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## CLICK-WRAP AGREEMENTS AND ITS INTERPRETATION BY THE BRAZILIAN COURTS

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Guilherme de Carvalho Doval  
[gdoval@almeidalaw.com.br](mailto:gdoval@almeidalaw.com.br)

The current reality of global businesses, where the use of the features brought by technology is unquestionable, was not followed by the development of legal rules.

This way, an analysis of the applicability of the existing rules becomes the only method available to evaluate the practices of the companies in order to avoid a practice that could be considered not valid by the Brazilian Courts or interpreted in a way that may put at risk the company's interests.

### 1 – Elaboration of Contracts

The formal requirements for validity of a contract do not depend on the environment in which it was executed, whether in person or remotely, as it occurs with the Internet deals. The article 104 of the Civil Code determines such requirements as follows (i) capable agent, (ii) lawful object, and (iii) prescribed or non-forbidden format.

The same happens with the preparation of contracts, in which if there is an statement of will by the contractor (which binds the contractor) and the acceptance of the contracted the legal relationship will be formed whether in presence or through the Internet.

### 2 - Applicable Law

With the introduction of the Internet and

especially the electronic commerce, the execution of contracts where parties are in different places, often in different countries, is becoming increasingly common.

For that reason there may be some conflicts about the applicable law especially because the general rule brought by the Civil Code (Article 435: the contract is considered executed in the place where it was proposed) is of difficult application for the so-called online contracts, once the residence of the party and the localization of the website where the offer was proposed generally do not match.

Regarding that matter, the rule of the Law of Introduction to the Civil Code seems to address the issue more clearly: the obligation arising from the contract is created in the place where the proponent resides (article 9, paragraph 2).

On the other hand, the Pattern Law from UNCITRAL regarding e-commerce establishes that, unless agreed otherwise by the parties, an electronic message is considered sent from where the sender has its head office, and received where the recipient has its facilities, determining as the place of execution of the agreement the bidder's domicile.

Truth is that Courts have been interpreted e-commerce under the current existing

legislation which controls sales outside of the selling party's head office<sup>1</sup>.

### 3 - Adhesion Agreement

By the foregoing we conclude that it is rare for the parties on e-commerce and negotiations conducted by electronic means in general to negotiate the terms and conditions of the contract and transactions are performed and considered as adhesion agreement.

According to the Civil Code in its articles 423 and 424 adhesion agreements shall be interpreted in benefit of the accepting party, every time that there is an ambiguous clause or even if it is considered null (especially when there is a waiver of any right normally arising from the respective deal).

Furthermore, regarding consumer transactions the regulation of adhesion agreements is even more severe<sup>2</sup>.

### 4 - Shrink-wrap and Click-wrap: Contracting through the Internet

Shrink-wrap is an expression in English for a kind of vacuum packaging, commonly

used to wrap up softwares (among different types of products).

In the shrink-wrap agreements, when opening the package the customer, in theory, accepts all the license terms included.

The same concept has been applied on a large scale on the Internet, now named as click-wrap, in which the user must click to accept the terms offered by the supplier/website administrator.

The validity of Internet for the statement of will by the parties is already fully recognized by the Brazilian Courts<sup>3</sup>, inclusive for adhesion agreements in view of the non-existence of impediment by the Consumer Protection Code<sup>4</sup>.

However, the supplier must be careful not only with the quality of its products and services. If supplier elects to offer and contract by electronic means it will also become liable for its security, especially with respect to data exchanging and to avoid frauds<sup>5</sup>.

The Consulting Department of Almeida Advogados has a specialized staff on elaboration of information technology agreements and remains at your disposal for any clarifications you may deem necessary regarding the matter mentioned herein.

<sup>1</sup> TJRJ, 14<sup>th</sup> Chamber of Civil Court, nº 2006.001.42097 - Judge: José Carlos Paes - Trial: August 17, 2006

<sup>2</sup> Article 54. Adhesion agreement is the one which clauses have been approved by the competent authority or determined unilaterally by the supplier, and in which the consumer cannot discuss or substantially modify its content.

§ 1 The insertion of clauses on the form does not distort its nature of adhesion agreement.

§ 2 In adhesion agreements the default clause is accepted, once the alternative, at the consumer's sole discretion, except by the terms of the § 2 of the previous article.

§ 3 Adhesion agreements executed in writing shall be edited with comprehensive and visible characters to facilitate the understanding by the consumers.

§ 4 Clauses which involve limitation of consumer's rights must be written with as a disclaimer allowing the consumer's immediate and easily understanding.

<sup>3</sup> TJMG - 1.0024.06.153382-4/001 - Judge: JOSE AMANCIO March 05, 2008 and TJMG 1.0024.06.986334-8/001 - Judge: LUCAS PEREIRA July 12, 2007

<sup>4</sup> TJMG - 2.0000.00.472973-5/000 - Judge: Marcia Balbino November 18, 2004

<sup>5</sup> TJMG - 1.0702.03.065175-7/001 - Judge: Unias Silva June 07, 2006