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Trends and Developments

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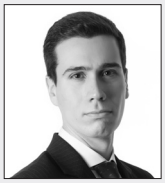

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Settlements and Aggregation Techniques in Collective Litigation: the Brazilian Effort to Reduce the Number of Pending Lawsuits

Introduction

According to the Conselho Nacional de Justiça (CNJ), the administrative body that oversees the functioning of the entire Brazilian Judiciary, there were 78.7 million lawsuits pending judgment in Brazil in 2018. But, despite the massive amount of cases before national courts, official reports by the CNJ indicates a fall of 900,000 proceedings in comparison to 2017.

Undoubtedly, this relative success in limiting the amount of litigation in Brazil results from the wide adoption of electronic records and platforms for digital filing with courts. Again according to CNJ reports, almost 85% of all legal actions commenced in 2018 were recorded and processed via electronic platforms.

Brazilian courts are also taking seriously the advantages and possibilities that artificial intelligence offers in case management and Q&A assistance for litigants. The São Paulo State Court of Appeals, considered the largest appellate court in the world, has pioneered the implementation of a robot assistant named Judi. As of now, Judi, a chatbot, provides information about costs and procedure in small claims courts and, in the near future, will even make brief templates available to potential plaintiffs.

Additionally, court specialisation has also become key to ensuring efficiency in the judgement of complex cases, such as those related to consumer protection and environmental law. Particularly for commercial and corporate litigation, the experience of the São Paulo State Court of Appeals with dedicated business courts has become invaluable to other Brazilian states.

Besides technological and managerial innovations, there have been also relevant legislative initiatives by the Brazilian Congress to deal with mass and repetitive litigation, particularly in collective procedure and alternative dispute resolution, allowing private parties, for instance, to arbitrate claims against government agencies.

In this context, it is worth mentioning the approval of settlement agreements in early 2018 by the Supremo Tribunal Federal (STF), Brazil's Supreme Court, which purports to put an end to a decades-long dispute between money savers, as consumers of financial services, and the savings banks that provided them with savings account services. These consent judgments, as will be seen, reveal important legal developments in Brazil, with respect to class action settlements and trends in the judicial handling of procedural techniques for the aggregation of lawsuits.

Inflation, monetary correction and disputes over consumer economic losses

In the past, the Brazilian federal government had set out a series of failed programmes for economic stabilisation. These "economic plans" (ie, Plano Bresser, Plano Verão, Plano Collor I and Plano Collor II), though unsuccessful, are well known by Brazilians who endured the so called lost decade of the 1980s and remained at the center of a massive amount of litigation that has lasted for more than 20 years.

Indeed, while the hyperinflation that once plagued the Brazilian economy is no longer a nightmare for the officials of the country's Central Bank (Bacen), consumers and courts of law are still facing the consequences of misguided monetary policies during the 1980s. According to the STF, the case records would indicate that disputes arising from the economic plans could amount to approximately 600,000, or even 800,000, pending lawsuits.

And, despite several rulings on individual and class actions by savings account holders, before state and federal courts alike, cases about compensation for consumer harm due to the economic plans have eventually reached the Supreme Court.

As of 2018, there were at least five key cases pending before the STF. Four of them (RE 591.797, RE 626.307, RE 631.363 and RE 632.212) are appeals for judicial review, positing that a monetary correction index inferior to the inflation rate violates consumers' property rights, assured by the Brazilian Constitution.

The fifth of these STF cases was a constitutional action (ADPF 165), filed by a national-level union of financial institutions (Confederação Nacional do Sistema Financeiro – CONSIF), asserting the lawfulness of monetary correction indexes applied by banks during the 1980s and early 1990s.

Economic plans, STF judgments and collective settlement

In an historic development, the constitutional cases on the 1980s economic plans were settled by the end of 2017 via the Instrumento de Acordo Coletivo, an out-of-court settlement agreement mediated by Advocacia-Geral da União (the Solicitor General's Office), involving representatives of consumers and banks (ie, CONSIF, IDEC (the Brazilian Institute of Consumer Protection) and FEBRAPO (a savers association)), with the participation and oversight of Bacen.

The basis of that collective settlement (the Settlement), was to allow for (i) the recovery of economic losses suffered by consumers holding savings accounts during the 1980s and early 1990s; (ii) better payment conditions for savings banks, through hair-cuts and deferred installments; (iii) avoidance of systemic risks arising from mass litigation about economic plans; and (iv) a substantial reduction in the caseload of state and federal courts around the country.

By the time the negotiations started, there were several legal actions, both individual and collective, against savings banks, among them two major financial institutions controlled by the federal government: Banco do Brasil and Caixa Econômica Federal. However, the Settlement, as a collective agreement, was meant to cover groups of consumers represented in all the class actions pending before courts. This includes class actions already tried and whose class members are currently collecting individual compensation in provisional enforcement procedures.

Because the settling parties were private organisations showing adequate representation of their class members, the agreement with CONSIF could even apply to individual consumers, and their attorneys, who might disagree with the specific terms of the Settlement with the savings banks. This fact, at first sight, would seem unexpected in Brazilian procedural law, which allows individual class members to make their own claims in court, independently of the collective proceedings and irrespective of the judgment rendered in respect to the entire class.

Legal framework for collective litigation in Brazil

Even though Brazilian law does not provide plaintiffs with a US-style class action – a generally mandatory, no opt-out procedure – there have been crucial legislative efforts to address mass and repetitive litigation.

The framework for collective litigation in Brazil was originally designed by Federal Law No 7.347, of 24 June 1985, which established a collective procedure known as Ação Civil Publica. However, it was only with the enactment of the Code of Consumer Protection and Defence in the 1990s that individual claims, originated from the same cause of harm, could be aggregated into one single legal action.

Brazilian collective-litigation law could be best described as a representative action regime, wherein a lawsuit can be brought by a plaintiff for the interest or protection of others, including the general public and specific groups of determined or undetermined individuals. While the subject matter of Ação Civil Pública proceedings can range from breach of environmental regulations to product liability and government corruption, adequate representation of collective rights and interests often lies with public bodies.

As provided by the law and the Constitution, Ministério Público (the states and federal attorney's office), an independent prosecution agency, has a broad representative standing to initiate collective actions.

However, some private organisations, subject to requirements of pre-incorporation and pertinent institutional mandates, such as labour unions and civil associations in general, are also allowed to represent class interests via collective litigation procedures.

Along with Ação Civil Pública, the Brazilian Congress has enacted legislation providing the STF and other high courts with a sort of model-case proceeding, largely inspired by the German Musterverfahren procedure, as an aggregation technique to cope with repetitive litigation in the country.

To that same end, the 2015 Code of Civil Procedure created the Incidente de Resolução de Demandas Repetitivas (IRDR), a proceeding meant only to resolve issues of law that are common to several (potentially conflicting) claims, so that pending and future lawsuits are all handled by courts in the same manner. Once the appellate court hearing the IRDR renders a general and abstract judgment as to the applicable interpretation of the disputed legislation, the ruling becomes mandatory precedent for all cases, either individual or collective actions, emerging from the same legal controversy.

While IRDR was explicitly devised to assure fairness and legal certainty, this aggregation tool holds the promise of using case law and binding precedents as a means to achieve uniform and consistent enforcement of Brazilian law.

To be sure, since at least the early 2000s, Brazil's civil procedure has provided higher courts, namely, the STF and Superior Tribunal de Justiça (STJ) with procedural tools to handle mass litigation, litigation that might otherwise hinder the expected uniformity in legal interpretation and enforcement by the national courts. It was the 2015 Code of Civil Procedure, however, that established a general framework for the resolution of repetitive disputes that reached high courts via Recurso Extraordinario e Recurso Especial, "extraordinary appeals" that, similar to the US petition of certiorari, ask for a review of appellate courts' judgments in accordance with constitutional and federal law.

Under the procedure for repetitive extraordinary appeals to the STF and/or the STJ, two or more paradigm cases are singled out by the justices, for which a legal principle will be stated as basis for the judicial review. Once the issue relevant to the integrity of constitutional and federal case law is defined, all other pending lawsuits will be stayed by order of the reporting justice, until the extraordinary appeal is decided.

Within this framework for collective litigation, the Settlement of the Supreme Court cases about the economic plans contributes to the development of Brazilian law by filling gaps in the regime of contingency fees and other incentives for the aggregation of repetitive lawsuits.

Accordingly, while the agreement between CONSIF, IDEC and FEBRAPO was meant to settle the ADPF 165 and all the extraordinary appeals pending before the STF, reporting justices had taken different approaches to assure the effectiveness of the Settlement. For instance, in extraordinary appeal RE 632.212, Justice Gilmar Mendes decided that not

only should the appeal be stayed – so that consumers not represented by IDEC and FEBRAPO could voluntarily join the collective agreement – but also all the individual actions against savings banks should be adjourned.

A similar stay order, however, was promptly declined by Justice Carmen Lúcia, in RE 626.307, on the grounds that the stay of all individual consumer actions would not be the most adequate measure for that purpose. Interestingly, the stay order by Justice Mendes was revoked by a recent decision of 9 April 2019. In any case, despite the contrasting positions among the STF's Justices, their acknowledgment that stay orders, as an aggregation technique, could be employed to increase the reach of the STF's consent judgments to allow for a collective settlement to any lawsuits pending before lower courts, seems clear.

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Conclusion: trends and developments

The judicial approval of the agreement to settle a decades-long dispute between money savers and savings banks, arising from the Brazilian government's monetary policy in the 1980s and 1990s, reinforces the general trend in Brazilian law to improve its class action procedure.

As stated in a 2018 opinion for ADPF 165, the STF understands that agreement provisions that reward private organisations for representing consumer classes in court, as an "entrepreneurial class counsel" or a "litigation funder", are not only permissible in Brazilian law, but also (mostly) desirable.

The acknowledged validity of conventional contingency fees, as provided in the Settlement, even at the expense of consumers' counsel for the enforcement of class action judgments, is an important development, in that it creates incentives for private collective litigation promoted by civil associations.

Finally, the experimentalism in the extraordinary appeals RE 626.307 and RE 626.307, regarding the stay orders directed to lower courts, if not promoting voluntary participation in the Settlement, at least reveals the STF's technical and political willingness to employ aggregation tools to expand the reach and effects of collective agreements, in another attempt to handle the repetitive litigation in Brazilian courts.