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The 'Mandatory' Nature of the Hague Service Convention in the United States is the Forum's Victory

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ABSTRACT

This Note addresses the current United States approach to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. The Note recognizes a split in United States case law concerning whether strict compliance with the Hague Service Convention is required. While some United States courts focus on the scope of the Convention and United States due process concepts to avoid strict compliance, other courts, especially state courts, require strict compliance with the Convention under the supremacy clause of the United States Constitution. The author focuses on service on foreign state corporations by substituted service on United States domestic subsidiaries as agents of foreign corporations.

The Note presents the United States Supreme Court's answer to the split in the case law in favor of the interpretation requiring mandatory application of the Hague Service Convention. The author considers the effect of this interpretation on a second split in United States case law concerning whether the Convention allows service by mail. Based on this and other effects of the Supreme Court's solution, the author concludes that this ostensible answer falls short of affording the Convention true supremacy. The Court falters by focusing solely on its interpretation of the scope of the Convention and by failing to look at all the purposes of the Convention, which the author argues is the better reasoned approach.

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I. INTRODUCTION

The rise of international civil litigation—a response to the ever-increasing interdependence of national economies—generates much concern over the mechanics of such litigation.[1] International service of process is an obviously important issue in this litigation, but it remains a much disputed area of conflict between states. The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention or Convention)[2] represents an attempt by a number of states, including the United States and most industrial Western states,[3] to lessen this dispute. At least from the United States perspective, however, two main issues arise in the case law concerning the Hague Service Convention and cause disagreement in the

1. *See, e.g.*, Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 516-17 (1953).

2. The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163 (entered into force Feb. 10, 1969) [hereinafter Hague Service Convention]. The full text of the Convention is reproduced below. *See infra* appendix.

3. *See generally* Note, *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 or Commercial Matters*, 21 VAND. J. TRANSNAT'L L. 1071 (1988).

lower federal and state courts. The first issue is whether the Convention controls international service of process to the exclusion of the United States Federal Rules of Civil Procedure and domestic state long arm statutes. The second issue is whether the Convention allows the mailing of service of process abroad directly to the opposing party or only the sending of judicial documents by the mails.

This Note examines the historical splits in the case law concerning these two issues. It shows that while there was general agreement that the Hague Service Convention supersedes state laws, a split existed in regard to the relative authority of the Convention and the Federal Rules of Civil Procedure, as well as to whether the Convention allows service of process by mail. This Note then discusses how recent United States Supreme Court cases, which apparently close the gap in the first split of cases in favor of the supremacy of the Convention over the Federal Rules of Civil Procedure possibly may open the previously agreed, yet related, gap regarding the relationship between the Convention and state service rules. This Note considers the ramifications of this development on future interpretations of the applicability of the Hague Service Convention, and focuses on the effect of the Court's pronouncements on the second split in the case law regarding service of process by mail. This Note concludes that the best way to determine the applicability of the Hague Service Convention is a case by case analysis that includes consideration of all the Convention's purposes and a presumption in favor of the applicability of the Convention. This method simultaneously gives courts a necessary flexibility in extreme cases and upholds the integrity of the Convention.

A. *The Hague Service Convention*

The Hague Service Convention reached its final form on 15 November 1965[4] as a result of discussions between twenty-three states, including the United States.[5] Today, twenty-eight states are party to the Convention.[6] The Convention arose from a milieu of growing concern over

4. Hague Service Convention, *supra* note 2, preamble; *see* Note, *The Hague Service Convention and Agency Concepts:* Lamb v. Volkswagenwerk Aktiengesellschaft, 20 CORNELL INT'L L.J. 391, 395 (1987).

5. Note, *supra* note 4, at 395; *see also* Note, *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, 126 (1969).

6. 1989 TREATIES IN FORCE 328 (U.S. Dep't of State, Pub. No. 9433). The member states are Antigua and Barbuda, Barbados, Belgium, Botswana, Canada, Cyprus, Czechoslovakia, Egypt, Denmark, the Federal Republic of Germany, Finland, France, Greece,

the shortcomings of and challenges to international judicial service of process.[7] In this connection, reference is frequently made to the following: (1) the United States post-World War II judicial isolationism at a time when the dislocation of persons and property and the emergence of the United States as the world's leading industrial and creditor state generated an "unprecedented volume of litigation involving international complications;"[8] (2) the reciprocal inadequacy of judicial assistance between states;[9] (3) the need for personal service at a time when neither publications nor the files of the State Department of the United States contained information on how to secure service or described the attitudes or practices of foreign governments;[10] (4) the fact that foreign counsel fees for guidance on service were in excess of the amounts usually allowed by United States courts for costs of service;[11] (5) the absolute bar to using consular officers to execute service;[12] (6) the problems in meeting United States practice act requirements when complying with foreign service law;[13] (7) the refusal of United States executive departments to receive, transmit, or supervise compliance with requests for judicial assistance when their foreign counterparts provided these services;[14] and (8) the problems generated by Rule 4 of the Federal Rules of Civil Procedure,[15] including difficulties in its construction,[16] its reference to often

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Israel, Italy, Japan, Luxembourg, Malawi, the Netherlands, Norway, Pakistan, Portugal, Spain, Seychelles, Sweden, Turkey, the United Kingdom, and the United States. *Id.* Article 28 of the Convention permits accession to the agreement. Hague Service Convention, *supra* note 2, art. 28.

7. Shoei Kako Co. v. Superior Court, 33 Cal. App. 3d 808, 819, 109 Cal. Rptr. 402, 480 (1973). For a helpful discussion of the *travaux prêparatoires* and corresponding commentary reflecting on the purposes and mechanics of the Hague Service Convention, see Note, *supra* note 4, at 393-98.

8. Jones, *supra* note 1, at 516-17.

9. *Id.* at 516. Civil law states presented a special challenge to the reciprocal inadequacy of judicial assistance. *Id.*

10. *Id.* at 534, 536.

11. *Id.* at 536. Jones narrates an example of the potential excessiveness of these fees. A German lawyer sent a fee to a New York lawyer for service of process. The fee was based on the amount in controversy rather than the fee of a process server because the German bar stresses the amount in controversy in the computation of fees. The service fee was for "several hundred dollars" at a time "[s]ome years ago" from the article's 1953 publication. *See id.* at 536 n.66.

12. *Id.* at 536-37.

13. For example, the common United States practice act requirement of verification of proof of service is unknown to civil law. *Id.* at 537.

14. *Id.* at 539.

15. FED. R. CIV. P. 4. For a discussion of the problems presented by Rule 4 in this regard, see generally Smit, *International Aspects of Federal Civil Procedure*, 61

inadequate provisions in federal statutes,[17] and its insufficient consideration of possible objections from foreign sovereigns.[18]

The plain language of the Convention's preamble sets forth the twofold purpose of the agreement: (1) the creation of appropriate means to ensure timely notice of judicial and extrajudicial documents served abroad; and (2) the simplification and expedition of such procedure to improve the organization of mutual judicial assistance.[19]

Article 1 indicates the scope of the Convention, stating that the Convention is applicable to all civil or commercial cases "where there is occasion to transmit a judicial or extrajudicial document for service abroad."[20] Articles 2 through 6 outline the basic structure for service under the Convention. Competent authorities or judicial officers of the originating state send requests for service that conform with the model annexed to the Convention to the "Central Authority," which the recipient signatory state designates and organizes in conformity with that state's law.[21] The Central Authority determines whether the request complies with the Hague Service Convention.[22] If there is compliance, the Central Authority, under article 5, either directly serves the document on its national or has the document served by an appropriate agency in accordance with the recipient state's internal law or by a method requested by the applicant, provided the requested method is not incompatible with the recipient state's internal law.[23] The Convention directs the Central Authority to object promptly and specifically to noncomplying requests.[24] Under certification requirements, the Central Authority presents to the applicant a certificate modeled after that annexed to the Convention.[25] The certificate states either that the document was served—including the method, place, and date of service, and the person

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COLUM. L. REV. 1031 (1961).

16. Smit, *supra* note 15, at 1032-39. One problem in the construction of Rule 4 results from the Rule's reference to state law and federal statutes to determine when and how foreign service may be made. The question arises whether other subdivisions of Rule 4 or the corresponding provisions in the state laws or federal statutes apply when performing extraterritorial service. *Id.* at 1035.

17. *Id.* at 1039-40.

18. *Id.* at 1032, 1040-43. This problem is still evident when state law, rather than the federal rules, guides foreign service. *Id.* at 1041.

19. Hague Service Convention, *supra* note 2, preamble.

20. *Id.* art. 1.

21. *Id.* arts. 2, 3.

22. *Id.* art. 4.

23. *Id.* art. 5.

24. *Id.* art. 4.

25. *Id.* art. 6.

to whom service was delivered—or the reasons service was prevented.[26]

The model Request, Certificate, and Summary of the Document to be Served—annexed to the Convention—are subject to language restrictions: The standard terms generally must be written in French or English, but may be written in an official language of the originating state; the blanks are to be completed either in the recipient state's language, French, or English.[27] If the Central Authority determines that the request for service complies with the Convention and therefore serves the document under a method provided by article 5, it additionally may require that the document itself be written in or translated into an official language of the recipient state.[28]

Alternative methods of service are possible under the Hague Service Convention. Article 8 allows direct service through diplomatic or consular agents.[29] Article 9 allows the recipient state to designate other authorities to receive service through the transferring state's consular channels or, in exceptional cases, diplomatic channels.[30] Additionally, unless incompatible with the recipient state's internal law, the receipient national may receive service through voluntary acceptance of the document.[31]

Article 10(a) provides that the "Convention shall not interfere with . . . the freedom to send judicial documents, by postal channels, directly to persons abroad."[32] United States federal and state court interpretations of this last alternative method of service generate the difference of opinion that is mentioned above as arising from one of the two main issues in the United States case law concerning the Hague Service Convention.[33]

A state may object to these alternative service methods. Articles 8 and 10 specifically provide for objections to service through consular or diplo-

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26. *Id.*

27. *Id.* art. 7.

28. *Id.* art. 5.

29. *Id.* art. 8.

30. *Id.* art. 9. Article 9 also implies the obverse of this alternative method. Under this article, a state's failure to designate other authorities to receive process indicates that state's refusal of this alternative method of process. *See supra* note 23 and accompanying text (discussing the alternative methods allowed through the Central Authority mechanism).

31. *Id.* art. 5.

32. *Id.* art. 10(a).

33. *See supra* part I. This split in the case law concerns whether the use of the word "send" instead of "service" in article 10(a) means that service may never be effectuated abroad through use of the mails. See *infra* part III.

matic channels, or mail, respectively.[34] Article 21 establishes the formalities for making these objections.[35] Under article 9, a state may refuse to allow other authorities to receive service merely by not making a designation.[36]

The United States Senate recognizes article 15, which addresses default judgments,[37] as equivalent to the United States due process concept.[38]

B. *The Effect of Insufficient Service of Process*

Although some courts dismiss actions because service offends the Hague Service Convention provisions,[39] courts often quash the service instead and give the plaintiff additional time to effect service in accordance with the Convention.[40] The United States Court of Appeals for the Fourth Circuit established this precedent in *Vorhees v. Fischer & Krecke*.[41] The court, while holding service invalid for noncompliance with the Hague Service Convention, held that the lower court should not have dismissed the action "until the plaintiffs were given a reasonable opportunity to attempt to effect valid service" in compliance with the Convention.[42] This leniency runs flatly against the traditional and arguably integral requirement of statutes of limitation that a defendant must be served before the running of the statute.[43] Recognizing this re-

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34. Hague Service Convention, *supra* note 2, arts. 8, 10.

35. Article 21 requires the objecting state to inform the Ministry of Foreign Affairs of the Netherlands of its opposition to the use of the transmission methods provided under articles 8 and 10. *Id.* art. 21.

36. *Id.* art. 9; *see supra* note 30.

37. *Id.* art. 15; Note, *supra* note 4, at 397.

38. Shoei Kako Co. v. Superior Court, 33 Cal. App. 3d 808, 820, 109 Cal. Rptr. 402, 410 (1973) (citing 119 CONG. REC. 404 (1967)); *see also infra* notes 58, 138 and accompanying text.

39. *See, e.g.*, Low v. Bayerische Motoren Werke, A.G., 88 A.D.2d 504, 449 N.Y.S.2d 733 (1982).

40. *See, e.g.*, Harris v. Browning-Ferris Indus. Chem. Serv., 100 F.R.D. 775 (M.D. La. 1984); Mommsen v. Toro Co., 108 F.R.D. 444 (S.D. Iowa 1985); *see also* Cipolla v. Picard Porsche Audi, 496 A.2d 130 (R.I. 1985); Pochop v. Toyota Motor Co., 111 F.R.D. 464 (S.D. Miss. 1986).

41. 697 F.2d 574 (4th Cir. 1983).

42. *Id.* at 576 (quoting Bailey v. Local 667, Int'l Brotherhood of Boilermakers, 480 F. Supp. 274, 278 (N.D.W. Va. 1979)) ("If the first service of process is ineffective, a motion to dismiss should not be granted, but rather the Court should treat the motion in the alternative, as one to quash the service of process and the case should be retained on the docket pending effective service.").

43. Stoehr v. American Honda Motor Co., 429 F. Supp. 763, 767 (D. Neb. 1977).

quirement, the United States Court of Appeals for the Eighth Circuit took the position that the running of the statute of limitations before proper service precludes an action against a defendant even when the lawsuit is timely filed.[44]

II. Scope of the Hague Service Convention

The case law presents examples of the two extremes of the dichotomy in United States jurisprudence concerning whether the Hague Service Convention provides the exclusive means of service abroad. At one extreme is the United States Court of Appeals for the Third Circuit decision in *DeJames v. Magnificence Carriers*, holding that the Hague Service Convention specifies valid methods of effecting service only if the United States Federal Rules of Civil Procedure or state long arm statutes authorize service abroad.[45] At the other end of the spectrum is the Rhode Island Supreme Court decision in *Cipolla v. Picard Porsche Audi*, holding that state long arm statutes and rules notwithstanding, service abroad must be perfected according to the Hague Service Convention under the supremacy clause of the United States Constitution.[46] In addition to this typical state court position, some federal courts also rule that the Convention overrides the Federal Rules of Civil Procedure, using supremacy clause analysis in a slightly different form.[47]

A. *Strict Compliance Not Required*

1. Scope

Through an analysis focused on the scope of the Hague Service Convention, the *DeJames* court fully recognized the supremacy clause and yet held the Hague Service Convention inapplicable to a United States plaintiff's service on a foreign defendant that had its principal place of

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44. *Id.* (citing Prashar v. Volkswagen of America, 480 F.2d 947 (8th Cir. 1973), *cert. denied*, 415 U.S. 994 (1974)).

45. 654 F.2d 280, 289 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981).

46. 496 A.2d 130, 132 (R.I. 1985). The supremacy clause reads:

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

U.S. Const. art. VI, cl. 2.

47. For a discussion of how supremacy clause analysis also applies to conflicts between the Hague Service Convention and the Federal Rules of Civil Procedure, see *infra* part II, section B.1.

business in Japan.[48] The United States Court of Appeals for the Third Circuit specifically defined the scope of the Convention and held that the Convention does not provide independent authorization for service in a foreign state, but merely provides a *mechanism* for a plaintiff, independently authorized to serve under its own state laws, to give appropriate notice by a service method that is not objectionable to the foreign state.[49] In this way, the Hague Service Convention is truly the supreme law and overrides United States federal and state methods for service abroad that are objectionable to the foreign state.[50] The court, however, limited this supremacy to the methods, not the authorization, of service and held that the Hague Service Convention "in [no] way affects a state's chosen limits on the jurisdictional reach of its courts."[51]

An important consequence of this reasoning, which allows a plaintiff to bypass the standard Central Authority mechanism established by the Convention, is relief from the translation requirements of the Convention.[52] In *Weight v. Kawasaki Heavy Industries*, the United States District Court for the Eastern District of Virginia upheld strict reliance on the Virginia long arm statute, which authorized direct mail service on a Japanese defendant in Japan, when Japan had not objected to service by mail under article 21 of the Hague Service Convention.[53] The court noted that although Central Authorities may require translations of documents to be served under article 5, the plaintiff avoided the Japanese Central Authority by using direct mail service; there is no translation requirement under article 10(a), which allows for mail service.[54]

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48. DeJames v. Magnificence Carriers, 654 F.2d 280, 282-83, 288-89 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981).

49. *Id.* at 288-89. Stating that the same principle applies to the Federal Rules of Civil Procedure, the court held the Hague Service Convention "merely serves as an important adjunct to state long-arm rules, and that it specifies a valid method of effecting service only if the state long-arm rule authorizes service abroad." *Id.* at 289.

50. *Id.* at 288-89.

51. *Id.* at 289.

52. *See supra* notes 27-28 and accompanying text.

53. 597 F. Supp. 1082 (E.D. Va. 1984). Article 10(a) provides the authorization for mail service if the recipient state has not objected to this form of service. Hague Service Convention, *supra* note 2, art. 10(a). Courts dispute this interpretation. *See supra* part I and *infra* part III; *see also* note 33. Article 21 provides the method for objecting to this form of service. Hague Service Convention, *supra* note 2, art. 21; *see supra* note 35 and accompanying text.

54. 597 F. Supp. at 1086; *see supra* note 53.

2. Due Process

Courts also justify noncompliance with the Hague Service Convention on due process grounds. In *Shoei Kako Co. v. Superior Court*,[55] the California Supreme Court found that the return receipt signed by the defendant was satisfactory evidence of actual delivery thereby validating the service of the summons and complaint on a Japanese corporation's head office in Japan.[56] The court upheld this form of service even though the documents mailed were not written in Japanese, a requirement that the Japanese Central Authority could have imposed under article 5 of the Hague Service Convention if there had been compliance with the Convention's terms.[57] The court drew attention to the United States Senate's recognition of article 15 of the Hague Service Convention as the equivalent of the United States due process concept[58] and relied on the United States Supreme Court's traditional statement of due process:

> The adequacy of service "so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice . . . implicit in due process are satisfied."[59]

The United States District Court for the Northern District of Illinois in *Tamari v. Bache & Co. (Lebanon) S.A.L.* followed *Shoei* and held

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55. 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1973).

56. *Id.* at 823-24, 109 Cal. Rptr. at 412-13.

57. The *Shoei* court distinguished Julen v. Larson, 25 Cal. App. 3d 325, 101 Cal. Rptr. 796 (1972), in which the same court upheld the lower court's refusal to enforce a default judgment of a Swiss court against a local defendant. In *Julen*, the documents sent to defendant by certified mail were written entirely in German and not described. Therefore, the *Julen* court held that defendant had not received fair notice, observing that the Hague Service Convention itself calls for the use of English or French. By contrast, the record in *Shoei* showed the use of English by Japanese companies involved in international trade. *Shoei*, 33 Cal. App. 3d at 823, 109 Cal. Rptr. at 412; *see also supra* notes 27-28 and accompanying text (discussing language requirements in the Hague Service Convention); *supra* notes 52-54 and accompanying text (discussing possible methods of circumventing the translation requirements imposed by Central Authorities).

58. *Shoei*, 33 Cal. App. 3d at 820, 109 Cal. Rptr. at 410; *see also supra* notes 37-38 and accompanying text; *infra* note 138 and accompanying text.

59. *Shoei*, 33 Cal. App. 3d at 818, 109 Cal. Rptr. at 409 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). The *Milliken* Court relied on its decision in MacDonald v. Mabee, 243 U.S. 90 (1917) to recognize that substituted service on a domiciled but absent defendant served at the defendant's usual place of abode in the state may be wholly adequate to meet the due process requirements. *Milliken*, 311 U.S. at 462-63.

service adequate despite that the service on the foreign defendant was not effected pursuant to one of the specific methods set forth in the Hague Service Convention.[60] The court reasoned that although the service was not in compliance with the Central Authority method of the Hague Service Convention, it nevertheless was proper under articles 5, 10, and 15 of the Convention.[61] The court focused on the United States due process requirement and held that whereas the Hague Service Convention sets out a service method through a Central Authority, it does not necessarily follow that a plaintiff cannot use other methods if the plaintiff can present "effective proof of / delivery."[62] The court buttressed its holding by declaring that the Hague Service Convention preamble clearly shows that the treaty's purpose is to simplify service to ensure that the defendant receives timely notice[63]—a due process notion.

B. *Strict Compliance Required*

1. Federal Rules of Civil Procedure

As in *Cipolla v. Picard Porsche Audi*,[64] the United States courts that require strict compliance with the Hague Service Convention rely primarily on the supremacy clause of the United States Constitution. Because the Hague Service Convention "establishes affirmative and judicially enforceable obligations without requiring any implementing legislation," it is a self-executing treaty, thereby having legal effect equal to acts of the United States Congress.[65] The Federal Rules of Civil Procedure, as an act of Congress, are on equal footing with the Hague Service Convention under supremacy clause analysis. The United States Court of Appeals for the Fourth Circuit accordingly held that because the Hague Service Convention entered into force subsequent to the enactment of the Federal Rules, the Convention prevails over the Federal

60. 431 F. Supp. 1226 (N.D. Ill.), *aff'd*, 565 F.2d 1194 (7th Cir. 1977), *cert. denied*, 435 U.S. 905 (1978).

61. *Tamari*, 431 F. Supp. at 1229; Article 5 provides for voluntary acceptance of service. Hague Service Convention, *supra* note 2, art. 5. Article 10(b) allows service directly through competent persons of the service recipient's state. *Id.* art. 10(b). Article 15 conveys the due process concept noted in *Shoei*. *Id.* art. 15; *see supra* notes 37-38, 58 and accompanying text; *infra* note 138 and accompanying text.

62. *Tamari*, 431 F. Supp. at 1228 (quoting *Shoei*, 33 Cal. App. 3d at 821, 109 Cal. Rptr. at 411).

63. *Id.*

64. *See supra* note 46 and accompanying text.

65. Vorhees v. Fischer & Krecke, 697 F.2d 574, 575-76 (4th Cir. 1983) (citing Cook v. United States, 288 U.S. 102, 119 (1933); Whitney v. Robertson, 124 U.S. 190, 194 (1888)).

Rules of Civil Procedure when the two conflict.[66]

The United States District Court for the Middle District of Louisiana reached the same result by a different interpretation of the supremacy clause in *Harris v. Browning-Ferris Industries Chemical Services.*[67] The court held insufficient service on a West German corporation because the service was not in compliance with the Convention.[68] The court ruled that the Hague Service Convention prevails over the Federal Rules of Civil Procedure because, regarding service abroad, the Hague Service Convention is specific and the Federal Rules of Civil Procedure are general.[69] The court specifically rejected a later in time analysis which, by the time of the court's 1984 decision in *Harris*, would have determined Rule 4 to be controlling because Rule 4 was amended subsequent to the entry into force of the Convention.[70]

2. State Long Arm Statutes

Courts usually decide the control issue in favor of the Hague Service Convention when a plaintiff uses state procedural or business corporation law to serve a foreign defendant abroad.[71] Unlike the Federal Rules of Civil Procedure, which are equal in weight to the Convention, state laws are always of a lower authority than treaties. In *Harris*, the United

66. *Id.* at 575-76 (citing *Cook*, 288 U.S. at 119; *Whitney*, 124 U.S. at 194). The court noted that Federal Rule of Civil Procedure 4(i) became effective 1 July 1963, and the Hague Service Convention entered into force for the United States on 10 February 1969, making the Hague Service Convention the "latter in time," and thereby superseding Rule 4(i). *Id.* The Federal Rules of Civil Procedure are United States statutes and accordingly "are to be given equal dignity" as United States treaties. Harris v. Browning-Ferris Indus. Chem. Serv., 100 F.R.D. 775, 777 (M.D. La. 1984) (citing *Whitney*, 124 U.S. 190); *accord Shoei*, 33 Cal. App. 3d at 822, 109 Cal. Rptr. at 412; *Tamari*, 431 F. Supp. at 1229. The *Vorhees* decision, containing the "latter in time" analysis which favored the Hague Service Convention, *Vorhees*, 697 F.2d at 576, came on the eve of the 1983 amendments to Rule 4. Under the court's theory, in times after the amendment, Rule 4 would control over the Hague Service Convention. A United States district court decision after the amendment rejected this outcome by use of a different analysis. *Harris*, 100 F.R.D. at 777; *see infra* notes 68-70 and accompanying text.

67. 100 F.R.D. 775 (M.D. La. 1984).

68. *Id.* at 777-78.

69. *Id.*

70. *Id.* at 778. Congress amended Rule 4 in 1983, after the entry into force of the Convention in 1969. *Id.* at 777; *see supra* notes 65-66 and accompanying text (discussing the *Vorhees* "latter in time" analysis). For a detailed analysis of the interplay between the Hague Service Convention and the Federal Rules of Civil Procedure, see Note, *supra* note 3.

71. *See generally supra* part I; notes 46-47 and accompanying text.

States District Court for the Middle District of Louisiana conclusively declared, "If the provisions of state law conflict with the provisions of an international treaty, by virtue of the supremacy clause the provisions of the treaty must prevail."[72]

The Alabama Supreme Court explicitly ruled that the Hague Service Convention superseded its own state civil procedure rules, even though the state rules specifically provided several methods of foreign service.[73]

The New York Appellate Division similarly found that its state business corporation law could not override the application of the Hague Service Convention.[74] In *Reynolds v. Koh*, the court held that the sending of an amended summons and complaint by registered mail, return receipt requested, to a Japanese corporate defendant in Japan, with a copy delivered to the New York Secretary of State pursuant to the New York business corporation law, did not satisfy the Hague Service Convention.[75] The court declared that reliance on business corporation law for a service method contrary to the Hague Service Convention was insufficient to establish personal jurisdiction over the foreign defendant.[76] Although the Japanese corporation voluntarily accepted the mailed service, the court held that the service did not comply with article 5(b) of the Hague Service Convention, which allows service by additional particular methods requested by the applicant if not incompatible with the recipient state's law.[77] The court based its rationale on the fact that the plaintiff never requested service by mail and found Japanese and New York law incompatible to the extent that the latter allowed direct service by one litigant upon another.[78]

In *Low v. Bayerische Motoren Werke, A.G.*, the New York Appellate Division held that the use of business corporation law service methods does not override the Hague Service Convention requirements.[79] The court held that compliance with New York business corporation law, by serving the New York Secretary of State and mailing a copy of the service by registered mail to Bayerische Motoren Werke, A.G. (BMW-AG) in West Germany, was improper under the Hague Service Convention

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72. *Harris*, 100 F.R.D. at 777 (citing DeJames v. Magnificence Carriers, 654 F.2d 280 (3d Cir. 1981); United States v. Pink, 315 U.S. 203 (1942)).

73. Rivers v. Stihl, Inc., 434 So. 2d 766 (Ala. 1983).

74. Reynolds v. Koh, 109 A.D.2d 97, 490 N.Y.S.2d 295 (1985).

75. *Id.*

76. *Id.* at 100, 490 N.Y.S.2d at 298.

77. *Id.*

78. *Id.*

79. 88 A.D.2d 504, 449 N.Y.S.2d 733 (1982).

because West Germany had objected to article 10 mail service.[80]

C. *Agency Considerations*

1. Failed Attempts to Avoid Compliance through Agency

The *Low* court also addressed whether the appointment of BMW of North America (BMW-NA) as BMW-AG's agent for service under section 1399(e) of the Motor Vehicle Safety Act,[81] made service upon BMW-NA for BMW-AG proper in a products liability action.[82] Noting that *Bollard v. Volkswagenwerke, A.G.*[83] allowed service on the section 1399(e) appointed agent in a private action against a manufacturer, the court followed the "weight of authority, declining to follow *Bollard*," and held "that 'the appointment of an agent under § 1399(e) is solely for the purposes of expediting enforcement of the [Motor Vehicle] Safety Act and is not a general agency appointment.' "[84]

Courts consider other general agency grounds to circumvent compliance with the Hague Service Convention. The Federal Rules of Civil Procedure allow substituted service on a "managing or general agent, or . . . any other agent authorized by appointment or by law to receive service."[85] The New York legislature adopted this language into the New York business corporation law and the New York Appellate Division considered it in *Low*, yet the court determined that the record did not support a finding that BMW-NA was an agent of BMW-AG as described in the statute.[86] To the court, however, such an agency finding would have allowed service on BMW-AG, doing business itself or through BMW-NA as BMW-AG's agent in the state, by delivery of service of BMW-NA, regardless of any authorization to receive service.[87]

The New York Appellate Division did not find that BMW-NA was so completely controlled by BMW-AG that it was merely a department

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80. *Id.* at 505, 449 N.Y.S.2d at 735. As a result of this ineffective service, the New York court did not obtain jurisdiction under New York business corporation law. *Id.*; *see infra* part III (discussing whether service by mail is ever permissible under the Hague Service Convention).

81. 15 U.S.C. § 1399(e) (1988).

82. *Low*, 88 A.D.2d at 505, 449 N.Y.S.2d at 735.

83. 313 F. Supp. 126 (W.D. Mo. 1970).

84. *Low*, 88 A.D.2d at 505, 449 N.Y.S.2d at 735 (quoting Rubino v. Celeste Motors, No. 72-C-350 (N.D.N.Y., October 11, 1984)) (citations omitted).

85. FED. R. CIV. P. 4(d)(3).

86. *Low*, 88 A.D.2d at 505-06, 449 N.Y.S.2d at 735.

87. *Id.*

of BMW-AG.[88] It did, however, recognize cases in which "mere department" findings lead to holdings that the subsidiary represents the parent for service purposes.[89]

2. Circumvention of the Hague Service Convention through Agency

The cases that do allow service on foreign defendants by circumvention of the Hague Service Convention requirements more often involve this broad, "mere department" type service on a foreign national's agent, a wholly owned subsidiary in the forum. Two courts in cases involving service on the West German corporation, Volkswagenwerk Aktiengesellschaft (VWAG), through its wholly owned United States subsidiary in the forum, Volkswagen of America (VWoA), allowed service on the subsidiary as the foreign corporation's agent for service of process without any specific appointment of the subsidiary to this effect.[90] In *Ex Parte Volkswagenwerk Aktiengesellschaft*, the Alabama Supreme Court found service on the wholly owned, New Jersey subsidiary sufficient to obtain jurisdiction over the West German parent corporation that had a high degree of control over the internal affairs of the subsidiary and determined the subsidiary's daily operations.[91] The court determined that the subsidiary was the "alter ego" of the parent even though the subsidiary "hire[d] and fire[d] its own employees, [wa]s adequately capitalized, maintain[ed] its own bank accounts, and purchase[ed] products from other manufacturers."[92] The court framed the issue to set out an explicit rule providing that if "[the wholly owned subsidiary] can be considered the agent of [the foreign parent] for the purpose of service of process . . . then the summons and complaint served on [the wholly owned subsidiary] on the behalf of [the foreign parent] is good and sufficient

88. *Id.* at 505-06, 449 N.Y.S.2d at 735-36.

89. *Id.* at 506, 449 N.Y.S.2d at 735 (citing Taca Int'l Airlines, S.A. v. Rolls-Royce of England, 15 N.Y.2d 97, 204 N.E.2d 329, 256 N.Y.S.2d 129 (1965); Geffen Motors v. Chrysler Corp., 54 Misc. 2d 403, 283 N.Y.S.2d 79 (N.Y. Sup. Ct. 1967)).

90. *Ex parte* Volkswagenwerk Aktiengesellschaft (VWAG), 443 So. 2d 880 (Ala. 1983); Lamb v. Volkswagenwerk Aktiengesellschaft, 104 F.R.D. 95 (S.D. Fla. 1985).

91. *VWAG*, 443 So. 2d 880.

92. *Id.* at 884, 885. The court held that "these factors merely indicate that the parent and subsidiary are formally structured as two separate corporations" and would not allow these formalities to overshadow the real connection between the companies. *Id.* Although not cited by the court, earlier support exists for finding service on a subsidiary proper where the subsidiary is the "alter-ego" of the parent. ABKCO Indus. v. Lennon, 52 A.D.2d 435, 440, 384 N.Y.S.2d 781, 784 (1976) (citing Public Admin'r of New York v. Royal Bank of Canada, 19 N.Y.2d 127, 224 N.E.2d 877, 278 N.Y.S.2d 378 (1967)), *aff'd in part, modified in part*, 52 A.D.2d 435, 384 N.Y.S.2d 781 (1976).

service on [the foreign parent]."[93]

This formulation of the proper service test allowed the court to reverse the traditional supremacy clause analysis. Rather than use supremacy clause analysis to determine whether the service of process was conducted under the proper law, the court made an independent determination of whether the service was proper to determine whether the supremacy clause was violated:

> [I]f service of process on VWoA as the alter ego of VWAG is not good and sufficient service on VWAG, then requiring VWAG to submit to the trial court's jurisdiction would be in disregard of the provisions of the Hague Convention and, therefore, in violation of the Supremacy Clause of the United States Constitution . . . .[94]

In *Lamb v. Volkswagenwerk Aktiengesellschaft*, the United States District Court for the Southern District of Florida similarly held the Hague Service Convention inapplicable to the determination of the validity of the service; the court found this determination properly made under common law agency theory when the foreign corporation or its agent is located and served in the United States.[95] In *Lamb*, sufficient evidence of control over the United States subsidiary by the West German parent corporation supported the finding that the United States subsidiary could be considered the agent of the West German corporation for the purpose of effecting valid service on the West German corporation.[96]

These two courts followed cases providing a clear precedent that the United States District Court for the District of Kansas aptly summarized in *Professional Investors Life Insurance Co. v. Roussel*:

> 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 domination 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 economic entity. In such a situation service of process on the subsidiary operates to extend jurisdiction over the parent.[97]

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93. *VWAG*, 443 So. 2d at 881.

94. *Id.* at 882 (footnote omitted).

95. *Lamb*, 104 F.R.D. at 97.

96. *Id.* at 100-01.

97. 445 F. Supp. 687, 698 (D. Kan. 1978) (citing Farha v. Signal Cos., 216 Kan. 471, 532 P.2d 1330 (1975), *opinion modified*, 217 Kan. 43, 535 P.2d 463 (1975)). In *Professional Investors*, the mere allegation of a "family business" controlling various

Courts use a number of formulations to indicate the degree of control necessary to establish agency for purposes of service. The parent-subsidiary relation alone ordinarily is not enough;[98] a manufacturer-distributor relationship alone also is not enough.[99] The "mere department" determination, as noted above, is sufficient for some courts to hold proper substituted service on a subsidiary.[100] A number of courts declare that control such that the subsidiary "no longer has a will, mind, or existence of its own" is the test.[101] The Alabama Supreme Court utilized the "alter ego" formulation.[102] The New York Appellate Division also used the "alter ego" test to find substituted service proper.[103] New York courts have held that service on a wholly owned subsidiary that is a "mere instrumentality" of the parent constitutes valid service on the parent.[104] The United States District Court for the Southern District of Florida, in *Lamb v. Volkswagenwerk Aktiengesellschaft*,[105] adopted the test formulated by the United States District Court for the Western District of Missouri in *Richardson v. Volkswagenwerk, A.G.*:

> The parties seeking to prove proper service must at least show that the parent exercises such a degree of control over the subsidiary that the activities of the subsidiary are the activities of the parent or show that the subsidiary's activities are controlled by the parent to the extent that the subsidiary is only a department of the parent.[106]

As hinted by this language, the plaintiff must establish agency because the plaintiff has the burden of proving proper service once it is con-

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corporations, including defendant's business, was insufficient to trigger in personam jurisdiction, although other facts made the exercise proper. *Id.* at 698.

98. Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925); Jones v. Volkswagen of America, 82 F.R.D. 334, 335 (E.D. Tenn. 1978).

99. Turner v. Jack Tar Grand Bahama, Ltd., 353 F.2d 954 (5th Cir. 1965).

100. *See generally supra* notes 90-93 and accompanying text; *see also supra* note 96 and accompanying text; *infra* notes 104-06 and accompanying text.

101. *See, e.g., Professional Investors*, 445 F. Supp. at 698; *see also supra* note 97 and accompanying text.

102. *VWAG*, 443 So. 2d 880, 884; *see supra* notes 91-93 and accompanying text.

103. *ABKCO Indus.*, 52 A.D.2d at 440, 384 N.Y.S.2d at 784; *Royal Bank of Canada*, 19 N.Y.2d 127, 224 N.E.2d 877, 278 N.Y.S.2d 378; *see supra* note 92 and accompanying text.

104. Taca Int'l Airlines, S.A. v. Rolls-Royce of England, 15 N.Y.2d 97, 204 N.E.2d 329, 256 N.Y.S.2d 129 (1965).

105. 104 F.R.D. 95, 98 (S.D. Fla. 1985).

106. 552 F. Supp. 73, 79 (W.D. Mo. 1982) (citing *Professional Investors*, 445 F. Supp. at 698; Stoehr v. American Honda Motor Co., 429 F. Supp. 763, 765-66 (D. Neb. 1977)).

tested.[107] This inquiry into the relationship between the parent and its subsidiary is so crucial that in *McHugh v. International Components*,[108] the New York Superior Court granted a motion for discovery of jurisdictional facts to determine whether the Japanese defendant and its United States subsidiary "[we]re one" so that service on the subsidiary would be valid service on the defendant Japanese corporation.[109] The court in *McHugh* explicitly noted that it is not necessary that the subsidiary be independently subject to the court's jurisdiction.[110]

The Washington Supreme Court stated the policies behind these holdings in *Crose v. Volkswagenwerk Aktiengesellschaft*.[111] In that case the court refused to quash substituted service on VWAG's wholly owned subsidiary.[112] In *Crose*, the physical service was even further removed from the name defendant than in the usual case of substituted service on a wholly owned subsidiary; service was performed on VWAG by service on CT Corporation, the agent for service for Riviera Motors, a wholly owned subsidiary of VWoA, which itself is a wholly owned subsidiary of VWAG.[113] The court's primary concern was fairness to the parties.[114] The court distinguished cases in which courts facing "the same distribution scheme and a similar state jurisdictional statute . . . reached a contrary result,"[115] stating that these courts did not "fully consider[] the intricacy or the economic reality of the [VWAG] and [VWoA] distribution system."[116] The court couched its decision in terms of policy rationale: "Those corporations involved in the Volkswagen distribution scheme

107. Amen v. City of Dearborn, 532 F.2d 554, 557 (6th Cir. 1976), *cert. denied*, 465 U.S. 1101 (1984).

108. 118 Misc. 2d 489, 461 N.Y.S.2d 166 (N.Y. Sup. Ct. 1983).

109. *Id.* at 492, 461 N.Y.S.2d at 168.

110. *Id.*

111. 88 Wash. 2d 50, 558 P.2d 764 (1977).

112. *Id.*

113. *Id.* at 52-53, 558 P.2d at 765-66. Process was also served directly on an officer of VWAG in West Germany. *Id.* at 52, 558 P.2d at 766.

114. *Id.* at 57, 558 P.2d at 768. The court considered the following factors to conclude that VWAG and VWoA were properly subject to service in Washington: (1) the state's interest in providing a forum for its residents; (2) the availability of another forum; (3) the amount, kind, and continuity of VWAG's activities in the state; (4) the significance of the economic benefit derived by VWAG resulting from its purposeful activities in the state; and (5) the foreseeability of injury resulting from the use of Volkswagen products traveling through the entire Volkswagen distribution chain. *Id.*

115. *Id.* at 56, 558 P.2d at 767-68 (citing Delagi v. Volkswagenwerk A.G., 29 N.Y.2d 426, 278 N.E.2d 895, 328 N.Y.S.2d 653 (1972); Lynch v. Volkswagen of America, Inc., 322 F. Supp. 1286 (D. Minn. 1970); Ritter v. Volkswagen Werk GmbH, 322 F. Supp. 569 (D. Minn. 1970)).

116. *Crose*, 88 Wash. 2d at 56, 558 P.2d at 768.

should not be allowed to circumvent the rights of the citizens of this state or to provide themselves with immunity merely by their choice of organizational form."[117]

This case is especially significant because the court found that CT Corporation's failure to advise Riviera Motors of the service did not affect the service's validity.[118] Rather than rely on this lack of actual notice, the court focused on the "intricate linking of [VWAG], [VWoA] and Riviera in the worldwide manufacture, sales, and distribution network."[119] The court found it "reasonably certain that [Riviera] would turn over the process to those called upon to answer" because of Riviera's "responsible representative status in relationship to [VWAG] and [VWoA]" as found from all the surrounding facts.[120]

III. Service of Process Mailed Directly Abroad Under the Hague Service Convention

United States jurisprudence exhibits clearly countervailing cases on the issue of whether the Hague Service Convention allows the direct mailing of service abroad. The language of the Convention itself, article 10(a), provides the basis of the controversy: "Provided the State of destination does not object, the present Convention shall not interfere with . . . the freedom to send judicial documents, by postal channels, directly to persons abroad."[121]

A. *Mail Service Impermissible*

The argument against the Hague Service Convention permitting service by mail as an alternative to the Central Authority method[122] is based on statutory construction. In *Mommsen v. Toro Co.*,[123] the United States District Court for the Southern District of Iowa relied on popular canons of statutory construction relating to plain meaning,[124] legislative

117. *Id.* at 56, 558 P.2d at 767.

118. *Id.* at 58, 558 P.2d at 769. Perhaps the court was influenced by the fact that a copy of the service was mailed to VWAG in West Germany. *See supra* note 113.

119. *Crose*, 88 Wash. 2d at 59, 558 P.2d at 769.

120. *Id.* at 58, 558 P.2d at 769.

121. Hague Service Convention, *supra* note 2, art. 10(a).

122. For a discussion of the primary Central Authority service method outlined by the Hague Service Convention and alternative methods, see *supra* notes 21-36 and accompanying text.

123. 108 F.R.D. 444 (S.D. Iowa 1985).

124. *Id.* at 446; *see id.* (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 108 (1980)) ("[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary,

intent,[125] and established meaning in equity and common law[126] to find mail service impermissible under the Convention:

> The Hague Convention repeatedly refers to "service" of documents, and if the drafters of the Convention had meant for subparagraph (a) of Article 10 to provide an additional manner of service of judicial documents, they would have used the word "service." To hold that subparagraph (a) permits direct mail service of process, would go beyond the plain meaning of the word "send" and would create a method of service of process at odds with other methods of service permitted by the Convention. Sending a copy of a summons and complaint by registered mail directly to a defendant in a foreign country is not a method of service of process allowed by the Hague Convention.[127]

One year later, the United States District Court for the Southern District of Mississippi announced that it faced "precisely the same" issue faced in *Mommsen* and agreed with the United States District Court for the Southern District of Iowa, claiming that the "better reasoned view" is that the Hague Service Convention precludes service by mail.[128]

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that language must ordinarily be regarded as conclusive.").

125. *Mommsen*, 108 F.R.D. at 446. The court quoted Russelo v. United States, 464 U.S. 16, 23 (1983) (Where a legislative body "includes a particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislative body] acts intentionally and purposely in the disparate inclusion or exclusion.").

126. *Mommsen*, 108 F.R.D. at 446. The court quoted NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981) (Where a legislative body "uses terms that have accumulated meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that the [legislative body] means to incorporate the established meaning of these terms.").

127. *Mommsen*, 108 F.R.D. at 446. The Hague Service Convention makes a substantial number of references to "service." *See* Hague Service Convention, *supra* note 2, preamble ("documents to be served"); *id.* art. 1 ("service abroad" and "person to be served"); *id.* art. 2 ("requests for service"); *id.* art. 3 ("document to be served"); *id.* art. 5 ("shall itself serve . . . or . . . have it served," " method . . . for . . . service," "served by delivery," "document is to be served," "document to be served," and "shall be served"); *id.* art. 6 ("document has been served," "date of service," "has not been served," and "prevented service"); *id.* art. 8 ("free to effect service," "opposed to such service," and "document is to be served"); *id.* art. 9 ("for the purpose of service"); *id.* art. 10 ("to effect service" and "to effect service"); *id.* art. 11 ("for the purpose of service"); *id.* art. 12 ("service of judicial documents" and "method of service"); *id.* art. 13 ("request for service"); *id.* art. 14 ("documents for service"); *id.* art. 15 ("for the purpose of service," "served by a method," "for the service of documents," "the service or the delivery," and "certificate of service or delivery"); *id.* arts. 16, 17 ("for the purpose of service"); *id.* art. 19 ("for service").

128. Pochop v. Toyota Motor Co., 111 F.R.D. 464, 466 (S.D. Miss. 1986).

The statutory construction argument against foreign service of process by mail under the Hague Service Convention found favor in the case law of New York in *Ormandy v. Lynn.*[129] The New York Supreme Court relied on the intent of the signatory states as evidenced in the Hague Service Convention provisions and the ordinary meaning of the term "send" to conclude that article 10(a) did not authorize mail service on the Japanese defendant.[130] On policy grounds, the court declared that "a liberal reading of 'send' to include effective service of legal process would vitiate the fundamental intent of the parties to establish more formal modes of service."[131]

The New York Appellate Division adopted the *Ormandy* position in *Reynolds v. Koh* as the interpretation most consistent with the intent and design of the Hague Service Convention.[132] Use of both "send" and "service" in the Convention indicated to the court that article 10(a) authorized "something other than 'service' in the legal sense, such as the mere transmittal of notices and legal documents which need not be 'served' in the legal sense."[133]

B. *Mail Service Permissible*

The cases interpreting the Hague Service Convention to allow foreign service by mail rely on the entire purpose of the Convention and due process rationale. In *Shoei Kako Co. v. Superior Court*, the California Supreme Court considered the entire scope of the Convention to outweigh the —albeit somewhat meritorious—distinction between "send" and "service."[134] Because the Hague Service Convention as a whole is concerned with the service abroad of judicial documents, the court concluded that "[t]he reference to 'the freedom to send judicial documents by postal channels, directly to persons abroad' would be superfluous unless it was related to the sending of such documents for the purpose of service."[135] This reference is placed in the Convention among the alternatives to the Central Authority method, supporting the inference that the

129. 122 Misc. 2d 954, 472 N.Y.S.2d 274 (N.Y. Sup. Ct. 1984).

130. *Id.* at 955, 472 N.Y.S.2d at 274-75.

131. *Id.*, 472 N.Y.S.2d at 275.

132. 109 A.D.2d 97, 100, 490 N.Y.S.2d 295, 298 (1985). The court stated that a contrary holding would diminish the role of Japan's Central Authority, and thus counter the intentions of the drafters of the Hague Service Convention. *Id.*

133. *Id.* at 99, 490 N.Y.S.2d at 297-98.

134. 33 Cal. App. 3d 808, 821, 109 Cal. Rptr. 402, 411 (1973).

135. *Id.*

method represents another alternative service mechanism.[136] Additionally, the court decided that the Hague Service Convention does not forbid mail service because such an understanding of the treaty ratified by the United States Senate would abrogate the Senate's earlier purpose expressed in Rule 4(i) of the Federal Rules of Civil Procedure to expedite service abroad.[137]

On due process grounds, the court noted that article 15 of the Hague Service Convention is equivalent to the United States due process concept.[138] Because the court believed internal Japanese law did not prohibit mail service with evidence of delivery, and because Japan did not specifically object to mail service under the Convention procedures, the court held that the service was within the letter and spirit of Japanese law.[139]

The United States District Court for the District of Columbia freely accepted that article 10(a) allows foreign mail service in the absence of an objection by the foreign state.[140] The court cited *Shoei* without discussion and noted the benefit of this unobtrusive method.[141]

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136. *Id.* The alternative methods of service appear in articles 8, 9, and 10 of the Convention. Hague Service Convention, *supra* note 2, arts. 8-10; *see supra* notes 29-36 and accompanying text.

137. The court found that the United States Senate intended to retain Rule 4(i) mail service unless the foreign state objects because the Federal Rules were amended after the treaty entered into force without any change in Rule 4(i). *Shoei*, 33 Cal. App. 3d at 821, 109 Cal. Rptr. at 411. This is analogous to the "latter in time" supremacy clause analysis discussed at *supra* notes 65-66 and accompanying text.

138. *Shoei*, 33 Cal. App. 3d at 820, 109 Cal. Rptr. at 410; *see also supra* notes 37-38, 58 and accompanying text.

139. *Shoei*, 33 Cal. App. 3d at 822, 109 Cal. Rptr. at 412; *see supra* note 53 and accompanying text; *infra* note 143 and accompanying text (discussing a similar holding by the United States District Court for the Eastern District of Virginia).

The *Shoei* court, however, mistakenly concluded that Japanese law permits service of process by mail. The California Court of Appeals corrected this misapprehension in 1988. *See* Suzuki Motor Co. v. Superior Court, 200 Cal. App. 3d 1476, 1480-81, 249 Cal. Rptr. 376, 379 (1988) ("Japan does *not* have an internal legal system which allows service of process by registered mail.").

Because service of process in Japan—unlike the United States—requires the authorization of a Japanese court, service by a private party constitutes an impermissible encroachment on Japanese sovereignty. Such private service therefore is without legal effect. *See generally* Kim & Sisneros, *Comparative Overview of Service of Process: United States, Japan, and Attempts at International Unity*, 23 VAND. J. TRANSNAT'L L. ——— (1990).

140. Chrysler Corp. v. General Motors, 589 F. Supp. 1182, 1206 (D.D.C. 1984).

141. *Id.* The court quoted FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1313 (D.C. Cir. 1980) ("[S]ervice of process from the United States into a foreign country by registered mail may thus be viewed as the least intrusive means of

The United States District Court for the Northern District of Illinois also held mail service not contrary to the Hague Service Convention because Japan had not objected to mail service.[142] Similarly, the United States District Court for the Eastern District of Virginia approved mail service in accordance with the Virginia long arm statute when Japan had not objected to such service under the mechanism provided by the Convention.[143] Although holding service proper or improper on other grounds, other courts have also expressly or impliedly interpreted the Hague Service Convention to allow foreign mail service unless the foreign state explicitly objects to the method.[144]

IV. Recent United States Supreme Court Answers to the Applicability of the Hague Service Convention

In two cases decided exactly one year apart, the United States Supreme Court first hinted at and then ostensibly answered the question concerning the scope of the Hague Service Convention in favor of the exclusivity of the Hague Service Convention over the Federal Rules of Civil Procedure and state long arm statutes.[145]

A. Société Nationale Industrielle Aérospatiale v. United States District Court

In *Société Nationale Industrielle Aérospatiale v. United States District Court*,[146] the United States Supreme Court ruled on the effect of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention).[147] Before the case

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service—*i.e.*, the device which minimizes the imposition upon the local authorities caused by official U.S. government action within the boundaries of the local state.").

142. Zisman v. Sieger, 106 F.R.D. 194, 199 (N.D. Ill. 1985).

143. Weight v. Kawasaki Heavy Indus., 597 F. Supp. 1082, 1085-86 (E.D. Va. 1984); *see supra* note 53 and accompanying text.

144. *See, e.g.*, Rivers v. Stihl, Inc., 434 So. 2d 766, 769 (Ala. 1983) (mailed service held ineffective because West Germany objected to service by any method other than through the Minister of Justice, its Central Authority under the Hague Service Convention).

145. These Supreme Court decisions are Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522 (1987), and Volkswagenwerk Aktiengesellschaft v. Schlunk, 108 S. Ct. 2104 (1988).

146. *Aérospatiale*, 482 U.S. 522.

147. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 (entered into force Oct. 7, 1972) [hereinafter Hague Evidence Convention].

reached the Supreme Court, the United States Court of Appeals for the Eighth Circuit adopted the analysis of the Fifth Circuit[148] and held the Hague Evidence Convention does not apply when a district court has jurisdiction over a foreign litigant, even when the information sought through discovery is physically located within the territory of the foreign signatory to the Hague Evidence Convention.[149] On appeal, the United States Supreme Court held the Hague Evidence Convention does not provide exclusive or mandatory procedures for discovery in a foreign signatory's territory.[150] The Court agreed with the United States Court of Appeals for the Eighth Circuit in rejecting the "extreme position"[151] that the Hague Evidence Convention supplies the exclusive or mandatory discovery procedures in a foreign state. The Court, however, did not affirm the ruling of the Eighth Circuit because it likewise rejected the court's position on the other extreme: that the Hague Evidence Convention does not apply to discovery on a foreign litigant over which a United States court has established jurisdiction.[152] Rather, the Court declared that the Hague Evidence Convention, although not exclusive, is optional and that its procedures are available and a court may choose to apply them "whenever they will facilitate the gathering of evidence by the means authorized in the [Hague Evidence] Convention."[153]

The Court based its ruling on the purposes of the Hague Evidence Convention as stated in its preamble: "to facilitate the transmission and execution of Letters of Request" and to "improve mutual judicial cooperation in civil or commercial matters."[154] The Court buttressed its holding that the application of the Hague Evidence Convention is optional by comparing the permissive language of the Hague Evidence Convention with the mandatory language of the Hague Service Convention. The Court here hinted at what it explicitly held one year later.[155]

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148. In re Anschuetz & Co., GmbH, 754 F.2d 602 (5th Cir. 1985), *vacated*, 483 U.S. 1002 (1987), *quoted with approval in* In re Société Nationale Industrielle Aérospatiale, 782 F.2d 120, 124 (8th Cir. 1986).

149. *Aérospatiale*, 782 F.2d at 124.

150. 482 U.S. at 529.

151. *Id.*

152. *Id.* at 540. The Supreme Court vacated the judgment of the United States Court of Appeals for the Eighth Circuit and remanded the case for further proceedings consistent with its opinion. *Id.* at 547.

153. *Id.* at 541.

154. *Id.* at 534 (quoting the Hague Evidence Convention, *supra* note 147, preamble).

155. *I.e.*, Volkswagenwerk Aktiengesellschaft v. Schlunk, 108 S. Ct. 2104 (1988). For a discussion of *Schlunk*, see *infra* part IV, section B.

The foreshadowing appears in a footnote:

> The Hague Conference on Private International Law's omission of mandatory language in the preamble is particularly significant in light of the same body's use of mandatory language in the preamble to the Hague Service Convention . . . . Article 1 of the Service Convention provides: "The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." . . . [T]he Service Convention was drafted before the Evidence Convention, and its language provided a model exclusivity provision that the drafters of the Evidence Convention could easily have followed had they been so inclined. Given this background, the drafters' election to use permissive language instead is strong evidence of their intent.[156]

B. Volkswagenwerk Aktiengesellschaft v. Schlunk

The Court explicitly reinforced[157] and expounded upon the mandatory nature of the Hague Service Convention one year later in *Volkswagenwerk Aktiengesellschaft v. Schlunk*.[158] This case arose in the Illinois courts.[159] After the Illinois Supreme Court denied appeal,[160] the United States Supreme Court granted certiorari to settle the disagreement among lower courts concerning the applicability of the Hague Service Convention.[161]

The factual situation surrounding the case is typical of others discussed in this Note, especially those cases considering the effects of

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156. *Aérospatiale*, 482 U.S. at 534 n.15 (quoting Hague Service Convention, *supra* note 2, preamble).

157. The Court cited *Aérospatiale* for its acknowledgement the previous term of the mandatory nature of article 1 of the Hague Service Convention. *Schlunk*, 108 S. Ct. at 2108.

158. 108 S. Ct. 2104 (1988).

159. Schlunk v. Volkswagenwerk Aktiengesellschaft, 145 Ill. App. 3d 594, 503 N.E.2d 1045 (1986), *aff'd*, 108 S. Ct. 2104 (1988).

160. 112 Ill.2d 595 (1986).

161. *Schlunk*, 108 S. Ct. at 2107. The Court listed several cases holding the Hague Service Convention inapplicable to service on a foreign national properly served through its domestic agent. *Id.* (citing *Ex parte* Volkswagenwerk Aktiengesellschaft, 443 So. 2d 880, 881 (Ala. 1983); Zisman v. Sieger, 106 F.R.D. 194, 199-200 (N.D. Ill. 1985); Lamb v. Volkswagenwerk Aktiengesellschaft, 104 F.R.D. 95, 97 (S.D. Fla. 1985); McHugh v. International Components, 118 Misc. 2d 489, 491-92, 461 N.Y.S.2d 166, 167-68 (N.Y. Sup. Ct. 1983)). The Court also listed cases holding the Hague Service Convention the exclusive means by which to serve a foreign corporation. *Id.* (citing Cipolla v. Picard Porsche Audi, 496 A.2d 130, 131-32 (R.I. 1985); Wingert v. Volkswagenwerk A.G., Nos. 3:86-2994-16 and 3:86-2995-16 (D.S.C. May 19, 1987)).

agency on the applicability of the Hague Service Convention.[162]

In *Schlunk*, plaintiff[163] filed a wrongful death suit against Volkswagen of America (VWoA)[164] in the Illinois Circuit Court in Cook County, Illinois.[165] VWoA, importer and distributor for the designer and manufacturer, Volkswagenwerk Aktiengesellschaft (VWAG), was served through C.T. Corporation, VWoA's registered agent for service of process in Illinois, and timely filed an appearance and answer.[166] Plaintiff then amended his complaint to join VWAG and allege design defects.[167] Service was first attempted by plaintiff on VWAG through C.T. Corporation. After C.T. Corporation refused to accept the service, an alias summons was issued to C.T. Corporation to serve VWoA "as agent for" VWAG.[168] VWAG filed a special and limited appearance to quash service, supported by an affidavit of VWoA's manager and product liaison asserting that VWoA was separate and independent and was an agent for VWAG only to receive notices under the National Traffic and Motor Vehicle Safety Act.[169] The Cook County Circuit Court found that VWoA, a New Jersey corporation having its principal place of business in Michigan and registered to do business in Illinois, was not appointed by VWAG as its agent for service in common law actions. VWoA, nevertheless, was VWAG's wholly owned subsidiary with a majority of its directors on VWAG's Board of Management and was tied to VWAG by an exclusive importer and distributor agreement.[170] On this basis, the court concluded that VWoA and VWAG were "so closely related" that

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162. *See supra* part II, section C. Service in *Schlunk* was very similar to that in Crose v. Volkswagenwerk Aktiengesellschaft, 88 Wash. 2d 50, 558 P.2d 764 (1977), and also involved some of the same parties. *See supra* notes 111-20 and accompanying text.

163. Plaintiff, Herwig J. Schlunk, filed this action as administrator of the estates of Franz J. Schlunk and Sylvia Schlunk, plaintiff's parents, who were killed in a head-on collision in Cook County, Illinois. Schlunk, v. Volkswagenwerk Aktiengesellschaft, 145 Ill. App. 3d 594, 594-95, 503 N.E.2d 1045, 1045.

164. Dennis J. Reed, apparently the driver of the other vehicle, was also named as a defendant. Reed was served by a special process server and subsequently a default judgment was entered against him. *Id.*

165. *Id.*

166. *Id.* at 595, 503 N.E.2d at 1045-46.

167. *Id.* at 595, 503 N.E.2d at 1046.

168. *Id.*

169. *Id.* The agency requirement is codified at 15 U.S.C. § 1339(e) (1988). In addition to this affidavit, the record included documents partially reflecting the relationship between VWAG and VWoA and interrogatory answers from both VWAG and VWoA. Schlunk v. VWAG, 145 Ill. App. 3d at 595, 503 N.E.2d at 1046. Most courts find section 1339(e) agency appointment alone insufficient for service in unrelated claims. *See supra* notes 81-84 and accompanying text.

170. Schlunk v. VWAG, 145 Ill. App. 3d at 595-96, 503 N.E.2d at 1046.

VWoA was VWAG's agent for service as a matter of law, even though VWAG failed or refused to make a formal appointment.[171] The court, therefore, held that the alias service was effective under both the Illinois Supreme Court Rules and Illinois Code and was not in conflict with the Hague Service Convention, which the court found applicable only to service outside the United States.[172]

On VWAG's application, two questions of law were certified to the Appellate Court of Illinois: (1) whether the substituted service method at issue violated the Hague Service Convention; and (2) whether VWoA and VWAG were so closely related that VWoA was VWAG's agent for service of process.[173]

In affirming the Cook County Circuit Court, the Illinois Court of Appeals countered VWAG's two main arguments. First, VWAG contended that the Hague Service Convention provides the exclusive method for foreign service on residents in signatory states, of which West Germany is one.[174] The court responded that the Hague Service Convention, by its own terms, was inapplicable because Illinois state law does not require service abroad, and article 1 of the Hague Service Convention clearly states that the Convention is applicable only "*where there is occasion* to transmit a judicial or extra-judicial document *for service abroad.*"[175] In the Illinois Court of Appeals' view, an opposite holding would render the Hague Service Convention a shield to protect foreign nationals even when they are present in the state.[176] Other courts had rejected such an outcome.[177] The Illinois court relied upon the purpose of the Hague Service Convention as simplifying the procedures for timely notice, and on article 10(c) of the Convention, which allows direct service if there is no objection by the state of destination. The court concluded that "[i]f VWoA, which is located in this country, is an agent of VWAG here, then the United States is the 'State of destination' under the treaty, and the treaty allows plaintiff to effect service using American procedure."[178]

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171. *Id.* at 596, 503 N.E.2d at 1046.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 596, 503 N.E.2d at 1046-47 (quoting Hague Service Convention, *supra* note 2, art. 1).

176. *Id.* at 597, 503 N.E.2d at 1047.

177. *Id.* at 597-98, 503 N.E.2d at 1047 (citing Lamb v. Volkswagenwerk Aktiengesellschaft, 104 F.R.D. 95 (S.D. Fla. 1985); Zisman v. Sieger, 106 F.R.D. 194, 199-200 (N.D. Ill. 1985); McHugh v. Int'l Components, 118 Misc. 2d 489, 491, 461 N.Y.S.2d 166, 167 (N.Y. Sup. Ct. 1983)).

178. *Id.* at 598, 503 N.E.2d at 1047-48. The court rejected VWAG's reliance on

Second, VWAG posited that because of the unfairness of subjecting foreign residents to the various procedures of the fifty United States, the purpose of the Hague Service Convention was to achieve a uniform method of service.[179] The court questioned why foreign nationals warrant greater protection against this unfairness than do United States citizens, holding that "VWAG . . . conceded away this preemption argument by acknowledging that domiciliaries of foreign states can waive the protection of the Hague [Service] Convention by appointing an agent for service of process in the United States."[180]

The main issue, therefore, became whether serving VWoA as VWAG's agent constituted valid service.[181] The court discussed this in the context of the two prerequisites for the exercise of personal jurisdiction in Illinois: (1) sufficient activity in the state; and (2) service in accordance with Illinois law.[182] Illinois decisions provide two theories to support valid service on the parent by way of service on its subsidiary: (1) that the parent is "doing business" in the state;[183] and (2) that the subsidiary is the "alter ego" of the parent.[184] The plaintiff argued VWAG was doing business in Illinois by virtue of its relationship with VWoA based on thirty years of operations under a written importer agreement.[185] The court noted that written disclaimers of agency, like the one in this importer agreement, are not controlling and that the case law is unsettled as to whether VWAG's control over VWoA is pervasive enough to find agency.[186] The court stressed the factual nature of this

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Low v. Bayerische Motoren Werke, A.G., 88 A.D.2d 504, 449 N.Y.S.2d 733 (1982), stating that the New York court did not rule against service through the West German corporation's wholly owned subsidiary, and Cipolla v. Picard Porsche Audi, 496 A.2d 130 (R.I. 1985), stating that the Rhode Island court did not hold that the Hague Service Convention precludes service on VWoA as VWAG's agent. Schlunk v. VWAG, 145 Ill. App. 3d at 598-99, 503 N.E.2d at 1048. These cases are discussed *supra* at notes 79-89 and accompanying text, and notes 46, 64 and accompanying text, respectively.

179. Schlunk v. VWAG, 145 Ill. App. 3d at 599, 503 N.E.2d at 1048.

180. *Id.*

181. *Id.*

182. *Id.* at 600, 503 N.E.2d at 1049. VWAG did not claim that it lacked sufficient activity in the state. *Id.* at 599, 503 N.E.2d at 1048.

183. *Id.* at 600, 503 N.E.2d at 1049.

184. *Id.* at 601, 503 N.E.2d at 1050.

185. *Id.* at 602, 503 N.E.2d at 1050.

186. *Id.* The court listed cases that considered the importer agreement between VWAG and VWoA and ultimately found an agency relationship. *Id.* (citing Roorda v. Volkswagenwerk, A.G., 481 F. Supp. 868, 870-80 (D.S.C. 1979); Lamb v. Volkswagenwerk Aktiengesellschaft, 104 F.R.D. 95, 97-101 (S.D. Fla. 1985); *Ex parte* Volkswagenwerk Aktiengesellschaft, 443 So. 2d 880, 882-85 (Ala. 1983)). The court also listed cases reaching the opposite result. *Id.* (citing Volkswagenwerk Aktiengesellschaft v. McCurdy,

inquiry and in this case decided that VWAG exercised enough control over VWoA for a finding that VWoA was VWAG's agent for service of process.[187]

In support of its conclusion that the "relationship between VWAG and VWoA is so close that it is certain that VWAG 'was fully apprised of the pendency of the [action]' by delivery of the summons to VWoA,"[188] the Illinois Court of Appeals adopted, among other things, the lack of free will language of *Professional Investors Life Insurance Co. v. Roussel*,[189] without attribution; the court found that "VWoA exercises no free will of its own in deciding whether to accept the importer agreement or any other aspect of its relationship with VWAG."[190] Still, the court claimed that Illinois courts avoid labels such as "alter ego" or "mere department" to define the control necessary to render sufficient service on a parent corporation through its subsidiary based on the relationship between the two.[191] The court also claimed that this relationship need not go so far that the control of the parent company over its subsidiary makes the entities "essentially one," thus allowing the court to "disregard the corporate entities and hold service of process on one corporation effective as to the others."[192]

After this discourse, the court held that the relationship between VWoA and VWAG was such that VWoA was VWAG's agent for ser-

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340 So. 2d 544 (Fla. Dist. Ct. App. 1976), *cert. denied*, 348 So. 2d 950 (Fla. 1977); quoting Richardson v. Volkswagenwerk, A.G., 552 F. Supp. 73 (W.D. Mo. 1982)).

187. The court remarked on several factors supporting this finding. First, VWoA was wholly owned by VWAG and was bound to sell its products only within its territory, yet VWoA was required to do maintenance and repair on VWAG automobiles regardless of where they were sold. Second, VWAG could terminate the importer agreement without prior notice in the case of VWoA business or financial problems. Third, VWAG controlled VWoA's choice of dealers and dominated the VWoA Board of Directors, often conducting meetings in West Germany. Fourth, VWoA was required by contract to advise VWAG of all aspects of the business. And fifth, VWoA was authorized to prosecute trademark infringement in VWAG's name. Schlunk v. VWAG, 145 Ill. App. 3d at 606, 503 N.E.2d at 1053.

188. *Id.* (quoting Maunder v. DeHavilland Aircraft of Canada, 102 Ill. 2d 342, 353, 466 N.E.2d 217, 233, *cert. denied*, 469 U.S. 1036 (1984)).

189. 445 F. Supp. 687, 698 (D. Kan. 1978); *see supra* notes 97, 100, 106 and accompanying text (discussing *Professional Investors*).

190. Schlunk v. VWAG, 145 Ill. App. 3d at 608, 503 N.E.2d at 1054. The court used this finding to dispel any analogy to a franchisee, which is independent and able to accept or reject the franchise terms. *Id.* at 607-08, 503 N.E.2d at 1053-54 (distinguishing Slates v. International House of Pancakes, 90 Ill. App. 3d 716, 413 N.E.2d 457 (1980)).

191. *Id.* at 608, 503 N.E.2d at 1054.

192. *Id.* (quoting Rymal v. Ulbeco, Inc., 33 Ill. App. 3d 799, 803, 338 N.E.2d 209, 213 (1975)).

vice *by operation of law*[193] and that substituted service authorized under the Illinois long arm statute did not violate the Hague Service Convention.[194]

The above discussion of the Illinois Appellate Court analysis illustrates the plethora of arguments for and against the exclusivity of the Hague Service Convention as a means to effect service on defendants in foreign signatory states. In contrast, on appeal, the United States Supreme Court focused solely on the scope of the Convention and held that the Hague Service Convention does not apply to service of process on a foreign corporation by service on its domestic subsidiary, as the foreign corporation's involuntary agent for service under state law, when such service is valid and complete under both state law and the due process clause.

After discussing the purpose[195] and relevant provisions of the Hague Service Convention,[196] the Supreme Court[197] found that article 1 defines the scope of the Convention and in that case provided the subject of the controversy.[198] Article 1 provides, "The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad."[199] The Court declared that this language is mandatory and thus "pre-emp[ts] inconsistent methods of service prescribed by state law *in all cases to which it applies.*"[200] The Court set down a rule for the present case that the service should be quashed if it were within the scope of article 1 of the Convention.[201] When the court applied this rule to the facts, it found that the service was not within the scope of article 1; an order to quash therefore was not automatically available.[202]

In arriving at this conclusion, the Court interpreted article 1 by ana-

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193. *Id.*

194. *Id.* at 597, 503 N.E.2d at 1047.

195. The Supreme Court stated that the purpose of the Hague Service Convention is to provide a simplified foreign service structure both to assure actual and timely notice to foreign defendants and to facilitate proof of such service. Volkswagenwerk Aktiengesellschaft v. Schlunk, 108 S. Ct. 2104, 2107 (1988).

196. The Court discussed the Central Authority provisions as providing the "primary innovation" of the Hague Service Convention. *Id.* at 2107-08 (discussing Hague Service Convention, *supra* note 2, arts. 2, 5-6, 8-11, 15-16, 19).

197. Justice O'Connor delivered the opinion of the Court. *Id.* at 2106.

198. *Id.* at 2108.

199. Hague Service Convention, *supra* note 2, art. 1, *quoted in Schlunk*, 108 S. Ct. at 2108.

200. *Schlunk*, 108 S. Ct. at 2108 (emphasis added).

201. *Id.*

202. *Id.* at 2112.

lyzing the text, context, history, negotiation, and practical construction of that provision. Because the text of the Convention is silent regarding the "occasion to transmit" documents for "service of process," the Court relied on the "well-established technical meaning" of "service of process" which the Court defined as the "formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action."[203] The Court said the negotiating history shows that "service of process" was meant in this technical sense.[204] According to the Court, because the Convention fails to provide a standard for the legal sufficiency of formal delivery, the Court "almost necessarily must refer to the internal law of the forum state"[205] to formulate the controlling rule: "If the internal law of the forum state defines the applicable method of serving process as requiring the transmittal of documents abroad, then the Hague Service Convention applies."[206] The Court found support for its rule in the negotiating history of the Convention, which the Court indicated also refers to the use of the forum state's law to determine whether there is service abroad.[207] VWAG contended that this interpretation is inconsistent with the purposes of the Hague Service Convention because states could circumvent the Convention by defining methods that do not require transmitting documents abroad.[208] The Court dismissed this accusation, stating, "[w]e do not think that this country, or any other country, will draft its internal laws deliberately so as to circumvent the Convention in cases in which it would be appropriate to transmit judicial documents for service abroad."[209]

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203. *Id.* at 2108.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 2109. The Court noted that although this solution lessens the obligatory force of the Hague Service Convention, the drafters, in the absence of an objective test, intended the forum state law test to provide clarity. *Id.*

208. *Id.* at 2109-10.

209. *Id.* at 2111. The Court buttressed its belief by countering the method that VWAG gave as an example of such circumvention practices, *notification au parquet.* This method allows foreign service by deposit of service documents with a designated local official who is not subject to any sanction for failure to transmit the documents. Yet the statute of limitations runs from the time of delivery to the official. The Court found that the Convention drafters clearly put an end to this method through the default judgment provisions found in articles 15 and 16. The Court, however, did not find any comparable evidence of the drafters' intentions to have the Convention apply to substituted service on a subsidiary if service abroad clearly is not required under the forum's law. The Court said that even articles 15 and 16 of the Convention apply only when service documents require transmittal abroad. The Court expressly did not resolve whether the

The Court denied that the two stated purposes of the Hague Service Convention—(1) the creation of an appropriate means to facilitate foreign service of process; and (2) the improvement of the organization of mutual judicial assistance by a simplification and expedition of the procedure[210]—compel a different conclusion.[211] The Court agreed with VWAG that a further purpose of the Convention is the assurance of adequate notice in foreign service, but the Court emphasized that this purpose, effectuated through articles 15 and 16, applies only when the Hague Service Convention applies.[212] The Court candidly admitted that its interpretation does not necessarily advance the adequate notice purpose of the Hague Service Convention but rather makes the forum's law control the determination of whether the Convention's service methods—aimed at advancing this purpose—are mandatory.[213]

The Court's position in *Schlunk* resulted in a finding that the Illinois long arm statute authorized substituted service on VWoA as an agent of VWAG without transmitting documents to Germany.[214] The Court rejected VWAG's due process, notice requirement argument[215] that whenever service on a foreign national is involved, the service falls within the scope of the Hague Service Convention under article 1.[216] The court held, "Where service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends and the Convention has no further implications."[217]

The Court concluded that *Schlunk* did not present an occasion to

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Convention applies to variants of *notification au parquet* that require transmittal of foreign service. *Id.* at 2110.

210. *See supra* note 19 and accompanying text.

211. *Schlunk*, 108 S. Ct. at 2110. The Court reasoned that nothing in its decision interferes with the Convention's requirement that each state establish a Central Authority by which the Convention implements the enabling function outlined by its purposes. *Id.* at 2110.

212. *Id.* at 2110-11; *see supra* notes 37-38, 58, 138, and accompanying text (article 15 as the equivalent of the United States due process notion).

213. *Schlunk*, 108 S. Ct. at 2111. The concurring Justices stated that the majority opinion fails adequately to guarantee timely notice. *Id.* at 2112-14 (Brennan, J., concurring) (joined by Marshall and Blackmun, JJ.). The majority in turn criticized the concurrence for denominating timely notice as the "primary purpose" of the Hague Service Convention without any authority and for asserting a due process notion that is not in line with the plain meaning of "service abroad." *Id.* at 2111 n.**.

214. *Id.* at 2111-12.

215. Id. at 2112 (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

216. *Id.*

217. *Id.*

transmit service abroad within article 1 of the Hague Service Convention.[218] This conclusion rendered the Convention inapplicable and the service proper.[219] The Hague Service Convention therefore applies only when service under the forum's law necessarily requires transmittals abroad; the due process clause does not necessarily require service abroad every time there is service on a foreign national.[220]

The three concurring Justices[221] agreed with the majority's conclusion that service on a foreign corporation's wholly owned domestic subsidiary is process not within the scope of article 1 "service abroad" and is therefore not contrary to the Hague Service Convention.[222] They disagreed, however, with the majority's analysis.[223] In essence, the concurring Justices disagreed with the majority's broad view that the forum's law conclusively determines whether required process is "service abroad" or "domestic" service—the former requires compliance with the Hague Service Convention whereas the latter does not[224]—because they claimed such a view deprives the Convention of any mandatory effect.[225] Rather, these Justices believed that the negotiating history supports an interpretation of "service abroad" that embodies a substantive standard that "limits a forum's latitude to deem service complete domestically."[226] The

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218. *Id.*

219. *Id.*

220. *Id.*

221. Justice Brennan wrote a concurring opinion in which Justices Marshall and Blackmun joined. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* The concurring Justices were not as optimistic as the majority about the forum's reluctance to designate service as "domestic" to circumvent compliance with the Hague Service Convention provisions. *Id.* at 2113-14. The concurring Justices argued:

> [H]ad we been content to rely on foreign notions of fair play and substantial justice, we would have found it unnecessary, in the first place, to participate in a Convention "to ensure that judicial . . . documents to be served abroad [would] be brought to the notice of the addressee in sufficient time . . . ."

Id. at 2117 (quoting Hague Service Convention, *supra* note 2, preamble).

225. *Id.* at 2112. The concurring Justices also specifically agreed with the prior holding in Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522 (1987), that the Hague Service Convention terms are mandatory with respect to transmissions within the scope of article 1. *Schlunk*, 108 S. Ct. at 2112; *see supra* notes 155-56 and accompanying text (discussing the indication of the Court the prior term in *Aérospatiale* that the Hague Service Convention terms are mandatory as to transmissions within its scope); *infra* note 242 and accompanying text (discussing all United States Supreme Court pronouncements that the Hague Service Convention is mandatory as to transmissions within its scope).

226. *Schlunk*, 108 S. Ct. at 2112.

concurring Justices focused on the first of the two stated objectives of the Hague Service Convention which they interpreted as the promotion of notice,[227] and indicated that the negotiating history supports this construction.[228] The concurring Justices criticized the majority's adherence to its interpretation even though the majority admitted that its view "does not necessarily advance" what the concurring Justices considered the "primary purpose" of notice advanced by the Convention. The Justices accused the majority of abrogating its duty to read the Convention in a way to effectuate the objects and purposes of the signatory states.[229]

The concurring Justices agreed with the majority that the Hague Service Convention does not provide a precise standard to distinguish between "domestic" service and "service abroad."[230] They did not approve, however, of the majority's holding that the forum state's internal law determines this question.[231] Rather, the concurring Justices thought the negotiating history provides a substantive standard, namely, that of providing adequate notice[232]—a due process concept. The concurring Justices recognized that this standard is problematic to apply, but they justified this difficulty with an analogy to similar complications in applying the United States due process concept.[233] They agreed with the majority's conclusion on the facts because, under the adequate notice standard, "it is remarkably easy to conclude that the Convention does not prohibit . . . [s]ervice on a wholly owned, closely controlled subsidiary [because such service] is reasonably calculated to reach the parent 'in due time' as the Convention requires."[234]

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227. *Id.* at 2113. The majority's analysis of this purpose of the Convention deemphasizes the notice provision and states that the Convention's first purpose is the creation of an appropriate means to facilitate foreign service. The Court emphasized the outline of the service structure, not the due process notion. *See supra* notes 195, 210-13 and accompanying text.

228. The concurring Justices discussed this emphasis on notice in the *travaux préparatoires* primarily through the passages in the *travaux* evincing dissatisfaction with *notification au parquet*. *Schlunk*, 108 S. Ct. at 2113-16; *see supra* note 209.

229. *Schlunk*, 108 S. Ct. 2114 (citing Rocca v. Thompson, 223 U.S. 317, 331-32 (1912); Factor v. Laubenheimer, 290 U.S. 276, 293-94 (1933); Wright v. Henkel, 190 U.S. 40, 57 (1903)).

230. *Id.*

231. *Id.*

232. *Id.* at 2116.

233. *Id.*

234. *Id.* The concurring Justices indicated that their disagreement with the majority, having no relevance on the outcome here, may have little practical consequences in other cases that would come before United States courts as well because all process must comply with due process under the United States judicial system. *Id.* at 2116-17. Yet, the

V. The Effect of the United States Supreme Court Position on United States Interpretations of the Hague Service Convention

The effect of the recent United States Supreme Court position developed in *Aérospatiale* and *Schlunk* depends on whether subsequent courts read the Supreme Court's decision in *Schlunk* restrictively or expansively. Read restrictively, the case may be limited to its facts and constitute a statement more of agency than of the Convention's applicability. This is the basis of agreement between the majority and the concurring Justices; a wholly owned, highly controlled, domestic subsidiary of a foreign corporation neatly fits both the majority's emphasis on the scope of the Convention and the emphasis of the concurring Justices on the Convention's purpose as a means to ensure that foreign defendants receive adequate notice of suit.

Broadly speaking, in *Aérospatiale* and *Schlunk*, the Supreme Court ostensibly closes the first of the two major splits in the case law concerning the interpretation of the Hague Service Convention[235] by declaring the Convention mandatory and therefore applicable to all service within the Convention's scope.[236] After the Court cited *Aérospatiale* for its own prior acknowledgement of the Convention's mandatory nature,[237] it declared, in *Schlunk*, that "[b]y virtue of the Supremacy Clause, . . . the Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies."[238] This declaration's explicit mention of state law is attributable to the fact that state service rules were the rules exercised in *Schlunk*.[239] That the Hague Service Convention supersedes state service rules is well settled under the supremacy clause.[240] It is the authority of the Convention vis-à-vis the Federal

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concurring Justices thought their position important because they found some practical problems with the majority's holding. First, noncompliance with the Hague Service Convention makes it more difficult for United States nationals to enforce judgments abroad. *Id.* at 2117. And second, the defendant is equally disadvantaged by circumvention of the Hague Service Convention regardless of whether circumvention is intentional by the forum. *Id.*

235. *See supra* part I.

236. *See infra* note 242 (indicating the United States Supreme Court pronouncements that the Hague Service Convention is mandatory over transmissions within its scopes).

237. Volkswagenwerk Aktiengesellschaft v. Schlunk, 108 S. Ct. 2104, 2108 (1988).

238. *Id.*

239. *Id.* at 2106.

240. *See supra* part I, and part II, section B.2.

Rules of Civil Procedure that is more uncertain.[241] Ostensibly, the Court declared the supremacy of the Convention over the Federal Rules of Civil Procedure as well as over state procedural rules in its pronouncements that the Convention is mandatory in all cases within its scope.[242] Such a case would be one heard in a federal court, generally operating under federal law, including the Federal Rules of Civil Procedure, that requires service abroad. But the Court's explicit mention of state rules only[243] may encourage future litigants to argue that the Court meant that only state rules are superseded.

The Court's explicit holding in *Schlunk* settles the controversy in the lower courts in favor of cases that hold the Hague Service Convention inapplicable to service on a foreign national that is properly served through its domestic agent under the forum's law; this holding rejects the cases that hold the Hague Service Convention the exclusive means of serving a foreign corporation, the forum's law notwithstanding.[244] This strict reliance on the forum's internal law allowed the Court to avoid adopting one of the many formulations of the control necessary to establish agency for service of process,[245] leaving that determination to subsequent courts in accordance with the applicable controlling forum law.[246]

Read expansively, the Court's holding is broad, yet simple: the forum's law is controlling. If the forum's law requires the transmittal of service documents abroad, the Hague Service Convention controls exclusively; if not, the Hague Service Convention has no application. This is reflective of the expansive United States Court of Appeals for the Third Circuit holding in *DeJames v. Magnificence Carriers*, which, as did

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241. *See supra* part I, and part II, sections A, B.1.

242. These pronouncements appear in the majority opinion in Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522, 534 n.15 (1987), in the majority opinion in *Schlunk*, 108 S. Ct. at 2108, and in the concurrence in *Schlunk*. *Id.* at 2112 (Brennan, J., concurring).

243. *See supra* note 238-39 and accompanying text.

244. *See supra* note 161 and accompanying text.

245. These formulations are presented above. *See supra* notes 98-106 and accompanying text.

246. At first glance, the Court seems to state, contrary to established precedent, *see supra* note 98 and accompanying text, that the parent-subsidiary relationship alone is enough to establish agency for the purpose of service because the Court does not discuss the degree of control exercised by VWAG over VWoA. This, however, is not the case. The lower courts already established the existence of the control necessary for agency under Illinois law. *Schlunk*, 108 S. Ct. at 2106; *see also supra* notes 170-72, 181-94 and accompanying text. The Court apparently adopts this finding because it deems controlling the forum's internal law on the question. *See supra* notes 205-06, 239 and accompanying text.

Schlunk, focused on the scope of the Convention.[247] Other courts have relied on due process, solely or in conjunction with the Convention, to justify noncompliance.[248] The United States District Court for the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit—the circuit for Illinois, through whose courts *Schlunk* arose—have followed *Shoei Kako Co. v. Superior Court* in looking to due process to circumvent the Hague Service Convention.[249] The concurrence in *Schlunk* also focuses on due process.[250] The majority, however, ignored this rationale. Not only did the majority ignore the notice provision in the first of the two stated purposes of the Hague Service Convention, it also admitted that its holding does not advance this purpose.[251] The supremacy clause usually provides the primary rationale for finding that the Hague Service Convention exclusively controls foreign service.[252] The United States Court of Appeals for the Third Circuit, however, avoided the criticism that it ignored the supremacy clause when it found that the Hague Service Convention was inapplicable.[253] The court held that the Hague Service Convention is the supreme law only for its limited stated purpose of providing a method for service independently authorized under the forum state's laws.[254]

Another potential answer to the supremacy clause criticism is the analysis in *Ex parte Volkswagenwerk Aktiengesellschaft*, in which the Alabama Supreme Court explored whether the service was valid before finding a supremacy clause violation, rather than using the supremacy clause to determine whether the service was valid.[255]

Aside from its cursory statement of the supremacy of the Convention over state rules under the supremacy clause, the Supreme Court in *Schlunk* failed to address the supremacy clause issue.[256] In this way, the Court avoided deciding whether the later in time analysis, the general

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247. *See supra* notes 48-51 and accompanying text.

248. *See supra* part II, section A.2.

249. Tamari v. Bache & Co. (Lebanon) S.A.L., 431 F. Supp. 1226 (N.D. Ill. 1977), *aff'd*, 565 F.2d 1194 (7th Cir.), *cert. denied*, 435 U.S. 905 (1978).

250. *See supra* notes 227-33 and accompanying text.

251. *Schlunk*, 108 S. Ct. at 2111; *see supra* notes 213, 227-29 and accompanying text.

252. *See supra* part II, section B.

253. DeJames v. Magnificence Carriers, 654 F.2d 280, 288-89 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981).

254. *Id.* at 289; *see supra* notes 48-51 and accompanying text (discussing *DeJames*).

255. *See supra* notes 93-94 and accompanying text.

256. *See supra* notes 238-40 and accompanying text. This failure could be because the argument was not raised in the court below. The Supreme Court, however, could have answered the supremacy clause issue sua sponte.

versus specific analysis, or a different test altogether determines whether the Hague Service Convention controls or the Federal Rules of Civil Procedure control under the supremacy clause.[257]

In addition to failing to address the due process rationale for circumventing the Hague Service Convention, or the supremacy clause arguments for and against the Hague Service Convention providing the exclusive method for service, the *Schlunk* majority did not rely on any policy reasons for allowing agency findings to circumvent compliance with the Convention.[258] The majority, by relying solely on the Convention's scope, as revealed in article 1, and the Convention's negotiating history, left itself open to much criticism. First, it is unclear why the Court "almost necessarily" must refer to the internal law of the forum in the absence of an explicit standard in the Convention to determine when there is "service abroad" so that the Convention applies.[259] Second, although there is negotiating history supporting this conclusion, the concurrence also shows negotiating history supporting adequate notice as the substantive standard applicable when courts seek to bypass the Convention. Third, the Court focuses on the creation of the means for foreign service, but does not attribute to these methods their function, stated in the Convention as the assurance of timely notice. Fourth, the majority does not explain why the clarity gained by relying on the forum's law to determine when the Hague Service Convention provisions apply is more important than the advancement of the clearly stated timely notice purpose of the Convention.

Most important, by allowing the forum's law to determine when there must be service abroad, the forum's law gains supremacy over the Hague Service Convention under the *Schlunk* holding. The Court's explicit holding concerning the mandatory nature of the Convention is undercut by this power given the states.[260] The Court's ruling therefore may have the opposite effect than the Court's ostensible holding. The Court explicitly closed the first gap in the case law addressed by this Note in favor of the mandatory nature of the Convention over United States state and

257. *See supra* part II, section B.1.

258. Other courts rely on these policies to find valid service on domestic subsidiaries under local procedure rules. *See supra* notes 111-20 and accompanying text.

259. *See supra* notes 204-06 and accompanying text.

260. *See* Note, *The Hague Service Convention as Enabler*: Volkswagenwerk Aktiengesellschaft v. Schlunk, 20 INTER-AM. L. REV. 175, 193 (1988) (calling the Court's contradictory language "puzzling"); Recent Development, *Service of Process: Application of the Hague Service Convention in United States Courts*—Volkswagenwerk Aktiengesellschaft v. Schlunk, 108 S. Ct. 2104 (1988), 30 HARV. INT'L L.J. 277, 286 (1989).

federal service rules. Yet, in effect, the Court opened the possibility of noncompliance with the Convention even in favor of state rules of service, rules that historically courts found the Convention most clearly superseded.[261]

The concurring Justices in *Schlunk* may be overly nationalistic in their determination that notice, paralleling the United States due process concept, is the "primary" purpose of the Convention. They are correct, however, in asserting that, like the United States due process concept, difficulty in application does not make the standard undesirable.[262] The concurring Justices also correctly take the position that the majority is too optimistic in believing service of process rules are not or will not be formulated at least partially with the avoidance of compliance with the Hague Service Convention in mind.[263]

The potential consequences of *Schlunk* are perhaps the greatest problem with the Court's holding. Bypassing the Central Authority relieves the process server of the translation requirements that the Central Authority may impose.[264] If the defendant, however, is not charged with knowledge of the language in which the service documents are written, due process may be violated. Circumvention of the Convention also runs counter to the solutions that the Convention sought to provide to the difficulties giving rise to the Convention's existence.[265] Specifically, the reciprocal inadequacy of judicial assistance between states is heightened by circumvention.[266]

The most serious consequence of the Supreme Court's holding results from the fact that states may object to the alternative methods of service under the Hague Service Convention,[267] including those possibly sanctioned by the forum's internal law. The most noteworthy of these alternative methods is mail service, the subject of the second split in the case

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261. *See supra* part II, section B.2.

262. Volkswagenwerk Aktiengesellschaft v. Schlunk, 108 S. Ct. 2104, 2116 (1988).

263. For the views of both the majority and the concurring justices on this issue, see *supra* notes 208-09 and accompanying text, and *supra* note 224 and accompanying text, respectively. *See also* Leiner, *American Service of Process upon Foreign Corporations: the Schlunk Case and Beyond*, 23 J. WORLD TRADE L. 37, 41 (Feb. 1989); Note, *supra* note 260, at 198.

264. *See supra* notes 27-28, 52-54 and accompanying text.

265. *See supra* notes 7-18 and accompanying text; *see also* Recent Development, Volkswagenwerk Aktiengesellschaft v. Schlunk: *The Supreme Court Defines the Scope of the Hague Service Convention*, 63 TUL. L. REV. 950, 956 (1989).

266. *See supra* note 9 and accompanying text.

267. *See supra* notes 34-36 and accompanying text.

law concerning interpretation of the Hague Service Convention.[268] If the forum's law requires service of a foreign defendant by mail, the *Schlunk* Court's rule would require compliance with the Hague Service Convention because service is required on a foreign national abroad. Mandatory compliance would render the rest of the forum's rule ineffective. Considering, however, that the existence of personal jurisdiction depends on both sufficient minimum contacts[269] and perfected service giving notice,[270] a plaintiff arguably fails to obtain proper service when its service method does not comply with the forum service law but instead complies with the Hague Service Convention. Lack of perfected service may destroy personal jurisdiction.[271] The idea that personal jurisdiction is not lost by forced compliance with a United States treaty under the supremacy clause does not provide a straightforward solution to the problem at hand.

To avoid this potential problem, forum laws and decisions could circumvent the Hague Service Convention by allowing service on the foreign defendant in a way that does not require service abroad. Such a development, however, renders the Convention a nullity for service on the foreign defendant, and is contrary to the solution that the Hague Service Convention provides to the myriad problems leading to its enactment.[272]

Another significant problem with circumvention of the Hague Service Convention provisions is the likelihood that enforcement problems may result if the foreign state does not like the forum's method of service.[273] Because the foreign state is concerned for its defendant, it will probably object to the service and refuse enforcement of any resulting United States court judgment. Again, the problem of reciprocal inadequacy of judicial assistance between states survives the Hague Service Convention's attempt to cure this shortcoming of international judicial process.[274]

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268. *See supra* part I and part III.

269. Kulko v. Superior Court, 436 U.S. 84 (1978).

270. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); *Ex parte* Volkswagenwerk Aktiengesellschaft, 443 So. 2d 880, 884 (Ala. 1983).

271. *See supra* note 80 and accompanying text.

272. *See supra* notes 7-18, 265-66 and accompanying text.

273. Shoei Kako Co. v. Superior Court, 33 Cal. App. 3d 808, 822, 109 Cal. Rptr. 402, 412 (1973).

274. *See supra* note 9 and accompanying text.

VI. CONCLUSION

Because of the enforcement problem, and perhaps for other reasons, the Supreme Court indicated in dicta in *Schlunk* that courts may apply the Hague Service Convention even if compliance is not required under the Court's forum law test.[275] This is good advice. Not only are the Convention methods simple and certain, but there is a risk that a plaintiff may later discover that the forum requires the transmittal of documents for service abroad and that the plaintiff must resort after all to the Hague Service Convention mechanism.[276]

After the *Aérospatiale* and *Schlunk* opinions, two practitioners advanced an even more cautious solution calling for service both domestically under the forum's internal law and abroad under the Hague Service Convention.[277] This assumes, of course, that compliance with one method will not abrogate compliance with the other. For example, if the foreign state has refused mail service[278] or the method is deemed not allowable under the Hague Service Convention regardless of an explicit objection,[279] performance of mail service under the forum's statute or rule may give rise to enforcement and other problems noted for noncomplying service,[280] regardless of any service also performed under the Hague Service Convention provisions. Conversely, full compliance with the Hague Service Convention may present the jurisdiction problems also noted.[281]

What is needed is an interpretation of the applicability of the Hague Service Convention more like that of the concurrence in *Schlunk*, which determines mandatory compliance with the Convention on a case by case basis. This solution does not provide the clarity in application of the *Schlunk* majority rule that the forum law determines whether the Convention is applicable. It does, however, allow for consideration of the Convention's purposes in the circumstances of the case. In order to satisfy the United States due process concerns, this consideration should include not only the Convention's notice purpose emphasized in the

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275. Volkswagenwerk Aktiengesellschaft v. Schlunk, 108 S. Ct. 2104, 211 (1988).

276. *Id.*

277. Davies & Weinstock, *The Service of Process Overseas*, Nat'l L.J., Oct. 3, 1988, at 15, col. 4.

278. *See supra* notes 34-35 (discussing objections allowed by states to alternative service methods).

279. *See supra* part III, section A (discussing arguments that the Hague Service Convention forbids service by mail).

280. *See supra* notes 264-66, 273-74 and accompanying text.

281. *See supra* notes 267-72 and accompanying text.

Schlunk concurrence, but *all* the Convention's purposes to achieve the full intent of the signatory states and to solve the problems giving rise to the Convention. A presumption that the Convention is applicable to the foreign defendant should aid a case by case analysis. Such a presumption is consistent with the signatories' intentions and adds predictability to the determination of the applicable service law.[282]

This method gives courts the flexibility necessary to allow service under domestic procedures on foreign corporations doing business in the forum through subsidiaries. In those cases, the policies of the Convention would not lose their integrity by the exercise of domestic service procedure. Rather, the exercise of service under the domestic rules would merely estop a foreign corporation doing substantial business in the United States from avoiding service merely by its choice of corporate structure. Indeed, this method of case by case analysis, coupled with a presumption in favor of the Convention's applicability is the best solution in light of the Court's rationale for its advice to follow the Hague Service Convention.[283] The Court's explicit holding that compliance is not necessary if service abroad is not required under the forum's law unfortunately undermines this conclusion.

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282. The presumption also should aid compliance with the United States concept of due process because compliance with all the Convention's terms necessitates compliance with article 15 of the Convention, which the United States Senate and various United States courts recognize as equivalent to the United States due process concept. *See supra* notes 37-38, 58, 138 and accompanying text.

283. *See supra* notes 275-76 and accompanying text.

APPENDIX

CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS

The States signatory to the present Convention,

Desiring 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,

Desiring to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.

This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER I - JUDICIAL DOCUMENTS

Article 2

Each contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other contracting States and to proceed in conformity with the provisions of articles 3 to 6.

Each State shall organise the Central Authority in conformity with its own law.

Article 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other

equivalent formality.

The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

Article 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

Article 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either —

(a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

(b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph (b) of the first paragraph of this article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.

The certificate shall be forwarded directly to the applicant.

Article 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 8

Each contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

Each contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another contracting State which are designated by the latter for this purpose.

Each contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

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

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

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

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

Article 11

The present Convention shall not prevent two or more contracting States from agreeing to permit, for the purpose of service of judicial doc-

uments, channels of transmission other than those provided for in the preceding articles and, in particular, direct communication between their respective authorities.

Article 12

The service of judicial documents coming from a contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed.

The applicant shall pay or reimburse the costs occasioned by —

(a) the employment of a judicial officer or of a person competent under the law of the State of destination,

(b) the use of a particular method of service.

Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.

It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that —

(a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

(b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention, and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each contracting State shall be free to declare that the judge, notwithstanding the provisions of the first pargraph of the article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled -

(a) the document was transmitted by one of the methods provided for in this Convention,

(b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

(c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled —

(a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

(b) the defendant has disclosed a *prima facie* defence to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.

This article shall not apply to judgments concerning status or capacity of persons.

CHAPTER II - EXTRAJUDICIAL DOCUMENTS

Article 17

Extrajudicial documents emanating from authorities and judicial officers of a contracting State may be transmitted for the purpose of service in another contracting State by the methods and under the provisions of

the present Convention.

CHAPTER III - GENERAL CLAUSES

Article 18

Each contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 19

To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

Article 20

The present Convention shall not prevent an agreement between any two or more contracting States to dispense with —

(a) the necessity for duplicate copies of transmitted documents as required by the second paragraph of article 3,

(b) the language requirements of the third paragraph of article 5 and article 7,

(c) the provisions of the fourth paragraph of article 5,

(d) the provisions of the second paragraph of article 12.

Article 21

Each contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following —

(a) the designation of authorities, pursuant to articles 2 and 18,

(b) the designation of the authority competent to complete the certificate pursuant to article 6,

(c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to article 9.

Each contracting State shall similarly inform the Ministry, where appropriate, of—

(a) opposition to the use of methods of transmission pursuant to arti-

cles 8 and 10,

(b) declarations pursuant to the second paragraph of article 15 and the third paragraph of article 16,

(c) all modifications of the above designations, oppositions and declarations.

Article 22

Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905, and on 1st March 1954, this Convention shall replace as between them articles 1 to 7 of the earlier Conventions.

Article 23

The present Convention shall not affect the application of article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.

These articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

Article 24

Supplementary agreements between parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the Parties have otherwise agreed.

Article 25

Without prejudice to the provisions of articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the contracting States are, or shall become, Parties.

Article 26

The present Convention shall be open for signature by the States represented at the Tenth Session of The Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of article 26.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 28

Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objections, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 29

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of article 27, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in article 26, and to the States which have acceded in accordance with article 28, of the following —

(a) the signatures and ratifications referred to in article 26;

(b) the date on which the present Convention enters into force in accordance with the first paragraph of article 27;

(c) the accessions referred to in article 28 and the dates on which they take effect;

(d) the extensions referred to in article 29 and the dates on which they take effect;

(e) the designations, oppositions and declarations referred to in article 21;

(f) the denunciations referred to in the third paragraph of article 30.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed the present Convention.

DONE at The Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certifed copy shall be sent, through the diplomatic channel, to each of the States represented at the Tenth Session of the Hague Conference on Private International Law.

Source: 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163.