TRIAL AND ERROR:

CLASS ACTIONS IN BRAZIL AND THE US, AND GLOBAL TRENDS

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Brazil's class action legislation is stronger than ever, but doubts and abuses remain. Luiz Migliora of Veirano Advogados and Walter Cofer and Gregory Fowler of Shook Hardy & Bacon LLP describe the state of play and compare with trends in the US and beyond

In the past two decades, Brazil has seen increasing numbers of class actions, especially concerning consumer law. The cases have also been getting more aggressive and have even been used to create or revise federal regulation. Doctrine is also contributing to this trend by creating additional mechanisms to facilitate the filing of class actions in Brazil. In view of the bills that will probably be approved by the National Congress, these developments should lead to a boom in collective litigation in the next few years.

Influenced by global trends, and especially by the American class action model, Brazilian legislation on class actions has developed significantly in the past 20 years. The enactment of the 1965 'popular action law' was the first attempt to protect third generation rights in a tangible way. But it was only with the enactment of law No. 7347 in 1985 and the creation of the 'public civil action' that an authentic class action, aimed at protecting broadly defined collective interests, was created.

The strength of these class actions was further reinforced when third generation rights were given constitutional status in 1988. Then, three years later, the Consumer Defence Code (CDC) introduced new rules for class actions allowing the collective enforcement of diffuse, collective or individual and homogeneous rights – an innovation in the Brazilian legal system.

The collective lawsuits provided for in the CDC, especially those seeking recovery of damages for the violation of individual and homogeneous rights, are the Brazilian versions of the US-type class actions. There are, however, two main differences between the Brazilian and the American models. Under the Brazilian model, only some specific entities have standing to sue, and the certification of a class is not necessary. As a result, any entity with standing may file a lawsuit and declare itself a representative of a specified class, which alone should be sufficient for the class action to be admitted and processed as such, with no separate certification procedure.

At present, standing to sue is used to file class actions in many different circumstances. For instance, in a class action filed by an association against United International Pictures for the production of the movie *Madagascar*, the plaintiff asserted that the movie was, at first glance, harmless – but, looking more closely, it could be considered as an invitation to teenagers and children to experiment with illegal drugs. The basis for this allegation was that a character in the movie – the zebra – said he was sorry for not bringing "drops" to a rave party, and there is specific jargon in Brazil in which 'drops' are the illegal drug ecstasy. The defence maintains that although the reference to 'drops' could result in an adult making the connection with drugs, it seems that teenagers and children, who do not know such language, would be unlikely to. These arguments have yet to be analysed by the court.

Yet whereas some groups are using class actions to air legitimate grievances, it is more alarming that others are trying to use them as a way to change federal regulations. An interesting example is a class action which a consumer association filed against a beer company, requesting that a non-alcoholic beer be removed from the market. It was claimed that, although the level of alcohol in the product was within the parameters of regulations applicable to non-alcoholic beverages, the fact that it had some alcohol, even in a very small amount, would make the label misleading and the product dangerous to consumers who may not be aware of the regulations' contents. The association obtained an injunction and the product was taken off the market.

Another similarly alarming case was the class action filed by the public attorney's office of the State of Minas Gerais against Macdonald's, requesting the inclusion of nutritional information in their products throughout Brazil. Instead of litigating the case, the defendant decided to settle by agreeing to do what the plaintiff wanted on a national basis, in order to avoid similar cases. In both the beverage and the fast food cases, it is worth noting that the defendants were in compliance with regulations issued by federal authorities – and yet, nonetheless, the class action plaintiffs were successful.

There is still much work to be done. The biggest criticism of the Brazilian class action system is certainly the absence of rules defining the judicial competence for the judgment of similar class actions filed in different venues. As a result, similar class actions are not only filed in different courts – but also contradictory decisions are rendered. Regardless of these problems, national doctrine continues to advocate that more entities should be allowed to bring class actions, on the basis that such actions provide greater protection of third generation rights. We believe that both issues should be analysed together – and that, unless the first problem (contradictory rulings) is duly solved, the second rule (greater access to courts) should not be modified. We should not be focused on allowing more class actions to be presented; rather, we have to focus on how to devise a system that, through class actions, will generate more qualified results – and, in this direction, avoiding contradictory decisions is a necessary first step.

As a result of criticisms levelled against the present model, a group of scholars has developed two bills of law that will lead to a Brazilian Code of Collective Actions. As the group – Ada Pellegrini Grinover, Kazuo Watanabe, Antonio Gidi and Aluísio de Castro Mendes – also participated in the expansion of the Ibero-American Model Code of Collective Actions, both the Brazilian bills of law were clearly inspired by it. In both, thus, the following ideas can be found: an increase in the number of entities who have standing to sue; the creation of a special reward for the entity who successfully presents a collective action; and the creation

of a rule of priority for class actions, allowing them to be processed and judged more quickly than other lawsuits.

Trends from the US and beyond

Although Brazil is certainly ahead of the curve, there is a clear international trend for the introduction of class action mechanisms and for their use in courts around the world. In the mid-1960s, only the United States and two other countries had class action mechanisms in place. Twenty years later, this number had increased to seven (including Brazil). Another 20 years on, and today the number of countries with class action mechanisms has mushroomed to more than 40, and many other countries are actively debating additional class action legislation.

The multiplication of class action mechanisms around the world is only one way of increasing access to justice for a greater proportion of the population. Along with the globalisation of markets and consumer information has come the spread of consumerism and pro-consumer initiatives by which activists and reformers seek to enhance social welfare through easier access to the courts. Thus, we see the 'loser pays' rule and prohibitions against contingency fee arrangements eroding. We see a relaxation of filing fee requirements for class actions and an increasing availability of punitive or 'moral' damages available to plaintiffs. By the same token, the availability of class action mechanisms has obviously increased around the world.

But easier access to the courts for would-be litigants does not necessarily lead to a greater dispensation of justice. Unfettered access to class action mechanisms may allow unmeritorious, even frivolous, claims to go forward which, if unchecked, can lead to class action litigation abuses that are only now being addressed in the United States.

The United States is probably the most litigious society in the world. Its citizens feel entitled to sue anyone for any perceived wrong and, for years, many of its most popular books, television shows and movies have been based on the 'legal thriller', and in many instances on class action stories. The 'little guy taking on a big corporation' motif – see Julia Roberts in *Erin Brockovich* or John Travolta in *A Civil Action* – has reached almost mythic status, and the audience cheers their every move.

Indeed, there is a legitimate place for class actions in real-world courtrooms. Appropriate class action cases concern single events in which a large number of people's rights are affected and where a single trial can resolve core legal and factual issues for every member of the class. Aeroplane crashes in which the jury must determine what caused the crash – pilot error, airline negligence, aeroplane design, an act of God, etc – for all members of the class is one example. Others could be employment cases, in which a company is alleged to have systematically discriminated based on age, gender or racial grounds, and certain types of automobile or pharmaceutical cases.

Often, class actions concern large numbers of people who uniformly claim to have been wronged by the actions of defendants but have suffered a relatively small amount of damages, making it unduly expensive for each to bring individual actions against the alleged wrongdoer. Resolving hundreds or even thousands of claims in one trial promotes judicial efficiency and also provides for the consistent treatment of identical claims. Class action litigation, when properly used, can serve a valuable role in providing justice for citizens and promoting judicial efficiency and consistency.

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Class action laws in the United States, such as rule 23 of the Federal Rules of Civil Procedure, set forth specific requirements for whether an action can proceed as a class action. Importantly, United States class action mechanisms require cases to be 'certified' as appropriate before they can move forward collectively. In the certification process, the court determines whether: the group of plaintiffs have properly described a cohesive class; the class members are sufficiently numerous; the common issues predominate (that is, individual issues do not overwhelm the common issues); and the class action mechanism is the superior way to resolve these issues. Without class certification, a massive class action could be filed, which unfairly exposes a corporate defendant to damages so potentially great that it would be forced to settle the litigation rather than defend itself at trial. As Judge Richard A Posner of the Chicago Seventh Circuit Court of Appeals wrote in the *In re Rhone-Poulenc Rorer Inc* case, the pressure of a class action can force defendants to "stake their companies on the outcome of a single jury trial, or be forced by the fear of the risk of bankruptcy to settle even if they have no legal liability." This concept of 'judicial blackmail' has long been a criticism of the United States system.

Even with the class certification mechanism, many abuses in class action litigation have been documented, especially class actions filed in certain state courts in the United States. A number of these state courts have been criticised as being unfair to corporate defendants, especially in class action litigation. Indeed, some of the jurisdictions are referred to as 'judicial hell holes' or 'magnet' jurisdictions where class actions are often certified with little regard to the facts or the law.

One unfortunate abuse in the class action system in the United States has been for litigation to be driven by plaintiff lawyers who file questionable class actions that generate millions of dollars in legal fees while plaintiffs receive little of value. In one case concerning Blockbuster Video, plaintiffs' lawyers settled for coupons for free movie rentals and US$1 off non-food items for the class members, while the lawyers themselves were paid nearly US$10 million in fees (*Forbes*, June 2001). Similarly, in a class action lawsuit concerning Cheerios cereal over a food additive with no proven injury to any consumers, lawyers were paid nearly US$2 million in fees (approximately US$2,000 per hour) whereas consumers received coupons for a free box of cereal (*Business Today*, 1997).

The exposure of numerous class action abuses led to the enactment of the Class Action Fairness Act by the US Congress in 2005. Among other things, CAFA allows defendants to remove most class actions from state court to federal court, thus avoiding magnet jurisdictions. So far, CAFA has been quite effective. In one magnet jurisdiction, Madison County, Illinois, less than 10 class actions have been filed in 2006 and 2007 combined, whereas before CAFA, in 2004 more than 80 class actions were filed in that court.

Whereas the rest of the world, including Brazil, is enacting procedures to allow or expand class action litigation, the United States is moving in the opposite direction in an attempt to reduce or eliminate the abuses that can come with class action litigation. Thus, the experience in the United States can provide a useful example that other countries can use in considering, drafting or amending class action laws to avoid the kinds of abuse that are now being corrected in the United States.