

INTERNATIONAL BEST PRACTICES SURVEY

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Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.

COLOMBIA

Responses submitted by:

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

Colombia is a civil code jurisdiction.

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

Civil and commercial cases as well as administrative law cases and labor law cases follow an adversarial adjudication method. Criminal law migrated in recent years (2004) to the adversarial method as well.

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

In Colombia, all judges are appointed, for there are no elected judges in our jurisdiction.

Candidates must be lawyers and hold Colombian citizenship. Appointments rely mainly on judges' experience as well as on their academic and professional background. Moreover, candidates should not have criminal records, except if s/he was prosecuted for political offenses or non-intentional crimes

Regarding Judges' appointments. First and Second instances Judges are appointed by an independent body that is part of the judiciary called Superior Council of the Judiciary (*Consejo Superior de la Judicatura*). High Courts Justices' appointments differ from the former because the judiciary, the President, and the Congress intervene in different ways at different levels.

Colombia does not have a single High Court. Instead, the top of Colombia's judiciary is divided in the following four High Courts: (i.) the State Council as the higher Court for administrative law matters, (ii.) the Supreme Court of Justice, (iii.) the Constitutional Court and (iv.) the Superior Council of the Judiciary. Justices of each one of these Courts are appointed differently.

For instance, current State Council's Justices, from a list of candidates submitted by Superior Council of Judiciary, appoint new State Council Justices. Senate, from a list composed by a candidate of the President, a candidate of the Supreme Court, and a candidate of the State Council, appoints constitutional Court Justices. All branches (the President, the Congress, and High Courts) intervene in the appointment of Superior Council of Judiciary's Justices. Without exception, Justices of High Courts must demonstrate at least 10-years of background experience.

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

Yes. Depending on the claim or action, different judges will have jurisdiction on the specific matter and different proceedings must be undertaken.

The following are the four main branches in which the jurisdiction is divided:

- (i) The so-called “Ordinary Jurisdiction” in which one may find four different specialized Courts as well as four specific proceedings to follow: civil and commercial branch, criminal branch, labor branch, and family branch.
- (ii) The “Administrative Jurisdiction”, which holds jurisdiction for administrative law issues and has its own set of rules and specialized proceedings.
- (iii) “Special Jurisdictions” made by “peace adjudicators” and indigenous jurisdictions.
- (iv) The “Constitutional Jurisdiction” that deals with two main actions: *tutela* (a constitutional action for individual right’s protection; similar to the so-called *amparo* of other jurisdictions) and constitutional trials to determine whether a certain law is in accordance with the Constitution. Constitutional Court holds jurisdiction for constitutional trials and is the Higher Court in *tutela* cases as, under Colombian Law, all judges of the Judiciary hold jurisdiction when *tutela* is brought forward.

In addition, it is noteworthy that, in addition to the specialized proceedings mentioned above (particularly civil and commercial as well as administrative law proceedings), some public bodies and boards that are not part of the judiciary as such (e.g. Superintendence of Commerce, Superintendence of Finance, and Superintendence of Companies) may have jurisdiction over certain controversies and disputes.

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

Yes. If a dispute is to be submitted to arbitration, the following rules must be taken into account:

- (i) The issue at stake should deal with matters that can be freely decided or disposed of by parties. Examples of issues that cannot be submitted based on this rule are constitutional rights such as freedom or equality or some inherent features of persons, such as the name or domicile.
- (ii.) The law authorizes that the dispute be submitted to arbitration.
- (iii.) Parties agree to submit their dispute to arbitration.

Moreover, it is important to consider that under Colombian law awards can be rendered in law or in equity if parties agree so. Exception is made if there is a public party, in which case only awards in law can be rendered. Colombian law also states that arbitration can be local or international. This entails that proceedings must follow either the local section of the arbitration Act or its international section. Both have different approaches and rules.

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Colombian law differentiates as well “*ad hoc*” arbitration proceedings and institutional arbitration proceedings. The first refers to proceedings that are carried out directly by the Panel. The second, to proceedings administered by an arbitration center.

Lastly, even though parties may establish their own procedural rules for arbitration, agreements typically refer to Colombian Arbitration Law or to specific arbitration rules such as ICC’s rules or Bogotá’s Chamber of Commerce’s rules.

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

Yes. In fact, Colombian Civil Procedure Code states that defendants may ask with their statement of defense that the action be precluded due to the existence of an arbitration agreement that prevents the local Judge to hold jurisdiction on the matter.

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

Mediation or “conciliation” is mandatory for most proceedings. Exception is made to some specific proceedings such as constitutional actions and arbitration wherein conciliation is not a requirement although parties can request and attempt it at any time before the trial. An additional exception in which conciliation is not deemed obligatory is if parties have asked for precautionary measures or injunctions.

It is important to make note, however, that in cases wherein conciliation is mandatory, two different conciliation hearings must take place. (i.) When the conciliation ought to be attempted before, “certified conciliators” must conduct it and thus only after such a pre-trial hearing took place, can the requested-party (and future plaintiff) become entitled to file the action. When the conciliation hearing is attempted after the action was filed, the Judge who already holds jurisdiction on the lawsuit is the one who conducts it.

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

As such, there is no pre-hearing fact discovery in Colombia. Nonetheless, parties can request Judges to ask their counterparts to disclose evidence prior to trial proceedings (“*prueba anticipada*”).

(a) Are there provisions for mandatory document disclosures?

Yes. Judges and Courts may ask parties to disclose and/or exhibit documents if a party requested so through “*prueba anticipada*”. If a party refuses to disclose or exhibit the documents that the Judge or the Court requested, s/he is deemed to have accepted the facts that the counterpart aimed to prove through such documents. This, however, would not prevent the party to demonstrate otherwise during trial.

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

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As mentioned, there are special proceedings for pre-trial disclosure of evidence, which includes oral examination of testimonies. Provisions that rule pre-trial evidence are the same rules followed during trial. In other words, pre-trial and trial collection of evidence follow the same rules.

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

No. It is important to take into account, however, that the Judge or the Court conducting the hearing may limit the length of oral examination.

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

Yes. Plaintiff in its action or defendant in its statement of defense must summarize and explain the reasons for which the witness is called, why his /her deposition is deemed necessary, and what facts or claims will be proven.

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

There is no pre-hearing expert disclosure. Expert's opinion are disclosed by parties either when they file their action or in their statement of defense.

10. Are there other notable discovery rules?

No.

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

No.

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

Yes. Defendants may bring a motion to dismiss if (i.) there is evidence of *res iudicata*, (ii.) that the time for statute of limitation has passed or (iii.) that there is no cause of action for either defendant or plaintiff. Threshold test in such cases is strict as with their decision, Judge or Court's will affect plaintiff's rights.

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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 not a pre-hearing process as such for evidentiary purposes. Decisions regarding admissibility of evidence take place during trial in a later hearing, i.e. after the action and the statement of defense have been filed.

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

Standard for admissibility of expert evidence is wide. As a matter of fact, one can say that experts' opinions are deemed admissible whenever technical issues are involved and the Judge or the Court anticipates that the matter is related to matters that are beyond law and to which they are not acquainted or familiar with.

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

Courts in Colombia (as well as arbitration panels) can request or order *ex-officio* almost any type of evidence including of course experts' opinions.

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)?

Yes it does. Lawyers, doctors, nurses, laboratorians, accountants, priests, and any other person to whom law has awarded secrecy are protected under Colombian law and are therefore exempted, for instance, to make depositions through testimonies.

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?

Yes there are. Colombian law protects, for instance, trade secrets, business information and records, as well as private and intimate information. Nonetheless, it does so not by impeding Courts from requesting such information, but by restricting or limiting its disclosure to third parties if the Judge or the Court have reasons to believe that the owner of the information can end up harmed or in any case affected.

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

The Judge or the Court who holds jurisdiction on the matter determines and rules on both, i.e. privileges disputes and the extent and scope of other forms of protection.

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19. Briefly describe the trial process?

There is no distinction in Colombia between pretrial and trial stages of a proceeding. Trials typically follow a common structure in which, although with some variations that depend on the applicable law and the forum, it is possible to identify the following three stages: (i.) initial statements (which includes action, service to defendants, and statement of defense), (ii.) evidentiary stage, and (iii.) closing arguments and judgment. Subsequently, parties may appeal and file for cassation. Nonetheless, appeal and cassation have their own scope, requirements, and terms.

Now, there are some variations in other proceedings such as arbitration or administrative law proceedings. For instance, in arbitration one must take into account that, before trial, there is a pre-arbitral stage in which members of the panel are nominated and appointed. On the other hand, in administrative law proceedings, particularly when administrative acts or executive orders are challenged, there is also a pre-trial stage consisting of a proceeding conducted and instructed (through an inquisitorial method) by the public entity that issues the administrative act or the executive order and who would later become defendant on trial.

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

In most proceedings the only early submissions are the lawsuit and/or requests for precautionary or interim measures.

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

There is no rule addressing this point. Judges determine on a case-by-case basis the order and the number of witness's depositions that will be accepted.

(c) Who conducts examination and in what order?

Judge or Justices of Courts conduct examination in all cases. The party who asked for the deposition examines the witness afterwards and, later on, counterparties may do so if they wish.

(d) What is the process for closing submissions?

Once evidentiary stage ends, parties can submit closing arguments by writing. Moreover, most proceedings foresee that a hearing can be held in order for the parties to make their closing arguments orally.

20. Please identify any other notable trial procedures.

In addition, it is important to refer to executory proceedings in which plaintiff looks to collect a credit that is incorporated on a security (locally known as "executive-title"), which refers to explicit and enforceable obligations.

Executory proceedings begin with the executory action that is brought forward by plaintiff who asks that the obligation incorporated in the "executive-title" be paid. Now, defendant may either pay or oppose the execution demonstrating that no obligation is due. If defendant succeeds in filing a statement of defense saying so, executory proceedings will undertake similar stages as those describe in the answer to question 19.

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

General rule of Civil Proceeding Code is that burden of proof lies on plaintiffs. Nonetheless, Constitutional Court's jurisprudence as well as State Council and Supreme Court's jurisprudence have established what is locally known as dynamic burden of proof, which consist of placing the burden of proof on the party who is better positioned to provide certain facts and to whom, for that very reason, the Court will ask to bring forward such evidence.

This dynamic burden of proof rule will be part of the legislation once the new Civil Procedure Code (the so-called General Proceedings Code), which has already been enacted, becomes enforceable.

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

In Colombia, only direct damages are recoverable. Typically, direct damages includes (i.) material damages (i.e. compensatory such as breach of contract, Damnum emergens, Lucrum cessans or financial loss) and (ii.) non-material damages (i.e. moral, social life and the loss of a chance).

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

There are no punitive damages under Colombian Law.

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

Yes. Depending on the action, Colombian law refers to different statute of limitations, which may range from 6 months to 10 years. In administrative law proceedings, for instance, statute of limitation may vary from 6 months (i.e. bringing a claim against an administrative act or an executive order) to 2 years for public contracts.

In civil and commercial matters, statute of limitation is 10 years for ordinary actions and 5 years for executory proceedings.

Regarding the time for responding to claims, defendants have different terms to do so. In *tutela* proceedings, for instance, defendant has 48 hours to respond. In administrative actions, 30 business days. In ordinary actions as well as on Arbitration, 20 business days, and in executory proceedings 10 business days.

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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?

Courts must rely on Colombian conflict-of-laws rules. In any case, if under the conflict-of-laws rules Colombia holds jurisdiction, plaintiff may sue its counterpart either if s/he is a Colombian citizen or not.

Additionally, defendant cannot decline jurisdiction on the basis that there is a more convenient forum.

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

Yes. A defendant can bring other potentially responsible parties through Forced Intervention or a claim to Join Third Parties. This can only happen if there is evidence that a previous legal and/or contractual relation or link exists between the defendant and the third party. Third parties are allowed to submit a statement of defense, propose preliminary objections and, in general, to exercise their right to a defense.

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).

Indeed, generally speaking, Colombia follows a loser pays costs system in which the unsuccessful party shall bear the legal costs and pay the amount of money in which the counterparty incurred for general expenses and professional fees.

The amount of money is determined by the judge according to specific rules provided by the law or set by the Superior Council of the Judiciary.

28. Are contingency fees allowed?

Yes.

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

Yes. There are no restrictions on third party funding of claims.

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

Yes. Class actions (locally known as “*acciones de grupo*”) are allowed. At least 20 persons holding uniform conditions over the same cause of action can bring *acciones de grupo* before the respective Judge or Court. Under Colombia law,

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class actions can be intended only to receive compensation for damages. Consequently, the scope of such actions are limited to civil or administrative liability lawsuits.

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

Yes. Under Colombian law, either a person or an association may bring forward actions (locally known as “*Acción Popular*”) aiming to protect collective or third-generation rights such as environment, public and common heritage, public safety, collective rights, competition etc.

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

It depends on the proceeding and how complex the case is. Ordinary proceedings (involving civil and commercial law matters) may take 5 years at first instance for final ruling best-case scenario. Administrative law proceedings, on the other hand, may last at least 2 to 3 years for a first instance final ruling. Constitutional actions such as *Tutela*, as it has been designed to urgently protect Constitutional rights, may last one month at first instance. Arbitration proceedings (taking into account pre-arbitral stage) last at least a year and a half.

Length of trials mainly depends on the complexity of the issue as mentioned above as well as on the evidence that ought to be collected during trial.

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?

Yes, the right to appeal is possible in two-instances’ proceedings and can be undertaken for both final decisions and interlocutory/procedural orders. For the latter (interlocutory/procedural orders), however, appeal is limited to an exhaustive list of judicial orders mentioned in the respective law (e.g. Civil Procedure Code or Administrative Procedure Code).

Few exceptions exist to the right to appeal, and they refer to special proceedings such as arbitration proceedings and certain civil and commercial law cases.

A three-judge panel of Tribunals as second instance judges will hear the appeal. In certain Administrative law cases, however, it is a three-judge panel of the State Council that hears it.

The Superior Council of the Judiciary appoints Justices of Tribunals while State Council appoints the respective Justices as mentioned above. Both Tribunals’ Justices and State Council’s Justice must be lawyers and ought to hold a background experience of at least eight years for Tribunal’s Justices and ten years for State Council’s Justices.

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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)?

No.

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

Although it is becoming common in recent years, particularly in arbitration and administrative law proceedings, not all Courts or Judges have the means to do so.

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

There is neither a Trial/ Pre-trial distinction, nor a solicitor/barrister distinction.

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?

Yes, there are special provisions in both Colombian Civil Code and Colombian Administrative Law Code stating that, whenever plaintiffs and defendants contribute to the harm and they are deemed liable, such a fact impacts on the assessment of the compensation that will be awarded as well as on liability's judgment. By the same token, and as a necessary conclusion, if defendants demonstrate that the plaintiff contributed in its own harm, liability can be either eliminated or reduced.

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

Under Colombian Law, defendants must be served on its domicile. If defendants are outside the Country because they are domiciled abroad, following Inter-American Convention of Letters Rogatory as well as Hague Convention becomes mandatory to complete the notification process. It is not possible to use "informal" means for serving defendants.

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

No.

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

None.

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?

Most proceedings in Colombia level the playing field between plaintiffs and defendants.

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

Yes. Bill 1564 was recently enacted in Colombia (2012) introducing a very comprehensive set of rules that aim to migrate proceedings (particularly civil and commercial) from a typical written proceeding to an oral one. The new proceeding and procedural rules have not been implemented fully in the Country yet.