SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **HON. BARRY R. OSTRAGER** **PART** **IAS MOTION 61EFM**

Justice

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AIR ASTANA JSC,

Plaintiff,

- v -

EMBRAER S.A.,

Defendant.

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INDEX NO. 654173/2021

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. BARRY R. OSTRAGER

The Court heard oral argument via Microsoft Teams on December 9, 2021 on the motion by plaintiff Air Astana JSC for an order deeming the service completed upon defendant Embraer S.A. effective under Business Corporation Law ("BCL") § 307 or, in the alternative, deeming the service proper as alternate service pursuant to CPLR § 311(b) and/or granting an extension of time, pursuant to CPLR § 306-b, to complete additional service. In accordance with the proceedings on the record and herein, plaintiff's motion is determined as follows.

Plaintiff first moves to confirm that the service of process it completed pursuant to BCL § 307 was valid. Although defendant, a Brazilian limited liability corporation, has consented to the jurisdiction of the New York courts and the application of New York law (see NYSCEF Doc. No. 14), it has not waived service of process. And while defendant does not dispute that both its General Counsel in Brazil and its New York counsel received notice of this action and a copy of the pleadings, notice, standing alone, does not satisfy the requirements of service of process.

Brazil, the domicile of defendant, has adopted the Hague Service Convention and, as is defendant's right, the defendant insists on service that complies with the Hague Service Convention. And while service via the Hague Service Convention may not be exclusive, it does preempt inconsistent methods of service. BCL § 307 authorizes service on foreign corporations

via the Secretary of State, followed by a mailing pursuant to BCL § 307(b)(2). The mailing must be sent "by or on behalf of the plaintiff to such foreign corporation by registered mail with return receipt requested, at the post office address specified for the purpose of mailing process, on file in the department of state, or with any official or body performing the equivalent function, in the jurisdiction of its incorporation …"

Plaintiff has established service on the Secretary of State (NYSCEF Doc. No. 8), but the subsequent mailing to defendant's General Counsel in Brazil via registered mail (NYSCEF Doc. No. 9) was not proper, notwithstanding that plaintiff received an acknowledgment of receipt from the defendant's General Counsel (NYSCEF Doc. No. 10) because the service did not comply with the Hague Service Convention. Contrary to plaintiff's claim, the mailing is a part of the service requirement and does not merely function as notice to the defendant. Because the mailing is part of the service requirement, it triggers the application of the Hague Service Convention and must be completed in accordance with the terms of the Convention where, as here, Brazil has objected to service by mail and insists upon service via the Brazilian Central Authority pursuant to the Hague Service Convention. *See Stewart v Volkswagen of Am.*, 81 NY2d 203 (1993) (holding that compliance with the mailing requirement under BCL § 307(b)(2) is an essential part of the service) and *Mutual Benefits Offshore Fund v Zeltser*, 140 AD3d 444 (1st Dep't 2016) (holding that service must be made via the Hague Service Convention on parties that have objected to service by mail or other means, even if other means are authorized by State law). The mailing here to defendant's General Counsel in Brazil, while received, did not comply with BCL § 307(b)(2), which triggered the Hague Service Convention requirement of service through the Central Authority. Plaintiff's reliance on *Sardanis v Sumitomo Corp.*, 279 AD2d 225 (1st Dep't 2001), to argue otherwise is misplaced, as the First Department in *Mutual*

Benefits expressly declined to follow *Sardanis*. In any event, Brazil has objected to service by mail directly to persons abroad.

The Court therefore denies that part of the motion which seeks in the alternative to allow the BCL § 307 service to be deemed valid pursuant to CPLR § 311(b) on the ground that service under the Hague Service Convention is impracticable due to customarily extended delays, which surely will be exacerbated by the pandemic (see NYSCEF Doc. No. 30). Service via the Hague Service Convention has not been attempted, and while proof of attempted service is not required under cases such as *Franklin v. Winard*, 189 AD2d 717 (1st Dep't 1993), and the pandemic will likely cause some complications, the record here suggests that routine matters in Brazil are proceeding. So, for example, the registered mail sent to counsel in Brazil was received within a reasonable time, and the acknowledgment of receipt was received back in the United States, although it took about five weeks to arrive. In light of the case law and Brazil's insistence on service via the Hague Service Convention, plaintiff should attempt such service before asking the Court to approve alternate means.

However, defendant has taken no position on plaintiff's alternative request for an extension of time to complete service under CPLR § 306-b. Pursuant to the CPLR, plaintiff had 120 days from commencement of the action, until on or about November 2, 2021, to complete service. The Court is hereby granting plaintiff an extension of time through June 30, 2022 to complete service via the Hague Service Convention. If such service cannot be completed by that time, plaintiff may renew its motion which seeks to allow the service that was completed to be deemed valid pursuant to CPLR § 311(b) and/or for a further extension of time to serve.

As the Court emphasized during oral argument, although defendant does have the right to demand service under the Hague Service Convention, it has expressly consented to the

jurisdiction of the New York courts and, in the opinion of the Court, insisting upon service pursuant to the Hague Service Convention under the circumstances presented here will not serve the interests of either party. Defendant's counsel is therefore urged to work with plaintiff's counsel to consensually resolve this dispute and avoid unnecessary burdens and delays and the consumption of judicial resources that may otherwise have to be expended on this issue.

A conference in this matter is scheduled for July 12, 2022 at 10:00 a.m. Counsel are urged to advise the Court via efiled letter if a referral to ADR or a mediator is requested

Dated: December 9, 2021

BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	☐	CASE DISPOSED		☒	NON-FINAL DISPOSITION		
	☐	GRANTED	☐ DENIED	☒	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐	REFERENCE