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# JURISDICTION AND THE JAPANESE DEFENDANT

Robert W. Peterson\*

## I. INTRODUCTION

Xenophobia is more than fear of foreigners; for a lawyer the concept applies *a priori* to another country's legal system. When disputes arise between Americans and Japanese, American attorneys and their clients naturally prefer familiar surroundings to the linguistically opaque and procedurally alien courts of Japan. To keep the game in the home court, the attorney must first serve process in Japan.<sup>1</sup> This article considers some of the current tactical and legal issues counsel must face in bringing the Japanese defendant into an American court. Much of the discussion is also relevant to service in other foreign countries. The article concludes with a recipe for the proper preparation of service of process which the Japanese defendant should find irresistible.

Initially, counsel must decide whether the presence of the Japanese party is essential or desirable. In a products liability suit, for example, a plaintiff can usually recover from a distributor or subsidiary. Of course, the intermediary or its insurer may attempt to shift the loss back to the potential Japanese party. While a claim against a domestic party may be time-barred, the statute of limitations may have been tolled with respect to the foreign defendant. In some states, the statute simply does not run while the defendant is absent

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1. See Jordan, *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: AN ANNUAL 69 (1983). See generally Schkepper, *Obtaining Service Abroad of Judicial Documents*, 105 N.J.L.J. 83 (1980); Horlick, *A Practical Guide to Service of United States Process Abroad*, 14 INT'L LAW. 637 (1980).

from the state.<sup>2</sup> Counsel should also consider the possibility that the Japanese defendant, if joined, may file an inconvenient declaratory judgment countersuit in Japan.<sup>3</sup>

Even if ultimate enforcement against the Japanese is unlikely, counsel may still want to include the Japanese as a party in order to facilitate discovery from Japan. Japan is a civil law country and, like other civil law countries, it does not share America's enthusiasm for pretrial discovery.<sup>4</sup> In addition, Japan has declined to join the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (Evidence Convention).<sup>5</sup> American courts have

2. "Saving statutes" commonly provide that the period of the defendant's absence from the state does not count against the limitation period. *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1224 (1950). See *Renfroe v. Eli Lilly & Co.*, 541 F. Supp. 805, 813-14 (E.D. Mo. 1982), *aff'd*, 686 F.2d 642 (1982) (applying Ohio saving statute). The U.S. Supreme Court has upheld such statutes against due process and equal protection challenges. *G.D. Searle Co. v. Cohn*, 455 U.S. 404 (1982). In *Coons v. American Honda Motor Co.*, 94 N.J. 305, 463 A.2d 921 (N.J. 1983), *reh'g*, 96 N.J. 419, 476 A.2d 763 (1984), *cert. denied sub nom.*, *Honda Motor Co. v. Coons*, 105 S. Ct. 808 (1985). The New Jersey Supreme Court invalidated a tolling provision on the grounds that the only way the foreign corporation, which was engaged exclusively in interstate commerce, could take advantage of the statute of limitations under New Jersey law was to obtain a certificate to do business in New Jersey. This was thought to be an impermissible burden on interstate commerce. See also *McKinley v. Combustion Engineering, Inc.*, 575 F. Supp. 942 (D. Idaho 1983) (unconstitutional burden on interstate commerce to toll statute for foreign corporation unless foreign corporation waives minimum contacts objections by appointing agent for service). Some less burdensome procedure may well satisfy an interstate commerce challenge—indeed, nothing requires a state court to permit any foreign corporations to benefit from the statute of limitations. See also *Cramer v. Borden's Farm Products, Co.*, 58 F.2d 1028 (S.D.N.Y. 1932) (New York corporation licensed to do business in New Jersey is not "resident" of New Jersey, therefore not entitled to assert statute of limitations under then-existing New Jersey law).

California's saving statute, CAL. CIV. PROC. CODE § 351, apparently saves actions against absent individuals (other than non-resident motorists), but does not save actions against absent corporations. *Dew v. Appleberry*, 23 Cal. 630, 591 P.2d 509, 153 Cal. Rptr. 219 (1979) (en banc) (individuals); *Loope v. Greyhound Lines, Inc.*, 114 Cal. App. 2d 611, 250 P.2d 651 (1952) (corporations); *Renfroe v. Eli Lilly & Co.*, 541 F. Supp. 805, 815 (E.D. Mo. 1982) (applying California law, action against corporation not "saved"). The rationale given for this distinction is that absent corporations may be served by sending process to the Secretary of State who then forwards it by registered mail to the absent corporation (CAL. CORP. CODE § 2111).

Service in this manner, however, is no longer valid when the corporation is in a country, such as Germany, which has filed an objection to service by mail. Service by mail in these countries is not permitted because it conflicts with a federal treaty. *Ing. H.C.F. Porsche v. Superior Court*, 123 Cal. App. 3d 755, 177 Cal. Rptr. 155 (1981); see *infra* text accompanying note 19. It should, therefore, follow that the statute of limitations will not run in California with respect to actions against corporations in countries which have objected to service by mail, or in which service by mail is otherwise unavailable.

3. See *infra* text accompanying note 81.

4. Harris & Matsuo, *Litigation in Japan: A Trial Practice and Procedure Manual*, A.B.A. LITIGATION SECTION 33-41 (1980).

5. 23 U.S.T. 2555, T.I.A.S. No. 7444, 658 U.N.T.S. 163. The text may also be found

sometimes been willing to order discovery American-style against foreign parties in spite of the limited discovery rules of the foreign countries.<sup>6</sup> Consequently, naming a Japanese as a party may be the only practical way to compel discovery. This is particularly true with interrogatories which may only be served on parties. Because Japan has not joined the Evidence Convention, Japanese parties would not be able to invoke the protection of those cases which prefer prior resort to the procedures of that Convention.<sup>7</sup>

Careful planning can minimize some jurisdictional problems. For example, the parties might want an arbitration clause in a commercial contract.<sup>8</sup> If so, the parties should also agree both on the

in 7 MARTINDALE-HUBBLE LAW DIRECTORY, pt. vii, at 12 (1985).

6. Batista, *Confronting Foreign "Blocking" Legislation: A Guide to Securing Disclosure from Non-resident Parties to American Litigation*, 17 INT'L LAW. 61 (1983). See generally Symposium, *Obtaining Foreign Discovery and Evidence for Use in Litigation in the United States*, 13 INT'L LAW. 3 (1979); Southerland, *The Use of the Letter of Request (or Letter Rogatory) for the Purpose of Obtaining Evidence for Proceedings in England and Abroad*, 31 INT'L & COMP. L.Q. 784 (1982).

7. *Pierburg GmbH & Co. v. Superior Court*, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982) (must use procedures of Evidence Convention prior to ordering American-style discovery), *Volkswagenwerke, A.G. v. Superior Court*, 123 Cal. App. 3d 840; 176 Cal. Rptr. 874 (1981) (must use procedures of Evidence Convention prior to ordering American-style discovery). The first federal court of appeals to address the issue disagreed with the above cases and held that, in part because the Federal Rules of Civil Procedure have equal dignity with treaties and conventions, federal courts may order some discovery without first resorting to the Evidence Convention. *In re Anschuetz*, 754 F.2d 602 (5th Cir. 1985). Parties subject to in personam jurisdiction may be ordered to answer interrogatories, produce documents (even though the documents are in the foreign country), and either to submit to voluntary depositions in the foreign country or to produce the witnesses in the United States for deposition. The court did not resolve whether an on site inspection of premises could be ordered (this was one type of discovery ordered in *Pierburg*), and the court held that the Evidence Convention must be employed when taking the involuntary deposition of a party *in the foreign country* and when seeking the production of documents or other evidence in the foreign country from *non-parties*. *Id.* at 615. See Platto, *Taking Evidence Abroad for Use in Civil Cases in the United States—A Practical Guide*, 16 INT'L LAW. 575 (1982); Shemanski, *Obtaining Evidence in the Federal Republic of Germany: The Impact of the Hague Evidence Convention on German-American Judicial Cooperation*, 17 INT'L LAW. 465 (1983).

8. Japan has ratified both the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards and the 1958 New York (United Nations) Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Japanese courts seem enthusiastic to embrace arbitration and will enforce arbitral awards even when rendered in countries that are not members of either of the above Conventions. Fujita, *Procedural Fairness to Foreign Litigants as Stressed by Japanese Courts*, 12 INT'L LAW. 795, 801, 808-09 (1978); 7 DOING BUSINESS IN JAPAN, pt. 14, § 5.04 (Z. Kitogawa 1985)

The United States also enthusiastically endorses arbitration agreements. See Federal Arbitration Act, 9 U.S.C. § 1 (1982) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346 (1985), the U.S. Supreme Court compelled a Puerto Rico automobile dealer, pursuant to its distribution contract, to arbitrate its disputes (including the dealer's antitrust claims) with its supplier in Tokyo, Japan. Because the Federal

place for arbitration and the language to be used for the proceedings, documents, and award. Unfortunately, if the award is to be enforced in Japan, the enforcement proceedings will be in Japanese and any documentary evidence submitted in the court must be accompanied by a Japanese translation.<sup>9</sup> Counsel might also consider including a forum selection clause in the contract.<sup>10</sup> Also, in the case of potential products liability, Japanese and American dealers might consider using the same insurer, thereby avoiding the need to pass back the loss.<sup>11</sup>

After determining to include a Japanese party, counsel must then decide if and where the judgment is likely to be enforced. Counsel must secure a judgment which will be recognized by Japan if there are insufficient assets to support the judgment in the United States.

## II. ENFORCEABILITY IN THE UNITED STATES

Assuming there is an adequate jurisdictional basis for the forum selected,<sup>12</sup> proper service of process is the *sine qua non* for enforce-

Arbitration Act preempts state law, the dealer was forced to arbitrate in Tokyo in spite of a contrary Puerto Rico law purporting to render null and void any contract provision which requires a dealer to arbitrate outside of Puerto Rico. *Id.* at 3351 n.8.

9. MINJI SOSHO HO [hereinafter cited as CCP] art. 248 (1983). "Article 248. A translation shall be attached to a document written in a foreign language." This can result in the bizarre situation in which all business, including the contract, the arbitration agreement, and the arbitration was conducted in English, yet the documents must be translated into Japanese in the recognition proceedings. Mr. Tameyuki Hosoi of the Tokyo Bar recently outlined the potential expense and delay of this provision in an unpublished paper delivered to the Sixth International Congress of Maritime Arbitrators, Monte Carlo, October, 1983 (copy on file at the Santa Clara Law Review Office).

10. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Choice of Forum Clauses in International Contracts: What is Unjust and Unreasonable*, 12 INT'L LAW. 779 (1978). Of course, choosing the forum does not necessarily solve the problem of service of process unless the contract contains a clause consenting to a particular kind of service. See *National Equipment Rental v. Szukhent*, 375 U.S. 311 (1964).

11. This arrangement is suggested in Fujita, *U.S.-Japanese Transactions and Litigation: "The Kansai Iron Works,"* reprinted in CURRENT LEGAL ASPECTS OF DOING BUSINESS IN JAPAN AND EAST ASIA 196, 201 (J. Haley ed. 1978).

12. A foreign defendant, like any out-of-state defendant, must have the requisite minimum contacts with a forum in order to satisfy due process. Whether the contacts must be with the particular forum, or whether overall contacts with the United States are sufficient, is an issue on which courts and commentators are divided. Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85 (1983); Comment, *National Contacts as a Basis for In Personam Jurisdiction over Aliens in Federal Question Suits*, 70 CALIF. L. REV. 686 (1982), *The Outer Limits of In Personam Jurisdiction Over Aliens in Federal Question Suits*, 16 GEO. WASH. J. INT'L L. & ECON. 637 (1981). Moreover, the state must have a sufficiently broad long-arm statute. Because the federal courts borrow state long-arm statutes under FED. P. CIV. PROC. 4(e), federal jurisdiction is no broader than the jurisdiction of the state in which

ability of a default judgment in the United States. This service will have to be accomplished either in the United States or abroad.

Apart from serving the defendant in his home country, it is sometimes possible to serve a foreign defendant in the United States by serving process on an American subsidiary of the defendant. This is not a reliable form of service, however, and it should be used only as a desperate measure or as a back-up to service on the defendant abroad. In order to be successful, counsel will have to prove that the subsidiary is a mere instrument for carrying on the business of the parent.<sup>18</sup> Even when the subsidiary is wholly-owned by the parent

it sits. *De James v. Magnificence Carriers, Inc.*, 654 F.2d 230 (3d Cir. 1981) (Japanese ship-builder not shown to have sufficient contacts with New Jersey in injured longshoreman's suit), *cert. denied*, 454 U.S. 1085. *But see Hedrick v. Daiko Shoji, Co.*, 715 F.2d 1355 (9th Cir. 1983) (Japanese cable manufacturer amenable in Oregon in injured longshoreman's suit).

Occasionally a federal act expands jurisdiction beyond that which would be permitted to the states. *See, e.g.*, the Federal Interpleader Act, 28 U.S.C. § 2361 (1982). Likewise, numerous code sections authorize foreign service without regard to the existence of a state long-arm statute. *See* statutes collected in Horlick, *supra* note 1, at 639 n.11. Presumably, even under these acts the defendant would have to have minimum contacts with the United States viewed as a whole.

It is worth noting that the majority of courts hold that the broad jurisdictional provisions of the National Traffic and Motor Vehicle Safety Act of 1966, (15 U.S.C. § 1399(e) (1982)), do *not* apply to personal injury suits. *Low v. Bayerische Motorenwerke, A.G.*, 88 A.D.2d 504, 449 N.Y.S.2d 733 (1982) (also citing unreported cases to same effect); *Richardson v. Volkswagenwerk, A.G.*, 552 F. Supp. 73 (W.D. Mo. 1982) (also citing unreported cases to same effect); *Ing. H.C.F. Porsche, A.G. v. Superior Court*, 123 Cal. App. 3d 755, 177 Cal. Rptr. 155 (1981); *see Volkswagenwerk, A.G. v. McCurdy*, 340 So. 2d 544 (Fla. Dist. Ct. App. 1976). The lone reported case permitting service under the Act, *Bollard v. Volkswagenwerke, A.G.*, 313 F. Supp. 126 (W.D. Mo. 1970), appears to be a maverick decision.

13. Service on the subsidiary was upheld as service on the parent in *Ex Parte Volkswagenwerk Aktiengesellschaft v. Volkswagen of America, Inc.*, 443 So. 2d 880 (Ala. 1982) (service on German parent effected through service on American subsidiary); *Taca Int'l Airlines v. Rolls-Royce of England*, 15 N.Y.2d 97, 204 N.E.2d 329, 256 N.Y.S.2d 129 (N.Y. 1965) (British company owned Canadian company which owned Delaware Company—service on British company effected through service on Delaware company); *Goodman v. Pan-American World Airways*, 1 Misc. 2d 959, 148 N.Y.S.2d 253 (N.Y. Sup. Ct. 1956), *aff'd*, 2 A.D.2d 707, 153 N.Y.S.2d 600 (N.Y. App. Div. 1956) (American subsidiary found to be managing agent of American parent); *Alfred Hofmann & Co. v. Karl Mayer Erste H.*, 159 F. Supp. 77 (D. N.J. 1958) (officer of West German defendant served at convention in Atlantic City).

Service was quashed, usually for failure of the plaintiff adequately to discharge his burden of proof that the subsidiary was a mere instrumentality of the parent, in the following cases: *Richardson v. Volkswagenwerk, A.G.*, 552 F. Supp. 73 (W.D. Mo. 1982); *Cintron v. W. & D. Machinery Co.*, 182 N.J. Super. 126, 440 A.2d 76 (1981); *Coons v. Honda Motor Co.*, 176 N.J. Super. 575, 424 A.2d 446 (App. Div. 1980) (statute of limitations tolled against foreign manufacturer because no agent for service present in New Jersey, dealers being merely "minor functionaries"); *McHugh v. International Components Corp.*, 188 Misc. 2d 489, 461 N.Y.S.2d 166 (N.Y. Sup. Ct. 1983); *Low v. Bayerische Motoren Werke*, 88 A.D.2d 504, 449 N.Y.S.2d 733 (App. Dept. 1982); *Volkswagenwerk, A.G. v. McCurdy*, 340 So. 2d 544 (Fla. App. 1976).

Assuming that the subsidiary can be proven to be a mere instrumentality of the defendant,

and distributes the parent's product, it does not necessarily follow that the subsidiary is a mere instrument of the parent. Counsel will still have to take discovery on the defendant's corporate structure and management in order to maintain the burden of proof on this issue. If the defendant can be served directly, the risk and effort of serving the subsidiary should be avoided.

In order to serve defendants in their home countries, many counsel, relying on the Federal Rules of Civil Procedure (FRCP) section 4(i) or state law equivalents, attempt to serve an untranslated copy of the summons and complaint directly by mail. Such service by mail may impair the enforceability of the judgment in the United States for at least two reasons: 1) failure to comply with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Service Abroad Convention);<sup>14</sup> and 2) constitutionally inadequate notice.

courts disagree whether service by mail on the subsidiary is valid if service by mail directly on the the foreign parent would have been barred by treaty. Compare *Richardson* 552 F. Supp. 73, 79 (local subsidiary cannot be served by mail because German parent could not have been served by mail) with *McHugh* 188 Misc. 2d 489, 461 N.Y.S.2d 166 (Sup. Ct. 1983)(because service on local subsidiary is completed within the United States, failure to comply with the Service Abroad Convention is irrelevant); *Volkswagenwerk Aktiengesellschaft, v. Volkswagen of America, Inc.*, 443 So. 2d 880 (Supreme Ct. Ala. 1983)(service of local subsidiary completed within the United States).

Assuming, however, that the parent has sufficient contacts with the forum to justify long-arm jurisdiction over the subsidiary, it is apparently unnecessary for a subsidiary which is a "mere instrumentality" of the parent to also have contacts with the forum. Service on the parent may be effected by serving the subsidiary anywhere in the United States. *McHugh*, 118 Misc. 2d 489, 461 N.Y.S.2d 166 (service of New York process on Illinois subsidiary of Japanese parent).

14. Convention on the Service Abroad of Judicial and Extrajudicial Documents; Opened for signature November 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163. The text of the Convention is found following FED. R. CIV. PROC. and also in 7 MARTINDALE-HUBBLE LAW DIRECTORY 1 (1985). A handy manual containing the text and comments, entitled HAGUE CONVENTION: SERVICE OF PROCESS ABROAD [hereinafter cited as Manual] is published by the Permanent Bureau of the Hague Conference on Private International Law, 2c, Javastraat, 2585 AM THE HAGUE, Netherlands. The Convention articles referred to in this article are:

**CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS**

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:

**ARTICLE 1**

### A. *Exclusivity of the Service Convention*

#### Failure to comply with the Service Abroad Convention is the

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.

This Convention shall not apply where the address of the person to be served with the document is not known.

#### ARTICLE 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either -

- (a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or
- (b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph (b) of the first paragraph of this article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

#### ARTICLE 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

#### ARTICLE 9

Each contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another contracting State which are designated by the latter for this purpose.

Each contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

#### ARTICLE 10

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.

#### ARTICLE 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that -



first basis for challenging mailed service. The Convention provides a number of different methods for service abroad, including service through the receiving country's "Central Authority" (article 5), delivery by the Central Authority to an addressee who accepts it "voluntarily" (so long as not "incompatible" with the law of the receiv-

- (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 this Convention,
- and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled -

- (a) the document was transmitted by one of the methods provided for in this Convention,
- (b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,
- (c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

#### ARTICLE 19

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.

#### ARTICLE 23

The present Convention shall not affect the application of article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.

These articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

#### ARTICLE 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in article 26, and to the States which have acceded in accordance with article 28, of the following -

- (a) the signatures and ratifications referred to in article 26;
- (b) the date on which the present Convention enters into force in accordance with the first paragraph of article 27;
- (c) the accessions referred to in article 28 and the dates on which they take effect;
- (d) the extensions referred to in article 29 and the dates on which they take effect;
- (e) the designations, oppositions and declarations referred to in article 21;
- (f) the denunciations referred to in the third paragraph of article 30.

ing state) (article 5),<sup>15</sup> service through diplomatic or consular agents of the sending country (article 8), service directly through officials or process servers of the state of destination (article 10 (b), 10 (c)), service as permitted by the internal law of the receiving state (article 19),<sup>16</sup> and possibly direct mail (article 10 (a)). While all contracting countries must permit service through the designated Central Authority, the Convention permits contracting countries to exclude the methods of service outlined in articles 8 and 10 by filing objections to them. A number of countries, including Japan and Germany, have filed objections, although they have objected to different things.

Although Japan formally objects only to direct service through process servers in Japan (article 10(b), (c)), for various reasons some other forms of service under the Service Abroad Convention are also unavailable in Japan. Because there is no internal Japanese law relating to service of foreign documents in Japan, article 19 cannot be used.<sup>17</sup> Article 8 is also useless in Japan; although Japan does not object to diplomatic or consular service, the United States diplomatic corps simply will not serve documents for private litigation.<sup>18</sup> Thus,

15. Several courts which upheld service by means other than the Central Authority, have noted that the service had been accepted "voluntarily." *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 431 F. Supp. 1226 (N.D. Ill. 1977); *Shoei Kako Co. v. Superior Court*, 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1973). The reference to voluntary acceptance appears in article 5. Because article 5 treats only service by or through the Central Authority, voluntary acceptance alone will likely not validate service. While the courts have failed to note that contextual problem, one commentator has addressed it. 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, 153 (1983). That kind of informal delivery through the Central Authority is used extensively by a number of contracting states. Manual, *supra* note 14, at 35.

16. One commentator stated that article 19 authorizes the sending state to use methods of service which are more liberal than those provided by the Convention. Comment, *supra* note 15, at 152-53. However, article 19 neither says nor implies this. The article reads: "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." (emphasis added). This provision allows the United States or Japan to permit service within their territories by methods other than under the Convention, but it does not authorize either country to impose on the other methods of service not found in the Convention.

17. Japan has a general Judicial Aid Law which requires Japan to assist in the service of documents or the taking of evidence pursuant to letters of request which are transmitted through diplomatic channels. With respect to service of process, however, this law is superseded by the Service Convention. T. HATTORI & D. HENDERSON, *CIVIL PROCEDURE IN JAPAN*, § 12.03 [1] [a] (1983).

18. Foreign Relations, 22 C.F.R. § 92.85 (1983) prohibits officers of the Foreign Service from serving process unless the Department of State so directs. For the same reason, service under the Consular Convention, March 22, 1963, United States - Japan, 15 U.S.T. 768. T.I.A.S. No. 5602 Art. 17(1)(e)(i), is unavailable.

the only remaining alternatives under the Convention are service through the Central Authority (article 5), delivery by the Central Authority to one who voluntarily accepts it (article 5), and possibly service by mail (article 10 (a)).

While all agree that the Service Abroad Convention, as a federal treaty, is the supreme law of the land,<sup>19</sup> the scope of the Convention's preemption is unsettled. A number of courts have held that enforcement of a judgement in the United States is not impaired by failure to effect service through the procedures of the Convention if service complies with state or federal rules, and if the receiving country has filed no objection under the Convention to that particular method of service.<sup>20</sup> Those courts view the Convention Rules as a proper method, but not the exclusive method, for service in contracting countries. Congress' failure to amend FRCP 4(i) subsequent to the ratification of the Convention<sup>21</sup> is the main argument advanced to support that view.

Whatever the continued viability of Rule 4(i) in federal litigation, the above analysis is flawed when state courts apply it to up-

19. *Harris v. Browning-Ferris Industries Chemical Services, Inc.*, 100 F.R.D. 775 (M.D. La. 1984) (service by mail in Germany quashed); *Rivers v. Stihl.*, 434 So. 2d 766 (Sup. Ct. Ala. 1983) (service by mail quashed); *Volkswagenwerk, A.G. v. Volkswagen of America*, 443 So.2d 880 (Sup. Ct. Ala. 1983) (same but service on wholly owned United States subsidiary sustained an alter ego theory); *Vorhees v. Fisher & Krecke*, 697 F.2d 574 (4th Cir. 1983) (service by mail quashed); *Low v. Bayerische Motoren Werke, A.G.*, 88 A.D.2d 504, 449 N.Y.S.2d 733 (Supreme Ct., App. Civ. 1982) (service by mail quashed); *Cintron V.W. & D. Machinery Co.*, 182 N.J. Super. 126, 440 A.2d 76 (1981) (service by mail quashed); *Ing. H.C.F. Porsche v. Superior Court*, 123 Cal. App. 3d 755, 177 Cal. Rptr. 155 (1981) (service by mail quashed); *Kadota v. Hosogai*, 125 Ariz. 131, 608 P.2d 68 (Ariz. Ct. App. 1980) (personal service in Japan by Japanese attorney quashed).

20. *Chrysler Corp. v. General Motors Corp.*, 589 F. Supp. 1182, 1206 (D.D.C. 1984). *Weight v. Kawasaki Heavy Industries, Ltd.*, 597 F.Supp. 1082 (E.D. Va. 1984); *DeJames v. Magnificence Carriers, Inc.* 654 F.2d 280, 288 (3d Cir. 1981); *Ing. H.C.F. Porsche, A.G. v. Superior Court*, 123 Cal. App. 3d 755, 761, 177 Cal. Rptr. 155, 158 (1981); *Shoie Kako, Ltd. v. Superior Court*, 33 Cal. App. 3d 808, 822 109 Cal. Rptr. 402, 412 (1973). Sometimes the rule is stated without reference to whether the country has lodged an objection under the convention. *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 431 F. Supp. 1226, 1229 (N.D. Ill. 1977).

Because the Convention is the supreme law of the land, service under the Convention of foreign process in the United States is proper even if it does *not* comply with local state law. *Aspinall's Club Ltd. v. Aryeh*, 86 A.D.2d 428, 450 N.Y.S.2d 199 (1982) (service of British process by U.S. Marshal valid in spite of failure to comply with New York statute on service of process).

21. See cases cited *supra* note 20; *Harris v. Browning-Ferris Industries Chemical Services, Inc.*, 100 F.R.D. 775 (1983 amendment of FED. R. CIV. P. 4 does not indicate Congressional intent to supersede Convention). Cf. *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1327 (D.C. Cir. 1980) (power to serve overseas civil investigatory subpoena not to be construed from congressional silence; court should choose construction least likely to conflict directly with regulations of other nations).

hold service under the state law. While the federal government may modify or ignore its treaty obligations by subsequently adopting inconsistent legislation, states are not free to do so.<sup>22</sup> FRCP 4(i) does not purport to authorize state courts to serve process by mail, no basis exists for state courts to conclude that state as well as federal process may be served by mail. Rule 4(e) does, however, permit the federal courts to serve process on out-of-state defendants "under the circumstances and in the manner prescribed" by state statutes or law. This leads to the anomalous situation that the federal courts may borrow state methods for service of process even though the states may not be able to validly use them. California has recognized the supremacy of the Service Abroad Convention and the possibility that it might be overlooked by counsel. Therefore, in 1983, California amended its service provisions to provide: "These rules are subject to the provisions of the Convention on the 'Service Abroad of Judicial and Extrajudicial Documents' in Civil or Commercial Matters (Hague Service Convention)."<sup>23</sup> At a minimum, that provision rebuts any arguments that the California rules are intended to override the Convention provisions.

Consistent with the view that the Convention takes precedence, a number of courts have quashed service,<sup>24</sup> and some have even reversed judgments after trial,<sup>25</sup> because although plaintiffs had complied with state or federal rules, they used methods of service to which the receiving country had formally objected. This line of cases endorses the view that, at least when an objection has been lodged, the Service Abroad Convention rules preempt contrary state or federal modes of service. Judging from the reported cases, German defendants seem to have been the chief beneficiaries of this rule, and service by mail has been the chief culprit.<sup>26</sup>

22. This point is illustrated in the context of the Service Convention by *Aspinall's Club Ltd. v. Aryeh*, 86 A.D.2d 428, 450 N.Y.S.2d 199 (1982). The U.S. Marshal served process from England in accordance with the provisions of the Convention and the Rules promulgated by the Dep't of State under the Convention. The service was upheld even though it did not comply with the procedures of the State of New York.

23. CAL. CIV. PROC. CODE § 413.10 (West 1968 & Supp. 1985).

24. See cases cited *supra* note 20. Consequently, it is clearly inaccurate to say that [t]here is not a great deal of difference between service of U.S. process under the Convention and service of U.S. process in countries that are not a party to the Convention. In both cases, the validity of service for purposes of enforcement in the United States will be judged by Rule 4.

Horlick, *supra* note 1, at 638.

25. *Richardson v. Volkswagenwerk, A.G.*, 552 F. Supp. 73; *Kadota v. Hosogai*, 125 Ariz. 131, 608 P.2d 68 (1980).

26. See cases cited *supra* note 20.

The latter line of cases substantially undermines those cases allowing modes of service not found in the Service Abroad Convention. The Convention endorsed several methods of service thought to be acceptable to most, though not necessarily all, countries. It would seem illogical then, to forbid service in a manner endorsed by the Convention yet objected to by the receiving country and at the same time to allow modes of service which are not found in the Convention and which are contrary to the internal law of the receiving nation. Moreover, the argument that Rule 4(i) remains valid even with respect to countries entering the Convention, carries weight regardless of whether the country has objected to a particular mode of service.<sup>27</sup> Indeed, prior to the Service Abroad Convention, Rule 4(i) was clearly intended to authorize, although not to encourage, methods of service to which the foreign nation may have objections.<sup>28</sup> Rule 4(i) authorized numerous methods of service so that counsel could, so far as possible, accommodate service to the rules of the foreign nation while still complying with American rules.<sup>29</sup> It seems a gratuitously parochial breach of comity to continue to resort to Rule 4(i) when subsequent treaties specify how process can be served consistent with the laws of both countries.

In short, Rule 4(i) was intended merely as a flexible stopgap because neither state and federal rules nor international treaties adequately dealt with foreign service of process.<sup>30</sup> It seems reasonable to

27. In *Harris v. Browning-Ferris Industries Chemical Services, Inc.*, 100 F.R.D. 775 (M.D. La. 1984) the court rejected the argument that Congress' 1983 amendments to FED. R. CIV. PROC. 4 meant that the rule should take precedence over the earlier ratified Service Abroad Convention.

28. Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963* (I), 77 HARV. L. REV. 601, 637 (1964); Horlick, *supra* note 1, at 641. *Hunt v. Mobil Oil Corp.*, 410 F. Supp. 4, 9 (S.D.N.Y. 1975) (pre-ratification service by mail in Germany upheld).

29. "One of the purposes of subdivision (i) is to allow accommodation to the policies and procedures of the foreign country." Notes of the Advisory Committee on Rules, FED. R. CIV. PROC. 4(i). See *F.T.C v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 205 U.S. App. D.C. 172, 636 F.2d 1300 (1980), holding that Rule 4(i) "underlines rather than obviates the need for judicial sensitivity to foreign territorial sovereignty when scrutinizing particular methods of overseas service." *Id.* at 1314.

30. The remarks of Prof. Kaplan, who was the reporter to the Advisory Committee on the Civil Rules when FED. R. CIV. PROC. 4(i) was adopted, are consistent with this approach. Rule 4(i) was adopted because there were no adequate treaties extant.

The adoption of Rule 4(i) need not inhibit efforts to achieve international arrangements if the goal is thought worthy the effort . . . . In some instances — which will be rare, if litigants are careful — it must be admitted that courts may have to say that service comporting with our standards under rule 4(i) is valid even if forbidden by the foreign country in which it was made; an unhappy result, *avoidable by proper international agreement*.

Kaplan, *supra* note 28, at 636-37 (1964) (emphasis added).

infer that the Advisory Committee and Congress have not amended Rule 4(i) simply because many countries still have not joined the Convention.

The words of the Convention itself also support its exclusive application. Article 1 provides: "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," (emphasis added). Under Article 15, the contracting parties agree that default judgments may not be entered unless process was served "by a method prescribed by the internal law of the State addressed" or by "another method *provided for by this Convention.*" (emphasis added). In addition to suggesting preemption, those provisions evidence a policy of uniformity and certainty.<sup>31</sup> In order to know whether service is proper, the defendant need only look to his own domestic law or to the Convention. If the Convention can also be supplemented by the domestic law of the sending state, then the defendant would also have to research applicable foreign law in an inconvenient place and with an unfamiliar language, and would probably have to do so under the time restraints for filing an answer.

Prior to entering the Service Abroad Convention, the United States had a marked reluctance to embrace treaties based upon international private law. One of the reasons prompting the United States finally to enter the Service Abroad Convention was the prospect of protecting its own citizens from some perhaps unfair foreign modes of service.<sup>32</sup> If, however, the law of the sending State may supplement the Convention's modes of service, other nations may also

31. The basic objectives of the [Convention] are the following:

- a) To establish a system which, to the extent possible, brings actual notice of the document to be served to the recipient in sufficient time to enable him to defend himself.
- b) To simplify the method of transmission of these documents from the requesting State to the requested State.
- c) To facilitate proof that service has been effected abroad, by means of certificates contained in a uniform model.

Explanatory Report by V. Toborda Ferreira, Actes et Documents de la Dixieme session, v. III, at 363-64 (translated by the Permanent Bureau of the Hague Conference on Private International Law and *quoted in* the Manual, *supra* note 14, at 28). To allow the domestic law of the sending state to supplement the Convention could impair each of these aims.

32. Downs, *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, 129-130 (1969). The United States particularly objected to service *au parquet*. This form of service, which is available in France, Luxembourg, the Netherlands and sometimes in Belgium, consists of service on an official of the forum country accompanied by mailed notice to the foreign defendant. The service is valid even if the mailed notice never finds the defendant. *Id.* at 130.

properly employ modes of service which have not been specifically provided for in the Convention and to which the United States has objected. Broadening the modes of service for United States litigants may in the end set a precedent which exposes United States citizens to the very evils which initially prompted entry into the Convention.<sup>33</sup>

Comparing the Service Convention with the Evidence Convention may help resolve the preemption question. Some courts, especially at the state level, have held that comity impels litigants to use Evidence Convention procedures prior to ordering American-style discovery.<sup>34</sup> Even courts which have declined to give the Evidence Convention such deference nevertheless hold that the Evidence Convention procedures must be employed to compel discovery from foreign nonparties, or to compel depositions or other more intrusive forms of discovery from parties if the discovery activity is to take place on foreign soil (e.g., involuntary depositions in the foreign country or on site inspections).<sup>35</sup> That this quasi-preemptive status is conferred upon the Evidence Convention is striking given the absence of any preemptive language in the text of the Convention. By contrast, the Service Convention expressly provides for exclusivity in articles 1 and 15.<sup>36</sup>

The analogy between these two Conventions suffers somewhat because discovery which requires the foreign party or nonparty to respond in the foreign country arguably trenches more directly on a foreign nation's sovereignty than does service of process.<sup>37</sup> Still the analogy seems helpful because in addition to the strong suggestion of preemption in the language of the Service Convention, service of process takes place *in* the foreign country, service is effected on a nonparty (at least up to the moment of service), and civil law countries have traditionally considered the nature of service as uniquely judi-

33. A country might, for example, provide that service may be effected by merely mailing a notification of the suit, written in the language of the sending state, to the defendant. In this case, the defendant would not be unreasonable in assuming the document was junk mail and in discarding it. While a default judgment would violate due process and be unenforceable in the United States, *see infra* note 43, nothing would stop the forum country from enforcing the judgment if one accepts the view that the domestic law of the forum state may supplement the modes of service under the Convention.

34. *Pierburg GmbH & Co. v. Superior Court*, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982); *Volkswagenwerk, A.G. v. Superior Court*, 123 Cal. App. 3d 846, 176 Cal. Rptr. 874.

35. *In re Anschuetz*, 754 F.2d 602, 615 (5th Cir. 1985).

36. *Id.*

37. *See Compagnie de Saint-Gobain-Pont-a-Mousson*, 205 U.S. App. D.C. 172, 636 F.2d 1300 (1980) (service of FTC investigatory subpoena in France quashed).

cial. Moreover, the ultimate sanction for failure to respond to discovery is a default judgment. A default judgment is the standard consequence for failure to respond to service of process.

According preemptive status to the Service Convention would not unduly fetter American litigants. While numerous methods of service exist under the Service Convention which are optional with the contracting countries, the Convention requires all contracting countries to designate a Central Authority, and that Authority must serve process on the contracting nations. By contrast, article 23 of the Evidence Convention permits the contracting nations to declare that they will not execute letters of request issued for the purpose of obtaining pretrial discovery of documents as known in common law countries. Every contracting state except the United States has taken the opportunity to make this reservation. Because discovery of documents is the centerpiece of the sort of complex litigation which so often involves foreign parties, affording even quasi-preemptive status to the Evidence Convention potentially tips the balance too far in favor of the foreign litigant. By contrast, affording preemptive status to the Service Convention does not court this kind of imbalance.

Persuasive arguments favor exclusive application of the Service Abroad Convention, and to date no American court has squarely held to the contrary. Courts that have suggested supplementing the Convention with domestic rules have either done so by way of dictum, or have found that the challenged service also satisfied the Convention's requirements.<sup>38</sup> The conclusion of the seminal case also seems to be based at least in part on the erroneous assumption that the kind of service employed (mail), was also permitted under Japan's internal law.<sup>39</sup> Serving foreign process by a means other than that authorized under the Convention, then, seems unnecessarily risky.

#### B. *Proposed Amendments to FRCP 4(i)*

The Committee of Rules on Practice and Procedure of the Judicial Conference of the United States is presently considering a number of amendments to the FRCP, including Rule 4(i). As amended the rule would read:

[I]t is also sufficient if service of the summons and complaint is

38. See cases cited *supra* note 20.

39. *Shoei Kako Co. Ltd. v. Superior Court*, 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1973). See also *Chrysler Corp. v. General Motors Corp.*, 589 F. Supp. 1182, 1206 (D.D.C. 1984) (upholding mailed service in Japan and *Shoei Kako*).



made: . . . upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) pursuant to any applicable treaty or convention . . . .<sup>40</sup>

In other words, counsel will have the option of proceeding *either* under any applicable treaty (the Service Convention being the principal one) *or* proceeding to serve the defendant by personal delivery or by mail. The impact would be to elevate Rule 4(i) above the treaty by authorizing forms of service which are either not found in the treaty or are forms of service to which contracting States have formally objected. Because Rule 4(i) would also specifically recognize the existence of these treaties and conventions, courts would be hard pressed not to hold that Rule 4(i), having been amended more recently than the adoption of the Convention, now takes precedence over the Convention.

Dispensing with the rules of the Convention would be an unfortunate result for three reasons. First, there has been no showing that following the procedures of the Convention is inadequate. Second, the Committee Note to the proposed amendment states that “[T]o the extent that the procedures set out in the Hague Convention or other treaties or conventions conflict with Federal Rules of Civil Procedure, subdivision (i)(1)(E) harmonizes them.”<sup>41</sup> Because the amendment would directly conflict with the Convention, it would not achieve the purpose of harmonizing the two. Third, unilaterally repudiating the Convention is an invitation to other contracting countries to do likewise, and this would thereby deprive American defendants of the benefits of the Convention. The drafters of the amended rule should either re-work the provision to achieve their stated purpose or clearly state their intention to overrule the case law which interprets the rules of the Convention as preemptive.

### C. *Constitutional Adequacy of Untranslated Service*

Apart from failure to comply with the rules of the Convention, a default judgment based on untranslated process may also be unen-

40. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE, FEDERAL RULES OF CIVIL PROCEDURE, FEDERAL RULES OF CRIMINAL PROCEDURE AND RULES GOVERNING SECTION 2254 CASES AND SECTION 2255 PROCEEDINGS IN THE UNITED STATES DISTRICT COURTS 17 (1981).

41. *Id.* at 19.

forceable in the United States because due process requires that the mode of service of process be reasonably calculated to apprise the defendant of the pendency of the action.<sup>42</sup> A California court held that service of untranslated Swiss documents on a non-German speaking American, even though they were transmitted by the Swiss embassy via certified mail, violated due process because the service failed to give adequate notice of the Swiss suit.<sup>43</sup> In dictum the court added that if the documents themselves were not translated, at least an English summary should have been included.<sup>44</sup> Unless one indulges in the parochial assumption that English is universally read and understood, a Japanese translation would be required when serving an American summons and complaint on a Japanese in Japan.<sup>45</sup>

Assuming that due process imposes some translation burden, it is questionable whether due process requires that a summary of the document be translated. The purpose of the notice requirement is to give the defendant adequate opportunity to appear and to defend. To serve this purpose, it is not necessary that all the documents in the litigation accompany the notice; important documents need only be reasonably available. English speaking counsel will defend, so no substantial purpose would be served by requiring relevant documents, such as the complaint, to be translated. The purposes of due process are adequately served if the defendant receives notice that he has been sued in an American court. Failure to respond will result in entry of judgment. Certainly, if an untranslated copy of the complaint accompanied such a translated summons-like notice, the defendant could then turn the complaint over to English speaking counsel to answer or to otherwise defend. In New York, for example, a summons may be served without a complaint if accompanied by notice of the object of the action.<sup>46</sup> In addition, the Kentucky practice

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

43. *Julen v. Larson*, 25 Cal. App. 3d 325, 101 Cal. Rptr. 796 (1972). Although the document was accompanied by a cover letter from the embassy in English, the cover letter merely asked for a receipt and did not mention the litigation nor describe the tenor of the enclosed document.

44. *Id.* at 328, 101 Cal. Rptr. at 798-99.

45. *But see Isothermics v. United States Energy Research & Dev. Agency*, 434 F. Supp. 1155 (D.N.J. 1977). The Japanese parties whose interests could have been affected by the ongoing litigation were added as necessary parties. They were served by mail with untranslated copies of the summons and complaint. In answer to their objection that service had been improper, the court remarked that the defendants, "even if not effectively served with process, are at least on notice of [the] claim." *Id.* at 1158.

46. N.Y. CIV. PRAC. R. § 305(b) (McKinney 1972 & Supp. 1984-85). Service of the summons and notice is sufficient under the Service Convention. *Re v. Breezy Pt. Lumber Co.*,

of serving the summons alone has withstood constitutional challenge.<sup>47</sup>

In measuring the adequacy of untranslated service, the importance of the particular defendant's linguistic ability is unclear. Ideally, the validity of service of process should be determinable by fixed and objective standards. Thus, if the vast majority of a population can read the language of the document, any particular individual's ability should not be controlling. In the context of domestic service, however, the United States Supreme Court has held that the serving party violates due process by serving process which will not actually notify because of a known incapacity of the particular defendant.<sup>48</sup> In the international context, both a California court of appeal and a federal district court have upheld the validity of service on the basis of the particular foreign defendant's ability to read English. In the federal case, the court upheld service in English on a German corporation. In that case, however, the court noted that the defendant was a multinational corporation which had negotiated contracts in English and, in fact, had understood the service well enough to make a special appearance in the action.<sup>49</sup> In *Shoei Kako*,<sup>50</sup> a frequently cited decision, the California court of appeal relied upon very tenuous evidence to arrive at a similar conclusion with respect to a Japanese defendant.<sup>51</sup>

118 Misc. 2d 206, 460 N.Y.S.2d 264 (Sup. Ct. 1983).

47. *Owens v. I.F.P. Corp.*, 374 F. Supp. 1032 (W.D. Ky. 1974) (three-judge court) (domestic service of summons unaccompanied by complaint sufficient notice), *aff'd*, 419 U.S. 807 (1974). *Owens* involved a domestic service in which the complaint would be readily available at the courthouse. In the international setting, this would not be the case. However, the case for adequate notice in *Owens* would be stronger if a copy of the untranslated complaint had been included with the translated summons or a summons-like document. A trip to the courthouse would be then unnecessary.

48. *Covey v. Somers*, 351 U.S. 141 (1956) (service on property owner known to be incompetent); *Robinson v. Hanrahan*, 409 U.S. 38 (1972) (notice mailed to home when serving party knew defendant was in jail); Comment, "*Citado a Comparacer*": *Language Barriers and Due Process— Is Mailed Notice in English Constitutionally Sufficient?*, 61 CALIF. L. REV. 1395 (1973).

49. *Hunt v. Mobile Oil Corp.*, 410 F. Supp. 4, 9 (S.D.N.Y. 1975). Although registered mail service under FED. R. CIV. PROC. 4(i)(1)(D) was used, *Hunt* predates Germany's ratification of the Service Abroad Convention on June 26, 1979. Upon ratifying the Convention, Germany filed a formal objection to service by mail.

50. *Shoei Kako Co. v. Superior Ct.*, 33 Cal. App. 3d 808, 109 Cal. Rptr. 402.

51. The court noted that: 1) according to the affidavit of an experienced international attorney, "most" Japanese businesses trading abroad deal in English; 2) the return receipt was signed in English; 3) the company authorized the use of brochures in English to promote its products in the United States; and 4) the defendant had made a special appearance to quash service. *Id.* at 823-24, 109 Cal. Rptr. at 413. Of these four arguments, only the last seems at all persuasive.

D. *Service by Mail of Untranslated Documents Under the Convention*

1. *Translation*

While the Service Convention addresses the question of translation with respect to some modes of service, it is silent with respect to others. Article 5 provides that when a document is to be served through the offices of the receiving country's Central Authority by a method prescribed by its internal law, "the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed." Many countries, including the United States and Japan, have exercised their right to require these translations. Consequently, a document tendered to the Japanese Central Authority for service will be returned unserved unless accompanied by a Japanese translation.

Some countries, however, are not so strict and either permit an array of different languages or endow the Central Authority with some discretion to accept untranslated documents. Norway, for example, accepts documents in Norwegian, Danish, or Swedish. Untranslated documents, however, will be served on an addressee who accepts them voluntarily, and the Minister of Justice retains discretion, especially in business matters, to serve untranslated documents if he is convinced that the addressee understands the language used in the document.<sup>52</sup>

The only other provision of the Service Convention that touches on translation is article 7, which provides that:

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language . . . of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or English.

One could also argue that, particularly in an international commercial context, if the defendant understands that the documents are of a legal nature, the burden of translation can legitimately be shifted to the defendant. This reflects the tenor of a case upholding service in Hebrew on a non-Hebrew speaking American in Israel. Hebrew was, however, the official language of the country in which service was made, and evidence existed that the defendant understood the legal nature of the documents. *Tahan v. Hodgson*, 662 F.2d 862 (D.C. Cir. 1981). See also *Commonwealth v. Olivo*, 369 Mass. 62, 337 N.E.2d 904 (1975) (notice in English valid because "the nature of the defendants' . . . inability to read English, was not such as would render them incapable of understanding the *need for further inquiry*." *Id.* at 910 (emphasis added).

52. Manual, *supra* note 14, at 73.

Some commentators have cited this article as authorizing the service of documents in French, English, or the language of the state of origin.<sup>53</sup> Article 7 does not say this. The article specifically refers to the "model annexed to the present Convention" which includes the Request for Service Abroad of Judicial or Extrajudicial Documents, the Certificate, and Summary of the Document to be Served. The standard terms of these documents may be written in the language of country of origin provided they are also written in French or English. The *blanks* of these forms must be completed in the language of the state addressed, in French, or in English. Article 7 is silent as to the language of the documents to be served.

The three model forms referred to by article 7 are merely forms which accompany the documents to be served. Central Authorities use the model forms in order to know the gist of the documents, how and upon whom to serve the documents, and how to complete the proof of service certificate. In fact, the Convention requires only one of these three documents, the Summary of the Document to be Served, to be served on the defendant.<sup>54</sup> English and French are used in the forms because they are the primary languages of diplomacy. Because article 7 refers only to the model form documents accompanying the documents to be served, the article does not authorize the use of French or English in the other documents to be served. Any doubt is resolved by the specific language in article 5 which permits the Central Authority to require that a document to be served be translated into the language of the receiving country. The drafters could obviously distinguish between the document to be served and the model forms.

The Summary of the Document to be Served is served on the defendant along with the summons and complaint. Consequently it can perform a similar notice function. Recognizing this beneficial function, in 1980 the Fourteenth Session of the Hague Conference recommended that this document be expanded to include information on the availability of legal aid in the country of origin.<sup>55</sup> Because many people speak English or French, the Conference also recom-

53. Note, *Service of Process in Japan*, 6 LOY. L.A. INT'L & COMP. L.J. 141, 148 (1983); In Jordan, *supra* note 1, at 77-78, the author argues that, while the Convention is silent on the question, French, English or the language of the receiving state should be permitted by analogy to article 7.

54. Manual, *supra* note 14, at 4 (article 5(1)).

55. Cf. *Aguchak v. Montgomery Ward Co.*, 520 P.2d 1352 (Sup. Ct. Alaska 1977) (summons in small claims action against domestic but remote "bush" defendants must inform them of right to file written response and to ask for change of venue).

mended that the standard terms of the summary be written in *both* English and French, and that the summary accompany all documents served in foreign countries, no matter what mode of service (Central Authority, mail, process server, etc.) is used. These recommendations, however, are not a part of the treaty and countries are free to adopt or to ignore them. Other than printing the standard terms of the model forms (available from the U.S. Marshal's Office) in both French and English, the United States has not adopted these recommendations.

Curiously, the Convention was silent on both the questions of translation and the power of the receiving country to require translation when service is made in any way other than by the Central Authority utilizing its internal law. One country, Luxembourg, requires translation of documents served under article 10(b) and (c),<sup>56</sup> but because this authority was not conferred by the Convention, the fact of the United States' Convention membership should not require United States courts to quash untranslated service in Luxembourg. It would also be inappropriate to infer that Japan's failure to require translation indicates Japan's acquiescence to untranslated service by mail.

Yet one should not interpret the Convention's silence on this point as authority for using untranslated service. That the Convention would specifically permit countries to require translation when service is made through their Central Authorities, yet acquiesce in service of untranslated documents by means as casual as the mails, would be inconsistent. The contrary would be a more logical approach. Because service under the auspices of the Central Authority is itself an event likely to emphasize the importance of the document served, while service by the mails is not, to require translation of mailed service seems more appropriate. Moreover, it is in the interest of parties to the Convention to encourage use of their Central Authorities. The Central Authority mechanism is both the centerpiece of the Convention and probably the best way to insure adequate notice. If untranslated service by mail is adequate, then there is little reason to ever use the Central Authority.

Given both the possible constitutional inadequacy of untranslated service and the murky status of the issue under the Convention, to serve untranslated process on anyone who does not voluntarily accept it would be imprudent. The translation burden itself may be minimized by using short complaints modeled on the federal

56. Manual, *supra* note 14, at 113.

forms—once properly served, subsequent amendments need not be translated.<sup>57</sup> In addition, translations need not be typed; finding a translator with a Japanese typewriter is, therefore, unnecessary. The translator should, however, be familiar with both English and Japanese legal terms.

## 2. *Service by Mail*

Assuming that service of process must be pursuant to the provisions of the Convention, the question arises whether the Convention permits service by mail in countries which have not objected to it. Unfortunately, the language of the Convention does not give a clear answer. The critical provision, article 10 (a), reads:

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 . . . .<sup>58</sup>

In other instances, when the language of the Convention mentions the conveyance of documents abroad, including the title, the preamble, and articles 10(b) and 10(c), the words “serve” or “service” are used. In article 10(a) however, the Convention language used is merely “send.” In the parallel French text, which is equally official,<sup>59</sup> the English word “service” is translated to either “*signification*” (service by a process server) or “*notification*” (service by other means).<sup>60</sup> The word “send” in article 10(a), however is translated merely as “addresser.” This usage may merely be a drafting anomaly in both versions. Yet, it is also possible that the drafters intended to use the mails as a device to transmit the bulk of necessary docu-

57. Many reasons exist why amendments need not be translated. As a practical matter, either the defendant will have defaulted, in which case no amendment is necessary, or the defendant will have appeared through counsel. If defendant appeared through American counsel, then documents such as amendments to pleadings may be served in English on counsel in the United States. Even if a defendant appears through foreign counsel or in propria persona, article 10(a) of the Service Convention, which contains no translation requirement, permits parties to send judicial documents, by postal channels, directly to persons abroad. See Fujita, *Service of American Process Upon Japanese Nationals by Registered Airmail and Enforceability of Resulting American Judgments in Japan*, 12 *LAW IN JAPAN* 69 (1979). Fujita states “the author does not see why an initial complaint cannot be made short and succinct—succinct in the sense that it is easy for a layman to understand and translate. Complaints in American practice seem never to go unamended at a later time.” *Id.* at 80.

58. Japan objected to service by process servers in Japan (articles 10(b) and 10(c)), but did not object to article 10(a) (emphasis added).

59. Manual, *supra* note 14, at 13 (article 31).

60. Graveson, *The Tenth Session of the Hague Conference of Private International Law*, 14 *INT'L. & COMP. L.Q.* 528, 539 (1965).

ments and court orders, and to preserve the more formal Convention for service of process.

Attributing this more modest intent to article 10(a) is also consistent with attitudes toward service of process in civil law countries like Japan. Civil law countries generally view service of process as a purely sovereign act; consequently, they require service to be made through government officials or official channels.<sup>61</sup> Japan, whose legal system is modeled after the German Civil Code, is no exception.<sup>62</sup> The Japanese Civil Procedure Code provides "All matters concerning service shall be handled by court clerks."<sup>63</sup> Unlike the American practice, neither Japanese attorneys nor private citizens may serve process either in Japan or abroad.<sup>64</sup> 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").<sup>65</sup> 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.<sup>66</sup> All documents, of course, are in Japanese.

A country taking this kind of care with domestic process would probably not, in an international context, agree to service by the rather casual use of regular mail which emanates from any sender and requires no translation or return receipt. This conclusion is also consistent with a Japanese case which refused to give a foreign default effect in Japan when the Japanese party had been served by mail with documents written in French.<sup>67</sup> In addition, some evidence exists that the participating countries understood that sending process through the mails would constitute nothing but a pure fact and

61. Fujita, *supra* note 57, at 76.

62. *Id.*

63. CCP art. 161(1) (1983).

ARTICLE 161.

(1) The business relating to service shall be administered by a court clerk.

(2) The administration of the business mentioned in the preceding paragraph may be entrusted with the court clerk of a district court having the jurisdiction over the place of service.

*Id.*

64. Fujita, *supra* note 57, at 74.

65. CCP art. 162 (1983). While "tokubetsu sootatsu" is also written on letters comparable to our "special delivery," "sootatsu" carries a stronger connotation of "service." Fujita, *supra* note 57, at 73; compare Jordan, *supra* note 1, at 79.

66. CCP art. 177 (1983): "ARTICLE 177. The official who has effected service shall draw up a document, enter therein the matters relating to the service, and submit it to the court."

67. Daiei K.K. v. Blagojevic, 352 Hamei Taimuzu 246 (Tokyo Dist. Ct., Dec. 21, 1976). See *infra* text accompanying note 76.



would pose no obligation to enforce a subsequent default judgment in the receiving state.<sup>68</sup> The Swiss and German observers went further, noting that their countries had no objection to article 10(a) if documents were mailed strictly for informational purposes and no legal consequences flowed *in the sending state*.<sup>69</sup> Concern over the scope of article 10(a) may have contributed to Switzerland's decision not to join the Convention.

Unfortunately, the contrary argument, based on article 15, also seems persuasive. Article 15, which deals with default judgments, authorizes courts to render default judgments only when process is served by a method prescribed by the internal law of the State addressed or when the process was "delivered to the defendant or to his residence by another method provided for by this Convention." Certainly, to "send" a document through the mail is a standard method by which a document may be "delivered to the defendant." This language indicates that the sending State may enter a valid default judgment if service satisfies the conditions of article 15. Unfortunately, article 15 does not address whether the receiving State must also recognize a judgment satisfying article 15.

Scholarly opinion is divided on these issues. Some American and Japanese scholars take the position that article 10(a) does not authorize service by mail.<sup>70</sup> Another American scholar takes the opposite view.<sup>71</sup> Other scholarly opinion assumes that service is proper under article 10(a) without discussing the counter arguments or noting the drafter's use of the word "send".<sup>72</sup> The few cases discussing the point seem to support the use of the mails for service in countries which have not objected to article 10(a).<sup>73</sup> Apparently the practice is

68. Fujita, *supra* note 57, at 73.

69. Ristau, *Judicial Assistance*, 72 AM. J. INT'L LAW 633, 634-35 (1978).

70. Fujita, *supra* note 57 at 73, 80. (U.S. default judgments based on mailed service would not be enforceable in Japan); (Z. Kitagawa ed. 1985); *DOING BUSINESS IN JAPAN*, p. 14, § 15:05 (3), at 5-97-98; Routh, *Litigation Between Japanese and American Parties*, A.B.A., CURRENT LEGAL ASPECTS OF DOING BUSINESS IN JAPAN AND EAST ASIA 188, 190 (J. Haley ed. 1978) (may not be enforceable in Japan or in the U.S.); T. HATTORI & D. HENDERSON, *supra* note 17, at § 1203[1][b], ("doubtful such service would be recognized in Japan").

71. Jordan, *supra* note 1, at 55, 69, 70.

72. J. Soek, *The Service of Documents Abroad and the Protection of Defendant Residents Abroad*, 29 NETHERLANDS INT'L L. REV. 72, 85-86 (1982); Downs, *supra* note 32, at 134-135.

73. *Weight v. Kawasaki Heavy Industries*, 597 F. Supp. 1082 (1984); *DeJames v. Magnificence Carriers*, 654 F.2d 280, 288 (dictum); *Ing. H.C.F. Porsche v. Superior Court*, 123 Cal. App. 3d 755, 761, 177 Cal. Rptr. 155, 158 (dictum); *Shoei Kako Co. v. Superior Court*, 33 Cal. App. 3d 808, 822, 109 Cal. Rptr. 402, 412 (1973) (alternative holding based in part on erroneous assumption that service complied with the internal law of Japan for service

customary in both the United States and other countries.<sup>74</sup> Because the United States Supreme Court has not spoken on the topic, and none of the cases is the kind of “four-square” precedent upon which one may confidently rely, the more prudent course is to use a means of service clearly authorized under the Convention. In Japan, this again points to service through the Central Authority.

### III. ENFORCEABILITY IN JAPAN

Even if a judgment is enforceable in the United States, it does not necessarily follow that it is enforceable in Japan. To be enforceable in Japan, a foreign judgment must satisfy the Japanese Civil Procedure Code (CCP) article 200, which provides:

A foreign judgment which has become final and conclusive shall be valid only upon the fulfillment of the following conditions:

(1) That the jurisdiction of the foreign court is not denied in laws and regulations or a treaty;

(2) That the defeated defendant, being Japanese, has received service of summons or any other orders necessary to commence procedure by a method other than public notice or has entered an appearance in the case without receiving service thereof;

(3) That the judgment of the foreign court is not contrary to the public order or good morals of Japan;

(4) That there exists reciprocity [also translated as “mutual guarantee”].<sup>75</sup>

Many foreigners forwarding judgments to Japan for enforcement have difficulty navigating the shoals of article 200. Subsections (2), (3), and (4) seem to present the greatest hazards.

Subsection (2) is the only section which directly addresses service of process. If the defendant makes any appearance, perhaps even a special appearance to quash service,<sup>76</sup> then subsection (2) is clearly

of domestic documents).

74. Manual, *supra* note 14, at 38.

75. CCP art. 200 (1983).

76. The purpose of CCP art. 200(2) (1983), *supra* note 75, is to protect Japanese defendants who have not been given an opportunity to defend. A special appearance by the defendant would show that the defendant had been afforded such an opportunity even if the motion to quash were denied. While this view reflects the American approach towards special appearances (RESTATEMENT (SECOND) OF JUDGMENTS § 10(2) (1982)); *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U.S. 522 (1931)), and probably reflects the Japanese view, the question in Japan has not been authoritatively settled. T. HATTORI & D. HENDERSON, *supra* note 17, at § 11.02 n.228 (1983).

satisfied regardless of the mode of service employed. If, however, the defendant cannot be induced to appear, generally or specially, then the method of service may be questioned under subsection 2.

*Daiei K.K. v. Blagojevic*<sup>77</sup> is the only Japanese precedent which interprets CCP article 200(2). In this lower court case, the Japanese party argued that Japan should not recognize a French default judgment because: 1) process was served by mail; 2) it was not translated; 3) the Japanese party could not read French; and 4) it was not served in accordance with the Service Abroad Convention. The court upheld the Japanese party's contentions, stating:

[I]t is clear that the Japanese party intends in this action to deny the satisfaction of the requirements under Article 200, Subparagraph 2 of the CCP. It is because, if we rely on the [Japanese party's] statement that all the summons and complaints concerning the services of civil actions brought to the French court were sent by mail without attaching Japanese translations and without using a method in compliance with law, we cannot recognize compliance with the requirements of Article 200, Subparagraph 2 of the CCP.<sup>78</sup>

Unfortunately, from this brief discussion it is impossible to isolate the precise defects in this service. The obvious purpose of CCP article 200(2) is to assure adequate notice to the defendant, so it would be reasonable to infer that failure to attach a translation would invalidate the service. Because the court did not discuss the Japanese party's alleged inability to read French, the importance of a particular Japanese party's ability to understand the content or tenor of the documents is not clear.<sup>79</sup>

Even more obscure is the court's meaning in saying "without using a method in compliance with law." Because the service lacked the formalities of Japanese service by mail, the court may have meant that service by mail without the intervention of the Japanese courts is not "service" within the meaning of CCP article 200(2).<sup>80</sup> Alternatively, the court may have meant that the service was not "in compliance with law" because the service did not comply with the Service Abroad Convention. The latter would imply that, at least in

77. 352 Hanrei Taimuzu 246 (Tokyo Dist. Ct., Dec. 21, 1976), 22 JAP. ANN. INT'L LAW 160 (1978) (English translation).

78. The author thanks Mr. Hiroto Kimura of the Tokyo firm of Nagashima & Ohno for this translation. See also 22 JAP. ANN. OF INT'L LAW 160, 164 (1978).

79. Mr. Fujita takes the view that ability of the population to read the language of the document should be the standard. Fujita, *supra* note 57, at 79.

80. See Fujita, *supra* note 57, at 74.

Japan's view, service by mail is not contemplated by article 10(a) of the Convention. There was no suggestion that the service was otherwise invalid under French law, so these seem to be the only two possible legal defects. The decision did not discuss the type of mail used—special delivery, return receipt, or registered—so this was presumably unimportant to the decision.

Again, the lesson seems clear. The safest procedure is to serve the summons and complaint, with translations, through Japan's Central Authority.

Subsection (3) of CCP 200 does not usually present difficulties because Japan does not embrace an expansive view of "public order and good morals." The subsection's ambit seems to be confined to family law cases and possibly punitive or treble damages;<sup>81</sup> tort and contract money judgments will ordinarily be enforced.

However, counsel should be aware of one Japanese case.<sup>82</sup> A Washington state plaintiff who had been injured by a punch press sued a number of defendants in Washington, including Marubeni-America, the importer of the machine. Marubeni-America then filed a third-party complaint for indemnity against Kansai Iron Works, the Japanese manufacturer. Kansai Iron Works responded with a counter suit *in Japan* asking for a declaratory judgment of nonliability against Marubeni-America. Marubeni-America appeared specially and challenged the Japanese court's jurisdiction, but the motion was denied.<sup>83</sup> The Washington action came to judgment first and Kansai Iron Works was ordered to pay \$85,000. Two weeks later the Japanese Court entered a default judgment against Marubeni-America in the Japanese action. No appeal was taken, and the Japanese default judgment became final. Several months later, Marubeni-America filed an enforcement action in Japan asking the

81. T. HATTORI & D. HENDERSON, *supra* note 17, at § 11.02[1] (1983); ADACHI, HENDERSON, MIYATAKE & FUJITA, *PRODUCT LIABILITY IN JAPAN, A MANUAL OF PRACTICE IN SELECTED NATIONS*, § 5.354 (1981). Even though it is commonly stated that Japan would not recognize a punitive or treble damage judgment (at least to the extent of non-compensatory portion), there is no case on point. Because § 1 of the Uniform Foreign Money-Judgments Recognition Act, 13 U.C.L.A. 419 (Master ed. 1980 & 1985 Supp.), which is currently adopted in 13 states, excludes judgments for "a fine or other penalty," Japan could refuse to enforce a similar judgment on the grounds of lack of reciprocity.

82. *Marubeni-America v. Kansai Iron Works*, 361 Hanrei Taimuzu 127 (Osaka Dist. Ct., Dec. 22, 1977). For discussions of the case, see Fujita, *supra* note 11; Fujita, *supra* note 57, at 71; T. HATTORI & D. HENDERSON, *supra* note 17, at § 11.02[1] n.229.

83. CCP art. 15 (1983) authorizes Japanese courts to take jurisdiction in a suit relating to tort in "the court of the place where the act was committed." Interpreting the place of the act to include both the place of injury and the place of manufacture would allow the court to take jurisdiction in Osaka.

courts to enforce the Washington judgment. The Japanese court refused to enforce the Washington judgment on the grounds that it would violate "public order" to enforce a foreign judgment in conflict with a final Japanese judgment.<sup>84</sup>

This case raises the possibility that Japan may interpret its jurisdictional rules broadly enough to permit Japanese defendants to file declaratory judgment counterclaims in Japan against foreign personal injury plaintiffs. CCP article 15, which combines the American concepts of venue and territorial jurisdiction, permits jurisdiction in tort cases at the place where the "act is committed." In the context of Marubeni-America's indemnity claim which arose from the contract of sale, the "act" could be construed as the manufacture and sale of the machine to Marubeni Corporation. Marubeni-America, the third-party plaintiff, is merely a subsidiary of Marubeni Corporation, which is a large Japanese trading company with approximately 190 offices around the world. In fact, Marubeni-America's indemnity claim was based on a contract between Kansai Iron Works and Marubeni Corporation, the Japanese parent of Marubeni-America.<sup>85</sup> The contract provided that the sale was "FOB Kobe."<sup>86</sup> It would not be surprising, then, for a Japanese court to consider the case to be essentially a conflict between two Japanese parties arising out of a Japanese contract. Although nothing in the *Marubeni-America* opinion suggests this limitation, it is an open question whether Japanese courts would extend jurisdiction to declaratory judgment actions against a purely American distributor of Japanese products.

Whatever the status of American distributors, CCP article 15 should not be construed so broadly as to force injured ultimate consumers to respond in Japan to a declaratory judgment suit filed by the manufacturers. One civil procedure expert believes that Japanese courts would not extend jurisdiction so far as to include personal injury,<sup>87</sup> but another expert suggests that they might.<sup>88</sup> Because of the expense of duplicate litigation, Japan does not make a practice of filing these countersuits in ordinary personal injury cases. Filing fees, which are based on a percentage of the claim, are one practical deterrent. Because the filing fee for a \$1,000,000 claim would proba-

84. Fujita, *supra* note 57, at 71.

85. Fujita, *supra* note 11, at 196.

86. *Id.*

87. Interview with Prof. Hiroshi Takahashi, University of Tokyo Faculty of Law (November 28, 1983).

88. Fujita, *supra* note 11, at 201.

bly exceed \$5,000, American plaintiffs should be generous in their ad damnum clauses. Courts charge a similar filing fee for enforcing an American judgment in Japan, but it is based on the actual judgment, not the original claim, and it is a taxable cost. Moreover, if the judgment has been partially satisfied or the defendant is not sufficiently solvent to respond to the entire amount, counsel may reduce this filing fee by seeking to enforce less than the adjudged amount.

The final subsection of CCP 200 provides a perennial bone of contention. When a plaintiff files an enforcement action in Japan, the Japanese defendant will usually put the plaintiff to his proof on the issue of "reciprocity." Until recently, Japanese courts interpreted reciprocity to mean that the rendering jurisdiction's recognition rules for foreign judgments must be "identical to or more liberal than" Japan's recognition rules.<sup>89</sup> Even though Japan will issue an execution judgment if the conditions of CCP 200 are satisfied, and Japan forbids inquiry into the "merits of the decision"<sup>90</sup> or the "propriety of the trial,"<sup>91</sup> it often proves difficult to show that the rendering jurisdiction's rules were equal to or more liberal than these liberal Japanese standards.

In 1983, however, the Japanese Supreme Court adopted a more liberal test for reciprocity.<sup>92</sup> The District of Columbia had rendered a judgment which the plaintiff sought to enforce in Japan. The defendant argued that there was insufficient reciprocity because the District of Columbia has ten conditions which must be met before it will recognize a foreign judgment,<sup>93</sup> while Japan lists only the four

89. The seminal case upholding the enforceability of a California judgment is *Witkosky & Co.*, 3670 Horitsu Shimbun 16 (Gr. Ct. Cass., Dec. 5, 1933). See Fujita, *supra* note 57, at 71-72.

90. CCP art. 515 (1983).

91. Japan Civil Execution Law § 24(2) (1983).

92. *Chung v. Burroughs Corp.*, Case No. (0) 826/1982 (Sup. Ct. Japan, June 7, 1983). A translation of the case can be found in Clayton, *Recent Supreme Court Decision Clarifying Conditions for Recognition of Foreign Judgments*, 10 YUASA & HARA JOURNAL 8 (1983). This journal is published for the clients of the Tokyo firm of Yuasa & Hara, New Ohtemachi Building, 2-1, Ohtemachi 2-chome, Chiyoda-ku, Tokyo 100, Japan.

93. The opinion of the Japanese Supreme Court did not list the 10 conditions, but the Tokyo District Court, relying on *Cherun v. Frishman*, 236 F. Supp. 292 (D.D.C. 1964), concluded that the District of Columbia required the following 10 conditions:

- 1) The foreign court which rendered the subject judgment had jurisdiction.
- 2) In the court proceeding, lawful notice to the Defendant was given, or the Defendant appeared voluntarily, etc., namely the Defendant was assured an adequate opportunity to defend.
- 3) The proceedings for the foreign judgment were confined by due process according to the rules admitted by civilized countries based upon formal allegation and proof.

conditions in CCP article 200. The Japanese Supreme Court rejected the defendant's "count-them-on-the-fingers" argument and held that reciprocity exists so long as the rendering jurisdiction's recognition rules are "not materially different from" or "are equivalent in essence to" those of Japan.<sup>94</sup> In the Court's view, to expect exact identity would be unrealistic and undesirable because it would lead to contradictory judgments and instability in the rapidly expanding arena of private international relations.

Apart from its specific approval of the District of Columbia's rules, it is difficult to know how much more liberal the new Japanese standard is. One rather vague clue is found in the court's reasoning. In revising the old standard, the Japanese Supreme Court reasoned that the "equal to or more liberal than" standard could result in a vicious circle if the foreign jurisdiction's standards were

- 4) The trial was conducted under a system of jurisprudence likely to secure an impartial administration of justice to a foreigner.
- 5) The foreign judgment is clearly and formally recorded.
- 6) There are no particular factors showing either prejudice in the judgment or fraud in procuring the judgment.
- 7) There are no particular factors showing that the foreign judgment should not be approved in light of the various principles of international law or the comity of nations.
- 8) The country in which the court that rendered the judgment respects the judgments of the courts of the District of Columbia on similar conditions, namely a mutual guarantee, is not lacking.
- 9) The foreign judgment is final, irrevocable, and conclusive under the laws of the country of the judgment.
- 10) The foreign judgment does not violate the public order or good morals of the District of Columbia.

*Chung v. Burroughs Corp.*, Case No. (0) 826/1982 (Sup. Ct. Japan, June 7, 1983), *translated in Ono & Pickard, Court Decision—A Case Demonstrating the Necessary Condition for Approval of a Foreign Judgment in Japan*, 9 YUASA & HARA JOURNAL 18 (1982).

It is doubtful whether the District of Columbia or federal courts in general still require condition (8) (reciprocity). *Tahan v. Hodgson*, 662 F.2d 862, 867-68 (D.C. Cir. 1981).

94. The Tokyo District Court found that items (2) through (7) in note 92 *supra*, did not impose conditions more onerous than in CCP art. 200(3) (1983). In order to satisfy the latter:

[I]t is a necessary condition that not only the content of judgment but also the procedure upon which the judgment is based does not violate the public order or good morals in Japan. Thereby in light of socially accepted ideas in Japan it is interpreted that a foreign judgment is required to be fair and just in terms of procedure and contents.

*Chung v. Burroughs Corp.*, Case No. (0) 826/1982 (Sup. Ct. Japan, June 7, 1983), *translated in Ono & Pickard, supra* note 93, at 20-21.

Although it could have been clearer, the Japanese Supreme Court seems to have endorsed the lower court's point of view. "[T]he provisions of Item 3 of article 200 require that not only the content but also the validity of the judgment of a foreign court not be contrary 'to public order and good morals' in Japan." *Chung v. Burroughs, translated in Ono & Pickard, supra* note 93, at 11.

more liberal than Japan's. If the foreign jurisdiction also required reciprocity, then it would refuse to enforce Japanese judgments in spite of its "liberal" recognition rules. Because it would not enforce Japanese judgments, Japan would respond by refusing to recognize the foreign jurisdiction's judgments. Thus, Japanese litigants would be deprived of the benefit of the foreign jurisdiction's liberal rules, and the foreign litigants would not be able to enforce judgments which otherwise qualified for enforcement under CCP article 200. Because this anomalous result is undesirable for both countries, the Japanese Supreme Court chose to break the circle by interpreting its reciprocity rule liberally enough to allow recognition of judgments from jurisdictions with a broad recognition rule. Rarely will another jurisdiction's recognition rules be more liberal than Japan's; therefore, the wheel of mutual nonrecognition should never be set in motion.

Still, because the outer limits of this new interpretation of reciprocity are unclear, counsel contemplating enforcement in Japan should consider, when possible, filing a case in a jurisdiction which has already received a Japanese court's approval.<sup>95</sup> This would greatly ease counsel's burden of proving this difficult aspect of local American law to a Japanese court. If a judgment is forwarded to a Japanese counterpart for enforcement proceedings, counsel should also include for Japanese counsel's benefit a brief on the recognition rules of the rendering jurisdiction.

#### IV. RECIPE FOR SERVICE OF AMERICAN PROCESS IN JAPAN

This section takes the novice step-by-step through the service of process on a Japanese defendant via the Central Authority of Japan. It is assumed that the defendant has not, or the plaintiff anticipates

95. In addition to the District of Columbia and California, Japanese precedents have enforced judgments from Hawaii and Switzerland. Japan refused to recognize a Belgian judgment because Belgium would have reexamined a Japanese judgment on the merits. See T. HATTORI & D. HENDERSON, *supra* note 17, at § 11.02[1]. Because Japan recognizes California judgments and California has adopted the Uniform Foreign Money Judgments Recognition Act, CAL. CIV. PROC. CODE §§ 1713-1713.8 (West 1982), it would be reasonably safe to conclude that judgments from the other states adopting the act (Alaska, Colorado, Illinois, Maryland, Massachusetts, Michigan, Missouri, New York, Oklahoma, Oregon, Texas, and Washington) would be recognized in Japan. 13 U.L.A. 343 (1985 Supp.). Moreover, because the District of Columbia's recognition rules are the same as the general federal rule, judgments of other federal courts on federal claims should also be recognized in Japan. A federal court sitting in diversity or, presumably, alienage jurisdiction would probably follow the recognition rules of the state in which it sits. *Tahan v. Hodgson*, 662 F.2d 862, 867-68 (D.C. Cir. 1981).



that the defendant will not, voluntarily accept process.<sup>96</sup>

### A. *Ingredients*

1. Name and address of the defendant. This should be correct, so it may be necessary to consult a Japanese counterpart to find or verify it.

2. Name and address of a Japanese translator familiar with legal terms. Choose this individual with care, for it would be extremely embarrassing if "general damages" were translated "the honorable leader of a destructive army."<sup>97</sup>

3. Summons (2 copies).

4. Complaint (2 copies)—Make it easy for the translator. Use a "short and plain statement of the claim showing that the pleader is entitled to relief."<sup>98</sup> Note that some jurisdictions, such as New York, do not require service of a complaint. Under these circumstances, neither does the Service Abroad Convention.<sup>99</sup>

5. Notice of the Amount of General and Special Damages sought to be Recovered (2 copies)—This document may be required in jurisdictions such as California which prohibit a statement of the amount of damages in personal injury complaints, yet still require this notice prior to taking a default.<sup>100</sup> Compare the New York prac-

96. The easiest way to find out is to use the notice and acknowledgement of receipt procedures available in the federal courts and in some state courts, including California. That method of service would be valid under the Convention because if service is compatible with the law of the state addressee, article 5 permits service by "delivery to an addressee who accepts it voluntarily." While that form of voluntary acceptance is not precisely paralleled in Japanese practice (voluntarily accepted process is usually called for at the court clerk's office), the American procedure is not "incompatible" with Japanese practice.

While case law supports this kind of voluntary acceptance, a careful reading of article 5 suggests that service may be effected through voluntary acceptance only if processed through the Central Authority. *See supra* note 15.

97. Japan did not declare that it required translations when it entered the Convention, but nevertheless, the practice is to require one. Manual, *supra* note 14, at 66; Interview with Mr. Shisei Kaku, First Secretary, and Mr. Kiyoharu Enoki (December 1, 1983) at the Ministry of Foreign Affairs, Tokyo, Japan.

98. *See* FED. R. CIV. PROC. 8(a).

99. New York requires only a summons and a notice of object of the action. N.Y. Civ. Prac. R. § 305 (b) (McKinney 1985). *Re v. Breezy Pt. Lumber Co.*, 118 Misc. 2d 206, 460 N.Y.2d 264 (Sup. Ct. 1983) (service of summons and notice sufficient under Service Abroad Convention).

100. *See, e.g.*, CAL. CIV. PROC. CODE §§ 425.10, 425.11 (West Supp. 1985) *Plotitsa v. Superior Court*, 140 Cal. App. 3d 755, 189 Cal. Rptr. 769 (1983). Because the "Summary of the Document to be Served" contains a blank for the amount claimed, it may not be necessary to also serve that notice. Because the summons and complaint must be translated anyway, it will be very simple to remove a potential bone of contention by also translating and serving that short document at the same time.

tice, which requires a similar notice in the event a complaint is not served with the summons.

Obtain the following documents from the United States Marshal's office:

6. Hague Convention Model Form, "Request for Service Abroad of Judicial or Extrajudicial Documents" (2 copies).
7. Hague Convention Model Form, "Certificate" (2 copies)—This Certificate may be on the back of the Request form.
8. Hague Convention Model Form, "Summary of the Document to be Served" (2 copies).

### B. *Preparation*

Thoroughly translate into Japanese items (3), (4) and, if applicable, (5), above. Translate everything, including the captions and proper names. If local court rules do not require the use of a specific summons form, re-type a form and eliminate extraneous material. Because the Roman alphabet is not officially recognized in Japan, the translator must use Katakana, one of the Japanese phonetic syllabaries, for proper names and words having no Japanese characters. The translations should be on sheets separate from the document translated. The translation need not be typed, so the translator may print it by hand. The translation need not be certified.<sup>101</sup>

Complete two copies of the "Request for Service Abroad of Judicial or Extrajudicial Documents" and two copies of the "Summary of the Document to be Served." These may be completed in English, there is no translation requirement. Japanese, however, is also permissible.

Under article 3 of the Convention, the documents must be forwarded by "the authority or judicial officer competent under the law of the State in which the documents originate."

The United States has represented to the Central Authorities of the contracting countries that the following persons have the capacity to present requests to a foreign Central Authority:

- a. all Federal and State courts;

101. In *Isothermics, Inc. v. United States Energy Research and Dev. Agency*, 434 F. Supp. 1155 (D.N.J. 1977), a Japanese defendant had been served by mail with an untranslated summons and complaint. The Defendant returned them with a request that he be served under the Service Abroad Convention with a certified translation of the summons and complaint. While the defendant's objection to mail service may have had merit, there is nothing in the Convention requiring certified translations, nor is it the practice of the Ministry of Foreign Affairs to require certification. Interview, *supra* note 97.

- b. all judges of Federal and State courts;
- c. all clerks of Federal and State courts;
- d. all U.S. Marshals serving with Federal courts;
- e. all sheriffs and other public officials of State courts duly authorized under State law to serve judicial documents;
- f. private attorneys representing litigants before State courts who are duly authorized under State law to serve judicial documents. If such is the case, the attorney is advised to indicate on the request for service that he is authorized under the law of state X to request service under the Convention.<sup>102</sup>

The applicant listed on the "Request for Service Abroad of Judicial or Extrajudicial Documents" should be one of the people on this list. Include his or her title; if the applicant is a private attorney in a state court, also include the above statement of authority to request service. The same person should sign and date the "Request." Note that a Japanese attorney does *not* qualify to forward the documents under article 3 because a Japanese attorney has no authority to serve process either in Japan or abroad.

Mail two copies of items 3, 4, and 5, 7 (in blank), and 8 and two copies of the translations of items 3, 4, and 5, and the signed and dated original and one copy of item 6 by first class overseas airmail directly to:

The Minister of Foreign Affairs  
2-2-1 Kasumigaseki, Chiyoda-ku  
Tokyo  
Japan

The Minister of Foreign Affairs is the "Central Authority" for Japan.

Unless a special form of service is requested, the Ministry charges no fees. The "Request" form serves as a cover letter; including any other cover letter serves no purpose and may result in confusion and delay.

### C. *Timing*

The Ministry of Foreign Affairs forwards the documents to the

102. Manual, *supra* note 14, at 89. Although private attorneys representing litigants before *federal* courts are not included in the list, it would seem that they are qualified by virtue of the last sentence in FED. R. CIV. PROC. 4(c)(2)(A) and 4(i) (1) ("On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service."). Still, to avoid a query by an overly punctilious foreign official, it is probably best to use the federal marshal in federal cases. This may require a court order under FED. R. CIV. PROC. 4(c)(B)(iii).

Japanese Supreme Court, which forwards the documents to the appropriate court clerk. The court clerk sees that the documents, including a copy of the "Summary of the Document to be Served," are served on the party named. The clerk usually uses the special form of mail service.<sup>103</sup> Based on the mail carrier's return of service, the clerk executes the "Certificate," which constitutes proof of service under the Convention. This certificate then goes to the Supreme Court, to the Ministry of Foreign Affairs, to the Japanese Consulate General in the United States, and then to the person listed as the applicant on the "Request."

This process takes from two to three months, and the Ministry of Foreign Affairs is not amenable to requests to expedite it. Such a request may result in further delay. The Ministry of Foreign Affairs has been known simply to return the documents and to advise that the Ministry could not serve the documents by the date requested.

#### V. CONCLUSION

Attempting service by mail is fraught with danger, especially if the documents are not translated. At best the practice clouds any default judgment in both jurisdictions, and at worst it may result in a reversal after plenary trial. If counsel follows the above recipe, the resulting judgment should satisfy the service requirements of both the United States and Japan. The resulting service should be good enough to secure the appearance of the defendant, or at least good enough to make him sorry that he stayed away.

103. See text accompanying notes 65-66.