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# NOTES AND COMMENTS

## Permitting Service of Process by Mail on Japanese Defendants

### I. INTRODUCTION

With Japan's rise as a leading world economic power and the United States' emergence from isolationism after World War II, Japanese commercial activity has become a large part of the United States business climate.<sup>1</sup> Today, Japanese companies regularly invest in and contract with United States businesses, invest in United States real estate, and export Japanese goods to United States consumers.<sup>2</sup> As a result, litigation involving Japanese companies has become an inescapable reality for both United States businesses and private consumers.<sup>3</sup>

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1. For example, in 1980 alone, the United States imported \$30.7 billion worth of merchandise from Japan, constituting 12.75% of total United States imports for that year. See U.S. Bureau of the Census, *Statistical Abstract of the United States: 1989* 788, 790 (109th ed. 1989).

2. See generally *Japan's Money Troubles Begin to Jolt U.S. Economy*, L.A. Times, Oct. 13, 1990, at 1, col. 4.

3. See Davies & Weinstock, *The Service Of Process Overseas*, Nat'l L.J., Oct. 3, 1988, at 15, col. 3. The authors state:

With the growing presence in the United States of foreign investors and foreign goods, American attorneys are finding it increasingly necessary to bring suit against companies based overseas.

Indeed, when a foreign company simply possesses critical evidence but is otherwise unnecessary to a multi-party lawsuit, being perhaps a shallow pocket, an attorney may wish to add that company as a party to help ensure the availability against it of American pretrial discovery devices. Whatever the reason for suing the foreign national, service of process abroad may well be required.

*Id.* See also 4 C.A. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE (1987). The authors note that the

phenomenal expansion of international trade, communication, and travel in recent decades has made it increasingly common for a potential defendant to be physically in a foreign country at the time suit is commenced or to be a citizen of or an entity created by another nation and located outside the United States.

*Id.* at 365. See also Comment, *An Interpretation of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents Concerning Personal Service in Japan*, 6 LOY. L.A. INT'L & COMP. L.J. 143 (1983) ("Japanese imports constitute a large part of the total merchandise imported by the United States. Commercial litigation between Japanese defendants and American plaintiffs, therefore, is inevitable and has increased proportionately with the increase in Japanese imports."); see generally Peterson, *Jurisdiction and the Japanese Defendant*, 25 SANTA CLARA L. REV. 555 (1985).

When a Japanese company is located within the United States, service of process<sup>4</sup> is a relatively simple procedure, governed by the Federal Rules of Civil Procedure in federal court and the applicable state rules of civil procedure in state courts.<sup>5</sup> However, when a plaintiff desires to bring suit in the United States against a Japanese company located in Japan, which has sufficient minimum contacts with the United States to subject the company to personal jurisdiction,<sup>6</sup> service of process becomes more complex.<sup>7</sup>

In order to simplify service of process in international litigation, the United States in 1969 became a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Convention").<sup>8</sup> The Convention

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4. Service of process is the

service of writs, summonses, etc., signif[ying] the delivery to or leaving them with the party to whom or with whom they ought to be delivered or left; and, when they are so delivered they are then said to have been served. . . . The service must furnish reasonable notice to defendants of proceedings to afford [the defendant] opportunity to appear and be heard.

BLACK'S LAW DICTIONARY 1227 (5th ed. 1979). See also Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 700 (1988) ("Service of process refers to a formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action.").

5. See *Hanna v. Plumer*, 380 U.S. 460 (1965); FED. R. CIV. P. 4.

6. This Comment will not discuss issues of personal jurisdiction, as it assumes the requirements of personal jurisdiction are satisfied. In *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and its progeny, the Supreme Court defined the minimum requirements necessary to subject a foreign defendant to personal jurisdiction in a United States forum. In *International Shoe*, the Court held that in order to subject a defendant to judgment in personam, due process requires that the defendant have certain minimum contacts with the forum such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. 326 U.S. at 316. This Comment moves beyond issues of personal jurisdiction and addresses the now common and problematic issue of serving a Japanese defendant.

7. Difficulties exist with service in a foreign country that do not exist with service within the United States. C.A. WRIGHT & A. MILLER, *supra* note 3, at 367. For example, a person not qualified by the law of the foreign country to make service may be subject to criminal sanctions or other constraints if that person attempts to serve process according to United States procedures. Also, some countries view service of process within their borders as a judicial and, therefore, sovereign act. Finally, enforcement of judgments rendered in United States courts against foreign defendants may be problematic if the particular foreign country does not recognize the manner in which original service was made. See *id.*

8. The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163 [hereinafter *Convention*]. The Convention is reprinted in 28 U.S.C.A., FED. R. CIV. P. 4, app. at 138 (West Supp. 1990) and in VIII MARTINDALE-HUBBLE LAW DIRECTORY, Part VII, at 1 (1990). For a quick reference guide to the Convention, see HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PRACTICAL HANDBOOK ON THE OPERATION OF THE HAGUE CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS (1983).

provides several methods by which a litigant of one signatory state to the Convention may effect service of process upon a potential litigant who is a member of another signatory state.<sup>9</sup> The basic method guaranteed by the Convention is service through a signatory's designated Central Authority.<sup>10</sup> This method can be cumbersome, expensive, and time consuming.<sup>11</sup> The Convention, however, provides several alternative methods of service on defendants who are members of signatory states that have not objected to the particular alternative method.<sup>12</sup>

Articles 8 and 9 of the Convention provide two of these alternatives,<sup>13</sup> while article 10 arguably provides three more alternatives.<sup>14</sup>

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9. Convention, *supra* note 8.

10. Convention, *supra* note 8, arts. 2-7 (defining the role of a Central Authority designated pursuant to the Convention). For a discussion of the power of designated Central Authorities under the Convention, see *infra* text accompanying notes 45-58.

11. Service through a state's Central Authority requires the serving party to fill out a request for service conforming to the Convention's model request form. Convention, *supra* note 8, art. 3. The request form must be attached to the documents the applicant is serving, and all the documents must be provided in duplicate to the receiving state's Central Authority. *Id.* The Central Authority can further require that the serving party translate the documents into the receiving state's official language. *Id.* art. 5. This whole process can be difficult and expensive, especially if the receiving state's Central Authority requires the plaintiff to translate the documents into a foreign language. The plaintiff would have to find and employ a person knowledgeable in the particular foreign language.

Furthermore, the Convention also empowers the Central Authority to reject the documents if it does not believe the documents conform to the Convention's requirements. *Id.* art. 4. This could cause delays in service if the Central Authority finds defects in the request. Even if the particular defects would not impair the addressee's actual notice, the Central Authority could rightfully reject the documents and require the plaintiff to remedy the defect and reapply for service. After the receiving state's Central Authority determines the documents are acceptable, the Central Authority then serves the documents on the party addressed. *Id.* art. 5. Therefore, the Central Authority acts as a middle man, causing a substantial time delay between transmission of the documents by the plaintiff and actual receipt by the potential defendant.

Several courts have recognized the burdensome requirements of service through a state's Central Authority. See, e.g., *Bankston v. Toyota Motor Corp.*, 123 F.R.D. 595, 599 (W.D. Ark. 1989) (quoting Routh, *Litigation Between Japanese and American Parties*, CURRENT LEGAL ASPECTS OF DOING BUSINESS IN JAPAN AND EAST ASIA 190-91 (1978) ("The [C]onvention sets up a rather cumbersome and involved procedure for service of process."); *McClenon v. Nissan Motor Corp.*, 726 F. Supp. 822, 826 (N.D. Fla. 1989) ("Article 10(a) may merely make clear that such post-service official documents need not be routed through the Central Authority, or meet the Convention's burdensome requirements of translation and the like.").

12. Convention, *supra* note 8, arts. 8-10. A signatory to the Convention can object to the alternative methods of service outlined in articles 8 and 10 by filing an objection with the ministry of Foreign Affairs of the Netherlands. *Id.* art. 21. See also *infra* text accompanying notes 68-70.

13. See *infra* text accompanying notes 59-63.

For plaintiffs seeking to serve foreign defendants, use of any of the alternative methods outlined in article 10 is less cumbersome than the use of a state's designated Central Authority<sup>15</sup> and more consistent with United States' federal and state rules governing service of process.<sup>16</sup> Japan has expressly objected to two of the alternative methods of service provided for under article 10.<sup>17</sup> Japan has not, however, objected to what is arguably a third method, outlined in paragraph (a) of article 10.<sup>18</sup>

Article 10(a) allows a litigant "the freedom to send judicial documents by postal channels, directly to persons abroad."<sup>19</sup> Since the United States and Japan<sup>20</sup> adopted the Convention, the meaning of article 10(a) has become one of the most litigated provisions of the Convention in United States courts.<sup>21</sup> Several courts have held that article 10(a) allows service of process by mail on a Japanese defendant,<sup>22</sup> while many other courts have reached the opposite conclusion.<sup>23</sup> As a result, needless litigation has recently flooded the courts over the availability of postal channels to United States plaintiffs attempting to serve process on Japanese defendants. Furthermore, judicial interpretations of article 10(a), both allowing and disallowing service of process by mail, have consistently employed faulty or incomplete analyses. This has led to precedential authority based on erroneous interpretations of facts,<sup>24</sup> textual meaning, legislative intent, and inapplicable canons of statutory construction.<sup>25</sup>

During the last few years, judicial disagreement over the mean-

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14. See *infra* text accompanying note 64.

15. *Id.*; see also *supra* note 11 and accompanying text.

16. See *infra* text accompanying notes 96-101; compare Convention, *supra* note 8, arts. 8-10 with FED. R. CIV. P. 4 and CAL. CIV. PROC. CODE § 415.40 (West Supp. 1990).

17. Convention, *supra* note 8. For the significance of Japan's objections, see *supra* note 12 and accompanying text.

18. Convention, *supra* note 8, art. 10.

19. *Id.*

20. Convention, *supra* note 8; see also *infra* text accompanying notes 33-38.

21. See *infra* text accompanying notes 96-97; see also Comment, *Service of Process Abroad Under The Hague Convention*, 71 MARQ. L. REV. 649, 676 (1988).

22. See *infra* note 128 and accompanying text.

23. See *infra* note 129 and accompanying text.

24. See *infra* text accompanying note 267; see also *Shoei Kako Co. v. Superior Court*, 33 Cal. App. 3d 808, 822, 109 Cal. Rptr. 402 (1973).

25. See *infra* text accompanying notes 210-21. For a general criticism of United States courts' interpretations of article 10(a) as allowing service of process by mail on a Japanese defendant, see Fujita, *Service of American Process upon Japanese Nationals by Registered Air-mail and Enforceability of Resulting American Judgments in Japan*, 12 LAW IN JAPAN 68 (1979).

ing of article 10(a) has grown,<sup>26</sup> reaching a stage at which a logical analysis of its meaning is critical. Such an analysis would provide much needed guidance to United States plaintiffs who serve increasing numbers of Japanese defendants. Additionally, the alarming recent trend of judicial authority toward the erroneous interpretation of article 10(a)—denying service of process by mail on Japanese defendants—places an unnecessary and unfair burden on United States litigants.<sup>27</sup>

This Comment will analyze the Convention and the split in judicial interpretations of article 10(a). It will examine the opinions that do not allow service of process by mail on Japanese defendants under article 10(a) and will suggest that these decisions are based on unduly restrictive interpretations of the plain language and purpose of the Convention. This Comment will also criticize the unfortunate analytical weaknesses in the decisions that have allowed service of process by mail on Japanese defendants. Additionally, this Comment will propose an analysis of article 10(a) that demonstrates that the Convention permits service of process by mail on Japanese defendants, until Japan formally objects to this method. Finally, this Comment will conclude that current judicial interpretations of article 10(a), which refuse to allow service of process by mail, place an undue burden on United States litigants and unfairly favor Japanese business enterprises in the United States.

## II. THE LAW OF THE CONVENTION

### A. *History and Purpose of the Convention*

After World War II, the United States began to abandon its isolationist policies.<sup>28</sup> As a result, the United States' international business and economic ties greatly increased.<sup>29</sup> The United States did not, however, simultaneously modernize its procedures for service of process on foreign litigants or for receipt of process by United States litigants from abroad.<sup>30</sup> A simplified system of service of process

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26. See *infra* notes 126-30 and accompanying text.

27. See *infra* notes 387-90 and accompanying text.

28. See C.A. WRIGHT & A. MILLER, *supra* note 3, at 367-68; Comment, *supra* note 21, at 652. Prior to World War II, pursuant to the Monroe Doctrine, the United States was reluctant to get involved in foreign affairs.

29. See C.A. WRIGHT & A. MILLER, *supra* note 3, at 367-68; Comment, *supra* note 21, at 652.

30. See C.A. WRIGHT & A. MILLER, *supra* note 3, at 367-68; Comment, *supra* note 21, at 652; see also Comment, *The Effect of The Hague Convention On Service Abroad Of Judicial*

between United States litigants and foreign litigants, including Japanese companies, was, therefore, desperately needed.<sup>31</sup>

The Hague Convention was drafted in 1965 by delegates from the United States and twenty-two other states, including Japan, to address these and other related problems.<sup>32</sup> The final draft of the Convention was completed and opened for signature on November 15, 1965.<sup>33</sup> The United States became the first signatory to the Convention when it ratified the Convention on August 24, 1967.<sup>34</sup> The Convention entered into force for the United States on February 10, 1969.<sup>35</sup> Japan ratified the Convention shortly thereafter on May 28, 1970, and the Convention entered into force for Japan on July 27, 1970.<sup>36</sup> Article 30 of the Convention provides that the Convention shall remain in force for any signatory state for five years from the date of its entry into force for that state. If the state has not denounced the Convention, it shall be tacitly renewed for that state

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*And Extrajudicial Documents in Civil and Commercial Matters*, 2 CORNELL INT'L L.J. 125, 126-28 (1969).

31. Prior to the United States' adoption of the Convention, United States litigants serving process abroad were faced with the problem of trying to choose a method of service that met constitutional due process requirements and was compatible with the local laws of the particular foreign state. This choice usually amounted to the United States litigant having to utilize letters rogatory (a formal request, made by the court in which the action is pending, to a foreign court to perform some judicial act) requesting service on the foreign litigant. See Comment, *supra* note 21, at 653.

For a more extensive discussion of the problems facing both United States and foreign litigants serving process in international litigation prior to the adoption of the Convention and the obvious need for a simplified system for such service, see C.A. WRIGHT & A. MILLER, *supra* note 3, at 367-68; Comment, *supra* note 21, at 652-54; see also Comment, *The "Mandatory" Nature of the Hague Service Convention in the United States is the Forum's Victory*, 23 VAND. TRANSNAT'L L. 179 (1990).

32. See Note, *The Interplay Between Domestic Rules Permitting Service Abroad by Mail and the Hague Convention on Service: Proposing an Amendment to the Federal Rules of Civil Procedure*, 22 CORNELL INT'L L.J. 335 (1989); Comment, *The Effect of The Hague Convention On Service Abroad Of Judicial And Extrajudicial Documents In Civil And Commercial Matters*, 2 CORNELL INT'L L.J. 125 (1969). The Convention was also designed to prescribe acceptable criteria for rendering default judgments in the event a properly served defendant fails to appear. See Convention, *supra* note 8.

33. Convention, *supra* note 8.

34. *Id.*

35. *Id.* Since that time, twenty-eight other states have become signatories to the Convention making a total of twenty-nine in 1990. The signatories include: Antigua, Barbuda, Barbados, Belgium, Botswana, Canada, Cypress, Czechoslovakia, Denmark, Egypt, the Federal Republic of Germany, Finland, France, Greece, Israel, Italy, Japan, Luxembourg, Malawi, the Netherlands, Norway, Pakistan, Portugal, Spain, the Seychelles, Sweden, Turkey, the United Kingdom, and the United States. *Id.*

36. *Id.*

every five years.<sup>37</sup> Since neither the United States nor Japan have denounced the Convention since becoming signatories, the Convention remains in force for both parties.<sup>38</sup>

One of the main purposes of the Convention is to create a simple and expeditious procedure for service of process on foreign litigants in an effort to encourage judicial assistance and cooperation in international litigation.<sup>39</sup> The drafters made this purpose explicit in the preamble to the Convention.<sup>40</sup> The preamble states the drafters intended the Convention: (1) "to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee"; and (2) "to improve the organization of mutual judicial assistance for that purpose by *simplifying and expediting* the procedure."<sup>41</sup>

### B. Provisions of the Convention

The Convention's various provisions set forth the scope of its applicability and the methods by which judicial and extrajudicial documents may be served abroad.<sup>42</sup> Article 1 defines the broad scope of

37. *Id.* art. 30.

38. See VIII MARTINDALE-HUBBLE LAW DIRECTORY Part VII, at 1 (1990).

39. See Convention, *supra* note 8, preamble; see also Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 698 (1988). The other major purpose of the Convention is to ensure that any method of service used between signatories to the Convention guarantees that the receiving party actually receives notice of any suit initiated against that party. This purpose is also explicitly stated in the preamble to the Convention. See *id.*; see also *infra* note 41.

40. Note, *supra* note 32, at 340.

41. See Convention, *supra* note 8, preamble (emphasis added). The preamble states:  
The States signatory to the present Convention,

Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,

Desiring to improve the organization of mutual judicial assistance for that purpose by simplifying and expediting the procedure,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions[.]

*Id.*

42. *Id.* The Convention also prescribes requirements that must be met before a default judgment against a member of a signatory state can be entered. Article 15 states that:

[a] defendant shall not be adjudged to be in default until it is established that—

(a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

(b) the document was actually delivered to the defendant or to his residence by another method provided for by the present Convention; and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

*Id.* art. 15. Furthermore, each state is free to declare that default judgment may be given



the Convention by stating that the Convention applies "in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad."<sup>43</sup> Since both the United States and Japan are Convention signatories, article 1 makes clear that the Convention applies in all civil and commercial litigation between United States and Japanese litigants.<sup>44</sup>

### 1. The Basic Method of Service Under the Convention

Articles 2 through 7 define the basic method of service under the Convention. Article 2 requires each signatory state to recognize this method of service in accordance with the Convention by stating: "[e]ach contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other contracting States . . ."<sup>45</sup> The United States has designated the Departments of State and Justice as its Central Authorities.<sup>46</sup> Japan has designated its Minister of Foreign Affairs as its Central Authority.<sup>47</sup> Article 3 requires any authority or judicial officer, competent under the law of the state in which the documents originate, to forward a request for service to the Central Authority of the state addressed, conforming to the model attached to the Convention.<sup>48</sup> The docu-

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"even if no certificate of service or delivery has been received," as long as: (a) the document was transmitted by one of the methods provided for in the Convention; (b) a period of time, not less than six months, considered adequate by the judge has elapsed since the document was transmitted; and (c) no certificate was received, even though every reasonable effort has been made to obtain it through the authorities of the state addressed. *Id.*

Finally, article 16 provides that in the event a default judgment is entered pursuant to the Convention, a court has the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment provided certain conditions are met. *Id.* art. 16.

43. *Id.* art. 1. See also *infra* note 213 and accompanying text. It is interesting to note that article 1 of the Convention also requires that the address of the party to be served with the document must be known, otherwise the Convention does not apply. See Convention, *supra* note 8, art. 1. One commentator has concluded, therefore, that in a commercial case where the address of the Japanese defendant to be served is not known, the Convention does not apply, and "other methods such as service by publication may be utilized." Comment, *supra* note 3, at 146.

44. See *infra* note 213 and accompanying text. Note that the Convention's applicability is subject to the requirement that the United States plaintiff know the address of the Japanese defendant. See *supra* note 43.

45. Convention, *supra* note 8, art. 2; see also 1 B. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE (CIVIL AND COMMERCIAL) 119 (1984) (The Convention "mandates" the establishment in each signatory state of a Central Authority).

46. Convention, *supra* note 8.

47. *Id.*

48. *Id.* art. 3. Model forms are attached to the Convention for all the particular documents required under it. See *id.*

ment to be served or a copy must be attached to the request, and both the request and document must be furnished in duplicate to the Central Authority of the state addressed.<sup>49</sup> Under article 4, if the Central Authority believes that the request does not comply with the provisions of the Convention, it must promptly inform the applicant and specify its objections to the request.<sup>50</sup>

Article 5 permits the Central Authority of the state addressed to serve the document itself or arrange to have it served by an appropriate agency. The Central Authority can serve the document either by a method prescribed by its internal law or by a particular method requested by the applicant, so long as the requested method is compatible with the law of the state addressed.<sup>51</sup> Additionally, as long as the receiving state's law permits, the document may be served by delivery to an addressee who accepts it voluntarily.<sup>52</sup> Finally, the Central Authority of the state addressed may require the document to be written in, or translated into, that state's official language.<sup>53</sup>

Article 6 requires the Central Authority of the state addressed, or any authority it may have designated for that purpose, to complete a certificate conforming to the model attached to the Convention.<sup>54</sup> The certificate must state: (1) that the document has been served; (2) the method, place, and date of service; and (3) the person to whom the document was delivered.<sup>55</sup> If the document was not served, the certificate must set forth the reasons preventing service.<sup>56</sup>

Finally, documents served through a state's Central Authority must meet certain language requirements. Article 7 provides that the standard terms in the model Request, Certificate, and Summary of the Document to be Served, attached to the Convention, must be written in either French or English, and may additionally be written in the official language of the state in which the documents originate.<sup>57</sup> The blanks in the forms must be completed in either the language of the state addressed, or in French or English.<sup>58</sup>

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49. *Id.*

50. *Id.* art. 4.

51. *Id.* art. 5.

52. *Id.*

53. *Id.*

54. *Id.* art. 6.

55. *Id.*

56. *Id.*

57. *Id.* art. 7.

58. *Id.*

## 2. Alternative Methods of Service Under the Convention

The Convention also provides several alternative methods of service.<sup>59</sup> These alternative methods are outlined in articles 8 through 10.<sup>60</sup> Article 8 allows service directly through a sending state's diplomatic or consular agents, provided that the state addressed has not objected.<sup>61</sup> Article 9 permits each state to use consular channels to forward documents, for the purpose of service, to the authorities of another state who are designated to receive such documents under this article.<sup>62</sup> Additionally, each state may use diplomatic channels for this purpose if "exceptional circumstances so require."<sup>63</sup>

Article 10 potentially provides three additional alternative methods of service. Article 10 states:

Provided the State of destination does not object, the present Convention shall not interfere with—

- (a) the freedom to send judicial documents, by postal channels, directly to persons abroad;
- (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination;
- (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.<sup>64</sup>

Thus, the Convention explicitly provides four alternative service methods to using a state's Central Authority: (1) service through diplomatic or consular agents; (2) transmission of documents through consular or diplomatic channels of the sending state for service by officials of the state addressed; (3) service through each state's judicial officers; and (4) service directly by a litigant through judicial officers of the state addressed. Additionally, article 10(a) may allow service directly by mail as a fifth alternative method. However, since article

59. Convention, *supra* note 8.

60. *Id.* arts. 8-10.

61. *Id.* art. 8. The receiving state is not free to object to this method of service if a national of the state from which the documents originate is the party receiving process. *Id.*

62. *Id.* art. 9.

63. *Id.* What constitutes an "exceptional circumstance" is not defined in the Convention. *See id.*

64. *Id.* art. 10.

10(a) does not expressly contain the word "service," as this Comment will discuss, the availability of this alternative is uncertain.

The Convention makes clear, however, that it is not intended to invalidate more liberal methods of service that signatory states have previously allowed or to which they have subsequently agreed. Article 19 states that the Convention shall not prevent a sending party from using methods of service that are permitted by the internal laws of the receiving state, regardless of whether such methods are provided for in the Convention.<sup>65</sup> Similarly, article 11 provides that the Convention will not prevent two or more signatory states from agreeing to permit methods of service of judicial documents through channels of transmission other than those provided for in the Convention.<sup>66</sup>

Finally, once a litigant has effected service in compliance with the terms of the Convention, a signatory state must recognize such service as valid. Article 13 makes this clear by stating that where a request for service complies with the terms of the Convention, the state addressed may refuse to comply with the service "only if it deems that compliance would infringe its sovereignty or security."<sup>67</sup>

### 3. Japan's Objections to Alternative Methods of Service

Article 21 of the Convention allows a signatory state, at the time it ratifies the Convention or at any time thereafter, to inform the Ministry of Foreign Affairs of the Netherlands of its opposition to the use of methods of transmission pursuant to articles 8 and 10.<sup>68</sup> The United States has not objected to any of the alternative methods of service outlined in articles 8 and 10.<sup>69</sup> Japan, on the other hand, has eliminated three of the alternative methods of service outlined in the Convention.<sup>70</sup>

Japan has effectively eliminated the alternative method available under article 9, which allows service through a sending state's consular agents to a designated authority of the receiving state. In its ratifying declaration of 1970, Japan stated that its Minister of Foreign

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65. *Id.* art. 19.

66. *Id.* art. 11.

67. *Id.* art. 13.

68. *Id.* art. 21.

69. See VIII MARTINDALE-HUBBLE LAW DIRECTORY Part VII, at 1 (1990).

70. Japan did not, however, object to article 8. See Convention, *supra* note 8. Therefore, presumably a United States plaintiff could serve a Japanese defendant by having a United States diplomatic official personally serve the document on the defendant in Japan. See *id.*

Affairs was the authority competent to receive documents transmitted through consular channels, pursuant to article 9.<sup>71</sup> Since Japan's Minister of Foreign Affairs is also its Central Authority pursuant to article 5,<sup>72</sup> Japan has effectively merged the alternative method available under article 9 into article 5. In either case, a plaintiff must deliver the documents to be served to Japan's Minister of Foreign Affairs. Additionally, Japan expressly objected to the use of the methods of service defined in paragraphs (b) and (c) of article 10.<sup>73</sup> Japan, therefore, will not permit a United States plaintiff<sup>74</sup> to effect service directly through a judicial officer, official, or other competent person of Japan.<sup>75</sup> Japan did not, however, render any objection to the method of service arguably allowed under article 10(a).<sup>76</sup> Furthermore, Japan has not amended its original declaration of objections in the twenty years since it adopted the Convention.<sup>77</sup>

### C. *Applicability of the Convention in United States Courts*

The Convention governs the procedure a United States plaintiff must use whenever serving a Japanese defendant located in Japan.<sup>78</sup> Neither federal nor state rules of civil procedure supersede the Convention when a plaintiff serves a foreign national whose state is a signatory to the Convention, as is Japan.<sup>79</sup> Therefore, the terms of the Convention are applicable in all civil and commercial litigation in the United States between United States and Japanese litigants.

#### 1. The Supremacy Clause of the United States Constitution

Under article VI of the United States Constitution, all treaties made under the authority of the United States are the supreme law of

71. *Id.*

72. *See id.* art. 5.

73. *Id.*

74. In federal court, Rule 4 of the Federal Rules of Civil Procedure allows service of process abroad to be made by any person who is not a party to the action and is not less than 18 years of age. FED. R. CIV. P. 4. Numerous other United States jurisdictions also permit service by private parties, including a plaintiff's attorney. *See Note, Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters under the Hague Convention*, 3 REV. LIT. 493, 501 (1983); *see also* CAL. CIV. PROC. CODE § 414.10 (West 1973).

75. *See* Convention, *supra* note 8. Under Japanese law, only official officers of the court are "competent" to serve process upon a Japanese litigant. *See* Fujita, *supra* note 25.

76. *See* Convention, *supra* note 8.

77. *See id.*

78. *See infra* text accompanying notes 80-95; *see also* Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988).

79. *See id.*

the land.<sup>80</sup> Several courts have held that the Convention has the status of a treaty.<sup>81</sup> Therefore, the provisions of the Convention have authority equivalent to any federal law.<sup>82</sup> As a result, so long as the Convention does not transgress constitutional restrictions, a United States court must abide by its terms.<sup>83</sup> Service of process, the subject of the Convention, is generally tested against the constitutional requirements of adequate notice and an opportunity to be heard, as guaranteed by the due process clause of the fourteenth amendment.<sup>84</sup> The Convention has yet to be challenged on the grounds that it violates due process.<sup>85</sup> This is true probably because convention drafters apparently considered United States constitutional due process re-

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

*Id.* See also *United States v. Pink*, 315 U.S. 203 (1942). The Court held that "[a]ll constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature . . . . A treaty is a 'Law of the Land' under the supremacy clause (Art. VI, cl. 2) of the Constitution." *Id.* at 230. Further, "state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement." *Id.* at 230-31.

81. *E.g.*, *Newport Components v. NEC Home Electronics*, 671 F. Supp. 1525, 1541 (C.D. Cal. 1987); *Cooper v. McKita, U.S.A., Inc.*, 117 F.R.D. 16, 17 (D. Me. 1987); *Pochop v. Toyota Motor Co.*, 111 F.R.D. 464, 465 (S.D. Miss. 1986); *Weight v. Kawasaki Heavy Industries, Ltd.*, 597 F. Supp. 1082, 1085 (E.D. Va. 1984); *Harris v. Browning-Ferris Industries Chemical Services, Inc.*, 100 F.R.D. 775, 777 (M.D. La. 1984); *Schlunk v. Volkswagenwerk Aktiengesellschaft*, 145 Ill. App. 3d 594, 595, 495 N.E.2d 1114, 1115 (1986); *Ex Parte Volkswagenwerk Aktiengesellschaft*, 443 So. 2d 880, 882 (Ala. 1983); *Dr. Ing. H.C.F. Porsche A.G. v. Superior Court*, 123 Cal. App. 3d 755, 757-58 n.1, 177 Cal. Rptr. 155, 156 n.1 (1981).

82. U.S. CONST. art. VI, cl. 2; *Pink*, 315 U.S. at 230.

83. *Reid v. Covert*, 354 U.S. 1, 16 (1957) ("No agreement with a foreign nation can . . . [be] free from the restraints of the Constitution.").

84. See U.S. CONST. amend. XIV; see also *Milliken v. Meyer*, 311 U.S. 457 (1940). The Court stated:

That . . . substituted service may be wholly adequate to meet the requirements of due process was recognized by this Court . . . . Its adequacy 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 . . . 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.

*Id.* at 463; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). "An 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 interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314.

85. See Comment, *supra* note 21, at 660.

quirements and incorporated them into the Convention.<sup>86</sup> Therefore, under the Constitution, the Convention should apply in United States courts.

## 2. Conflicts with State Rules of Civil Procedure

Conflicts between state rules of civil procedure governing service of process and the provisions of the Convention are relatively easy to resolve. Under the supremacy clause, treaties of the United States preempt state law.<sup>87</sup> Thus, as long as a treaty is constitutional, it can regulate any matter within the territory of a state regardless of any contrary state law.<sup>88</sup> Accordingly, courts have regularly held that where state service of process rules conflict with Convention procedures, the Convention controls.<sup>89</sup>

## 3. Conflicts with the Federal Rules of Civil Procedure

A more complicated situation arises when the Convention conflicts with the Federal Rules of Civil Procedure.<sup>90</sup> In federal courts, the issue is whether the provisions for service under the Convention, or the methods contained in Rule 4 of the Federal Rules of Civil Procedure govern the method of service a plaintiff must follow. This conflict is especially apparent in the controversy surrounding the availability of service of process by mail arguably allowed under arti-

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86. See 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. (1967) [hereinafter SENATE REPORT]. Speaking about the Convention in his statement to the Senate Committee, Richard D. Kearney, an official United States delegate to the Convention, stated that "[u]nanimous agreement was reached upon a convention which basically conforms to the American standards of procedural due process . . ." *Id.* at 6-7. In his report, Phillip W. Amram, also an official United States Convention delegate, stated "[the Convention] recognizes the concept of due process in international litigation where the defendant is a resident of a foreign country." *Id.* at 11; see also Convention, *supra* note 8 (preamble).

87. U.S. CONST. art. VI, cl. 2; see also *Pink*, 315 U.S. at 230-31.

88. U.S. CONST. art. VI, cl. 2; see also *Pink*, 315 U.S. at 230-31; *Nielsen v. Johnson*, 279 U.S. 47, 52 (1929); *Missouri v. Holland*, 252 U.S. 416, 434 (1920).

89. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988); *Ackerman v. Levine*, 788 F.2d 830, 840-41 (2d Cir. 1986); *Harris v. Browning-Ferris Indus. Chem. Serv.*, 100 F.R.D. 775, 777 (M.D. La. 1984); *Weight v. Kawasaki Heavy Indus.*, 597 F. Supp. 1082, 1085-86 (E.D. Va. 1984); *Schlunk v. Volkswagenwerk Aktiengesellschaft*, 145 Ill. App. 3d 594, 495 N.E.2d 1114 (1986); *Rivers v. Stihl, Inc.*, 434 So. 2d 766 (Ala. 1983).

90. See FED. R. CIV. P. 4. In federal courts, the Federal Rules of Civil Procedure generally apply. See *Hanna v. Plumer*, 380 U.S. 460 (1965). "When a situation is covered by one of the Federal Rules, . . . [a federal] court has been instructed to apply the Federal Rule, and can refuse to do so only if . . . the Rule in question transgresses [either] the terms of the Enabling Act [or] constitutional restrictions." *Id.* at 471.

cle 10(a) of the Convention and clearly allowed under paragraph (i) of Rule 4.<sup>91</sup> Rule 4(i) provides, in relevant part, that a plaintiff may serve a foreign defendant "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."<sup>92</sup> The Constitution provides no clear answer to this situation.<sup>93</sup> However, federal courts have apparently resolved the conflict by applying the "doctrine of implied repeal." This doctrine holds that the enactment later in time prevails.<sup>94</sup> Since the Convention was ratified in 1969, and Rule 4(i) was enacted in 1963, federal courts have held that the Convention preempts Rule 4(i).<sup>95</sup> As a result, a United States plaintiff cannot avoid the Convention's service requirements by bringing suit in federal court.

### III. THE CONFLICT OF AUTHORITY INTERPRETING ARTICLE 10(A) AND JAPAN'S SILENCE

Since the Convention applies whenever a United States plaintiff serves process on a Japanese defendant in federal or state court, many courts have been forced to interpret the terms of the Convention.<sup>96</sup>

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91. FED. R. CIV. P. 4. Rule 4(e) provides, in part, that whenever service is provided for on "a party not an inhabitant of or found within the state in which the district court is held, service may be made . . . in a manner stated in this rule." *Id.* at 4(e). Rule 4(i) provides five additional alternative methods of service a plaintiff may utilize when serving process on a foreign defendant. *See id.* at 4(i). For a discussion on the conflict between service methods allowed under Rule 4 and the provisions of the Convention, see Note, *supra* note 32, at 344-70.

92. FED. R. CIV. P. 4(i).

93. *See* U.S. CONST. art. VI, cl. 2.

94. *See* *Cook v. United States*, 288 U.S. 102, 119-20 (1932); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

95. *E.g.*, *Ackerman v. Levine*, 788 F.2d 830, 840 (2d Cir. 1986) ("Federal Rule 4 was superseded by the Hague Convention and thus . . . should not limit application of the convention."); *Smith v. Dainichi Kinzoku Kogyo Co., Ltd.*, 680 F. Supp. 847, 850 n.1 (W.D. Tex. 1988); *Cooper v. Makita, U.S.A., Inc.*, 117 F.R.D. 16, 17 (D. Me. 1987); *Vorhees v. Fisher & Krecke*, 697 F.2d 574, 575-76 (4th Cir. 1983).

96. *See infra* text accompanying notes 131-277; *see generally* *Wasden v. Yamaha Motor Co.*, 131 F.R.D. 206 (M.D. Fla. 1990); *McClenon v. Nissan Motor Corp.*, 726 F. Supp. 822 (N.D. Fla. 1989); *Meyers v. Asics Corp.*, 711 F. Supp. 1001 (C.D. Cal. 1989); *Bankston v. Toyota Motor Corp.*, 123 F.R.D. 595 (W.D. Ark.), *aff'd*, 889 F.2d 172 (8th Cir. 1989); *Smith v. Dainichi Kinzoku Kogyo Co.*, 680 F. Supp. 847 (W.D. Tex. 1988); *Prost v. Honda Motor Co.*, 122 F.R.D. 215 (E.D. Mo. 1987); *Cooper v. Makita, U.S.A., Inc.*, 117 F.R.D. 16 (D. Maine 1987); *Newport Components, Inc. v. NEC Home Electronics (U.S.A.), Inc.*, 671 F. Supp. 1525 (C.D. Cal. 1987); *Lemme v. Wine of Japan Import, Inc.*, 631 F. Supp. 456 (E.D.N.Y. 1986); *Pochop v. Toyota Motor Co.*, 111 F.R.D. 464 (S.D. Miss. 1986); *Mommsen v. Toro Co.*, 108 F.R.D. 444 (S.D. Iowa 1985); *Zisman v. Sieger*, 106 F.R.D. 194 (N.D. Ill. 1985); *Weight v. Kawasaki Heavy Industries*, 597 F. Supp. 1082 (E.D. Va. 1984); *Chrysler Corp. v. General Motors Corp.*, 589 F. Supp. 1182 (D.D.C. 1984); *Suzuki Motor Co. v. Superior Court*, 200 Cal. App. 3d 1476, 249 Cal. Rptr. 376 (1988); *Reynolds v. Koh*, 109 A.D.2d



One of the greatest areas of controversy over the Convention is whether article 10(a) allows service of process by mail on a Japanese defendant.<sup>97</sup> This controversy arises because service of process by mail is a common method of service for domestic litigants in both federal and state courts.<sup>98</sup> Both federal and state rules of civil procedure generally allow for service of process by mail.<sup>99</sup> A plain reading of Rule 4(i) indicates that service of process by mail on a foreign defendant is permissible without need to resort to any further regulations.<sup>100</sup> Therefore, it is probable that many attorneys who are not experienced in litigating against Japanese defendants are not aware of the Convention's provisions and applicability.<sup>101</sup> As a result, many United States plaintiffs' attorneys, completely unaware of the potential problems, may attempt service by mail on a Japanese defendant.

Unfortunately, even knowledgeable attorneys have been left without definitive direction. Both federal and state courts are split on whether article 10(a) of the Convention allows service by mail.<sup>102</sup> One state court has even split between two of its appellate districts over the issue.<sup>103</sup> Furthermore, the various court opinions are generally based on very cursory reasoning, imprecise logic, or faulty interpretations of the Convention.<sup>104</sup> Therefore, guidance from the courts remains confusing and unreliable. As a result, a plaintiff's decision to

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97, 490 N.Y.S.2d 295 (1985); *Rissew v. Yamaha Motor Co.*, 129 Misc. 2d 78, 493 N.Y.S.2d 78 (1985); *Ormandy v. Lynn*, 122 Misc. 2d 954, 472 N.Y.S.2d 274 (1984); *Shoei Kako Co. v. Superior Court*, 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1973).

97. See Comment, *supra* note 21, at 676; see also *infra* text accompanying notes 131-277; cases cited *supra* note 96.

98. See *infra* text accompanying notes 131-277.

99. See FED. R. CIV. P. 4; see, e.g., CAL. CIV. PROC. CODE § 415.30 (West 1973).

100. See FED. R. CIV. P. 4(i); see also Note, *supra* note 32, at 344. "The parallel service provisions of domestic law and the [Convention] foster confusion. The language of domestic service rules is a trap for the unwary, often permitting service by mail to foreign parties without limitation." *Id.*

101. See Note, *supra* note 32. The author observes that "[Rule 4(i)] permits service by mail without imposing any restrictions or encouraging resort to the [Convention]. The accompanying advisory committee notes fail to mention the [Convention] . . . . Given the optional and far-reaching language of Rule 4(i), attorneys plausibly could assume that no conflicting legal obligation exists." *Id.* at 344.

102. See *infra* text accompanying notes 131-277.

103. Compare *Shoei Kako Co. v. Superior Court*, 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1st Dist. 1973) (holding service of process by registered mail upon a Japanese defendant was permissible under article 10(a) of the Convention) with *Suzuki Motor Co. v. Superior Court*, 200 Cal. App. 3d 1476, 249 Cal. Rptr. 376 (4th Dist. 1988) (declining to follow *Shoei*, and holding service of process by registered mail on a Japanese defendant was not permissible under article 10(a) of the Convention); see also *infra* text accompanying notes 261-77.

104. See *infra* text accompanying notes 131-281.

serve a Japanese defendant by mail is open to attack by the defendant, even where controlling precedent indicates it is permissible.<sup>105</sup> Consequently, a real need exists to resolve the issue with a logical analysis that properly interprets the plain meaning and purpose of the Convention.

*A. The Need to Resort to Article 10(a)*

The need to serve process on a Japanese defendant can arise in a number of different contexts. Japanese products and business interests in United States markets are substantial.<sup>106</sup> As a result, cases in which United States courts have interpreted article 10(a) most often arise from claims by United States businesses or individuals against Japanese companies.<sup>107</sup>

Due to increasing Japanese business competition in United States domestic markets, United States businesses often resort to the courts to settle commercial disputes against Japanese companies. These disputes involve issues in contract,<sup>108</sup> antitrust,<sup>109</sup> and patent infringement.<sup>110</sup> To adjudicate these disputes against a Japanese company incorporated and located in Japan, the United States plaintiff must often effect service of process upon the Japanese defendant in Japan.<sup>111</sup>

Similarly, with the great influx of Japanese manufactured consumer goods into United States markets, private individuals who are injured by these goods must often turn to the courts to obtain compensation.<sup>112</sup> Generally, these cases involve damages for personal injuries or wrongful death and allege claims in contract for breach of

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105. See, e.g., *infra* text accompanying notes 261-77.

106. See *supra* notes 1 & 2.

107. See *infra* text accompanying notes 131-277.

108. See *Newport Components, Inc. v. NEC Home Electronics (U.S.A.), Inc.*, 671 F. Supp. 1525 (C.D. Cal. 1989); *Chrysler Corp. v. General Motors Corp.*, 589 F. Supp. 1182 (D.D.C. 1984).

109. See *Newport Components, Inc. v. NEC Home Electronics (U.S.A.), Inc.*, 671 F. Supp. 1525 (C.D. Cal. 1989); *Chrysler Corp. v. General Motors Corp.*, 589 F. Supp. 1182 (D.D.C. 1984).

110. See *Meyers v. Asics Corp.*, 711 F. Supp. 1001 (C.D. Cal. 1989).

111. See *infra* text accompanying notes 131-277.

112. See, e.g., *Smith v. Dainichi Kinzoku Kogyo Co.*, 680 F. Supp. 847 (W.D. Tex. 1988); *Mommsen v. Toro Co.*, 108 F.R.D. 444 (S.D. Iowa 1985); *Weight v. Kawasaki Heavy Industries*, 597 F. Supp. 1082 (E.D. Va. 1984); *Suzuki Motor Co. v. Superior Court*, 200 Cal. App. 3d 1476, 249 Cal. Rptr. 376 (1988); *Shoei Kako Co. v. Superior Court*, 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1973).

warranty and in tort for negligence and strict product liability.<sup>113</sup> Especially in personal injury actions, the plaintiff must sue several defendants. The parties generally named are the retailer, wholesaler or distributor, and manufacturer of the allegedly defective product.<sup>114</sup> Almost invariably, the manufacturer of the allegedly defective product is a Japanese company incorporated and located in Japan.<sup>115</sup> Often the Japanese manufacturer introduced its product into the United States market through a Japanese or United States distributor. Thus, it may have insufficient contacts with the United States forum where the suit is initiated to allow service of process upon it within the United States.<sup>116</sup> As a result, the individual plaintiff is faced with the difficult task of serving the Japanese manufacturer in Japan.<sup>117</sup>

Whether in commercial or civil litigation, United States plaintiffs often attempt to serve the Japanese defendant in Japan directly by mail.<sup>118</sup> Plaintiffs choose to use postal channels to effect service of process for a variety of reasons. Probably the most obvious reason is that service by mail is generally easier and less expensive than personal service.<sup>119</sup> Since litigants generally desire to keep litigation costs as low as possible, service by mail represents not only the most desirable method, but also, in many cases, the only practical method.

Furthermore, service by mail satisfies due process requirements of adequate notice and an opportunity to be heard.<sup>120</sup> Therefore, both

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113. See, e.g., *Suzuki Motor Co. v. Superior Court*, 200 Cal. App. 3d 1476, 249 Cal. Rptr. 376; *Shoei Kako Co. v. Superior Court*, 33 Cal. App. 3d 808, 109 Cal. Rptr. 402.

114. See, e.g., cases cited *supra* note 113.

115. See cases cited *supra* note 112.

116. *Id.* For a discussion of recent case law addressing the contacts necessary for a Japanese company's United States subsidiary to constitute its agent for purposes of service of process, see Comment, *supra* note 31 at 193-97. Note that the Supreme Court has held that if a foreign company does have sufficient contacts with a subsidiary within the United States so that the subsidiary constitutes its agent for purposes of service of process under the applicable forum's law, the Convention does not apply to service on the company's United States subsidiary. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988).

117. See cases cited *supra* note 112.

118. See cases cited *supra* note 96; see also *infra* text accompanying notes 131-277.

119. See C.A. WRIGHT & A. MILLER, *supra* note 3, at 377. Personal service denotes actual delivery of process to the person to whom the process is directed or to someone authorized to receive it in his behalf. Personal service is made by delivering a copy of the summons and complaint to the person named, or by leaving it, or copies of it, at the person's dwelling or usual place of abode with some responsible person, or by delivering a copy to an agent authorized to receive such. BLACK'S LAW DICTIONARY 1227 (5th ed. 1979).

120. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950). In *Mullane*, the Court upheld the constitutionality of service of process by mail stating, "[h]owever it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication." *Id.* at 319.

the Federal Rules of Civil Procedure and most state rules of civil procedure specifically allow for service by mail, subject to certain conditions.<sup>121</sup> Because these rules basically involve the same requirements for service of process on a foreign defendant as on a domestic defendant,<sup>122</sup> the rules may easily mislead a plaintiff into believing the law permits service by mail on a Japanese defendant located in Japan.<sup>123</sup> Plaintiffs, therefore, will often attempt service of process on a Japanese defendant located in Japan directly by mail.<sup>124</sup> The Japanese defendant will commonly respond by a motion to dismiss for insufficiency of service of process. Alternatively, the defendant may move to quash for improper service, alleging that service of process by mail on a Japanese company does not satisfy the Convention.<sup>125</sup>

As a result, several state and federal courts have been faced with interpreting the ambiguous language of article 10(a) to determine whether it allows service of process by mail on a Japanese defendant.<sup>126</sup> In attempting to interpret article 10(a), the courts have become severely split.<sup>127</sup> Several early decisions held that article 10(a) does allow service of process by mail and that Japan's failure to object to article 10(a) meant that service of process by mail on a Japanese defendant was permissible.<sup>128</sup> However, an equal number of courts held that article 10(a) does not allow service of process by mail.<sup>129</sup> The more recent judicial trend is consistent with this latter interpretation.<sup>130</sup>

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121. FED. R. CIV. P. 4; *see, e.g.*, CAL. CIV. PROC. CODE § 415.30 (West 1973).

122. FED. R. CIV. P. 4; *see, e.g.*, CAL. CIV. PROC. CODE § 415.30 (West 1973); *but see* CAL. CIV. PROC. CODE § 413.10 (West Supp. 1990). Section 413.10 states that the California rules are "subject to the provisions of the Convention on the 'Service Abroad of Judicial and Extrajudicial Documents' in Civil or Commercial Matters." CAL. CIV. PROC. CODE § 413.10(c) (West Supp. 1990).

123. *See supra* notes 100-01 and accompanying text.

124. *See infra* text accompanying notes 131-277.

125. *Id.*

126. *Id.*

127. *Id.*

128. *See Lemme v. Wine of Japan Import, Inc.*, 631 F. Supp. 456 (E.D.N.Y. 1986); *Zisman v. Sieger*, 106 F.R.D. 194 (N.D. Ill. 1985); *Weight v. Kawasaki Heavy Industries*, 597 F. Supp. 1082 (E.D. Va. 1984); *Chrysler Corp. v. General Motors Corp.*, 589 F. Supp. 1182 (D.D.C. 1984).

129. *See Prost v. Honda Motor Co.*, 122 F.R.D. 215 (E.D. Mo. 1987); *Cooper v. Makita, U.S.A., Inc.*, 117 F.R.D. 16 (D. Maine 1987); *Pochop v. Toyota Motor Co.*, 111 F.R.D. 464 (S.D. Miss. 1986); *Mommsen v. Toro Co.*, 108 F.R.D. 444 (S.D. Iowa 1985); *Suzuki Motor Co. v. Superior Court*, 200 Cal. App. 3d 1476, 249 Cal. Rptr. 376 (1988); *Reynolds v. Koh*, 109 A.D.2d 97, 490 N.Y.S.2d 295 (1985); *Rissew v. Yamaha Motor Co.*, 129 Misc. 2d 317, 493 N.Y.S.2d 78 (1985); *Ormandy v. Lynn*, 122 Misc. 2d 954, 472 N.Y.S.2d 274 (1984).

130. *See Prost*, 122 F.R.D. at 216 ("More recent opinions believe that service by registered

## B. Cases Allowing Service by Mail

### 1. The Seminal Case

*Shoei Kako Co. v. Superior Court*,<sup>131</sup> a California state court decision, is the oldest and most cited case holding that article 10(a) allows service of process by mail on a Japanese defendant.<sup>132</sup> Although part of the basis for the *Shoei* court's holding relies on a faulty record,<sup>133</sup> the court provides a substantially complete analysis of article 10(a) as it relates to service on a Japanese defendant.<sup>134</sup>

*Shoei* was a typical personal injury action brought by a United States plaintiff against a Japanese manufacturer.<sup>135</sup> The plaintiff sustained severe bodily injuries in a traffic collision with another vehicle.<sup>136</sup> The plaintiff filed suit in a California state court, alleging that the collision and a defective safety helmet caused his injuries.<sup>137</sup> At the time of the collision, the plaintiff was driving a motorcycle, wearing a safety helmet designed and manufactured by the defendant, Shoei Kako Company, a Japanese corporation with its principle place of business in Tokyo.<sup>138</sup> The plaintiff alleged causes of action for breach of warranty, negligence, and strict product liability against Shoei.<sup>139</sup>

Pursuant to the California Code of Civil Procedure,<sup>140</sup> the plaintiff attempted to serve defendant Shoei with a copy of the summons

mail is improper."); see generally *Bankston v. Toyota Motor Corp.*, 889 F.2d 172 (8th Cir. 1989); *Wasden v. Yamaha Motor Co.*, 131 F.R.D. 206 (M.D. Fla. 1990); *McClenon v. Nissan Motor Corp.*, 726 F. Supp. 822 (N.D. Fla. 1989); *Suzuki Motor Co. v. Superior Court*, 200 Cal. App. 3d 1476, 249 Cal. Rptr. 376 (1988).

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

132. *Id.*

133. The record before the court erroneously indicated that service of process by direct mail between litigants was permissible under the domestic law of Japan. *Shoei*, 33 Cal. App. 3d at 822, 109 Cal. Rptr. at 412; see also *Suzuki*, 200 Cal. App. 3d at 1480-81, 249 Cal. Rptr. at 379.

134. *Shoei*, 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1973). For cases following *Shoei*, see, e.g., *Meyers v. Asics Corp.*, 711 F. Supp. 1001 (C.D. Cal. 1989); *Smith v. Dainichi Kinzoku Kogyo Co.*, 680 F. Supp. 847 (W.D. Tex. 1988); *Newport Components, Inc. v. NEC Home Electronics (U.S.A.), Inc.*, 671 F. Supp. 1525 (C.D. Cal. 1987); *Lemme v. Wine of Japan Import, Inc.*, 631 F. Supp. 456 (E.D.N.Y. 1986); *Chrysler Corp. v. General Motors Corp.*, 589 F. Supp. 1182 (D.D.C. 1984).

135. *Shoei Kako Co. v. Superior Court*, 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1973).

136. *Id.* at 810, 109 Cal. Rptr. at 403.

137. *Id.* at 808, 109 Cal. Rptr. at 402.

138. *Id.* at 811, 109 Cal. Rptr. at 404.

139. *Id.* at 810-11, 109 Cal. Rptr. at 404.

140. CAL. CIV. PROC. CODE § 415.40 (West Supp. 1990).

and complaint by mail, requesting a return receipt.<sup>141</sup> Defendant Shoei did not return the formal acknowledgement of service, but apparently received the summons and complaint because the plaintiff produced an international mail receipt signed by an employee of Shoei.<sup>142</sup> After receiving the receipt, the plaintiff's attorney sent a registered letter to Shoei alleging that the plaintiff had served Shoei in a timely manner with a copy of the summons and complaint and that the time to answer the complaint had expired.<sup>143</sup> The letter further threatened that the plaintiff would seek a default judgment unless Shoei filed a responsive pleading.<sup>144</sup> Shortly thereafter, Shoei filed a motion to quash service.<sup>145</sup> Defendant Shoei argued that the method used to perfect service of process, mail, did not comply with the Convention.<sup>146</sup>

The California Court of Appeal for the First District began its

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141. *Shoei*, 33 Cal. App. 3d at 815-16, 109 Cal. Rptr. at 406-08.

142. *Id.*

143. *Id.*

144. *Id.* at 817, 109 Cal. Rptr. at 408.

145. *Id.*

146. *Shoei*, 33 Cal. App. 3d at 810, 109 Cal. Rptr. at 403. Shoei also argued that, in the alternative, service of process should be quashed because the notice given by the service failed to comply with due process requirements since the documents transmitted by mail were not written in Japanese. *Id.* The court found no merit to this argument. *Id.* The court recognized that service was not made through Japan's designated Central Authority, so the plaintiff could not "rely upon the authorization of English language contained in the treaty. . . ." *Id.* at 823, 109 Cal. Rptr. at 413. However, the court noted that the record before it indicated through the declaration of a "qualified international lawyer" that in his experience all Japanese companies engaged in trade with other countries correspond with these other countries in the English language and that "almost all Japanese companies involved in trade with other countries are accustomed to receiving communications in English and have facilities" for interpreting and translating the communications. *Id.* The court further noted that Shoei executed the postal receipt which was written in English and French and that Shoei apparently authorized the use of "brochures printed in English to further sales of its products" in California. *Id.* at 823-24, 109 Cal. Rptr. at 413. The court concluded that "[t]he special appearance [by Shoei] in these proceedings bespeaks that the purport of the documents was understood" and, therefore, "there was neither a lack of due process of law nor a violation of the letter or spirit of the [Convention]." *Id.* at 824, 109 Cal. Rptr. at 413.

Courts that have allowed service of process by mail on a Japanese defendant under article 10(a) have generally held that the documents (generally in English, one of the official languages of the Convention) need not be translated into the Japanese language. *See, e.g., id.* at 823-24, 109 Cal. Rptr. at 413; *Lemme*, 631 F. Supp. at 464; *Weight*, 597 F. Supp. at 1086.

For a discussion of the requirement that documents served by mail on a Japanese defendant must be translated into the Japanese language, compare Jorden, *Beyond Jingoism: Service By Mail To Japan and The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 16 LAW IN JAPAN 69, 78 (1983) (arguing translation is not required) with Fujita, *supra* note 25, at 79-80 (arguing translation is required to satisfy due process requirements).

analysis by referring to the supremacy clause<sup>147</sup> and noted that it could not exercise jurisdiction if doing so would violate an international treaty.<sup>148</sup> Having found the Convention applicable, the court summarized the Convention's provisions<sup>149</sup> and noted the Japanese government's objections to articles 10(b) and (c).<sup>150</sup>

The court then addressed the parties' arguments. The plaintiff argued that since article 10(a) binds both the United States and Japan, the summons and complaint could be sent directly by mail to the defendant Shoei.<sup>151</sup> Shoei responded by arguing that while the Convention consistently refers to "service," article 10(a) specifically refers to the freedom to "send" judicial documents by postal channels directly to persons abroad, as distinguished from the transmission abroad for the purposes of service.<sup>152</sup> Shoei further argued that article 10(a) does not authorize service by mail, but merely authorizes the giving of notices and exchange of other judicial documents after jurisdiction is acquired.<sup>153</sup>

The court, however, found that consideration of the entire scope of the Convention outweighed any merit in Shoei's argument.<sup>154</sup> The court pointed out that the Convention purports to deal with the subject of service abroad of judicial documents.<sup>155</sup> The court reasoned that reference to the freedom to send judicial documents by postal channels directly to persons abroad would be "superfluous" unless it was related to the sending of such documents for the purpose of service.<sup>156</sup>

Next, the court noted that the reference to postal channels appears in the context of other alternatives to the use of the Central Authority.<sup>157</sup> The court reasoned that if the purpose of the Convention is to establish one method of service to avoid the difficulties and controversies of other methods, "it does not necessarily follow that other methods may not be used if effective proof of delivery can be

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

148. *Shoei*, 33 Cal. App. 3d at 818-19, 109 Cal. Rptr. at 409-10. The court apparently took for granted that the Convention had the status of a treaty. *See id.*

149. *Id.* at 819, 109 Cal. Rptr. at 410.

150. *Id.* at 819-20, 109 Cal. Rptr. at 410.

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

152. *Id.* at 820, 109 Cal. Rptr. at 411.

153. *Shoei*, 33 Cal. App. 3d at 820-21, 109 Cal. Rptr. at 411.

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

155. *Id.*

156. *Id.*

157. *See* Convention, *supra* note 8, art. 10.

made.”<sup>158</sup> The court then cited article 5 of the Convention (which allows service if the addressee accepts the document voluntarily) and concluded that the international mail receipt produced by the plaintiff evidenced voluntary acceptance by Shoei.<sup>159</sup>

The court then turned to the provisions of Rule 4(i) of the Federal Rules of Civil Procedure. The court found that the purpose of Rule 4(i) was to expedite service of process abroad.<sup>160</sup> From this, the court reasoned that an acceptance of Shoei’s interpretation of the Convention would mean that the Senate, in ratifying the Convention, intended to abrogate what it had impliedly approved four years earlier.<sup>161</sup> It is more reasonable, the court held, to infer that in approving article 10(a), the Senate intended to retain service by mail as an effective method of service of process in a foreign country unless that country objected to it.<sup>162</sup> The court noted further that if the Convention abrogated the provisions of Rule 4(i), then Rule 4(i) should have been changed along with other revisions of the rules made after the Convention went into effect.<sup>163</sup>

In further support of its reasoning, the court noted that Japan’s internal law allows service of process by mail with evidence of delivery.<sup>164</sup> The court concluded that, in the absence of any objection by Japan to article 10(a), service by mail on Shoei was proper under the Convention.<sup>165</sup> The court believed this conclusion was “consistent with both the letter and the spirit of the convention.”<sup>166</sup>

## 2. Cases Following *Shoei*

The United States District Court for the Central District of California followed *Shoei* in *Newport Components, Inc. v. NEC Home Electronics (U.S.A.), Inc.*<sup>167</sup> In *Newport*, two United States electronic

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158. *Shoei*, 33 Cal. App. 3d at 821, 109 Cal. Rptr. at 411.

159. *Id.*

160. *Id.* at 821-22, 109 Cal. Rptr. at 411-12.

161. *Id.*

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

163. *Shoei*, 33 Cal. App. 3d at 821-22, 109 Cal. Rptr. at 411-12.

164. *Id.* at 822, 109 Cal. Rptr. at 412; *but see* *Suzuki Motor Co. v. Superior Court*, 200 Cal. App. 3d 1476, 249 Cal. Rptr. 376 (1988). In *Suzuki*, the court correctly recognized that the record before the *Shoei* court was erroneous and that the internal law of Japan does not allow direct service by mail between litigants. *Id.* at 1480-81, 249 Cal. Rptr. at 378-79.

165. *Shoei*, 33 Cal. App. 3d at 822, 109 Cal. Rptr. at 412.

166. *Id.* Although the *Shoei* court reached the correct conclusion, the court’s analysis was erroneous since it was based on a partially faulty record and an inaccurate reading of the provisions of the Convention. *See infra* text accompanying notes 210-17.

167. 671 F. Supp. 1525 (C.D. Cal. 1987).



equipment distributors brought suit against NEC Corporation, a Japanese multinational manufacturer and distributor of electronic products, and two of its wholly owned subsidiaries.<sup>168</sup> The plaintiffs alleged state and federal antitrust claims.<sup>169</sup> The plaintiffs served the defendants, including NEC, by mail,<sup>170</sup> and NEC received process at its mailing address in Japan.<sup>171</sup> NEC moved to dismiss for insufficient service of process,<sup>172</sup> however, arguing that service by mail upon it was ineffective under the Convention.<sup>173</sup>

The district court held that service of process by mail on a Japanese defendant was proper.<sup>174</sup> The court found particularly persuasive the *Shoei* court's reasoning that if the purpose of the Convention is to establish one method of service, it does not follow that other methods may not be used if effective proof of delivery can be made.<sup>175</sup> The court noted that the California Code of Civil Procedure requirements assured proof of delivery.<sup>176</sup>

The court further reasoned that this interpretation of the Convention was consistent with the Ninth Circuit's views on the interface between the Hague Conventions and the Federal Rules of Civil Procedure in the discovery context,<sup>177</sup> as articulated by the appellate court in *Societe Nationale Industrielle Aerospatiale v. United States District Court*.<sup>178</sup> In *Societe Nationale*, the Ninth Circuit Court of Appeals interpreted provisions of the Multilateral Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Evidence Convention").<sup>179</sup> The court of appeals held that the Evidence Convention was not intended to shield foreign litigants from the normal burdens of litigation in American courts.<sup>180</sup> If the Evidence Convention supplanted the Federal Rules of Civil Procedure, foreign litigants would

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168. *Id.* at 1528.

169. *Id.* at 1529.

170. *Id.* at 1541.

171. *Id.*

172. *Newport*, 671 F. Supp. at 1541.

173. *Id.*

174. *Id.* at 1542.

175. *Id.*

176. *Id.*

177. *Newport*, 671 F. Supp. at 1542.

178. 788 F.2d 1408 (9th Cir. 1986).

179. Multilateral Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 [hereinafter Evidence Convention].

180. *Societe Nationale*, 788 F.2d at 1411.

have an extraordinary advantage in United States courts.<sup>181</sup> The court of appeals concluded that a litigant should consider using the Evidence Convention but need not actually utilize it in every case.<sup>182</sup> The *Newport* court applied this same analysis to the Convention.<sup>183</sup>

Finally, the *Newport* court noted that the *Societe Nationale* court considered the degree of intrusion on the foreign sovereign as a major factor in its analysis.<sup>184</sup> Applying the appellate court's reasoning, the *Newport* court decided that NEC failed to show that service of process by mail represented an intrusion on Japanese sovereignty. Therefore, mail service on NEC was proper.<sup>185</sup>

The United States District Court for the District of Columbia allowed service by mail on a Japanese company in *Chrysler Corp. v. General Motors Corp.*<sup>186</sup> In *Chrysler*, Chrysler Corporation, a United States corporation, brought an antitrust action against General Motors Corporation, also a United States corporation, and Toyota Motor Corporation, a Japanese corporation.<sup>187</sup> Chrysler served Toyota by registered mail at its corporate headquarters in Japan.<sup>188</sup> Toyota completed and returned the receipt of service but later moved to dismiss for improper service under the Convention.<sup>189</sup>

The *Chrysler* court reached a similar conclusion to that reached by the *Newport* court. The *Chrysler* court found that in the District of Columbia Circuit, precedent established service of process from the United States into a foreign country by registered mail as the least intrusive means of service.<sup>190</sup> Noting that Japan had not objected to article 10(a), the court concluded that service of process by mail on Toyota was proper.<sup>191</sup>

In *Lemme v. Wine of Japan Import, Inc.*,<sup>192</sup> the United States District Court for the Eastern District of New York agreed with the

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181. *Newport*, 671 F. Supp. at 1542 (quoting *Societe Nationale*, 788 F.2d at 1411).

182. *Id.*

183. *See id.* But see *supra* text accompanying notes 42-44 and 78-95. The Convention should apply in all cases where a United States litigant serves a Japanese defendant.

184. *Newport*, 671 F. Supp. at 1542.

185. *Id.* The United States District Court for the Central District of California followed *Newport* in *Meyers v. Asics Corp.*, 711 F. Supp. 1001 (C.D. Cal. 1989).

186. 589 F. Supp. 1182 (D.D.C. 1984).

187. *Id.*

188. *Id.*

189. *Id.* at 1206.

190. *Id.* (quoting *F.T.C. v. Compagnie De Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1313 n.68 (D.C. Cir. 1980)).

191. *Chrysler*, 589 F. Supp. at 1206.

192. 631 F. Supp. 456 (E.D.N.Y. 1986).

*Chrysler* court. In *Lemme*, the plaintiff, a United States corporation, brought a breach of contract action against another United States corporation and a Japanese corporation.<sup>193</sup> *Lemme* attempted to serve the Japanese corporation, Konishi Brewing Company, by direct mail pursuant to Rule 4(e) and (i).<sup>194</sup> Konishi moved to dismiss for insufficient service of process under the Convention.<sup>195</sup>

The court, following *Shoei*, held that service by mail on the Japanese defendant was proper.<sup>196</sup> Defendant Konishi argued that it would be "incongruous" for Japan to require that personal service be made only through the Japanese Central Authority but also to permit service by mail.<sup>197</sup> The court dismissed Konishi's contention, reasoning that the argument only made sense if Japan's sole concern was the reliability of the method used.<sup>198</sup> The court stated that if Japan's objectives were also to promote the least intrusive means of notifying its citizens of lawsuits filed against them, it would be logical to permit only representatives of the Central Authority or the postal service to serve process.<sup>199</sup> In other words, Japan may have rejected sections 10(b) and 10(c) because it was more concerned with "who [was] arriving on the doorstep of its citizen to serve process than with how that process [was] served."<sup>200</sup> If this were true, the court reasoned, then there was no incongruity in Japan's requirement that service can be made only through the mail or the Central Authority.<sup>201</sup>

Finally, in *Smith v. Dainichi Kinzoku Kogyo Co.*,<sup>202</sup> Smith brought a personal injury action against a Japanese manufacturer.<sup>203</sup> Smith served the defendant Dainichi by direct mail pursuant to a Texas state rule of civil procedure.<sup>204</sup> Dainichi moved to dismiss for insufficient service of process.<sup>205</sup>

Dainichi argued that by expressly rejecting the type of service authorized by article 10(b) and (c), which use the words "effect ser-

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193. *Id.* at 458.

194. *Id.* at 462.

195. *Id.* at 458.

196. *Id.*

197. *Lemme*, 631 F. Supp. at 464.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. 680 F. Supp. 847 (W.D. Tex. 1988).

203. *Id.* at 849.

204. *Id.*

205. *Id.*

vice," while ratifying article 10(a), which uses the word "send," Japan intended to draw a distinction between judicial documents sent through the mails for the purpose of "service" and those sent for other purposes.<sup>206</sup> The court characterized this argument as a "hyper-technical interpretation."<sup>207</sup> The court reasoned that the use of the word "send" rather than "service" must instead be attributed to careless drafting.<sup>208</sup> It decided that there was no significant distinction between the use of "send" in article 10(a) and the words "effect service" in articles 10(b) and (c). The court concluded that allowing such a distinction to prohibit service of process directly by mail under article 10(a) would "elevate form over substance."<sup>209</sup>

### 3. The Inadequacies of Current Authority Allowing Service by Mail

Unfortunately, cases concluding that article 10(a) allows service of process by mail on a Japanese defendant, while reaching the correct conclusion, are based largely on faulty or cursory reasoning and inaccurate facts. *Shoei* represents the leading case. It was directly followed by the federal court in *Newport*<sup>210</sup> and is relied upon by most other courts allowing service of process by mail.<sup>211</sup> However, the *Shoei* court reasoned that if the Japanese defendant actually received notice, the specific method of service the plaintiff employed need not be one specifically authorized by the Convention and agreed to by Japan.<sup>212</sup> This logic ignores the plain meaning and purpose of the Convention. The Convention was designed to prescribe the sole method of service between its signatories.<sup>213</sup> Therefore, whether the

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206. *Id.* at 850.

207. *Smith*, 680 F. Supp. at 850.

208. *Id.*

209. *Id.*

210. *See Newport*, 671 F. Supp. at 1542.

211. *See, e.g., Smith*, 680 F. Supp. at 850; *Lemme*, 631 F. Supp. at 463; *Chrysler*, 589 F. Supp. at 1206.

212. *Shoei Kako Co. v. Superior Court*, 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1973).

213. *See Convention, supra* note 8. "The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." *Id.* art. 1; *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699-700 (1988) (the Convention applies anytime a United States litigant must send service of process documents abroad to a litigant who is a member of another signatory state); *see also Wasden v. Yamaha Motor Co.*, 131 F.R.D. 206 (M.D. Fla. 1989); *McClenon v. Nissan Motor Corp.*, 726 F. Supp. 822 (N.D. Fla. 1989); *Mommsen v. Toro Co.*, 108 F.R.D. 444 (S.D. Iowa 1985); *Harris v. Browning-Ferris Indus. Chemical Serv.*, 100 F.R.D. 775 (M.D. La. 1984).

Japanese defendant received notice, in spite of the method used, is irrelevant. A United States plaintiff must serve a Japanese defendant in accordance with the Convention. The *Shoei* court should have focused solely on whether article 10(a) allows service of process by mail—the method of service employed by the plaintiff in that case.

Furthermore, the *Shoei* court erroneously cited article 5 for the proposition that anytime a defendant accepts a document voluntarily, the requirements of the Convention are met.<sup>214</sup> In doing so, the court overlooked the fact that article 5's "voluntary acceptance" provision applies only to service through the receiving state's Central Authority.<sup>215</sup> Furthermore, the ultimate method of service the Central Authority uses, even when a defendant accepts the document voluntarily, must be compatible with the law of the state addressed.<sup>216</sup> It is unclear whether the *Shoei* court even considered this second requirement since it labored under the erroneous impression that Japan's internal law allowed service of process by mail, with evidence of delivery.<sup>217</sup> Therefore, the leading case allowing service of process by mail under article 10(a) is unfortunately based largely on faulty reasoning and clearly erroneous facts.

This same faulty analysis persuaded the *Newport* court.<sup>218</sup> Additionally, the *Newport* court supported its decision by referring to a circuit court case that interpreted a completely different Hague Convention.<sup>219</sup> Although the arguments used by the *Societe Nationale* court in interpreting the Evidence Convention may apply to the Convention,<sup>220</sup> the *Newport* court should not have relied so heavily on the interpretation of a completely different and unrelated convention.

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214. *Shoei*, 33 Cal. App. 3d at 821, 109 Cal. Rptr. at 411.

215. Convention, *supra* note 8, art. 5.

216. *Id.*

217. *See Shoei*, 33 Cal. App. 3d at 822, 109 Cal. Rptr. at 412; *see also Suzuki*, 200 Cal. App. 3d at 1480-81, 249 Cal. Rptr. at 378-79.

218. *Newport*, 671 F. Supp. at 1542.

219. The *Newport* court relied heavily on the court of appeals' analysis of the Evidence Convention in *Societe Nationale* to bolster its conclusion. *See id.* at 1542.

220. *See infra* text accompanying notes 384-88. The appellate court in *Societe Nationale* based its decision largely on the fact that the Evidence Convention before it did not state that its provisions were mandatory or the exclusive means available to a plaintiff. *Societe Nationale*, 788 F.2d at 1410. The Convention at issue here, however, states that its provisions are mandatory. *See supra* note 213. The Supreme Court has specifically noted the distinction between the mandatory language of the Convention and the optional language of the Evidence Convention. *See Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 534 n.15 (1987). Therefore, much of the *Societe Nationale* court of appeals' analysis should not apply to an interpretation of the Convention at issue here.

The *Shoei* and *Newport* decisions greatly influenced subsequent courts which have held that article 10(a) allows service of process by mail on a Japanese defendant.<sup>221</sup> The result is a line of precedential authority that provides unclear guidance for United States plaintiffs seeking to serve Japanese defendants.

### C. Cases Denying Service by Mail

Partially in response to the faulty reasoning in the cases allowing service of process by mail, several courts have concluded that article 10(a) was not intended to allow service by mail.<sup>222</sup> Additionally, this interpretation appears to be the modern trend.<sup>223</sup> New York state courts were the first to reach this conclusion with regard to a Japanese defendant.<sup>224</sup>

#### 1. New York State Court Cases

*Ordmandy v. Lynn*<sup>225</sup> is the seminal New York case. In *Ordmandy*, the plaintiff served process on the defendant Toyota Motor Corporation, a Japanese corporation, by registered mail pursuant to New York law.<sup>226</sup> Toyota moved to dismiss for insufficient service.<sup>227</sup> The New York trial court turned to the Convention to determine whether it permitted service of process by mail.<sup>228</sup>

Noting that Japan had not objected to article 10(a),<sup>229</sup> the court decided it must first examine the article's plain meaning.<sup>230</sup> It pointed out that the Convention did not define the term "send."<sup>231</sup> It also decided that there was no controlling or persuasive authority as to whether the term "send" means or may include "service" in a "tech-

221. See, e.g., *Meyers*, 711 F. Supp. at 1007; *Chrysler*, 589 F. Supp. at 1206; *Lemme*, 631 F. Supp. at 463; *Smith*, 680 F. Supp. at 850; *Weight*, 597 F. Supp. at 1085-86; *Zisman*, 106 F.R.D. at 199.

222. See cases cited *supra* note 129.

223. See cases cited *supra* note 130.

224. See *Risew v. Yamaha Motor Co.*, 129 Misc. 2d 317, 493 N.Y.S.2d 78 (1985); *Reynolds v. Koh*, 109 A.D.2d 97, 490 N.Y.S.2d 295 (1985); *Ordmandy v. Lynn*, 122 Misc. 2d 954, 472 N.Y.S.2d 274 (1984). *Ordmandy* appears to be the first reported case squarely concluding that article 10(a) does not allow service of process by mail on a Japanese defendant.

225. 122 Misc. 2d at 954, 472 N.Y.S.2d at 274.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Ordmandy*, 122 Misc. 2d at 954-55, 472 N.Y.S.2d at 274-75. For the text of article 10, see *supra* text accompanying note 64.

231. *Id.* at 955, 472 N.Y.S.2d at 275.

nical legal sense."<sup>232</sup> The court, therefore, turned to the intent of the parties to the Convention as evidenced by its provisions and the ordinary meaning of the word "send."<sup>233</sup> It found that the ordinary meaning of "send" is "to dispatch or transmit."<sup>234</sup> The court concluded that since every other provision of the Convention uses the word "service" when prescribing approved methods of transmission for service, and since liberally reading the word "send" to include effective service of legal process would "vitiating the fundamental intent of the parties to establish more formal modes of service," article 10(a) did not authorize service of process by mail.<sup>235</sup>

The New York Court of Appeals followed *Ormandy* in *Reynolds v. Koh*.<sup>236</sup> The *Reynolds* court emphasized the fact that article 10(a) refers to "send," whereas other articles of the Convention repeatedly refer to "service" of documents. The court reasoned that this indicated that article 10(a) was meant to authorize something other than "service in the legal sense."<sup>237</sup> The court suggested that article 10(a) merely authorizes transmittal of notices and legal documents which need not be "served."<sup>238</sup> Holding otherwise, the court reasoned, would relegate the role of the Japanese Minister for Foreign Affairs in a way that seems contrary to the Convention's import.<sup>239</sup>

## 2. Federal Cases Following the New York Interpretation

Several federal courts have followed the New York state courts' interpretation of article 10(a). The first court to do so was the United States District Court for the Southern District of Iowa in *Mommsen v. Toro Co.*<sup>240</sup> In *Mommsen*, the plaintiff brought a products liability action against a Japanese corporation.<sup>241</sup> The court granted the de-

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232. *Id.*

233. *Id.*

234. *Id.*

235. *Ormandy*, 122 Misc.2d at 955, 472 N.Y.S.2d at 275.

236. 109 A.D.2d 97, 490 N.Y.S.2d 295 (1985). The *Reynolds* court reviewed the California court's holding in *Shoei* and rejected it in favor of the reasoning in *Ormandy*. *Id.* at 99, 490 N.Y.S.2d at 297.

237. *Id.* at 100, 490 N.Y.S.2d at 298.

238. *Id.* at 99, 490 N.Y.S.2d at 297-98.

239. *Id.* at 100, 490 N.Y.S.2d at 298.

240. 108 F.R.D. 444 (S.D. Iowa 1985).

241. *Id.* *Mommsen* is typical of the problems a plaintiff may face serving a Japanese corporation. See also *McClenon v. Nissan Motor Corp.* 726 F. Supp. 822, 823 (N.D. Fla. 1989). In *Mommsen*, the plaintiff initially attempted to serve the Japanese defendant, Kioritz Corporation, by serving a summons and complaint upon an attorney in Chicago, Illinois as Kioritz's agent. 108 F.R.D. at 444. Kioritz moved to dismiss alleging that the Chicago attorney was

fendant's motion to quash for insufficient service under the Convention.<sup>242</sup>

The *Mommsen* court, following *Ordmandy*, held that article 10(a) does not expressly allow "service" of judicial process by mail, but merely permits a litigant to "send" judicial documents by mail to persons abroad.<sup>243</sup> To support its conclusion, the court relied on familiar canons of statutory construction and began with an interpretation of the statute itself. The court noted that absent a clearly expressed legislative intention to the contrary, the statute's language controls.<sup>244</sup> Furthermore, where a legislative body includes particular language in one section of a statute but omits it in another section of the same statute, a court generally presumes the legislative body acted intentionally and purposely in including or excluding the language.<sup>245</sup> Finally, the court noted that where a legislative body uses terms that have accumulated meaning under either equity or common law, a court must infer, unless the statute otherwise dictates, that the legislative body meant to incorporate the term's established meaning.<sup>246</sup> Based on these principles of statutory interpretation, the court reasoned that if the Convention's drafters had meant article 10(a) to provide an additional manner of service of judicial documents, they would have used the word "service."<sup>247</sup> The court concluded that interpreting article 10(a) to permit direct mail service of process would go beyond the plain meaning of the word "send" and create a method of service of process "at odds" with the other methods of service permitted by the Convention.<sup>248</sup>

Similarly, in *Bankston v. Toyota Motor Corp.*,<sup>249</sup> the United States District Court for the Western District of Arkansas, after reviewing a number of the above cases, concluded article 10(a) did not

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not its agent, officer, or employee. *Id.* The plaintiff then filed the summons and complaint with the Iowa Secretary of State and mailed notification of the filing together with a copy of the summons and complaint to Kioritz in Japan by registered mail, in accordance with Iowa's state rules of civil procedure. *Id.* at 444-45. Kioritz responded by supplementing and enlarging its motion to challenge the sufficiency of service on the ground that service by mail violated the Convention. *Id.* at 445.

242. *Mommsen*, 108 F.R.D. at 446.

243. *Id.*

244. *Id.* (citing *Consumer Product Safety Comm'n v. GTE Sylvania Inc.*, 447 U.S. 102 (1980)).

245. *Id.* at 446 (citing *Russello v. United States*, 464 U.S. 16 (1983)).

246. *Id.* (citing *National Labor Relations Bd. v. Amax Coal Co.*, 453 U.S. 322 (1981)).

247. *Mommsen*, 108 F.R.D. at 446.

248. *Id.*

249. 123 F.R.D. 595 (W.D. Ark.), *aff'd*, 889 F.2d 172 (8th Cir. 1989).



allow service by mail.<sup>250</sup> The opinion of a leading expert in Japanese law persuaded the *Bankston* court.<sup>251</sup> The court adopted the commentator's opinion that the Convention does not address service of process by mail.<sup>252</sup> Instead, the court opined, it merely discusses the right to "send" judicial documents by mail after the plaintiff accomplishes "service."<sup>253</sup> The court claimed that any other interpretation would produce an illogical result.<sup>254</sup> The court further noted that the Convention sets up a "rather cumbersome and involved procedure" for service of process, and if article 10(a) allowed one to "circumvent" this procedure by simply sending something through the mail, the "vast bulk of the Convention would be useless."<sup>255</sup> The court concluded that it was inconceivable that the drafters of the Convention would use the word "send" in article 10(a) to mean service of process when they "so carefully" used the word "service" in other sections of the Convention.<sup>256</sup>

Finally, in *McClenon v. Nissan Motor Corp.*,<sup>257</sup> the United States District Court for the Northern District of Florida reasoned that the phrase "judicial documents" used throughout article 10 could reasonably be construed as applying to "orders, notices, motions, and all other such litigation-related documents."<sup>258</sup> The court decided it was not a term that could be restricted to a summons and complaint.<sup>259</sup> The court concluded that article 10(a) may merely make clear that a litigant need not route such post-service official documents through a state's Central Authority, and that such documents do not have to meet the Convention's "burdensome requirements of translation and the like."<sup>260</sup>

### 3. *Shoei's* Rejection in California

The California Court of Appeal returned to the meaning of article 10(a) fifteen years after *Shoei* in *Suzuki Motor Co. v. Superior*

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250. *Id.* at 595.

251. *Id.* at 599.

252. *Id.*

253. *Id.*

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

255. *Id.*

256. *Id.*

257. 726 F. Supp. 822 (N.D. Fla. 1989).

258. *Id.* at 826.

259. *Id.*

260. *Id.*

*Court*.<sup>261</sup> In *Suzuki*, the California Court of Appeal for the Fourth District expressly declined to follow *Shoei* and held that article 10(a) did not allow service of process by mail on a Japanese defendant.<sup>262</sup>

In *Suzuki*, the plaintiff brought a personal injury action against a Japanese manufacturer.<sup>263</sup> The plaintiff served the defendant by direct mail pursuant to the California Code of Civil Procedure.<sup>264</sup> The defendant Suzuki moved to quash service as improper under the Convention.<sup>265</sup> The court agreed with Suzuki and granted the motion.<sup>266</sup>

Beginning with a review of the *Shoei* decision, the *Suzuki* court noted that Japan's internal law does not permit direct service of process by mail.<sup>267</sup> Instead, Japanese law requires the court clerk to stamp the envelope containing the documents to be served with a notice of special service.<sup>268</sup> The mail carrier then acts as a special officer of the court in transmitting the documents.<sup>269</sup> Given the fact that Japan itself does not recognize service by mail, the court concluded that it was extremely unlikely that by failing to object to article 10(a), Japan intended to authorize service by mail.<sup>270</sup> This is particularly true, the court reasoned, since Japan specifically objected to the more formal modes of service under article 10(b) and (c).<sup>271</sup> The court stated that it was more likely that Japan interpreted article 10(a) as allowing only the transmission of judicial documents and not service of process.<sup>272</sup> The court felt this interpretation was reasonable, especially given the Convention's repeated references to "service" as opposed to "send."<sup>273</sup>

Under "well recognized" canons of statutory interpretation, the court of appeals felt it should give words in a statute their common and ordinary meaning; it should presume that every word and phrase used in a statute has a particular meaning and performs a useful function.<sup>274</sup> The common, ordinary meaning of "send" is "to cause to be

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261. 200 Cal. App. 3d 1476, 249 Cal. Rptr. 376 (1988).

262. *Id.* at 1479, 249 Cal. Rptr. at 377.

263. *Id.* at 1478, 249 Cal. Rptr. at 377.

264. *Id.*

265. *Id.*

266. *Suzuki*, 200 Cal. App. 3d at 1479, 249 Cal. Rptr. at 377.

267. *Id.* at 1480-81, 249 Cal. Rptr. at 379.

268. *Id.*

269. *Id.* at 1481, 249 Cal. Rptr. at 379.

270. *Id.*

271. *Suzuki*, 200 Cal. App. 3d at 1481, 249 Cal. Rptr. at 379.

272. *Id.*

273. *Id.*

274. *Id.*

conveyed by an intermediary to a destination' or 'to dispatch, as by mail or telegraph' not 'to serve.'<sup>275</sup> The court reasoned that the fact the Convention's drafters used both the phrase "to send" and the phrase "service of process" indicates they intended each phrase to have a unique meaning and function.<sup>276</sup> Therefore, the court concluded that interpreting "send" in article 10(a) to include "serve" simply did not make sense.<sup>277</sup>

#### 4. The Erroneous Analyses of Cases Disallowing Service by Mail

The New York cases, and decisions following them, give article 10(a) an overly restrictive and narrow construction.<sup>278</sup> By interpreting article 10(a) as not allowing service of process, but merely the "sending" of judicial documents by mail after service of process has been accomplished, they have erroneously relied on inapplicable and restrictive canons of statutory construction and have disregarded the general rule of liberally interpreting international treaties or their equivalent.<sup>279</sup> This approach led these courts to misread the provisions of the Convention, thus failing to give proper import to its overall purpose.<sup>280</sup> In addition, these courts have simply misconstrued Japan's failure to object to article 10(a).<sup>281</sup>

### IV. PERMITTING SERVICE BY MAIL ABSENT A JAPANESE OBJECTION

Judicial attempts at interpreting article 10(a), and Japan's failure to object to it, have failed to produce any definitive precedent either allowing or disallowing service by mail.<sup>282</sup> Furthermore, neither the cases interpreting article 10(a) as allowing service by mail, nor the more recent cases reaching the opposite conclusion, provide persua-

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275. *Id.*

276. *Suzuki*, 200 Cal. App. 3d at 1481, 249 Cal. Rptr. at 379.

277. *Id.* at 1482, 249 Cal. Rptr. at 380.

278. *See supra* text accompanying notes 225-77.

279. *See, e.g., Mommson*, 108 F.R.D. at 446; *Suzuki*, 200 Cal. App. 3d at 1481, 249 Cal. Rptr. at 379; *Ormandy v. Lynn*, 122 Misc. 2d 954, 472 N.Y.S.2d 274 (1984). An international treaty should be interpreted liberally. *See infra* note 294.

280. *See infra* text accompanying notes 289-350.

281. *See infra* text accompanying notes 369-93.

282. As this Comment points out, federal and state courts are severely split over the issue, leaving subsequent courts two relatively equal lines of precedent from which to choose. *See, e.g., Wasden v. Yamaha Motor Co.*, 131 F.R.D. 206 (M.D. Fla. 1990). "Two distinct lines of interpretation concerning Article 10(a) have arisen since the Convention's adoption . . . . This court finds the second line of interpretation to be more persuasive." *Id.* at 209.

sive reasoning.<sup>283</sup> This split in judicial authority creates confusion in the law and, as a result, produces even greater problems for a United States plaintiff attempting to serve a Japanese defendant.<sup>284</sup>

For example, litigants will likely experience increased litigation costs as a result of failed service attempts.<sup>285</sup> Similarly, United States plaintiffs are exposed to potential statute of limitations consequences should service fail.<sup>286</sup> In addition, disputes over arguably improper service attempts under the Convention caused by confusion over governing law wastes valuable court time.<sup>287</sup> Finally, this confusion over governing law undermines the Convention's goal of simplifying international service of process methods to promote mutual judicial assistance.<sup>288</sup>

Therefore, a logical analysis of article 10(a) of the Convention is needed. The interpretation that best comports with the plain meaning of the Convention, its purpose, and the interests of the courts and litigants involved, is that article 10(a) allows service of process by mail on a Japanese defendant. Furthermore, ordinary treaty interpretation rules support this conclusion.

### A. *Interpreting the Convention*

#### 1. The Analytical Structure

Because the Convention has the status of a treaty,<sup>289</sup> courts should construe the Convention consistent with traditional methods of treaty interpretation. Like a statute, any analysis of the provisions of a treaty begins with the plain meaning of its words.<sup>290</sup> The context

283. See *supra* text accompanying notes 210-21 and 278-81.

284. See *supra* text accompanying notes 118-30.

285. See Note, *supra* note 32, at 335-52.

286. See *id.* at 352. However, courts have been reluctant to dismiss a plaintiff's case when the plaintiff's method of service does not comply with the terms of the Convention. Instead, courts have generally allowed plaintiffs a specified amount of extra time in which to effect service in a manner consistent with the terms of the Convention. See, e.g., *Prost*, 122 F.R.D. at 217 (granting the plaintiff 90 days to serve the defendant in accordance with the Convention); *Pochop*, 111 F.R.D. at 467 (granting the plaintiff 45 days to perfect service); *Bankston*, 889 F.2d at 175 (remanding for proper service within a "reasonable" time); *Wasden*, 131 F.R.D. at 210 (granting 30 days to perfect proper service); *McClenon*, 726 F. Supp. at 827 (granting 30 days to effect service); see generally *Cooper*, 117 F.R.D. at 18-19; *Mommsen*, 108 F.R.D. at 446.

287. See Note, *supra* note 32, at 352.

288. Convention, *supra* note 8, preamble.

289. See *supra* note 81 and accompanying text.

290. *Air France v. Saks*, 470 U.S. 392 (1984) (interpreting the word "accident" by examining its plain meaning and the context in which the term was used within the text of a treaty).

in which the words are used within the treaty is also important.<sup>291</sup> Unlike a statute, however, a court must look beyond the plain meaning of a treaty's words,<sup>292</sup> especially if those words are apparently ambiguous.<sup>293</sup>

Interpreting the text of a treaty requires especially liberal construction of its provisions to give effect to the whole treaty's apparent purpose, especially where the treaty can be fairly construed in two different ways.<sup>294</sup> Where it is possible to construct the treaty's provisions in two different ways, one restrictive of rights, and the other more liberal, a court should favor the more liberal construction.<sup>295</sup> Furthermore, a court should construct each provision of a treaty to give a fair operation to the whole treaty.<sup>296</sup> A court should consider several factors when interpreting a treaty, including the treaty's history, the negotiations leading to the treaty, the intent of the parties to the treaty, and the practical construction of the treaty adopted by the signatory parties.<sup>297</sup> Thus a complete analysis of the meaning of arti-

"The analysis [of a treaty] must begin with the text of the treaty and the context in which the written words are used." *Id.* at 396-97. See also *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988) (interpreting the phrases "occasion to transmit" and "for service abroad" in the Convention at issue here); *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 534 (1987).

291. *Air France v. Saks*, 470 U.S. 392, 396-97 (1984).

292. *Factor v. Laubenheimer*, 290 U.S. 276, 294 (1933) ("In ascertaining the meaning of a treaty we may look beyond its written words."); *Chocktaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943) ("Of course, treaties are construed more liberally . . . , and to ascertain their meaning we may look beyond the written words."); *Saks*, 470 U.S. at 396; *Schlunk*, 486 U.S. at 700.

293. See *Schlunk*, 486 U.S. at 700. In interpreting phrases of the Convention at issue here, the Court stated: "Other general rules of [treaty] construction may be brought to bear on different or ambiguous passages." *Id.* See also *Factor*, 290 U.S. at 294; *Chocktaw*, 318 U.S. at 431-32; *Saks*, 470 U.S. at 396.

294. *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936) (obligations of a treaty should be liberally construed so as to give effect to apparent intention of parties); *Factor*, 290 U.S. at 293 (treaty "obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them"); *Todok v. Union State Bank of Harvard*, 281 U.S. 449 (1930) (treaties should receive liberal construction to give effect to their apparent purpose); see also *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928) ("where a treaty fairly admits of two constructions one restricting the rights that may be claimed under it and the other enlarging them, the more liberal construction is preferred"); *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924).

295. *Jordan*, 278 U.S. at 127; *Asakura*, 265 U.S. at 342; *Hauenstein v. Lynham*, 100 U.S. 483, 487 (1879).

296. *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921).

297. *Chocktaw*, 318 U.S. at 432 (court may look to the history of the treaty, the negotiations, and the practical construction adopted by the parties); *Schlunk*, 486 U.S. at 699; *Societe Nationale*, 482 U.S. at 534; *Factor*, 290 U.S. at 294.

cle 10(a) and the effects of Japan's silence as to its provisions, should involve each of these elements.

## 2. The Plain Meaning of Article 10(a)

The first step in analyzing article 10(a) involves a close examination of its plain meaning.<sup>298</sup> In examining the plain meaning, a court should liberally construe the words.<sup>299</sup> Cases interpreting article 10(a) as not allowing service of process by mail have not given liberal effect to its provisions. Instead, they have done quite the opposite by rendering overly narrow interpretations.<sup>300</sup>

Article 10 states: "[p]rovided the State of destination does not object, the present Convention shall not interfere with . . . *the freedom to send judicial documents by postal channels, directly to persons abroad.*"<sup>301</sup> The first issue is the meaning of the word "send." *Webster's Dictionary*<sup>302</sup> defines "send" as "to cause to go or be carried; to dispatch; to transmit; . . . to dispatch . . . by mail, messenger etc."<sup>303</sup> The word "send" is thus relatively unambiguous. Its plain meaning appears to allow a litigant to "dispatch" or "transmit" judicial documents by mail for any purpose, including service of process.

The next issue is whether a summons and complaint, documents which when properly dispatched and received constitute service of process, can be considered "judicial documents." The Convention does not define the phrase "judicial documents." However, *Black's Law Dictionary*<sup>304</sup> defines "judicial" as "[b]elonging to the office of a judge; as judicial authority. Relating to or connected with the administration of justice . . . . Having the character of judgment or formal legal procedure."<sup>305</sup> Certainly one can consider a summons and complaint as "[r]elating to or connected with the administration of justice" and as "[h]aving the character of . . . formal legal procedure."

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298. *Saks*, 470 U.S. at 396-97; *Schlunk*, 486 U.S. at 699; *Societe Nationale*, 482 U.S. at 534.

299. *Todok v. United States Bank of Harvard*, 281 U.S. 449 (1930); *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936); *Factor*, 290 U.S. at 293; *Asakura v. City of Seattle*, 265 U.S. 332 (1924).

300. *See, e.g., Mommsen v. Toro Co.*, 108 F.R.D. 444 (S.D. Iowa 1985); *Reynolds v. Koh*, 109 A.D.2d 97, 490 N.Y.S.2d 295 (1985); *Ordmandy v. Lynn*, 122 Misc. 2d 954, 472 N.Y.S.2d 274 (1984).

301. Convention, *supra* note 8, art. 10 (emphasis added).

302. WEBSTER'S UNIVERSAL UNABRIDGED DICTIONARY 1651 (2d ed. 1983).

303. *Id.*

304. BLACK'S LAW DICTIONARY 759 (5th ed. 1979).

305. *Id.*

Finally, *Webster's* defines "document" as "anything printed, written, etc., relied upon to record or prove something."<sup>306</sup> Summons and complaints are "printed" or "written" and are definitely "relied upon to record or prove something." A plaintiff relies on receipt of a summons and complaint to prove that the defendant had notice of the initiation of a legal proceeding against it.<sup>307</sup>

Article 10(a) explicitly allows a plaintiff to send these documents "by postal channels directly to persons abroad."<sup>308</sup> This phrase is clear. Therefore, looking only at the plain meaning of article 10(a) and giving it a liberal construction, it is exceedingly apparent that the Convention allows a United States plaintiff to transmit service of process documents by mail directly to a Japanese defendant.

### 3. The Context of the Words Within the Convention

A court must consider the context in which the words of article 10(a) are used within the Convention.<sup>309</sup> Many courts have looked to other provisions in the Convention which prescribe various acceptable methods of service. These courts have correctly noted that when prescribing such acceptable methods the other provisions of the Convention use the word "service," which these courts argue, has special legal significance.<sup>310</sup> The courts conclude that since article 10(a) contains the word "send" instead of "service," it does not prescribe an additional method of service of process, but merely refers to a method for sending litigation documents after the plaintiff has perfected service of process.<sup>311</sup>

Initially, this reasoning appears sound. However, this analysis breaks down after taking into consideration the Convention's main purposes. The Convention was aimed at addressing a specific problem in international litigation—organizing and establishing appropriate and simplified methods of international service of process.<sup>312</sup> In

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306. WEBSTER'S UNIVERSAL UNABRIDGED DICTIONARY 540 (2d ed. 1983).

307. See *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950).

308. Convention, *supra* note 8, art. 10(a).

309. *Saks*, 470 U.S. at 396-97.

310. See *Mommsen v. Toro Co.*, 108 F.R.D. 444 (S.D. Iowa 1985); *Suzuki Motor Co. v. Superior Court*, 200 Cal. App. 3d 1476, 249 Cal. Rptr. 376 (1988); *Reynolds v. Koh*, 109 A.D. 2d 97, 490 N.Y.S.2d 295 (1985); *Ordmandy v. Lynn*, 122 Misc. 2d 954, 472 N.Y.S.2d 274 (1984).

311. See cases cited *supra* note 310.

312. Convention, *supra* note 8, preamble. The other main purpose is to ensure that defendants receive adequate notice of suits pending against them. *Id.* Neither of these purposes relates to sending judicial documents after a plaintiff accomplishes service of process.

light of this purpose, article 10(a) would be completely out of context in the Convention if it was not meant to provide another viable method of "service." If the Convention's drafters intended to address a completely different subject in article 10(a), they would have indicated this more clearly. Furthermore, construing article 10(a) to cover the topic of sending rather than serving judicial documents would mean that in countries objecting to article 10 entirely parties would be precluded from using the mail to conduct their litigation. That would render international litigation in those countries practically impossible.<sup>313</sup>

Additionally, article 10(a) appears in the middle of the section of the Convention dealing with alternative methods of "service."<sup>314</sup> Despite the slight variation in language from "service" to "send," it is implausible to suggest that the drafters of the Convention would abruptly switch from addressing acceptable methods of service of process to methods of sending post "service" documents. Even more inconceivable is that the very next sentence in the same article would return to address the subject of service of process. The Convention's drafters could not have intended to create such an awkward construction. Construing article 10(a) to merely encompass sending judicial documents after a plaintiff effects "service" and not as prescribing another acceptable method of service of process, ignores the context in which the word "send" is used within the Convention.

Nevertheless, several courts have reasoned that because the Convention sets up a complex procedure for service of process through a state's Central Authority, article 10(a) could not allow service of process by mail, since it would circumvent this cumbersome procedure.<sup>315</sup> However, this analysis similarly takes article 10(a) out of its context within the Convention. The Convention's drafters specifically placed article 10(a) within the section of the Convention containing provisions that explicitly provide exceptions to allow "circumvention" of the more cumbersome method of service.<sup>316</sup> One of the Convention's main purposes was to facilitate judicial cooperation in international litigation by prescribing simple and expeditious methods

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313. See *Rich v. Kis California, Inc.*, 1988 WL 47605 (M.D.N.C.).

314. See Convention, *supra* notes 8, arts. 8-10.

315. *Bankston v. Toyota Motor Corp.*, 123 F.R.D. 595 (W.D. Ark.), *aff'd* 889 F.2d 172 (8th Cir. 1989); *McClenon v. Nissan Motor Corp.*, 726 F. Supp. 822 (N.D. Fla. 1989); *Suzuki Motor Co. v. Superior Court*, 200 Cal. App. 3d. 1476, 249 Cal. Rptr. 376 (1988).

316. Convention, *supra* note 8, arts. 8-10.



of service.<sup>317</sup> Furthermore, the Convention explicitly permits states to use the most convenient methods of service for their litigants as long as the other state involved does not object.<sup>318</sup> Therefore, interpreting article 10(a) to allow service by mail does not "render the vast bulk of the Convention . . . useless."<sup>319</sup> Instead, article 10(a) supplements the Convention's other provisions and helps to facilitate its various purposes.<sup>320</sup> Consequently, examining article 10(a) within the context of the Convention supports the conclusion that it permits "service" by mail.

#### 4. History of the Convention

An accurate interpretation of article 10(a) also requires a court to look beyond the Convention's actual text,<sup>321</sup> including the historical context in which the United States adopted the Convention.<sup>322</sup> The Convention was drafted in response to difficulties international litigants experienced in effecting service of process.<sup>323</sup> United States delegates to the Convention intended to eliminate procedural problems encountered in international litigation, including difficulties United States plaintiffs experienced trying to serve foreign defendants.<sup>324</sup> The Convention attempted to alleviate these problems by simplifying the procedure for service of process while assuring procedural safeguards for defendants.<sup>325</sup> Rule 4 already allowed service of process by mail on foreign defendants.<sup>326</sup> As such, the United States Senate certainly did not intend to ratify an international Convention that would impose barriers to international service not present in Rule 4.<sup>327</sup> Such a decision would increase rather than decrease the difficul-

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317. *Id.* preamble.

318. *Id.*

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

320. *See* Convention, *supra* note 8.

321. *Factor*, 290 U.S. at 294; *O'Connor v. United States*, 479 U.S. 27, 33 (1986); *Saks*, 470 U.S. at 396; *Schlunk*, 486 U.S. at 699-700.

322. *See Chocktaw*, 318 U.S. at 432 (the Court may look to the history of a treaty); *Schlunk*, 486 U.S. at 699; *Societe Nationale*, 482 U.S. at 534.

323. For references discussing the extensive problems both United States and foreign litigants were experiencing in this regard, *see supra* notes 29-32.

324. *See generally* SENATE REPORT, *supra* note 86.

325. Convention, *supra* note 8; *see also* SENATE REPORT, *supra* note 86, at 1.

326. *See supra* text accompanying notes 91-92.

327. This could occur, for example, when a signatory state to the Convention would have accepted service of process by direct mail prior to ratifying the Convention. However, this same state would now be unable to accept this form of service, absent a special agreement in any given case, because this form of service would not comply with the terms of the Convention.

ties United States plaintiffs were experiencing at the time the Convention was drafted.

### 5. Negotiations Leading to the Convention

A similar conclusion may be reached by reviewing the negotiations leading to the Convention.<sup>328</sup> The Report on the Draft Convention ("Draft Report")<sup>329</sup> states that the drafters intended the final version of article 10(a) to correspond to article 10 of the draft convention.<sup>330</sup> Article 10's negotiating history indicates that sending of judicial documents by mail was intended to include service of process.<sup>331</sup> In explaining the background and purpose of article 10, the Draft Report states that the provisions of article 10 also permit "service" by telegram if the state where the plaintiff is effecting "service" does not object.<sup>332</sup> It further states that the draft convention rejected a proposal limiting postal channels to registered mail.<sup>333</sup> This report clearly refers to "service" when discussing the meaning of the various phrases of the original article 10, which subsequently became article 10(a).<sup>334</sup> Therefore, records of the Convention's negotiating history indicate that article 10(a), like the other provisions of the article, refers to an alternative method of service.

### 6. Intent of the Signatories to the Convention

A court should construe the Convention's requirements liberally to give effect to the signatories' intentions.<sup>335</sup> Where the Convention admits interpretations which may either restrict or enlarge signatories' rights, a court should accept the more liberal construction.<sup>336</sup> The Convention's preamble amply demonstrates the signatories' liberal intent.

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328. The Court has held that in interpreting treaties, it is proper to look to the negotiations leading to the treaty. *Chocktaw*, 318 U.S. at 432.

329. See B. RISTAU, *supra* note 45, §§ 4-28. The draft convention preceded the final version of the Convention which was formulated by the Hague Conference on Private International Law in 1964. See *id.* The Convention revised parts of the Hague Conventions on Civil Procedure of 1905 and 1954. *Id.*; see also *Schlunk*, 486 U.S. at 698.

330. B. RISTAU, *supra* note 45, at 165-67 (citing *Conférence de la Hague de Droit International Privé, Actes et Documents de la Dixième Session, tome III, "Notification" (1965)*).

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *Valentine*, 299 U.S. at 10; *Todok*, 281 U.S. at 454.

336. *Jordan*, 278 U.S. at 127; *Hauenstein*, 100 U.S. at 487; *Asakura*, 265 U.S. at 342.

The preamble makes clear that the Convention's signatories intended to alleviate difficulties involved in international litigation. They sought to promote international judicial cooperation by providing a simple and expeditious procedure for service of process while ensuring that defendants received sufficient notice.<sup>337</sup> It is obvious that the signatories intended to establish much more than a formal mode of service.<sup>338</sup> Instead, they intended to promote simplicity and expedience of service.<sup>339</sup> Interpreting the Convention as allowing service of process by mail furthers this purpose by providing states the option of allowing another simple and expeditious method of service.<sup>340</sup> Furthermore, since service by mail meets strict due process requirements of notice and an opportunity to be heard,<sup>341</sup> it conforms with the signatories' intent to ensure that defendants receive actual notice of judicial documents served from abroad.

Additionally, in interpreting the Convention, a court must give great weight to the Senate's interpretation of the Convention.<sup>342</sup> The Senate Committee Report on the Convention ("Senate Report")<sup>343</sup> reveals the Senate's understanding of the Convention. The Senate Report discusses the large amount of work that the United States government did to establish practicable methods for service of process in cases involving foreign litigants.<sup>344</sup> These efforts culminated in the revision of Rule 4 by the addition of paragraph (i).<sup>345</sup> The Senate Report further discusses the liberal service methods under Rule 4(i) and states that the Judicial Conference of the United States endorsed the Convention as in accord with the Federal Rules of Civil Procedure.<sup>346</sup> In addition, the Senate Report states that ratification of the Convention by the United States would not repeal or modify anything authorized by United States law.<sup>347</sup> Obviously, the Senate did not interpret the Convention to preclude methods of service of process outlined in Rule 4(i), including service of process by mail.

Furthermore, in his statement to the Senate Committee describ-

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337. Convention, *supra* note 8, preamble.

338. *Contra Ordmandy*, 122 Misc. 2d at 955, 472 N.Y.S.2d at 275.

339. Convention, *supra* note 8, preamble.

340. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

341. *Id.*; *Milliken v. Meyer*, 311 U.S. 457 (1940).

342. *Koloravt v. Oregon*, 366 U.S. 187, 194 (1961).

343. SENATE REPORT, *supra* note 86.

344. *Id.*

345. *Id.* at 6.

346. *Id.* at 7.

347. *Id.* at 2.

ing the terms of the Convention, Phillip Amram, the principal United States delegate to the Convention,<sup>348</sup> stated that the philosophy of the Convention was very liberal regarding judicial assistance techniques.<sup>349</sup> In describing the various methods of service available under the Convention, he recognized that the use of the Central Authority was not obligatory. A plaintiff could use optional techniques including "direct service by mail" unless the requested state objected.<sup>350</sup> In short, the United States delegation to the Convention interpreted article 10(a) to refer to service of process, not merely transmitting judicial documents by mail after service of process was complete.

### 7. The Practical Construction of The Convention by the Signatories

The United States government's reactions to article 10(a) also supports the conclusion that service of process by mail is permissible. The Convention was drafted and the United States adopted it after Rule 4(i), in its present form, went into effect.<sup>351</sup> In this form, Rule 4(i) allows service of process abroad by mail.<sup>352</sup> The Senate Report indicates that the Senate believed the Convention was consistent with the spirit of the laws in force at the time of the Convention's ratification.<sup>353</sup> These laws included Rule 4(i), which guarantees liberal methods of service of process abroad.<sup>354</sup>

In the twenty-three years since the Senate ratified the Convention, it has not amended Rule 4(i) to prohibit plaintiffs from attempting service of process by mail on a foreign defendant who is a citizen of a Convention signatory.<sup>355</sup> Presumably, the Advisory Committee to the Federal Rules of Civil Procedure would have proposed such an amendment to Rule 4(i) if it viewed article 10(a) as not permitting

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348. *See id.*

349. *Id.* at 13.

350. *Id.* (emphasis added).

351. Rule 4(i) went into effect in 1963. FED. R. CIV. P. 4(i). The Convention was ratified by the United States in 1967 and went into effect in 1969. Convention, *supra* note 8.

352. FED. R. CIV. P. 4.

353. SENATE REPORT, *supra* note 86, at 7.

354. FED. R. CIV. P. 4; *see* SENATE REPORT, *supra* note 86, at 6 (Rule 4(i) "establishes very liberal provisions, within the limits of due process, in a suit brought in the United States for making service upon a person residing abroad."); C.A. WRIGHT & A. MILLER, *supra* note 3, at 369.

355. FED. R. CIV. P. 4(i).

service of process by mail. The Senate could not have intended to subject plaintiffs to conflicting federal law.

Other signatories' declarations to the Convention further support this interpretation.<sup>356</sup> For example, Czechoslovakia objected to any service under article 10, specifically referring to service by mail. Czechoslovakia's government stated in its declaration that "in accordance with Article 10 . . . judicial documents may not be *served* by another contracting State through postal channels nor through the judicial officers, officials or other competent persons."<sup>357</sup> Obviously, the Czechoslovakian government construed article 10(a) as referring to service of process by mail.

Several other countries have indicated the same understanding. In its declaration of ratification, the Federal Republic of Germany objected to any service under article 10 by stating: "*Service* pursuant to Article 10 of the Convention shall not be effected."<sup>358</sup> The German government apparently did not distinguish between "send" and "serve." The Turkish government similarly objected to article 10 stating that it was "opposed to the use of the methods of *servicing* judicial documents listed in Article 10."<sup>359</sup> Finally, the government of Norway declared that it was "opposed to the use of such methods of *service* or transmission of documents on its territory as mentioned in Articles 8 and 10 of the Convention."<sup>360</sup> Thus, ample evidence demonstrates that many Convention signatories believed that article 10(a) prescribed another method of service of process.<sup>361</sup> Perhaps more revealing, no signatory to the Convention has subsequently amended its declaration to distinguish the provisions of article 10(a) or elaborate on its special import.<sup>362</sup>

Finally, further support for this interpretation can be found in the Report on the Work of the Special Commission on the Operation of the Convention ("Special Commission Report").<sup>363</sup> Held in 1977, several years after the final version of the Convention was com-

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356. See Convention, *supra* note 8.

357. *Id.* (emphasis added).

358. *Id.* (emphasis added).

359. *Id.* (emphasis added).

360. *Id.* (emphasis added).

361. See *Rich v. Kis California, Inc.*, 1988 WL 47605 (M.D.N.C.).

362. Convention, *supra* note 8.

363. *Report on the Work of the Special Commission on the Operation of the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters*, reprinted in 17 I.L.M. 319 (1978) [hereinafter *Special Commission Report*].

pleted,<sup>364</sup> the Special Commission Report states that most of the states made no objection to the *service* of judicial documents coming from abroad directly by mail into their territory.<sup>365</sup> This statement strongly suggests that the Special Commission, which Japan attended, interpreted the Convention as allowing service of process by mail.<sup>366</sup> Furthermore, the Special Commission Report contains no record of any state, including Japan, making an objection to this interpretation during the commission meeting.<sup>367</sup>

Consequently, the logical conclusion following from the signatories' practical construction of article 10(a) is that it allows service of process by mail, as long as the receiving state has not objected. Since Japan only objects to paragraphs (b) and (c) of article 10,<sup>368</sup> courts should interpret the Convention, consistent with the signatories' interpretation, as allowing service by mail on a Japanese defendant.

### B. *The Effect on Japan of Allowing Service By Mail*

Several courts and commentators have rightly expressed concerns over the effect on Japan of interpreting article 10(a) to allow service by mail.<sup>369</sup> One concern is that the internal law of Japan does not allow direct service of process by mail in Japanese domestic litigation.<sup>370</sup> The other concern is that Japan is a civil law country, and as such, it considers service of process strictly an official government function.<sup>371</sup> Thus, allowing direct service of process by mail from a United States plaintiff would usurp a Japanese governmental power and infringe on Japan's sovereignty.<sup>372</sup> Although these concerns are legitimate and deserve attention, as the following sections demonstrate, they are easily alleviated without resort to an unduly restrictive interpretation of article 10(a).<sup>373</sup>

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364. *Id.*

365. *Id.* at 326.

366. *Id.* at 319.

367. *Id.*

368. Convention, *supra* note 8.

369. See, e.g., *Suzuki*, 200 Cal. App. 3d at 1480-81, 249 Cal. Rptr. at 379; see also *Fujita*, *supra* note 25; *Ohara*, *Judicial Assistance to be Afforded by Japan for Proceedings in the United States*, 23 INT'L L. 10, 14-18 (1989); but see *Jorden*, *supra* note 146.

370. See sources cited *supra* note 369.

371. See *Fujita*, *supra* note 25, at 72-73; *Jorden*, *supra* note 146.

372. See *Fujita*, *supra* note 25; *Jorden*, *supra* note 146; see also C.A. WRIGHT & A. MILLER, *supra* note 3, at 367. "Some countries view service of process within their borders in connection with litigation pending elsewhere as a 'judicial,' and therefore a 'sovereign,' act that is offensive to the policies or contrary to the law of the particular country." *Id.*

373. See *infra* notes 374-94 and accompanying text; see generally *Jorden*, *supra* note 146.

## 1. Japanese Law

As the court recognized in *Suzuki*, Japan's internal law prohibits direct service of process by mail between two private litigants.<sup>374</sup> However, just as in the United States, the Constitution of Japan provides that treaty provisions take precedence over existing domestic statutory law.<sup>375</sup> Therefore, since Japan ratified the Convention, the Convention's provisions supersede any existing Japanese domestic service laws.<sup>376</sup>

A further argument, however, is that since the internal law of Japan does not allow service by direct mail, Japan could not have believed article 10(a) allowed service of process by mail. If it did, it would have objected to article 10(a) as being inconsistent with its domestic laws governing service.<sup>377</sup> This argument loses force when one considers that other Convention signatories, such as the Federal Republic of Germany, recognized that article 10(a) allowed service by mail and in accordance with its civil law, expressly objected to article 10(a).<sup>378</sup> Japan had notice of such objections and presumably could have similarly objected if it believed such an objection was desirable.<sup>379</sup> Furthermore, in debating the terms of the Convention, Germany specifically expressed its dissatisfaction with article 10's inclusion in the Convention.<sup>380</sup> Japan attended the Convention and must surely have been aware of Germany's objections.<sup>381</sup> Nevertheless, there is no record of Japan joining in this objection.<sup>382</sup>

Finally, no record exists of Japan ever objecting to, or even commenting on, article 10(a).<sup>383</sup> Presumably, Japan, realizing the precedence the Convention's terms would have over its domestic rules, would have objected to article 10(a) if it believed foreign litigants

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374. *Suzuki*, 200 Cal. App. 3d at 1480-81, 249 Cal. Rptr. at 379; see also Fujita, *supra* note 25; Jorden, *supra* note 146.

375. Jorden, *supra* note 146, at 78-79.

376. *Id.*

377. *Suzuki*, 200 Cal. App. 3d at 1480-81, 249 Cal. Rptr. at 379; Fujita, *supra* note 25, at 78.

378. Convention, *supra* note 8; see also Jorden, *supra* note 146, at 75.

379. Under article 31 of the Convention, the Ministry of Foreign Affairs of the Netherlands must give notice of the ratifications and declarations, including any objections, of all signatory states to the Convention to the other signatory states. Convention, *supra* note 8, art. 31.

380. See Jorden, *supra* note 146, at 75.

381. *Id.*

382. *Id.*

383. Convention, *supra* note 8; *Special Commission Report*, *supra* note 363, at 326; Jorden, *supra* note 146, at 75.

could undesirably construe article 10(a) as permitting a procedure that is contrary to Japanese law. This is especially true considering the long history of controversy article 10(a) has fostered regarding service upon Japanese defendants in United States litigation.

## 2. Japanese Sovereignty

The second concern is that allowing service of process by mail directly on a Japanese national would infringe on Japan's sovereignty.<sup>384</sup> This concern stems from two arguments. First, since Japan is a civil law country and thus regards service of process as an official government function, allowing service of process by mail would infringe on the Japanese government's ability to protect Japanese citizens.<sup>385</sup> This perspective disproportionately protects Japanese litigants and places too much emphasis on the Japanese government's role.<sup>386</sup>

Japanese citizens would not, in fact, be left unprotected in United States courts by allowing service of process by mail. Instead, they would be placed on more equal ground with United States litigants. As the *Newport* court reasoned, neither the Convention at issue here nor the Evidence Convention was intended to shield a Japanese defendant from the normal burdens of litigation in United States courts.<sup>387</sup> The court concluded that if article 10(a) was construed as not allowing service of process by mail, Japanese companies doing business in the United States would enjoy an extraordinary advantage as potential litigants in United States courts.<sup>388</sup> Japanese companies would be much less amenable to process from United States plaintiffs, giving them a distinct advantage over United States businesses and consumers in civil and commercial disputes. Taking the *Newport*

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384. See Fujita, *supra* note 25.

385. *Id.*; Jorden, *supra* note 146.

[One] Japanese commentator has taken the position that service from abroad by mail on Japanese defendants located in Japan *ipso facto* fails to satisfy [Japanese law]. The only interest served by the acceptance of such an analysis by a Japanese tribunal would be Japanese sovereignty, or . . . procedural jingoism. [Japanese law] and the Convention, should be read as above all insuring fairness to litigants. Japanese tribunals should focus on the central issue of whether or not a given defendant *actually* received notice, rather than on the metaphysics of sovereignty. Over-reliance on the issue of sovereignty would ultimately lead to unfairness to foreign plaintiffs rather than fairness to defendants.

*Id.* at 90.

386. See Jorden, *supra* note 146, at 90.

387. *Newport Components, Inc. v. NEC Home Electronics (U.S.A.), Inc.*, 671 F. Supp. 1525, 1542 (C.D. Cal. 1987).

388. *Id.*



court's reasoning one step further, one could argue that this infringes on United States, not Japanese, sovereignty by diminishing the United States government's ability to protect its citizens.

The second argument is that Japan objected to other more formal modes of service contained in article 10(b) and (c), and allowing service by mail would undermine these objections and the role of Japan's Central Authority.<sup>389</sup> This argument has little merit. Japan's Central Authority has the same role as every other Central Authority of a signatory state that has not objected to article 10(a). There is no reason to elevate Japan's Central Authority to some higher position, presumably representing Japan's sovereignty. If Japan is concerned that service of process by mail under article 10(a) undermines its objections to article 10(b) and (c), or infringes on the role of its Central Authority, it can formally object to article 10(a).<sup>390</sup> Furthermore, as the court pointed out in *Lemme*, if Japan's interest in sovereignty is to promote the least intrusive means of notifying its citizens of lawsuits against them, it would be logical to permit only the Central Authority or the postal service to serve process.<sup>391</sup>

Therefore, concerns for the effect interpreting article 10(a) as allowing service of process by mail would have on Japan, while well intentioned, are overstated. Japan has the ability to safeguard its own internal law and sovereignty.<sup>392</sup> Furthermore, Japan should have the burden of clarifying any ambiguity in its interpretation or ratification of the Convention, especially when such clarification can be rendered so easily.<sup>393</sup>

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389. See *Reynolds v. Koh*, 109 A.D.2d 97, 100, 490 N.Y.S.2d 295, 298 (1985).

390. Convention, *supra* note 8, art. 21.

391. *Lemme v. Wine of Japan Import, Inc.*, 631 F. Supp. 456, 464 (E.D.N.Y. 1986).

392. See *Jorden*, *supra* note 146.

393. *Id.*

The Japanese Foreign Ministry should be informed of the manner in which courts in the United States have interpreted Japan's failure to object to article 10(a) of the Convention. If, alas, the Foreign Ministry were to decide that jingoism should triumph over the principle of judicial cooperation (upon which the Convention is based), the signatory states should be informed in appropriate fashion—a revised Japanese declaration registered with the Dutch Foreign Ministry in the Hague in accordance with article 21 of the Convention.

*Id.* at 90. See also *Ohara*, *supra* note 369, at 16. The author asserts that: "In order to avoid misunderstandings by foreigners that Japan permits the validity of service by mail inasmuch as it did not object to article 10(a) of the Convention, . . . the Japanese Government should have declared, or even now should declare, its objection to it." *Id.*

To clarify its interpretation of the Convention or to object to article 10(a), Japan need merely notify the Ministry of Foreign Affairs of the Netherlands. See Convention, *supra* note 8, art. 21.

## V. CONCLUSION

At present, United States courts disagree over whether article 10(a) of the Convention allows service of process by mail on a Japanese defendant. While some decisions have allowed service by mail under article 10(a), the opinions were based on faulty, cursory analyses and incorrect factual assumptions. Other decisions, representing the current trend not to allow service by mail under article 10(a), are based on overly restrictive and erroneous interpretations of the Convention's text and purpose.

This split in authority needlessly confuses United States litigants, increases litigation costs and chances for statute of limitations conflicts, and wastes valuable court time. Additionally, the present trend of interpreting article 10(a) as denying service of process by mail places an unfair burden on United States plaintiffs. Finally, it gives Japanese businesses an unfair advantage over both their United States counterparts and consumers in the United States domestic market. Therefore, the need for courts to follow a more logical analysis of article 10(a) is clear. This Comment suggests that courts should interpret article 10(a) in its proper context within the Convention as allowing service of process by mail. To reach this conclusion, a court need only follow ordinary rules of treaty interpretation.

United States courts, while attempting to safeguard the rights of all litigants before them, are currently favoring Japanese defendants. Although the signatories to the Convention sought to promote judicial assistance while protecting the rights of litigants, this goal must be accomplished without unduly restricting the rights of United States plaintiffs.<sup>394</sup> If the Japanese government believes that interpreting article 10(a) as allowing service of process by mail infringes on its laws or its sovereignty, it can object to it. Until it does, however, United States courts should interpret article 10(a) as allowing a United States plaintiff to serve a Japanese defendant by mail.

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394. Article 10 of the Convention states that the "Convention shall not interfere with . . . the freedom to send judicial documents, by postal channels, directly to persons abroad[.]" Convention, *supra* note 8, art. 10(a) (emphasis added); see also Jorden, *supra* note 146, at 90. Jorden concludes that "Article 10(a) of the Convention was intended to obligate signatory states that did not object thereto to recognize the validity of service by mail . . . . By ratifying the Convention and failing to make a formal declaration objecting to article 10(a), Japan assumed said obligation as a matter of international law." *Id.*

\* To my parents for their constant support throughout my law school experience.

