Dispute Resolution
Brazil

1. INTRODUCTION TO BRAZILIAN LAW

1.1 LEGAL SYSTEM

In Brazil, the principal legal source is the law, which is created at federal, state or municipal legislative levels.

1.2 LEGISLATIVE HIERARCHY

In Brazil, the primary and highest law is the Constitution, and as such, it cannot be modified by ordinary legislation, and can only be modified through a Constitutional Amendment.
Below the constitution are ordinary federal laws, which must always be in conformity with constitutional norms. Thereafter follows the State Constitutions, followed by ordinary state law.
Finally we have the laws enacted by city governments.

1.3 LAWS OF A PROCEDURAL NATURE

Laws that govern conflict resolution Brazil are procedural laws. The Constitution itself has a special Chapter that deals specifically with the Judiciary (Chapter III), establishing its agencies, guarantees to judges, in addition to establishing the existence of Federal Courts as well as State Judiciary Branches. Brazilian judges enter the career through public examinations, through which their technical knowledge and skill as well as their good standing is evaluated, in order to hold a judicial position. Once vested with judicial powers, the Constitution guarantees that the position is lifelong, and they cannot be removed, nor are they subject to expiration dates, to ensure their independence both judicially as well as legally.

Recent Constitutional Amendment no. 45/04 created the Binding Abridgment, seeking to expedite cases. The National Justice Council was also created, which established an external control of the Judiciary. Article 5 of the Brazilian Constitutions sets forth on Fundamental Rights and Guarantees held, and it also includes in its various items, a number of different norms of a procedural nature, such as the one that sets forth that the law cannot prevent a legal threat or injury from being appreciated by the Judiciary, that the law cannot limit *stare decisis*, that there will be no exceptional court or tribunal, that no one can sued or sentenced by anyone other than the authority competent to do so, that no one can be denied their freedom or their assets without due legal process, which assures the litigants of their right to face their accusers and to an ample defence, which prohibits the use of proof obtained through illegal means, that no one will found guilty after the criminal *res judicata* sentence, that anticipates the concession of an injunction to protect an assured right against an illegal use or abuse of governmental authority, that establishes full and free legal assistance to people who can prove that they cannot otherwise provide for their own legal needs, among other provisions.

Below the Constitution, the most important civil federal law is the Brazilian Code of Civil Procedure, Law no. 5.869, dated January 11, 1973, which in its 1220 articles, many of which have been modified throughout the years, governs civil jurisdiction.
Criminal law is regulated by the Criminal Code (Law no. 2.848/40), Code of Criminal Procedure (Law no. 3.931/41) and the relevant legislation.

Extrajudicial resolution of disputes is governed by what is called the Arbitration Law, Federal Law no. 9.307, dated September 23, 1996.

1.4 STATUTE OF LIMITATIONS

The statute of limitations is understood as the loss of a right to an action, attributed to a material right, as the result of the passage of time. In the Brazilian legal system, there is no type of action that does not possess a statute of limitations. There are rights, however, that do not ever expire, like the right to life, honour, one's name, freedom, or the right to separation, interdiction, etc. A statute of limitations may be interrupted or suspended, and it may be renounced. The statute of limitation, statutory deadlines, causes for suspension and interruption thereof, and the expiration thereof are all regulated in Title IV of the Brazilian Civil Code, Law no. 10.406, dated January 10, 2002, articles 189 through 211.

2. ADMINISTRATION OF JUSTICE AND THE FUNCTION OF JURISDICTION

2.1 JUDICIAL PROCEDURES

The Brazilian judge will apply Brazilian procedural law to the judicial process, in accordance with the principle of territoriality, and as such, both Brazilians and foreigners are subject to Brazilian Law. The Civil Code and the Introduction to the Civil Code determine that the Brazilian judiciary has the authority to hear cases when the defendant is domiciled in Brazil, or when an obligation is to be fulfilled in Brazil. Brazilian law (article 12, paragraph 1 of the Introductory Law to the Civil Code) also determines the extent of Brazilian jurisdictional authority if the conflict concerns real estate located in Brazilian territory.

International judicial cooperation is also established in our system, in the event that a procedural act must take place in another country, which is requested by a Brazilian court to a foreign court through a rogatory letter.

2.2 JUDICIAL BODIES

Jurisdiction is exercised by the Judiciary Branch, through the agencies listed below:

2.2.1 State Courts

Brazil is composed of 26 states, and each one maintains its own judges and state courts, which have the authority to rule upon both civil and criminal cases.

2.2.2 Federal Court

This is justice administered by the Federal Government, which is divided into a Federal Court (for actions to which the Federal Government is party) and Labour Court (for actions of a labour nature).

2.2.3 Military Court

For military crime and the Electoral Commission (for electoral conflicts).

2.2.4 National Magistrate Council

This council hears disciplinary cases on members of the Magistrate themselves.

2.2.5 Superior Courts

The Federal Supreme Court (constitutional issues) and the Superior Court of Law (questions involving federal legislation), are the highest levels of the Brazilian Judiciary, and hold jurisdiction over Brazilian territory, with the fundamental authority to determine special cases and with the authority to rule on cases that have already been decided by the other courts of the land, as a special or superior appeal court.

3. CIVIL PROCESS

Within the civil sphere, there are a variety of different types of actions. These include actions of acknowledgment, through which a conflict of interest existing between parties is presented to a judge, so that he or she may resolve it. There are judgment debt actions, which presume the existence of an enforceable title, as for example, a trade note or a letter of exchange. There are precautionary actions, through which an urgent yet temporary measure is requested, since it will only be in force while awaiting a decision on the main case, for example, a search and seizure, or an "ad perpetuam rei memoriam" inspection.

Acknowledgment actions may be ordinary or summary proceedings. The summary proceeding is the faster of the two, but it can only be adopted on cases the values for which do not exceed sixty monthly minimum salaries, or under specific circumstances, for example, indemnification actions owing to an accident in a land vehicle. Below is a brief summary of an ordinary lawsuit, which is the most common hypothesis.

3.1 ORDINARY PROCEEDINGS

This phase starts with an initial complaint, which includes a written brief in which the plaintiff (individual or legal entity) explains their intent, supporting their brief with all documents that are essential for filing the action, in addition to attaching a power of attorney granted to a lawyer, as well as the form that proves that all judicial costs have been paid. This initial complaint is taken to the Court and filed. It will be allocated to a particular judge, who will hear the case, and the complaint should also be registered with the court's registry office, which should officially register and commence the action, numbering the pages and assigning a case number to it.
The judge will perform an advance examination of the initial complaint, and if he or she does not find that it should be rejected out of hand or that it does not need to be amended, the defendant will be subpoenaed, which normally takes place through the mail or a court officer.
The defendant should present a timely defence through their attorney, and they should also formalise their defence with their own documents.
The judge will hand down a "rectification" order, rectifying any flaws that may be discovered, establishing the litigious points and stating what proof should be produced during the discovery phase.
The initial proof to be produced is an expert examination, when ordered. Afterwards, oral testimony is provided, through the personal depositions of the parties involved, and the testimony of their witnesses, in a hearing.

After the final arguments are made, the judge will rule on the case.
An appeal can be made to the court based upon the judge's decision. Under certain circumstances established in the Brazilian Constitution, the sentence proffered by the Court can be appealed to the Federal Supreme Court or the Superior Court of Law.

3.2 Estoppel

The parties to a case are subject to deadlines legally imposed or imposed by the judge presiding over the action, for the procedural acts to be practiced throughout. Attorneys for the parties are notified of judicial determinations through publication in the legal press (State's Official Gazette - *Diário Oficial do Estado*). If these acts are not practiced by the established deadline, "*estoppel*" will become effective, which is to say, the loss of the right to perform this procedural act, although there are certain acts determined that can be practiced at any time, as for example, the argument for complete nullification. A case is a sequence of acts, which, if they are not performed at the proper time, cannot be practiced at a later time. Thus, the defendant, upon responding, has to rebut all of the charges made in the initial allegations at the time of their rebuttal. A counter-argument may not be presented at the time that final arguments are made, or during the appeals process. Proof must be produced through the discovery phase. Parties cannot adduce proof in the appeal or at the time that a special appeal is filed with the Federal Supreme Court, for example. If the defendant does not mount a defence by the specified deadline, the facts alleged in the initial complaint are accepted as fact, leading to a judgment by default. If the losing party does not file an appeal against the sentence by the legal deadline, *res judicata* will be effective, and the decision becomes fixed.

3.3 Parties

Parties to a case have the same rights, duties and guarantees, in light of the principle of equality between the parties.
Every attack ensures the right to a respective defence, in light of the principle of being allowed to face one's accusers.
The parties are subject to the duty of procedural fidelity, and they will be charged a fine for bad faith litigation if they alter the facts, mount unjustified resistance to the process, file appeals merely to stave off final judgment, as well as other acts that violate the course of Justice.
The parties should cover the fees charged for procedural acts that take place during the case, and the final sentence will condemn the losing party to pay the condemnation charges, which cover the expenses that the winning party may have paid in advance, as well as attorneys' fees to be assessed by the judge.

3.4 Judge

The judge is the representative of the State, acting as the agent of the jurisdictional function. He or she is responsible for directing the case, leading it through its various phases until a final decision is reached. The judge cannot fail to make a decision, in the event that the law is vague, he or she will be responsible for applying an analogous law, custom or general legal principle, but always restricted to the limits of the request, whereby he or she must not rule on questions that have not been raised.

The judgment may be proffered in a hearing, in the presence of the parties or not, and in his or her sentence, the judge should summarize the case, provide grounds for their decision, partially or wholly accepting or rejecting the request made by the plaintiff.

3.5 JUSTICE DEPARTMENT

The Justice Department, which is a state agency that is not part of the Judiciary, may also play a part in cases. The Justice Department works in conjunction with the Judiciary to defend the interests of the State as well as society itself. In criminal actions, the Justice Department is the body responsible for requesting charges, acting as the accusing body.

In the civil sphere, the Justice Department works to ensure that laws are being obeyed, acting in the defence of families and those incapable of representing themselves. If the Justice Department fails to become involved in a case to which a minor is party, this is cause for a total nullification, for example.

3.6 VARIOUS OCCURRENCES THROUGHOUT THE ACTION

Throughout the progression of a case, various incidents can take place. For example, one of the different types of third party intervention could take place: opposition (when a third party enters a case alleging the same dispute as held between the plaintiff and defendant); appointment to the case (when the defendant claims that it is holding something in someone else's name and appoints the true owner as the real defendant); impleading (to sue in court in response to an earlier pleading, among other circumstances).

Exceptions may take place, for example, the exception of incompetence, where it is alleged that another court has the authority to hear the case. Appeals can be filed, like bills of review (to be filed against provisional decisions from the judge, which is to say, those that do not terminate the case).

Further we have requests for clarification, when the judicial decision contains a contradiction, omission or vague point. Furthermore, incidents, as for example, the incident of a falsehood, whereby one finds a falsehood in a document attached to the case by the opposing party.

3.7 EXECUTION

The condemnation sentence will be liquidated, and the party losing the action will be ordered to pay the amount within fifteen days, under the penalty of a 10% fine on the total condemned amount. If payment is not made, the creditor can seize the debtor's assets, appraise and sell them in a public auction to satisfy the debt. Some judges have allowed a cash lien placed directly on the debtor's bank accounts, through electronic means.

Under certain specific circumstances (such as the nullification of the defendant's summons, excessive execution, etc), the debtor can challenge the execution, without that challenge actually suspending the progression thereof.

A foreign sentence is an enforceable title, provided that it is legally confirmed by the Superior Court of Law, and this confirmation should be undertaken by an attorney duly appointed through a power of attorney, which is attached to the records of the foreign sentence, duly legalised by the proper Brazilian Consular Authority in the country where the sentence was handed down, duly translated by a sworn translator.

4. ARBITRATION

4.1 Arbitration in Brazil

As stated, the extra judicial resolution of disputes is governed by what is known as the Arbitration Law, Federal Law no. 9.307, dated September 23, 1996.Arbitration was a tool rarely used until just a few years ago. Despite the fact that arbitration is not yet a fully tested institution, it is true that it has increasingly gained credibility in Brazil, thanks to the speed and specialization that it represents.

Brazilian law accepts arbitration as a valid means for resolving conflicts, which is elected by the parties through an arbitration commitment, which in turn rejects the authority of the state's judge. The law states that the arbitration commitment is a convention through which the parties submit their dispute to the arbitration of one or more persons.

Article four of the law establishes the possibility of inclusion in the contract executed between the parties of a clause committing to arbitration. In the event of a dispute, the use of arbitration becomes obligatory. Even after a contract is entered into, an arbitration commitment can be mutually undertaken by the parties.

4.2 Arbitration Proceedings

In Brazil, arbitrations take place before an arbitration authority constituted specifically to resolve that specific controversy ("ad hoc") or before other entities, such as chambers of commerce or federations, which is known as institutional arbitration.

Brazilian law demands that in order for an arbitration commitment to be valid, it must contain the qualification of the parties, qualification of the arbitrators or the entity that nominates them, the dispute subject to arbitration, as well as the location where arbitration is to take place.

Under arbitration, the parties are free to adopt whichever procedure they desire, which is to say, as long as they respect due legal process and legal limits, the parties may adopt any procedure established by the entity that will preside over the arbitration, or the norms of the Civil Code, or they may even create a new procedure.

4.3 Enforcement

An arbitral award cannot be appealed, unless the parties arrange otherwise in advance. The law only allows for a request for correction and/or clarification, in the case of a material error, contradiction, omission or vagueness.

The arbitral award is considered as a judicially enforceable title (article 584, VI, of the Brazilian Code), and should the losing party fail to comply with the ruling, it may be executed through the Judiciary, without first requiring judicial confirmation. However, if any of the circumstances that serve to overturn the arbitral award takes place, as set forth in article 32 of the Arbitration Law, the party may file a lawsuit, within 90 days from the notification of the arbitral award.

A foreign arbitral award, as happens with a sentence handed down by a judge, needs to first be confirmed by the Superior Court of Law (article 105, I, i, of the Brazilian Constitution, confirmed by Constitutional Amendment no. 45/04), in order to insure enforcement.

5. ALTERNATIVES EXTRA-JUDICIAL DISPUTE RESOLUTION

5.1 MEDIATION AND CONCILIATION

Non-binding extra judicial alternatives may also be adopted for dispute resolution in Brazil. Under mediation, a third party is appointed to attempt to bring the parties to some understanding, who will try to negotiate directly with one another. On the other hand, in conciliation, the conciliator indeed assumes the negotiation, participating actively in discussions between the parties.

In the case of both mediation and conciliation, a decision is not made by the mediator or conciliator that can be imposed upon the parties. It is the parties, together, who must reach a consensus.

Evidently, these are more economical alternatives, but the disadvantage is that if an agreement cannot be reached, then no solution is reached.

However, the parties can indeed make the following sort of deal: if mediation is unsuccessful, the mediator will hence be authorized to commence arbitration, and even act as the arbitrator.

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