REPORT OF BRAZIL

TREATMENT GIVEN TO COMMERCIAL CASES

I. ORGANIZATION/STRUCTURE

1. a) What law applies to commercial activities in your judiciary system? b) Are there special statutory provisions?

Answers: a) In Brazil, commercial law applies to commercial activities and enjoys legal autonomy from Civil Law, since the Federal Constitution (art. 22, inc. I) itself clearly separates Civil Law from Commercial Law; b) Yes, the new Brazilian Civil Code, which went into effect on January 2003, clearly revoked the First Part of the Commercial Code (Law No. 556 of June 25, 1850), which comprised "Trade in General,", from then on covering civil and commercial matters alike, as well as comprehensive special legislation. However, despite this legislative unification of private law, commercial matters should not be confused with civil matters in the new Code – this is one of the factors that highlight the legal autonomy of Commercial Law.

2. How are courts for ruling over commercial cases structured? (For example, are commercial cases handled by courts with generalist judges, ruling over a variety of topics? Do judges with more extensive commercial experience handle commercial cases? Or do you have specialized courts where judges with that particular specialty decide on commercial cases exclusively?)

Answers: The Brazilian Constitution gives the Federal Government the power to legislate over lawsuits (art. 22, I); federal states receive the power to organize their justice (art. 96, II, d). It also grants them the supplementary powers to legislate on procedure (Article 24 and paragraphs). Thus, the Brazilian Judicial structure comprises the State-level justice system and the Federal-level Justice System, and it also allows for the creation of specialized courts (art. 96, inc. I, "d" and inc. II, c and d, Federal Constitution of 1988), as in the case of Rio de Janeiro, which took the initiative to create specialized courts for corporate law¹. As for the state of São Paulo, the largest business center in the country, it has not yet created any courts specializing in corporate law, arguing that the number of

¹ The specialized courts in Rio de Janeiro were created by changing the jurisdiction of existing Bankruptcy Courts, through art. 2 of Resolution 19/2001 of the TJRJ special agency, changing the text of art. 91, I, letter d, of the Code of Judicial Jurisdictions and Organization of the State of Rio de Janeiro (CODJERJ).
commercial cases is not sufficient to warrant them, compared to other areas of the Law.

3. a) Do you have arbitration courts for trade disputes? Are there circumstances in which the matter should go through mediation or arbitration before the parties have access to judicial courts or shift the process to these courts once the process has already started?

**Answers:** a) Yes. With the advent of Law No. 9307/1996, arbitration was recognized in Brazil as a private alternative to dispute resolution; b) Yes. The law states that the parties can resolve their conflicts by means of an arbitration court, through a commitment clause and / or legal commitment. The arbitration clause is a covenant whereby the parties involved in a contract choose to resolve any dispute that may occur through arbitration. This clause, always in writing, is part of the contract or included in a separate document. Thus, if the contract is nullified, this does not necessarily affect this clause, since it is autonomous vis-à-vis the contract to which it belongs. As for the commitment to submit to arbitration, judicial or extrajudicial, this is an adjustment through which the parties agree to submit to arbitration to resolve their dispute. The extrajudicial arbitration commitment shall be agreed upon in writing, through a private document, signed by two witnesses, or be signed in the public realm. The judicial arbitration commitment will take place through a judicial process. The arbitration agreement extinguishes the judicial process, without a trial pertaining to the merits and to the defendant, the defendant (in the lawsuit), must state the existence of arbitration. The arbitration shall preferably be linked to an institutional entity such as the various arbitration chambers and courts, much like the various models existing in Brazil and elsewhere in the world.

4. a) What types of commercial cases are heard by your courts? (ex: contracts, intellectual property, securities, insolvency, corporate restructuring etc.). b) What types of commercial cases are handled most frequently by your courts?

**Answers:** a) In Brazil, the right to access the judicial branch cannot be waived, it is a constitutional principle. Thus, in theory, any matter of a commercial nature can be taken before the judicial branch as long as, as said before, there is no arbitration agreement in effect; b) While there is no official study about it in Brazil, it is possible to list the commercial cases most frequently handled by our courts - for example, issues relating to the following subjects: contracts, such as their execution, revocation, bidding, etc. Civil Liability, compensation and the appropriation of properties belonging to members or directors; accountability and displaying documents, takeovers, mergers, bankruptcies and reorganizations; market fraud; credit titles, protests, execution and annulment; trading in the Stock Exchange, etc..

II. PROCESS/PROCEDURE
1. a) Do you have special procedural norms in place for cases involving trade disputes (ex: those relating to the discovery of documents before trial, questionnaires, interviews)? b) Are these rules left to the discretion of the judge or are they based on a statute? c) Are these rules sufficient to handle complex commercial cases?

Answers: a) No. The Brazilian Judicial System makes no distinction vis-à-vis the processes and procedures pertaining to matters of a private nature b) in cases of civil and commercial cases, the rules in the Code of Civil Procedure apply (Federal Law No. 5869/1973) c) Yes, the Brazilian Civil Procedure Law has already been proven capable of handling complex commercial cases, due to the constant changes that have introduced new and diversified trends and tools into the Brazilian Civil Procedure, designed to meet the needs of contemporary life, with emphasis on the creation of Special Courts, the Electronic Legal Process and immediate injunctions for diffuse and collective interests, among others.

2. a) In situations where a particular claim in a commercial case does not involve a particularly high monetary value, do different procedural rules apply? b) Will the issue be analyzed by some other court?

Answers: a) Yes, through the creation of Special Courts (Law 9099/1995), which seek to facilitate access to courts, and rule over commercial and civil cases of lesser complexity and involving lower monetary amounts. Only commercial and civil cases of greater complexity are tried by the common justice system; b) the decisions made by judges of the Special Courts may be appealed to the Appeal Groups of the court itself, composed of three (3) qualified judges acting on first-level jurisdiction.

3. a) Is your system quicker to judge commercial issues than other issues? If so, is there also a process to expedite the appeals? b) Do your courts usually schedule hearings for the collection of evidence from one day to another or are hearings scheduled in advance? Does this practice differ in the case of a trade dispute?

Answers: a) No. As mentioned before, the same rules of the Brazilian Civil Procedure apply to commercial issues, especially the Special Civil Courts, which also rule over less complex trade issues; b) No. Public hearings are scheduled in advance; since there is no special legal provision stipulating another deadline, subpoenas will only enforce attendance after 24 (twenty four) hours (art. 192 of the Civil Code), and this practice does not differ in the case of a trade dispute.

4. Do you have some kind of deadline to decide on trade cases (informal policy, the judge's
own criteria or statutory deadlines)?

**Answers:** All procedural steps that must be taken by both parties and the judges have time limits stipulated by law and by internal court regulations. There is no legal provision for a special deadline in deciding cases of a commercial nature in Brazil.

5. **In commercial cases, do your courts have the power to impose deadlines for pre-trial procedures or for the trial itself? (ex: setting deadlines for when certain pretrial matters should be ready, or establishing limits for starting statements, witnesses examination, etc.). What are the consequences of non-compliance to such deadlines, if any?**

**Answers:** a) Yes, deadlines are set forth by law. If the law does not mention a deadline, the judge shall establish it. If there is no law or determination by the judge, the deadline will be five days, pursuant to art. 185 of the Code of Civil Procedure; b) failure to keep the deadline will lead to the party being barred from claiming or denying an argument (estoppel). In this case, the judge shall enforce to the parties that had the burden of performing the act the consequences arising from their omission.

6. **Are there situations in which your courts assign more than one judge to a commercial case expected to be particularly complex?**

**Answers:** No. In Brazil we have the principles of a natural judge and the physical identity of that judge. Thus, a single magistrate is appointed, and the magistrate who collects oral evidence is bound to the trial process. Moreover, the judge who will be judging must gather evidence directly (immediacy), unless there is a need for collecting evidence in other jurisdictions or countries, which is then performed by means of rogatory or precatory letters.

7. a) **Are there specific rules of evidence that apply to a trade dispute (ex: admissibility, cogency)?** b) **In commercial litigation, do your courts give special weight to "expert opinions" and testimonials?**

**Answers:** a) No. In Brazil, disputes in substantial private, civil or commercial law, when taken to court, are resolved by applying jurisdiction in accordance with the rules of Civil Procedure, with no specific rules exclusively for commercial disputes, although procedural law creates special procedures that conform to the peculiarities of the substantive law under discussion; b) In Brazil, there is no principle of rational persuasion of the judge, also called free motivated convincing. According to art. 131 of the Code of Civil Procedure, the judge shall freely analyze the evidence in a case but, when the time comes to issue the ruling, the judge must state the reasons which helped him/her make the decision. As such, there is no hierarchy of evidence. The judge must examine the
evidence collected and freely make up his/her mind - however, his/her decision must be clearly explained in the sentence. In Brazil, the need for any judicial decision to be clearly motivated is a constitutional requirement (it is provided for in the Federal Constitution).

III. INTERNATIONAL/TRANSBORDER

1. Do you have special courts to deal with international trade disputes?
   **Answers:** No, except in the case of a dispute between a foreign State or international organization and the Federal Government (the Union), a Brazilian state, the Federal District or Territory, in which case the lawsuit should be judged, originally, by the Federal Supreme Court (art. 102, inc. I, letter "e" of the Federal Constitution).

2. Roughly, how many of your commercial cases have at least one party in another country?
   **Answers:** We can say that the number does not surpass 10% of all commercial disputes, although in Brazil there is no official data or even a scientific study on this subject. We can also say that the constant increase of Brazilian trade relations with neighboring countries and the rest of the world has contributed to the emergence of several cases involving commercial disputes between Brazilian companies and those in other countries.

3. Do the parties, in your international cases, ever raise the issue that the case at hand should be tried elsewhere? If so, how often does this become a problem?
   **Answers:** Yes. *Lis pendens* is a common claim as a primary defense in international affairs. However, the existence of a lawsuit process or even a decision made in another country is irrelevant to the Brazilian justice system. According to art. 90 of the Code of Civil Procedure, an action taken abroad does not lead to *lis pendens*; the Brazilian judicial authority does not need to know the same cause and linked causes. Even a final foreign sentence shall be ignored by a Brazilian judge, unless it is approved before the Superior Court of Justice (art. 105, I, i, of the Federal Constitution), in which case it would then become effective in Brazil, producing the effects of *lis pendens*. However, there are those who contend that the provisions of art. 90 of the Code of Civil Procedure are no longer in effect, because Brazil is a signatory of the Bustamante Code, whose art. 394 provides that proceedings abroad prevent identical actions from being taken in Brazil.\(^2\)

4. Are your courts able to provide interpreters for the questioning of people from abroad?
   **Answers:** Yes. Some courts have translation and interpretation services, performed by public

\(^2\) Cândido Rangel Dinamarco, Instituição de Direito Processual Civil, v. 1, p. 346.
servants. If this service is not made available by the court, the judge must appoint an interpreter whenever he/she deems necessary, to translate into Portuguese the statements of the parties and witnesses who do not know the national language (art. 151, II, of the Code of Civil Procedure). In Brazil, we recognize and guarantee the right of any person (whether foreign or not) to express themselves in their mother tongue before the courts.

5. Do your courts allow the special attendance of foreign lawyers, in the case of international dispute? If so, what special rules apply, if any?

Answers: No. In Brazil, only lawyers from the Brazilian Bar Association can practice law and be effectively recognized as lawyers. Private actions taken by attorneys who are not registered at the Brazilian Bar Association are rendered null and void (articles 3 and 4 of Law 8906 / 1994).

IV. MISCELLANEOUS

1. a) Do your courts have the power to provide reports on costs and attorneys’ fees so as to discourage the parties from acting unreasonably? If so, do your courts use of such power in commercial cases?

b) Do your courts, in general, make use of such power? If so, on what basis does one decide on the costs and fees?

Answers: a) No. Except in cases of free justice, it is the responsibility of parties to provide the expenses relating to the lawsuit, paying them in advance. b) In the sentence, the judge will condemn the loser to pay to the winner the prepaid expenses and the attorneys’ fees, which will be between the minimum of 10% (ten percent) and a maximum of 20% (twenty percent) on the value stated in the conviction. In setting the fees, the following requirements will be observed: the degree of professional decorum, the place where the service was provided, the nature and importance of the cause, the work done by the lawyer and the time taken by his/her work as a lawyer.

2. a) Does your highest court handle trade issues frequently? b) Are some of your Supreme Court Justices (“Ministers”) specialists in trade management?

Answers: a) No. The Supreme Court is the highest level of the Brazilian Judicial branch, and its responsibility is, primarily, to safeguard the Constitution, as defined in art. 102 of the Federal Constitution. Among its main tasks is deciding on cases of the unconstitutionality of a law or state or federal normative act, the declaratory action asserting the constitutionality of the law or normative act, petitions on the breach of a fundamental precept deriving from the Constitution itself and extraditions requested by foreign states; b) The Federal Supreme Court is composed of eleven
ministers who must be native Brazilians (art. 12, § 3, IV of CF/88), chosen from among citizens over 35 and less than 65 years of age, of notable legal knowledge and with a spotless reputation (art. 101 of CF/88), and must be appointed by the President and receive approval by the absolute majority of the Federal Senate. Currently, four ministers can be considered experts in private law, and two of them are specialists in commercial law: Minister Eros Grau and Minister Carmen Lucia.

3. a) To what extent does technology play a role in your commercial cases? b) For example, do you have "paperless" trials, or have they ever been considered? c) Do you allow parties to appear in video broadcast via satellite?

**Answers:**

a) Technological tools in Brazil have been increasingly contributing to the development and improvement of the judicial branch, resulting in greater efficiency and speed in providing legal services in all areas of the law; b) Yes. Federal Law No. 11,419 / 2006 was the first to accept the use of electronic tools in judicial proceedings, communication acts and the transmission of trial documents, thus contributing to the process of computerizing the Brazilian Judiciary system. The implementation of the Electronic Legal Process System has already begun in the higher courts and in various states of the country. In the future, all courts and jurisdictions in the country will be interconnected; c) Yes. The Law of Electronic (virtual) Legal Process states that the judge may decide that data and documents needed in the lawsuit must be sent and presented electronically (art. 13 of Law No. 11.419/2006).

**Case Study**

Jean, a citizen of France residing in Switzerland, is the sole shareholder and general manager of Company B, registered in Germany, but with offices in Italy and Latvia. Working outside of his Italian office, he sent a request to X Ltd., a company registered in Spain, which is the distributor of E Ltd, the Swiss machinery manufacturer.

When submitting the order, Jean emphasized that the timely delivery of machinery was essential for Company B to timely produce and deliver what had been requested by D Inc., a U.S. company. The order: a large quantity of copper wire, made by Jean’s company. X Ltd. promised to send the merchandise by ship by June 1, from a port in Sweden. The contract stated that Spanish law would apply to the transaction, but did not specify the location for the hearing, in case any controversies should arise.

Due to a Sweden labor union strike, the requested machinery was not ready for shipment by June 1 and the next freighter available would only leave port on August 1. As a result,
Jean found himself in violation of the contract with D. Ind.

D Ind. filed a lawsuit against Company B in the justice court for the Southern District of New York.

Questions

1. a) Company B. wants to file a third-party lawsuit against X Ltd. In your judicial system, is a similar process possible? b) If so, could X Ltd. file a fourth-party lawsuit against the Swedish manufacturer for non-delivery of machinery on the date stipulated in the purchase order?

**Answers:** a) Yes, in the Brazilian Judiciary System, Company B. could use the principle of “*lis denunciação*” (“litisdenúnciação”, art. 70, inc. III of the Code of Civil Procedure). The denunciation of the issue allows for one party to exercise their right to compensation vis-à-vis another party. Moreover, the Brazilian civil jurisdiction is exercised by judges around the country, under the Code of Civil Procedure, art. 1, but the Brazilian authorities may apply rules of substantive law abroad in the cases being analyzed here (art. 337 CPC), and the claimant will have to prove its content and validity, if the judge so decides. b) Yes. Also, Company X Ltd. could also avail itself of the denunciation of the dispute to file a lawsuit against the Swedish manufacturer, to ensure their right to compensation. This is called a successive denunciation lawsuit (Article 73 of Code of Civil Procedure).

2. If D. Inc. were a company registered in your country rather than in the U.S., would your courts order that each party wishing to file a lawsuit against a foreign defendant do so in the language of the defendant?

**Answers:** No. According to art. 156 of the Code of Civil Procedure, all procedural acts must be written in the vernacular. Thus, petitions, statements by the parties, and legal decisions must be written in Portuguese. Any documents written in a foreign language can only be included in the records if accompanied by the vernacular version, signed by an official translator.

3. What special rules, if any, would apply to the official subpoena given out to parties in different countries?

**Answers:** In Brazil, subpoenas are issued to foreign parties through a rogatory letter, a sort of request for the court of another country to cooperate in the practice of a given procedural act. The acceptance and compliance with the request shall respect international conventions.

4. Would your courts grant additional time to file the lawsuit and / or to respond to the various, motions etc. because the parties reside in different countries?

**Answers:** Yes. In an ordinary procedure, the time given for a response is fifteen days, but according to art. 191 of the Code of Civil Procedure, this must be doubled when there is a joinder of parties with different attorneys. If done by rogatory letter, the period will begin when the letter is included in the official documents and duly followed. Still, in the case of a joinder in the passive sense, the deadline will begin only when the subpoena cycle is concluded, i.e., when the last duly-followed subpoena is annexed to the official documents (art. 241, inc. III, Code of Civil Procedure).

5. a) Are there special rules and procedures in your country to honor sentences by foreign courts? b) What rules apply in honoring foreign arbitration decisions?

**Answers:** a) Yes. As mentioned before, for a final decision by a foreign court decision to become effective in Brazil, it must first be approved by the Superior Court of Justice (art. 105, I, i, of the Federal Constitution); b) To be recognized or enforced in Brazil, the foreign arbitration decision must be approved by the Supreme Federal Court (art. 35 of Law No. 9307/1997).