KREIMERMAN V. CASA VEERKAMP, S.A. DE C.V.: THE FIFTH CIRCUIT SEVERELY LIMITS THE SCOPE OF THE INTER-AMERICAN CONVENTION ON LETTERS ROGATORY

Alberto Kreimerman owns Hermes Music and Hermes International, Inc., corporations that sell music-related products. Both companies are principally located in Texas, where Kreimerman resides. Walter Veerkamp, a Mexico City resident, is the owner of Casa Veerkamp, S.A. de C.V., also a company which sells music-related products. Casa Veerkamp's principal place of business is in Mexico. Veerkamp discovered an article published in a Mexican political magazine that accused Kreimerman of less than admirable behavior, including allegations of drug trafficking, gun running, and money laundering. Apparently, Veerkamp forwarded copies of this article to some of Kreimerman's suppliers, accompanied by a colorful cover letter. Kreimerman was distressed by Veerkamp's conduct and consequently sued Veerkamp et al. in Texas state court for libel, civil conspiracy, and slander. Pursuant to the Texas Long-Arm Statute, Kreimerman served process on the Mexican defendants via direct mail. After the case was removed to the U.S. District Court for the Southern District of Texas, Veerkamp moved to quash the service. The District Court granted the motion, holding that the Inter-American Convention on Letters Rogatory (Convention),[1] a multinational treaty designed to facilitate service of letters rogatory among its signatory nations, was the exclusive means of effecting service on the Mexican defendants.

Following the District Court's decision to quash service, Kreimerman successfully moved to extend the time to serve the defendants and requested the court to issue four letters rogatory for service under the terms of the Convention. Kreimerman retained Mexican counsel in Ciudad Juarez to receive the letters and assist with such service. This counsel in turn hired another Mexican attorney whose firm had offices in Mexico City where the letters rogatory had to be filed. During the ensuing months, Kreimerman's Mexican counsel reported that

1. Inter-American Convention on Letters Rogatory, *opened for signature* Jan. 30, 1975, S. TREATY DOC. NO. 27, 98th Cong., 2d. Sess. (1984), 14 I.L.M. 336 (1975) [hereinafter Inter-American Convention].

the letters had been received and filed with the Federal District Court of Mexico, but due to a personnel shortage, the letters had not been served. As his time to effect service expired, Kreimerman requested and received a second extension of time to serve the defendants. Prior to the expiration of the second extension, Kreimerman's counsel in Mexico represented that service of the letters rogatory had finally been effected, but that there would be a delay in processing the returns. Kreimerman once again requested a time extension. Veerkamp subsequently moved for sanctions against Kreimerman's counsel, claiming service had never been effected in Mexico and that Kreimerman's counsel had misrepresented this fact. Only after Veerkamp's motion was filed did Kreimerman learn that service had indeed not been effected. It seems the lawyer in Mexico City had continually disguised the true situation.

Kreimerman's request for a third time extension was denied. The statute of limitations had tolled and the case was dismissed without prejudice. Thus Kreimerman appealed the District Court's decision to quash the initial service on Veerkamp made pursuant to the Texas Long-Arm Statute, arguing, inter alia, that the Convention does not preempt other methods of service. The U.S. Court of Appeals for the Fifth Circuit agreed, *holding* that the Inter-American Convention on Letters Rogatory does not supplant all other means of effecting service on a defendant residing in Mexico. *Kreimerman v. Casa Veerkamp, S.A. de C.V.*, 22 F.3d 634 (5th Cir.), *cert. denied*, 115 S. Ct. 577 (1994).

The Convention was drafted in the wake of the success of the Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil and Commercial Matters (Hague Service Convention).[2] The Hague Service Convention is a multilateral treaty formulated in 1964 by the Tenth Session of the Hague Conference on Private International Law.[3] The treaty was intended to provide a simpler method to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice, and to facilitate proof of service abroad.[4] The primary innovation of the Hague Service Convention was the requirement that each state establish a central

2. Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 [hereinafter Hague Service Convention].

3. Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 698 (1988).

4. *Id.*

authority for receiving requests for service of documents from other countries.[5] Once the central authority receives a request in the appropriate form, it must serve the documents by a method prescribed by the internal law of the receiving state.[6] Thirty-two countries, including the United States, are signatories.[7]

In January 1975, the Organization of American States (OAS) convened the First Inter-American Specialized Conference on Private International Law.[8] Although only one other OAS member had acceded to the Hague Service Convention, the members recognized the success of this treaty and the desirability of a multilateral treaty regime among the OAS which would promote the orderly service of foreign judicial documents.[9] Accordingly, the members of the Conference negotiated and adopted the Convention.[10] The Convention establishes mechanisms for the service of process and similar documents, and mechanisms for processing certain requests for information, designed to save the courts and litigants of the OAS time, effort, and expense.[11] The Convention provides that each state must designate a central authority for both receiving and transmitting letters rogatory.[12] Litigants are required to use

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5. *Id.*

6. *Id.* at 699.

7. *Id.* at 698.

8. Kenneth W. Dam (Acting Secretary of State), Letter of Submittal on Inter-American Convention on Letters Rogatory, June 7, 1984, S. TREATY DOC. NO. 27, 98th Cong., 2d Sess. at III (1984). This is a letter recommending transmittal of the Convention to the Senate for advice and consent to ratification, with commentary on each article of the treaty. *Id.*

9. *Id.* at IV.

10. *Id.* The United States did not originally sign the Convention because it believed that service of judicial documents could be more effectively accomplished if certain additional provisions were incorporated in the treaty regime. Therefore, the United States proposed the draft of a protocol to the Convention for consideration at the Second Inter-American Specialized Conference on Private International Law in 1979. The Additional Protocol, *inter alia*, clarified the obligations of the parties to designate a "Central Authority," simplified the authentication requirement for the documents transmitted by letters rogatory for service, prescribed the use of standard issuance forms and execution requests, and established a procedure for payment of costs. Protocol, May 8, 1979, S. TREATY DOC. NO. 27, 98th Cong., 2d. Sess. (1984), 14 I.L.M. 336 (1975). Both the Convention and Additional Protocol were signed by the United States on April 15, 1980, and ratified by the Senate on October 9, 1986. Dam, Letter of Submittal on the Inter-American Convention on Letters Rogatory, S. TREATY DOC. NO. 27, 98th Cong., 2d Sess. at IV.

11. *See* Inter-American Convention, *supra* note 1, at XIII.

12. *Id.* art. 4. Although article 2 of the Convention does not expressly oblige each contracting State to designate a Central Authority, the article when read as a whole implies that such an obligation is mandatory. Dam, Letter for Submittal on the Inter-American Convention on Letters Rogatory, S. TREATY DOC. NO. 27, 98th Cong., 2d Sess. at VI. Furthermore, whereas the Hague Service Convention only prescribed the use of the Central Authority for receiving and processing

standardized forms for transmitting letters of request and returning the executed documents, thereby eliminating the confusion previously caused by a myriad of forms.[13] Once a state receives a letter rogatory, the state must serve it pursuant to the laws of the receiving state.[14] When the central authority in Mexico, the Secretariat of Foreign Affairs, receives a letter rogatory from the U.S. Justice Department, the Secretariat will in turn forward the letter to the appropriate local court for service on the party.[15] Once the citation has been served, the court that processed it will attest to the execution of the letter of request, and return the relevant documents to the Secretariat.[16] The Secretariat will then certify execution to the Justice Department.[17] The Convention does not limit provisions regarding letters rogatory in other multistate agreements that "have been signed or may be signed in the future by the States Parties or preclude the continuation of more favorable practices in this regard that may be followed by the signatory States."[18]

Aside from the noted case, only one other federal decision has addressed the issue of whether the Convention is the exclusive means of serving process on foreign defendants residing in a signatory State.[19] Thus, the noted case relied heavily on the rules of interpretation employed by the United States Supreme Court when determining the scope of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention)[20] in *Société Nationale Industrielle Aérospatiale v. United States District Court for the*

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letters rogatory, the Convention makes the Central Authority the proper channel for both reception and transmission of letters rogatory. *Id.* The United States has designated the Justice Department as its Central Authority, and Mexico has chosen the Secretariat of Foreign Affairs. *Id.*

13. *Id.*

14. Inter-American Convention, *supra* note 1, art. 10.

15. Bilder, Richard B., *International Judicial Assistance*, ST. MARY'S L.J. 1059, 1072 (1994) (book review).

16. *Id.* at 1074.

17. *Id.*

18. *Id.* art. 15.

19. Pizzabiocche v. Vinelli, 772 F. Supp. 1245, 1249 (M.D. Fla. 1991) (holding that the Convention is not the exclusive means of serving process on defendants residing in a signatory state).

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

Southern District of Iowa[21] and the Hague Service Convention in *Volkswagenwerk Aktiengesellschaft v. Schlunk.*[22]

In *Aérospatiale,* the Supreme Court examined the extent to which parties must comply with the procedures of the Hague Evidence Convention when they seek evidence from a foreign adversary residing in a signatory State.[23] In *Aérospatiale*, two French national corporations engaged in the business of designing, manufacturing and marketing aircraft were sued when one of their planes crashed in Iowa, injuring the respondents.[24] Initial discovery was conducted without objection by both sides pursuant to the Federal Rules of Civil Procedure. However, when respondents served a second request for information the petitioners responded with a motion for a protective order, averring that because they were French corporations and the evidence sought could only be found in France, the Hague Evidence Convention provided exclusive procedures for pretrial discovery.[25]

The Court held that the Hague Evidence Convention does not provide the exclusive and mandatory procedures for obtaining information located in a foreign signatory's jurisdiction.[26] The Court explained that an international treaty is "'in the nature of a contract between nations,'"[27] to which the general rules of construction will apply.[28] Thus, the Court found it must "'begin with the text of the treaty and the context in which the written words are used.'"[29] Also, the treaty's history, negotiations and the practical construction adopted by the parties may be considered.[30] Starting with the treaty's preamble, the Court found it significant that the provision did not "speak in *mandatory* terms" prescribing procedures for all permissible transitional discovery and excluding all other existing practices.[31] Rather, the preamble spoke with a permissive tongue and described the purpose of the Hague

21. 482 U.S. 522 (1987) (interpreting the Hague Evidence Convention).
22. 486 U.S. 694 (1988) (interpreting the Hague Service Convention).
23. *Aérospatiale*, 482 U.S. at 524.
24. *Id.* at 525.
25. *Id.* at 525-26.
26. *Id.* at 529.
27. *Id.* at 533 (quoting World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 253 (1984)).
28. *Aérospatiale*, 482 U.S. at 533.
29. *Id.* at 534 (quoting Air France v. Saks, 470 U.S. 392, 397 (1985)).
30. *Id.*
31. *Id.* (emphasis added).

Evidence Convention as "'facilitat[ing] the transmission and execution of Letters of Request'" and "'improv[ing] mutual judicial co-operation.'"[32] In a footnote, the Court stated that the omission of mandatory language in the Hague Evidence Convention is particularly significant in light of its use in the preamble to the Hague Service Convention. The Hague Service Convention was drafted before the Evidence Convention and states "'The present convention shall apply in all cases . . . where there is occasion to transmit a judicial or extrajudicial document for service abroad.'"[33]

Furthermore, the Court believed the text of the Hague Evidence Convention itself does not modify the law of any contracting State, require any contracting State to use the Convention procedures, or compel any contracting State to change its own procedures.[34] The Court pointed again to the treaty's use of permissive rather than mandatory language. For example, Article 1 provides that a judicial authority in one state "'may'" forward a letter of request to the competent authority in another state for the purpose of obtaining evidence.[35] Similarly, Articles 15, 16, and 17 provide that certain individuals "'may . . . without compulsion'" take evidence under certain conditions.[36]

Continuing its textual analysis, the Court examined Article 23, which expressly authorizes a contracting state to declare that it will not execute any letter of request in aid of pretrial discovery of documents in a common-law country.[37] In light of Article 23 and "the absence of explicit textual support," the Court refused to accept the "hypothesis that the common law contracting states abjured recourse to all pre-existing discovery procedure at the same time that they accepted the possibility that a contracting party could unilaterally abrogate the Convention's procedures."[38]

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32. *Id.* (quoting the Hague Evidence Convention, *supra* note 20, 23 U.S.T. at 2557).

33. *Aérospatiale*, 482 U.S. at 534 n.15. (quoting the Hague Service Convention, *supra* note 2, art. 1, 20 U.S.T. at 2557).

34. *Id.*

35. *Id.* at 335 (quoting the Hague Evidence Convention, *supra* note 20, art. 1, 23 U.S.T. at 2557).

36. *Id.* (quoting the Hague Evidence Convention, *supra* note 20, art. 1, 23 U.S.T. at 2557).

37. *Id.* at 536 (quoting the Hague Evidence Convention, *supra* note 20, art. 1, 23 U.S.T. at 2568).

38. *Aérospatiale*, 482 U.S. at 537.

Petitioners cleverly invited the Court to announce a rule of law that would require "first resort"[39] to the Hague Evidence Convention whenever discovery is sought from a foreign litigant. Reasons for the adaptation of a rule of first resort included international comity and the need to respect the sovereignty of states in which evidence is located.[40] In rejecting the petitioners' argument, the Court expressed concern that certain procedures authorized by the Hague Evidence Convention would be unduly time consuming and costly.[41] It is interesting that the Court further believed that principles of comity did not mandate first resort to treaty procedures, but instead mandates an individual case-by-case analysis of the particular acts, sovereign interests, and likelihood that resort to those procedures will prove effective.[42]

Finally, if interpreted as the exclusive means for obtaining evidence abroad, the Hague Evidence Convention would effectively subject every American court adjudicating a case involving a national of a contracting state to the internal laws of that State.[43] Without a plain statement of preemptive intent in the text of the treaty, the Court was unwilling to resolve that the contracting parties intended such a result.[44]

In *Schlunk*, the Supreme Court relied on the interpretive tools it set forth in *Aérospatiale* to decide whether the Hague Service Convention preempts all other forms of service for the contracting parties.[45] Schlunk's parents were killed in an accident while driving an automobile sold by Volkswagen of America, Inc., a wholly owned subsidiary of Volkswagen Aktiengesellschaft (VWAG), a corporation established under the laws of Germany with its principal place of business in that country.[46] Schlunk attempted to serve VWAG by serving Volkswagen of America as VWAG's agent.[47] VWAG moved to quash the service, asserting that service could only be made in accordance with the Hague

39. *Id.* at 542.
40. *Id.*
41. *Id.* at 542-43.
42. *Id.* at 544.
43. *Aérospatiale*, 482 U.S. at 539.
44. *Id.*
45. *Schlunk*, 486 U.S. at 696.
46. *Id.* at 697.
47. *Id.*

Service Convention and that Schlunk had failed to comply with the treaty's requirements.[48] The Supreme Court granted certiorari.

The Court recognized that Article 1 of the Hague Service Convention determines its scope.[49] Article 1 states: "'The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.'"[50] The Court summarily explained that this language is "mandatory" as "we acknowledged last Term in [*Aérospatiale*]."[51] Therefore, "[b]y virtue of the Supremacy Clause, U.S. Const., Art. VI, the Convention preempts methods of service prescribed by state law in all cases to which it applies."[52] Without any further textual analysis or consideration of extraneous evidence, the Court found this mandatory language to be dispositive.[53]

Only one other federal court, aside from the noted case, has confronted the issue of whether the Inter-American Convention on Letters Rogatory preempts other methods of service for signatory States. In *Pizzabiocche v. Vinelli*,[54] the U.S. District Court for the Middle District of Florida rejected the foreign defendants' contention that, similar to the Hague Service Convention, the Convention procedures were mandatory. Several shareholders (all residents of Argentina or Uruguay) of a Florida corporation with its principal place of business in Florida, brought suit against a New York corporation and several foreign individuals. Plaintiffs personally served the foreign defendants pursuant to Rule 4(i)(1)(e)[55] of the Federal Rules of Civil Procedure. The defendants

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48. *Id.*

49. *Id.* at 699.

50. *Schlunk*, 486 U.S. at 699 (quoting the Hague Service Convention, *supra* note 2, art. 1, 20 U.S.T. at 362).

51. *Id.* (citing *Aérospatiale*, 482 U.S. at 534 n.15).

52. *Id.*

53. The Court also concluded that the internal law of the forum state would govern whether the particular service in question was "service abroad," mandating compliance with the Hague Service Convention's requirements. *Id.* at 700-01.

54. 772 F. Supp. 1245 (M.D. Fla. 1991).

55. FED. R. CIV. P. 4(i)(1)(e). Service of process in federal court is governed by the provisions of Rule 4. Rule 4(i) sets out alternative provisions for service of process in a foreign country:

> (1) Manner. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and

moved to quash service, averring that the Convention preempts all other methods of service, thus that plaintiffs' service pursuant to the Federal Rules was insufficient.[56]

The court determined that the Convention "states that it shall apply to letters rogatory; it does not state that letters rogatory are the only means of serving process in the signatory countries."[57] Rather, the Convention merely outlines the procedures necessary to properly execute a letter rogatory.[58]

In the noted case, the Fifth Circuit described its task as "simply . . . to determine whether the language, history, and purpose of the Convention indicate that it was devised to supplant all other means of effecting service on a defendant residing in a signatory nation other than the forum nation."[59] The court commenced by setting forth the standards of construction to be applied in interpreting the Convention. Citing *Schlunk*, the court explained it would begin with the language or text of the treaty.[60] Extraneous information such as the history of the treaty, the content of negotiations concerning the treaty, and the practical construction adopted by the parties were to be resorted to only if the language of the treaty, read in the context of its structure and purpose, was ambiguous.[61] Although courts commonly declare that treaties are to be construed more liberally than contracts, the *Kreimerman* court interpreted this proposition as merely reflecting the willingness of courts to consider extraneous nontextual factors when interpreting an unclear treaty provision, rather than to reflect the willingness of courts to construe treaty provisions broadly.[62] According to the court, precedents suggest that

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> complaint is made: . . . or (c) upon an individual, by delivery to the individual personally.

FED. R. CIV. P. 4(I). The provisions of Rule 4(i) only apply where service in a foreign country is not prohibited by an international treaty. *Pizzabiocche*, 772 F. Supp. at 1248.

56. *Pizzabiocche*, 772 F. Supp. at 1247.

57. *Id.* at 1249.

58. *Id.*

59. *Kreimerman*, 22 F.3d at 638.

60. *Id.*

61. *Id.* The court recognized that *Schlunk* did not define the word "context." It explained that when it speaks of "interpreting the language of a treaty in the context of its structure and purpose, it means construing the literal language of the treaty in light of its structural organization and its purpose—as reflected in the preamble and other parts of the treaty." *Id.* n.10.

62. *Id.* (citing *Saks*, 470 U.S. at 396; Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 535 (1991)).

treaties should be construed narrowly because they establish restrictions on the exercise of sovereign rights.[63]

Similar to the court in *Pizzabiocche*, the Fifth Circuit noted that Article 2 of the Convention states that it shall apply to letters rogatory, but does not proclaim that letters rogatory are the only means of serving process in the signatory countries.[64] Ignoring its own proclamation that it must look first to the plain meaning of the text of the treaty in question, the court next compared the language of Article 2 of the Convention to that used in the analogous article of the Hague Service Convention. By its own terms, the Hague Service Convention "'appl[ies] *in all cases*, in civil or commercial matters, *where there is occasion to transmit a judicial . . . document for service abroad*.'"[65] In contrast, letters rogatory are by definition merely one of a number of procedural mechanisms listed in Rule 4 of the Federal Rules of Civil Procedure to request assistance from authorities in another country. Hence the scope of the Convention appears to be limited to regulating this single mechanism.[66]

To buttress its comparative argument, the court also pointed to the modest preamble of the Convention which expresses that the member States are "desirous of concluding a convention on letters rogatory."[67] The language of the Hague Service Convention is notably more preemptory: "'Desiring to create appropriate means to *ensure* that judicial and extrajudicial documents to be served abroad *shall be* brought to the notice of the addressee in sufficient time.'"[68]

The court thought it significant that the Convention lacks an express statement of preemptive intent, a factor that the Supreme Court in *Aérospatiale* found important when it held that the procedures of the

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63. *Id.* (citing The Case of S.S. Lotus (France v. Turkey), 1927 P.C.I.J. Ser. A, No. 10 at 18-19; *In re* Extradition of Demjanjuk, 612 F. Supp. 544, 555 (N.D. Ohio 1985) (citing the *S.S. Lotus* case for the proposition that the jurisdiction of sovereign States to adjudicate is unbounded unless explicitly prohibited)).

64. *Kreimerman*, 22 F.3d at 639. Article 2 of the Convention provides: "This convention shall apply to letters rogatory, issued in conjunction with proceedings in civil and commercial matters held before the appropriate judicial . . . authority of one of the States Parties to this convention ." Inter-American Convention, *supra* note 1, art. 2, at XIII.

65. *Id.* (quoting the Hague Service Convention, *supra* note 2, art. 1, 20 U.S.T. 361) (emphasis added).

66. *Id.* at 640.

67. *Id.* (quoting Inter-American Convention, *supra* note 1, pmbl., at XIII).

68. *Id.* (quoting the Hague Service Convention, *supra* note 2, pmbl., 20 U.S.T. 361) (emphasis added).

Hague Evidence Convention would not preclude other methods of discovery.[69] Nonetheless, Veerkamp asserted that Article 15 of the Convention demonstrates the drafters' intent to preempt other methods of service. Article 15 provides:

> This Convention shall not limit [1] any provisions regarding letters rogatory in bilateral or multilateral agreements that may have been signed or may be signed in the future by the States Parties or [2] preclude the continuation of more favorable practices in this regard that may be followed these States.[70]

Veerkamp interpreted the second clause of Article 15 to permit contracting State to continue other more favorable practices only when those practices have been agreed upon by all effected States. In other words, Article 15 would prohibit the continuation of *unilateral* service practices by member States which were not assented to by all the signatories.[71] The State Department's comments on Article 15 appear to support this interpretation, stating: "[Article 15] 'authorizes the continuance of practices *between* states *concerning letters rogatory* which may be less restrictive than those prescribed by the Convention.'"[72] Yet the court found that Article 15 addresses only those state practices that pertain to letters rogatory. Thus, the only unilateral practices which are prohibited are those "in regard to letters rogatory."[73] Dismissing the import of the State Department's comments, the court indicated that the word "between" simply means "among" the contracting states, as opposed to "agreed upon by" the contracting parties.[74] In any event, the State Department comment on Article 15 only addresses practices "'concerning letters rogatory.'"[75]

The court added that even if the provision does not permit continuance of unilateral state practices, the express authorization in Article 15 of mutually-accepted service practices does not implicitly

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69. *Kreimerman*, 22 F.3d at 639 (citing *Aérospatiale*, 482 U.S. at 539).
70. *Id.* at 641 (quoting Inter-American Convention, *supra* note 1, art. 15, at XV).
71. *Id.*
72. *Id.* (quoting Dam, *supra* note 8, at VIII) (emphasis added).
73. *Id.* at 642.
74. *Kreimerman*, 22 F.3d at 641.
75. Dam, *supra* note 8, at VIII.

forbid other practices not so expressly authorized.[76] Moreover, the court noted that the Supreme Court has rejected the argument that the mere existence of an international convention implies the proscription of other practices not expressly prohibited by the convention.[77]

Kreimerman relied on Article 17 of the Convention, which permits a "'State of destination [to] refuse to execute a letter rogatory that is manifestly contrary to public policy.'"[78] In interpreting an escape clause of the Hague Evidence Convention which is similar to Article 17, the Supreme Court in *Aérospatiale* professed an unwillingness, in the absence of explicit textual support, to assume that parties would contract to abjure recourse to all pre-existing discovery procedures and at the same time accept the possibility that a party could unilaterally abrogate the agreed upon procedures.[79] The *Kreimerman* court believed that the same logic applied to the Convention; in the absence of clear textual support, it would not assume that the United States abjured recourse to all other methods of service while allowing the other contracting parties to refuse to execute letters rogatory that are contrary to their public policy.[80] However, the court ignored the fact that Article 17 grants the United States the same right to refuse a letter rogatory if it offends its public policies. Furthermore, Article 17 limits a contracting party's right to abrogate the convention's procedures. Rather, only in narrow and most likely unique circumstances where a State's public policies are offended may it refuse to implement the procedures. Therefore, the court failed to adequately explain why a contracting party would not accept that the Convention both preempts other methods of service and provides a limited escape clause in Article 17.

Veerkamp also pointed to mandatory language within the Convention and argued that similar language led the Supreme Court in *Schlunk* to conclude that the Hague Service Convention preempted other methods of service.[81] Rejecting this line of reasoning, the court emphasized that the significance of mandatory language depends on the context in which it is used.[82] Again, the court asserted that all of the

76. *Kreimerman*, 22 F.3d at 641.
77. *Id.*
78. *Id.* at 642.
79. *Id.* (citing *Aérospatiale*, 482 U.S. at 537).
80. *Id.*
81. *Kreimerman*, 22 F.3d at 642.
82. *Id.*

mandatory language in the Convention refers to what must be done with regard to letters rogatory; none of the mandatory language indicates that the Convention governs any other method of service.[83]

Veerkamp advanced some nontextual arguments as well. Veerkamp pointed to President Reagan's Letter of Transmittal to the Senate[84] and the State Department's Letter of Submittal,[85] which aver that the Convention "establish[es] a treaty-based system of judicial assistance *analogous* to that which exists"[86] among the states party to the Hague Service Convention.[87] Veerkamp argued that this language demonstrates that the President and the State Department viewed the Inter-American Convention as having the same preemptive effect of the Hague Service Convention. However, the court defined the term "analogous" to mean similar in certain respects, but implicitly different in other respects.[88] Veerkamp strategically chose not to emphasize that President Reagan's letter said that litigants "[would] be able to avail themselves of a number of improved and simplified procedures" upon the ratification of the Convention. The court emphasized that such language shows that the Convention merely provides optional procedures that litigants may use.[89] In any event, the court concluded that President Reagan and the State Department never intended to convey legal judgments about the relative scopes of the two conventions.[90]

Veerkamp further argued that if resort to the Convention procedures is viewed as optional rather than mandatory, the Convention is rendered inefficacious; contracting states could simply choose to disregard Convention procedures when they proved inconvenient.[91] In response, the court looked to *Aérospatiale* where the Supreme Court rejected a similar argument with regard to the Hague Evidence

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83. *Id.*

84. President Reagan, Letter of Transmittal to the Senate, June 15, 1984, S. TREATY DOC. NO. 27, 98th Cong., 2d Sess. at I.

85. *See* Dam, *supra* note 8, at III.

86. *Id.* (emphasis in original).

87. *Id.*

88. *Kreimerman*, 22 F.3d at 642.

89. *Id.*

90. *Id.* at 642-43.

91. *Id.* at 643.

Convention, noting that it is enough that the treaty's procedures are available when the means authorized by the treaty are chosen.[92]

The *Kreimerman* court concluded that the Convention merely provides plaintiffs with a dependable mechanism by which they may effect service on foreign defendants residing in a signatory nation, if plaintiffs opt to use its procedures.[93] Plaintiffs who choose not to avail themselves of the Convention risk the possibility that the principle of international comity may hinder their assertion of jurisdiction, or make enforcement of their judgments abroad difficult or even impossible.[94]

It is curious that the court here expressly limited itself to the plain meaning of the words found within "the four corners" of the treaty document, yet immediately thereafter made extraneous comparative arguments based on the language of the Hague treaties. Surely it is both intuitive and logical for courts to seek guidance from similar treaties, as they are important and acceptable interpretive tools. Treaties are not negotiated in a legal vacuum without any awareness of prior attempts to resolve similar issues. Therefore, rather than engaging in a legal fiction that contemplates a strict interpretation of a treaty's text (that is in practice largely ignored), the court should have merely noted that it will indeed look to other treaties.

Nevertheless, the court's textual analysis in the noted case is arguably sound. The Convention by its own terms describes its scope narrowly, stating that "[t]his Convention shall apply to letters rogatory."[95] Had the drafters intended the Convention to govern *all* attempts to serve process on a foreign litigant residing in a signatory state, they could have chosen broader language, such as that found in the Hague Service Convention. Indeed, even the title of the Convention is limiting, declaring it simply to be the Inter-American Convention on *Letters Rogatory*. The extraneous comments of both President Reagan and the State Department buttress this observation. President Reagan noted that the Convention is "a *step* in filling the void that exists in the area of judicial cooperation with other OAS countries," as opposed to a panacea.[96] Kenneth Dam, then Acting Secretary of State, explained that

92. *Id.* (citing *Aérospatiale*, 482 U.S. at 541).
93. *Kreimerman*, 22 F.3d at 643.
94. *Id.* at 644.
95. Inter-American Convention, *supra* note 1, art. 2, at XIII.
96. President Reagan, *supra* note 84, at I (emphasis added).

the Convention "establishes *a* mechanism for the service of process"[97] rather than the only mechanism.

Yet, the court failed to address significant policy and practicality concerns raised by its declaration that the Convention is merely an advisory agreement. One could easily view the court's holding as an affront to the nations that have joined the United States in ratifying this ground-breaking treaty. The court appears not to acknowledge the considerable achievement in accommodating the divergent interests that the Convention represents.[98] The U.S. Federal Rules of Civil Procedure are fairly liberal in permitting U.S. counsel to mail the complaint that constitutes service of process.[99] In contrast, service of process is a formal matter in most civil law countries. For example, in Mexico service must be in person and performed by Mexican officials—attorneys do not have the authority to serve process.[100]

The Convention is a notable accomplishment that should not be given minimal import. This is especially true considering that "regular commercial and legal channels loom ever more crucial"[101] in our world. The North American Free Trade Agreement will invariably give rise to an increase in transnational litigation between the United States and Mexico. Certainly a predictable, uniform method of service of process in this context would satisfy the salient purpose of service—to provide adequate and timely notice to the parties.

Moreover, the recognition of an exclusive procedure for service of process among Convention signatories is preferable to reliance on a case-by-case comity analysis of service attempted outside the guidelines of the Inter-American Treaty. It is absurd to opt for a system where almost every non-Convention service must be litigated; most defendants would challenge service that is not executed pursuant to their national laws or the Convention. International comity is a fluid and ill-defined concept that provides courts with limited guidance in litigating these

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97. Dam, Letter of Submittal, S. TREATY DOC. NO. 27, 98th Cong. at IV (emphasis added).

98. *See, e.g.*, *Aérospatiale*, 482 U.S. at 548-49 (Blackmun, J., concurring in part and dissenting in part) (Blackmun raised the same concerns over the Courts decision to relegate the Hague Service Convention to "optional" status).

99. *See, e.g.*, FED. R. CIV. PROC. P. 4(C)(2)(c)(ii).

100. *See* Michael W. Gordon, *Rendering and Enforcing Foreign Judgments in Mexico and the United States: A Panel Discussion*, 2 U.S.-MEX. L.J. 91 (1994).

101. *Aérospatiale*, 522 U.S. at 548 (Blackmun, J., concurring in part and dissenting in part).

matters. It appears there will be little continuity in this area if the Convention is viewed as merely a set of optional guidelines.

Admittedly, a finding that the Convention preempts all other forms of service would not be well supported by the text of the treaty. However, the court should have considered a rule of "first resort" as an alternative to the extreme holding that the Convention is merely an advisory agreement. The goals of the Convention would be better served if litigants and courts were instructed to presume that they should initially use the procedures set forth in the Convention. Where it appears that it would be futile, egregiously costly, or unhelpful to employ the Convention's procedures, an individualized analysis of the circumstances would be warranted.[102] Thus, the burden would be on the litigant to prove to a local court that for some legitimate reason he or she should not be bound by the Convention's provisions.

The issue resolved by the *Kreimerman* court will probably arise again in the near future if commerce between the United States and Mexico expands. Hopefully, an insightful and forward-looking court will consider the practical consequences of relegating the Inter-American Convention on Letters Rogatory to a mere advisory status and consider a rule of first resort as a realistic solution.

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102. *Aérospatiale*, 482 U.S. at 549 (Blackmun, J., concurring in part and dissenting in part) (Blackmun presented similar arguments in favor of a rule of "first resort" in regard to the Hague Evidence Convention).