

INTERNATIONAL

NOVEMBER 2016

IN THIS ISSUE

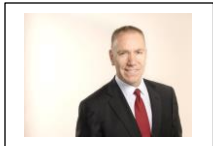
Stacey Hsu and Daniel Reisler of Reisler Franklin LLP, comment on an interesting Court of Appeal Decision where the Gutierrez patriarch attempts to validate service of a claim on his Guatemalan family ... only the method of service is illegal in Guatemala.

International Conflicts of Service

ABOUT THE AUTHORS



Stacey Hsu is an associate at Reisler Franklin LLP where she practices civil litigation with a focus on insurance defence. She regularly appears before Masters and Judges at the Ontario Superior Court level. She obtained her Juris Doctor, cum laude from the University of Ottawa. She can be reached at shsu@reislerfranklin.com.



Daniel Reisler is a founding partner of Reisler Franklin LLP. He has made numerous appearances at the Court of Appeal for Ontario but is probably best known as jury trial counsel. He may have conducted more civil jury trials than any lawyer in Canada. He is a past President of Canadian Defence Lawyers and has been active in DRI – The Voice of the Defense Bar and IADC, the International Association of Defense Counsel. He can be reached at dreisler@reislerfranklin.com.

ABOUT THE COMMITTEE

The International Committee is the core international group in IADC and serves those members who have an interest in transnational or international legal matters including transactions, litigation, and arbitration. Thus any member, whether in the USA or abroad, who does cases with a foreign element (inbound or outbound) will find involvement in this committee extremely useful. Many of the members of the committee are from outside the USA, and this provides a rich mix of experiences and expertise as well as great networking opportunities. The International Committee also organizes European, South American, and Asian Regional Meetings and contributes to the International Corporate Counsel College. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



Daniel Reisler
Vice Chair of North America
Reisler Franklin LLP
dreisler@reislerfranklin.com

The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

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.

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 (This is the principle that countries will mutually recognize 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.

Past Committee Newsletters

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

AUGUST 2016

Independence Day
Bill Perry

MARCH 2016

Intellectual Property in Ukraine after the Association Agreement: On the Way to an Effective Level of Regulation
Maria Orlyk and Oleksandra Kondratenko

MAY 2015

Cyber Security for International Lawyers
Bob Craig and Norman Comstock

FEBRUARY 2015

A Commentary on the United Kingdom's Reappraisal of the Law as it Relates to Insurance Contracts
David Wilkinson

JANUARY 2015

A Review of Forum Non Conveniens in the United States and the Factors in Deciding Whether to Pursue an FNC Dismissal
Barry Davis

OCTOBER 2014

Litigation Funding in Australia - A Proposal for Reform
Stuart Clark

JUNE 2014

France and Belgium Adopt Class Actions
Spring 2014
Christopher Scott D'Angelo and Jennifer Canfield

MAY 2014

Lago Agrio-Transnational Enforcement of Judgments
Be-Nazeer Damji

MARCH 2014

Pension Plans and Class Actions: The *Vivendi* Case
Louis Charette, Josée Dumoulin, Bernard Larocque and François Parent

FEBRUARY 2014

Canadian Price-Fixing Class Actions: The Supreme Court of Canada Gives the Green Light to Indirect Purchaser Claims
Steven F. Rosenhek and Vaso Maric

JULY 2013

Is The Class Action 'Centre of Gravity' Moving Away From the United States?
S. Stuart Clark, Ross McInnes, Colin Loveday, Andrew Morrison and Greg Williams