Complex Commercial Litigation

Contributing editors
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GETTING THE DEAL THROUGH

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Second edition

Getting the Deal Through is delighted to publish the second edition of *Complex Commercial Litigation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria, Nigeria and the United Arab Emirates.

Getting the Deal Through titles are published annually in print and online. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Simon Bushell and Daniel Spendlove of Signature, the contributing editors, for their assistance in devising and editing this volume.

GETTING THE DEAL THROUGH

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Brazil

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Background

1 How common is commercial litigation as a method of resolving high-value, complex disputes?

Although arbitration has gained a lot of traction over the past 15 years, litigation is still, by far, the prevailing method of resolution for complex commercial disputes.

Mediation and other alternative dispute resolution (ADR) methods are unusual as parties tend to see commitment to ADR as a sign of low confidence in the merits of their claim. This is expected to change in the future as a result of the enactment of both the Mediation Act and the new Civil Procedure Code of 2015 (the 2015 CPC), which may incentivise ADR.

2 Please describe the culture and 'market' for litigation. Do international parties regularly participate in disputes in the court system in your jurisdiction, or do the disputes typically tend to be regional?

There is a strong demand for commercial litigation because:

- the costs of litigation are comparatively low;
- there are several reputable local law firms; and
- parties see it as an effective way of gaining leverage in negotiations.

While disputes tend to be regional, and international parties rarely engage in litigation in Brazil, local subsidiaries of foreign conglomerates often become party to commercial disputes before Brazilian courts of law.

3 What is the legal framework governing commercial litigation? Is your jurisdiction subject to civil code or common law? What practical implications does this have?

Brazil is a civil-law jurisdiction, so its commercial disputes are, to a large extent, regulated by statute – chiefly, the 1976 Corporations Act, the 2002 Civil Code and the 2015 CPC. Specific statutes apply to insolvency, debt instruments, capital markets and other matters. A Commercial Code Bill is currently under Congress's review; if it is passed and enacted it will become a very relevant statute and replace several commercial laws.

Over the past 10 years Brazil has been gradually shifting towards a more 'mixed' system; pursuant to this, opinions entered by the highest courts are binding upon lower courts by operation of statute. The result is that the decision to pursue, defend and settle commercial disputes depends on very careful assessments of both statutory and case law, which may at times be inconsistent.

Bringing a claim – initial considerations

4 What key issues should a party consider before bringing a claim?

Review of court precedents in addition to statute is advisable to assess the likelihood of success. See question 3.

A claimant should also take the economic burden of the dispute into account. Pursuant to the applicable 'loser pays' rules under the 2015 CPC, the defeated party must bear the court-related expenses and also pay attorney's fees to the prevailing party's counsel. See question 47.

Foreign claimants who do not own real estate in Brazil will customarily need to deliver security for all those expenses and fees. See question 28.

Timing may also be a concern as court proceedings may drag and could take several years to unfold before the lower court and the court of appeals (see question 38). If the matter is urgent, the claimant may need to consider resorting to ADR or seeking an injunction.

5 How is jurisdiction established?

Brazilian courts have jurisdiction over lawsuits involving:

- defendants domiciled in Brazil, which includes foreign companies with a local office, agency or branch;
- obligations to be performed in Brazil;
- the facts that occurred or acts performed in Brazil; or
- the enforcement of a contract that chose Brazil as the venue for court disputes.

Jurisdiction is exclusively vested with Brazilian courts when it comes to disputes over real estate located in Brazil, family affairs and other non-commercial matters.

There is no international lis pendens as a rule, so the party will usually not be prevented from bringing forth the same claim before a different jurisdiction, and a foreign award may be confirmed (homologated) and enforced in Brazil while the Brazilian lawsuit is pending.

Parties to an international contract may choose foreign courts as the venue for dispute resolution and this choice will be enforceable against the claimant if the defendant raises the matter in its statement of defence.

The 2015 CPC also contains several rules on internal jurisdiction.

6 Res judicata: is preclusion applicable, and if so how?

A party is precluded from challenging a decision if it has failed to timely do so, except if it is within the court's power to review the subject matter ex officio (eg, standing to sue and be sued), or a legitimate cause prevented such party from lodging the appeal.

Pursuant to article 966 of the 2015 CPC, a party may, under very strict circumstances, seek to set aside (rescind) a final award on the merits after it has become res judicata.

7 In what circumstances will the courts apply foreign laws to determine issues being litigated before them?

Decree Law No. 4,657, dated 4 September 1942, contains the applicable rules for conflict of laws. The company's formation, structure and dissolution are governed by the law of the jurisdiction in which it was formed. The law applicable to property is usually that of the venue where it is located, but the law of the pledgee's domicile (or the domicile of the person possessing the pledged asset) applies to pledges. Production of evidence and burden of proof involving facts that occurred abroad are governed by the laws of the country where the fact has occurred.

The law applicable to contracts and other obligations is that of the jurisdiction where the contract was signed or the obligation was undertaken; if there is no reference in the contract, the law of the proponent or offeror's domicile applies. There is no clear statutory or case law in Brazil on the validity and enforceability of choice of governing law clauses inserted in international contracts.

8 What initial steps should a claimant consider to ensure that any eventual judgment is satisfied? Can a defendant take steps to make themselves 'judgment proof'?

A claimant should search for information on the defendant's economic wherewithal to bear an unfavourable award (ie, other lawsuits filed against the defendant, insolvency filings, debts recorded with public officials) and, if need be, seek an injunction to freeze the defendant's assets.

The right to resort to the judiciary is enshrined in the 1988 Constitution. A defendant may not be contractually exempted from the risk of litigation and an adverse ruling, and any such waiver of the right to sue a defendant is void.

9 When is it appropriate for a claimant to consider obtaining an order freezing a defendant's assets? What are the preconditions and other considerations?

The preconditions to all interim remedies under the 2015 CPC, including asset freezes, are urgency (risk of harm, usually relating to the concrete risk that the defendant will become insolvent or the argument that it is hiding its assets away from creditors) and plausibility of the claimant's right on the merits. See questions 8 and 11.

10 Are there requirements for pre-action conduct and what are the consequences of non-compliance?

There are no required pre-action conducts unless the parties have agreed them (eg, engaging in ADR or healing periods). In the latter case, failure to perform these conducts could cause the suit to be dismissed without prejudice on the grounds that the dispute was not yet mature enough to be taken to the judiciary.

11 What other forms of interim relief can be sought?

Courts have the power to enter whatever interim remedies they see fit as requested by the party, such as freezing assets, orders to search and seize property, cease and desist orders, and the advance production of evidence. They may go as far as advancing the practical effects of an award on the merits (see question 39). A claimant must provide convincing elements to the court about plausibility, namely, the likelihood of success on the merits (*fumus boni iuris*), and urgency, namely, the risk that a final award will be useless or ineffective if relief is not promptly granted (*periculum in mora*).

Urgency may be dispensed with if:

- the defendant has abused its right of defence or sought to delay the proceedings;
- a binding precedent applies and there is enough documentary evidence on the factual allegations;
- the claimant seeks to regain possession of its property and has produced evidence of his or her right to repossess the asset; or
- the defendant has failed to reasonably dispute the facts of and exhibits to the statement of claim.

12 Does the court require or expect parties to engage in ADR at the pre-action stage or later in the case? What are the consequences of failing to engage in ADR at these stages?

As for pre-action ADR, see question 10. After a claim is filed, and before the defendant files its statement of defence, a settlement hearing must be held under the 2015 CPC unless both parties expressly refuse to attend the hearing or applicable statute prohibits settlement of the matter. A fine of up to 2 per cent of the amount in dispute may be imposed on the party who fails to attend the hearing.

13 Are there different considerations for claims against natural persons as opposed to corporations?

Claims against natural persons and corporations are basically subject to the same rules; differences are minor and regard service of process and the documentation to prove the party's capacity to be in court.

14 Are any of the considerations different for class actions, multi-party or group litigations?

There are several types of proceedings of a collective and public-interest nature under Brazilian law, each of which with its specificities. The standing to sue and be sued, and the effects of res judicata, will greatly vary according to the type of proceedings. For instance, individuals lack the standing to sue under the 1985 Civil Public Action Act but they do have the standing to enforce a favourable award thereunder, and also to sue to safeguard public interest under Law No. 4,717, dated 29 June 1965.

As for strictly commercial disputes between private parties, a party will not have standing to pursue a right held by a third party except in very limited cases (eg, a trustee in a debenture issue may enforce the indenture and collaterals on behalf of holders). Strict rules also apply to the joinder of third parties and the filing of cross-claims. See question 30.

15 What restrictions are there on third parties funding the costs of the litigation or agreeing to pay adverse costs?

The doctrines of champerty and maintenance do not apply in Brazil and there are no statutory rules about third-party litigation funding. In principle, a party should be free to fund a dispute, and to have its dispute funded. That said, alternative funding structures are still very recent in Brazil and there is no case law; courts may eventually impose limits thereto based on an interpretation of Brazilian legal system as a whole, such as prohibiting the funding if the purpose of the dispute is to tarnish the reputation of a competitor of the funder, or capping the return on investment if the deal is interpreted as a loan.

The claim

16 How are claims launched? How are the written pleadings structured, and how long do they tend to be? What documents need to be appended to the pleading?

Claims are launched by a statement addressed to the court and must meet the formal requirements set forth in the 2015 CPC. They are customarily structured as follows:

- preamble with parties' names and qualification;
- factual background;
- legal grounds for the claim;
- relief sought;
- request for evidence production, if any;
- interest in attending a preliminary settlement hearing;
- amount in dispute; and
- list of exhibits.

Statements of claim are usually 15 to 30 pages long, but this can vary a lot and statements tend to be longer in complex commercial litigation.

17 How are claims served on foreign parties?

Foreign parties are typically served with process by letter rogatory unless they have an office, agency or branch in Brazil or have granted a local attorney in fact the power to receive service of process.

18 What are the key causes of action that typically arise in commercial litigation?

A considerable number of commercial litigation involves interpretation of contractual terms and conditions (right of termination, breach of covenant, price readjustment, unfair treatment and so forth). Claims involving custom duties, product liability, torts and corporate disputes are also usual.

19 Under what circumstances can amendments to claims be made?

A claimant may freely amend its statement of claim until service of process has been effected. From then on, defendants must consent to any amendment. Amendments are totally forbidden once the court has set the controversial aspects of the dispute and the evidence to be produced.

20 What remedies are available to a claimant in your jurisdiction?

Roughly, a claimant may request that the court (i) declare that a right does or does not exist or that a fact has or has not occurred; (ii) order the defendant to perform (or to refrain from performing) an act, such as a payment; and (iii) enter a decision creating, changing or terminating a right. If an award has already been entered, or if the defendant has formally admitted in a written document (extrajudicial title) to the existence of an obligation before the claimant (eg, a cheque and other debt instruments), then the claimant may directly enforce such

award or document. The claimant may also pursue interim relief (see question 11).

21 What damages are recoverable? Are there any particular rules on damages that might make this jurisdiction more favourable than others?

Pursuant to the 2002 Civil Code, direct damages – namely, material damages, lost profits and moral damages (pain and suffering) – may be recovered. Indirect or derivative damages and damages that have not materialised yet are not indemnifiable. Brazilian legislation does not provide for punitive damages, but some courts apply similar criteria (eg, wrongdoer's wherewithal, discouraging a repeated offence) upon defining the amount of direct damages to be awarded.

Contractual indemnity caps may be disregarded by courts, and strict liability will apply in some specific situations such as environmental damages and consumer rights.

Responding to the claim

22 What steps are open to a defendant in the early part of a case?

The so-called principle of concentration applies to Brazilian procedural law. As a result, jurisdictional objections, the claimant's failure to take pre-action measures, other preliminary matters such as standing to sue and be sued, counterclaims stemming from the same factual background, and requests for third-party joinder must all be brought forth along with the statement of defence, usually within 15 business days from the completion of service of process.

23 How are defences structured, and must they be served within any time limits? What documents need to be appended to the defence?

Defences are customarily structured as follows:

- summary of the claim;
- factual issues;
- preliminary or procedural arguments;
- merits;
- relief sought;
- request for evidence production, if any; and
- list of exhibits.

All documents in support of the defence that already exist and are in the defendant's possession must be appended.

24 Under what circumstances may a defendant change a defence at a later stage in the proceedings?

Once the defence has been filed, it is only possible to bring new arguments if they relate to a supervening right or fact, if it is within the court's power to review the subject matter ex officio or if the defendant is expressly allowed by the law to do so.

25 How can a defendant establish the passing on or sharing of liability?

Upon filing its defence, a defendant may seek a third-party joinder or file a cross-claim against a third party, such as a guarantor or insurer. It may also file a separate claim for contribution or redress.

26 How can a defendant avoid trial?

A defendant may seek to have the suit dismissed prior to the evidence production phase by settling with the claimant or by raising jurisdictional and other procedural objections – the decision must precede the review of the merits. The filing of a counterclaim will not usually stay the original claim.

27 What happens in the case of a no-show or if no defence is offered?

As a rule, a default judgment may be entered and all factual allegations made by the claimant will be deemed true. However, this will not be the case if a co-defendant has timely filed its own defence or the claimant's factual allegations do not seem credible or are otherwise inconsistent with evidence already produced. The defendant will be able to participate in the proceedings from the moment it joins and will not be precluded from raising legal arguments.

28 Can a defendant claim security for costs? If so, what form of security can be provided?

The defendant may claim security for costs if the claimant resides abroad or leaves the country during the course of the lawsuit and does not own real property in Brazil. The claimant must post collateral to cover all court expenses and attorney's fees under applicable 'loser pays' rules which could equate to up to 20 per cent of the amount in dispute. Security for costs will not be required if there is a waiver in an international treaty to which Brazil is a party, if the claimant seeks to enforce an award or debt instrument (extrajudicial title), and in the context of counterclaims.

Progressing the case

29 What is the typical sequence of procedural steps in commercial litigation in this country?

Pleadings stage

First, the statement of claim, statement of defence, reply and (rarely) rejoinder are filed. The so-called principle of concentration applies and each party must bring forth all of its factual and legal arguments upon making its initial filing, which includes any procedural objections the defendant may want to raise. A settlement hearing may be held.

Court decision on preliminary matters

The court may then grant any procedural objections and dismiss the suit without prejudice; grant any jurisdictional objections and remit the matter to the right court; promptly enter an award on the merits if it finds that the matter involves solely legal interpretation or if the available documentary evidence is sufficient; or define the need for evidence production and the applicable burden of proof.

Evidentiary stage

Expert evidence may be produced as determined by the court, and the parties and their expert assistants must cooperate with the court-appointed expert. Individuals and goods may be inspected directly by the court and the parties, and their expert and factual witnesses, and the court-appointed expert, may be heard at an evidence production hearing. The court may order the delivery of closing arguments orally or in writing.

The length of the evidence production hearing varies according to the complexity of the matter, the number of depositions and the decision on oral or written closing arguments, but it will typically be held on a single day.

Final decision

The lower court enters its award in writing, either at the evidence production hearing or following receipt of the parties' written closing arguments. The award must contain: a summary of the parties' arguments and the prior stages of the proceedings; the court's findings on the main legal and factual controversies in the dispute; and the decision on each relief sought by the parties. The parties may file a motion to clarify the award in case of perceived self-contradictions, omissions and unclear wording.

Appeal

The defeated party may lodge an appeal before the relevant appellate court to have the award voided, overturned or otherwise reviewed; in very few cases, further appeals to the Superior Court of Justice or even the Supreme Court may be admissible.

30 Can additional parties be brought into a case after commencement?

Third parties may seek or be ordered to join the proceedings under the 2015 CPC, as follows:

- Assistance (articles 119 to 124): a third party joins the proceedings to assist one of the parties thereto if it has a valid interest in doing so (ie, its rights or duties are potentially affected by the outcome of the dispute), so that a favourable award also benefits the assistant (eg, a subtenant may assist a tenant in an eviction lawsuit filed by the landlord).
- 'Denunciation' or cross-claim (articles 125 to 129): either party requests that an existing guarantor (by operation of law or contract) join the proceedings as a defendant so that contribution

can promptly be sought from the guarantor (eg, an insurer may be ordered to join the proceedings to bear any unfavourable award entered against an insured defendant).
- 'Call to join' (articles 130 to 132): the defendant requests that one or more additional debtors to a common debt join the proceedings, so that the economic burden of an unfavourable award is immediately assessed pro rata, per the applicable rules of joint or several liability (eg, a debtor and other guarantors to a bank debt may be ordered to join the collection suit filed by creditor directly against one of the guarantors).
- Piercing of the corporate veil (articles 133 to 137): the party or the public prosecutor may seek to disregard the legal entity and hold its equity holders and managers or officers liable for acts formally performed by the entity.
- Amicus curiae (article 138): a relevant individual or entity provides information on a dispute to the court voluntarily, or per the court's request, in defence of public or private interests that may be affected by the outcome of the dispute.

31 Can proceedings be consolidated or split?

Proceedings can be consolidated if the cause of action or the relief sought are the same (known as a 'connection'), if the scope of one lawsuit is fully contained in a prior lawsuit, or, more generally, if there is a risk of contradictory awards in similar situations. Proceedings can be split should the court find, at its discretion, that this is advisable to facilitate the exercise of procedural rights or to save time and resources (eg, cases involving too many claimants may be deemed inefficient).

32 How does a court decide if the claims or allegations are proven? What are the elements required to find in favour, and what is the burden of proof?

The court may freely weigh the evidence produced as long as the final decision contains a clear reference to the court's factual assessment (including evidence taken into consideration) upon granting or denying each relief sought.

As a rule, each party must prove its own factual allegations; the claimant must prove its cause of action, while the defendant must prove any fact in opposition to the claimant's arguments. The court may shift the burden of proof if it finds that it will be easier for the opposing party to produce the evidence or as set forth in statute (eg, matters involving consumer rights).

33 How does a court decide what judgments, remedies and orders it will issue?

The court is bound by the relief sought by the claimant in the statement of claim and may not grant different relief. Each relief is decided upon separately, based on the court's findings on each corresponding cause of action.

34 How is witness, documentary and expert evidence dealt with?

Each party is usually very conservative upon listing its witnesses and avoids calling individuals with whom it has not had prior contact or does not have a good relationship, eliminating the risk of producing adverse evidence in the context of cross-examination. Perjury is a crime but charges for perjury are rare. A witness may refuse to address facts that are subject to a confidentiality duty or that may harm the witness or its close relatives.

A party may seek to cross-examine the legal representative of the opposing party. This is usually a good strategy to unsettle the opposing party and lead it to make statements in contradiction or otherwise inconsistent with its own arguments.

All relevant existing documentation must be enclosed in each party's initial filing. Further documents may be produced if they regard facts that occurred later, or in order to challenge documents submitted by the opposing party. Pretrial discovery is not contemplated by the 2015 CPC but a party may request the exhibition of one or more specified documents in possession of the opposing party or a third party under certain conditions.

Expert evidence is usually very complex. The parties present a list of questions to the court-appointed expert and the court decides whether they are appropriate; the parties may also appoint their own assistant experts, who will usually provide comments and information to the expert as needed, in the hope that they influence the content of the final report to be submitted. A court will usually have to review three reports, each prepared by the court-appointed expert and by the party-appointed assistants.

There is no hierarchy under Brazilian law regarding different types of evidence but, in practice, courts tend to favour expert review and documents over oral evidence. The party's choice to produce one type of evidence instead of another is contingent upon the facts of the dispute and strategic considerations; witness evidence is commonplace and can substitute or help interpret documentary evidence.

35 How does the court deal with large volumes of commercial or technical evidence?

Courts will typically appoint one or more experts to handle commercial or technical evidence depending on the subject matters involved (accountancy, engineering, finance, etc).

36 Can a witness in your jurisdiction be compelled to give evidence in or to a foreign court? And can a court in your jurisdiction compel a foreign witness to give evidence?

As a rule, foreign courts will issue a letter rogatory to Brazil in connection with a local witness; any such foreign letter rogatory will only be enforced in Brazil following recognition by the Superior Court of Justice (see question 50). Brazilian courts may issue a letter rogatory to the foreign witness's jurisdiction, to be processed and enforced pursuant to the laws of such jurisdiction. Mutual legal assistance treaties in effect may also apply, depending on the country involved.

37 How is witness and documentary evidence tested up to and during trial? Is cross-examination permitted?

A party may challenge the authenticity and admissibility of documents enclosed by the opposing party as well as comment on their content.

A party may dispute the impartiality of the opposing party's witnesses and request that they be prevented from deposing; if the objection is denied, it may cross-examine them at the evidence production hearing. The party may also object to questions made by the opposing party to witnesses during the deposition if those questions seek to induce an answer, are unrelated to the facts to be addressed by the witness or repeat prior questions that have already been answered.

38 How long do the proceedings typically last, and in what circumstances can they be expedited?

Court proceedings usually take years to unfold, but it is very hard to estimate the time frame as this depends on the speed of the court presiding over the matter, on the submission of objections, on requests for injunction and so forth, and on the extent and complexity of the evidence production phase. On average, a complex commercial dispute could last three to five years at the lower courts, one to two years at the appellate courts and then an additional one to two years at both the Superior Court of Justice and the Supreme Court. Parties have a limited ability to expedite the proceedings, but pursuant to articles 190 and 191 of the 2015 CPC, they may agree upon a procedural timetable and to change or simplify the proceedings, to some extent.

39 What other steps can a party take during proceedings to achieve tactical advantage in a case?

Parties may pursue injunctions and other interim relief – see questions 9 and 11. This includes the request for partial awards and for advance awards on the merits. As for this latter case, in urgent situations where the court finds that the party is likely to prevail eventually, the court may immediately enter an award to grant the party the relief it seeks, sometimes without even hearing the opposing party, and will revisit the matter only afterwards, upon entering its final award following evidence production.

40 If third parties are able to fund the costs of the litigation and pay adverse costs, what impact can this have on the case?

A third party may fund the costs of the dispute, but there is no case law to the effect that such funder should bear adverse costs in case the funded party is defeated. The upside of third-party funding is that it may facilitate access to the judiciary by claimants who are cash-strapped or just want to rationalise their litigation budget; it may also facilitate the taking of complex forensic evidence, which could be very

costly in certain larger disputes. The downside is that it may create economic disparity between the parties: it may encourage claimants to bring and maintain claims that are groundless as a way of pressuring defendants; it may also force the opposing party to overspend during evidence production pursued by the funded party. For further comments on third-party funding, see question 15.

41 How are parallel proceedings dealt with? What steps can a party take to gain a tactical advantage in these circumstances, and may a party bring private prosecutions?

A given act or fact could give rise to civil, administrative, regulatory and criminal liability separately one from the others. This means that in principle administrative authorities, regulatory agencies, criminal courts and civil courts may be reviewing the same matter at the same time, with potentially different results (with the caveat that civil proceedings may be stayed for up to one year if a decision on the merits depends on the existence of a criminal offence being assessed by criminal courts).

A party to a civil proceeding may take actions in the regulatory, administrative and criminal spheres for several tactical reasons: to compensate for a weaker position in the civil proceeding; to seek an expedited ruling that could be argued as a blueprint for the civil court ruling; to disrupt the opposing party's defence strategy and capitalise on mistakes and contradictions; to increase the opposing party's legal costs or shift risk to it; to gain leverage with a view to a future settlement; and so forth.

In very limited cases (eg, defamation, property damage), the aggrieved private party may itself bring criminal charges against the wrongdoer, and it may drop the charges at any moment.

Other than that, however, the parties to the civil proceeding will not equally be parties to the administrative, regulatory or criminal proceedings – those will be official investigations or prosecutions over which the parties will have limited or no control. Accordingly: (i) the party who took action will not have the ability to relinquish such investigation or prosecution; and (ii) a settlement between the parties to the civil proceeding will not protect the party against whom action was taken from the risk of an unfavourable administrative, regulatory or criminal decision.

Trial

42 How is the trial conducted for common types of commercial litigation? How long does the trial typically last?

There is no 'trial' as the term is understood in common-law jurisdictions. An evidence production hearing may or may not be held, and the court may enter its award at the hearing following the parties' oral closing arguments, or it may grant the parties a time frame to file written closing arguments and enter its award thereafter. See question 29.

43 Are jury trials the norm, and can they be denied?

Jury trials are not admissible in commercial and civil disputes in Brazil.

44 How is confidentiality treated? Can all evidence be publicly accessed? How can sensitive commercial information be protected? Is public access granted to the courts?

As a rule, proceedings in Brazil are public. The court has the discretion to order that the records be sealed upon either party's justified request for confidentiality; if the records are not sealed, the party may ask that specific documents enclosed to the records (eg, tax returns, bank statements, trade secrets) be deemed confidential and that access thereto be limited to the parties.

45 How is media interest dealt with? Is the media ever ordered not to report on certain information?

Access to information is a right enshrined in article 5, item XIV of the 1988 Constitution, and the media is free to report on any ongoing public disputes. Theoretically, the media should not be able to obtain information on sealed records, but it is not prevented from reporting thereon if their content is leaked. Courts have, in a few opportunities, forbidden media outlets from reporting on ongoing probes and civil and criminal suits to protect public officials and politicians involved.

Update and trends

Decree Law No. 4,657/1942, which is the basic statute on conflicts of laws (see question 7), was amended in April 2018 to add provisions the purpose of which is to increase certainty and efficiency in the application of public law by administrative and court authorities. Notwithstanding this limited scope, the language of the new provisions does not limit their application to public law disputes, so there is a chance that they may also be applied or at least argued in the context of complex commercial litigation; this could result in civil courts being required to expressly address the practical consequences of rulings with grounds on indeterminate legal principles (eg, good faith). It will be necessary to monitor whether civil courts will apply such provisions in commercial litigation.

Additionally, the Executive branch submitted to the Congress a bill of law in May 2018 to amend the Business Insolvency Act (Law No. 11,101, dated 9 February 2005). The bill contains provisions on cross-border insolvency that could affect the relationship between distressed businesses and their foreign creditors; it also contains provisions that limit creditors' ability to pursue claims against debtors while in-court restructuring proceedings are pending.

46 How are monetary claims valued and proved?

The claimant should, if possible, indicate the exact amount being sought (ie, it should value its monetary claim immediately). If it does, the accuracy of the amount will be one of the aspects of the evidence production phase, typically through expert analysis, and the final award will refer to a specified value. If the claimant is unable to value its monetary claim, then this is a matter of illiquidity and the valuation may be carried out at the evidence production phase or, most likely, may become a standalone procedural phase, liquidation, following a favourable (and illiquid) award. Liquidation proceedings may be drawn out in the context of complex commercial disputes as parties will customarily fight over each component and formula involved in the calculations.

Post-trial

47 How does the court deal with costs? What is the typical structure and length of judgments in complex commercial cases, and are they publicly accessible?

Court costs rarely exceed 100,000 reais; expert fees can be expensive and exceed that amount depending on the complexity of the forensic analysis. The 'loser pays' rules apply, pursuant to which the defeated party must reimburse the prevailing party for all disbursements made in connection with the lawsuit (eg, court costs, expert fees) and pay the attorney's fees to the prevailing party's counsel, ranging from 10 per cent to 20 per cent of the amount in dispute or the amount awarded, as the case may be. If both parties have only prevailed in part, the decision will allocate the economic burden, and the attorney's fees will be owed by both parties without the possibility of set-off.

Decisions will be publicly available provided that the records are not sealed. As for structure and length, see question 29.

48 When can judgments be appealed? How many stages of appeal are there and how long do appeals tend to last?

All final decisions from the lower court may be appealed before the relevant appellate court; the appeal will usually stay the enforcement of the final decisions. Certain interlocutory (interim) decisions may also be appealed, but the defeated party must seek an injunction to stay their immediate enforceability. A party may not lodge a further appeal against the opinion entered by the Court of Appeals to revisit the facts of the matter, but it may lodge an appeal before the Superior Court of Justice (interpretation of federal law) or before the Supreme Court (interpretation of the Constitution). See question 38 on the length of time.

49 How enforceable internationally are judgments from the courts in your jurisdiction?

In principle, decisions entered by Brazilian courts should be enforceable abroad, pursuant to the applicable rules of the jurisdiction in which they will be enforced, as Brazil's civil procedure system abides by internationally adopted principles of due process of law. Enforcement is facilitated whenever a mutual legal assistance treaty or another international cooperation agreement is in place.

50 How do the courts in your jurisdiction support the process of enforcing foreign judgments?

Foreign decisions must be submitted to and reviewed and confirmed (homologated) by the Superior Court of Justice prior to being enforced in Brazil. The Superior Court of Justice's review is limited to formal aspects of the decision (jurisdiction, valid service of process, effectiveness in the country of origin, sworn translation, etc); the merits may not be reviewed, although the foreign decision will not be confirmed if it violates human dignity, Brazilian sovereignty or public policy.

Other considerations

51 Are there any particularly interesting features or tactical advantages of litigating in this country not addressed in any of the previous questions?

Considering that proceedings may take a long time to unfold and interest rates and adjustment for inflation may accrue, the initial amount involved in the claim may increase substantially by the time a final decision is entered. Parties may compare the court-related accruals to then-current market rates and define whether it is in their interest to expedite, settle or hold back the proceedings.

52 Are there any particular disadvantages of litigating in your jurisdiction, whether procedural or pragmatic?

Timing is certainly a huge disadvantage, especially compared to arbitration. Some courts lack the expertise to handle commercial disputes, either because they are not familiar with complex disputes or because they do not understand the inner workings of businesses. Courts also tend to have difficulties understanding and applying foreign law. Finally, defendants may seek to frustrate enforcement by transferring assets in anticipation of an unfavourable ruling, and courts are sometimes too slow or too debtor-friendly to inhibit this conduct.

53 Are there special considerations to be taken into account when defending a claim in your jurisdiction, that have not been addressed in the previous questions?

No.

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