

The Foundation of the International Association of Defense Counsel
SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE

*This document is a resource tool only. The information was compiled in 2014.
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

BRAZIL

Responses submitted by:

Name: Bruno D. Chiaradia

Law Firm/Company: Bernardi & Schnapp Advogados

Location: São Paulo, Brazil

1. Would your jurisdiction be described as a common law or civil code jurisdiction?

Brazil is a civil code jurisdiction based on the Roman-Germanic law principals.

Recent Amendments to the Constitution of Brazil and changes in the Civil Procedure Code created the possibility of the Superior Courts rendering decisions with power to bind other cases with the same subject in debate. These binding decisions may arise only from relevant processes specifically appointed by the Superior Courts.

Despite the influence of some specific binding precedents for future decisions, in general all the matters are decided case-by-case and the written laws must be observed and applied – what keeps Brazil in the civil code system.

2. What method of adjudication is used (adversarial, inquisitorial, other or hybrid)?

Brazilian law does not clearly define the method. Features of both can be found in the Brazilian procedures, but considering the power that the judges undertake to render some decisions on how to address the proofs the Inquisitorial Adjudication is currently the most accurate definition.

3. What are the qualifications of the adjudicator (judge – elected, appointed; jury; other)?

Taking into consideration an ordinary legal procedure, the Brazilian Courts System can be divided in three levels for describing the qualifications of the adjudicators, as follows:

i. First Instance Courts

In Brazil judges are selected by means of a public exam. Provisions of the Constitution of Brazil set forth some prior requirements for candidates in order to apply for the exam, such as graduation in law school and evidence of at least a three years period of legal practice. The National Justice Council (“Conselho Nacional de Justiça – CNJ”) - a board created also by an amendment to the Constitution of Brazil provides the rules on the management of the public exam, from the opening program up to the outcome of the tests. After the outcome, the approved candidates are subject to a program about practical activities for a final assessment before they start working at the first instance Courts.

The Foundation of the International Association of Defense Counsel
SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE

*This document is a resource tool only. The information was compiled in 2014.
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

BRAZIL

ii. Courts of Appeals

The first instance judges can be promoted to the Courts of Appeals based on seniority and merit.

One fifth of the judges' positions of the Courts of Appeals are destined to Public Prosecutors, with over ten years of work and lawyers with notorious legal knowledge and exemplary reputation also with over ten years of professional activity, indicated by the responsible bodies of their working classes.

iii. Superior Courts (Supreme Court and Superior Court of Justice)

Adjudicators of the Supreme Court and Superior Court of Justice are nominated by the President of the Republic subject to an approval by the majority of the Senate at the Congress. Adjudicators of the Supreme Court are not necessarily graduated in law, but must have "notable legal knowledge and soundness of character" according to the federal Constitution.

**There is no jury for civil cases in Brazil*

4. Are there any procedures available for specialized courts (i.e. commercial court, employment, environmental)?

Yes, there are specialized courts, e.g., Commercial Courts, Employment Courts, Insolvency and Restructuring Courts, Environmental Courts, Family Courts, Juvenile Courts etc.

The procedures of each specialized courts are governed by specific laws. However, the Civil Procedure Code and Civil Code are applicable to all of them when it does not have a conflict of provisions with the mentioned specific laws.

5. Is arbitration an option and when? If so, what rules are typically used?

Arbitration is an option in Brazil when it is contractually agreed by and between the parties. The procedures used are provided by the law 9.307 of 1996. Basically, the parties agree and indicate a Board/Association or any other similar entity to decide about contractual conflicts that they might have in the future. The parties may determine certain rules to be applied and/or refer it to the organization of the Board/Association/Entity appointed by them in the contract.

6. Will the Courts enforce an arbitration agreement to preclude other forms of litigation?

The courts may enforce an arbitration agreement to preclude other forms of litigation, if it comes from a valid contract according to the rules mentioned in the question 5.

The Foundation of the International Association of Defense Counsel
SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE

*This document is a resource tool only. The information was compiled in 2014.
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

BRAZIL

7. For Court proceedings, is mediation mandatory, either before or after filing of a claim or complaint?

According to the Civil Procedure Code (articles 329, 330, 331) only after an action is filed in Court the judge will analyze the case and decide if a mediation hearing is necessary or not. Please see below a summary of the proceedings in the question 19.

The mediation is mandatory in some special cases, i.e., “summary procedures” and processes before the Small Claims Courts.

8. What is the process for pre-hearing fact discovery (if any)?

There is no discovery procedure under the Brazilian Civil Law. Hearings take place and other evidences are presented by the parties in Court during the lawsuit proceedings.

(a) Are there provisions for mandatory document disclosures?

There are no provisions for the parties to disclose specific documents. For starting a lawsuit, the plaintiff has to file an initial complaint in Court with all documents considered relevant to the facts alleged. Once the defendant is served with the claim, it must also present all necessary documents together with a written defense.

Further documents may be accepted by the judge subsequently only if the plaintiff and the defendant are able to prove that they could not have access to them when they filed their first petitions (initial complaint or defense) or if such documents are necessary due to new facts argued in the case.

(b) Is there provision for oral examinations of the parties or others?

There are no pre-hearings according to Civil Procedure Code. The hearings are scheduled in the course of the lawsuits by the judges for mediation (settlement attempt) and also for oral examinations of the parties and witnesses.

(c) Are there limits on the length of oral examinations?

No, there are no limits on the length of each oral examination in Court proceedings.

(d) Are witness statements or summaries to be provided before the hearing?

No. Depositions are exclusively provided orally in front of the judge of Civil Court.

9. What is the process for pre-hearing expert disclosure (if any)?

There is no pre-hearing expert disclosure in Brazil. In the course of the lawsuit, the court expert provides a report with his

The Foundation of the International Association of Defense Counsel
SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE

*This document is a resource tool only. The information was compiled in 2014.
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

BRAZIL

conclusions which is subject to the parties assistants (also experts) for a response. Afterwards the parties can request a Court order for the expert to provide further clarifications in writing and/or during a hearing.

(a) Are expert reports or written summaries required to be exchanged?

Experts are not required to exchange their reports, but usually before a final conclusion they exchange technical information. The court expert sometimes releases a version of the report to the experts' assistants of the parties before filing a final version in Court, but it depends on the case. The release is neither required nor forbidden.

(b) Are the parties entitled to conduct a pre-hearing oral examination of opposing experts?

As previously mentioned, there is no pre-hearing of the expert. Only after the expert report is filed in Court, the judge will conduct the hearing. The parties are allowed to address questions to the expert under judges' conduction.

(c) Are there provisions requiring experts to meet and narrow issues before the hearing?

No. There is no provision in this sense in the Civil Procedure Code. The judge appoints the experts considering their expertise/capacity to present a technical and accurate report about the subject of the dispute.

10. Are there other notable discovery rules?

N.A.

11. Is there a prehearing conference (for trial management, settlement or other purposes)? Who conducts it? How long before the hearing?

There is no prehearing conference according to the Civil Procedure Code of Brazil. A similar procedure can be found at the Small Claims Court, but it is indeed a Court process, not a pre-conference. In this procedure, a Conciliator (not qualified as a judge) may conduct the first hearing in order to help the parties settle the case. If a settlement is reached, the act must be ratified by the judge. If settlement is not reached, a hearing with the judge should occur immediately, but in general it is scheduled for another date.

12. Can a prehearing motion for judgment be brought? If so, what is the threshold test for judgment?

N.A.

The Foundation of the International Association of Defense Counsel
SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE

*This document is a resource tool only. The information was compiled in 2014.
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

BRAZIL

13. Is there a process for obtaining pre-hearing rulings with respect to evidence admissibility including admissibility of expert testimony? What is the process and when does it occur?

There is no pre-process or pre-hearing with respect to evidence admissibility.

Actually, in Brazil there is an action with the specific purpose of producing certain evidences, such as depositions and expert examinations, but, again, it is a Court proceeding conducted by the judge.

The process is named “*produção antecipada de provas*” (*action for anticipation of evidence*) in accordance with the articles 846 to 851 of the Civil Procedure Code and it occurs in case of urgency, such as a potential perishing or disappearance of evidences.

14. What is the standard for admissibility of expert evidence?

The admissibility is a matter of judge’s discretion. The parties may disagree with judge’s decision in this regard and appeal.

15. Does the Court have the power to appoint its own experts? Under what circumstances and what type?

Experts are appointed by the judges in all circumstances.

16. Does your jurisdiction protect privilege? If so, what privileges are protected from disclosure (attorney client / legal advice; documents prepared in anticipation of litigation; settlement discussions; other)?

According to the Brazilian Bar Association Statute and the Ethics Code, the attorneys have the right of inviolability of their offices, their tools of work, written, electronic, telephonic and telematics mails, once it are related to their work.

Privileged and confidential information are inherent in the profession of the lawyers. Only in case of a threat to life, honor, or when the lawyers are confronted by a client may they reveal secret information limited to the facts of the case.

The lawyers should maintain confidentiality even in court depositions and shall refuse to provide evidence in a process where they are working or may work in the future, or about a fact related to a person for whom they had been a lawyer, even if authorized or requested by the constituent.

Privileged information is used within the limits of the defense. It is protected by the Constitution of Brazil and by the rules mentioned above. The attorneys may reveal only what is authorized by their client.

The Foundation of the International Association of Defense Counsel
SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE

*This document is a resource tool only. The information was compiled in 2014.
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

BRAZIL

17. If privilege is not protected, are there other protections from disclosure (i.e. privacy) that could prevent disclosure of otherwise privileged information, and what is the basis for those protections?

The judge can determine that certain evidences/documents must be maintained in privacy, upon the request of the parties, e.g., when they are related to business or certain private information of the party – article 363 Civil Procedure Code.

18. Who determines privilege disputes, or disputes with respect to other forms of protection described in 17 above?

Please see previous answer.

19. Briefly describe the trial process?

First of all, in Brazil we do not have an identical concept of what is a “trial” in other countries, mainly where common law is applied.

According to the Civil Procedure Code of Brazil, the Court proceedings take place as summarized below:

Taking the ordinary procedure as the most common example, a lawsuit is commenced by the plaintiff with a written complaint filed in Court and the defendant being served to present a written defense in 15 days. Both parties have to present all arguments against each other and attach to the files all documents that they have in their possession at these very first moments (complaint and defense). The judge then schedules a hearing aiming at conciliation between the parties. If a settlement agreement is not reached, the judge will render a decision about the preliminary issues (those issues are related to formalities of the lawsuit – e.g. statutes of limitation, lack of standing to sue etc). If one of the parties does not meet a preliminary formality, the case is closed by the judge. The defeated party may appeal.

If the parties meet all formalities, the judge will determine further evidences to be produced, i.e., expert examination and hearing for deposition of the parties, the witnesses and the experts. After all evidences are gathered by the judge, he receives the files for rendering a decision.

(a) Are there opening submissions, in what form and of what length?

Opening submissions are allowed only for judgments at the appeal levels according to the article 565 of the Civil Procedure Code. Submissions are presented by means of oral statements and the length varies according to the internal rules of each Court of Appeals.

The Foundation of the International Association of Defense Counsel
SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE

*This document is a resource tool only. The information was compiled in 2014.
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

BRAZIL

(b) *What is the order of presentation of witnesses?*

First the witnesses appointed by the plaintiff are heard, and then the ones named by the defendant according to the article 413 of the Civil Procedure Code.

(c) *Who conducts examination and in what order?*

The examination is conducted by the judge, who addresses the first questions, then the party who appointed the witness and finally the opposing party.

(d) *What is the process for closing submissions?*

After the deposition of the parties, the attorneys will present the closing oral arguments. These oral arguments can be substituted by the presentation of final arguments in writing in a date to be set by the judge, which occurs with the majority of the cases.

20. Please identify any other notable trial procedures.

In a case where final oral arguments are presented during the hearing, the judge may immediately render a merit decision on the case or do it within 10 days according to the Civil Procedure Code.

21. Who bears the burden of proof of liability? Causation? Damages? What is the standard of proof for each?

Following the Civil Procedure Code, the plaintiff bears the burden of proof of liability, causation and damages. Then the defendant bears the burden of proof to contest the facts argued in the complaint of the plaintiff. In cases ruled under the Consumer Code the burden of proof can be totally reverted to the defendant (as supplier) by the judge in favor of plaintiff (as consumer) when the consumer is considered a weaker party under a technical, legal or economical perspective.

22. What heads of damage are recoverable (compensatory, pre-judgment interest, punitive damages, other)?

Any pecuniary and non-pecuniary damage is recoverable according to the Civil Code. Some examples are: moral damages (similar to “pain and suffering”), loss of profits, aesthetical damages, allowance for injury etc. Punitive damages are not applied according to our Civil Code.

The Foundation of the International Association of Defense Counsel
SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE

*This document is a resource tool only. The information was compiled in 2014.
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

BRAZIL

23. If punitive damages are available, what is the threshold for recovery, and range of awards?

N.A.

24. Are there time limits for bringing claims? Responding to claims? Please describe.

There are several time limits for bringing claims as set forth in the Civil Code and also in some specific Laws (statute of limitations). When there are no specific time limits for certain claims, then a general 10 years period is applied.

The same rationale is applied to time limits for the responses, but they are shorter considering that a lawsuit was already commenced. For the ordinary matters it must be 15 days counted from the date when the proof of service is attached to the lawsuit.

25. What are the requirements to establish jurisdiction over a foreign defendant in your court? Can a foreign defendant request that the court decline jurisdiction on the basis that there is a more convenient forum?

The general rule to establish jurisdiction of any Court is the domicile of the defendant. The Court of the defendant's domicile has jurisdiction over the case. Foreign persons or legal entities can file actions in Brazil regardless of their domicile – being the domicile of the defendant, as a first requirement, the reference for a complaint.

There are several other rules to establish jurisdiction, but for very specific situations. As an example, the jurisdiction for actions having a collateral of a real estate in debate is of the Court where the property subject of the guarantee is located.

Also, an alimony claim must be filed in the Court of the domicile of the spouse who receives the benefit from the other – according to the Civil Procedure Code.

The defendant may challenge the jurisdiction chosen by the plaintiff by filing a *forum non conveniens* motion based on the Civil Procedure Code.

26. Are there procedures for a defendant to bring other potentially responsible parties into the proceeding? Briefly describe.

Yes, there are three claims for the defendant to implead a third party into the proceeding, as follows:

“*Nomeação à Autoria*”: if the defendant is in the possession of an asset owned by other person, the defendant can bring to the lawsuit the owner of the property.

The Foundation of the International Association of Defense Counsel
SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE

*This document is a resource tool only. The information was compiled in 2014.
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

BRAZIL

“*Denúnciação da Lide*”: in the majority of the cases it is a procedure used for bringing to the lawsuit a third party responsible for the compensation claimed by the plaintiff (based on a contract or based on law).

“*Chamamento ao Processo*”: this is procedure used by a defendant in order to implead third parties severally and jointly responsible for the facts discussed in the claim.

27. Are legal costs recoverable by either party? If so, under what circumstances, and how is the amount calculated? (i.e. is it a loser pays costs system).

Yes, loser party pays all expenses of the lawsuit (e. g. court costs, expenses with experts and legal costs). The amount of Court Costs is calculated based on the rules of each State of the country.

The legal costs are destined to the attorney of the winner party (it is a cost fixed by the judge - not a contractual fee) and is calculated from 10% to 20% in cases of pecuniary condemnation. When pecuniary benefits are not measurable in the decision, legal costs are discretionally fixed by the judge considering the professional care of the attorney, the place where the attorney performed the services, the nature/importance of the case and the timeframe demanded for the attorney’s work.

28. Are contingency fees allowed?

Yes, contingency fees are allowed.

29. Is third party funding of claims permitted? Under what circumstances?

There is no rule about this subject in Brazil. In principal, it is not forbidden once it is agreed by and between the party and the third-party under the limits of the law.

30. Are class or multi-party actions allowed? Under what circumstances? For what types of claims?

Yes, there is a special law (Nº 7.347/85) which governs class actions in Brazil.

According to Law Nº 7.347/85 class actions should be brought to avoid damage and protect the environment, the consumer, the properties and rights of artistic, aesthetic, historic, touristic and landscape. Consumer Code ratifies the possibility of class actions for consumer matters.

The class action can be filed by the Public Attorneys, the Public Defense, the Federal Government, the States, the Federal

The Foundation of the International Association of Defense Counsel
SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE

*This document is a resource tool only. The information was compiled in 2014.
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

BRAZIL

District and Municipalities; Government agencies, Companies controlled by the government, Foundations, Public-Private companies, and associations duly registered at least one year prior to the class action.

31. Can claims be commenced by a consumers association or other representative organization? Under what circumstances?

Please see the response above.

32. On average, how long does it take to get to trial/final hearing, and what factors can affect that?

At first instance, which is the level that the hearings occur, it depends on the specific Civil Courts location, but it is possible to estimate a timeframe from 1 year to 3 years, so that the average would be one year and a half. Some factors that may affect and cause delays are the number of defendants to be served, expert examinations (that may occur or not), incidental measures that suspend the lawsuit, e.g. a FNC motion.

33. Is an appeal process available (distinguish between final and interlocutory/procedural orders as needed)? Who hears the appeal? How are they appointed? What are their qualifications?

The party that receives an unfavorable final decision or an interlocutory order is entitled to appeal. In case of a final decision, the party has 15 days in the ordinary proceedings to file an appeal to the Court of Appeals according to the Civil Procedure Code. A Panel of three judges will render a judgment on the appeal.

There are several chambers of judges in each Court of Appeals. The appeal is randomly directed to one of the chambers specialized on the matter in debate for judgment. After the judgment of the Court of Appeals, the losing party may appeal to the Superior Courts - Superior Court of Justice and Supreme Court. The appeal to the Superior Court of Justice is the first to be decided and if the Court of Appeals decision is maintained, then the appeal to the Supreme Court is subject to judgment. At the Superior Courts, the appeal will be decided by a panel of 3 to 5 judges (Ministers). The appeals at the Superior Courts are also randomly distributed to one of the boards specialized on the matter in debate.

For the interlocutory orders, the party may file an appeal (“interlocutory appeal”) that is attached to the files of the lawsuit and is decided by the Court of Appeals as a preliminary argument of a future appeal on the merits, if the case. However, in the majority of the cases an interlocutory appeal is filed directly in the Court of Appeals and it will follow a similar proceeding as above described for an appeal against a final decision.

The Foundation of the International Association of Defense Counsel
SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE

*This document is a resource tool only. The information was compiled in 2014.
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

BRAZIL

34. Are hearing rooms available for electronic trials or appeals (i.e. where documents and transcripts are presented on computer monitors; witnesses can testify by video conference)?

The law n° 11.419/06 sets forth general proceedings for electronic processes. From a practical stand point, the electronic lawsuits are being rapidly implemented by the civil courts all over the country. Hearing rooms for electronic trial and appeals have not been provided yet. Some Courts are equipped with cameras only to broadcast judgments.

Motions, petitions, evidences and the whole files of lawsuits are being turned into electronic format even more frequently nowadays.

In some criminal matters, there are depositions by video conference.

35. What is the practice regarding the use of graphics, computer animation, power point and the like, in trials? In appeals?

Normally those evidences are recorded in CD-ROM, SD card, USB drive or other types of portable devices and presented in Court.

36. Will the lawyer at trial be the same as the one responsible for pre-trial procedures? Is there a solicitor / barrister distinction?

As previously mentioned, in Brazil the concept of trial is not the same as is in the other countries. Anyway, in general there is no obligation that the same lawyer becomes responsible for future proceedings because he/she participated in any other development of the process.

There is no distinction between a solicitor / barrister.

37. What are the contributory negligence laws in your jurisdiction? Is there a comparative fault assessment, joint and several or proportionate liability among tortfeasors? Does a plaintiff's negligence reduce or eliminate liability of defendants named in the litigation?

The Civil Code sets forth that all tortfeasors are jointly and severally liable before the plaintiff (victim). Therefore, the plaintiff is entitled to go after any of the tortfeasors to seek the entire compensation. The tortfeasor who was sued and paid full compensation to the plaintiff, may bring actions against the other tortfeasors to proportionally recover the proper amount (article 942).

The Foundation of the International Association of Defense Counsel
SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE

*This document is a resource tool only. The information was compiled in 2014.
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

BRAZIL

If the plaintiff somehow contributed to damage, then compensation will be reduced in accordance with the proportion of his/her/its fault according to article 945 of the Civil Code.

38. Is service of a complaint issued outside your country permitted in your country by “informal” means, or must the Hague Convention be followed?

The service proceedings will follow the INTER-AMERICAN CONVENTION ON LETTERS ROGATORY, Bilateral Treaties and also the Diplomatic Channels.

39. Do your laws prohibit export of relevant documents from your jurisdiction for the purposes of litigation outside your jurisdiction? (Consider privacy rules)

No, unless it is protected by secrecy.

40. Please point out any litigation Best Practices employed by Courts in your jurisdiction but not yet referenced in the survey.

The survey covered the most important practices.

41. Are there any significant areas in which you believe the playing field between plaintiff and defendant is not level that you think need to be addressed?

No.

42. Are there legislative efforts under way that address any of the litigation practices in your country?

Yes, our Civil Procedure Code is dated January 11, 1973. This Code was amended several times over the years.

In the meantime, the Brazilian Congress started to work in the project of a new Civil Procedure Code, which was approved after almost 5 years. The final language of the Code is now waiting to be sent to the Brazilian President for ratification, but some articles can be barred. Once the Code is ratified by the President it will become in force only after one year (*vacatio legis*).