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Brazil

LITIGATION

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This country-specific Q&A provides an overview of litigation laws and regulations applicable in Brazil.

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BRAZIL
LITIGATION

1. What are the main methods of resolving disputes in your jurisdiction?

The traditional litigation before state and federal courts is still the prevailing method of solving disputes in Brazil. However, there are alternative methods, such as arbitration and mediation. The Brazilian Civil Procedure Code (CPC): (i) expressly allows arbitration, in accordance with statutory law (Law 9.307/96 — the Brazilian Arbitration Act) and (ii) encourages the use of conciliation, mediation and other methods of consensual dispute resolution, even during the course of a lawsuit before a court (art. 3, CPC). Additionally, since 2015, mediation has been promoted as a preferred alternative for dispute resolution and has a specific law to regulate it (Law 13.140/2015).

2. What are the main procedural rules governing litigation in your jurisdiction?

Brazilian law follows the civil law system, which has codes and statutes as main sources. To the extent the legislation does not regulate a certain matter, subsidiary sources of law shall apply, such as court precedents and opinion from legal scholars. The CPC covers the general rules that govern civil litigation in Brazil; it regulates: (i) specific proceedings depending on the nature of each claim/lawsuit, and form of procedural acts; (ii) jurisdiction provisions, parties' duties, principles on how evidence may be produced; and (iii) provisions on ruling before a trial court and appeals proceedings (due process). There is also Law 9.099/95, which deals with specific proceedings for small civil claims (claims below 40 minimum wages: BRL 1,320), which are very common for consumer matters in Brazil.

3. What is the structure and organisation of local courts dealing with claims in your jurisdiction? What is the final court of appeal?

The judicial branch is divided into (i) federal courts, responsible for all cases involving the federal government, and (ii) state courts, responsible for all other cases involving disputes among companies, individuals and the respective states and municipalities. There is also a specific labor court. The judiciary systems comprise two levels: (i) singular/trial judges that decide the case at the first level; and (ii) a court of appeal, composed by a panel of three judges to decide appeals filed against first-level awards. There are three higher courts that would be "the final court of appeal," depending on the matter under dispute: (i) the Superior Court of Justice, for ruling on the legality of the laws (violation of federal law and/or unification of court rulings on a certain legal matter); (ii) the Superior Labor Court, for the legality of labor cases; and (iii) the Supreme Court of Justice, for constitutional matters. Appeals to the higher courts have strict requirements and are limited to legal/constitutional violations, not entailing the review of facts, evidence or contractual matters.

4. How long does it typically take from commencing proceedings to get to trial in your jurisdiction?

Based on the public report from the National Council of Justice (CNJ), in 2022, a civil proceeding takes an average of 19 months to be ruled by the trial court (first level) and, if an appeal is filed, a further 10 months to be judged by the State Court of Appeals. CNJ also revealed that a civil lawsuit takes an average of two years and three months to be closed and shelved. However, these timeframes drastically vary depending on the nature of the claims, the court, the evidence to be produced and the number of appeals filed.

5. Are hearings held in public and are documents filed at court available to the public in your jurisdiction? Are there any exceptions?

As a general rule, CPC determines that procedural acts

are public, which includes hearings, documents attached to the court dockets, decisions rendered by courts, etc. However, there are specific exceptions (art. 189, CPC), when the information under dispute is confidential and protected and all the related proceedings must develop under secrecy. This occurs when: (i) public or social interest requires it, (ii) the case deals with family matters (marriage, divorce, custody of children, succession, etc.), (iii) the dispute involves protected information by constitutional right to privacy, or (iv) the case is related to arbitration matters.

6. What, if any, are the relevant limitation periods in your jurisdiction?

Brazilian law provides specific terms for a party to file for a claim (statute of limitations). The relevant periods are the following: (i) a general term of 10 years, which applies to all cases in which there is a violation of a right but in which the law does not provide for a specific period (art. 205 of the Brazilian Civil Code (CC)); (ii) a term of five years to collect due credits set forth in written instruments (art. 206, § 5º, CC), and (iii) a term of three years for civil reparation, which is the indemnification for an illicit act that caused harm to another party (art. 206, §3, CC).

7. What, if any, are the pre-action conduct requirements in your jurisdiction and what, if any, are the consequences of non-compliance?

Parties under a contract that provides an ADR method (such as mediation and conciliation), before commencing a litigation and/or arbitration, will be subject to the penalties and obligations agreed in such contract for cases of non-compliance. According to Law 13.140/2015, if a party/entity is invited to a mediation and it does not attend the first meeting for negotiation, it shall pay 50% of the court costs and attorney fees if it succeeds in a future lawsuit/arbitration involving the same legal matter as the mediation. The CPC also establishes in article 334 a mandatory preliminary hearing for conciliation purposes, with a court-appointed mediator. This hearing will be scheduled if the complaint fulfils its essential requirements (it may not occur if both parties expressly state that they are not interested in settling the case). The unjustified absence in this hearing may constitute obstruction of justice, which triggers payment of fines (§ 8º, art. 334, CPC).

8. How are proceedings commenced in your jurisdiction? Is service necessary and, if so, is this done by the court (or its agent) or by the parties?

Any judicial proceeding is commenced with the filing of the plaintiff's complaint before a court. Once the judge properly receives the lawsuit, the defendant's service of process will occur through these options: (i) by a formal letter mailed by the court, (ii) by a court's officer, (iii) by electronic means (email), since it follows the specific law's rules (art. 246 and 247, CPC). The parties are not authorized to summon the opponent and/or to directly handle the service of process.

9. How does the court determine whether it has jurisdiction over a claim in your jurisdiction?

The general rule is that Brazilian courts have jurisdiction to hear and to rule on cases: (i) involving defendants domiciled in Brazil, (ii) in which an obligation has to be complied with in Brazil, (iii) that involve alimony obligations in favor of a Brazilian resident, and (iv) related to consumer law, provided that the consumer is a Brazilian resident (art. 21 and 22, CPC). In Brazil, the parties to an agreement are free to elect the jurisdiction to solve disputes, except in certain specific instances (disputes involving real estate in Brazil, family and succession matters involving assets located in Brazil — art. 23, CPC). Besides, according to art. 25, CPC, Brazilian courts do not have jurisdiction over cases when, in an international agreement, the parties agree on an exclusive foreign jurisdiction, and this argument is raised by the defendant in its answer to a lawsuit. The contractual choice is generally observed by Brazilian judges where a domestic jurisdiction is elected (e.g., if a contract establishes that disputes must be solved by the courts of a specific city). Nonetheless, in cases where a foreign jurisdiction has been elected, such contractual provisions have not been enforced consistently by Brazilian courts (especially when it has been evidenced that a litigation outside Brazil may negatively affect one party).

10. How does the court determine which law governs the claims in your jurisdiction?

The general rule is that the parties to an agreement are not completely free to elect the governing law of a contract. However, having arbitration as the dispute resolution method may be a way to enforce foreign law. The Brazilian rule on conflict of laws (Decree-Law No. 4,657/1942 — arts. 9 and 17) is mandatory and establishes that obligations (e.g., contracts) should be

governed by the law of the place where they were constituted. More specifically, the law establishes that obligations arising from contracts signed in different countries are deemed to have been constituted in the place of residence of the agreement's proponent. If foreign law is the governing law of a contract based on the provisions above, it will be applicable in most cases. However, it will not be applicable/enforceable in Brazil to the extent it offends national sovereignty, public order and good customs. In this regard, certain Brazilian rules, such as the Consumer Defense Code and the Copyright Law, are mandatory and would govern certain aspects of the relationship between a foreign party and a domestic party in the event of a dispute, regardless of any contractual choice of law provision.

11. In what circumstances, if any, can claims be disposed of without a full trial in your jurisdiction?

The lawsuit will be dismissed without prejudice (i.e., without analyzing its merits) if the complaint is dismissed due to the recognition of lack of standing to sue/to be sued, lack of procedural interest, lack of payment of court costs by the plaintiff or if the plaintiff drops the case (art. 485, CPC). Also, the lawsuit may be ruled on the pleadings, without facing the phase to produce evidence (summary judgment, art. 355, CPC). This will happen if the case does not require further evidence or if the defendant defaults under the hypothesis of art. 344 (i.e., no defense is filed within the proper deadline). Art. 332, CPC, establishes the concept of preliminary rejection of the claim, which occurs when the case: (i) is against a precedent from the Superior Court of Justice or from the Supreme Court, or (ii) is not supported by case law from the State Court of Appeals and/or biding decisions (e.g., judgment related to repetitive litigation).

12. What, if any, are the main types of interim remedies available in your jurisdiction?

The CPC has specific requirements for a preliminary relief/injunction and for an action aiming to obtain a provisional remedy (art. 300-311). Generally, the party must prove that the case is well founded with arguments/elements that evidence the probability of the alleged claim/rights under dispute. Additionally, the party must prove that if the remedy is not granted, it would cause a loss/injury to the lawsuit's outcome. The case law also indicates that the party must prove that the urgency of the matter necessitates the application of a remedy early in the proceedings. Even if these requirements are not complied with, a relief may be granted if there is an abuse of the right of defense or if the party demonstrates that the opponent has clear intentions of delaying the proceedings. Note that if a lawsuit deals with the enforcement of specific obligations, art. 497 of the CPC states that the judge must grant specific relief or, if not possible, determine which measures shall be taken to assure that relief is obtained by means of an equivalent practical result.

13. After a claim has been commenced, what written documents must (or can) the parties submit in your jurisdiction? What is the usual timetable?

The Brazilian judicial procedure is mainly conducted in written form and the production of evidence is made before the trial judge, except in rare situations. The plaintiff must present with the initial complaint all written documents available to support its claims. After the complaint is filed and the defendant is served, an answer must be submitted within 15 business days (counted from the preliminary hearing in which the parties did not settle the case, or from the date on which the service of process' receipt was attached to the dockets). The defendant has to file with its defense all written documents available to support its arguments. Art. 437, CPC, allows the plaintiff to comment on the answer/defense ("reply") and, subsequently, the defendant to comment on the reply. These measures are subject to the deadline of the 15 business days, counted from the date on which the party was notified by the court to do so. After the pleading phase, the evidence production stage may come, or the case may be ruled by the trial judge (see question 11). New documents (or documents the parties were unaware of before) may be presented at later stages of the case.

14. What, if any, are the rules for disclosure of documents in your jurisdiction? Are there any exceptions (e.g. on grounds of privilege, confidentiality or public interest)?

The basic rule is that the plaintiff has the burden of proving its rights and the defendant has the burden of proving its arguments of defense. Thus, each party must produce its own evidence and it is not obliged to disclose documents against its interests (this is set forth not only in the CPC, but also in the Constitution and in the Code of Criminal Procedure). There is no discovery in Brazil. However, a party may request the presentation of "common" documents in the other party's possession. A

"common" document is not only a document that directly involves both parties (e.g., a contract), but also a document that relates to or has a connection with an existing legal relationship between the parties, or between one of the parties and a third party. As a result, the scope of a request for documents in the Brazilian system is narrower than the discovery/disclosure proceedings available in some common law jurisdictions. Art. 397, CPC, determines that a document may have to be disclosed in litigation if the other party is able to provide a sufficiently detailed description of the document along with evidence that it has come into the third party's possession and the purpose of obtaining such information. In relation to privilege, a broad concept of protection is found in the Constitution, the Code of Ethical Conduct issued by the Brazilian Bar Association and in Law 8.906/1994. It encompasses: the confidentiality of legal communications prepared for professional use; client-lawyer privilege, which covers all communications related to the attorney's professional activity with a client, and applies to any lawyer licensed at the competent Brazilian Bar; and the inviolability of lawyers' offices and related work files.

15. How is witness evidence dealt with in your jurisdiction (and in particular, do witnesses give oral and/or written evidence and what, if any, are the rules on cross-examination)? Are depositions permitted?

If the evidence production stage is necessary, the judge may determine expert examination, inspections and hearings to produce oral evidence. Pursuant to art. 453, CPC, the witnesses testify during a hearing before the judge. If the witness resides in a judicial district different to the one in which the case is proceeding, the hearing may be carried out by means of a videoconference or other technological resource for the transmission and reception of audio and video in real time (such files are transcribed and attached to the court dockets). The judge conducts the witnesses' examination (art. 456, CPC), but the parties' attorneys are also allowed to ask questions (art. 459, CPC). The parties may request the personal testimony of the opponent and, if such evidence is granted, the party will also be interrogated during a hearing before a judge. The judge is also authorized to request such oral evidence, even if there is no request by the parties (art. 385, CPC). Written depositions are usually also accepted, but oral depositions tend to have more impact on the judge's ruling.

16. Is expert evidence permitted in your jurisdiction? If so, how is it dealt with (and in particular, are experts appointed by the court or the parties, and what duties do they owe)?

Expert evidence is permitted in civil litigation, and sometimes even in disputes before the small claims courts (such understanding is ratified by some case law from the Superior Court of Justice). The expert evidence will be dismissed if the fact to be proven does not depend on technical knowledge and if the examination is impractical (art. 464, CPC). However, if granted, the expert examination encompasses examinations, inspections and evaluations. Such measures will be conducted by an expert to be appointed by the judge and with specific knowledge in the subject matter. Parties may challenge the appointment of an expert provided they prove the expert's lack of appropriate qualification for the case. Also, parties may appoint their technical assistants to liaise with the court expert. The court-appointed expert must take the necessary diligence to present a report containing: the scope of the examination, answers to the queries parties submitted, the scientific analysis/method used and a conclusion (even if the examination has an inconclusive result) — art. 473, CPC.

17. Can final and interim decisions be appealed in your jurisdiction? If so, to which court(s) and within what timescale?

It is possible to file an interlocutory appeal from interim decisions to the Court of Appeals, provided they deal with these specific issues, set forth in art. 1015, CPC: (i) preliminary injunction or any provisional remedy, (ii) partial decision on the merits of the case, (iii) changes to the jurisdiction due to the effects of an arbitration clause, (iv) the piercing of the corporate veil, (v) rejection of the benefit of free legal aid, (vi) a ruling on the disclosure of a document, (vii) exclusion of a co-party, (viii) a ruling on the admission or denial of joinder and/or third-party intervention, (ix) decision on the suspension/stay of collection/execution lawsuits, (x) decision on the burden of proof, (xi) relation to an enforcement proceeding. A final ruling rendered by the trial judge may also be appealed to the Court of Appeals. A judgment from the Court of Appeals may be challenged by special appeals to the Superior Court of Justice (in cases where federal law is violated) and/or to the Supreme Court (in cases where the Constitution's provisions are violated). The general rule is that all these appeals and correspondent answers must be filed within 15 business days. Also, all decisions issued during a

lawsuit are subject to a motion for clarification, to be filed within five business days, to clarify omissions, contradictions and/or to correct any material error.

18. What are the rules governing enforcement of foreign judgments in your jurisdiction?

The foreign awards can only be enforced in Brazilian territory after a recognition procedure before the Superior Court of Justice (STJ). In this procedure, the STJ will only analyze the compliance with the following formal requirements: (a) the judgment was entered by a competent court; (b) parties were duly served with process or, in the case of a default judgment, evidence that, although served, the party did not participate in the lawsuit; (c) the judgment is final and not subject to any further appeal (i.e., it has res judicata effects); (d) it is offensive to Brazilian sovereignty or to public policy/order, and (e) the award relates to Brazilian affairs or Brazilian territory. Despite only analyzing formal requirements, the party against which the award is to be enforced must be duly served with process before the STJ. Then, such party must present its answer within 15 business days to agree or to challenge the ratification proceedings. After the answer, the parties might be allowed to present a reply and further motions, depending on documents and evidence brought and particulars of the case. If the parties agree, the case will be outright ruled by the reporting justice. If the answer is filed to challenge the proceeding, the case records will then be sent to the Superior Court of Justice's so-called Special Chamber. The Federal Attorney's Office may opine on the recognition within 15 days. Afterwards, the Superior Court of Justice will rule the case. Such decision is subject to a motion for clarification and, depending on its merits, in specific situations when Constitutional Law violations occur, the losing party may try to appeal to the Supreme Court of Justice (this is not common and varies on a case-by-case basis). After such decision is final, the recognized foreign award will then be enforced by the competent federal court through a letter of request. This whole process usually takes from six months to one year to be completed.

19. Can the costs of litigation (e.g. court costs, as well as the parties' costs of instructing lawyers, experts and other professionals) be recovered from the other side in your jurisdiction?

The final decision will sentence the losing party to pay attorneys' fees and court costs to the prevailing party (art. 85, CPC). In relation to the attorneys' fees, they are fixed between 10% to 20% of the condemnation amount or of the economic benefit obtained and they are granted to the attorneys who worked on the case, not to the party. If it is not possible to follow the criteria above, such percentage is calculated considering the amount ascribed to the case, but also considering the attorney's dedication, the importance of the case, the time taken to perform the legal services, etc. In relation to the court costs, they are related to procedural and mandatory costs to file the lawsuit, to serve defendants and witnesses, and to pay expert's fees. Note that in Brazil there are no rules to order the losing party to pay the fees the opponents expended to hire their own lawyers.

20. What, if any, are the collective redress (e.g. class action) mechanisms in your jurisdiction?

Class actions are common in Brazil, especially those involving consumer and environmental protection. Since 1985, there has been a specific Class Action Law (7.347/1985, amended in 2014) to protect diffuse and collective rights. This type of action has grown since the Brazilian Consumer Defense Code (Law 8,078/1990) was enacted and, thus, there has been more of a culture of consumer protection in Brazil. The legal system provides special protection for collective rights (i.e., protection of a right that belongs to a group of people) by entitling class representatives or the District Attorney Offices to file lawsuits seeking the recovery of and/or compensation for damages, as well as injunctions and other remedies. The object in this type of action is to have a judgment that binds a group as a whole. The CPC also has provisions that may be considered as mechanisms to resolve repetitive lawsuits together (i.e., cases that involve the same rights in dispute will be suspended when admitted to a specific proceeding to identify multiple repetitive claims until a decision is rendered about the subject matter — art. 976-987, CPC). Additionally, art. 139, CPC, determines that if the judge identifies several repetitive individual actions, the district attorney and other parties with standing to sue must be notified in order to allow the filing of the corresponding class action.

21. What, if any, are the mechanisms for joining third parties to ongoing proceedings and/or consolidating two sets of proceedings in your jurisdiction?

Art. 119, CPC, authorizes a third parties with interests in the legal claim to intervene to assist one of the sides/parties in the litigation provided it is proven that they might be affected by the outcome. It is also

possible to request that third parties are also included in the lawsuit if they may be held liable before the plaintiff or the defendant due to the facts and allegations under dispute (normally, this happens when the losing party has the right of recourse — art. 125, CPC). The defendant may also request the co-debtor to join the case, with the purpose of dividing the liability and/or sharing the financial burden (art. 130, CPC). As for the consolidation of two or more proceedings, this may happen when: (i) there is a risk of contradictory decisions if the lawsuits are ruled separately (art. 55, CPC), and (ii) the cause of action or the claims are common in two or more lawsuits.

22. Are third parties allowed to fund litigation in your jurisdiction? If so, are there any restrictions on this and can third party funders be made liable for the costs incurred by the other side?

There is no specific regulation in Brazil about legal financing by third parties. In this case, the general principles of a private contract between the involved parties and correspondent obligations set forth in such instrument would be applied. The general rule in Brazilian law is freedom to contract. Parties can freely stipulate their rights and obligations under an agreement, provided that (i) these are capable parties; (ii) the subject matter is licit, possible, determined or determinable; (iii) the agreement is in a form according to or not contrary to law; (iv) the principles of free will, honesty and good faith are respected; and (v) the agreement meets its social function.

23. What has been the impact of the COVID-19 pandemic on litigation in your jurisdiction?

At the beginning, the pandemic triggered a delay to the litigation proceedings because there were several suspensions of the procedural deadlines. The number of lawsuits involving default/non-compliance with obligations under agreements increased, as well as discussions about the pandemic being interpreted as force majeure (which normally authorizes non-compliance with contracts' provisions without consequences, such as payment of fines, etc.). On the other hand, the pandemic encouraged the legal system to implement digital tools. Currently, court hearings and judgment sessions in Brazil are being handled virtually most of the time. This makes it easier for lawyers to participate in the hearings and judgment sessions and allows lawyers to save time and effort. For judges, this system also allows them to have more time to issue decisions and to work remotely. This made cases move a little faster than before.

24. What is the main advantage and the main disadvantage of litigating international commercial disputes in your jurisdiction?

The disadvantage is that litigating in Brazil is very time-consuming, and may be expensive, mainly because of the rule about paying attorney fees and court costs to the prevailing party. Also, depending on the subject matter, it might be difficult to find a court-appointed expert with the proper technical capacity/expertise to conduct an examination and the judges' decisions normally rely on the expert report's conclusions. It is challenging to review decisions based on facts and evidence, since superior courts are prevented from re-examining them. Another obstacle is related to the applicable law because Brazilian judges are very reluctant to apply foreign law when the case is proceeding before a Brazilian court.

The advantage is that Brazil has a solid body of laws to regulate commercial disputes, is fully digital and has efficient mechanisms to assess court precedents. This allows lawyers to foresee difficulties and challenges parties may face before/during a litigation and, in advance, estimate the probability of loss/chances of success. Additionally, Brazilian courts are encouraging parties to reach an agreement and take a less litigious approach (there are several opportunities to settle the case during the process). A key element is related to arbitration, since Brazil has skilled arbitrators who specialize in commercial law, and arbitration provisions are commonly enforced in Brazil.

25. What is the most likely growth area for commercial disputes in your jurisdiction for the next 5 years?

Due to the Brazilian interest rates,[1] and depending on the development of the economic scenario, there could be a tendency to utilize ADR methods to resolve litigation involving default matters, as well as bankruptcy proceedings and judicial reorganization cases. New product areas, such as cryptocurrency and artificial intelligence will inevitably give rise to new types of commercial disputes. Other areas that have been in the spotlight due to political matters are internet law (responsibility of internet providers for third parties' content/fake news) and data privacy. ESG litigation is also a trend in Europe and other countries and has the potential to increase in Brazil.

[1] https://www.bcb.gov.br/en/monetarypolicy/interestrates

26. What, if any, will be the impact of technology on commercial litigation in your jurisdiction in the next 5 years?

As explained above, new technologies will affect the types of lawsuits that will be filed in the coming years. In terms of the processing of lawsuits, they are already processed electronically and, since the pandemic, procedural acts are being handled virtually most of the time. Developments in technology will continue to play an important role in attorneys' and the courts' work, allowing the courts to speed-up the processing of lawsuits and ensuring the unification of understandings, for example. For the attorneys, new technologies will continue to ensure complete access to several courts' databases in an integrated manner, allowing quick and complete research.

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