Mediation Opportunities In Cartel Damages Claims In Brazil

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ABSTRACT

The paper discusses the opportunities for the use of mediation in cartel damages claims in Brazil. For this, the paper discusses the growth of the private mediation market in Brazil as well as the art of choosing a consensual dispute resolution method and why mediation would be a suitable method in cartel damage cases. It than discusses cases in which cartel damages claims were filed in Brazil that could have benefited from mediation. Finally, it also discusses a global Dispute System Design case involving cartel damages claims (the Parker ITR case related to the marine hose cartel) and provides a forward looking view on private mediation in Brazil in cartel damages claims.

Keywords: Mediation - Cartel - Damage Claims - Antitrust

1. Introduction

This short paper[3] is based on a lecture we gave at Shinshu University

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[3] This paper was prepared based on the lecture we gave at Shinshu University during the XX Seminar on January, 2018.

during the Brazil-Japan Litigation and Society Seminar – Courts and Disputes Resolutions in January 2018 and aims to provide some food for thought on mediation opportunities in cartel damages claims in Brazil, including a Dispute System Design method. The issues discussed in this paper derive from other papers in which we have proposed that mediation and other alternative dispute resolution methods could be explored as alternatives for the collection of redress from cartel damages in Brazil[4].

The paper is organized in five sections. The first section discusses the growth of the private mediation market in Brazil. Section two focuses on the choice of mediation as a conflict resolution method. Section three explores the possibility of customizing mediation and section four has a brief discussion on private enforcement of antitrust laws in cartel investigations discussing potential cases that could benefit from an alternative method of conflict resolution such as mediation. Section five provides our conclusions to this short paper.

2. The growth of the private mediation market in Brazil

Before discussing mediation in antitrust cases, it is important to provide some general information on private mediation in Brazil.

For the success of mediation, institutional support is essential. In this sense, it is important to highlight the role of the Mediation Act (Act n. 13. 140/2015), which deals predominantly with private mediation, and the role of

[4] See Demandas Indenizatórias Por Danos Causados Por Cartéis No Brasil Um Campo Fértil Aos Mecanismos Consensuais De Solução De Conflitos in Revista de Arbitragem e Mediação: RArb, v. 11, n. 43, p. 171-207, out./dez. 2014 and Arbitragem e Outros Meios de Solução de Conflitos em Demandas Indenizatórias na Área de Direito da Concorrência in Revista Brasileira de Arbitragem, v. 11, n. 43, p. 7-32, jul./set. 2014.

the new Code of Civil Procedure (Act n. 13.105/2015), which focuses on judicial mediation and is applied in a subsidiary manner to private mediation.

In Brazil, as in other countries (such as the US), the institutionalization of mediation in the Judiciary played a significant role in the growth of the private mediation market. Within the Courts, it is important to highlight the role of Resolution n. 125 of the Brazilian National Council of Justice (CNJ), from 2010, which instated a national public policy for the appropriate treatment of conflicts and contributed to important steps towards the institutionalization of mediation, as well as the dissemination and improvement of the mediation practices already adopted in the Judiciary.

The institutionalization of mediation is very important to create regulatory standards (minimal due process) and provide a secured environment for mediation. It also creates standards to the training of mediators and establishes principles to be observed in mediation proceedings.

The new Code of Civil Procedure in Brazil brought a mandatory mediation in the Judiciary, what have increased the visibility to mediation and to access to justice, contributing to making mediation more familiar to the parties and lawyers.

Although it is important to consider the role of regulation and institutionalization, it should not be forgotten that the autonomy of the parties is essential in mediation. So, often, "less is more". Moreover, we cannot expect more from the laws than they can provide. Alongside the regulation (top-down), it is important to incentivize mediation practices (from the bottom to the top), so people, companies and institutions can see real opportunities in

mediation and, thereby, change their way of managing and solving their own conflicts. This is the only way to create a culture focused on mediation, which will be discussed in the next topic.

A former president of the State Court of Justice of São Paulo, José Renato Nalini, once said: "justice is a collective work". It is true because cultural change does not come just from the law or governmental measures, but mostly from a deeper and collective mentality change that comes from the society, including lawyers, who need to consider the use of mediation as an effective alternative for access to justice.

Inspired by the mediation pledge of the International Institute for Conflict Prevention & Resolution (CPR), it was created in Brazil (under the coordination of Prof. Kazuo Watanabe) a Mediation Pledge, which was launched in November 2014 at Fiesp-Ciesp (The State of São Paulo Industry Federation) and signed by institutions, companies, Universities, lawyers and individuals in the country. The pledge states:

> "we are committed to internally and externally adopt practices that are adjusted to consensual methods of dispute resolution, such as negotiation, conciliation and mediation, when appropriate, with the goal of constantly establish and improve dispute management and resolution processes in a collaborative, integrative, efficient and sustainable way".

The goal of this pledge is not just to create commitment, but also to create opportunities for networking and exchange of experiences about successful mediation practices. The future of mediation depends on such initiatives,

which come from the society and see mediation as an effective way to solve conflicts and provide access to justice.

According to a research conducted on April 2018 by Daniela Gabbay[5], there is a growing market of mediation in Brazil, considering the numbers of institutional private mediation. This is the first study that look at the landscape of mediation in Brazil, analyzing data from 2012 to 2017 of three different chambers active in the country: the International Center for ADR of the International Chamber of Commerce (ICC), the Center for Arbitration and Mediation of the Brazil-Canada Chamber of Commerce (CAM-CCBC) and the Chamber for Conciliation, Mediation and Arbitration of the Federation of Industries of the State of Sao Paulo (CIESP-FIESP).

Among the factors for the clients and attorneys decisions when choosing an institution to administrate the proceedings, there are the costs involved and the average duration of the proceedings, as well as the profile of the mediator and who is responsible for choosing the neutral when the parties do not have a consent on that choice. The research analyzes these issues and also presents the impact of the Brazilian new legal framework on private mediation.

[5] The full article is available in Portuguese at: https: //www. jota. info/opiniao-e-analise/artigos/mediacao-empresarial-em-numeros-onde-estamos-e-para-onde-vamos-21042018.

3. The art of choice

3.1. When mediation is appropriate? Raising some criteria to guarantee a good choice

The choice of mediation is often strategic and depends on the goals of each party and what is appropriate for a particular dispute. It can be chosen before or after the arrival of a conflict. When it is chosen earlier, while making an agreement, the parties tend to use a mediation clause according to criteria related to the value of the dispute, importance of minimizing costs, the goal to maintain or improve their relationship, confidentiality, the parties' intention to control the process and its results, among other criteria to better match procedure and conflict.

This contractual choice may stipulate that mediation is mandatory, preceding arbitration or a lawsuit in the Judiciary (on a combined dispute resolution clause). The obligation, however, is never to reach an agreement, but to participate in the mediation process. So, if, after the first meeting, one of the parties does not intend to continue with the mediation process, such party is not required to remain in the proceeding, which can be ended.

The choice of mediation can also be made after the conflict between the parties has arisen. In this case, although there is the risk of a belligerent mood coming from the litigation, with the advent of the conflict it is possible to have more knowledge of the dispute and of the parties' interests. Even when there is no contractual clause of mediation, there is nothing to prevent the parties from making the choice to go to mediation later.

3.2. The advantages of mediation in comparison with other ADR choices

To choose mediation, it is important to know its main features and advantages. According to Frank Sander and Lukasz Rozdeiczer[6], although the process of choice remains an art rather than science, there are some criteria, theoretical and practical, that can be analyzed to support the most appropriate choice for each dispute (in a screening process).

The main features and advantages of mediation are:

- Autonomy of the parties: the control of the process and of its outcome
- It maintains ongoing relationships
- It minimizes costs and time in conflict resolution by working on prevention
- The mediator keeps the parties on the table, contributing to generate information flow and clarification of the dispute
- It generates win-win results and creates value
- It provides confidentiality to the disputed issues
- It improves the parties understanding of the dispute

So, mediation is suitable when there is a continuous relationship and the parties are looking for an effective solution, saving time and money and avoiding losses of opportunity. Some areas have revealed great potential for the growth of mediation, such as infrastructure, energy, corporate, contracts, among others in which there are ongoing relationships between the parties.

[6] SANDER, Frank E. A; ROZDEICZER, Lukasz. Matching Cases and Dispute Resolution Procedures: detailed analysis leading to a mediation-centered approach. 11 Harvard Negotiation Law Review, Spring, 2006, pp. 1-41.

With the role of facilitating communication between the parties, through an active listening approach, the mediator contributes for a better flow of information and clarification of the dispute, using techniques to keep the parties on the table and to encourage them to generate win-win results, with the satisfaction of the parties' goals.

Even when a settlement is not reached, the parties participating in the mediation process often improve their understanding of the dispute. It is an opportunity to improve, prevent and preserve relationships.

4. Customizing mediation to specific conflicts: one size does not fit all

Considering the spirit of mediation and its perspectives as set out above, we propose that there would be mediation opportunities in cartel damages claims. For that, we have analyzed the advantages of mediation, considering some cartel damages claims in Brazil and the global settlement obtained in the Parker ITR case (marine hose cartel).

Although the right to free competition can be characterized as a diffuse right (the whole society being the owner of the rights protected by it), the focus of our paper is the individual rights and interests related to the compensation claims for cartel damages (it also includes homogeneous individual rights - as we refer in Brazil, that can be collectivized in class actions). The cartel damages can affect companies (increasing their costs, diminishing their ability to compete or even to enter certain markets) and consumers (which potentially paid higher prices, for cartelized products, than they would have paid if there was effective competition in the market).

In the US, cartel damages claims are available both at the federal and state levels. There is also the mandatory provision for treble damages (which determines that the damages related to anticompetitive practices should be tripled). Treble damages have a very important dissuasive role to anticompetitive practices. In the US, most of the compensation claims in this area end in settlements (due to potential high costs for litigation as well as potential of higher damages awards from the Courts due to treble damages).

In Brazil, the situation is different. There are not enough incentives for plaintiffs to file cartel damages claims. With regard to the standing to file class actions, unlike what is found in US law, the member of the group has no standing to bring a class action[7]. Therefore, the plaintiffs in Brazil may bring individual claims more easily.

4.1. The continued relationship in contractual arrangements and opportunities for negotiation and mediation in damages claims

The mediation creates advantages to both sides of the dispute in cartel damages claims. From the plaintiff's point of view, the fast resolution of the conflict gives the comfort of not having to face long years of litigation (which may include extensive litigation related to access to evidence of the cartel as well as the burden of proving the actual damages incurred by the plaintiff, which is often difficult to prove and to quantify) and mediation gives a less expensive and more flexible proceeding for the compensation of the cartel damages. From the defendant's perspective, a negotiated settlement brings

[7] Brazilian lawmakers opted for expressly indicating the parties with standing to file a class action: The Public Prosecutor's Office; the Public Defender's Office; the federal government, states, municipalities and the federal district; the entities and bodies of the direct or indirect public administration and associations legally organized for at least one year, and which institutional purpose includes the defense of collective rights.

predictability, confidentiality and prevents a negative exposure of the anticompetitive practice (control of potential damages to the image of the plaintiff). This is especially true in continued relationships (such as supply agreements).

When there is a continuous relationship between the parties, which is common in this field, another advantage is to avoid the rupture of this relationship, since mediation facilitates communication between the parties involved in the search for win-win results.

Besides the use of mediation in individual cartel damages claims, it is also possible to use Dispute System Design (DSD) techniques, especially during the enforcement of the generic condemnatory award (in the case of homogeneous individual rights). It brings the possibility to design an out-of-court compensation program for damages claims, with better allocation of risks, identification of stakeholders and objective criteria to fix the amounts of damages to be awarded to the plaintiffs. The compensation programs in Brazil (as the program designed for victim's compensation for the 2006 TAM aircraft accident and the one under discussion in the Samarco environmental accident) are examples of initiatives to think of something different and new to compensate damages caused by cartels, as well as the compensation programs in the US (as happened with the September 11th Victim Compensation Fund[8]), with an important role of the Judiciary in legitimizing these out-of-court programs.

[8] ACKERMAN, Robert M., The September 11th Victim Compensation Fund: An Effective Administrative Response to a National Tragedy, Harvard Negotiation Law Review, vol. 10, 2005, pp. 135-229.

5. Private Enforcement of Antitrust Laws in Cartel Investigations

Cartels are the most aggressive and aggravating forms of anticompetitive behavior. The damages caused by cartels are very extensive. It is estimated that the prices overcharged by cartels range between 20%-30%[9], generating billions of US dollars' worth of damages.

In the US, the amounts of penalties paid by cartel participants in the awards in private damages claims can be very significant and may even surpass the criminal fines levied on the companies by the US Antitrust Authorities. Practically every cartel case prosecuted by the DOJ winds up with many private damages claims (class actions). The culture of settlements in these damages claims is also strong in the US not only to avoid joint and several liabilities but also because of the high costs of litigation (especially of the discovery process).

Whereas in Europe, following a directive issued by the European Parliament[10] as well as legislative reforms in the UK[11] and the Netherlands[12],

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9 See OECD. Hard Core Cartels: Third report on the implementation of the 1998 Council Recommendation, p. 25. Avaliable at http://www.oecd.org/daf/competition/cartels/35863307.pdf

10 Directive 2014/104/EU available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.349.01.0001.01.ENG

11 Consumer Rights Act 2015 available at http://www.legislation.gov.uk/ukpga/2015/15/pdfs/ukpga_20150015_en.pdf

12 The Damages Directive Implementation Act, which implemented in the Netherlands the Directive 2014/104/EU on antitrust damages actions on 10 February 2017 by way of creating new sections to the Dutch Civil Code (BW) and the Dutch Code of Civil Procedure (RV).

cartel damages claims have increased and the tendency is to follow what already occurs in the US (the main venues for class actions in Europe are Germany, the Netherlands and the UK).

In countries in which the private cartel damages claims market exists, lawyers and law firms are specialized in acting in this specific niche and, in some countries, there are specialized courts dealing with cartel damages claims. In many countries, out of court conflict resolution mechanisms are available and are widely used by the litigants to settle these claims.

Antitrust Authorities in several jurisdictions have confirmed that antitrust private enforcement play a major role in competition advocacy and are a strong dissuasive vector in curbing antitrust behavior.

On the other hand, in Brazil, the situation is quite different. Although the Brazilian Antitrust Authority (CADE) systematically convicts cartels levying hefty fines, only a small portion of these cases also result in the filing of cartel damages claims. The culture of antitrust private enforcement in Brazil is not as strong as in other jurisdictions.

CADE has been making efforts to encourage private antitrust enforcement. In several cartel convictions, CADE has incentivized the injured parties to pursue cartel damages claims and has also calculated potential damages caused by these cartels as well as sent letters to the main injured parties communicating its decision to convict these cartels.

In addition to that, more recently CADE is working on the drafting of a regulation to allow access to third parties of certain portions of confidential

documents available in its administrative investigations to facilitate and encourage the filing of cartel damages claims. The regulation aims to preserve CADE's Leniency Program as well as engage injured parties in pursuing cartel damages claims. There is also a bill of law in the Brazilian Senate proposing amendments to the Brazilian Competition Act in order to, among others: (i) alter the current statute of limitations for these types of damages claims (proposing that such limitations period should only start to run after the publication of the decision rendered by CADE); (ii) provide a punitive damages mechanism; and (iii) limit the liability of the leniency applicants.

In the past years, Brazil has experienced an increased interest of injured parties in pursuing cartel damages claims. In the context of the economic crisis and the car wash operation, for example, a handful of construction companies started to notify cement companies of their intent to file damages claims deriving from the cement cartel convicted some years ago in Brazil. In the Forex cartel cases (both onshore and offshore) a handful of third parties have already tried to access the confidential files of the administrative investigation potentially to assess the possibility of bringing cartel damages claims in the near future. So, the culture of private enforcement in Brazil is undergoing radical changes and it is expected that with the incentives that CADE is proposing as well as the potential legislative changes to the Brazilian Competition Act that the number of cartel damages claims are going to rapidly increase. This opens the door for alternative methods of conflict resolution such as mediation.

5.1. Brazilian Cases: The growth of cartel damages claims

In this paper, we have picked examples of two cartel cases (the industrial

gas cartel and the cement cartel) that could benefit from alternative dispute resolution methods, especially mediation. These were cases convicted by CADE in which injured parties filed cartel damages claims against the companies engaged in the cartel. What all of these cases have in common is the need for the preservation of ongoing relationships.

5.1.1. The industrial gas cartel (medical gas)

Industrial gas (which includes medical gas) is an essential input in the production process of several industries and medical gas is essential for the running of medical facilities and patient treatment processes. It is estimated that the gas cartel in Brazil lasted for more than 4 years and generated great damage due to the prices overcharged by the cartelists.

This is a very concentrated market with very few industrial gas suppliers which means that parties injured by the cartel will most likely still need to buy industrial gas from the companies involved in the cartel. After the cartel was convicted by the Brazilian antitrust authority several damages claims were filed to recoup damages from the cartel. These claims are still pending final judicial decision after almost 10 years. If the parties opted to use mediation to resolve these disputes, it is very likely that such disputes would have already been resolved and less public resources would have been spent.

5.1.2. The cement cartel

The cement cartel was also a huge cartel scheme implemented by several cement suppliers in Brazil. The supply of cement is essential for the construction business (both public and private) and it is estimated that the cartel may have generate a BRL 28 billion damage due to the inflated prices charged by the cartelists over the course of more than 20 years of the

duration of the conduct.

In this case, even before the cartel was convicted by the antitrust authority, a class action was filed by the Public Prosecutors Office (this suit is still pending judgment for almost 6 years). It is also known that several construction companies are seeking compensation from the cartel and threatened to file lawsuits against the cement companies.

The relationship of construction and cement companies is also an ongoing relationship, given that there are few cement suppliers in Brazil (especially for massive infrastructure works). Therefore, this is also a case in which mediation may play an important role in disputes arising from damages caused by the cement cartel.

5. 2. Dispute System Design as an alternative for settling global cartel damages claims

Recollecting the spirit of Dispute System Design[13], such mechanism usually follow a staged sequence which comprises the following stage: **(i) diagnosing** (to identify how the disputes are solved, listening to all involved and assessing stakeholders, their goals, and interests, and contexts), **(ii) designing procedures and planning steps** (according to the goals and priorities identified in the diagnosis made): it can be a collective effort from the people involved in the case, what is a good strategy to legitimate the program, **(iii) implementation of the program**, after training and planning how to select and engage the parties. Incorporating technology to the system

[13] ROGERS, Nancy H; BORDONE, Robert; SANDER, Frank E.A; MCEWEN, Craig A. *Designing Systems and Processes for Managing Disputes*. New York, Wolters Kluwer Law & Business, 2013.

can be a key step in the program. **(iv) the evaluation of the results** obtained and adjustments to be made.

In Brazil, there was a successful DSD experience applied in the program designed for victim's compensation for the TAM/Air France aircraft accident, an initiative carried out by the Ministry of Justice together with the companies (including the insurance companies). The Program sought to compensate the families of the fatal victims of this accident and this experience served as inspiration for the public compensation program implemented by the Public Defender's Office in the subway accident in São Paulo in 2007[14]. Another DSD experience that is ongoing in Brazil is the one related to the Samarco environmental accident.

In 2009, it was discussed in Brazil the creation of an out-of-court program for the prevention or compensation of damages, at the moment when a Bill was presented to reform the Public Civil Action Act (n. 5139/2009). The Bill determined that at any time a proposal of a program could be presented to the Court for the compensation of damages in class actions. The program could be proposed during the class action proceeding or even if there was no ongoing lawsuit, and could also establish a system to identify the largest number of interested parties.

The role of the Judiciary in this scenario was not to judge, but rather to legitimate and supervise the compensation program. The agreement that established the program should necessarily be submitted to court approval,

[14] See more information in FALECK, Diego. Introdução ao Design de Sistema de Disputas: Câmera de Indenização 3054. Revista Brasileira de Arbitragem. n. 23, p. 7-32. jul./ago./set. 2009.

after a previous opinion issued by the Public Prosecutor's Office. The Bill was vetoed, but there is no doubt that with consensus the parties can design a compensation program, even without a legal provision.

5.2.1. The leading case: the global cartel settlement reached in the Parker ITR case (marine hose cartel)

Therefore, another possibility of ADR in cartel damages cases is the Dispute System Design mechanism, which was used in the Parker ITR case for settling the global marine hose cartel case. This was an unprecedented case in which Parker proposed a global out of court private settlement in which purchasers of its marine hose would adhere to the settlement waiving their rights to sue Parker or any of its parents or affiliates in exchange for a compensation from the damages suffered from the cartel as well as access to evidence against other cartel members and cooperation from Parker in the pursuit of lawsuits against these co-cartelists.

The marine hose cartel was a global cartel investigated in several jurisdictions (including Brazil and Japan). It lasted from at least 1999 until 2007. Several damages claims were filed in the US and the UK. In the US these claims have been settled for about USD 31.7 million.

An interesting feature of the global settlement reached by Parker is that the company assumed that purchasers may have paid an overprice of 16% in the purchase of its marine hose. So Parker set up an escrow fund and deposited an amount equivalent to 16% of its revenues from non-US sales of marine hose between 2002-2007. As mentioned before it is estimated that the prices overcharged by cartels range between 20%-30%, with studies also pointing out that such overcharges may range between 15%-20%.

The design of this compensation program allowed the parties to solve the litigation in a strategic way, with a better allocation of risks. The agreement, being private, did not require the approval of the Judiciary and allowed the anonymity of those who adhered to its terms, making the dispute confidential. The program was managed by an independent company specialized in agreements of this nature[15].

The design used for this settlement is interesting and unique in relation to global cases of cartel damages claims and could also serve as inspiration for the adoption of alternative dispute resolution mechanisms for the settlement of cartel damages claims.

6. Conclusion: building the future of private mediation in Brazil

The future of private mediation depends not only on the law and institutions, but mostly on mediation practices carried out by the society (companies, lawyers, clients). Thus, a good strategy is to focus more on the mediation practices (from the bottom to the top) than in the top-down regulation changes. Only from this perspective we can see real opportunities in mediation and change our way of managing and solving our own conflicts to create a culture focused on mediation.

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15 The Forensic Risk Alliance is specialized in cross-border litigations and in the Parker ITR case had designed the program considering: (i) Groundbreaking global private settlement – commercial, non-court based agreement in respect of global marine hose cartel; (ii) Damages analysis and complex valuation calculations to include multiple currencies, fluctuation in exchange rates and interest awards; (iii) Transparent validation of claims taking into consideration settlement terms, appropriate third party sources and research, purchase documentation and Expert Counsel findings. See more information at http://www.forensicrisk.com, https://www.marinehoseclaims.com/ and http://www.law360.com/articles/90378/hose-maker-strikes-preemptive-deal-over-cartel

The purpose of this short paper has been to bring to light a new field for mediation, which is the cartel damages claims. Searching new fields to apply mediation is also a good strategy, because we can customize the analysis and the benefits brought by mediation.

In cartel damages claims, as we have explained, mediation helps to maintain ongoing relationships between the companies (in the individual sphere) and also contributes to access to justice from the consumers perspective (in the collective sphere). Therefore, claimants and defendants in cartel damages claims may benefit from the use of mediation.

In this particular field, mediation can also have a positive impact on the number of cases to be brought by plaintiffs and the willingness of the cartelists to settle these cases. The Brazilian antitrust authority is currently studying several measures to encourage antitrust private enforcement and mediation may certainly help with the goal of the antitrust authority.

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