

Commercial Contracts

Contributing editors

Duncan Reid-Thomas and Doris Myles



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GETTING THE
DEAL THROUGH 

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Contract formation

1 Is there an obligation to use good faith when negotiating a contract?

Yes. Good faith is considered one of the most relevant principles of Brazilian contract law and it governs every act and relationship, including the negotiation of a contract.

The Civil Code establishes that the negotiation of a deal should be construed in accordance with probity and good faith between the contractors, and, if a party acts against this principle, it will be deemed an unlawful act (articles 113, 187 and 422 of the Civil Code).

2 How are 'battle of the forms' disputes resolved in your jurisdiction?

In the case where a proposal is sent by a party and the other party returns it with modifications, if not challenged, they will be deemed accepted by the offeror and, consequently, the last version of the contract will prevail.

Nevertheless, any dispute involving a discussion regarding the object or formalities of a contract should be resolved in court using any other type of proof available, including emails and witnesses.

3 Is there a legal requirement to draft the contract in the local language?

There is no legal requirement to draft contracts only in Portuguese. However, to be effective and enforceable against third parties and before a court, a contract written in another language should be accompanied by an official registered translation into Portuguese.

4 Is it possible to agree a B2B contract online?

Yes, it is possible to agree an online B2B contract in Brazil, given that there is no mandatory form for this type of contract.

Although there is no specific legislation regulating the subject (there is, however, a legislative bill in progress), the prevailing precedents and doctrine have recognised its validity and have not repudiated this matter in the courts.

Statutory controls and implied terms

5 Are there any statutory or other controls on parties' freedom to agree terms in contracts between commercial parties in your jurisdiction?

Brazilian contract law recognises the freedom of contract in negotiating and drafting contracts. However, the parties must also abide by the social function of the contracts (article 421 of the Civil Code), which means that an agreement shall not be used as an instrument to cause damage to the other party or third parties and that it shall aim at fulfilling a purpose in society. Furthermore, there are certain minimum requirements and rights for the parties involved for some contracts such as real estate leases, consumer contracts and labour contracts.

Therefore, contractors are free to negotiate the terms of the contracts, as long as they are in accordance with the applicable Brazilian legislation.

6 Are standard form contracts treated differently?

Yes. Standard form contracts are treated with specific rules set forth in the Civil Code. As a general rule, suppliers shall provide clear and simple

language and any ambiguity shall be construed in favour of the consumer. Also, Brazilian law does not allow any waiver of right that is inherent to the nature of the agreement. The Consumer Code also sets out other specific requirements.

7 What terms are implied by law into the contract? Is it possible to exclude these in a commercial relationship?

Contracts involving goods, whether the sale or supply of goods, have an implied warranty regarding hidden defects that cannot be excluded by the contractors. According to the Civil Code and the Consumer Code, hidden defects are those defects that a person cannot see superficially, and which make the product that forms the object of the agreement unfit for use or impair its value.

The Consumer Code specifically admits that services rendered unsatisfactorily, not corresponding to the contracted terms, may be considered as hidden defects.

As a result of a hidden defect the contract may be terminated, the price of the contract may be reduced, or the service or product can be replaced or repaired.

Contracts involving goods also have an implied warranty of good title.

The parties may, based on the Civil Code, increase, reduce or exclude liability for bad title. However, the Code also provides that, even if the contract has expressly excluded liability for title, if the rightful owner recovers the good, the purchaser is entitled to a refund, if the seller was aware of the risk of a third party claiming ownership.

8 Is your jurisdiction a signatory to the United Nations Convention on Contracts for the International Sale of Goods (the Vienna Convention)?

Yes. Brazil signed the United Nations Convention on Contracts for the International Sale of Goods in 2013, with effect from 1 April 2014.

9 Is there an obligation to use good faith when entering and performing a contract?

Yes. Good faith is a general principle of Brazilian law and it governs every act and relationship.

The Civil Code expressly provides that the contractors must uphold, at the conclusion of the contract and during its execution, the principles of probity and good faith (articles 113, 187 and 422 of the Civil Code).

Limiting liability

10 What liabilities cannot be excluded or limited by a supplier in a contract?

Despite being very common, the limitation or exclusion of liability in contracts, particularly the limitations of financial caps, is a controversial issue. The limitation or exclusion of liability is not always accepted by the Brazilian judiciary, especially in cases related to the Consumer Code. The acceptance or rejection of such limitations or exclusions depends on each specific case, considering principles of reasonableness and proportionality.

11 Are there any statutory controls on using financial caps to limit liability for breach of contract?

Contracts may freely establish caps to limit liability for breach. However, if the dispute goes to court, the judge may adjust the amount of compensation

Update and trends

In March 2016, the new Civil Procedure Code, which seeks greater agility and transparency in the Brazilian legal system, came into force. Enforcement of contracts will be subject to the rules of the new Code.

depending on the circumstances of the case, if deemed necessary, considering the principles of reasonableness and proportionality.

12 Are there any statutory controls on indemnities used to cover liability risks in contracts?

Yes, indemnities arising from contracts are governed generally by the provisions of the Civil Code, especially the provisions regarding civil liability. The obligation to indemnify depends on the existence of a causal relation between the act and the damage (article 927 of the Civil Code). Brazilian law provides for the obligation to indemnify regardless of such direct relation of cause in specific cases, such as environmental issues.

13 Are liquidated damages clauses enforceable and commonly used in your jurisdiction?

Yes, liquidated damages clauses are enforceable and commonly used in Brazil. Nevertheless, if the dispute goes to court and the judge considers an excessive disproportion between the fault and the damage, the judge may reduce the compensation equitably, even if a fixed amount is set out on the contract.

Payment terms

14 Are there statutory time limits for paying invoices? Is it possible to agree a different payment period?

There are no statutory limits for paying invoices in Brazil. The contractors may agree the payment period that best suits them.

15 Is statutory interest charged on late payments? Is it possible to agree a different rate of interest?

Yes. The Civil Code provides that when the default interest is not agreed in the contract, or there is no stipulated rate, or when it is mandatory, it shall be fixed at the rate that is charged on late tax payments to the National Treasury.

16 What are the civil penalties for failing to comply with the statutory interest rate or late payment of invoices?

In a case of failure to comply with the interest rate or late payment of invoices, the party shall be considered in default regarding the obligations of the contract, subject to the penalties set forth in the contract (eg, the termination of the contract) and will remain obliged to pay the interest until the full settlement of the obligation.

Termination

17 Do special rules apply to termination of a supply contract that will be implied by law into a contract? Can these terms be excluded or limited by including appropriate language in the contract?

Although contracts and their termination are governed by general rules of the Civil Code, the parties may agree specific terms regarding the termination of contracts, subject to the Civil Code's provisions.

18 If a contract does not include a notice period to terminate a contract, how is it calculated?

Brazilian law does not establish a notice period to terminate a contract if no express provision has been made. However, according to prevailing precedents, if the party harmed by the unilateral termination of the contract has made significant investment, the notifier should wait for a period sufficient to allow the other party to recoup the investment by performing the contract (the payback term), respecting the general principles of good faith and contractual justice.

19 Will a commercial contract terminate automatically on insolvency of the other party?

A commercial contract will only terminate automatically on insolvency of the other party if it is provided for in the contract. Nevertheless, the insolvency practitioner may decide, jointly with the creditors' committee, whether the insolvency party is capable and will fulfil the contract or terminate it.

20 Are there restrictions on terminating a contract if the other party is in financial distress?

No.

21 Is force majeure recognised in your jurisdiction? What are the consequences of a force majeure event?

Yes. Brazilian law recognises force majeure as unpredictable (or difficult to predict) events that have consequences or effects on the parties to the contract as well as third parties, but that do not create liability or a right to compensation.

Subcontracting, assignment and third-party rights

22 May a supplier subcontract its obligations under the contract without seeking consent from the other party?

There is no restriction for subcontracting of obligations under a supplier contract if the contract does not provide otherwise. However, it is very common to find such restriction in contracts and public bids, especially due to labour and civil subsidiary liabilities attached to subcontracting.

In addition, the responsibility of the subcontractor may be joint or subsidiary. The joint responsibility shall apply in the specific cases set forth in the law or in the contract. In all other cases the subcontractor shall have subsidiary responsibility.

23 Are there any statutory rules that apply to subcontracting in your jurisdiction?

There are no specific rules that apply to subcontracting in Brazil.

However, there are labour laws and precedents that restrict subcontracting if the service subcontracted relates to the core business of the company.

24 May a party assign its rights and obligations under the contract without seeking the other party's consent?

There is no restriction on the assignment of rights and obligations under a contract. However, it is very usual to include a contractual clause that prevents any type of assignment of contractual obligations without the prior consent of the other party.

25 What statutory controls apply to the assignment of rights or obligations under a supply contract?

In principle, the agreement will set the terms for the assignment of the rights and obligations under a supply contract, including receivables. However, in certain cases, the original supplier may still be liable to the counterparty.

26 How may a third party enforce a term of the contract?

Initially, only the parties may enforce the provisions of the contract. However, if it is proved that the intention of the parties was to cause damage to a third party, actual damage and a causal connection (causal link between the intention and the damage), a third party may judicially claim rights under the contract.

Disputes

27 What are the limitation periods for breach of contract claims? Is it possible to agree a shorter limitation period?

The general limitation period for claims established by the Civil Code is 10 years. However, there are specific situations that have lower terms, such as the claim of net debts established on the contract (five years), civil compensation claim (three years), among others.

28 Do your courts recognise and respect choice-of-law clauses stipulating a foreign law?

Yes. Decree-Law No. 4,657/42, known as the Introduction Law to the Civil Code, allows the stipulation of foreign law as the applicable law to contracts.

29 Do your courts recognise and respect choice-of-jurisdiction clauses stipulating a foreign jurisdiction?

The freedom of contract to stipulate jurisdiction is legitimised by Precedent No. 335 of the Supreme Court, which provides: 'Choice of forum clauses are valid for lawsuits arising from the contract.' This provision is especially important with regard to international agreements.

Brazilian law allows for the concurrent jurisdiction of Brazilian and foreign courts in disputes arising from an international contract.

However, in spite of the choice of forum having always been a legal possibility, Brazilian courts have held that, in certain cases of agreements between Brazilian and foreign companies, the Brazilian forum could not be excluded by the will of the parties.

The new Civil Procedure Code, which entered into force on 18 March 2016, included an express provision about the choice of foreign forum in international contracts that has no corresponding provision in the previous code.

Article 25 of the new Civil Procedure Code establishes explicitly that the Brazilian judicial authority is not competent to judge the matter if the international contract contains exclusive choice of foreign jurisdiction. As an exception, article 25, paragraph 1, provides that this does not apply to cases related to real estate and inventory of assets located in Brazil.

Furthermore, the forum selection clause can be deemed ineffective if considered abusive by the judge, who can determine the jurisdiction of the defendant's domicile, even if it is not an adhesion contract.

Thus, though the new Civil Procedure Code still provides for concurrent jurisdiction in the cases when the defendant is domiciled in Brazil, the obligation is fulfilled in Brazil or the action's foundation is fact or act occurred in Brazil, it is likely that we see a modification of the prevailing precedents considering the law reform with the inclusion of article 25 of the new Civil Procedure Code.

30 How efficient and cost-effective is the local legal system in dealing with commercial disputes?

In general, the Brazilian legal system is not very effective. However, if the contract is signed by two witnesses, it may have its clauses enforceable by a specific execution procedure in court, if the obligation or compensation is certain and undisputable.

Notwithstanding, if the commercial dispute involves an issue not clearly provided for in the contract, it may be subject to the regular procedure of judgment, which is long and may be expensive, depending on the amount involved.

In all cases, enforcement of a contract in the Brazilian judicial system tends to be time-consuming.

31 Is your jurisdiction a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Which arbitration rules are commonly used in your jurisdiction?

Yes. Brazil signed the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 2002, through Decree No. 4,311/2002. The arbitration rules used in Brazil are those established under Federal Law No. 9,307/1996, as amended, known as the Arbitration Law.

Remedies**32 What remedies may a court or other adjudicator grant? Are punitive damages awarded for a breach of contract claim in your jurisdiction?**

In case of breach of a contract, the party may ask the court or other adjudicator to pursue specific performance or termination of the contract providing for financial compensation (article 475 of the Civil Code). The application of the concept of punitive damages in Brazilian law is controversial, and its application will depend on the case, considering the principles of reasonableness and proportionality.

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