

## **COST AND FEE ALLOCATION IN CIVIL PROCEDURE**

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### **I – THE BASIC RULES**

#### **1. Court Costs and Attorneys' Fees**

Under Brazilian Law, the basic rule on cost and fee allocation is that, at the end of the lawsuit, the loser must reimburse all costs and expenses paid upfront by the prevailing party over the course of the proceedings, as determined in the final judgment.<sup>1</sup> When the plaintiff's claim is partially rejected, and therefore both parties are winners and losers, the costs and expenses shall be proportionally divided between the parties.<sup>2</sup> If only a minimal part of a claim is rejected, the litigant who lost most part of its claims shall bear the full payment of the court costs.<sup>3</sup>

The loser must also pay the attorneys' fees to the other party's counsel.<sup>4</sup> These fees, called "*sucumbenciais*" (defeated party's fees), may be awarded by the judge in the amount of 10% to 20% of the monetary judgment.<sup>5</sup> Where there is no monetary judgment, the fees shall be determined by the judge according to his equitable discretion.<sup>6</sup>

Finally, the law authorizes the judge to impose fines for malicious abuse of process,<sup>7</sup> for presenting appeals that are clearly inadmissible or dilatory, etc.,<sup>8</sup> and for acts offensive to the dignity of justice,<sup>9</sup> among others.

#### **2. Justification for the rule**

Brazilian rules on cost and fee allocation are based on the idea that the process should not result in loss to the party who had her right recognized in court.<sup>10</sup> Instead, it should

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<sup>1</sup> Articles 20 and 27, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>2</sup> Article 21, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>3</sup> Article 21, sole paragraph, Brazilian Code of Civil Procedure (Law N. 5.869/73).

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

<sup>5</sup> Article 20, § 3, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>6</sup> Article 20, § 4, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>7</sup> Article 18, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>8</sup> Article 538, sole paragraph, and Article 557, § 2, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>9</sup> Article 601, Brazilian Code of Civil Procedure (Law N. 5.869/73).

put her in the same economic situation that she would be if the obligations object of the dispute had been fulfilled without the need of a process. Therefore, the rule imposes on the losing party – regarded as the one giving cause for the filing of the lawsuit or the presentation of the defense – the liability for the costs.

### 3. Special rules for appeals

Prior to explaining how the costs for appeals are paid, we shall proceed to a short introduction to the Brazilian court system. In the first and second levels of court hierarchy, there are two types of courts: the Federal Courts, competent to decide any cases where the Federal Government or a governmental agency are parties, and the State Courts, competent to decide any cases that fall outside the Federal Courts' competence. In the third level there are the Higher Courts: the Superior Court of Justice (STJ) and the Supreme Court (STF). These are competent to decide cases coming from the State and the Federal Courts, as the final arbiters of the law. The rules governing the costs for appealing are different in Federal Courts, State Courts and Higher Courts.

In any of these Courts, there is no need to pay the fees of the opposing party's counsel ("*sucumbência*") prior to filing the appeal; they are due at the stage of enforcement of the decision. The payment of the fees agreed upon between attorneys and clients, on the other hand, depend on the agreement between them, so it might be necessary to pay them prior to filing an appeal.

#### Federal Courts

The Federal Court legislation covers the entire national territory.<sup>11</sup> Prior to filing a civil action before a Federal Court, the plaintiff shall calculate the court costs, which correspond to 1% of the amount of the dispute,<sup>12</sup> and pay half of it as initial costs ("*custas de preparo*").<sup>13</sup> Upon an appeal, the party appealing shall pay the other half.<sup>14</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>15</sup>

Costs incurred with the transportation of the physical process ("*porte de remessa e retorno*") due to the appeal shall also be paid, based on a fixed rate established by each Court.

#### State Courts

Brazil has continental dimensions. It is formed by 26 (twenty-six) States and 1 (one) Federal District, and each State has its own rules regarding costs. For that reason, there is a significant variation as to the costs for appealing throughout the country. The

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<sup>10</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>11</sup> Law N. 9.289/96.

<sup>12</sup> 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>13</sup> Article 14, I, Law N. 9.289/96.

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

<sup>15</sup> Article 14, IV, Law N. 9.289/96.

common rule is that all states require the payment of initial court costs and costs related to the process transportation.

As an example, we refer to the rules regarding appeals in the State of Sao Paulo, the richest and one of the most populous of the country. The general rule in Sao 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.<sup>16</sup> 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.<sup>17</sup> In addition to these costs, the party shall pay the costs related to the transportation of the process, in this case calculated based on the number of sheets contained in the files.<sup>18</sup>

### Higher Courts

For the remittance of cases from state and federal courts to the Higher Courts, parties shall pay a fixed amount as initial court costs, which is published by each of the Courts, as well as transportation costs, which again depends on the number of sheets of the process.

#### **4. Taking of evidence: costs related to witnesses and expert witnesses.**

Under Brazilian law, the general rule is that the party requesting the evidence shall bear the corresponding costs of production.

The party claiming expert evidence shall pay the expert fees, costs of travelling and hotels. If such evidence is requested by the judge or by both parties, the claimant shall bear the costs. The party appointing a technical assistant to monitor the work carried out by the expert shall also bear the fees and expenses related to such assistant.<sup>19</sup>

As to oral testimony, each party shall bear the expenses incurred by their witnesses to attend the hearing.<sup>20</sup>

The judgment will establish the loser's obligation to pay the court costs, including fees of the expert and of the technical assistants, as well as transportation of witnesses, as long as these expenses are documented in the court files. Thus, the prevailing party may recover the expenses incurred with the taking of evidence, provided that such expenses had been duly proved in the process (receipts, vouchers, etc).

There are cases where these costs related to taking of evidence may represent a considerable amount, and even be decisive in bringing or not the case to court. This may

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<sup>16</sup> Article 4, I and § 1, Sao Paulo State Law N. 11.608/03. Under 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.

<sup>17</sup> Article 4, § 2, Sao 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.

<sup>18</sup> Article 4, § 4, Sao Paulo State Law N. 11.608/03.

<sup>19</sup> Articles 20, § 2 and 33, Brazilian Code of Civil Procedure (Law N. 5.869/73).

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

happen when there is a need to take of complex expert evidence. However, it should be noted that costs related to taking of evidence in Brazil usually do not represent a significant amount of the overall costs of litigation. When compared with the U.S., for example, these costs are usually minimal in Brazil.

## 5. Settlement

Parties settling disputes by agreement usually decide on the responsibility for court costs, attorney's fees and expenses. If the parties do not provide for that in their agreement, all costs shall be divided equally between them.<sup>21</sup>

If a party withdraws from her claim or recognizes the rights claimed by the other party, thus leading to the end of the lawsuit, the costs and fees shall be paid by the party withdrawing or recognizing the right.<sup>22</sup> 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>23</sup>

Brazil has no statistics on the percentage of civil suits resolved by settlement. It takes many years for a definitive decision to be obtained and enforced, and defendants often prefer to use the long process as a mean to postpone any payment that would otherwise result from a settlement. However, 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 Sao 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>24</sup>

## II - EXCEPTIONS AND MODIFICATIONS

### 1. Exceptions to the basic rule

Brazilian law provides for legal aid benefiting those whose economic situation make it impossible to afford the court costs and attorney's fees without causing damages to themselves or to their family.<sup>25</sup>

Other exceptions are laws dealing with class actions aimed at the protection of collective, diffuse and public rights, such as 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<sup>26</sup> and the Popular Action,<sup>27</sup> as we will detail below.

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<sup>21</sup> Article 26 § 2, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>22</sup> Article 26 *caput*, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>23</sup> Article 26 § 1, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>24</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)).

<sup>25</sup> Article 5, LXXIV, Brazilian Constitution and Article 2, sole paragraph, Law N 1.060/50.

<sup>26</sup> Article 18, Law N. 7347/85.

<sup>27</sup> Article 5, LXXIII, Brazilian Constitution.

## **2. Mandatory pre-litigation procedures impacting on cost and fee allocation**

There are no mandatory pre-litigation procedures in Brazilian Civil Procedure.

## **3. Party agreements allocating costs and fees in case of litigation**

When parties settle a judicial dispute by agreement, it is common and legally binding for them to agree on the responsibility for costs and expenses paid upfront in the proceedings.

On the other hand, parties to a contract may not agree on who should advance the payment of court costs during the proceedings, for example establishing that these costs shall be collected by the defaulting party. The rules governing the payment of such costs are cogent and must be followed by the parties.

## **4. Self-representation**

Under Brazilian Law, it is mandatory that a party be represented by a counsel, both to propose a lawsuit and to present a defense, unless 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>28</sup>

The only exception to this rule is provided in the Special Courts Act, a court specialized in small claims, which allows self-representation where the amount in dispute does not exceed 20 (twenty) times the Brazilian minimum wage.<sup>29</sup> In these cases, self-representation is very common and parties are often aided by prosecuting attorneys in conciliation and trial hearings.

The rules governing payment of attorneys' fees to the prevailing party's counsel also apply to cases of self-representation.<sup>30</sup>

# **III - ENCOURAGEMENT OR DISCOURAGEMENT OF LITIGATION**

## **1. Introduction**

After analyzing the Brazilian rules governing cost and fee allocation, one could conclude that they are designed to discourage litigation, since they impose the liability for the costs on the loser, regarded to be the one who caused the lawsuit to be filed. On the other hand, the court costs are low in Brazil, especially in comparison with the amount of attorney's fees.

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<sup>28</sup> Article 36, Brazilian Code of Civil Procedure.

<sup>29</sup> Article 9, Law N. 9099/95. The minimum wage is currently R\$ 465,00 (Law N. 11.944/ 2009).

<sup>30</sup> Article 20, *caput*, Brazilian Code of Civil Procedure (Law N. 5.869/73).

## **2. Payments to be made upfront**

### **2.1. Court Costs**

In order to file a claim, the plaintiff shall pay the full amount of the initial court costs, which usually correspond to 1% (one per cent) of the amount in dispute.

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>31</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>32</sup> In addition, 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 anyway. Whenever a party fails to comply with such duty, the respective procedural step will not be carried out.

### **2.2. Attorneys Fees**

Attorneys and their clients are free to contract the payment of attorneys' fees as they wish. The payment of legal fees can be made anytime, even after examining the pertinent documents, proposing the lawsuit or presenting the defense. In spite of this level of freedom, it is not common for attorneys to request a retainer prior to start working on the case.

### **2.3. Costs of taking evidence**

The costs related to taking of evidence shall be borne by each party. Thus, each party may decide the amount she is willing to spend on that. However, as already stated, if a party requests that expert evidence be taken, she shall anticipate the fees of the expert. The amount of these fees shall be established by the expert after his appointment in the procedure. The amounts spent on the production of evidence may be collected from the losing party at the end of the lawsuit, as long as these costs had been properly proved in the process.

## **IV - DETERMINATION OF COSTS AND FEES**

### **1. Court costs**

Brazilian law provides that court costs shall be governed by special legislation. Therefore, there is a federal law regulating the matter as to the Federal Court. Regarding the State Courts, each Member of the Federation regulates the matter through a State Law. As Brazil has several states with different laws, there are differences as to how to determine the legal costs. In spite of these differences, the general rule for both the

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<sup>31</sup> Article 19, *caput*, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>32</sup> Article 19, § 2, Brazilian Code of Civil Procedure (Law N. 5.869/73).

Federal Court and the majority of the states is that the initial filing fees are determined by the amount in controversy. For that reason, a jurisdictional amount must be assigned to each lawsuit, even if the dispute has no immediate economic content.<sup>33</sup> The amount in controversy shall be indicated by the plaintiff in his initial submission, and may be challenged by the defendant. In this event, the judge shall decide the amount.<sup>34</sup>

## **2. Lawyers' fees**

The amount of lawyer's fees is agreed upon between the lawyer and the client and varies widely depending on the location, the area of practice and the expertise of the firm. The only parameters regarding these fees are set by the Bar Associations of each Brazilian state, which establish minimum amounts that can be accepted by a lawyer depending on the services to be rendered.<sup>35</sup>

## **3. Decision as to the concrete amount to be awarded to the parties**

When filing the lawsuit, the claimant must prove payment of the court costs, to be calculated based on the amount in dispute. However, the defendant, when presenting its defense, may also challenge the amount in dispute, requesting it to be increased or decreased.

The actual amount of the dispute, which, as explained, is the basis for calculating the courts costs, is determined by the judge, through a decision that is not part of the judgment. If a court decision changes the amount of the dispute, a change in legal costs automatically follows. If the amount is raised, the claimant shall supplement the amount of court costs. Moreover, if the judge finds out that the amount in dispute or the costs are incorrect, he may determine that the claimant rectifies it, under the penalty of the dismissing the case without deciding the merits. The judge also awards the amount of the expert's fees by a simple judicial order which is not part of the judgment.

In the judgment, the judge only determines the amount of the attorney's fees of the prevailing party to be paid by the loser, as well as who will bear the costs expended in the process.

As referred to above, the attorneys' fees may be arbitrated by the judge in the amount of 10% to 20% of the monetary judgment.<sup>36</sup> Where there is no monetary judgment, the fees shall be determined by the judge according to his equitable discretion.<sup>37</sup> In both cases, the judge 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>38</sup>

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<sup>33</sup> Article 258, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>34</sup> Articles 259 and 261, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>35</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>.

<sup>36</sup> Article 20, § 3, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>37</sup> Article 20, § 4, Brazilian Code of Civil Procedure (Law N. 5.869/73).

<sup>38</sup> Article 20, § 3, Brazilian Code of Civil Procedure (Law N. 5.869/73).

Any attorneys' 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.

The remaining costs arising out of the procedure and the costs of appealing are established by published by each Court and do not depend on a judicial decision on that regard.

## **V - SPECIAL ISSUES: SUCCESS-ORIENTED FEES, CLASS ACTIONS, SALE OF CLAIMS AND LITIGATION INSURANCE**

### **1. Success fees**

There are several ways to charge the fees, depending on the policy of each law firm. Some firms charge on an hourly-basis, based on a pre-established rate. Others charge a fixed price for representing a party in a dispute, and the payment may be done in a lump sum or in several installments. Some firms charge a fixed monthly rate for representing a party in a specific number of processes.

Success fees are also allowed and quite common. They represent a percentage of the economic benefit obtained by the party in the process as a result of the work carried out by the lawyer. This success may correspond to the amount that the claimant has won in the lawsuit, or the amount that the defendant did not have to pay.

The amount of the success fees shall be agreed in advance between the lawyer and the client. The loser of the lawsuit does not have to pay the other party's attorneys success fees, since this is a private arrangement between the lawyer and his client. The payment of success fees is an ancient legal custom in Brazil. It is not regulated by law and it is allowed in all cases.

### **2. Sale of claims**

It is possible to transfer an amount that is in dispute and the person who received the credit assignment assumes all the risks of the claim. However, for this assignment to be valid it must follow the requirements established by law, including the notification of the other party to the dispute, who must accept to the substitution of the party.<sup>39</sup>

### **3. Class actions**

As mentioned earlier, Brazilian laws dealing with class actions aimed at the protection of collective, diffuse, and public rights set out specific rules regarding legal costs.

According to the Law of Public Civil Action, there will be no advance on costs, fees, expert fees and any other court costs. In addition, associations acting as plaintiffs shall

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<sup>39</sup> Article 42, § 1, Brazilian Code of Civil Procedure (Law N. 5.869/73).

not be responsible for paying the attorneys' fees and court costs in case they lose the case, unless there is proven bad faith.<sup>40</sup>

As to the Popular Action, the law states that the costs and initial court costs shall only be paid at the end of the proceedings.<sup>41</sup> In the event the case is upheld, the defendants shall pay the costs and other expenses directly related to the process, either judicial or extrajudicial, as well as attorneys' fees.<sup>42</sup> If the claim is held malicious, the plaintiff shall pay the court costs multiplied by ten.<sup>43</sup>

In class actions aiming at the protection of interests of consumers, children and adolescents, claimants are not required to make an upfront 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>44</sup>

#### **4. Litigation Insurance**

Brazilian law does not prevent the parties from insuring against the costs of litigation, including attorneys' fees. However, this is not a common practice in Brazil.

### **VI - LEGAL AID**

#### **1. Publicly funded**

As required in the Brazilian Constitution,<sup>45</sup> Brazil has a public funded legal aid system, composed of Public Defenders ("*Defensoria Pública*"), to serve the people who cannot afford the costs of litigation.<sup>46</sup>

Law N. 1060/50 provides for detailed rules for granting this assistance. In addition to having access to public defenders, the parties in legal aid 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>47</sup>

#### **2. Privately organized help for indigent or other clients**

In addition to the public funded legal aid system, there are lawyers and law firms carrying out bono work, that is, without receiving any money for work they do for indigent people. There is also public-private funded help, such as the program developed by the State of Sao Paulo with the Brazilian Bar Association. Lawyers interested in helping those in need may register to participate in this program. The fees

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<sup>40</sup> Article 18, Law N. 7347/85.

<sup>41</sup> Article 10, Law N. 4717/65.

<sup>42</sup> Articles 12, Law N. 4717/65.

<sup>43</sup> Articles 13, Law N. 4717/65.

<sup>44</sup> Article 141 §§ 1 and 2, Law N. 8069/90; Article 87, Law N. 8078/90.

<sup>45</sup> Article 5, LXXIV, Brazilian Constitution.

<sup>46</sup> Article 5, LXXIV, Brazilian Constitution and Article 2, sole paragraph, Law N 1.060/50.

<sup>47</sup> Article 3, Law N 1.060/50.

are paid by the State of Sao Paulo, based on amounts previously established in a specific chart. Other programs exist throughout the country, but due to Brazil's large territorial extension, one cannot see how many private institutions or programs exist for legal aid.

### **3. Legal aid availability**

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>48</sup> This condition must be proven during the procedure by means of a declaration included in the plaintiff's initial submission.<sup>49</sup> If the judge considers that the declaration is not enough, he may determine that the individual submit tax returns in the process. If it is proven that the plaintiff was not eligible to legal aid, he shall be condemned to pay ten times the courts costs.<sup>50</sup>

### **4. Litigation costs and access to justice**

Costs and fees should not be considered as a serious or severe obstacle to filing the action, in view of the benefits of the public 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.

Litigation costs may be considered a barrier to filing certain kinds of lawsuits, particularly where the economic values involved are meaningless or substantially lower in comparison with the costs involved in the procedure – what may happen in cases requiring complex expert evidence.

## **VII – EXAMPLES**

### **1. Estimate of the sum total of costs and fees of litigating to final judgment in the first instance a routine private or commercial**

In order to do the calculation below and present an example, we will follow the chart applicable to the Sao Paulo State Court. Since the amount of court costs is determined by each Brazilian State, as mentioned above, these calculations may suffer a significant difference in relation to other Brazilian states.

Also, for the purposes of these calculations, we will take into account attorney's fees corresponding to 20% of the amount in dispute, which, as mentioned above, would indicate the worst scenario for the losing party.

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<sup>48</sup> Article 5, LXXIV, Brazilian Constitution and Article 2, sole paragraph, Law N 1.060/50.

<sup>49</sup> Article 4, § 1, Law N 1.060/50.

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

We clarify that this estimate does not include the attorney's fees agreed between the client and his lawyer or expenses such as: (i) publication of service of process notices, which are required when the Defendant is at an unknown location; (ii) examination fees, which vary according to complexity of the case (iii) costs related to appeals against judicial decisions rendered throughout the process (Interlocutory Appeals or "Agravos").

### **Small Claim**

If the amount in controversy is equivalent of \$ 1,000, and the plaintiff is a natural person, he may opt for the Special Civil Court, where no court costs or attorney fees are due. In that case, the litigation would have no costs for the parties, except for the attorney's fees agreed upon by each party with her lawyer. This rule is valid for the entire national territory.

Since legal entities may not present claims in the Special Civil Court, they shall follow the regular procedure. Therefore, in a case involving the same amount in controversy, at the end of the first instance, the loser could be ordered to pay court costs of about \$ 60 and attorney's fees that could be arbitrated at \$ 200. The cost of such action would be equivalent to \$ 260.

### **Small to medium claim**

In a claim equivalent of \$ 10,000, a natural person could also opt for the Special Civil Court, where no court costs or attorney fees are due. Therefore, the only cost would be the fee agreed between each party with her lawyer.

For legal entities, at the end of the first instance, the loser could be ordered to pay court costs of about \$ 120 and attorneys' fees that could be arbitrated at \$ 2,000. Therefore, the total costs of this action would be approximately \$ 2,120.

### **Medium to large claim**

In the amount in controversy is \$ 100,000, the Special Civil Court will no longer be available. Therefore, the plaintiff, either an individual or a company, shall follow the regular procedure. In this case, the loser could be ordered to pay court costs of approximately \$ 1,020 and attorney's fees of \$ 20,000. The total costs in this case would be approximately \$ 21,020.

### **Large claim**

Finally, if the amount in dispute is \$ 1,000,000, the parties shall also follow the regular procedure. The loser could be ordered to pay court costs of approximately \$ 10,020 and attorneys' fees in the amount of \$ 200,000. The cost of this action would be approximately U \$ 210,020.

## **2. Estimate of the sum total of costs and fees to a plaintiff of defendant who loses a claim after litigation**

If a plaintiff lost a \$ 100,000 claim after litigation, what would his/her cost and fee liability roughly be and 3. If a defendant lost a \$ 100,000 claim after litigation, what would his/her cost and fee liability roughly be?

Either a plaintiff or a defendant, the loser of a civil action which amount in dispute was \$ 100,000 will be subject to the same costs. They would be condemned to pay court costs of approximately \$ 1,020 and fees that could be determined as \$ 20,000. These figures do not take into account amounts that may be due during the proceedings, as indicated in item 1 above.

## VIII – CONCLUSION

Brazilian Constitution includes access to justice in the title of fundamental rights and guarantees, providing that "the law may not exclude from judicial review any injury or threat to a right".<sup>51</sup> In order to comply with such constitutional commandment, the rules governing cost and fee allocation in the civil procedure are designed to give access to justice to everyone.

Still, people face many obstacles in order to reach that. For instance, Brazil's Supreme Court is the most overburdened court in the world.<sup>52</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.

Therefore, the costs of litigation are probably not the main barrier excluding parties to access to justice. However, they are certainly an important factor, especially for those who are not entitled to the benefits of legal aid.

As to the future, a reform of the Brazilian Code of Civil Procedure is underway,<sup>53</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 already stated that it intends to discourage legal adventures that load the Brazilian courts, and changes to these rules are probably the easiest way to reach such purpose.

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<sup>51</sup> Art. 5, XXXV, Brazilian Constitution.

<sup>52</sup> When less is more; Brazil's supreme court. (Supreme Federal Tribunal), *The Economist* (US), May 23, 2009.

<sup>53</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)