

# Pre-Action Letters in Brazil: Overview

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A Practice Note providing an overview of the key issues to consider before issuing or responding to a pre-action letter in Brazil.

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When instructing local counsel or dealing with a dispute with an international element or regulatory perspective, a legal practitioner needs to know about the pre-action requirements, including the rules and legal practice in relation to pre-action letters. In most jurisdictions, it is not mandatory to send or respond to a pre-action letter for many types of action. In these cases, parties can commence proceedings without making an offer of compromise or taking any other step.

Regardless of any pre-action requirements, it is generally customary for parties to send a warning or demand letter to the adverse party before commencing court proceedings. It is also customary for adverse parties to reply, even if there is no requirement to respond. This is usually the case unless the situation demands otherwise (see *Disputes Not Suitable for Pre-Action Letters*).

This Note provides an overview of the rules in relation to pre-action correspondence from a potential claimant or their lawyer before initiating legal proceedings, which addresses a potential claim or suit, or defense to a potential claim or suit. It explains the practice of notifying the prospective defendant before an action commences in Brazil and its use and effectiveness in resolving disputes amicably. It also provides practical drafting tips for both drafting and responding to pre-action correspondence.

## Rules on Pre-Action Letters

Sending a pre-action letter specifying the details of a claim is standard practice in Brazil. However, there is no general requirement to do so in the Civil Procedure Code (*Código de Processo Civil*) (Law No. 13.105/2015) or any other rules. Brazilian law does require a letter or notice to be sent before legal proceedings in certain specific cases. The content of the letter or notice does not specify details of the claim, but warns the other party of any legal issue involving them. For example, in a lease agreement for an indefinite period, the lessor must send a letter or notice to the lessee requesting that they leave the property and stating the right to terminate the lease agreement within 30 days (*Article 57, Law No. 8.245/91 (known as the Lease Law)*).

## Disputes Suitable for Pre-Action Letters

Pre-action letters are suitable for disputes with the potential to be settled by the parties. Brazilian letters or notices are used to assert a right and to warn the other party of an alleged breach or wrongdoing.

## Disputes Not Suitable for Pre-Action Letters

There are no general statutory rules that parties must send a pre-action letter. They can choose not to send one in any type of dispute. However, not sending a pre-action letter could demonstrate to the court when a judicial claim is filed that the claimant did not try to warn the respondent before initiating legal proceedings. Although we recommend sending a letter prior to initiating proceedings, there are no consequences for a creditor or party that chooses not to.

## Pre-Action Procedures for Different Types of Disputes

Pre-action rules and procedures are the same irrespective of the type of case. However, the creditor or party should send a letter if the applicable:

- Contracts require previous notice.
- Law requires previous notice, for example Law No. 8.245/91 (see [Rules on Pre-Action Letters](#)).

## Who Can Send a Pre-Action Letter?

Brazil does not have specific rules for pre-action letters. They are an extrajudicial measure to give notice of a fact and its legal issues. Lawyers generally send pre-action letters on behalf of their clients, but they can be sent by potential claimants or in-house lawyers.

## Contents of Pre-Action Letter

Brazilian law does not specify the details or documents that must be included in a pre-action letter. However, it is best practice to outline the facts of the case and include supporting documents about the legal relationship between the parties. If the pre-action letter is issued by internal or external counsel a power of attorney is required.

## The Response to a Pre-Action Letter

Brazilian law does not specify the details or documents that must be included in the response to a pre-action letter. However, the reply should address the facts that preclude, modify, or extinguish the rights claimed in the pre-action letter. Supporting documents should be provided about the contrary claims regarding the legal relationship between the parties. If the reply is issued by internal or external counsel a power of attorney is required.

## Standard Forms

There are no specific standard forms of response for pre-action letters under Brazilian law.

## Suspension of Limitation Period

The limitation period is not interrupted by a potential claimant's pre-action letter.

Where the limitation period is close to expiring, a potential claimant can file a motion to stay the limitation period before a court (*Article 726, Civil Procedure Code*). Once the court grants the applicant's request to hear the motion, the potential defendant must be served with a notice of the motion. The court will hear the motion to stay the limitation period. However, the merits of the claim will not be discussed in these proceedings.

A potential claimant can also start legal proceedings and apply for a preliminary injunction to interrupt the running of the limitation period. To do so they should state:

- The facts of the dispute and the reasons for it.

- A brief outline of the right that they aim to assert.
- The risk of loss or injury if proceedings are not commenced and successful.

(Article 305, Civil Procedure Code.)

## Effectiveness of a Pre-Action Letter

As a general rule, pre-action letters are considered effective in avoiding legal proceedings. Even though they are not required under Brazilian law, they are standard practice regardless of the potential claim under dispute. Pre-action letters are useful in getting the parties to agree on an alternative measure for resolving the potential dispute (through the use of ADR).

## Practical Tips

When issuing or responding to a pre-action letter, it is very important to keep in mind that the parties involved have not entered into formal litigation. The wording of the pre-action letter should be clear, straightforward, specific, and courteous to maximise chances of a positive response from the other party.

In addition, before writing a pre-action letter it is advisable to examine the relevant facts and the legal basis for the claim, and any other relevant material. It is also advisable to consider conducting research on the other party's background, or other lawsuits involving them, to evaluate that party's willingness to settle in a similar situation.

## Standard Clauses in a Pre-Action Letter

*Standard Document, Letter before action: Cross-border* is adequate for use in Brazil. However, the following amendments should be made:

- As a procedural rule, a party must define, characterize, or describe as completely as possible a document or thing to be disclosed. Therefore, a request to provide any other documents that the recipient considers to be relevant may not be effective.
- Clause 7 would only be effective if the parties have already signed a written contract with the cited expert. As a rule, the court appoints the expert for the case, but the parties can consent and execute specific agreements in this matter (*Article 190, Civil Procedure Code*).
- Clause 10 should be changed to: "Ignoring this letter may increase your liability for costs."

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