

# BRAZIL

*Sérgio Pinheiro Marçal and Lucas Pinto Simão*<sup>1</sup>

## I INTRODUCTION TO THE CLASS ACTIONS FRAMEWORK

Back in the 1970s, legal commentators in Brazil started supporting class actions as a form of dispute resolution because social conflicts could no longer be handled and settled through individual lawsuits.

Drawing on US experience, Brazilian lawmakers issued specific statutes aimed at creating efficient mechanisms to protect ‘trans-individual rights’ through class actions. Albeit inspired by the US model, the Brazilian class action system differs greatly from that in place in the United States.

In 1985, Law 7,347 created a distinct subsystem for class actions in civil procedure to protect diffuse and collective rights. Later, the 1988 Federal Constitution introduced significant innovations, expressly assuring the protection of diffuse and collective rights and interests in a constitutional guarantee. Subsequently, the Brazilian Consumer Protection Code of 1990 brought important contributions to the class action system, such as the definition of trans-individual rights. The Consumer Protection Code also provided for the use of class actions to protect homogeneous individual rights, another landmark initiative geared towards representing consumers collectively and expediting resolution for recurrent lawsuits involving the common interests of a class.

Although Law 7,347 of 1985 and the Consumer Protection Code are the most relevant in the class action system in Brazil, other specific statutes also deal with class action-related issues, in parallel with relevant substantive law. Among these statutes are the Securities Market Investors Protection Act, the Persons with Disabilities Act, the Children and Juveniles Act, the Administrative Misconduct Act and the Elderly Act.<sup>2</sup> In this context, legal scholars say that the Brazilian regulatory framework truly provides a class action system, underpinned primarily by the above-mentioned Law 7,347 of 1985 and the Consumer Protection Code.<sup>3</sup>

Following more than 35 years of experience in the use of class actions in Brazil, the general belief is that class actions have in that time contributed significantly to the resolution of collective disputes in Brazil, and Brazilian law undoubtedly sets a pattern for all civil law countries wishing to legislate on and regulate the use of class actions.

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1 Sérgio Pinheiro Marçal is a partner and Lucas Pinto Simão is a senior associate at Pinheiro Neto Advogados.

2 Law 7,913 of 1989; Law 7,853 of 1989; Law 8,069 of 1990; Law 8,429 of 1992; and Law 10,741 of 2003.

3 Nery Junior, Nelson. *Código Brasileiro de Defesa do Consumidor comentado pelos autores do anteprojeto. Processo Coletivo*. Volume II. 10th Edition. Rio de Janeiro. Editora Forense. 2011, p. 221.

## II THE YEAR IN REVIEW

In Brazil, 2020 was marked by discussions related to (1) the territorial applicability of class action awards; and (2) the need for a new class action system that turned into a new legislative bill.<sup>4</sup>

With regard to the first point, the Superior Court of Justice had already decided in a vast number of cases that the extent of *res judicata* in class actions is determined by the matters for which relief is sought and also by the persons affected, and that the immutability of the effects that a collective judgment produces derives from its *res judicata* and not from the jurisdiction of the court that issued it. In other words, an award granted in a class action can be valid throughout Brazil, without the imposition of any mandatory limitation based on the jurisdiction of the body that granted the award.

However, the Brazilian Federal Supreme Court has decided to further review this point and there may be a change in case law in the near future. The Federal Supreme Court is to hear an extraordinary appeal and decide on the validity of a Superior Court of Justice decision rejecting the applicability of Article 16 of Law 7,347 of 1985, which states: ‘the court decision will have *res judicata* effects *erga omnes*, but only within the limits of the territorial authority of the court that granted the award’. This is a very important discussion that could overturn current Superior Court of Justice case law regarding the nationwide effects of a class action judgment. In 2020, pleadings were submitted, and associations were admitted as *amicus curiae* in order to argue for or against the constitutionality of Article 16 of Law 7,347 of 1985. Their judgment is expected to take place in the first semester of 2021.

With regard to the second point, in 2020, the Brazilian National Council of Justice (CNJ) sent to the presidency of the Chamber of Deputies a draft of a legislative bill that aims to improve class actions. Currently, actions seeking to protect collective and diffuse rights are governed by several rules, such as the Law on Public Civil Action (Law No. 7,347 of 1985), which is over 35 years old.

The legislative bill, coordinated by Justice Maria Isabel Gallotti, was prepared by a team of scholars to (1) judicialise collective resolution of disputes that would not be worth being filed individually; (2) achieve the effective protection of rights that are intrinsically collective – collectively strict and diffuse; and (3) fully implement the principle of equality, thus reducing the excessive workload of the courts. Among other things, the legislative bill introduces rules to (1) improve the representation for associations that wish to file class actions; (2) deal with *lis pendens* where multiple class actions are filed; and (3) voluntarily discontinue class actions through settlement agreements.

The Brazilian National Congress will assess the legislative bill, which, although received with great enthusiasm, may face delayed voting because it involves a sensitive and complex civil procedure matter, namely collective rights.

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<sup>4</sup> Law 13,105 of 2015.

### III PROCEDURE

#### i Types of action available

In Brazil, as a rule, class actions can be brought to deal with matters relating to the environment, consumer relations, assets and rights carrying artistic, aesthetic, historical, tourism and landscape value, and should centre on the protection of diffuse, collective or homogeneous individual rights.

Article 81, I of the Consumer Protection Code defines diffuse rights as ‘indivisible trans-individual rights held by unidentifiable persons linked by factual circumstances’.

Article 81, II of the Consumer Protection Code defines collective rights as ‘indivisible trans-individual rights held by a group, category or class of persons linked to each other or to the opposing party through a basic legal relationship’.

The sole paragraph of Article 81, III of the Consumer Protection Code defines homogeneous individual rights as ‘those with a common origin’. Legal scholars have it that homogeneous individual rights are collective only incidentally because, in principle, their protection could be pursued individually by each holder, as it happens with the traditional system for protection of subjective rights. The approach to collective protection of individual rights, however, was incorporated into Brazilian law to resolve identical conflicts in one single proceeding, thus avoiding multiple individual actions.

According to Article 83 of the Consumer Protection Code, all kinds of actions can be brought for adequate and effective protection of diffuse, collective or homogeneous individual rights, that is, prohibitory actions, actions seeking affirmative and negative covenants, indemnification actions, declaratory actions and actions seeking urgent relief, among others. Hence, class actions may result in condemnatory, declaratory, constitutive, self-enforceable and commanding judgments.

For illustrative purposes, class actions may be brought to seek compensation for damage caused to consumers on account of a defective product, or to compel a certain polluter to bear expenses for the clean-up of illegally polluted soil. There are no objective or specific limits on the scope of class actions and of the particular claims, and the class that potentially benefits is defined based on the claims asserted by the plaintiff in the class action.

#### ii Commencing proceedings

With regard to the standing to file class actions, unlike US law, Brazilian law opted to expressly indicate which parties have standing to file a class action. Under Article 5 of Law 7,347 of 1985 and Article 82 of the Consumer Protection Code, the parties with standing to bring a class action to defend the rights of citizens in court are: (1) the Public Prosecutor’s Office; (2) the Public Defender’s Office; (3) the federal government, states, municipalities and federal district; (4) the entities and bodies of the direct or indirect public administration, even if with no separate legal identity, when specifically intended to defend diffuse and collective interests and rights; and (5) associations legally organised for at least one year, and whose institutional purposes include the defence of diffuse, collective or homogeneous individual rights. Further, the Public Prosecutor’s Office must also intervene in class actions as an overseer of the law (when it is not a plaintiff in the class action).

In Brazil, there is generally no requirement for class-representative adequacy as to the parties with standing to file class actions, and Professor Antonio Gidi notes that the standing to file a class action is concurrent, disjunctive and exclusive. It is concurrent because all parties with legal standing may seek collective relief for citizens in an independent manner.

Furthermore, the legal standing is disjunctive, which is different from complex standing, ‘as any of the parties with joint standing to sue may file, alone, a class action with no need to form a joinder or else obtain authorisation from the other parties which also have standing to sue’. The standing is also exclusive in that the parties with legal standing are expressly identified in prevailing law.<sup>5</sup>

The Brazilian legislation has not established mandatory binding effects in a class action (the opt-out system). The rule is that a class action judged to be groundless does not prevent citizens from filing indemnification claims, but if a class action is judged to have admissible grounds, the sentence benefits the victims and their successors, who may proceed with individual enforcement of the sentence.

As for the standing to file class actions, the most relevant matter up for debate in court in 2017 pertained to the standing of associations to file class actions. Earlier rulings of the Superior Court of Justice had signalled that associations and trade unions had standing to act as substitute parties in class actions, regardless of express authorisation from those being substituted and of submission of a nominal list of their members.

It so happens that the matter was taken to the Full Bench of the Federal Supreme Court, which, acknowledging the leading-case status of this issue, held in Extraordinary Appeal 573,232/SC that the activity of associations in defending the interests of their members can take shape by representation only, not as substitute parties in the proceedings. It was thus declared that express authorisation should be obtained, whether individually or by a meeting resolution, for an association to file class actions. After this finding by the Federal Supreme Court, other Brazilian courts<sup>6</sup> sided with this opinion that an association could only bring a class action defending its members by way of representation in the proceedings<sup>7</sup> under prior express authorisation (either through an individual act or through a resolution made at a meeting, which is a measure not satisfied via a mere generic statutory authorisation).

As mentioned above, in 2017, a new decision rendered by the Full Bench of the Federal Supreme Court held that ‘the subjective efficacy of *res judicata* from an ordinary class action brought by a civil association in defence of the interests of its members only reaches those members residing within the jurisdiction of the adjudicating body on or before the filing date and listed on the complaint’.<sup>8</sup> This judgment has triggered discussions on whether the interpretation of Article 5, V of Law 7,347 of 1985 and Article 82, IV of the Consumer Protection Code would lead to the conclusion that a general statutory provision is not enough to legitimise the standing of associations in defence of the rights of their members, thus making it indispensable to obtain the prior express authorisation of the members.

The discussion is far from over, and the limits of the standing of an association to bring class actions are currently the subject of debate in actions still pending in the higher courts.

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5 Gidi, Antonio. *Coisa julgada e litispendência em ações coletivas*. São Paulo: Saraiva, 1995. pp. 37/38.

6 Special Appeal No. 1481089/SP; Bill of Review in Special Appeal No. 494160/DF; Bill of Review in Special Appeal No. 1331592/RJ; Special Appeal No. 1185823/GO, among other judgments from the Superior Court of Justice.

7 Article 5, XXI of the Federal Constitution.

8 Extraordinary Appeal 612043/PR, Reporting Justice Marco Aurélio, judgment of 10 May 2017, Federal Supreme Court.

### iii Procedural rules

A class action starts with a complaint that must be addressed to a court with jurisdiction, and must accurately identify the parties, the facts and their legal grounds, as well as the pleadings with all specifications, the amount in controversy and the evidence by which the plaintiff intends to prove the truthfulness of alleged facts.

Before analysing the merits of the case, the judge must scrutinise whether all conditions for valid existence of the class action have been satisfied, such as the standing to sue and to be sued, the procedural interest and the legality of the pleading. These conditions may be recognised by the judge on his or her own initiative, or challenged by the defendant as preliminary arguments in the defence.

After process is served upon the defendant, he or she will present an answer containing all possible arguments of defence, which will occasionally be followed by a reply and then a defendant's rejoinder. The judge then renders a decision on the preliminary arguments so as to establish the matters in controversy and to specify the evidence to be produced in the case.

The evidentiary phase (discovery) starts after the conciliation hearing. The parties may prove their allegations through all means admissible into evidence by operation of law. Basically, evidence can be composed of supporting documents, oral testimony or expert investigation.

The parties may present any type of document to prove the alleged facts. Ordinarily, the parties must introduce documentary evidence in the complaint and in the statement of defence, but further documents may also be put forward at a later stage in support of unforeseen facts or to refute evidence presented by the opposing party.

Examples of oral evidence are the plaintiff's deposition and the hearing of witnesses. Brazil adopts the inquisitorial system of proceeding. Oral evidence is collected at specific hearings in which the judge and the counsels for the parties may ask questions to the plaintiff or to the witnesses enrolled.

Expert evidence is made when specific forensic knowledge (e.g., in the accounting, medical or engineering area) is required. To obtain expert evidence, the judge appoints an expert of his or her trust, and the parties may also designate experts to assist in expert works. The parties submit questions that will be answered by the court-appointed expert, who eventually issues an expert opinion.

There is no jury and the judge will make a decision granting or denying the class action. Under Law 7,347 of 1985, this decision has immediate effects, and appeals usually cannot stay the applicability of the decision until it has been the subject of a future favourable judgment by the Court of Appeal.

Appeals, if any, are heard by a three-judge panel of the Court of Appeal. The appellate ruling can generally be challenged via an extraordinary appeal to the Federal Supreme Court and a special appeal to the Superior Court of Justice; such appeals, however, cannot revisit issues of fact and evidence.

As a class action can be filed to safeguard diffuse, collective or trans-individual rights, the Consumer Protection Code stipulates how *res judicata* applies to each of these scenarios.

For diffuse rights, the court ruling on a class action will ensure *res judicata erga omnes*, unless the claim is dismissed for lack of evidence, in which case any legitimate party may file another lawsuit with identical grounds and based on new evidence.<sup>9</sup>

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9 Article 103, I of the Consumer Protection Code.

For collective rights, the court ruling on a class action will ensure *res judicata ultra partes*, but limited to the group, category or class, unless the claim is dismissed for lack of evidence.<sup>10</sup>

For trans-individual interests, the court ruling on a class action will ensure *res judicata erga omnes*, only if the claim is granted to benefit all victims and their successors.<sup>11</sup> Also, ‘if the claim is dismissed, the interested parties that did not intervene in the case as co-plaintiffs may file an individual suit for damages’.<sup>12</sup> However, further class actions would be barred given the *res judicata*.

#### **iv Damages and costs**

As to court costs, Article 87 of the Consumer Protection Code states that, in class actions, ‘there shall be no advance payment of costs, court fees, expert fees or any other expenses, nor shall there be any sentencing of the plaintiff association to attorneys’ fees and court costs and expenses, except in cases of proven bad faith’.

As for damages awarded on behalf of citizens in a class action, a class action in Brazil generally seeks to have the courts recognise a legitimate right and establish the *an debeatur* (what is due), so that the *quantum debeatur* (the amount due) may then be ascertained for each citizen.

As a rule, each aggrieved citizen must sue for calculation and enforcement of the award. This new individual proceeding would be subject to presentation of evidence and answer by the defendant, but the answer would be limited to discussing the *quantum debeatur*.

Nonetheless, one of the legitimate entities may also file a class action suit for calculation and enforcement of an award. This option for enforcement by extraordinary legitimate entities was introduced to the Brazilian legal system to prevent the supplier or vendor from escaping the payment of damages arising from injury caused by it in the event that citizens do not show interest in seeking recovery on an individual level. If citizens are not interested in seeking individual redress of the damage caused, the recovery sum is to accrue to a diffuse rights defence fund. Under Article 100 of the Consumer Protection Code, the legitimate entities can only plead fluid recovery after ‘one year has elapsed without identification of interested parties in a number compatible with the seriousness of the damage’.

#### **v Settlement**

In Brazilian law, unlike in US law, there is no systematic regulation of settlements in class actions involving diffuse, collective or homogeneous individual rights. There are only sparse provisions in Article 5, Paragraph 6 of Law 7,347 of 1985 and in Article 107 of the Consumer Protection Code, but these provisions are clearly not enough, which ends up hindering the effective settlements involving class actions.

Article 5, Paragraph 6 of Law 7,347 of 1985 establishes the ‘terms of agreement’ by which ‘the public bodies with standing to sue may demand of the legitimate parties that they execute terms of agreement by which they will abide by legal requirements or else face penalties, with the agreement being valid and enforceable as an extrajudicial enforcement

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10 Article 103, II of the Consumer Protection Code.

11 Article 103, III of the Consumer Protection Code.

12 Article 103, Paragraph 2 of the Consumer Protection Code.

instrument'. Terms of agreement are defined as an alternative dispute resolution method that is meant to avoid or put an end to the lawsuit by means of execution of an agreement between a private party and one of the public bodies with standing to file a class action.

Article 107 of the Consumer Protection Code, in turn, institutes the 'consumer collective agreement' by which 'the civil consumer entities and the associations of suppliers or unions of an economic category may regulate, by means of a written agreement, consumer relations intended to lay down specific conditions on price, quality, quantity, warranty and characteristics of products and services, as well as complaints and settlement of consumer-related disputes'.

However, a significant portion of legal doctrine states that the terms of agreement and the consumer collective agreement do not operate as true forms of settlement since there is purportedly no actual disposal of rights under those instruments. Generally, in the terms of agreement and in the consumer collective agreement, the representatives of a given class are not the holders of the substantive right being protected, and are thus unable to 'perform any act that directly or indirectly entails the disposal of those substantive rights involved, as the latter do not belong to them'.<sup>13</sup> Hence, according to the majority view emerging from legal doctrine and court rulings, such settlements could only be reached with regard to the form, time, place and conditions for fulfilment of an obligation or redress – although without ever entailing a disposal or waiver of substantive rights.

In Brazil, the terms of agreement and consumer collective agreements may be executed out of court, but recognition of these may also be sought from the courts – especially when a class action has already been brought. The judge's role in recognising a settlement in a class action differs greatly from that of a US judge. As a rule, the Brazilian judge does not analyse the merits of a settlement or whether the interests of the class have been properly satisfied in the agreement. The judge only checks the formal aspects of a settlement, such as the parties' standing, ascertaining that there has been no undue disposal of a right, and the parties' status in the proceedings.

Settlements in class actions follow the opt-in system and are not automatically binding upon all interested parties, who may file individual lawsuits regardless of the agreement (unless they have expressly opted in). Also, most legal doctrine and court rulings hold that the execution of a settlement is not binding on other parties that have legitimate cause to file class actions to consider the same collective dispute covered by the agreement.

#### IV CROSS-BORDER ISSUES

Class actions are usually filed in Brazil to obtain redress on behalf of Brazilian citizens – but, in theory, they could also include foreign claimants. However, in contrast to the law in other jurisdictions, Brazilian law does not offer particularly favourable options for foreign claimants and, although possible, cross-border class actions are extremely rare in practice. In fact, in some cases, foreign claimants are even required to post bond when bringing suit in Brazil.

Further, Brazilian courts have jurisdiction only in Brazil and, as a rule, a foreign class action brought before a foreign court does not result in *lis pendens* nor does it prevent a Brazilian judicial authority from considering and adjudicating upon the same case (and connected cases).

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13 Zavascki, Teori Albino. *Processo coletivo – tutela de direitos coletivos e tutela coletiva de direitos*, 4th ed. São Paulo, Ed. *Revista dos Tribunais*, 2009, p. 139.

Also in this context, to become enforceable in Brazil, a foreign judgment on a class action must be: (1) final and binding, with *res judicata* effects pursuant to Article 15 of Decree-Law 4,657 of 1942 and Article 5, III of Resolution 9 of 2009 of the Superior Court of Justice; and (2) recognised by the Superior Court of Justice pursuant to Article 961 of the Brazilian Civil Procedure Code. These rules apply in general terms and Brazil can sign international treaties with other countries establishing different procedures for enforcement of decisions. For instance, Brazil has an international treaty on judicial cooperation with Mercosur countries (including Argentina, Venezuela, Uruguay and Paraguay), whereby a decision is valid in Brazil if it has become *res judicata* or is otherwise enforceable in the country of origin.

## V OUTLOOK AND CONCLUSIONS

Class actions in Brazil are an important instrument for resolution of collective trans-individual conflicts, which are typical in current society. Brazil has over 35 years' experience in class actions and a well-defined system that serves as a veritable reference for civil law countries willing to put in place a legal framework for class actions. Class actions are largely used in Brazil to handle matters related to consumer relations, product liability and environmental law.

However, as noted above, in terms of effectiveness, class actions in Brazil are undergoing a crisis, which is mostly due to a misinterpretation of the class action proceeding that has its basis in the ordinary rules of Brazilian civil procedure (which is strongly marked by an individualistic culture).

Overall, scholars argue that the Brazilian class action system must be improved since the absence of adequate resolution of collective disputes is largely responsible for the chronic excessive number of lawsuits in Brazil. In fact, according to the CNJ: (1) over 430,000 class actions were pending judgment by the end of 2020; (2) an average of 57,000 new class actions are filed every year; and (3) fewer than 1,000 are shelved each year.<sup>14</sup> These numbers evidence the need to improve the current class action system in order to increase its effectiveness.

In this context, the Brazilian higher courts are constantly debating case law, interpreting rules related to class actions and even reinterpreting rules on matters on which they were understood to have already reached a consensus. In the same regard, opinions have emerged into the need of a new Bill of Law to reassess the Brazilian class actions system.

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<sup>14</sup> <https://paineisanalytics.cnj.jus.br/single/?appid=1d54bc4d-81c7-45ae-b110-7794758c17b2&sheet=87f1a661-cf86-4bda-afe4-61dfc6778cd4&lang=pt-BR&copt=ctxmenu,currsel>.



## ABOUT THE AUTHORS

### **SÉRGIO PINHEIRO MARÇAL**

*Pinheiro Neto Advogados*

Mr Marçal graduated from the Pontifical Catholic University of São Paulo (PUC) in 1985 and achieved credits towards his master's degree, also from PUC. He is a former chair of the São Paulo Lawyers Association (AASP). Mr Marçal is highly recommended as a product liability law practitioner by *Chambers and Partners* (Band 1), *Who's Who Legal, Best Lawyers* and Euromoney Legal Media Group's *Expert Guides* directories of the world's leading lawyers.

### **LUCAS PINTO SIMÃO**

*Pinheiro Neto Advogados*

Mr Simão graduated from the Pontifical Catholic University of São Paulo (PUC) in 2007 and he has an LL.M. in contract law from Insper, São Paulo, and a master's degree from PUC.

Mr Simão has represented major companies in the most significant product liability cases in Brazil, in industry sectors ranging from tobacco, drugs and medical devices to cars and electronics.

### **PINHEIRO NETO ADVOGADOS**

Rua Hungria 1100  
São Paulo 01455-906  
Brazil  
Tel: +55 11 3247 8400  
Fax: +55 11 3247 8600  
smarcal@pn.com.br  
lsimao@pn.com.br  
www.pinheironeto.com.br