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STUDENT NOTES

INTERNATIONAL SERVICE OF PROCESS BY MAIL UNDER THE HAGUE SERVICE CONVENTION

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The United States is one of twenty-eight States bound by the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (the Convention).¹ The Convention provides several methods through which a plaintiff in one Member State may effect service of process upon a defendant in another. There is a dispute as to whether these methods include service of process by direct mail. Some courts and commentators interpret the Convention to permit a plaintiff to effect service by mailing service documents directly to the defendant abroad. Other courts and commentators maintain that the Convention does not authorize service in this manner. This dispute raises important questions of judicial economy and international comity.

To understand the dispute, one first must consider the provisions of the Convention that unquestionably establish methods of service. Articles 2 through 6 of the Convention establish a system in which each nation creates a "Central Authority." The Central Authority receives, and attempts to satisfy, requests from abroad for service upon persons within the nation's borders.² This procedure is the primary method envisioned by the Convention, but other methods of service also are authorized. Article 8 allows service to be obtained through diplomatic or consular agents.³ Article 9 permits documents to be forwarded through consular channels to authorities within a contracting State who are authorized by that State to effect service.⁴ Article 19 permits any method of service which is allowed under the internal law of the nation in which service is effected.⁵ In addition, article 10 states

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1. Convention on the Service Abroad of Judicial and Extrajudicial Documents, Nov. 15, 1965, 20 U.S.T. 361, 4 I.L.M. 341 [hereinafter Hague Service Convention].

2. *Id.* art. 2, 20 U.S.T. at 362, 4 I.L.M. at 341.

3. *Id.* art. 8, 20 U.S.T. at 363, 4 I.L.M. at 342.

4. *Id.* art. 9, 20 U.S.T. at 363, 4 I.L.M. at 342.

5. *Id.* art. 19, 20 U.S.T. at 365, 4 I.L.M. at 343.

that:

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.⁶

In the United States, the federal courts are split over the proper interpretation of article 10(a). The Second Circuit has held that article 10(a) allows international service of process by mail, as long as the receiving nation has not explicitly objected to this provision of the Convention.⁷ The Eighth Circuit, however, has ruled that such service is not authorized by article 10(a).⁸ Noting that article 10(a) uses the word "send," instead of the word "serve" which is used consistently elsewhere in the Convention, the Eighth Circuit has concluded that only subsequent documents may be mailed, after service has been obtained using an authorized method.⁹

In other circuits, the appellate courts have not addressed the controversy. District courts have examined the question, however, and they have split between the two lines of interpretation. District courts in the D.C., Third, Fifth, and Ninth Circuits have consistently interpreted article 10(a) to permit international service by mail.¹⁰ The district courts of the First and Tenth Circuits have taken the opposite position.¹¹ Within the Fourth, Seventh, and Eleventh Circuits, the various district courts are divided over the issue.¹²

6. *Id.* art. 10, 20 U.S.T. at 363, 4 I.L.M. at 342.

7. *Ackermann v. Levine*, 788 F.2d 830 (2d Cir. 1986).

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

9. *Id.* at 173-74.

10. *See Hutchins v. Beneteau (USA) Ltd.*, No. 89-4806, 1990 U.S. Dist. LEXIS 1725 (E.D. La. Feb. 16, 1990); *In re All Terrain Vehicles Litig.*, No. 88-237, 1989 U.S. Dist. LEXIS 1843 (E.D. Pa. Feb. 23, 1989); *Smith v. Dainichi Kinzoku Kogyo Co.*, 680 F.Supp. 847 (W.D. Tex. 1988); *Newport Components, Inc. v. NEC Home Elect. (U.S.A.)*, 671 F.Supp. 1525 (C.D. Cal. 1987); *Great Am. Boat Co. v. Alsthom Atl., Inc.*, Nos. 84-0105, 84-5442, 1987 U.S. Dist. LEXIS 2805 (E.D. La. Apr. 8, 1987); *Chrysler Corp. v. General Motors Corp.*, 589 F.Supp. 1182 (D.C. Cir. 1984).

11. *Arthur v. Nissei ASB Co.*, No. 87-2261-0, 1988 U.S. Dist. LEXIS 7262 (D. Kan. June 22, 1988); *Cooper v. Makita, U.S.A., Inc.*, 117 F.R.D. 16 (D. Me. 1987).

12. Within the Fourth Circuit, for a discussion interpreting article 10(a) to authorize mail service, see *Hammond v. Honda Motor Co.*, 128 F.R.D. 638 (D.S.C. 1989); *Weight v. Kawasaki Heavy Indus.*, 597 F.Supp. 1082 (E.D. Va. 1984); *cf. Flemming v. Yamaha Motor Corp.*, No. 900130-A, 1991 U.S. Dist. LEXIS 14277 (W.D. Va. Oct. 2, 1991). For cases in the Seventh

State courts also are divided on the question of international service by mail. An early, influential California case held that article 10(a) authorizes service by direct mail.¹³ A subsequent decision by a different California appellate court forcefully advanced the contrary holding.¹⁴ New York and Arizona courts have held that article 10 does not permit mail service.¹⁵ State courts in Maryland and North Carolina, on the other hand, interpret the treaty provision to allow the direct mailing of service upon international defendants.¹⁶

No consensus among legal commentators has emerged regarding mail service under article 10(a). *Moore's Federal Practice and Procedure* acknowledges the dispute without taking a position on it.¹⁷ *Wright and Miller's Federal Practice and Procedure* does not explicitly address the Convention, but maintains that service by mail "may be less objectionable" than more formal methods of service between international litigants.¹⁸ While Bruno Ristau's *International Judicial Assistance* argues that mail service is permitted under article 10(a), other commentators have maintained the opposite position with equal force.¹⁹

The controversy over article 10(a) is an important one. Compared to service by mail, the Convention's more formal methods of obtaining service are expensive and time-consuming.²⁰ The controversy is also important because it implicates the principles of international comity and judicial economy. When U.S. courts permit service by mail under

Circuit interpreting the article to allow mail service, see *Chowaniec v. Heyl Truck Lines*, No. 90-C-07034, 1991 U.S. Dist. LEXIS 8138 (N.D. Ill. June 17, 1991); *Zisman v. Sieger*, 106 F.R.D. 194 (N.D. Ill. 1985); *cf.* *General Electro Music Corp. v. Samic Music Corp.*, No. 90-C-5590 (1991), 1991 U.S. Dist. LEXIS 11905 (N.D. Ill. Aug. 27, 1991). In the Eleventh Circuit see *Patty v. Toyota Motor Corp.*, No. 4:-91-v-62-HLM (1991), 1991 U.S. Dist. LEXIS 16561 (N.D. Ga. Oct. 17, 1991); *Coblentz GMC/Freightliner v. General Motors Corp.*, 724 F.Supp. 1364 (M.D. Ala. 1989). Both cases hold that article 10(a) permits mail service. *But cf.* *Wasden v. Yamaha Motor co.*, 131 F.R.D. 206 (M.D. Fla. 1990); *McClenon v. Nissan Motor Corp. U.S.A.*, 726 F.Supp. 822 (N.D. Fla. 1989); *Pochop v. Toyota Motor Co.*, 111 F.R.D. 464 (S.D. Miss. 1986).

13. See *Shoei Kako Co. v. Super. Ct. of San Francisco*, 33 Cal. App. 3d 808 (1973).

14. See *Suzuki Motor Co. v. Super. Ct. of San Bernardino*, 200 Cal. App. 3d 1476 (1988).

15. See *Kadota v. Hosogai*, 608 P.2d 68 (Ariz. Ct. App. 1980); *Reynolds v. Koh*, 490 N.Y.S.2d 295 (1985); *Ordmandy v. Lynn*, 472 N.Y.S.2d 274 (1984).

16. See *Nicholson v. Yamaha Motor Co.*, 566 A.2d 135 (Md. Ct. App. 1989); *Hayes v. Ergo Tel. Co.*, 397 S.E.2d 325 (N.C. Ct. App. 1990).

17. JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE AND PROCEDURE* § 6.19, n.3 (1991).

18. CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* 377 (1987).

19. BRUNO RISTAU, *INTERNATIONAL JUDICIAL ASSISTANCE, CIVIL AND COMMERCIAL* 148-49 (1990). *But see* Peter D. Trooboff, *International Decisions*, 82 AM. J. INT'L L. 816, 819 (1988).

20. WRIGHT & MILLER, *supra* note 18, at 564.

article 10(a), but other States interpret the provision not to authorize that method of service and object to service by mail on their citizens, international comity is breached.²¹ In addition, the controversy over article 10(a) impedes judicial economy by perpetuating an uncertain rule of procedure for litigants and courts.²²

This Note addresses the article 10(a) controversy and argues that the provision should be interpreted as not authorizing service by mail. Part I establishes that application of the Convention is mandatory, and that it supersedes inconsistent methods of service authorized by federal or state law. Part I then discusses the proper methods of interpreting international treaties. Part II applies these methods of treaty interpretation to the article 10(a) controversy, and argues that the article does not authorize service by mail. Part III addresses other considerations for courts and practitioners, including the availability of mail service under article 19 whenever mail service is permitted by the internal law of the receiving nation. Part III argues that such considerations favor interpreting article 10(a) not to authorize service of process by mail.

I. MANDATORY NATURE OF THE CONVENTION AND METHODS OF TREATY INTERPRETATION

A. *Mandatory Nature of the Convention*

Article 1 states that the 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."²³ In *Societe Nationale v. U.S. District Court*, the U.S. Supreme Court described this language as "mandatory," meaning that the Convention not only permits, but requires, the use of its procedures by litigants effecting service abroad.²⁴ In a subsequent case, *Volkswagenwerk Aktiengesellschaft v. Schlunk*, the Court further declared that by virtue of the Supremacy Clause of the U.S. Constitution, the Convention "pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies."²⁵

Societe Nationale and *Schlunk* have quieted, but not completely resolved, a debate in the lower courts over the relationship between the Convention and Federal Rule of Civil Procedure 4(i). Rule 4(i) authorizes several means of effecting service abroad, including direct

21. See *infra* notes 115-16 and accompanying text.

22. For a discussion related to this area, see *infra* notes 133-39 and accompanying text.

23. Hague Service Convention, *supra* note 1, art. 1, 20 U.S.T. at 362, 4 I.L.M. at 341.

24. *Societe Nationale v. U.S. Dist. Ct.*, 482 U.S. 522, 534 n.15 (1987).

25. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988).

mail service, which in some cases would conflict with the procedures authorized by the Convention.²⁶ *Schlunk* established that the Convention supersedes inconsistent procedures authorized by *state* law, but it did not explicitly address the apparent conflict between the Convention and Rule 4(i).²⁷

As a federal statute, Rule 4(i) is given equal dignity with treaties entered into by the United States; the apparent conflict between the Rule and the Convention must therefore be examined.²⁸ Courts addressing this conflict have noted that the Convention was ratified in 1967, long after the 1938 enactment of Rule 4. Reasoning that the Convention represented an updated congressional intent, these courts concluded that the Convention superseded the Rule.²⁹ In 1983, Congress amended Rule 4 and several courts entertained an argument that the Convention had, in turn, been superseded by the new version of Rule 4.³⁰ Were this "latter in time" analysis to govern the issue, mail service might be permitted under Rule 4(i) even if the Convention did not allow such service.

A more reasoned analysis, however, rejects the "latter in time" approach as being overly simplistic. Recognizing that Congress may enact new laws without having examined prior inconsistent legislation, some courts have attempted to read the Convention and Rule 4(i) in unison so that the legislature's true intent might be discovered.³¹ Courts taking this approach note that while the Federal Rules are general in nature, the Convention is specific, defining how service of process may be made in nations which have agreed to be bound by the treaty.³² Under this analysis, Rule 4(i) provides methods of service which may be used only if they are not prohibited by the Convention.³³

This view of the relationship between the Convention and Rule 4(i) is particularly compelling when one considers article 19 of the Convention. Article 19 provides that:

To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding

26. See FED. R. CIV. P. 4(i)(1)(D).

27. See *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988).

28. See, e.g., *Whitney v. Robertson*, 124 U.S. 190 (1888).

29. See, e.g., *Vorhees v. Fischer & Krecke*, 697 F.2d 574, 575-76 (4th Cir. 1983).

30. See, e.g., *Ackermann v. Levine*, 788 F.2d 830, 840 (2d Cir. 1986).

31. See, e.g., *Harris v. Browning-Ferris Indus., Chem. Serv.*, 100 F.R.D. 775, 777 (M.D. La. 1984).

32. *Id.*

33. *Id.* at 777-78.

articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.³⁴

This article was included in the Convention at the request of the U.S. delegation.³⁵ The delegation wanted article 19 included in the Convention to ensure that the treaty would not repeal the internal procedures in effect for service of foreign documents within the United States.³⁶ In light of article 19, there is no inconsistency in Congress's decision to both ratify the Convention and enact Rule 4(i): the Federal Rule has effect only to the extent its procedures are not prohibited by the treaty.

Documents coming from abroad, into the United States, may be served in accordance with Rule 4(i), and documents coming from the United States may be served, in accordance with Rule 4(i), into States which are not parties to the Convention. To obtain service in a State which is a convention member, however, litigants must follow a procedure authorized by the Convention. The Convention therefore supercedes inconsistent service authorized either by state law or Rule 4(i). The question remains, however, whether article 10(a) authorizes service abroad by mail. In order to address this question, the proper methods of treaty interpretation should first be reviewed.

B. *Methods of Treaty Interpretation*

The U.S. Supreme Court has established a number of principles to govern the manner in which U.S. courts interpret international treaties. According to the Court, an international treaty is "in the nature of a contract between nations."³⁷ In interpreting treaties, "[g]eneral rules of construction apply."³⁸ An interpretation, therefore, should begin "with the text of the treaty and the context in which the written words are used."³⁹ Furthermore, "[o]ther general rules of construction may be brought to bear on difficult or ambiguous passages."⁴⁰ With regard to such passages, courts should "look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties."⁴¹

These principles of treaty interpretation, announced by the U.S.

34. Hague Service Convention, *supra* note 1, art. 19, 20 U.S.T. at 365, 4 I.L.M. at 343.

35. 113 CONG. REC. 9404 (1967).

36. *Id.*

37. *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984), *reh'g denied* 467 U.S. 1231 (1984).

38. *Id.* at 262 (Stevens, J., dissenting).

39. *Air France v. Saks*, 470 U.S. 392, 397 (1985).

40. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988).

41. *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943).

Supreme Court, closely parallel those set out in the 1969 Vienna Convention on the Law of Treaties.⁴² Article 31 of the Vienna Convention states that a treaty shall be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."⁴³ Where the meaning of the treaty passage is ambiguous or obscure, article 32 provides that recourse may be made to preparatory works of the treaty and the circumstances in which it was concluded.⁴⁴

The United States has yet to ratify the Vienna Convention, but the U.S. Department of State has said that its provisions are "already recognized as the authoritative guide to current treaty law and practice."⁴⁵ Thus, international law is in accord with the principles set out by the U.S. Supreme Court regarding treaty interpretation. Interpretation turns on the treaty's text, its negotiating history, the construction afforded by the parties to the treaty, and the general purposes of the treaty.

II. EXAMINING ARTICLE 10(a) IN LIGHT OF METHODS OF TREATY INTERPRETATION

The principles of treaty interpretation discussed in Part I may shed light on article 10(a) of the Hague Service Convention. Before applying them, however, it should be noted that the U.S. Supreme Court has interpreted other aspects of the Convention and has, in dicta, hinted at an interpretation of article 10(a).

Volkswagenwerk Aktiengesellschaft v. Schlunk involved a claim brought in an Illinois state court.⁴⁶ The plaintiff served a complaint upon the U.S. subsidiary of a German corporation. The corporation argued that service of process was not in accordance with the Convention. Noting that Illinois law permitted service to be made upon the corporation's U.S. subsidiary, the Supreme Court held that the Convention was inapplicable.⁴⁷ The Convention was implicated only by international service of process, and, the Court reasoned, the law of the forum determined whether "service abroad" was required.⁴⁸

Justice Brennan, in a concurring opinion, took issue with the ma-

42. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31, 1155 U.N.T.S. 331, 340, 8 I.L.M. 679, 691-92 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

43. *Id.* art. 31, 1155 U.N.T.S. at 340, 8 I.L.M. at 691-92.

44. *Id.* art. 32, 1155 U.N.T.S. at 340, 8 I.L.M. at 692.

45. S. EXEC. DOC. L., 92d Cong. 1st Sess., at 1 (1971).

46. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 697 (1988).

47. *Id.* at 706-08.

48. *Id.* at 707.

jority's reasoning. He argued that the majority opinion would allow contracting States to ignore the Convention's terms entirely.⁴⁹ To illustrate his point, Justice Brennan stated that under the majority's analysis, "a forum nation could prescribe direct mail service to any foreigner and deem service effective upon deposit in the mailbox."⁵⁰ While not examining article 10(a) in any detail, Justice Brennan's illustration suggests that he believed direct mail service was not permitted by the Convention.⁵¹

Except for this thin reed of dicta, the Supreme Court has not addressed service by mail under the Convention. Article 10(a) has, however, been examined by several federal circuit courts, a multitude of federal district courts, and a number of state courts. The arguments of these courts, and of legal commentators, are most effectively examined by grouping them within the various methods of treaty interpretation described in Part I of this Note. This Part, therefore, will consider the interpretations of article 10(a) in light of the Convention's text, its negotiating history, the constructions afforded by the contracting States, and the purpose of the article within the Convention.

A. Text of the Convention

Courts that interpret article 10(a) as not authorizing direct mail service focus on the text of the Convention. They hold that the word "send" in article 10(a) does not have the same meaning as "service of process."⁵² These courts note that in other provisions of the Convention, the word "service" is consistently used to describe authorized methods of transmitting an initial summons and complaint.⁵³ The courts point out that the equally authentic French version of the Convention also uses a different word in article 10(a) than in other provisions of the Convention.⁵⁴

In addition, these courts note that when a legislative body "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislative body] acts intentionally and purposely in the disparate inclusion or exclusion."⁵⁵ These courts conclude that "[i]f the drafters of the Convention had meant for subparagraph (a) to provide an addi-

49. *Id.* at 710 (Brennan, J., concurring).

50. *Id.*

51. Trooboff, *supra* note 19, at 819.

52. *See, e.g.*, Bankston v. Toyota Motor Corp., 889 F.2d 172, 173 (8th Cir. 1989).

53. *Id.*

54. Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 697 (1988).

55. Bankston v. Toyota Motor Corp., 889 F.2d at 174 (citing favorably *Russello v. United States*, 464 U.S. 16, 23 (1983)).

tional manner of service of judicial documents . . . they would have used the word 'service.'"⁵⁶ Article 10(a) "merely provides a method for sending subsequent documents after service of process has been obtained" by one of the means clearly authorized by the Convention.⁵⁷

This reasoning is particularly compelling when one observes that within article 10 itself, the distinction between the "send" and "serve" language is present. Where article 10(a) addresses the freedom to "send" judicial documents by postal channels, articles 10(b) and 10(c) discuss the freedom to "effect service."⁵⁸ As one court has stated, "it strains plausibility that the Convention's drafters would use the word 'send' in article 10(a) to mean service of process, when they so carefully used the word 'service' in 10(b) and (c)."⁵⁹

The text of the Convention, therefore, strongly favors the interpretation of those who maintain that article 10(a) does not authorize service of process by mail. Those courts that take the opposite position — that direct mail service is permitted by the Convention — can only attribute the "send" and "serve" language to "careless drafting."⁶⁰ They then look to the negotiating history of the Convention to support their theory.⁶¹

B. *Negotiating History of the Convention*

The courts which have attributed article 10(a)'s ambiguous language to "careless drafting" are numerous.⁶² In advancing this theory, they cite the explanation of Bruno Ristau, who discussed article 10(a)'s negotiating history in his *International Judicial Assistance*.⁶³ Ristau's analysis begins with the Rapporteur's report on the Convention's final text. This report was adopted by the delegates at the Hague Conference.⁶⁴ The report states that "except for minor changes, article 10 of the Convention corresponds to article 10 of the draft convention."⁶⁵

56. *Id.* at 173-74.

57. *Id.* at 174.

58. Hague Service Convention, *supra* note 1, art. 10, 20 U.S.T. at 363, 4 I.L.M. at 342.

59. McClenon v. Nissan Motor Corp. in U.S.A., 726 F.Supp. 822, 826 (N.D. Fla. 1989); *see also* Hantover Inc. v. Omet, S.N.C. of Volentieri & Co., 688 F.Supp. 1377, 1385 (W.D. Mo. 1988).

60. Ackermann v. Levine, 788 F.2d 830, 839 (2d Cir. 1986).

61. *Id.*

62. *See, e.g., id.*; Chowanec v. Heyl Truck Lines, No. 90-C-07034, 1991 U.S. Dist. LEXIS 8138, at *7 (N.D. Ill. June 17, 1991); Hutchins v. Beneteau (USA) Ltd., No. 89-4806, 1990 U.S. Dist. LEXIS 1725, at *3 (E.D. La. Feb. 16, 1990); Smith v. Daninchi Kinzoku Kogyo Co., 680 F.Supp. 847, 850 (W.D. Tex. 1988).

63. RISTAU, *supra* note 19, at 148-49.

64. *Id.* at 149; *see also* text accompanying note 66 *infra*.

65. RISTAU, *supra* note 19, at 149.

The draft convention, in turn, had been accompanied by another, earlier report.⁶⁶ This earlier report discussed the draft convention's article 10 in terms which suggest service by mail was to be permitted. As Ristau translated the earlier report:

a) Postal channels. (para.1)

Paragraph 1 [designated "(a)" in the final text] of article 10 corresponds to paragraph 1 of Article 6 of the 1954 Convention. Throughout, the term "*interested parties*" used in the latter convention to designate the addressee has been substituted with the term *persons*, which is more definite.

In paragraph 1 of Article 10 the reference is intended to be to *private persons*; that expression also includes persons who are competent to represent parties for purposes of service [*notification*], such as English solicitors.

Moreover, it should be understood that private persons includes individuals as well as juristic persons.

The provision of paragraph 1 also permits service [*notification*] by telegram if the state where *service* [*notification*] is to be made does not object.

The Commission did not accept the proposal that postal channels be limited to registered mail.

It should be stressed that in permitting the utilization of postal channels, provided the state of destination does not object, the draft convention did not intend to pass on the validity of this mode of transmission under the law of the forum state: in order for the postal channel to be utilized, it is necessary that it be authorized by the law of the forum state. That is the reason why under the 1954 Convention Belgian documents could be served [*notifies*] in France by postal channels, because such manner of service [*notification*] was authorized by Belgian law and France did not object to it, although French documents, however could not be similarly serviced [*notifies*] in Belgium by postal channels, even though Belgium did not object to it, because such manner of service [*notification*] was unknown under French law.⁶⁷

In light of this report on the draft convention, Ristau concluded that "[i]t would appear that the draftsmen of the Convention intended the language 'to send judicial documents, by postal channels' to include the service of process. The use of different terms in the several paragraphs of Article 10 may well be attributed to careless drafting."⁶⁸

While Ristau makes a plausible case for his interpretation of article 10(a), there are several flaws in his analysis. First, Ristau assumes that the report of the final Convention, which was adopted by the Hague Conference, incorporated the terms of the earlier report on the draft convention. This an unfair assumption. There are four docu-

66. *Id.*

67. *Id.*

68. *Id.*

ments involved here: the final Convention, the report on the final Convention, the draft convention, and the report on the draft convention. At the Hague Conference, the delegates of the contracting States voted only on the final Convention and the report on the final Convention.⁶⁹ Because the report on the final Convention states that the final Convention's article 10 essentially corresponds to the draft convention's article 10, the terms of the draft convention are, in a sense, incorporated into the report on the final Convention.⁷⁰ It is not clear, however, that the terms of the *report* on the draft convention were also to be incorporated in this fashion.

At most, Ristau's analysis of the four documents shows that *some* of the people involved in drafting the treaty understood article 10(a) to permit service of process by mail. His analysis does not establish that there was a "meeting of the minds" on this issue; other delegates may have understood the provision to refer only to the mailing of documents after service had been accomplished. When these delegates voted to approve the report on the final Convention, which equated the final article 10 with its earlier draft, they may have merely compared the nearly identical draft and final texts of the treaty, without examining the more illuminating report on the draft convention. The two groups of delegates may have retained their own understanding of article 10(a), ignorant even of the existence of any disagreement over the provision.

Another flaw in Ristau's analysis of the Convention's negotiating history is that it ignores a related method of treaty interpretation, the examination of the construction used by the parties. Since an analysis of negotiating history is essentially an attempt to discover the intent of the contracting States, that analysis should be informed by the manner in which the States have treated the disputed treaty language.

C. Construction Adopted by the Contracting States

Article 21 of the Convention permits the contracting States to object to certain provisions of the Convention.⁷¹ The entry of such objections means that the State is not bound by the provisions to which it objects.⁷² With regard to article 10(a), the contracting States may be classed in three groups: those that objected to the article, those that did not object to the article and permit mail service from abroad in their internal laws, and those that did not object to the article but do

69. *Id.*

70. *Id.*

71. Hague Service Convention, *supra* note 1, art. 21, 20 U.S.T. at 365, 4 I.L.M. at 343.

72. *Id.*

not permit mail service from abroad in their internal laws. States that represent each of these three groups are, respectively, the Federal Republic of Germany, the United States, and Japan.⁷³

1. The Construction by the Federal Republic of Germany

The Federal Republic of Germany has objected to all of article 10, including paragraph (a).⁷⁴ Germany, like most civil law countries, does not permit direct mail service under its internal laws.⁷⁵ It considers service of process to be a sovereign act.⁷⁶ When service is attempted from abroad, Germany does not object if copies of service documents are mailed *for informational purposes only*, as long as no legal consequences follow.⁷⁷ Service itself must be obtained through one of the more formal methods authorized by the Convention.⁷⁸

Because Germany objected to article 10(a), it could be argued that Germany interprets the article's language to provide for service by mail. This, however, is not necessarily the case. Germany may have interpreted article 10(a) to refer to documents mailed after service has been obtained, and objected to this type of mailing as well. The terms by which Germany expressed its objection to the article suggest exactly this interpretation.

In expressing its objection to article 10, Germany referred to "methods of transmission" as well as "service."⁷⁹ Other civil law countries expressed their objections in similar terms. Norway objected to "such methods of service *or transmission* of documents on its territory as mentioned in articles 8 and 10 of the Convention."⁸⁰ Articles 8, 10(b), and 10(c) explicitly deal with "service"; Norway's distinction between service and transmission therefore may reflect a belief that article 10(a) deals with transmission of documents after service has been obtained. Egypt also objected to the "methods of transmitting" documents under article 10.⁸¹ Each of these nations may interpret ar-

73. See *infra* notes 74-110 and accompanying text.

74. Hague Service Convention, *supra* note 1, art. 21, 20 U.S.T. at 365, 4 I.L.M. at 343.

75. WILLIAM D. PARK & STEPHEN J. CROMIE, INTERNATIONAL COMMERCIAL LITIGATION 414-15 (1990).

76. *Id.*

77. *Reports on the Work of the Special Commission on the Operation of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 17 I.L.M. 312, 317 (1978) [hereinafter *1977 Special Commission Report*].

78. See *supra* notes 2, 4, 5, and accompanying text.

79. Comments to FED. R. CIV. P. 4(i) (noting reservations to Hague Service Convention, *supra* note 1, art. 10, 20 U.S.T. at 363, 4 I.L.M. at 342).

80. *Id.* (emphasis added).

81. *Id.*

ticles 10(b) and (c) to authorize methods of service, but article 10(a) to pertain only to the sending of non-service documents.

2. The U.S. Construction of Article 10(a)

The internal law of the United States permits mail service from abroad. Under the U.S. Constitution and the Federal Rules of Civil Procedure, direct mail service may be used in both domestic and international litigation.⁸² It is not clear, however, how the United States officially construes the language of article 10(a). The fact that the United States expressed no reservations to article 10(a) does not necessarily mean that the United States interprets the provision to be as broad as its internal law. The pronouncements of the U.S. government must be studied to determine whether an official interpretation has emerged.

When the U.S. State Department submitted the Convention to the Senate for advice and consent, no remarks in the ensuing hearings were specifically directed towards the interpretation of article 10.⁸³ The Convention is self-executing, meaning that once the treaty was ratified, no further legislative act was required to incorporate the treaty into the internal law of the United States.⁸⁴ The U.S. delegation to the Convention did report to Congress that the treaty would require "little change in the present procedures in the United States." These remarks, however, appear to have been addressed to concerns that the Convention might affect due process principles or expand judicial assistance to foreigners.⁸⁵ It is unlikely that such general assurances to Congress were specifically addressed to the issue of service by mail.⁸⁶ There is little in Congress's behavior at the time of ratification to suggest an interpretation of article 10(a).

It is also difficult to draw inferences from the behavior of Congress subsequent to the treaty's ratification. The Convention was ratified in 1969.⁸⁷ Since then, Congress has continued to authorize service abroad by direct mail in the Federal Rules of Civil Procedure.⁸⁸ Because Congress has not changed this aspect of the Federal Rules, a number of courts have reasoned that the Rules must already be in

82. See FED. R. CIV. P. 4(i); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

83. See S. DOC. C, 90th Cong., 1st Sess. (1967).

84. See *Vorhees v. Fischer & Krecke*, 697 F.2d 574, 575-76 (4th Cir. 1983); *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 288 (3d Cir. 1981), cert. denied 454 U.S. 1085 (1981).

85. See S. EXEC. REP. No. 6, 90th Cong., 1st Sess., at 11 (1967).

86. See generally *id.*

87. Hague Service Convention, *supra* note 1, 20 U.S.T. at 365, 4 I.L.M. at 343.

88. FED. R. CIV. P. 4(i)(1)(D).

accord with the Convention, and that the Convention therefore must allow mail service under article 10(a).⁸⁹ It is doubtful, however, that Congress's inaction on the Federal Rules represents a conscious decision that those Rules are in accord with the Convention. In such instances of legislative inaction, it is often the case that the legislative body has simply failed to address a conflict between laws.⁹⁰

Moreover, the inclusion of article 19 in the Convention, which was inserted at the request of the United States, indicates that Congress could allow the Federal Rules to continue to permit mail service even while interpreting article 10(a) not to provide for mail service.⁹¹ Article 19 states that if "the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions."⁹² Thus, the Convention itself allows Congress to authorize, in the Federal Rules, service from abroad by direct mail even if such service is not authorized by the Convention.

The U.S. State Department has indicated, in a letter to the Administrative Office of United States Courts and the National Center for State Courts, that it interprets article 10(a) to permit service abroad by mail.⁹³ In the United States, treaty interpretations of the Executive Branch are given weight by the courts.⁹⁴ The courts, however, are the final authority on the interpretation of treaties as law.⁹⁵ The split in the U.S. courts over the correct interpretation of article 10(a) suggests that in the United States, a definitive construction has not emerged.

3. The Construction by Japan

Japan has not objected to article 10(a).⁹⁶ Japan's internal law, however, does not authorize service of process through ordinary postal channels.⁹⁷ Like other civil law nations, Japan regards service of pro-

89. See *Shoei Kako Co. Ltd. v. Super. Ct. of San Francisco*, 33 Cal. App. 3d 808, 821 (1973).

90. See Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 286 (1990).

91. 113 CONG. REC. 9404 (1967).

92. Hague Service Convention, *supra* note 1, art. 19, 20 U.S.T. at 365, 4 I.L.M. at 343.

93. *United States Department of State Opinion Regarding the Bankston Case and Service by Mail to Japan Under the Hague Service Convention*, 30 I.L.M. 260 (1991) [hereinafter *State Department Opinion Regarding the Bankston Case*].

94. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 326(2) (1986).

95. *Id.*

96. Hague Service Convention, *supra* note 1, art. 10, 20 U.S.T. at 365, 4 I.L.M. at 342.

97. See *Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 174 (8th Cir. 1989); *Suzuki Motor Co. v. Super. Ct. of San Bernardino*, 200 Cal. App. 3d 1476, 1481 (1988) (citing Robert W. Peterson, *Jurisdiction and the Japanese Defendant*, 25 SANTA CLARA L. REV. 555, 563 (1985)).

cess as a sovereign act.⁹⁸ Consequently, Japanese law requires service to be made through government officials.⁹⁹ As one commentator has explained:

When process is served by mail in Japan, the court clerk uses a special form of mail. The court clerk stamps the outside of the envelope with a notice of special service ("tokubetsu sootatsu"). The mail-carrier acts as a special officer of the court by recording the proof of delivery on a special proof of service form and returning it to the court clerk.¹⁰⁰

The fact that Japan's internal law proscribes direct mail service makes it unlikely that Japan would intend to allow foreign litigants to effect service on persons within its borders using this method. Moreover, Japan objected to the relatively more formal service methods set out in articles 10(b) and 10(c).¹⁰¹ Because Japan objected to those provisions but not to article 10(a), it is unlikely that Japan interprets article 10(a) as authorizing an additional method of service.¹⁰²

Indeed, authorities on Japanese law insist that Japan's failure to object to article 10(a) does not mean that mail service into Japan is authorized.¹⁰³ These authorities stress that article 175 of Japan's Code of Civil Procedure does not authorize direct mail service abroad. This aspect of Japanese law was not altered by Japan's ratification of the Convention, these authorities continue, because in Japan a ratified multinational treaty is not self-executing.¹⁰⁴ A Japanese national therefore cannot use direct mail service in a foreign nation. "[F]rom the viewpoint of reciprocity," these authorities conclude, Japan does not permit direct mail service from abroad into Japan.¹⁰⁵ Japan's failure to object to article 10(a) thus does not mean that Japan has consented to service by direct mail from abroad.¹⁰⁶

Some courts have argued that, since ratifying the Convention, Japan has probably become aware that U.S. courts interpret article 10(a)

98. Peterson, *supra* note 97, at 577.

99. *Id.*

100. *Id.*

101. Hague Service Convention, *supra* note 1, art. 10, 20 U.S.T. at 363, 4 I.L.M. at 342.

102. *Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 174 (8th Cir. 1989); *Suzuki Motor Co. v. Super. Ct. of San Bernardino*, 200 Cal. App. 3d 1476, 1481 (1988).

103. Yasuhiro Fujita, *Service of American Process Upon Japanese Nationals By Registered Airmail and Enforceability of Resulting American Judgments in Japan*, 12 LAW IN JAPAN: AN ANNUAL 69 (1979); William T. Jorden, *Beyond Jingoism, Service By Mail To Japan and the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters*, 16 LAW IN JAPAN: AN ANNUAL 69 (1983); Yoshio Ohara, *Japanese Law and Practice in Transnational Litigation*, 23 INT'L LAW. 10 (1989).

104. Ohara, *supra* note 103, at 14.

105. *Id.*

106. *Id.* at 15; see also E. Charles Routh, *Litigation Between Japanese and American Parties*, in CURRENT LEGAL ASPECTS OF DOING BUSINESS IN JAPAN AND EAST ASIA 188, 190-91 (John O. Haley ed., 1978).

to authorize direct service by mail. These courts contend that Japan's failure to subsequently object to the provision indicates that it is receptive to that method of service.¹⁰⁷ There are several flaws in this reasoning. First, Japan is not bound by the interpretations of U.S. courts and is not required to base its treaty objections on those interpretations. Second, many U.S. courts interpret article 10(a) not to authorize mail service; it is unreasonable to expect Japan to respond to the interpretations of U.S. courts when the U.S. courts are split over the issue. Third, Japan has stated that its failure to object to article 10(a) does not constitute consent to direct mail service.¹⁰⁸ This statement was made by Japan's delegates to the 1989 Hague Service Conference. The delegates were responding to efforts by the U.S. Departments of State and Justice to elicit a more precise position from Japan on the question of service by mail from other contracting States.¹⁰⁹ The Japanese delegation explained:

Japan has not declared that it objects to the sending of judicial documents, by postal channels, directly to persons abroad. In this connection, Japan (in an April 1989 statement) has made it clear that no objection to the use of postal channels for sending judicial documents to persons in Japan does not necessarily imply that the sending by such a method is considered a valid service in Japan; it merely indicates that Japan does not consider it as an infringement of its sovereign power.¹¹⁰

This statement suggests that while Japan does not believe its sovereignty is violated when judicial documents are mailed from abroad directly to persons in Japan, it does not agree that documents mailed in this manner constitute effective service. Thus it appears that Japan does not interpret article 10(a) to authorize service of process through postal channels.

D. *Purpose of Article 10 Within the Convention*

In the article 10(a) controversy, advocates of each of the two interpretations have sought to use the general purpose of the Convention to advance their arguments. Those who interpret the provision to allow mail service contend that such service is consistent with the Convention's goal of "simplifying and expediting" service procedures.¹¹¹ Those taking the opposite position maintain that a key purpose of the Convention was to establish formal means of service, and that it would

107. See, e.g., *Patty v. Toyota Motor Corp.*, 777 F.Supp. 956 (N.D. Ga. 1991).

108. See *Hague Conference on Private International Law: Special Commission Report on the Operation of the Hague Service Convention and the Hague Evidence Convention*, 28 I.L.M. 1556, 1561 (1989) [hereinafter *1989 Special Commission Report*].

109. *State Department Opinion Regarding the Bankston Case*, *supra* note 93, at 261.

110. *1989 Special Commission Report*, *supra* note 108, at 1561.

111. *Shoei Kako Co. Ltd. v. Super. Ct. of San Francisco*, 33 Cal. App. 3d 808 (1973).

be inconsistent with that purpose to allow litigants to entirely avoid the use of those mechanisms by effecting service directly through the mails.¹¹² The purposes of the Convention are general enough to support either conclusion.

It may be helpful, therefore, to look not at the purpose of the Convention as a whole, but instead at the purpose of article 10 within the Convention. The article states that "[p]rovided the State of destination does not object, the present Convention shall not interfere with" the "freedom" to take the actions described in subparagraphs (a), (b), and (c).¹¹³ Given this discussion of noninterference with apparently preexisting "freedoms," contracting States may have construed article 10(a) not to create new procedures, but merely to perpetuate existing ones. Because the civil law nations did not permit service by mail in their internal laws, they, during treaty negotiations, may not have regarded article 10(a) as authorizing mail service.¹¹⁴

The negotiating history of the Convention, the construction of article 10(a) afforded by the contracting States, and the purposes of the Convention, when used to interpret the controversial article, are, at best, inconclusive. The language of the text itself, however, leads to only one conclusion. Examining the language of article 10(a) strongly suggests that the provision was not intended to authorize service abroad by mail.

III. CONSIDERATIONS FOR COURTS AND PRACTITIONERS

Part II of this Note demonstrates that, as a matter of treaty interpretation, article 10(a) does not authorize service of process by mail. This Part will present additional reasons for courts and practitioners to construe article 10(a) in this manner. For analytical purposes, a general distinction may be drawn between those considerations which primarily concern courts and those which primarily concern practitioners. Each of the considerations, however, may be of value to judges and litigants alike.

A. *Considerations for Courts*

1. Comity

In adjudicating legal disputes with international dimensions, the promotion of comity is a well established and important consideration. The principle of comity entails the willingness of one State to recognize the sovereign acts of other States, not as a matter of right, but out

112. See *Cooper v. Makita, U.S.A., Inc.*, 117 F.R.D. 16, 18 (D. Me. 1987).

113. Hague Service Convention, *supra* note 1, art. 10, 20 U.S.T. at 363, 4 I.L.M. at 342.

114. See 1977 *Special Commission Report*, *supra* note 77, at 317.

of deference and good will.¹¹⁵ Promoting comity is a goal of the Hague Service Convention: the treaty is designed to ensure that international service will not be objectionable to the State in which service is made.¹¹⁶

Comity is best promoted by interpreting article 10(a) to not authorize mail service. States which do not object to direct mail service will not be offended if its citizens are nevertheless served using a non-postal method of service clearly authorized by the Convention. On the other hand, States which do object to service by mail may be offended when U.S. courts recognize mail service upon persons residing within those States' borders. As long as ambiguity remains over the article 10(a) language, comity requires that U.S. courts interpret that language not to permit service by mail.

2. Opportunity to Cure Service

Plaintiffs are not unduly prejudiced when courts invalidate mail service under article 10(a). Normally, the plaintiff's case is not dismissed.¹¹⁷ Instead, service is "quashed" and the plaintiff is given the opportunity to cure service upon the defendant.¹¹⁸ As long as the initial attempt at service was made before the statute of limitations expired, the cured service will relate back to the earlier date of attempted service, and the plaintiff's case will proceed.¹¹⁹ Nothing in the Convention prohibits U.S. courts from allowing plaintiffs to cure defective service.¹²⁰ The Convention's terms may therefore be viewed as complementary to the general and flexible scheme of the Federal Rules of Civil Procedure.¹²¹ This is particularly true, as one court has observed, "where no injustice or prejudice is likely to result to the party located abroad, or to the interests of the affected signatory country."¹²² Thus, plaintiffs making good faith efforts to effect service are

115. See LOUIS HENKIN ET AL., INTERNATIONAL LAW CASES AND MATERIALS 3 (2d ed. 1987).

116. DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 288 (3d Cir. 1981), cert. denied, 454 U.S. 1085 (1981); Mommsen v. Toro Co., 108 F.R.D. 444, 446 (S.D. Iowa 1985).

117. See, e.g., Wasden v. Yamaha Motor Co., 131 F.R.D. 206, 210 (M.D. Fla. 1990); McClellon v. Nissan Motor Corp. in U.S.A., 726 F.Supp. 822, 827 (N.D. Fla. 1989); Pochop v. Toyota Motor Co., 111 F.R.D. 464, 467 (S.D. Miss 1986).

118. Flemming v. Yamaha Motor Corp., 774 F.Supp 992, 996 (W.D. Va. 1991); General Electro Music Corp. v. Samic Music Corp. No. 90-C-5590, 1991 U.S. Dist. LEXIS 11905, at *4 (N.D. Ill. Aug. 27, 1991); Mommsen v. Toro Co., 108 F.R.D. at 446.

119. Vorhees v. Fischer & Frecke, 697 F.2d 574, 576 (1983).

120. See Hague Service Convention, *supra* note 1, art. 10, 20 U.S.T. at 363, 4 I.L.M. at 342; Fox v. Regie Nationale Des Usines Renault, 103 F.R.D. 453, 455 (1984).

121. Fox, 103 F.R.D. at 455.

122. *Id.*

afforded the opportunity to cure service defects.¹²³

3. Cost of Nonpostal Service Methods

Service by mail has been heralded as the least expensive, most convenient method of effecting service of process.¹²⁴ The Convention's more formal service methods can cost plaintiffs \$800.00 or \$900.00 more than service by direct mail.¹²⁵ Courts have noted, however, that the cost is not prohibitive, and may be regarded as a standard litigation expense.¹²⁶ Moreover, if the plaintiff prevails, he may be entitled to recover such expenses as part of his judgment.¹²⁷ Courts therefore should not interpret article 10(a) to authorize mail service merely because mail service is relatively inexpensive.

Several other cost-related factors should be considered. Experienced international litigants maintain that when in doubt, several methods of service should be utilized simultaneously.¹²⁸ These litigants reason that the additional cost of duplicative service may be justified by the certainty that service will be properly obtained.¹²⁹ Duplicative service may be especially useful when one of the service methods utilized depends on postal channels. In some States, mail service may be unpredictable and time-consuming.¹³⁰ If plaintiffs follow this advice by using mail service in tandem with service through the Central Authority, they will bear the expense of the formal service methods even if the courts hold the mail service to be valid under article 10(a).

4. Potential Disadvantages to U.S. Litigants

In one respect, interpreting article 10(a) not to authorize service by mail disadvantages U.S. litigants. Arguably, it is unfair for U.S. defendants to be subject to a method of service by foreign plaintiffs which U.S. plaintiffs cannot employ in effecting service on certain foreign defendants. This "unfairness," however, is more the result of article 19 than of any interpretation of article 10. Article 19 provides

123. *Cooper v. Makita, U.S.A., Inc.*, 117 F.R.D. 16 (D. Me. 1987); *Pochop v. Toyota Motor Co.*, 111 F.R.D. 464, 467 (S.D. Miss. 1986); *Fox*, 103 F.R.D. at 455.

124. *WRIGHT & MILLER*, *supra* note 18, at 564.

125. *Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 174 (8th Cir. 1989) (Gibson, J., concurring).

126. *Dunakey v. American Honda Motor Co.*, 124 F.R.D. 638, 639 (E.D. Mo. 1989).

127. *Id.*

128. Kenneth B. Reisenfeld, *Service of United States Process Abroad: A Practical Guide to Service Under the Hague Service Convention and the Federal Rules of Civil Procedure*, 24 INT'L LAW. 55 (1990).

129. *Id.*

130. *Id.*; see also *PARK & CROMIE*, *supra* note 75, at 403.

that a State may continue to recognize service from abroad when service satisfies the State's own laws, even if the service is not otherwise authorized by the Convention.¹³¹ U.S. service procedures are generally simpler and more flexible than the procedures of the Convention.¹³² "Unfairness" to U.S. plaintiffs, therefore, is inherent in U.S. law and in the Convention; it is not limited to the issue of direct mail service. Moreover, it should be noted that the Convention is only "unfair" to U.S. plaintiffs vis-à-vis foreign plaintiffs. U.S. plaintiffs are not disadvantaged in relation to foreign defendants, within the scope of their own litigation.

B. Considerations for Practitioners

1. Enforcement of Judgments

When a U.S. plaintiff sues a foreign defendant, and prevails in a U.S. court, the case may not be concluded: if the defendant's assets are located in the defendant's own State, the plaintiff may require the cooperation of that State's government in enforcing the judgment.¹³³ When there is any chance that the State will be offended by the U.S. court's recognition of the plaintiff's method of service, this increases the likelihood that the State will not provide the cooperation necessary to secure the judgment.¹³⁴ The plaintiff therefore has an interest in following the Convention's authorized methods of service. Plaintiffs should err on the side of caution by choosing a nonpostal method of service if the defendant's State might object to mail service.

2. Consolidation or Transfer of Litigation

The complex nature of litigation has led to the adoption of procedures which make possible the consolidation or transfer of civil actions among U.S. courts.¹³⁵ When lawsuits filed in different U.S. jurisdictions share common issues or parties, the lawsuits might be consolidated into a single jurisdiction to enhance judicial economy.¹³⁶ The consolidation may occur on a motion by the court, a defendant, or a third-party plaintiff.¹³⁷ Although the plaintiff chooses the jurisdiction

131. See Hague Service Convention, *supra* note 1, art. 10, 20 U.S.T. at 363, 4 I.L.M. at 342.

132. Compare FED. R. CIV. P. 4 with Hague Service Convention, *supra* note 1, art. 10, 20 U.N.T.S. at 363.

133. David Westin, *Enforcing Foreign Commercial Judgments and Arbitral Awards in the United States, West Germany, and England*, LAW & POL'Y INT'L BUS. 325, 340-41 (1987).

134. Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 499 (1988) (citing Westin, *supra* note 133).

135. 28 U.S.C. §§ 1404, 1406, 1407i (1991); MANUAL FOR COMPLEX LITIGATION SECOND, § 31.11 (1985).

136. MANUAL FOR COMPLEX LITIGATION SECOND, *supra* note 135, at § 31.11.

137. *Id.* § 31.121.

in which the suit is initially filed, the case ultimately may be resolved by a jurisdiction not of the plaintiff's choosing.¹³⁸ The possibility of consolidation or transfer must be kept in mind by the plaintiff who contemplates international service of process by mail. Even if the plaintiff intends to file suit in a district court of the Second Circuit, which would permit the mail service, the defendant or a third party plaintiff may succeed in transferring or consolidating the litigation into the Eighth Circuit, which would quash the service.¹³⁹ This risk of consolidation or transfer is another reason for plaintiffs to regard article 10(a) as not authorizing service by mail.

3. Mail Service Still Permitted for Most States Under Article 19

Article 19 of the Convention states: "To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions."¹⁴⁰ This article has been consistently interpreted to allow service abroad by any means permitted by the internal law of the State in which service is made. Most courts which have interpreted article 19 in this manner have done so in a perfunctory fashion, listing article 19 as one of the methods of service authorized by the Convention.¹⁴¹ Recently, several state courts have discussed the option of service under article 19 in greater detail.¹⁴² This interpretation of article 19 is not new, however. Writing in 1969, one commentator clearly indicated his belief that article 19 permits service of process by any means authorized by the internal law of the receiving nation.¹⁴³

The availability of mail service under article 19 is an additional reason to interpret article 10(a) to not authorize service of process by mail. Most States which have not objected to article 10(a) have no objection to mail service; their internal law permits service by mail.¹⁴⁴

138. *Id.*

139. *See* Bankston v. Toyota Motor Corp., 889 F.2d 172, 174 (8th Cir. 1989); Ackermann v. Levine, 788 F.2d 830, 838-40 (2d Cir. 1986).

140. Hague Service Convention, *supra* note 1, art. 10, 20 U.S.T. at 363, 4 I.L.M. at 342.

141. *See, e.g.,* Bankston, 889 F.2d at 174; Prost v. Honda Motor Co., 122 F.R.D. 215, 216 (E.D. Mo. 1987).

142. *See, e.g.,* Kadota v. Hosogai, 608 P.2d 68, 72 (Ariz. Ct. App. 1980); Nicholson v. Yamaha, 566 A.2d 135, 139 (Md. Ct. App. 1989); Hayes v. Evergo Tele. Co., 397 S.E.2d 325, 327 (N.C. Ct. App. 1990).

143. Stephen F. Downs, Note, *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, 132 (1969).

144. *See supra* notes 82-95 and accompanying text.

Therefore even if article 10(a) were interpreted not to authorize mail service, service could still be effected by direct mail, in most signatory States, under article 19. Only in States such as Japan, whose internal law proscribes mail service, would service by mail be prohibited.¹⁴⁵

Of course, mail service under article 19 would present some problems of proof concerning the internal law of the State receiving the service documents. The U.S. court might not be sufficiently familiar with the receiving nation's internal laws to take judicial notice of the availability of mail service. The litigants, however, should be able to offer evidence concerning the receiving State's internal laws. Because service is assumed to be proper until challenged by the defendant, the burden would properly be placed on the defendant to demonstrate that the receiving State's laws do not permit direct service by mail from abroad. Since the defendant is located in the receiving State, it is reasonable to expect the defendant to be able to produce such evidence concerning the receiving State's laws. If the laws of the receiving State in fact permit service by direct mail from abroad, the service would be permitted under article 19 of the Convention.

CONCLUSION

The plain language of article 10(a) suggests that the provision does not authorize service abroad by mail. It merely provides that, to the extent States do not object, documents may be mailed after service has been effected. Many of the States which are bound by the Convention would prefer that mail service be permitted. Several of the contracting States, however, reject service of process by mail. U.S. courts should respect the desires of these States, as well as the plain language of article 10(a), by interpreting the provision not to authorize a method of service. If the courts adopted this interpretation, litigants would retain the ability, under article 19, to obtain service by mail in any contracting State which permits mail service from abroad in its internal laws.

145. See *supra* notes 96-110 and accompanying text.