Class actions in Brazil[1-2]

Teresa Arruda Alvim
Full associate professor with an LL.M. and Ph.D. in laws from PUC-SP. Lectures post-graduate, specialisation, masters and doctoral courses at the same institution. Visiting professor at the University of Cambridge and University of Lisbon. International Relations Director of the Instituto Brasileiro de Direito Processual. Honorary Executive Secretary General of the International Association of Procedural Law. Honorary Member of the Associazione italiana fra gli studiosi del processo civile. Member of the Accademia delle Scienze dell'Istituto di Bologna, of the Instituto Ibero-americano de Direito Processual, of the Instituto Panamericano de Derecho Procesal, of the Instituto Português de Processo Civil Member of the International Board of Advisors of the Instituto de Derecho Procesal y Practica Forense de la Asociación Argentina de Justicia Constitucional. Attorney.
E-mail: teresaarrudaalvim@aalvim.com.br

Welder Queiroz dos Santos
J.D., Master, and Specialist in Procedural Law from PUC-SP. Specialist in Business Law from Universidade Presbiteriana Mackenzie. Assistant director and Law Professor in the graduation, specialisation, and masters courses at Universidade Federal de Mato Grosso (UFMT). Member of the Brazilian Procedural Institute (IBDP). Member of the Commission for Studies of the Civil Procedural Code of the Brazilian Bar Association (CECPC/OAB). Member of the Mato Grosso Law Academy (AMD). Attorney.
E-mail: welder@wqadv.com.br

Bruno Dantas
Minister of the Federal Court of Accounts (TCU), currently Vice-President and Chief of Internal Affairs Office. Former Head of the Legislative Counsel Office of the Federal Senate and former Counselor of the National Council of Justice (CNJ) and of the Nacional Council of the Prossecutor's Office (CNMP). Under the guidance of Professor Loïc Cadiet, he was a Visiting Researcher of the University of Paris 1 Panthéon-Sorbonne, focusing his studies on mediation between Audit Courts and Public Administration bodies. He is a Postdoctoral fellow in Law and Professor of External Control of Public Administration at Fundação Getúlio Vargas (FGV Direito Rio) and at UNINOVE (São Paulo). He chaired the Commitee of Jurists appointed by the House of Representatives to draft legislative proposals for the improvement of government management and external control of Public Administration. He was also part of the Committe of Jurists appointed by the Federal Senate to draft the new Code of Civil Procedure. He is the author of scientific articles in Public Law and co-author of the book "Infrastructure Law: Regulation and External Control (Forum Publisher)".
E-mail: dantasbruno@outlook.com

Abstract:

This text addresses Brazilian class actions. Obviously inspired by the American class action, they have recently been undergoing a critical phase. The existing laws, and also a bill which is

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at the moment in parliament, are analysed herein. Most of the problems that exist nowadays stem from the fact that class actions are governed by two main acts, and it's not always easy to harmonise their provisions. Furthermore, there has been a great deal of abuse which, to a certain extent, compromises the credibility of these proceedings. The existing bill reveals concern about this deformity and tries to lead class actions to develop their real role which is, in fact, to promote citizenship and to unburden the judiciary, by solving at once problems or disputes relating to mass litigation.

Keywords:

Class actions in Brazil – standing – *res judicata* – mass litigation – fundamental rights

Contents

1. The purpose of class actions in Brazil: collective rights *lato sensu*

Class actions are a sensitive subject. All over the world, it is, broadly speaking, a suit filed by one or more persons on their own behalf (or not) but, most importantly, it produces an award which affects a whole group of persons, who have rights in common (the same individual right as, for example, a large group of people who bought the same kind of rotten biscuits or who are holders of the same right, such as the right to breathe clean air or to ensure fundamental rights).

Why is it a sensitive subject? Apparently, because the government and large enterprises feel threatened by such a powerful tool, which, if well regulated, has the power to generate very useful awards, affecting a large group of people and, in certain cases, the whole country, rapidly

and efficiently. To this extent, bad conducts by these enterprises or by the government can be quickly corrected, and they can also be ordered to pay compensation for losses that may have been caused to these people. Therefore, pressure from companies or from the government is to be expected.

Furthermore, it is important to stress that there are at least two styles of representative class actions: those actions whose goal is to get a court ruling to protect the rights that belong to everyone (including, but not exclusively, fundamental rights),[3] and those actions that aim to protect people against the violation of individual rights, with common characteristics (actions which could, in fact, be individually filed).[4]

Disputes that can be solved by this SECOND kind of class action, which aims to obtain a single decision in identical disputes involving a considerable number of persons, could normally also be solved by means of aggregate litigation. Aggregate litigation, as will be seen later, is a method for solving identical disputes (partially or entirely) "at the same time".

Class actions and collective actions are terms normally used interchangeably in Brazilian law.

Because the subject is regulated by several statutes, there are some points around which the discussions among legal writers seem to be endless, and this is naturally reflected in case law, which is not uniform in many respects.

Nevertheless, legislation in Brazil can be considered to have achieved a good level of development.

In Brazilian law, there are three kinds of rights that can be the object of a class action – encompassed by what we call "collective rights *lato sensu"* – : (i) diffuse rights –those which belong to everyone, e.g. the right to breathe clean and healthy air; (ii) *sensu stricto* collective rights– these rights belong to a group of people between who have a link of fact or of right, for instance rights of lawyers or doctors; and, lastly, (iii) what we call "individual homogeneous rights" - these rights are individual, but collectively protected, because they have a common origin, e. g., the right to obtain an award in the sense that a certain clause of a bank agreement (adhesion or boilerplate contract) is null and void, and said contract is entered into with thousands of people: exactly the same contract. In this last case, we can certainly note that these rights are in fact individual rights. However, because they are absolutely identical, the legislator treats them as if they were a "*collective*" right.

These species of "collective" rights can also be the subject matter of Brazilian class actions, because class actions are also intended to solve problems which stem from mass litigation, which is very frequent in Brazil and creates an overload on our Courts. It is responsible for a great deal of pending proceedings in our country (*circa* 90 million at the end of 2018).

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[3] Baumgartner uses the term "human rights class action" [S P BAUMGARTNER. CLASS ACTIONS AND GROUP LITIGATION IN SWITZERLAND, *Northwestern Journal of International Law & Business* 27, p. 301-349, (2006-2007)].

[4] One of the legal authors that stresses this difference is Anthoine W. Jongbloed: he says there are two types of collective actions: "acciones de grupo y las acciones de interés general" [A W JONGBLOED. LAS ACCIONES COLECTIVAS EN HOLANDA. *In*: A GIDI; E F MAC-GREGOR (ed.). *Procesos Colectivos*. p. 167 and ff. (México: Editorial Porruá, 2003)].

Class actions alone, however, were not able to solve this problem for several reasons, but mainly because the *lis pendes* regime is not very well regulated by statutes. So, sometimes there are class actions which are identical, in different States of the Federation.

As previously mentioned, disputes stemming from the violation of homogeneous rights could also be solved by aggregate litigation.

Aggregate litigation is the model that seems to be more suited to the cultural context of civil law jurisdictions, and it is normally adopted in continental Europe. Its goal is to protect individual rights in a collective way.

It normally implies the joining of proceedings (i.e. individual suits that have already been filed) at some point, so that a common solution can be given to all cases, at least in what concerns some specific issues.

Disputes that can be solved by models of aggregate litigation, and there are many of them, could theoretically also be solved by representative actions, but the contrary is not true. Not all the disputes solved by class actions can be solved by aggregate litigation, such as those that concern the protection of the environment from pollution, or historical heritage. Being these rights of the kind that belong to everybody, it is generally considered that the representative class action is the best way to solve disputes that involve them.

Aggregate litigation normally involves the possibility that part of the *fattispecie* that constitutes all individual proceedings may be defined collectively by a judge.

One of the techniques of aggregate litigation employed in Europe is that of the "casi pilota", "Pilot-verfahren", or test claims. One or some of the cases are chosen and heard, and the decision is "binding" on the other cases (GLO – 19.13(b) and 19.15 – Civil procedure Rules).

The technique has been adopted in Austria and in Brazil.[5]

In Brazil, rules 1.036-1.041 of the Civil Procedure Code set out the "recursos especial e extraordinário repetitivos".

When it is verified that there is a reasonable quantity of pending actions based on the same facts and involving the same *quaestio iuris*, one or more appeals to the Supreme Court or to the Superior Court of Justice are selected and heard by the courts, and their decision is binding on all the other identical cases, past and future, involving the same question of law. This decision is considered a binding precedent.

There is a good example of aggregate litigation in Germany. It is the "Model Proceeding", *Musterverfahren* (Gesetz zur Einführung von Kapitalanleger – KapMUG) which applies to a very restricted area of substantive law: the securities market.

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[5] O Ballon I. Einführung in das österreichische Zivilproβrecht – Streitiges Verfahren. 6. ed. Graz, Leikam, p. 299, Testprozeβ – in Albeitsrecht. *Apud* A do PASSO CABRAL. O NOVO PROCEDIMENTO-MODELO (MUSTERVERFAHREN) ALEMÃO: UMA ALTERNATIVA ÀS AÇÕES COLETIVAS, v. 147, *Revista de Processo*, p. 123-146 (2007).

The collective decision encompasses *quaestio facti* and *quaestio iuris*, and until it is rendered, all individual proceedings are stayed. It is said that *res judicata* produced in the decision of the collective incident affects all individuals whose proceedings were stayed.

The main subject of this article is not the Aggregate Litigation Model but typical Brazilian Class Actions which were inspired by the American model, albeit not without many "adaptations".

All these kinds of collective rights may be the object of a class action, regulated not only, but mainly, by the Consumer Protection Code (Act 8078/1990) and by the Public-Interest Civil Action Act (Law No. 7.347/85).

These two acts broadly encompass class actions, but there are also other statutes which deal with class actions that have special proceedings to reach specific goals.

2. The origin of class actions in Brazil

The first Brazilian class action was the *Ação Popular*, set forth in the *Ordenações Filipinas* – the Code of the Portuguese Kingdom that came into effect in 1603, during the reign of Philip II of Portugal – as well as in all the Brazilian Constitutions (but for the Constitution of 1937), and regulated by *Lei da Ação Popular* or Law of Citizen Suits (Act of Law No. 4.717/1965), in effect until today.

Afterwards, in 1985, the abovementioned Public-Interest Civil Action Act (Act of Law No. 7.347/1985) was passed. According to these statutes, only the public prosecutor's office has standing to sue in these proceedings.

In the recitals accompanying Bill of Law 4.984/1985, which would come to be enacted as the Class Action Act, the then Minister of Justice, Ibrahim Abi-Ackel, affirmed that *"class actions have produced excellent results in the United States and, for this reason, it was deemed that this experience should be applied in Brazil"*.

As occurs with all great novelties, the Act could not foresee the practical problems that would arise from its application over the years.

Subsequently, the Constitution of 1988, a landmark of the period democracy returned in Brazil, expressly included collective rights in the list of fundamental rights, in addition to expressly laying out the procedural means for the protection of said rights, such as the citizen suit (Ação Popular), the public-interest civil action, the collective writ of mandamus and the collective injunction. Furthermore, breaking away from the traditional notion of *legitimatio ad causam*, it gave associations standing to sue in order to protect members' rights.

In 1990, the Consumer Protection Code, Act of Law No. 8.078/1990), was enacted and remains in effect until today, part of which was entirely drafted to regulate class actions.

These four statutes are the legislative landmarks of class actions in Brazil.

The Consumer Protection Code improved, to some extent, and extended the scope of collective relief. However, without solving important issues which are still pending.

As previously mentioned, the current general regime of Brazilian class actions is fundamentally (albeit not exclusively) made up of the Public-Interest Civil Action Law and the Consumer Protection Code. They are the basis of what we call the "microsystem of class actions in Brazil". The Public-Interest Civil Action Law deals with the activities of the Public Prosecutor's Office (*Ministério Público*) because, as previously mentioned, originally, only members of the Public Prosecutor's Office could file class actions, by virtue of their role, under the Federal Constitution, i.e., to defend the rights of society.

Some years later, the Consumer Protection Code came into force. It is divided in two parts: substantive law (consumers' rights and duties) and a procedural part. The latter applies to all class actions, not only to those where consumers' rights are defended, but to all rights that can be defended in class actions.

In 1992, the administrative corruption law was enacted (Act of Law No. 8.429/1992), intending to prevent or abolish dishonest acts committed by civil servants and by others who induce, participate in, or benefit from such acts.

The new writ of mandamus law (Act of Law No. 12.016/2009) came into effect to combat illegal acts or abuses of power committed by public authorities that violate, in a collective manner, liquid and certain rights of a particular group.

More recently, Act of Law No. 13.300/2016 regulated injunctions, both individual and collective, against regulatory omissions arising from the total or partial inertia of the legislative branch.

3. Types of class actions

The fact that class actions in Brazil are governed by two basic laws gives rise to an infinite number of discussions, which are often merely terminological.

The Public-Interest Civil Action Law (Act of Law 7.347) aspires to protect (including compensation for pecuniary and non-pecuniary losses) public and social property, the environment, consumer rights, property and rights of artistical, aesthetic, historical, touristic and landscaping value, the economic order, urban planning, the honour and dignity of race, ethnic or religious groups, and other diffuse and collective rights.

However, claims involving taxes, social security contributions, workers' Guarantee Fund for Length of Service (FGTS) or other funds of an institutional nature whose beneficiaries can be individually identified[6], were expressly excluded from the possibility of being the subject-matter of public-interest civil actions, for obvious reasons of a political nature. It is not in the interest of the state that these issues be settled in a quick *en masse* fashion, normally in favour of the individuals.

The Consumer Protection Code can, in turn, serve as the basis for any class action and has a longer list of those with standing to sue, when compared with the previous Public-Interest Civil

[6] Constitution of Brazil, 1988, Rule 129 (III); Public-Interest Civil Action Act, 1985, Rule 18; Consumer Protection Code, 1990, Rule 1.

Action Law. It makes express reference to said homogeneous individual rights[7], which are not mentioned in the previous law. Indeed, the abovementioned classification is based on legal writings and on rule 81 of the Consumer Protection Code. Actions based on this code to defend homogeneous individual rights, aim to obtain an award for compensation of losses incurred individually by consumers or by holders of any homogeneous individual rights.

Citizen suits (Ação Popular) pursue the annulment or declaration of nullity of acts that damage **public property** committed by the state or by an entity in which the state has a share, at upholding administrative morality, at preserving the environment and the historical and cultural heritage.[8]

Administrative corruption actions protect administrative honesty and are procedural tools which, upon confirmation of the dishonest acts by someone who performs a political role in the country and of the parties who persuaded them, participated in or benefited from dishonest acts, lead to the suspension of political rights, removal from public office, loss of assets obtained illegally, full compensation of the losses caused to taxpayers, payment of civil fines and, when applicable, the prohibition to bid on and win government contracts, or to receive tax or credit benefits or incentives, without prejudice to applicable criminal prosecution. [9]

The writ of mandamus (*Mandado de Segurança*), which already existed in the individual form, similarly to the *Juicio de Amparo* in Mexican law – an action to guarantee that the state will not commit illegal or abusive acts, brought on the basis of merely documentary evidence – can be filed in order to protect the rights, either collective *sensu stricto* or homogeneous individual, of the members of political parties with representation in the National Congress or of party-political activities; and of the members of trade unions or associations against the illegal or wrongful acts committed by government or by a person holding public office.[10]

Lastly, the collective injunction (which also existed previously in an individual form) can also be applied in the total or partial absence of a regulation, as a result of the inertia of the legislative branch, that renders the exercise of constitutional rights and freedom unviable, for example, in the event of a gap in the laws governing: unwaivable social and individual rights; the rights, freedom and prerogatives of members of political parties with representation in the National Congress or related to party-political activities; the rights, freedom and prerogatives of members of trade unions or associations. The same occurs if there is a gap in the legislation that impedes the promotion of human rights and the protection of individual and collective rights of the needy – as well as the prerogatives inherent to nationality, sovereignty and citizenship.[11]

4. Standing to file class actions

Class actions necessarily imply a different approach to standing.[12]

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[7] Homogeneous individual rights were previously referred to, Consumer Protection Code, 1990, Rules 91-100.
[8] Constitution of Brazil, 1988, Rule 05 (LXXIII); Public-Interest Civil Action Act, 1985, Rule 18; Popular Action Act, 1965, Rule 1.
[9] Constitution of Brazil, 1988, Rule 37 (04); Administrative corruption action, 1992, Rules 09, 10 and 11.
[10] Constitution of Brazil, 1988, Rule 05 (LXIX); Writ of Mandamus Act, 2009, Rule 21.
[11] Constitution of Brazil, 1988, Rule 05 (LXXI); Writ of Injunction Act, 2016, Rules 02 e 12.
[12] C PLASKET. REPRESENTATIVE STANDING IN SOUTH AFRICAN LAW, *Ann. Am. Acad. Polit. Soc. Sci.* 62, p. 256-298, (2009).

This concept of standing had to be deeply changed: in this context, we have just one claimant and a whole group of people who are pointed out as having had an unlawful behaviour. This claimant can be an official authority (e.g. the Public Prosecutor's Office, the approximate equivalent of the French *Ministère Public*) or a semi-official authority (e.g. a trade union) that represents the persons who suffered the injury.

In civil law jurisdictions, this is called extraordinary standing or "*substituição processual*".

In any case, and this is another important classical concept that had to be remodelled to adequately fit collective litigation, the *res judicata* effects of the decision affect a whole group of people or a community.

In Brazilian law, only those parties with standing, as provided by law, can file class actions. All parties with standing can file these actions, independently of others, and independently of the authorisation of the holders of the right.

This is one of the main characteristics of a class action, besides the effects of *res judicata*. In fact, the general rule, when we deal with traditional civil procedure, is that *res judicata* extends its effects only to the parties, and third parties are not directly, but rather indirectly, affected. In Brazilian class actions, conversely, the claimant (himself or herself) is not affected, but rather the community that he or she represents.

In the general model, that is, in class actions governed by the Public-Interest Civil Action and by the Consumer Protection Code (rules 81 to 104), the Public Prosecutor's Office, federal, state and municipal governments, bodies of the direct and indirect public administration, associations (that have been legally established for at least a year) that have among their institutional purposes the protection of consumer interests or of protected collective rights, which we call the interest of the parties in the issue, have standing to file class actions.

4.1. Control of the adequacy of representation

Brazil does not adopt the adequacy of representation theory in the sense that "*anyone*" could be the claimant of a class action if he or she really represents her or his social group sociologically. In Brazil, as previously mentioned, only those chosen by the legislator *"numerus clausus*" can play this role.

Brazilian law did not expressly provide for adequacy of representation in statutory law, as is done, for example, in the U.S.A. Adequacy of representation is presumed by the law itself when it determines who has standing to file class actions. It is only with regard to the standing of associations to bring class actions that the law provides that their institutional purposes pertain to the collective interest at stake. Therefore, traditional jurists do not allow judicial control of the adequacy of representation in class actions in Brazil.[13]

[13] N NERY JUNIOR; R M A NERY. LEIS CIVIS COMENTADAS. p. 247 (São Paulo: Revista dos Tribunais, 2006); P S DINAMARCO. AÇÃO CIVIL PÚBLICA. p. 201-202 (São Paulo: Saraiva, 2001); G A ALMEIDA. CODIFICAÇÃO DO DIREITO PROCESSUAL COLETIVO. p. 113-116 (Belo Horizonte: Del Rey, 2007).

Adequacy of representation in Brazil is not a criterion for standing but, instead, legal writers say that it is just a standard of assessment of the claimant's conduct. This means that the claimant has to endeavour to win the case. The reason is that practical experience has shown the existence of serious problems in the handling of class actions by associations without adequacy of representation, due to not having the slightest credibility, integrity, financial standing nor a reasonable number of members, despite formally fulfilling the prerequisites of having been established at least one year previously, and the existence of a connection between their institutional purpose and the subject-matter of the claim.

Thus, as was already said, some jurists accept the control of adequacy of representation of associations in class actions filed by them, as a control of the adequacy of the associations' conduct during the proceedings, which has already been accepted by the Superior Court of Justice.[14]

5. Funding

As a rule, there is no payment (or advance) of court costs, fees, expert fees or any other procedural cost for the filing and processing of class actions in Brazil, nor awards against the losing party, the applicant or the defendant,[15] for the payment of counsel fees, court and procedural costs,[16] except in the event of proven malicious prosecution by the claimant,[17] which, in the case of an association, will be ordered to pay counsel fees and court fees tenfold, jointly with the directors responsible for the filing of the class action, without prejudice to civil liability for damages.[18]

There is the exception of citizen suits (Ação Popular) in which the payment of court fees and procedural costs is also not required for filing, but payable at the end of the proceedings,[19] with the losing defendant being ordered to pay court and procedural costs as well as counsel fees.[20] If the judgment holds that the claim was manifestly frivolous, the claimant will be ordered to pay the costs tenfold.[21]

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[14] "Without neglecting the understanding that the law, by establishing those who have standing to file class actions, presumably recognised their connection with the collective interests to be protected, what is certain is that judicial control of the adequacy of representation, especially in relation to associations, constitutes an important element of the conviction of the judge to gauge the scope and, even, the relevance of the interests discussed in the action, even allowing him, in the absence of the former, to prevent the prosecution of the action, in observance of the principle of the due process of law in the protection of collective rights, in order to avoid the distortion of collective proceedings" (Superior Court of Justice. Third Court. Special Appeal n. 1.405.697/MG. Rapporteur: Justice Marco Aurélio Bellizze, Trial: 17.09.2015).

[15] Superior Court of Justice. Special Court. EAREsp 962.250/SP. Rapporteur: Justice Og Fernandes. Trial: 15.08.2018.

[16] Public-Interest Civil Action Act, 1985, Rule 18; Consumer Protection Code, 1990, Rule 87.

[17] Public Civil Action Act, 1985, Rules 17 and 18, changed by Code of Consumer Defense and Protection, 1990, Rules 115 and 116; Writ of mandamus Act, 2009, Rule 25.

[18] Consumer Protection Code, 1990, Rule 87.

[19] Popular Action Act, 1965, Rule 10.

[20] Popular Action Act, 1965, Rule 12.

[21] Popular Action Act, 1965, Rule 13.

It should be noted that, in Brazilian law, there are no rules regarding the funding of individual or class actions by third parties. What is done in this regard in Brazil – and this is an increasingly frequent phenomenon – is done on a purely contractual basis.[22]

6. Relationship between class actions: *lis pendens*, "*conexão*" (actions connected by the cause of action, or *petitum)* and *continentia causarum* – and between individual and class actions

The filing of a class action in the Brazilian system does not impede the filing of individual actions, revolving around the same object.

In concrete terms, this means that there can be thousands of class and individual actions **dealing with the same legal issue**. There is no *lis pendens* between these actions by express act of law (rule 104 of the Consumer Protection Code).

The person who files his or her own individual action can request its discontinuance or stay while awaiting the outcome of the class action. The claimant will then be affected by said outcome if the claim is granted. Otherwise, the claimant can proceed with his or her own action.

If the individual does not request a discontinuance or stay of the proceedings, he or she will be subject to the decision rendered in this action, whether the claim is granted or denied (*res judicata pro et contra*). This is the way in which the individual exercises the right to opt out: filing his or her own action and, in the event that a class action is filed subsequently, not requesting its discontinuance.

Brazil's class action regime is an opt-out one. The way in which individuals can avoid being affected by the result of a class action is by filing their own individual action when possible. It is normally possible when the right at stake is an "individual homogeneous right" or a collective right. Normally, diffuse rights cannot be defended by a single individual before the courts (such as the right to defend historical or artistic heritage).

As already mentioned, there is no *lis pendens* between a class action and individual actions on the same point of law and regarding the same facts, according to the statutes. Both may coexist.

It is also held that there is no *lis pendens* between class actions if the claimants are different.

The group of people affected is, erroneously, not taken into account, which generates several problems of a practical nature. These problems arise mainly from a discussion, which will be dealt with further ahead (item 10), regarding *res judicata erga omnes.*

When there are two identical actions filed by different claimants, it is understood, artificially, in this author's view, that there is *conexão*, which could lead to the joinder of claims to be heard jointly. If the claim of one action is broader than that of the other, it is deemed that there is *continentia causarum* and also, as a rule, that the claims should be joined.

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[22] A do PASSO CABRAL. CONVENÇÕES SOBRE OS CUSTOS DA LITIGÂNCIA (II): INTRODUÇÃO AO SEGURO E AO FINANCIAMENTO PROCESSUAL, n. 277, *Revista de Processo*, p. 47- 78, (feb./2018).

7. Res judicata

In Brazilian law, there is a very complex system of *res judicata*. It works *secundum eventum litis* and *secundum eventum probationis*.

This *res judicata* regime, *secundum eventum litis* or *in utilibus*, applies to cases where individual homogeneous rights are dealt with. If the claim is denied, only the moral person that filed the action[23] is affected and the individuals who intervened personally (because the law allows them to intervene if it is an action that addresses homogeneous individual rights).

Furthermore, *res judicata secundum eventum litis* applies also to all cases involving genuine collective rights related to individual claims. That means that when the class action is denied it does not affect individuals, who can file their own claims. If, on the other hand, the class action is successful, everyone is positively affected.

The *res judicata secundum eventum probationis* regime applies to cases related to intrinsically collective rights: diffuse rights and collective rights *stricto sensu*. This means that if the claim is not heard by the judge, due to lack of evidence, there is no *res judicata* and the suit can be filed again, based on different evidence. Furthermore, if the claim is not granted, *res judicata* applies only to the specific claimant who will not be able to file the action again. However, another legal entity, to whom statutes give standing, may claim the same thing before the courts (same "*causa petendi*" and same "*petitum*").

8. *Res judicata*. Territorial limitation: Enforcement of judgment in class actions

In 1997, rule 16 of the Public-Interest Civil Action Law was amended, aiming to weaken enforcement, and limiting *res judicata* to the state in which judgment was rendered, *rectius*, to the area of territorial jurisdiction of the court that rendered judgment, which has been branded by many authors as being unconstitutional.

It was the result of a certain abuse that took place, which in fact compromised the credibility of this powerful tool.

This provision was mainly applied to actions addressing homogeneous individual rights.

In a recent appeal filed before the STF, this provision was considered unconstitutional, thus extending the effects of class actions to the whole country.[24]

9. Liquidation of collective awards

In order to deal with the liquidation of general awards rendered in class actions in Brazil, one must distinguish between: (i) those dealing with injury to diffuse or collective rights; and (ii) those that deal with homogeneous individual rights.

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[23] One of those who has standing according to Statutes.

[24] Extraordinary Appeal 1.101.937-SP. Rapporteur: Justice Alexandre de Moraes. Trial: 26.03.2021 to 07.04.2021.

In the case of an unliquidated award regarding compensation for damage caused to diffuse rights and collective rights *sensu stricto*, the liquidation, as a rule, follows the provisions of the Code of Civil Procedure. It starts with the submission of the liquidation request to the judge that rendered the judgment, by the party with standing that conducted the cognizance proceedings, or by any of the parties with standing. The liquidation will assess the *quantum debeatur* for the compensation of the damage caused to the collective.

In turn, the liquidation of the unliquidated award for the compensation of damage to homogeneous individual rights with the determination of the defendant's liability for the damage, can be proposed by each individual who benefits from the collective award or by those who have legal standing to file class actions.

In the case of the individual liquidation of the collective award, besides the assessment of the *quantum debeatur*, as occurs with liquidations in general, the judge also analyses, before anything else, whether the individual qualifies as one of the beneficiaries of the legal status of "injured party" defined by the collective award. Due to this dual purpose, legal scholars have named it "improper liquidation". It is the injured party and beneficiary of the collective award[25] who has standing to file for liquidation, and the court of jurisdiction is the one where the party is domiciled as a way of assuring access to justice.[26]

Exceptionally, the law authorises those who have legal standing to file class actions, to file for collective liquidation of the award in favour of the individuals. This is known as "pseudo-collective liquidation" (and enforcement). Additionally, the parties with standing can file for liquidation (and enforcement) in favour of the collective (through fluid recovery), as will be explained in the next topic, regarding the enforcement of class actions.

10. Enforcement of collective awards

In actions whose subject matter is the satisfaction of the obligation to do, or not do, e.g. the performance of the action due, or the cessation of the harmful action, a judge can determine that the necessary measure be taken to ensure compliance with the court order, such as search and seizure, removal of things or people, demolition of building works, stoppage of a harmful action, in addition to requesting police intervention, and can even impose a daily fine, independently of an application by the claimant, to achieve specific performance or equivalent practical result.[27]

In turn, the collective award that orders the compensation for damage can be enforced in three different ways according to Brazilian law: (i) collective enforcement; (ii) individual enforcement of the collective award; (iii) pseudo-collective enforcement.

The collective enforcement of the collective judgment can take place in actions regarding diffuse and collective rights *sensu stricto*, and can be filed by the party with standing who conducted the cognizance proceedings, or by those who have legal standing to file class actions,

[25] Consumer Protection Code, 1990, Rule 97.
[26] Superior Court of Justice. Special Court. Rapporteur: Justice Luis Felipe Salomão. Trial: 19.10.2011.
[27] Public-Interest Civil Action Act, 1985, Rule 11; Consumer Protection Code, 1990, Rule 84, § 5°; Code of Civil Procedure, Rule 139, IV.

to obtain compensation for the collective damage in favour of the collectivity,[28] and the sum will revert to a fund for the protection of diffuse rights and destined to recover the damaged property.[29]

In addition, it is also possible to conduct a collective execution, by fluid recovery, of judgments rendered in class actions that address homogeneous individual rights, and said execution may be filed by those who have legal standing to file class actions, when the number of claims filed is incompatible with the gravity of the damage after a period of one year.[30] In the event of enforcement by fluid recovery, the sum will also revert to a fund destined to recover the damaged property.[31]

The filing of a collective enforcement of a collective judgment that addresses homogeneous individual rights does not impede the possibility of the individual enforcement of a collective judgment, and the two can be prosecuted simultaneously, with the injured individuals having priority in the compensation for damage over the compensation that will be allocated to the fund.[32]

In turn, the individual enforcement of a collective judgment that addresses homogeneous individual rights is one that is filed by the individual beneficiary of the collective judgment, in his or her own favour, for the compensation of the personal injury incurred.[33]

An interesting situation in Brazilian law is that of the extension *in utilibus* of the collective judgment granting the claim that relates to diffuse and collective rights to the individual who will benefit from it, with the possibility of filing individual liquidation and enforcement proceedings.[34]

Lastly, pseudo-collective enforcement is the one filed by the party with standing who conducted the cognizance proceedings, or by any of those who have legal standing to file class actions, in favour of the individuals benefitted by the collective judgment who did not file individual enforcement proceedings, for the purpose of obtaining compensation for injury personally incurred by them.[35]

11. Defendant class actions

There are differences of opinion among legal writers regarding the admissibility of defendant class actions in Brazil. This action is one in which the defendant represents a group of persons.

[28] Consumer Protection Code, 1990, Rule 98.
[29] Public-Interest Civil Action Act, 1985, Rule 13.
[30] Consumer Protection Code, 1990, Rule 100.
[31] Public-Interest Civil Action Act, 1985, Rule 13.
[32] Consumer Protection Code, 1990, Rule 99.
[33] Consumer Protection Code, 1990, Rule 97.
[34] Consumer Protection Code, 1990, Rule 103, § 3°.
[35] Consumer Protection Code, 1990, Rule 98.

The Superior Court of Justice judged that there is no legal provision for defendant class actions in Brazil, and therefore decided for the impossibility of filing incidental proceedings in a class action due to its incompatibility with the rules of *res judicata* in class actions in Brazil.[36]

12. Settlements in class actions

Settlements are allowed and encouraged in class actions in Brazil.[37] Paragraph 6 of rule 5 of LACP expressly provides that public authorities with standing may execute consent decrees pursuant to the law.

More recently, the Law of Mediation between individuals, between individuals and the government, or between different government bodies, provides that even unwaivable rights can be the subject-matter of a settlement, provided it is ratified in court, having heard the Public Prosecutor's office.[38]

There is much discussion in Brazil about whether the only parties with standing to enter into a settlement in class actions are the Public Prosecutor's office and public entities, or whether private legal entities with standing, as is the case of associations, can also enter into such settlements. On one hand, there are those who understand that it would not be possible for private associations with standing to enter into a settlement in court, due to the lack of legal provision and lack of control of adequacy of representation. On the other hand, the Federal Supreme Court has recently decided for the viability of a collective settlement being entered into by private associations with standing, as the absence of a specific legal provision does not impede them from executing collective settlements and the specific provision for public entities arises from the principle of strict legality, as public entities can only do what the law expressly authorises them to do, unlike private entities, and unanimously ratified the first[39] and the second[40] settlement.

The express prohibition that existed in Brazilian law was relative to settlement in administrative corruption cases. However, Act of Law No. 13.964/2019, known as the Crime-Fighting Law, changed that provision and expressly allowed settlements, under which there will be no civil prosecution in actions dealing with administrative corruption.[41] If it is possible to enter into a settlement to prevent civil prosecution, *a fortiori*, it would seem that it is also possible, to reach a settlement in administrative corruption proceedings.

13. Endeavours for standardisation – the new draft bill on class actions

Class actions are not a primary construct in the theory of procedural law. Rather, they are

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[36] Superior Court of Justice. Third Panel. Special Appeal 1.051.302/DF. Rapporteuse: Justice Nancy Andrighi. Trial: 23.03.2010.
[37] Public-Interest Civil Action Act, 1985, Rule 13, § 6.
[38] Law No. 13.140/2015, Rule 3, § 2.
[39] Federal Supreme Court. Full Bench. Settlement in Action Against the Violation of a Fundamental Constitutional Right No. 165. Rapporteur: Justice Ricardo Lewandowski. Trial: 15.02.2018.
[40] Federal Supreme Court. Full Bench. Second Settlement in Action Against the Violation of a Fundamental Constitutional Right No. 165. Rapporteur: Justice Ricardo Lewandowski. Trail: Virtual Session of 22.05.2020 to 28.05.2020.
[41] Administrative Corruption Act, 1992, Rule 17, § 1º.

derivatives of decades of observation and of the recognition that classical procedural law, built upon the principles of individualism, was unable to provide the proper tools for the resolution of a crucial range of typical disputes of a mass society[42].

Civil procedure was conceived as being an essentially private phenomenon. The dominant values were the autonomy and the freedom of the parties to the proceedings. Obviously, it is not an ideologically neutral conception, on the contrary, it is the projection of a political ideology largely predominant throughout the XIX century.[43]

The main concern of thinkers of the period was to depict man as an individual and a rational being.

The classical individual concepts and institutions of traditional civil procedure were conceived in the light of philosophical concerns that have changed considerably throughout the last two centuries.

What rendered this shift a more complex transition was that these traditional concepts were conceived as if they were *dogmas* i.e. as if they were something that cannot be questioned or on which doubts should not be cast.

Savigny, for example, used to compare law with mathematics, more specifically with geometry.[44]

So, procedural categories were conceived as if they were eternal, as if they were something "natural". Law was seen as a *conceptual* branch of knowledge, unrelated to history, culture. Presumably, legal concepts could serve any human society, at any time, independently of its cultural characteristics and needs.

Dogmatic thought considers it natural that legal concepts and structures of civil procedure conceived for the European society of the XIX century could be useful for the post-industrial society of the XXI century.[45]

This is one of the reasons why the creation of collective techniques to solve disputes was not easy. Collective litigation implies a need to shift from the classical individual concepts, related to the individual model of litigation, Caius v. Ticius, in the name of access to justice and of

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[42] In an influential article published in 1979, ADA PELLEGRINI GRINOVER remarked that "it is the political reality that changes the very concept of procedure, no longer perceived as a classical tool of interpersonal dispute resolution, but rather transformed into a means of dispute resolution involving diffuse interests, and for that very reason typically political. In the same manner that one changes the concept of procedure, so does that of action, which is transformed into a means of political participation, in an open concept of legal system, in contrast with the closed rigidity that arises from traditional material situations. In this context, the action entrenches the political practice of law, caused by the inadequacy of the traditional techniques" [A P GRINOVER. A tutela jurisdicional dos interesses difusos, v. 268, n. 916/917/918, *Revista Forense*, p. 67, (oct./nov./dec. 1979)].

[43] M TARUFFO. IDEOLOGIE E TEORIE DELLA GIUSTIZIA CIVILE, n. 247, *Revista de Processo*, p. 49-60, (sep./2015).

[44] F C von SAVIGNY. DE LA VOCACIÓN DE NUESTRA ÉPOCA PARA LA LEGISLACIÓN Y LA CIENCIA DEL DERECHO. (Madrid: Universidad Carlos III, 2015).

[45] O A B SILVA. PROCESSO E IDEOLOGIA, O PARADIGMA RACIONALISTA. p. 300-305 (Rio de Janeiro: Forense, 2004).

efficiency, to different concepts of standing and of *res judicata*.[46]

Nevertheless, as previously mentioned, changes in society were so deep and drastic that some changes in the Brazilian legal system were unavoidable. Over time, laws were enacted in order to solve disputes arising from mass litigation in a more effective way. Furthermore, these new laws were also able to produce good results in what concerns historically "new" rights, such as the right to a healthy environment.

Naturally, all of this was done with remarkable enthusiasm. Possibly due to said enthusiasm, an excess of overlapping laws was enacted, which led to interpretation problems and enabled their misuse. So, it was considered, as we will see, that the time was propitious to rethink this situation

The reality is that the existing system, composed of several Acts governing class actions, as previously mentioned, dates back almost four decades and, unacceptably, deep-seated doubts still persist on essential points, whose full understanding and associated mastery would enable the efficient and proper use of this instrument of citizenship.

As if the doubts did not suffice, contributing to the scenario of uncertainty, there is a problem that was observed long ago by TEORI ZAVASCKI and that, from the start, undermined the effectiveness of collective relief: the romantic, idealised and, naturally, mistaken view that it would be a panacea for all that ailed Brazilian justice.[47]

For this set of reasons, this distinguished jurist and Supreme Court Justice called, way back in 1995, for a broad review of Brazilian class actions: *"The process of critical review that has been perceived of late, striving to hinder excesses and, thus, not only safeguarding against disrepute but enhancing and perfecting these important advances in the procedural field, is therefore very salutary"*.[48]

The anomaly of having a single legal subject (class actions) governed by at least **two** laws, that would be mutually complementary, generates interpretative perplexity.

The lack of certainty as regards some doctrines in the context of class actions, such as, for instance, the extent of the enforceability of the judgment, besides encouraging litigiousness, is a huge source of legal uncertainty. The controversies that exist among jurists, and which are reflected in case law, range from a certain confusion regarding the terminology of the lawsuits, to such relevant aspects as the need for authorization to file a class action, in certain cases.

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[46] Pablo Gutierrez de Cabiedes Hidalgo says that the group and collective litigation phenomenon can be an instrument for a great transformation, which he calls a Copernican revolution, in the Spanish justice system. He denies that it generated a litigation culture, as some people had predicted, but an "enforcement" culture of consumer law and consumers' rights and interests. [P G C HIDALGO. GROUP LITIGATION IN SPAIN, National Report, Stanford University Law School, Global Class Actions Exchange, p. 19, (2007)].

[47] "The ensuing enthusiastic usage of the new procedural mechanisms did not always occur in an appropriate manner, sometimes due to the inexperience of the users – which is understandable -, at other times because it was, mistakenly, presumed that finally we had a remedy for all ills: to unshackle the judiciary and to save society from all the aggressions of the government and of the powerful in general" [T A ZAVASCKI. DEFESA DE DIREITOS COLETIVOS E DEFESA COLETIVA DE DIREITOS, v. 32, n. 127, *Revista de Informação Legislativa*, p. 83-96, (jul./sep. 1995)].

[48] *Id. Ibid.*

Concerns with the unity of law, with legal certainty, from the aspect of the consistency and harmony of court decisions, which, in part, stem from the acknowledgement that they have a certain normative impact, were not so acutely present[49], which led the legislator, of both the Class Action Act and the Consumer Protection Code, to opt for adopting complex legal frameworks, such as *res judicata secundum eventum litis* and *secundum eventum probationis*.

The law governing class actions must be **simple and efficient**. There cannot be any loopholes that enable misuse, discrediting and demoralizing the device[50]. In fact, it was precisely the discredit caused by a structure of inappropriate incentives that plunged the North American class action – a source of inspiration to our class action, as admitted by the Minister of Justice Ibrahim Abi-Ackel in the recitals of the Brazilian law – into the deepest crisis of its century-old existence.[51]

For this reason, the **Brazilian National Council of Justice** has, by means of Ordinance 152/2019 and, at an excellent moment, as revealed by **Justice Dias Toffoli**, charged civil procedural law scholars with the task of drafting a bill of law capable of encompassing class action law in general. This initiative, in addition to the dynamic participation of counsellors **Henrique Ávila and Maria Teresa Uile**, has established a favourable environment in which to diagnose problems and provide for good solutions in the new law.

Class actions have the potential to become a real tool for the exercise of citizenship and cannot be governed in such a way as to give rise to risks of misuse as, in theory, their impairment would represent a great loss to society. Therefore, in this draft bill, care was taken to properly regulate the standing of associations. The idea of functionality has been associated with that of simplicity[52]. Therefore, simplicity, even as regards the terminology, was the ***key word.*** It was clarified, in a timely manner, that class actions are a genus of which public-interest civil actions and collective writs of mandamus are species, there being, evidently, no impediment to the establishment of other special procedures to provide for collective claims, as well as for the

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[49] The main concerns at the time were, in contrast, focused on access to justice, a principle that directly influenced the choice of these doctrinal structures. In 1978, Cappelletti and Garth wrote: "Access [to justice] is not only a fundamental social right, increasingly acknowledged; it is also, necessarily, to focal point of modern civil procedure" [M CAPPELLETTI; B GARTH. ACESSO À JUSTIÇA. p. 13, (Porto Alegre: Fabris, 1988). Trad. Ellen Gracie Northfleet]. To this effect, Ada Pellegrini underscores: "Thus, in the value judgment that preceded the choice of the legislator, one notes that extending the matter adjudged to third parties, who had not personally been heard in the proceedings, posed excessive risks, running deep within intersubjective relationships, when it involved undermining individual rights; furthermore, the Brazilian system of eligibility could give rise to issues of constitutionality, due to the indiscriminate subjective extension of the decision, on the grounds of infringing the right to be heard. It was for this reason that the Consumer Protection Code included the regime of the extension of the matter adjudged to third parties, who were not parties to the proceedings, only to benefit them" [A P GRINOVER; K WATANABE; N NERY JUNIOR. CÓDIGO DE DEFESA DO CONSUMIDOR: COMENTADO PELOS AUTORES DO ANTEPROJETO. 10. ed. v. II, p. 181 (Rio de Janeiro: Forense, 2011)].

[50] It suffices to note how the class action crisis in the United States is directly related to the abuses that its system allows. This is the criticism voiced by Linda Mullenix, professor at the University of Texas in Austin. [L S MULLENIX. O FIM DO PROCESSO COLETIVO TAL COMO O CONHECEMOS: REPENSANDO A *CLASS ACTION* NORTE-AMERICANA. n. 283, *Revista de Processo*, p. 503-563, (sep./2018). Trad. Bruno Dantas].

[51] As even its staunch advocates admit, such as Deborah Hensler, Professor at the University of Stanford and Director of the *Global Class Action Exchange* programme: "After almost two decades of multilateral attacks, private class actions are on the decline in the United States" [D H HENSLER. GOLDILOCKS AND THE CLASS ACTION, v. 126, *Harvard Law Review Forum*, p. 56, (2012-2013)].

[52] As Dinamarco insists, "this action is useful for the results it produces in the lives of people or groups", that is, the action is not an end in itself, but rather a tool aimed at achieving its intended objectives, for which reason it should be "concerned with the results that society, the government and individuals expect from it" [C R DINAMARCO. INSTITUIÇÕES DE DIREITO PROCESSUAL CIVIL. v. I, p. 50 (São Paulo: Malheiros, 2005)].

possibility of any lawsuit being "transformed" into a class action, provided that, through it, the party with standing files a claim on the grounds of collective rights.

Class actions were conceived (a) to permit the filing of claims that would not be worth filing individually; (b) to achieve the effective protection of rights that are intrinsically collective – collective in the strict sense and diffuse; (c) to provide the full realisation of the principle of equality, thus reducing the work overload of Courts.

Any regulation that does not fulfil these aims strays from what a class action should, ideally, be.

The draft bill intends to satisfactorily regulate *lis pendens* between class actions, naturally safeguarding the individual right of action, also as a way of opting out of the pending class action.

Having suitably regulated *lis pendens* in class actions, care was taken to establish the possibility of **other claimants joining** the one who filed the action. In contrast, *res judicata* prevails, *rectius*, the scope of the enforceability of the judgment, for the whole country, if that is the extent of the damage.

This prevents, among other things, the company or the government from being sued in countless class actions with the same aim, which would, in the end, jeopardise the defendant's financial health and would, consequently, represent a hindrance to the country's prosperity.

Many of the suggestions proposed by jurists regarding the points of intersection between class actions were accepted, such as the one that determines that, in the event of a bellwether trial, whereby the most representative actions are tried first while others are stayed (claims or appeals on the same point of law), class actions must be given priority.

The best way of protecting the values connected to the claims filed in intrinsically collective actions is to use the relief or redress obtained in the performance of **works or activities aimed at restoring the damage caused**. The draft bill chooses this as **the preferred manner of enforcing a favourable judgment** in these actions.

The principle of publicity is clearly attributed great importance, the National Council of Justice having been advised to disclose, by means of a **register** to be created, all the existing class actions in the country, as well as Consent Decrees executed and bench decisions. Reports shall be drawn up and **updated monthly,** and shall be mandatorily consulted by the parties with standing to sue at the time of filing the claim, under penalty of having the claim dismissed for lack of interest in the suit.

The freedom of the parties with regard to the procedure is broadly dealt with in the draft bill. Settlements are encouraged, including and mainly relative to the allocation of the damages claimed or settled.

Society's right to be heard is encouraged, through the *amicus curiae* as well as by means of public hearings, whenever deemed suitable.

Significant advances have been made as regards evidence: the valuation in court of evidence obtained in a civil investigation is forbidden, unless it is carried out with the judge's

authorization and assuring the right to be heard.[53] The inversion of the burden of proof is allowed (and this is not new), but the inversion of the rule of its defrayal is also allowed. Sampling or statistical evidence is deemed to be welcome.

The matter adjudged represents the certainty that must never be taken away. *Res judicata secundum eventum litis* and *secundum eventum probationis* is done away with. However, new evidence, which could not be produced in the previous proceedings, that can give rise to a new identical action, is admissible.

The draft bill puts an end to the discussion regarding the fact that class actions interrupt the running of the limitation period of individual actions, by establishing a rule that is in harmony with the need to stabilise legal relations and with the intention of the legislator of the Civil Code, aiming to always shorten the deadlines within which rights may be exercised. The absence of this explicit rule allows an interpretation that would lead to the existence of infinite deadlines.

On the other hand, one does not, naturally, take away from the individual, for constitutional reasons, the right to file an individual action, the running of which is not automatically suspended by the filing of a class action.

The award in a class action, once liquidated, is an enforceable instrument for individual actions.

The scope of res judicata, of the enforceability of the judgment, as well as the interlocutory relief granted, in any case, covers the whole of Brazil.

Measures granted as interim relief may be challenged by interlocutory appeals and by motions to stay preliminary injunctions. The individual decision of the *rapporteur* or of the president of the appellate court, as the case may be, can be challenged by means of an internal interlocutory appeal as a way of endorsing bench decisions, whether favourable or unfavourable.

Precisely as compensation for the adoption of the *res judicata erga omnes*, the operation of ***lis pendens*** was expressly provided for, with the **necessary clarity,** between class actions with the same claim and with the same cause of action even if the claimant is not the same, in which case the second action must be dismissed without prejudice. On the other hand, any possibility of contradiction must be neutralised by the necessary joinder of related claims before the same court.

In perfect harmony with the current world trend of encouraging other forms of dispute resolution[54], other than those that take place before the courts, the draft bill encourages both the

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[53] A provision that, in turn, aims to fully concretize, within the scope of class actions, the teachings of Michele Taruffo to the effect that "in modern procedural systems, one cannot expect to find the 'truth' by guessing, the casting of lots, reading tea leaves, dueling in court or by any other irrational an uncontrollable system (such as God's judgments or any other type o Medieval ordeal), but on the basis of evidence, which *must be properly offered, admitted and produced*" [M TARUFFO. A PROVA. (São Paulo: Marcial Pons, 2014). Trad. João Gabriel Couto].

[54] A movement in which Carnelutti sees, beyond a mere spread motivated by the advances of comparative studies, a deeper meaning: "The influence that causes the external interest in determining the spontaneous resolution of disputes to expand is neither small, nor can it be disregarded. On the contrary, an in-depth analysis of the regimes

execution of settlements and of consent decrees, and provides for them in great detail, even permitting that consent decrees executed by the Public Prosecutor's Office be granted nationwide enforceability if ratified by the courts.

In order to facilitate the realisation of the concrete right of the beneficiaries of the award, the draft bill encourages the judge to render a liquidated award, even if the claim was general, which evidently has the effect of waiving the liquidation phase, shortening the path for individuals.

Aiming to establish the proper conditions for the final decision in the proceedings to constitute **quality judicial relief,** a **mandatory review** becomes a requirement whatever the decision may be, i.e. for the validity or invalidity of the claim.

With the overriding aim of inhibiting malicious or frivolous litigation that, as we know, has the power of discrediting the doctrine itself, a rule is established applying the provisions of the Code of Civil Procedure that govern court costs and loss of suit costs to class actions.

Since 2015, Brazilians have had a modern Code of Civil Procedure that, one can say without hesitation, is among the most advanced in the world. Many are the reasons that justify this affirmation, such as the adoption of the principle of cooperation, which must be understood in its broadest sense; the principle of *audi alteram partem,* in its contemporary version, having an influence even on the manner in which a court must substantiate its decision; the precedent system, which tends to produce unified, cohesive, coherent and harmonious law, fully achieving the principle of equality and creating legal certainty. Therefore, it is propitious that the draft bill should contain a rule stating that the **Code of Civil Procedure is applicable in a supplementary manner to the statutes governing class actions.**

The drafting of a bill of law to govern class actions demands in-depth knowledge of the matter, intensive experience and, necessarily, less passion. It is a sensitive subject that cannot be dealt with by those who see merely the interests of the government and of companies, nor by those who see things, exclusively, from the perspective of the individuals who will be affected by the impacts of the judgment.

Abuses must be curbed, on both sides, so that class actions may produce the desired **benefits** for society. Above all, a high degree of serenity is necessary as the protection of individuals cannot take place to the detriment of the economic prosperity of society, **given that the welfare of those very individuals depends on this prosperity.** This is the difficulty, the apparent paradox, that makes class actions a sensitive topic, the regulation of which must be conceived based on the idea that balance is indispensable.

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of interpersonal, interunion and international disputes, it appears to me, should lead to evidence that, *as civilization progresses, there is less need for Law to provide the peaceful resolution of the dispute, not only because morality grows, but also, and above all, because there is an increased sensitivity of human beings before the supreme interests of the collective*" [F CARNELUTTI. SISTEMA DE DIREITO PROCESSUAL CIVIL. 2. ed. v. 1, p. 63 (São Paulo: Lemos e Cruz, 2004)].

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