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# THE POSSIBILITY OFARBITRATION AS A MECHANISM FOR EFFECTING CONSUMER RIGHTS AND THE PRINCIPLE OF REASONABLE DURATION OF THE PROCESS: RESP 1.742.547 ANALYSIS

## DA POSSIBILIDADE DA ARBITRAGEM COMO MECANISMO DE EFETIVAÇÃO DOS DIREITOS DO CONSUMIDOR E DO PRINCÍPIO DA RAZOÁVEL DURAÇÃO DO PROCESSO: ANÁLISE DO RESP 1.742.547

Danilo Henrique Nunes[1]
Olavo Augusto Vianna Alves Ferreira[2]
Carlos Eduardo Montes Netto[3]

## ABSTRACT

An unprecedented decision handed down by the Superior Court of Justice deals with the application of arbitration in consumer law: once the option for arbitration is accepted, after the conclusion of the agreement, the consumer can no longer bring this matter to court, with a new exception to access to justice as a fundamental right as a counterpoint to the fact that consumer protection is a norm of public order. The study analyzes Special Appeal No. 1,742,547, deepening the verification of arbitration as a mechanism to enforce consumer rights and the principle of reasonable duration of the process. To support the study, a literature review involving phenomena related to the theme had been carried out, also using the inductive method for argumentation. The results pointed to two currents of analysis involving access to justice, one that considers access to justice as

1 Doctoral Student and Master in Collective Rights and Citizenship at the University of Ribeirão Preto/SP, UNAERP. Lawyer and journalist. Professor of undergraduate and postgraduate courses at the Estácio University Center of Ribeirão Preto/SP and the University Center at the Fundação Educacional de Barretos. ORCID iD: http://orcid.org/0000-0001-9162-3606.

2 Doctor in State Law at the Pontifical Catholic University of São Paulo (2008), Master in State Law at the Pontifical Catholic University of São Paulo (2002). Attorney of the State of São Paulo n. V. He was an elected member of the Superior Council of the Attorney General of the State of São Paulo. Full Professor of the Doctoral Program, Masters in Law and graduation from UNAERP, where he acts as General Coordinator of the lato sensu Postgraduate Courses in Law. ORCID iD: http://orcid.org/0000-0003-1067-4335.

3 Doctoral Student and Master in Collective Rights and Citizenship at the University of Ribeirão Preto/SP, UNAERP. Judge of the Court of Justice of São Paulo. Professor of undergraduate and postgraduate courses at the University of Ribeirão Preto/SP, UNAERP. ORCID iD: http://orcid.org/0000-0003-4274-0309.

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a synonym for access to the Judiciary and another that considers it in a broader character, with the arbitration institute being applicable. However, in fact, it was understood that arbitration is a valid mechanism for the enforcement of Consumer Rights and compliance with the Reasonable Principle of the Process, with this institute being more beneficial than the judicial process, as long as they are complied with some fundamental requirements, such as the parties' autonomy of will.

**Keywords:** Consumer Rights; Access to justice; Public order; Arbitration.

## RESUMO

*Decisão inédita proferida pelo Superior Tribunal de Justiça trata da aplicação da arbitragem no direito consumerista: uma vez aceita a opção pelo procedimento arbitral, após a celebração do acordo, o consumidor não pode mais levar a juízo esta mesma matéria, ocorrendo nova exceção ao acesso à justiça como direito fundamental em contraponto ao fato de que, a defesa do consumidor, é norma de ordem pública. O estudo analisa o Recurso Especial nº 1.742.547, aprofundando a verificação da arbitragem como mecanismo de efetivação dos direitos do consumidor e do princípio da razoável duração do processo. Para embasar a pesquisa, fora realizada revisão de literatura envolvendo os fenômenos relacionados ao tema, utilizando-se também do método indutivo para a argumentação. Os resultados apontaram para duas correntes de análise envolvendo o acesso à justiça, sendo uma que considera o acesso à justiça como um sinônimo do acesso ao Judiciário e outra que o considera em caráter mais amplo, abrangendo o instituto da arbitragem. Porém, de fato, compreendeu-se que a arbitragem constitui mecanismo válido para a efetivação dos Direitos do Consumidor e atendimento ao princípio da razoável do processo, apresentado esse instituto mais benéfico do que o processo judicial, desde que sejam cumpridos alguns requisitos fundamentais, como a autonomia de vontade das partes.*

**Palavras-chave***: direitos do consumidor; acesso à justiça; ordem pública; arbitragem.*

# 1. INTRODUCTION

Nowadays, one of the great obstacles to the effective fulfillment of the principle of reasonable duration of the process comes from confronting the culture of judicialization, in view of this, other adequate methods of conflict resolution have been discussed as a possibility of increasing access to justice, producing faster and more efficient decisions, without disregarding other guiding principles of Brazilian law.

In this context, access to state justice and the respective procedural instruments should be more important for their potential use than because of their effective use, enabling the creation of a "new mentality" to replace the paternalism of the State, with the emergence of of a civil society in which unofficial means of conflict resolution are more used than formal and official means (GRINOVER et al., 2007, p. 791). The defenders of this thesis start from teachings such as those by Condado (2008), who point out that the modern view of access to justice can no longer be limited to access to the Judiciary, especially given its inefficiency in meeting the constitutional principle of reasonable duration of the process.

The general objective of this study, based on the literature review, hypothetical-deductive and empirical analysis methods, is to approach the arbitration procedure as a mechanism for enforcing Consumer Rights and the principle of reasonable duration of the process from an analysis of Special Appeal No. 1,742,547, unprecedented decision in which consumers signed, independently and voluntarily, in relation to the purchase and sale agreement, a term of commitment, actively participating in the arbitration procedure, which made the Judiciary's

assessment of the same matter. The specific objectives were also delimited and, in a detailed way, it is possible to: a) make a presentation of the Consumer's Rights and its fundamental foundations, drawing a parallel with the presentation of the principle of reasonable duration of the process; b) verify what are the arguments for access to justice as a fundamental right, exploring its concept and contemplating the institute of arbitration in the context of access to justice; and, c) present and analyze REsp No. 1,742,547, pointing to aspects related to the principle of reasonable duration of the process and the enforcement of consumer rights, verifying whether the decision rendered by the Superior Court of Justice (STJ) is possible exception to access to justice as a fundamental right.

It is noteworthy that, since the decision of REsp nº 1,742,547 is quite recent, there are few opinions and no scientific studies published on the subject in Brazilian databases. Thus, with the preparation of an original study that seeks to clarify the issues analyzed, the justification for carrying out this study comes precisely from a need to cast a critical and impartial look on the topic as a whole, checking possible repercussions of the decision of the STJ.

According to Silva (2018, p. 786), the success of adequate methods of resolving disputes other than state justice is so great that it has been expanded to areas as unlikely as tax law, with an express legal provision for the use of arbitration in litigation involving tax or criminal matters under Portuguese law.

The theoretical basis for the analysis of the case in question was obtained from the literature review method, so that, it briefly addresses the historical evolution and foundations of consumer rights; then, the principle of reasonable duration of the process and the relevance of arbitration for the fulfillment of this constitutional commandment, inserted by EC nº 45/2004, is presented; and, continuously, it analyzes access to justice as a fundamental right, also presenting the institute of arbitration and relating it to other contents. Finally, such knowledge is used, specifically, in discussions involving the judgment of REsp No. 1742.54, with the promotion of jurisprudential and doctrinal dialogue on the subject, producing original conclusions about the problem presented.

## 2. CONSUMER RIGHTS AND THE POSSIBILITY OF USING ARBITRATION IN CONSUMPTION CONFLICTS

A first point to analyze the arbitration procedure as a mechanism for enforcing Consumer Rights starts with a proper understanding of some of the fundamental precepts of Consumer Law. According to Marimpietri (2001) the first movements acting on behalf of the consumer emerged between the end of the 19th century and the middle of the 20th century, since there were no specific consumer rights, who were considered a low-sufficient party in consumer relations, having any safeguards in relation to the supplier of the goods. Such movements, which emerged in countries like the United States, England and France, however, were not able to effect the creation of consumer rights, although they have been extremely important to alert consumers to possible abuses practiced by suppliers.

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According to Alemida (1982) it was only during the 1960s that the consumer began to be recognized as the holder of specific rights protected by the State, with the US President John F. Kennedy being the main articulator of Consumer Law when sending in 1962 a document that considered some basic consumer rights, in the above sense: a) in the case of the Right to Health, it came to be considered essential to the protection against the sale of products that could represent a risk to the health of consumers; b) the Right to Safety involves the perception that products available in the market cannot violate the safety of consumers, making merchants responsible for any unsafe products offered in the market; c) the Right to Information sought to protect consumers from misleading advertisements, designed to induce them to buy defective products or that have a price or configuration different from those presented by the merchant/supplier; d) the Right to Choice understands that there must be a variety of products and services at competitive prices, so that consumers can select them in the purchase process; and, e) finally, there is also the Right to be Heard, which is associated with the ideal that consumers should always have their interests represented in the formulation of public policies, implementing fair, equal and swift measures in the courts.

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Thus, inserted in art. 5, item XXXII, urges to contextualize that Consumer Protection gains from the Original Constituent of 1988 the status of direct and fundamental guarantee, in addition to a permanent clause, under the terms of constitutional hermeneutics, especially when combined with art. art. 60, § 4, item IV also of the CRFB/1988 which teaches the formal, material, temporal and circumstantial limiting list, establishing the same (stone clauses) to the power of reform by the Reform Constituent Power, so that they are not liable of alteration, as they have the function of protecting the fundamental rights of individuals.

In Miragem's school (2008, p. 34), the constitutionalization of consumer protection is a result of the affirmation of the dignity of the human person as a principle that represents a kind of constitutional right of the person, promoting a qualitative change in the status of consumer rights , which became preferential in relation to rights that are based only on infra-constitutional legislation.

In this context, Bejamin (2009) even stated that the "CDC" is the "habeas corpus of the consumer", being one of the few Brazilian laws that was born from a constitutional determination, from art. 48 of the Transitory Constitutional Provisions Act, which determined the drafting of the Code within 120 days, as of the enactment of CRFB/88.

Further on, based on these preliminary observations, it becomes possible to observe that Consumer Law is the result of the work of a legal current that understands the consumer as the low-sufficient party in consumer relations, in order to protect it from possible abuses that could be committed by merchants and suppliers,

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considering that the market does not have efficient mechanisms to overcome this vulnerability, showing the necessary State intervention (GRINOVER et al., 2007, p. 6-7). Alda (2012) points out that in Brazil, although other constitutions have dealt with rights related to the economic order, it was only with the advent of the CRFB/1988, especially in article 170, caput and subsections, that the Economic Order was conceived , based on valuing work and free enterprise, should aim to ensure a dignified existence, observing criteria of social justice and orienting itself, among other principles, to consumer protection, as expressed in item V. Although there were already dedicated organizations for consumer protection, state tutelage only effectively exists in the current constitutional text.

Article 5, item XXXII of the Charter provides that the State must promote, in accordance with the law, consumer protection. When talking about Consumer Rights in Brazil, it is essential to address consumer legislation, that is, Law No. 8.078/1990, which established the CDC – Consumer Defense Code.

The main point of the existence of Consumer Rights and, therefore, of the CDC, comes from the understanding that the consumer is the low-sufficient party in consumer relations, and should therefore be protected. Soares (2015) teaches that the main foundation of consumer rights involves the effectiveness of such rights, which can only be acquired by opening up legal principles that guide consumer relations, such as transparency, vulnerability, equality, good -objective faith, the efficient repression of abuses, the harmony of the consumer market, fairness and consumption, principles which guide the Brazilian consumer legislation.

Carvalho (2013) deepened some of the guiding principles that underlie the rights of Brazilian consumers, which are presented in a summarized way: a) the Principle of Vulnerability (Article 4, item I, of the CDC) establishes that the consumer is the vulnerable person, regardless of who it is and its economic power, since it does not have techniques, knowledge and technologies, being conceived in an inferior position compared to the trader/supplier.

It is the recognition of this principle that considers the consumer as the party to be protected in consumer relations; b) associated with the principle of vulnerability, the Constitutional Principle of Isonomy applies concomitantly, which is associated with the unequal treatment of unequals, aiming that the best solution and interpretation in the specific case is based on the consumer’s presumption as a constitutionally part recognized as weaker; c) the Principle of Information and Transparency is a foundation that aims to seek safe and conscious consumption, and is associated (as the name itself indicates) with the duty to provide clear and concise information to consumers about what they are purchasing, contemplating the duty of transparency in all negotiation phases; d) as for the Principle of Objective Good Faith, it comprises the functions of limiting abuse of rights, interpreting and integrating the contract and the creation of duties, seeking balance and justice, protecting and protecting the consumer in consumer relations based on rules of conduct established by legislation and doctrine; and, e) the Principle of Equity (also known as the Principle of Trust) encompasses the balance between duties and obligations, with no intentional or reprehensible conduct being required by the supplier, comprising the safety of what the consumer reasonably expects and can demand in front of a particular product or service.

These and other principles end up constituting some of the basic foundations of consumer rights in the Brazilian case. In possession of this knowledge, it becomes possible to deepen

the principle of reasonable duration of the process, bringing a parallel with regard to arbitration and its possible application in consumer matters, as Article 4, V of the CDC highlights it as a principle of the National Policy on Relations of I use the “incentive to the creation by suppliers of efficient means of quality control and safety of products and services, as well as alternative mechanisms for resolving consumption conflicts”.

Through the aforementioned provision, it is possible to support the application of arbitration in consumer relations, especially when these deal with rights available or subject to availability. Thus observe Fichtner, Mannheimer and Monteiro (2019, p. 261) “that private autonomy is also present in consumer relations and that the international experience reinforces the idea that these relations are a fertile field for the adoption of arbitration.”

As can be seen, although consumer law has rules of a cogent nature and of public order, the presence of private autonomy in their relations is also undeniable, and it should be noted that the purpose of imposing mandatory rules, in any area of law, it is to prevent the parties from seeking undue advantages or the practice of fraud (APRIGLIANO, 2010, p. 52).

It is important to note that the expression “public order” is expressly provided for in the Arbitration Law (art. 2, § 1), representing a clear limit to the autonomy of the parties and, according to José Antonio Fichtner, Sergio Nelson Mannheimer and André Luís Monteiro, it does not concern the availability or heritage of the cause, but rather political, economic, social, moral and cultural values relevant to the State.

Nery Júnior, one of the authors of the CDC draft, states that “the arbitration judgment is an important factor in the composition of consumer disputes, which is why the Code did not want to prohibit its constitution by the parties to the consumer contract”, indicating the interpretation to contrario sensu of the norm (art. 51, VII of the CRC), which is not determined compulsorily, the institution of arbitration is possible (GRINOVER et al., 2007, p. 592).

Likewise, Alvim et al. (1991, p. 253-254) argue that despite the rigid wording of VII, of art. 51 of the CDC, it does not prohibit the use of arbitration commitment, which, in addition, has proven to be effective for the resolution of disputes involving consumer rights in developed countries.

Thus, it would be possible to apply Articles 51, VII of the CDC and 4, § 2, of Law 9,307/96, conditioning the effectiveness of the arbitration clause on the consumer’s taking the initiative in instituting arbitration or its express agreement, any compulsory form of arbitration in this type of relationship (FERREIRA; FERREIRA; ROCHA, 2019, p. 94), as decided by the STJ in REsp 1,189,050/SP.

There are judgments of the Court of Justice of the State of São Paulo (TJSP) and of the Court of Justice of the State of Góias (TJGO), admitting arbitration in adhesion contracts involving consumer relations, provided that the requirements of art. 4 § 2, of the Arbitration Law (TJSP, appeals 1050534-29.2017.8.26.0100, 1019669-24.2014.8.26.0554, 3001192-12.2013.8.26.0114, TJSP, interlocutory appeal 0166160-98.2012.8.26.0000 and TJGO, Appeal No. 0237312.21.2016.8.09.0137).

It should be noted, however, that authors such as Marques, Benjamin and Miragem (2004, p. 55) maintain that the CDC norms lend themselves to serving social interests, in contrast to the dogma of private autonomy, having introduced the social function of contract before the forecast that became part of the Civil Code of 2002.

From this perspective, Fichtner, Mannheimer and Monteiro (2019, p. 263) observe that, despite the clarity of the legislation in force authorizing the use of arbitration in conflicts involving consumer rights, most consumer doctrine defends incompatibility arbitration in consumer relations, based on art. 51, VII of the CDC, arguing that the rules that deal with consumer rights are of a cogent nature and of public order.

Filomeno states that the use of arbitration in the resolution of conflicts involving consumer rights is incompatible with "the cornerstones of the consumerist philosophy, notably those embodied in inc. I of art. 4th [...] and secs. IV and VII of its art. 51" (GRINOVER et al., 2007, p. 89).

The author argues that arbitration would be impractical in the context of consumer relations, and it would be preferable to sacrifice this method of dispute resolution in favor of maintaining the consumerist philosophy based on the manifest vulnerability of consumers in general (GRINOVER et al., 2007, p. 89 ).

Marques (2004, p. 890) states that arbitration is not the best way to resolve disputes involving consumer rights, working well in disputes involving large companies or traders, with parity of forces. According to the author, the Arbitration Law has a civil procedural nature and should not be used to "escape" or "fraud" the application of imperative material law, especially in such unbalanced and abused relations, such as consumer relations.

In addition, Amaral Júnior (1991, p. 197) argues that art. 51, VII of the CDC expressly prohibits the use of arbitration in consumer disputes, arguing that its stipulation can be extremely harmful to the interests of consumers, also emphasizing that the jurisprudence of France has considered the arbitration clause in contracts involving the consumer relations.

As noted, the application of arbitration in the resolution of disputes involving consumer rights is extremely controversial, however, a good part of the doctrine, including Nery Júnior, one of the authors of the CDC draft, and some recent judgments admit its use, making the analysis of this access door to justice relevant as a potential mechanism for enforcing consumer rights, with regard only to patrimonial and available aspects of the consumer relationship.

## 3. THE PRINCIPLE OF REASONABLE PROCESS DURATION: PRESENTATION AND ITS CONFLICT WITH THE JUDICIARY DELAY

Nunes (2017) points out that the slowness of Brazilian justice is a recurrent theme in legal debates, being associated with the delay in the provision of jurisdictional protection and also the difficulties of ensuring access to justice as a human and fundamental right, an issue that will be addressed further ahead in the present study. The duration of the process, in this sense, is one of the major factors to be considered by the State in view of the jurisdictional provision, so that the principle of reasonable duration of the process is consolidated from instruments in order to safeguard the citizen's right to obtain guardianship in a timely manner.

In light of this, Teori Albino Zavascki (1997, p. 64) observes that "under the name of the right to the effectiveness of justice", the Constitution assured the individual effective means

for the analysis of the demand brought to the State, an efficacy that is sufficient to give rise to the litigant winner the achievement of his victory, which would be equivalent to what he would naturally have if he did not have to enter the Judiciary (DINAMARCO, 2008, p. 319).

As pointed out by Soares and Alves (2017, p. 1), the reasonable duration of the process "was raised to the condition of a fundamental principle with Constitutional Amendment No. 45/2004, endowed, therefore, with immediate applicability and full effectiveness". This principle seeks to satisfy the needs of society insofar as the judicial process is conceived as the means to ensure, preserve or repair violated rights. Its application is associated with the notion that, when jurisdictional protection is lengthy, it itself represents a violation of rights, since it does not guarantee the satisfaction required by the jurisdiction, who sees himself harmed since the Judiciary Branch did not satisfactorily fulfill its primary function. Mologni and Pierotti (2009, p. 2) reiterate that the introduction of this principle in the legal system "cannot be considered a novelty, as it has always been enshrined in the Constitution, even if implicitly, an analysis of the principle of due process, or even the dignity of the human person" to confirm its existence. However, this principle began to ensure in a more express way the right to a reasonable duration of the process, equating the speed of proceedings with the constitutional guarantees.

Basically, the principle of reasonable duration of the process, in this sense, sought to improve the procedural system, aiming to optimize and speed up the jurisdictional provision, including by recognizing the same in the list of fundamental rights, since EC No. 45/2004 implied in the emergence of item LXXVIII of article 5 of the Magna Carta. This principle, however, finds a major obstacle in the slowness of the Brazilian Justice, implying reflections on the need for alternative means of conflict resolution, such as arbitration. Thus:

> [...] the principle of reasonable duration must be in harmony with other constitutional principles, also fundamental, with those of contradictory, access to justice, effectiveness, and fairness of procedure, seeking a fair and reasonable decision on the conflict. Therefore, the reasonable duration of the process cannot be a justification for shortening the procedural rite or for rejecting evidentiary steps relevant to the delinquency of the case. In fact, what is sought, according to the doctrine, is a process without undue delays, that is, that observes the contradictory, ample defense and the due legal process, but which strives for the speed of the procedure, reduces the procedural bureaucracy, eliminates the useless steps and is increasingly accessible to the citizen (SHIAVI: 2015, p. 6).

Based on the teachings mentioned, the principle of reasonable duration of the process must not be detached from other fundamental principles. Since this study seeks to analyze arbitration with a focus on access to justice, this legal foundation will also be considered throughout development, also promoting the articulation between all the fundamental precepts of Consumer Law.

## 4. ACCESS TO JUSTICE AS A FUNDAMENTAL RIGHT AND THE INSTITUTE OF ARBITRATION

According to Oliveski (2013), access to justice is a concept that is closely related to access to the Judiciary and the legal order, reflecting in a full way for the realization of citizenship.

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With CRFB/88, access to justice began to be expanded to all citizens, listing it at the level of a constitutional principle (Principle of Non-Removable Jurisdiction) provided for in item XXXV of article 5 of the Charter, in which the legislator points out that the law will not exclude from the Judiciary's assessment an injury or threat to a right. For Costa (2013), access to justice is seen as a fundamental right for all citizens and for its reach the provisions of the Constitution must be complied with, since its provision is in part I, title I of this legislation. It is a fundamental right analogous to rights, freedoms and guarantees, being an essential guarantee in the protection of fundamental rights from the perspective of the Democratic Rule of Law. Given this understanding, the author also draws a parallel between the recognition of access to justice as a fundamental right and the right to a decision within a reasonable time, pointing to the slowness of the Judiciary in the following terms:

> The conclusion of all these problems is the decrease of citizens' trust in Justice and a Justice that is increasingly far from being a right that should be guaranteed to all. Successive governments still tend to look at the problem of procedural speed and reasonable duration of the process as a problem of lack of effectiveness and efficiency, using these concepts here from a purely economic perspective of cost reduction, of de-judicialization, when it should not be looked at to the courts how one is looking at a company, but rather at a sovereign body whose problems must be resolved with the involvement and investment of the State and not with the opposite position, because this can have disastrous consequences for the rule of law Democratic (COSTA: 2013, pp. 39-40).

This is all aggravated by the mistaken view that the judicial route is the only way to access justice, making Brazil offer the world a perspective that we are experiencing a war of all against all, showing that man's vocation would be to live eternally in litigation, as a population of approximately 202 million inhabitants has more than 100 million lawsuits (NALINI, 2018, p. 29). Thus, the demand for more adequate mechanisms for the resolution of disputes is evident, which is verified in the changes promoted in the civil procedure, it has been observed that the adjudicated state justice is no longer the only instrument suitable for the resolution of disputes and alongside the state justice, with a single door, new forms of access emerged, such as arbitration, becoming the access to multi-door justice (DIDIER JÚNIOR; ZANETI JÚNIOR, 2018, p. 38). According to Fichtner, Mannheimer and Monteiro (2019), the slowness of the Judiciary as an obstacle to access to justice and to obtain a reasonable duration of the process that is contemplated highlights the institute of arbitration, understood as an alternative mechanism for the solution of controversies, obtaining faster and more technical decisions and contributing to "unburden" the courts of the Judiciary. Casado Filho (2014) defines arbitration as the institution through which two conflicting parties can hire and entrust arbitrators, appointed by them or not, to adjudicate their disputes regarding enforceable rights.

Since the slowness of the Judiciary makes it impossible to achieve access to justice as a fundamental right, as people end up not having their demands met or have their demands met with a great waste of time, arbitration and other adequate means of solution of conflicts are now contemplated as possibilities to optimize the jurisdictional provision, since they occur outside the Judiciary, reducing the demand assessed by the Brazilian courts. Ferreira, Ferreira and Rocha (2019) point out that although arbitration cannot be considered an innovation in the legal system, the Arbitration Law (Law No. 9.307/96) was conceived as an important regulatory

framework in this regard, by admitting that people can trigger the arbitration procedure to settle disputes regarding available property rights.

Procedural authors such as Dinamarco (2013) criticize arbitration as a mechanism for access to justice, since the plaintiff understands that it could not reach a satisfactory level of excellence without the foundations of the General Theory of Process, not being methodologically legitimate in itself. concern only with phenomena inherent to state jurisdiction, not considering the jurisdiction of arbitrators. Carmona (2009), on the other hand, contemplates that arbitration can not only, as it has flourished in the Brazilian case, not only because of the crisis in the judicial process, but also because of the benefits associated with access to justice, such as greater speed, secrecy in the decision of the cause, better efficiency of the technical decisions rendered by the arbitrator, this one conceived as someone with specific knowledge about the thing in merit in the arbitration procedure, among countless other aspects.

Regarding the application of arbitration in consumer relations, Olavo Augusto Vianna Alves Ferreira, Matheus Lins Rocha and Débora Cristina Fernandes Ananias Alves Ferreira (2019, p. 93) state that arbitration can be applied in consumer disputes, highlighting that this instrument of conflict resolution, by expanding access to justice and having faster and more efficient processing (which in some cases may not even generate costs, depending on the model adopted), will provide benefits to the consumer. Levy and Pereira (2018) sought to give a new focus to the institute of arbitration in the light of current Law, conceiving it as an instrument that can be used to expand access to justice and to optimize the jurisdictional provision of the State, from from the perspective of several authors. In fact, there is no absolute consensus involving the perception that the mechanism known as arbitration can be seen as a possibility to promote the optimization of access to justice and a reasonable duration of the process, especially in the context of Consumer Rights, being necessary to obtain a impartial view of its applicability in these terms.

The elements presented throughout the work included the offer of basic information to provide an analysis of REsp No. 1,742,547, verifying the possibility of contemplating arbitration as a mechanism for enforcing consumer rights and the principle of reasonable duration of the process, which occurs in the next chapter. The fact that fundamental information has been presented and substantiated throughout the previous chapters does not in any way mean that such information should not be deepened and questioned during the development of this study, which will be carried out at an opportune time.

## 5. SPECIAL RESOURCE NO. 1,742,547: A NEW EXCEPTION OF ACCESS TO JUSTICE AS A FUNDAMENTAL RIGHT?

This chapter seeks the presentation and analysis of REsp nº. 1,742,547, contemplating the possibility of verifying arbitration as a mechanism to enforce consumer rights and the principle of reasonable duration of the process, considering that in 2007, in the judgment of REsp nº. 819.519/PE, in the first judgment dealing with arbitration clauses inserted in consumer contracts, the STJ adopted the understanding that "the arbitration agreement clause inserted in

the adhesion contract, entered into under the Consumer Protection Code is null and void" (in the same sense: AgRg in EDcl in Ag No. 1.101.015/RJ).

Fichtner, Mannheimer and Monteiro (2019, p. 262), state that although consumer relations are subject to public order rules, they have an evident patrimonial nature, which is already sufficient to meet the requirements of objective arbitrability. And the same authors continue, in addition to stressing that "although free availability is not a criterion adopted by the Brazilian legal system for the purpose of objective arbitrability, in any case, the consumer's rights are available" (FICHTNER; MANNHEIMER; MONTEIRO, 2019, p. 262).

In the judgments of REsp no. 1.169.841/RJ and REsp no. 1.189.050/SP, the STJ stated that it is perfectly applicable to arbitration in consumer relations, being a defense, however, the imposition of an arbitration clause, reserving to the consumer the power to free himself from the arbitration process to resolve any eventual lead. As early as 2018, the same Court had the opportunity to analyze a different case, AgInt in AREsp nº. 1.152.469/GO in which, unlike the aforementioned, the consumer had expressed his willingness to join the arbitration, but even so chose to file an action for annulment of the arbitration award. In this judgment, the STJ established that the CDC prevents the prior and compulsory adoption of arbitration, but that it does not prohibit its institution, provided that there is an agreement between the parties and the special consent of the consumer, however, the court understood that the analysis of the Appeal Special would demand the re-examination of the factual matter of the dispute, applying Precedent 7 of the STJ, dismissing the appeal.

Given these facts, the importance of the analysis of REsp nº. 1,742,547, which was a Special Appeal filed by LCDCL and JJM, in an indemnity action for material and moral damages filed by the appellants against an engineering company, due to alleged non-compliance with the promise to buy and sell a unit in a project real estate. Below, the summary of the appeal to be analyzed is presented:

> SPECIAL RESOURCE. CIVIL AND CONSUMER PROCEDURE. ADHESION CONTRACT. ACQUISITION OF REAL ESTATE UNIT. ARBITRATION AGREEMENT. LIMITS AND EXCEPTIONS. CONSUMPTION CONTRACTS. POSSIBILITY OF USE. ABSENCE OF TAX. CONSUMER PARTICIPATION. TERM OF COMMITMENT. SUBSEQUENT SIGNATURE. REsp nº 1742547 / MG (2018/0121028-6).

In the appellants' appeal, the nullity of the arbitration agreement contained in the adhesion contract was alleged. However, the Court of Justice of Minas Gerais (TJMG) dismissed the appeal, stating that, at a later time, the appellants signed an arbitration term that grounds the litigation to arbitration jurisdiction, in the following terms, under which emphasis:

> APPEAL. ACTION FOR INDEMNITY. ARBITRATION CLAUSE FOR INSTITUTION OF ARBITRAL COURT. VALIDITY. ADHESION CONTRACT. PARTICIPATION IN THE INSTRUCTION IN THE ARBITRAL COURT. IMPOSSIBILITY OF TRANSFER TO THE JUDICIARY. VENIRE PROHIBITION AGAINST FACTUM PROPRIUM. The arbitration clause for the resolution of conflicts, through arbitration, in consumer relations arising from adhesion contracts, is null. However, the qualified party to understand what was being agreed upon, by opting for the arbitration court, participating in its instruction, gave up access to the Judiciary for the assessment of issues related to the contract, which makes it impossible for the contracting parties to seek a solution to their disputes via the Judiciary Branch.

In the case in question, the option for the arbitration procedure culminated in the abdication of access to the Judiciary Power, meaning that the authors could no longer seek the solution of disputes through this means, but through arbitration. Based on the decision, the case was dismissed without judgment on the merits, based on item VII of article 485 of the CPC/73, due to the establishment of the arbitration procedure to settle the same dispute. The REsp no. 1,742,547 contemplated the allegation of violation of item VII of article 51 of the CRC and of § 2 of article 4 of the Arbitration Law, in addition to the existence of jurisprudential agreement. Article 51 of the CRC is present in Section II of the Diploma (Abusive Clauses) contemplating that, among others, the contractual clauses relating to the supply of products and services that, pursuant to item VII, determine the compulsory use are null and void. of the institute of arbitration. In the lesson by Olavo Augusto Vianna Alves Ferreira, Matheus Lins Rocha and Débora Cristina Fernandes Ananias Alves Ferreira (2019, p. 93), the legislator's objective was consumer protection, balancing the relationship, as if there was legal permission for the use of arbitration compulsory, the consumer would be required to submit to the arbitration clause frequently by the suppliers.

It is necessary to bring to the debate that, in foreign law, the use of arbitration in consumer relations is admitted and encouraged, for example, Lemes (2003) highlights that in Portugal the Consumer Dispute Resolution Centers lead the use of arbitration, recording between 2000/2001, the average of ten thousand cases. In Argentina, where consumer law encourages arbitration, in 2002 there were 2,698 arbitration awards.

Thiago Rodovalho (2016, p. 98-100) observes that article 51 of the CRC provides a comprehensive list of clauses considered, in themselves, abusive, which must be recognized ex officio, with the Brazilian legislator failing to opt for the adopted legislative technique in other countries such as Germany and Portugal, which divide unfair terms between those that admit and those that do not allow valuation. In this way, this impossibility of valuation, may in some cases harm the consumer, considering that the option for nullity will not always be more advantageous in the specific case, such as the insertion of an arbitration clause in consumer adhesion contracts, being the ineffectiveness with relationship to the consumer, a better solution than nullity, as it would only allow the consumer, in the event of a possible dispute, to opt for arbitration before the supplier (RODOVALHO, 2016, p. 100-101).

However, Thiago Rodovalho (2016, p. 100) points out that although the national legislator has not done well, the rigidity of article 51 of the CRC has been improved by doctrine and jurisprudence, with the approximation of the German and Portuguese systems, which notes, including with regard to O REsp nº. 1,742,547. Paragraph 2 of Article 4 of the Arbitration Law, on the other hand, determines that the arbitration clause is contemplated as the convention through which the parties to a contract undertake to submit the arbitration procedure for disputes relating to adhesion contracts, so that the arbitration clause it will only be effective if the adherent takes the initiative to institute arbitration or expressly agree with its institution.

Paulo Furtado and Uadi Lammêgo Bulos (1997, p. 50-51), Joel Dias Figueira Junior (1997, p. 116-117) and Humberto Theodoro Júnior (2008, p. 344-345) argue that this provision of the Arbitration Law would have revoked article 51, VII of the CDC, but most of the doctrine followed a different path, considering that this special rule lives in harmony with the protection granted to the consumer/adherent in article 51, VII of the CDC, in this sense (CARMONA, 2009 , p. 108; CRETELLA NETO, 2004, p. 58-59; ROCHA, 1997, 34; RODOVALHO, 2016, p. 119;

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FERREIRA; ROCHA; FERREIRA, 2019, p. 94; NERY JR., 2004, p. 582; FICHTNER; MANNHEIMER; MONTEIRO, 2019, p. 265). Nelson Nery (2004, p. 582) points out that the two provisions are in full force, making it possible to establish an arbitration clause in consumer contracts, obeying the bilaterality in contracting and the form of expression of will, guaranteeing the manifestation of mutual agreement by the parties.

The subject was analyzed in Special Resource n. 1,169,841-RJ, with the STJ highlighted that when the Arbitration Law came into force, three rules with different degrees of specificity came to coexist harmoniously, namely: a) the general rule, which requires the observance of the arbitration when agreed upon by the parties, to the detriment of state jurisdiction; b) the specific rule of article 4, § 2, of Law 9,307/96, with application to generic adhesion contracts, restricting the effectiveness of the arbitration clause; and c) the even more specific rule of art. 51, VII, of the CDC, which applies to consumer contracts, adhesion or not, with the imposition of the nullity of a clause establishing the compulsory use of arbitration, even if the requirements of art. 4, § 2, of the Arbitration Law. According to Olavo Augusto Vianna Alves Ferreira, Matheus Lins Rocha and Débora Cristina Fernandes Ananias Alves Ferreira (2019, p. 94) it is possible to apply articles 51, VII of the CDC and 4, § 2, of Law 9,307/96, provided that the The effectiveness of the clause is subject to the consumer's initiative to institute arbitration, or his express agreement, and the compulsory use of arbitration cannot be considered. In this sense, the STJ has already expressed itself in consideration of REsp n. 1,169,841-RJ, by pointing out that art. 51, VII of the CDC is limited to prohibiting the prior and compulsory adoption of arbitration, at the time of entering into the contract, but does not prevent its subsequent establishment, provided that there is consensus between the parties and, especially, the consent of the consumer (in the same meaning see: REsp 1,628,819/MG).

In REsp 1.785.783/GO, the conclusion was the same, having been highlighted that by the content of art. 4, § 2, of the Arbitration Law, even if the arbitration clause is on the same contract signature page, if the necessary highlights are observed, as determined by the CDC, it will be considered valid. José Antonio Fichtner, Sergio Nelson Mannheimer and André Luís Monteiro (2019, p. 267), contrary to what is stated in REsp 1.785,783/GO, note that the simple bold highlighting of the clause and the specific signature do not effectively protect the consumer, who in practice may consider that it is just another clause in bold in the contract, creating doubt as to the meaning of their choice.

The same Court of Justice, in the judgment of REsp 1,189,050/SP, ruled that there is no opposition to arbitration in the CDC, which would even encourage its adoption, only the imposition of the arbitration clause being prohibited, recognizing that there is no incompatibility between the articles 51, VII, of the CDC and 4, § 2, of Law n. 9.307/96 and that, in order to reconcile them and guarantee greater protection to the consumer, the arbitration clause will only be effective in case the adherent takes the initiative to institute arbitration, or expressly agrees with its institution. On the subject, Thiago Rodovalho (2016, p. 121-122) highlighted that while the CDC protects what is presumed to be vulnerable, the Arbitration Law aims to protect the "effectively under-sufficient", applying both rules in cases where there is disparity of forces between the contracting parties, this difference of forces being presumed in the CDC and concretely verified in the Arbitration Law.

Fátima Nancy Andrighi (2006, p. 19), ponders that one should not turn a blind eye to reality, considering that the adoption of arbitration in the resolution of consumer disputes is still

incipient and that, despite this, there is already news of the misuse of this instrument by service or product providers. For José Antonio Fichtner, Sergio Nelson Mannheimer and André Luís Monteiro (2019, p. 267) “In the event that the consumer himself takes the initiative to institute arbitration, there is no greater doubt as to the full regularity of the arbitration process”, serving his initiative of proof of action with freedom, conscience and autonomy in expressing their will.

On the other hand, the situation would be much more complex if the supplier took the initiative to institute arbitration, as there would be no proof in advance constituted of the consumer’s freedom, conscience and autonomy of expression of will, in the case of a case that would demand greater degree of caution in the analysis (FICHTNER; MANNHEIMER; MONTEIRO, 2019, p. 268). Based on the observation of the doctrine and jurisprudence on the subject, it is observed that, in the case under study (REsp nº 1,1742,547), the voluntary adherence of consumers ended up making access to the Judiciary impossible. The appeal’s rapporteur, Minister Nancy Andrighi, following the jurisprudence of the STJ and the exposed doctrine, stated that item VII of article 51 of the CRC is limited to prohibiting the prior and compulsory adoption of the arbitration institute at the time of signing the contract, interpreting that this does not promote subsequent impediment, in the face of litigation, with a consensus between the parties. Thus, it is possible to use arbitration to resolve disputes arising from consumer relations, provided that it is not imposed by the supplier or when the initiative of the establishment is the consumer, or even if the consumer expressly agrees with the supplier’s initiative regarding the option by arbitration.

The reporter contemplated that, in the case in question, the consumers signed, independently and voluntarily, in relation to the purchase and sale agreement, a term of commitment, actively participating in the arbitration procedure. Since the appellants accepted such participation with the subsequent signing of the arbitration agreement, the appeal was denied. The arbitration clause would be null if it had been imposed on consumers, but it is possible to establish the arbitration procedure in a compulsory manner in consumer relations once there is later agreement of the parties through this alternative dispute resolution mechanism. This decision corroborated the applicability of arbitration, as well as the validity of the arbitration agreement in consumer relations, provided that the parties’ autonomy of will considering the contractual act is present. Therefore, the authors must be submitted to the arbitration procedure with which they spontaneously agreed.

According to Lima (2018), the autonomy of the will is considered the dominant principle of arbitration, so that the institute can only be activated in the cases provided for by law in a voluntary manner by both parties. In the case in question, it was found that, once arbitration on this issue has taken place (even if later) it is no longer possible for the consumer to take the same matter to court, being a new exception to access to justice as a fundamental right , a circumstance that will be discussed later. Article 3 of the Arbitration Law determines that interested parties may submit the solution of their disputes to arbitration proceedings based on the arbitration agreement, being the arbitration clause and the arbitration commitment. According to Pinho and Mazzola (2017), by the arbitration clause, the parties undertake to submit possible disputes to arbitration, while in the arbitration commitment, the conflict is effectively submitted to the arbitration procedure, indicating the names of the parties, the arbitrators, matter under discussion, place of the arbitration award, in addition to the stipulation of the rules of procedure, respecting local limits. Once the arbitration agreement is established voluntarily, there is no

reason to 'go back' to the procedure. Therefore, an analysis will be promoted as to the reasonable duration of the process in consumer matters from this judgment.

According to Oliveira and Nunes (2018, p. 72) "the end of the litigious culture aims at the true realization of access to justice, guaranteeing the citizen respect for the due legal process and the reasonable duration of the process", recognizing that this The last principle has not been respected in the Brazilian case due to the slowness of the Judiciary, which is justified by the high demand for lawsuits assessed by it. Thus, arbitration can be seen as a means of promoting the fulfillment of the assessment of demands within a reasonable time. Once opted for the arbitration procedure, it is through it that the dispute will be resolved, and it is not possible to 'go back' to submit any consumer rights to court for the same matter. This is exactly what happened at REsp nº 1,742,547, where consumers agreed to opt for arbitration, which is the ideal way to solve the dispute and no longer the judicial way.

In his opinion on the aforementioned Special Appeal, Rover (2019) pointed out that, once a consumer signs an adhesion contract in the consumer relationship and, later, voluntarily, expressly agrees with the use of the arbitration institute, he cannot more seeking support in the Judiciary for the resolution of the conflict, since although consumer law prohibits prior and compulsory action of arbitration at the time of entering into a contract, there is no subsequent impediment once the arbitration is agreed upon by consensus between the parties. As previously presented in this study, one of the fundamental precepts of Consumer Rights resides in the principle of vulnerability, which recognizes the low sufficiency of consumers and the need for their protection. In this sense, a possible affront to the principle of vulnerability could be verified in the judgment of REsp nº 1,742,547 if the supplier had used its privileged position to force consumers to opt for arbitration. However, this was not confirmed in practice, so that the interpretation of item VII of article 51 of the CRC can be considered adequate, since the consumer legislation does not deal with subsequent adhesion.

Considering the above, it is necessary to ask: does the decision rendered in the judgment of REsp No. 1,742,547 imply a new exception to access to justice as a fundamental right by preventing the examination in court of the same matter before submission to the arbitration proceeding? In order to answer this question, Sadek's (2009) understanding should be used, in which the author points out that for the effectiveness of rights, access to justice is considered fundamental, since rights are only realized in the face of real possibility. to claim them before partial and independent courts, so that, in the event of any impediment to the right of access to justice, there are limitations or even impossibility of effective citizenship:

> In fact, rights mean little if there are no mechanisms for their realization. The real possibility of recourse to justice is the basic condition for this approximation between formal and substantive equality. Or if you prefer, it is the possibility of moving from intention to practice. Access to justice has a broader meaning than access to the judiciary. Access to justice means the possibility of making use of channels in charge of recognizing rights, of seeking institutions aimed at the peaceful solution of threats or impediments to rights. The set of state institutions designed for the purpose of securing rights is called the justice system (SADEK: 2009, p. 175).

Thus, based on the assumption that access to justice would be limited to access to the Judiciary, we would be facing a real affront to the Constitutional Diploma of 1988 in the judgment of REsp No. 1,742,547, including violating the effective citizenship of consumers by removing

them from the jurisdictional provision. However, in the present case, access to justice was reconfigured, given the option and appreciation of the arbitration procedure. It is necessary to present the understanding of Condado (2008), which contemplates that Brazilian arbitration meets the fundamental assumptions of the Constitutional Diploma of 1988, approaching the people's desire to live with a fast, safe, unbureaucratic and easy justice access. The constitutional right to jurisdiction is defended in the doctrinal field as the most fundamental among state obligations and, therefore, there is usually a direct association between access to justice and the courts, a view that, for the author of this study, does not more sustains itself. For the author, formal access to justice, based on the activation of the Judiciary, is not seen as the best model, nor as the model that provides greater access to justice, requiring a broader meaning that provides access to the citizen, not only to the courts and to the result of the jurisdictional provision, but of a just legal order. By making use of arbitration, the citizen obtains the solution to the conflict, however, if the agreement is not fulfilled, it continues with the support of the state power so that it makes use of its authority and monopoly of coercion, making use of the Judiciary and Forced Execution:

> [...] it's time to open up horizons and tread alternative paths, visualizing yourself, because, through arbitration, you will have a greater breadth of access to justice, conforming to the demands of the common good. It should be noted that the Judiciary Branch is responsible for ensuring the legality and, on multiple aspects, for the application and interpretation of Law No. 9,307/96. From another perspective, it is added that the objectification of an institute (arbitration) constitutes a social process, which can be delayed or stimulated, according to the performance of human agents related to it and, in creating the habit of arbitration, it is important to the guidance that lawyers and legal practitioners give their clients regarding the option for the arbitration process (CONDADO: 2008, p. 87).

When analyzing REsp nº 1.742.547, it is possible to speak not of a prohibition on access to justice, since this must be based on the arbitration procedure, which is effectively regulated by legislation in the Democratic State of Law. Speak up. then, in an exception to access to the Judiciary before the subsequent acceptance of the parties to the arbitration agreement in the consumer relationship. In the same sense, when considering the Special Appeal as a whole, one could only speak of a real impediment to access to justice if, in view of the non-compliance with the agreement in the arbitration procedure, the Judiciary refused to defend the interests of the injured consumers.

Silva (2005) points to two paths for the meaning of access to justice, the first being related to the understanding of access to justice as a synonym for access to the Judiciary and the second path to the understanding of access to justice through a scale of values and fundamental human rights, transcending judicialization and, therefore, not ending with access to the Judiciary. This understanding advocates two perspectives for the analytical essay of REsp No. 1,742,547: a) when considering access to the Judiciary as a synonym for access to justice, an impediment to access due to consumers is observed; and, b) when considering access to justice in a broad perspective and its modern definition, the institute of arbitration fulfills the precepts of access to justice, since arbitration would not be conceived as compulsory, given voluntary acceptance of consumers.

Thus, from the second perspective, it is considered that the decision of REsp No. 1.742.547 represents a new exception to access to justice as a fundamental right, which does not represent

an affront to the exercise of citizenship and access to justice in itself, but the removal of the judicialization of the matter to be considered before the opening of the arbitration proceeding. In the present case, there was no coercion of the Judiciary on the basis of consumers abstaining from judicial review, but an assessment of the legal provisions in which the parties' acceptance of the arbitration agreement was considered. The principle of consumer vulnerability was also not challenged, still conceived as the low-sufficient part of the consumer relationship, since at no time were consumers forced to accept the arbitration institute, which is recognized as a possibility to optimize and achieve more forcefully the principle of reasonable duration of the process.

The great obstacle to obtaining a faster decision for the case in question comes precisely from the judicialization of the case. When submitting the case for arbitration, one can make use of the teachings of Thiago Rodovalho (2017), who points to the main attractions of the institute: the judge's specialty, speed, flexibility and reliability. The legislation establishes a fixed period of six months for its end and, although its extension is not uncommon, arbitration procedures usually come to an end in just over a year, with evidence and hearings set up for the final decision without the possibility of an appeal for the challenge. Thus, it is possible to state that arbitration is a way to implement the principle of reasonable duration of the process, even though the Special Appeal analyzed has very specific nuances.

However, for the use of arbitration in matters of consumer law to be feasible, it is necessary to rule out the absence of financial resources for the establishment of arbitration proceedings, avoiding the so-called impecuniousness of arbitration. Thiago Dias Delfino Cabral (2019, p. 77), in a specific work on the subject, observes that although arbitration is generally not expensive, the amounts necessary for the establishment and its continuation may prevent the use of this mechanism by a person who has entered into an arbitration agreement, especially during periods of economic crises that impact everyone. José Antonio Fichtner, Sergio Nelson Mannheimer and André Luís Monteiro (2019, p. 61) after pointing out that there is no statistical data to demonstrate the cost of arbitration, they stated that the initial cost to initiate the procedure, such as registration fee and registration fee arbitrators' administration and fees have an immediate face value generally greater than that necessary to file a lawsuit, but they considered that this higher face value would represent a savings for the parties if diluted in the time a process in the state court usually takes , with the reduction of interest and legal surcharges, as well as with the elimination of the cost of managing a lawsuit for several years.

In state justice, according to article 82 of the CPC, subject to the provisions concerning free justice, it is incumbent on the parties to provide for the expenses of the acts that they perform or require in the process, including the advance payment of the procedural acts they wish to practice. In consumer relations, it is still common to apply article 6, VIII of the CDC, with the inversion of the burden of proof in favor of the consumer, when, at the discretion of the judge, its claim is credible or when it is insufficient, with the determination for the supplier to make advance payment of procedural acts, such as the costs of producing an expert evidence, for example.

In institutional arbitrations, Thiago Dias Delfino Cabral (2019, p. 80) points out that if one party is unable to pay the necessary costs for the initiation or continuation of the arbitration, the other may make the payment, under penalty of suspension or termination of the procedure. The situation is even more complex given the absence of the State's duty to offer assistance to the citizen in arbitrations, with no chance of benefiting from legal assistance yet (CABRAL, 2019, p. 81-82).

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Thus, the possibility would arise that an injury or threat to a right would not be analyzed by the arbitrator or arbitral tribunal and the party would still be prevented from directing its claim to the Judiciary, due to the arbitration agreement (CABRAL, 2019, p. 82 ). Given this legislative gap, it is suggested in the narrow limits imposed in this study regarding the issue, that the anticipation of payment of the costs of the arbitration procedure is always the responsibility of the supplier, and the parties may provide for the responsibility for payment of the costs of the procedure arbitration at the end of the dispute, in a consensual manner, observing, in particular, the consumer's consent on this point. If the convention is silent, it is suggested to apply the understanding of Olavo Augusto Vianna Alves Ferreira, Matheus Lins Rocha and Débora Cristina Fernandes Ananias Alves Ferreira (2019, p. 286-287) for arbitrations in general, with the adoption of the regulation of the arbitration institution, if the parties have not agreed otherwise. In the last case, it will be up to the arbitrators to fix it (FERREIRA; ROCHA; FERREIRA, 2019, p. 287). Returning to the issue of access to justice, it is also important to point to the following counterpoint, under which it is highlighted:

> [...] the principle of access to justice stands out, which serves to exist a process at the same time that it protects the interest of the citizen regarding the intervention of the State to guarantee the jurisdictional protection. The principle of access to justice is sometimes called the right of action or even the inescapability of jurisdictional control. It is a guarantee of citizenship, where the State must easily allow access to justice, and the legislator cannot, under any circumstances, draw up rules that hinder or prevent access, not only to the judiciary, but in a global way to all its manifestations, maintaining always equal access to the system (CANZI, 2012, p. 1).

In REsp No. 1,742,547, the option of consumers not to be interested in the arbitration proceeding, but rather in the judicial process, remains clear, regardless of whether the first alternative is considered faster, more efficient and aligned with the principle of reasonable duration of the proceeding. Although most legal doctrine on the subject does not consider access to the Judiciary as synonymous with access to justice, there are authors such as Canzi (2012) who understand that, although access to justice has a broad meaning and includes other means suitable for resolving disputes, easy access to the Judiciary would be one of its fundamental perspectives on access to justice as a whole, which reinforces the thesis of two lines of thought for the interpretation of the Special Appeal analyzed throughout the development of this study.

Schiavi (2015) reiterates that access to justice and the principle of reasonable duration of the process must be harmonious, so that the reasonable duration cannot be justified to shorten the procedural shot, but rather by the speed of the procedure and reduction of procedural bureaucracy, eliminating useless steps that are increasingly accessible to the citizen. Therefore, the author points out that the behavior of the parties in the process is considered essential for a quick solution to the conflict. With collaboration between the parties, especially with honesty and good faith in the allegations, the process is resolved more quickly, producing a decision with more justice and in line with reality, and this same understanding is taken to the conception of the arbitration method. Even when considering arbitration as a procedure more in line with the principle of reasonable duration of the process, the behavior of the parties is another point to be considered in the result of REsp No. 1,742,547: consumers clearly stated that they sought the option for the judicial route for the resolution of the dispute with the supplier, which may indicate a hostile relationship between the parties, ruling out the possibility of reaching an arbitration decision that produces effects considered 'fair' by both parties. In the case in

question, the arbitration procedure has already been contemplated, but the possible risk is that the institute will be misrepresented, mainly due to the fact that, even in view of the acceptance of the consumers in the execution of the arbitration, the non-intention of the consumers in effectively activate the institute.

The great merit of the institute of arbitration is due to the fact that the parties voluntarily choose the institute. It would be more prudent, in this sense, to allow access to the Judiciary in the face of any party's dissatisfaction with the arbitration procedure. The creation of adequate means of conflict resolution does not mean that such alternatives should be imposed on citizens, even in the face of eventual acceptance prior to or subsequent to the signing of the commercial contract. In fact, since the judgment of REsp No. 1,742,547 took place at a recent time, there are few studies and opinions on the legal repercussions of the decision, so this study started from the theoretical basis carried out in the previous chapters to reach conclusions original to the problem exposed. It is expected that, with the results arising from the preparation of this study, other relevant analyzes and publications on the subject will be carried out.

## 6. FINAL CONSIDERATIONS

Based on the analysis of REsp No. 1,742,547 carried out throughout this study, it was found that Arbitration can in fact be appointed as a mechanism for the realization of Consumer Rights and the Principle of Reasonable Duration of the Process, especially when considering that this second, it has been largely hampered by the Judiciary's inability to produce decisions that are both swift and efficient, which had been analyzed concurrently with the perspective of the great demand for legal proceedings present in Brazilian courts.

On the other hand, the decision of the Special Appeal analyzed here brought a series of other controversies, including the principle of reasonable duration of the process and the possibility of establishing a new exception to access to justice as a fundamental right. The discussion involving this second perspective contemplates two views of thought: the first contemplates access to justice as a synonym for access to the Judiciary, which would imply an impediment to access to justice; the second, which provides for a more modern and comprehensive view of access to justice, understands that the institute of arbitration represents access to justice itself, with only a new exception rule for access to the Judiciary. It was also found that the action of the institute of arbitration is more in line with the assumptions contained in the principle of reasonable duration of the process in actions involving Consumer Rights. However, the decision of REsp No. 1.742.547, despite an adequate interpretation of the legislation that supported it, may lead to the distortion of the institute, since it is clear that consumers have no intention of submitting the dispute to arbitration, but to the court. Although there is no coercion and the autonomy of the consumers' will was configured in the adhesion to the arbitration after the signing of the contract, it could be more appropriate to review the request in court. In this way, even in the face of criticism of the decision in question, the Judiciary could only be brought into action in the case analyzed in view of the non-compliance with the agreements entered into with the establishment of the arbitration proceeding. Access to justice was ensured from

the granting of the appraisal through arbitration, ensuring a reasonable duration of the process, regardless of the parties' regret for the option of arbitration.

## REFERENCES

ALVIM, A., et al. *Código do consumidor comentado*. São Paulo: Editora Revista dos Tribunais, 1991.

AMARAL JÚNIOR, A. *Comentários ao Código de Defesa do Consumidor*. São Paulo: Saraiva, 1991.

AIRES NETO, A.W. *Princípio da razoável duração do processo: contribuição ao desenvolvimento de legislação e medidas que o levem a efeito.* Dissertação (mestrado) – Pontifícia Universidade Católica de Goiás, Goiânia, 2012.

APRIGLIANO, R. C. *A ordem pública no direito processual civil.* 2010. 329 p. Tese (Doutorado em Direito). Faculdade de Direito, Universidade de São Paulo, 2010.

ALMEIDA, C.F. *Os direitos dos consumidores.* Coimbra: Almedina, 1982.

ANDRIGHI, F. N. Arbitragem nas relações de consumo. *Revista de Arbitragem e Mediação*, São Paulo: RT, ano 3, n. 9, p. 19, abr./jun. 2006.

BENJAMIN, H. Senadonotícias. *Herman Benjamin, ministro do STJ*: O CDC é o habeas corpus do consumidor. 16 mar. 2009. Disponível em: https://www12.senado.leg.br/noticias/materias/2009/03/16/herman-benjamin-ministro-do-stj-o-cdc-e-o-habeas-corpus-do-consumidor. Acesso em: 11 nov. 2020.

BRASIL. STJ, 3ª T., *REsp 819.519/PE*, rel. Min. Humberto Gomes de Barros, j. 09.10.07, DJe 23.03.11.

BRASIL. STJ, 3ª T., *REsp 1.169.841/RJ*, rel. Min. Nancy Andrighi, v.u., j. 06.11.12, DJe 14.11.12.

BRASIL. STJ, 3ª T., *REsp 1.628.819/MG*, rel. Nancy Andrighi, v.u., j. 27.02.18, DJe 15.03.18.

BRASIL. STJ, 3ª T., *REsp 1.742.547/MG*, rel. Min. Nancy Andrighi, v.u., j. 18.06.19, DJe 21.06.19.

BRASIL. STJ, 3ª T., *REsp 1.785.783/GO*, rel. Min. Nancy Andrighi, v.u., j. 05.11.19, DJe 07.11.19.

BRASIL. STJ, 4ª T., *AgRg nos EDcl no Ag 1.101.015/RJ*, rel. Min. Aldir Passarinho Junior, j. 17.03.11, DJe 23.03.11.

BRASIL. STJ, 4ª T., *AgInt no AREsp 1.152.469/GO*, rel. Min. Maria Isabel Gallotti, j. 08.05.18, DJe 18.05.18.

BRASIL. STJ, 4ª T., *REsp 1.189.050/SP*, rel. Min. Luis Felipe Salomão, v.u., j. 01.03.16, DJe 14.03.16.

CABRAL, T. D. D.. *Impecuniosidade e Arbitragem:* Uma análise da ausência de recursos financeiros para a instauração do procedimento arbitral. São Paulo: Quartier Latin, 2019.

CANZI, K.N.C. *O princípio do acesso à justiça e o processo eletrônico.* UNOESC, 2012.

CARMONA, C.A. *Arbitragem e processo: um comentário à Lei nº 9.307/96.* 3. Ed. São Paulo: Atlas, 2009.

CARVALHO, M. Princípios Gerais do CDC e Direitos Básicos do Consumidor. *Cadernos do Curso de Extensão de Direito do Consumidor,* n. 1, 2013. Disponível em TJRJwww.emerj.tjrj.jus.br/publicacoes/cadernos_de_direito_do_consumidor/edicoes/cadernos_de_direito_do_consumidor_9.pdf. Acesso: Nov/2019.

CASADO FILHO, N. *Arbitragem Comercial Internacional e Acesso à Justiça: o novo paradigma do Third Party.* Tese (Doutorado em Direito) - Faculdade de Direito da PUC/SP, São Paulo, 2014.

CONDADO, E.C.G. *A Arbitragem como Instrumento Eficaz de Acesso à Justiça.* Dissertação (Pós-Graduação em Direito) - Universidade Estadual de Londrina, Londrina, 2008.

COSTA, P.J.A. *O acesso à justiça como direito fundamental de todos os cidadãos.* Dissertação apresentada no âmbito do 2.º ciclo de Estudos em Direito da Faculdade de Direito da Universidade de Coimbra, Coimbra, 2013.

CRETELLA NETO, J. *Comentários à lei de arbitragem brasileira*. Rio de Janeiro: Forense, 2004.

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DIDIER JÚNIOR, F.; ZANETI JÚNIOR, H. Justiça Multiportas e tutela adequada em litígios complexos: a autocomposição e os direitos coletivos. *In*: ZANETI JÚNIOR, Hermes; CABRAL, Trícia Navarro Xavier (Coord.). *Justiça Multiportas*: Mediação, Conciliação, Arbitragem e outros meios adequados de solução de conflitos. 2. ed. Salvador: Juspodivm, 2018.

DINAMARCO, C. R. *A Instrumentalidade do Processo*. São Paulo: Malheiros, 2008.

DINAMARCO, C. R. *Arbitragem na teoria geral do processo.* São Paulo: Malheiros, 2013.

FERREIRA, O.A.V.A; FERREIRA, D.C.F.A.A; ROCHA, M.L. *Lei de Arbitragem Comentada Artigo por Artigo.* Editora JusPODIVM, 1ª ed., 2019.

FICHTNER, J. A.; MANNHEIMER, S. N; MONTEIRO, A. L.. *Teoria geral da arbitragem.* – Rio de Janeiro: Forense, 2019.

FIGUEIRA JUNIOR, J. D.**.** *Manual da arbitragem*. São Paulo: Revista dos Tribunais, 1997.

FURTADO, P.; BULOS, U. L. *Lei de arbitragem comentada*. São Paulo: Saraiva, 1997.

GOIÁS. Tribunal de Justiça. TJGO, 5ª Câmara Cível, *Apelação 0237312.21.2016.8.09.0137*, rel. Delintro Belo de Almeida Filho, j. 22.03.2018.

GRINOVER, A. P; BENJAMIN, A. H. V.; FINK, D. R.; FILOMENO, J. G. B.; WATANABE, K.; NERY JÚNIOR, N.; DENARI, Z. *Código brasileiro de defesa do consumidor*. 9. ed. Rio de Janeiro: Forense Universitária, 2007.

LEVY, D; PEREIRA, G.S.J (Coords). *Curso de Arbitragem.* São Paulo: Thomson Reuters Brasil, 2018.

LIMA, P.E.C. A Escolha da Lei Aplicável à Convenção de Arbitragem. *RJLB*, Ano 4, nº 3, 2018.

LEMES, S. F. *O Uso da Arbitragem nas Relações de Consumo*. 12 ago. 2003. Disponível em: http://www.arbitragemsantos.com.br/conteudo/noticia_27.htm. Acesso em: 01 nov. 2020.

MARQUES, C. L. *Contratos no Código de defesa do consumidor*: o novo regime das relações contratuais. 4. ed. São Paulo: Editora Revista dos Tribunais, 2004.

MARQUES, C. L.; BENJAMIN, A. H; MIRAGEM, B. *Comentários ao Código de Defesa do Consumidor*. São Paulo: Revista dos Tribunais, 2004.

MARIMPIETRI, F. *Direito material do consumidor.* Salvador: Endoquality, 2001.

MIRAGEM, B. *Direito do consumidor*. São Paulo: Revista dos Tribunais, 2008.

MOLOGNI, C.K.F; PIEROTTI, S.M. *Do Direito À Razoável Duração Do Processo: Necessidade De Se Equacionar O Processo Célere Com As Garantias De Defesas Mínimas.* Revista do Direito Privado da UEL – Volume 3 – Número 1, 2009.

NALINI, J. R. É urgente construir alternativas à justiça. *In*: ZANETI JÚNIOR, Hermes; CABRAL, Trícia Navarro Xavier (Coord.). *Justiça Multiportas*: Mediação, Conciliação, Arbitragem e outros meios adequados de solução de conflitos. 2. ed. Salvador: Juspodivm, 2018.

NERY JR., N. et al. *Código Brasileiro de Defesa do Consumidor*: comentado pelos autores do anteprojeto. 8. ed. Rio de Janeiro: Forense Universitária, 2004, p. 582.

NUNES, C.L.G. O Princípio da Razoável Duração do Processo e Seus Critérios de Definição no âmbito do Sistema Interamericano de Direitos Humanos: Um Estudo do Caso Damião Ximenes Lopes. *Revista do CEJUR/TJSC*: Prestação Jurisdicional, v. V, n. 01, p. 35-58, dez. 2017.

OLIVEIRA, P.R.L; NUNES, T. Sistema Multiportas Para Solução Adequada De Conflitos De Interesses: Mediação, Conciliação E Arbitragem. *Direito & Realidade*, v.6, n.6, p.56 - 74/2018.

OLIVESKI, P.M. *Acesso à justiça.* Editora Unijuí - Coleção Educação a Distância. Ijuí, 2013.

PINHO, H.D.B; MAZZOLA, M. A Cooperação Como Elemento Estruturante Da Interface Entre O Poder Judiciário E O Juízo Arbitral. *Revista Eletrônica de Direito Processual – REDP*. Rio de Janeiro. Ano 11. Volume 18. Número 3. Setembro a Dezembro de 2017. Disponível em https://www.e-publicacoes.uerj.br/index.php/redp/article/view/31693/22428. Acesso: Nov/2019.

ROCHA, S. L. F. A cláusula compromissória prevista na lei 9.307, de 23.09.1996 e as relações de consumo. *In*: Claudia Lima Marques. *Revista de Direito do Consumidor*, vol. 21, Jan./1997.

RODOVALHO, T. Aspectos Introdutórios da Arbitragem. *In*: MOTTA JR., A et al. *Manual de Arbitragem para Advogados. Confederação das Associações Comerciais e Empresariais do Brasil (CACB)*: OAB, Comissão Especial de Mediação, Conciliação e Arbitragem, 2017.

RODOVALHO, T. *Cláusula Arbitral nos Contratos de Adesão*. São Paulo: Almedina, 2016.

ROVER, T. Consumidor que aceita arbitragem não pode recorrer ao Judiciário, decide STJ (Internet). *CONJUR*, ago. 2019. Disponível em https://www.conjur.com.br/2019-ago-16/consumidor-aceita-arbitragem-nao-recorrer-judiciario. Acesso: Nov/2019.

SADEK, M.T.A. *Acesso à justiça:* porta de entrada para a inclusão social. Rio de Janeiro: Centro Edelstein de Pesquisa Social, 2009. pp. 170-180.

SÃO PAULO. Tribunal de Justiça. TJSP, 3ª Câmara de Direito Privado, *Apelação Cível 1019669-24.2014.8.26.0554*, rel. Des. Carlos Alberto de Salles, j. 17.01.17.

SÃO PAULO. Tribunal de Justiça. TJSP, 6ª Câmara de Direito Privado, *Agravo de instrumento 0166160-98.2012.8.26.0000*, rel. Des. Paulo Alcides, j. 30.08.12.

SÃO PAULO. Tribunal de Justiça. TJSP, 8ª Câmara de Direito Privado, *Apelação Cível 3001192-12.2013.8.26.0114*, rel. Des. Grava Brazil, j. 30.06.16.

SÃO PAULO. Tribunal de Justiça. TJSP, 25ª Câmara de Direito Privado, *Apelação Cível 1050534-29.2017.8.26.0100*, rel. Des. Hugo Crepaldi, j. 16.08.18.

SCHIAVI, M. *O Novo Código de Processo Civil e o Princípio da Duração Razoável do Processo (Internet)*. TRF7, 2015. Disponível em www.trt7.jus.br/escolajudicial/arquivos/files/busca/2015/NOVO_CPC_E_O_PRINCIPIO_DA_DURACAO_RAZOAVEL_DO_PROCESSO_-_Mauro.pdf. Acesso: Nov/2019.

SILVA, A. S. *Acesso à justiça e arbitragem: um caminho para a crise do judiciário.* Barueri: Manole, 2005.

SILVA, P. C. O Acesso ao Sistema Judicial e os Meios Alternativos de Resolução de Controvérsias*:* Alternatividade Efectiva e Complementaridade. *In:* ZANETI JÚNIOR, H.; CABRAL, T. N. X. (coord.). *Justiça Multiportas:* Mediação, Conciliação, Arbitragem e outros meios adequados de solução de conflitos*.* 2. ed. Salvador: Juspodivm*,* 2018.

SILVA, E.M. *A garantia constitucional da razoável duração do processo e a defesa do Estado*. Brasília a. 43 n. 172 out./dez. 2006. Disponível em https://www2.senado.leg.br/bdsf/bitstream/handle/id/93271/Silva%20Enio.pdf?sequence=4. Acesso: Nov/2019.

SOARES, E.C; ALVES, F.B. Princípios Do Contraditório E Da Ampla Defesa: Óbice Para A Efetiva Aplicação Do Princípio Da Razoável Duração Do Processo?. *Revista Notices*, [S.l.], v. 6, n. 6, mar. 2017.

SOARES, R. M. F. O discurso principiológico do código brasileiro de defesa do consumidor. *Rev. Ciênc. Juríd. Soc. UNIPAR*. Umuarama. v. 18, n. 2, p. 187- 200, jul./dez. 2015.

THEODORO JÚNIOR, H. *Curso de direito processual civil*. 39. ed. Rio de Janeiro: Forense, 2008, v. III.

ZAVASCKI, T. A. *Antecipação de Tutela*. São Paulo: Saraiva, 1997.

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