

# Chapter 5

## Major Shifting: The Brazilian Way

Alexandre Alcino de Barros and Sílvia Julio Bueno de Miranda

### 5.1 Basic Principle

As indicated in the General Report, Brazil is a member of the (majority) group of countries which can be characterized as “major shifting”. The Brazilian loser-pays rule is based on the idea that the process should not result in loss to the party who had her right recognized in court.<sup>1</sup> Instead, it should put her in the same economic situation that she would be in if the object of the dispute had been fulfilled without the need of a lawsuit. Following that, Brazilian law imposes liability for costs on the losing party.

### 5.2 Costs Incurred in Civil Litigation in Brazil

#### 5.2.1 Court Costs

Each Member of the Brazilian Federation has different laws regulating court costs. In spite of these differences, the general rule for both the Federal Court<sup>2</sup> and the majority of the states<sup>3</sup> is that the filing fees are determined

---

<sup>1</sup> THEODORO JUNIOR, Humberto, *Curso de Direito Processual Civil* – Rio de Janeiro: Forense, 2000, v. 1, p. 79 and ABREU, Frederico do Valle, *O Custo Financeiro do Processo in Revista dos Tribunais*, 2003, v. 818, p. 67.

<sup>2</sup> Federal court costs correspond to 1% of the amount of the dispute. Law N. 9.289/96 and Resolution 278/2007, Schedule of Costs I – Civil Actions, Item (a) Civil Litigation. Under this Schedule of Costs, the minimum amount to be paid as court costs in the Federal Courts currently corresponds to R\$10.64 and the maximum corresponds to R\$1,915.38.

<sup>3</sup> As an example, the general rule in the State of São Paulo is that prior to filing a civil action before such Court, the plaintiff shall pay initial costs corresponding to 1% of the amount of the dispute. See Article 4, I and § 1, São Paulo State Law N. 11.608/03. Under

A.A. de Barros (✉)

Senior Associates ad L.O. Baptista Advogados Associados, Sao Paolo, Brazil

by the amount in controversy, with a cap – which is also true in most jurisdictions covered by the General Report. For that reason, the plaintiff shall always indicate the amount in controversy, even if the dispute has no immediate economic content.<sup>4</sup> If the defendant challenges the amount, the judge shall decide it.<sup>5</sup>

In case of appeal, parties shall pay the expenses incurred with the transportation of the physical process (“*porte de remessa e retorno*”), calculated based on the number of sheets contained in the files. These costs are usually insignificant when compared to the other court costs.

The law also authorizes the judge to impose fines for malicious abuse of process,<sup>6</sup> for presenting appeals that are clearly inadmissible or dilatory,<sup>7</sup> and for acts offensive to the dignity of justice,<sup>8</sup> among others.

### 5.2.2 Attorney’s Fees

Brazil is part of a minority of systems under which representation by a lawyer is mandatory, except for small claims. In addition to this common exception, Brazilian law does not require legal representation when the party is an attorney duly enrolled at a Brazilian State Bar Association or if there is no attorney available to represent such party in the process.<sup>9</sup>

Attorneys and clients are free to contract the payment of the fees. The amount varies widely depending on the location, the area of practice and the expertise of the firm. Success-fees are allowed and quite common. The Bar Associations of each Brazilian state only establish floors for

---

these rules, the minimum amount to be paid as court costs currently corresponds to R\$79.25 and the maximum corresponds to R\$47,550.00. In order to appeal the party shall have paid costs of 2% of the amount in dispute, in the case of adjudication of a right (where there is no conviction of the losing party to pay a certain amount); or 2% of the monetary judgment, where the sentence has condemned the loser to pay a certain amount. See Article 4, § 2, São Paulo State Law N. 11.608/03. The minimum and maximum amounts to be paid as court costs for appeal are the same as the ones applicable to the initial costs. In addition to these costs, the party shall pay the costs related to the transportation of the process. See Article 4, § 4, São Paulo State Law N. 11.608/03.

<sup>4</sup> Article 258, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>5</sup> Articles 259 and 261, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>6</sup> Article 18, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>7</sup> Article 538, sole paragraph, and Article 557, § 2, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>8</sup> Article 601, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>9</sup> Articles 259 and 261, Brazilian Code of Civil Procedure (Law N. 5.869/73).

different services,<sup>10</sup> above which the parties are free to negotiate with their attorneys.

### **5.2.3 Evidence Expenses**

The general rule is that the party requesting the evidence shall bear the corresponding costs of production, including expert fees, costs of travelling and hotels.<sup>11</sup> If such evidence is requested by the judge or by both parties, the claimant shall bear the costs. Parties are free to appoint a technical assistant to monitor the work carried out by the expert, and they usually do; in these cases, they also have to bear the fees and expenses related to such assistant.<sup>12</sup> The amount of these fees shall be established by the expert after his appointment in the procedure.

Costs related to the taking of evidence may represent a considerable amount, and may even be decisive in a plaintiff's decision to bring a case to court. In most cases, however, they do not represent a significant amount of the overall costs of litigation. When compared with the U.S., for example, they are usually minimal – as it happens in other civil law systems.

## **5.3 The Brazilian Meaning of Shifting**

The Brazilian system imposes on the losing party all three major categories of expenses, i.e., court costs, lawyer, and evidence expenses. However, it does not entitle the winner to recover the full amount spent in litigation, as detailed below.

### **5.3.1 Court Costs**

All court costs are subject to shifting.

---

<sup>10</sup> As an example, the Minimum Fee Schedule approved by the São Paulo Bar Association is available at <http://www.oabsp.org.br/tabela-de-honorarios/tabela-de-honorarios-completa-nova>. There is no immediate consequence if a lawyer charges less than those minimum amounts. However, the Bar Association Code of Ethics provides that lawyers must avoid degrading the value of their services, not charging an insignificant amount or less than those minimums, unless they have a justification for that. Article 41, Brazilian Bar Association Code of Ethics.

<sup>11</sup> Articles 19 and 20, § 2, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>12</sup> Articles 20, §§ 2 and 33, Brazilian Code of Civil Procedure (Law N. 5.869/73).

### 5.3.2 Attorney's Fees

Following the same approach as other Latin countries, recoverable attorney's fees<sup>13</sup> are capped. The exact percentage is awarded by the judge, and it may range from 10–20% of the monetary judgment<sup>14</sup> – a low percentage in comparison with other countries examined in the General Report. Where there is no monetary judgment, the judge shall determine these fees according to his equitable discretion.<sup>15</sup> In both cases, he shall take into account the attorney's degree of professional care, the place where the services were rendered, the nature and importance of the case, the work carried out by the attorney and the time required for rendering such services.<sup>16</sup>

This approach avoids a concern pointed out in the General Report that the free determination of lawyer fees and the availability of success-fees could lead the winner to make arrangements with his lawyer potentially at the loser's expense.

Any fees exceeding the amount set forth by the judge shall be borne by each party, in accordance with the services agreement executed by and between the party and her attorney.

### 5.3.3 Evidence Expenses

As pointed out in the General Report, all civil law systems impose these costs on the loser. The prevailing party may recover all the expenses incurred with the taking of evidence, provided that such expenses had been duly proved in the process (receipts, vouchers, etc).

## 5.4 Shifting Procedure

Prior to filing a civil action before a Federal Court, the plaintiff shall pay half of the court costs as initial costs.<sup>17</sup> Upon an appeal, the party appealing shall pay the other half.<sup>18</sup> If there is no appeal, the defeated party shall pay the other half only if she presents a defense in the enforcement proceeding or hinders its performance.<sup>19</sup> When an action is filed before a state court, the plaintiff shall pay all of the court costs as initial costs. Parties to a

---

<sup>13</sup> Article 20, *caput*, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>14</sup> Article 20, § 3, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>15</sup> Article 20, § 4, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>16</sup> Article 20, § 3, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>17</sup> Article 14, I, Law N. 9.289/96.

<sup>18</sup> Article 14, II, Law N. 9.289/96.

<sup>19</sup> Article 14, IV, Law N. 9.289/96.

contract may not agree on who should advance the payment of court costs, for example establishing that these costs shall be collected by the defaulting party. The rules governing the payment of such costs are mandatory and parties may not derogate from them.

During the proceedings – from the beginning of the lawsuit until the enforcement of the decision – each party shall advance payment of costs and expenses of the procedural steps that she carries out or requires,<sup>20</sup> such as experts' fees, witnesses' travel expenses, photocopies, etc. In addition, the plaintiff shall anticipate payment of costs related to procedural steps ordered by the judge *ex officio* or requested by the Public Prosecutors' Office.<sup>21</sup> The judge may prefer to have the parties sharing the costs of each of these steps, since the prevailing party will be reimbursed at the end of the proceedings. Whenever a party fails to comply with such a duty, the respective procedural step requested by such party will not be carried out. If the procedural step is requested by the judge *ex officio* or by the public prosecutor, and a party refuses to pay for that, the judge may determine that the payment only be made at the end of the proceedings, by the losing party.

At the end of the lawsuit, as determined in the final judgment, the loser must reimburse all costs and expenses paid up-front by the prevailing party over the course of the proceedings.

## 5.5 Exceptions to the Shifting Rule<sup>22</sup>

In line with other jurisdictions which exempt cases with a strong social element from cost shifting, Brazilian laws dealing with class actions aimed at the protection of collective, diffuse, and public rights set out specific rules in that regard.<sup>23</sup>

Public Civil Actions do not require that parties advance payment of court costs, attorney fees, expert fees, and any other court costs. In addition,

---

<sup>20</sup> Article 19, *caput*, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>21</sup> Article 19, § 2, Brazilian Code of Civil Procedure (Law N. 5.869/73). Please notice that it is very uncommon for judges or public prosecutors to request such procedural steps.

<sup>22</sup> As indicated in the General Report, some systems forego or limit cost shifting in small claims. Although such claims may be heard in Special Courts in Brazil, according to a simplified procedure, and self-representation is authorized in these cases, the cost shifting is also applicable here. Please note that Special Courts allow self-representation where the amount in dispute does not exceed twenty times the Brazilian minimum wage. Article 9, Law N. 9099/95. The minimum wage is currently R\$465.00 (Law N. 11.944/2009). See Article 20, *caput*, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>23</sup> Some examples: public property, the environment, and the interests of consumers, people with disabilities, children and adolescents. Each of them is provided for in a specific law, such as the Public Civil Action (Article 18, Law N. 7347/85) and the Popular Action (Article 5, LXXIII, Brazilian Constitution).

associations acting as plaintiffs shall not be responsible for paying attorneys' fees and court costs in case they lose the case, unless there is proven bad faith.<sup>24</sup> This rule is justified by the public interest underlying these actions.

As to the Popular Action,<sup>25</sup> costs and initial court costs shall only be paid at the end of the proceedings.<sup>26</sup> In the event the case is upheld, defendants shall pay the costs and other expenses directly related to the process, either judicial or extrajudicial, as well as attorneys' fees.<sup>27</sup> If the claim is held malicious, the plaintiff shall pay the court costs multiplied by ten.<sup>28</sup>

In class actions aimed at protecting the interests of consumers, children and adolescents, claimants are not required to make an up-front payment of fees and court costs. Moreover, they are exempt from the payment of court costs and attorney's fees, except in cases of proven bad faith.<sup>29</sup>

## 5.6 Exceptions to the Rules Concerning Costs

### 5.6.1 *Indigents*

Brazil has a publicly funded legal aid system to serve the people who cannot afford the costs of litigation.<sup>30</sup> Parties are exempt from paying the courts' costs and expenses, as well as the attorneys' fees of the opposing party in the case they lose.<sup>31</sup>

The benefits of legal aid are available to those individuals who really cannot afford the costs of civil procedure without causing damages to themselves or to their family.<sup>32</sup> This condition must be proven during the procedure by means of a declaration included in the plaintiff's initial submission.<sup>33</sup> The judge may also determine that the individual submit tax

---

<sup>24</sup> Article 18, Law N. 7347/85.

<sup>25</sup> Popular Actions may be filed by any citizen to request the annulment or declaration of invalidity of acts detrimental to the assets of the Union, of the Federal District, of the States, of the Municipalities, of the Municipal Entities, etc. (Article 1, Law N. 4717/65).

<sup>26</sup> Article 10, Law N. 4717/65.

<sup>27</sup> Articles 12, Law N. 4717/65.

<sup>28</sup> Articles 13, Law N. 4717/65.

<sup>29</sup> Article 141 §§ 1 and 2, Law N. 8069/90; Article 87, Law N. 8078/90.

<sup>30</sup> Article 5, LXXIV, Brazilian Constitution and Article 2, sole paragraph, Law N. 1.060/50.

<sup>31</sup> Article 3, Law N. 1.060/50.

<sup>32</sup> Article 5, LXXIV, Brazilian Constitution and Article 2, sole paragraph, Law N. 1.060/50.

<sup>33</sup> Article 4, § 1, Law N. 1.060/50.

returns in the process. If it is proven that the plaintiff was not eligible for legal aid, he shall be condemned to pay ten times the courts costs.<sup>34</sup>

### 5.6.2 *Split Outcomes*

In line with most of the systems analyzed in the General Report, Brazilian rules handle the issue of split outcomes by examining how much each side won or lost. When the plaintiff's claim is partially rejected, the costs shall be proportionally divided between the parties.<sup>35</sup> If only a minimal part is rejected, the litigant who lost most shall bear the full payment of the court costs.<sup>36</sup>

### 5.6.3 *Settlement*

Parties settling disputes by agreement usually decide on the responsibility for court costs, attorney's fees and expenses. If they fail to do that, all costs shall be divided equally between them.<sup>37</sup>

If a party withdraws from her claim or recognizes the rights claimed by the other party, the costs shall be paid by the party withdrawing or recognizing the right. If the withdrawal or recognition is partial, the responsibility for costs and fees will be proportional to the amount that is withdrawn or recognized.<sup>38</sup>

Brazil has no statistics on the percentage of cases resolved by settlement, but practice indicates very low rates. Since it takes many years for a definitive decision to be obtained and enforced, the party in a weaker position often prefers to postpone it. There is an incipient movement to encourage settlement and disseminate the use of alternative dispute resolution in Brazil. In addition, many courts, such as the São Paulo State Court, have been organizing weeks called "National Conciliation Week", when judges across the country are committed to helping the parties to achieve settlements.<sup>39</sup>

---

<sup>34</sup> Article 4, § 1, Law N. 1.060/50.

<sup>35</sup> Article 21, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>36</sup> Article 21, sole paragraph, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>37</sup> Article 26 § 2, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>38</sup> Article 26, *caput* and § 1, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>39</sup> Information on the National Conciliation Week is available at São Paulo State Court's website ([www.tj.sp.gov.br](http://www.tj.sp.gov.br)).

## 5.7 Distribution of Civil Litigation Costs

The same publicly funded legal aid system which exempts indigents from courts costs also gives them access to public defenders, i.e., in civil cases, an attorney representing them.<sup>40</sup> Lawyers and law firms also carry out pro bono work for indigent people.

Public-private funded help is also available, such as the program developed by the State of São Paulo with the Brazilian Bar Association. Lawyers interested in helping those in need may register to participate in this program, and the fees are paid by the State of São Paulo based on amounts previously established. Other programs exist throughout the country.

Finally, a party may transfer the right to collect an amount in dispute – together with the risks of the claim – to a third party as long as the assignment follows the legal requirements, including notifying the other party to the dispute, who must consent to the substitution.<sup>41</sup>

Although Brazilian law does not prevent the parties from insuring against the costs of litigation, including attorneys' fees, it is not common practice.

## 5.8 Conclusion

Costs and fees should not be considered as a serious or severe obstacle to filing an action, in view of the benefits of the publicly funded legal aid, the legal aid programs developed in partnerships between the government and private entities and the freedom of the parties to agree on the amount and form of payment of the attorney's fees. However, it should be noted that most of the people who are entitled to such benefits, especially in the case of natural persons, have no access to such information and therefore do not enjoy its benefits.

In practice, however, parties pursuing their rights before the Brazilian Courts still face many other difficulties, and the constitutional rule commanding access to justice for all still stands as a challenge and an objective to be reached. Brazil's Supreme Court is the most overburdened court in the world.<sup>42</sup> It takes many years for a definitive decision to be obtained and enforced, and sometimes such length is enough to hinder the access to justice. Also, most people who are entitled to the benefits of legal aid have no access to such information and therefore do not enjoy these benefits: lack of proper legal advice and lack of information also exclude several parties.

---

<sup>40</sup> Article 3, Law N. 1.060/50.

<sup>41</sup> Article 42, § 1, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>42</sup> When less is more; Brazil's supreme court. (Supreme Federal Tribunal), *The Economist* (US), May 23, 2009.



As to the future, a major reform of the Brazilian Code of Civil Procedure is underway,<sup>43</sup> aiming to reduce the volume of claims pending in the courts and the long duration of the proceedings. Up to now, no major amendments regarding the rules on cost and fee allocation have been presented. However, the Commission in charge of the reform project already stated that it intends to discourage frivolous claims that further increase the case load of the Brazilian courts, and changes to these rules are probably the easiest way to achieve this goal. Given the Commission's aim of improving the Brazilian legal system, it is an important moment to understand the rules governing litigation costs in other systems and analyze what particularities would better fit in the Brazilian system.

---

<sup>43</sup> The first version of the bill drafted by a commission of legal experts is available at the STJ's website: [http://www.stj.gov.br/portal\\_stj/publicacao/download.wsp?tmp.arquivo=1541](http://www.stj.gov.br/portal_stj/publicacao/download.wsp?tmp.arquivo=1541).