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YOU'VE GOT [INTERNATIONAL] MAIL!: A COMMENT ON *BAKALA V. BAKALA*

*Renee Ballew**

INTRODUCTION

With the increase in international litigation during the 1950s, and the challenges with foreign service of process that accompanied it,¹ the Tenth Session of the Hague Conference on Private International Law² met in 1964 to deliberate revisions to the Hague Conventions on Civil Procedure of 1905 and 1954, which led to the creation of the Hague Convention on Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters (Hague Service Convention).³ The intent of the new convention was to “provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad.”⁴ On February 10, 1969, the Hague Service Convention⁵ entered into force against party states, including the United States, making the Convention “the Supreme law of the land”⁶ in the U.S. for lawyers confronting issues related to

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¹ Franklin B. Mann, Jr., Comment, *Foreign Service of Process by Direct Mail Under the Hague Convention and the Article 10(a) Controversy: Send v. Service*, 21 CUMB. L. REV. 647, 649–50 (1991).

² The Hague Conference is a global inter-governmental organization that develops multilateral legal instruments in response to global needs. *Overview*, HAGUE CONF. ON PRIVATE INT’L L., http://www.hcch.net/index_en.php?act=text.display&tid=26 (last visited Nov. 2, 2013).

³ Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 695 (1988).

⁴ *Id.* (citations omitted).

⁵ Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Hague Service Convention]. For a full list of the countries who have become a State Party to the Hague Service Convention, see *Status Table*, HAGUE CONF. ON PRIVATE INT’L L., http://www.hcch.net/index_en.php?act=text.display&tid=26 (last visited June 20, 2014).

⁶ U.S. CONST., art. VI, cl. 2.

the service of judicial and extra-judicial documents to defendants located abroad.

Today, more than forty years after the inception of the Hague Service Convention, one might believe that all issues concerning the Convention have been settled and the Convention may seem irrelevant to the everyday practice of law: particularly in South Carolina where matters of international law are not prevalent. Supporting this assumption is the fact that no significant opinion concerning the Hague Service Convention has been handed down since 1988, when the Supreme Court of the United States decided *Volkswagenwerk Atkiengesellschaft v. Schlunk*.⁷ However, a deeper look at the relationship between the Convention and the circumstances in which it may apply reveals that “it is becoming increasingly necessary for potential plaintiffs in [the U.S.] to understand the ways in which a defendant residing abroad may be brought under the jurisdiction of U.S. Courts,”⁸ in particular because many signatory nations to the Convention have taken reservations to certain provisions.⁹

Even though the Hague Service Convention has seen little action in the court room over the past forty years, the Hague Conference on Private International Law has cautioned that the Convention remains a constant in the field of law and is critical to maintaining “effective

⁷ *United States Responses to the Questionnaire of July 2008*, HAGUE CONF. ON PRIVATE INT’L L., at II(E) (2008), <http://www.hcch.net/upload/wop/2008usa14.pdf>; see also *Volkswagenwerk*, *supra* note 3, at 694 (holding that the Hague Service Convention does not apply to process served on a domestic subsidiary of a foreign corporation, which under state law is the corporation’s involuntary agent for service).

⁸ Mark A. Canizio & Jessica Y. Singh, *Service of Process and the Hague Convention*, 244 N.Y. L.J., Aug. 27, 2010, at 4; see also George Bundy Smith & Thomas J. Hall, *Divergent Views of Service of Process Under the Hague Convention*, 247 N.Y. L.J. 115, June 15, 2012, at 3.

⁹ Jennifer Scullion, Adam T. Berkowitz, & Charles Sanders McNew, *International Litigation: Serving Process Outside the US*, Proskauer Rose LLP (Dec. 2011), http://www.proskauer.com/files/News/5b04a3dd-34ab-40f4-a64f-3bc52468277a/Presentation/NewsAttachment/db2a546c-d01c-4ce3-815a-43df368f05c8/Proskauer_122011_Practical%20Law%20Company_Scullion_Berkowitz_McNew_International%20Litigation_Serving.pdf; see also *Table Reflecting Applicability of Articles 8(2), 10(a)(b) and (c), 15(2) and 16(3) of the Hague Service Convention*, HAGUE CONF. ON PRIVATE INT’L L. (Feb. 2013), <http://www.hcch.net/upload/applicability14e.pdf> [hereinafter *Provision Applicability Table*].

cross-border judicial and administration co-operation” across the globe.¹⁰ In this sense, it is especially important to understand the enduring effect of this Convention in a world where advancing globalization continues to shrink the distance between countries and diminish the difficulty of contacting foreign legal persons.¹¹ In South Carolina, for example, over 1,200 international firms have placed facilities within the state’s borders, including large corporations like Michelin and BMW.¹² Additionally, “foreign-affiliated companies have invested almost \$45.9 billion” in the state since 1960,¹³ and the South Carolina Department of Commerce maintains offices abroad in Germany and China for the purpose of strengthening the state’s relationships with the international market.¹⁴

In the same vein, it is important to note that the Hague Service Convention operates “in an environment which is subject to important technological developments,” a fact that is likely to become increasingly important in years to come.¹⁵ Consequently, the

¹⁰ HAGUE CONFERENCE ON PRIVATE INT’L LAW [HCCH], CONCLUSIONS AND RECOMMENDATIONS OF THE SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE HAGUE APOSTILLE, SERVICE, TAKING OF EVIDENCE AND ACCESS TO JUSTICE CONVENTIONS, ¶ 2 (2009) [hereinafter 2009 CONCLUSIONS AND RECOMMENDATIONS], available at http://www.hcch.net/upload/wop/jac_concl_e.pdf.

¹¹ See Canizio & Singh, *supra* note 8.

¹² See *International Presence*, S.C. DEP’T COM., <http://sccommerce.com/about-sc-commerce/international-offices> (last visited June 20, 2014).

¹³ See *id.*; see also S.C. DEP’T OF COMMERCE, SOUTH CAROLINA: STATE OF BUSINESS. WORLD OF OPPORTUNITY. 5 (“South Carolina ranks 3rd in the nation for globalization on the 2010 *State New Economy Index.*”), available at http://sccommerce.com/sites/default/files/document_directory/south_carolina_state_of_business_world_of_opportunity.pdf; *South Carolina Takes Top Spot for Jobs Linked to Foreign Investment*, S.C. DEPARTMENT COM. (Jan. 17, 2013), <http://sccommerce.com/news/press-releases/south-carolina-takes-top-spot-jobs-linked-foreign-investment>.

¹⁴ See *International Presence*, *supra* note 12.

¹⁵ 2009 CONCLUSIONS AND RECOMMENDATIONS, *supra* note 10; see also Jeremy A. Colby, *You’ve Got Mail: The Modern Trend Towards Universal Electronic Service of Process*, 51 *Buff. L. Rev.* 337 (2003) (noting that the “Hague [Service] Convention neither explicitly authorizes nor explicitly prohibits service of process by e-mail”).

Convention may become applicable in more areas of law than originally anticipated.¹⁶

By way of example, the South Carolina Supreme Court recently addressed the Hague Service Convention in a 2003 family law case, *Bakala v. Bakala*.¹⁷ In this case,¹⁸ the Court declined to resolve whether notices and a Rule to Show Cause served upon Husband by mail in Prague violated the Convention because Husband failed to preserve his objections for appeal.¹⁹ Despite the Court's refusal, it did not pass upon the opportunity to comment on the service methods provided for in the Convention, specifically, whether Article 10(a) "applies to documents served *subsequent* to the service of process" by mail—an aspect of the Convention that has no definite precedent.²⁰

Although the Hague Service Convention has been in effect in the U.S. since 1969, some controversy remains as to whether it applies only to the initial service of process, or to the service of subsequent documents served upon a party by mail as well. Section I of this comment will lay out the relevant facts of *Bakala*, while Section II will examine the South Carolina Supreme Court's analysis of the Convention in relation to the various documents served upon Husband abroad. Section III will discuss the two main approaches taken by courts in interpreting Article 10(a) of the Convention. On one hand, a majority of courts follow the *Ackermann* approach and hold that Article 10(a) allows for the initial service of process by mail upon a defendant located abroad. On the other hand, a minority of courts follow the *Bankston* approach and hold that Article 10(a) only allows for the service of process by mail for documents subsequent to the initial service of process. Additionally, this note will consider the potential result of *Bakala* in light of both approaches. Finally, this comment will conclude by suggesting that

¹⁶ See, e.g., *Hammond v. Hammond*, 708 S.E.2d 74 (N.C. Ct. App. 2011) (divorce action); *U.S. v. First Coast Meat & Seafood*, 452 F. Supp. 2d 1348 (Ct. Int'l Trade 2006) (trade violations); *Dahya v. Second Judicial Dist. ex rel. Cnty. of Washoe*, 19 P.3d 239 (Nev. 2001) (breach of fiduciary duty); *Davies v. Jobs & Aldverts Online, Gmbh*, 94 F. Supp. 2d 719 (E.D. Va. 2000) (employer breach of contract claim); *Randolph v. Hendry*, 50 F. Supp. 2d 572 (S.D. W. Va. 1999) (personal injury action).

¹⁷ *Bakala v. Bakala*, 325 S.C. 612, 576 S.E.2d 156 (2003).

¹⁸ *Id.*

¹⁹ *Id.* at 626–29, 576 S.E.2d at 163–65.

²⁰ *Id.* at 627, 576 S.E.2d at 164 (emphasis added).

courts within the Fourth Circuit are likely to follow the majority approach found in *Ackermann* and hold that Article 10(a) of the Hague Service Convention allows for the service of process upon a defendant abroad by mail for both the initial service of process and any subsequent documents.

I. UNDERLYING FACTS AND FAMILY COURT OPINION

Husband, a political refugee from the Czech Republic, met his wife while attending business school at Dartmouth College.²¹ The couple married in 1990 while living in New York City, and shortly thereafter, settled in Prague to work and live.²² In November 1996, Wife left the marital residence in Prague after accusing Husband of adultery, and moved to Beaufort, South Carolina.²³ On May 1, 1998, while Husband was visiting their child in Beaufort, Wife had Husband personally served with a summons and complaint seeking a divorce on the grounds of adultery.²⁴ Both parties attended the first hearing, and Husband agreed to submit himself to the jurisdiction of the Beaufort County Family Court.²⁵ While the divorce litigation continued, Husband returned to Prague and relieved his counsel.²⁶

On August 13, 1999, Husband “was ordered to appoint an agent for service or he would be served by mail in the Czech Republic.”²⁷ On August 19, 1999, the family court entered an order to allow service upon Husband in the Czech Republic by mail.²⁸ Pursuant to this order, various notices and a Rule to Show Cause were sent to Husband in Prague by mail for the final hearing.²⁹ At the final

²¹ *Id.* at 620, 576 S.E.2d at 160.

²² *Id.*

²³ *Id.*

²⁴ *Id.* It should be noted that the Hague Service Convention does not apply to this original service of process upon Husband because service of process “was accomplished in South Carolina by personal service.” *Id.* at 627, 576 S.E.2d at 164; *see* *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 639 (1990) (holding that the “exercise of personal jurisdiction over a defendant based on his voluntary presence in the forum will satisfy the requirements of due process”).

²⁵ *Bakala v. Bakala*, 325 S.C. 612, 627, 576 S.E.2d 156, 164 (2003).

²⁶ *Id.* at 621, 576 S.E.2d at 161.

²⁷ *Id.*

²⁸ *Id.* at 625, 576 S.E.2d at 163.

²⁹ *Id.* at 626, 576 S.E.2d at 163.

hearing of the case on November 1, 1999, Husband did not appear.³⁰ By an order dated, December 21, 1999, the Beaufort County Family Court found Husband in contempt of the 1998 order from the first hearing and ordered Husband to pay child support, attorney's fees and costs.³¹

II. SOUTH CAROLINA SUPREME COURT APPEAL

On appeal, Husband argued that the Beaufort County Family Court did not have jurisdiction to hold him in contempt because the service of certain documents had violated international law, specifically the Hague Service Convention.³² These documents included: (1) notices sent pursuant to the August 19th order and (2) the Rule to Show Cause,³³ which was also sent pursuant to the August 19th order. After hearing both parties' arguments, the South Carolina Supreme Court found that Husband did not properly preserve these issues for appeal and declined to address them³⁴

³⁰ *Id.* at 621, 576 S.E.2d at 161.

³¹ *Id.*

³² *Bakala*, 325 S.C. at 626–30, 576 S.E.2d at 163–65. It should also be noted that, on appeal, Husband raised a violation of the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (Hague Evidence Convention). The South Carolina Supreme Court found that Husband did not properly preserve this issue for appeal nor did the Court provide very little commentary as to the provisions of this Convention, and it is therefore not discussed in this comment. However, the Court did provide that the Hague Evidence Convention is not mandatory and that it “essentially allows discovery abroad through Letters of Request executed by a central authority designated by the signatory country.” *Id.* at 628, 576 S.E.2d at 164; *see* Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, Mar. 18, 1970, 23, U.S.T. 2555, 847 U.N.T.S. As of 2009, the Permanent Bureau had not made a comment on the relationship between the Hague Service Convention and the Hague Evidence Convention. *See* 2009 CONCLUSIONS AND RECOMMENDATIONS, *supra* note 10, at ¶ 40.

³³ A Rule to Show Cause Order is “an order directing a party to appear in court and explain why the party took (or failed to take) some action or why the court should or should not grant some relief.” BLACK’S LAW DICTIONARY 1207 (9th ed. 2009).

³⁴ *See Bakala*, 325 S.C. at 627, 629, 576 S.E.2d at 164, 165.

because Husband failed to raise both of these arguments to the family court by a Rule 59(e) motion.³⁵

*A. BASIC HAGUE SERVICE CONVENTION APPLICATION:
RULE TO SHOW CAUSE*³⁶

On appeal, Husband argued that the Rule to Show Cause, heard by the family court in the November 1st hearing, was not properly served upon him in Prague, and that the family court therefore “had no jurisdiction to find him in contempt.”³⁷ While the South Carolina Supreme Court found that there was no compliance with the Hague Service Convention on this matter, it concluded that because Husband did not raise the issue of personal jurisdiction to the family court, he effectively waived this objection.³⁸

There is no question that the Hague Service Convention applies to the service of process in this case.³⁹ Under Article 2 of the Convention, service of process may be achieved through a designated Central Authority of the receiving State.⁴⁰ Under Article 15, a rule to show cause (as an equivalent document) must be “served by a method prescribed by the internal law of the [receiving state]” or served upon the defendant himself or to his “residence by another method provided for in the Convention.”⁴¹ In this instance, Wife’s

³⁵ S.C. R. Civ. P. 59(e) (providing that a motion to alter or amend a judgment should be served no later than 10 days after receiving written notice of the entry of the judgment).

³⁶ Husband was served the Rule to Show Cause pursuant to a “contempt proceeding regarding contemptuous conduct outside the presence of the court.” *Bakala*, 325 S.C. at 628, 576 S.E.2d at 165. For this type of proceeding, the Rule to Show Cause accompanies the initial service of process. *See id.*

³⁷ *Id.* at 628, 576 S.E.2d at 164.

³⁸ *Id.* at 629, 576 S.E.2d at 165.

³⁹ *Id.* at 628, 576 S.E.2d at 165.

⁴⁰ Hague Service Convention, *supra* note 5, art. 2.

⁴¹ *Id.* art. 15. The United States made a reservation to this provision of the Hague Service Convention. If the U.S. is designated as the receiving State, then a judge *may* enter a judgment even though the services of process was not achieved by a method prescribed by the internal law of the United States, so long as the provisions of the second paragraph in Art. 15 have been met—that the document was served by a method prescribed in the Convention, the document was served at least 6 months ago, and that the serving party has not received a certificate of service.

private investigator personally served Husband with the Rule to Show Cause while in Prague: there was no attempt to serve Husband through the Czech Republic's central authority.⁴² However, as the Court noted, the Convention clearly requires such process to "be served through the Central Authority of the [Czech Republic]."⁴³ Therefore, the service of the Rule to Show Cause" upon Husband "was not accomplished in compliance with the Hague Convention."⁴⁴ The Court commented that the better practice in this instance would have been for the family court to appoint an agent for service once Husband's counsel was relieved or for Wife's counsel to comply with the Convention.⁴⁵ While interpretation of this aspect of the Hague Service Convention is not as murky as the interpretation of Article 10(a), it is still important to be reminded of the measures one must take in serving process upon a defendant who is not located in the United States.

B. THE DIFFICULT SCENARIO: NOTICES

Although the South Carolina Supreme Court found that Husband did not properly preserve his challenge to service of the notices pursuant to the August 19th order for appeal, the Court provided

⁴² Bakala, 352 S.C. at 628, 576 S.E.2d at 164.

⁴³ *Id.* at 628–29, 576 S.E.2d at 165. In this specific case, the Court likely found that the only sufficient method in which the wife could serve process upon her husband was to serve him through a Central Authority of the Czech Republic because in signing on to the Hague Service Convention, the Czech Republic specifically took opposition to Articles 8 and 10 of the convention, which provide for alternate methods of service to the Central Authority method. See *Provision Applicability Table*, *supra* note 9, at 3. See generally Mann, Jr., *supra* note 1, at 652–53 (providing a summary of the varying methods of service permissible under the Hague Service Convention). Therefore, under Article 15 of the Hague Service Convention, the method in which a person may effect service of process in the Czech Republic is through the Czech's Central Authority since the country's opposition to Article 10 eliminates service of process through "another method provided for by [the] Convention." Hague Service Convention, *supra* note 5, art. 15.

⁴⁴ Bakala, 325 S.C. at 629, 576 S.E.2d at 165.

⁴⁵ *Id.* The South Carolina Rules of Civil Procedure states that whenever an order provides for service of process, or other judicial documents, the "service shall be made under the circumstances and in the manner prescribed by the . . . order." S.C. R. Civ. P. 4(e).

insightful commentary on one of the most controversial provisions of the Hague Service Convention—Article 10(a). This provision provides that so long as the receiving State does not object, the Convention does not hinder “the freedom to *send* judicial documents, by postal channels, directly to persons abroad”⁴⁶ The controversy of this provision lies in the drafters’ decision to use the word “send” rather than “serve.”

In *Bakala*, the Court notes that there is much debate about “whether Article 10(a) applies to the original service of process or whether it applies only to subsequent documents as indicated by use of the word ‘send’ rather than ‘serve.’”⁴⁷ Some courts have found that the Hague Service Convention, including Article 10(a), only applies to initial service of process. Under this approach, Article 10(a) would not apply to service of the notices since Husband’s initial service was accomplished through personal service in Beaufort. Thus, the mailing of the notices, as subsequent documents, to Husband in Prague would not violate the Convention. However, other courts interpret Article 10(a) as applying to service of subsequent documents, which are permitted “to be served by mail.”⁴⁸ This second approach is the argument Husband attempts to make on appeal. Under this view, the Court noted that the subsequent mailing of notices would violate the Convention because in acceding to the Hague Service Convention, the Czech Republic opposed Article 10(a).⁴⁹ In the Court’s view, this decision to “opt out of Article 10(a) amounts to a decision to forbid the use of mails entirely.”⁵⁰ Unfortunately, the Supreme Court does not take its analysis further. Since *Bakala v. Bakala* is the most recent South Carolina case to deal with the issue of service of process abroad, the current interpretation of Article 10(a) of the Hague Service Convention in South Carolina remains unsettled.

⁴⁶ Hague Service Convention, *supra* note 5, art. 10(a) (emphasis added).

⁴⁷ *Bakala*, 352 S.C. at 627, 576 S.E.2d at 164; *see also* Smith & Hall, *supra* note 8 (stating that “[c]ourts around the country are split as to whether Article 10(a) permits service of process by mail in international civil actions”).

⁴⁸ *Bakala*, 352 S.C. at 627, 576 S.E.2d at 164.

⁴⁹ *See Provision Applicability Table, supra* note 9, at 3.

⁵⁰ *Id.* (citations omitted).

III. TREATMENT OF ARTICLE 10(A) BY COURTS

Jurists have commented that “no single provision in the Hague [Service] Convention has received as much judicial attention as Article 10(a).”⁵¹ For years, U.S. courts have disagreed as to whether “the freedom to *send* judicial documents” in Article 10(a) includes the meaning “freedom to *serve* judicial documents.”⁵² The crux of the debate is whether the term “send” is synonymous with the term “serve” when dealing with the service of process. In this context, “service of process” refers to the service of jurisdictional papers—i.e., the summons and complaint—as opposed to non-jurisdiction papers—i.e., notices of a motion.⁵³ On one hand, some circuits have taken a literal approach and held that the term “send” is *not* synonymous with the term “service.”⁵⁴ Under this approach, Article 10(a) would allow only subsequent documents (non-jurisdiction documents) to be served by mail, so long as the receiving State has not objected to this method.⁵⁵ In contrast, other circuits have taken a more liberal approach and held that the term “send” *is* synonymous with the term “serve,” which renders the terms of Article 10(a) applicable to initial service of process.⁵⁶ This approach allows a plaintiff to serve a defendant located in a contracting by postal channels, so long as the receiving State does not object.⁵⁷ Similar to both of these views is the Hague Service Convention’s applicability to the initial service of process; however, they differ in the applicability of Article 10(a) to the initial service of process. The former of these two approaches will be discussed first.

⁵¹ See *Syncrude Canada Ltd. v. Highland Consulting Grp., Inc.*, 916 F. Supp. 2d 620, 625 (D. Md. 2013) (quoting *Randolph v. Hendry*, 50 F. Supp. 2d 572, 576 (S.D. W.Va. 1999) (citation omitted)).

⁵² *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004) (emphasis in original).

⁵³ *Canizio & Singh*, *supra* note 8.

⁵⁴ See *Bakala v. Bakala*, 325 S.C. 612, 627, 576 S.E.2d 156, 164 (2003); see also *Nuovo Pignone SpA v. STORMAN ASIA M/V*, 310 F.3d 374, 384–85 (5th Cir. 2002); *Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 174 (8th Cir. 1989); *ARCO Electronics Control Ltd. v. CORE Int’l*, 794 F. Supp. 1144, 1147 (S.D. Fla 1992).

⁵⁵ See *Bakala*, 325 S.C. at 627, 576 S.E.2d at 164.

⁵⁶ See *id.*; see also *Ackermann v. Levine*, 788 F.2d 830, 839–40 (2nd Cir. 1986).

⁵⁷ *Id.*

A. BANKSTON APPROACH: THE LITERAL INTERPRETATION

In 1989, the Eighth Circuit decided *Bankston v. Toyota Motor Corp.*⁵⁸ In this case, the court held that “sending a copy of a summons and complaint by registered mail to a defendant in a foreign country” is not a method of service of process permitted by the Hague Service Convention.⁵⁹ The Court based its conclusion on the rationale that one of the fundamental principles of statutory construction is to begin the analysis by looking directly at the language of the statute, and “[a]bsent a clearly expressed legislative intention to the contrary,” in most cases regarding that plain language meaning as “conclusive.”⁶⁰ Additionally, the Court held that a general presumption exists “where a legislative body ‘includes particular language in one section . . . but omits it in another section of the same Act . . . [then] the [legislative body] acts intentionally and purposely in the disparate inclusion or exclusion.’”⁶¹ In 2002, the Fifth Circuit adopted a similar approach in *Nuovo Pignone SpA v. STORMAN ASIA M/V*.⁶² Currently, neither case has been overturned, possibly aided by the fact that Hague Service Convention cases are so rarely litigated. It would seem at present, a party to a proceeding in either the Fifth or Eighth Circuits should assume that the Hague Service Convention does not permit the initial service of process service of process by registered mail.

As applied to *Bakala*, a similar approach would likely result in a ruling that the initial service of process on Husband did *not* violate the Hague Service Convention, but that the Convention *was* violated by the service of the subsequent notices through postal channels. Since the initial service of process on Husband was accomplished by personal service in Beaufort, South Carolina rather than abroad, it did not violate the Convention.⁶³ Nonetheless, it is significant and possibly determinative that Husband did not raise a challenge to the validity of that initial service in the family court.⁶⁴

⁵⁸ *Bankston v. Toyota Motor Corp.*, 889 F.2d 172 (8th Cir. 1989).

⁵⁹ *Id.* at 174.

⁶⁰ *Id.* (citations omitted).

⁶¹ *Id.* (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

⁶² See *Nuovo Pignone SpA v. STORMAN ASIA M/V*, 310 F.3d 374, 384–85 (5th Cir. 2002).

⁶³ See Hague Service Convention, *supra* note 5, art. 8.

⁶⁴ *Bakala*, 352 S.C. at 627, 576 S.E.2d at 164.

In contrast, the *Bankston* approach would likely result in a ruling that the personal service of the Rule to Show Cause upon Husband in Prague violated the Hague Service Convention. Since the Rule to Show Cause is included in the initial service of process in a “contempt proceeding regarding contemptuous conduct outside the presence of the court,”⁶⁵ the Convention clearly applied to the situation. Article 2 of the Convention provides that each “contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other contracting States.”⁶⁶ In this case, service of the Rule to Show Cause was not “attempted through the Central Authority of the Czech Republic,”⁶⁷ or through another method provided for in the Convention.⁶⁸ Therefore, service of the Rule to Show Cause would violate the Hague Service Convention.

Lastly, the Fifth and Eighth Circuits would be likely to hold that the subsequent notices sent to Husband in Prague via postal channels pursuant to the August 19th order violated the Hague Service Convention. Under the *Bankston* approach, Article 10(a) allows for these subsequent notices to be served by mail since “send” is not equivalent to “serve.” In this sense, such notices would not normally violate the Convention, however, the service of subsequent documents by mail is only permissible if the “State of destination *does not object*.”⁶⁹ In acceding to the Convention, the Czech Republic took reservation⁷⁰ to Article 10(a), declaring that “judicial

⁶⁵ State v. Johnson, 249 S.C. 1, 152 S.E.2d 669 (1967).

⁶⁶ Hague Service Convention, *supra* note 5, art. 2.

⁶⁷ Bakala, 325 S.C. at 629, 576 S.E.2d at 165.

⁶⁸ Articles 8 through 10 provide alternative methods for service of process than through the designated Central Authority of the contracting State—Article 8 provides for service directly through diplomatic or consular agents; Article 9 provides for the service indirectly through diplomatic (in extreme circumstances) and consular channels; and Art. 10 provides for the use of postal channels. See Hague Service Convention, *supra* note 5, arts. 8–10; see also Mann, Jr., *supra* note 1, at 652–53. Of these alternative methods for service of process, the Czech Republic opposes those methods outlined in Articles 8 and 10. See *Provision Applicability Table*, *supra* note 9, at 3.

⁶⁹ Hague Service Convention, *supra* note 5, art. 10 (emphasis added).

⁷⁰ The Czech Republic based this reservation on the rationale that the other methods of service under the Hague Service Convention were “sufficient and effective.” *Czech Republic Responses to the Questionnaire of July 2008*, HAGUE CONF. ON PRIVATE INT’L L., Part Two (IV)(D) (2008), http://www.hcch.net/upload/wop/2008_czechrepublic14.pdf.

documents may not be served by another Contracting State through postal channels.”⁷¹ The Court in *Bakala* interprets the Czech Republic’s decision to opt out of this provision as amounting to “a decision to forbid the use of the mails entirely.”⁷² Therefore, if the South Carolina Supreme Court had chosen to adopt the *Bankston* approach in *Bakala*, it is possible that Husband could have prevailed on his violation of international claims, and therefore, would not have been subject to the personal jurisdiction of the family court.

B. ACKERMANN APPROACH

Three years earlier in *Ackermann v. Levine*, the Second Circuit adopted the notion that Article 10(a) permits the initial service of process by registered mail.⁷³ The Second Circuit’s conclusion was based primarily on the purpose and history of the Hague Service Convention in order to determine that the terms “send” and “service” are synonymous.⁷⁴ In drafting the Convention, the members of the Hague Conference “intended to provide a simpler way to serve process abroad.”⁷⁵ The circuits following this approach would hold that the language in Article 10(a) of the Convention does apply to the initial service of process in that it provides an alternate, simpler method for service rather than through the Central Authority of the receiving State.

In recent years, the *Ackermann* approach seems to be the prevailing approach, probably because it has gained the approval of the Hague Conference and the federal department responsible for

⁷¹ *Declarations Reservations*, HAGUE CONF. ON PRIVATE INT’L L., http://www.hcch.net/index_en.php?act=status.comment&csid=396&disp=resdn (last visited June 20, 2014); see also *Czech Judicial Assistance*, TRAVEL.STATE.GOV, http://travel.state.gov/law/judicial/judicial_697.html (last visited June 20, 2014).

⁷² *Bakala v. Bakala*, 325 S.C. 612, 627, 576 S.E.2d 156, 164 (2003) (citing *Randolph v. Hendry*, 50 F. Supp. 2d 572, 577–78 (S.D.W. Va. 1999)) (making the presumption that this would be a court’s decision under the *Bankston* approach).

⁷³ *Ackermann v. Levine*, 788 F.2d 830, 839–40 (2d Cir. 1986). It is important to note in *Ackermann*, the receiving State is the United States, while in *Bakala* and *Bankston*, the receiving State is a foreign country.

⁷⁴ See *Brockmeyer v. May*, 383 F.3d 798, 801–02 (9th Cir. 2004).

⁷⁵ *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698 (1988).

compliance with the Hague Service Convention: the Department of State. In 2003, the Special Commission of the Hague Conference stated that “the term ‘send’ in Article 10(a) is to be understood as meaning ‘service’ through postal channels.”⁷⁶ The Permanent Bureau of the Hague Conference⁷⁷ has also expressed a similar thinking.⁷⁸ Moreover, in the early 90s, the legal adviser of the United States Department wrote a letter to the Administrative Office of the United States Courts, wherein he stated that the Department of State believes that *Bankston* was decided incorrectly.⁷⁹ The letter contends that *Bankston* is incorrect only to the extent that it suggests that the Convention “does not permit” the sending of the initial service of process “by registered mail to a defendant in a foreign country.”⁸⁰ Finally, and most importantly, many nations who are party to the Hague Service Convention oppose the concept that Article 10(a) permits service of initial process by mail.⁸¹ Signatory parties like the People’s Republic of China, the Czech Republic, Germany, the

⁷⁶ HAGUE CONFERENCE ON PRIVATE INT’L LAW [HCCH], CONCLUSIONS AND RECOMMENDATIONS OF THE SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE HAGUE APOSTILLE, EVIDENCE AND SERVICE CONVENTIONS, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW ¶ 55 (2003), available at http://www.hcch.net/upload/wop/lse_concl_e.pdf; see also Canizio & Singh, *supra* note 8.

⁷⁷ The Permanent Bureau is primarily responsible for researching any subject that is to be taken up by the Hague Conference and to organize the Plenary Sessions and Special Commissions of the Hague Conference. *What is the Permanent Bureau of the Hague Conference?*, HAGUE CONF. ON PRIVATE INT’L LAW., http://www.hcch.net/index_en.php?act=faq.details&fid=30 (last visited June 20, 2014).

⁷⁸ “[P]ermittitng service of process by registered mail [under Article 10] ‘seems to have been the implicit understanding of the delegates at the 1977 Special Commission meeting.’” *Synchrude Canada Ltd. v. Highland Consulting Grp., Inc.*, 916 F. Supp. 2d 620, 626 (D. Md. 2013) (quoting HAGUE CONFERENCE ON PRIVATE INT’L LAW, PRACTICAL HANDBOOK ON THE OPERATION OF THE HAGUE CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS 44 (1992)).

⁷⁹ Letter from Alan J. Kreczko, Deputy Legal Adviser, U.S. Dep’t of State to Harry W. Swegle, Washington Liaison, Nat’l Ctr. for State Courts (Mar. 14, 1990), available at http://www.carltonfields.com/files/upload/Kreczko_letter.pdf.

⁸⁰ *Id.*

⁸¹ Canizio & Singh, *supra* note 8.

Russian Federation, and Japan⁸² all oppose service of process upon one of their nationals by registered mail.⁸³ In the language of their reservations, these States use the term “serve” rather than “send,” confirming that they treat the Article 10 as applicable to the initial service of process only.

Therefore, in *Bakala*, the Hague Service Convention would be inapplicable to the subsequent notices served upon Husband, and like the result under the *Bankston* approach, service of the Rule to Show Cause would violate the convention. Since the Rule to Show Cause is part of the initial service of process in a contempt proceeding, the *Ackermann* approach would allow for service upon the defendant through use of the postal channels. However, since that method was not used in *Bakala* and because the Czech Republic takes specific reservation to that method of service, the South Carolina Supreme Court would have likely found that personal service of the Rule to Show Cause violated the Convention. Secondly, since the notices are not considered part of the initial service of process, which was served upon Husband personally in Beaufort, SC, and because Husband did not challenge the validity of this service at family court, the Convention is inapplicable to the notices. Therefore, “the mailing of subsequent documents to Husband in Prague would not violate the Hague Service Convention” as the convention is inapplicable to these documents.⁸⁴ In contrast to *Bankston*, under the *Ackermann* approach, Husband would have likely lost his arguments on appeal since the Hague Service Convention would not have been applicable to any of Husband’s arguments as they pertain to the notices since these are not considered part of the original service of process—they are not jurisdictional documents.

⁸² Japan does not formally object to the service of process by postal channels, but it may not always be considered valid service, such as when the rights of the addressee are not respected. See *Authorities*, HAGUE CONF. ON PRIVATE INT’L L., http://www.hcch.net/index_en.php?act=authorities.details&aid=261 (last visited June 20, 2014).

⁸³ See *Provision Applicability Table*, *supra* note 9.

⁸⁴ *Bakala v. Bakala*, 325 S.C. 612, 627, 576 S.C. 156, 164 (2003); see also *Schiffer v. Mazda Motor Corp.*, 192 F.R.D. 335 (N.D. Ga. 2000).

CONCLUSION

While the Second, Fifth, and Eighth Circuits have provided clear viewpoints on the interpretation of Article 10(a) of the Hague Service Convention, many of the federal circuits have yet to address this issue directly, including the Fourth Circuit.⁸⁵ However, a majority “of the district courts in the Fourth Circuit have followed the *Ackermann* decision by holding that service by registered mail is appropriate under Article 10(a) of the [Hague Service] Convention.”⁸⁶ Under this reasoning—if, or when—the Fourth Circuit decides to address this issue, it will likely adopt the *Ackermann* approach and hold that the Hague Service Convention is only applicable to the original service of process. However, this conclusion is not certain. *Bakala v. Bakala*, therefore, serves as an important reminder that while a major decision concerning the Hague Service Convention has not happened in a number of years, it is an issue that is still looming—especially in a world where the phrase, “what a small world” is no longer a thought, it is a reality.

⁸⁵ *Syncrude Canada Ltd. v. Highland Consulting Grp., Inc.*, 916 F. Supp. 2d 620, 624 (D. Md. 2013).

⁸⁶ *Id.* at 625 (citing a string of cases of various district courts in the Fourth Circuit that have followed either the *Ackermann* approach or the *Bankston* approach).