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# Effective methods of consumer protection in Brazil. An analysis in the context of property development contracts\*

DEBORAH ALCICI SALOMÃO\*\*

**ABSTRACT:** This study examines consumer protection in arbitration, especially under the example of property development contract disputes in Brazil. This is a very current issue in light of the presidential veto of consumer arbitration on May 26, 2015. The article discusses the arbitrability of these disputes based on Brazilian legislation and relevant case law. It also analyzes of the advantages, disadvantages and trends of consumer arbitration in the context of real estate contracts. The paper concludes by providing suggestions specific to consumer protection in arbitration based on this analysis.

**KEYWORDS:** Arbitration, consumer law, property development contract, standard contract, arbitration clause.

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***Métodos efectivos de protección de los consumidores en Brasil.  
Un análisis en el contexto de los contratos de promesa  
de compraventa de inmueble en construcción***

RESUMEN: El presente estudio analiza la protección del consumidor en el arbitraje, principalmente en disputas derivadas de la promesa de compraventa de inmueble en construcción en Brasil. Este tema es de gran actualidad, primordialmente desde el veto presidencial al arbitraje del consumidor el pasado 26 de mayo de 2015. Se discute la arbitrabilidad de estas disputas, con base en la legislación brasileña y la jurisprudencia pertinente, y se hace un análisis de las ventajas, desventajas y tendencias del arbitraje de consumo en el contexto de contratos inmobiliarios. A partir de este análisis se plantean sugerencias concretas para la protección del consumidor en el arbitraje.

PALABRAS CLAVE: arbitraje, derecho del consumidor, contrato de compraventa de inmueble en construcción, contrato de adhesión, cláusula de arbitraje.

INDEX: Introduction. I. The property development contract. II. Arbitration in property development contracts in Brazil. III. The arbitration clause: Arbitrability and validity. A. Arbitrability. B. Validity of the arbitration clause. IV. Relevant Brazilian case law. A. *CONAC Ltda. v. Flávia Zirpoli Sobral*. B. *CZ6 Empreendimentos Comerciais Ltda. v. Davidson Roberto de Faria Meira Júnior*. V. Advantages and disadvantages of consumer arbitration arising out of property development contracts. A. Advantages of arbitration for the consumer. B. Disadvantages of arbitration for the consumer. VI. A propensity towards consumer arbitration in property development contracts. VII. Concrete suggestions for consumer arbitration in property development contracts. References.

## Introduction

Brazil has experienced a boom in the real estate market in the last decade<sup>1</sup>. This scenario stems from a variety of reasons, the most important among them being

1 *Der brasilianische Wirtschaftsboom hat auch einen Immobilien-Boom ausgelöst*. ad-hoc-news.de, 21.05.12. Available at: <<http://www.ad-hoc-news.de/brasiliens-immobilien-sektor-der-um-around-wird-immer--/de/News/23361363>>. Last accessed: May 11, 2015. BRÜHWILLER, TJERK. *In Brasilien schießen Häuser wie Pilze aus dem Boden*. Neuer Zürcher Zeitung, 08.06.2012. Available at: <<http://www.nzz.ch/aktuell/wirtschaft/uebersicht/in-brasilien-schiessen-haeuser-wie-pilze-aus-dem-boden-1.17212343>>. Last accessed: May 11, 2015. KAREN FUKUSHIMA, "O boom imobiliário", *Revista Ideias. Política, Economia e Cultura do Paraná*, 19.12.2011. Available at: <<http://revistaideias.com.br/ideias/materia/o-boom-imobiliario>>. Last accessed: May 11, 2015.

the increase in credit offers to this sector<sup>2</sup>. Brazilian citizens' income is rising<sup>3</sup>, which, in turn, strengthens its consumption power. Moreover, a governmental program, called "Minha Casa, Minha Vida" incentivizes and facilitates home buying for low-income families by offering attractive finance options<sup>4</sup>.

Currently, one of the most common ways for consumers to benefit from these market incentives and purchase their own home in Brazil is through the property development contract. Such a contract allows consumers to make the dream of home ownership a reality, through installment payments and the inclusion of personal notes in the construction of the home. The property development contract likewise offers a great advantage for construction companies as it enables them to make a profit while during construction, thereby reducing the financial risks involved.

The property development contract carries an important social meaning. By creating an opportunity for a low-income buyer to purchase a home in an economy where he or she normally would be unable to do so, this contract helps to encourage self-realization and self-development of low-income consumers. In most cases, this is the most important contract of the consumer's life, as many aspects of the consumer's personal life, i.e. marriage, children, etc. are dependent upon the fulfillment of this contract.

However, many problems can clearly arise out of a contract where one purchases his or her "dream home" before ever having seen it. Difficulties are

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HAMILTON QUIRINO, *Aspectos relevantes da incorporação imobiliária – Boom imobiliário, alienação fiduciária, juros durante a obra e arbitragem*. Available at: <<http://www.hamiltonquirino.com.br/artigo10.htm>>. Last accessed: May 22, 2015.

- 2 RICARDO, AMORIM, *Boom de crédito e expansão imobiliária: você só viu o começo*. Ricardo Amorim, economista, palestrante e consultor econômico-financeiro, 2009. Available at: <<http://ricamconsultoria.com.br/news/artigos/boom-de-credito-e-expansao-imobiliaria-voce-so-viu-o-comeco>>. Last accessed: May 11, 2015. TJERK BRÜHWILLER, "In Brasilien schiessen Häuser wie Pilze aus dem Boden", *Neuer Zürcher Zeitung*, 08.06.2012. Available at: <<http://www.nzz.ch/aktuell/wirtschaft/uebersicht/in-brasilien-schiessen-haeuser-wie-pilze-aus-dem-boden-1.17212343>>. Last accessed: May 5, 2015. HYLTON PINTO DE CASTRO FILHO, *Breve estudo sobre a atividade de incorporação imobiliária*, 2011. Available at: <<http://jus.com.br/artigos/18539/breve-estudo-sobre-a-atividade-de-incorporacao-imobiliaria>>. Last accessed: May 11, 2015.
- 3 TJERK BRÜHWILLER, "In Brasilien schiessen Häuser wie Pilze aus dem Boden". *Neuer Zürcher Zeitung*, 08.06.2012. Available at: <<http://www.nzz.ch/aktuell/wirtschaft/uebersicht/in-brasilien-schiessen-haeuser-wie-pilze-aus-dem-boden-1.17212343>>. Last accessed: May 11, 2015. "Die Kombination aus steigendem Wohlstand, sinkenden Zinsen und breiterem Zugang zu Krediten hat die Nachfrage nach Wohnraum massiv angekurbelt". HYLTON PINTO DE CASTRO FILHO, *Breve estudo sobre a atividade de incorporação imobiliária*, 2011. Available at: <<http://jus.com.br/artigos/18539/breve-estudo-sobre-a-atividade-de-incorporacao-imobiliaria>>. Last accessed: May 11, 2015.
- 4 THOMAS LAW y KLEBER M. KUWABARA (eds.), *Inteligência Imobiliária. A alta valorização do mercado brasileiro*, São Paulo, Livrus negócios editoriais, 2014, p. 209. HYLTON PINTO DE CASTRO FILHO, *Breve estudo sobre a atividade de incorporação imobiliária*, 2011. Available at: <<http://jus.com.br/artigos/18539/breve-estudo-sobre-a-atividade-de-incorporacao-imobiliaria>>. Last accessed: May 11, 2015.

also likely to ensue where the connection between consumer and builder is long-lasting because the full construction often takes more time, sometimes years longer, than the builder originally promised and the final constructed home may not appear as it did in advertisement the consumer was shown years before, construction defects may also come to light along with a variety of other headaches that the consumer now must deal with.

Faced with such problem, the consumer will then, probably for the first time, look for the dispute resolution clause in the contract. Most developers include an arbitration clause in the contract<sup>5</sup>. Consumers, under the pressure of signing a contract with many pages of difficult legal jargon tend to overlook the clause and sign it without having read or understood the implications of an arbitration clause in this important and often life-altering contract.

Consequently, many of questions arise that look at whether arbitration is the appropriate dispute resolution method to solve these kinds of disputes. For example, whether a consumer friendly arbitration model currently exists that would enable consumers to resolve their disputes with the homebuilders without fear of unpredictable proceedings and unpredictable outcomes and in what manner can consumers be effectively protected in an arbitration arising out of a property development contract. Such inquiries will be addressed throughout this paper and help guide the proposed discussion.

This paper will first address the issue of consumer protection before an arbitration arising out of a property development contract by briefly introducing the concept of the Brazilian property development contract while taking into account the legal definition of this contract and its practical aspects. Then it will discuss the arbitrability of property development disputes applying classical methods of legal interpretation. Subsequently, it will present a case law analysis with two cases decided by the Brazilian Superior Court of Justice. An examination of the practical aspects of consumer arbitration is also imperative and shall be explored by discussing the advantages and disadvantages of arbitration to the consumer. A historical analysis of consumer arbitration will thus enable an investigation and understanding of the future possibilities for consumer arbitration. Lastly, based on the research developed in the previous chapters, this study will make concrete suggestions on how to satisfy the consumer's needs in an arbitration dispute.

## I. The property development contract

In Portuguese, the Brazilian property development contract is called *Contrato de Incorporação Imobiliária*. Although this contract has elements of the normal

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5 HAMILTON QUIRINO, *Aspectos relevantes da incorporação imobiliária – Boom imobiliário, alienação fiduciária, juros durante a obra e arbitragem*. Available at: <<http://www.hamiltonquirino.com.br/artigo10.htm>>. Last accessed: May 22, 2015.

purchase contract, it cannot be seen as a pure type<sup>6</sup>. The most significant feature of this contract is the advanced sale of home units from a building, which has yet to be built or is currently under construction<sup>7</sup>. The property is still under development, justifying the name of the contract type. Hence, the buyer/consumer is not purchasing a piece of real estate that he or she has already seen, but rather is buying the “idea” as being sold to him/her in an advertisement of what his/her new home will look like. Normally the developers and/or the construction companies involved provide the prospective buyers with images of how the building and the apartments within the building will appear after construction has been completed. In addition, models of the apartments are made available to help the consumer get an idea of what he/she is about to purchase.

Article 28 of Brazilian Law n.º 4.591<sup>[8]</sup> provides a legal definition of property development. It considers it to be an “activity exercised with the objective of promoting and executing the construction, to total or partial alienation, of buildings or building complexes, composed of autonomous units”<sup>9</sup>.

Three figures are involved in the property development contract. Firstly, there is the developer, in Portuguese: *incorporador*, which is the legal or natural person, who in fact negotiates the household units<sup>10</sup>. Normally, the developer is the owner of the land on which the construction is taking place, or at least has real rights over the land<sup>11</sup>. Secondly, there is the builder, who effectively does the construction work on the land. The builder can be engaged by the developer or could also be the developer itself. In Brazil it is very common to see the hybrid figure of a developer and builder<sup>12</sup>, as many construction companies purchase the land to start a property development and sell the units. The third participant in this agreement is the buyer, who enters into the contract to purchase the future residential unit and who, in the case of this paper, is also the consumer<sup>13</sup>.

6 THOMAS STICKLER, “Bauträgervertrag“, in B. MESSERSCHMIDT y W. VOIT (Org.), *Privates Bau-recht: Kommentar zu §§63 I ff. BGB*, 2nd ed., München, C. H. Beck, 2012. para. 60. See ORLANDO GOMES, *Contratos*, 23 ed., Rio de Janeiro, Forense, 2001, p. 450. “A incorporação imobiliária abrange distintos atos jurídicos que podem ser objeto de contratos diversos”.

7 MELHIM NAMEM CHALHUB, *Da Incorporação Imobiliária*, 3rd ed., Rio de Janeiro, Renovar, 2010, p. 13. hübert, ivens henrique. *condomínios em geral e incorporações imobiliárias*, Curitiba, IESDE Brasil, 2009, p. 132. GOMES, ORLANDO. *Direitos reais*, 2nd ed., Rio de Janeiro, Forense, 1988, p. 212.

8 Brazil. *Law n.º 4.591*. Property Development Law, 16.12.1964.

9 ORLANDO GOMES criticizes the legal definition as an “activity” and asserts that the suitable definition is that of a legal transaction: ORLANDO GOMES, *Direitos reais*, 2nd ed., Rio de Janeiro, Forense, 1988, p. 212.

10 IVENS HENRIQUE HÜBERT, *Condomínios em geral e incorporações imobiliárias*, Curitiba, IESDE Brasil, 2009, p. 113.

11 ORLANDO GOMES, *Direitos reais*, 2nd ed., Rio de Janeiro, Forense, 1988, p. 306.

12 IVENS HENRIQUE HÜBERT, *Condomínios em geral e incorporações imobiliárias*. Curitiba, IESDE Brasil, 2009, p. 160.

13 This paper considers the Brazilian definition of consumer. Pursuant to Art. 2 of the Consumer

These three figures come together when the developer contracts a constructor to build a building with autonomous apartments. The developer calculates how many units should be built and at which price it must sell these units in order to adequately finance the construction and make a profit. Then, the developer searches for people interested in buying a residential unit and enters into a contract with them<sup>14</sup>. The buyer then starts to pay for the apartment at a certain rate during the construction phase. After the construction is finalized and the units are complete, the developer has to transfer property of the units to the purchasers. Apart from the property of the units itself, each buyer receives an ideal fraction of the land<sup>15</sup>.

The advantages of this contract for both, the developer and the consumer, are evident. It enables the developer to capitalize on its investment during the construction; using the buyers' installments the developer is able to pay the constructor, cover the cost of construction materials and make a profit. This is only possible because of the existence of simultaneous contracts. In a pure purchase contract situation, the seller would first have to complete construction on the building before any purchase installments could be made. Only after the completion of the construction, would the seller be able to recuperate any money it invested and make a profit. In this sense, the property development contract enables new construction companies/new developers to enter the market, since under the a pure purchase contract scenario only very well established companies would ever be able to completely finance the construction for years on end and profit from it at a later stage. The property development contract is likewise beneficial for many consumers, who can pay for the apartment in installments that fit their monthly budget.

In conclusion, the Brazilian property development contract is of great meaning for the real estate market, employing a great number of people and enabling the buyer's self-realization and self-development. Hence, it is important to note how a dispute resolution arising out of this significant contract can be conducted in a manner that is fair and equitable to the vulnerable party, namely the consumer.

## II. Arbitration in property development contracts in Brazil

Arbitration is widely used in the civil construction field<sup>16</sup>. Construction companies have recognized the value of arbitration dispute resolution (ADR), as

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 Protection Code, "a consumer is any legal or natural person, who acquires or uses a product or a service as the final recipient". Brazil. *Law n.º 8.078*. Consumer Protection Code, 11.09.1990.

14 MELHIM NEMEM CHALHUB, *Da incorporação imobiliária*, 3rd ed., Rio de Janeiro, Renovar, 2010, p. 1.

15 ORLANDO GOMES, *Contratos*, 23 ed., Rio de Janeiro, Forense, 2001, pp. 453-454.

16 CHRISTOPH BENEDICT, "Part IV - Selected Areas and Issues of Arbitration in Germany, Cons-

opposed to courts given it can be faster and often offers a better environment for issues of high technical and legal complexity, like constructions projects<sup>17</sup>. It is becoming common practice to include an arbitration clause in nearly all construction contracts, including the property development contract<sup>18</sup>.

In Brazil, the use of arbitration in the construction field is also a reflection of the friendly position towards arbitration assumed by the country in the past decades. Brazil has signed a number of important conventions for arbitration, like the Panama Convention (1995)<sup>19</sup>, the New York Convention (2002)<sup>20</sup>, the Mercosur Olivos Protocol for the Settlement of Disputes (2003) and the United Nations Convention on Contracts for the International Sale of Goods (2014)<sup>21</sup>. Most importantly, in 1996, Brazil enacted Arbitration Law n.º 9.307<sup>22</sup>, thereby creating a safe environment for commercial arbitration. This development encouraged the growth of the arbitration market, welcoming new institutions and new practitioners. Furthermore, it stimulated construction companies to resort to this institute.

The tendency to also include an arbitration clause in B2C (Business to Consumer) construction contracts has been noted in recent years and can be seen in the high number of published court decisions discussing the validity of the arbitration clause in B2C property development contracts<sup>23</sup>. These clauses face resistance from the doctrine and from Brazilian courts qualified to rule on such matters<sup>24</sup>. Most property development contracts are understood as stan-

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truction Arbitration in Germany”, in K.-H. BÖCKSTIEGEL; S. KRÖLL; P. NACIMIENTO (Org.), *Arbitration in Germany: The Model Law in practice*, Alphen aan den Rijn, Kluwer Law International, 2007, pp. 899-917, paras. 1 and 19.

17 CHRISTOPH BENEDICT, “Part IV - Selected Areas and Issues of Arbitration in Germany, Construction Arbitration in Germany”, in K.-H. BÖCKSTIEGEL; S. KRÖLL; P. NACIMIENTO (Org.), *Arbitration in Germany: The Model Law in practice*, Alphen aan den Rijn: Kluwer Law International, 2007, pp. 899-917, paras. 3-6.

18 CHRISTOPH BENEDICT, “Part IV - Selected Areas and Issues of Arbitration in Germany, Construction Arbitration in Germany”, in K.-H. BÖCKSTIEGEL; S. KRÖLL; P. NACIMIENTO (Org.), *Arbitration in Germany: The Model Law in practice*, Alphen aan den Rijn, Kluwer Law International, 2007, pp. 899-917, para. 19.

19 *Inter-American Convention on International Commercial Arbitration*, 16.06.1976.

20 United Nations. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10.06.1958.

21 United Nations. *Convention on the Contracts for the International Sale of Goods*, 11.04.1980.

22 Brazil. *Law n.º 9.307. Arbitration Law*, 23.09.1996.

23 See, for example: Tribunal de Justiça de Minas Gerais. *Apelação Cível 1.0024.08.180398-3/001*, 05.05.2010; Tribunal de Justiça de Minas Gerais. *Apelação Cível 1.0525.10.001931-0/001*, 17.11.2011; Superior Tribunal de Justiça, 3rd Chamber. *REsp n.º 1.169.841 - RJ*, 06.11.12; Superior Tribunal de Justiça, 3rd Chamber. *REsp n.º 819.519 - PE*, 09.10.2007; Tribunal de Justiça do Rio Grande do Sul. *Agravo 70051678332*, 28.02.2013; Tribunal de Justiça de São Paulo. *Apelação 1023756-54.2014.8.26.0576*, 13.05.2015.

24 Superior Tribunal de Justiça, 3rd Chamber. *REsp n.º 819.519 - PE*, 09.10.2007. Superior Tribunal de Justiça, 3rd Chamber. *REsp n.º 1.169.841 - RJ*, 06.11.12.

dard contracts<sup>25</sup>, where the consumer only adheres to its terms. Therefore, the arbitration clause, as an imposition on the consumer does not resist scrutiny as to its validity under the Brazilian Law<sup>26</sup>. Moreover, arbitration proceedings are guided by flexibility and party autonomy, but the consumer is not familiar with arbitration and usually does not know what to do with so much autonomy. In arbitration, the consumer cannot count on costless proceedings. He/she must nominate an arbitrator and may not even be bound by the consumer protective legislation of his/her country. The advantages of the protective state courts are suddenly gone. Suggestions on how to address these problems will be discussed below<sup>27</sup>.

Although, arbitration has proven to be a suitable dispute resolution method for the construction field and the inclusion of an arbitration clause, including in B2C contracts is commonplace, consumer arbitration needs to be cautious and tread lightly, since the legal relationship in B2C standard contracts is not balanced.

### III. The arbitration clause: Arbitrability and validity

As mentioned above<sup>28</sup>, today most property development contracts in Brazil include an arbitration clause. However, the arbitration clause *per se* is not sufficient to grant a dispute settlement through arbitration. One may firstly ask if the dispute is at all arbitrable under the relevant law and if the arbitration clause is valid and binding on the consumer.

#### A. Arbitrability

The law defines the limits for arbitration. It excludes some issues from the autonomy of the parties to arbitrate, defining the arbitrability of a certain dispute. These exclusions can refer to the object of the dispute, known as objective arbitrability; or to the parties, known as subjective arbitrability.

Regarding objective arbitrability, one must ask if property development contract disputes are even arbitrable. In situations of subjective arbitrability, one must ask if consumers can arbitrate under the Brazilian Law. The practical importance of the arbitrability is connected to the enforcement of the arbitral award. New York Convention Art. V(2)(a)<sup>29</sup> allows for the refusal of enforcement

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25 ORLANDO GOMES, *Contratos*, 23 ed., Rio de Janeiro, Forense, 2001, p. 446.

26 See Art. 5 I, VII of the Brazilian Consumer Protection Code. See also below: Section IV (2) (b).

27 See below: Section VIII.

28 See above: Section III.

29 United Nations. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10.06.1958.

if the matter subject to arbitration is not capable of settlement by arbitration, *i.e.* lack of objective arbitrability and Art. V(1)(a) allows refusal if the said agreement is invalid under the law to which the parties have subjected it, covering the case when there is a lack of subjective arbitrability. Likewise, Brazilian Arbitration Law Art. 31 considers the awards null if the arbitration clause is to be considered null, again encompassing arbitrability matters.

### 1. *Objective arbitrability*

As to the objective arbitrability, Art. 1 of the Brazilian Arbitration Law establishes that conflicts that involve patrimonial disposable rights are arbitrable. Conflicts that arise out of a property development contract are generally of patrimonial nature and are therefore arbitrable under the Brazilian Law.

### 2. *Subjective arbitrability*

The general rule of subjective arbitrability in Brazil relates to the parties' capacity to consent. In that regard, Art. 1 of the Brazilian Arbitration Law establishes that any person with full legal capacity can elect for arbitration in order to solve their disputes<sup>30</sup>.

Concerning the figure of the consumer as a party to the arbitration, there is no explicit prohibition of consumer arbitration in Brazilian Law<sup>31</sup>. Thus, in principle, the disputes in discussion face no lack of subjective arbitrability.

## B. Validity of the arbitration clause

Although the subjective arbitrability for consumers is guaranteed, Brazilian Law widely recognizes the vulnerability of consumers<sup>32</sup> and the unbalanced legal relationships that arise out of B2C contracts such as in case of property developments, especially considering that most of them are standard contracts, drastically reducing the consumer's bargaining power<sup>33</sup>. For that reason, law-

30 Arts. 1 to 5 of the Brazilian Civil Code regulate the legal capacity. According to Art. 5 full legal capacity starts at the age of 18. Cases where the full legal capacity starts earlier are in the paragraphs of Art. 5. Cases of full or partial incapacity are in Arts. 3 and 4. Brazil. *Law n.º 10.406. Civil Code*, 10.01.2002.

31 Superior Tribunal de Justiça, 3rd Chamber. *REsp n.º 1.169.841 - RJ*, 06.11.12. See comments on this decision below: Section v (2).

32 See Art. 4 (1) of the Consumer Protection Code. CLÁUDIA LIMA MARQUES; BRUNO MIRAGEM, *O novo direito privado e a proteção dos vulneráveis*, São Paulo, Revista dos Tribunais, 2012, p. 149.

33 IVENS HENRIQUE HÜBERT, *Condomínios Em geral e incorporações imobiliárias*, Curitiba, IESDE Brasil, 2009, pp. 114-115.

makers redirected the limitations of arbitration from the subjective arbitrability to the validity of the arbitration clause or arbitration agreement.

### 1. Formal validity

In line with the principle of transparency in consumer contracts, Brazilian Arbitration Law Art.4 §2 only confers validity to an arbitration clause in a standard contract if the clause is in bold letter or in a separate document and the consumer has signed it separately<sup>34</sup>. This means that a signature at the end of the contract is not sufficient to bind the consumer to the clause in a standard contract. The arbitration may also be valid if the consumer starts arbitration or expressly agrees to it.

### 2. Material validity

The formal requirements are not sufficient to protect the consumer. Even if he/she has read the clause in bold type, it does not mean that he/she has understood what an arbitration clause means. Moreover, in the moment of signing the contractual provision the consumer may feel compelled to sign the clause, so that he/she can conclude the contract as a whole. Therefore, some type of content control (*Inhaltskontrolle*)<sup>35</sup> is important to protect the consumer<sup>36</sup>. This is the role of the material validity requirement.

Article 51, VII of the Brazilian Consumer Protection Code (*Código de Defesa do Consumidor*, hereinafter CDC)<sup>37</sup> regards as null and void any clause that com-

34 Superior Tribunal de Justiça, 3rd Chamber. *AgRg no Recurso Especial n.º 1.439.034 - MG*, 11.11.2014, Inteiro Teor, p. 7.

35 “*Inhaltskontrolle*” means “content control”. The expression describes the content control made in standard contracts’ clauses in Germany, the so-called *Allgemeine Geschäftsbedingungen - AGB*. For instance, §307 Absatz 1 BGB controls the content of AGB clauses, regarding them void if they do not comply with good faith, clearness and understandability aspects. “§307 (1) BGB Bestimmungen in Allgemeinen Geschäftsbedingungen sind unwirksam, wenn sie den Vertragspartner des Verwenders entgegen den Geboten von Treu und Glauben unangemessen benachteiligen. Eine unangemessene Benachteiligung kann sich auch daraus ergeben, dass die Bestimmung nicht klar und verständlich ist.” About *Inhaltskontrolle* in consumer contracts: WOLFGANG WURMNEST, “BGB § 307 Inhaltskontrolle”, in F. J. SÄCKER; R. RIXECKER (Org.), *Münchener Kommentar zum BGB*, 6th ed., München, C. H. Beck, 2012, paras. 1-6. Specifically about *Inhaltskontrolle* in property development contracts with a consumer party: WOLFGANG KOEBLE, “11. Teil Formen des Bauens und Vertragsarten; Baumodelle und Bauträgervertrag”, in R. KNIFFKA; W. KOEBLE (Org.), *Kompendium des Baurechts: Privates Baurecht und Bauprozess*, 4th ed., München, C. H. Beck, 2014, paras. 220-226. CHRISTIAN SCHWENKER, “F. Bauvertrag und AGB”, in B. MESSERSCHMIDT; W. VOIT (Org.), *Privates Baurecht: Kommentar zu §§631 ff. BGB*, 2nd ed., München, C. H. Beck, 2012, paras. 18-19.

36 CLÁUDIA LIMA MARQUES, *Contratos no Código de defesa do consumidor. O novo regime das relações contratuais*, 2nd ed., São Paulo, Revista dos Tribunais, 2006, p. 898.

37 Brazil. *Law n.º 8.078*. Consumer Protection Code, 11.09.1990.

pulsorily imposes arbitration in a B2C contract<sup>38</sup>. This code becomes highly relevant when considering the vulnerable position of the consumer in such a contract. The fact that the article was drafted by the proponent of the standard contract, without any participation or influence of the vulnerable party makes it an imposition on the consumer, whose only choices become agreeing with the complete contractual content or not to contract. Hence, Art. 51, VII CDC prevents the consumer from being bound to the arbitration clause upon signature of the contract, since at that moment he/she normally does not possess sufficient technical information in order to make a conscious decision about the dispute resolution method.

#### IV. Relevant Brazilian case law

The Brazilian Superior Court of Justice (*Superior Tribunal de Justiça*, hereinafter STJ)<sup>39</sup> has already had the opportunity to debate the present issue. It mainly dealt with the validity requirements of the arbitration clause for consumer arbitration, presented above. Brazil enacted its Arbitration Law in 1996 and its Consumer Protection Code in 1990, giving rise to discussions as to whether the formal requirements for an arbitration clause in B2C contracts set forth by the Arbitration Law derogated the requirement made by the Consumer Protection Code<sup>40</sup>. Accordingly, two notable decision arose which demonstrate the development of the Brazilian approach towards consumer protection concerning arbitration in standard property development contracts:

38 This provision is comparable to Art. 3(1) of the EEC Directive 93/13, where a balanced negotiation power between the contractual parties is key for defining the binding nature of the contractual terms. European Economic Community. *Council Directive 93/13 on unfair terms in consumer contracts*, 05.04.1993.

39 The Superior Court of Justice (*Superior Tribunal de Justiça* – STJ) is the highest court in the country, which deals with non-constitutional issues. The court is responsible for standardizing the interpretation of federal law in Brazil. Constitutional issues are dealt with by the Brazilian Supreme Court (*Supremo Tribunal Federal* – STF), which is the highest judiciary institution and serves as the ultimate guardian of the Brazilian Constitution. They are both based in the capital, Brasília.

40 Supporting the derogation theory based on “*lex posterior derogat legi priori*”: SELMA M. FERREIRA LEMES, “A arbitragem em relações de consumo no Direito brasileiro e comparado”, in C. A. CARMONA; PEDRO A. BATISTA MARTINS; SELMA M. FERREIRA LEMES (Org.), *Aspectos fundamentais da lei de arbitragem*, Rio de Janeiro, Forense, 1999, p. 126. Contrary to the derogation theory: Fátima Nancy Andriighi in: Superior Tribunal de Justiça, 3rd Chamber. *REsp n.º 1.169.841 - RJ*, 06.11.12. About this discussion see also FERNANDA SIROTSKY SCALETSCY, “Arbitragem e ‘Parte Fraca’: a Questão das Relações de Consumo”, *Revista Brasileira de Arbitragem*, 2014, pp. 68-99, 78-84.

### A. CONAC Ltda. v. Flávia Zirpoli Sobral

On October 9, 2007, the STJ decided on a dispute arising out of a property development contract with an arbitration clause<sup>41</sup>. In the first instance, the consumer, Flávia Zirpoli, sued the developer, CONAC Ltda, seeking termination of the contract, the return of the paid installments and the payment of contractual penalty and damages. The judge accepted the claim, despite of the arbitration clause. CONAC then unsuccessfully appealed. In its decision, the Court of the State of Pernambuco asserted that in a standard contract, where the consumer could not influence the draft of the arbitral clause, one must infer that this clause was an imposition from the other party. Therefore, the court applied Art. 51, VII CDC and regarded the arbitration clause null.

As a last instance, CONAC brought the case to the STJ, where it asked the court to annul all of the prior proceedings on the grounds of the existence of a valid arbitration clause, which had been freely agreed to in the contract. In its decision, the STJ agreed with the court *a quo* and considered the arbitration clause in the standard property development contract null. The Court's reasoning did not question the binding force of the arbitral clause or it as a ground to terminate the proceedings in the state courts. It limited itself to the question of the validity of the arbitration clause in this particular context, namely the insertion of the clause in a B2C contract unilaterally drafted by the developer. The Court acknowledged the contract as a standard contract, so that the consumer only had the option of either signing it as a whole or not to purchase the apartment. The fact that the consumer did not have the chance to discuss the arbitral clause lead the STJ to understand that this was a compulsory clause towards a consumer and therefore lacked validity.

Although the result of the decision can be considered just, the reasoning behind it was very poor as it left many issues that surround the problem of the consumer arbitration untouched, like the derogation discussion implementing a dialogue between the Consumer Protection Code and the Arbitration Law or even the arbitrability of consumer disputes in general. In this decision, the STJ chose a very simplistic view of the case by only looking towards consumer protection and not at arbitration. In sum, the Court affirmed, in the abstract of its decision that an arbitration clause inserted into a standard contract celebrated while the Brazilian Consumer Protection Code was in force, was null.

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41 Superior Tribunal de Justiça, 3rd Chamber. *REsp n.º 819.519 - PE*, 09.10.2007.

### B. *CZ6 Empreendimentos Comerciais Ltda. v. Davidson Roberto de Faria Meira Júnior*

In *CZ6 Empreendimentos Comerciais Ltda. and others v. Davidson Roberto de Faria Meira Júnior*<sup>42</sup>, the consumer initiated proceedings in the state courts. The developer argued as a preliminary defense, that there was a valid arbitration clause binding upon the parties, preventing the dispute from being resolved by the judiciary. In the first instance, the judge rejected the developer's defense based on the arbitration clause, affirming, "Nothing can prevent a party from seeking its right in the judicial sphere"<sup>43</sup>. Both parties then appealed until the case came to the last instance, giving the STJ, in 2012, another chance to analyze the validity of the arbitration clause in a B2C standard property development contract.

As a first step, the STJ's decision debated the binding effect of the arbitration clause as a general rule. It acknowledged that Brazil, as a signatory country of the Geneva Protocol from 1923<sup>44</sup>, recognizes that the parties can elect for arbitration, thereby excluding the dispute from the judiciary's competence. Therefore, as a general rule, arbitration clauses have a binding nature. Along this same line, a valid arbitration clause is grounds for the termination of the court proceedings under Art. 267, VII of the Brazilian Civil Procedure Code<sup>45</sup>.

The second step took by the court was to check if the case at hand would constitute an exception to this general rule. The important premises were the existence of a standard contract and the involvement of a consumer, making the application of the Consumer Protection Code indispensable.

The decision expressly mentions that the 3<sup>rd</sup> Chamber of the STJ had previously discussed the matter of the arbitral clause in a B2C property development standard contract in *CONAC v. Flávia Zirpoli Sobral*. On that occasion, the Court decided that an arbitration clause inserted in these kinds of contracts would be null, in light of Art. 51, VII CDC. However, that decision did not inspect the matter

42 Superior Tribunal de Justiça, 3rd Chamber. *REsp n.º 1.169.841 - RJ*, 06.11.12.

43 This is a clear evocation of the access to justice principle. This expressly guaranteed in Art. 5, xxxv of the Brazilian Constitution, which affirms that the law will not exclude any injury or threat to a right from the judiciary's jurisdiction. The understanding that arbitration would go against this constitutional guarantee has originated a debate about the constitutionality of arbitration in the past. A constitutional complaint against the Arbitration Law was brought to the STF through a recourse to the recognition of a foreign award. In its decision on December 12, 2011, the Supreme Court eliminated the doubts as to arbitration's constitutionality and recognized its legitimacy based on the fundamental principle of party autonomy. Supremo Tribunal Federal. *SE 5206*, 12.12.2001. Moreover, the Brazilian New Civil Procedure Code, which will enter into force in 2016, ratifies the above. In its Art. 3 *caput* it states that no threat or harm to a right can be excluded from judicial appreciation, unless the dispute has been voluntarily submitted to arbitration in the terms of the arbitration law. Brazil. *Law n.º 13.105*. New Civil Procedure Code, 16.03.2015.

44 Brazil. *Decreto n.º 21.187 (Promulgates the Geneva Protocol from 24.09.1923)*, 22.03.1932.

45 Brazil. *Law n.º 5.869*. Civil Procedure Code, 11.01.1973.

in light of Art. 4, §2 of the Arbitration Law. Specifically, it did not examine the possible derogation of Art. 5 I, VII CDC by the Arbitration Law.

The derogation problem depends on an incompatibility between the Consumer Protection Code's and the Arbitration Law's provisions. As mentioned before<sup>46</sup>, Art. 5 I, VII CDC considers null any contractual clause in a B2C contract that determines the compulsory use of arbitration. The question is whether Art. 4 §2 of the Arbitration Law makes this clause obsolete by giving new weight to B2C standard contracts. It provides that in standard contracts the arbitral clause will only be valid if the adhering party, *i.e.* the consumer, initiates arbitral proceedings or expressly agrees with the clause in written form in a separate document or in bold letters with a specific signature. Confronting these provisions, the STJ understood that the incompatibility between them is only superficial and did not, in fact, amount to the derogation of the first. According to the STJ, the Arbitration Law provision addresses standard contracts in general, while the Consumer Protection Code would apply only if the standard contract relates to a consumer.

The decision emphasizes that the Consumer Protection Code only interposes compulsory arbitration. It does not prohibit consumer arbitration in Brazil, as long as the consumer agrees with it.

The Court then maintained the *a quo* decision, albeit on different grounds, and did not refer the dispute to arbitration, since it was clear that the consumer did not want to take that route.

## V. Advantages and disadvantages of consumer arbitration arising out of property development contracts

Considering all the factors and the decisions presented above, it is essential to observe the advantages that arbitration could bring for property development disputes and to confront them with the possible needs of the consumer in arbitration. This confrontation will enable a study of which cases arbitration could indeed be the better dispute resolution choice for the consumer or even how to make arbitration a plausible choice.

This discussion is extremely current given that on May 26, 2015 the president of Brazil sanctioned alterations to the Arbitration Law and vetoed the new paragraphs concerning consumer arbitration in standard contracts<sup>47</sup>. A pros and cons analysis of consumer arbitration will enable us to evaluate the prohibited alterations in consumer arbitration<sup>48</sup>.

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46 See above: Section IV (2) (b).

47 Brazil. *Law n.º 13.129*. New Arbitration Law, 26.05.2015.

48 The content of the vetoed alterations and its implications in the Brazilian legal system will be presented below in Section VII.

### A. Advantages of arbitration for the consumer

Court proceedings are repeatedly criticized for being extremely time-consuming and expensive. Especially in Brazil, it is widely known that the judiciary is overloaded with proceedings, what influences the speed and the quality of the disputes' outcome. Consequently, alternatives to the judiciary are becoming more common and proving to be advantageous in many cases<sup>49</sup>.

Especially in the civil construction field, ADR already plays a very important role in B2B (Business to Business) contracts. Adjudication and arbitration are widely used to solve disputes between the construction companies<sup>50</sup>. The speediness of the proceedings is a great motivator, since disputes between the construction company and the deliverer of the material, for example, may cause the construction to come to a halt. One day of work stoppage at a construction site can mean a loss of millions of Reais. Therefore, the faster the dispute resolution, the less money is lost.

This advantage can also be applied to B2C construction disputes. Property development consumer disputes usually push for solution. One of the most common consumer complaints in the property development contract is the delay in construction. Although the developers have to give the consumers a prospective date for finishing the construction and turning over the apartments to their owners, in practice consumers face difficulties with frequent delays. The delay in the delivery of a residential unit can signify much more than only a few more months of additional rent. Normally, the consumer plans his/her family life around the delivery date; marriages, family planning and other major personal life events depend on that date. Going to state courts the consumer will likely wait for years for the dispute to be solved, as the Brazilian legal system involves a number of possible appeals that may delay any final settlement of the proceedings. Although arbitration is not always as fast as the parties expect, it is unlikely that arbitration will take longer than court proceedings in addressing construction matters. Particularly because in arbitration, the parties can stipulate in their contract a fixed term for the arbitral tribunal or sole arbitrator to issue the award. Pursuant to Art. 23 of the Brazilian Arbitration Law, if the parties did not fix a determined period for the issuance of the award, the term will be of six months counted from the start of proceedings. During the proceedings, parties and arbitrators can together extend the contractual or the legal term, if they agree this is necessary. Furthermore, arbitrators are interested in rendering the award in a reasonable time in order to maintain their reputation.

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49 LARS WEIHE, *Der Schutz der Verbraucher im Recht der Schiedsgerichtsbarkeit*, Frankfurt am Main, Peter Lang, 2004, p. 35.

50 VOLKMAR WAGNER, "Schiedsgerichtsbarkeit, Schiedsgutachten, Schlichtung, Dispute Adjudication, Mediation - Möglichkeiten der alternativen Konfliktlösung im Baurecht", *Neue Zeitschrift für Baurecht und Vergaberecht*, 2001, pp. 169-173.

The high number of possible appeals in court proceedings also increases the costs of the dispute. In this regard, arbitration may be less costly, at least for the companies, which do not depend on costless proceedings or free legal advocacy. However, the consumer can profit not only from his/her own savings, but also from the companies' cost reduction. If companies can reduce their dispute resolution costs, they can also pass the savings on to the consumer, thereby offering lower prices<sup>51</sup>.

In addition, the expertise of the arbitrators in this arena constitute a great attraction to arbitration. The construction field is very specific and the possibility of having a jurist with a real state background or even an engineer or an architect to be part of the decision body may increase the quality and fairness of the decisions<sup>52</sup>. It may also speed up the proceedings if the parties believe that the expertise of the arbitrators is sufficient and thus do not see the need for expert witnesses.

Lastly, companies tend to comply voluntarily with arbitral awards<sup>53</sup>, which is a great advantage for the consumer. They want to maintain a good reputation in the market. Further, the trust in the freely chosen dispute resolution method and in the arbitrators increases the trust in the final decision, encouraging parties to comply with the award, saving on costs and the time affiliated with enforcement proceedings.

## B. Disadvantages of arbitration for the consumer

Other features of arbitration can represent a disadvantage to the consumer. Flexibility, for example, is a well-known characteristic of arbitration. The proceedings are heavily based on the principle of party autonomy, letting the parties decide on the language of the proceedings, the seat of arbitration, the method of composition of the tribunal, applicable law, applicable arbitration rules, institution, etc. So much freedom may not be ideal for the consumer party for three reasons. Firstly, in general the consumer is not familiar with arbitration and has limited or no knowledge about this kind of dispute resolution method<sup>54</sup>. Thus, the consumer will not be able to make intelligent choices about the features of

51 KEVIN R. CASEY, *Mandatory Consumer Arbitration*, The Metropolitan Corporate Counsel, August 2009, p. 18.

52 MICHAEL KUTSCHERA, "Vorteile des Schiedsgerichtlichen Verfahrens", in H. TÖRGGLE (Org.), *Praxisbandbuch Schiedsgerichtsbarkeit*, Vienna, Verlag Österreich, 2007, p. 6.

53 KLAUS PETER BERGER (ed.), *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration*, 3rd ed., Alphen aan den Rijn, Kluwer Law International, 2015, pp. 682-683. "Recent empirical studies confirm that in more than 70 per cent of the reported cases, the non-prevailing party voluntarily complies with the award".

54 KEVIN R. CASEY, *Mandatory Consumer Arbitration*, The Metropolitan Corporate Counsel, August 2009.

arbitration. Secondly, usually the consumer is not in a bargaining position in a standard contract<sup>55</sup>, therefore, the probability that the consumer will in fact be able to use the freedom given by arbitration to shape the arbitration clause together with the stronger party is low. Consequently, the developer could take advantage of its position and impose language, legal basis, seat of arbitration etc. on the consumer. Thirdly, this flexibility allows the parties to decline the applicability of important consumer protection laws, such as the Consumer Protection Code. As such, the arbitrators would not need to take into account in their decision many consumer rights. This is a serious problem, since these protection laws regulate the market towards a more balanced B2C relationship.

Furthermore, the principle of publicity, which governs court proceedings, is not present in arbitration<sup>56</sup>. Even though confidentiality is not inherent to arbitration, nowadays most institutional rules possess a confidentiality provision<sup>57</sup>. To avoid reputational loss, one can assume that companies treasure confidentiality<sup>58</sup>. However, for the consumer, publicity is more beneficial. Public proceedings apply more pressure on the companies to resolve the problems in a fair manner, considering the vulnerability of the less sophisticated party. Publicity is also important for the consumer society, as it allows for an overview of companies that tend to cause more disputes than others.

## VI. A propensity towards consumer arbitration in property development contracts

Although it is not common nowadays that a consumer would initiate an arbitration proceeding based on breach of a property development contract, the number of property development contracts with arbitration clauses have increased. This was seen as a sign that in the future, arbitration would play an important role in consumer dispute resolution in Brazil<sup>59</sup>.

It is important to clarify that the author does not support arbitration as the best dispute resolution method in general in consumer disputes arising out of

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55 PETER BÜLOW; MARKUS ARTZ, *Verbraucherprivatrecht*, 2nd ed., C. F. HEIDELBERG. Müller, 2008, para. 3.

56 GARY B. BORN, *International Arbitration: Cases and Materials*, 2nd ed., Kluwer Law International, 2015, p. 111.

57 Example of Brazilian institutions that have a confidentiality clause in their arbitration rules: CAMARB Art. 12.1, CMA-CRA/RS Art. 71, CCBC Art. 14 (CCBC expressly allows the parties to waive the confidentiality provision). Example of international institutions: ICC Art. 6, DIS Art. 43, LCIA 30.1 (LCIA expressly allows the parties to waive the confidentiality provision).

58 PHILIPPE CAVALIEROS; HYUN JEONG, "Can the Arbitral Community Learn from Sports Arbitration?", *Journal of International Arbitration*, 2015, vol. 32, Issue 2, pp. 237-260, p. 251.

59 FERNANDA SIROTSKY SCALETSCY, "Arbitragem e 'Parte Fraca': a Questão das Relações de Consumo", *Revista Brasileira de Arbitragem*, 2014, pp. 68-99, p. 69.

property development cases. The suitability of this approach and other dispute resolution methods must be determined on a case-to-case basis. Still, in view of the increasing use of arbitration clauses in these kinds of contracts, it is of utmost importance to search for a more consumer friendly approach in arbitration.

The history of consumer arbitration may discourage a wider use of the method. Recalling the consumer arbitration fiascos, the U.S. episode with the National Arbitration Forum (NAF) comes to mind. NAF is a for-profit institution based in Minneapolis, specialized in resolving claims by banks and credit-card companies against consumers, who owe them money. An article in the June 2008 edition of *Business Week* made public that NAF had jeopardized consumers and acted with bias in an exceedingly large number of cases it had administered<sup>60</sup>. Citing the a San Francisco attorney who had filed the lawsuit against NAF, the article said that “in California, the one state where arbitration results are made public, creditors win 99.8% of the time in NAF cases that are decided by arbitrators on the merits...”<sup>61</sup>.

Still, many Brazilian attorneys believe there is a general tendency to accept consumer arbitration. In fact, the aforementioned case law displays a slight inclination to accept it. Although both decisions recognize the consumer’s right to go to court<sup>62</sup>, the reasoning of the second decision<sup>63</sup> shows a more open approach towards consumer arbitration in Brazil than the first one, outlining a positive development in the field.

In addition, Brazilian lawmakers had confirmed the tendency to support consumer arbitration in the Project of Bill 406 (hereinafter PLS)<sup>64</sup>. In 2013, the Senate proposed Bill 406 in an effort to alter Brazil’s Arbitration Law in many aspects. The bill’s main goal was to expand the scope of arbitration in the country, including consumer disputes<sup>65</sup>. Recently the Senate approved Bill 406<sup>66</sup> and

60 ROBERT BERNER; BRIAN GROW, “Banks vs. Consumers (Guess Who Wins)”. *Bloomberg Business Week*, 04.06.2008. Available at: <<http://www.bloomberg.com/bw/stories/2008-06-04/banks-vs-dot-consumers-guess-who-wins>>. Last accessed: May 5, 2015. PHILIPP HABEGGER; DANIEL HOCHSTRASSER; GABRIELLE NATER-BASS; URS WEBER-STECHER, *Arbitral institutions under scrutiny*, New York, Juris, 2013, p. 41.

61 ROBERT BERNER; BRIAN GROW, *Banks vs. Consumers (Guess Who Wins)*. *Bloomberg Business Week*, 04.06.2008. Available at: <<http://www.bloomberg.com/bw/stories/2008-06-04/banks-vs-dot-consumers-guess-who-wins>>. Last accessed: May 5, 2015.

62 Superior Tribunal de Justiça, 3RD CHAMBER. *REsp n.º 1.169.841 - RJ*, 06.11.12. Superior Tribunal de Justiça, 3rd Chamber. *REsp n.º 819.519 - PE*, 09.10.2007.

63 Superior Tribunal de Justiça, 3rd Chamber. *REsp n.º 1.169.841 - RJ*, 06.11.12.

64 Brazil. *Projeto de Lei do Senado 406*. New Arbitration Law Project, 2013.

65 DEBORAH ALCICI SALOMÃO, “Arbitration under the Brazilian Law with Regards to the main changes suggested by the reform committee”, *World Arbitration & Mediation Review*, vol. 8, 2014, pp. 107-127, p. 117.

66 The Senate approved the PLS on 05<sup>th</sup> May 2015. TERCIO RIBAS TORRES, *Lei da Arbitragem é aprovada e segue para sanção*, 2015. Available at: <<http://www12.senado.gov.br/noticias/>>

rejected the alterations proposed by the Chamber of Deputies. The original Bill was sanctioned by the executive branch on May 26, 2015. However, it vetoed the paragraphs on consumer arbitration<sup>67</sup>.

With help of this comparative chart, one can understand the changes proposed by the Senate and see the development of Brazil's Arbitration Law:

Law 9.307 / 1996

Art. 4 The arbitration clause is the convention by which the parties to a contract undertake to submit to arbitration any dispute, which may arise in respect of such contract.

§1 The arbitration clause must be stipulated in writing and may be inserted in the contract or in a separate document that refers to it.

§2 In the standard contracts, the arbitration clause is effective only if the adherent takes the initiative to start arbitration or expressly agrees with it, as long as in writing in an attached document or in bold type, with signature especially for this clause.

Bill 406 / 2013

Art. 4 The arbitration clause is the convention by which the parties to a contract undertake to submit to arbitration any dispute, which may arise in respect of such contract.

§1 The arbitration clause must be stipulated in writing and may be inserted in the contract or in a separate document that refers to it.

§2 In the standard contracts, the arbitration clause shall be effective only if written in bold type or in a separate document.

§3 In a consumer relationship established through a standard contract, the arbitration clause should be effective only if the adherent takes the initiative of starting arbitration or expressly agrees with it.

Although critics of consumer arbitration strongly disapproved of Art.4 §3 of Bill 406 and made strong movements asking for the presidential veto<sup>68</sup>, the lawmakers' efforts to protect the consumer from hidden arbitration clauses can be seen. The new draft of Art. 4 is clearer and it actually corresponds to Bill 78/1992 that spurred the creation of Brazil's Arbitration Law.

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materias/2015/05/05/lei-da-arbitragem-e-aprovada-e-segue-para-sancao>. Last accessed: May 6, 2015.

67 See vetos In: Brazil. *Law n.º 13.129*. New Arbitration Law, 26.05.2015.

68 *Grupo pede veto para arbitragem no consumo*. O Estado de Sao Paulo. Available at: <<http://economia.estadao.com.br/noticias/geral/grupo-pede-veto-para-arbitragem-no-consumo-imp-,1687945>>. Last accessed: June 1, 2015.

The draft approved by the Senate distinguished two very important moments of the consumer's consent to arbitrate. First, the moment of the signature of the contract, requiring more transparency for the arbitration clause with the bold type and/or separate document. Second, the moment of initiating arbitration proceedings, *i.e.* requesting arbitration. With this new paragraph, arbitration would indeed only occur if the consumer wanted it, because even with a valid arbitration clause in the terms of §2, the consumer would have to agree with the initiation of proceedings when the dispute arose. Section 3 encompasses both situations, when the consumer is in the active or the passive position in the legal suit. In the active position, if the consumer files the request for arbitration, then the clause is valid. If the consumer instead goes to court, the clause, even if it complied with the requirements of §2, would not be regarded as valid, as the lawsuit before the court is *per se* an implicit denial of arbitration, contrary to what can be understood as “expressly agrees to arbitration”. In the passive position, if the company starts arbitration and the consumer does not expressly agree to it, the arbitration clause loses its validity. On the other hand, if the company goes to court and the consumer invokes the arbitration clause, the company is bound by the clause.

In sum, §3 was an important tool for consumer protection, because it created a consumer arbitration clause that would bind solely the companies but never the consumer. It is unfortunate that most consumer rights specialists did not fully understand the content of this provision. Now, because of the Presidential veto, §3 of the Bill will not become part of Brazil's Arbitration Law.

Even if the new §3 had been sanctioned, this alone would have been insufficient to protect the consumer in private arbitration. The consumer has other needs, such as the mandatory applicability of the Consumer Protection Code by arbitrators. Nevertheless, Brazil is now left with the old version of the article, the left column of our table above, which is unclear and ambiguous, confusing the moment of signing with the moment of initiating arbitration. Consequently, the veto does not signify any sort of progress in consumer protection in arbitration.

This veto shows that the consumer protection community in Brazil is still not prepared for ADR or continues to be ignorant of the arbitration vocabulary, which consequently did not allow for a correct interpretation of Bill 406. The veto goes against the actual objective of the new law, which seeks to widen the scope of arbitration. In this sense, it also went against the forecasts of a propensity to accept consumer arbitration in Brazil.

## **VII. Concrete suggestions for consumer arbitration in property development contracts**

The author believes that lawmakers' effort to expand the scope of arbitration to consumer disputes is not a big enough step in order to make consumer arbitration plausible for property development contracts. There needs to be some

kind of limitation imposed as to the content of the arbitration clause, making it comparable to the *Inhaltskontrolle*<sup>69</sup> as applied in German standard contracts.

The content control of consumer arbitration clauses in the law should specifically encompass two aspects: the application of the Consumer Protection Code and the publicity of proceedings. The law should stipulate the mandatory applicability of the Consumer Protection Code to arbitrations with a consumer party, at least for domestic arbitrations, thereby prohibiting an *et aequo et bono* arbitration. The fact that Brazil included the consumer protection provisions in one code makes it easier for the lawmaker to protect consumers in domestic arbitration proceedings. The law would not have to require the application of diverse legal documents to protect the consumer. It must only give due importance to the Consumer Protection Code. It contains important rules as to unfair terms, which would be applied by the arbitrators in the interpretation of the contract. It also contains procedural advantages for the consumer, like the reverse burden of proof that would facilitate the taking the evidence in an arbitration proceeding.

Only with the mandatory applicability of the Consumer Protection Code, can the consumer count on any sort of effective protection, since the norms of the code serve the purpose of balancing the legal relationship between the companies and the vulnerable consumer.

A provision to make all consumer disputes public, unless the consumer wants confidentiality, is also significant. This would enable a better control and scrutiny of consumer arbitral awards and avoid episodes like the NAF scandal. It would also encourage fast voluntary compliance, because the companies would risk their reputation in the market if they refused to comply. It would, moreover, discourage any corporate behavior that could bring about a dispute. Publicity can also be achieved if the government itself creates consumer arbitration boards or develops a program to help the existing institutions<sup>70</sup>, requiring a consumer friendly posture in return.

On the other hand, the demand for too many requirements in the law for a content control of the arbitration clause in B2C standard contracts could also be seen as an invasion of the consumer's contractual freedom and party autonomy. It could stunt consumer arbitration by hindering it from developing together with the consumer's behavioral changes and the economic market. Additionally, the suitability of the requirements for each kind of consumer arbitration can greatly differ. For instance, consumers in the property development contract, tourist consumers<sup>71</sup>

69 See above: Footnote 36.

70 See the Spanish example: SPAIN. *ORDEN SCO/3703/2005, de 25 de noviembre, por la que se establecen las bases reguladoras de la concesión de subvenciones para el fomento de actividades de las Juntas Arbitrales de Consumo, para el ejercicio de 2005.*, 25.11.2005.

71 See ARDYLLIS ALVES SOARES, "A tutela internacional do consumidor turista", *Revista de Direito do Consumidor*, 2012, pp. 113-175.

or consumers in cross-border contracts<sup>72</sup> may use the flexibility of arbitration to cover different needs. The speed and the language flexibility could benefit a foreign investor, thus the choice of the contractual law is important for cross-border disputes. In sum, the aspects of different branches of consumer arbitration present different needs. The delimitations needed in all kinds of consumer arbitration in the law are therefore, not advisable.

To comply with the consumer's needs in an arbitration arising out of a property development dispute, the stipulation of other limits can be made at an institutional level instead of a legal level. Institutional rules specifically designed for consumer arbitration in property development contracts could be the most adequate tool to offer the consumer a safe environment in arbitration to solve property development disputes.

For instance, the institutional rules could stipulate that in property development disputes where a consumer is involved, the language of arbitration would be the one of the consumer, thus making the proceedings more comprehensible for all parties involved. The seat of arbitration could be where the property is being developed, which is the place where the consumer seeks to live, and therefore, where its regular forum choice would fall. It would also facilitate the taking of evidence and the applicability of a *lex arbitri* that fits the case. Particularly special costs regulations are of the utmost importance to make arbitration accessible for all consumers<sup>73</sup>.

If institutions develop specific rules for the consumer, all three parties involved in the arbitration of a property development contract will benefit. Construction companies will be encouraged to choose these institutions, which have developed specific rules for B2C construction cases, bringing more clients to the institution. Consumers will have a more consumer friendly arbitration,

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72 See DONNA M. BATES, "A consumer's dream or pandora's box: Is arbitration a viable option for cross-border consumer disputes?", *Fordham International Law Journal*, vol. 27, Issue 2, 2003, pp. 823-898.

73 SPAIN, for instance, has already developed a consumer friendly cost regulation in which the consumers only have to cover the evidence production costs. FÁTIMA NANCY ANDRIGHI, "Arbitragem nas relações de consumo: uma proposta concreta", *Revista de Arbitragem e Mediação*, vol. 9, 2006, pp. 13-21. In 2005 the Spanish government has issued regulatory bases to help finance the so-called *Juntas Arbitrales de Consumo* and potentiate consumer arbitration in the country. SPAIN. *ORDEN SCO/3703/2005, de 25 de noviembre, por la que se establecen las bases reguladoras de la concesión de subvenciones para el fomento de actividades de las Juntas Arbitrales de Consumo, para el ejercicio de 2005.*, 25.II.2005. According to the preamble of the *ORDEN SCO/3703/2005*, the subvention is a consequence of the Spanish Law for Consumer protection. "*La Ley 26/1984, de 19 de julio, General para la Defensa de los Consumidores y Usuarios, en su artículo 31, determina el establecimiento, por parte del Gobierno, de un sistema arbitral que permita atender y resolver, sin formalidades especiales y con carácter vinculante y ejecutivo, las quejas o reclamaciones de los consumidores y usuarios.*" Additionally, the Agencia Española de Consumo, Seguridad Alimentaria y Nutrición – AECOSAN encourages consumer to recourse to arbitration in their disputes. See Agencia Española de Consumo, Seguridad Alimentaria y Nutrición. *Arbitraje*. Available at: <<http://consumo-inc.gob.es/arbitraje/home.htm?id=60>>. Last accessed: May 21, 2015.

allowing them to have an appealing alternative to state courts.. Companies will not have to waste time trying to enforce an arbitration clause that will later be challenged by the consumer in a domestic court. Even the judiciary would benefit from it, as a number of proceedings would migrate to ADR, reducing the Brazilian judiciary docket's case load.

In conclusion, a legal content control of the arbitration clause combined with specific consumer institutional rules may be the key to improving consumer arbitration.

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