What Compensates Tears? A Case Study in How To Determine Damages In Large Proportion Disasters in Brazil through Class Arbitration

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Brumadinho Dam's Rupture[fn]The dam collapse happened on 25 January 2019. On the first day, the fire department, responsible for the rescues, estimated that the number of victims was about 200. Ten days after the disaster, the death toll was confirmed to be 134, while 199 were still missing. Trigger Warning: At this link one can find material produced by the BBC, showing images after the break of the dam near the city of Brumadinho. Discretion advised.[/fn] **and the First Gulf War**

Writing about these events side by side might seem like a mistake at first as they hold no historical connection and emerged under completely distinct circumstances. However, amidst these personal tragedies, we cannot ignore this common denominator: the human and material losses suffered by the victims. In both cases, either federal prosecutors or attorneys acting on behalf of the victims will have to deal with the complex process of calculating a fair compensation (for the lack of a better expression) over the damaged properties, the lost business expectations, and the work and salary prospects of the perished victims. All these elements matter in the determination of a fair value for the indemnification.

The UNCC Model

But how can we ensure that fair compensation is paid and justice done, given the magnitude of the disaster? In 1991, in the aftermath of the first Gulf War, the UN Security Council created the United Nations Compensation Committee ("UNCC"), a subsidiary organ whose purpose was to determine the compensation owed to those directly affected by the conflict. Under those circumstances, it was established that a class action would be the most suitable course of action.

What makes the UNCC model special is the separation of claims into two phases. In the first phase, the claimant could present claims arising from their own rights and other substantive aspects of the dispute. Hence, the victims may be aided by lawyers or other professionals as they argue their case. In the second phase, the Panels examined the claims in terms of their admissibility for each claimant or victim, including consideration of the existence of a nexus of causality and the determination of the

quantum – using as main criterion the real value, in market conditions, of the damaged goods and/or establishments.

Translating the UNCC Model to Class Arbitration in Brazil

Taking a cue from UNCC experience, one could imagine that a possible solution in the event of mass disasters, such as Brumadinho's and/or even in case of wars, is class arbitration[fn] In Brazil, arbitration is considered an accepted alternative to long-standing lawsuits, which may obstruct access to justice, see explanatory discussion here.[/fn].

In Brazilian law, both class actions and arbitration are well established practices for dispute resolution in several situations.[fn] In Brazilian law this means of dispute resolution is available to some associations acting on behalf of their members (e.g., pension fund associations)[/fn]. However, compared with the American counterpart, the practice of class arbitration in Brazil is still in its infancy.

To consider the merits of this approach, we must pose ourselves the following question: why is class arbitration only an afterthought in the minds of Brazilian jurists? An attempt to answer this question requires understanding the legal premises of class action in Brazil, and how those foundations may or may not allow for class arbitration, which then allows for a comparison to the American experience in this area of law.

Brazil adopts the civil law system, in which its legal system is based on codified and written law, as opposed to the role played by precedents in common law systems. Nowadays, legal grounds for typified class actions are found in two main legal sources: the Public Civil Action Law (Law 7,347 of 1985) and the Consumer Protection Code. If in the United States class actions are only valid after the Court verifies the conditions under which the class was certified, in contrast, in Brazil the law already grants them legitimacy beforehand. Another difference is that class action decisions in the U.S. are binding to all members except those who informed the Court before the procedure that they were not to be considered as members of the class. This process, known as "opting out", does not occur in Brazil. Instead, given that class actions lawsuits protect plaintiffs' collective rights, a decision in a class action is only binding if it is favorable to class members. If the decision is unfavorable, plaintiffs are still free to file individual lawsuits before the Court.

In Brazil, class action and arbitration law were designed independently and the legal framework does not necessarily provide for a specific legal apparatus to allow combination of the two. Still, that does not mean that class arbitration is impossible, nor that the nature of class action or arbitration are incompatible with Brazilian law. Rather, it does seem more of a lack of forethought by the legislator than an outright prohibition. In fact, the Federal Constitution allows labor class arbitration in the Article 114, §1, and legislatures previously discussed Bill No. 5139/2009, which deals precisely with arbitration as an alternative dispute resolution method for class litigations. Discussions over this particular bill, however, have since been discontinued.

Yet, at the end of 2018 the Court of Justice of the State of São Paulo accepted a collective arbitration. Shareholders of Petrobras (one of Brazil's main state-owned company) decided to sue the company as a class after Federal Police's Operation Car Wash corruption scandals were revealed. As a defense, Petrobras argued, before the first instance court, that the shareholders signed contracts with arbitration clauses, thus removing the state courts' jurisdiction over their claims. The shareholders replied that they signed the clause as individuals, not as a group. In the decision, the judge ruled that, since all members of the class signed the arbitration clause, the arbitral tribunal had jurisdiction to

adjudicate the claim. Yet, it would not be necessary for each individual to file an independent action. Collective arbitration could happen through class representation, reducing costs for the claimants. The Court of Justice thus upheld the decision of the first instance judge.

Applying the UNCC Model to Large Proportion Disasters in Brazil

On November 5, 2015, a dam in Mariana, located in the state of Minas Gerais, collapsed, causing catastrophic damage. Samarco, a joint venture between Vale (another one of Brazil's main state-owned companies and the one responsible for the Brumadinho incident) and the BHP group, was responsible for the dam. Four years have passed and the environmental damage from the disaster remains, with an aftermath of 19 deaths and lawsuits being filled at the State and Federal levels. Out of the several administrative penalties applied, Samarco only paid one. An astonishing amount of dozens of public civil actions and more than fifty thousand individual lawsuits remain pending before the judiciary awaiting trial.

State-owned company Vale submitted to the Public Prosecutor's Office the following proposal: (i) compensation for moral damages, ranging from R$ 75,000 to R$ 300,000, depending on the relationship the person had with the victim; (ii) monthly payment corresponding to two-thirds of the wages of the deceased worker until the date on which he would turn 75 years old; (iii) guarantee of "employment or salary" for the surviving employees of Brumadinho until the end of 2019; and (iv) health plan for families of independent and outsourced workers.

The Atlantic Forest's Non-Governmental Organizations Network filed a civil lawsuit against Vale claiming compensation for collective moral damages in the amount of R$ 30 billion and compensation of R$ 500,000 to R$ 1 million for relatives of the deceased and surviving victims of the dam's rupture.

In an interview, Supreme Court Justice Dias Toffoli said that the best alternative to Samarco's reputation and to alleviate the suffering of the victims was through conciliation. The Coordinator of the program "Development and Socioenvironmental Rights" at the NGO Conectas, Caio Borges, commented that "unlike the way in which businesses and the authorities acted in the case of the Rio Doce, this time the whole remediation process must be carried out through legitimate means and this means the participation of the people affected." [

Given the large number of victims and the extensive material and environmental damage, I dare not say there is a method that both satisfies and reduces the impact of this incident with the various possibilities to be explored along the third-party funding companies in the market. For this reason, the legal model and mentality used in the Panels of the UNCC could be transported and adapted to the reality of Brumadinho – perhaps with the new perspective of a class arbitration.

The combination of both methods – bifurcated proceedings to be assisted by a fully and strictly vetted group of accountants and collective action – in the UNCC was paramount in the long process of damage determination and quantification. By implementing this reasoning, we could more adequately compensate the victims of the incident, as well as their families, for their material and immaterial losses, thus also reducing the risk of spending years or decades in the State courts in the search for justice.