MICHAEL O. ESHLEMAN[*] WITH JUDGE STEPHEN A. WOLAVER[†]

Prego Signor Postino[‡]
Using the Mail to Avoid the Hague Service Convention's Central Authorities[§]

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[‡] "Please Mr. Postman" was written by Brian Holland, Freddie Gorman, William Garrett, and Georgia Dobbins. BRUCE POLLOCK, ROCK SONG INDEX 284 (2d ed. 2005). It was first performed by The Marvelettes and released as a single in August 1961 as Tamla T 54046. JOEL WHITBURN, THE BILLBOARD BOOK OF TOP 40 HITS 405 (7th ed. 2000) (Tamla was owned by Berry Gordy and was the sister label of Motown Records. *See* David Friecke, *Review of The Complete Motown Singles, Vol. 1, 1959–1961*, ROLLING STONE, Feb. 25, 2005, at 75.) "Postman" hit the top forty in October and was number one during the week of December 11. WHITBURN, BILLBOARD BOOK at 827. *See also* Richie Unterberger, The Marvelettes, in ALL MUSIC GUIDE TO ROCK 581 (2d ed. 1997); The Marvelettes in 5 ENCYCLOPEDIA OF POP MUSIC 3495 (Colin Larkin ed. 3d ed. 1998).

§ This Article extends an opinion on the Hague Convention written by Michael O. Eshleman, as law clerk for Judge Stephen A. Wolaver. The court's revised opinion, Enquip Techs. Grp. v. Tycon Technoglass, S.r.l., No. 2008-CV-1276 (Greene Cty. Ct. Com. Pl. Aug. 24, 2009) was not reported but is available at 2009 WL 2588197.

The complaint has been filed. Now it must be served. Service of process must be "reasonably calculated to give [a defendant] actual notice of the proceedings and an opportunity to be heard."[1] The

[1] Milliken v. Meyer, 311 U.S. 457, 463 (1940) (Douglas, J.). For an overview of the purpose of service and how the courts have permitted it, see generally Yvonne A. Tamayo, *Are You Being Served?: E-mail and (Due) Service of Process*, 51 S.C. L. REV. 227 (2000). For a survey of service abroad, see also, generally, Philip A. Buhler, *Transnational Service of Process and Discovery in Federal Court Proceedings: An Overview*, 27 TUL. MAR. L.J. 1 (2002). For a discussion of service abroad with a focus on using e-mail, see generally Yvonne A. Tamayo, *Catch Me If You Can: Serving United States Process on an Elusive Defendant Abroad*, 17 HARV. J.L. & TECH. 211 (2003) [hereinafter, *Catch Me*]; Kevin W. Lewis, *E-Service: Ensuring the Integrity of International E-Mail Service of Process*, 13 ROGER WILLIAMS U. L. REV. 285 (2008).

burden is on the plaintiff to show service has been perfected.[2] And without proper service, a case is not legitimately before a court.[3]

Most of the time, a certified letter or a process server is dispatched.[4] But what to do when the defendant is outside the United States or outright evasive? One wants to avoid sending a process server into the jungle with a machete, cornering a hostile defendant at Royal Ascot, catching a foreigner's plane as it refuels, fleeing the bodyguards of a fugitive financier, tracking down a science fiction writer turned prophet, locating the cave a terrorist lurks in, or finding an insurance tycoon 30,000 feet over Little Rock.[5]

For most of the world, a multilateral treaty, the Hague Service Convention, provides the answer.[6] And for service directed to most

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2 Aetna Bus. Credit, Inc. v. Universal Decor & Interior Design, Inc., 635 F.2d 434, 435 (5th Cir. 1981).

3 State *ex rel*. Ballard v. O'Donnell, 553 N.E.2d 650, 651, paragraph one of the syllabus (Ohio 1990).

4 *E.g.*, OHIO R. CIV. P. 4.1(a) (certified letter); *id.* 4.1(b) (process server). For how and why the Federal Rules of Civil Procedure were amended to make mail service the norm, see Kent Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 VA. L. REV. 1183, 1197–1212 (1987); David D. Siegel, *Practice Commentary on Amendment of Federal Rule 4 (Eff. February 26, 1983) with Special Statute of Limitations Precautions*, 96 F.R.D. 88 (1983). For courts' presumption that legal documents sent by mail are received, see Paul Golden, *Parties Who Do Not Receive Mail May Have Difficulties Obtaining a Hearing on Service Issues*, 74 N.Y. ST. B. ASS'N J., Sept. 2002, at 18.

5 *See* Arin Greenwood, *Serving Them Right: When Taking on International Defendants, Expect Challenges, Even Complications*, 91 A.B.A. J., June 2005, at 24 (machete); Maharanee Seethadevi Gaekwar of Baroda v. Wildenstein, [1972] 2 Q.B. 283 (C.A.) (Lord Denning, M.R.) (Indian princess sued her art dealer, a Parisian, and served him when he attended Royal Ascot); *In re* Gonzalez, 993 S.W.2d 147, 151–52 (Tex. App. 1999) (plane en route to Mexico stopped to refuel); Int'l Controls Corp. v. Vesco, 593 F.2d 166, 175–92 (2d Cir. 1979) (papers served on fugitive swindler Robert Vesco in Nassau by throwing the papers down on the grounds of his home while evading his bodyguards); Cooper v. Church of Scientology of Boston, Inc., 92 F.R.D. 783, 786 (D. Mass. 1982) (ordering Church of Scientology to use its telex system to transmit service to L. Ron Hubbard, founder of the Church, because Hubbard had been evading service); Smith v. Islamic Emirate of Afghanistan, Nos. 01 CIV 10132(HB), 01 CIV 10144(HB), 2001 WL 1658211, 2001 U.S. Dist. LEXIS 21712 (S.D.N.Y. Dec. 26, 2001) (service on Osama bin Laden and Al Qaeda via television broadcasters such as Al Jazeera because of the impossibility of locating either for more traditional means of service); Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959) (insurance millionaire John D. MacArthur cornered on commercial flight between Memphis and Dallas).

6 *But see* Blackmer v. United States, 284 U.S. 421, 439 (1932) (Hughes, C.J.) (the absence of a treaty with a particular nation does not prevent valid service from being effected on persons found there).

of the nations participating in the Convention, the answer is the same as it is at home: service by mail.[7]

Why is mail service preferred? Because it is cheap and quick: "[f]ew methods of service are less expensive than direct mail, which costs only a few dollars for postage . . . [and] use of the mail provides an expeditious method of service."[8] Compare that to service through the Hague Convention's "central authorities," which can be slow and expensive: it takes months to execute a request, costs fees to a foreign government in many instances, and sometimes requires all the documents to be translated into a foreign tongue.[9] Twenty years ago the cost of serving parties through the Convention's central authorities was estimated at $800 to $900.[10]

The Convention was supposed to make things easier, but where is the love?

> Generally, it seems that U.S. lawyers, particularly those active in the products liability field, are less than enthusiastic about the Hague Convention. Those familiar with the treaty chafe at what they consider time-consuming and unnecessarily complex steps required to accomplish what is routine in domestic litigation. In the absence of energetic judicial direction, the bar has attempted to avoid the Convention's procedures and, instead, use the more familiar domestic methods.[11]

But there is nothing wrong with familiarity.[12]

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7 *See* discussion *infra* Parts I, V. For a review of domestic mail service, see Note, *Service of Process by Mail*, 74 MICH. L. REV. 381 (1975). Service by mail comports with constitutional requirements of due process. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950) (Jackson, J.). *But see* Robert B. von Mehren, *International Control of Civil Procedure: Who Benefits?*, 57 LAW & CONTEMP. PROBS. 13, 14–15 (1994) (noting service by mail not recognized in many nations).

8 Franklin B. Mann, Jr., *Foreign Service of Process by Direct Mail Under the Hague Convention and the Article 10(a) Controversy: Send v. Service*, 21 CUMB. L. REV. 647, 657 (1991). *See also* 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1134, at 331 (3d ed. 2002).

9 Richard J. Hawkins, *Dysfunctional Equivalence: The New Approach to Defining "Postal Channels" Under the Hague Service Convention*, 55 UCLA L. REV. 205, 218–19 (2007). *See also* Paul Meijknecht, *Service of Documents in the European Union: The Brussels Convention of 1997*, 4 EUR. REV. OF PRIV. L. 445, 451 (1999) (stating that service took about four months under the Convention).

10 Bankston v. Toyota Motor Corp., 889 F.2d 172, 174 (8th Cir. 1989) (Gibson, J., concurring). *See also* L. Andrew Cooper, I*nternational Service of Process by Mail Under the Hague Service Convention*, 13 MICH. J. INT'L L. 698, 716 (1992).

11 Joseph F. Weis, Jr., *Service by Mail—Is the Stamp of Approval From the Hague Convention Always Enough?*, 57 LAW & CONTEMP. PROBS. 165, 165 (1994).

12 *See* Robert C. Casad, *Service of Process by Certified Mail*, 59 J. KAN. B. ASS'N, Nov.-Dec. 1990, at 25 (discussing how certified mail was made the default service regime in Kansas) Harry G. Fins, *Service of Process* By Mail, 50 CHI. B. REC. 198 (1969)

I
WHAT IS THE HAGUE CONVENTION?

The formal name of the treaty is the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters.[13] Because it was concluded at the seat of the Dutch government,[14] the treaty is commonly known as the "Hague Service Convention." This is one of many conventions drafted by the Hague Conference on Private International Law.[15] The Conference

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(proposing certified mail to be default regime in Illinois). Contra Ann Varnon Crowley, *Rule 4: Service by Mail May Cost You More Than a Stamp*, 61 IND. L.J. 217, 217 (1986) (arguing the amendment to Fed. R. Civ. P. 4 adopting service by mail was costly and confusing); Sinclair, *supra* note 4, at 1212–33 (also arguing the amendment to Fed. R. Civ. P. 4 was costly and confusing); David S. Welkowitz, *The Trouble With Service by Mail*, 67 NEB. L. REV. 289 (1988) (reviewing difficulties under new rules); Siegel, *Practice Commentary*, 96 F.R.D. 88 (faulting changes); H. COMM. ON THE JUDICIARY, FEDERAL RULES OF CIVIL PROCEDURE AMENDMENTS—DELAY, H.R. REP. NO. 97-662 § 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 595, 1982 WL 25044, and 96 F.R.D. 131 (1983) (discussing problems with certified mail service); Stanley E. Harper, Jr., *Service of Process in Ohio by Certified Mail: A Critique of the Southgate Shopping Center Case*, 5 OHIO N.U. L. REV. 613 (1978) (discussing an Ohio decision invalidating service by certified mail).

13 *Opened for signature* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 (effective Feb. 10, 1969) [hereinafter Convention]. The full text appears in three readily available books: UNITED STATES CODE ANNOTATED in the Title 28 volume following FED. R. CIV. P. 4 (2010); UNITED STATES CODE SERVICE, vol. International Agreements 457 (2007); and MARTINDALE-HUBBELL INTERNATIONAL LAW DIGEST IC-1 (2006) [hereinafter MARTINDALE-HUBBELL]. The Convention also is printed in the official handbook to the Convention, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PERMANENT BUREAU, 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 app. A (Christophe Bernasconi & Laurence Thébault eds., 3d ed. 2006) [hereinafter PRACTICAL HANDBOOK]; Hague Conference on Private International Law, Final Act of the Tenth Session, 4 I.L.M. 338, 341–47 (1965); 2 BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, CIVIL AND COMMERCIAL app. B (2000) [hereinafter RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE]; 3 TRANSNATIONAL CONTRACTS doc. X.3 (Lawrence J. Bogard & George W. Thompson eds. 2010) (reproducing Convention and declarations to Dec. 1997); DAVID EPSTEIN, JEFFREY L. SNYDER & CHARLES S. BALDWIN, IV, INTERNATIONAL LITIGATION: A GUIDE TO JURISDICTION, PRACTICE, AND STRATEGY app. 2[2] (3d ed. 1998); and Gr. Brit. T.S. No. 50 (1969) (Cmnd. 3986).

14 In what can only be called Dutch metaphysics, Amsterdam is the "constitutional capital" of the Kingdom of the Netherlands, as it has been since 1814, and is the home of the monarch, but The Hague "is the seat of the Dutch legislature, the Dutch supreme court . . . and foreign embassies." *The Hague*, in THE COLUMBIA ENCYCLOPEDIA 1172 (Barbara A. Chernow & George A. Vallasi eds., 5th ed. 1993).

15 The Hague Conference is governed by the Statute of the Hague Conference on Private International Law, *opened for signature* Oct. 31, 1951, 15 U.S.T. 2228, 220 U.N.T.S. 121 (effective in the U.S. Oct. 15, 1964). The Statute is discussed in Kurt H. Nadelmann, *Ignored State Interests: The Federal Government and International Efforts to*

first met in 1893 and drafted a convention concerning service of process at that initial meeting.[16] Today the Conference sponsors numerous treaties on subjects as diverse as taking of evidence abroad and international child custody.[17]

A. Working and Playing Well with Others

When the Hague Conference held its first session after World War II, the American position of judicial isolationism meant it was not even invited.[18] The Americans present at the Eighth Session in 1956 did not represent the government, nor were they funded by it.[19] The

Unify Rules of Private Law, 102 U. PA. L. REV. 323, 350–352 (1954). For a brief history of the Conference, see Philip W. Amram, *A Unique Organization: The Conference on Private International Law*, 43 A.B.A. J., 809, 809 (1957) [hereinafter Amram, *A Unique Organization*]. A longer history can be found in Georges A.L. Droz & Adair Dyer, *The Hague Conference and the Main Issues of Private International Law for the Eighties*, 3 NW. J. INT'L L. & BUS. 155, 155–162 (1981) [hereinafter Droz & Dyer, *The Hague Conference*] (authors were top two officials of the Conference). A one-hundred page history can be found in Kurt Lipstein, *One Hundred Years of Hague Conferences on Private International Law*, 42 INT'L & COMP. L. Q. 553 (1993).

16 Georges A.L. Droz, *A Comment on the Role of the Hague Conference on Private International Law*, 57 LAW & CONTEMP. PROBS. 3, 3 (1994) [hereinafter Droz, *A Comment on the Role*] (Droz was Secretary General of the Conference).

17 *See* Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231; Hague Convention on the Civil Aspects of International Child Abduction, done Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, 19 I.L.M. 1501. *See* Peter H. Pfund, *The Hague Conference Celebrates Its 100th Anniversary*, 28 TEX. INT'L L.J. 531 (1993), for an article focusing on the Hague Conference and child custody issues. For more on the current work of the Conference and the conventions it sponsors, see HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PERMANENT BUREAU, ANNUAL REPORT 2009 (2010), *available at* http://www.hcch.net/upload/annualreport2009.pdf; Christophe Bernasconi, *Some Observations From the Hague Conference on Private International Law*, 101 AM. SOC'Y INT'L L. PROC. 350 (2007) (author is First Secretary of the Conference).

18 Armando L. Basarrate, II, *International Service of Process: Reconciling the Federal Rules of Civil Procedure with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters*, 21 VAND. J. TRANSNAT'L L. 1071, 1073 (1988). *See also* Harry LeRoy Jones, *A Commission and Advisory Committee on International Rules of Judicial Procedure*, 49 AM. J. INT'L L. 379, 379 (1955) (speaking of "juridical isolationism" of the United States, which theretofore, "of all the major Powers of the Western world, [was] the only one which ha[d] neither entered into treaties or other agreements prescribing rules for serving judicial documents" and other aspects of civil procedure); Arthur K. Kuhn, *The Council of Europe and the Hague Conferences on Private International Law*, 46 AM. J. INT'L L. 515, 518–519 (1952) (explaining how the Conference functioned at the time of the 1951 meeting, which was the first session since 1928).

19 Kurt H. Nadelmann, *The United States Joins the Hague Conference on Private International Law*, 30 LAW & CONTEMP. PROBS. 291, 299–300 (1965) [hereinafter Nadelmann, *The United States Joins*] (author unofficial delegate); Amram, *A Unique Organization*, *supra* note 15, at 810 (author unofficial delegate). For other reports on the

same was true of the American delegates to the Ninth Session in 1960.[20]

The United States joined the Hague Conference in 1963.[21] And the next year Congress passed a law to unilaterally provide assistance to foreign courts.[22] These two actions ended America's well-known hostility toward international judicial cooperation.[23]

Eighth Session from the American delegation, see also Willis L.M. Reese, *Some Observations on the Eighth Session of the Hague Conference on Private International Law*, 5 AM. J. COMP. L. 611 (1956); Kurt H. Nadelmann & Willis L.M. Reese, *The Eighth Session of the Hague Conference on Private International Law*, 12 REC. ASS'N B. CITY N.Y. 51 (1957); Kurt H. Nadelmann, *The United States at the Hague Conference on Private International Law*, 51 AM. J. INT'L L. 618 (1957); Kurt H. Nadelmann & Willis L.M. Reese, *The American Proposals at the Hague Conference on Private International Law to Use the Method of Uniform Laws*, 7 AM. J. COMP. L. 239 (1958); Joe C. Barrett, *Report on the 1956 Barcelona and Hague Conferences on Unification of Law*, 1957 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS & PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SIXTY-SIXTH YEAR 299; Philip W. Amram, *Uniform Legislation as an Effective Alternative to the Treaty Technique*, 54 AM. SOC'Y INT'L L. PROC. 62 (1960). See *Eighth Hague Conference on Private International Law*, 5 AM. J. COMP. L. 650 (1956) for a translated reprint of the draft conventions approved by the Eighth Session.

20 For reports on the Ninth Session from the Americans present, see Willis L.M. Reese, *The Ninth Session of the Hague Conference on Private International Law*, 55 AM. J. INT'L. L. 447 (1961); James C. Dezendorf, *The Ninth Session of the Hague Conference on Private International Law*, 47 A.B.A. J., 909 (1961); and Philip W. Amram, *The Hague Conference on Private International Law*, 5 A.B.A. SEC. ON INT'L & COMP. L. BULL, July 1961, at 50. *See also* R.H. Graveson, *The Ninth Hague Conference of Private International Law*, 10 INT'L & COMP. L.Q. 18 (1961) (author one of the British delegates). Graveson reproduces the draft conventions approved by the Ninth Session, following his article, in both the original French and a translation into English. *Id.* at 36–69. For another translation, see *The Hague Conference on Private International Law, Ninth Session*, 9 AM. J. COMP. L. 701, 701–11 (1960).

21 *See* Joint Resolution to Provide for Participation by the Government of the United States in the Hague Conference on Private International Law and the International (Rome) Institute for the Unification of Private Law and Authorizing Appropriations Therefor, Pub. L. No. 88-244, § 1, 77 Stat. 775 (codified as amended at 22 U.S.C. § 269(g) (2000)). *See also* Treaty Information, 51 U.S. DEP'T STATE BULL. 762, 762 (1964) (indicating the American ratification of the Hague Conference Statute was deposited on October 15, 1964). *See generally* Peter H. Pfund, *United States Participation in International Unification of Private Law*, 19 INT'L LAW. 505 (1985) (discussing twenty years of American participation in the Conference). *See generally* Cornelius D. van Boeschoten, *Hague Conference Conventions and the United States: A European View*, 57 LAW & CONTEMP. PROBS. 47 (1994) (discussing American participation from a foreign perspective).

22 An Act to Improve Judicial Procedures for Serving Documents, Obtaining Evidence, and Proving Documents in Litigation With International Aspects, Pub. L. 88-619, 78 Stat. 996 (1964). *See also* S. COMM. ON THE JUDICIARY, JUDICIAL PROCEDURES IN LITIGATION WITH AN INTERNATIONAL ASPECT, S. REP. 88-1580, at 1 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3794, 1964 WL 4882, 3 I.L.M. 1085 (1964); *see also* Philip W. Amram, *Public Law No. 88-619 of October 3, 1964—New Developments in International Judicial Assistance in the United States of America*, 32 J. B. ASS'N D.C. 24 (1965); Hans

The Tenth Session in 1964 drafted the Convention.[24] The nations participating were Austria, Belgium, Denmark, Egypt, Finland, France, Greece, Ireland, Israel, Italy, Japan, Luxembourg, the

Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1016–17 (1965).

23 *See, e.g.*, David Welford Williams, *Closing the Chasm of International Judicial Assistance: Extraterritorial Service of Documents*, 12 HOWARD L.J. 238 (1966) (discussing the American unwillingness to cooperate abroad); Richard F. Gerber, *Revitalization of the International Judicial Assistance Procedures of the United States: Service of Documents and Taking of Testimony*, 62 MICH. L. REV. 1375, 1384 (1964) (quoting the State Department's standard refusal to help foreign courts). *See generally* Kurt H. Nadelmann, *Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law*, 102 U. PA. L. REV. 323 (1954) (discussing the lack of United States participation in international conferences on private international law questions). *See also* Kurt H. Nadelmann, *The United States and the Hague Conferences on Private International Law*, 1 AM. J. COMP. L. 268 (1952); Nadelmann, *United States Joins, supra*, note 19, at 291–96 (discussing the lack of participation of the United States in the Hague Conference). *See generally* Arthur K. Kuhn, *Should Great Britain and the United States Be Represented at the Hague Conferences on Private International Law?*, 7 AM. J. INT'L L. 774, 774 (1913) (mentioning an early call for the United States to join the Conference).

24 Unification of the Rules of Private International Law: Report of the U.S. Delegation to the 10th Session of the Hague Conference on Private International Law, October 7–28, 1964, 52 DEP'T STATE BULL. 265, 265–66 (1965) [hereinafter, Report of the U.S. Delegation] (official report of the American delegation). The American delegation was led by Richard D. Kearney, Deputy Legal Adviser, Department of State. The other delegates were Philip W. Amram, Chairman of the Advisory Committee to the Commission on International Rules of Judicial Procedure and a lawyer in private practice in Washington, D.C.; Joe C. Barrett, a lawyer in private practice in Jonesboro, Arkansas, and a former president of the National Conference of Commissioners on Uniform State Laws; James C. Dezendorf, a lawyer in private practice in Portland, Oregon, and another former president of the National Conference; Kurt H. Nadelmann, research scholar at Harvard Law School; Willis Livingston Mesier Reese, Charles Evans Hughes Professor of Law and Director of the Parker School of International and Comparative Law, both at Columbia University; and John N. Washburn, Attorney-Advisor, Office of the Legal Advisor, Department of State. *Id.* at 266. For other reports on the Tenth Session, see Kurt H. Nadelmann & Willis L.M. Reese, *The Tenth Session of the Hague Conference on International Private Law*, 13 AM. J. COMP. L. 612 (1964); Nadelmann, *The United States Joins*, *supra* note 19, at 308–15; Eighth Session, 1965 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS & PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-FOURTH YEAR 114–18 (report of Barrett and Dezendorf); Philip W. Amram, *Report on Tenth Session of the Hague Conference on Private International Law*, 59 AM. J. INT'L L. 87 (1965) [hereinafter Amram, *Report on the Tenth Session*]; Richard D. Kearney, *The United States and International Cooperation to Unify Private Law*, 5 CORNELL INT'L L.J. 1, 4–6 (1972); Peter Hay, *The United States and International Unification of Law: The Tenth Session of the Hague Conference*, 1965 U. ILL. L. F. 820, 835–861; R.H. Graveson, *The Tenth Session of the Hague Conference on Private International Law*, 14 INT'L & COMP. L.Q. 528 (1965) (Graveson was leader of the British delegation); Kurt Lipstein, *The Tenth Session of the Hague Conference on Private International Law, 1964*, 23 CAMB. L.J. 224, 224 (1965) (focusing on the adoption convention).

Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, the United States, and West Germany.[25] The service convention was adopted unanimously; the other two conventions approved were not.[26] The Convention was opened for signature in November 1965. The United States signed on the first day.[27] The Convention's preamble declares:

> 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.[28]

The United States was the first to ratify.[29] The Foreign Relations Committee unanimously reported the treaty to the Senate on April 13, 1967.[30] The day after, the Senate gave its advice and consent.[31] There was no debate on the Senate floor.[32] The vote in the Senate was 82–0.[33] The majority and minority leaders stated seventeen of the absent senators would also have voted in favor.[34] Having been ratified by three signatories,[35] the Convention went into force February 10, 1969.[36]

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25 Report of the U.S. Delegation, *supra* note 24, at 266.

26 *Id.* at 268. *See generally* Hague Conference on Private International Law: Final Act of Tenth Session, 4 I.L.M. 338 (1965) for the texts of all three of the conventions adopted by the Tenth Sessions.

27 Association of the Bar of the City of New York, Committee on International Law, The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, 22 REC. ASS'N B. CITY OF N.Y. 280, 280 (1967).

28 Convention, *supra* note 13.

29 Leonard A. Leo, *The Interplay Between Domestic Rules Permitting Service Abroad by Mail and the Hague Convention on Service: Proposing an Amendment to the Federal Rules of Civil Procedure*, 22 CORNELL INT'L L. J. 335, 340 (1989).

30 Philip W. Amram, *United States Ratification of the Hague Convention on Service of Documents Abroad*, 61 AM. J. INT'L L. 1019, 1019 (1967).

31 *Id.*

32 113 CONG. REC. 9664–65 (1967).

33 *Id.*

34 *Id.*

35 Convention, *supra* note 13, art. 27 (stating ratification by three signatories made the Convention operative). The other two initial ratifications were by Egypt and the United Kingdom. Stephen F. Downs, *The Effect of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 2 CORNELL INT'L L.J. 125, 128–30 (1969). *See* Treaty Information, 57 DEP'T STATE BULL. 378, 378 (1967) (noting the American ratification was deposited with the Dutch Foreign Ministry on August 24, 1967). *See also* Treaty Information, 60 DEP'T STATE BULL. 87, 87 (1969)

As a ratified treaty, the Convention is the supreme law of the land.[37] Where an international treaty exists, a state court "may not attempt to exercise jurisdiction by service of process in violation of the Convention."[38]

B. Making International Service Easier

> [The Hague Convention] was intended to further international judicial cooperation among nations for the increasing number of cases both here and abroad that had international overtones . . . American plaintiffs sometimes found it difficult, or prohibitively expensive, to effect service in a manner that complied both with [domestic and international rules]. Foreign plaintiffs . . . often encountered difficulties because there was no central authority to assist them . . . Moreover, certain civil-law countries authorized methods of service that failed to give notice to the American defendant, thereby creating the risk that an American defendant

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[hereinafter Treaty Information (1969)] (noting President Johnson proclaimed the treaty on January 8, 1969).

36 Treaty Information (1969), *supra* note 35, at 87.

37 U.S. CONST., art. VI, § 1, cl. 2 (the "supremacy clause" reads "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 . . . ."). *See also* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.) (indicating that treaties are like laws passed by Congress); Whitney v. Robertson, 124 U.S. 190, 194 (1888) (Field, J.) (stating that treaties and laws are "on the same footing"); American Trust Co. v. Smyth, 247 F.2d 149, 153 (9th Cir. 1957) (stating a convention is a treaty for purposes of the supremacy clause); Vorhees v. Fischer & Krecke,, GmbH., 697 F.2d 574, 575 (4th Cir. 1983) (noting the Hague Convention is self-executing and is equivalent to an act of Congress). *But compare* Missouri v. Holland, 252 U.S. 416, 433 (1920) (Holmes, J.) (indicating treaties can grant the United States government powers not allowed to it by the Constitution) *with* Reid v. Covert, 354 U.S. 1 (1957) (Black, J.) (discussing that executive agreements cannot override the Constitution) *and* United States as the United States Element, Allied Kommandatura v. Tiede, 86 F.R.D. 227 (U.S. Ct. Berlin 1979) (discussing how executive acts done under treaties cannot violate the Constitution). For a comprehensive review of the Constitutional language authorizing treaties and how treaties should be interpreted, see Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885 (2005).

38 62B Am. Jur. 2d *Process* § 323, at 888 (2005). For a case finding the Convention supersedes state service procedures, see Cipolla v. Picard Porsche Audi, Inc., 496 A.2d 130 (R.I. 1985) (examined in Peter M. Goldberg, *Method of Service of International Documents upon Citizens of Signatory Nations of the Hague Convention*, 20 SUFFOLK U. L. REV. 396 (1986)). *See also* Low v. Bayerische Motoren Werke, A.G., 449 N.Y.S.2d 733, 735 (App. Div. 1982); Dr. Ing. h.c. F. Porsche, A.G. v. Sacramento Cnty. Super. Ct., 177 Cal. Rptr. 155, 158 (Ct. App. 1981) (discussing that when an international treaty such as the Convention applies, a court cannot exercise jurisdiction in contravention of it). *Cf.* U.S. v. Pink, 315 U.S. 203, 230–34 (1942) (Douglas, J.) (stating executive agreement with the Soviet Union defeated New York State court proceedings).

> would suffer a default judgment in that country without having had an opportunity to defend the claim.[39]

Most notorious of these civil law practices was *notification au parquet*, also called remise au parquet, in which a copy of the suit was left for a foreign defendant at a local prosecutor's office.[40] The prosecutor was supposed to make efforts to send it abroad but there was no penalty—such as dismissal of the suit—if notice did not reach the defendant. Nor was there a penalty if the prosecutor failed to even try to notify the defendant. The U.S. Supreme Court invalidated a similar method of service decades before because there was no obligation on the part of the public official to transmit the documents to the defendant.[41] And there was objection to this kind of service by the Hague Conference as long ago as its first meeting in 1893.[42]

Even worse, service was considered complete when the summons was left at the prosecutor's office, not when it was received by the defendant, thus enabling readily available default judgments against foreigners.[43] This constructive notice regime seems comparable to notice to Earthlings being left in the vicinity of Alpha Centauri.[44]

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39 DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 287–88 (3d Cir. 1981). *See also* Reply Brief for the Petitioner at 12–15, Volkswagenwerk, A.G. v. Schlunk, 486 U.S. 694 (1988) (No. 86-1052), 1988 WL 1031826, 1986 U.S. S. Ct. Briefs LEXIS 1671. For more on the objectives of the Convention, see Downs, *supra* note 35, at 125. For the difficulties before the Convention was adopted, see Hans Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031, 1032–53 (1961); Harry Leroy Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515 (1953) [hereinafter Jones, International Judicial Assistance]; Henry N. Longley, *Serving Process, Subpoenas, and Other Documents in Foreign Territory*, 1959 A.B.A. SEC. INT'L & COMP. L. PROC. 34; S. COMM. ON THE JUDICIARY, COMMISSION AND ADVISORY COMMITTEE ON INTERNATIONAL RULES OF JUDICIAL PROCEDURE—ESTABLISHMENT, S. REP. NO. 85-2392 (1958), *reprinted in* 1958 U.S.C.C.A.N. 5201, 1958 WL 3715; S. COMM. ON THE JUDICIARY, JUDICIAL PROCEDURES, S. REP. NO. 88-1580; Gerber, *supra* note 23, at 1377–80; William B. Stern, *International Judicial Assistance Part I: Service and Discovery Abroad*, 14 PRAC. LAW., Dec. 1968, at 17 (discussing American litigants' options for service just before Convention became effective). For American practice on foreign requests, see Paul D. McCusker, *Some United States Practices in International Judicial Assistance*, 37 DEP'T STATE BULL. 808 (1957).

40 Report of the U.S. Delegation, *supra* note 24, at 269.

41 Wuchter v. Pizzutti, 276 U.S. 13, 25 (1928) (Taft, C.J.). Notwithstanding *Wuchter*, similar practices continued for many years until *Mullane*, 339 U.S. at 306. For a more in-depth discussion of *Mullane* and acceptable methods of service of notice of suit, see George B. Fraser, Jr., *Jurisdiction by Necessity: An Analysis of the Mullane Case*, 100 U. PA. L. REV. 305, 316–19 (1951).

42 Lipstein, *supra* note 15, at 581 n.211.

43 Philip W. Amram, *The Revolutionary Change in Service of Process Abroad in French Civil Procedure*, 2 INT'L LAW. 650, 650–51 (1968), citing CODE CIVIL [C. CIV.] art. 69(1) (Fr.). Amram noted that after the Convention was drafted, the French reformed notification au parquet to at least require notice be sent abroad, but still perpetuated a less

Article 15 of the Convention limits default judgments. For example, a court must allow at least six months to elapse after dispatching service before a default may be entered.[45]

In a nutshell, the Convention's two key purposes were: "1) to facilitate service abroad by providing a reliable method of both effecting and proving service and 2) to ensure that persons affected by proceedings in another country would receive notice and an opportunity to be heard."[46]

Besides court documents such as complaints and summonses, the Convention also applies to "extrajudicial documents."[47]

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than ideal regime for notice. *Id.* at 654–57, citing Loi 65-1006 du 26 novembre 1965 [Decree 65-1006], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 2, 1965, p. 10664. One commentator read Article 10(a) of the Convention as still allowing notification au parquet. Downs, *supra* note 35, at 134–35. This system persisted until reforms made by the European Union in the 1990's ended the constructive notice of notification au parquet and made actual notice mandatory. *See* Meijknecht, *supra* note 9, at 455, which discusses the Convention on the Service in the Member States of the European Union of Judicial and Extrajudicial Documents in Civil or Commercial Matters, done May 26, 1997, 1997 O.J. (C 261) 1. That convention never entered into force and was largely enacted by Council Regulation (EC) No. 1348/2000, on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters, May 29, 2000, 2000 O.J. (L 160) 37.

44 DOUGLAS ADAMS, THE HITCHHIKER'S GUIDE TO THE GALAXY ch. 3 (1979), *reprinted in* DOUGLAS ADAMS, THE ULTIMATE HITCHHIKER'S GUIDE 25 (1997) (describing how notice that the Earth was to be destroyed to make way for an interstellar highway was posted for fifty years in the Galactic Hyperspace Planning Council office in Alpha Centauri, only 4.3 light years away, and no objections having been received from them, thus Earthlings had no justifiable reason to complain when the construction fleet arrived to blow up their planet).

45 *See, e.g.*, Saysavanh v. Saysavanh, 145 P.3d 1166, ¶¶ 20–23 (Utah Ct. App. 2006), discussed in Brett R. Turner, *Saysavanh v. Saysavanh: A Cautionary Tale About Serving Process Upon a Foreign Defendant*, 18 DIVORCE LITIG, Oct. 2006, at 177.

46 Anne-Marie Kim, *The Inter-American Convention and Additional Protocol on Letters Rogatory: The Hague Service Convention's "Country Cousins"?*, 36 COLUM. J. TRANSNAT'L L. 687, 692 (1998).

47 "Extrajudicial documents" are those which "'emanat[e] from authorities and judicial officers' of a state. The legislative history of the convention indicates that, in European practice, this is intended to include the official documents of a European notary. In [American] practice, and also in England and Norway, it is intended to include the official documents of administrative agencies and commissions." Statement by Philip W. Amram, Attorney at Law, in S. COMM. ON FOREIGN RELATIONS, CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS, S. EXEC. REP. NO. 90-6, at 14 (1967) [hereinafter SENATE EXECUTIVE REPORT]. They "differ from judicial documents in that they are not directly related to a trial, and from strictly private documents in that they require the involvement of [public officials and] . . . include . . . demands for payment, notices to quit in connection with leaseholds or contracts of employment, protests with respect to bills of exchange and promissory notes . . . Objections to marriage, consents for adoption, and acceptances of paternity are also in this class . . . ." PRACTICAL HANDBOOK, *supra* note 13, at ¶ 67. *See also* 1 RESTATEMENT (THIRD) OF THE FOREIGN

C. Who Participates in the Convention?

About seven dozen jurisdictions are covered by the Hague Convention. Some were initial signatories. Other jurisdictions joined subsequently, since any nation may join provided no current member of the convention objects—while some jurisdictions are covered because the nation responsible for their foreign relations extended the Convention to them. Most of America's major trading partners—including Canada, China, Japan, Germany, South Korea, Mexico, the United Kingdom, and, most recently, Australia—are participants. (A complete list appears in Appendix A.)

D. How Does It Work?

> [The Convention] is meant to simplify service of process abroad so as to insure . . . documents to be served abroad are brought to the notice of the addressee in sufficient time, and to make one method of service that will avoid the difficulties and controversy attendant to the use of other methods. [It] applies as to service of process if the internal law of the forum state defines the applicable method of serving process as requiring the transmittal of documents abroad but does not apply if the law of the forum state and due process considerations allow, for example, service on a domestic agent in lieu of foreign transmittal.[48]

RELATIONS LAW OF THE UNITED STATES § 471 reporter's note 3 at 532 (1987) [hereinafter FOREIGN RELATIONS RESTATEMENT]. Some countries, e.g., France and Germany, object to papers sent by administrative agencies such as the Federal Trade Commission. *E.g.*, Fed. Trade Comm'n v. Compagnie de Saint-Gobain-Pont-à-Mousson, 636 F.2d 1300, 1306 (D.C. Cir. 1980) (reprinting note of protest by French Government). *See also* Kenneth B. Reisenfeld, *Service of United States Process Abroad: A Practical Guide to Service Under the Hague Service Convention and the Federal Rules of Civil Procedure*, 24 INT'L LAW. 35, 66 (1990).

[48] 62B Am. Jur. 2d *Process* § 321, at 885 (2005). *See also Schlunk*, 486 U.S. at 698 (Convention "was intended to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad"). *Schlunk*, the Supreme Court's only opinion on the Convention, is also examined in Alison K. Freeborn, Volkswagenwerk Aktiengesellschaft v. Schlunk—*An Examination Into the Scope of the Hague Service Convention*, 8 WIS. INT'L L.J. 421 (1990); Kenneth M. Minesinger, *Volkswagenwerk Aktiengesellschaft v. Schlunk: The Supreme Court Interprets the Hague Service Convention*, 23 GEO. WASH. J. INT'L L. & ECON. 769 (1990); Brenda L. White, *Service of Process: Application of the Hague Convention in United States Courts*, 30 HARV. INT'L L.J. 277 (1989); P.S. Gillespie, *Volkswagenwerk Atktiengesellschaft v. Schlunk: The Supreme Court Defines the Scope of the Hague Service Convention*, 63 TUL. L. REV. 950 (1989); Elizabeth A. Cocanaugher, Comment, *The Hague Service Convention as Enabler: Volkwagenwerk Aktiengesellschaft v. Schlunk*, 20 U. MIAMI INTER-AM. L. REV. 175 (1988); Peter D. Trooboff & Carlos M. Vasquez, *Hague Service Convention—Scope and Application—Role of Internal Law*, 82 AM. J. INT'L L. 816 (1988).

This is how the convention works in practice.[49]

The Convention requires each country to name a "central authority" that receives and executes requests for service from other countries. When the Convention took effect in 1969, the United States designated the State Department as its central authority; the Department's Office of Security and Consular Affairs handled requests for service.[50] Since December 31, 1973, the central authority has been the Justice Department.[51] The Marshals Service, a unit of that Department, previously executed requests from abroad.[52] The

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49 For other descriptions of how the Convention works in practice, see 1 RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, *supra* note 13, at ch. 4; PRACTICAL HANDBOOK, *supra* note 13, *Schlunk*, 486 U.S. at 698–99; *DeJames*, 654 F.2d at 288; Shoei Kako Co. v. San Francisco Cty. Super. Ct., 109 Cal. Rptr. 402, 409–11 (Ct. App. 1973); Pamela R. Parmelee, *International Service of Process: A Guide to Serving Process Abroad Under the Hague Convention*, 39 OKLA. L. REV. 287 (1986); Basarrate, *supra* note 18; New York State Bar Ass'n, Committee on Federal Courts, *Service of Process Abroad: A Nuts and Bolts Guide*, 122 F.R.D. 63, 69–71 (1989); Mann, *supra* note 8; Michael L. Silhol, *Service of Process Upon Foreign Defendants Under the Hague Convention*, 28 TENN. BAR. J., Sept.–Oct. 1992, at 16; Bruce A. Brightwell, *The Hague Convention on Service of Process Abroad: An Overview*, 37 RES GESTAE 420 (1994).

50 Relating to the Implementation of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Exec. Order No. 11,471, 34 Fed. Reg. 8,349 (May 30, 1969), *reprinted in* 1969 U.S.C.C.A.N. 2886. *See also* [BRUNO A. RISTAU], REPORT OF THE UNITED STATES DELEGATION TO THE SPECIAL COMMISSION ON THE OPERATION OF THE CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS, THE HAGUE, THE NETHERLANDS, 21–25 NOVEMBER 1977 (Feb. 1978), *reprinted in* 17 I.L.M. 312, 313 (1978); Judicial Assistance: Multilateral Agreements: The Hague Service Convention, 1978 DIGEST § 6, at 865–67.

51 The executive order signed by President Nixon authorized the Secretary of State and the Attorney General to transfer responsibility for the central authority. In 1973, Secretary Kissinger transferred authority to the Justice Department. Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters: Designation of Justice Department, 38 Fed. Reg. 30,115 (Nov. 1, 1973). Acting Attorney General Bork then assigned the Department's duties to the Assistant Attorney General for the Civil Division. International Judicial Assistance, 38 Fed. Reg. 32,805 (Nov. 28, 1973) (codified at 28 C.F.R. § 0.49). The American declaration to the Dutch Foreign Minister on the change in central authorities is reprinted in 908 U.N.T.S. 94 and Hal Roberts Ray, Jr., *Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters Under the Hague Convention*, 3 REV. LITIG. 493, 553–554 (1983). A report prepared by Bruno A. Ristau before the 1977 Special Commission of the Hague Conference on how the American central authority was functioning in practice is reprinted in Judicial Assistance: Multilateral Agreements: The Hague Service Convention, 1977 DIGEST § 6, at 477–84 [hereinafter 1977 DIGEST] and is excerpted as *The Hague Service Convention*, 72 AM. J. INT'L L. 130 (1978).

52 Memorandum No. 386, Rev. 2 from Barbara Allen Babcock, Assistant Att'y Gen., Civil Div., U.S. Dep't of Justice, to all United States Marshals (June 15, 1977), *reprinted as Department of Justice Instructions for Serving Foreign Judicial Documents in the U.S. and Processing Requests for Serving American Judicial Documents Abroad*, 16 I.L.M. 1331 (1977), *excerpted in* 1977 DIGEST, *supra* note 51, at § 6 at 485–90 [hereinafter

Justice Department in 2003 contracted the work to a private company in Seattle, Process Forwarding International.[53]

Foreign authorities are usually a court official or clerk or a justice ministry. For example, in England, the central authority is an official at the Royal Courts of Justice in The Strand.[54] In Italy, the central authority is the Registry of the Rome Court of Appeals on Julius Caesar Street in the Eternal City.[55] As for Germany, it is a federal republic like the United States and has designated authorities in each state.[56] Canada and Switzerland have also done this.[57] Britain has named authorities in each of its overseas possessions.[58]

No cover letter is necessary.[59] The request to serve papers is made on a standard form written in English and French appended to the text of the Convention.[60] The use of this form is mandatory.[61]

Babcock, Justice Department Instructions]. The Marshals' role in serving civil process domestically generally ended in 1983 with the adoption of amendments to Fed. R. Civ. P. 4(c). *See* 1 MOORE'S FEDERAL PRACTICE, § 4App.07[1], at 4App-29 to 4App-30 (3d ed. 2010) (*reprinting* rule showing text before and after), and *id.* at § 4App.07[3], at 4App-33 to 4App-36 (*reprinting commentary* on revised rule and Marshal Service's role in serving process). *See also* Sinclair, *supra* note 4, at 1201 (explaining rule change was because the Marshals Service complained of the costs of serving papers).

53 Private International Law: Judicial Assistance: Service of Process: Change in Procedure in United States, 2003 DIGEST ch. 15, at 865–68; Circular Letter from Colin L. Powell, Sec'y of State, to Chiefs of Foreign Missions in the United States (June 4, 2003), excerpted in *id.* at 866–68, *available at* http://www.state.gov/s/l/2003/44337.htm; Letter from United States to Hague Conference Depositary (Aug. 21, 2003), excerpted at http://www.hcch.net/upload/outsourcing14.pdf. For commentary on how the outsourcing program is functioning, see Emily Fishbein Johnson, *Privatizing the Duties of the Central Authority: Should International Service of Process Be Up for Bid?*, 37 GEO. WASH. INT'L L. REV. 769 (2005). For a discussion of the adverse reaction by the Russian government to the outsourcing, see Spencer Willig, *Out of Service: The Causes and Consequences of Russia's Suspension of Judicial Assistance to the United States Under the Hague Service Convention*, 31 U. PA. J. INT'L L. 593 (2009).

54 MARTINDALE-HUBBELL, *supra* note 13, at IC-12.

55 *Id.* at IC-8.

56 *Id.* at IC-7.

57 *Id.* at IC-3 to IC-4 (Canada); *id.* at IC-12 (Switzerland).

58 *Id.* at IC-13.

59 1 RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, *supra* note 13, at 176.

60 The form may be found following the Convention in both the UNITED STATES CODE ANNOTATED and MARTINDALE-HUBBELL, *supra* note 13, and also in Cmnd. 3986, *supra* note 13, at 22–27. The text of the form is also found at Julen v. Larson, 101 Cal. Rptr. 796, 799 n.2 (Ct. App. 1972). The United States Marshals Service has designated this Form USM-94, *available at* http://www.usmarshals.gov/forms/usm94.pdf. The Hague Conference makes it available as a fillable PDF form at http://www.hcch.net/upload/act_form14e.pdf. A trilingual version of the form in English, French, and Russian, appears at 2293 U.N.T.S. 117–19. Instructions on completing the documents are in Reisenfeld, *supra* note 47, at 80–83 (including examples of completed forms), Babcock, Justice Department Instructions, *supra* note 52, at 1351–53 (also including examples of

A party has the papers he wishes served sent directly to the central authority of the foreign jurisdiction; he does not go through his own nation's central authority.[62] The request should be sent by someone the local rules authorize to serve papers, e.g., a court clerk or attorney.[63] However, to avoid unnecessary difficulties with foreign officials, litigants should prepare the papers and then request the court clerk dispatch them.[64]

A nation may require the documents to be served be translated into its official language.[65] (Translation requirements are listed in Appendix A.)

A central authority that finds a request for service to be defective is to promptly tell the litigant of the problem.[66] Otherwise, the central authority is to have the documents served.[67] Service may be by a

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completed forms), and 1 RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, *supra* note 13, at § 4-2-3, at 176–191.

61 Convention, *supra* note 13, art. 3.

62 PRACTICAL HANDBOOK, *supra* note 13, at ¶ 83. The Bulgarian, Egyptian, and Finnish central authorities transmit requests abroad for their citizens, as do those in some Swiss cantons. *Id.* And Process Forwarding can arrange for translation and transmission of papers to foreign central authorities. E-mail from Rick Hamilton, Process Forwarding International, to Author (Apr. 1, 2009, 17:48:53 PDT) (on file with author).

63 Convention, *supra* note 13, art. 3; PRACTICAL HANDBOOK, *supra* note 13, at ¶ 92.

64 *See* Reisenfeld, *supra* note 47, at 62 n.33 (noting some central authorities refuse requests received from attorneys); Hal Roberts Ray, Jr., *Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters Under the Hague Convention*, 3 REV. LITIG. 493, 501 (1983) (also noting that some central authorities refuse requests received from attorneys).

65 Convention, *supra* note 13, at art. 5. Some American courts have decided that documents must be translated even if the receiving nation has not required translations. *E.g.*, Lobo v. Celebrity Cruises, Inc., 667 F. Supp.2d 1324, 1339 (S.D. Fla. 2009). *See also* Marjorie A. Shields, Annotation, *Requirement That Summons and Complaint Be Translated for Proper Service Under Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 7 A.L.R. FED.2D 329 (2005); Christopher *Cheng, Translated Documents and Hague Service Convention Requirements*, 14 MICH. J. INT'L L. 383 (1993).

66 Droz, A Comment on the Role, *supra* note 16, at 5.

67 Some countries have their peculiarities of what subject matter they will and will not serve. *See, e.g.*, Klaus J. Beucher & John Byron Sandage, *United States Punitive Damage Awards in German Courts: The Evolving German Position on Service and Enforcement*, 23 VAND. J. TRANSNAT'L L. 967 (1991 (describing how in Germany, some officials formerly refused to serve suits seeking punitive damages). More recent decisions have rejected the German position on service of suits including punitive damages because, while punitive damages do seek to punish wrongdoing, they are not criminal sanctions. *See, e.g.*, Bundesverfassungsgericht [BverfG] [Federal Constitutional Court], Dec. 7, 1994, 1995 Neue Juristische Wochenschrift [NJW] 649, *translated as* Gerhard Wegner & Christopher Kuner, *Germany: Federal Constitutional Court Orders Concerning Service of Punitive Damage Claims*, 34 I.L.M. 975 (1995); Oberlandesgericht München [Court of Appeals of Munich] [OLG], May 9, 1989, 35 Recht der Internationalen Wirtschaft [RIW]

method requested by the litigant—e.g., personal service, "nail and mail"—or by the methods used in the receiving nation for executing domestic service. Service is still good even if the authority serves the complaint but fails to serve the summons.[68]

Upon serving the papers, the authority prepares a certificate of service that includes information found on a typical process server's return—including the date and place of service and the person served. That certificate is sent to the party requesting service. This document is prima facie evidence the documents were properly served.[69]

If an authority fails in its obligations, a court can order alternative means of service and extend the time for perfecting it.[70] A failure to submit proof of service does not invalidate the service.[71] Nor does a clerical mistake in the central authority's completion of the form.[72]

The American central authority serves defendants sometimes as soon as ten days after receipt while most foreign nations take a couple months; in some countries service happens on the Greek kalends.[73]

Service through the central authority is not the exclusive means of service under the Convention.[74] Countries may have their diplomatic and consular agents serve papers abroad.[75] (The United States,

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489, *translated as* Bruno A. Ristau, *Federal Republic of Germany: Court of Appeals of Munich Decision in X Company and Attorney Y v. Bavaria (Hague Service Convention)*, 28 I.L.M. 1571 (1989). Egypt considers divorce and family cases to be outside the convention's scope because those matters are handled in Egypt's religious courts. REPORT OF THE UNITED STATES DELEGATION, *supra* note 50, at 320.

68 *See* Phillips v. Symes, [2008] UKHL 1, [2008] 2 All E.R. 537 (appeal taken from Eng.).

69 Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, S.A., 51 F.3d 1383, 1389–90 (8th Cir. 1995); Marine Geotechnics, LLC v. Williams, C.A. No. H-07-3499, 2009 WL 2144278 at *2–3 (S.D. Tex. July 13, 2009).

70 Balintulo v. Daimler, A.G. (In re S. Afr. Apartheid Litig.), 643 F. Supp.2d 423, 433 (S.D.N.Y. 2009). *But see* Leslie Blankenship, *For Whom the Statue Tolls—The Statute of Limitations As Applied to Foreign Defendants in Countries Which Do Not Permit Service by Mail*, 27 SANTA CLARA L. REV. 765 (1987).

71 1 MOORE'S FEDERAL PRACTICE, *supra* note 52, at § 4.104, 4-137.

72 *E.g.*, Greene v. Le Dorze, No. 3-96-CV-590-R, 1998 WL 158632, 1998 U.S. Dist. LEXIS 4093, at *8–10 (N.D. Tex. Mar. 24, 1998).

73 Hawkins, *supra* note 9, at 218. The State Department observed that before the United States hired an outside contractor to execute process, it took the Marshals Service "anywhere from six months to one year or longer to complete" requests from abroad. 2003 DIGEST, *supra* note 53, at 866.

74 Report of the U.S. Delegation, *supra* note 24, at 269 ("Use of the Central Authority is purely optional.").

75 Convention, *supra* note 13, art. 8. *See also,* e.g., McCusker, *supra* note 39, at 809 (describing an example before the Convention where a court in Casablanca, French Morocco, had the French consul in Detroit use the police department of Columbus, Ohio, to serve a defendant there).

however, does not allow its diplomats to serve process except when the defendant is a foreign government.)[76] Diplomats may be used to forward documents to foreign officials to serve.[77] The judicial authorities of the receiving nation may also serve process through letters rogatory.[78]

And then there is article 10, a catch-all allowing other possibilities. But whether it authorizes service by mail is hotly disputed. Before we consider that issue, we look at how in many cases the Hague Convention is superfluous if the foreign defendant can be served within the United States—which is usually going to be done by mail. A commentary in the *Federal Rules Decisions* says of the Hague Convention "the whole subject can become academic—happily academic and even irrelevant for the plaintiff—if there is any way to serve the foreign defendant locally."[79]

II
IS SERVICE ABROAD EVEN NECESSARY?

The Hague Convention applies "where there is occasion to transmit a . . . document for service abroad."[80] While this language is mandatory,[81] "[t]he Hague Convention does not require that all citizens of the signatory nation be served according to its methods, since it does not state when service abroad is required."[82] The

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76 *See* 22 C.F.R. § 92.85 (describing the general prohibition on consular service of process). This has been a longstanding policy of the State Department. *See, e.g.*, former 22 C.F.R. § 136.85, published as Part 136, Notarial and Related Services, 17 Fed. Reg. 5540, 5553 (June 20, 1952). For service upon a foreign state, see 28 U.S.C. § 1608(a) (2000); 22 C.F.R. § 93.1; United States: Department of State Memorandum on Judicial Assistance Under the Foreign Sovereign Immunities Act and Service of Process on a Foreign State (May 10, 1979), *reprinted in* 18 I.L.M. 1177 (1979).

77 Convention, *supra* note 13, art. 9.

78 Convention, *supra* note 13, art. 10.

79 David D. Siegel, *The New (Dec. 1, 1993) Rule 4 of the Federal Rules of Civil Procedure: Changes in Summons Service and Personal Jurisdiction*, 154 F.R.D. 441, 461 (1994).

80 Convention, *supra* note 13, art. 1. *See also* Marjorie A. Shields, Annotation, *When Is Compliance with Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Art. 1 et seq., Required*, 18 A.L.R. FED.2D 185 (2007).

81 Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa, 482 U.S. 522, 534 n.15 (1987) (Blackmun, J.) (dicta in case about the Hague Evidence Convention).

82 62B Am. Jur. 2d Process § 326 at 890. *See also* Randolph v. Hendry, 50 F. Supp. 2d 572, 575 (S.D.W. Va. 1999).

Supreme Court has held that only if the forum's law requires documents to be sent abroad does the Convention become relevant.[83]

> If there is no occasion for service abroad, the Hague Convention, by its own terms does not apply, the Convention not being implicated until a determination is made that service abroad is necessary. If a foreign national is present in the United States, domestic service is possible, and there is no need to obtain service in accord with the Hague Convention . . . [which] applies only to attempt to serve process in foreign countries, and does not apply to service on a foreign corporation in the United States pursuant to [the Civil Rules].[84]

The Dutch Supreme Court has ruled likewise and the official handbook for the Convention agrees.[85] The head of the British delegation to the 1965 session of the Hague Conference lamented the ambiguity of the Convention:

> It is perhaps, unfortunate, that the Convention does not state more precisely the circumstances to which it shall apply, especially as one of its principal objects is to change the practice in which service of process against a defendant abroad can be made in the court of the plaintiff's own country.[86]

He hoped courts would apply the Convention liberally in order to prevent "the hardship and injustice which it seeks to relieve."[87]

A. Service on Foreign Defendants Through Their American Agents

Usually in this context, it is the subsidiary that is being served on behalf of a foreign parent.[88] One treatise contends "the fact that a

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83 *Schlunk*, *supra* note 34, at 700.

84 62B Am. Jur. 2d *Process* § 324, at 888–89, citing Daewoo Motor Am., Inc. v. Dongbu Fire Ins. Co., 289 F. Supp. 2d 1127 (C.D. Cal. 2001); Luciano v. Garvey Volkswagen, 521 N.Y.S.2d 119 (App. Div. 1987); Zisman v. Sieger, 106 F.R.D. 194 (N.D. Ill. 1985).

85 HR 27 juni 1986, NJ 1987, 764 m.nt. WH Heemskerk (Segers & Rufa, B.V./Mabanaft, GmbH.) (Neth.), RvdW 1986, 144, *reprinted as* English Translation of Decision No. 13072 of the Supreme Court of the Netherlands, 27 June 1986, 28 I.L.M. 1585, 1586 (1989) ("The cases in which a document must be sent abroad 'for service' are not set out in the Convention. This point is entirely left to the domestic law of the Contracting State of origin of the document."); PRACTICAL HANDBOOK, *supra* note 13, at xxv–xxvi ("The law of the State of origin . . . determines whether or not a document has to be transmitted abroad for service in the other state.").

86 Graveson, *supra* note 24, at 539.

87 *Id.*

88 An example is Lamb v. Volkswagenwerk, A.G., 104 F.R.D. 95 (S.D. Fla. 1985), which is examined in detail in Gloria M. Hoyal, *The Hague Service Convention and Agency Concepts,* Lamb v. Volkswagenwerk Aktiengesellschaft, 20 CORNELL INT'L L.J. 391 (1987). Other cases where service on the subsidiary was found to be valid service on

subsidiary's parent corporation does business in a given state cannot in itself render the subsidiary amenable to service of process and subject to in personam jurisdiction in that state.[89] But if the corporate veil can be pierced through various devices—e.g., "alter ego" test or the complete domination of the subsidiaries by the parent—then service on the parent binds the subsidiary.[90] Those suing foreign

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the parent include Sankaran v. Club Mediterranée, S.A., No. 97 Civ. 8318(RPP), 1998 WL 433780, 1998 U.S. Dist. LEXIS 11750 (S.D.N.Y. July 31, 1998) (service on French parent by serving New York City subsidiary); Mirrow v. Club Med, Inc., 118 F.R.D. 418 (E.D. Pa. 1986) (service on Cayman Islands parent by serving American subsidiary); United States v. Toyota Motor Corp., 569 F. Supp. 1158, 1160 (C.D. Cal. 1983) (service on Japanese parent by serving California subsidiary); Roorda v. Volkswagenwerk, A.G., 481 F. Supp. 868, 870 (D.S.C. 1979) (service on German parent by serving South Carolina Secretary of State who sent it to the American subsidiary and parent's C.E.O. in Germany); Top Form Mills, Inc. v. Sociedad Nationale Industria Applicazioni Viscosa, 428 F. Supp. 1237, 1250–51 (S.D.N.Y. 1977) (service on Italian parent by serving its New York subsidiary); Tokyo Boeki (U.S.A.), Inc. v. S.S. Navarino, 324 F. Supp. 361, 366–67 (S.D.N.Y. 1977) (service on Japanese parent by serving New York subsidiary); Handlos v. Litton Indus., Inc., 304 F. Supp. 347, 350–51 (E.D. Wis. 1969) (service on California parent by serving Wisconsin agent of its subsidiary was binding on parent because parent in its annual report held out to the world parent's close control over subsidiaries); United States v. U.S. Alkali Ass'n, [1946–1947] Trade Cas. (CCH) ¶ 57,481, at 58,202 (S.D.N.Y. 1946) (service on English parent by serving New York City subsidiary); Indus. Research Corp. v. Gen. Motors Corp., 29 F.2d 623, 628 (N.D. Ohio 1928) (service on parent by serving wholly owned subsidiary that parent represented was closely controlled by it); Ex parte Volkswagenwerk, A.G. (Brown v. Volkswagen of America, Inc.), 443 So.2d 880, 885 (Ala. 1983) (service on German parent by serving New Jersey subsidiary); Maunder v. De Havilland Aircraft of Can., Ltd., 466 N.E.2d 217, 222 (Ill. 1984) (service of Canadian parent by serving Illinois-incorporated subsidiary); Taca Int'l Airlines, S.A. v. Rolls-Royce of Eng., Ltd., 204 N.E.2d 329, 331 (N.Y. 1965) (service on English parent by serving its New York subsidiary); Geffen Motors, Inc. v. Chrysler Corp. 283 N.Y.S.2d 79, 81 (Sup. Ct. 1967) (the subsidiary actually served and the parent "are really the same entities in different guises" and so service on subsidiary was valid service on parent); McHugh v. Int'l Components Corp., 461 N.Y.S.2d 166, 168 (Sup. Ct. 1983) (service on Japanese parent by serving its Illinois subsidiary). *Cf.* Crose v. Volkswagenwerk, A.G., 558 P.2d 764 (Wash. 1977) (service on car dealer in which carmaker owned no stock but utterly dominated was valid service on carmaker); Sunrise Toyota, Ltd. v. Toyota Motor Co., 55 F.R.D. 519, 528–31 (S.D.N.Y. 1972) (finding that a parent operating through its wholly owned subsidiaries does not insulate parent from suit).

89 18A WILLIAM MEADE FLETCHER & CAROL A. JONES, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 8773, at 235 (2007) (citing Uston v. Hilton Casinos, Inc., 564 F.2d 1218 (9th Cir. 1977); Chung v. Tarom, S.A., 990 F. Supp. 581 (N.D. Ill. 1998); Hobbs v. Don Mealey Chevrolet, Inc., 642 So. 2d 1149 (Fla. Dist. Ct. App. 1994); *In re* Crespo, 475 N.Y.S.2d 319 (Sup. Ct. 1984); Bowers v. Wurzburg, 519 S.E.2d 148 (W. Va. 1999)).

90 *Id.* at § 8773 *passim*. *See also* Prof'l Investors Life Ins. Co. v. Roussel, 445 F. Supp. 687, 698 (D. Kan. 1978) ("The rationale of the courts which have extended jurisdiction over a foreign parent corporation on the basis of a subsidiary's 'presence' within the state is that when the parent corporation exercises such control and dominion over the subsidiary that it no longer has a will, mind, or existence of its own, and operates merely as a department of the parent corporation, both corporations should be treated as a single

carmakers should know a federal statute requires them to appoint an American agent for service.[91]

B. Agents for Service

It is not necessary for there to be a formal agency relationship in order to serve a foreign defendant.[92] As many old cases involving railroad ticket agents and Western Union representatives show, it is not necessary that the person receiving process be designated for that purpose.[93] In fact, some courts have held "[i]n the absence of an express agency agreement, the common ownership of two corporations 'gives rise to a valid inference as to the broad scope of the agency.'"[94] Likewise, on a question of providing discovery, the executives of a parent company were in control of their subsidiaries' documents and thus were obliged to comply with subpoenas because of their control.[95]

C. Service and the Corporate Family Tree

A good example of that parental control as to service of process is *Hoffmann v. United Telecommunications*.[96] The plaintiff claimed

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economic entity. In such a situation service of process on the subsidiary operates to extend jurisdiction over the parent."). *Cf.* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984) (parent corporation and its wholly owned subsidiary could not conspire together to violate the Sherman Act because they were a single economic enterprise).

91 49 U.S.C. § 30164 (2000). Notice must be given to the National Highway Transportation Safety Administration. *See* 49 C.F.R. § 551.45 et seq.

92 N.Y. Marine Managers, Inc. v. The M.V. Topor-1, 716 F. Supp. 783, 785 (S.D.N.Y. 1989) (Mukasey, J.).

93 *See* E.W.H., Annotation, *Service of Process Upon Actual Agent of Foreign Corporation in Action Based on Transactions Out of State*, 96 A.L.R. 366 (1935) (many of which have to do with railroads and telegraph companies). Two typical examples are Yockey v. St. Louis & S.F. Ry., 37 S.W.2d 694 (Ark. 1934) and Steele v. W. Union Tel. Co., 173 S.E. 583 (N.C. 1934). *See also* FMAC Loan Receivables Trust v. Dagra, 228 F.R.D. 531, 534 (E.D. Va. 2005) (service on Pakistani delivered to his American lawyer was valid and the Convention was not implicated).

94 Jayne v. Royal Jordanian Airlines Corp., 502 F. Supp. 848, 856 (S.D.N.Y. 1980) (quoting Frummer v. Hilton Hotels Int'l, Inc., 227 N.E.2d 851, 854 (N.Y. 1967)). *Cf.* Canterbury Belts, Ltd. v. Lane Walker Rudkin, Ltd., 869 F.2d 34, 40 (2d Cir. 1989) (subsidiaries' activities attributed to the parent for determining personal jurisdiction); Milligan v. Anderson, 522 F.2d 1202, 1207 (10th Cir. 1975) (where disputed jurisdictional facts are intimately intertwined with the parties' dispute on the merits "plaintiffs should not be required to submit proof which would, in effect, establish the validity of their claims and their right to the relief sought").

95 *See In re* Investigation of World Arrangements With Relation to the Prod., Transp., Ref., & Distribut. of Petroleum, 13 F.R.D. 280, 285 (D.D.C. 1952).

96 Hoffmann v. United Telecomm., Inc., 575 F. Supp. 1463 (D. Kan. 1983).

discrimination in the employment practices of the parent and numerous subsidiary companies of a nationwide telephone system. The plaintiff served the parent company and its chief executive. The court found the parent utterly dominated the subsidiaries, operating them as a completely unified enterprise controlled from its headquarters. Thus by serving the parent and the chief executive each of the subsidiaries was served. This was proven by the subsidiaries both receiving actual notice from the parent and filing timely responses to the suit.[97]

Treating service upon a subsidiary as service on a parent—and vice versa—is a rational attitude for courts as the practice does not permit corporations to hide from suit by a clever corporate shell game.[98] This is especially true in that many foreign corporations operate in the United States by "stealth," transacting their business through a web of subsidiaries while the parent corporation sits in a foreign land, protected from the consequences of its actions—and American jurisdiction.[99]

The Solicitor General, a friend of the Supreme Court in *Volkswagenwerk v. Schlunk*, the high court's one decision on the Convention, said the Convention

> does not limit the power a contracting nation to permit service of foreign corporations doing business within its borders through delivery of a summons and complaint to domestic agents or subsidiaries of those corporations. Indeed, it was well established at the time the Convention was drafted that a foreign corporation doing business in the United States was properly amenable to service of process by delivery of a summons and complaint to an agent or wholly owned American subsidiary.[100]

The Supreme Court agreed and held that serving the parent through its subsidiary—and not through the central authority mechanism—was acceptable, a notion "shocking" to attorneys in civil law regimes.[101] Yet the European Court of Justice in 1972 held that

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97 *Id.* at 1482–83.

98 *See* Rita M. Allis, *The "Mandatory" Nature of the Hague Service Convention in the United States is the Forum's Victory*, 23 VAND. J. TRANSNAT'L L. 179, 220 (1990).

99 Comment, *Notice Due to Stealth and Other Foreign Defendants After* Volkswagenwerk Aktiengesellschaft v. Schlunk *and Under the Hague Service Convention*, 2 TRANSNAT'L LAW. 641 (1989).

100 Brief for the United States as Amicus Curiae Supporting Respondent at 18–19, Volkswagenwerk, A.G. v. Schlunk, 486 U.S. 694 (1988) (No. 86-1052), 1988 WL 1031822, 1986 U.S. S. Ct. Briefs LEXIS 1669.

101 Droz, A Comment on the Role, *supra* note 16, at 10 ("The 'piercing of the corporate veil' in this case was shocking to some jurists from civil law systems.").

service on a subsidiary could be valid service on a parent, so the practice is not totally unknown to civilian lawyers.[102]

The California Court of Appeals confronted in 2009

> [t]he question of whether a Japanese manufacturer can be served . . . simply by serving [its] American subsidiary. The trial court ruled that [the parent] could indeed be validly served that way. The method just seemed too easy a way to get around the Hague Service Convention . . . On review, however, it turns out that, yes, it really is that easy.[103]

The appellate court also held serving an American subsidiary of a foreign corporation provided valid service on the parent.

D. Foreign Defendants Are Not Always Entitled to Central Authority Service

Many courts have also found service on a domestic agent is valid and does not implicate the Convention.[104] Where the law only requires notice and not formal service, sending an informational copy of the documents abroad does not implicate the Convention.[105] And

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102 Case 48/69, Imperial Chem. Indus., Ltd. v. Comm'n, 1972 E.C.R. 619, [1972] C.M.L.R. 557, ¶¶ 34–44 (English company validly served with papers by the European Union at the offices of the company's German subsidiary even though subsidiary had not been authorized to receive service of process on behalf of its parent).

103 Yamaha Motor Co., v. Orange Cnty. Super. Ct., 94 Cal. Rptr. 3d 494, 495 (Ct. App. 2009).

104 *Schlunk*, 486 U.S. at 707; Darden v. DaimlerChrysler N. Am. Holding Corp., 191 F. Supp. 2d 382, 387–88 (S.D. N.Y. 2002) (while recognizing service on domestic agent could be valid that had not been shown in this case); *Daewoo Motor*, 289 F. Supp. 2d at 1130 (service on state insurance commissioner as domestic agent of Japanese insurer); Sankaran, 1998 WL 433780, at *5; Pittsburgh Nat. Bank v. Kassir, 153 F.R.D. 580, 583–84 (W.D. Pa. 1994) (foreign debtors in their loan agreement appointed an American agent for the receipt of process and serving the agent was proper and in compliance with Convention); Gallagher v. Mazda Motor of Am., Inc., 781 F. Supp. 1079, 1082 (E.D. Pa. 1992) (while recognizing service on domestic agent could be valid it had not been shown in this case); Moroz v. San Diego Cnty. Super. Ct., No. D038329, 2002 WL 16093, at *4, 2002 Cal. App. Unpub. LEXIS 5108 (Cal. App. 4th Dist. Jan. 8, 2002) (finding Polish resident was served by delivery of complaint to her agent in California); Weber v. Zurich Fin. Servs. Grp., 18 Mass. L. Rptr. 544 (Super. Ct. 2004) (dicta allowing domestic service but finding service in the case invalid); Celik v. Dundar, No. CV95-0142921S, 1995 WL 424710, at *2, 1995 Conn. Super. LEXIS 2050 (Super. Ct. July 12, 1995) (recognizing American distributor of Turkish magazine could be magazine publisher's agent and calling for a hearing on the question); Karaszewski v. Honda Motor Co., 537 N.Y.S.2d 975, 976 (Sup. Ct. 1989) (allowing service on foreign corporation through New York Secretary of State).

105 *In re* Get Wet Water Sports, Inc., Civ. No. 95-6116, 1996 WL 162073, at *2, 1996 U.S. Dist. LEXIS 4292 (D.N.J. Mar. 18, 1996) (limitation of liability action where notice was given under F. R. CIV. P. SUPP. R. ADM. & MAR. P. F(4) meant Convention not

where a defendant's address is unknown, the Convention does not apply.[106]

> Where service on a domestic agent [of a foreign party] is valid and complete under both state law and the Due Process Clause [of the Fourteenth Amendment, a court's] inquiry ends and the Convention has no further implications . . . [T]he Due Process Clause does not require an official transmittal of documents abroad every time there is service on a foreign national.[107]

Now we consider service by mail.

III
AROUND THE WORLD ON AN ENVELOPE

Send and serve. "If [those] words are different, then the Convention contains no specific permission for service by mail. If the words are the same, documents may be sent, and service of process may be effected, through use of the mails."[108] Where to begin the analysis? The canons of construction are the most obvious toolkit. But "textual ambiguity is often created . . . when courts attempt to apply rules of statutory construction that are only suited to domestic legislation . . . [and] giving too much credit to the precise language of a treaty can lead a court to give too much weight to an apparent omission, despite the clear meaning of the text."[109]

The question of whether or not the Hague Convention allows the service of process by mail has divided our courts.[110] The relevant language, Article 10, reads:

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implicated because the Convention addresses service of process and the Supplemental Rules require only notice).

106 *E.g.*, BP Prods. N. Am., Inc. v. Dagra, 236 F.R.D. 270, 271 (E.D. Va. 2006); People v. Mendocino Cnty. Assessor's Parcel No. 056-500-09, 68 Cal. Rptr. 2d 51, 53 (Ct. App. 1997); Kott v. L.A. Cnty. Super. Ct., 53 Cal. Rptr. 2d 215, 220 (Ct. App. 1996) (court accepted service by publication could be used when defendant's address unknown but invalidated it in the case because plaintiff had made insufficient efforts to learn defendant's address); Eto v. Muranka, 57 P.3d 413, 423 (Haw. 2006).

107 *Schlunk*, 486 U.S. at 707. *See also* Delta Constructors, Inc. v. Roediger Vacuum, GmbH., 259 F.R.D. 245, 248 (S.D. Miss. 2009) ("[T]he fact that [defendant] is a German corporation and Germany is a signatory to the Hague Convention does not necessarily mean that [defendant] is entitled to receive all service of process at its home office in Germany.").

108 VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 2:6 (2d ed. 2005).

109 David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 965 (1994) (citations omitted).

110 For an excellent short summary of the divide, see *Eto*, 57 P.3d at 423, n.6. For a longer one, see EOI Corp. v. Medical Mktg., Ltd., 172 F.R.D. 133, 136–42 (D.N.J. 1997). *See also* Beverly L. Jacklin, Annotation, *Service of Process by Mail in International Civil*

> 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; [or]
>
> (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.[111]

Action as Permissible Under Hague Convention, 112 A.L.R. FED. 241 (1993) (collecting cases); Diane Davis, *An Interpretation of Article 10(a) of the Hague Service Convention: Does "Send" Mean "Serve"*?, 53 ALB. L. REV. 877, 878–82 (1989) (discussing the federal circuit split on the question); Christine A. Elech, *A Cosmopolitan Approach to Treaty Interpretation: Why Service by Postal Channels Should Be Permitted Under the Hague Convention*, 36 N. KY. L. REV. 163, 167–73 (2009) (same); Sarah K. Rathke, *There May Be an Easier Way: Serving Non-U.S. Civil Defendants With Process*, 79 CLEVE. BAR. J., Nov. 2007, at 48 (discussing split among federal circuits, among district courts within the Sixth Circuit, between the Ohio federal districts, and among the Ohio appellate districts).

111 More practically, sometimes private delivery services such as U.P.S., Federal Express, and D.H.L. have been found acceptable as "postal channels." PRACTICAL HANDBOOK, *supra* note 13, at ¶ 198 states "private courier services offer the same security as domestic postal services while usually being faster. In addition, pursuant to the wave of privitisation in the postal sector, the distinction between public and private services has tended to blur. It is difficult to see, therefore, what would prevent a private courier service from being treated as a postal channel within the meaning of the convention." The 2003 Special Commission on the Convention decided that courier services were acceptable as a "postal channel" under Article 10(a). HAGUE CONFERENCE ON INTERNATIONAL PRIVATE LAW, Oct. 28–Nov. 4, 2003, *Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of the Hague Apostille, Evidence, and Service Conventions*, 56 [hereinafter 2003 COMMISSION], excerpted in PRACTICAL HANDBOOK, *supra* note 13, at app. 6, *available at* http://www.hcch.net/upload/wop/lse_concl_e.pdf. Service abroad by courier was found to be valid under Article 10(a) in Rogers v. Kasahara, No. 06-2033(PGS), 2006 WL 6312904, at *1, 2006 U.S. Dist. LEXIS 74870 (D.N.J. Oct. 16, 2006) (D.H.L. to Japan); *EOI Corp.*, 172 F.R.D. at 142 (D.H.L. to United Kingdom); R. Griggs Grp., Ltd. v. Filanto, S.p.A., 920 F. Supp. 1100, 1107–08 (D. Nev. 1996) (Federal Express to Italy). Contra Mezitis v. Mezitis, N.Y.L.J., Nov. 21, 1995, at 25–26 (N.Y. Sup. Ct. 2005) (service to Greece by D.H.L. invalid). For cases where service by courier to countries outside the Convention was found to be service by "mail" under Fed. R. Civ. P. 4(f)(2)(C)(ii), see Export-Import Bank of the United States v. Asia Pulp & Paper Co., No. 03 Civ. 8554(LTS)(JCF), 2005 WL 1123755, at *5, 2005 U.S. Dist. LEXIS 8902 (S.D.N.Y. May 11, 2005) (service by D.H.L. to Indonesia); Power Integrations, Inc. v. System General Corp., No C 04-02581, 2004 WL 2806168, 2004 U.S. Dist. LEXIS 25414 (N.D. Cal. Dec. 7, 2004) (Federal Express to Taiwan); Dee-K Ents., Inc. v. Heveafil Sdn. Bhd., 174 F.R.D. 376 (E.D. Va. 1997) (D.H.L. to Indonesia and Malaysia). For an examination of private delivery services and the Federal Rules of Civil Procedure, see Paul Yowell, *Through Rain, Snow, Heat, or Dark of Night: Does Private Express Delivery*

A. The Right to Object

Essentially, the Hague Convention provides that what is not expressly forbidden is implicitly allowed.[112] This right of objection exists because in the civil law world the service of process is seen as an official sovereign act. A nation is presumed sovereign in its territory.[113] To some governments, allowing agents of foreign governments to act within their frontiers would be an infringement of their sovereignty.[114] (The recent arrest and deportation of a passel of Russian agents in United States shows that America shares this disapproval.)[115] But when it comes to serving process and conducting discovery here, the United States has for decades had no objection.[116]

Professor Hans Smit feels these claims about sovereignty are a fiction: "the persons to whom the notices are addressed wish to create as many impediments as possible to their being served and call for the assistance of their national governments in these efforts" and compliant foreign governments then protest service efforts and erect

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Constitute Service by Mail Under Federal Rule of Civil Procedure 5?, 46 BAYLOR L. REV. 1147 (1994).

112 *DeJames*, 654 F.2d at 289; Hui Suet Ying v. Sharp Corp., [2000] H.K.C.F.I. 624, ¶ 22 (Feb. 15, 2000).

113 The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute."); The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824) (Story, J.) (one nation's laws "can have no force to control the sovereignty or rights of any other nation within its own jurisdiction").

114 1 FOREIGN RELATIONS RESTATEMENT, *supra* note 47, § 471 cmt. b, at 530; Robert W. Peterson, *Jurisdiction and the Japanese Defendant*, 25 SANTA CLARA L. REV. 555, 577 (1985); John D. Gregory, *The Hague Service Abroad Convention*, 11 ADVOC. Q. 327, 328 (1989). *Cf.* Brief for Respondent at 5, Volkswagenwerk, A.G. v. Schlunk, 486 U.S. 694 (1988) (No. 86-1052), 1988 WL 1031820, 1986 U.S. S. Ct. Briefs LEXIS 1667 (foreign corporation "for no better reason than its own convenience, [asked the Supreme] Court to rewrite a convention designed to provide judicial assistance for service in foreign lands into a nationwide standard applicable only to foreign corporations").

115 *See* Jerry Seper, *Feds Burn 'Deep Cover' Russian Spy Network*, WASH. TIMES, June 29, 2010, at 1; Richard A. Serrano, *U.S. Charges 11 As Russian Agents*, L.A. TIMES, June 29, 2010, at A1; Bruce Golding, Andy Soltis & Cathy Burke, *Spy Ring's Femme Fatale*, N.Y. POST, June 29, 2010, at 8; Dina Temple-Raston & Renee Montagne, *F.B.I. Arrests 10 Alleged Russian Secret Agents*, MORNING EDITION (National Public Radio, June 29, 2010); Martha T. Moore & Kevin Johnson, *Pleas Set Spy Deal in Motion; U.S. Gains Freedom for Several Accused as Spies in Russia*, USA TODAY, July 9, 2010, at 2A. The foreigners in this incident were not criminally charged with espionage, despite the use of the word "spy" in the press, but with being unregistered foreign agents.

116 *E.g.*, McCusker, *supra* note 39, at 809.

roadblocks to expeditious service of process as protectionist measures to benefit their countries' multinational corporations.[117]

B. The Swiss Stance

Typical of this insistence that service be handled through official channels is the case of Switzerland. The Swiss have been particularly vocal on the subject of judicial acts being performed on their territory, their government having repeatedly protested to the American State Department over attorneys and courts serving Swiss defendants by mail.[118] It is not that the Swiss consider mail *malum in se*—for the Swiss themselves serve court documents through the mail domestically—but, rather, they claim foreign parties performing official acts such a serving process infringe on their national prerogatives.[119]

Writes one observer,

> Switzerland's public policy requires deep governmental involvement with service of process on a party residing within its territory. [Because of] Switzerland's extreme view of sovereignty . . . the Swiss government routinely investigates the nature of all documents to be served within its borders, and rejects service of any legal actions to which it objects. Presently, Switzerland considers

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117 Smit, *supra* note 39, at 36 (stating that foreigners seek to use the Hague Conventions not to help American courts but "to protect [their companies] from U.S. litigation"). Professor Smit states that, because the Convention has caused so much "useless" litigation over its terms, and has provided "negligible benefits," the United States should denounce it. *Id.* at 38–39, 44–45.

118 *See, e.g.*, *Sovereignty: Supremacy of Territorial Sovereign—Service of Judicial Documents by Mail in Foreign State*, 56 AM. J. INT'L L. 794 (1962) (reprinting Swiss protest); Judicial Assistance: Service: International Registered Mail, [2] 1981–1988 DIGEST § 6, at 1445 [hereinafter Judicial Assistance: Service] (another Swiss protest). *See also* Banque Commerciale Arabe, S.A., Case, *as translated in* 65 I.L.R. 412, 415, Tribunal Fédéral [TF] [Federal Supreme Court] Apr. 27, 1977, 103 Arrêts du Tribunal fédéral suisse [ATF] III 1 (Switz.) ("Direct notification to a foreign country by post of a summons . . . constitutes an act of public authority on foreign territory."). For an example of lawyers causing an international incident with the Swiss, see Jones, International Judicial Assistance, *supra* note 39, at 520 (describing how Dutch lawyers taking discovery were arrested and charged with economic espionage and violating Swiss sovereignty by performing governmental acts within Swiss territory).

119 *See* Arthur R. Miller, *International Cooperation in Litigation Between the United States and Switzerland: Unilateral Procedural Accomodation in a Test Tube*, 49 MINN. L. REV. 1069, 1083–84 (Swiss serve documents domestically by mail). The Swiss, however, have no problem in infringing American sovereignty by having their government serve papers in the United States by mail. For example, in Julen v. Larson, 101 Cal. Rptr. 796 (Ct. App. 1972), a Swiss court sent papers in the German language to the Swiss consulate in San Francisco which mailed them, untranslated, to a defendant in California. The California court refused to enforce the resulting judgment.

> service of process by any means other than by letter rogatory through Swiss governmental personnel a criminal act.[120]

Forty-five years ago, before the Swiss adhered to the Convention, Professor Arthur R. Miller wrote that

> [V]iewed from the perspective of an American litigant, the major obstacle appears to be Switzerland's insistence upon strict compliance with its own procedures and Switzerland's desire to guard against any encroachment upon its sovereignty or any other national policy. As a result, it frequently is impossible or prohibitively expensive, in terms of time or money, to procure any useful aid from the Swiss authorities.[121]

C. Electronic "Postal Channels"

The Convention was drafted in 1964, when telegrams still were being sent.[122] This was also a time when international communications were made via telex machine.[123] (Think of a it as a typewriter capable of instant messaging chats.[124])

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120 Tamayo, *Catch Me*, *supra* note 1, at 239.

121 Miller, *supra* note 119, at 1074. The State Department notes that "past experience has shown that letters rogatory are delayed or have to be returned and subsequently resubmitted, because they do not meet the requirements of Swiss judicial authorities as to content and form. The judgment of the Swiss judicial authorities on whether to proceed with the letters rogatory will be based largely on their understanding of the material facts in the case." Judicial Assistance: Service, *supra* note 118, at 1448–49 (quoting flyer on judicial assistance in Switzerland).

122 Telegram service was sanctioned by some states' civil rules. *E.g.*, IDAHO R. CIV. P. 4(c)(3) (authorizing service by telegram or fax); MONT. CODE ANN. § 25-3-501 (originally enacted in 1895); UTAH R. CIV. P. 4(*l*) (repealed Apr. 1, 1990), previously codified as UTAH CODE § 104-43-9, previously codified as UTAH COMP. L. § 7032. These provisions are now obsolete as Western Union sent its last telegram January 27, 2006. For the end of American telegram service, see Dan Neil, *800 Words. R.I.P. Stop.*, L.A. TIMES, Feb. 19, 2006, at I6; Don K. Ferguson, *Western Union Telegrams: Now They're a Thing of the Past*, NEWS SENTINEL (Knoxville, Tenn.), Feb. 19, 2006, at G5; Jeff Daniel, *Telegram Stop Dead Stop: Another Once-Universal Technology Goes on the Scrapheap*, ST. LOUIS POST-DISPATCH, Feb. 13, 2006, at C1; Hina Alam, *With Last Month's Quiet Exit of the Telegram Comes the End of an Era*, LUFKIN DAILY NEWS (Lufkin, Tex.), Feb. 12, 2006; Sam Roberts, *Dot-Dot-Dot, Dash-Dash-Dash, No More*, N.Y. TIMES, Feb. 12, 2006, sec. 4, at 7; Shelly Freierman, *Telegram Falls Silent Stop Era Ends Stop*, N.Y. TIMES, Feb. 6, 2006, at C7; Jonel Aleccia, *Telegrams a Tangible Link to Past; Region's Residents Recall Messages of Joy and Sorrow Brought by Western Union Service*, SPOKESMAN-REVIEW (Spokane, Wash.), Feb. 5, 2006, at B1; Valerie Bauerlein, *Western Union's Last Telegram Marks the Conclusion of an Era*, WALL ST. J., Feb. 3, 2006, at B3; P. Solomon Banda, *No Profit Stop Telegrams End Stop*, CINCINNATI POST, Feb. 2, 2006, at A7. A quarter of a century before, Western Union officials told *The New York Times* they were trying to get out of the telegram business and kept raising the prices to kill the service. Andrew Pollack, *A New Message From Western Union*, N.Y. TIMES, Nov. 21, 1982, at A1.

123 A telex machine, also known as a teletype or teletypewriter, is an advanced form of a telegraph, which also transmits messages with electrical impulses. The device looks like

a cross between a telephone and an electric typewriter. It placed calls, like a telephone or facsimile call, to other telex machines. Each telex machine would have an individual number to call. They were originally part of a special network of lines but later could be used through the regular telephone network. Messages could be typed offline on paper tape, which would be fed through the machine once the call was placed, and the message would then be typed at the other end. This would minimize the connection time, which was billed by the minute. Messages could also be typed during the call and transmitted instantly, thus allowing a conversation to take place. The service was always more popular outside the United States because of the unreliability of foreign telephone and postal services and was heavily used for international communications. And as each machine (1) had its own identity that could not be spoofed, (2) produced an acknowledgment message for messages sent to it, and (3) produced a writing, this meant a telex could reliably be used to form binding contracts. For descriptions of telex service, see NATHAN J. MULLER, DESKTOP ENCYCLOPEDIA OF TELECOMMUNICATIONS 1056–1058 (3d ed. 2002); STEVE WINDER, NEWNES TELECOMMUNICATIONS POCKET BOOK ch. 3 (3d ed. 2001). For the electrical engineering behind telex, with many illustrations of the equipment used, see ERHHARD A. ROSSBERG & HELMUT E. KORTA, TELEPRINTER SWITCHING (1960). Large organizations used them to communicate securely around the world and a few still do. *Old Fashioned? Yes. Obsolete? Not Quite. Stubbornly the Telex Endures*, TORONTO STAR, Feb. 3, 2008, Ideas sec., at 12 (noting banks still use telexes because of their reliability and security). Newsrooms used to use these to receive stories from their reporters, see, e.g., Ellen Goodman, *High-Tech's Human Gap*, BOSTON GLOBE, June 15, 1995, at 21 (noting author's early days in journalism filing stories by Western Union or telex), and the news agencies. *See, e.g.*, ROBERT W. DESMOND, WINDOWS ON THE WORLD, THE INFORMATION PROCESS IN A CHANGING SOCIETY 1900–1920, 72–76 (1980) (describing introduction of teletype by news agencies); David O'Reilly, *Saying Goodbye to the Teletype*, PHILA. INQUIRER, Aug. 11, 1986, at E1 (noting the Associated Press and United Press International were phasing out their teletypes that year). For examples of newsroom teletypes clattering away, see ALL THE PRESIDENT'S MEN (Warner Bros. 1976). Telex services have now largely been discontinued. *See, e.g.*, *Batelco Set to Phase Out Telex Service*, GULF DAILY NEWS (Manama, Bahr.), Nov. 16, 2009 (noting end of telex service in Bahrain); William Boei, *Telex Machine Ticks Into History*, VANCOUVER SUN (Vancouver, B.C.), Mar. 16, 1999, at D1 (noting end of commercial telex service in Canada).

124 *See, e.g.*, Ewart Thomas, *Conference by Telecon*, POPULAR MECHANICS, Apr. 1954, at 122 (discussing using the telex for instant messaging-like conference calls, called "telecons," focusing on U.S. military's use of the technology and accompanied by a photograph of military men sitting around a conference table reading the telex messages projected upon a screen). For other examples, see LESLIE R. GROVES, NOW IT CAN BE TOLD: THE STORY OF THE MANHATTAN PROJECT 328–30 (1962) (Gen. Groves, head of the Manhattan Project, discusses with Gen. Curtis E. LeMay, commander of strategic bombing of Japan, the use of nuclear weapons in August 1945); LOWELL BENNETT, BERLIN BASTION: THE EPIC OF POST-WAR BERLIN 54 (1951) (American commander in Berlin using telecon to plan resupplying the city during the Soviet blockade in 1947); MARK W. CLARK, FROM THE DANUBE TO THE YALU 46–47 (1954) (Gen. Clark discusses telecons held about a hostage crisis during the Korean War); STANLEY WEINTRAUB, MACARTHUR'S WAR: KOREA AND THE UNDOING OF AN AMERICAN HERO ch. 4 (2000) (conferences between Gen. MacArthur and staff in Tokyo with the Pentagon in chapter titled "The Telecon War"); ROY E. APPLEMAN, SOUTH TO THE NAKTONG, NORTH TO THE YALU 38 (1960) (Gen. MacArthur and Joint Chiefs of Staff conferencing in June 1950 on how to react to the beginning of the Korean War); D. CLAYTON JAMES, 3 THE YEARS OF MACARTHUR: TRIUMPH & DISASTER, 1945–1964, 421–22 (1985) (same); DAVID A. KORN, ASSASSINATION IN KHARTOUM 103–04 (1993) (discussing telecons between State

The Hague Conference says service by those methods was embraced by the phrase "postal channels."[125] That is logical because at the time telecommunications in most of the world were operated by the government, usually the post office.[126] The Hague Conference does not appear to have taken a position on service by facsimile, however.[127] Though the technology had existed in various forms for decades, e.g., the Associated Press's Wirephoto service,[128] the facsimile machines on the market at the time the Convention was drafted were relatively uncommon and massively expensive.[129] One

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Department in Washington and the American embassy in the Sudan when terrorists kidnapped the American ambassador in 1973).

125 PRACTICAL HANDBOOK, *supra* note 13, at ¶ 197 ("Telegrams and telex are also to be treated as postal channels, even though it is difficult to imagine their frequent use in practice."). *See also* 1 RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, *supra* note 13, at 373. Telex service of process was allowed in New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., 508 F. Supp. 49, 51–52 (S.D.N.Y. 1980) (permitting service to non-Hague country by telex because Iranian postal authorities refused to send back the return receipts sent with mailings); Int'l Schools Service v. Gov't of Iran, 505 F. Supp. 178, 179 (D.N.J. 1981) (same); Harris Corp. v. Nat'l Iranian Radio & Television, 691 F.2d 1344, 1352 (11th Cir. 1982) (approving service by telex because notice was actually received); *Cooper*, 92 F.R.D. at 786 (ordering use of telex to transmit service to defendant evading it).

126 *See, e.g.*, THE STATESMAN'S YEARBOOK 1968–1969, at 123 (S.H. Steinberg ed., 105th ed. 1968) (noting in United Kingdom the post office handled telegrams and telex services); *id.* at 272 (noting in Australia postal revenues from mail and telecommunications); *id.* at 352 (noting in New Zealand "the telephone and telegraph systems are governmental"); *id.* at 241 (noting the "Saskatchewan Government Telephone System"); *id.* at 384 (noting in India the "Posts and Telegraphs Department"); *id.* at 980 (noting in Finland "the telegraph system and part of the telephone system are state property"); *id.* at 1002 (noting in France the revenues of state-owned "posts, telegraphs, and telephones"); *id.* at 1174 (noting in Israel "the Ministry of Posts controls the postal, telegraph, and telephone service"); *id.* at 1473 (noting in Switzerland the "Federal Post, Telephone, and Telegraph" agency); *id.* at 1504 (noting in Turkey the number of "post and telegraph offices"); Doran Howitt, *Electronic Mail Takes On Telex: But Overseas Telex Monopolies Resist Computer Invasion*, 6 INFOWORLD, Nov. 12, 1984, at 44 (noting foreign post offices running telex services); *Smaller Means Better in Telex*, 80 NEW SCIENTIST 936, (1978).

127 An early article on the use of facsimile machines to serve process is David A. Sokasits, *The Long Arm of the Fax: Service of Process Using Fax Machines*, 16 RUTGERS COMPUTER & TECH. L.J. 531 (1990).

128 ASSOCIATED PRESS, BREAKING NEWS: HOW THE ASSOCIATED PRESS HAS COVERED WAR, PEACE, AND EVERYTHING ELSE 311–18 (2007) (discussing the system to transmit photographs operated 1926 to 1933 by the American Telephone & Telegraph Co. and the system the Associated Press began in 1935 to replace it; at 317 is a photograph of the A.P.'s transmission equipment).

129 *See generally* DANIEL M. COSTIGAN, FAX: THE PRINCIPLES AND PRACTICE OF FACSIMILE COMMUNICATION (1970), which explains the devices, illustrates many of them, and discusses the electrical engineering behind them (the author worked at Bell Labs). Costigan estimated there were 55,000 fax machines in place in the United States in 1970.

English court has said service by fax under the Convention is permitted only if the recipient has consented receiving service by fax.[130] But the same logic that holds that telegram and telex service are permissible as "postal channels" for purposes of service ought to apply to the fax machine.

Other contemporary forms of communication should also acceptable channels too. [131] E-mail service abroad has been occasionally sanctioned, usually when the defendant is elusive and cannot otherwise be found.[132] And some foreign courts have even

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Id. at vii. Uses at the time included transmitting weather maps, railroads sending consists ahead of trains, bank branches verifying signatures against files at the main office, and newspapers transmitting typeset pages to remote printing plants. *Id.* at 14–21. A fax machine that could transmit an entire newspaper page cost between $30,000 and $60,000. *Id.* at 246, 250–51. In a series of appendices, Costigan has a catalog of the devices on the market then. Machines intended for general office use, often had separate units for transmission and reception and were costly: the least expensive was $1,200 and the most expensive $5,500. *Id.* at 193–208. Those prices are equivalent to $5,700 and to $26,000 in 2010, according to the Author's calculation. *See also* RAY HORAK, TELECOMMUNICATIONS AND DATA COMMUNICATIONS HANDBOOK 156 (2007) (discussing early technologies and stating facsimile service as we know it did not begin until the 1970s).

130 Molins, P.L.C. v. G.D., S.p.A., [2000] EWHC (Pat) 170, ¶ 14 (Ch.), *aff'd* [2000] 1 W.L.R. 1741, ¶ 25 (C.A.).

131 *Cf.* Timothy Coughlan, *Applying the U.S. Postal Service Statutes to E-Mail Transmissions*, 25 RUTGERS COMPUTER & TECH. L.J. 375 (1999) (making analogies between postal and electronic mail).

132 *See, e.g.*, Broadfoot v. Diaz (In re Int'l Telemedia Assocs.), 245 B.R. 713, 719–20 (Bankr. N.D. Ga. 2000) (defendant in Singapore); Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1017 (9th Cir. 2002) (Costa Rica); Williams v. Advertising Sex, L.L.C., 231 F.R.D. 483, 488 (N.D.W. Va. 2005) (Australia); Hollow v. Hollow, 747 N.Y.S.2d 704, 708 (Sup. Ct. 2002) (Saudi Arabia). *See also* Int'l Raelian Movement v. Hashem, No. CIV S-08-687, 2009 WL 2136958, at *2–4, 2009 U.S. Dist. LEXIS 60542 (E.D. Cal. July 15, 2009) (court must order e-mail service to Hague signatory nation and cannot grant permission retroactively). At least one federal statute allows electronic service of process. *Cf.* Anti-Cybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d)(2)(a)(ii) (2000). Electronic service of process was examined in Tamayo, *Catch Me*, *supra* note 1; David P. Stewart & Anna Conley, *E-Mail Service on Foreign Defendants: Time for an International Approach*, 38 GEO. J. INT'L L. 755 (2007); Matthew R. Schreck, *Preventing "You've Got Mail" from Meaning "You've Been Served": How Service of Process by E-Mail Does Not Meet Constitutional Due Process Requirements*, 38 J. MARSHALL L. REV. 1121 (2005); John M. Murphy, III, *From Snail Mail to E-Mail: The Steady Evolution of Service of Process*, 19 ST. JOHN'S J. LEGAL COMMENT. 73 (2004); Terry W. Posey, Jr., *"You've Got Service!": Rio Properties, Inc. v. Rio International Interlink, 284 F.3d 1007 (9th Cir. 2002)*, 28 U. DAYTON L. REV. 403 (2003); Aaron R. Chacker, *E-ffectuating Notice: Rio Properties v. Rio International Interlink*, 48 VILL L. REV. 597 (2003); Rachel Cantor, *Internet Service of Process: A Constitutionally Adequate Alternative?*, 66 U. CHI. L. REV. 943 (1999); Frank Conley, *:-) Service With a Smiley: The Effect of E-Mail and Other Electronic Communications on Service of Process*, 11 TEMP. INT'L & COMP. L. J. 407 (1997) (reviewing service by e-mail after first known case to allow it, a decision of England's High Court).

sanctioned service by Facebook[133] and Twitter.[134] (In only one of these cases, was it alleged the defendant was abroad, a case from New Zealand.[135]) And Singapore, which is not a Convention signatory, is considering issuing court rules for service by social networking websites.[136] Service by these means should be acceptable to serve process even in Convention member states because the Convention

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133 *See generally*, John J. Browning, *Served Without Ever Leaving the Computer: Service of Process Via Social Media*, 73 TEX. B.J. 180 (2010); Andrianna L. Shultz, *Superpoked and Served: Service of Process Through Social Networking Sites*, 43 U. RICH. L. REV. 1497 (2009). The cases allowing this service are from Australia, New Zealand, and Canada. The most discussed Australian case is MKM Capital Pty. v. Corbo, No. SC 608 of 2008 (Austl. Cap. Terr. Sup. Ct.). *See also* Rod McGuirk, *Australian Court OK's Using Facebook to Serve Foreclosure Notice*, VIRGINIAN-PILOT (Norfolk, Va.), Dec. 17, 2008, at A3; Noel Towell, *You've Been Served: Court Approves Facebook Notice*, CANBERRA TIMES, Dec. 16, 2008, at 1; Janet Fife-Yeomans, *Writ Served Via Facebook—Court's Use of Facebook to Serve Documents a World First*, DAILY TELEGRAPH (Sydney, N.S.W.), Dec. 17, 2008, at 7; *Law Firm Sends Summons Via Facebook*, TV WORLD NEWS (Special Broadcasting Service [Austl.]), Dec. 16, 2008). Another Australian case where service by Facebook was allowed is Byrne v. Howard, [2010] FMCAfam 509 (Fed. Magis Ct. of Austl. at Adelaide). An Australian case refusing to serve process via Facebook is Citigroup Pty. v. Weerakoon, [2008] QDC 174 (Queensl.), *available at* http://www.sclqld.org/au/qjudgment/2008/QDC/+100. A Canadian case authorized Facebook service in Knott v. Sutherland, No. 0803 02267 (Alta. Q.B. Feb. 5, 2009). *Do You Use Facebook?*, CLIA LOSS PREVENTION BULLETIN, No. 47, Fall 2009, *available at* http://clia.ca/eng/docenglish/LossPrevention/CLIABulletin47English.pdf.

134 The order for service by Twitter came in a case against an imposter on Twitter and was issued by England's High Court. *See* Lee Moran, *Twitter Writ Is Historic: Law Firm Principal Serves an Injunction*, KENT & SUSSEX COURIER (Tunbridge Wells, Eng.), Oct. 9, 2009, at 13; Benny Evangelista, *London Court Uses Twitter to Serve Injunction on Impostor*, S.F. CHRON., Oct. 3, 2009, at DC1; *Long Arm of Law Reaches Twitter*, THE INDEPENDENT (London), Oct. 2, 2009, at 14. Another foreign case where Twitter was used to serve process was against the Pirate Bay website for file-sharing. L. Scott Harrell, Service of Process Through Twitter, PURSUIT MAG.: THE JOURNAL OF PROFESSIONAL EXCELLENCE FOR INVESTIGATORS, Nov. 11, 2009, *available at* http://pursuitmag.com /service-of-process-through-twitter.

135 Axe Market Gardens v. Axe, No. CIV 2008-485-2676 (H.C., Wellington, Mar. 16, 2009) (man accused of embezzling from the family business and was thought to be in the United Kingdom). New Zealand is not a Hague signatory but the United Kingdom is. *See also* Allison Ferguson & Felicity Monteiro, *High Court Allows Service of Proceedings on Facebook*, BRANCH BRIEF (Law Society of New Zealand, Waikato Bay of Plenty Branch newsletter), Feb. 2010, at 4, *available at* http://my.lawsociety.org.nz/branches /waikato_bay_of_plenty/branch_brief_archives/branch_brief/february-2010.pdf; *Court Upholds Web Notice*, TOWNSVILLE BULLETIN (Townsville, Queensl.), Mar. 17, 2009, at 12; Melanie Peters, *Legal World Uses Facebook to Trap Criminals In Its Web*, THE ARGUS (Cape Town, S. Afr.), Apr. 5, 2009, at 4.

136 SUPREME COURT OF SINGAPORE, CONSULTATION PAPER: USE AND IMPACT OF SOCIAL MEDIA IN LITIGATION: § c (Sept. 15, 2010), *available at* http://app.supremecourt .gov.sg/data/doc/ManageHighlights/2586/Public Consultation Paper for the use of social media in civil litigation.pdf.

does not apply where the physical address of a defendant is unknown.[137]

But this Article is about the most undisputed form of "the postal channel," what is retronymically called "snail mail."[138]

IV
ARE YOU BEING SERVED?

One word in clause (a) is the source of all the trouble. It has been litigated in American courts more than any other part of the Convention.[139] Because the Convention uses the word "send," whereas the word "service" is used not only in the other clauses of Article 10 but throughout the rest of the convention, some courts have applied the canons of construction to find a distinction between the two terms.[140] A reasonable approach, especially as America's most famous textualist, Justice Scalia, believes in applying those principles to treaties.[141]

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137 Convention, *supra* note 13, art. 1. *But see* Mapping Your Future, Inc. v. Mapping Your Future Svcs., Ltd., 266 F.R.D. 305 (D.S.D. 2009) (plaintiff requested service through central authority of the Cayman Islands which was unable to because address supplied on defendant's website registration used by plaintiff was incorrect but the federal court then refused to allow service by e-mail because of the holding in *Bankston*, 889 F.2d at 172). The interplay between the Convention and serving defendants online is examined in Charles T. Kotuby, Jr., *International Anonymity: The Hague Conventions on Service and Evidence and Their Applicability to Internet-Related Litigation*, 20 J.L. & COM. 103 (2000).

138 William Safire, *Retronym*, N.Y. TIMES, Jan. 7, 2007 (Magazine), at 18.

139 PRACTICAL HANDBOOK, *supra* note 13, at ¶ 213; Hawkins, *supra* note 9, at 220; Gary A. Magnarini, *Service of Process Abroad by the Hague Convention*, 71 MARQ. L. REV. 649, 676 (1988).

140 Jacklin, *supra* note 110, at § 2[a]. *But see* Escaped War Criminal (Germany) Case, *as translated in* 26 I.L.R. 707, 711 ((Ger., Fed. S. Ct., 1958) [Bundesgerichtshof [BGH] [Federal Court of Justice] 1959, 12 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHST] 36]) ("the courts are not entitled to use the technique employed in the interpretation of German laws when interpreting international agreements"); Public Trustee v. Chartered Bank of India, Australia & China, *as reprinted in* 23 I.L.R. 687, 699 ((Sing. Ct. Orig. Civ. Juris. 1956), [1956 S.L.R. 32]) ("the canons applicable to statutes are not safe guides" to interpreting treaties).

141 *See* Van Alstine, *supra* note 37, at 1904, (citing United States v. Stuart, 489 U.S. 353, 371 (1989) (Scalia, J., concurring) and Chan v. Korean Air Lines, Ltd., 409 U.S. 122, 135 (1989) (Scalia, J.)). For Justice Scalia's own explanation of his philosophy on textualism, see ANTONIN G. SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997). But see his opinion for a unanimous court in O'Connor v. United States, 479 U.S. 27 (1986), where Justice Scalia used extrinsic sources to come to a conclusion precisely opposite the plain text of a treaty. His claim in *Stuart*, that legislative history for treaties is never consulted is debunked with malicious glee in Detlev F. Vagts, *Senate Materials and Treaty Interpretation: Some Research Hints for the Supreme Court*, 83 AM. J. INT'L L. 546 (1989). Another response to that same opinion in *Stuart* is Malvina

A. The Interpreter's Toolkit

Using the canons is understandable. Chief Justice Marshall said "diplomatic men" choose their words carefully and the language they select cannot be "ascribed to inattention."[142] More recently, the Supreme Court said a "treaty is in the nature of a contract between or among sovereign nations" and the "[g]eneral rules of construction apply."[143]

One canon is *expressio unius est exclusio alterius*, i.e., "that to express or include one thing implies the exclusion of the other."[144] Thus, some courts reason, by using different words the drafters must

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Halberstam, *The Use of Legislative History in Treaty Interpretation: The Dual Treaty Approach*, 12 CARDOZO L. REV. 1645 (1991). Foreign courts sometimes also decline to look at extrinsic evidence. *E.g.*, Security for Costs (Germany) Case, *as translated in* 1 Ann. Dig. 242, 243 (Ger. RGZ, Mar. 18, 1922) (Reichsgericht [RG] [Imperial Court of Justice] 104 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 189).

142 The Nereide, 13 U.S. (9 Cranch) 388, 419 (1815) (Marhsall, C.J.).

143 Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 253 (1984) (O'Connor, J.); *id.* at 262 (Stevens, J. dissenting) (citing Ware v. Hylton, 3 U.S. (3 Dall.) 199, 240–41 (1796) (Chase, J.)). *See also* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979) (Stevens, J.); Trans World, *supra* at 262 (Stevens, J., dissenting) (with treaties "there is a strong presumption that the literal meaning is the true one" (quoting United States v. M.H. Pulaski Co. (The Five Percent Discount Cases), 243 U.S. 97, 106 (1917) (Holmes, J.))); Les Quatres Frères, Hay & Mar. 170, 172, 165 Eng. Rep. 40, 40 (Adm. 1778) ("there is but one way of expounding all grants . . . , private or public"); Marryat v. Wilson, 1 Bos. & Pul. 430, 439, 126 Eng. Rep. 993, 997 (Ex. 1799) ("we are to construe this treaty as we would construe any other instrument public or private. We are to collect from the nature of the subject, from the words and from the context, the intent and meaning of the contracting parties, whether they are A. and B., or happen to be two independent [S]tates."). *Cf.* The Ionian Ships, 2 Sp. Ecc. & Adm. 212, 227, 164 Eng. Rep. 394, 402-03 (Adm. Prize Ct. 1855) (Lushington, J.) ("I hold it to be the duty of every Court professing to administer the Law of Nations to carry into effect and operation the plainest terms of a treaty"); Treaty of St. Germain (Yugoslav Liquidations) Case, *as translated in* 7 Ann. Dig. 296, 297–98 (Austria, S. Ct., Apr. 11, 1934) [OGH] (strictly applying treaty imposed on nation). *Contra* Sharma v. State of W. Bengal, *as reprinted in* 21 I.L.R. 272, 273–74 (Calcutta H.C., Feb. 11, 1954) [41 A.I.R. 591 (Cal.)] ("The primary rule is that a treaty has to be liberally construed so as to carry out the intention and purpose of the contracting parties thereto . . . In the interpretation of international agreements it is often necessary to adopt a more liberal method of construction than that which might be fairly applied in the case of private instruments.").

144 BLACK'S LAW DICTIONARY 661 (9th ed. 2009). *See also* JABEZ GRIDLEY SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 325, at 410 (1st ed. 1891); HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS § 72, at 219 (2d ed. 1911). For an example of the canon in practice, see State v. Chappell, 900 N.E.2d 238, ¶ 36 (Greene Cnty., Ohio Ct. Com. Pl. 2008). For an example of it being used with treaties, see Tucker v. Alexandroff, 183 U.S. 424, 436 (1902) (Brown, J.).

have meant different things by "send" and "service."[145] A minority of courts have found this language means "that service by registered mail is not a permissible method of service of summons under the Convention."[146] If it was allowed, they argue, the verb in clause (a) would be "serve" rather than "send."[147] This is a "strong technical argument"[148] and represents the "strict constructionist view."[149] But if the canons of construction are an interpreter's toolkit, using this tool and this one alone throws a monkey wrench into the operation of the Convention. Remember that the canons of construction operate like Newton's third law, for each there is an equal and opposing canon.[150]

B. A More Learned Approach

Learned Hand said the surest way to misread a document is to read it literally and this strict textualist approach exactly illustrates what he was talking about.[151] To start with, the intent of the parties ought to be considered.[152]

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145 The leading case making this argument is *Bankston v. Toyota Motor Corp*., 889 F.2d 172, 174 (8th Cir. 1989). For commentary, *compare* Cooper, *supra* note 10, at 698; Jeffrey S. Ahearn, Case Comment, *Interpretation of the Word "Send" in Article 10(a) of the Hague Convention: Bankston v. Toyota Motor Corporation, 889 F.2d 172 (8th Cir. 1989)*, 14 SUFFOLK TRANSNAT'L L.J. 672 (1991); *and* Michael H. Altman, Case Comment, *Mailing Service to Japan: Does Article 10(a) of the Hague Conference Authorize a Separate Method?: Bankston v. Toyota Motor Corp., 889 F.2d 172 (8th Cir. 1989)*, 69 WASH. U. L.Q. 635 (1991) (all three agreeing with the Eighth Circuit) *with* Patricia N. McCausland, Note, *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*, 12 PACE L. REV. 177 (1992) (disagreeing with the Eighth Circuit).

146 62B Am. Jur. 2d *Process* § 327, at 891 (2005), (citing Bankston v. Toyota Motor Corp., 123 F.R.D. 595, (W.D. Ark. 1989), *aff'd*, 889 F.2d 172); Anbe v. Kikuchi, 141 F.R.D. 498 (D. Haw. 1992) (*abrogated by* Brockmeyer v. May, 361 F.3d 1222 (9th Cir. 2004)); Mommsen v. Toro Co., 108 F.R.D. 444 (S.D. Iowa 1985); Prost v. Honda Motor Co., 122 F.R.D. 215 (E.D. Mo. 1987); Ward v. Ludwig, 778 N.E.2d 650 (Ohio Ct. App. 2002); and Conservatorship of Prom v. Sumitomo Rubber Indus., Ltd., 592 N.W.2d 657 (Wis. Ct. App. 1999).

147 *E.g.*, Okubo v. Shimizu, Greene App. No. 2001-CA-134, 2002-Ohio-2624, 2002 WL 1042086, 2002 Ohio App. LEXIS 2742 (Ohio Ct. App. 2002).

148 NANDA & PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES § 2:6. *Contra* The Vredeburg/The Sarina Dorina, 19 I.L.R. 487, (Dist. Ct. of Rotterdam, Dec. 17, 1952) (use of domestic rules of construction on a treaty to subvert its purpose not permitted).

149 Kasahara, 2006 WL 6312904, 2006 U.S. Dist. LEXIS 74780, at *8 (*Bankston*, 889 F.2d 172, is the "strict constructionist" view of the Convention).

150 Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1949).

151 *See* Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944) (Learned Hand, J., concurring); Cent. Hanover Bank & Trust Co. v. Comm'r, 159 F.2d 167, 169 (2d Cir. 1947) (Learned Hand, J.). *See also* Imperial Japanese Gov't v. Peninsular & Oriental

A California court closely examining the entire text of the Convention rejected the send-serve interpretation:

> Although there is some merit to the proposed distinction[,] it is outweighed by consideration of the entire scope of the convention. It purports to deal with the subject of service abroad of judicial documents. The [disputed language] would be superfluous unless it was related to the sending of such documents for the purpose of service . . . Moreover, the reference appears in the context of other alternatives to the use of the "Central Authority" created by the treaty. If it be assumed that the purpose of the [C]onvention is to establish one method to avoid the difficulties and controversy attendant to the use of other methods . . . it does not necessarily follow that other methods may not be used if effective proof of delivery can be made.[153]

A New Jersey court felt likewise: allowing service by mail "is the only construction [of Article 10(a)] which will achieve the Convention's stated goal of effective, expeditious[,] and inexpensive service."[154] The Western District of Texas called the construction disallowing service by mail to be a "hyper-technical interpretation."[155] The District of South Carolina said the entirety of Article 10(a) would

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Steam Navigation Co., [1895] A.C. 644, 657 (P.C.) (appeal taken from Brit. Sup. Ct. for China and Japan) (Hershell, L.C.) ("treaties must be interpreted according to their manifest spirit and intent. In construing such instruments a too slavish adherence to the letter would be out of place"); Bukowski/Mgmt. of the Bank for Soc. Ins., *as translated in* 26 I.L.R. 587, 588 (Neth. Ct. App. Admin. L., Apr. 2, 1958) [RSV, No. 16, Tijdschrift, V (1958), p. 394] ("When interpreting the words and expressions employed in a provision of a [t]reaty, one should pay closer attention to the purpose of the provision, read in connection with the further contents of the treaty, than to the literal meaning of its terms."); Geschäftshaus, GmbH. v. Schweizerische Rückversicherungs Gesellschaft, *as translated in* 5 ANN. DIG. 378, 379 (Ger. Civ. Ct. Justice, Nov. 8, 1930) [Reichsgericht [RG] 130 Entscheidungen des Reichgerichts in Zivilsachen [RGZ] 220] ("A literal interpretation of certain words . . . is not admissible; rather has the true will to be sought in the circumstances of the treaty as a whole").

152 1 FOREIGN RELATIONS RESTATEMENT, *supra* note 47, § 325, at 196 (treaties to be interpreted "with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose") (emphasis added). *See also* The Twende Brodre, 4 C. Rob. 33, 35, 165 Eng. Rep. 525, 526 (Adm. 1801); Ships Taken at Genoa, 4 C. Rob. 388, 399, 165 Eng. Rep. 650, 654 (Adm. 1803); Daniel v. Comm'rs for Liquidating Brit. Claims on Fr. (The English Roman-Catholic Colleges in France), 2 Knapp 23, 48, 12 Eng. Rep. 387, 397 (P.C. 1825) (appeal taken from the Comm'rs for Liquidating Brit. Claims on Fr.); Dürrenberg v. Polish State Treasury, *as translated in* 1 ANN. DIG. 339, 340 (Pol. Sup. Ct. 5th Div., Sept. 29, 1922) [O.S.P. II, No. 332] (looking to spirit of Treaty of Versailles to interpret clause therein).

153 *Shoei Kako*, 109 Cal. Rptr. at 411.

154 Gapanovich v. Komori Corp., 605 A.2d 1120, 1123 (N.J. Super. Ct. App. Div. 1992).

155 Smith v. Dainichi Kinzoku Kogyo Co., 680 F. Supp. 847, 850 (W.D. Tex. 1988).

be extraneous if mail service were disallowed.[156] (Recall that another canon of construction contends that one should not read statutes in a way that make parts of them surplusage.)[157] Thus, "[i]nterpreting one sub-article of the Hague Convention as addressing the sending of documents following service would seem to be taking that particular provision out of context."[158] Another analysis found that

> [d]espite the slight variation in language from "service" to "send," it is implausible to suggest that the drafters of the Convention would abruptly switch from addressing acceptable methods of service of process to methods of sending post "service" documents. Even more inconceivable is that the very next sentence in the same article would return to address the subject of service of process. The Convention's drafters could not have intended to create such an awkward construction. Construing article 10(a) to merely encompass sending judicial documents after a plaintiff effects "service" and not as prescribing another acceptable method of service of process, ignores the context in which the word 'send' is used within the Convention.[159]

An international litigation treatise observes clause (a) speaks of sending documents "indirectly" through the mails and finds that word is an important clue.

> Its use implies alternatives that would be "indirectly." The "indirectly" would be to effect the delivery through the central authority. In theory, the Hague Service Convention could be interpreted as requiring [process] to first pass through the central authority. . . . The use of the term "directly" clarifies that documentary communication can occur without the involvement of the central authority (or other judicial agency in the state addressed) unless the state addressed objects.[160]

C. Circuit Splittism[161]

The principal case espousing the view that mail service is not allowed is the Eighth Circuit's opinion in *Bankston v. Toyota*.[162] That

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156 Hammond v. Honda Motor Co., 128 F.R.D. 638, 641 (D.S.C. 1989). *Cf.* SUTHERLAND, *supra* note 144, § 260, at 341–42; Air France v. Saks, 470 U.S. 392, 397 (1984) (O'Connor, J.) (treaty analysis begins with text and context).

157 Black, *supra* note 144, § 60, at 165.

158 *In re* Harnischfeger Indus., Inc. (Beloit Liquidating Trust v. Beloit Walmsley, Ltd.), 288 B.R. 79, 86 (Bankr. D. Del. 2003).

159 Craig R. Armstrong, Note, *Permitting Service of Process by Mail on Japanese Defendants*, 13 LOY. L.A. INT'L & COMP. L.J. 551, 589 (1991).

160 NANDA & PANSIUS, *supra* note 148, at § 2:6.

161 *See* William Safire, *Superdel*, N.Y. TIMES, Apr. 27, 2008 (Magazine), at 16 (examining word "splittism").

162 889 F.2d 172.

decision relied on the different words used and cited two Supreme Court decisions on statutory construction to reach its decision but it did not examine any extrinsic sources nor even consider the treaty as a whole.[163] *Bankston* has been erroneously relied on by many courts.

However, most courts accept that mail service is allowed.[164] If one shepardizes the case on Westlaw, twenty-one cases are flagged as disagreeing with or declining to follow it, and eighteen are listed as treating it positively.[165] Doing the same on Lexis produces twenty-three cases following it, twenty-two disagreeing, one questioning, and another criticizing.[166] This is in line with a 1991 survey of the subject

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163 *Id.* at 174.

164 *Hammond*, 128 F.R.D. at 641.

165 Flagged as "disagreeing with": Brockmeyer v. May, 361 F.3d 1222, 1226 (9th Cir. 2004), *opinion withdrawn and replaced by* 383 F.3d 798 (9th Cir. 2004); Koss Corp. v. Pilot Air Freight Corp., 242 F.R.D. 514, 516–17 (E.D. Wis. 2007); *Randolph*, 50 F. Supp.2d at 578; Eli Lilly & Co. v. Roussel Corp., 23 F. Supp.2d 460, 471 (D.N.J. 1998); Trump Taj Mahal Assocs. v. Hotel Servs., Inc., 183 F.R.D. 173, 177–79 (D.N.J. 1998); *R. Griggs Grp.*, 920 F. Supp. at 1104 ("If 10(a) were intended only to preserve the right to use postal channels for nonservice correspondence, it would be out of place in Article 10, in Chapter 1, and indeed in the Convention itself."); Patty v. Toyota Motor Corp., 777 F. Supp. 956, 959 (N.D. Ga. 1991) ("This Court does register its specific disapproval of the analysis given this question by the Eighth Circuit in *Bankston*."); *Harnischfeger*, 288 B.R. at 85–86.

Flagged as "declined to follow": Orms v. Takeda Pharmaceuticals Am., Inc., No. C.A. 10-160, 2010 WL 2757760, at *2, 2010 U.S. Dist. LEXIS 70298 (E.D. Ky. July 12, 2010); Sec. & Exchange Comm'n v. Int'l Fiduciary Corp., S.A., No. C.A. 1:06cv1354, 2007 WL 7212109, at *4 (E.D. Va. Mar. 29, 2007); Conax Florida Corp. v. Astrium, Ltd., 499 F. Supp.2d 1287, 1293 (M.D. Fla. 2007); Europacific Asset Mgmt. Corp. v. Tradescape Corp., 233 F.R.D. 344, 348 (S.D.N.Y. 2005); Lafarge Corp. v. The M.V. Macedonia Hellas, No. Civ A 99-2648, 2000 WL 687708 at *11, 2000 U.S. Dist. LEXIS 22437 (E.D. La. May 24, 2000) ("The court finds that to allow the distinction between 'send' and 'service' to prohibit service of process directly by mail would elevate form over substance."); Schiffer v. Mazda Motor Corp., 192 F.R.D. 335 (N.D. Ga. 2000); *EOI Corp.*, 172 F.R.D. at 140–41; Curcuruto v. Cheshire, 864 F. Supp. 1410, 1412 (S.D. Ga. 1994); *Borschow Hosp.*, 143 F.R.D. at 480–81; Raffa v. Nissan Motor Co., 141 F.R.D. 45, 46 (E.D. Pa. 1991); Denlinger v. Chinadotcom Corp., 2 Cal. Rptr.3d 530, 535 (App. Ct. 2003); Johnson v. Pfizer, Inc., 26 Conn. L. Rptr. 690 (Super. Ct. 2000) (flag is incorrect: "This court . . . concludes that Article 10(a) does not permit service of process to be sent by mail.").

166 This list omits cases listed in the previous note. Flagged as "criticizing": Rae Grp., Inc. v. AIESEC Int'l, No. 08-10364, 2008 WL 4642849, 2008 U.S. Dist. LEXIS 83519 (E.D. Mich. Oct. 20, 2008); Ballard v. Tyco Int'l, Ltd., MDL No. 02-1335 & Civ. No. 04-CV-1336, 2005 WL 1863492, 2005 U.S. Dist. LEXIS 16054 (D.N.H. Aug. 4, 2005); Mitchell v. Theriault, 516 F. Supp. 2d 450, 453 (M.D. Pa. 2007); *Kasahara*, 2006 WL 6312904, 2006 U.S. Dist. LEXIS 74870; Brown v. Bandai Am., Inc., No. 3:01-CV-0442R, 2002 U.S. Dist. LEXIS 8664 (N.D. Tex. May 14, 2002); Zaboli v. Mazda Motor Co., No. 1:98-CV-3210, 1999 U.S. Dist. LEXIS 21756 (N.D. Ga. July 14, 1999); Dominguez v. Pyrgia Shipping Corp., No. 98-529, 1998 WL 204798, 1998 U.S. Dist. LEXIS 5988 (E.D. La. Apr. 24, 1998); Honda Motor Co. v. Santa Clara Cnty. Super. Ct. 12 Cal. Rptr.2d 861,

which found "[a] slight majority of courts that have addressed the issue . . . have held [the Convention] does allow for foreign service of process via direct mail."[167] A recent examination found that fifty-five percent were in favor of mail service, while forty-five percent were against it.[168]

The leading cases permitting service by mail are the Second Circuit's opinion in *Ackermann v. Levine*[169] and the Ninth Circuit's in *Brockmeyer v. May*.[170] In *Ackermann*, the German plaintiff sent the papers to his country's consulate in New York City, which then sent the papers via registered mail to the defendant's Manhattan apartment. The Second Circuit reasoned that since the United States had not filed an objection to service by mail, it was permissible.[171] In *Brockmeyer*, the plaintiff sent the papers to the defendant by mail to an address in England.[172] The Ninth Circuit looked at *Bankston* and rejected it.[173] The Ninth Circuit considered *Ackermann*, the negotiations behind the Convention, the interpretation of other signatories, and the view of the State Department in reaching its decision that international mail service is allowed.[174]

V
A MATTER OF INTERPRETATION

Too often, American courts have "a preference for close examination of individual terms and articles of the [Hague Service and Evidence] conventions, but with a less-than-cosmopolitan view of the conventions' purposes as a whole. In other words, when it comes to private law conventions, the [American judiciary] closely inspects the trees but has a thoroughly myopic view of the forest."[175]

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862 (Ct. App. 1992); Rojas v. Hitachi Koki Co., 26 Mass. L. Rptr. 310 (Super. Ct. 2009). Flagged as "distinguished by": *Northrup King*, 51 F.3d at 1389.

167 Mann, *supra* note 8, at 647 n.8.

168 Samuel R. Feldman, *Not-So-Great Weight: Treaty Deference and the Article 10(a) Controversy*, 51 B.C. L. REV. 797, 817–18 (2010).

169 788 F.2d 830, 838 (2d Cir. 1986).

170 383 F.3d 798 (9th Cir. 2004). The Brockmeyer decision was examined closely in Yvonne A. Tamayo, *Sometimes the Postman Doesn't Ring at All: Serving Process by Mail to a Post Office Box Abroad*, 13 WILLAMETTE J. INT'L L. & DISP. RESOL. 269 (2005).

171 *Ackermann*, 788 F.2d at 839.

172 *Brockmeyer*, 383 F.3d at 800–01.

173 *Id.* at 801–03.

174 *Id.* at 802–03.

175 Patrick J. Borchers, *The Incredible Shrinking Hague Evidence Convention*, 38 TEX. INT'L L.J. 73, 75 (2003).

Bankston has been criticized for its shallowness, one court observing it and its progeny have a "paucity" of analysis.[176]

The Supreme Court instructs treaties "are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and are to be kept in the most scrupulous good faith."[177] When examining any instrument, one must consider "the mischief and defect" that caused its making.[178] Let us also examine the Convention as a whole,[179] for "words are chameleons, [and] reflect the color of their environment."[180] We first look at the purposes of the Convention as expressed in its title and preamble.[181]

A. Imprimis

The title of the Convention is "Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters." While at common law titles were ignored, more modern

176 *EOI Corp.*, 172 F.R.D. at 141. For examples of this minimal analysis and research, see Humble v. Gill, No. 1:08-CV-00166, 2009 WL 151668, 2009 U.S. Dist. LEXIS 4552 (W.D. Ky. Jan. 22, 2009); Nuovo Pignone v. The M/V Storman Asia, 310 F.3d, 374, 384 (5th Cir. 2002) ("we rely on the canons of statutory interpretation rather than the fickle presumption that the drafters' use of the word 'send' was a mere oversight"); Postal v. Princess Cruises, Inc., 163 F.R.D. 497 (N.D. Tex. 1995); Gonnuscio v. Seabrand Shipping, Ltd., 908 F. Supp. 823 (D. Or. 1995); Kim v. Frank Mohn, A/S, 909 F. Supp. 474, 479 (S.D. Tex. 1995) (Kent, J.).

177 Chew Heong v. United States, 112 U.S. 536, 540 (1884) (Harlan, J.) (quoting 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 174 (1826)). *See also* The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 68, 72 (1821) (Story, J.) ("scrupulous good faith" required in treaty interpretation and a court "is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise"); 1 FOREIGN RELATIONS RESTATEMENT, *supra* note 47, § 321, at 190 (treaties must be performed in "good faith").

178 *See* Heydon's Case, 3 Co. Rep. 7a, 7b, 76 Eng. Rep. 637, 638 (K.B. 1584).

179 *Cf.* Bywater v. Brandling, 7 B. & C. 643, 660, 108 Eng. Rep. 863, 870 (K.B. 1828) (Lord Tenterden, C.J.) ("In construing [laws] we are to look not only at the language of the preamble . . . but at the language of the whole [law]. And if . . . we can collect, from the large and more extensive expressions used in other parts, the real intention of the legislature, it is our duty to give effect to the larger expressions, notwithstanding the phrases of less extensive import in the preamble, or in any particular clause."); Joined Cases 7/54 & 9/54, Groupement des Industries Sidérurgiques Luxembougeoises v. High Authority of the European Coal & Steel Cmty., 1954–56 E.C.R. 175, 195, 23 I.L.R. 597, 600 (1956) (interpreting treaty by looking at it as a whole).

180 Comm'r v. Nat'l Carbide Co., 167 F.2d 304, 306 (2d Cir. 1948) (Learned Hand, J.).

181 *Contra* Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter), Advisory Opinion, 1962 I.C.J. 151, 268 (July 20) (Koretsky, J., dissenting) (looking to purposes rather than strict adherence to the text is to follow the policy that "the ends justify the means").

practice is to consider them in cases of ambiguity.[182] If the Convention was intended to address the dispatch of documents other than service, then that fact ought to have been reflected in the title, perhaps by using "transmission" instead of "service." The former is used elsewhere in the Convention.[183]

The preamble states the Convention's purpose is "to ensure that judicial . . . documents to be served abroad shall be brought to the notice of' the addressee in sufficient time." Treaty interpretation includes looking at the preamble.[184] Coke said preambles were "a good means to find out the meaning of the statute and [are] a true key to open the understanding thereof."[185] Put another way, they can be

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182 *E.g.*, Mills v. Wilkins, 6 Mod. 62, 62, 87 Eng. Rep. 822, 822–3 (Q.B. 1704) (Holt, C.J.) ("the title of an Act of Parliament is not part of the law . . . no more than the title of a book is part of the book"); The King v. Williams, 1 W. Bl. 93, 95, 96 Eng. Rep. 51, 53 (K.B. 1758) (Lord Mansfield, C.J.) ("The title is no part of the law."). *Cf.* OHIO REV. CODE ANN. 1.01 (Lexis 2001) (titles not part of Ohio statutes). *But see* Stradling v. Morgan, 1 Plowd. 199, 203, 75 Eng. Rep. 305, 312 (Ex. 1560) (examining the title of a statute to ascertain the scope of the enactment); and Sutton v. Sutton, 22 L.R. Ch. 511, 513 (1882) (Lord Jessel, M.R.) ("the title of the Act is always upon the Roll"). *See also* SUTHERLAND, STATUTES § 210, at 277–78 (common law); 1A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 18:1, at 42 (7th ed. 2009) (modern practice); Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998) (Breyer, J.) (example of modern practice considering titles).

183 *E.g.*, Convention, *supra* note 13, art. 11.

184 1 FOREIGN RELATIONS RESTATEMENT, *supra* note 47, § 325 cmt. d, at 197 ("for the purpose of interpreting an agreement, the context comprises . . . the text, including its preamble"); Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, Art. 31. (entered into force Jan. 27, 1980), *reprinted in* S. EXEC. DOC. L, 92d Cong., 1st sess. (1971) and 8 I.L.M. 679 (1969). (The United States is a signatory to the Vienna Convention but has not ratified it.). *Cf.* Al-Maqaleh v. Gates, 604 F. Supp.2d 205, 225, n.17 (D.D.C. 2009) (body of international agreement should be given precedence over the words of a preamble).

185 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES ON THE LAWS OF ENGLAND, OR A COMMENTARY UPON LITTLETON lib. 2, ch. 4, sec. 104, fol. 79a (First Am. ed. from 19th Eng. ed. Francis Hargave & Charles Butler eds. 1853). *See also* Cook v. United States, 288 U.S. 102, 112 (1933) (Brandeis, J.) (looking at preamble of treaty to aid in its construction); City of Dayton v. State, 892 N.E.2d 506, ¶¶ 74–78 (Ohio Ct. App. 2008) (examining preamble of state constitution to determine the scope of legislature's lawmaking powers); Attorney-General v. Prince Ernest Augustus of Hanover, [1957] A.C. 436, 467 (H.L. 1956) (appeal taken from Eng.) (opinion of Viscount Symonds) ("When there is a preamble, it is generally in its recitals that the mischief to be remedied and the scope of the Act are described. It is therefore clearly permissible to have recourse to it as an aid to construing the enacting provisions."), *aff'g* [1956] Ch. 188 (C.A. 1955) (also looking to preamble); SUTHERLAND, STATUTES § 212, at 279 (use of preambles); 1A SINGER & SINGER, STATUTORY CONSTRUCTION § 20:3, at 122–23 ("purposes stated in the preamble are entitled to weight, although they are not conclusive"). *Cf. Mills*, 6 Mod. at 63 ("the preamble . . . is no part" of a statute). *See also* Anne Winckel, *The Contextual Role of a Preamble in Statutory Interpretation*, 1999 MELB. U. L. REV. 7 (examining preambles from a foreign common-law perspective).

the "key to open the minds of the makers of [an] Act, and the mischiefs which they intended to redress."[186] Again, if the Convention was not meant to address the topic of service, the word would not have been used in the preamble.

But more than the text ought to be considered, for the Supreme Court tells us "treaties are construed more liberally than private agreements, and to ascertain their meaning [courts] may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties."[187] The courts that have disallowed mail service typically eschew the use of secondary sources and rely solely on the text.[188]

Now to the drafting history to discover just what did the striped-trousers brigade think they were doing in drafting the Convention?

B. The View from Foggy Bottom

The views of the State Department should be given special weight in construing treaties.[189] And it is proper to consider the "legislative history" of a treaty's drafting.[190]

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186 Stowel v. Zouch, 1 Plowd. 353, 369, 75 Eng. Rep. 536, 560 (Q.B. 1562/63). *See also* Copeman v. Gallant, 1 P. Wms. 314, 317, 24 Eng. Rep. 404, 405 (Ch. 1716) ("The preamble of the act has been always thought material in the construction of it"); Pattison v. Bankes, 2 Cowp. 540, 543, 98 Eng. Rep. 1230, 1231 (K.B. 1777) (Lord Mansfield, J.) ("the preamble is certainly special and particular . . . [and] strong words in [it] may extend beyond the preamble."). *Cf.* The Sussex Peerage Case, 11 Cl. & Fin. 85, 143, 8 Eng. Rep. 1034, 1057 (H.L. 1844) (Lord Tindal, C.J.) (preamble only to be consulted in cases of ambiguity).

187 Choctaw Nation of Indians v. United States, 318 U.S. 423, 431–32 (1943) (Murphy, J.) (internal citations omitted). *See also* Shanks v. DuPont, 28 U.S. (3 Pet.) 242, 249 (1830) (Story, J.) ("If the treaty admits of two interpretations . . . why should not the most liberal exposition be adopted?"); Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 158 (1931) (Hughes, C.J.) (practical construction should be examined); Factor v. Laubenheimer, 290 U.S. 276, 294 (1933) (Stone, J.) (diplomatic history and construction should be examined); Todok v. Union State Bank of Harvard, 281 U.S. 449, 454 (1930) (Hughes, C.J.) (applying "the fundamental principle that treaties should receive a liberal interpretation to give effect to their apparent purpose").

188 NANDA & PANSIUS, *supra* note 148, § 2:6.

189 *See* Sullivan v. Kidd, 254 U.S. 433, 442 (1921) (Day, J.); Kolovrat v. Oregon, 366 U.S. 187, 194–95 (1961) (Black, J.); Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982) (Burger, C.J.); Bush v. United States (The Yulu), 71 F.2d 635, 636 (5th Cir. 1934); Rickmers Rhederei, A.G. v. United States (The Sophie Rickmers), 45 F.2d 413, 418 (S.D.N.Y. 1930); Castro v. De Uriarte, 16 F. 93, 98 (S.D.N.Y. 1883). *See also* 1 FOREIGN RELATIONS RESTATEMENT, *supra* note 47, § 112 cmt. c, at 59 (deference given because the United States should speak with one voice on foreign matters); *id.* § 326(2) at 202 ("courts in the United States have final authority to interpret an international agreement for purposes of applying it as law in the United States, but will give great weight to an interpretation made by the Executive Branch"). *Cf.* San Lorenzo Title &

The official report of the American negotiating team said "use of the central authority is purely optional . . . Articles 9 to 11 permit wide use of alternative channels for the transmission of the documents *for the purpose of service* except to the extent that a particular State formally objects to a particular method."[191]

Dean Rusk, the American secretary of state at the time the convention was negotiated, signed, and ratified, stated in his official report to President Johnson: "Article 10 permits direct service by mail . . . unless [the receiving] state objects to such service."[192]

Philip W. Amram was one of the American delegates and the vice-chairman of the drafting committee that wrote the service convention; he was the only English-speaking member of that committee.[193] Amram told the Senate Foreign Relations Committee that "unless the requested State objects, direct service by mail" was allowed under Article 10 and "use of the central authority is not obligatory."[194]

Improvement Co. v. Caples, 48 S.W.2d 329, 331 (Tex. Civ. App. 1932) (the executive branch's construction of a treaty is binding upon the government but not private parties).

190 1 FOREIGN RELATIONS RESTATEMENT, *supra* note 47, § 325 Reporters' Note 5, at 325 ("A court or agency of the United States is required to take into account United States materials relating to the formation of an international agreement . . . These may include: (i) Committee reports, debates, and other indications of meaning that the legislative branch has attached to an agreement . . . ; (ii) The history of the negotiations leading to the agreement . . . .").

191 Report of the U.S. Delegation, *supra* note 24, at 269 (emphasis added), *reprinted in* S. EXEC. DOC. C, 90th Cong., 1st Sess., at 20 (1967). The portion of the report dealing with the Convention was written by Philip W. Amram.

192 Letter of Secretary of State Dean Rusk to President Lyndon B. Johnson (n.d.), *reprinted in* S. EXEC. DOC. C, at 5. This document, sent to the Senate on January 31, 1967, contains the message of President Johnson transmitting the Convention and urging its ratification, Rusk's letter, and an excerpt of the report by the United States delegation to the Tenth Session. President Johnson's letter is *reprinted in* 113 CONG. REC. 1976 (1967) and as *Judicial Assistance: Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters*, 61 AM. J. INT'L L. 799 (1967). *Contra* Soupart v. Houei Kogyo Co., 770 F. Supp. 282, 285, n.4 (W.D. Pa. 1991) (declaring that unless a Convention signatory consents to mail service it is forbidden); *Nuovo Pignone*, 310 F.3d at 384 (finding signatories are not obligated to file an objection under Article 10(a) because mail service in some nations is inadequate).

193 Graveson, *supra* note 24, at 539. A federal judge said Amram "enjoyed a distinguished career as an international lawyer, a leading member of the United States delegation to the Hague, and a lifetime professional in the field of civil procedure, serving for many years as Chairman of the Pennsylvania Civil Rules Committee." Joseph F. Weis, Jr., *The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity*, 50 U. PITT. L. REV. 903, 904 (1989).

194 SENATE EXECUTIVE REPORT, *supra* note 47, at 13. Judge Weis found that Amram's statement to the Senate Foreign Relations Committee was rarely cited in decisions on the question of service by mail, "leaving open to question the adequacy of briefing in those cases." Weis, *supra* note 11, at 171. *See also* 1 FOREIGN RELATIONS RESTATEMENT, *supra* note 47, § 314(2), at 186 ("When the Senate gives its advice and consent to a treaty

Amram had written similarly in the *American Bar Association Journal*[195] and the *American Journal of International Law*.[196] The chairman of the American delegation also understood the central authority route was to be optional unless a signatory made objections to other means of service.[197] There is nothing in the legislative history to show a contrary understanding was held by the Senate.

Thirty years ago the State Department advised the judiciary that mail service to only those countries which had objected under the Convention was not allowed.[198]

What about the State Department's more recent interpretations? The Department has a current circular stating unless a nation "has made a specific reservation . . . objecting to service by registered mail . . . [service] may be made by international registered mail."[199] And following *Bankston*, the State Department formally said the Eighth Circuit's ruling was wrong: "the decision . . . is incorrect to the extent that it suggests that the Hague Convention does not permit as a method of service the sending of a copy of the summons and complaint by registered mail to a defendant in a foreign country."[200]

In 2000, the State Department had the Administrative Office of the United States Courts write the clerks of the District Courts to inform them certain Convention signatories had objected to mail service; the implication of its statement being that defendants in countries not on that list could be served by mail.[201] The State Department on its

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on the basis of a particular understanding of its meaning, the President, if he makes the treaty, must do so on the basis of the Senate's understanding").

195 Philip W. Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A. J., 1965, at 653 [hereinafter Amram, *The Proposed International Convention*] ("Article 10 permits direct service by mail . . . unless [the receiving] state objects to such service.").

196 Amram, *supra* note 24, at 90 ("Articles 9 to 11 of the convention permit wide use of alternative channels for the transmission of the documents for the purpose of service").

197 Kearney, *supra* note 24, at 4.

198 Judicial Assistance: Service, *supra* note 115, § 6, at 1447, *reprinting memorandum captioned* "Service of Process in Foreign Countries" from the Administrative Office of the United States Courts to all Clerks of United States District Courts (Nov. 6, 1980).

199 U.S. Dep't of State, Bureau of Consular Affairs, Overseas Citizen Services, Office of Citizen Consular Services, Service of Legal Documents Abroad, *excerpted in* Judicial Assistance: Service, *supra* note 118, § 6, at 1441–45.

200 Letter from Alan J. Kreczco, Legal Adviser, U.S. Dep't of State, to the Administrative Office of the U.S. Courts and the National Center for State Courts (Mar. 14, 1991), *excerpted as* United States Department of State Opinion Regarding the *Bankston* Case and Service by Mail to Japan Under Hague Service Convention, 30 I.L.M. 260, 261 (1991).

201 Letter from Leonidas Ralph Mecham, Director, Administrative Office of the United States Courts, to all Clerks of United States District Courts (Nov. 7, 2000), *excerpted in*

website presently advises litigants that mail service is allowed to Convention members that have not objected.[202]

The State Department's view is widely shared.

C. The Lawyers Weigh In at Home . . .

The Supreme Court compared the draft and final language of the Convention and found a change was made because the conference delegates thought the draft "suggested that the Convention could apply to transmissions abroad that do not culminate in service. The final text of Article 1 eliminates this possibility and thus it applies only to documents transmitted for *service* abroad."[203]

The Federal Rules of Civil Procedure, while specifically noting the existence of the Convention, allow mail service abroad.[204] The 1993 amendment to those rules continues to permit service by mail abroad, even to Convention members.[205]

Consular and Judicial Assistance and Related Issues: Judicial Assistance, 2003 DIGEST ch. 2, at 150–52, available in full at http://www.laed.uscourts.gov/process_abroad.pdf. The Convention members noted in the memo as having objected were China, Czech Republic, Egypt, Germany, Greece, Republic of Korea, Latvia, Luxembourg, Norway, Poland, Slovakia, Switzerland, Turkey, and Venezuela. The memo also noted that Kuwait and the Russian Federation, which both subsequently became Convention members, also objected to mail service.

202 *E.g.*, U.S. Dep't of State, Service of Legal Documents Abroad, http://travel.state.gov/law/judicial/judicial_680.html (advising litigants that only certain countries object to service by mail and naming them); U.S. Dep't of State, Judicial Assistance United Kingdom, http://travel.state.gov/law/judicial/judicial_671.html ("service by international registered mail is permitted"); U.S. Dep't of State, Judicial Assistance Spain, http://travel.state.gov/law/judicial/judicial_684.html ("service can be effected by international registered mail (return receipt requested) or any of the overnight or rapid delivery services which provide a returned receipt as proof of service").

203 *Schlunk*, 486 U.S. at 701. *See also* Brief for the United States as Amicus Curiae Supporting Respondent at 38, Volkswagenwerk, A.G. v. Schlunk, 486 U.S. 694 (1988) (No. 86-1052), 1988 WL 1031822, 1986 U.S. S. Ct. Briefs LEXIS 1669 ("Given that service refers to the formal delivery of documents, then service abroad clearly refers to the formal delivery of documents in the territory of another member nation.").

204 FED. R. CIV. P. 4(f).

205 For commentary on the changes, see Gary B. Born & Andrew N. Vollmer, *The Effect of the Revised Federal Rules of Civil Procedure on Personal Jurisdiction, Service, and Discovery in International Cases*, 150 F.R.D. 221, 235–41 (1993) and Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57 LAW & CONTEMP. PROBS. 103, 114–25 (1994). For a comment by drafters of the revision, see J. Dickson Phillips & Paul D. Carrington, *Reflections on the Interface of Treaties and Rules of Procedure: Time for Federal "Long-Arm" Legislation*, 57 LAW & CONTEMP. PROBS. 153 (1994) (Phillips was a senior circuit judge who served on the Advisory Committee on the Civil Rules and Carrington was a law professor who served as the Committee's reporter).

The practice note in the *United States Code Annotated* tells attorneys

> [t]he Convention is not . . . automatically preemptive of all methods that may be used for service abroad. As long as the nation concerned has not, in its ratification or in any other part of its law, imposed any limits on particular methods, or made an unequivocal statement that only specifically listed methods may be used, other methods, like those set forth in [Fed. R. Civ. P. 4, which includes mail] may be resorted to.[206]

The Committee on International Law of the Association of the Bar of the City of New York read the Convention as allowing mail service—but conceded it might be a good idea to serve through the central authority, just to be safe.[207] A drafting note to the Alaska Rules of Civil Procedure observes service to Hague signatories by mail is allowed except when the receiving nation has objected.[208] This language also appears in the rules of several jurisdictions adopting the federal rules.[209] And the New York State Bar Association's "nuts and bolts guide" to service abroad gives the practical steps on how to serve by mail defendants in Hague Convention countries.[210]

Foreign lawyers and diplomats share this understanding.

D. . . . and Abroad

The "post-ratification understanding of the contracting parties" is relevant.[211] Attention should be paid to the decisions of foreign courts.[212] How do foreign nations treat the Convention?

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206 David D. Siegel, Practice Commentary, in 28 U.S.C.A. following FED. R. CIV. P. 4 at 174 (2008).

207 Association of the Bar of the City of New York, Committee on International Law, *The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters*, 22 REC. ASS'N B. CITY OF N.Y. 280, 286 (1967).

208 Alaska Sup. Ct. Order 1750 (May 25, 2005), *available at* http://courts.alaska.gov/sco/sco1570leg.pdf.

209 *E.g.*, D.C. SUPER. CT. R. CIV. P. 4(f); GUAM R. CIV. P. 4(f); N. MAR. I. R. CIV. P. 4(f) (service abroad may be effected by a treaty such as the Convention including sending mail requiring a signature unless forbidden by the receiving nation). *Cf.* KY. R. CIV. P. 4.04(8) (allowing service by mail on those outside state); ME. R. CIV. P. 4(j)(1) (allowing service by mail abroad but making no mention of Convention).

210 New York State Bar Association, Service of Process Abroad, 122 F.R.D. at 83–84.

211 Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996) (Scalia, J.). *See also* 1 FOREIGN RELATIONS RESTATEMENT, *supra* note 47, § 325(2), at 196 ("subsequent practice between the parties in the application of the agreement are to be taken into account in its interpretation").

212 Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815) (Marshall, C.J.); 1 FOREIGN RELATIONS RESTATEMENT, *supra* note 47, § 112 cmt. b, at 59.

The Ninth Circuit found it was the "essentially unanimous view of other member countries of the Hague Convention" that mail service was allowed, citing cases from the highest court of the European Union, the European Court of Justice, as well as Greek and Canadian tribunals.[213] The European Court of Justice said "Article 10(a) of [the Hague Convention] allows service by post."[214]

The European Union has a regulation on international service of process, similar to the Hague Convention, which specifically allows service by registered mail; many Convention signatories are bound by this regulation.[215] If mail service abroad between European countries is unobjectionable, why would it be problematic when done under the Hague Convention regime?

In the United Kingdom, the High Court in England has permitted mail service from that nation to defendants in the United States and Japan.[216] North of the Tweed, Scotland's court rules make specific note of the Hague Convention central authority but explicitly permit service by mail to Hague signatories.[217] Germany has officially objected to service from abroad being sent by mail, but its laws provide for service abroad by mail of lawsuits filed in its domestic courts.[218] When Czechoslovakia ratified in 1982, it stated "documents may not be *served* . . . through postal channels."[219]

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213 *Brockmeyer*, 383 F.3d at 802 (citing Case C-412/97, E.D., S.r.l. v. Italo Fenocchio, 1999 E.C.R. I-3845, [2000] C.M.L.R. 855); Integral Energy & Envtl. Eng'g, Ltd. v. Schenker of Can., Ltd., 295 A.R. 233 (Alta. Q.B. 2001), *rev'd on other grounds*, 293 A.R. 327 (Alta. Ct. App. 2001); R. v. *In re* Recognition of an Italian Judgment, [2002] I.L.Pr. 15, 2000 WL 33541696 (Thessaloniki App. Ct. 2000). While the Ninth Circuit quotes the Greek case as saying "[i]t should be noted that the possibility of serving judicial documents in civil and commercial cases through postal channels . . . is envisaged in Article 10(a) of the Hague Convention . . . ," the text at the Westlaw number cited by the Ninth Circuit does not have that language.

214 *Italo Fenocchio*, 1999 E.C.R. I-3845, ¶ 6.

215 Regulation (EC) No. 1393/2007 of the European Parliament and of the Council on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Service of Documents), Nov. 13, 2007, 2007 O.J. (L 324) 79, Article 14. *See also* Meijknecht, *supra* note 9, at 453.

216 Crystal Decisions (U.K.), Ltd. v. Vedatech Corp., [2004] EWHC (Ch) 1872, 2004 WL 1959749, ¶ 21; Noirhomme v. Walklate, [1992] 1 Lloyd's Rep. 427 (Q.B. 1991).

217 SUMMARY CAUSE RULES 2002, R. 5.7(3) (Scot.).

218 Hans-Eric Rasmussen-Bonne, *The Pendulum Swings Back: The Cooperative Approach of German Courts to International Service of Process*, 241–42, in RESOLVING INTERNATIONAL CONFLICTS: LIBER AMICORUM TIBOR VÁRADY (Peter Hay et al. eds., 2009). *Contra* Brief for the Federal Republic of Germany as Amicus Curiae Supporting Petitioner at 17, Volkswagenwerk, A.G. v. Schlunk, 486 U.S. 694 (1988) (No. 86-1052), 1987 WL 881149, 1986 U.S. S. Ct. Briefs LEXIS 1073 ("German citizens are required by German law to use the Convention").

219 1279 U.N.T.S. 313, *reprinted at* MARTINDALE-HUBBELL IC-6 (emphasis supplied).

Pakistan's declarations said "it has no objection to such service by postal channels directly to the persons concerned."[220] The civil rules in the Bahamas, while recognizing the Convention's central authority mechanism, do not require litigants to use it. They make no allowance for mail but permit service through other methods.[221] The same is true for Belize.[222] An Israeli law professor observes mail service under the Hague Convention is good in her nation's courts unless the receiving state has objected.[223]

Canada, a Hague signatory, allows service to parties abroad by mail; only Saskatchewan appears to require use of the central authority when serving papers to a Hague signatory.[224] Its official declaration on joining the Convention stated "Canada does not object to service by postal channels" and "Canadian law allows the use of postal channels to serve Canadian documents to persons abroad."[225] And a Canadian court found "Article 10(a) of the Hague Convention provides that if the state of destination does not object, judicial documents may be served by postal channels."[226]

And when the Dutch central authority was asked to serve a company located within that nation's territory on behalf of an American plaintiff, the authority perfected service by domestic mail.[227]

The Hague Conference reports that "it seems that only courts in the United States have had difficulties with the interpretation of this

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220 1541 U.N.T.S. 431, *reprinted at* MARTINDALE-HUBBELL IC-10.

221 RULES OF THE SUP. CT., ORDER 11, R. 6(3) (Bah.).

222 SUPREME COURT (CIVIL PROCEDURE) RULES 2005, R. 7.9(3) (Belize).

223 TALIA EINHORN, PRIVATE INTERNATIONAL LAW IN ISRAEL 314 (2009).

224 RULES FOR REGULATING THE PRACTICE AND PROCEDURE IN THE FEDERAL COURT OF APPEAL AND THE FEDERAL COURT, SOR/98-106 (Can.), R. 137(2); TAX COURT OF CANADA RULES (GENERAL PROCEDURE), SOR/90-688a (Can.), R. 42(5); SUPREME COURT RULES, ALTA. RULES OF COURT, Alta. Reg. 390/68, R. 31.1; SUPREME COURT RULES, B.C. Reg. 221/90, R. 13(12); COURT OF QUEEN'S BENCH RULES, Man. Reg. 553/88, R. 17.05(1); RULES OF THE SUPREME COURT, 1986, S.N.L. 1986, c. 42, Sch. D (Nfld.), R. 6.08(2); RULES OF THE SUPREME COURT OF THE NORTHWEST TERRITORIES, N.W.T. Reg. 010-96, R. 50(2); NUN. SUP. CT. R. 50(2); ONT. RULES OF CIVIL PROCEDURE, R.R.O. 1990, Reg. 194, R. 17.05(3); P.E.I. RULES OF CIVIL PROCEDURE 17.05(3); *id.* R. 16.03(4); CODE OF CIVIL PROCEDURE, R.S.Q. ch. 25-1, § 140 (Que.); YUKON SUP. CT. R. 13(12); *id.* R. 12(7); SASK. Q.B. R. 29.

225 1529 U.N.T.S. 299, *reprinted at* MARTINDALE-HUBBELL IC-4.

226 *Integral Energy*, 295 A.R. 233 (citing Wilson v. Servier Canada, Inc., 53 O.R.3d 219, ¶ 44 (Ont. Super. Ct. 2000)).

227 *Fokker Aircraft*, 713 F. Supp. at 395.

Article."[228] It is error to insist on reading a treaty to produce a result never contemplated by the contracting parties.[229]

E. An Expert Opinion

Bruno A. Ristau was head of the State Department's Foreign Litigation Unit, the original American central authority.[230] When responsibility for the Convention was transferred to served the Justice Department's Office of Foreign Litigation, Ristau became its director. He was the American delegate to the 1977 Special Commission on the Convention.[231] Ristau is widely recognized as an expert on international law issues.[232]

Ristau has written that the language of Article 10(a) regarding the use of "postal channels" was "intended to include service of process."[233] Others concur. "It is clear that . . . every participant in the debates concerning Article 10(a) . . . understood the provision as referring to . . . the use of postal channels for the purpose of service."[234] Another analysis said "[p]erhaps the most compelling

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228 PRACTICAL HANDBOOK *supra* note 13, at ¶ 217 (citing *Noirhomme*, [1992] 1 Lloyd's Rep. 427; *Italo Fenocchio*, 1999 E.C.R. I-3845; *Integral Energy*, 295 A.R. 233; and *Recognition of an Italian Judgment*, [2002] I.L.Pr. 15). The *Handbook* cited only these four decisions because "space does not allow us to refer to the numerous decisions of other States expressly supporting the view that Art. 10(a) allows for service of process." *Id.* at n.275.

229 *See* Maltass v. Maltass, 1 Rob. Eccl. 67, 75-6, 163 Eng. Rep. 967, 970 (Prerog. Ct. Canterbury 1844) (Lushington, Dean of the Arches), *previous proceeding reported as* 3 Curt. 231, 163 Eng. Rep. 712 (Prerog. Ct. Canterbury 1842).

230 Earl Weisbaum, *The Hague Service Convention and C.C.P. Section 413.10*, 47 L.A. BAR. BULL. 390, 390 n.5 (1972).

231 Ristau's report on the 1977 meeting is REPORT OF THE UNITED STATES DELEGATION, 17 I.L.M. 312.

232 *E.g.*, Ristau served as the assistant to Judge Herbert J. Stern while presiding over the United States Court for Berlin in *Tiede*, 86 F.R.D. 227. Ristau is highly praised by the judge in his account of the proceedings, HERBERT J. STERN, JUDGMENT IN BERLIN (1984), where Ristau appears *passim*. In the 1988 film of Judge Stern's book—which has the same name—Stern is played by Martin Sheen and Ristau by veteran character actor Harris Yulin. 40 JOHN WILLIS, SCREEN WORLD 125 (1989). *See also* TARA ARIANO & ADAM STERNBERGH, HEY! IT'S THAT GUY! 103 (2005) ("Yulin's characters are quintessentially weary of this world, worn out by its ugliness and many disappointments.").

233 1 RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, *supra* note 13, § 4-3-5 (citing 3 CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ [HAGUE CONFERENCE ON INTERNATIONAL PRIVATE LAW], ACTES ET DOCUMENTS DE LA DIXIÈME SESSION (NOTIFICATION) [ACTS AND DOCUMENTS OF THE TENTH SESSION (SERVICE)] 373 (1965)).

234 William Temple Jorden, *Beyond Jingoism: Service by Mail to Japan and the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters*, 16 LAW IN JAPAN: AN ANNUAL 69 (1983). Jorden was responding to two articles that said mail service is forbidden, both by Yasuhiro Fujita: *Service of*

evidence in support of the theory that Article 10(a) authorizes service by mail is the fact that those who actually participated in the original Convention . . . believe that to be the case."[235]

Ristau quoted the official report on the draft convention, which indicated the language of Article 10 was worded broadly.[236] It is so broad, he writes, that it "permits service by telegram if the State where service is to be made does not object."[237]

Ristau's explanation for the use of both "serve" and "send" was this: "The draftsmen of the Convention intended the language 'to send judicial documents, by postal channels' to include the service of process. The use of different terms in the several paragraphs of Article 10 may well be attributed to careless drafting."[238] The Second Circuit has endorsed this view.[239] So has a judge of the Third Circuit, who suggested that the unclear language of Article 10 is because it tracks the language of an earlier Hague Conference treaty on civil procedure drafted in 1954.[240]

American Process Upon Japanese Nationals by Registered Airmail and Enforceability of Resulting American Judgments in Japan, 12 LAW IN JAPAN: AN ANNUAL 69 (1979), and *Nihn no hikoku ni taisuru Amerika sojō no chokusets o yūsū to sono kōroyoku* [*Service by Direct Mail of American Complaints Against Japanese Defendants and Their Validity*], 354 HANREI TAIMUZU 685 (1978).

235 Mann, *supra* note 8, at 660. *See* SENATE EXECUTIVE REPORT, *supra* note 47, at 13 (statement of American member of the drafting committee saying mail service was allowed); Amram, *supra* note 24, at 90; Amram, *supra* note 195, at 653; Kearney, *supra* note 24, at 4 (the chairman of American delegation agreeing).

236 1 RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, *supra* note 13, at 373. Courts have sometimes relied on the working papers and negotiations of treaty drafters—often referred to by the French phrases *travaux préparatoires* and *procès-verbal*—to analyze treaties, e.g., *Air France*, 470 U.S. at 400; *Franklin Mint*, 466 U.S. at 266 (Stevens, J., dissenting); Fothergill v. Monarch Airlines, Ltd., [1981] A.C. 251, 278 (H.L. 1980) (appeal taken from Eng.) (opinion of Lord Wilberforce). *See also* 1 FOREIGN RELATIONS RESTATEMENT, *supra* note 47, § 325 cmt. e, at 197 (discussing use of *travaux*).

237 1 RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, *supra* note 13, at 373. *See also* PRACTICAL HANDBOOK, *supra* note 13, at ¶ 197.

238 2 RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, *supra* note 13, at 373. Ristau's analysis is criticized in Cooper, *supra* note 10, at 706–08.

239 *Ackermann*, 788 F.2d at 839. *Ackermann* is examined closely in Denise M. Leydon, *International Service of Process Under the Hague Convention*, 11 SUFFOLK TRANSNAT'L L.J. 159 (1987).

240 Weis, *supra* note 11, at 170–71 (citing Hague Convention on Civil Procedure, *opened for signature* Mar. 1, 1954, 286 U.N.T.S. 265, Art. 6). The full text of the 1954 Convention is reprinted in 2 RISTAU, *supra* note 13, app. L and on the Hague Conference website at http://www.hcch.net/upload /conventions/txt02en.pdf. The 1954 convention was written for the civil law countries of Europe, rather than the common-law nations, and it was not accepted by the latter. Droz & Dyer, The Hague Conference, *supra* note 15, at 162.

F. Cut and Paste

"One must be a wise reader to quote wisely and well."[241] The trial court judge in *Bankston* found "it inconceivable that the drafters of the Convention would use the word 'send' in Article 10(a) to mean service of process, when they so carefully used the word 'service' in other sections of the treaty."[242] But he did not understand the lineage of Article 10. In English it reads: "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." The French text of this language, which is equally authentic,[243] reads: "*La présente Convention ne fait pas obstacle, sauf si l'Etat de destination déclare s'y opposer: (a) à la faculté d'adresser directment, par la voie de la poste, des actes judiciaires aux personnes se trouvant l'entranger*."[244]

The French text of the 1965 convention was copied from three earlier Hague Conference conventions, all of which were understood to allow service upon defendants abroad by mail. The 1954 Hague Convention on Civil Procedure states: "*Les dispositions des articles qui précèdent ne s'opposent pas: 1. à la faculté d'adresser directement, par la voie de la poste, des actes aux intéressés se trouvant à l'étranger*."[245] Its predecessor, adopted in 1905, used the same words.[246] That treaty in turn copied the language verbatim from the 1896 Civil Procedure Convention.[247] An English translation of

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241 A. BRONSON ALCOTT, *Quotation*, in TABLE-TALK bk. 1, ch. 1, at 8 (1877).

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

243 Signature clause of the Convention.

244 1 RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, *supra* note 13, citing 3 CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ [HAGUE CONFERENCE ON INTERNATIONAL PRIVATE LAW], ACTES ET DOCUMENTS DE LA DIXIÈME SESSION (NOTIFICATION) [ACTS AND DOCUMENTS OF THE TENTH SESSION (SERVICE)] 373 (1965)).

245 1954 Civil Procedure Convention, Art. 6.

246 Convention on Civil Procedure, July 17, 1905, 50 L.N.T.S. 180, 199 Consol. T.S. 1, 2 Martens Nouveau Recueil (ser. 3) 243, 99 BRIT. & FOR. ST. PAP. 990, Art. 6. The 1905 Convention was adhered to by Austria-Hungary (and later both Austria and Hungary), Belgium, Czechoslovakia, the Free City of Danzig, Denmark, Estonia, Finland, France, Germany, Italy, Latvia, Luxembourg, the Netherlands, Norway, Poland, Portugal, Rumania, Russia, Spain, Sweden, Switzerland, and Yugoslavia. *Judicial Assistance: Introductory Comment*, 33 AM. J. INT'L L. SUPP. 26, 27–28 (1939); Gordon A. Christenson, *International Judicial Assistance and Utah Practice*, 7 UTAH L. REV. 478, 478 n.4 (1961). The full text of the 1905 Convention appears in the original French in 33 AM. J. INT'L L. SUPP. app. VI at 148–52.

247 Convention on Civil Procedure, *opened for signature* Nov. 14, 1896, 183 Consol. T.S. 470, 23 Martens Nouveau Receuil (ser. 2) 398, 88 BRIT. & FOR. ST. PAP. 555, Art. 6 (the language of Art. 6 of 1905 convention verbatim). Technical changes were made to it

the 1896 Convention published in 1901 translates this language without using "service."[248] The translation uses "delivery" and "send," even when it clearly is describing what we would call "service of process."[249]

The language in the 1896 and 1905 Conventions translates to "[t]he previous articles do not limit: First, the ability to directly send, by way of mail, notices to interested parties found abroad."[250] The American cases denying mail service as valid essentially are arguing that the Hague Conference was repudiating its previous attitude toward the mail.

G. An Unclean Break

It would be odd if the Hague Conference after seven decades of having no issue with service by mail—and only a decade after the previous convention on this same subject—reversed itself. Coke said legislative language should be read with an eye to the evil the law was meant to remedy.[251] With that in mind, it would be even odder that, having made a complete reversal of its previous position, the Conference would seek to remedy the ill of its prior conventions in such an ambiguous and muddled way as is supposed by the *Bankston* line of cases. One would expect it in drafting that repudiation to make a clear break from the past practice in unmistakable language.[252] Especially since the Convention states it supersedes the service portions of the 1905 and 1954 conventions.[253]

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by a protocol of May 22, 1897, 25 Martens Nouveau Receuil (ser. 2) 226. The parties to the treaty were Austria-Hungary, Belgium, France, Germany, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden-Norway, and Switzerland. The Convention is discussed in C.D. Asser, *The Convention of The Hague of 14th November 1896, Especially In Connection With the Execution of Foreign Judgments*, in INT'L LAW ASS'N, REPORT OF THE TWENTIETH CONFERENCE HELD AT GLASGOW, AUGUST 20TH–23RD, 1901, at 299 (1901). Excerpts from the 1896 Convention, translated into English, appear in *id.* at 307–09. Excerpts in the original French appear, interlineated with the corresponding articles from the 1905 convention, in 33 AM. J. INT'L L. SUPP. app. VI at 148–52.

248 Asser, *supra* note 247, at 306.

249 *See id.* at 305–06, translating Articles 1–3 of the 1896 Convention.

250 Translation by the Author.

251 *Heydon's Case*, 3 Co. Rep. at 7b.

252 *Cf. Chappell*, 900 N.E.2d 238, ¶¶ 46–48. *See also* SUTHERLAND, STATUTORY CONSTRUCTION § 290, at 374 (statutes in derogation of the common law to be strictly construed).

253 Convention, *supra* note 13, art. 22.

But in the language actually used, there is no "'clearly expressed legislative intention'" to change the *status quo ante*.[254] Which is what one would expect to see if *Bankston* is correct as diplomats are supposed to be learned men who draft treaties with care and precision.[255]

H. Play It Again, Sam

The title of the official record of proceedings for the Tenth Session of the Hague Conference says the meeting dealt with the subject of "notification," which is not only the French term for "service" but, in English, its purpose.[256]

What appears to have happened was the drafters took the language from the three Hague Civil Procedure Conventions and used it for the Service Convention. All three of those were in French. At the Tenth Session the Hague Conference used the English language officially for the first time.[257] So a translation had to be made. The previous conventions use the French verb *adresser*, a cognate of the English verb *address* in its sense of sending a communication.[258]

> [While] [t]he terms of the agreement are presumed to have the same meaning in each authentic text . . . when a comparison of the authentic texts discloses a difference of meaning . . . the meaning that best reconciles the texts, having regard to the object and purpose of the international agreement, is to be adopted.[259]

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254 *See Bankston*, 889 F.2d at 174 (quoting *Consumer Prods. Safety Comm'n*, 447 U.S. at 108).

255 *See* Rocca v. Thompson, 223 U.S. 317, 331–32 (1912) (Day, J.) ("treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties"); The Neck, 138 F. 144, 147 (W.D. Wash. 1905) ("treaties are usually, if not invariably, prepared with great care by men of learning and experience, accustomed to select words apt to express precisely and fully the intention of the contracting parties").

256 PRACTICAL HANDBOOK, *supra* note 13, at xxv ("the French version of this handbook uses the term 'notification' for 'service'"). Professor Graveson, the leader of the British delegation to the Tenth Session, wrote about the terminology: "Where the French title speaks of signification and notification the English title merely refers to service. Yet while no difference exists in English between signification and notification, the distinction is familiar in Scots law, the former representing service by an officer of the court while notification indicates the giving of notice of proceedings by other persons." Graveson, *supra* note 24, at 538–39. Ristau also notes this distinction. 1 RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, *supra* note 13, § 4-1-4(2), at 150–51.

257 Nadelmann & Reese, *supra* note 24, at 614.

258 MARGUERITE-MARIE DUBOIS, MODERN FRENCH DICTIONARY 14 (Larousse 1969).

259 1 FOREIGN RELATIONS RESTATEMENT, *supra* note 47, § 325 cmt. f, at 198.

The "send" versus "service" question arises from the use of a literal translation of the French words into English. "Legal and technical terms do not bear exactly the same connotation in different systems, even where the root word is identical. A literal rendering may mislead and a free translation cannot be precise."[260] The only English-speaking member of the drafting committee was Philip W. Amram.[261] "Service of process" has in English a technical meaning.[262] And there are two technical words for "service of process" in French, *notification* and *signification*.[263] Neither was used here or in the prior conventions. However, Amram, in his efforts to see the Convention ratified, repeatedly said the language used allowed service by mail.[264]

One explanation for his choice of English words is that he was not familiar with technical legal terms in the French language. But since the language used in the French version of the Convention precisely duplicated what had been used in three previous Hague conventions dating back seventy years, much more likely is that Amram and the drafting committee did what lawyers have done since laws were composed in cuneiform: they copied what had been done before. "The draftsman pressed for time naturally turns to any resource that will hasten his progress and perhaps even improve the result."[265] Everyone recognizes "lawyers are notorious copycats."[266] (If they were not there would be no need for the seas of judicial decisions, reported and otherwise, that lawyers study.)[267] As the Preacher said, there is nothing new under the sun.[268]

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260 *Chartered Bank of India*, [1956] Sing. L. Rep. 32 in 23 I.L.R. 687, 698.

261 Graveson, *supra* note 24, at 539.

262 *Schlunk*, 486 U.S. at 700.

263 Graveson, *supra* note 24, at 588–89; 1 RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, *supra* note 13, § 4-1-4(2), at 150–51.

264 SENATE EXECUTIVE REPORT, *supra* note 47, at 13; Amram, *Report on the Tenth Session*, *supra* note 24, at 90; Amram, *The Proposed International Convention*, *supra* note 195, at 653.

265 F. REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING § 4.12, at 69–70 (2d ed. 1986). *See also* RICHARD H. WEISBERG, WHEN LAWYERS WRITE § 14.3, at 194 (1987) (section "Boilerplate as a Hazard" states: "When time seems to run out, lawyers run to boilerplate").

266 Sidney G. Saltz, *Drafting Made Easy*, 15 PROB. & PROP., May–June 2001, at 32, 36.

267 For the vast quantities of decisions available, see generally SUSAN W. BRENNER, PRECEDENT INFLATION (1992).

268 *Ecclesiastes* 1:9.

This is the most logical explanation given lawyers' ageless embrace of an "if it ain't broke"[269] drafting philosophy that produces endless recycling[270] of time-tested[271] (or, at least, "time-

269 Or as Viscount Falkland put it more artfully, "When it is not necessary to change, it is necessary not to change." *See* J.A.R. Marriott, THE LIFE AND TIMES OF LUCIUS CARY, VISCOUNT FALKLAND 200 (1907) (reprinting speech thought to have been given in 1641 during the Long Parliament). It is an old thought that change is inherently suspect. Mrs. Piozzi reported: "[I]t is a maxim here [at Venice], handed down from generation to generation, that change breeds more mischief from its novelty, than advantage from its utility." HESTER LYNCH PIOZZI, OBSERVATIONS AND REFLECTIONS MADE IN THE COURSE OF A JOURNEY THROUGH FRANCE, ITALY, AND GERMANY 140 (1789). "The common saying is, the change is seldom made for the better." 2 GEORGE PETTIE, *Pygmalion's Friend, and His Image*, in A PETITE PALLACE OF PETTIE HIS PLEASURE 108, 132 (1576) (reprinted 1908, I. Gollancz ed.).

270 *E.g.*, Joseph Kimble, *How to Write an Impeachment Order*, 78 MICH. B.J. 1304 (1999) (predicting that the next time an American president is impeached, sometime in the 22d century, Congress's lawyers will look back to that of President Clinton for guidance as to form and offering suggestions to those future copyists); Thomas J. Steuber, *Due Diligence in Drafting: Copyrights in Legal Documents*, 18 CONN. LAW., May–June 2008, at 30 (entire article predicated on lawyers' endless pilfering of others' work); Jessica Y.K. Young, *Drafting in Unfamiliar Territories*, 9 NEWCASTLE L. REV. 45, 51–53 (2006) (discussing Hong Kong law students' natural inclination to simply copy from previous documents); Ezra Dodd Church, *Technological Conservatism: How Information Technology Prevents the Law from Changing*, 83 TEX. L. REV. 561, 594 n.248 (2004) (stating it is commonplace in law schools for moot court teams to find the real briefs of the parties in the case they are arguing and recycle those arguments); Saltz, *supra* note 266, at 34 ("In preparing to draft, where do we start?" and answering the question with several hundred words on the use of forms); David Mellinkoff, *Why I Wrote The Language of the Law*, 79 MICH. B.J. 28, 28 (2000) (stating that when he was hired for his first job as a lawyer in 1939 he was told to recycle documents from the files); Michael C. Loulakis, *Drafting a Design-Build Contract: Does It Require More Than Cut and Paste?*, 20 CONSTR. LAW., Jan. 2000, at 33 (article's title shows presumption of recycling); SUSAN L. BRODY, JANE RUTHERFORD, LAUREL A. VIETZEN & JOHN C. DERNBACH, LEGAL DRAFTING 18 (1994) (advising drafters of the pitfalls of recycling); Brian Baillie, *Legal Drafting—A Plea for Original Thinking*, 22 HONG KONG L.J. 327 (1992) (discussing lawyers' mindless copying and citing Hong Kong cases where this harmed the client's suit); Justin Sweet, *The Lawyer's Role in Contract Drafting*, 43 J. ST. B. OF CAL. 362, 372–73 (1968) (discussing use of lawyers' office form file); Carroll D. French, *An Electronic Forms File New Assistance for Legal Drafting*, 50 A.B.A. J., 41 (1964), (stating that in corporate legal work it is inadvisable to start afresh and discussing how firms recycle documents such as securities registrations); F. Reed Dickerson, *Some Jurisprudential Implications of Electronic Data Processing*, 18 LAW & CONTEMP. PROB. 53, 61 (1963) ("Should lawyers refrain from using legal boilerplate? They cannot operate efficiently without it. Indeed, they cannot operate even inefficiently without it"). *See also* F. Reed Dickerson, *Electronic Aids to the Drafting of Legal Instruments*, 1 RUTGERS J. COMPUTERS & L. 75, 75 (1970) (noting the law school at which the author taught had no legal drafting class; thus new lawyers had little ability to do anything but copy).

271 *E.g.*, DAVID MELLINKOFF, THE LANGUAGE OF THE LAW § 126, at 375 (1963) ("Yet the lawyer's traditional respect for the preserved word encourages him to believe that words uttered in court—as in some ancient temple—are sacrosanct. Blessed with the ritual phrase *stare decisis* . . . they become 'precise.' It is on the strength that what is sanctioned by precedent is precise"). *See also* WILLIAM SHAKESPEARE, MERCHANT OF

unchallenged") language,[272] even when it is so redundant and archaic it echoes the fourteenth century.[273]

"The drafting lawyer thinks big and fast. He wants to cover it all, and the quickest way to do it is in the manner it has most often been done before, in the manner he is most familiar with. Include!"[274] The "lawyer has no time to question the precision of this language he has learned to live with," and tells himself, "change is suspect. Meet the

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VENICE Act 4, sc. 1, l. 218–19 (". . .there is no power in Venice/Can alter a decree established./'Twill be recorded for a precedent,/And many an error by the same example/Will rush into the state"); LEMUEL GULLIVER [JONATHAN SWIFT], TRAVELS INTO SEVERAL REMOTE NATIONS OF THE WORLD [GULLIVER'S TRAVELS] pt. 4, ch. 5 at 288 (4th ed. 1742) ("It is a maxim among these lawyers, that whatever has been done before may legally be done again . . . ."); 7 AMBROSE BIERCE, THE COLLECTED WORKS OF AMBROSE BIERCE: THE DEVIL'S DICTIONARY 262 (1911) ("PRECEDENT, n. In Law, a previous decision rule or practice which . . . has whatever force and authority a Judge may choose to give it, thereby greatly simplifying his task of doing as he pleases").

272 *E.g.*, ADAM FREEMAN, THE PARTY OF THE FIRST PART: THE CURIOUS WORLD OF LEGALESE 30 (2007) ("[F]ormbooks were smash hits with the legal profession. As a result, all of the linguistic oddities [of lawyers] became set in stone, carefully preserved, and passed on from one generation to the next"); MELLINKOFF, *supra* note 270, § 112, at 275–82 (section titled "The spread of formula," detailing lawyers' formbooks with their boundless collections of rubbish included because someone somewhere had used that particular form of rubbish and thereby sanctified it); Charles A. Beardsley, *Beware of, Eschew and Avoid Pompous Prolixity and Platitudinous Epistles!*, 16 ST. B. J. ST. B. OF CAL. Mar. 1941, at 65, 66 ("An adjudicated form is a form that has attached to it a certificate that there is something terribly wrong with it. If there was not something terribly wrong with it, it never would have been adjudicated. And we publish these form books to the end that the worse mistakes in legal draftsmanship may be preserved and perpetuated"); BARBARA CHILD, DRAFTING LEGAL DOCUMENTS: PRINCIPLES AND PRACTICES 14 (2d ed. 1992) ("An attorney should not routinely rely on [formbooks] with confidence," the injunction implying it is both routine and sometimes acceptable). *See also* BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 711 (2d ed. 1995) ("If there is a malady endemic in legal writing, it is the practice . . . of mechanically repeating previously received ideas," defining "psittacism," a term derived from the Greek for "parrot.").

273 *E.g.*, MELLINKOFF, *supra* note 270, § 70 at 120–22 (explaining origins of redundantly repetitious doublets and triplets such as "goods and chattels" and "right, title, and interest"); *id.* § 122, at 345–49 (discussing valid uses of the repeated words in modern writing); *id.* § 123, at 349–62 (section "worthless doubling" referring to phrases such as "fit and proper," "give, devise, and bequeath," and "rest, residue, and remainder"); *id.* § 124, at 363–64 ("The pattern of two-words-for-one"). *See also* Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936) ("There are two things wrong with almost all legal writing. One is its style. The other is its content"); Kohlbrand v. Ranieri, 823 N.E.2d 76 ¶¶ 13–17 (Ohio Ct. App. 2005) (Painter, J.) ("The Norman Conquest was in 1066. We can safely eliminate the couplets now"); Oliver Wendell Holmes, *Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV").

274 MELLINKOFF, *supra* note 270, § 124, at 363–64.

deadline. My law dictionary is somewhere in the library."[275] Justifiable, given the "tyrannical attitude of some judges" when presented with anything they have not seen before.[276]

And that attitude is to blame for this dispute. It is a mistake for American courts to apply the canons of construction to derive a false technical meaning from a word translated literally and not legally from the French. The drafters took the language from the prior conventions and rendered the terms with a translation that they understood to allow service of mail. Only this and nothing more.

The clearest indication that this whole controversy is a misunderstanding on the part of American lawyers is to look to the Hague Conference itself, which has repeatedly said service by mail is allowed under the Article 10 from almost the day the treaty was finished.[277]

I. The Official Story

The Hague Conference believes mail service is allowed. The report on the draft convention observed that mail service was to be allowed provided no objection was filed. As long as the forum state allowed service by mail, it was irrelevant whether the receiving state also used service by mail.[278] The secretary of the Conference wrote in 1966 that the central authority mechanism was "non-mandatory."[279] The top two officials of the Hague Conference wrote thirty years ago that use of the central authority was not required and the Convention allowed service by other means—"for the most part this refers . . . to service by mail"—and specifically called service by mail "permissible."[280] The official report of the 1977 Special Commission on the Convention observed, "[t]he States which object to the

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275 David Mellinkoff, *The Myth of Precision and the Law Dictionary*, 31 UCLA L. REV. 423, 425 (1983).

276 Sweet, *supra* note 259, at 377.

277 *Cf. In re* Int'l Bank for Reconstruction & Dev. v. All Am. Cables & Radio, Inc., 17 F.C.C. 450, 460 (1953) (an example of an international body having binding interpretive authority for a treaty).

278 1 RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, supra note 13, § 4-3-5(2), at 205 (quoting SERVICE CONVENTION NEGOTIATING DOCUMENT at 373). *Contra* Casio Computer Co. v. Sayo, No. 98. Civ. 3772, 1999 U.S. Dist. LEXIS 14675, at *90 (S.D.N.Y. Sept. 20, 1999) (quashing mail service to Japan even though that nation had not filed a formal objection to mail service because Court erroneously believed Japan does not use mail to serve suits domestically).

279 M.L. Saunders, *The Hague Conference on Private International Law*, 1966 AUSTL. Y.B. INT'L L. 115, 124.

280 Droz & Dyer, The Hague Conference, *supra* note 15, at 163, 164.

utilisation of service by post sent from abroad are known thanks to the declarations made to the [Dutch] Ministry of Foreign Affairs" and most of the members "made no objection" to direct mail service.[281] The 1989 Special Commission meeting noted

> the postal channel for service constitutes a method which is quite separate from service via the Central Authorities or between judicial officers. Article 10(a) 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.[282]

The official guide to the Convention summed up the 1989 commission this way: after "a lively debate the experts dismissed the restrictive construction of Article 10(a) in *Bankston*."[283]

In 1992, the first secretary of the Hague Conference wrote an American law professor:

> The view that Article 10(a) does not allow service of process by mail is, so far as we know at the Permanent Bureau, entirely contrary to the historical interpretation of the 1965 Convention as well as the similar language . . . in its predecessors, the 1954 Convention on Civil Procedure and the 1905 Convention on Civil Procedure. The idea that the Convention permits service of process by mail, not merely sending of documents, was implicit in the conclusions of the Special Commission which met in November 1977 to consider the operation of this Convention, as well as of the

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281 HAGUE CONFERENCE ON INTERNATIONAL PRIVATE LAW, REPORT ON THE WORK OF THE SPECIAL COMMISSION ON THE OPERATION OF THE CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS (21–25 NOVEMBER 1977), *reprinted in* 17 I.L.M. 319, 329 (1978) (declarations filed), *available at* http://hcch.e-vision.nl/upload/scrpt14_77e.pdf; *id.* at 326 (few objections). For a case finding the declarations a government filed with the Dutch Foreign Ministry trumped whatever statements that government might say domestically, see Griffin v. Mark Travel Corp., 724 N.W.2d 900, ¶ 15 (Wis. Ct. App. 2006) (considering differing translations of the Mexican government's declarations and holding the one submitted to the Dutch Foreign Ministry in French and Spanish trumped the one published in Spanish in the Mexican government's official gazette).

282 HAGUE CONFERENCE ON INTERNATIONAL PRIVATE LAW, REPORT OF THE WORK OF THE SPECIAL COMMISSION OF APRIL 1989 ON THE OPERATION OF THE HAGUE CONVENTIONS OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS AND OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS, at ¶ 16 (Aug. 1989), *reprinted in* 28 I.L.M. 1558, 1561, *available at* http://www.hcch.net/upload/scrpt1989.pdf (1989); 2 RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, *supra* note 13, app. 4.

283 PRACTICAL HANDBOOK, *supra* note 13, at ¶ 216. *See also* Lewis, *supra* note 1, 13 at 300 (commenting on the 1989 commission report that "this interpretation effectively ends the dispute" on send versus service).

> Special Commission of April 1989, which met to consider the operation of both Conventions. Service of process by mail under the Convention has also been upheld by courts in Belgium and we at the Permanent Bureau are not aware of any case, except in the United States, where a court has held that the Convention does not allow service of process by mail abroad.[284]

The 2003 special commission "reaffirmed its clear understanding that the term 'send' in Article 10(a) is to be understood to as meaning 'service' through postal channels."[285]

Most recently, the report of the commission held in February 2009 spoke of the way members could object to mail service.[286] An American process server who observed those proceedings wrote, "[m]any of the countries present indicated a willingness to allow service by mail . . . A main point regarding mail service was that it did need to be generally considered a valid method of service under the provisions of the forum court rules."[287]

The Conference's *Practical Handbook*, the official manual to the Convention, states:

> Service by mail under Article 10(a) is effective if (i) service by mail is allowed by the law of the State of origin and all the conditions imposed by that law for service by mail have been met, and (ii) the State of destination has not objected to the use of Article 10(a).[288]

The *Handbook* goes on:

> [N]either the letter nor the history of the Hague Conventions can be used to support the approach used in *Bankston*. Moreover,

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284 Letter from Adair Dyer, First Secretary of the Hague Conference on Private International Law, to Robert B. von Mehren (June 19, 1992), quoted in von Mehren, *supra* note 7, at 17–18.

285 HAGUE CONFERENCE, 2003 COMMISSION, ¶ 55.

286 HAGUE CONFERENCE ON INTERNATIONAL PRIVATE LAW, CONCLUSIONS AND RECOMMENDATIONS ADOPTED BY THE SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE HAGUE APOSTILLE, SERVICE, TAKING OF EVIDENCE, AND ACCESS TO JUSTICE CONVENTIONS (2 TO 12 FEBRUARY 2009), ¶ 28, *available at* http://www.hcch.net/upload/wop/jac_concl_e.pdf.

287 Celeste Ingalls, *International Process Service: Progressing Toward Convenience or Just Lip Service*, THE DOCKET SHEET: THE OFFICIAL NEWSMAGAZINE OF THE NATIONAL ASSOCIATION OF PROFESSIONAL PROCESS SERVERS, Jan.–Feb. 2009, at 20, 21, *available at* http://www.napps.org/docket/09_jan_feb/International-Service.pdf. Ingalls cautions, "HOWEVER, it is very important to point out that although 'ALLOWED', it must also be noted that such service would not always be accepted as valid for the purpose of later enforcing a judgment in that country, *especially in default situations*." *Id.* (emphasis in original).

288 PRACTICAL HANDBOOK, *supra* note 13, at ¶ 201.

> teleologically,[289] there is not much point to the *Bankston* approach, since it leads to the conclusion that the Convention does not apply to the service of the most important instrument in any proceeding, the writ of summons, but that it does apply to the transmission of instruments of secondary importance, such as procedural documents.[290]

The *Handbook* puts it bluntly:

> [The Conference] rejects *Bankston* . . . and advocates the reasoning underlying [the Second Circuit's ruling in] *Ackermann* [*v. Levine*[291]] and clearly expressed [by the Ninth Circuit] in *Brockmeyer* [*v. May*[292]]: Service by mail under Article 10(a) is possible and effective under two cumulative conditions: (i) the State of destination must not have objected to this method; and (ii) the conditions set for the lex fori for valid service by mail must be met.[293]

J. Send It to the Dead Letter Office

The *Bankston* court fails to cite any authority on how treaties should be interpreted. It does not consider the document as a whole. Nor does it address proper rules for interpreting treaties, the history from the drafting of the Convention, the legislative history of the ratification, the opinions of the State Department, the views of other parties to the treaty, or the documents of the Hague Conference.[294] *Bankston* looks at one element in isolation and, while gazing at a single tree by a misguided use of one of the canons of statutory construction, thereby misses the forest of evidence that service of process by mail is allowed.

It is the duty of the judicial department to say what the law is.[295] And that duty extends to ascertaining just what treaties mean.[296]

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289 Teleology is "the belief or theory that certain phenomena or acts are to be explained in terms of purpose or intention." 2 SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 3199 (Angus Stevenson ed. 6th ed. 2006). *See also* C.H. Schreuer, *The Interpretation of Treaties by Domestic Courts*, 45 BRIT. Y.B. INT'L L. 255, 279–83 (1971) (section titled "The 'Object and Purpose' Doctrine (Teleological Approach)").

290 PRACTICAL HANDBOOK, *supra* note 13, at ¶ 222.

291 788 F.2d 830.

292 383 F.3d 798.

293 PRACTICAL HANDBOOK, *supra* note 13, at ¶ 223.

294 *Compare Bankston's* meager analysis, 889 F.2d 172, *with* two excellent opinions on the send/serve controversy that survey all these things: Quinn v. Keinicke, 700 A.2d 147 (Del. Super. Ct. 1996) *and* The Knit With v. Knitting Fever, Inc., No. 08-4221 & 08-4775, 2010 WL 2788203, 2010 U.S. Dist. LEXIS 70412, at *16–24 (E.D. Pa. July 13, 2010).

295 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (Marshall, C.J.).

Justice Blackmun observed, "relatively few judges are experienced in the area" of transnational litigation.[297] Thus the divergent views on the Hague Convention are understandable. But as "[e]very authoritative analysis of the Convention . . . explicitly recognizes the establishment of mail service by [A]rticle 10(a),"[298] the only sensible approach is to find mail service is permissible under the Hague Convention. Because of the circuit split among the Second, Fifth, Eighth, Ninth, and Eleventh Circuits, and the divergent views of state courts on this issue, the Supreme Court should grant certiorari to resolve the question. *Bankston* and those cases relying upon it ought to be overruled.[299]

VI
CASE STUDY: *ENQUIP V. TYCON*

An Ohio state trial court recently confronted the "send" versus "serve" issue and whether service on an American agent obviated service abroad. The court was the Greene County Court of Common Pleas in Xenia. The case was *Enquip Technologies Group, Inc. v. Tycon Technoglass, S.r.l.*[300] It concerned a maker of glass-lined equipment. In glass, said Dr. Johnson, is "concealed so many

296 *See* The Frances Louise (United States v. 3,500 Cases of Alcohol), 1 F.2d 1004, 1006 (D.C. Cir. 1924); United States v. Domestic Fuel Corp., 71 F.2d 424, 430 (C.C.P.A. 1934).

297 *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 553 (Blackmun, J., concurring in part and dissenting in part). *Cf.* Burbank, *The Reluctant Partner*, *supra* note 205, at 145 (making similar observation as to the judges and other lawyers who serve on the committees revising rules of procedure).

298 Magnarini, *supra* note 139, at 677.

299 *Bankston*, 889 F.2d 172.

300 Greene Cty. Ct. Com. Pl. No. 2008-CV-1276, originally filed as Montgomery Cty. Ct. Com. Pl. No. 2008-CV-5992 (Montgomery County court granted motion to transfer on grounds of improper venue). Five appeals to the Second District Court of Appeals have been taken: Enquip Techs. Grp., Inc. v. Tycon Technoglass, S.r.l., Greene App. Nos. 2009-CA-42 & 2009-CA-47, 2010-Ohio-28, 2010 WL 53151, 2010 Ohio App. LEXIS 21 (Ohio Ct. App. 2010) (affirming dismissal of one third-party defendant; reversing dismissal of third-party defendants Thaletec, GmbH., and Karl Bergmann; and affirming an order compelling discovery), *juris. denied* 927 N.E.2d 11 (Ohio 2010); Enquip Techs. Grp., Inc. v. Robbins & Myers, Inc., Greene Appeal No. 2009-CA-44 (dismissed by the Second District on Aug. 21, 2009); Enquip Techs. Grp., Inc. v. Tycon Technoglass, S.r.l., Greene App. No. 2010-CA-23, 2010-Ohio-6100, 2010 WL 5123395, 2010 Ohio App. LEXIS 5126 (Ohio Ct. App. 2d Dist. Dec. 10, 2010) (affirming dismissal of third-party defendants Thaletec, GmbH., and Karl Bergmann). Previously the case was filed as Naidel v. Wallace, No. 2007-CA-010950-NC (Sarasota Cty., Fla., Cir. Ct.), removed as No. 8:07-cv-01827 (M.D. Fla.), and voluntarily dismissed by the plaintiffs. Another proceeding between the parties was R&M Italia, S.p.A. v. Enquip Techs. Grp., Inc., No. D2007-1477 (World Intellectual Prop. Org. Arbitration and Mediation Ctr. Dec. 7, 2007), *available at* http://www.wipo.int/amc/en/domains/decisions/html/2007/d2007-1477.html.

conveniences of life . . . [and] a great part of the happiness of the world."[301]

"Some cases tax the anxious diligence of a court, not by their difficulty, but [by] their simplicity."[302] This was not one of them. The pleadings displayed a "Herculean strength of forensic ability,"[303] whose sources "from the four corners of the earth they c[a]me."[304] The international and foreign law materials cited to the court nearly fill a single-spaced page in ten-point type.[305]

The case arose from the breakdown in the business relationship between an Italian manufacturer and its North American sales representatives, who sold the manufacturer's products to customers in the chemical and pharmaceutical businesses.[306] The manufacturer, Tycon Technoglass, S.r.l., is in the business of making glass-lined chemical reactors and equipment used by chemical and pharmaceutical makers.

Robert W. and Jeffery L. Naidel—Robert is Jeffrey's father—and their company Enquip, incorporated in Florida, were the sales representatives for Tycon and its corporate predecessors. After several years working with Enquip, the manufacturer terminated the representation. Tycon claimed Enquip had improperly entered into arrangements with one of Tycon's competitors, failed to abide by their terms of their contract, and, in Tycon's words, engaged in acts "incompatible with effective business cooperation."

Enquip then sued for breach of contract, failure to pay money owed, tortious interference, and fraud. The defendants were Tycon; its immediate parent, Robbins & Myers Italia, S.r.l.; its ultimate parent, Robbins & Myers, Inc., based in Greene County; and a sister company owned by the ultimate parent, Pfaudler, Inc., which makes the same equipment as Tycon.[307] Thanks to its subsidiaries Tycon

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301 SAMUEL JOHNSON, The Rambler, No. 9, Apr. 17, 1750, in 1 SAMUEL JOHNSON, THE WORKS OF SAMUEL JOHNSON, LL.D. 26 (3d Complete Am. ed. 1846).

302 Wells v. City of Savannah, 13 S.E. 442, 442 (Ga. 1891).

303 Livingston v. Jefferson, 15 F. Cas. 660, 661 (C.C.D. Va. 1811) (No. 8,411).

304 WILLIAM SHAKESPEARE, MERCHANT OF VENICE act II, sc. 2, l. 208.

305 The full list appears at Enquip Techs. Grp. v. Tycon Technoglass, S.r.l., No. 2008-CV-1276, 2010 WL 3720978 ¶ 1 n.1 (Greene Cty. Ct. Com. Pl. Mar. 23, 2010) (order appointing an expert on Italian law).

306 Rather than add scores more footnotes to this Article, the Author notes that information on Enquip v. Tycon throughout Part VI is taken from the Court's revised opinion on the Hague Convention, not reported, but available at 2009 WL 2588197 (Aug. 24, 2009) (Wolaver, J.).

307 This is the corporate family tree: Robbins & Myers, Inc., an Ohio corporation, owns Robbins & Myers Holdings, Inc., a Delaware corporation, which in turn owns Pfaudler,

and Pfaudler, Robbins & Myers claims to "have the number one worldwide market position . . . for quality glass-lined reactors and storage vessels."[308]

The defendants filed counterclaims against Enquip and the Naidels. Tycon and Pfaudler impleaded new defendants, a German company, Thaletec, GmbH.,[309] and a principal of it, Karl Bergmann. They claimed Thaletec and Bergmann conspired with Enquip and the Naidels to steal their business.[310]

A. Grazie, Santo Gabriel

Upon filing, the Clerk of Courts was instructed to serve Tycon by certified mail to Ron Stella, who Tycon identified on its website as its "technical sales representative" and apparently became the American contact point for Tycon after its relationship with Enquip ended. Stella was an employee of Pfaudler at its headquarters in Rochester, New York. Tycon and Italia were to be served by registered mail at Tycon's office in San Donà di Piave, Italy, a town seventeen miles northwest of *la Serenissima*, the city wedded to the sea.

A green domestic return receipt—Postal Service Form 3811—showed the complaint was delivered to Stella. Two pink international return receipts—Postal Service Form 2865—showed the Italian postal service delivered the complaint to Tycon and Italia eight days after it

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which is incorporated in Delaware. Holdings also owns Robbins & Myers, N.V., which is organized in the Dutch Antilles. That company owns Romaco International, B.V., a Dutch corporation. Romaco owns Robbins & Myers Italia, headquartered in Bologna, Italy. Italia owns 99 percent of Tycon, headquartered in San Donà di Piave, Italy. Romaco also owns Pfaudler Werke, GmbH.

308 ROBBINS & MYERS, INC., ANNUAL REPORT TO THE U.S. SECURITIES AND EXCHANGE COMMISSION ON FORM 10-K FOR THE YEAR ENDED AUG. 31, 2009, at 5 (Oct. 26, 2009), *available at* http://investorrelations.robn.com.

309 The experts at Merriam-Webster say the city's name should be pronounced "'tä-lə." MERRIAM-WEBSTER'S GEOGRAPHICAL DICTIONARY 1177 (Daniel J. Hopkins ed., 3d ed. 1997). Even though the Author is not 'Enry 'Iggins, he believes the company name should be pronounced TAHH-lee-tek.

310 A German member of the corporate family has lodged similar accusations against Thaletec in the German courts. *See* Pfaudler Werke, GmbH. v. Thaletec, GmbH., Landgericht Mannheim [Mannheim District Court] No. 7 O 51/09 (main case, filed Mar. 9, 2009, which is stayed as of Oct. 2, 2009, because of ongoing criminal investigation by German authorities); Pfaudler Werke, GmbH. v. Thaletec, GmbH., Landgerich Mannheim No. 7 O 137/09 (request for an injunction, filed July 3, 2009, which was denied on Aug. 14, 2009); Pfaudler Werke, GmbH. v. Thaletec, GmbH., Oberlandesgericht Karlsruhe [Higher Regional Court Karlsruhe], No. 6 U 142/09 (appeal of denial of injunction in Mannheim No. 7 O 137/09, which was affirmed Dec. 23, 2009); Pfaudler Werke, GmbH. v. Thaletec, GmbH., Oberlandesgericht Karlsruhe No. 6 W 83/09 (appeal of stay granted in Mannheim No. 7 O 51/09).

was dispatched by the Clerk. Counsel for Tycon and Italia timely appeared to answer the complaint.

Enquip then filed an amended complaint. Enquip instructed the Clerk to formally serve it. The Clerk sent it via certified mail to Tycon and Robbins & Myers in care of Peter C. Wallace at his office. Wallace was the chief executive of Robbins & Myers. Both mailings were returned by the post office marked "refused." Enquip then asked for service to be repeated by ordinary first-class mail.[311] That was successful.

Enquip also asked for the sheriff to serve the papers on Wallace to be absolutely sure they were received. But the sheriff was turned away because nobody in the office would come out to accept the papers. The defendants denied the service was refused—they claimed Wallace was not in the office the day the sheriff appeared, but the sheriff's return says service was refused.

Finally, Enquip had the Clerk send two more certified mailings to Robbins & Myers's statutory agent, CSC Lawyers Incorporating Service, addressed to "Robbins & Myers, Inc., as Agent for Its Subsidiary" with each being named. These mailings were successfully delivered.

In their answers, all the defendants asserted the boilerplate defense of insufficient service of process. The Court then ordered the defendants to either assert their service defenses by an appropriate motion or else waive them. Because two of the defendants were based overseas, the court specifically asked the parties to address how the Hague Service Convention affected the case.

Robbins & Myers and Pfaudler chose to waive their defenses on service. Tycon and Italia both insisted registered mail service is forbidden under the Hague Convention and they should have been served through the Italian central authority. They pointed to two Ohio Court of Appeals decisions from the district Greene County is situated in, the Second District. Both, based on *Bankston*, held service by mail is not allowed.[312] Italia objected it was served at Tycon's address, claiming its registered office was in Bologna not San Donà di Piave. Tycon further objected Stella is not one of its officers or managers, so serving him also was defective.[313]

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311 *See* OHIO R. CIV. P. 4.6(c).

312 Meek v. Nova Steel Processing, Inc., 706 N.E.2d 374 (Ohio Ct. App. 1997); *Okubo*, 2002-Ohio-2624.

313 *Compare* OHIO R. CIV. P. 4.2(f) (service on the corporation effected "by serving the agent authorized by appointment or by law to receive service of process; or by serving the

The Second District's decision in *Meek v. Nova Steel Processing* cites nothing but *Bankston* as authority. It noted, but rejected, the contrary view expressed in *Ackermann*.[314] The Second District revisited the issue in *Okubo v. Shimizu*. That case looked back on the Second District's earlier reliance on *Bankston* and rejected a federal case supporting mail service presented by the plaintiff.[315]

Other Ohio courts have made similarly shallow examinations of the subject. The First Appellate District in ruling mail service is forbidden cited only to one of the Second District decisions and a Northern District of Ohio decision.[316] (The federal decision it cited did not in fact reject mail service in general but only mail service to Germany, correctly observing that nation had filed an objection to service by mail.)[317] And the Ninth Appellate District looked at the "send" versus "service" issue only through other cases and no primary materials.[318]

The Greene County Common Pleas Court rejected these decisions based on an examination of the text of the Convention as a whole, the views of the State Department, the legislative history, foreign constructions of the treaty, and the Hague Conference's own statements. (One should take "every thing from which aid can be derived.")[319] It held that because Article 10 allows what is not expressly prohibited, mail service is allowed if no objection was filed.

The Court then turned to the specific example of Italy. That nation is a party to the Convention.[320] Italy could have objected to service by mail; however, it has not done so.[321] The State Department advises litigants "International service of process by registered mail is

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corporation by certified or express mail at any of its usual places of business; or by serving an officer or a managing or general agent of the corporation") *with* Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 408 (1855) (Curtis, J.) (valid service may be made on corporation's agent even if agent not expressly designated for receipt of process).

314 *Meek*, 706 N.E.2d at 376–77.

315 *Okubo*, 2002-Ohio-2624, at ¶ 13, discussing *Schiffer,* 192 F.R.D. 335. The *Okubo* court called Schiffer "masterful" before completely rejecting it.

316 Collins v. Collins, 844 N.E.2d 910, ¶ 8 (Ohio Ct. App. 2006) (citing *Okubo*, 2002-Ohio-2624); *Lyman Steel*, 747 F. Supp. 389.

317 *Lyman Steel*, 747 F. Supp. at 400.

318 In re D.C., Summit App. No. 23484, 2007-Ohio-2344, 2007 WL 1427471, 2007 Ohio App. LEXIS 2205 ¶¶ 22–28 (Ohio Ct. App. 2007).

319 United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall, C.J.).

320 2 RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, *supra* note 13, at A-56. For cooperation on service before the Convention, see Riccardo Gori-Montanelli & David A. Botwick, *International Judicial Assistance—Italy*, 9 INT'L LAW. 717, 718–21 (1975).

321 MARTINDALE-HUBBELL at IC-8.

allowed in Italy."[322] Courts have found that as no objection was made, mail service to Italy is therefore allowed.[323]

As for Italia, the court found that Tycon, a subsidiary of Italia, was its agent. Tycon signed for the letter instead of refusing it.[324] The court also felt Italia's actual receipt of notice further proved the agency relationship.[325]

B. Service Domestically Was Valid

The plaintiff alleged the defendants were the alter egos of each other. Since the defendants failed to supply evidence to contradict the plausible and legally sustainable allegations in the complaint, the court assumed them to be true.[326] The court assumed that all the defendants were operated as each other's alter egos; their separate corporate existences were ignored.[327] Therefore, service on one was service on them all. This conclusion was supported by the fact that all the companies had actual notice of this lawsuit, as evidenced by their timely answers to it.

As for Tycon, there was an additional basis for holding service on it was proper. Tycon's website lists Ron Stella as the company's American agent. The Clerk served Stella with the complaint. There is a certified mail receipt showing he received it. As Tycon held out to the world that Stella is its agent, service on him was proper. "It is

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322 U.S. Dep't of State, Italy Judicial Assistance, http://travel.state.gov/law/info/judicial/judicial_653.html.

323 *E.g.*, *Eli Lilly*, 23 F. Supp. 2d at 474; *R. Griggs Grp.*, 920 F. Supp. at 1107–08; Robins v. Max Mara U.S.A., Inc., 923 F. Supp. 460, 469 (S.D.N.Y. 1996); G.A. Modefine, S.A. v. Burlington Coat Factory Warehouse Corp., 164 F.R.D. 24, 25 (S.D.N.Y. 1995). *Contra* Hantover, Inc. v. Omet, S.N.C. of Volentieri & C., 688 F. Supp. 1377, 1385 (W.D. Mo. 1988); *Nuovo Pignone*, 310 F.3d at 384; Camphor Techs., Inc. v. Biofer, S.p.A., 916 A.2d 142, 147 (Conn. Super. Ct. 2007).

324 *See In re* D.C., 2007-Ohio-3744, at ¶ 29 (documents addressed to party signed for at foreign address presumed to have been received by the party).

325 *See* Case 8/56, Acciaierie Laminatoi Magliano Alpi, S.p.A. v. High Auth. of the European Coal & Steel Cmty., 1957–1958 E.C.R. 95, 99 (1957) (registered mail service upon company at an address other than of its registered office was valid because company acknowledged receiving it).

326 *See* Byrd v. Faber, 565 N.E.2d 584, 589 (Ohio 1991) ("all the factual allegations . . . must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party") (citing Mitchell v. Lawson Milk Co., 532 N.E.2d 753, 756 (Ohio 1988)).

327 *Cf.* Mirrow v. Club Med, Inc., 118 F.R.D. 418 (E.D. Pa. 1986) (foreign parent exercised control over its subsidiary in the British Virgin Islands, to which the Convention applies, thus serving subsidiary served parent). *See also Canterbury Belts*, 869 F.2d at 40 (subsidiaries' activities attributed to the parent for determining personal jurisdiction).

no different," wrote the court, from cases "where ticket and telegraph agents were served process for their companies."[328]

By effectively serving Robbins & Myers, Pfaudler, and Ron Stella, the court found service was also perfected on the affiliated companies Tycon and Robbins & Myers Italia within the United States. As service was made domestically there was no need to send documents abroad. Thus the Hague Convention was inapplicable.

C. The German Defendants

As for the defendants impleaded into the case, the court quashed service against them. Thaletec and Bergmann were sent papers by mail per the instructions of Tycon and Pfaudler. (The Court noted the incongruity of Tycon objecting to service of defendants abroad by using the same registered mail service it claimed was invalid as to the process served upon it.) The Clerk mailed registered letters to their German addresses. The German post office returned the mailing to Bergmann as undeliverable because the addressee was not known at the address used. (The Court subsequently was told he resided in Switzerland and had never lived at the German address initially used.) There was no effective service on Bergmann. But a return receipt showed the mailing to Thaletec was successful.

Germany ratified the Hague Convention in 1979[329] but has objected to service by mail.[330] Many courts have accepted that no mail service to Germany is effective and have quashed such attempts at service.[331] The Greene County Court did likewise. Unlike Tycon and Italia, no service had been perfected on Thaletec or its agents within the United States. Mailings to Enquip and the Naidels, which attempted to serve them as agents for the third-party defendants, were refused by them.

Ultimately, summonses and complaints were translated into German by Tycon and Pfaudler, then dispatched abroad by the Clerk of Courts. Within a few weeks Thaletec and Bergmann were both served through the appropriate central authorities in Germany and

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328 *Enquip*, 2009 WL 2588197, at ¶ 67.

329 *Porsche*, 177 Cal. Rptr. at 158. *See also* 2 RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, *supra* note 13, at A-49.

330 MARTINDALE-HUBBELL at IC-7.

331 *E.g.*, *Collins*, 844 N.E.2d 910, ¶ 9; Ward v. Ludwig, 778 N.E.2d 650 (Ohio Ct. App. 2002); *Lyman*, 747 F. Supp. at 400; *Porsche*, 177 Cal. Rptr. 158; Brown v. Bellaplast Maschinenbau, 104 F.R.D. 585 (E.D. Pa. 1985); Harris v. Browning-Ferris Indus. Chem. Servs., Inc., 100 F.R.D. 775 (M.D. La. 1984); *Kassir*, 153 F.R.D. 580; Rhodes v. J.P. Sauer & Sohn, Inc., 98 F. Supp.2d 746 (W.D. La. 2000); *Delta Constructors*, 259 F.R.D. 245.

Switzerland and the certificates were returned by the foreign officials to the Clerk of Courts. Thus service was perfected on both.

VII
SIGNED, SEALED, DELIVERED, YOU'RE SERVED

Of course, just because service may be valid in the United States without recourse to the Convention's central authorities, a prudent attorney would be advised to use a "belt-and-suspenders" approach to service and effect it through international mail, a domestic agent, *and* the foreign central authority.[332] (And send everything certified or registered mail with return receipts.) In drafting contracts, an attorney should insert a clause requiring the foreign party appoint an American agent for receipt of process or expressly consenting to service upon the Secretary of State.[333] One must be careful to serve the documents in compliance with the rules of the forum, which have tripped up many litigants.[334] "The only universal principle guiding this choice [of service methods] is to exercise caution."[335]

And even where a foreign nation does not require translation,[336] it would be advisable to translate the documents to avoid any due process arguments at home or abroad.[337] One way the translation

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332 *See* Rathke, *supra* note 110, at 49; Hawkins, *supra* note 9, at 231–23; Peterson, *supra* note 114, at 575 (1985) ("The Central Authority mechanism is both the centerpiece of the Convention and probably the best way to insure adequate notice"); Reisenfeld, *supra* note 47, at 60–61 (advising counsel to use redundant methods of service); Kenneth B. Reisenfeld, *"The Usual Suspects": Six Common Defense Strategies* in Cross-Border Litigation ch. 9, at 77 in INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE (Barton Legum ed. 2005); Henry J. Moravec, *Service of Process Abroad—Is There Anything Left After* Volkswagenwerk, A.G. v. Schlunk*?*, 12 LOY. L.A. INT'L & COMP. L.J. 317, 339 (1989) (warning that servic on a statutorily appointed agent, e.g., a state official, may make any judgment awarded invalid on due process grounds).

333 *Cf. Pittsburgh Nat. Bank*, 153 F.R.D. at 584–85.

334 *E.g.*, Ballard v. Tyco Int'l, Ltd., MDL No. 02-1335 & Civ. No. 04-CV-1336, 2005 WL 1863492, 2005 U.S. Dist. LEXIS 16054 (D.N.H. Aug. 4, 2005) (finding mail service to England was permitted by the Convention but quashing service because the documents' mailing did not comply with the Federal Rules).

335 Reisenfeld, *supra* note 47, at 56. *See also* Mark Davies & David S. Weinstock, *The Service of Process Overseas*, 11 NAT'L L. J., Oct. 3, 1988, at 15 (headline on p. 16 after the jump is "If In Doubt Serve Both Domestically and Abroad").

336 In *Shoei Kako*, 109 Cal. Rptr. at 402, the court ruled translation of documents served upon a Japanese corporation heavily involved in international trade was unnecessary because its management had to understand English to transact its business. Some foreign companies are trying to operate exclusively in English, even for things as unrelated to international commerce as the menus in the company cafeteria. Daisuke Wakabayashi, *English Gets the Last Word in Japan*, WALL ST. J., Aug. 6, 2010, at B1.

337 *Cf.* Covey v. Town of Somers, 351 U.S. 141 (1956) (Warren, C.J.) (due process was violated when plaintiff used service by publication as sole means of notice and received

expense can be minimized is to write the complaint as succinctly as possible, translate it, and then serve that document. If the defendant does not appear, a default judgment can be obtained; if he does appear, then a detailed amended complaint can be served untranslated on his American counsel. Either scenario avoids the need to translate a lengthy document.[338]

The committee notes to the 1993 revision to Rule 4 of the Federal Rules of Civil Procedure suggest asking the defendant to waive service, otherwise he could be taxed the costs of formal service, including translation expenses.[339] But attorneys should go ahead and formally serve the papers because a foreign litigant has little reason to sign the waiver.

Above all, attorneys should consider this question: where are the defendant's assets? If they are outside the United States, counsel should jump through every hoop and dot every procedural "i" if there is *any* chance the plaintiff might enforce a judgment abroad.[340] In other words, follow the counsel of Sgt. Esterhaus: "Let's be careful out there."[341]

FINALMENTE

The Convention was adopted to simplify service abroad, and reading Article 10 to require the mandatory use of the costly and cumbersome central authority process turns a blind eye to that purpose.[342] Treaties should be given a liberal construction to give effect to the intentions of the parties.[343] And they should be construed to "extract rules applicable to the actual problems for the solution of

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default judgment against a defendant the plaintiff knew was mentally incompetent and thus unable to respond).

338 Peterson, *supra* note 114, at 575–76.

339 *See* Committee Note of 1993 to Amendment, *reprinted in* 1 MOORE'S FEDERAL PRACTICE, *supra* note 52, § 4.App.09[2], at 4App-58. f. Sheets v. Yamaha Motors Corp. U.S.A., 657 F. Supp. 319, 323 (E.D. La. 1997) (sanctioning defendant for unnecessarily requiring service via central authority mechanism) aff'd in part, rev'd in part, 849 F.2d 179 (5th Cir.1988). This case is discussed in Peter D.Trooboff & Peter J. Spiro, International Decision, 83 Am. J. Int'l L. 580 (1988).

340 *See* Gary N. Horlick, *A Practical Guide to United States Service Abroad*, 14 INT'L LAW. 637, 638 (1980); Reisenfeld, *supra* note 47, at 58 (1990).

341 *See* Peter Kerr, *Michael Conrad, 58, Won Emmy for Role in "Hill Street Blues,"* N.Y. TIMES, Nov. 23, 1983, at B3; David Bianculli, *How Will 'Hill Street' Open Now?*, PHILA. INQUIRER, Nov. 23, 1983, at D12.

342 Armstrong, *supra* note 159, at 590. *See also* Tamari v. Bache & Co. (Lebanon), S.A.L., 431 F. Supp. 1226 (N.D. Ill. 1977) (refusing to void personal service in the case or order defendant be served through the central authority mechanism).

343 Valentine v. United States ex rel. Neidecker, 299 U.S. 5 (1936) (Hughes, C.J.).

which [the treaty] was sought to provide."[344] The Supreme Court also tells us that America cannot have international trade solely on its own terms.[345] But just because America operates on the world stage, its courts should not be required to grant foreigners special privileges.[346] Reading the Convention to require use of the central authorities runs counter to the purpose of the treaty, privileges foreign defendants at the expense of American plaintiffs, and ignores vast evidence to the contrary.

344 Kozuh v. Uff. Stato Civile di Milano, *as translated in* 23 I.L.R. 322, 326, (Court of Appeals of Milan) Mar. 18, 1952, Foro Padano, 1952, p. 554.

345 The M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 8–9 (1972) (Burger, C.J.).

346 *Quinn*, 700 A.2d at 156 (refusing to interpret the Convention as giving a foreigner more rights than a citizen of Delaware). *See also* Chryssikos v. Demarco, 107 A. 358 (Md. 1919) (courts "are not required . . . to give a strained construction to the language of a treaty, or place an unreasonable interpretation upon it, for the purpose of securing to foreigners privileges which are denied citizens of this country"); Universal Adjustment Corp. v. Midlands Bank, Ltd., 184 N.E. 152 (Mass. 1933) ("a treaty [is] not to be given a strained construction or an unreasonable interpretation in order to vouchsafe to aliens rights and privileges denied to citizens"); Hardoy v. Universidad Nacional de Buenos Aires, *as translated in* 7 ANN. DIG. 442, 443–44 (Arg. Sup. Ct. Aug. 21, 1933) [Corte Suprema de Justicia de la Nación [CSJN] [Supreme Court of Justice], Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos], (1933-168-414)] (treaty construction that would favor aliens over natives must fail).

APPENDIX A: TABLE OF JURISDICTIONS[1]

It may help practicitioners to have a list of jurisdictions acceding to the Convention.

After the Convention has been ratified or applied to a territory, "Adhere" indicates when notice of that fact was deposited with the Dutch Foreign Ministry. (Dates are given in the American style, i.e. month/date/year.) This date may be significantly different than the date the jurisdiction signed or ratified the Convention. (For example, the United States signed the Convention on November 15, 1965, and ratified it April 14, 1967. But the Foreign Ministry lists the date below—August 24, 1967—because on that day the American ratification was deposited. Germany signed the treaty the same day as the United States but did not deposit its ratification until April 27, 1979.) The dates listed are also different from the dates of deposit recorded by the United Nations on its website; the United Nations gives the dates on which the U.N. Treaty Section received the documents from the Dutch Foreign Ministry.

"Effective" is the effective date for the Convention in that jurisdiction. For former British colonies as well as the Czech Republic and Slovakia, dates are given to indicate when the Convention was first applied to the territory. The new government's accession to the Convention is indicated by the second row of dates.

"Notice" gives volume/page references to the *United Nations Treaty Series* for the accession and initial declarations of a jurisdiction. Subsequent notices are listed in this column as well, without effective dates.

"Additional Information" indicates subsequent notices published in *U.N.T.S.* in the same format, along with further details keyed below.

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1 The entire *United Nations Treaty Series* is available in pdf format on the website of the United Nations at http://treaties.un.org/Pages/AdvanceSearch.aspx. The declarations and central authorities are reprinted in several sources: MARTINDALE-HUBBELL INTERNATIONAL LAW DIGEST IC-1 (2006); 2 BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, CIVIL AND COMMERCIAL (2000); the website of the Hague Conference on Private International Law, http://www.hcch.net/ index_en.php?act =conventions.statusprint&cid=17; and the website of the Convention's depository, the Dutch Ministry of Foreign Affairs, http://www.minbuza.nl/en/Key_Topics/Treaties/Search _the_Treaty_Database?isn=004235. They are listed in this table where information has changed from Martindale-Hubbell or is incomplete.

Name	Adhere	Effective	Notice	Additional Information
Albania[2]	11/06/06	07/01/07	a	b
Anguilla[3]	08/03/82	09/28/82	1286/384	bcfi
Antigua & Barbuda[4]	05/20/70 05/01/85	07/19/70 11/01/81	737/408 1401/264	bc 1477/274[be]
Argentina	02/02/01	12/01/01	2165/201	bhi
Aruba	05/28/86	07/27/86	1434/261	b
Ascension[5]	07/07/70	07/19/70	737/408	bcfi
Australia[6]	03/15/10	11/01/10	a	bci
Azores[7]	12/27/73	02/25/74	955/470 2100/104	2057/22
Bahamas	06/17/97	02/01/98	2001/402	bc
Barbados	02/10/69	10/01/69	700/376	bc
Belarus	06/06/97	02/01/98	8	b

2 The Albanian accession is noted at *Implementation of Uniform Law Instruments*, 11 UNIF. L. REV. (N.S.) 884, 885 (2006). The Albanian Central Authority is: Ministry of Justice, Bulevardi Zogu I, Tirana. Tel: (355) 4-22-59-388.

3 The Anguillan Central Authority is: The Registrar, The Supreme Court, P.O. Box 60, The Valley. Tel: (264) 497-2377. Fax: (264) 497-5420.

4 Antigua and Barbuda had the Convention applied to it by the United Kingdom when still a colony. It became independent November 1, 1981, and subsequently filed an accession to the convention. It has two central authorities: (1) The Governor-General, Government House, Church Street at Independence Drive, St. Johns. Tel: (268) 562-3081. Fax: (268) 462-2566; and (2) The Registrar, The High Court, Parliament Drive, St. Johns. Tel: (268) 462-0609. Fax: (268) 462-3929.

5 Use the St. Helena Central Authority. E-mail from Frank Wastell, Attorney General, St. Helena Government, Jamestown, St. Helena, to Author (Sep. 3, 2010 08:34:33 GMT). Ascension has an airport but St. Helena does not. Wright v. Maersk Line, Ltd., 84 Fed. Appx. 123, 124 (2d Cir. 2003). Mail to St. Helena arrives via ship, so any service through the central authority will take months.

6 Australia has a national central authority and one in each state and territory. Requests may be sent to either and the Australian government has no preference. E-mail from Thomas John, Principal Legal Officer, Private International Law Section, Attorney-General's Department, to Author (Sept. 28, 2010, 10:24:04 A.M. Australian Eastern Time). The national authority is: Australian Government Attorney-General's Department, 3-5 National Circuit, Barton, Australian Capital Territory 2600. Tel: (61) 2-6141-3055. Fax: (61) 2-6141-5254. The Australian declaration upon accession stated the Convention applies to all of its states and territories, as well as its possesions of the Ashmore and Cartier Islands, the Australian Antarctic Territory, Christmas Island, the Cocos Islands, the Coral Sea Islands, the Heard Island and McDonald Islands, and Norfolk Island.

7 The Convention applies to the Azores, a Portuguese territory. Use the Portuguese Central Authority. Letter from Bernardo Embry, American Embassy, Lisbon, to Author (n.d. but metered Sept. 7, 2010).

8 Belarus's accession was never submitted to the United Nations and thus does not appear in *U.N.T.S.* E-mail from Bianca E. Suciu, Legal Officer, Treaty Section, Office of

Name	Adhere	Effective	Notice	Additional Information
Belgium	11/19/70	01/18/71	759/344	658/182
Belize[9]	05/20/70	07/19/70	737/408	bcfi
	09/08/09	05/01/10	a	bgg
Bermuda[10]	05/20/70	07/19/70	737/408	bcfi
Bosnia & Herzigovina[11]	06/16/08	02/01/09	a	b
Botswana	02/10/69	09/01/69	700/376	955/470[cgi]
British Virgin Islands[12]	05/20/70	07/19/70	737/408	bcfi
Bulgaria	11/23/00	08/01/00	2121/294	bhi
Canada[13]	09/26/88	05/01/89	1529/299	bci
Cayman Islands[14]	07/07/70	07/19/70	737/408	1562/342 [cfi]
People's Republic of China[15]	05/06/91	01/01/92	1658/651	2100/106 [h]
			2100/104	2133/188
Croatia[16]	02/28/06	11/01/06	a	bhi

Legal Affairs, United Nations, New York, N.Y., to Author (Aug. 25, 2010, 10:26:59 EDT).

9 Belize had the Convention applied to it by the United Kingdom when it was the colony of British Honduras. It became independent September 21, 1981, and subsequently filed an accession. There was a dispute in the American courts over the status of the convention. *Compare* Mayoral-Amy v. BHI Corp., 180 F.R.D. 456, 459 (S.D. Fla. 1998) (Belize's status is ambiguous) *with* Sec. & Exchange Comm'n v. Banner Fund Int'l, 211 F.3d 602, 613 (D.C. Cir. 2000) (Belize proven by S.E.C. to be a party to Convention) *and with In re* Jacobsen (Moser v. Coast Capital, Ltd.), No. 07-41092 (Bankr. E.D. Tex. Jan. 23, 2009) (Belize is not a party to the Convention.). This dispute is now moot because Belize has formally acceded to the Convention. The Belizean Central Authority is: The Registrar General, The Supreme Court of Belize, Treasury Lane, P.O. Box 87, Belize City. Tel: (501) 227-2053. Fax: (501) 227-0181. E-mail from Velda Flowers, Registrar General, Supreme Court of Belize, to Author (Aug. 31, 2010 11:20:51 PDT).

10 The Bermudian Central Authority is: The Registry, The Supreme Court, 113 Front Street, Hamilton HM 11. Tel: (441) 292-1350. Fax: (441) 292-2268.

11 The Bosnian Central Authority is: Ministry of Justice, Square of Bosnia and Herzegovina No. 1, 71000 Sarajevo. Tel: (387) 33-223-501. Fax: (387) 33-223-504.

12 The B.V.I. Central Authority is: The Registrar, The Supreme Court, P.O. Box 418, Road Town, Tortola. Tel: (284) 494-3074. Fax: (284) 494-6664.

13 Canada's translation requirements depend on the province. For Alberta, British Columbia, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, and Saskatchewan the documents must be in English. For Manitoba, New Brunswick, the Northwest Territories, Nunavut, and the Yukon Territory they must be in English or French. For Quebec they must be in a language the recipient understands. A translation will be required by Quebec into French unless the recipient speaks English.

14 The Cayman Islands Central Authority is: The Clerk of Courts, Grand Court of the Cayman Islands, Edward Street, P.O. Box 495, George Town KY1–1106, Grand Cayman. Tel: (345) 949-4296. Fax: (345) 949-9856.

15 China refuses to accept requests sent to its central authority by private delivery services. They must be sent via mail. PRACTICAL HANDBOOK at ¶ 105.

Name	Adhere	Effective	Notice	Additional Information
Cyprus	10/26/82	06/01/83	1318/324	1352/337
Czech Republic[17]	04/01/82	06/01/82	1279/313	bh
	01/28/93	01/01/93	1717/454	b
Denmark	08/02/69	10/01/69	700/372	b
Egypt	12/12/68	02/10/69	658/184	1157/443[h]
Estonia	02/02/96	10/01/96	1941/389	b
Falkland Islands	07/07/70	07/19/70	737/408	bcfi
Faroe Islands[18]	08/02/69	10/01/69	700/372	b
Fiji Islands[19]	07/07/70	07/19/70	737/408	bcfgi
Finland[20]	09/11/69	11/10/69	700/376	1276/501
France	07/03/72	09/01/72	832/354	b
French Guinea	07/03/72	09/01/72	a	bd
French Polynesia	07/03/72	09/01/72	a	bd
Germany	04/27/79	06/26/79	658/182	1703/424[hi]
Gibraltar[21]	07/07/70	07/19/70	737/408	bcfi
Greece	07/20/83	09/18/83	1330/288	1562/342
			2077/275	2110/257
Greenland[22]	08/02/69	10/01/69	700/372	b

16 The Croatian accession is noted at *Implementation of Uniform Law Instruments*, 11 UNIF. L. REV. (N.S.) 884, 885 (2006). The Croatian Central Authority is: Ministry of Justice, Dezmanova 6 I 10, 10000 Zagreb. Tel: (385) 1-3710-617. Fax: (385) 1-3710-672.

17 Czechoslovakia deposited a ratification of the Convention on September 23, 1981, which was effective June 1, 1982. 1279 U.N.T.S. 313. Czechoslovakia split into the Czech Republic and Slovakia on January 1, 1993, and both nations succeeded to the Convention on the same terms.

18 The Convention applies to the Faroe Islands, a Danish territory. Use the Danish central authority. Letter from Richard Bell, Acting Deputy Chief of Mission, Counselor for Political and Economic Affairs, American Embassy, Copenhagen, to Author (Aug. 17, 2010).

19 The Fiji Islands had the Convention applied to them by the United Kingdom when still a colony. They became independent October 10, 1970, and no formal declaration of accession was filed. 2 RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, at A-46. However, they have informed the State Department of a Central Authority: Chief Registrar, The High Court, Government Buildings, Suva. The country's name is legally "Fiji Islands." FIJI ISLANDS CONST., Art. 1.

20 The Finnish government informed the Hague Conference in 2008 that: "A translation is not required; however, if the addressee does not accept a document in a foreign language, service can only be effected if the document is translated into one of the official languages of Finland, i.e., Finnish or Swedish, or if the addressee must be deemed to understand the foreign language. Companies with international business relations must be deemed to understand English, German or French."

21 The Gibraltarian Central Authority is: The Registrar, Supreme Court of Gibraltar, 277 Main Street, Gibraltar. Tel: (350) 75608. Fax: (350) 77118.

Name	Adhere	Effective	Notice	Additional Information
Guam	08/24/67	02/10/69	658/182	b
Guadeloupe[23]	07/03/72	09/01/72	a	bd
Guernsey[24]	07/07/70	07/19/70	737/408	bcfi
Hong Kong	07/07/70	07/19/70	737/408	ce
	06/16/97	07/01/97	1984/401	
Hungary	07/13/04	04/01/05	2308/73	bhi
Iceland[25]	11/10/08	07/01/09	a	b
India[26]	11/23/06	08/01/07	a	bchi
Ireland	04/05/94	06/04/94	1775/371	1941/389[ch]
Israel	08/14/72	10/13/72	835/315	b
Isle of Man	07/07/70	07/19/70	737/408	bcfi
Italy	11/25/81	01/24/82	[27]	b
Japan[28]	05/28/70	07/27/70	737/411	bi
Jersey[29]	07/07/70	07/19/70	737/408	bcfi
Kiribati[30]	07/07/70	07/19/70	737/408	bcfig

22 The Convention applies to Greenland, a Danish territory. Use the Danish central authority. Letter from Richard Bell, Acting Deputy Chief of Mission, Counselor for Political and Economic Affairs, American Embassy, Copenhagen, to Author (Aug. 17, 2010).

23 Guadalupe includes the islands of Grande-Terre, Basse-Terre, St. Martin (the southern third of which is Dutch and known as Sint Maarten), Marei-Galante, St. Barthélemy, Îles des Sainte, and La Désirade.

24 Guernsey includes the islands of Alderney, Brechou, Herm, Jethou, Lihou, Great Sark, and Little Sark. The Guernsey Central Authority is: The Bailiff, The Bailiff's Chambers, Royal Court House, St. Peter Port, Guernsey, GY1 2PB, Channel Islands. Tel: (44) 1481-726161. Fax: (44) 1481-713861.

25 The Icelandic Central Authority is: Ministry of Justice and Human Rights, Skuggasundi, 150 Reykjavik. Tel: (354) 545-9000. Fax: (354) 552-7340.

26 The Indian accession is noted at *Implementation of Uniform Law Instruments*, 11 UNIF. L. REV. (N.S.) 884, 885 (2006). The Indian Central Authority is: The Ministry of Law and Justice, Department of Legal Affairs, 4th Floor, A-Wing, Shastri Bhavan, New Delhi-110001. Tel: (91) 11-23387557. Fax: (91) 11-23384241.

27 The Italian ratification was never submitted to the United Nations and thus does not appear in *U.N.T.S.* E-mail from Bianca E. Suciu, Legal Officer, Treaty Section, Office of Legal Affairs United Nations, New York, N.Y., to Author (Aug. 25, 2010, 10:26:59 EDT).

28 Japan has not formally objected to service by mail under Article 10(a) but its courts refuse to recognize judgments obtained with such service. See Appendix B.

29 The Jersey Central Authority is: The Attorney General, Law Officers' Department, Morier House, Halkett Place, St. Helier, Jersey JE1 1DD, Channel Islands. Tel: (44) 1534-441200. Fax: (44) 1534-441299.

30 Kiribati and Tuvalu were formerly part of the Gilbert and Ellice Islands Colony. The colony was divided on October 1, 1975. The Gilbert Islands became the independent nation of Kiribati on July 12, 1979. Kiribati also includes the Central and Southern Line Islands, which were not part of the former Gilbert and Ellice Islands Colony and were administered from Honiara, Solomon Islands, as part of the British High Commission for

Name	Adhere	Effective	Notice	Additional Information
South Korea	01/13/00	08/01/00	2121/296	bh
Kuwait	05/08/02	12/01/02	2204/504	2331/54[h]
Latvia[31]	03/28/95	11/01/95	1893/388	i
Lithuania	08/02/00	06/01/01	2152/213	bh
Luxembourg[32]	07/09/75	09/07/75	1088/411	1098/317 h i
Macao	02/09/99	04/12/99	2057/22 2100/104	
Macedonia[33]	12/23/08	09/01/09	a	b
Madeira[34]	12/27/73	02/25/74	955/470 2100/104¶	2057/22
Malawi	04/24/72	12/01/72	854/222	b
Martinique	07/03/72	09/01/72	a	bd
Mayotte	07/03/72	09/01/72	a	bd
Mexico[35]	11/02/99	06/01/00	2117/318	bhi
Monaco[36]	03/01/07	11/01/07	a	bh
Montserrat[37]	07/07/70	07/19/70	737/408	bcfi
Netherlands[38]	11/03/75	01/02/76	a	b

the Western Pacific. The Central and Southern Line Islands also had the Convention applied to them by the United Kingdom with a different central authority than the Gilbert and Ellice Islands.

31 Latvia requires translation into Latvian or a language spoken by the recipient. Latvia permits service by mail if translated into Latvian and sent via registered mail with a return receipt.

32 Luxembourg requires translation into French or German.

33 The Macedonian Central Authority is: Ministry of Justice, Dimitrie Cupovski no. 9, 1000 Skopje. Tel: (389) 3117-277. Fax: (389) 3226-975.

34 The Convention applies to the Azores, a Portuguese territory. Use the Portuguese Central Authority. Letter from Bernardo Embry, American Embassy, Lisbon, to Author (n.d. but metered Sept. 7, 2010).

35 Mexico's declarations are unclear because of an issue with the translation into English and have been disputed in American courts. A recent law review article conclusively shows that Mexico should be considered as having objected to service under Article 10. *See* Charles B. Campbell, *No Sirve: The Invalidity of Service of Process Abroad by Mail or Private Process Server on Parties in Mexico Under the Hague Service Convention*, 19 MINN. J. INT'L L. 107 (2010).

36 The Monégasque Central Authority is: Direction des Services Judiciaires, Palais de Justice, 5 rue Colonel Bellando de Castro, Monaco-Ville MC-98000. Tel: (377) 98-98-88-11. Fax: (377) 98-98-85-89.

37 The Montserratian Central Authority is: The Registrar of the High Court, P.O. Box 418, Brades. Tel: (664) 491-3827. Fax: (664) 491-4687.

38 The Netherlands acceptance of the Convention did not apply it to the Netherlands Antilles, which consisted of the islands of Bonaire, Curaçao, Saba, Sint Estatius, and Sint Maarten (the northern part of which is French and known as St. Martin) until it was dissolved October 10, 2010. It is unclear if the Convention will be extended to the successor jurisidictions. Letter from Gerard van der Wulp, Deputy Chief of Mission,

Name	Adhere	Effective	Notice	Additional Information
New Caledonia	07/03/72	09/01/72	[a]	[bd]
Northern Mariana Islands	03/31/94	05/30/94	1775/372	[b]
Norway	08/02/69	10/01/69	700/374	[bh]
Pakistan[39]	12/07/88	08/01/89	1541/431	1562/343
Pitcairn[40]	07/07/70	07/19/70	737/408	[bcfi]
Poland	02/13/96	09/01/96	1935/429	[bh]
Portugal	12/27/73	02/25/74	955/470 2100/104	2057/22
Puerto Rico	08/24/67	02/10/69	658/182	[b]
Réunion	07/03/72	09/01/72	[a]	[bd]
Romania	08/21/03	04/01/04	2253/298	[b]
Russia[41]	05/01/01	12/01/01	2165/204	2293/114[hi]
St. Helena[42]	07/07/70	07/19/70	737/408	[bcfi]
St. Lucia[43]	07/07/70	07/19/70	737/408	[bcfgi]

Royal Netherlands Embassy, Washington, D.C., to author, Aug. 6, 2010. The Convention does, however, apply to the Dutch possession of Aruba. *Id.*

39 Pakistan allows service by mail under Article 10(a) if that is a method of service in the originating state of the documents.

40 The British declaration of 1970 gave the central authority as "The Governor and Captain-in-Chief, Adamstown, Pitcairn Island, South Pacific Ocean." That is a problem as the governor of Pitcairn in recent years has been the British High Commissioner (i.e., ambassador) to New Zealand, who is 3,000 miles from Pitcairn. The current address for the Governor is: The Governor of the Pitcairn Islands, c/o British High Commission, 44 Hill Street, Wellington 6011, New Zealand. (Mail: P.O. Box 1812, Wellington 1812.). Tel: (64) (4) 924 2888. Fax: (64) (4) 473 4982. Letters to Pitcairn can easily take six months to make the round trip. Litigants are advised to send service requests not only by mail to Pitcairn but the Governor in Wellington.

41 Russia refuses to comply with requests submitted under the Convention from the United States. Spencer Willing, *Out of Service: The Causes and Consequences of Russia's Suspension of Judicial Assistance to the United States Under the Hague Service Convention*, 31 U. PA. J. INT'L L. 593 (2009). There is an existing bilateral accord between the United States and Russia—as successor to the Soviet Union's obligations—that provides for the use of letters rogatory. Exchange of Notes between the United States and the Union of Soviet Socialist Republics Concerning Execution of Letters Rogatory, Nov. 22, 1935, 49 Stat. 3840, 167 L.N.T.S. 303. For service to Russia outside the Convention, *see* Tatyana Gidirimski, *Service of United States Process in Russia Under Rule 4(F) of the Federal Rules of Civil Procedure*, 10 PAC. RIM L & POL'Y J. 691 (2001).

42 St. Helena gets mail via ship because it has no airport. *World's End in the South Atlantic*, 9 WILDSIDE (Prestondale, S. Afr.), Spring 2009, at 60, *available at* http://www.sthelenatourism.com/data/files/ downloads/wildside2009sthelena.pdf. Any service sent through its central authority will take months to make the round trip. The Central Authority: The Registrar, The Supreme Court, Essex House, Main Street, Jamestown STHL 1ZZ. Tel: (290) 2270. Fax: (290) 2454. E-mail from Frank Wastell, Attorney General, St. Helena Government, Jamestown, to Author (Aug. 31, 2010, 17:08:13 GMT).

Name	Adhere	Effective	Notice	Additional Information
St. Kitts[44]		05/01/83	1312/316	bcfgi
St. Pierre & Miquelon	07/03/72	09/01/72	a	bd
St. Vincent[45]	07/07/70	07/19/70	737/408	bci
	01/06/05	10/27/70	2303/87	a
San Marino[46]	04/15/02	11/01/02	2199/133	ahi
Serbia[47]	07/02/10	02/01/11	a	bhi
Seychelles	07/07/70	07/19/70	737/408	c
	11/18/80	07/01/81	1240/300	1248/431
Slovakia	04/01/82	06/01/82	1279/313	bh
	03/15/93	01/01/93	1745/446	a
Slovenia	09/18/00	06/01/01	2152/216	b
Solomon Islands[48]	07/07/70	07/19/70	737/408	bcfgi
South Georgia[49]	07/07/70	07/19/70	737/408	bcfgi

43 St. Lucia had the Convention applied to it by the United Kingdom when still a colony. It became independent February 22, 1979. St. Lucia has not formally indicated its accession to the Convention but has informed the State Department the Central Authority is: The Registrar, The High Court of Justice, Peynier Street, Castries. Tel: (758) 468-3804. Fax: (758) 453-2071.

44 St. Kitts and Nevis had the Convention applied to it by the United Kingdom when still a colony. It became independent September 19, 1983, and has not formally indicated its accession to the Convention but has informed the State Department the Central Authority is: Ministry of Justice and Legal Affairs, Government Headquarters, Church Street, P.O. Box 186, Basseterre, St. Kitts. Tel: (869) 465-2521. Fax: (869) 465-5040.

45 St. Vincent and the Grenadines requires translations into English. In 2005, it formally acceded to the Convention, retroactive to its independence from the United Kingdom in 1979. Its Central Authority is: The Registrar, The High Court of Justice, Hinds Building, Halifax Street, Kingstown. Tel: (784) 451-2945. Fax: (784) 457-1888.

46 The Sanmarinese Central Authority is: Tribunale Unico de la République de Saint-Marin, Via 28 Luglio n. 194, 47893 Borgo Maggiore. Tel: (378) 0549885435. Fax: (378) 0549882598.

47 The Serbian Government informed the Hague Conference the central authority is the Belgrade First Instance Court but provided no address. However, reviewing that court's website, http://www.prvi.os.sud.rs/korisne-informacije.html, it appears requests should be sent to: Belgrade First Basic Court, ul. Ustanička no. 14, 11000 Beograd. (In Cyrllic, which is used by the Court, that is Први основни суд у Београду, Устаничка 14, 11000 БЕОГРАДУ). Tel: (381) 11-3083-600. Fax: (381) 11-2451-120.

48 The Solomon Islands had the Convention applied to them by the United Kingdom when still a colony. They became independent July 7, 1978, and have not formally indicated their accession to the Convention. The Central Authority named by the British was the Registrar of the High Court. The current address: The Registrar, The High Court of Justice, Mendana Avenue, P.O. Box G21, Honiara. Tel: (677) 21632. Fax: (677) 22702. The Registrar made inquiries on behalf of the Author and could not find more information about whether the Solomon Islands Government considers the Convention binding; however, the Registrar indicated he would most likely execute requests sent to him. E-mail from Gavin J. Withers, Registrar of the High Court & Court of Appeal of the Solomon Islands, to Author (Nov. 11, 2010, 12:38:58 P.M. Pacific/Guadalcanal Time).

Name	Adhere	Effective	Notice	Additional Information
South Sandwich Islands[50]	07/07/70	07/19/70	737/408	bcfgi
Spain	06/04/87	08/03/87	1477/274	b
Sri Lanka[51]	08/31/00	08/03/01	2152/214	bchi
Sweden	08/02/69	10/01/69	700/374	2133/190[i]
Switzerland[52]	11/02/94	01/01/95	1841/335	bhi
Tristan da Cunha [53]	07/07/70	07/19/70	737/408	bcfi
Turkey	02/28/72	04/28/72	822/402	1318/324[h]
Turks & Caicos[54]	07/07/70	07/19/70	737/408	bcfgi
Tuvalu[55]	07/07/70	07/19/70	737/408	bcfgi
Ukraine	02/01/01	12/01/01	2165/200	2275/259[h]

49 Use Falklands Central Authority.

50 Use Falklands Central Authority.

51 Sri Lanka requires translation into English.

52 Switzerland requires translation into French, German, or Italian, depending on the language of the canton the papers are to be served in. Switzerland has designated a central authority in each of its cantons. A locator to determine which authority applies to an address, and what language should be used, is at: http://www.elorge.admin.ch/.

53 Use the St. Helena Central Authority. E-mail from Frank Wastell, Attorney General, St. Helena Government, Jamestown, St. Helena, to Author (Sep. 3, 2010 08:34:33 GMT). Tristan has no airport. Mail to St. Helena arrives via ship, so any service through the central authority will take months.

54 The Turks and Caicos Central Authority is: The Registrar, The Supreme Court, Pond Street, Cockburn Town, Grand Turk. Tel: (649) 946-1724.

55 Kiribati and Tuvalu were formerly part of the Gilbert and Ellice Islands Colony. The colony was divided on October 1, 1975. The Ellice Islands became the independent nation of Tuvalu on October 1, 1978. Tuvalu had the Convention applied to it by the United Kingdom when part of the Gilbert and Ellice Islands Colony but has not formally indicated its accession to the Convention.

Name	Adhere	Effective	Notice	Additional Information
United Kingdom[56]	11/17/67	02/10/69	658/193	737/408
			920/305	1268/384
			1312/316	1562/342
			1984/404	cfi
United States[57]	08/24/67	02/10/69	658/182	759/344
			1775/372	2226/32
Venezuela	10/29/93	07/01/94	1819/505	bhi
Virgin Islands	08/24/67	02/10/69	658/182	b

56 The United Kingdom has extended the Convention to Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, the Falkland Islands (including South Georgia Island and the South Sandwich Islands), Gibraltar, Guernsey, the Isle of Man, Jersey, Montserrat, the Pitcairn Islands, St. Helena Island (including Ascension Island and Tristan da Cunha), and the Turks and Caicos Islands. It has not extended it to three of its overseas territories: the British Indian Ocean Territory, Letter from Joanne Yeadon, Head of British Indian Ocean Territory & Pitcairn Section, Overseas Territories Directorate, Foreign & Commonwealth Office, London, to the author, Aug. 4, 2010, the British Antarctic Territory, nor the Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus. The English Central Authority is: Foreign Process Section, Queen's Bench Division, Royal Courts of Justice, Room E12, The Strand, London, WC2A 2LL. Tel: (44) 020-7947-6394. Fax: (44) 020-7947-6975. The Scottish Central Authority is: Scottish Government, European Union & International Law Branch, 2W St. Andrew's House, Edinburgh EH1 3DG. Tel: (44) 131-244-2417. Fax: (44) 131-244-4848. The Northern Ireland Central Authority is: The Master (Queen's Bench and Appeals), Royal Courts of Justice, Chichester Street, Belfast BT1 3JF. Tel: (44) 28-9072-4706. Fax: (44) 28-9023-5186.

57 The United States did not extend the Convention to American Samoa. At the time the Convention was ratified, the United States was overseeing the Trust Territory of the Pacific Islands under the aegis of the United Nations. The Trust Territory consisted of islands that became the Republic of the Marshall Islands, the Federated States of Micronesia, the Republic of Palau, and the American territory of the Commonwealth of the Northern Mariana Islands. The convention does not apply in Micronesia. Letter from Marianne Gustafson, Consular Officer, Embassy of the United States of America, Kolonia, Micronesia, to the author, Aug. 3, 2010. It does not appear to apply to Palau or the Marshalls but it has been extended to the Marianas. The American Central Authority is: Office of International Judicial Assistance, U.S. Department of Justice, 1100 L Street, N.W., Room 11006, Washington, D.C. 20530. Phone: (202) 514-7455. Fax: (202) 514-6584. But requests for service from abroad should be sent to Process Forwarding International, 633 Yesler Way, Seattle, Washington 98204. Tel: (206) 521-2979. Fax: (206) 224-3410.

Key:

[a] The notice has not appeared in the *United Nations Treaty Series*, whose publication is running three years behind the present.

[b] No other documents were filed.

[c] This jurisdiction is English-speaking.

[d] France announced in 1972 that the Convention would apply to its overseas territories of French Guiana, French Polynesia, Guadeloupe, Martinique, Mayotte, New Caledonia, Réunion, St. Pierre and Miquelon, and Wallis and Futuna. E-mail from Irene Rampersad, Treaties Division, Ministry of Foreign Affairs of the Kingdom of the Netherlands, to Author (Nov. 5, 2010) (stating French notice regarding its possessions filed July 3, 1972 that was effective Sept. 1, 1972); French Ministère de la Justice, Direction des affaires Civiles et du Sceau, Bureau de l'entraide civile et commerciale internationale, Circulaire Consolidée Nos. CIV/20/05 & CIV/11/08 (Nov. 20, 2008) 17, *available at* http://www.entraide-civile-internationale.justice.gouv.fr/ circulaire_cons_20081120.pdf. The French central authority, the Justice Ministry in Paris, will act as central authority for all these territories. Ministère de la Justice, *supra*, at 17. This notice was never submitted to the United Nations and thus does not appear in *U.N.T.S.* E-mail from Bianca E. Suciu, Legal Officer, Treaty Section, Office of Legal Affairs, United Nations, New York, N.Y., to Author (Aug. 25, 2010, 10:26:59 EDT).

[e] This notice was filed by the United Kingdom as the colonial power.

[f] The United Kingdom and its colonies require translations into English.

[g] This nation was formerly a colony of the United Kingdom but is now independent and has not filed any declarations with the Dutch Foreign Ministry as to whether it considers itself bound by the Convention nor has it formally supplied information on central authorities, translation requirements, or mail service.

[h] This indicates that the jurisdiction has objected to service by mail.

[i] This indicates that translations are required by the jurisdiction.

APPENDIX B: THE PROBLEM OF JAPAN

Service by mail to Japan is the subject of scores of contradictory opinions in the courts and in the academic press.[1] The Japanese government has not declared its opposition to service by mail under Article 10(a).[2] Since they have not objected, service by mail is technically valid.[3] Though one federal court somehow has come to the conclusion that the Japanese government must know of this controversy in American courts and by failing to file a notification on Article 10(a), it is confirming that mail service is forbidden while another has come to precisely the opposite conclusion.[4]

In 1989, at a special meeting of the Hague Conference working on the Service Convention, Japan stated:

> 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

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1 Service by mail is not allowed: *Bankston*, 889 F.2d at 174; Wasden v. Yamaha Motor Co., 131 F.R.D. 206, 209-210 (M.D. Fla. 1990); McClenon v. Nissan Motor Corp. in U.S.A., 726 F. Supp. 822, 826 (N.D. Fla. 1989); *Prost*, 122 F.R.D. at 216-217; Cooper v. Makita, U.S.A., Inc., 117 F.R.D. 16, 17 (D. Me. 1987); Pochop v. Toyota Motor Co., 111 F.R.D. 464, 466 (S.D. Miss. 1986); *Mommsen*, 108 F.R.D. at 446; Suzuki Motor Co. v. San Bernardino Cty. Super. Ct. 249 Cal. Rptr. 376, 381 (Ct. App. 1988); Reynolds v. Koh, 490 N.Y.S.2d 295, 297 (App. Div. 1985); Ormandy v. Lynn, 472 N.Y.S.2d 274, 274 (Sup. Ct. 1984); Fujita, *supra* note 234, at 72; Yoshio Ohara, *Judicial Assistance to Be Afforded by Japan for Proceedings in the United States*, 23 INT'L LAW. 10, 14; Michael H. Altman, *Mailing Service to Japan: Does Article 10(a) of the Hague Conference Authorize a Separate Method?* Bankston v. Toyota Motor Corp*., 889 F.2d 172 (8th Cir. 1989)*, 69 WASH. U. L.Q. 635, 635 (1991). Mail service is allowed: *Shoei Kako*, 109 Cal. Rptr. at 412 (Ct. App. 1973); Meyers v. Honda Motor Co., 711 F. Supp. 1001, 1007–08 (C.D. Cal. 1989); *Hammond*, 128 F.R.D. at 641; Smith v. Dainichi Kinzoku Kogyo Co., 680 F. Supp. 847, 850-851 (W.D. Tex. 1988); Newport Components, Inc., v. NEC Home Elecs. (U.S.A.), Inc., 671 F. Supp. 1525, 1541–42; Lemme v. Wine of Japan Import, Inc., 631 F. Supp. 456, 463–64 (E.D. N.Y. 1986); *Zisman*, 106 F.R.D. at 199–200; Weight v. Kawasaki Heavy Indus., Ltd., 597 F. Supp. 1082, 1085-1086 (E.D. Va. 1984); *Chrysler*, 589 F. Supp. at 1206; Nicholson v. Yamaha Motor Co., 566 A.2d 135, 143 (Md. App. 1989); *Rissew*, 515 N.Y.S.2d at 355; *Sandoval*, 527 A.2d at 566; Armstrong, *supra* note 159, at 589; Robert M. Hamilton, *An Interpretation of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents Concerning Personal Service in Japan*, 6 LOY. L.A. INT'L & COMP. L. REV. 143, 159 (1983).

2 Armstrong, *supra* note 159, at 554.

3 Craig R. Delk, *Service of Process on a Japanese Defendant in Japan Under Article 10(a) of the Hague Service Convention*, 48 INTER ALIA, Nov.–Dec. 1983, at F1.

4 *Compare* Anbe v. Kikuchi, 141 F.R.D. 498, 500 (D. Haw. 1992) (Japanese silence equals agreement with position that mail service is forbidden), *with Schiffer*, 192 F.R.D. at 339 (Japanese silence equals agreement with position that mail service is allowed).

> considered valid service in Japan; it merely indicates that Japan does not consider it as infringement of its sovereign power.[5]

This statement

> was to discourage the direct-mail practice and 'drastically' reduce the number of direct mailing of judicial documents from foreign countries to Japan. In other words, what the Japanese government actually meant to say in its statement was that Japan does not consider direct mail as a valid method of service abroad. The ambiguity is obviously the result of the Japanese officials' peculiar, and often-criticized, general reluctance to make any clear-cut, yes-or-no statements at any official public meeting.[6]

It thoroughly muddied the waters, however, as the Hague Conference's statement on it observes:

> Japan has not declared that it objects to the sending of judicial documents, by postal channels, directly to addressees in Japan. As the representative of Japan made clear at the Special Commission of April 1989 on the practical operation of the Service and Evidence Conventions, Japan does not consider that the use of postal channels for sending judicial documents to persons in Japan constitutes an infringement of its sovereign power.
>
> Nevertheless, as the representative also indicated, the absence of a formal objection does not imply that the sending of judicial documents by postal channels to addressees in Japan is always considered valid service in Japan. In fact, sending documents by such a method would not be deemed valid service in Japan in circumstances where the rights of the addressee were not respected.[7]

One commentator observes the Japanese Constitution makes treaties superior to domestic law.[8] Thus its treaty obligations would seem to trump whatever its civil procedure code says. An attorney licensed in both Japan and California states,

> Japanese courts expect that a U.S. service of process upon a resident in Japan, in which the summons and complaint from the United States are transmitted to Japan, will be effected by two methods

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5 Hague Conference on Private International Law, Permanent Bureau, *Report of the Work of the Special Commission of April 1989 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 and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, 28 I.L.M. at 1561 at ¶ 17 (1989).

6 5 DOING BUSINESS IN JAPAN § 14.07[5][c][iii] (2010) (citing Hara, *Shiho no kokusai-teki toitsu-undo (1989-nen no tenkai) [International Unification of Private Law (Development in 1989)]*, 17 KOKUSAI SHOJI HOMU 1284 (1989)); *cf.* Emily Parker, *Japan: Lost in Translation?*, WALL ST. J., Sept. 18, 2010, at A15 (discussing Japanese distaste for going on the record about anything).

7 Hague Conference, 2003 Commission, ¶ 57.

8 Armstrong, *supra* note 159, at 596.

> recognized under the convention: service through the Japanese Central Authority (the Foreign Affairs Ministry) or the U.S. consular officer stationed in Japan. Since U.S. administrative regulations prohibit U.S. consular officers from performing service of process on behalf of a private litigant, a U.S. plaintiff must request the Japanese Central Authority to effect service of process upon a resident in Japan, and the U.S. summons and complaint must be translated into Japanese.[9]

Where service has been effected by mailing the summons and complaint directly to the defendant, the Japanese courts have refused to respect the American court judgment.[10] This is in spite of the fact that Japan does allow service by mail for domestic lawsuits, though such service is effected through the court clerks.[11] The documents must be translated into Japanese, even if the defendants understand English.[12] Though there is also a dispute about this.[13]

Japan could opt to make a clear objection to mail service by filing a statement with the Dutch Foreign Minister. It has not done so. Therefore mail service is *de jure* permitted to Japan. But, *de facto*, it is not. If there is any possibility the judgment might need to be

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9 Yasuhiro Fujita, *Enforcing U.S. Judgments in Japan*, 27 L.A. LAW., Dec. 2004, at 19-20.

10 *Id.* at 20 (citing Chihô Saibansho [Dist. Ct.] Mar. 26, 1990, KIN'YÛ SHOJI HANREI [1630 HANREI JIHO 6] (Japan) (Hawaiian judgment not honored)).

11 G. Brian Raley, A Comparative Analysis: Notice Requirements in Germany, Japan, Spain, the United Kingdom and the United States, 10 ARIZ. J. INT'L & COMP. L. 301, 315 (1993) (citing MINJI SOSHŌHŌ [MINSŌHŌ] [C. CIV. PRO.] 1996, art. 172, para. 6 (Japan) and TAKAAKI HATTORI & DAN F. HENDERSON, CIVIL PROCEDURE IN JAPAN § 7.01[4][d] (1985). *See also* Outline of Civil Litigation in Japan, SUPREME COURT OF JAPAN (2006), § II(B)(2)(b)(3) (2006) ("The court clerk in charge usually serves these documents by ordering a letter carrier . . . to deliver them to the proper recipient."), http://www.courts.go.jp/english/proceedings/civil_suit_index.html.

12 Fujita, *supra* note 9, app. B, at 20 (citing KŌTO SAIBANSHO [High Ct.] Sept. 18, 1997, 1630 HANREI JIHŌ 6 [HANJI] (Japan) (refusing to enforce judgment of Ohio court)).

13 *Compare* Jorden, *supra* note 234, at 78 (saying translations are not required), *with* Fujita, *supra* note 234, at 79 (saying translations are required). Ohara, *supra* note 347, at 14, gives an example of a French judgment that was not enforced in Japan because the documents were sent to the defendant in Japan in the French language. *See also id.* at 17 (citing CHIHÔ SAIBANSHO [Dist. Ct.] Dec. 21, 1976, KAKYŪ SAIBANSHO KEIJI SAIBAN REISHŪ [KAMINSHŪ] (Japan). Robert W. Peterson, Jurisdiction and the Japanese Defendant, 25 SANTA CLARA L. REV. 555, 580 (1985), cites this same case to reports in 352 HANREI TAIMUZU 246 and 22 JAP. ANN. INT'L L. 160 (1978) (English translation). Peterson reports an interview with officials of the Foreign Ministry, Japan's central authority, who noted Japan did not require a translation in its declarations with the Dutch Foreign Ministry—but yet the Foreign Ministry's actual practice has been to insist on a translation. Peterson, *supra* note 114, at 586.

enforced in Japan, use redundant methods of service—and translate the documents.[14]

14 *Cf.* Fujita, *supra* note 9, app. B, at 20.