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SERVICE BY EMAIL IN BRAZIL

Brazil overhauls its business law and introduces service of process by email. What does this mean for the foreign defendant?

The law in Brazil is famously pro-consumer. Small Claims Courts located in a number of airports are an example of how passengers are provided with easily-accessible and immediate means to file grievances and claims. An airline looking to do business in Brazil must be prepared to engage in litigation and become adept at navigating its judicial system.

Despite the litigation risks, Brazil is an important economic market. Prior to the Covid pandemic Brazil ranked within the world's top 10 largest economies by nominal gross domestic product or GDP, underscoring the importance of its aviation market for international carriers operating in Latin America. By 2020 it had dropped to 12th place, but the International Monetary Fund (IMF) reported a 2021 rebound to pre-pandemic levels.

Nevertheless, doing business in Brazil has added challenges. It ranked a rather low 124 out of 190 in the World Bank's 2020 "Ease of Doing Business Report" and a shrinking economy is rumoured for 2022. As the country looks towards sustainable growth, it is essential for Brazil to be increasingly innovative, find ways to encourage new investment, and reduce the obstacles faced by already-established businesses looking to transform.

The "New Business Environment Law"

To address this, the Ministry of Economy is spearheading a raft of reforms aimed at enhancing economic freedom and legal security in Brazil. At its core is the "New Business Environment Law" (Law no.14, 195/2021), which seeks to simplify the establishment and operation of companies in Brazil, to stimulate the recommencement of economic activity and attract foreign capital.

The main measures of the Law include: (i) facilitating the process for granting business licences (online applications are automatically approved provided that the minimum requisites are fulfilled); (ii) consolidating federal, state and municipal tax registrations in the National Register of Legal Entities (CNPJ); (iii) ending the residency requirement for foreign administrators; (iv) removing restrictions on foreign investment in some sectors; (v) providing greater freedom for operating hours; (vi) adopting digital books; and (vii) removing the requirement of a physical address.

Service of legal process by email – pros, cons and the "regulatory void"

The Law amends the Brazilian Civil Procedural Code so as to make service by "electronic means" the method of service of process.

It is worth noting at this point that the new rule on service by email does not automatically apply to foreign entities that have no office or representative in Brazil. Foreign defendants still need to be served by means of international judicial cooperation (whether through bilateral/multilateral conventions or letter rogatory) and the procedures for serving a defendant based abroad are intricate, involving high costs with sworn translations and notarised supporting documents. However, we have previously seen Brazilian judges authorising the service of foreign entities by email on the basis that the party was trying to evade being notified.

This change in the rule is, in some ways, good news for airlines. In relation to tort liability in Brazil, interest starts to accrue from the moment the proceedings are issued, yet a named defendant can be compelled to wait months merely to be summoned to provide a response to the complaint. Also, the previous service rules required a Court clerk to certify that the service was valid before the deadline for the response was triggered, which in practice resulted in an irregular process arising from an unpredictable "human-factor": it was difficult for defendants to immediately know when the clock would start ticking for them to answer the complaint, leaving them with little choice but to monitor the docket regularly and systematically, sometimes for months, thus driving up their costs unfairly.

If a defendant does not confirm service by email within three business days, the new rules direct the court to proceed with the summons by non-electronic means. However, this is not to suggest that a defendant can simply ignore the email on the basis that the court will ultimately issue the summons in a manner aligned with the old rules. Rather, the defendant will be required to justify why they did not provide the court with a confirmation, and the defendant can be fined up to 5% over the value in dispute, payable to the State.

This would seem, therefore, to offer a more balanced system for parties on both sides of the litigation.

But there are reasons for concern, too: the new Law is not sufficiently prescriptive as to the practicalities. It states that service is to be effected by "electronic means" within two days after the court issues a notification to be served on the defendant party, but does not define "electronic means". There is no doubt that email would fall within that description but what is less clear is whether "electronic means" also includes other alternatives, such as service through instant messaging Apps like WhatsApp and Telegram. Given the unpredictability of Brazilian courts and the continuing evolution of our means of electronic communication, it would not be surprising if some courts opted to read the rule more broadly.

In addition, legal entities with an office or representative in Brazil must keep their contact information updated on the National Council of Justice database (Conselho Nacional de Justiça or "CNJ"), an authority that oversees and regulates the country's judicial system.

However, the CNJ has yet to issue a regulation governing how the electronic addresses must be registered and updated, so ironically there is a "regulatory void" with respect to these new procedural rules aimed at providing more legal security to the parties. It is perhaps for this reason that currently, in practice, parties are still relying on traditional methods of service (i.e. registered letter or in person by a court clerk), although we have also seen judges authorising electronic service by IM or email if evidence of the defendants' contact information is presented in the proceedings.

Closing Observations

On the one hand, these changes to the civil procedure rules should certainly expedite service of process in Brazil and reduce the defendants' exposure as a consequence of delays. A common tactic of plaintiffs with little or no interest in settling their claims is to delay as long as possible and watch its value increase due to monetary correction and interest accrual (at a rate of 12% p.a., which is more than available bank deposit rates). We see this often in baggage litigation, for example, where there is little incentive for the plaintiff-passengers to come to the negotiating table, knowing that pursuing the claim will cost them little, and a successful win will provide them with a financial benefit exceeding the award.

On the other hand, the possibility of judges applying fines against parties that delay service without a reasonable explanation (which remains undefined and is subject to the judge's interpretation) will require companies operating in Brazil to ensure that their contact information is kept updated regularly to avoid penalties or, ultimately, a default judgement. This makes it all the more important for the CNJ to issue the regulation governing this aspect of the law, yet it remains unclear when this will happen.

If Brazilian lawmakers fail to address these flaws of the New Business Environment Law, the attempts of the courts to enforce it in this 'regulatory void' are likely to generate confusion and reluctance, rather than the certainty of process to which it aspires in order to achieve its aim of supporting reinvention of domestic business and attracting new foreign capital.

We would welcome an indication as to whether the change in law will be extended to foreign entities with no office or representative in Brazil. For now, though, the requirement to serve foreign parties by diplomatic channels through the Ministry of Justice does discourage plaintiffs in Brazil faced with unpredictable timing and costs for achieving service, which could take up to several years. This is, perhaps, good for the foreign investor, even if it could result in a higher exposure down the line if the plaintiff persists and eventually obtains judgment.

There is no doubt that email service is going to be the way forward. However, as we have commented before in other contexts, Brazilian judges are not necessarily consistent in their rulings on primary legislation, especially when consumer rights are central to the issues in dispute. Although the legislators' intention to stimulate economic activity and reduce regulatory burdens is to be applauded, we have to wait and see how the local courts will interpret the new service of process rules. It is increasingly important for all businesses, including foreign businesses, to monitor how this law continues to evolve.

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