

Practice
Maritime

Article: Litigation costs in Brazil





Litigation costs in Brazil

Brazilian courts are filled with lawsuits that occasionally take several years to come to a final decision, which increase the overall costs involved in the dispute. This is one of the most controversial aspects of litigation in Brazil.

Article 389 of the Brazilian Civil Code provides for that “if the obligation is not fulfilled, the debtor is responsible for losses and damages, plus interest and monetary restatement according to the established indexes, and lawyers’ fees”. Article 395 of the same law sets forth a similar wording when it comes to payment of outstanding debts.

Firstly, it is important to highlight that interest and monetary restatement accrue over the amount in dispute but have different commencement terms that may vary according to the nature of the damage, whether material or moral.



Secondly, it should be clarified that the monetary correction intends to grant the party the update amount that corresponds to their lost, i.e. to adjust the devaluation of the currency over time.

At the State Courts, there are different indexes to be used for this purpose, which should be analyzed on a case-by-case basis. On the other hand, currently the Federal Courts have published Resolution No. 267/2013, which established the methods of calculation before such courts. The Labor Courts are settled in using the IPCA index, which is nationwide applicable. Such provisions, however, may be amended at any time.

The application of interest may be considered as a penalty for the non-compliance of a certain obligation. As per the Civil Code, the current interest rate is of 12% per year, i.e., 1% per month (article 406).

Further, lawyers' fees shall also be included in the costs of litigation, having in mind that the losing party is responsible to pay for them.

The longer the lawsuit takes to become *res judicata*, the higher are the costs involved. This is a matter to have in mind when litigating in Brazil.

We shall simplify the understanding below:

1

Material damages

Material damages involve a certain monetary loss for one of the parties, which must be duly evidenced in a lawsuit. Such loss can arise out from contractual or non-contractual disputes.

1.1. The interest rate

For contractual liabilities, the interest rate shall be applied from the defendant's summoning in a lawsuit. Article 405 of the Civil Code provides for that "default interest shall be counted from the valid summoning", even if it is ordered in the wrong jurisdiction (article 240 of the Civil Procedure Code).

In cases of non-contractual liability, the debtor is in default since the date of the event (article 398 of the Civil Code). The Superior Court of Justice has already settled this discussion, as per Docket No. 54 that states "the default interest accrues from the harmful event, in case of non-contractual liability".

1.2. The monetary restatement

It shall accrue in either case (contractual or non-contractual liability) as of the date of the harmful event. The Superior Court of Justice has also analyzed this matter and the decisions are settled in this regard (Docket No. 43).

2

Moral damages

The compensation for moral damages corresponds to the damages suffered by the person itself, whether it is a human being or a legal entity, that affects the integrity of such person.

The interest rate

There is a controversy of when the interests shall count when it comes to moral damages. Some argue that the interest rate should be counted from the date of the harmful event as the right to compensation for the damage arises. On the other hand, there are those who affirm that the interest rate should be counted from the date of the decision that arbitrates the indemnity, because no amount was effectively due before that.

The latter support their arguments based on the Civil Code (article 407), being the interest rate over the moral damages applicable from when it is established, whether it is by a first instance court decision, an arbitration award, or a settlement agreement between the parties.





The monetary restatement

2.2

In contrast, when it comes to the monetary restatement, the Superior Court of Justice is settled on Docket No. 362 which foresees that "the monetary restatement of the amount of the indemnity for moral damage shall apply from the date it is established".

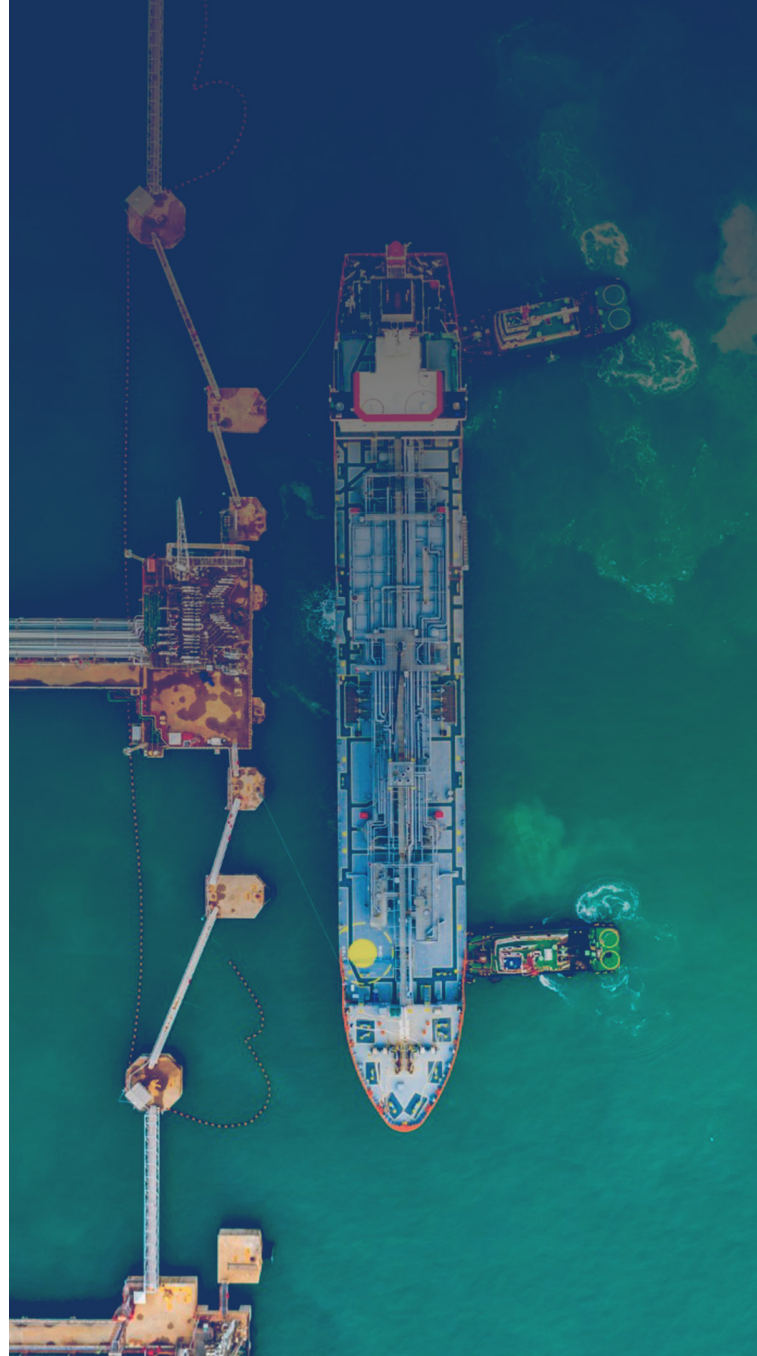
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Lawyers' fees

In a lawsuit, the losing party shall also be responsible for the lawyers' fees that are indicated in the decision by the judge. According to article 85 of the Civil Procedure Code, the lawyers' fees can be established in the range of 10% to 20% over the updated amount of the award. The fees are instituted in the first instance decision and can be increased in each appeal up to the limit of 20%.

When the lawsuit does not have a determined amount established or it does not aim to have an economic outcome identified, the judge may apply a different rule for the lawyers' fees. In that case, the fees shall be based on specific legal grounds, such as degree of professionalism, location of the service, nature and importance of the case, and the time allocated. In those cases, it is not possible to foresee the amount to be established by the judge.

Once the lawyers' fees are set in a certain amount, the monetary restatement shall accrue after the decision becomes final and binding.



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