

# Methods of Service to a Corporate Defendant in Japan

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When initiating a lawsuit against a Japanese defendant, effecting proper service of process is one of the first challenges facing a U.S. plaintiff. Without proper service, default judgments are unenforceable in Japan, and the case may be derailed before it even gets started. This article discusses available methods of serving a Japanese corporate defendant using examples from recent litigations.

Service under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Convention) is one of the most common methods for serving Japanese corporations. In addition, Rule 4 of the Federal Rules of Civil Procedure also allow for service by: (1) following applicable state laws, including those which allow for service on a foreign corporation through a U.S. subsidiary, and (2) pursuant to a court order, by methods that are not prohibited by the Convention—for example, service to the foreign defendant corporation's U.S. legal counsel. Below, we explain each method of service, and discuss some benefits and drawbacks associated with each option.

## Service Under the Convention

Under Article 3 of the Convention a plaintiff may request that the designated Central Authority of the receiving country serve process on a defendant in that country. Additionally, Article 10(a) of the Convention allows a plaintiff to serve process by mail directly to defendants in countries that consent to service by mail. However, direct mail is no longer an option to serve a Japanese defendant because, in December 2018, the government of Japan issued a [Notification pursuant to Article 31 of the Convention](#), which declared an objection to Article 10(a) of the Convention. Plaintiffs may still mistakenly attempt to serve via direct mail, but Japanese defendants can refute such service, citing the government's objection.

To properly effect service in Japan under Article 3 of the Convention, a U.S. plaintiff may make a request to the Ministry of Foreign Affairs of Japan (MOFA) for service that will require mandatory receipt by the Japanese defendant. All documents to be served must be translated into Japanese by the plaintiff. The Consular Affairs

Bureau of MOFA and the Civil Affairs Bureau of the Supreme Court of Japan will each then check the documents, page by page, to confirm they have been translated in their entirety. If they find any deficiencies, MOFA will reject and return the request. Due to this thorough review process, it commonly takes at least four to six months after the request arrives at MOFA for service to be completed.

Following MOFA's review, service requiring mandatory receipt is completed by a postal employee handing over the documents to the addressee. In the case of a corporate defendant, common practice is for one of the directors who has the right to represent the company to be designated as an addressee on the request, and the service is effected at an office of the corporation under the Proviso of Article 103, paragraph 1 of Japan's Code of Civil Procedure (CCP). Article 106, paragraph 1 of the CCP recognizes that in most cases, a mail carrier will not see the representative director and instead deliver the documents to a receptionist or a mailroom clerk. If employees at the defendant refuse to accept, Article 106, paragraph 3 of the CCP authorizes the postal employee to leave the documents at the addressed place and thereby complete the service. However, if a defendant does not have a manned office, or postal employees are unable to enter its premises, the service attempt will be unsuccessful.

Despite this time-consuming and costly process, service under the Convention provides an advantage in that any resulting judgment can be recognized and enforced under Japanese law pursuant to Article 118 of the CCP, even if the defendant does not appear in the litigation. Conversely, the Supreme Court of Japan has held that service that does not follow the methods prescribed by the Convention does not constitute effective service, making any foreign judgment unenforceable in Japanese courts unless the defeated defendant has appeared in the foreign litigation. Thus, if a defendant is not likely to appear in the litigation and a plaintiff is relying on enforcement of the judgment in Japan, service should be sought pursuant to the Convention.

## Service to a U.S. subsidiary

A corporation can be served under the laws of the state in which the federal district court is located, or the state where service is made. The Supreme Court in *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 707-08 (1988), found that service on a domestic agent pursuant to state law was proper, and the Convention did not apply. Many states, including for example, California, allow for service on a corporation through its general manager. Some of these state laws have been construed to allow service on a foreign defendant by serving a U.S. subsidiary acting as an agent for the corporation.

For example, Sharp Corporation was served in *Continental Automotive Systems v. Avanci*, No. 3:19-cv-02933-M (N.D. Tex. July 5, 2020) through its U.S. subsidiary, Sharp Electronics Corporation, and the service was upheld by the court, which found that the subsidiary was a "mere conduit or vehicle for entering and exploiting the American market."

To determine whether the subsidiary is an agent, courts consider various factors, including whether it is a wholly-owned subsidiary, shares majority members of the board of directors, and/or actually serves as an agent for the foreign corporation.

## Service to a Corporation's U.S. Legal Counsel

Rules 4(f)(3) & 4(h)(2) of the Federal Rules of Civil Procedure also permit service on foreign defendants through any alternative means that are not prohibited by the Convention. In *Rio Props. v. Rio Int'l Interlink*, 284 F.3d 1007, 1016 (9th Cir. 2002), the court held that "trial courts have authorized a wide variety of alternative methods of service including ... delivery to the defendant's attorney." For such service to be permissible, a plaintiff "need not have attempted every permissible means of service of process before petitioning the court for alternative relief," but must "demonstrate that the facts and circumstances of the ... case necessitate[] the district court's intervention." In terms of due process, the Supreme Court in *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), stated that this alternative method of service of process must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

In *Terrestrial Comms v. NEC*, NO. 6:19-CV-00597-ADA, 2020 WL 3270832 at \*4 (W.D. Tex. June 17, 2020), the Japanese defendant demanded service under the Convention after the plaintiff's failed attempt of service. The court viewed the defendant's objection to service by alternative means "as an attempt to further delay resolution of the lawsuits rather than as a method of ensuring [the defendant's] appraisal of the pending suits," and allowed service upon the Japanese defendant's U.S. legal counsel by email.

But in another case, *Tevra Brands v. Bayer Healthcare*, No. 19-cv-04312-BLF, 2020 WL 3432700 (N.D. Cal. June 23, 2020), where the first and second attempts of service to a German defendant under the Convention failed due to clerical errors and the third attempt was delayed by the COVID-19 pandemic, the court agreed with a defendant that any delay was due to the plaintiff's own errors and denied the motion for alternative service.

In conclusion, effecting proper service of process on a corporate defendant in Japan can be a challenging and time-consuming endeavor, but plaintiffs have various options at their disposal to serve Japanese defendants and adjudicate their claims in the U.S. courts. However, if a plaintiff has reason to believe that the Japanese defendant will not appear in the U.S. litigation even after service, a default judgment would only be enforceable against the defendant in Japanese courts if service is made under Article 3 of the Convention.

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