

1990

## Comparative Overview of Service of Process: United States, Japan, and Attempts at International Unity

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### Recommended Citation

Chin Kim and Eliseo Z. Sisneros, Comparative Overview of Service of Process: United States, Japan, and Attempts at International Unity, 23 *Vanderbilt Law Review* 299 (2021)  
Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol23/iss2/2>

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# Comparative Overview of Service of Process: United States, Japan, and Attempts at International Unity

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Eliseo Z. Sisneros\*\*

## ABSTRACT

*This Article examines the differing philosophical and legal requirements for service of process in the United States and Japan. Professor Kim and Mr. Sisneros compare service of process laws in the United States, where compliance with the due process clause of the United States Constitution is a fundamental requirement, with service of process laws in Japan, where service of process is an official act of the judiciary. A detailed analysis of valid service of process by a foreign state in Japan follows. The authors then discuss the effect of the Bilateral Consular Convention Between the United States and Japan and the Hague Convention on Service Abroad (Hague Convention) in ensuring compliance with Japanese internal law. The United States judicial response to the Hague Convention follows. The authors conclude that despite the United States judicial interpretation indicating the Hague Convention is not the exclusive manner to serve process on a foreign defendant, compliance with the Convention is the surest means for valid service of process in Japan.*

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## I. INTRODUCTION

Rapid means of transportation and innovative communication devices have fostered increasing transnational activities involving nationals of different states. In this rapidly shrinking world, United States lawyers engaged in transnational practice must have a working knowledge of the laws of foreign nation states in order to serve the needs of their clients. In 1957 the New York Court of Appeals opined, in connection with counsel's failure to note the existence of a foreign country's comparative negligence statute:

When counsel who are admitted to the Bar of this State are retained in a matter involving foreign law, they are responsible to the client for the proper conduct of the matter, and may not claim that they are not required to know the law of the foreign State.<sup>1</sup>

Foreign service of process rules are an important example. Traditionally, service of process has been considered a matter to be executed in accordance with the law of the forum, since it is a procedural concern of the forum state.<sup>2</sup> This approach prevails in United States<sup>3</sup> and Japanese jurisdictions.<sup>4</sup> This means that United States lawyers involved in cases

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1. *In re Roel*, 3 N.Y.2d 224, 232, 144 N.E.2d 24, 28, 165 N.Y.S.2d 31, 37 (1957) (citation omitted). R. SCHLESINGER, H. BAADE, M. DAMASKA, & P. HERZOG, *COMPARATIVE LAW* 68 (5th ed. 1988) [hereinafter SCHLESINGER] (discussing the *Roel* case and noting that "when speaking of a 'foreign State,' the Court referred to foreign countries as well as sister states.").

2. M. WOLFF, *PRIVATE INTERNATIONAL LAW* 162 (2d ed. 1950). For a discussion of the English approach, see *id.* at 244-48.

3. *Hanna v. Plumer*, 380 U.S. 460 (1965) (diversity case rejecting state service of process rules in favor of the federal rules). See also *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 126 (1971); R. LEFLAR, L. McDOUGAL & R. FELIX, *AMERICAN CONFLICTS LAW* §§ 121-122 (4th ed. 1986) [hereinafter LEFLAR].

4. A. EHRENZWEIG, S. IKEHARA & N. JENSEN, *AMERICAN-JAPANESE PRIVATE INTERNATIONAL LAW* 35 (1964) [hereinafter EHRENZWEIG].

requiring service of process in Japan must pay special attention to Japanese rules of service of process. In order to be recognized and enforced in Japan, a judgment must meet the requirements of Japan's Code of Civil Procedure (*Minji Soshōhō*).<sup>5</sup> The code tests the validity of a foreign country's judgment by asking whether service of process was executed properly<sup>6</sup> and whether the judgment is contrary to public order and good morals in Japan.<sup>7</sup>

The legal systems of the United States and Japan differ in striking ways. The United States follows common law tradition, whereas Japan follows civil law tradition.<sup>8</sup> A comparison of the service of process rules of the two countries exemplifies the difference. In the United States, for example, service of process is an important component of a court's assertion of jurisdiction over a person.<sup>9</sup> That, however, is not the case in Japan.<sup>10</sup> Also, in the United States service of process is primarily the function of the parties involved in the litigation and their attorneys,<sup>11</sup> whereas in Japan, as in most civil law countries, it is a judicial function.<sup>12</sup> Civil law countries view service of process as an exercise of sover-

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5. MINSOHŌ, art. 200; see T. HATTORI & D. HENDERSON, CIVIL PROCEDURE IN JAPAN § 11.02[1] (1985) [hereinafter HATTORI & HENDERSON] (This work provides a detailed analysis of the *Minji Soshōhō*). For the English translation of the civil procedure code, see EHS LAW BULLETIN SERIES, RŌPPŌ (Eibun-Horei-Sha 1975).

6. MINSOHŌ art. 200(ii); see HATTORI & HENDERSON, *supra* note 5, § 11.02[1].

7. MINSOHŌ art. 200(iii); In addition, Japanese law must allow the foreign court jurisdiction, *id.* art. 200(i), and the state of rendition must give reciprocal treatment to Japanese judgments. *Id.* art. 200(iv). See HATTORI & HENDERSON, *supra* note 5, § 11.02[1]. In considering public policy, Japanese courts concern themselves only with the holding of a foreign judgment, not the underlying reasons supporting the conclusion. For example, a declaratory judgment establishing the status of a second wife is unenforceable, whereas a judgment ordering payment of a gambling debt will be enforced. *Id.* § 11.02[1] n.229. Japanese courts are usually reluctant to refuse recognition of foreign judgments on public policy grounds. *Id.* But see *Marubeni-America v. Kansai Tekko* (Kansai Iron Works), HANTA (No. 361) Dec. 22, 1977, at 127 (Osaka Dist. Ct.) (against public policy to recognize United States judgment finding liability when Japanese court in a previous declaratory judgment had found no liability). See also Fujita, *Service of American Process Upon Japanese Nationals by Registered Airmail and Enforceability of Resulting American Judgments in Japan*, 12 LAW JAPAN 69, 70 (1979).

8. SCHLESINGER, *supra* note 1, at 322. Japan took its civil code primarily from German law. *Id.*

9. See LEFLAR, *supra* note 3, §§ 23-26.

10. Fujita, *Transnational Litigation—Conflict of Laws*, in 7 DOING BUSINESS IN JAPAN part XIV, § 5.02[3][a] (Z. Kitagawa ed. 1989).

11. J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 3.22 (1985).

12. MINSOHŌ art. 160; see HATTORI & HENDERSON, *supra* note 5, § 7.01[3]. See also Fujita, *supra* note 10, § 5.05[1].

eignty within the state, to be invoked only by the appropriate government authority.<sup>13</sup>

These differences illustrate the obstacles to overcome in achieving a multilateral agreement such as the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (Hague Service Convention or Convention).<sup>14</sup> For many years, the United States adhered to a policy of nonparticipation in efforts to unify international private law.<sup>15</sup> The United States has changed this policy, however, at the urging of the organized American Bar.<sup>16</sup> The growth of international commerce and the resulting increase in international litigation made it difficult for courts to apply their local law, i.e., their service of process rules, and be assured that another country would recognize and enforce their judgments.<sup>17</sup> This uncertainty worked to the disadvantage of the unwary practitioner.<sup>18</sup>

Resistance to ratification of the Hague Service Convention is only one source of uncertainty arising from this attempt at international unification of private law.<sup>19</sup> How the courts of a member country will incorporate the Convention into its internal law once ratified is also uncertain in light of the 1988 United States Supreme Court decision in *Volkswagenwerk v. Schlunk*.<sup>20</sup>

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13. See Comment, *The Hague Service Convention as Enabler: Volkswagenwerk Aktiengesellschaft v. Schlunk*, 20 U. MIAMI INTER-AM. L. REV. 175, 180 (1988).

14. 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 in the United States on Feb. 10, 1969) [hereinafter Hague Service Convention].

15. Pfund, *United States Participation in International Unification of Private Law*, 19 INT'L LAW. 505 (1985).

16. *Id.* at 506.

17. *Id.*; *Island Territory of Curacao v. Solitron Devices, Inc.*, 489 F.2d 1313, 1321 n.8 (2d Cir. 1973) (noting that while the court felt compelled to recognize foreign judgment, it felt no compulsion to enter enforcement of judgment), *cert. denied*, 416 U.S. 986 (1974).

18. Pfund, *supra* note 15, at 507.

19. The following countries are parties to the Convention: Belgium, Canada, Denmark, Finland, France, Greece, Israel, Italy, Japan, Luxembourg, The Netherlands, Norway, The Federal Republic of Germany, Portugal, Spain, Turkey, The United Kingdom, and The United States. See OFFICE OF LEGAL ADVISER, U.S. DEP'T OF STATE, PUB. NO. 9433, TREATIES IN FORCE 328 (1989) (listing 28 states party as of January 1, 1989).

20. 486 U.S. 694 (1988). The concurrence by Justice Brennan, 486 U.S. at 708, agrees with the majority that the uncertainty arises from the failure of the Convention to provide "a precise standard to distinguish between 'domestic' service and 'service abroad.'" *Id.* at 710.

This Article will first compare service of process rules of the United States and Japan to acquaint the reader with requirements for service of process in Japan for United States proceedings.<sup>21</sup> Next, the Article will analyze service of process under the Bilateral Consular Convention between the United States and Japan.<sup>22</sup> Finally, the Article will address the case law involving the Hague Service Convention that has developed in the United States.<sup>23</sup>

## II. COMPARISON OF SERVICE OF PROCESS RULES IN THE UNITED STATES AND JAPAN

### A. *Service of Process in the United States*

The touchstone for valid service of process in the United States is that it must comply with the constitutional requirement of due process.<sup>24</sup> Due process requires notice reasonably calculated to give actual notice to the parties and the opportunity to respond.<sup>25</sup> Both service of United States documents in a foreign country and service of foreign documents in the United States must meet this constitutional standard of due process. If the method of service does not meet this standard, the ability of a court to exercise its jurisdiction is limited.<sup>26</sup> Furthermore, when a foreign court renders a judgment without having jurisdiction, United States courts will neither recognize nor enforce that judgment.<sup>27</sup>

In the United States federal courts, *any person* not less than eighteen years of age and not a party to the lawsuit may serve a subpoena or a summons and complaint.<sup>28</sup> Certain exceptions apply when service must

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21. Other authors have treated this subject. In Japanese, see ISHIGURO, GENDAI KOKUSAI SHIHŌ JYO (1 MODERN PRIVATE INTERNATIONAL LAW) 217-33 (1986); T. SAWAKI & Y. AOYAMA, KOKUSAI MINJI SOSHŌHŌ NO RIRON (THEORIES OF INTERNATIONAL PROCEDURAL LAW) 285-306 (1987); *Kokusai Minji Funsō to Bengoshi (International Civil Disputes and Lawyers)*, 39 JIYU TO SEIGI (LIBERTY AND JUSTICE), 4-90 (1988) (Symposium issue). In English, see Ohara, *Judicial Assistance to be Afforded by Japan for Proceedings in the United States*, 23 INT'L LAW. 10 (1989).

22. Consular Convention Between the United States of America and Japan, Mar. 22, 1963, 15 U.S.T. 768, T.I.A.S. 5602, 518 U.N.T.S. 179 [hereinafter Consular Convention] (entered into force Aug. 1, 1964).

23. *Infra* part IV.

24. For a discussion of service of process in the United States, see R. LEFLAR, *supra* note 3, § 69 (4th ed. 1986).

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

26. *Id.*

27. *Sprague & Rhodes Commodity Corp. v. Instituto Mexicano del Cafe*, 566 F.2d 861, 863 (2d Cir. 1977).

28. FED. R. CIV. P. 4(c)(1), 4(c)(2)(A). Many states permit service of a summons

be performed by a United States marshal or a court-appointed process server. This includes situations involving a complainant proceeding *in forma pauperis*, actions concerning a seaman, actions in which the United States Government is a party, and an order by a federal court for the United States marshal to make the service of process.<sup>29</sup> In general, however, the responsibility for service of process and delivery of documents lies not with the government but with the parties to the litigation.

In addition to service of process agreements or conventions to which the United States is a party, the federal courts of the United States can effect service of process on defendants located in a foreign country under rules 4(c)(2)(C), 4(e), and 4(i) of the Federal Rules of Civil Procedure.<sup>30</sup> Rule 4(c)(2)(C) allows service of summons and complaint pursuant to the law of the state in which the federal district court is located.<sup>31</sup> Rule 4(e) provides that whenever a statute of the United States, a statute of a state, or a court order in lieu of a summons authorizes service of process outside the district or state in which the court is located, service may be made according to that statute or according to the provisions of Rule 4.<sup>32</sup> Rule 4(i), entitled "Alternative Provisions for Service in a Foreign Country," specifies that when a party is to be served in a foreign country, the manner of service is sufficient if made: in the manner provided by the law of the foreign country,<sup>33</sup> as directed by the foreign authority in response to a letter rogatory, when it is reasonably calculated to give actual notice;<sup>34</sup> by personal delivery upon an individual litigant, or in the case of a corporation or association or partnership, by delivery to an officer or agent;<sup>35</sup> by any form of mail dispatched by the court clerk requiring a signed receipt, or; as directed by court order.<sup>36</sup> Rule 4(i) further specifies that personal service must be effected by a person designated by the United States court or the foreign court. In addition, the

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and complaint by any person not a party to the action who is at least 18 years old. CAL. CIV. PROC. CODE § 414.10 (West 1985). Other states with similar provisions include Alabama, ALA. R. CIV. P. 4.1(b)(2) (1984); Arizona, ARIZ. R. CIV. P. 4(c) (1987 & Supp. 1989) (age is 21); Illinois, ILL. ANN. STAT. ch. 110, para. § 2-202(a) (Smith-Hurd 1983 & Supp. 1989); New Mexico, N.M. STAT. ANN. § 1-004(D) (1978); Pennsylvania, PA. R. COURT 400(b)(1) (West 1989); Texas, TEX. R. COURT 103 (West 1989); Virginia, VA. CODE ANN. § 8.01-293 (1984 & Supp. 1989).

29. FED. R. CIV. P. 4(c)(1), 4(c)(2)(B).

30. FED. R. CIV. P. 4(c)(2)(C), 4(e), 4(i).

31. FED. R. CIV. P. 4(c)(2)(C).

32. FED. R. CIV. P. 4(e).

33. FED. R. CIV. P. 4(i)(1)(A).

34. FED. R. CIV. P. 4(i)(1)(B).

35. FED. R. CIV. P. 4(i)(1)(C).

36. FED. R. CIV. P. 4(c)(2)(C), 4(e), 4(i)(1)(D) & (E).

person must not be less than eighteen years of age and must not be a party to the lawsuit if service is by personal delivery or court order.<sup>37</sup>

Two amendments to Rule 4(i) proposed by the Advisory Committee on Rules for Civil Procedure are pending.<sup>38</sup> One amendment would incorporate service of process under the Hague Service Convention.<sup>39</sup> The second amendment concerns procedures to identify who would act as process server in the foreign country.<sup>40</sup>

Other specific federal statutes, not discussed here, expressly or implicitly authorize service of process in a foreign country for specific types of lawsuits, such as revocation of naturalization, patents, antitrust actions, and liens affecting real property.<sup>41</sup>

Also, any federal or state court in the United States may request that the United States Department of State receive and transmit to a foreign court a letter rogatory issued by the court in the United States for the purpose of seeking judicial assistance from the foreign court in serving United States judicial documents.<sup>42</sup>

California and many other states authorize service of process outside the United States.<sup>43</sup> The California statute requires that service be effected by methods authorized by California law, by the law of the foreign country in which service is made, if such method is reasonably calculated to give actual notice, and by any method directed by the court in which the action is pending.<sup>44</sup> Five states and the District of Columbia have adopted parts of the Uniform Interstate and International Procedure Act to regulate service of process in transnational litigation.<sup>45</sup> Most states, however, have their own statutory scheme.<sup>46</sup>

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37. FED. R. CIV. P. 4(i)(1)(E).

38. 4A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1134 (Supp. 1989).

39. *Id.*

40. *Id.*

41. *Id.* § 1133, nn.8-9 (1987).

42. 28 U.S.C. § 1781(a)(2) (1982).

43. CAL. CIV. PROC. CODE § 413.10(c) (West 1973 & Supp. 1989). Other states with similar provisions include Arizona, ARIZ. R. CIV. P. 4(e)(b); Illinois, ILL. ANN. STAT. ch. 110, paras. 2-208(a), 2-209(c) (Smith-Hurd 1983 & Supp. 1989); Massachusetts, MASS. R. CIV. P. 4(e) (West 1978); New York, N.Y. CIV. PRAC. L. & R. 313 (McKinney 1972); Pennsylvania, PA. R. COURT 404(4), (5) (West 1989); Texas, TEX. R. COURT 108(a)(1) (West 1989).

44. CAL. CIV. PROC. CODE § 413.10(c) (West 1973 & Supp. 1989).

45. 1 B. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE (CIVIL AND COMMERCIAL) §§ 2-3(1) n.2, 2-21(1) n.2, 3-4(1) n.2 (1986).

46. *Id.*



### B. *Service of Process in Japan*

In Japan, "business relating to service shall be administered by the court clerk."<sup>47</sup> As discussed above, service of process in Japan, as in most civil law countries, is an official function to be performed by the court.<sup>48</sup> This requirement is consistent with the role the court plays in civil law countries.<sup>49</sup> Their codes of civil procedure grant the judge much power in controlling litigation.<sup>50</sup> Japan<sup>51</sup> and West Germany,<sup>52</sup> for example, give the judge power to clarify the issues of litigation. Both Japan<sup>53</sup> and West Germany<sup>54</sup> authorize the judge to conduct examination of witnesses or parties, and to control the questioning of witnesses by the parties to the litigation. In Japan, the judge may attempt to impose a compromise at any stage of the lawsuit,<sup>55</sup> seek expert testimony to assist in the litigation,<sup>56</sup> examine a party to the lawsuit,<sup>57</sup> or order any necessary

47. MINSOHÖ art. 161 (emphasis added); see HATTORI & HENDERSON, *supra* note 5, § 7.01[3] ("[Service may be made] by a bailiff or through the mail under direction by the court clerk."). Service made in violation of the statute is null and void, but defects in service will be cured, if the addressee, with knowledge of the defect, fails to raise objections. MINSOHÖ art. 161; see HATTORI & HENDERSON, *supra* note 5, § 7.01[3] & n.26 (citing 1 KIKUI-MURAMATSU, MINJI SOSHÖHÖ (CODE OF CIVIL PROCEDURE) 537-38 (1957)).

48. *In re Matsuyama*, 7 Minshō 1128, (1928), cited in Fujita, *supra* note 10, § 5.05[2].

49. See SCHLESINGER, *supra* note 1, at 406, 411, 417-20.

50. *Id.*

51. MINSOHÖ arts. 127, 128, 131. See HATTORI & HENDERSON, *supra* note 5, § 7.06(8). The judge has the power to clarify, which performs an important function in framing the claim. *Id.* § 7.02[10]. Authority to clarify may be a *duty* in some circumstances. *Id.*

52. See, e.g., ZPO §§ 139, 278 (Code of Civil Procedure, W. Ger.); see SCHLESINGER, *supra* note 1, at 419-21; see also ZPO §§ 141-144; HATTORI & HENDERSON, *supra* note 5, 7.02[10] n.160(c). For German commentary, see R. POHLE, KOMMENTAR ZUR ZIVILPROZESSORDNUNG (19th ed. 1964).

53. MINSOHÖ, arts. 271, 279, 294, 296, 300. See HATTORI & HENDERSON, *supra* note 5, §§ 7.04[1], 7.05[6], [7], [11].

54. ZPO § 397 (W. Ger.); see SCHLESINGER, *supra* note 1, at 435.

55. MINSOHÖ art. 136; see HATTORI & HENDERSON, *supra* note 5, § 7.02[14]. The court may order parties to appear with a view to arranging a settlement. See also *id.* § 7.06 n.480. Parties may reach settlement during appellate proceedings. One third of all appeals are terminated by judicial settlements. *Id.* § 8.02[3][a] n.39.

56. MINSOHÖ art. 310; see HATTORI & HENDERSON, *supra* note 5, § 7.05[4][b], 7.05[9].

57. MINSOHÖ art. 336; see HATTORI & HENDERSON, *supra* note 5, § 7.04[1]. A party may be examined "when the court is unable to resolve its doubts from other evidence." *Id.* This is based upon the policy holding that the probative value of a party's testimony is inferior to witness testimony because of the party's direct interest in the

investigation pertaining to the litigation.<sup>58</sup>

The methods of service allowed in Japan are personal service,<sup>59</sup> service on the legal representative of one lacking litigation capacity,<sup>60</sup> service on a prison chief for a prisoner,<sup>61</sup> service by mail,<sup>62</sup> and service by publication.<sup>63</sup> Under Japanese law, the places where a person may be served include a person's domicile, place of residence, or place of business, or where the person is encountered.<sup>64</sup> A Japanese court administers

result. *Id.* § 7.05[10], n.434. A judge may examine the party only if he is unable to reach a decision after considering all other evidence. Case law indicates, however, that a judge need not wait to examine a party until after the parties have presented all of their evidence. *Id.* § 7.05[10]. Furthermore, a judge may order the party to take an oath. *Id.*

58. MINSOHŌ art. 262; see HATTORI & HENDERSON, *supra* note 5, § 7.05[4][b].

59. MINSOHŌ art. 164; see HATTORI & HENDERSON, *supra* note 5, § 7.01[4][a].

60. MINSOHŌ art. 165; see HATTORI & HENDERSON, *supra* note 5, § 7.01[4][a]; Service on a legal representative may be made at the place of business or office of the representative. *Id.*

61. MINSOHŌ art. 168.

62. MINSOHŌ art. 172; see HATTORI & HENDERSON, *supra* note 5, § 7.01[4][d]. The *Minji Soshōhō* allows such service when service by delivery, substitute service, and service by leaving the document all fail. The clerk may then send a copy by registered mail, and service is deemed completed with full effect from the time of dispatch, whether or not the addressee receives it later. *Id.*

63. MINSOHŌ art. 178; see HATTORI & HENDERSON, *supra* note 5, § 7.01[4][f]. This applies only if: (1) the party's domicile, residence, or other place for service is unknown; or (2) service cannot be effected in a foreign country. *Id.* Publication may include posting on the notice board of the court and, if ordered by the judge, publication in the official gazette or in a newspaper. *Id.*

64. MINSOHŌ art. 169. The *Minji Soshōhō* describes the concept of process agent as follows:

[when] a party, legal representative, or advocate does not have domicile, residence, place of business or office in the place of the first filing court, he shall decide the place at which service is to be made in the place the court locates and designate the person to receive service and report thereof.

2. In case the person who is to receive service fails to make report under the preceding paragraph, the document to be served upon such person may be sent by registered mail addressed to the place at which the service is to be made under the provisions of paragraph 1 of the preceding Article.

3. The report under paragraph 1 shall also apply to a case where the person on whom the service is to be made has domicile, residence, place of business or office in the place where the first filing court is located.

*Id.* art. 170.

Commentators doubt, however, whether this system applies to international cases. For a discussion of this point, see SHOGAI SOSHOHŌ (LAW OF TRANSNATIONAL LITIGATION) 96-98 (N. Motoki & K. Hosokawa eds. 1989).

service of process by mail by having the clerk stamp "special service" on the envelope, thus designating the postal service as the official effecting agent.<sup>65</sup>

Pursuant to article 175 of the Japanese Code of Civil Procedure, the presiding judge entrusts service of Japanese judicial documents in a foreign country to the competent government authorities of that country, or to the Japanese ambassador, minister, or consul stationed there.<sup>66</sup> Article 175 is not operative unless an enabling convention or agreement exists between Japan and the foreign country involved.<sup>67</sup> Absent an enabling convention or agreement, service is entrusted to the competent authority of the foreign country.<sup>68</sup> Usually the request is made by letters rogatory, which proceed from the presiding judge to the Supreme Court of Japan for delivery to the appropriate foreign authorities. The provisions of article 175 do not include service by mail.

It is worth noting that with respect to service of Japanese documents in a foreign country, Japan does not adopt *notification au parquet*.<sup>69</sup> *Notification au parquet*, used in some civil law countries,<sup>70</sup> is a method of service by which service on a nonresident litigant is deemed completed upon delivery of the judicial documents to a public official's office, even if the nonresident litigant gets actual notice only after judgment is entered or never gets notice at all.<sup>71</sup>

Absent a multilateral convention or bilateral agreement, the Reciprocal Judicial Assistance Law governs requests for service of foreign documents in Japan.<sup>72</sup> Under this law, a Japanese court will render judicial

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65. MINSOHō art. 162; see HATTORI & HENDERSON, *supra* note 5, § 7.01[3].

66. MINSOHō art. 175; see HATTORI & HENDERSON, *supra* note 5, § 7.01[4][e]. For discussion of the initiation of a proceeding against a foreign enterprise under the Antimonopoly Act and the position that the Act does not intend to effect an extraterritorial service of process, as article 175 of the Minji Soshōhō does not appear in the Act, see 1 Japan Business Law Guide (CCH) ¶37-400 (1988).

67. See generally HATTORI & HENDERSON, *supra* note 5, § 7.01[4][e] & n.37.

68. See *id.* § 12.02[1] & n.13 (citing Saikōsai (Supreme Court), Civil 2, Gaikoku ni oite suru minji soshō jiken tō no shoriu no sōtatsu oyobi shōko shirabe no shokutaku ni tsuite (Concerning Requests for Examination of Evidence and Service of Documents in Cases of Civil Litigation Conducted in foreign Countries) Tsōūtatsu (Circular) No. 549 (Sept. 9, 1964)).

69. Cf. MINSOHō art. 175.

70. SCHLESINGER, *supra* note 1, at 408-09, 412-13.

71. Volkswagenwerk A.G. v. Schlunk, 486 U.S. 694, 709, n.1 (1988). For discussion of *notification au parquet* (service on an absent foreign defendant by service on local authorities of the forum), see E. SCOLES & P. HAY, CONFLICT OF LAWS 388-89 (1982).

72. Law No. 63 of Mar. 13, 1905, as amended by Law No. 7 of Mar. 29, 1912; Law No. 17 of Mar. 22, 1938. For the English text, see Ohara, *Judicial Assistance to be*

assistance in serving foreign documents if the foreign court makes a request and the following conditions exist: the request is made through diplomatic channels; the request for service of process is made in writing stating the name, nationality, and domicile or residence of the person to be served; the request contains a translation into Japanese of the documents to be served appended to the originals; the state of the foreign court guarantees payment of expenses incurred in serving the documents; and the state of the foreign court assures it will render judicial aid to the Japanese courts in matters of the same or similar nature. Japanese courts rigidly adhere to the translation requirement regardless of whether service of foreign documents is effected through the Reciprocal Judicial Assistance Law or another convention or treaty.<sup>73</sup> The United States and Japan are parties to both a bilateral agreement and convention pertaining to service of process, and therefore the Reciprocal Judicial Assistance Law does not apply between the two.<sup>74</sup>

Whatever the method or place of service, and whether service is of Japanese documents in a foreign state or of foreign documents in Japan, valid service of process in Japan requires that a Japanese court authorize the service. This is the one common thread found in all Japanese service of process rules. Japanese courts are part of the government, and therefore service of process is considered an official act. Under this structure, the Japanese Government and courts are not very tolerant of attempts by foreign governments or persons to circumvent the authority the Japanese courts assert over service of process. Failure to follow the explicit requirements of the Japanese courts may result in a subsequent judgment's having no effect.<sup>75</sup> The Japanese Government considers the service of documents directly upon a person residing in Japan by United States courts or litigants to constitute an impermissible exercise of jurisdiction by the United States within the territory of Japan.<sup>76</sup> The Tokyo District Court refused to recognize a French default judgment against a Japanese defendant because the defendant had been served by mail and without a translation.<sup>77</sup> This view is consistent with the view of most

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*Afforded by Japan for Proceedings in the United States*, 23 INT'L LAW. 10, 28 (1989); see also Sawaki, *Recognition and Enforcement of Foreign Judgments in Japan*, 23 INT'L LAW. 29 (1989).

73. *Daiei K.K. v. Blagojevic*, HANTA No. 344, at 102 (Tokyo Dist. Ct. 1977), 22 JAPANESE ANN. INT'L L. 160 (1976).

74. Consular Convention, *supra* note 22, art. 17(1)(e).

75. See *supra* notes 6, 12-13 and accompanying text.

76. U.S. DEP'T OF STATE, CIRCULAR, SERVICE OF PROCESS IN JAPAN 3 (June 1987) [hereinafter PROCESS IN JAPAN].

77. *Daiei*, HANTA No. 344, at 102, 22 JAPANESE ANN. INT'L L. 160. See MINSOHŌ

civil law countries. Some civil law countries make it a crime for a private person to handle this type of judicial function.<sup>78</sup>

In Japan, service of process is not a factor in the court's assertion of jurisdiction over the person.<sup>79</sup> Rather, the rule of territorial competence implies adjudicatory authority over a person.<sup>80</sup> Therefore, in personam jurisdiction is not tied into service of process in Japan as it is in the United States.

### C. Comparison

There are several differences between the Japanese statutes and the United States statutes (federal and state) pertaining to service of process of documents in a foreign country. First, the Japanese Code of Civil Procedure does not authorize service of documents in a foreign country by mail; United States statutes do permit service in a foreign country by mail.<sup>81</sup> Second, Japanese courts will not give effect to service of process directly upon a person not in their jurisdiction, but will effect service through the authorities of the other country. One exception to this rule is where the court decides to serve notice by publication.<sup>82</sup>

In the United States, service of process of United States documents in a foreign country may be effected through the courts or authorities of the foreign country, by service directly upon the party in the foreign country, or by mail to the party in the foreign country. Clearly, several of the methods of service permitted under United States law for serving docu-

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art. 200(ii) which may not allow for service by mail under the Convention.

78. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 528-29 (1953).

79. EHRENZWEIG, *supra* note 4, at 26-28; Matsuo, *Jurisdiction in Transnational Cases in Japan*, 23 INT'L LAW. 6-9 (1989); Fujita, *Japanese Rules of Jurisdiction*, 4 LAW JAPAN 55, 55-57 (1970). Japanese courts have applied and modified the territorial competence provision of the MINJI SOSHŌHŌ in the international context. Although in the United States service of process has been held sufficient as well as necessary for the establishment of jurisdiction in personam, in Japan jurisdiction is determined by certain contacts the defendant has with the country or by the legal relationship between them. The fundamental principle is that jurisdiction is based on the defendant's domicile, or *jōsho*. An office, place of business, or officer doing business in Japan is enough to confer jurisdiction for the Japanese courts under the MINJI SOSHŌHŌ. The location of misconduct or injury confers tort jurisdiction. See Fujita, *supra* note 10, § 5.02[1].

80. EHRENZWEIG, *supra* note 4, at 26-28.

81. MINSOHŌ art. 175; see HATTORI & HENDERSON, *supra* note 5, §§ 7.01[4][e], 12.02[1].

82. MINSOHŌ art. 178; see HATTORI & HENDERSON, *supra* note 5, § 12.02[1]. Generally, if compliance with article 175 is not possible or deemed useless, the presiding judge may authorize service by publication. *Id.*

ments in a foreign country conflict with the Japanese and civil law view that service of process is a function of the courts. For this reason, the safest method of service, lacking a convention or agreement, is service according to the laws of Japan or by letters rogatory. Complying with service of process rules may be burdensome, but otherwise an ensuing judgment may not be enforced or recognized.

Under United States law, foreign judicial documents can be served within the United States with the assistance of the federal court<sup>83</sup> or the United States Department of State,<sup>84</sup> but service can also be effected *without any court order*.<sup>85</sup>

Authority for service of process of foreign documents in the United States without court approval suggests that foreign documents can be served directly upon a party in the United States without the assistance of United States authorities. In practice, however, litigants in Japan probably will not avail themselves of this manner of service because the Japanese courts have authority over service of process that is limited to those methods specified in article 175 of the Japanese Code of Civil Procedure. Even if a Japanese litigant did effect service directly without the assistance of a Japanese court, the Japanese court may declare the service invalid.<sup>86</sup>

In the past, state courts of the United States disfavored letters rogatory or letters of request for judicial assistance from a foreign court and did not honor such requests. The United States did not wish to give judicial assistance to foreign courts that asserted jurisdiction over a cause of action or a person on grounds it perceived contrary to United States internal law.<sup>87</sup> Later, Congress enacted a statute that recognized the need to give judicial assistance to foreign courts while allowing a domestic court to reserve its power of nonrecognition or nonenforcement of foreign country judgments.<sup>88</sup> This statute authorizes the federal courts to give assistance to the foreign court but also states, "Service pursuant to this subsection does not, of itself, require the recognition or enforcement in the United States of a judgment, decree, or order rendered by a foreign or international tribunal."<sup>89</sup>

Another statute permits the United States Department of State to act

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83. 28 U.S.C. § 1696(a) (1982).

84. *Id.* § 1781(a)(2).

85. *Id.* § 1696(b).

86. *See supra* notes 6, 12-13 and accompanying text.

87. *In re* Letters Rogatory Out of First Civil Court of City of Mexico, 261 F. 652 (S.D.N.Y. 1919).

88. 28 U.S.C. § 1696.

89. *Id.*

as intermediary between the foreign court and the United States court for transfer of any letters of request.<sup>90</sup> This statute specifically provides that the courts are free to deal with each other directly concerning the transfer of letters rogatory.<sup>91</sup>

### III. SERVICE OF PROCESS UNDER THE BILATERAL CONSULAR CONVENTION BETWEEN THE UNITED STATES AND JAPAN

Under the United States and Japan Bilateral Consular Convention, litigants may seek the assistance of their consul to serve judicial documents in the other country.<sup>92</sup> As mentioned above, article 175 of the Japanese Code of Civil Procedure contains procedures for foreign service of process that are operative under the Bilateral Consular Convention.<sup>93</sup> Consistent with domestic Japanese practice, the presiding court must make a request of the foreign authorities for service of process.

In theory, United States litigants should receive the same type of assistance from their consular officers in Japan as Japanese litigants get from their consular officers in the United States. Department of State regulations, however, prohibit United States consul officers from serving documents in Japan (or any country) on behalf of private United States litigants because it is not a foreign service function.<sup>94</sup> Thus, private United States litigants do not receive assistance under this bilateral agreement between the United States and Japan.

### IV. SERVICE OF PROCESS UNDER THE HAGUE CONVENTION ON SERVICE ABROAD

The Hague Convention on Service Abroad entered into force in the United States on February 10, 1969.<sup>95</sup> In Japan, the Convention was

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90. *Id.* § 1781.

91. *Id.*

92. Consular Convention, *supra* note 22, art. 17(1)(e). "Service to be effected in a foreign country shall be made upon entrustment thereof by the Presiding Judge to the competent government authorities of that country or to the Japanese Ambassador, Minister or Consul stationed therein." MINSOHŌ art. 175; *see* HATTORI & HENDERSON, *supra* note 5, § 12.02[1].

93. *See supra* note 67 and accompanying text.

94. 22 C.F.R. § 92.85 (1989), *see also* 1 B. RISTAU, *supra* note 45, app. N, § 92.85, at DS-218.

95. *Supra* note 14; 1 B. RISTAU, *supra* note 45, app. B, at DS-2. Ristau's work is a useful guide in dealing with extraterritorial service of process. Another guide is the HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, HAGUE CONVENTION, SERVICE OF PROCESS ABROAD (1983).

implemented by law on June 5, 1970.<sup>96</sup>

The purpose of the Convention is two-fold: "to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time," and "to improve the organization of mutual judicial assistance for that purpose by simplifying and expediting the procedure."<sup>97</sup>

The Convention requires that each contracting state designate a central authority for receiving, transmitting, and arranging the service of documents.<sup>98</sup> In the United States, the designated central authority is the United States Department of Justice.<sup>99</sup> In Japan, the designated central authority is the Ministry of Foreign Affairs.<sup>100</sup> Judicial officers or the competent authority of the originating state submit in duplicate the request for documents to be served to the central authority of the receiving country.<sup>101</sup>

#### A. *When Does the Convention Apply? The Supreme Court of the United States Responds*

The Convention applies "in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad."<sup>102</sup> In the United States, much litigation involving the Convention has concerned the meaning of the language, "where there is occasion to transmit . . . documents for service abroad."<sup>103</sup>

In *Volkswagenwerk v. Schlunk*,<sup>104</sup> the Supreme Court of the United States held that a German corporation was served adequately by personal service of its involuntary corporate agent with offices in the state of Illinois. The court considered such service adequate notice to the foreign

96. Law No. 115 of June 5, 1970; see 2 B. RISTAU, *supra* note 45, at CI-111, 112.

97. Hague Service Convention, *supra* note 14, preamble.

98. *Id.* arts. 2, 5, 6.

99. 1 B. RISTAU, *supra* note 45, § 4-12(A), at 134.

100. *Id.* app. D, at DS-105.

101. Hague Service Convention, *supra* note 14, art. 3.

102. *Id.* art 1.

103. *Id.* Compare *Volkswagenwerk A.G. v. Schlunk*, 486 U.S. 694 (1988); *Ex Parte Volkswagenwerk A.G.*, 443 So.2d 880, 885 (Ala. 1983) (holding that the Convention does not apply if a foreign national is properly served through its local agent); *Zisman v. Sieger*, 106 F.R.D. 194, 199-200 (N.D. Ill. 1985); *Lamb v. Volkswagenwerk A.G.*, 104 F.R.D. 95, 97 (S.D. Fla. 1985); *McHugh v. International Components Corp.*, 118 Misc. 2d 489, 491-92, 461 N.Y.S.2d 166, 167-68 (N.Y. Sup. Ct. 1983) *with* *Cipolla v. Picard Porsche Audi, Inc.*, 496 A.2d 130, 131-32 (R.I. 1985) (Convention is exclusive means of service abroad).

104. *Volkswagenwerk A.G. v. Schlunk*, 486 U.S. 694 (1988).



corporation because there was no occasion to transmit judicial documents abroad.<sup>105</sup> This decision appears to indicate that fair notice does not always require serving judicial documents directly on a foreign defendant. The case is significant because the Court's decision is premised on the finding that the notice requirements of the internal law of the forum, and not the terms of the Convention, determined the requirements of service of process abroad.

In *Schlunk*, the plaintiff filed a wrongful death action in Illinois state court against one Reed and Volkswagen of America (VWoA) for the death of his parents in an automobile accident.<sup>106</sup> The plaintiff based his claim against VWoA in part on manufacturer product liability. VWoA responded that a German corporation, Volkswagenwerk Aktiengesellschaft (VWAG), and not VWoA, manufactured the vehicle. Plaintiff then attempted service of his amended complaint on VWAG by serving VWoA as agent for VWAG. VWAG argued, in a motion to quash service of process, that VWoA was not its agent and that the Convention was the exclusive means for serving process on a foreign defendant. The Illinois court denied VWAG's motion.<sup>107</sup>

On appeal, the appellate court found that a *de facto* agency existed between VWoA and VWAG because of significant connections between both corporations, most notably the same directors serving on the board of directors of both corporations, and the nature of the contractual relationships between the corporations. The court also held that since service upon the agent was valid, there was no need to turn to the provisions of the Convention.<sup>108</sup>

The Supreme Court of the United States affirmed, rejecting VWAG's argument that the Convention is the exclusive means of service of process in every case involving a foreign defendant.<sup>109</sup> The concurring opinion pointed out, however, that weakening the mandatory effect of the Convention would result in each contracting member to the Convention looking to its own internal law to determine whether or not the Convention applied in any particular case.<sup>110</sup> An interpretation allowing leeway in the forum's deeming service as proper domestic service could open the door to the use of *notification au parquet* as a means of service, a prac-

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105. *Id.* at 707, 708.

106. *Schlunk v. Volkswagenwerk A.G.*, 145 Ill. App. 3d 594, 503 N.E.2d 1045 (Ill. App. Ct. 1986).

107. *Id.*

108. *Id.*

109. *Schlunk*, 486 U.S. 694, 707 (1988).

110. *Id.* at 708 (Brennan, J., concurring).

tice that the drafters of the Convention tried to eliminate.<sup>111</sup>

The United States Supreme Court acknowledged that, by making the applicability of the Convention dependent upon the internal law of the forum, its interpretation of the Convention did not advance the Convention's objective of adequate notice to foreign defendants.<sup>112</sup> The Court did not think, however, that any country would change its internal laws to circumvent the Convention. The Court found the Convention intended to eliminate *notification au parquet*, but construed it to leave United States service of process rules intact.<sup>113</sup>

Nevertheless, the Supreme Court stated, "nothing that we say today prevents compliance with the Convention even when the internal law of the forum does not so require."<sup>114</sup> Under the Supreme Court's view, the Convention does not alter the internal law of the forum, but if the Convention's procedures are used, the United States courts will enforce its provisions.

Although the United States Supreme Court decision was unanimous, Justices Brennan, Marshall, and Blackmun joined in a concurring opinion. The concurring justices felt the Court was correct in concluding that service on an involuntary agent was proper domestic service of process.<sup>115</sup> They felt, however, that the majority went too far in holding that the internal law of the forum was conclusive in determining whether a particular process constitutes service abroad, which is covered by the Convention, or domestic service, which is not covered by the Convention.<sup>116</sup> This in effect made use of the Convention optional. The concurring Justices believed the Convention is mandatory based on the Court's holding in an earlier case construing a multilateral agreement concerning

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111. *Id.* at 711 (Brennan, J., concurring).

112. *Id.* at 705.

113. *Id.* at 703-05, 715. *Notification au parquet*, used in some civil law countries, is a method of service in which service on a nonresident litigant is deemed complete upon delivery of the judicial documents to a public official's office even if the nonresident litigant gets actual notice after judgment is entered or the litigant never gets notice. Often the out-of-state litigant will not have a right to reopen or appeal because the statute of limitations will usually have run by the time the litigant is aware of the lawsuit. See *supra* note 71 and accompanying text. *Id.* at 709 n.1 (Brennan, J., concurring). See also SCHLESINGER, *supra* note 1, at 408-09, 412-13.

114. *Schlunk*, 486 U.S. at 706. There is a strong view that the *Schlunk* ruling has a limited scope and will not erode the mandatory effect of the Convention in the United States. As to this view, see Alley, *New Developments Under the Hague Evidence and Service Conventions: The 1989 Special Commission*, 17 INT'L BUS. LAW. 380, 382 (1989).

115. 486 U.S. at 708 (Brennan, J., concurring).

116. *Id.*

the taking of evidence abroad.<sup>117</sup>

After *Volkswagenwerk v. Schlunk*, it appears that a court, applying the internal laws of the forum, has much discretion in determining whether the Convention applies in a particular case. Prior to this case, several lower courts, state and federal, dealt with the same issue.<sup>118</sup> Although utilizing perspectives distinct from that of the Supreme Court, these earlier cases show that the lower courts do have a tendency to use their discretion in construing the Convention.

A federal district court in Illinois, denying a motion to quash personal service effected in France upon a Lebanese defendant, held that the method set forth in the Convention did not require that it be followed, but rather only that the method used comply with the constitutional limitations of due process.<sup>119</sup> The court had appointed a process server to serve the Lebanese defendant in France and asserted its jurisdiction over the defendant under the Illinois long arm statute. The court found that no evidence showed this method of service was inconsistent with the internal laws of France, and therefore the service, under the terms of the Convention, was valid.<sup>120</sup>

The Arizona Court of Appeals, in dicta, stated that to the extent the service of process rules of the Convention conflicted with the rules of the state, the supremacy clause requires the rules of the Convention to apply in service of process of a Japanese defendant residing in Japan.<sup>121</sup>

Two other federal courts held that the Convention was not the exclusive method for serving a foreign defendant when the defendant's agents were served in the United States. In those particular cases, the courts held that service on the agent was valid service and did not require the use of the Convention.<sup>122</sup>

The United States Supreme Court's result in *Schlunk* opens the door for other Convention members to use internal law to define when service of process is deemed service abroad so as to require the use of Convention procedures. In *Schlunk*, the Court considered service upon an agent

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117. *Société Nationale Industrielle Aérospatiale v. United States Dist. Court*, 482 U.S. 522, 534 (1987), cited in *Volkswagenwerk A.G. v. Schlunk*, 486 U.S. 694, 708 (1988) (Brennan, J., concurring). For a discussion of *Schlunk*, see Leiner, *American Service of Process Upon Foreign Corporations: the Schlunk Case and Beyond*, 23 J. WORLD TRADE LAW 37 (1989).

118. See *supra* note 103.

119. *Tamari v. Bache & Co.*, 431 F. Supp. 1226, 1228-29 (N.D. Ill. 1977).

120. *Id.* at 1229.

121. *Kadota v. Hosogai*, 125 Ariz. 131, 134, 608 P.2d 68, 71 (Ariz. Ct. App. 1980).

122. *Zisman v. Sieger*, 106 F.R.D. 194 (N.D. Ill. 1985); *Lamb v. Volkswagenwerk A.G.*, 104 F.R.D. 95 (S.D. Fla. 1985).

found in the United States to be domestic service, and therefore actual service abroad on the defendant in Germany was unnecessary. By adopting the position that the law of the forum determines the nature of the service required (domestic or foreign), the Court leaves intact the service of process rules of all courts in the United States. Arguably, all service of process rules of all courts of the contracting members to the Convention will likewise remain intact. Although the Court did construe the Convention to eliminate *notification au parquet*, its rationale supports the argument that the Convention did not change the internal law of member countries. The position the Court adopted is the same as the Restatement (Second) on Conflicts of Law, which states that the law of the forum where the action is filed determines the means of service on the defendant.<sup>123</sup>

Under the United States Supreme Court's holding, a United States court can avoid application of the Convention by finding that domestic service has been effected based upon an agency relationship. It remains unclear what, if any, guidance this decision will provide to a challenge of domestic service on a foreign defendant under a nonresident long arm statute. Various states of the United States maintain long arm statutes as part of their internal law.<sup>124</sup> Service of process under long arm statute procedures, in light of the existence of the Convention, raises the question as to whether application of the internal laws of the various member countries will undermine the Convention. The United States Supreme Court and United States authorities are aware of this potential problem.<sup>125</sup>

In comparison, France's *notification au parquet* statute requires that the public official served with the documents must, on the same day or the next possible day, mail another copy to the defendant by registered mail. If this does not establish that the defendant received timely notice, the court may then order additional measures.<sup>126</sup> This French statute appears similar to the long arm statutes found in the United States. A

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123. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 126 (1971).

124. See *supra* note 43. In the United States, use of a nonresident long arm statute consists of serving an out-of-state defendant through the other state's secretary of state or other state official; the state official or secretary of state is required as a matter of law to transmit the summons and complaint to the defendant by mail. Brief for the United States as Amicus Curiae Supporting Respondent, at 26-27, Volkswagenwerk A.G. v. Schlunk, 486 U.S. 694 (No. 86-1052) [hereinafter Amicus Brief].

125. Volkswagenwerk A.G. v. Schlunk, 486 U.S. 694, 713-16 (1988) (Brennan, J., concurring).

126. NOUVEAU C. PR. CIV. arts. 683-687 (Fr. 1989). See SCHLESINGER, *supra* note 1, at 413 n.18.

member of the United States delegation that negotiated the Convention expressed his view that service of process under a long arm statute and under notification au parquet should be regarded as service abroad requiring application of the Convention.<sup>127</sup> This opinion, however, appears questionable in view of the *Schlunk* decision. A civil law country could construe service of process under *notification au parquet* as domestic service and thereby avoid the provisions of the Convention. Such a position would not be inconsistent with the position of the Restatement (Second).

Indeed, as mentioned above, one federal court in Illinois held that use of a long arm statute for asserting jurisdiction and authorizing service of process over a foreign defendant in France complied with the due process requirements of the Convention.<sup>128</sup> The Illinois court's decision can be understood two ways. First, the Convention is not the exclusive means of serving a foreign defendant. Second, if the means of service employed comply with due process, then they comply with the requirements of the Convention. The court found no evidence that the method employed (the process server was court appointed) was incompatible with the internal laws of France.

What effect the Convention will ultimately have on service of process under nonresident long arm statutes and *notification au parquet* is difficult to assess. In view of the Supreme Court's decision in the *Schlunk* case, however, other courts will not likely discard internal law of service in favor of the Convention's procedures for service of foreign defendants.

It is unlikely that service originating in Japan would create the problems discussed in the above paragraphs, as Japan does not use the *notification au parquet* method for service of process. Application by United States courts of nonresident long arm statutes to effect service of process in Japan, however, may make it difficult, if not impossible, for a Japanese court to recognize or enforce an ensuing judgment.

### B. *Execution of Judgments in Japan*

According to the Japanese Code of Civil Procedure, a final and conclusive foreign judgment receives its recognition in the Japanese court by meeting four conditions.<sup>129</sup> First, jurisdiction of the foreign court must be allowed by laws or ordinances, or by treaty.<sup>130</sup> Second, the defeated Jap-

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127. Amicus Brief, *supra* note 124, at 26-27, n.37.

128. *Tamari v. Bachi & Co.*, 431 F. Supp. 1226 (E.D. Ill. 1977).

129. MINSOHŌ art. 200; see HATTORI & HENDERSON, *supra* note 5, § 11.02[1] nn.226, 231.

130. MINSOHŌ art. 200(i); see HATTORI & HENDERSON, *supra* note 5, § 11.02[1]

anese defendant must have received personal service of process,<sup>131</sup> or responded to the action without receiving such service.<sup>132</sup> Third, the judgment of the foreign court must not be contrary to the Japanese public order or morals.<sup>133</sup> Fourth, the country where the foreign judgment was rendered must recognize a Japanese judgment under similar circumstances.<sup>134</sup>

The execution of the foreign judgment takes place only when a Japanese court pronounces its lawfulness.<sup>135</sup> The court must execute the judgment, however, without inquiring into the correctness of the foreign judgment.<sup>136</sup> An action for the issuance of the judgment of the foreign court must be certified to be final and conclusive.<sup>137</sup>

### C. *How to Effect Service When the Convention Applies*

Under the Convention the central authority of each state may require that the documents to be served be written in, or translated into, the official language of the state where the documents are to be served.<sup>138</sup> Japan requires that documents to be served in Japan must be accompanied by a translation in the Japanese language. If a translation does not accompany the service, the documents will be returned to the applicant.<sup>139</sup>

Two California cases addressing the issue of translation of documents

n.227. Existence of jurisdiction is required. Exercise of jurisdiction based on long arm statutes in international cases has received attention recently in Japan. For discussion of this issue, see Kobayashi, *Gaihoku hanketsu no shōnin shikō ni tsuite no ichigosatsu (An Observation on Recognition and Execution of Foreign Country Judgments)* 33 HANTA 18, 19-22 (1982).

131. The Japanese text reads: "the defeated defendant, being a Japanese, has received service of summons or the order necessary for the commencement of the action other than by means of public notice service, or . . ." MINSOHŌ art. 200(ii).

132. MINSOHŌ art. 200(ii); see HATTORI & HENDERSON, *supra* note 5, § 11.02[1] n.228.

133. MINSOHŌ art. 200(iii); see HATTORI & HENDERSON, *supra* note 5, § 11.02[1] n.229.

134. MINSOHŌ art. 200(iv); see HATTORI & HENDERSON, *supra* note 5, § 11.02[1] n.230. This provision is designed to protect the Japanese defendant.

135. MINSOHŌ, art. 200, see HATTORI & HENDERSON, *supra* note 5, § 11.02[1] n.231.

136. MINSOHŌ art. 515; see *Daiei K.K. v. Blagojevic*, HANTA No. 344, at 102 (Tokyo Dist. Ct. 1976), 22 JAPANESE ANN. INT'L L. 160, 163.

137. MINSOHŌ art. 515.

138. Hague Service Convention, *supra* note 14, art. 5.

139. See 1 B. RISTAU, *supra* note 45, §§ 4-17, at 147-49 (noting state's translation requirement), cited in PROCESS IN JAPAN, *supra* note 76, at 2.

are inconsistent in their findings. In one case, the defendant, a California resident, moved for summary judgment in opposition to enforcement of a Swiss default judgment on grounds that documents were served in German, without an English translation. The court, evaluating article 5 of the Convention, agreed and did not recognize or enforce the judgment.<sup>140</sup> In the other case, the plaintiff, a California resident, served a Japanese defendant in Japan by return receipt mail with documents not accompanied by a translation. The court held this was adequate notice because the evidence showed the defendant was fluent in English and that service by mail was consistent with the internal law of Japan.<sup>141</sup> The court failed to recognize that a Japanese court would not enforce the judgment because of the lack of a translation and because service by mail circumvented the Japanese judicial function in service of process.<sup>142</sup>

Clearly the safest method of complying with the Convention is to make certain that any documents served in Japan (or any other member country) are translated into Japanese (or the applicable language) and delivered to the central authority.

Articles 5, 9, and 10 of the Convention specify acceptable methods of service.<sup>143</sup> Article 5 provides that the internal law for domestic service where the documents are to be served will govern the method of service; or the party seeking service may request the method of service so long as it is not incompatible with the law of the state addressed; or the addressee can accept the documents voluntarily.<sup>144</sup> Article 9 of the Convention permits service of process through consular or diplomatic channels.<sup>145</sup>

Article 10 of the Convention permits, provided the state of destination does not object, the sending of documents and service of process by other alternatives.<sup>146</sup> Subsection (a) of article 10 allows the sending of judicial documents by direct mail to persons abroad.<sup>147</sup> Subsection (b) of article 10 permits judicial officers, officials, or other competent persons of the state of origin to effect service directly through the judicial officers, offi-

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140. *Julen v. Larson*, 25 Cal. App. 3d 325, 101 Cal. Rptr. 796 (Cal. Ct. App. 1972).

141. *Shoei Kako Co. v. Superior Court*, 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (Cal. Ct. App. 1973).

142. *Daiei K.K. v. Blagojevic*, HANTA No. 344, at 102 (Tokyo Dist. Ct. 1976), 22 JAPANESE ANN. INT'L L. 160.

143. Hague Service Convention, *supra* note 14, arts. 5, 9, 10.

144. *Id.* art. 5.

145. *Id.* art. 9.

146. *Id.* art. 10.

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

cials, or other competent persons of the state of destination.<sup>148</sup> Subsection (c) of article 10 allows any person of the state of origin to effect service directly through the judicial officers, officials, or other competent persons of the state of destination.<sup>149</sup> These subsections are operative only if the member country does not object to these provisions.

An issue has arisen in the United States courts whether Japan has authorized, under article 10(a) of the Convention, direct service by mail. Direct service by mail means mailing the documents directly to a party rather than going through the central authority as provided in the Convention. Article 10(a) refers to the "freedom to send judicial documents" by mail provided the country of destination does not object.<sup>150</sup> In adopting the Convention, Japan objected to article 10(b) and (c), but it did not object to article 10(a).<sup>151</sup> The Japanese Embassy has informed the United States Department of State, however, that the Japanese Government considers direct service of documents by mail under article 10(a) to be an exercise of jurisdiction by the United States within the territory of Japan.<sup>152</sup>

Japan's internal law does not provide for service on foreign parties by direct mail.<sup>153</sup> Construing article 10(a) to permit direct service of process by mail is inconsistent with Japan's internal law and with the Japanese courts' function of implementing service of process. As discussed earlier, the entire statutory scheme of the Japanese Code of Civil Procedure reflects the control that Japanese courts have over *all* aspects of litigation, including service of process.<sup>154</sup>

Courts in the United States are divided as to whether article 10(a) of the Convention permits service of process in Japan by mailing the necessary documents directly to the party. One state court found that article 10(a) does not authorize service by mail because articles 10(b) and (c) expressly uses the words "to effect service," and article 10(a) does not, but rather uses the words, "to send."<sup>155</sup> Another state court noted that it

148. *Id.* art. 10(b).

149. *Id.* art. 10(c).

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

151. *Kadota v. Hosogai*, 125 Ariz. 131, 135-36, 608 P.2d 68, 73 (Ariz. Ct. App. 1980).

152. *PROCESS IN JAPAN*, *supra* note 76, at 3.

153. *MINSOHŌ* art. 175; see *HATTORI & HENDERSON*, *supra* note 5, §§ 12.01, 12.02. For a discussion of Japan's not allowing either attorneys or other persons to serve process by mail, see Peterson, *Jurisdiction and the Japanese Defendant*, 25 *SANTA CLARA L. REV.* 555, 576-79 (1985).

154. See *supra* notes 48-51.

155. *Ordmandy v. Lynn (Toyota)*, 122 Misc. 2d 954 (N.Y. Sup. Ct. 1984), 472



was unclear if Japan permitted direct service of process by mail upon a Japanese resident (the case was decided on the insufficiency of service under its own statutes). The court also commented that the parties had not produced any evidence of Japanese law regarding service of process to determine if the service attempted conformed to article 5(a)—service consistent with the internal law of Japan.<sup>156</sup> Three federal district courts have construed article 10(a) as not permitting service of process directly upon Japanese residents by mail.<sup>157</sup>

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N.Y.S. 2d 274 (1984). In *Suzuki Motor Co. v. Superior Court*, 200 Cal. App. 3d 1476, 249 Cal. Rptr. 376 (Cal. Ct. App. 1988), a California court took a strong position that the phrase "to send" as used in the Hague Convention does not mean "to serve" as in service of process, thus disallowing service by mail, but merely allowing individuals to send judicial documents abroad. For a similar line of argument, see *Reynolds v. Koh*, 109 A.D.2d 97, 490 N.Y.S. 2d 295 (N.Y. App. Div. 1985). In *Suzuki Motor Co. v. Superior Court*, the defendant, a Japanese corporation, moved to quash service of process as improper under the provisions of the Hague Convention. The court in *Suzuki* held that service was not effective, finding it was not bound by the earliest California case. 200 Cal. App. 3d 1484, 249 Cal. Rptr. 381-82.

In *Suzuki* the plaintiff sustained injuries while operating a Suzuki four-wheel, all-terrain vehicle. Plaintiff served defendant by registered mail to Suzuki's office in Hamamatsu, Japan. The documents were not translated into Japanese. *Id.* at 1478, 249 Cal. Rptr. at 377.

The *Suzuki* court reached its holding through an understanding of Japanese law, in particular the knowledge that Japan's internal legal system does not allow service of process by registered mail. *Id.* at 1480, 249 Cal. Rptr. at 379. "Given the fact that Japan . . . does not recognize a form of service sufficiently equivalent to America's registered mail system, it is extremely unlikely that Japan's failure to object to Article 10, subdivision (a) was intended to authorize the use of registered mail as an effective mode of service of process . . ." *Id.* at 1481, 249 Cal. Rptr. at 379.

156. *Kodota v. Hosogai*, 125 Ariz. 131, 608 P.2d 68, 73-74 (Ariz. Ct. App. 1980).

157. *Mommsen v. Toro Co.*, 108 F.R.D. 444 (S.D. Iowa 1985); *Pochop v. Toyota Motor Co.*, 111 F.R.D. 464 (S.D. Miss. 1986); *Cooper v. Makita, U.S.A. Inc.*, 117 F.R.D. 16 (D. Me. 1987). In *Mommsen*, the defendant, a Japanese corporation, moved to dismiss or quash service on the basis of invalid service of process. *Id.* at 444. Service of process was made by registered mail, in accordance with Iowa's long-arm statute. The court framed the issue as: "whether subparagraph (a) [of article 10 of the Hague Convention] permits service of process by mailing a copy of a complaint to a defendant in a signatory nation." *Id.* at 445. The court held that that form of service was insufficient. It reasoned:

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 the other methods of service permitted by the Convention.

Other United States courts present a contrary view. One California opinion held that article 10(a) does permit direct mail service upon a Japanese resident.<sup>158</sup> In that case, the California court reasoned that article 5 read together with article 15 permits service of process on a Japanese resident by mail.<sup>159</sup> Article 15(b) permits judgment to be given upon establishing that delivery of the document to the defendant or his residence has been effected.<sup>160</sup> The Court construed Japan's failure to object to article 10(a) to mean that service by mail was consistent with the internal laws of Japan and thus in compliance with article 5 of the Convention. Some federal courts have followed this viewpoint.<sup>161</sup>

In contrast to cases concerning Japanese defendants, United States courts have been consistent in construing article 10(a) with respect to defendants who are residents of West Germany. West Germany rejected articles 10(a), (b), and (c) as alternative methods of service within West Germany, and therefore United States courts uniformly hold that service

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*Id.* at 446.

*Mommsen* became a leading case for a number of decisions that followed, each affirming the controlling nature of the Hague Convention on service of process in Japan and disallowing service of process by direct mail on a foreign defendant.

In *Pochop*, the plaintiff attempted to serve process on the defendant, a Japanese corporation, by registered mail, return receipt requested. 111 F.R.D. at 465. The defendant moved to quash service of process because it was ineffective due to failure to meet the requirements of the Hague Convention. The *Pochop* court held for the Japanese defendant, citing the reasoning expressed in *Mommsen*. *Id.* at 466.

In *Pochop*, the plaintiff also argued that the Hague Convention was not intended to supercede rule 4 of the Federal Rules of Civil Procedure, and that "requirements of the Hague Convention need not be complied with if service is otherwise valid under Rule 4." *Id.* at 466. The *Pochop* court rejected this argument, relying in part upon the reasoning of *Harris v. Browning-Farris Indus. Chemical Services*, 100 F.R.D. 775 (M.D. La. 1984). In that case, the court held that since the Hague Convention is specific about service on foreign defendants, and the Federal Rules of Civil Procedure are general and designed to cover all circumstances, the Hague Convention is controlling. *Pochop*, 111 F.R.D. at 466-67.

158. *Shoei Kako Co. v. Superior Court*, 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (Cal. Ct. App. 1973). See also *Ackermann v. Levine*, 610 F. Supp. 633 (S.D.N.Y. 1985). In *Ackermann*, a federal court construed "send" to mean "serve." *Id.* at 643. For discussion of the *Ackermann* case, see Recent Development, 11 SUFFOLK TRANSNAT'L L.J. 159 (1987). See also, Recent Development, 30 HARV. INT'L L.J. 277 (1989).

159. 33 Cal. App. 3d at 821-22, 109 Cal. Rptr. 411-12.

160. Hague Service Convention, *supra* note 14, art. 15.

161. *Chrysler Corp. v. General Motors Corp.*, 589 F. Supp. 1182, 1206 (D.D.C. 1984); *Weight v. Kawasaki Heavy Indus.*, 597 F. Supp. 1082, 1085-86 (E.D. Va. 1984); *Lemme v. Wine of Japan Import, Inc.*, 631 F. Supp. 456, 463-64 (E.D.N.Y. 1986); *Newport Components v. NEC Home Electronics*, 671 F. Supp. 1525, 1541-42 (C.D. Cal. 1987).

of process on a West German resident in West Germany is not valid if accomplished by mail.<sup>162</sup>

It appears that the safest use of the Convention in serving judicial documents in Japan is to serve them through the central authority pursuant to article 5 of the Convention and to avoid serving directly by mail. This strategy is the one most consistent with the internal laws of Japan regulating service of process. Also, serving the documents pursuant to article 5 should minimize the risk of nonrecognition of a judgment if Japanese recognition or enforcement of a United States judgment is required. Serving documents under article 5 of the Convention is not as burdensome as having a judgment that cannot be enforced.

#### D. *Other Provisions of the Convention*

To conduct service of process in accordance with the provisions of the Convention, the following points should be considered:

First, the Convention does not apply when the address of the person to be served is unknown.<sup>163</sup> Second, the Convention provides that there must be a summary of the documents to be served attached to any of the documents served.<sup>164</sup>

Third, the Convention requires the central authority of the state making service to complete a certification of service. The certificate must state the method of service, place of service, date of service, and the person served. If the document is not served, it must state the reasons why. The central authority then forwards the certificate to the applicant.<sup>165</sup>

Fourth, the applicant for service under the Convention must pay the costs of employment of a judicial officer or of a person competent under the law of the state of destination, or pay for the costs of a particular method of service.<sup>166</sup>

Fifth, the convention allows a signatory to the Convention to refuse a request for service of process if it infringes on the sovereignty or security of the country. A member country may not, however, refuse a request because it claims exclusive jurisdiction over the cause of action, or because it claims that such an action would not be allowed under its inter-

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162. *Porsche A.G. v. Superior Court*, 123 Cal. App. 3d 755, 177 Cal. Rptr. 155 (Cal. Ct. App. 1981); *Harris v. Browning-Farris Indus. Chemical Services*, 100 F.R.D. 775 (M.D. La. 1984).

163. Hague Service Convention, *supra* note 14, art. 1.

164. *Id.* art. 5.

165. *Id.* art. 6.

166. *Id.* art. 12.

nal law.<sup>167</sup>

Sixth, when service of process is made pursuant to the provisions of the Convention, several conditions must be met before a court may render a default judgment.<sup>168</sup> The court must first determine if service was made in a method prescribed by the internal law of the state addressed, or by personally serving the defendant or his residence by another method provided for by the Convention.<sup>169</sup> In the event that the court does not receive a certificate of service from the central authority of the state addressed, the judge may render judgment if: the document was transmitted by a method allowed under the Convention; a period of not less than six months has elapsed since the date of transmission of the document, and; after reasonable efforts to obtain the certificate of service, none has been received.<sup>170</sup>

Seventh, the Convention permits a defendant who has been defaulted to set aside the default if it can be shown that, without any fault on defendant's part, defendant did not have knowledge of the document in time to defend, or did not know of the judgment in time to appeal, *and* defendant has a prima facie defense to the action. Application for relief must be made within a reasonable time after knowledge of the judgment.<sup>171</sup>

## V. CONCLUSION

Service of process in Japan differs distinctly from service of process in the United States. In the United States, service of process can be effected by anyone who is not less than eighteen years of age and not a party to the lawsuit. The method of service need only comply with due process, that is, the method must be reasonably calculated to give the defendant actual notice and an opportunity to be heard. In contrast, service of process in Japan is an official function that the court must authorize. As a result, service by direct mail, so widely used in the United States, does not have a counterpart in Japan. The United States plaintiff seeking service of process upon a Japanese defendant should rely on the Hague Convention.

In Japan, service is a function of the government effected by the courts. The entire statutory scheme concerning service of process allows only the court to effect service. Even under the Convention, the central

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167. *Id.* art. 13.

168. *Id.* art. 15.

169. *Id.*

170. *Id.*

171. *Id.* art. 16.

authority in Japan turns over requests for service to the court.<sup>172</sup> Failure to serve process properly upon a Japanese defendant may result in any subsequent judgment's having no effect, as the sufficiency of the method employed to effect service upon a Japanese defendant will be evaluated under Japanese concepts and standards regarding service of process. For this reason, practitioners should avoid service of documents in Japan by mail even though article 10(a) of the Convention arguably authorizes such service.

The Hague Convention has met with mixed reaction from United States courts, particularly at the Supreme Court level. In *Volkswagenwerk v. Schlunk*,<sup>173</sup> the United States Supreme Court stated "nothing that we say today prevents compliance with the Convention even when the internal law of the forum does not so require."<sup>174</sup> The Court states that the purpose of the Convention is "to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad."<sup>175</sup> While the Court does not want the Convention to alter the internal law of the forum, it recognizes that there is no reason why the Convention should not be used, since its use facilitates enforcement of judgments. Although the trend of United States courts is to hold that the Convention is not the exclusive method of service on a foreign defendant, service under article 5 of the Convention seems to be the safest manner of serving documents in Japan and the least subject to litigation.<sup>176</sup>

Article 5 ensures that the method used will be either pursuant to the internal laws of Japan, or by a method not incompatible with the internal laws of Japan. Service of process upon a Japanese defendant poses many difficulties. Among these are the conflict of Japanese rules of procedure with United States rules of procedure, and the types of service recognized internally in each country. Even the Hague Convention has met with varying interpretations from United States courts.<sup>177</sup> The Hague Convention, however, remains the preferred alternative for service of process upon a Japanese defendant. It was designed to provide a

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172. Law No. 115 of June 5, 1970, arts. 2-7 reprinted in 2 B. RISTAU, *supra* note 45, at CI-112.

173. *Volkswagenwerk A.G. v. Schlunk*, 486 U.S. 694 (1988).

174. *Id.* at 706.

175. *Id.* at 698.

176. Since 1985 there has been a marked increase in the number of incidents of Japanese-entertained service of process requested by United States courts pursuant to the Service Convention. See Ohara, *supra* note 72, at 13.

177. See *supra* part IV(A).

consistent and reliable method of service abroad. Furthermore, where varying interpretations exist as to what forms of service are valid in Japan, the interpretation favoring the traditional forms of service in Japan is most likely to be recognized by Japanese courts. The practitioner setting out to effect service of process in Japan should keep in mind this difference in viewpoint. Giving appropriate weight to these considerations should aid in formulating a service of process plan that will result in the recognition and enforcement of a judgment in a foreign country.

