



Revista Brasileira de
Alternative Dispute Resolution

RBADR

01

Ano 1 · Número 1
Jan./Jun. 2019

Publicação Semestral
ISSN: 2596-3201

Presidente

Gustavo da Rocha Schmidt

Editor-Chefe

Daniel Brantes Ferreira



CBMA | CENTRO BRASILEIRO DE
MEDIÇÃO E ARBITRAGEM

FORUM



Consumer protection and arbitration in mass consumption adhesion contracts. A comparative look between Brazil and U.S.

Jair Gevaerd

Attorney at Law and Senior Partner at Gevaerd & Associates (1985/2019). Arbitrator. Mediator with experience in the Los Angeles County Courts (Alhambra, Downey, Inglewood and Van Nuys). Professor of Corporate Law, International Law and Conflict of Laws (Pontifical Catholic University of Parana – PUC/PR – 1985/2019). State Attorney at the Parana State General Attorney’s Chamber (1986/2019). Specialist in Development Law (International Development Law Organization – IDLO – Rome – Italy – 1986), Master and Doctor (Ph.D.) in Corporate Law (Parana State Federal University – UFPR – 1995 and 2000). Master of Laws (LL.M) in Dispute Resolution, concentration in arbitration (Strauss Institute for Dispute Resolution/Pepperdine University – 2017).

Abstract: Based upon (i) a comparative reading of the consumer protection legal system in Brazil and in the United States, regarding mass consumption adhesion contracts, and (ii) the analysis of the most recent precedents of the American Supreme Court validating arbitration agreements in which consumers waive class actions, the article highlights the different role that arbitration plays in both institutional environments. The article also questions whether an uniformization of the consumer protection system referring mass consumption adhesion contracts would be (a) possible and/or (b) desirable, in view of the ever-growing globalization and the economic consequences of uneven domestic legal regimes, mainly in highly monopolized industries as telecommunication, motor vehicle manufacturing/distribution, insurance, financial services and products, processed food, among others.

Keywords: Consumer Protection in Brazil and in the U.S. Mass Consumption Adhesion Contracts x Class Actions x Arbitration.

Summary: **1** Introduction – **2** The Main Features of the Brazilian Consumer Protection System – **3** Arbitration and Consumer Protection in Brazil – **4** A Brief and Contrastive Overview of the Consumer Protection Framework and Arbitration in Mass Consumption Contracts in the U.S. – **5** Conclusion

1 Introduction

Despite globalization, mass consumption consumer contracts, on one hand, and arbitration, on other, have a different legal treatment in Brazil and in the U.S. Aiming a comparative understanding of these discrepancies, this paper highlights the essential distinctions between both consumer protection systems and the contrasting role of arbitration in their realm.

Furthermore, it addresses a practical underlying and imbalanced situation that affects hundreds of millions of consumers in both countries, as well as the interests of powerful globalized companies.

Indeed, contingently to how lenient or strict the consumer defense regimes are in each particular jurisdiction – and despite the fact that Brazil and U.S. markets are operated by the same oligopolist agents – costs, prices and profits in the telecommunication, motor vehicle, insurance, financial, processed food and other globalized markets tend to be significantly diverse. Considering that in 2012 alone 311 and 115 million estimate consumers,¹ respectively in the U.S. and in Brazil, bid daily for these commodities – and paid significantly different prices for the exact same wares – the economic impact of such legal regimens over the local and globalized markets is huge. Wouldn't this be enough for the dispute resolution community to craft a uniform legal regime compatible with both legal cultures and that could be, at the same time, fair and cost-effective?²

By discussing the legal mainstays that allow the Brazilian and the U.S. consumer protection systems to be so distinct and, therefore, so uneven in their impact over costs, prices and profits, this article ultimately aims to offer some fuel to air-up the combustion of feasible ideas in this direction.

2 The Main Features of the Brazilian Consumer Protection System

2.1 First, the Civil Law Affiliation

Brazil is a civil law country and this has a pivotal importance on how legal issues are identified, construed, and dealt within its domain. In the Roman-Germanic tradition,³

¹ Data retrieved from the U.S. Bureau of Labor Statistics Report, March 2014 and the Mckinsey & Company Report, June 2016 (<https://www.bls.gov/cex/csxann12.pdf> and <http://www.mckinsey.com/industries/consumer-packaged-goods/our-insights/meet-the-new-brazilian-consumer>, consulted online on April 19th, 2017).

² In recognition of this reality the United Nations Conference on Trade and Development – UNCTAD – published in 1985 and periodically revises the Guidelines for Consumer Protection, a repository of consecrated principles in which developed and developing countries might find inspiration to regulate occasionally predatory demeanors of economic agents in their globalized activity (http://unctad.org/en/PublicationsLibrary/ditccplmisc2016d1_en.pdf). Besides that, Brazil and U.S. has signed, in October 1999, an agreement “regarding cooperation between their competition authorities in the enforcement of their competition laws” (<https://www.ftc.gov/policy/cooperation-agreements/us-brazil-cooperation-agreement-regarding-cooperation-between-their>).

³ Besides a specific legal reasoning largely based upon a deductive model, four other characteristics distinguish the civil law tradition: (a) its Roman and Germanic roots; (b) its emphasis on codification; (c) its dependence on scientific and scholar developments (whereas the common law is usually portrayed as made by judges and practitioners, civil law is considered to be the domain of jurists and scholars), and (d) the centrality of civil and, most recently, constitutional law. See Mi Jian, “Da Tradição Continental e a sua Relação com os Sistemas do Continente (RPC), Taiwan e Macau, in “Administração, n.º 28, vol. VIM, 1995-2.º, 319-341”, consulted online on April 19th, 2017 at <http://docslide.com.br/documents/a-tradicao-continental-e-a-sua-relacao-com-os-sistemas-do-continente-rpc.html>, and Von Mehren, A., & Murray, P. (2007). *Law in the United States*. Cambridge: Cambridge University Press.

in spite of mild temperaments,⁴ courts do not create law but apply statutes that are, as a result, virtually the only primary legal source. Either in the form of comprehensive codes or through scattered legislation, general and abstract legal rules, principles and exceptions are drafted and enacted in a sophisticatedly systematized fashion, which is informed by a strict deductive top-down logic.

Accordingly, Brazil has the essential areas of general legal concern covered by a collection of codes comprising a *civil, civil procedure, criminal, criminal procedure, taxation, and consumer defense code*.⁵ These statutes grant extraordinary leeway for scholars to comment and elaborate on substantial and/or procedural aspects in what is altogether known as *legal doctrine*, which end up being affirmatively or negatively applied by courts and consolidating the so-called predominant jurisprudence. It is fair to say, consequently, that whereas the common law is a system dominated by the work of practitioners and judges – whose work in courts lead to legal precedents –, the civil law system, despite operated by the same stakeholders, is determinatively influenced by legal scholarship or *legal doctrine*.

2.2 Second, the Two-Tier Federative System of Courts and Statutes

Brazil, unlike the U.S. – where each of the 50 confederated states has their own, and fairly autonomous, court and legal systems – has its federal and state

⁴ Effective on March 18th, 2016, arts. 489, V, 926, 927 and 932, III, IV and V of the new Brazilian Civil Procedure Code (NCP) establishes that the summaries of dominant jurisprudence published by the Brazilian Supreme Court and all other Superior Federal and State Appellate Courts shall suffice, by themselves, to dismiss and/or set aside lawsuits and/or awards over repetitive pleadings. Based upon this new development – in fact an enlargement of the authoritative breadth and depth long recognized to the consecrated jurisprudence of the Brazilian appellate courts – some scholars argue that the Brazilian civil law is somehow conceding to the notion of precedent, as in vigor in the U.S. With all due respect, this not seem to be the case. The NCP, despite its advancement in comparison with the superseded procedural legislation, has adopted a streamlined mechanism to solve repetitive claims at their cradle and have not change, significantly, the role of judicial precedents as a secondary source of law. About the controversy see Donizetti, Elpídio. A força dos precedentes no Novo Código de Processo Civil. Consulted online on April 19th, 2017 at <https://elpidiodonizetti.jusbrasil.com.br/artigos/155178268/a-forca-dos-precedentes-do-novo-codigo-de-processo-civil>, Lourenço, Haroldo. Precedente judicial como fonte do Direito: algumas considerações sob a ótica do novo CPC. Consulted online on April 19th, 2017 at <http://www.temasatuaisprocessocivil.com.br/edicoes-antiores/53-v1-n-6-dezembro-de-2011-/166-precedente-judicial-como-fonte-do-direito-algumas-consideracoes-sob-a-otica-do-novo-cpc>, and Marinoni, Luiz Guilherme. O precedente na dimensão da igualdade. Consulted online on April 19th, 2017 at <http://marinoni.adv.br/artigos.php#>.

⁵ The inspiration for that comes from the *Corpus Iuris Civile* that comprised four books: “(1) Codex Constitutionum, (2) Digesta, or Pandectae, (3) Institutiones, and (4) Novellae Constitutiones Post Codicem” (see Encyclopaedia Britannica, consulted online on April 19th, 2017 at <https://www.britannica.com/topic/Code-of-Justinian>) and from the Napoleonic Codes that encompassed (i) a civil code (1804), (ii) a civil procedure code (1806), (iii) a commercial code (1807), (iv) a criminal (penal) code, and (v) a criminal procedure code. See Christian Chêne “História da codificação no Direito francês – Conferência proferida na Faculdade de Direito da Universidade do Estado do Rio de Janeiro 10 de novembro de 1999 –. Revista Trimestral de Direito Civil, Ano I, Vol. 2, Abril/Junho 2000, p. 139”. Consulted online on April 19th, 2017 at <http://www.direitocontemporaneo.com/wp-content/uploads/2014/02/CHENE-Codificacao-do-Direito-Frances.pdf>.

levels of courts and statutes functioning according to a unified set of substantial, procedural and administrative principles, rules and regulations. This twofold structure is set by the federal constitution and interweaved by a complex net of codes, statutes and regulations.

Furthermore, by the virtuosity of a long existing and ingenious system of allocation of complementary competences, substantial and procedural conflicts and disconformities between the federal and state entities are eliminated at the outset by the application of a virtuous set of strict logical principles that, by themselves, break the system free of conflicts. This grants uniformity for the legal treatment of virtually all areas of concern, including arbitration and consumer protection. Just as an example, and as federal and state jurisdictions fundamentally apply the same legislation – but in different settings of cognizance, under different premises and in face of persons and entities acting in different capacities –, there is no *preemption* of federal law in favor of arbitration. Conflicts of law and jurisdiction, therefore, are practically inexistent or, when existing, end up being logically solved in the cradle.

In the legislative and administrative realms, an effective system of allocation of competence works ingeniously and, as a rule, leaves to the federal instance the more general tier of regulation and administration while commending to states and municipalities the successive and more peculiar levels of concern (in what might be applicable according to a residual criteria).

2.3 Third, the Prevalence of a Top-Down Legal and Deductive Legal Reasoning and The Constitutional Seat of Substantial and Procedural Legal Regimes in the Brazilian Civil Law

In the Brazilian civil law system, legal issues are not discussed, determined or adjudicated from a bottom-up approach or based, from the upfront, upon the concrete facts of the case, as it happens in the U.S.

Conversely, and in line with the general configuration of the statutory system, every legal argument in court begins with a top-down, deductive and quite systematized discussion over the set of rules and legal principles that, according to statutory law, shall apply to the facts. This logic format is usually defined as *subsumption*. Lastly, court decisions, as interpretative directives, are usually added to the arguments, but not as mandatory and binding precedents. *Stare decises*, case law and case system are concepts that do not apply to the Brazilian legal system, but with a remote resemblance to their correspondents in the common law realm.

In many areas of vital importance, as consumer protection for instance, the deductive argumentative series – either in court, arbitration or academic realm –

begin with substantial principles set forth by the constitution that, in the civil law setting, plays a crucial role in the establishment of substantial legal mainstays that in a common law system are conversely covered by ordinary statutory or case derived law.

In essence, the legal regime trumping over virtually all fields of interest and its overarching principles are set by a hierarchized set of sources that descends from the constitutional level all the way down to administrative regulations. For instance, all regulatory needs over consumer protection, arbitration, mass adhesion contracts and any other legal institute are provided, at full extent, by a coordinated net of substantial and procedural statutory sources that are interweaved by a deductive and highly methodized chain of logical derivations. Courts exert, therefore, a declaratory and highly intellectual activity. Their job is to apply to the context of cases the legal reasoning ideally, abstractly and anticipatedly established by the statutes, under the authority of the overarching principles of the constitution.

Consequently, whereas in the U.S. courts *create* decisions from the scratch and through a factual, objective and inductive bottom-up logic – ultimately setting a binding precedent that is generated by the facts of the case – in Brazil, awards are intellectually built through a deductive and top-down logic that departs from the constitutional paramount and ends up in the declaration of the rule applicable to given conflict.

To understand the supremacy of the programmatic constitutional principles that are at the very top of the consumer protection system and warrant the consistency of all other statutory tiers of regulation, it is necessary to consider some historical, political and cultural differences between the U.S. and Brazil.

Historically, and with very little significant and localized exceptions, no revolution preceded the independence of Brazil. Contrary to what happened with the movement headed by the American colonies in the U.S., there were no movement of colonies and no political frictions. A friendly arrangement between members of the same Portuguese real family gave birth to Brazil as a nation, in 1822.⁶

Therefore, since its inception and as a legal and political instrument, the Brazilian constitution has not been conceived or enacted to warrant the power balance between competing stakeholders or to conciliate clashing stakes between, for instance, colonies that aspired a fair degree of independence and a union that, by its turn, envisioned primacy and control, as it originally happened in the U.S.

On the contrary. Since the political power in Brazil was usually exerted as a block by the prevailing “elites”, that eliminated by brute force, overt oppression and/or economic subjugation, every form of resistance, the constitution traditionally

⁶ See <http://www.historiaillustrada.com.br/2015/09/o-mito-da-independencia-do-brasil.html>.

became a vehicle to subject the destinies of the nation to the core interests of those in power. As a result, and even though formally encompassing the basic contents common to every constitution influenced by the French enlightenment movement⁷ (a bill of rights, a declaration of individual warranties and the structure of state and its branches), the appealing economic and social differences prevailing since ever in Brazil – as well as the predominant logic and deductive profile of the civil law tradition – instigated the instrumentalization of the constitutional space to nominally warrant the application of particular interests.

Regardless the totally different context, but due to this historical restraint, the 1988 Brazilian constitution followed this same pathway. As a means of perpetuating the achievements of a society that struggled hard to overcome almost 25 years of brutal dictatorship, it laid down the political-social structure of the Brazilian society by proclaiming the prevalence of fundamental rights – ranging from the consumer protection⁸ to health, social security, education, healthy environment, and an extensive list of other concerns and subjects – through an omni-comprehensive chain of intertwined substantial and procedural instruments, according to what some scholars define as *modern constitutionalism*.⁹ In this constitutional context, unrelinquishable class actions, for instance, became one of the comprehensive vehicles through which many fundamental rights were secured, in quite an unparallel and stiff format, as it is commented below.

⁷ “Enlightenment, French siècle des Lumières (literally “century of the Enlightened”), German Aufklärung, a European intellectual movement of the 17th and 18th centuries in which ideas concerning God, reason, nature, and humanity were synthesized into a worldview that gained wide assent in the West and that instigated revolutionary developments in art, philosophy, and politics. Central to Enlightenment thought were the use and celebration of reason, the power by which humans understand the universe and improve their own condition. The goals of rational humanity were considered to be knowledge, freedom, and happiness” (Encyclopaedia Britannica. Consulted online on April 20th, 2017 at <https://www.britannica.com/event/Enlightenment-European-history>).

⁸ Brazilian Federal Constitution, Art. 5º, XXXII – “The state will promote the consumer defense, according to the law” (“O Estado promoverá a defesa do consumidor, na forma da lei”). Consulted online on April 20th, 2017 at http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm. Free translation by the Author.

⁹ As a term of art used in the field of Constitutional Law in Brazil, South America and Continental Europe, “constitutionalism” has a different connotation than the one used in the U.S., according to which “(c) onstitutionalism is the idea, often associated with the political theories of John Locke and the founders of the American republic, that government can and should be legally limited in its powers, and that its authority or legitimacy depends on its observing these limitations” (<https://plato.stanford.edu/entries/constitutionalism/>, consulted online on April 20th, 2017). As existing in Brazil, the prevailing connotation of the term has to do with the conscious use of the constitution as an instrument to warrant and structure fundamental rights of each single individual and/or the whole community. See, for a more extended comprehension of this subject Canotilho, J. J. Gomes. *Direito Constitucional e Teoria da Constituição*. 7. ed. Lisboa: Almedina, 2003; Bonavides, Paulo. *Curso de Direito Constitucional*. 23. ed. São Paulo: Malheiros, 2008; Mendes, Gilmar Ferreira. *Curso de Direito Constitucional*. 3. ed. São Paulo: Saraiva, 2008 e Silva, José Afonso da. *Curso de Direito Constitucional Positivo*. 31. ed. São Paulo: Malheiros, 2008.

2.4 Fourth, the Essential and Basically Unrelinquishable Principles of Consumer Protection in Brazil

2.4.1 Public Order Nature and Non-Waivable Class Action.

The first consequence of the overarching constitutional consumer protection is that its legal nature carries the weight of a public order issue. Moreover, as a “diffuse interest” – an individual warranty that is concomitantly individual and collective – its observance is safeguarded not only by ordinary individual legal actions, but also by unrelinquishable¹⁰ class actions whose filing compete to the public ministry and/or a closed number of public and private entities representing the concerned sectors of the civil society (federal, state and municipal attorney general chambers and administrative agencies, consumer associations, unions, among other qualified plaintiffs).

2.4.2 A Comprehensive Pro-Consumer Public Policy and a Plethora of Substantial and Procedural Provisions that Presumes the Vulnerability of the Consumer and Grants It with the Fullest Possible Safeguards Against Abuse

In addition to the constitutional privileges, the infra-constitutional consumer protection is granted by the 119 sections of a progressive Consumer Protection Federal Code (Código de Defesa do Consumidor – CDC).¹¹ Its public order provisions, along with its affirmative substantial and procedural rules, set an unmistakably pro-consumer tone that departs from the principle that the consumer, as a general rule and except otherwise proven, is always vulnerable and in clear disadvantage vis-à-vis the supplier of the vendible, who responds under strict, joint and several liability. The CDC is, otherwise, consecrated to the safeguard of the “dignity, health, safety, economic interest and quality of life”, as well as of the “transparency and harmony of the consumer relations” (art. 4). Besides declaring the “economic hypo-sufficiency” of the prototypical consumer (art. 4, I),

¹⁰ In the Brazilian civil law system, as a general rule, the statutory form of the legal procedures and legal actions, as well as the right of filing them, are not subject to the disposition of the parties. Since the general right of petition to the courts of law and other public venues is an unrelinquishable individual warranty granted by the constitution, only in very exceptional circumstances and by dully justified reasons (as binding settlements, for instance) a juridical or moral person may waive the constitutional right of proceed with legal action in face of a violation of law and/or contract. Exception exists for disposable individual patrimonial rights. In the public and diffuse interest realm, however, the exceptions are practically inexistent.

¹¹ Lei 8.078, de 11 de setembro de 1990.

the CDC designs a system aimed to (i) match consumer protection policies and actions with the demands of the economic and technological development of the country, (ii) foster fairness, good faith and balance. (iii) promote the education of consumers and other stakeholders and the improvement of consuming standards, (iv) discourage, prevent and punish abuses, and, despite the heavy judicial and administrative *weaponry* put at the disposal of consumers, (v) incentive the creation of alternative dispute resolution mechanisms (art. 6).

Other than that, the extensive list of the CDC's consumer's rights and warranties also include full disclosure of information, maximum freedom of choice, protection against material risks of products and services, and against false, deceptive or wrongful publicity (art. 6). Featuring a solid theory of consumer contracts focused on the prevention and punishment of abuses (arts. 29 to 54), the CDC also provides streamlined substantial and procedural mechanisms to vacate or modify contractual clauses that establish disproportional and excessively onerous burdens disfavoring the consumer, especially in adhesion contracts. Damages are recovered based upon strict, joint and several liability, in an extremely far-reaching train of causation (mother companies, subsidiaries, third party suppliers, input providers, etc.) (art. 12). In extreme cases, the disregarding of legal entity is authorized by the CDC, as a coercive, reparatory or punitive measure (art. 29). Lastly, and beyond the definition of consumer related crimes (art. 61 and segts.), the CDC provides for the consumer the inversion of the burden of proof, contingent to the verisimilitude of the claim and its legal grounds, and the proved hypo-sufficiency of the claimant (art. 6, VIII).

3 Arbitration and Consumer Protection in Brazil

Even though existing as an alternative dispute resolution method throughout Brazilian legal history,¹² arbitration has been only marginally and localized used to solve commercial conflicts among quite sophisticated parties. In 2015, however, a significant legal reform adjusted the institute to reasonably fit the standardized

¹² In 1494, the conflict between Portugal and Spain about colonization rights over Brazil was settle through arbitration (Treaty of Tordesilhas), by the Pope Alexander VI. Between 1603 e the enactment of the first Brazilian constitution, in 1824, the Title XVI, Book II (Of Judges Arbitrators) of the "Ordenações Filipinas" – the Philippine Ordinances, named after a Portuguese King – established arbitral procedures to solve disputes between parties. Art. 160 of the 1824 imperial constitution allowed the appointment of arbitrators for resolving conflicts in all civil and criminal cases. All commercial disputes between 1850 and 1867 were exclusively adjudicated by specialized arbitral panels. From 1916 on, arts. 1.037 to 1.041 of the Brazilian Civil Code allowed parties to solve disposable patrimonial conflicts through arbitration. Since then, arbitration always existed as an alternative dispute resolution method in Brazil, although scarcely used. See about the history of arbitration in Brazil <http://www.cmaj.org.br/2014/06/13/historico-da-arbitragem-no-brasil/>.

UNCITRAL Model Law and, along with other statutes,¹³ enlarged the arbitrability scope that so far prevailed in Brazil.¹⁴ As a result, and because of the universally recognized virtuositities of the method, arbitration is being considered by the community of Brazilian scholars and practitioners as a feasible solution for partially solving the heavy demands of an over-docketed judiciary, among other utilities related to its expediency, economy, specialization, choice, etc.

The use of arbitration in consumer conflicts in Brazil is possible and would be highly beneficial. Even with arbitrability circumscribed, according to the new law, to the concept of disposable patrimonial interests –¹⁵ a notion that, despite the public order of the consumer protection system, matches the core of a significant part of the individual consumer disputes – arbitration could be widely used in this realm.

With the implementation of the adequate structure – such as (i) specialized chambers, (ii) expedite technological means, (iii) streamlined processes, (iv) specialized arbitrators and attorneys, (v) *best practices* guidelines, (vi) due incentives by the consumer's public agencies, consumer's associations and concerned industries, etc. – arbitration could respond swifter and better to the consumer protection adjudicative individual demands than the judiciary is presently doing, benefitting not only the social-legal realm but also the domestic and, by the scale of the respective market, the international economy.

But what would be the limitations that arbitration would have to overcome to become a tool for the improvement of the Brazilian consumer protection system?

First – and due to the public order feature that is keen to the field – the pro-consumer profile of the Brazilian system would have to be respected, if not progressively tuned through new laws, to the optimum degree. By the way, the temperaments that would certainly come out of the extended use of arbitration in this conflagrated market would naturally force the softening of occasionally harder constraints. It is important not to lose sight, at this point, that the CDC itself lists as one of its programmatic goals the incentive to the creation of alternative dispute resolution mechanisms.¹⁶

Second – and because class actions are not waivable in the Brazilian system – consumer arbitration would be circumscribed to disposable individual patrimonial rights. Also, the existence of three tiers of consumer protection – individual, collective and diffuse – could, at first, bring some need for clarification criteria. Nonetheless, and closely appraised, these two professed obstacles are not unsurmountable. In fact, except for the instances in with the consumer conflict is

¹³ Arbitration in the public administration area, Lei 13.129, de 26 de maio de 2015.

¹⁴ Lei 9.307, de 23 de setembro de 1996.

¹⁵ Brazilian Arbitration Act, art. 1.

¹⁶ CDC, art. 4, V.

characterized as exclusively collective or diffuse, all other remaining instances may be dealt with in an individual basis and through arbitration. By the way, depending on the degree of collectiveness involved, and if the conflict is circumscribed to an identified and reasonably small group – for instance, people harmed by ruined food in a reception for 500 people, all identified and able to be represented by private attorneys – even collective consumer conflicts can be solved through arbitration. Lastly, considering that the key issue for class actions is the impossibility/unfeasibility of having all members of a particular class dully represented in the lawsuit, the extensive use of arbitration in individual disputes can be beneficial. To the extent that are cases in which a consumer can take part in both – diffuse interest court procedure and individual interest arbitration – the continuing work of arbitrators will progressively contribute to enhance the discernment between the three different tiers of rights, their casuistry and management.

Third, a very important limitation applicable to adhesion is the art. 4, §2 of the Brazilian Arbitration Act that limits the validity of arbitration agreements within their scope to the fulfillment of two restricted conditions. For one, they are only valid if the adhering party clearly and expressly opts for arbitration and commences the procedures or solemnly concurs with its institution and commencement by the adversary party. For two, the arbitration agreement cannot be inscribed in the body of the adhesion contract, but must be celebrated through a bold written annex especially executed, delivered, sealed and signed for this specific purpose by both parties.

Fourth, the hypo-sufficiency presumption, the strict, several and joint liability for damages, as well as the inversion of the burden of proof – along with all pro-consumer contractual theories brought up by the CDC – are unremittable components of the governing law of the arbitration. Just the same, there is no reasonable cause for arbitrators not handle these kinds of strict issues as competently as courts do.

Fifth, confidentiality – to the feeble degree that it may be granted within arbitration procedures – would also be an issue in consumer protection arbitration. Due to the public interest involved in the consumer field, as well as the need for recognition and occasional enforcement of arbitration awards, transparency would be a necessary component of the procedures, what seem to be perfectly acceptable for the standards of the mass consumption industry, as far as trade secrets and intellectual property privileges are not at stake.

Other than that and as far as the parties are granted fair opportunities to present their cases, procedural streamlining, cost and time saving innovations will not be a problem. Of course, in time and through judicial review of the legality of the length and width of these innovative procedural tracks – compared to its court

equivalents – will be dully adjusted and eventually the stiff and complex discovery apparatus typical of civil law jurisdictions will tend to be reduced and adjusted to the arbitration needs. Furthermore, and as a prove of the inexistence of any outstanding reason preventing its appliance, the Brazilian consumer protection system, is in line with the *UNCTAD Guidelines for Consumer Protection*.

In sum, the mass consumption universe is a field in which the use of arbitration could be outstandingly expanded in Brazil, through means that can be designed, perfected and implemented through the comparative analysis of how other jurisdictions are managing to solve their problems. Globalization and the international impact coming from this highly monopolized and widespread market urge the respective communities of scholars and practitioners to do that.

4 A Brief and Contrastive Overview of the Consumer Protection Framework and Arbitration in Mass Consumption Contracts in the U.S.

First, as a common law jurisdiction, the U.S. legal system has developed under the influx of case derived law. The natural approach of legal issues in this system is typically inductive, topic, and casuistic. Even though increasingly adopting statutory law, the *stare decisis* system and the essential role played by case law favored the development of a bottom-up legal reasoning that contrasts with the deductive, comprehensive, systematic and highly methodological fashion which with civil law system deals all sort of legal issues. This causes U.S. statutes to be very practically driven, less systematized and loosely structured since they serve the purposes of a system that has in the court decisions the main vivid manifestations of the law *in action*, as determined by the realism of the judges.¹⁷ As a result, and albeit establishing directives and rules, they seldom go into finished theories of law, comprising all the possible solutions applicable to a certain field, as the typical civil law statute does. Common law is a system of judges and practitioners and the main part of the legal activity, as far as the determination of what the law in vigor actually is, is developed by the courts of justice and its unique system of precedents, seldom by scholars and/or general concepts conveyed by statutes.

The constitution, by its turn, has a completely different role in the U.S. system. Substantial contents of the different fields of law, no matter how important they might be – as well as procedural formulas – fall completely off the scope of the constitutional matter. Conversely, according to very broad paradigms, the courts, and mainly the U.S. Supreme Court, quotidianly adjusts the essentially abstract

¹⁷ Von Mehren, Arthur Taylor & Peter L. Murray. *Law in the United States*, 2d ed. Cambridge, 2010.

principles stated by the Magna Carta, as well as the precedents extracted from the concrete reality, to the new demands of the society, in the building of a *living* system of law that is unique and very efficient.

Concerning adjudicatory methods, and due to its very practical cleavage, the American system actively encourage, since a quite early point of the last century (FAA, 1926), the thriving of arbitration, a widely used, expedite and economic method for dispute resolution. The preemption granted for the FAA to trump contradictory state law –legislation and court decisions included – is an exigence for the coexistence of 50 different and relatively autonomous systems of law, plus the federal district). In this context – and without the public order constraints that in Brazil are typical of many over-legislated and highly protected fields – it is natural that, similar to what happens in all other fields of interest in the U.S., arbitration ended up widely adopted in the realm of mass consumption adhesion contracts. The needs of a vibrant, fast and market-driven economic system, in which conflicts have to be rapidly resolved for resources to circulate and generate more and more benefits, had also contributed to the success of arbitration. Here again, as opposed to the polarized, heavily controlled and concentrated economic environment of Brazil, conjunctural differences explains legal and cultural disparities in the use of arbitration.

Even though legislative principles in U.S., due to the protagonist role of the courts, do not have the same determinative weight and are not applied according to the same legal logic that prevails in the Brazilian civil law system, consumer protection is provided by a wide, effective and intertwined combination of court precedents, statutory law, the action of administrative agencies and consumer organizations.¹⁸ An overview of this legal and administrative framework is useful, before tackling the set of exemplary precedents that, regarding arbitration in mass consumption adhesion contracts, represent the focal point of this comparative account.

¹⁸ The result is that American consumers are protected from unsafe products, fraud, deceptive advertising, and unfair business practices through a mixture of national, state, and local governmental laws and the existence of many private rights of actions. These public and private rights both protect consumers and, at a formal level, equip them with the knowledge they need to protect themselves. Although U.S. mechanisms for consumer protection often exist separately from each other, what the overall scheme lacks in centralization, it gains in depth and variety of protection. Its strength is the array of governmental actors, formal legal rights, and remedies protecting consumers. Its weakness lies in the unequal reality of who has access to the government and the courts. Waller, Spencer W., Brady, Jillian G. and Acosta, R.J. Consumer Protection in the United States: An Overview. <http://www.luc.edu/media/lucedu/law/centers/antitrust/pdfs/publications/workingpapers/USConsumerProtectionFormatted.pdf>.

4.1 The Main Components of the American Legal, Administrative and Institutional¹⁹ Consumer Protection Framework

Beginning in the end of the 19th century as a governmental response to popular complaints over the excesses of free trade, three acts referring antitrust and competition regulation seem to have inaugurated the legal control over private economic activities in the U.S., namely the *Sherman Act* (1890),²⁰ the *Wilson Tariff Act* (1894),²¹ and the *Clayton Act* (1914).²² Evolving among harsh discussions between conservatives and progressivists about ideological, legal and economic concepts as *caveat emptor*²³ and *free market*,²⁴ the American consumer protection legal framework has been seemingly propelled by popular claim. Indeed, as the hazards of the meatpacking market and other food quality affairs determined the creation of FDA in 1907,²⁵ the consumerist pressures, championed by Ralph Nader and other advocates in the 1950's and 1960's, led to the enactment of the *Consumer Bill of Rights*,²⁶ a landmark in the area.²⁷

¹⁹ The term is used in reference of the grass-root civil society entities – consumer associations, unions and advocacy organizations – that are actively involved in consumer protection actions.

²⁰ 15 U.S.C. §§1-7.

²¹ 15 U.S.C. §§8-11.

²² 15 U.S.C. §§12-27.

²³ Verbatim “let the consumer beware”, the latin expression *caveat emptor* is a term of art that remits to the attention and care that all consumers shall have whenever buying merchandise or services in a free market. In the legal sense, the *caveat emptor* clause usually implies the dismissal of the liability of the vendor for defective products. Usually prevailing in real estate sales contracts, it is used by supporters of unregulated free trade to criticize the trend of protection that progressive schools of thought defend, through the enforcement of policies that consider the consumer incapable of taking care of its own interests. See https://www.law.cornell.edu/wex/caveat_emptor.

²⁴ “Free market, an unregulated system of economic exchange, in which taxes, quality controls, quotas, tariffs, and other forms of centralized economic interventions by government either do not exist or are minimal. As the free market represents a benchmark that does not actually exist, modern societies can only approach or approximate this ideal of efficient resource allocation and can be described along a spectrum ranging from low to high amounts of regulation. Many economists consider resource allocation in a free market to be Pareto-efficient, where no one can be made better off without making other individuals worse off, given certain conditions (like the absence of externalities or informational asymmetries, among others). Moreover, according to this theory, through the invisible-hand mechanism of self-regulating behaviour, society benefits by having self-interested actors make free economic decisions that benefit them. Some ethicists have argued that the efficiency of free markets depends on several moral parameters as scope conditions, such as fair play, prudence, self-restraint, competition among equal parties, and cooperation”. Consulted online on April 23rd, 2017 at <https://www.britannica.com/topic/free-market>.

²⁵ The episode is narrated at the FDA site that also mention that “(s)ince 1879, nearly 100 bills had been introduced in Congress to regulate food and drugs; on 30 June 1906 President Roosevelt signed the Food and Drugs Act, known simply as the Wiley Act, a pillar of the Progressive era”. Consulted online on April 23rd, 2017 at <https://www.fda.gov/aboutfda/whatwedo/history/origin/ucm054819.htm>.

²⁶ A speech made by the President Kennedy to the Congress on March 15th, 1962 the “(c)onsumer Bill of Rights refers to group of consumer rights [...] consists of 6 basic consumer rights[...]: 1. The Right to Be Safe [...]; 2.The Right to Choose Freely [...]; 3. The Right to be heard [...]; 4. The right to be informed [...]; 5.The Right to Education [...]; 6.The Right to Service. [...]”. Consulted online on April 23rd, 2017 at <https://definitions.uslegal.com/c/consumer-bill-of-rights>.

²⁷ Waller, Spencer W., Brady, Jillian G. and Acosta, R.J. Consumer Protection in the United States: An Overview <http://www.luc.edu/media/lucedu/law/centers/antitrust/pdfs/publications/workingpapers/USConsumerProtectionFormatted.pdf>.

4.2 Administrative Agencies and Basic Set of Statutory Law Supporting their Action

Outstandingly strong in the area of administrative action, the U.S. Federal Government²⁸ has been ingenious and proliferous in the establishment a significant number of agencies that develop a very effective and noteworthy job in defense of American consumers, such as:²⁹

- *The Federal Trade Commission (CTF)* –³⁰ independent, bipartisan, and extremely well-structured agency created in 1914 to protect consumers and competition by the *Federal Trade Commission Act*.³¹ Manages, acts and have authority to enforce a broad set of statutes in a wide array of areas as the *Truth in Lending Act*,³² *Fair Credit Reporting Act*,³³ *Equal Credit Opportunity Act*,³⁴ *Petroleum Marketing Practices Act*,³⁵ *Comprehensive Smokeless Tobacco Health Education Act*,³⁶ *Do-Not Call Registry Act*,³⁷ *Controlling Assault of Non-Solicited Pornography and Marketing Act*.³⁸ Through the *Bureau of Consumers Protection*.
- *The Consumer Financial Protection Bureau (CFPB)* –³⁹ administrative agency with powers to investigate banks and leading actors in the financial industry. It has competency, among many other actions, to trigger *Civil Investigative Demands (CID's)*, by presidential and/or congressional request, court referrals, consumer claims or for purposes of internal research,⁴⁰ and can apply fines, seek injunctions and damage compensations, the latter alternatively to the pursuance of criminal and civil charges by the concerned private parties involved.

²⁸ Due to limitations of length, references will be restricted to federal agencies and statutes. Nevertheless, it is essential to mention that each one of every 50 American states tends to reproduce to a similar or enlarged extent – as it happens with California that has the most advanced and comprehensive consumer protection framework – the same basic structure in vigor at the federal level, as witnessed by the existence and extensive adoption of a Uniform Deceptive Trade Practices Act Uniform Model. See Waller, Spencer W., Brady, Jillian G. and Acosta, R.J. op. cit. and – Spencer W. Waller, In Search of Economic Justice: Considering Competition and Consumer Protection Law, 36 Loy. U. Chi. L. J. 631 (2005). Available at: <http://lawecommons.luc.edu/luc/lj/vol36/iss2/21>.

²⁹ References to the following agencies and acts has been researched on Waller, Spencer W., Brady, Jillian G. and Acosta, R.J. op. cit.

³⁰ <https://www.ftc.gov>.

³¹ 15 U.S.C. §§41-58.

³² 15 U.S.C.: Commerce and Trade.

³³ 15 USC §1681 et seq.

³⁴ 15 U.S.C. §1691 et seq.

³⁵ 15 U.S.C. §2801.

³⁶ 15 U.S.C. §§4401-4408.

³⁷ 15 U.S.C. §6101 et. seq.

³⁸ 15 U.S.C. ch. 103.

³⁹ <https://www.consumerfinance.gov>.

⁴⁰ Similar investigative procedures, known as *Inquéritos Cíveis Públicos (civil public inquiries)*, can be launched by the Public Ministry, in Brazil. See arts. 8 and 9 of “Lei da Ação Cível Pública (Lei federal nº 7.347, de 1985)” and art. 129, III, 1988 Brazilian Constitution.

- *The Consumer Product Safety Commission* (CPSC) –⁴¹ governmental agency that oversees the field of hazardous products, specifications and standards.
- *The Food and Drug Administration* (FDA) –⁴² public entity that regulates the food, drug, cosmetics and medical devices market.
- *The National Highway Traffic Safety Administration* (NHTSA) –⁴³ agency that deals with motor vehicle consumer affairs.
- *The Federal Communication Commission* (FCC) – entity that regulates “interstate and international communications by radio, television, wire, satellite and cable”.⁴⁴
- *The Bureau of Consumer Financial Protection* (BCFP) –⁴⁵ agency created in 2010 as a reaction to the 2007-2009 U.S. financial crisis, by the *Dodd-Frank Wall Street Reform and Consumer Protection Act*,⁴⁶ within the Federal Reserve System, to investigate, research and regulate the financial markets, through civil lawsuits and other means. Provided with a huge budget and overarching powers, it consolidates competencies that were traditionally of the Federal Reserve, the Federal Deposit Insurance Corporation and Department of Housing and Urban Development, it is supposed to act as a *superagency* that champions the defense of the consumer in the financial market.

As seen, acts and entities form two important columns of the consumer protection framework. The statutes mentioned, as well as several others that directly or not safeguard consumer rights, suffice for a very sophisticated and comprehensive defense of fair trade, full disclosure and information, product safety, freedom of choice and provide for the prevention and punishment of fraud, misrepresentation, unfair practices, as well as for the punishment of the supplying of defective products and services.

4.3 Consumer Defenses Used in Arbitration of Mass Consumption Adhesion Contracts

Concerning specifically the private *rights of actions*, and from now on focusing on arbitration in mass consumption adhesion contracts, defenses against abuse are ordinarily based upon general contractual defenses and, very especially,

⁴¹ <https://www.cpsc.gov>.

⁴² <https://www.fda.gov>.

⁴³ <https://www.nhtsa.gov>.

⁴⁴ <https://www.fcc.gov>.

⁴⁵ <https://www.credit.org>.

⁴⁶ H.R. 4173.

unconscionability.⁴⁷ To the point to which the whole agreement, including the arbitration clause, can be vacated and set aside, defenses using the basic concepts of infancy, duress, forgery, alteration, all kinds of fraud, and misrepresentation. Procedural and substantive unconscionability are “key doctrine(s) used by courts in addressing perceived due process concerns growing out of arbitration agreements in contracts of ‘adhesion’”, when “(g)ross inequality of bargaining power, together with terms unreasonably favorable to the stronger party” indicate unfairness, as noted by Thomas J. Stipanowich.⁴⁸

Accordingly, some seminal cases are noteworthy as for how they treat these legal concerns in adhesion contracts under arbitration:

- (1) Pursuant to *Engalla v. Permanente Med. Grp., Inc.* promissory fraud⁴⁹ is grounds to rescind an arbitration agreement.⁵⁰ In the concurring opinion, Justice Kennard goes over an interesting discussion about procedural and substantial fraud (similar to unconscionability that, nonetheless, was put aside in this case), and about the attention that arbitration procedures in adhesion contracts shall deserve from adjudicators:

“*987 This case illustrates the role that courts play in maintaining the procedural fairness, as well as the substantive fairness, of arbitration proceedings. Procedural manipulations can be used by a party not only to delay and obstruct the proceedings, thereby denying the other party the speed and efficiency that are the arbitration system’s primary justification, but also to affect the possible outcome of the arbitration.[...] courts must be alert to procedural manipulations of arbitration proceedings and should grant appropriate relief when such manipulations occur. As here, such conduct may give rise to claims of fraud in the inducement of the arbitration agreement or claims that the manipulating party has waived its right to enforce the arbitration agreement. Moreover, if such conduct affects the arbitration award, it may form the basis for vacating the award as one “procured by corruption, fraud or other undue means.” (Code Civ. Proc., §1286.2, subd. (a).) [...] *989 Private arbitration may resolve disputes faster and cheaper than judicial proceedings. Private arbitration, however, may also become an instrument of injustice imposed on a “take it or

⁴⁷ *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996).

⁴⁸ *Contemporary Issues in International Arbitration and Mediation*, The Fordham Papers. Arthur W. Rovine Editor. Martinus Nijhoff Publishers. Leiden-Boston, 2011. Stipanowich, Thomas J. *Revelation and Reaction: The Struggle to Shape American Arbitration*. P. 120-122.

⁴⁹ “‘Promissory fraud’ is a subspecies of fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud. [Citations.]”. *Engalla v. Permanente Medical Group, Inc.*, 15 Cal.4th 951 (1997), p. 15.

⁵⁰ “We construe section 1281.2, subdivision (b), to mean that the petition to compel arbitration is not to be granted when there are grounds for rescinding the agreement. Fraud is one of the grounds on which a contract can be rescinded. (Civ.Code, §1689, subd. (b)(1).)[...]”. *Engalla v. Permanente Medical Group, Inc.*, 15 Cal.4th 951 (1997), p. 15

leave it” basis. The courts must distinguish the former from the latter, to ensure that private arbitration systems resolve disputes not only with speed and economy but also with fairness”.⁵¹

- (2) In *Hooters of America, Inc. v. Phillips*, perfectly aligned with the severability principle, the 4th Circuit U.S. Court of Appeals applied “ ‘such grounds as exist at law or in equity for the revocation of any contract.’ 9 U.S.C. §2.” and vacated the arbitration agreement for breaching of the contractual duty of good faith.⁵²
- (3) In *Broemmer v. Abortion Services of Phoenix, Ltd.*, unenforceability of the arbitration clause and waiver of a jury trial was determined by the Supreme Court of Arizona because those covenants were beyond the reasonable expectations of the adhering party, who lacked opportunity or power to discuss it.⁵³ The District of Columbia U.S. Court of Appeals upheld in *Cole v. Burns Intl. Sec. Serv.* that, despite valid in employment contracts which involve interstate commerce, arbitration clauses and procedures under the FAA shall grant parties equal and fair opportunities to present their cases and not impose to the employee the payment of costs and fees as a condition to have access to the arbitration process.⁵⁴
- (4) The U.S. Supreme Court, going even beyond the precedent established by *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*,⁵⁵ also decided that

⁵¹ Engalla v. Permanente Medical Group, Inc., 15 Cal.4th 951 (1997), p. 22-23.

⁵² “[...] Hooters materially breached the arbitration agreement by promulgating rules so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith. [...] By agreeing to settle disputes in arbitration, Phillips agreed to the prompt and economical resolution of her claims. She could legitimately expect that arbitration would not entail procedures so wholly one-sided as to present a stacked deck[...]” *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (1999), p. 6-7.

⁵³ “[...] As the court stated in Graham: Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or ‘adhering’ party will not be enforced against him. [citations omitted] The second – a principle of equity applicable to all contracts generally – is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or “unconscionable”. *Broemmer v. Abortion Services of Phoenix, Ltd.*, 173 Ariz. 148 (1992), p. 4.

⁵⁴ “[...] There is no doubt that parties appearing in federal court may be required to assume the cost of filing fees and other administrative expenses, so any reasonable costs of this sort that accompany arbitration are not problematic.¹² However, if an employee like Cole is required to pay arbitrators’ fees ranging from \$500 to \$1,000 per day or more, see note 8 supra,¹³ in addition to administrative and attorney’s fees, is it likely that he will be able to pursue his statutory claims? We think not” Two assumptions have been central to the Court’s decisions in this area. First, the Court has insisted that, “[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.” [...] Second, the Court has stated repeatedly that, “although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute’ at issue [...]”. *Cole v. Burns Intern. Sec. Services*, 105 F.3d 1465 (1997), p. 16-19.

⁵⁵ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), where it was granted that the arbitrators, and not a court of law, could determine, in face of a contractual delegation, about the validity of the whole agreement.

determination of the validity of the arbitration clause for unconscionability can be delegated by contract to the arbitrators, dispensing the intervention of a court of law. Justice Scalia, in *Rent-A-Center, West, Inc. v. Jackson*⁵⁶ (2010) upheld that “*provision of employment agreement which delegated to an arbitrator exclusive authority to resolve any dispute relating to the agreement’s enforceability was a valid delegation under the FAA*”.

- (5) By its turn, Justice Alito in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, (2010), *a contrario sensu*, allowed class arbitration on consumer adhesion contracts as far as the respective scripture undoubtedly indicates so and the respective provision do not fall out of the scope intended by the parties.⁵⁷
- (6) Composing a “trilogy”⁵⁸ of cases that entails a clear crescendo in a rather ampliative construing of the FAA vis-à-vis consumer adhesion contracts,⁵⁹ in *AT&T Mobility LLC v. Concepcion*⁶⁰ (2011) the U.S. Supreme Court through an opinion held, once again, by Justice Scalia, abrogated *Discover Bank v. Superior Court*⁶¹ (2005), and asserted that “*the Federal Arbitration Act preempts California’s judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts*”.

Contestation on the fairness of this extensive interpretation of the FAA by the U.S. Supreme Court, to the extent that it potentially jeopardizes consumer protection, is being constant and intense. Besides the introduction of bills to the enactment of an *Arbitration Fairness Act* in 2015 and 2017, whose terms are incisively opposing to the judicial holdings mentioned before,⁶² the Bureau

⁵⁶ *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), p. 1.

⁵⁷ “[...] Imposing class arbitration on parties who have not agreed to authorize class arbitration is inconsistent with the Federal Arbitration Act (FAA), 9 U.S.C. §1 et seq”. *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010). p. 3

⁵⁸ Stipanowich, Thomas, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration* (August 30, 2011). *American Review of International Arbitration*, 2012; Pepperdine University Legal Studies Research Paper No. 2012/10. Available at SSRN: <https://ssrn.com/abstract=1919936>

⁵⁹ See also, as a confirmation of this trend, *American Exp. Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013), where the ripple effect of the *Stolt-Nielsen* and *Concepcion* cases can be seen.

⁶⁰ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), p. 1 (holding).

⁶¹ “[...] [1] waiver of class arbitration in a consumer contract of adhesion is unconscionable under certain circumstances and should not be enforced, and [2] prohibition of class action waivers in arbitration agreements is not preempted by the Federal Arbitration Act (FAA)”. *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005). p. 1.

⁶² “Arbitration Fairness Act of 2015 – (Bill) – S.1133 – Arbitration Fairness Act of 2015. 114th Congress (2015-2016). Sponsor: Sen. Franken, AI [D-MN] (Introduced 04/29/2015). Committees: Senate – Judiciary. Latest Action: 04/29/2015 Read twice and referred to the Committee on the Judiciary. (All Actions) [...] Arbitration Fairness Act of 2015 – Declares that no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment, consumer, antitrust, or civil rights dispute. Declares, further, that the validity and enforceability of an agreement to arbitrate shall be determined by a court, under federal law, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract

of Consumer Financial Protection – among other qualified stakeholders in the consumer protection field and the public opinion – has very emphatically opposed the ampliative trend mentioned herein. Directed by the U.S. Congress, the Bureau had thoroughly studied the matter and made available to the Congress, in 2015, a study of arbitration⁶³ and its use in adhesion consumer contracts. As an empirical argument against arbitration agreements that block class action, the Bureau brings data showing that in the five-years span of the its study “160 million class members were eligible for relief” through “settlements (that) totaled \$2.7 billion in cash, in-kind relief, and attorney’s fees and expenses”.⁶⁴ Based upon the Dodd-Frank Wall Street Reform and Consumer Protection Act and the evidences of its study, the Bureau also published a comprehensive report⁶⁵, in which it stands for the prohibition of the use of mandatory arbitration agreements to block class actions in court and for the submission of the records of consensual bilateral arbitrations to the scrutiny of the Bureau, for a public interest control.⁶⁶

How to interpret this clash?

5 Conclusion

Conclusions over the harsh debate about the use of arbitration in mass consumption contracts, as well as the U.S. Supreme Court subscription to the

containing such agreement. Exempts from this Act arbitration provisions in a contract between an employer and a labor organization or between labor organizations. Denies to any such arbitration provision, however, the effect of waiving the right of an employee to seek judicial enforcement of a right arising under the U.S. Constitution, a state constitution, a federal or state statute, or related public policy”. Consulted online on April 23rd, 2017 at <https://www.congress.gov/bill/114th-congress/senate-bill/1133> and “[...] Sponsor: Rep. Johnson, Henry C. “Hank,” Jr. [...]. Committees: House – Judiciary. Latest Action: 03/17/2017 Referred to the Subcommittee on Regulatory Reform, Commercial And Antitrust Law. Summary: H.R.1374 — 115th Congress (2017-2018)All Bill Information [...] Introduced in House (03/07/2017). Arbitration Fairness Act of 2017. This bill prohibits a predispute arbitration agreement from being valid or enforceable if it requires arbitration of an employment, consumer, antitrust, or civil rights dispute. The validity and enforceability of an agreement to arbitrate shall be determined by a court, under federal law, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement. Nothing in this bill applies to arbitration provisions in a contract between an employer and a labor organization or between labor organizations, except that no such arbitration provision shall have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under the U.S. Constitution, a state constitution, a federal or state statute, or related public policy”. Consulted online on April 24th, 2017 at <https://www.congress.gov/bill/115th-congress/house-bill/1374>.

⁶³ http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

⁶⁴ <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-proposes-prohibiting-mandatory-arbitration-clauses-deny-groups-consumers-their-day-court/>.

⁶⁵ http://files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf.

⁶⁶ <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-proposes-prohibiting-mandatory-arbitration-clauses-deny-groups-consumers-their-day-court/>.

waiver of class actions in such agreements, is up to the American society to reach. What nonetheless is clear is that due to historical, political, cultural and legal differences the Brazilian and the U.S. consumer protection systems give contrasting solutions to identical problems.

In the U.S., an independent society thrived to assemble, through successive and democratic clashes between the interests of the people and the interests of the capital, a pragmatic, flexible, simple and very effective framework of consumer protection. It is yet to face some crucial confrontations. The dynamics of a brutal but reasonably inclusive capitalism seem to distribute profits with one hand and withhold essential rights with the other, in name of a *free* market that, paradoxically, clearly benefits the wealthier. Nonetheless, it works fast and transparently. It is what it is and its face value equals its inner value.

In Brazil, a promiscuous political and economic elite pushed through the throat of the unempowered people – who is too occupied surviving – a consumer protection system that is highly systematized, omni-comprehensive, strict, and progressive...at the outset. Its face value is great. But its inner value is null. Judges and lawyers, docile and mostly unconscious accomplices of the owners of the power, crafted it to formal perfection. Its effective application, however, is a mere detail that does not appeal to a professional elite that do not really want the society to change. It would be wonderful to dwell in the country of the Brazilian constitution. And some do. Unfortunately, though, the people live in the real world.

Notwithstanding this, it is a fact that the difference of costs, prices and profits that both systems entail to consumers and monopolized companies, is discrepant, with a massive ripple effect in the domestic and international economies, due to the size and scale of the respective markets. AT&T telecommunication services in the U.S. (or Ford vehicles, Heinz Ketchup, Gillete razors, etc.), because the rather favorable consumer protection system, cost less than in Brazil, where revenues must cover contingency accounts over strict, joint and several liability for damages among other odds of the legal system. This impact, that tends to grow exponentially with the unavoidable diffusion of e-commerce and the ever-increasing globalization, must be measured and studied by the multidisciplinary scholar community that, on the dispute resolution end, could bring up legal means to narrow this gap and bring relief to all involved stakeholders in terms of fairness, just competition and material gains.

Arbitration has traditionally been, in the U.S. and abroad, an instrument of progress. It can and shall be used to serve the highest purposes of justice. Its long and massive use in the U.S. is an invaluable source from where the whole

international community could benefit. Isn't it about time for the community of scholars and practitioners of both countries to work on a task force that, through cooperation agreements, treaties and other multi-lateral tools, could uniformize the use of arbitration, harmonizing legal culture differences and prove means to soothe the negative economic impact of the existing differences?

Informação bibliográfica deste texto, conforme a NBR 6023:2018 da Associação Brasileira de Normas Técnicas (ABNT):

GEVAERD, Jair. Consumer protection and arbitration in mass consumption adhesion contracts. A comparative look between Brazil and U.S. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 01, n. 01, p. 133-153, jan./jun. 2019.
