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INTERNATIONAL LITIGATION IN TEXAS: SERVICE OF PROCESS AND JURISDICTION

by
R. Doak Bishop*

TEXAS rapidly is becoming a center for international trade as industry shifts to the sunbelt states, trade with Mexico increases, the commercial centers of Houston and Dallas grow increasingly important, and agricultural exports remain vital to the nation's balance of payments.¹ As international trade becomes more important to the state's economy, litigation involving our foreign commerce is certain to increase proportionately. Unfortunately, the Texas procedures for dealing with international litigation, which may differ significantly from those used in strictly domestic litigation, have not kept pace with commercial development. This Article considers those aspects of international litigation relating to the service of process abroad. Both Texas and federal rules and statutes for service of process in other countries are compared with the methods sanctioned by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.² The general requirements for obtaining in personam and in rem jurisdiction and the problems posed by the different methods of service also are discussed. Finally, alternatives for serving foreign persons and companies are considered.

I. OBTAINING IN PERSONAM JURISDICTION

Personal jurisdiction in American courts entered the modern era a few months after the end of World War II in 1945, with the United States Supreme Court's opinion in *International Shoe Co. v. Washington*.³ Throwing off the shackles imposed by *Pennoyer v. Neff*,⁴ the Supreme

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1. Carl, *Recognition of Texas Judgments in Courts of Foreign Nations—and Vice Versa*, 13 HOUS. L. REV. 680 (1976).

2. November 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163, reprinted in 8 MARTINDALE-HUBBELL LAW DIRECTORY 4617 (1982) [hereinafter cited as Convention].

3. 326 U.S. 310 (1945).

4. 95 U.S. 714 (1878). In *Pennoyer* the Supreme Court held that a party's presence within the territorial jurisdiction of a court was prerequisite to the rendition of a judgment personally binding upon him. *Id.* at 733.

Court held that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"⁵ The Court found that the defendant's contacts with the forum state were systematic and continuous and that service by registered mail to its home office and by delivery to its agent within the forum state was proper.⁶ "Minimum contacts" still remains the basic due process test for personal jurisdiction over nonresidents.

In 1957 in personam jurisdiction reached its high water mark with the Supreme Court's decision in *McGee v. International Life Insurance Co.*⁷ The defendant in that case had only one contact with the forum state, an insurance contract entered into by mail. In holding such limited contact sufficient to invoke jurisdiction, the Court noted the evolutionary expansion of state court jurisdiction as technological changes in transportation and communications had made the defense of a suit less burdensome.⁸ The Court also observed that California had enacted special legislation declaring its manifest interest in providing redress for citizens injured by insurance companies.⁹

One year later, the Court cautioned that state boundaries had not become irrelevant for personal jurisdiction.¹⁰ In *Hanson v. Denckla* the Court articulated what has become the primary limitation on the minimum contacts test of *International Shoe*:

[T]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.¹¹

The Court reiterated the restriction of *Hanson v. Denckla* in 1980 in *World-Wide Volkswagen Corp. v. Woodson*.¹² There the Supreme Court overturned an Oklahoma court's ruling that nonresident defendants with activities limited to certain northeastern states could be forced to defend a products liability suit in Oklahoma on a showing that it was foreseeable that the automobiles they sold could be used in Oklahoma.¹³ The Court stated that "the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such

5. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

6. 326 U.S. at 320.

7. 355 U.S. 220 (1957).

8. *Id.* at 222-23.

9. *Id.* at 221, 223.

10. *Hanson v. Denckla*, 357 U.S. 235, 251 (1958).

11. *Id.* at 253.

12. 444 U.S. 286 (1980).

13. *Id.* at 290-91.

that he should reasonably anticipate being haled into court there."¹⁴ The Court added that the due process clause ensures a degree of predictability as to where defendants may or may not be sued.¹⁵

Federal courts sitting in Texas have developed their own shorthand formulations of the limitations imposed by the due process clause. Before a federal court can exercise personal jurisdiction over a nonresident, the law of the state must confer jurisdiction, and the exercise of jurisdiction under state law must comport with due process requirements.¹⁶ In *Product Promotions, Inc. v. Cousteau*¹⁷ the Fifth Circuit restated the *International Shoe* holding as a two-part test: (1) the defendant must have minimum contacts with the forum state, and (2) it must be fair and reasonable to require the defendant to defend in the forum.¹⁸ This has become the principal test cited by federal courts sitting in Texas for determining the validity of an exercise of personal jurisdiction.¹⁹ A federal district court has enumerated five factors to be considered when determining the constitutionality of taking personal jurisdiction: (1) the nature of the business, (2) the quantity and character of activities in the forum, (3) whether the activities in the forum gave rise to the cause of action, (4) whether the forum has a special interest in granting relief, and (5) the relative convenience to the parties.²⁰

The exercise of personal jurisdiction over a defendant may have one of several bases. A general appearance obviously will subject a defendant to the court's jurisdiction,²¹ as will consent.²² Domicile,²³ residence,²⁴ and citizenship²⁵ are other jurisdiction-creating connections. These are usually considered "generally affiliating" contacts; they are so substantial that they

14. *Id.* at 297.

15. *Id.*

16. *See* *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 196 (5th Cir. 1980); *Walker v. Newgent*, 583 F.2d 163, 166 (5th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 489 (5th Cir. 1974); *Navarro v. Sedco, Inc.*, 449 F. Supp. 1355, 1357 (S.D. Tex. 1978); *Murdock v. Volvo of Am. Corp.*, 403 F. Supp. 55, 56-57 (N.D. Tex. 1975).

17. 495 F.2d 483 (5th Cir. 1974).

18. *Id.* at 494.

19. *See, e.g.*, *Jamesbury Corp. v. Kitamura Valve Mfg. Co.*, 484 F. Supp. 533, 536 (S.D. Tex. 1980); *Western Desert, Inc. v. Chase Resources Corp.*, 460 F. Supp. 63, 64 (N.D. Tex. 1978); *Navarro v. Sedco, Inc.*, 449 F. Supp. 1355, 1360-61 (S.D. Tex. 1978); *Reich v. Signal Oil & Gas Co.*, 409 F. Supp. 846, 849 (S.D. Tex. 1974), *aff'd mem.*, 530 F.2d 974 (5th Cir. 1976).

20. *Lone Star Motor Import, Inc. v. Citroen Cars Corp.*, 185 F. Supp. 48, 56 (S.D. Tex. 1960), *rev'd on other grounds*, 288 F.2d 69 (5th Cir. 1961); *Hearne v. Dow-Badische Chem. Co.*, 224 F. Supp. 90, 99 (S.D. Tex. 1963); *Pliler v. Asiatic Petroleum Co.*, 197 F. Supp. 212, 216 (S.D. Tex. 1961).

21. *Sugg v. Thornton*, 132 U.S. 524, 530 (1889); *Banco Minero v. Ross*, 106 Tex. 522, 526, 172 S.W. 711, 714 (1915); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 33 (1971) [hereinafter cited as RESTATEMENT (SECOND)].

22. *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1964); RESTATEMENT (SECOND), *supra* note 21, § 32.

23. *Milliken v. Meyer*, 311 U.S. 457, 462 (1940); RESTATEMENT (SECOND), *supra* note 21, § 29.

24. RESTATEMENT (SECOND), *supra* note 21, § 30.

25. U.S. CONST. amend. XIV, § 1; *Blackmer v. United States*, 284 U.S. 421, 437-38 (1932); RESTATEMENT (SECOND), *supra* note 21, § 31.

will support a finding of jurisdiction whether or not the cause of action is related to the defendant's contacts with the forum state.²⁶ By contrast, a "specifically affiliating" contact is one that will permit jurisdiction only over causes of action related to the defendant's contacts with the forum.²⁷ The dictum in *Shaffer v. Heitner*²⁸ that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe*" makes it doubtful whether a person subjects himself to the jurisdiction of a state's courts for all purposes merely by passing through the state.²⁹ If a defendant's trip to another state is related to the plaintiff's cause of action against him, however, service accomplished while he is in the state may be sufficient. Thus, presence, traditionally considered a generally affiliating ground for jurisdiction,³⁰ may now be only a specifically affiliating circumstance.

Other grounds for in personam jurisdiction include the specifically affiliating tests of doing business, committing acts, and causing consequences in the forum.³¹ While the relevant Texas statute³² defines doing business so broadly as to encompass committing acts and causing consequences as well,³³ this is not the standard definition of the phrase.³⁴ Doing business may be a generally affiliating basis of jurisdiction if the defendant's business interests in the forum are sufficiently substantial and continuous,³⁵ or continuous and systematic.³⁶ Causing consequences in the forum (*e.g.*, by

26. Weintraub, *Jurisdiction Over the Person and Service of Process*, in 1 STATE BAR OF TEXAS, ADVANCED CIVIL TRIAL COURSE H-7 (1980).

27. *Id.* at H-8.

28. 433 U.S. 186, 212 (1977).

29. Weintraub, *supra* note 26, at H-8.

30. RESTATEMENT (SECOND), *supra* note 21, § 28.

31. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 103, 109 (1971).

32. TEX. REV. CIV. STAT. ANN. art. 2031b, § 4 (Vernon Supp. 1980-1981). Section 4 defines "doing business" as follows:

For the purpose of this Act, and without including other acts that may constitute doing business, any foreign corporation, joint stock company, association, partnership, or non-resident natural person shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State. The act of recruiting Texas residents, directly or through an intermediary located in Texas, for employment inside or outside of Texas shall be deemed doing business in this State.

Id.

33. Weintraub, *supra* note 26, at H-10.

34. See RESTATEMENT (SECOND), *supra* note 21, § 35, Comment a. Section 35 provides that doing business is "doing a series of similar acts for the purpose of thereby realizing pecuniary benefit, or otherwise accomplishing an object, or doing a single act for such purpose with the intention of thereby initiating a series of such acts." *Id.*

35. *Jamesbury Corp. v. Kitamura Valve Mfg. Co.*, 484 F. Supp. 533, 537 (S.D. Tex. 1980); *Navarro v. Sedco, Inc.*, 449 F. Supp. 1355, 1362 (S.D. Tex. 1978).

36. *Docutel Corp. v. S.A. Matra*, 464 F. Supp. 1209, 1220 (N.D. Tex. 1979). These tests are based on the Supreme Court's holding in *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952) (continuous and systematic activities such as holding of directors' meetings, banking, corporate correspondence, payment of salaries, and purchase of equipment sufficient to make subjection of corporation to in personam jurisdiction "fair and reasonable"). In *Perkins* the corporation owned mines located in the Philippine Islands, but conducted business temporarily in Ohio because of the Japanese occupation of those islands

placing into the stream of commerce products that cause harm, when the defendant knows or should know that they will be sold or resold in the forum state) should support jurisdiction when the plaintiff's cause of action is connected with the product.³⁷ The same is true of a defendant's breach of contract when the contract required performance in the forum state.³⁸ In both situations it is foreseeable that the defendant's actions may cause harm in the forum; furthermore, because the defendant has sought to serve the forum's market in some way, it is also foreseeable that he might be brought to justice there.³⁹

In construing due process limitations in conjunction with an Illinois long-arm statute similar to that of Texas, the Texas Supreme Court adopted the following formulation of requirements for personal jurisdiction:

- (1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state;
- (2) the cause of action must arise from, or be connected with, such act or transaction; and
- (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.⁴⁰

In later cases, Texas courts have used this test in construing the Texas long-arm statute.⁴¹ State and constitutional rules for in personam jurisdiction have been held to apply to service under the Hague Convention as well.⁴²

II. THE HAGUE CONVENTION

The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters was completed in 1965. Twenty nations are presently parties to the treaty.⁴³ Application of the

during World War II. Because of its unusual facts, the holding in that case that "doing business" is a generally affiliating basis of jurisdiction may be questionable. R. WEINTRAUB, *supra* note 31, at 108.

37. See *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 200 (5th Cir. 1980).

38. See, e.g., *Docutel Corp. v. S.A. Matra*, 464 F. Supp. 1209, 1215 (N.D. Tex. 1979).

39. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

40. *O'Brien v. Lanpar Co.*, 399 S.W.2d 340, 342 (Tex. 1966) (quoting *Tyee Constr. Co. v. Dulien Steel Prods., Inc.*, 62 Wash. 2d 106, 381 P.2d 245, 251 (1963)).

41. See, e.g., *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760, 762 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978); *Wright Waterproofing Co. v. Applied Polymers*, 602 S.W.2d 67, 71 (Tex. Civ. App.—Dallas), *writ ref'd n.r.e. per curiam*, 608 S.W.2d 164 (Tex. 1980); *Sherman Gin Co. v. Planters Gin Co.*, 599 S.W.2d 348, 350 (Tex. Civ. App.—Texarkana 1980, *writ ref'd n.r.e.*).

42. *Martin Motor Sales, Inc. v. Saab-Scania of Am., Inc.*, 397 F. Supp. 389, 390 (S.D.N.Y. 1974).

43. The countries that currently are parties to the Convention are Barbados, Belgium, Botswana, Denmark, Egypt, Federal Republic of Germany, Finland, France, Israel, Japan, Luxembourg, Malawi, the Netherlands, Norway, Portugal, Seychelles, Sweden, Turkey, the

Hague Convention is limited by its terms to civil and commercial cases.⁴⁴ This clearly excludes criminal matters, and probably also eliminates tax and administrative cases.⁴⁵ The Convention requires each contracting party to designate a central authority to receive and process requests for service within its territory from other contracting nations.⁴⁶ The central authority receiving the request serves the document itself or arranges to have it served by an appropriate agency.⁴⁷ The use of a central authority is not mandatory, but its services are always available.⁴⁸

Article 5 lists the principal methods of service sanctioned by the Convention. These procedures are available only when the documents are transmitted through the central authority. The central authority may serve the document by any method allowed by its domestic law⁴⁹ or by any particular method requested by the applicant, unless such an alternative method is incompatible with local law.⁵⁰ Normally the central authority will be requested to make personal service upon the defendant, which is unlikely to be incompatible with its own law.⁵¹ Mere inconvenience is not a ground for refusing to make service in the manner requested.⁵² No charge is made for the services of the central authority,⁵³ but the applicant usually will be required to pay the costs of the process server.⁵⁴ The central authority can require that the documents to be served be written in, or be translated into, the official language of its country,⁵⁵ but the standard terms on the model form always must be written in either French or English and also may be written in the language of the originating country.⁵⁶ The blanks on the form next to the standard terms may be completed either in French, English, or the language of the nation addressed.⁵⁷

Another method of service expressly permitted by article 5 is *remise simple*, the delivery of a document to a person who accepts it voluntarily. This procedure can be used only when it is not incompatible with the law of the nation where service is made;⁵⁸ it is used frequently in Western Europe.⁵⁹ Generally, the central authority merely transmits the documents to

United Kingdom, and the United States. 8 MARTINDALE-HUBBELL LAW DIRECTORY 4619 (1982).

44. Convention, *supra* note 2, art. 1.

45. Horlick, *A Practical Guide to Service of United States Process Abroad*, 14 INT'L LAW. 637, 646-47 (1980).

46. Convention, *supra* note 2, art. 2.

47. *Id.* art. 5.

48. Amram, *The Proposed International Convention on the Service of Documents Abroad*,

51 A.B.A.J. 650, 653 (1965).

49. *Id.* art. 5(a).

50. *Id.* art. 5(b).

51. Horlick, *supra* note 45, at 648-49.

52. *Id.* at 649.

53. Convention, *supra* note 2, art. 12; *see* Amram, *supra* note 48, at 653.

54. *See* Amram, *supra* note 48, at 653; Horlock, *supra* note 45, at 648.

55. Convention, *supra* note 2, art. 5.

56. *Id.* art. 7; *see id.* Annex to the Convention (model form titled *Request for Service Abroad of Judicial or Extrajudicial Documents*).

57. *Id.* art. 7; *see* Amram, *supra* note 48, at 653.

58. Convention, *supra* note 2, art. 5.

59. Horlick, *supra* note 45, at 649.

a local police station, which calls the person to be served and asks him to pick them up.⁶⁰ The defendant usually obliges.⁶¹

Other methods of service are permitted by the Convention, but only if the nation in which the process is to be served does not object. Service may be made directly through diplomatic or consular officials on nationals of either the nation of destination or of a third nation,⁶² through the mail,⁶³ or directly through judicial officials or other competent persons of either nation.⁶⁴ Many contracting nations have filed reservations, however, objecting to some or all of these procedures.⁶⁵ Service can be made directly through diplomatic or consular officials on nationals of the country of origin over the objection of the nation of destination.⁶⁶ American consular officials generally are not permitted to serve process in other countries in private actions,⁶⁷ with the notable exception of service upon foreign governments under the Foreign Sovereign Immunities Act.⁶⁸

To obtain service under the Convention, the applicant must send duplicate copies of the document to be served, a model form request,⁶⁹ and a model form summary of the document to be served.⁷⁰ The request need not be legalized or authenticated formally before transmission to the central authority.⁷¹ A request for service under the Convention can be made only by someone authorized to serve process under the law of the jurisdiction where the case is pending.⁷² In federal courts this individual is the U.S. Marshal; in Texas it is usually a sheriff or constable. In some cases, however, any disinterested person may serve process; therefore, if the court appoints someone to carry out this task, the person appointed should state

60. *Id.*

61. *Id.*

62. Convention, *supra* note 2, art. 8. Documents may also be forwarded through consular channels to the officials of the state where service is to be made. *Id.* art. 9.

63. *Id.* art. 10(a).

64. *Id.* art. 10(b)-(c).

65. For example, Egypt, Norway, and Turkey do not permit service by mail within their territories; Belgium, Egypt, France, Luxembourg, and Norway will not allow diplomatic or consular officials to serve process directly within their countries; Botswana, Denmark, Egypt, Finland, Japan, Norway, Sweden, and Turkey object to direct service through judicial officials or appointed persons of either the country of origin or the country of destination. 8 MARTINDALE-HUBBELL LAW DIRECTORY 4619-24 (1982).

66. Convention, *supra* note 2, art. 8.

67. 22 C.F.R. §§ 92.85, .92 (1981). Consular and diplomatic officials are allowed to serve documents abroad, however, if express permission is granted by the State Department. *Id.* § 92.85. Such permission usually is given only for serving court-ordered subpoenas (*id.* § 92.86), "show cause" orders in contempt proceedings (*id.* § 92.87), and documents concerning proceedings to revoke naturalization certificates (*id.* § 92.90). See Department of Justice Memo No. 386, at 18 (July 1979). Nevertheless, permission may be granted in exceptional circumstances when all other methods have been tried and have failed, provided that the foreign law does not prohibit this means of service.

68. 28 U.S.C. § 1608(a)(4) (1976); 22 C.F.R. § 93.1 (1981); Department of State Memorandum on Judicial Assistance Under the Foreign Sovereign Immunities Act and Service of Process Upon a Foreign State (May 10, 1979), reprinted in 18 INT'L LEGAL MATERIALS 1177 (1979).

69. Convention, *supra* note 2, art. 3.

70. *Id.* art. 5.

71. *Id.* art. 3.

72. *Id.*

in the request that he is authorized under Texas law and United States practice to request the service.⁷³

The documents to be served should be sent by the American process server directly to the foreign central authority by international air mail.⁷⁴ No payment need accompany the request, and no transmittal letter or other formality is required.⁷⁵ The country to which a request is sent can refuse to serve the process only if it considers that the request does not comply with the terms of the Convention,⁷⁶ or that compliance would infringe its sovereignty or security.⁷⁷ It cannot refuse to comply solely because it claims exclusive jurisdiction over the subject matter of the suit or because its domestic law would not permit the action.⁷⁸ If the central authority refuses to execute a request because it does not conform to the treaty's specifications, it is required to inform the applicant promptly and to specify its objections.⁷⁹

III. TEXAS STATUTES AND RULES ON SERVICE ABROAD

Any analysis of the patchwork Texas statutory scheme for achieving service of process upon nonresidents, including those residing in foreign countries, must begin with article 2031b.⁸⁰ This provision generally is regarded as *the* long-arm statute in Texas, but it is actually only one of several long-arm statutes and rules in the state.⁸¹ Others that will be considered are article 2039a⁸² and rule 108 of the Texas Rules of Civil Procedure.⁸³ Rule 109,⁸⁴ while not a long-arm provision as such, also affords a means of service upon foreign residents in certain situations.

A. Article 2031b

Article 2031b was adopted in Texas in 1959 in the wake of the United States Supreme Court's opinions in *International Shoe Co. v. Washing-*

73. Horlick, *supra* note 45, at 651 n.47. The person making the request should state explicitly on the model form request: "Authorized to serve judicial process under Section 00 of the XYZ Code of Civil Procedure." Department of Justice Memo No. 386, at 14 n.11 (July 1979).

74. Department of Justice Memo No. 386, at 16 (July 1979). For a list of the names and addresses of the various central authorities, see *id.* Appendix D.

75. *Id.* at 16.

76. Convention, *supra* note 2, art. 4.

77. *Id.* art. 13.

78. *Id.* These claims arise most frequently out of American antitrust suits and maritime proceedings. See Maechling, *Uncle Sam's Long Arm*, 63 A.B.A.J. 372, 376 (1977).

79. Convention, *supra* note 2, art. 4.

80. TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964 & Supp. 1980-1981).

81. A discussion of all the Texas long-arm statutes is beyond the scope of this Article. Other such statutes include: TEX. BUS. CORP. ACT ANN. art. 8.10 (Vernon 1980) (foreign corporations); TEX. FAM. CODE ANN. §§ 3.26, 11.051 (Vernon Supp. 1980-1981) (suits involving divorce, annulment, and parent-child relationship); TEX. REV. CIV. STAT. ANN. arts. 2033a, 2033b, 2033c (Vernon 1964) (suits against nonresident public utilities).

82. TEX. REV. CIV. STAT. ANN. art. 2039a (Vernon 1964).

83. TEX. R. CIV. P. 108.

84. *Id.* 109.

ton,⁸⁵ *Perkins v. Benguet Consolidated Mining Co.*,⁸⁶ *McGee v. International Life Insurance Co.*,⁸⁷ and *Hanson v. Denckla*.⁸⁸ The courts have held consistently that the purpose of article 2031b was to extend the reach of Texas jurisdiction to the limits of due process.⁸⁹ The statute provides that any nonresident company or person that engages in business in Texas will be subject to the process of Texas courts by substituted service upon the Texas Secretary of State.⁹⁰ The doing business requirement is defined in three specific ways: (1) entering into a contract, by mail or otherwise, with a resident of Texas, that is to be performed in whole or in part by either party in Texas; (2) committing a tort in whole or in part in the state; or (3) recruiting Texas residents, directly or indirectly, for employment at any location.⁹¹ The reach of the statute is not limited to contacts based on contracts, torts, and recruitment; it also includes a catch-all provision encompassing "other acts that may constitute doing business."⁹² The scope of this catch-all provision, however, is restricted to cases in which the cause of action arises out of business done within the state.⁹³

Recent Texas decisions have greatly expanded the doing business test of article 2031b. In *U-Anchor Advertising, Inc. v. Burt* the Texas Supreme Court stated that in interpreting the statute Texas courts should "focus on the constitutional limitations of due process rather than . . . engage in technical and abstruse attempts to consistently define 'doing business.'"⁹⁴ This attempt to obliterate the test will not be entirely effective, however, as long as the "doing business" language remains part of the statute.⁹⁵

To uphold service under article 2031b, the necessary requisites to its invocation must be pleaded.⁹⁶ Thus, the plaintiff must allege specifically that the defendant does not maintain either a place of regular business or a

85. 326 U.S. 310 (1945).

86. 342 U.S. 437 (1952).

87. 355 U.S. 220 (1957).

88. 357 U.S. 235 (1958).

89. *Walker v. Newgent*, 583 F.2d 163, 167 (5th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 491 (5th Cir. 1974); *Lone Star Motor Import, Inc. v. Citroen Cars Corp.*, 288 F.2d 69, 72-73 (5th Cir. 1961); *Jamesbury Corp. v. Kitamura Valve Mfg. Co.*, 484 F. Supp. 533, 536 (S.D. Tex. 1980); *Docutel Corp. v. S.A. Matra*, 464 F. Supp. 1209, 1217 (N.D. Tex. 1979); *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760, 762 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978).

90. TEX. REV. CIV. STAT. ANN. art. 2031b, § 3 (Vernon 1964).

91. *Id.* § 4 (Vernon Supp. 1980-1981).

92. *Id.* Professor Thode demonstrates the ambiguity of the phrase and its possible interpretation as a restriction in Thode, *In Personam Jurisdiction; Article 2031B, The Texas "Long Arm" Jurisdiction Statute; and the Appearance to Challenge Jurisdiction in Texas and Elsewhere*, 42 TEXAS L. REV. 279, 307-08 (1964). See also *Walker v. Newgent*, 583 F.2d 163, 166-67 (5th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979); *Gutierrez v. Raymond Int'l, Inc.*, 484 F. Supp. 241, 247 (S.D. Tex. 1979). Such a reading, however, would be inconsistent with the purpose of the statute.

93. TEX. REV. CIV. STAT. ANN. art. 2031b, § 3 (Vernon 1964).

94. 553 S.W.2d 760, 762 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978).

95. See *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1267 (5th Cir. 1981); Weintraub, *supra* note 26, at H-7 to -8, -12; Comment, *Long-Arm Jurisdiction: Rule 108 as an Alternative to "Doing Business" Under Article 2031b*, 30 BAYLOR L. REV. 99, 110 (1978).

96. *McKanna v. Edgar*, 388 S.W.2d 927, 930 (Tex. 1965); *Roberts Corp. v. Austin Co.*, 487 S.W.2d 165, 166 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.).

designated agent upon whom service may be made in Texas.⁹⁷ Without this allegation, the exercise of jurisdiction over a nonresident defendant cannot be sustained under the statute.⁹⁸ To uphold a default judgment, or to withstand a challenge to service under the statute, the proof must establish that service was made upon the Texas Secretary of State and that the secretary actually forwarded a copy of the process to the defendant by registered mail, return receipt requested.⁹⁹ This can be shown by offering into evidence the secretary of state's certificate reciting that service was received and forwarded to the defendant.¹⁰⁰

Few Texas cases have construed article 2031b as it applies to defendants in foreign countries. In *Helicopteros Nacionales de Colombia, S.A. v. Hall*¹⁰¹ a Texas court was faced with four wrongful death actions arising from a helicopter crash in Peru. The defendant was a South American corporation with its residence in Colombia, and the four decedents were residents of Oklahoma, Illinois, Arizona, and South America. The court discussed both due process requisites and the doing business requirement of article 2031b and concluded that the defendant was not amenable to the jurisdiction of the Texas court.¹⁰² Finding no tort committed by the defendant in whole or in part in Texas, the court turned to the contract question. The defendant had contracted with a joint venture to provide helicopter transportation service in connection with the joint venture's construction of a pipeline in Peru. All parties had agreed that Lima, Peru, was the locus of the contract and that they would submit to Peruvian jurisdiction. Payments were made from the joint venture's bank in Texas to the defendant's offices outside the state. The court determined that the contract provision requiring payment from the main office of the joint venture had no significant bearing on the contractual relations of the parties, even if that main office was determined to be in Houston.¹⁰³

One other Texas case involves service of process on a party in another country under article 2031b;¹⁰⁴ however, the opinion adds little to the analysis of the statute. The court in *Smith v. Reynolds* focused upon the failure of the defendant, a resident of Mexico, to prove by sufficient evi-

97. *McKanna v. Edgar*, 388 S.W.2d 927, 929 (Tex. 1965). TEX. REV. CIV. STAT. ANN. art. 2031b, § 3 (Vernon 1964) provides that a foreign corporation doing business in Texas, but which does not maintain a regular place of business or a designated agent in the state, is deemed to have appointed the Secretary of State of Texas as an agent upon whom service of process may be made. In *McKanna* the Texas Supreme Court held that if a corporation maintains a regular place of business in Texas, substituted service under § 3 is improper. 388 S.W.2d at 929-30.

98. *Woodcock, Cummings, Taylor & French, Inc. v. Crosswell*, 468 S.W.2d 864, 866 (Tex. Civ. App.—Houston [1st Dist.] 1971, no writ); *Harris v. Hayles*, 433 S.W.2d 250, 252 (Tex. Civ. App.—Texarkana 1968, no writ).

99. *Prine v. American Hydrocarbons, Inc.*, 519 S.W.2d 520, 522 (Tex. Civ. App.—Austin 1975, no writ); TEX. REV. CIV. STAT. ANN. art. 2031b, § 5 (Vernon 1964) (providing that secretary of state shall mail a duplicate of service of process to nonresident defendant).

100. *Whitney v. L&L Realty Corp.*, 500 S.W.2d 94, 96 (Tex. 1973).

101. 616 S.W.2d 247 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ granted).

102. *Id.* at 251-52.

103. *Id.* at 251.

104. *Smith v. Reynolds*, 533 S.W.2d 861 (Tex. Civ. App.—San Antonio 1976, no writ).

dence that he was not amenable to service from a Texas court. The decision thus fails to enhance interpretation of the statute.

Federal courts, noting the provisions of article 2031b, have held that a defendant is not necessarily subject to the state's jurisdiction merely because it is party to a contract performable in whole or in part in Texas; the contract must form the basis of the plaintiff's cause of action.¹⁰⁵ Another court has held that the place where the contract was made does not determine jurisdiction; rather, the place of performance is critical under Texas law.¹⁰⁶ In *Product Promotions, Inc. v. Cousteau* the Fifth Circuit held that defendant CEMA was doing business in Texas within the meaning of the statute because it entered into a contract performable in part in the state by delivering certain reports and films made in France to plaintiff's office in Dallas.¹⁰⁷ In *Docutel Corp. v. S.A. Matra* the court held that even though the contract was made in France, it was performable almost wholly in Texas, where the plaintiff manufactured the prototype of a specially adapted automated teller.¹⁰⁸

Another decision has indicated that making numerous purchases of goods and services from Texas companies constitutes doing business in Texas,¹⁰⁹ as does sending payments into Texas on a contract negotiated at least partly in the state.¹¹⁰ Jurisdiction of a tort claim has been held proper when connected with a contract claim over which jurisdiction was shown; although no tort claim arising in Texas was proved, the court reasoned that article 2031b extends as far as due process allows.¹¹¹ Another court has indicated that a contractual contact with the forum state may be insufficient to support jurisdiction over a tort claim,¹¹² but the Fifth Circuit recently rejected this view.¹¹³ For jurisdictional purposes, a plaintiff need not prove the scope of the contract relied upon;¹¹⁴ its burden is merely to make a prima facie showing of the facts on which jurisdiction is based, not a prima facie demonstration of a cause of action.¹¹⁵ Some federal courts have held that the plaintiff's cause of action need not arise directly out of

105. *Walker v. Newgent*, 583 F.2d 163, 166 (5th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 491 (5th Cir. 1974); *Reich v. Signal Oil & Gas Co.*, 409 F. Supp. 846, 852 (S.D. Tex. 1974), *aff'd mem.*, 530 F.2d 974 (5th Cir. 1976). *See also* *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 616 S.W.2d 247 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ granted).

106. *Jamesbury Corp. v. Kitamura Valve Mfg. Co.*, 484 F. Supp. 533, 535 (S.D. Tex. 1980).

107. 495 F.2d 483, 492 (5th Cir. 1974).

108. 464 F. Supp. 1209, 1214-15 (N.D. Tex. 1979). *But see* *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760, 762 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978). The cases can be reconciled because Matra was not merely a passive customer of Docutel; in fact, Matra sent employees to Dallas and conducted part of the negotiations there.

109. *Navarro v. Sedco, Inc.*, 449 F. Supp. 1355, 1359 (S.D. Tex. 1978).

110. *Western Desert, Inc. v. Chase Resources Corp.*, 460 F. Supp. 63, 66-67 (N.D. Tex. 1978).

111. *Docutel Corp. v. S.A. Matra*, 464 F. Supp. 1209, 1217 (N.D. Tex. 1979).

112. *Reich v. Signal Oil & Gas Co.*, 409 F. Supp. 846, 849-50 (S.D. Tex. 1974), *aff'd mem.*, 530 F.2d 974 (5th Cir. 1976).

113. *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1270 (5th Cir. 1981).

114. *Docutel Corp. v. S.A. Matra*, 464 F. Supp. 1209, 1215 n.2 (N.D. Tex. 1979).

115. *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 490-91 (5th Cir. 1974).

the defendant's contacts with Texas, even though article 2031b imposes this requirement.¹¹⁶

Notwithstanding the Texas Supreme Court's declaration that courts should focus on due process limits rather than upon a technical construction of the law's wording, the most significant problem with article 2031b is its restrictive language. By its express terms, the statute awards jurisdiction to Texas courts over only those nonresidents that may be considered to be doing business in the state. Moreover, the plaintiff's cause of action must arise out of the business done in the state by the defendant. While the purpose of the statute is to provide Texas courts with jurisdiction over nonresidents to the extent allowed by due process, this cannot be achieved completely within the limits of the doing business test, even when defined as broadly as in the Texas statute. As long as this phrase remains the only statutory basis of jurisdiction expressly authorized, it will lead to further confusion of the due process requirements as they relate to this test.¹¹⁷

Another problem besetting the statute, at least in international cases, is that it provides for substituted service followed by mailing the papers to the nonresident. Some countries do not recognize substituted service;¹¹⁸ even more consider service by mail within their countries to be a violation of their territorial sovereignty and have lodged protests over this practice with the United States Department of State.¹¹⁹ If the method of service violates the law of the land where service is to be made (or simply is not recognized by the foreign country as valid service) and the defendant's assets are located there (as often will be the case), any judgment issued by a Texas court based upon this service is unlikely to be recognized or enforced by the courts of that country.¹²⁰

B. Article 2039a

Article 2039a¹²¹ is the Texas nonresident motorist's statute, adopted in 1929 following the United States Supreme Court decision in *Hess v. Pawlowski*.¹²² Before the adoption of article 2031b, the nonresident motorist's law was the most important long-arm statute in Texas. The gist of this law is that any nonresident who avails himself of the rights, privileges, and benefits of operating a motor vehicle in Texas is deemed to have appointed the chairman of the Texas Highway Commission as his agent for service of process in any civil action in Texas arising out of a motor vehicle accident

116. *Jamesbury Corp. v. Kitamura Valve Mfg. Co.*, 484 F. Supp. 533, 536-37 n.3 (S.D. Tex. 1980); *Docutel Corp. v. S.A. Matra*, 464 F. Supp. 1209, 1219-20 (N.D. Tex. 1979).

117. *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1267 (5th Cir. 1981).

118. See Brenscheidt, *The Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany*, 11 INT'L LAW. 261, 266 (1977).

119. Horlick, *supra* note 45, at 641.

120. Brenscheidt, *supra* note 118, at 265-66; Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 537 (1953).

121. TEX. REV. CIV. STAT. ANN. art. 2039a (Vernon 1964).

122. 274 U.S. 352, 356-57 (1927) (rejecting due process challenge of motorist's long-arm statute).

in the state.¹²³ In order to invoke the statute, the plaintiff must allege the nonresident status of the defendant and the occurrence of the accident within the state.¹²⁴ Proof of service for upholding a default judgment should include evidence—usually a certificate from the chairman of the Texas Highway Commission—showing that service was made upon the chairman and forwarded by the commission to the defendant by registered mail, postage prepaid, or by notice served upon the defendant personally by any disinterested person.¹²⁵ Article 2039a, when used with nonresidents of the United States, is subject to problems similar to those involved with article 2031b because of its provision for substituted service and mailing of process to the defendant.¹²⁶

In *Rushing v. Bush*,¹²⁷ the only reported Texas case applying article 2039a to a citizen of another country, the Dallas court of civil appeals held that the term “nonresident” is sufficiently broad to include a corporation organized under the laws of a foreign country, in this case Mexico.¹²⁸ The court found in personam jurisdiction over the Mexican corporation based upon a traffic accident in Dallas allegedly caused by the negligence of its agent.¹²⁹ The court also upheld service upon the chairman of the Texas Highway Commission, because the record showed both service upon the chairman and the forwarding of a copy of the process to the defendant in Mexico.¹³⁰

C. Rule 108

Rule 108 of the Texas Rules of Civil Procedure provides that notice may be served upon a nonresident by any disinterested person who is competent to make an affidavit attesting to the service.¹³¹ Service upon a nonresident may be made in the same manner as permitted for residents under rule 106.¹³² These methods are: (1) delivery to the defendant in person, or (2) mailing the process to the defendant by registered or certified mail, with delivery restricted to the addressee only, return receipt requested.¹³³ When either of these methods has been tried and has failed, and an affidavit of such is filed showing the location of the defendant’s usual place of business or abode, service may be made upon court order: (1) by leaving copies of the citation and petition at the usual place of business of the party to be served or with anyone over sixteen years of age at the party’s

123. TEX. REV. CIV. STAT. ANN. art. 2039a, § 1 (Vernon 1964).

124. *Gianelle v. Morgan*, 514 S.W.2d 133, 134 (Tex. Civ. App.—Texarkana 1974, no writ).

125. TEX. REV. CIV. STAT. ANN. art. 2039a, § 2 (Vernon 1964); see *Rushing v. Bush*, 260 S.W.2d 900, 903 (Tex. Civ. App.—Dallas 1953, writ dismissed).

126. See text accompanying notes 118-20 *supra*.

127. 260 S.W.2d 900 (Tex. Civ. App.—Dallas 1953, writ dismissed).

128. *Id.* at 905.

129. *Id.* at 901-02.

130. *Id.* at 903.

131. TEX. R. CIV. P. 108.

132. *Id.* 106.

133. *Id.* 106(a)-(b).

usual place of abode; or (2) in any other manner that the evidence before the court indicates will be reasonably effective to give the defendant notice of the suit.¹³⁴

The last sentence of rule 108 provides:

A defendant served with . . . notice shall be required to appear and answer in the same manner and time and under the same penalties as if he had been personally served with a citation within this State *to the full extent that he may be required to appear and answer under the Constitution of the United States in an action either in rem or in personam*.¹³⁵

This sentence has been interpreted as converting the rule on nonresident service into a long-arm provision.¹³⁶ Its purpose is to expand the scope of the rule to the limits allowed by the due process clause.¹³⁷ Unlike the Texas long-arm statutes, rule 108 does not permit substituted service, but concerns itself instead with the means of obtaining personal service upon the nonresident. When personal delivery can be made, rule 108 provides an alternate route for service.¹³⁸ Moreover, use of rule 108 may avoid the requirement under article 2031b that the defendant be doing business in the state.¹³⁹ Any contacts that the defendant has with Texas that are adequate to satisfy due process requirements will be sufficient to obtain either in personam or in rem jurisdiction under rule 108.¹⁴⁰ The plaintiff still must show that the defendant's contacts with the state satisfy due process requisites, but it need not allege the formal requirements of article 2031b.¹⁴¹ In a proper case, personal service can be made under this rule on a foreign merchant vessel in Texas waters.¹⁴²

In *Dosamantes v. Dosamantes*¹⁴³ service was made on the defendant in Mexico by pushing the papers under the door of his home. The court held that this action was improper because the court never ordered this manner of substituted service.¹⁴⁴ While the trial court certainly could have authorized service in this manner, it was never requested to do so. Moreover, an attempted personal service upon the defendant followed by his refusal to

134. *Id.* 106(c)-(d), (f).

135. *Id.* 108 (emphasis added). The italicized clauses were added by order of the Texas Supreme Court in 1975. Supreme Court of Texas, *Civil Procedure Rules Amended*, 38 TEX. B.J. 823, 824 (1975).

136. Comment, *supra* note 95, at 109; Comment, *Forum Non Conveniens: The Need for Legislation in Texas*, 54 TEXAS L. REV. 737 (1976). Although one commentator noted that the pre-amendment language of rule 108 seemed to make it a long-arm provision, it was not interpreted as such by the courts. Thode, *supra* note 92, at 304-05 n.165. See generally *Roumel v. Drill Well Oil Co.*, 270 F.2d 550, 554 (5th Cir. 1959). Accordingly, what has changed is primarily the supreme court's construction of the rule.

137. Supreme Court of Texas, *supra* note 135, at 824; see *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760, 762 n.1 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978).

138. Comment, *supra* note 95, at 109.

139. *Id.* at 110.

140. *Id.* at 103-04.

141. *Id.* at 110-12.

142. TEX. ATT'Y GEN. OP. NO. M-285 (1968).

143. 500 S.W.2d 233 (Tex. Civ. App.—Texarkana 1973, writ *dism'd*).

144. *Id.* at 237.

accept the papers was held invalid under rule 108 because delivery was attempted in English, while defendant spoke only Spanish.¹⁴⁵ Nevertheless, the judgment for divorce and a child custody decree were affirmed because the defendant failed to prove a meritorious defense to the plaintiff's action.¹⁴⁶

Substituted service under rules 106 and 108 was upheld in a divorce action in *Alvarez v. Alvarez*.¹⁴⁷ Although the defendant resided in Mexico at the time of service, the district judge authorized service upon Rapido Forwarding Company, the defendant's usual place of business.¹⁴⁸ Direct evidence indicated that the company served neither was owned by nor was the usual place of business of the defendant; other evidence, however, included an assumed name certificate signed by him, which stated that he was doing business under the name of Rapido Forwarding Company, and a signature card at a local bank signed by the defendant for the purpose of opening an account in the name of that company.¹⁴⁹

One commentator has challenged the validity of the 1975 amendment to rule 108 as violative of the Texas Constitution,¹⁵⁰ his argument being that Texas statutes, especially article 2031b, determine the long-arm jurisdiction of the Texas courts, and rule 108 is inconsistent with the statutes because it enlarges the courts' jurisdiction over nonresidents. Therefore, it is outside the scope of the Texas Supreme Court's rulemaking power under article V, section 25 of the Texas Constitution.¹⁵¹ The original purpose of article 2031b, however, as repeatedly announced by the courts, was to expand in personam jurisdiction over nonresidents to the extent permitted by the United States Constitution. To that end, courts have gradually enlarged the doing business language until its construction was expanded to due process limits by the Texas Supreme Court's recent decision in *U-Anchor Advertising, Inc. v. Burt*.¹⁵² Although *U-Anchor* was decided two years after the amendment of rule 108, its effect was to make the scope of article 2031b coextensive with that of rule 108, thereby counteracting the

145. *Id.*

146. *Id.* at 238.

147. 476 S.W.2d 353 (Tex. Civ. App.—Corpus Christi 1972, no writ).

148. *Id.* at 355-56.

149. *Id.* at 357-59.

150. Letter to the Editor, from Prof. Hans W. Baade of the University of Texas Law School, 38 TEX. B.J. 988 (1975). One federal court recently interpreted rule 108 as not being a long-arm provision, but as providing merely an alternative means of serving process. *Boyd v. Piper Aircraft Corp.*, No. CA-3-80-1151-G (N.D. Tex. Sept. 15, 1981). The court noted that the rule might be infirm under the Texas Constitution if construed otherwise. It is highly unlikely, however, that the rule will be invalidated under the Texas Constitution both for the reasons given in the text and because the final arbiter of such constitutionality is not the federal courts, but the Texas Supreme Court, which adopted the rule. Moreover, it is unrealistic to suggest that the Texas Supreme Court's footnote in *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760, 762 n.1 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978), concerns only the means of serving process; the court explicitly stated that "the purpose of the amendment is to permit acquisition of in personam jurisdiction to the constitutional limits." Clearer language that the court intended the rule to be a long-arm provision involving jurisdiction and not merely the means of service could not have been used.

151. Letter to the Editor, *supra* note 150.

152. 553 S.W.2d 760 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978).

argument that rule 108 is an enlargement or extension of long-arm jurisdiction in Texas. Accordingly, the rule merely makes explicit for Texas jurisdiction what has been achieved already as a practical matter through the various decisions interpreting article 2031b. The only real change, therefore, is in the means by which service can be effected. The amended rule provides a much needed way of obtaining personal, rather than substituted, service upon a nonresident, and certainly is a procedural matter within the court's rulemaking authority. Under this analysis, the amendment is merely a housekeeping matter, and is not an enlargement of Texas law.

Even if the rule as amended did expand Texas jurisdiction, it would be invalid under the Texas Constitution only if it is "inconsistent" with the statute.¹⁵³ Because the purposes of the amendment and of article 2031b are exactly the same, the two are not inconsistent. Rather, they are merely two different means of achieving the same end. While rule 108 arguably is also broader than article 2031b, because it does not require the plaintiff's cause of action to be connected with his contacts with the state, such an argument also fails to invalidate the rule because the court has imposed the connection requirement in its declaration of due process requisites.¹⁵⁴ Rule 108 therefore provides a necessary procedure for foreign service of process, and its validity should be sustained.

IV. FEDERAL RULES OF CIVIL PROCEDURE

Extraterritorial service on a nonresident is governed in the federal courts by rules 4(e) and (i) of the Federal Rules of Civil Procedure.¹⁵⁵ Rule 4(e) allows federal courts to make service on nonresidents in the manner prescribed either by federal statutes or by the statutes and rules of court of the state in which the federal court sits.¹⁵⁶ The rule is not a long-arm statute; the basis of in personam jurisdiction must be found in the relevant state or federal statute or rule of court.¹⁵⁷ This provision permits federal courts to use Texas statutes and rules in diversity cases to obtain personal jurisdiction over a defendant and to serve him abroad.¹⁵⁸

Rule 4(i) supplements, rather than supplants, rule 4(e) for obtaining

153. TEX. CONST. art. V, § 25.

154. See text accompanying note 40 *supra*. The Fifth Circuit in *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260 (5th Cir. 1981), correctly noted the statutory source of the nexus requirement and noted further that the United States Supreme Court has not required a nexus between the cause of action and the forum if the defendant's activities in the forum are substantial and continuous. *Id.* at 1265-66. Nevertheless, the Texas Supreme Court has read the nexus requirement into its analysis of due process, and this saves rule 108 from violating the Texas Constitution.

155. FED. R. CIV. P. 4(e), (i).

156. *Id.* 4(e).

157. Horlick, *supra* note 45, at 639 n.11.

158. See, e.g., *Navarro v. Sedco, Inc.*, 449 F. Supp. 1355, 1357 n.1 (S.D. Tex. 1978). While rule 4(e) allows federal courts to use state statutes to obtain service outside the state in which they sit, rule 4(d)(7) permits federal courts to use state statutes to serve the defendant within the state. FED. R. CIV. P. 4(d)(7), (e). Several courts, however, have erroneously used these two provisions interchangeably. See *Jamesbury Corp. v. Kitamura Valve Mfg.*

service of process in other countries.¹⁵⁹ Five methods of service abroad are authorized. First, service may be made in the manner prescribed by the law of the country in which the service is to be made.¹⁶⁰ This procedure coincides with that permitted by article 5(a) of the Hague Convention.¹⁶¹ The chief advantage of this approach is that this form of service is more likely to be approved when an American judgment is later presented to the foreign court for recognition and enforcement.¹⁶²

The second method sanctioned by rule 4(i) is service as directed by the foreign authority in response to an American letter rogatory,¹⁶³ provided that the service is reasonably calculated to give actual notice to the defendant.¹⁶⁴ The notice condition apparently was meant to apply to service according to the internal law of the nation making the service as well, although the punctuation in the rule makes this unclear.¹⁶⁵ The condition should be understood as applying to both, because service must be reasonably calculated to give actual notice in order to pass constitutional muster.¹⁶⁶ An application for a letter rogatory and for an authorization order must be made to the court in which the suit is pending.¹⁶⁷ Service by letter rogatory is often time-consuming and difficult, but some nations do not permit any other type of service within their territories.¹⁶⁸

Another approach to service allowed by the rules is personal service by delivery to an individual or to an officer or managing or general agent of a company.¹⁶⁹ Personal service may be made by any person who is not a party to the action and who is at least eighteen years old.¹⁷⁰ Under this procedure, the plaintiff's attorney or his local counsel abroad can be designated to serve the process.¹⁷¹ When available, this approach is obviously the best procedure, because it guarantees actual notice to the defendant

Co., 484 F. Supp. 533, 534 (S.D. Tex. 1980); *Gutierrez v. Raymond Int'l, Inc.*, 484 F. Supp. 241, 244 (S.D. Tex. 1979).

159. Horlick, *supra* note 45, at 639.

160. FED. R. CIV. P. 4(i)(1)(A).

161. Convention, *supra* note 2, art. 5(a).

162. See Brenscheidt, *supra* note 118, at 266; Horlick, *supra* note 45, at 640; Jones, *supra* note 120, at 537.

163. "Letters rogatory are the medium, in effect, whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter's control, to assist the administration of justice in the former country; such request being made, and being usually granted, by reason of the comity existing between nations in ordinary peaceful times." The Signe, 37 F. Supp. 819, 820 (E.D. La. 1941).

164. FED. R. CIV. P. 4(i)(1)(B).

165. *Advisory Committee's Note of 1963 to Subdivision (i)*, in J. MOORE, 2 MOORE'S FEDERAL PRACTICE ¶ 4.01[25], at 4-36 (1981).

166. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

167. See Horlick, *supra* note 45, at 640-41.

168. *Id.* at 641-42. Prior to the Convention, letters rogatory were the most common method of international service by civil law nations. Jones, *supra* note 120, at 537.

169. FED. R. CIV. P. 4(i)(1)(c).

170. *Id.* 4(i).

171. See *International Controls Corp. v. Vesco*, 593 F.2d 166, 174-75 (2d Cir.), *cert. denied*, 442 U.S. 941 (1979). The American attorney should always check the foreign counsel's fee for serving process in his country before proceeding. In some countries, the process

and is relatively simple and quick.¹⁷² Direct personal service without permission of the authorities, however, may violate the internal law of the particular country in which service is to be executed.¹⁷³ In that case, consummating the service may be impossible. Even if service is executed, it may prove a Pyrrhic victory if the judgment cannot be satisfied from assets other than those located in the foreign country.

The federal rule also allows service by mail, addressed and dispatched by the clerk of the court where the lawsuit is pending, and requires a signed receipt.¹⁷⁴ This form of service is exceedingly easy, but its effectiveness depends upon the willingness of the defendant to accept it. Without the return receipt signed by the addressee, or some other evidence of actual delivery, service cannot be sustained nor a judgment taken. In addition, some countries prohibit service by mail within their territories and will not recognize or enforce any judgment resulting therefrom.¹⁷⁵ Some governments assert that service by mail in another nation is inconsistent with general principles of international law;¹⁷⁶ the District of Columbia Court of Appeals recently agreed with this proposition in the context of a Federal Trade Commission subpoena sent by international mail to the Paris headquarters of a French company.¹⁷⁷ The court's opinion, however, implied that service of a summons and complaint by mail would not violate international law.¹⁷⁸

Finally, rule 4(i) also contains a catch-all provision permitting service abroad by any method ordered by the court.¹⁷⁹ Often the court will authorize several types of service simultaneously, such as service both by personal delivery to an agent and upon the defendant by mail.¹⁸⁰ In *International Controls Corp. v. Vesco*¹⁸¹ the court upheld service on a defendant who had been served by throwing the document on his premises and by mailing a copy to him. One observer suggested that courts handling cases in the Iranian assets litigation authorize service of process by

server may charge a fee based on a percentage of the amount in controversy. See Jones, *supra* note 120, at 536.

172. Horlick, *supra* note 45, at 642.

173. See, e.g., Gori-Montanelli & Botwinik, *International Judicial Assistance—Italy*, 9 INT'L LAW. 717, 719-20 (1975).

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

175. See Brenscheidt, *supra* note 118, at 264-66; Horlick, *supra* note 45, at 643.

176. See, e.g., *FTC v. Compagnie de Saint-Gobain-Pont-à-Mousson*, 493 F. Supp. 286, 290 (D.D.C.), *vacated*, 636 F.2d 1300 (D.C. Cir. 1980).

177. *FTC v. Compagnie de Saint-Gobain-Pont-à-Mousson*, 636 F.2d 1300, 1313 (D.C. Cir. 1980).

178. *Id.* The court of appeals noted the distinction between service of notice, the purpose of which is informational, and service of compulsory process, which itself constitutes an exercise of one country's sovereignty within the territory of another nation. Service of notice by mail is a relatively benign procedure and is the least intrusive means of service by one nation within the territory of another; service of compulsory process by mail, on the other hand, is an infringement of the sovereignty of the nation where service is made and is maximally intrusive. *Id.*

179. FED. R. CIV. P. 4(i)(1)(E).

180. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 402 F. Supp. 262, 330 (E.D. Pa. 1975); *Levin v. Ruby Trading Corp.*, 248 F. Supp. 537, 540 (S.D.N.Y. 1965).

181. 593 F.2d 166, 177-78, 181-82 (2d Cir.), *cert. denied*, 442 U.S. 941 (1979).

telex because telex communications with Iran were continuing on a regular basis and because the revolutionary turmoil, the disruption of postal deliveries, the lack of cooperation from local authorities, and the impossibility of personal delivery made successful service by other methods unlikely.¹⁸² Simultaneous use of several methods of service is a commendable practice that should be encouraged in difficult cases.

V. RELATIONSHIP BETWEEN THE HAGUE CONVENTION AND FEDERAL AND STATE PROVISIONS

In evaluating the relationship between the Hague Convention and federal and state service provisions, the initial consideration is whether the Convention is binding on state and federal courts. Because the Convention has not been enacted as legislation in the United States, it cannot be part of our law unless it is self-executing, which in turn depends upon the intent of the parties.¹⁸³ If the treaty reflects an intention that it be implemented in each contracting nation by specific legislation, then it is not self-executing.¹⁸⁴ If it reflects the intention that it become a part of each country's domestic law immediately upon becoming effective, however, then it is self-executing.¹⁸⁵ The fact that a treaty must be ratified—in the United States upon the advice and consent of the Senate—does not prevent it from being self-executing.

Article 1 of the Hague Convention declares that “[t]he 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.”¹⁸⁶ Article 19 provides that the Convention will not affect the internal law of a contracting nation insofar as that nation allows other methods of serving documents from abroad within its territory.¹⁸⁷ Article 26 states that the Convention shall be open for signature and shall be ratified,¹⁸⁸ while article 27 specifies the time when the Convention “shall enter into force.”¹⁸⁹ Finally, article 29 states that any nation may declare at the time it signs, ratifies, or accedes to the Convention that the Convention shall extend to all or some of the territories for which the particular coun-

182. Comment by John E. Hoffman, Jr., of the New York Bar, at the Workshop on Problems in Transnational Litigation in Washington, D.C. (Apr. 16, 1980). The workshop was cosponsored by the International Law and Litigation Sections of the American Bar Association. See *New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co.*, 495 F. Supp. 73, 81 (S.D.N.Y. 1980).

183. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 141(1)(A) (1965). See also 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 304, 309 (1970).

184. *Aerovias Interamericanas de Panama, S.A. v. Board of County Comm'rs*, 197 F. Supp. 230, 245-46 (S.D. Fla. 1961), *rev'd on other grounds*, 307 F.2d 802 (5th Cir. 1962), *cert. denied*, 371 U.S. 961 (1963); *Indemnity Ins. Co. v. Pan Am. Airways*, 58 F. Supp. 338, 340 (S.D.N.Y. 1944).

185. See note 184 *supra*.

186. Convention, *supra* note 2, art. 1.

187. *Id.* art. 19.

188. *Id.* art. 26.

189. *Id.* art. 27.

try is responsible.¹⁹⁰ Nowhere in the treaty is implementing legislation in contracting states required for its effectiveness. Indeed, the provisions manifest an intention that the Convention will become binding upon each nation as soon as it is ratified and enters into force. The Convention entered into force for the United States on February 10, 1969, after being ratified properly.¹⁹¹

A. Service of Process

The principal provision of the Convention is article 5, which sets out the methods of service from which the central authority of the state addressed may choose.¹⁹² Article 5 states that the central authority "shall" serve the document or see that it is served.¹⁹³ Article 8, however, provides that each nation "shall be free" to serve documents through diplomatic or consular agents;¹⁹⁴ article 9 uses the same language in allowing documents to be forwarded through consular channels for service abroad.¹⁹⁵ Article 10 cautions that "the present Convention shall not interfere with" the freedom to send judicial documents by mail or by judicial officers, officials, or other competent persons of either nation.¹⁹⁶ The language of these provisions indicates, however, that they were not intended to authorize service abroad by means of the methods specified therein unless internal law otherwise authorizes these methods. While it has been stated that a treaty can be self-executing in part and not self-executing in another part,¹⁹⁷ such is not the case with the present Convention because the member nations have not undertaken any obligation to enact domestic legislation to authorize these service procedures. The Convention simply allows the countries to take advantage of these alternative methods if they choose to authorize them and if the state of destination does not object. Clearly, therefore, the Convention was intended to be self-executing and is binding on the states as the supreme law of the land.¹⁹⁸

Another question concerning the Convention and its interaction with state and federal law is whether the Convention abrogates methods of service allowed by Texas that are inconsistent with it. An Arizona appellate court has held that the Convention abrogates state rules and statutes for service of process abroad insofar as the two are inconsistent.¹⁹⁹ In *Kadota v. Hosogai* the defendant was served personally by a private pro-

190. *Id.* art. 29. Both the United States and the United Kingdom have extended the Convention to most of their territories. 8 MARTINDALE-HUBBELL LAW DIRECTORY 4622 n.14, 4624 n.15 (1982).

191. 8 MARTINDALE-HUBBELL LAW DIRECTORY 4619 (1982).

192. Convention, *supra* note 2, art. 5; see notes 49-79 *supra* and accompanying text.

193. Convention, *supra* note 2, art. 5.

194. *Id.* art. 8.

195. *Id.* art. 9.

196. *Id.* art. 10.

197. *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 738 (1943) (Stone, C.J., dissenting).

198. U.S. CONST. art. VI, cl. 2. See generally *Asakura v. City of Seattle*, 265 U.S. 332 (1924).

199. *Kadota v. Hosogai*, 125 Ariz. App. 131, 608 P.2d 68, 73 (1980).

cess server in Japan, in addition to receiving service by other means.²⁰⁰ Both Japan and the United States are parties to the Convention, but Japan has objected to direct personal service within its territory under article 10(b) and (c).²⁰¹ The Arizona court stated:

As a result of this objection, the treaty between Japan and the United States is inconsistent with the Arizona Rules of Civil Procedure to the extent that personal service pursuant to Rule 4(e)(6)(iii) and Article 10(c) is objected to by Japan.

. . . The treaty between the United States and Japan specifically prohibits this method of service, although the Arizona rules allow for it. The law is clear that state statutes are abrogated to the extent that they are inconsistent with a treaty.²⁰²

The Justice Department, however, has stated that the Convention does not preempt other means of effecting service abroad, but rather supplements those methods.²⁰³ In a California case in which service was made by mail in Japan,²⁰⁴ the intermediate California appellate court declared: "If it be assumed that the purpose of the convention is to establish one method to avoid the difficulties and controversy attendant to the use of other methods, it does not necessarily follow that other methods may not be used if effective proof of delivery can be made."²⁰⁵ Other courts have reached the same conclusion,²⁰⁶ but only in dicta. In *Shoei Kako Co. v. Superior Court*²⁰⁷ service was made by mail directly to the defendant in Japan. Article 10(a) of the Convention specifically authorizes service by postal channels unless this method is objected to by the nation in which service is made.²⁰⁸ Japan has not objected to this method of service, so the method used in that case was not inconsistent with the Convention; actually it was authorized by the permissive terms of article 10(a). Likewise, in *Tamari v. Bache & Co. (Lebanon) S.A.L.*²⁰⁹ service was made directly on the defendant in France by means of an appointed process server. Direct personal service on a defendant abroad is authorized by article 10(b) of the Convention, unless objection to this method is filed.²¹⁰ Because France has not entered any objection to this type of service within its territory, the procedure used was consistent with the terms of the Convention. Thus, broad statements by these courts regarding the use of state-approved meth-

200. 608 P.2d at 70.

201. *Id.* at 72. See the declarations and reservations of the contracting nations, 8 MARTINDALE-HUBBELL LAW DIRECTORY 4619-24 (1982).

202. 608 P.2d at 73.

203. Justice Department Memo No. 386, at 13 n.10 (July 1979).

204. *Shoei Kako Co. v. Superior Court*, 33 Cal. App. 3d 808, 109 Cal. Rptr. 402, 407-08 (1973).

205. 109 Cal. Rptr. at 411.

206. See, e.g., *International Controls Corp. v. Vesco*, 593 F.2d 166, 179-80 (2d Cir.), cert. denied, 442 U.S. 941 (1979); *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 431 F. Supp. 1226, 1228 (N.D. Ill. 1977).

207. 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1973).

208. Convention, *supra* note 2, art. 10(a).

209. 431 F. Supp. 1226 (N.D. Ill. 1977).

210. Convention, *supra* note 2, art. 10(b).

ods of service not sanctioned by the Convention are less persuasive precedent than might be desired.

The Convention allows an applicant to request a particular method of service, thus indicating an intention to mold the Convention around the internal law of the contracting states to a great extent. While it allows these countries considerable freedom to choose among several different modes of serving process coming from other countries, however, it also manifests an intention that service not be made by one contracting state in another by methods other than those either mandated or permissively allowed by the Convention. Article 19 states that the Convention shall not affect the internal law of a contracting country insofar as it permits other methods of serving process from abroad within its territory.²¹¹ The clear implication of this provision is that the Convention will supersede the domestic law of a nation only to the extent that it provides alternative means of serving process in *other* countries for litigation within that nation's territory.

The analysis by the Arizona intermediate appellate court in *Kadota v. Hosogai*,²¹² which invalidated service of process made in Japan by direct personal service through an appointed process server, therefore is basically correct: Japan had entered its reservation objecting to subparagraphs (b) and (c) of article 10 of the Convention.²¹³ This important difference distinguishes *Kadota* from the federal court's holding in *Tamari v. Bache & Co. (Lebanon) S.A.L.*²¹⁴ As the Arizona court noted, if the treaty's methods of service were held to be merely supplementary to those provided by the federal and state governments, Japan's objections to this method of service within its territory would be meaningless.²¹⁵ Such service would violate treaty obligations and could touch sensitive diplomatic nerves, triggering diplomatic protests against American judicial imperialism. Moreover, if the manner of service violated Japan's internal law as well, the court, by authorizing this service, could be fostering disrespect for a foreign country's laws within its own territory and, in some cases, service could subject the parties or the appointed process server to criminal sanctions.²¹⁶ Comity militates against such arrogance when other methods of achieving service are provided. American courts and litigants should not be eager to give offense.

The Arizona court's statement that the Convention "abrogated" incon-

211. *Id.* art. 19. Article 19 differs from article 5(a) in that the latter refers to the methods prescribed by the internal law of the nation for service upon persons resident therein *in suits pending in its own territory*; while article 19 applies to the methods allowed by the internal law of the country for service in its territory for *suits pending in other nations*. Thus, if a country already has provided specific means for serving documents from other countries, this law will remain undisturbed by the Convention. *Id.* art. 19.

212. 125 Ariz. App. 131, 608 P.2d 68 (1980).

213. 8 MARTINDALE-HUBBELL LAW DIRECTORY 4620 n.9 (1982).

214. 431 F. Supp. 1226 (N.D. Ill. 1977).

215. 608 P.2d at 73.

216. *See* note 231 *infra*.

sistent Arizona procedural rules²¹⁷ perhaps is too broad. The Convention provides that the nation in which litigation is pending may serve process under the specific terms of article 5, which must be honored by the nation addressed, or by any of the methods provided in articles 8, 9, and 10, unless objection is made.²¹⁸ Some nations have filed objections to the procedures provided in articles 8, 9, and 10;²¹⁹ others have not. Certainly Arizona's procedural rules for service abroad are not abrogated totally by the Convention; neither is any particular procedure abrogated because one nation has objected to its use within its territory. The method is merely inapplicable to service in the nation that has objected to its use; it remains available in other nations that have not done so.

The courts in both *Tamari v. Bache & Co. (Lebanon) S.A.L.*²²⁰ and *Shoei Kako Co. v. Superior Court*²²¹ articulated an alternative basis for their holdings that the service made on the defendant was valid under the Convention: in both cases nothing indicated that the defendant had not accepted the document voluntarily. Article 5 of the Convention provides that service always may be made by delivery to a person who accepts voluntarily.²²² In *Shoei Kako* service was made by mail, while in *Tamari* service was made personally on the defendant in France. The voluntary acceptance method of article 5 was used by the courts as a catch-all provision. The voluntary acceptance method was added at the instigation of the Western European countries, which use it frequently.²²³ The placement of this provision in article 5, which deals with service only by the central authority of the nation addressed, strongly indicates that the method does not apply to direct delivery from the requesting court or its designated process server; furthermore, the method is limited by the language in article 5 that it not be incompatible with the domestic law of the nation addressed.²²⁴ Voluntary acceptance certainly would not authorize a country to serve process by mail in another nation that had filed an objection to article 10(a) of the Convention, or by personal delivery in a country that had objected to subparagraphs (b) and (c) of article 10. Clearly it was not intended to be a catch-all provision, and cannot be used as such by Ameri-

217. 608 P.2d at 73; see text accompanying notes 199-202 *supra*.

218. See notes 192-96 *supra* and accompanying text.

219. 8 MARTINDALE-HUBBELL LAW DIRECTORY 4619-22 (1982).

220. 431 F. Supp. 1226, 1229 (N.D. Ill. 1977).

221. 33 Cal. App. 3d 808, 109 Cal. Rptr. 402, 411 (1973).

222. Convention, *supra* note 2, art. 5.

223. See text accompanying notes 58-61 *supra*.

224. Article 5 provides in part:

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 appellant, 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.

Convention, *supra* note 2, art. 5.

can courts. If used as a catch-all procedure, the voluntary acceptance method would expand rapidly to consume almost every situation, and the benefits and limitations contracted for by the ratifying nations would be lost.

Further inquiry into the relationship between the Convention and federal and state service provisions raises the question: Does the Convention authorize service according to its terms regardless of whether the method used is authorized by Texas law? This question requires an affirmative answer. According to the Convention's first article, it applies in all cases in civil or commercial matters.²²⁵ A contracting nation whose law on service is narrower than that permitted by the Convention nevertheless is required to make or allow service within its territory by any of the methods provided for within the Convention (except for those provided in articles 8, 9, or 10, if the country has objected to them). The corollary also must be true: when the law of the nation requesting service is narrower than the procedures mandated by the Convention in article 5, the Convention still authorizes service by these means.²²⁶ Articles 8, 9, and 10 merely provide optional methods of service that can be used only if the law of the state of origin authorizes them independently of the terms of the Convention. By specifying in article 5 the methods of service from which the state of destination can choose in making service within its territory, the Convention implicitly requires the nation of origin to recognize service made by one of these methods. Thus, any court in the United States can recognize service made in accordance with article 5 of the Convention unless due process requirements are violated, in which case the Convention would be unconstitutional to that extent.

Questions would arise only if the foreign authority served process in some manner permitted by its internal law, but not authorized by Texas law. Most Texas procedures are compatible with the methods allowed by the Hague Convention and could be used as a basis for a request for service under the treaty even if the treaty's terms did not provide sufficient authorization. For example, because rule 108 allows service by personal delivery to the defendant by any disinterested person who is at least eighteen years of age,²²⁷ it will permit a request to the central authority of a contracting nation for service to be made in this manner.

Problems also could arise if service is made by leaving the process at the usual place of business or abode of the defendant when other means had not been tried first. Rule 108 provides a hierarchy for service and allows service to be made by a procedure ordered by the court. Some parties to the Convention—such as Egypt, Norway, and Turkey—prohibit direct

225. *Id.* art. 1.

226. See Note, *The Effect of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 2 CORNELL INT'L L.J. 125, 131-32 (1969).

227. TEX. R. CIV. P. 108; see notes 131-54 *supra* and accompanying text.

personal service and service by mail within their territories.²²⁸ Many countries that are not parties to the Convention also prohibit these methods; for example, Italy prohibits direct personal service within its territory without prior authorization,²²⁹ and Switzerland will not allow service by mail within its boundaries.²³⁰ Requiring that a plaintiff attempt service in one of these ways in a country that objects to the service is futile at best and may even subject the process server to criminal prosecution in the nation of service.²³¹ Texas procedures should not require a party to subject himself or his agents to liability abroad when other methods are available.

The relationship between articles 2031b and 2039a and the Convention also requires examination. Service is made under the Texas statutes by delivery of process to Texas officials and by their forwarding of the papers to the defendant by mail.²³² Many European countries have a similar service procedure called "notification *au parquet*."²³³ Process is served by delivery to a domestic court official, and the local authorities attempt to give notice to the defendant abroad through diplomatic channels or by other methods, but the failure to give the defendant notice does not affect the validity of the service.²³⁴ The Convention applies where a judicial document is transmitted for service abroad. It does not provide expressly for service upon an official of the nation where the suit is pending. Consider, then, whether the Texas procedure comes within the terms of the Convention, and if so, whether it is allowed or abrogated. If the Texas methodology does fall within the Convention's provisions, it must come under the permissive terms of article 10, which states that the "present Convention shall not interfere with" service by mail unless objection is made.²³⁵ The question is not a simple one, and its answer should not turn upon a technical decision whether the service is the receipt of the documents by the defendant or the delivery to the Texas official and his forwarding of the documents by mail. Clearly the documents must be forwarded by mail by the Texas official, or the service is not complete.²³⁶ Because the mailing of the papers to the defendant is an integral part of this procedure for service, it arguably falls within the permissive terms of article 10(a) and is not abrogated by the Convention. The method may be inapplicable, however, if the defendant resides in a country that has rati-

228. See the declarations and reservations filed by the contracting parties, 8 MARTINDALE-HUBBELL LAW DIRECTORY 4619-24 (1982).

229. See Gori-Montanelli & Botwinik, *supra* note 173, at 719.

230. See Horlick, *supra* note 45, at 641.

231. See Gori-Montanelli & Botwinik, *supra* note 173, at 719-20; Jones, *supra* note 120, at 520; Justice Department Memo No. 386, at 17 (July 1979). An SEC staff attorney was indicted for serving an administrative subpoena in France and an Assistant U.S. Attorney was sued for malicious trespass for serving a subpoena in the Bahamas. *Id.* at 20.

232. See notes 90-130 *supra* and accompanying text.

233. See Note, *supra* note 226, at 134.

234. Amram, *supra* note 48, at 653.

235. Convention, *supra* note 2, art. 10.

236. See note 99 *supra*.

fied the Convention and also has objected to service by mail.²³⁷ This matter is not merely an academic question; its resolution determines whether the Convention's terms regarding taking and opening default judgments apply.²³⁸ One method of proceeding that would resolve these potential problems is to request the Texas official to mail the documents to the central authority of the country where the defendant resides. The central authority then would accomplish service in conformity with the terms of the Convention. In that case, the Convention's terms on default judgments clearly would apply.

The most common method of making service of process in civil law countries that are not parties to the Convention is by letter rogatory.²³⁹ Indeed, some countries permit no other kind of service within their boundaries.²⁴⁰ Texas law does not authorize this type of service expressly. In another context, however, the Texas Supreme Court has held that Texas courts have inherent power to honor letters rogatory from other jurisdictions.²⁴¹ No reason exists to prevent Texas courts from having the inherent power to issue letters rogatory to serve documents abroad. This authority is necessary in aid of the court's jurisdiction in a proper case; without it, legal service cannot be made in nations such as Switzerland, and a Texas judgment that cannot be satisfied from assets other than those abroad will be ineffective. Texas courts have an interest in seeing their judgments recognized and enforced in other jurisdictions, just as they have an interest in seeing that their jurisdiction is not frustrated by a failure to serve the defendant. Furthermore, when means are available for making service of process abroad in a legal manner, Texas courts have some responsibility based upon comity to prevent the service of process in a manner illegal in the territory where the documents are served.

B. Proof of Service

Upon completion of service under the Convention, the central authority of the state of destination must execute a model certificate stating that the document has been served; the certificate must list the method of service, the place and the date of service, and the person to whom the document was delivered.²⁴² If the document was not served, the certificate must state this fact and enumerate the factors that prevented service.²⁴³

The federal rules authorize proof of foreign service by the normal method of return, by the method provided by the law of the country where

237. See Note, *supra* note 226, at 134.

238. See text accompanying notes 251-88 *infra*. One member of the United States delegation to the negotiations that led to the Convention has declared that the default judgment provisions of the Convention were intended to apply to the European system of "notification *au parquet*." Amram, *supra* note 48, at 653.

239. Jones, *supra* note 120, at 537.

240. Horlick, *supra* note 45, at 641.

241. *Ex parte Taylor*, 110 Tex. 331, 334, 220 S.W. 74, 75 (1920).

242. Convention, *supra* note 2, art. 6.

243. *Id.*

service is made, or by order of the court.²⁴⁴ Service by mail is proved by signed receipt or by other evidence of delivery.²⁴⁵ Rule 107 of the Texas Rules of Civil Procedure²⁴⁶ provides that the officer making service shall endorse or attach the return to the citation, shall state when the citation was served and the manner of service, and shall sign it officially. When service is made by mail, the officer also must make a return of service and attach the return receipt with the addressee's signature.²⁴⁷ The court can order the manner of making proof of service when the citation is executed by one of the alternative means provided in rule 106.²⁴⁸

Article 6 of the Convention relating to proof of service is mandatory and therefore binding on state and federal courts.²⁴⁹ When return is made in accordance with this provision, state and federal courts must recognize it as valid proof of service, regardless of whether it meets the other requirements of rule 107 or rule 4(i)(2). Both rule 107 and rule 4(i)(2) should be amended specifically to permit return of service made according to the terms of any applicable convention or treaty; rule 107 should be amended expressly to authorize return of service in the manner authorized by the internal law of a country where service is made. Some countries do not require an affidavit or sworn proof of service, and such proof is nearly impossible to obtain in certain other nations.²⁵⁰ A Texas court ordering service in a non-Convention country under one of the alternative methods provided in rule 106 should be sensitive to this problem and should not require a return of service that cannot practically be obtained from a process server abroad.

C. Default Judgments

The Convention also contains a provision for the taking of default judgments. Article 15 declares that no judgment shall be given following service under the Convention until the document is shown to have been served in ample time to allow the defendant to appear and defend.²⁵¹ A contracting nation may declare, however, that a judgment may be awarded notwithstanding the absence of a certificate of service if the document was served pursuant to a method permitted by the Convention, if at least six months have elapsed since transmission of the document, and if every reasonable effort has been made to obtain a certificate of service.²⁵²

In federal suits the defendant has twenty days from the date on which he

244. FED. R. CIV. P. 4(i)(2). The provision allowing proof of service to be made according to the law of the country where service is made is quite important, because obtaining a sworn return in some nations is almost impossible. Jones, *supra* note 120, at 537.

245. FED. R. CIV. P. 4(i)(2).

246. TEX. R. CIV. P. 107.

247. *Id.*

248. *Id.* 106; see notes 133-34 *supra* and accompanying text.

249. Convention, *supra* note 2, art. 6.

250. See note 244 *supra*.

251. Convention, *supra* note 2, art. 15.

252. *Id.*

is served with a summons to appear and answer the complaint.²⁵³ The person serving the process is required to make prompt proof of service, at least within the twenty-day response period.²⁵⁴ A failure to make proof of service, however, does not affect the validity of the service.²⁵⁵ If the defendant does not file an answer, a responsive pleading, or a motion of some sort, a default entry on a liquidated claim may be made by the clerk and a default judgment entered by the court.²⁵⁶

Under Texas procedure a defendant generally is required to answer by 10:00 a.m. on the Monday following the expiration of twenty days after the date of service of process.²⁵⁷ When the defendant is served personally in a foreign country, however, he is required to answer by 10:00 a.m. on the Monday following the expiration of twenty days after the return day of the citation or notice.²⁵⁸ If no answer is filed by answer day, the plaintiff may take a default judgment.²⁵⁹ No default judgment can be taken against a defendant unless the citation showing proof of service has been on file for at least ten days prior to the taking of the default.²⁶⁰

The Convention's general default judgment provision requiring sufficient time to defend is mandatory and binding on state and federal courts.²⁶¹ The six-month waiting period exception that article 15 provides is not, however, binding upon state and federal courts. The exception authorizes member governments to file a formal declaration that it will permit the taking of a default upon failure to obtain a certificate for six months after service despite reasonable efforts to do so,²⁶² but it does not mandate or otherwise authorize the taking of a default in this way absent a declaration. The United States has filed such a declaration.²⁶³

The mandatory default provision of the Convention will work no change in general federal law or in service under rule 108, because the date of service must be established before one can determine the time in which the defendant is required to answer. If the time for answer has not run, no default can be entered. A default judgment after service made according to the terms of articles 2031b or 2039a, however, may be changed by this provision. Under these statutes, a default is allowed in Texas when the plaintiff shows that delivery of the citation and petition to the Texas official was accomplished and that he forwarded the documents by registered or certified mail to the defendant.²⁶⁴ This showing probably does not comply with that required by the Convention for establishing that delivery to

253. FED. R. CIV. P. 12(a).

254. *Id.* 4(g).

255. *Id.*

256. *Id.* 55.

257. TEX. R. CIV. P. 101, 237.

258. TEX. REV. CIV. STAT. ANN. art. 2092 (Vernon 1964).

259. *Id.*; TEX. R. CIV. P. 239.

260. TEX. R. CIV. P. 107, 239.

261. Convention, *supra* note 2, art. 15.

262. Amram, *supra* note 48, at 653.

263. 8 MARTINDALE-HUBBELL LAW DIRECTORY 4617, 4624 (1982).

264. TEX. REV. CIV. STAT. ANN. arts. 2031b, 2039b (Vernon 1964 & Supp. 1980-1981).

the defendant was effected in sufficient time to enable him to answer and defend. If the plaintiff files the return receipt or a certificate from the Texas official showing delivery to the defendant, however, and the time for answering and appearing has run, the provisions of the Convention will be satisfied. In construing service under the Convention pursuant to articles 2031b or 2039a, Texas courts should hold that a default judgment cannot be taken against a defendant unless a showing is made that he actually received the process and was given the normal time for answering thereafter.

Even though no Texas or federal provisions have been adopted concerning the six-month exception to the mandatory default rule of article 15 of the Convention, the exception is, nevertheless, binding on state and federal courts. The federal government's declaration approving the exception was filed in accordance with the terms of the treaty and became part of the domestic law of the country much like a reservation or statement of understanding.²⁶⁵ American law, however, usually requires a showing of notice to the defendant, and a default judgment entered in accordance with the exception might not withstand constitutional scrutiny.

In some circumstances a default judgment may be vacated when service was made under the Convention. Such relief is available only if the defendant, with no fault on his part, lacked knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal. The defendant also must disclose a prima facie defense to the action on the merits.²⁶⁶ An application for relief from the judgment must be made within a reasonable time after the defendant obtains knowledge of the judgment.²⁶⁷ A definite time limit for filing an application for relief may be set, but it cannot be less than one year.²⁶⁸

A default entry by the clerk in federal court may be set aside upon a showing of good cause.²⁶⁹ A default judgment by the court, however, may be set aside only upon a showing of: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or misconduct of an adverse party; (4) voidness of the judgment; (5) satisfaction, release, or discharge of the judgment; or (6) other justifiable reasons.²⁷⁰ Federal courts also generally require a showing of a meritorious defense that may make the outcome of the suit different.²⁷¹ The motion for relief from the default judgment must be made within a reasonable time; for the first three categories listed above, the motion must be made within one year after the judgment is entered.²⁷²

265. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 134-135 (1965).

266. Convention, *supra* note 2, art. 16.

267. *Id.*

268. *Id.*

269. FED. R. CIV. P. 55(c).

270. *Id.* 55(c), 60(b).

271. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2697, at 342 (1973).

272. FED. R. CIV. P. 60(b).

In Texas a motion for new trial may be filed within thirty days after the entry of the judgment, and a trial court has plenary power to set aside the judgment for good cause shown.²⁷³ If a motion for new trial is not filed within thirty days, the judgment may be set aside in Texas only upon a bill of review proceeding for sufficient cause.²⁷⁴ To obtain relief from a default judgment upon a bill of review hearing, the moving party must show that: (1) a meritorious defense to the cause of action exists; (2) the defendant was prevented from making his defense by the fraud, accident, or wrongful act of the opposite party; and (3) the defendant was not at fault or negligent in failing to answer and defend.²⁷⁵ Reliance upon erroneous official information that prevented the defendant from timely answering and defending or from timely filing a motion for new trial will excuse proof of the second element.²⁷⁶ The defendant may make out a prima facie meritorious case by showing that his defense is not barred as a matter of law and that he would be entitled to judgment on retrial if no evidence to the contrary is offered.²⁷⁷ Prima facie proof may be based upon affidavits, documents, or other proper evidence.²⁷⁸ If the defendant presents a prima facie meritorious defense, the court will conduct a trial; the defendant then has the burden of proving that the judgment was rendered as a result of fraud, accident, or wrongful act of the opposite party, or official mistake, and that the defendant was not at fault or negligent in any way.²⁷⁹

The Convention's terms with respect to vacating a default judgment are mandatory.²⁸⁰ This provision does not apply, however, until the defendant discloses a prima facie defense; furthermore, he must show that he lacked knowledge of the document in time to defend or knowledge of the judgment in time to appeal, with no fault on his part.²⁸¹ This generally accords with Texas procedure, which was established recently by the Texas Supreme Court in *Baker v. Goldsmith*.²⁸² The Convention negates the Texas requirement that the judgment must have been rendered as a result of fraud, accident, or wrongful act of the opposite party, or official mistake. When personal service is made on the defendant, the Texas provision will not apply, because the defendant obviously will have had knowledge of the document in time to defend. The Convention provision can be reconciled with the federal procedure because the sixth provision of rule 60(b) provides for relieving a defendant from a judgment for any justifiable reason.²⁸³ In accordance with the terms of the Convention, the United States

273. TEX. R. CIV. P. 320, 329b(a), (d)-(e).

274. *Id.* 329b(f).

275. *Baker v. Goldsmith*, 582 S.W.2d 404, 406-07 (Tex. 1979) (noting *Alexander v. Hagedorn*, 148 Tex. 565, 568, 226 S.W.2d 996, 998 (1950)).

276. 582 S.W.2d at 407.

277. *Id.* at 408-09.

278. *Id.* at 409.

279. *Id.*

280. Convention, *supra* note 2, art. 16.

281. *Id.*

282. 582 S.W.2d 404, 409 (Tex. 1979).

283. FED. R. CIV. P. 60(b)(6).

has declared that an application for relief will not be entertained after the later of one year from the date of the judgment or the time period allowed by the procedural regulations of the court in which the judgment has been entered.²⁸⁴ The effect of this declaration is that an American court must entertain an application for relief from a default judgment made under the mandatory terms of the Convention within at least one year following the entry of the judgment.²⁸⁵ This comports with federal law and will not change Texas procedures expressly.

Article 16 states that the judge "shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment."²⁸⁶ This language at first glance seems to imply that the Convention does not provide a mandatory section concerning relief from the judgment itself, but merely allows extra time for appeal. This construction is belied, however, by the statement of conditions that must be fulfilled before the judge may exercise this power. Among these conditions is proof of the defendant's lack of knowledge of the document in time to defend or lack of knowledge of the judgment in time to appeal.²⁸⁷ Because a defendant may lack knowledge of the complaint before a default judgment is taken, but gain knowledge of the judgment in time to appeal, the first condition would be meaningless unless the judge is awarded the power to set aside the judgment for a new trial when the conditions are satisfied. The Convention does not apply when the address of the person to be served is unknown,²⁸⁸ so the Convention's provision for setting aside a default judgment cannot be used when the default is based upon citation by publication and the defendant's address is unknown.

In *International Corporate Enterprises, Inc. v. Toshoku Ltd.*²⁸⁹ the court refused to set aside a default judgment against a Japanese corporation, concluding that the defendant's failure to answer was due to gross carelessness on its part and not to excusable neglect, mistake, or inadvertence. Defendant was served under article 2031b of the Texas statutes; a copy of the summons and complaint was received by defendant's mail department and forwarded to its chemical department. The person who read English documents for the company glanced at the document and filed it away. The court determined that a foreign company doing business in Texas has a responsibility to ensure that its internal procedures will allow it to be responsive to legal proceedings in the state.²⁹⁰ Although the court made no mention of the Convention, its provision granting relief from default judgments probably would not have benefitted the defendant, because it apparently had knowledge of the document in time to defend.

284. See the declarations of the United States, 8 MARTINDALE-HUBBELL LAW DIRECTORY 4624 n.15 (1982).

285. See note 268 *supra*.

286. Convention, *supra* note 2, art. 16.

287. *Id.* art. 16.

288. *Id.* art. 1.

289. 71 F.R.D. 215 (N.D. Tex. 1976).

290. *Id.* at 218.

VI. ALTERNATIVES TO SERVICE ABROAD

Texas law also provides methods by which a foreign defendant in some circumstances can be brought before the court without service outside the boundaries of the state. Three such procedures are attachment of property, service upon an agent, and publicized process.

A. Attachment

Federal law makes available in federal actions all remedies for seizure of a defendant's property in satisfaction of a judgment that are allowed by the law of the state in which the district court sits.²⁹¹ Courts have construed this statute as allowing prejudgment attachment of the defendant's assets in order to obtain quasi-in-rem jurisdiction over the defendant in a federal lawsuit.²⁹² Two provisions of Texas law provide for obtaining in rem jurisdiction over property found within the state but owned by a non-resident. Article 275 declares that a court may issue a writ of attachment before judgment based upon an affidavit presented by the plaintiff or his attorney showing: (1) that the defendant is justly indebted to the plaintiff for a specified amount, and (2) that the defendant is either not a resident of the state or is a foreign corporation.²⁹³ Article 281 provides that Texas courts may issue writs of attachment in suits founded upon torts or unliquidated demands when personal service cannot be obtained upon the defendant within the state.²⁹⁴

As a prerequisite to the issuance of an attachment order, the plaintiff must execute a bond conditioned upon his paying all damages and costs that might arise should the attachment be adjudged wrongful.²⁹⁵ The property must actually be attached by the court before an in rem judgment can be issued.²⁹⁶ Of course, the property attached must have some connection to the plaintiff's cause of action for the attachment to comport with due process of law.²⁹⁷ A writ of attachment can be issued only upon a written court order entered after a hearing,²⁹⁸ which may be ex parte.²⁹⁹ The trial court is required to make specific findings of fact to support the statutory grounds for issuance of the writ.³⁰⁰ The writ must be in the form specified by rule 598a³⁰¹ and must inform the defendant of his right to replevy the property or to file a motion to dissolve the writ.³⁰²

A defendant wishing to challenge the attachment must file a sworn mo-

291. FED. R. CIV. P. 64.

292. *National Am. Corp. v. Federal Repub. of Nigeria*, 448 F. Supp. 622, 633 n.16 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979).

293. TEX. REV. CIV. STAT. ANN. art. 275 (Vernon 1973).

294. *Id.* art. 281.

295. *Id.* art. 279.

296. *See Banco Minero v. Ross*, 106 Tex. 522, 535, 172 S.W. 711, 713 (1915).

297. *Shaffer v. Heitner*, 433 U.S. 186, 208-09 (1977).

298. TEX. R. CIV. P. 592.

299. *Id.*

300. *Id.*

301. *Id.* 598a.

302. *Id.*

tion praying that the writ be vacated, dissolved, or modified and stating the grounds therefor.³⁰³ The motion must admit or deny each of the trial court's findings or state the reasons why such cannot be done.³⁰⁴ The court is required to hold a hearing on the motion promptly, after reasonable notice to the plaintiff, which may be less than the customary three-day minimum.³⁰⁵ The court must rule upon the motion within ten days after it is filed.³⁰⁶ The burden of persuasion at the hearing is upon the plaintiff to prove the grounds of issuance of the writ; the movant has the burden of persuading the court either that the value of the property attached exceeds the amount necessary to secure the debt, or that certain other property should be substituted for the property actually attached.³⁰⁷ Despite these safeguards, some doubt remains as to the constitutionality of the Texas attachment statutes, even when used in conjunction with due process guarantees not specified in the statutes.³⁰⁸

B. Service upon Resident Agents

All foreign corporations authorized to transact business in Texas are required to maintain a registered agent in the state.³⁰⁹ A nonresident corporation can always be served by delivery of process to its registered agent within the state.³¹⁰ Any foreign corporation that engages in business in Texas and is not required to maintain a registered agent may be served by delivery of process to the person in charge of its business within the state.³¹¹ Under the federal rules, service can be made on a managing or general agent of the defendant.³¹²

Service upon a parent or subsidiary corporation is not considered service upon the other merely because of this corporate relationship.³¹³ Common stock ownership and identity of officers do not establish an agency relationship between corporations.³¹⁴ An agency relationship sufficient to justify service upon the agent may be found where one corporation is the "alter ego" of another³¹⁵ or where one corporation exercises a sufficient degree of control over the activities of the other.³¹⁶ The possibility of finding an agent of the defendant within the state may avoid difficult and time-

303. *Id.* 608.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. 6 L. LOWE, TEXAS PRACTICE: REMEDIES § 692 (2d ed. Supp. 1979).

309. TEX. BUS. CORP. ACT ANN. art. 8.08A(2) (Vernon 1980).

310. *Id.* art. 8.10A.

311. TEX. REV. CIV. STAT. ANN. art. 2031b, § 2 (Vernon 1964).

312. FED. R. CIV. P. 4(i)(1)(c).

313. See *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 336-37 (1925); *Gutierrez v. Raymond Int'l, Inc.*, 484 F. Supp. 241, 253 (S.D. Tex. 1979); *Murdock v. Volvo of Am. Corp.*, 403 F. Supp. 55, 57 (N.D. Tex. 1975). See also RESTATEMENT (SECOND), *supra* note 21, § 52, Comment b.

314. *Turner v. Jack Tar Grand Bahama, Ltd.*, 353 F.2d 954, 956 (5th Cir. 1965).

315. See *Murdock v. Volvo of Am. Corp.*, 403 F. Supp. 55, 57 (N.D. Tex. 1975).

316. *Turner v. Jack Tar Grand Bahama, Ltd.*, 353 F.2d 954, 956 (5th Cir. 1965); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 616 S.W.2d 247, 249 (Tex. Civ. App.—

consuming procedures and is worth investigation.³¹⁷

C. Service by Publication

Another means of obtaining service upon a foreign defendant is by publication under rule 109 of the Texas Rules of Civil Procedure.³¹⁸ Under rule 109 service by publication generally can be used only when the plaintiff or his attorney makes an affidavit stating that: (1) the defendant's residence is unknown, (2) the plaintiff and his attorney have been unable to locate the defendant after due diligence, and (3) personal service upon the nonresident defendant has been attempted under rule 108 and has failed.³¹⁹ When the defendant is shown to be outside the United States, however, the plaintiff need not show that the whereabouts of the defendant are unknown or that an attempt has been made to serve the defendant personally under rule 108.³²⁰ Under Texas law, therefore, a defendant out of the country may be served by publication in the first instance.

If service of citation is to be made by publication, it must meet the requirements of rule 114.³²¹ Service of citation is made by having the sheriff or constable publish the citation once each week for four consecutive weeks.³²² Because the rule for citation by publication is strictly construed,³²³ the plaintiff must follow it carefully. Service in this manner is not favored because usually it will not come to the attention of the defendant in time for him to respond.³²⁴ The fiction that service by publication

Houston [1st Dist.] 1981, writ granted). See also RESTATEMENT (SECOND), *supra* note 21, § 52, Comment b.

317. The general authority in Texas is that service upon a subsidiary within the state is not service upon the parent located outside the state. *Atchison, T. & S.F. Ry. v. Stevens*, 109 Tex. 262, 268-69, 206 S.W. 921, 922 (1918); *Country Clubs, Inc. v. Ward*, 461 S.W.2d 651, 658 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.). The holding in *Stevens* was based upon the United States Supreme Court's decision in *Peterson v. Chicago, R.I. & P. Ry.*, 205 U.S. 364 (1907), and purported to overrule the earlier Texas Supreme Court decision in *Buie v. Chicago, R.I. & P. Ry.*, 95 Tex. 51, 65 S.W. 27 (1901). *Buie* had held that service upon the nonresident corporation's local subsidiary was service upon the parent. 95 Tex. at 66-67, 65 S.W. at 31-32. *Buie*, however, expressly involved jurisdictional issues, while *Stevens* was concerned only with a question of venue. The *Ward* case was based upon the decision of the United States Supreme Court in *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925).

The modern rule, in contrast, holds that service upon a local subsidiary is service upon the foreign parent if the parent dominates and controls the subsidiary. RESTATEMENT (SECOND), *supra* note 21, § 52, Comment b; Thomas, *Conflict of Laws, Annual Survey of Texas Law*, 26 Sw. L.J. 191, 198 (1972). The earlier cases generally can be distinguished because no showing was made that the corporate entity of the subsidiary was disregarded or that the parent dominated and controlled the subsidiary. When two companies are intertwined so closely that they are for all practical purposes one functioning entity, service upon the one within the state should be held to be service upon the other as well.

318. TEX. R. CIV. P. 109.

319. *Id.*

320. *Id.*

321. *Id.* 114.

322. *Id.* 116.

323. See *South Tex. Dev. Co. v. Martwick*, 328 S.W.2d 230, 232 (Tex. Civ. App.—Waco 1959, writ ref'd n.r.e.).

324. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950); *Johnson, Citation by Publication: A Sham Upon Due Process*, 36 TEX. B.J. 205, 206 (1973).

gives notice to the defendant is an attenuated one when the defendant is out of the country, and is particularly so in the case of a foreign national who is not resident within the United States. Publicized service certainly is not likely to come to his attention in time to answer and defend. For these reasons, a court should be reluctant to allow its use unless every other reasonable alternative has been tried and has failed.

While the last sentence of rule 109 appears to allow the plaintiff to ambush a defendant residing abroad,³²⁵ the American advocate first must determine where the defendant's assets are located. Many foreign countries will not recognize or enforce a foreign judgment based upon service by publication.³²⁶ If the judgment must be satisfied abroad, the advocate would be prudent not to rely solely upon this type of notice. Moreover, if the defendant's whereabouts abroad are known or can be obtained easily by the use of due diligence, service by publication under rule 109 probably violates due process requirements.³²⁷

VII. SERVICE UPON FOREIGN GOVERNMENTS

Following the adoption of the Foreign Sovereign Immunities Act of 1976 (FSIA),³²⁸ state courts are unlikely to be hosts for suits against foreign governments; such a result is possible, however, because the FSIA did not mandate exclusive jurisdiction in the federal courts.³²⁹ Process upon a foreign government or its political subdivisions, agencies, or instrumentalities must be served in accordance with the terms of section 1608 of the FSIA.³³⁰ Federal rule 4 applies to service upon foreign governments only when service cannot be made by the procedures listed in the FSIA.³³¹

Section 1608(a) of the FSIA provides a hierarchy of methods for serving a foreign nation or one of its political subdivisions. If a special arrangement for service exists between the parties, that means must be used.³³² If no such arrangement exists, service must be made by the means provided by any applicable international convention on service of judicial documents.³³³ If these methods are unavailable, service should be made by

325. The sentence reads:

[W]here the affidavit shows that the defendant is not within the United States, and is not in the Armed Forces of the United States, it shall not be necessary for the party to show that the residence or whereabouts of the defendant is unknown or that an attempt has been made to procure service of nonresident notice.

TEX. R. CIV. P. 109.

326. Brenscheidt, *supra* note 118, at 264-66.

327. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318-20 (1950).

328. 28 U.S.C. §§ 1602-1611 (1976).

329. *Id.* § 1602.

330. *Id.* § 1608.

331. See Republic Int'l Corp. v. Amco Eng'rs, Inc., 516 F.2d 161, 165 (9th Cir. 1975); New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., 495 F. Supp. 73, 79-80 (S.D.N.Y. 1980).

332. 28 U.S.C. § 1608(a)(1) (1976).

333. *Id.* § 1608(a)(2).

mail requiring a signed receipt.³³⁴ The clerk of the court is required to mail a copy of the summons, complaint, and notice of suit, together with a translation of each, to the head of the ministry of foreign affairs or the head of state of the defendant.³³⁵ If service cannot be made directly by mail within thirty days, another procedure is employed. The court clerk must send by mail two copies of the summons, complaint, and notice of suit, together with a translation, to the Director of Special Consular Services of the United States Department of State in Washington.³³⁶ The secretary is required to transmit one copy of the papers through diplomatic channels and to return to the clerk a certified copy of the diplomatic note showing when the papers were transmitted.³³⁷

Service on an agency or instrumentality of a foreign country is similar to service upon the government; the preferred method of service is that provided by any special arrangement that may exist between the parties.³³⁸ If none exists, service is made as provided by any applicable international convention on the service of judicial documents or by delivery of the summons and complaint to an officer, a managing or general agent, or any other agent authorized by appointment to receive process in the United States.³³⁹ If service cannot be made by one of these methods, it may be accomplished: (1) by delivering a copy of the summons and complaint, and a translation of each, in the manner directed by the foreign government in response to a letter rogatory,³⁴⁰ (2) by mail to the foreign defendant, requiring a signed receipt,³⁴¹ or (3) as directed by the court.³⁴² Service must be consistent with the law of the place where made³⁴³ and must be reasonably calculated to give actual notice.³⁴⁴

Service generally is deemed made upon the date of receipt by the defendant as shown by the certification or postal receipt;³⁴⁵ when served through diplomatic channels, service is deemed made on the date of transmittal by the secretary.³⁴⁶ The defendant has sixty days in which to answer the complaint.³⁴⁷ The plaintiff must prove his claim to the court's satisfaction, however, before a default judgment can be entered,³⁴⁸ even if the defendant does not answer or appear.

Proper service under the FSIA will depend on whether the defendant is classified as a foreign state, a political subdivision, or an agency or instru-

334. *Id.* § 1608(a)(3).

335. *Id.*

336. *Id.* § 1608(a)(4).

337. *Id.*

338. *Id.* § 1608(b)(1).

339. *Id.* § 1608(b)(2).

340. *Id.* § 1608(b)(3)(A).

341. *Id.* § 1608(b)(3)(B).

342. *Id.* § 1608(b)(3)(C).

343. *Id.*

344. *Id.* § 1608(b)(3).

345. *Id.* § 1608(c)(2).

346. *Id.* § 1608(c)(1).

347. *Id.* § 1608(d).

348. *Id.* § 1608(e).

mentality of a foreign state. The permanent mission of a foreign government to the United Nations properly is characterized as a foreign state, and is not a mere agency or instrumentality thereof.³⁴⁹ If the summons and complaint and the required notice of the suit³⁵⁰ are not translated into the defendant's language, service is invalid. The plaintiff must comply strictly with the statute's requirements in order to uphold service against a later attack;³⁵¹ in exceptional circumstances, however, courts have allowed service upon foreign states and their agencies or instrumentalities under rule 4 of the Federal Rules of Civil Procedure, so long as the mode of service chosen is not prohibited by the foreign nation's law.³⁵² The FSIA does not require the method of service to be a procedure prescribed by the foreign government's law.³⁵³ Of course, the minimum contacts test must be met before service of process under the FSIA will afford personal jurisdiction over the defendant under the due process clause.³⁵⁴

VIII. CONTESTING SERVICE OF PROCESS

A challenge to citation and service of process must be distinguished from a contest of the court's jurisdiction. Although the court does not obtain personal jurisdiction over a defendant unless he is served properly, service does not guarantee jurisdiction. These challenges represent separate attacks on the court's authority and should not be confused.

Contesting the formalities and technicalities of citation and service of process in a Texas court generally is futile except for the purpose of vacating a default judgment. Even if the challenge to service is successful, rule 122 of the Texas Rules of Civil Procedure provides that if service is quashed, the defendant shall be deemed to have been duly served and to have entered an appearance within a certain number of days after the date service was quashed.³⁵⁵ The penalty for failure to answer timely in response to the constructive appearance rule is the entry of a default judgment.³⁵⁶ If the service or citation is to be challenged, the attack is accomplished properly by filing a motion to quash citation or service

349. *Gray v. Permanent Mission of People's Repub. of the Congo to the United Nations*, 443 F. Supp. 816, 819-20 (S.D.N.Y.), *aff'd*, 580 F.2d 1044 (2d Cir. 1978).

350. *40 D 6262 Realty Corp. v. United Arab Emirates Gov't*, 447 F. Supp. 710, 711 (S.D.N.Y. 1978); *Gray v. Permanent Mission of People's Repub. of the Congo to the United Nations*, 443 F. Supp. 816, 821 (S.D.N.Y.), *aff'd*, 580 F.2d 1044 (2d Cir. 1978).

351. *Gray v. Permanent Mission of People's Repub. of the Congo to the United Nations*, 443 F. Supp. 816, 821 (S.D.N.Y.), *aff'd*, 580 F.2d 1044 (2d Cir. 1978).

352. *New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co.*, 495 F. Supp. 73, 78-79 (S.D.N.Y. 1980). Exceptional circumstances might arise when diplomatic relations have been terminated and other means of communication between the nations are sporadic.

353. *Id.*

354. *Thomas P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247, 1255 (9th Cir. 1980); *Waukesha Engine Div., Dresser Am., Inc. v. Banco Nacional de Fomento Cooperativo*, 485 F. Supp. 490, 492 (E.D. Wis. 1980); *Carey v. National Oil Corp.*, 453 F. Supp. 1097, 1101 (S.D.N.Y. 1978).

355. TEX. R. CIV. P. 122.

356. *Id.*

before an answer is filed.³⁵⁷

The other way to attack service in Texas is more substantive; it involves the question of whether a nonresident defendant is amenable to the in personam jurisdiction of a Texas court. Under rule 120a a nonresident defendant may file a special appearance objecting to the jurisdiction of the court over his person or property.³⁵⁸ The special appearance may be made with respect to the entire proceeding or a severable claim,³⁵⁹ and it must be verified and filed prior to any other pleading or document by the defendant.³⁶⁰ The defendant's attorney can make the affidavit in support of the special appearance.³⁶¹ Any other manner of challenging personal jurisdiction will be deemed a general appearance.³⁶² The defendant can engage in discovery proceedings fully without fear of waiving the special appearance.³⁶³ If the defendant's objection to the court's jurisdiction is overruled, he may appear generally and defend without waiving his objection.³⁶⁴ Under rule 120a the defendant has the burden to prove that he is not amenable to the court's process.³⁶⁵ Thus, he bears not only the burden of production but also the burden of persuasion.³⁶⁶ While a defendant must verify his special appearance in order properly to challenge the court's jurisdiction over him,³⁶⁷ an affidavit is inadmissible at the special appearance hearing because it denies the opposing party the right to cross-examine the witness.³⁶⁸ Normal rules of evidence apply at the hearing, and proper evidence must be produced. The defendant is granted a privilege against service of process while he is in the state for the purpose of contesting jurisdiction under rule 120a.³⁶⁹ If the court grants the defendant's motion contesting jurisdiction, it may order dismissal of the whole proceeding or the severable part in contention.³⁷⁰

Federal practice has obliterated the distinction between general and special appearances.³⁷¹ To challenge personal or in rem jurisdiction in federal court, the defendant either may file a motion to dismiss for want of

357. 2 R. McDONALD, TEXAS CIVIL PRACTICE §§ 7.03, 9.05.1 (1970).

358. TEX. R. CIV. P. 120a, § 1.

359. *Id.*

360. *Id.*

361. *Omniplan, Inc. v. New Am. Dev. Corp.*, 523 S.W.2d 301, 304 (Tex. Civ. App.—Waco 1975, no writ).

362. TEX. R. CIV. P. 120a, § 1.

363. *Id.*

364. *Id.* § 3.

365. *Smith v. Reynolds*, 533 S.W.2d 861, 862 (Tex. Civ. App.—San Antonio 1976, no writ).

366. *Id.*; *Hoppenfeld v. Crook*, 498 S.W.2d 52, 55 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.).

367. TEX. R. CIV. P. 120a, § 1.

368. *Main Bank & Trust v. Nye*, 571 S.W.2d 222, 223-24 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.).

369. *Oates v. Blackburn*, 430 S.W.2d 400, 403 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.) (dictum); *Thode*, *supra* note 92, at 339.

370. *See* TEX. R. CIV. P. 120a, § 3.

371. *C. WRIGHT & A. MILLER*, *supra* note 271, § 1344, at 522.

jurisdiction or may assert this defense in his answer.³⁷² A challenge to the citation or its service is made by filing a motion to quash or by asserting the challenge in the defendant's answer.³⁷³ If these defenses are asserted by way of a motion, the motion must be filed before the answer.³⁷⁴ Want of jurisdiction over the person is waived unless presented promptly.³⁷⁵ A motion to quash process or its service will be waived if any other motion is filed prior to its being asserted.³⁷⁶ In response to a motion to quash process or service, the plaintiff has the burden to establish the validity of the process or service.³⁷⁷ The plaintiff also has the burden to prove jurisdiction over the person of the defendant when it is placed in issue.³⁷⁸ The process server's return, when admitted into evidence, will establish a prima facie case of service of process.³⁷⁹ This evidence can be supported further or can be rebutted at a hearing by affidavits, counter-affidavits, depositions, or live testimony.³⁸⁰ On a motion to challenge jurisdiction, affidavits are admissible to support or rebut the challenge; the court also may allow discovery on the jurisdictional issue.³⁸¹ If a motion to quash process or service is granted, the suit should be maintained rather than dismissed if a reasonable prospect exists that the plaintiff will be able to serve the defendant properly.³⁸² When a motion to the jurisdiction of the court is sustained, however, the suit usually will be dismissed.³⁸³

The courts' desire to uphold the method of service actually used by plaintiffs in Convention countries, even when it does not comply with the Convention, probably results from a belief that the suit will have to be dismissed if service is not upheld and that the statute of limitations might prevent its reinstatement. This rationale is in error. If a reasonable likelihood of successful service exists, as usually will be the case when dealing with a Convention country, the suit need not be dismissed at all; the action can be maintained while the plaintiff re-serves the defendant under the Convention. In Texas a challenge to the citation or service is deemed a general appearance at a designated later time.³⁸⁴ The case therefore is never dismissed when the formalities of service are attacked. Even if the suit is dismissed, however, most states have saving statutes, so the suit can be reinstated within a reasonable time without running afoul of the stat-

372. FED. R. CIV. P. 12(b)(2); see C. WRIGHT & A. MILLER, *supra* note 271, § 1351, at 560, 563.

373. FED. R. CIV. P. 12(b)(4) & (5); see C. WRIGHT & A. MILLER, *supra* note 271, § 1353, at 577, 581.

374. C. WRIGHT & A. MILLER, *supra* note 271, § 1351, at 564, § 1353, at 580.

375. *Id.* § 1351, at 564.

376. *Id.* § 1353, at 581.

377. *Id.* at 582.

378. *Walker v. Newgent*, 583 F.2d 163, 166 (5th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 489-90 (5th Cir. 1974); *Navarro v. Sedco, Inc.*, 449 F. Supp. 1355, 1357 (S.D. Tex. 1978).

379. C. WRIGHT & A. MILLER, *supra* note 271, § 1353, at 582.

380. *Id.* at 583.

381. *Id.* § 1351, at 565-66.

382. *Id.* § 1354, at 584, 586.

383. *Id.* § 1351, at 567.

384. See text accompanying note 355 *supra*.

utes of limitations.³⁸⁵ The Texas saving statute is embodied in article 5539a.³⁸⁶ While it generally is considered to apply only to a dismissal for lack of subject matter jurisdiction,³⁸⁷ its language is broad enough to include a dismissal for want of personal jurisdiction because of improper service.

IX. CONSTITUTIONAL REQUIREMENTS FOR SERVICE ABROAD

In order to satisfy due process requirements, service of process must be reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard.³⁸⁸ At a minimum, due process requires a summary of the documents (translated into the language of the country in which they are served) to be delivered to the defendant along with the documents.³⁸⁹ The summary should show that a legal action of a specific nature is pending against the defendant and should state the location of the suit, the amount involved, the date by which defendant is required to respond, and the possible consequences of a failure to respond.³⁹⁰ The summary may not be required, however, when the defendant is shown to be sufficiently familiar with the language of the forum.³⁹¹ The Texarkana court of civil appeals implicitly responded to this constitutional imperative in *Dosamantes v. Dosamantes*,³⁹² holding that an attempted personal service on the defendant in Mexico was invalid because the delivery was attempted in English although the defendant spoke only Spanish.

X. CONCLUSION

In order to alleviate the problems concerning international service of process, the Texas Supreme Court should add to the Texas Rules of Civil Procedure a rule 108a, specifically authorizing service of process in foreign countries.³⁹³ The rule should provide that service in other countries is

385. See W. FERGUSON, THE STATUTES OF LIMITATION SAVING STATUTES 79 (1978).

386. TEX. REV. CIV. STAT. ANN. art. 5539a (Vernon 1958).

387. W. FERGUSON, *supra* note 385, at 61.

388. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

389. *Julen v. Larson*, 25 Cal. App. 3d 325, 101 Cal. Rptr. 796, 798 (1972).

390. 101 Cal. Rptr. at 798.

391. *Hunt v. Mobil Oil Corp.*, 410 F. Supp. 4, 9 (S.D.N.Y. 1975); *Shoei Kako Co. v. Superior Court*, 33 Cal. App. 3d 808, 109 Cal. Rptr. 402, 412-13 (1973).

392. 500 S.W.2d 233, 237 (Tex. Civ. App.—Texarkana 1973, writ *dism'd*).

393. The proposed rule reads as follows:

RULE 108a. SERVICE OF PROCESS IN FOREIGN COUNTRIES

(1) Manner. Service of process may be effected upon a party in a foreign country if service of the citation and petition is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory or a letter of request; or (C) in the manner provided by Rule 106; or (D) pursuant to the terms and provisions of any applicable treaty or convention; or (E) by diplomatic or consular officials when authorized by the U.S. Department of State; or (F) by any other means directed by the court that is not prohibited by the law of the

valid when made: (1) pursuant to the terms and provisions of any applicable convention or treaty; (2) in accordance with one or more of the methods provided by the internal law of the country where service is made; (3) by letter rogatory or by letter of request; (4) by *remise simple* or voluntary acceptance; (5) pursuant to the provisions of rule 106; (6) by diplomatic or consular officials when so authorized by the United States Department of State; or (7) by any other means directed by the court, so long as it is not prohibited by the internal law of the country where service is to be made. Additionally, the rule should require the method chosen to be reasonably designed to give actual notice of the proceedings to the defendant in time to answer and defend. It specifically should provide that attempted service by other means is not a prerequisite to the use of any form of service under the rule, and it should state that a defendant served with process will be subject to the in personam or in rem jurisdiction of a Texas court to the full extent allowed by the United States Constitution.

Rule 107 likewise should be amended to provide for proof of service pursuant to a method provided by the internal law of a nation where the service is executed or by a method provided in any applicable convention or treaty. The last sentence of rule 109 also should be deleted. Federal rule 4(i) should be amended to provide that both service and proof of service can be made according to any method authorized in an applicable convention or treaty. Finally, rule 55(c) of the Federal Rules of Civil Procedure should be amended to allow relief from a default judgment taken against a resident in a foreign nation to be set aside pursuant to the provisions of any applicable convention or treaty. Because the Convention is the law of the land, it may not be necessary to amend Texas or federal law to provide specifically for the procedures embodied therein; such amendments, however, would focus the attention of courts and litigants on the existence of conventions and treaties that might affect important rights. Moreover, the express provision for these methods would resolve any uncertainty that may exist as to the relationship between the Convention and domestic law.

country where service is to be made. The method for service of process in a foreign country must be reasonably calculated, under all of the circumstances, to give actual notice of the proceedings to the defendant in time to answer and defend. It is not a requirement for service of process by any one of these means, including any of the means provided in Rule 106, that any other method has been attempted previously. A defendant served with process under this rule shall be required to appear and answer in the same manner and time and under the same penalties as if he had been personally served with citation within this state to the full extent that he may be required to appear and answer under the Constitution of the United States or under any applicable convention or treaty in an action either in rem or in personam.

(2) Return. Proof of service may be made as prescribed by the law of the foreign country, by order of the court, by Rule 107, or by a method provided in any applicable treaty or convention.

