
THE PRIVATE
COMPETITION
ENFORCEMENT
REVIEW

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LAW BUSINESS RESEARCH

Chapter 2

BRAZIL

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I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Antitrust private litigation has significantly developed in the past two years, as courts issued the first decisions in groundbreaking civil actions either challenging single-firm conduct or demanding injunctive relief and compensation for injury caused by collusive schemes.

The first private antitrust action in Brazilian legal history for collecting damages and lost profits attributable to cartelisation was filed in 2006 (*Cobraço Group v. ArcelorMittal*).¹ The action followed a ruling by the Administrative Council for Economic Defence (‘CADE’), which condemned steel producers ArcelorMittal, Barra Mansa (part of the Votorantim Group), and Gerdau for consumer allocation, resale price maintenance and collusion for fixing prices of steel rebars used in the civil construction industry for concrete reinforcement (‘the rebars cartel’).²

The private action was brought by independent steel distributors allocated by the producers and allegedly injured by (i) price squeeze resulting from the combination of cartel prices in the upstream and resale price maintenance downstream, and (ii) boycott and price discrimination as defendants established their own distribution system. In a landmark decision, the state judge of first instance granted preliminary injunctive relief, ordering defendants to sell steel rebars either for the pre-cartel prices, adjusted for inflation (*status quo ante*), or the prices the firm currently sells to its controlled distributors.³

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1 Civil Court of Belo Horizonte, Case No. 0024.06984815-8

2 CADE, Administrative Process No. 08012.004086/2000-21

3 Civil Court of Belo Horizonte, Case No. 0024.06984815-8

On appeal, the Court of Justice of Minas Gerais considered the opinions of CADE, the Secretariat for Economic Monitoring ('SEAE') and the Secretariat of Economic Law ('SDE') as 'unequivocal evidence' of the anti-competitive practices⁴ and unanimously upheld the preliminary injunction. Analogous actions by injured parties have followed.

With respect to private actions challenging unilateral conducts, decisions were issued in two major cases. First, in a leading discrimination case, the Court of Justice of Rio de Janeiro ordered Petrobrás, the Brazilian state oil company, to pay approximately \$153 million in compensation to Vasp, an airline, for price discrimination and discriminatory requirement of upfront payment for fuel. The Court held that Petrobrás abused its dominant position and lessened competition in the passengers and cargo markets.⁵ Parties settled subsequently.

The second major case concerned the action brought by a leading steeling company against the world's largest iron ore mining company for halting supply of pellets of iron ore (*CSN v. Vale*).⁶ The state judge of first instance granted injunctive relief, ordering Vale to sell the quantities of pellets demanded by CSN. CSN had argued that:

- a* Vale is a quasi-monopolist company in the national pellets of iron ore market;
- b* pellets of iron ore are an essential input for producing pig iron;
- c* Vale competes with CSN in several markets; and
- d* Vale has refused to deal with CSN and unilaterally terminated a long-term commercial relationship.

In an appeal filed by Vale, the Court of Justice of Rio de Janeiro issued a preliminary decision limiting the compulsory sale of iron ore pellets to 56,229 tons per month, based on past dealings.⁷ However, a final decision on the merits has not been issued as of 8 October 2008.

Finally, the Courts of Justice of four different states have confirmed that both unilateral and coordinated conducts challenged by private actions must be assessed under the rule of reason, pursuant to Act 8,884/94 ('the Antitrust Act').⁸

4 Minas Gerais State Court of Justice ('TJMG'), Case No. 1.0024.06. 984815-8/001.

5 Rio de Janeiro State Court of Justice ('TJRJ'), Case No. 2006.001.02659.

6 Civil Court of Rio de Janeiro, Case No. 2008.001.027120-4.

7 TJRJ, Case No. 2008.014.00040.

8 TJMG, Cases Nos. 2.0000.00.443280-0/0001, 1.0702.02.002684-6/001, 2.0000.00.514885-2/000(1), 2.0000.00.342408-2/0001; São Paulo State Court of Justice ('TJSP'), Nos. 196.793.49, 152.096.46; Rio Grande do Sul State Court of Justice ('TJRS'), No. 70010005544; Santa Catarina State Court of Justice ('TJSC'), No. 2005.030277-2.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Article 29 of the Antitrust Act is the central provision regarding private actions for damages and establishes that:

[i]njured parties, by themselves or through the legitimate representatives as defined by Article 82 of Act 8,078 of September 11 of 1990 [‘the Code of Consumer Protection’], may bring a lawsuit in defence of its individual interests or homogeneous individual interests, to halt infringements of the economic order and receive compensation for losses and injury suffered, independently of the administrative process, which shall not be stayed as a consequence of the filing.

Although the provision refers to administrative process, there is no requirement of previous or current administrative adjudication. Parties may file antitrust actions directly before state courts, pursuant to Article 5(XXV) of the Brazilian Constitution, which establishes that ‘the law shall not exclude from judicial examination violations or threat of violations of a right.’ Courts have construed it broadly, affirming the autonomy and supremacy of the judiciary in applying and interpreting the laws.⁹

Infringements of the economic order (or anti-competitive practices) are defined by Article 20 of the Antitrust Act as ‘any act or conduct, regardless of fault, having as its object or being able to’:

- a* lessen, restrain or in any way harm competition or free enterprise;
- b* dominate a relevant market of goods or services;
- c* increase profits arbitrarily; or
- d* abuse a dominant position.

Sections 1 to 3 of Article 20 elaborate on the definition of infringements of the economic order. Section 1 establishes that ‘the conquest of the market resulting from a natural process based on the higher efficiency of a firm in comparison with its competitors shall not be considered unlawful [dominance]’. Dominant position is defined by Section 2 of Article 20 as the factual situation in which ‘a firm or a group of firms controls a substantial share of a relevant market as supplier, trader, acquirer or financial sponsor of a product, service or related technology’. Section 3 of Article 20 clarifies the preceding one by establishing a rebuttable presumption of dominance whenever a firm or group of firms controls 20 per cent or more of a relevant market. In addition, it permits CADE to establish different presumptions of dominance based on market share for specific industries.

Plaintiffs suing for injunctive relief or damages must assert that the defendants’ conduct generated or might generate, besides private losses, harm to competition or free enterprise; dominance of a relevant market; arbitrary increase in profits; or abusive exercise of a dominant position. Thus, private parties must assert antitrust injury in the

⁹ See *Federal Public Attorney’s Office v. Steel Rebars Cartel*, interlocutory decision (TRF1, Public Civil Action No. 2005.38.00.010174-2).

sense defined by the US Supreme Court in *Brunswick*.¹⁰ Courts have construed Article 20 according to the rule of reason and increasingly through the lens of economic theory.¹¹

Plaintiffs suing for injunctive relief should traditionally provide evidence of injury or threat of injury, irreparable or hardly repairable (*periculum in mora*). After a series of amendments to the Code of Civil Procedure, courts have gradually changed their interpretation of the applicable requirements for granting injunctive relief (*tutela inibitória*) and have ruled that it is sufficient to demonstrate a violation or threat of a violation of the law. In order to grant injunctive relief, judges must weigh alleged facts and presented evidence, and find a probable violation or threat of violation of the law.¹² Furthermore, plaintiffs suing for damages or lost profits must provide evidence of a causal nexus between the defendant's practice and the actual losses.

Pursuant to Article 89 of the Antitrust Act, in every action regarding the application of the Antitrust Act, CADE must be notified so it may at its discretion assess the need to intervene. In practice, however, CADE has rarely intervened in private actions, focusing instead on administrative adjudication.

State courts have jurisdiction to enforce antitrust laws. However, when CADE intervenes, the lawsuit is transferred to a federal court. Appropriate venue is defined by Article 100(V)(a) of the Code of Civil Procedure as the place in which the illicit conduct took place (*forum delicti commissi*).

The Civil Code imposes a three-year statute of limitations on claims for money damages.¹³ In the case of continuous infringement, the limitation period starts to run only when the infringement ceases. Courts have not issued any significant decision yet concerning tolling or specific doctrines applicable to period of limitations regarding private antitrust actions. A traditional rule based on equity establishes that the limitation period does not start to run when plaintiffs are unable to act, as in cases of covert violations or concealment by defendants (*contra non valentem agere nulla currit praescriptio*); the issue, though, remains unsettled.

III EXTRATERRITORIALITY

Brazilian antitrust law explicitly embraces the effects doctrine. Foreign companies are subject to jurisdiction in Brazil when anti-competitive practices 'produce or may produce effects' in the country.¹⁴ Moreover, the Antitrust Act establishes that foreign companies are considered to be located in Brazil and, thus, indisputably subjected to Brazilian antitrust law, if they operate or have any 'branch, agency, office, establishment, agent or representative in the country.'¹⁵

10 See *Brunswick Corp v. Pueblo Bowl-O-Mat, Inc*, 429 US 477 (1977).

11 See note 8, *supra*.

12 TJMG Case No. 1.0024.06. 984815-8/001

13 Civil Code, Article 206.

14 Antitrust Act, Article 2.

15 *Ibid*.

In order to request injunctive relief, plaintiffs need to assert that the foreign anti-competitive conduct (i) may violate the Brazilian Antitrust Act and (ii) may injure their interests in the country.

Furthermore, the filing of a private antitrust lawsuit in a foreign country does not impede Brazilian courts in adjudicating the same case or related lawsuits,¹⁶ provided that the anti-competitive conduct produced or may produce effects in the Brazilian territory or defendants were located in the country according to the aforementioned criteria. Additionally, plaintiffs may file lawsuits for injunctive relief or money damages before Brazilian courts even when a foreign court has issued a final decision, which shall not be considered by domestic courts, unless it has been homologated in Brazil by the Superior Court of Justice.¹⁷

Under Brazilian law, foreign sovereigns are granted immunity from Brazilian courts' jurisdiction when they act in official matters and in direct relation with the Brazilian State (*iure imperii*).¹⁸ Private parties, nevertheless, may sue foreign sovereigns for their acts in private matters, involving 'questions of civil, labour and commercial nature'.¹⁹ The Superior Court of Justice has further mentioned that the immunity does not apply in cases of actions filed for recovery of damages caused by illegal civil conduct.²⁰

IV STANDING

Pursuant to Article 29 of the Antitrust Act, any injured or potentially injured person by an anti-competitive practice may bring a private antitrust action. Injured or potentially injured persons may be represented by:

- a* the Public Attorney's Office ('PAO'), in the defence of 'collective or diffuse interests'. The PAO may request injunctive relief and application of remedies to halt anti-competitive practices, but is not allowed to sue for money damages representing private parties;
- b* the union, states, municipalities and the Federal District;
- c* administrative agencies or departments; or
- d* associations legally established at least for one year, provided that representing the injured class is one of its primary legal objectives. Lawsuits filed by recently established associations may be allowed to proceed in cases in which there is 'a clear social interest demonstrated by the dimension or nature of the injury or by the relevance of the value to be safeguarded'.²¹

16 Code of Civil Procedure ('CCP'), Article 90.

17 Article 105(I)(i) of the Brazilian Constitution, as amended by Amendment No. 45/2004.

18 Supreme Court ('STF') Case No. ACO 522 (2001).

19 STF Cases Nos. AgRg 139.671 (1995) and Ag 222.368 (2002). Superior Court of Justice ('STJ') Nos. RO 45 (2005) and RO 42 (2007).

20 STJ Case No. RO 39 (2006).

21 Consumer Protection Code, Article 82.

The provisions concerning lawsuits for damages are broad²² and there is no limitation on classes of plaintiffs, such as competitors, suppliers, purchasers, consumers, shareholders or employees. However, plaintiffs have the burden of demonstrating a causal relation between the anti-competitive conduct and the alleged injury.²³

There is no provision barring indirect purchasers from filing suits for recovering damages. Defendants might face simultaneous actions from direct and indirect purchasers. In such cases, the actions will be consolidated and analysed by the same judge, who must apportion damages between classes to avoid undue multiple compensation.²⁴ Indirect purchasers may also intervene in actions filed by direct purchasers and assert their rights.²⁵

V DISCOVERY

Evidence is produced under strict judicial control. All evidence is presented before a judge according to the fact-pleading. Plaintiffs should present documentary evidence attached to the complaint and defendants with their answer. Parties must specify further evidence they intend to produce and request the judge's approval.

After a preliminary hearing, the judge decides what the disputed facts are and sanctions the requests for evidence production according to the allocation of the burden of the proof. Plaintiffs bear the burden of proving the alleged facts and the constitutive elements of their rights while defendants bear the burden of proving alleged facts that impede, alter or extinguish plaintiff's claims.²⁶

Parties may request compulsory exhibition or disclosure of documents and tangible things before the court, indicating the facts to be proven and the purpose of the request.²⁷ If the judge finds that a party has refused to disclose the requested documents on illegitimate grounds, he or she shall deem as true the facts the opposing party intended to prove through the compulsory disclosure.²⁸ The scope of compulsory disclosure is quite broad and judges generally approve it if the requested documents are relevant for meeting parties' burden of proof.

22 Antitrust Act, Article 29; Civil Code, Article 947.

23 See Federal Regional Court for the 4th Region ("TRF4") Case No. 2000.04.01.004115-1.

24 Note that this is the regime advocated by the Sections of Antitrust Law, International Law and Business Law of the American Bar Association in their comments to the EC White Paper on antitrust actions for damages. See Joint Comments of the American Bar Association Section of Antitrust Law, Section of International Law, and Section of Business Law on the Commission of the European Communities' White Paper on Damages Actions for Breach of the EC Antitrust Rules (2008) ("Joint Comments"), p. 21-22.

25 CCP, Article 56.

26 CCP, Article 333.

27 CCP, Article 356.

28 CCP, Article 359.

Additionally, parties may request that third parties be ordered to disclose relevant documents or tangible things. If the third party refuses on illegitimate grounds, the judge may order a seizure of the evidence.

Parties or third parties may legitimately refuse to disclose requested evidence when the disclosure may expose a party's family life, violate a duty of honour or a professional duty of confidentiality, or result in a criminal action. Moreover, the judge may waive the obligation to disclose if he or she finds that other serious reasons justify the party's refusal.²⁹

In cases of a threat of injury to their rights as a result of the course of time inherent to the ordinary process, parties may request early or immediate production of evidence,³⁰ such as expert analysis, compulsory exhibition of documents and objects, and witness examination.³¹

VI USE OF EXPERTS

Expert evidence may be used to prove several aspects of private claims, such as relevant markets and market shares, the overcharges or amount of damages including lost profits, and, crucially, whether the defendant's conduct lessened competition, and, thus caused antitrust injury pursuant to Article 20 of the Antitrust Act.

Following a justified request for expert evidence by any party, courts appoint an impartial expert who must have specialised knowledge in the field in question and must present unbiased, scientific opinion. Both plaintiffs and defendants submit questions to be answered in a written opinion by the impartial expert and may name assistant experts to assess the independent expert opinion and, if necessary, present a totally or partially divergent opinion. Judges, nonetheless, are not bounded either by the court-appointed expert opinion or assistant expert opinions and may reach a final decision based on the other produced pieces of evidence.³²

VII CLASS ACTIONS

Two types of collective actions may be filed to halt or remedy anti-competitive practices: (i) public civil actions and (ii) collective actions for defence of 'homogeneous individual rights'. The former aims at halting or remedying illegal conducts that affect collective or diffuse interests, not specifically individualised. The latter aims at obtaining injunctive relief or money damages for a class of plaintiffs, besides specific behavioural or structural remedies.

29 CCP, Article 363.

30 CCP, Article 798.

31 CCP, Articles 844 to 851.

32 CCP, Article 436.

Public civil actions³³ are often filed either by consumer associations³⁴ or the PAO, although the Union, states, municipalities, the Federal District, and administrative agencies or departments also have standing. Plaintiffs in public civil actions cannot recover money damages, although defendants may be ordered to pay compensation to a public fund in order to redress the harm.

Collective actions for defence of homogeneous individual rights may be filed by trade associations, the PAO, the Union, the states, municipalities, the Federal District, administrative agencies or departments. Following the filing, courts publish a notice in the official gazette to interested parties to intervene and join the plaintiffs ('opt in'). Parties that have already filed individual actions may request that their actions be stayed pending the final decision of the collective action, which will be binding with regard to their claims only if it is decided in favour of plaintiffs. Otherwise, the individual processes are resumed. The PAO shall join collective actions since the action has a social dimension that extends beyond aggregation of individual claims, aiming also at remedying the violation of the law.

In collective actions for money damages, courts issue a general and broad ruling establishing that defendants must pay money damages (e.g., for overcharges imposed) to injured parties according to the extent of the injury individually suffered, which shall be subsequently calculated and recovered through the specific procedure of liquidation.³⁵

Following the general ruling in favour of plaintiffs, any injured party may file an action for liquidation of damages individually suffered. In the liquidation procedure parties must prove the amount of damages and the casual relation between the damages and the antitrust violation.

Importantly, any of the representatives mentioned above may liquidate money damages not claimed by individual firms after one year from the decision against the defendants. In this case, defendants must pay the compensation to a public fund.

Currently, Congress is considering a Bill to establish a Code of Collective Actions that might also introduce US-style class actions.

VIII CALCULATING DAMAGES

Damages shall reflect the actual extent of the injury³⁶ caused by defendant's antitrust violations.³⁷

Punitive or multiple damages are not awarded in antitrust cases. Corrective justice is a foundational principle of Brazilian law, though it has increasingly embraced deterrence as a legitimate goal and reflected society's demand for adequate levels of punitive measures.

33 See Act 7,347/1985.

34 See Section IV, *supra*.

35 *Id.*, Articles 95-98.

36 Civil Code, Article 944.

37 Antitrust Act, Article 29.

Currently, plaintiffs in antitrust actions may claim damages for: (i) past and present actual losses; (ii) reasonable lost profits according to a ‘pre-post’ approach, including projected sales and estimated growth; and (iii) injury to plaintiff’s reputation, goodwill and image.

Plaintiffs have the burden of proving that the anti-competitive conduct was an ‘important’³⁸ or ‘efficient’³⁹ cause of the damages. When defendants prove the harm was also caused by the plaintiff’s fault, courts shall weigh the defendant’s conduct and plaintiff’s fault when deciding the amount of damages.⁴⁰ Courts have yet to detail the measure of damages for overcharges, single-firm conducts and exclusionary practices.⁴¹

Successful plaintiffs are awarded court costs, statutory attorneys’ fees, interest on actual damages and post-judgment interest. Losing parties bear the burden of litigation costs and statutory attorney’s fees.

IX PASS-ON DEFENCES

There is no statutory provision or judicial decision barring defendants from asserting passing-on defences, despite the arguably positive effects of such a determination on deterrence and consumer welfare, when combined with a ban on indirect purchasers actions.⁴²

Nevertheless, pursuant to the general rule established by the Code of Civil Procedure, defendants bear the burden of proving facts that impede, alter or extinguish a plaintiff’s claimed right.⁴³ Therefore, to successfully assert a passing-on defence, defendants must prove that plaintiffs have effectively passed on the claimed overcharges.⁴⁴

Consequently, direct purchasers may recover full damages if they prove both the antitrust violation and actual payment of overcharge and defendants fail to produce evidence that plaintiffs have passed it on.

Indirect purchasers who have possibly borne part of or the entire overcharge may intervene or subsequently sue the successful plaintiffs and recover their share of the damages collected.⁴⁵ Indirect purchasers always bear the burden of proving that damages have flowed through the chain.

38 STJ, Case No. REsp 102.231

39 TRF4, Case No. 2000.04.01.004115-1.

40 See for example the law on unlawful enrichment by public officials which establishes a penalty of three times the amount illicitly obtained (Act 8,429/1992).

41 See, for example, Joint Comments, pp. 12-15.

42 See William M Landes & Richard A Posner, Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick, 46 *U. Chi. L. Rev.* 602 (1979). William M. Landes & Richard A. Posner, The Economics of Passing On: A Reply to Harris and Sullivan, 128 *U. Pa. L. Rev.* 1274 (1980).

43 CCP, Article 333(II).

44 See note 26, *supra*.

45 CCP, Article 56; Civil Code, Article 272.

X FOLLOW-ON LITIGATION

Private actions do not need to rely on a prior finding of an infringement by the antitrust authorities.⁴⁶ Courts adjudicating actions for damages in the course of administrative proceedings, however, may admit evidence produced in the administrative process provided that it has been produced according to the adversary system.

Apart from considering opinions from SEAE and SDE and findings made by CADE as ‘unequivocal evidence’ of the anti-competitive practices, for the purposes of granting plaintiffs injunctive relief,⁴⁷ courts have not fully developed a doctrine concerning private litigation following administrative adjudication. Thus, there is a degree of legal uncertainty regarding actions filed after or regardless of investigations by the administrative authorities. However, a few scenarios are to some extent predictable, in view of (i) the broad interpretation in effect of Article 5(XXXV) of the Brazilian Constitution and (ii) the general rules of evidence established in the Code of Civil Procedure.

First, in cases in which CADE has entered judgement in favour of defendants, private plaintiffs may be allowed to reassert and relitigate all the issues in court pursuant to Article 5(XXXV). However, courts are expected to consider and weigh the administrative findings as pivotal evidence, balancing them against the arguments and/or new evidence presented by the plaintiffs.

Second, in cases in which CADE has found that defendants violated antitrust laws and defendants have not appealed to federal courts or appealed and lost, courts may consider the administrative ruling as sufficient evidence of the anti-competitive practice and the plaintiff’s burden of proving the antitrust violation will be manifestly met. Nevertheless, courts may allow defendants to assert arguments derived from new and previously unknown facts.⁴⁸ In every case, private plaintiffs must present evidence that they were in fact injured by the antitrust violation proved in the administrative process and liquidate the appropriate damages.⁴⁹

Third, in cases in which a CADE ruling against the defendants has been reversed by a final decision of a federal court,⁵⁰ the Superior Court of Justice or the Supreme Court, plaintiffs will be able to bring a private action provided that it has been reversed on procedural grounds.

In conclusion, under the Constitution, courts do not have to defer to CADE’s findings. Judges are expected though to consider the administrative ruling as central evidence and weigh it according to the outcome of its subsequent (if any) judicial review.

Under the current Brazilian leniency programme, applicants may be granted immunity from administrative penalties and criminal prosecution,⁵¹ but not from civil

46 Article 5(XXXV) of the Brazilian Constitution; Antitrust Act, Article 29.

47 *Cobraço Group v. ArcelorMittal*, see Section I, *supra*.

48 CCP, Article 397.

49 CCP, Article 475-E.

50 By federal courts is meant federal courts of first instance and Regional Federal Courts.

51 Antitrust Act, Articles 35-B and 35-C.

actions for recovering damages attributable to the anti-competitive scheme. Equally, administrative consent orders that halt or extinguish the administrative process,⁵² do not grant immunity from private actions or mitigate civil liability.

XI PRIVILEGES

Under Brazilian law, attorney's files, data, mail, communications, including phone calls, call logs, e-mails and other electronic communications are inviolable.⁵³ Communications between attorney and client are privileged and confidential,⁵⁴ including communications between foreign clients and Brazilian attorneys.⁵⁵

Attorneys who counsel or counselled parties shall refuse and be excused from testifying about facts related to clients' matters.⁵⁶

- Attorney's offices may not be raided unless ordered by a court of law⁵⁷ and when:
- a* the lawyer's conduct is the object of the investigation (in this case, information concerning clients must be safeguarded by authorities and shall not be used or disclosed); or
 - b* the office is used to hide documents from judicial investigation or objects obtained as a result of criminal conducts.⁵⁸

Moreover, attorneys are prohibited from disclosing any information or communication obtained as a result of rendering legal services.⁵⁹

Although provisions regarding attorney–client privilege are broad and its logical and teleological interpretation would provide for protection of attorney work product from discovery, courts still have to develop an informative case law concerning the precise extent of the privilege.

The attorney–client privilege may be deemed waived when information is voluntarily disclosed to governmental authorities or agencies, except when confidentiality is requested and explicitly granted by the governmental authority, according to the limits established by the applicable statutes.

XII SETTLEMENT PROCEDURES

Disputes by private parties concerning the amount of money damages derived from antitrust violations may be settled before or during the course of the judicial process. In

52 Antitrust Act, Article 53.

53 Act No. 8,906/1994 (Attorneys and Brazilian Bar Association Act), Article 7(II).

54 STF Cases Nos. MS 23452/RJ; MS 23864 MC/DF.

55 STF Case No. MS 25005/DF.

56 See Attorneys and Brazilian Bar Association Act, Article 7(II) and (XIX), Supreme Court Cases Nos. HC 71231/RJ; HC 86429/DF.

57 Attorneys and Brazilian Bar Association Act, Article 7(II).

58 See STF Case No. MS 23452/RJ, pp. 31-33.

59 Code of Ethics and Discipline of the Brazilian Bar Association, Articles 25-27.

the latter case, parties must present the settlement agreement in court to be homologated by the judge, and, thus, conclude the civil litigation.⁶⁰ In general, courts accept settlements without analysing their merits.

Moreover, pursuant to the Code of Civil Procedure, judges shall schedule a preliminary hearing, before determining which questions of fact must be proven by the parties, and mediate a settlement agreement.⁶¹

When a settlement agreement does not provide for litigation costs and attorney's fees, the judge shall divide them equally.⁶²

Parties can either declare or recognise the others' rights, but may not transfer rights through settlement agreements.⁶³ Claims filed before the SEAE, SDE or CADE may not be object of private settlement agreements. Administrative authorities must proceed with the investigations when there is evidence of anti-competitive conduct, in spite of settling by private parties who may be notified by SDE to provide information or testify.

Public civil actions or collective actions for defence of homogenous individual rights may not be settled through a private agreement since such actions also aim at protecting comprehensive social and individual interests (*ultra partes*). Such actions may be settled, however, when the agreement reached effectively remedy the infringement and is, therefore, sanctioned by the PAO.

XIII ARBITRATION

Only individual antitrust claims for money damages may be subject to arbitration. Essentially, parties may not limit or extinguish either their antitrust liability or applicable remedies through arbitration clauses or arbitral awards. Article 1 of the Antitrust Act establishes that society is entrusted with the rights protected therein. Thus, private parties may not limit antitrust liability through private agreements. Collective claims may not be resolved by arbitration due to their social dimension and the mandatory participation of the Public Attorney's Office.

XIV INDEMNIFICATION OR CONTRIBUTION

A party that has provided compensation for damages caused entirely or in part by others has the right to sue for indemnification.⁶⁴ Additionally, there are no limitations on seeking contribution from participants in an antitrust conspiracy.

Plaintiffs have the prerogative to sue any of the participants in an antitrust violation and shall not be required to litigate against all of them.⁶⁵ The party sued by the

60 CCP, Article 269 (III).

61 CCP, Article 331.

62 CCP, Article 26, Section 2.

63 Civil Code, Article 840.

64 Civil Code, Article 934.

65 Civil Code, Article 275.

plaintiff is severally liable and, thus, must pay full compensation for the harm caused by the joint conduct.⁶⁶

An elected defendant, nevertheless, may seek contribution from other participants in the anti-competitive scheme, either by filing a subsequent action or by giving them legal notice of the lawsuit during the period for presenting its answer.⁶⁷ In the latter case, the defendant will remain severally liable, but the decision will establish the amount of damages paid in excess, to be collected from the notified participants.⁶⁸

XV FUTURE DEVELOPMENTS AND OUTLOOK

The antitrust authorities are currently conducting nearly 300 cartel investigations, several of which may lead to private actions for damages. As the number of such actions increases and firms internalise their costs, private enforcement will substantially enhance deterrence.

However, as the number of actions for damages increase, the Antitrust Act should be amended to limit the liability of successful applicants to the leniency programme, in order to avoid undermining the programme.⁶⁹ As a second-best solution, courts should craft a rule prohibiting admission of evidence produced as a result of a successful leniency application.

With regard to single-firm conducts, although private parties still file most of their claims before the antitrust authorities, there is an inevitable trend toward filing antitrust actions directly before the judiciary for two reasons. First, courts have started to develop case law and increase both legal certainty and private parties' confidence on judges' ability to assess complex economic evidence and properly enforce antitrust laws. Second, as matter of law, antitrust authorities' decisions are always subject to comprehensive judicial review by the courts, which may review the administration's findings of fact and law due to Article 5(XXXV) of the Brazilian Constitution. Consequently, orders and rulings issued by either SDE or CADE are often challenged and end up in courts. Finally, claims filed before the SEAE, SDE or CADE may not be settled through private agreements. As a result, an increasing number of antitrust claims challenging unilateral conducts are expected to be brought before the judiciary.

66 Civil Code, Article 942.

67 CCP, Articles 77(II), 78.

68 CCP, Article 80.

69 See European Commission, White Paper on Damages Actions for Breach of the EC Antitrust Rules (2008); Andrea Renda *et al.*, *Making Antitrust Damages Actions More Effective in the EU: Welfare Impacts and Potential Scenarios*, Report for the European Commission (2007); Joint Comments; US Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Section 213.

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Before founding Lanna Peixoto Advogados, Mr. Peixoto was an attorney at the antitrust department of the Ministry of Justice ('SDE'). He held positions both in the merger control division, where he conducted review of mergers and acquisitions in several industries, and in the anti-competitive practices division, where he prosecuted international cartels. He also actively participated in the drafting of the Brazilian predatory pricing guidelines. Mr Peixoto has published academic articles on antitrust law in Brazilian and American law journals.

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