
THE EVIDENCE OF CONTRACTS EXECUTED THROUGH THE INTERNET AND ITS VALIDITY IN COURT

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The contract, among many definitions found in the doctrine, may be defined as "the agreement of two or more parties in compliance with the law with the scope to establish rules between the parties, aiming to constitute, modify or terminate relationships of patrimonial nature"¹.

With the expansion of the Internet it was inevitable the increase of transactions through a virtual environment. E-commerce appeared to be the main method for this new business transaction format among governments, companies and consumers.

Due to this reality, the current designation used to describe contracts executed through the Internet by these agents are:
a) B2B - transactions between companies
b) B2C - transactions between companies and consumers
c) B2G - transactions between companies and governments
d) C2C - transactions between consumers, among others.

The evolution of the electronic transactions methods is evident as for example the purchasing of software. The click-wrap² agreement appeared in

response to the growth of e-commerce, in replacement to the shrink-wrap³ agreements in almost all transactions, aiming to ensure that the buyer was aware of the terms of the agreement and continue only by clicking on the "I agree" or "I accept" all the clauses of the contract. Nowadays this type of agreement became a rule for downloading software among other products and services. This trend turned possible the increase of security for both the buyer and for the online sellers.

Regarding Information Technology the most common examples of contracts that take place through the Internet for B2B or B2G transactions are those related to virtualization of servers, remote control of access to customer's environments, management of customer's environments to ensure data security among other possibilities.

With respect to the legal protection involving the parties of contracts executed through the Internet it is important to clarify that while on B2C transactions the Consumer Protection Code is applicable, the same does not occur on B2B transactions, once, in theory, there is no disadvantage party between companies.

¹ VARELA, Antunes. Right of Obligation. Rio de Janeiro: Forense, 1977; page 118.

² Type of contract by which the buyer has access to the terms of the contract before purchasing the product.

³ Type of contract by which the buyer has access to the terms and conditions of the product purchase by opening the box of the product.

Among many measures that may be used to provide a larger protection on the contracts - regardless the form of execution, whether by written or virtual format - it is possible to mention as for example the institution of general conditions of the contract, confidentiality, limitation of liability, institution of arbitration for disputes resolution, among others.

However, the main issue regarding specifically the contracts executed through the Internet is the evidence of the effectiveness of such contracts.

This occurs because on a virtual environment the evidence of execution is fragile due to the difficulty to obtain accrued information about the identity of the parties executing the contract.

Some basic practices shall be taken by those who decide to execute contracts on a virtual environment. It is recommended as for example to save all electronic messages sent and received and also save payment or bank transfer receipts, as it is possible to identify the account owner through such receipts.

For contracts executed directly on a website the doctrine recommends that the buyer prints the website's main screens such as: the presentation of the product purchased, the purchase confirmation, the payment information. It is also essential that the buyer saves the payment or bank transfer receipts.

In addition some jurists⁴ advise that "attention must be intensified with regard

⁴ BASSO, Maristela. The legal inclusion on the digital economy. Jus Navigandi, Teresina, year 6, n. 58, August 2002, available at <http://jus2.uol.com.br/doutrina/texto.asp?id=3048> Access on: August 26. 2008.

to the applicable law and jurisdiction in case of any dispute resolution that may arise from the B2B or B2C transactions executed through websites that provide business abroad. For websites addressed to consumers it is important to observe that the consumer is always protected by the right of domicile and will be subject only to the jurisdiction of such domicile. Otherwise, for B2B websites the parties may decide about the applicable law and jurisdiction, once the article 9th of the Law of Introduction to the Brazilian Civil Code is respected⁵.

The general theory of the contracts ruled by the Civil Code is perfectly applicable to the contracts executed through the Internet. Such contracts have in fact the peculiarity of being executed between absent parties. For evidence purposes the Code of Civil Procedure is not negligent to this type of contract as it provides to the judge the free analysis of the evidences⁶.

With the increase of business transactions through the Internet some mechanisms were designed to provide a larger security for contracts on this environment. The main examples are the encryption and digital signature. Encryption, which purpose is protecting the original content of a document, is a codification by mathematical algorithms called keys. The digital signature aims to ensure sufficiently secured information about the identity of the parties involved.

⁵ LICC, art. 9, caput. In order to qualify and rule the obligations, the law of the country where they were incorporated will apply

⁶ CPC, art. 131. The judge will analyze the evidences in a free way taking into consideration the facts and circumstances filed in the records even if not claimed by the parties but must state on the decision the reasons that convinced him.
CPC, art. 332. All legal means, as well as the morally legitimate, even if not specified in this code, are able to prove the truth of the facts.

Therefore, we may conclude that the business transactions established on a virtual environment do not change its nature for the parties. Also their requirements are the same applied to contracts executed by other means. However, it is important to inform that the parties shall ensure each other mutually and with higher precautions so that in case of breach of the contract there are effective guarantees for losses, without imbalance between the parties⁷.

⁷ This article was prepared with the assistance of the lawyers Cassio Augusto Ambrogi and Ana Carolina Renda.