



# Accountability Across Borders

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Substantial trade relationships with foreign countries have led to the import of billions of dollars of products to the United States<sup>1</sup>—but one drawback arises when defective products harm U.S. consumers. In our practices, many of the foreign manufacturers we deal with are based in China and Japan. Attorneys bringing products liability suits against defendants in these countries face challenges, including how to effect service and how to enforce a judgment if one is obtained.<sup>2</sup> Here are some techniques to overcome these obstacles.

## Service in Japan

Service of process to defendants in Japan must be made under what is commonly referred to as the Hague Service Convention.<sup>3</sup> Strict compliance with its terms is required. As of December 2018, Japan no longer accepts direct service on a Japanese company via mail, so your only option is to follow Article 5 of the convention.<sup>4</sup> Translate the documents you are serving into Japanese. Japan requires this under Article 5, and it makes no difference whether the defendant's representatives understand English.<sup>5</sup>

Next, fill out Form USM-94, available on the U.S. Marshals Service website,<sup>6</sup> which must be completed to serve convention signatories. Form USM-94 has three parts: the Request, the Certificate, and the Warning and Summary. One mistake and the form will get kicked back, so make sure you fill it out yourself. Article 7 of the convention provides that the form may be completed in English.<sup>7</sup>

Here are three essential tips for filling out the Request. First, it requires the applicant's contact information, which means you, the attorney; it is not referring to the client, process service company, or anyone else. Second, the Request requires you to choose how you want the documents to be served. Select box "a," which essentially says your documents will be "formally"

served in the same manner that documents are routinely served in that country. (Parties may select formal service under Article 5(a), service "by a particular method" under Article 5(b), or delivery to the addressee if it accepts service voluntarily.) Formal service is the most conservative course to ensure a judgment entered in the United States will remain enforceable if the defendant defaults. Finally, the Request requires the applicant's signature; the signer must be an attorney and, again, it should be you.

Mail Form USM-94 and your translated documents to Japan's designated Central Authority at:  
Ministry of Foreign Affairs  
2-2-1 Kasumigaseki Chiyoda-ku Tokyo  
100-8919 Japan.<sup>8</sup>

After your documents are received and processed, they will be referred by Japan's Minister of Foreign Affairs to the appropriate court of justice.<sup>9</sup> If you selected box "a" within the Request section of Form USM-94, your documents will be served by either special postal service or a marshal.<sup>10</sup> A fee will be charged if a marshal completes service, and you can expect a bill of less than \$100.<sup>11</sup>

Finally, you wait. The process usually takes about six months, and you should receive an affidavit of service (or non-service) in the mail, which you can then file with the court based on your local rules.

## Service in Mainland China

Like in Japan, service on a mainland China-based defendant must follow the convention.<sup>12</sup> China requires that service be effected through diplomatic channels under Article 5.<sup>13</sup> In our experience, because U.S. lawyers are considered "officers of the court," a U.S.-admitted attorney can also sign the Form USM-94 Request for service in China.

Two certified simplified Chinese translations of the documents must be enclosed with the service form, along with a receipt for a wire transfer for \$95 to the “Supreme People’s Court of China.”<sup>14</sup> The package can then be mailed to:

International Legal  
Cooperation Center  
Ministry of Justice of China  
33 Pinganli Xidajie  
Xicheng District, Beijing 100035  
People’s Republic of China.<sup>15</sup>

We recommend using Federal Express to transmit service of process to mainland China because it provides documentation that the request was delivered to the Central Authority.

The Chinese Ministry of Justice will tell the appropriate regional court to effect service, usually personally. If personal service is impracticable,

however, service may be effected by alternative means permitted under Chinese civil procedure law (such as service by mail or public announcement).<sup>16</sup> Service on companies located in large cities such as Shanghai, Beijing, or Shenzhen usually can be completed within six months if all the paperwork is well prepared. Generally, the Central Authority in China will return a certificate of service or non-service explaining why it could or could not be accomplished.

Service can be substantially delayed (or unachievable) under the convention if it is to a small municipality or if the destination address is inaccurate, which is not uncommon for Chinese companies registered as foreign corporations in the United States. In those instances, service may need to be pursued by leave of a U.S. court using methods other than those outlined by the Hague Service

Convention. To do this, however, you first may need to submit proof that the convention process has failed. For instance, in *Federal Trade Commission v. PCCare247, Inc.*, a federal court granted the plaintiff’s motion for leave to serve defendants based in India by email or by Facebook, after the Indian Central Authority had not responded in five months to a service request under the convention.<sup>17</sup>

### Enforcing Judgments in Japan

The United States is not party to any judgment recognition and enforcement treaties. Consequently, separate proceedings must be brought in other jurisdictions to “recognize” a U.S. judgment before it can be enforced, a process that can involve opening a fresh proceeding using the U.S. judgment as evidence of a debt. This article’s discussion of enforcement is nonexhaustive—for example, the appeals process is not



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homepage of [www.ctlanet.org](http://www.ctlanet.org) or under the Member Resources tab.

covered—but it outlines the major steps for the majority of judgments you likely will try to enforce.

**Applicable authority.** Like the United States, Japan is not party to any treaties for the reciprocal recognition of foreign judgments. But Japan’s jurisdictions take a uniform approach to the enforcement of foreign judgments, which is governed by Article 118 of Japan’s Code of Civil Procedure and Article 24 of its Civil Execution Act.

Article 118 includes four requirements that must be met for foreign pecuniary judgments to be enforceable: the foreign court issuing the judgment must have had jurisdiction (meaning that the U.S. court would have had personal and subject matter jurisdiction over the claim); the Japanese defendant received service (or has appeared in the action voluntarily); the judgment and the foreign court’s proceeding were not contrary to Japan’s public policy; and the foreign jurisdiction reciprocally recognizes Japanese judgments (this applies with U.S. courts).<sup>18</sup> However, like most foreign jurisdictions, Japanese courts do not recognize foreign punitive damages awards.<sup>19</sup>

Article 24 provides that a foreign judgment must be executed without investigating its appropriateness, which means that the merits of your claim may not be relitigated in Japan. But under Article 24, Japanese courts will not recognize a foreign judgment if it was not final and binding or did not meet Article 118’s requirements.<sup>20</sup>

**Filing for enforcement.** If your U.S. judgment checks these boxes, then file it with the Japanese district court that has jurisdiction over the defendant, or if that’s not ascertainable, with the district court where the corporate defendant resides. Under Article 4 of Japan’s Code of Civil Procedure, jurisdiction over a person falls where he or she is domiciled, and jurisdiction over a corporation

exists at its principal place of business.<sup>21</sup>

When the appropriate Japanese court recognizes your U.S. judgment, it will serve the defendant with a title of obligation and a compulsory execution deed requiring the Japan-based defendant to satisfy the judgment. Article 22 of the Civil Execution Act provides that a foreign judgment can be carried out by compulsory execution.<sup>22</sup>

Although there may be exceptions, a good rule of thumb is that you have 10 years from the day a foreign judgment became final and binding to enforce it. Neither Japan’s Code of Civil Procedure nor its Civil Execution Act speak directly to foreign judgments, but its Civil Code provides a 10-year limitation period for non-foreign judgment claims.<sup>23</sup> Defendants could argue that imposing judgments older than 10 years would run afoul of Article 118’s requirement that enforcement be in line with Japan’s public policy.

### Enforcing Judgments in Mainland China

Enforcement of foreign judgments in mainland China is less straightforward. Except for two recent unique exceptions,<sup>24</sup> it is generally accepted that U.S. monetary judgments will not be recognized or enforced by Chinese courts. This can embolden China-based defendants with assets primarily located in China to ignore U.S. judgments. But these judgments can be exported to other jurisdictions where a debtor has exposure. So as a first step, thoroughly investigate a defendant’s corporate, customer, shipping, banking, and other relationships to find assets in jurisdictions friendly to U.S. creditors and enforcement.

**Enforcement-friendly jurisdictions.** Multiple key financial and regional securities exchange centers in eastern Asia, such as Hong Kong and Singapore, use English common law and routinely

enforce U.S. judgments. Hong Kong, a “special administrative region” of China, applies the English system of law rather than Chinese civil law and has fast, reliable, and creditor-friendly courts.

This creates opportunities for arbitrage when a judgment that is unenforceable in mainland China can nonetheless be enforced in Hong Kong. Companies based in mainland China commonly will have subsidiaries incorporated in Hong Kong, often listed on the Hong Kong Stock Exchange or with bank accounts in Hong Kong. Due to export restrictions on Chinese currency, many China-based companies maintain Hong Kong or U.S. dollar accounts in Hong Kong, which are not subject to currency export controls.

Similarly, many companies based in China are incorporated or have subsidiaries incorporated in offshore financial centers that operate under English common law, such as the British Virgin Islands or the Cayman Islands. These ties give options for enforcing pecuniary U.S. judgments against China-based defendants even if they are not recognized in China.

**Injunctive relief.** Injunctions may be obtained to aid U.S. enforcement proceedings. For example, a U.S. judgment creditor could bring a fresh proceeding in Hong Kong to enjoin assets discovered there under Section 21M of the Hong Kong High Court Ordinance.<sup>25</sup> England and other common law jurisdictions such as the British Virgin Islands have equivalent remedies.<sup>26</sup> Similarly, a creditor can put a member of the defendant’s corporate family into interim receivership to make use of special discovery powers to find and claw back assets into the receivership estate. Even the issuance of a receivership order can cause problems for the judgment debtor, as its trade partners may no longer know whom to deal with—the judgment

debtor or the receiver. Creditors may be able to seek appointment of interim receivers over assets that require active management, which if left in the hands of the debtor may reduce the value of the asset.

**Think Creatively**

When enforcing U.S. judgments abroad, several other strategies can help you overcome potential delays and difficulties.

**Map out assets pre-judgment.**

There is only a narrow window to enforce a judgment before the defendant has a chance to restructure its affairs. Investigate and map out a prospective judgment debtor’s corporate structure, supply chains, shipping routes, and customer and financial relationships in the six months leading up to a judgment, if not earlier.

**Identify decision-makers.** In addition to finding assets, determine where the defendant’s decision-makers are located and where they are subject to personal jurisdiction. Finding where executives or people with relationships to the company are subject to discovery can lead to important information and legitimate additional leverage points if and when a judgment is not promptly satisfied. For example, if you can identify facts that amount to fraudulent conveyance of company assets by the defendant’s management, that could create opportunities to file for freezing orders or to claw back the assets.

**Develop evidence of alter ego liability.** Though difficult to achieve, discovery also can be used to collect evidence that an otherwise U.S. judgment-proof entity may be the alter ego of one with greater jurisdictional exposure. Similarly, when a defendant is an undercapitalized subsidiary, use depositions and discovery to search

for evidence to support veil piercing or reverse veil piercing arguments once judgment is entered.

**Encourage the defendant to appear.**

Default judgments are enforceable but may leave the door open to relitigation of the merits. Entice a defendant to make at least a limited appearance by, for example, taking discovery that otherwise tells a one-sided story or demonstrating the defendant’s U.S. enforcement exposure. Later, when enforcing the judgment outside the United States, this will reduce available defenses such as denial of due process, defective service, or inadequate notice.

**Maximize compensatory damages.**

Non-compensatory damages generally are not enforceable in China and Japan. If a claim is settled in part by a defendant facing joint and several liability, state in the settlement agreement that payment is credited to the punitive portion of the judgment so that the full compensatory damages still can be enforced abroad.

Enforcement by garnishing assets piecemeal is neither a cost-efficient nor a quick way to monetize a very large judgment. When mapping out a defendant’s corporate structure and supply chains, also research any vulnerabilities that can be targeted for legitimate disruption.

Look for key bottlenecks in a defendant’s supply chain that could be interrupted through a ship attachment or for a client relationship with a 60-days accounts payable that could be garnished. The legitimate disruption in global supply or of a sensitive client relationship could pressure the defendant to settle an outstanding judgment.

To enforce judgments against defendants based in China and Japan, consider service and enforcement early, and plan globally to reach beyond U.S. borders. ▲▲▲

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**Endnotes:**

- <sup>1</sup> In 2018, the United States imported the most products from China, receiving goods valued at \$539.5 billion. Japan was the fourth-largest supplier with goods valued at \$142.6 billion. Office of the U.S. Trade Representative, *The People’s Republic of China*, <https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china>; Office of the U.S. Trade Representative, *Japan*, <https://ustr.gov/countries-regions/japan-korea-apec/japan>.
- <sup>2</sup> If you are unable to serve a local domestic subsidiary under your own state’s law, serving the defendant in its own nation may be your only choice.
- <sup>3</sup> The convention applies to contracting states, which include China, Japan, and the United States. Hague. Conf. on Private Int’l Law, *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (Nov. 15, 1965), [www.hcch.net/en/instruments/convention/s/full-text/?cid=17](http://www.hcch.net/en/instruments/convention/s/full-text/?cid=17).
- <sup>4</sup> Hague Conf. on Private Int’l Law, *[Japan] Declaration/Reservation/Notification* (Dec. 21, 2018), [www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=407&disp=resdn](http://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=407&disp=resdn).
- <sup>5</sup> See Hague Service Convention, *supra* note 3.
- <sup>6</sup> *Request for Service Abroad of Judicial or Extrajudicial Documents*, [usmarshals.gov/forms/usm94.pdf](http://usmarshals.gov/forms/usm94.pdf).
- <sup>7</sup> See Hague Service Convention, *supra* note 3.
- <sup>8</sup> Hague Conf. on Private Int’l Law, *Japan—Central Authority & Practical Information* (Jan. 17, 2019), [www.hcch.net/en/states/authorities/details3/?aid=261](http://www.hcch.net/en/states/authorities/details3/?aid=261).
- <sup>9</sup> *Id.* Ministry of Foreign Aff. of Japan,

*Methods for a Court of a Foreign State to Request Japan to Serve Judicial or Extrajudicial Documents and Take Evidence* (Dec. 28, 2018), [www.mofa.go.jp/ca/cp/page25e\\_000251.html](http://www.mofa.go.jp/ca/cp/page25e_000251.html).

<sup>10</sup> “Marshal” in this context may refer to consular staff or other officials who complete service.

<sup>11</sup> *Japan—Central Authority*, *supra* note 8.

<sup>12</sup> If the defendant is based in a “special administrative region” of China, such as Hong Kong, then options may be more flexible than in mainland China. Under Hong Kong law, for example, process can be served through local counsel without resorting to the Hague authority.

<sup>13</sup> Hague Conf. on Private Int’l Law, *[People’s Republic of China] Declaration/Reservation/Notification*, [www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=393&disp=resdn](http://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=393&disp=resdn).

<sup>14</sup> Hague. Conf. on Private Int’l Law, *[People’s Republic of China] Most Fre-*

*quently Asked Questions and Answers*, <https://assets.hcch.net/docs/5bbc302d-532b-40b1-9379-a2ccbd7479d6.pdf>.

<sup>15</sup> *See id.*

<sup>16</sup> Hague. Conf. on Private Int’l Law, *China—Central Authority & Practical Information* (Jan. 17, 2019), [www.hcch.net/en/states/authorities/detail/s3/?aid=243](http://www.hcch.net/en/states/authorities/detail/s3/?aid=243).

<sup>17</sup> *F.T.C. v. PCCare247, Inc.*, 2013 WL 841037 (S.D.N.Y. Mar. 7, 2013).

<sup>18</sup> Japan Code of Civil Procedure, art. 118, as last amended by Act No. 36 of 2011.

<sup>19</sup> *See, e.g.,* Craig I. Celniker et al., *Litigation and Enforcement in Japan: Overview*, Westlaw, <https://tinyurl.com/yyjnmzhy>.

<sup>20</sup> Japan Civil Execution Act, art. 24, Act No. 4 of 1979.

<sup>21</sup> Japan Civil Execution Act, art. 24, Act No. 4 of 1979.

<sup>22</sup> Japan Civil Execution Act, art. 22.

<sup>23</sup> Japanese Civil Code, 174-2.

<sup>24</sup> In September 2018, the Shanghai First Intermediate People’s Court recognized a judgment entered by the U.S. District Court for the Northern District of Illinois. (2017) Hu 01 Xie Wai Ren No.16. In June 2017, the Intermediate People’s Court of Wuhan recognized a Los Angeles Superior Court default judgment. No. (2015) E Wu Han Zhong Min Shang Wai Chu Zi No. 00026. Both parties to the U.S. judgment enforced by the Wuhan court were Chinese nationals. The Chinese court in the Wuhan case referenced a 2009 decision in which the Central District of California recognized a judgment entered by a Chinese court as a basis for reciprocity. The prevailing view is that these decisions are limited to the facts of their cases and do not change the well-established precedent of non-recognition of U.S. judgments by Chinese courts.

<sup>25</sup> Hong Kong High Court Ordinance (Cap. 4), Section 21M.

<sup>26</sup> The Eastern Caribbean Supreme Court (Virgin Islands) Act (Cap. 80), Section 24.

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