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Class Arbitrations in Brazil?

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Brazil has well-developed systems both in arbitration and class actions and yet the use of arbitration as a class-litigation dispute resolution has been little discussed. In the USA, on the other hand, discussions on the matter abound (see especially Supreme Court *Bazzle v. Green Tree, Stolt-Nielsen S.A v. Animalfeeds International Corp.* and *AT&T Mobility LLC v. Concepcion*). Regarding international investment disputes, an ICSID decision on jurisdiction and admissibility (Abaclat v. Republic of Argentina case) in 2012 decided to accept a "mass claim" that involves thousands of Italian investors. In the European Union class arbitration has also awakened curiosity in a few jurists (see, for example, *Class Arbitrations in the European Union*, 2013). Would this be a new frontier for the Brazilian arbitration to develop? I feel that the discussion cannot be ignored.

Class litigation in Brazil focuses on diffuse, collective (*stricto sensu*) and homogeneous individual rights. The definitions of these rights are found in the Consumer Protection Law, which together with the Public Civil Action Law, constitutes the main foundation of the Brazilian class action system (not only consumer actions, but also environmental and labor actions, among others). The Brazilian system differs from that found in the USA especially for two reasons. First: the absence of a "certification order". In Brazilian class actions the legitimacy of the plaintiff, for example, is not analyzed case by case in order to verify the plaintiff's "adequacy of representation", as would be the case in North America, but rather granted by the law (Associations, Unions, Public Prosecutors Office, and so on). Second: in Brazil as a general rule, only a favorable decision for the class members will bind them whereas an unfavorable decision still allows the members of the class to file their own individual lawsuits. Conversely, in the USA, once the class action has been certified, the decision binds all the members, except those who previously and expressly informed the Court of their decision not be a member of the class (the so called "opt out").

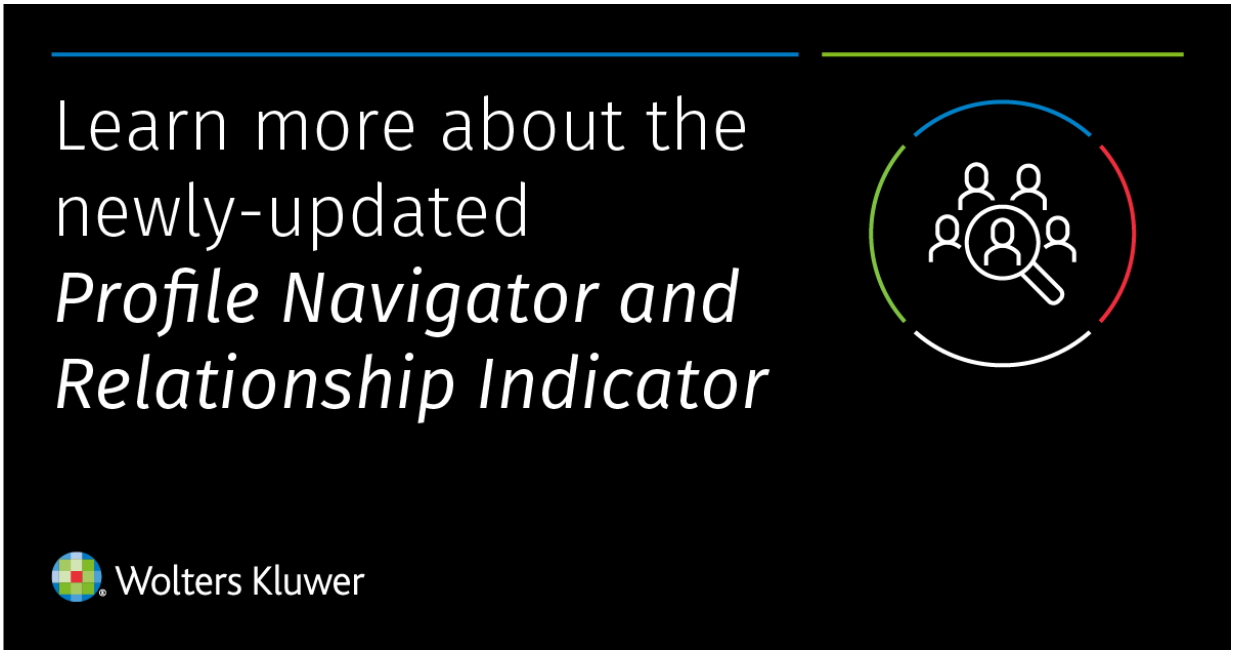
When it comes to arbitration in Brazil, on the other hand, it is well-known that since its 1996 law, the system has experienced significant growth. The arbitral culture is getting consolidated year after year, with significant impact on the number of arbitral proceedings that are commenced and administrated in the Brazilian territory. The Courts, too, have been giving their contribution by rendering several decisions that have allowed arbitration for highly controverted matters. The participation of a state-owned company in arbitration is a good example which received a clearly positive answer from the highest Brazilian Court for ordinary legal matters (Superior Court of Justice). Notwithstanding, it is important to remember that Brazilian law keeps a few restrictions to arbitrability, both objective and subjective ones. That is to say that not all matters and not all litigants (plaintiffs or defendants) can be involved in an arbitration.

The development of a class arbitration practice is nothing more than the union of these two different worlds: class litigation and arbitration, each one with its own peculiarities. In Brazil, there is no doubt that neither one of them was created to walk together. Indeed a class arbitration is not ruled by class actions law (especially the already mentioned Consumer Law and Public Civil Action Law) nor by arbitration law. However, in Brazilian class actions and arbitration systems there is nothing suggesting that the answer for the question proposed here is peremptorily negative. Quite on the contrary, the Federal Constitution provides for labor class arbitration (art. 114, § 1º), and there has been a legislative bill (No. 5139/2009) expressly providing that arbitrations could be used as a dispute resolution system for class litigations. Although this bill received the approval of some of the most important professors in the subject of class actions, the entire legislative bill was shelved.

The use of class arbitrations in Brazil demands a deep discussion about the arbitrability of class litigation matters (such as consumer, environmental, bond market and labor issues), together with the particularities of this kind of lawsuit, which includes legitimacy and jurisdiction, among others, and the practice issues that will certainly arise. For example: is it possible for and in what situations will the Claimant accept to sign an arbitration agreement? In the case of an arbitration, who will bear the costs? (considering that in Brazil a judicial class action would be costless for the Plaintiff) Another issue to consider is the possibility that a Public Prosecutor Office intervention is requested by the law. Would it be acceptable in class arbitration? As one can see, even for a country that can today be considered arbitration friendly, there are important legal and practical challenges to be overcome.

Through a quick analysis of the USA's experience, it is possible to see that in the wake of *Bazzle v. Green Tree*, in 2003, hundreds of class arbitrations were administrated before the main Arbitration Centres, such as AAA and JAMS. It cannot be ignored that recent decisions from the North American Supreme Court have restricted the use of class arbitrations (see especially *AT&T Mobility LLC v. Concepcion*). However, class arbitration cases seem to demonstrate that legal and practical matters can be overcome, with unequivocal gains for the relief requested by the parties.

Despite the peculiarities of the USA's experience, if compared to Brazilian law, it suggests that such a discussion is definitely interesting and can lead to solutions for the issues that, at first, seem to make the practice of class arbitration almost impossible. This might indeed be the new frontier for the Brazilian arbitration to explore.



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