The Legal 500 Country Comparative Guides

Brazil: Litigation

This country-specific Q&A provides an overview to litigation laws and regulations that may occur in Brazil.

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

   Under Brazilian jurisdiction, litigation before state courts is the prevailing method of dispute resolution between businesses. Additionally, commercial arbitration has experienced a strong development, particularly after the supreme court (*Supremo Tribunal Federal*) opinion in *AgReg SEC 5.206-7* declaring that the Arbitration Statute (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 Law No. 13.140/2015, if provided for in commercial contracts.

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

   The rules governing commercial litigation in Brazil are the general 'common procedure' provided in the Civil Procedure Code (CPC). Because the majority of legal actions by businesses could not be qualified as a small claim under the Law No. 9.099/1995, the CPC's common procedure would be applicable in commercial cases before courts across all member states, and even at the federal court system. However, in shareholders disputes, there are special procedural rules in the CPC for the partial dissolution and liquidation of partnerships, limited liability companies and privately held corporations.

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

   In some local jurisdictions, such as the São Paulo and Rio de Janeiro State Judiciary, there are specialized courts dedicated for commercial disputes. At the appellate level, there also review panels in São Paulo Court of Appeals that hear only commercial claims. However, the court of last resort for commercial disputes, and for any non-constitutional case in Brazil, would be the

   Superior Tribunal de Justiça, via a special appeal procedure meant to maintain the integrity of federal statutes, as interpreted by appellate courts from each state of the federation.

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

   According to 2019 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 businesses, 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 arbitral procedure, if that arbitration 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, commercial disputes arising from business torts or violations of fiduciary duties by corporate officers or directors 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 (Law No. 6.404/1976).

Also, a 5-year limitation period is applicable for rights of credit represented by public or private written instruments providing a liquidated amount of money as due (art. 206, § 5º, II, of the 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 commercial contract provides for mediation as a method of dispute resolution, 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. Pursuant to the Law No. 13.140/2015, once invited to a mediation proceeding, the non-compliant party will be responsible for 50% of legal costs and attorney fees arising from litigation, even if she 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 rules establish a mandatory meeting with a court-appointed mediator, which 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 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 (*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 by the district court, which is the preferred way pursuant to the article 247 of the CPC.

The defendant cannot be personally served by the representatives of the other party, but any decision taken by the court, previously to the summons, can be informed to the defendant by a formal communication (*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?**

As general rule, state courts, rather than the federal ones, have jurisdiction over commercial 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, their commercial 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 they are to be litigated before national courts. Pursuant to article 9 of the Decree-law No. 4.657/1942, 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 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 in proceedings, 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 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 *Superior Tribunal de Justiça* and *Supremo Tribunal Federal,* as formalized in *enunciados de súmula,* 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 commercial 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, as provided by 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 urgency of the matter imposes that a remedy is applied early in 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 (*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 (*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 determine the opposing party to disclose documents if the following requirements are simultaneously fulfilled: (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 his or her claim that the document exists and is in the possession of the opposing party.

The judge 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 in order to provide grounds to its defence; and (iii) the document, by its content, is common to both parties.

Additionally, despite not being a usual scenario, the judge may ex *officio* determine the parties to present documents which could be relevant for the trial, according to 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 in a hearing held in the evidentiary phase of judicial proceeding by means of a 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 available for the parties upon their request.

According to the article 461 of Brazilian Civil Procedure Code (CPC), the judge may order *ex officio* or at the request of the part a sort of cross-examination (*acareação*) of two or more witnesses or of witnesses and the parties' representatives, when distinct statements are made on a specific fact that may influence the trial.

Furthermore, the CPC enables the production of witness evidence in a pre-litigation phase, since one of the following situations take place: (i) there is a reasonable fear 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 commercial disputes under litigation. 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 face is impossible.

Although the expert is ordinarily 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.

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 summon the technical assistants on the beginning and on all developments of 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 in first instance may be appealed, only certain interim decisions can be challenged before an appellate court. According to the case law of the *Superior Tribunal de Justiça*, the interim decisions that may be appealed are those which discuss (i) requests for provisional relief, (ii) merits of the case, (iii) rejection of arbitration

agreement clause, (iv) piercing the legal entity veil, (v) denial of legal aid, (vi) disclosure of a document or a thing, (vii) exclusion of a co-party, (viii) admission or denial of joinder, (ix) admission or rejection of third-party intervention, (x) granting, modification or revocation of the stay of enforcement, (xi) reallocation of the burden of proof, (xii) decisions rendered in liquidation or enforcement proceedings, (xiii) other subjects that, if not appreciated immediately, may harm the whole case development and (xiv) subjects expressly mentioned by other laws than the Brazilian Civil Procedure Code.

Appeals filed against decisions rendered in first instance are addressed to the corresponding state court of appeals or to the corresponding federal court of appeals, depending upon the venue where the case is ongoing. State and federal appellate court' rulings may be challenged by special appeals addressed to higher national courts, such as the *Supremo Tribunal Federal* – if the challenged ruling violates the 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,* one of Brazilian higher national courts. After the filing of the request for homologating a foreign judgment, the opposing party will be served with the process to present its defence.

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 judgments 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 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 updated amount in dispute. On the other hand, Brazilian courts usually do not condemn the loosing party to reimburse values dispended by the winning one in instructing lawyers, once the choice of the lawyer is upon the liberty of action of each party and costs may vary and be considerably subjective.

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*, 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 proceeding aiming at indemnifying damages caused or preventing from damages to be caused to social, economic and cultural collective rights (e.g., environment, consumers protection, economic order etc); and

(iii) *ação popular*, which is a proceeding that can be filed by any Brazilian citizen aiming at setting 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 the third-party intervention. Third-party intervention embeds the following situations:

(i) *assistência*, which allows third parties to participate in the litigation, provided that they might be potentially affected by the award to be rendered;

(ii) *denunciação da lide*, wherein a party serves a liable third-party with the process and thereby expedites the right of recourse in a single litigation;

(iii) *chamamento ao processo*, wherein the defendant serves joint-liable third-party (e.g., guarantor) with the process so as to correctly divide the burden of the sentence;

(iv) 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 there was a 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.

The consolidation of two or more proceedings occurs when the cause of action or the requests made by the 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 relation by 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, third-party funder is not held accountable to reimburse court costs paid by the opposing party.

Conversely, should the financed party be the prevailing one on 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, 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 the process developments.

The main disadvantage is that Brazil has one of the most crammed court systems in the world and, hence, it is usual that judicial proceedings are excessively time-consuming. This scenario, however, does not apply to arbitrations.

24. **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 are expected to boom in the next 5 years, particularly due disputes over termination of commercial lease and distribution agreements.

25. **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 courts 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 to expend financial resources with traveling and documentation, since red tape related to the validity of documents will likely be way mitigated.

26. **How have the courts in your jurisdiction dealt with the COVID-19 pandemic and have you seen particular types of disputes arise as a result of the pandemic?**

The first measure taken nationwide was to suspend for over a month all procedural deadlines. 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 quite easy once almost every court in Brazil is fully digital in 2020.

As a result of the COVID-19 pandemic, relevant contractual and bankruptcy disputes have already started arising in the wake of the crisis.