International Labour Organization

Access to labour justice: Judicial institutions and procedures in selected South American countries

Overview of procedural elements for access to labour justice in judicial dispute resolution institutions

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Labour Law and Reform Unit
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Introduction

As the number of individual disputes arising from day-to-day workers' grievances or complaints continues to grow in many parts of the world[1], labour courts are important part of dispute prevention and resolution systems and play a critical role in ensuring access to justice and contributing to equity in industrial relations.

Access to labour justice cannot be understood only as the formal access to labour courts and right to have a claim examined by an impartial judge, but also as access to a fair procedural regulation, which enables real conditions of equality before the judiciary.

This report aims at examining labour courts and ordinary courts hearing labour cases and various detailed aspects of their procedures and institutional settings, seeking to identify connections between them or trends in the region which may impact on the level of access to labour justice in the countries examined.

States commonly establish different types of institutions and procedures to resolve individual and collective disputes.

In South American countries labour conflicts may be resolved mainly through judicial courts/tribunals, which are empowered to hear cases and determine a binding outcome of a dispute.[2] The following countries systems were examined: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Venezuela, and Uruguay.

For the purpose of this report, these countries are divided in two major models: i) ordinary civil courts with jurisdiction over labour cases (with or without specialized labour branches/divisions or judges), and ii) specialized labour courts, under the direct administration of the Judiciary.

Courts hearing labour cases in South America are formed essentially by professional judges and cases are normally heard by a single judge in first instance. In the past, some of these systems would count with the participation of non-professional judges (often called lay judges), appointed by representatives of trade unions and employers' organizations.[3]

There may be also a combination of institutions when, for example, decisions taken by specialized labour courts at first instance may be appealed to ordinary higher courts.

Courts can also be competent to hear collective and individual cases. In some countries, labour courts may have full jurisdiction over all labour disputes or have their jurisdiction limited to either individual or collective disputes. They may also be competent to hear cases involving public employees or social security (pensions, unemployment).

Different models may involve different organic procedural laws and court procedural rules, depending on the existence of specific rules enacted for labour disputes, or general procedural rules, applicable to all cases falling under civil jurisdiction.

Countries examined also present differences on the physical distribution of these courts and their availability of services to the public, which may impact on the level of access to labour justice.

To examine the multitude of characteristics of each country and compare them, pertinent national pieces of legislation and official statistics,

1 Ebisui, M; Cooney, S; Fenwick, C: *Resolving individual labour disputes: a comparative overview* / edited by Minawa Ebisui, Sean Cooney, Colin Fenwick; International Labour Office. - Geneva: ILO, 2016. p. 19.

2 Colàs-Neila, E., Yélamos-Bayarri, E. 2020. *Access to Justice: A Literature Review on Labour Courts in Europe and Latin America*, ILO Working Paper 6 (Geneva, ILO). p. 06.

3 In Brazil, for example, lay judges ("*juízes classistas*") would hear labour cases in a panel with a professional judge until 1999, when Constitutional Amendment No. 24 extinguished this model.

when available, were examined considering 4 thematic areas: i) institutional structure of courts and tribunals, ii) jurisdiction, iii) procedural aspects, and iv) operational and practice.

The institutional structure evaluates how the courts are composed, if they are part of a multiple-tier system under judicial authority, how judges are appointed, what are the governmental bodies responsible for selecting them, and what are the requirements to be met to become a professional judge.

In jurisdiction, the courts hearing labour cases will be classified according to the material jurisdiction, if they can hear cases related to international jurisdiction, and if they can hear both individual and collective cases. For the purpose of this report, collective cases are disagreements between a group of workers usually, but not necessarily, represented by a trade union, and an employer or group of employers over existing rights or future interests.[4]

By analysing the procedural aspects, this report aims at comparing the procedures by which it is possible to present claims to the judicial dispute resolution institutions under examination, and how the procedures themselves are applied to cases[5], which may affect directly or indirectly the level of access to labour justice.

Lastly, in operation and practice, the report examines the average distribution of courts and judges to hear cases (supported by official records, if available), who are the parties and actors involved in labour cases, what types of outcomes can be expected, what are the remedies available to deal with these outcomes, and what are the circumstances involving the enforcement or termination of these procedures.

This report used updated procedural regulations, updated information provided by official channels of Ministries and courts, and statistics from 2017 to 2020, when available.

4 ITCLO: *Labour dispute systems: guidelines for improved performance*. International Training Centre of the International Labour Organization, 2013. p. 18

5 Including with respect to formal requirements, presentation of evidence and rules of burden of proof, participation of accredited representatives, and possibility of appealing the case to higher instances, costs of procedures, possible legal aid, and legal fees.

Methodology

In order to compare models of procedural law and structure of courts in South American countries, pertinent national legislation of each country was examined to collect qualitative data and produce contextual knowledge about the composition of courts hearing labour cases, context of their jurisdiction, procedures and practice of courts. Data collected was divided in several indicators conceived to enable the comparison of countries examined. Given the variety of models and processes, a cross-country quantitative comparison cannot readily be undertaken. Data provided are thus accompanied by descriptions of the specific context. In respect to statistical data, existing quantitative data was examined, when available by official countries 'websites and their respective agencies and by other official institutions.

Institutional Structure of Courts and Tribunals

Composition of Courts and Tribunals

Models of courts hearing labour cases

South American countries have a very similar system of hearing labour cases. In only 2 (Guyana and Suriname) of the 12 countries analysed, labour cases are heard by civil courts, meaning that in these countries labour cases do not fall under a special judicial jurisdiction.

In Argentina (Juzgados de Trabajo)[6], Bolivia (Juzgados de Partido del Trabajo)[7], Colombia (Juzgados de Trabajo del Circuito)[8] and Paraguay (Juzgados del Laboral)[9], first instance labour courts are part of the civil ordinary courts and are competent to handle individual and collective labour cases and disputes related to the provision of social security services. In Argentina, labour courts are composed by individual provincial (federal) or national judges at first instance.[10]

In Brazil, labour courts (Varas do Trabalho) are part of a specialized and independent branch of federal courts. They have jurisdiction over any dispute, individual or collective, arising from labour and employment relations, including public employees if their contracts follow the Consolidation of Labour Laws. However, disputes involving social security benefits fall under ordinary federal courts.[11]

Labour Courts of Law (Juzgados de Letras de Trabajo) and Labour and Social Security Collection Courts (Juzgados de Cobranza Laboral y Previsional)[12] in Chile are part of ordinary courts, and also have special jurisdiction of labour and social security disputes.[13]

In Uruguay, labour courts of first instance (Juzgados Letrados de Trabajo) are competent to hear cases arising from individual labour disputes.[14] The first instance courts of law of the countryside (Juzgados Letrados de Primera Instancia del Interior) are competent to hear criminal, labour and customs matters, as assigned by the respective special laws; and in civil, commercial, tax, family and juvenile matters.[15]

Although there are specialized labour courts, in some countries ordinary courts also have jurisdiction over labour cases where no labour court has been established.[16]

As there are no specialized labour courts in Suriname, labour disputes are usually resolved by alternative dispute resolution systems

6 Article 75, XII, National Constitution and Articles 20, 21 and 22 of the Law on Organization and Procedures of Labour Courts.

7 Article of 6 Labour Code.

8 Articles 2, 3 and 12 of Labour Procedure Code.

9 Article 28 of Code of Labour Procedure.

10 In Buenos Aires labour disputes are dealt with by national judges, since as yet there has been no transfer of judicial competences from the Federal Government to province.

11 Article 114 of Federal Constitution and Constitutional Amendment n°45/2004.

12 These courts have jurisdiction over enforcement of decisions or awards related to labour and employment disputes or issues.

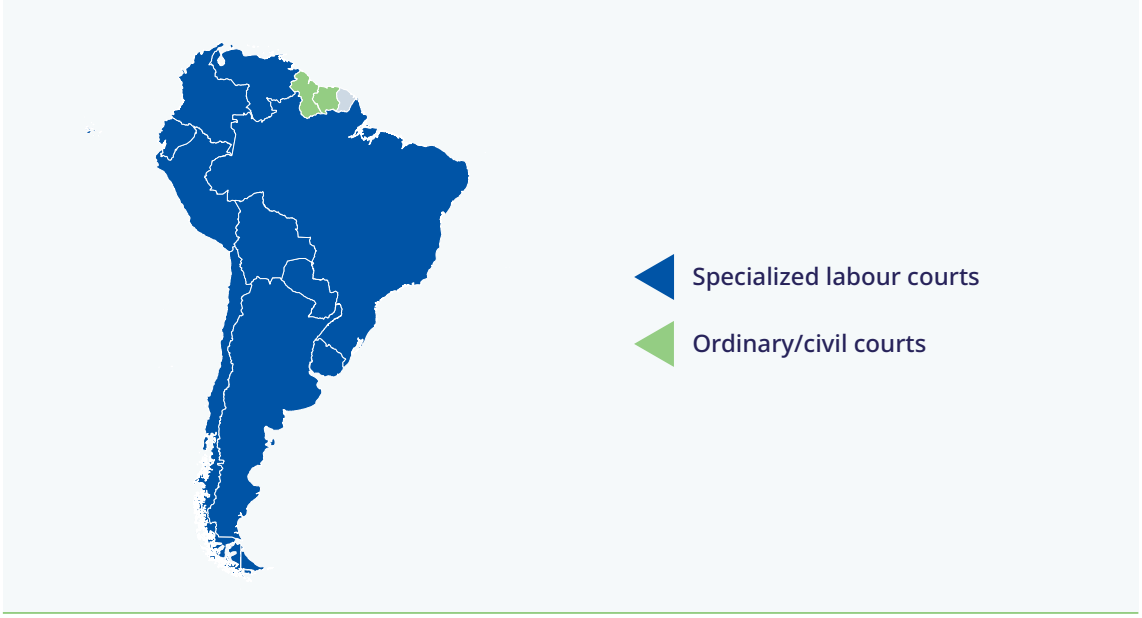
13 Articles 420 and 421 of Labour Code and Articles 1-13 of Law No. 20022/2000.

14 Article 66 Law of Organization of courts (Ley de Organización de los Tribunales) and Article 106 Law No. 12,803/1960.

15 Act No. 15.750.

16 Examples include Brazil, Chile, and Ecuador.

Chart 1: Judicial courts of first instance hearing labour cases



(Conciliation, Mediation and Arbitration Councils)[17]. However, resorts to ordinary civil courts are possible[18]. Similar system is found in Guyana.[19]

Composition of courts hearing labour cases

Labour courts and ordinary courts hearing labour cases can comprise professional judges and/or non-professional judges, often representatives of employers, workers, and experts in labour markets (often called "lay judges"). As it was seen, in South America nowadays only professional judges chair labour or ordinary courts hearing labour cases.

Moreover, it is much less common to find first instance courts in South America hearing cases in panels, even composed only by professional judges. In general, first instance courts are composed by a single judge, who is likely to be responsible for conducting hearings and rendering final decisions about the same case[20].

Some countries have more than one judge in the composition of each court[21], however this does not mean they will decide cases together, but instead they will divide the workload or replace each other during holidays or leaves.

Judgement in panels is common in higher instances, such as Courts of Appeals, Superior, Supreme and Constitutional Courts. Panels may comprise 3 to 5 judges divided in Chambers. In Brazil, for instance, labour cases based on violation of labour constitutional rights and that have general repercussion (*erga omnes*) are likely to be decided by the plenary of the Supreme Federal Court, in which case 11 Justices (Ministros) will decide.

17 Act G.B. 1946 No. 104.

18 Articles 1 and 2 1 of G.B. 1935 No. 79), as amended by G.B. 1971 No. 65, S.B. 1980 No. 116, S.B. 1985 No. 2, S.B. 1990 no. 10, S.B. 1994 No. 17.

19 Article 33 of Chapter 3:05 of Laws of Guyana.

20 Exceptions include Venezuela, where statement of claim must be presented to a judge of substantiation, mediation and execution, responsible for conducting the first hearing when attempt of conciliation is carried out, as well as receipt of pleas and evidence. Concluded the preliminary hearing, the proceedings are sent to a trial judge, who will conduct the proceedings onwards.

21 Examples include Brazil, Chile, Ecuador, Peru.

Selection and qualification of judges

Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives.[22] The aim of judicial appointment processes should be to provide a reliable means of identifying persons who possess these qualities, and to do so in a manner that is legitimate, in order to sustain public confidence in the judiciary[23].

Rules on selection and qualification of judges serve to guarantee their independence and ensure a sufficient degree of expertise and high standards in the qualification. The processes of selection of first instance professional judges and the qualifications required to hold the position are quite different among the countries examined, but specific trends are important to be explored.

Qualification of Judges

All countries examined provide specific legislation in respect to appointment and selection of judges. In some, the pertinent legislation provides that candidates must have proved professional experience in the field of law. Other requirements are related to citizenship, education (degree in law), age, attendance to training programmes. Some countries also established rules related to the reputation, credibility, and physical and mental fitness for the job. **(Figure 1)**

In Bolivia, besides the requirements common to other countries, candidates must speak at least 2 national languages, considering that, besides Spanish, 36 indigenous languages are considered official[24]. Moreover, the candidate must have worked for at least eight years in law activities, as a judicial system employee or a law professor, including as original indigenous peasant authority. In addition, to be a labour judge the candidate must have experience in the area[25].

Figure 1: Statutory qualification requirements for professional judges

Qualification requirements						
Citizenship	**Age**	**Reputation or/and Health**	**Education (Bachelor`s degree in Law)**	**Education (Advanced degree in Law)**	**Training**	**Experience**
Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay, Venezuela	Argentina, Brazil, Bolivia, Paraguay, Peru, Suriname, Uruguay, Venezuela	Bolivia, Chile, Colombia, Peru, Uruguay, Venezuela	Argentina, Brazil, Chile, Colombia, Guyana, Paraguay, Perú, Suriname, Uruguay, Venezuela	Ecuador, Suriname	Chile	Argentina, Bolivia, Brazil, Colombia, Paraguay, Peru, Uruguay, Venezuela

22 Unites Nations, High Commissioner for Human Rights: Basic Principles on the Independence of the Judiciary. Available here https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx

23 J. van Zyl Smi:, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Report of Research Undertaken by Bingham Centre for the Rule of Law), 2015, p. 17.

24 Article 5 of Constitution of Plurinational State of Bolivia (2009).

25 Articles 18, 19 and 36 of Judiciary Body Act.

In Chile, candidates must have satisfactorily completed the training program for applicants to the Primary Ranking of the Judiciary[26].

In Venezuela, experience period may be replaced by a postgraduate degree in Law[27]. In Brazil, candidates must have at least 3 years of proven experience in the field of law to participate in the selection process.

Selection of Judges

All countries examined appear to have an objective and transparent criteria in national legislation for selecting their professional judges, either by public competition based on technical exams or through the establishment of independent Judicial Commissions, which carry out the selection procedures, even if they are not solely responsible for the final appointment of judges.

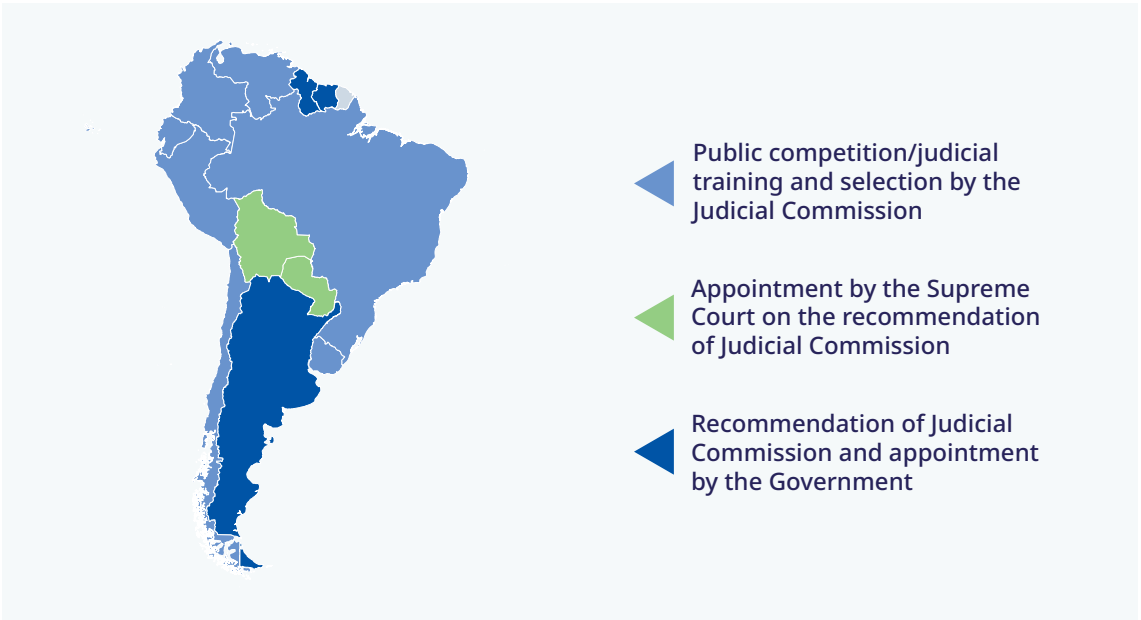
In 58% of countries examined, professional judges are appointed after a successful selection procedure based on technical evaluations. **(Chart 2)**

In Argentina, regardless the instance, nominations are made by the President in consensus with a Senate Commission.[28]

In Bolivia[29] and Paraguay[30], nominations are made by the Supreme Court on the recommendation of Judicial Commission.

In Brazil, first instances judges are selected after a public contest. In higher instance, judges are appointed by the President among first instance judges. However, 20% of the vacancies shall be reserved to private attorneys or prosecutors to be appointed by the respective representatives' organizations.[31]

Chart 2: Methods of selection of professional judge



26 Paragraph 3 of Organic Code of Courts (Código Orgánico de Tribunales).
27 Article 10 of Law of Judicial Career.
28 Article 2 of Law of Organization of National Justice.
29 Article 9 of Law of Organization of Justice.
30 Article 250 of Constitution of Paraguay.
31 Article 93 of the Constitution.

Jurisdiction

Material Scope

Courts dealing with labour cases might also be divided in terms of material and geographical scope. They might have their jurisdiction shared with other mechanisms of dispute resolution depending on the nature of the claims. **(Figure 2)**

Individual labour disputes might be resolved in the same way as those available for the resolution of collective labour disputes. Collective disputes, in this case, are those between a group of workers usually, but not necessarily, represented by a trade union, and an employer or group of employers[32], over violation of an existing entitlement embodied in the law, a collective agreement, or under a contract of employment (disputes concerning rights), or future rights and obligations under the employment contract (dispute concerning interests).[33]

Geographical Scope

Cases involving foreign workers and enforcing foreign decisions

Courts hearing labour cases might be competent to enforce decisions rendered by foreign courts or render decisions on labour cases involving foreign workers providing services in national territory, depending on the reach of national legislation on this regard.

Most of the countries examined provide regulation in respect to Labour Courts to enforce decisions rendered by foreign courts.

However, in Bolivia, Ecuador and Venezuela, there is no indication in the legislation that suggests labour courts can enforce foreign decisions unless specific legislation in respect to reciprocity with certain countries addresses it. In the case of enforcement of foreign judgments or resolutions, the general rules applicable to all matters will be followed.

In Bolivia, foreign judgments shall have mandatory and probative effects and enforceable force, in accordance with the provisions of existing treaties or conventions, under specific requirements provided by civil procedural regulations.[34] The same occurs in Ecuador[35] and Venezuela[36].

Figure 2: Material scope of judicial courts hearing labour cases

Labour & Employment Relations Disputes		
Individual & Collective	**Individual**	
Labour Courts	**Labour Courts**	**Ordinary Courts**
Argentina, Bolivia, Brazil, Chile, Colombia, Paraguay, Peru, Venezuela	Ecuador, Uruguay	Guyana, Suriname

32 ITCLO: *Labour dispute systems: guidelines for improved performance.* p. 18.
33 Ibid.
34 Article 503 - 506 of Code of Civil Procedure.
35 Article 414 of General Code of Procedure.
36 Article 850 of Code of Civil Procedure.

Procedural Aspects

Procedural Rules

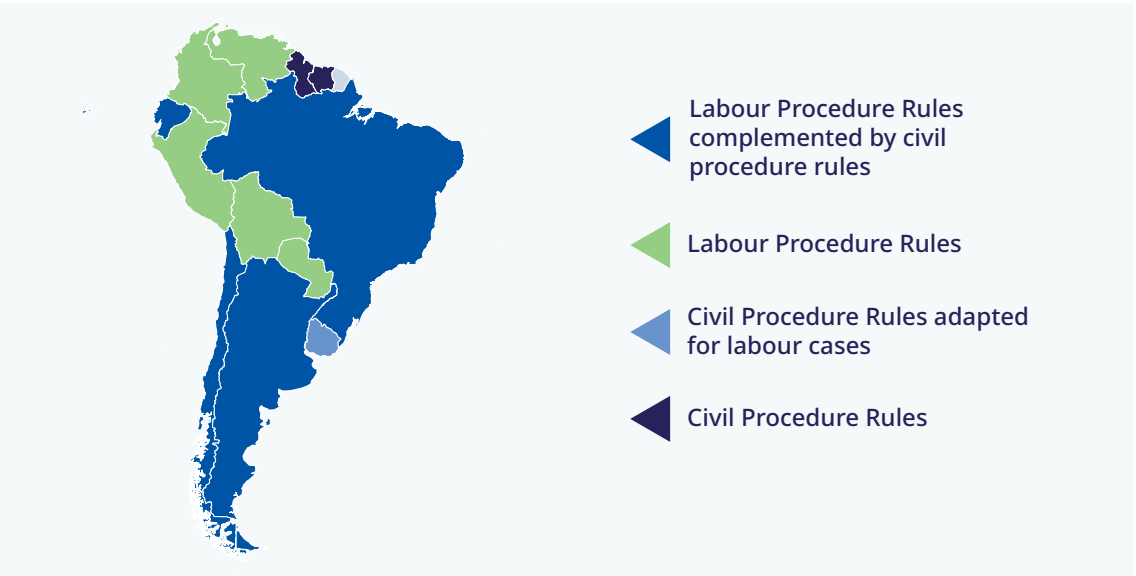
Procedures adopted by courts hearing labour cases[37] may follow specific rules enacted for labour disputes, or general procedural rules, applicable to all cases falling under the jurisdiction of ordinary courts.

Some countries examined have special procedures intended to ensure the application of expertise in complex employment and labour legislation, particularly in first instance.[38] These procedures intend to make the system less formal and legalistic, faster, and more accessible, in order to adjust an unequal power relationship between the parties to labour disputes.[39]

Other countries adopt general codes of civil procedures with adaptations to labour cases.[40] And there were also countries in which labour cases are heard under civil procedures[41] or labour procedures rules are complemented by civil procedures rules in different aspects.[42]

In Argentina, in the case of regional courts in different provinces that are not part of province de Buenos Aires, labour courts are regulated by regional laws and addressed to federal courts and not national courts, like in Buenos Aires. Also, some claims have specific procedures, such disputes related to occupation accidents.[43] **(Chart 3)**

Chart 3: Procedural rules applicable to labour cases



37 For this report, only specific procedures for labour cases or ordinary civil procedures applied to labour cases have been considered.

38 Examples include Bolivia, Colombia, Peru and Venezuela.

39 Ebisui, M; Cooney, S; Fenwick, C. p. 18.

40 Uruguay applies Shortening of Labour Procedures (Laws No 18.572/2009 and 18.847/2009) and Ordinary Procedures Law to labour cases in labour courts.

41 Guyana and Suriname.

42 Examples include Argentina, Brazil, Chile, and Ecuador.

43 Article 137 of Law on Organization and Procedures of National Labour Justice.

Legal Aid, Court Fees & Costs

An important aspect for the right of access to justice is the presence of judicial fees. A costly procedure may prevent people from requesting the services of courts, particularly those in more precarious economic situations[44]. Exemptions from paying legal fees are common in most countries examined, as well as provisions guaranteeing legal aid.

The report examined access to legal aid, payment of administrative costs (court fees) and costs with external reports and experts, and payment of legal fees.

All countries examined have provisions in law granting legal aid to access the judiciary and which can be applied to labour cases. Initial fees to present a claim do not apply to most countries.

In Brazil, initial fees are charged in specific procedures, mainly initiated by employers, based on the amount involved attributed to the claim and the parts might be exempted in case they are beneficiaries of legal aid.[45]

Courts fees in labour courts and ordinary courts hearing labour cases are either fully supported by the State or shared by the parties according to the outcomes of the cases, in which case beneficiaries of legal aid are exempted of paying them.

Most of the countries which have provisions determining the payment of courts fees distribute the burden of responsibility to pay such costs according to the claims granted. This means that in cases in which there has been presentation of a counterclaims, workers might also be sentenced to pay a share of court fees in case the decision finds counterclaims justified.

Only in Bolivia, administrative court fees are fully supported by the State regardless the outcome of the case.[46] However, in specific cases, mainly related to abuse of the right to defend, the judge may condemn the defendant to pay a share of such costs.[47]

Court fees might also include fees to appeal.[48]

Same rules apply in respect to costs with external reports and experts, which may be summoned to present reports on issues related to assessment of workplace to evaluate occupational health and safety conditions, medical evaluations on occupational illnesses and accidents, judicial inspections, and investigation of possible fraud in documents.

In almost all the countries examined, these costs follow the same rules of administrative court fees, which means that the losing party of a certain claim shall be responsible for the payment of the expert fees responsible for settling the matter. In other words, whoever caused the expense must bear it.

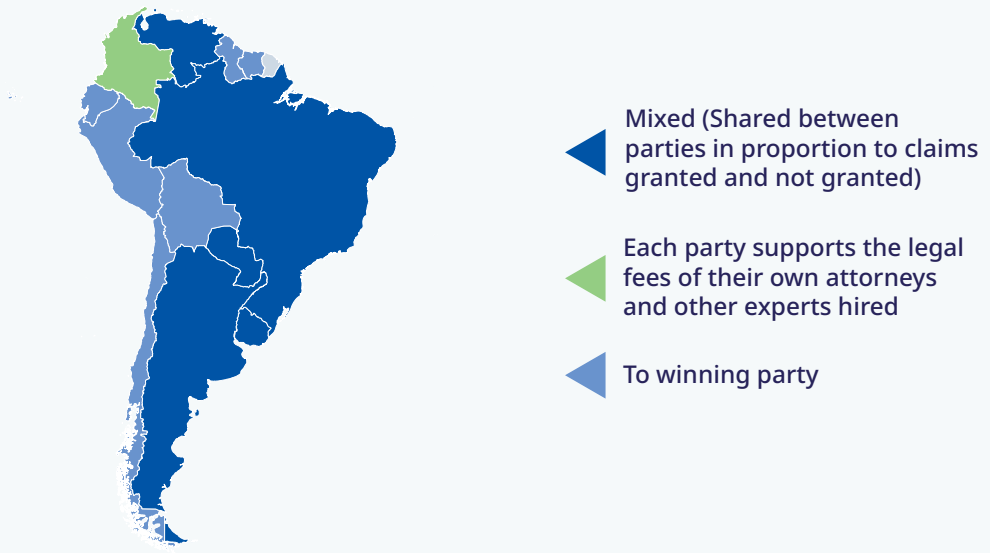
In Bolivia, these costs are not covered by the State, as other court expenses. They are paid to the State and shared by the parties, according to claims that have been granted[49]. Beneficiaries of legal aid are exempted though.

In respect to the responsibility over payment of legal fees, national legal systems provide for different models. In general, losing parties bear the most of it, but this may depend on the proportion of claims granted. In these cases, the plaintiff may be demanded to pay legal fees to the defendant in respect to the claims that were not granted. **(Chart 4)**

In Brazil, for example, the Labour Law Reform of 2017 has included in the Consolidation of Labour Law provisions in relation to legal fees[50]. Before such Reform, labour cases in labour courts did not have any provisions in this respect and parties were responsible for the legal fees of their own

44 Colàs-Neila , E., Yélamos-Bayarri , E. p. 20.
45 Articles 291 and 292 of Code of Civil Procedure.
46 Articles 3 (a) and 5 of Labour Procedure Code.
47 Article 204 of Labour Procedure Code.
48 Examples include Argentina, Brazil, Chile and Colombia.
49 Article 195 of Labour Procedure Code.
50 Article 791 A Consolidation of Labour Law.

Chart 4: Responsibility for the payment of legal fees



attorneys. After the Reform, legal fees are calculated over the amount attributed to each claim, meaning that workers who do not benefit from legal aid and exemption of the costs of litigation may have to pay for legal fees connected to claims that are not granted, even if the overall outcome is positive.

First instance procedures

First instance procedures applied for labour cases, either in labour or ordinary courts, are similar, regardless of specific procedures provided by law. However, certain trends have been observed in cross-case analysis.

Precautionary Measures

Prior to the presentation of a statement of claim or petition to initiate a labour lawsuit, parties can present a petition to the Court for precautionary measures. Precautionary measures are an essential procedural law institution, once they often have a direct impact on the effectiveness of the future judgment and are fundamental to secure evidence and means to enforce the decision. **(Chart 5)**

In Suriname, no information in the law indicates that such measures are possible. However, it might be the case that they are applied according to the discretion of judiciary in specific situations.

Precautionary measures are also likely to be requested during the preliminary hearings, especially concerning securing of evidence and anticipation of effects of a final decision (such as reinstatement of workers).

Administration of documents and evidence

The search for instruments to shorten the time taken to resolve disputes also motivates many legal reforms and the introduction of specific mechanisms to present statements of claims, documents, evidence, and pleas in electronic form. Most countries examined have regulations providing formal requirements, such as written statements of claims (or specific forms to be filed), to initiate the procedures, even though admit oral petitions, particularly during hearings.

Countries have already adopted measures that enable digitalisation of proceedings and electronic forms of presenting documents, evidence, and petitions. **(Chart 6)**

Chart 5: Possibility of precautionary measures

- Yes, to ensure availability of evidence, availability of assets and to antecipate future decisions to avoide irreparable damages from violation of the right in question
- Not possible
- Yes, to anticipate the effects of a future decision, if the case requires to avoid irreparable damages from violation of the right in question

During the Covid-19 pandemic, several courts also accelerated the use of technological solutions to ensure the continuation of services provided. These changes might also have functioned as a catalyst for further change and cutting-edge innovation in the future, providing a faster and costless procedure to parties. However, access to such technological improvements may be uneven in the region.[51]

Countries like Colombia, Paraguay and Uruguay, which had not had a digital or electronic system to receive documents and claims before, started to apply technological tools to enable continuation of labour procedures during the crisis.[52] Argentina, Brazil and Chile had already applied technological tools before the pandemic, but improved them to circumvent the effects of the crisis.[53]

Litigants and parties

In countries examined, the range of litigants which may be part of a labour dispute in court rarely varies. In most of countries, workers, employers, public prosecutors, trade unions, third parties indirectly involved, associations, heirs in case of death of one of the parties, and legal representatives, in case of incapacity of any of the parties, are allowed to take part in the proceedings.

In some countries[54], Trade Unions may replace workers in individual or multiple lawsuits.

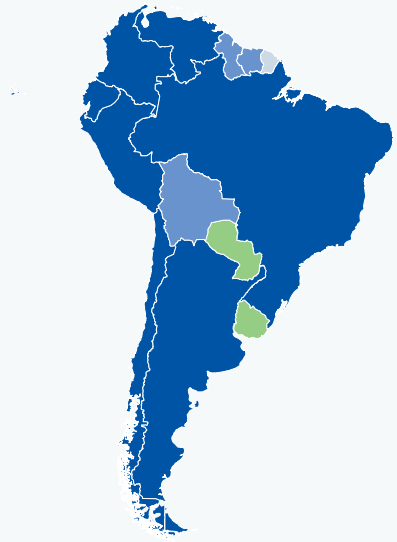
51 Report on rapid assessment survey: The response of labour dispute resolution mechanisms to the COVID-19 Pandemic. International Labour Organization – ILO, 2021, p. 14. Available in https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/governance/labour-law/WCMS_828628/lang--en/index.htm

52 Ibid.

53 Ibid.

54 Examples include Brazil, Uruguay and Paraguay.

Chart 6: Administration of documents and evidence



- Electronic or physical copy of documents and proceedings, in which case possible fraud must be raised the judges or contrary party
- Physical and original documents, given back to the parties at some point
- Physical and copy of original documents, which authenticity is attested by a public servant

Representation of parties

In respect to legal representation of parties in Court, labour and ordinary courts hearing labour cases have different approaches to admit representation. In individual labour disputes, many of the countries provide regulations admitting self-representation in specific cases.

In Brazil, self-representation may only be valid in the first instance. However, workers may rely on legal advice and attorneys provided by Trade Unions.[55]

In Argentina, although the law allows self-representation in labour cases, regional regulations and national regulations on cases involving occupational accidents provide the possibility of workers to be represented by attorneys paid by the government.[56]

In Paraguay, self-representation is only allowed in only one instance procedures (no grant of appeal)[57] and in conciliation hearings.[58]

In Colombia, self-representation is allowed under certain conditions. The plaintiff must be registered as lawyer, with specific exceptions provided by Law No 69/75. The parties may act on their own, without the intervention of lawyers, in single instance proceedings and conciliation hearings[59]. **(Chart 7)**

55 The Consolidation of Labour Laws (Consolidação das Leis do Trabalho) foresees in its article 791 the possibility of employees and employers to present a claim personally before the Labour Court. The article, however, is considered to be controversial and to run up against the Federal Constitution of 1988, which states that the presence of lawyers is indispensable in any judicial proceedings, with the exception of habeas corpus petitions. All the higher courts in Brazil require the presence of a lawyer in lawsuits.

56 Article 35 of the Law on Organization and Procedures of National Labour Justice and Law on Occupational Risks (Ley sobre riesgos del trabajo) No. 27.348.

57 Article 34 of Labour Procedure Code.

58 Article 65 of Labour Procedure Code.

59 Article 33 of Labour Procedure Code.

Chart 7: Representation of parties

Presentation of statement of claims and responses

In general, statements of claims might include information about the parties, facts and legal grounds of claims, and evidence that will support the claims or a request to secure or produce evidence for this purpose. In some countries, it is possible to hold a preliminary hearing before the presentation of defence, depending on the case, for mediation and conciliation[60]. Some countries require the parties to present an estimate of the claims involved[61].

Upon the receipt of the claim, in all countries examined, the Court evaluates its appropriateness and adequacy to the requirements of the national procedural law. Parties may be summoned to amend the petition.

Opposite parties will either be served with the statement of claim or will be called for a first hearing where they can present their arguments and evidence. Parties can be served by the post office or via bailiffs. Defences and counterclaims may be presented at the first hearing or before. In Bolivia, however, counterclaims are not allowed if the defendant is the employer[62].

In general, amendments to the complaint may be authorised if agreed by the defendant and plurality of claims against the same defendant are allowed in all countries examined, depending on the material jurisdiction of the Court. Parties may also exchange pleas.

Decisions that do not admit the statement of claim may be appealed to higher instances.

Evidence and arguments phase

After received pleas from parties, documents, and requests to assist with the presentation of further

60 Examples include Brazil (either with pre-mediation hearings or first hearings in the judicial proceedings).

61 In Brazil, the Labour Reform of 2017 (Article 840 CLT) determined that statement of claims must be accompanied by an estimate of each claim. However, jurisprudence has been in the direction that this is not a reason for rejection of the statement of claims. In case of violation of this rule, the judge in charge of the case shall determine its amendments.

62 Article 65 of Code of Labour Procedure.

evidence, courts may schedule a hearing aiming at trying a conciliation between parties and solve most of issues related to continuation of proceedings. This hearing may also delimit the facts and legal grounds of the claims and decide on matters related to evidence that needs the assistance of the court. As said before, in some countries this hearing will also serve to receive defence or counterclaims.

Matters that are not controversial or have not been contested might be judged immediately.

In Ecuador, if conciliation is not possible at the first hearing, the defendant will answer the complaint orally and shall submit a reply in written form subsequently. In Venezuela, preliminary hearing will be presided by the judge of substantiation, mediation and execution. If mediation is positive, the judge will terminate the proceedings by means of an oral ruling that will have *res judicata* effect.[63] If there is no conciliation, the judge will receive the defence of the defendant and documental evidence that might be pertinent. Concluded the preliminary hearing, the proceedings are sent to a trial judge, which means that two judges can act in the same proceedings.

Normally, types of evidence admitted include documentary evidence, witnesses, hearings of parties, experts report in the areas of occupational health and safety, accounting, etc. Parties may ask the assistance of the court to produce or secure evidence.

Burden of Proof

Preliminary hearing may also decide on burden of proof. Burden of proof in the countries examined in respect to labour cases may follow different rules from country to country, but normally take into consideration the possibility and opportunity of parties to present evidence.

In Argentina, the burden of proof is also distributed dynamically according to the capacity of each party. Therefore, the judge will appraise the proof according to the possibility of each party to clarify the issue, respecting, for instance, the less favourable possibility to produce evidence by the worker.[64] Same applies in Brazil.[65]

In Uruguay, law provides that it is incumbent upon the party claiming something to prove the facts constituting this claim. The party that contradicts the claim shall have the burden of proving the facts that modify, impede, or extinguish that claim.[66]

In Paraguay, the burden of proof is inverted when the claims are related to obligations provided by the law.[67]

In Colombia, the Labour Code of Procedures does not provide specific rules for burden of proof and the management of the means of evidence is regulated by general procedural law.[68] Depending on the specific nature of the case, the judge may, by discretion or at the request of part, to distribute the burden of proof depending upon which party is in a better position to prove by virtue of its proximity to the evidentiary material. **(Chart 8)**

Admissibility and presentation of evidence

In respect to admissibility of evidence, all countries examined provide rules conditioned to deadlines for presentation of evidence and lawfulness of different types of evidence presented. In all countries examined, admissibility of evidence is conditioned by legal deadlines, lawfulness of the evidence, judge discretion and accord of parties.

63 It means that matter that has been adjudicated by a competent court may not be pursued further by the same parties. Please, see more in https://uk.practicallaw.thomsonreuters.com/2-242-7976?transitionType=Default&contextData=(sc.Default)

64 Article 377 of the Civil Procedure Code of the Nation.

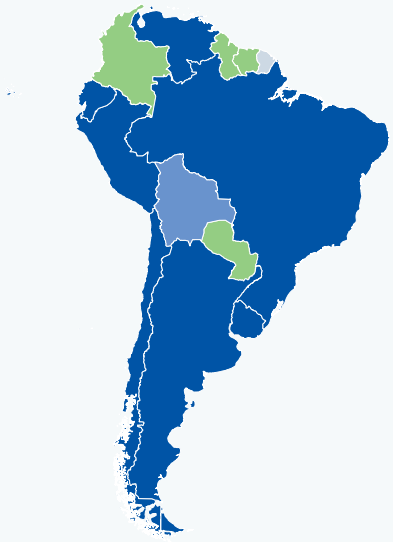
65 Articles 818 of Labour Code and 373 of Code of Civil Procedure.

66 Article 139 of General Code of Procedures.

67 Article 137 of Code of Labour Procedure and Article 249 of Code of Civil Procedure.

68 Articles 165 and 167 of General Code of the Procedures.

Chart 8: Rules on distribution of burden of proof



- Belongs to the part that initiates the proceedings just for claims that constitute a right and to the defendant for claims that imply changes in a constituted right
- Belongs always to the part that initiates the proceedings
- Belongs always to the defendant

Regardless the documentation enclosed with the initial statement of claim and defence and counterclaims presented, parties may request, in general, hearing of parties and witnesses, elaboration of technical reports by experts, judicial inspections and presentation of public and private documents in the possession of a third party.

During the main hearing, parties might be obliged to appear. In all countries examined, the absence without valid grounds might lead to disadvantage in weighing the evidence of the case. Postponements of hearings are allowed in all countries, provided that reasonable justifications are presented. The presiding judges may also determine the order of acts, depending on the complexity of evidence to be produced.

The overview below provides a short description of common procedural measures and acts that might be adopted during first instance procedures in courts hearing labour cases in South America. Important to bear in mind that they may occur in different ways depending on the type of procedure applied to the labour lawsuit.[69] Also, the order in which they happen can change from country to country, and, sometimes, depending on the dynamics of the case itself and under the discretion of some courts.[70]

That said, main steps in first instance may consider: presentation of the statement of claim, reception and acceptance of the statement of claim, notification of opposite parties, preliminary hearings to attempt conciliation, collection and production of evidence, main hearings (when also evidence can be collected, such as witnesses and parties' testimonials), judgement and notification of the decision, and amendments to the final decision in specific circumstances under first instance jurisdiction.

Preliminary measures or injunctions, although in many cases serve to guarantee or secure presentation of evidence in advance, may happen in a separate proceeding before or during the

69 In some countries, depending on the amount involved, if the claims are monetary, or nature of the claim, the proceedings may follow a faster or detailed (ordinary) procedures, which may affect the occurrence of certain acts. For the purpose of this report, only ordinary procedures were considered.

70 Different stages of hearings or exchange of arguments may follow the principle of orality, which may change the order of acts or length of proceedings. In countries which follow only or mainly labour procedural rules, proceedings tend to be less complex than in countries where labour cases are heard under general procedural rules.

main case, on provisional basis. They may also be requested in different instances and the way they are operationalized differ from country to country. For these reasons, they will not be considered to be part of the following steps.

Judgement phase

Concluded evidence phase, parties may have the opportunity to present final considerations orally or in writing, depending on the discretion of the presiding court.

The court will render a judgement, normally by a single judge. Judgements may be rendered in total or partially at the end of the main hearing or within a reasonable deadline after that, when parties shall be notified.

Decisions may comprise merit decisions to decide on inexistence of a right, a credit or relationship. They can also be condemnatory, constitutive of a right, and executive, either of a sum or an obligation to be fulfilled.

Recourses and appeals against final decisions might attack all aspects of the merits (facts and legal grounds) or might be limited only to points of law and specific grounds provided by the law. All countries examined provide possibility of fully appealing against first instance decisions.

In countries where labour cases are heard by specialized labour courts, the legislation provide for a recourse to the same judge that rendered the decisions in order to clarify contradictory, omissive or obscure points or to correct obvious and clerical mistakes.

Below there is an overview of the main common steps of presentation of evidence, hearing, and judgement of the case, provided by the 12 national procedural legislation analysed. **(Figure 3)**

Recourses and appeals to higher instances

The examined systems may accept more than one type of recourse against decisions rendered during the proceedings. There have been observed recourses against final decisions, which may attack merits, points of law or seek annulment of decisions, and against interlocutory decisions which may influence the final judgement, such as decisions granting precautionary measures or secure of assets and evidence, as well as accepting or denying requests related to admissibility of statements of claims, defences, and other pleas.

Recourses may also vary from country to country. However, for the purposes of this report, proceedings in second instance will be considered in respect to recourses or appeals which attack the merits of the case, even if the name of the recourse is not necessarily appeal.

All countries provide possibility to re-examination of labour cases. However, I many cases, it is necessary to grant a leave to appeal or the grounds to appeal are limited.

In Ecuador, it is possible to lodge an appeal before the Superior Provincial Court of the district, provided that the amount of condemnation is greater than one thousand dollars (US$ 1,000).[71] If the decision rejects the claim entirely or partially, the plaintiff can present an appeal regardless the amount of the condemnation.

The presentation of recourses against decisions on the merits of the case may have court fees or, in cases of decisions determining payment of sums in monetary claims, demand a deposit of an amount which may be converted in payment in case the decision stands.[72]

The appeal or respective recourse might be presented to the same Court which rendered the decision or directly to the next instance. If presented to the Court the rendered the decision, its admissibility will be assessed in first instance.

71 Articles 609 of Labour Code and 289 and 290 General Code of Procedures.

72 Examples include Brazil, Bolivia, Uruguay.

▶ **Figure 3: General overview of first instances phases**

General overview of first instances phases
Representation: Parties may be self-represented, represented by accredited lawyers or authorized representatives (such as Trade Unions or Employers and Employees 'Organizations).
Parties : Workers, employers, public prosecutors, trade unions, third parties indirectly involved, associations, heirs in case of death of one of the parties, and legal representatives, in case of incapacity of any of the parties, may take part in the proceedings.
Admissibility of the claim and responses: The judge examines the statement of claim and decides whether to accept it, reject it, or summon the plaintiff to adequate it. The defendant will be notified and can present a defence or/and counterclaim. Partial judgments are possible.
Initial evaluation of the cases and delimitation of facts and legal grounds: After received pleas from parties, documents, and requests to assist with the presentation of further evidence, the Courts may: i) decide on a preliminary hearing to attempt conciliation between parties, ii) delimit the facts and legal grounds of the claims, iii) distribute the burden of proof, and iv) determine admissibility of evidence and production of evidence from third persons.
6. Evidence: Preparation of case. Procedures in respect to summoning of experts and witnesses are likely to take place during this phase, although in some countries they happen during the initial phase. Determination of judicial inspections and expert reports may take place. Authenticity or validity of evidence may be argued in written pleas.
Hearing of the case (main hearing): Parties summoned to attend the hearing might only be absent in specific cases. The absence without justification might cause the disregard of the party´s arguments related to facts. New attempt of conciliation. Evidence produced is examined. Parties and witnesses, including experts, may be heard.
Final arguments and judgement: Concluded evidence examination, parties may present their final arguments in some countries. The Court may retire itself to discuss the case (in case of panel) and render the decision on the merits, in which case parties are notified immediately. Decisions may also be rendered after the hearing, within a deadline, and parties notified.
Clarification of decision and granting of appeal: The Court usually can, upon request of parties or due its own discretion, clarify obscure, vague, or contradictory points of the decision, as well as obvious formal mistakes. The decision might also establish the possibility of appeal or recourses, if allowed by the law. Appeals might be presented by the interested parties at first instance or directly to higher instances.

Regardless of in which court the appeal is lodged, the opposite parties must be notified by the Court to present a response or to join the appeal with a counter-appeal, in case there is interest. If received by the first instance, proceedings must be sent to immediate Higher Instance.

The recipient Court can also decide on the ready effectiveness of the appealed decision, meaning that its effects may be suspended in total or partially depending on the content of the recourse.

The Court of Appeals[73] may be a specialised labour court of appeal[74], or an ordinary Court of Appeal which hear labour cases in chambers that can be specialized.[75]

Below there is an overview of the main common steps of presentation of appeals in these different appealing jurisdictions. **(Figure 4)**

73 Or immediate higher instance competent to hear the recourse.
74 Examples include Brazil (Regional Labour Courts) and Bolivia (National Labour and Social Security Court).
75 Examples include Argentina, Chile, Colombia, Paraguay, Peru, and Uruguay.

Figure 4: Overview of main steps of presentation of recourses and appeals against final decisions of first instance

Overview of main steps of presentation of recourses and appeals against final decisions of first instance
Presentation of recourse and responses: The notice of recourse and its reasons might be presented before the Court which rendered the appealed decision or directly to the Registrar of the higher instance where the recourse shall be heard. In either case, the opposite party shall be summoned to present a response to the recourse or/and a joint recourse. Court fees or secure deposits to present a recourse may apply.
Distribution of the recourse in higher instance: The procedures of recourse are directed to a panel or chamber of the respective Court of Appeal/Higher Instance, in which it might be assigned to a judge Rapporteur, who will make report about the case to be examined by the Panel.
Re-examination of the case: Parties may have the opportunity to present their arguments in written form before the trial. New evidence or evidence rejected by the previous instance may or may not be admitted, depending on its relevance. The Court may also conduct its own investigation. Parties may be summoned to a hearing, in which the case will be examined.
Hearing and Judgement: The Court examines the first-instance judgment within the limits of the grounds specified in the recourse. During the hearing, parties may be heard, as well as new evidence may be examined. The Court decides about the merits of the recourse in a panel and the decision is rendered according to the majority. Decisions may comprise: i) reform of the previous decision; ii) annulment of the decision and replacement with a new one; iii) annulment of the decision and determination of a new trial in first instance.

Supreme Court Phase

In a number of countries[76], a Supreme or Superior Court is the highest instance in the judiciary to hear recourses in labour related cases, including many in respect for constitutional matters. In most of the times, labour cases do not go that far due to the limitations to further discuss evidence and facts.

Proceedings at the Supreme Courts are remarkably similar to proceedings of Court of Appeals, particularly concerning the designation formation of a panel of judges and few possibilities to present recourses, due to more strict requirements to be met. In most cases, only matters on point of law can be re-examined at this stage. Some formalities, however, differ from country to country.

Procedures might be slightly different depending upon the type of recourse presented, as superior instances are generally competent to hear both extraordinary recourses, such as cassation, and ordinary recourses, such as appeals and revisions. Furthermore, recourses might be presented to the Superior instances directly against a decision rendered by first instance.

In Colombia, for example, recourses (appeals and revision) can be presented to the second instance, but also, in specific cases, recourse of cassation can be presented directly to the Supreme Court of Justice.[77] **(Figure 5)**

76 Exceptions include Brazil (where there is a Superior Labour Court as last resort within labour jurisdiction and conflicts decided by this court in respect to constitutional matters can be directed to Supreme Federal Court) and Colombia. In other countries, it might be the case that Superior and Supreme Courts have Constitutional Chambers.

77 Articles 62 - 69, 82, 86 - 90 of Labour Procedures Code.

▶ **Figure 5: Overview of main steps of presentation of recourses to Superior instances**

Figure 5. Overview of main steps of presentation of recourses to Superior instances
Presentation of recourse and responses: The notice of recourse and its reasons might be presented before the Court which rendered the appealed decision or directly to the Registrar of the Supreme Court where the recourse shall be heard. In either case, the opposite party shall be summoned to present a response to the recourse. Incidental or joint recourses are rarely allowed.
Distribution of the recourse in higher instance: The procedures of recourse are directed to a panel or chamber of the respective Supreme Court, in which it will be assigned to a judge Rapporteur, who will make report about the case to be examined by the Panel.
Examination of reasons of the recourse: Parties may have the opportunity to present their arguments in written form before the trial. New evidence or evidence rejected by the previous instance is generally rejected, except when in support of the allegations related to violation of specific point of the allegations of the recourse. Parties may be summoned to a hearing, in which the case will be examined. A bench, with 3 or more judges will analyse the case. Parties may be summoned to appear in the trial hearing.
Judgement: Decision may i) Adopt a resolution to dismiss the recourse and leave the decision unchanged; ii) Adopt a resolution on full or partial cancellation of the decision and refer the case for new proceedings to trial or appeal; iii) Adopt a resolution to abolish the decision and keep in force a judicial court of first instance that was standing before; iv) abolish judicial decisions and to close the proceedings in the case or leave the application without consideration; v) Reverse and adopt a new decision or change the decision.

Enforcement phase

Final decisions might be enforceable immediately according to express statutory provisions, regardless of presentation of appeals. Examples include Argentina[78], Brazil[79], Bolivia[80], Chile[81], Peru[82], and Uruguay (after the second instance decision).[83]

In most of the countries examined, enforcement proceedings are either regulated by specific legislation[84] or be complemented by the general civil procedures.[85]

In all countries examined, legislation provide for the possibility of seizure of assets in case of enforcement in respect to monetary claims.

Regardless the type of procedural law regulating enforcement, proceedings are similar across the countries examined and normally courts that firstly heard the case will be in charge of the enforcement proceedings. However, in Chile the court will order compliance with the ruling and will forward it, together with its antecedents, within the fifth day to the Labour and Pension Collection Court, when appropriate, in order for it to continue with the enforcement proceedings.[86]

In addition, in general, enforcement proceedings are carried out by bailiffs.

Enforcement may be initiated upon a request of the interested party or ex officio by the court.

78 Article of 132 Law on Organization and Procedures of National Labour Justice.
79 Article 899 of Consolidation of Labour Laws.
80 Article 217 of Labour Procedure Code.
81 Articles 231 to 241 Code of Civil Procedure.
82 Articles 57 to 63 Code of Civil Procedure.
83 Articles 371 to 389 of General Code of Procedures.
84 Examples include Brazil, Bolivia, Chile, Ecuador, Paraguay, and Peru.
85 Examples include Argentina, Colombia, Guyana, Suriname, Uruguay (although provisions of Shortening of Labour Procedures Act are also applied), and Venezuela.
86 Examples include Brazil, Bolivia, Chile, Ecuador, Paraguay, and Peru.

The competent court will, upon the request and with the presentation of proof of the last decision standing, as well as of indication of means to promote the execution against the debtor (such as indication of assets, properties, addresses, etc), issue an enforcement order (often called writ of execution).

In countries such as Argentina[87], Brazil[88], and Peru[89] either the court is responsible for presenting estimates representing the last decision or parties may be summoned to present their own estimates.

In this case, if there are conflicting, the court may decide which one is more appropriate or ask for a report from an accountant.

Debtors may present measures to contest the execution, but most of them are only accepted if specific requirements are met. In Brazil[90] and Ecuador[91], for instance, a deposit in guarantee must be done before any contestation or appeal against decisions during enforcement phase.

If no opposition is presented and the debtor does not comply with the obligation voluntarily, enforcement measures may be taken, such as seizure of assets and restriction of rights. Although the opposition to the enforcement proceedings seems to be a common step, its presentation and terms are not always very clear in national legislations examined.

In terms of assets which can be arrested, most of the countries have express provisions in this regard, authorizing seizure of movable and immovable assets to enable the payment of monetary claims.

Other measures are also provided to avoid the non-compliance with the decision in respect to payment of monetary claims. In Peru, cumulative and increasing fines by thirty percent (30%) and subsequent criminal proceedings can be applied.[92]

In Brazil, the System for Searching the Assets of the Judiciary (SisbaJud) is an electronic platform of the National Council of Justice (CNJ) to track and block the assets of debtors with debts recognized by the judicial decisions and it helps to ensure the compliance with decisions when debtors do not pay voluntarily and want to disguise their assets.[93] The system provides access to online consultation of the debtor's banking relationships with financial institutions. and it is possible to block both amounts in current accounts and securities, such as fixed-income securities and shares.

In some cases, conciliation hearings may take place during the enforcement phase, if requested by parties or in case the court understands that there is an opportunity to settle the issue without seizure of assets.[94] **(Figure 6)**

87 Article 133 of Law on Organization and Procedures of National Labour Justice.

88 Articles 876 – 878 of Consolidation of Labour Law.

89 Article 57-63 of Labour Procedure Code.

90 Article 882 of Consolidation of Labour Law.

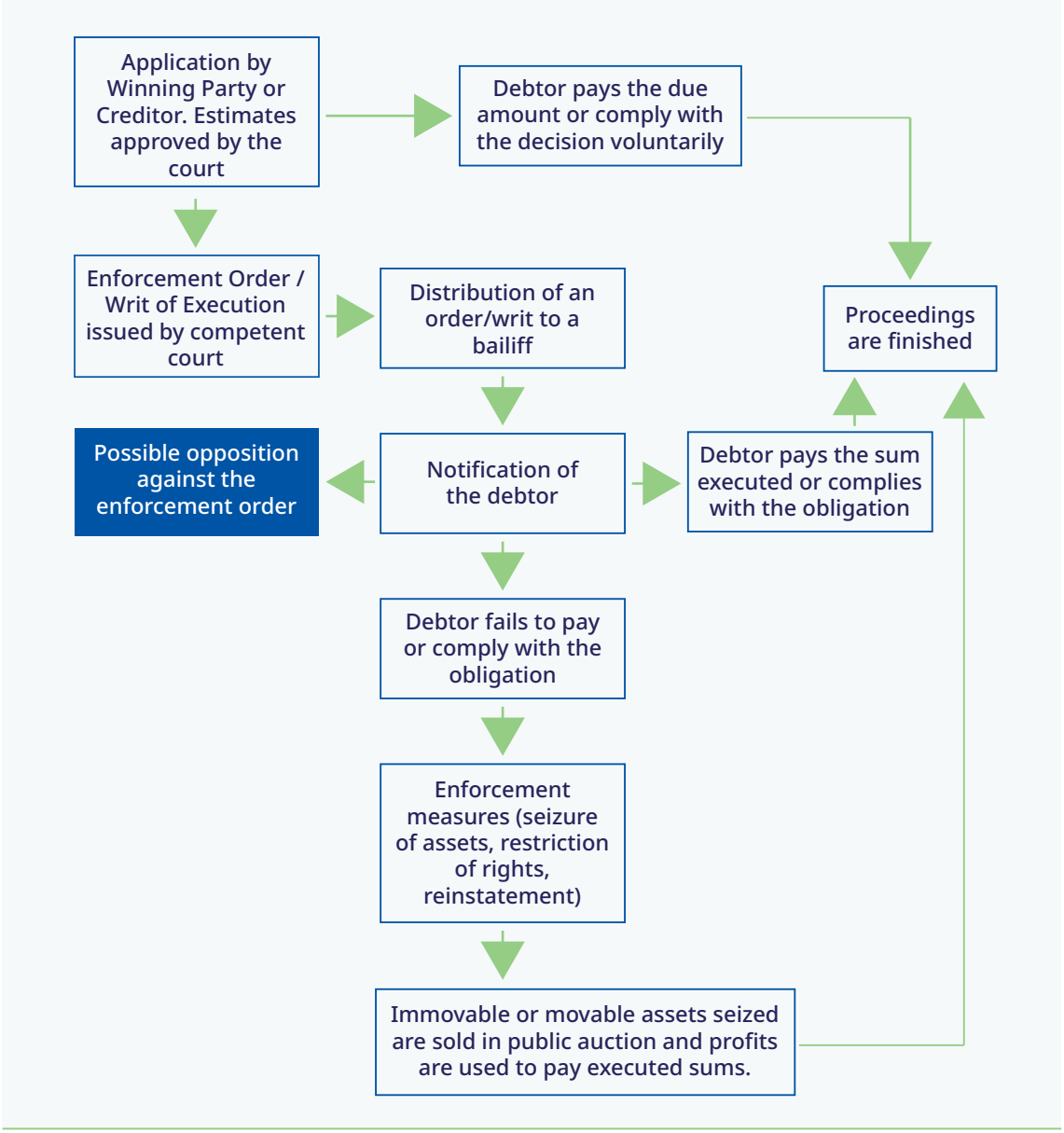
91 Article 611 to 616 of Labour Code.

92 Ibid.

93 Superior Labour Tribunal. Available in http://www.csjt.jus.br/web/csjt/noticias3/-/asset_publisher/RPt2 /content/id/8161296

94 Examples include Brazil, Guyana, and Suriname.

▶ Figure 6: Common steps in procedures for enforcement of decisions



Possibility of conciliation and mediation during judicial proceedings

In all countries examined, courts may refer cases to mediation and conciliation at any time during the judicial proceedings, including during the enforcement phase. Ratification of the Court is mandatory in case agreements are reached during the proceedings in course in all countries. **(Chart 9)**

If conciliation or mediation is successful during the enforcement phase, agreements may not comprise waiving of claims granted by the final decision, unless the enforcement is temporary, and the case is pending trial of a recourse.

Procedural phases

Depending on the judicial tiers established in a country and the possibilities of review of final

decisions set forth in the procedural law, the number of procedural phases may drastically vary from country to country. Most of the countries examined have normally 4 procedural phases: i) first instance; ii) second instance (appeal); iii) third instance (Supreme or Superior Court); and iv) enforcement phase.

However, due to limitation of presentation of appeals in some countries or the existence of Constitutional Courts which allow the possibility of discussing the constitutionality of decisions directly, this may vary. **(Chart 10)**

Chart 9: Conciliation and mediation of labour cases during the judicial proceedings

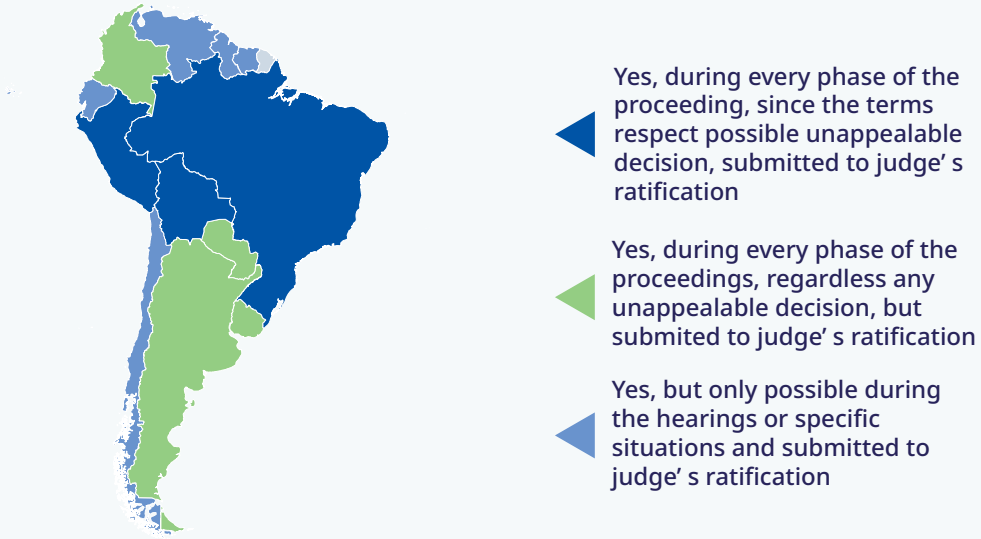
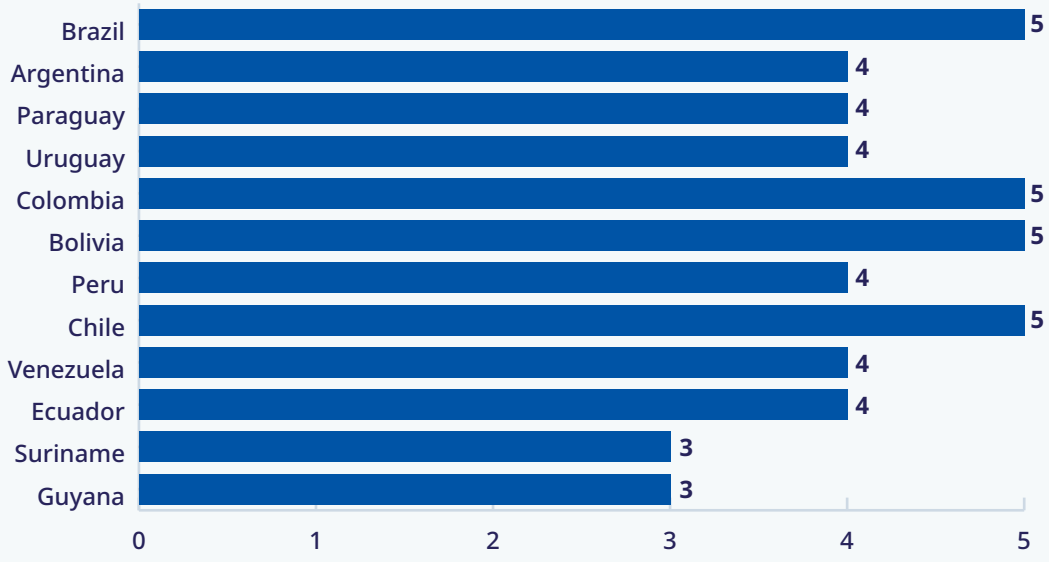
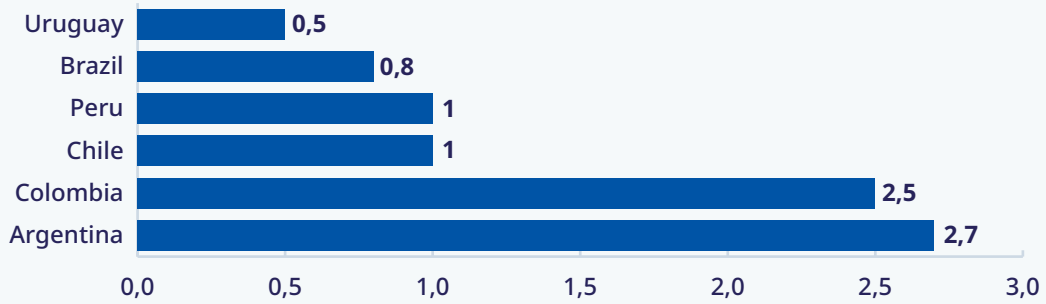


Chart 10: Number of procedural phases



▶ Chart 11: Possible recourses to present in a labour procedure

▶ Chart 12: Average duration of proceedings in first instance (in years)



The number of recourses provided by the national legislation impact direct in the number of procedural phases. In some countries examined, it is possible to present appeals against interlocutory and final decisions.

Recourses during enforcement phase and specific recourses reconsider decisions that cannot be ordinarily appealed or to discuss constitutional matters are allowed in Brazil, Bolivia, Chile, Colombia, Ecuador, Peru and Venezuela. **(Chart 11)**

Average duration of procedures

There is little official information or few statistics on average duration of procedures in courts hearing labour cases. Official information has been obtained official websites of governments.

In other countries examined, although there are few statutory provisions in respect to length of trial, no statistical information is available. No information about that was found in respect to Bolivia, Ecuador, Guyana, Paraguay, Suriname and Venezuela.

The information below provides average duration of proceedings in first instance, once the duration of phases may vary within the same country due to different proceedings applied. **(Chart 12)**

Operation & Practice

Average distribution of courts

It is not particularly easy to find statistics on distribution of courts to hear labour cases within the examined countries. This information does not seem to be available or updated in several countries' official websites[95]. **(Chart 13)**

In Argentina, in average, it was used the data concerning National Labour Justice for Buenos Aires. This numbers might differ in respect to the other provinces.

Official information about Bolivia, Ecuador, Paraguay, Suriname, Uruguay and Venezuela was not found in this respect.

Professional Judges per 100.000 people

Similar difficulties are found in respect to statistics on the availability of judges to hear labour cases. Most of labour and ordinary courts do not provide information on how many judges, professional and non-professional, are available per 100,000 habitants only for labour cases.[96] **(Chart 14)**

Chart 13: Average distribution of courts hearing labour cases

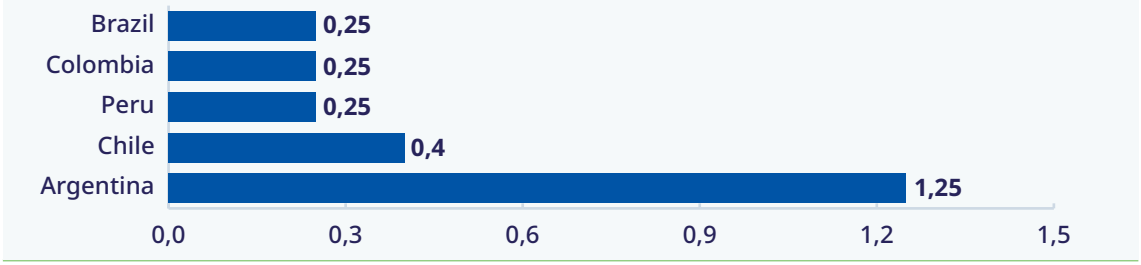
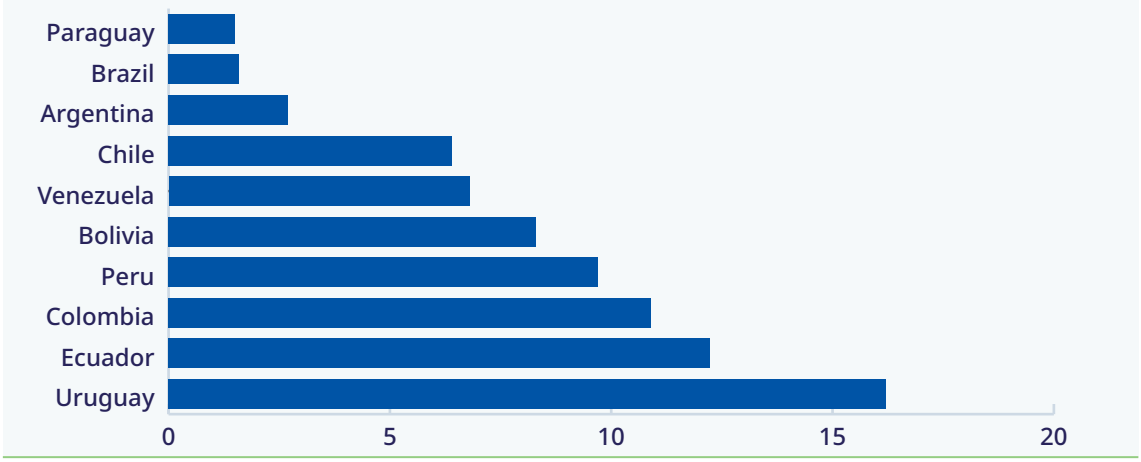


Chart 14: Judges per 100.000 people



95 Information was not found in respect to Bolivia, Paraguay, Uruguay, Suriname, Guyana, Ecuador and Venezuela.

96 Information was not found in respect to Suriname and Guyana. Due to the lack of specific information on labour judges, the information about Ecuador and Venezuela is taking into consideration also judges of ordinary courts.

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Chile

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- Organic Code of the Courts
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Colombia

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- Statute of Administration of Justice
- Labour Code
- Labour Procedure Code

Ecuador

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- Organic Law of Judicial Function
- General Code of Procedure
- Labour Code

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