

CASE COMMENTS

MAILING SERVICE TO JAPAN: DOES ARTICLE 10(a) OF THE HAGUE CONVENTION AUTHORIZE A SEPARATE METHOD?

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

In *Bankston v. Toyota Motor Corp.*,¹ the United States Court of Appeals for the Eighth Circuit determined that Article 10(a) of the Hague Service Convention² does not permit service of process on a Japanese corporation by registered mail.³ Instead, the court held that plaintiffs suing such corporations must effect service pursuant to the cumbersome requirements found elsewhere in the Convention.⁴

1. 889 F.2d 172 (8th Cir. 1989).

2. Convention On The Service Abroad Of Judicial And Extrajudicial Documents In Civil Or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163 [hereinafter *Hague Convention*], reprinted in 28 U.S.C.A. Rule 4, at 138-53 (Supp. 1990). See also *Suzuki Motor Co. v. Superior Court*, 200 Cal. App. 3d 1476, 249 Cal. Rptr. 376 (1988) (*Hague Convention* reprinted in Appendix A). Besides Japan and the United States, other signatories to the Hague Convention include: Antigua and Barbuda, Barbados, Belgium, Botswana, Canada, Czechoslovakia, Denmark, Egypt, Finland, France, Germany, Greece, Israel, Italy, Luxembourg, Malawi, the Netherlands, Norway, Pakistan, Portugal, Seychelles, Spain, Sweden, Turkey, and the United Kingdom. 28 U.S.C.A. Rule 4, at 145 (Supp. 1990).

3. 889 F.2d at 174. The scope of this Case Comment is limited to the question of whether Article 10(a) authorizes service of process by mail. Questions as to the applicability of the Hague Convention itself to specific fact situations are beyond the scope of this Comment. Generally, courts require service pursuant to the mandates of the Convention for defendants residing in a signatory country. See, e.g., *Lyman Steel Corp. v. Ferrostaal Metals Corp.*, 747 F. Supp. 389, 399 (N.D. Ohio 1990) (collecting authority).

Also, this Comment does not discuss the enforceability of American judgments in Japan under Article 10(a). For an in-depth discussion of that issue, compare Fujita, *Service of American Process Upon Japanese Nationals by Registered Airmail and Enforceability of Resulting American Judgments in Japan*, 12 LAW IN JAPAN 69 (1979) (American judgments relying on mailed process unenforceable), with 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) (such judgments are enforceable).

4. The Hague Convention prescribes several methods of achieving service of process: 1) through a Central Authority designated by each party nation; litigants using this method are required to request in writing that the Central Authority serve the attached document, and to provide duplicates of both the request and the document itself; 2) through the sending nation's diplomatic or consular agents; 3) through the judicial officers, officials, or other competent persons of the state of destination; 4) pursuant to any other agreement between the nations involved; or 5) pursuant to the internal law of the receiving state. *Hague Convention*, supra note 2, at 139-41 (Articles 2, 3, 8, 10, 11 & 19 respectively). Before the Eighth Circuit in the *Bankston* case, counsel stated that the cost of effecting service of process pursuant to these provisions is \$800 to \$900 and may include translating the documents into Japanese. 889 F.2d at 174 (Gibson, J., concurring); see *Hague Convention*, supra

Charles Bankston, Sr. and Regina Dixon filed suit against the Toyota Motor Corporation for damages resulting from an accident involving a Toyota truck.⁵ They attempted service of process by serving a United States corporation affiliated with Toyota.⁶ The United States District Court for the Western District of Arkansas denied Toyota's motion to dismiss for improper service of process, but the court quashed the service and allowed the plaintiffs forty-five days to serve Toyota in accordance with the Hague Convention.⁷ The plaintiffs then attempted to serve Toyota by sending a summons and complaint by registered mail, return receipt requested, to its corporate headquarters in Tokyo, Japan.⁸ Toyota renewed its motion to dismiss, arguing that plaintiffs still had not complied with the Hague Convention's requirements.⁹

The district court ruled that Article 10(a) of the Convention does not permit service by mail¹⁰ and once again gave the plaintiffs more time to perfect service.¹¹ The district court subsequently granted plaintiffs' motion to certify the issue for an interlocutory appeal to the Eighth Circuit.¹² The Eighth Circuit affirmed and held: Article 10(a) of the Hague Convention on service does not allow service of process by mail.¹³

The Hague Convention is a multilateral treaty drafted in 1965 "to cre-

note 2, at 139 (Article 5(b)) (the Central Authority may require translation of the document into the official language of the state addressed).

5. 889 F.2d at 172.

6. The plaintiffs alleged that the affiliated corporation, located in Torrence, California, was Toyota's agent. *Id.*

7. *Id.*

8. *Id.* The documents were not translated into Japanese. *Id.* The validity of untranslated service of process under the Hague Convention is beyond the scope of this Case Comment. Article 5 of the Convention provides that "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." *Hague Convention, supra* note 2, at 139. *See also* Fujita, *supra* note 3; Jorden, *supra* note 3.

9. 889 F.2d at 172. For the Hague Convention requirements, see *supra* note 4.

10. *Bankston v. Toyota Motor Corp.*, 123 F.R.D. 595, 597 (W.D. Ark.), *aff'd*, 889 F.2d 172 (8th Cir. 1989).

11. The court gave the plaintiffs sixty days in which to effectuate service upon Toyota in compliance with the Convention. 123 F.R.D. at 599.

12. 889 F.2d at 172-73. A district judge may certify an otherwise unappealable order for immediate review by a court of appeals when he is of the opinion that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal [would] materially advance the ultimate termination of the litigation . . ." 28 U.S.C. § 1292(b) (Supp. 1990). The court of appeals has discretion to accept or deny the issue for immediate appeal. 28 U.S.C. § 1292(b). In *Bankston*, the Eighth Circuit agreed to decide the issue on an interlocutory appeal. 889 F.2d at 173.

13. 889 F.2d at 174. The court remanded the case with directions to give the plaintiffs a reasonable time to effectuate service. *Id.*

ate appropriate means to ensure that judicial and extrajudicial documents . . . served abroad shall be brought to the notice of the addressee in sufficient time."¹⁴ The Convention preempts inconsistent state law methods of service.¹⁵

Article 10(a) of the treaty states that "[p]rovided the State of destination does not object, the present Convention shall not interfere with . . . the freedom to *send* judicial documents, by postal channels, directly to persons abroad."¹⁶ American courts differ on whether the word "send"¹⁷ in Article 10(a) includes service of process, making service of process by mail on Japanese defendants acceptable.¹⁸

14. *Hague Convention*, *supra* note 2, at 138. See also *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698 (1988) (the treaty was intended to provide a simpler way to serve process abroad, to assure actual and timely notice, and to facilitate proof of service).

15. *Volkswagenwerk*, 486 U.S. at 699 (relying on the supremacy clause of the United States Constitution); *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 288-89 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981) (same).

The question whether the Hague Convention preempts the Federal Rules of Civil Procedure, in particular Rule 4(i), is beyond the scope of this Case Comment. See, e.g., *Lyman Steel Corp. v. Ferrostaal Metals Corp.*, 747 F. Supp. 389, 400 (N.D. Ohio 1990) (the two are reconcilable because the Hague Convention is specific and the Federal Rules are general) (citing *Blanco v. United States*, 775 F.2d 53, 61 (2d Cir. 1985)). See also Note, *The Interplay Between Domestic Rules Permitting Service Abroad by Mail and the Hague Convention on Service: Proposing an Amendment to the Federal Rules of Civil Procedure*, 22 CORNELL INT'L L.J. 335, 358-65 (1989) [hereinafter *Proposing an Amendment*] (advocating a requirement that plaintiffs initially attempt to serve via the Hague Convention); Note, *Service of Process Abroad Under the Hague Convention*, 71 MARQ. L. REV. 649, 659-60 (1988) (stating that courts generally hold that the Convention preempts the Federal Rules); Note, *International Service of Process: Reconciling the Federal Rules of Civil Procedure with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 21 VAND. J. TRANSNAT'L L. 1071, 1085-96 (1988) (concluding that the Hague Convention supersedes Rule 4(i)).

16. *Hague Convention*, *supra* note 2, at 140 (emphasis added). Article 10(a) is the single-most litigated provision of the Hague Service Convention. See Note, *Service of Process Abroad Under the Hague Convention*, *supra* note 15, at 676.

17. English and French are the official languages of the Hague Service Convention. *Hague Convention*, *supra* note 2, at 143 (Article 31). In the parallel French text, "'service' is translated as either 'signification' (service by a process server) or 'notification' (service by other means). The word 'send' in Article 10(a), however, is translated merely as 'addresser.'" Peterson, *Jurisdiction and the Japanese Defendant*, 25 SANTA CLARA L. REV. 555, 576 (1985).

18. It is important to note that Japan has objected to sections (b) and (c) of Article 10, but not to section (a). *Bankston*, 889 F.2d at 173. Article 10 provides in full:

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

One line of cases concludes that the word "send" is intended to include service of process.¹⁹ The first court to allow service by mail was the California Court of Appeals in *Shoei Kako Co. v. Superior Court*.²⁰ In *Shoei Kako*, the plaintiff sued a Japanese corporation for injuries he sustained in a motorcycle accident while wearing a helmet manufactured by the defendant.²¹ In rejecting the defendant's contention that service by mail was inadequate, the court held that consideration of the Convention's entire scope minimized the significance of the drafters' frequent references to "service."²² The court, interpreting the record, also noted that Japanese internal law does not proscribe service by mail.²³

Several federal district courts followed *Shoei Kako*²⁴ and in 1986 the Second Circuit, in *Ackermann v. Levine*,²⁵ became the first federal appellate court to do so. In *Ackermann* an American defendant objected to a West German plaintiff's attempt to enforce his German judgment by

documents directly through the judicial officers, officials or other competent persons of the State of destination.

Hague Convention, *supra* note 2, at 140.

19. See *Ackermann v. Levine*, 788 F.2d 830, 839 (2d Cir. 1986) (service mailed from Germany to U.S. citizen); *Coblentz GMC/Freightliner, Inc. v. General Motors Corp.*, 724 F. Supp. 1364, 1372 (M.D. Ala. 1989) (service mailed from U.S. to Swedish corporations); *Meyers v. ASICS Corp.*, 711 F. Supp. 1001, 1007-08 (C.D. Cal. 1989) (service mailed from U.S. to Japanese company); *Hammond v. Honda Motor Co.*, 128 F.R.D. 638, 641 (D.S.C. 1989) (same); *Smith v. Dainichi Kinzoku Kogyo Co.*, 680 F. Supp. 847, 850 (W.D. Tex. 1988) (same); *Newport Components v. NEC Home Elec. (U.S.A.), Inc.*, 671 F. Supp. 1525, 1541-42 (C.D. Cal. 1987) (same); *Lemme v. Wine of Japan Import, Inc.*, 631 F. Supp. 456, 462-64 (E.D.N.Y. 1986) (same); *Zisman v. Sieger*, 106 F.R.D. 194, 199-200 (N.D. Ill. 1985) (same); *Weight v. Kawasaki Heavy Indus.*, 597 F. Supp. 1082, 1085-86 (E.D. Va. 1984) (same); *Chrysler Corp. v. General Motors Corp.*, 589 F. Supp. 1182, 1206 (D.D.C. 1984) (same); *Shoei Kako Co. v. Superior Court*, 33 Cal. App. 3d 808, 822, 109 Cal. Rptr. 402, 412 (Ct. App. 1973) (same); *Nicholson v. Yamaha Motor Co.*, 80 Md. App. 695, 710, 566 A.2d 135, 143 (Ct. Spec. App. 1989), *cert. denied*, 318 Md. 683, 569 A.2d 1242 (1990) (same); *Rissew v. Yamaha Motor Co.*, 129 A.D.2d 94, 98, 515 N.Y.S.2d 352, 355 (App. Div. 1987) (same); *Sandoval v. Honda Motor Co.*, 364 Pa. Super. 136, 140, 527 A.2d 564, 566 (Super. Ct. 1987) (same).

20. 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (Ct. App. 1973).

21. 33 Cal. App. 3d at 810, 109 Cal. Rptr. at 403.

22. 33 Cal. App. 3d at 821, 109 Cal. Rptr. at 411. See *infra* note 33. The court asserted that Article 10(a) would be superfluous if the word "send" did not include service of process because the mails are open to all anyway. *Id.* This argument, however, ignores the entire context of Article 10, which preserves a right with which "the present Convention shall not interfere . . .," and thus could logically refer to a device open to all before the Convention. *Hague Convention*, *supra* note 2, at 140.

23. 33 Cal. App. 3d at 822, 109 Cal. Rptr. at 412. The record was clearly incorrect. See *infra* notes 43-45 and accompanying text.

24. See, e.g., *Smith*, 680 F. Supp. at 850 (interpreting the word "send" so as not to include service is a "hyper-technical" interpretation); *Zisman*, 106 F.R.D. at 199 (because Japan has not objected to Article 10(a), service by mail is proper). See also *Weight*, 597 F. Supp. at 1085-86; *Chrysler Corp.*, 589 F. Supp. at 1206.

25. 788 F.2d 830 (2d Cir. 1986).

serving process through the mail.²⁶ The Second Circuit held that service by mail satisfies the Hague Convention's service of process requirements.²⁷ The court determined that the term "service" in Article 10(c) did not limit the meaning of "send" in Article 10(a); the court attributed the ambiguity to careless drafting.²⁸ *Ackermann* remains the leading case for the proposition that service by mail is valid under Article 10(a).

A second line of cases holds that Article 10(a) does not authorize service of process by mail.²⁹ Under this view Article 10(a) merely allows parties to mail litigation related documents³⁰ after achieving proper service pursuant to the Convention.³¹ Generally regarded as the minority view,³² these courts point to the Convention's frequent use of the term "service,"³³ and conclude that if the drafters intended Article 10(a) to

26. The Second Circuit determined that service by mail to the United States was proper under Article 10(a) and that the German default judgment was enforceable in this country. *Id.* at 838-41. The United States, like Japan, has not objected to Article 10(a). Therefore, the *Ackermann* decision is relevant to the issue of whether service by mail to a Japanese defendant is valid under Article 10(a).

27. *Id.* at 838.

28. *Id.* at 839 (citing B. RISTAU, 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 § 4-28, at 165-67 (1984) [hereinafter PRACTICAL HANDBOOK]).

29. See *Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 174 (8th Cir. 1989) (service mailed from U.S. to Japanese corporation); *Wasden v. Yamaha Motor Co.*, 131 F.R.D. 206, 209-10 (M.D. Fla. 1990) (same); *McClenon v. Nissan Motor Corp. in U.S.A.*, 726 F. Supp. 822, 826 (N.D. Fla. 1989) (same); *Hantover, Inc. v. Omet, S.N.C. of Volentieri & C.*, 688 F. Supp. 1377, 1385 (W.D. Mo. 1988) (service mailed from U.S. to Italian partnership); *Prost v. Honda Motor Co.*, 122 F.R.D. 215, 216-17 (E.D. Mo. 1987) (service mailed from U.S. to Japanese manufacturer); *Cooper v. Makita, U.S.A., Inc.*, 117 F.R.D. 16, 17 (D. Me. 1987) (same); *Pochop v. Toyota Motor Co.*, 111 F.R.D. 464, 466 (S.D. Miss. 1986) (same); *Mommsen v. Toro Co.*, 108 F.R.D. 444, 446 (S.D. Iowa 1985) (same); *Suzuki Motor Co. v. Superior Court*, 200 Cal. App. 3d 1476, 1484, 249 Cal. Rptr. 376, 381 (Ct. App. 1988) (same); *Reynolds v. Koh*, 109 A.D.2d 97, 99, 490 N.Y.S.2d 295, 297 (App. Div. 1985) (same); *Ormandy v. Lynn*, 122 Misc. 2d 954, 472 N.Y.S.2d 274 (Sup. Ct. 1984) (same).

30. These include notices and legal documents that need not be "served" in the legal sense. See *Reynolds*, 109 A.D.2d at 99, 490 N.Y.S.2d at 297-98 (notices and legal documents need not be "served" in the legal sense); *McClenon*, 726 F. Supp. at 826 ("judicial documents" include orders, notices, motions, and all other litigation-related documents).

31. See *supra* note 4.

32. See *Hammond v. Honda Motor Co.*, 128 F.R.D. 638, 641 (D.S.C. 1989) (the majority of courts conclude that service by mail is permitted); *Meyers v. ASICS Corp.*, 711 F. Supp. 1001, 1007 (C.D. Cal. 1989) (the weight of federal and state authority supports service by mail). *But see Vasquez, International Decisions*, 82 AM. J. INT'L. L. 816, 819 (1988) (most courts find that Article 10(a) does not provide for service by mail). In fact, the cases are nearly equal in number on both sides. See *supra* notes 19, 29.

33. See *Shoei Kako*, 33 Cal. App. 3d at 821, 109 Cal. Rptr. at 411 (quoting *Hague Convention, supra* note 2, at Article 1 ("service abroad"); Article 2 ("requests for service"); Article 3 ("document

include service, they would have so specified.³⁴ Additionally, these courts contend that allowing service by mail under Article 10(a) would vitiate the Convention's goal of formalizing service of process.³⁵

In *Bankston v. Toyota Motor Corp.*³⁶ the Eighth Circuit followed the second line of cases and held that Article 10(a) does not authorize service of process by mail. The court relied primarily on three arguments. First, the court applied the rule of statutory construction³⁷ that a statute's language is ordinarily conclusive.³⁸ The court held that authorization of service by mail is beyond the plain meaning of the word "send"³⁹ and thus inconsistent with this rule of statutory construction.⁴⁰ Additionally, the court pointed out that when particular language is included in one section of a statute and omitted in another, a presumption arises that the omission is purposeful.⁴¹ Therefore, because no evidence rebutted this presumption, the Eighth Circuit rejected the argument that a drafting error accounts for Article 10(a)'s use of the term "send."⁴²

Second, the court determined that internal Japanese law does not per-

to be served"); Article 5 ("serve the document"); Article 6 ("the document has been served"); Article 8 ("effect service of judicial documents"); Article 9 ("forward documents, for the purpose of service"); Article 10(b) ("effect service of judicial documents"); Article 10(c) (same); Article 11 ("service of judicial documents"); Article 12 (same); Article 13 ("request for service"); Article 14 ("transmission of judicial documents for service"); Article 15 ("transmitted abroad for the purpose of service"); and Article 16 (same)).

34. See, e.g., *McClenon v. Nissan Motor Corp. in U.S.A.*, 726 F. Supp. 822, 826 (N.D. Fla. 1989); *Mommsen v. Toro Co.*, 108 F.R.D. 444, 446 (S.D. Iowa 1985).

35. See *Mommsen*, 108 F.R.D. at 446 (direct mail service of process is at odds with the other methods of service permitted by the Convention); *Suzuki Motor Co.*, 200 Cal. App. 3d at 1483, 249 Cal. Rptr. at 380-81 (it makes no sense to allow litigants to bypass the methods of service agreed upon in the Convention); *Ormandy v. Lynn*, 122 Misc. 2d 954, 472 N.Y.S.2d 274, 275 (Sup. Ct. 1984) (allowing service by mail is inconsistent with the intent to establish more formal modes of service).

36. 889 F.2d 172 (8th Cir. 1989).

37. General rules of statutory construction apply to treaties. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 262 (1984) (Stevens, J., dissenting) (citing *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 240-41 (1796) (Chase, J.)).

38. The court stated that "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." 889 F.2d at 174 (quoting *Consumer Prods. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

39. 889 F.2d at 173-74. In *Suzuki Motor Co.*, 200 Cal. App. 3d at 1481, 249 Cal. Rptr. at 379, the court defined "to send" as "'to cause to be conveyed by an intermediary to a destination' or 'to dispatch, as by mail or telegraph.'" (quoting *AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 1179 (1969)).

40. 889 F.2d at 174. See also *Mommsen v. Toro Co.*, 108 F.R.D. 444, 446 (S.D. Iowa 1985).

41. 889 F.2d at 174 (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

42. 889 F.2d at 174. See also *Suzuki Motor Co. v. Superior Court*, 200 Cal. App. 3d 1476,

mit service of process by direct mail,⁴³ contrary to the finding in *Shoei Kako Co. v. Superior Court*.⁴⁴ The Eighth Circuit concluded that Japan would not authorize a method of service for foreigners unavailable to domestic plaintiffs.⁴⁵

Finally, the court pointed to Japan's objections to sections (b) and (c) of Article 10.⁴⁶ The Eighth Circuit found it unlikely that the Japanese would object to the formal methods of service prescribed in those sections,⁴⁷ but consent to a more informal method, service by mail, in section 10(a).⁴⁸

Circuit Judge Gibson, in a concurring opinion,⁴⁹ agreed with the court's interpretation of the Hague Convention, but expressed concerns over the practical effects of such an interpretation, particularly as applied to products liability actions.⁵⁰ Judge Gibson hinted that amending the

1481, 249 Cal. Rptr. 376, 379 (Ct. App. 1988) (the use of the phrases "to send" and "to serve" indicates that the drafters intended each phrase to have a separate meaning and function).

43. 889 F.2d at 174. On the contrary, "service of process in Japan, as in most civil law countries, is an official function to be performed by the court." See Kim & Sisneros, *Comparative Overview of Service of Process: United States, Japan, and Attempts at International Unity*, 23 VAND. J. TRANSNAT'L. L. 299, 306 (1990). Service by mail is only allowed if service by delivery, substitute service, and service by leaving the document all fail. *Id.* at 307 n.62. In fact, the requirement that a Japanese court authorize service is the one common thread found in all Japanese service of process rules. *Id.* at 309.

44. 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (Ct. App. 1973).

45. 889 F.2d at 174 (citing *Suzuki Motor Co.*, 200 Cal. App. 3d at 1481, 249 Cal. Rptr. at 379). In *Suzuki Motor Co.*, the court found:

Japan, unlike California, does not allow either attorneys or lay people to secure process by mail. To effectuate service of process through the mail, *the court clerk* stamps the outside of the envelope containing the required documents with a notice of special service ("tokubetsu sootatsu") and the mail carrier acts as a *special officer of the court* by recording proof of delivery on a special proof of service form and returning this proof of service to the court.

Suzuki Motor Co., 200 Cal. App. 3d at 1481, 249 Cal. Rptr. at 379 (emphasis in original).

46. 889 F.2d at 174.

47. *Id.* See *supra* note 18 for text of *Hague Convention* sections 10(b) and 10(c).

48. 889 F.2d at 174. See also *McClenon v. Nissan Motor Corp.* in U.S.A., 726 F. Supp. 822, 825 (N.D. Fla. 1989) (citing *Bankston*, 123 F.R.D. at 598); *Suzuki Motor Co. v. Superior Court*, 200 Cal. App. 3d 1476, 1481, 249 Cal. Rptr. 376, 379 (Ct. App. 1988) (consent to service by mail unlikely in light of objection to formal methods of service contained in Article 10(b) and (c)). *But see* *Lemme v. Wine of Japan Import, Inc.*, 631 F. Supp. 456, 464 (E.D.N.Y. 1986) ("Japan may have rejected section 10(b) and 10(c) because it is more concerned with who is arriving on the doorstep of its citizen to serve process than with how that process is served."). In 1989, Japan issued an ambiguous statement regarding its failure to object to Article 10(a). See *infra* notes 58-60 and accompanying text.

49. 889 F.2d at 174 (Gibson, J., concurring).

50. *Id.* Judge John R. Gibson queried whether a manufacturer is now required to inform a purchaser that, should litigation arise, service must be made pursuant to the Hague Convention and,

Convention may be necessary if the cost of complying with the Convention's processes proves prohibitive to plaintiffs in personal injury cases.⁵¹

The Eighth Circuit reached the correct result in *Bankston*. Although service by mail gave the defendant notice, it did not comport with the Hague Convention's plain language. The assertion that Article 10(a)'s use of the word "send" is the product of drafting error⁵² stretches credulity. Chief Justice Marshall wrote that "[t]reaties are formed upon deliberate reflection. Diplomatic men . . . cannot be supposed either to omit or insert an article . . . Neither the one nor the other is to be ascribed to inattention."⁵³ The Supreme Court has repeatedly mandated a strong presumption in favor of following the plain meaning of a treaty.⁵⁴ To ascribe the use of the term "send" to poor draftsmanship without more proof is to ignore this precedent.

Moreover, the contention that the drafters intended "send" in Article 10(a) to include service of process "simply doesn't make sense."⁵⁵ It strains plausibility to assert that the word "send" means service when the drafters carefully used the word "service" in so many other provisions.⁵⁶ A far more plausible interpretation is that Article 10(a) allows parties to use the mails to "send" subsequent documents after process is served and Articles 10(b) and (c) preserve the more formal rules for service of process.⁵⁷

The Japanese themselves have provided little guidance in interpreting

if so, whether the purchaser must be informed of the cost of such process (approximately \$800 to \$900). *Id.*

51. *Id.*

52. See *supra* note 28 and accompanying text.

53. See *Bankston v. Toyota Motor Corp.*, 123 F.R.D. 595, 597-98 (W.D. Ark.), *aff'd*, 889 F.2d 172 (8th Cir. 1989) (quoting *The Nereide*, 13 U.S. (9 Cranch) 388, 419 (1815)).

54. See, e.g., *United States v. Stuart*, 489 U.S. 353 (1989) (Scalia, J., concurring) (a treaty's language is the best evidence of its purpose and the parties' intent); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 262 (1984) (Stevens, J., dissenting) ("there is a strong presumption that the literal meaning is the true one"); *Rocca v. Thompson*, 223 U.S. 317, 331-32 (1912) ("treaties are the subject of careful consideration before they are entered into and are drawn by persons competent to express their meaning").

55. *Suzuki Motor Co. v. Superior Court*, 200 Cal. App. 3d 1476, 1482, 249 Cal. Rptr. 376, 380 (Ct. App. 1988).

56. See *supra* note 33 and accompanying text.

57. See *Peterson*, *supra* note 17, at 576-77; E. Routh, *infra* note 61, at 190-91 (allowing parties to circumvent the Hague Convention's procedures by simply sending something through the mail renders the vast bulk of the Convention useless). See also *supra* note 30. It is also worth noting that in Japan the Minister of Foreign Affairs is the "Central Authority" responsible for service of process. *Reynolds v. Koh*, 109 A.D.2d 97, 490 N.Y.S. 295, 298 (App. Div. 1985) (citing *Hague Convention* Article 5). In *Reynolds*, the court stated that allowing service by mail under Article 10(a) would

Article 10(a). The Japanese delegation abstained from voting on or participating in the debate regarding the inclusion of Article 10 in the Convention.⁵⁸ At a special meeting of the members of the Convention in April, 1989, however, the Japanese government issued a statement regarding Article 10(a).⁵⁹ This statement did nothing to defray the ambiguity, though it did convince one court that because Japan had an opportunity to reject service by mail expressly, yet failed to do so, mail service should be allowed.⁶⁰ This conclusion is suspect, however, because Japan's highly ambiguous statement did not expressly endorse service by mail.

The *Bankston* decision continues the trend toward correctly construing Article 10(a).⁶¹ As international litigation becomes more common,⁶² disputes about the construction of the Hague Convention on Service of

limit the role of this official in a manner contrary to the import of the Convention. *Reynolds*, 490 N.Y.S. at 298.

58. Jorden, *supra* note 3, at 75. Jorden claims that because of the vigorous opposition of the Federal Republic of Germany to the inclusion of Article 10, that nation, and by implication, the others, understood Article 10(a) to refer to service of process. *Id.* West Germany eventually objected to Article 10 entirely. See *Lyman Steel Corp. v. Ferrostaal Metals Corp.*, 747 F. Supp. 389, 400 (N.D. Ohio 1990) (West Germany specifically rejected the provisions of Article 10); Legal Development, *An Interpretation of Article 10(a) of the Hague Service Convention: Does "Send" Mean "Serve"?*, 53 ALB. L. REV. 877, 884 (1989) (German version of the Convention criticizes the United States' use of Article 10(a) to effect service directly through the mail).

59. The Japanese government stated:

Japan has not declared that it objects to the sending of judicial documents, by postal channels, directly to persons abroad. In this connection, Japan . . . has made it clear that no objection to the use of postal channels for sending judicial documents to persons in Japan does not necessarily imply that the sending by such a method is considered valid service in Japan; it merely indicates that Japan does not consider it as infringement of its sovereign power.

See *Reisenfeld*, *infra* note 61, at 72 n.89. See also *Nicholson v. Yamaha Motor Co.*, 80 Md. App. 695, 566 A.2d 135, 142 (Ct. Spec. App. 1989), *cert. denied*, 318 Md. 683, 569 A.2d 1242 (1990) (neither gave a citation, but the court noted that the statement would be included in future editions of the PRACTICAL HANDBOOK, *supra* note 28).

60. *Nicholson v. Yamaha Motor Co.*, 80 Md. App. 695, 710, 566 A.2d 135, 143 (Ct. Spec. App. 1989), *cert. denied*, 318 Md. 683, 569 A.2d 1242 (1990).

61. Several commentators support the *Bankston* rule. See *Kim and Sisneros*, *supra* note 43, at 321; *Peterson*, *supra* note 17, at 576-79; E. ROUTH, *Litigation Between Japanese and American Parties*, in CURRENT LEGAL ASPECTS OF DOING BUSINESS IN JAPAN AND EAST ASIA 188, 190-91 (J. Haley ed. 1978); *Vazquez*, *supra* note 32, at 819; *Service of Process Abroad: A Nuts and Bolts Guide*, 122 F.R.D. 63, 79-80 (1987). *But see* *Bishop*, *Service of Process and Discovery in International Tort Litigation*, 23 TORT & INS. L.J. 70, 77 (1987); *Fujita*, *supra* note 3; *Herzog*, *Conflict of Laws*, 36 SYRACUSE L. REV. 119, 140 (1985); *Jorden*, *supra* note 3; *Reisenfeld*, *Service of Process Abroad: A Practical Guide to Service Under the Hague Service Convention and the Federal Rules of Civil Procedure*, 24 INT'L LAW. 55, 71-72 (1990); *Proposing an Amendment*, *supra* note 15, at 343; *Note*, *Service of Process Abroad Under the Hague Convention*, *supra* note 15, at 677-79; *Note*, *International*

Process will continue to arise. The existing disagreement among the circuit courts allows district courts to disregard the suspect logic of *Ackermann*. Generally, federal courts allow plaintiffs to perfect inadequate attempts at service of process,⁶³ thus making the importance of this dispute questionable. Nevertheless, it remains an unresolved legal issue affecting many parties to international litigation.⁶⁴ The Eighth Circuit's decision in *Bankston* provides the basis for a higher court's endorsement of the logical view.

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Service of Process: A Guide to Serving Process Abroad Under the Hague Convention, 39 OKLA. L. REV. 287, 294-95 (1986).

One commentator, though finding that Article 10(a) does support service by mail, admonishes practitioners that mail service should be avoided, due to the uncertainty of its validity and the cost of litigation on the issue. Reisenfeld, *supra*, at 64-65.

62. See Reisenfeld, *supra* note 61, at 55 ("Due to the explosive growth of foreign investment and trade in the United States, American litigators are increasingly encountering situations where they are required or desire to join a foreign individual or corporation in a lawsuit in U.S. courts"); Note, *International Service of Process: A Guide to Serving Process Abroad Under the Hague Convention*, 39 OKLA. L. REV. 287 (1986) (civil litigation with international elements is rapidly increasing).

63. Every federal court holding that service by mail is invalid under Article 10(a) has allowed the plaintiff an opportunity to perfect service. See *Bankston*, 889 F.2d at 174; *Wasden v. Yamaha Motor Co.*, 131 F.R.D. 206, 210 (M.D. Fla. 1990); *McClenon v. Nissan Motor Corp. in U.S.A.*, 726 F. Supp. 822, 827 (N.D. Fla. 1989); *Hantover, Inc. v. Omet, S.N.C. of Volentieri & C.*, 688 F. Supp. 1377, 1385 (W.D. Mo. 1988); *Prost v. Honda Motor Co.*, 122 F.R.D. 215, 217 (E.D. Mo. 1987); *Cooper v. Makita, U.S.A., Inc.*, 117 F.R.D. 16, 18 (D. Me. 1987); *Pochop v. Toyota Motor Co.*, 111 F.R.D. 464, 467 (S.D. Miss. 1986); *Mommsen v. Toro Co.*, 108 F.R.D. 444, 446 (S.D. Iowa 1985).

These cases are consistent with the general federal rule that a court will not dismiss a suit for ineffective service of process. See *Vorhees v. Fischer & Krecke*, 697 F.2d 574, 576 (4th Cir. 1983) (collecting cases). Defendants probably raise the issue merely to gain extra time or, perhaps, to induce settlements. Therefore, the importance of an ultimate resolution to the meaning of Article 10(a) is of limited import.

64. In many states invalid service of process does result in dismissal of the case. See, e.g., *Reynolds v. Koh*, 109 A.D.2d 97, 490 N.Y.S.2d 295, 298 (App. Div. 1985). Indeed, if the statute of limitations has run, dismissal may result in complete loss of the right to pursue the cause of action. See *Rissew v. Yamaha Motor Co.*, 129 Misc. 2d 317, 320, 493 N.Y.S.2d 78, 81 (Sup. Ct. 1985), *modified on other grounds*, 129 A.D.2d 94, 515 N.Y.S.2d 352 (1987); *Service of Process Abroad: A Nuts and Bolts Guide*, *supra* note 61, at 76.