Arbitration as a dispute resolution method for B2C property development contracts

- A comparative study on consumer arbitration in Brazil and Germany –

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Table of Abbreviations

AAA	American Arbitration Association
ADR	Alternative Dispute Resolution
AGB	Allgemeine Geschäftsbedingungen
ARGE Baurecht	Arbeitsgemeinschaft für Bau- und Immobilienrecht im Deutschen Anwaltverein
B2B	business to consumer
B2C	business to business
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof
CAMARB	Câmara de Arbitragem Empresarial do Brasil
CCB	Código Civil Brasileiro
CDC	Código de Defesa do Consumidor
CLT	Consolidação das Leis Trabalhistas
CPC	Código de Processo Civil
DAV	Deutscher Anwaltverein
DBV	Deutscher Beton- und Bautechnik-Verein e.V.
DIS	Deutsche Institution für Schiedsgerichtsbarkeit
ECHR	European Convention for the protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
etc.	et cetera
EU	European Union
GVG	Gerichtsverfassungsgesetz
i.e.	id est
LBA	Lei Brasileira de Arbitragem
LCIA	London Court of International Arbitration
MaBV	Verordnung über die Pflichten der Makler, Darlehensvermittler, Bauträger und Baubetreuer
ML	Model Law
NAF	National Arbitration Forum
NYC	New York Convention

OLG	Oberlandesgericht
p./pp.	page/s
para./s	paragraph/s
PLS	Projeto de Lei do Senado
PROCON	Programa de Proteção e Defesa do Consumidor
SCC	Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
SINDUSCON	Sindicato da Indústria da Construção Civil
SLBau	Streitlösungsordnung für das Bauwesen
SOBau	Schlichtungs- und Schiedsordnung für Baustreitigkeiten
ss.	subsequent
STJ	Superior Tribunal de Justiça
TRT	Tribunal Regional do Trabalho
TST	Tribunal Superior do Trabalho
UNCITRAL	United Nations Commission on International Trade Law
U.S.	United States of America
UWG	Gesetz gegen den unlauteren Wettbewerb
VOB	Vergabe- und Vertragsordnung für Bauleistungen
ZPO	Zivilprozessordnung

I - Introduction

In recent years, the propitious market conditions encouraged many consumers to embrace the project of buying their own home. For instance, the interest rates for real estate financing has extremely decreased in Germany in the past 6 years.[1] In Brazil, a raising credit offer to the construction sector[2] together with the economic boom in the last decade originated a real estate boom.[3]

In this context, the property development contract has proven to be an important legal instrument for consumers to buy their dwelling.[4] On the one hand, it allows consumers to pay for the household unit through monthly installments. On the other hand, it enables the property developers to make money already in the building phase, reducing the financial risks. In light of these advantages for the parties, this contract is widely used in both countries.

Furthermore, the property development contract is of great social significance for the consumer. It means leaving the rent and the realization of a dream. It concerns a big sum of money and is closely related to the family planning of the consumer. In many cases, it can be considered one of the most important contracts of the consumer´s life.

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[1] Hillemacher, M., *Deutschland lebt naiven Traum vom eigenen Heim*, available at: www.welt.de/finanzen/immobilien/article138646150/Deutschland-lebt-naiven-Traum-vom-eigenen-Heim.html. 22.10.2015. Brückner, M., *Zeitbombe Baufinanzierung: Käufer in der Zinsfalle*, available at: info.kopp-verlag.de/hintergruende/deutschland/michael-brueckner/zeitbombe-baufinanzierung-kaeufer-in-der-zinsfalle.html. 22.10.2015.

[2] Amorim, R. (2009), *Boom de crédito e expansão imobiliária: você só viu o começo. | Ricardo Amorim » economista, palestrante e consultor econômico-financeiro*, available at: ricamconsultoria.com.br/news/artigos/boom-de-credito-e-expansao-imobiliaria-voce-so-viu-o-comeco. 11.05.2015. Brühwiller, T. (2012), 'In Brasilien schiessen Häuser wie Pilze aus dem Boden', *Neuer Zürcher Zeitung*, 08.06.12. de Castro Filho, Hyltom Pinto, JusNavigandi (2011), *Breve estudo sobre a atividade de incorporação imobiliária*, available at: jus.com.br/artigos/18539/breve-estudo-sobre-a-atividade-de-incorporacao-imobiliaria. 11.05.2015.

[3] (21.05.12), *Der brasilianische Wirtschaftsboom hat auch einen Immobilien-Boom ausgelöst*, available at: www.ad-hoc-news.de/brasiliens-immobiliensektor-der-turnaround-wird-immer--/de/News/23361363. 11.05.2015.

[4] Find the definition of property development contract in Chapter II, D.

Despite the importance of the contract, consumers do not discuss the dispute resolution clause with the developer; they simply sign the standard contract. When a dispute arises, the consumer will, probably for the first time, be confronted with the dispute resolution clause in the contract. They may find an arbitration clause in their contract, instead of a choice of forum clause.[5]

For the consumer, this is a two-sided situation. On the one hand, construction disputes have proven to be more suited for out-of-courts proceedings.[6] Arbitration is faster than courts and this is an essential characteristic for the construction area. The consumer could also profit from it, because one frequent cause for consumer redress in property development contracts is the delay in the delivery of the apartments. Added to the time that courts need to issue a binding decision, consumers that sue the developers usually wait for years to finally enter in their new home. In arbitration, the consumer would have a faster outcome.

Furthermore, in arbitration, the parties can appoint arbitrators, who know about the issue in discussion, experts in construction, like architects or engineers or even lawyers specialized in real estate matters.[7] This increases the quality of the proceedings, of the decisions and the trust of the parties in the tribunal. It makes these disputes more suitable to arbitration than other consumer disputes.

Even, the value of the household unit can be a factor to determine whether arbitration is more suitable for a certain property

[5] Quirino, H., *Aspectos relevantes da incorporação imobiliária – boom imobiliário, alienaçao fiduciária, juros durante a obra e arbitragem*, available at: www.hamiltonquirino.com.br/artigo10.htm. 22.05.2015. Benedict, C. (2007a), 'Part IV - Selected Areas and Issues of Arbitration in Germany, Construction Arbitration in Germany' in: Böckstiegel, K.-H., Kröll, S., Nacimiento, P. (eds.), *Arbitration in Germany: The Model Law in practice,* Alphen aan den Rijn, Kluwer Law International, pp. 899–917.

[6] Benedict, C. (2007a), 'Part IV - Selected Areas and Issues of Arbitration in Germany, Construction Arbitration in Germany' in: Böckstiegel, K.-H., Kröll, S., Nacimiento, P. (eds.), *Arbitration in Germany: The Model Law in practice,* Alphen aan den Rijn, Kluwer Law International, pp. 899–917. Koeble, W. (2014), '1. Teil. Außergerichtliche Streitbeilegung und schiedsgerichtliche Verfahren' in: Kniffka, R., Koeble, W. (eds.), *Kompendium des Baurechts: Privates Baurecht und Bauprozess,* München, C. H. Beck.

[7] Drabek, J. (2004), 'Schiedsverfahren -Bauträgervertrag, Gemeinschaftsordnung-' in: *Bauträgervertrag, Teilungserklärung und Gemeinschaftsordnung: Von der Planung bis zur Fertigstellung des Bauvorhabens ; 3. Weimarer Fachgespräch vom 4.2. bis 6.2.2004,* Köln, O. Schmidt. p.235.

development dispute than court resolution methods. A consumer, who buys an apartment with 600m^2 in a noble area of an important city, probably does not fit the financially vulnerable position of the average consumer in comparison to developers. More sophisticated consumers, who are used to financial transactions of great volume, may even prefer arbitration in detriment to courts.

On the other hand, even though consumer protection is discussed and practiced all over the world, it is not yet well developed in the field of arbitration.[8] Factors like the costs and the flexibility of arbitration seem to scare many consumer specialists, who claim that consumer arbitration needs much more regulation and caution or should even be banned.[9] Their worries are justified, especially concerning the property development contract. It is notably necessary to protect the consumer in proceedings that discuss a contract that brings self-realization and concerns a huge sum of money for the consumer.[10] Moreover, the legal relationship between the consumer and the developer/constructor is not balanced. The consumer occupies the structurally weaker position in the contract, since they do not influence the content of the standard form of the property development contract, they have less information and less financial resources than the developer.[11] This weaker position has not yet been overcome with protective mechanisms in the arbitral proceedings.

In view of the above-described framework, this work studies the protection of consumers in arbitration, specifically regarding property development disputes. It intends to examine the arguments against

[8] Weihe, L. (2004), *Der Schutz der Verbraucher im Recht der Schiedsgerichtsbarkeit*, Frankfurt am Main, Peter Lang, p.319.
[9] See for example Lazzarini, M., Marques, C. L., Idec - Instituto Brasileiro de Defesa do Consumidor, *Não à arbitragem de consumo!*, available at: www.idec.org.br/em-acao/artigo/no-a-arbitragem-de-consumo. 22.10.2015. *Grupo pede veto para arbitragem no consumo*, available at: economia.estadao.com.br/noticias/geral,grupo-pede-veto-para-arbitragem-no-consumo-imp-,1687945. 01.06.2015.; Miletzki, R. (1982), *Formen der Konfliktregelung im Verbraucherrecht*: *Der Beitrag der Schlichtungsstellen zur Rechtsverwirklichung*, Industriegesellschaft und Recht, Bielefeld, Gieseking.
[10] Germany, Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz (2015), Entwurf eines Gesetzes zur Reform des Bauvertragsrechts und zur Änderung der kaufrechtlichen Mängelhaftung.
[11] Heiermann, W. (2007), 'Der Verbraucherschutz in der gesetzlichen Regelung des deutschen _Bauträgerrechts - ausreichend im Licht der EG-Richtlinie 93/13?' in: Jochem, R. (ed.), *Rechtshandbuch des ganzheitlichen Bauens: Festschrift für Hans Ganten,* Wiesbaden, vieweg, pp. 109–111.

consumer arbitration and the legal mechanisms that could prevent the consumer of arbitrating their property development disputes. In contrast, this study also wants to ponder any advantages that arbitration may bring to the consumer in view of their property development dispute. Henceforth, it investigates if it is worth it to make arbitration more consumer friendly and how to do so. Hereafter, the delimitation of the investigation subject (A) and the research methods to be applied (B) will be outlined.

Importantly, the aim of this work is not to present consumer protection as an end in itself. It rather wants to determine how necessary consumer protective measures are and in which measure they should be established in the property development arbitration field.

A. Subject of investigation

To analyze the situation above described, this study will focus on three main issues:

First, whether the law should protect the consumer **from** arbitration arising out of property development contracts. This question regards the consumer´s freedom of contract and its limits. It ponders the worries of consumer arbitration opponents and the validity of arbitration agreements with a consumer party.

Second, whether the law should protect the consumer **in** arbitration arising out of property development contracts. This question discusses the needs of consumers inside arbitral proceedings and to what extend should the law estipulate consumer protective measures to make construction arbitration consumer friendly.

Third, the development of arbitration tailor made for B2C construction disputes will be proposed, outlining arbitration rules and

an arbitration system encompassing developers, consumers and arbitral institutions. For this purpose, this study will consider the discussion of the above-mentioned questions and the litigation and arbitration experience of consumers and construction companies.

These issues will be presented in the nucleus of the work, namely in chapters IV, V and VI respectively. Before that, chapters II and III will provide the reader with the necessary introductory definitions and information. Later, chapter VII will present the final considerations, summarizing the analysis performed in this work.

B. Research methods

The subject of investigation of this dissertation unites three important legal areas, namely consumer protection, private construction law and arbitration. Due to this interdisciplinarity, the study requires the use of the research methods described below.

The main method is the comparative law. Legal basis for the present study of consumer protection in arbitration of property development disputes are the German and the Brazilian law. The use of two different legal systems presupposes a comparative approach. Although one may think that a comparison is only useful in issues with a notable international character, this is not the truth. Comparative Law has proven to be important in the discussion and development of national law.[12] Lawmakers can develop national legislation by studying challenges and solutions that another jurisdiction faces with a certain subject.[13] Thus, comparative law is an important instrument for legal improvement to be applied in this work.

[12] Basedow, J. (2013), 'Comparative Law and its Clients', *Max Planck Private Law Research Paper No. 14/2*, p. 4-5.
[13] Sacco, R., Joussen, J. (2001), *Einführung in die Rechtsvergleichung*, Stud. jur, Baden-Baden, Nomos, p.25-26.

The comparative work for the subject of investigation will be done following the third and the fourth stages of comparative law research.[14] Where the third stage focuses on specific areas of the law and the fourth stage compares the solutions that each legal system has given to a certain problem.[15] Thus, chapters II and III will do the micro-comparison of the definitions of the key elements of the subject of investigation in both countries, corresponding to the third stage. Chapters IV, V and VI will then apply the fourth stage to compare how Germany and Brazil deal with the consumer arbitration in property development issues.

Germany and Brazil are both civil law systems. In fact, the German Civil Law has expressively influenced the formation of the Brazilian Civil Law.[16] Nevertheless, there are significant variances between these legislations. Therefore, the first chapters present the definitions of the key study elements in the German and Brazilian law to enable the reader to identify these variances before deepening into the work´s discussions.

Accordingly, case-law analysis will be applied. The comparative approach considering the German and the Brazilian legal systems is useful in particular because the higher courts of both countries present an antagonist position towards the question of whether consumers should be able to arbitrate their property development disputes.[17] Therefore, an analysis of the law and legal reasoning from these two jurisdictions are of relevance for the examination of the subject. To interpret the law of both countries, Savigny´s four interpretation canons (grammatical, logical, historical and systematic) will be used, as well as the teleological analysis.[18]

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[14] Information about all six stages in: Basedow, J. (2013), 'Comparative Law and its Clients', *Max Planck Private Law Research Paper No. 14/2*.
[15] Basedow, J. (2013), 'Comparative Law and its Clients', *Max Planck Private Law Research Paper No. 14/2*, p. 12.
[16] Junior, Otavio Luiz Rodrigues (2013), 'A Influência do BGB e da doutrina alemã no Direito Civil Brasileiro do século XX', *Revista dos Tribunais*, Vol. 938, pp. 79–155.
[17] BGH (2007), III ZR 164/06; STJ (2007), REsp 819.519 - PE.
[18] Savigny, Friedrich Karl von (1940), *System des heutigen Römischen Rechts*, Berlin, p. 213-216.

The study also uses elements of legal realism.[19] This comparative method, which considers the real-life components that influence the law, started with the Free Law School (*Freirechtsschule*)[20] and later came to life again with the access to justice movement.[21] By using this method, rather than looking at the law as a static system, it is intended to analyze the real conditions of each agent in the present study. It will, for example, give due attention to the economic and social importance of the property development contract for the consumer, evaluate the factual advantages and disadvantages of court and arbitral proceedings for the parties and consider the structural imbalance in the legal relationship between the consumer and the developer.

Relying on these legal research methods, the present work intends to provide a relevant and valid contribution to the consumer protection law as well as to the arbitration field, regarding the subject of investigation.

[19] Clark, David Scott, ed. (2012), *Comparative law and society*, Research handbooks in comparative law, Cheltenham, U.K., Northampton, Mass., Edward Elgar. Seelmann 2010, pp. 42–43.
[20] Braun, J. (2006), *Einführung in die Rechtsphilosophie*: *Der Gedanke des Rechts*, Mohr Lehrbuch, Tübingen, Mohr Siebeck.
[21] Cappelletti, M. (1993), 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement', *The Modern Law Review*, Vol. 56, p. 282; Seelmann, K. (2010), *Rechtsphilosophie*, [Place of publication not identified], Munchen, pp. 42-43.

II – Consumer protection in property development contracts in comparison

The study of arbitration in B2C property development contracts presupposes the understanding of consumer protection and of property development contracts. The reasons why the Law protects the consumer and the definition of consumer may vary from jurisdiction to jurisdiction. Thus, to enable the comparative study in this work, the different models of consumer protection will be introduced (A) and present a short summary of the history of consumer protection (B). Then the definition of consumer and legal basis for consumer protection in Brazil and in Germany will be addressed (C). By the same token, the concept of property development will be presented (D), focusing later on the property development standard contract with consumer participation (E). Lastly, final conclusions about the above described examination will be drawn (F).

Notably, the next sub points present the basic aspects of each research element in the different jurisdictions and propose a short comparison between them. It will oversee the exceptions and details of the law, since the objective of this work is not to discuss the consumer protection in property development, but to study arbitration in the context of B2C property development disputes. In fact, this chapter provides the reader with elementary information, which will be needed in the next chapters to deepen the functional comparative study of this thesis.

A. Consumer protection models

It is widely known that consumers profit from a differentiated treatment in the legal system. Yet the simple lecture of the law does not evidence why consumers deserve protection from the State. The idea of consumer protection has developed during the years and been

supported by basically four models, which are driven by different justifications to consumer protection in the market and in the society.

In fact, consumer protection has been discussed and even denied in the past. Sceptics believed in the self-regulatory characteristic of the market. One may think that if all companies and professionals develop products and services to serve this final addressee: the consumer, then, a product or service will only survive in the market if the consumers approve of them and consequently buy them. That would mean that the consumer has the dominant character in the market and their rational choice for products and services would attend the purpose of market regulation.[22] This idea is connected to the *homo oeconomicus* model, in which the consumer is seen as a self-sufficient market agent, entirely responsible for their consumerist choices, who does not need protection.[23]

However, the idea of a self-regulatory market has proven to be wrong.[24] This illusion is replaced by the actual market failure, cause by mainly two factors: ineffective competition[25] and lack of information for consumers.[26] The market is heavily influenced by companies, which agree between themselves to fix prices or offer extremely similar services. Moreover, there are companies that are strong enough to control the market alone in a specific segment. Furthermore, consumers do not have sufficient information, be it of technical or financial nature, to decide between services and

[22] Howells, G. G., Weatherill, S. (2009), *Consumer protection law*, Markets and the law, Aldershot, Ashgate, p.1.
[23] Tamm, M. (2016), 'Kapitel 1, §1 Verbraucherschutz und Privatautonomie' in: Tamm, M., Tonner, K. (eds.), *Verbraucherrecht,* Baden-Baden, Nomos, paras. 21 - 23.
[24] Weatherill, S. (2012), '19 Consumer protection' in: Smits, J. M. (ed.), *Elgar encyclopedia of comparative law,* Cheltenham, UK, Northampton, MA, USA, Edward Elgar, p. 237. Howells, G. G., Weatherill, S. (2009), *Consumer protection law*, Markets and the law, Aldershot, Ashgate, p. 1.
[25] See Schneider, A. C. (2016), 'A protecao do consumidor na praxis concorrencial brasileira e européia: uma reflexao sobre os aspectos comuns e díspares' in: Marques, C. L., Benicke, C., Jaeger Junior, A. (eds.), *Diálogo entre o direito brasileiro e o direito alemão: Fundamentos, métodos e desafios de ensino, pesquisa e extensão,* Porto Alegre, RJR, pp. 229–259. Howells, G. G., Weatherill, S. (2009), *Consumer protection law*, Markets and the law, Aldershot, Ashgate. Soltész, U., Schilling, S. (2016), 'Europäisches Wettbewerbsrecht und Politik – ein unzertrennliches Paar?', *EuZW*, p. 768.
[26] See Benjamin, Antonio Herman V (1994), 'O Controle Jurídico da Publicidade', *Revista de Direito do Consumidor*, Vol. 9, pp. 25–57.

products.[27] The lack of information is so powerful in the market that it can initiate a so called "race to the bottom", where companies, instead of craving for developing better quality products, realize that it is not worthy it to offer qualitative good products. Consumers who do not or cannot judge about the quality of a certain product or service are driven solely by the smallest price to make their purchase decisions. Thus, traders realize that a good product with a higher price is not accepted in the market and are tempted to offer products of bad quality for low prices.[28] This reality gives rise to the "information" consumer protection model (*der aufzuklärende homo oeconomicus*), which accepts that the market is not self-regulatory and recognizes that the consumer is dependent on information to make good market decisions with regulatory power.[29]

Nevertheless, this last consumer protection model ignores the fact that consumers not always respond rationally to what they know.[30] Some consumers may absorb information easier than others, some may over or underestimate risks. Moreover, the capitalist market has experienced cases where traders and producers try to deceive the consumer by broadcasting advertisement with false information, impose unfair contractual terms, deliver defective products or services and even try to addict the consumer to its products in the name of profit.[31] Hence, information is not the only factor influencing a good-decision. The consumer´s situation at the contracting moment, their feelings and other factors, may also play a role in the consumer´s

[27] Weatherill, S. (2012), '19 Consumer protection' in: Smits, J. M. (ed.), *Elgar encyclopedia of comparative law,* Cheltenham, UK, Northampton, MA, USA, Edward Elgar, p. 240.
[28] See Benicke, C. (2006), *Wertpapier- vermögensverwaltung*, Beiträge zum ausländischen und internationalen Privatrecht, Tübingen, Mohr Siebeck, pp. 146-147.
[29] Benjamin, Antonio Herman V, Marques, C. L., Miragem, B. (2015), *Comentários ao código de defesa do consumidor*, São Paulo, Revista dos Tribunais. Tamm, M. (2016), 'Kapitel 1, §1 Verbraucherschutz und Privatautonomie' in: Tamm, M., Tonner, K. (eds.), *Verbraucherrecht,* Baden-Baden, Nomos.
[30] See Weatherill, S. (2012), '19 Consumer protection' in: Smits, J. M. (ed.), *Elgar encyclopedia of comparative law,* Cheltenham, UK, Northampton, MA, USA, Edward Elgar, p. 240. Engel, M., Stark, J. (2015), 'Verbraucherrecht ohne Verbraucher?', *ZEuP*, pp. 38-39.
[31] Schäfer, H.-B., Ott, C. (2012), *Lehrbuch der ökonomischen Analyse des Zivilrechts*, Springer-Lehrbuch, Berlin, Heidelberg, Springer, pp. 370-371. Hippel, E. von (1986), *Verbraucherschutz*, Tübingen, Mohr, pp. 3-4.

decision making.[32] Consequently, the information model needs to be complemented by the situational consumer protection model, which considers not only the consumer´s lack of information, but also the facts of the specific contractual situation, in which protection is required.[33]

Lastly, consumer protection derives not only from market failure, but also from the sense of fairness.[34] The sense of fairness carries a strong connection to human rights and uses consumer protection as a tool to distribute wealth, therewith creating a fairer society.[35] In this context, the consumer is seen as a structurally vulnerable person in comparison to the trader. This corresponds to the social protection model of the consumer.[36]

In sum, the law recognizes that the market does not function perfectly and that the consumer suffers the consequences of market failure in a way that requires protective measures, because of their informational, situational and social vulnerability.[37] These grounds gave rise to the three consumer protection models above presented: the informational consumer protection model, the situational consumer protection model and the social consumer protection model. To minder the consumer vulnerability, the State develops consumer protection law establishing market-compensatory and market-

[32] For instance, the German Law protects the consumers in case of a doorstep selling. The situation of surprise and the compelling effect of a doorstep selling are taken into account to justify the especial consumer protection given by §312b BGB or, in certain cases, even the nullity of the legal transaction. See Looschelders, D. (2015), '§138 BGB' in: Heidel, T., Hüßtege, R., Mansel, H.-P. (eds.), *Nomos-Kommentar BGB,* Baden-Baden, Nomos, para. 219.

[33] See Engel, M., Stark, J. (2015), 'Verbraucherrecht ohne Verbraucher?', *ZEuP*, pp. 43-44. Micklitz, H.-W., Purnhagen, K. (2015), 'Vorbemerkungen zu §§ 13, 14' in: Säcker, F. J., Rixecker, R. (eds.), *Münchener Kommentar zum BGB,* München, C. H. Beck, para. 42.

[34] Weatherill, S. (2012), '19 Consumer protection' in: Smits, J. M. (ed.), *Elgar encyclopedia of comparative law,* Cheltenham, UK, Northampton, MA, USA, Edward Elgar, p. 237. According to Micklitz and Purnhagen all models above find a common reference point in the social model, *i.e.* in the sense of fairness. Micklitz, H.-W., Purnhagen, K. (2015), 'Vorbemerkungen zu §§ 13, 14' in: Säcker, F. J., Rixecker, R. (eds.), *Münchener Kommentar zum BGB,* München, C. H. Beck.

[35] Miragem, B. (2016), *Curso de direito do consumidor*, São Paulo, Revista dos Tribunais, p.11.

[36] Tamm, M. (2016), 'Kapitel 1, §1 Verbraucherschutz und Privatautonomie' in: Tamm, M., Tonner, K. (eds.), *Verbraucherrecht,* Baden-Baden, Nomos, para. 26.

[37] Very critic to the idea of consumer vulnerability detached from a situational or structure imbalance: Coester, M. (2014), 'Party Autonomy and Consumer Protection', *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht - euvr*, pp. 170–178.

complementary means to reduce the asymmetry between trader and consumer.[38]

B. Short historical background of consumer protection

The need for consumer protection as a consequence of market failure goes back to the 19th century, after the industrial revolution.[39] However, it was in the early 60´s that the demand to develop consumer protection grew internationally.[40] A historic mark for consumer protection development worldwide was U.S. president John F. Kennedy´s Special Message to the Congress on Protecting the Consumer Interest in March 1962.[41] It was a vehement message, which brought the consumer protection issues to light in the whole world.

After that, in the 70´s, the European Community started working on a framework for their consumer protection policies.[42] Within the same scope, the German government published the first report on consumer politics in 1971.[43] The report begins explaining the will of the government to create a society that offers more freedom and joint responsibility and therefore consumer politic is necessary. It also considers the consumer as the, generally speaking, more vulnerable

[38] Tamm, M. (2016), 'Kapitel 1, §1 Verbraucherschutz und Privatautonomie' in: Tamm, M., Tonner, K. (eds.), *Verbraucherrecht,* Baden-Baden, Nomos, para.55.
[39] According to Micklitz even earlier, going back to the Roman Law.
Micklitz, H.-W., Purnhagen, K. (2015), 'Vorbemerkungen zu §§ 13, 14' in: Säcker, F. J., Rixecker, R. (eds.), *Münchener Kommentar zum BGB,* München, C. H. Beck, para. 33. See also Miragem, B. (2016), *Curso de direito do consumidor*, São Paulo, Revista dos Tribunais, para. 1.II.1.
[40] Miragem, B. (2016), *Curso de direito do consumidor*, São Paulo, Revista dos Tribunais, p.11. Hippel, E. von (1986), *Verbraucherschutz*, Tübingen, Mohr, pp. 5-6. Miletzki, R. (1982), *Formen der Konfliktregelung im Verbraucherrecht*: *Der Beitrag der Schlichtungsstellen zur Rechtsverwirklichung*, Industriegesellschaft und Recht, Bielefeld, Gieseking, p.1.
[41] Micklitz, H.-W., Purnhagen, K. (2015), 'Vorbemerkungen zu §§ 13, 14' in: Säcker, F. J., Rixecker, R. (eds.), *Münchener Kommentar zum BGB,* München, C. H. Beck, para. 11.
[42] Official Journal of the European Communities (1975), 'Preliminary programme of the European Economic Community for a consumer protection and information policy', 25.04.75. See Nassall, W. (2005), 'Kapitel 5: Allgemeine Geschäftsbedingungen' in: Gebauer, M., Wiedmann, T., Hirsch, G. (eds.), *Zivilrecht unter europaïschen Einfluss: Die richtlinienkonforme Auslegung des BGB und anderer Gesetze, Erlaünterung der wichtigsten EG-Verordnungen,* Stuttgart, Boorberg. Pfeiffer, T. (2013), '7. Teil. Richtlinie 93/13/EWG: Art. 6' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck.
[43] Deutscher Bundestag (1971).

party in the market.[44] Herein, one recognizes the social model of consumer protection adopted by Germany in the early development of consumer law.

Likewise, the European community preferred the social model by giving the consumer protection policies a status of fundamental right in the European Union Charter of Fundamental rights in 2000.[45] Art. 38 of the Charter expresses the importance of a high level of consumer protection inside the EU and is placed inside the chapter of rights related to solidarity.

The German lawmaker has chosen not to make a special codex for consumer protection.[46] Consumer protective policies were introduced to the German legal system by special laws, which were later integrated to the BGB, like the *AGB Gesetz*.[47] Although the birth of consumer policy in Germany resorts to the social model of consumer protection, present in European Law, when the consumer law was introduced into the BGB, the lawmaker did not justify the reasons for the necessity to protect the consumer.[48] Nowadays, German courts prefer to justify the consumer protection not only anchored in the social model but also in the information model.[49]

In Brazil the consumer protection movement also gained force after Kennedy's speech,[50] originating organizations pro consumer in

[44] Deutscher Bundestag (1971), p. 2.
[45] Micklitz, H.-W., Purnhagen, K. (2015), 'Vorbemerkungen zu §§ 13, 14' in: Säcker, F. J., Rixecker, R. (eds.), *Münchener Kommentar zum BGB,* München, C. H. Beck, p.38.
[46] Micklitz, H.-W., Purnhagen, K. (2015), 'Vorbemerkungen zu §§ 13, 14' in: Säcker, F. J., Rixecker, R. (eds.), *Münchener Kommentar zum BGB,* München, C. H. Beck, pp.5 and 36. See also Tamm, M. (2016), 'Kapitel 1, §1 Verbraucherschutz und Privatautonomie' in: Tamm, M., Tonner, K. (eds.), *Verbraucherrecht,* Baden-Baden, Nomos, para.28.
[47] Micklitz, H.-W., Purnhagen, K. (2015), 'Vorbemerkungen zu §§ 13, 14' in: Säcker, F. J., Rixecker, R. (eds.), *Münchener Kommentar zum BGB,* München, C. H. Beck, pp.68-69.
[48] Micklitz, H.-W., Purnhagen, K. (2015), 'Vorbemerkungen zu §§ 13, 14' in: Säcker, F. J., Rixecker, R. (eds.), *Münchener Kommentar zum BGB,* München, C. H. Beck, p.36.
[49] Tamm, M. (2016), 'Kapitel 1, §1 Verbraucherschutz und Privatautonomie' in: Tamm, M., Tonner, K. (eds.), *Verbraucherrecht,* Baden-Baden, Nomos, para.27.
[50] Marques, C. L. (2008), 'I. Introducao ao Direito do Consumidor' in: Benjamin, Antonio Herman V, Marques, C. L., Bessa, L. R. (eds.), *Manual de direito do consumidor,* São Paulo, SP, Brasil, Editora Revista dos Tribunais, p.24.

the 70´s.[51] But it was in 1988 that consumer protection started being part of the national law.[52] The Brazilian Constitution promulgated in that year, also known as the citizenship constitution, establishes in Art. 5, XXXII that the State will promote consumer protection in conformity with the law. It should be noted that Art. 5 lists fundamental rights, what denotes the adoption of the social model of consumer protection by Brazil. Additionally, the Brazilian Constitution in Art. 170, V ensures that the State recognizes consumer protection as an economic principle. This provision is in line with the market failure theory, justifying consumer protection not only as a social means of fairness, but also as an important tool for market regulation.

Since Art. 5, XXXII needed a national law to become effective,[53] in 1990 the lawmaker created the Consumer Protection Code (*Código de Defesa do Consumidor*, hereinafter CDC).[54] It is a multidisciplinary legal microsystem, covering all matters related to the consumer and the trader and containing provisions of civil and criminal nature.[55] The CDC considers the consumer as the vulnerable party in the market, reflecting the arguments of the social model of consumer protection. This makes Brazil a country with strong consumer protection policies. Although such an approach can be laudable thinking about the structural vulnerability of the consumer, some criticize Brazil for the overprotective law and call this type of

[51] dos Santos, Lindojon G. Bezerra (2016), 'Direito do consumidor e o instituto da mediacao: Uma análise sob o viés da tutela administrativa de protecao ao consumidor' in: Miragem, B., Marques, C. L., Oliveira, A. F. de (eds.), *25 anos do Código de Defesa do Consumidor: Trajetória e perspectivas,* São Paulo, Tomson Reuters Revista dos Tribunais, pp.328-329. Benjamin, Antonio Herman V; Marques, Claudia Lima; Bessa, Leonardo Roscoe, eds. (2016), *Manual de direito do consumidor*, Revista dos Tribunais, para. XII.8.
[52] Miragem, B. (2016), *Curso de direito do consumidor*, São Paulo, Revista dos Tribunais, no. 22.
[53] See Art. 48 Atos das Disposições Constitucionais Transitórias – ADCT of the Brazilian Constitution, determining that within 120 the Brazilian Congress had to prepare a Consumer Protection Code. Brazil (1988), Constitution of the Federal Republic of Brazil.
[54] Brazil (1990), Law No. 8.078.
[55] Benjamin, Antonio Herman V; Marques, Claudia Lima; Bessa, Leonardo Roscoe, eds. (2016), *Manual de direito do consumidor*, Revista dos Tribunais, para. II.1.

protection as legal paternalism, arguing that overprotection is prejudicial to the market regulation.[56]

C. The consumer

To perform consumer protection, each legal system has to establish a definition of consumer, outlining the scope of application of the consumer protective measures.[57] The most common definition of consumer is the final user of products or services.[58] This means that the consumer is the person who acquires a product or service and do not resell it to other people or use it to manufacture other products. They literally take the product or service out of the market. The main idea of this description is to exclude from the definition of consumer any person who earns profit out of the acquired product or service.

Still, the meaning of consumer can significantly vary from jurisdiction to jurisdiction. Considering the German and the Brazilian concepts, the Brazilian Law (1) stands out for its wide definition and teleological interpretation of consumer norms, while the German Law (2) is strict with the definition of consumer, in line with the European directives. A legal comparison (3) will follow.

1. The Brazilian definition of Consumer

The Brazilian definition of consumer is in Art. 2 of the CDC. Pursuant to it, consumer is every natural or legal person who acquires or uses products or services as the final addressee. The Law uses the

[56] See for example Faria de Martins da Costa, Geraldo (2008), *Consumidor e Profissional: contraposicao jurídica básica*, Belo Horizonte, Del Rey.
[57] Kingisepp, M., Värv, A. (2011), 'The Notion of Consumer in EU Consumer Acquis and the Consumer Rights Directive - a Significant Change of Paradigm?', *Juridica International*, XVIII, pp. 44–53.
[58] Benjamin, Antonio Herman V, Marques, C. L., Miragem, B. (2015), *Comentários ao código de defesa do consumidor*, São Paulo, Revista dos Tribunais, Art. 2.

word "*destinatário*" which literally means "addressee" in English.[59] However, the final addressee concept matches that of the end user. This means that for the Brazilian Law, the consumer is the person who will use the service or product as the last in the market chain, regardless of being a natural or even a legal person.[60]

a) The elements of the Brazilian consumer definition

The consumer definition contains two elements: the subjective and the objective element. The subjective element of the norm clarifies that both the natural and the legal person can be a consumer under the Brazilian Law. The objective element attempts to define the type of relationship that should exist between the subjective element and the good or service to characterize it as a consumer relationship. Following the common understanding, Brazilian law characterizes the consumer relationship through the end user figure, *i.e.*, the consumer is the one who takes the product away from the market, they are at the end of the production line.

However, this norm has been widely discussed in the Brazilian doctrine, especially regarding the objective element. The main question surrounding the objective element is whether the final addressee is only the one who withdrew the good from the market (factual final addressee), or the one who not only took the good away from the market but also did not employ it in the production of other goods or services (economic final addressee).[61]

The following example will elucidate the difference between the factual final addressee and the economic final addressee: An

[59] CollinsDictionary, available at: www.collinsdictionary.com/dictionary/portuguese-english/destinatario. 14.03.2017.
[60] Benjamin, Antonio Herman V, Marques, C. L., Miragem, B. (2015), *Comentários ao código de defesa do consumidor*, São Paulo, Revista dos Tribunais, Art. 2.
[61] Benjamin, Antonio Herman V, Marques, C. L., Miragem, B. (2015), *Comentários ao código de defesa do consumidor*, São Paulo, Revista dos Tribunais, Art. 2.

informatics company specialized in printer´s repair, bought a car. Its employees will use the car to do home visits and repair the client´s printers. To fix the printer at the customer's house or workplace the company charges a displacement rate. In this case, this company can be considered a factual final addressee, since it bought the car for its own use and will not resell it. It factually withdrew the product from the market. On the other hand, although the purchase did not have any relation with the specific repair of printers, the car's costs are included in the price of the services it provides. Therefore, one cannot say that this company is the economic final addressee of the good.

Given these points, the subject of Art. 2 CDC is clear, namely any natural or legal person, but the object of the provision raises doctrinal questions. The decisive element for the Brazilian consumer definition is the objective one, making it indispensable for the doctrine to choose between the factual or the economic final addressee to define consumer.

b) Interpretation of Art. 2 CDC

The question about how to interpret the final addressee expression gave rise to three theories. They are the maximalist theory, the finalist theory and the moderate finalist theory. These theories describe the evolution of the interpretation of Art. 2 CDC in Brazil.

i) The maximalist theory

The maximalist theory gives a broad interpretation to the definition of consumer, the maximal interpretation, justifying the theory´s name. Therefore, it uses the factual final addressee concept.

For the maximalists, it is sufficient that a person takes the product or service away from the market to be considered a consumer.[62]

The main argument of the maximalists is that the Consumer Protection Code should be seen as a general code of consumption and, therefore, govern all relations of consumption and not only those in which there is an underprivileged party.[63] In contrast, critics emphasize that this theory does not take into account the vulnerability factor and consequently deviates from the real purpose of the Consumer Protection Code, which is to protect the weakest part of the legal relationship.[64]

ii) The finalist theory

The finalist theory interprets the Consumer Protection Code´s norms according to the purpose for which it was created, namely to protect the consumer as the weaker party of the legal relationship.[65] The theory´s name comes from the Portuguese word "*finalidade*", which not only means finality as the quality of something finished, but also the objective, the goal, the purpose of something.[66] In this sense, this theory has the purpose of the Law as its main interpretation tool, a teleological interpretation.

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[62] Grinover, Ada Pellegrini, ed. (2007), *Código brasileiro de defesa do consumidor*: *Comentado pelos autores do anteprojeto*, Rio de Janeiro, Forense Universitária. Miragem, B. (2016), *Curso de direito do consumidor*, São Paulo, Revista dos Tribunais. Garcia, L. d. M. (2010), *Direito do consumidor*: *Código comentado, jurisprudência, doutrina, questões, decreto 2.181/97*, Niterói, Impetus, para. 5.2.3.2.

[63] Benjamin, Antonio Herman V, Marques, C. L., Miragem, B. (2015), *Comentários ao código de defesa do consumidor*, São Paulo, Revista dos Tribunais, Art. 2. Grinover, Ada Pellegrini, ed. (2007), *Código brasileiro de defesa do consumidor*: *Comentado pelos autores do anteprojeto*, Rio de Janeiro, Forense Universitária.

[64] See Garcia, L. d. M. (2010), *Direito do consumidor*: *Código comentado, jurisprudência, doutrina, questões, decreto 2.181/97*, Niterói, Impetus. Miragem, B. (2016), *Curso de direito do consumidor*, São Paulo, Revista dos Tribunais, para. 5.2.3.2.

[65] Miragem, B. (2016), *Curso de direito do consumidor*, São Paulo, Revista dos Tribunais. Grinover, Ada Pellegrini, ed. (2007), *Código brasileiro de defesa do consumidor*: *Comentado pelos autores do anteprojeto*, Rio de Janeiro, Forense Universitária, para. 5.2.3.1.

[66] Abbagnano, N. (2003), *Dicionário de filosofia*, São Paulo, Martins Fontes. Ferreira, Aurélio Buarque de Holanda, Marina Baird Ferreira (2010), *Míni Aurélio*: *O dicionário da língua portuguesa*, Curitiba, Positivo.

As above mentioned,[67] the CDC was created to comply with the 1988 Federal Constitution, which adopted a social model of consumer protection, recognizing the need to protect the consumer as the vulnerable party in the market. The authors of the CDC's project confirm this objective and stand against the maximalist theory and in favor of a finalist theory.[68] They emphasize that the transformation of the CDC in a general code of consumer relations could soften the jurisprudential interpretations against business and would take away the strength of the code to protect especially the weakest part in the consumer relationship.[69]

Thus, the finalist theory, considering the CDC´s *telos*, adopts a narrower interpretation of Art. 2 CDC. It contemplates not only the factual final addressee concept, but also and mainly the economic final addressee.[70] According to this theory, consumer is the person who took the product or service away from the market for his or her own use, not related to the business´ purpose. They do not reintroduce the product or service to the supply chain in any form.

However, the interpretation of economic final addressee for the finalists excludes legal entities from the scope of protection of the consumer protection rules. This is because, as a rule, the goods and services purchased by a legal person are an input of their productive activity.[71] This interpretation reflects the German concept of consumer.[72] The German legislation fully unleashes the consumer from legal persons or professionals.

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[67] See above Chapter II, B.
[68] Marques, C. L. (2016), *Contratos no código de defesa do consumidor*, São Paulo, Revista dos Tribunais. Grinover, Ada Pellegrini, ed. (2007), *Código brasileiro de defesa do consumidor*: *Comentado pelos autores do anteprojeto*, Rio de Janeiro, Forense Universitária, para. 2.1.1.1.a.
[69] See Grinover, Ada Pellegrini, ed. (2007), *Código brasileiro de defesa do consumidor*: *Comentado pelos autores do anteprojeto*, Rio de Janeiro, Forense Universitária.
[70] Garcia, L. d. M. (2010), *Direito do consumidor*: *Código comentado, jurisprudência, doutrina, questões, decreto 2.181/97*, Niterói, Impetus.
[71] Miragem, B. (2016), *Curso de direito do consumidor*, São Paulo, Revista dos Tribunais.
[72] See below Chapter II, C, 2.

iii) Moderate finalist theory

As explained above, the finalist theory in its original form, did not include the legal person and professionals as possible consumers. However, Art. 2 CDC expressly brings the legal person to the subjective element of the norm.[73] Hence, to do justice to the CDC´s norm it is necessary to soften the finalist interpretation. This is what the moderate finalist theory does.

The recognition that legal persons and professionals can be consumers is the major contribution of this theory.[74] The fact that the lawmaker included the legal person as a possible consumer shows that they recognize that the legal entity can indeed be the weaker party in a strictly consumerist relationship.

Accordingly, to understand who the consumer is under the Brazilian law, it is not sufficient to check if the person is the factual final addressee or the economic final addressee. More importantly, one must detect the vulnerability of the party in the concrete legal relationship.[75] In fact, the vulnerability of the non-professional natural person is presumed. As for the legal person and professionals, there is no presumption of vulnerability, it is necessary to prove the vulnerability in each case.[76] Thus, it is possible to consider the legal person or the professional as a consumer analyzing the actual case, to which the consumer protective norm will be applicable. If in a particular case, one can detect the weakness of the legal entity or of the professional, whether technical, economical, legal or factual, in

[73] Criticizing the inclusion of legal person in the definition of consumer: Grinover, Ada Pellegrini, ed. (2007), *Código brasileiro de defesa do consumidor*: *Comentado pelos autores do anteprojeto*, Rio de Janeiro, Forense Universitária. According to them, the inclusion of the legal person as a possible consumer goes against the protective philosophy of the CDC.

[74] Miragem, B. (2016), *Curso de direito do consumidor*, São Paulo, Revista dos Tribunais para. 5.2.3.3.

[75] Carpena, H. (2005), *O consumidor no direito da concorrência*, Rio de Janeiro, Renovar, p. 182. STJ (2015), REsp 1.176.019 - RS.

[76] Benjamin, Antonio Herman V, Marques, C. L., Miragem, B. (2015), *Comentários ao código de defesa do consumidor*, São Paulo, Revista dos Tribunais, Art. 2. For instance, in a case where the consumerist carachter of a legal person was questioned, the Minas Gerais Court of Appeal affirmed: "*Since the legal person is not the final adressee, nor demonstrates the existance of any type of vulnerability able to originate a legal disbalance, the realationship between the contractors is not of consumerist nature*." Citation translated by the author. Tribunal de Justiça de Minas Gerais (2017), Apelação Cível 0285292-12.2013.8.13.0701.

face of the trader, it can be said that the final addressee, is a consumer and deserves protection under the Brazilian law.

Definitely, vulnerability is the nuclear factor of the consumer definition in the moderate finalist theory. This in line with Art. 4, I CDC, which establishes the recognition of the consumer´s vulnerability in the economic market as a guiding principle of Brazilian policy for consumer relations. This principle should, therefore, guide the interpretation of all CDC provisions.

For its moderate characteristic and compatibility to the CDC goals, this model is widely followed by Brazilian courts.[77] A good example of the moderate finalist theory use by the Superior Court of Justice is the case Carlos Augusto dos Santos v. Quinta Roda Máquinas e Veículos and Scania Latin America Ltda.[78] Mr. dos Santos is an autonomous truck driver. He purchased a vehicle from the defendant to use in his commercial activity of transporting loads. Mr. dos Santos sued Quinta Roda Máquinas and Scania Latin America because of defects in the truck he bought. Making use of the procedural consumer protective measure of Art. 101, I CDC, he sued the company in the court of his city. The defendant then argued that the court had no jurisdiction, since Mr. dos Santos is not a consumer, but a professional, who uses the vehicle in his commercial activities. Therefore, he would have to had sued in the defendant´s domicile´s court. The first instance decided in favor of Mr. dos Santos. The defendant brought the case to the Superior Court of Justice. In its memorial, the defendant affirms that Mr. dos Santos "*is a businessman, using the vehicle as a production means and, consequently, as means for the production of new income. The end consumer, differently, is situated in the end of the consumption chain*

[77] STJ (2015), REsp 1.176.019 - RS. STJ (2015), REsp 415.244 - SC. STJ (2007), REsp 716.877 - SP. Tribunal de Justiça de Minas Gerais (2017), Apelação Cível 1.0313.12.014605-5/001; Tribunal de Justiça de Minas Gerais (02.02.201), Agravo de Instrumento 1.0079.13.004829-5/001.
[78] STJ (2007), REsp 716.877 - SP.

and acquires goods or services for the caring of its own needs, as the final addressee."[79]

Nevertheless, the Superior Court of Justice recognized Mr. dos Santos as a consumer. Pursuant to it, scholars and the jurisprudence have widened the notion of final addressee to protect those who face the economic market with vulnerability and clearly, Mr. dos Santos as a truckdriver with a single truck was not in good bargaining conditions towards the trader. The decision affirms that a prominent transport company would be able to carry its legal relationships with the vehicle seller under the Brazilian Civil Code, but an autonomous truck driver, who drives his only truck to provide for his family needs the special protection of the Consumer Protection Code.

This case shows that the highest civil court of Brazil adopts the moderate finalist theory to interpret Art. 2 CDC. It uses the principle of vulnerability to determine who is a consumer, regardless of them being a natural person, a professional or even a legal entity.[80]

2. The German definition of Consumer

The German Law defines consumer in §13 BGB (*Bürgerliches Gesetzbuch* – German Civil Code). It determines that "*a consumer is any natural person, who enters into a legal transaction for purposes that are predominantly neither commercial nor can it be attributed to their independent professional activity*." The German lawmaker did not freely articulate this concept; it is strongly shaped by the European law.[81] It complies with the European requirements on consumer law laid down by the European consumer directives.[82] At the same time, it serves as a parameter for the implementation of European consumer

[79] STJ (2007), REsp 716.877 - SP Citation translated by the author.
[80] See also STJ (2015), REsp 1.176.019 - RS. STJ (2015), REsp 415.244 - SC. STJ (2007), REsp 716.877 - SP.
[81] Tamm, M. (2016), 'Kapitel 1, §2 Die gesetzlichen Definitionen der Begriffe Verbraucher und Unternehmer' in: Tamm, M., Tonner, K. (eds.), *Verbraucherrecht,* Baden-Baden, Nomos, paras. 7-8.
[82] Bülow, P., Artz, M. (2016), *Verbraucherprivatrecht*, Schwerpunktbereich, Heidelberg, C.F. Müller, para. 44.

protection within the national law. Hence this definition can be observed as a double consumer concept.[83]

The definition of consumer in German law is comprehensive and negative. Comprehensive when it extends the consumer status to **any** natural person. It is negative when it determines the nature of the legal transaction as predominantly **not** for commercial **neither** professional purposes.

a) The allocation of the German consumer definition

One questionable aspect of the German definition of consumer is its allocation in the German Civil Code. The consumer legal definition is set in the general part of the BGB, Chapter People. Notably, the consumer definition is not linked with other concepts pertaining to the personality rights chapter.[84] Unlike the right to have a name, legal capacity, full-age or residence, the definition of consumer is not a *status* in itself; it originates from the closing of a specific legal transaction.[85] The person in full-age is a person in full-age in any legal business, but the consumer is only considered a consumer if they buy a product or service for their personal use. With this example, one can see that the other rights listed in this chapter originate from facts of the person while the consumer definition originates from a fact outside of the person, namely the type of legal transaction in which the person is involved.[86] Therefore, §13 seems misplaced among the personality rights.

On the other hand, one can justify the allocation of the provision at the beginning of the BGB, to serve as a basis for various other norms that work with the concept of consumer. The German Law does not have a unique law or code that gathers all consumer protective

[83] Micklitz, H.-W., Purnhagen, K. (2015), '§13 Verbraucher' in: Säcker, F. J., Rixecker, R. (eds.), *Münchener Kommentar zum BGB,* München, C. H. Beck, paras. 1-3.
[84] Staudinger/ Bernd, §13BGB, para. 16.
[85] Soergel/Pfeiffer Rn 2, Köhler, §5, BGB Allgemeiner Teil, para. 22.
[86] See Engel, M., Stark, J. (2015), 'Verbraucherrecht ohne Verbraucher?', *ZEuP*, p. 35.

norms.[87] They are in different laws and codes. For instance, there are consumer protective provisions in the civil code,[88] in the Product Liability Law (*Produkthaftungsgesetz*) and in the Law Against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb* – UWG). Thus, to cover the scope of application of the diverse norms with consumerist provisions, it was necessary for the German lawmaker to establish the definition of consumer in the general part of the civil code. §13 is then applicable to all rules that refer to the consumer, in and out of the BGB.[89]

b) The elements of the German consumer definition

Two elements build the German definition of consumer. One is the subjective element, which affirms that only a natural person can be considered a consumer. The other is the objective element, which refers to the nature of the legal transaction. It determines that the purpose of the legal transaction must not be commercial or professional; otherwise, the contractor is not acting as a consumer.

i) The natural person

The German definition of consumer is linked to the natural person. That means that, contrarily from what the Brazilian legislation, the German Law completely excludes the legal entities from the consumer protection.[90]

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[87] Micklitz, H.-W., Purnhagen, K. (2015), 'Vorbemerkungen zu §§ 13, 14' in: Säcker, F. J., Rixecker, R. (eds.), *Münchener Kommentar zum BGB,* München, C. H. Beck, paras. 5, 36.
[88] Many norms were integrated to the BGB after the restructuring of the obligation law. Bülow, P., Artz, M. (2016), *Verbraucherprivatrecht*, Schwerpunktbereich, Heidelberg, C.F. Müller. Micklitz, H.-W., Purnhagen, K. (2015), 'Vorbemerkungen zu §§ 13, 14' in: Säcker, F. J., Rixecker, R. (eds.), *Münchener Kommentar zum BGB,* München, C. H. Beck, paras. 68-69.
[89] Bernd, Kannowski, Staudinger BGB, neubearbeitung 2013, para. 23.
[90] Micklitz, H.-W., Purnhagen, K. (2015), '§13 Verbraucher' in: Säcker, F. J., Rixecker, R. (eds.), *Münchener Kommentar zum BGB,* München, C. H. Beck.

This idea of consumer can be connected to the finalist theory, analyzed above.[91] Since the legal person presumably acquires goods and services as inputs to their own commercial activity, the German lawmaker chose to exclude companies and other legal entities from the vulnerable pole of the consumerist relationship.[92] In addition, one can assume that the legal person has better infrastructure to deal with legal problems, prescinding from consumer protection. Legal entities often have juridical departments or sufficient resource to pay for the advice of an attorney.

However, this presumption not always reflects reality. There are a number of autonomous professionals, small and medium companies with no legal department and limited resources to pay for legal advice (which is very costly in Germany). They are indeed frequently in a vulnerable position in face of the sellers, comparable to a consumer.[93] Moreover, also legal entities and professionals enter into non-commercial legal transactions that do not directly affect their business. In this sense, the subjective element of the German and therewith the European consumer definition is subject to criticism.[94] Micklitz, for instance, states that a functional definition, like the Austrian one,[95] not linked to the natural person but to the nature of the legal transaction, could be a better solution.[96] Others believe that the word "any" in §13 BGB, regarding the subjective element, gave the consumer definition a much greater scope than it should.[97]

All in all, the general rule is that the German law excludes the legal person of the protection scope of the consumer protective regulations, regardless of whether the legal person or the professional

[91] See above Chpater II, C, 1, ii.
[92] Tamm, M. (2016), 'Kapitel 1, §2 Die gesetzlichen Definitionen der Begriffe Verbraucher und Unternehmer' in: Tamm, M., Tonner, K. (eds.), *Verbraucherrecht,* Baden-Baden, Nomos, paras. 11-14.
[93] Remien, O. (1994), 'AGB-Gesetz und Richtlinie über mißbräuchliche Verbrauchervertragsklauseln in ihrem europäischen Umfeld', *ZEuP*, pp. 34–36.
[94] See Micklitz, H.-W., Purnhagen, K. (2015), '§13 Verbraucher' in: Säcker, F. J., Rixecker, R. (eds.), *Münchener Kommentar zum BGB,* München, C. H. Beck, para.12.
[95] §1 Abs. 1 Österreichisches Konsumentengesetz.
[96] Micklitz, H.-W., Purnhagen, K. (2015), '§13 Verbraucher' in: Säcker, F. J., Rixecker, R. (eds.), *Münchener Kommentar zum BGB,* München, C. H. Beck, para. 16.
[97] Kannowski/Staudinger BGB, Neubearbeitung 2013, para. 49.

is vulnerable in the concrete case, because the finalist understanding of the lawmaker presumes the permanent business activity of the company.

ii) Non-commercial or non-professional objectives of the legal transaction

Following the same line of thought that justifies the exclusion of the legal entity of the consumer´s roll, the German law provides that the legal transaction must predominantly not have commercial or professional purposes.[98] With the support of this element, people who acquire the physical product to invest in their business or trade are excluded from the shield of consumer protection.

Yet, some scholars say that a positive phrasing, explaining which kind of legal transaction is within the scope of consumer protection, instead of a negative one, could have facilitated the understandability and the application of the provision.[99] In fact, the preliminary community program for consumer information and protection from 21st May 1974 defined consumer as "*a purchaser of goods or services for personal or group purposes*". This is undoubtedly a positive definition. However, the positive definition was banned from the European law exactly for having caused application difficulties.[100]

[98] Bülow, P., Artz, M. (2016), *Verbraucherprivatrecht*, Schwerpunktbereich, Heidelberg, C.F. Müller, paras. 62-63.
[99] Micklitz, H.-W., Purnhagen, K. (2015), '§13 Verbraucher' in: Säcker, F. J., Rixecker, R. (eds.), *Münchener Kommentar zum BGB,* München, C. H. Beck, para. 35.
[100] „*Das erste Verbraucherprogramm der EWG von 1975 (vgl Vorbem 8 zu §§ 13, 14) hatte ebenfalls noch eine positive Umschreibung ("Käufer oder Benutzer von Gütern und Dienstleistungen für den persönlichen, familiären oder kollektiven Bedarf") versucht, hatte aber zugleich gesagt, dass er darüber hinaus als jemand betrachtet werde, "der an allen Aspekten des sozialen Lebens, die unmittelbar oder mittelbar auf ihn als Verbraucher Auswirkungen haben können, Anteil nimmt". Damit war für eine Definition wenig gewonnen. Sollte der Verbraucherbegriff auf die Nachfragerrolle beschränkt werden oder nicht? Diesen Weg der positiven Zweckbestimmung hat das Gemeinschaftsrecht dann nicht weiter verfolgt*." Bernd, Kannowski, Staudinger BGB, neubearbeitung 2013,§13 BGB, para. 50.

The European consumer definition present, in Art. 2 (b) of the European Directive 93/13 on Unfair Terms, affirms that the legal transaction must not have a commercial or professional purpose. Germany followed the European concept, by also using the negative expression. This shows that Germany wants to comply with the European consumer protective measures and have a consumer definition that fits these norms.[101]

In fact, until 17.08.2015, §13 BGB was a literal translation of the European definition. The paragraph in force nowadays innovated by using the word "purposes" in the plural and by using the word "predominantly", when referring to the character of the purposes.[102] Therewith, the German lawmaker gives the consumer definition a wider scope, in harmony with the European Law. It recognizes that a legal transaction can serve more than one purpose and measures the consumerist transaction on the purpose that prevails.[103] This situation is not seldom, what will require a careful analysis of each case. A professional accountant, who buys a laptop for both professional and personal use has now a better chance to count on consumer protection in Germany than it had with the previous wording.

3. Short comparison

Comparing the German and the Brazilian definition of consumer one can conclude that both jurisdictions have strong consumer protection tradition.

On the one hand, considering all the above outlined Brazilian theories, one can see that defining consumer based on the Brazilian

[101] Micklitz, H.-W., Purnhagen, K. (2015), '§13 Verbraucher' in: Säcker, F. J., Rixecker, R. (eds.), *Münchener Kommentar zum BGB,* München, C. H. Beck, para. 9.
[102] In German: "*Verbraucher ist jede natürliche Person, die ein Rechtsgeschäft zu Zwecken abschließt, die überwiegend weder ihrer gewerblichen noch ihrer selbständigen beruflichen Tätigkeit zugerechnet werden können.*" Germany, Bürgerliches Gesetzbuch, §13.
[103] Bülow, P., Artz, M. (2016), *Verbraucherprivatrecht*, Schwerpunktbereich, Heidelberg, C.F. Müller. Bülow, P., Artz, M. (2014), *Verbraucherprivatrecht*, Heidelberg, München, Landsberg [u.a.], Müller, p.62.

Law is not an easy task. It requires from the jurist a deep analysis of the subject and of the subject´s vulnerability in a case-to-case basis. Accordingly, the current interpretation of the CDC´s consumer definition is the teleological, materialized in the moderate finalist theory. This interpretation is closely linked to the CDC´s purpose of protecting the vulnerable part of the business relationship, regardless of them being a natural or a legal person. On the other hand, Germany has a less complicated consumer doctrine. The strong influence of the European Law supplies Germany with a solid base for interpreting and concretizing national consumer law.

In comparison, the Brazilian consumer definition is broader and encompasses more legal relations than the German one. Moreover, Brazil has chosen to concentrate all matters concerning the consumer and the liability for products and services in one code. Germany, on the other hand, kept its legal civil structure and has opted against a specific code; hence, diverse laws and the BGB have kept their character of protecting the contractor in each case depending on the specificity of the contract, many times regardless of their consumerist nature. Therefore, Germany did not need a broad consumer definition, but only to identify who are those people, which are specially in need of compensatory protective measures. These are the ones envisaged by the German consumer concept.

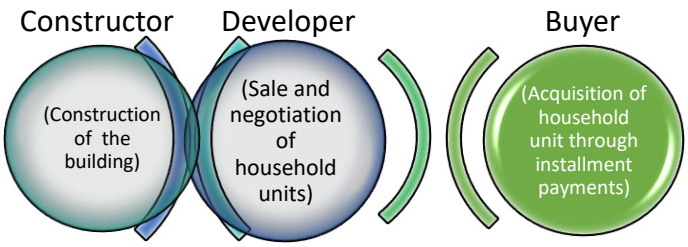
D. The property development contract

The property development contract is an important contractual figure for the dwelling acquisition in Brazil and Germany. Developer, constructor and buyer come together in a contractual modality (1), in which the property transmission occurs even before the property exists. In the following lines, first the phenomenological (2) and then legal aspects of this contract will be explored, focusing on its legal nature (3) and on the law applicable to it (4). Later, a comparison

between the Brazilian and the German legal approach to the contract will be done (5).

1. The 3 agents of the PDC

Property development is the name given to the activities exercised with the objective of promoting the construction of a building.[104] The development itself depends on two agents, the developer, who idealizes and negotiates the real estate development and the constructor, who undertakes the building activities. On the other pole of the contract is the buyer, who acquires the units, fruit of the property development. These three agents interact as shown in this illustration:



The central figure of the property development contract is the developer. They are the person who idealizes the real estate development and obliges themselves to build a building, generally with autonomous units, with the objective to sell those units.[105] The developer is the owner or at least has real rights over the land, in which they build.[106] Therefore, on a first level, the developer will be the owner of the whole building and autonomous units according to §946 BGB and Arts. 1.248, V CCB. The developer negotiates and sells the

[104] Gomes, O. (2001a), *Contratos*, Rio de Janeiro, Forense, p. 81.
[105] Chalhub, M. N. (2001), 'O contrato de incorporacao imobiliária sob a perspectiva do Codigo de Defesa do Consumidor', *Revista de Direito Imobiliário*, Vol. 50, pp. 92–135, para. 3.1.
[106] Gomes, O. (1988), *Direitos Reais*, Rio de Janeiro, Forense, p. 306. Wagner, K.-R. (2012), 'E. Bauträgervertrag' in: Messerschmidt, B., Voit, W. (eds.), *Privates Baurecht: Kommentar zu §§631 ff. BGB,* München, C. H. Beck, para. 12. See Art. 31 Law No. 4.591, Brazil.

autonomous units (apartments) before or during construction.[107] This enables the developer to capitalize already during the development phase. They then formalize the sale promising to transfer the property of the unit to the buyer as soon as the unit is ready.[108] This commitment has to be registered in the land registry.

The developer must not embrace the actual construction activity. They can outsource planning and construction to a third: the constructor.[109] In this case, the developer is much more an idealizer and a negotiator of the property development contract than a builder. It is the constructor´s factual obligation to plan and put up the walls of the building according to the construction plan.

Nevertheless, developing and constructing activities can be done by the same person. This hybrid figure is not seldom.[110] Many construction companies are specialized in property development contracts and act as both, the developer and the constructor. They buy the land to start a property development, plan it and build. They calculate how many units to which price they have to sell to finance the development and to make profit. After fixing prices, they search for buyers and negotiate the units.[111]

The buyers enter into the contract to purchase the future household units. They interact with the developer, not with the constructor,[112] unless they are the same person. Buyers pay for the units in installments during the construction. This way the developer can invest the money acquired for the units in the construction of the

[107] Hübert, I. H. (2009), *Condomínios Em Geral E Incorporações Imobiliárias*, Curitiba, IESDE Brasil, p. 113.
[108] See Art. 32, §2 of the Law 4.591, which ensures the bindingness and irrevocability of the contract that contains the promise to sell the unit, which is registered in the notary´s office.
[109] Chalhub, M. N. (2001), 'O contrato de incorporacao imobiliária sob a perspectiva do Codigo de Defesa do Consumidor', *Revista de Direito Imobiliário*, Vol. 50, pp. 92–135, para. 3.2.
[110] Hübert, I. H. (2009), *Condomínios Em Geral E Incorporações Imobiliárias*, Curitiba, IESDE Brasil, p.160.
[111] Chalhub, M. N. (2010), *Da Incorporação Imobiliária*, Rio de Janeiro, Renovar, para.1.
[112] Busz, E. G. (2009), '§14 Das Bauträgergeschäft' in: Motzke, G. (ed.), *Prozesse in Bausachen: Privates Baurecht, Architektenrecht,* Baden-Baden, Nomos, p.66. The delevoper is the contractual partner of the buyer. See Christensen, G. (2016), 'Klauseln, Vertragstypen, AGB-Werke (11) Bauträgervertrag' in: Ulmer, P., Hans Erich, B., Hensen (eds.), *AGB-Recht: Kommentar zu den [Paragraphen] 305-310 BGB und zum,* Köln, Otto Schmidt, para.11.

same units.[113] Together with the unit, the buyers also acquire an ideal fraction of the land.[114] For instance, in very simple terms, if the building is being built in a 500m^2 land, with 8 units of 100m^2 each, the buyer of a unit purchases an apartment with 100m^2 and an ideal fraction of the land in which the building is located of 62,5m^2. When the construction phase is over and the units are ready, the developer has to transfer the property of the units and of the ideal fraction to the buyers.[115]

The most noteworthy characteristic of this type of contract is the advanced sale of household units from a building, which will still be built or is in its development phase,[116] justifying the name of the contract. In sum, the property development contract occurs when the developer builds a building in their own land and promises to sell the autonomous units of the building to the buyer through a notarized document. The buyer pays for it in successive installments. When the unit is ready and the buyer has paid the complete price, the developer transfers the property of the unit to the buyer.

2. Factual aspects of the property development contract

The core of the property development is that the transmission of real rights occurs already before the conclusion of the construction.[117] This influences the contractual dynamic in many ways, be it positively or negatively.

[113] See Wagner, K.-R. (2012), 'E. Bauträgervertrag' in: Messerschmidt, B., Voit, W. (eds.), *Privates Baurecht: Kommentar zu §§631 ff. BGB,* München, C. H. Beck, para. 16. About the problem of developers who in the past, did not have own capital and only counted on the buyers´ payments as finantial means to build.
[114] Gomes, O. (2001b), *Contratos*, Rio de Janeiro, Forense, pp.453-454.
[115] Chalhub, M. N. (2013), 'Incorporacao imobiliária: aspectos do sistema de protecao do adquirente de imóveis', *Revista de Direito Imobiliário*, Vol. 75, pp. 167–186, para.2.
[116] Chalhub, M. N. (2010), *Da Incorporação Imobiliária*, Rio de Janeiro, Renovar, para. 13. Hübert, I. H. (2009), *Condomínios Em Geral E Incorporações Imobiliárias*, Curitiba, IESDE Brasil, para 132. Gomes, O. (1988), *Direitos Reais*, Rio de Janeiro, Forense, p.212.
[117] See Arts. 29 and 30 Law No. 4.591, Brazil.

On the positive side, the buyer pays for the household units in installments during the construction.[118] This enables the developer to capitalize already during the development phase. In a pure sales contract, the developer would have to invest their own money to finalize the construction and only when the building were ready, they would be able to sell the units. In this contractual modality, the developer receives money monthly from the buyers and can profit and invest in the construction simultaneously. This feature allows new companies to enter the construction market. From the consumer´s perspective, without the division of the total price in installments the consumers who dream of the own home would first have to save the whole amount of the apartment's price or enter into a financing contract with a bank to then purchase the household unit.

Nevertheless, consumers invest their monthly installment in the developer bearing the risk that it could go bankrupt and not be able to complete the construction.[119] In a contract of this dimension and this social importance, any breach from the developer can have serious consequences for the buyer, personally and financially. For instance, a late delivery can directly influence the family planning of a buyer, who intended to have children or even to marry based on the delivery date of the apartment. Not to mention their financial loss, by having to rent an apartment for that period. Construction flaws, abusive prices and interest rates or even the omission of the developer to make obligatory registrations in the notary office or land registry amounts to serious financial loss for a consumer who has already paid many installments for the unit through the months or even years.[120]

[118] Wagner, K.-R. (2012), 'E. Bauträgervertrag' in: Messerschmidt, B., Voit, W. (eds.), *Privates Baurecht: Kommentar zu §§631 ff. BGB,* München, C. H. Beck, para. 13.
[119] See Christensen, G. (2016), 'Klauseln, Vertragstypen, AGB-Werke (11) Bauträgervertrag' in: Ulmer, P., Hans Erich, B., Hensen (eds.), *AGB-Recht: Kommentar zu den [Paragraphen] 305-310 BGB und zum,* Köln, Otto Schmidt. See also Koeble, W. (2014), '11. Teil Formen des Bauens und Vertragsarten; Baumodelle und Bauträgervertrag' in: Kniffka, R., Koeble, W. (eds.), *Kompendium des Baurechts: Privates Baurecht und Bauprozess,* München, C. H. Beck, para. 11.
[120] See Martins, P. L., Ramda, P. C. P. (2014), 'Overbooking imobiliário e os direitos do consumidor na aquisicao de imóveis', *Revista de Direito do Consumidor*, Vol. 91, para. 33.

Another negative consequence of the trasmission of real rights during construction is that property development contracts come with a certain risk for the buyer regarding the contract´s object. Buyers purchase the idea of a product that they have not yet seen. The seller commonly uses model apartments and prospects with plan pictures of the future building and the household units to help the buyers see how the product that they are buying will look like when ready. Although the developer is liable for the idea sold in the prospects and plans, it is still a risk for the consumer to buy something that does not yet exist.

However, on the positive side, many developers give their buyers the chance to personalize some of the construction items.[121] Depending on in which stage of the development the buyer enters into the contract, they could for example, choose the floor material or the tiles of the bathroom paying the difference of price.

Additionally, due to the risk of the purchase, the unit is cheaper in the beginning of the construction and gets more expensive when time goes by. The developer updates the price table during the construction. Thus, the buyer that comes first may be able to buy their brand-new unit at a better price than they would at the end of construction or by buying a new unit, which is already constructed.

One can see that the trasmission of real rights during construction makes the property development contract a unique phenomenon. The advantages and disadvantages of this contractual modality are determinant to its use by construction companies and consumers. They are also crucial for the development of legal consumer protection. It is up to the legal regulations to ensure the financial advantages of the installment payments for the developers and at the same time to protect the consumer from the risk of loss.[122]

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[121] See Basty, G. (2009), *Der Bauträgervertrag*: *Schwerpunkte der Vertragsgestaltung*, Köln, München, Heymann, pp. 926-930.

[122] Heiermann, W. (2007), 'Der Verbraucherschutz in der gesetzlichen Regelung des deutschen _Bauträgerrechts - ausreichend im Licht der EG-Richtlinie 93/13?' in: Jochem, R. (ed.), *Rechtshandbuch des ganzheitlichen Bauens: Festschrift für Hans Ganten,* Wiesbaden, vieweg, p. 111.

3. The legal nature of the property development contract

The legal nature of the property development contract is controversial. The German Superior Court of Justice affirmed that the property development contract has elements of both the contract for work and service[123] and the sales contract.[124] Most scholars agree with this finding.[125]

Elements of a sales contract are present because the developer sells the units to the buyer, who, for an agreed price, will eventually acquire the property of the unit, matching the definition of Art. 481 CCB and §433 BGB.[126] However, it cannot be seen as a pure sales contract, since the buyer purchases an idea of a household unit, which is still under construction.[127] The sales contract presupposes that the purchased object already exists and that property must be immediately transferred to the buyer.[128] This does not happen in the property development contract.

Elements of a contract for work and service are present because the developer obliges themselves to build a household unit and deliver it on a certain fixed time, free from defects.[129] (The developer owes

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[123] Here, as the contract in which the contractor engages a person to manufacture a work. A contract where the success of the finished work is owed, not the service itself. Note that the construction contract fits the definition of a contract for work and service. In Portuguese: *contrato de empreitada*. In German: *Werkvertrag*. Köbler, G. (2011), *Rechtsenglisch*: *Deutsch-englisches und englisch-deutsches Rechtswörterbuch für jedermann*, München, Vahlen.

[124] BGH (1985), VII ZR 366/83.

[125] See for example Stickler, T. (2012), 'Bauträgervertrag' in: Messerschmidt, B., Voit, W. (eds.), *Privates Baurecht: Kommentar zu §§631 ff. BGB,* München, C. H. Beck. Gomes, O. (2001b), *Contratos*, Rio de Janeiro, Forense, p. 450 and *Basty, G. (2009), Der Bauträgervertrag: Schwerpunkte der Vertragsgestaltung, Köln, München, Heymann, para. 44.*.

[126] See Christensen, G. (2016), 'Klauseln, Vertragstypen, AGB-Werke (11) Bauträgervertrag' in: Ulmer, P., Hans Erich, B., Hensen (eds.), *AGB-Recht: Kommentar zu den [Paragraphen] 305-310 BGB und zum,* Köln, Otto Schmidt, para. 11. Dammann, J. (2013), '5. Teil. ABC der Klauseln und Vertragstypen - Klauseln (B)' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck, p. 131. Hansen, E. (2006), *Bauträgerrecht*: *Planung; Finanzierung; Vertrag; Abwicklung*, Neuwied, Werner, para.77.

[127] da Silva Pereira, Caio Mário (1995), 'Código de Defesa do Consumidor e as incorporacoes imobiliárias', *Revista dos Tribunais*, Vol. 712, pp. 102–111, Questão 17.

[128] See Art. 481 CCB and § 433(1) BGB.

[129] Dammann, J. (2013), '5. Teil. ABC der Klauseln und Vertragstypen - Klauseln (B)' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck, para. 31. Hansen, E. (2006), *Bauträgerrecht*: *Planung; Finanzierung; Vertrag; Abwicklung*, Neuwied, Werner, para. 88.

the success of their work to the buyer, matching the provisions in Art. 610 ss. CCB and §631 BGB.) However, the developer builds on their own land and are therewith the first owner of the building. Moreover, they do not only receive the price when the work is done, but during the development of the work.

Hence, the legal nature of the property development contract does not fit an ordinary contractual type present in the civil code, it is a mixed typ,[130] or, as the German court concluded, a *sui generis* contract ("*Vertrag eigener Art*").[131]

4. The law applicable to the property development contract

Being the property development contract a mixed typ, with elements of two contractual types, the Law had to deal with the question as to which provisions are applicable to this contract. Are there suitable provisions in the civil code or must the lawmaker develop specific laws to govern this contract? Brazil and Germany have dealt with the applicable laws to this contract in different manner, as described below.

a) Brazil

In Brazil, two set of rules are applicable to the property development contract: the civil code and the Law 4.591. The Brazilian lawmaker, facing the challenge of regulating the property development contract, preferred to develop a law specific for this

[130] Fiuza, C. (2008), *Direito Civil*: *Curso completo*, Belo Horizonte, Del Rey. Wagner, K.-R. (2012), 'E. Bauträgervertrag' in: Messerschmidt, B., Voit, W. (eds.), *Privates Baurecht: Kommentar zu §§631 ff. BGB,* München, C. H. Beck. Basty, G. (2009), *Der Bauträgervertrag*: *Schwerpunkte der Vertragsgestaltung*, Köln, München, Heymann.
[131] BGH (1985), VII ZR 366/83.

purpose, the Law 4.591. Provisions of the civil code are subsidiarily applicable.

i) Law 4.951

Already in the early 60´s, the Brazilian real estate market urged for specific regulations on this contract.[132] Therefore, Prof. Caio Mário da Silva Pereira, idealized and drafted a law to regulate property development and condominium. This Law, No. 4.591, is in force since 16 December 1964. It is divided in two parts, whereas the second, from Art. 28 on, is dedicated to the property development.

To limit the scope of application of the property development regulations, Art. 28 defines property development and gives it its Brazilian name: *Contrato de Incorporação Imobiliária*. According to it, an activity exercised with the objective of promoting and executing the construction, to total or partial transmission, of buildings or building complexes, composed of autonomous units, is property development.[133]

The Law 4.591 regulates the property development by establishing rights and obligations for the developer and for the buyer. Since the Law 4.591 is a *lex specialis*, the application of the civil code is subsidiary.[134] Only matters not regulated by this law are subject to the civil code.

ii) The Civil Code

[132] See Gomes, O. (2011), 'Contrato de Incorporacao Imobiliária' in: Tepedino, G., Fachin, L. E. (eds.), *Obrigações e contratos,* São Paulo, Revista dos Tribunais, pp. 1339–1353.
[133] Orlando Gomes criticizes the legal definition as an "activity" and asserts that the suitable definition is that of a legal transaction: Gomes, O. (1988), *Direitos Reais*, Rio de Janeiro, Forense. Gomes, O. (2001a), *Contratos*, Rio de Janeiro, Forense, p. 181.
[134] Under the maxim *lex specialis derogat legi generali.*

The Brazilian civil code does not contain specific provisions about the property development contract, it does not even define what property development is. However, it contains specific provisions that suits the construction scenario in the title for work and service.[135] Hence, the property development contract is subject to Arts. 610 ss. CCB (*Direito do Contrato de Empreitada*), where the specific law 4.591 does not suffice and where the contractual element in discussion in the concrete case is not the sales element of the property development contract.

Importantly, the remedies for a breach of contract are nor regulated in the specific law and are therefore subject to the CCB. The title for the contract of work and service encompasses more remedies for the parties in case of a breach and a better time limitation for liability than the sales contract´s provisions. It provides for remedies like the request for performance, price reduction and rejection of the object with the consequent avoidance of the contract, in case of a breach.[136] One may reject the object and avoid the contract in case the constructor deviates from the instructions given, the construction plan or the applicable technical norms, even if the deviation did not amount to a defect that deprives the party from the purpose of the contract (Art. 615 CCB). One may also request for price reduction under these grounds (Art. 616 CCB). In Brazil, the lawmaker established in Art. 618 CCB that the constructor is liable for the solidness and safety of the building for the irreducible time of 5 years.

iii) Consumer protection in the Law 4.591

As above mentioned, the Law 4.591 stipulates several rights and obligations for developer and buyer. Notably, the obligations of the

[135] See, for instance, Arts. 618 CCB about buildings and Art. 621 CCB about architect´s rights.
[136] Remedies available for the sales contract in Brazil: Performance (see arts. 481 ss.); Price reduction (Art. 442 CCB); Reject the object and avoid the contract (Art. 441 CCB). Remedies available for the construction contract in Brazil: Performance (see arts. 610 ss.); Price reduction (Art. 442 CCB); Reject the object and avoid the contract (Art. 441 CCB).

developer are directly connected with the protection of the buyer, who, for the purposes of this work, is also the consumer.[137] The main protective measures present in the law touches upon three aspects of the consumer´s interest. First, the law regulates the liability of the developer; second, it intends to suffice the right to information of the consumer and thirdly, it protects the consumer financially.

As to the liability aspect, Art. 31 *caput* makes it clear that the liability for the property development lies on the developer´s hands. Subsection 3 of this provision establishes that in developments with more than one developer, they are jointly liable for the whole contract.[138]

As to the second aspect, many provisions serve the right of information of the consumer and therewith the principle of transparency.[139] Art. 31 (2), for example, affirms that no unit can be negotiated if the name of the developer is not expressly specified, requiring the ostensive indication of the developer´s name in the construction site.

Moreover, in Art. 32, the law prohibits the developer to negotiate the units before they have registered the property development in the land registry. To do so, they have to comply with an extensive list of documents about the land and the development project. The developer must file evidence of their property over the land; tax clearance certificates, construction plans, evaluation of construction costs, financial probity certificates, amongst other papers specified in lines from "a" to "p" of Art. 32.

Upon registration in the land registry, the property development receives a number. With this number, any interested person can request the notary to provide copies of the archived documents, in line

[137] See Chalhub, M. N. (2001), 'O contrato de incorporacao imobiliária sob a perspectiva do Codigo de Defesa do Consumidor', *Revista de Direito Imobiliário*, Vol. 50, para. 5.c.
[138] On the liability of the developer/constructor, see also Art. 12 CDC.
[139] Chalhub, M. N. (2001), 'O contrato de incorporacao imobiliária sob a perspectiva do Codigo de Defesa do Consumidor', *Revista de Direito Imobiliário*, Vol. 50, para. 4.3.

with Art. 32 (4). Therewith, all acts and documents related to the specific property development are under the shield of the publicity principle, intrinsic to the notary law.[140] This enables the consumer to have access to all formal aspects of the development, if they so wish.

To ensure that the consumer can effectively have access to information about that property development, the registration number must be in all contracts and even in all publicity related to it, pursuant to Art. 32 (3) of the Law.

As to the financial aspect, the Law 4.591 created a legal instrument to protect the household unit acquirers' money. It is the so-called *Patrimônio de Afetação*.[141] This is a legal financial regime to administer the property development, under which the assets of the developer and the assets of the property development are strictly separated.[142] In other words, any money concerning the specific construction project, like the money that the consumers pay monthly for the developers, is put aside from the developer´s patrimony, in a specific account to manage the particular construction project. According to Art. 31-A (1) of the Law, the capital of this account is armored from any debts of the developer, it can only be touched to comply with debts or obligations related to the exact construction project. In this case, if the developer goes insolvent, the acquirers still have access to the *Patrimônio de Afetação* and can continue the construction with the money they have invested.[143] Unfortunately, Art. 31-A affirms that it is up to the developer to decide if the property development will be conducted under the *Patrimônio de Afetação* regime or not.

[140] Brazil (1973), Law No. 6.015.
[141] In English: the affected patrimony. Affected in the legal sense, meaning that the law stipulated a certain incumbency to that specific patrimony.
[142] See Chalhub, M. N. (2013), 'Incorporacao imobiliária: aspectos do sistema de protecao do adquirente de imóveis', *Revista de Direito Imobiliário*, Vol. 75, para. 3.1.2.
[143] Although the importance and the advantages of the *patrimônio de afetação* is recognizeable, one must also acknowledge how difficult it must be for consumers to manage to continue the construction project with the left patrimony, but without the expertise of the developer, in case of it´s bankrupcy.

b) Germany

The German law applicable to the property development contract has always been the BGB itself, even though it did not contain provisions specifically adequate to construction contracts. Recently, the lawmaker recognized the need to develop provisions to govern the property development contract and construction contracts, reformulating the title of work and service contract of the code. Moreover, the public law norm that regulates the activity of the developer, the MaBV, is also applicable in some specific issues, as will be explained below.

i) The Civil Code

Since the property development contract mixes elements of a sales contract and of a contract for work and service, the question as to which provisions of the BGB apply to it arises. In 1985, the German court analyzed the question and concluded that the contract is subject to the legal provisions that touches the right in discussion in each concrete case.[144] If the sale element is in discussion, the provisions for sales contract in the BGB are applicable. Conversely, if the development of the property is in discussion, the work and service contract´s provision are applicable.[145] However, the doctrine recognized that the work and service nature outweighs the sales nature of the contract.[146] Hence, the prevailing legal basis for the property

[144] BGH (1985), VII ZR 366/83. Basty, G. (2009), *Der Bauträgervertrag*: *Schwerpunkte der Vertragsgestaltung*, Köln, München, Heymann.
[145] OLG Stuttgart (2015), 10 U 46/14.
[146] According to Christensen, the property development contract is essentially a *Werkvertrag*. See Christensen, G. (2016), 'Klauseln, Vertragstypen, AGB-Werke (11) Bauträgervertrag' in: Ulmer, P., Hans Erich, B., Hensen (eds.), *AGB-Recht: Kommentar zu den [Paragraphen] 305-310 BGB und zum,* Köln, Otto Schmidt. See also Hansen, E. (2006), *Bauträgerrecht*: *Planung; Finanzierung; Vertrag; Abwicklung*, Neuwied, Werner.

development used to be the provisions for the contract for work and service, named *Werkvertrag*[147] (from §631 to §650 BGB).[148]

Acknowledging that the *Werkvertrag* is similar to the property development contract but the *Werkvertragsrecht* does not completely satisfy the specificities of it, Germany planed since 2015 to renew the law concerning the *Werkvertrag*. The project of law, created for this purpose, intended to add to the BGB provisions about construction of buildings, B2C construction contracts and architect´s contracts.[149] The reform entered into force on the 1st of January of 2018. The former Title 9 of the BGB, called *Werkvertrag*, is now called *Werkvertrag und ähnliche Verträge, i.e.* contract for work and service and similar contracts. Therein, the BGB has a new subtitle called property development contract (*Bauträgervertrag*) in §§650u ss., as a contractual type similar to the work and service contract.[150]

In §650u the BGB defines property development contract as a contract, whose object is the development or the rebuilding of a building and at the same time contains the obligation of the contractor to transfer ownership of the property or to order or transfer a leasehold to the buyer.[151] The provision also ratified the understanding of the BGH, pacifying the discussion about the application of provisions of sales contract or of contract for work and service to the

[147] The German BGB contains another type of service contract named *Dienstvertrag* (from §611 to §630 BGB). In a summarized explanation, this service contract differs from the *Werkvertrag* for one main reason. In the *Dienstvertrag* the contracted person owes the service (§611 BGB), in this sense, an employment contract is a type of *Dienstvertrag* in Germany. Differently, in the *Werkvertrag* the contracted person owes the successful results of the service (*Erfolg*) (§631 (2) BGB), like in the construction contract or even in an architect contract.
[148] Wagner, K.-R. (2012), 'E. Bauträgervertrag' in: Messerschmidt, B., Voit, W. (eds.), *Privates Baurecht: Kommentar zu §§631 ff. BGB,* München, C. H. Beck.
[149] Germany, Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz (2015), Entwurf eines Gesetzes zur Reform des Bauvertragsrechts und zur Änderung der kaufrechtlichen Mängelhaftung. See Langen, W. (2015), 'Änderung des Werkvertragsrechts und Einführung eines Bauvertragsrechts: Der Referentenentwurf des Bundesjustizministeriums', *Neue Zeitschrift für Baurecht und Vergaberecht*, pp. 658–668. and Mundt (2017), '§623a BGB' in: Gsell, B., Krüger, W., Lorenz, S., Mayer, J. (eds.), *beck-online.GROSSKOMMENTAR: BeckOGK,* C. H. Beck.
[150] See Basty, G. (2017), 'Baurechtsreform 2017 und Bauträgervertrag', *Mitteilungen des Bayerischen Notarvereins, der Notarkasse und der Landesnotarkammer Bayern*, pp. 445–450. and Reiter, H. (2018), 'Das neue Bauvertragsrecht – Teil I: Allgemeines Werkvertragsrecht und Bauvertrag', *Juristische Arbeitsblätter*, pp. 161–168.
[151] See Busche, J. (2015), '§650u' in: Säcker, F. J., Rixecker, R. (eds.), *Münchener Kommentar zum BGB,* München, C. H. Beck.

Bauträgervertrag. According to it, the BGB paragraphs for *Werkvertrag* apply to the issues concerning the property development, that is the construction itself. On the other hand, the paragraphs for sales contract apply to questions regarding the transfer of property.[152]

There are remedies available to the parties in case of a breach in the *Werkvertragsrecht*. They are, for instance, the request for performance, price reduction and rejection of the object with the consequent avoidance of the contract, in case of a breach.[153] Moreover, under the German contract one may also ask for the money to fix the defect by oneself (*Selbstvornahme*, §637 BGB). Additionally, the time limitation for requesting civil remedies is of 5 years, according to §634a (1) Nr. 1 BGB.

ii) MaBV

The property development contract is also subject to the *Markler- und Bauträger Verordnung* (MaBV),[154] which is a legal ordinance in the field of Trade Law.[155] The MaBV first entered into force in 1974, however, it has been substantially changed since then.[156] As a Trade Law norm, the MaBV is not a civil law norm, but a norm of public law.[157] It provides guidelines for the commercial property development and real estate purchase, mainly establishing obligations for the developer.

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[152] Busche, J. (2015), '§650u' in: Säcker, F. J., Rixecker, R. (eds.), *Münchener Kommentar zum BGB,* München, C. H. Beck.
[153] Remedies available for the construction contract in Germany: Late performance (§635 BGB.); Price reduction (§638 BGB); Reject the object and avoid the contract (§§636, 323, 326(5) BGB). In case of a breach in the sales´ element, remedies available for the sales contract in Germany: Late performance (§439 BGB.); Price reduction (§441 BGB); Reject the object and avoid the contract (§§440, 323, 326(5) BGB).
[154] Germany (1990), Verordnung über die Pflichten der Makler, Darlehensvermittler, Bauträger und Baubetreuer. Dammann, J. (2013), '5. Teil. ABC der Klauseln und Vertragstypen - Klauseln (B)' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck, para. 3134.
[155] The MaBV derives from §34c (3) Gewerbe Ordnung, being then in the field of Gewerberecht. See Marcks, P. (2014), *Makler- und Bauträgerverordnung*: *Mit Paragraph 34c GewO und MaBVwV*, Gelbe Erläuterungsbücher, München, Beck.
[156] Basty, G. (2009), *Der Bauträgervertrag*: *Schwerpunkte der Vertragsgestaltung*, Köln, München, Heymann, para. 81.
[157] Wagner, K.-R. (2012), 'E. Bauträgervertrag' in: Messerschmidt, B., Voit, W. (eds.), *Privates Baurecht: Kommentar zu §§631 ff. BGB,* München, C. H. Beck, para. 31.

iii) Consumer protection in the MaBV

Although the MaBV is not a civil law, it originates civil effects.[158] Inside the obligations established by this norm to the developer, there are important mechanisms to the financial protection of the development. Consequently, the MaBV helps shielding the high investment made by the consumer when they buy a dwelling. The next lines will describe some of the most important provisions with beneficial effects to the consumer.

§3 MaBV establishes special security obligations for developers. It asserts that the developer can only receive money from the consumer if they already possess all required authorizations for the development, especially the authorization for construction.[159] The developer must also pre-register the transmission of property to the buyer in the land registry and be sure that no mortgages lies on the real property. These provisions are positive for the consumer, who will be able to rely that their money will only be accepted to invest in a development that is officially authorized and that the land in which they are acquiring property is free from real rights from third parties.

Additionally, the MaBV obliges the developer to separate its patrimony from the capital it receives from the property acquirers for future construction, pursuant to §6.[160] Thus, when the developer

[158] See MARCKS, Peter. *Makler- und Bauträgerverordnung.* Mit Paragraph 34c GewO und MaBVwV. 9. ed. (Gelbe Erläuterungsbücher). München: Beck, 2014. 1 online resource (450 S.). Vormerkung, para.1 Basty, G. (2009), *Der Bauträgervertrag*: *Schwerpunkte der Vertragsgestaltung*, Köln, München, Heymann, paras. 90-92. Hansen, E. (2006), *Bauträgerrecht*: *Planung; Finanzierung; Vertrag; Abwicklung*, Neuwied, Werner, paras. 74-81. Contrary to it, Heiermann doubts on the effectiveness of public law instruments in the civil law field: Heiermann, W. (2007), 'Der Verbraucherschutz in der gesetzlichen Regelung des deutschen _Bauträgerrechts - ausreichend im Licht der EG-Richtlinie 93/13?' in: Jochem, R. (ed.), *Rechtshandbuch des ganzheitlichen Bauens: Festschrift für Hans Ganten,* Wiesbaden, vieweg, pp. 111-112. In addition, Wagner discourses on the incompatibility between the MaBV and the content control through the European Directive 93/13.Wagner, K.-R. (2012), 'E. Bauträgervertrag' in: Messerschmidt, B., Voit, W. (eds.), *Privates Baurecht: Kommentar zu §§631 ff. BGB,* München, C. H. Beck, paras. 31-42.

[159] Basty, G. (2009), *Der Bauträgervertrag*: *Schwerpunkte der Vertragsgestaltung*, Köln, München, Heymann, para. 86.

[160] See Hansen, E. (2006), *Bauträgerrecht*: *Planung; Finanzierung; Vertrag; Abwicklung*, Neuwied, Werner, para. 124.

receives money from the buyers, it has to create a special bank account to manage the money, separating it from their own patrimony and of other contractors.[161] Similarly to the Brazilian *Patrimônio de Afetação*,[162] this norm beneficiates the consumer, who can be certain that their money is not threatened in case the developer goes insolvent, for instance.

Although all these provisions are positive for the consumers, the doctrine does not recognize them as consumer protective measures.[163] As norms of Trade Law, they are understood as a protection against the misuse of the *Bauträgervertrag* from the developer´s side, even though the results thereof may be advantageous for the consumer.[164]

5. Short comparison

The property development contract is of great meaning for the real estate market in both Brazil and Germany. In both countries, the structure of the contract is similar; consequently, both jurisdictions identify the contract as a *sui generis* type. Both countries have recognized that, from the contracts typified in the civil code, the contract for work and service is the most similar to the property development, therefore, its provisions are applicable to property development cases.

Yet, Brazil and Germany have acknowledged the need to develop more specific legislation about the contract. In this regard, the

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[161] Marcks, P. (2014), *Makler- und Bauträgerverordnung*: *Mit Paragraph 34c GewO und MaBVwV*, Gelbe Erläuterungsbücher, München, Beck, para 2.
[162] See above Chapter II, D, 3, b, ii.
[163] See Wagner, K.-R. (2012), 'E. Bauträgervertrag' in: Messerschmidt, B., Voit, W. (eds.), *Privates Baurecht: Kommentar zu §§631 ff. BGB,* München, C. H. Beck, para. 8. and Heiermann, W. (2007), 'Der Verbraucherschutz in der gesetzlichen Regelung des deutschen _Bauträgerrechts - ausreichend im Licht der EG-Richtlinie 93/13?' in: Jochem, R. (ed.), *Rechtshandbuch des ganzheitlichen Bauens: Festschrift für Hans Ganten,* Wiesbaden, vieweg, pp. 109–124. on the unsatisfactory consumer protection in property development.
[164] Wagner, K.-R. (2012), 'E. Bauträgervertrag' in: Messerschmidt, B., Voit, W. (eds.), *Privates Baurecht: Kommentar zu §§631 ff. BGB,* München, C. H. Beck para. 4. Differently: Marcks, P. (2014), *Makler- und Bauträgerverordnung*: *Mit Paragraph 34c GewO und MaBVwV*, Gelbe Erläuterungsbücher, München, Beck, para. 1.

countries have chosen different approaches. While the Brazilian Lawmaker has drafted a civil norm that details the developer's and the buyer´s rights and obligations, namely the Law 4.591, Germany has reformulated the *Werkvertragsrecht* to include provisions about the property development contract. Additionally, the Germans count on a norm of public law, the MaBV, whose addressees are solely the developers,[165] avoiding abusive and dangerous commercial practices from their side.

In direct comparison, the Law 4.591 is more focused on protecting the consumer. A good illustration is the prohibition of advertisement for the property development, which do not mention the registration number of the development. This measure protects diffuse consumer interests, *i.e.*, it protects even those consumers who are not acquiring a unit.[166]

Both norms impede the developer from negotiating units of developments, which do not have authorization for construction or which were not registered. Moreover, both provide for a mechanism to separate the buyer´s investment from the developer´s patrimony. However, while the Law 4.591 has these provisions to protect the buyer, the MaBV´s focus is to inhibit the developer from abusive practices inside the contract.

E. The property development contract as a B2C standard contract

To study consumer protection in property development, one has to bear in mind two important aspects of the contract. To begin, it is manifestly necessary to limit the scope of the study only to property development contracts with a consumer as the buyer. In addition, one

[165] Wagner, K.-R. (2012), 'E. Bauträgervertrag' in: Messerschmidt, B., Voit, W. (eds.), *Privates Baurecht: Kommentar zu §§631 ff. BGB,* München, C. H. Beck, para. 55.
[166] See Miragem, B. (2016), *Curso de direito do consumidor*, São Paulo, Revista dos Tribunais, para. 2.2.4.2.

has to recognize that B2C contracts are widely formalized through standard formats. Brazilian and German laws have specific provisions applicable to contracts with consumer participation. Equally, they have provisions applicable to standard contracts. Therefore, a B2C standard property development contract will not only be subject to the laws mentioned above, but also to the provisions about consumer protection and standard contracts in force in the jurisdictions in study.

After establishing the fundamentals for understanding the property development with a consumer party (1) and as a standard contract (2), this subpoint will present the additional applicable laws to this contract in both jurisdictions (3 and 4) and compare them (5).

1. The property development as a consumer contract

Nothing impedes businesses to acquire property through the property development contract. However, only the B2C contracts are subject of this work. A great number of individuals buy their dwelling through this contractual mode. They buy it for their own use, as the final addressee of the household units. Thus, their position in the contractual relationship matches the definition of consumer above presented.[167] On the other pole of the contract, one sees the figure of the developer, who fits the definition of trader.[168] Hence, in both Brazil and Germany it is undisputed that these property development

[167] See Chapter II, C, 1 and 2.
[168] Cavalieri Filho, S. (1998), 'A responsabilidade do incorporador/construtor no Código do Consumidor', *Revista de Direito do Consumidor*, Vol. 26, para. 1.

contracts are to be treated as consumer contracts.[169] They are subject to the consumer protective legal regulations of these jurisdictions.

The need for consumer protection in the property development contract is justified by the positions of the developer and the consumer in the real estate market. On one side, the developer is used to do real estate business. They act in the construction field by option and conclude several property development contracts a year. The consumer, on the other side, generally does not have real estate expertise and is very likely to conclude a property development contract only once in a life-time. In this contract, the consumer has an **informational deficit**. In short, the developer-consumer legal relationship is a "pro" – "amateur" relationship.[170]

Additionally, the consumer usually has a **situational disadvantage** when concluding the property development contract that may influence their rational decision-making. The consumer is under the pressure of purchasing their own home. Psychologically, they face a contract that may change their lives.[171]

Not to mention that in the property development contract the consumer invests a high sum of money, paying in installments for a work that is not yet completed. Hence, the property development contract carries a financial risk for the consumer that cannot be overseen. On the other hand, the developer, as a company, is usually

[169] See Cavalieri Filho, S. (1998), 'A responsabilidade do incorporador/construtor no Código do Consumidor', *Revista de Direito do Consumidor*, Vol. 26, para.1.1. Chalhub, M. N. (2001), 'O contrato de incorporacao imobiliária sob a perspectiva do Codigo de Defesa do Consumidor', *Revista de Direito Imobiliário*, Vol. 50, para. 4.1. de Brito, Rodrigo Azevedo Toscano (2000), 'Cláusulas abusivas nos contratos de incorporacao imobiliária e o código de defesa do consumidor', *Revista de Direito Imobiliário*, Vol. 49, pp. 81–110. Basty, G. (2009), *Der Bauträgervertrag*: *Schwerpunkte der Vertragsgestaltung*, Köln, München, Heymann, para. 19. Heiermann, W. (2007), 'Der Verbraucherschutz in der gesetzlichen Regelung des deutschen _Bauträgerrechts - ausreichend im Licht der EG-Richtlinie 93/13?' in: Jochem, R. (ed.), *Rechtshandbuch des ganzheitlichen Bauens: Festschrift für Hans Ganten,* Wiesbaden, vieweg, pp. 109–124. Wagner, K.-R. (2012), 'E. Bauträgervertrag' in: Messerschmidt, B., Voit, W. (eds.), *Privates Baurecht: Kommentar zu §§631 ff. BGB,* München, C. H. Beck, paras. 31 ss.

[170] Heiermann, W. (2007), 'Der Verbraucherschutz in der gesetzlichen Regelung des deutschen _Bauträgerrechts - ausreichend im Licht der EG-Richtlinie 93/13?' in: Jochem, R. (ed.), *Rechtshandbuch des ganzheitlichen Bauens: Festschrift für Hans Ganten,* Wiesbaden, vieweg, p. 109.

[171] See other examples of situations that similarly affect the consumer´s ability to make neutral rational decisions in Engel, M., Stark, J. (2015), 'Verbraucherrecht ohne Verbraucher?', *ZEuP*, pp. 43-44.

in an economically superior position than the individual. The contract embodies an **economic disparity** between the parties.

In sum, the property development contract with a consumer carries three types of imbalance deriving from the B2C relationship: the informational, the situational and the economic imbalance. This raises the need for the law to compensate these differences, avoiding that the imbalance amounts to an unfair disadvantage to the party in the weaker position, namely the consumer.

2. The property development as a standard contract

The property development contract is generally formalized in a standard contract.[172] Most B2C property development contracts concern a building with multiple units,[173] making the developer a repeated player in the construction projects scenario. The developer then negotiates many household units from one building, thus, it is economic for them to draft one model contract to all prospective buyers. Typically, traders who know that they will offer the same service or product to a great number of consumers draft a model contract, detailing the legal relationship and use this contract with a number of parties.[174] The consequence of it is a unilateral determination of the contractual terms.[175] These contracts presuppose that the adherent part does not have room to exercise their consent to

[172] Basty, G. (2009), *Der Bauträgervertrag*: *Schwerpunkte der Vertragsgestaltung*, Köln, München, Heymann, para. 18. Heiermann, W. (2007), 'Der Verbraucherschutz in der gesetzlichen Regelung des deutschen _Bauträgerrechts - ausreichend im Licht der EG-Richtlinie 93/13?' in: Jochem, R. (ed.), *Rechtshandbuch des ganzheitlichen Bauens: Festschrift für Hans Ganten,* Wiesbaden, vieweg, p. 112. de Brito, Rodrigo Azevedo Toscano (2000), 'Cláusulas abusivas nos contratos de incorporacao imobiliária e o código de defesa do consumidor', *Revista de Direito Imobiliário*, Vol. 49, pp. 81–110.
[173] Basty, G. (2009), *Der Bauträgervertrag*: *Schwerpunkte der Vertragsgestaltung*, Köln, München, Heymann, paras. 18, 21.
[174] Pfeiffer, T. (2013), '1. Teil. Einleitung' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck, para. 11. Benjamin, Antonio Herman V, Marques, C. L., Miragem, B. (2015), *Comentários ao código de defesa do consumidor*, São Paulo, Revista dos Tribunais, Art. 54.
[175] Schapp, J., Schur, W. (2007), *Einführung in das bürgerliche Recht*, Vahlen Studienreihe Jura, München, Vahlen, pp. 491-493.

each clause, but has either to adhere to the whole contract or not to contract at all.[176]

Standard contracts are rather common in our contractual life. For instance, consumers have all probably signed a telephone or internet provider contract with many pages in small letters, with no possibility of discussion or have ticket the box of accepting the terms and conditions of a service offered in the internet. In all of these occasions, consumers face the typical take-it-or-leave-it situation in which standard contracts put the consumers. Similarly, a consumer who signs a property development contract fully drafted by the developer, meant to serve as the contractual model for the sale of other units, signs a standard contract. The consumer did not participate in the formulation of the clauses and usually does not have much room for changing clauses, especially those, which are not related to the features of the unit. Moreover, they may have limited understanding regarding the meaning of technical clauses. Thus, within the standard contract parties face a **structural imbalance** in which, only one party drafts and decides about the clauses and the other party has no or limited space to influence the contractual content.

Anyhow, one cannot imagine today´s business´ transactions without the figure of the standard contract. In face of the massification of contracts, the standard contractual terms represent an important time economy in negotiation and drafting.[177] Jurisprudentially speaking, the probability that courts have discussed and decided about a contractual piece, which was largely used is not low. Consequently, one could even argue that standard contracts bring some legal

[176] Bessa, L. R. (2008), 'XI. Proteção Contratual' in: Benjamin, Antonio Herman V, Marques, C. L., Bessa, L. R. (eds.), *Manual de direito do consumidor,* São Paulo, SP, Brasil, Editora Revista dos Tribunais, p. 276. Marques, C. L. (2006), *Contratos no Código de defesa do consumidor*: *O novo regime das relações contratuais*, São Paulo, Revista dos Tribunais, p. 71.
[177] See Pfeiffer, T. (2013), '1. Teil. Einleitung' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck, para. 11.

certainty to the contracting party, despite their lack of bargaining power regarding the contractual content.[178]

On the negative side, which certainly outweighs for the consumer, the developer itself establishes its own rights and obligations under the contract and those of the consumer, increasing the possibility of unconscionability.[179] Thus, the property development contract as a standard contract embodies a structural imbalance, because of the unilateral determination of the contractual content.[180]

Due to the disparities in the contractual relationship with a consumer party, discussed in subitem 1, and the disparity caused because of the standardization of the contract, jurisdictions, such as Brazil and Germany, have developed consumer protection laws and laws preventing unconscionable clauses in standard terms. They try to compensate the disparity through regulation and are applicable to the property development contract, as subsequently shown.

3. Applicable Laws to the B2C property development standard contract in Brazil

Under the Brazilian Law, a property development contract that has a consumer as the buyer is not only subject to the CCB and the Law 4.591, but also to the CDC.[181] Two provisions of the code stand

[178] European Communities (1984), 'Bulletin of the European Communities Supplement 1/84: Unfair terms in contracts concluded with consumers', Item 11.
[179] Germany, Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz (2015), Entwurf eines Gesetzes zur Reform des Bauvertragsrechts und zur Änderung der kaufrechtlichen Mängelhaftung Vebraucherbauherren „in der Regel nicht die Verhandlungsmacht haben, um für sich günstige Vertragsbedingungen auszuhandeln, para. 22. Camargo, C. M. J. (2011), 'Contrato de adesao', *Revista dos Tribunais*, Vol. 903, pp. 713–726.
[180] Chalhub, M. N. (2001), 'O contrato de incorporacao imobiliária sob a perspectiva do Codigo de Defesa do Consumidor', *Revista de Direito Imobiliário*, Vol. 50, pp. 92–135.
[181] Martins, P. L., Ramda, P. C. P. (2014), 'Overbooking imobiliário e os direitos do consumidor na aquisicao de imóveis', *Revista de Direito do Consumidor*, Vol. 91, pp. 119–140, para. 2.2. See also da Silva Pereira, Caio Mário (1995), 'Código de Defesa do Consumidor e as incorporacoes imobiliárias', *Revista dos Tribunais*, Vol. 712, pp. 102–111. and Chalhub, M. N. (2001), 'O contrato de incorporacao imobiliária sob a perspectiva do Codigo de Defesa do Consumidor', *Revista de Direito Imobiliário*, Vol. 50, pp. 92–135.

out in this regard. Art. 54 CDC, which lay out norms for the standard contract and Art. 51, which defines unfair clauses, enabling the content control of those contracts.

a) Applicability of Art. 54 CDC

Even though the standard contract is a type of technique to contract in mass, which can be used either in B2B or in B2C legal relationships,[182] in Brazil, the key norms related to it are inside the Consumer Protection Code. This means that they are applicable in B2C contracts and were specifically designed to protect the consumer.

The code preferred to call standard contracts as adhesion contracts (*Contrato de Adesão*), since the party can only adhere to the whole contract content or refuse to contract.[183] Art. 54 CDC explains that an adhesion contract is the one, whose clauses have been unilaterally established by the supplier of products or services, giving no space for the consumer to discuss or modify its content.[184] Essentially, the last sentence is the core of the norm.[185] The fact that the parties cannot freely discuss the clauses of the contract demonstrates the inequality of the parties.[186] It reflects the unbalanced legal relationship established through an adhesion contract.

For this reason, adhesion contracts must follow some special requirements. The contract must be written in clear terms, legible font type and minimum font size 12, pursuant to Art. 54 (3) CDC. This is to avoid those standard terms, which the consumer can neither understand nor read. Furthermore, according to Art. 54 (4) CDC

[182] STJ (2016), REsp 1.602.076 - SP.
[183] Benjamin, Antonio Herman V, Marques, C. L., Miragem, B. (2015), *Comentários ao código de defesa do consumidor*, São Paulo, Revista dos Tribunais, Art. 54.
[184] Marques, C. L. (2016), *Contratos no código de defesa do consumidor*, São Paulo, Revista dos Tribunais, para. 1.2.2.a.
[185] STJ (2000), REsp 59.870 - SP.
[186] Marques, C. L. (2016), *Contratos no código de defesa do consumidor*, São Paulo, Revista dos Tribunais, para. 1.2.1.

clauses that limit any consumer right must be highlighted in some way, for example by writing them in bold type.

The applicability of Art. 54 to property development contracts is controversial, because it presupposes the standard character of the contract. When the CDC entered into force, it equated the property development contract to a consumer contract, ensuring its applicability to the contract.[187] This originated many doubts in the construction field about the consequences of this application to their business. Subsequently, the Union of industry and civil construction of the estate of Minas Gerais filed many questions to the author of the Law 4.591, Prof. Caio Mário da Silva Pereira, in order to solve doubts about the applicability of the CDC to the property development. One of those questions was: Does the fact that the property development contract is a standard contract make it null? Prof. Caio Mário, however, has shown his disagreement with the thesis that the property development contract is a standard contract. In his view, it is actually a "type-contract", because the developer has drafted the contract in advance for all the units of a building to his comfort and he offers it to the possible acquirers. However, the difference between the standard contract and the "type-contract" is that in the first case, the clauses are imposed and cannot be discussed, but in the "type-contract", although the pre-drafted clauses are offered to the acquirer, they can be modified and perfectioned by the parties. The acquirers have, for instance, the possibility to adjust the payment modality, payday for the installments, and so on.[188] Hence, according to Prof. Caio Mário, the property development contract would not fall into the scope of Art. 54 CDC.

Nevertheless, the ruling understanding is that the standard character of the contract overweighs, since the possibility to discuss and modify clauses is not as wide as Prof. Caio Mário affirms. Still,

[187] Chalhub, M. N. (2001), 'O contrato de incorporacao imobiliária sob a perspectiva do Codigo de Defesa do Consumidor', *Revista de Direito Imobiliário*, Vol. 50, pp. 92–135, paras. 4.1, 4.4.3.
[188] da Silva Pereira, Caio Mário (1995), 'Código de Defesa do Consumidor e as incorporacoes imobiliárias', *Revista dos Tribunais*, Vol. 712, pp. 102–111, Questão 16.

the applicability of Art. 54 CDC has to be evaluated case-to-case. Where the developer brings evidence that the clause was discussed and modified by the parties, this clause does not qualify as a standard term anymore. For example, if developer and consumer agree on a modification of the plan transforming a bedroom in two or in an extension of the living room; or even agree on a modification in the payment conditions, which was not offered to the other acquirers, these clauses are excepted from the provisions ruling adhesion contracts under the Brazilian Law.[189]

Notably, Art. 54 CDC does not contain a list of unfair terms that should be deemed invalid for their abusive appeal, as it is the usual way to deal with standard contracts. As will be explained in the item below, this list, which provides the law with measures to execute content control, is in Art. 51 and is not applicable solely to adhesion contracts, but to all B2C contracts. Therefore, the discussion whether the B2C property development contract is or is not a standard contract cannot hinder the courts to declare the nullity of an abusive clause.

b) Applicability of Art. 51 CDC

The question whether the property development contract is standard or not does not play the central role for determining the content control of unfair clauses through the CDC. Its consumerist nature does so. B2C contracts are subject to Art. 51 CDC, which contain a list of terms that are considered unfair in the Brazilian Law and therefore should be deemed null.[190] The provisions in Art. 51 are not designed exclusively for standard contracts, like the ones in Art.

[189] STJ (2000), REsp 59.870 - SP.

[190] "*A number of legal systems have a black list of clauses which are regarded as prejudicial to the interests of consumers*", examples can be found in European Communities (1984), 'Bulletin of the European Communities Supplement 1/84: Unfair terms in contracts concluded with consumers', items 21-25.

54, they are expressly applicable to all contractual clauses concerning the providing of a service or product to the consumer.[191]

The blacklist in Art. 51 CDC contains sixteen concrete examples of unfair clauses that are deemed null and void under the Brazilian Law.[192] Although not each of the subsections in the provision are subject of this study, subsection 1 deserves a highlight, for it establishes a general rule to consider a standard term as unfair. According to it, a clause in a B2C contract that offends the fundamental principles of the legal system; restricts fundamental rights or obligations, which are inherent to the contract in a way to threaten the contract´s object or the contractual balance or which is excessively onerous for the consumer, considered the nature and the content of the contract, the interest of the parties and the peculiar circumstances of the case, are to be considered null. In other words, a clause inside a standard contract, that is, against the principle of good-faith, extremely onerous for the consumer is null under the CDC. The other sixteen examples in the black list are a concretization of this general rule.

Importantly, Art. 51 (2) CDC affirms that if a clause is considered null, that does not annulate the whole contract, as long as the absence of the clause does not amount to an excessive onus to one of the parties.

[191] Nery Júnior, N. (2007), 'Capítulo I - Da proteção Contratual' in: Grinover, A. P. (ed.), *Código brasileiro de defesa do consumidor: Comentado pelos autores do anteprojeto,* Rio de Janeiro, Forense Universitária, pp. 504–638. Garcia, L. d. M. (2010), *Direito do consumidor*: *Código comentado, jurisprudência, doutrina, questões, decreto 2.181/97*, Niterói, Impetus.

[192] Nery Júnior, N. (2007), 'Capítulo I - Da proteção Contratual' in: Grinover, A. P. (ed.), *Código brasileiro de defesa do consumidor: Comentado pelos autores do anteprojeto,* Rio de Janeiro, Forense Universitária, pp. 504–638. Garcia, L. d. M. (2010), *Direito do consumidor*: *Código comentado, jurisprudência, doutrina, questões, decreto 2.181/97*, Niterói, Impetus.

4. Applicable Laws to the B2C property development standard contract in Germany

Property development contracts in Germany find their main governance in the civil code, but not only the part of the code that deals with *Werkvertrag* is important. A property development standard contract is equally subject to the part of the code that regulates standard terms, the so-called AGB-Law. Moreover, Germany, as a member State of the European Union, applies, through national law, the European Directive on Unfair Terms 93/13, which was designed to protect the consumer from unfair clauses inside a standard contract.

a) Applicability of the AGB-Law

Standard contracts are governed by §§305 to 310 BGB.[193] This set of rules is called AGB-Law. This is because the expression used to designate standard contract in Germany is *Allgemeine Geschäftsbedingungen – AGB*, which could be better translated as general terms and conditions than as adhesion or standard contract.[194] The definition of AGB is found in §305 (1) BGB. It asserts that AGB are terms and conditions, pre-formulated for a multiplicity of contracts, which one party (*Verwender*) presents to the other party when concluding a contract. Hence, this definition encompasses any

[193] Standard terms are goverened by the BGB since the modernization of the law of obligations in the end of 2001. Before that, there was a Law of Standard terms, in force sinde 1977. Germany (1976), Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen. See Pfeiffer, T. (2013), '1. Teil. Einleitung' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck, paras. 12-14. Nassall, W. (2005), 'Kapitel 5: Allgemeine Geschäftsbedingungen' in: Gebauer, M., Wiedmann, T., Hirsch, G. (eds.), *Zivilrecht unter europaïschen Einfluss: Die richtlinienkonforme Auslegung des BGB und anderer Gesetze, Erlaünterung der wichtigsten EG-Verordnungen,* Stuttgart, Boorberg, para. 11.

[194] Köbler, in its German-English Law Dictionary, suggests the following translations for AGB: standard terms of business, standard trading conditions, general terms and conditions of trade, general terms and conditions of business. Köbler, G. (2011), *Rechtsenglisch*: *Deutsch-englisches und englisch-deutsches Rechtswörterbuch für jedermann*, München, Vahlen, p. 10. The Bulletin of the European Communities on unfair terms in consumer contracts from 1984 translated the term AGB as general conditions of business. European Communities (1984), 'Bulletin of the European Communities Supplement 1/84: Unfair terms in contracts concluded with consumers', item 32.

contracts that were pre-drafted by one party, who intended to use it to conclude three or more contracts.[195]

The German Law takes an atypical approach to standard contracts. Differently from other jurisdictions, it does not link the content control of unconscionable clauses to the participation of a consumer in the contract or solely to the fact that one party has drafted the contract unilaterally.[196] The AGB presupposes that the drafter intents to use the contractual draft for various contracts. The addressees of the AGB norms are not the consumer and the supplier, but the user (*Verwender*) and the party on the other pole of the legal relationship, regardless of it being a consumer or not.[197] Therewith the German Law protects other agents of the market, who could, as well as the consumer, be in a disadvantageous position towards the general terms, for example the small trader. Hence, although the consumer widely profits from the AGB norms, scholars affirm that the Law of AGB should not be treated as a consumer protective law.[198] The focus

[195] BGH (2001), VII ZR 388/00 (Koblenz). Köhler, H., Lange, H. (2013), *BGB, Allgemeiner Teil*: *Ein Studienbuch*, Kurzlehrbücher für das juristische Studium, München, Beck, §16, para. 6. Note that the intention to use the contract in at least three legal relationships is enough. It is not necessary to use the terms in three contracts, but to have drafted it in the intention to do so. BGH (1996), VII ZR 318/95 (Düsseldorf).

[196] In Germany, content control exists not only for B2C standard contracts, but also for B2B standard terms. BGH (1991), III ZR 141/90 (Bremen). Nevertheless, the content control of consumer contracts was widened by the Directive 93/13/EEC. Fuchs, A. (2016), 'Vorbemerkungen zur Inhaltskontrolle: Vor §307' in: Ulmer, P., Hans Erich, B., Hensen (eds.), *AGB-Recht: Kommentar zu den [Paragraphen] 305-310 BGB und zum,* Köln, Otto Schmidt. See also Hau, W. (2013), '5. Teil. ABC der Klauseln und Vertragstypen: Schiedsklausel' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck, para. 49.; Schmidt (2016), 'Klauseln, Vertragstypen, AGB-Werke: (40) Schiedsgutachtenklauseln, Schieds-, Schlichtungs- und Mediationsklauseln' in: Ulmer, P., Hans Erich, B., Hensen (eds.), *AGB-Recht: Kommentar zu den [Paragraphen] 305-310 BGB und zum,* Köln, Otto Schmidt. See also Pfeiffer, T. (2013), '1. Teil. Einleitung' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck. In paras. 52 to 97, Pfeiffer discourses about the content control of unfair clauses in other countries. Many of them use a different systematic than the German Law. Thereunder, for example, Belgium, Denmark, Finnland, Great Britain, Japan, Turkey, and the U.S.

[197] Bülow, P., Artz, M. (2016), *Verbraucherprivatrecht*, Schwerpunktbereich, Heidelberg, C.F. Müller. Bülow, P., Artz, M. (2014), *Verbraucherprivatrecht*, Heidelberg, München, Landsberg [u.a.], Müller, p. 492.

[198] Bülow, P., Artz, M. (2016), *Verbraucherprivatrecht*, Schwerpunktbereich, Heidelberg, C.F. Müller, p. 492.

of the general terms and conditions norms is not the consumer but the business transactions in general.[199]

As to the structure of the AGB-Law, apart from defining general terms and conditions in §305 BGB, the AGB provisions also establish parameters to the inclusion of general terms to the contract in §§305a to 306a BGB. Then, §307 BGB sets general conditions for the content control of clauses.[200] Subsequently, exemplificative lists of terms that should be deemed null under the German Law are displayed by §§308 and 309 BGB.[201] Finally, §310 limits the scope of application of the AGB norms.

Of all these provisions, §307 BGB represents the core stone of the content control.[202] Pursuant to it, a clause is invalid if it puts the party who did not draft the terms in an unreasonable disadvantage, against the principle of good-faith. The examples of unfair clauses listed in the subsequent paragraphs are a concretization of this general rules established by §307 BGB.[203]

Only the last provision, §310 BGB, brings special rules for consumer protection. Subsection 3 of the norm establishes, for instance, that the provisions for AGBs are applicable to consumer contracts, even if these were meant to be used only once. Moreover, it affirms that all contractual circumstances must be taken into

[199] Bülow, P., Artz, M. (2016), *Verbraucherprivatrecht*, Schwerpunktbereich, Heidelberg, C.F. Müller, p. 492. Bülow, P., Artz, M. (2014), *Verbraucherprivatrecht*, Heidelberg, München, Landsberg [u.a.], Müller, p. 604. Contrary to this view, Dr. Werner Müller, according to whom the fact that the Law of AGB leans so much on consumer protection harms the business transactions in Germany. Müller, W. (2013), 'Die AGB-Kontrolle im unternehmerischen Geschäftsverkehr – Standortnachteil für das deutsche Recht', *Betriebs-Berater*, Vol. 23, p. 1355.
[200] Pfeiffer, T. (2013), '§307' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck, para. 55.
[201] See Dammann, J. (2013), 'Vorbemerkungen zu §§ 308, 309' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck.
[202] See Fuchs, A. (2016), 'Vor §307' in: Ulmer, P., Hans Erich, B., Hensen (eds.), *AGB-Recht: Kommentar zu den [Paragraphen] 305-310 BGB und zum,* Köln, Otto Schmidt, para. 11. See also para. 62 to 65 about the good-faith principle. Schapp, J., Schur, W. (2007), *Einführung in das bürgerliche Recht*, Vahlen Studienreihe Jura, München, Vahlen, p. 500.
[203] See Fuchs, A. (2016), 'Vor §307' in: Ulmer, P., Hans Erich, B., Hensen (eds.), *AGB-Recht: Kommentar zu den [Paragraphen] 305-310 BGB und zum,* Köln, Otto Schmidt, para. 44.

consideration to determine the unreasonable disadvantage that the contract causes to the consumer.[204]

The property development contract is subject to the AGB provisions for two reasons.[205] First, because it usually concerns various household-units in a building instead of one house, consequently, there is the practice of pre-drafting the terms and conditions for more than one unit, matching the definition of §305(1) BGB. Second, because the object of this study are preformulated B2C contracts, which are subject to the AGB provisions, even if they are not meant to be used more than once.

Nonetheless, if the parties negotiate any clause individually, this clause is not considered an AGB anymore.[206] If especial payment conditions or even construction materials are individually negotiated with the consumer, the clause that verses about the negotiated topic are not considered AGB and the consumer does not profit from the protective AGB rules for those clauses.[207]

b) Indirect applicability of the European Directive 93/13

The Council of the European Community has issued a Directive about unfair terms in consumer contracts in the year 1993.[208] This Directive is fruit of the worries of the Community about the consumer, who is in a weaker position than the trader in the market.[209] The

[204] See Köhler, H., Lange, H. (2013), *BGB, Allgemeiner Teil*: *Ein Studienbuch*, Kurzlehrbücher für das juristische Studium, München, Beck, §16, paras. 11-13.
[205] See Dammann, J. (2013), '5. Teil. ABC der Klauseln und Vertragstypen - Klauseln (B)' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck, para. B133.
[206] Heiermann, W. (2007), 'Der Verbraucherschutz in der gesetzlichen Regelung des deutschen _Bauträgerrechts - ausreichend im Licht der EG-Richtlinie 93/13?' in: Jochem, R. (ed.), *Rechtshandbuch des ganzheitlichen Bauens: Festschrift für Hans Ganten,* Wiesbaden, vieweg, pp. 112-113.
[207] Basedow, J. (2015), '§305 BGB' in: Säcker, F. J., Rixecker, R. (eds.), *Münchener Kommentar zum BGB,* München, C. H. Beck, para. 34.
[208] European Union (2013), Directive 2013/11/EU. Directive on Consumer ADREuropean Economic Community (1993), Council Directive 93/13 on unfair terms in consumer contracts.
[209] Ulmer, P., Habersack, M. (2016), 'Einleitung' in: Ulmer, P., Hans Erich, B., Hensen (eds.), *AGB-Recht: Kommentar zu den [Paragraphen] 305-310 BGB und zum,* Köln, Otto Schmidt, p. 91.

Directive´s objective is to harmonize the law in regard to consumer standard contracts within the European Community[210] and establish minimum standards for consumer contracts.[211]

To limit the scope of application of the Directive, it establishes in Art. 2 the definition of consumer and of seller or supplier. Art. 3 clarifies which contractual terms should be considered unfair, namely those that have not been individually negotiated and, against the principle of good-faith, "*causes a significant imbalance in the parties´ rights and obligations arising under the contract, to the detriment of the consumer.*" Moreover, the norm has an annex with a list of examples of terms that should be considered null by the member States´ courts.

Importantly, the Directive does not apply directly to the B2C contracts in Germany,[212] it had to be implemented by the Member States by December 1994, according to Art. 10. Germany has implemented this Directive through the AGB provisions. Although the German AGB-Law precedes the directive,[213] it had to widen its scope and encompass the consumer contract to leave up to the Directive. As above mentioned, the AGB Law is not considered consumer Law, it wants to protect any party who signs standard terms. The Directive, however, aims at the consumer protection. For this reason, §310 (3) BGB has widened the applicability of the AGB provisions to B2C

[210] See Art. 1 of the Directive 93/13 and Nassall, W. (2005), 'Kapitel 5: Allgemeine Geschäftsbedingungen' in: Gebauer, M., Wiedmann, T., Hirsch, G. (eds.), *Zivilrecht unter europaïschen Einfluss: Die richtlinienkonforme Auslegung des BGB und anderer Gesetze, Erlaünterung der wichtigsten EG-Verordnungen,* Stuttgart, Boorberg, para. 6.

[211] Nassall, W. (2005), 'Kapitel 5: Allgemeine Geschäftsbedingungen' in: Gebauer, M., Wiedmann, T., Hirsch, G. (eds.), *Zivilrecht unter europaïschen Einfluss: Die richtlinienkonforme Auslegung des BGB und anderer Gesetze, Erlaünterung der wichtigsten EG-Verordnungen,* Stuttgart, Boorberg, para. 12.

[212] See Nassall, W. (2005), 'Kapitel 5: Allgemeine Geschäftsbedingungen' in: Gebauer, M., Wiedmann, T., Hirsch, G. (eds.), *Zivilrecht unter europaïschen Einfluss: Die richtlinienkonforme Auslegung des BGB und anderer Gesetze, Erlaünterung der wichtigsten EG-Verordnungen,* Stuttgart, Boorberg, para. 8.

[213] Germany already had the AGBG in the year 1977, while the Directive was issued in 1993. The AGB provisions were inserted in the BGB in 2002, however, they did not suffer major changes by their inclusion in the civil code.

standard terms, even if those terms were not meant to be used for a variety of contracts.[214]

Moreover, German courts may not interpret standard terms in discordance with the Directive. The directive is an European norm and as such, must be taken as a parameter for legal interpretation in the member states.[215] If the national law of each member state is not interpreted in accordance with the directive, it does not achieve its objective of harmonization.[216] Hence, the indirect applicability of the Directive 93/13 occurs by the interpretation of the AGB in conformity with the Directive.

5. Short comparison

The central divergence point between the AGB and the Brazilian adhesion contract lies on the definition of these types of contracts itself. While the Brazilian law focuses on the lack of actions of the consumer to define adhesion contract, namely the consumer who could not discuss and consent to the clauses of the contract. The German law focuses on the actions of the drafter, who pre-drafted the contractual terms intending to use it in several legal relationships. Eventually, this difference will not cause a big discrepancy in the legal consequences of having a standard contract in both countries, because most adhesion contracts were pre-drafted to be used in many contracts. On the other hand, the consumers cannot exercise their consent facing an AGB. Therefore, in most cases the definitions can

[214] Ulmer, P., Habersack, M. (2016), 'Einleitung' in: Ulmer, P., Hans Erich, B., Hensen (eds.), *AGB-Recht: Kommentar zu den [Paragraphen] 305-310 BGB und zum,* Köln, Otto Schmidt, para. 3.
[215] Nassall, W. (2005), 'Kapitel 5: Allgemeine Geschäftsbedingungen' in: Gebauer, M., Wiedmann, T., Hirsch, G. (eds.), *Zivilrecht unter europaïschen Einfluss: Die richtlinienkonforme Auslegung des BGB und anderer Gesetze, Erlaünterung der wichtigsten EG-Verordnungen,* Stuttgart, Boorberg, paras. 2 and 9. Weiler, F. (2014), *Schuldrecht Allgemeiner Teil*, Nomoslehrbuch, Baden-Baden, Nomos, §11, para. 2. Nassall, W. (2005), 'Kapitel 5: Allgemeine Geschäftsbedingungen' in: Gebauer, M., Wiedmann, T., Hirsch, G. (eds.), *Zivilrecht unter europaïschen Einfluss: Die richtlinienkonforme Auslegung des BGB und anderer Gesetze, Erlaünterung der wichtigsten EG-Verordnungen,* Stuttgart, Boorberg, para. 3.
[216] Nassall, W. (2005), 'Kapitel 5: Allgemeine Geschäftsbedingungen' in: Gebauer, M., Wiedmann, T., Hirsch, G. (eds.), *Zivilrecht unter europaïschen Einfluss: Die richtlinienkonforme Auslegung des BGB und anderer Gesetze, Erlaünterung der wichtigsten EG-Verordnungen,* Stuttgart, Boorberg, para. 9.

overlap and either contracts are subject to the black lists of their jurisdiction.

However, if the supplier drafts a contract unilaterally, without discussing the individual clauses with a consumer, this can be seen as an adhesion contract by the Brazilian Law, even if the drafter only used the terms once or twice. This is also true for the German Law, thanks to the exceptions made for consumer contracts in §310 (3) BGB, fruit of the implementation of the European Directive 93/13, which also establishes parameters for content control of unfair clauses, but specifically for B2C contracts. On the contrary, if the terms and conditions, pre-formulated by one party, used in many contracts, have as a counter party someone who is not a consumer, this person would not enjoy the protection of Brazilian Law, unless their vulnerability can be evidenced.

For the purposes of this work, the definitions of German and Brazilian Law overlap. The property development contract complies with the requirements of both legislations. The contract is pre-formulated by the developer, who intends to use it to at least all units of the building. On the other pole of the relationship, there is the consumer, who could not discuss the clauses individually with the developer.

Content wise, the provisions on standard terms in both countries are equivalent. They consider clauses that, against good-faith, amount to an unreasonable burden to the consumer or the non-drafting party as unfair. Based on this, both countries have developed a black list of terms that should be deemed null.

Although the civil codes and the specific laws applicable to the property development contract have mechanisms to protect the buyer financially,[217] it is through the standard terms provisions that the

[217] See Chapter II, D, 3, b.

consumer is protected from unconscionable contractual clauses.[218] Through content control, the law intends to balance the contractual relationship that has started unequally with the unilateral draft of a contract, which should reflect the will and consent of both the developer and the consumer and not just of the drafter. It is then not wrong to affirm that the greatest consumer protection inside the property development area does not come from the specific contract law, but from the standard terms regulations above presented.[219]

Lastly, considered the divergence of terms to describe the massification of contracts phenomenon – AGB in Germany and adhesion contract in Brazil –[220] this study favors a third term, not to prefer the German neither the Brazilian denominations. The term standard contract is used to describe the pre-drafted property development contract, with no clause discussion with the consumer.

F. Chapter's conclusion:

The purpose of consumer protection is to compensate the imbalance in a legal relationship between trader and consumer,[221] given that the consumer is the weaker party. As above demonstrated, the B2C property development contract denotes such an imbalance in many levels. Consequently, the law applicable to the property development contract has to protect the consumer.

The Brazilian and German Law supports this view. The countries present diverse definitions of consumer and diverse approaches towards standard property development contracts.

[218] Pause, H.-E. (2017), 'Verbraucherrecht und Bauträgerrecht - zuglech ein Ausblick auf weitere Entwicklungen im Gesetzgebungsverfahren', *BauR*, p. 430.
[219] Messerschmidt, Burkhard; Voit, Wolfgang, eds. (2012), *Privates Baurecht*: *Kommentar zu §§631 ff. BGB*, München, C. H. Beck, para. 4.
[220] Prof. Cláudia Lima Marques explains in detail the differentiation of the German and the Brazilian denominations: Marques, C. L. (2006), *Contratos no Código de defesa do consumidor*: *O novo regime das relações contratuais*, São Paulo, Revista dos Tribunais, p. 68-69.
[221] Bülow, P., Artz, M. (2016), *Verbraucherprivatrecht*, Schwerpunktbereich, Heidelberg, C.F. Müller, para. 11.

Nonetheless, the different definitions and approaches generally do not amount to a different legal result in the practice.[222] Both of them recognize the consumer as the weaker party in the B2C property development contract and the law applicable to it has protective provisions.

The laws specifically about property development, like the Law 4.591 and the MaBV, consider the financial risk of the contract for the consumer, who invests a high sum in an incomplete work, and protects the consumer´s money. Further, the provisions about standard terms in Germany and about consumer contracts in Brazil impede a clause that contains an unreasonable disadvantage to the consumer to carry its effects.

The finding that the consumer of a property development enjoys legal protection in the material law field is of utmost importance for this thesis. It indicates that this protection should be reflected in the procedural law field.[223] The same consumer who contracted through an unbalanced legal relationship is the one that will, in case of a dispute, figure in one of the poles of a proceeding. Therefore, in the next chapters the access to justice for consumers and the protection of the consumer in arbitration will be studied.

[222] See Basedow, J. (2013), 'Comparative Law and its Clients', *Max Planck Private Law Research Paper No. 14/2* "*As a result of a functional comparison, it can often be observed that the practical solutions are similar in different legal systems, although the instruments and constructions differ*." p. 10.
[223] See Chalhub, M. N. (2001), 'O contrato de incorporacao imobiliária sob a perspectiva do Codigo de Defesa do Consumidor', *Revista de Direito Imobiliário*, Vol. 50, para. 4.

III – Access to justice for consumers in property development disputes

Consumer law is a cross section law;[224] in order to provide effective consumer protection it touches diverse law fields, including the procedural one. This is so because even though the material law has mechanisms to protect the consumer in the market, if these mechanisms are not followed through by the market agents, the consumer must count on efficient instruments to enforce what the material law dictates, otherwise, consumer protection will not be effective.[225] In other words, the consumers will not have access to justice.

The instruments consumers may use to access justice and enforce their rights are called dispute resolution methods and are subject to the procedural law. But not only those instruments described in a country´s civil procedural law, such as the classic lawsuit, may be considered suitable for a consumer to resolve a property development matter. In fact, searching for a dispute resolution mechanism that suits the specificities of construction cases requires deep examination. Many factors may influence the outcome of this investigation. Different components could influence the access to justice of a consumer in a property development dispute.[226] For instance, the complexity of construction cases and the underprivileged position of the consumer are important aspects in the search of the adequate dispute resolution method. Additionally, one may ask to what extend are the court services complying with the real needs of

[224] Tamm, M. (2016), 'Kapitel 1, §1 Verbraucherschutz und Privatautonomie' in: Tamm, M., Tonner, K. (eds.), *Verbraucherrecht,* Baden-Baden, Nomos, para. 2.

[225] See Di Spirito about the procedural law as the instrument to give effectiveness to material law. Di Spirito, Marco Paulo Denucci (2008), 'A convencao de arbitragem nos contratos de promessa de compra e venda de imóveis como alternativa à tutela jurisdicional substitutiva da declaracao de vontade', *Revista de Arbitragem e Mediacao*, Vol. 16, pp. 54–97.

[226] To achieve access to justice, a certain amount of legal realism is needed. One must not neglect the "real-world-components" to take the theoretical approach to the factual world. See Cappelletti, M. (1993), 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement', *The Modern Law Review*, Vol. 56, p. 282.

the parties. The outcome of this investigation is decisive for parties to consider choosing a path outside of the courts to solve their disputes.

Arbitration is one of these methods, which enables the parties to resolve construction disputes with specialized arbitrators and a tailor-made proceeding. The purpose of this work, is to examine arbitration as a legitimate way to solve B2C property development disputes, in other words, check if arbitration is an effective access to justice for those consumers. To do so, this chapter will shortly introduce the access to justice movement (A); present the main obstacles to access to justice (B) and the main types of out-of-court dispute resolution methods (C). Then, this study will deepen the investigation about arbitration as a way of accessing justice for consumers in property development disputes (D). Lastly, conclusions will be drawn (E).

A. The worldwide access to justice movement

In the late 60´s, a movement worried about making rights effective has emerged: the access to justice movement. This movement gained importance worldwide and has been a propellant to the reform of legal systems in many jurisdictions.[227] One should note that the meaning of access to justice in this sense is not that of accessing justice as being what is right or fair, but much more that of access to a system of judgement,[228] the access to jurisdiction in its etymological sense, regardless of it being through a law suit in courts or through out-of-court methods.[229]

The movement proposes a new approach to the idea of access to justice. It aimed at detecting the obstacles to the effective access to

[227] Cappelletti, M. (1993), 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement', *The Modern Law Review*, Vol. 56, p. 282.
[228] See "Justice",meanings 2 and 1 respectively, in: (2009), *Longman dictionary of contemporary English*, Harlow, Pearson Longman.
[229] From the Latin genitive *juris*, meaning "right, law" and *dictio* meaning "to say". Online Etymology Dictionary, available at: www.etymonline.com/index.php?term=jurisdiction. 30.07.2015.

justice and proposed changes to overcome those obstacles. It developed three reform waves.[230] The first wave wanted to overcome the economic obstacle to accessing the judiciary, proposing *e.g.* legal aid. The second wave dealt with the organizational obstacle, caring about the representation of diffuse rights. The third wave is about the procedural obstacle. It showed that the path to justice must not always go through the courts. There are disputes more suitable to other types of dispute resolution methods. According to Prof. Cappelletti, a leading scholar of the movement, "*in certain areas the traditional, ordinary types of procedure are inadequate.*"[231] This third wave is the one in which this work focuses. It aims to investigate an effective out-of-court means of access to justice for consumer for property development disputes, regarded all the specificities of those.[232]

Undoubtedly, one of the areas affected by the access to justice movement is the consumer law. The access to justice movement of the 60´s and movement in favor of consumer protection are contemporaneous.[233] The last reinforcing and creating consumer rights and protective policies, the other trying to ensure that consumers can make those new rights effective.

Concerning the German and European context, already the first programme of the European Economic Community for a consumer protection and information policy in 1975 voiced this concern.[234] Regarding advice, help and redress of consumers, which corresponds to item C of the programme, the latter is guided by the following principle in number 33: "*Consumers are also entitled to proper*

[230] Cappelletti, M., Garth, B. G. (1978), 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective', *Buffalo Law Review*, Vol. 27, pp. 181–292.
[231] Cappelletti, M. (1993), 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement', *The Modern Law Review*, Vol. 56, p. 284.
[232] See below Chapter III, D, 1. To read more about the third wave and alternative dispute resolution methods, see Cappelletti, M., Garth, B. G. (1978), 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective', *Buffalo Law Review*, Vol. 27, pp. 181–292.
[233] See chapter II, B.
[234] Official Journal of the European Communities (1975), 'Preliminary programme of the European Economic Community for a consumer protection and information policy', C92/8, 25.04.75. See Micklitz, H.-W. (2003), '§32 Außergerichtliche Beilegung von Verbraucherstreitigkeiten' in: Reich, N., Micklitz, H.-W. (eds.), *Europäisches Verbraucherrecht,* Baden-Baden, Nomos, p. 1214.

redress for such injury or damage by means of swift, effective and inexpensive procedures."[235] Within the same scope, in number 33 the commission commits itself to study "*systems of redress, arbitration and the amicable settlement of disputes existing in Member States*."[236] In Brazil, the access to justice for consumers outside of courts is still crawling, consumer arbitration is frowned upon and other ADR methods are practiced inside the courts.

B. Main obstacles to access justice

Our legal systems are profusely criticized for not guaranteeing sufficient access to justice. Innumerous barriers make it difficult for the people to seek for judicial enforcement of their rights.[237] Scholars of the access to justice movement researched these barriers in the four-year "Florence Access-to-Justice Project." They considered the factors that impede many people from accessing the effectiveness of their rights.[238] Two of them stand out for their importance, the high costs of legal services (1) and the long duration of court proceedings (2).

1. Costs

Litigation is generally expensive.[239] Parties to a contentious proceeding have to pay the court fees, the attorney fees and other legal services. The expenses extend during the proceedings, so the farest one goes in the juridical instances and the longer the proceedings, the

[235] Official Journal of the European Communities (1975), 'Preliminary programme of the European Economic Community for a consumer protection and information policy', 25.04.75.
[236] Official Journal of the European Communities (1975), 'Preliminary programme of the European Economic Community for a consumer protection and information policy', 25.04.75.
[237] See Dyck, K., *Making a List: Barriers to Access to Justice*, available at: www.slaw.ca/2016/03/23/making-a-list-barriers-to-access-to-justice/. 11.07.2017.
[238] See Cappelletti, M., Garth, B. G. (1978), 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective', *Buffalo Law Review*, Vol. 27, pp. 186–190.
[239] Cappelletti, M., Garth, B. G. (1978), 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective', *Buffalo Law Review*, Vol. 27, pp. 186.

costlier it tends to be. However, if court proceedings are expensive, then only those people who can afford it will be able to access justice.[240]

Costs also depend on the success perspective of each party, because in many States, like Brazil and Germany, the losing party has to bear the attorney and court fees of the winning party.[241] Although this systematic intends to unburden the party who was right in their claims, it eventually discourages people to enforce their rights, if they are not positive that they will win the case. However, it is impossible to guarantee the success of a legal claim.[242] Additionally, small claims suffer the most under the high costs of litigation. It is not worth it to pay the costs of a contentious court proceeding if they exceed the actual amount in controversy.

Hence, the costs of litigation are a real barrier to the access of justice of many people, who, for economic reasons have little or no access to legal representation.[243] It is also an obstacle for those who, would be able to pay litigation fees without threatening their subsistence, but do not do so because the financial risk of their dispute is disproportioned to the hoped for financial recovery.[244]

2. Time

Time is an intrinsic part of justice. People seeking for a judicial resolution of their dispute expect the resolution not only to be just, but

[240] See Zuckerman, A. (2014), 'The civil court - A public service for the enforcement of rights requiring effective management' in: Adolphsen, J., Goebel, J., Haas, U., Hess, B., Kolmann, S., Würdinger, M. (eds.), *Festschrift für Peter Gottwald zum 70. Geburtstag,* München, C.H. Beck, pp. 717. "*The state would fail to provide justice if only the rich could afford it*."
[241] Art. 85 CPC and §91 ZPO.
[242] See Cappelletti, M., Garth, B. G. (1978), 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective', *Buffalo Law Review*, Vol. 27, pp. 187.
[243] Cappelletti, M. (1993), 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement', *The Modern Law Review*, Vol. 56, pp. 283.
[244] Zuckerman, A. (2014), 'The civil court - A public service for the enforcement of rights requiring effective management' in: Adolphsen, J., Goebel, J., Haas, U., Hess, B., Kolmann, S., Würdinger, M. (eds.), *Festschrift für Peter Gottwald zum 70. Geburtstag,* München, C.H. Beck, p. 717.

also timely.[245] Nevertheless, most litigants must wait over two, three or even more years for an enforceable judicial decision to their dispute.[246]

Delay in the jurisdiction originates ruthless effects for the parties. Financially, a person who wins the claim after many years has in fact lost a lot of money, due to the inflation rates.[247] Parties of too long proceedings may even feel compelled to abandon the proceedings or even settle for less than what they are entitled to receive, especially if the party is economically vulnerable.[248] Psychologically, the lack of legal safety given to the party who is waiting for a judicial decision must not be neglected. Depending on the content of the dispute, other personal decisions may be unresolved because of the late justice. A long judicial process means emotional distress for the parties.

As taught by Prof. Rui Barbosa, "*late justice is not justice, in fact it is a manifest injustice*".[249] Thus, time and justice have to walk

[245] See Zuckerman, A. (2014), 'The civil court - A public service for the enforcement of rights requiring effective management' in: Adolphsen, J., Goebel, J., Haas, U., Hess, B., Kolmann, S., Würdinger, M. (eds.), *Festschrift für Peter Gottwald zum 70. Geburtstag,* München, C.H. Beck, p. 717.
[246] See Cappelletti, M., Garth, B. G. (1978), 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective', *Buffalo Law Review*, Vol. 27, p. 189.
[247] Englert, K., Franke, H., Grieger, W. (2006), *Streitlösung ohne Gericht*: *Schlichtung, Schiedsgericht und Mediation in Bausachen*, Neuwied, Werner, para.1.
[248] Cappelletti, M., Garth, B. G. (1978), 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective', *Buffalo Law Review*, Vol. 27, p. 190.
[249] Barbosa, R. (1997), *Oração aos moços*: *Edição popular anotada por Adriano da Gama Kury*, Rio de Janeiro, Fundação Casa de Rui Barbosa, p.39. "*We must similarly accept that time is an integral imperative of civil justice, as indicated by the aphorism ´justice delay is justice denied*." Zuckerman, A. (2014), 'The civil court - A public service for the enforcement of rights requiring effective management' in: Adolphsen, J., Goebel, J., Haas, U., Hess, B., Kolmann, S., Würdinger, M. (eds.), *Festschrift für Peter Gottwald zum 70. Geburtstag,* München, C.H. Beck, p. 716. See also Di Spirito, Marco Paulo Denucci (2008), 'A convencao de arbitragem nos contratos de promessa de compra e venda de imóveis como alternativa à tutela jurisdicional substitutiva da declaracao de vontade', *Revista de Arbitragem e Mediacao*, Vol. 16, para. 4.

together. If the State apparatus is not capable of providing timely justice, it is then not capable of providing justice.

C. Types of out of court access to justice for consumers

Court proceedings are repeatedly criticized for being extremely time-consuming and expensive, what hinders the access to justice. Therefore, in some cases, parties search for access to justice out of court.[250]

Especially, in certain areas or kinds of controversies, the normal solution – the traditional contentious litigation in court might not be the best possible way to provide effective vindication of rights.[251] The judiciary might be expensive and not fast enough to resolve the consumer´s small claims. On the other hand, it might be too slow and inefficient to solve their complex claims.

Thus, different disputes may need different approaches. Small consumer claims are suitable to the cheap and uncomplicated ADR methods (1). Complex property development claims are more suitable to Arbitration (2).

1. ADR

The acronym ADR stands for Alternative Dispute Resolution methods. Hence, under ADR one can understand all dispute resolution methods that are not addressed to the courts. The Office of Fair Trading from England made a study about consumer redress published in 2010 in which it lists six types of out-of-court dispute resolution mechanisms for the consumer, namely: In-house complaint

[250] See Di Spirito, Marco Paulo Denucci (2008), 'A convencao de arbitragem nos contratos de promessa de compra e venda de imóveis como alternativa à tutela jurisdicional substitutiva da declaracao de vontade', *Revista de Arbitragem e Mediacao*, Vol. 16, para. 1.7.
[251] Cappelletti, M. (1993), 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement', *The Modern Law Review*, Vol. 56, p. 287.

procedures, mediation, conciliation, ombudsman schemes, adjudication and, the modality studied in this work, arbitration.[252] All these methods intend to be more flexible and time efficient than court proceedings.[253] The suitability of each method to a dispute must be checked on a case-to-case basis.

Especially for consumer issues the use of ADR has expanded considerably in the past years[254] and tends to very soon become more important than courts to solve cases, which were not worth it to sue, be it because of their small value or because of the emotional and economic distress they cause to the consumers.[255] Consumers oft search for solutions for small monetary claims[256] and expect a fast, simple solution. For this reason, they are gradually avoiding slow unsatisfactory court proceedings and preferring ADR.

From the above-mentioned ADR methods, the most popular in consumer cases are the mediation and the conciliation. In fact, both Brazil and Germany have experience with conciliation and mediation for consumers even inside the courts.[257] The Brazilian judiciary trains judicial conciliators to work in the small claims courts and tribunals will soon create judiciary centers for consensual dispute resolution.[258] The first hearing in the small claims courts, where many consumer disputes are solved, are obligatorily conciliation meetings.[259] Moreover, judges are obliged to encourage the consensual dispute resolution methods always and at any stage of court proceedings.[260]

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[252] Office of Fair Trading (2010). The document contains a detailed explanation about each of these methods.
[253] ,Hodges, C., Benöhr, I., Creutzfeldt-Banda, N. (2012), *Consumer ADR in Europe*: *Civil Justice Systems*, Oxford and Portland, Oregon, Hart Publishing.para. 1.
[254] Hodges, C., Benöhr, I., Creutzfeldt-Banda, N. (2012), *Consumer ADR in Europe*: *Civil Justice Systems*, Oxford and Portland, Oregon, Hart Publishing, para. 1.
[255] Gössl, S. L. (2016), 'Das Gesetz über die alternative Streitbeilegung in Verbrauchersachen - Chancen und Risiken', *NJW*, p. 838.
[256] Bělohlávek, A. J. (2012), 'Arbitrability limitation in consumer (B2C) disputes?: Consumer´protection as legal and economic phenomenon', *Journal of Governance and Regulation*, Vol. 1, Issue 3, p. 161.
[257] About ADR in court proceedings under the new Brazilian civil procedure code see Back, A. (2015), 'O novo código de processo civil brasileiro e a solução consensual dos conflitos', *DBJV - Mitteilungen*, Nr. 1, pp. 44–54.
[258] Brazil (2015), Law No. 13.105.
[259] Brazil (1995), Law No. 9.099.
[260] Brazil (2015), Law No. 13.105

Likewise, the German law requires courts to foment amicable dispute resolution at any stage of court proceedings.[261] It even provides for mediation proceedings after the party has started litigation. The judge designated to decide upon the case can refer the case to a judge from another chamber, who acts as a mediator in a first meeting.[262] If the parties do not settle, the case goes back to the judge *a quo*.

Nevertheless, conciliation and mediation inside the court proceedings are not pure ADR, they contradict the acronym where A stands for an alternative to the courts.[263] Considering the actual ADR, *i.e.* proceedings outside the judiciary, in Brazil conciliation is the flagship of consumer ADR. Consumer organizations[264] regularly promote conciliation hearings with consumers and traders.[265]

Germany differs in the use of consumer ADR. The consumer organizations, like the *Verbraucherzentrale* do not promote any type of dispute settlement. Other ADR bodies specialized in consumers are still developing.[266] This tends to change soon. A new law that entered into force in 2017 intends to implement Consumer ADR bodies in Germany.[267] The idea derives from the European Union Directive 2013/11/EU, which requires all member states to develop an ADR

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[261] Germany (2005), Zivilprozessordnung.
[262] Germany (2005), Zivilprozessordnung.
[263] Glasenapp, J. von (2007), 'Der Mediator als ersuchter Richter – das Ende der gerichtsnahen Mediation?', *NordÖR*, p. 283. "*Die Mediation kann nur dann eine echte Alternative zur Streitbeilegung sein, wenn sie außerhalb des gerichtlichen Verfahrens stattfindet*." Hodges, C., Benöhr, I., Creutzfeldt-Banda, N. (2012), *Consumer ADR in Europe*: *Civil Justice Systems*, Oxford and Portland, Oregon, Hart Publishing, p.115. "*(...) mediation-alongside-court-claims is a different animal from consumer ADR.*"
[264] By consumer organizations, the so called PROCONs are meant. They are governmental organizations for the protection of the consumer. In Germany, it could be compared to the *Verbraucherzentrale*. However, differently from the *Verbraucherzentrale*, most PROCON services are free. The PROCONs give consumers legal advice, start in-house proceedings, organize conciliation hearing for consumers and suppliers and lead a number of campaigns to educate the consumer about their rights and warn about unfair market practices.
[265] Britto, I. R., Santos, R. G. (2009), 'O papel do procon na defesa qualificada dos interesses dos consumidores: o acesso à justiça e os métodos alternativos de resolução de conflitos de consumo | Arcos - Informações Jurídicas', *Revista Eletrônica de Direito Processual*, Vol. IV. G1 (2015), 'Procon de Natal promove conciliação entre empresas e devedores', 03.11.15.
[266] Hodges, C., Benöhr, I., Creutzfeldt-Banda, N. (2012), *Consumer ADR in Europe*: *Civil Justice Systems*, Oxford and Portland, Oregon, Hart Publishing pp. 73-74.
[267] Germany (2016), Verbraucherstreitbeilegungsgesetz. Critics tot he Project Law: Engel, M. (2015), 'Außergerichtliche Streitbeilegung in Verbraucherangelegenheiten - Mehr Zugang zu weniger Recht', *NJW*, pp. 1633–1637.

system to solve consumer disputes. The Directive encourages the member states to create a dispute resolution system for consumers that is cheaper, faster and more efficient than courts.[268] All in all, consumer ADR is trending, especially in Europe as an effective way to provide access to justice for consumers.

2. Arbitration

Arbitration is an ADR method, since it is a dispute resolution method alternative to court proceedings. By choosing arbitration, parties exclude the court´s competence over their case. In arbitration, not a judge but one or more arbitrators decide upon the matter. Their decision is binding, subject to no recourse on the merits[269] and can be enforced in many countries around the world.[270] The core stone of arbitration is party autonomy, so arbitration can only be used to resolve a certain dispute, if the parties so agreed. They can do it directly in the contract with an arbitration clause. Thanks to the separability doctrine, even if the contract is considered void, the arbitration clause survives, enabling the arbitral tribunal to decide even on the validity of the contract itself.[271] The parties can also choose arbitration in a separate document at any time before or after the dispute arises in an arbitration agreement.

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[268] European Union (2013), Directive 2013/11/EU. Directive on Consumer ADR, Preamble, item 4.

[269] Since arbitration is determined by the parties, there have been discussions whether the parties can choose to go to courts after the proceedings. This depends on the arbitration law of the jurisdiction where they seek for the review. Moreover, AAA and ICDR have even published Optional Rules for an appeal on the merits, for parties who wish proceedings that allow an appeal on the merits.

[270] By now, 149 States have ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This is undoubtedly one of the most successful conventions in the world. With only sixteen articles, the Convention aims to make countries recognize and enforce arbitral awards issued in other jurisdictions. This Convention is of great importance for arbitration and makes international arbitration possible. The list of contracting States can be found here: *NYC Contracting States*, available at: www.newyorkconvention.org/countries. 17.11.2015.

[271] See Blackaby, N., Partasides, C., Redfern, A., Hunter, M. (2015), *Redfern and Hunter on international arbitration*, Oxford, Oxford University Press. Born, G. (2001), *International commercial arbitration*: *Commentary and materials / Gary B. Born*, Ardsley, N.Y., Transnational Publishers; The Hague; London : Kluwer Law International.

Additionally, the parties can determine many aspects of the arbitration proceedings for their particular dispute. They can select the seat of arbitration and therewith the *lex arbitri*. Parties can choose between *ad hoc* arbitration or institutional arbitration.[272] They can also decide on which substantive law should be applicable to the case or even let the arbitrators decide *ex aequo et bono*. Further, the parties can choose the language of proceedings, the number of arbitrators, the nomination method, etc.[273]

The flexibility of arbitration makes it particularly adequate for international disputes, for it can bridge the gaps between different legal systems. Hence, the use of arbitration has rapidly grown in the last decades, because of the increasing internationality of business in our globalized world.

However, arbitration is neither solely designed for international disputes nor a phenomenon from the modern society. This dispute resolution method, nowadays considered as an alternative to courts, precedes the estate courts in the history.[274] It was widely used in the antique, for instance, scholars affirm that one of the earliest arbitrators was Salomon.[275] It was after the states instituted the justice monopoly through courts that arbitration developed as an alternative and disputants preferred litigation in detriment to arbitration.[276]

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[272] See McIlwrath, M., Savage, J. (2010), *International arbitration and mediation*: *A practical guide / Michael McIlwrath, John Savage*, Austin, Wolters Kluwer. about the difference between institutional and *ad hoc* arbitration, whereas the first is administered by an arbitral institution and the second is not.
[273] See Blackaby, N., Partasides, C., Redfern, A., Hunter, M. (2015), *Redfern and Hunter on international arbitration*, Oxford, Oxford University Press. on the basic elements of the arbitral proceedings that parties choose in their arbitration clause.
[274] Born, G. (2015), *International Arbitration: Cases and Materials*, Kluwer Law International, p. 7. Burger-Scheidlin (2007), 'Einleitung' in: Torggler, H. (ed.), *Praxishandbuch Schiedsgerichtsbarkeit,* Wien, Verl. Österreich, para. 4.
[275] Xavier, G. (2010), 'Evolution of arbitration as a legal institutional and the inherent powers of the court : Putrajaya Holdings Sdn. Bhd. v. Digital Green Sdn. Bhd.', *Asian Law Institute, Working Papers Series*, No. 009, para. 1. Emerson, F. D. (1970), 'History of Arbitration Practice and Law', *Cleveland State Law Review*, Vol. 19, pp. 155–156.
[276] Emerson, F. D. (1970), 'History of Arbitration Practice and Law', *Cleveland State Law Review*, Vol. 19, pp. 155–157.

Yet, arbitral and court proceedings have contact points.[277] Arbitration needs the cooperation of the courts in actions where the private arbitrator lacks two elements of the jurisdiction, namely the *coertio* and the *executio* powers.[278] The effectiveness of jurisdiction also depends on these two elements, therefore, the helping function of the courts, for example by issuing interim measures,[279] requesting the party to nominate an arbitrator[280] or enforcing an award, is precious for arbitration.[281]

To what extend and how courts help the arbitral tribunal is set in the respective national laws. The laws also rule about the arbitration agreement, specificities of the proceedings and the arbitral award as well as about the setting aside requirements. Hereunder, important aspects of the arbitration laws of Brazil and Germany will be presented.

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[277] Paulsson, J. (2010), 'Arbitration in Three Dimensions', *LSE Law, Society and Economy Working Papers*, Vol. 2, para. 2. Paulsson explains, "*The great paradox of arbitration is that it seeks the cooperation of the very public authorities from which it wants to free itself*."

[278] The other three elements of jurisdiction are *notio*, *vocatio* and *iudicium*. Bernini illustrates the lack of *coertio* power of arbitrators with the figure of the antique Law goddess "*The arbitrators may have the scale of justice, seldom, if ever, the sword*." Bernini, G. (2007), 'Chapter 3: The Future of Arbitration: Flexibility or Rigidity' in: Lew, J. D. M., Mistelis, L. A. (eds.), *Arbitration insights: Twenty years of the annual lecture of the School of International Arbitration,* Alphen aan den Rijn, Kluwer Law International, pp. 47–62. On the cooperation between courts and arbitral tribunals: Schütze, R. A., Kratzsch, S. (2007), 'Unterstützung der Schiedsgerichtsbarkeit durch staatliche Gerichte' in: Torggler, H. (ed.), *Praxishandbuch Schiedsgerichtsbarkeit,* Wien, Verl. Österreich.

[279] Ehle, B. D. (2007), 'Concurrent Jurisdiction: Arbitral Tribunals and Courts Granting Interim Relief' in: Alibekova, A., Carrow, R. (eds.), *International arbitration and mediation: From the professional's perspective,* Salzburg, Austria, Yorkhill Law Pub., p. 169.; Schroth, H.-J. (2003), 'Einstweiliger Rechtsschutz im deutschen Schiedsverfahren', *SchiedsVZ*, p. 104.

[280] Muniz, Joaquim T. de Paiva; Basílio, Ana Tereza Palhares, eds. (2006), *Arbitration law of Brazil*: *Practice and procedure*, Huntington, NY, Juris Publishing, p. 85. Schütze, R. A., Kratzsch, S. (2007), 'Unterstützung der Schiedsgerichtsbarkeit durch staatliche Gerichte' in: Torggler, H. (ed.), *Praxishandbuch Schiedsgerichtsbarkeit,* Wien, Verl. Österreich.

[281] de Noronha, João Otávio (2015), *Courts and Arbitration in Brazil*: *A View from the Superior court of Justice (STJ)*, Vienna, p.12. Gamboa Morales, N. (2011), 'Remarks on the cooperation between the Latin American judiciary and arbitral tribunals with respect to the taking of evidence', *International commercial Arbitration Brief 1*, No. 1, pp. 11–13. Apart from the helping function, the courts also carry a control function. "*The control function relates to the objectives of the State as carrier of the order and jurisdiction. Hence, the State verifies if a certain arbitration proceeding complied with the due process of law, ordre public and other principles of public interest, for instance in the setting aside and enforcement proceedings*." Marques, Cláudia Lima; Benicke, Christoph; Jaeger Junior, Augusto, eds. (2016), *Diálogo entre o direito brasileiro e o direito alemão*: *Fundamentos, métodos e desafios de ensino, pesquisa e extensão*, Porto Alegre, RJR, p. 330.

a) Arbitration in Brazil

Brazil has adopted a very positive approach towards arbitration in the last years. It is a signatory country of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), what assures a secure environment for arbitration. It has promulgated and already reformed its arbitration law.[282] It has included provisions about arbitration in national laws, like the civil procedure code, the Concession's Law,[283] the Private-Public Partnership Law,[284] the Oil Law,[285] amongst others. These factors contributed for the worldwide recognition of Brazil as an arbitration friendly country.[286]

Brazil´s Arbitration Law (*Lei Brasileira de Arbitragem* - LBA) was enacted in 1996. The country has not adopted the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (UNCITRAL Model Law). A commission of Brazilian specialists has developed the LBA focusing not only in international arbitrations, but also in domestic ones.

In Brazil, according to Art. 1 LBA, any person who is able to contract can arbitrate. The parties are free to choose the substantive law, as long as it does not violate moral principles and *ordre public*. In case one party resists the arbitration clause and does not attend the arbitration, the claimant can ask the court to oblige him to arbitrate, pursuant to Art. 7 LBA. In the hearing, the judge will first try to conciliate. If the original clause does not mention how to nominate the

[282] Brazil (1996), Law No. 9.307 - Lei brasileira de arbitragem. Brazil (2015), Law No. 13.129. Although the arbitration community in Brazil was satisfied with the LBA in its 1996´s shape, the Senate proposed some changes to the Law in 2013. Tripodi, L., Kluwer Arbitration Blog (2013), *A New Arbitration Law for Brazil?*, available at: kluwerarbitrationblog.com/blog/2012/09/10/a-new-arbitration-law-for-brazil/. 19.11.2015. Most changes concerned the use of arbitration by the state, interim measures and the arbitral awards. In 2015 the reform project was approved and sanctioned through the Law No. 13.129.
[283] Brazil (1995), Law No. 8.987.
[284] Brazil (2004), Law No. 11.079.
[285] Brazil (1997), Law No. 9.478.
[286] See (2014), *Brasil é quarto país com mais usuários de arbitragem,* Revista Consultor Jurídico, available at: www.conjur.com.br/2014-mar-29/brasil-quarto-pais-usuarios-arbitragem-mundo. 19.11.2015.

arbitrators, the judge will decide upon it and can even appoint a sole arbitrator. The court decision will be regarded as an arbitration clause.

According to Art. 12 LBA, the arbitration clause can be ineffective in some specific occasions. If the parties choose a certain arbitrator and expressly declare that they do not accept any replacement, they may see their clause extinguished if this arbitrator refuses to serve, dies or is for any reason not able to express his or her vote. Additionally, the clause can be extinguished if the tribunal or sole arbitrator does not comply with the term given by the parties to the issuance of the award. In this case, extinction will only happen after the parties notify the tribunal about its delay, grating it 10 more days to issue the award. Regarding this last rule, the Brazilian Law interferes more than it should in the party autonomy driven arbitration. It should be left for the parties to decide how many more days it wants to grant the tribunal to comply with their duty. It is not a problem that the law stipulates a period as a suggestion, but it is against the nature of arbitration not to give space for party freedom. Art. 12 (III) LBA does not use any expression like “unless otherwise agreed by the parties”, therefore, it can be assumed that the 10-day period is mandatory and cannot be extended by the parties. This is counter intuitive, since according to Art. 11 (III) LBA the parties can determine the term for the arbitrators to issue the award.

The Law recognizes the arbitrators as *de facto et de jure* judges, hence the award issued by them cannot be subject to recourse on the merits and must not be homologated by the courts. Parties can directly enforce arbitral awards in Brazilian courts.

A controversial reform point brought by the new law concerns interlocutory measures. Pursuant to Art. 22-A, the parties can only request interim measures in the courts before the constitution of the arbitral tribunal. If the party does not start arbitration in the 30 subsequent days, the measure loses effectiveness. The arbitrators can maintain, modify or revoke the measure. A request direct to the courts

after commencement of arbitration is not possible anymore. The retrenchment of this possibility was still not discussed by the doctrine.

A good sign of cooperation between courts and arbitral tribunal is the new Arbitral Letter (*Carta Arbitral*). It is a communication tool created by the law, for arbitrators to submit their requests to courts. The law basically gave the request from the arbitral authority a name and formal frames, which enables a better processing inside the judiciary. According to Art. 260, §3º CPC, a copy of the arbitration agreement and a proof of the nomination of the arbitrators must accompany the Arbitral Letter. Therewith, courts can check the competence of the requesting authority. Moreover, if the arbitrators submit prove of the confidentiality of proceedings, the courts will also comply with confidentiality in the Arbitral Letter proceedings, pursuant to Art. 189, IV CPC.

Lastly, although the LBA can be criticized in some aspects, one must note the effort of the lawmaker to keep it up-to-date and to include arbitration as an important dispute resolution method next to litigation in the legal system. Brazil has great potential to say farewell to the dominance of courts in terms of dispute resolution, especially because the judiciary itself give signs that it so wants. The new LBA and the new CPC show strong signs that all people involved in the access to justice should encourage parties to use out-of-court methods.

b) Arbitration in Germany

Germany tops the litigation rates worldwide.[287] Scholars are very proud of the qualities of the German judiciary, some even

[287] van Aeken, K. (2012), '11 - Civil court litigation and alternative dispute resolution' in: Clark, D. S. (ed.), *Comparative law and society,* Cheltenham, U.K., Northampton, Mass., Edward Elgar, p. 227

discouraging the use of ADR methods.[288] Nonetheless, the number of litigation proceedings have been sinking in the last years[289] and ADR methods may play a role in this new development.[290] In fact, Germany is considered a very arbitration friendly country. Most parties to commercial disputes in Germany prefer arbitration.[291] This is due to its liberal arbitration legislation. Germany has adopted the UNCITRAL Model Law of 1985, which is the 10th Book of Germany´s civil procedure code. It is a signatory country of the NYC, the European Convention on International Commercial Arbitration amongst other important arbitration conventions.[292] Furthermore, the judiciary has assumed a very pro-arbitration approach, recognizing the wish of the parties to arbitrate even in pathological arbitration clauses.[293]

Parties who seek redress in courts in spite of the arbitration clause in their contracts will not be successful. Courts must dismiss the claim if there is a valid arbitration clause ruling over the dispute, pursuant to §1033 (1) ZPO.

Parties who seek interlocutory measures are able to request them in courts, according to §1033 ZPO. Differently from the Brazilian law, the ZPO does not restrain the request in the judiciary only to interim requests before the constitution of the arbitral tribunal. This is not only a ratification of the principle of guarantee to justice access, but an

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[288] "*Während die ADR-Richtlinie diese Prinzipien für Schlichtungsstellen sehr weit versteht, spricht vieles dafür, dass insbesondere die deutsche Justiz die genannten Kriterien auch bei enger Auslegung nahezu mustergültig erfüllt.*" Engel, M. (2015), 'Außergerichtliche Streitbeilegung in Verbraucherangelegenheiten - Mehr Zugang zu weniger Recht', *NJW*, p. 1634. Hirtz, B. (2012), 'Plädoyer für den Prozess', *NJW*, pp. 1686–1689.

[289] Tombrink, Christian (2018): Der deutsche Zivilprozess - "alternativlos"? In: IWRZ, pp. 275–279.

[290] Adolphsen, Jens (2017): Der Zivilprozess im Wettbewerb der Methoden - Pay Pal und eBayLaw. In: BRAK, pp. 148.

[291] Bockstiegel, K.; Kröll, Stefan; Nacimiento, Patricia, eds. (2015), *Arbitration in Germany. The model law in practice. 2nd, rev. ed*: *The Model Law in practice*, Den Haag, Kluwer Law International, para. 5.

[292] *E.g.* Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States; Energy Charter Treaty; Bilateral Commerce, Friendship and Investment Protection Treaties with several countries. Deutsche Institution für Schiedsgerichtsbarkeit (DIS) e.V. - German Institution of Arbitration - Internetportal, *Bilaterale Investitionsschutz- und Investitionsförderverträge*, available at: www.dis-arb.de/de/53/bit/uebersicht-id0. 18.12.2015.

[293] Bockstiegel, K.; Kröll, Stefan; Nacimiento, Patricia, eds. (2015), *Arbitration in Germany. The model law in practice. 2nd, rev. ed*: *The Model Law in practice*, Den Haag, Kluwer Law International, paras. 16-17.

open door for parties to strategically choose their forum for interim requests. In some cases, it may be tactically clever to request measures directly in courts, instead of asking the arbitral tribunal, which, in case the measure is not complied with, must anyway seek help in the judiciary.

Timely work has great value under German law, hence, an arbitrator who does not work timely, can be removed from the arbitral tribunal based on §1038 (1) ZPO. Either the arbitrator can recognize that it cannot comply with its obligations and resignate, or the parties can agree to remove the arbitrator from the panel. If the parties do not agree, they can request the court to decide upon the removal of the arbitrator. The German law does not set a definite term to consider the arbitrator in delay. It leaves the issue to the sensibleness of arbitrators and parties.

Still, courts perform helping and control function over arbitration. The control function is made in setting aside or in enforcement proceedings. Notably, the courts do not control the decisions on the merits, what confirms the binding effect of the decision in arbitration.

In sum, despite of the demand of the German judiciary, Germany may be going through an important process of privatising conflict resolution in which arbitration can and may help. Germany is a safe environment for arbitration, its liberal arbitration law is in line with the most important principles of arbitration, like party autonomy and due process. The law suits both national and international arbitrations, but especially international parties feel comfortable with the German *lex arbitri*, since Germany adopted the UNCITRAL Model Law, which counts on translations to many languages and reflects the will of harmonization of arbitration laws in the world.

c) Consumer Arbitration

In Germany and in Brazil the law does not provide for arbitration especially designed for consumers.[294] Generally, scholars understand consumer arbitration as an arbitration with a consumer party.[295] This definition comprises any proceeding between a business and a consumer decided by an independent arbitrator or arbitral tribunal. Notably, the only factor that differentiates consumer arbitration from arbitration in both countries is the consumer participation.

This understanding of consumer arbitration can be problematic, because the classical definition of arbitration leads us to rather flexible proceedings, with no regard to the sensitiveness of consumer disputes. In arbitration, the parties can choose the arbitral rules, however for consumers, this can be unfavorable, since they not necessarily will benefit from procedural advantages guaranteed in court proceedings. The parties also choose the applicable substantive law or even an *ex aequo et bono* arbitration, meaning that the national consumer protective measures are not mandatorily applicable.

Although it is still not time to evaluate if the aspects above mentioned are disadvantageous or advantageous for consumers,[296] one can observe that the characteristics of arbitration reveals that it was not developed considering legal relationships with a great disbalance, like the relation between traders and consumers.[297] Much more, the features of classical arbitration suits states and business, who can use the flexibility of proceedings in the same bargaining level as their counter parties. Nevertheless, it is possible to use arbitration

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[294] Other jurisdictions have developed regulated arbitration for consumers. For example: Argentina, Netherlands, Spain, England, Portugal.
[295] Born, G. (2014), *International Commercial Arbitration*, p. 1013.
[296] See Chapter III, D, 2 for advantages and disadvantages of arbitration for consumers.
[297] "*Der Zeitgeist folgt einem anderen Trend und möchte den Spielraum für alternative Formen der Streitbeilegung eher ausbauen als begrenzen. Dem Verbraucher aber wird damit, so steht zu befürchten, ein Bärendienst erwiesen*." So writes Mäsch, G. (2005), 'Schiedsvereinbarungen mit Verbrauchern' in: Schlosser, P., Bachmann, B. (eds.), *Grenzüberschreitungen: Beiträge zum Internationalen Verfahrensrecht und zur Schiedsgerichtsbarkeit ; Festschrift für Peter Schlosser zum 70. Geburtstag,* Tübingen, Mohr Siebeck, p. 543.

for consumers in an adequate manner. In other words, considering to integrate consumer protection and due care to the consumer´s needs in the arbitral proceedings, will lead to a path that will lead us to an arbitration tailor made for consumer disputes, that may differ from the classical definition of arbitration.

As an illustration, one can mention jurisdictions, which developed arbitration for consumers. Argentina and Spain have created a National System for Consumer Arbitration.[298] Portugal also has made very successful experience with their consumer arbitration bodies.[299] In those countries consumer arbitration is not only an arbitration with a consumer party, but much more an arbitration tailor made for consumer disputes, with differentiated costs, specific rules for the nomination of arbitrators, specific adherence methods for suppliers, amongst other important provisions to guide consumer arbitration.

Based on this positive experience from other jurisdictions, it is possible and even desirable to develop arbitration for consumers also in Brazil[300] and Germany. Even further, to develop consumer arbitration for property development disputes, paying due regard to the particularities of the contract and to the consumers and suppliers´ needs.[301] Therefore, this thesis supports a definition of consumer arbitration that goes beyond the mere participation of a consumer in the proceedings. Consumer arbitration should be understood and developed as an arbitration that provides access to justice and consumer protection at the same time.

[298] Argentina (1998), Decree 276/98 - Sistema Nacional de Arbitraje de Consumo. Spain (2008), Royal Decree 231/2008 - Sistema Arbitral de Consumo.
[299] Portugal (2011), Law-Decree No. 60/2011 - Nacional de Centros de Arbitragem Institucionalizada. Neves, C. (2012), '16 queixas por semana resolvidas por arbitragem - Portugal - DN', *Diário de Notícias*, 10.01.12.
[300] See Lemes, Selma M. Ferreira (2003), 'O Uso da Arbitragem nas Relações de Consumo', *Valor Econômico, Caderno Legislação & Tributos*, 12.08.03.
[301] See below Chapter IV, B, 2 about developing consumer arbitration for property development disputes in inspired by the models of jurisdictions like Spain and Portugal.

d) Consumer arbitration in the European ADR Directive

Although arbitration is an ADR method, the Directive 2013/11/EU only mentions the word arbitration once. This implies that the norm does not propose arbitration as a dispute resolution method to be used in the European ADR bodies.[302] Item (29) of the Directive´s Preamble ratifies this understanding.[303] There, arbitration is not put on the same level as the other proposed ADR methods, like mediation and conciliation, but seen as a subsequent proceeding to be followed if the ADR is not successful.

The view articulated in the Directive has many facets. It firstly clearly expresses that this ADR Directive does not aim to implement arbitration in the European ADR bodies and even tends to exclude arbitration from the ADR definition used in the norm. Which has to be seen critically, since arbitration is widely recognized as one type of ADR.

Secondly, item (29) levels arbitration and court proceedings equally, assuming that *ultima ratio*, parties will either start court or arbitration proceedings. Therewith it implies that arbitration and court proceedings are more comparable than arbitration and other ADR methods. Both court and arbitration proceedings end up with a binding decision made by a third person, may it be a judge or an arbitrator. Contrarily, mediation or conciliation, for example, search for a consensual decision made by the parties. In fact, the state must have acknowledged the equivalence of arbitration proceedings and court proceedings in order to give up its jurisdiction monopoly in favor of arbitral tribunals in face of an arbitration clause. [304]

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[302] See Coester-Waltjen, D. (2017), 'Schiedsgerichtsbarkeit und Verbraucher' in: Hess, B. (ed.), *Der europäische Gerichtsverbund - Gegenwartsfragen der internationalen Schiedsgerichtsbarkeit - Die internationale Dimension des europäischen Zivilverfahrensrechts,* Bielefeld, Gieseking-Verlag, p. 86.
[303] European Union (2013), Directive 2013/11/EU. Directive on Consumer ADR "*Confidentiality and privacy should be respected at all times during the ADR procedure. Member States should be encouraged to protect the confidentiality of ADR procedures in any subsequent civil or commercial judicial proceedings or arbitration.*"
[304] See: Brazil (2015), Law No. 13.105 and Germany (2005), Zivilprozessordnung.

Thirdly, the Directive presumably excludes arbitration from its roll of suitable ADR methods for consumer disputes because it targets the most common consumer claims, which are those of small value.[305] A great number of consumer complaints refer to product or service defects that have the pontential to be solved consensually with the trader. Traders understand that it is simpler, faster and cheaper to propose a solution outside of the courts. Therefore, the ADR methods proposed in the Directive are generally suitable for consumer claims of small value.[306] Neither consumers nor traders would enter into an arbitration to solve claims of low value. The costs of arbitration may exceed the costs of the defective product or service itself and an arbitration proceeding is not worth it for most consumer complaints. This also means that the ADR Directive did not envisage the procedural solution for property development disputes, which are generally claims with a greater value and can be adequate for arbitration.

In sum, the out-of-court methods are gaining importance each day to solve consumer disputes. ADR schemes are particularly satisfactory for consumers who want to resolve small claims. On the other hand, consumer arbitration is an ADR method that could sustain consumer claims of a big value,[307] but does not seem to be riding the growing wave of other ADR methods in the consumer´s sphere.

e) Consumer arbitration as an institutional bypass

Arbitration represents a way to access jurisdiction, to those who want to avoid the many times long and stony path of the judiciary. In

[305] Hess, B. (2015), 'Prozessuale Mindestgarantien in der Verbraucherschlichtung', *Juristenzeitung*, Vol. 70, p. 549.
[306] Hodges, C., Benöhr, I., Creutzfeldt-Banda, N. (2012), *Consumer ADR in Europe*: *Civil Justice Systems*, Oxford and Portland, Oregon, Hart Publishing.
[307] See Kutschera, M. (2007), 'Vorteile des schiedsgerichtlichen Verfahrens' in: Torggler, H. (ed.), *Praxishandbuch Schiedsgerichtsbarkeit,* Wien, Verl. Österreich, p. 936. See also: Wagner, G., Quinke, D. (2005), 'Ein Rechtsrahmen für die Verbraucherschiedsgerichtsbarkeit', *JZ*, Vol. 19, 932 - 939.,according to whom, arbitration is not worth the costs for resolving consumer small claims.

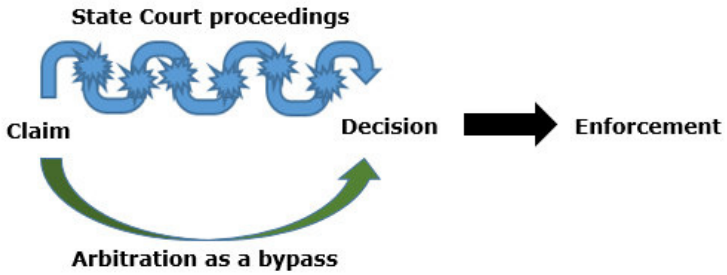
this sense, arbitration is a type of institutional bypass. The institutional bypass theory, created by Dr. Prado,[308] explains the phenomenon of creating new public or private institutions to reach the same results as a mal-functioning public institution would reach, but faster and more efficiently.

Creating bypasses is often the best option to deliver quality service to the society instead of reforming the public institutions. A reform costs not only money and time but also counts on numerous opponents, who were profiting from the non-working system. Therefore, in many cases in the public sector, instead of improving the existing system, it is easier to create a bypass. Create another institution to offer the same services in a more effective way, without replacing the pre-existing institution. Although Dr. Prado´s studies are in field of public law and even public administration, they contribute to justify the development of consumer arbitration as an alternative to services offered by the public courts.

Pursuant to her, *"an institutional bypass is analogous to a road bypass. A road bypass goes around a town or village, allowing drivers to deviate from the town centre, avoiding the slower limits and possibly traffic jams. Similarly, an institutional bypass creates a new pathway around clogged or blocked institutions."*[309] Thus, arbitration represents a pathway around a congested public institution. It aims to be more efficient than the judiciary and competes with it. Dr. Prado confirms this by asserting: *"Private arbitration can be considered a bypass because even though the ordinary legal dispute resolution system (state courts) remains in place, the parties can choose to have their legal dispute adjudicated by a private party. Arbitration*

[308] Prado, M. M. (2011), *Institutional Bypass: An Alternative for Development Reform*, available at: papers.ssrn.com/sol3/papers.cfm?abstract_id=1815442. 15.07.2016, p.19.
[309] Prado, M. M. (2011), *Institutional Bypass: An Alternative for Development Reform*, available at: papers.ssrn.com/sol3/papers.cfm?abstract_id=1815442. 15.07.2016, p.39.

tribunals could therefore be considered a means for private parties to avoid perceived shortcomings in state judicial systems."[310]



Arbitration fits the three main characteristics of an institutional bypass.[311] First, it does not modify or reform the public institution. Courts continue to exist. Second, it only creates an alternative path to deliver the services that a court would do, namely to issue a final decision about the dispute. Third, it seeks to be more efficient or functional than courts, with faster proceedings, party appointed arbitrators, more flexible proceedings and party chosen rules.

Furthermore, arbitration is a type of private bypass, since this is a bypass to a public institution – the judiciary – implemented by private parties.[312] In contrast to that, there are public bypasses in the field of access to justice, implemented by the government itself. A good example is the National Board for Consumer Disputes (ARN) in Sweden. The Board is a public authority, competent to decide on consumer disputes.[313] The European Community recognizes it as an ADR body.[314] Sweden has experienced great success with ARN and

[310] Prado, M. M. (2011), *Institutional Bypass: An Alternative for Development Reform*, available at: papers.ssrn.com/sol3/papers.cfm?abstract_id=1815442. 15.07.2016, p.9.
[311] Prado, M. M. (2017), 'Institutional Bypasses in Brazil: Overcoming Ex-Ante Resistance to Institutional Reforms' in: Fortes, P., Boratti, L. V., Palacios Lleras, A., Daly, T. G. (eds.), *Law and policy in Latin America: Transforming courts, institutions, and rights / Pedro Fortes, Larissa Boratti, Andres Palacios Lleras, Tom Gerald Daly, Editors,* London, United Kingdom, Palgrave Macmillan, p. 32 and 39.
[312] Prado, M. M. (2011), *Institutional Bypass: An Alternative for Development Reform*, available at: papers.ssrn.com/sol3/papers.cfm?abstract_id=1815442. 15.07.2016.p. 39.
[313] *The National Board for Consumer Disputes (ARN)*, available at: www.arn.se/other-languages/english-what-is-arn/. 03.12.2015.
[314] European Commission - Consumers (2013), *Out of court bodies in your country*, available at: ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/national-out-of-court-bodies/index_en.htm. 03.12.2015.

consumers rarely go to courts.[315] However, the implementation of a bypass like the ARN by the government comes with a certain burden to the state. To implement a public bypass, the state has to issue regulations and provide for the organizational apparatus of the new institution.[316] Hence, arbitration, as a private bypass solution, may be more interesting for the state. It relieves the state not only of the juridical services but also of the organizational and regulatory aspects that are linked to the juridical activity.

In conclusion, consumers, business and even the judiciary itself can profit from arbitration as a private bypass. Parties can find in arbitration a shortcut to achieve the dispute resolution. Since arbitration comes from a private initiative, the state does not have the same organizational burden as it would have creating new institutions or making a judiciary reform. Lastly, the concurrence between the judiciary and arbitration brings advantages also for the first. Arbitration can minimize the overload of proceedings in the judiciary and promote a healthy juridical discussion in different fields.

D. Arbitration as access to justice for consumers in property development disputes

It is clear, based on the findings above, that consumers and governments are investing in solutions for consumer disputes other than the judicial ones. Construction cases also tend to be resolved outside of courts,[317] and the judicial dispute resolution method is considered *ultima ratio*.[318] However, when it comes to disputes

[315] Hodges, C., Benöhr, I., Creutzfeldt-Banda, N. (2012), *Consumer ADR in Europe*: *Civil Justice Systems*, Oxford and Portland, Oregon, Hart Publishing, p.229.
[316] See Cappelletti, M. (1993), 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement', *The Modern Law Review*, Vol. 56, p. 285.
[317] Boldt, A. (2012), 'T. Außergerichtliche Streitbeilegung' in: Messerschmidt, B., Voit, W. (eds.), *Privates Baurecht: Kommentar zu §§631 ff. BGB,* München, C. H. Beck, para. 2. Koeble, W. (2014), '1. Teil. Außergerichtliche Streitbeilegung und schiedsgerichtliche Verfahren' in: Kniffka, R., Koeble, W. (eds.), *Kompendium des Baurechts: Privates Baurecht und Bauprozess,* München, C. H. Beck, para. 91.
[318] Englert, K., Franke, H., Grieger, W. (2006), *Streitlösung ohne Gericht*: *Schlichtung, Schiedsgericht und Mediation in Bausachen*, Neuwied, Werner, paras 7-8.

between consumers and construction companies arbitration is not commonly used.[319] In this sense, a key question arises: If both, consumers and construction companies, are willing to resolving conflicts away from state courts, why do consumerists not encourage the use of arbitration to resolute property development conflicts?

Whether arbitration is an advisable dispute resolution method for B2C property development disputes depends on mainly two aspects. Firstly, on the suitability of these disputes for arbitral proceedings (1) and second, on the balance between the advantages that arbitration offers and the disadvantages that the parties have to consider, before deciding between litigation or arbitration (2). In the next subpoints, this work will discourse about these two aspects.

1. Suitability of property development disputes to arbitration

Arbitration may be an efficient alternative to court proceedings. However, this dispute resolution method does not fit any disputes.[320] There are special types of disputes, which potentiate the advantages of arbitration and are therefore, more suitable to arbitration than others.

According to Kutschera, six types of disputes are particularly suitable for arbitration.[321] They are: first, complex disputes; second, disputes that require especial knowledge or expertise from the decision body; third, disputes with an international background; fourth, disputes in which language barriers or a variety of languages plays a role; fifth, disputes with parties who wish to individually

[319] Koeble, W. (2014), '1. Teil. Außergerichtliche Streitbeilegung und schiedsgerichtliche Verfahren' in: Kniffka, R., Koeble, W. (eds.), *Kompendium des Baurechts: Privates Baurecht und Bauprozess,* München, C. H. Beck, para. 91.
[320] Bělohlávek, A. J. (2012), 'Arbitrability limitation in consumer (B2C) disputes?: Consumer´protection as legal and economic phenomenon', *Journal of Governance and Regulation*, Vol. 1, Issue 3, p. 157.
[321] Kutschera, M. (2007), 'Vorteile des schiedsgerichtlichen Verfahrens' in: Torggler, H. (ed.), *Praxishandbuch Schiedsgerichtsbarkeit,* Wien, Verl. Österreich, pp. 41 - 51.

design the proceedings; and sixth, disputes with parties who urge for a quick decision.

Out of these six, three stand out regarding property development disputes, namely the complexity of construction disputes, the consequent need for experts as deciding people and the wish of the parties to have a quick decision. These aspects will reflect the advantages of arbitration described below in more deepness.[322]

a) Complexity of construction disputes

Construction disputes tend to be complex.[323] They encompass factors that make it more multifaceted than other civil matters. Illustratively, they may have more parties involved, like buyer, developer and constructor or even a material deliverer; they usually involve high costs and therefore a high amount in controversy; they regard a long period – years or sometimes even decades - for the fulfillment of the contract.[324]

The more parties, contracts, and factors involved, the more complex is the dispute. When different companies are involved in the construction, it is particularly challenging to determine the extent of the liability of each party involved, when it comes to damages. Moreover, in construction cases, it is generally demanding to detect the facts that amount to a construction defect and its consequences; hence, a case involving numerous single construction defects, which

[322] See below Chapter III, D, 2, a.
[323] See(2015) in: Bockstiegel, K., Kröll, S., Nacimiento, P. (eds.), *Arbitration in Germany. The model law in practice. 2nd, rev. ed: The Model Law in practice,* Den Haag, Kluwer Law International.; Benedict, C. (2015), 'Part IV – Selected Areas and Issues of Arbitration in Germany, Construction Arbitration' in: Bockstiegel, K., Kröll, S., Nacimiento, P. (eds.), *Arbitration in Germany. The model law in practice. 2nd, rev. ed: The Model Law in practice,* Den Haag, Kluwer Law International, paras. 3-5. See also Hau, W. (2013), '5. Teil. ABC der Klauseln und Vertragstypen: Schiedsklausel' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck, paras. 55 - 56. Although Hau argues that arbitration is not suitable for consumer disputes or for domestic disputes, he admits that complex cases may justify the use of arbitration, even in domestic cases.
[324] Englert, K., Franke, H., Grieger, W. (2006), *Streitlösung ohne Gericht*: *Schlichtung, Schiedsgericht und Mediation in Bausachen*, Neuwied, Werner, para. 1.

is not rare, is an intricate one.[325] In sum, construction disputes tend to be more complicated than other civil matters and therefore, need a more suitable dispute resolution method, like arbitration.[326]

b) Need for an expert decision body

The necessity to have a decision body with especial knowledge about the issues in dispute is a consequence of the aforementioned complexity of the construction disputes. Depending on the degree of technical or legal complexity of the dispute, it is desirable to have experts in that particular relevant field of knowledge as arbitrators.[327] A specialized decision body increases the quality of the decision and may even reduce the costs and the time of proceedings.[328]

Complex construction cases require difficult interdisciplinary knowledge from the decision maker, which the judge normally does not have.[329] Consequently, a judge will often need an expert to help make the necessary findings of the decision,[330] this will cost the parties time and money. Hence, one of the primary reasons for the use of arbitration in construction disputes is the need to have the technically complex questions understood and decided by experts.[331]

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[325] Bietz, H. (2003), 'Baustreitigkeiten vor dem Schiedsgericht', *Neue Zeitschrift für Baurecht und Vergaberecht*, p. 178.
[326] Englert, K., Franke, H., Grieger, W. (2006), *Streitlösung ohne Gericht*: *Schlichtung, Schiedsgericht und Mediation in Bausachen*, Neuwied, Werner, para. 5.
[327] Hoellering, M. F. (op. 1991), 'The Qualifications of Arbitrators for Construction Disputes' in: van den Berg, A. J. (ed.), *International council for commercial arbitration: I. preventing delay and disruption of arbitration : II. effective proceedings in construction cases : [Xth International Arbitration Congress, Stockholm, 28-31 May 1990],* Deventer, Boston, Kluwer Law and Taxation Publ, pp. 413–414.
[328] See Bietz, H. (2003), 'Baustreitigkeiten vor dem Schiedsgericht', *Neue Zeitschrift für Baurecht und Vergaberecht*, pp. 177–179.
[329] See Englert, K., Franke, H., Grieger, W. (2006), *Streitlösung ohne Gericht*: *Schlichtung, Schiedsgericht und Mediation in Bausachen*, Neuwied, Werner, para. 2.
[330] Bietz, H. (2003), 'Baustreitigkeiten vor dem Schiedsgericht', *Neue Zeitschrift für Baurecht und Vergaberecht*, p. 178.
[331] Hoellering, M. F. (op. 1991), 'The Qualifications of Arbitrators for Construction Disputes' in: van den Berg, A. J. (ed.), *International council for commercial arbitration: I. preventing delay and disruption of arbitration : II. effective proceedings in construction cases : [Xth International Arbitration Congress, Stockholm, 28-31 May 1990],* Deventer, Boston, Kluwer Law and Taxation Publ, pp. 413–414. Englert even talks about the "*Nichtjustizibilität*" of construction cases, see: Englert, K., Franke, H., Grieger, W. (2006), *Streitlösung ohne Gericht*: *Schlichtung, Schiedsgericht und Mediation in Bausachen*, Neuwied, Werner para. 2.

c) Need for a quick decision

Construction cases urge for a fast solution. On the other hand, their complexity hinders the ordinary justice to act fast.[332] In this case, arbitration is highly recommended.

Especially in property development issues, time is an enemy of the parties as soon as a dispute arises. During the construction phase, a pending judicial decision may hinder the construction. Hence, both developers and buyers are interested in a quick decision. One lost day in a construction site amounts to high costs for the developer and to delay in delivery for the buyer.

After the delivery, if a dispute arises, especially the consumer needs a rapid outcome. A pending decision about a construction defect, for instance, may hinder the consumer to live in their newly bought apartment or hinder them to use it entirely. When consumers sign the contract for the purchase of a household unit through a property development contract, they are usually very interested in the delivery date. The contract must set a date for giving out the apartment keys with all permits from the city hall. Many buyers make their family plans depending on the contractual date. They set their marriage for one month after the delivery date or even plan to have a baby, to move in with someone, etc. depending on that date. Consequently, if a dispute arises, preventing the buyer to reside in their new apartment, or preventing them from a flawless housing, the time dedicated to solving the dispute must be as short as possible in order to give the consumer effective protection. Otherwise, the proceedings would only be an extension of that longed-for time in which the consumer can reside in their new apartment. Prof.

[332] See Benedict, C. (2015), 'Part IV – Selected Areas and Issues of Arbitration in Germany, Construction Arbitration' in: Bockstiegel, K., Kröll, S., Nacimiento, P. (eds.), *Arbitration in Germany. The model law in practice. 2nd, rev. ed: The Model Law in practice,* Den Haag, Kluwer Law International, para. 77."*Satisfactory handling of court proceedings in construction and engineering affairs requires a lot of time and effort to address the specific complexities inherent in such disputes*."

Zuckerman, by analyzing the efficiency of civil courts, warns: "*A lengthy delay in resolving a property dispute will tend to erode the usefulness of the right in dispute.*"[333]

Thus, a sentence that comes years later, even if in favor of the consumer, has already caused damage to it.[334] It has caused rent costs, psychological stress and has not lived up to the consumer´s needs upon the contract. For this reason, the temporal aspect of arbitration is a great advantage for property development disputes.[335]

2. Pros and Cons of arbitration for B2C property development disputes

Despite the above, one cannot assume that arbitration is the best dispute resolution method for all property development disputes. It is necessary to investigate in a case-to-case basis, whether the consumers need a bypass to solve their disputes more efficiently, or if court proceedings are more beneficial. To address this question, one has to confront the advantages and the disadvantages of arbitration proceedings in comparison to litigation in courts. This legal comparison of pros and cons is only productive if made in a definite context.[336] For this purpose, in the present study, the advantages and disadvantages are described from a consumer´s perspective in the context of property development disputes.

The comparison below is punctual and does not cover all possible advantages and disadvantages of arbitration in confrontation to litigation. Only the most important and debated points will be presented, knowing that in the individual case other aspects can arise,

[333] Zuckerman, A. (2014), 'The civil court - A public service for the enforcement of rights requiring effective management' in: Adolphsen, J., Goebel, J., Haas, U., Hess, B., Kolmann, S., Würdinger, M. (eds.), *Festschrift für Peter Gottwald zum 70. Geburtstag,* München, C.H. Beck, p. 716.
[334] See Englert, K., Franke, H., Grieger, W. (2006), *Streitlösung ohne Gericht*: *Schlichtung, Schiedsgericht und Mediation in Bausachen*, Neuwied, Werner, para, 1.
[335] See Kutschera, M. (2007), 'Vorteile des schiedsgerichtlichen Verfahrens' in: Torggler, H. (ed.), *Praxishandbuch Schiedsgerichtsbarkeit,* Wien, Verl. Österreich, paras 50-51.
[336] See van Aeken, K. (2012), '11 - Civil court litigation and alternative dispute resolution' in: Clark, D. S. (ed.), *Comparative law and society,* Cheltenham, U.K., Northampton, Mass., Edward Elgar, p. 217.

that will help the consumer and the developer to verify the adequacy of arbitration to their disputes.

a) Advantages in direct comparison to courts

The advantages of arbitration are what made this dispute resolution method so successful in the past years.[337] In this work, three main advantages associated with arbitration will be considered: speedy proceedings, flexibility of proceedings and the specialization of arbitrators.

i) Fast arbitration vs. lengthy court proceedings

One of the great advantages of arbitration is the short duration of proceedings.[338] In arbitration, the tribunal has to issue the award within a reasonable period or may have to comply with a fixed period of time to issue the award. The term can be set by the law, the institutional rules or the parties. For instance, Art. 23 of the LBA provides that if the parties do not set a term for the issuance of the award, the tribunal or sole arbitrator will have 6 months from the commencement of proceedings to do so. Section 33.1 of the Arbitration Rules of the German Institution for Arbitration requires tribunals to issue the award in a reasonable time.

Apart from the legal and institutional provisions, the speedy proceedings are also a consequence of two other factors. First, the interest of the arbitrators in issuing the award in a reasonable time, so that he/she sustains a good reputation in the arbitration field. The German Law, §1038 ZPO, allows parties to remove the arbitrator from

[337] Noussia, K. (2010), *Confidentiality in international commercial arbitration*: *A comparative analysis of the position under English, US, German and French law*, Berlin, New York, Springer, para. 15.
[338] Koeble, W. (2014), '1. Teil. Außergerichtliche Streitbeilegung und schiedsgerichtliche Verfahren' in: Kniffka, R., Koeble, W. (eds.), *Kompendium des Baurechts: Privates Baurecht und Bauprozess,* München, C. H. Beck, para. 92.

the panel if he/she is not working timely.[339] Diligent and timely work is a sign of efficiency and help arbitrators make a name in the arbitration scenario. Good arbitrators will be remembered by parties and counsels and will be nominated again. Second, arbitration generally does not bear a second instance, saving the time of an appeal.[340] Practice shows that, in general, complex arbitrations can take an average of two years. All in all, according to Koeble, arbitration is faster than courts in construction cases even if the respondent tries their best to delay the proceedings.[341]

In comparison to courts, the duration of arbitral proceedings positively stands out. In Brazil, construction cases can go on for many years, given the overload of proceedings that courts face.[342] Only in the STJ, which is the last instance for civil cases and therefore, difficult to reach, in 2015 there were still 254.826 cases from different years pending a final decision.[343] In Germany, proceedings tend to be faster than in Brazil but still not as fast as arbitration can be.[344] According to the *Statistisches Bundesamt*, proceedings in front of the *Landesgericht,* in which the parties do not reach an agreement, take in average 14,5 months.[345] If parties appeal to the *Oberlandesgericht*, the time more than doubles. It takes in average 31,2 months.[346] Bietz, who

[339] Duve, C., Sattler, M. (2010), 'Schiedsvereinbarungen in Verbraucherverträgen' in: Genzow, F. C. (ed.), *Zwischen Vertragsfreiheit und Verbraucherschutz: Festschrift für Friedrich Graf von Westphalen zum 70. Geburtstag,* Köln, O. Schmidt, p. 95.
[340] Vygen, K., Joussen, E. (2013), *Bauvertragsrecht nach VOB und BGB*: *Handbuch des privaten Baurechts*, Köln, Werner, p. 364. Benedict, C. (2015), 'Part IV – Selected Areas and Issues of Arbitration in Germany, Construction Arbitration' in: Bockstiegel, K., Kröll, S., Nacimiento, P. (eds.), *Arbitration in Germany. The model law in practice. 2nd, rev. ed: The Model Law in practice,* Den Haag, Kluwer Law International, para. 1.
[341] Koeble, W. (2014), '1. Teil. Außergerichtliche Streitbeilegung und schiedsgerichtliche Verfahren' in: Kniffka, R., Koeble, W. (eds.), *Kompendium des Baurechts: Privates Baurecht und Bauprozess,* München, C. H. Beck, para. 92.
[342] There is not official statistics about the lengh of B2C construction cases in the Brazilian courts, however, a simple research in the courts´ case-law database shows that most proceedings, from the beginning to the appeal decision, take more than 4 years to be resolved.
[343] STJ - Assessoria de Modernização e Gestão Estratégica (2015), p. 22
[344] Duve, C., Sattler, M. (2010), 'Schiedsvereinbarungen in Verbraucherverträgen' in: Genzow, F. C. (ed.), *Zwischen Vertragsfreiheit und Verbraucherschutz: Festschrift für Friedrich Graf von Westphalen zum 70. Geburtstag,* Köln, O. Schmidt, p. 95. A well-known example of late justice in Germany is the case ECtHR (2006), Sürmeli vs. Germany - Application no. 75529/01, where the ECRH held that there had been a violation of the right to an effective remedy and of the right to a fair hearing (Arts. 13 and 6 §1 EConHR) in respect of the excessive length of pending civil proceedings in Germany, because of a sue made by Mr. Sürmeli, which took more than 16 years in total.
[345] Statistisches Bundesamt (2014), p. 56
[346] Statistisches Bundesamt (2014), p. 102

acted as a judge for more than 30 years, reminds us, that these statistics do not concern only construction cases and suggests that one should add 20% more time to reach the average duration of construction proceedings, which are in average more complicated than other civil cases.[347] Following his advice, the proceedings would reach more than three years, without considering the possibility of a review by the BGH. In fact, according to Dr. Ulrich Böttger, member of the executive committee of the working group for building and real estate law (ARGE) in the German lawyer association (DAV), construction cases take an average of 44 months just in the first instance.[348] Unfortunately, courts have proven to be slow in the resolution of construction cases,[349] when indeed fast proceedings is one of the consumer´s priorities in these cases and is considered a hurdle to the access to justice.[350]

ii) Flexible proceedings vs. rigid court proceedings

Arbitration, as a party autonomy driven process, gives the parties flexibility to shape their proceedings. Amongst many procedural aspects that the parties can define are the seat of arbitration and therewith the applicable arbitration law, the number of arbitrators and the method of nomination of arbitrators. Parties also decide if they want their arbitration to be administered by an arbitral institution and therewith adhere to the institution´s arbitration rules or if they want an

[347] Bietz, H. (2003), 'Baustreitigkeiten vor dem Schiedsgericht', *Neue Zeitschrift für Baurecht und Vergaberecht*, p. 178. Bietz justifies the additional percentage by explaining that in construction cases the court often needs to obtain the opinion of an expert. These proceedings are usually more complex than the others civil cases, especially if they verse about numerous construction defects.
[348] The data refers to all kinds of construction cases, not only those with consumer participation. IBRNews 19450 (2013), 'Baurecht fordert mehr Baukammern: Unzumutbare Prozessdauer bei Baurechtsverfahren', Press release, 23 May 2013.
[349] Boldt, A. (2012), 'T. Außergerichtliche Streitbeilegung' in: Messerschmidt, B., Voit, W. (eds.), *Privates Baurecht: Kommentar zu §§631 ff. BGB,* München, C. H. Beck, para. 3. Vygen, K., Joussen, E. (2013), *Bauvertragsrecht nach VOB und BGB*: *Handbuch des privaten Baurechts*, Köln, Werner. "*Bauprozesse vor den staatlichen Gerichten in Deutschland dauern durchweg erheblich länger als andere Rechtsstreitigkeiten*." See also Kutschera, M. (2007), 'Vorteile des schiedsgerichtlichen Verfahrens' in: Torggler, H. (ed.), *Praxishandbuch Schiedsgerichtsbarkeit,* Wien, Verl. Österreich, pp. 37–56.
[350] See above Chapter III, B, 2.

ad hoc arbitration.[351] Especially in international arbitrations, parties should pay due attention to the choice of the language of the proceedings and the substantive law that should be applicable to the case.[352]

Nevertheless, arbitration, as a dispute resolution method recognized by the state, has to comply with the national arbitration law, especially observing mandatory rules and the due process principle. §1042 (3) ZPO affirms that the parties can regulate the proceedings themselves or adhere to institutional rules, but they may not deviate from the mandatory provisions of the 10th book of the ZPO.[353] Similarly, Art. 2 LBA gives the parties freedom to choose the rules to govern the arbitration, as long as they do not harm morality and *ordre public*.[354]

In contrast, court proceedings follow strict provisions from the civil procedure code and are not adaptable to the needs of the individual parties or disputes.[355] In court, parties cannot freely decide where to sue, there are certain limitations dictated by the law. They cannot choose their judges. The language of proceedings is most likely mandatorily the official language of the country[356] and most jurisdictions will never allow a judge to decide based on equity or to

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[351] McIlwrath, M., Savage, J. (2010), *International arbitration and mediation*: *A practical guide / Michael McIlwrath, John Savage*, Austin, Wolters Kluwer.

[352] See Berger, K. P. (2015), 'Part III, 16th Scenario: The Commencement of the Arbitration' in: Berger, K. P. (ed.), *Private International Dispute Resolution in International Business: Negotiation, Mediation, Arbitration,* Alphen aan den Rijn, Wolters Kluwer, Law & Business, paras. 16-23. Bietz, H. (2003), 'Baustreitigkeiten vor dem Schiedsgericht', *Neue Zeitschrift für Baurecht und Vergaberecht*, p. 178.

[353] See Duve, C., Sattler, M. (2010), 'Schiedsvereinbarungen in Verbraucherverträgen' in: Genzow, F. C. (ed.), *Zwischen Vertragsfreiheit und Verbraucherschutz: Festschrift für Friedrich Graf von Westphalen zum 70. Geburtstag,* Köln, O. Schmidt, p. 95.

[354] See Veirano, R. C., Backsmann, T. A. (2015), 'Schiedsgerichtsbarkeit in Brasilien: Einige Neuigkeiten und Ausgewählte Themen für Ausländische Investoren' in: Cascante, C., Spahlinger, A., Wilske, S. (eds.), *Global Wisdom on Business Transactions, International Law and Dispute Resolution: Festschrift für Gerhard Wegen zum 65. Geburtstag,* München, Beck, C H, p. 774.

[355] See Lew, Julian D. M, Mistelis, L. A., Kröll, S. (2003), *Comparative international commercial arbitration*, The Hague, New York, Frederick, MD, Kluwer Law International; Sold and distributed in North, Central and South America by Aspen Publishers, paras. 1-4.

[356] The German lawmaker has been discussing the possibility of introducing English as a language for court proceedings as long as both parties so agree and the case has a connection to the language, for instance, when the contract´s language is English. See Armbrüster, C. (2011), 'Fremdsprachen in Gerichtsverfahren', *NJW*, pp. 812–817 and Kummermehr, M. (2011), 'Zur englischen Sprache vor deutschen Gerichten', *NJ*, pp. 195–197.

deviate in any form from the national law.[357] In fact, it is extremely important for the law to provide the society with well-regulated state court proceedings, achieving legal security. On the other hand, the procedural formalities produce a more complex process.[358]

However, the flexibility of arbitration does not only have a bright side. In the context of consumer arbitration, arising out of a standard property development contract, there is great concern that the consumer does not fully profit from the flexibility of arbitral proceedings, since they usually do not discuss the specific aspects of a future proceeding with the counter party.[359] Arbitration clauses are the primordial source of the features of the proceedings and in a standard contract the developer drafts them unilaterally. As a result, developers alone determine the seat of arbitration, the substantive law, the institution, etc.

Nevertheless, the law minimizes this problem by applying the equality principle.[360] Within the scope of equality and proportionality, the proceedings cannot be conceived in a way that there are much more advantages for one party than for the other.[361] Moreover, scholars discuss the application of content control to arbitration clauses, under which the developer must not impose on the consumer an unreasonable disadvantage in the shaping of the arbitration clause.[362] Legal basis for this in Germany is §307 (1) BGB and in

[357] Kutschera, M. (2007), 'Vorteile des schiedsgerichtlichen Verfahrens' in: Torggler, H. (ed.), *Praxishandbuch Schiedsgerichtsbarkeit,* Wien, Verl. Österreich, pp. 37–56.
[358] Pitkowitz, N. (2015), 'Die Schiedsgerichtsbarkeit im Wettbewerb mit staatlicher Gerichtsbarkeit: Eine Analyse aus österreichischer Sicht' in: Cascante, C., Spahlinger, A., Wilske, S. (eds.), *Global Wisdom on Business Transactions, International Law and Dispute Resolution: Festschrift für Gerhard Wegen zum 65. Geburtstag,* München, Beck, C H, pp. 725–731.
[359] As above discussed, B2C property development contracts are usually standard contracts, entirely drafted solely by the developer. See above Chapter II, E, 2.
[360] See §1042 (1) ZPO.
[361] See Duve, C., Sattler, M. (2010), 'Schiedsvereinbarungen in Verbraucherverträgen' in: Genzow, F. C. (ed.), *Zwischen Vertragsfreiheit und Verbraucherschutz: Festschrift für Friedrich Graf von Westphalen zum 70. Geburtstag,* Köln, O. Schmidt, pp. 81–109.
[362] Although the application of content control to arbitration clauses is not incontroversial, there are scholars who support it. See below Chapter V, A, to read about the content control of arbitration clauses in more depth.

Brazil Art. 51, §1 (III) CDC.[363] Hence, clauses in standard contracts, which provide for an unbalanced arbitration, will not be considered valid by the national courts. Flexibility, enabling tailor-made proceedings for the parties, remain an advantage of arbitration over court proceedings also in B2C disputes.

iii) Specialization of arbitrators vs. legal judge

Differently from court proceedings, the parties in arbitration have influence on who will decide their case.[364] They can nominate the arbitrators that will build the decision body. Hence, parties can appoint people with specific expertise on issues related to their dispute,[365] increasing the quality of the decision and the efficiency of the process.[366]

The specialization of arbitrators is a great advantage, especially in property development disputes with focus on construction problems.[367] Parties will search for an arbitrator with knowledge in the construction field, who will understand the specificities of the

[363] See for example OLG Brandenburg (2011), 13 U 11/10, where the court did not find any unreasonable disadvantage in an arbitration clause inside a construction contrac, according to §307 BGB and the clause remained valid. See also BGH (2007), III ZR 164/06, where the drafter determined the name of the sole arbitrator in the clause, leaving no space for the other party to participate in the nomination. The court recognized that this determination of the arbitrator´s name was an unreasonable disadvantage for the contractual partner, however, instead of declaring the clause´s nullity, under §307 BGB, it redirected the party to the remedy in §1034 (2) ZPO, by which the harmed party may ask the jugde to nominate the arbitrator.
[364] Pitkowitz, N. (2015), 'Die Schiedsgerichtsbarkeit im Wettbewerb mit staatlicher Gerichtsbarkeit: Eine Analyse aus österreichischer Sicht' in: Cascante, C., Spahlinger, A., Wilske, S. (eds.), *Global Wisdom on Business Transactions, International Law and Dispute Resolution: Festschrift für Gerhard Wegen zum 65. Geburtstag,* München, Beck, C H, p. 727.
[365] Pitkowitz, N. (2015), 'Die Schiedsgerichtsbarkeit im Wettbewerb mit staatlicher Gerichtsbarkeit: Eine Analyse aus österreichischer Sicht' in: Cascante, C., Spahlinger, A., Wilske, S. (eds.), *Global Wisdom on Business Transactions, International Law and Dispute Resolution: Festschrift für Gerhard Wegen zum 65. Geburtstag,* München, Beck, C H, p. 729. Bietz, H. (2003), 'Baustreitigkeiten vor dem Schiedsgericht', *Neue Zeitschrift für Baurecht und Vergaberecht*, p. 182 Koeble, W. (2014), '1. Teil. Außergerichtliche Streitbeilegung und schiedsgerichtliche Verfahren' in: Kniffka, R., Koeble, W. (eds.), *Kompendium des Baurechts: Privates Baurecht und Bauprozess,* München, C. H. Beck, para. 92.
[366] Kutschera, M. (2007), 'Vorteile des schiedsgerichtlichen Verfahrens' in: Torggler, H. (ed.), *Praxishandbuch Schiedsgerichtsbarkeit,* Wien, Verl. Österreich, p. 33.
[367] See Lew, Julian D. M, Mistelis, L. A., Kröll, S. (2003), *Comparative international commercial arbitration*, The Hague, New York, Frederick, MD, Kluwer Law International; Sold and distributed in North, Central and South America by Aspen Publishers paras. 1-25. on the advantage of having a specialist arbitrator in cases of a particular industry, like construction.

case, may it be an engineer, an architect or a real estate lawyer.[368] This will make a significant difference in how proceedings will flow compared to courts. These arbitrators will be better prepared than judges to deal with this type of concrete cases.

A noteworthy advantage of having an expert in the decision body is that in arbitration, even in complex cases, the necessity to invite an expert is less frequent than in courts.[369] Even if the arbitral tribunal invites an expert, their questions to them are qualitatively better and more punctual, given their knowledge about the matter of the case. Furthermore, when they advise the parties to reach an agreement, their suggestions are generally fairer and more suitable for the case, since they are advising in their area of specialization.[370]

In courts, however, judges are rarely prepared to decide on these matters with the necessary expertise. The construction field tends to produce disputes of high technical complexity[371] and judges in general have insufficient training in private construction law and few understanding of the matter.[372] In courts, the same judge who will

[368] See Hoellering, M. F. (op. 1991), 'The Qualifications of Arbitrators for Construction Disputes' in: van den Berg, A. J. (ed.), *International council for commercial arbitration: I. preventing delay and disruption of arbitration : II. effective proceedings in construction cases : [Xth International Arbitration Congress, Stockholm, 28-31 May 1990],* Deventer, Boston, Kluwer Law and Taxation Publ, p. 413.
[369] Motzke, G. (2009), '§4 Prozessuale Besonderheiten von Baustreitigkeiten' in: Motzke, G. (ed.), *Prozesse in Bausachen: Privates Baurecht, Architektenrecht,* Baden-Baden, Nomosp. 727.
[370] Bietz, H. (2003), 'Baustreitigkeiten vor dem Schiedsgericht', *Neue Zeitschrift für Baurecht und Vergaberecht*, p. 178.
[371] Benedict, C. (2015), 'Part IV – Selected Areas and Issues of Arbitration in Germany, Construction Arbitration' in: Bockstiegel, K., Kröll, S., Nacimiento, P. (eds.), *Arbitration in Germany. The model law in practice. 2nd, rev. ed: The Model Law in practice,* Den Haag, Kluwer Law International, paras. 1-6.
[372] Englert, K., Franke, H., Grieger, W. (2006), *Streitlösung ohne Gericht*: *Schlichtung, Schiedsgericht und Mediation in Bausachen*, Neuwied, Werner, paras 1-2.

decide a complex construction case is the one confronted with innumerous other very different issues.[373] They are not specialized.[374]

Unfortunately, in the first hearing in courts, sometimes parties even have the feeling that the judges do not know their cases.[375] In complex cases they often too strongly advise parties to reach an agreement in order to avoid the high costs of inviting an expert.[376]

Nonetheless, Germany has tried to overcome the specialization problem in the judiciary by introducing §72a in the Gerichtsverfassungsgesetz – GVG in 2018. According to its section 2, district courts are to have special chambers for disputes arising from building and architectural contracts as well as from engineering contracts, insofar as they relate to construction work. This change corresponds to a long-standing demand of the sector to have more specialized jugdes, since the construction law matter has many specificities, with which most jugdes were not completely familiar. However, the extent of improvement brought by this measure is not yet to be proven. The reform is still young and the level of specialization that the judges will achieve depend on the number of cases and the matter of the cases decided by the constructions chambers.[377]

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[373] Carpi, F. (2014), 'Specialization of judges as an efficiency factor in civil justice' in: Adolphsen, J., Goebel, J., Haas, U., Hess, B., Kolmann, S., Würdinger, M. (eds.), *Festschrift für Peter Gottwald zum 70. Geburtstag,* München, C.H. Beck, pp. 73–80. "*Commercial disputes are extremely different from family questions or cases involving minors*"

[374] Specialization has proven to be the key for efficiency in many areas. So, says Carpi, who wrote about the specialization of judges. "*In the modern world, knowledge is increasingly compartmentalized and requires extremely thorough study. Frequently one orthopedist treats the knee, and another the hand. The cardiologist does not treat stomach problems. And so it goes. The same may be said of the engineer and the lawyer. Lawyers to, especially in the most economically developed countries, are required to be extremely specialized in order to offer clients an efficient service*." Carpi, F. (2014), 'Specialization of judges as an efficiency factor in civil justice' in: Adolphsen, J., Goebel, J., Haas, U., Hess, B., Kolmann, S., Würdinger, M. (eds.), *Festschrift für Peter Gottwald zum 70. Geburtstag,* München, C.H. Beck, p. 74.

[375] Bietz, H. (2003), 'Baustreitigkeiten vor dem Schiedsgericht', *Neue Zeitschrift für Baurecht und Vergaberecht*, p. 178.

[376] Vygen, K., Joussen, E. (2013), *Bauvertragsrecht nach VOB und BGB*: *Handbuch des privaten Baurechts*, Köln, Werner, paras. 3-6. Bietz, H. (2003), 'Baustreitigkeiten vor dem Schiedsgericht', *Neue Zeitschrift für Baurecht und Vergaberecht*, p. 178.

[377] Klose, B. (2017), 'Reform des Bauvertragsrechts 2017', *MDR*, 793 ss.

In fact, the lack of specialization of judges is still a ground for inefficiency in courts.[378] Reversely, it is a ground for the efficiency of arbitration. This advantage is one that the consumer can profit from in property development disputes, in which defects in construction are the critical point. The decision and efficiency of court proceedings may be sufficient for many small claims and other commercial issues in consumerist level. However, in the construction field, the expertise of the decision body or of the decision person makes a notable difference in the case management and in the quality of the final decision.

b) Disadvantages

In the search for the adequate method of dispute resolution for a certain case, the parties must not oversee the disadvantages of each method. Arbitration represents an advance in comparison to courts in the aspects above mentioned, but it also may be disadvantageous in other aspects. Three main disadvantages will be presented: the consumer´s lack of procedural knowledge, the uncertainty of requests for interim measures and the confidentiality.

It must be remembered, that the aspects below are disadvantageous for the proceedings in study, nevertheless, they may appear as an advantage in B2B proceedings.

i) Consumer´s lack of procedural knowledge

A critical point about arbitration for consumer disputes is that the consumers have few or no knowledge about this process.[379]

[378] Carpi, F. (2014), 'Specialization of judges as an efficiency factor in civil justice' in: Adolphsen, J., Goebel, J., Haas, U., Hess, B., Kolmann, S., Würdinger, M. (eds.), *Festschrift für Peter Gottwald zum 70. Geburtstag,* München, C.H. Beck, pp. 73–80.
[379] Casey, K. R. (2009), 'Mandatory Consumer Arbitration', *The Metropolitan Corporate Counsel*, August 2009.

Particularly in Germany and Brazil, where arbitration is not as prominent as conciliation and mediation in the consumer field, arbitration can embody a great challenge for consumers. Advantages, like the free choice of the dispute resolution method, or the flexibility of the arbitration proceedings are suppressed by the lack of procedural knowledge of the consumer.

Consumers, who do not know what arbitration is already before the signature of the contract, are unable to choose freely this method for their contractual disputes.[380] They do not have sufficient information about arbitration, its advantages and disadvantages, to consciously want it as their dispute resolution method.

Moreover, consumers are not well informed to be able to shape the proceedings to their needs. As above explained,[381] in arbitration it is up to the parties to choose many characteristics of their proceedings, like the seat of arbitration, method of composition of the tribunal, applicable law, applicable arbitration rules, etc. Consumers are rarely informed enough to be able to make these decisions.

Further, the information level of consumers about arbitration becomes obsolete inside the standard property development contract, where the consumer is not in a bargaining position to actively discuss if they should introduce the clause to the contract or not, let alone to discuss and draft the arbitration clause together with the supplier.[382] In practice, the consequence of the arbitration clause inside the property development contract is that the developer unilaterally drafts the arbitration clause and determines the characteristics of the arbitration solely. Hence, the combination of the consumer's

[380] Andrighi, F. N. (2006), 'Arbitragem nas relações de consumo: uma proposta concreta', *Revista de Arbitragem e Mediação*, Vol. 9, pp. 13–21. Pitkowitz, N. (2015), 'Die Schiedsgerichtsbarkeit im Wettbewerb mit staatlicher Gerichtsbarkeit: Eine Analyse aus österreichischer Sicht' in: Cascante, C., Spahlinger, A., Wilske, S. (eds.), *Global Wisdom on Business Transactions, International Law and Dispute Resolution: Festschrift für Gerhard Wegen zum 65. Geburtstag,* München, Beck, C H, p. 730.
[381] See above Chapter III, D, 2, a, ii.
[382] Bülow, P., Artz, M. (2016), *Verbraucherprivatrecht*, Schwerpunktbereich, Heidelberg, C.F. Müller, para. 22.

unawareness about arbitration, their lack of bargaining power and the flexibility of these proceedings can amount to a dangerous result.

ii) Uncertainty in the request for interim measures

A valid arbitration agreement impedes the courts to decide on the main matter in dispute. However, courts can be necessary if a party needs an interim relief before the arbitral tribunal is composed. In fact, the competence of courts to issue interim measures in issues subject to arbitration is debatable.[383] It is up to the national laws to resolve the problem.

Most importantly, it is important to recognize the court´s competence in these situations because if interim measures could only be issued by the arbitral tribunal, the other party could use delay tactics in their favor. By retarding the nomination of the party appointed arbitrator, the party can hinder the composition of the tribunal and thereby stagnate the arbitration. In that case, without arbitrators, the party would have no possibility to require an interim relief.[384] It would have to wait for the composition of the tribunal and at that time, the interim relief could already be obsolete. Therefore, the competence of the courts to issue interim measures in arbitration matters, especially before the composition of the tribunal, is imperative.

Germany recognizes the courts´ competence in §1033 ZPO. Pursuant to this provision, it is not incompatible with arbitration for

[383] Donovan, D. F. (Lethworth : Turpin (distributor), 2003), 'The Scope and Enforceability of Provisional Measures in International Commercial Arbitration: A Survey of Jurisdictions, the Work of UNCITRAL and Proposals For Moving Forward' in: Berg, A. J. van den (ed.), *International commercial arbitration: Important contemporary questions / general editor, Albert Jan van den Berg with the assistance of the International Bureau of the Permanent Court of Arbitration, The Hague,* The Hague, Kluwer Law International, pp. 82–149.
[384] Bietz, H. (2003), 'Baustreitigkeiten vor dem Schiedsgericht', *Neue Zeitschrift für Baurecht und Vergaberecht*, pp. 177–183.; Garbe-Emden, J., 'Nachteile von Schiedsverfahren', *BauR*, Vol. 2012, pp. 1036–1037.

the courts to grant interim measures, before or after the composition of the tribunal.[385]

In contrast, Art. 22, §4 LBA from 1996 provided that the arbitrators could request the court to issue the interim measures. This provision was limiting because it gave only the arbitrator active ability to request for the measure and consequently, did not help the party who needed interim relief before the composition of the tribunal. The reform lawmaker corrected the problem by revoking that article and stating in the new Art. 22-A LBA that the parties can directly request the measures to the courts, before the commencement of arbitration. Yet, the new provision originates two issues. In the first place, the law only permits the parties to request interim reliefs in courts before the commencement of arbitration.[386] In this sense, the Brazilian law is still much more limiting than the German. The parties cannot choose to request interim relief in courts during the proceedings. This is a disadvantage of arbitration in Brazil, since it can be strategically intelligent for the party to go directly to courts and from there directly start the enforcement proceedings of the interim measure, instead of asking first the arbitrators and then having to go to courts for the enforcement.

In addition, Art. 22-A LBA raises the huge question as to when exactly arbitration starts. If one considers that it starts already with the request for arbitration from claimant, the problem of needing interim relief and not having a competent authority to issue it would remain. In practice, if a party wants to annul an interim decision based on this argument, it will probably not succeed, for it is a very formal argument

[385] Wolf, C., Eslami, N. (2016), '§1033' in: Vorwerk, V., Wolf, C. (eds.), *Beck'scher Online-Kommentar ZPO,* München, Verlag C.H.BECK. Voit, W. (2017), '§1033' in: Musielak, H.-J., Voit, W. (eds.), *Zivilprozessordnung,* München, Vahlen, Franz. Münch, J. (2013), '§1033' in: Krüger, W., Adolphsen, J., Gottwald, P., Rauscher, T., Gruber, U., Hau, W., Hilbig-Lugani, K., Micklitz, H.-W., Münch, J., Pabst, S., Ulrici, B., Zimmermann, W. (eds.), *Münchener Kommentar zur Zivilprozessordnung: Bd. 3: §§ 1025-1109 EGZPO, GVG, EGGVG, UKlaG, Internationales und Europäisches Zivilprozessrecht,* München, Beck, C H.

[386] Veirano, R. C., Backsmann, T. A. (2015), 'Schiedsgerichtsbarkeit in Brasilien: Einige Neuigkeiten und Ausgewählte Themen für Ausländische Investoren' in: Cascante, C., Spahlinger, A., Wilske, S. (eds.), *Global Wisdom on Business Transactions, International Law and Dispute Resolution: Festschrift für Gerhard Wegen zum 65. Geburtstag,* München, Beck, C H, p. 776.

and does not comply with the teleological interpretation of the norm, which´s objective is to give the parties an alternative to arbitration when they need interim relief where no tribunal exists. Still, the lawmaker could have been more specific, saying that the interim measures can be request to the courts before the composition of the arbitral tribunal. This way, it would avoid a doctrinal discussion about the provision.

Some institutions have tried to give the parties an alternative to courts, providing for the emergency arbitrator rules.[387] Parties can incorporate the emergency arbitrator rules to their agreement and thereby, completely prescind from the courts to solve interim issues, even before the composition of the tribunal. But even if the measure is granted by the emergency arbitrator or the arbitral tribunal, if the party does not comply voluntarily with the interim measure, the party who requested it must enforce it in front of the courts.[388]

Hence, the request for interim measures can be regarded as a disadvantage of arbitration, depending on which rules the parties have chosen and depending on the national arbitration law that governs the proceedings. The German law is more advantageous for the parties, leaving the path to courts opened before and during arbitration, concerning interim measures. On the other hand, parties who want to completely avoid the courts, must search for an institution with the emergency arbitrator service.

[387] Article 29 of the Rules and Appendix V of the ICC Arbitration Rules. Appendix II of the SCC Arbitration Rules. Schedule 1 of the SIAC Arbitration Rules.
[388] The enforcement proceedings in front of the courts does not take long. Bietz, H. (2003), 'Baustreitigkeiten vor dem Schiedsgericht', *Neue Zeitschrift für Baurecht und Vergaberecht*, p. 181.

iii) Confidentiality

Confidentiality is perceived as an advantage of arbitration for B2B cases.[389] The reputation loss that can occur if a dispute between businesses is known to the public is avoided with confidentiality. Moreover, the possibility of having confidential proceedings in the state courts is limited by the law, while in arbitration, it only depends on the will of the parties. Hence, if the dispute concerns information that the company prefers to keep secret, like business information, products´ descriptions, correspondence between parties, etc., it is much more advantageous to take the case to arbitration than to courts. Confidentiality promotes the perfect environment for business disputes.

However, the confidentiality of arbitral proceedings is prejudicial to consumers.[390] Public court proceedings enable the consumer organizations to keep track on the developers who were involved in the disputes. They can publish lists with the names of developers who caused more disputes, the ones who caused less, the ones who quickly complied with the decisions, etc. Thereby they make a service to the consumer society, helping the consumers who are thinking about entering into a property development contract to choose consciously their contractual partners.

[389]See Kutschera, M. (2007), 'Vorteile des schiedsgerichtlichen Verfahrens' in: Torggler, H. (ed.), *Praxishandbuch Schiedsgerichtsbarkeit,* Wien, Verl. Österreich, paras. 21-25. Motzke, G. (2009), '§4 Prozessuale Besonderheiten von Baustreitigkeiten' in: Motzke, G. (ed.), *Prozesse in Bausachen: Privates Baurecht, Architektenrecht,* Baden-Baden, Nomos, p. 727. Vygen, K., Joussen, E. (2013), *Bauvertragsrecht nach VOB und BGB*: *Handbuch des privaten Baurechts*, Köln, Werner, p.3365. Lew, Julian D. M, Mistelis, L. A., Kröll, S. (2003), *Comparative international commercial arbitration*, The Hague, New York, Frederick, MD, Kluwer Law International; Sold and distributed in North, Central and South America by Aspen Publishers, paras. 1-26.

[390] Wagner, G., Quinke, D. (2005), 'Ein Rechtsrahmen für die Verbraucherschiedsgerichtsbarkeit', *JZ*, Vol. 19, p. 936.

Nevertheless, confidentiality is not an intrinsic characteristic of arbitration, as privacy is.[391] Furthermore, the extent of confidentiality in arbitral proceedings is also a debatable matter.[392] Some arbitral rules protect the hearings and documents submitted by the parties, others put even the arbitral award under the confidentiality shield.[393] This is an important aspect of confidentiality since the publicity of decisions plays an important role in the development of the jurisprudence. If the legal reasoning behind arbitral decisions is confidential, it becomes difficult for the law to achieve uniformity and to advance in certain issues.[394]

Hence, although confidentiality derives from the wish of the parties or from the arbitration rules, it can be listed here as a controversial aspect of this dispute resolution method in B2C cases, since most arbitration rules possess a confidentiality provision.[396] Parties must be alert, to opt out of the confidentiality provisions if they so wish.

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[391] Confidentiality was long considered as an inherent feature of arbitration and not a consequence of the confidentiality clause. THE HAGUE CONFERENCE (2010), p. 3 "*For many years commercial arbitration participants assumed that arbitration was confidential. While neither statutes, judicial decisions, procedural rules, treatises nor contracts precisely or comprehensively defined the contours and limits of this confidentiality, there was widespread tacit acceptance of a generalized confidentiality principle. Many have long considered confidentiality to be a desirable feature of arbitration and one that distinguishes it from court litigation. This assumption was called into question by a few highly publicized court decisions in the mid-1990's which prompted considerable commentary and debate."* Malatesta, A., Sali, R. (2011), *Arbitrato e riservatezza*: *Linee guida per la pubblicazione in forma anonima dei lodi arbitrali*, Padova, CEDAM, pp. 20-22. Oldenstam, R., Pachelbel, J. v. (2006), 'Confidentiality and Arbitration - a few reflections and practical notes', *SchiedsVZ*, p. 32. Noussia, K. (2010), *Confidentiality in international commercial arbitration*: *A comparative analysis of the position under English, US, German and French law*, Berlin, New York, Springer. Decisions that still support confidentiality as inherent to arbitration: Bleustein et al v. Société True North et Société FCB International and Aita vs. Ojeeh, pp. 163-164.

[392] The scope of confidentiality must be delimited by the clause or the rules. In this sense, if the duty of confidentiality covers the existence of the proceedings, the content of the proceedings and the award depends on the clause drafted by the parties or on the specific rules. Supporting this view see: Smeureanu, I. M. (2011), *Confidentiality in international commercial arbitration*, International arbitration law library, Alphen aan den Rijn, Frederick, MD, Kluwer Law International; Sold and distributed in North, Central and South America by Aspen Publishers.

[393] Privacy of arbitral proceedings oposed to publicity of litigation will be discussed in depth in Chapter VI, A, 1, c.

[394] Pelzer, N. (2016), 'Tagungsbericht - Schiedsgerichtsbarkeit und private Justiz: Rechtspolitische Herausforderungen: 59. Bitburger Gespräch am 15. und 16. Januar 2016 in Mainz', *JZ*, Vol. 7, p. 356. Read more about publicity below in Chapter VI, A, 1, c.

[396] Examples: DIS Art. 43, SLBau §2 (3), CAMARB Art. 12.1, ICC Art. 6, LCIA 30.1 and others. See the Hague Conference (2010), p. 10 and Annex 1

c) Controversial aspects

While the aspects above mentioned can be classified, as an advantage or a disadvantage for consumer property development disputes, there are still two other important characteristics of arbitration, which cannot so easily be labeled as good or bad. They are the costs and the finality.[397]

i) Costs and legal-aid

Most scholars present arbitration as a cheaper alternative to courts.[398] However, this is controversial. The amount of costs due in arbitration is dependent on many factors,[399] for instance the number of arbitrators intensively affects arbitration costs. An arbitration with a sole arbitrator is normally much cheaper than an arbitration in which the parties must pay a panel of three arbitrators.[400] On the other hand, the comparison with the costs in courts also depends on various factors. The farther one goes in the court´s instances, the more

[397] Kary, C. (2009), 'Schiedsrecht oder Gericht?', *Die Presse*, 26.11.09. "*Ob es ein Vor- oder Nachteil ist, dass Schiedssprüche nur in Ausnahmefällen anfechtbar sind, ist Ansichtssache. Und auch über die Kostenfrage sind die Experten uneinig*."

[398] See Pitkowitz, N. (2015), 'Die Schiedsgerichtsbarkeit im Wettbewerb mit staatlicher Gerichtsbarkeit: Eine Analyse aus österreichischer Sicht' in: Cascante, C., Spahlinger, A., Wilske, S. (eds.), *Global Wisdom on Business Transactions, International Law and Dispute Resolution: Festschrift für Gerhard Wegen zum 65. Geburtstag,* München, Beck, C H, p. 729.; Duve, C., Sattler, M. (2010), 'Schiedsvereinbarungen in Verbraucherverträgen' in: Genzow, F. C. (ed.), *Zwischen Vertragsfreiheit und Verbraucherschutz: Festschrift für Friedrich Graf von Westphalen zum 70. Geburtstag,* Köln, O. Schmidt, p. 93. Koeble, W. (2014), '1. Teil. Außergerichtliche Streitbeilegung und schiedsgerichtliche Verfahren' in: Kniffka, R., Koeble, W. (eds.), *Kompendium des Baurechts: Privates Baurecht und Bauprozess,* München, C. H. Beck, para. 92. Vygen, K., Joussen, E. (2013), *Bauvertragsrecht nach VOB und BGB*: *Handbuch des privaten Baurechts*, Köln, Werner, p. 3368.

[399] Duve, C., Sattler, M. (2010), 'Schiedsvereinbarungen in Verbraucherverträgen' in: Genzow, F. C. (ed.), *Zwischen Vertragsfreiheit und Verbraucherschutz: Festschrift für Friedrich Graf von Westphalen zum 70. Geburtstag,* Köln, O. Schmidt, p. 94.

[400] Vygen, K., Joussen, E. (2013), *Bauvertragsrecht nach VOB und BGB*: *Handbuch des privaten Baurechts*, Köln, Werner, p. 3368. Bietz, H. (2003), 'Baustreitigkeiten vor dem Schiedsgericht', *Neue Zeitschrift für Baurecht und Vergaberecht*, pp. 179-180.

expensive the proceedings are.[401] Moreover, if the judge or the parties see the necessity to invite an expert, costs increase.[402] Hence, the costs of arbitration cannot be classified as an advantage or a disadvantage in relation to litigation.[403] The amount spent on the proceedings is very individual and difficult to be generalized. If arbitration or litigation is cheaper is a case-to-case issue.

Nevertheless, even if court proceedings were expensive, the state can offer legal aid, which is one of the greatest achievements of modern legal systems to ensure access to justice for all.[404] With legal aid, even parties who cannot afford court and attorney fees can start court proceedings. Considering that, opponents of consumer arbitration argue that the fact that consumers cannot count on legal aid in arbitration is crucial.[405] To examine this concern better one must first understand the legal requirements for granting legal aid in the jurisdictions in study.

In Brazil, the right to legal aid is a constitutional fundamental right, present in Art. 5, LXXIV of the Brazilian Constitution. The Law 1.060 regulates the matter since 1950. According to its Art. 2, a party should receive legal aid if their economic situation does not permit them to pay the procedural costs without threatening their own subsistence or that of their family. The law does not set clear criteria for the evaluation of the economic situation of the party, it is up to the judge to grant legal aid in face of the brought evidence. However, the

[401] According to Koeble, one tends to say that an arbitration with a pannel of three arbitrators is more expensive than courts. However, if one considers the whole duration of court proceedings, including the appeal instances, then the court proceedings may even cost double the expenses of an arbitration. Koeble, W. (2014), '1. Teil. Außergerichtliche Streitbeilegung und schiedsgerichtliche Verfahren' in: Kniffka, R., Koeble, W. (eds.), *Kompendium des Baurechts: Privates Baurecht und Bauprozess,* München, C. H. Beck, para. 92.
[402] Bietz, H. (2003), 'Baustreitigkeiten vor dem Schiedsgericht', *Neue Zeitschrift für Baurecht und Vergaberecht*, p. 180.
[403] Motzke, G. (2009), '§4 Prozessuale Besonderheiten von Baustreitigkeiten' in: Motzke, G. (ed.), *Prozesse in Bausachen: Privates Baurecht, Architektenrecht,* Baden-Baden, Nomos, p. 727.
[404] See Cappelletti, M., Garth, B. G. (1978), 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective', *Buffalo Law Review*, Vol. 27, pp. 197-209.
[405] Thode, R. (2007), 'Schiedsvereinbarungen in Verbraucher-Bauträgerverträgen', *DNotZ*, p. 409. Interestingly, in sport´s arbitration before the Deutsche Sportsschiedsgericht and the Court of Arbitration for Sport, athletes can already count on legal aid. Requirements and rules can be found in the Ordnung über Verfahrenskostenhilfe in Anti-Doping-Streitigkeiten („VKH-Ordnung") – DIS and the Guidelines on Legal Aid before the Court of Arbitration for Sport – CAS, respectively.

jurisprudence of the federal courts and of the south regional court of Brazil have been repeatedly deciding that if a party earns up to 10 Brazilian minimum salaries, their financial need can be assumed, giving ground for granting legal aid.[406]

The party may already in the first petition ask for legal aid and prove their difficult financial situation through bank statements or the worker´s registry.[407] If the judge concludes that the party has enough means to carry the procedural costs, they will deny legal aid. Further, the other party may challenge the declaration of financial need of the party. It is in their interest to challenge if the declaration does not reflect the reality, because Art. 11 of the Law 1.060 affirms that, if the poor person wins, the other party has to bear the costs of the proceedings, lawyer and expert fees.

In Germany legal aid is regulated in §§114 ss. ZPO. According to it, a party who cannot pay the costs of the litigation, be it in part or only in installments, because of their personal and economic circumstances, will receive legal aid upon request, if their claims have sufficient chance of success. The economic need of the party is to be presented and documented based on a declaration of personal and economic circumstances. The applicant must therefore provide true information about their financial situation. The exact calculation methods can be complicated in individual cases.[408] Parties who receive social financial help from the government, like unemployment benefits, are very likely to receive legal aid under the German Law. As in Brazilian law as well as in German law, if the losing party is not the one benefiting from legal aid, they will pay for the proceeding costs and attorney fees of the winning party.

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[406] Tribunal Regional Federal - 1 (2007), Agravo Regimental 2007.01.00.023811-5 MG; Tribunal Regional Federal - 4 (2010), Agravo de Instrumento 123753520104040000 RS; Tribunal de Justiça do Rio Grande do Sul (2014), Apelação Cível 70056719719. The current minimum salary is of R$ 937,00, that is ca. 255€ or 292USD (stand and converting rates from July 2017).

[407] See Tribunal de Justiça de Minas Gerais (2006), Apelação Cível 2.0000.00.498252-1/000

[408] See for example internet tools to help estimate the carried costs in each individual case. *PKH Rechner*, available at: www.pkh-rechner.de/. 14.07.2017.

Although the requirements for judges to grant legal aid are to be investigated in each individual case, it is assumable that a consumer in a property development dispute will most likely not benefit from it. It cannot be neglected that legal aid aims at helping the poor people with real financial need,[409] what is generally not the case of a real estate purchaser. Courts have already decided in this direction. According to the Tribunal de Justica do Rio Grande do Sul, one can assume the stable economic situation of those who acquire an apartment in real estate development, what is incompatible with the benefit of legal aid.[410] Therefore, it is unlikely that consumer in property development disputes will suffer from the lack of legal aid in arbitration, since the majority of them would probably not receive any financial benefits in court either.

Furthermore, assuming an anti-consumer arbitration position based on the lack of legal aid is unfounded. One must consider that legal aid is not a mechanism created to help consumers. It is a mechanism to help all those citizens, who do not have enough means to pay for the judicial service without endangering their own subsistence.[411] Therefore, even if one assumes that consumers are financially more vulnerable than traders, one cannot assume that all consumers would have legal-aid granted in civil courts.

On the other hand, there certainly are consumers who can only access justice with the help of legal aid. Admittedly, for those, arbitration might not be adequate, since the costs will impede the party to seek enforcement of their rights or even to defend themselves.

All the above considered, two conclusions can be taken from the controversy of costs and legal aid regarding arbitration for property

[409] Tribunal de Justiça do Rio Grande do Sul (2016), Apelação Cível 70068693308
[410] Tribunal de Justiça do Rio Grande do Sul (2014), Agravo de Instrumento 70059506980; Tribunal de Justiça do Rio Grande do Sul (2011), Recurso Inominado 0018285-16.2008.8.19.0209; Tribunal de Justiça do Rio Grande do Sul (2014), Agravo em Agravo de Instrumento 70061113072. Contrary to it, see OLG Hamm (2011), 19 W 38/10, where the court granted legal aid to the buyer, as the defendant of a claim for payment of the rest of the purchase price agreed in a property development contract.
[411] Harich, B. (2011), 'Prozesskostenhilfe und Existenzminimum', *Sozialrecht aktuell*, pp. 41–45.

development disputes. First, using direct comparison, since most consumers of the real estate market would not receive legal aid in courts, the lack of legal-aid in arbitration is not an exclusion criterion for consumer arbitration. More importantly, consumers, who want to choose arbitration, must analyze the cost aspects together with the other advantages of arbitration and check the cost-benefit relation. Disputes differ in complexity and in amount in controversy, which oft affects how much an individual is willing to pay for their fast resolution.

Second, courts confronted with the question of validity of a B2C arbitration clause, must also verify if the way the proceedings are conceived will make the proceedings too expensive for a financially vulnerable consumer, blocking these provisions.[412] If the property development contract has an arbitration clause, but the consumer demonstrates that the costs of arbitration make it impossible for them to access justice, this clause is causing an unreasonable burden to the consumer and it is the court´s duty to acknowledge under Art. 51 (1) (III) CDC or §307 (1) BGB the nullity of that clause and accept the consumer´s claims in court, enabling their access to justice.

[412] See Duve, C., Sattler, M. (2010), 'Schiedsvereinbarungen in Verbraucherverträgen' in: Genzow, F. C. (ed.), *Zwischen Vertragsfreiheit und Verbraucherschutz: Festschrift für Friedrich Graf von Westphalen zum 70. Geburtstag,* Köln, O. Schmidt, pp. 93-94.

ii) Finality

In general, there is no second instance in arbitration,[413] one cannot appeal of the award. The award is final.[414] Finality is a debatable aspect of arbitration,[415] some classify it as an advantage[416] and some as a disadvantage of this dispute resolution method.[417] On the one hand, finality is the great responsible for the quickness of arbitration,[418] which is one of its best features. On the other hand, parties who choose arbitration waive their chance to have a material revision of the future award. As well illustrated by Prof. Andrews, in arbitration "*one party's final victory is the opponent's irreversible defeat*"[419] Yet, the waiver of a second instance is mitigated by the fact that the parties choose their arbitrators, and one can suppose that they trust that the decision body will come to a reasonable finding.

Moreover, although arbitration generally does not encompass a review on the merits, unacceptable problems with the decision are

[413] Although the general rule is to have arbitration as an one instance proceeding, there may be exceptions. The rules for sport´s arbitration of the German arbitration institution (DIS-SportSchO), for example, affirms that an arbitral tribunal may decide at first instance or as appellate court. As the appellate court, the arbitral tribunal typically decides if an association court has previously dealt with the dispute and the association's statute subjects the review of this decision to the rules of the DIS SportSchO. In the first instance, an arbitral tribunal usually acts when the parties have submitted their disputes under a contract to the rules of the DIS SportSchO.

[414] See Lew, Julian D. M, Mistelis, L. A., Kröll, S. (2003), *Comparative international commercial arbitration*, The Hague, New York, Frederick, MD, Kluwer Law International; Sold and distributed in North, Central and South America by Aspen Publishers, para. 1.20. "*As a general rule the decisions of arbitrators are to be final and binding. There are no or very limited grounds on which arbitrators' awards can be appealed to the courts on the basis that the arbitrators' conclusions are wrong. Equally, the grounds upon which the decisions of arbitrators can be challenged and set aside are limited to where the arbitrators have either exceeded the jurisdictional authority in the arbitration agreement or have committed some serious breach of natural justice.*"

[415] Andrews, N. (2016), *Arbitration and contract law*: *Common law perspectives*, Ius gentium, London, Springer, para. 1.06.

[416] Duve, C., Sattler, M. (2010), 'Schiedsvereinbarungen in Verbraucherverträgen' in: Genzow, F. C. (ed.), *Zwischen Vertragsfreiheit und Verbraucherschutz: Festschrift für Friedrich Graf von Westphalen zum 70. Geburtstag,* Köln, O. Schmidt, p. 95.

[417] Pitkowitz, N. (2015), 'Die Schiedsgerichtsbarkeit im Wettbewerb mit staatlicher Gerichtsbarkeit: Eine Analyse aus österreichischer Sicht' in: Cascante, C., Spahlinger, A., Wilske, S. (eds.), *Global Wisdom on Business Transactions, International Law and Dispute Resolution: Festschrift für Gerhard Wegen zum 65. Geburtstag,* München, Beck, C H, pp. 730-731. Motzke, G. (2009), '§4 Prozessuale Besonderheiten von Baustreitigkeiten' in: Motzke, G. (ed.), *Prozesse in Bausachen: Privates Baurecht, Architektenrecht,* Baden-Baden, Nomos, p. 728.

[418] Duve, C., Sattler, M. (2010), 'Schiedsvereinbarungen in Verbraucherverträgen' in: Genzow, F. C. (ed.), *Zwischen Vertragsfreiheit und Verbraucherschutz: Festschrift für Friedrich Graf von Westphalen zum 70. Geburtstag,* Köln, O. Schmidt, p. 95.

[419] Andrews, N. (2016), *Arbitration and contract law*: *Common law perspectives*, Ius gentium, London, Springer, para. 1.06.

covered by the setting aside and non-enforcement provisions.[420] Main grounds for setting aside an award are the breach of the right to be heard, the due process or the *ordre public*.[421] In detail, the conditions for setting aside an award in Germany and Brazil can be found in §1059 (2) ZPO and Art. 32 LBA respectively.

Consequently, the finality of awards is neither an advantage nor a disadvantage of arbitration. It is a feature that fits this dispute resolution method and would not fit court proceedings. Arbitrators are more specialized than judges and the arbitral proceedings more efficient, therefore the reliance of the parties in the quality of the decision is higher and, in this context, it is understandable not to have a second instance to revise the merits of the case.[422] Worse cases are covered by the setting aside proceedings.

d) Confrontation of pros and cons

On the positive side, the advantages of arbitration are significant motive to leave the path of arbitration opened for consumers, who wish to take it. On the negative side, the disadvantages show that arbitration needs to develop mechanisms to protect the consumer who may be in a more vulnerable position in comparison to the trader.

In general, based on the study of advantages and disadvantages of arbitration for property development disputes with consumer participation, one cannot assume that arbitration is the best dispute resolution method for all B2C property development disputes. Both arbitration and litigation have their pros and cons. Sensible parties will choose arbitration, if its advantages outweigh the disadvantages in

[420] See Duve, C., Sattler, M. (2010), 'Schiedsvereinbarungen in Verbraucherverträgen' in: Genzow, F. C. (ed.), *Zwischen Vertragsfreiheit und Verbraucherschutz: Festschrift für Friedrich Graf von Westphalen zum 70. Geburtstag,* Köln, O. Schmidt, p. 95.
[421] Bietz, H. (2003), 'Baustreitigkeiten vor dem Schiedsgericht', *Neue Zeitschrift für Baurecht und Vergaberecht*, pp. 177–183.
[422] Bietz, H. (2003), 'Baustreitigkeiten vor dem Schiedsgericht', *Neue Zeitschrift für Baurecht und Vergaberecht*, p. 181.

their particular dispute. [423] Therefore, the analysis of adequacy of arbitration must be made in a case-to-case basis.

E. Chapter´s conclusion

The access to justice for consumers must not always take place in courts. Alternative dispute resolution methods can be faster and more efficient for consumers. Consequently, one can observe a tendency to develop ADR for consumers, both in Germany, through the application of the European Directive 2013/11 and in Brazil, through the consumer´s boards. However, arbitration is not amongst the ADR methods treasured by the consumerists. Mainly because the new ADR trend focuses on small consumer claims.

For the consumer in a property development contract, whose disputes are generally not of small character, the ADR methods offered by the Directive or the Brazilian consumer boards are not satisfactory. They do not suit these kinds of disputes. Thus, the consumer is not presented to an alternative to courts, in a dispute that concerns what can be considered one of the most important contracts in the life of an average individual.[424]

This chapter has demonstrated that arbitration is a possible alternative for consumers with property development disputes, who do not want to resort to courts. Arbitration suits disputes of higher value; high complexity and it is fast, which is a very important aspect for consumers. Additionally, it offers other advantages for consumers, as the specialization of arbitrators and the flexibility of proceedings.

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[423] Pitkowitz, N. (2015), 'Die Schiedsgerichtsbarkeit im Wettbewerb mit staatlicher Gerichtsbarkeit: Eine Analyse aus österreichischer Sicht' in: Cascante, C., Spahlinger, A., Wilske, S. (eds.), *Global Wisdom on Business Transactions, International Law and Dispute Resolution: Festschrift für Gerhard Wegen zum 65. Geburtstag,* München, Beck, C H, p. 725.

[424] See IBEDEC – Instituto Brasileiro de Estudo e Defesa das Relações de Consumo (2013), *Problemas com imóveis adquiridos de construtoras: IBEDEC alerta consumidores e convoca para Ações Coletivas*, available at: www.ibedec.org.br/informativos/item/75-problemas-com-im%C3%B3veis-adquiridos-de-construtoras-ibedec-alerta-consumidores-e-convoca-para-a%C3%A7%C3%B5es-coletivas.html. 09.06.2016.

This is the reason why it is important to study arbitration as an alternative for consumers in property development disputes.

Of course, arbitration also has disadvantages that must be taken into account before choosing this dispute resolution method for a specific case. The most impacting disadvantage is the consumer´s lack of procedural knowledge. Arbitration is highly based on party autonomy and in a standard contract, the lack of knowledge and of bargaining power can amount to unbalanced proceedings and unilateral determination of the arbitration features. It is up to the Law to try to balance the relationship, impeding the developer to determine unilaterally how an arbitration between the parties should go.

In sum, it is important to study arbitration as a possibility for consumers in property development disputes, trying to give the consumer an alternative path to solve problems in such an important contract. Arbitration has potential to offer a reasonable access to justice for consumers in property development disputes, if the Law develops consumer protection in this field.

To discuss consumer protection in this unique combination of property development contract, standard terms and arbitration, the next chapters will explore the two main questions of this work, namely: Does the consumer need protection from arbitration? Does the consumer need protection in arbitration? Thereby, considering what has been done in Germany and Brazil and what the law can still do to achieve access to justice with fairness and efficiency outside of courts.

IV- The necessity to protect the consumer FROM arbitration arising out of property development disputes

One of the key questions concerning consumer arbitration is whether consumer disputes should be arbitrated at all. While some authors see in arbitration a great chance for consumers to solve their conflicts out of courts,[425] others plead for a ban of consumer arbitration.[426] Arbitration opponents base their arguments not only in the unequal position of the parties during the formation of the standard contract,[427] but also on former bad consumer arbitration experiences, like the NAF scandal.[428] National Arbitration Forum – NAF is a for-profit institution based in Minneapolis, which was specialized in arbitrating consumer debt collections. It is public that NAF jeopardized consumers and acted bias in an overly large number of cases it administered. The Attorney General of the state of Minnesota sued NAF for consumer fraud, deceptive trade practices, and false advertising. As a consequence, the institution is no longer administering consumer arbitrations. However, it is unfounded to base the argument against arbitration on the bad examples from U.S. cases, since the consequences of adhering to arbitration in the U.S. and in

[425] Lemes, Selma M. Ferreira (2003), 'O Uso da Arbitragem nas Relações de Consumo', *Valor Econômico, Caderno Legislação & Tributos*, 12.08.03.; Scaletscky, F. S. (2014), 'Arbitragem e "Parte Fraca": a Questão das Relações de Consumo', *Revista Brasileira de Arbitragem*, Issue 41, pp. 68–99.; Andrighi, F. N. (2006), 'Arbitragem nas relações de consumo: uma proposta concreta', *Revista de Arbitragem e Mediação*, Vol. 9, pp. 13–21.; Duve, C., Sattler, M. (2010), 'Schiedsvereinbarungen in Verbraucherverträgen' in: Genzow, F. C. (ed.), *Zwischen Vertragsfreiheit und Verbraucherschutz: Festschrift für Friedrich Graf von Westphalen zum 70. Geburtstag,* Köln, O. Schmidt, pp. 85-87.

[426] *Grupo pede veto para arbitragem no consumo*, available at: economia.estadao.com.br/noticias/geral,grupo-pede-veto-para-arbitragem-no-consumo-imp-,1687945. 01.06.2015.; Hirtz, B. (2012), 'Plädoyer für den Prozess', *NJW*, pp. 1686–1689.; Marques, C. L., *É preciso manter veto à arbitragem privada de consumo*, available at: www.conjur.com.br/2015-jun-09/claudia-marques-preciso-manter-veto-arbitragem-consumo. 11.03.2016. Lazzarini, M., Marques, C. L., Idec - Instituto Brasileiro de Defesa do Consumidor, *Não à arbitragem de consumo!*, available at: www.idec.org.br/em-acao/artigo/no-a-arbitragem-de-consumo. 22.10.2015.

[427] See above Chapter II, E, 2.

[428] See Berner, R., Grow, B. (2008), 'Banks vs. Consumers (Guess Who Wins)', *Bloomberg Business Week*, 04.06.08. Habegger, P., Hochstrasser, D., Nater-Bass, G., Weber-Stecher, U. (2013), *Arbitral institutions under scrutiny*, New York, Juris, p. 41. Salzwedel, M. R., Wells, D., *National Arbitration Forum Settlement with Minnesota Attorney General*, available at: www.fed-soc.org/publications/detail/national-arbitration-forum-settlement-with-minnesota-attorney-general. 22.01.2016. Duve, C., Sattler, M. (2010), 'Schiedsvereinbarungen in Verbraucherverträgen' in: Genzow, F. C. (ed.), *Zwischen Vertragsfreiheit und Verbraucherschutz: Festschrift für Friedrich Graf von Westphalen zum 70. Geburtstag,* Köln, O. Schmidt, p. 82.

Germany or Brazil are widely different and not comparable.[429] In the very diverse manner as different jurisdictions deal with consumer arbitration, some have even opted for a prohibition of pre-dispute arbitration clauses in consumer contracts, regardless of the value of the case or even the will of the consumer to arbitrate.[430]

However, a prohibition for consumers to arbitrate represents a huge intervention in the consumer's freedom of contract and party autonomy, which are primary principles in private law.[431] Freedom of contract relates mainly to two aspects: the decision of the party whether to enter into a certain contract and the decision about what should the content of the contract be. In this sense, freedom of contract and party autonomy are closely related.[432] Moreover, they are essential for arbitration.[433] Through the freedom of contract, the parties decide if they want to arbitrate and how. Through Party autonomy the parties empower the tribunal through their arbitration clause or agreement to decide their dispute. In addition, the nomination of the arbitrators, the election of the substantive law, the arbitral institution, the seat of arbitration, etc. depend on party autonomy and the freedom of contract. In fact, arbitration only finds legitimacy because of these principles.

Mandatory provisions may limit the freedom and the autonomy of the parties. Particularly consumer law uses the limitation of party autonomy as a tool to protect the consumer.[434] Mandatory provisions

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[429] On the non-comparability of the U.S. consumer arbitration and the German scenario see Coester-Waltjen, D. (2017), 'Schiedsgerichtsbarkeit und Verbraucher' in: Hess, B. (ed.), *Der europäische Gerichtsverbund - Gegenwartsfragen der internationalen Schiedsgerichtsbarkeit - Die internationale Dimension des europäischen Zivilverfahrensrechts,* Bielefeld, Gieseking-Verlag, p. 83.

[430] For instance, Austria, Québec and Sweden.

[431] Schapp, J. (1986), *Grundfragen der Rechtsgeschäftslehre*, Tübingen, Mohr.

[432] Berger, K. P. (2014), *Trans-Lex.org principles with commentary*, Köln, Center for Transnational Law Cologne, p. 25. Lorenz, S. (1997), *Der Schutz vor dem unerwünschten Vertrag*: *Eine Untersuchung von Möglichkeiten und Grenzen der Abschlusskontrolle im geltenden Recht*, Münchener Universitätsschriften. Reihe der Juristischen Fakultät, München, Beck, p. 17.

[433] Born, G. (2014), *International Commercial Arbitration* Okuma, K. (2005), 'Arbitration and Party Autonomy', *The Seinan Law Review*, Vol. 38, Issue 1, paras. 83-85.

[434] Kirchner, C. (2012), 'Chapter 8 - Justifying Limits to Party Autonomy in the Internal Market - Mainly Consumer Protection' in: Grundmann, S., Kerber, W., Weatherill, S. (eds.), *Party autonomy and the role of information in the internal market,* Berlin, New York, Walter de Gruyter, p. 165.

in the consumer regulation aim to shield the consumer and focus on the responsibility of the traders. At the same time, it inevitably limits the consumer´s autonomy. Finding the balance between the freedom of contract and the party autonomy, and the statutory/social responsibility to protect the consumer and the market has always been a challenge for consumer regulation.[435]

In the specific case of the consumer arbitration arising out of a property development contract it is not undisputed whether the consumer´s party autonomy should be limited to prohibit it to arbitrate. To answer this question, the nature of the property development contract and the nature of the consumer as a contractual partner will be examined, checking if these justify such a limitation of the consumer´s freedom to contract (A). Following, the arbitrability and validity requirements of an arbitration agreement in both Germany and Brazil will be studied (B). Lastly, there will be a discussion about how to effectively protect the consumer from arbitration using an adequate legal model (C) to later draw the final conclusion on the question as to whether the law should protect the consumer from arbitration (D).

A. Justifying the limits to party autonomy

Party autonomy is the core stone of private law.[436] Through party autonomy, parties commit themselves to each other through contracts autonomously; they themselves organize and regulate their

[435] See Micklitz, H.-W. (2012), 'Chapter 10 - A Comment on Party Autonomy and Consumer Regulation in the European Community: A Plea for Consistency' in: Grundmann, S., Kerber, W., Weatherill, S. (eds.), *Party autonomy and the role of information in the internal market,* Berlin, New York, Walter de Gruyter, pp. 200-202.

[436] Köhler, H., Lange, H. (2013), *BGB, Allgemeiner Teil*: *Ein Studienbuch*, Kurzlehrbücher für das juristische Studium, München, Beck, §5, para. 1.

mutual relationships. This implies that the state recognizes the parties' autonomy and enforces their private arrangements.[437]

However, this is not feasible in all cases, sometimes the law recognizes the supremacy of the collective wellbeing in detriment of the individual freedom.[438] Freedom of contract and party autonomy occurs in the social environment; therefore, the contract cannot be seen detached from the society.[439] When this happens, party autonomy is limited.

In the contractual sphere, the limits to this self-autonomy can be justified by the nature of the contract or by the nature of the subject, party to the contract. As to the first, if the object of a certain contract has social relevance, this would justify a limitation in the parties´ autonomy. In this justification model, the law wants to protect the social object of the contract. It reduces the parties' freedom to a certain extent in the name of a social justice, fulfilling the social duty of the private law.[440] As to the second, a contract that is celebrated under a structural imbalance between the parties may be subject to the limitation of the parties´ freedom.[441] The law, to compensate the disequilibrium between the parties, establishes clauses that should be considered null, even if the parties agree upon them and sign the contract. Therewith the law aims to either prohibit the weaker part to, naively, enter into contracts that are unfair and extremely disadvantageous for them, or to prohibit the stronger party to take advantage of their contractual position. In this second model, the limitation of the party´s freedom protects one party itself. Here, the

[437] Coester, M. (2014), 'Party Autonomy and Consumer Protection', *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht - euvr*, p. 170.
[438] Coester-Waltjen, D. (2012), 'Chapter 2 - Constitutional Aspects of Party Autonomy and its Limits: The Perspective of Law' in: Grundmann, S., Kerber, W., Weatherill, S. (eds.), *Party autonomy and the role of information in the internal market,* Berlin, New York, Walter de Gruyter, pp. 43-44.
[439] Martins-Costa, J. (2005), 'Reflexões sobre o princípio da função social dos contratos', *Revista DIREITO GV*, Vol. 1, pp. 45-47.
[440] Gierke, O., *Die soziale Aufgabe des Privatrechts*: *Vortrag gehalten am 5. April 1889 in der juristischen Gesellschaft zu Wien*
[441] Eike von Hippel lists the vulnerable people as the employees, the tenant, the consumer, the children, the elderly, disabled people and the poor. Hippel, E. von (1982), *Der Schutz des Schwächeren*, Uni-Taschenbücher, Tübingen, Mohr. See also Marques, C. L., Miragem, B. (2012), *O novo direito privado e a proteção dos vulneráveis*, São Paulo, Revista dos Tribunais.

law, as a social means of order and justice, acts to protect the individual from a structural contractual imbalance.

In the following, both justification models will be examined, considering our object of study, namely the property development contract with a consumer party, to discuss the question whether the social function of this contract (1) or the structural imbalance of the contracting parties (2) justify a limitation in the parties´ autonomy to establish that they want to arbitrate disputes arising out of that contract.

1. Limits due to the social function of the contract

The social function of the contract denotes a contact point between the private law and the public law. It entails the idea of the realization of a public function through a private instrument, moreover.[442] Based on this concept, a contract whose object provides essential social duties to the party performs a social function.

The object of the property development contract is, at last, the sale of a household unit. In this sense, the property development contract is a private means to execute a social function; it is an instrument through which the buyer´s right to housing can be concretized.[443] The right to housing is a fundamental human right recognized in Art. 25 of the Universal Declaration of Human Rights[444] and Art. 11 of the International Covenant on Economic, Social and

[442] The social function of the contract is an important principle in the Brazilian Law, however not easy to define. This work uses a limited understanding of the principle as the function of a contract whose object serves a concrete social interest. In the Brazilian Law the principle may have a wider interpretation, it situates the autonomy of the parties in the social context, requiring from the parties to use their freedom in a solidary way. To read more about the wide concept of the contractual social function see Martins-Costa, J. (2005), 'Reflexões sobre o princípio da função social dos contratos', *Revista DIREITO GV*, Vol. 1, pp. 41–66. To read about the concept used in this work see item 4.I.2 of the article denominated as "*contratos que viabilizam prestacoes essenciais à pessoa humana*".

[443] See Martins, P. L., Ramda, P. C. P. (2014), 'Overbooking imobiliário e os direitos do consumidor na aquisicao de imóveis', *Revista de Direito do Consumidor*, Vol. 91, pp. 119–140. "*The consumer´s right to housing has been confronted by the inumerous abusive practices in the real estate marke*t."

[444] United Nations (1948), The Universal Declaration of Human Rights

Cultural Rights,[445] to which Germany and Brazil are parties. Thus, the social function, is an ontological part of the property development contract.[446]

In Brazil, the social function of the contract is a motive to limit the parties´ autonomy. Art. 421 of the Brazilian Civil Code, which opens the civil code´s book on contracts, asserts that the freedom of contract shall be exercised in the limits of the social function of the contract.[447] The position of this article demonstrates that the social function is not only a legal principle but also the nucleus of a general clause in the Brazilian legal system and influences the contractual freedom as much as other principles, like good-faith.[448] Although the CCB justifies the limitation of party autonomy because of the social function, it does not clarify how this limitation should work. Scholars agree that the role of the social function´s limitation is to inhibit any inequality in the contractual relationship.[449] In other words, the general clause limits party autonomy by ensuring that the contractual

[445] United Nations (1966), International Covenant on Economic, Social and Cultural Rights

[446] See Cavalieri Filho, S. (1998), 'A responsabilidade do incorporador/construtor no Código do Consumidor', *Revista de Direito do Consumidor*, Vol. 26, pp. 230–236. Chalhub, M. N. (2013), 'Incorporacao imobiliária: aspectos do sistema de protecao do adquirente de imóveis', *Revista de Direito Imobiliário*, Vol. 75, para. 2.2. Chalhub, M. N. (2001), 'O contrato de incorporacao imobiliária sob a perspectiva do Codigo de Defesa do Consumidor', *Revista de Direito Imobiliário*, Vol. 50, para. 2.1.

[447] The principle of the social function of the contract in the Brazilian legal system derives from the principle of social function of property, expressed in Art. 5, XXIII and others of the Brazilian Constitution. It has been inserted in the contractual doctrine because the contract is the instrument to manage and distribute the property. Miguel Reale, *Função Social do Contrato*, available at: www.miguelreale.com.br/artigos/funsoccont.htm. 02.02.2016, p. 62. Tartuce, F. (2007), *Função social dos contratos*: *Do Código de Defesa do Consumidor ao Código Civil de 2002*, Coleção Professor Rubens Limongi França, São Paulo, Método. The idea of the social function of property is not strange to the German Law, it was present in Art. 153 of the *Weimarer Reichsverfassung* from 11. August 1919: "*Artikel 153. Das Eigentum wird von der Verfassung gewährleistet. Sein Inhalt und seine Schranken ergeben sich aus den Gesetzen. Eine Enteignung kann nur* ***zum Wohle der Allgemeinheit*** *und auf gesetzlicher Grundlage vorgenommen werden. (...) Eigentum verpflichtet.* ***Sein Gebrauch soll zugleich Dienst sein für das Gemeine Beste****."*

[448] See Fiuza, C., Sá, Maria de Fátima Freire de, Naves, Bruno Torquato de Oliveira (2009), *Direito Civil*: *Atualidades III : princípios jurídicos no direito privado*, Belo Horizonte, Del Rey, p. 375.

[449] See Martins-Costa, J. (2005), 'Reflexões sobre o princípio da função social dos contratos', *Revista DIREITO GV*, Vol. 1, pp. 41–66.; Micklitz, H.-W. (2012), 'Chapter 10 - A Comment on Party Autonomy and Consumer Regulation in the European Community: A Plea for Consistency' in: Grundmann, S., Kerber, W., Weatherill, S. (eds.), *Party autonomy and the role of information in the internal market,* Berlin, New York, Walter de Gruyter, pp. 197–204.; Tartuce, F. (2007), *Função social dos contratos*: *Do Código de Defesa do Consumidor ao Código Civil de 2002*, Coleção Professor Rubens Limongi França, São Paulo, Método.; Miguel Reale, *Função Social do Contrato*, available at: www.miguelreale.com.br/artigos/funsoccont.htm. 02.02.2016.

duties are balanced and that the duties must not harm the social role of the contract.

Considering the above, even if one recognizes the specific social function of providing housing of the property development contract, this cannot limit the parties´ autonomy to agree on arbitration. The law may only limit the parties´ autonomy to agree on a certain clause if this clause acts as an impediment to the realization of the specific social interest. In the case in study, the arbitration clause does not obstruct the contractual object from being executed, *i.e.* it does not hinder the contract from fulfilling the right to housing of the buyer. The arbitration clause is just a choice of a dispute resolution method and touches mere private interests. Hence, even though the contractual object of the property development contract has a social function, the autonomy of the parties´ to agree on an arbitration clause cannot be limited by the Brazilian law under this ground.

In Germany, the concept of the social function as a limit to party autonomy is not discussed. German private law, does not expressly mention the social function of the contract. Anyhow, the idea of a private law, which supports the aims of public law has been developed by German scholars in the past. For instance, Otto von Gierke pleaded for the socialization of private law[450] and Canaris recognizes the bond between the fundamental rights and the private law.[451] Yet the social function of the contract is not a positive legal justification for the limitation of party autonomy in the country.

Hence, even though the property development contract performs a social function, this is not sufficient to justify a limitation in the parties´ autonomy to agree on arbitration, neither in Brazil, nor in Germany.

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[450] Gierke, O., *Die soziale Aufgabe des Privatrechts*: *Vortrag gehalten am 5. April 1889 in der juristischen Gesellschaft zu Wien*.

[451] See Canaris, C.-W., *Grundrechte und Privatrecht*: *Eine Zwischenbilanz ; stark erweiterte Fassung des Vortrags gehalten vor der Juristischen Gesellschaft zu Berlin am 10. Juni 1998*, Schriftenreihe der Juristischen Gesellschaft zu Berlin.

2. Limits due to the structural imbalance between consumer and developer

A structural imbalance between the contracting parties can be a reason for limitation of party autonomy.[452] This is the case when one of the parties is contractually in an inferior position in comparison with the other party.[453]

There is a structural imbalance between the consumer and the developer in the property development contract concerning the stipulation of the contractual content. The property development contract is usually a standard contract, in which the developer alone drafts the contractual terms and the consumer has limited bargaining power to change those.[454]

The economic and informational superiority of the developer enables them to set the contractual rules unilaterally.[455] Considering this imbalance, the law may limit the consumer´s autonomy, prohibiting it to agree to some types of clauses.[456] On the other hand, it may also limit the developer´s autonomy to establish certain clauses, for instance by declaring the nullity of unfair terms.[457]

Prima facie one may think that the limitation of the autonomy of one contractual party is a sign of unequal treatment. However, this unequal treatment provides contractual equality by treating the

[452] See Coester, M. (2014), 'Party Autonomy and Consumer Protection', *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht - euvr*, pp. 175-176.
[453] Köhler, H., Lange, H. (2013), *BGB, Allgemeiner Teil*: *Ein Studienbuch*, Kurzlehrbücher für das juristische Studium, München, Beck, §5, para. 2.
[454] See Chapter II, E, 2.
[455] Schapp, J., Schur, W. (2007), *Einführung in das bürgerliche Recht*, Vahlen Studienreihe Jura, München, Vahlen, p. 491.
[456] See Pfeiffer, T. (2013), '1. Teil. Einleitung' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck, paras. 3-4.
[457] See above Chapter II, E, 3 and 4, about unfair clauses in standard property development contracts

unequal parties differently.[458] That means, lifting up the consumer or lowering the trader to achieve balance. This kind of limitation derives from the *favor debilis* principle, according to which, the interpretation of norms or clauses may favor the weakest party of the legal relationship.[459]

Thus, the imbalance between consumer and developer in the standard contract may justify a limitation in the parties´ autonomy in the case in study. If the arbitration clause in the property development contract reflects, in anyway, the superior position of the trader in the contractual relationship, the law may limit the trader´s autonomy and consider the clause or part of it as null.

B. Arbitrability of consumerist property development disputes

Knowing that there is a justifiable reason to limit the parties´ autonomy to arbitrate property development disputes, this work will now analyze how does the law implement this limitation.

Considering the matter in study, the law makes the limitation of party autonomy effective on three levels. They are the limitation to the freedom to contract (*Schranken der Abschlussfreiheit*), the limitation to the form of the contract (*Schranken der Formfreiheit*) and the limitation to the contractual content (*Schranken der Inhaltsfreihet*).[460]

The first limitation asserts that not anyone is free to contract over anything. In arbitration this limitation is materialized by the

[458] This corresponds to the ideia of equality by Aristoteles, under which equals should be trated equally and unequals should be treated unequally, in the measure of their unequality. Aristóteles, Vallandro, L., Bornheim, G., Souza, E. d., Pessanha, J. A. M. (1991), *Ética a Nicômaco ; Poética*, Os Pensadores, São Paulo, Nova Cultural.

[459] See Schötz, G. J. (2013), 'El favor debilis como principio general del Derecho Internacional Privado. Su particular aplicación a las relaciones de consumo transfronterizas', *Ars Juris Salmanticensis*, Vol. 1, p. 124.

[460] Köhler, H., Lange, H. (2013), *BGB, Allgemeiner Teil*: *Ein Studienbuch*, Kurzlehrbücher für das juristische Studium, München, Beck, §5, para. 2.

arbitrability rules. They determine who can arbitrate and which disputes can be arbitrated under a certain arbitration law.[461]

Secondly, generally contracts can be celebrated in any form.[462] Yet when the law sees a need for party autonomy limitation, it may require the parties to follow certain formal requirements in order to contract validly.[463] Regarding arbitral clauses, the law may determine that the clause must be in writing or follow any other formal requirement to be considered valid.

Lastly, the law may limit the content of the parties´ commitments, establishing material requirements for their validity. Applying this limitation to arbitration clauses, the law may for instance, verify the fairness of the arbitration clause´s content and intervene if it considers that the content goes beyond the legal limits.[464]

Both Brazil (1) and Germany (2) have made use of these three levels of limitation: they have established arbitrability rules, formal and material requirements for the validity of an arbitration clause in a B2C property development contract. Below, the limitations made by these countries will be delineated, enabling an analysis about how they were applied in courts. Finally, a comparison between the two

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[461] Lew, Julian D. M, Mistelis, L. A., Kröll, S. (2003), *Comparative international commercial arbitration*, The Hague, New York, Frederick, MD, Kluwer Law International; Sold and distributed in North, Central and South America by Aspen Publishers, paras. 1-4.

[462] Duarte, N. (2010), 'Art. 107' in: Peluso, C. (ed.), *Código civil comentado: Doutrina e jurisprudência : Lei n. 10.406, de 10.01.2002 : contém o código civil de 1916,* Barueri, SP, Manole. Diniz, M. H. (2010), *Código civil anotado*, São Paulo, Saraiva. Alvarenga, Maria Amália de Figueiredo Pereira (2010), 'Arts. 104 a 137' in: Machado, Antônio Cláudio da Costa, Chinellato, S. J. (eds.), *Código civil interpretado: Artigo por artigo : parágrafo por parágrafo,* Barueri, SP, Manole.

[463] A well-known example is the necessity of a notarized contract for the acquisition of property, established by Art. 108 CCB and §311b BGB. See also Alvarenga, Maria Amália de Figueiredo Pereira (2010), 'Arts. 104 a 137' in: Machado, Antônio Cláudio da Costa, Chinellato, S. J. (eds.), *Código civil interpretado: Artigo por artigo : parágrafo por parágrafo,* Barueri, SP, Manole. Duarte, N. (2010), 'Art. 107' in: Peluso, C. (ed.), *Código civil comentado: Doutrina e jurisprudência : Lei n. 10.406, de 10.01.2002 : contém o código civil de 1916,* Barueri, SP, Manole.

[464] See Münch, J. (2013), '§1029' in: Krüger, W., Adolphsen, J., Gottwald, P., Rauscher, T., Gruber, U., Hau, W., Hilbig-Lugani, K., Micklitz, H.-W., Münch, J., Pabst, S., Ulrici, B., Zimmermann, W. (eds.), *Münchener Kommentar zur Zivilprozessordnung: Bd. 3: §§ 1025-1109 EGZPO, GVG, EGGVG, UKlaG, Internationales und Europäisches Zivilprozessrecht,* München, Beck, C H.

limitation systems will allow us to know if they work satisfactorily to protect the consumer (3).

1. B2C property development arbitration in Brazil

The LBA and the CDC regulate the legal scenario for arbitration of B2C property development disputes in Brazil. They set the limitations to the arbitrability and validity of arbitration clauses as follows.

a) Objective Arbitrability

The objective arbitrability deals with the subject matter of the arbitration. It deals with the validity of the clause *ratione materiae*, defining which disputes are arbitrable under a certain law. In Brazil, Art. 1 LBA verses about arbitrability. It affirms that disputes relating to patrimonial alienable rights are arbitrable. The first adjective relates to patrimony, but not in its etymological sense, meaning heritage.[465] In Portuguese, the word patrimony indicates what a person owns, its assets, property in general. Thus, the patrimonial criterion practically states that commercial disputes are arbitrable.[466]

The second adjective relates to the availability of the rights in dispute. In fact, availability is the exact word that the Brazilian Law uses (*direitos disponíveis*). The availability concerns not only the possibility to waive the right, but also the prerogative to transfer it to another person. Some rights are not alienable because the law so determines, like the employee cannot waive its right to a

[465] Patrimony comes from the Latin word for father (*Pater*). It designated the assets of the father, which passed as heritage.
[466] It is undisputable in Brazil that patrimonial rights are those which can be quantified in money. Hence, disputes that concern patrimonial rights are commercial disputes. See Roque, A. V. (2012), 'A evolucao da arbitralidade objectiva no Brasil: Tendencias e Perspectivas', *Revista de Arbitragem e Mediacao*, Vol. 33, paras. 1-2.

remuneration.[467] The legal recognition of some rights as inalienable is important for social and *ordre public* reasons. Nobody should be able to abdicate from its life, image or other personal rights. Other rights are inalienable by nature, this is the case of the personal rights.[468] For instance, it is impossible to sever the dignity, the life, the fatherhood, the image from its right holder. In sum, inalienable rights are the ones of which the party cannot dispose of by an act of will.[469] These must not be subject to arbitration.

Since property development disputes verse about patrimonial alienable rights, nothing impedes its objective arbitrability under the Brazilian Law.

b) Subjective arbitrability

The subjective arbitrability concerns the restrictions as to who can arbitrate. It is a *ratione personae* issue.[470] Therefore, the question of whether a consumer is allowed to arbitrate their disputes in a certain jurisdiction is a subjective arbitrability question.

In Brazil, people capable to contract are also capable to arbitrate, according to Art. 1 LBA.[471] This means that the Arbitration Law leans the subjective arbitrability on the civil code, which regulates the legal

[467] See Arts. 2, 3, 9 and 468 of the CLT and Art. 7, VI of the Brazilian Constitution.
[468] Stolze Gagliano, P., Pamplona Filho, Rodolfo M. V (2009), *Novo curso de direito civil*, Parte Geral, São Paulo, Saraiva, p. 154.
[469] In 2005 the STJ produced an interesting decision on the topic of inaliable rights and arbitration. In the REsp 777.906 – BA, an employee asked for an urgent measure to be able to withdraw the money from its social insurance, which was monthly discounted from its salary. However, the bank alleged that the employee could not withdraw the money, since the decision which allowed the withdraw was an arbitral award and labor rights cannot be subject to arbitration because of its inaliable nature. The STJ, however, disagreed with the former instances and granted the urgent measure saying that, although these disputes are not arbitrable, the non-waivability is a characteristic that should favor the employee and not impede it to access its rights. Hence, in this intelligent and teleological decision, the STJ recognized the non-arbitrability of inaliable rights, but flexibilized this rule to attend the rights of the person, who the law wanted to favor. STJ (2005), REsp 777.906 - BA.
[470] Fouchard, P., Gaillard, E., Goldman, B., Savage, J. (1999), *Fouchard, Gaillard, Goldman on international commercial arbitration*, The Hague, Boston, Kluwer Law International, p. 534.
[471] Roque, A. V. (2012), 'A evolucao da arbitralidade objectiva no Brasil: Tendencias e Perspectivas', *Revista de Arbitragem e Mediacao*, Vol. 33, para. 11.

capacity in Arts. 1 to 5 CCB.[472] The law does not explicitly prohibit consumers to arbitrate.[473] In fact, the word "consumer" does not appear in the law whatsoever.

c) Formal validity of arbitration clauses

The Brazilian lawmaker from 1996, trying to protect the adherent/consumer, established, in Art. 4 (2) LBA, requirements to recognize the formal validity of an arbitration clause inserted in the standard contract. These requirements are, hence, applicable to the context of the property development standard contract. The provision is composed of two alternative requirements as follows: First, in standard contracts, the clause will only be considered valid if the adherent takes the initiative to institute arbitration. Second, the clause is valid if the adherent expressly agrees with the institution of arbitration, as long as in written in a separate document or in bold type, with a signature especially for the arbitration clause.[474]

Pursuant to the first requirement, the arbitration clause is always binding on the developer if the consumer is the one who starts arbitration.[475] Here, the core of the requirement lies on a post-dispute decision of the consumer. If a dispute arises and the property development contract possess an arbitration clause, no matter if in bold type or if with a separate signature, if the consumer takes the initiative to start arbitration, the clause is considered valid.[476] The post-dispute aspect is extremely important, since it does not compel

[472] 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.
[473] Timm, L. B., Moser, L. G. M. (2014), 'Vícios e abusividades do compromisso arbitral?' in: *Arbitragem e Mediação,* São Paulo, Editora Revista dos Tribunais, para. 2.
[474] Original: Art. 4, § 2º LBA: "*Nos contratos de adesão, a cláusula compromissória só terá eficácia se o aderente tomar a iniciativa de instituir a arbitragem ou concordar, expressamente, com a sua instituição, desde que por escrito em documento anexo ou em negrito, com a assinatura ou visto especialmente para essa cláusula*."
[475] Ferreira, M. V. V. (2013), 'Da validade da convencao arbitral em contratos de adesao decorrentes de relacao de consumo e a recente jurisprudencia do STJ', *Revista de Arbitragem e Mediacao*, Vol. 37, para. A.II.III.
[476] See Lacerda, B. A. d. (1998), *Comentários à Lei de arbitragem*, Belo Horizonte, Del Rey, pp. 48-49. If the adherent is not the one to start arbitration, then the clause is not valid. The counter conclusion is that if the adherent starts arbitration, the clause is valid and binds the drafter.

the consumer to choose arbitration before it could, to a certain extent, analyze the specific situation and consult lawyers to advise them as to the advantages and disadvantages of arbitration in the specific case. It leaves the door of the courts opened for consumers, as well as the possibility of arbitrating the dispute.

The core of the second requirement is the contractual principle of transparency. Pursuant to it, the simple signature of the contract does not bind the consumer to the arbitration clause in it. It does not evidence the agreement with arbitration as the dispute resolution method.[477] The lawmaker demands in Art. 4 (2) LBA that the clause be written in bold type or in an attached document, and that the consumer signs either the clause separately or the attached document in addition to having signed the contract.[478] Therewith, the law wants to avoid that adherents sign contracts with an arbitration clause without noticing it.[479]

d) Material validity of arbitration clauses

While the arbitrability and the formal requirements of the arbitration clause are regulated by the Brazilian Arbitration Law, the material validity of the clauses in study is subject to the CDC. Like every other clause inserted in a B2C contract in Brazil,[480] the arbitration clause in a B2C property development contract must resist the content control of Art. 51 CDC to be considered valid. Art. 51, VII

[477] Timm, L. B., Moser, L. G. M. (2014), 'Vícios e abusividades do compromisso arbitral?' in: *Arbitragem e Mediação,* São Paulo, Editora Revista dos Tribunais, para. 11.
[478] See also Superior Tribunal de Justiça, 3rd Chamber (2014), AgRg no Recurso Especial No. 1.439.034 - MG, Inteiro Teor, p. 7.
[479] STJ (2016), REsp 1.602.076 - SP STJ (2012), REsp 1.169.841 - RJ
[480] See above Chapter II, E, 3, b.

CDC considers as null and void any clause that compulsorily imposes arbitration in a B2C contract.[481]

In practice, Art. 51, VII CDC is responsible for the invalidity of practically all arbitration clauses included in a standard contract in Brazil, regardless of them complying with the formal validity requirements of Art. 4 LBA or not.[482] The prevailing understanding is that when the trader, without any participation or influence of the consumer, drafts the arbitration clause and inserts it in the standard contract, they make it an imposition on the consumer, who, at the moment they sign the contract, generally do not have sufficient technical information to be able to take a conscious decision about the dispute resolution method, this is then considered to be a compulsory clause.[483] Hence, Art. 51, VII CDC, in practice, enables consumers to contract with property developers without being bound to a formally valid arbitration clause.

e) Attempts to change validity requirements

The recent legislative history of arbitration shows that the arbitration of consumer disputes is a critical point for Brazilian jurists. In 2013, the Senate initiated a Project of Law to modify and modernize the Brazilian Arbitration Law in many aspects. This was the Project

[481] da Costa, Nilton César Antunes (2014), 'A convencao de arbitragem no contrato de adesao' in: *Arbitragem e Mediação,* São Paulo, Editora Revista dos Tribunais, para. 3.2.1. Nery Júnior, N. (2007), 'Capítulo I - Da proteção Contratual' in: Grinover, A. P. (ed.), *Código brasileiro de defesa do consumidor: Comentado pelos autores do anteprojeto,* Rio de Janeiro, Forense Universitária, pp. 504–638. Garcia, L. d. M. (2010), *Direito do consumidor*: *Código comentado, jurisprudência, doutrina, questões, decreto 2.181/97*, Niterói, Impetus.
[482] STJ (2007), REsp 819.519 - PE; Tribunal de Justiça de Minas Gerais (2010), Apelação Cível 1.0024.08.180398-3/001; Tribunal de Justiça de Minas Gerais (2011), Apelação Cível 1.0525.10.001931-0/001; Tribunal de Justiça do Rio Grande do Sul (2013), Agravo 70051678332; Tribunal de Justiça de São Paulo (2017), Apelação Cível 1095158-71.2014.8.26.0100. I register that during my research I did not find any B2C property development case in Brazil, in which the court recognized the validity of the arbitration clause.
[483] See Timm, L. B., Moser, L. G. M. (2014), 'Vícios e abusividades do compromisso arbitral?' in: *Arbitragem e Mediação,* São Paulo, Editora Revista dos Tribunais, pp. 281–296. Soares, D. V. (2016), 'A Arbitragem de Consumo no Direito Comparado: Um Modelo Possível para o Brasil?', *Revista de Direito do Consumidor*, Vol. 106, pp. 445–484.See also da Costa, Nilton César Antunes (2014), 'A convencao de arbitragem no contrato de adesao' in: *Arbitragem e Mediação,* São Paulo, Editora Revista dos Tribunais, pp. 1027–1052.

of Law 406/2013,[484] whose main goal was to expand the scope of arbitration in the country, offering a better framework to arbitration with state-owned companies and also with consumer parties.[485] On 26th May 2015, the project completed its legislative process and was sanctioned by the presidency, turning into the Law 13.129.[486] However, the presidency vetoed the paragraphs regarding consumer arbitration.[487]

To better understand the legislative process of consumer arbitration provisions in Brazil, the comparative chart below demonstrates the changes proposed by the project of the law 13.129. On the left side of the table, one can read the proposal made by the Senate to change the LBA. On the right side one can read the LBA provisions, the way they were before the sanction of the law 13.129. It also corresponds to the LBA today, since the propositions were vetoed and no changes were accepted to those provisions.

PLS 406 / 2013	(LBA) 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.	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	§1 The arbitration clause must be stipulated in

[484] Brazil (2013), Projeto de Lei do Senado 406
[485] See Salomão, D. A. (2014), 'Arbitration under the Brazilian Law with regards to the main changes suggested by the reform committee', *World Arbitration & Mediation Review*, Vol. 8, No. 1, pp. 107–127.
[486] Brazil (2015), Law No. 13.129
[487] In Brazil the president is allowed by Art. 66, §2 of the Constitution to veto the integral text of an article, a paragraph, a subsection or a line of the project of law. The veto must then be discussed by both legislative chambers and can only be rejected by the absolute majority of votes.

and may be inserted in the contract or in a separate document that refers to it.	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 valid only if written in bold type or in a separate document.	§2 In the standard contracts, the arbitration clause is effective only if the adherent takes the initiative to institute arbitration or expressly agrees with its institution, as long as in writing in an attached document or in bold type, with signature especially for this clause.
§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.	

Notably, the PLS differentiates between the moment of signing the contract in §2 and the moment after the dispute arises in §3. With the wording of Art. 4 LBA, proposed by the PLS 406[488] the arbitration clause would still have to comply with the formal requirements based on the transparency principle, yet in a standard contract the clause would only be binding to the trader, but not to the consumer. So even having signed an arbitration clause in bold or in a separate document, with a specific signature for it, consumers still would not be bound to

[488] The draft of Art. 4 in the PLS 406 corresponds to the Project of Law 78/1992 that first originated the Brazilian Arbitration Law. Justice Nancy Andrighi, in a decision about an arbitration clause inside a property development contract, emphasized that at that time, the Deputy chamber wrongly changed the original Senate´s project to the LBA, giving it a confusing draft and hampering the interpretation of the norm and therewith the protection of the consumer. STJ (2012), REsp 1.169.841 - RJ

it. For the clause to be effective the consumer would have to want arbitration, either as respondent, agreeing with it, or as claimant, starting it.[489] Art. 4, §3 LBA would postpone the effectiveness of the arbitration clause to a post-dispute decision of the consumer.

In contrast, the provision of the LBA, in force in Brazil, has a confusing draft. Art. 4 (2) LBA mixes the time when the consumer signs the contract with the time after the dispute arises. Moreover, it does not follow a chronologic order, touching the post dispute moment in the first part of the subsection and the contractual signature moment in the second part. The first sentence of the subsection is clear. It asserts that the arbitration clause only produces effects if the consumer starts arbitration. However, this is only the case when the consumer is the claimant. The sentence leaves out the case where the trader starts arbitration and the consumer, as a respondent, would have to agree with it to give effectiveness to the clause. The second part affirms that the arbitration clause will only be effective if the consumer expressly agrees with the institution of arbitration, in writing, in an attached document or in bold type letter with a special signature. These requirements denote the application of the transparency principle, which is applicable to standard terms. Thus, this second sentence refers to the formal requirements to the clause in standard terms.

Comparing the PLS with the LBA one realizes that the PLS has a clearer draft. It treats the formal requirements for an arbitration clause in standard terms and the post-dispute decision to arbitrate of the consumer in two different subsections, what facilitates the understanding and the application of the consumer protective rules. It also follows the chronology of facts concerning a contractual dispute. First the parties sign the contract, so first the PLS regulates the requirements for the clause validity. Later the dispute arises, so the PLS treats the effectiveness of the clause in the post-dispute moment

[489] Gouvêa Neto, Flávio de Freitas, Consultor Jurídico (2015), *Arbitragem de consumo como a da Espanha aceleraria resolução de demandas*, available at: www.conjur.com.br/2015-nov-14/flavio-gouvea-arbitragem-consumo-aceleraria-resolucao-demandas. 10.02.2016.

at last. Differently from the LBA, Art. 4 (3), the PLS covers the situation in which the consumer, as respondent, wants to follow through with the arbitration started by the trader and can agree with it.

Some consumer protection organizations and scholars, however, disapproved of the changes made by the PLS 406 and made strong movements asking for the presidential veto.[490] It understood the provision as a widening measure, instead of a protective one. The campaign for the veto gave life to strong voices who pleaded for a ban in consumer arbitration in Brazil.[491]

The pressure made by the consumer protection oraganizations and scholars was fruitful in the presidency. Although the provisions passed through the legislative process in both legislative chambers without any changes, the presidency surprisingly vetoed both paragraphs and the law remained with the wording from 1996. According to the Presidential Message No. 162 from 26.05.2015, the proposed paragraphs would alter the rules for arbitration in standard contracts and therewith would widely allow arbitration in consumer disputes.[492] It affirms that the paragraphs are not clear in explaining that the consumer´s consent must be done not only in the moment of signing the contract, but also after the dispute arises.

Unfortunately, the veto was undeniably a throwback in the field of consumer protection. The provisions of the PLS were clearer than the ones in force nowadays. They did not widen the possibility of consumer arbitration, on the contrary, they protected the consumers by giving them the ultimate choice between arbitration and courts. Neither the Brazilian consumer protection scholars nor the president

[490] *Grupo pede veto para arbitragem no consumo*, available at: economia.estadao.com.br/noticias/geral,grupo-pede-veto-para-arbitragem-no-consumo-imp-,1687945. 01.06.2015. Lazzarini, M., Marques, C. L., Idec - Instituto Brasileiro de Defesa do Consumidor, *Não à arbitragem de consumo!*, available at: www.idec.org.br/em-acao/artigo/no-a-arbitragem-de-consumo. 22.10.2015.
[491] Marques, C. L., Lima, C. C. de (2014), 'Anotacao ao PLS 406 de 2013 sobre arbitragem', *Revista de Direito do Consumidor*, Vol. 91, pp. 407–414. Marques, C. L., *É preciso manter veto à arbitragem privada de consumo*, available at: www.conjur.com.br/2015-jun-09/claudia-marques-preciso-manter-veto-arbitragem-consumo. 11.03.2016.
[492] Roussef, D. (2015), *MENSAGEM Nº 162, DE 26 DE MAIO DE 2015.*, available at: www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/Msg/VEP-162.htm. 01.06.2017.

seemed to have interpreted the PLS 406 correctly.[493] The author does not support the idea that only the change in the clause as proposed by the PLS 406 is sufficient to protect the consumer in an appropriate way in the arbitration proceedings. However, it must be recognized that the §2 and §3 represented an advance in comparison with the current legislation.

f) Case law studies

Knowing the legal scenario for arbitration clauses in property development contracts in Brazil, two leading cases on the topic decided by the highest civil court of Brazil will be presented. The first case is from 2007 and the second from 2012. The chronological order of description allows us to follow the development of the understanding of the court towards arbitration with a consumer party in property development disputes.

i) STJ decision from 09.10.2007[494]

In this case, Flavia Zirpoli (consumer) entered into a property development contract with CONAC (developer). It was a standard contract with an arbitration clause. The developer did not comply with the contractual delivery date. The consumer then went to the courts and sued the developer searching for the termination of the contract, the restitution of paid installments, payment of contractual penalty and damages.

In the first instance, the judge has partially granted the plaintiff´s requests, condemning the developer to pay for damages, restitute

[493] Prof. Tucci affirms that, to veto the paragraphs on consumer arbitration under those grounds, the presidency has either not read the paragraphs or not understood them. Tucci, José Rogério Cruz e, *Vetos inusitados conspiram contra o futuro promissor da arbitragem*, available at: www.conjur.com.br/2015-jun-02/paradoxo-corte-vetos-inusitados-conspiram-futuro-promissor-arbitragem. 10.02.2016.
[494] STJ (2007), REsp 819.519 - PE

installments and to pay the contractual penalty. The developer then appealed and asked for the termination of proceedings, since the dispute was subject to a valid arbitration clause. The Tribunal of the State of Pernambuco rejected the appeal. Regarding the arbitration clause, the tribunal found that in a standard contract, where the consumer could not influence the draft of the clauses, one could infer that this dispute resolution method did not result from the trust and consensus of the parties, but from an imposition from the side of the drafter. Hence, the tribunal recognized the nullity of the clause, under Art. 51 VII CDC, since the developer determined the compulsory use of arbitration.

The developer appealed to the last possible instance, the Superior Court of Justice. It argued that the proceedings must be terminated, since there was an arbitration clause, which was freely agreed upon in the contract. It also emphasized that the court should have examined the contractual clauses to verify that there is no unconscionability and that the clauses were fair. The court nevertheless decided that the clause was unfair, because the consumer could not influence the elaboration of the contract and by express disposition of Art. 51 VII CDC, must be considered null. Additionally, it also pointed as legal basis for this decision Art. 4 I CDC, which recognizes the vulnerability of the consumer in the market and Art. 51 IV CDC, which considers abusive all clauses that puts the consumer in a disadvantageous position or are incompatible with good-faith and equity. In sum, the court dismissed the appeal.

This decision shows that the STJ at that time supported a position deliberately against consumer arbitration. The reasoning for the nullity of the arbitration clause is rather poor. It is against the good legal practice to regard a clause as abusive under the mere fact that it was unilaterally drafted. May it so be, then all the clauses in any standard contract would be considered unfair and thus, null. The court did not examine the other clauses of the contract, as suggested by the defendant, to verify if the contract had an abusive or unfair character.

The decision used Art. 51 VII CDC as a blanket rule to consider any arbitration clause in a standard contract as null.

There was no examination of the will of the consumer who, in this case, clearly wanted to go to courts, which could have justified the non-binding nature of this specific clause according to Art. 4 (2) LBA. Actually, none of the requirements of the LBA were discussed.

ii) STJ decision from 06.11.2012[495]

Davidson Roberto de Faria Meira Júnior (consumer) entered into a property development contract with CZ6 Empreendimentos (developer). The contract was drafted as a standard contract and contained an arbitration clause. In spite of the arbitration clause, the consumer sued the developer asking for courts to recognize as abusive the charging of interest before handing over the keys of the unit and the possibility of expanding the delivery date in 180 days, expressed in the contract. The developer presented its defense and argued upon the arbitration clause as a preliminary matter. In the first instance, the judge rejected the preliminary issue based on the constitutional guarantee under which nothing can impede the party to seek for their rights in the judiciary.[496]

The parties appealed until the last instance, which in this case was the Special Recourse in front of the Superior Court of Justice. The STJ recognized that it has had the opportunity to examine the insertion of an arbitration clause in a B2C property development standard contract before in CONAC *vs.* Flávia Zirpoli Sobral, but at that time, did not analyze the issue in light of the arbitration law.

The first question that arose with the analysis of the arbitration law was whether Art. 4 (2) LBA superceeded Art. 51 VII CDC. Since

[495] STJ (2012), REsp 1.169.841 - RJ
[496] Art. 5, XXXV Brazil (1988), Constitution of the Federal Republic of Brazil

the LBA was promulgated after the CDC, it could have tacitly revoked the provision in the CDC if they were incompatible.[497] Therefore, the court proceeded to verify if these provisions were incompatible with one another. The court concluded that as the LBA recognizes the binding nature of the arbitration clause, it also establishes in Art. 4 (2) mechanisms to protect the consumer from an arbitration clause in the standard contract, where it cannot discuss the clauses with the trader and therefore the incompatibility between this provision and Art. 51 VII CDC was only apparent.

The decision asserts that Art. 4 (2) LBA verses about standard contracts in general and that Art. 51 VII CDC verses about standard contracts with a consumer party, concluding that the revocation could not be done under the specialty criterion. Thus, the court concluded that both provisions coexist in harmony in the Brazilian legal system.

The STJ emphasized that the CDC only prohibits the compulsory use of arbitration, but apart from that, the use of arbitration in consumer disputes is allowed. Although the clause inserted in the standard contract finds its obstacle in Art. 51 VII CDC, nothing impedes the consumer to find a post-dispute agreement to submit the dispute to arbitration.

More importantly, the decision´s conclusion did not only consider the fact that the clause was inserted in a standard contract, much more, it gave the due significance to the fact that the consumer sued the developer, what evidenced that he did not want to submit the dispute to arbitration.

This decision lied 5 years ahead of the one above-mentioned and represents a big step in the understanding of the STJ regarding the issue in study. The decision examined the legal issue in many aspects and resolved the revocation question. It also confirmed the binding

[497] According to the principle of *lex posteriori derogat lex priori*, expressed in Art. 2 (1) of the Brazil (1942), Decree - Law No. 4.657. Introductory Act to the rules of Brazilian law

nature of an arbitration agreement in general and affirmed that the Brazilian law does not prohibit the consumer to arbitrate.

Although the decision discoursed about all provisions that touch the matter, the exact legal basis used to decide against the arbitration clause was Art. 51 VII CDC. However, this provision, does not exactly reflect the justification described. The court did not decide based on the fact that the clause determined compulsory arbitration but based simply on the will of the consumer not to arbitrate, which, tends to accompany the LBA more than the CDC. Although the lack of legal basis is highly critical, Justice Nancy Andrighi, as the rapporteur of the case, made what she could out of the blurry legislation about consumer arbitration in Brazil.

2. B2C property development arbitration in Germany

The German legal scenario for B2C property development arbitration is set by the requirements of the 10th book of the ZPO and the content control according to AGB-Law. They regulate the matter as follows.

a) Objective Arbitrability

Since Germany has adopted the UNCITRAL Model Law of 1985, arbitrability requirements under both the ML and the German application of it in the ZPO are of relevance. By defining its scope of application, the ML1985 in Art. 1 (1) states that it shall be applicable to international commercial arbitration. Therewith, the arbitrability of disputes under the ML1985 is dependent on two main aspects: the dispute must be international and commercial. The commercial aspect is still present in the German Law in §1030 (1) ZPO. According to this provision, any patrimonial right can be arbitrated, *i.e.* disputes

regarding financial and commercial interests.[498] Consistently with Art. 1 (1) ML1985 "*the term ´commercial´ should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not.*"[499]

Nonetheless, some differences between the ML1985 and the 10th book of the ZPO can be seen in the arbitrability field. The international aspect, for instance, is not mentioned in the national law, since the 10th Book regulates both domestic and international arbitrations with seat in Germany.

Further, the ML did not oversee the fact that adopting countries, like Germany, would want to develop their own arbitrability conditions in their arbitration laws. Art. 1 (5) ML1985 asserts that "*this law shall not affect any other law of the adopting State by virtue of which certain disputes may not be submitted to arbitration."* This article leaves space for the countries that adopted the Model Law to define within other laws which disputes they want to keep away from arbitration. The German lawmaker, for instance, made an exception to the arbitrability of any "commercial issues" in §1030 (2) ZPO. To protect the tenant,[500] disputes, which´s object is the existence or not of a rental agreement of a residential property in Germany are not arbitrable.

Moreover, §1030 (1) ZPO states that an arbitration agreement about a non-patrimonial right is nonetheless binding if the law entitles the parties to find a settlement about the dispute. The differentiation between the arbitrability of patrimonial rights and non-patrimonial rights, whereby non-patrimonial rights are only arbitrable if the parties would be able to settle, is an important aspect of this provision. Before 1998, the settlement criterion was not a differentiation criterion but a

[498] Bockstiegel, K.; Kröll, Stefan; Nacimiento, Patricia, eds. (2015), *Arbitration in Germany. The model law in practice. 2nd, rev. ed*: *The Model Law in practice*, Den Haag, Kluwer Law International, paras. 15-16.
[499] Foot note of Art. 1 (1) UNCITRAL ML 1985 about to the interpretation of the provision.
[500] See Wegen, G., Barth, M. (2007), 'Praktische Tipps für den Abschluss der Schiedsklausel' in: Torggler, H. (ed.), *Praxishandbuch Schiedsgerichtsbarkeit,* Wien, Verl. Österreich, para. 6.

condition for arbitrability of any issue, so that also patrimonial disputes could only be submitted to arbitration as long as a settlement upon the issue would be possible.[501] The settlement condition reinforces the thesis whereby the parties could not vest private arbitrators with the power to decide on a matter about which they themselves would not be entitled to settle.[502]

The use of the settlement criterion in the new German Arbitration Law only for non-patrimonial rights comes from the example of the Swiss Law.[503] Art. 177 (1) Swiss Federal Law on Private International Law admits that arbitration suits every patrimonial dispute and puts the settlement criterion in the position of differing between arbitrable and not arbitrable disputes only where non-patrimonial rights are involved.

In general, particulars are not allowed to settle about matrimonial matters, filiation and custody, incapacitation, etc.[504] One can say that the prohibition to settle about some rights goes in line with the doctrine of inalienable rights (*direitos indisponíveis*), anchored in Roman-Latin countries, like Italy, Portugal and Brazil.[505] It serves the classification of rights. As mentioned above,[506] inalienable rights are the ones one cannot transfer or waive.[507] Under these circumstances, one cannot make any concessions about the right

[501] Old version of §1025 (1) ZPO. See Wegen, G., Barth, M. (2007), 'Praktische Tipps für den Abschluss der Schiedsklausel' in: Torggler, H. (ed.), *Praxishandbuch Schiedsgerichtsbarkeit,* Wien, Verl. Österreich, para. 3.
[502] Trittmann, R., Hanefeld, I. (2015), 'Part II - Chapter II: Arbitration Agreement, § 1030 – Arbitrability' in: Bockstiegel, K., Kröll, S., Nacimiento, P. (eds.), *Arbitration in Germany. The model law in practice. 2nd, rev. ed: The Model Law in practice,* Den Haag, Kluwer Law International, para. 5.
[503] In the Bill of the Arbitration Law Reform Act, the lawmaker justifies the insertion of the settlement criterion only for non-patrimonial disputes using the example of the Swiss Law for Private International Law, BT-Drs. 13/5274, p.43.
[504] Schwab, K. H., Walter, G., Baumbach, A. (2005), 'Schiedsgerichtsbarkeit: Systematischer Kommentar zu den Vorschriften der Zivilprozeßordnung, des Arbeitsgerichtsgesetzes, der Staatsverträge und der Kostengesetze über das privatrechtliche Schiedsgerichtsverfahren', para. 2.
[505] Art. 806 *Codice di procedura civile italiano: "Le parti possono far decidere da arbitri le controversie tra di loro insorte che non abbiano per oggetto* ***diritti indisponibili****, salvo espresso divieto di legge*." Art. 1 Brazi 9.307: "*As pessoas capazes de contratar poderão valer-se da arbitragem para dirimir litígios relativos a direitos patrimoniais* ***disponíveis***." In Portugal the inalienable right was a criterion for arbitrability until 2011, the new Arbitration Law from 14.12.2011 in Art. 1 is similar to the German arbitrability provision.
[506] Chapter IV, B, 1. a
[507] Stolze Gagliano, P., Pamplona Filho, Rodolfo M. V (2009), *Novo curso de direito civil*, Parte Geral, São Paulo, Saraiva, p. 154.

in a settlement. Therefore, although the German – Swiss criterion has a different name, it comes to the same conclusion as the Brazilian-Italian one as to the non-arbitrability of disputes involving inalienable rights, or rights about which one cannot settle.[508]

Since disputes arising out of a property development contract generally concern patrimonial rights, they do need to pass through the settlement criterion and are arbitrable in Germany, in accordance with §1030 (1) ZPO.[509]

b) Subjective arbitrability

Germany does not have provisions about subjective arbitrability in its arbitration law.[510] Identically to Brazil, people who are capable to enter into a contract are also able to arbitrate.[511] The capacity to enter into contracts is regulated in §§104 to 115 BGB.[512] In short, the consumer does not lack subjective arbitrability.

c) Formal validity of arbitration clauses

In order to avoid that the consumer signs a contract with an arbitration clause without noticing it, the law establishes specific

[508] About understanding rights about which one cannot settle and inalienable rights as identic arbitrability criteria, see: Fouchard, P., Gaillard, E., Goldman, B., Savage, J. (1999), *Fouchard, Gaillard, Goldman on international commercial arbitration*, The Hague, Boston, Kluwer Law International, p. 573.
[509] See Benedict, C. (2007b), 'Part IV – Selected Areas and Issues of Arbitration in Germany, Construction Arbitration in Germany' in: Böckstiegel, K.-H., Kröll, S., Nacimiento, P. (eds.), *Arbitration in Germany: The Model Law in practice,* Alphen aan den Rijn, Kluwer Law International, para. 42.
[510] Bockstiegel, K.; Kröll, Stefan; Nacimiento, Patricia, eds. (2015), *Arbitration in Germany. The model law in practice. 2nd, rev. ed*: *The Model Law in practice*, Den Haag, Kluwer Law International, §1038, para. 8. Mäsch, G. (2005), 'Schiedsvereinbarungen mit Verbrauchern' in: Schlosser, P., Bachmann, B. (eds.), *Grenzüberschreitungen: Beiträge zum Internationalen Verfahrensrecht und zur Schiedsgerichtsbarkeit ; Festschrift für Peter Schlosser zum 70. Geburtstag,* Tübingen, Mohr Siebeck, p. 529.
[511] See Voit, W. (2017), '§1040' in: Musielak, H.-J., Voit, W. (eds.), *Zivilprozessordnung,* München, Vahlen, Franz, para. 5. If the party lacks legal capacity, the arbitration agreement is invalid.
[512] Restrictions to the subjective arbitrability of partial incapable people can be found in specific legislation. *E.g.* restrictions to arbitrate with a minor in §1822 BGB; with a person going through an insolvency process §160 (2) (3) Insolvency Law.

formal validity requirements for a consumer to agree on arbitration.[513] §1031 (5) ZPO asserts that the agreement to arbitrate must be in a document signed by hand by both parties.[514] Thereunder, the trader cannot comply with §1031 (5) ZPO with a mere reference to the standard terms with an arbitration clause. Even if those standard terms become part of the contract, the arbitration clause does not.[515] Equally, two documents in which the parties individually express their will to arbitrate and sign separately are not valid as an arbitration agreement under the German law.[516]

Furthermore, one of the lawmaker´s biggest worries is that the consumer signs a contract with an arbitration clause that becomes lost in the jungle of clauses of a standard contract. Hence, §1031 (5) ZPO requires that other agreements than those referring to the arbitral proceedings may not be inserted in the document, where one can find the arbitration agreement. To comply with this provision, the arbitration agreement must be in a separate document only concerning the arbitration agreement and proceeding rules.[517] A clause inserted in

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[513] See Saenger, I. (2017), '§1031' in: Saenger, I., Bendtsen, R. (eds.), *Zivilprozessordnung: Familienverfahren, Gerichtsverfassung, Europäisches Verfahrensrecht : Handkommentar,* Baden-Baden, Nomos, para. 9 and Hau, W. (2013), '5. Teil. ABC der Klauseln und Vertragstypen: Schiedsklausel' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck, para. 54.

[514] Graf von Westphalen, F. (2016), 'Schiedsgerichtsklauseln' in: Graf von Westphalen, F., Thüsing, G. (eds.), *Vertragsrecht und AGB-Klauselwerke 38. Ergänzung,* München, Beck, C H.Kröll, S. (2004), 'Schiedsrichterliche Rechtsprechung 2003', *SchiedsVZ*, p. 114.

[515] Voit, W. (2017), '§1031' in: Musielak, H.-J., Voit, W. (eds.), *Zivilprozessordnung,* München, Vahlen, Franz. "*Der Wille muss sich aus der Erklärung selbst und nicht erst aus Verweisungen ergeben. Deshalb erfüllt eine Schiedsvereinbarung die Form des Abs. 5 nicht, wenn sie lediglich in den in Bezug genommenen AGB enthalten ist, und zwar auch dann nicht, wenn diese wirksam in den Vertrag einbezogen sind. Es muss vielmehr aus der Verweisung in der Urkunde selbst erkennbar sein, dass ein Schiedsgericht tätig werden soll*." Differently from B2B contracts, where the mere reference to the AGB is enough to bind the parties to arbitration. Schwab, K. H., Walter, G., Baumbach, A. (2005), 'Schiedsgerichtsbarkeit: Systematischer Kommentar zu den Vorschriften der Zivilprozeßordnung, des Arbeitsgerichtsgesetzes, der Staatsverträge und der Kostengesetze über das privatrechtliche Schiedsgerichtsverfahren'

[516] Voit, W. (2017), '§1031' in: Musielak, H.-J., Voit, W. (eds.), *Zivilprozessordnung,* München, Vahlen, Franz, para. 10. Münch, J. (2013), '§1031' in: Krüger, W., Adolphsen, J., Gottwald, P., Rauscher, T., Gruber, U., Hau, W., Hilbig-Lugani, K., Micklitz, H.-W., Münch, J., Pabst, S., Ulrici, B., Zimmermann, W. (eds.), *Münchener Kommentar zur Zivilprozessordnung: Bd. 3: §§ 1025-1109 EGZPO, GVG, EGGVG, UKlaG, Internationales und Europäisches Zivilprozessrecht,* München, Beck, C H, para. 27. Differently, when the NYC is applicable. The NYC, to which Germany is party, obliges the contracting States to recognize validity to an arbitration agreement contained in an exchange of letters or telegrams, pursuant to Art. II (2) NYC. See also Voit, W. (2017), '§1031' in: Musielak, H.-J., Voit, W. (eds.), *Zivilprozessordnung,* München, Vahlen, Franz, para. 18.

[517] BGH (2005), III ZR 265/03 Schmidt (2016), 'Klauseln, Vertragstypen, AGB-Werke: (40) Schiedsgutachtenklauseln, Schieds-, Schlichtungs- und Mediationsklauseln' in: Ulmer, P., Hans Erich, B., Hensen (eds.), *AGB-Recht: Kommentar zu den [Paragraphen] 305-310 BGB und zum,* Köln, Otto Schmidt.

a standard contract is considered to also comply with the provision if it is visibly separated from the other clauses, giving it a clear detach and the parties must give their signature specifically for this clause, the signature in the end of the contract is not enough.[518]

These requirements are not applicable if the contract, where the arbitration clause is inserted, was notarized.[519] The notary has an instruction obligation, which makes them responsible for informing the parties about the specificities of the contract they are about to sign.[520] Therefore, the law presupposes that by a notarized contract, the arbitration clause does not need to follow the special requirements, since the notary will inform the consumer about the clause.[521] In fact, property development contracts must be notarized according to §311b (1) BGB, since they concern the sale of land.[522] Thus, in the contracts

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[518] Saenger, I. (2017), '§1031' in: Saenger, I., Bendtsen, R. (eds.), *Zivilprozessordnung: Familienverfahren, Gerichtsverfassung, Europäisches Verfahrensrecht : Handkommentar,* Baden-Baden, Nomos, para. 13.Voit, W. (2017), '§1031' in: Musielak, H.-J., Voit, W. (eds.), *Zivilprozessordnung,* München, Vahlen, Franz, para. 11.

[519] Wolf, C., Eslami, N. (2016), '§1031' in: Vorwerk, V., Wolf, C. (eds.), *Beck'scher Online-Kommentar ZPO,* München, Verlag C.H.BECK, para. 24. Voit, W. (2017), '§1031' in: Musielak, H.-J., Voit, W. (eds.), *Zivilprozessordnung,* München, Vahlen, Franz, para. 11.

[520] Germany (1969), Beurkundungsgesetz §17 (1) of the law explains what does the instruction obligation covers. *§17 (2a) establishes especial requirements of the instruction obligation regarding contracts with a consumer. "§17 (1) Der Notar soll den Willen der Beteiligten erforschen, den Sachverhalt klären, die Beteiligten über die rechtliche Tragweite des Geschäfts belehren und ihre Erklärungen klar und unzweideutig in der Niederschrift wiedergeben. Dabei soll er darauf achten, daß Irrtümer und Zweifel vermieden sowie unerfahrene und ungewandte Beteiligte nicht benachteiligt werden.*

(2) (...)

(2a) Der Notar soll das Beurkundungsverfahren so gestalten, daß die Einhaltung der Pflichten nach den Absätzen 1 und 2 gewährleistet ist. Bei Verbraucherverträgen soll der Notar darauf hinwirken, dass
1.die rechtsgeschäftlichen Erklärungen des Verbrauchers von diesem persönlich oder durch eine Vertrauensperson vor dem Notar abgegeben werden und
2.der Verbraucher ausreichend Gelegenheit erhält, sich vorab mit dem Gegenstand der Beurkundung auseinanderzusetzen; bei Verbraucherverträgen, die der Beurkundungspflicht nach § 311b Absatz 1 Satz 1 und Absatz 3 des Bürgerlichen Gesetzbuchs unterliegen, soll dem Verbraucher der beabsichtigte Text des Rechtsgeschäfts vom beurkundenden Notar oder einem Notar, mit dem sich der beurkundende Notar zur gemeinsamen Berufsausübung verbunden hat, zur Verfügung gestellt werden. Dies soll im Regelfall zwei Wochen vor der Beurkundung erfolgen. Wird diese Frist unterschritten, sollen die Gründe hierfür in der Niederschrift angegeben werden."

[521] Wolf, C., Eslami, N. (2016), '§1031' in: Vorwerk, V., Wolf, C. (eds.), *Beck'scher Online-Kommentar ZPO,* München, Verlag C.H.BECK, para. 24. See also European Court of Justice - ECJ (2014), C-342/13 (Katalin Sebestyén vs. Zsolt Csaba Kovári et alia), concerning the information about the arbitration clause as a central aspect for the validity of the clause.

[522] See Hansen, E. (2006), *Bauträgerrecht*: *Planung; Finanzierung; Vertrag; Abwicklung*, Neuwied, Werner, p. 106. Heiermann, W. (2007), 'Der Verbraucherschutz in der gesetzlichen Regelung des deutschen _Bauträgerrechts - ausreichend im Licht der EG-Richtlinie 93/13?' in: Jochem, R. (ed.), *Rechtshandbuch des ganzheitlichen Bauens: Festschrift für Hans Ganten,* Wiesbaden, vieweg, p. 114. Busz, E. G. (2009), '§14 Das Bauträgergeschäft' in: Motzke, G. (ed.), *Prozesse in Bausachen: Privates Baurecht, Architektenrecht,* Baden-Baden, Nomos, para. 31ss.

in study, formal requirements for arbitration clauses in B2C standard contracts do not need to be followed.

It is noteworthy that the lack of these formal requirements is of no significance if, when the conflict arises, both parties resistless go to the arbitration hearing. Pursuant to §1031 (6) ZPO, in that case the lack of formal validity would be healed.[523]

d) Material validity of arbitration clauses

In German arbitration law, there are no specific material requirements for an arbitration clause inserted in a standard B2C contract. Nevertheless, the arbitration clause there is a discussion about the applicability of the content control, proposed by the AGB Law, to arbitration clauses in standard contracts.[524]

In light of the possibility of content control, verifying §§308 and 309 BGB, one notes that the arbitration clause is in none of these lists of unfair terms.[525] The clause is yet subject to the content control of §307 BGB. Pursuant to it, the clause is null and void if it, against the principle of good-faith, originates an unreasonable disadvantage to the party. The unreasonable disadvantage can also come from a lack of transparency. In that regard, §307 BGB affirms that the disadvantage may arise if the terms are not clear and understandable, in line with Art. 4 (2) and Art. 5 of the European Directive 93/13.[526]

It must be remembered that the AGB Law is the application of the European Directive in Germany. Thus, articles about content

[523] Voit, W. (2017), '§1031' in: Musielak, H.-J., Voit, W. (eds.), *Zivilprozessordnung,* München, Vahlen, Franz, para. 13.Wolf, C., Eslami, N. (2016), '§1031' in: Vorwerk, V., Wolf, C. (eds.), *Beck'scher Online-Kommentar ZPO,* München, Verlag C.H.BECK, para. 25.
[524] The application of content control to the clauses in study is discussed below in Chapter V, A.
[525] Mäsch, G. (2005), 'Schiedsvereinbarungen mit Verbrauchern' in: Schlosser, P., Bachmann, B. (eds.), *Grenzüberschreitungen: Beiträge zum Internationalen Verfahrensrecht und zur Schiedsgerichtsbarkeit ; Festschrift für Peter Schlosser zum 70. Geburtstag,* Tübingen, Mohr Siebeck, pp. 535.
[526] Palandt, O., Bassenge, P. (2016), *Bürgerliches Gesetzbuch*, Beck'sche Kurz-Kommentare, München, C. H. Beck, §310, para. 19.

control must be interpreted under the Directive´s light. The Directive has an Annex with a non-exhaustive list of terms that may be considered as unfair, pursuant to Art. 3 (3). Thereunder, heading "q" of the Annex expressly mentions arbitration clauses and sets clauses excluding or hindering the consumer´s right to take legal action or exercise any other legal remedy in the red list. Based on this provision, authors affirm that an arbitration clause in a consumer´s contract must be seen at least as an indication of abusiveness, since they hinder the consumer to take legal action.[527] However, the expression "to take legal action" must be interpreted in a wide manner, encompassing arbitration, which is an equivalent form of access to justice, recognized by the courts.[528]

In sum, an arbitration clause in a standard contract is not essentially invalid in face of the German Law. Differently from the approach of the Brazilian CDC, the fact that the developer unilaterally drafts the arbitration clause in standard terms does not mean by itself that it puts the consumer in an unreasonably disadvantageous position.[529] Content control has to be done in a case-to-case basis. One cannot generally say that an arbitration clause in a standard contract in Germany will always resist the AGB content control. Nevertheless, one can say that an arbitration clause in the standard property

[527] Graf von Westphalen, F. (2016), 'Schiedsgerichtsklauseln' in: Graf von Westphalen, F., Thüsing, G. (eds.), *Vertragsrecht und AGB-Klauselwerke 38. Ergänzung,* München, Beck, C H, p 17. Thode, R. (2007), 'Schiedsvereinbarungen in Verbraucher-Bauträgerverträgen', *DNotZ*, pp. 404–412.; Schmidt (2016), 'Klauseln, Vertragstypen, AGB-Werke: (40) Schiedsgutachtenklauseln, Schieds-, Schlichtungs- und Mediationsklauseln' in: Ulmer, P., Hans Erich, B., Hensen (eds.), *AGB-Recht: Kommentar zu den [Paragraphen] 305-310 BGB und zum,* Köln, Otto Schmidt, para. 5. See also European Court of Justice - ECJ (2000), Joined cases C - 240/98 to C-244/98 (Oceáno Grupo Editorial vc. Rocío Murciano Quintero et. alia)
[528] See BGH (2005), III ZR 265/03 BGH (2007), III ZR 164/06 Graf von Westphalen, F. (2016), 'Schiedsgerichtsklauseln' in: Graf von Westphalen, F., Thüsing, G. (eds.), *Vertragsrecht und AGB-Klauselwerke 38. Ergänzung,* München, Beck, C H. Mäsch, G. (2005), 'Schiedsvereinbarungen mit Verbrauchern' in: Schlosser, P., Bachmann, B. (eds.), *Grenzüberschreitungen: Beiträge zum Internationalen Verfahrensrecht und zur Schiedsgerichtsbarkeit ; Festschrift für Peter Schlosser zum 70. Geburtstag,* Tübingen, Mohr Siebeck, pp. 529–543.
[529] OLG Brandenburg (2011), 13 U 11/10

development contract *per se* does not cause an unreasonable disadvantage to the consumer,[530] and is therefore, valid.[531]

e) Case law studies

Two cases will help us understand how the German courts apply the rules above described. The first case was decided in 2007 by the BGH, the highest civil law court of Germany. The second one is from 2011 and decided by the regional court of Brandenburg.

i) BGH decision from 01.03.2007[532]

The case decided by the BGH is about consumers, who bought a house through a property development contract. The plaintiffs requested the courts to condemn the developer to pay money in advance for them to fix construction defects in the house. The defendant, however, raised the arbitration clause issue, asking the court to dismiss the lawsuit. This argument succeeded in the first instance, where the judge recognized the formal validity of the arbitration clause and therewith its bindingness. Unsatisfied with the result of the proceedings, the plaintiffs brought the case to the last instance in the BGH.

Indeed, the standard contract had an arbitration clause. However, the clause was quite peculiar. Not only it determined that any dispute arising out of the contract would be subject to arbitration, it also nominated the sole arbitrator. According to the clause, a certain judge would decide the dispute. If he could not serve as an arbitrator,

[530] "*Eine in AGB enthaltene Schiedsklausel stellt als solche keine unangemessene Benachteiligung des Vertragspartner dar.*" BGH (1991), III ZR 141/90 (Bremen) BGH (2005), III ZR 265/03 Hanefeld, I., Wittinghofer, M. A. (2005), 'Schiedsklausel in Allgemeinen Geschäftsbedingungen', *SchiedsVZ*, p. 222.
[531] Dammann, J. (2013), '5. Teil. ABC der Klauseln und Vertragstypen - Klauseln (B)' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck, para. B-160.
[532] BGH (2007), III ZR 164/06

the clause provided that at request from any party, the judge who presides the OLG Hamm must nominate a replacement. The BGH did not bring the clause to fall. The fact that the contract was notarized supplied the special formal requirements for arbitration clauses with a consumer provided by §1031 (5) ZPO. Hence, the court considered the clause formally valid.

Nevertheless, the consumers brought up the issue of material invalidity. They alleged that the arbitration clause would not resist the content control of §307 BGB, since it caused an unreasonable disadvantage to the consumer. The BGH however did not see any legal violation concerning the inclusion of the clause in a standard contract. In fact, it asserted that the arbitration clause in a standard contract does not by itself represent a disadvantage to the consumer.

On the other hand, it recognized that the consumer suffered a disadvantage concerning the nomination proceeding established in the clause. Yet, in the BGH´s understanding, this disadvantage was not enough to render the clause invalid, since §1034 (2) ZPO can heal the problem. According to this provision, if a clause gives one party an overweight in the composition of the tribunal, causing the other party to be in disadvantage, this party can request the court to nominate an arbitrator deviating from what the clause established. Based on this paragraph, the BGH decided that the disadvantageous nomination process did not amount to the invalidity of the clause, because the law provides the remedy for this situation. The court then rejected the claim.

This decision was severely criticized in Germany. Scholars appoint the disadvantages of arbitration for the consumer and argue that the BGH did not interpret the clause in consonance with the

European understanding of the Directive on unfair terms.[533] They affirm that due to Art. 3 (3) (q) of the Directive, arbitration clauses in B2C standard contracts indicate unfairness.[534] Pursuant to Thode, courts inside the European Union must check the fairness of all clauses in consumer contracts *ex officio*.[535] He asserts that the clause in discussion was disadvantageous for the consumer in many aspects and would not remain valid, if the BGH had checked its unfairness.

ii) OLG Brandenburg decision from 16.02.2011[536]

This dispute arose out of a B2C construction standard contract with an arbitration agreement. Before the dispute, the parties entered into a so-called independent process for the taking of evidence (*selbständiges Beweisverfahren, Titel 12 - ZPO*). Through this process, they wanted to identify the defects of the construction. Hence, the consumer requested the courts to open an independent process for the taking of evidence according to §485 (1) ZPO, to which the constructor agreed. The judge than nominated an expert to identify and quantify the defects of the construction. This special German proceeding intents to avoid that the parties start the main dispute, §485 (3) ZPO. If the evidence taken already demonstrates that one party has to pay for the defects, it is more likely that this party pays before entering into the dispute, to avoid procedural costs. Conversely, the evidence taken can also serve in the proceeding of the main issue.

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[533] See BGH (2007), III ZR 164/06 - Schiedsvereinbarung im Bauträgervertrag; Thode, R. (2007), 'Schiedsvereinbarungen in Verbraucher-Bauträgerverträgen', *DNotZ*, pp. 404–412.; Suffel, C., Suffel & Kollegen, *Schiedsgerichtsvereinbarung mit Verbrauchern*, available at: www.jenanwalt.de/entscheidungen/entscheidungen-2007/schiedsgerichtsvereinbarung-mit-verbrauchern. 01.03.2016.

[534] Jarusevicius, J. (2016), *Consumer Arbitration – Will The Two Different Worlds Across The Ocean Converge? - Kluwer Arbitration Blog*, available at: kluwerarbitrationblog.com/2016/02/25/consumer-arbitration-will-the-two-different-worlds-across-the-ocean-converge/. 08.03.2016.

[535] Thode, R. (2007), 'Schiedsvereinbarungen in Verbraucher-Bauträgerverträgen', *DNotZ*, pp. 406-407. Suffel, C., Suffel & Kollegen, *Schiedsgerichtsvereinbarung mit Verbrauchern*, available at: www.jenanwalt.de/entscheidungen/entscheidungen-2007/schiedsgerichtsvereinbarung-mit-verbrauchern. 01.03.2016. European Court of Justice - ECJ (2000), Joined cases C - 240/98 to C-244/98 (Oceáno Grupo Editorial vc. Rocío Murciano Quintero et. alia)

[536] OLG Brandenburg (2011), 13 U 11/10

Therefore, the ZPO provides that the party can start the main proceeding subsequently to the independent process for the taking of evidence, §494a ZPO. In the present case, that is exactly what the consumer did. It successively started court proceedings requesting the constructor to pay the sum of money corresponding to the defects and to free them from paying 366,26€ referring to a debt that it had to pay for the constructor.

The constructor however, raised the issue of the arbitration agreement in its defense, asking the court to terminate the proceedings. In the first instance, the judge accepted the constructor's defense and rejected the claim based on §1032 (1) ZPO.

The consumer appealed and brought the case to the OLG Brandenburg. It argued against the arbitration agreement with three main arguments. Firstly, the consumer alleges that the agreement was invalid, since the arbitration agreement form annexed to the contract was not completely filled in by the parties. Secondly, the arbitration agreement would establish an unreasonable disadvantage for the consumer, since in arbitration they would probably have to pay counselors and arbitrator´s costs in advance. Thirdly, the consumer affirms that the constructor could not rely on the arbitration agreement anymore, since they agreed to the independent process for the taking of evidence, which is a court proceeding that foresees a subsequent court proceeding about the main dispute.

Regarding the first argument, the OLG Brandenburg found that the incompleteness of the Arbitration agreement form does not amount to its invalidity. The parties did not fill in all information about themselves; however, one could clearly identify who the parties to that agreement are based on their signatures. Moreover, the agreement was signed on the same date as the construction contract and was annexed to it; hence, one can infer that the same parties to the construction contract are the parties to the arbitration agreement. The court decided that the agreement was determined enough. It also fulfilled the formal

requirements for an arbitration agreement with a consumer, namely that the agreement was in a separate document and signed by both parties.

The court also rejected the argument on the unreasonable disadvantage arising out of the arbitration costs. Comparing the costs in arbitration with the costs in court proceedings the OLG did not find any disadvantage for the consumer. In both cases, there is the possibility of paying for the lawyers and for the proceeding costs in advance. Additionally, the arbitration agreement did not establish anything about the distribution of costs. Consequently, pursuant to §1057 ZPO, the arbitral tribunal is the one who has to allocate the costs in its award, taking the dispute circumstances and the outcome of the case in consideration. Thus, the arbitration agreement does not constitute a financial disadvantage to the plaintiff.

Lastly, the court rejected the *venire contra factum proprium* argument. The decision explains that it is not contradictory to agree to a judicial taking of evidence process not willing to take the main dispute to the courts. The situation is comparable to the one presented by §1033 ZPO, which affirms that it is not incompatible with arbitration to ask for interim measures in the courts, be it before or after the constitution of the tribunal. In conclusion, the Tribunal decided that it was not against good-faith for the constructor to rely on the arbitration agreement. In light of all the above, the consumer´s appeal did not succeed and the court rejected the claim, referring it to arbitration.

Although this decision had corresponding elements to the one decided by the BGH, such as the consumer involvement and the construction contract celebrated through standard terms, it was not subject to as much criticism as the one above. The decision reaffirms that courts do not find arbitration clauses in B2C standard contracts as onerous for the consumer. German courts endorse the validity and bindingness of an arbitration agreement even on the consumer.

3. Comparison of legal scenarios

The comparison between the Brazilian and the German scenarios in the field of consumer arbitration regarding the property development contract is very enriching. On the one side, the requirements for the validity of an arbitration clause in a standard contract are similar in both jurisdictions. On the other side, their courts come to completely contrary decisions when they face the concrete case.

To better visualize the current legal situation of arbitration clauses in B2C standard contracts one can use this comparative chart:

Brazil	**Germany**
Formal Requirements	
Art. 4 (2) LBA	§1031 (5) ZPO
- The agreement to arbitrate must be in written in a separate document or in bold type, with a signature especially for the arbitration clause.	- The agreement to arbitrate must be in written in a separate document signed by hand by both parties.
Material Requirements	
Art. 51 §1 III CDC	§307 BGB
- An advantage is assumedly unreasonable and causes the nullity of the clause if it is excessively onerous for the consumer, considering the nature and content of the	- Clauses, which originate an unreasonable disadvantage to the party, against the principle of good-faith, are null.

contract, the interest of the parties and other circumstances peculiar to the case.	
Art. 51 VII CDC	Annex to Art. 3 (3) European Directive 93/13, "q"
- Clauses that determine the compulsory use of arbitration are null.	- Clauses requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions may be regarded as unfair.

The validity problem of the arbitration clause normally does not lie on the formal requirements. In Brazil, the developers have already adapted to the legislation and use the separate document or the bold type in their standard contracts. The fact that the consumer has to sign the arbitration clause or agreement separately avoids that the consumer agrees to arbitration without noticing it. In Germany, the notary information supplies the need for more formal requirements. Notably, all four decisions above presented recognized the formal validity of the arbitration clause in the concrete cases.

It is on the field of the material validity that the paths of both jurisdictions deviate. Legislation, case-law and scholars give the impression that in Brazil the general understanding is that the mere fact that a consumer dispute is referred to arbitration constitutes a disadvantage for the consumer, while in Germany it is widely recognized that arbitration is, to a certain extent, equivalent to court proceedings in its jurisdictional function and does not *per se* constitutes a disadvantage for the consumer.[537] The latter understanding is more reasonable and in line with the new efforts to

[537] BGH (1991), III ZR 141/90 (Bremen) BGH (2005), III ZR 265/03

give the consumer alternatives to access justice. Arbitration is not a land without law where the consumer can only be harmed. It has to comply with national legislation and most importantly with the due process principle. Moreover, this study has already discoursed about the advantages of arbitration specifically in the property development field,[538] which should be taken into account in a case-to-case basis when the parties choose their dispute resolution method.

Nonetheless, in German courts, the consumer stays bound to the clause, even if after the dispute arises, they expressly demonstrate that they do not want to arbitrate. It is of course, a notable application of the party autonomy and *pacta sunt servanda* principles. Yet the question whether these principles can still be lived with such a rigorousness in a situation where one party did not influence the drafting or freely consented to the arbitration clause remains unanswered.

In sum, the comparison of legal scenarios guides us to the conclusion that none of the jurisdictions have achieved an adequate level of consumer protection when it comes to arbitration clauses inside the standard property development contracts. German consumers who had only the option of agreeing to the clause or rejecting the whole contract are later obliged by the law to arbitrate their disputes against their will, under the formalistic argument of a formally valid arbitration clause. On the other hand, in Brazil courts assume that an arbitration clause inside a standard contract is *per se* unfair and invalid, even if formally valid and with no explicit unfair content.

Both legislations can learn from each other to reach the good middle and achieve a fair consumer protection in the field of arbitration, especially aiming at property development disputes, where the arbitration clause has been used more often.

[538] See above Chapter III, 2, a.

C. Protecting the consumer from arbitration

This chapter stays under the light of a basic question: Should the law protect the consumer from arbitration? Considering all the above, the structural imbalance between consumer and developer justifies a limitation in the parties´ autonomy to decide on the dispute resolution method. This has been the reason why Brazilian courts have invalidated arbitration clauses and the reason why German courts have been criticized for not invalidating them. Thus, the answer to this first basic question must be positive.

Yet, other questions arise out of this assumption. Should the limitation to arbitrate be complete or partial? Should there be a ban to consumer arbitration, or should consumers be able to arbitrate if they want to, but under some limits?

Opinions about how to answers these questions differ a lot.[539] In the search for answers that fit consumer protection in the current legal scenario, the questions above and the positions taken by both jurisdictions on the matter of banning consumer arbitration will be

[539] See, for instance publications with a pro consumer arbitration understanding: Tucci, José Rogério Cruz e, *Vetos inusitados conspiram contra o futuro promissor da arbitragem*, available at: www.conjur.com.br/2015-jun-02/paradoxo-corte-vetos-inusitados-conspiram-futuro-promissor-arbitragem. 10.02.2016.; Canário, P., *Especialistas criticam vetos do governo à nova Lei de Arbitragem*, available at: www.conjur.com.br/2015-mai-28/especialistas-criticam-vetos-governo-lei-arbitragem. 10.02.2016. Andrighi, F. N. (2006), 'Arbitragem nas relações de consumo: uma proposta concreta', *Revista de Arbitragem e Mediação*, Vol. 9, pp. 13–21. Lemes, Selma M. Ferreira (2003), 'O Uso da Arbitragem nas Relações de Consumo', *Valor Econômico, Caderno Legislação & Tributos*, 12.08.03. Gouvêa Neto, Flávio de Freitas, Consultor Jurídico (2015), *Arbitragem de consumo como a da Espanha aceleraria resolução de demandas*, available at: www.conjur.com.br/2015-nov-14/flavio-gouvea-arbitragem-consumo-aceleraria-resolucao-demandas. 10.02.2016. Scaletscky, F. S. (2014), 'Arbitragem e "Parte Fraca": a Questão das Relações de Consumo', *Revista Brasileira de Arbitragem*, Issue 41, pp. 68–99. Born, G. (2014), *International Commercial Arbitration*, p. 1022ss. Duve, C., Sattler, M. (2010), 'Schiedsvereinbarungen in Verbraucherverträgen' in: Genzow, F. C. (ed.), *Zwischen Vertragsfreiheit und Verbraucherschutz: Festschrift für Friedrich Graf von Westphalen zum 70. Geburtstag,* Köln, O. Schmidt, pp. 81–109. And against consumer arbitration: Engel, M. (2015), 'Außergerichtliche Streitbeilegung in Verbraucherangelegenheiten - Mehr Zugang zu weniger Recht', *NJW*, pp. 1633–1637. Thode, R. (2007), 'Schiedsvereinbarungen in Verbraucher-Bauträgerverträgen', *DNotZ*, pp. 404–412. Bauherren-Schutzbund e.V. (2013). Marques, C. L., *É preciso manter veto à arbitragem privada de consumo*, available at: www.conjur.com.br/2015-jun-09/claudia-marques-preciso-manter-veto-arbitragem-consumo. 11.03.2016.; *Grupo pede veto para arbitragem no consumo*, available at: economia.estadao.com.br/noticias/geral,grupo-pede-veto-para-arbitragem-no-consumo-imp-,1687945. 01.06.2015. Xavier, L., Casemiro, L. (2014), 'Arbitragem é o novo problema ou a solucao?', *O Globo*, 25.04.14.

analyzed (1) and of letting the consumer arbitrate under some other protection mechanism in the law (2).

In order to reach the best results to protect the consumer from arbitration, solution models other than the Brazilian over-protective and the German under-protective will be presented (3). The objective is to find the best model, which would fit the Brazilian and the German legal systems providing the consumer with the adequate protection.

1. Protecting the consumer by banning consumer arbitration

Concerning the first question, a complete ban of consumer arbitration cannot be supported. The law should not protect the consumer from arbitration by prohibiting them to arbitrate and invalidating all arbitration clauses with consumer participation for three reasons. It is not advantageous for the consumer to be prohibited to arbitrate, the ban of consumer arbitration is an improper interference with the principle of party autonomy and freedom of contract and the ban would go against the NYC.

a) A ban of consumer arbitration is disadvantageous for the consumer

Initially, it is not advantageous for the consumer to prohibit them to arbitrate. The consumer would lose one more option for dispute resolution, which, especially in the property development case, has advantages.[540] A state that cherishes consumer protection, should leave the arbitration door opened for consumer´s who might prefer this method. It is to believe that there are consumers who would

[540] See Chapter III, D, 2, a.

indeed prefer arbitration over court proceedings, and they should be given the chance to enforce the arbitration clause.

Furthermore, a state that bans consumer arbitration loses the chance to develop consumer arbitration as an alternative for consumers to access justice, like Spain and Portugal did.[541]

b) A ban of consumer arbitration constitutes an improper interference in the principles of party autonomy and freedom of contract

A prohibition would constitute an unnecessary extreme interference in party autonomy. It is dangerous to limit party autonomy in such a way to prohibit the consumer of a property development contract to arbitrate if they want to.[542] Such a measure presupposes the irrationality of any consumer, as if the state must take the decision power from them, to permanently protect any consumer from themselves. Banning consumer arbitration and taking away from the consumer their party autonomy and freedom of contract entirely is not consistent with the Law itself, for consumers are not considered legally incapable. On the contrary, the legal capacity, which is the only requirement for the subjective arbitrability of disputes in Brazil and Germany,[543] is what justifies that consumers should be given the opportunity to exercise their freedom of contract and their party autonomy, even to agree on arbitration.

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[541] Gouvêa Neto, Flávio de Freitas, Consultor Jurídico (2015), *Arbitragem de consumo como a da Espanha aceleraria resolução de demandas*, available at: www.conjur.com.br/2015-nov-14/flavio-gouvea-arbitragem-consumo-aceleraria-resolucao-demandas. 10.02.2016. Neves, C. (2012), '16 queixas por semana resolvidas por arbitragem - Portugal - DN', *Diário de Notícias*, 10.01.12.

[542] Coester-Waltjen, D. (2012), 'Chapter 2 - Constitutional Aspects of Party Autonomy and its Limits: The Perspective of Law' in: Grundmann, S., Kerber, W., Weatherill, S. (eds.), *Party autonomy and the role of information in the internal market,* Berlin, New York, Walter de Gruyter, p. 44. "*Mandatory rules concerning the formation of contracts, the types of available contracts and the conditions of a contract may serve the goal of social justice, but they constitute a serious infringement of party autonomy. Recourse to them should be taken only reluctantly and with care.*"

[543] See Chapter IV, B, 1, a and 2, a.

A ban also ignores the existence of more sophisticated consumers, who are over the average level of consumer vulnerability.[544] If these consumers consciously and autonomously choose arbitration over courts in certain disputes, the Law must not worry about their consent to arbitrate, since there is no presumption of vulnerability.

All in all, a complete ban of consumer arbitration is not compatible with the most important principles of the private law doctrine, namely contract freedom and party autonomy.[545] To better illustrate the importance of those principles it is worth it to quote Prof. Born´s assertion: "*This natural right of self-regulation is precious possession of a democratic society, for it embodies the principles of independence, self-reliance, equality, integrity and responsibility, all of which are of inestimable value to any community*"[546] Hence, it is not compatible with the private law principles to ban arbitration for consumers.

c) A ban of consumer arbitration is incompatible with the NYC

Furthermore, a ban of consumer arbitration is incompatible with the NYC.[547] Pursuant to Art. II (1) NYC, each contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. Although the NYC is not applicable to domestic arbitration, the invalidation of all pre-dispute

[544] See below Chapter IV, C, 2, c.
[545] See Köhler, H., Lange, H. (2013), *BGB, Allgemeiner Teil*: *Ein Studienbuch*, Kurzlehrbücher für das juristische Studium, München, Beck, §5, para. 1.
[546] Emerson, F. D. (1970), 'History of Arbitration Practice and Law', *Cleveland State Law Review*, Vol. 19, p. 157.
[547] Born, G. (2014), *International Commercial Arbitration*, p. 1022.

arbitration agreements with a consumer party would also touch those agreements made in cross-border B2C contracts. Hence, due care shall be taken not to infringe the NYC. Convention to which both Brazil and Germany are signatory countries. This argument is a great counter to the supporters of a ban in consumer arbitration. A country shoulg not go against an important international convention in name of an interventionism in consumer autonomy. Again quoting Prof. Born: "*it is obvious that consumers are, as a general matter, able to conclude binding sale and purchase, financial and other contracts and it is difficult to see why, subject to unconscionability defenses, consumers ought not also be able to conclude valid arbitration agreements*."[548]

Clearly, a blanket rule considering null all arbitration agreements with a consumer is not a plausible choice for the jurisdictions in study.

2. Consumers who do not need protection

The sub point above demonstrates that the question of whether the law should protect the consumer from arbitration cannot be answered under generalization. The necessity to protect the consumer from arbitration has to be analyzed case by case. This means that the consumer protection in arbitration should not follow the old schools of consumer concepts, like the *homo oeconomicus*, the information model or the social model.[549] Arbitration needs an own consumer concept, adapted to the practice. It needs to identify the consumers who need protection and those who do not.

Some consumers would not like to be protected from arbitration, on the contrary, they want to use it. Others have signed the pre-dispute arbitration clause in the standard contract, without even knowing what

[548] Born, G. (2014), *International Commercial Arbitration*, p. 1022.
[549] Tamm, M. (2016), 'Kapitel 1, §1 Verbraucherschutz und Privatautonomie' in: Tamm, M., Tonner, K. (eds.), *Verbraucherrecht,* Baden-Baden, Nomos, paras. 20-27.

arbitration is, just to be able to adhere to the whole contract. However, when the dispute arises, they would prefer the traditional courts. To make justice to these two types of consumers, neither the excessive protectiveness from Brazil, nor the excessive liberalism from Germany seem appealing.

The legal solution would be to protect the consumer from arbitration only if they need protection. For that regard, it is to believe that there are two kinds of consumers who do not need to be protected from arbitration: the consumer who did not lack bargaining power to contract and the consumer who wants to arbitrate, who, in most cases, can be classified as a sophisticated consumer.

a) The consumer who did not lack bargaining power

The vulnerability of the consumer derives from many factors already discussed above,[550] but specifically considering standard contracts, their lack of bargaining power to discuss the contractual clauses is a crucial point. As a rule, the consumer does not exercise bargaining power in a standard property development contract. The clauses and the arbitration agreement are unilaterally drafted by the developer, for adherence of the consumer.[551] That means that at the moment of signing the contract, the consumer would rarely be able to choose if they want a choice of forum clause or an arbitration clause.

The consumers who did not lack bargaining power and could discuss the inclusion of the arbitration clause with the developer do not need protection, because they were not in a vulnerable position in contrast to the developer´s position. Generally, this only happens if

[550] See Chapter II, A .
[551] da Costa, Nilton César Antunes (2014), 'A convencao de arbitragem no contrato de adesao' in: *Arbitragem e Mediação,* São Paulo, Editora Revista dos Tribunais, para. 2.1.

the B2C contract is not a standard contract. Admittedly, this will not apply to the great majority of property development contracts.

b) The consumer who wants to arbitrate

Since there is the assumption of the lack of bargaining power of the consumer in a B2C standard contract, the will of the consumer to arbitrate is decisive to identify if they need protection from arbitration or not. In other words, it is assumable that all consumers who are part to a property development standard contract lack bargaining power and therewith need protection, unless they want to arbitrate. If they do want to arbitrate, the clause would actually reflect their post-dispute will. In such case, the results achieved by the arbitration clause would be the same as if the consumer would have had equal bargaining power as the developer and could choose the inclusion of the arbitration clause into the contract.

If the consumer actually wants to arbitrate, the arbitration clause, even if unilaterally drafted and imposed on the consumer through a standard contract, will reflect the real intention of the consumer when they gave its declaration of intent. Notably, even if the intent of the consumer to arbitrate originated prior to the dispute, only when the dispute arises the law can effectively verify that this was the consumer´s intent. The lack of bargaining power in the contractual phase impedes the law to verify if the consent to arbitrate by signing the contract was merely formal or real. Therefore, it is extremely important to leave space for the consumer to choose arbitration in the post-dispute moment.

There are also those consumers, who, at the time they signed the contract, did not intent to arbitrate but when the dispute arises and they get in touch with the arbitration clause through their legal counselors, they will be advised by them about the advantages and disadvantages of arbitration, especially referring to the dispute at hand. They can

then, make a well-based decision to arbitrate at the post-dispute moment, but yet using the arbitration clause previously inserted in the contract.

Both these consumers do not need to be protected from arbitration. On the contrary, they need to be protected from an exaggerated withdraw of their party autonomy from the law that could impede them to arbitrate against their will.

c) The sophisticated consumer

To recognize the consumers that do not need protection the law may also identify the profile of consumers who would generally be able of doing a conscious decision about using arbitration to solve their disputes.[552] In other words, the law may identify the consumers who actually know what they are doing when they sign a contract. A concept coming from the economic and marketing sciences, called consumer sophistication, is suitable to map this profile. Consumer sophistication is a notion created to analyze consumerist purchase behavior and how they decide between one product/service or the other. The issue of consumer sophistication is used to debate to which extent the market needs regulatory policies.[553] If consumers are sophisticated enough, they can regulate the market with their purchase behavior. If they are not sophisticated enough, they cannot solely regulate the market and need governmental intervention through policies.

According to the economic theory, a consumer can be considered sophisticated if they are capable of making an efficient

[552] See, for example, Engel and Stark, who discourse about the consumer´s decisional behavior and how the law should protect the consumer because of their lack of rationality in decisions. Taking the contrary approach, the law must not protect those consumers who make decisions rationally. Engel, M., Stark, J. (2015), 'Verbraucherrecht ohne Verbraucher?', *ZEuP*, pp. 38-41.
[553] Titus, P. A., Bradford, J. L. (1996), 'Reflections on Consumer Sophistication and Its Impact on Ethical Business Practices', *The Journal of Consumer Affairs*, Vol. 30, No. 1, pp. 171-172.

decision and a wise purchase.[554] The intention of this study is then to transport this concept of consumer sophistication from the purchase decision to the procedural decision. Therewith, one can see which factors influence the consumer who is capable to make an efficient decision as to which dispute resolution method they should use.

Various factors influence the decision of the consumer. These factors serve to distinguish between naive consumers and sophisticated consumers. Different conceptualizations of consumer sophistication take factors like information,[555] knowledge, education and experience of the consumer to measure to which extent they are capable of taking well-reasoned and efficient decisions in the market.[556] Moreover, according to Garry, "*there are varying degrees of consumer sophistication in terms of their ability;*

-to issue advice and instructions to the service provider,

-to understand the features and benefits of the service they are receiving and

-to gauge the technical attributes of the service."[557]

Transporting this concept to the dispute resolution method choice of the consumer, one can infer that the knowledge and information of the consumer turns them into a sophisticated consumer in the procedural field. Consumers who are familiar with arbitration and know about its advantages and disadvantages are more likely to make a good decision of whether using arbitration or not than naive

[554] Liu, J. Y. (2010), 'A conceptual model of consumer sophistication', *Innovative Marketing*, Vol. 6, Issue 3, p. 73. Wu, B., Titus, P., Newell, S. J., Petroshius, S. (Spring, 2011), 'Consumer sophistication: The development of a scale measuring a neglected concept', *Marketing Management Journal*, p. 17. Estelami, H. (2014), 'An ethnographic study of consumer financial sophistication', *Journal of Consumer Behavior*, Vol. 13, p. 328.

[555] Armstrong, M. (2013), *Interactions between naive and sophisticated consumers*, Jahrestagung des Vereins für Socialpolitik, Düsseldorf.

[556] Wu, B., Titus, P., Newell, S. J., Petroshius, S. (Spring, 2011), 'Consumer sophistication: The development of a scale measuring a neglected concept', *Marketing Management Journal*, p. 16.; Titus, P. A., Bradford, J. L. (1996), 'Reflections on Consumer Sophistication and Its Impact on Ethical Business Practices', *The Journal of Consumer Affairs*, Vol. 30, No. 1, p. 174.

[557] Garry, T. (2007), 'Consumer Sophistication and the Role of Emotion on Satisfaction Judgments within Credence Services', *Journal of Consumer Behavior*, Vol. 6, Issue 6, p. 386.

consumers.[558] Consumers that have already had experience with arbitration can also be considered sophisticated consumers.

In fact, according to Liu, the number of sophisticated consumers is growing in the market.[559] She also proposes that "*sophisticated consumers are more innovative and willing to try new products than less sophisticated consumers.*"[560] In this sense, one can infer that sophisticated consumers would also be willing to try new ways to access justice, especially considering that the property development dispute is not a small claim and that arbitration offers a great advantage in terms of proceeding´s specialization and time.[561]

The concept of a sophisticated party is not unknown to Brazilian scholars. It has been applied in the jurisprudence in Brazil, not regarding consumerist cases but in labor matters. Generally, labor matters are only subject to arbitration in Brazil in case of a collective dispute. Courts do not recognize the validity of arbitration clauses inside individual labor contracts, since they are seen as adhesion contracts and the employees are assumedly vulnerable and have no bargaining power towards their contract.[562] Courts protect the employees from arbitration under similar grounds as they protect the consumers from arbitration.

However, some courts have started to examine the sophistication of the employee to decide if they need protection or not. For instance, in the case Sérgio de Jesus Ferreira *vs.* Textil Rossini do Brasil Ltda.[563] the judge affirms that individual labor arbitration can be accepted if the employee has higher education and performs a high

[558] Andrighi, F. N. (2006), 'Arbitragem nas relações de consumo: uma proposta concreta', *Revista de Arbitragem e Mediação*, Vol. 9, pp. 13–21. According to Andrighi, the lack of information contributes to the non-utilization of this recognizedly efficient dispute resolution method, arbitration, by the consumer.
[559] Liu, J. Y. (2010), 'A conceptual model of consumer sophistication', *Innovative Marketing*, Vol. 6, Issue 3, p. 72.
[560] Liu, J. Y. (2010), 'A conceptual model of consumer sophistication', *Innovative Marketing*, Vol. 6, Issue 3, p. 73.
[561] Kutschera, M. (2007), 'Vorteile des schiedsgerichtlichen Verfahrens' in: Torggler, H. (ed.), *Praxishandbuch Schiedsgerichtsbarkeit,* Wien, Verl. Österreich, pp. 50-57.
[562] TST (2011), RR 144300-80.2005.5.02.0040
[563] TRT 15ª REGIÃO (2006), 01048-2004-032-15-00-0

position inside the employer company. The judge denied validity to the arbitration clause considering that the employee Sérgio de Jesus Ferreira was not graduated and did not have a high office in the company. Although the "sophisticated employee" theory is not the ruling opinion in Brazilian labor courts, it gains importance each day and is mentioned in diverse decisions.[564]

The understanding that an arbitration clause signed by an employee can be considered valid based on their education and their position in the company is analogous to the theory of the sophisticated consumer above presented. In cases where there is satisfying evidence that a consumer could make a conscious decision about arbitration, this may be a sign for the courts that this consumer does not need protection but can make their own fundamented decisions about the dispute resolution method.

Considering all the above, sophisticated consumers may be the ones who would search for information about arbitration before signing an arbitration clause or already know what arbitration is. They would be more likely to want arbitration. Thus, consumer sophistication reduces the need for consumer policies. However, markets contain a mixture of sophisticated and naive consumers and sometimes policy helps one group and harms the other.[565] It harms the sophisticated group if the party autonomy to make the decision is taken away from them, based on the assumption that all consumers would make bad decisions. It would harm the naive group if unlimited party autonomy is given to all consumers, assuming that they will all make good decisions. Consequently, in order not to harm the one or the other group, the law has to find a way to distinguish between them. Protecting only the ones who deserve and need protection.

[564] TRT 15ª REGIÃO (2014), 0001738-28.2013.5.15.0130 TRT 15ª REGIÃO (2017), 0010862-23.2015.5.15.0079 (RO); TRT 2ª REGIÃO (2012), 0002186-34.2010.5.02.0076

[565] Armstrong, M. (2013), *Interactions between naive and sophisticated consumers*, Jahrestagung des Vereins für Socialpolitik, Düsseldorf.

3. Solution models

Neither Germany nor Brazil are able, with the current legal scenario, to protect from arbitration only those consumers who need protection. The Brazilian validity requirements are unclear, leaving room for bad interpretation. The German validity requirements are insufficient to protect consumers who do not want to arbitrate. Hence, it is imperative to look at the legal models from other jurisdictions, which deal with the consumer arbitration matters in a different way.

Based on the analysis of the different solution models it will be possible to, later on, suggest a solution that would be applicable to the countries in study and contemplate the implementation of the model in the national laws.

a) Alternative Models: Examples from selected countries

Three solution models regarding the validity of an arbitration clause in a B2C standard contract were selected to be presented in this work: the post-dispute agreement, the option-clause and the non-binding clause. They respectively reflect the development of a legal idea to solve the question of how to protect the consumers who need protection from arbitration.

i) Post-dispute agreement: Austria

Concerned about the lack of bargaining power of the consumer and the pressure they suffer at the moment they sign the contract, the Austrian lawmaker decided to regard as invalid any arbitration clause or agreement made before the dispute arises.

According to §617 (1) of the Austrian Civil Procedure Code, arbitration agreements between a trader and a consumer can be effectively concluded only for already existing disputes.[566] Under this provision, all the arbitration clauses drafted by the developer inside the property development contract would be invalid. Parties are only allowed to make post-dispute arbitration agreements.

Other jurisdictions accompany Austria using this model. The Québec´s Consumer Protection Act in Art. 11.1 provides that any stipulation that obliges the consumer to refer a dispute to arbitration, that restricts the consumer's right to go before a court, in particular by prohibiting the consumer from bringing a class action, or that deprives the consumer of the right to be a member of a group bringing a class action is prohibited. Also, the Swedish Arbitration Act of 1999 in Section 6 states that where a dispute between a business enterprise and a consumer concerns goods, services, or any other products supplied principally for private use, an arbitration agreement may not be invoked, where such was entered into prior to the dispute.

One could say that this model is a good way to protect the consumers who need protection, namely the ones who lacked bargaining power and do not want to arbitrate. This is because the will of the consumer to arbitrate can only be verified after the dispute arises and the consumer indeed requests arbitration instead of going to courts. However, the model has its flaws.

First, the banning of pre-dispute arbitration clauses, especially in property development contracts amounts to a lack of information of the consumer about the possibility to arbitrate. One of the contract´s social functions is indeed to be an informative educational tool for the society,[567] in this case, informing about the legal options available to access justice. It also stanches the important debate about consumer

[566] Original text of §617 (1) Austrian ZPO "*Schiedsvereinbarungen zwischen einem Unternehmer und einem Verbraucher können wirksam nur für bereits entstandene Streitigkeiten abgeschlossen werden*."
[567] Fiuza, C. (2008), *Direito Civil*: *Curso completo*, Belo Horizonte, Del Rey, p. 394.

arbitration, since most cases stimulating the legal debate about consumer arbitration in courts concern pre-dispute arbitration clauses in property development contracts.

Additionally, consumers who indeed want to arbitrate their disputes will face more difficulties due to this validity requirement. Even if the consumer tries to agree on arbitration with the developer after the dispute arises, this will be more difficult than before. Clearly, it is much more problematic for parties in general to reach any agreement after a dispute arises. Hence, this model may be overprotective, keeping arbitration away even from those consumers who acknowledge the advantages of arbitration for their cases.

Further, a banning of pre-dispute clauses faces difficult problems in the international sphere. These provisions are contrary to Art. II (1) NYC,[568] which affirms that the contracting states shall recognize arbitration agreements in writing about an arbitrable matter also when they refer to a dispute which may arise between the parties in respect of a defined legal relationship.

Hence, it is recognizable that the jurisdictions, which adopted the post-dispute agreement model, are concerned about the consumer and their lack of bargaining power, yet this model does not reflect the level of consumer protection that fits the consumer´s needs.

ii) The option-clause: The Netherlands

The current Dutch Arbitration Act entered into force on the 1st January 2015 to amend the Arbitration Act from 1986. In the field of consumer arbitration, the new act ratified consumer protection by

[568] Born, G. (2014), *International Commercial Arbitration*, p. 1022.

giving the consumer who enters in a standard contract with an arbitration clause the option to go to courts if they want. [569]

The new Arbitration Act amended the Dutch Civil Code where it discourses about standard terms and conditions. In Section 6.5.3, Art. 6:236, the Dutch civil code establishes a black list of stipulations, which are always considered unreasonably onerous for consumers and therefore, void. Thereunder, line "n" asserts that in a contract between a trader and a consumer, a stipulation, which provides for the settlement of a dispute by one or more arbitrators, is unfair. Unless it still allows the consumer to choose for a settlement of the dispute by the court with jurisdiction pursuant to law and this choice can be made within a period of at least one month after the trader has invoked the stipulation in writing.[570]

This solution model succeeds in giving the consumer free access to either arbitration or courts. Therewith, it obliges the developers, as drafters of the property development clause, to always give the consumer the option to go to courts, if they want their clause to be regarded valid by Dutch courts. Such a clause would have saved the German consumers, above mentioned in the case-law analysis, from having to arbitrate against their will. They would also have saved time and money from the Brazilian consumers, who had to wait until the last instance´s decision for the developers to stop invoking the arbitration clause requesting the courts to reject the consumer´s claim.

This option does not contradict the NYC[571] and it actually takes the valid arbitration clauses in The Netherlands away from the Directive 93/13´s aim. The Directive´s provision clearly states that clauses requiring the consumer to take disputes exclusively to

[569] Rumora-Scheltema, B., Hoebeke, B. R., Kluwer Arbitration Blog, *The New Dutch Arbitration Act 2015*, available at: kluwerarbitrationblog.com/2015/02/25/the-new-dutch-arbitration-act-2015/. 27.04.2015.
[570] *Dutch Civil Law*, available at: www.dutchcivillaw.com/civilcodebook066.htm. 09.03.2016. "*Art. 6:236, n, Dutch Civil Code: a stipulation which provides for the settlement of a dispute other than by a court with jurisdiction pursuant to law or by one or more arbitrators, unless it still allows the counterparty to choose for a settlement of the dispute by the court with jurisdiction pursuant to law and this choice can be made within a period of at least one month after the user has invoked the stipulation in writing*."
[571] See above, the Post-dispute agreement from Austria in Chapter IV, C, 3, a, i.

arbitration may be considered unfair. In this case, the arbitration clauses that could be valid under Dutch law will never require exclusivity of arbitration. There is always the option to go to courts. Consumers are able to avoid arbitration if they so want.

Nevertheless, the Dutch model hides the danger of invalidity in case the consumer wants to arbitrate in conformity with a clause drafted by the developer. Consider the following circumstance: a developer includes an arbitration clause in the contract that does not expressly states that the consumer has the option to go to courts. When the dispute arises, the consumer analyzes the pros and cons of arbitration and decides to start arbitration proceedings. The developer then challenges the competence of the arbitral tribunal based on the invalidity of the arbitration clause under section 6.5.3, Art. 6:236 of the Dutch civil code. The arbitral tribunal may even decide against the developer based on the imperative legal principle of *venire contra factum proprium*, *i.e.* prohibition of inconsistent behavior. The developer is going against their own draft to escape from arbitration. Anyhow, if the arbitral tribunal dismisses the challenge and decides on the case, the award may not be enforceable in Dutch courts again based on the invalidity of the arbitration clause. If the arbitral tribunal rejects the case, the consumer will be obliged to go to courts to solve the competence problem. Thus, using the Dutch model, the developer may use the validity requirements as a delay tactic to escape from a clause they, themselves drafted.

iii) The non-binding clause: Norway

In Norway, the lawmaker opted for an arbitration clause that is not binding on the consumer. The Norwegian Arbitration Act from 14th May 2004 provides for rules on consumer arbitration in §11. It affirms that an arbitration agreement to which a consumer is a party

shall not be binding on the consumer if entered into prior to the dispute arising.

Additionally, the same paragraph states that a consumer who involves themselves in proceedings before the arbitral tribunal without having been made aware of the implications of an arbitral award in terms of the scope for appeal, and that the arbitration agreement is not binding on them pursuant to the provision above mentioned, may invoke the invalidity of the arbitration agreement irrespective of the time limit established by Section 18, Subsection 3 of the Arbitration Act, regarding the challenge to the tribunal´s jurisdiction.

The Norwegian solution seems very consumer friendly and at the same time arbitration friendly. First, it binds to the unilaterally drafted pre-dispute clause only the drafter. Second, it complies with the principle of information, very important in consumer protection. Moreover, the language of the Norwegian law is very clear and avoids misunderstandings.

This model, postpones the declaration of intent of the consumer about arbitrating or not their dispute to a post-dispute moment. Therewith, it protects the consumers who, by signing the unilaterally drafted contract, could not negotiate clauses or express real consent. After the dispute arises, the consumer can choose if they want the clause to produce its effects or if they want to litigate.[572]

Comparing the Dutch model and the Norwegian one, both models intend to let the consumer choose between courts or arbitration when the dispute arises, however the Dutch model leaves the burden of concretizing this option for the drafter of the arbitration clause, condemning a clause to invalidity if it does not comply with the

[572] In a case where the arbitration clause inside a standard contract gave only one contractual partner the choice between arbitration or litigation, the German Court of Justice has decided to invalidate the clause, based on the unreasonable one-sided disadvantage. BGH (1991), III ZR 141/90 (Bremen) However, notably, the case did not include a consumer, who enters in the standard contract already in a more vulnerable position than business people.

"option" requirement. The Norwegian model gives this task to the law. Independently from what the arbitration clause affirms, it is the law that guarantees that the consumer can choose.

iv) The three models and the three levels of the legal transaction

The three models above presented affect the procedural contract of agreeing to arbitrate differently.[573] They touch upon different levels of the legal transaction. The Brazilian Civil doctrine distincts between three levels of the legal transaction. Although the models do not come from the Brazilian Law, there is a close relation between the levels of the legal transaction, as it is studied in Brazil, and the three models presented above. The level on which each model works, interferes directly with the election of the better model amongst them.

Prof. Junqueira de Azevedo teaches that the three levels of the legal transaction are the existence, the validity and the effectiveness.[574] The existence level presupposes that a legal transaction has to fulfill certain minimum requirements to exist in the legal world. For instance, the constitutive elements of the legal transactions are the declaration of intention, the object and the form. Without these, the legal transaction will not exist.

The second level is the validity one, because the fact that the legal transaction exists does not mean that it is perfect and deserves to

[573] See about the legal nature of the arbitration agreement/clause as a procedural contract in: Saenger, I. (2017), '§1029' in: Saenger, I., Bendtsen, R. (eds.), *Zivilprozessordnung: Familienverfahren, Gerichtsverfassung, Europäisches Verfahrensrecht : Handkommentar,* Baden-Baden, Nomos. Münch, J. (2013), '§1029' in: Krüger, W., Adolphsen, J., Gottwald, P., Rauscher, T., Gruber, U., Hau, W., Hilbig-Lugani, K., Micklitz, H.-W., Münch, J., Pabst, S., Ulrici, B., Zimmermann, W. (eds.), *Münchener Kommentar zur Zivilprozessordnung: Bd. 3: §§ 1025-1109 EGZPO, GVG, EGGVG, UKlaG, Internationales und Europäisches Zivilprozessrecht,* München, Beck, C H. BGH (1986), IVb ZR 80/85 (Köln). Austrian Supreme Court (2009), C GmbH (limited liability company) v. S AG (joint-stock corporation).

[574] Azevedo, Antonio Junqueira de (2002), *Negócio jurídico*: *Existência, validade e eficácia*, São Paulo, Saraiva. See also Triginelli, Wania do Carmo de Carvalho (2003), *Conversão de negócio jurídico*: *Doutrina e jurisprudência*, Belo Horizonte, Del Rey. About the three levels and the arbitration clause, see Diniz, M. H. (2010), *Código civil anotado*, São Paulo, Saraiva. and Filomeno, J. G. B. (2007), 'Capítulo II - Da Política Nacional de Relações de Consumo' in: Grinover, A. P. (ed.), *Código brasileiro de defesa do consumidor: Comentado pelos autores do anteprojeto,* Rio de Janeiro, Forense Universitária, pp. 66–135.

produce legal effects. The validity level presupposes requirements for the transaction to be considered valid. So not only a declaration of intention is needed for a legal transaction to be valid, but a declaration from a capable person. Not only an object is needed for the legal transaction to be valid, but an object that is licit, possible and determined; moreover, not only a form is needed to celebrate the legal transaction, but the form prescribed by the law or not prohibited by it. Hence, if a minor signs the arbitration agreement, this will be invalid, because they lack subjective arbitrability. Consequently, this legal transaction will be considered null. If the legal transaction has the property development of a house in Jupiter as object, this transaction will not be valid, since the object is not possible. Lastly, if the property development contract is not notarized, it will also be considered invalid, since it did not follow the form prescribed by the law for this kind of legal transactions. In consumer law, the validity level has often to do with the conscionability of the clause, so the lists of unfair clauses in the European Directive 93/13, §308 and §309 BGB or Art. 51 CDC act on the validity level of the legal transaction, checking the fairness of the legal transaction´s object.

The effectiveness level is the third one and it concerns the effects that the legal transaction intents to produce. So even if a legal transaction exists and is valid, it does not mean that it will necessarily produce effects. To illustrate this level, one can think of the contract for sale of a land. If two capable people contract about the sale of a land in Germany and notarize the contract, the contract will be existent and valid. However, it will only produce the desired effects if the contractor registers the contract in the Land Registry.[575] If they do not, the legal transaction will not produce the desired effect, namely to transfer the property from the seller to the buyer.

Considering these three levels of the legal transaction, one can understand the effect of the above presented three solution models for

[575] §873 BGB. Brazilian law also requires the registration in the Land registry to acknowledge the property Art. 1245 CCB.

consumer protection in the arbitration agreement. The arbitration agreement is a legal transaction in which the parties declare their intention to submit to arbitration disputes arising out of a certain contract. In the post-dispute model, the law acts in the validity level attacking the object of the clause. According to it, the law does not permit pre-dispute clauses to submit disputes to arbitration with a consumer. Hence, clauses like that would have an illicit object and would be invalid. Similarly, the option-clause model also aims on the invalidity of clauses, that do not expressly estipulate the right of the consumer to choose between arbitration or court proceedings.

The great achievement of the Norwegian model is the differentiation between validity and effectiveness. While the two models above mentioned work on the level of the validity of the clauses, invalidating either all pre-dispute clauses or those that do not comply with the option-clause model, the Norwegian law does not touch upon the validity of the clause but on its effectiveness after the dispute arises. A clause that is not binding on the consumer is not essentially invalid. It only will not produce the effects for which it was designed, if the consumer so wishes. The effectiveness of the arbitration clause in the third model, depends on the consumer´s intention in a post-dispute moment.

In practice, the results of invalidity and ineffectiveness may be the same: parties will solve their dispute in courts. However, legally, the difference is important. An arbitration clause in a B2C standard contract is not essentially unfair. Arbitration is widely recognized as an equivalent path to access jurisdiction, so that the jurisdictions recognize and enforce arbitral awards. Arbitration has to follow the due process principle and even has advantages over court proceedings. Hence, the recognition of the invalidity of a clause that is not essentially unfair is unjustified in the legal doctrine. This is exactly what the German courts have acknowledge in the decisions above

discussed.[576] Norway then correctly leaves the validity of the clause untouched. Therewith, Norwegian courts have less work accessing the unfairness of arbitration clauses for consumers. What really matters is the will of the consumer to bind itself to that clause or not in a post-dispute moment.

b) The non-binding model as the best solution for arbitration clauses in B2C standard contracts

The Norwegian model has two main characteristics that makes it the best solution to deal with the protection of consumer from arbitration clauses in B2C standard contracts. It postpones the effectiveness of the clause to the post-dispute moment and it enables the unmotivated denial of the clause by the consumer.

i) The post-dispute decision of the consumer to arbitrate

The main reasons to postpone the bindingness of the arbitration clause to a post-dispute decision of the consumer to arbitrate coincide with the already mentioned concerns of the law about the B2C standard contracts. There is a structural imbalance between the parties caused by the unilateral draft of the arbitration clause by the trader, so the drafter´s one-sided decision to arbitrate should not prevail over the consumer. This idea is so fundamental that all three models present a protection against pre-dispute agreements.

In the German law, the non-binding arbitration clause can be compared to §38 (3) (1) ZPO, pursuant to which an agreement about a legal venue between a consumer and a trader would only be allowed after the dispute arises. The thought behind this provision is in line

[576] See above Chapter IV, B, 2, e.

with the non-binding model. According to the project of law that implemented that provision after the dispute arises the parties become clearly aware of the scope of the agreement and, in this case, there is no longer any risk of over-balancing for the consumer.[577] Analogously, postponing the decision to arbitrate to after the dispute arises moves the concerns about imbalance away. Moreover, the non-binding model is in fact less invasive then the German legal venue norm. The latter prohibits pre-dispute agreements, while the Norwegian model for arbitration clauses gives the consumer the option to make use of the clause afterwards, not limiting the parties' autonomy.

One could argue that it could be that the consumer knew they wanted to arbitrate at the time they signed the contract and that a non-bindingness is then not justifiable in all cases. However, generally, one can only legitimately verify if the consumer wants to arbitrate after the dispute arises, since, at the moment of signing the contract, the consumer was under certain pressure to accept the contract as a whole.[578] Moreover, with the Norwegian model, nothing impedes the consumer who wanted to arbitrate to ratify their decision afterwards. Such a ratification would not be possible using the first model and could be in danger using the second models, since even if there was an arbitration clause in the contract, it could be considered invalid if it did not contain the required option.

Moreover, the developer will only include an arbitration clause to their contract if they know that this is probably the best possible way to resolve disputes arising out of that contract for them. With the non-binding model, the consumer will be given an opportunity to evaluate the benefits of arbitration for them, compensating the one-sided advantage of the drafter. Only after the dispute arises the consumer can indeed verify if arbitration is the best option for their

[577] Deutscher Bundestag (1973) "*…nach dem Entstehen der Streitigkeit den Parteien die Tragweite der Vereinbarung klar zum Bewusstsein kommen dürfte und in diesem Fall eine Übervorteilung des Verbrauchers nicht mehr zu befürchten ist.*"
[578] See above Chapter II, E, 1.

case. At that moment, the consumer will know the amount in dispute and therewith be able to make calculations comparing court and arbitration costs. For example, if the amount in dispute is small, arbitration costs will probably not be worth to pay in comparison to courts.[579] If the amount is high, and the consumer has urgency to solve the problem in dispute, arbitration may be more advisable than courts. It is only after the dispute arises that the consumer can compare advantages and disadvantages of each dispute resolution method specifically regarding the issue in dispute.

Based on the Norwegian model, the arbitration clause inside the property development contract would still have to fulfill all the formal requirements to be considered valid, making it easier for the consumer to acknowledge the existence of the clause in their contract. Yet, the clause would only be effective if the consumer agrees with arbitration in a post dispute moment.[580]

ii) The unmotivated decision of the consumer not to arbitrate

Since the non-binding model does not touch the validity of the clause, one must not evaluate the clause to give the consumer the non-binding benefit. This model dispenses with court evaluations and enables an unmotivated denial of the clause.

According to the second model, a clause that refers the disputes exclusively to arbitration is invalid. Hence, the courts will have to

[579] See for example Art. 91 of the English Arbitration Act, which considers an arbitration agreement where a modest amount is sought as unfair. Roquette explains that in disputes of small value the costs of arbitration are not worth the claim. Roquette, A. J. (2011), 'D. Alternative Konfliktlösungsverfahren, II. Schiedsklauseln' in: Roquette, A. J. (ed.), *Vertragsbuch Privates Baurecht: Kommentierte Vertragsmuster,* München, Beck. Wagner, G., Quinke, D. (2005), 'Ein Rechtsrahmen für die Verbraucherschiedsgerichtsbarkeit', *JZ*, Vol. 19, 932 - 939.

[580] See, in the same direction: European Union (2013), Directive 2013/11/EU. Directive on Consumer ADR, item 43.

evaluate the clause and see if it confronts that provision. They will then decide about its validity and consequently about their competence. Under the Norwegian model, however, the consumer´s decision not to arbitrate suffices. A court scrutiny will be unnecessary and the model more efficient in providing a solution to the problem.

Pursuant to this model, the consumer must not prove that the clause is unfair for them to be able not to be bound by it. Their mere will not to arbitrate is sufficient, even if the clause is not unfair. This unmotivated denial is of utmost importance to overcome the informational and the economic imbalance in the B2C contractual relationship.

When the developer includes the arbitration clause into the contract, and assuming that the developer does this in good faith, choosing arbitration features that are positive for both parties, the developer has already a much higher informational standard than the consumer does. They know that arbitration may be a very good option for the construction case that it may be faster and they have probably been involved in arbitration before. The consumer will have to face this analysis after the dispute arises. If the consumer does not want to do so, they do not have to. To illustrate, it may be that the consumer has a lawyer of trust who is not familiar with arbitration, which is not a seldom case. This would imply that the consumer finds another lawyer just to start knowing what arbitration is and to make the first pros and cons analysis before trying to argue on court about the validity of the clause. This is a burden that the law has to take away from the consumer, especially nowadays, when, unfortunately, it cannot be expected, neither from consumers nor from lawyers, that they are familiar with arbitration.

As to the economic imbalance, the developer generally has a financial situation that allows them to bear higher costs than consumers. On the other hand, even if the arbitration clause is fair, it may be that the consumer can only know if they can afford arbitration after the dispute arises. The financial situation of the consumer may

not be the same at the moment they have signed the contract and at the moment the dispute arises. In case the consumer indeed cannot pay for arbitration costs and would, for instance be eligible for legal aid in court proceedings, binding the consumer to a fair arbitration clause would be denying the consumer their right to access justice. The same is true if the arbitration costs are expressively higher than court fees in a certain case, so that the consumer would be able to pay for litigation but it would compromise their finances to afford arbitration.

Notably, if the consumer had to argue on the unfairness of the clause, asking courts to apply content control in order to render the clause invalid, the consumer could, after the dispute arises and they have done a cost analysis, argue in court that the arbitration clause, despite its fair character, would represent an unreasonable burden for them because they cannot afford the arbitration costs and are not provided with legal aid outside of the courts. However, the fairness verification made by the courts is to be done considering the financial situation of the consumer at the time they signed the contract. If, at that time, the fair clause did not amount to an unreasonable burden, then courts will have no legal basis to accept the consumer´s claim. Consequently, even if the draft of the clause is positive for the consumer, it is necessary not to bind them.

Admittedly, the fact that only one party has the right to choose between arbitration or litigation may seem unfair and contrary to the principle of equality in contracts. In a case where the arbitration clause inside a standard contract gave only one contractual partner the choice between arbitration and litigation, the German Court of Justice has decided to invalidate the clause, based on the unreasonable one-sided disadvantage to the other party.[581] However, that case did not include a consumer, who enters in the standard contract already in a more vulnerable position than business people do. More importantly, in that

[581] BGH (1991), III ZR 141/90 (Bremen), §307 (1) BGB. See Schmidt (2016), 'Klauseln, Vertragstypen, AGB-Werke: (40) Schiedsgutachtenklauseln, Schieds-, Schlichtungs- und Mediationsklauseln' in: Ulmer, P., Hans Erich, B., Hensen (eds.), *AGB-Recht: Kommentar zu den [Paragraphen] 305-310 BGB und zum,* Köln, Otto Schmidt.

case, the free choice between courts or arbitration was given to the drafter.[582] Hence, that case cannot be used to justify an unequal treatment of the parties in B2C cases.[583] Further, in analogy with the *contra proferentem rule*,[584] the contract should not benefit the drafter more than it benefits the counter-party, therefore, a non-binding clause for the consumer can be justified, even if at first glance it may seem uneven. On the contrary, a non-binding clause would treat the unequal parties in an unequal way, aiming at balancing the contractual and later the procedural relationship of trader and consumer.

iii) The non-binding model in practice

Under this solution, the various scenarios for a dispute arising out of a standard property development contract with a valid arbitration clause would be as follows:

1- Consumer on the active pole of the dispute – wants to arbitrate

When the dispute arises, the consumer starts arbitration pursuant to the arbitration clause. With this action, they demonstrate acquiescence to arbitration. The clause binds both parties.

[582] See Hanefeld, I., Wittinghofer, M. A. (2005), 'Schiedsklausel in Allgemeinen Geschäftsbedingungen', *SchiedsVZ*, p. 228.Hau, W. (2013), '5. Teil. ABC der Klauseln und Vertragstypen: Schiedsklausel' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck, para. S15.

[583] See Also Art. 2 (2) (g) of the European Union (2013), Directive 2013/11/EU. Directive on Consumer ADR. There it is stated that the ADR Directive shall not apply to procedures initiated by a trader against a consumer, but only to those initiated by the consumer against the trader. Although the Directive does not concern arbitration, it demonstrates that the different treatment between trader and consumer is not an affront to the principle of equality; it rather supports that principle by giving only the vulnerable party, namely the consumer, the shelter of the directive.

[584] See Berger, K. P. (2014), *Trans-Lex.org principles with commentary*, Köln, Center for Transnational Law Cologne, p. 47.

2- Consumer on the active pole of the dispute – does not want to arbitrate

When the dispute arises, the consumer sues the developer. The developer raises the issue of the arbitration clause in its defense. The court has to deny effectiveness to the arbitration clause, even if the formal requirements are fulfilled, since the clause binds the developer but not the consumer. With this action, the consumer demonstrated that they did not want to arbitrate.

3- Consumer on the passive pole of the dispute – wants to arbitrate

3.1 When the dispute arises, the developer starts arbitration pursuant to the arbitration clause. The consumer answers to the request to arbitration and does not contest the tribunal´s competence. With this action, they demonstrate acquiescence to arbitration. The clause binds both parties.

3.2 When the dispute arises, the developer sues the consumer in state courts. The consumer however raises the issue of the arbitration clause in their defense. The court checks the validity requirements, if they are fulfilled, the court must reject the claim, denying its competence in favor of the arbitral tribunal. The clause binds both parties.

4- Consumer on the passive pole of the dispute – does not want to arbitrate

a. When the dispute arises, the developer starts arbitration pursuant to the arbitration clause. The consumer contests arbitration, expressing their will to go to courts. The tribunal has to deny its competence in favor of courts. The clause does not bind the consumer.

4.2 When the dispute arises the developer sues the consumer in state courts. The consumer contests without referring to the arbitration clause or even expressly affirming that they do not want to arbitrate. With this action, the consumer demonstrated that they did not want to arbitrate. The court has to deny effectiveness to the arbitration clause, even if the formal requirements are fulfilled, since the consumer does not want to arbitrate and is therefore not bound by the clause.

One may argue that this model is extremely disadvantageous for the developer. If the consumer wants to apply delay tactics, always denying the first choice of the developer in the active pole they can. However, it is sensible to accept these consequences considering the superior position of the developer in the contract and in the market and that the developer will draft the arbitration clause as it is more advantageous for them. Instead of limiting the consumer's possibilities, it is more effective to limit the trader´s possibilities according to the consumer´s wish. The model assures that the developer can only arbitrate under their clause if the consumer wants to.

c) Implementation of the non-binding model in the national law

Assuming that the Brazilian and the German national laws implement the non-binding model to their national laws, where should this provision be allocated? One might affirm that the lawmaker could

implement this model inside the law that enables content control of the arbitration clause in a standard contract, namely the CDC or the AGB-Law, or they could provide for a non-binding rule in the arbitration law. Nevertheless, the characteristics of this model leads us to an implementation through the arbitration law and not through content control.

The unmotivated denial, above discussed, defines the reason why the arbitration law should implement the model and not the law that regulates the content control. The expression content control itself goes against an unmotivated declination of the clause, since if the consumer does not need a motive to decline the clause, the content of the clause is irrelevant for the non-bindingness.

Understanding that the non-binding model does not relate to the content control of the clauses but solely to the effectiveness of the arbitration clause makes it clear that this is not a CDC or an AGB issue but an issue for the arbitration law. Implementation of the non-binding model fits the 10th book of ZPO and the LBA.

i) Adequacy and application of the solution-model to the German legal system

The idea of a non-binding post-dispute model to protect the consumer is already present in the European law. Item (43) of the European ADR Directive 2013/11 affirms that "*an agreement between a consumer and a trader to submit complaints to an ADR entity should* ***not be binding on the consumer*** *if it was concluded* ***before the dispute has materialized****"* Although the directive does not cover arbitration, this sentence demonstrates that the non-binding model for out-of-court dispute resolution methods is in harmony with

the European Law.[585] It propitiates a good environment in Germany for the application of that solution model also in arbitration. Moreover, the non-binding model would not represent a drastic change in the legal understanding of consumer arbitration in Germany. It leaves the validity of the clause intact, in line with the German decisions, which do not see any essential unfairness of an arbitration clause in a B2C standard contract.[586]

Moreover, the pre-dispute arbitration clauses of the Norwegian solution model would not fall into the scope of Art. 3 (3) (q) of the European Directive on unfair terms. With a non-binding clause, there is no exclusivity of arbitration for the consumer; the clause does not hinder the consumer to take legal action, neither in the broad sense,[587] because the consumer has two paths to access justice, nor in the strict sense of interpretation,[588] because the consumer can choose to go to courts.

Since the proposed model of arbitration clause is not unfair and does not discuss unfairness, the AGB part of the BGB would not be adequate to house the non-binding rule. The only place in the German law that sets down specific rules for arbitration clauses with a consumer is §1031 (5) ZPO. Therefore, the solution model fits better into this paragraph. The lawmaker could give a new wording to subsection (5), adding a ruling under which, an agreement between a consumer and a trader to submit disputes to arbitration should not be binding on the consumer if it was concluded before the dispute has materialized, therewith mirroring the draft of item (43) of the ADR Directive, above mentioned.

[585] The idea of a non-binding clause on the consumer is also applied for unfair clauses. Pursuant to Art. 6 (1) of the European Directive 93/13, unfair clauses must not be binding on the consumer. See Pfeiffer, T. (2013), '7. Teil. Richtlinie 93/13/EWG: Art. 6' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck.
[586] BGH (1991), III ZR 141/90 (Bremen) BGH (2005), III ZR 265/03 BGH (2007), III ZR 164/06
[587] Understanding "to take legal action" as any kind of access to justice.
[588] Understanding "to take legal action" as the possibility of suing in courts.

ii) Adequacy and application of the solution-model to the Brazilian legal system

The application of the non-binding model in Brazil does not require any new legal rule. Despite the confusing draft of Art. 4 (2) LBA, it is possible and desirable to interpret this provision in accordance with the solution model. As aforementioned,[589] the objective of the lawmaker when they drafted the LBA was to apply the concept of a non-binding arbitration clause for the consumer. Hence, applying a teleological interpretation, courts should only recognize the effectiveness of an arbitration clause with a consumer if the consumer starts arbitration or if, in a post-dispute moment, the consumer expressly agrees with the arbitration started by the trader.

In fact, this interpretation has recently been applied by the STJ. The case regarded a consumer of a property development unit, who sued the developer in courts, despite the arbitration clause in their contract.[590] In the decision from 01.03.2016, the rapporteur of the case, Justice Luís Felipe Salomão, instead of recognizing the invalidity of the clause according to Art. 51 CDC, as all previous STJ decisions did; based on Art. 4 (2) LBA, he considered the arbitration clause ineffective, since the consumer clearly did not want to arbitrate, because he sued in courts.[591] The Justice explicitly wrote that arbitration clauses bind the developer but do not bind the consumer.

Moreover, the Justice confronted the apparent conflict between art 51 VII CDC and Art. 4 (2) LBA. According to him, if the arbitration clause in a standard contract is interpreted as non-binding to the consumer, one cannot regard them as compulsory anymore,

[589] See Chapter IV, B, 1, e.
[590] STJ (2016), REsp 1.189.050 - SP.
[591] Differently, for instance, from the STJ decision from 06.11.2012. STJ (2012), REsp 1.169.841 - RJ. Although Justice Andrighi also bases her decision on the will of the consumer not to arbitrate, since they sued, she recognized the nullity of the arbitration clause, pursuant to Art. 51 VII CDC, instead of its ineffectiveness, pursuant to Art. 4 (2) LBA.

since the consumer always has the last word as to the application of the clause or not. The clause loses its obligatory character and therewith, it cannot be considered an unfair term.[592]

In sum, the Justice applied the solution model above presented in its entirety by just interpreting the Brazilian Law in a teleological and systematic way. If subsequent decisions follow this example, the non-binding solution model will find application in Brazil through the jurisprudence´s development.

D. Chapter´s Conclusion

The first challenge imposed by property development arbitration with consumer participation is whether the law should protect the consumer from arbitration whatsoever. Considering the structural imbalance in the legal relationship between consumer and developer, the question must be answered with a yes.

Nevertheless, Brazilian and German legislation do not achieve consumer protection in arbitration in a balanced way. Both countries accept the arbitrability of consumer cases but when it comes to the validity of the arbitration clause in standard contracts, they take different paths. Brazil considers all pre-dispute clauses in standard contracts as compulsory unfair clauses and Germany applies the AGB content control to the clauses.

By applying their laws, the countries also diverge. The Brazilian case law shows that the tendency in the country is to consider B2C clauses in property development contracts as null, under the argument

[592] In face of the recent application of the non-binding interpretation of arbitration clauses by the STJ, it is desirable to remove subsection VII from the list of Art. 51 CDC, because it became obsolete. The arbitration clause cannot be compulsory and is therefore not unfair. In fact, there is a project of law in process in the Brazilian parliament to reform the CDC since 2012. However, the reform does not encompass a change regarding consumer arbitration. To know more about the CDC reform see: Miragem, Bruno; Marques, Claudia Lima; Oliveira, Amanda Flávio de, eds. (2016), *25 anos do Código de Defesa do Consumidor*: *Trajetória e perspectivas*, São Paulo, Tomson Reuters Revista dos Tribunais.

that the consumer who sues contesting the validity of the clause, does not want to arbitrate. German courts, in contrast, try to access the unfairness of the clauses and generally concludes that the arbitration clause in a property development contract is not unfair for the consumer and ratifies the validity of the clause, rejecting the consumer´s claims.

None of these approaches protects the consumers who need protection, namely, the ones who lacked bargaining power at the moment of signing the pre-dispute clause and do not want to arbitrate. To try to find a solution for the issue, three legal models from other jurisdictions were presented. The Norwegian model of an arbitration clause, that is not binding on the consumer, seems to represent the good middle between the German liberalism and the Brazilian alleged overprotection when it comes to consumer arbitration in property development disputes. It protects those consumers who need or prefer to solve their disputes in the judiciary; leaves the validity of the clause intact, touching upon the effectiveness of the clause and leaves the path to arbitration opened for those consumers who want to arbitrate their property development disputes.

V- The necessity to protect the consumer IN arbitration arising out of property development disputes

Arbitration is known as a flexible dispute resolution method, with relatively few legal interferences. In arbitration, the principle of party autonomy reigns, allowing the parties to determine many aspects of the proceedings.[593] Nevertheless, such flexibility must be seen with careful eyes when the consumer is one of the parties. On the one side, their vulnerability, as the party with lack of bargaining power and information negatively influences their ability to decide on how the arbitration proceeding should be.[594] On the other side the developer tends to know more about arbitration and as a repeated player in the arbitration scenario, knows how to set up an arbitration clause that fulfils their procedural needs. This factual context makes it necessary to verify the fairness of the content of the arbitration clause drafted by the developer from a consumer´s perspective. This verification is carried out by the content control of the arbitration clause in the standard contracts.

Anyhow, the content control of arbitration clauses is not undisputed. Hence, its application to arbitration clauses in standard B2C contracts is to be studied (A). One may also ask if controlling the content of the arbitration clause is still necessary if the law implements the solution model suggested in chapter IV, where the consumer is not bound by the clause (B). Eventually, if content control is needed, the parameters that should be used to consider an arbitration clause in a B2C property development contract as unfair must be studied (C). After that, the conclusion about the necessity to protect the consumer in arbitration will be presented (D).

[593] See Born, G. (2014), *International Commercial Arbitration*, pp. 83-85.
[594] Bělohlávek, A. J. (2012), 'Arbitrability limitation in consumer (B2C) disputes?: Consumer´protection as legal and economic phenomenon', *Journal of Governance and Regulation*, Vol. 1, Issue 3, pp. 156–170.

A. Application of content control to arbitrations clauses in B2C standard contracts

In both Brazil and Germany the law establishes conditions on the arbitration clauses in standard contracts to protect the consumer – bold letter, separate document, separate signature -.[597] These are outlined in art. 4 (2) LBA and in §1031 (5) ZPO. Nevertheless, the protection offered by the formal validity requeriments may not be sufficient, since it does not take into account the content of the clause. A formal valid clause, may yet harm the consumer, if it contains unfair provisions. For this reason, scholars discuss if content control should be applicable to arbitration clauses in standard contracts.

One point of view supports the sufficiency of the formal validity requirements, without the need of content control.[598] This view rebounds the fact that the arbitration clause should be subject to the *lex arbitri* and not to the material law, like the Civil Code or the Consumer Protection Code.

However, the view that supports a content control of arbitration clauses in standard contracts has grown.[599] Accoridng to it, the objective of formal validity requirements, like the ones in §1031 (5) ZPO ad Art. 4(2) LBA is to avoid that the adherent signs the contract not kowing about the arbitration clause. On the other hand, the objective of a content control is to avoid that the adherent signs an unfair clause. Thus, the objetive of content conntrol differs from the

[597] See above Chapter IV, B, 1, c and 2, c, respectively.
[598] Schwab, K. H., Walter, G., Baumbach, A. (2005), 'Schiedsgerichtsbarkeit: Systematischer Kommentar zu den Vorschriften der Zivilprozeßordnung, des Arbeitsgerichtsgesetzes, der Staatsverträge und der Kostengesetze über das privatrechtliche Schiedsgerichtsverfahren'.
[599] Hau, W. (2013), '5. Teil. ABC der Klauseln und Vertragstypen: Schiedsklausel' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck; Mäsch, G. (2005), 'Schiedsvereinbarungen mit Verbrauchern' in: Schlosser, P., Bachmann, B. (eds.), *Grenzüberschreitungen: Beiträge zum Internationalen Verfahrensrecht und zur Schiedsgerichtsbarkeit ; Festschrift für Peter Schlosser zum 70. Geburtstag,* Tübingen, Mohr Siebeck, pp. 529–543; Münch, J. (2013), '§1029' in: Krüger, W., Adolphsen, J., Gottwald, P., Rauscher, T., Gruber, U., Hau, W., Hilbig-Lugani, K., Micklitz, H.-W., Münch, J., Pabst, S., Ulrici, B., Zimmermann, W. (eds.), *Münchener Kommentar zur Zivilprozessordnung: Bd. 3: §§ 1025-1109 EGZPO, GVG, EGGVG, UKlaG, Internationales und Europäisches Zivilprozessrecht,* München, Beck, C H; Wagner, G. (1998), *Prozessverträge*: *Privatautonomie im Verfahrensrecht*, Jus privatum, Tübingen, Mohr Siebeck; Weihe, L. (2004), *Der Schutz der Verbraucher im Recht der Schiedsgerichtsbarkeit*, Frankfurt am Main, Peter Lang; Hauptmann, H. (2004), 'Schiedsvereinbarungen in "Ungleichgewichtslagen" - am Beispiel des Sports -', *SchiedsVZ*, pp. 175–187.

one of the formal validity requirements and the scope of protection of those is not the same.

In this sense, formal validity requirementes are not enough to protect the consumer from an unfair clause, but solely to protect them from a hidden clause.[600] Therefore, content control should be applied to arbitration clauses in standard contracts, to enable scrutiny on the fairness of the provisions inside the clause, which will determine important aspects of a future proceeding.

B. Content control despite a non-binding arbitration clause?

In chapter IV a solution model for protecting the consumer from an undesired arbitration was suggested, namely the non-binding arbitration clause.[601] According to this model, the consumer is not bound to the arbitration clause drafted by the developer and inserted in the property development standard contract. The consumer can either take any disputes to the courts, giving no effect to the clause, or decide to arbitrate, giving effect to the clause that will bind the developer. In light of the implementation of this model the question as to whether the clause in the standard contract must still be subject to content control arises.

Content control is a legal tool to identify unfairness in clauses inside standard terms and protect the adhering party from them.[602] Yet, if the adhering party is not bound by the clause, it means that the party can choose not to give effectiveness to the clause based on its unfairness. In other words, if the consumer finds that the arbitration

[600] Hauptmann, H. (2004), 'Schiedsvereinbarungen in "Ungleichgewichtslagen" - am Beispiel des Sports -', *SchiedsVZ*, pp. 175–187.
[601] See above Chapter IV, C, 3, a, iii.
[602] Köhler, H., Lange, H. (2013), *BGB, Allgemeiner Teil*: *Ein Studienbuch*, Kurzlehrbücher für das juristische Studium, München, Beck, §16, paras. 28-29.

clause is unfair, they can simply not arbitrate and content control would be unnecessary.

Although this line of thought may seem sensible at first glance it does not translate the real objective of the non-binding solution model nor that of the content control. It is not the goal of the non-binding model to give the consumer one way out of the unfair arbitration clause, but to give the consumer the option to arbitrate a dispute under a fair clause, if arbitration proves to be the most adequate dispute resolution method after the dispute arises. Hence, the ground behind the consumer´s decision to arbitrate or not should not be the unfairness of the arbitration clause, but the suitability of that method to the dispute at hand, considering for instance the costs, the expertise of the arbitrators, the time of proceedings, etc.[603]

Further, assuming that a certain contract has an unfair arbitration clause and the consumer still chooses to arbitrate, the fact that the consumer choses to give effect to the clause does not heal the unfairness of the clause. Content control is the most important legal instrument against unconscionable clauses in standard terms and is needed whenever a one-sided drafted clause comes into play.[604]

In light of the above, even when the non-binding model is implemented to deal with B2C arbitration, the content control of the arbitration clause is not an exaggerate care. If the consumer chooses to arbitrate, they must be able to do so under a fair clause that reflects not only the developer´s procedural needs, but also the ones of the consumer. Hence, courts should carry out the content control of arbitration clauses in standard terms, even if the non-binding model is implemented in the country.

[603] See Aravena-Jokelainen, A., Wright, S. P. (2017), 'Chapter 16: Balancing the Triangle: How Arbitration Institutions Meet the Psychological Needs and Preferences of Users' in: Cole, T. (ed.), *The roles of psychology in international arbitration,* Alphen aan den Rijn The Netherlands, Kluwer Law International B.V, pp. 391–418. on the grounds for choosing arbitration.
[604] Pfeiffer, T. (2017), 'Entwicklungen und aktuelle Fragestellungen des AGB-Rechts', *NJW*, pp. 913–918.

In this context, the content control will not be used to avoid the clause and protect the consumer from arbitration. This is already the role of the non-binding model. In fact, it shall be used to guarantee a fair arbitration for those consumers who choose to arbitrate. In this sense, content control is there to protect the consumer in arbitration.

C. Content control in B2C arbitration clauses

One of the striking characteristics of arbitration is flexibility.[605] Parties are able to choose many aspects of their future proceeding.[606] However, in standard contracts, like the majority of property development contracts, the consumer did not participate in the drafting of the clause, which is the moment where the parties choose those features.[607] Thus, the consumer who arbitrates has to follow a clause full of procedural choices that they did not make.[608]

To protect the consumer from choices, which can represent an unreasonable disadvantage for them in standard contracts, the law has developed the content control of contractual clauses.[609] Through content control, courts may recognize the invalidity of unfair clauses in standard contracts. Admittedly, content control applies mainly to provisions related to substantive law,[610] which are the majority in standard contracts. Moreover, it is a tool that arises from the civil code

[605] See Chapter III, 2, b, i, i.2.
[606] Hau, W. (2013), '5. Teil. ABC der Klauseln und Vertragstypen: Schiedsklausel' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck, para. S2.
[607] See Chapter II, C, 1 and 2.
[608] Mäsch, G. (2005), 'Schiedsvereinbarungen mit Verbrauchern' in: Schlosser, P., Bachmann, B. (eds.), *Grenzüberschreitungen: Beiträge zum Internationalen Verfahrensrecht und zur Schiedsgerichtsbarkeit ; Festschrift für Peter Schlosser zum 70. Geburtstag,* Tübingen, Mohr Siebeck, p. 530.
[609] See Fuchs, A. (2016), 'Vorbemerkungen zur Inhaltskontrolle: Vor §307' in: Ulmer, P., Hans Erich, B., Hensen (eds.), *AGB-Recht: Kommentar zu den [Paragraphen] 305-310 BGB und zum,* Köln, Otto Schmidt, para. 2.
[610] Prove of this is that in both Brazil and Germany the black lists of unfair provisions (§308, 309 BGB and Art. 51 CDC) contain practically only provisions regarding substantive law.

and not from the procedural code.[611] The reason behind that is the mandatory nature of most procedural provisions in contrast with the wider possibility of waiver and free layout of clauses in the substantive law field. While the parties are free to choose the material issues of their contracts, they are rarely free to design any aspect of their civil procedure.[612] The civil procedure code establishes unchangeable rules as to the applicable law, language of proceedings, etc. In this sense, clauses that relate to non-mandatory matters are more susceptible to unfairness and need content control. However, in arbitration the mandatory nature is not the rule as it is in the ordinary civil procedure. Hence, the law should impose the limits of content control to arbitration clauses, since they do choose many aspects of the future arbitration proceedings. Content control is applicable to procedural provisions as soon as they are encompassed in the standard terms presented to the consumer.[613]

As above explained,[614] in Brazil, the legal basis for the invalidity of clauses with an unreasonable burden for the consumer is the general clause in Art. 51 (IV) CDC. According to it, clauses that determine abusive obligations that leaves the consumer in exaggerated disadvantage or which are against the good-faith or equity principles are null. The provision, which was inspired by the German AGB Law,[615] works together with Art. 51 §1 (III) CDC. The latter asserts that a clause in a B2C contract is presumably exaggerated in cases in which the clause is excessively onerous to the consumer, considering

[611] See Walker, W.-D. (2017), *Allgemeines Schuldrecht*, Grundrisse des Rechts, München, C.H. Beck, paras. 46-47. Benjamin, A. H., Marques, C. L., Bessa, L. R. (2016), *Manual de direito do consumidor*, São Paulo, Revista dos Tribunais, p. 292. Bonatto, C. (2001), *Código de defesa do consumidor*: *Cláusulas abusivas nas relações contratuais de consumo*, Porto Alegre, Liv. do Advogado, p. 45.
[612] Lew, Julian D. M, Mistelis, L. A., Kröll, S. (2003), *Comparative international commercial arbitration*, The Hague, New York, Frederick, MD, Kluwer Law International; Sold and distributed in North, Central and South America by Aspen Publishers, paras. 1-14.
[613] Wagner, G. (1998), *Prozessverträge*: *Privatautonomie im Verfahrensrecht*, Jus privatum, Tübingen, Mohr Siebeck, pp. 132-133. See also Mäsch, G. (2005), 'Schiedsvereinbarungen mit Verbrauchern' in: Schlosser, P., Bachmann, B. (eds.), *Grenzüberschreitungen: Beiträge zum Internationalen Verfahrensrecht und zur Schiedsgerichtsbarkeit ; Festschrift für Peter Schlosser zum 70. Geburtstag,* Tübingen, Mohr Siebeck, p. 534. About the control of the incorporation of the arbitration clause to the contract.
[614] See Chapter II, E, 3, b.
[615] Marques, C. L. (2016), *Contratos no código de defesa do consumidor*, São Paulo, Revista dos Tribunais, para. 4.1.2.b.

the nature and the content of the contract, the parties´ interest and other peculiar circumstances. In other words, a clause representing an unreasonable disadvantage for the consumer that cannot be justified by the contractual circumstances may be considered unfair under the Brazilian Law.

Note that this is the last step of the scrutiny process to verify the invalidity of the clause. Art. 51 CDC has a black list of provisions that must be considered null because of their unfairness. Only if the clause does not fit those examples of unfair clauses, it will be subject to scrutiny under the unreasonable disadvantage criterion. The only mention to arbitration in the black list of Art. 51 is in the subsection VII. It affirms that a clause providing for the compulsory use of arbitration should be null.[616] There is no item in the black list indicating the unfairness of the procedural rules present in the arbitration clause.

In Germany, §307 (1) BGB is the legal basis for the content control and consequent invalidity of a clause that excessively burdens the consumer, including the arbitration clause.[617] According to it, provisions in a standard contract are invalid if they put an unreasonable disadvantage on the drafter´s contractual partner, in the current context, the consumer. Also, in Germany, this first sentence of §307 (1) BGB is the last step in the verification of the clause´s invalidity.[618] The civil code brings a closed black list of unfair clauses in §309 BGB, another list with examples of unfair clauses is in §308 BGB. Only if the clause in study did not fit any of the afore mentioned

[616] Nery Júnior, N. (2007), 'Capítulo I - Da proteção Contratual' in: Grinover, A. P. (ed.), *Código brasileiro de defesa do consumidor: Comentado pelos autores do anteprojeto,* Rio de Janeiro, Forense Universitária, pp. 504–638.; Garcia, L. d. M. (2010), *Direito do consumidor*: *Código comentado, jurisprudência, doutrina, questões, decreto 2.181/97*, Niterói, Impetus.; Garcia, L. d. M. (2010), *Direito do consumidor*: *Código comentado, jurisprudência, doutrina, questões, decreto 2.181/97*, Niterói, Impetus.

[617] Weihe, L. (2004), *Der Schutz der Verbraucher im Recht der Schiedsgerichtsbarkeit*, Frankfurt am Main, Peter Lang, p. 266. Hanefeld, I., Wittinghofer, M. A. (2005), 'Schiedsklausel in Allgemeinen Geschäftsbedingungen', *SchiedsVZ*, p. 222. Fuchs, A. (2016), 'Vorbemerkungen zur Inhaltskontrolle: Vor §307' in: Ulmer, P., Hans Erich, B., Hensen (eds.), *AGB-Recht: Kommentar zu den [Paragraphen] 305-310 BGB und zum,* Köln, Otto Schmidt, paras. 4-19.

[618] Palandt, O., Bassenge, P. (2016), *Bürgerliches Gesetzbuch*, Beck'sche Kurz-Kommentare, München, C. H. Beck, §307, para. 2.

provisions, the court will check its validity under §307 BGB and the unreasonable disadvantage criterion.[619] The arbitration clause is not encompassed by §308 and §309 BGB and is therefore, subject to the control under §307[620]

One can see that both countries protect the consumers, through content control, from a clause that will cause them an unreasonable disadvantage.[621] Thus, every arbitration clause inside a standard B2C property development contract must not be excessively onerous for the consumer. An arbitration clause unjustifiably much more beneficial for the developer than for the consumer will not resist scrutiny. [622]

To deepen our vision about how the content control of arbitration clauses may protect the consumer, the next sub points will analyze factors that indicate the unfairness of a clause (1), discuss if the content control should cover also the institutional rules (2) and lastly investigate the legal consequences of content control of arbitration clauses (3).

1. Indications of unfairness in arbitration clauses

To apply the unreasonable disadvantage criterion to the arbitration clause, the judge must identify the unfairness in the

[619] Wagner and Quinke discourse about consumer arbitration under the light of the BGH decision to the matter (BGH (2005), III ZR 265/03). They criticize the decision saying that the fact that an arbitration clause is not *per se* a disadvantage to the consumer does not mean that all arbitration clauses in consumer contracts survive scrutiny under §307 BGB. It actually means that the scrutiny will be transferred to the design of the clause, meaning the aspects of arbitration determined in the clause. Wagner, G., Quinke, D. (2005), 'Ein Rechtsrahmen für die Verbraucherschiedsgerichtsbarkeit', *JZ*, Vol. 19, p. 934.

[620] Mäsch, G. (2005), 'Schiedsvereinbarungen mit Verbrauchern' in: Schlosser, P., Bachmann, B. (eds.), *Grenzüberschreitungen: Beiträge zum Internationalen Verfahrensrecht und zur Schiedsgerichtsbarkeit ; Festschrift für Peter Schlosser zum 70. Geburtstag,* Tübingen, Mohr Siebeck, p. 535.

[621] Although there may be a difference in the understanding of "unreasonable disadvantage" between the Brazilian and the German courts, as already seen in the case-law comparison in Chapter IV, B, 2, e; the basic notion of invalidating an unconscionable clause is the same. The legal structure is similar, although there might be differences in the application of the "unreasonable burden" as a measure to unconscionability.

[622] See Duve, C., Sattler, M. (2010), 'Schiedsvereinbarungen in Verbraucherverträgen' in: Genzow, F. C. (ed.), *Zwischen Vertragsfreiheit und Verbraucherschutz: Festschrift für Friedrich Graf von Westphalen zum 70. Geburtstag,* Köln, O. Schmidt, p. 95.

arbitration clause. Admittedly, the sense of fairness is a challenge to the Law. It is difficult to determine what is unfair and who can judge on fairness.[623] Yet, one of the roles of the Law and especially of consumer law is to promote fairness, as vague as it might sound. The sense of fairness fights the imbalance between consumer and trader in their asymmetric bargaining power, this is for instance, what the European Directive on Unfair Terms aims at.[624] Some commentators embraced the difficult task of mentioning aspects that could indicate unfairness in arbitration clauses inside standard contracts,[625] however, they do not trail the specific scheme followed by drafters of arbitration clauses and thereby do not cover all main aspects of an arbitration clause.[626] To fill this gap, the next lines will display indicators of unfairness towards the consumers, based on the aspects that the arbitration doctrine advises the drafter to include in the clause.

The recommended draft of an arbitration clause embodies at least the language of proceedings, the seat of arbitration, the institutional rules or the determination of *ad hoc* arbitration, the applicable substantive law or the determination that arbitration will be decided *ex aequo et bono*, the number of arbitrators and the

[623] Weatherill, S. (2012), '19 Consumer protection' in: Smits, J. M. (ed.), *Elgar encyclopedia of comparative law,* Cheltenham, UK, Northampton, MA, USA, Edward Elgar, p. 242.
[624] See Pfeiffer, T., 'A 5. Richtlinie 93/13/EWG des Rates über mißbräuchliche Klauseln in Verbraucherverträgen' in: Grabitz, E., Hilf, M., Nettesheim, M. (eds.), *Das Recht der Europäischen Union: [Kommentar],* München, Beck.
[625] Hau touches upon the arbitration rules, the *ex aequo et bono* arbitration, costs, seat and venue of arbitration: Hau, W. (2013), '5. Teil. ABC der Klauseln und Vertragstypen: Schiedsklausel' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck, paras. S3, S5 and S11. Schmidt, on the other hand, does not cover content aspects of the clause: Schmidt (2016), 'Klauseln, Vertragstypen, AGB-Werke: (40) Schiedsgutachtenklauseln, Schieds-, Schlichtungs- und Mediationsklauseln' in: Ulmer, P., Hans Erich, B., Hensen (eds.), *AGB-Recht: Kommentar zu den [Paragraphen] 305-310 BGB und zum,* Köln, Otto Schmidt, paras. 3-6. Hanefeld and Wittinghofer do a systematical analysis of arbitration clause´s content that could be barred by the content control of standard contracts, but not specifically for B2C disputes: Hanefeld, I., Wittinghofer, M. A. (2005), 'Schiedsklausel in Allgemeinen Geschäftsbedingungen', *SchiedsVZ*, pp. 217–229.
[626] Mäsch, G. (2005), 'Schiedsvereinbarungen mit Verbrauchern' in: Schlosser, P., Bachmann, B. (eds.), *Grenzüberschreitungen: Beiträge zum Internationalen Verfahrensrecht und zur Schiedsgerichtsbarkeit ; Festschrift für Peter Schlosser zum 70. Geburtstag,* Tübingen, Mohr Siebeck, p. 536. "*Dazu passt, dass die Literatur zwar annimmt, dass eine Schiedsklausel oder –Vereinbarung als solche grundsätzlich an §307 Abs. 1 BGB scheitern kann, sie aber nicht in der Lage ist, konkrete Beispielsfälle zu nennen, in denen dies dann tatsächlich geschehen ist*."

nomination proceeding.[627] Following these aspects of the facultative content of the arbitration clause, it is important to verify which choices made by the developers/drafters within them could harm the consumer in the proceedings.[628]

Note that the aspects of unfairness listed below are not exhaustive. They may serve as indicators. They may guide courts to identify the unreasonable disadvantage imposed on the consumers who want to arbitrate and therewith apply content control to identify an unfair developer by reading their standard contract. Lastly, the indicators may also be a guide for fair developers who want to draft consumer friendly clauses.

a) Seat of arbitration and *lex arbitri*

The seat of arbitration is the place the parties choose as the arbitration paradigm. By choosing the seat of arbitration, the parties are choosing the arbitration law of that country as the applicable procedural law for their dispute,[629] and therewith all the arbitrability rules.[630] Moreover, the seat of arbitration determines the nationality of

[627] Wegen, G., Barth, M. (2007), 'Praktische Tipps für den Abschluss der Schiedsklausel' in: Torggler, H. (ed.), *Praxishandbuch Schiedsgerichtsbarkeit,* Wien, Verl. Österreich, pp. 55-70. Nanni, G. E., Consultor Jurídico (2011), *Os cuidados na elaboração da cláusula arbitral*, available at: www.conjur.com.br/2011-jun-17/arbitragem-nao-fundada-equidade-sim-lei. 01.11.2016. Out-Law.com, *Drafting an arbitration clause*, available at: www.out-law.com/en/topics/projects--construction/international-arbitration/drafting-an-arbitration-clause/. 01.11.2016.

[628] Note that the whole examination as to whether a clause is indeed unfair must be done in a case-to-case basis. Therefore, this study is not able to follow the juridical path of examination without a concrete case. Indicators of unfairness that could possibly be ground for the invalidity of a clause based in §307 (1) BGB or Art. 51, §1 (III) CDC will be mentioned.

[629] Roquette, A. J. (2011), 'D. Alternative Konfliktlösungsverfahren, II. Schiedsklauseln' in: Roquette, A. J. (ed.), *Vertragsbuch Privates Baurecht: Kommentierte Vertragsmuster,* München, Beck, p. 16.

[630] If the seat of arbitration is Brazil, the LBA will be applicable. If Germany is the seat, the 10th book of the ZPO will be applicable. The arbitrability of B2C property development disputes in those cases will follow the rules of those norms, as explained in Chapter IV, B.

the future arbitral award and future setting aside proceedings may only be carried out in that country.[631]

In B2C proceedings due concern must be given to the seat of arbitration, since this choice may affect the access to justice of the consumer and the transparency principle. Even though the consumer may never have to travel to that country during the arbitral proceedings if the venue of arbitration is not there, they have to consider the possibility of needing to set aside the award in a foreign country or to deal with foreign arbitration law.[632] This would be incompatible with the transparency principle and the access to justice for consumers, respectively. One cannot know beforehand if setting aside proceedings will be needed and for consumers, to sue out of their country of residence is a huge burden.[633] They will probably have to abdicate of empowering their lawyer of trust, have to spend money on translations to be able to present their case and understand the proceedings or even pay for a trip, if presence is demanded in court proceedings.[634] All of those having serious economic consequences. In light of these problems, a clause opting for a seat of arbitration that hinders the consumer from future access to justice and transparency in proceedings may not survive court scrutiny.

Usually, the seat of arbitration is not an issue if parties come from the same country and the property being purchased is also in that country, because the natural solution would be to have a domestic arbitration, where their country is the seat. Consequently, the

[631] Blackaby, N., Partasides, C., Redfern, A., Hunter, M. (2015), *Redfern and Hunter on international arbitration*, Oxford, Oxford University Press. Lew, Julian D. M, Mistelis, L. A., Kröll, S. (2003), *Comparative international commercial arbitration*, The Hague, New York, Frederick, MD, Kluwer Law International; Sold and distributed in North, Central and South America by Aspen Publishers.
[632] Hau, W. (2013), '5. Teil. ABC der Klauseln und Vertragstypen: Schiedsklausel' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck, para. S11. "*Vereinbarungen über den Schieds- und Verhandlungsort dürfen die Rechtsverfolgung der Gegenseite nicht ohne sachlichen Grund erschweren, das gilt auch und gerade für die Verlagerung ins Ausland."*
[633] See Graf von Westphalen, F. (2016), 'Schiedsgerichtsklauseln' in: Graf von Westphalen, F., Thüsing, G. (eds.), *Vertragsrecht und AGB-Klauselwerke 38. Ergänzung,* München, Beck, C H, p. 26. Hanefeld, I., Wittinghofer, M. A. (2005), 'Schiedsklausel in Allgemeinen Geschäftsbedingungen', *SchiedsVZ*, p. 224.
[634] See Wagner, G., Quinke, D. (2005), 'Ein Rechtsrahmen für die Verbraucherschiedsgerichtsbarkeit', *JZ*, Vol. 19, p. 937.

arbitration law of this country will be applicable and the future arbitral award will have the same nationality as the parties.

In case the developer is an international company, consumers should be alert and check if the seat of arbitration is the developer´s or the consumer´s country. A clause that stipulates the seat as the developer´s country and this is not the same as the place where the property is being developed should not be regarded fair, since it amounts to the obstacles above-mentioned, which are an unreasonable burden for the consumer.

If the clause, however, chooses the place of construction as the seat of arbitration, even if this is not the consumer´s residence place, the analysis of fairness may admit this clause. The fact that the consumer buys a property in that country is an indication that traveling and dealing with legal affairs there is not an unreasonable burden for the consumer but a burden that they are willing to take.

Hence, to avoid imposing an unreasonable burden on the consumer the seat of arbitration in B2C clauses shall be either the consumer´s country or the one where the property is, given the subjective and objective connection between these locations and the contract. Any divergent provision is an indicator of an unfair clause.

b) Language of the proceedings

In arbitration, parties can choose the language of the proceedings. This is especially relevant for international arbitration, where the parties have different nationalities and different mother tongues.[635] In this situation, if the parties do not choose a language in their clause, the arbitral tribunal will establish the proceeding´s

[635] See Faienza, V., Kluwer Arbitration Blog (2014), *The Choice of the Language of the Proceedings: An Underestimated Aspect of the Arbitration?*, available at: arbitrationblog.kluwerarbitration.com/2014/05/06/the-choice-of-the-language-of-the-proceedings-an-underestimated-aspect-of-the-arbitration/. 23.01.2018.

language, considering the case´s circumstances and the language of the contract.[636] Since most property development disputes involve parties, who are nationals of the same country, the language of arbitral proceedings will frequently not be an issue. In most domestic cases, the question about the language becomes obsolete, since the case´s circumstances and the contractual language point to the official language of the country in which the parties reside and do business.

However, for deviating cases it is necessary to establish a parameter of unfairness in regard to the language if a consumer is a party. Consumer law is intensively guided by the principle of transparency. This principle is a consequence of the law´s intent to overcome the informational imbalance between the consumer and the trader, making it easier and clearer for the consumer to access the contractual content. This principle can and should be analogically applied to consumer arbitration. Therefore, the language of the arbitration has to be determined in means to satisfy the transparency principle and give the consumer access to all documents and hearings without the need for translation.

Moreover, the choice of language can influence the fundamental right to be heard and to be treated equally, culminating in a distress of the due process.[637] This happens if the consumer is unable to present their case in a certain procedural language, where the other party has no difficulty with this language. The language of proceedings is even important to enable the consumer to be represented by their lawyer of trust and not to be obliged to outsource the case to someone they do not know because of the language.

In fact, the language choice may affect the consumer also financially. The need for translation of oral and written submissions

[636] This is established in most institutional arbitration rules, as in Art. 12.3 CAMARB Rules; Art. 20 ICC Rules; Art. 21.1 DIS Rules. It is advisable to have the proceedings in the same language of the contract. See Berger, K. P. (2014), *Trans-Lex.org principles with commentary*, Köln, Center for Transnational Law Cologne, p. 43.

[637] See Berger, K. P. (2014), *Trans-Lex.org principles with commentary*, Köln, Center for Transnational Law Cologne, p. 151.

increases the costs of proceedings. Further, the translations would hinder the expediency of proceedings.

Given the lack of transparency, the distress of the due process and the economic burden that may result out of a wrong choice of language, it is necessary to recognize the unfairness of any B2C arbitration clause that arbitrarily chooses a language that results in these problems.[638]

A clause that stipulates the consumer´s mother tongue or the official language of the place of residence of the consumer as the language of the arbitration must be regarded as fair. This choice does not amount to the problems above discussed, since the consumer either understands it or it can be assumed that the consumer understands it, because they have to cope with their daily affairs in that language.

The language of the contract and of the correspondence between the parties may still be taken into account, in a case where the consumer buys a household unit in a foreign country. The language of the contract can be deemed as a reasonable burden for the consumer, even if it was not written in the consumer´s language. A consumer who buys a unit in a foreign country can foresee that the contract and eventual proceedings will not be carried out in their language. The fact that they have exchanged correspondence and signed a contract in a certain language indicates that using that foreign language is a reasonable burden for the consumer. Hence, for foreign consumers, not only the mother tongue or the official language of the consumer´s

[638] See Hanefeld, I., Wittinghofer, M. A. (2005), 'Schiedsklausel in Allgemeinen Geschäftsbedingungen', *SchiedsVZ*, p. 2227. See also Holtzmann, H. M., Neuhaus, J. E. (2015), *A guide to the UNCITRAL model law on international commercial arbitration*: *Legislative history and commentary / by Howard M. Holtzman and Joseph E. Neuhaus*, Deventer, Kluwer Law and Taxation Publishers; The Hague: T.M.C. Asser Instituut, p. 628: "*The determination of the language to be used in an arbitration is a subject that is not commonly addressed in national arbitration laws. It is nonetheless a question of considerable importance to the cost, efficiency, and fairness of the arbitration*."

residence country but also the language of the contract can be considered fair for arbitration.

Differently, when the developer stipulates a language that is neither one of those nor the language of the contract, there are reasons to believe that this clause is unfair and will be confronting the transparency principle, the due process of law and be economically onerous for the consumer.[639]

c) Applicable substantive law

In arbitration the parties can indicate the law upon which the matter of the case shall be resolved. This can be done already in the arbitration clause or by agreement of the parties after the dispute arises. In case the parties do not reach an agreement regarding the choice of law, the arbitral tribunal will apply the rules of law it deems appropriate, finding out the law of the State with which the subject-matter of the proceedings is most closely connected to.[640]

For property development issues, it is important to determine which specific issue is being discussed. For instance, if the parties are discussing the payment, the closest law could be the one of the country of residence of the debtor, for this is the place where they have their assets. On the other hand, if parties are discussing construction defects or property rights, the law of the place of the property is most closely related and shall be applied to the arbitration. This is in line with an analogous application of the law. Both the Brazilian and the German Law determine that the law of the country where a certain property is located shall govern the legal transactions and rights related to

[639] See Wagner, G., Quinke, D. (2005), 'Ein Rechtsrahmen für die Verbraucherschiedsgerichtsbarkeit', *JZ*, Vol. 19, p. 937.
[640] For example, Art. 21, 1 ICC Arbitration Rules and Art. 23.3 DIS Arbitration Rules.

them.[641] Accordingly, for conflicts related to a property located in Brazil, the judge will apply the Brazilian Law and for conflicts related to a property located in Germany, the German Law. In disputes involving real rights it is advisable to follow the example of the law and establish the law of the country where the property is as the applicable substantive law to the arbitration, because property rights must be registered in official books and the application of foreign law could represent an obstacle to the registration, since the notary office must follow requirements of national law.

Anyhow, since most property development cases are domestic cases, the choice of law will most likely correspond to the law of the country of residence of the consumer, which will also be the law of the place where the property is. Therefore, if a contract between a developer and a German consumer, whose object is a property in Germany, unjustifiably provides for the application of foreign substantive law, this is an indication of unfairness.

d) Number of arbitrators and its consequence on the cost of arbitration

The arbitration clause can determine the number of arbitrators who will decide the future dispute and the way they will be nominated to constitute the Tribunal. However, provisions about the arbitrators in the arbitration clause can be tricky. It is difficult to determine in the drafting of the contract, the number and method of nomination of arbitrators to a dispute that the parties do not know yet.[642]

[641] See Art. 8 Lei de Introdução ao Código Civil and Art. 43 Abs. 1 EGBGB. See also Rome I Regulation Art. 4 (I) (c), determining the applicable substantive law in case of law collision in Europe, where the parties did not determine the applicable law. It affirms: "*a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated*".
[642] Karrer, A. P. (2007), 'Konstituierung des Schiedsgerichts' in: Torggler, H. (ed.), *Praxishandbuch Schiedsgerichtsbarkeit,* Wien, Verl. Österreich, pp. 89–111.

Furthermore, the number of arbitrators affects the costs of arbitration directly, raising the importance of this issue to the consumer.[643] The more arbitrators, the more will the arbitration costs raise, because they include the arbitrators´ payment.[644] Costs are of utmost importance when a consumer is a party. The probable economic vulnerability of the consumer in comparison to the developer plays a central role when the consumer has to decide between arbitration or courts. Hence, the provisions of the arbitration clause as to whether future disputes arising out of the contract will be decided by a sole arbitrator or a panel of three arbitrators must be analyzed carefully.

In the context of property development, where a future dispute may regard a great sum of money for the consumer in some cases or even concern only a small sum in other cases, it is advisable to determine a flexible number of arbitrators, which could adapt to the needs of the parties, depending on the value of the dispute.

As an illustration, take the construction projects of the *Stadtquartier am Aulweg* in the city of Gießen, Germany. The developer asks for 428.000,00€ for an apartment with 139,20m^2, 4 rooms, in the attic, without garage.[645] Assuming there would be a valid arbitration clause in the property development contract and that the developer for any reason does not deliver the apartment, the consumer may want to start arbitral proceedings. The consumer only mentions the value of the apartment as the value of case (not claiming for

[643] Graf von Westphalen, F. (2016), 'Schiedsgerichtsklauseln' in: Graf von Westphalen, F., Thüsing, G. (eds.), *Vertragsrecht und AGB-Klauselwerke 38. Ergänzung,* München, Beck, C H, p. 20. Hanefeld, I., Wittinghofer, M. A. (2005), 'Schiedsklausel in Allgemeinen Geschäftsbedingungen', *SchiedsVZ*, p. 224.

[644] Pursuant to Koeble, although the 3-arbitrator panel rises the costs of arbitration, arbitration remains cheaper than courts if one regards the length of the proceedings and the lost interests in the second instance of German courts. These considered, court proceedings might even cost the double of arbitration. See Koeble, W. (2014), '1. Teil. Außergerichtliche Streitbeilegung und schiedsgerichtliche Verfahren' in: Kniffka, R., Koeble, W. (eds.), *Kompendium des Baurechts: Privates Baurecht und Bauprozess,* München, C. H. Beck, para. 92.

[645] The value and the measures are illustratively taken from a real property development. The construction site is the block in the corner of Aulweg and Riegelpfad in Gießen, Germany. The price above mentioned corresponds to the price table stand of 25.07.2016 for a penthouse with the above indicated measures, 4 rooms, in the building #2. The real estate was developed during this study by Depant Bauträger and the estimated delivery time is the fall of 2017. Depant Bauträger GmbH und Co. KG, *Q16 - Leben im grünen Stadtquartier*, available at: www.depant.de/Immobilien/Kaufen/Q16-Stadtquartier-am-Aulweg/484/. 11.07.2017.

damages, for instance because of their rental costs). The clause determines the *Deutsche Institution für Schiedsgerichtsbarkeit* – DIS as the arbitral institution and that the dispute will be decided by a panel of three arbitrators. Using the DIS costs calculator one can see that the costs with the arbitrators´ fees would be 36.333,00€ and the total costs of arbitration would be of 42.021,20€. The same case with a sole arbitrator would cost less than half. The arbitrator´s fee would be 14.313,00€ and the total costs 20.001,20€. In sum, the costs for arbitration with a sole arbitrator would be around 4% of the sum in dispute while the costs of arbitration with 3 arbitrators rises to around 9% of the sum in dispute. Converting the sum to *Reais*, the Brazilian currency, and applying it to the costs calculator of the *Camara de Arbitragem Empresarial do Brasil* – CAMARB, one obtains very similar values and percentages.[646]

Given the high difference of costs between an arbitration with a sole arbitrator or an arbitral tribunal with three people, it is wiser to discuss the need for a panel of arbitrators when the parties already know the complexity of the dispute and the total amount of money in dispute. Nevertheless, it is not easy to leave important decisions to the moment after the dispute arises, when the parties are less cooperative. Thus, a sensible and more objective approach to the issue of how many arbitrators should decide a certain dispute considers that the number of arbitrators will depend on the amount of money in dispute. The drafter of the clause has to analyze which sum of money is considered high enough to deserve a more elaborate decision by a panel of three arbitrators and then, provide in the arbitration clause, for example, that disputes with a value until 1.000.000€ will be resolved by a sole arbitrator nominated within the list of arbitrators of the arbitral institution and disputes involving a higher sum of money will be resolved by a panel of three arbitrators, where each party will

[646] To do this calculation, the conversion rate of 19.10.2016 was used, coming to R$1.489.877,57 as the value of the case. An arbitration in CAMARB considering this sum in dispute and a sole arbitrator would cost 4,41% of that value and with three arbitrators 9,12%. The author considers that the converted sum as similar to the costs obtained using the DIS costs calculator. Both the values given by the DIS and the CAMARB calculators are from 19.10.2016.

appoint one and the chairperson will be jointly appointed by the co-arbitrators.[647]

In light of the above, a clause that provides for arbitration with a three-arbitrator tribunal is not to be considered unfair *per se*. Nevertheless, it deserves examination in the concrete case, to check if the number of arbitrators and the costs connected with it burden the consumer excessively, hindering them to access justice.[648]

e) Nomination of arbitrators

Concerning the nomination proceeding, any clause that excludes the consumer or a consumer representative from participating in the nomination process must be seen as unfair.[649] It is of utmost importance that the consumers have the chance to nominate as arbitrator someone of their trust or that knows the specific matter of their case. Even in the case that a sole arbitrator will decide the dispute, the arbitrator must not be unilaterally appointed.

However, in Germany, clauses with an unbalanced nomination method are not seen as invalid. The German arbitration law presents a solution for clauses with an unfair division of nomination powers. According to §1034 (2) ZPO if the nomination method established by the clause causes disadvantage to one party, the party can request the

[647] This rule was adopted by the SLBau and the SOBau, the most famous arbitration rules for construction in Germany. §30 (2) SLBau recommends parties to agree on a sole arbitrator for disputes concerning less than 100.000,00€. §15 SOBau establishes that the dispute will be decided by a sole arbitrator in case the dispute concerns until than 100.000€. The Spanish system for consumer arbitration recommends a sole arbitrator for cases, whose value is under 300€. See Art. 19 (1) (b) Spain (2008), Royal Decree 231/2008 - Sistema Arbitral de Consumo

[648] See Gershoni, N., *Singles vs. Panels: Do More Arbitrators InduceLess Bias?*, available at: naomigershoni.weebly.com/uploads/5/3/2/0/53205125/singlesvspanels_nov15.pdf. 16.01.2018. and Giaretta, B., Kishore, A., *One arbitrator or three?*, available at: www.ashurst.com/en/news-and-insights/legal-updates/one-arbitrator-or-three/. 27.11.2018. to know about pros and cons of having one single arbitrator or a panel of three, other than the cost issue. This was not a topic of this work, because it requires a case-to-case analysis and is not as connected to consumer protection as the financial access to justice.

[649] Hau, W. (2013), '5. Teil. ABC der Klauseln und Vertragstypen: Schiedsklausel' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck, para. S11. Graf von Westphalen, F. (2016), 'Schiedsgerichtsklauseln' in: Graf von Westphalen, F., Thüsing, G. (eds.), *Vertragsrecht und AGB-Klauselwerke 38. Ergänzung,* München, Beck, C H, p. 24.

courts to nominate arbitrators deviating from that method. The party has two weeks after the constitution of the arbitral tribunal to sue. Hence, in Germany, the clause would not be considered unfair, since the law itself offers mechanisms to overcome the unfairness.[650]

Brazilian law lacks such a provision. The arbitration law allows the courts to intervene in the nomination method but by action of the party who agrees with the constitution of the arbitral tribunal and faces resistance by the other party. Under Art. 7 LBA, if there is a valid arbitration clause but one party resists to start arbitration, the party requests the courts to intervene. The court will invite the other party to a hearing and according to §3 of the provision, if the parties do not agree in any of the terms of the arbitration clause, including the method of nomination, the judge will decide, after hearing the defendant, about the content of the clause. The judge must still respect the terms of the clause and decide in line with the LBA. Thus, in Brazil the unbalanced nomination method may still be a ground for invalidity of the clause due to its unfairness, since the arbitration law does not offer a specific procedural remedy for the party in disadvantage.

2. Should the content control cover the institutional rules?

The arbitration clause in the property development standard contract may also designate the arbitration institution that will administer a future dispute. In this case, their institutional rules are incorporated to the contract and will later govern the proceedings.[651] They become part of the contract. That means that by choosing to

[650] Weihe, L. (2004), *Der Schutz der Verbraucher im Recht der Schiedsgerichtsbarkeit*, Frankfurt am Main, Peter Lang, p. 282. Hanefeld, I., Wittinghofer, M. A. (2005), 'Schiedsklausel in Allgemeinen Geschäftsbedingungen', *SchiedsVZ*, pp. 225-226.

[651] Born, G. (2014), *International Commercial Arbitration* "*Parties frequently agree to arbitrate pursuant to institutional rules, incorporated by reference into their arbitration agreement (...)"* and p. 831. "*It is, of course, trite law that an arbitration agreement may validly incorporate institutional arbitration rules. As one court reasoned, it is settled doctrine that a reference in a contract to another writing, sufficiently described, incorporates that writing*."

arbitrate under that clause the consumer will submit themselves to those institutional arbitration rules.

The incorporation of arbitration rules external to the written contract itself raises concern about protecting the consumer not only from the arbitration features expressed in the arbitration clause or arbitration agreement, but also from the institutional rules.

The legal instrument that scrutinizes the contract to assure fairness for the consumer is the content control of clauses. Yet, few has been said about the content control of the institutional rules incorporated to the consumer´s standard contract. Neither in Brazil nor in Germany has the issue about submitting institutional rules to content control in consumer contracts been deeply discussed.

In both Brazil and Germany, the content control of the institutional rules, would depend on two conditions. The rules must be perceived as general terms and conditions and must be validly incorporated into the contract.[652] This is in line with §305 (1) BGB and Art. 54 CDC. The next lines will show when are these conditions fulfilled.

a) Institutional Rules as general terms and conditions

General terms and conditions are subject to content control, consequently, institutional rules can only be controlled if they are considered general terms and conditions of contract. That means that the content control of institutional rules is dependent on the definition of general terms and conditions.[653] In Germany, §305 (1) BGB defines them as follows: "*Standard business terms are all contract terms pre-formulated for more than two contracts which one party to the*

[652] See Köhler, H., Lange, H. (2013), *BGB, Allgemeiner Teil*: *Ein Studienbuch*, Kurzlehrbücher für das juristische Studium, München, Beck, §16, para. 14 ss.
[653] See above Chapter II, C, 2.

contract (the user) presents to the other party upon the entering into of the contract. It is irrelevant whether the provisions take the form of a physically separate part of a contract or are made part of the contractual document itself, what their volume is, what typeface or font is used for them and what form the contract takes. Contract terms do not become standard business terms to the extent that they have been negotiated in detail between the parties." [654]

Concerning the adequacy of institutional rules to the definition of general terms and conditions one can say, firstly, arbitration rules are pre-formulated by the institution to be incorporated into a multiplicity of contracts. It is generally assumed that the party who presents the standard terms to the other is also the drafter of those terms, however, this is not a condition settled by the legal provision. Hence, the fact that the arbitral rules were drafted by the institution and not by the user themselves is not a barrier to the recognition of them as general terms and conditions. For that, it is sufficient that the user includes the institutional rules to the contract, by mentioning them in the arbitration clause.

Secondly, the institutional rules indeed constitute an externally separate component of the contract. Even though the provisions of the institutional rules are not each by each mentioned in the contractual written document, they are incorporated to the contract and become part of it as soon as the arbitration clause mentions the rules or even the institution. Therefore, the institutional rules fit into the definition of general terms and conditions (*AGB*) and should be subject to content control in Germany.

A comparable situation in this regard is the exception of the content control to the VOB/B. The VOB/B are contractual conditions for construction contracts. Contracts may mention that the parties

[654] Citation translated by the author.

agree on the VOB/B, thereby incorporating them to the contract.[655] Note that the VOB/B, like institutional rules, are not drafted by the user.[656] They are a separate document that enhances rules for construction contracts. Hence, the VOB/B, as rules incorporated to the contract should be subject to AGB content control.[657] Nevertheless, §310 (1) BGB removes the VOB/B from the content control.[658] By doing so the law admits that the VOB/B are AGB, for if they were not, they would not need to be removed from content control,[659] they would just not fall into the class of legal instruments that are subject to content control.

The similarity between the VOB/B and institutional rules is significant. They are both external set of rules, which are incorporated to the contract by mention in a clause. Therefore, if the law considers the VOB/B as general terms and conditions, so must also the institutional rules be considered general terms and conditions and be subject to content control in Germany.

In Brazil, Art. 54 CDC, which defines standard terms, does not expressly mentions the possibility of encompassing a set of rules external to the contract itself, which was incorporated to the contract by virtue of a clause. It affirms: "*Standard terms are clauses which were approved by the competent authority or unilaterally established by the trader, when the consumer is not able to discuss or substantially modify their content*."[660]

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[655] See Christensen, G. (2016), 'Klauseln, Vertragstypen, AGB-Werke (58) VOB/B' in: Ulmer, P., Hans Erich, B., Hensen (eds.), *AGB-Recht: Kommentar zu den [Paragraphen] 305-310 BGB und zum,* Köln, Otto Schmidt, para. 44.
[656] See Vygen, K., Joussen, E. (2013), *Bauvertragsrecht nach VOB und BGB*: *Handbuch des privaten Baurechts*, Köln, Werner, p. 468.
[657] See Vygen, K., Joussen, E. (2013), *Bauvertragsrecht nach VOB und BGB*: *Handbuch des privaten Baurechts*, Köln, Werner, p. 462.
[658] See Christensen, G. (2016), 'Klauseln, Vertragstypen, AGB-Werke (58) VOB/B' in: Ulmer, P., Hans Erich, B., Hensen (eds.), *AGB-Recht: Kommentar zu den [Paragraphen] 305-310 BGB und zum,* Köln, Otto Schmidt, paras. 5-9.
[659] Ulmer, P., Schäfer, H.-B. (2016), '§310' in: Ulmer, P., Hans Erich, B., Hensen (eds.), *AGB-Recht: Kommentar zu den [Paragraphen] 305-310 BGB und zum,* Köln, Otto Schmidt, para. 35b.
[660] Citation translated by the author.

Notice that, differently from the German definition, the law states that the clauses are drafted by the trader. Hence, in a formalistic interpretation, institutional rules, which were not personally drafted by the trader are not standard terms under Art. 54 CDC. A teleological interpretation widens the possibility of perceiving the institutional rules as within the scope of Art. 54. The law focuses on the lack of bargaining power of the party who adheres to the contract[661] and understands, not only clauses drafted by the trader, but also clauses approved only by the trader as standard terms. Since the trader approves of the institutional rules when they draft the arbitration clause referring to the institution, they can be interpreted as within the standard terms.

Moreover, it is widely recognized that general terms and conditions which are external to the contract are subject to content control.[662] Similarly, to institutional rules, they are not presented to the consumer in written form at the moment they sign the contract. They are incorporated to the contract by means of reference. Traders establish the general conditions of contract and make them available for example in their website. They incorporate them to the contract by mere reference, affirming that the general conditions of contract are applicable to a certain legal negotiation. In this sense, using the analogical interpretation, institutional rules can be considered general terms and conditions, since they also are a set of rules approved by the trader and can be incorporated to the contract by reference.

[661] Marques, C. L. (2016), *Contratos no código de defesa do consumidor*, São Paulo, Revista dos Tribunais, para. 1.2.2.a.
[662] See Marques, C. L. (2016), *Contratos no código de defesa do consumidor*, São Paulo, Revista dos Tribunais1.2.3.a. Miragem, B. (2009), 'Nulidade das cláusulas abusivas nos contratos de consumo: Entre o passado e o futuro do Direito do Consumidor Brasileiro', *Revista de Direito do Consumidor*, Vol. 72, para. 1.2.3.a.

b) The incorporation of institutional rules to the contract

Since the institutional rules are not in the contract itself, to be subject to content control they must be validly incorporated to the contract. The German Civil code establishes three requisites for the valid incorporation of the general conditions to the contract in §305 (2). First, according to §305 (2) (1) BGB, the consumer must have been informed about the application of those conditions to the contract. Second, pursuant to §305 (2) (2) BGB, the consumer must have had a real possibility to be acquainted to the content of those conditions. Lastly, in conformity with the last sentence of §305 (2) BGB, the acceptance of the consumer to the incorporation of those conditions to the contract is needed. Brazilian scholars have adopted the same requisites to validate the incorporation in the country.[663]

Applying these requisites analogically to the institutional rules the content control of those is sustained. The consumer is by simple means of the formal requirements to the validity of the arbitration clause informed about the incorporation of the institutional rules. The clause must be in bold type and separately signed, meaning that the consumer will have been informed about it. The special signature is also important for the third requirement, denoting an acceptance. Moreover, all institutional rules are nowadays available in the websites of the arbitral institutions, what provides the consumer with the possibility of knowing them.

Nevertheless, the information requirement is very fragile. Arbitration clauses may be drafted in a way that consumers will not directly understand that a specific set of rules will apply to a future dispute. Clauses not rarely mention the institution, which will administer the dispute but do not even use the word "rules". An

[663] Lobo, P. L. N. (1993), 'Contratos no Código do Consumidor: Pressupostos Gerais', *Revista de Direito do Consumidor*, Vol. 6, pp. 134–141. Miragem, B. (2009), 'Nulidade das cláusulas abusivas nos contratos de consumo: Entre o passado e o futuro do Direito do Consumidor Brasileiro', *Revista de Direito do Consumidor*, Vol. 72, pp. 41–77. Marques, C. L. (2016), *Contratos no código de defesa do consumidor*, São Paulo, Revista dos Tribunais, para. 1.2.3.

example of the beginning of a clause could be: "*All and any disputes arising out of or related to the present contract shall be settled by Arbitration, to be administered by CAMARB – Câmara de Arbitragem Empresarial*." Notice that the clause explicitly asserts that CAMARB is the chosen institution; hence, CAMARB´s arbitration rules will be applicable to the case. This is a logical and consequent interpretation of any person familiarized with arbitration, but not of the consumer. It cannot be expected that even the consumer who reads the clause carefully understands the implications of the choice of an institution to the future proceedings.

Therefore, arbitration clauses, which clearly affirm that the disputes will be settled by arbitration administered by a certain institution and in accordance with the rules of that institution, must be treated differently from those, which only mention the name of the institution. Very clear terms are of utmost importance in consumer law, since the wording of clauses can directly influence the consumer´s understanding and decision about the contract. If the clause does not clearly affirm that the institutional rules will be applicable to the arbitration, one may argue that these rules were not validly incorporated to the contract due to the lack of transparency.[664]

Additionally, §307 (1) BGB and Art. 54 (3) CDC requires the clauses in standard contracts to be drafted in clear terms. Only clear clauses fulfill the information requirement above described. Thus, the institutional rules can be considered incorporated and should be subject to content control, analogically to the content control of contractual general conditions if the clause is drafted in a way that the consumer understands that these set of rules will apply to a future proceeding. Less clear clauses risk the non-incorporation of the institutional rules to the contract, creating a problem to the practicability of the arbitration clause.

[664] See Basedow, J. (2015), '§305 BGB' in: Säcker, F. J., Rixecker, R. (eds.), *Münchener Kommentar zum BGB,* München, C. H. Beck, para. 12 ss.

In sum, the content control of institutional rules in standard contracts is conditioned to their status of general terms and their incorporation to the contract. The lack of legal basis capable of supporting such a control is a call for the lawmakers to fill the gap, giving the consumer who wants to arbitrate full support and protection.

3. Legal consequences of the content control

The objective of the content control of unfair provisions is to remove the unfairness from the contract, protecting the disadvantaged party. The removal can be made by invalidating the whole arbitration clause or by invalidating solely the unfair provision inside the arbitration clause. The question as to whether clauses with unfair provisions must be completely invalidated or stand without the unfair part is widely discussed in the doctrine.[665]

a) In Brazil: Nullity of the arbitration clause

In Brazil Art. 51 CDC provides not for the invalidation of the clause but for its absolute nullity.[666] It is as if the clause has never existed in the legal world. §2 of the same provision establishes that the nullity of an unfair clause does not invalidate the contract, unless the contract would make no sense without that clause, which is not the case regarding arbitration clauses. In fact, the STJ has recognized the power of the judge to declare an abusive clause as null *ex officio*.[667] In light of the wording of the Brazilian Consumer Code, an arbitration

[665] Basedow, J. (2015), '§306 BGB' in: Säcker, F. J., Rixecker, R. (eds.), *Münchener Kommentar zum BGB,* München, C. H. Beck, para. 12 ss. Lindacher, W. F., Hau, W. (2013), '§306 BGB' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck, para. 68.
[666] Marques, C. L. (2016), *Contratos no código de defesa do consumidor*, São Paulo, Revista dos Tribunais, para. 4.1.2.b. Prof. Marques explains that the CDC has opted for the absolute nullity in divergence with the German model of invalidation of abusive clauses.
[667] STJ (2007), REsp 767.052 - RS STJ (2000), REsp 190.860 - MG

clause with an unfair provision will not partially survive, even if the provision inside the clause does not hinder the parties from the essential idea of arbitrating their disputes. The law saves the contract, but not the arbitration clause.

Art. 6 (V) CDC allows the courts to modify abusive clauses, healing them only if they concern the price or the installments of the contract.[668] This is to be considered an exception. By conceiving this exception, the lawmaker understood that the law does not possess provisions, which could replace the unfair prices and interests in contracts. Thus, this exception is not applicable to arbitration clauses. Although there are decisions from the Superior Tribunal of Justice, which relativize the competence-competence principle, letting the court decide on the invalidity of a clause,[669] there are still no decisions in which the court actively modifies a pathological clause, let alone an unfair clause. The approach of the court towards an arbitration clause inside a standard contract has been to consider its absolute nullity.

b) In Germany: Invalidation of the unfair part of the clause

Pursuant to §306 (1) BGB, the arbitration clause, which contains an unfair provision may be considered partially invalid if the clause can be divided and still keep its sense.[670] The court will then apply the blue pencil doctrine, finding a part of the clause void and letting the rest of the clause stand.

[668] Marques, C. L. (2016), *Contratos no código de defesa do consumidor*, São Paulo, Revista dos Tribunais, para. 4.1.2.b.2. STJ (2008), REsp 1.061.530 - RS
[669] STJ (2016), REsp 1.602.076 - SP
[670] Hanefeld, I., Wittinghofer, M. A. (2005), 'Schiedsklausel in Allgemeinen Geschäftsbedingungen', *SchiedsVZ*, pp. 228–229. Schmidt (2016), '§306 BGB' in: Ulmer, P., Hans Erich, B., Hensen (eds.), *AGB-Recht: Kommentar zu den [Paragraphen] 305-310 BGB und zum,* Köln, Otto Schmidt, para. 6 ss. Basedow, J. (2015), '§306 BGB' in: Säcker, F. J., Rixecker, R. (eds.), *Münchener Kommentar zum BGB,* München, C. H. Beck, para. 17 ss.

In case of the invalidation of a part of the clause, following the criteria above used to demonstrate indications of unfairness, possible gaps of the arbitration clause would be the lack of determination concerning the seat of arbitration, the procedural language, the substantive law or the arbitrator´s number and nomination method. How to fill these gaps left by a partial invalidation of the arbitration clause is a widely discussed issue in the context of the European Directive on unfair terms.[671] It is unsure if the European law allows for a supplementary interpretation of the contract.[672] In the Banco Español case,[673] the European Court of Justice decided that a court cannot directly revise the content of the clause to fill the gap, its only duty is to exclude the unfair part, leaving the rest of the contract intact.[674] After that, the Court decided in the Árpad Kásler vs. OTP Jelzálogbank case,[675] that the member States may substitute the unfair provision by the provisions in their dispositional law, since it is to expect that the law does not contain unfair terms and is entirely consistent with the objective of the Directive 93/13. Hence, filling the gaps using the German Arbitration law would be in accordance with the European Directive.

The German Law indeed offers solutions for filling the gaps in the situations above described. For example, if a certain clause has an unfair language provision, the court will invalidate the part of the clause that chooses the language of proceedings. It may then apply §1045 (1) ZPO, according to which the arbitral tribunal must determine the language of the proceedings in case the clause does not

[671] Basedow, J. (2015), '§306 BGB' in: Säcker, F. J., Rixecker, R. (eds.), *Münchener Kommentar zum BGB,* München, C. H. Beck, para. 4 ss. Pfeiffer, T. (2013), '7. Teil. Richtlinie 93/13/EWG: Art. 6' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck. Lindacher, W. F., Hau, W. (2013), '§306 BGB' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck, para. 9.
[672] Pfeiffer, T. (2013), '7. Teil. Richtlinie 93/13/EWG: Art. 6' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck, para. 10.
[673] European Court of Justice - ECJ (2012), C-618/10 (Banco Espanol de Credito S/A vs. Joaquín Calderón Camino)
[674] Lindacher, W. F., Hau, W. (2013), '§306 BGB' in: Wolf, M., Lindacher, W. F., Pfeiffer, T. (eds.), *AGB-Recht: Kommentar,* München, Beck, para. 28a.
[675] European Court of Justice - ECJ (2014), C-26/13 (Árpad Kásler, Hajnalka Kaslerne Rábai vs. OTP Jelzálogbank Zrt)

mention it. The court will let the arbitral tribunal decide. Furthermore, §1045 (1) ZPO proves that the German law does not consider the lack of a provision about the proceeding´s language as essential to the arbitration clause. Reason why the partial invalidity of a language determination should not cause the invalidity of the whole clause.

Similarly, if the clause remains without the provision referring to the arbitral seat, it will be for the arbitral tribunal to determine the seat of arbitration, considering all important circumstances to find an appropriate place for the parties, as asserts §1043 (1) ZPO.

Regarding the nomination method, the arbitration law would fill the gap left by the invalidation of that part of the clause with §1035 (3) ZPO. According to the provision, if arbitration will be decided by a sole arbitrator the parties can agree on one person. If they do not agree the sole arbitrator will be nominated by the courts at request of one party. If the tribunal has to be composed by three arbitrators, each party will nominate one and these two will nominate the chairperson.

All the above shown methods to reinterpret the arbitration clause and give it life in an adequate way for the consumer and for the dispute could be classified as efficient, counting on the sensibleness of the arbitrators and of the courts. Nevertheless, concerns about the number of arbitrators are rather problematic when one tries to supplement it by the legal provisions.

The German arbitration law also foresees the lack of provision as to the number of arbitrators. Hence, in case the courts find that a certain number of arbitrators is unfair for the consumer and invalidates the provision, the tribunal will be composed by three arbitrators in accordance with §1034 (1) ZPO. This provision is however controversial since the number of arbitrators is connected with the costs of arbitration and the law does not provide for cases in which the number of arbitrators can be only one. Hence, this filling gap strategy will only be beneficial for the consumer if the drafter provides for an

arbitral tribunal with five arbitrators or more, what is extremely unusual, but will not be effective to discuss the possible unfairness of a tribunal of three arbitrators for a case, which would better fit a sole arbitrator.

Anyhow, the above described situations show that the German Arbitration Law has provisions that could fill the gaps left by the partial invalidity of an arbitration clause, even if they do not present the best solution in every scenario. The above mentioned legal rules are considered dispositional law as an opposition to mandatory provisions.[676] They will only be in force if the parties do not agree otherwise. From that, two conclusions can be drawn: First, that when the law uses the expression "unless agreed otherwise by the parties", it puts the will of the parties above that specific provision and wants the provision to fill a gap, solely if the parties do not make an agreement concerning that specific procedural aspect. Second, an arbitration clause, which has one part invalidated due to its unfairness must be treated as a clause that did not mention that specific procedural aspect of the arbitration, being then subject to the gap filling of the dispositional law, namely the provisions of the German arbitration law.

D. Chapter´s conclusion

The application of content control to the arbitration clause in the two jurisdictions are opposed. Germany tries to save the clause and Brazil prefers to consider it null. The nullity of the arbitration clause as a whole, due to an unfair procedural provision, impedes the parties to use that same clause to arbitrate. One could claim that this is not a problem, since this thesis plead for a post-dispute decision of the consumer about arbitrating. In this context, the parties can arbitrate

[676] See Wagner, G. (1998), *Prozessverträge*: *Privatautonomie im Verfahrensrecht*, Jus privatum, Tübingen, Mohr Siebeck, p. 52ss.

despite the nullity of original clause, by making a post-dispute agreement to arbitrate. This is a good option, however not always possible. In the post-dispute moment, the business atmosphere is not as favorable as it was at the beginning of the contract. Hence, even if the consumer wants to arbitrate, in the post-dispute moment the developer may deny to arbitrate, just as a delay tactic, knowing that courts decisions take longer. The German law, allows for the clause to stand without the unfair part. This is desirable for consumers who want to arbitrate. Therefore, the possibility of having a partial invalidation of the clause is closely related to the protection of those consumers who do not want to arbitrate. If the law gives those consumers due shelter, then the law can and should cope with unfair provisions inside the arbitration clause using the partial invalidity.

Within the scope of this thesis and applying the non-binding clause, as advocated in the last chapter,[677] the content control must not be a tool to invalidate the whole arbitration clause, precluding the consumer from arbitrating their dispute. It must rather invalidate solely the unfair provision inside the clause, ensuring that the consumer can arbitrate in fair conditions, if they so want. This is the crucial point about making an effective content control.

In fact, the consumer who does not want to arbitrate does not even need to point an unfairness in the clause. Their merely lack of will must suffice for the courts to welcome their sue. On the other hand, the state can protect the consumer who wants to arbitrate by removing any unfair content of the arbitration clause, as long as the removal is possible and does not harm the whole clause. In sum, the action of the courts must depend on the consumer´s prayer for relief. A consumer who does not want to arbitrate will request the courts to invalidate the clause and recognize their competence to resolve the dispute. Consumers who want to arbitrate will request the court to invalidate

[677] See Chapter IV, C, 3, b.

the unfair part of the provision, giving balance to the arbitration clause.

From the above, two deductions can be drawn. First, what was advocated in the last chapter is ratified: the content control should not even apply for consumers who do not want to arbitrate.[678] Due to the consumer´s weaker bargaining position, they must be able to opt out of the clause groundless. Second, the content control should be used as a protection tool for consumer who want to arbitrate. Thus, the content control of arbitration clauses in favor of the consumers must not invalidate the whole clause if it identifies an unfair provision. It must invalidate the provision, leaving the rest of the clause valid, as long as it can exist without the invalid provision. For this purpose, the German law fits the content control of arbitration clauses better than the Brazilian one.

[678] See Chapter IV, C, 3, b, ii.

VI - Developing rules for B2C construction arbitration proceedings

A lot has been discussed about protecting the consumer from arbitration, by prohibiting them to use this dispute resolution method; or even by controlling the content of arbitration clauses. However, given the benefits of arbitration as a dispute resolution method that fits property development disputes, much more appropriate than protecting the consumer in regard to arbitration would be to develop a consumer-friendly environment for consumers and developers to use arbitration when a dispute arises.

Engaging in the task of developing B2C arbitration for construction disputes, this work will start by developing arbitration rules, specifically designed to satisfy the needs of consumers and developers (A). Then, an arbitration system that encourages the use of this dispute resolution method will be studied and suggested (B). Finally, the chapter will be concluded in an overall analysis of the suggested B2C construction arbitration (C).

A. Tailor made rules for B2C construction disputes

An indispensable step towards B2C construction arbitration is the development of arbitration procedural rules tailor made for the challenges posted by these types of disputes. Arbitration rules are what shapes the proceedings. They govern the arbitral proceedings establishing the guidelines for arbitrators, institutions and parties to follow. Hence, tailor made arbitration rules for construction disputes with a consumer party will enable a better shelter for consumers inside arbitration and at the same time give the developers and construction companies the opportunity to use with their clients, the same dispute resolution method that they are used to recourse to when a B2B dispute arises.

In order to develop those tailor-made rules for the type of dispute in study, both the consumer´s side and the developer´s side

must be studied. Since consumer disputes are resolved mainly in courts, some aspects of court proceedings will be analysed, which are important for the consumers and see how to apply them to consumer arbitration (1). On the other side, arbitration is widely used by the agents of the construction field, prove of that is that there are already arbitration rules especially designed for construction disputes. By examining these rules, one can verify what are important aspects of construction arbitration that must remain present in arbitration rules for B2C construction disputes (2).

Based on the findings of the above described analysis, this work will suggest model rules tailor-made for B2C construction disputes (3). They intend to be the starting point for the development of consumer arbitration in the construction field.

1. The court proceedings – the consumer´s side

As mentioned before, arbitration is not a common dispute resolution method in consumer cases.[679] In both Germany and Brazil, consumer disputes are generally resolved in courts. Therefore, one might not overlook the features of court proceedings that are important for B2C property development disputes. Three of which will be examined here, they are: the legal venue, the joinder of parties and the publicity in proceedings. Through a comparative examination of how these three aspects of court proceedings work in each country and the analysis of their suitability to consumer arbitration in property development cases, then an arbitration rule that would enable the application of these features in B2C construction arbitration, considering the consumer´s needs will be proposed.

[679] See Chapter III, C, 2, c.

a) Arbitral venue and Legal venue

The arbitration venue is the location the parties choose to hold the proceedings, meaning meetings, hearings etc.[680] It is the most convenient geographical location for the parties and arbitrators to meet. One must distinguish "seat of arbitration" and "venue of arbitration". Although, the term venue of arbitration is sometimes used as a synonym to seat of arbitration,[681] the correct definitions of these terms differ.[682] The seat of arbitration has a legal meaning more than a convenience meaning. When the parties choose the seat, they are choosing the *lex arbitri* of the seat to govern the proceedings. Further, the future arbitral award will have the nationality of the seat and it will only be possible to set it aside in the courts of the seat. Anyhow, seat and venue must not coincide.

To establish the venue of arbitration, parties are to designate a place that is convenient for them and for the proceedings, taking into account the place of residence of the parties and their counselors as well as the construction place.[683] Yet, with a consumer party one other factor must guide the choice of the arbitral venue. The access to justice of the consumer.[684] If the venue of arbitration is too distant from a reachable place for the consumer, it will hinder them from attending the meetings and hearings.[685] The consumer´s attendance will be bound to time and financial expenses. Such a problem would go against the principle of facilitation of access to jurisdiction.

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[680] Wegen, G., Barth, M. (2007), 'Praktische Tipps für den Abschluss der Schiedsklausel' in: Torggler, H. (ed.), *Praxishandbuch Schiedsgerichtsbarkeit,* Wien, Verl. Österreich, pp. 59–87.
[681] Ostrove, M., Salomon, C. T., Shifman, B. (2013), *Choice of venue in international arbitration*, Oxford, OUP.
[682] Supreme Court of India (2014), Enercon (India) Ltd. & Ors vs. Enercon GmbH & Anr. "*It was observed that the problem about all these formulations, (...), is that they elide the distinction between the legal localisation of arbitration on the one hand and the appropriate or convenient geographical locality for hearings of the arbitration on the other hand*."
[683] Blackaby, N., Partasides, C., Redfern, A., Hunter, M. (2015), *Redfern and Hunter on international arbitration*, Oxford, Oxford University Press.
[684] See Chapter III.
[685] See Wagner, G., Quinke, D. (2005), 'Ein Rechtsrahmen für die Verbraucherschiedsgerichtsbarkeit', *JZ*, Vol. 19, p. 934.

Transferring the idea of the arbitration venue to the courts, one observes that the lawmaker has faced the same challenges while determining the legal venue for B2C disputes. The legal venue regards the territorial competence of a specific court to hear and decide upon a claim. It is the answer to the question: Where to sue? Legal provisions determining the legal venue for each case take into account mainly two aspects of the dispute: the type of dispute and the parties´ domicile.[686] Thus, depending on these two factors the law may designate a different competent court to hear the claim. The party suing must then submit their sue in a certain place, be it for instance the domicile of the respondent, the place where the obligation must be fulfilled, etc., depending on the legal determination.

Markedly, if the consumer must claim in a place difficult to reach, the legal venue will impede them from pursuing their rights.[687] Hence, it is important to verify in which cases the legal venue must coincide with the consumer´s domicile to facilitate their access to the judiciary.

Examining how the lawmaker solved the access to justice problem may serve as a guideline for determining a suitable arbitration venue in B2C property development cases. Hence, in the next subpoints, the Brazilian and the German rules about legal venue will be presented.

i) Brazil

The Brazilian Civil Procedure Code establishes in Art. 46 the general rule about territorial competence, designating the domicile court of the defendant as the legal venue. However, other three competence rules are relevant for the study of B2C property development disputes.

[686] Adolphsen, J. (2016), *Zivilprozessrecht*, Baden-Baden, Nomos, §6, para. 41.
[687] See European Court of Justice - ECJ (2000), Joined cases C - 240/98 to C-244/98 (Oceáno Grupo Editorial vc. Rocío Murciano Quintero et. alia)

Art. 47 CPC affirms that the territorial competence for the solution of a dispute concerning real right must be that of the place of the property. Hence, if the parties are contesting, for instance the right of property of the consumer, the legal venue must be that of the building´s place, regardless of where the developer or the consumer have their domicile.

The second rule is in Art. 53 (d) CPC. It provides for the competence of the performance place – *Erfüllungsort* -, *i.e.* the party seeking for the satisfaction of a certain obligation must sue in the court of the place where the obligation must be done. Applying this to our study case, the performance place will coincide with the property´s site, because all obligations that the developer must satisfy are to be carried out in the construction site. In other words, if the consumer requires the developer to change the windows of their household units, so that these match the ones afore shown to them in the sample apartment, then the consumer must sue in the court of the place of the property, because the developer will comply with its obligation in that place.

The third relevant territorial competence rule is an exception to the general rule tailor made for consumer disputes. It is not to be found in the Civil Procedure Code but in Art. 101 (1) of the Consumer Protection Code. Pursuant to that provision, the consumer may sue in their own domicile when the claim verses about the civil liability of the trader, even if they are the plaintiff. Note that this norm gives the consumer a facultative right, they may or may not sue in their own domicile. Teleologically, this rule was designed to overcome the challenge of consumer access to justice. The option given to the consumer in the CDC is based on the fact that most traders make themselves present in innumerous cities, selling their products, throughout the country. It is just fair that the consumer may sue the company also in their domicile, from where they probably bought the product. The general rule of the defendant´s domicile would have drastic consequences in Brazil. For instance, it would be unpractical

for a consumer from Campo Grande-MS to sue a producer of a defective stereo system, with seat in Manaus-AM, a journey of 3.055Km by car.

Differently, when one faces the problem of civil liability in construction cases this rule may not be as suitable for consumer cases. Many consumer claims in the construction field touch upon the trader´s civil liability. So, it is also in property development disputes, concerning, for instance, defects in construction or construction delay. In these cases, the consumer may sue in their own domicile, according to Art. 101 (1) CDC, but such an approach would not be clever. The developer´s liability is closely connected to the building, it is easier to access the evidences needed in these proceedings in the place where the building is.

Anyhow, in practice, the consumer, as the plaintiff, has the faculty to choose between suing in their domicile or not.[688] However, the consumer´s choice of legal venue cannot be random.[689] The judge may decline their competence if they find that the party or their lawyer has arbitrarily chosen the venue.[690] In the passive pole, if the developer does not present the claim in the consumer´s domicile´s court, the judge can decline their competence *ex officio* based in the STJ´s jurisprudence, if they find that the principle of facilitation of the consumer´s defense was not observed.[691] Following the consumer friendly approach of the Brazilian judiciary, although property development disputes are very closely connected to the property, the venue must be the one where the property is located only in the cases where the claim verses about real rights, with special cases of exclusive competence ruled in Art. 47, §§1 and 2 CPC. Otherwise the

[688] STJ (2015), AREsp 708368
[689] STJ (2015), CC 136903
[690] STJ (2015), AgRg no AREsp 667721 - MG
[691] STJ (2015), AgRg no AREsp 667721 - MG; STJ (2015), CC 136903

consumer´s domicile may prevail if the consumer, as the plaintiff, so wishes, in accordance with the STJ´s understanding.[692]

ii) Germany

Germany´s general rule about territorial court competence, present in §12 ZPO, also follows the maxim *actor sequitur forum rei*. Accordingly, if the developer sues the consumer for debts, it must sue them in the courts of their domicile, what facilitates the consumer´s defense. In contrast, if the consumer sues the developer, they must do it where the developer has its seat, according to §17 ZPO.

If the dispute concerns real rights, the exclusive venue is the one where the property is, according to §24 ZPO. Considering that, most consumer disputes in this context concern construction defects and construction delay, the parties are generally not bound to the property´s venue. They are, however, bound to the performance place. §29 ZPO determines the location of the contractual performance as the legal venue, which in the property development contract coincides with the property´s location, because the most important performance of the developer is to build the property.[693]

These three territorial competence rules coincide with the ones present in the Brazilian CPC. In contrast, the German Law does not give the consumer the right to choose their own domicile court in a liability case.[694] The German Civil Procedure Code only gives the consumer special venue in their domicile for disputes arising out of doorstep selling, pursuant to §312 BGB and §29c (1) ZPO.[695] Since it

[692] STJ (2016), AREsp 832058
[693] BGH (2003), X ARZ 91/03 (KG); BGH (1985), I ARZ 737/85 (LG Dortmund). See also §269 BGB, for cases in which the performance place is not clear..
[694] Proceedings involving a trader and a consumer in a member state of the European Union have their territorial competence ruled byThe Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Accoring to its art. 18 (2), "Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled."
[695] Adolphsen, J. (2016), *Zivilprozessrecht*, Baden-Baden, Nomos.§6 para. 49.

is very unlikely that a consumer will celebrate a property development contract at their doorstep, claims arising out of property development contracts must follow the rules above described, regardless of the participation of a consumer or not.

iii) Legal Comparison

Both jurisdictions have similar rules concerning the legal venue. The general rule of suing in the venue of the defendant´s domicile, the place of the property as the exclusive venue for disputes about real rights and the place of performance as the legal venue, where performance satisfaction is required are similarities. Additionally, both jurisdictions recognize, that there are situations in which the general rule has to be excepted in favor of the consumer. In Germany, this is the case in disputes involving doorstep selling, §29 c (1) ZPO. However, it is not likely that this provision will be applicable to the case in study in practice. Therewith, only Brazilian law can cover disputes concerning property development contracts, giving the consumer the option of choosing their own domicile court in any dispute involving the discussion about the civil liability of the developer, pursuant to Art. 101, I CDC, in the name of the principle of facilitation of the consumer´s defense.

Yet, one must consider that the size of the Brazilian territory makes it much more important to have a rule facilitating the access to justice for consumer plaintiffs in this country than in Germany. Moreover, this provision was not conceived for construction disputes, but much more for product liability disputes. If the consumer´s domicile does not coincide with the construction site, the principle of facilitation of the consumer´s defense in some cases conflicts with the principle of procedural economy. The consumer who sues the developer about their liability for construction defects is not obliged to sue in the place of the property, thereby making the taking of

evidence in the household unit difficult. In this case, it would be economic to sue in the property´s venue, facilitating any taking of evidence in the construction site.[696]

Moreover, the comparison between the legal venue rules of Brazil and Germany shows that the most common legal venue for construction cases in both jurisdictions will be the construction site.

iv) Conclusion

In property development disputes, an extra rule facilitating the access to justice for consumers by giving them the choice of suing in their own domicile is not necessary. The developers, even if with a company seat somewhere else, are present in the geographical place of property development, at least during the construction phase. Besides, one may assume that the place where the consumer buys a household unit, be it to live in or to invest, is not an unachievable place for them. Therefore, the application of the consumer´s domicile as legal venue to property development disputes is not of utmost significance for consumer protection as it is in other disputes.

Moreover, the general legal venue rule is sensible enough to govern cases that concern the consumer´s obligations. Under that rule, if the developer sues the consumer – if the developer claims that the consumer did not comply with one of its obligations, for instance paying the agreed price - the consumer would be the defendant and the legal venue would be their domicile. On the other hand, when a consumer sues a developer, it is because the developer failed to perform one of their obligations. Very often, the obligations of the developer have to do with the construction itself, which is the main performance that the developer has to do under the property development contract. In this case, the legal venue will be the

[696] BGH (1985), I ARZ 737/85 (LG Dortmund)

performance place, which is reachable for the consumer, since they buy their dwelling in this place.

Transporting the legal venue examples of the German and Brazilian Law to arbitration, one can conclude that it is important to set the venue of arbitration in a place that facilitates not only the consumer´s access to justice, but that facilitates the taking of evidence, being close to the performance place. The principle of facilitation of the consumer´s defense, when applied to arbitration, is closer to the arbitration venue than to the arbitration seat. A convenient venue for the consumer will facilitate their attendance to the hearings.[697] However, not only the consumer´s domicile is considered convenient for the consumer in the property development disputes. As mentioned before, the choice of the place of property as venue facilitates the taking of evidence, which is a significant cost aspect for the parties.

It is also important to note that it would be naive to think that in all cases the roles of the parties are clearly divided, meaning one as Claimant and the other as Respondent. Sometimes these roles mix through a counterclaim. In these situations, the case will verse about obligations and rights of both parties. Hence, it is reasonable to set the place of construction as the best venue for situations like that. First, because both parties must have access to that place, since the one is performing their contractual obligation there and the other is buying a household unit there. Second, because the facilitation of the taking of evidence referring to the obligations of the developer may reduce the costs of arbitration, bringing advantages for both parties. In particular cases, where this thought does not optimally apply, the Arbitral Tribunal should have discretion to move the venue from the place of construction to the consumer´s domicile.

Nevertheless, in arbitration party autonomy plays a major role, reason why the option to opt out of these two venues must stay opened

[697] Wagner, G., Quinke, D. (2005), 'Ein Rechtsrahmen für die Verbraucherschiedsgerichtsbarkeit', *JZ*, Vol. 19, p. 937.

for the parties. Still, since it is the developer who usually drafts the arbitration clause, determining the venue, the principle of the facilitation of the consumer´s defense justifies a limitation in the party autonomy to constrain a deviation from these two places only with the express agreement of the consumer in a post-dispute moment.[698]

v) Suggested rule for B2C property development disputes:

Venue of arbitration:

To facilitate the defense of the consumer, the venue of arbitration, despite the choice of seat of arbitration or any pre-dispute determination of the venue of arbitration, will be as follows:

1. In cases that verse solely about obligations of the consumer, the city of the consumer´s domicile.
2. In cases that verse about obligations of the developer the city of the place of construction;
3. The venue of arbitration will be determined by the obligations referred to in the Request for Arbitration. Obligations referred to in a Counterclaim will not change the venue of arbitration, unless the parties so agree or the Arbitral Tribunal/Sole Arbitrator reasonably understands that a change of venue fits the case.

    (1) The parties may agree to have the venue on a third place, as long as in writing in a post-dispute agreement.

[698] Following the argumentation for a post-dispute arbitration agreement exposed in Chapter IV, C, 3, b, i.

b) Joinder of Parties

In civil proceedings, the joinder of parties is the multiplicity of parties in one or both of the poles of the claim, *i.e.* two or more plaintiffs or two or more defendants in one lawsuit.[699] For the claims of or against different parties to be joint in one proceeding, they must have some kind of affinity. It is the national law that defines the affinity requirements for a joinder, such as identity of fundaments, identity of claims, necessity of one uniform decision to all parties, etc.

The law provides for the subjective plurality in proceedings mainly based on two reasons: first, it is economically viable to join cases which have great affinity, instead of carrying different proceedings. This reduces the judiciary´s and the parties´ efforts and may bring expedience to the resolution of the case. Thus, the joinder is a factor of procedural economy.[700] Second, gathering the connected claims contributes to the avoidance of contradictory decisions to the different, but connected parties.[701]

The possibility of having a multiplicity of parties in the proceeding for economic and procedural reasons is especially important in the context of property development disputes. Mostly, people buy apartments in a building, not houses, through property development contracts.[702] Thus, there are problems that affect all prospective buyers, who contracted for that same building.

On the other pole of the contract, the developer may also not be alone. It may take more than one developer to build a building. The

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[699] Voit, W. (2017), '§60' in: Musielak, H.-J., Voit, W. (eds.), *Zivilprozessordnung,* München, Vahlen, Franz. Adolphsen, J. (2016), *Zivilprozessrecht*, Baden-Baden, Nomos, §7, para. 53 ss. Didier Junior, F. (2016), *Curso de direito processual civil*: *1 : introdução ao direito processual civil, parte geral e processo de conhecimento*, Salvador, JusPODIVM, p. 457 ss.

[700] See Júnior, H. T. (2015), *Curso de Direito Processual Civil – Teoria geral do direito processual civil*, Rio de Janeiro, Forense, §30.

[701] Voit, W. (2017), '§60' in: Musielak, H.-J., Voit, W. (eds.), *Zivilprozessordnung,* München, Vahlen, Franz. BayObLG (1991), AR 1 Z 45/91 - Zuständigkeitsbestimmung im Beweisverfahren

[702] Generally, the property development contract concerns an apartment in a building and not a house. Heiermann, W. (2007), 'Der Verbraucherschutz in der gesetzlichen Regelung des deutschen _Bauträgerrechts - ausreichend im Licht der EG-Richtlinie 93/13?' in: Jochem, R. (ed.), *Rechtshandbuch des ganzheitlichen Bauens: Festschrift für Hans Ganten,* Wiesbaden, vieweg, pp. 109–124.

developer is not always the constructor. It can outsource the construction or parts of it to an expert company.

Picturing the idea of a building with 10 household units, one can imagine that 10 consumers have entered into a contract with the developer, whose main obligation was to deliver the household units and the common areas of the building in perfect state and on time. The contracts of all buyers are identical, except for the price, which differs depending on the floor of the household unit and the time when the buyers entered the contract. They were drafted by the developer, meaning, standard contracts. On the other side, one finds the developer contracting a constructor company, to execute the project. After delivery, the consumers discovered a leak in the pool of the building. Since the pool is of common use and the leak can threaten the security of the construction, each one of the 10 individual buyers could separately sue the developer. However, it is cheaper and sensible to join all consumers in one only claim. This way, the buyers can save legal costs and time and the judiciary will not run the risk of issuing decisions that may not coincide.

Additionally, the developer is not the only debtor in the case. The constructor, who had the obligation to build the pool flawless also owes the consumers and the developer. Therefore, for the sake of procedural economy, all consumers may jointly sue the developer and the constructor in one claim facilitating the sue, the defense and the taking of evidence.

In conclusion, in property development disputes, characterized by the plurality of parties, the procedural figure of the joinder facilitates the access to justice by reducing the legal costs in comparison to individual claims. It complies with procedural economy by ensuring a faster decision and economy of procedural acts when it joins all claims in one proceeding and it guarantees the uniformity of the decision.

Given the interconnection between the actors of a property development contract, it is important to analyze the requirements for the joinder of parties in their civil procedure law in Brazilian and German law and verify if they could be applied in property development arbitration, to enable a collective redress, particularly of the consumers against the developer and constructor.

i) Brazil

The Brazilian Law differentiates between the facultative joinder and the compulsory joinder.[703] The first occurs if the parties so want, the second is mandatory by force of the law or of the case. In both types of joinder, each party is autonomous in the proceedings, despite their connected interests and the decision of the case must not be the same for all joint parties.

Art. 113 of the new Brazilian civil procedure code is dedicated to the facultative joinder. It establishes that two or more people may litigate jointly in the same proceedings, be it in the active or passive pole, in the following situations: First, if these people share the same rights or obligations concerning the case. Second, if their claims share the same request or reasoning for the request. Third, if there is affinity between their claims, because of the factual or legal reasoning. In case of facultative joinder, the judge may limit the number of litigants if it hampers the quick solution of the case, pursuant to Art. 113, §1º, CPC.[704]

On the other hand, the joinder is mandatory, under Art. 114 CPC, if the law so affirms or if the effectiveness of the judgment depends on the citation of all those who must have been joint parties

[703] Didier Junior, F. (2016), *Curso de direito processual civil*: *1 : introdução ao direito processual civil, parte geral e processo de conhecimento*, Salvador, JusPODIVM, p. 460 ss.
[704] Neves, D. A. A. (2016), *Novo Código de Processo Civil Comentado*, Salvador, JusPODIVM, Art. 113.

to the claim.[705] Note that the compulsory joinder, differently than one may think, does not presuppose that the decision of proceedings will be the one and the same to all joint parties. It only presupposes that, in some cases, the multiplicity of parties does not depend on the will of the parties to carry proceedings together, but on the law or the nature of the case. Although the main concern of Art. 114 CPC is to guarantee the effectiveness of the decision to all necessary joint parties, importantly; this decision does not necessarily need to be the same for all parties.[706] Very importantly, all joint parties have the right to promote the progress of proceedings and all must be made aware of all procedural acts, according to Art. 118 CPC.[707]

ii) Germany

In Germany the joinder is regulated in the second title of the second section of the ZPO, in §§59 to 63.[708] The German Law also

[705] Júnior, H. T. (2015), *Curso de Direito Processual Civil – Teoria geral do direito processual civil*, Rio de Janeiro, Forense, §30. Neves, D. A. A. (2016), *Novo Código de Processo Civil Comentado*, Salvador, JusPODIVM, Art. 114.

[706] See Coura, A. B. (2015), *O litisconsórcio no velho Código de Processo Civil e suas modalidades menos usuais*, available at: jus.com.br/artigos/41176/o-litisconsorcio-no-velho-codigo-de-processo-civil-e-suas-modalidades-menos-usuais. 05.03.2018. Coura illustrates the possibility of different decisions for the compulsory joint parties using the lawsuit for acquisitive prescription or usucaption as an example. The plaintiff of such a claim must, by force of law, sue the owner of the land and all neighbors that owe a land in the limits of the land object of the usucaption. Hence, this is a compulsory joinder under Art. 114 CPC. However, the judge will deliver different decisions towards the different joint defendants. While the owner of the land may face a decision proving for their lost of property, the neighbors will solely have the guarantee that the limits of their property will be respected. This shows that the *telos* of the compulsory joinder is not to assure a unitary decision, but to guarantee that all parties that must be aware of a decision, in order to give it the due effectiveness, be gathered in the same proceedings.

[707] Differently from other means of collective redress in the Brazilian law, where one party represents the rights of the collectivity. For instance, the prosecution or the consumer boards may represent a collectivity of consumers in class actions. In class actions, not all consumers who holds the rights, which are being represented in the claim, may act in the proceedings. See Nery Júnior, N. (2007), 'Capítuo VI - Disposições finais' in: Grinover, A. P. (ed.), *Código brasileiro de defesa do consumidor: Comentado pelos autores do anteprojeto,* Rio de Janeiro, Forense Universitária. Only the person who formally figures in the active pole of the proceeding (prosecutor or consumer board) may do it. In this cases, the real right holders, namely the consumers are theoretically replaced by these other legitimate parties in the proceedings, reason why the doctrine calls this procedural replacement (*substituição processual*). See Neves, D. A. A. (2016), *Novo Código de Processo Civil Comentado*, Salvador, JusPODIVM, Art. 118.

[708] The German law does not know the class action as a form of consumer collective redress. Much more they have the options of suing through a *Musterklage* (§606 ss. ZPO) or a *Verbandsklage*. For more information on collective redress for consumers other than the joinder, see Kocher, E. (2016), 'Kapitel 7, §24 Kollektiver Rechtsschutz' in: Tamm, M., Tonner, K. (eds.), *Verbraucherrecht,* Baden-Baden, Nomos.

distinguishes between the compulsory and the facultative joinder. The first is regulated in §62 and the second in §§59, 60 ZPO.

A plurality of people can jointly be plaintiffs or defendants of a claim in two situations. If the parties are connected with regard to the object of the case, for instance in case of joint obligations or joint debts; or if the object of the dispute are rights or obligations, which share an identical or essentially identical factual and legal basis. Parties of a facultative joinder are autonomous in the proceedings, they must not act together and the outcome of the proceedings must not be the same for them all.[709]

The joinder is mandatory in Germany if the dispute can only be resolved in uniformity against all joint parties.[710] Hence, the main concern of the German Lawmaker while establishing the compulsory joinder is to avoid that cases, which should be decided consistently, risk controversial decisions if they are processed apart. Thus, in this kind of joinder, the outcome of the case will be identical to all parties.[711] In fact, §325 ZPO lists subjective limits to the legal force of the decisions, explaining for and against whom they will have effect in specific cases. Moreover, §63 ZPO, explains that each party has the right to affect the progress of proceedings, alike Art.118 CPC. This is true despite of the type of joinder.

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[709] See Thomas, Heinz; Putzo, Hans; Reichold, Klaus; Hüßtege, Rainer; Seiler, Christian, eds. (2016), *Zivilprozessordnung*: *FamFG, Verfahren in Familiensachen, EGZPO, GVG, EGGVG, EU-Zivilverfahrensrecht : Kommentar / begründet von Prof. Dr. Heinz Thomas, ehem. Vorsitzender Richter am Oberlandesgericht München; Prof. Dr. Hans Putzo, ehem. Vizepräsident des Bayer. Obersten Landesgerichts ; fortgeführt von Dr. Klaus Reichold, Vorsitzender Richter am Bayer. Obersten Landesgericht a.D.; Dr. Rainer Hüßtege, Vorsitzender Richter am Oberlandesgericht München; Dr. Christian Seiler, Richter am Oberlandesgericht München, Lehrbeauftragter der Universität Regensburg*, Gelbe Erläuterungsbücher, München, C.H. Beck, paras. 59-60.

[710] Thomas, Heinz; Putzo, Hans; Reichold, Klaus; Hüßtege, Rainer; Seiler, Christian, eds. (2016), *Zivilprozessordnung*: *FamFG, Verfahren in Familiensachen, EGZPO, GVG, EGGVG, EU-Zivilverfahrensrecht : Kommentar / begründet von Prof. Dr. Heinz Thomas, ehem. Vorsitzender Richter am Oberlandesgericht München; Prof. Dr. Hans Putzo, ehem. Vizepräsident des Bayer. Obersten Landesgerichts ; fortgeführt von Dr. Klaus Reichold, Vorsitzender Richter am Bayer. Obersten Landesgericht a.D.; Dr. Rainer Hüßtege, Vorsitzender Richter am Oberlandesgericht München; Dr. Christian Seiler, Richter am Oberlandesgericht München, Lehrbeauftragter der Universität Regensburg*, Gelbe Erläuterungsbücher, München, C.H. Beck.

[711] Schultes, H.-J. (2016), '§62' in: Krüger, W., Rauscher, T. (eds.), *Münchener Kommentar zur Zivilprozessordnung: ZPO: Bd.1: §§ 1-354,* München, C.H. Beck, para. 62.

iii) Legal comparison

Both the German and the Brazilian legislations provide for cases in which the joinder is mandatory and when it is not. However, they differ in the establishment of requirements for the mandatory joinder, where Germany aims at the identical decision for all parties and Brazil at the guarantee that all parties that must know about the decisions, to assure its effectiveness, be in the proceedings.

Anyhow, thinking about the most common joinder cases in property development disputes, which concern construction defects in common areas of the building, the joinder would be in the active pole, encompassing the consumers who bought the household units. The reason for their joinder would be the identity of the claim and of its grounds. Therefore, in both Germany and Brazil, this would classify as a facultative joinder under §§59 and 60 ZPO and Art. 113 CPC, respectively.

However, considering the joinder of constructor and developer in the passive pole of the proceedings, it may be that this joinder is mandatory, if under the German law, the decision against them must be the uniform to both parties, or, in Brazil, if the effectiveness of the decision depends on the participation of both parties in the proceedings. Under the example above given, this would be the case if the judge decides that the developer must repair the pool, but it is for the constructor to actually undertake the repair service.

iv) Conclusion

Although the joinder of parties is well regulated in court proceedings, it proposes a challenge to arbitration. The power of the arbitrators to decide upon a certain dispute comes from the agreement

of the parties. Through the arbitration clause or the arbitration agreement, the parties make use of their party autonomy to empower the arbitral tribunal to issue a binding award.[712] Without the agreement of the parties, the arbitrators lack jurisdiction to decide over the case. Consequently, only parties who have signed an arbitration agreement may join one or the other pole of the dispute. A joinder is generally only possible, if all joint parties are bound by an arbitration agreement.[713] Hence, even if the law would consider a certain situation to be a necessary joinder, the joinder in arbitration is dependent on the party´s autonomy.

Preventing the jurisdiction of the arbitrators and the future enforceability of the award, the joinder can be accepted only where the parties have validly submitted the case to arbitration, be it through an arbitration clause or through an arbitration agreement. It is safer to admit a joinder if the clauses/agreements are compatible, *i.e.* they determine the same number of arbitrators, same institution, same applicable laws, etc.

Having in mind that the situation examined in this study is that of a standard property development contract, one can assume that the developer will use the same standard terms, containing the same arbitration clause, to all buyers of household units of a certain construction project. Therefore, all buyers will be bound by an identically drafted arbitration clause. This facilitates the joinder of the buyers of household units in the same building in arbitration, since they are party to different contracts with the same developer with compatible arbitration clauses. The clauses choose the same rules, law, seat, venue, etc. Hence, if the dispute matters are close enough or identical, a joinder is possible and desirable.

[712] See Fouchard, P., Gaillard, E., Goldman, B., Savage, J. (1999), *Fouchard, Gaillard, Goldman on international commercial arbitration*, The Hague, Boston, Kluwer Law International, p. 31 ss.
[713] See Blackaby, N., Partasides, C., Redfern, A., Hunter, M. (2015), *Redfern and Hunter on international arbitration*, Oxford, Oxford University Press, para. 2.214 ss.

Yet, the joinder in arbitration will be bound to the parties´ will, unless courts order the consolidation of proceedings.[714] This may be perceived as a disadvantage of arbitration in comparison to courts. Where the mandatory joinder can oblige the parties to figure together in one pole of the lawsuit by force of the law or the nature of the case, arbitration cannot oblige the parties to a joinder. Hence, even if the buyers of household units of the same building can jointly take part in arbitration against the developer to request, for instance, the repair of the pool, the arbitral tribunal cannot oblige the constructor to join the arbitration, if it does not want to. In this case, if the tribunal rules in favor of the consumers, the developer, who figures alone in the passive pole of the proceedings will have to later sue the constructor in regress to either repair the pool or compensate the costs. Hence, the joinder of developer and constructor are a challenge if the arbitration clause only refers to the developer.

Still considering the significance of party autonomy as the hallmark of arbitration, if a party wants to join the arbitration after the commencement of proceedings, the arbitral tribunal should consult the party to be joint and ask if they agree with the joinder. Only then the arbitral tribunal will be free to accept the joinder without risking having the award not recognized by means of Art. V (d) NYC, which states that recognition and enforcement of the arbitral award may be refused if the arbitral procedure was not in accordance with the agreement of the parties or by means of the national law.

For the joinder in arbitration it is very important to check if the applicable procedural rules, *i.e.* the procedural law of the seat of arbitration and the institutional rules, in case of non-*ad hoc* arbitrations, post any requirements for a joinder, here also preventing any refusal of recognition of the award. As an illustration, some institutional provisions concerning the joinder of parties can be mentioned. For instance, Art. 13.3 of the DIS Rules affirms that the

[714] About court-ordered consolidation, see Blackaby, N., Partasides, C., Redfern, A., Hunter, M. (2015), *Redfern and Hunter on international arbitration*, Oxford, Oxford University Press, para.2.221ss.

tribunal decides on the admissibility of multi-party proceedings. Similarly, LCIA indicates as an additional power of the tribunal to allow one or more persons to be joined in the arbitration, pursuant to Art. 22.1 (viii). The Swiss Rules are more specific and establishes in Art. 4 (2) that the arbitral tribunal shall decide on such request, after consulting with all of the parties, including the person or persons to be joined, taking into account all relevant circumstances. In contrast, many other institutional rules do not mention the joinder.[715]

Considering the principle of competence-competence, even if the institutional rules do not regulate the joinder, the tribunal may accept the joinder of parties, if, after analyzing the arbitration clause or the arbitration agreement, it finds that it is competent to decide upon the case brought up by the parties. It is anyhow better, if the institutional rules give the tribunal guidelines on which it can base their position and the way it processes the request to join. The conclusion driven from the legal comparison above is that the arbitral tribunal must analyze the request for joinder of the parties and allow them in situations where the joinder favors the procedural economy. To determine which situations these are, it is intelligent to mirror the law, admitting the joinder if the claims of the parties share an identical or essentially identical factual or legal basis or if the parties share the same rights or obligations concerning the case.

All in all, two important conclusions can be taken out of this sub point. The figure of the joinder is important for property development disputes, and a joinder is possible in arbitration and even desirable, where it favors the procedural economy. Accordingly, arbitration rules designed for property development disputes ought to regulate the processing of the joinder´s request.

[715] For example: CAM-CCBC, CAMARB, Camera Arbitrale di Milano, SLBau, SGOBau.

v) Suggested rule for B2C property development disputes:

Joinder:

1. Where there are multiple claimants or multiple respondents, all the acts for the nomination of arbitrators must be done jointly by the multiple claimants or the multiple respondents.

2. Where one or more third persons request to participate in arbitral proceedings already pending under these rules, the tribunal shall admit the request, if the party to be joint accepts the joinder and, if the claims of the third person and of the party share an essentially identical factual or legal basis or if they share the same rights or obligations concerning the case, except where other circumstances speak against the joinder. In this case, the tribunal may deny the joinder by a justified act.

c) Publicity in civil proceedings

The principle of publicity is a pillar of any democratic state and a reflection of the rule of law principle.[717] In a state governed by democracy and the rule of law, state actions must be public, enabling the citizens to verify if those actions are indeed in line with the law

[717] Hassemer, W. (2013), 'Über die Öffentlichkeit gerichtlicher Verfahren - heute', *ZRP*, pp. 149–151. Avelar, E. P. d., Academia Brasileira de Direito (2007), *O Princípio da Publicidade dos Atos Processuais*, available at: www.abdir.com.br/doutrina/ver.asp?art_id=&categoria=%20TGD. 04.07.2016. Adolphsen, J. (2016), *Zivilprozessrecht*, Baden-Baden, Nomos, §4, para 36; Oliveira da Silva, Cléber Demetrio, Jus Navigandi (2006), *O princípio da publicidade no direito processual civil*, available at: jus.com.br/artigos/8361/o-principio-da-publicidade-no-direito-processual-civil. 21.06.2016.; Arnold, S. (2012), 'Zum Grundsatz der Öffentlichkeit im Zivilverfahren' in: Geimer, R., Schütze, R. A., Garber, T. (eds.), *Europäische und internationale Dimension des Rechts: Festschrift für Daphne-Ariane Simotta,* Wien, LexisNexis, pp. 12-13. Reichelt, L. A. (2014), 'A exigencia de publicidade dos atos processuais na perspectiva do direito ao processo justo', *Revista de Processo*, Vol. 234, pp. 77–97.

and satisfying the people´s interest. These are namely the two main functions of publicity: control the state actions and serve the public interest.[718]

Jurisdiction, as an action of the state must comply with publicity. In civil procedure, each decision, be it an interlocutory one or a sentence, each performed hearing, taking of evidence, etc. is an action of the state, reason why the proceedings, from start to final decision, are public, so that the citizens can verify if the judiciary is taking actions and decisions in compliance with the law.[719] Further, the public wants to know if justice is being done and how it is done.[720] In this sense, Hegel pleads for the publicity of proceedings, in the name of the public interest, as follows:

"*Honest common sense holds that the publicity of legal proceedings is right and just. A strong reason to the contrary was always the rank of the judiciary. They were not to be seen by everybody, and regarded themselves as the warders of a law, into which laymen ought not to intrude. But law should possess the confidence of the citizens, and this fact calls for the publicity of the sentence. Publicity is a right, because the aim of the court is justice, which as a universality belongs to all. Moreover, the citizens should be convinced that the right sentence has actually been pronounced.*"[721]

[718] Böttcher, R. (2013), '§169 GVG' in: Ambos, K., Dölling, D. (eds.), *Gesamtes Strafrecht: StGB, StPO, Nebengesetze ; Handkommentar,* Baden-Baden, Nomos, para. 1. Avelar, E. P. d., Academia Brasileira de Direito (2007), *O Princípio da Publicidade dos Atos Processuais*, available at: www.abdir.com.br/doutrina/ver.asp?art_id=&categoria=%20TGD. 04.07.2016.
[719] Zimmermann, W. (2013), '§169 GVG' in: Krüger, W., Adolphsen, J., Gottwald, P., Rauscher, T., Gruber, U., Hau, W., Hilbig-Lugani, K., Micklitz, H.-W., Münch, J., Pabst, S., Ulrici, B., Zimmermann, W. (eds.), *Münchener Kommentar zur Zivilprozessordnung: Bd. 3: §§ 1025-1109 EGZPO, GVG, EGGVG, UKlaG, Internationales und Europäisches Zivilprozessrecht,* München, Beck, C H, para. 1.
[720] Moreira, J. C. B. (1992), 'A justiça no limiar do novo século', *Revista Forense*, No. 312, p. 73. Arnold, S. (2012), 'Zum Grundsatz der Öffentlichkeit im Zivilverfahren' in: Geimer, R., Schütze, R. A., Garber, T. (eds.), *Europäische und internationale Dimension des Rechts: Festschrift für Daphne-Ariane Simotta,* Wien, LexisNexis, pp. 13-14.
[721] Hegel, G.W.F. (2000), *Philosophy of Right*: *Dyde, S.W*, ProQuest Ebook Central, Kitchener, Ontario, Batoche Books, p. 4 and 27.

It is through publicity that the State builds a trustful relationship with the people and increases legal security.[722] Yet, relying on the essentiality of the publicity principle to the State, one may ask if it is wrong that arbitration, as an equivalent form of jurisdiction recognized by the State,[723] is frequently confidential. Especially in the case of arbitration with consumer participation, there is great interest of the public to know how these cases are processed and decided. This raises a debate discussing if the advantages of confidentiality in arbitration outweighs the necessity of publicity imposed by the public interest, the public control and the development of the law. The advantages of confidentiality for the developer would be the protection of its reputation.[724] For the consumer of their intimacy. Yet, allegations to the fact that companies misuse confidentiality in B2C arbitration to hide their wrongdoings persist.[725] Consequently, it is of utmost importance to verify if the protection of reputation and privacy can be put before the public interest in cases involving the consumer.

To discuss this question in the context of property development B2C disputes, this study will analyze the publicity principle in Brazil and Germany and apply the comparison of the exercise of publicity in these countries to B2C property development arbitration. To achieve a qualitatively better comparison, the topic will be divided in two branches: the publicity of proceedings and the publicity of judgments. The first regards the interlocutory acts in the proceedings, like parties´ written submissions, hearings etc.; aiming at the public control and the public interest. The second is about the possibility given to the public to be acquainted with the decisions uttered by the judiciary; aiming

[722] Arnold, S. (2012), 'Zum Grundsatz der Öffentlichkeit im Zivilverfahren' in: Geimer, R., Schütze, R. A., Garber, T. (eds.), *Europäische und internationale Dimension des Rechts: Festschrift für Daphne-Ariane Simotta,* Wien, LexisNexis, pp. 11–27.
[723] See STF (2001), SE 5206, on the constitutionality of arbitration as a form of jurisdiction equivalent to the judiciary.
[724] See Chapter III, D, 2, b, iii.
[725] Drahozal, C. R. (2015), 'Confidentiality in Consumer and Employment Arbitration', *Yearbook on Arbitration & Mediation*, Vol. 7

not only at the objectives above mentioned, but also on establishing precedents, enabling legal development and providing legal certainty.

i) Publicity of proceedings

As Brazil and Germany are states governed by the rule of law, the publicity in court proceedings is guaranteed, complying with the due process of law. Nevertheless, the way each country exercises publicity may diverge in accordance with its national laws and legal practices.

i.1) Brazil

In Brazil, the publicity of proceedings has constitutional rank. It appears in Art. 5 CF, which contains the fundamental rights. The provision defends the publicity of the procedural acts, affirming in item LX that the law can only restrict publicity to protect the intimacy or the social interest. The civil procedure code endorses the principle of publicity in Art. 8 and Art. 189, in conformity with the constitutional provisions.

In practice, publicity of civil proceedings means that all judicial acts are published in the official daily state journal, becoming public.[726] All hearings are public, so that anyone can watch them. Anyone can have access to the content of the proceedings, checking the files and reading the parties´ briefs and documents inside the courts.[727] They cannot take the file away. Anyone can access the progress of the proceedings in the website of the national courts. To

[726] Didier Junior, F. (2016), *Curso de direito processual civil*: *1 : introdução ao direito processual civil, parte geral e processo de conhecimento*, Salvador, JusPODIVM, p. 89 ss.
[727] Avelar, E. P. d., Academia Brasileira de Direito (2007), *O Princípio da Publicidade dos Atos Processuais*, available at: www.abdir.com.br/doutrina/ver.asp?art_id=&categoria=%20TGD. 04.07.2016. Peruingeiro, R. (2012), 'O livre acesso à informação, as inovacoes tecnológicas e a publicidade processual', *Revista de Processo*, Vol. 203, pp. 149–180.

access that information, one just need either the number of the proceeding, the name of a party or of a lawyer.[728] In the websites, it is possible to check all proceedings, active or deactivated in the name of a certain person in a determined jurisdiction. One can also request a certificate from the courts, listing the proceedings in which a certain person is a party.[729] For all that, one need not to be a lawyer or a party to the proceeding.[730]

Art. 189 CPC governs exceptions to the publicity of proceedings. Pursuant to this provision, family law cases and cases with a minor are confidential.[731] Further, the judge may keep proceedings confidential if they find that the public interest is prejudicial for the proceedings and in cases that verse about data protected by the right to intimacy.[732] In these cases, only the parties and their attorneys have access to the proceedings´ file, hearings and decisions.

A noteworthy innovation of the new Brazilian civil procedure code is the confidentiality of proceedings, which derives from a

[728] The lack of protection of the parties´ names goes against the Rules of Heredia. These rules were developed during the Seminar for Judicial System and Internet in July 2003, organized by the Instituto de Investigación para la Justicia Argentina and the Supreme Court of Costa Rica. The meeting took place in the city of Heredia with the objective of discussing the diffusion of judicial information in the web, debating the balance between transparency, publicity and intimacy. Scholars, judges and civils from Argentina, Brazil, Canada, Colombia, Costa Rica, Ecuador, El Salvador, Mexico, Dominican Republic and Uruguay were present. The Rules of Heredia contain minimum standards for the divulgation of judicial information in the internet, especially by the court´s websites. Rule 4 asserts that in each case the search tools must adapt to the objectives to which the judicial information is diffused. In this regard, the panelists of the event noted that it is not necessary to search for cases in the name of a certain party. In Brazil, there are examples of misuse of this tool, especially concerning labor courts. The search by name has proven to be prejudicial for people trying to find a job. Companies searched for proceedings in the name of the prospective employee in the website of the labor court and started denying employment to people who have already sued their former employers, fearing that the person would do the same to them. See Lobato de Paiva, Mário Antonio (2004), 'A Carta de Heredia: Regras mínimas para a difusao de informacao judicial em internet', *Revista de Direito do Trabalho*, Vol. 30, N. 114, pp. 328–335. Hence, although the Brazilian search tool is a great source of transparency and publicity of the judicial acts, it disregards the privacy of the individuals.

[729] Avelar, E. P. d., Academia Brasileira de Direito (2007), *O Princípio da Publicidade dos Atos Processuais*, available at: www.abdir.com.br/doutrina/ver.asp?art_id=&categoria=%20TGD. 04.07.2016.

[730] The practices described in this paragraph are not regulated by a national law, but by the internal rules of each court and by laws of each federal state. For this reason, specific legal basis is not mentioned in this text. In general, one can say that those practices are performed in the whole country, even though they are justified by different legal basis.

[731] Neves, D. A. A. (2016), *Novo Código de Processo Civil Comentado*, Salvador, JusPODIVM, Art. 189.

[732] Reichelt, L. A. (2014), 'A exigencia de publicidade dos atos processuais na perspectiva do direito ao processo justo', *Revista de Processo*, Vol. 234, pp. 77–97.

confidential arbitration. According to Art. 189, IV CPC, if the parties to an arbitration go to courts, for instance to request an interim measure or set aside an award, these court proceedings will be confidential, as long as the parties prove that the arbitration itself was confidential.[733] Therefore, it is important that the parties´ file the contractual confidentiality clause or the confidentiality duty present in the arbitration rules together with their main request in courts and explicitly request the judge to keep the court proceedings confidential, pursuant to Art. 189 CPC.[734] Brazilian law reinforces the confidentiality as an advantage of arbitration, guaranteeing that parties do not have to give it up, in case they need the courts to assist the arbitral tribunal or to enforce or revise the award.

i.2) Germany

The publicity principle is not expressly mentioned in the German constitution;[735] however, it is a direct consequence of the democratic state created by it.[736] Additionally, the European Convention for the protection of Human Rights and Fundamental Freedoms, to which Germany is a party, displays the publicity of proceedings as a vital part of the right to due process. Art. 6 (1) and Art. 47 ECHR guarantee public proceedings for the citizens. Accordingly, §169 GVG has concretized the principle of publicity for the court proceedings in Germany. This provision asserts that the

[733] Neves, D. A. A. (2016), *Novo Código de Processo Civil Comentado*, Salvador, JusPODIVM, Art. 189.
[734] See Art. 22-C, parágrafo único, LBA, which determines the confidentiality of the proceedings arising out of an arbitral letter, referring to an arbitration with a confidentiality duty.
[735] Arnold, S. (2012), 'Zum Grundsatz der Öffentlichkeit im Zivilverfahren' in: Geimer, R., Schütze, R. A., Garber, T. (eds.), *Europäische und internationale Dimension des Rechts: Festschrift für Daphne-Ariane Simotta,* Wien, LexisNexis, pp. 11–27. According to him, der Grundsatz der Öffentlichkeit ist nach hM kein Rechtsatz mit Verfassungsrang.
[736] Adolphsen, J. (2016), *Zivilprozessrecht*, Baden-Baden, Nomos, §4, para. 36. Zimmermann, W. (2013), '§169 GVG' in: Krüger, W., Adolphsen, J., Gottwald, P., Rauscher, T., Gruber, U., Hau, W., Hilbig-Lugani, K., Micklitz, H.-W., Münch, J., Pabst, S., Ulrici, B., Zimmermann, W. (eds.), *Münchener Kommentar zur Zivilprozessordnung: Bd. 3: §§ 1025-1109 EGZPO, GVG, EGGVG, UKlaG, Internationales und Europäisches Zivilprozessrecht,* München, Beck, C H, para. 1.

hearings in court, including the pronouncement of the decisions, are public.

In practice, this means that any person can watch the hearing of a given proceeding, even if they are not a party or an attorney of the case, as long as there is room capacity and no concerns about security.[737] Yet only parties have access to the briefs and documents in the proceedings´ files and may receive copies and certificates from the court. According to §299 (2) ZPO, a third person can only see the file without permission of the parties if they prove that they have a credible legal interest in it.[738]

Exceptions to the publicity of proceedings are listed in §170 to §172 GVG. Similarly, to Brazilian Law, family cases are confidential, the judge can decide against publicity to protect intimate data from the parties or witnesses and they can also decide to make a hearing or a part of it confidential for the reasons listed in §172 GVG.

On the other hand, differently from Brazil, in Germany, proceedings arising out of a confidential arbitration are not excepted from publicity.[739] Setting aside, enforcement or even interim

[737] Zimmermann, W. (2013), '§169 GVG' in: Krüger, W., Adolphsen, J., Gottwald, P., Rauscher, T., Gruber, U., Hau, W., Hilbig-Lugani, K., Micklitz, H.-W., Münch, J., Pabst, S., Ulrici, B., Zimmermann, W. (eds.), *Münchener Kommentar zur Zivilprozessordnung: Bd. 3: §§ 1025-1109 EGZPO, GVG, EGGVG, UKlaG, Internationales und Europäisches Zivilprozessrecht,* München, Beck, C H, para. 1 ss.

[738] This provision is not applicable to state authorities and offices, who may see all files anchored in Art. 35 of the German Constitution, which states that all official authorities help cooperate with each other with legal and administrative assistance. Reichold, K. (2016), '§299' in: Thomas, H., Putzo, H., Reichold, K., Hüßtege, R., Seiler, C. (eds.), *Zivilprozessordnung: FamFG, Verfahren in Familiensachen, EGZPO, GVG, EGGVG, EU-Zivilverfahrensrecht : Kommentar / begründet von Prof. Dr. Heinz Thomas, ehem. Vorsitzender Richter am Oberlandesgericht München; Prof. Dr. Hans Putzo, ehem. Vizepräsident des Bayer. Obersten Landesgerichts ; fortgeführt von Dr. Klaus Reichold, Vorsitzender Richter am Bayer. Obersten Landesgericht a.D.; Dr. Rainer Hüßtege, Vorsitzender Richter am Oberlandesgericht München; Dr. Christian Seiler, Richter am Oberlandesgericht München, Lehrbeauftragter der Universität Regensburg,* München, C.H. Beck. Peruingeiro sees the limitation of the access to procedural information only to those who prove justified interest critically: "*In Germany in the 70´s, scholars talked about the limited principle of publicity, which retringed the information to those who had an interest to the exercise of a subjective public right was based on the idea that it was the only efficient form of protecting personal data. However, nowadays it is recognized that the access to information goes beyond the defense of individual rights and reaches other branches of the rule of law State, such as the democratic and republican principles*." Citation translated by the author. Peruingeiro, R. (2012), 'O livre acesso à informação, as inovacoes tecnológicas e a publicidade processual', *Revista de Processo*, Vol. 203, pp. 149–180.

[739] Arnold, S. (2012), 'Zum Grundsatz der Öffentlichkeit im Zivilverfahren' in: Geimer, R., Schütze, R. A., Garber, T. (eds.), *Europäische und internationale Dimension des Rechts: Festschrift für Daphne-Ariane Simotta,* Wien, LexisNexis, pp. 23-24.

measures´ proceedings in German courts are public as any other, regardless of the confidentiality clause in force for the arbitration.

i.3) Legal comparison

Concerning the legal basis of the publicity principle, the difference between the Brazilian and the German law is the mention of publicity amongst the fundamental rights under the Brazilian Constitution. Even though the German constitution does not refer to publicity in court proceedings, a certain constitutional rank is guaranteed by the fact that publicity derives from the rule of law principle, governing the state.

The national laws differ considerably in applying publicity to the civil proceedings. While in both countries, the hearings are public, anyone could attend them and listen to the pronouncement of decisions, only in Brazil third parties may access the proceedings´ file without having a credible legal interest in the case.[740] On the one hand, the Brazilian approach seems more coherent with the fact that state actions must be public. In fact, watching a hearing does not reach publicity in its pure sense. A layperson who watches a hearing will most probably not understand the content of the hearing or even of the

[740] According to Leonardo Grecco: "*Our publicity is wider than the European one. Amongst us all submissions in the procedural file are accessible to the public, while in continental Europe, under the argument of the protection of the parties´ privacy, only the oral hearing and the judgments are public, so that the file is only accessible to the parties. According to the publicity principle all citizens, independently from their interest in the proceedings, are holders of the civic right to access the content of all procedural acts and to attend, with their physical presence, any solemn or oral procedural act*." (translation by the author) P. 558 Leonardo Greco 2015. See also Peruingeiro, R. (2012), 'O livre acesso à informação, às inovacoes tecnológicas e à publicidade processual', *Revista de Processo*, Vol. 203, pp. 149–180. This view has started to be questioned by Brazilian scholars since the electronic proceedings started to be widely used and cause a super exposition of the parties. See Peruingeiro, R. (2012), 'O livre acesso à informação, as inovacoes tecnológicas e a publicidade processual', *Revista de Processo*, Vol. 203, pp. 149–180.

pronounced decisions.[741] Moreover, judges decide many cases without the necessity of a hearing. The publicity of those judiciary actions would be impeded by the lack of hearings if the files and documents were not public. Hence, the mere opening of hearings to the public is not sufficient to achieve the publicity´s goals, namely public control and public interest.[742] On the other hand, the Brazilian publicity is not as careful with the parties´ intimacy as the German. In Brazil, the public interest overweighs the intimacy, when it comes to the publicity of proceedings.[743]

An interesting aspect of the Brazilian publicity is that it covers not only the content of the proceedings but also its existence. In other words, the publicity of the hearings (in Germany and Brazil) and of the file (in Brazil) concern the content of a certain dispute. But how can the layperson know about the existence of that dispute before attending the hearing and/or checking its file? As aforementioned, in Brazil people can easily discover if there are active or inactive disputes under the name of a certain person through a search in the court´s websites. Websites enable search for proceedings under the name of the party, the name of the lawyer or the proceeding´s number. Additionally, under a simple request, courts give out a certificate about active proceedings with a certain party. One must only say the name of the party.

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[741] Arnold, S. (2012), 'Zum Grundsatz der Öffentlichkeit im Zivilverfahren' in: Geimer, R., Schütze, R. A., Garber, T. (eds.), *Europäische und internationale Dimension des Rechts: Festschrift für Daphne-Ariane Simotta,* Wien, LexisNexis, p. 15. Zimmermann, W. (2013), '§169 GVG' in: Krüger, W., Adolphsen, J., Gottwald, P., Rauscher, T., Gruber, U., Hau, W., Hilbig-Lugani, K., Micklitz, H.-W., Münch, J., Pabst, S., Ulrici, B., Zimmermann, W. (eds.), *Münchener Kommentar zur Zivilprozessordnung: Bd. 3: §§ 1025-1109 EGZPO, GVG, EGGVG, UKlaG, Internationales und Europäisches Zivilprozessrecht,* München, Beck, C H, paras. 1-2.

[742] Zimmermann, W. (2013), '§169 GVG' in: Krüger, W., Adolphsen, J., Gottwald, P., Rauscher, T., Gruber, U., Hau, W., Hilbig-Lugani, K., Micklitz, H.-W., Münch, J., Pabst, S., Ulrici, B., Zimmermann, W. (eds.), *Münchener Kommentar zur Zivilprozessordnung: Bd. 3: §§ 1025-1109 EGZPO, GVG, EGGVG, UKlaG, Internationales und Europäisches Zivilprozessrecht,* München, Beck, C H, para. 1.

[743] This view is ratified by the Constitution in Art. 93, IX, which clearly states that the judgments must all be public and that the judge may keep secrecy about a decision only if the right to intimacy does not harm the public interest on information. Although this provision relates to the publicity of the judgments and not to the publicity of proceedings it illustrates well the ranking of publicity in the country, which is above the right to intimacy.

In sum, the Brazilian publicity practice is much broader than the German one. It covers not only the publicity of the hearings, but also of the files, letters and documents exchanged by the parties and the existence of proceedings, with the possibility of searching for processes against a certain party or represented by a certain lawyer.

The assertion above originates two categories of the publicity of proceedings: the publicity of the proceeding´s content and the publicity of the proceeding´s existence. Both countries fulfill the content´s category, yet content´s publicity is broader in Brazil. Function of the content´s publicity is the public control of the judiciary acts and the satisfaction of the public interest. Only Brazil figures in the existence category. Function of the existence category is only the satisfaction of the public, since one cannot verify the legitimacy or justice of the mere existence of a dispute.

i.4) Comparison applied to B2C property development arbitration

The first thesis´ relevant assertion one can make out of the comparison between the application of the publicity principle in Brazilian and German civil proceedings is that in both countries, disputes between a consumer and a developer are generally not confidential. This characteristic is frontally contrary to the arbitration scenario, where those disputes are frequently confidential.[744]

The great number of confidential arbitral proceedings however, do not come from the nature of arbitration itself.[745] Neither the

[744]The scope of confidentiality is controversial. Different jurisdictions and arbitration rules present various extents to confidentiality. Scholars discuss if it encompasses only the content of arbitration or also its existence, similarly to the discussion about the scope of publicity above presented. Noussia, K. (2010), *Confidentiality in international commercial arbitration*: *A comparative analysis of the position under English, US, German and French law*, Berlin, New York, Springer, p. 128-133.

[745] Notably, the UNCITRAL have developed Transparency Rules for arbitration especially designed to investment proceedings. In this case, not the nature of arbitration, but the matter it concerns is decisive for the transparency need.

German, nor the Brazilian arbitration law imposes the duty of confidentiality to the parties or the arbitrators. This means that they are not precluded from disclosing any information about the dispute by law.[746] However, they must comply with the confidentiality duty stipulated by the parties themselves or by the arbitration rules governing the case. Most arbitration rules have some kind of confidentiality duty. [747]

Even if the parties are not under the duty of confidentiality, arbitration is never as public as a court proceeding can be. Arbitration is *per se* private.[748] Third parties may not attend the hearings or access the files of an arbitral proceeding. Therefore, the intimacy of the consumer and the reputation of developers is sufficiently sheltered by privacy and must not be overprotected by confidentiality.

Yet, the question about the applicability of Art. 6 HRCH to arbitration may arise. Being the principle of publicity a nuclear procedural principle, must it not be present in arbitration? In this regard, it is important to acknowledge that the pulicity mentioned in that provision is a right of the citizen, but not its obligation.[749] Therefore, the party can waive their right to publicity by choosing arbitration.

In light of the above, consumer disputes should not be done within completely closed doors, because of the great public interest that these disputes originate. Nevertheless, applying the publicity of

[746] Drahozal, C. R. (2015), 'Confidentiality in Consumer and Employment Arbitration', *Yearbook on Arbitration & Mediation*, Vol. 7

[747] Oldenstam, R., Pachelbel, J. v. (2006), 'Confidentiality and Arbitration - a few reflections and practical notes', *SchiedsVZ*, pp. 31–36.

[748] Koeble, W. (2014), '1. Teil. Außergerichtliche Streitbeilegung und schiedsgerichtliche Verfahren' in: Kniffka, R., Koeble, W. (eds.), *Kompendium des Baurechts: Privates Baurecht und Bauprozess,* München, C. H. Beck, para. 92.Oldenstam, R., Pachelbel, J. v. (2006), 'Confidentiality and Arbitration - a few reflections and practical notes', *SchiedsVZ*, pp. 34–36.

[749] This legal thought is analogous to the interpretation of Justice Marco Aurélio Mello to the right to a legal procedure in Brazil. In a case about the constitutionality of arbitration, the party argued that arbitration is inconstitutional, because it goes against the guarantee that the court must appreciate any case under the procedural principles (*Justizgewährungsanspruch*). The Court ruled in favor of arbitration and of its constitutionality. The Justice affirmed that the right to take the claims to court is a "right", not an "obligation"; therefore, if parties, in the use of their party autonomy, choose not to submit their case to the courts, this is not inconstitutional. STF (2001), SE 5206.

court disputes to arbitration would mischaracterize this dispute resolution method. Hence, for B2C property development disputes a non-confidential approach should be preferred, where third parties do not have the right to access the proceedings´ content, but the consumer must not keep silence about the facts or information they gained during the proceedings, avoiding that arbitration be a shield for wrongdoings from the developer´s side.

ii) Publicity of the judgments

Apart from the content of proceedings, the principle of publicity also encompasses the judgments. The function of the publicity of judgments goes beyond those of the publicity of the proceedings. Not only it serves the control of public actions and the public interest, it is also important for the development of the law itself and for the legal certainty (*Rechtssicherheit*). For research and development purposes, it is of utmost importance that the decisions are made public.[750] As a social applied science, the Law must be in constant change to keep up with the social changes, it is based on the judgments that the legal community can observe the application of the law and its suitability to the current time, enabling the study and development of the law.

Concerning the legal certainty, it is important for the parties to have a minimum of predictability concerning their cases. It is important to be aware about which conclusion a judge resolving a similar case came to. Citizens must know what to expect from the state jurisdiction. Further, the publication of the decisions is the triggering point for making *res judicata*.[751] From the publication of the decisions

[750] Júnior, H. T. (2015), *Curso de Direito Processual Civil – Teoria geral do direito processual civil*, Rio de Janeiro, Forense, §5., para. 55.
[751] See Didier Junior, F. (2016), *Curso de direito processual civil*: *1 : introdução ao direito processual civil, parte geral e processo de conhecimento*, Salvador, JusPODIVM, p. 89 ss.

on, the period for appeal starts, after which, the decisions gain binding force, producing legal certainty.

Hence, in civil procedure, the publicity of judgements has a fundamental meaning. If arbitration, as an alternative to court proceedings, shall abdicate from publishing awards is a question worth debating.

ii.1) Brazil

The Brazilian constitution affirms in Art. 93, IX, that all judiciary judgements must be public.[752] Further, it affirms that the law can only limit publicity in cases where the right to intimacy of the concerned person does not harm the public interest to information. The provision clearly demonstrates that the publicity of judgments in Brazil is more important than the right to intimacy itself. It puts these two values on the scale and tells both the lawmakers and the judges, which of both should overweigh the other, that being publicity.

In practice, it is easy to access a judgment of any Brazilian judge or tribunal, without going to the court personally. One must only have access to the court´s websites and use the search tools. Decisions are published in full, with parties´ and lawyers´ names, proceeding´s number and so on.[753] Only the cases listed in Art. 189 CPC are

[752] In civil procedure this is endorsed by Art. 8 and Art. 189 CPC, where it is stated that all procedural acts are public. The judgment, as procedural act, is therefore encompassed.
[753] See footnote 728. See also Lobato de Paiva, Mário Antonio (2004), 'A Carta de Heredia: Regras mínimas para a difusao de informacao judicial em internet', *Revista de Direito do Trabalho*, Vol. 30, N. 114, pp. 328–335. According to Lobato, the names of the parties are in general not necessary for scientific or controlling purposes.

excepted, where only the initials of the parties are to be seen in the decisions.

ii.2) Germany

Publicity of judgments in Germany seems more complicated to justify than the Brazilian one. Since there is no express mention to publicity in the constitution, some authors discuss if the publicity of judgments can be justified by the principle of publicity or by the rule of law principle.[754] The discussion, may be carried out for the sake of the debate, however it does not attach value to the exercise of the law. Be it because of the publicity principle or because of the rule of law principle, which by the way, gives rise to publicity; publication of judgments must be justified in essence because of the right of the people to information, the control function, and the development of the science of law. If the legal community cannot access the judgements, it can neither check if the law has been correctly applied, neither evaluate the grounds of the decisions, making it difficult to perform control or develop the law.

Moreover, Art. 6 (1) ECHR guarantees not only public proceedings for the citizens but also the publication of the court´s decisions. Therewith, Germany prescinds from an express mention of the publicity principle in the constitution to justify the publication of court decisions. According to Saenger, also in Germany the publicity of judgments, anchored on the public interest in information and the

[754] Against the principle of publicity as reason for the publication of judgments: "*Ob die Gerichte aufgrund des allgemeinen rechtsstaatlichen Publizitätsgebots verpflichtet sind, ihre Urteile in angemessener Weise zu veröffentlichen, ist umstritten und im Allgemeinen abzulehnen.*" Zimmermann, W. (2013), '§169 GVG' in: Krüger, W., Adolphsen, J., Gottwald, P., Rauscher, T., Gruber, U., Hau, W., Hilbig-Lugani, K., Micklitz, H.-W., Münch, J., Pabst, S., Ulrici, B., Zimmermann, W. (eds.), *Münchener Kommentar zur Zivilprozessordnung: Bd. 3: §§ 1025-1109 EGZPO, GVG, EGGVG, UKlaG, Internationales und Europäisches Zivilprozessrecht,* München, Beck, C H, para. 13. Recognizing the principle of publicity as the reason for publishing jugdments: "*Von der Akteneinsicht nach § 299 ist die anonymisierte Veröffentlichung von Gerichtsentscheidungen zu unterscheiden, zu der die Gerichte aufgrund des Publizitätsgebots für jedes staatliche Handeln iR des Zumutbaren verpflichtet sind.*" Saenger, I. (2017), '§299' in: Saenger, I., Bendtsen, R. (eds.), *Zivilprozessordnung: Familienverfahren, Gerichtsverfassung, Europäisches Verfahrensrecht : Handkommentar,* Baden-Baden, Nomos, para. 24. OLG Celle (1990), 1 VAs 4/90

scientific interest, ranks higher than the right to intimacy. Therefore, courts must not deny handing over a judgment to a third person.[755]

In practice, judgments are published in anonymous form.[756] Either are the names of the parties omitted or just the parties´ initials are mentioned.[757] To search for case law it is generally not enough to go to the court´s websites, since not all decisions are published there. They are given out to lawyers or legal publishers.[758] The legal publishers have databases with several judgments. Lawyers or researchers can pay a monthly or annual fee to have full access to the databases to search for case law, articles and books.[759]

ii.3) Legal comparison

While in Germany decisions are published without any mention to the names of the parties, in Brazil not only decisions are published containing names of parties, lawyers and file number, but anyone can consult if there are proceedings under a certain name in a certain jurisdiction. In this sense, Germany is much more careful with the privacy of the parties and the publicity of the decisions serves much more the controlling function and the developing of the law than the public interest in general. The publication as it is done in Germany

[755] Saenger, I. (2017), '§299' in: Saenger, I., Bendtsen, R. (eds.), *Zivilprozessordnung: Familienverfahren, Gerichtsverfassung, Europäisches Verfahrensrecht : Handkommentar,* Baden-Baden, Nomos, para. 24.
[756] Zimmermann, W. (2015), 'GVG §169' in: Säcker, F. J., Rixecker, R. (eds.), *Münchener Kommentar zum BGB,* München, C. H. Beck.; Zimmermann, W. (2013), '§169 GVG' in: Krüger, W., Adolphsen, J., Gottwald, P., Rauscher, T., Gruber, U., Hau, W., Hilbig-Lugani, K., Micklitz, H.-W., Münch, J., Pabst, S., Ulrici, B., Zimmermann, W. (eds.), *Münchener Kommentar zur Zivilprozessordnung: Bd. 3: §§ 1025-1109 EGZPO, GVG, EGGVG, UKlaG, Internationales und Europäisches Zivilprozessrecht,* München, Beck, C H, para. 13.
[757] Reichold, K. (2016), '§299' in: Thomas, H., Putzo, H., Reichold, K., Hüßtege, R., Seiler, C. (eds.), *Zivilprozessordnung: FamFG, Verfahren in Familiensachen, EGZPO, GVG, EGGVG, EU-Zivilverfahrensrecht : Kommentar / begründet von Prof. Dr. Heinz Thomas, ehem. Vorsitzender Richter am Oberlandesgericht München; Prof. Dr. Hans Putzo, ehem. Vizepräsident des Bayer. Obersten Landesgerichts ; fortgeführt von Dr. Klaus Reichold, Vorsitzender Richter am Bayer. Obersten Landesgericht a.D.; Dr. Rainer Hüßtege, Vorsitzender Richter am Oberlandesgericht München; Dr. Christian Seiler, Richter am Oberlandesgericht München, Lehrbeauftragter der Universität Regensburg,* München, C.H. Beck, para. 3.
[758] Huber, M. (2017), '§299' in: Musielak, H.-J., Voit, W. (eds.), *Zivilprozessordnung,* München, Vahlen, Franz, para. 33.
[759] Most famous legal publishers with a large database on legal decisions are Beck-online (www.beck-online.de) and Juris (www.juris.de).

enables the juridical community to verify the reasoning of the decision and to develop case law based on them. On the other hand, in Brazil it is easier to access the decisions. One must not have access to especial commercial databases. The judgments are available in the courts´ websites, achievable for any person.

ii.4) Comparison applied to B2C property development arbitration

While in civil procedure law the parties cannot opt out of the publicity of the proceeding or of the judgment,[760] in arbitration it is up to the parties to choose if their proceedings will be kept confidential or not. The confidentiality of the proceedings and of the award comes from the arbitration clause or from the arbitration rules. Many arbitral institutions, like the DIS and the CAMARB,[761] provide for a confidentiality duty, which is as broad as to be understood as encompassing the arbitral award.

Contrary to those rules, in consumer arbitration, it would be ideal to enable the publication of awards.[762] The legal comparison above demonstrates that publicity is essential for the development of the law and for the legal certainty, functions that should be complied with in arbitration as in courts. Pelzer explains that the guarantee of a uniform jurisdiction becomes a problem if the reasoning of the arbitral

[760] Zimmermann, W. (2013), '§169 GVG' in: Krüger, W., Adolphsen, J., Gottwald, P., Rauscher, T., Gruber, U., Hau, W., Hilbig-Lugani, K., Micklitz, H.-W., Münch, J., Pabst, S., Ulrici, B., Zimmermann, W. (eds.), *Münchener Kommentar zur Zivilprozessordnung: Bd. 3: §§ 1025-1109 EGZPO, GVG, EGGVG, UKlaG, Internationales und Europäisches Zivilprozessrecht,* München, Beck, C H, paras 24-28. Arnold, S. (2012), 'Zum Grundsatz der Öffentlichkeit im Zivilverfahren' in: Geimer, R., Schütze, R. A., Garber, T. (eds.), *Europäische und internationale Dimension des Rechts: Festschrift für Daphne-Ariane Simotta,* Wien, LexisNexis, p. 21.

[761] Rules contain confidentiality duties: status from 27.07.2016. On the contrary, the DIS Rules for Sport´s arbitration provide for confidentiality in §42.

[762] For instance, the AAA Consumer arbitration rules do not mention a general duty of confidentiality of the parties or the confidentiality of the arbitral award. AAA - American Arbitration Association (2014), Consumer Arbitration Rules.

decisions is not public.[763] In this sense, other arbitral tribunals, lawyers and parties do not have access to the arbitral decisions of cases similar to theirs and are impeded to construe their understanding and arguments based on fundaments that have already been discussed and decided. Thus, the non-publicity of arbitral awards hinders the uniformity of decisions, the knowledge about precedents and even the further development of legal reasoning present in the decisions.

Furthermore, the lack of control over the decisions through the legal community is one of the greatest fears of consumerists and counts as a disadvantage of arbitration,[764] which, in our view, can be resolved through the publicity of awards. This is justifiable under the shield of the equivalence of arbitration to jurisdiction, recognized by the state. Since jurisdiction is an essential public service it must comply with publicity. Under this argument one could plead that all arbitrations must be public. However, only in consumer cases the public interest plays a role that supersedes the protection of the parties´ reputation. Publicity enables the public control in a structurally unbalanced legal relationship consolidated through standard contracts between business and consumer, this is not the case in B2B legal relationships, where there is, as a general rule, no unbalance. Recalling the NAF Scandal,[765] in which 80% of the decisions made in B2C cases administered by NAF were against the consumer, the control of the problem was only possible because in California the decisions were not confidential.[766] This way, the Attorney General Lori Swanson could analyze the decisions and

[763] Pelzer, N. (2016), 'Tagungsbericht - Schiedsgerichtsbarkeit und private Justiz: Rechtspolitische Herausforderungen: 59. Bitburger Gespräch am 15. und 16. Januar 2016 in Mainz', *JZ*, Vol. 7, p. 356. "*Die Sicherung eine einheitliche Rechtsprechung werde zum Problem, wenn die rechtliche Begründung von Schiedssprüchen unbekannt sei*."

[764] See above Chapter III, D, 2, b, iii.

[765] The NAF Scandal was described in Chapter IV.

[766] See Berner, R., Grow, B. (2008), 'Banks vs. Consumers (Guess Who Wins)', *Bloomberg Business Week*, 04.06.08. Habegger, P., Hochstrasser, D., Nater-Bass, G., Weber-Stecher, U. (2013), *Arbitral institutions under scrutiny*, New York, Juris. Salzwedel, M. R., Wells, D., *National Arbitration Forum Settlement with Minnesota Attorney General*, available at: www.fed-soc.org/publications/detail/national-arbitration-forum-settlement-with-minnesota-attorney-general. 22.01.2016. Duve, C., Sattler, M. (2010), 'Schiedsvereinbarungen in Verbraucherverträgen' in: Genzow, F. C. (ed.), *Zwischen Vertragsfreiheit und Verbraucherschutz: Festschrift für Friedrich Graf von Westphalen zum 70. Geburtstag,* Köln, O. Schmidt, pp. 81–109.

identify the problem, deciding then to sue against the arbitral institution in the name of the consumers. This example clarifies that the publicity of the arbitral awards is vital in B2C cases, enabling due control from the consumerist community and legal agents. Thus, in B2C cases, publicity is not a service only to the parties, much more it is a service to the consumer community, given the structural imbalance imposed by the B2C legal relationship.

Assuming that arbitration rules especially designed for B2C property development arbitration provide for the publicity of awards, the rule must also provide for the scope of this publicity. Should it follow the example of the German practice, publishing the content of the decision but not the name of the parties or should it follow the Brazilian example and publish the judgements thoroughly? As improper as it might seem, in the case of B2C disputes it is important to know who the parties in the decisions published are.[767]

The possibility to know if a certain developer is in the passive pole of a certain consumer dispute and what the matter in the case was is of great public interest and may affect the decision of the consumer about who should they contract with.[768] The consumer needs to access information not only about the legal content of the decision but also about who the developer behind that case is. For instance, the consumer could not recognize a decision concerning a construction problem in a building of their interest if the decision does not name the parties. Even though this information could heavily influence their decision about contracting or not. A consumer who has no possibility to access the name of the developer who has given rise to as certain

[767] This view goes against the Rule of Heredia 7 (a), which suggests that the database of judgments should be able to search for case law ignoring the names and personal data of the parties. See above footnote 728.
[768] Californian Law has recognized the importance of disclosing the name of the company who is arbitration with the consumer party, to offer enough information for consumers. The Californian Civil Procedure Code in §1281.96 requires the arbitral institutions to "*publish at least quarterly, and make available to the public on the Internet Web site of the private arbitration company, if any, and on paper upon request, a single cumulative report that contains all of the following information regarding each consumer arbitration within the preceding five years: (2) The name of the nonconsumer party, if the nonconsumer party is a corporation or other business entity, and whether the nonconsumer party was the initiating party or the responding party, if known*." David J. Jung, Jamie Horowitz, Jose Herrera, Lee Rosenberg (2013)

decision or to a certain construction problem, has less information to make a conscious decision. As already shown above, information is of the most important factors for consumers to make efficient decisions and wise purchases, according to the consumer´s sophistication theory.[769] Hence, the disclosure of the name of the parties is of public interest for the consumer community.

Furthermore, worries about the intimacy of the consumer in regard to property development contracts are not as high as they are in family matters or other cases encompassed by the exceptions to publicity made in both countries. The fact that neither in Germany nor in Brazil property development disputes must be kept confidential shows that in these cases the public interest supersedes the need for intimacy protection of the parties.

Admittedly, the probability that a layperson will indeed search for arbitral awards under the developers´ name is low.[770] So is the probability that a layperson attends a random hearing in courts or read a judgment, just because they can. In fact, one can assume that many people do not even know that they are allowed to do so. Usually, this information is not widely disseminated and most people who are interested in using the publicity principle are related to legal professions. Nevertheless, it is the duty of the Law to maintain the information accessible. Especially considering the public interest of the consumer.

Concerns as to whether developers will prefer not to choose arbitration, if consumer arbitration rules do not offer confidentiality are groundless. In an AAA survey from 2001, confidentiality ranked

[769] Armstrong, M. (2013), *Interactions between naive and sophisticated consumers*, Jahrestagung des Vereins für Socialpolitik, Düsseldorf. Liu, J. Y. (2010), 'A conceptual model of consumer sophistication', *Innovative Marketing*, Vol. 6, Issue 3, p. 73. Wu, B., Titus, P., Newell, S. J., Petroshius, S. (Spring, 2011), 'Consumer sophistication: The development of a scale measuring a neglected concept', *Marketing Management Journal*, p. 17. Estelami, H. (2014), 'An ethnographic study of consumer financial sophistication', *Journal of Consumer Behavior*, Vol. 13, p. 328. See above Chapter IV, C, 2, c.

[770] Arnold, S. (2012), 'Zum Grundsatz der Öffentlichkeit im Zivilverfahren' in: Geimer, R., Schütze, R. A., Garber, T. (eds.), *Europäische und internationale Dimension des Rechts: Festschrift für Daphne-Ariane Simotta,* Wien, LexisNexis, pp. 16–17.

very low as one of the perceived advantages of arbitration.[771] According to the Queen Mary College (2010) report, 65% of respondents do not regard the absence of confidentiality in court proceedings as the main reason for choosing arbitration.[772] Hence, parties will not be discouraged to use arbitration if the awards may be published in its entirety.

In this regard, the extent of publicity, especially in the context of B2C proceedings should enhance the name of the parties in order to satisfy the public interest.

iii) Conclusion

Learning from the publicity principle applied in court proceedings, B2C property development arbitration should not be kept confidential. This would protect the public interest and enable the control of the jurisdictional function performed by the arbitrators.

However, publicity in arbitration must not be implemented one hundred percent as it is in state courts. Although proceedings must not be confidential, they should also not be public,[773] because privacy is an intrinsic characteristic of arbitration as a private dispute resolution method. Therefore, third parties must not have the right to attend arbitral hearings or access the proceedings file, but the parties must not have the duty to keep the arbitration confidential. Institutions may provide for a confidentiality duty for arbitrators and the institution itself, since it is not in the interest of those to disclose any information about the cases they work with.

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[771] Oldenstam, R., Pachelbel, J. v. (2006), 'Confidentiality and Arbitration - a few reflections and practical notes', *SchiedsVZ*, p. 34.
[772] Andrews, N. (2016), *Arbitration and contract law*: *Common law perspectives*, Ius gentium, London, Springer, para. 1.08.
[773] See Arnold, S. (2012), 'Zum Grundsatz der Öffentlichkeit im Zivilverfahren' in: Geimer, R., Schütze, R. A., Garber, T. (eds.), *Europäische und internationale Dimension des Rechts: Festschrift für Daphne-Ariane Simotta,* Wien, LexisNexis, pp. 17-18.

Regarding the arbitral awards publicity becomes more important. Publicity of awards has not only the function of enabling control and serving the public interest but also of establishing case law and unification of jurisdiction, making *res judicata*, providing legal certainty and enabling research and development of the law.[774] These functions become even more important in the context of consumer disputes about a majorly significant contract, as the property development one. Consequently, for arbitral awards in B2C property development disputes, publicity should be the rule.

As well stated by Hegel:

"*Though the special content of the case is of interest only to the contending parties, the universal content, involving right and a legal decision, is of interest to all. Hence is demanded the publicity of the administration of the law*."[775]

Since arbitration is motivated by party autonomy, the rules of non-confidentiality in B2C property development arbitrations can be mitigated by the will of the parties themselves.[776] Confidentiality must not be the rule, but the result of an active post-dispute choice.[777] If both parties agree that they want their proceeding and award to be kept confidential, the tribunal or the rules may not oppose to it. In case that only one party wants confidentiality, the tribunal should decide about

[774] Peruingeiro, R. (2012), 'O livre acesso à informação, as inovacoes tecnológicas e a publicidade processual', *Revista de Processo*, Vol. 203, pp. 149–180.
[775] Hegel, G.W.F. (2000), *Philosophy of Right*: *Dyde, S.W*, ProQuest Ebook Central, Kitchener, Ontario, Batoche Books, p. 224.
[776] Different from the non-disposability of publicity in civil procedure. Zimmermann, W. (2013), '§169 GVG' in: Krüger, W., Adolphsen, J., Gottwald, P., Rauscher, T., Gruber, U., Hau, W., Hilbig-Lugani, K., Micklitz, H.-W., Münch, J., Pabst, S., Ulrici, B., Zimmermann, W. (eds.), *Münchener Kommentar zur Zivilprozessordnung: Bd. 3: §§ 1025-1109 EGZPO, GVG, EGGVG, UKlaG, Internationales und Europäisches Zivilprozessrecht,* München, Beck, C H.paras. 24-28. Arnold, S. (2012), 'Zum Grundsatz der Öffentlichkeit im Zivilverfahren' in: Geimer, R., Schütze, R. A., Garber, T. (eds.), *Europäische und internationale Dimension des Rechts: Festschrift für Daphne-Ariane Simotta,* Wien, LexisNexis, p. 21.
[777] The reasoning for requiring a post-dispute choice and not a mere mention of confidentiality in the arbitration clause of the standard contract is the same already discussed in Chapter IV, C, 3, b, i. In standard contracts the consumer is not able to influence actively the content of the clause, neither have them the necessary knowledge to make an option for or against confidentiality. Only in a post-dispute moment, the will of the consumer will be free from the structural imbalance imposed by the standard terms.

it, but following the example of the state´s publicity principle, the public interest must play a big role in the reasoning of the decision.

iv) Suggested rule for B2C property development disputes:

Confidentiality:

1. The arbitrators, appointed experts and the people involved in the administration of the arbitral proceeding within the arbitral institution undertake to keep all materials submitted by the parties confidential and to keep discretion about their duties.[778]
2. Unless the parties expressly agree in writing, in a post-dispute moment, to the contrary, they are not under the duty of confidentiality.
3. If the parties disagree as to whether the arbitration, including its existence, materials and decisions, should be kept confidential also by the parties, the party requesting confidentiality shall submit its request to the Arbitral Tribunal or Sole Arbitrator, which will hear the other party and decide.

   (1) The Arbitral Tribunal or Sole Arbitrator will determine the period of time for the contesting party to submit the reasons why the arbitration shall not be kept confidential.
   (2) The Tribunal or Sole Arbitrator must consider the functions of the principle of publicity in civil procedure in its decision. Uncontested requests must not be automatically granted.

[778] See §3 (1) SOBau.

(3) While the request for confidentiality is pending a decision, the parties stay under the duty of confidentiality.

(4) The Arbitral Tribunal or Sole Arbitrator is allowed to grant the request partially, submitting the parties to the confidentiality of only one document, evidence or part of the proceedings.[779]

Publicity of Awards

1. All arbitral awards may be published in its entirety. The institution may also publish statistical data, for which information about the arbitral proceedings are needed.

(1) In case the parties have agreed or the Arbitral Tribunal/Sole Arbitrator has decided to keep the proceedings confidential according to numbers 2 or 3 above, the final arbitral award will be published without any references to the parties´ names.[780]

2. The SLBau and the SOBau - the developer´s side

Considering the complexity and specificity of construction disputes and the advantages that arbitration signifies for construction disputes,[781] the arbitration rules for B2C disputes must not merely comply with the needs of the consumer but combine the needs of the

[779] See AAA - American Arbitration Association (2014), Consumer Arbitration Rules "*R-23. Enforcement Powers of the Arbitrator: The arbitrator may issue any orders necessary to enforce the provisions of rules R-21 and R-22 and to otherwise achieve a fair, efficient, and economical resolution of the case, including, but not limited to: (a) an order setting the conditions for any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing in order to preserve such confidentiality*."

[780] See Hauptmann, H. (2004), 'Schiedsvereinbarungen in "Ungleichgewichtslagen" - am Beispiel des Sports', *SchiedsVZ*, pp. 175–187.

[781] About the advantages of arbitration in construction disputes see above Chapter III, D, 1.

consumer with the needs of the developer, making the incorporation of those rules attractive for both parties.

Paying due regard to the necessities of the construction business and the wide use of arbitration to solve construction disputes, in Germany, two institutions have dedicated effort to develop arbitration rules for construction disputes.[782] They are the SLBau – *Streitlösungsordnung für das Bauwesen*, developed by the German society of construction law (*Deutsche Gesellschaft für Baurecht e.V.*) and the German Concrete and Construction Technology Organization (*Deutscher Beton- und Bautechnik-Verein e.V.*)[783] and the SOBau – *Schlichtungs- und Schiedsordnung für Baustreitigkeiten* developed by the ARGE *Baurecht – Arbeitsgemeinschaft für Bau- und Immobilienrecht im Deutschen Anwaltverein*.[784] These two set of rules encompass ADR methods other than arbitration, like mediation, adjudication and conciliation. The object of this study will be the arbitration rules, which are the most famous and significant arbitration rules for the German construction business.[785] Their focus is B2B disputes, whose most common parties are, for instance, the developer, the constructor and the material deliverer.

The SLBau and the SOBau have some contact points, similar provisions. They denote that the drafters of both rules find those aspects important. By detecting these repeated rules, it will be possible to discover what the important aspects of arbitration in the construction business are. After that, it is important to verify if these provisions conflict with the needs of the consumers, described in the

[782] See Vygen, K., Joussen, E. (2013), *Bauvertragsrecht nach VOB und BGB*: *Handbuch des privaten Baurechts*, Köln, Werner, p. 383.
[783] The SLBau was developed to substitute the former SGOBau. See Motzke, G. (2009), '§4 Prozessuale Besonderheiten von Baustreitigkeiten' in: Motzke, G. (ed.), *Prozesse in Bausachen: Privates Baurecht, Architektenrecht,* Baden-Baden, Nomos. See also Vygen, K., Joussen, E. (2013), *Bauvertragsrecht nach VOB und BGB*: *Handbuch des privaten Baurechts*, Köln, Werner, p. 383.
[784] See Roquette, A. J. (2011), 'D. Alternative Konfliktlösungsverfahren, II. Schiedsklauseln' in: Roquette, A. J. (ed.), *Vertragsbuch Privates Baurecht: Kommentierte Vertragsmuster,* München, Beck, para. 88.
[785] Vygen, K., Joussen, E. (2013), *Bauvertragsrecht nach VOB und BGB*: *Handbuch des privaten Baurechts*, Köln, Werner, p. 347. Koeble, W. (2014), '1. Teil. Außergerichtliche Streitbeilegung und schiedsgerichtliche Verfahren' in: Kniffka, R., Koeble, W. (eds.), *Kompendium des Baurechts: Privates Baurecht und Bauprozess,* München, C. H. Beck, para. 96.

indicators of unfair clauses[786] and in the comparison between court and arbitral B2C proceedings.[787] Therewith, the intention of this study is to determine which provisions from the arbitration rules for construction disputes could be applied in B2C construction disputes and which are not suitable for consumer disputes, taking into account the structural imbalance between developer and consumer.

a) Privacy and Confidentiality

Firstly, both rules establish that the proceedings will not be public, §2 (3) SLBau and §3 (1) SOBau, in contrast with the public proceedings in courts, where hearings are public. Nonetheless, only the SLBau asserts that proceedings will be confidential and not public. In this regard, the SOBau assumes that the fact that proceedings are closed to the public suffices to protect the construction companies from bad publicity. The SLBau imposes a confidentiality duty on the people involved in the proceedings, going one step further and preventing parties, arbitrators and third involved persons to disclose any information about the arbitration. Construction companies cherish the possibility to resolve their disputes out of the public light. If confidentiality is indeed necessary to guarantee the maintenance of the parties´ good reputation remain a question for the parties themselves to answer. They can do so by choosing the SLBau or by establishing a confidentiality duty in the arbitration clause.

However, the confidentiality duty is in conflict with the need of the consumer for non-confidential proceedings and even for the publicity of arbitral awards, as above shown.[788] The privacy of arbitration may suffice to protect the consumer's intimacy in the concrete case, but confidentiality goes against the public interest.[789]

[786] See above Chapter V, C, 1.
[787] See above Chapter VI, A, 1.
[788] See above Chapter VI, A, 1, c.
[789] About confidentiality and privacy in arbitration, see Oldenstam, R., Pachelbel, J. v. (2006), 'Confidentiality and Arbitration - a few reflections and practical notes', *SchiedsVZ*, pp. 31–36.

A confidentiality provision applied to B2C cases will deter due public control. Hence, adapting §2 (3) SLBau for B2C disputes, the privacy of arbitration should remain, but not the confidentiality.

b) Speedy proceedings

Diverse provisions of the SOBau and the SLBau show that fast proceedings are of utmost interest for parties of construction disputes.[790] According to §3 SLBau, the parties must comply with the deadlines and hold onto the schedule, keeping a proactive attitude towards the fast course of proceedings. Arbitrators shall only take over the case if they are able to process the case quickly, asserts §15 (4) SOBau. Moreover, §35 (4) SLBau and §4 SOBau encourage arbitrators to promote a fast course of proceedings and to solve the case, if possible, already on their first hearing.[791] The interest of construction companies in fast proceedings is one of the reasons why they choose arbitration on the first place.[792] A delayed solution for construction problems, may mean delay in the construction, which reflects in loss of money.[793] Therefore, companies who are involved in a construction dispute are usually very interest in resolving conflicts as fast as possible.

The provisions of the SOBau and the SLBau are not only in line with these needs of the construction business but also with the needs of the consumer, who is also interested in achieving a fast solution to the problem,[794] this being one of the most important advantages of

[790] See above Chapter III, D, 1, c.
[791] Benedict, C. (2015), 'Part IV – Selected Areas and Issues of Arbitration in Germany, Construction Arbitration' in: Bockstiegel, K., Kröll, S., Nacimiento, P. (eds.), *Arbitration in Germany. The model law in practice. 2nd, rev. ed: The Model Law in practice,* Den Haag, Kluwer Law International, pp. 829–846.
[792] See Kutschera, M. (2007), 'Vorteile des schiedsgerichtlichen Verfahrens' in: Torggler, H. (ed.), *Praxishandbuch Schiedsgerichtsbarkeit,* Wien, Verl. Österreich, pp. 37–56.
[793] Deustche Gesellschaft für Baurecht e. V. and Deutscher Beton- und Bautechnik-Verein e.V. (2016), Streitlösung für das Bauwesen
[794] Chapters III, D, 1, c. and III, D, 2, a, i., above, discuss the interest of the consumer to solve construction disputes fast in detail.

arbitration and a motivation for consumers who would choose arbitration.

c) The number of arbitrators and the amount in dispute

The SLBau and the SOBau have established a clear relation between the amount in dispute and the number of arbitrators. For disputes under 100.000€, the rules recommend a sole arbitrator, pursuant to §30 (1) SLBau and §5 (1) SOBau. Above that value, a panel of three arbitrators should decide the case.[795] The provisions differ in their terms. While the SLBau only suggests the parties to agree to this criterion of nomination, the SOBau establishes the value in dispute as the criterion for determining the number of arbitrators, unless the parties agree otherwise.

Using the amount in dispute as the determinant factor for the number of arbitrators is in line with an economic approach towards arbitration.[796] The costs of arbitration are directly proportional to the number of arbitrators; therefore, it is advisable to choose three arbitrators only in disputes that involve a high sum of money. The amount in dispute that makes the high costs worth it.[797] Therefore, this is a laudable rule, which benefits the companies but is also of financial interest for consumers.

However, the amount in dispute often, but not always, reflects the complexity of the dispute. High complex cases deserve a panel of arbitrators as decision body. The examination by three instead of one arbitrator increases the credibility of the decision. In a panel,

[795] Motzke, G. (2009), '§4 Prozessuale Besonderheiten von Baustreitigkeiten' in: Motzke, G. (ed.), *Prozesse in Bausachen: Privates Baurecht, Architektenrecht,* Baden-Baden, Nomo, p. 735.
[796] Vygen, K., Joussen, E. (2013), *Bauvertragsrecht nach VOB und BGB*: *Handbuch des privaten Baurechts*, Köln, Werner, p. 369.
[797] See also Roquette, A. J. (2011), 'D. Alternative Konfliktlösungsverfahren, II. Schiedsklauseln' in: Roquette, A. J. (ed.), *Vertragsbuch Privates Baurecht: Kommentierte Vertragsmuster,* München, Beck, paras. 17, 31 and 40. Since the amount in dispute may change through a counter claim or an amendment to the claim, Roquette makes in para. 17 a suggestion to a detailed rule on the number of arbitrators based on the amount in dispute.

arbitrators discuss the case, they point out important points to each other and this reduces the risk of mistakes. Therefore, the possibility of the parties to choose to have an arbitral tribunal instead of a sole arbitrator, even in cases that do not concern a high amount of money should remain opened. Therewith, parties can have a panel of arbitrators to decide a complex cause, even if the amount of money involved does not reflect the complexity of the case. Note that the agreement of the parties to change the number of arbitrators must be done after the dispute arises. Only when the problem is known to the parties, can they recognize the complexity of the case and the need to have an arbitral tribunal instead of a sole arbitrator. Further, such a decision has a huge financial impact for the parties and especially for the consumer, who, in general, is under the financial and the structural imbalance imbalance of a standard contract in face of the developer. Thus, only in a post-dispute moment, accessorized by their counselor, can the consumer make the necessary analysis to choose between a panel or a sole arbitrator.

d) Nomination of arbitrators

In case the parties fail to nominate an arbitrator within the period established by the rules, or the two co-arbitrators fail to nominate the chair arbitrator, the SLBau determines that the party can request the DBV (*Deutscher Beton- und Bautechnik-Verein e.V.*) to nominate the arbitrators, §32 (2) and (4). By the same token, according to §15 (4) ad (5) SOBau, in those cases, the DAV (*Deutscher Anwaltverein*) can be requested to nominate the decision-maker.

According to §30 (4) SLBau and §15 (2) SOBau, sole-arbitrators and chair-arbitrators must be qualified to carry out the functions of a judge. In German law, that means that these arbitrators must be lawyers. They must have studied law and be submitted to the

German legal exams.[798] Co-arbitrators, on the other hand, must not be lawyers. Parties can, for instance, nominate architects or engineers as co-arbitrators. These provisions denote a concern from the DAV and the DBV about the legal background of the person deciding the cases. Although the expertise of the arbitrators in the field of construction is a positive aspect of arbitration, the knowledge of the law is extremely important to guarantee a due process and an award in accordance to the national legal system, which can later be enforceable.

However, in cases where the parties or the co-arbitrators appoint a non-German as arbitrator, this provision, as it is written, may raise serious concerns. In other legal systems the legal studies are not as attached to the function of a judge as it is in Germany. In Brazil, for example, in order to be able to carry the function of a judge a person has to be Brazilian, have completed the law studies, must have passed the Bar Exam, have 3 years of working experience, have no criminal record, pass the special exam to tender to the vacancy as a judge, amongst other pre requisites that are established by the courts, when they make the call for tenders public. Hence, although the objective of those provisions is to make sure that a person who has completed the study of law presides the tribunal, it can hinder the parties from appointing a person with a notable legal background from another country. Consequently, this provision suits domestic German arbitrations, but are controversial if one thinks that many construction contracts, especially inside the European Union, count on parties from different countries, which could be interested in having a non-German chair person.[799] A better draft for the provisions above, which would still carry out the same objective of the rules, would be to determine that sole arbitrators and chair arbitrators must have completed their

[798] §5 DRiG. Germany, Deutsches Richtergesetz. See Benedict, C. (2015), 'Part IV – Selected Areas and Issues of Arbitration in Germany, Construction Arbitration' in: Bockstiegel, K., Kröll, S., Nacimiento, P. (eds.), *Arbitration in Germany. The model law in practice. 2nd, rev. ed: The Model Law in practice,* Den Haag, Kluwer Law International, pp. 829–846.

[799] Especially the SLBau seems to have been drafted aiming at domestic arbitration, since in §2 (1) SLBau the rules assert that the proceedings will be carried out in German.

studies in law. Therewith, parties would be able to choose lawyers from another country, if the dispute has an international connection.

The DAV as well as the DBV maintain a list of arbitrators carefully chosen by the institutions. Prospective arbitrators have to submit their request to be part of the list, which is subject to approval by the institution. Although the list is not binding, the DAV and the DBV are interested in suggesting arbitrators of quality to decide disputes under the SOBau and the SLBau.

The SLBau imposes more conditions on the arbitrators. Pursuant to §30 (4), arbitrators should have special knowledge of construction technology, construction management and construction law and in extrajudicial dispute resolution. Thereby, the SLBau intends to build arbitral tribunals with a mixture of legal and construction background, where the chair person is a lawyer and the co-arbitrators come from the construction field.

The concern of the rules as to the expertise and quality of the arbitrators is a legitimate one that meets the needs of the consumer too. However, the consumer is not only interested in arbitrators who know about construction techniques or law in a broad sense, but also in arbitrators who know about consumer law. Hence, to apply these rules to B2C disputes, one may think about adding to the list of arbitrators also lawyers specialized in consumer law and the appointing authority must not only be the DAV and DBV but, depending on who applies the B2C rules, the institutions and the consumer bodies. Institutions usually already have their arbitrators´ lists. A suggestion would then be, to formulate a list of arbitrators specifically prepared to deal with B2C cases. Consumer bodies in Germany and Brazil do not yet deal with arbitration, it would be, however, interesting for consumers if they start accepting resumé´s submission from interested arbitrators and after analysis, including them into their own arbitrators´ list, so that the consumer can have a trustworthy list of qualified people to nominate, if they need.

e) Seat of arbitration

Both set of rules assert that, in case the parties do not choose the seat of arbitration, the sole-arbitrator or the tribunal will. To do so, they must consider the construction place, the matter of dispute and the adequacy of the place for the parties, according to §16 (1) SOBau. The SLBau, in §2 (2), establishes only the place of fulfilment of the construction service as the decisive factor for determining the seat of arbitration. Anyhow, both the SOBau and the SLBau agree that the construction place is extremely relevant for the seat of arbitration.

This understanding goes along with the view above presented, that the place of construction must be an achievable venue for all parties involved in the construction contract.[800] Moreover, it also calls for the use of the arbitration law of that place, due to the connection of that law with the contract. Hence, this provision could be applicable to B2C arbitration, as long as the place of residence of the consumer is also considered as relevant in cases that verse solely about the obligations of the buyer.

The model arbitration rules for B2C construction disputes

The product of the analysis done throughout this work should be the development of model arbitration rules specifically designed for B2C construction disputes. These rules must combine the needs of the consumer and the needs of the developer. The tailor-made rules could be used as model rules, which can be adhered to or adapted to by different institutions and consumer bodies.

Although it is undoubtful that the development of such rules is a task for a commission composed by representatives of construction

[800] See Chapter VI, A, 1, a.

companies, consumers and lawyers experienced in arbitration, this study will dare to take the first step to instigate such a development by adapting the arbitration rules for construction to B2C disputes, using the findings of the analysis made above. The idea is to use the SLBau as the basis for the prototype of model rules and remove from it the provisions, which are not in accordance with the consumer´s needs. Between the SLBau and the SOBau the SLBau will be preferred, since it represents the most updated work in the area. The SLBau dates from July 2016, while the last state of the SOBau is from September 2009. Therefore, one can assume that the committee that drafted the SLBau has considered the newest standards and developments in the construction field.

The focus of the adapted rules will be to enable the consumer to arbitrate in a consumer-friendly environment that considers the specificities of construction contracts. The rules intend to enable the consumer to:

- Make joint claims, which are especially important for property development of apartments[801]
- Have the seat and the venue of arbitration in a convenient place[802]
- Have access to former arbitral awards, through publicity of awards[803]
- Have the proceedings in the language of the consumer[804]
- Have the number of arbitrators, in principle, dependent on the amount in dispute, to reduce the arbitration costs.[805]
- Be part of any decisions about the proceedings, by guaranteeing that non-mandatory provisions can be opted

[801] As shown in Chapter VI, A, 1, b.
[802] As shown in Chapters V, B, 1, a; VI, 1, a, I and VI, 1, b, v.
[803] As shown in Chapters VI, A, 1, c
[804] As shown in Chapter V, B, 1, b
[805] As shown in Chapter V, B, 1, d and VI, 2, c.

out only by means of a post-dispute agreement of the parties.[806]

To make the adaptations, the translation of the SLBau to English made available by Meyer-Hofmann is used.[807] Mentions to the ZPO were taken out of the proposed rules, since the rules are not ought to be used only in Germany.[808] Equally, mentions to the BGB were removed, since the application of the BGB depends on the choice of law of the parties. Rules in the SLBau concerning conciliation, mediation and adjudication were ignored to compose the B2C arbitration rules for construction disputes. Changes made to the original text or provisions inserted by the author are in italic, to give the reader a clear detach from the original text.

Once more, it is to emphasize that the rules below presented are only the starting point for a discussion about the development of model rules.

Model Arbitration Rules for B2C Construction Disputes

Art. 1 Scope of Application *(corresponds to Art. 1 SLBau)*
Objective of the *Model Arbitration Rules for B2C Construction Disputes* is to prevent and settle disputes according to the provisions set out below, by taking into consideration the agreement made between the parties. This agreement shall be made in writing.

[806] Following the argumentation for a post-dispute arbitration agreement exposed in Chapter IV, C, 3, b,i any non-mandatory provision that allow parties to agree differently from the rules must specify that the agreement is only valid if done in a post dispute moment. Provisions different from the rules done in the arbitration agreement inside the standard contract should not prevail over the rules.
[807] *SLBau - English version*, available at: www.meyer-hofmann.de/meyer-hofmann/. 22.11.2016.
[808] Note that ZPO will be applicable anyway as *lex arbitri* if the seat of arbitration is Germany.

Art. 2 General Principles *(based on Art. 2 SLBau)*

(1)The language of the proceedings shall be *the language of the consumer or of the consumer´s domicile*.[809] The parties may agree on a different language *after the dispute arises*.

(2)The Parties will, in principle, take part in the proceedings in person. In exceptional cases, a party may appoint another person as a contact person with the authorization to take decisions on their behalf and the party in question shall inform the Arbitrator of such a person in writing.

(3)The Parties may be represented by legal representatives. Such persons are obliged to provide evidence of their power of representation, upon the request of any person involved.

(4)The Parties agree to refrain from calling the Arbitrator as a witness or expert, if subjects regarding the dispute are in question.

(5)The *Arbitrator*[810] must not advise or represent any of the persons involved both during and after the conclusion of the dispute resolution proceedings if such advisory or representative activities would refer to matters which are subject of the dispute resolution.

Art. 3 Venue and seat of arbitration[811]

To facilitate the defense of the consumer, the venue of arbitration, despite the choice of seat of arbitration or any pre-dispute determination of the venue of arbitration, will be as follows:

(1)In cases that verse solely about obligations of the consumer, the city of the consumer´s domicile.

[809] Rule inserted due to the results of Chapter V, B, 1, b. This provision has to carefully be discussed when developing the B2C arbitration rules, especially for use in countries with a high number of resident foreigners, like Germany. The language of the consumer must not be a triumph of the consumer on the developer, but a fair aspect, considering the language of both parties, the language of the contract, the language of the place of construction and the language of the place of residence of the consumer. In this regard, it would be an excessive burden to the developer if a French consumer who, for example, lives in Germany for many years, speaks German, buys their household unit in Germany and has signed the contract in German, wants to impose the French language as the language of the proceedings for a domestic arbitration. This exception must be included in tailor made rules.

[810] The SLBau mentions the "dispute resolver" instead of the "arbitrator", because it refers not only to arbitration, but to other ADR methods.

[811] Rule as suggested in Chapter VI, A, 1, a, v.

(2)In cases that verse about obligations of the developer the city of the place of construction;

(3)The venue of arbitration will be determined by the obligations referred to in the Request for Arbitration. Obligations referred to in a Counterclaim will not change the venue of arbitration, unless the parties so agree or the Arbitral Tribunal/Sole Arbitrator reasonably understands that a change of venue fits the case.

(4)The parties may agree to have the venue on a third place, as long as in writing in a post-dispute agreement.

(5)If the Parties have not agreed on the seat of arbitration, the Arbitral Tribunal/Sole Arbitrator will determine it to be the same as the venue of arbitration, according to the aspects mentioned above. The substantive law of the seat of arbitration may apply to the arbitration.[812]

Art. 4 Confidentiality[813]

(1)The arbitrators, appointed experts and the people involved in the administration of the arbitral proceeding within the arbitral institution undertake to keep all materials submitted by the parties confidential and to keep discretion about their duties.[814]

(2)Unless the parties expressly agree in writing, in a post-dispute moment, to the contrary, they are not under the duty of confidentiality.

(3)If the parties disagree as to whether the arbitration, including its existence, materials and decisions, should be kept confidential also by the parties, the party requesting confidentiality shall submit its request to the Arbitral Tribunal or Sole Arbitrator, which will hear the other party and decide.

1. *The Arbitral Tribunal or Sole Arbitrator will determine the period of time for the contesting party to submit the reasons why the arbitration shall not be kept confidential.*

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[812] Rule inserted due to the results of Chapter V, B, 1, c.
[813] Rule as suggested in Chapter VI, A, 1, c, iv.
[814] See §3 (1) SOBau.

2. *The Tribunal or Sole Arbitrator must consider the functions of the principle of publicity in civil procedure in its decision. Uncontested requests must not be automatically granted.*
3. *While the request for confidentiality is pending a decision, the parties stay under the duty of confidentiality.*
4. *The Arbitral Tribunal or Sole Arbitrator is allowed to grant the request partially, submitting the parties to the confidentiality of only one document, evidence or part of the proceedings.*[815]

Art. 5 Deadlines and Timeframes *(corresponds to Art. 3 SLBau)*
All persons involved are obliged to work towards a rapid and target-oriented execution of the proceedings. They are bound by the deadlines specified. The parties and any joining third parties shall state all facts on the matter and perform the required procedural activities within the periods specified. An extension of such deadlines may be granted in exceptional cases only.

Art. 6 Correspondence *(corresponds to Art. 4 SLBau)*
The *Arbitrator* will prescribe the type of transfer of documents and the proof of delivery. Otherwise, representations made by the persons involved will be transferred in writing against proof of delivery (e.g. registered letter, acknowledgement of receipt by the authorized recipient). The effectiveness of written notifications delivered by any other way remains unaffected.

Art. 7 Amicable Settlement *(corresponds to Art. 5 SLBau)*
All persons involved shall work towards an amicable settlement – even for parts of the matters in dispute – at all times during the proceedings.

[815] See AAA - American Arbitration Association (2014), Consumer Arbitration Rules "*R-23. Enforcement Powers of the Arbitrator: The arbitrator may issue any orders necessary to enforce the provisions of rules R-21 and R-22 and to otherwise achieve a fair, efficient, and economical resolution of the case, including, but not limited to: (a) an order setting the conditions for any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing in order to preserve such confidentiality*."

Art. 8 Rejection of the Arbitrator and Inability of Performance of Duties *(corresponds to Art. 6 SLBau)*

(1)The *Arbitrator* will perform his/her duties in an impartial and independent manner. Prior to his/her appointment or nomination, he/she shall disclose all facts, which might raise doubts as to his/her impartiality or independence. The same applies following acceptance of the office until the conclusion of the relating dispute resolution proceedings.

(2)He/she may only be rejected under circumstances which might raise doubts as to his/her impartiality or independence or if the *Arbitrator* fails to comply with the preconditions as agreed between the parties.

(3)Any rejection of the *Arbitrator* shall be inadmissible, unless it is made immediately upon becoming aware of the reason for rejection.

(4)The parties may only reject an *Arbitrator* to whose appointment they contributed, for reasons of which the parties first became aware of after having already made such an appointment.

(5)If an *Arbitrator* is, indeed, unable to perform the duties of office or if he/she fails to perform his/her duties within a reasonable period of time, he/she will resign by providing the parties with a written declaration of resignation or the parties will agree on his/her resignation.

Art. 9 Arbitrator Contract *(based on Art. 30 SLBau)*

(1)For arbitrations with an amount in dispute of less than EUR 100,000, the case will be decided by a sole arbitrator. For the other arbitrations the Arbitral Tribunal is composed of three Arbitrators. The parties may agree otherwise after the dispute arises.

(2)The single individual Arbitrator and the chair*person*[816] *shall have completed the study in Law.* Arbitrators should have special knowledge of construction technology, construction management,

[816] The SLBau mentions the "chairman". For gender respect, the author chooses to use the word "chairperson" throughout these rules, as more appropriate, encompassing men and women as possible chair of the tribunal.

construction law, *consumer law* and in extrajudicial dispute resolution.[817]

Art. 10 Initiation of the Arbitration Proceedings *(corresponds to Art. 31 SLBau)*

(1) The party wishing to initiate arbitration proceedings (claimant) shall notify the other party (respondent) thereof in writing.

(2) The arbitration proceedings commence on the day when the respondent in arbitration proceedings receives the notification on the initiation of the arbitration proceedings.

(3) This notification shall contain:

a) the names and addresses of the parties;
b) the matter in dispute (application and facts),
c) the information regarding the arbitration agreement;
d) the application for the resolution of the matter before an Arbitral Tribunal;
e) the name of the Arbitrator appointed by the in arbitration and the declaration of acceptance by this Arbitrator;
f) one or more proposals for an individual Arbitrator, if the parties have agreed on an Arbitral Tribunal consisting of one Arbitrator without having determined the person who should fulfil the role of the Arbitrator.

Art. 11 Appointment of a Three-Person Arbitral Tribunal *(based on Art. 32 SLBau)*

(1)Upon the opening of the arbitration proceedings, the claimant in arbitration calls upon the respondent in arbitration to also appoint one Arbitrator within a period of two weeks following receipt of the written submissions of initiation and to provide the claimant in arbitration with a written declaration that the proposed Arbitrator has accepted to fulfil the role of Arbitrator. The respondent in arbitration shall comply with this request even if he/she rejects the Arbitrator appointed by the claimant in arbitration.

[817] Rule change based on the findings of Chapter V, B, 1, b, iv.

(2)If the respondent in arbitration fails to make such appointment in due time, the claimant in arbitration may apply for the appointment of the Arbitrator by the *Institution* (appointment of a replacing Arbitrator). In addition to the information required under Art. 10, the application shall also contain the declaration that the respondent in arbitration is in default. The *Institution* shall provide the respondent in arbitration with the opportunity to respond to the application and the Arbitrator to be appointed, by specifying a grace period of one week. Following the end of this term, the *Institution* will immediately appoint the Arbitrator and will inform the persons involved in writing of his/her name and his/her declaration of acceptance.

(3)Following a hearing involving the parties, the Arbitrators will appoint a chair*person*. Such appointment shall be made within two weeks following the notification that the second Arbitrator has been appointed. The Arbitral Tribunal shall be deemed to be constituted after having provided the parties involved with a written declaration of acceptance.

(4)If the Arbitrators are unable to agree on the person of the chair*person*, they will immediately inform the parties and the *Institution* thereof. Any Arbitrator may request the appointment of the chair*person* by the *Institution* (appointment of a replacing arbitrator). Such a request must include the information as set out in Art. 10 and the names of the persons put forward to chair the Arbitral Tribunal. The Institution will immediately appoint the chair*person* and will notify the parties involved in writing of that person's name and his/her declaration of acceptance. The Arbitral Tribunal will thus be deemed to be constituted.

(5)If one of the Arbitrators or the chair*person* is prevented from exercising the office sections 1 to 4 will apply accordingly.

Art. 12 Appointment of a Single Individual Arbitrator *(corresponds to Art. 33 SLBau)*

(1) Upon opening of the arbitration proceedings, the claimant in arbitration will request that the respondent in arbitration select one of the proposed persons (Art. 10, sec. 3, item f) or to make a counterproposal within a period of two weeks following receipt of the written submissions. The claimant in arbitration shall make a statement on the counterproposal within one week of receipt.

(2) If the parties have agreed on a single individual Arbitrator, either party may inform this person in writing of his/her appointment. The Arbitral Tribunal shall be deemed to be constituted when the individual Arbitrator has informed the parties in writing of his/her acceptance of the role.

(3) If one of the parties fails to make a pronouncement in due time or if the parties fail to agree on a proposal, an application shall be filed with *Institution* for a legally binding appointment of the single individual arbitrator (appointment of a replacing Arbitrator). Otherwise, Art. 11, sec. 2 shall apply.

Art. 13 Joinder[818]

(1) Where there are multiple claimants or multiple respondents, all the acts for the nomination of arbitrators must be done jointly by the multiple claimants or the multiple respondents.

(2) Where one or more third persons request to participate in arbitral proceedings already pending under these rules, the tribunal shall admit the request, if the party to be joint accepts the joinder and, if the claims of the third person and of the party share an essentially identical factual or legal basis or if they share the same rights or obligations concerning the case, except where other circumstances speak against the joinder. In this case, the tribunal may deny the joinder by a justified act.

[818] Rule as suggested in Chapter VI A, 1, b, v.

Art. 14 Rejection of Arbitrators *(corresponds to Art. 34 SLBau)*

(1) An Arbitrator is obliged to reject his/her appointment if there are doubts as to his/her impartiality or independence. The same applies if an Arbitrator is unable to immediately exercise his/her role. Otherwise, Art. 8, sec. 1 applies.

(2) An Arbitrator may be rejected if circumstances exist which might raise justified doubts as to his/her impartiality or independence (Art. 8, sec. 2), or if he/she fails to comply with the preconditions agreed upon by the parties.

(3) If one of the parties is aware of grounds for rejection, it shall make the Arbitral Tribunal aware of its rejection of the Arbitrator within two weeks, with a statement outlining the reasons for rejection.

(4) If the parties fail to agree on the dismissal of an Arbitrator or if an Arbitrator does not resign from his/her role, the Arbitral Tribunal will decide upon the rejection in writing by way of a justified resolution; in the case of a three-person Arbitral Tribunal, this shall be done without the involvement of the rejected person.

(5) If the application for rejection remains unsuccessful, the rejecting party may challenge the decision before a competent court within one week following receipt of the decision. The Arbitral Tribunal, including the rejected Arbitrator, may continue with the arbitration proceedings and pronounce an arbitrator's award until such time as a decision is reached by the court.

Art. 15 Principles of the Proceedings *(corresponds to Art. 35 SLBau)*

(1) Following the constitution of the Arbitral Tribunal, the claimant in arbitration shall deliver written submissions to all parties involved within a period to be specified by the Arbitral Tribunal and including the number of copies of such submissions as specified by such tribunal and it shall present evidence of deliverance to the Arbitral Tribunal.

(2) The chair*person* will determine the timeframes, specify the deadlines (Art. 5) and decide upon other procedural questions.

He/she will prepare the summons and request the advances on costs. A period of two weeks must be given between the receipt of the summons and the date for the first hearing.

(3) Following delivery of written submissions, the chair*person* will give the respondent in arbitration a period of time to respond which is reasonable for proceedings of this nature.

(4) The dispute should be resolved in one session when possible. The chair*person* will take all the steps required in this regard. Therefore, he/she may, in particular

- request that the parties appear in person;
- order the parties to have available during the session any witness, experts and other sources of evidence to which the parties referred;
- order that the session will include an inspection of the site.

The chair*person* may provide preliminary legal information and pass resolutions on evidence in preparation of the oral proceedings.

Art. 16 Minutes *(corresponds to Art. 36 SLBau)*

Minutes of the oral proceedings shall be kept and shall be signed by the chairperson. The documentation of testimonies made by witnesses, experts and of the hearing of the parties as well as of the results of a visual inspection shall be subject to the Arbitrator's discretion.

Art. 17 Extension, Amendment, Withdrawal of the Action *(corresponds to Art. 37 SLBau)*

The claimant in arbitration may extend or supplement the action during the proceedings in accordance with the scope of the arbitration agreement (Art. 264 of the ZPO). An amendment of the action is admissible if the respondent in arbitration approves and if the Arbitral Tribunal deems it relevant.

Art. 18 Counterclaim, Offsetting *(corresponds to Art. 38 SLBau)*

(1) The respondent in arbitration may file a counterclaim, if the matter in dispute is subject to the Arbitration Agreement. If this fact is in

dispute, the Arbitral Tribunal shall decide. The provisions regarding the action apply accordingly to the counterclaim.

(2) Subject to the parties' approval, the Arbitral Tribunal may also decide on a claim regarding offsetting to which the Arbitration Agreement does not apply.

Art. 19 Interim Measures *(corresponds to Art. 39 SLBau)*

At the request of one of the parties, the Arbitral Tribunal may order provisional and safeguarding measures, which it deems necessary with regard to the matter in dispute.

Art. 20 Form, Contents and Effect of the Arbitrators' Award *(corresponds to Art. 40 SLBau)*

(1) The Arbitrators' Award shall be made in writing, be substantiated and signed by the Arbitral Tribunal.

(2) The day on which the decision regarding the Arbitrators' Award was passed and the place where the arbitration proceedings took place shall be specified in the Award. The decisions regarding the Arbitrators' Award shall be deemed to be passed at this date and place.

(3) An Arbitrators' Award signed by the Arbitrators shall be delivered to all of the parties.

Art. 21 Settlement *(corresponds to Art. 41 SLBau)*

If the parties have agreed on a settlement, the Arbitral Tribunal shall bring the proceedings to a close. At the parties' request, it will document the settlement in form of an Arbitrators' Award with an agreed wording.

Art. 22 Publicity of awards[819]

(1)All arbitral awards may be published in its entirety. The institution may also publish statistical data, for which information about the arbitral proceedings are needed.

[819] Rule as suggested in Chapter V, B, 1, a, iii, iii.4.

(2)*In case the parties have agreed or the Arbitral Tribunal/Sole Arbitrator has decided to keep the proceedings confidential according to numbers 2 or 3 above, the final arbitral award will be published without any references to the parties´ names.*[820]

Art. 23 Conclusion of the Arbitration Proceedings *(corresponds to Art. 42 SLBau)*

(1) The arbitration proceedings will be concluded with the final Arbitrators' Award or with a resolution of the Arbitral Tribunal.

(2) The jurisdiction of the Arbitral Tribunal will end upon the conclusion of the arbitration proceedings.

Art. 24 Retention of Files *(corresponds to Art. 43 SLBau)*

Files may be returned to the persons involved following the conclusion of the proceedings.

Art. 25 Intervention of Third Parties *(corresponds to Art. 44 SLBau)*

(1)If the parties have agreed on the opportunity of third parties to intervene, they may intervene, at any time during the proceedings, to support one of the parties if they have a legitimate interest in a beneficial outcome of the proceedings from the viewpoint of this party.

(2)Such intervention will be undertaken by the submission of a document with the Arbitral Tribunal. This document shall include:

a) the name of the parties and of the subject matter under arbitration;

b) a specification as to the nature of the interest of the intervening party;

c) the declaration of intervention.

[820] See Hauptmann, H. (2004), 'Schiedsvereinbarungen in "Ungleichgewichtslagen" -am Beispiel des Sports-', *SchiedsVZ*, pp. 175–187.

d) The chair*person* will specify to which persons and in what number of copies the document must be delivered against receipt.

e) The intervening party must accept the proceedings according to the stage they are at, at the time of intervention. Insofar as his/her representations do not contradict the party to be supported, the intervening party is authorized to make representations and to take an active role in the proceedings.

f) In the case of a dispute, the Arbitral Tribunal will decide on the admissibility of the intervention.

Art. 26 Third Party Notice *(corresponds to Art. 45 SLBau)*

(1) If one of the parties has agreed on the *Model Arbitration Rules for B2C Construction Disputes* with third parties, it is entitled to notify them of the dispute at any time during the proceedings, if it believes to be able to assert a claim against them in the case that the proceedings end unfavorably for it or if it asserts the claim on behalf of a third party.

(2) Such third-party notice is performed by filing a document with the Arbitral Tribunal stating the reason for the third-party notice, the Arbitral Tribunal and the status of the arbitration. The party shall deliver this document to the other party, the recipient of the third-party notice and any other intervening parties either directly involved or indirectly in an assisting role for a directly involved party. The third-party notice takes effect upon delivery to the recipient of the third-party notice.

(3) If the recipient of the third-party notice enters the arbitration, Art. 25 shall apply accordingly to him/her. If the recipient of the third-party notice has agreed upon the *Model Arbitration Rules for B2C Construction Disputes* with another party, this recipient may also notify it of the dispute.

(4) In the case that the admissibility of the third-party notice is in dispute, the Arbitral Tribunal shall make a decision in this regard.

Art. 27 Effect of Intervention and Third-Party Notice *(corresponds to Art. 46 SLBau)*

In the cases described in Articles 25 and 26, the actual and legal determinations made by the Arbitral Tribunal which favor the party are legally binding for the party intervening and the recipient of the third-party notice in their relation to the party, insofar as the Arbitration Award is based on them. The same applies to the determinations actually made if the proceedings will not be concluded with an Arbitrators' Award. This effect will apply to the recipient of the third party notice even if he/she did not intervene in the proceedings. Sentences 1 and 2 hereof do not apply if the determinations were made prior to the intervention or the third-party notice or if the third party was prevented from making representations or performing actions without the consent of insurance companies if such third party is obliged to them.

Art. 28 Costs of the Arbitration Proceedings *(based on Art. 47 SLBau)*

(1)The Arbitral Tribunal will decide on the costs of the5 arbitration proceedings and their allocation to the parties by way of an Arbitrators' Award.

(2) The costs and the Arbitrators' fee is determined according to the calculation rates of the Arbitral Institution.[821]

B. Outlines for an encouraging consumer arbitration system

The wide use of the Model Arbitration Rules for B2C Construction Disputes above suggested depend on the development of a consumer arbitration system that encourages companies and consumers to arbitrate, giving both parties incentives and instruments to inform themselves about consumer arbitration and to execute the proceedings. Hence, outlines for an encouraging adhering system for

[821] Arbitral institutions adhering to rules shall be free to use their own costs and fees regulations and are encouraged to develop especial arbitration fees for consumers.

construction companies (1) and for arbitral institutions (2) will be presented, to motivate the development of B2C construction arbitration and to set sign that fair consumer arbitration is achievable.

1. Adhering system for construction companies

To start implementing the arbitration rules and make them attractive to construction companies, a promising idea is the creation of an adhering system, by which the company will agree to arbitrate their B2C disputes using the Model Arbitration Rules for B2C Construction Disputes. Thereby, they will be advertising their positive attitude towards the consumers and their procedural needs.

a) The example of the Consumer Arbitration System in Spain

Spain has designed a so-called *Sistema Arbitral de Consumo* or Consumer Arbitration System. The system is regulated by the Royal Decree 231/2008[822] and aims at resolving B2C disputes through arbitration when the consumer is in the active pole of the demand. Diverse arbitration bodies were created by the government to receive and process the consumer´s claims. Arbitral tribunals are generally composed of a representative of the state, a member of a trade union and a member of a consumer protection body.[823] The system has been a success and provides both the consumer and the trader with a fast and adequate solution to B2C disputes.[824]

The Spanish *Sistema Arbitral de Consumo* is a successful example of adhering system, that can be followed in the field of B2C

[822] Spain (2008), Royal Decree 231/2008 - Sistema Arbitral de Consumo
[823] Gouvêa Neto, Flávio de Freitas, Consultor Jurídico (2015), *Arbitragem de consumo como a da Espanha aceleraria resolução de demandas*, available at: www.conjur.com.br/2015-nov-14/flavio-gouvea-arbitragem-consumo-aceleraria-resolucao-demandas. 10.02.2016.
[824] Alba, I. (2013), 'Arbitraje y mediación de consumo: a propósito de la ley 16/2011, de 24 de junio, de contratos de crédito al consumo', *Boletín del Ministerio de Justicia*, No. 2160

construction disputes. Therein, companies make a public declaration attesting that they adhere to the consumer arbitration system. After that, all their future disputes with a consumer will be subject to arbitration under the Spanish consumer arbitration law.

Additionally, Spain has developed a special seal to honor those adhering companies.[825] As soon as they join the system, they have the right to put that symbol of adherence in their commercial place, signalizing for all customers, that they joined the system, as a positive characteristic of their business. Hence, by becoming part of the Spanish consumer arbitration system, the companies not only benefit from the advantages of arbitration, they also advertise their business as being consumer friendly and keen on resolving any possible problems in due time and in a consumer-friendly environment. The seal helps to advertise the traders´ good reputation in the market. Since good examples should be followed, the proposal of an adhering system for construction companies seems to be a great incentive for developers to use the consumer-friendly arbitration rules in their contract also in Brazil or Germany.

b) Suggestion for a private B2C construction arbitration adhering system

To make a similar adhering system in Brazil or Germany one has to consider a major difference between the Spanish consumer arbitration system and how consumer arbitration is perceived in the countries in study. Brazil and Germany recognize arbitration as a private method of dispute resolution, *i.e.* not ran by the state.[826] In Spain, on the contrary, the initiative to establish a consumer arbitration system comes from the state and is regulated by law and even the

[825] Annex 1 of Spain (2008), Royal Decree 231/2008 - Sistema Arbitral de Consumo
[826] Arbitration is perceived as a private institutional bypass, not a public one. See Chapter III, C, 2, e.

arbitration boards are administered by the State.[827] Hence, in Brazil and Germany a successful adhering system for construction disputes should still respect the private nature of arbitration.

Instead of creating an adhering system by the government through a law, as in Spain, the system can be created directly by private entities, such as the consumer bodies (*Verbraucherverbände* and *PROCONs*). These institutions may analyze the Model Arbitration Rules for B2C Construction Disputes checking for any provision that may not suit the consumer. Likewise, representatives of the construction companies, such as trade unions (*Deutsche Gesellschaft für Baurecht, Deutscher Beton- und Bautechnik-Verein e. V.,* Sindicato da Indústria da Construção - *SINDUSCON)* may also approve the Rules. After approval of the Rules by both sides, the consumer bodies may advertise the Model Arbitration Rules for B2C Construction Disputes and companies can make a declaration of adherence, like the one made by the Spanish traders, in which they make the commitment to use resolve B2C conflicts using those rules.

A list with the names of all companies who adhered to the Model Arbitration Rules for B2C Construction Disputes must be made available in the institutions´ websites, making it easier for consumers to know which the consumer-friendly companies are. This list pays a favor to both parties. The consumer will have access to important information about the consumer-friendly attitude of the company even before deciding with which one to contract. The companies will have one more advertisement platform in their favor. This system will make the incorporation of consumer-friendly rules attractive for the construction companies and incentive the development of fair consumer arbitration practices.

Importantly, the declaration of adherence made in the trade union or the consumer protection body must entail a public

[827] Alba, I. (2013), 'Arbitraje y mediación de consumo: a propósito de la ley 16/2011, de 24 de junio, de contratos de crédito al consumo', *Boletín del Ministerio de Justicia*, No. 2160

commitment to arbitrate all B2C construction disputes under the Model Rules, with *erga omnes* effect. Therewith, the consumer who contracted with an adhering company and finds that, in their contract the arbitration clause mentions another set of rules or does not mention any set of rules, is able to request the courts to declare that the Model Rules are applicable, since the company has made the adhering declaration. Adhesion can be withdrawn by the company at any moment but will be enforceable for all contracts signed during the force of the adhesion.

2. Adhering system for institutions

For the system to work, companies and consumers must be able to count on arbitral institutions to administer their case, if they do not want to use *ad hoc* arbitration. Unlike in Spain, neither Brazil nor Germany have public arbitral institutions, so institutions who are available to administer consumer cases should be able to adhere to the Model Arbitration Rules for B2C Construction Disputes as well. By adhering, they will agree to administer B2C construction disputes under those rules, instead of using their own arbitration rules. An adhering system will avoid that new institutions or bodies specialized in arbitration must be created specifically to use the rules and arbitrate B2C construction disputes. The Rules can and should be used by already existing institutions.

Two types of adherence for the institutions can be proposed, the partial adherence and the complete adherence. Institutions that would prefer to keep their procedural identity may make a partial adherence and incorporate only the provisions with great consumer relevance. They would be, according to the results of this work, the ones regarding: the language of the proceedings, the seat and the venue of arbitration, the applicable substantive law, the number of arbitrators and the nomination method, the possibility of joinder, confidentiality

and the publicity of awards.[828] On other provisions, such as replacement of arbitrators, deadlines for submitting memoranda, etc., the rules of the existing institution may govern the arbitration, as long as they do not conflict with the Model Rules. A partial adherence may be subject of approval by the consumer bodies and the construction trade unions, who will scrutinize the consolidation of the partially modified rules. The second possibility is the adherence of the Model Rules in its entirety.

With an adhering system, parties will slowly get acquainted with the rules as they become popular and hopefully make good experience with it. The results will be positive for all parties involved. Consumers will start to be familiar with this ADR option to solve their construction dilemmas faster and in a good consumer friendly environment. Developers will have the chance to arbitrate B2C disputes, since arbitration has already proven to be one of the favorite dispute resolution methods for construction companies. Moreover, the validity of their clause will be assured by the fact that those rules do not contain provisions, which could be considered as unfair for the consumer. Lastly, the institutions will gain a new clientele. It is not yet common that consumer disputes are arbitrated in Brazil and Germany. The times, however, show, that the future tends to widen the possibilities of arbitration for the consumer instead of narrowing it.[829] Institutions, who act first and pioneer the new ADR possibilities will certainly benefit from it at least in midterm.

In sum, the adhering system for companies and institutions represents the beginning of a consumer-friendly arbitration service, that would not require from the law, the institutions or bodies to develop extra rules. The system would enable institutions to start

[828] These are the relevant issues in accordance with this study. If a committee developing model rules for B2C construction disputes find other issues worth listing as mandatory for institutional adherence, they may do so to widen the consumer protection and guide the institution´s partial adherence.

[829] Mäsch, G. (2005), 'Schiedsvereinbarungen mit Verbrauchern' in: Schlosser, P., Bachmann, B. (eds.), *Grenzüberschreitungen: Beiträge zum Internationalen Verfahrensrecht und zur Schiedsgerichtsbarkeit ; Festschrift für Peter Schlosser zum 70. Geburtstag,* Tübingen, Mohr Siebeck, p. 543.

arbitrating B2C construction disputes straight away, as soon as they find that the Rules fit in their work philosophy.

C. Chapter´s conclusion

The former chapters of this work have engaged on protecting the consumer *from* and *in* arbitration. However, more effective and appropriate than protecting the consumer from possible problems would be to develop arbitration specifically designed for B2C construction disputes.[830]

For that purpose, it is important to draft arbitration rules that fit the necessities of the consumer and at the same time comply with the interests of the construction business, offering advantages for both parties. From the consumer´s side, the verification of needs was done in the last chapter and also through a litigation *vs*. arbitration comparison, showing which advantages do the courts offer, that need to be implemented in arbitration with a consumer party. From the developer´s point of view, arbitration rules specifically designed for construction disputes were studied. As a starting point for the new arbitration rules for B2C construction disputes, the use of the existent SLBau, applying to it the results of the examination of unfair provisions for consumers and the advantages that consumers have in litigation is suggested.

Furthermore, the creation of an adhering system for consumer disputes, which can attract companies to use the tailor-made arbitration rules is reccomendable. This system can be implemented using an adhering technique, similar to the one used in Spain, where companies publicly declare their adherence to the arbitration rules,

[830] About the perspectives for consumer arbitraton in Brazil, see Andrighi, F. N. (2016), 'Perspectivas para aprimoramento do direito do consumidor' in: Miragem, B., Marques, C. L., Oliveira, A. F. de (eds.), *25 anos do Código de Defesa do Consumidor: Trajetória e perspectivas,* São Paulo, Tomson Reuters Revista dos Tribunais, pp. 639–653.

advertising their consumer-friendly approach in procedural matters. Institutions may also adhere to the rules to offer to administer arbitration under those rules.

In sum, this chapter shows that consumer protection should be the incentive for the development of a consumer arbitration with realistic chances of complying with the consumer´s and the developers´ expectations, creating a favorable environment for the out-of-court resolution of property development cases.

VII – Summary of work results

Chapters I, II and III:

In the last years, the access to justice path for consumers has been widened. The law has acknowledged the benefits of dispute resolution outside of courts and ADR has become a strong tendency to solve consumer disputes. This tendency is concretized by the European Directive 2013/11 on Consumer ADR and the German implementation of the Directive embodied in the *Verbraucherstreitbeilegungsgesetz*. In Brazil, consumer bodies offer conciliation meetings to help consumers resolve their disputes fast outside of the courts with great success.

Although the legal community has been keen on accepting and developing consumer protection in ADR and especial consumer ADR systems, it still resists arbitration. Neither the European Directive nor the German law foresees arbitration as one of the ADR methods to be used in consumer disputes. Hence, the field of consumer arbitration has still a lot of potential for improvement. Arbitration is not yet a trendy dispute resolution method for consumer disputes, neither in Germany nor in Brazil. This can be justified by the fact that many consider arbitration as not adequate for disputes of small value, which are the majority of disputes concerning the consumer.

However, property development disputes do not fit the definition of small claim and still urge for the advantages of arbitration, such as the speedy proceedings and the specialization of the decision makers. Thus, property development disputes represent a niche of consumer disputes, which suits arbitration. For this reason, it is important to study the current legal scenario for consumers to arbitrate property development disputes and develop a consumer-friendly environment for B2C construction arbitration.

Chapter IV:

Property development disputes are in principal arbitrable under both the German and the Brazilian law, since they verse about patrimonial rights. Further, both legislations do not hinder the consumer from arbitrating their matters. There is no objection to the subjective arbitrability of consumers. The only filter imposed by the law for the arbitration of property development disputes lies in the formal validity of arbitration clauses inside the standard contracts. Considering that the majority of property development contracts are laid down in standard contracts, the law wants to make sure that the arbitration clause is visible for the consumer and do not disappear amongst the other clauses. Hence, in Brazil the arbitration clause must be typed in bold letter or in a separate document and must be especially signed by the consumer. Also, in Germany, the clause must either be in a separate document or somehow stand out in the contract. It also needs a special signature of the parties. With these formal requirements, the law tries to protect the consumer at the moment they sign the standard contract, but it does not contemplate the post-dispute moment, which is crucial for the consumer. Only when the dispute arises the consumer has real chances to influence the choice of a dispute resolution method for their case. At the signing moment the consumer cannot evaluate the adequacy of a possible future dispute to arbitration, more importantly, they are under pressure to sign the contract and will rarely be in the position of hesitating because of the dispute resolution clause. Thus, it is important to give the consumer the chance to decide about the method of resolving their property development dispute only after the dispute arises, which is when they are on the position to make such an important decision.

The legal solution presented by this work to give the consumers who want to arbitrate the chance to decide so and at the same time protect the consumers who do not want to arbitrate, giving them the chance to deviate from a valid arbitration clause, is the non-binding arbitration clause for consumers. The implementation of the non-

binding rule for consumerist disputes arising out of a standard contract would be a smart protective tool for consumers, for it would only bind the consumers to a valid arbitration clause inside the standard contract, if the consumer decides to arbitrate the dispute. The decision to use the clause will be taken after the dispute arises. At this moment, the consumer is able to evaluate the advantages and disadvantages of arbitration in view of the concrete case. Consumers, who need a rapid solution to their dispute, might prefer arbitration. Consumers who compare the costs of arbitration with those of the courts and conclude that courts would be cheaper, might prefer court proceedings despite of other disadvantages they may have. The non-binding arbitration clause would also contribute to the information of the consumer, who would be confronted with the possibility of taking the dispute to arbitration when the dispute arises and would ask for advice by their legal counselor. They would then explain to the consumer the pros and cons of arbitration in comparison to courts. Even if the consumer does not choose arbitration, they will know that it exists and learn about it to make their decision. Therefore, the non-binding clause is the solution model that best fits the objectives of consumer law both in Germany and in Brazil; it protects the consumer complying with flagship principles of consumer law and compensating the structural imbalance caused in the B2C relationship by a standard contract.

Chapter V:

Further, it must be remembered that not only the arbitration clause, its validity or binding effect, must be regarded to develop consumer protection in arbitration. The structural imbalance caused by the unilateral draft of the standard contract plays an important role in the definition of the procedural rules inside arbitration. The arbitration clause brings more than only the choice to arbitrate; it also brings the characteristics of this future possible arbitration. This means that the drafter of the standard contract has the chance to

determine the seat of arbitration, the language of the proceedings, the applicable law and other features, while the consumer merely signs the clause. Therefore, it is imperative for the law to protect consumers from unfair arbitration provisions inside the arbitration clause.

The current tool available for courts to verify the aspects of arbitration displayed inside the clause is the content control. This dissertation displays a list of indications of unfairness in B2C arbitration clauses that can be used as a compass for consumers and courts to identify clauses that represent an unreasonable disadvantage for the consumer. It also pleads that institutional arbitration rules should be subject to content control under the law, since they can be considered as general terms and conditions incorporated to the contract. Like the arbitration clause, they include rules as to how the arbitration proceedings will flow and what to do if the parties have not agreed upon a certain aspect of arbitration; therefore, they also need scrutiny to check if they contain any harmful provisions for the consumer.

Chapter VI:

Anyhow, the tendency to develop consumer ADR and therein, consumer arbitration cannot be overseen by the legal community. Even though consumer arbitration is not yet widely used, the perspective that arbitration can be a suitable dispute resolution method for construction disputes should serve as an incentive to develop especial arbitration rules and an especial consumerist arbitration system for those disputes.

Hence, the starting point for developing tailor-made rules for B2C property development disputes is to combine the needs of the consumer, explored by researching the suitable arbitration provisions and the beneficial aspects of litigation, with arbitration rules especially designed for B2B construction disputes, like the SOBau

and the SLBau. The development of a B2C arbitration system shall reflect the successful experiences of a country that has already developed B2C arbitration, like Spain, using an adhering mechanism, which is quite attractive for companies and institutions as well as advantageous for consumers and developers.

Overall conclusion:

All things considered, access to justice for consumers, through either arbitration or courts, only occurs if on ponders the underprivileged position of the consumer in relation to the developer. The disparity of balance in the B2C legal relationship is substantial in standard property development contracts. First, because the bargaining position of the consumer in a standard contract is in most cases inexistent. Second, because a property development contract has a major importance for the consumer. It means the purchase of a dream, releasing the consumer from the rent and normally a safe investment of money. Hence, consumer protection is important to compensate this unbalanced relationship even in the procedural phase.

Yet, consumer protection should not be an end in itself. One should not detach consumer protection from the legal and economic reality. It is very important to protect the consumer only as long as they need protection, avoiding exaggerate state intervention into the consumer´s private autonomy. Protection of consumers must not mean to ban consumer arbitration, depriving them from the advantages of this dispute resolution method. One should not be afraid of the ADR tendencies in the consumerist field, on the contrary, the Law should enable appropriate arbitration for consumers, especially if it is known that some kinds of disputes, like property development cases, can profit from them.

The core of the consumer protection is the principle of equality. It means to treat the equals equally and the unequals unequally, in the

measure of their inequality. In this sense, the law must treat the consumer and the company unequally in arbitration, since they have different experience, expertise, knowledge, information and bargaining position. This disadvantageous position of the consumer can and should be balanced by creating a filter to arbitration clauses that considers the intention of the consumer to arbitrate, after the dispute arises and by creating an especial system for B2C construction arbitration, with tailor-made rules.

Therefore, the development of practical arbitration solutions for consumers with property development disputes represents a great advance in both consumer law and arbitration law, for it gives the consumer one more way to access justice.

In essence, the legal community, the traders, the consumers and even the states all over the world have been in the process of acknowledging the benefits of ADR for consumer disputes, thereunder also arbitration. Eventually Brazil and Germany will also probably face the challenge of offering adequate arbitration for consumer disputes. This thesis hopes to contribute for a fruitful debate about the possibilities to make it happen. May the ADR wave in consumer law be called a tendency or even a trend, it is not time to swim against the current, it is time to make this new path viable.

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