

# Litigation and settlement in Brazil



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Those contemplating litigation in Brazil need to be aware of the potential for delay, escalating claim costs, liability issues and the formal requirements of concluding a settlement.

## Introduction

Later in this bulletin, Constantino Salivaras refers to the importance of the Brazilian market in the Latin American region. However, one aspect of international trade is the potential for litigation when commercial partners have a dispute. In this article, we explore the key issues that those contemplating litigation in Brazil should be aware of.

## Delay

Litigation in Brazil can be prolonged because of the time involved in taking procedural steps. For example, appealing first instance decisions. The first step in this process involves appealing the first instance decision to the relevant court of appeal – each state in Brazil has its own. From there, a further special appeal lies to the superior courts, the Superior Court of Justice and the Supreme Federal Court, the latter dealing only with constitutional matters.

In order to appeal to either the Superior Court of Justice or the Supreme Federal Court, cases must first pass an admissibility test determined by the relevant court of appeal. However, even if a case doesn't pass the test, the unsuccessful party can request the superior courts to review the decision not to allow the appeal which can ultimately result in the special appeal being heard in any event.

There is also the potential for delay arising out of the various types of application that parties can pursue during the course of litigation, for example, an application seeking clarification of a particular issue.

## Claim costs

A claim pursued through the Brazilian court system has the potential to almost double over a five year period as a result of interest and monetary correction. At present, interest of 12% and a monetary correction of approximately 6% a year are applied to sums claimed. The effect of this is magnified as a result of the inherent delays in the Brazilian court system described above.

## Liability issues

Cargo carriers have an obligation to deliver goods in the same condition as they were in when they were received. This means that in the event of alleged shortage or damage, cargo interests must only prove that there was shortage or damage and the onus is on the carrier to establish a defence such as force majeure or causation. If liability is established, a defendant cannot limit its liability with reference to the Hague or Hague-Visby rules because Brazil is not a signatory. Additionally, general principles of package limitation are not well recognized by the Brazilian courts.



#### Settlements

Parties involved in litigation in Brazil who wish to settle their claims need to ensure the settlement agreement includes certain details for it to be effective. Specifically, the agreement must discontinue the court proceedings on foot and make provision for lawyers' fees and other costs. These details must be set out clearly in the agreement, whether it is concluded in Brazil or elsewhere.

If a settlement agreement does not include the above details the parties may find the court proceedings are not discontinued. Also, it leaves a defendant exposed to a claim for legal fees by the plaintiff's lawyer for up to 20% of the amount of the settlement, as lawyers have an independent cause of action for fees.

#### Conclusion

It is vital for those contemplating pursuing their disputes through the Brazilian court system to be aware of its unique features and consider how they could affect the result they are trying to achieve. Familiarity with the system is of critical importance. The potential for delay and – for defendants – the potential for the amount in dispute to escalate may mean alternative modes of dispute resolution merit consideration. Defendants in cargo claims should also be aware of the relatively low threshold of liability and inability to limit in Brazil based on the Hague and Hague-Visby Rules.

There is hope for the future though: the Brazilian Congress is reviewing new civil procedure rules designed to simplify and speed up proceedings in Brazil. It will be interesting to see if they have the desired effect once implemented.