The Private Competition Enforcement Review

Sixth Edition

Editor
Ilene Knable Gotts

Law Business Research

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EDITOR'S PREFACE

Private antitrust litigation has been a key component of the antitrust regime for decades in the United States. The US litigation system is highly developed – using extensive discovery, pleadings and motions, use of experts, and, in a small number of matters, trials, to resolve the rights of the parties. The process imposes high litigation costs (both in time and money) on all participants, but promises great rewards for prevailing plaintiffs. The usual rule that each party bears its own attorneys' fees is amended for private antitrust cases such that a prevailing plaintiff is entitled to its fees as well as treble damages. The costs and potential rewards to plaintiffs create an environment in which a large percentage of cases settle on the eve of trial. Arbitration and mediation are still rare, but not unheard of, in antitrust disputes. Congress and the US Supreme Court have attempted to curtail some of the more frivolous litigation and class actions by adopting tougher standards and ensuring that follow-on litigation exposure does not discourage wrongdoers from seeking amnesty. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high levels of litigation activity, particularly involving intellectual property rights and cartels.

The United States has not been alone, however, in having a long-established private litigation history. Brazil, for example, has had private litigation arise involving non-compete clauses since the beginning of the twentieth century, and monopoly or market closure claims since the 1950s. Nonetheless, Brazil – as well as many of the other jurisdictions discussed in this book – has seen an increasing role for private antitrust litigation in the past few years. In addition, other jurisdictions have more recently initiated private litigation regimes (for instance, Israel and Poland) as a complement to increased public antitrust enforcement. In some jurisdictions (e.g., Lithuania, Romania, Switzerland and Venezuela), however, private actions remain very rare and there is little, if any, precedent establishing the basis for compensatory damages or discovery, much less for arbitration or mediation. In some of these jurisdictions (e.g., Norway and Switzerland), legislation is pending that would potentially provide a greater role for private enforcement. In addition, the European Union (EU) – and some of its

Member States – are contemplating providing for expanded private damages rights, including in a class action.

On the other hand, many jurisdictions (e.g., Switzerland) still have very rigid requirements for 'standing', which limit the types of cases that can be initiated. Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its participants; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages (e.g., Brazil, Canada and Switzerland, although Switzerland has legislation pending to toll the period) or injunctive litigation. Some jurisdictions base the statute of limitations upon the point at which a final determination of the competition authorities is rendered (e.g., Romania, South Africa and, effective from 2012, Austria) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions (e.g., Australia or Chile), it is not as clear when the statutory period will be tolled. In a few jurisdictions, it is only after the competition authority acts that a private action will be decided by the court.

The interface between leniency programmes (and cartel investigations) and private litigation is still evolving in many jurisdictions; in some jurisdictions it remains unclear what weight to give competition agency decisions in follow-on litigation private cases and whether documents in the hands of the competition agency are discoverable. (See, for example, Germany). Some jurisdictions seek to provide a strong incentive for utilisation of their leniency programmes by providing full immunity from private damages claims for participants (e.g., Hungary). In contrast, other jurisdictions, such as the Netherlands, do not bestow any benefit or immunity in a follow-on damages action.

As mentioned above, the European Union is potentially at a critical decision point regarding private enforcement procedure. In April 2008, the European Commission published a White Paper suggesting a new private damages model for achieving compensation for consumers and businesses who are victims of antitrust violations, noting that 'at present, there are serious obstacles in most EU Member States that discourage consumers and businesses from claiming compensation in court in private antitrust damages actions […]. The model is based on compensation through single damages for the harm suffered.' The key recommendations included collective redress, in the form of representative actions by consumer groups and victims who choose to participate, as opposed to class actions of unidentified claimants; disclosure of relevant evidence in the possession of parties; and final infringement decisions of Member States' competition authorities constituting sufficient proof of an infringement in subsequent actions for damages. Commissioner Kroes was unable to achieve adoption of the legislation on private enforcement before the end of her term. Commissioner Almunia entered into a new round of consultations. On 11 June 2013, the Commission published a package of documents that most notably includes a Proposal for a directive on certain rules governing actions for damages under national law for infringements of competition law to facilitate antitrust damages actions in Member States as well as a Recommendation on common principles for injunctive and compensatory collective redress mechanisms in Member States (not limited to antitrust matters).

Even in the absence of the issuance of final EU rules, the Member States throughout the European Union have increased their private antitrust enforcement rights or are considering changes to legislation to provide further rights to those injured by antitrust law infringement. Indeed, private enforcement developments in many of

these jurisdictions have supplanted the EU's initiatives. The English and German courts are emerging as major venues for private enforcement actions. Collective actions are now recognised in Sweden, Finland and Denmark. Italy also recently approved legislation allowing for collective damages actions and providing standing to sue to representative consumers and consumer associations, and France and England are currently also contemplating collective action or class action legislation. Differences will continue to exist from jurisdiction to jurisdiction regarding whether claimants must 'opt out' of collective redress proposals to have their claims survive a settlement (as in the UK), or instead must 'opt in' to share in the settlement benefits (e.g., the proposal in France). Even in the absence of class action procedures, the trend in Europe is towards the creation and use of consumer collective redress mechanisms. For instance, the Netherlands permits claim vehicles to aggregate into one court case the claims of multiple parties. Similarly, in one recent case in Austria, several parties filed a claim by assigning it to a collective plaintiff. Some jurisdictions have not to date had any private damages awarded in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages.

Almost all jurisdictions have adopted an extraterritorial approach premised on 'effects' within their borders. Canadian courts may also decline jurisdiction for a foreign defendant based on the doctrine of *forum non conveniens* as well as comity considerations. In contrast, some jurisdictions, such as the UK, are prepared to allow claims in their jurisdictions when there is a relatively limited connection, such as when only one of a large number of defendants is located there. In South Africa, the courts will also consider 'spill-over effects' from antitrust cartel conduct as providing a sufficient jurisdictional basis.

The litigation system in each jurisdiction to some extent reflects the respective perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Austria, Canada, France, Hungary, Israel, Japan, Korea, Norway, the Netherlands and the UK), with liability arising for participants who negligently or knowingly engage in conduct that injures another party. Turkey, while allocating liability on the basis of tort law, will in certain circumstances award treble damages as a punitive sanction. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway and the Netherlands); others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement, with some (e.g., Russia) focusing on the potential for 'unjust enrichment' by the defendant. In Brazil, there is a mechanism by which a court can assess a fine to be paid by the defendant to the Fund for the Defence of Collective Rights if the court determines the amount claimed as damages is too low as compared with the estimated size and gravity of the antitrust violation. Still others are concerned that private antitrust litigation might thwart public enforcement and may require what is in essence consent of the regulators before allowing the litigation or permitting the enforcement officials to participate in the case (e.g., in Brazil, as well in Germany, where the competition authorities may act as *amicus curiae*). A few jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Chile, Venezuela). Interestingly, no other jurisdiction has chosen to replicate the United States' system of routinely awarding treble damages for competition claims; instead, the overwhelming majority of jurisdictions take the position that damages awards should be compensatory

rather than punitive (Canada does, however, recognise the potential for punitive damages for common law conspiracy and tort claims, as does Turkey). Only Australia seems to be more receptive than the United States to suits being filed by a broad range of plaintiffs – including class-action representatives and indirect purchasers – and to increased access for litigants to information and materials submitted to the antitrust authorities in a cartel investigation. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Cultural views also clearly affect litigation models. Outside the EU and North America, the availability of group or class actions varies extensively. A growing minority of jurisdictions embrace the use of class actions, particularly following a cartel ruling by the competition authority (e.g., Israel). Some jurisdictions (e.g., Turkey) permit group actions by associations and other legal entities for injunctive (rather than damages) relief. Jurisdictions such as Germany and Korea generally do not permit representative or class actions but instead have as a founding principle the use of courts for pursuing individual claims. In some jurisdictions (e.g., China, Korea and Switzerland) several claimants may lodge a collective suit against the same defendant if the claims are based on similar facts or a similar legal basis, or even permit courts to join similar lawsuits (e.g., Romania and Switzerland). In Japan, class actions are not available except to organisations formed to represent consumer members. In contrast, in Switzerland, consumers and consumer organisations do not currently have legal standing and cannot recuperate damages they have incurred as a result of an infringement of the Competition Act. In Poland, only entrepreneurs, not individuals, have standing to bring claims under the Unfair Competition Act, but the Group Claims Act is available if no administrative procedure has been undertaken concerning the same case.

Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Hungary, Korea, the Netherlands, Switzerland and Spain), also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in Chile; in France, where the appointment of independent experts is common; in Japan, which does not have mandatory production or discovery except in narrowly prescribed circumstances; and in Germany, which even allows the use of statements in lieu of documents). In Korea, economic experts are mainly used for assessment of damages rather than to establish violations. In Norway, the Civil Procedure Act allows for the appointment of expert judges and advisory opinions of the EFTA Court. Other jurisdictions believe that discovery is necessary to reach the correct outcome (e.g., Canada, which provides for broad discovery, and Israel, which believes that 'laying your cards on the table' and broad discovery are important). Views towards protecting certain documents and information on privilege grounds also cut consistently across antitrust and non-antitrust grounds (e.g., no attorney–client, attorney work product or joint work product privileges in Japan; limited recognition of privilege in Germany; extensive legal advice, litigation and common interest privilege in the UK and Norway), with the exception that some jurisdictions have left open the possibility of the privilege being preserved for otherwise privileged materials submitted to the antitrust authorities in cartel investigations. Interestingly, Portugal, which expressly recognises legal privilege for both external and in-house counsel, nonetheless provides for broad access to documents to the Portuguese Competition Authority. Some jurisdictions view settlement as a private matter (e.g.,

France, Japan and the Netherlands); others view it as subject to judicial intervention (e.g., Israel and Switzerland).

The culture in some jurisdictions, such as Germany, so strongly favours settlement that judges will require parties to attend hearings, and even propose settlement terms. In Canada, the law has imposed consequences for failure to accept a reasonable offer to settle and, in some jurisdictions, a pretrial settlement conference is mandatory.

As suggested above, private antitrust litigation is largely a work in progress in many parts of the world. Change occurs slowly in some jurisdictions, but clearly the direction appears to be to acknowledge that private antitrust enforcement has a role to play. In Japan, for example, over a decade passed from adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; also only recently has a derivative shareholder action been filed. In other jurisdictions, the transformation has been more rapid. During the past year in Korea, for example, private actions have been brought against an alleged oil refinery cartel, sugar cartel, school uniform cartel and credit card VAN cartel. In addition, the court awarded damages to a local confectionery company against a cartel of wheat flour companies. In the past year alone, some jurisdictions have had decisions that clarified the availability of the pass-on defence (e.g., France and Korea) as well as indirect-purchaser claims (e.g., Korea).

Many of the issues raised in this book, such as the pass-on defence and the standing of indirect purchasers, remain unresolved by the courts in many countries and our authors have provided their views regarding how these issues are likely to be clarified. Also unresolved in some jurisdictions is the availability of information obtained by the competition authorities during a cartel investigation, both from a leniency recipient and a party convicted of the offence. Other issues, such as privilege, are subject to change both through proposed legislative changes as well as court determinations. The one constant across all jurisdictions is the upward trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
August 2013

Chapter 5

BRAZIL

Carlos Francisco de Magalhães, Gabriel Nogueira Dias and Cristiano Rodrigo Del Debbio[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The Brazilian courts are no strangers to private competition litigation. From the classic judicial controversy over the validity and extension of a non-compete clause at the beginning of the 20th century to the groundbreaking decisions on monopoly rights and market closure upheld by the Supreme Court in the 1950s, the Brazilian judiciary has always been extraordinarily active in antitrust litigation. Competition violations can take many forms and the Brazilian courts have dealt with practically every type as they became progressively more complicated – especially after the stupendous development of the Brazilian economy in the past two decades.

Brazilian courts regularly deal with claims involving non-compete clauses and refusals to deal, exclusivity agreements, abusive conduct and predatory practices. Unfair competition is a common cause of disputes among Brazilian competitors, who are constantly seeking for the courts to address issues ranging from intellectual property violations and breach of trade secrets to the illegal luring of employees and administrators. Disparagement in the market through illegal and abusive advertising is also a common fount of litigation – even more so after the enactment of the Brazilian Consumer Code and its stricter advertising rules.[2] Furthermore, the opening of the Brazilian market to foreign companies and investments and the sale of state enterprises to private buyers (privatisation) increased the numbers of players and heightened competition like never

1 Carlos Francisco de Magalhães and Gabriel Nogueira Dias are partners and Cristiano Rodrigo Del Debbio is an associate at Magalhães e Dias Advocacia.

2 Federal Law No. 8078/90.

before in the country. Finally, the creation of several relevant regulatory agencies[3] introduced a whole new battlefield for competitors.

The recently enacted Federal Law No. 12,529/2011 (Brazil's current Competition Law) is expected to provide an even bigger boost to competition litigation, as companies will turn to it to augment their lawsuit claims, as with the former legislation (Law No. 8884/94). In recent years, as the Administrative Council of Economic Defence (CADE) has gained visibility – and its significant investment in competition advocacy has started to mature – Brazil has experienced a surge of class actions aimed at redressing collective damages caused by antitrust violations to the market as a whole, most of them due to the initiative of the state and federal branches of the Public Prosecutors' Office. Although Brazil does not have the same powerful tools and incentives for collective litigation as other countries,[4] CADE has been searching for new and more effective ways to encourage victims to claim damages as a group, aiming to amplify the deterrent effect of the Agency's decisions. For example, in its industrial gas cartel decision, CADE has openly incentivised associations and other injured parties to file collective claims against the defendants.[5] CADE has also decided to take a more active role in individual disputes, joining several private lawsuits as an *amicus curiae*, to ensure its view of the Competition Law will prevail also in the courts.

There always has been, therefore, ample scope for private competition litigation in Brazil, and these disputes will further intensify in the future as collective antitrust actions become an important tool to redress damages suffered by victims and consumers.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Article 5 (XXIV) of the Brazilian Federal Constitution establishes as a fundamental guarantee that any injury or threat to a right can be submitted to the judiciary. This

3 For example, Agência Nacional de Energia Elétrica (Aneel) governed by Federal Law No. 9.427/96 (electricity); Agência Nacional De Telecomunicações (Anatel) governed by Federal Law No. 9.472/97 (telecommunications); Agência Nacional de Petróleo (ANP) governed by Federal Law No. 9.478/97 (oil and gas); Agência Nacional de Vigilância Sanitária (Anvisa) governed by Federal Law No. 9.782/99) (health regulation); Agência Nacional de Saúde Suplementar(ANS) governed by Federal Law No. 9.961/00 (private health insurance); Agência Nacional de Águas (ANA) governed by Federal Law No. 9.984/00 (water); Agência Nacional de Transportes Aquaviários (Antaq) governed by Federal Law No. 10.233/01 (water transportation infrastructure); Agência Nacional de Transporte Terrestre (ANTT) governed by Federal Law No. 10.233/01 (transportation) and Agência Nacional de Aviação (Anac) governed by Federal Law No. 11.182/05 (aviation).

4 For instance, Brazil does not have a 'triple damages rule' for antitrust private litigation.

5 For example, in the Administrative Procedure No. 08012.009888/2003-70, after passing a judgment against the companies involved in the gas cartel, CADE determined that a copy of the judgment should be delivered to several trade confederations, federations and associations so that any interested parties might be notified of the possibility of filing claims for damages.

is the basic foundation for the prevention and redress of any and all damages under Brazilian Law. Moreover, Federal Law No. 10406/2002 – the Brazilian Civil Code (CC) – sets out the right to obtain compensation for any damages suffered due to wrongful or unlawful behaviour. This general torts rule is applicable to virtually all disputes involving competition issues. In fact, before the enactment of the Competition Law, the CC was at the heart of practically every claim involving unfair competition, abuse of economic power and contractual restrictions in general. To this day, the CC continues to regulate damages, causation and liability – and the breadth and versatility of its rules allows its enduring applicability to competition issues.In addition, Article 29 of Federal Law No. 8884/94 establishes that any injured individuals, on their own or through their representatives or substitutes, may file suit to cease or to seek compensation for any violation of the economic order, regardless of any prior decision or authorisation from CADE. Indeed, as the judiciary has final authority in Brazil over any dispute, victims do not have to wait for CADE to investigate the violation and declare the liability of the offender. Actually, victims are allowed to go to court even if CADE has expressly decided that no violation has occurred[6] – given that courts are not bound by CADE's judgment and therefore are free to take a different view of the matter.[7]

The time limit for these lawsuits is three years for injured parties in general,[8] and five years if the victim is a consumer,[9] counted from the date the damage occurred.[10]

Together with the full compensation of damages, victims are allowed to request injunctions to prevent or stop the anticompetitive behaviour. The Brazilian courts, for example, can impose daily, weekly or monthly fines on the offender, in order to force him or her to comply. The courts structure the fines according to the situation, and have ample discretion to raise their amount, if compliance is not immediate. Fines may be accompanied by any other measure needed to stop the antitrust violation.[11] For example, courts have the power to suspend contract clauses, restore unlawfully terminated agreements and impose obligations to deal. In extreme cases, the courts may even intervene directly in the defendant's business.[12] In these situations, intervention must address the crisis in a proportional and adequate manner, such as appointment of a court official to monitor the defendant's activities or temporarily replacing its administrators. The judicial intervention, in any case, must not exceed 180 days.

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6 As an example, the Secretariat of Economic Defence – a former part of Brazilian Competition Defence System, now replaced by CADE – opened investigations questioning the legality of the radius clause on shopping centres, and CADE has considered those clauses illegal in a couple of situations. The Brazilian courts, however, have consistently upheld the validity of those same clauses.

7 Naturally, even if judges are not bound by CADE's opinion, its authority as the antitrust agency will lend considerable weight to its influence on the judicial decision.

8 Article 206(3)(V) of the CC.

9 Article 27 of the Brazilian Consumer Code (CDC).

10 Every instance of damage (i.e., multiple purchases from a cartel) is counted individually.

11 Article 461 of the Brazilian Code of Civil Procedure (CPC).

12 Article 102 of Federal Law No. 12,529/2011.

III EXTRATERRITORIALITY

Under Article 88 of the CPC, Brazilian courts have jurisdiction over any dispute:

a where the defendant, regardless of nationality, has a registered office or a subsidiary in Brazil;

b where the obligation shall be performed in Brazil; or

c that has arisen from a fact or act that took place in Brazil.

In the presence of any of the above conditions, regardless of the nationality of the parties,[13] the lawsuit may be filed in Brazil.[14] Foreign plaintiffs, however, are required to post a judicial bond for the full amount of the court and attorneys' fees in order to litigate in Brazil.[15] The Brazilian Competition Law is only applicable to acts committed in Brazil or that may produce effects in Brazil.[16] Therefore, competition violations committed abroad by Brazilian companies that produce no effects in Brazil may still be litigated in Brazilian courts but will be governed by foreign law. Ongoing disputes abroad do not prevent the filing of the same suit in Brazil.[17] If a final judgment has been rendered in a foreign court, it may be enforced in Brazil upon prior submission to the Superior Court of Justice for homologation (*exequatur*).[18]

IV STANDING

In Brazil, private antitrust lawsuits can be filed by the injured party or its successors. Collective lawsuits (class actions) may be filed only by:

a the Ministerio Publico;[19]

b the union, states, municipalities and the federal district;

c direct and indirect public administration entities and agencies; or

13 See, Federal Supreme Court (STF), SEC No. 6684/EU, Reporter Justice Sepulveda Pertence, Full bench, adjudged on 19 August 2004, DJ of 8 October 2004; CR No. 10686 AgR/EU, Reporter Justice Mauricio Correa.

14 If there is more than one defendant, as long as one is domiciled in Brazil, all the other can be jointly sued in Brazil.

15 Article 835 of the CPC. The bond must be equivalent to 20 per cent of the amount in dispute (which means, as a rule, the amount requested for the award, if it is a net value).

16 Article 2 of Federal Law No. 8884/94,.

17 Article 90 of the CPC.

18 The Superior Court of Justice will not examine the merits of the foreign judgment, but ascertain if it does not breach any provision of public order or social interest.

19 In general, the Public Prosecutor may only defend the consumers. Except for extraordinary circumstances, the Public Prosecutor cannot act on behalf of injured companies (Superior Court of Justice (STJ) EREsp 141491, Waldemar Zveiter)

d associations in existence for at least one year that include among their purposes the defence of interests and rights of their members.[20]

Private companies or individuals are not authorised to file collective actions on behalf of the parties injured by anti-competitive behaviour.

V THE PROCESS OF DISCOVERY

Brazilian civil procedure does not have anything similar to pretrial discovery: all evidence must be produced in court before the judge during the lawsuit. The CPC deems admissible all legal means of evidence, as well as those that are morally legitimate (i.e., evidence that does not unreasonably violate, for example, the intimacy or privacy of the parties). Telephone tapping is generally considered illegal, whether the recording was conducted by a third party or by one of the parties to the conversation[21] – although occasionally the courts will admit the recording as evidence, if it is necessary to prove the innocence of the defendant in a criminal trial.[22]

There is no legal hierarchy regarding the different types of evidence, so courts are free to weight them as they see fit.[23] The burden of proof falls on the plaintiff as a general rule[24], but litigation involving consumers may shift the burden to the defendant, if the plaintiff is deemed more vulnerable (i.e., when there is a significant asymmetry of information or economic resources between the parties). The parties must declare early on in the lawsuit the types of evidence they intend to produce or to obtain through discovery[25] – failure to comply with this rule may result in the loss of the right to produce the evidence, as judges do not usually request its production *ex officio*.[26] The most common types of evidence in Brazil, expressly regulated in the CPC, consist of: (1) the testimony of parties and witnesses; (2) documental evidence; (3) expert examination (See Section VI, *infra*).

20 Recently established associations may file class actions, if they show that the damage they are addressing has extraordinary social interest.

21 STJ-RT 743/208; RF 342/307; RT 620/151; 789/293; 815/242; 828/250; JTJ 143/199; 916/221.

22 STF, HC No. 74.678, Reporting Justice Moreira Alves.

23 Article 131 of the CPC.

24 Article 333(I) of the CPC.

25 Plaintiffs must specify the evidence they want to produce when the defendant files the claim. Defendants must specify it in their defences.

26 Although exceptionally the judge may determine, *sua sponte*, the production of evidence if he or she considers it necessary to clarify some doubt or if it is indispensable for the proper judgment of the dispute.

i Deposition and testimony of witnesses

Each party is entitled to request the testimony of the other[27] (however, they cannot request their own deposition in court). The main goal of the deposition is to get the other party to confess – that is, to admit facts that are detrimental to their cause.[28] Therefore, when summoned to depose, parties cannot fail to show up in court, nor can they refuse to answer the questions posed by the judge or by their opponent: if they do, without proper and justified cause, the judge will treat their behaviour as an admission of the veracity of the claims made by their opponent.[29] Parties have the right to summon up to 10 witnesses[30] – limited to three for each of the facts that the party intends to prove. Witnesses can be challenged for impediment (for example, kinship) or suspicion (close friendship, or strong animosity demonstrable through objective fact).[31] The testimony is mediated by the judge, as parties are not allowed to ask questions directly to the witness. Witnesses are not obliged to testify about facts that may endanger them or their relatives; or about facts that they are bound to keep confidential.[32]

ii Documents

Parties may produce in court any document within their possession. Brazilian law treats as a 'document' any material representation apt to reconstitute or preserve an image, sound situation, idea, wish, etc. Therefore, contracts, declarations, commercial records, photographs, digital files (e-mails) and sound recordings are considered documents. There are several rules governing the admissibility and validity of each different type of document, but, as a general rule, parties must produce the original document in court. The law establishes, however, that courts may accept copies, if properly certified by a public notary[33] or if the lawyer takes responsibility for the accuracy of the copy.[34] If the document is not in possession of the party, courts may be asked to reclaim them from the opposing party or any third party.[35] For that to happen, however, the requesting party must describe the document as precisely as possible and inform the purpose of the evidence. The party must also demonstrate a reasonable belief that the document exists and is in possession of the other party. Therefore, Brazilian law does not leave much room for 'fishing expeditions'. Refusal to surrender the document may result in the penalty of confession or the search and seizure of the document.[36] Parties, nonetheless, are allowed

27 Article 342 of the CPC.

28 Article 348 of the CPC.

29 Article 343(2) of the CPC.

30 Article 407 of the CPC.

31 Article 405 of the CPC.

32 Article 406 of the CPC.

33 Article 365 of the CPC.

34 Courts may also allow simple copies, as long as the opposite party does not challenge the document.

35 Article 355 of the CPC.

36 Articles 359 and 362 of the CPC.

to refuse to handle documents that may subject them to the risk of a criminal action[37] – a very important limitation, when one is dealing with cartel cases. Any document introduced in the lawsuit can be challenged for its authenticity. Documents produced in previous lawsuits or administrative proceedings – for example, those introduced before CADE or any other regulatory agency – are also admissible under Brazilian case law as 'borrowed evidence'. The same applies to documents produced in foreign legal or administrative proceedings.[38] It is important to note that administrative proceedings before CADE are sometimes confidential, meaning that third parties – including victims – may not have access to the evidence produced in them. In the industrial gas cartel case, for example, part of the evidence used to convict some of the defendants is confidential and, therefore, would not be readily available to potential plaintiffs. There is no case law addressing this situation.

Exceptionally, courts may admit witnesses' depositions or the seizure of documents as a preliminary measure.[39] The deposition of witnesses may be anticipated as long as there is a risk of the witness defaulting (for example, leaving the country) or dying.[40] Documents, on the other hand, may be obtained insofar as their content is necessary for the evaluation of a future dispute.[41]

VI USE OF EXPERTS

If the dispute requires the assessment of technical issues, the judge either *ex officio* or upon the parties' request will summon an expert in the field to perform an examination.[42] Antitrust issues usually involve the opinion of an economist or accountant but depending on the relevant market, product or infrastructure involved in the dispute the court may summon the aid of engineers, doctors or any other expert in the related field (expert examination can involve multiple fields[43]). The court will determine the scope of the technical opinion and parties are allowed to pose questions they want the expert to address in his or her examination. In order to perform the examination, the expert may use any means available, including questioning witnesses and requesting documents held by the parties. The expert can, therefore, demand books, records and other economic information of the parties to calculate, for example, lost profits or illegal surcharges applied to goods or services. The parties are allowed to hire their own experts to monitor and critique the work of the court expert. The court is not obligated to follow the opinion of the expert, but the examination does lend exceptional weight. In addition to the expert examination determined by the court, the parties are allowed to introduce their

37 Article 363 of the CPC.

38 They must, however, first be duly translated to Portuguese.

39 Articles 846 and 844 of the CPC.

40 Article 847. Brazilian courts have allowed some leeway, permitting the evidence to be produced early despite being outside legal cases (STJ, REsp 50492, Reporter Justice Ruy Rosado).

41 Article 844 of the CPC.

42 Article 420 of the CPC.

43 Article 431-B of the CPC.

own independent analyses, economic studies or legal opinions of jurists and authorities in order to advance their case. The courts tend to be open to these contributions, as long as they respect due process – that is, as long as they are not being used to surprise the other party or to hinder the progress of the lawsuit. CADE's decision regarding an antitrust violation will be treated as a document, as it was not produced by a court expert. Because of the authority and knowledge of the antitrust agency on the matter, however, it will carry undeniable weight with the court.

VII CLASS ACTIONS

Under Brazilian law, class actions can only be filed by the entities or associations determined by law and cannot be brought by a single private party or a corporation.[44] Class actions must involve collective rights; the Brazilian system identifies three types of 'collective' rights this purpose:

a diffuse rights, which are indivisible, entitled to undermined holders and related to factual circumstances;

b collective rights, which are indivisible and entitled to groups, categories or classes of individuals related among them or with the opposing party by a basic legal relationship; and,

c homogeneous individual interests or rights, resulting from a common origin – which is the case with class actions aimed to redress antitrust damages.

Courts are allowed to grant provisional remedies in class actions so long as there is *prima facie* evidence of the strength of the claim and, cumulatively, there is risk of extraordinary damages resulting from procedural delay. As sound as the lawsuit may be, courts generally understand that the mere delay of the lawsuit poses no risk to claims for monetary damages. For that reason, it is very unlikely that courts will grant an injunction for a quicker payment of damages. If the class action is successful, it will benefit the whole class. A judgment against the collective plaintiff, however, will not harm the individual rights of the members of the class – who can, therefore, still file their own private claims against the defendant.[45] A successful class action aimed to redress antitrust injuries develops in two phases: first, the court establishes the competition violation and the liability of the defendant, rendering a collective decree;[46] next, each injured member of the class must act individually to claim its own damages.[47] If not enough injured parties claim damages, based on the estimated size and gravity of the antitrust violation, the court may assess a fine to be paid by the defendant to the Fund for the Defence of Collective Rights.[48]

44 With the exception of associations.

45 Article 103 (I) of the CPC.

46 Article 95 of the CPC.

47 Article 97 of the CPC.

48 Article 100 of the CDC.

VIII CALCULATING DAMAGES

All kinds of damages suffered by the victim can be claimed under Brazilian law, being either material damages (any type of monetary damages, including forgone profits and loss of business) or pain-and-suffering damages (i.e., injury to the reputation or good standing of the victim). Such damages are not to be confused with the punitive damages of, for example, the United States, as it is not their purpose to penalise the offender. To be entitled to a claim for pain and suffering in an antitrust case, the victim must effectively prove an actual injury to his reputation. There is not a strong set of judicial precedents for pain-and-suffering damages in cases involving private antitrust litigation – although there are usually material damages involved, and with the exception of disparagement cases, the reputation or good standing of the victim is seldom tainted by a competition violation – but ordinarily the awards in such cases do not exceed five hundred times the Brazilian minimum wage.[49]

On the other hand, in recent years, some collective actions – especially those filed by public prosecutors – have demanded compensation for 'social' damages caused by the offender (i.e., the damage to the whole market). Those claims usually work as disguised claims for punitive damages, but they have sometimes been accepted by the courts, mainly in cases involving labour claims or mass torts.[50] In individual actions, the award also includes the payment of attorney's fees (aimed at the lawyers, not the party[51]), usually between 10 per cent and 20 per cent of the amount under dispute. Defendants also may be subject to the payment of attorney's fees if the class action is filed by a private party.[52]

IX PASS-ON DEFENCES

Brazilian law allows pass-on defences by offender (i.e., the allegation that the plaintiff passed on its losses to third parties or end consumers). The CC expressly sets out that indemnification must be measured according 'to the extent of the damage',[53] which means that it must not go beyond what was concretely lost by the victim. Therefore, there is a strong body of case law stating that victims cannot claims damages over losses that were already paid or covered by someone else (v.g. insurance company or a third party).

X FOLLOW-ON LITIGATION

Only a small fraction of Brazilian private antitrust litigation actually depends on CADE's decisions. Each conflict is fought directly by the parties in court, even if in some there is also a collective issue lurking under the dispute. Companies usually do not wait for CADE

49 Approximately 339,000 reais.

50 See STJ, REsp No. 1.057.274, Reporting Justice Eliana Calmon.

51 In the event that the plaintiff is the losing party, the plaintiff will be compelled to pay attorney's fees to the defendent.

52 See STJ, REsp No. 200600937910, Reporting Justice Luiz Fux.

53 Article 944.

or even for its regulatory agencies to take action over matter affecting their business – mainly because, as previously mentioned, under Brazilian law victims are not obligated to wait for an administrative decision to seek relief in court. As a result, follow-on litigation is usually not a relevant issue for companies and entrepreneurs. As class actions for damages have caused consumers to take a more prominent role in the system, however, more and more associations (and sometimes even the Public Prosecutor's Office) are turning to CADE for information and guidance regarding collective antitrust violations.

That being said, there are virtually no limitations in Brazilian law regarding follow-on litigation. A decision from CADE whether to convict or absolve a defendant does not prevent private antitrust litigation. The payment of administrative fines does not release the defendant from repairing the damages caused by the antitrust behaviour. An administrative conviction, however, may foster private antitrust ligation, since it may make it easier, faster and less costly for collective plaintiffs to demonstrate the liability of the defendant and the damages caused to the market in a civil court.[54] Leniency agreements or cease-and-desist agreements entered into by a defendant may involve some sort of admission regarding the antitrust behaviour or the facts underlying the investigation. Should the defendant plead guilty for the purposes of those agreements, he or she will not be allowed to discuss his or her liability in follow-on individual or collective litigation (agreements, however, are always restrictively interpreted in Brazil).

XI PRIVILEGES

Under Brazilian law, attorney–client communication is privileged.[55] This privilege extends to the law office or place of work, as well as to the professional tools, work product, written, electronic, telephonic and telematic communications.[56] There are only two exceptions: where there is evidence indicating the authorship and material practice of a crime by the lawyer;[57] and when the lawyer holds an element of the *corpus delicti*[58] (Brazilian law does not differentiate between external and in-house counsel).[59] According to the Brazilian Federal Constitution, all correspondence and data communication is inviolable and therefore cannot be used for litigation purposes.[60] There is, however, no consistent body of case law defining whether this provision also encompasses e-mails or

54 Sometimes, however, according to Federal Law No. 8884/94 CADE may punish the behavior of the defendant based on its potential to cause damages to the market. In these cases, CADE does not have to show the behavior caused actual damages. Plaintiffs on private antitrust lawsuits, however, still have the burden to show the damages they suffered.

55 Article 133 of the Federal Constitution.

56 Article 7 of the Federal Law No. 8906/94.

57 Article 7(6) of Federal Law No. 8906/94.

58 Article 243(2) of the Brazilian Code of Criminal Procedure.

59 However, in practice, in-house counsel may have its documents seized (for example, during a search carried out in the company's headquarters) and the court will select afterwards what may be included in the administrative or judicial proceeding.

60 Article 5 (XII) of Federal Law No. 8906/94.

other forms of electronic communication. It is also of note that several precedents have allowed the use in court of opened letters and e-mails, under the principle that the Federal Constitution protects the transmission of data (the communication process) but not its content.[61] On the other hand, the Brazilian Constitution allows wiretapping 'by court order, in the situations and in the manner provided by law for the purposes of criminal investigation or fact finding'.[62] Once the recording has been used in a criminal court, parties may present it (or its transcription) as evidence in administrative proceedings or civil litigation.[63]

XII SETTLEMENT PROCEDURES

Parties are allowed to settle disputes involving alienable rights at any time. Settlements are, in fact, encouraged by Brazilian courts and may even encompass rights or obligations that are not part of the original lawsuit. A settlement in or out of court carries the same weight as *res judicata*, so that the controversy, once settled, cannot be discussed again by the parties.

Class actions, in comparison, allow very limited room for settlements. If the plaintiff is the Public Prosecutor's Office, Brazilian law allows the execution of a term of adjustment (TAC) for the purpose of ceasing a violation of collective rights; for example, the defendant compromises by stopping the behaviour and pay a collective fine, therefore avoiding the uncertainties and risks of a collective lawsuit. The payment of a fine, however, no matter the amount, does not relieve the defendant from the obligation of redressing individual damages, as the TAC cannot dispose about the individual rights of the victims. Therefore, it has very limited use for settling antitrust damages.

XIII ARBITRATION

Under Federal Law No. 9307/96 (Brazilian Arbitration Law) parties may resort to arbitration only to solve disputes involving alienable property rights. Law No. 8884/94 establishes that competition is a matter of public interest, narrowing the possibilities of using arbitration to deal with antitrust litigation. In theory, it is possible to employ arbitration in Brazil to dispute the amount of damages caused by a cartel, for example. It is very unlikely, however, that a defendant would voluntarily join an arbitration of such scope. On the other hand, agreements entered into with arbitration clauses may generate disputes involving antitrust issues – for example, contracts with exclusivity clauses. In such cases, it is possible that the arbitrators will have to face an antitrust

61 See opinion in MS 21729, Full Bench, 10.05.95, Reporter Justice Neri da Silveira – RTJ 179/225, 270). (STF – RE 418416, Reporter Justice Sepulveda Pertence, Full Bench, adjudged on 10 May 2006, DJ 19 December 2006).

62 Federal Supreme Court (STF) – Inq. 2424, Reporter Justice Cezar Peluso, adjudged on 26 November 2008, Full Bench, DJE of 26 March 2010.

63 Federal Supreme Court (STF) – Inq. 2424-QO-QO, Reporter Justice Cezar Peluso, adjudged on 20 June 2007, Full Bench, DJ of 24 August 2007.

issue as part of their brief.[64] The Brazilian Arbitration Law establishes, however, that an arbitration award may be voided by the courts if the decision conflicts with public interest provisions.[65] Moreover, the arbitration clause does not prevent the injured party from seeking an administrative decision from CADE, which will not be bound in any way to the arbitration award. This means that CADE can decide to investigate and may punish behaviour or contractual clauses that are under arbitration or even that were considered fully lawful by the arbitrators.

XIV INDEMNIFICATION AND CONTRIBUTION

In the event of a competition violation, Brazilian law provides that all the individuals involved in the conduct – for example, all the members of the cartel – will answer jointly for the damages they caused.[66] This means that each of the offenders can be called to answer for the full amount of damages. Furthermore, administrators and sometimes the employees involved in the conduct may also be liable for the damages. Brazilian law also allows piercing of the corporate veil in cases of fraud or property commingling[67] – so that the victim, in some cases, may seek reimbursement from other companies of the same group, even if they did not participate directly in the violation.

XV FUTURE DEVELOPMENTS AND OUTLOOK

As mentioned in our introduction, competition disputes have always been an important part of the repertoire of Brazilian courts and they have experienced an exponential increase due to the country's rapid economic development since the 1990s. As Brazil takes a more prominent role in the world economy, the growing influx of foreign capital and investment and the expansion of its national players will lead to the inevitable escalation of competition conflicts – and the courts, as always, will be the final (if they are not the first) port of call for those disputes. CADE, naturally, will continue to play a fundamental role in the system, both as the antitrust authority and as the main voice of competition advocacy in Brazil, acting as guiding light for the associations and groups that will promote collective actions for the protection of consumer victims.

The recent reform of the Brazilian competition system, in which the former three administrative entities in charge of antitrust analysis and investigation – the Secretariat for Economic Monitoring (SEAE), the Secretariat of Economic Defence (SDE) and CADE – fused into 'SuperCADE' is expected to provide a significant increase in efficiency and in the rate of antitrust investigation and merger analysis.

64 The Brazilian system also provides for the possibility of arbitrators suspending the procedure and remanding to the Judiciary the decision of a matter involving inalienable rights (Article 25).

65 Article 32 of Federal Law No. 9307/96.

66 Article 942 of the CC.

67 Article 50 of the CC.

Furthermore, Brazil is currently considering some relevant legislation reforms aimed at improving its judicial civil procedure and consumer protection environment that, if enacted, will significantly affect private competition litigation.

There is a bill for a new CPC (Bill No. 8046/2010), which is also expected to reduce the cost and duration of civil lawsuits. A Legislative Senate Commission has also been assigned to work on a bill for a new Consumer Code. The Commission is currently studying changes in Brazilian class actions in order to encourage further their use by consumers. At the same time, several regulatory agencies are contemplating changes in their procedures and regulation to create more competition in regulated sectors.

In summary, private antitrust litigation is entrenched in Brazilian judicial culture and will continue to flourish in the future as companies in Brazil tend to consider the judiciary their main source of protection from unfair competitors and competition misconduct. In addition, class actions aimed at redressing collective damages caused to consumers are also expected to experience a significant boost in the near future as a result of CADE's remarkable efforts in competition advocacy.

Appendix 1

ABOUT THE AUTHORS

CARLOS FRANCISCO DE MAGALHÃES

Magalhães e Dias Advocacia

Carlos Francisco de Magalhães is an expert in commercial and competition law and a pioneer in the competition area in Brazil. He is the creator and founder of IBRAC (the Brazilian Institute of Studies on Competition, Consumption and International Trade), and has been the author of studies, articles and opinions on competition law published in specialised magazines and journals since 1970.

A member of several government committees that prepared amendments to the Brazilian Competition Defence Act, particularly the bill that originated most of the provisions of the current law, he drafted the provisions on Infringements and Submission of Concentration Acts for the analysis of the Brazilian System of Competition Defence.

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Gabriel Nogueira Dias is distinguished for his academic expertise and intense involvement in highly complex cases. He has an LLB from the Law School of the University of São Paulo and was granted an LLM and LLD by the Law School of Bonn. A former adviser to the president of the Administrative Council of Economic Defence (CADE), he was directly responsible for the development of new resolutions and opinions during his tenure. Currently, he is also director of Legislative Monitoring at IBRAC (the Brazilian Institute of Studies on Competition, Consumption and International Trade). He is the author of several articles and an award-winning book published by the German publisher Mohr Siebeck.

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Cristiano Rodrigo Del Debbio graduated from Pontifícia Universidade Católica de São Paulo (1999) and has a master's degree in civil procedure from Universidade de São

Paulo (2005) and an LLM from the University of Chicago (2007). Mr Del Debbio has extensive experience in complex commercial and antitrust litigation, including class-action suits and collective claims, before judicial and administrative authorities, involving banking and credit cards, petrochemicals, telecommunications, agribusiness and health insurance.

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