

SERVING PROCESS IN BRAZIL

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Brazil has a burgeoning middle and stable upper class whose citizens continue to travel if not move to the United States. The converse is true as well where Americans continue to enjoy the wonders of Brazil, including where they have the ability to purchase real property there.¹ With all of this economic activity and interaction, it is no wonder that many civil suits (including divorce) are getting filed in the USA (and Brazil). One issue that keeps arising in resolving these disputes filed in the US is how to serve US process² against individuals and entities that are or reside in Brazil. Unless a voluntary waiver³ or alternative form of service is available (as discussed below), serving Process in Brazil can be achieved with considerable patience and the necessary resources as a Letter Rogatory (*carta rogatória*) is the only viable option.

Unfortunately, Brazil is not a party to the Hague Service Convention. The courts in Brazil are the sole gatekeepers for serving Process there. Thus, a US litigant has essentially four avenues when trying to effect service; unfortunately, the gold standard for serving foreign Process via personal service is not available in Brazil. Though I have listed six options below in increasing risk or cost for any litigant, two options are the same (alternative forms of service, which subsumes service by publication) and another option (personal service) is not available:

1. **Waiver of Service.** This is a viable option that both negates the need for service and dramatically decreases the costs associated with international service. Thus, if the recipient of a subpoena,⁴ for example, were amenable, he or she (or an agent of an entity) could execute (i.e., sign) a waiver of service before a notary and/or a consular official at any US consulate/embassy. While said notary would require that he/she gain an Apostille in order to have legal effect in the US, an authorized consular official certification is sufficient.⁵

¹ This [article](#) describes how to purchase real property in Brazil.

² Process is defined as the summons and the complaint or other documents to be served, i.e., case initiating documents (“*Process*”).

³ Waivers of service should not necessarily be employed with other countries as their courts sometimes do not recognize this option. This article only concerns Brazil.

⁴ Notably, 28 USC. 1783, 28 USC. 1784 and Rule 45 of the Federal Rules of Civil Procedure provide for service of a *subpoena* upon a national or resident of the United States in a foreign country. There are no provisions for service upon non-US nationals or residents. **See 22 C.F.R. 92.86 - 92.89.**

⁵ Since Brazil is a party to the Hague Legalization Convention, a local foreign notary authenticates her signature either in front of a US consular official or obtains an Apostille, which is a certification under the terms of said convention and thus supplements a local notarization of a document, e.g., proof of service.

2. **Alternative Forms of Service.** Service in the US of a foreign individual may effect valid service.⁶ Additionally, serving in the US either an individual partner of a foreign partnership or a foreign company's US subsidiary may also effect valid service. The key to these forms of alternative service is that service must occur in the United States.
3. **Personal Service.** Except for the methods of service listed above, personal service typically is by far the best option for numerous reasons. Personal service provides any litigant (and his/her/its attorney) with significantly greater confidence that service will not be challenged later, thus decreasing the risk associated with any future judgment. Additionally, the costs, in terms of actual costs and opportunity costs as a function of time saved when compared with other methods again makes personal service the preferred method. Unfortunately, there is no rule or law that allows for an attorney licensed in Brazil to open a case in a local court and effect service that way. Accordingly, this option is not available for service in Brazil.
4. **Service by Publication.** Service by publication is really another alternative form of service that occurs in the US. However, before a U.S. judge will grant this type of relief against an international recipient, pursuant to due process protections, a litigant typically has needed to have attempted service via other methods.⁷ Trying to avoid the cost of other forms of service, without more, is typically not a valid reason to invoke service by publication.
5. **Letter Rogatory.** A letter rogatory (AKA "letter of request") is simply a request from a court in one country to a court in a foreign country requesting international judicial assistance. The letter itself is typically quite simple.⁸ What is not simple is that this method is costly and timely because this option involves a series of requests, sometimes (historically) taking up to a year to complete.⁹ Letters

⁶ Some courts have held that if an individual is in a forum merely to testify in another case, such service is ineffective.

⁷ Service by publication usually occurs by electronic means, including social media (e.g., Facebook, Twitter, etc.). Prior to incurring the expense through attorney's fees of requesting a court to order service by publication, a judge will almost always want an affidavit of due diligence, which will typically include, *inter alia*, information of prior attempts at service. Accordingly, except in the most limited circumstances, a litigant would first need to attempt some type of service prior to successfully requesting service by publication.

⁸ Requesting service of Process or collection of evidence, i.e., documents.

⁹ Brazil is a party to the Inter-American Convention on Letters Rogatory and Additional Protocol (or aka Inter-American Service Convention or IASC). Pursuant to the IASC, a party must make a request for service by completing [US Marshall Form USM-272/272A](#), which, similar to service of Process under other methods, must also bear the signature and seal of the issuing court. The request is comprised of an original and two copies along with three copies of the Process. Each of the documents of the Process must get translated into (Brazilian) Portuguese, but typically, said form also gets translated as well. Essentially, the procedure follows this path: request to the US Central Authority (the US Department of Justice) that applies its own signature and seal; after the Brazilian Consulate puts its imprimatur on the request, it gets forwarded to the Central Authority in Brazil, the Ministry of Justice; wherein the request is submitted to the Federal Supreme Court, which then officially recognizes the request and allows for service of Process on the recipient, i.e., exequatur, after the Superior Court of Justice puts its own imprimatur on the request. After service, the previous cumbersome procedure gets performed in reverse with proof of service eventually returned to the applicant.

rogatory really should only be used (in countries, like Brazil) if there are no other options available. Since without alternative forms of service, there are no other viable options available to effect service in Brazil. Accordingly, though this author had only reluctantly recommended this type of service, his opinion is changing since he has learned that service times, in some cases have significantly decreased to two to three (2-3) months.

It goes without stating that service of Process is an official act of a sovereign that should occur within its borders pursuant to law or in the case of US or any foreign Process, a treaty. Our firm has relationships with numerous attorneys and law firms in Brazil, and we can help with service via letter rogatory (which is really a subset of personal service except that it occurs on a national level). Our Brazilian-based lawyers ensure that all rules are followed in correctly following procedure. Finally, employing our firm is, often times, cheaper than using a dedicated third-party international service vendor.

6. **Mail.** Many jurisdictions in the US will allow service by mail so long as it is not prohibited by the rules of the foreign jurisdiction. Applicable court rules in Brazil neither specifically prohibit mail service nor authorize it (as it is authorized in most courts in the US). Moreover, service by mail creates considerable risk that debase this method to the least desirable except for the most limited circumstances. For example, if a defendant did not have actual knowledge of Process (e.g., where the mail was not delivered or mis-delivered), an intended recipient may defeat any resulting judgment. Simply, the risks associated with service by mail in a foreign jurisdiction, especially Brazil,¹⁰ are simply too great for this author to recommend.

Should you need help with, among other legal services, serving Process in Brazil or suing or defending a case in the United States or Brazil, please contact us.

¹⁰ This author has knowledge of one American client sending correspondence to Brazil that was eventually returned five months later. In that situation, the address was fully complete except that one letter was written as the letter 'M' instead of the letter 'N.' What made this situation particularly troubling is that the letter was merely used in 'Nº' (which means *número*)!