COUNTRY COMPARATIVE GUIDES 2022

The Legal 500 Country Comparative Guides

Brazil

LITIGATION

Contributing firm

Souza Araujo Butzer Zanchim Advogados – SABZ Advogados

Paulo Doron Rehder de Araujo

Partner | paulo.doron@sabz.com.br

Alberto Lucio Barbosa Junior

Associate | abarbosa@sabz.com.br

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

For a full list of jurisdictional Q&As visit **legal500.com/guides**

BRAZIL
LITIGATION

1. What are the main methods of resolving commercial disputes?

Under Brazilian jurisdiction, litigation before state courts is the prevailing method of dispute resolution. Additionally, arbitration has experienced a strong development, particularly after the Supreme Court (i.e. Supremo Tribunal Federal) opinion in AgReg SEC 5.206-7, a legal precedent declaring that the Arbitration Statute (i.e Federal Law No. 9.307/1996) does not violate the due process clause in Brazil's Constitution. Finally, mediation has been promoted as a preferred alternative dispute resolution method since the 2015 Code of Civil Procedure and might even become a mandatory proceeding under the Federal Law No. 13.140/2015, if provided for by the contracting parties.

2. What are the main procedural rules governing commercial litigation?

The rules governing civil litigation in Brazil are the general 'common procedure' provided in the Civil Procedure Code (CPC). Because the majority of legal actions by private parties could not be qualified as a small claim under the Federal Law No. 9.099/1995, the CPC's common procedure would be applicable in civil cases before courts across all member states, and even at the federal court system. However, there are special procedural rules in the CPC for the specific claims, involving the partial dissolution and liquidation of partnerships and limited liability companies or the enforcement of property rights (e.g. possessory action) and specific collection procedures (e.g. monition action).

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

Brazilian civil jurisdiction is divided between state and federal courts. In local state jurisdictions, civil claims are made before general district courts, each of which with its own venue where the cases are tried. At the appellate level, every Brazilian State has a Court of Appeals, some of them counting with panels with expertise in commercial law, consumer law, family law, bankruptcy law and environmental law. There is also the federal jurisdiction, restricted to claims related to federal government or any federal administrative body. It is organized in district courts distributed amid the main Brazilian cities and in Five Regional Courts of Appeal, named Tribunais Regionais Federais, covering the entire Brazilian territory. Regardless of state or federal jurisdiction, the court of last resort for civil disputes, and for any non-constitutional case in Brazil (except labour cases), would be the Superior Tribunal de Justiça, via a special appeal procedure meant to maintain the integrity of federal statutes, as interpreted by state or federal Appeal Courts.

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

According to 2021 report by the Conselho Nacional de Justiça, the administrative body that oversees the functioning of the entire Brazilian Judiciary, judicial proceedings take in average 26 months to reach a trial or summary judgment by a district court.

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

In general, judicial hearings are granted full publicity, and the transcriptions of witnesses' testimonies and other depositions are attached to the case files, along with any documentation presented by the parties during the judicial proceeding. However, despite accessible, via electronic platform on the internet, to any attorney and interested individuals and companies, the case records could be classified under specific circumstances. Pursuant to the article 189 of the Civil Procedure Code, pending judicial proceedings are confidential in the interest of the public or society at large, which may include the protection against misappropriation of trade

secrets and unfair competition. Additionally, confidentiality is mandatory to a legal action and its records if they are somehow related to a pending or concluded arbitration procedure if that case was also confidential to the parties.

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

In breach of contract cases, a claim for damages or a specific performance remedy should be brought within the general 10-year period provided in Brazilian Civil Code (CC), as established and reinforced by the Superior Tribunal de Justiça opinion in EREsp 1.281.594. However, disputes arising from business torts or violations of fiduciary duties by corporate officers or directors, for instance, are subject the 3-year limitation period, in accordance with article 206, § 3º, V, of the CC and article 189 of the Statute of Corporations (Federal Law No. 6.404/1976). Also, a 5-year limitation period is applicable for rights of credit represented by public or private written documents (e.g. credit instruments) providing a liquidated amount of money as due to a determined creditor (art. 206, § 5º, II, CC).

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

If a contract provides for mediation as an ADR method, it is mandatory for the parties to attend at least the first meeting with the appointed mediator, as an attempt to reach an out-of-court settlement of any contractual dispute. Pursuant to the Federal Law No. 13.140/2015, once invited to a mediation proceeding, the noncompliant party will be responsible for 50% of legal costs and attorney fees arising from litigation, even if that party is able to secure a favourable ruling by courts. However, parties could negotiate mediation clauses under specific terms, that deviate from the default rules and even put away any penalties for refusal or absence in the mediation meetings. Additionally, despite any contractual provisions, the Civil Procedure Code default rule establish a mandatory meeting with a court-appointed mediator, who would be exempted only if, by its very nature, the disputed matter could not be settled or if both parties to the proceeding express their mutual and explicit refusal to a judicial mediation.

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

As with any claim made under the common procedure provided in Civil Procedure Code (CPC), judicial proceedings commence with the filing of the plaintiff's pleadings (i.e. petição inicial) with a district court registry. While both the state and federal Judiciary employs civil servants with the responsibility for the service of summons, defendants might also be served through formal letter mailed by the district court, pursuant to the article 247 of the CPC. However, a recent amendment to CPC has made the service of summons via electronic communication the preferred way of serving defendants. In fact, the article 246 of the CPC now states that summons must be served as a message delivered to defendant e-mail address, previously registered with the Judiciary's databases, in accordance with guidelines still to be published by Conselho Nacional de Justiça. However, the defendant cannot be personally served by the representatives of the other party, either electronically or via conventional mail. But any decisions taken by the court, even those previous to the summons, could be informed to the defendant by a formal communication (i.e. intimação) mailed by plaintiff, as allowed by the article 269 of the CPC.

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

Generally, state courts, rather than the federal ones, have jurisdiction over any civil claims. According to the Civil Procedure Code, district courts functioning within the area of the defendant's residence or headquarter should hear the case against her. In the São Paulo State Judiciary, claims against defendant headquartered in the city of São Paulo will be heard by the specialised commercial courts, if their cause of action is grounded on (i) provisions from business law book in the Brazilian Civil Code (CC), as well on (ii) the CC's rules for agency and distribution contracts; (iii) the Statute of Corporations (Law No. 6.404/1976); (iv) the Statute of Business Franchising (Law No. 13.966/2019); (v) the Arbitration Statute (Law No. 9.307/1996); (vi) industrial property rights; and (vii) restructuring and insolvency law. However, it is not unusual for contract parties to negotiate jurisdictional clauses determining to which state courts, within a given territory (i.e. court venue), their contractual disputes should be submitted. Parties cannot, however, designate specific judges or court divisions to resolve future disputes among them.

10. How does the court determine what law

will apply to the claims?

Under Brazilian jurisdiction, contractual parties are not allowed to decide which laws should govern their future disputes, at least not if their contract is expected to be enforced in national courts. Pursuant to article 9 of the Federal Decree-law No. 4.657/1942, reformed in 2010, duties and rights arising from contracts, or from any other obligational sources, are regulated by the law of the place in which the obligations have been created. The applicable law could be freely chosen only through the negotiation of arbitration clauses, so that the arbitral tribunal would resolve the dispute between the contracting parties in accordance with the substantive and procedural rules previously agreed to in the contract.

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

As general rule, a legal claim will be dismissed if the plaintiff is found, early on in the proceeding, to lack standing or cause of action against the defendant. Apart from the pretrial dismissals, a judicial proceeding could be terminated with a summary judgment if the case depends only on matters of law and the defendant is in default, or there is no need of further evidence than the documentation already filed by the parties. Under specific circumstances, there can be a summary judgment, on the merits of the case, without even the defendant response to the claim. Pursuant to article 332 of Civil Procedure Code, a legal claim is to be rejected by the district courts ab initio if the plaintiff's cause of action: is not supported by the appellate court's case law, as formalized in enunciados de súmula, i.e., public statements about the interpretation of local law; is not supported by the case law of the higher, national courts, such as the Superior Tribunal de Justiça and Supremo Tribunal Federal, also formalized in enunciados de súmula, i.e., public statements about the interpretation of the federal law or the Brazilian Constitution; and is contrary to the holding of a binding precedent from local appellate courts or from Superior Tribunal de Justiça and Supremo Tribunal Federal, as established in proceedings for aggregation and resolution of repetitive litigation.

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

Because the civil litigation is usually grounded on issues of private law (e.g. contracts, torts, and property), the plaintiff may seek relief with restitution, damages, or specific performance remedies. Apart from these, relief for a violation of patent and trademark rights might be granted through disgorgement of profits illegally accrued to the defendant, in accordance with the Law No. 9.279/1996. The article 497 of the Civil Procedure Code (CPC) gives district courts considerable discretion in tailoring injunctive relief to satisfy the aggrieved party, so that any measures could be ordered by the judge, including coercive fines, as long as they are necessary to achieve practical results equivalent to those expected by the plaintiff if the defendant had not failed to perform voluntarily. In any case, injunctive relieve could be granted if the plaintiff's cause of action is considered prima facie plausible and the urgency of the matter imposes that a remedy is applied early on the proceedings. According to the article 311 of the CPC, even without the urgency requirement, an interim remedy would be available if the defendant pleadings are considered abusive and procrastinating, or if the documentation filed by the plaintiff is sufficient to prove her claim, and the defendant could not cast any doubt as to the validity or relevance of that evidence.

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

A judicial proceeding is formally commenced with the filing of the plaintiff´s pleadings with the district court registry, in the form of an initial petition (i.e. petição inicial), to which all relevant evidentiary documents should be already attached. Once the defendant is served, and the successful summons is documented and attested in the case records, a comprehensive written response should be filed within 15 business days, so as to avoid an entry of default, as per article 344 of the Civil Procedure Code (CPC). Additionally, in accordance with the article 437 of the CPC, the plaintiff would have further 15 business days to comment on or challenge the validity and legitimacy of the documented evidence provided by the defendant. The plaintiff may also reply within 15 business if the defendant had included in her pleadings a counterclaim (i.e. reconvenção) or a motion to dismiss. In this case, plaintiff may adduce any extra and relevant evidence to refute the defendants claim and oppose the requested dismiss judgment.

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

Pursuant to article 381 of the Brazilian Civil Procedure Code (CPC) and the case law of the Superior Tribunal de Justiça, parties are entitled to request for a district court

to order the opposing party to disclose documents if the following requirements are simultaneously met and provided in the applicant's motion: (i) the description, as complete as possible, of the document; (ii) the purpose of the evidence, pointing to the facts that are related to the document; and (iii) the circumstances upon which the party bases her claim that the document exists and is in the possession of the opposing party. A recent amendment to article 397 of the CPC has expanded the scope the disclosure order, allowing that not only specific documents are disclosed in court, but also general classes of documents, as long these categories could be sufficiently identified by the party requesting the motion. In any case, the courts shall deny a refusal of one party to present a document when: (i) such party has a legal obligation to disclosure the document; (ii) such party refers to the document as grounds to her own defence; and (iii) the document, by its very content, is common to both parties. Additionally, despite not being a usual scenario, a district court may ex officio determine the parties to present documents which could be relevant for the trial, according to the article 370 of the CPC.

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

Witness evidence is produced at a hearing held in the evidentiary phase of the general 'common' judicial procedure by live testimony. The live testimonies are always transcribed and attached to the case files as a written document. Certain courts also record the live testimony and make the video or audio files available for the parties upon their request. According to the article 461 of Brazilian Civil Procedure Code (CPC), the court may order ex officio, or at the request of the part, a sort of cross-examination (i.e. acareação) of two or more witnesses or of witnesses and the parties' representatives, when distinct statements are made on a specific fact that may be material to the trial. Furthermore, the CPC enables the production of witness evidence in a pre-litigation phase, as long as one of the following situations take place: (i) there is a reasonable possibility that it may become impossible or very difficult to verify certain facts during the course of the litigation; (ii) the evidence to be produced has potential to make the parties enter into an agreement or resort to other suitable means of dispute resolution; and (iii) prior knowledge of the facts may either justify or avoid the commencement of the litigation.

16. Is expert evidence permitted and how is it dealt with? Is the expert appointed by the court or the parties and what duties do they owe?

Expert evidence is permitted in all kinds of civil disputes litigated before Brazilian courts, under the general 'common' judicial procedure. However, a district court shall deny the production of expert evidence if (i) the issue of fact does not depend on specific technical knowledge to be proved, (ii) it is unnecessary in view of other pieces of evidence produced and (iii) the technical analysis of the issue of fact is impossible. Although the expert is most usually appointed by the court, it is possible that the parties enter into an agreement to request that the judge appoint a specific expert. Either in the former or in the latter scenario, the parties can choose their technical assistant to participate in the production of the expert evidence. All information provided by the court-appointed expert and the parties' technical assistants must be attached to the case records in written reports. Besides that, the expert has the duty to communicate with the technical assistants at the beginning and before any developments related to the expert evidence.

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

Whereas all final decisions rendered by district courts may be appealed, only certain interim decisions can be challenged before a court of appeal. According to the case law of the Superior Tribunal de Justiça, the interim decisions that may be review by an appellate court are those which (i) relates to an injunctive relief or any provisional remedy, (ii) resolve the merits of the case, (iii) denies the jurisdictional effects of an arbitration clause, (iv) relates to the piercing of a legal entity veil, (v) denies legal aid, (vi) rules on the disclosure of a document or a thing, (vii) rules on the exclusion of a co-party to the same lawsuit, (viii) rules on the admission or denial of joinder, (ix) rules on the admission or rejection of third-party intervention, (x) relates to the granting, modification or revocation of a stay of enforcement, (xi) rules on the reallocation of the burden of proof, (xii) relates to liquidation or enforcement proceedings, (xiii) relates to other subjects that, if not appreciated immediately, may harm the whole case development and (xiv) rules on subjects expressly mentioned by statutes other than the Brazilian Civil Procedure Code. Appeals filed against district court rulings are addressed to the corresponding state court of appeals or to the corresponding federal court of appeals, depending on

the cause of action, its legal grounds and the defendants qualification as federal agency or authority. State and federal appellate court' rulings may be challenged by special appeals to higher national courts, such as the Supremo Tribunal Federal – if the challenged ruling violates the Brazilian constitution – and to the Superior Tribunal de Justiça – if the challenged ruling violates federal law. Generally, appeals must be filed within 15 working days.

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

First, the party must file a motion requesting the homologation of the foreign judgment before the Superior Tribunal de Justiça, Brazilian higher national court in matters of civil law. After the filing of the request for homologating a foreign judgment, the opposing party will be served and allowed to present its response. According to the Superior Tribunal de Justiça 's internal rules and the article 963 of the Civil Procedure Code, the requirements for homologating a foreign judgment are: (i) the decision shall be rendered by an authority with jurisdiction; (ii) the defendant shall be duly served with the process; (iii) proof that the party failed to timely present its defence if the case; (iv) the decision shall be effective under in the country where it was rendered; (v) the decision shall not violate a Brazilian res judicata decision; (vi) the decision shall be followed by an official translation to Portuguese, except if there is a waiver established in international treaties in force in Brazil; (vii) the decision shall not violate public policy, human rights or national sovereignty; (viii) the decision shall be final and unappealable. Once the judgment is duly homologated by the Superior Court of Justice, its enforcement proceeding will take place before a federal court.

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?

Pursuant to the Brazilian Civil Procedure Code, a sentence shall condemn the losing party to reimburse court costs disbursed by the prevailing party. Such costs to be reimbursed encompasses, amongst others, (i) travel expenses, (ii) technical assistant's fees, (iii) court expert's fees and (iv) travel allowance of witnesses. Besides the reimbursement of costs, awards also shall condemn the losing party to pay attorney's fees to the prevailing party's lawyer. Usually, these attorney's fees range between 10% to 20% of the amount in dispute. On the other hand, Brazilian courts usually do not order the losing party to reimburse amounts dispended by the winning one to hire and instruct her lawyers, since the choice of counsel is within the liberty of action of each party and so that the corresponding costs cannot objectively assessed and compared.

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

The main collective redress mechanisms in Brazil are: (i) ação de responsabilidade under the Statute of Corporations (Law No. 6.404/1976), which is a proceeding that enables shareholders and third parties to seek indemnification arising from misconduct of corporate officers and directors; (ii) ação civil pública, which is a special proceeding to collect damages and prevent harm to any social, economic and cultural collective rights (e.g., environment defence, consumers protection, free markets etc); and (iii) ação popular, which is a special proceeding that can be filed by any Brazilian citizen to set aside an act or contract by a public authority that harms or waste government properties, funds or financial resources.

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

The mechanism for joining third parties to ongoing proceedings is called intervenção de terceiros under the Brazilia Civil Procedure Code. Third-party intervention mechanism includes the following situations: (i) assistência, which allows third parties to participate in the litigation, provided that they might be potentially affected by the ruling to be rendered; (ii) denunciação da lide, wherein a party summons a liable third-party to litigate thereby expedites the enforcement of its right of recourse in a single procedure; (iii) chamamento ao processo, wherein the defendant summons a joint-liable third party (e.g. a guarantor) to litigate as a co-defendant, so that financial burden of the liability judgment is evenly divided; (iv) the piercing the veil of legal entities, which allows the plaintiff to include shareholder and company managers as third parties in the litigation as defendants in case of fraud committed against the company creditors; and (v) amicus curiae, which enables third parties to provide additional data and arguments to both district and appellate courts in view of complex cases, discussing technical or socially relevant topics. As for the consolidation of two or more proceedings, it may occur when the cause of actions or the claims by the different plaintiffs are common in two

or more lawsuits. This consolidation aims at preventing the parties from having two conflicting and contradictory decisions regarding the same disputed matter by the rendering of a joint judgment.

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

Legal financing is neither prohibited nor positively allowed by the Brazilian legal system. Due to such lack of regulation, a third party funder is not held accountable to reimburse court costs paid by the opposing party. Conversely, should the financed party prevail in the litigation, the third party funder is legally entitled to request the reimbursement of the court costs paid on behalf of the prevailing party by means of subrogation of rights.

23. What has been the impact of the COVID-19 pandemic on litigation in your jurisdiction (and in particular, have the courts adopted remote hearings and have there been any procedural delays)?

The first measure taken nationwide in March 2020 was to suspend for over a month all procedural deadlines. As of District and appellate courts have also already begun to implement tools to permit virtual trials, as well as oral argument via video conference applications. This process was implemented successfully, because almost every court in Brazil is already fully digital. In any case, as a result of the COVID-19 pandemic, numerous contractual and bankruptcy disputes have emerged in the wake of the crisis. However, productivity by commercial courts in the State of São Paulo, for instance, is considered to be increasing due to the recourse to videoconferencing and other communication technologies. This same trend has remained steady throughout 2021.

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

The main advantages are that Brazil has a solid body of (i) laws capable of regulating international commercial disputes and (ii) high-profile, seasoned, skilled judges and arbitrators specialized in commercial law. Also, once practically one hundred per cent of the courts around the country are fully digital, it is very easy to access the case records and to follow up on the proceeding developments. The main disadvantage is that Brazil has one of the most crammed court systems in the world and, hence, it is expected that judicial proceedings will be excessively time-consuming. This scenario, however, does not apply to arbitrations.

25. What, in your opinion, is the most likely growth area for disputes for the next five years?

Because of the economic crisis created by the COVID-19 pandemic, litigation among businesses is expected to boom during the next 5 years, particularly due to disputes over the termination of commercial leases and distribution agreements, as well to bankruptcy claims.

26. What, in your opinion, will be the impact of technology on commercial litigation in the next five years?

Not only will new electronic tools be implemented to ease the communication with court clerks and judges, but also businesses will expand the use of digital contracts and artificial intelligence. Such factors combined tend to expedite litigation and avoid that parties expend financial resources with traveling and documentation, since red tape related to the validity of documents will likely be way mitigated.

27. What, if any, will be the long –term impact of the COVID-19 pandemic on commercial litigation in your jurisdiction?

The lasting impact of COVID-19 will be acceleration of legislative and government initiatives to fully digitalize the administration of justice in Brazil. For instance, the administrative body that oversees the functioning of the entire Brazilian Judiciary, Conselho Nacional de Justiça (CNJ), has already issued the Resolution No 345/2020, allowing state and federal appellate courts to implement the *Juízo 100% Digital* program. That is, a non-mandatory framework for the development of a totally on-line and remote court proceeding. According to CNJ, remote judicial proceedings are to be promoted and implemented across the country not only during the pandemic crisis, as a precautionary measure, but also after the sanitary restrictions applicable to the Judiciary personal are forgone.

Contributors

Paulo Doron Rehder de Araujo
Partner
paulo.doron@sabz.com.br

Alberto Lucio Barbosa Junior
Associate
abarbosa@sabz.com.br