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Service of Process Abroad — Is There Anything Left of the Hague Service Convention After *Volkswagenwerk A.G. v. Schlunk*?

*There is nothing more likely to start disagreement among people or countries than an agreement.*¹

I. INTRODUCTION

As international trade increases, countries realize that their status among nations may well be judged by the strength of their economy. This world view of economics has spawned a theory that economics has replaced war as the vehicle for competition among nations. A noted humorist went so far as to state that a Japanese trade delegate had told him, "[b]ecause of our economic strength, in the future the United States will be our farm and Europe will be our boutique."² Whether the above statement is viewed as an anecdote or a challenge, the new emphasis on international economics has led to a re-examination by United States courts of international law and its practical applications.³

One major force in promulgating international law has been the

1. E.B. WHITE, *My Day*, ONE MAN'S MEAT 56 (1944), *quoted in* Brief for the Motor Vehicle Manufacturers Association of the United States, Inc., and the Product Liability Advisory Council, Inc. as amici curiae at 1, *Volkswagenwerk A. G. v. Schlunk*, 108 S. Ct. 2104 (1988).

2. Gore Vidal on *The Tonight Show*, *Starring Johnny Carson* (NBC television broadcast, Nov. 18, 1988). Vidal added: "This quote was overheard at a trade summit in Moscow. When the delegate from the Soviet Union parried this somewhat humorous quote with the question 'And what do you think Russia will be?', the Japanese delegate answered, 'We don't think of you.'"

3. Recently, the doctrines of foreign sovereign immunity, enforcement of choice of forum provisions in contracts, the act of state doctrine, and the extraterritorial enforcement of United States laws have been given either judicial formation or review. *See Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511 (D.C. Cir. 1988) (foreign sovereign immunity); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (forum selection clauses); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976) (act of state doctrine); *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976) (extraterritorial enforcement of United States antitrust law).

Hague Conference on International Law.⁴ The subject of this Note concerns one of the Conference's progeny, the Hague Service Convention ("the Convention"),⁵ and its recent interpretation by the United States Supreme Court in the case of *Volkswagenwerk A.G. v. Schlunk*.⁶

The United States signed the Convention in 1967, and it entered into force on February 10, 1969.⁷ In international litigation, challenges to proper jurisdiction and service are common tactics.⁸ In response, the Convention promised to alleviate at least a portion of the litigation on service issues by providing a uniform procedure for international service. In the United States, some confusion arose among various state and federal courts regarding whether the Convention was the exclusive method of serving process on foreign defendants abroad.⁹ The United States Supreme Court granted certiorari in *Schlunk* in an attempt to resolve the split of opinion on this issue.

The *Schlunk* case presented a classic service problem. A Volkswagen Rabbit involved in an auto accident in Illinois resulted in a products liability suit against Volkswagen of Germany ("VWAG"). The plaintiff served Volkswagen of America ("VWOA") in Illinois as VWAG's agent, pursuant to Illinois law. An immediate dispute arose over whether service should have been made under Illinois service methods or by the service methods provided for in the Convention. VWAG argued that service should be quashed because it did not conform to Convention rules. However, at every level, the Illinois state courts rejected VWAG's position and found that Illinois' method of service was proper. VWAG successfully petitioned the United States

4. For a good introduction to the Hague Conference, see Reese, *The Hague Conference on Private International Law: Some Observations*, 19 INT'L LAW. 881 (1985).

5. Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 (entered into force in the United States Feb. 10, 1969) [hereinafter Hague Service Convention].

6. 108 S. Ct. 2104 (1988).

7. Hague Service Convention, *supra* note 5.

8. Contributing factors to the frequent challenges to service are the different methods of service used by various countries. See Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515 (1953).

9. Compare *Cipolla v. Picard Porsche Audi, Inc.*, 496 A.2d 130 (R.I. 1985); *Vorhees v. Fisher & Krecke*, 697 F.2d 574 (4th Cir. 1983); *Harris v. Browning-Ferris Industries Chem. Servs., Inc.*, 100 F.R.D. 775 (M.D. La. 1984), with *Ex parte Volkswagenwerk A.G.*, 443 So. 2d 880 (1983); *Zisman v. Singer*, 106 F.R.D. 194 (N.D. Ill. 1985); *Lamb v. Volkswagenwerk A.G.*, 104 F.R.D. 95 (S.D. Fla. 1985); *McHugh v. Int'l Components Corp.*, 118 Misc.2d 489, 461 N.Y.S.2d 166 (1983).

Supreme Court for certiorari.¹⁰

The Illinois state courts validated service primarily because VWAG and VWOA were so closely related as to be virtual alter egos of each other. Since VWAG was thus "present" in Illinois, service was proper because "service abroad" had not been necessary, allowing the Convention requirements to remain dormant.¹¹ The United States Supreme Court, not content to simply affirm the reasoning of the state courts, went one step further in its analysis. The Supreme Court held that the law of the forum state will determine whether a particular "service situation" constitutes "service abroad."¹² The Court's reasoning upheld the state courts' findings of proper service on two theories. First, the relationship between VWAG and VWOA was sufficiently close as to avoid offending the traditional "notice" requirement of due process.¹³ Second, the Supreme Court added the doctrinal theory that the Illinois service statute, not the relationship of VWAG to VWOA, was the controlling factor in determining whether to apply the Convention.¹⁴

This new doctrine, which could be labelled "forum law determination," requires examination. Although finding service to be proper may have been the correct result based on the facts of the case, the Court's rationale creates the possibility of using many types of insufficient service methods which the Convention had sought to prevent. Moreover, this doctrine adds little or no improvement to United States law.¹⁵ To begin with, this Note analyzes the constitutional requirements for service of process in the United States, the Convention's service requirements, and the problems with international service in general. Next, this Note analyzes and critiques the *Schlunk* case as unnecessarily degrading the Convention and its policy, and as a decision containing circular reasoning and raising a possible consti-

10. 108 S. Ct. at 2106-07.

11. *Id.* For a complete discussion of the relationship between VWOA and VWAG, see *Schlunk v. Volkswagenwerk A.G.*, 145 Ill. App. 3d 594, 503 N.E.2d 1045 (1986).

12. *Volkswagenwerk A.G. v. Schlunk*, 108 S. Ct. at 2112 (1988).

13. *Id.*

14. *Id.*

15. In 1978, Lawrence Tribe wrote, "I do not regard the rulings of the Supreme Court as synonymous with constitutional truth." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* vii (2d ed. 1988). In an era of routine denial of certiorari to an endless number of cases of great importance, at a minimum, the Supreme Court should endeavor to clarify and improve United States law in the cases it *does* take. Though this Note focuses primarily on legal analysis, the reader should also consider whether, by ruling as it did in *Schlunk*, the Court satisfied its responsibility as the final arbiter of United States law.

tutional law problem in its application. This Note concludes that the *Schlunk* decision may have been correct on its facts and merits, but the ramifications of the Court's rationale may lead to an inconsistency of notice in international litigation. Finally, this Note proposes an alternative test for applicability of the Convention based on standard due process analysis.

II. HISTORICAL FRAMEWORK

A threshold requirement of international litigation is proper service of process on a foreign defendant.¹⁶ In federal court, process is served pursuant to Rule 4 of the Federal Rules of Civil Procedure.¹⁷ Rule 4 requires service to follow the particular rules of service of the forum state.¹⁸ State courts follow their own rules of service subject, of course, to due process standards established by the Supreme Court regarding notice.¹⁹ Although these service and notice requirements initially appear simple, cases which involve parties from different states or countries often spawn complex conflict of law choices regarding which method of service to use in a particular situation.²⁰

Service and notice issues provide the first chance for a defendant to challenge the plaintiff, and perhaps quash service.²¹ Because the trial cannot progress until all of the service and notice issues are settled, challenging service can result in a long delay before the merits of the dispute are reached. This delay could benefit the defendant because it might result in an outright victory if the statute of limitations runs before the plaintiff can successfully serve the defendant.²²

16. J. FRIEDENTHAL, M. KANE, & A. MILLER, CIVIL PROCEDURE 164-79 (1985). For an excellent discussion of the federal rules of service in general, and how the applications can quickly become complex, see J. GLANNON, CIVIL PROCEDURE 47-61 (1987).

17. FED. R. CIV. P. 4.

18. FED. R. CIV. P. 4(C)(2)(i) provides: "A summons and complaint may be served upon a defendant . . . pursuant to the law of the State in which the district court is held . . ."

19. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and notes 28-36 *infra*, and accompanying text.

20. See J. GLANNON, *supra* note 16, for examples in the domestic arena. See G. BORN & D. WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 119-69 (1989) for international examples.

21. Although the plaintiff can always subsequently serve the defendant in the correct manner, there could be a statute of limitations problem.

22. Because a delay which results in the statute of limitations running could lead to the suit being filed in a non-United States forum, the "outright victory" could be achieved if all possible forum statutes of limitations have run or if the option of beginning the suit anew in a foreign forum is not practicable. Thus, at least one court has allowed the plaintiff to "re-serve" the defendant under the Convention, regardless of the time elapsed. *Vorhees v. Fischer & Krecke*, 697 F.2d 574, 576 (4th Cir. 1983). Moreover, the option of the plaintiff taking a

A. *The Mullane Standard.*

Although the practical problem of *Schlunk* has international flavor, the initial legal problem is grounded in the domestic concept of legal notice. The law of the United States, with its constitutional emphasis on due process, has always regarded service of process and notice as important concepts. When the modern standard of minimum contacts²³ replaced presence as the benchmark for personal jurisdiction, new standards were required for service and notice in order to safeguard those parties haled into jurisdictions in distant forums. Because the new standards are based on constitutional law and are thus binding on all federal and state courts, they apply to cases involving service of process on foreign defendants.²⁴

The United States Supreme Court addressed the constitutional standards for notice in the seminal case of *Mullane v. Central Hanover Bank & Trust Co.*²⁵ In *Mullane*, a bank formed a common trust fund under New York banking law,²⁶ and after acquiring the membership of 113 smaller trusts, petitioned the New York Surrogate Court²⁷ for an accounting and settlement of the common trust for the first trust period. The accounting is an important event in the management of any trust fund, especially for the beneficiaries.²⁸ The trustee complied with the notice requirements of New York law by publishing an announcement in a New York newspaper. The announcement did not list the names of all the individuals who would be affected by the trust, but rather contained only the name of the bank and the names

default judgment may not be the end of the suit. An additional problem is the "enforcement game," where enforcement can prove to be more onerous than obtaining the judgment.

23. *International Shoe v. Washington*, 326 U.S. 310 (1945), was the landmark case which introduced new, broader concepts of personal jurisdiction based on "minimum contacts" with a forum as opposed to "presence" in the forum. The result of *International Shoe* has been a steady expansion of personal jurisdiction, which has roughly coincided with ease of modern travel.

24. For example, one state has held that the due process clause requires notice of suit to be written in the language of the jurisdiction in which he is served. *Julen v. Larson*, 25 Cal. App. 3d 325, 101 Cal. Rptr. 796 (1972).

25. 339 U.S. 306 (1950).

26. *Id.* at 307.

27. "In New York, the Surrogate's Court has jurisdiction over all actions and proceedings relating to the affairs of decedents, probate of wills, administration of estates" BLACK'S LAW DICTIONARY 1296 (5th ed. 1979).

28. Once the fiduciary settles or accounts for trust funds for a specific time period, all of the beneficiaries of the trust will have waived any claims (such as mismanagement) against the fiduciary arising from the accounting period. *Mullane*, 339 U.S. at 309. Consequently, notice of an accounting is of paramount importance to the beneficiaries of the trust.

of each trust agreement.²⁹ After he was appointed special guardian of the interests of all possible known beneficiaries of the 113 smaller trusts, Mullane challenged the New York notice provisions which allowed for publication alone without any other effort at contact.³⁰ Mullane based the challenge on possible constitutional problems with notice and service.³¹

The New York Court of Appeals held that the notice by publication sufficiently met Fourteenth Amendment requirements of procedural due process.³² Mullane then appealed to the United States Supreme Court under 28 U.S.C. § 1257.³³ The Court held: "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections."³⁴ Applying this rule to the facts, the Court found that where the trustee knew of a beneficiary's address, due process would, at a minimum, require notice by mail. Publication would only suffice for unknown beneficiaries.³⁵

Although the *Mullane* rule arose from a case involving published notice to claimants, it has been extended analytically to service on defendants. The rule is most applicable to *Schlunk* when stated broadly: a statutory notice provision not meeting the minimum requirements of due process is unconstitutional.³⁶ The Convention is a statutory notice provision, as was the Illinois service statute examined in *Schlunk* and the New York law examined in *Mullane*. Thus, the first key to understanding the true import of *Schlunk* is a recognition that any service situation or statute must always comport with due process standards.³⁷

29. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 309-10 (1950).

30. *Id.* at 311.

31. *Id.*

32. *Id.* at 307.

33. *Id.* 28 U.S.C. § 1257 provides for appeal to the Supreme Court, from, *inter alia*, a state high court decision whose validity is questioned on the ground of its being repugnant to the Constitution.

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

35. *Id.* at 317-18.

36. *Id.* at 320.

37. For a discussion of the various permutations of service and whether a particular method has been held constitutional, see J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 16, at 164-72.

B. International Service of Process and the Hague Convention

While the legal system of the United States was attempting to solve domestic notice problems using the *Mullane* rule, the international legal community was grappling with the same problem. Historically, there have been many ways of serving process abroad. Litigants in the United States and other countries have had to choose which method of service to use when serving foreign defendants.³⁸ The choice often fell on the plaintiff's attorney in the common law jurisdictions,³⁹ and it was thus not surprising that various methods of international service developed. However, one of the historic disadvantages of having attorneys make individual decisions regarding service in international cases is that different countries have different ideas of what procedure should be used at the pre-trial⁴⁰ stage in general and to serve process in particular.⁴¹

For example, countries following a civil law system regard the court and judge as the primary organ of judicial power, frowning on the accepted common law method of allowing the attorneys free reign over service.⁴² Common law attorneys may be cited for contempt in a civil law court if they persist in using common law methods of service, discovery and subpoena.⁴³ On the other hand, civil law attorneys can be frustrated when attempted service sent to a government official in a common law jurisdiction is delayed in transit and results in lack of notice to the actual defendant.

Perhaps the international version of the New York banking law (which provided the catalyst for *Mullane*) is the French service method of *notification au parquet*.⁴⁴ In *notification au parquet*, service is deemed complete when it is placed in the hands of an appointed official in the plaintiff's forum, regardless of whether the official actually notifies the defendant of the suit either by mailing or handing

38. G. BORN & D. WESTIN, *supra* note 20.

39. See, e.g., California Code of Civil Procedure Section 413.10, *infra* note 108.

40. For example, the common and civil law systems have two completely diverse ways of conducting a deposition. In the United States common law system, the deposition will most likely take place in the lawyer's office, while in a civil law country, the deposition can only take place in the courtroom. The civil law systems follow this procedure because they "do not share the Anglo-American notion of a trial as a separate, isolated episode," and require the judge to conduct all relevant procedure. Jones, *supra* note 8, at 527-28.

41. G. BORN & D. WESTIN, *supra* note 20, at 119-36.

42. *Id.* at 127-32.

43. *Id.*

44. Discussed in Volkswagenwerk A.G. v. Schlunk, 108 S. Ct. 2104, 2110 (1988).

over the service documents.⁴⁵ When *notification au parquet* attempted to cross common and civil law boundaries, it frequently resulted in lack of notice to defendants, default judgments, and the inability to enforce judgments abroad because of the hostility of the defendant's forum.⁴⁶

Because the common law jurisdictions generally disliked *notification au parquet* and because the use of United States methods of direct service or alternative methods of service such as letters rogatory⁴⁷ had yielded inconsistent results,⁴⁸ the member states of the Hague Conference on Private International Law⁴⁹ convened to address the problem. The result was the Hague Service Convention. The United States took an active part in drafting and ratifying the Convention because the agreement promised to bring foreign methods of service in line with accepted United States standards of due process.⁵⁰ The United States ratified the Convention in 1969. By 1988, many leading industrial nations were signatories.⁵¹

When the United States ratified the Convention, an observer of the law of international service might have thought that all of the conflicts had been put to rest. The Convention provides several basic methods for service of process,⁵² none of which are especially onerous when examined in light of United States' standards. The primary

45. S. EXEC. REP. NO. 6, 90th Cong., 1st Sess. 12 (1967) (statement of Phillip Amram, member of United States delegation to the Hague Convention).

46. *Id.*

47. Letters rogatory are a "request by one court of another court in an independent jurisdiction . . ." BLACK'S LAW DICTIONARY 815 (5th ed. 1979). In the absence of a treaty, many United States courts were reluctant to use letters rogatory, as the success or failure of the request rested entirely upon grounds of international comity. See 1 B. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE 3-4 (1984).

48. G. BORN & D. WESTIN, *supra* note 20, at 136.

49. The Hague Convention has also promulgated other international treaties, discussed in Reese, *supra* note 4.

50. See 1 B. RISTAU, *supra* note 47, at 4-13 for a summary of United States participation in international efforts to codify the international law of service.

51. Antigua, Barbuda, Barbados, Belgium, Botswana, Czechoslovakia, Denmark, Egypt, Finland, France, Germany (Fed. Rep.), Greece, Israel, Italy, Japan, Luxembourg, Malawi, Netherlands, Norway, Portugal, Seychelles, Spain, Sweden, Turkey, United Kingdom, United States. See appendix to FED. R. CIV. P. 4; 28 U.S.C.A. § 210 (1988 supp.).

52. The primary method, set out in Articles 2 through 6 of the Convention, is to forward the service documents to a designated Central Authority in the target country, whereupon the Central Authority effects service. See Hague Service Convention, *supra* note 5, arts. 2-6, at 362. Article 5 of the Convention allows the Central Authority to simply mail the documents to the intended recipient. *Id.* For an analysis of all the possible methods of service allowable under the Convention, see Note, *International Service of Process: A Guide to Serving Process Abroad Under the Hague Convention*, 39 OKLA. L. REV. 287 (1986).

method, for example, requires the plaintiff to send the documents to a designated central authority in the defendant's country.⁵³ However, it is not clear to which cases and situations the Convention applies. The Convention simply states that it applies to: "all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad."⁵⁴ The drafters of the Convention left this phrase somewhat open-ended and undefined.⁵⁵

As an enforceable treaty of the United States, the Convention will pre-empt state law by virtue of the Supremacy Clause in the United States Constitution.⁵⁶ No controversy exists on this point. However, doubt has arisen over the scope of the Convention's application due to various United States courts' interpretations of the "service abroad" language.⁵⁷ Thus, although the international community has agreed on a treaty to handle the same problem which the Supreme Court confronted in *Mullane*, the uncertainty regarding the correct method for international service persists in this country because the various United States jurisdictions have been unable to agree on the scope of the Convention.

III. STATEMENT OF THE CASE

It is against this background that the *Schlunk* case arose. Herwig Schlunk's parents were killed when their 1978 Volkswagen Rabbit collided head-on with another car driven by Dennis Reed in Cook County, Illinois.⁵⁸ Schlunk filed suit in state court in Illinois, alleging design defects in the car.⁵⁹ He initially served VWOA through C.T. Corporation, its designated agent as required for service of process in Illinois.⁶⁰ Later, Schlunk amended his complaint to include VWAG as a defendant.⁶¹

VWAG entered a special and limited appearance to quash ser-

53. Hague Service Convention, *supra* note 5, arts. 2-6, at 362-63.

54. *Id.* art. 1, at 362.

55. Volkswagenwerk A.G. v. Schlunk, 108 S. Ct. 2104, 2108-09 (1988).

56. *Id.* at 2108. *Cf.* Vorhees v. Fischer & Krecke, 697 F.2d 574, 575 (4th Cir. 1983). *See also* discussion in text part V, section B, *infra*.

57. Compare notes 9 and 10, *supra*.

58. Amicus Curiae Brief for Respondent at 4, Volkswagenwerk A.G. v. Schlunk, 108 S. Ct. 2104 (1988). Reed's negligence was one cause of the death of Schlunk's parents. Reed did not appear and an order of default was entered against him. *Id.* at 4-5.

59. *Id.* at 4; Volkswagenwerk A.G. v. Schlunk, 108 S. Ct. 2104, 2106 (1988).

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

61. Volkswagenwerk A.G. v. Schlunk, 108 S. Ct. at 2106.

vice.⁶² The trial court determined that service was sufficient under the Illinois Code, and found no conflict with the Convention due to the close relationship between VWOA and VWAG.⁶³

The case then moved to the Illinois Court of Appeals, where VWAG lost again.⁶⁴ The Court of Appeals' reasoning consisted of two prongs. First, it found that because VWAG was present in Illinois through its agent, VWOA, the Convention would not apply.⁶⁵ The court stated that "[e]ven if the intended recipient is standing right next to him, a process server, according to VWAG, would have to send a summons off to West Germany."⁶⁶

Second, to support the theory that VWAG was in fact "present" in Illinois, the state court set forth a detailed analysis of the connections between the two companies. It compared cases in which presence was the issue and took care to distinguish "presence" under a service statute from "presence" for personal jurisdiction purposes.⁶⁷

The court concluded that since VWAG was present in Illinois through its alter ego and agent, VWOA, service was proper, and the Convention was not an issue.⁶⁸ When the Supreme Court of Illinois

62. *Id.* This was not the first time that VWAG had attempted to challenge service in a products liability case. See *Lamb v. Volkswagenwerk A.G.*, 104 F.R.D. 95 (S.D. Fla. 1985); *Richardson v. Volkswagenwerk A.G.*, 552 F. Supp. 73 (W.D. Mo. 1982); *Cipolla v. Picard Porsche Audi, Inc.*, 496 A.2d 130 (R.I. 1985); *Ex parte Volkswagenwerk A.G.*, 443 So. 2d 880 (Ala. 1983); *Dr. Ing H.C.F. Porsche v. Superior Court*, 123 Cal. App. 3d 755, 177 Cal. Rptr. 155 (1981). This trail of cases is one example of why a more usable doctrine should have been formulated in *Schlunk*.

63. *Schlunk v. Volkswagenwerk A.G.*, 145 Ill. App. 3d at 608, 503 N.E.2d at 1054.

64. *Volkswagenwerk A.G. v. Schlunk*, 108 S. Ct. at 2107.

65. *Id.* The "presence" argument is perhaps the most persuasive way to avoid application of the Convention. The simplicity of this doctrine which exists when a non-resident defendant or its agent is present in the forum and, thus, amenable to service, makes the alternative doctrine of forum law determination all the more questionable.

66. *Schlunk v. Volkswagenwerk A.G.*, 145 Ill. App. 3d 594, 597, 503 N.E.2d 1045, 1047 (1986).

67. *Id.* "Presence" for purposes of service is actually a prerequisite to personal jurisdiction. Although a corporation may transact business in a given state, and thus have minimum contacts with that state sufficient to support jurisdiction, it may not have an agent "present" to accept service in that state. VWAG did not question its minimum contacts with Illinois, only its presence for service. Thus, the applicability of transient personal jurisdiction to a foreign defendant is a completely separate issue, because in personal jurisdiction, the focus is on the contacts within the forum state and not the details of service. For a recent discussion of whether or not transient personal jurisdiction can still be obtained by simply serving a party who is temporarily in the forum, see *Amusement Equipment Co. v. Mordelt*, 779 F.2d 264 (5th Cir. 1985) (transient personal jurisdiction is still permissible as long as exercise of jurisdiction is "ethical, not onerous, and fair, not oppressive.").

68. *Schlunk v. Volkswagenwerk A.G.*, 145 Ill. App. 3d at 608, 503 N.E.2d at 1054.

denied leave to appeal,⁶⁹ VWAG petitioned the United States Supreme Court for certiorari.⁷⁰ The Supreme Court granted certiorari to resolve a conflict among the circuits concerning whether the Convention should apply to cases involving service on domestic subsidiaries of foreign corporations.⁷¹

Although the Illinois courts had used the relationship between the companies as the primary ground for holding service to be proper,⁷² the Supreme Court affirmed on a broader ground. The Court found that the Convention did not apply in this case because, according to Illinois law, this was not a case where "service abroad" was necessary.⁷³ Hence, service under Illinois law had been proper.⁷⁴ This holding thus added a doctrine of "forum law determination" (i.e., the issue of whether "service abroad" is necessary is determined and defined by state law) to international service situations involving the Convention.

IV. THE SUPREME COURT'S REASONING

The Court saw the *Schlunk* case as an opportunity to define the scope of the Convention and began its analysis with a review of the Convention's negotiation history.⁷⁵ The majority of the Court framed the issue as one of statutory interpretation as opposed to fictional "presence."⁷⁶ The Court determined that the drafters of the Convention had left the definition of "service abroad" to be interpreted by the various countries that signed the treaty, thus leaving a void which the Court believed needed to be filled.⁷⁷

The majority began its analysis with the premise that because the Convention is a treaty of the United States, there is no doubt that the Convention would pre-empt any conflicting state law.⁷⁸ Thus, unlike the holding of *Societe Nationale Industrielle Aerospatiale v. Dist. Ct.*,⁷⁹ (which interpreted the Hague Discovery Convention as an optional method of discovery) the Court held that the Hague Service Conven-

69. Volkswagenwerk A.G. v. Schlunk, 108 S. Ct. 2104, 2107 (1988).

70. *Id.*

71. *Id.*

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

73. Volkswagenwerk A.G. v. Schlunk, 108 S. Ct. 2104, 2112 (1988).

74. *Id.*

75. *Id.* at 2108-09.

76. *Id.*

77. *Id.* at 2110.

78. *Id.* at 2108.

79. 107 S. Ct. 2542 (1987).

tion serves as the exclusive method of service of process for international litigation to which it applies.⁸⁰ However, the problem remained in determining when such an exclusive situation might arise. Although "service of process" was well-defined, "service abroad" had no definable legal meaning.⁸¹ Obviously, the task was to find a test that could be applied in deciding when a particular "service" would have to be "abroad," thereby triggering the Convention. On this point, the Court noted that "[t]he legal sufficiency of a formal delivery of documents must be measured against some standard."⁸²

To find that standard, the majority made some rather astounding leaps of logic. It pointed out that "[as] [t]he Convention itself does not prescribe a standard, . . . we almost necessarily must refer to the internal law of the forum state."⁸³ It was not explained why looking at the internal law of the forum state should be so "necessary." During the thirty-eight years since *Mullane*, United States courts had been required to look at the facts of each case to determine whether notice was constitutionally adequate.⁸⁴ If a court found a particular procedure inadequate, it was free to prescribe what it felt were proper methods of service. If this analysis was followed, the service issue in *Schlunk* could have been resolved by comparing the Illinois service statute to the Convention in order to determine whether VWAG had adequate notice. But the Court chose a different route. Completely avoiding a due process path, the Court contended that the first step in this analysis should be to look at the forum's law.⁸⁵

To buttress this argument, the majority focused almost entirely on the legislative history of the Convention.⁸⁶ This analysis was two-fold. First, the Court noted that the drafters had intentionally used the legally narrow term *signification* (service) as opposed to a broader term, *notification* (notice).⁸⁷ The Court inferred that in the present situation, VWAG had been "served" in Illinois, and only the "notice" had been sent to Germany. Since the drafters had made it a point to say the Convention only applied to "service," there was at least some

80. Volkswagenwerk A.G. v. Schlunk, 108 S. Ct. at 2108.

81. 108 S. Ct. 2104, 2108.

82. *Id.*

83. *Id.*

84. J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 16.

85. Volkswagenwerk A.G. v. Schlunk, 108 S. Ct. 2104, 2108 (1988).

86. *Id.* at 2108-09.

87. *Id.* at 2109.

chance that they would limit the Convention when there was no "service" actually sent abroad.

Second, the Court examined quotations from the Yugoslavian and Dutch delegates which supported a view that the law of the forum state be used to determine the scope of the Convention.⁸⁸ In view of these factors, the Court concluded the internal law of the forum would determine the scope of the Convention.⁸⁹

Although there was some support for this position, it was equally plausible that the Convention drafting committee's references to the "forum's internal law" referred to the types of cases to which the Convention would apply (i.e. civil, maritime, or commercial), not to the basic applicability of the Convention.⁹⁰

There had been no mention of the Convention's legislative history in the Illinois state court decisions, and it is interesting to note that the Illinois courts seemed to go to great lengths to avoid such a rationale. The Illinois appellate court felt that VWAG was simply present in Illinois, and rejected VWAG's attempts to define the issue as a test of the scope of the Convention. The court stated: "VWAG seems to suggest that, under the Convention, one cannot serve West German residents pursuant to Illinois law even when they are in Illinois."⁹¹ This feeling was echoed in Schlunk's brief, in which he noted that, after losing "an essentially factual argument in the Illinois courts as to its relationship with its wholly-owned subsidiary, petitioner attempts to manufacture an issue for review . . . where none exists."⁹²

VWAG still had one potent argument left. Because any argument based on the legal scope of the Convention seemed doomed to fail, VWAG raised a factual comparison. Looking again to the legislative history of the Convention, VWAG emphasized that the framers of the Convention specifically noted that certain forms of service would no longer be sufficient once the Convention was in force. One of these methods was *notification au parquet*,⁹³ which looked very similar to the type of substituted service on an agent which had oc-

88. *Id.*

89. *Id.* at 2110.

90. G. BORN & D. WESTIN, *supra* note 20, at 138-39.

91. Schlunk v. Volkswagenwerk A.G., 145 Ill. App. 3d 594, 597, 503 N.E.2d 1045, 1047 (1986).

92. Brief for Respondent in Opposition to Petition for Certiorari at 2, Volkswagenwerk A.G. v. Schlunk, 108 S. Ct. 2104 (1988).

93. For a discussion of *notification au parquet*, see *supra* notes 44-46 and accompanying text.

curred in this case.⁹⁴

The Illinois state courts completely avoided this counterargument by basing their holdings on the "presence" in Illinois of VWAG through VWOA. Rather than adopt the state court's reasoning, the majority maintained its "forum law determination" position by claiming to have issued a narrow holding. Specifically, the Court stated that "this statement (VWAG's reference to the similarities between *notification au parquet* and the instant case) might affect our decision as to whether the Convention applies to *notification au parquet*, . . . [but this is] an issue we do not resolve today."⁹⁵

Unfortunately, at certain points in the opinion the majority seemed to lose track of the basis for its argument. The majority seemed to waver between whether it felt that the actual method of service was legally sufficient because of the newly announced theory of forum law determination, or whether it was the close relationship of VWAG and VWOA which made this case comport with due process. The Court seemed to endorse the view of the Illinois courts when it stated, "there is no comparable evidence in the negotiating history that the Convention was meant to apply to substituted service on a subsidiary like VWOA, which *clearly* does not require service abroad under the forum's internal law."⁹⁶

Many law students are taught that they should be very careful in legal writing when using the word "clearly," because it is sure to alert the reader to a possible problem with one's contention.⁹⁷ This instance was no exception. After formulating the forum law determination theory on the grounds of the "clear" intent of the drafters, the majority admitted that due process would not be offended in United States courts by the *Schlunk* rationale. According to the majority, "forum law determination" did not purport to overrule the *Mullane* standard, "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."⁹⁸ Thus, despite the new

94. See *Schlunk v. Volkswagenwerk A.G.*, 145 Ill. App. 3d 594, 503 N.E.2d 1045, 1045-46 (1986) for more details of the initial service in this case.

95. *Volkswagenwerk A.G. v. Schlunk*, 108 S. Ct. at 2110.

96. *Id.* (emphasis added).

97. Thanks to Professor John Calmore for his erudite statement of the principle of using "clearly" to mask actual lack of clarity. Professor Calmore expounded on this principle in his Spring 1988 Torts-Writing class at Loyola Law School, Los Angeles, California.

98. *Volkswagenwerk A.G. v. Schlunk*, 108 S. Ct. at 2111, *citing* *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Schlunk rationale, the only apparent reason that the Convention "clearly" did not apply here was because an application of the *Mul-lane* standard (as used by the Illinois courts) resulted in a finding of adequate notice *because* agency theory supported the conclusion that VWAG was actually present in Illinois through VWOA.

The majority concluded its opinion with a rebuttal to VWAG's argument that the decision would lead to widespread non-observance of the Convention by other countries. The Court stated, "[w]e do not think that this country, or any other country, will draft its internal laws deliberately so as to circumvent the Convention in cases in which it would be appropriate to transmit judicial documents for service abroad."⁹⁹

The concurring opinion, by Justices Brennan, Marshall, and Blackmun, attacked this reasoning. They found that VWOA was VWAG's direct and close agent in the forum, and perhaps its alter ego as well. As such, service on VWOA satisfied due process standards for adequate notice to VWAG.¹⁰⁰ Because courts in this country are bound by due process standards of notice, the real issue should be whether a state statute can actually "define" service abroad if the definition chosen (e.g. service is complete on presentation to an involuntary local agent regardless of the principle's domiciliary or relationship with the agent) would result in inadequate notice.¹⁰¹ If a state did not have this power, then a doctrine of forum law determination is unnecessary. The concurrence felt that the convention itself provided a substantive standard which limits the forum state's ability to determine whether service abroad is required on the facts of a particular case.¹⁰²

V. ANALYSIS

A. *Has the Court Created a Legally Indefensible Doctrine?*

The first area where the Court has left itself open to criticism is in the future application of the *Schlunk* forum law determination doc-

99. Volkswagenwerk A.G. v. Schlunk, 108 S. Ct. 2104, 2111 (1988).

100. *Id.* at 2116. Note that ILL. REV. STAT. ch. 110, paras. 2-204 (1985) provide, in part: "A private corporation may be served (1) by leaving a copy of the process with its registered agent or any officer or agent of the corporation found anywhere within the State; or (2) in any other manner now or hereafter provided by law." Apparently, this statute makes no attempt to define "within," let alone "service abroad," which is why the Illinois courts focused on the agency issue.

101. Volkswagenwerk A.G. v. Schlunk, 108 S. Ct. at 2116.

102. *Id.* at 2112, 2115.

trine. In order to be most useful in its application, a legal rule should distinguish one factual situation from another in such a way that the result both comports with notions of justice and furthers public policy on the issue presented. In this case, the problem of producing a just result requires reconciling notions of fair notice to the defendant with (1) jurisprudential concerns over unnecessary imposition of federal law on the states, and (2) the international political reality of a standing treaty. The public policy problem involves practical concerns over what standards foreign defendants (often corporations) should be required to meet in order to effectively challenge service (usually attempted by a sole United States plaintiff).

To understand why the *Schlunk* case does not further either of those concerns, it is necessary to examine the possible service situations to which it can apply. A proper level of abstraction should cover all the possibilities. These abstractions will be labeled Situations One, Two and Three. For analytical purposes, it is important to note that a foreign defendant may well *have* presence in the United States sufficient to confer personal jurisdiction on a United States court, but *lack* the presence to be served process. It is the presence for service of process with which we are concerned.

Situation One involves a United States plaintiff serving a foreign defendant who has no presence, actually or through an agent, in the United States at the time of service. The suit might cover a tort or a breach of contract which occurred while the defendant was in the United States. Or perhaps the action arose while the plaintiff was in the defendant's home country. A classic Situation One example would involve a breach of contract by a foreign businessman (with no agents or offices in the United States) with a United States plaintiff, where the plaintiff attempts to serve the defendant in the defendant's native country.

Situation Two involves a United States plaintiff serving a foreign defendant who is actually present in the United States at the time of service. Again, the action may have arisen in any jurisdiction. The factual example in Situation One would become Situation Two if the defendant decided to remain in the United States, and the plaintiff had effectively served the defendant in the United States.

Situation Three involves a United States plaintiff serving a foreign defendant whose presence in the United States at the time of service is uncertain. The most common reason for uncertainty as to "presence" may be the issue of whether the defendant has an agent in

the United States. Unlike Situations One and Two, wherever the action may have arisen, the problem in Situation Three is determining where and how to serve process on the defendant or the defendant's agent. The *Schlunk* case itself is, as demonstrated by the factual record in the Illinois courts, an example of Situation Three.

Assuming that the Hague Convention is in force, there is no doubt as to the outcome of the case in Situations One and Two. The plaintiff in Situation One must serve the defendant "abroad," mandating use of the Convention. The plaintiff in Situation Two does not need the Convention, because service will be accomplished in the United States. Both decisions are based on a factual inquiry to determine the status of the defendant. There are two options for Situation Three. Either agency law must be abolished in service cases, or Situation Three must be re-classified as either a Situation One or a Situation Two in order to arrive at a decision on how service should be accomplished. It seems most logical to re-classify Situation Three, since Situation Three only exists until a legal determination of presence is made.

Both the Illinois courts and the United States Supreme Court determined that the *Schlunk* case was actually a Situation Two case. The difference in opinion is that the Illinois courts made the decision on the basis of a factual inquiry, whereas the Supreme Court reframed the inquiry as a legal one. Until the *Schlunk* case, the inquiry has indeed been factual. The doctrine enunciated in *Mullane* recognized that although different jurisdictions may promulgate different methods of service on principals and agents, a uniform Constitutional test would prevent lawmakers from manipulating the law to suit the facts of a particular case, or class of cases. The *Schlunk* forum law determination doctrine seems to suggest that, rather than following *Mullane*, the inquiry should be the interpretation of the statute of the forum state. The inconsistency in the Court's reasoning is apparent: a factual inquiry has been transformed into a legal one without a reason.¹⁰³

Of course, the law is not always perfectly consistent. Forum law determination may be categorized as a departure from established law, but does the new doctrine serve a useful purpose? The *Schlunk* case, as the majority admitted, would have yielded the same result, namely, inapplicability of the Convention, had a standard due process

103. The Court made no attempt to distinguish *Mullane*, and in fact claimed to embrace it as part of the new test. *Volkswagenwerk A.G. v. Schlunk*, 108 S. Ct. at 2112.

test been applied.¹⁰⁴ This is so because the factual inquiry of whether VWAG was present in Illinois was resolved by both the Illinois courts and members of the Supreme Court in *Schlunk*'s favor. Several courts had ruled that the doctrine of forum law determination (or any new doctrine) was not necessary to resolve this case. Thus, the question is: Can a factual situation arise in the United States where an application of the *Schlunk* forum law determination doctrine clarifies or advances the law of service of process? In other words, does the *Schlunk* forum law determination doctrine make it any easier to re-classify Situation Three cases?

The answer to both questions is "no." The development of United States law has yielded a strong connection between service of process and notice, a connection which has been settled since *Mullane* in 1950.¹⁰⁵ There can be no doubt that in the United States, whatever method of service is used, there is no escaping the notice requirements of due process. Moreover, the history of the United States' participation in the Convention suggests that the Convention was an effort to internationally codify service and notice.¹⁰⁶ In *Schlunk*, the Supreme Court did not overrule *Mullane*, or limit *Mullane*'s applicability to the instances of agency, or limit *Mullane*'s application in international situations. Instead, the Court has added a useless step to the international service of process analysis.

For instance, before *Schlunk*, an attorney or judge with a *Schlunk*/Situation Three case would analyze it according to the following test. First, the attorney would determine if the defendant had an agent in the United States. If so, the defendant would be "present" factually, and thus amenable to service under *Mullane*, because the defendant would receive notice. Essentially, this would be the same method used in analyzing service on any out-of-state defendant. If the defendant was not "present," or if the question was too close to call, the attorney might simply rely on the Convention. In either case, the final determination would be made by applying due process standards to the facts of the case. If the defendant was not present and

104. *Id.*

105. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). In *Greene v. Lindsey*, 456 U.S. 444 (1982), the Supreme Court applied the *Mullane* analysis to a Kentucky statute which authorized service by posting. The Court held that on the facts, posting did not provide adequate notice. *Id.* at 453. See Greenbaum, *The Postman Never Rings Twice: The Constitutionality of Service by Process by Posting after Greene v. Lindsey*, 33 AM. U.L. REV. 601 (1983). *Greene* provides a good domestic illustration of the underlying constitutional test necessary in every service situation.

106. See B. RISTAU, *supra* note 47, at 4-7.

would not receive notice, the Convention would apply because service would have to be sent abroad.

In contrast, after *Schlunk*, a Situation Three case would be analyzed in a different way. As a new first step, the internal law of the forum should be examined to see if service on an agent of the defendant is somehow "defined" as service which is "not abroad." However, as a second step, the attorney must go through the same constitutional due process analysis as above, because the forum law determination doctrine does not relieve service of process from *Mullane* liability.¹⁰⁷ The laws of the states may vary, and may make no attempt to define "service abroad,"¹⁰⁸ so an attorney who reads *Schlunk* literally will likely perform an extra first step needlessly. Moreover, a narrow reading of a state service statute which does not provide notice to a defendant may run afoul of *Mullane* requirements, and may result in a delay while service is re-executed.

Perhaps a given State, which chooses to draft a service statute hostile to foreign companies, might attempt to make "the new first step" created by *Schlunk* worthwhile¹⁰⁹ to a United States plaintiff. Given the goals of notice embedded in both the Convention and United States law, however, can a situation where a state could define "service abroad" so as to completely block the transmission of documents abroad even exist unless it comported with due process? The answer is that it cannot. If the Supreme Court had decided to exempt

107. Volkswagenwerk A.G. v. Schlunk, 108 S. Ct. at 2112 (1988).

108. For example, prior to 1984, Section 413.10 of the California Code of Civil Procedure made no mention of the Convention, but simply stated that service could be accomplished, "[e]xcept as otherwise provided by statute . . . (a) Within this state, as provided by this chapter [or] . . . ; (c) Outside the United States, as provided in this chapter or as directed by the court in which the action is pending, or, if the court before or after service finds that the service is reasonably calculated to give actual notice, as prescribed by the law of the place where the person is served"

In 1984, the California legislature amended Section 413.10(c) to include the sentence: "These rules are subject to the provisions of the Convention on the 'Service Abroad of Judicial and Extrajudicial Documents' in Civil or Commercial Matters (Hague Service Convention)." However, other sections of the California Codes remained unchanged. For instance, Corporations Code Section 25550 allows service on a foreign corporation to be made by leaving a copy of the process with the Commissioner of Corporations, *provided* the plaintiff also mails a copy of the process to the defendant or "takes other steps which are reasonably calculated to give actual notice" To the California attorney who wishes to know whether the Convention applies, it is no answer to say "look to state law." The crucial question, as illustrated by Section 25550's incorporation of the *Mullane* standard, is whether "notice reasonably calculated to give actual notice" requires transmission of documents abroad.

109. "Worthwhile" in the sense of making service on an agent easier for the domestic plaintiff, and notice more difficult to obtain for the foreign defendant.

Situation Three cases from the *Mullane* rule, perhaps many service statutes could be drafted which would effectively define "service abroad." However, as long as *Mullane* remains good law, due process will ultimately determine whether or not a given defendant is "present" in a forum. If the defendant is not present in the forum, nothing in *Schlunk* indicates that service would then be anything other than "abroad," and the Convention would apply.

Thus, as the concurrence observed,¹¹⁰ the attorney in this situation will finish analytically where he started—not because of a particular reading of the forum's law, but because the forum's law is always subject to due process analysis. The obvious problems involved in redefining Situation Three cases have not been answered, but rather have been avoided. In the end, as long as the due process analysis remains part of the test for sufficiency of the service technique, it will be impossible for the forum law determination doctrine to "determine" anything.

B. Forum Law Determination and the Supremacy Clause

The problem spawned by the forum law determination doctrine was not the only problem that made the classification of Situation Three service problems more confusing. The Court in *Schlunk* noted that: "By virtue of the Supremacy Clause, United States Constitution, Article VI, the Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies."¹¹¹ This statement is correct, but perhaps was forgotten by the Court when it announced its doctrine of forum law determination. The result of the doctrine is that all fifty states may decide for themselves the scope of application of a United States treaty.¹¹² This is completely contrary to the Supremacy Clause.

State law may conflict with the Supremacy Clause in two ways. First, the state law may conflict directly with the federal law such that compliance with both laws is impossible.¹¹³ Second, conflict also ex-

110. *Volkswagenwerk A.G. v. Schlunk*, 108 S. Ct. at 2116 (Brennan, J., concurring).

111. *Id.* at 2108.

112. The power of the federal government to encroach, by treaty, into areas of law normally reserved to the states has been settled since *Missouri v. Holland*, 252 U.S. 416 (1920). Moreover, because the Convention has been ratified by the Senate, the "executive agreement as a treaty" concerns of *United States v. Belmont*, 301 U.S. 324 (1937), and *United States v. Pink*, 315 U.S. 203 (1942) do not arise.

113. See, e.g., *McDermott v. Wisconsin*, 228 U.S. 115 (1913). See also L. TRIBE, *supra* note 15, at 481.

ists when "state action undermines a congressional decision in favor of national uniformity of standards."¹¹⁴

In the instant case, it is possible that the forum law determination doctrine will lead to differences among the states concerning what factual situations trigger the Convention. Such differences will arise if individual states read *Schlunk* as limiting or de-emphasizing the *Mullane* rule in cases involving foreign corporations. When Congress ratified the Convention, they could not have intended that its scope and applicability should be decided by each state. The Convention's purpose was to promote international standards of service, not to give signatory countries the freedom to allow jurisdictional subdivisions free reign over the decision of when the Convention would apply.

The forum law determination doctrine may lead to non-uniform standards among the states regarding international service of process abroad, a result which conflicts with congressional purpose. When such a conflict exists, the state law should be pre-empted by virtue of the Supremacy Clause. As the Court has left it, state law now controls a treaty of the United States, a situation which both the Supremacy Clause and the Treaty Clause were designed to prevent. Had the Court held that factual inquiry guided by due process standards of notice was the appropriate test to determine the "presence" of the defendant, this tension between federal and state law would have been avoided.

C. *Adequate Notice to United States Defendants in Foreign Cases*

The Court stated: "Where service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends and the Convention has no further implications."¹¹⁵ This assertion may be true, but what of its effect on a foreign court's reading of the United States' commitment to the Convention? If the Supreme Court has decided that individual states may legislate on the applicability of the Convention, and potentially limit its application, are foreign jurisdictions likely to say, "since their due process analysis will produce the same result, let's not worry that they have ruled the Convention non-applicable upon an interpretation of state law?" While this might be the response of the other convention members,

114. See, e.g., *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). See also L. TRIBE, *supra* note 15, at 486.

115. *Volkswagenwerk A.G. v. Schlunk*, 108 S. Ct. at 2112.

another response could well be retaliation through the passage of laws which would severely limit notice to United States defendants.¹¹⁶

Simply because the Supreme Court indicated it was "unlikely" that any foreign state would try to "circumvent" the Convention,¹¹⁷ should United States corporations doing business abroad not be concerned? Perhaps this question is one of the rare questions that is best answered with a question: If we could rely on the judgment of foreign legal systems to provide adequate notice to United States defendants, why did we participate so eagerly in the ratification of the Convention in the first place? It is perhaps relevant that at least four countries—West Germany, Japan, France, and the United Kingdom—were interested enough in the *Schlunk* case to respond by sending diplomatic notes to the State Department.¹¹⁸

Perhaps the concern that foreign jurisdictions may actually legislate against the Convention is unrealistic. But in an age in which the world of international commerce is an increasingly important medium through which countries compete, a wiser choice would be to heed the warning of the concurrence, which points out that "after today's decision [foreign] . . . courts will surely sympathize little with any United

116. For example, in the recent battle over extraterritorial discovery, other countries have not hesitated to pass "blocking statutes" which provide for criminal penalties for parties who submit to direct discovery requests from United States plaintiffs. See generally G. BORN & D. WESTIN, *supra* note 20, at 282-325.

117. Volkswagenwerk A.G. v. Schlunk, 108 S. Ct. at 2111.

118. Brief for petitioner at 10-12, Volkswagenwerk A.G. v. Schlunk, 108 S. Ct. 2104 (1988).

The Federal Republic of Germany stated in a note verbale dated January 22, 1987 that the decision of the Illinois Appellate Court is "likely to have serious adverse effects on international litigation in civil and commercial matters" and is "in conflict with the letter and spirit of the Convention and ignores its mandatory character."

The note further explained:

[s]erving process on a domestic subsidiary of a foreign corporation frustrates the declared purpose of the Hague Service Convention which is to ensure that documents "be brought to the notice of the addressee in sufficient time" and . . . in its language, so as to enable a foreign defendant to defend an action in a foreign language and over a distance of several thousand miles.

The Government of Japan also filed a diplomatic note stating that it "shares the common concerns expressed by the Note dated January 22, 1987, addressed to the Department of State by the Embassy of the Federal Republic of Germany." *Id.* at 11. The Government of France filed a similar diplomatic protest on April 7, 1987. *Id.* The United Kingdom filed a diplomatic protest as well, stating that "in this instance, where service necessarily involves the transmission of documents abroad, the Convention must be construed in the liberal spirit in which it was intended, in order to mitigate the inconsistencies and hardships that the drafters sought to redress." *Id.* at 12. These letters indicate that foreign governments indeed are concerned with the *Schlunk* decision which allows individual states to interpret the Convention.

States national pleading that a judgment violates the Convention"¹¹⁹

VI. CONCLUSION

Although the Court's reasoning seems to suggest that state courts can define the term "service abroad," that determination will inevitably be decided, not by statute, but by a due process analysis. Accordingly, any attorney who relies on service on an agent under a state statute alone risks having such service invalidated by a due process appeal, or worse, having a foreign court refuse to enforce a judgment because of enmity to the *Schlunk* doctrine. Moreover, despite the Court's pronouncement of a new doctrine, all of the practical and policy rationales which favor the use of the Convention still apply, so the prudent attorney should continue to use the Convention. Unfortunately, as a result of this decision, United States defendants may find other countries increasingly unwilling to follow the Convention when foreign plaintiffs serve appointed agents of United States nationals abroad.

The better approach would have been to leave out any new "forum law determination" test and allow our own constitutional due process standards to dictate when service abroad is required. Analytically, it is now necessary to go through a two-step test to determine whether or not a particular factual situation triggers use of the Convention. First, the attorney must consult the forum law to see how service is performed in that particular fact situation. Assuming that forum law allows service on an agent or substitute service by mail, it may appear unnecessary to use the Convention. However, as a second step, the attorney must turn to the *Mullane* due process test to determine if service abroad is constitutionally mandated. Because due process concerns cannot be avoided, this second test is mandatory.

On the other hand, if the *Schlunk* test had never been formulated, it would take only one step to decide whether to use the Convention. A more realistic approach is to declare the Convention *per se* applicable to any situation involving service of documents to a foreign defendant located abroad. The Convention could only be circumvented by a showing that under due process, service would be complete on the defendant's agent in the United States, with no transmission abroad required. This latter situation actually occurred

119. Volkswagenwerk A.G. v. Schlunk, 108 S. Ct. at 2117 (Brennan, J., concurring).

in *Schlunk*, and the analysis of the lower state courts was correct in its application of a due process standard.

Perhaps, as the concurrence pointed out, the forum law determination test may "have little practical consequence."¹²⁰ Nevertheless, a prospective service on an overseas defendant should be handled with care, for service and sufficiency of notice will undoubtedly continue to be challenged by defendants the world over.

Henry J. Moravec

120. *Id.* at 2116.