

1-1-1983

# An Interpretation of the Hague Convention on the Service Abroad of Judicial Extrajudicial Documents Concerning Personal Service in Japan

Robert M. Hamilton

---

## Recommended Citation

Robert M. Hamilton, *An Interpretation of the Hague Convention on the Service Abroad of Judicial Extrajudicial Documents Concerning Personal Service in Japan*, 6 Loy. L.A. Int'l & Comp. L. Rev. 143 (1983).

Available at: <http://digitalcommons.lmu.edu/ilr/vol6/iss1/7>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

# An Interpretation of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents Concerning Personal Service in Japan

## I. INTRODUCTION

Japanese imports constitute a large part of the total merchandise imported by the United States.<sup>1</sup> Commercial litigation between Japanese defendants and American plaintiffs, therefore, is inevitable and has increased proportionately with the increase in Japanese imports. Because service of process is an integral part of the American civil litigation system, it is important to develop an effective method to serve a Japanese defendant.

This comment explores the applicability of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters<sup>2</sup> (Hague Convention) to the domestic laws of Japan and the United States. Both federal and state laws related to service of process abroad will be analyzed. However, since California is the only state which has interpreted the Convention, only the law of California will be considered.<sup>3</sup>

---

1. In 1980, the United States imported \$30.7 billion worth of merchandise from Japan, constituting 12.75% of total U.S. imports. This amount was second only to Canada, which provided imports of \$41.5 billion. See U.S. Bureau of the Census, *Statistical Abstract of the United States: 1981* at 846, 848 (102d ed. 1981). See also *Report of the Senate Comm. on Foreign Relations on the Convention on the Service Abroad of Judicial and Extrajudicial Documents*, S. EXEC. REP. No. 6, 90th Cong., 1st Sess. (Apr. 12, 1967) [hereinafter cited as SENATE EXECUTIVE REPORT], which indicates the timeliness of the Convention on the Service Abroad of Judicial and Extrajudicial Documents, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 [hereinafter cited as the Hague Convention], "[g]iven the continually increasing volume of American travel abroad, especially in Europe, of international business transactions [and] of U.S. investment abroad . . ." *Id.* at 6.

2. The Hague Convention, 20 U.S.T. at 361. For a general overview of the Convention. see Graveson, *The Tenth Session of the Hague Conference of Private International Law*, 14 INT'L & COMP. L.Q. 528, 538-41 (1965).

3. Since the requirements of personal jurisdiction are presumed satisfied, issues of personal jurisdiction are beyond the scope of this comment. This is not an unreasonable presumption since the typical situation where jurisdiction exists is when a Japanese defendant causes a product to be put into the stream of commerce which is foreseeably imported by an American company, causing injury in the United States. The difficulty lies in attempting to serve the Japanese defendant. See *Shoei Kako Co. v. Superior Court*, 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1973).

## II. UNITED STATES LAW CONCERNING SERVICE OF PROCESS

The general requirements of service of process in the United States were set forth by the United States Supreme Court in *Milliken v. Meyer*:<sup>4</sup>

[Adequate service,] so far as due process is concerned, is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice . . . implicit in due process are satisfied.<sup>5</sup>

The *Milliken* requirements of service of process appear to be applicable to service of process abroad. More importantly, however, the purposes behind the *Milliken* requirements appear to have been incorporated into the Hague Convention. For example, the treaty states that it is designed to "ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressees in sufficient time"<sup>6</sup> and to "improve the organization of mutual judicial assistance for that purpose by simplifying and expediting the procedure . . . ."<sup>7</sup>

The Hague Convention appears to be controlling on issues of service of process abroad. However, the requirements of service of process and the rationale behind those requirements as stated by *Milliken* and applied to service of process abroad have been codified in federal and state statutes. Hence, whether courts must follow the Hague Convention or domestic law is an important issue.

4. 311 U.S. 457 (1940).

5. *Id.* at 463.

6. The Hague Convention, 20 U.S.T. at 362.

7. *Id.* SENATE EXECUTIVE REPORT, *supra* note 1, at 1. Other purposes of the Convention are set forth in the Report. For example:

1. "This convention is an important step toward the international codification of a uniform law governing the service of judicial and extrajudicial documents abroad." *Id.* at 3.

2. "[It] provides a high degree of assurance that if an American citizen in the United States is sued in the courts of a state party to this treaty, he will be notified of the suit in sufficient time to enable him to defend the action." *Id.* at 6 (statement of Richard Kearney).

3. "[It] gives to our people, whether litigating rights in State or Federal courts, a very useful tool in furthering a fair determination of their rights, where nationals of other contracting countries are involved, that would otherwise not be available to them." *Id.* at 9 (statement of Joe Barrett).

The answer is provided in the United States Constitution. The supremacy clause of the Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all *Treaties* made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>8</sup>

Because "[a] convention enjoys the status of a treaty as the 'supreme Law of the Land,'"<sup>9</sup> the Hague Convention has the same force and effect as a treaty under the supremacy clause, and would supersede any domestic laws concerning service of process abroad.

### III. THE REQUIREMENTS OF THE HAGUE CONVENTION

The Hague Convention became effective in the United States on February 10, 1969,<sup>10</sup> and Japan adopted the Convention on July 27, 1970.<sup>11</sup> Because Japan and the United States have not denounced the Convention since its inception, it is automatically renewed every five years.<sup>12</sup>

The Convention applies to all civil or commercial cases where judicial or extrajudicial "documents" are required to be transmitted for service abroad. For purposes of the Convention, the word "documents" does not denote "private documents of private individuals."<sup>13</sup> "Documents" are those items "emanating from authorities and judicial officers of a state . . . . In U.S. practice, . . . it is intended to include the official documents of administrative agencies and commissions."<sup>14</sup>

8. U.S. CONST. art. VI, cl. 2 (emphasis added).

9. *Richardson v. Volkswagenwerk, A.G.*, 552 F. Supp. 73, 78-79 (W.D. Mo. 1982) (citing *American Trust Co. v. Smyth*, 247 F.2d 149, 153 (9th Cir. 1957)).

10. The Hague Convention, 20 U.S.T. at 361.

11. *Shoei*, 33 Cal. App. 3d at 819, 109 Cal. Rptr. at 410.

12. The Convention provides in pertinent part:

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of article 27, even for States which have ratified it or acceded to it subsequently. If there has been no denunciation, it shall be renewed tacitly every five years.

The Hague Convention art. 30, 20 U.S.T. at 367.

13. SENATE EXECUTIVE REPORT, *supra* note 1, at 14 (statement of Philip Amram).

14. *Id.* One commentator has also indicated that "the Convention does not intend to effect [sic] the present system of letters rogatory." 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, 131 (1969) (footnote omitted). See also *infra* notes 105-09 and accompanying text.

The Convention also requires that the address of the party being served be known.<sup>15</sup> Consequently, in a commercial case, for a Japanese defendant to be served, his address must be known by the American plaintiff. Where the address of the defendant is unknown, the Convention does not apply, and apparently other methods such as service by publication may be utilized.

### A. *Methods of Serving Documents*

A Japanese defendant may be served in various ways under the Convention. Article 2 provides that each contracting state shall designate a central authority which will receive requests for service from other contracting states.<sup>16</sup> Japan has designated the Minister of Foreign Affairs as its central authority and the United States has designated the Departments of State and Justice as its central authorities.<sup>17</sup> Under article 5(a), the central authority is to use the method, of service which is normally used in that State for service of documents in domestic actions against its own citizens.<sup>18</sup> Because all of the members of the Hague Convention have methods of service of process which comply with the *Milliken* requirements of due process,<sup>19</sup> the central authority usually serves documents pursuant to article 5(a).

If there is any doubt, however, that the method of service may not comply with due process, article 5(b) allows the applicant to request a special method of service, provided that it is not incompatible with the laws of the requesting State.<sup>20</sup> Thus, a United States applicant may demand that the defendant be personally served, or served through an adult member of his family or through the person who is in charge of his business.<sup>21</sup> It is unlikely that such conventional methods which satisfy the *Milliken* requirements of due process would be incompatible with local law,<sup>22</sup> and hence, would qualify as a proper

---

15. The Hague Convention art. 1, 20 U.S.T. at 362.

16. *Id.* art. 2, 20 U.S.T. at 362. It should be noted that the central authority is utilized to effectuate service only, and should not concern itself with the merits of the litigation. SENATE EXECUTIVE REPORT, *supra* note 1, at 13 (statement of Philip Amram).

17. SENATE EXECUTIVE REPORT, *supra* note 1, at 13 (statement of Philip Amram); see *infra* note 49 and accompanying text.

18. The Hague Convention art. 5(a), 20 U.S.T. at 362; see SENATE EXECUTIVE REPORT, *supra* note 1, at 13-14 (statement of Philip Amram).

19. SENATE EXECUTIVE REPORT, *supra* note 1, at 14 (statement of Philip Amram).

20. The Hague Convention art. 5(b), 20 U.S.T. at 362.

21. SENATE EXECUTIVE REPORT, *supra* note 1, at 14 (statement of Philip Amram).

22. *Id.*

method of service under article 5(b).

The request by the applicant to the central authority for a special method of service must be made by using the special forms annexed to the Convention.<sup>23</sup> These forms require, inter alia, that the applicant must furnish in duplicate the address of the party to be served, the method of service requested under article 5, the nature and purpose of the documents, the date, and the signature of the applicant.<sup>24</sup>

The central authority may decline the request for service, but may only do so on the following grounds: (1) the request does not comply with the provisions of the Convention (e.g., the document is not properly translated or the judicial forms are improperly filled out)<sup>25</sup> or (2) compliance with the request would infringe upon the contracting state's sovereignty or security.<sup>26</sup> If the central authority declines the request, it must promptly inform the applicant and state the reasons for its objections.<sup>27</sup> Questions concerning these objections may then be raised during diplomatic negotiations.<sup>28</sup>

When a request is accepted by an applicant, the central authority must fill out the special certificate which is annexed to the Convention.<sup>29</sup> If service of process is completed, the central authority must list the particulars of service, e.g., the method, place, date of service, and the person to whom the document was delivered, on the certificate.<sup>30</sup> If service is not made, however, the central authority must indicate in the certificate the reasons for failing to complete service.<sup>31</sup> The certificate is to be countersigned by the central authority, or by a judicial authority, and forwarded directly to the applicant.<sup>32</sup>

Use of the central authority is not obligatory,<sup>33</sup> and several other

---

23. The Hague Convention art. 3, 20 U.S.T. at 362. The judicial forms are reprinted at pages 81-82 of the 1983 Supplement to the Notes of the Advisory Committee for Rule 4 of the Federal Rules of Civil Procedure [hereinafter cited as Rule 4 Advisory Committee Notes].

24. Rule 4 Advisory Committee Notes, *supra* note 23, at 81-82.

25. The Hague Convention art. 5, 20 U.S.T. at 363.

26. *Id.* art. 13, 20 U.S.T. at 364. See SENATE EXECUTIVE REPORT, *supra* note 1, at 13 (statement of Philip Amram).

27. *Id.* art. 4, 20 U.S.T. at 362.

28. *Id.* art. 14, 20 U.S.T. at 364. See SENATE EXECUTIVE REPORT, *supra* note 1, at 13 (statement of Philip Amram).

29. The Hague Convention art. 6, 20 U.S.T. at 363. See Rule 4 Advisory Committee Notes, *supra* note 23, at 82.

30. Rule 4 Advisory Committee Notes, *supra* note 23, at 82.

31. *Id.*

32. The Hague Convention art. 6, 20 U.S.T. at 363.

33. SENATE EXECUTIVE REPORT, *supra* note 1, at 13 (statement of Philip Amram).

alternatives may be used under the Convention to effect service of process. The central authority, however, may be thought of as a safety valve, since it may always effect service if any of the aforementioned alternatives fail.<sup>34</sup> Documents may be served through diplomatic or consular channels,<sup>35</sup> by direct mail,<sup>36</sup> through judicial officers or other competent members of the State of destination,<sup>37</sup> or by any other means authorized by the domestic law of the state of destination.<sup>38</sup>

### B. Language Requirement

The Hague Convention contains language requirements for documents presented to be served. Article 7 indicates that the documents may be translated in English, French, or in the official language of the State in which the documents originate.<sup>39</sup> Article 5, however, requires that if the documents are served through the central authority, they may be required to be translated into the official language of the State of destination.<sup>40</sup>

### C. Default Judgments

Prior to the Hague Convention, notification *au parquet* systems existed in many foreign countries.<sup>41</sup> Under such systems, a foreign plaintiff would serve the summons and complaint on a local foreign official.<sup>42</sup> The time for the domestic defendant to answer would then begin to run immediately after the local foreign official was served.<sup>43</sup> The local official was then supposed to notify the defendant, but failure to do so would have no effect on the validity of service. Thus, a default judgment could be entered against the defendant without affording the defendant adequate notice.<sup>44</sup>

Article 15, however, prevents this problem by requiring the plain-

---

34. *Id.*

35. The Hague Convention art. 8, 20 U.S.T. at 363.

36. *Id.* art. 10(a), 20 U.S.T. at 363.

37. *Id.* art. 10(b), 20 U.S.T. at 363.

38. *Id.* art. 19, 20 U.S.T. at 365.

39. *Id.* art. 7, 20 U.S.T. at 363.

40. *Id.* art. 5, 20 U.S.T. at 362. For instance, the United States Department of State requires an English translation to accompany any documents sent to it. See SENATE EXECUTIVE REPORT, *supra* note 1, at 2.

41. Note, *supra* note 14, at 129-30.

42. *Id.* See SENATE EXECUTIVE REPORT, *supra* note 1, at 11-12 (statement of Philip Amram).

43. SENATE EXECUTIVE REPORT, *supra* note 1, at 11-12 (statement of Philip Amram).

44. *Id.*

tiff to prove certain facts before a default judgment is entered against the defendant. The plaintiff must prove that: (1) the foreign defendant was served in sufficient time to permit him to defend the action, and that he was served either under his own law or under the provisions of the Convention; or (2) an effort was made to serve him under the Convention, that at least six months had elapsed, and that no report had been received as to whether he was served despite "reasonable effort."<sup>45</sup>

Article 16 further expands this protection of defendants against "un-noticed" default judgments by allowing the judge who entered the default judgment to reopen the judgment within one year or more after the date the judgment was entered. The judge may exercise this discretion if the defendant has a prima facie defense on the merits and has acted promptly upon learning of the judgment.<sup>46</sup>

Consequently, articles 15 and 16 taken together guarantee a defendant who was never actually served a minimum of eighteen months from the date of judgment to move to protect his interests.<sup>47</sup> Hence, even if the procedures of notification *au parquet* are valid under the Convention,<sup>48</sup> the defendant is nonetheless protected by other provisions of the Convention.

#### D. Japanese Reservations

Japan has made the following reservations with respect to the Hague Convention:

- (1) The only authorized agent for service in Japan is the Minister of Foreign Affairs who is designated as the central authority as well as the diplomatic or consular agent.<sup>49</sup>
- (2) The district court which has rendered judicial aid with respect to service is designated as the authority competent to complete

---

45. The Hague Convention art. 15, 20 U.S.T. at 364; SENATE EXECUTIVE REPORT, *supra* note 1, at 15 (statement of Philip Amram). For an analysis of the possible conflict between articles 10 and 15 of the Convention, see Note, *supra* note 14, at 139-40.

46. The Hague Convention art. 16, 20 U.S.T. at 364-65.

47. See SENATE EXECUTIVE REPORT, *supra* note 1, at 15 (statement of Philip Amram).

48. "It is interesting to note that notification *au parquet* is still probably a valid method of service under the Convention, providing the state of destination does not object." Note, *supra* note 14, at 134.

49. Rule 4 Advisory Committee Notes, *supra* note 23, at 86. The Consular Convention, Mar. 22, 1963, United States-Japan, art. 17(i)(3), 15 U.S.T. 768, 795, T.I.A.S. No. 5602, indicates that a consular officer may serve judicial documents on behalf of the courts of the sending state. However, this treaty, which came into effect in 1963, appears to be abrogated by these reservations to the Hague Convention, which came into effect after 1970. See *supra* note 11 and accompanying text.

the certificate of service.<sup>50</sup>

- (3) Japan expressly objects to article 10(b) which provides that service may be made through judicial officers or other competent persons of the state of origin, directly through judicial officers or other competent persons of the state of destination.<sup>51</sup>
- (4) Japan expressly objects to article 10(c) which provides that service may be made by a person interested in a judicial proceeding directly through judicial officers or competent persons of the state of destination.<sup>52</sup>

By limiting the central authority to the Minister of Foreign Affairs and by not allowing any other judicial or consular officials to effectuate service, Japan has effectively eliminated the use of notification *au parquet* by a Japanese plaintiff.<sup>53</sup> This result exists because Japan has objected to article 10(b) and, therefore, a Japanese plaintiff can no longer use local Japanese officials in the State of origin to effect service.<sup>54</sup>

#### IV. THE DOMESTIC LAW OF JAPAN

The Japanese Code of Civil Procedure states in article 161 that judicial documents shall be administered by the court clerk.<sup>55</sup> It further indicates in article 172 that the court clerk may dispatch documents by registered mail.<sup>56</sup> Article 175 provides that service in a foreign country shall be made to the presiding judge or Japanese official.<sup>57</sup>

Article 19 of the Hague Convention expressly states that to the extent that the internal laws of the contracting state permit other forms of service, the Convention will not affect such provisions.<sup>58</sup> Moreover, articles 5<sup>59</sup> and 15<sup>60</sup> explicitly provide for the use of the internal law of the contracting state. Nonetheless, because Japan has objected to the use of article 10, subparagraphs (b) and

---

50. Rule 4 Advisory Committee Notes, *supra* note 23. at 86.

51. *Id.*

52. *Id.*

53. The *Milliken* requirements of due process in the United States dictate that notification *au parquet* procedures may not be used by an American plaintiff. See SENATE EXECUTIVE REPORT, *supra* note 1. at 15 (statement of Philip Amram).

54. See *supra* note 51 and accompanying text.

55. MINJI SOSHŌ HŌ (Code of Civil Procedure), Law No. 29 of 1890.

56. *Id.*

57. *Id.*

58. The Hague Convention art. 19, 20 U.S.T. at 365.

59. *Id.* art. 5, 20 U.S.T. at 362.

60. *Id.* art. 15, 20 U.S.T. at 364.

(c),<sup>61</sup> which allow documents to be sent or received by judicial officials, it would appear that the Hague Convention has preempted the internal law of Japan.<sup>62</sup> As such, when documents are transmitted to or from Japan, the applicant need only comply with the Hague Convention—and there is no necessity to look to the internal law of Japan.

#### V. UNITED STATES STATUTES CONCERNING THE HAGUE CONVENTION

Rule 4(i) of the Federal Rules of Civil Procedure states that service on a foreign defendant may be made:

(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court of the party to be served; or (E) as directed by order of the court.<sup>63</sup>

Federal Rule of Civil Procedure 4(i) and the Hague Convention appear to agree that service on a Japanese defendant may be made: (1) directly on the Japanese court clerk, as provided by Japanese law;<sup>64</sup> (2) by delivery of documents to the Minister of Foreign Affairs; or, (3) by direct mail. Rule 4(i), however, allows personal service or service by an order of the court—methods which are not provided by the Convention.

The conflicts between Rule 4(i) and the Hague Convention seem to be resolved by the supremacy clause of the United States Constitution<sup>65</sup> which provides that a treaty shall be the supreme law of the land. Furthermore, when congressional legislation is inconsistent with a treaty, the United States Supreme Court, as early as

---

61. *Id.* art. 10, 20 U.S.T. at 363.

62. *See supra* note 57 and accompanying text.

63. FED. R. CIV. P. 4(i). The difficulties inherent in the Federal Rules of Civil Procedure which gave rise to the Hague Convention have been documented. *See Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 534-38 (1953); Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031, 1032-43 (1961).

64. The internal law of Japan may have been abrogated by the Hague Convention. *See supra* note 62 and accompanying text.

65. *See supra* note 8 and accompanying text.

1889, stated that "[t]he last expression of the sovereign will must control."<sup>66</sup> The Hague Convention was ratified in 1969,<sup>67</sup> six years after Rule 4(i) was amended<sup>68</sup> and, therefore, would appear to preempt Rule 4(i).<sup>69</sup>

At first blush, the foregoing analysis seems correct. However, the legislative history<sup>70</sup> and article 19 of the Convention mandate a contrary result. The Senate Executive Report indicates "nothing now authorized by our law will be repealed or modified in the event of ratification of this convention by the United States."<sup>71</sup> The testimony of Richard Kearney, then Deputy Legal Advisor to the Department of State, before the Senate Committee on Foreign Relations also supports this view. In his testimony, Kearney discussed the liberal methods of serving process under Rule 4(i) and stated that the Judicial Conference of the United States has endorsed the treaty as being in accord with the Federal Rules of Civil Procedure.<sup>72</sup>

Article 19 also indicates that the Convention does not preempt Rule 4(i). Article 19 provides: "To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions."<sup>73</sup> Moreover, Philip Amram, the principal American spokesman at the Hague Conference,<sup>74</sup> testified before the Senate Committee that article 19 "makes it clear that the convention is an *enabling* convention, designed to create benefits

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

67. The Hague Convention went into effect in the United States on February 10, 1969. See *supra* note 10 and accompanying text.

68. See Rule 4 Advisory Committee Notes, *supra* note 23, at 67-69.

69. Moreover, one commentator has noted that when the defendant's address is known, "[t]he Hague Convention, through the supremacy clause, supersedes all state and federal methods of service abroad . . . ." Note, *supra* note 14, at 128.

70. A court "may look to the diplomatic and legislative history of a treaty to determine its correct interpretation." Day v. Trans World Airlines, Inc., 393 F. Supp. 217, 222 (S.D.N.Y. 1975) (citing Choctaw Nation v. United States, 318 U.S. 423 (1943)).

71. SENATE EXECUTIVE REPORT, *supra* note 1, at 2. At the time of the Hague Conference:

a great deal of work had been carried on in the United States to establish modern and practicable methods for service of process in cases involving foreign plaintiffs or defendants. These efforts culminated in the revision of Rule 4 of the Federal Rules of Civil Procedure by the addition of section (i) . . . .

*Id.* at 6 (statement of Richard Kearney).

72. *Id.* at 7 (statement of Richard Kearney).

73. The Hague Convention art. 19, 20 U.S.T. at 365.

74. SENATE EXECUTIVE REPORT, *supra* note 1, at 5 (statement of Richard Kearney).

where none now exist, and is not a *restricting* convention which would, in any manner, limit the existing or future procedures in any signatory state if they are more liberal than the convention."<sup>75</sup>

Notwithstanding the fact that the Convention does not preempt Rule 4(i), a contrary result is reached when a Japanese defendant is served. Because Japan has objected to subparagraphs (b) and (c) of article 10,<sup>76</sup> an American plaintiff can never serve a Japanese defendant by serving judicial officers or other competent persons, even though this method of service is permitted by Rule 4(i).

For example, suppose an American attorney personally serves a Japanese defendant in Japan. The service is valid under the federal rules, which expressly authorize personal service, and is also valid under the Hague Convention, which does not provide for personal service, but does not prevent other more liberal procedures such as personal service. Even though Japan has expressly objected to article 10(c), the Hague Convention does not preclude the attorney from personally serving the Japanese defendant, because service is not effectuated through persons of the state of destination—Japan.

A literal interpretation of the treaty creates an anomalous result when the American plaintiff decides to have a Japanese attorney serve the Japanese defendant. Although this method of service complies with Rule 4(i), the service would nonetheless be invalid because Japan has expressly objected to article 10(c) which allows service by a competent person living in Japan.

In comparing these two examples, it is difficult to believe that the purpose of the treaty, that is, adequate notice,<sup>77</sup> would be greatly enhanced by having an American attorney rather than a Japanese attorney, acting as the American attorney's agent, deliver the documents. For this reason, despite the literal wording of the treaty, and because Japan has objected to article 10, subparagraphs (b) and (c), presumably neither method of service would be allowed.

---

75. *Id.* at 14 (statement of Philip Amram) (emphasis in original). Several courts have indicated that the Hague Convention "was not meant to abrogate the provisions of Rule 4, as evidenced by the fact that there has been no change in the provisions of the Rule since the treaty became effective." *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 431 F. Supp. 1226, 1229 (N.D. Ill. 1977) (citing *Shoei*, 33 Cal. App. 3d at 822, 109 Cal. Rptr. at 412).

76. See *supra* notes 51-52 and accompanying text.

77. See *supra* note 7 and accompanying text.

## VI. FEDERAL CASES INTERPRETING THE HAGUE CONVENTION

Several federal courts have interpreted the Hague Convention. In *DeJames v. Magnificence Carriers, Inc.*,<sup>78</sup> the district court found that the Japanese defendant did not have sufficient contacts with the state of New Jersey to support an assertion of personal jurisdiction.<sup>79</sup> On appeal, the American plaintiff claimed that the Hague Convention, combined with Rule 4, effects a "wholly federal means" of service, and that the district court should have aggregated all of the defendant's contacts with the United States (instead of merely New Jersey) to support the assertion of jurisdiction.<sup>80</sup> The court of appeals indicated that the purpose of the Convention was three-fold: (1) to provide a consistent means of service abroad in different nations so that American plaintiffs would not be faced with the cost-prohibitive process of complying with state, federal and foreign country procedure for service of documents;<sup>81</sup> (2) to allow American plaintiffs to serve a central authority rather than dealing with local officials unfamiliar with procedure;<sup>82</sup> and, (3) to prevent an American defendant from suffering a default judgment without ever having the opportunity to defend the claim.<sup>83</sup> The court then noted:

[T]he purpose and nature of the treaty demonstrate that it does not provide independent authorization for service of process in a foreign country . . . .

By virtue of the supremacy clause the treaty overrides state methods of service of process abroad that are objectionable to the nation in which process is served. However, we do not believe that the treaty in any way affects a state's chosen limits on the jurisdictional reach of its court. If a state long-arm rule does not authorize service outside the United States, a litigant in that state would have no authority to invoke the methods of service of process provided in the treaty. We believe that the treaty merely serves as an important adjunct to state long-arm rules, and that it specifies a valid method of service only if the state long-arm rule authorizes service abroad.

---

78. 654 F.2d 280 (3d Cir. 1981).

79. *Id.* at 286.

80. *Id.*

81. *Id.* at 287.

82. *Id.* at 287-88.

83. *Id.* at 288.

[T]he treaty is similar to rule 4(i) in that it provides a "manner" of service to be used by a litigant with the requisite authority to serve process. Were we to hold other wise [sic], we would attribute to the Senate that ratified the treaty the intent to authorize the equivalent of "world-wide" service of process in all federal-question, admiralty and diversity cases while at the same time not authorizing nationwide service of process for those same claims.<sup>84</sup>

Accordingly, the court found that mere compliance with the Convention does not constitute service by "wholly federal means," and thus, because the defendant's contacts were insufficient to satisfy the state long-arm statute, personal jurisdiction could not be asserted.<sup>85</sup> Thus, under *DeJames*, the Hague Convention is not a "federal" long-arm statute, and independent authorization for asserting personal jurisdiction must exist.

An Illinois district court also interpreted the Hague Convention in *Tamari v. Bache & Co. (Lebanon) S.A.L.*<sup>86</sup> The defendant, a Lebanese corporation, moved to quash service of summons when service was effected by a court-appointed process server.<sup>87</sup> In denying the motion, the court indicated that the service was sufficient pursuant to article 10(b) of the Hague Convention which allows judicial officers of the United States to serve judicial documents through competent persons in foreign countries.<sup>88</sup> The court also stated that there was no indication that the defendant did not voluntarily accept process in accordance with article 5.<sup>89</sup> The difficulty with the court's conclusion is that article 5 allows an addressee to accept documents voluntarily only if they are first served through the central authority designated for service of process.<sup>90</sup>

If the fact pattern of *Tamari* were to arise with a Japanese defendant, the motion to quash service would probably be successful since the method of service used in *Tamari* would not be sufficient for a Japanese defendant.<sup>91</sup> Further, it is doubtful whether a court

---

84. *Id.* at 288-89 (footnote omitted).

85. *Id.* at 290.

86. 431 F. Supp. 1226 (N.D. Ill. 1977).

87. *Id.* at 1227.

88. *Id.* at 1229.

89. *Id.*

90. See *supra* note 18 and accompanying text. It is questionable whether this point is of any practical significance since it is probably the exception rather than the rule that a foreign defendant will voluntarily accept the documents.

91. Japan has objected to article 10(b) which deals with service of process by competent persons in foreign countries. See *supra* note 51 and accompanying text.

would allow article 5 to rescue the service of process, since Japan has indicated that the only court-related official which can deliver service to an addressee who accepts it voluntarily, is the central authority, i.e., the Minister of Foreign Affairs.<sup>92</sup>

Finally, in *Hitt v. Nissan Motor Co.*,<sup>93</sup> without mentioning the Hague Convention, a Florida district court indicated that the requirements of service of process were satisfied where a Japanese defendant's agent was personally served by mail pursuant to Federal Rule of Civil Procedure 4(i)(1)(D).<sup>94</sup>

## VII. CALIFORNIA STATUTES CONCERNING THE HAGUE CONVENTION

The California Code of Civil Procedure authorizes service of process abroad. Section 413.10 provides in pertinent part that "[e]xcept as otherwise provided by statute a summons shall be served . . . [o]utside the United States as provided in this chapter . . . ."<sup>95</sup> Section 415.30 falls within the same chapter as section 413.30 and allows a summons to be served by mail.<sup>96</sup> Section 415.40 further describes this type of service and allows an out-of-state person to be served "by sending a copy of the summons and . . . complaint to the person to be served by any form of airmail requiring a return receipt."<sup>97</sup> Thus, California statutes allow service of judicial documents outside the United States if return-receipt type mail is used to effect the service of such documents.

The California return-receipt method of service appears more restrictive than the direct-mail method allowed by article 10(a) of the Hague Convention. The Convention, however, was not intended to preempt state law, and in fact, "does not invade the domain of State law in the United States."<sup>98</sup> Hence, California law, rather than the Hague Convention, dictates the method of service of process on foreign defendants.

---

92. See *supra* note 49 and accompanying text. However, as noted in the previous two examples in the text, personal service by an American plaintiff may be sufficient.

93. 399 F. Supp. 838 (S.D. Fla. 1975).

94. *Id.* at 840.

95. CAL. CIV. PROC. CODE § 413.10 (Deering Supp. 1983).

96. *Id.* § 413.30.

97. *Id.* § 415.40.

98. SENATE EXECUTIVE REPORT, *supra* note 1, at 9 (statement of Joe Barrett). See, e.g., The Hague Convention art. 10(a), 20 U.S.T. at 363.

## VIII. CALIFORNIA CASES INTERPRETING THE HAGUE CONVENTION

*Shoei Kako Co. v. Superior Court*,<sup>99</sup> provides an extensive overview of the incorporation of the Hague Convention into the California service of process statutes. At the outset the court states that because of the supremacy clause, California "cannot attempt to exercise jurisdiction if to do so would violate an international treaty."<sup>100</sup> The court then confronted the issue whether service of process could be directly mailed to a Japanese defendant.<sup>101</sup> Here, the American plaintiff complied with article 10(a) of the Hague Convention by directly mailing service of process to the defendant.<sup>102</sup> The court applied article 15(b), which allows a judgment to be entered against a defendant, provided that "the document was actually delivered to the defendant or to his residence by *another method provided for by this Convention*."<sup>103</sup> Article 10(a) is the other "method" referred to by the court.<sup>104</sup>

The defendant in *Shoei* contended that the phrase "judicial documents" contained in article 10(a)<sup>105</sup> does not relate to service of process because the Convention consistently refers to "service of judicial documents" in other parts of the treaty, but refers to "*sending*" judicial documents in article 10(a).<sup>106</sup> Consequently, the defendant argued that article 10(a) merely authorizes the giving of notices and the exchange of other judicial documents after service is effected by some method other than direct mail.<sup>107</sup> The court, however, indicated that the clause in article 10(a), "freedom to send judicial documents by postal channels, directly to persons abroad,"<sup>108</sup> would be superfluous unless it related to documents for service of process purposes.<sup>109</sup> The court stated that if the defendant's interpretation of the treaty was correct, Rule 4(i) of the Federal Rules of Civil Procedure

---

99. 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1973).

100. *Id.* at 819, 109 Cal. Rptr. at 410. *Cf. supra* note 98 and accompanying text.

101. *Shoei*, 33 Cal. App. 3d at 819, 109 Cal. Rptr. at 410.

102. *Id.* at 820, 109 Cal. Rptr. at 410.

103. *Id.* (emphasis in original).

104. *Id.*

105. *See supra* note 13 and accompanying text for a discussion of the definition of "documents."

106. *Shoei*, 33 Cal. App. 3d at 820, 109 Cal. Rptr. at 411.

107. *Id.* at 820-21, 109 Cal. Rptr. at 411.

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

109. *Id.*

would be abrogated, a result clearly inappropriate.<sup>110</sup>

The court also noted that the internal law of Japan permits service from abroad by mail and, thus, the requirements of article 15(a) needed to render judgment were fulfilled.<sup>111</sup> Moreover, the court indicated that the subject judicial documents could be transmitted to Japan in English because almost all Japanese companies involved in trade with other countries are accustomed to receiving communications in English.<sup>112</sup> Hence, the court concluded that direct mail may be used to serve process on Japanese defendants in Japan.<sup>113</sup>

#### IX. EVIDENCE OF SERVICE REQUIREMENTS UNDER UNITED STATES AND CALIFORNIA LAW

California Code of Civil Procedure section 417.10 provides that, "if service is made by mail pursuant to Section 415.30, proof of service shall include the acknowledgment of receipt of summons in the form provided by that section or other written acknowledgment of receipt of summons satisfactory to the court."<sup>114</sup> Rule 4(i)(2) of the Federal Rules of Civil Procedure provides that "when service is made pursuant to subparagraph (1)(D) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court."<sup>115</sup> Thus, both the California statute and the Federal Rules appear to require a signed receipt or other evidence to prove and validate service of process.

Several California courts have interpreted California Code of Civil Procedure section 417.10. In *Stamps v. Superior Court*,<sup>116</sup> the court found that where the service was airmailed and the return-receipt was labeled "unclaimed," service of process was insufficient.<sup>117</sup> In *M. Lowenstein & Sons v. Superior Court*,<sup>118</sup> the court indicated that while a return receipt stating the date it was received by *plaintiff's* counsel was defective, dismissal could be avoided by filing a copy

---

110. *Id.* at 822, 109 Cal. Rptr. at 412. See *supra* note 75 and accompanying text.

111. *Id.*

112. *Id.* at 823, 109 Cal. Rptr. at 413.

113. *Id.* The *Shoei* court left open the question of whether the Japanese defendant could stay or dismiss the action on the ground of inconvenient forum. *Id.* at 817 n.3, 109 Cal. Rptr. at 408 n.3.

114. CAL. CIV. PROC. CODE § 417.10 (Deering Supp. 1983). See *supra* note 96 and accompanying text.

115. FED. R. CIV. P. 4(i)(2). See *supra* note 63 and accompanying text.

116. 14 Cal. App. 3d 762, 92 Cal. Rptr. 151 (1971).

117. *Id.* at 762, 92 Cal. Rptr. at 152.

118. 80 Cal. App. 3d 762, 145 Cal. Rptr. 874 (1978).

of the defendant's acknowledgment of receipt of service and a declaration of the secretary who mailed the service.<sup>119</sup> Finally, in *Shoei*,<sup>120</sup> the court recommended that where a defendant did not execute an official acknowledgment of receipt, service would be sufficient if the defendant executed a form of international mail receipt in English and in French.<sup>121</sup>

## X. CONCLUSION

The following methods may be used to serve a Japanese defendant residing in Japan:

- (1) The Ministry of Foreign Affairs may be served which may then serve the documents:
  - (a) by itself, or through an appropriate agency,
  - (b) by a method requested by the applicant, or
  - (c) by delivery to an addressee who accepts it voluntarily;
- (2) by direct mail, or
- (3) by any other means authorized by the domestic law of Japan.

If service is made through the Minister of Foreign Affairs, the forms annexed to the Convention must be accurately completed. The American plaintiff using this method should receive a certificate of service from the Minister of Foreign Affairs. Service may be effectuated only through the Minister of Foreign Affairs and not through judicial officials, diplomatic agents or other competent persons in Japan.

The documents to be served may be written in English unless the Minister of Foreign Affairs is utilized to serve process. In that instance, the documents may be required to be translated into Japanese.

Under the Convention, Japanese defendants are guaranteed a minimum of eighteen months to reopen a default judgment entered against them. Generally, a signed return-receipt is needed as evidence to prove that service was made.

United States cases and statutes interpreting the Hague Convention have resolved some conflicts between United States law and certain provisions of the Convention. The provisions of Rule 4(i) of the Federal Rules of Civil Procedure are not preempted by the Hague Convention. However, contrary to Rule 4(i), service may not be made through the Japanese court clerk. Requirements of personal

---

119. *Id.*

120. *Shoei*, 33 Cal. App. 3d at 823-24, 109 Cal. Rptr. at 413.

121. *Id.* at 817-18, 109 Cal. Rptr. at 409.

jurisdiction are also not abrogated by the treaty. The *DeJames* decision indicates that the Hague Convention may not be used as an independent basis for asserting personal jurisdiction.

State case law, such as *Shoei*, indicates that the Convention cannot preempt state law. Hence, in California, a Japanese defendant may be served by direct mail with documents written in English.

The purposes of the Hague Convention are to make service of process more efficient and to reduce the cost of service for an American plaintiff. To further the purposes and goals of the treaty, it seems likely that in the future courts will require adherence to the Convention.

*Robert M. Hamilton*



