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On the Road Again: Driving Through the Barriers to International Litigation

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On The Road Again: Driving Through The Barriers To International Litigation

By Michael P. Waxman

Volkswagenwerk Aktiengesellschaft
v.
Herwig J. Schlunk
(Docket No. 86-1052)

Argued March 21, 1988

Schlunk is another skirmish in a series of transnational battles testing the power of the American judiciary in light of international conventions addressing judicial power conflicts among sovereigns. While these treaties are ostensibly intended to ease the access to service of process, jurisdiction, discovery and enforcement of foreign judgments, they are actually reflections of the sharp distinctions in the nations' legal philosophies and practices. These cross-cultural conflicts go well beyond the civil versus common law distinctions. Rather, they are based on the belief that American courts exert personal and extraterritorial jurisdiction too easily and willingly participate in the discovery excesses of a fishing expedition passing for a legal system. For many foreign parties and their governments, the Hague Service Convention, much like the other judicial power and procedure conventions, represents a wall to separate them, as much as possible, from the legal visigoths in America.

ISSUE

In *Schlunk*, the Court must determine whether an American plaintiff can circumvent the procedures set forth in the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters by serving process on a foreign defendant's agent within the court's jurisdiction.

FACTS

At its factual foundation, *Schlunk* is a standard products liability action. On December 17, 1983, Franz and Sylvia Schlunk, who are the parents of Herwig Schlunk, a party in this action, and his two brothers and sister were killed on an Illinois highway. The car they were riding in was a 1978 Volkswagen Rabbit which had been designed, manufactured and tested in West Germany by Volkswagenwerk Aktiengesellschaft, a West German corporation (VWAG). The car was sold in the United States through VWAG's wholly-owned subsidiary, Volkswagen of America (VWoA)—a New Jersey corporation with its principal place of business in Troy, Michigan.

Schlunk brought a suit against VWAG in the Circuit Court of Cook County, Illinois for wrongful death due to a design defect which rendered the car uncrashworthy. Because VWAG is neither authorized to transact business in Illinois nor a resident, Schlunk served an alias summons and complaint on VWAG by serving the agent VWoA (through CT Corporation System) addressed to VWoA "as agent for" VWAG.

VWAG responded by asserting that the service was invalid. It argued that since it is neither authorized to transact business in Illinois nor a resident, but instead, a subject of a foreign sovereign signatory to the Hague Service Convention, that Convention is the exclusive means to serve it. Further, this exclusivity applied even though Illinois might provide other methods of service.

The Circuit Court of Cook County denied VWAG's motion to quash service. The court found that, despite VWAG's failure formally to appoint VWoA as its agent for service of process, VWAG and VWoA are so closely related and VWAG exhibits such pervasive control of its wholly-owned subsidiary, that VWoA is an agent for service of process as a matter of law. Since service was accomplished through the imputed local agent, the Hague Service Convention was not relevant because it applies only to service of process outside the United States.

The Illinois Appellate Court affirmed the circuit court's decision (145 14 App. 3d 594 (1986)). It reasoned that since the Supremacy Clause of the United States Constitution permits service on agents selected by foreign persons within the forum state, notwithstanding the Hague Service Convention, the existence of an agency relationship, however it came about, is sufficient to effect service properly. The court upheld the circuit court's finding that VWoA was the agent of VWAG.

The Illinois Supreme Court denied leave to appeal.

BACKGROUND AND SIGNIFICANCE

The United States Supreme Court has wrestled almost annually for the past few years with the breadth of the power of American courts, the restrictions on this power by international treaties and alternative dispute resolution mechanisms.

In *Schlunk*, the Court must address two issues:

1. What kind of agency, if any, circumvents the require-

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ments of the Hague Service Convention? and

2. Does the specific language of the treaty, requiring its procedures when the occasion involves transmitting documents for service abroad, mean that the agent's transmission of the served documents (and notice) triggers the Convention's procedure?

Service on the agents of foreign parties (beyond those specifically appointed by foreign principals) has been the basis of much judicial discussion. Most lower federal and state courts have segregated the agency issue into two categories: common law agents and statutorily-appointed agents. The courts have generally upheld service on the common law agents of foreign principals without compliance with the Hague Service Convention. They have reasoned that if the purported agent and principal are so closely connected that a common law agency is clear, the foreign principal will receive the documents and notice which are the heart of the service standard. In *Schlunk*, the agent (CT Corporation System) of an agent (VWoA) was served.

Understandably, the purported foreign principals and their governments look to the higher purposes and requirements of the Hague Service Convention rather than the concerns of the American court and its judicial system. In addition to the enforcement of international obligations, purported foreign principals and their sovereigns are concerned about the nexus which will be required to constitute the common law agency relationship.

At the same time, American courts have generally required compliance with the Hague Service Convention where statutorily-appointed agents are involved. This distinction seems appropriate from an American perspective. If one chooses an agent voluntarily, whether by specific direction or by clear action (subject to the varying standards of common law agency as found by different state courts), proper service upon the agent ensures the notice and document will be delivered to the principal. Conversely, an arbitrarily appointed agency established solely by statute would thrust together two unwilling allies. The forced relationship would not provide the security that notice and document delivery had been properly made.

Of course, even having established an agency relationship acceptable for United States judicial purposes, the question remains whether the Hague Service Convention requires a higher standard and compliance. In *Societe Nationale Industrielle Aerospatiale v. United States District Court* (107 S. Ct 2542 (1987); *Preview*, 1986-87 term, pp. 213-15), the Court considered the "plain language" of the Hague Evidence Convention and found that it was not the exclusive means for discovery of evidence in the control of a foreign defendant in their country, but proper before an American court.

The plain language of the Hague Service Convention states the Convention will apply only if there was an "occasion to transmit a ... document for service abroad." One question in this case is whether the service of process here was validly completed before the foreign defendant was ultimately notified. The Illinois courts clearly believe that the service on the common law agent completed the service requirements and, therefore, the transmission to the foreign defendant by the agent is a matter between the principal and the agent, not the court and the foreign defendant. Thus, since service of process was physically completed on United States territory, then the service, like United States-based discovery, should not be subject to an international convention. The foreign party having selected an agent here, through that agent avails itself of a state's legal rights and legal duties.

The key to VWAG's argument is that this makes a virtual mockery of the Hague Service Convention. The very benefits and protections bargained for in the Hague Service Convention will be circumvented. Due to the failures of a purported agent, the purported foreign principal may never know that any agency relationship is being asserted. This would go to the very clear purpose of the treaty—ensuring proper and efficient notice in a manner that preserves the due process rights of the litigants.

ARGUMENTS

For Volkswagenwerk Aktiengesellschaft *(Counsel of Record, Stephen M. Shapiro, 2000 Pennsylvania Avenue, NW, Washington, DC 20006; telephone (202) 463-2000)*

1. The decision of the Illinois Appellate Court conflicts with the literal language of the Hague Service Convention and disregards settled rules of treaty interpretation.
2. The interpretation of the Hague Service Convention adopted by the Illinois Appellate Court creates conflicts among its provisions and nullifies its explicit guarantees, frustrating its purposes.

For Herwig J. Schlunk *(Counsel of Record, Jack Samuel Ring, 69 W. Washington Street, Chicago, IL 60602; telephone (312) 782-5462.*

1. Service on VWoA as agent of VWAG complies with due process of law as guaranteed by the United States Constitution.
2. The Hague Convention on Service of Process Abroad does not apply to service upon an agent of a foreign corporation within the United States.
3. Service in this case does not offend concepts of international comity.

AMICUS ARGUMENTS

In Support of Volkswagenwerk Aktiengesellschaft

The Motor Vehicle Manufacturers Association of the United States, Inc. and the Product Liability Advisory Council, Inc.; the Federal Republic of Germany

In Support of Herwig J. Schlunk

The United States and the Association of Trial Lawyers of America