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International Conflicts of Service

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Stacey Hsu and Daniel Reisler of Reisler Franklin LLP, comment on an interesting Court of Appeal Decision where the Gutierrez patriarch attempts to validate service of a claim on his Guatemalan family … only the method of service is illegal in Guatemala.

Introduction

The decision of the Ontario Court of Appeal in *Xela Enterprises Ltd et al v Castillo et al* ("*Xela*") 2016 ONCA 427, is the most recent addition to the legal saga of one of Guatemala's most wealthy and powerful families.

The decision in *Xela* is the leading case on how to serve a document on a party residing in a country that is not a signatory to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Convention"). The principles in *Xela* must be considered when applying Rule 17.05(2) of the Ontario *Rules of Civil Procedure*.

I. PROCEDURAL HISTORY

A. The Facts

The Plaintiffs are individuals who live in Canada or are companies that carry on business in Canada. They include the father, Juan Arturo Gutierrez and his son, Juan Guillermo Gutierrez who are suing his children, his nephew and his sister-in-law for $400 million in damages related to fraud, breach of fiduciary duty, conspiracy to commit tortious acts and unjust enrichment. The Defendants reside in Guatemala.

On February 28, 2013, the Plaintiffs amended their Statement of Claim and attempted to serve the Fresh Statement of Claim on the Guatemalan Defendants. They emailed a copy to the Defendants' Canadian counsel, left a copy at the Defendants' business, and couriered copies to their Guatemalan businesses and residences.

After attempting service, the Plaintiffs brought a motion to validate or substitute service on the Guatemalan Defendants.

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B. Ontario Superior Court Decision

At the motion, the Defendants argued that in order for service to be valid in Ontario, it must be done in accordance with Guatemalan law. The Defendants stated that to find otherwise would violate Canada's international law obligations and the principle of comity (i.e. the principle that countries will mutually respect each other's laws).

In Guatemala, direct service by a party violates the Guatemalan constitution and is subject to a penalty. Instead, the courts must appoint notaries to effect service. At the motion, all Parties agreed that the Defendants were not served in accordance with the Rules of Service of Guatemala.

At the Superior Court level, Justice J.A. Thorburn of the Ontario Superior Court of Justice found that service on the individual Defendants was attempted but unsuccessful. However, she validated service because a copy of the Fresh Statement of Claim had come to the Defendants' attention. For the corporate Defendants, Justice Thorburn held that service was effective because a copy was left with a person appearing in control or management of the place of business.

C. Divisional Court

The decision was appealed to the Divisional Court and heard before Justices Corbett, Perell and Gilmore. The Divisional Court dismissed the appeal.

D. The Issue

Can parties residing in a country that is not a signatory to the Hague Convention, be served in accordance with Ontario Rules?

E. Ontario Court of Appeal Decision

The matter was appealed to the Ontario Court of Appeal and heard before Justices Weiler, LaForme and Huscroft. The Court dismissed the appeal.

It explained that the procedure for service of documents outside of Ontario is provided in Rule 17.05 of the *Rules of Civil Procedure*. Service is governed by a different Rule depending on whether the Defendant resides in a country that is a signatory to the Hague Convention. If it is a signatory, then service must be through the Central Authority (Rule 17.05(3)). If the country is not a signatory to the Hague Convention, Rule 17.05(2) provides as follows:

> (2) An originating process or other document to be served outside Ontario in a jurisdiction that is not a contracting state may be served in the manner provided by these rules for service in Ontario, or in the manner provided by the law of the jurisdiction where service is made, if service made in that manner could reasonably be expected to come to the notice of the person to be served. R.R.O. 1990, Reg. 194, r. 17.05 (2).

Guatemala is not a party to the Hague Convention. Thus, service on the Defendants is governed by Rule 17.05(2).

No Violation of International Law

The Appellants argued that Rule 17.05(2) must be interpreted to respect Guatemalan sovereignty because the Ontario method of service would be illegal in Guatemala. To this, the Court of Appeal stated that Rule 17.05(2) merely provides an option for service. While the method of service is illegal in Guatemala and subject to a penalty, the Court stated that it wasn't clear that the penalty applied to service *ex juris*. Further, the penalty appeared to be in the de minimis range. It did not violate Guatemalan sovereignty because, ultimately, the Defendants could challenge Ontario's jurisdiction based on *forum non conveniens*.

Principle of Conformity is Rebutted

The Appellants also argued that Rule 17.05(2) should be interpreted to mean service within the law of the destination country — to interpret otherwise would be against the principle of conformity. The principle of conformity states that Canadian courts should strive to avoid construction of domestic laws that violate international obligations, unless there is a clear legislative intent. It is a rebuttable presumption. The Court of Appeal held that Rule 17.05(2) was enough to rebut the presumption. Rule 17.05(2) expressly provides a choice to the serving party to serve documents pursuant to Ontario Rules or pursuant to the law of the jurisdiction. To require service in accordance with Guatemalan law would be to remove the choice that is provided for in Rule 17.05(2).

II. ANALYSIS

This case is the leading decision on Ontario's Rule 17.05(2) and its application. It is noteworthy because where a party resides in a country that is not a signatory to the Hague Convention, they may be served in a manner that is illegal in their own jurisdiction, yet valid in Ontario.

It is interesting to note that the Court of Appeal did not address whether the Plaintiffs attempted to serve the Defendants in accordance with Guatemalan law, and if not, why. It was enough that they had attempted service pursuant to the Ontario Rules only.

Practically, this ruling provides certainty for Ontario courts and litigants. Litigants are not required to research service requirements for specific countries, nor comply with them. Further, the application of this case extends beyond civil actions and into Family Law actions because the *Family Law Rules* do not specifically provide for service outside Ontario.

However, parties applying this case must be aware that this judgment may invite local process servers to break domestic laws. This may or may not result in violations and penalties for the client. For this reason, it is still advisable to be aware of the service laws of the local state and their penalties.

This case raises legal, practical and political issues. The Appellants have applied for leave to appeal to the Supreme Court of Canada. Hopefully, the Supreme Court can provide some definitive guidance on this area. Otherwise, we can expect further debate on this subject. This discussion is set against the backdrop of ongoing negotiations of bilateral and multilateral international trade agreements and the unprecedented movement of people across international borders.