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Contributing Editor:
Michael Madden

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Brazil

Renato Stephan Grion & Guilherme Piccardi de Andrade Silva
Pinheiro Neto Advogados

Efficiency of process

Improving the efficiency of the Brazilian judicial process has been a major concern for the Brazilian legal community. Not only practitioners, but also members of the Judiciary, scholars, legislators and society in general have long recognised the need to improve and modernise Brazil's dispute resolution framework. Even the Brazilian Federal Constitution now provides the reasonable duration of a lawsuit as a principle.

Over the last decade, Brazil has taken a number of significant legal and practical measures to improve and modernise its laws in order to create a framework for a more rational and efficient dispute resolution system. Several statutes, laws and rules have been altered, amended and/or enacted in order to reach that aim.

Probably the most notable example of this process is the new Code of Civil Procedure that was enacted on 16 March 2015 and entered into force on 16 March 2016. One of the main objectives of this new Code is to deal with the problem of excessive repetition of cases (matters with the same cause of action or raising the same legal issues) that clog the Brazilian courts. A recent report from the Brazilian National Council of Justice indicated that there were about 74 million lawsuits pending judgment in Brazil at the end of 2015. The new Code of Civil Procedure also aims at improving the structure of Brazilian civil procedure in several ways, with good examples being: **(i)** fewer formalities and appeals, in order to speed up civil litigation; **(ii)** modernisation of provisions related to alternative dispute resolution methods, especially arbitration, mediation and conciliation; **(iii)** redesigning of rules related to international cooperation and the enforcement of foreign awards; **(iv)** more flexible rules in order to allow the parties to adapt the procedure to their particular needs; and **(v)** establishing certain rules allowing and regulating the use of technology in the judicial process.

The Brazilian legal system derives from the civil law tradition (Roman-Germanic), but is also influenced by common law institutions (*e.g*, writ of *mandamus* and writ of *habeas corpus*). Legislation is the main source of law. Only where legislation is silent may the courts have recourse to other sources to resolve disputes.

Recently, however, Brazil has established specific circumstances under which some higher court decisions are considered binding on the lower courts. Constitutional Amendment No. 45 of 2005, for instance, introduced a partial system of *stare decisis* called *súmulas vinculantes* (binding precedents), according to which the Federal Supreme Court ("STF") was then allowed to distil its thinking on a certain matter and to issue binding precedents to impose legal force on all divisions of the judicial system and the public administration. In case of noncompliance with the *súmula vinculante*, STF was authorised to determine

directly the invalidity of the defiant acts through a remedy called *reclamação*.

The new Code of Civil Procedure now establishes that other higher court decisions also have a binding nature, such as decisions rendered on the subject of constitutionality control and decisions rendered to solve repetitive cases or repetitive appeals. In addition to the *súmulas vinculantes,* all these decisions will be treated as binding precedents, meaning that any defiant act will be voidable through the *reclamação* remedy.

The Brazilian judicial system is composed of common and specialised jurisdictions, each subordinated to specific higher courts, but all are subject to: **(i)** the Superior Court of Justice (STJ) on federal law matters; and **(ii)** the STF on constitutional matters. The Brazilian Constitution divides the judicial system into Federal – specialised or common – and state courts, each with different jurisdiction. Given the federal structure of the country, the judicial branches of the states are granted the power to judge. The rules of judicial organisation are provided for in the Federal Constitution and in procedural laws and internal rules of the courts, and normally regulate jurisdiction based on the amount in controversy, the persons involved, and the subject matter.

The Federal Constitution establishes the core principles applicable to judicial proceedings, such as due process of law, the right to a full defence (*i.e.*, the right of a party to present its case in a fair and a thorough manner), the right to independent and impartial judges, the guarantee of a "regular judge" or a "court of law", the inadmissibility of evidence obtained by illegal means, the right of public trial, a reasoned judicial decision, and a process with reasonable duration. None of these guarantees and rights are absolute; they might be reduced or restricted in some manner to assure that another guarantee or right is also being secured, depending on the specific case.

It is also worth mentioning that almost all judicial lawsuits in Brazil are now processed electronically.

The recent enactment of the new Brazilian Code of Civil Procedure is expected to improve the efficiency of judicial proceedings in Brazil. The attainment of these goals, however, is yet to be confirmed, since only time will tell if the changes brought about by the new Code will be successful or not.

In this context, the use of arbitration and other alternative dispute resolution methods in Brazil has been growing consistently, as will be addressed further in specific topics below.

Integrity of process

Lack of integrity in judicial proceedings in Brazil is not generally perceived as a problem.

The nomination of lower court judges derives from an impartial and objective selection process (*i.e.* exam), and these judges may ascend to appellate courts according to several criteria, including seniority, productivity and merit. There are few exceptions to this general rule of selection, which apply mostly to the nomination of justices for appellate courts and higher courts.

In order to promote the independence and impartiality of the Judiciary, the Brazilian National Council of Justice was created on 30 December 2004, through Constitutional Amendment No. 45. The Council of Justice consists of a judicial agency responsible for carrying out administrative and financial supervision of the Judiciary and the performance of judges.

Generally, under Brazilian law, judges must apply statutory law and are bound to follow the rules of civil procedure at all times. Therefore, they are not allowed to adjudicate a dispute according to rules of natural justice, for example. In very specific situations, however − in

particular, when the law is silent about a specific matter − judges are allowed to decide according to analogy, socially accepted customs, and general principles of law.

Privilege and disclosure

As a rule, which has some specific exceptions (*e.g.*, family-related lawsuits), all lawsuits are public in Brazil and the case files can be accessed by any interested party. Whenever an exception to this general rule is applicable, parties may request the proceeding in matter to be processed under court secrecy. An important exception to this rule relates to judicial proceedings filed in connection with arbitrations. Such proceedings are processed *in camera*, provided that the interested party is able to demonstrate that the arbitration to which the case is related is also subject to confidentiality.

Under Brazilian law, parties and witnesses may refuse to provide some types of sensitive information. Parties and witnesses may refuse, for example, to provide information that they need to keep confidential due to their professional status, or information that could put their family members at risk.

Full disclosure and discovery are not a part of Brazilian civil proceedings. Nonetheless, Brazilian procedural law provides a proceeding specifically designed for a party to request the forced disclosure of documents. The party should specify, in detail, which documents are being requested and what their purpose is within the context of the case, demonstrating which facts may be proven or disproven through the documents in question. In addition to all that, the interested party will also have to demonstrate on what grounds it bases its assertion that the requested documents actually exist and are actually in the opposing party's possession. The opposing party will have a legal obligation to provide the requested documents when: **(i)** there is a specific legal provision that imposes such obligation; **(ii)** the requested party has made reference to such document in order to constitute it as evidence; and **(iii)** the document is common to both parties.

According to the new Brazilian Code of Civil Procedure, the requested party may refuse to exhibit a document when: **(i)** it relates to his or her private life; **(ii)** the exhibition violates his or her duty of honour; **(iii)** the exhibition could create dishonour to the party or to a third party; **(iv)** the exhibition could cause the publicity of confidential facts; **(v)** there are any other justified reasons, pursuant to the court's opinion; and **(vi)** the law expressly allows the party to object to the request, in that specific situation.

The third party is legally bound to present any document demanded by the court which is under his or her possession (Article 401 of the new Code of Civil Procedure). However, the restrictions and procedural defences explained above must be considered in this case too.

In arbitration proceedings seated in Brazil, the parties are free to agree upon the admissibility, scope, and extension of disclosure and discovery proceedings, since Federal Law No. 9,307/1996 (the Brazilian Arbitration Act) provides parties with such an autonomy.

Article 133 of the Brazilian Federal Constitution provides protection to attorneys in the exercise of their profession and this is reflected in the Code of Ethics of the Brazilian Bar Association. Regarding professional privilege, there are express and specific provisions on the matter contained in the Brazilian Bar Association Statute (Federal Law No. 8,906/1994). These provisions establish rules related to attorney-client privileged relationships, and grant attorneys the right to protect and refuse to disclose the information received from their clients. This also includes documents related to the case at bar, prepared in relation to or in preparation for litigation (judicial or arbitral), or concerning previously rendered legal advice.

Costs

The party who initiates proceedings must bear the related costs, which can vary significantly depending on the venue. As Brazil is a federal republic, each of the 26 Brazilian states and the Federal District may determine the costs for filing a new claim, usually calculated as a percentage of the amount in dispute and varying generally from 0.5% up to 6%. Some states, for example São Paulo, may provide a cap for filing costs.

In addition, the party who files an appeal must bear the related costs, which may also vary considerably depending on the relevant Court of Appeals (generally from 1% to 5% of the value of the claim). In the past few years, some Courts of Appeal in different states have increased this percentage, in an attempt to stop the overload of appeals.

Upon a final decision, the defeated party is, in most cases, sentenced to pay the winning party all court costs and expenses incurred during the proceedings, including an additional amount that usually varies between 10% and 20% of the amount under discussion as attorneys' fees to the winning party's legal representative(s). It is important to clarify that such fees are payable to the winning party's attorneys (and not to the winning party itself) because of their success in the lawsuit, and should not be confused with the fees relating to the contract agreed upon between the party and its lawyers.

As regards foreign parties, according to Article 83 of the new Code of Civil Procedure, a non-resident individual or company without real estate assets in Brazil, besides bearing the related filing costs, must also post a bond when filing a lawsuit. This requirement aims at ensuring proper reimbursement of costs and payment of legal fees in case the non-resident individual or company is defeated in the process. There are, however, some exceptions to said requirement.

Litigation funding

Brazilian law does not address the issue of funding as regards litigation.

Interim relief

The new Code of Civil Procedure has implemented relevant changes when it comes to the possibility of parties seeking interim relief. According to Article 294 of said Code, the interested party may seek interim relief based on either urgency (*tutela de urgência*) or clear evidence (*tutela de evidência*). While the former is intended to prevent imminent damages, the latter aims at anticipating the results of a probable ruling.

To obtain interim relief based on urgency (*tutela de urgência*), the party must demonstrate: **(i)** the likelihood of its right(s); and **(ii)** a risk of damage or a risk to the practical result of the proceedings.

On the other hand, interim relief based on evidence (*tutela de evidência*) may be granted if: **(i)** the plaintiff has strong and demonstrable grounds on the merits of the case or if the respondent does not present enough grounds to object to the plaintiff's requests; **(ii)** the defendant is making use of delaying tactics; **(iii)** there is no controversy on the issue; or **(iv)** the issue in dispute is the subject of settled case law.

Lastly, it is worth mentioning that, as regards arbitration proceedings, arbitrators have the same discretionary powers granted to a state court judge to analyse and grant interim relief measures. They also have the authority to review, reconsider or maintain any interim relief granted by state courts before the constitution of the arbitral tribunal. A recent amendment to the Brazilian Arbitration Act included new provisions (Arts. 22-A and 22-B) on the matter.

Enforcement of judgments

According to the Brazilian Constitution, the enforcement of foreign decisions in Brazil − whether arbitral or judicial, final or partial − will only be possible if the interested party obtains the recognition of the decision by the Brazilian STJ. Recognition proceedings before the STJ are regulated concomitantly by the new Brazilian Code of Civil Procedure, Decree-Law No. 4,657/1942 − known as the Law of Introduction to the Rules of Brazilian Law − and the STJ's internal rules. In case of a foreign arbitral award, the Brazilian Arbitration Act is also applicable, as well as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Depending on the specific case, other conventions may also apply.

The STJ does not examine the merits of the relevant dispute, but may deny recognition whenever it interprets that the content of the decision is contrary to Brazil's national sovereignty, the dignity of the human person, and/or Brazil's public policy. In general, the STJ will deny recognition if it finds that: **(i)** the award was not issued by a competent authority; **(ii)** the respondent was not duly notified about the commencement of the proceedings; **(iii)** the award is not effective in its country of origin; **(iv)** the award is contrary to previous decisions rendered by Brazilian courts which have already become *res judicata*; **(v)** the award and relevant documents are not accompanied by full translations into Portuguese; or **(vi)** the award violates Brazil's national sovereignty, the dignity of the human person and/or Brazil's public policy. Case law shows that the STJ has a strong tendency to recognise foreign decisions, arbitral or judicial, this having been the case in the wide majority of cases so far.

Once the STJ issues the writ of enforcement − or, depending on the case, the *exequatur* − the interested party may present it to a competent federal lower court, which will initiate enforcement proceedings.

Cross-border litigation

Cross-border litigation in Brazil is on the rise. Not only have companies been expanding globally in the past few decades, but people, goods, money and data are also circulating faster, regardless of traditional borders. As a result, disputes in Brazil with foreign elements are becoming more and more common.

Some of the basic concepts concerning cross-border litigation in Brazil can be found in the Law of Introduction to the Rules of Brazilian Law, which dates from 1942, as previously mentioned. Although several projects seeking to modernise choice of law methods have been presented to the Brazilian Congress, no major modifications are foreseen in the near future.

Amongst the most important provisions in the Law of Introduction to the Rules of Brazilian Law, Article 9 determines that contracts are governed by the law of the country in which they were entered into by the parties. It is still a matter of controversy in Brazil whether the parties can freely choose a law governing an agreement in all circumstances.

Regarding arbitration, the situation is much clearer. According to Article 2, §1º, of the Brazilian Arbitration Act ("BAA"), if parties choose to submit conflicts to arbitral jurisdiction, the choice of law made in the contract is thereby reputed valid and shall be observed by the arbitral tribunal (or sole arbitrator, as the case may be).

It is worth noting that any foreign judgment or award (*i.e.*, issued outside of Brazil), must be submitted to a recognition procedure (*homologação de sentença estrangeira*) before the

STJ prior to enforcement proceedings in Brazil. The STJ is not entitled to review the merits of the decision, as stated above.

It is worth mentioning that the new Code of Civil Procedure, in its Article 25, now recognises the parties' autonomy to choose an exclusive forum (outside Brazil) for the resolution of disputes in international contracts.

International arbitration

The Brazilian Arbitration Law was enacted in 1996, but arbitration has only started to become a real choice in contracts after 2001, when the STF decided on the constitutionality of some fundamental principles set out in said law. Today, arbitration is a reality and is widely used, especially in complex contracts and transactions.

Brazil is party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and its 1996 Arbitration Act is inspired by the UNCITRAL Model Law. In this sense, Brazilian law is recognised to be modern and arbitration-oriented, which has been confirmed through many decisions already issued by Brazilian courts.

More recently, the new Code of Civil Procedure brought some important changes to arbitration, as the concept of *arbitral letter* (*carta arbitral*), an instrument created to permit arbitral tribunals to request direct assistance of national courts, for example, to enforce provisional measures and other decisions arising out of arbitration proceedings.

In May 2015, the Brazilian Congress enacted Federal Law No. 13,129/2015, which amended and expanded certain aspects of the Brazilian Arbitration Act and included important arbitration-related provisions in other legal statutes. A series of pro-arbitration changes are now part of the Brazilian Arbitration Act, namely: **(i)** governmental entities may participate in arbitration proceedings; **(ii)** arbitral tribunals − and sole arbitrators − now have the undisputed right to render partial arbitral awards; **(iii)** state courts have jurisdiction to analyse interim relief and precautionary measures requests before the constitution of the arbitral tribunal which, once constituted, may uphold, amend or revoke the previously granted measures; **(iv)** the inclusion of arbitration clauses in the bylaws of companies shall be admitted, and dissenting shareholders have the right to sell their shares; **(v)** the institution of arbitration interrupts the statute of limitations backdating the referred interruption to the date on which the request for arbitration was filed; and **(vi)** the confidentiality regime assigned to arbitration shall be extended to acts performed by national courts related to an arbitration procedure.

Mediation and ADR

Along with the reform of the Brazilian Arbitration Act, a Mediation Act also came into force in 2015 (Federal Law No. 13,140/2015), regulating mediation within the Brazilian legal system for the first time. It should be noted that, before the enactment of the Mediation Act, some institutions specialised in alternative dispute resolution mechanisms were already prepared to administer mediation procedures in accordance with their own internal rules and were already in a position to provide interested parties with qualified bodies of mediators. Nonetheless, the absence of comprehensive legislation on the topic was considered by some as a source of insecurity and unpredictability that dissuaded parties from resorting to this alternative method of dispute settlement.

In that scenario, the new Mediation Act established important rules on the use of mediation in Brazil and provides parties with an adequate level of predictability and assurance as to

the institute's advantages, procedures, possible consequences, etc. The enactment of the act is, therefore, in line with a new social and legislative culture that is currently growing in Brazil, focused on embracing consensual dispute resolution methods, in large part derived from the reform brought about by the new Brazilian Code of Civil Procedure.

Regulatory investigations

Brazilian law is known to be extremely protective in certain fields, especially when it comes to labour and consumer affairs. Employees and consumers tend to be considered, by judicial and administrative authorities, as vulnerable parties who are at a disadvantage in relation to employers and suppliers/service providers. As a result, companies doing business in Brazil should be aware that they may be subject to administrative proceedings and investigations on these subjects, as well to as individual and collective lawsuits deriving from these investigations.

In addition to the above, it is possible to observe that, in the past few years, compliance programmes have become a fundamental aspect of doing business in Brazil, notably in relation to anti-corruption and antitrust matters. An example of this is the fact that, inspired by the US Foreign Corrupt Practices Act of 1977 and the UK Bribery Act of 2010, the Brazilian Congress has recently enacted Federal Law No. 12,846/2013 − known as the Brazilian Anti-Corruption Law. In summary, the new law contains provisions that intensify the fight against corruption in the Brazilian public sector, increasing the investigative powers of Brazilian authorities and setting forth rigorous penalties for companies involved in acts of corruption.

Renato Stephan Grion
Tel: +55 11 3247-8965 / Email: rgrion@pn.com.br

Renato Stephan Grion is a partner at Pinheiro Neto Advogados, based in São Paulo. Mr. Grion concentrates his practice on commercial disputes before international and domestic arbitral tribunals, as well as on commercial mediations. He handles arbitration and mediation cases before virtually every major institution, including the ICC and other leading arbitration and mediation centres in Brazil and abroad. He also represents Brazilian and international clients in litigation in Brazil involving disputes over the enforcement of arbitral awards and arbitration agreements, as well as other transnational disputes.

Guilherme Piccardi de Andrade Silva
Tel: +55 11 3247-8451 / Email: gpsilva@pn.com.br

Guilherme Piccardi de Andrade Silva is an associate at Pinheiro Neto Advogados. He holds a degree in law from the Pontifical Catholic University of São Paulo (*Pontifícia Universidade Católica de São Paulo* – PUC/SP) and focuses his practice on arbitration, civil and commercial litigation and international law.

Pinheiro Neto Advogados

Rua Hungria, 1100, 01455-906, São Paulo – SP, Brazil
Tel: +55 11 3247 8400 / Fax: +55 11 3247 8600 / URL: www.pinheironeto.com.br

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