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International Service of Process

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International Service of Process: Reconciling the Federal Rules of Civil Procedure With the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

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I. INTRODUCTION

With the rapid advance of scientific technology in the twentieth century and the development of an interdependent international economy, the significance of national boundaries in regard to the daily life of many businesses and people has been substantially reduced. In light of this development it seems logical that international civil litigation is becoming

more and more frequent.[1] In an effort to ease the difficulties and inequities that may develop in the course of international litigation, twenty-six nations, including the United States, have entered into an international agreement that sets forth service methods to be employed in litigation involving residents of the signatory nations. This agreement entitled The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Service Convention)[2] has been adopted by most industrial western nations.[3]

This Note examines the conflicts that may arise between the Federal Rules of Civil Procedure utilized by American federal courts and procedures under the Service Convention. In addition, this Note compares the logic and policy of the differing approaches utilized by federal courts to resolve such conflicts. Finally, it concludes that the approach which best resolves the legal and practical problems of such conflicts is one which holds that the Service Convention supercedes certain rules of civil procedure when the two conflict.[4]

A. *Background and History of the Service Convention*

The United States historically had adopted and followed a policy of "judicial isolationism" in the area of private international law before it

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

2. *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 for the United States February 10, 1969) [hereinafter Service Convention].

3. The twenty-six nations that have become signatories to the Service Convention are Antigua and Barbuda, Barbados, Belgium, Botswana, Cyprus, Czechoslovakia, Denmark, Egypt, Finland, France, the Federal Republic of Germany, Greece, Israel, Italy, Japan, Luxembourg, Malawi, the Netherlands, Norway, Portugal, Seychelles, Spain, Sweden, Turkey, the United Kingdom, and the United States. 8 MARTINDALE HUBBELL LAW DIRECTORY pt. 7, at 2 (1989).

4. The state courts that have examined this issue have consistently concluded that the Service Convention supercedes the state rules on service of process. These courts have based this conclusion on the supremacy clause of article 6 of the United States Constitution. The supremacy clause mandates that federal laws, including treaties, override any contradictory state laws. Thus, state courts have ruled that the Constitution requires that the Service Convention must control whenever it conflicts with state rules of civil procedure. River v. Stihl, Inc., 434 So. 2d 766 (Ala. 1983); Kadata v. Hosagai, 125 Ariz. 131, 608 P.3d 68 (Ct. App. 1980), *later proceeding on other grounds*, 145 Ariz. 227, 700 P.2d 1354 (Ct. App. 1984), *vacated*, 145 Ariz. 227, 700 P.2d 1327 (1985); Aspinall's Club, Ltd. v. Aryeh, 86 A.D.2d 428, 450 N.Y.S.2d 199 (App. Div. 1982). For a further analysis of these cases see Note, *Service Abroad of Judicial and Extrajudicial Documents in Civil or Commerical Matters Under the Hague Convention*, 3 REV. LITIG. 493, 504-507 (1983).

entered into the Service Convention.[5] In 1854, it declined an offer to enter into an agreement with France that proposed to promote mutual judicial assistance between the two nations.[6] The United States had consistently declined similar overtures from foreign nations and chose not to participate in the international effort to promote those goals at The Hague Convention on Civil Procedure of 1905.[7] The noncooperative attitude of the United States stemmed from its general view that such agreements would supercede state rules of civil procedure and, thus, run afoul of the philosophy of federalism upon which the American system of government is based.[8] The United States position on the subject of international agreements regarding mutual judicial assistance was so widely known that the United States was not even offered an invitation to the Seventh Hague Conference in 1951.[9]

As the world's economies became increasingly interdependent, the United States nonparticipation in international judicial agreements became a source of substantial problems to American attorneys and their clients involved in international litigation. At the end of World War II, the incidence of international litigation in American courts was increasing at a rapid pace.[10] In 1950, the American Bar Association adopted a resolution urging President Truman to explore options which might lead to greater international judicial cooperation.[11]

Specifically, in the area of international service of process and other judicial documents, United States reluctance to promote international judicial cooperation became more critical as international litigation became more common. Prior to United States adoption of the Service Convention, it was very difficult for an attorney to discern the proper method to effectuate service in a foreign nation.[12] The only way for counsel to quickly discern the proper method was to retain local counsel in the na-

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5. Jones, *supra* note 1, at 517.

6. *Id.* at 556.

7. *Id.* at 557.

8. *See* Note, *The Effect of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 2 CORNELL INT'L L.J. 125, 126 (1969).

9. Jones, *supra*, note 1, at 558.

10. *See id.*

11. *Id.* at 558-59. The 1950 American Bar Association resolution announced the organization's strong support of governmental actions toward the promotion of mutual international judicial assistance. *See id.* at 559 n.146 (resolution reprinted at footnote). The United States Attorney General made a similar announcement of support and encouragement in 1952. *See id.* at 559.

12. *See id.* at 536. The State Department kept almost no information on the proper methods to serve residents of foreign nations. *Id.*

tion within which service was sought, a time-consuming and expensive undertaking.[13] The use of United States consular officers to assist in the service of process was available in only a limited number of areas and was expressly prohibited by law in some nations.[14] The need for an international treaty to allow American litigants to effect service on residents of foreign nations was readily apparent.[15]

As this need grew, the United States slowly began to reconsider its longstanding refusal to join in international efforts to promote judicial assistance. In 1956, the United States sent a delegation of observers to the Hague Conference on Private International Law.[16] In 1963, President Lyndon B. Johnson authorized the United States to join the Hague Conference on Private International Law as a full member.[17] The Service Convention was one of the international agreements produced by the Conference when it convened in 1964.[18] The United States participated in the drafting of the Service Convention and contributed substantially to the substance of the final product.[19] Thus, the Service Convention was promulgated and marked a dramatic break with the past for the United States in the area of international judicial assistance.[20]

An understanding of the underlying objectives and purposes of the Service Convention is important in analyzing the relationship between the Service Convention and the Federal Rules of Civil Procedure.[21] The Service Convention briefly states the goals that it seeks to promote. First, the Service Convention attempts to ensure that the service of legal docu-

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13. *Id.*

14. *Id.*

15. Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031, 1043 (1961). Without such an international agreement, a foreign nation easily could hamper service of process on persons and businesses located within its borders. *Id.* at 1040-43.

16. Note, *supra* note 8, at 126. The Hague Conference on Private International Law was created in 1893 and participants agreed to subsequently meet every four years to discuss and attempt to resolve problems concerning private international law. *Id.* at 126-27; *see* Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A. J. 650 (1965).

17. H.J. Res. 778, 77 Stat. 775 (1963); *see also* Note, *supra* note 8, at 127-28.

18. Amram, *Report on the Tenth Session of the Hague Conference on Private International Law*, 59 AM. J. INT'L L. 87, 90-91 (1965). The Service Convention was unanimously adopted. *Id.* at 90.

19. Note, *supra* note 8, at 128; Amram, *supra* note 18, at 90.

20. *See* Note, *supra* note 8, at 128.

21. The legislative history of a treaty is a valuable tool in the process of determining a correct interpretation of its language. Choctaw Nation of Indians v. United States, 318 U.S. 423, 431-32 (1943); *see* Day v. Trans World Airlines, Inc., 393 F. Supp. 217, 222 (S.D.N.Y. 1975), *aff'd*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976).

ments to residents of signatory nations provides actual notice to its recipients.[22] This purpose was one of the primary concerns of the United States regarding the subject of service of process in international litigation.[23] Second, the Service Convention undertakes to improve international judicial cooperation among the signatory nations with regard to the efficiency with which service of process and other judicial documents can be made.[24] The European nations involved in the drafting of the Service Convention were concerned with the development of an international system to provide a regular governmental channel for service of process within signatory nations with the focus of this concern being the development of such a governmental channel within the United States.[25] This was a concern of some nations because their local judicial systems required that service be made by a government official.[26] The United States also sought from the agreement a uniform method of service of documents abroad and an end to the frustration that United States litigants sometimes encountered in their efforts to serve documents.[27] These goals and purposes must be considered in interpreting the Service Convention.

B. *Available Methods of Service Under the Service Convention*

In order to explore the proper resolution of conflicts arising between the Service Convention and United States Federal Rules of Civil Procedure, it is necessary to understand the Service Convention's provisions for the service of documents. The Service Convention requires each signatory nation to designate a central authority to which requests for service may be sent by litigants from another signatory nation but does allow the contracting nations flexibility in the organization or creation of its central authority.[28] Requests for service through a signatory's central

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22. Service Convention, *supra* note 2, preamble.

23. Note, *supra* note 8, at 129. The United States was concerned with this problem because often process served to the satisfaction of European courts was not reasonably likely to provide notice to a concerned party located within the United States. *Id.* at 129-30.

24. Service Convention, *supra* note 2, preamble.

25. Note, *supra* note 8, at 129.

26. *Id.* at 128.

27. *Id.* at 129-30; *see supra* notes 12-15 and accompanying text.

28. Service Convention, *supra* note 2, art. 2. In the United States, the Department of Justice serves as the central authority. 28 C.F.R. § 0.49 (1988). The Office of Security and Consular Affairs of the Department of State had acted as the designated central authority for the United States until December 31, 1973. REPORT OF THE UNITED STATES DELEGATION TO THE SPECIAL COMM'N ON THE OPERATION OF THE CONVEN-

authority must be made by a competent authority or officer of the state where the requests originate, and copies of the documents to be served must accompany the request.[29] If the central authority receiving the request finds that it is in some manner defective, the recipient central authority is required to promptly notify the applicant and to specify its reasons for finding the request defective.[30] Any disputes that arise over such findings are to be resolved through diplomatic channels.[31]

After receiving a request for service, the central authority will serve the document or make arrangements for its service by an appropriate server.[32] This service is made in accordance with the internal law of the nation receiving the request[33] or may be made in a manner specified by the applicant if such manner is not incompatible with the receiving nation's internal law.[34] After the document is served, the central authority completes a Service Convention model certificate, which includes information as to the date, the method, and the place of service, and sends this document to the litigant who applied for service.[35] If the service has not been effectuated, the central authority will complete the Service Convention model certificate and explain its inability to serve the requested documents.[36]

The Service Convention also provides for methods of service in addition to the use of a central authority. It allows the central authority to be bypassed, and service to be made by diplomatic officers of the nation from which the documents originate; however, any signatory state may

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TION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS, *reprinted in* 17 I.L.M. 312, 313 (1978) [hereinafter UNITED STATES DELEGATION REPORT].

29. Service Convention, *supra* note 2, art. 3. In federal courts, the judicial officer competent to make such a request is a United States Marshal. Bishop, *International Litigation in Texas: Service of Process and Jurisdiction*, 35 SW. L.J. 1013, 1019 (1982). In state courts, a sheriff is often a competent officer to make such requests. *See id.*

30. Service Convention, *supra* note 2, art. 4.

31. *Id.* art. 14.

32. *Id.* art. 5.

33. *Id.* art. 5(a).

34. *Id.* art 5(b). This provision concerning requests for specific methods of service may allow a litigant to ensure that service of process will meet federal constitutional requirements of due process. For example, a plaintiff suing in a United States court may request that a defendant be served in a manner that satisfies due process, such as personal service. Note, *An Interpretation of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents Concerning Personal Service in Japan*, 6 LOY. L.A. INT'L & COMP. L.J. 143, 146-47 (1983).

35. Service Convention, *supra* note 2, art. 6.

36. *Id.*

bar service in this manner except where the service is to be made upon a resident of the nation where the documents originate.[37] In addition, the Service Convention permits consular channels and, in extraordinary circumstances, diplomatic channels to be utilized to transmit requests and documents for service to the central authority of the receiving nation.[38]

Article 10 of the Service Convention outlines several rather broad methods of effecting service within a signatory nation without involving the nation's central authority. These article 10 methods are restricted to some extent, however, as they may only be used if the signatory nation of destination fails to object to them.[39] Article 10(a) states that the Service Convention will not prohibit the use of postal channels to mail documents directly to persons within a signatory nation.[40] Subdivisions 10(b) and 10(c) of the Service Convention allow competent officials or persons of the state of origination of the documents who have an interest in the litigation to serve process through competent parties in the state of destination.[41] Thus, the Service Convention provides several methods for effecting service of process abroad within a signatory nation. However, the Service Convention does not clearly indicate whether it is the sole means of serving process within a signatory nation.

C. *The Mechanics of Service Under the Federal Rules of Civil Procedure*

Rule 4 of the Federal Rules of Civil Procedure sets forth methods of service of process.[42] In 1963, subdivision (i) was added to rule 4 in an effort to address the problems encountered by United States litigants seeking to serve process on persons abroad.[43] Subdivision (e) provides methods for serving process abroad when such service is specifically au-

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37. *Id.* art. 8. United States consular officers generally are not authorized to serve judicial documents except when such service is made under the Foreign Sovereign Immunities Act on foreign governments. *See generally Department of State Memorandum on Judicial Assistance Under the Foreign Sovereign Immunities Act and Service of Process Upon a Foreign State* (May 10, 1979), *reprinted in* 18 I.L.M. 1177 (1979).

38. Service Convention, *supra* note 2, art. 9.

39. *Id.* art. 10. *See generally* 8 MARTINDALE-HUBBELL LAW DIRECTORY pt. 7, at 3-7 (1988) (reservations of signatory nations).

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

41. *Id.* art. 10(b)-(c).

42. FED. R. CIV. P. 4.

43. *Id.* at Notes of Advisory Comm. on Rules-1963 Amendment; *see also* Siegal, *Original Practice Commentary*, C4-34, *in* FED. R. CIV. P. 4, at 56 (28 U.S.C.A. West Supp. 1988); *see also supra* notes 5-27 and accompanying text.

thorized by a statute.[44]

Subdivision (i) provides several alternative methods of effecting service abroad when subdivision (e) is not applicable.[45] One provision allows service to be made by the methods allowed under the laws of the foreign nation in which process is to be served.[46] Subdivision (i) also allows service to be made with the assistance of a court of the nation where process is to be served in response to a letter rogatory from a federal court.[47] It allows for direct service on the person to be served or on an official if the service is to be made on a business[48] and also permits process to be served by direct mail sent by the court clerk.[49] Finally, subdivision (i) allows the court to direct another method of service.[50] This final method seems to allow courts flexibility when faced with unusual or extraordinary circumstances.[51] For example, in *New England Merchants National Bank v. Iran Power Generation and Transmission Co.*,[52] a federal district court authorized service by telex when attempts to serve the defendant by direct mail were thwarted because Iranian mail services refused to return the signed receipts.[53]

Presently, rule 4(i) makes no mention of the Service Convention. The absence of such language contributes to the present confusion regarding inconsistencies between the Federal Rules of Civil Procedure and the Service Convention. In 1984, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States proposed an amendment to rule 4(i) that, among other changes, would add a clause to 4(i) which would permit service of process abroad in a manner authorized by any pertinent convention or treaty.[54] The proposal, however, has

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

45. *Id.* at 4(i).

46. *Id.* at 4(i)(1)(A).

47. *Id.* at 4(i)(1)(B).

48. *Id.* at 4(i)(l)(C). Should an American litigant choose to serve process in this manner, the litigant "had best be sure that nothing done offends the foreign sovereign, lest the return [of service] consist of a large envelope containing only the process server." Siegal, *supra* note 43, C4-34, *in* FED. R. CIV. P. 4, at 57 (28 U.S.C.A. West Supp. 1988).

49. FED. R. CIV. P. 4(i)(l)(D). In order for service made in this manner to be sufficient, the Rule requires a signed receipt or "other evidence of delivery to the addressee satisfactory to the court." FED. R. CIV. P. 4(i)(2).

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

51. Siegal, *supra* note 43, C4-35, *in* FED. R. CIV. P. 4, at 57 (28 U.S.C.A. West Supp. 1988).

52. 508 F. Supp. 49 (S.D.N.Y. 1980).

53. *Id.* at 52.

54. Siegal, *supra* note 43, C4-34, *in* FED. R. CIV. P. 4, at 105 (28 U.S.C.A. West

not yet been adopted.[55]

II. PRELIMINARY CONSIDERATIONS

In order to examine the conflicts that may arise between the Service Convention and federal and state rules of civil procedure, it is necessary to comprehend the range of application of the Service Convention.

A. *Scope of the Service Convention*

The Service Convention, by its terms, applies to service abroad in all "civil or commercial matters" among its signatory nations.[56] Unfortunately, the Service Convention does not clarify or define this phrase. As might be expected, the interpretations of this phrase by the signatory nations have not been uniform.[57] For example, the United States and the United Kingdom interpret the phrase to include all noncriminal matters.[58] France construes the phrase to exclude fiscal as well as criminal matters.[59] Japan interprets the Service Convention as not applicable to matters concerning administrative proceedings.[60] In Egypt, matters concerning domestic relations law are within the domain of its religious courts and therefore are not considered within the scope of the Service Convention.[61]

Also, when a potential conflict arises in the interpretation of the scope of the Service Convention, it is unclear whether the interpretation to be adopted is that of the nation of origination or the nation receiving the request.[62] The Service Convention drafters recognized this problem but concluded that it would be impossible to define the scope in a manner

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Supp. 1988) (1985 Practice Commentary).

55. *See infra* notes 170-75 and accompanying text.

56. Service Convention, *supra* note 2, art. 1.

57. PERMANENT BUREAU, REPORT ON THE WORK OF THE SPECIAL COMM'N ON THE OPERATION OF THE CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS, *reprinted in* 17 I.L.M. 319, 320 (1978) [hereinafter PERMANENT BUREAU REPORT]. The definition of this phrase has varied among the signatory nations, and, in some cases, these variations have been substantial. *Id.*

58. UNITED STATES DELEGATION *supra* note 28, at 315. For a similar discussion of this general matter, see Note, *supra* note 4, at 498-99.

59. UNITED STATES DELEGATION REPORT, *supra* note 28, at 315. It seems that Switzerland agrees with France on the scope of this phrase. *Id.*

60. *Id.*; Note, *supra* note 4, at 498-99.

61. UNITED STATES DELEGATION REPORT, *supra* note 28, at 316.

62. PERMANENT BUREAU REPORT, *supra* note 57, at 320.

satisfactory to all the signatory nations.[63] Experts have stated, however, their hope that the scope of the Service Convention will be liberally construed by the signatory nations.[64] Apparently, most central authorities have attempted to honor the spirit of the Service Convention and have cooperated in serving documents that do not concern tax or criminal matters.

In addition to the requirement that the service must concern a civil or commercial matter, the papers to be served must be "judicial or extrajudicial document[s]" to come within the scope of the Convention.[65] The term "judicial document" is generally understood by the signatories to mean a document that is directly connected with a lawsuit.[66] The interpretation of the term "extrajudicial document," however, varies widely among the signatory nations. Generally, extrajudicial documents must "emanate from an authority or from a process server," and must require the action of a judicial officer or authority to be served under the terms of the Service Convention.[67] Examples of extrajudicial documents include notices regarding leasehold disputes, protests concerning bills of exchange, and payment demands.[68] Though the Service Convention seems to exclude documents served by private persons,[69] disputes have arisen with regard to the service of such documents. In the legal system of the United Kingdom, certain types of documents normally considered to be within the scope of the term "extrajudicial document," such as consents to adoption, do not emanate from an authority or judicial officer.[70] In an effort to accommodate the United Kingdom's legal system, the Special Commission on the Operation of the Service Convention has urged the central authorities of signatory nations to treat such documents as within the scope of extrajudicial documents if the type of document in question must be issued with the action of a judicial officer within the legal system of the central authority receiving the request for service.[71]

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63. *Id.* at 321.

64. *Id.*; *see also* Note, *supra* note 4, at 499.

65. Service Convention, *supra* note 2, art. 1.

66. *See* PERMANENT BUREAU REPORT, *supra* note 57, at 327.

67. *Id.*

68. *Id.*; *see* Note, *supra* note 4, at 500. Certain instruments requiring formalities, such as formal marriage objections and adoption consents, are usually also considered extrajudicial documents under the terms of the Service Convention. PERMANENT BUREAU REPORT, *supra* note 57, at 328.

69. *See* Service Convention, *supra* note 2, art. 17; *see also* PERMANENT BUREAU REPORT, *supra* note 57, at 328.

70. PERMANENT BUREAU REPORT, *supra* note 57, at 328.

71. *Id.*

The Service Convention also requires that "the address of the person to be served" be known by the party requesting service.[72] If the address of the person on whom the document is to be served is unknown, the Service Convention does not apply. In such a case, alternative methods of service may be attempted.[73]

The Service Convention does not apply in all instances where service is to be made on a foreign defendant. The Service Convention only applies "where there is occasion" for service to be made on a resident of a foreign signatory nation.[74] This limit on the Service Convention's scope was at issue in *Lamb v. Volkswagenwerk A.G.*[75] In that case, the plaintiff sought to serve process on Volkswagenwerk's agent within Florida where the suit was filed. The federal district court ruled that the service was valid though not consistent with the terms of the Service Convention.[76] The court noted that the plaintiff did not seek to serve process *abroad* and that "nowhere among the provisions of The Hague [Service] Convention [is there] any indication that it is to control attempts to serve process on foreign corporations or agents of foreign corporations *within the State of origin.*"[77]

The issue arose again in *Schlunk v. Volkswagenwerk A.G.*[78] In *Schlunk*, an Illinois state appellate court ruled that service of process on the foreign corporation's agent within the state did not violate the terms of the Service Convention. This method of service, authorized by the state's rules of civil procedure, was deemed proper by the appellate court which noted that the Service Convention was not intended "to work such a drastic interference" on a signatory state's methods of civil procedure by requiring that its terms be followed whenever a foreign defendant

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72. Service Convention, *supra* note 2, art. 1. Generally, Central Authorities have attempted to determine the correct address instead of refusing to attempt service on article 1 grounds. PERMANENT BUREAU REPORT, *supra* note 57, at 321.

73. Note, *supra* note 34, at 146. An example of such an alternative method is service by publication. *Id.*; *see* PERMANENT BUREAU REPORT, *supra* note 57, at 321 (a discussion of the difficulties which arise due to incorrect or incomplete addresses on service requests mailed to Central Authorities)

74. Service Convention, *supra* note 2, art. 1.

75. 104 F.R.D. 95 (S.D. Fla. 1985), *summary judgment for defendant on other grounds*, 631 F. Supp. 1144 (S.D. Fla. 1986), *aff'd sub. nom.* Eddings v. Volkswagenwerk A.G., 838 F.2d 1369 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 68 (1988).

76. 104 F.R.D. at 96-97.

77. *Id.* at 97 (emphasis added); *see* Zisman v. Sieger, 106 F.R.D. 194 (N.D. Ill. 1985).

78. 145 Ill. App. 3d 594, 503 N.E.2d 1045 (1986), *appeal denied*, 112 Ill. 2d 595 (1986), *aff'd*, 108 S. Ct. 3104 (1988).

was involved in litigation.[79] The court stressed its belief that the Service Convention applies only when process is served abroad.[80] Thus, unless the document to be served falls within the scope of the Service Convention as interpreted by the serving state, it will not come into conflict with federal or state rules of civil procedure.

B. *Personal Jurisdiction*

Although the Service Convention provides several mechanisms for the service of process abroad, it does not create personal jurisdiction over the person or business association to be served. The Court of Appeals for the Third Circuit examined the relationship between personal jurisdiction and the Service Convention in *DeJames v. Magnificence Carriers, Inc.*[81] In *DeJames*, the plaintiff sued a Japanese ship-building corporation and alleged that the corporation's negligent construction on a ship had resulted in the plaintiff's injury. The court concluded that the defendant corporation did not have sufficient contacts in New Jersey, where the injury occurred and where the suit was filed, to establish personal jurisdiction over the defendant.[82] The plaintiff argued that the Service Convention created a "wholly federal means" of service that would allow the aggregation of all defendant corporation's contacts with the United States to determine whether personal jurisdiction could be asserted over the defendant.[83] The court of appeals reviewed the nature and purpose of the Service Convention and concluded that it only provides the mechanism for serving process.[84] The court also emphasized its finding that the Service Convention does not place "limits on the jurisdictional reach" that a

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

80. *See id.*

81. 654 F.2d 280 (3d Cir. 1981), *cert. denied*, 454 U.S. 1085 (1981). For further discussion of this case see Note, *supra* note 4, and Note, *supra* note 34.

82. *De James*, 654 F.2d at 286.

83. *Id.* The due process clause of the Fourteenth Amendment of the United States Constitution requires that a defendant have sufficient contacts with the forum state so that forcing the defendant to defend a suit in the forum state does not contradict "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). In *DeJames*, the federal district court had subject matter jurisdiction over the suit because it involved admiralty law. However, the appellate court noted that the trial court's ability to assert personal jurisdiction over the defendant still was limited by the fourteenth amendment, which applies to state governments, because the trial court had to rely on the New Jersey long-arm statute to assert personal jurisdiction. *DeJames*, 654 F.2d at 284.

84. *DeJames*, 654 F.2d at 288-89.

government may impose on its courts.[85] Thus, while the Service Convention provides methods for effecting service abroad, a litigant must first find a federal or state statute which authorizes use of these methods.[86]

C. *Insufficiency of Process*

With regard to personal jurisdiction and the Service Convention, a foreign defendant also should be aware that, the defense of insufficiency of process must be made promptly or it will be considered waived.[87] This rule was addressed by a federal district court in *Zisman v. Sieger*.[88] The issue before the court was whether the process served on a Japanese third-party defendant was sufficient. The Japanese corporation, Fujitsu, Ltd., claimed that the service of process was not valid because the plaintiff failed to follow the methods prescribed by the Service Convention.[89] However, Fujitsu had previously filed a rule 12(b) motion to dismiss for insufficiency of process on other grounds and had failed at that time to raise the issue of the Service Convention.[90] The court ruled that this failure prevented Fujitsu from subsequently raising this issue because it constituted a waiver of the defense.[91] Thus, it appears that a defendant litigant raising Service Convention provisions in disputing the sufficiency of process must do so promptly.

D. *Due Process and Notice Considerations*

Even if process is served on a foreign defendant from a signatory nation in accordance with the Service Convention, such service must still satisfy the independent requirements of due process to be valid in a United States court. The United States Constitution requires that defendants receive due process prior to the deprivation of their property by a damage award in a civil suit.[92] Due process mandates that adequate service of process be "reasonably calculated to give . . . actual notice of

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85. *Id.* at 289.

86. *Id.*

87. FED. R. CIV. P. 12(g)-(h). If the defense is not raised in a responsive pleading, an amended responsive pleading, or a motion to dismiss, the insufficiency of process defense will be deemed to be waived. *Id.* at 12(h).

88. 106 F.R.D. 194 (N.D. Ill. 1985).

89. *Id.* at 197.

90. *Id.*

91. *Id.* at 198. The policy behind this rule is to allow the process of litigation to proceed as quickly as possible "by avoiding the piecemeal consideration of pretrial motions." Rauch v. Day and Night Mfg. Corp., 576 F.2d 697, 701 (6th Cir. 1978).

92. U.S. CONST. amend. V, XIV.

the proceedings and an opportunity [for the defendant] to be heard."[93] This requirement must be met in order to satisfy "traditional notions of fair play and substantial justice . . . implicit in due process."[94]

The Service Convention requires only that documents served through its methods be written in English or French.[95] The documents may also be written in an official language of the nation of origination if the applicant so desires.[96] A United States representative has suggested that applications for service made under the Service Convention should include at least a summary of the contents of the documents written in the language of the nation receiving the service request.[97] Surprisingly, this suggestion was not enthusiastically received by Service Convention experts from other signatory nations.[98] Without the adoption of this practice by the signatory nations, the possibility exists that service made properly under the provisions of the Service Convention may not be valid in the United States for failure to meet the due process requirements of the federal constitution.

An analogous situation arose in *Julen v. Larson.*[99] In *Julen*, a California resident was sued in a Swiss court. The notice received by the California defendant was written in German, which the defendant was unable to read.[100] The state appellate court refused to enforce the default judgment of a Swiss court because the service of process at issue was not "informative" and did not satisfy the United States constitutional requirement of due process.[101]

Under the Service Convention, the potential exists that a similar situation could occur. If documents written in English are served on a French resident unable to read English, the service, though in compliance with the terms of the Service Convention, would likely fail to meet the constitutional requirement of due process.[102] However, a foreign defendant is

93. Milliken v. Meyer, 311 U.S. 457, 463 (1940).
94. *Id.* (citation omitted).
95. Service Convention, *supra* note 2, art. 7.
96. *Id.*
97. PERMANENT BUREAU REPORT, *supra* note 57, at 323-24.
98. *Id.*
99. 25 Cal. App. 3d 325, 101 Cal. Rptr. 796 (1972).
100. *Id.* at 327, 101 Cal. Rptr. at 798.
101. *See id.* at 328, 101 Cal. Rptr. at 798.
102. Note, *International Service of Process: A Guide to Serving Process Abroad Under the Hague Convention*, 39 OKLA. L. REV. 287, 290-91 (1986). This problem is not likely to occur frequently because many recipients of documents served under the Service Convention are multinational business organizations with multilingual legal staffs. *See* PERMANENT BUREAU REPORT, *supra* note 57, at 324.

not deprived of due process simply because the documents served are not written in the language of the nation of which the defendant is a resident. In *Shoei Kako Co. v. Superior Court*,[103] a Japanese corporation moved to have a trial court quash service made on it because the documents were written in English. The state appellate court ruled that the service of process in question was valid. The court noted that the Japanese corporation regularly transacted business in English and was capable of translating communications it received in English.[104] As a result, the court concluded that the due process mandate of reasonable notice had been satisfied.[105]

III. Approaches to Conflicts Between the Service Convention and United States Federal Rules of Civil Procedure

A. *The Theory that the Service Convention Supplements Rules of Civil Procedure Concerning Service of Process*

Certain courts and authorities have expressed the view that when the Service Convention and Rule 4(i) of the Federal Rules of Civil Procedure are in conflict, the federal rule on service of process abroad should control. This view stems from the premise that the Service Convention was meant merely to supplement the federal rules concerning the service of process abroad. Those who have adopted this supplementation theory, however, vary somewhat on the rationales that support this premise.

The most obvious support for the contention that the Service Convention only supplements federal rules on service of process is the language of article 19 of the Service Convention.[106] Article 19 states that the Service Convention "shall not affect" methods of serving process that a signatory nation's internal law permits.[107] One commentator reports that this provision leaves intact any methods of service of process previously authorized by federal and state service rules that are more expansive than those authorized by the Service Convention.[108] This commentator concludes that, due to the language of article 19, the Service Convention only prevents a signatory nation from authorizing those methods to which the Service Convention specifically allows a signatory nation to

103. 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1973).
104. *Id.* at 823, 109 Cal. Rptr. at 413.
105. *See id.* at 824, 109 Cal. Rptr. at 413.
106. Service Convention, *supra* note 2, art. 19.
107. *Id.*
108. Amram, *supra* note 18, at 90.

object.[109] Another commentator, taking a less expansive view of article 19, states that this language of the Service Convention allows service abroad by any method authorized by the federal rules to the extent that such a method does not violate any "deep-rooted local policy" of the nation in which the service is to be made.[110]

The problem with these analyses of article 19 of the Service Convention stems from the language of the provision on which these commentators so steadfastly rely. The meaning of this provision is not at all as clear as their analyses would lead one to believe. Article 19 states that the Service Convention will not interfere with a signatory nation's freedom to authorize methods of service of process "of documents *coming from abroad, for service within its* [the authorizing signatory nation's] *territory.*"[111] Thus, it seems that article 19 may not authorize what these commentators claim. A more logical interpretation of this language may be that article 19 allows a signatory nation to authorize methods of service for documents from foreign courts that are additional to those methods prescribed in the Service Convention.[112] This alternative interpretation seems to be more in line with the goals addressed by the preamble of the Service Convention.[113] This reading of article 19 is particularly consistent with the United States concern with developing a system of international service of process that would ensure actual notice for the recipient litigant.[114] If the more expansive interpretation of article 19 is adopted, the notice problems that the United States sought to solve with the Service Convention could easily arise again.[115]

Nonetheless, the legislative history of the Service Convention provides some support for the contention that the Service Convention merely supplements the service of process rules of its signatory nations. While testifying before the Senate Foreign Relations Committee in 1967, Phillip Amram, a United States representative to the Convention which produced the Service Convention, stated that the Service Convention "is an

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109. *Id.*; *see* Service Convention, *supra* note 2, art. 10.

110. Siegal, *supra* note 43, C4-34, *in* FED. R. CIV. P. 4, at 104 (28 U.S.C.A. West Supp. 1988) (1985 Practice Commentary). This writer also concludes that the language of article 19 does not force the litigant attempting to serve process to show that such a method is authorized by the receiving nation. Such a litigant must show only that the method is not prohibited. *Id.*

111. Service Convention, *supra* note 2, art. 19 (emphasis added).

112. *See* Note, *supra* note 4, at 509 (citing S. EXEC. REP. No. 6, 90th Cong., 1st Sess. 13 (1967).

113. *See supra* notes 22-24 and accompanying text.

114. *See supra* notes 22-23 and accompanying text.

115. For a short discussion of this approach see Note, *supra* note 34, at 151-53.

enabling convention, designed to create benefits where none now exist, and is not a *restricting* convention" that limits the types of procedures for service which a signatory nation may authorize.[116] The Senate Executive Report on the Service Convention states that the Service Convention will not affect any pre-existing United States law.[117]

The reliance on this legislative history for the interpretation of the Service Convention leads to complications and logical inconsistencies. First, this view again forces the conclusion that the United States failed to procure from the Service Convention what it wanted most—mandatory methods of service which would ensure that United States residents receive actual notice.[118] Second, this view produces the conclusion that specific clauses of the Service Convention are meaningless and completely unenforceable. Article 10 of the Service Convention, for example, states that signatory nations may specifically object to and prohibit certain methods of service otherwise permitted by the Service Convention.[119] West Germany is such a nation and has objected to all methods that would otherwise be allowed by article 10.[120] Article 10(a) provides for direct service of process abroad by means of postal channels.[121] The United States Federal Rules of Civil Procedure also authorize service of process abroad by means of direct mail.[122] If the statements in the legislative history are controlling and the Service Convention viewed as an optional method of service, then a litigant in a United States federal court would be allowed to utilize postal channels to serve process on a defendant in West Germany.[123] Thus, the language of the Service Convention that allows signatory nations to prohibit the methods of service enumerated in article 10 would not only be unenforceable but also would be extremely misleading. Additionally, this result, logically mandated by the supplementation theory, seems to be directly at odds with the United States Supreme Court's position that an international treaty "is in the nature of a contract between nations."[124]

One commentator, who favored the view of the Service Convention as

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116. *Id.* at 152-53 (quoting S. EXEC. REP. No. 6, 90th Cong., 1st Sess. 14 (1967) (statement of Phillip Amram) (emphasis in the original)).

117. *Id.* at 152.

118. *See supra* notes 22-23 and accompanying text.

119. *See* Service Convention, *supra* note 2, art. 10.

120. Siegal, *supra* note 43, *Annex to the Convention, in* FED. R. CIV. P. 4, at 130 (28 U.S.C.A. West Supp. 1988).

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

122. *See supra* note 49 and accompanying text.

123. Note, *supra* note 34, at 152.

124. Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 253 (1984).

a supplement, examined an analogous situation involving Japanese defendants.[125] This author conceded that in this type of situation the terms of the Service Convention should control and prohibit such service although the federal rules would allow it.[126] This commentator did not, however, offer any explanation for this result, which is so inconsistent with his adopted view.[127] This omission was likely due to the fact that this view locks one into a doctrinal trap from which there exists no logical escape.

The proponents of the supplementation theory have examined the evolution of rule 4(i) since the Service Convention came into being. In *Tamari v. Bache & Co. (Lebanon)* S.A.L.,[128] a federal district court ruled on the validity of process served on the defendant in Paris. The court declared that the Service Convention does not limit the reach of rule 4(i).[129] The court concluded that the fact that the provisions of rule 4(i) had not been changed was strong evidence that the Service Convention had no effect on rule 4(i).[130] The *Tamari* court purported to rely on the reasoning of a California appellate court in *Shoei Kako Co. v. Superior Court.*[131] While *Shoei Kako* does contain language supporting the view adopted by the *Tamari* court,[132] a careful review of the former's analysis shows substantial support for the view that the Service Convention did restrict rule 4(i). The *Shoei Kako* court, examining the validity of a service of process abroad by mail, actually stated that the Service Convention restricts rule 4(i) only at points where the two conflict.[133]

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125. Note, *supra* note 34, at 153.

126. *Id.* at 153; *see also* Kadota v. Hosogai, 125 Ariz. 131, 608 P.2d 68 (Ct. App. 1980), *later proceeding on other grounds*, 145 Ariz. 227, 700 P.2d 1354 (Ct. App. 1984), *vacated*, 145 Ariz. 227, 700 P.2d 1327 (1985). The state court seems to recognize this trap by its rejection of the supplementation theory of the Service Convention in regard to its effect on state rules. *Id.* at 136, 608 P.2d at 73.

127. Note, *supra* note 34, at 152. This commentator described this illogical result simply as an anomaly. *Id.* The United States Court of Appeals for the Third Circuit also seems to adopt this analysis without acknowledging the logical problems it creates. DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 289-90 (3d Cir. 1981) *cert. denied*, 454 U.S. 1085 (1981).

128. 431 F. Supp. 1226 (N.D. Ill. 1977), *aff'd*, 565 F.2d 1144 (7th Cir. 1977), *cert. denied*, 435 U.S. 905 (1976). For further analysis of this decision see Note, *supra* note 54 at 507-08.

129. *Tamari*, 431 F. Supp. at 1229. A similar approach was adopted by the United States Court of Appeals for the Second Circuit in International Controls Corp. v. Vesco, 593 F.2d 166, 179-80 (2d Cir. 1979), *cert. denied*, 492 U.S. 941 (1979).

130. *Tamari*, 431 F. Supp. at 1229.

131. 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1973).

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

133. *See id.* at 821-22, 109 Cal. Rptr. at 411-12.

The court then proceeded to state that if the Service Convention was meant to restrict rule 4(i) to a greater extent, the Federal Rules Civil Procedure would have been amended to show this more extensive alteration.[134] Thus, it seems that the *Tamari* court, and at least one commentator,[135] have misconstrued the reasoning of the *Shoei Kako* decision.

In *Harris v. Browning-Ferris Industries Chemical Services, Inc.*,[136] a litigant advanced the theory that the Federal Rules of Civil Procedure should prevail over the Service Convention when the two conflict. The plaintiff argued that the federal rules governed over the Service Convention because the rules were last amended in 1983 long after the enactment of the Service Convention.[137] While it is true that a federal act may validly contradict a prior international treaty,[138] it seems dubious that a mere rule can override an international treaty.[139] The *Harris* court rejected the plaintiff's contention on this ground.[140]

Although the Supreme Court has not considered the conflicts between the Service Convention and the federal rules, the Court did examine a similar problem in *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*.[141] In that decision, the Court examined inconsistencies in the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Evidence Convention)[142] and the federal rules concerning production of documents, interrogatories, and requests for admission.[143] The court's majority opinion, written by Justice Stevens, rejected the argument that the Evidence Convention supercedes those federal rules with regard to discovery methods for "obtaining documents and information located within the territory of a foreign signatory."[144] The Court stated that the language of the

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134. *Id.* at 822-23, 109 Cal. Rptr. at 411-12.

135. Note, *supra* note 34, at 157-59. However, at least one author has criticized this flaw in the rationale of the *Tamari* decision. Note, *supra* note 4, at 507-08.

136. 100 F.R.D. 775 (M.D. La. 1984), *later proceeding on other grounds,* 635 F. Supp. 1202 (M.D. La. 1986), *aff'd*, 806 F.2d 259 (5th Cir. 1986).

137. *Id.* at 777.

138. *See* Horner v. United States, 143 U.S. 570 (1892).

139. *See* Amella v. United States, 732 F.2d 711 (9th Cir. 1984).

140. *Harris*, 100 F.R.D. at 777; *see infra* notes 176-81 and accompanying text.

141. 107 S. Ct. 2542 (1987).

142. *Opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231. The United States and most industrialized countries are signatories to the treaty. 23 U.S.T. at 2576-77, T.I.A.S. No. 7444, 847 U.N.T.S. at 250-51; *see also Societe Nationale*, 107 S. Ct. at 2546 n.l.

143. FED. R. CIV. P. 33-34, 36.

144. *Societe Nationale*, 107 S. Ct. at 2548. The French Government, in an amicus brief to the Court, adopted the position that the Evidence Convention provides the exclu-

Evidence Convention and the historical background which led to its creation supported the conclusion that it was meant only to provide supplementary methods of discovery.[145] As previously discussed, similar arguments have been made with regard to the Service Convention.[146] However, the Court noted that the language of article 1 of the Service Convention was different from the language of the Evidence Convention and seems to mandate the use of methods prescribed in the Service Covention.[147]

In *Societe Nationale*, the Court stated reasons other than the language and historical background that demonstrate why the conclusion that the Evidence Convention provides exclusive methods of discovery was "unacceptable."[148] The Court declared that the supersession theory was offensive because under that theory United States defendants would be subject to more extensive discovery under the federal rules than foreign defendants subject only to the Evidence Convention.[149] Accordingly, this theory would result in an advantage to foreign businesses that do business in the United States over United States domestic businesses because the foreign defendants would have to comply with less extensive discovery obligations.[150]

Proponents of the supplementary view of the Service Convention could adapt the Evidence Convention argument to the service of process controversy. It could be argued that if the Service Convention is accepted as exclusive, similar odious results will occur. The Service Convention would subject domestic businesses and individuals to more methods by which process may be served, and, thus, would be subject to a greater risk of being forced to defend a suit and of having to pay damages. This argument, however, is much weaker with regard to the Service Convention than to the Evidence Convention. While the methods of discovery prescribed by the Evidence Convention conceivably may subject a foreign litigant to less discovery, such a result would be unlikely to occur under the Service Convention. Adoption of the Service Convention as the exclusive method of serving process on a foreign defendant located within a signatory nation would limit the options a United States plaintiff would have to serve process, but it should not prevent such a plaintiff from

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sive methods to be used for such discovery unless the signatory nation where such discovery is to take place chooses otherwise. *Id.* at 2548 n.11.

145. *Id.* at 2550-53.

146. *See supra* notes 106-26 and accompanying text.

147. *Societe Nationale*, 107 S. Ct. at 2550-51 n.15.

148. *Id.* at 2553-54 n.25.

149. *Id.*

150. *Id.*

being able to serve process.

Rule 1 of the Federal Rules of Civil Procedure requires that these rules be interpreted in a manner "to secure the just, speedy, and inexpensive determination of every action."[151] The proponents of the view that the Service Convention is supplementary may argue that this crucial interest requires adoption of their interpretation of the nature of the Service Convention.[152] Two considerations weaken this argument. First, substantial room for debate exists as to whether the procedures outlined by the Service Convention would add significantly to the time or expense incurred by a litigant.[153] Second, rule 1 was last amended in 1966 prior to the enactment of the Service Convention.[154] The Supreme Court has declared that in a situation in which conflict exists, "the last expression of the sovereign . . . must control."[155] Therefore, the Service Convention may be construed as analogous to a treaty that supercedes a prior act of Congress.[156]

Finally, the Service Convention may be overridden by the federal rules simply because the court and the litigants fail to acknowledge the existence of the Service Convention. Though this approach may seem ludicrous, it arguably was adopted by a federal district court in *Hitt v. Nissan Motor Co.*[157] In *Hitt*, the court ruled that service by mail on a Japanese defendant was proper without any analysis or mention of the Service Convention.[158] Obviously, this argument, or lack thereof, is by far the weakest one in support of the view that the Service Convention should only supplement those methods for serving foreign defendants enumerated in rule 4(i).

B. *The Theory that the Service Convention Supercedes Rule 4(i) in Situations in Which the Two Conflict*

The better reasoned view is that the Service Convention supercedes rule 4(i) when process is served on a foreign defendant located within a

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151. FED. R. CIV. P. 1.

152. *See Societe Nationale*, 107 S. Ct. at 2555. The Supreme Court noted Rule 1 of the Federal Rules of Civil Procedure as support for the proposition that the Evidence Convention is supplementary in nature. *Id.*

153. The provisions of the Service Convention requiring the litigant applying for service of documents under its terms to pay costs do not seem likely to be prohibitive to the bringing of a suit. *See* Service Convention, *supra* note 2, art. 12.

154. FED. R. CIV. P. 1.

155. The Chinese Exclusion Case, 130 U.S. 581, 600 (1889).

156. *See* The Cherokee Tobacco Case, 78 U.S. (11 Wall.) 616 (1870).

157. 399 F. Supp. 838 (S.D. Fla. 1975).

158. *Id.* at 840.

signatory nation.[159] A thorough examination of the rationale behind this conclusion is necessary to understand why such a conclusion is correct. The flaws in the underlying foundation of the view that the Service Convention is supplementary may be contrasted with the rationale underlying the supersession view.

The most obvious basis for the view that the Service Convention supercedes rule 4(i) when a conflict arises is the actual language of the Service Convention. Article 1 of the Service Convention states that this treaty is applicable "in all cases"[160] that are within its scope. The Service Convention must supercede rule 4(i) so that all attempts to serve process in suits in United States courts are within the scope of the Service Convention.[161] The Supreme Court seems to find merit in this argument.[162] If the Service Convention is merely supplementary to the federal rules, the Service Convention would not apply to all cases within its scope.

The supersession view is also supported by the fact that it was enacted subsequent to the enactment of rule 4(i).[163] This approach to the supersession issue was adopted by the United States Court of Appeals for the Fourth Circuit in *Vorhees v. Fischer & Krecke.*[164] The *Vorhees* court first determined that the Service Convention is "a self-executing treaty because it establishes affirmative and judicially-enforceable obligations without requiring any implementing legislation."[165] This conclusion seems rational in light of the fact that the Service Convention contains no language which could be construed to require implementing legislation

159. *See, e.g.,* Note, *supra* note 102, at 289-90. This author stated this view at the conclusion of a two paragraph examination of the entire conflict surrounding the Service Convention. The author inadequately described the supersession view as being based on the supremacy clause of the United States Constitution. This description is inadequate because in federal cases the conflict is between a federal rule and a federal convention. *Id.* at 288-89. Many state courts have adopted the supersession view with regard to state rules of civil procedure. *See supra* note 4. For more thorough analyses of these state cases, see Note, *supra* note 4, at 504-07 and Note, *supra* note 34, at 157-58.

160. Service Convention, *supra* note 2, art. 1.

161. *See* Vorhees v. Fischer & Krecke, 697 F.2d 574, 574-75 & n.1 (4th Cir. 1983). The United States Court of Appeals for the Fourth Circuit seems to adopt this reasoning to reach the conclusion that the Service Convention supercedes rule 4(i). *Id.* at 375-76.

162. *See supra* note 145 and accompanying text.

163. Proponents of the supplementation theory have crafted an analogous argument to support their view. *See supra* notes 136-39 and accompanying text.

164. 697 F.2d 574 (4th Cir. 1983). For further discussion of this case, see Note, *supra* note 4, at 508-09.

165. *Voorhees,* 697 F.2d at 575.

in order for the Service Convention to bind a signatory nation.[166] The court went on to note that a self-executing convention has stature equivalent to a Congressional act.[167] Thus, it concluded that because the Service Convention became effective subsequent to rule 4(i), the Service Convention supercedes the federal rule when the two conflict.[168] This argument has been adopted by other federal courts.[169]

This basis for the view that the Service Convention supercedes the federal rules may be undermined if the proposal to amend rule 4(i) is adopted.[170] Obviously, the amendment would damage this argument because the rule would have been amended subsequent to the time the Service Convention entered into force.[171] Also, the proposed amendment would add a clause to the *alternative* service provisions of rule 4(i)(1)[172] that would permit service of process by methods prescribed by any relevant convention or treaty.[173] This proposed amendment could be interpreted as relegating the Service Convention service methods to the status of just another option that a litigant may choose under rule 4(i).[174] It is, however, a questionable premise that a rule may alter a prior international treaty.[175]

Another factor supporting the conclusion that the Service Convention supercedes the federal rules in cases of conflict is the specificity of this treaty. This factor was explored in *Harris v. Browning-Ferris Industries Chemical Services, Inc.*[176] In *Harris*, a federal district court ruled on a West German corporation's motion to dismiss for insufficiency of process in a products liability suit. The process had been served by direct mail, a method to which West Germany had officially objected in the

166. Bishop, *supra* note 29, at 1031-32. The absence of such language is evidence of the drafter's intent that the Service Convention be self-executing. *Id.*

167. *Vorhees*, 697 F.2d at 575-76 (citing Cook v. United States, 288 U.S. 102 (1933); Whitney v. Robertson, 124 U.S. 190 (1888)).

168. *Id.* at 576.

169. Ackerman v. Levine, 788 F.2d 830, 840 (2d Cir. 1986); Pochop v. Toyota Motor Co., 111 F.R.D. 464, 467 (S.D. Miss. 1986).

170. *See supra* notes 54-55 and accompanying text.

171. *See supra* notes 163-69 and accompanying text.

172. *See supra* notes 45-51 and accompanying text.

173. Siegal, *supra* note 43, C4-34, *in* FED. R. CIV. P. 4, at 103 (28 U.S.C.A. West Supp. 1988) (1985 Practice Commentary).

174. *See id.*

175. *See supra* note 139 and accompanying text.

176. 100 F.R.D. 775 (M.D. La. 1984), *later proceedings on other grounds*, 635 F. Supp. 1202 (M.D. La. 1986), *aff'd*, 806 F.2d 259 (5th Cir. 1986); *see supra* note 136 and accompanying text.

manner prescribed by the Service Convention.[177] The *Harris* court noted that rule 4 was drafted as a general guide to cover all instances in which service of process is required.[178] It also stated that the Service Convention was drafted specifically to address the subject of service abroad upon a person or business located within a signatory nation.[179] Thus, the *Harris* court reasonably concluded that the provisions of the Service Convention should control when it conflicts with the federal rules.[180] The court seemed to conclude that this interpretation is necessary to avoid the doctrinal trap previously discussed.[181]

Finally, both the legislative history and practical considerations lend weight to the view that the Service Convention should supercede the federal rules. This view would result in the United States accomplishing its primary objective in entering the Service Convention.[182] It would assure that service made on persons and businesses located within the United States would provide notice in most situations.[183] The supersession view is also more in line with the desire of the signatory nations to promote international judicial cooperation. If the supersession view is adopted, the litigants of signatory nations are bound to follow the methods enumerated in the Service Convention and agreed upon by all other signatory nations. If the supplemental view is adopted, the methods enumerated in the Service Convention are merely tacked on to whatever other methods a litigant is authorized to use under the rules of the nation where the litigation is instituted. This latter result is much less likely to foster a climate of goodwill and cooperation.[184] Also, the supersession view of the Service Convention provides a much stronger incentive for nations that are not presently signatories to enter the Service Convention, and thus promotes international judicial assistance. Potential signatory nations will be more willing to submit to the Service Convention's provisions in exchange for the respect of other signatory nations for their ter-

177. *Harris*, 100 F.R.D. at 776-77.

178. *Id.* at 777-78.

179. *Id.*

180. *Id.* at 778.

181. *Id.*; *see supra* notes 125-27 and accompanying text.

182. *See supra* notes 22-23, 113 and accompanying text. If the supplementary view is adopted, it seems only logical that the litigants of other signatory nations would be free to continue the methods of service that the United States had sought to restrict by means of the Service Convention. *Id.*

183. *Id.*

184. *See* Societe Nationale Industrielle Aerospatiale v. United States District Court for the S. Dist. of Iowa, 107 S. Ct. 2542, 2558-59 (1987) (Blackmun, J., concurring in part and dissenting in part) (analogous argument regarding the Evidence Convention).

ritorial sovereignty in limiting service made within their nation to those methods provided for in the Service Convention.[185] This territorial respect could be the primary impetus for some potential signatories to enter into this international agreement.

The supersession view of the Service Convention is more consistent with the principles of separation of powers embodied in the United States Constitution than is the supplemental view.[186] The Service Convention represents the determinations of the legislative and executive branches of the most efficient balance of United States national interests in the context of the international legal community.[187] The supersession view of the Service Convention forces the judiciary to defer to the judgment of these two branches in the determination of what should be the proper balance of interests with regard to international service of process by implementing the agreement to which the separate branches of government have bound the nation.[188] Aside from the fact that the legislative and executive branches of the federal government are the proper representatives of United States national interests in international contexts, the federal judiciary is poorly suited to balance the factors that are pertinent to this nation's agreement to be bound by the Service Convention.[189]

By allowing federal courts and litigants to simply resort to the familiar federal rules, as the supplemental view of the Service Convention would do, the delicate balance of national and international interests made by the drafters of the Service Convention would give way to the more narrow interests of the litigants involved in the determination of whether service was properly effected.[190] This conclusion seems particularly reasonable in light of the relatively small percentage of the judiciary that is extensively educated in the area of foreign legal systems and their procedures.[191]

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185. *Id.*

186. U.S. CONST. arts. I-III.

187. *See Societe Nationale,* 107 S. Ct. at 2560 (Blackmun, J., concurring in part and dissenting in part).

188. *See id.* The executive branch has the duty to decide the proper national interests to be promoted—and conceded—in the context of international agreements. *See* Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984).

189. *See Societe Nationale,* 107 S.Ct. at 2560-61 (Blackmun, J., concurring in part and dissenting in part).

190. *Id.*

191. *Id.* at 2560.

IV. CONCLUSION

As international litigation continues to occur more frequently for United States courts, litigants, and attorneys, the need for certainty and clarity in the area of the mechanics of service of process becomes increasingly evident. As this examination has revealed, the view that the Service Convention provisions should be the exclusive guides regarding service made on defendants located within signatory nations is far superior to the view that the Service Convention acts as a mere supplement to existing rules on service of process abroad. United States courts would be well advised to closely and carefully examine the difficult questions and important policies involved in the determination of which view will prevail. These courts should consider the long term effects that these decisions will have on not only United States litigants but also on the future evolution of much needed developments in the area of international judicial cooperation. The supersession view of the Service Convention sets out clear guidelines and also fosters the respect of territorial sovereignty necessary to promote an international climate that will nurture further developments in the sphere of international legal disputes. In adopting this position, United States federal courts will be promoting, in the long run, the admirable judicial goal of "the just, speedy, and inexpensive determination of every action."[192]

Armando L. Basarrate, II

192. FED. R. CIV. P. 1.