

## Fed. Circ. Eases Serving Of Patent Suits On Foreign Cos.

By Ryan Davis

*Law360 (September 24, 2021, 9:55 PM EDT)* -- A recent Federal Circuit decision likely provides a route for judges and plaintiffs in patent cases to circumvent an international treaty that creates hurdles when serving complaints on foreign defendants, potentially speeding up some proceedings by many months, attorneys say.

The appeals court denied a mandamus petition by Chinese smartphone maker OnePlus, which argued it wasn't properly served with a patent complaint because Western District of Texas Judge Alan Albright allowed the plaintiff to serve OnePlus attorneys in the U.S., rather than the company itself in China through procedures set by the Hague Convention.

While the Federal Circuit expressed "concerns" about permitting alternative ways of serving complaints just to accelerate cases, it noted that federal rules give judges broad discretion in this area. Litigators said plaintiffs and courts like those in Texas that prize speedy trials may take that as an invitation to seek to evade the treaty's red tape more frequently.

"It's quite significant and maybe people don't realize it yet, but I think this is going to be opening the door to bypassing the Hague Convention in order to serve process," said Kory Christensen of Polsinelli PC.

Under the treaty, countries provide a central authority that receives legal complaints filed abroad and serves them on companies in the country. That can involve expensive translations and bureaucratic headaches, particularly in China, where serving complaints through the Hague Convention has recently taken a year or two in some cases, Christensen said.

Chinese officials have been known to wait months before denying requests for service, citing clerical errors in addresses, spelling or translation, he noted. During that time, the litigation in the U.S. may not be able to get started, creating an appetite for plaintiffs suing Chinese companies to find other ways to serve complaints, which the Federal Circuit ruling may provide.

"This is going to give plaintiffs that are suing international defendants in patent infringement cases another possible tool for getting service," said Michael Adams of Dykema Gossett PLLC. "Plaintiffs are going to be more likely to consider alternative service, rather than the more costly or burdensome method of going through the Hague Convention."

That's especially true if the case is in the Western District of Texas, where 25% of all U.S. patent

cases have been filed this year. Judge Albright, who has made a point of trying to bring patent cases to trial as quickly as possible, complained in his order that let plaintiff Brazos Licensing serve the attorneys that the Hague process is too slow and expensive.

The Federal Circuit said that wasn't an abuse of discretion, noting that the Federal Rules of Civil Procedure state that foreign defendants can be served through the Hague Convention, different methods available under their country's laws, or "by other means not prohibited by international agreement, as the court orders."

"This is one more reason to look to the Western District of Texas. It's possibly a good forum if you're suing a foreign defendant," Adams said.

In addition to typical bureaucratic issues, disruptions caused by the pandemic have also dragged out the process of serving complaints in some countries, such as Japan and Germany, which might provide an additional reason why judges and plaintiffs might try to serve complaints on a company's attorneys or agents in the U.S.

"It's a tactic that people will be thinking about more frequently when you look at foreign jurisdictions that you know have been particularly slowed by the pandemic," said Blair Jacobs of McKool Smith.

While the Federal Circuit's holding that judges have broad discretion will put a spotlight on alternative methods of service, there are some aspects of the ruling that may give judges and litigants pause before following in the path Judge Albright set out.

For one, the ruling came in a denial of a petition for mandamus, which imposes a very high bar for relief, and the court noted that defendant OnePlus could raise the issue again in an appeal of a final judgment.

"I would be a little concerned if I were the plaintiff," Jacobs said. "You have to proceed through the entirety of the case with that risk hanging out there," since the appeals court might later reconsider whether service was appropriate.

In addition, while it didn't change the outcome, the Federal Circuit's concerns about authorizing an alternative method of service simply because the judge finds the Hague Convention to be cumbersome, and its suggestion that allowing it in every case might exceed the bounds of discretion, may also weigh on the minds of litigants and judges.

"If there's a deeper message, the court may be saying to all the district courts, and it may just be dicta, don't overuse this authority," said Arthur Gollwitzer of Jackson Walker LLP. He noted, however, that the wording of the opinion "leaves plenty of room for people to try it out."

In many patent cases involving foreign defendants, the Hague Convention isn't an issue because the company has a U.S. subsidiary that can be served, which gets the case underway. The issue typically arises in suits where a company like OnePlus is solely based in China, and going through the treaty will prolong the case.

"The main thing is it's a very slow process," said Adams of Dykema. "If you're filing a lawsuit, you want to get it served and get it rolling. If you have to wait months, if not longer, to try to get service through the Hague Convention, that's a big roadblock to get the case moving and resolved."

Court watchers will now have an eye on Judge Albright, who has become well known for pursuing rapid trial schedules, to see if alternate methods of service become more common in his court, and on whether the practice becomes more widespread generally.

"I think other judges might be a little more reticent to do it, but the precedent has been set, and the Federal Circuit didn't really do anything about it," Polsinelli's Christensen said. "So I suspect we'll see this happen in other courts, and it'll be interesting to see whether they follow Judge Albright's example."

The case is *In re: OnePlus Technology (Shenzhen) Co. Ltd.*, case number 2021-165, in the U.S. Court of Appeals for the Federal Circuit.

--Editing by Jill Coffey and Emily Kokoll.