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HOW FOREIGN COMPANIES' ONLINE ACTIVITIES CAN INCREASE EXPOSURE TO U.S. LITIGATION

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Your client is a multinational company with headquarters in Shenzhen, People's Republic of China, and subsidiaries in Los Angles, Detroit, and New York. You represent the company's Los Angeles–based subsidiary in an unfair competition litigation action in federal court, and discovery is heating up. You receive an urgent message from your client that the opposing counsel has delivered a subpoena duces tecum to the L.A. subsidiary that seeks testimony and documents from the Chinese entity in connection with the unfair competition case. What is your reaction? Your reaction may be to politely inform the opposing counsel, "nice try, but the service was invalid because the Chinese entity must be served by means of the Hague Service Convention. But the opposing counsel insists that the service was valid. Who's correct?

Can one legitimately serve a subpoena on a foreign company through its U.S. affiliate company? It depends. It depends on the state where the subpoena is served and the nature of the relationship between the foreign company and the domestic affiliate. And if the foreign company or the domestic affiliate maintains a website and has online and social media presence, which most companies do these days, that could be used to demonstrate that the service was proper.

What is the effect of this end around the Hague Service Convention on your foreign company client? It could be an expensive and burdensome intrusion, resulting in your foreign client being dragged into what it surely dreads—American-style discovery. Your client may find this particularly frustrating if it's not even a party to the litigation. And if your client seeks to quash the subpoena, that could trigger a request for intrusive discovery regarding the relationship between the companies. In short, being unwittingly entangled in U.S. litigation as a third party can be expensive and burdensome, with no upside to the foreign company or the U.S. subsidiary. Foreign organizations and their domestic subsidiaries, however, can take certain steps—proactively and inexpensively—to reduce the risk of being served through the domestic subsidiary.

Before discussing those steps, a brief discussion of the basics is warranted. Federal Rule of Civil Procedure 4(f) requires that a foreign person or entity be served through the Hague Service Convention, to the extent that the country is a member. *See* Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638. The Hague convention is an international agreement among member states that ensures that judicial and extrajudicial documents to be served abroad are brought to the notice of the addressee in sufficient time. Although the Hague convention can be beneficial in that it provides a unified process for serving foreign entities, it is disfavored by litigants seeking discovery due to its expensive and time-consuming process. In fact, it may take months to complete serving a witness. And if the time to complete discovery is running out, this could mean saying goodbye to that key testimony or piece of evidence that you need for trial.

The U.S. Service Loophole

This is where the loophole comes in. The Hague convention does not apply to service within the judicial district of the United States. Instead, Federal Rule of Civil Procedure 4(h) requires that service be made by following the law of the state or by delivering a copy of the relevant documents to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process. And some states treat the domestic subsidiary as an involuntary agent of the parent for service of process.

For instance, in California, serving a foreign corporation through a domestic

subsidiary may be sufficient under certain circumstances. The pivotal case is *Yamaha Motor Co. v. Superior Court (Connors)*, 94 Cal. Rptr. 3d 494 (Ct. App. 2009). In *Yamaha*, the question was whether a Japanese manufacturer could be served simply by serving the Japanese manufacturer's American subsidiary. The Japanese manufacturer asserted that service of process could be accomplished only by means of the Hague Service Convention. The *Yamaha* court held that service of process may be accomplished by service on the domestic subsidiary under the circumstances. The court explained that under California law, a corporation can be served by service of process on an agent, which for purposes of service constitutes any representative having "'ample regular contact' so that it was 'reasonably certain' that the representative [i.e., the American subsidiary] would apprise the manufacturer of the service."

Recently, the Ninth Circuit further clarified that service on a foreign corporation through the entity's domestic subsidiary is sufficient if the parent corporation is foreign and otherwise not readily available for service within California, and the service is through a subsidiary

Illustration by Elizabeth Rosen

as general manager that has a sufficiently close connection with the parent. *U.S. ex rel. Miller v. Pub. Warehousing Co. KSC*, 636 F. App'x 947, 949 (9th Cir. 2016). The second element depends on the frequency and quality of contact between the parent and the subsidiary, the benefits in California that the parent derives from the subsidiary, and the overall likelihood that service on the subsidiary will provide actual notice to the parent. *Id.* What demonstrates a "close connection" with the parent depends on the facts of the case.

Similarly, in Illinois, a foreign corporation can be served through a domestic subsidiary, depending on the facts of the case. In *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988), the U.S. Supreme Court determined that the service of process made on Volkswagenwerk's wholly owned domestic subsidiary was sufficient. There, the Court determined that the domestic subsidiary was an involuntary agent for service of process according to Illinois state law. In rendering its decision, the Court considered the following factors: that the foreign corporation and its American subsidiary shared common members of their boards of directors and that the domestic subsidiary was the parent's exclusive distributor and importer in the United States. In light of these factors, the Court held that service by the Hague convention was not required and that service was accomplished pursuant to Illinois state law.

In New York, a foreign parent can be served through a domestic subsidiary where either the domestic subsidiary serves as a "mere department" or serves as a "managing or general agent." *Kwon v. Yun*, 2006 U.S. Dist. LEXIS 7386, at *2–3 (S.D.N.Y. 2006); *see* N.Y. C.P.L.R. § 311(a)(1) (authorizing service on "managing or general agent" of foreign corporation); *Darden v. DaimlerChrysler N. Am. Holding Corp.*, 191 F. Supp. 2d 382, 387 (S.D.N.Y. 2002) (noting New York law authorizes service on domestic subsidiary where subsidiary acts as "general agent" or "mere department" of foreign corporation). This requires a showing of an agency relationship between the two corporations that goes beyond the parent's mere ownership of the subsidiary. Courts in the Second Circuit have considered the following factors for that purpose: (1) common ownership of the parent and subsidiary, (2) financial dependency of the subsidiary on the parent corporation, (3) the degree to which the parent corporation interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities, and (4) the degree of control over the marketing and operational policies of the subsidiary exercised by the parent. *See Kwon*, 2006 U.S. Dist. LEXIS 7386, at *3 (citing *Volkswagenwerk A.G. v. Beech Aircraft Corp.*, 751 F.2d 117, 120–22 (2d Cir. 1984)).

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But what if the subpoena in our hypothetical was served on the U.S. subsidiary located in Detroit? In Michigan, serving a subsidiary is not deemed sufficient service on the foreign corporation. Courts in Michigan have found that "it is a well-recognized principle that separate corporate entities will be respected." *Lafarge Corp. v. Altech Envtl. USA*, 220 F. Supp. 2d 823, 832 (E.D. Mich. 2002). Thus, if your foreign client's subsidiary is located in Michigan, service on that entity will not be deemed sufficient to reach the foreign company.

In sum, whether your foreign company client may be served through its U.S. subsidiary depends largely on where the U.S. affiliate is located and your client's relationship with that entity. If it is located in a state that permit service through the U.S. subsidiary (like California, Illinois, and New York), your client should carefully consider its online activities. For instance, if your client states online that the foreign and the U.S. affiliate companies are part of a single organization, if the domestic affiliate's employees describe their employer as the foreign parent company on LinkedIn or other social media, and if the website reveals that the entities share the same board members and executives, those factors could be used to support the argument that the U.S. affiliate is the "general manager" or "agent" of the foreign company.

Steps to Reduce Risk

Foreign companies, however, can undertake the following proactive steps to reduce the likelihood that their U.S. affiliate will be treated as an involuntary agent for service of process or discovery:

- On the corporate website, don't portray the domestic affiliate as a unit or division of the foreign company, or vice versa. List the entities as separate legal entities.
- Don't share the same board members or executives.
- Don't share the same LinkedIn, Facebook, or other social media accounts.
- Ensure that the business cards and email signature lines of the employees reflect the correct entity name, not the name of the foreign entity.
- Ensure that the letterhead reflects the correct entity name, not the name of the foreign entity.
- Monitor and educate employees on proper social media use.
- Have experienced counsel audit the corporate website and employees' social media activity. ■