Incident of Resolution of Repetitive Demands (IRDR) and Repetitive Appeals in the New Brazilian Civil Procedure Code

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The New Brazilian Civil Procedure Code Comes into Force

The Brazilian new Civil Procedure Code, Law 13.105/2015³, was sanctioned on March 16, 2015 and is now in force as of March 18, 2016. The new law preserves some points of the 1973 Code, improves others and creates new ones.

One of the most important points of the new code is the treatment provided to repetitive demands; it permits a single resolution of a common question of law that is presented in multiple proceedings. The new Code doesn’t change class actions rules or the rules governing other representative proceedings in Brazil, like popular actions or collective mandamus, but it improves the consistency of judgments when courts are faced with repetitive questions, and it will therefore also have a relevant impact on representative proceedings. This article highlights some of the key features of the new Code.

A Preliminary Consideration: The Volume of Claims in the Brazilian Judiciary

The reason for enacting the Code changes relating to repetitive or common demands includes to give adequate treatment to claims brought before the Judiciary, bringing efficiency and equality.

According to the National Council of Justice⁴, there were 28,032,551 new claims and 64,451,825 claims pending in Judiciary in 2012; in 2013 there were

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⁴ Available at http://www.cnj.jus.br/files/conteudo/arquivo/2015/11/491328c33144833370f375278683f955.pdf.
28,557,871 new claims in Judiciary and 67,131,040 claims pending and in 2014 there were 28,878,663 new claims and 70,828,587 claims pending.

**A Preliminary Note: The Judgment of Repetitive Claims in the New Code**

According to article 928 of the new code, a judgment of repetitive demands, can be obtained by two different mechanisms: the **Incident of Resolution of Repetitive Demands (IRDR)** and the Repetitive Appeals. The two mechanisms are intended to function in a harmonic and complementary system.

**The first mechanism: The Incident of Resolution of Repetitive Demands (IRDR)**

In the final version of the new code, the **Incident of Resolution of Repetitive Demands (IRDR)** has two requisites: 1) multiple disputes present an identical question of law in a way that creates significant multiplication of judicial proceedings and 2) not permitting the question to be answered in a single proceeding would cause serious legal uncertainty due to the risk of conflicting decisions. The mechanism will not be allowed if there has been a repetitive appeal (discussed below), because the judgment of repetitive appeal binds the courts of the whole country, in individual or collective actions, and also in small claims courts.

The parties with standing to raise the IRDR, which can be initiated ex officio by the court, are the parties involved in a disputed civil claim. The public prosecutor or the public defender, through simple petition, may also invoke the IRDR procedure, although the prosecutor must intervene to do so. The questions of law raised through the IRDR procedure will be recorded in the National Council of Justice. Courts will also record questions raised in the IRDR.

There are no court costs for initiating the IRDR procedure. The court can accept or refuse a petition to initiate an Incident depending on its evaluation of the two requisite factors. The procedure is to be initiated in the appeal courts, which will apply their own internal rules to the proceedings.

If a petition for an Incident is accepted, the judge to whom the Incident is raised, known as the rapporteur, may suspend all the claims pending in the area of the court’s jurisdiction. The rapporteur may also inquire of the lower court for information.
about the underlying case, and the information should be provided within 15 days, with notification to the Public Attorney. The time period in which other cases are suspended is limited to one year as a rule of the final version of the code, but the period can be extended by the rapporteur of the Incident. In addition, anyone who has standing can make a request in the Superior Court of Justice or in Supreme Court of Justice that these High Courts suspend suits pending in the whole country.

During the incident proceeding interested parties may participate, and may also participate in requests for documents or in conducting investigations. They will have fifteen days from the notice of the rapporteur to present documents and state their positions. These same time limits apply to the expression of the Public Prosecutor.

On the day of trial, all interested parties are limited to a combined total of 30 minutes of presentation time to the court. This can lead to a very small amount of time being allocated to each interested party, depending on the number who seek to appear. After a final decision of the proceeding, the judgment is to be published and the thesis (decision) registered in a court register. The judgment is also to be registered in the National Council of Justice.

The repetitive questions decided will be binding and applied to all individual and collective claims and to future claims brought in the courts within the jurisdiction of the court that entered the judgment, unless it is overruled by a higher court.

The judgment in an Incident may be appealed to the Superior Court (STJ), or to the Supreme Court (STF), from the court of origin where the Incident was brought. The appeal can be brought by any person who is party to any ongoing proceeding in which the same legal issue is raised.

The Second Mechanism: Repetitive Appeals

Repetitive Appeals are not new in the Brazilian system, but this mechanism was improved in the new code. The new law gives more weight to the precedents of High Courts. Repetitive Appeals are a procedure for resolving common questions of law in either the Superior Court of Justice (STJ) or the Supreme Court of Justice (STF). Brazilian law does not address how many cases are enough to justify initiating this procedure.
The procedure is addressed generally in articles 1036-1040 of the new Code, and it works as follows: The Circuit or the State Court may admit two or more representative appeals and refer them to the Superior Court of Justice, if the matter is a federal issue, or to the Supreme Court, if the matter is a constitutional issue. All other suits and appeals involving the same legal question will remained suspended until 1 (one) year, or the final pronouncement of the Court in the representative appeal proceeding if it ends before.

Parties to any claim that had been suspended will be notified of the decision and be given an opportunity to distinguish their case of the selected representative cases by the court in the Repetitive Appeal.

Before the day of the trial, the court may conduct a public hearing about the question to be decided in Repetitive Appeals, and the rapporteur may also inquire of the lower court for information about the underlying case. If additional information is requested, the lower court is to provide it within 15 days, with notification to the Public Attorney.

After a final decision of the proceeding of Repetitive Appeals, the judgment is to be published. The judgment of a Repetitive Appeal has binding effect, pursuant to article 927, III, of the new rule.

A special note about class claims in the Code: The Notice to Authorities Standing to sue a Brazilian Class Action

Article 139, X, of the new code has a provision that, in case of individual repetitive suits, the judge will notify public officials, government entities, and associations who have standing to bring a Brazilian class action (The Public Prosecutor; the Public Defender; Union, states, the Federal District and municipalities; the local authority; public corporation; foundation or mixed capital company and associations) to inform of the possibility that there may be a basis to start a class action. The idea is to encourage the limited class of parties with authority to bring a class action to consider whether the issue presented might justify use of the class action procedure, avoiding the multiplication of individual repetitive claims.

Other Procedures Affecting Mass or Multi-Party Litigation: Procedural Conventions and Substantive Settlements in Massive Claims
The new code also provides a potential solution for resolving multi-party claims through conciliation and mediation. Article 3, §2º and §3º, is one of the provisions where the new code emphasizes alternative dispute resolution (ADR), specially conciliation/mediation. According to the Amendment 2/2016 to Resolution 125/2010 of National Council of Justice, Courts will have 30 days to create Dispute Resolutions Centers, providing alternative dispute resolution in the Judiciary Power. The ADR procedures will be applied to all claims. The National Council of the Public Attorneys also edited Resolution 118/2014 to emphasize mediation, conciliation and restorative practice as a solution to both judicial and extrajudicial controversies. Alternative dispute resolution could be used as solution for repetitive pleas, collective actions and other claims.

Article 190 of the new code also mentions the possibility of procedural conventions which could be applied in individual repetitive claims and even in collective claims. Resolution 118/2014 (article 17) of the National Council of the Public Attorneys suggests procedural conventions as a way of helping to resolve claims involving collective rights.

Some consequences of the system for repetitive judgments:

There are many practical consequences of the repetitive judgments in the new Civil Procedure Code, but we highlight a few examples. First, if someone makes a claim that would be barred by a holding of the judgment in an Incident of Resolution of Repetitive Demands (IRDR) or a judgment issued as part of the Repetitive Appeals process, the other party can initiate the procedure for obtaining a preliminary dismissal ruling (article 332, III) to have the repetitive claim preliminary dismissed.

Also, after a repetitive question has been decided, a party may employ the procedure for temporary protection based on evidence (article 311, II) to obtain a decision based on the application of the documentary evidence unique to that case to the

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5 Available at http://www.cnj.jus.br/busca-atos-adm?documento=2579
6 Available at http://www.cnmp.mp.br/portal/images/Normas/Resolucoes/Resolu%C3%A7%C3%A3o_n%C2%BA_118_autocomposi%C3%A7%C3%A3o.pdf
law that was previously established through one of the mechanisms for issuing judgments of repetitive demands.

It is also important to mention the possibility of a monocratic judgment by the rapporteur (article 932, IV, b and c and article 932, V, b and c), the dischargement of the necessary remittance (article 496, §4º, II and III) and a few more points with specific rules in the new Code.

**A Final Question:** The Future of Class Actions?

The new Code doesn`t focus on collective claims, but it introduces and emphasizes a more sophisticated treatment to repetitive suits and offers a procedure that could encourage more class actions in Brazil. Collective actions continue with their own rules and statutes, but of course they will have a relevant impact. The provisions are complementary and collective actions will not end, but the ability to resolve repetitive claims in a more definitive, predictable, and uniform way will improve access to justice and avoiding contradictory judgments.