GETTING THE DEAL THROUGH

GCR
GLOBAL COMPETITION REVIEW

Private Antitrust Litigation

in 26 jurisdictions worldwide

2012

Contributing editor: Samantha Mobley

Published by
Getting the Deal Through
in association with:

ACTECON Competition and Regulation Consultancy
Anderson Mōri & Tomotsune
Bányaiová Vožehová
Barretto Ferreira, Kujawski e Brancher
Barun Law
Boekel De Nerée
Cleary Gottlieb Steen & Hamilton LLP
Clifford Chance LLP
De Dios & Goyena
DLA Piper Spain SL
EDAS Law Firm
Edward Nathan Sonnenbergs Inc
Grandall Law Firm
Hausfeld & Co LLP
Lachenal & Le Fort
Maclay Murray & Spens LLP
Mannheimer Swartling
Marques Mendes & Associados
Mayer Brown LLP
McMillan LLP
Milbank, Tweed, Hadley & McCloy LLP
Motieka & Audzevicius
Nestor Nestor Diculescu Kingston Petersen
Rojs, Peljhan, Prelesnik & Partners
SimmonsCooper Partners
Sołtysiński Kawecki & Szlęzak
Vasil Kisil & Partners

GETTING THE DEAL THROUGH

Private Antitrust Litigation 2012

Contributing editor
Samantha Mobley
Baker & McKenzie LLP

Business development managers
Alan Lee
George Ingledew
Robyn Hetherington
Dan White

Marketing managers
Ellie Notley
Sarah Walsh
Alice Hazard

Marketing assistants
William Bentley
Sarah Savage

Subscriptions manager
Nadine Radcliffe
Subscriptions@GettingTheDealThrough.com

Assistant editor
Adam Myers

Editorial assistant
Lydia Gerges

Senior production editor
Jonathan Cowie

Chief subeditor
Jonathan Allen

Subeditors
Caroline Rawson
Davet Hyland
Sarah Morgan

Editor-in-chief
Callum Campbell

Publisher
Richard Davey

Private Antitrust Litigation 2012
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

ISSN 1742-2280

Printed and distributed by
Encompass Print Solutions
Tel: 0870 897 3239

Law Business Research

CONTENTS

Brazil

Paulo Brancher and Luiz Eduardo Salles

Barretto Ferreira, Kujawski e Brancher

Legislation and jurisdiction

1 How would you summarise the development of private antitrust litigation?

In Brazil, the judicial lawsuits of greatest relevance within the sphere of competition law still involve dispute of the antitrust authorities' administrative decisions.

The Administrative Council for Economic Defence (CADE) is the main authority to analyse the infringements listed in Law 8,884/94 (Antitrust Act), which, among other things, deals with the prevention and repression of infringements against the economic order. Hence, the majority of the discussions concerning unlawful acts committed in relation to the aforesaid law continue in the administrative sphere.

Cases involving anti-competitive conduct, or even economic concentration acts not approved or approved with restrictions by the antitrust authorities, have already resulted in complex judicial actions with implications for private interests. Nevertheless, the pursuit of a judicial remedy to compensate losses and damages, or even to impede anti-competitive conduct, is something that, while incipient, is expected to increase over the next few years. This increase will be aided by a greater amount of leniency and settlement agreements executed between defendants and authorities, in which there may be acknowledgement of breach of the law.

There are no courts specialising in competition issues in Brazil. This makes for complex and voluminous judicial proceedings, as the judge must understand everything from the most basic principles to the most complex questions related to each specific case. Arbitration can also be used as an instrument of dispute resolution within the ambit of competition law. However, although it is well developed in other areas, the use of this mechanism in this area is nascent.

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible?

The possibility of bringing individual or class judicial actions to obtain compensation for damages is conferred on individuals and corporations by article 29 of the Antitrust Act, which guarantees the right to the receipt of indemnity for losses and damages suffered, regardless of administrative proceedings. As there is no specific rule that regulates the filing and course of actions relating to anti-competitive practices, the constitutional principle is valid: any injury or threat to a right may be submitted to the judiciary branch, and the proceedings shall follow the general procedural rules of Brazilian law.

3 If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

All and any lawsuit that involves the antitrust authorities shall be brought within the sphere of the federal courts. Lawsuits of a private nature shall be brought in the state courts (with jurisdiction for cases of a civil nature). Besides the Antitrust Act itself, and in addition to other specific laws, the main applicable laws are Law 5,869/1973, which instituted the Code of Civil Procedure, Law 7,343/1985, which disciplines Public Civil Actions, and Law 8,078/1990, which provides for consumer protection.

4 In what types of antitrust matters are private actions available?

The Antitrust Act does not specify the matters that may be the subject of private actions. Thus, it is possible to infer from a reading of article 29 that any damage resulting from an infringement against the economic order may be the subject of a judicial lawsuit. According to the Antitrust Act, infringements against the economic order are related to the production of the following effects on the market:

- limiting, falsifying or in any way harming free competition or free enterprise;
- dominating a relevant market of goods or services;
- arbitrarily increasing profits; and
- exercising a dominant position in an abusive manner.

Article 21 of the Antitrust Act lists examples of 24 types of conduct that may result in the infringements indicated above. These include:

- fixing or practising in any way, in combination with competitors, prices and conditions for the sale of goods or services (cartel);
- limiting or impeding market access by new companies;
- barring competitors' access to input, raw material, equipment or technology sources and to the distribution channels;
- regulating markets of goods and services or establishing agreements to limit or control technological research and development, the production of goods or rendering of services, or to hinder investments earmarked for the production of goods or services or for the distribution thereof;
- imposing, in the commerce of goods and services, on distributors, retailers and representatives, retail prices, discounts, payment conditions, minimum or maximum volumes, profit margins or any other marketing conditions related to their business with third parties;
- unreasonably selling goods below cost price;
- importing any assets below cost from an exporting country that is not a signatory of the GATT anti-dumping and subsidy codes; and
- placing conditions on the sale of a product to the purchase of another or to the use of a service, or placing conditions on the rendering of a service to the use of another or to the purchase of a product.

5 What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

The Antitrust Act determines in article 2 that its provisions are applicable to practices committed in whole or in part in Brazilian territory,

or that do or may produce effects therein. This provision provides for general guidance on the jurisdiction for antitrust matters in Brazil. Other provisions might be used to determine the precise venue. The general rule of Brazilian civil procedural law is that an action shall be brought in the jurisdiction of the defendant's domicile. When a contractual breach is involved, it is possible to follow the election of jurisdiction clause if there are no impediments to a legal order.

6 Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Article 15 establishes that both individuals and corporations may be held to answer for infringements against the economic order, including the associations of entities or people incorporated de facto or de jure, even if temporarily, with or without a legal personality.

Private action procedure

7 May litigation be funded by third parties? Are contingency fees available?

There is no need for third parties to fund lawsuits in the Brazilian judiciary. There is not even a need for the party itself to fund the lawsuit if it lacks the financial resources, since the Federal Constitution guarantees all citizens full access to the courts, regardless of their economic capacity (article 5, LXXIV of the FC). Litigants who cannot afford to pay the court costs and legal fees of a lawsuit are entitled to proceed *in forma pauperis* – instituted by Law 1060/50 – to be defined by the judge of the lawsuit by means of proof of certain minimum requirements. The granting of this benefit exempts less fortunate parties from the payment of court costs (judiciary charges, fees, expert and lawyer fees, etc).

On the subject of the contingency fee, it is important to mention that the possibility of the inclusion of the *quota litis* clause (contingency fee) in legal service agreements has been the subject of considerable discussion in Brazilian law in the past: although the contingency fee practice is considered lawful and healthy in the United States, numerous civil and common law countries believe it to be unethical and illegal.

In Brazil, success or contingency fee agreements, as they are normally called, are already normal and common practice among law firms. However, Brazilian legislation limits the use and application of this institution.

Article 38 of the Code of Ethics and Discipline of the Brazilian Bar Association determines that the *quota litis* clause may only be stipulated *in pecunia* and the professional's financial gain (success fees plus the legal fees paid by the losing party to the lawyer of the prevailing party, the latter of which are awarded by the judge) may not be greater than that of the client.

8 Are jury trials available?

There is no legal provision in Brazil for the judgment by jury trials of crimes against the economic order. Brazilian legislation restricts the authority of the jury to judgment of a few specific types of crime, and none of them concern competition-related matters.

9 What pre-trial discovery procedures are available?

The discovery procedure does not exist in the Brazilian procedural system. In our legal system, all evidence is produced in court, being presided over directly by the judge of the case. The judge examines the use of the evidence requested by the parties, granting it if he understands that such evidence is required for the unravelling of the case, or rejecting it if he feels that it is not.

Hence, as opposed to the discovery procedure, in which the lawyers meet out of court to present to one another the evidence that they intend to use in the judgment, in Brazil the evidence, as a rule, will be produced before the judiciary (exercise of the adversary system). It is at the probative phase of civil procedural law that the evidence requested by the parties (eg, testimonial, documentary, technical and other kinds of evidence) may be produced.

It is also important to mention that Brazilian law permits, through exceptional mechanisms, the collection of evidence before the probative phase (for example, an interim precautionary measure) or even before the actual filing of the lawsuit (for example, a preparatory precautionary measure).

Nevertheless, some requirements must be met by the party for the measure to be accepted and, necessarily, the evidence will also be produced before the judge of the case. It is necessary that the party demonstrates to the court that it has strong indicia of the ownership of the right claimed and proves that there will be a danger of injury to its interest owing to the delay in the proceeding and normal sequence. Examples of precautionary measures for the pre-trial collection of evidence or collection of evidence prior to the probative phase include the provisional remedy for the advance production of evidence (which may consist of examination of the party, questioning of witnesses and production of expert examinations) or a precautionary measure for the exhibition of documents.

In addition, the Public Ministry may, in the discharge of its inherent and legitimate *custos legis* duties, launch a civil investigation, under its presidency, for the verification and investigation of conducts that are contrary to the economic order. The Public Ministry may also exercise its information-requesting power to gain certificates, data, examinations or expert investigations from any public or private entity for a possible future judicial action.

Moreover, an investigatory process exists in the administrative sphere through the Economic Law Secretariat, which may document a future administrative proceeding for the cessation of anti-competitive practices. When not protected by confidentiality, these documents may serve as evidence in specific judicial actions.

10 What evidence is admissible?

The probative techniques provided for in the Code of Civil Procedure are the personal deposition of the parties, the testimonial, documentary and expert evidence, judicial inspection and confession. Actually, any instrument capable of generating lawful information is a possible source of evidence in the Brazilian civil proceedings.

11 What evidence is protected by legal privilege?

Information exchanged between client and lawyer is protected by law and therefore treated as confidential in court.

In addition, there are specific laws that ensure confidentiality of certain manufacturing processes and formulas for implementing certain businesses. The trade secret, for example, may be related to certain parameters of industrial processes (ie, the method or methods used to achieve a given result, higher quality or less time to produce in relation to the competition). Also, the trade secret can include a variety of information related to certain business and eventually benefit from the result obtained from this business over the competition. We can cite as an example of a trade secret a list of clients or a strategic sales plan. Such information is normally protected by secrecy. Moreover, when the confidential issue is critical to the resolution of the suit, the court can determine that the entire lawsuit takes place in secrecy (with restricted access to the lawsuit files) and may require that the holder of this confidential information presents it to the court.

12 Are private actions available where there has been a criminal conviction in respect of the same matter?

The civil and penal spheres are independent in Brazilian law. Bringing a lawsuit founded on a penal matter does not hinder the processing

of the civil action, and vice versa. However, under article 935 of the Civil Code, it is not permitted to call into question in civil actions the existence of a fact, or facts about its perpetrator, when such issues have been definitively decided in the criminal court. On the other hand, the penal *res judicata* does not interfere in the civil area. If the defendant is acquitted in penal proceedings, this will not imply the immediate discharge of its liability in the civil lawsuit.

13 Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation?

The evidence produced in criminal proceedings may be used in a civil lawsuit provided that certain requirements are met, such as the due process of law and the adversary system.

Generally, the essential aspect of the use of evidence produced within the scope of criminal proceedings is that it is in documentary form. However, attachment of all documents pertaining to the probative activity conducted in the proceedings of origin is indispensable for its admissibility.

Indeed, once the basic prerequisites of validity are met, it will be up to the judge, at his discretion, to determine and accept the use of the evidence produced in the criminal proceedings.

On the subject of the leniency applicant, it is certain that an agreement entered into between the Federal Union and the legal entity perpetrators of a violation against the economic order does not have the capacity to eliminate the legal consequences and, principally, the civil liability of the agent in a private action. This is in contrast to administrative and criminal proceedings, where the sanctions may be more lenient or even be eliminated in accordance with the provisions of articles 35-B and 35-C of Law 8,884/94.

However, there is nothing to prevent the judge from taking into consideration the 'availability' and 'penitence' of the leniency applicant at the moment that the judge arbitrates the quantum relating to the compensation for moral damages experienced by the victim.

14 In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

According to the Antitrust Act and the Brazilian legal system, a private claim would not depend on an enforcement decision that is pending, or that is being challenged. It may be possible to bring a private action even if no administrative proceeding has been initiated by the proper administrative authorities.

15 What is the applicable standard of proof for claimants and defendants?

In accordance with article 333 of the Brazilian Code of Civil Procedure, the burden of proof lies with the plaintiff in respect of the constitutive fact of its right, and with the defendant in respect of the existence of a hindering, modifying or extinguishing fact of the plaintiff's right. The collection of evidence is presided over by the judge of the case, and is entirely subject to the contestation of the parties. The judge will freely examine the evidence, giving attention to the facts and circumstances of the case records (article 131 of the Code of Civil Procedure).

This is the general rule; it is certain that exceptions may prevail in cases regulated by special laws. Imagine a situation where certain petrol stations in a city get together to agree on fuel prices, constituting the true and illegal formation of a cartel. The consumer injured by the act may file an action for damages against the participating companies of the competition violation, and is guaranteed the reversal of the burden of proof. In other words, this mechanism transfers to the companies involved in the suspected cartel the burden to prove the non-existence of alleged conduct. The reversal of the burden of proof was created with the purpose of balancing the forces of the litigants, since the consumer is considered the weaker party of the relationship due to inevitably having less expertise in the matter. Should the injured party be another petrol station that did not contribute to the formation of the cartel, the Antitrust Law also guarantees the aggrieved party the exercise of an action against the perpetrators of the illegal conduct. Actually, the injured petrol station may file an action for damages against the members of the cartel, claiming redress for the damages that it understands it experienced by reason of the illegal conduct. Nevertheless, if there is no consumer relationship, the burden of proof rule will follow the provision in article 333 of the Code of Civil Procedure, where the duty for proving the constitutive fact of its right is that of the case's plaintiff (the injured petrol station).

16 What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

It is extremely difficult to estimate how long a given proceeding may take to be processed by the Brazilian courts. Long probative phases and use of the endless appeals provided for in the procedural system may belie any estimated figure. It is estimated that a private or class action may run for an average period of five years until it has been definitively judged by all the instances (trial, appellate and last resort).

However, there are methods of accelerating the delivery of the relief sought. Under article 273 of the Code of Civil Procedure, the judge may, at the request of the party, totally or partially advance the effects of the protection sought in the final request (interim relief). Such relief should only be granted when unequivocal proof exists, the judge is convinced and some other requirements necessary for its granting are fulfilled. Consequently, a request for the advance of the effects of the claim brought to the judiciary for examination (at any time, whether at the start or during the course of the action) is possible in Brazilian law, provided that the requirements set forth in law are met.

17 What are the relevant limitation periods?

In accordance with Law 9,873/99, the limitation period for infringements against the economic order is five years from the date that the unlawful act is committed or, in the case of a permanent or continued infringement, from the date on which it ceased. In cases where the administrative violation is also a crime, the term of the limitation is that which is applicable for the criminal violation. For the purposes of a claim for damages, article 206 paragraph 3 subsection V of the Civil Code determines that the limitation period is three years from the date of the injurious act or fact.

18 What appeals are available? Is appeal available on the facts or on the law?

The Brazilian appellate system is complex, providing various remedies to challenge decisions handed down in court. Analysis of each of these remedies would deviate from the focus of this study. Therefore, only the appeals of regular applicability in civil actions will be discussed here, namely:

- The *recurso de apelação* appeal, which is applicable against all and any judgment, whether delivered with or without analysis of the merits. In the *recurso de apelação* appeal the matter heard by the first instance will be returned in its entirety (facts or erroneous application of law, or both) to the Supreme Court of the state or federal circuit court of appeals (Brazil's second instances), which may partially or totally reverse the judgment (collegial decision).
- The *agravo* appeals, which are means of contestation applicable against all interlocutory decisions (acts whereby the judge, during the course of proceedings, resolves an incidental issue)

of the first instance, such as denial of the production of certain evidence.

- The motion for an en banc rehearing (*embargos infringentes*), which is applicable in court decisions when a non-unanimous court decision (two votes against one, for example) has reversed a judgment on the merits at the appellate level.
- The motion for clarification of judgment (*embargos de declaração*), which is filed for when there is obscurity, contradiction or omission in a routine order, interlocutory decision, judgment or court decision. Its purpose is to complete a defective decision, clearing its omissions and dissipating the obscurities and contradictions.
- The special and extraordinary appeals (*recursos especial e extraordinário*), which are extreme measures that are not designed to re-examine the factual or probative matter, as occurs in the case of *recurso de apelação* appeals. A special appeal will be permitted only in cases decided, in an exclusive or last jurisdiction, by the Federal Circuit Courts of Appeal, or by the courts of the states, federal district or territories when the appealed decision conflicts with a treaty or federal law, or denies them legal effect, or, further, gives a federal law a different interpretation to the one that has been given by another court (among other circumstances). The extraordinary appeal may be lodged against the lawsuits decided in an exclusive or last jurisdiction, and will generally have be accepted when the attacked decision is in conflict with a constitutional provision. A special appeal will be judged by the Federal Court of Appeals; an extraordinary appeal will be judged by the Supreme Court of Brazil.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

In Brazil, there are many mechanisms created by the legislature for the protection of collective rights. For example, the Public Civil Action Act may be cited: specifically concerning antitrust-related matters, Law 7,347/85 (pertaining to public civil action) affirms in article 1, subsection V that liability actions for non-economic and economic damages caused by infringement of the economic order and of the economy of the people are governed by its provisions, without prejudice to the class action. Indeed, this concept of the prevention and repression of infringements against the economic order includes the protection of free enterprise, free competition, the social function of property rights, and also consumer protection and repression of the abuse of economic power. In addition, the application scope of the public civil action is not restricted to seeking compensation for damages. Parties with a legal standing to sue will be able to bring an action with the objective of obtaining the condemnation of the defendant to performance of the obligation to do or not to do, or both. Therefore, if there is no activity by the antitrust authorities in the ascertainment and investigation of a given infringement against the economic order, a public civil action may be filed with the purpose of obtaining condemnation of the defendants to suspend or cease the wrongful conduct.

20 Are collective proceedings mandated by legislation?

Class actions are regulated in Brazil by Laws 7,347/85, 4,717/65 and 8,078/90 (Consumer Protection Code – title III contains rules applicable to a collective process), and also by article 5, subsection LXX of the constitution.

21 If collective proceedings are allowed, is there a certification process? What is the test?

Although complex, Brazilian legislation fails to contemplate the procedural system for the protection of collective rights with a formal phase for examination of the admissibility of class proceedings, very often submitting the defendants to lengthy and unreasonable litigations. Nevertheless, provisions in the individual right fill this gap in a certain way, whereupon it is possible to consider the certification phase of the American class action to be similar to the curative phase of the individual proceeding in Brazilian law (fully applicable to the class regulation). In the curative phase of the proceeding, the judge will analyse whether the conditions (standing to sue, interest to sue and cause of action) and prerequisites (capacity to plead in court, competence of the judge, jurisdiction and other things) of the action were properly met in order to permit further proceedings and the subsequent judgment on the merits. If any defect is found in the action, the judge will dismiss the proceedings and not examine the merits.

22 Have courts certified collective proceedings in antitrust matters?

The judiciary permits class actions for damages brought by parties with legal standing to sue when the acts performed during the exercise of unfair competition cause losses to the community. In most lawsuits, the party sustains the occurrence of an unlawful act, and consequently its right to receive compensation, on the basis of a decision rendered by CADE about the same case. We cite as an example the activities of the Public Ministry in the public civil actions relating to:

- the alleged constitution of a cartel between the owners of gasoline stations – there were various judicial orders in this respect;
- the alleged constitution of a cartel between companies from the steel metallurgy sector (Gerdau, Barra Mansa and Belgo Mineira); and
- the barring of the sale of a supermarket belonging to the Dutch Royal Ahold group under the allegation of formation of a cartel.

23 Are 'indirect purchaser claims' permissible in collective and single party proceedings?

In accordance with the Brazilian procedural system, to bring or contest an action, it is necessary to have interest and legal standing. Thus, even if the party which is aggrieved due to a given anti-competitive conduct is not a direct participant of a relationship, it may claim for the recovery of its losses and damages provided that it has grounds that demonstrate its rights. The lawsuit is directed against the party causing the loss.

24 Can plaintiffs opt out or opt in?

In the Brazilian system, class actions indiscriminately and automatically protect the entire community, group or class of victims harmed by a given event (which in fact ends up dispensing with the express manifestation of interested parties' intention to participate in a class action (opt in)), except in the event provided for in article 104 of the Consumer Protection Code (CDC), which determines that if the stay of an individual action is not requested within 30 days from the cognisance of the filing of the class action, the plaintiff of the individual action will be excluded from the subjective extent of the judgment to be pronounced in the class action. This 'reservation' (stay of the individual action until the judgment of the class action) is an institution that bears very close similarities to American class actions' right to opt out or opt in, given the possibility of the interested party and plaintiff of an individual action choosing whether or not to stay the processing of its individual lawsuit to wait for the outcome of the class action. Nevertheless, as the protection of collective rights is automatic in the Brazilian system except in the case set forth in article 104 of the Consumer Protection Code, the self-exclusion mechanism (right to opt out) has no practical use, since in class actions *res judicata* only operates to benefit the community, not to harm it. In Brazilian collective law, *res judicata* only operates

secundum eventum litis: that is, the judgment of the validity of the class suit will extend its effects to the entire community (except for the previously mentioned case of article 104). On the other hand, if the suit is judged without grounds, the *res judicata* will preclude the re-filing of the class action, but will not impede the bringing of individual actions disputing the same matter or the prosecution of individual actions stayed as a result of the application of article 104 of the Consumer Protection Code. It is exactly for these reasons that it would make no sense for a party to opt out from the class action, since an unfavourable res judicata would not have the prerogative of impairing or impeding the filing or prosecution of the individual action for the pleading of the same rights. Lastly, it is also important to mention that in accordance with article 94 of the Consumer Protection Code, the interested parties of a class action may intervene as co-plaintiffs, in order to help the plaintiff of the class action defend and safeguard the protected collective rights.

25 Do collective settlements require judicial authorisation?

Article 5 paragraph 6 of Law 7,347/85 (the Public Civil Action Act) determines that the public agencies with legal standing to sue may accept an interested party's commitment to adjust its conduct to the legal requirements through the imposition of a fine, with the force of a prima facie judicially enforceable debt instrument. It is, in practice, possible to obtain a covenant from the interested party to adjust its conduct in order to suspend the injurious practice or resolve the dispute. Indeed, the antitrust legislation (articles 53 and 58 of Law 8,884/94) created appropriate mechanisms for the resolution of disputes within the administrative sphere of CADE, granting it ample powers to enter into commitments with interested parties for cessation of the practice under investigation, commitment of performance, or both. In the case of commitment of performance, ratification of its terms by the judiciary is not necessary. In cases involving prima facie judicially enforceable debt instruments, the competent agencies in case of default will necessarily have to take the controversy (execution of the debt instrument) to the judiciary for examination, at which time the regularity and legality of the agreement shall be examined and decided by a judge.

26 If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

The regulation of class protection is contained in the federal legislation (Public Civil Action Act, Class Action and Consumer Protection Code), and therefore its provisions apply to the entire Brazilian territory. However, the aspect that determines whether one same class action may be used for the defence of collective rights of a territorial scope is different. It is said that it is the effect of the judgment and of *res judicata* that defines the extent of the protection sought by the filing of a class action, but the issue does not have a peaceable consensus in Brazilian case law, as the matter has been generating important discussions in the country's various courts. Many feel that extension of the effects of the judgment and of *the res judicata* in class actions would, depending on their subject matter, apply to the entire Brazilian territory. However, another school of thought, sustaining the existence of an express rule in the opposite sense (article 16 of Law 7,346/85), affirms that *res judicata* will only produce effects within the limits of the territorial jurisdiction of the body rendering judgment. The practice has demonstrated that the understanding of the former school of thought has been commanding the dispute, on the grounds that to limit the effects of trans-individual *res judicata* distorts the very essence of class protection. Thus, there are numerous judgments of the Federal Court of Appeals approving the possibility of such effects exceeding the limits of jurisdiction of the judgment-rendering body to reach the entire Brazilian territory.

In Brazil, the judiciary is divided into regular courts (state and federal) and special courts (military, electoral and labour). The principal tribunals are the Federal Court of Appeals (which judges last-resort cases originating in the regular courts and is responsible for the interpretative harmonisation of the infra-constitutional ordinary law rules) and the Supreme Court, which is the most important body of the Brazilian judiciary, performing the role of constitutionality control and processing and judging the cases defined in the constitution. Each body has specific powers, as established in the federal constitution, so each matter is related to the competent tribunal of first instance.

It would not be possible to bring a private action with the same parties, the same subject and the same request simultaneously in more than one state. It is possible for the same matter in a private litigation to be discussed in different states, although this may not involve the same parties to the litigation.

One possibility for multiple actions would be a class action initiated by the Public Ministry of each state to claim damages for the consumers, but this would not be considered as an action between private parties.

27 Has a plaintiffs' collective-proceeding bar developed?

The legal standing for the pleading of trans-individual interests belongs not only to the organs of the direct or indirect public administration, the Public Ministry, federal government, states, municipalities and federal districts, but also to lawfully established associations and other entities set forth in article 82 of Law 8,078/90 (Consumer Protection Code) and article 5 of Law 7,347/85 (Public Civil Action). It is common, therefore, for there to be entities that protect specific interests (such as consumer rights), with legal standing to file public civil actions. In this respect, by affecting consumer rights, the possibility of these associations filing such proceedings by virtue of damages caused to consumers due to infringements against the economic order cannot be ruled out.

Remedies

28 What forms of compensation are available and on what basis are they allowed?

Damages resulting from activities that infringe the economic order and free competition may be of two kinds: economic and non-economic damage. Economic damage includes actual damage and lost profits (article 402 of the Civil Code). Actual damage implies the effective and immediate reduction of the victim's assets, whereas lost profits represent loss of probable profits, frustration of the expectation of profit or potential reduction of the victim's assets. Within the scope of antitrust law, compensation for actual damages and lost profits will be due whenever the performance of acts defined by law as infringing injures the right of an adversarial company. In this case, compensation for damages shall take into consideration the effective loss of the victim.

Non-economic damage, on the other hand, is the non-economic damage of a *contra legis* act. It is the infringement of the objective honour of the injured corporation (its good name and image before society) or of the subjective honour of an individual (emotional distress). In both cases, if there is injury due to an act that infringes the economic order, the burden of reimbursing the damages experienced by the victim will be the responsibility of the perpetrator of the unlawful act by means of a payment of indemnity to be decided by the judge.

29 What other forms of remedy are available?

In addition to the appeals provided for in the appellate system against the acts performed by the judge, for which no specific appeal exists for

Update and trends

There has been increased competition law enforcement in the administrative realm. The increase in cartel and other conduct condemnations may result in increased private antitrust litigation.

A bill of law that intends to reform the Brazilian System for Competition Defence is underway in Congress and may be sanctioned this year.

their impugnation, the filing of an injunction, partial correction and grievance to the superior courts is also appropriate. The Code of Civil Procedure also provides for the possibility of a party filing a rescissory action, with the purpose of returning for examination by the judiciary a matter already decided in previous proceedings, for possible review or reversal. See question 9 with respect to provisional remedies and question 16 regarding the interim remedy mechanism.

30 Are punitive or exemplary damages available?

Although there are numerous provisions in the Civil Code regarding matters relating to civil liability, the legislator opted not to adopt the American institution of punitive damages, but rather only the thesis of full compensation of the damage actually experienced by the victim. This is the interpretation that one reaches from a reading of article 927 of the Civil Code, which determines that any person who, by perpetrating an unlawful act (articles 186 and 187), causes damage to another person is obligated to compensate the damage caused. Nevertheless, over the years, a school of supporters of the American system has formed, and a theory was created in Brazil to the effect that at the time of the arbitration of indemnity, the judge should take into account the compensatory nature of the damage suffered and the punitive and exemplary nature of the conduct engaged in by the offender. Therefore, it can be said that, in a certain way, the punitive and exemplary nature of the damage is present, albeit indirectly, in the Brazilian civil system.

31 Is there provision for interest on damages awards?

There is express provision in Brazil for the imposition of legal interest on indemnification for damages, as determined in article 406 of the Civil Code.

32 Are the fines imposed by competition authorities taken into account when settling damages?

The amounts resulting from sanctions imposed by CADE are not set off against the award fixed in court for compensation of damage resulting from infringements committed against the antitrust rules. The penalty applied by CADE (administrative) is of a punitive and sanctioning nature and does not resemble or bear similarity to compensation for reparation of the damage suffered by the victim. Moreover, indemnification shall be sought in court by the injured party, in which case only the damages actually experienced will be ascertained.

33 Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

Except in cases where the litigants are granted the *in forma pauperis* benefit (guaranteed by the state to those who prove the impossibility of bearing the procedural costs without prejudice to their subsistence), parties will bear the costs of the acts that they perform or request throughout the whole proceeding, until the final judgment (article 19 of the Code of Civil Procedure). After the lawsuit is judged, the defeated party is ordered to pay the legal fees of the opposing party's lawyer and the court costs advanced by the prevailing party.

34 Is liability imposed on a joint and several basis?

Responsibility for an infringement committed against the economic order, pursuant to the provision of article 17 of the Antitrust Act, will be joint and several between the companies or entities that make up an economic group, de facto or de jure, that have participated in the unlawful act. In the conception of the Civil Code (article 275), if there is joint liability, the creditor has the right to demand and receive from one or some of the debtors, either partially or totally, the common debt; if the payment has been partial, the other debtors will continue to be jointly and severally bound by the remaining debtors.

35 Is there a possibility for contribution and indemnity among defendants?

Bearing in mind question 34 and the provision in article 283 of the Civil Code, when one or several joint debtors are sued by a creditor who demands the total debt from them, the aggrieved party may exercise its right to recover against the co-debtors in order to recover the allotted quota paid on their behalf.

36 Is the 'passing-on' defence allowed?

There is no express provision in the Antitrust Act to the effect that the possible 'passing-on' of the losses of the injured party to third parties, such as the increase of prices, serves as a basis to mitigate or eliminate the infringer's liability. The law merely determines that for administrative sanctions, the degree of harm to free competition, the national

Barretto Ferreira, Kujawski e Brancher

Paulo Brancher **brancher@bkbg.com.br**
Luiz Eduardo Salles **rsalles@bkbg.com.br**

Rua Dr. Eduardo de Souza Aranha, 387 – 15th floor
São Paulo – SP
04543-121
Brazil

Tel: +55 11 3897 0360 / +55 11 3897 0317
Fax: +55 11 3897 0330
www.bkbg.com.br

economy, consumers and third parties shall be taken into consideration. Thus, making an analogous interpretation for compensation of damages cases, proof that the injured party 'passed on' the losses to the consumers or third parties might be used during the assessment of the indemnity sum, if the infringement is characterised.

37 Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

There are measures permitted by legislation for the prevention and defence of the possible imputation of liability to companies or people. For example, in the administrative sphere, if analysis of the supposed infringement against the economic order is being processed at CADE, pursuant to the provision of article 53 of the antitrust act, the government agency may grant the infringing party the possibility of entering into a commitment for the cessation of the unlawful conduct or, under article 58, a commitment of performance (which is no more than an agreement or term for the adjustment of its conduct), thereby avoiding the application of a sanction by the authority and, possibly, the filing of actions for damages.

38 Is alternative dispute resolution available?

In the case of a dispute concerning disposable equity rights (which is not the case of disputes involving collective rights, for example), the parties that have the capacity to contract may avail themselves of the arbitration institution, which will act as a substitute for the judicial lawsuit (Law 9,307/96). In this case, the litigating companies may opt for arbitral proceedings in an attempt to resolve the dispute.

** The authors extend special thanks to their colleagues Guilherme Bastian and Fernanda Bezerra.*

PRIVATE ANTITRUST LITIGATION 2012 ISSN 1742-2280