

**A GUIDE TO LITIGATING IN LATIN AMERICA
(MEXICO, COLOMBIA, PERU, CHILE, ARGENTINA, BRAZIL)**

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This article intends to offer a pocket-guide reference for those wanting to pursue civil litigation in Latin American countries. Although not a substitute guide for the detailed civil procedures of each country by any means, the article aims to highlight (particularly to those unfamiliar with the civil law systems) a few unique features of these regional systems that litigators should be aware of.

Mexico

i. The court system

Being a federal state, Mexico's court system is separated into federal and local courts.¹

At the federal level exists the *Suprema Corte de Justicia de la Nación* (SCJN)², the collegiate circuit courts, the unitary circuit court and the district courts (courts of first instance).³ In addition to appeals, the court hears constitutional matters.⁴

¹ Marco Tulio Venegas, Mexico, Latin Lawyer, < <https://latinlawyer.com/jurisdiction/1003062/mexico> > [1].

² The SCJN has a civil and penal chamber and an administrative and labour chamber. - Teresa M. Miguel-Stearns, 'Judicial Power in Latin America: a Short Survey' (2015) 15 *Legal Information Management* 100, 101.

³ Jorge A. Vargas, 'Introduction to Mexico's Legal System' (January 16, 2008). San Diego Legal Studies Paper No. 08-007. pp. 34 Available at SSRN: <https://ssrn.com/abstract=1085000> or <http://dx.doi.org/10.2139/ssrn.1085000>; Marco Tulio Venegas, Mexico, Latin Lawyer, < <https://latinlawyer.com/jurisdiction/1003062/mexico> > [1]

⁴ The majority of *amparo* matters are heard at the collegiate circuit courts and involve deciding issues of legality of decisions issued by the unitary circuit courts and the unitary circuit court considers decisions from the district courts. - Teresa M. Miguel-Stearns, 'Judicial Power in Latin America: a Short Survey' (2015) 15 *Legal Information Management* 100, 101.

At the state level, the states have their own high court and specialized courts dealing with civil, commercial, family, leasing, labor and criminal matters.⁵

ii. Is there a system of binding precedent?

Mexico is unique in that the state 'expressly' binds lower courts to the decisions of the highest court albeit in 'very specific circumstances' through the concept of *jurisprudencia* (precedent).⁶ An example of such a circumstance is where the same legal opinion or point of law is decided in five different and consecutive matters issued by eight justices of the SCJN sitting *en banc* (plenary session) or four justices if sitting in *sala* (chamber).⁷ That opinion then becomes *jurisprudencia*, and is binding on all courts.⁸ *Jurisprudencia* in this regard can only be overruled if the SCJN unanimously votes to do so.⁹

There are also a number of other select ways the SCJN can create *jurisprudencia* and create certainty in the decision-making in Mexico.¹⁰ A cited effect of *jurisprudencia* has been the fewer backlog of cases in the Mexican court system¹¹ which should offer some reprieve to those wanting to litigate in the country.

iii. Is it possible for a defendant to join additional parties to an existing proceeding?

The Commercial Code allows for parties possessing the same right and interests to join proceedings as co-plaintiffs or co-defendants.¹² This is done through a 'common representative'.¹³

⁵ Marco Tulio Venegas, Mexico, Latin Lawyer, <<https://latinlawyer.com/jurisdictions/1003062/mexico>> [1].

⁶ Teresa M. Miguel-Stearns, 'Judicial Power in Latin America: a Short Survey' (2015) 15 *Legal Information Management* 100, 101.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Most of these decisions from 2003 onwards can be found on the SCJN website (www.scjn.gob.mx/Paginas/Inicio.aspx). Decisions from 1917 to 2003 can be sourced from *Semanario Judicial de la Federación*.

¹¹ Teresa M. Miguel-Stearns, 'Judicial Power in Latin America: a Short Survey' (2015) 15 *Legal Information Management* 100, 102.

¹² Marco Tulio Venegas, Mexico, Latin Lawyer, <<https://latinlawyer.com/jurisdictions/1003062/mexico>> [12].

¹³ A joinder mechanism allowing a third party to 'join' proceedings before final judgment is. Issued i also available. An opposing third party may file ancillary proceedings regarding the claim. - Marco Tulio Venegas, Mexico, Latin Lawyer, <<https://latinlawyer.com/jurisdictions/1003062/mexico>> [12].

iv. Are more proceedings conducted 'on the papers' or orally?

Mexico is experiencing a shift to conducting mainly oral proceedings, notably concentrating pleadings on two hearings: preliminary hearing and trial hearing, in order to expedite proceedings.¹⁴ It is reported that by 2020, Mexico aims to conduct all of its commercial matters through oral proceedings.¹⁵

In the preliminary hearing, parties will provide procedural agreements concerning the common (agreed) facts, disputed facts and the evidence.¹⁶ After this, the court admits the evidence, summons parties and witnesses (including experts) for the trial hearing.¹⁷ At the trial hearing, all evidence is heard.¹⁸

v. What are the costs associated with commencing civil claims?

There are no costs associated with filing a civil law suit.¹⁹ Individual party expenses (lawyers' fees and other miscellaneous fees e.g. expert witnesses) are born by each party.²⁰

It is possible for a successful party to claim legal costs over the losing party.²¹ Typically, the successful party will commence an ancillary cost proceeding to recover such amounts and will provide evidence in relation to the amounts claimed.²²

vi. Appeal process

The applicable law to the dispute dictates the appeal process, if any were to exist.²³ If the applicable law does not offer such an appeal process, then parties may request the court to invoke its own discretion or determination through a 'motion to revoke'.²⁴ Mexico has two types of appeals: appeals to be resolved alongside the

¹⁴ Marco Tulio Venegas, Mexico, Latin Lawyer, <
<https://latinlawyer.com/jurisdiction/1003062/mexico> > [17].

¹⁵ Ibid [45].

¹⁶ Ibid [23].

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid [37].

²⁰ Ibid [34].

²¹ The Commercial Code stipulates when a losing party may be liable for legal costs. - Ibid [37]

²² Ibid.

²³ Ibid [39].

²⁴ Ibid.

final judgment and direct appeals to the appellate court.²⁵ The appeal is filed to the court which issued the order and after which the appeal is sent to the superior court.²⁶

Mexico allows for challenges to be made against federal administrative decisions. This is governed by the Federal Administrative Litigation Procedure Law applicable in the particular state.²⁷

vii. A point of interest

Mexico has been debating enacting a National Civil Procedural Code to standardize civil procedure.²⁸ Traditionally, civil procedure has been state-dependent, so each state may regulate it differently.²⁹

Colombia

i. The court system³⁰

Colombia's court system includes the *Corte Constitucional* (Constitutional Court), *Corte Suprema de Justicia* (Supreme Court of Justice), *Consejo de Estado* (Council of State), *Consejo Superior de la Judicatura* (Superior Council of Justice Administration), *Fiscalía General de la Nación* (The Attorney General's Office) and the lower administrative and civil courts.³¹

Notably, the Constitutional Court is able to consider the constitutionality of enacted legislation despite the lack of a legal controversy concerning that piece of

²⁵ Mexico has two forms of appeals: appeals that will be resolved alongside the final judgment and appeals which are to be sent directly to the appellate court. With regards to the latter, the applicable law may dictate that proceedings are to be suspended as the appeal is heard in the appellate court. - Marco Tulio Venegas, Mexico, Latin Lawyer, < <https://latinlawyer.com/jurisdiction/1003062/mexico> > [39].

²⁶ Ibid.

²⁷ Ibid [41].

²⁸ Ibid [45]

²⁹ Ibid.

³⁰ Roa Roa, Jorge, Pluralismo Jurídico Y Mecanismos De Coordinación Entre Los Sistemas De Justicia Indígena Y El Sistema Nacional De Justicia En Colombia (Legal Pluralism and Coordination Instruments between the Indigenous Judicial System and National Judiciary in Colombia) (December 10, 2014). REVISTA DERECHO DEL ESTADO No. 33, JULIO-DICIEMBRE de 2014. Available at SSRN: <https://ssrn.com/abstract=2536387>

³¹ Antonio Ramirez and Hernando Otero, 'UPDATE: An Introduction to Colombian Governmental Institutions and Primary Legal Sources, Hauser Global Law School Program NYU' (2015) < <http://www.nyulawglobal.org/globalex/Colombia1.html> >.

legislation.³² The Supreme Court of Justice is the highest court for civil, criminal and labor cases.³³ Similarly, The Council of State is the highest court for administrative matters.³⁴

ii. Is there a system of binding precedent?

Colombia is another state that has made significant advances to establishing binding judgments in some areas. The Constitutional Court and the Council of the State can operate to evoke 'mandatory judicial precedent' on other courts.³⁵

Additionally, Article 4 of Law 169 of 1896, establishes that three consistent decisions rendered by the Supreme Court of Justice on a particular issue will form *doctrina probable* (probable doctrine) and 'should be' relied upon by judges faced with similar cases.³⁶

iii. Is it possible for a defendant to join additional parties to an existing proceeding?

The General Code of Procedure (GCP) allows for joinder of parties to a proceeding on a number of grounds.³⁷ Some of these grounds include where, there is participation of all parties involved in the 'material facts of the case' or where a judgment could have an effect on an additional party.³⁸

iv. Are more proceedings conducted 'on the papers' or orally?

Court proceedings in Colombia appear to have a mix of written and oral pleadings. Initially, there is a written stage which includes commencement of the claim submissions, counterclaims and responses.³⁹

The second stage is mainly oral and consists of the first hearing, which sets the timeline and framework of proceedings where a judge may both encourage

³² The Constitucional Court may also hear matters pertaining to constitutional matters. - Antonio Ramirez and Hernando Otero, 'UPDATE: An Introduction to Colombian Governmental Institutions and Primary Legal Sources, Hauser Global Law School Program NYU' (2015) < <http://www.nyulawglobal.org/globalex/Colombia1.html>>.

³³ Ibid.

³⁴ Ibid.

³⁵ Johana Gutierrez Torres, El precedente Judicial como Fuente formal y material del procedimiento administrativo colombiano, Pensamiento Juridico, 2016, 135, 135.

³⁶ Lloreda Camacho & Co., Litigation and Alternative Dispute Resolution in Colombia, Mexico, Panama, and Brazil (2012) Association of Corporate Counsel, 8

³⁷ Columbia [12]

³⁸ Columbia [12]

³⁹ David Araque Quijano and Samuel Hernandez Lizarazu, Litigation and Enforcement in Colombia, (2017), [9]

settlement and provide judgment on any 'preliminary defences'.⁴⁰ At this hearing, a judge will usually ascertain the 'material facts' of the case and make orders to gather evidence.⁴¹ The 'trial hearing' is where evidence is gathered, closing submissions are delivered and the judge issues a final decision.⁴²

v. What are the costs associated with commencing civil claims?

Generally, in Colombia, there no set 'judicial fees or taxes' to commence claims.⁴³

However, courts may determine, the unsuccessful party liable for various types of legal costs.⁴⁴ Some of these could be, proceedings costs (claim amount) and other costs when an appeal has been initiated.⁴⁵ In the situation of an appeal, if the second instance decision affirms the first decision entirely, then the appellant is required to pay the costs of the appeal.⁴⁶ If the second instance decision revokes the first, then the unsuccessful party is liable for both first and second instance costs.⁴⁷ If the appeal is partially successful, judicial discretion may be exercised to decide on the division of costs.⁴⁸ The unsuccessful party may also have to pay for

⁴⁰ David Araque Quijano and Samuel Hernandez Lizarazu, *Litigation and Enforcement in Colombia*, (2017), [9]

⁴¹ David Araque Quijano and Samuel Hernandez Lizarazu, *Litigation and Enforcement in Colombia*, (2017), [9]

⁴² David Araque Quijano and Samuel Hernandez Lizarazu, *Litigation and Enforcement in Colombia*, (2017), [9]

⁴³ It should be noted however that Law 1394 of 2010 also introduced a special fee *arancel judicial* for summary collection proceedings. This fee relates to a percentage of the total amount of money recovered or 'collected' in proceedings - Lloreda Camacho & Co., *Litigation and Alternative Dispute Resolution in Colombia, Mexico, Panama, and Brazil* (2012) Association of Corporate Counsel, 9.

⁴⁴ Lloreda Camacho & Co., *Litigation and Alternative Dispute Resolution in Colombia, Mexico, Panama, and Brazil* (2012) Association of Corporate Counsel, 9.

⁴⁵ In comercial disputes, the statutory limit for fees produced during a first instance decision is 7.5% of the amount awarded or denied by the judgment. Columbia [37]; Resolution PSAA16-10554/16

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⁴⁸ In comercial disputes, the statutory limit for fees produced during a first instance decision is 7.5% of the amount awarded or denied by the judgment. Columbia [37]; Resolution PSAA16-10554/16

the successful party's lawyers' fees in accordance with statutory limits regarding payable sums.⁴⁹

vi. Appeal process

Appeals can be made regarding a variety of decisions.⁵⁰ Some of these decisions are contained in Article 321 of the GCP and Article 243 of the Code of Administrative Procedure (CAP) lists specific cases where parties may request an appeal and other rulings where the claimant is not seeking an amount under US\$10,000.⁵¹ In broad terms, appeals most commonly concern the following three grounds:⁵²

- (1) 'Wrongful application of the law pertinent to the subject matter of the dispute'⁵³
- (2) 'Wrongful appreciation of the evidence collected'⁵⁴
- (3) Gross mistake in the determination of the material facts of the dispute⁵⁵

viii. A point of interest

Although rarely granted, Colombia offers *tutela* which is a constitutional action that allows parties to challenge final judgments if that judgment contravenes a

⁴⁹ In commercial disputes, the statutory limit for fees produced during a first instance decision is 7.5% of the amount awarded or denied by the judgment. Columbia [37]; Resolution PSAA16-10554/16

⁵⁰ Additionally, like France, Italy and other countries, Colombia has a system of Administrative Justice with a separate court structure from the ordinary or civil courts. The apex court in this system is the State Council. Administrative decisions may be challenged flexibly in Colombia as pursuant to three broad grounds.⁵⁰ These grounds include, challenging on the basis of unconstitutionality, initiating a challenge process pursuant to the Code of Administrative Procedure (CAP) and for being unlawfully impacted by an administrative act.⁵⁰

⁵¹ David Araque Quijano and Samuel Hernandez Lizarazu, *Litigation and Enforcement in Colombia*, (2017), [20]

⁵² David Araque Quijano and Samuel Hernandez Lizarazu, *Litigation and Enforcement in Colombia*, (2017), [20]

⁵³ David Araque Quijano and Samuel Hernandez Lizarazu, *Litigation and Enforcement in Colombia*, (2017), [20]

⁵⁴ David Araque Quijano and Samuel Hernandez Lizarazu, *Litigation and Enforcement in Colombia*, (2017), [20]

⁵⁵ David Araque Quijano and Samuel Hernandez Lizarazu, *Litigation and Enforcement in Colombia*, (2017), [20]

fundamental right and if the plaintiff is without another recourse to seek protection of that right.⁵⁶

Peru

i. The court system

The highest court in Peru is the Supreme Court of Justice in Lima and includes specialized courts (civil, criminal, constitutional, labor law). Next, are the superior courts in each judicial district which also include specialized courts (civil, criminal, constitutional, labor, commercial, family and administrative law).

Following this, are specialized judges, with usually one specialized judge per major Peruvian city.⁵⁷ Similarly, but below these judges are, professional peace judges, with usually one professional peace judge in major Peruvian cities. These judges are not equipped to deal with one specific area of law or matter and so they have jurisdiction over various low value cases and other minor matters.⁵⁸

Following these judges are the peace courts, comprising of one judge who 'may not have the status of a lawyer'.⁵⁹

ii. Is there a system of binding precedent?

Peru has adopted certain procedures which have established binding precedent in some areas. For example, Article 43 of Legislative Decree 807, permits The Peruvian Institute for the Defense of Competition and Intellectual property (INDECOPI)'s administrative court to, after declaring that a particular decision is binding, to create binding precedent.⁶⁰

⁵⁶ Lloreda Camacho & Co., *Litigation and Alternative Dispute Resolution in Colombia, Mexico, Panama, and Brazil* (2012) Association of Corporate Counsel, 10.

⁵⁷ These judges deal with civil, criminal, constitutional, labor, commercial, family and administrative matters. - Carlos Henrique Soares; Ronaldo Brêtas de Carvalho. *Direito processual civil latino-americano*. Belo Horizonte: Arraes Editora, 2013. pp. 259-260.

⁵⁸ Carlos Henrique Soares; Ronaldo Brêtas de Carvalho. *Direito processual civil latino-americano*. Belo Horizonte: Arraes Editora, 2013. pp. 259-260.

⁵⁹ These courts are typically found in lowly populated (remote) cities and the judges, are not limited specific areas of law and therefore, have jurisdiction over various low value cases. - Carlos Henrique Soares; Ronaldo Brêtas de Carvalho. *Direito processual civil latino-americano*. Belo Horizonte: Arraes Editora, 2013. pp. 259-260.

⁶⁰ Sandra Elena, Alvaro Herrero, Keith Henderson, *Barriers to the Enforcement of Court Judgments in Peru – Winning in Court is Only Half the Battle: Perspectives from SMEs and Other Users* (2004) 50.

It is said that the Constitutional Court and Tax Court follow suit with respect to creating binding judgments, bar one exception.⁶¹ These two courts cannot be 'explicitly declared to be precedent-setting'.⁶² Despite this, the practices of the courts are to refer to 'precedent-setting decisions' and also, analyze previous decisions from courts such as the Constitutional Court.⁶³

- iii. Is it possible for a defendant to join additional parties to an existing proceeding?

Potentially liable parties may be joined to the proceedings provided the defendant is able to demonstrate an interest in the process and that any decision rendered could have either a direct or indirect effect on them.⁶⁴

- iv. Are more proceedings conducted 'on the papers' or orally?

It is unclear whether Peru adopts a solely 'on the papers' system for pleadings or an oral one. It appears, given comments for reform in Peru, that there are considerable written pleadings and thus, there is a clear need for oral pleadings for the 'simpler proceedings'.⁶⁵

- v. What are the costs associated with commencing civil claims?

For civil cases, court fees pertaining to offering evidence is required. These fees can range from between \$12 USD to \$160 USD and depend on the type and amount of the claim.⁶⁶ The higher the value of the claim, the more likely for the fees

⁶¹ Sandra Elena, Alvaro Herrero, Keith Henderson, Barriers to the Enforcement of Court Judgments in Peru – Winning in Court is Only Half the Battle: Perspectives from SMEs and Other Users (2004) 50.

⁶² Sandra Elena, Alvaro Herrero, Keith Henderson, Barriers to the Enforcement of Court Judgments in Peru – Winning in Court is Only Half the Battle: Perspectives from SMEs and Other Users (2004) 50.

⁶³ Sandra Elena, Alvaro Herrero, Keith Henderson, Barriers to the Enforcement of Court Judgments in Peru – Winning in Court is Only Half the Battle: Perspectives from SMEs and Other Users (2004) 50.

⁶⁴ Luis Alberto Linan Arana, Fernando Rodriguez Angobaldo, Adolfo oman Abram and Enrique Varsi Rospigliosi, Peru, Latin Lawyer <https://latinlawyer.com/jurisdiction/1003064/peru> . [12]

⁶⁵ Sandra Elena, Alvaro Herrero, Keith Henderson, Barriers to the Enforcement of Court Judgments in Peru – Winning in Court is Only Half the Battle: Perspectives from SMEs and Other Users (2004) 8.

⁶⁶ Luis Alberto Linan Arana, Fernando Rodriguez Angobaldo, Adolfo oman Abram and Enrique Varsi Rospigliosi, Peru, Latin Lawyer <https://latinlawyer.com/jurisdiction/1003064/peru> . [41]

to be higher.⁶⁷ There are also associated lawyers' costs and these costs are capped by an amount determined by the Bar of judicial districts in Peru.⁶⁸

In terms of awarding costs against the unsuccessful party, judges are afforded discretion in finding the losing party liable.⁶⁹ A judge will consider any defences raised and the party's 'behavior' during proceedings.⁷⁰ A successful party may also be found liable to pay the prevailing party's lawyers' fees⁷¹. The judge will determine the amount to be paid which suggests that the losing party may not be required to pay the entirety of the other side's lawyers' fees.⁷²

vi. Appeal process

The Peruvian judicial system offers an appeal process where the losing party may appeal a decision on the basis of errors, such as procedural issues or issues with 'trial court's content', in the judgment.⁷³

vii. A point of interest

Recently, judicial reform has centered on improving the 'efficiency of the service of justice'.⁷⁴ As part of this focus and specifically in relation to civil

⁶⁷ Luis Alberto Linan Arana, Fernando Rodriguez Angobaldo, Adolfo oman Abram and Enrique Varsi Rospigliosi, Peru, Latin Lawyer <https://latinlawyer.com/jurisdiction/1003064/peru>. [41]

⁶⁸ Luis Alberto Linan Arana, Fernando Rodriguez Angobaldo, Adolfo oman Abram and Enrique Varsi Rospigliosi, Peru, Latin Lawyer <https://latinlawyer.com/jurisdiction/1003064/peru>. [41]

⁶⁹ Luis Alberto Linan Arana, Fernando Rodriguez Angobaldo, Adolfo oman Abram and Enrique Varsi Rospigliosi, Peru, Latin Lawyer <https://latinlawyer.com/jurisdiction/1003064/peru>. [37]

⁷⁰ Luis Alberto Linan Arana, Fernando Rodriguez Angobaldo, Adolfo oman Abram and Enrique Varsi Rospigliosi, Peru, Latin Lawyer <https://latinlawyer.com/jurisdiction/1003064/peru>. [37]

⁷¹ Luis Alberto Linan Arana, Fernando Rodriguez Angobaldo, Adolfo oman Abram and Enrique Varsi Rospigliosi, Peru, Latin Lawyer <https://latinlawyer.com/jurisdiction/1003064/peru>. [37]

⁷² Luis Alberto Linan Arana, Fernando Rodriguez Angobaldo, Adolfo oman Abram and Enrique Varsi Rospigliosi, Peru, Latin Lawyer <https://latinlawyer.com/jurisdiction/1003064/peru>. [37]

⁷³ Luis Alberto Linan Arana, Fernando Rodriguez Angobaldo, Adolfo oman Abram and Enrique Varsi Rospigliosi, Peru, Latin Lawyer <https://latinlawyer.com/jurisdiction/1003064/peru>. [39-40]

⁷⁴ Luis Alberto Linan Arana, Fernando Rodriguez Angobaldo, Adolfo oman Abram and Enrique Varsi Rospigliosi, Peru, Latin Lawyer <https://latinlawyer.com/jurisdiction/1003064/peru>. [45]

(commercial) matters, two reform bills targeted at speeding up judicial processes through technological aids were introduced:⁷⁵

- (1) Electronic mail notification
- (2) Electronic judicial sale

Draft bills relating to the appeal process have also been debated.⁷⁶

Chile

i. The court system⁷⁷

Chile also follows a hierarchical court system. The system is split into the Supreme Court, Courts of Appeals and lower courts and specialized lower courts (tribunals of first instance) on matters such as labor, family, antitrust and the environment.⁷⁸ Additionally, Chile has a separate Constitutional Court.⁷⁹

ii. Is there a system of binding precedent?

⁷⁵ Luis Alberto Linan Arana, Fernando Rodriguez Angobaldo, Adolfo oman Abram and Enrique Varsi Rospigliosi, Peru, Latin Lawyer <https://latinlawyer.com/jurisdiction/1003064/peru> . [45]

⁷⁶ Luis Alberto Linan Arana, Fernando Rodriguez Angobaldo, Adolfo oman Abram and Enrique Varsi Rospigliosi, Peru, Latin Lawyer <https://latinlawyer.com/jurisdiction/1003064/peru> . [45]

⁷⁷ The Chilean courts allow for administrative challenges to be made against federal decisions, in addition to appeals of lower court decisions, which are typically heard in the Court of Appeals of the region where the lower court decision was heard.⁷⁷ Court of Appeals decisions can be challenged on limited grounds of instances where there have been contraventions of procedural or substantive law provisions. Carlos Henrique Soares; Ronaldo Brêtas de Carvalho. *Direito processual civil latino-americano*. Belo Horizonte: Arraes Editora, 2013. pp. 112; Francisco Aninat, Jorge Bofill and Sebastian Yanine, Chile, Latin Lawyer, 8th June 2017 <https://latinlawyer.com/jurisdiction/1003057/chile> [1]

⁷⁸ Francisco Aninat, Jorge Bofill and Sebastian Yanine, Chile, Latin Lawyer, 8th June 2017 <https://latinlawyer.com/jurisdiction/1003057/chile> [1]; Sergio Endress Gómez, *Essential Issues of the Chilean Legal System*, Hauser Global Law School Program at New York University School of Law, (2005).

⁷⁹ Carlos Henrique Soares; Ronaldo Brêtas de Carvalho. *Direito processual civil latino-americano*. Belo Horizonte: Arraes Editora, 2013. pp. 112; Francisco Aninat, Jorge Bofill and Sebastian Yanine, Chile, Latin Lawyer, 8th June 2017 <https://latinlawyer.com/jurisdiction/1003057/chile> [1]

An ongoing debate in Chile is whether judicial decisions from the highest courts can be used for; supporting a decision, 'illustrative purposes' or for a middle ground between direct support and 'illustration'.⁸⁰

There has been discussion on whether a new code of civil procedure could 'unify the jurisprudence in certain types of cases'.⁸¹ At the time of writing, a new civil code has not been enacted and the 2007 version still continues to exist.⁸²

- iii. Is it possible for a defendant to join additional parties to an existing proceeding?

Chile allows for a 'consolidation mechanism' which would apply in circumstances where two or more cases where the decision of any one case could have *res judicata* effect on the other.⁸³ Further to this, the procedure of *tercerias*, allows other interested third parties to 'intervene' in proceedings.⁸⁴

- iv. Are more proceedings conducted 'on the papers' or orally?

In lower courts, proceedings are typically conducted through written communications.⁸⁵ In the higher courts, oral hearings are more common.⁸⁶

- v. What are the costs associated with commencing civil claims?

The courts do not prescribe filing fees and the associated fees concern experts appointed by the court, notification of court orders and receipt of hearing transcripts.⁸⁷

Generally, the losing party bears the legal costs.⁸⁸ A court may, however, exercise discretion to find that each party will be liable for its own costs if the court finds

⁸⁰ Teresa M. Miguel-Stearns, 'Judicial Power in Latin America: a Short Survey' (2015) 15 *Legal Information Management* 100, 104.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Francisco Aninat, Jorge Bofill and Sebastian Yanine, Chile, *Latin Lawyer*, 8th June 2017 <https://latinlawyer.com/jurisdiction/1003057/chile> [12]

⁸⁴ Francisco Aninat, Jorge Bofill and Sebastian Yanine, Chile, *Latin Lawyer*, 8th June 2017 <https://latinlawyer.com/jurisdiction/1003057/chile> [12]

⁸⁵ Francisco Aninat, Jorge Bofill and Sebastian Yanine, Chile, *Latin Lawyer*, 8th June 2017 <https://latinlawyer.com/jurisdiction/1003057/chile> [11], [23]

⁸⁶ Francisco Aninat, Jorge Bofill and Sebastian Yanine, Chile, *Latin Lawyer*, 8th June 2017 <https://latinlawyer.com/jurisdiction/1003057/chile> [11]

⁸⁷ Francisco Aninat, Jorge Bofill and Sebastian Yanine, Chile, *Latin Lawyer*, 8th June 2017 <https://latinlawyer.com/jurisdiction/1003057/chile> [37]

⁸⁸ Francisco Aninat, Jorge Bofill and Sebastian Yanine, Chile, *Latin Lawyer*, 8th June 2017 <https://latinlawyer.com/jurisdiction/1003057/chile> [34]

that the unsuccessful party had legitimate or 'plausible' grounds to commence proceedings.⁸⁹

vi. Appeal process

A party may file an appeal against a lower court judgment, provided it is done within ten working days after the decision has been rendered.⁹⁰ Lower court judgments can be appealed on procedural (form) and substantive (merits) grounds.⁹¹ Appeals by these appellate courts may be further appealed through an 'annulment appeal' however the content of the appeal must be on either 'infringement of procedural or substantive provision of law'.⁹²

vii. A point of interest

Chile has been in lengthy discussions for the enactment of a new Code of Civil Procedure.⁹³ Implementation of an oral proceeding instead of the present written proceeding is one of the key aspects of the Code.⁹⁴

Argentina

i. The court system

Argentina operates as a dual judicial system.⁹⁵ The federal part deals with matters pertaining to federal law and the original jurisdictional courts hear matters within the provinces on common and local law claims.⁹⁶

ii. Is there a system of binding precedent?⁹⁷

⁸⁹ Francisco Aninat, Jorge Bofill and Sebastian Yanine, Chile, Latin Lawyer, 8th June 2017 <https://latinlawyer.com/jurisdiction/1003057/chile> [34]

⁹⁰ Francisco Aninat, Jorge Bofill and Sebastian Yanine, Chile, Latin Lawyer, 8th June 2017 <https://latinlawyer.com/jurisdiction/1003057/chile> [39]

⁹¹ Francisco Aninat, Jorge Bofill and Sebastian Yanine, Chile, Latin Lawyer, 8th June 2017 <https://latinlawyer.com/jurisdiction/1003057/chile> [39]

⁹² Francisco Aninat, Jorge Bofill and Sebastian Yanine, Chile, Latin Lawyer, 8th June 2017 <https://latinlawyer.com/jurisdiction/1003057/chile> [39]

⁹³ Francisco Aninat, Jorge Bofill and Sebastian Yanine, Chile, Latin Lawyer, 8th June 2017 <https://latinlawyer.com/jurisdiction/1003057/chile> [45]

⁹⁴ Francisco Aninat, Jorge Bofill and Sebastian Yanine, Chile, Latin Lawyer, 8th June 2017 <https://latinlawyer.com/jurisdiction/1003057/chile> [45]

⁹⁵ Argentina Practical Law [3]

⁹⁶ Argentina Practical Law [3]

Binding precedent operates as a 'soft obligation' in Argentina.⁹⁸ This obligation entails that there is a tendency of lower courts in Argentina to 'check' the Supreme Court's position on an issue and 'generally follow' that position.⁹⁹ There is not, however, an official, constitutionally-entrenched obligation for these courts to do so.¹⁰⁰

In any case, it has been reported that the Supreme Court issues warnings providing that, despite the lack of official binding precedent, a departure from Supreme Court decision-making, could result in those lower court decisions being 'struck down'.¹⁰¹ There still remains capacity, however, for lower courts to depart from Supreme Court decisions if there are 'new arguments' for deciding the case different to the prior decision.¹⁰²

iii. Are more proceedings conducted 'on the papers' or orally?

For the bulk of proceedings in Argentina, it appears that proceedings are conducted primarily 'on the papers' particularly in the earlier stages of the claim.¹⁰³ Typically, at around the 'evidence stage' will the proceedings shift to oral hearings.¹⁰⁴

iv. What are the costs associated with commencing civil claims?

Argentina has costs associated with mediation and also, litigation filing fees for accessing the court system.¹⁰⁵ Each party bears their own legal costs.¹⁰⁶

⁹⁷ Legarre, Santiago, Precedent in Argentine Law (2011). 57 LOY. L. REV. 781 2011; Notre Dame Legal Studies Paper No. 1412. Available at SSRN: <https://ssrn.com/abstract=2422405>.

⁹⁸ Santiago Legarre, Precedent in Argentine Law, European Journal of Comparative Law and Governance (2014), 1, 5.

⁹⁹ Santiago Legarre, Precedent in Argentine Law, European Journal of Comparative Law and Governance (2014), 1, 5.

¹⁰⁰ Santiago Legarre, Precedent in Argentine Law, European Journal of Comparative Law and Governance (2014), 1, 5.

¹⁰¹ Corte Suprema de Justicia de la Nacion [CSJN] [National Supreme Court of Justice], 6/10/1948, "Santin, Jacinto c. Impuestos Internos/ recurso extraordinario," Fallos de la Corte [FALLOS] (1948-212-51, 59) (ARG.); Santiago Legarre, Precedent in Argentine Law, European Journal of Comparative Law and Governance (2014), 1, 5-6.

¹⁰² Santiago Legarre, Precedent in Argentine Law, European Journal of Comparative Law and Governance (2014), 1, 6.

¹⁰³ Argentina Practical Law [9]

¹⁰⁴ Argentina Practical Law [9]

¹⁰⁵ Argentina Practical Law [6]

¹⁰⁶ Argentina Practical Law [6]

Ordinarily, the unsuccessful party will bear the legal costs of the winning party. The court is at its disposal to find an alternative conclusion and find that the unsuccessful party does not have to either, completely or, partially pay the legal costs.¹⁰⁷ The court may also, in exceptional circumstances where the judgment is 'partially favorable' to both parties, divide the legal costs between both parties.¹⁰⁸

v. Appeal process

Appeals against first instance judgments must be filed, five working days after judgment has been delivered and at that court but providing grounds for the appeal are not necessary at this stage.¹⁰⁹ If that court determines the appeal to be admissible, the National Commercial Court of Appeals in Buenos Aires (National Court) will hear the appeal.¹¹⁰ At the National Court, parties will need to present their grounds for appeal.¹¹¹

i. A point of interest

Since May 2016, Argentina adopted an e-filing law which posits that within twenty-four hours of 'paper submission of any presentation, an e-filing' in PDF format must be uploaded onto the court's system.¹¹² The Law also renders electronic notification as mandatory.¹¹³

Brazil

ii. The court system¹¹⁴

Brazil has a dual system of state and federal courts. Unlike other jurisdictions, their competence is not determined by the nature of the applicable law, but by the parties or subject matter involved in the case. Federal courts generally have

¹⁰⁷ Argentina Practical Law [22]

¹⁰⁸ In addition to this, the court may also order that the defendant is not liable to pay the costs if the defendant has 'admitted' the claim before submitting an answer to the complaint and if that admission is 'real, unconditional, timely, total and effective.' Argentina Practical Law [22]

¹⁰⁹ Argentina Practical Law [20]

¹¹⁰ Argentina Practical Law [20]

¹¹¹ Argentina Practical Law [20]

¹¹² Argentina Practical Law [35]

¹¹³ Argentina Practical Law [35]

¹¹⁴ Georges Abboud. Precedente Judicial versus Jurisprudência Dotada de Efeito Vinculante: a ineficácia e os equívocos das reformas legislativas na busca de uma cultura de precedentes. in: Teresa Arruda Alvim Wambier (org.). Direito Jurisprudencial, São Paulo: Revista dos Tribunais, 2012. pp. 491-552.

jurisdiction to hear cases involving the federal government and some types of entities under the control of the federal government., as well as foreign governments or international organizations. The other matters, regardless of the nature of the applicable law, are submitted to state courts.

Both the state and federal courts are organized in two instances, with a state court of appeals in each state and five regional federal courts of appeals for the federal court system.

The Brazilian judiciary also has two higher national courts, the STF hearing primarily constitutional matters and the STJ hearing matters on federal law.

iii. Is there a system of binding precedent?¹¹⁵

Significant moves have been made in Brazil towards creating binding precedent. Such moves do not mean abandoning the basic features of a civil law jurisdiction, but the need for legal certainty has created a move in favor of mechanisms that protect consistency and integrity in the application of certain higher court decisions.

For example, the STF has the power to issue so-called *sumulas vinculantes* (binding summaries), which are final judgments from which the STF extracts a straightforward and express statement of the interpretation of a certain constitutional provision. This statement becomes binding and allows for direct recourse to the STF in case of infringement. In the period after 2008 and especially after the enactment of the 2015 Brazilian Civil Code of Procedure (BCPC)¹¹⁶, the STJ has acquired similar competence and now has a number of ways to create binding precedent for lower courts.

iv. Is it possible for a defendant to join additional parties to an existing proceeding?

Third-party intervention is permissible through mechanisms such as *amicus curiae* (friend of the court) or because the third-party is 'directly involved or is potentially liable for the facts and obligations reported in the statement of claim'.¹¹⁷

v. Are more proceedings conducted 'on the papers' or orally?

Brazil has a typical system of 'on the papers' proceedings in the first instance, in which opportunities for hearings are limited and more focused on gathering evidence than allowing for interaction between counsel and the court. On the other

¹¹⁵ See José Wellington Bezerra da Costa Neto. Binding precedent and judicial free conviction. *Revista de Processo* (Apr / 2017), vol. 266/2017. pp. 447 – 480.

¹¹⁶ Brazil [45]

¹¹⁷ Brazil [12]

hand, the appellate trial is purely oral, based on the written submissions the parties have made at the time of filing the appeal in the lower instances; during trial, both counsel may submit oral arguments, and the court deliberates publicly on the same occasion.

vi. What are the costs associated with commencing civil claims?

Each state in Brazil prescribes its own set of court fees.¹¹⁸ Some of these fees are standard fees that are more or less applicable in each state for the filing of a civil claim.¹¹⁹ For example, the claimant usually pays the initial fees to commence a dispute and this fee typically ranges from 1% to 2% of the case value.¹²⁰ Each state will also typically establish a minimum and maximum amount of this fee.¹²¹ Similarly, the defendant will pay fees for the filing of a counterclaim.¹²² Appeals require additional fees.¹²³

The basic premise of the litigation fees in Brazil is that each party must pay any costs with respect to 'the execution of the acts they request'.¹²⁴

The unsuccessful party will bear the legal costs (and court-awarded attorneys' fees¹²⁵) of the successful party.¹²⁶ A peculiar trait of the Brazilian system is that the award for attorneys' fees legally belongs to the attorneys, not the clients. Article 85, BCPC, defines criteria for setting attorneys' fees that are generally set between 10% and 20% of the amount in dispute.

vii. Appeal process

First instance rulings may be reviewed by the respective State Court of Appeals or a Regional Court of Appeals.¹²⁷ These courts are limited by the scope of review defined by the grounds and claims which have been raised by the

¹¹⁸ Brazil [34]

¹¹⁹ Brazil [34]

¹²⁰ Brazil [34]

¹²¹ Brazil [34]

¹²² Brazil [34]

¹²³ Brazil [34]

¹²⁴ Brazil [34]

¹²⁵ The Brazilian Code of Civil Procedure includes a general provision which stipulates that these contingency fees will be 'fixed at the amount corresponding from 10% up to 20% of the case value or condemnation.' Brazil [37]

¹²⁶ The Brazilian Code of Civil Procedure includes a general provision which stipulates that these contingency fees will be 'fixed at the amount corresponding from 10% up to 20% of the case value or condemnation.' Brazil [37]

¹²⁷ Brazil [39]

unsuccessful party.¹²⁸ As for the typical number of appellate levels in civil litigation, Brazil has three:

- (1) An appeal to a state or regional appellate court
- (2) An appeal to the STJ on federal law matters
- (3) An appeal to the STF on constitutional law matters

Brazil allows for both appeals against interlocutory decisions and final decisions.

The admissibility requirements for appeals involve certain restrictions on the subject matter of the appeals. Interlocutory appeals are admitted only in a limited list of situations described in Article 1015 of the BCPC, although the STJ tends to amplify this list through interpretation. In addition, appeals to the STJ and STF may not deal with points of fact, only with points of federal or constitutional law, respectively, and are subject to several admissibility requirements.

viii. A point of interest

The BCPC placed a strong focus on electronic proceedings in litigation. The BCCP normalized electronic procedure such as, the submitting of documents, allowance of witnesses to be heard through videoconferences and so forth to be done through electronic means as a move to expedite litigation proceedings in the country.¹²⁹

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¹²⁸ Brazil [39]

¹²⁹ BCCP Art 198, 205, 236, 385, 453, 461, 937, 943.