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Case Comment

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CASE COMMENT

Service of Process by Registered Mail on a Japanese Defendant Is Ineffective Under Article 10(a) of the Hague Convention of November 15, 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, *Bankston v. Toyota Motor Corp.*, 889 F.2d 172 (8th Cir. 1989).

ABSTRACT

This Case Comment discusses the ability of a United States plaintiff to serve process pursuant to the Hague Service Convention on a defendant residing in Japan. The United States Court of Appeals for the Eighth Circuit held that the Convention generally prohibits service on foreign defendants by registered mail. This Case Comment discusses the history of the case, the objectives of the Convention, the law of service of process in Japan, and United States law of service of process on foreign parties under the Federal Rules of Civil Procedure. The author then discusses United States common law interpreting article 10(a) of the Convention. Currently, there exists a split of authority within the United States courts regarding whether service of process can be effectuated on a foreign defendant by use of the mails; one view strictly interprets the Convention to prevent service by mail while the broader interpretation seeks to facilitate service abroad. The author contends that although the underlying analysis used by United States courts to interpret article 10(a) is correct, the holdings that either generally prevent or generally facilitate service are overly broad so as to confuse the analysis. Instead, the author suggests that the courts should state explicitly that their holdings depend on the

internal laws of the recipient state as they apply to the Hague Service Convention.

I. FACTS AND HOLDING

Plaintiff appellants, Charles Bankston, Sr. and Regina Dixon (the Appellants), were granted an interlocutory appeal from a United States District Court decision holding that Appellants' use of direct mail was not proper service of process on the defendant, Toyota Motor Corporation (Toyota),[1] a Japanese corporation, pursuant to the Hague Convention of November 15, 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Service Convention or the Convention).[2] The appeal arose from a products liability action for damages resulting from an accident involving a Toyota truck.[3] In their first attempt to serve the summons and complaint on Toyota, the Appellants served a United States affiliate of Toyota, located in Torrance, California, as Toyota's purported agent.[4] Toyota, in turn, filed a motion to dismiss the claim because the Appellants had not served process pursuant to the Hague Service Convention.[5] On September 2, 1988, the United States District Court for the Western District of Arkansas entered an order (the September 2 Order) denying Toyota's motion to dismiss the complaint and granting the Appellants forty-five days to obtain proper service.[6]

Pursuant to the September 2 Order, the Appellants next attempted to serve process directly upon Toyota in Tokyo by means of United States registered mail, return receipt requested.[7] The documents were written in English and did not include a Japanese translation.[8] Toyota signed the receipt of service and returned it to the Appellants.[9] Toyota then renewed its motion to dismiss the complaint, arguing that the method of

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

2. 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]. The Hague Service Convention also can be found at 28 U.S.C.A. FED. R. CIV. P. 4 (West Supp. 1989).

3. *Bankston*, 889 F.2d at 172.

4. *Id.*

5. *Id.*

6. Bankston v. Toyota Motor Corp., 123 F.R.D. 595, 596 (W.D. Ark. 1989).

7. *Bankston*, 889 F.2d at 172.

8. *Id.*

9. *Id.*

service still did not comply with the Hague Service Convention.[10] The Appellants subsequently moved to have the district court reconsider the September 2 Order, contending that registered mail was sufficient to obtain service of process over a foreign defendant.[11]

At a hearing pursuant to this motion, the Appellants argued that the purpose of the Hague Service Convention, according to one interpretation of article 10(a) of the Convention,[12] is to facilitate service abroad.[13] Under this interpretation, the Convention would permit service of process obtained through the mails, without resorting to the Central Authority[14] established by the Convention and without translating the documents into the official language of the recipient state.[15] The Appellants argued that the reference to "the freedom to send judicial documents, by postal channels, directly to persons abroad,"[16] in paragraph (a) of article 10 of the Convention would be superfluous, unless it related to the sending of documents to serve a foreign defendant.[17] Moreover, the Appellants attributed the use of the term "send" in paragraph (a), rather than

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10. *Id.*

11. *Bankston*, 123 F.R.D. at 596-97.

12. Article 10 of the Hague Service Convention states that:

> 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.

Hague Service Convention, *supra* note 2, art. 10. For a discussion of the Hague Service Convention, see *infra* notes 28-53 and accompanying text.

13. *Bankston*, 889 F.2d at 173. For a discussion of the facilitation of service abroad approach to the Convention, see *infra* notes 71-73 & 78-96 and accompanying text.

14. Pursuant to article 2 of the Convention, "[e]ach contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other contracting States . . . ." Hague Service Convention, *supra* note 2, art. 2. Although contracting States to the Convention could "designate other authorities in addition to the Central Authority" to effectuate service, *id.* art. 18, the Central Authority was intended as the means by which documents would be served, *id.* art. 2. For a discussion of the Central Authority as established by the Convention, see *infra* notes 41-45 and accompanying text.

15. *Bankston*, 123 F.R.D. at 597.

16. Hague Service Convention, *supra* note 2, art. 10, para. (a). For the text of article 10, see *supra* note 12.

17. *Bankston*, 889 F.2d at 173.

the term "service," as used in paragraphs (b) and (c) of article 10, to careless drafting.[18]

On January 4, 1989, the District Court for the Western District of Arkansas held that the Hague Service Convention did not permit service of process by registered mail on a Japanese defendant.[19] Despite the Appellants' arguments, the district court agreed with Toyota's interpretation of article 10(a) of the Convention.[20] The district court found that, because the term "service of process" was used specifically in other sections of the Hague Service Convention, including paragraphs (b) and (c) of article 10, the term "service of process" was not equivalent to the term "send."[21] The district court then looked to Japanese domestic law and reasoned that proper service on a Japanese resident defendant could not be obtained through postal channels because such service would be defective under article 200 of the Code of Civil Procedure of Japan (Minji Soshōhō).[22] The district court noted that "it [would be] inconceivable that the drafters of the Convention would use the word 'send' in article 10(a) to mean service of process, when they so carefully used the word 'service' in other sections of the treaty."[23]

Thus, the district court concluded that service of process by means of United States registered mail is insufficient to obtain service under the Hague Service Convention.[24] Despite denying the Appellants' motion to reconsider its September 2 Order, the district court issued an order (the January 4 Order), allowing the Appellants sixty additional days to effectuate service of process in compliance with the Hague Service Convention.[25]

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18. *Id.*

19. *Bankston*, 123 F.R.D. at 597.

20. *Id.* For a discussion of Toyota's interpretation of paragraph (a) of article 10, the strict view, see *infra* notes 74-76 and 97-108 and accompanying text.

21. *Bankston*, 123 F.R.D. at 597, 599.

22. *Id.* at 598 (citing Sakai & Pickard, *Service of Process on a Japanese Defendant to Commence a Foreign Lawsuit*, YUASA AND HARA PATENT NEWS, Summer 1978, at 5 (English Ed.)); *see also* T. HATTORI & D. HENDERSON, CIVIL PROCEDURE IN JAPAN § 11.02[1] (1985) (providing a detailed analysis of the Minji Soshōhō). For the English translation of the Minji Soshōhō, see EHS LAW BULLETIN SERVICES, RŌPPŌ (Eibun-Horei Sha 1975). For a discussion of the Japanese law concerning service of process, see *infra* notes 54-59 and accompanying text.

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

24. *Id.*

25. *Id.* In order that they would comply with the Convention as well as with the January 4 Order, the district court gave the Appellants specific instructions: "the complaint and other documents to be served must be translated into the Japanese language, as is required when service of process is obtained through the central authority . . . ." *Id.*

On January 13, 1989, the district court amended the January 4 Order and certified for interlocutory appeal the issue of whether article 10(a) of the Hague Service Convention permits service of process on a Japanese defendant by direct mail.[26] On February 9, 1989, the United States Court of Appeals for the Eighth Circuit granted the Appellants leave to take an interlocutory appeal.[27] On interlocutory appeal to the United States Court of Appeals for the Eighth Circuit, *affirmed. Held*: A plaintiff may not serve process on a foreign defendant by registered mail if the defendant resides in a foreign state that has ratified the Hague Service Convention.

II. LEGAL BACKGROUND

The Hague Service Convention is a multilateral agreement intended to improve and clarify private international law.[28] The Convention was ratified at The Hague on November 15, 1965[29] and entered into force in the United States on February 10, 1969.[30] By virtue of the supremacy

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26. Bankston v. Toyota Motor Corp., 889 F.2d 172, 172-73 (8th Cir. 1989).

27. *Id.* at 173.

28. 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, 125 (1969) (discussing the procedural difficulties of the international law for service of process in private matters prior to the Convention); *see also* COMM'N ON INT'L RULES OF JUDICIAL PROCEDURE—ESTABLISHMENT, S. REP. NO. 2392, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. CODE CONG. & ADMIN. NEWS 5201, 5202.

29. *See* Hague Service Convention, *supra* note 2. Originally, the Convention had been ratified by the United States, Great Britain, and the United Arab Republic. Note, *supra* note 28, at 125. The original signatory states included: Belgium, Denmark, Finland, Germany, Israel, the Netherlands, Norway, Turkey, and Sweden. *Id.* at 125 n.2. Presently the Convention has entered into force in 28 states and their extensions including: Antigua & Barbuda, Barbados, Belgium, Botswana, Canada, Cyprus, Czechoslovakia, Denmark, Egypt, Finland, France, Germany, Greece, Israel, Italy, Japan, Luxembourg, Malawi, the Netherlands, Norway, Pakistan, Portugal, Seychelles, Spain, Sweden, 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: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1989 at 328 (1989). *See generally* HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PRACTICAL HANDBOOK ON THE OPERATION OF THE HAGUE CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS 22-23 (1983) [hereinafter PRACTICAL HANDBOOK].

30. *See* PRACTICAL HANDBOOK, *supra* note 29, at 22. For a discussion of the current United States approach to the Hague Service Convention, see Note, *The 'Mandatory' Nature of the Hague Service Convention in the United States is the Forum's Victory*, 23 VAND. J. TRANSNAT'L L. 179 (1990).

clause of the United States Constitution,[31] the Convention has the force of law and preempts the application of inconsistent methods of service.[32] Japan ratified the Convention on May 28, 1970; the Convention entered into force in Japan on July 27, 1970.[33]

The Convention has several objectives, including the establishment of a system to ensure that the defendant receives actual notice of documents to be served, the simplification of transmission of documents between nations, and the assurance of adequate proof of service abroad by means of a uniform certificate.[34] Historically, the United States adopted the Hague Service Convention to stop the practice whereby European plaintiffs won default judgments against United States defendants who lacked actual notice that such an action had been instituted.[35] By contrast, the other original signatory states[36] drafted the Convention primarily to effectuate service of documents in the United States through a United States government agency.[37] To achieve these objectives, article 2 of the Convention establishes a system of Central Authorities as the usual means of transmitting documents.[38] The Convention also provides that service by a method prescribed by the recipient state's internal law is a sufficient guarantee that a defendant will receive actual notice in time to prepare a defense.[39]

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31. U.S. CONST. art. VI, cl. 2.

32. *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 471 comment e and reporter's notes 2 & 5 (1986).

33. PRACTICAL HANDBOOK, *supra* note 29, at 22.

34. *Id.* at 28; *see also* Jorden, *Beyond Jingoism: Service By Mail to Japan and the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 16 LAW IN JAPAN 69 (1983) (discussing the implications of article 10(a) of the Convention for Japan).

35. Note, *supra* note 28, at 130. Under the system of notification *au parquet*, a European plaintiff merely had to serve process on a local European official and, although the defendant was supposed to be notified, the service was valid even if it never reached the defendant. *Id.* at 129-30.

36. *See supra* note 29.

37. Note, *supra* note 28, at 128-29; *see also* Graveson, *The 10th Session of the Hague Conference of Private International Law*, 14 INT'L & COMP. L.Q. 528, 538 (1965).

38. Hague Service Convention, *supra* note 2, art. 2; *see also* PRACTICAL HANDBOOK, *supra* note 29, at 28.

39. *See* Hague Service Convention, *supra* note 2, art. 19 ("To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the [Convention], of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions."); *see also* PRACTICAL HANDBOOK, *supra* note 29, at 28.

The Hague Service Convention applies to all civil or commercial cases that require the service of documents abroad.[40] Each state must establish a Central Authority to receive requests from other countries for service of documents.[41] Once a Central Authority receives a request for service in proper form, it must serve the documents either by a method prescribed by the internal law of the recipient state or by a method designated by the requesting party that is compatible with the law in the recipient state.[42]

The Central Authority may require that the requesting party translate the documents into the official language of the recipient state.[43] In an apparently contradictory statement, however, the Convention only requires that the requesting party transcribe the documents into English or

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The policy of protecting defendants from judgments without actual notice can be seen in two articles of the Convention. Article 15 of the Convention provides that certain conditions must be met before a judgment will be given. Hague Service Convention, *supra* note 2, art. 15; *see also* PRACTICAL HANDBOOK, *supra* note 29, at 28. In addition, article 16 empowers a judge to relieve the defendant from the effects of the expiration of the time for appeal, if the defendant meets certain conditions. Hague Service Convention, *supra* note 2, art. 16; *see also* PRACTICAL HANDBOOK, *supra* note 29, at 28.

40. Hague Service Convention, *supra* note 2, art. 1. The United States interprets the term "extrajudicial documents" broadly to include governmental commission papers, civil law notaries, and quasi-judicial agencies. *See* Note, *Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters Under the Hague Convention*, 3 REV. OF LITIGATION 493, 500 (1983).

41. Hague Service Convention, *supra* note 2, art. 2. In Japan, the designated Central Authority is the Ministry of Foreign Affairs. *See* 1 B. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE (CIVIL AND COMMERCIAL) D5-105 (1984 & Supp. 1986).

42. Hague Service Convention, *supra* note 2, art. 5. Article 5 states:

> 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 documents to be served, shall be served with the document.

Id.

43. *Id.*

French.[44] Once the Central Authority serves the documents, it must provide proof of service conforming with the model form outlined in the Convention.[45]

The Central Authority, however, is not the only means by which a party may effectuate service; a state may consent to methods of service that circumvent the Central Authority.[46] Under article 10 of the Convention, the serving party may send documents and serve process by means other than the Central Authority, provided the recipient state does not object.[47] Paragraph (a) of article 10 allows the requesting party to "send judicial documents, by postal channels directly to parties abroad."[48] Paragraph (b) permits officers or other competent persons in the requesting or forum state to serve documents "directly through the judicial officers, officials or other competent persons of the State of destination."[49] Paragraph (c) allows interested parties to "effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination."[50] Japan has objected to paragraphs (b) and (c) of article 10, but has not objected to paragraph (a).[51] Although the Hague Service Convention does not apply to service within the United States upon a domestic subsidiary operating as a foreign corporation's agent for service of process,[52] "the Convention does not purport to affect the existing laws in respect of service in the Contracting States."[53] Thus, service of process on a Japanese resident pursuant to article 10 must

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44. *Id.* art. 7. Japanese courts require all documents to be translated into Japanese regardless of whether the requesting party effected service by means of any treaty. *See* Kim & Sisneros, *Comparative Overview of Service of Process: United States, Japan, and Attempts at International Unity*, 23 VAND. J. TRANSNAT'L L. 299, 319 (1990) (citing 1 B. RISTAU, *supra* note 41, § 4-17).

45. Hague Service Convention, *supra* note 2, art. 6. The correct forms can be found in the PRACTICAL HANDBOOK, *supra* note 29, at 14-19.

46. Hague Service Convention, *supra* note 2, arts. 8-11, 19. Article 8 allows service through diplomatic or consular agents. *Id.* art. 8. Article 9 allows documents to be forwarded for the purpose of service through diplomatic or consular channels. *Id.* art. 9. Article 19 allows service of international documents by any means consistent with the internal law of a contracting state. *Id.* art. 19.

47. *Id.* art. 10.

48. *Id.* art. 10, para. (a).

49. *Id.* art. 10, para. (b).

50. *Id.* art. 10, para. (c).

51. *See* Kim & Sisneros, *supra* note 44, at 321; *see also* Kadota v. Hosogai, 125 Ariz. 131, 135-36, 608 P.2d 68, 73 (Ariz. Ct. App. 1980). Japan objected to paragraphs (b) and (c) when it ratified the Convention. *Id.*

52. *See Service of Process Abroad: A Nuts and Bolts Guide*, 122 F.R.D. 63, 71 (1988).

53. PRACTICAL HANDBOOK, *supra* note 29, at 28.

conform to Japanese laws of service.

Japanese law prohibits service of process on parties directly by mail.[54] Service of process in Japan follows a civil law tradition and is regarded as a judicial function.[55] Article 161 of the Minji Soshōhō states that "[t]he business relating to service shall be administered by a court clerk."[56] Japanese law, therefore, may prevent enforcement of foreign judgments if service is not performed properly.[57]

Because Japan does not recognize service by mail in domestic disputes, its failure to object to paragraph (a) of article 10 of the Hague Service Convention was not likely an acceptance of service by registered mail in international actions.[58] Rather, Japan probably interprets paragraph (a) to allow transmission of documents, but not service of process, by mail.[59] Thus, service by registered mail upon a Japanese defendant is impermissible.

The United States Supreme Court has interpreted the Hague Service

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54. MINSOHŌ art. 175; *see* T. HATTORI & D. HENDERSON, *supra* note 22, §§ 12.01, 12.02. For a discussion of the Japanese prohibition of service of process by mail, see Peterson, *Jurisdiction and the Japanese Defendant*, 25 SANTA CLARA L. REV. 555, 576-79 (1985); *see also* Suzuki Motor Co. v. Superior Court, 200 Cal. App. 3d 1476, 1480-81, 249 Cal. Rptr. 376, 379 (1988) (outlining the Japanese law regarding service by mail).

55. MINSOHŌ art. 161; *see* T. HATTORI & D. HENDERSON, *supra* note 22, § 7.01[3] (Service may be made "by a bailiff or through the mail under direction by the court clerk."); *see also* Kim & Sisneros, *supra* note 44 (discussing the law regarding service of process in Japan).

Prohibiting service directly by mail is consistent with the view of civil law countries that service of process is a sovereign act that occurs solely through official channels of government. *See* Peterson, *supra* note 54, at 577; *see also* Fujita, *Service of American Process Upon Japanese Nationals by Registered Airmail and Enforceability of Resulting American Judgments in Japan*, 12 LAW IN JAPAN 68, 73 (1985) (To avoid inconsistency under Japanese law, service of process by mail can only be performed by a court clerk rather than by private parties.).

56. *See* MINSOHŌ art. 161, *cited in* Nicholson v. Yamaha Motor Co., 80 Md. App. 695, 702, 566 A.2d 135, 139 (Md. Ct. Spec. App. 1989), *cert. denied*, 318 Md. 683, 569 A.2d 1242 (1990); *see also* Kim & Sisneros, *supra* note 44, at 306.

57. *See* Kim & Sisneros, *supra* note 44, at 306. Article 200(ii) of the Minji Soshōhō allows enforcement of foreign judgments if the Japanese national defendant received service pursuant to Japanese law or responded to the action without receiving such service. *Id.* at 319.

58. *See* Suzuki Motor Co. v. Superior Court, 200 Cal. App. 3d. 1476, 1481, 249 Cal. Rptr. 376, 379 (1988).

59. *Id.* "It would [be] illogical . . . to forbid service in a manner endorsed by the Convention yet objected to by the receiving country and at the same time to allow modes of service which are not found in the Convention and which are contrary to the internal law of the receiving nation." Peterson, *supra* note 54, at 566.

Convention to require service pursuant to the internal laws of the requesting or forum state rather than the recipient state. This interpretation conflicts with the Hague Service Convention's specific requirements that the law of the recipient state prescribe alternative means of service.[60] In *Volkswagenwerk Aktiengesellschaft v. Schlunk*,[61] the Supreme Court declared that "we almost necessarily must refer to the internal law of the forum state. 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."[62] In his concurring opinion, Justice Brennan warned that the majority opinion permitted contracting nations to ignore the terms of the Hague Service Convention.[63] Nevertheless, the majority held that service of process pursuant to the Hague Service Convention depended upon the laws of service of the requesting state.[64]

Service of documents under United States law must meet the due process requirements of the Constitution.[65] Under Rule 4(e) of the Federal Rules of Civil Procedure, when a statute or court rule authorizes service of a summons in a foreign country, service may be effectuated according to the state statute or according to other provisions of Rule 4.[66] Moreover, Rule 4(i) provides that service upon a party in a foreign country will be sufficient if made pursuant to the law of that nation,[67] or by any form of mail that requires a signed receipt to be addressed and dispatched by the court clerk.[68]

In order to serve process on a foreign defendant under Rule 4, the chosen method must not violate any deep rooted local policies of the foreign nation's law, either explicitly or by compelling analogy.[69] Thus, under *Volkswagenwerk*, a requesting party may use the methods of service described in Rule 4(i) in a foreign nation that has adopted the

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

61. 486 U.S. 694 (1988).

62. *Id.* at 700.

63. *Id.* at 708-09 (Brennan, J., concurring). As Justice Brennan noted, this holding allows each of the 50 states to decide under what circumstances, if any, the Convention would control. *Id.* at 708.

64. *Id.* at 700.

65. Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950).

66. FED. R. CIV. P. 4(e) (1990). Under the Federal Rules of Civil Procedure, the federal courts of the United States may be able to effect service on foreign defendants when the plaintiff cannot establish minimum contacts sufficient to comply with state long-arm statues. FED. R. CIV. P. 4(c)(2)(C).

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

68. FED. R. CIV. P. 4(i)(1)(D).

69. 28 U.S.C.A. FED. R. CIV. P. 4 practice commentaries C4-34 (West Supp. 1989).

Hague Service Convention, so long as those methods do not conflict with any conditions imposed by the particular foreign country.[70]

The issue of whether paragraph (a) of article 10 of the Hague Service Convention allows service by mail has been litigated extensively in both the state and federal courts. The courts have taken two diametrically opposed positions.[71] The majority of courts have concluded that article 10 generally permits service of process by direct mail on the defendant without resorting to the Central Authority and without translating the documents into the official language of the recipient state.[72] According to these courts, the purpose of the Convention is to facilitate service abroad,[73] and therefore, service of process on a Japanese defendant by registered mail would be permissible.

Recently, however, some courts have rejected the rationale of "facilitating service abroad" in favor of a strict interpretation of the Hague Service Convention.[74] According to this minority position, the term "send" in paragraph (a) of article 10 is not equivalent to "service of

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70. *See id.*

71. *See* Bankston v. Toyota Motor Corp., 889 F.2d 172, 173 (8th Cir. 1989).

72. *See* Ackermann v. Levine, 788 F.2d 830 (2d Cir. 1986); Meyers v. ASICS Corp., 711 F. Supp. 1001 (C.D. Cal. 1989); Montgomery, Zukerman, Davis, Inc. v. Diepenbrock, 698 F. Supp. 1453 (S.D. Ind. 1988); Smith v. Dainichi Kinzoku Kogyo Co., 680 F. Supp. 847 (W.D. Tex. 1988); Turick v. Yamaha Motor Corp., 121 F.R.D. 32 (S.D.N.Y. 1988); Newport Components, Inc. v. NEC Home Electronics U.S.A., Inc., 671 F. Supp. 1525 (C.D. Cal. 1987); Lemme v. Wine of Japan Import, Inc., 631 F. Supp. 456 (E.D.N.Y. 1986); Zisman v. Sieger, 106 F.R.D. 194 (N.D. Ill. 1985); Weight v. Kawasaki Heavy Ind., 597 F. Supp. 1082 (E.D. Va. 1984); Chrysler Corp. v. General Motors Corp., 589 F. Supp. 1182 (D.D.C. 1984); Tamari v. Bache & Co. (Lebanon) S.A.L., 431 F. Supp. 1226 (N.D. Ill.), *aff'd*, 565 F.2d 1194 (7th Cir. 1977), *cert. denied*, 435 U.S. 905 (1978); *In re* Mandukich, 87 Bankr. 296 (Bankr. S.D.N.Y. 1988); Shoei Kako Co. v. Superior Court, 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1973); Dr. Ing H.C.F. Porsche A.G. v. Superior Court, 123 Cal. App. 3d 755, 177 Cal. Rptr. 155 (1981); Nicholson v. Yamaha Motor Co., 80 Md. App. 695, 566 A.2d 135 (Md. Ct. Spec. App. 1989), *cert. denied*, 318 Md. 683, 569 A.2d 1242 (1990); Cintron v. W & D Machinery Co., 182 N.J. Super. 126, 440 A.2d 76 (1981); Rissew v. Yamaha Motor Co., 129 A.D.2d 94, 515 N.Y.S.2d 352 (N.Y. App. Div. 1987); Sandoval v. Honda Motor Co., 364 Pa. Super. 136, 527 A.2d 564 (1987).

73. *Bankston*, 889 F.2d at 173.

74. McClenon v. Nissan Motor Corp., 726 F. Supp. 822 (N.D. Fla. 1989); Hantover, Inc. v. Omet, S.N.C. of Volentieri & C., 688 F. Supp. 1377 (W.D. Mo. 1988); Prost v. Honda Motor Co., 122 F.R.D. 215 (E.D. Mo. 1987); Cooper v. Makita, U.S.A., Inc., 117 F.R.D. 16 (D. Me. 1987); Pochop v. Toyota Motor Co., 111 F.R.D. 464 (S.D. Miss. 1986); Mommsen v. Toro Co., 108 F.R.D. 444 (S.D. Iowa 1985); Suzuki Motor Co. v. Superior Court, 200 Cal. App. 3d 1476, 249 Cal. Rptr. 376 (1988); Reynolds v. Woosup Koh, 109 A.D.2d 97, 490 N.Y.S.2d 295 (N.Y. App. Div. 1985); Ordmandy v. Lynn, 122 Misc. 2d 954, 472 N.Y.S.2d 274 (N.Y. Sup. Ct. 1984).

process," because the term "service" is used specifically in other articles of the Convention, including paragraphs (b) and (c) of article 10.[75] Moreover, the language in the French version of paragraph (a) does not connote formal service.[76] As the case law reveals, courts using both lines of reasoning have confused the issue of whether service of process via the mails is permissible under the Hague Service Convention.[77]

The first case to interpret paragraph (a) of article 10 of the Hague Service Convention as it specifically applies to service of process on a Japanese defendant was *Shoei Kako Co. v. Superior Court.*[78] The California Court of Appeal adopted the rationale of "facilitating service abroad" and found that the Convention permitted service on a Japanese defendant by registered mail.[79] From Japan's failure to object to paragraph (a), the court inferred that Japan's internal law permitted service of process by postal channels within Japan.[80] Noting that article 10 was an alternative to the Central Authority as a means to effectuate service of process under the Convention,[81] the court concluded that it could exercise jurisdiction under the Hague Service Convention if it had personal

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75. *See Bankston*, 889 F.2d at 173.

76. The French version of article 10, which is of equal authority to the English version, states:

> La présente Convention ne fait pas obstacle, sauf si l'Etat de destination déclare s'y opposer:
>
> a) à la faculté d'adresser directement, par la voie de la poste, des actes judiciaires aux personnes se trouvant à l'étranger;
>
> b) à la faculté, pour les officiers ministériels, fonctionnaires ou autres personnes competénts de l'Etat d'origine, de faire procéder à des significations ou notifications d'actes judiciaires directement par les soins des officiers ministeriels, fonctionnaires ou autres personnes compétents de l'Etat de destination,
>
> c) à la faculté, pour toute personne intéressée à une instance judiciaire, de faire proceder à des significations ou notifications d'actes judiciaires directement par les soins des officiers ministériels, fonctionnaires ou autres personnes competents de l'Etat de destination.

Hague Service Convention, *supra* note 2, art. 10.

The French term *signification* implies formal service of documents by a government agent; the term *notification* reflects some formal requirements, but service does not involve a public official. Used together, these terms signify "service." These terms, however, are absent from the French version of article 10(a). *See* Jorden, *supra* note 34, at 76.

77. The term "send" in paragraph (a) should not be defined generally; rather, it should be interpreted with an eye toward the recipient state's internal laws. *See infra* notes 127-36 and accompanying text.

78. 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1973).

79. *Id.* at 823-24, 109 Cal. Rptr. at 413.

80. *Id.* at 822, 109 Cal. Rptr. at 412.

81. *Id.* at 821, 109 Cal. Rptr. at 411.

jurisdiction over the defendant and if the requesting party delivered service by mail and with a receipt for delivery.[82] Looking at both the letter and spirit of the Hague Service Convention, the court held that service by mail was effective so long as the recipient received actual notice of the pending action.[83]

Other courts have followed the *Shoei Kako* approach[84] by allowing service of process by registered mail on defendants in Japan. The Maryland Court of Special Appeals, in *Nicholson v. Yamaha Motor Co.*,[85] for example, concluded that service of process may be effected on a Japanese defendant by registered mail.[86] The court applied the internal law of the recipient state, Japan, to determine the definition of the term "send" in article 10(a). Despite holding that Japanese law did not permit service by mail except by the court clerk,[87] the court found four compelling reasons to allow service of process on the defendant. First, Japan was aware that service rules in the United States allow service abroad by registered mail delivery. Second, Japan knew that prior decisions had allowed service by mail on Japanese defendants. Third, Japan knew that Japanese assets in the United States would be subject to seizure upon default after service by mail. Lastly, Japan had not objected to article 10(a).[88] Despite interpreting the term "send" in article 10(a) as dependent on Japanese internal law, the court nevertheless allowed service of process by registered mail.

As representative of the facilitation of service approach, the United States Court of Appeals for the Second Circuit held, in *Ackermann v. Levine*,[89] that service of process by registered mail generally satisfies the requirements of both the Hague Service Convention and constitutional due process requirements.[90] In *Ackermann*, a German businessman served a United States defendant by registered mail. The German Court, which had exerted jurisdiction properly, entered a default judgment after the defendant did not respond to the service.[91]

After stating broadly that "service of process by registered mail did not

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82. *Id.* at 822, 109 Cal. Rptr. at 412.
83. *Id.*
84. *Id.* at 823-24, 109 Cal. Rptr. at 413.
85. 80 Md. App. 695, 566 A.2d 135 (Md. Ct. Spec. App. 1989), *cert. denied*, 318 Md. 683, 569 A.2d 1242 (1990).
86. *Id.* at 721, 566 A.2d at 148.
87. *Id.* at 702-03, 566 A.2d at 139.
88. *Id.* at 709-10, 566 A.2d at 142-43.
89. 788 F.2d 830 (2d Cir. 1986).
90. *Id.* at 838.
91. *Id.* at 834-37.

violate the Hague Convention,"[92] the *Ackermann* court concluded that the term "send" was equivalent to "service" in article 10(a) of the Hague Service Convention, because United States internal laws allow service of process by registered mail.[93] Since the United States did not object to article 10(a),[94] the court applied the internal law of the recipient state (the United States) to define the term "send" as it applied to the service of foreign documents on a United States defendant. According to the court, "where the Convention provides a rule of decision, that rule is dispositive, barring any contrary declaration by the [recipient state]; where the Convention is silent the federal law should govern where possible."[95] Thus, even though *Ackermann* offers a logical analytical framework with which to decide questions arising under article 10(a) of the Hague Service Convention, the court's blanket holding that service by mail generally is acceptable is problematic.[96]

Under the strict interpretation of the Hague Service Convention, article 10(a) merely provides a method for the plaintiff to send documents to a defendant after a plaintiff properly has served process through the Central Authority.[97] In *Suzuki Motor Co. v. Superior Court*,[98] the California Court of Appeal rejected their earlier holding in *Shoei Kako* that the Hague Service Convention authorized service of process by mail.[99] The *Suzuki* court found that Japan does not have an internal law that allows service of process by registered mail.[100] The court rejected the cases that attempted to facilitate service because article 10(a):

> [M]erely discusses the right to send subsequent judicial documents by mail. Any other process would be a rather illogical result, as the Convention sets up a rather cumbersome and involved procedure for service of

92. *Id.* at 838.
93. *Id.* at 839.
94. *Id.*
95. *Id.* at 840.
96. Although courts, which have interpreted the Hague Service Convention as a means to facilitate service abroad, originally asserted that the use of the term "send" rather than "service" in article 10(a) "must be attributed to careless drafting," these courts appear to recognize that the term "send" must be defined by the internal law of the recipient state. Nevertheless, these courts have held mail service to be enforceable on a Japanese resident despite the prohibitions in Japanese law because certain generalized interpretations of the Convention allow service by mail. *Id.* at 839 (citing 1 B. RISTAU, *supra* note 41, § 4-28).
97. *See generally* Bankston v. Toyota Motor Corp., 889 F.2d 172, 174 (8th Cir. 1989).
98. 200 Cal. App. 3d 1476, 249 Cal. Rptr. 376 (1988).
99. *Id.* at 1480-81, 249 Cal. Rptr. at 379.
100. *Id.*

process; and if this particular provision allowed one to circumvent the procedure by simply sending something through the mail, the vast bulk of the Convention would be useless.[101]

Thus, because Japanese law prohibits service by mail, the court held that the Hague Service Convention generally prohibits service of process on foreign defendants by mail.[102]

Federal district courts also have held that the Hague Service Convention generally prohibits serving a summons and complaint on a foreign defendant by registered mail. In *Mommsen v. Toro Co.*,[103] a United States plaintiff attempted to mail notification of the summons and complaint to the defendant, a Japanese resident.[104] The United States District Court for the Southern District of Iowa quashed service, explaining that to permit direct mail service would exceed the plain meaning of the term "send" in article 10(a) and would create a method at odds with other methods of service permitted by the Hague Service Convention.[105] The court strictly interpreted article 10(a) as forbidding service by mail on all signatory states and noted that the term "send" is not equivalent to the term "service."[106] Thus, while most courts have held that article 10(a) of the Hague Service Convention permits service by mail if a signatory state has not recorded an objection,[107] several recent decisions have quashed service attempted by mail because the plain meaning of the term "send" does not include "service of process."[108]

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101. *Id.* at 1484, 249 Cal. Rptr. at 381 (quoting Routh, *Litigation Between Japanese and American Parties*, in CURRENT LEGAL ASPECTS OF DOING BUSINESS IN JAPAN AND EAST ASIA 188, 190-91 (J.O. Hailey ed. 1978)).

102. The New York State courts also have accepted this general prohibition on service of process by mail under the Convention, but have split regarding its authority. *See* Ordmandy v. Lynn, 122 Misc. 2d 954, 472 N.Y.S.2d 274 (N.Y. Sup. Ct. 1984); Reynolds v. Woosup Koh, 109 A.D.2d 97, 490 N.Y.S.2d 295 (N.Y. App. Div. 1985). *Contra* Rissew v. Yamaha Motor Co., 129 A.D.2d 94, 515 N.Y.S.2d 352 (N.Y. App. Div. 1987).

103. 108 F.R.D. 444 (S.D. Iowa 1985).

104. *Id.* at 444-45.

105. *Id.* at 446.

106. *Id.*

107. *See, e.g.*, Chrysler Corp. v. General Motors Corp., 589 F. Supp. 1182 (D.D.C. 1984).

108. *See* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("Absent a clearly expressed legislative intention to the contrary, that language [of the Convention] must ordinarily be regarded as conclusive."); *see also* Russello v. United States, 464 U.S. 16, 21 (1983) ("When a term is not specifically defined in the statute, silence requires the court to 'start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.' " (citation omitted)).

III. INSTANT DECISION

In the instant case, the United States Court of Appeals for the Eighth Circuit found the strict interpretation of article 10(a) to be more persuasive than the argument that article 10(a) should be interpreted broadly to facilitate service of process.[109] After outlining the scope and purpose of the Hague Service Convention, the court discussed the two lines of interpretation.[110] The court declared that it first must consider the language of the Convention to be conclusive, absent a clear legislative intent to the contrary, when determining whether service of process is authorized by mail.[111] The court also noted that when a legislature includes particular language in one section of a statute, but omits it in another section of the same legislation, it is presumed the legislative body acted purposely when it used disparate wording.[112] The court cited *Suzuki Motor Co. v. Superior Court*[113] as support for the proposition that service of process by registered mail is not permitted under Japanese law. Furthermore, the court found that in its failure to object to paragraph (a) of article 10, Japan did not intend to allow service of process by mail, particularly since Japan objected to the more formal modes of service available in paragraphs (b) and (c) of article 10.[114]

The court concluded that the Hague Service Convention generally prohibits sending a copy of a summons and complaint by registered mail.[115] Thus, the court affirmed the judgment of the district court and remanded the case with instructions that the Appellants be given a reasonable time to effectuate service of process on Toyota in compliance with the Convention.[116]

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

110. The court cited to *Ackermann v. Levine*, 788 F.2d 830 (2d Cir. 1986), *Smith v. Dainichi Kinzoku Kogyo Co.*, 680 F. Supp. 847 (W.D. Tex. 1988), and *Newport Components, Inc. v. NEC Home Electronics, Inc.*, 671 F. Supp. 1525 (C.D. Cal. 1987), as examples of courts that utilize the facilitating service approach. The court cited *Hantover Inc. v. Omet, S.N.C. of Volentieri & C.*, 688 F. Supp. 1377 (W.D. Mo. 1988), *Prost v. Honda Motor Co.*, 122 F.R.D. 215 (E.D. Mo. 1987), *Pochop v. Toyota Motor Co.*, 111 F.R.D. 464 (S.D. Miss. 1986), *Mommsen v. Toro*, 108 F.R.D. 444 (S.D. Iowa 1985), and *Suzuki Motor Co. v. Superior Court*, 200 Cal. App. 3d 1476, 249 Cal. Rptr. 376 (1988) as examples of courts that advocate a strict interpretation of article 10(a) of the Hague Service Convention.

111. *Bankston*, 889 F.2d at 174 (citing *Consumer Prod. Safety Comm'n*, 447 U.S. at 108).

112. *Id.* (citing *Russello*, 464 U.S. at 23).

113. 202 Cal. App. 3d 501, 249 Cal. Rptr. 376 (1988).

114. *Bankston*, 889 F.2d at 174.

115. *Id.*

116. *Id.*

The concurring opinion expressed concerns about the practical effect of the majority opinion.[117] Even though automobiles are subject to "a plethora of regulations requiring particular equipment and detailed warnings,"[118] the concurrence questioned whether an automobile manufactured in Japan also should carry a disclosure that, if litigation ensues from the purchase and use of the automobile, service of process on the Japanese manufacturer could be obtained only under the Hague Service Convention. The concurrence also questioned whether an automobile purchaser should be informed that this special service of process will cost a substantial amount of money and must include a translation of the suit papers into Japanese.[119]

IV. COMMENT

The instant court followed the analytical framework similar to one used by the United States Court of Appeals for the Second Circuit in *Ackermann v. Levine*[120] yet reached the opposite conclusion regarding article 10(a) of the Hague Service Convention. Despite this apparent conflict, the two courts have established a comprehensive and logical framework within which to analyze questions regarding service of process by mail pursuant to article 10(a) of the Hague Convention. The principal problem with both the instant opinion and *Ackermann* is that each offers an overly generalized definition of "send" as that term appears in article 10(a), when a narrow conclusion limited to the possibility of service by mail within the recipient state is sufficient.

In *Ackermann*, the court held that service of process by mail was permissible because the internal law of the United States authorized this method of service.[121] The court correctly analyzed article 10(a) by applying the internal law of the United States to define the term "send." Although the original signatory states promulgated the Convention to simplify service internationally,[122] the drafters intended to leave intact the internal laws of the ratifying states.[123] Thus, the *Ackermann* court correctly upheld service by mail on a defendant in the United States because it complied with the internal laws of the United States. The court's conclusion that service by mail generally is acceptable in all signatory states

117. *Id.* (Gibson, J., concurring).
118. *Id.*
119. *Id.*
120. 788 F.2d 830 (2d Cir. 1986). *See supra* notes 89-96 and accompanying text.
121. *Id.* at 838-41.
122. *See supra* note 34 and accompanying text.
123. *See* PRACTICAL HANDBOOK, *supra* note 29, at 28.

that have not objected to article 10(a), however, was overly broad.

In the instant case, the United States Court of Appeals for the Eighth Circuit also correctly analyzed article 10(a) as it applied to a Japanese defendant.[124] First, the court found that Japanese internal law prohibited service by mail, despite the erroneous conclusion reached by the California Court of Appeal in *Shoei Kako*.[125] Although Japan did not object to article 10(a), the court found that it would be inconsistent with Japanese internal law to allow service by this method. The court then looked to Japanese internal law to define the term "send" in article 10(a). In order to comport with the intention of the Hague Service Convention to leave intact the internal law of the ratifying state, the *Bankston* court correctly disallowed service of process by mail on a Japanese resident defendant.[126] However, the *Bankston* court's conclusion that the Convention generally does not permit service by mail on all signatory states is overly broad as well.

Although both the *Bankston* and *Ackermann* courts correctly applied article 10(a) to the facts before them, their attempts to offer a blanket definition of the term "send" in article 10(a) were erroneous. The Convention's major development was the establishment of a Central Authority to coordinate service between foreign parties.[127] Article 10 is merely an alternative to the Central Authority as a means of service.[128] When the litigants reside in signatory states that have conflicting internal laws on service of process, the requesting party should follow the law of the recipient state rather than the law of the forum state, despite the United States Supreme Court's holding in *Volkswagenwerk Aktiengesellschaft v. Schlunk*[129] that the forum state's law applies. The holding in *Volkswagenwerk* is contrary to the intentions of the drafters of the Hague Service Convention and, as Justice Brennan noted in his concurring opinion, effectively makes the Convention a nullity.[130] Although a general holding that the Hague Service Convention permits service by mail is desirable because it offers a bright-line rule that allows courts to analyze a given situation quickly, the Convention requires a more thorough analysis to determine whether service by mail is permissible under the law of each recipient state. Therefore, courts should restrict their conclusions to each

124. *See supra* notes 109-16 and accompanying text.

125. *See supra* notes 113-14 and accompanying text.

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

127. *See* PRACTICAL HANDBOOK, *supra* note 29; *see also supra* notes 40-45 and accompanying text.

128. *See supra* notes 46-53 and accompanying text.

129. 486 U.S. 694 (1988); *see supra* notes 61-64 and accompanying text.

130. *See supra* note 63 and accompanying text.

specific recipient state rather than make generalizations applicable to all signatory nations.

Whether service by mail is permissible on a Japanese defendant is an issue that has been litigated extensively, and no clear line of authority has been established; some courts allow service by mail, while other courts do not.[131] Commentators, too, are split on this question.[132] Because the drafters of the Hague Service Convention did not intend to affect existing laws of service in signatory states,[133] and Japanese internal law prohibits service by mail,[134] United States courts should not permit service by mail on Japanese parties.

As one of the first nations to ratify the Convention, the United States sought to prevent defendants in the United States from losing default judgments when these defendants had no actual notice of the action.[135] By allowing service by mail on Japanese defendants who might not understand the purpose of the documents, United States courts are sanctioning a method of service in international disputes that the United States sought to avoid for its own citizens.

Thus, in order to avoid a glaring double standard, United States courts should follow the *Bankston* decision and prohibit service of process by registered mail on Japanese defendants because such service is contrary to Japanese internal law.[136] This prohibition, however, should not extend generally to all signatory states. Rather, the courts should analyze each recipient state's internal laws to determine whether the term "send" in article 10(a) of the Hague Service Convention includes service of process.

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131. *See supra* notes 72 and 74.
132. *See supra* notes 35-52.
133. *See supra* note 39 and accompanying text.
134. *See supra* notes 54-59 and accompanying text.
135. *See supra* note 35 and accompanying text.
136. *See supra* notes 54-59 and accompanying text.