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“Damage claims in competition matters: The dawn of a new era?”

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National Report of Brazil

Karen Ruback

Grinberg e Cordovil Advogados
Al. Santos, 787, cj. 81, São Paulo
01419-001, Brazil
+55 11 3371-5050
kcr@gcalaw.com.br

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CHAPTER I: STATUS QUO OF PRIVATE ENFORCEMENT

1. How would you summarize in few lines the status quo of private enforcement in your jurisdiction?

There has been relatively little litigation related to damage claims in competition matters in Brazil, but an increasing number of such claims have been filed in the past few years.

Among the factors triggering the increase of such damage claims in Brazil, the most relevant are the increasing awareness of competition law, especially by the potentially injured parties; a higher number of condemnatory decisions issued by the antitrust authority – the Administrative Council for Economic Defense, CADE; and an increasing involvement of the Public Prosecutors with antitrust matters.

CADE's effort to encourage suits seeking individual and collective redress should also be mentioned. A decision issued on September 2010 can be considered a milestone: the decision referred to the Brazilian redress system as a way to recover pecuniary and moral damages, and recommended sending a copy of the decision to potentially injured parties and entities who have legal standing to file suits for collective actions¹. Since then, an increase in damage claims filed is effectively noted.

Nevertheless, factors such as the length of a judicial case and the difficulty of proving the antitrust behavior by the plaintiffs remain as real challenges for suing for damages in Brazil.

- a. ***[For Non-EU Member States]* Can individuals (or only consumer organisations) file an antitrust damage claim? Who can bring an antitrust damages claim? (i.e. are there any requirements or limitations to standing in private enforcement proceedings?)**

If yes, what is the legal basis (codified or case law) and are they able to submit both stand alone and follow-on actions?

Individuals, firms, associations, the State and Federal Prosecutors, among other entities can file antitrust damage claims in Brazil.

Firms and individuals (and their successors) that have suffered losses as a result of an antitrust infringement are entitled to sue for damages through a private action for

¹¹ Administrative Proceeding 08012.009888/2003-70 (decision issued on September 2010).

individual redress. The Brazilian Civil Procedure Code sets forth the general rules for individual lawsuits.²

The Law also provides for suits directed to protect collective rights, being that only certain entities stand to file collective lawsuits on behalf of injured parties (such as the Public Prosecutors; the Union, states, municipalities; and certain associations). Therefore, private firms and individuals cannot file collective actions. Various statutes regulate these collective actions³.

The Brazilian Civil Code⁴ contains a general tort rule that gives ground for the right to suit for damages also in regards to antitrust infringements.⁵ The Antitrust Law⁶ also provides for the right to sue to recover losses suffered as result of a violation of the antitrust law (individual and collective actions), and also sets forth the right to request an order to cease the infringement.

An interesting fact regarding parties of a lawsuit is that the Antitrust Authority, CADE, has to be notified in all lawsuits addressing infringement to the antitrust law, so as to give CADE the opportunity, by its discretion, to join the suit as an “assistant” (*amicus curiae*)⁷.

b. [For EU Member States] Can individuals file an antitrust damage claim regardless of the implementation of Directive 2014/104/EU (private enforcement Directive)?

If yes, are they able to submit both stand alone and follow-on actions?

Not applicable for Brazil.

2. [For EU Member States] Has your country already implemented/started implementing the private enforcement Directive?

² As a civil law country, Brazilian law is based on a statutory system, with the main legal rules compiled in codes, which shall be in accordance with the Brazilian Federal Constitution. This system elevates the importance of codified law over judicial precedent

³ The most relevant is Law 7.347/1985 (see article 1º, item V).

⁴ Article 927 of Brazilian Civil Code (Law 10.406/2002) states that any party who causes losses to third parties as a result of a violation of the law shall indemnify the injured parties.

⁵ It shall be mentioned a provision in the Brazilian Federal Constitution of 1988 establishing that the right to sue in case of injury or threat to a right cannot be exempted by any Law (article 5º, item XXXV).

⁶ Article 47 of Law 12.529/2011 (Antitrust Law).

⁷ Article 118 of Law 12.529/2011.

- **If No: Do you believe that your country will meet the deadline?**
- **If Yes: Please give the status quo of the implementation by highlighting in few lines what you consider the most important aspects of the implementation of the private enforcement Directive into national law in your country.**

Not applicable for Brazil.

CHAPTER II: COURT AND PROCEDURE

3. What is (are) the court(s) in charge of antitrust private enforcement?

The Brazilian Judicial Branch is divided into Federal and State courts, and both are in charge of antitrust private enforcement⁸.

a) Is there a specialized court specifically for antitrust based claims?

If No: are there specific chambers for antitrust claims within the civil/commercial courts?

If Yes: is the court composed only by judges, also economic experts and/or other persons?

There is no specialized court specifically for antitrust based claims, nor specific chambers for antitrust claims within the civil/commercial courts.

b) May the court impose interim measures?

Injured parties are allowed to request injunctions to prevent or cease the infringement⁹. When an interim measure is granted by the court, fines (that can be possibly heavy) are usually imposed to enhance the chances that the perpetrator will comply with the preliminary injunction.

⁸ Federal courts have exclusive jurisdiction over any lawsuit in which the federal government or any of its agencies or quasi-governmental bodies are a party (including the antitrust authority, CADE), as well as those involving foreign states or international agencies. The State courts are responsible for the “residual” jurisdiction (i.e., any matter which does not fall within the federal system, such as private commercial litigation).

⁹ Preliminary injunction may be granted when there is *prima facie* evidence on the right argued by the plaintiff and (cumulatively) when there is risk of relevant damages resulting from the delay in issuing a decision.

c) May the trial proceed in parallel and independently of a National Competition Authority investigation?

If so, how likely it is that the court suspends the case up to the National Competition Authority decision?

A damage claim can be filed in parallel and independently of an antitrust authority investigation. The decision of the antitrust authority is not binding to courts. Even if such authority has already decided that there was no violation of the law, the courts can re-examine all evidence and issue a different decision.

It is not expected that the court would suspend the case up to the antitrust authority's decision.

d) Is the decision subject to appeal?

If Yes, does the 2nd (and/or 3rd) instance court assesses both the merit of the case and the law?

The Brazilian Judicial Branch is composed of three instances, plus an additional one specifically designed to analyze violation to the Brazilian Federal Constitution.

The decision issued by the first instance is subject to appeal in regards to both the merit of the case and the law. The decision issued by the second instance is subject to appeal solely in regards to the law, although, in some cases, the reassessment (not re-examination) of the facts detailed in the appealed decision can be allowed¹⁰.

4. What nexus with the jurisdiction is required to bring a private action to a court within your jurisdiction (and to keep it there)? Is there room for forum shopping (eg, is an “anchor defendant” sufficient (cf ECJ, C-352/13))?

Pursuant to the Civil Procedure Law, the general rule is to bring actions where the defendant is located. However, in regards specifically to private damage actions, such Law establishes that it shall be filed in the place where the fact or act (the infringement) was practiced¹¹.

¹⁰ For instance, see decisions issued by the Superior Tribunal de Justiça (a 3rd instance) in REsp 1.036.17 and REsp 683.702.

¹¹ According to article 53. IV, a, of the Civil Procedure Code (Law 13.105/2015). Some controversy exists in regards to this issue. For instance, when the action involves requests other than the

In addition, when the suit includes the antitrust authority, CADE, as party, it can be brought where the author is located, where the infringement occurred, or in the Federal District¹².

5. How long does a single (or collective) antitrust private enforcement action in first instance usually take?

An average of five (5) to ten (10) years for the first instance could be a reasonable estimate.

6. Who bears the legal costs (court fees, the own representation costs and the representation costs of the opposite party)?

During the course of the action, each party has to bear the court fees for the procedural acts performed or required by them (thus, plaintiff pays an initial fee; the party who files appeals pays a certain amount, etc.). By the end of the case, the losing party has to bear (reimburse) all court fees paid by the successful party.

The representation costs are of two types: (i) contractual fees, for own representation, which are freely established between client and attorney, being that a few rules apply; and (ii) losing fees, that have to be paid by the losing party to the attorney of the opposite party.

7. In your jurisdiction, are there any alternative funding options or fee arrangements that can be put in place by the plaintiff (for example conditional fee or damages based agreements)? Please outline and give examples if so. What rules on the assignment/bundling of claims exist in your jurisdiction that could allow third parties to buy claims from cartel victims?

Plaintiffs are free to negotiate contractual fees with their attorneys, although they are bound by some limits established by the Brazilian Bar Association. Agreements such as conditional fee or damages based agreements (named “Quota Litis” in Brazil), working

recovery of damages (for instance, when it includes a request to cease the infringement), one may argue that the general rule of the defendant’s location shall be applied. Another example relates to allegations that if the claimant is a consumer, the action could also be filed where the claimant is located (for instance, where their headquarters are located) in their discretion.

¹² According to article 109 of the Brazilian Federal Constitution.

under a “no win, no fee” arrangement, may be allowed as the sole source of payment only in exceptional cases where the plaintiff cannot afford the fees.

In regards to the losing fees, to be paid to the attorney of the successful party, the court will set the amount and there is no room to negotiate – these fees shall vary from 10% to 20%¹³ of the pecuniary amount of the matter in controversy (i.e., the damages to be recovered).

The exemption of payment of court fees and losing fees is available for individuals who cannot afford to file a claim without compromising their own or their family’s livelihood. A simple statement declaring poverty is enough to be granted this benefit. Legal entities can also be granted this benefit if they prove their inability to afford such fees.¹⁴

Finally, there is no provision in Brazilian law allowing third parties to buy claims from cartel victims.

8. Beside antitrust private actions, does your jurisdiction dispose of a collective redress system?

The Brazilian statutes provides for three different types of collective actions for damages¹⁵. Collective actions in Brazil do not have an essentially private function, *i.e.*, aiming to reduce costs of litigation by reuniting various plaintiffs to pursue reparations from damages suffered. They are mainly related to the protection of collective rights (as the rights of consumers, the society, the environment, free competition). Depending on the type of action, damages awarded will be reverted to a Public Fund and not to the injured parties (for instance, Public Civil Actions aimed at the protection of “diffuse rights”).

Notwithstanding, there are collective actions geared towards claiming damages individually suffered (the “Class Actions for the Defence of Homogenous Individual Interests”), but

¹³ According to article 85, paragraph 2nd of the Civil Procedure Code. Nevertheless, in some cases, the courts have set an amount of losing fees in a range below 10% of the value of the matter (which can be subject to appeal).

¹⁴ Law 1.060/1950, art. 5º, item XXXV of Brazilian Federal Constitution; and Precedent (“Súmula”) of the Superior Tribunal de Justiça n. 481.

¹⁵ The three types are related to (i) “diffuse rights”, considered as indivisible rights, belonging to indeterminate individuals/entities which are related by factual circumstances; (ii) collective [strict sense], referred to a specific group of consumers whose rights are indivisible and are related by a legal relationship; and (iii) homogeneous individual rights, referred to individual rights, related by a common origin – this last type pertains to the usual class actions aimed at redressing antitrust damages in Brazil.

these cannot be brought on by individuals or firms. The following entities have standing for filing collective actions:

- Public Prosecutors¹⁶;
 - The Union, States, Federal Districts and Municipalities;
 - Direct and indirect government agencies and entities (autarchy, public company, foundations or public-private mixed capital companies); and
 - Associations¹⁷.
- If Yes, how it is applicable to antitrust private enforcement, (e.g. direct/indirect purchasers, consumers and/or clients)?**

In regards to a class action which enables collection of damages individually suffered, the entity standing to file the action will represent the injured parties seeking a favorable decision. Such decision will be limited to setting responsibility for damages, that is, recognizing that a violation of the law was practiced by the defendant, causing harm to certain individuals and entities. In a following phase, named as the “liquidation phase”, injured parties (or their successors) shall, in a period of up to one year¹⁸, claim their rights to enforce the decision, and the court will analyse whether they stand for it, and calculate the amount due to each injured party.

- **Do collective redresses operate through an opt-in or an opt-out system? In case of an opt-out system, how is the class defined?**

The definition as opt-in or an opt-out system seems not to fit well for the Brazilian collective redress system, although the opt-in system seems to be similar to the Brazilian Class Actions for the Defense of Homogenous Individual Interests.

¹⁶ Public Prosecutors have been standing out by filing class actions seeking damages suffered as result of antitrust infringements. Some class actions have been filed even before a final decision have been issued by the antitrust authority, CADE.

¹⁷ As a standard rule, associations must have existed for at least one year to stand for a collective action and must have, as their objective, the protection of various diffuse rights. However, this criterion of one year of existence can be dismissed depending on the “public interest” and/or relevance of the right to be protected (Lei n° 7.347/1985, article 5 and paragraph 4°).

¹⁸ After a year without any injured party qualified to claim damages, or with only a few qualified parties, the legal entities who stand stands for filing the class action may enforce the decision to calculate damages and collect them for the Public Fund (*fluid recovery*).

In such class actions (allowing to collect damages individually suffered), notices shall be published in the Official Gazette (and by other means to disseminate the information on the action) so that interested agents can intervene in the procedure as joint parties and later recover their losses caused by the infringement.

- **How is it coordinated with the individual actions' framework?**

An injured party is also entitled to file an individual private damage suit instead of joining the class action, and both actions would be independent from each other (and could even lead to different decisions).

CHAPTER III: EFFECT OF NATIONAL DECISIONS, BURDEN OF PROOF, LIMITATION PERIODS, JOINT AND SEVERAL LIABILITY

9. Are National Competition Authority decisions relevant for individual antitrust claims, in particular

- **as presumption / proof of the infringement in the follow-on case? (f.i. does it matter for the division of the burden of proof between parties if the action is a follow on damages case or a stand-alone action? If so, please elaborate on any difference with regard to the burden of proof)**

The courts are not bound by the antitrust authority's (CADE) decision – all the evidence produced by or under the antitrust authority investigation can be re-examined by the courts. A damage claim can be filed before, during or after the investigation by CADE – even if it has decided that there was no violation of the law¹⁹.

Therefore, CADE's decision is not a presumption/ proof of the infringement. Plaintiffs need to prove both the liability of the defendant, causal link between the infringement and the damages caused (and how much loss it has caused) to them.

- **in terms of the *quantum* of the compensation?**

The decision of the antitrust authority has no effect on the *quantum* of the compensation.

- **for the limitation period?**

¹⁹ As such, two opposite decisions could be issued by the antitrust authority and the courts regarding the same alleged antitrust infringement

CADE's decision is not relevant in regards to the limitation period²⁰.

- else?

If a conviction decision has been issued by CADE, the damage action would probably move faster and be less costly, given the possibility of using the publicly available documents of CADE's investigation as evidence of the infringement.²¹

10. What are the relevant limitation periods (taking into account question 9 above)?

The injured party has three (3) years to file the proceeding asking for restitution of damages²². The term starts to count from the date the damage occurred, and is always counted individually (in regards to each injured party)²³. Note that cartel is usually considered as a continuous infringement, therefore, the term would not be counted from each isolated agreement of cartel participants.

It should be noted the existence of controversy in regards to whether limitation period applies to damage actions caused to the Union. Public Prosecutors have already argued that damages caused by antitrust infringement (cartel) constitutes injury to the public patrimony and are not subject to limitation periods. The result of this controversy is still to be seen²⁴.

11. What is the liability regime as regard parents for the infringement of their subsidiaries?

²⁰ Except for those who understands that the limitation period established in the Consumer Protection Law is allowed for plaintiffs classified as consumers (thus, it could be argued that the consumer became aware of the infringement and authorship through the decision issued by CADE) - see answer to question 10.

²¹ In addition, CADE has to be notified in all lawsuits addressing infringement to the antitrust law and may join the suit as "assistant" (*amicus curiae*) by its discretion. Thus, if a decision has been issued by CADE, there is a remote possibility of having CADE as party in the suit, acting in a way to defend its decision.

²² Article 206, section 3, item V of the Brazilian Civil Code.

²³ Some argue that if the injured party is a consumer, the term is of five (5) years shall apply, and would be counted from the date the consumer became aware of the infringement and of the perpetrator - According to Consumer Protection Code, article 27. Nevertheless, the provision regarding limitation periods established in the Consumer Protection Law seems to apply only to damages established in that Law, but not to damages established in the Antitrust or Civil Law.

²⁴ The Supremo Tribunal Federal is to decide on this issue in connection to the RE 627.432.

Companies that belong to the same economic group are jointly and severally liable for any antitrust infringement practiced by any entity of the group.²⁵

12. Please describe limits and scope of joint and several liability for antitrust infringements performed by undertakings (in particular between cartellists) in civil litigation. Does this differ from liability vis-à-vis the authorities?

Co-conspirators are jointly and severally liable for damages caused by their violation of the law²⁶. Thus, any and each cartel member may be held liable, in civil litigation, for the entirety of damages caused by the illegal actions.

However, co-conspirators are not jointly and severally liable in regards to the administrative antitrust infringement.

CHAPTER IV: DISCLOSURE OF EVIDENCE

13. What evidence is admissible in individuals' actions for antitrust infringements?

The following types of evidence are admissible under the Brazilian discovery system: testimony/witnesses deposition²⁷, documental evidence²⁸, expert evidence, and borrowed evidence²⁹ – under certain restrictions. Wiretappings recorded by the party or a third party, for example, would not be accepted as legal evidence in a damage action (it would be

²⁵ Article 33, Law 12.529/2015 – see, also, article 40, paragraph 3°.

²⁶ The Leniency applicants are not exempted of the joint and several liability.

²⁷ Parties has the right to summon a certain number of witnesses (up to 10, but not more than 3 aimed at proving the same facts).

²⁸ Parties can disclose the documents they possess and request the court to reclaim a document of the other party or a third party (the document shall be described as detailed as possible and the party shall indicate why they believe that such document is in possession of the other party/ third party). Parties may refuse to disclose the requested document if it would cause a risk of criminal action (note that cartel is also considered a criminal offense in Brazil). The standard rule is to disclose the original document, but a copy certified by a public notary or which authenticity is attested by a lawyer is also acceptable.

²⁹ Borrowed evidence is the use of evidence produced in other lawsuits or administrative proceedings. For instance, claimant in a civil litigation could ask the judge to reclaim documents produced in an investigation by the antitrust authority (to use a copy of such documents as evidence in the new case, the civil litigation case).

accepted only to prove guiltlessness in a criminal case). However, wiretapping obtained by court order could be used as evidence³⁰.

- **Is there any pre-trial discovery procedure available?**

Brazil does not have a pre-trial discovery procedure. All evidence is produced before the judge, in court, during the suit.

- **Is there any evidence protected by legal privilege?**

Attorney-client communication is privileged, including attorney's tools, hard copies and electronic documents, e-mails, telephone, among other usual types of communication. The attorney's office is covered under this rule as well³¹.

14. Can the court order the discovery of evidence to defendants or to third parties? Please describe its limits and scope.

The courts have the power to produce any evidence, and the parties shall comply with the courts orders except in regards to their rights of not producing evidence against themselves (avoiding self-incrimination). Third parties may also be requested to inform the judge of all facts and circumstances of which they are aware and to produce any document or anything in their possession.

15. Do the claimants and/or courts have access to the National Competition Authority's files? If so, also during a pending investigation? Please describe its limits and scope.

Claimants can have access to public files of the antitrust authority, CADE, at any time. However, the confidential files cannot be accessed by claimants, be it during the investigation or after it is concluded. Such files, or specific documents of it, could only be accessed by claimants through a judicial order. The court would issue such order, however, only if it is convinced that there are no legal grounds for the confidentiality granted by CADE, or that such grounds do not stand anymore.

³⁰ Conditions allowing the wiretapping and setting limits is established in the Law 9.296/1996.

³¹ This privilege is only invalid, and attorney's documents can be seized, if evidence is presented of authorship and materiality of a crime perpetrated by the attorney. See more details in Law 8.906/1994.

The analysis of whether the protection of certain documents granted by CADE should be enforced will be made by the judge, being unclear on what their decision would be. Nevertheless, the confidentiality of documents disclosed by leniency applicants to CADE, as well as of the documents disclosed by any defendant to CADE upon request of confidentiality dully granted by CADE, is expected to be preserved.

CHAPTER V: THE PASSING-ON OF OVERCHARGES

16. Are indirect purchasers entitled to claim compensation, and which limitation do they face?

The Brazilian law apparently does not establish any limitation to the rights of indirect purchasers for recovery of losses. Anyone who sues for damages must, however, prove that an infringement occurred and that they suffered an injury as result of such infringement – the causal link between the infringement and the harm has to be clearly proved.

17. Are victims of “umbrella damages” entitled to protection against antitrust infringements and to compensation in court?

The general rule of the Brazilian Civil Code establishes that whomever causes harm to a third party, by means of an unlawful act, shall indemnify the injured party. Thus, in theory, if a claimant succeeds in proving that an unlawful act was practiced (which would be a challenge) and the causal link between infringement and damage (an even bigger challenge), the right for indemnification may be granted.

18. Is the passing-on defence allowed?

Brazilian statutes apparently do not establish any limitation to the passing-on defence³².

CHAPTER VI: DAMAGES

³² One may argue that the passing-on defence could not be allowed regarding infringements against consumers, though, given the provisions of the Consumer Protection Law.

19. What form of compensation can be granted by national courts for antitrust violations?

In particular, can national courts accord punitive damages or treble damages or compensatory function exclusively?

As a general rule, “indemnification is measured by the extent of the damages”³³. Claimants may seek damages with compensatory function (pecuniary damages, including actual damages and lost earnings), as well as compensation for moral damages (as injury to the reputation of the claimant).³⁴

CHAPTER VII: QUANTIFICATION OF HARM

20. What do individuals have to prove in court in order to successfully obtain compensation for antitrust damages, who bears the burden of proof?

As a general rule, the party who alleges something has the burden to prove it. Thus, the plaintiff has the burden to prove the unlawful act, the damages suffered, and the causal link between those.

Notwithstanding, the New Brazilian Procedural Code (which entered in force on March, 2016) allows the judge to invert the burden of proof in specific cases such as the impossibility, or excessive difficulty to prove a fact, or in view of easiest access to the evidence by the opposing party³⁵. How this provision will be applied in damage claims regarding antitrust matters is still to be seen.

21. Is there a difference between stand alone and follow-on actions?

³³ Article 944, Civil Code.

³⁴ Nevertheless, one could argue that the Consumer Protection Law allows an injured party to ask for double damages, based on article 42, sole paragraph. One may also argue that article 940 of the Civil Code could also give grounds for requesting double damages.

³⁵ When it relates to damages to consumers, the inversion of the burden of proof (from plaintiffs/consumers to the defendants/firms) has been applied by the courts for a long time, meaning, for instance, that the defendants would have to prove that they did not cause damages to the plaintiffs. The inversion of the burden of proof in collective actions related to consumer damages, however, is controversial - some courts do not grant this benefit when the plaintiff is the Public Prosecutors, for instance.

Does not apply to Brazil, as follow-on actions do not exist in Brazil (considered as actions where claimants can rely on an antitrust authority's findings of infringement and facts, given that the decision of such authority is binding to courts).

22. How is damage quantified?

The law does not contain specific rules on quantification of damages. According to Brazilian law, claimant shall demonstrate the extent of the suffered damages. The use of experts may assist claimant (and defendant) in quantifying the damage.

Moral damages only have to be proven by claimant (i.e., actual injury to reputation, or good standing); whereas the amount to be awarded will be stipulated solely by the court. Usually using precedents as reference.

23. What defence is recognized, if any, for defendants (besides the passing-on defence (question 18 above), if applicable)?

There are no restrictions to defence arguments from defendants in Brazil. An example of a defence arguments, in a certain case, is that the defendant argued that plaintiff must prove the cartel, despite the fact that the defendant had plead guilty in CADE's investigation (being that the confession-related documents have been protected as confidential by the antitrust authority). The court recognized, in that case, that the confidential documents given by the defendant to CADE could not be accessed by claimants, who would still have the burden to prove the infringement.

The most usual defence arguments relate to contesting that the facts investigated constitute infringement to the antitrust law (even when a convicting decision by the antitrust authority has been issued). In some cases, the court agreed with the defendants in regards to the lack of proof of the infringement, denying damages claimed by the plaintiff.

24. What is the role of economic experts, if any?

Economic experts, as any other type of expert, will produce reports which can be utilized by the courts in their proceedings. Notwithstanding, these opinions are not binding, and would be used solely to aid the judge, who has discretionary conviction to lay down his decision.

25. What other types of experts are typically engaged in your jurisdiction?

The expert elected will naturally depend on the type of case at hand and what has to be proven. Nonetheless, accounting and legal experts (e.g. professors) are also typically engaged as experts in Brazil.

26. In case of follow-on claims, are the fines imposed by the national – or supranational – competition authority taken into account in evaluating the quantification of damages?

Not applicable to Brazil (due to the inexistence of follow-on claims in Brazil).

CHAPTER VIII: ALTERNATIVE DISPUTE RESOLUTION

27. Is there any form of alternative dispute resolution available in your jurisdiction?

If yes, in which form, and how do they coordinate with the civil and criminal proceedings regarding antitrust infringements?

Arbitration, mediation and conciliation are available as alternative dispute resolution in regards to private civil controversies (for instance, in regards to damage claims related to antitrust infringement). Any dispute related to matters classified as of public interest cannot be solved by alternative dispute resolution (for instance, in regards to antitrust infringement).

Arbitration can be used when parties sign an agreement establishing that any future controversies will be decided by an arbitration proceeding, or by agreement to solve the dispute by arbitration when facing a specific dispute. In both cases, when the parties freely decide, by their own will, to adopt arbitration as the mean of litigation, the courts are no longer competent to analyse the case (in other words, electing arbitration means abdicating of the right for judicial review) – the arbitration award does require approval by the judiciary and is a judicial enforcement instrument.

In mediation, a third and unbiased party, the mediator, helps the parties involved in the controversy to come to an agreement. The difference between this and arbitration is that, in the latter, there will be a binding decision, while in mediation there must be an

agreement. Finally, the difference between mediation and conciliation is only a less prominent figure of a third party mediating the negotiation.

CHAPTER IX: SETTLEMENTS

28. Please briefly set out the settlement mechanisms (if any) in your jurisdiction, for instance:

- **settlements requiring court approval;**
- **settlements outside of proceedings;**
- **timing of settlement;**
- **etc.**

Settlement mechanisms are available for parties regarding disposable rights, and damages are usually considered as disposable rights in Brazil. Thus, parties are able to settle, agreeing on amounts to be paid as damages, or even waiving their rights.

The Brazilian Law enforces a principle of freedom of contract, meaning that the content of the agreement may refer to all the issues the signatories see fit (such as amount to be paid, time and means of payment, among others), as long as it does not contradict/ violate the law.

The law has no provision regarding timing of settlements, therefore, it is understood that it could be negotiated at any time. If a settlement is negotiated during the course of a damage claim, the terms of the settlement shall be disclosed to the judge (who does not need to be involved in the negotiation), who will then approve it or not. If the settlement is negotiated outside of proceedings, the parties may, if they want, file a request of homologation of the settlement to the court – when an agreement is homologated by the court, it becomes a judicially enforceable instrument³⁶.

However, it should be noted that while settlements regarding *damages* caused by antitrust infringement can be reached and approved by the courts in Brazil, settlements regarding *antitrust infringements* themselves cannot be negotiated by the parties. This is because antitrust law is considered a matter of public interest (and not of disposable rights).

³⁶ Under Brazilian Law, this would allow the agreement to observe an expedited proceeding, with “limited” discussion concerning merit of the case.

Therefore, CADE and Public Prosecutors retain the power to investigate and issue decisions regardless of a settlement among the parties related to an antitrust infringement. Settlement agreements in investigations and proceedings carried out by CADE and Public Prosecutors, including public civil claims and criminal proceedings related to antitrust issues, are feasible. However, as these cases involve public interests (and not individual, private issues), the freedom of contract is significantly reduced. In addition, the advisability/ appropriateness of settling shall be analysed by CADE and/or Public Prosecutors, who may refuse to settle. Furthermore, settlements in public civil claims and criminal proceedings also demand judicial approval.

CHAPTER X: RECENT CASE LAW

29. Please give an example of noteworthy cases or authorities in your jurisdiction rendered in the last 18 months which are relevant to the content of this questionnaire.

The damage actions filed after the decision issued by the antitrust authority, CADE, in the Administrative Proceeding 08012.009888/2003-70 (“industrial gas cartel”) represents a turning point, given the unprecedented number of damage actions filed by injured parties and representatives of injured parties after CADE’s decision – despite having been filed much before 18 months ago³⁷.

Among the cases rendered in the last 18 months, it should be mentioned the civil action brought by the Public Prosecutors for cartel infringement (at the same time that the facts were being investigated by CADE³⁸). In that suit, the Public Prosecutors requested that the contracts (object of the alleged cartel) be declared null and void; that defendants be condemned to redress damages (in an amount of almost 0.5 billion Brazilian Reais); and that the companies (defendants) be dissolved³⁹.

³⁷ For instance, the Class action brought by an association of hospitals, the *Associação dos Hospitais de Minas Gerais*, (Class Action 7099345-90.2009.8.13.0024, *Tribunal de Justiça de Minas Gerais* – Court of Appeals from the state of Minas Gerais). Another example is the Civil Action brought by the Public Prosecutors (0002983-48.2012.4.03.6105 (3^a Federal Branch of the city of Campinas).

³⁸ An Administrative Proceeding (PA 08700.004617/2013-41) to investigate alleged cartel behavior in train and subway procurements.

³⁹ Class action number 1051058-75.2014.8.26.0053.