Discovery, Jurisdiction and Service: Changes in US Law and Implications for Japanese Companies

This update discusses recent developments in US law concerning discovery, jurisdiction, and service with implications for Japanese companies:

- A recent ruling of the US Supreme Court dramatically limits the ability to obtain discovery in the US for use in arbitrations
- An upcoming Supreme Court case will decide whether states can succeed in exercising general jurisdiction over out-of-state and non-US corporations based merely on the fact that they are registered to do business in the state
- A new journal article identifies the states in which service can be made on a Japanese company through its US affiliate or state officials without need to use the Hague Service Convention

US Discovery in Aid of Non-US Proceedings No Longer Available for Arbitrations

A US federal law called "Section 1782" allows litigants in proceedings anywhere in the world to obtain the assistance of US courts in obtaining discovery from parties inside the US.[1] Section 1782 can be a powerful tool for non-US litigants, entitling them to the same kind of broad discovery of documents or testimony from any person present or resident in the US that a party to a US proceeding would be able to obtain, so long as the discovery is "for use in a proceeding in a foreign or international tribunal."

On June 13, 2022, the US Supreme Court limited the scope of Section 1782, holding that it cannot be used in arbitrations, including bilateral investment treaty proceedings.[2] The decision, which concluded that an arbitration is not "a proceeding in a foreign or international tribunal," recognizes a significant and, many would say, appropriate limitation on the availability of US discovery in international arbitration. Parties can be expected to attempt to circumvent this holding: an arbitration participant could, for example, commence a non-US litigation ancillary to the arbitration – e.g., to freeze assets – and seek Section 1782 discovery for use in the litigation that could also be helpful in the arbitration. But the Court's holding will generally preclude any use of Section 1782 in arbitration.

[1] Codified at 28 U.S.C. § 1782.

[2] *ZF Automotive US Inc v Luxshare Ltd* (2022).

Section 1782 will continue to provide an important source of discovery from US sources for Japanese litigants in criminal and civil proceedings and even before a lawsuit is filed; it is particularly significant for Japanese parties since Japan is not a signatory to the Hague Evidence Convention. Section 1782 has recently been used by Japanese companies and individuals to obtain US documents and testimony in a wide variety of situations, from a Japanese manufacturer obtaining discovery from the US subsidiary of a Chinese company to aid in patent litigation in China against the Chinese parent; to a Japanese businessperson obtaining information from Google for use in a contemplated reputational tort action in Japan against an anonymous defamer; to a Japanese citizen obtaining financial records from Citibank and JPMorgan Chase for use in a divorce proceeding pending in Tokyo High Court.[3]

Is an Expansion of General Jurisdiction on the Horizon in the US?

US courts recognize two grounds for jurisdiction over a person or company: "specific" or "general" jurisdiction. Any company can be subject to *specific* jurisdiction in a US state if it has a connection with a transaction or event that occurred within the state, but only for litigation arising out of that specific transaction or event. If a company has a deeper connection to a particular state, such that it is effectively "at home" there, it may be subject to *general* jurisdiction, in which case it can be subject to the jurisdiction of the state's courts for any claim, whether it arises out of activity in the state, or any other state in the US or elsewhere in the world.

Each US state is free to determine the scope of the jurisdiction of its courts. However, that freedom is subject to the limits imposed by federal constitutional law, as determined ultimately by the US Supreme Court.

In 2014, in *Daimler AG v. Bauman*, the US Supreme Court limited general jurisdiction in most cases to the state where a company is incorporated or where it has its principal place of business.[4] That means that the US subsidiary of a Japanese corporation is subject to general jurisdiction in at most two states, and a Japanese corporation is not subject to general jurisdiction anywhere in the US.

On April 25, 2022, that welcome limitation on US jurisdiction was put in question, when the US Supreme Court agreed to hear a case raising the possibility that a corporation may be subject to general jurisdiction wherever it is registered to do business.

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[3] *Application Pursuant 28 U.S.C. Section 1782 of Japan Display v. Tianma Am.*, 2021 U.S. Dist. LEXIS 243636 (C.D. Cal. Oct. 1, 2021); *In re Hattori*, 2021 U.S. Dist. LEXIS 198402 (N.D. Cal. Oct. 14, 2021); *In re Reiko Aso*, 2019 U.S. Dist. LEXIS 93175 (S.D.N.Y. June 3, 2019).

[4] *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

Pennsylvania, Georgia, Iowa, Minnesota and Nebraska have laws saying that by registering to do business a company consents to the state's general jurisdiction. Last year, the Georgia Supreme Court upheld this basis for jurisdiction, while noting it was in "tension" with US Supreme Court precedent.[5] In December 2021, the Pennsylvania Supreme Court came to a different conclusion about its own state's law. The Pennsylvania court held that Pennsylvania's law providing that corporate registration was a sufficient basis for general jurisdiction was unconstitutional.[6] Now, the US Supreme Court has agreed to hear an appeal from the Pennsylvania Supreme Court's decision.[7] The case is scheduled to be argued later this year.

While the effect of a Supreme Court ruling that registration represents consent to general jurisdiction would be profound for US companies, which are often registered in many or most of the fifty states, its effect on companies incorporated in Japan would be limited. Japanese companies are unlikely to register to do business in the US unless they operate directly through a branch, which few do. US subsidiaries of Japanese companies that are registered widely, however, could find themselves subject to jurisdiction in dozens of US states. That in turn could cause difficulties for Japanese companies themselves: states with the lowest threshold for veil-piercing or finding an alter-ego relationship between parents and subsidiaries could become magnets for litigation against subsidiaries of foreign parents, with plaintiffs aiming to obtain jurisdiction over the parent as well.

US Service on Japanese Companies: Can Hague Service Be Skipped?

The rules for service of US process on Japanese companies now seem clear. On December 21, 2018, the Japanese Government objected to service of process by direct mail to defendants in Japan. Because the US and Japan are signatories to the Hague Service Convention, and because Japan objects to mail service, the only way to serve a Japanese company with US process is through the Japanese Central Authority, as provided by Article 10(a) of the Hague Convention – right?

The answer is: not necessarily. Of course, if a Japanese company is present in the US, or has appointed an agent for service of process in the US, it can be served there without recourse to the Hague Convention through personal service. But there is another kind of service permitted under the law of US states: "substituted service," or service by means other than personal service on a defendant. In many US states, such substituted service can permit service on a Japanese company without relying on the Hague Convention.

[5] *Cooper Tire & Rubber Co. v. McCall*, 863 S.E.2d 81 (Ga. 2021).

[6] *Mallory v. Norfolk Southern Railway Co.*, 2021 WL 6067172 (Pa. Dec. 22, 2021).

[7] *Mallory v. Norfolk Southern Railway Co.*, 21-1168.

In the US, the rules for service within a state, even if the case is in federal court, are determined by state law. Many states permit substituted service on a non-US corporation through service on an in-state corporate affiliate of the non-US corporation or on the secretary of state, a state official. In both cases, the service takes place in the state. If no transmittal of service abroad is required, the Hague Convention does not come into play.

The US Supreme Court has approved this end-run around the Hague Convention. In the 1988 case of *Volkswagen v. Schlunk*, the Court held that state law determines whether there is a need to transmit a document abroad for service, and hence whether the Hague Convention applies.[8]

An April 2022 journal article provides a fifty-state survey of the use of substituted service in place of Hague Convention Service.[9] Three states – California, Illinois and Massachusetts – allow substituted service through an affiliated company whenever such service is reasonably likely to provide notice to the non-US parent. A further eighteen states only permit service through an affiliate where there are grounds for piercing the corporate veil. Three states have rejected service through an affiliate entirely. Relying on California state law permitting substituted service on an affiliate, the California Court of Appeal recently held that service on a Japanese brake manufacturer through its US subsidiary's designated agent for service of process was adequate, and that the Hague Service Convention need not be used.[10]

Many states also permit substituted service on non-US companies through state officials. In such cases, Hague Service is not required if state law provides that service is complete when it is made on the state official, regardless of whether a mailing subsequently occurs. Service on a state official is generally sufficient to serve a non-US company if it is registered to do business in the state or if a court would determine that it ought to be registered given the nature and extent of its business in the state. Twenty states also permit service on a state official if a non-US company would be subject to personal jurisdiction in a lawsuit arising from its in-state conduct.

In a recent case under South Carolina law, a Japanese company was named as a defendant in a lawsuit arising from an accident involving a vehicle it manufactured. The Japanese company was served through substituted service on the secretary of state. A federal court held that the Japanese company was doing business in the state through a subsidiary and that this was sufficient under South Carolina law to permit substituted service. The

[8] 486 U.S. 694, 707 (1988).

[9] *See Substituted Service and the Hague Service Convention*, W. Dodge, 63 WILLIAM & MARY L. REV 1485 (2022).

[10] *Sweikhart v. Akebono Brake Indus.*, No. B305065 (Cal. Ct. App. Jan. 20, 2021) (unpublished).

Hague Convention did not have to be used because service was complete when it was made on the state official.[11] Courts in Kansas, New Mexico and Rhode Island have also found that where substituted service can be made on a state official the Hague Convention need not be used.

By contrast, a federal court recently held that under New York law substituted service on a non-US corporation through a state official was not complete until a copy had been sent to the non-US corporation.[12] Because a mailing to Japan would be required to complete substituted service, the Hague Convention must be used in New York when serving a Japanese company that cannot be served personally.

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[11] *Peake v. Suzuki Motor Corp.*, 2019 U.S. Dist. LEXIS 173335 (D.S.C. 2019); *see also* 2019 U.S. Dist LEXIS 150996 (D.S.C. 2019).

[12] *Air Astana JSC v. Embraer S.A.*, Ind. No. 654173/2021 (N.Y. Sup. Ct. Dec. 9, 2021).