BRAZIL

Global litigation guide

About

Welcome to The Global Litigation Guide (the **"Guide"**) which has been prepared by DLA Piper's civil litigation experts around the world for the purpose of presenting key aspects of civil litigation in jurisdictions in which DLA Piper operates.

For each country, the Guide focuses on the following aspects:

- Overview of court system
- Limitation
- Procedural steps and timing
- Disclosure and discovery
- Default judgment
- Appeals
- Interim relief proceedings
- Prejudgment attachments and freezing
- Costs
- Class actions

This global Guide provides practitioners, in-house counsel and clients with a comparative source of reference that covers some of the intricacies of civil litigation in 30 jurisdictions worldwide. DLA Piper has prepared separate guides that deal with matters that are closely related to civil litigation, such as DLA Piper's guide to Legal Professional Privilege and (coming soon) DLA Piper's guide to Third Party Funding. Criminal or administrative litigation (as well as litigation relating to other specialist areas of law that require different procedures such as tax and employment) are outside the scope of the Guide.

The Guide is not a substitute for legal advice. Should you have a civil claim, or if you would like further information, please contact any of the individuals listed in the Guide.

About DLA Piper

DLA Piper is a global law firm with lawyers located in more than 40 countries throughout the Americas, Europe, the Middle East, Africa and Asia Pacific, positioning us to help clients with their legal needs around the world.

For further information visit www.dlapiper.com.

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Brazil

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Overview of court system

Brazil is a civil law country where, in most cases, codified laws take precedence over judicial decisions. However, over the last 60 years or so, Brazil has instituted several procedures that give greater weight than previously to the normative effect of judicial decisions. The main reason to give judicial decisions such importance is the overwhelming case load in courts and the need to make them more efficient (In fact, the Brazilian Federal Constitution demands a "reasonable duration" of all judicial proceedings - Article 5, LXXVIII, of the Federal Constitution). As a result, the term precedent and even the concept of *stare decisis* (*i.e.*, determining points in litigation according to precedent), have started to appear more frequently in Brazil, in both scholars' opinions and legislated changes enacted in recent years. Brazil has a relatively new system of precedents introduced by the Code of Civil Procedure (Law No 13,105 of March 16, 2015 - CPC). This new system has numerous peculiarities in Brazilian Law. Article 927, for example, states that the judges and courts in Brazil will observe: past decisions from the Federal Supreme Court in constitutional matters; the binding decisions of the Federal Supreme Court; the past decisions by the Superior Court of Justice (Brazil's court of standardization of federal matters); and decisions of highest tier state courts.

Leaving aside special courts covering areas such as military, electoral and labor (which fall outside the scope of this report), the Brazilian civil justice system is structured into two different judicial branches:

- federal courts; and
- the courts organized by each state (state courts).

The jurisdiction of the federal and state courts does not overlap. The jurisdiction of the federal courts will depend on:

- the matter under dispute (*ratione materiae*); and
- the legal nature of each of the parties involved in the litigation *(ratione personae).*

State courts will hear cases that do not fall under the jurisdiction of other courts.

The different federal and state courts and the type of disputes that they have jurisdiction over are as follows.

Federal Low Courts

These courts are scattered over the capitals and major cities of Brazil. In general, these courts have jurisdiction to hear most disputes in which the federal government, federal bodies and agencies and some federal companies take part as plaintiffs, defendants, or intervening parties. Also, these courts have jurisdiction over disputes involving a foreign government or organism and companies or individuals domiciled in Brazil or disputes involving one of the referred foreign entities and a Brazilian city government. The Federal Low Courts are also competent to enforce foreign awards after the *exequatur* process before the Superior Court of Justice.

State Low Courts

Each state is empowered to organize its own Judiciary Branch. These courts are spread almost all over the country and have jurisdiction to rule on most disputes between private parties. In addition, these State Low Courts have jurisdiction over disputes based on private law or state and municipal environmental laws, disputes involving the government of the respective state, as well as state-owned companies

(like Petrobras), and cities' governments and city-owned companies. Furthermore, there are low courts specialized in bankruptcy (and even in case a federal body takes part of the bankruptcy/rehabilitation proceedings, for instance, as a creditor, this will not result in jurisdiction of the federal courts in detriment of the particular state bankruptcy court), and intellectual property disputes.

Federal High Courts

Their territorial jurisdiction is divided into six different regions (each covering two or more states). In most cases, these courts rule the appeals filed in the lawsuits started in the Federal Low courts located in the applicable region.

State High Courts

Generally, these High Courts rule over the appeals filed in lawsuits started at the State Low Courts where the respective High Court is located.

Superior Court of Justice

This federal court is located in Brasilia, the country's capital. One of the main roles of this court is to rule over appeals filed against decisions rendered either by a Federal or State High Court when:

- such decisions contravene a treaty, convention or federal law; or
- upon the analysis of a given treaty, convention or federal law, such decisions conflict with precedents issued by the Supreme Court of Justice or the Supreme Court on the same matter.

It is also the court responsible to grant the *exequatur* of foreign decisions, foreign arbitral awards or foreign judgments in Brazil. An *exequatur* is a precondition that permits the enforcement of a foreign decision, judgment or arbitral award within Brazilian territory.

Supreme Court

It is the last level of the Brazilian judiciary and, like the Superior Court of Justice, is located in Brasilia. One of the main roles of this federal court is to rule over appeals against decisions rendered by a Federal or a State High Court or, even, decisions rendered by the Superior Court of Justice, when these decisions:

- directly contravene the Brazilian Constitution (the violation must have "general repercussions" in order to be analyzed by the Supreme Court, meaning that the issue discussed in the appeal needs to be relevant from an economic, political, social or legal standpoint and that it transcends the interests of the parties involved);
- declare a given treaty, convention or federal law as unconstitutional; or
- relate to a law or ordinance deemed valid and issued by the relevant authority in one of the Brazilian states or cities in detriment to the Brazilian Constitution.

Further, Brazil does not have a separate administrative jurisdiction, which means that the judicial branch including the federal and state courts have jurisdiction over all disputes, including disputes involving the executive branch or state-owned entities.

Court proceedings are generally public, except where court proceedings are to be confidential, namely cases involving:

- public or social interest;
- family law;
- information protected by the right to privacy; and
- agreements with an arbitration clause.

Limitation

The general statutory limitation period for filing civil claims in Brazil is ten years from the date when the cause of action arose but such term is shorter for specific types of claim (e.g. the limitation period for bringing a tort claim is three years). Under the Superior Court of Justice's recent precedents, the applicable limitation period for damages claims under contractual relationships is ten years.

Procedural steps and timing

Only the federal government may legislate on civil and commercial procedures. The Code of Civil Procedure (CPC), enacted in 2015, is applicable to civil litigation proceedings and other matters for which no specific procedural rules exist. The Brazilian Federal Constitution limits trial by jury to criminal cases involving homicide.

As a general rule, representation by an attorney in civil proceedings is mandatory in Brazil. The only exception relates to lawsuits filed with the Small Claim Courts by individuals seeking to recover:

- in State Courts, an amount below the equivalent of 20 times the minimum wage; or
- in Federal Courts, an amount below the equivalent of 30 times the minimum wage.

The current minimum wage in Brazil (2023) is BRL1,320.00 (approximately USD272.24).

Civil lawsuits are initiated when the plaintiff files a petition with the relevant court. The plaintiff must serve the respondent with the filed petition and such service must take place at least 20 business days prior to a mandatory conciliation hearing, which the respondent is required to attend. This mandatory hearing:

- will take place before the court; and
- shall be scheduled at least 30 days in advance.

Should the parties fail to reach an agreement at the mandatory hearing, the respondent must file its defense within 15 business days of the date of the conciliatory hearing.

The judge may discharge the parties of their obligation to attend the mandatory conciliatory hearing. If this happens, the respondent must file a defense within 15 business days after it is served with the notice of the parties being discharged of the obligation to attend the mandatory conciliatory hearing. In cases where there is more than one respondent, the beginning of such term is the day after the last respondent is served.

After the respondent files a defense, the plaintiff has 15 business days to reply to the respondent's allegations.

The parties have five business days, counting from the day of the decision granting them the opportunity to present evidence, to inform the court of the evidence they wish to rely on. Timeframes for this evidence presentation phase may vary depending on the complexity of the matter.

Finally, after the evidence presentation phase, the judge may grant the parties the opportunity to file their closing arguments before rendering a judgment.

The usual total timeframe for a lawsuit to be ruled upon depends mainly on the complexity of the case, the relevant court competent for judging the case, the evidence the parties want to present and the number of appeals the parties decide to file. It may range from five months (in lawsuits in which it is not necessary to present any evidence) to three years, in accordance with the table below:

INITIAL TERM	FINAL TERM	NUMBER OF DAYS/MONTHS/ YEARS
Service	Mandatory conciliatory hearing	40 business days
Mandatory conciliatory hearing	Defense	15 business days
Defense	Decision granting opportunity for reply	1 month
Decision granting an opportunity for reply	Reply	15 business days
Reply	Decision granting opportunity for requesting evidence production	1-2 months

Decision granting opportunity for requesting evidence production	Petition requesting evidence production	5 business days
Petition requesting evidence production	Beginning of evidence production phase	1-2 months
Beginning of evidence production phase	Closing of evidence production phase	1-2 years
Closing of evidence production phase	Decision granting opportunity for closing arguments	1-2 months
Decision granting opportunity for closing arguments	Closing arguments	15 business days
Closing arguments	Judgment	1-2 months

Disclosure and discovery

Under the Brazilian Code of Civil Procedure, parties must ordinarily rely on their own evidence. However, a party can request the disclosure of documents or objects if there are grounds for believing that documents are in the other party's possession and that such evidence is relevant to the case. The other party must be granted five business days to reply to such requests. Also, where the court considers the analysis of a document or object necessary for reaching a decision, it may order the party in possession of such evidence to submit it for analysis.

If a relevant object(s) or document(s) is in possession of a third party, he/she/it may be ordered to present it to court. Furthermore, if a party or the third party refuses to comply with the disclosure order without an acceptable reason, the court may issue a search and seizure order.

Default judgment

Default judgments can be applied for in proceedings in any court when a respondent does not file a defense within the relevant time period (as long as the respondent has been properly served). As a result of such failure, and except in cases such as those specified below, the allegations formulated by the plaintiff will be presumed to be true. The judge will continue with the proceedings on that basis, consider the merits of the plaintiff's claims, and ordinarily rule in the plaintiff's favor provided that the plaintiff discharges its burden of proof.

The presumption that the plaintiff's allegations are true does not arise every time that the respondent has been duly served but fails to file a defense. For example, such presumption will not arise when the lawsuit deals with personal rights (such as the right to live) or when the plaintiff has not presented essential documents and information to persuade the judge on the strength of its claims. In the latter case, the judge will order the plaintiff to specify the evidence it intends to present.

On the other hand, even when a default judgment has been granted, the respondent can object to the default judgment before the court that has granted it. Such objection will be made when there are issues related to the service of process, which can cause the entire lawsuit to be nullified from its beginning.

Also, the respondent in default is allowed to participate in the lawsuit as long as it does not seek to modify measures that have already been adopted during the proceedings. For example, the respondent will not be able to file a defense once default judgment has been granted but will be able to present further evidence to challenge plaintiffs' allegations.

Appeals

In Brazil, parties may file an appeal against interlocutory decisions and final judgments. The term for the parties to file any appeal is 15 business days from the date the judgment is notified to the parties (with the exception of a motion for clarification, which must be made within 5 business days). After an appeal is filed, the opposing party has 15 business days to file a reply. Although it is very difficult to predict the duration of an appeal in Brazil, the average time for the Federal or State High Courts to render judgments varies from 12 to 30 months.

Appeals before a State High Court are decided by a panel of three judges (in some cases it is possible for a single judge acting alone to decide the case). Each state has a High Court that will rule the appeals against decisions issued by the State Low Courts. Appeals filed against decisions issued by Federal Low Courts shall be decided by the Federal High Courts.

As noted in Overview of the court system, the Superior Court of Justice has jurisdiction to rule over appeals filed against decisions rendered either by a Federal or State High Court when:

- such decisions contravene a treaty, convention or federal law; or upon the analysis of a given treaty, convention or federal law, such decisions conflict with precedents from the Superior Court of Justice or the Supreme Court on the same matter.

The Supreme Court can rule over appeals against decisions rendered by a Federal or a State High Court or, even, decisions rendered by the Superior Court of Justice, when these decisions:

- directly contravene the Brazilian Constitution (the violation must have "general repercussions" in order to be analyzed by the Supreme Court, meaning that the issue discussed in the appeal needs to be relevant from an economic, political, social or legal standpoint and that it transcends the interests of the parties involved);
- declare a given treaty, convention or federal law as unconstitutional; and
- relate to a law or ordinance deemed valid and issued by the relevant authority in one of the Brazilian states or cities.

The duration of an appeal in the Brazilian High Courts (Federal or State) depends mainly on the complexity of the matter under dispute. The average duration of a High Court appeal is 36 months.

Interim relief proceedings

In Brazil, the Courts are entitled to grant two different kinds of interim relief measures:

- Urgent interim relief, which may be granted in cases where a party claims that their right is at risk of being irretrievably lost before the final award is given.
- Evident interim relief, which may be granted even when there is no immediate risk, but the right of the party seeking relief is substantially plausible and duly evidenced.

Thus, the Brazilian Code of Civil Procedure allows the parties to request interim relief measures where:

- there is enough evidence of the certainty of the plaintiff's right (Evident); or
- it is necessary to avoid irreparable harm that a party may suffer should the relief not be granted before the end of the proceedings (Urgent).

Interim relief measures can be sought before proceedings have commenced, during the proceedings and after it, while pending execution of the judgment. In both cases, the alleged right may be challenged at a later stage in the proceedings.

The most common interim reliefs in civil litigation cases are:

- injunctions, requiring a party to do or not do a particular act;
- suspension of legal effect of certain acts; and
- attachment orders to preserve assets (see further details in Prejudgment attachments and freezing orders).

The suspension of legal effect of certain acts also means the temporary suspension of judicial acts (e.g. releasing one of the parties from the terms of an agreement or excluding a debtor's name from the data base of credit protection agencies). In such cases, the targeted acts will not produce effects so long as the interim orders remain valid. However, if a lawsuit is dismissed or rejected, the legal effect of the act will resume.

It is possible for urgent injunction applications to be heard by the judge *inaudita altera pars* or *ex parte*, without the opposing party's involvement. In urgent injunction applications, neither the opposing party nor its attorney is granted the opportunity to file a defense. There is no provision in the Brazilian Code of Civil Procedure specifying the term within which a judge should analyze the request for an

urgent injunction *inaudita altera pars*, but it usually takes no longer than 48 hours. Whenever a judge grants an interim relief measure *inaudita altera pars*, the party against whom the decision was issued can file an appeal within 15 business days of the notification of the judgment to the parties.

The party who requests an urgent interim relief shall be held liable for damages caused to the other party if:

- the final judgment rejects the plaintiff's claims;
- theplaintiff does not provide the necessary means to serve the respondent within 5 business days of the granting of the pre-action interim relief;
- the relief becomes ineffective; or
- the judge accepts the respondent's allegation of statutory limitation period for filing the lawsuit.

As a general rule, parties seeking interim relief measures must be represented by an attorney, except when such measures are brought by an individual before a Small Claims Court.

Prejudgment attachments and freezing orders

Prejudgment orders and freezing injunctions are inserted in the category of interim reliefs and, therefore, the principles noted in Interim relief proceedings apply to such orders.

The Brazilian Code of Civil Procedure allows the parties to request prejudgment attachments and freezing orders as provisional remedies before:

- the court that will have jurisdiction to hear the merits of the main claim if these measures are sought pre-action; or
- the court that is hearing the main claim if the main proceedings are pending.

For a prejudgment attachment/freezing order to be granted, the plaintiff must include in its application:

- a brief statement of:
  - the right which the plaintiff is seeking to protect; and
  - the risk of loss to which the plaintiff is exposed; and
- the irreparable harm that the plaintiff will suffer if the relief sought is not granted.

Following the plaintiff's filing of an application seeking an attachment/freezing order, the respondent will be given 5 business days from the date when he was served to file a defense and specify the evidence that he/she intends to present. If a defense is not filed within this period, the court will:

- presume that the facts alleged by the plaintiff are true; and
- render a final decision on the interim relief application within 5 business days from the expiry of the term given to the respondent to file its defense.

If a defense is filed, the judge will either:

- ask the parties to present their evidence requests; or
- render a final decision on the interim relief request. There is no timeframe regarding this decision.

Where a prejudgment attachment/freezing order has been granted, the plaintiff must file a claim on the merits within a maximum of 30 days after the provisional remedy has been enforced. Thereafter, the lawsuit follows the ordinary procedural steps, as described in Section: Procedural steps and timing above.

As noted in Interim relief proceedings, where the plaintiff also argues that the prejudgment attachment/freezing order must be granted on an urgent basis, the provisional remedy can be enforced by the judge *inaudita altera pars* or *ex parte*. In this case, neither the opposing party nor its attorney is granted the opportunity to file a defense. There is no provision in the Brazilian Code of Civil Procedure specifying

the term within which a judge should analyze the request for an urgent injunction *inaudita altera pars*, but it usually takes no longer than 48 hours. Whenever a judge grants a prejudgment attachment or a freezing order (or indeed any other kind of interim measure) *inaudita altera pars*, the party against whom the decision was issued can file an appeal within 15 business days.

If granted, assets will be attached in a specific order of priority:

- money, in cash or in a deposit or invested at a financial institution;
- Federal, State and Federal District government bonds listed on the market;
- bonds and securities listed on the market;
- land vehicles;
- real estate property;
- personal property in general;
- livestock;
- vessels and aircraft;
- membership interests and shares in partnerships and companies;
- percentage of the revenues of companies;
- precious stones and metals;
- rights of acquisition from a promise of sale or a fiduciary sale; and
- other rights.

If the attachment causes any damages to the respondent, the respondent is entitled to request the competent judge to either:

- revoke the attachment; or
- substitute the asset attached.

Frequently, respondents allege that the assets cannot be attached because they are crucial to their survival, for example, their salary or household appliances.

Creditors can be held liable for damages caused to the respondent when the attachment is based on an urgent request and if:

- the final judgment is unfavorable to the party who requested the attachment;
- the plaintiff does not provide the necessary measures to serve the respondent with the lawsuit within five business days of the granting of the pre-action attachment/freezing order;
- the attachment becomes ineffective; or
- the judge accepts the respondent's allegation of statutory limitation period for filing the lawsuit.

Costs

In Brazil, the unsuccessful party will be responsible for paying the litigation costs of the successful party. These litigation costs include:

- the judicial fees; and
- the other party's attorney's fees.

The judicial fees vary in each state. In civil litigation cases, attorney's fees will be fixed at minimum 10% and maximum 20% of the amount awarded in the judgment, the economic advantage of the party or, if it is not possible to measure it, of the total amount in dispute. Even though it is not common, the fees can be fixed at a lower rate in certain situations (for example, when the claim is dismissed).

When awarding attorney's fees, the judge will consider:

- the length of the proceedings;
- the nature of the claim;
- the professional attention to the case;
- the place where the service was performed; and
- the work provided by the lawyers.

The criteria for deciding the amount to be paid for attorney's fees comprise subjective elements, including the degree of professional attention to the case. In general terms, it is possible to consider that an attorney who has adopted a proactive approach in the lawsuit (e.g. the attorney has complied with the judicial requests in a timely manner, provided the necessary documents and evidence in order to guarantee a better quality of judicial decisions and has cooperated with the opposing party's attorney) is considered to have a high degree of attention to the case.

Finally, if the party is only partially successful, the courts may order a different percentage of the amount under dispute to be paid to each attorney based on the parties' relative success or failure in the lawsuit.

Class actions

Federal Law no. 7.347/1985 provides legal grounds for class actions in Brazil. Despite the fact that class actions are not limited to disputes involving consumer protection, the Brazilian Consumer's Code (Law no. 8,078/90) contains further supplementary provisions regarding class actions. Brazilian scholars make reference to both laws as the class action system.

The class action system does not generally relate to large commercial disputes, but to actions brought to protect selected social assets, namely:

- the environment;
- consumers;
- rights of artistic, aesthetic, historic, touristic and landscape value;
- diffuse and collective rights;
- economic and urban orders;
- honor and dignity of racial, ethnic and religious groups; and
- public and social assets.

Only a limited number of institutions are allowed to bring class actions on behalf of a group. These institutions include:

- public attorneys;
- the office of the public defender;
- federal government, states, and municipalities;
- autonomous federal government agencies or federal public companies; and
- specific non-governmental associations.

For a non-governmental association to be able to file a class action, it must be active for more than one year. Non-governmental associations also only have standing to sue in cases involving infringements of rights which are within the scope of their activities. For instance, an association created for protecting the environment will only be able to file a class action to request that a company refrains from polluting a river, but not to protect consumers.

Further, whenever the respondent is held liable in a class action and is ordered to pay the amounts owed under the judgment, the amount shall not be paid directly to the plaintiff, but to a public fund that is used to protect collective rights.

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