Has New York Stretched its Long Arm Too Far?: Court of Appeals Eschews Comity Analysis in Case Involving Service in Brazil

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Something financial
Something procedur'l
Something for everyone
But no comity tonight.

(with apologies to Stephen Sondheim)

The New York Court of Appeals held in *Morgenthau v. Avion Resources, Ltd.*, No. 167, 2008 BL 162252, a unanimous opinion handed down on November 20, 2008, that New York can apply its service of process rules to obtain jurisdiction in New York over Brazilian nationals even though the manner in which they were served was banned in Brazil. In upholding jurisdiction despite contrary foreign law, the *Avion* opinion may be a misstep by the highest court of a state that prides itself on being a center of international business transactions.

The case is but the latest reminder that New York needs to balance New York "procedural" rules and interests against the interests of comity, particularly where issues of jurisdiction are involved. Unless *Avion* is read as limited to its unusual facts, New York may supplant Tobago in the memorable question posed by Lord Ellenborough two centuries ago: "Can Tobago make a law to bind the rights of the whole world?"[1]

Background of the Case

The procedural history of the case does not cast the U.S. law enforcement agencies involved in a particularly favorable light. Federal agents uncovered a huge, illicit cash transfer operation running from Brazil to New York, violating both Brazilian and New York banking laws. Brazilian money changers used New York accounts to transmit billions of dollars. In 2002, U.S. agents seized about $21 million from a bank in New York County connected to the operation in a criminal forfeiture proceeding and also indicted an employee of a New York bank. However, federal authorities never were able to establish that the indicted employee held an interest in the confiscated funds. After four years of litigation in federal courts in New York and New Jersey, the District Court in New Jersey granted a motion by the account holders and ordered the federal government to return the seized funds to them.

In an apparent effort to sidestep the ruling, the federal agents asked New York County District Attorney (and former Southern District U.S. Attorney) Robert Morgenthau if his office might be interested in starting proceedings related to the funds. Two weeks later, in June, 2006, the District Attorney obtained an *ex parte* order in New York under CPLR Article 13-A attaching the funds (then in New Jersey), as the purported proceeds or instrumentalities of an illegal money transfer business violating the New York Banking Law. When the June 2006 *ex parte* seizure order was found to have lapsed because the District Attorney had not sought confirmation within the statutorily required five days, the District Attorney obtained a second *ex parte* seizure order.

The District Attorney also commenced a civil forfeiture action under CPLR Article 13-A, and sought and obtained indictments against 34 foreign nationals and 16 foreign entities holding the seized accounts. The 16 foreign entities all had British Virgin Islands addresses; almost all the foreign individuals had addresses in Brazil. All 50 entities and individuals also were the subject of criminal prosecution in Brazil.

The District Attorney served the Article 13-A forfeiture complaint on 19 account holders of the New York bank, both individuals and representatives of corporate defendants, in Brazil. Some

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were served personally. For some defendants who could not be served personally, the District Attorney obtained an order from Supreme Court in New York County allowing alternative service on their attorneys under CPLR 308(5), 311(b) and 313. Yet others were served in Brazil by Brazilian lawmen helping out their New York brethren under an informal agreement.[2]

These complicated facts gave rise to motions to dismiss by various account holders in the New York Supreme Court challenging both the sufficiency of the service and the validity of the attachment orders seizing the accounts. The Supreme Court found, *inter alia*, that the method of service was deficient both under the Inter-American Convention on Letters Rogatory and under domestic Brazilian law, which authorizes service only by letters rogatory or a letter of request through diplomatic channels. It therefore found that the service made was inconsistent with principles of comity, namely, respect for and deference to another country's law, where possible.

The Appellate Division affirmed. The First Department's opinion principally discussed the attachments' invalidity. While it held that service of the complaint under the Inter-American Convention was not mandatory, it applied comity principles to find the service deficient because it violated Brazilian law. The First Department made the further determination that service by Brazilian lawmen under an informal agreement did not satisfy the Mutual Legal Assistance Treaty on Criminal Matters. The Appellate Division certified the case to the Court of Appeals, which effectively reversed in what was styled an affirmance with modification.[3]

Court of Appeals Opinion

Judge Ciparick's opinion starts with the literal language of CPLR 313:

> A person domiciled in the state or subject to jurisdiction of the courts of the state under section 301 or 302 . . . may be served with the summons without the state, in the same manner as service is made within the state, by any person authorized to make service within the state who is a resident of the state or by any person authorized to make service by the laws of the state, territory, possession or country in which service is made or by any duly qualified attorney, solicitor, barrister, or equivalent in such jurisdiction.

Quoting Professor Alexander quoting Professor Siegel, the Court agreed that the purpose of the statute is to remove state lines and, apparently, national ones, too.

In contrast to the Appellate Division, however, the Court of Appeals found that considerations of international comity do not require deference to Brazilian law. Initially, the Court noted that comity is a discretionary doctrine, typically considered in weighing whether a foreign judgment should be enforced under CPLR Article 53. Never, the Court's opinion stated, has it been applied "to import the laws of a foreign country into a New York lawsuit – and we decline to do so in this case." That Brazilian law concededly requires letters rogatory or a request through diplomatic channels "[a] New York court's ability to exercise personal jurisdiction over a Brazilian domiciliary, where service is made in accordance with the CPLR, should not be so limited."

A different rule would apply if an international treaty, such as the Hague Service Convention, required service to be made only in a particular manner; then, the Court noted, the requirement would be the law of the land under the U.S. Constitution's Supremacy Clause, and New York courts would be obliged to apply it. But the lesser-known Inter-American Convention does not mandate any exclusive form of service; it just provides an additional method for service.

Inter-American Convention

While nothing in the Inter-American Convention excludes use of other mechanisms, it does provide that the receiving, not the serving, jurisdiction should decide the adequacy of service of process. Article 11 vests in the receiving state "jurisdiction to determine any issue arising as a result of the execution of the measure requested in the letter rogatory." If the District Attorney had

used a letter rogatory, it would have been up to the Brazilian courts whether it was valid. Similarly, Article 17, analogously to CPLR Article 53, allows the receiving state to refuse to execute a letter rogatory that is "manifestly contrary to its public policy ('ordere public')." Moreover, Article 14 allows for "special methods and procedures more expeditious than those provided in this Convention." Why bother to say so if the Convention provides merely another, optional route?

Unlike the Hague Conventions, which treat service and evidentiary functions separately, the Inter-American Convention applies to both.[4] Indeed, the President's message to the Senate accompanying the Convention said it was supposed to accomplish for the member states of the Organization of American States what the Hague Service Convention had done for other countries.[5]

Nevertheless, the Court of Appeals' opinion is in line with a series of American decisions holding that the Convention does not provide the exclusive means of service in a signatory nation; *Avion* cites some of them. *See, e.g., Kreimerman v. Casa Veerkamp S.A. de C.V.*, 22 F.3d 634 (5th Cir.), *cert denied*, 513 U.S.1016 (1994)[6]; *Paiz v. Castellanos*, No. 06-cv-22046 (S.D. Fla. Aug. 28, 2006); *Skanchy v. Calcados Ortope SA*, 952 P.2d 1071 (Utah Sup. Ct. 1998*); Laino v. Cuprum S.A. de C.V.*, 235 A.D.2d 25, 663 N.Y.S.2d 275 (2d Dep't 1977); *Pizzabiocche v. Vinelli*, 772 F. Supp. 1245 (M.D. Fla. 1991); *Mayatextil, S.A. v. Liztex U.S.A., Inc.*, No. 92-cv-04528 (S.D.N.Y. May 19, 1994). Other decisions, none cited by the Court of Appeals, have reached different conclusions. *Lake Charles Cane LaCassine Mill, LLC v. SMAR International Corp.*, No. 07-cv-00667 (W.D. La. June 8, 2007) (dismissing service effected in Brazil in violation of Brazilian law on basis of comity, distinguishing *Kreimerman*); *Lykes Lines Limited LLC v. Bringer Corp.*, No. 04-cv-04460 (S.D.N.Y. Mar. 12, 2007) (finding jurisdiction lacking where parties agreed Brazilian law required service by letters rogatory and Convention had not been complied with); *Lord v. Living Bridges*, No. 97-cv-06355 (E.D. Pa. July 22, 1999) (quashing service in Mexico because violative of Mexican law, even though concluding Convention was not sole method to effect service); *De Torres v. Arocena*, 155 Misc.2d 52, 56-57, 587 N.Y.S.2d 495 (Sup. Ct. N.Y. Co. 1992) (jurisdictional motion granted for failure to comply with Convention in effecting service of letter rogatory in Uruguay, where Uruguayan law required authorization of an Uruguayan court, noting "[T]he requirement in Article 10 that such service be made in accordance with the law of the state of destination preempts any New York State law inconsistent with the requirements for the service of process in Uruguay.").

Missing Comity Analysis

The broad language of the *Avion* opinion's statement – "we need not apply comity principles to service of process issues where the CPLR's requirements of service upon foreign defendants are fulfilled" – is unfortunate. It does not appear that any evidence was before the courts below or the Court of Appeals suggesting that Brazilian law permitted service as it was effected. This flaw was also present in the *Kreimerman* case, on which the Court of Appeals relied, where no proof at all as to what Mexican law allowed was adduced, and the comity question was not reached.

A finer-grained analysis might ask whether comity counsels attention to Brazilian domestic law on service of process even if the Inter-American Convention is not controlling. Merely concluding that letters rogatory are not the only way to serve a Brazilian domiciliary is not the same as concluding that any method authorized by New York law should override contrary Brazilian law.

Avion does not address this conflict between what New York law permits and what Brazilian law prohibits. This, perhaps, is where comity ought to have entered into the picture, as it did in the First Department's analysis.[7] Ironically, the Court of Appeals relied in part on analogy to Rule 4(f)(3) of the Federal Rules of Civil Procedure, noting that it allows service "by any method of court-ordered service, provided that the method of service is not prohibited by international agreement."[8] But Rule 4(f)(2), which would have governed *Avion* had the case been in federal court, allows service if there is no internationally agreed means, or if an international agreement

allows but does not specify other means by any method, with several provisions, including that the service method is not "prohibited by the foreign country's law." That was the situation in *Avion.*

The few cases which have considered this particular issue generally have applied comity analysis and invalidated service. In *Tucker v. Interarms*, 186 F.R.D. 450 (N.D. Ohio 1999), for example, a jurisdictional motion to dismiss where Brazilian law had not been followed was conditionally denied with this comment: "In this case, even if other means of obtaining service of process are technically allowed, principles of comity encourage the Court to insist that Tucker follow Brazilian law and obtain letters rogatory to ensure service of process upon Rossi." *Id.*, at 452; *cf.* Inter-American Convention Protocol Article 4 (requiring the transmittal of the letter rogatory "for processing in accordance with the applicable local law."). *See Lord v. Living Bridges*, *supra* (violation of Mexican law conceded, no showing of alternative service made); *Lake Charles Cane LaCassine Mill LLC v. SMAR International Corp.*, *supra* (Brazil); *DeTorres v. Arocera, supra*; (Uruguay); *cf. Hypo Bank Claims Group, Inc. v. American Stock Transfer & Trust Co.*, 4 Misc.3d 1020, 791 N.Y.S.2d 870 (Sup. Ct. N.Y. Co. 2004) (citing cases concluding compliance with law of foreign jurisdiction where service is made is implicit in BCL § 307). Still other cases which have found the Convention not mandatory nevertheless looked to see if the foreign jurisdiction's service requirements had been satisfied, *Paiz v. Castellanos*, *supra* (Guatemala); *Chemical Waste Management, Inc. v. Hernandez*, 1997 WL 47811 (S.D.N.Y. Feb. 5, 1997) (Mexico), or did not reach the question of whether service was adequate under foreign law, *Laino v. Cuprum S.A. de C.V., supra*.

Practical Considerations

As the only New York appellate court decision prior to *Avion* warned:

> [W]e . . . do not pass upon the efficacy of alternative means of service in the other signatory countries, in this case, Mexico. Indeed, as one commentator has noted, the differences between the American and Mexican jurisprudential systems may pose problems in enforcement of judgments where the procedures of the Inter-American Convention are not strictly followed, as in the case at bar . . . . Thus, the plaintiffs are on notice that if they do not proceed pursuant to the Inter-American Convention's procedures, there is a substantial risk that any judgment that is obtained may not be enforceable in the foreign signatory nation.

Laino, *supra,* 235 A.D.2d at 31-32. The First Department's *Avion* opinion sounded a similar warning.[9]

By the time the *Avion* case was being considered by the Court of Appeals, the issues related to the attachments were moot because the DA had returned the funds to federal custody. Despite this, the Court of Appeals stated, without elaboration, that the propriety of service issues remained "ripe."[10] If this was meant to invoke the doctrine of cases such as *In re Codey ex rel. N.J. (Capital Cities, ABC)*, 82 N.Y.2d 521, 605 N.Y.S.2d 661 (1993), keeping a case for decision which otherwise would have been moot, it is particularly unfortunate.[11] The doctrine has three requirements: (1) that the legal issue is novel and important; (2) there is a likelihood that the specific issue will recur; and (3) the issue is one that is likely repeatedly to evade review. If lawyers think the Court of Appeals saved *Avion* from dismissal for mootness for these reasons, they also are more likely to think it was enunciating a new rule of broad applicability on validity of service abroad.

We submit that the better way to understand *Avion* is to read it as limited to its peculiar facts and context – a forfeiture proceeding where there was an *ex parte* order of attachment, and where the defendants faced no liability beyond the attached funds. Had the focus been placed on the possible clash between the requirements of New York and Brazilian law in that context, a more informed analysis could have occurred. For example, in the context of exercising its conceded

discretion as to whether to apply comity, perhaps the finder of fact would have weighed the information noted by another court that, from May 2003 to August 2007, of 100 requests for service of process under the Inter-American Convention from the United States to Brazil, only two had been executed successfully. *Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com. De Equip. Medico*, No. 07-cv-00309 at *8 n.8 (S.D. Cal. August 2, 2007) (Magistrate Judge), *modified on review*, No. 07-cv-00309 (S.D. Cal. January 8, 2008). The apparent futility of proceeding by letters rogatory would have been a more appropriate and more persuasive reason not to defer to Brazilian law. It also would have been a situation Brazil could have rectified if it wished to do so. As matters now stand, however, it has little incentive to be more cooperative in other cases. Although *Synthes* was a case involving jurisdictional discovery, its comity analysis is informative. It applied the analysis of the U.S. Supreme Court in *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522 (1987), that a "particularized analysis of the respective interests of the foreign nation and requesting nation" is required by concepts of international comity. *Id.,* 482 U.S. at 543-44. On review of objections to the Magistrate Judge's order, the Court sustained the application of the Federal Rules of Civil Procedure to discovery. Of particular note to analysis of *Avion* is the court's reliance in part on the failure of the Brazilian government to express official opposition; in *Avion*, Brazilian law enforcement officials actually had helped effect some of the challenged service of process.

In *Avion*, of course, the money which was being fought over was in the United States. The Brazilian defendants had no exposure beyond the forfeiture of funds in the United States. On some level, the situs of the funds *has* to provide the standard for determining what happens to them. But in an era of aggressive assertions of national authority over private property, New Yorkers on the receiving end of disagreeable treatment abroad may be unhappy to find *Avion* cited to them as justification for how they are treated.

The issues raised here recall those commented upon in 2008 when the Legislature enacted CPLR 302(d) and 5304(b)(8), the so-called Libel Terrorism Protection Act, in light of the decision in *Ehrenfeld v. Bin Mafouz*, 9 N.Y.3d 501 (2007). *Ehrenfeld* had rejected an attempt by a New York-resident author of a book to have the New York courts declare an English judgment against her, obtained on default, unenforceable in the United States. The judgment, in an action for defamation, had awarded money damages and legal fees, as well as mandating an apology and the destruction of extant copies of the book. The Court of Appeals found jurisdiction to be lacking over the Saudi Arabian plaintiff in the English defamation case.

The Legislature's swift response was to create a new basis for personal jurisdiction over any person who obtains a judgment in a defamation case outside the United States against any person or entity resident in New York, or amenable to jurisdiction in New York who has assets in the state or who may have to take action in the state to comply with the foreign judgment, provided only that there was publication in New York of the statement leading to the foreign judgment.

Suppose a Saudi national and a Brazilian company with which he is doing business in Britain get into a dispute. Say the Saudi national creates a blog posting, which can be viewed worldwide, describing the Brazilian company as corrupt. The Brazilian firm sues and recovers a default judgment for defamation against the Saudi national in Britain, including money damages and requiring that he post an apology on the same blog. The Saudi national now moves some assets to a New York bank account and seeks a declaration in New York that the judgment is unenforceable against him. His lawyers effect service of the New York action on the Brazilian company by substituted service under the CPLR, in violation of the Brazilian service requirements. Wouldn't New York's extension of its notions of jurisdiction and service to make the Brazilian company's judgment effectively unenforceable strongly offend comity interests?

Conclusion

A New York plaintiff relying on the sweeping language of the *Avion* opinion to utilize New York service of process rules without regard to a foreign country's laws in making service abroad may wind up with a New York judgment unenforceable in the jurisdiction where the defendant has assets. Both for the sake of prudence, and to grease the wheels of international litigation, "when in Rome, do like the Romans" may remain sound advice for the transnational litigant.

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[1] *Buchanan v. Rucker*, 9 East. 192 (K.B. 1808).
[2] Four others were served by *prego e correio* ("nail and mail" translated into Portuguese and transplanted to Brazil), but in untimely fashion, so the Court did not consider the adequacy of this service.
[3] While the appeal to the Court of Appeals was pending, the U.S. District Court for the District of Columbia ordered the plaintiff District Attorney to transfer the funds at issue to the United States Government, which he did. *Avion* opinion at n.8. Although the Court of Appeals found that mooted the appeal as to the propriety of the attachment order, it nevertheless reached the service of process issue. See *infra.*
[4] The United States has filed a reservation to the discovery aspects of the Convention.
[5] "The Convention will, in effect, establish a level of international judicial cooperation among the contracting OAS States analogous to that which now exists among the 24 Contracting States to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. Although the latter convention entered into force for the United States on February 10, 1969, . . . only one other OAS member State has become a party to it. Ratification of the Inter-American Convention on Letters Rogatory and the Additional Protocol will thus constitute a significant step in filling the void that now exists in the area of judicial cooperation with other OAS countries." Message of President Ronald Reagan to the Senate Transmitting the Inter-American Convention on Letters Rogatory and a Protocol, June 25, 1984. Brazil is not a party to the Hague Convention on Service.
[6] Commentators have debated whether *Kreimerman* construed the Inter-American Convention correctly. *See* Note, "The Inter-American Convention and Additional Protocol on Letters Rogatory: The Hague Service Convention's 'Country Cousins'?" 36 *Col. J. Transnat'l L.* 687 (1998); "Kreimerman v. Casa Veerkamp, S.A. de C.V.: The Fifth Circuit Severely Limits The Scope of the Inter-American Convention on Letters Rogatory," 3 *Tulane J. Int'l & Comp. L.* 249 (Spring, 1995); "Kreimerman v. Casa Veerkamp, S.A.: The Fifth Circuit Defines the Scope of the Inter-American Convention on Letters Rogatory," 69 *Tulane L. Rev.* 823 (1995).
[7] *Morgenthau v. Avion Resources, Ltd.*, 49 A.D.3d 50, 58-59, 849 N.Y.S.2d 223 (1st Dep't 2007).
[8] *See Avion* opinion at n.9.
[9] *Id.*
[10] *Avion* opinion, n.8. Of course, the New Jersey District Court had entered an order directing return of the funds to the defendants, which had been ignored for four years.
[11] *In re Codey* involved New Jersey grand jury subpoenas of media defendants; it arguably was moot because the grand jury's term (and the force of its subpoenas) had lapsed.

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