

General Overview | Bullet Points Guide

Foreign Companies (without representation, real estates or branches in Brazil) going to the Brazilian Courts, against Brazilian Companies, based on Contractual Obligations unfulfilled - Lawsuit in Brazil and Foreign Companies

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§1. Necessary Documents to start a Lawsuit in Brazil:

a. Power of Attorney granted by the Foreign Company to the Brazilian Lawyer + Articles of Association (with last Amendments) of the Foreign Company:

a.1. Power of Attorney obtained with Notary (e.g., in Italy: Notaio) and a copy of the Articles of Association (including last Amendments) with legal validity in the

foreign country;

a.2. Haia Apostille (where it is not possible this Apostille:

a.2.1. Notarization of the Power of Attorney, which is the recognizance of signatures by the foreign public authorities (e.g., in Italy: Procura della Repubblica);

a.2.2. Consularization of the documents, which is the recognizance of the foreign public authorities by the Brazilian Consulate (e.g., in Italy: Brazilian Consulate in Italy, Milan / Rome);)

a.3. Sending to Brazil;

a.4. Translation, of the Power of Attorney and the Articles of Association, that need to be made in Brazil (The documents to be submitted directly to the Brazilian authorities in national territory, shall, necessarily, be translated by a sworn translator in Brazil, according to Brazilian Decree No. 13609 of 21/10/1943);

a.5. Record at a Public Brazilian Registry (Article 129, paragraph 6 of the Brazilian Law on Public Registration No. 6.014/73);

b. Contracts/Agreements and other documents related to the litigation object: applies the steps a.2/a.3 to a.6 above;

c. Witnesses: it is recommended that the witnesses put their testimonials in a document which will be recorded in a Public Brazilian Registry; if the witnesses is out of Brazil, applies steps a.2 to a.6;

d. Articles of Association (with last Amendments) of the Brazilian Company: we obtain these documents according the headquarter of the company and the competent Commercial Board.

§2. International Contracts according the Brazilian Law:

Substantive Law of Regency. According the Introduction Law to the Brazilian Norms, Article 9: “To qualify and make the regency of obligations, will be applied the law of the foreign country in which they were constituted. § 1o. If the obligation will be performed in Brazil and with dependency of essential form of performance, will be applied the Brazilian law, observing the extrinsic requirements to the act according the foreign law. § 2o. The obligation which was resulted of the contract will be considered constituted in the place of the tenderer”.

Procedural Law of Regency. According the Article 12, of the

same norm, “it is competent the Brazilian judiciary authority when the defendant has domicile in Brazil or here the obligation shall be performed. § 1o. Only the Brazilian Judiciary Authority can work with litigation concerning real estate in Brazil. § 2o. The Brazilian Judiciary Authority, with the *exequatur* and according the form establishes in Brazilian law, will make the diligence required by foreign judges”.

* *Exequatur* is given by the Brazilian Superior Court (STJ).

Judiciary Foreign Sentence in Brazil. Introduction Law to the Brazilian Norms. Article 15: “Will be executed in Brazil the foreign sentence which has these requirements: a) made by competent judge; b) be possible verify which the parts of the litigation were cited or happens the legally absence of the part; c) the necessary formalities to the execution in the foreign place are necessary elements of the foreign sentence; d) be translated by a sworn translator in Brazil, e) have acceptance by STJ (Brazilian Superior Court)”

Necessity, or not, of Guarantees in Lawsuit. Brazilian

Civil Procedural Code. Article 83. “The author of a lawsuit, be Brazilian or be foreign, which has residence outside of Brazil or ceases to reside in the country during the course of the proceeding, shall provide sufficient guarantees to the lawsuit costs and the legal fee of the attorney of the another part, in case of loss the lawsuit, if there is no real estates in Brazil which can guarantee the lawsuit.” (Lawsuit costs, e.g., to São Paulo, in 2022 = 1% of the value of the lawsuit; legal fee of the attorney of the another part, in case of loss the lawsuit = from 2% to 20% of the value of the lawsuit, decided by the judge). BUT, according the Article 83, **will not be necessary guarantees when** “I - when there is a waiver provided for in an international agreement or treaty to which Brazil is a party; II - in execution based on an extrajudicial title and in compliance with a judgment; III - in the counterclaim.”

§3. Strategies. Concrete situation – Case example:

A Commercial Contract, object of the litigation, is not a document with Extra Judicial-Enforcement according the Brazilian Law [e.g.,

Brazilian Civil Procedural Code. Article. 784. Are Extra Judicial-Enforcement Papers: ...the private contract signed by the debtor and two witnesses...Article. 783. The execution of credit collection will be based on a obligation with (a) certain concerning the parts and the object of the obligation (existence of the credit); (b) the possibility to measure, without another documents, the price; and (c) the possibility of requires the performance or payment to a judge, since the credit is not payed and not prescribed]. What are the options to solve this problem?

There are three ways:

a. IF the contract object of the litigation is an Extra Judicial-Enforcement in the foreign country, THEN the way is soft, because, according the Brazilian Civil Procedural Code. Article. 784. § 2: “§ 3 The foreign title will only be enforceable when the formation requirements demanded by the law of the place of its celebration and when Brazil is indicated as the place of performance of the obligation.”;

b. IF the contract, object of the litigation, do NOT has Enforcement in a Extra Judicial way, in the foreign country, THEN will be necessary transform the foreign document in an Extra-Judicial Enforcement Paper in the foreign country. In this case, will be necessary a lawsuit in the foreign State (with communication with the Brazilian defendant), then it will be necessary the acceptance of the foreign sentence in STJ (Brazilian Superior Court), and, after, will be necessary the execution of this sentence, arguing that the Article 83, above mentioned, shall be interpreted in a broadly perspective, because who can do the less secure (go to the court based on an Extra Judicial Enforcement Paper) can perform the more secure action (go to the court based on a foreign sentence which had recognition by STJ);

c. Go to the Court with a special specie of lawsuit, called “Ação Monitória”, which permits the contract, e.g., which do not have two witness (and, so, without Enforcement in a Extra-Judicial way) be transformed in a contract with Extra-Judicial's Enforcement. The execution of the

contract, satisfying the author of the lawsuit, is made as consequence. Concerning the guarantees to the Brazilian jurisdiction, these only will be necessary if, after a formal notification of the judge, the defendant do not accepted, and formally makes an opposition. According to the Brazilian Civil Procedure Code, Art. 785: “The existence of an extrajudicial enforcement order does not prevent the party from opting for the knowledge process in order to obtain a judicial enforcement order”.

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