The Legal 500 Country Comparative Guides

Brazil: Competition Litigation

This country-specific Q&A provides an overview of competition litigation laws and regulations applicable in Brazil.

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Contributing Firm

Marchini Botelho Caselta

Authors

Daniel Caselta
Partner
daniel.caselta@mbclaw.com.br

Victor Adame
Senior Associate
victor.adame@mbclaw.com.br

1. **What types of conduct and causes of action can be relied upon as the basis of a competition damages claim?**

   In Brazil, any of the anticompetitive practices provided for in Federal Law No 12,529/2011 ('Competition Law) can serve as the basis for a competition damages claim.

   Article 36 of the Competition Law describes the practices that are deemed anticompetitive, which include all acts that, with respect to their object or potential effect: (i) limit, distort or in any way harm competition; (ii) dominate a relevant market; (iii) arbitrarily increase profits; or (iv) abusively exercise a dominant position in any relevant market.

   Article 36, Paragraph 3, of the Competition Law sets forth a non-exclusive list of acts that may be considered anticompetitive, including collusive behaviour such as cartels to fix prices, divide markets, control production or allocate consumers and suppliers, as well as unilateral practices such as market foreclosure, tying arrangements, predatory pricing and boycotts.

   Pursuant to Article 47 of the Competition Law and Article 927 of Federal Law No. 10,406/2002 ('Brazilian Civil Code'), any injured party may bring a claim to recover losses arising from the above-listed violations of the Competition Law.

   The most common claims for damages in the competition sphere in Brazil are: (i) private actions filed by individuals and/or legal entities directly affected by the violation; and (ii) public class actions brought by the public prosecutor's office or other representatives (see item 11 below) on behalf of the victims of anticompetitive practices (Federal Law No 7,347/1985).

2. **What is required (e.g. in terms of procedural formalities and standard of pleading) in order to commence a competition damages claim?**

   A competition damages claim is started by filing a pleading with the court that has jurisdiction over the action. The procedural formalities are essentially the same for both state and federal courts.

   In private claims, the plaintiff must be represented by an attorney and pay court expenses up front, which vary depending upon the court. In public class actions, the injured parties are usually represented by the public prosecutor's office and there is no requirement to pay court expenses.

   The pleading is not just a preliminary outline of the main elements of a claim, but a complete statement by which the plaintiff has to present in detail, among other information: (i) the facts and the cause of action (e.g., in competition damages claims, the pleading must describe the infringement committed by the defendant, the losses suffered by the plaintiff and a causal link between the wrongdoing and the losses), (ii) its request for relief, stated

specifically, (iii) the amount of the claim, and (iv) the evidence by which the plaintiff intends to prove the facts alleged. If some of these elements are not fully available when the pleading is submitted, the submission of new elements is usually accepted throughout the proceeding.

3. **What remedies are available to claimants in competition damages claims?**

   The main remedies available to claimants in competition damages claims are: (i) recovery of damages; (ii) cease-and-desist orders to compel the defendant to cease the anticompetitive behaviour; and (iii) rulings that contractual provisions or agreements that breach of the Competition Law are unenforceable.

   Furthermore, in the case of public class actions brought by the public prosecutor's office or other representatives (see item 11 below), the defendant(s) may be ordered to pay an amount to a federal government fund ('Fund of Collective Rights') in order to compensate for the damages caused to competition and the economy.

   Also during the proceeding, claimants may obtain interim measures to safeguard their rights until a final decision on the merits is issued. To obtain an interim measure, a party must show the likelihood of success on the merits of the case and the risk of suffering further losses if a decision is delayed. Interim remedies usually granted in competition cases include orders to cease collusive practices such as price-fixing, as well as interim orders suspending the implementation of agreements deemed to be in breach of the Competition Law.

4. **What is the measure of damages? To what extent is joint and several liability recognised in competition damages claims? Are there any exceptions (e.g. for leniency applicants)?**

   The measure of damages available in competition damages claims in Brazil are the actual losses suffered by the claimant and loss of profits, as well as monetary adjustment (i.e., correction for inflation) and interest.

   Brazilian law does not allow claimants to recover punitive, double or treble damages in competition damages claims. However, there is a bill currently before Brazil's Congress (Bill No. 11,275/2018) which proposes that victims of collusive practices will be entitled to recover double damages in competition damages claims.

   If the violation was committed by more than one person or company (e.g., in a cartel case), the Brazilian Civil Code provides that all infringing parties will be jointly and severally liable for the entirety of the damages caused by such infringement. Therefore, a claimant can seek its losses from one, some or all co-infringers.

   Brazilian law currently does not permit exceptions to the rule of joint and several liability. Nonetheless, the above-mentioned bill being debated in Brazil's Congress (Bill No.

11,275/2018) proposes that beneficiaries of leniency agreements and/or settlement agreements (TCCs) with Brazil's competition authority, CADE, will be exempted from joint and several liability for losses caused by the other co-infringers.

5. **What are the relevant limitation periods for competition damages claims? How can they be suspended or interrupted?**

The statute of limitations applicable to private competition damages claims is three years (Brazilian Civil Code, Article 206, Paragraph 3, Item V).

The starting point of the limitations period is not clearly defined and is subject to determination on a case by case basis by the courts. Recent decisions have ruled that the limitations period begins when the victim can reasonably be expected to have knowledge of the violation which, according to such decisions, occurs when the final administrative decision of Brazil's competition authority, CADE, is made public. However, there are few judicial precedents on this issue.

The main causes that suspend or interrupt the limitation periods for competition damages claims are (i) when a claim originates from a fact that is subject to a criminal proceeding (which is often the case for price-fixing agreements), the limitations period applicable to competition damages claims will not run before the criminal court issues a final judgment; (ii) when the plaintiff notifies the defendant of its intention to pursue damages, the limitation period is interrupted; and (iii) when the defendant acknowledges by any unequivocal manner (e.g., in written form) that the plaintiff is entitled to recover damages, the limitation period is also interrupted.

When a claim is brought by a final consumer, by the public prosecutor's office or other representatives on behalf of final consumers (see item 11 below), the limitations period is five years counting from the time that the victim acquires knowledge of the infraction (Article 27 of Federal Law No 8,078/1990, Brazilian Consumer Protection Code).

Finally, the above-mentioned bill under discussion in Brazil's Congress (Bill No. 11,275/2018) proposes significant changes to the statute of limitations applicable to competition damages claims, providing that the limitations period will be five years from the date upon which the victim can be deemed aware of the unlawful conduct, which occurs as of the publication of the final decision of Brazil's competition authority.

6. **Which local courts and/or tribunals deal with competition damages claims?**

Brazilian judiciary system does not have a specialised court to deal with competition damages claims. Competition damages claims are dealt with by state and federal civil courts. For further information regarding jurisdiction, see item 7 below.

Appeals are subject to (i) first, the respective state or federal tribunal and (ii) subsequently, to (a) the Superior Court of Justice, if the appeal is based on ordinary laws and/or (b) the Federal Supreme Court, if the appeal is based upon the Constitution.

7. **How does the court determine whether it has jurisdiction over a competition damages claim?**

The court that has jurisdiction over a competition damages claim is the court located in the place where the anticompetitive practice which resulted in damage to the plaintiff was committed or where the defendant resides or has its headquarters. When a claim originates from a fact that is subject to a criminal proceeding or is brought by a final consumer, the court located in the place of residence of the plaintiff will also have jurisdiction. The plaintiff may choose the forum in which it wants to litigate if more than one court has jurisdiction over the claim.

State courts have general jurisdiction over competition damages claims. Federal courts have their jurisdiction restricted to specific cases and in particular, where a federal public body is a party to the litigation, such as the federal government. Therefore, if the federal government is injured by an anticompetitive practice (such as a bid-rigging in a public tender) and files a competition damages claim, federal courts will have jurisdiction over the claim.

The Brazilian judiciary has jurisdiction when the defendant is domiciled in Brazil or the facts from which the claim arises occurred in Brazil.

The court in which the claim was brought should first decide the issue of its own jurisdiction. Jurisdiction may be challenged by the judge of the court to which the claim was brought, by the parties or by the public prosecutor's office. If different judges disagree on jurisdiction, a proceeding can be opened to settle the jurisdictional issue, which will be decided by an appellate court or a superior court depending upon which courts are involved.

8. **How does the court determine what law will apply to the competition damages claim? What is the applicable standard of proof?**

The Brazilian Competition Law is applicable to competition damages claims that arise from anticompetitive practices performed in Brazil and/or that cause damages in Brazil (Article 2 of the Competition Law).

Brazilian courts are not bound by a specific standard of proof. Judges are permitted to adjudicate such claims according to their conviction, which must be justified and, therefore, based upon evidence presented by the parties in view of each party's burden of proof (see item 12 below).

9. **To what extent are local courts bound by the infringement decisions of (domestic or foreign) competition authorities?**

   In principle, Brazilian courts are not bound by administrative decisions of Brazil's competition authority, CADE.

   There is a debate, however, regarding the scope of judicial review of CADE's decisions. Recent court decisions have ruled that courts do not have broad authority to review CADE's application of the Competition Law and may only reassess certain aspects of the administrative decision (e.g., due process of law issues).

   Nonetheless, this issue is still unresolved and there have been instances in which judicial courts have ruled that there was no anticompetitive behaviour, notwithstanding the Brazilian competition authority's application of a fine for infringement of the Competition Law.

   In any event, Brazilian courts usually view a finding of infringement by CADE to be important evidence of anticompetitive conduct.

   With respect to foreign authorities, Brazilian courts are not bound by foreign administrative decisions. In the event the foreign competition authority is judicial, the foreign judicial decision can be enforced in Brazil by means of an exequatur procedure before Brazil's Superior Court of Justice.

10. **To what extent can a private damages action proceed while related public enforcement action is pending? Is there a procedure permitting enforcers to stay a private action while the public enforcement action is pending?**

    Private damages claims can proceed while a related administrative proceeding being conducted by Brazil's competition authority is pending. There is no procedure permitting enforcers to stay a private action while the public enforcement proceeding is pending.

11. **What, if any, mechanisms are available to aggregate competition damages claims (e.g. class actions, assignment/claims vehicles, or consolidation)? What, if any, threshold criteria have to be met?**

    Pursuant to Federal Law No 7,347/1985, a public class action can be brought by the public prosecutor's office, by organized associations and by other representatives on behalf of parties that were harmed by anticompetitive practices (e.g., indirect purchasers of products subject to cartel overcharges) with the purpose of seeking damages and/or other specific remedies. There are no threshold criteria to be met.

    The final decision in a public class action may typically order the defendants to: (i) cease the unlawful conduct; (ii) pay an amount to a federal government fund ('Fund of Collective

Rights') in order to compensate for damages caused to competition and the economy; and (iii) indemnify the damages suffered by victims of the infringement, who will then have to file separate individual proceedings to enforce the decision and determine their respective shares of the damages awarded.

Furthermore, in case of multiple claims in which the same legal issue is being litigated (either in private claims or in public class actions), there is a mechanism, the 'Multiple Claims Incident', to suspend the multiple ongoing proceedings until such time as the court of a selected leading case decides the issue. The decision on the Multiple Claims Incident will be binding on the other proceedings subject to the tribunal's jurisdiction. There are similar mechanisms to standardize the rulings of the Superior Court of Justice or the Federal Supreme Court for a legal issue subject to multiple appeals pending before those tribunals.

12. **Are there any defences (e.g. pass on) which are unique to competition damages cases? Which party bears the burden of proof?**

Defendants in competition damages cases in Brazil may argue that the claimant has passed on the overcharge, either wholly or partially, to indirect purchasers (the so-called 'pass-on defence'). Although there is no explicit rule or extensive body of cases on this matter, the pass-on defence is admissible based upon the general principle of Brazilian law that indemnification is determined by the actual extent of the damages.

The rules governing the burden of proof in competition damages cases are the same as in other civil claims. As a general rule, the claimant must prove the facts upon which the claim is grounded (e.g., unlawful conduct and losses suffered), whereas the defendant must provide evidence to support its objections to the claim (e.g., pass-on defence). However, the judge may shift the burden of proof considering the particularities of the case with respect to access to evidence.

13. **Is expert evidence permitted in competition litigation, and, if so, how is it used? Is the expert appointed by the court or the parties and what duties do they owe?**

Expert evidence is permitted and usually adopted in competition litigation with respect to economic, accounting, and technical issues raised by the parties, especially to prove the existence and the extent of the losses suffered by the plaintiff.

The expert is usually appointed by the court, but parties can enter into an agreement to decide the appointment of the court expert. The court expert shall be specialized in the matter subject to examination and must be impartial and independent from the parties. The expert will conduct examinations deemed necessary and will answer questions posed by the judge and the parties by means of a written expert report. Also, the expert can be asked to present clarifications in a hearing before the judge and the parties.

Parties may also retain their own experts to present reports in response to the findings of the

court-appointed expert. In theory, the judge is not bound by the conclusions of the court-appointed expert and can issue rulings based upon the findings of the expert reports of any party and/or upon other evidence. In practice, however, courts rarely depart from the conclusions of a court-appointed expert.

14. **Describe the trial process. Who is the decision-maker at trial? How is evidence dealt with? Is it written or oral, and what are the rules on cross-examination?**

The proceeding is mainly written, but oral evidence is admitted.

The proceeding begins with the filing of the pleading by the plaintiff, which is followed by the defendant's answer. Such statements will determine the scope of the case, the facts that will be the focus of the evidence produced, and the evidence that the parties intend to produce to prove the alleged facts. Documents must be presented by the plaintiff in support of the pleading and by the defendant in support of the answer (documents that were not initially available to the parties may be presented at a later stage). The parties must indicate any additional evidence they intend to produce later.

The lower court judge is the decision-maker and is charged with determining which evidence is pertinent to the case. There is no trial by jury in civil proceedings in Brazil. After the pleading and answer phase, the court will assess whether further evidence is necessary and will order the production of such evidence (for example, the court expert's examination and witnesses' hearing).

A hearing before the court is not mandatory and will only occur if it is necessary to hear witnesses, the parties, or the court expert. If a hearing takes place, parties can pose questions directly to all witnesses and the judge can also make complimentary inquiries.

The court's decision will usually be issued in writing and made available via the electronic records of the proceeding. The lower court's decision is subject to appeal (see item 15 below).

15. **How long does it typically take from commencing proceedings to get to trial? Is there an appeal process? How many levels of appeal are possible?**

The duration of a proceeding depends upon the complexity of the case and upon the evidence to be produced. Considering that competition damages claims are usually quite complex and that Brazilian courts are generally unfamiliar with competition law, it usually takes several years (often more than five) from the filing of the initial pleading until the issuance of a lower court decision.

The lower court's decision is subject to appeal to the appellate tribunal (second level court) that has jurisdiction over that court. Appellate tribunals deal with errors of law and can also

reassess facts.

The decision issued by the appellate tribunal is itself subject to further appeal to the Superior Court of Justice, which deals exclusively with errors of law and does not reassess facts. Also, an appeal to the Federal Supreme Court is possible if the case involves a constitutional issue. Internal appeals within each phase are also available, such as motions for clarification.

16. **Do leniency recipients receive any benefit in the damages litigation context?**

In Brazil, leniency benefits are applicable only with respect to administrative fines levied by the competition authorities and criminal sanctions. Therefore, leniency beneficiaries are not exempt from liability in damages claims. Moreover, unlike other jurisdictions and as noted above, there is no exemption from joint and several liability for leniency recipients.

Nonetheless, as already discussed, there is a bill under consideration in Brazil's Congress (Bill No. 11,275/2018) which proposes that: (i) defendants found to have taken part in price-fixing agreements will be liable for double damages, with the exception of beneficiaries of leniency agreements and/or settlement agreements (TCCs) with Brazil's competition authority, CADE, which will be liable only for single damages; and (ii) beneficiaries of leniency agreements and/or settlement agreements (TCCs) with CADE will also be exempted from joint and several liability for losses caused by co-infringers.

17. **How does the court approach the assessment of loss in competition damages cases? Are "umbrella effects" recognised? Is any particular economic methodology favoured by the court? How is interest calculated?**

There are no express rules or settled methodologies for the determination of damages for competition damages claims in Brazil. In cartel cases, plaintiffs often use a variety of methodologies to calculate the overcharge, including econometrics analysis and comparator-based approaches. However, considering that there are few decisions on the subject, it remains to be seen whether Brazilian courts will accept these methodologies.

There is no precedent regarding the possibility of considering 'umbrella effects' in the calculation of damages.

Interest is usually calculated at 1% per month after the defendant is notified of the claim or after the harmful act is performed, depending upon the specifics of the case.

18. **Can a defendant seek contribution or indemnity from other defendants? On what basis is liability allocated between defendants?**

In the event one defendant pays the entire claim for damages, it may sue the other defendants for their share of liability. A defendant may also request other liable parties to be

added to the lawsuit, in which case such defendant will be able to claim for the other parties' share of liability within the same lawsuit.

With respect to the allocation of liability among defendants, the Brazilian Civil Code provides that liability between joint and several debtors is presumed to be equal among them. However, defendants may bring claims against each other, independently or within the same lawsuit as mentioned above, to address their respective share of liability based upon the causal connection between the acts they performed and the resulting damage to the plaintiff(s).

19. **In what circumstances, if any, can a competition damages claim be disposed of (in whole or in part) without a full trial?**

A competition damages claim can be dismissed without a full decision on the merits if (i) the claim is time-barred; (ii) the pleading does not meet the required standards (e.g., if the plaintiff does not sufficiently describe the prayer for relief and/or the cause of action); and (iii) if other procedural or preliminary objections are accepted by the court (e.g., lack or jurisdiction or lack of standing). Also, a competition damages claim can be disposed of if the parties settle.

20. **What, if any, mechanism is available for the collective settlement of competition damages claims? Can such settlements include parties outside of the jurisdiction?**

Settlements are permissible in collective actions for competition damages claims provided that they are approved by the court.

21. **What procedures, if any, are available to protect confidential or proprietary information disclosed during the court process? What are the rules for disclosure of documents (including documents from the competition authority file or from other third parties)? Are there any exceptions (e.g. on grounds of privilege or confidentiality, or in respect of leniency or settlement materials)?**

Generally, civil proceedings are of public record. The case records will be subject to confidentiality when (i) reasons of public or social interest require that the documents remain confidential or (ii) the case involves industrial or commercial secrets. Specific documents can be subject to confidentiality within a public proceeding when necessary and with permission of the court.

Pursuant to Resolution No 21/2018 issued by Brazil's competition authority, CADE, the disclosure of documents related to competition investigations shall occur in accordance with the following rules: (i) during the negotiation and execution phases of leniency and/or settlement agreements, all documents must remain confidential; (ii) during the instruction phase of the administrative proceeding, only the public versions of the Technical Notes issued by the competition authority will be available, which must contain minimum elements for the

identification of the investigated parties, the illegal conduct, the facts, and the legal grounds applicable to the infraction; and (iii) after the final administrative decision is issued by CADE, documents and information that had been kept confidential during the investigation shall be made public.

The Resolution also provides that certain documents must remain confidential even after issuance of CADE's final decision, such as the History of Conduct (this is a document prepared by CADE based upon self-incriminating documents and information submitted voluntarily by beneficiaries of leniency agreements and settlement agreements) and other documents such as those containing secrets bearing upon industrial, fiscal, or banking matters, among others. These documents will be released only in exceptional circumstances if there is an express legal determination, specific judicial decision, authorization by the signatory of the leniency agreement or international cooperation with the agreement of the signatory.

22. **Can litigation costs (e.g. legal, expert and court fees) be recovered from the other party? If so, how are costs calculated, and are there any circumstances in which costs recovery can be limited?**

Litigation costs incurred by the winning party shall be recovered from the other party upon proof of amounts disbursed (e.g., court expenses, fees by the court-appointed expert or by the party's expert). Costs directly incurred by the winning party, such as fees paid to the party's own experts, are subject to an assessment of reasonableness by the court.

There is a debate with respect to the possibility of recovering legal fees. Brazilian substantive law sets out the principle of full compensation for damages, which in principle could lead to the conclusion that damages should include expenses incurred to hire an attorney to seek compensation. However, requests for relief in civil proceedings generally do not include compensation for such expenses and court decisions usually do not recognize the possibility of reimbursement for attorneys' fees paid by the winning party to its legal counsel.

Also, the losing party typically pays attorneys' fees directly to the attorneys of the winning party in an amount equal to 10% to 20% of the damages awarded to the winning party. Note that the attorneys of the winning party are entitled to such fees, which do not aim to reimburse legal fees disbursed by the winning party, but to provide additional remuneration to the winning party's attorneys.

23. **Are third parties permitted to fund competition litigation? If so, are there any restrictions on this, and can third party funders be made liable for the other party's costs? Are lawyers permitted to act on a contingency or conditional fee basis?**

Third party funding of litigation is gradually expanding in Brazil. Despite the absence of specific regulation, third parties are, in principle, permitted to fund litigation, including competition claims. Assignment of a credit or investment agreements are common

arrangements to implement third party funding.

If the third party funder enters into an assignment of credit agreement involving a credit that is the object of litigation and it becomes a party in the litigation, it can become liable for the other party's costs. If the third party funder is not a party to the litigation, it will not be liable for other party's costs beyond what was agreed with the original judgment creditor.

Attorneys can act on a contingency or conditional-fee basis.

24. **What, in your opinion, are the main obstacles to litigating competition damages claims?**

We have identified the following primary obstacles to litigating competition claims in Brazil:

i)Brazilian courts have little experience adjudicating competition damages claims. Therefore, there is uncertainty with respect to the standard of proof of damages required by the courts and whether standards that will be adopted will facilitate or hinder the recovery of damages.

ii)Quantifying damages in most cases requires expert examination and the retention of experts by the plaintiffs, which is costly and increases the length of lawsuits.

iii)There is no clear rule regarding the beginning of the statute of limitations period (i.e., whether the limitations period starts upon the date of the infringement or upon the decision of the competition authority), which can discourage plaintiffs from seeking damages.

iv)It often takes many years in civil proceedings in Brazil before a final decision on the merits is issued which, considering the other obstacles noted above, increases risks and uncertainties for plaintiffs.

In summary, competition damages claims in Brazil, whether in the nature of private claims or public class actions, have thus far failed to compensate victims of anticompetitive practices.

25. **What, in your opinion, are likely to be the most significant developments affecting competition litigation in the next five years?**

The most significant development expected to occur in competition litigation in Brazil in the coming years is approval of Bill No. 11,275/2018, currently under debate in Brazil's Congress. The main changes proposed by the bill are: (i) victims of price-fixing agreements will be allowed to recover double damages; (ii) beneficiaries of leniency and settlement agreements with Brazil's competition authority, CADE, will be liable only for single damages and will be exempt from joint and several liability for losses arising from competition violations; and (iii) the statute of limitations for damages claims arising from competition

violations will be five years from the date upon which the victim is deemed aware of the unlawful conduct, which occurs upon the publication of the final decision of CADE.

If the bill is approved, an increase in the number of competition damages claims in Brazil is expected due to the clarification of the statute of limitations and the incentive to claimants presented by an award of double damages.

The increase in the use of litigation funding mechanisms and alternative dispute resolution methods (such as arbitration and mediation) may also contribute to the expansion and development of competition litigation in Brazil in the coming years.