
LIMITATION OF LIABILITY ON SOFTWARE AGREEMENTS

Rafael Pavan
rpavan@almeidalaw.com.br

Collaborators:
Ana Carolina Renda
Cassio Augusto Ambrogi

In Brazilian law, rules that govern the limitation of liability have suffered many changes due to the institution of the new Civil Code¹, which directly affected the *pacta sunt servanda* principle, by which the parties are completely bound and subject to the terms and conditions of the agreement executed.

It is important to emphasize that before the institution of the Code above mentioned there were already some microsystems that considerably mitigated the effects of such principle, disclaiming or limiting clauses commonly used in most agreements, as for example the non-indemnity clause.

In this sense, the Consumer Protection Code considers abusive any clause that contains impediment for supplier to indemnify the consumer, such clause being considered as legally void and its inclusion in any contract as illegitimate².

The current Civil Code, following this tendency, also established rules in order to reduce the enforceability of clauses that completely bind the parties to the terms of the agreement, taking into consideration the principle of the social function of the contract.

The doctrine opinion is that the contract will be compliant to its social function when the parties are guided by solidarity values (Federal Constitution, art. 3, item I), social justice (Federal Constitution, art. 170 caput), free enterprise, the human dignity is respected (Federal Constitution, art. 1, item III) and the environmental values are not offended³.

On the other hand, the social function would not be compliant if: a) the obligations of a party are excessive or disproportionate, exceeding the risk of the deal b) there is excessive advantage for one party c) occurs a breach of the objective or subjective basis of the contract, among other reasons⁴.

Thus, in attention to the principle referred herein, the inclusion of a limitation of liability clause on an agreement is perfectly acceptable whatever its nature is.

The intention of the Brazilian legislator through the innovations brought by the Civil Code was to limit the enforceability of contracts executed by the parties in cases when the benefits established for one of the parties are or become extremely

¹ Law 10.406/02

² Consumer Protection Code, articles 25 and 51, item I.

³ NERY JUNIOR, Nelson e NERY, Rosa Maria de Andrade. *Código Civil Anotado e Legislação Extravagante*. São Paulo: Editora RT, 2003

⁴ Idem nota 3.

disproportionate when compared to the other party⁵.

That does not mean, however, that the limitation of liability clause included on an agreement will be immediately considered null due to violation of the mentioned principle of social function.

The "Software Legislation" which rules the protection of the intellectual property of softwares establishes that the clauses that do not allow the institution of liability between the parties on license agreements will be considered void⁶.

Therefore, not only because of what is determined by the Civil Code, but also because of the specific law regarding software copyright protection, it is perfectly acceptable and deemed valid, for example, the inclusion of a clause that establishes the liability of a party up to the annual value of a contract considering the year of the breach, or, as another example, limits the liability of a party up to the value of the principal obligation

agreed, among many other possible limitations of liability.

Therefore, unlikely what a less careful analysis of this matter could suggest, the inclusion of limitation of liability on contracts does not violate the principle of social function of the contract. Instead, it allows the accomplishment of the agreement at much as possible being the parties subject to similar conditions.

Almeida Advogados has a staff with expertise in Information Technology, as well as in elaboration and analysis of contracts, and remains at your disposal to provide any other information regarding the matter discussed herein.

⁵ This is the interpretation we deem more suitable for Article 2035 and sole paragraph of Civil Code: "**Art 2035:** The validity of business and other legal acts executed before the effectiveness of the present Code, are ruled by the provisions of previous laws, as referred in art. 2045, but their effects, produced after the effective date of this Code are subject to its provisions, unless otherwise established by the parties. **Sole paragraph:** No agreement will prevail if it violates principles of public policy, such as those established by this Code to ensure the social function of property and contracts."

⁶ **Article 10 of Law Nº. 9.609/98.** Acts and license agreements for marketing rights related to softwares of foreign origin shall establish, regarding the taxes and charges, the liability for their payments and set the remuneration of the software rights' owner resident or domiciled abroad.

Paragraph 1. The clauses will be considered null if:
II - exempt any of the contractors from the liability for any lawsuits filed by third parties arising out of defects or violation of copyright.