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INFORMATION TECHNOLOGY

AND

BRAZILIAN LAW

Brief Analysis

Almeida
CORPORATE LAW

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SUMMARY

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PRESENTATION

According to the Science and Technology Ministry the Information Technology Industry in Brazil, with respect to the industry of hardware, software and information services in general, has already contributed in the year 2000 with the amount of US$ 15 billion annually, around 2.5% of GDP with increasing annual rates.

The government incentives combined with the innovations brought by the information technology legislation, in addition to the credit support policy to the industry attracted to Brazil in recent years more than a hundred companies, which are well known worldwide and are producing information technology products in several regions of the country.

In order to promote the development of Information Technology Industry the government issued some policies focusing on the structure based on elements considered important to the expansion of the industry in the country.

The National Policy for Information Technology for example allowed the inclusion of Brazil in the worldwide scenario of the major software producers. In this sense, after achieving an average annual growth of 19% in the 1990's, Brazilian domestic market for software exceeded US$ 3 billion in 2001 already, amount that combined with other technical services related to the IT industry exceeded US$ 7 billion.

Connected to the importance of this industry to the economy Almeida Advogados presents a series of ten articles regarding Information Technology and its relationship with many areas of Law, such as: Labor, Tax, Contracts, Corporate, Social Security, Consumer affairs, among others.

By this study Almeida Advogados do not intend to exhaust the infinite variety of legal issues originated from many transactions that are developed and executed in the Information Technology Industry. Almeida Advogados just intend to contribute and allow the reader to analyze some interesting legal issues related to this strategic industry of the global economy.

Have a good reading!

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"STOCK OPTION PLAN" – AN INTERESTING OPTION FOR COMPANIES AND EMPLOYEES

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Stock Option Plan can be defined as a long-term program which allows employees to purchase shares of the company they work at a price under the market. It is a privileged option in which the company pledges to sell in the future and keep the value of shares frozen, ensuring the right of the employee to not make the purchase in the future, in case of stock price decrease.

The Stock Option Plan is not a recent institution. It was developed in the 20's and had its climax in the 90's, when employees of companies who chose to open the capital have become millionaires suddenly, due to the exorbitant appreciation of the shares of the companies they worked for. Good examples to be mentioned are Microsoft and Google.

The main objective of Stock Option Plan is the strategic alignment between employee and employer so that employee - when investing in the company - has at least interest in the appreciation of his shares and, subsequently, has financial return on the invested capital. This means that both employer and employees have positive results.

For the implementation of Stock Option Plan is necessary that certain requirements are observed: i) company should be a closely held or publicly held corporation[1], ii) there must exist authorized capital, iii) express decision of its institution, in the company by-laws; iv) the option plan must be approved in the company Shareholders Meeting; v) the purchase of shares must be intermediated by a professional of the Securities and Exchange Commission, as established by its rules.

The legal nature of the Stock Option Plan is an agreement on commercial basis, remunerated, which is subject to stock market fluctuations that causes mere expectation of rights to the employee who adhere to the plan and is independent from the employment contract.

In this sense and according to the labor law, it is discussed whether the purchase option could be classified or not as a benefit of salary nature. Unfortunately there is not a consensus, but most of Brazilian jurists understand that the risk of

[1] In case of closely held corporation, the implementation of the plan is restricted because the shares issuance will be available only to the employees of the company. In addition, employees will not have high expectations about the capital gain, if compared to the shares with more liquidity, which is typical of publicly held corporation.

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a Labor Court consider the option plans as salary benefit is minimal.

From a legal perspective, the Stock Option Plan cannot be confused with the employment contract, since the purchase option is a relationship of corporate nature, even if practiced in the course of employment. It is clear that when agreed, the employee will earn - or not - incomes of non-salary nature, according to the Corporations Law (Law No. 6.404/76)[2].

Some problems related to the implementation of Stock Option Plans - already disclosed by press media and TV and therefore well-known by most of people – is a consequence of lack of transparency, manipulation of results, digression from the focus based on the excessive concern about the share quotation, putting the company management into the background, among others.

However, such problems do not disqualify the Stock Option Plan as an excellent manner for the employer to get talents and mainly to motivate the employees to produce more and better, as they will also gain from their efforts.

Corporate and Labor Sectors of Almeida Advogados have a team with wide experience in development, assistance and implementation of stock option plans. We remain at your disposal for any additional information deemed necessary regarding this matter.

[2] Art 168. By-laws may have authorization to increase the capital, regardless of the amendment to the by-laws. Paragraph 3: By-laws can determine that company - within the authorized capital limit and according to the plan approved by the General Meeting – may grant purchase option to its directors or employees, or to persons who provides services to the company or to the company under its control.

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CLICK-WRAP AGREEMENTS AND ITS INTERPRETATION BY THE BRAZILIAN COURTS

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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[1].

[1] TJRJ, 14th Chamber of Civil Court, nº 2006.001.42097 - Judge. José Carlos Paes - Trial: August 17, 2006

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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[2].

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[3], inclusive for adhesion agreements in view of the non-existence of impediment by the Consumer Protection Code[4].

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[5].

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.

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[2] 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, lat 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.

[3] 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

[4] TJMG - 2.0000.00.472973-5/000 - Judge: Marcia Balbino November 18, 2004

[5] TJMG - 1.0702.03.065175-7/001 - Judge: Unias Silva June 07, 2006

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TAXATION ON *SOFTWARE*
Dispute Resolution nº 27/2008 of Brazilian Federal Revenue

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In the taxation field, the application given to software still involves some controversy that is related mainly to the absence of solid concepts by principles, jurisprudence and also by the tax law.

Despite these problems and after years of discussions involving the taxation of 'off the shelf' software, Federal Revenue of Brazil acknowledged that the amounts issued abroad for payment of acquisition or licensing of software in multiple copies (off the shelf software) are not subject to Income Tax levy and to the Federal contribution for intervention in the economic domain (CIDE).

Through the dispute resolution nº 27, dated on May 30th 2008 and published in the Official Gazette of 9th June 2008, the Federal Revenue of Brazil presented different interpretation from that one which has been applied to the provisions of the Federal Revenue regulations - RIR (Decree nº 3000 of March 26, 1999) and the Ministry of Treasury Ordinance nº 181/89 concerning the IRRF levy on remittances to foreign countries for payment of 'off the shelf' software.

Regarding the CIDE levy, the interpretation has not presented changes in practice, since the law related to the contribution had already been amended by Law nº 11.452/07, conciliating the non-levy of this contribution on the remuneration for the license of use or rights for trade or distribution of computer program, which does not involve the transfer of corresponded technology.

This study aims to clarify some aspects of the taxation conflict in transactions involving software, especially after the recent publication of the Dispute Resolution nº 27/2008, which in practice has brought other disagreements regarding the tax application.

I Dispute resolution nº 27 - May 30, 2008

As mentioned, the most recent change in tax application given to operations with software refers to the IRRF and CIDE levies on the values remitted abroad for acquisition of 'off the shelf' software.

The dispute resolution nº 27/2008, signed by the General Coordinator of the Federal Revenue Service of Brazil, acknowledged that the amount issued to foreign countries for 'off the shelf' software "are not subject to the levy of Income Tax (IRRF) neither of the CIDE for the acquisition or licensing of multiple copies software".

I. Withholding Tax - IRRF

The interpretation presented by the dispute resolution nº 27/2008 is expressive regarding the withholding tax income (IRRF), as it represents 15% on remittances abroad, as payment for purchase of "off the shelf" software.

The software, as you know, is based on a creative activity of the developer, and that is the motive its protection has copyright exemption, although in Brazil there is a specific law addressing the issue. Therefore, the legal relationship established between the software intellectual owner and the software itself is ruled by the copyright.

The amounts paid, credited, delivered, used or issued to a resident or domiciled abroad, resulted from the contract of assignment for rights of use and license, as copyrights, as

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well as the software maintenance, they characterizes royalties payment.

In this sense, the regulations of the Income Tax - RIR (Decree nº 3000, dated on March 26th 1999), establishes in its article 710 that the amounts paid, credited, delivered, used or issued to foreign countries for royalties from any nature are subject to Withholding Tax, at the rate of 15%, except for the possibility of application of the rate of 25%, if the destination country is considered a "tax haven".

Thus, remittance of values abroad as royalties for licensing of software will result IRRF rate of 15%, as well as 10% of CIDE.

The matter in question would not produce much controversy, except because of the rule that determines the non-levy of IRRF on abroad remittances for payment of software acquisition, unlike the software developed 'to order'. It is because - for this kind of software – remittances are not classified as royalty, as this is considered good and not copyright.

Although this classification does not find legal support, law allows the existence of distinction between 'off the shelf' software and software 'to order'.

The software "off the shelf" or "multiple copies" is commonly defined as the computer program produced on a large scale, in a uniform way and placed in the market for acquisition by any person.

Accordingly, the legal understanding is that the trade of a copy or copies of computer programs produced and commercialized in mass for retail - materializing the c*orpus mechanicum* of the intellectual creation of the program - is trade of goods.

Also, 'software to order' – for proper user and specific purpose – is classified by law as service, supported by the Complementary Law 116/2003.

According to the mentioned Law, the "development of computer programs is subject to the tax levy on services ("ISS"), including electronic games and licensing or assignment for right of use computer programs". In the topic below (item I.b), we will discuss some issues on the ISS levy in operations of software licenses and assignment of rights.

According to the legal understanding on the distinction of the 'off the shelf' software - that is qualified as goods - it is not necessary to discuss about the IRRF levy, as the consideration for the acquisition of such software is not related to the payment of royalties.

Therefore, the idea brought by the dispute resolution consolidates the legal conviction to not claim the abroad remittances for the acquisition or licensing of 'off the shelf' software, without withholding and payment of IRRF and CIDE.

I.b – Tax on Services - ISS

As mentioned above, the simple addition of a certain activity in the list of services subject to the ISS levy is not enough to make such activity as a service. In fact, it is necessary that such activity constitutes rendering of services. And it is questionable the classification of the assignment of rights and licensing of software as services, subject to the ISS levy.

The Complementary Law 116 from 31/07/03 has several changes, nationwide, among them the charge of ISS related to "licensing or assignment of right to use a computer program" - item 1.05 in the list attached.

ISS has its constitutional pattern ruled by Article 156, III of Federal Constitution, which Municipalities establish the tax on services from any kind, not included in art. 155 - II.
The substantive criterion of tax on services is connected to the rendering of services, as already provided in Article 8 of Decree Law nº 406/68 and also as determines Article 1 of the Complementary Law nº 116/03.

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In order to clarify this material criterion - rendering of services - the Tax Law applies the conception of the law of obligations, in particular, the distinction between the obligation to do and not to do.

In that sense, the substantive criterion of the Tax on Service (ISS) could never contemplate any sort of obligation to do - or even obligation not to do, since it is an obligation - which is reflected in the rendering of services contained in the tax assumption.

As mentioned above, with the institution of Complementary Law nº 116/03, the legislator attempted to embrace the activity of "licensing or assignment of right to use a computer program" as a possibility of ISS levy. The computer program, the content of the provisions in Article 1 of Law nº 9.609/98 "is the expression of an organized set of instructions in natural or coded language, contained in the material of any kind, necessary work in automatic machines of information processing, devices, peripheral instruments or equipments, based on digital technology or similar, in order to make them work for particular purposes."

The Law nº 9.609/98, which regulates the intellectual property of computer programs, adds in its Article 2 that the system of intellectual protection is the same in the literary works. And these literary works, as in Article 3 of Law nº 9.610/98, are considered movable assets - for legal purposes.

Thus, such goods are liable to have their ownership transferred to third parties, which occurs through the "agreement of assignment of rights to computer program", which are transferred, in whole or in part, the copyright holder to others.

In Brazil, as many countries, hiring the use of computer programs is made by the "license and use agreement" (licensing), and it was approved by Article 9 of Law nº 9.609/98.

So, the license to use or assignment of right for computer program is not presented as an obligation to do, but an obligation to give, by consideration or not (remunerated or free).

The assignment of rights or licensing involves the provision of software for use of a third party, on a temporary basis, so that the property is kept with the original owner.

Thus, there is not rendering of services in the licensing of software - without the effective addition of other services (consulting, customization, etc.) - but merely permission, remunerated or not, for the right of use of a work from a third party and its regulations (rights and obligations).

Federal Supreme Court decided to judge – in the extraordinary appeal nº 116.121- the ISS levy unconstitutional in the activity "movable property leasing", as such activity is a obligation to give, in temporary availability.

Before the brief arguments exposed, those companies that receive revenue arising from sale or license to use computer programs may have the approval of non-levy on ISS for future periods, as well as claim the refund of amounts already collected, by proposal of appropriate suit.

I.c Contribution for intervention in the economic domain (CIDE)

Regarding CIDE, the dispute resolution has not brought alterations, as Law nº 11452 from February 28th 2007 had already changed the interpretation of Article 2 of Law nº 10168, from December 29th 2000, amended by Law nº 10332 from December 19th 2001, which established the CIDE-Royalties.

The article 20 introduced the Paragraph 1-A to Article 2 of Law nº 10.168/00, stating that there will be no levy of CIDE on the remuneration from licensing of use or rights in trading and distribution of computer program, unless it involves the transfer of technology.

CIDE on royalties was created to finance technological development in Brazil, with 10% on the remuneration paid by Brazilian

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companies to foreign suppliers, basically software.

Since its creation - by Law nº 10.168/00 - taxable event (transfer of technology) admitted a number of interpretations, considering that any software licensing abroad was taxable event.

Law nº 11.452/07 provided solution to this problem by adding a provision which clarify that the simple acquisition of a computer program does not mean transfer of technology, but in fact a tool to the purchaser. The effective "technology transfer" only occurs when the software is purchased with access to source code.

In this sense, since the alteration of Law nº 11.452/07, there is not CIDE levy on called "off the shelf software", as it is not considered transfer of technology. There is not practical application regarding CIDE for the interpretation of dispute resolution nº 27/2008.

II Taxation on the software importation

We verify that the classification of the software as customized or "off the shelf" results different tax consequences, so that it determines the taxes levy on the operation.

In that sense, we present a summary of taxation on the software importation, in the current applicable law.

II.a Customized Software

The Customs Valuation Agreement determines that, in the case of software import, the importation tax is calculated only on the value of the material, regardless the value of the program contained therein, following the logic that the tax levies only on the ‘goods’, which in this case is only the media which was recorded the computer program.

So, in order to apply the rules of the Customs Valuation Agreement on the import of software, it is necessary that the value of the material be separated from the computer program value that was recorded. In general, this material has negligible value, compared to the value of the service contained therein.

However, the invoice should indicate the cost or value of the material separately - if any - from the cost or value of the computer program.

It important to highlight that, although the Federal Supreme Court has already expressed the non-levy of ICMS on customized software, the State of Sao Paulo approved the Decree nº 51619 of February 27th 2007, which presents similar text to the previous decree regarding the same subject - in force since 2002 - determining that "in operations with computer program (software), customized or not, ICMS will be calculated on a rate that will correspond to the double of the market value of its material".

Thus, in this type of import, the value of material will have taxes due levy on the importation of goods (Import Tax - "II" + Tax on Industrialized Products - "IPI" + PIS/PASEP + COFINS + ICMS), and the value of program will have taxation when the conclusion of the financial remittance abroad.

The mentioned Article 9 of Law of Software, which is in full compliance with the rules of international law, defines that the computer program will be subject to the license agreement, and the value remitted for payment of the software license corresponds to payment of royalties.

The remittance for payment of software license will be subject to the IRRF levy at rate of 15% and to the payment of CIDE at the rate of 10%, besides the contributions to PIS-importation and COFINS-importation, at rates of 1.65% and 7.6% respectively.

Moreover, current legislation and jurisprudence classify the software license as rendering of services - subject to ISS levy - according to Complementary Law 116/2003.

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In the city of Sao Paulo, the rate expected for the license is 2%.

Summarizing, the taxation for importation of customized software will be as follows, in the table below:

Importation of customized software

Total amount (software + material)	100,00
Software value (service)	99,00
Material deduction value	1,00
19% of II, on the material;	0,19
17.5% of IPI, on the material	0,17
18% of ICMS, on the double of market value of material	0,36
2% of ISS	1,98
15% of IR	17,65
10% of CIDE	11,11
1.65% of PIS-importation	1,97
7.6% of COFINS-importation	9,70
Total	**143,13**

II.b 'Off the shelf' Software

In the importation named "off the shelf software" there will be levy of ICMS, also calculated on a basis that corresponds to the double of the market value of its material.

Based on Federal and State legislation, there will be II, IPI and ICMS levy on importation of "off the shelf software" for the material only, in case it is deducted. If there is no deduction on the material, the levy will be on the total value of the transaction.

Moreover, PIS-importation and COFINS-importation will levy rates of 1.65% and 7.6%.

Under the recent dispute resolution nº 27/2008, discussed above, there will be no IRRF and CIDE on the values remitted abroad for payment of acquisition or licensing software trading, in multiple copies (off the shelf software).
Summarizing, the taxation in case of 'off the shelf software' importation - with deduction of the material - will be as follows:

Importation of 'off the shelf software'

Total amount (software + material)	100,00
Software value	99,00
Material deduction value	1,00
19% of II, on the material, if deducted	0,17
18% of ICMS, on double of the material market value, if deducted	0,36
1.65% of PIS-importation	1,68
7.6% of COFINS-importation	8,25
Total	**110,65**

In the case of importation of 'off the shelf software' - without deduction of the material - will be as follows:

Importation of 'off the shelf software'

Software value (value of the transaction)	100,00
19% of II	19,00
17.5% of IPI	17,00
18% of ICMS	18,00
1.65% of PIS-importation	1,97
7.6% of COFINS-importation	9,70
Total	**165,67**

However, it is necessary to be careful with software classification, since there is not a exact conception given both by the legislation and jurisprudence, often due to lack of technical knowledge on the subject.

Our Tax Law team in Almeida Advogados remains at your disposal for any additional information deemed necessary.

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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-wrap[2] agreement appeared in response to the growth of e-commerce, in replacement to the shrink-wrap[3] 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.

Among many measures that may be used to provide a larger protection on the contracts - regardless the form of

[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.

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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 jurists[4] advise that "attention must be intensified with regard 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 respected[5]".

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 evidences[6].

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.

Therefore, we may conclude that the business transactions established on a virtual environment do not change its

[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.

[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.

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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 parties[7].

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

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OUTSOURCING OF INFORMATION TECHNOLOGY SERVICES

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Outsourcing has been a measure increasingly used as a better way to organize business and reduce costs of the companies, turning the activity more profitable and sustainable. This type of contracting is a safe alternative if it follows the requirements determined by law and may help to avoid high costs of contracting direct employees.

The taxes over the payroll in Brazil - considered a record country on this aspect - are a real obstacle to regular employment. In the Information Technology Industry this scenario is even more stimulated, considering the lack of good professionals, high salaries, periodicity of the projects developed in this industry and also the low rates of future labor claims, taking into consideration that even the outsourcers benefit from this relationship once the high discounts of Income Taxes (IR) and Social Security Contribution (INSS) over their payments are reduced as if they were hired as direct employees of the contracting companies.

For this reasons outsourcing prevails in this industry by the organization of consulting or service provider companies, in which their partners develop the activities as outsourcers inside other companies.

However, inspections by the Social Security Office and the Labor Ministry may represent an obstacle to the success of this engagements. From the practical point of view, complaints can arise from the Labor Unions due to the decrease of the formal employment.

Regarding the understanding of the Brazilian Courts with respect to the outsourcing of other activities it is possible to verify that it has been contrary to this practice, as it is evident the increase of decisions condemning companies that contract outsourcers to develop their activities.

This situation arises from the understanding that the rendering of outsourcing services related to the company main activity brings the risk of employment bond between the contracting company and the service provider[1]. If the employment bond is acknowledged, the

[1] Precedent 331 – Service Agreements. Validity (Review Precedent nº 256 - res. 23/1993, DJ 21.12.1993. Item IV amended by Res. 96/2000, DJ 18.09.2000).
I - Engagement of service providers by intermediary company is illegal, creating a direct bond with the contracting company, except in the case of temporary work.
II - Hiring workers on an irregular basis through an intermediary company does not create employment bond with the direct, indirect or social security public offices.
III – It does not create employment bond the hiring surveillance services (Law nº 7102 from 20.06.1983), maintenance and cleaning services, as well as specialized services related to the company support activities, once it is not present the personal nature and direct subordination.
IV - The non compliance with the labor obligations by the employer constitutes the joint liability of the contracting company with respect to such obligations, also before the direct public offices, independent government agencies, public foundations, public companies and mixed companies, once they have participated on the lawsuit and are party on the extrajudicial enforcement instrument. (Article 71 of Law nº 8666 of 21.06.1993).

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contracting company shall be responsible for the payment of all labor costs arising from the employment bond, including the possibility of administrative penalties by Labor Ministry or Social Security Office (INSS).

Therefore, it is important a careful review of the activities to be outsourced and, additionally, the execution of service agreements which shall clearly determine which activities will be outsourced, the correct disposal of the job to be performed and the inclusion of protective clauses to the contracting company. Also, it is necessary a monthly management of all documents issued by the outsourcing company with respect to the payment of wages and labor costs due to its employees, as well as those resulting from the outsourcing relationship.

Engagement of professionals to execute a specific job and for a specific period, for example the development of a software, is very common in the Information Technology industry due to its special nature. This kind of service rendering, by being specific and for a specific term, is a form of outsourcing that, in theory, reduces the risk of employment bond, once it does not present the legal requirement of periodicity. However, in order to protect the contracting company interests it is necessary to accomplish the legal requirements which authorize the contracting for a specific term to the execution of a specific service under the penalty to be considered a fraud by the Labor Courts or Labor Ministry and acknowledged the employment bond.

It is important to emphasize the introduction in our legal system of the Provisional Measure converted into Law nº 11.196/05 that in its article 129[2] authorized the rendering of intellectual services, including the information technology services, through services companies. However, even being the risks reduced due to the mentioned article there are still some obstacles regarding the company main activity.

Another important aspect regarding this subject, even it is not related to the outsourcing of the company main activity, is the risk of paying wages[3] and labor costs[4] to the service provider. This risk arises from the current legislation[5] which determines that the contracting company has indirect liability for the compliance of the labor obligations of the contracted company, due to the failure or mismanagement, and may be condemned to pay such costs if the contracted company does not do it.

It is understood as failure or mismanagement of the contracted company when the contracted company does not comply with its obligations before its employees or before the contracting company. It is identified by the delay or improper payment of labor costs, such as salary, overtime, vacation, additionals, among others, as well as social security contributions (INSS and FGTS) and taxes (IRRF).

Therefore, it is essential to manage on a monthly basis all documents issued by the contracted company which proves the compliance on payment of salary and labor

[2] Article 129. For tax and social security purposes, the rendering of intellectual services, including scientific, artistic or cultural, with or without personal nature, with or without designation of any obligation to the partners or employees of the contracted company, when performed by it, is subject only to the law applicable to legal entities, without limiting the observation of the article 50 of Law nº 10.406, from January 10, 2002 - Civil Code.

[3] Salaries, vacations, overtime, additional, premium, previous notice, among others.

[4] IRRF, Social Security (INSS) and FGTS.

[5] Precedent 331, IV, from Superior Labor Court.

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costs (IRRF, FGTS and INSS) to its employees and arising from the service agreement, in order to reduce risks from the outsourcing relationship and also to correct immediately eventual failures.

Suggestion is made in order to have a direct supervision by the contracting company regarding the periodicity of payments and correct filling of GFIP forms, as they validate the effective outsourcing services, especially with respect to amounts, turning valid the outsourcing relationship for all purposes.

Simultaneously, it is very important the careful analysis of the service agreements for eventual inclusion of protective clauses to the contracting companies, establishing obligations to the outsourcing companies to certify their financial standing during the term of the agreement, as well as the right of the contracting company to withhold the amounts to be paid in case of failure or mismanagement on the payment of the salary, taxes or social security contributions by the contracted company. Certainly, these procedures will provide the contracting companies a secure condition regarding the present matter, preventing them against any future breaches and irregularities.

Almeida Advogados is available to clarify any doubts on the present matter, as well as discuss the strategic measures for an effective protection from the risks involved in the outsourcing services in the information technology industry.

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BENEFITS OF THE WORKFORCE ASSIGNMENT AGREEMENTS TO THE INFORMATION TECHNOLOGY COMPANIES

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From the Social Security perspective workforce assignment is legally defined as the provision of service to a client, in its own facilities or a third party's facilities, by secured workers who perform services on a continuous basis related or not to the company's core activity, whatever are the nature and recruitment form[1].

Different from outsourcing - although classified as one of its categories - the workforce assignment allows the services that are the scope of the agreement to be related to the company's core activity, unlike the outsourcing itself. However, the contracting party has the duty to pay 11%[2] of the gross amount of the services invoice, according to the Law 8.212/91[3].

Another important issue regarding the difference between workforce assignment and outsourcing is that in the workforce assignment the subordination of the workers to the client is allowed, situation that is not permitted in the outsourcing according to what is established by the Statement 331 of the Superior Labor Court ("TST"), under the penalty of employment bond and its reflexes.

Information Technology Companies ("IT Companies") have as its main attribute the need for highly specialized workforce recruitment in considerable scale. The main issue is the impact on the IT Companies payroll, causing them to loose in competitiveness due to the allocation of the costs to the final product.

In this sense, we may conclude that workforce assignment better fits the needs of the IT industry, once the professionals

[1] Article 31, Paragraph 3 of Law n. 8.212/91. For the purposes of this Act, workforce means the provision of services by a secured worker to a client performing services on a continuous basis, related or not to the company's core activity, whatever are the nature and recruitment form. (text determined by the Law n. 9711 from November, 20, 1998)

[2] Besides those in article 6 of Law n. 10.666/03, the percentage of retention of the gross amount of the invoice related to services provided through workforce assignment, including services rendered on a temporary basis, by the contracting party is added of four, three or two percentage points, with respect to services provided by the secured employee whose activity allows the granting of special retirement after fifteen, twenty or twenty-five years of contribution, respectively.

[3] Article 31. The company contracting services performed through workforce assignment, including services rendered on a temporary basis, shall retain eleven percent of the gross value of the services invoice and collect the amount retained until the second day of the month following the issuing of the invoice, on behalf of the service provider company, provided that the paragraph 5 of article 33 is observed.

that usually provide the services do it on a personal basis and in subordination to the client.

Moreover, as we verify in practice, the IT Companies, when suited before the Labor Court, end up unable to eliminate the employment bond due to the obvious employment bond that is created between the professional and the client.

In addition, we cannot disregard the content of the mentioned Statement 331 of the TST, which is clear about the non-employment bond with the client when contracting security guard services, maintenance and cleaning services, as well as specialized services related to support activities of the company and if there is not direct subordination.

Thus, recruitment of employees to perform any activity that does not fit in the mentioned Statement, as well as it represents the IT company's core activity, will cause concrete risk in any investigations by the Labor Ministry and labor claims that may be proposed.

It is important to clarify, however, that the option by the workforce assignment agreement does not avoid all risks to the client if the matter is addressed to the analysis of the Labor Court. What we would like to clarify is that the workforce assignment presents lower risks to the IT companies when compared to outsourcing.

Therefore, when contracting workforce assignment it shall be observed that with respect to labor issues the risk is probable - if verified the premises of the employment bond[4] - but with respect to social security issues the risk is remote, once the procedures established by law are observed.

Considering that the highest cost originated from an employment relationship is the social security charges, the decision for the workforce assignment agreement may be more attractive to the company rather than executing an outsourcing contract.

Therefore, if the objective, considering the peculiarity of the activities performed by IT companies, is to reduce the costs generated by hiring employees through the system of Labor Law ("CLT"), better a remote risk through the workforce assignment than a probable risk arising from outsourcing of services, especially with respect to the services that represent the company's core activity. As mentioned above, the higher costs on the payroll are those related to social security charges.

The social security risk of non-characterization of workforce assignment was reduced by the institution of the Law n. 11.196/05, which reinforced the applicable statements determining that the intellectual activities, even when performed personally, if contracted through legal entities, shall be governed by the rules applicable to such area of the Law.

Thus, the equation of legal and economic interests may be achieved through the option for the workforce assignment agreement, especially when related to intellectual works, where the clients assume lower risks if considered the mitigation of tax and social security notifications (social contributions).

Almeida Advogados' Social Security Department has a high specialized team and is at your disposal to provide any

[4] Arts. 2 and 3 of the Labor Law ("CLT").

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additional clarification concerning the matter herein discussed.

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TAX INCENTIVES TO INFORMATION TECHNOLOGY - CURRENT SCENARIO

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Information technology was benefited by the Provisional Measure nº 252/05, later converted into Law nº 11.196/05, also known as "Law of Good." This law, besides amend several provisions of the Federal tax law, also has some tax advantages, among them the Special System of Taxation for Exportation of Information Technology Services – (REPES in Portuguese abbreviation).

According to Law nº 11.196/05, is considered as beneficiary of REPES the legal entity which mainly performs activities of software development and information technology services, and because of that, agrees to export equal or greater than sixty percent of its annual gross revenue, resulted from sale of these goods and services.[1]

REPES is part of the incentives package created by Brazilian Government with the purpose of intensifying the IT national companies and support the consolidation of these companies in the economy.

The Provisional Measure nº 428/08 which reduced the mentioned percentage to 60% - in original writing, law required the commitment to export 80% of the annual gross revenue - gave to the Executive the opportunity to reduce this percentage to 50 % (Fifty percent).

With the conversion of the latter provisional measure (nº 428/08) into Law (nº 11.774/08), the paragraph 3 of Article 2 of Law 11.196 was amended (Law of Good). In this paragraph, companies that wish to participate in the REPES had obligation to renounce the cumulative PIS/COFINS, and it was impossible for software companies which legal system is cumulative, as income gained by IT companies are excluded from the non-cumulative program, resulting from activities of software development and its licensing or assignment of right of use, as well as analysis, programming, installation, configuration, consultancy, technical support and maintenance or software updating, also consisted in software and electronic pages.

In that time, Federal Revenue adjusted this failure through the regulation which determined that provisions of section XXV of art. 10 of Law 10.833 of December

[1] Article 2 – It is considered as beneficiary of REPES the legal entity which performs activities of software development and information technology services, and, because its option for REPES, takes commitment to export less than 60% (Sixty percent) of its annual gross revenue from sale of goods and services referred in this article. (Writing amended by Law nº 11.774, 2008).

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29th, 2003 [2] are not applied to legal entities which participate in REPES.

By the new wording given by Law 11.774/08, the legal entity is also a beneficiary from REPES if performs activities mainly for software development and provision of IT services.

As part of these incentives, Law nº 11.196/05 establishes that in case of sales or import of new goods for development of software and information technology services in the country, it is suspended the requirement of contribution to PIS and COFINS, as well as PIS/COFINS-Importation. Or when such goods are purchased or imported by legal entity which is beneficiary of REPES, for integration in its fixed assets. The same rule applies in case of sales or import of services with the same scope.

The Law of Good also stipulates that the adhesion to REPES is subject to the tax regulation of legal entities in respect of taxes and contributions controlled by Federal Revenue in Brazil, and may have their adhesion canceled if: i) breach in the agreement of exportation defined therein, ii) verify that the beneficiary did not meet the requirements or conditions for adhesion, and finally, iii) the own company requests it.

Adhesion to REPES, however, is not allowed to legal entity that participates in the SIMPLES (Integrated Payment System for Taxes and Contributions of Small Business).

Another benefit provided by the law to companies that join REPES is the suspension of the requirement of the Industrialized Product Tax - IPI, in importation of goods listed by the Executive[3] to be used for the integration to its fixed assets, since such goods do not have similar in the domestic market.

Law Nº 11.196/05 also states that the suspension of payments for taxes defined therein will be exempt since the terms and conditions for companies were analyzed. [4]

REPES, in fact, is not the only incentive with the aim of promoting the increase of investment in innovation. Besides these benefits in Law of Good, we may mention in addition, the Law on Information Technology (Law nº 10.176/01), the Law of Innovation (Law nº 10.973/04), as well as Law nº 8387 / 91, which created the *Zona Franca de Manaus*.

In the Law of Good itself, we may emphasize the tax incentives for technological innovation, expressed in Article 17 to Article 26, which has been the most significant incentives already obtained by the companies.

Along with the mentioned law, some government agencies also promote programs addressed to companies in information technology, especially in the field of innovation, as an example of BNDES which established the PROSOFT, also the Ministry of Science and Technology through SIBRATEC; and SEBRAE through Proimpe, among others.

[2] XXV - revenue earned by companies of information technology services, resulting from activities of software development and its licensing or assignment of right of use, as well as analysis, planning, installation, configuration, consulting, technical support and maintenance or upgrade software, including software and electronic pages. (Included in Law nº 11.051, 2004).

[3] Established under Decree nº 5713.

[4] The terms will be determined based on the average obtained from the calendar year subsequent to the start of the use of acquired goods under the REPES, during the period of three (3) calendar years. The period of start using can not be more than one (1) year counted from the acquisition.

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The fact is that market for software in Brazil is growing considerably during these years. For example, in the period between 2004/2006, the information technology industry grew 21.4%, and the software and services (only) grew 23.0%. [5]

In order to have Brazil as a prominent 'player' in this competitive scenario is very important to create new incentives programs and tax exemptions, especially regarding employees payrolls, as well as the maintenance and improvement of existing programs, so that improve the conditions for development of this important and fundamental sector of the economy.

Our sector in Almeida Advogados has a highly specialized team in analysis and development of opinions and projects related to the information technology industry. We are always at your disposal for any other information relating to the matters mentioned in the referred article.

[5] Source: ABES.

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INFORMATION TECHNOLOGY AGREEMENTS - BEST PRACTICES FOR ITS ELABORATION

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Information technology agreements ("IT Agreement") have some characteristics and peculiarities that once observed will ensure more effectiveness and protection in favor of the contracting parties.

During the elaboration of an IT Agreement it is highly important to include the following clauses: i) preliminary glossary; ii) object and scope of the contract; iii) term and schedule of the work development; iv) product or service guarantee (liability of the parties); v) quality; vi) security; vii) confidentiality; viii) provision for arbitration; ix) penalty clause; x) copyright provision, among others.

Among all types of IT agreements the customized software agreement is certainly the one which requires more attention for its elaboration; however, the same does not happen with the so-called shrink-wrap software agreement, which acceptance to its license terms is given when the consumer opens the product.

In the case of customized software agreements it is recommended to establish a schedule for verification and intermediary approvals of the services rendered which, once completed, receive the final approval from the customer. It is important to clarify, however, that such approvals ensure that the software is in accordance with the specifications agreed but will not necessarily achieve all the expectations intended by the customer.

IT Agreements must also contain a clause that presents an estimation of contracted working hours. This is recommended because - as it commonly happens in such contracts - the licensor is also the installation, maintenance and consulting services provider.

The inclusion of these clauses in an IT agreement avoids, for example, that during the term of the agreement the client requires additional functionalities to the product that were not considered in the original contract, situation that could bring up misunderstandings between the parties.

Another clause that, for its importance, requires attention when drafting IT agreements is with respect to the limitation of liability. In this sense, it is important to clarify that in spite of constant tests it is possible that the product (software) does not meet the desired purpose, even though it is in accordance with the initial proposal.

That is the reason because the agreement must be clear with respect to what is included in the project (necessary technical specifications) and how many hours of installation services are planned. This condition is very important because

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any eventual dissatisfaction of the client may demand many extra hours of installation bringing losses to the licensor.

Also regarding the limitation of liability another issue that requires attention - especially regarding information security softwares - is related to systems invasions often caused by a customer's employee acting together with the licensor's consultants.

In the cases above mentioned it is essential to have a limitation of liability, establishing the amount to be indemnified - which may never exceed the amount of the contract - and also the need of evidence of damage. The service provider can only take responsibility for what it has provably caused.

Regarding the guarantee term the Law of Software (law n. 9.609/98) prescribes in its article 8th [1] the term for product technical validity, which shall not be confused with the term of guarantee established by law for durable goods. Thus, the service provider should establish in the agreement the term by which it will be liable for failures or damages that the software may cause.

The arbitration clause also assumes special importance in such contracts because of the agility that is normally required by information technology agreements. Therefore, it is extremely important that the arbitrator has, from the technical point of view, a full knowledge on the matter.

Almeida Advogados' Consulting Department has a specialized team in elaboration of IT agreements and remains at your disposal for any necessary clarification on the matter raised in this article.

[1] Article 8 - Anyone who sells computer program, either being the program rights' owner or the trade rights' owner, is required, within the national territory, during the period of validity of its technical version, to assure its users the rendering of the complementary technical services for the proper functionality of the program.

Sole paragraph: The obligation will remain in case of removal of the computer program from the market during the period of validity, unless the proper indemnification is paid for any damage caused to third parties.

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INFORMATION TECHNOLOGY AND LAW – ELECTRONIC DOCUMENTS AND ITS VALIDITY IN COURT

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The validity of electronic documents as evidence is still a controvert issue in the legal environment.

Those who defend its validity support their understanding on what is prescribed by the Brazilian Code of Civil Procedure regarding documentary evidences. Otherwise, those who are opposed to its validity support their opinion on the absence of an express provision by the mentioned code regarding the possibility of its use as evidence. [1]

There are also those who argue that the elements that prove its authorship, content integrity and tangibility - requirements that are essential for its characterization as an eligible evidence - are absent on this type of document.

Despite of the arguments presented, the contrary opinion to the use of electronic documents does not correspond to the progress degree achieved by the business relationships at the end of the XX century and the early XXI century.

Moreover, if the issue is the nomenclature, the electronic documents do not even need to be described as documentary evidence in order to be accepted in court, as they could be included into the general category called *non-typical evidences*. [2]

Anyway, it is important to mention that Courts have already bent to the new reality and have accepted electronic documents as evidence in many cases. [3]

[1] CPC, art. 366. When the law requires the public instrument, as substance of the act, no other evidence, as special it may be, will furnish its absence.

[2] DINIZ, David Monteiro apud GANDINI, João Donizeti; Salomão, Diana Paola da Silva et al. The legal validity of digital documents. Jus Navigandi, Teresina, year 6, n. 58, August. 2002. Available at: HTTP://jus2.uol.com.br/doutrina/texto.asp?Id=3165. Accessed on September 26. 2008.

[3] Summary: INNOMINATED WRIT OF PREVENTION - PRESENTATION OF ELECTRONIC DOCUMENT - ANONYMOUS E-MAIL - REJECTION IN THE FIRST INSTANCE – NON CONFORMITY - CONSTITUTIONAL IMPEDIMENT TO ANONYMITY - *FUMUS BONI JURIS AND PERICULUM IN MORA PRESENTED* - *DECISUM REVERSED* - APPEAL GRANTED. (TJSC, Interlocutory appeal n. 2003.024687-8, decision 13/10/2005, Reporting Judge. Antônio do Rego Monteiro Rocha).

Summary: LAWSUIT - TUITION - SERVICE AGREEMENT - ELECTRONIC DOCUMENT - POSSIBILITY - CHARGES - LEGALITY. Although the service agreement does not contain the signature of the defendant, this fact is not able to invalidate the adjustment, as the educational services agreement is informal and no special form

The theory regarding the fragility of electronic documents as evidence also suffered a hard impact with the introduction of digital certification in Brazil, provided that the most important rule about the matter is the Provisional Measure n. 2.200/01 that establishes the Infrastructure of Brazilian Public Keys -- ICP-Brazil.

The public key is a cryptographic method [4]that aims to ensure the authenticity, integrity and legal validity of documents in electronic form, from the support applications and enabled applications that uses digital certificates to the performance of secure electronic transactions.

In this sense, if the electronic documents had their validity contested due to the possibility of modification of its content, which could ultimately put in doubt their originality and integrity, the digital certification proves to be an effective mechanism to avoid frauds responsible for its invalidity as evidence.

On a recent trial the Supreme Federal Court recognized the validity of digital certificate or the printed version of an electronic document protected by digital certificate despite of the disclaimer regarding the need of its regulation. [5]

The Brazilian law, however, is up to date with the progress of the digital age. In this sense, the Law n. 11.419 edited in 2006 rules the automation of judicial proceedings. Although the mentioned law does not rule specifically the electronic document and its validity as evidence, it already prescribes the need and importance of its use by the Judiciary.

There are several benefits brought by the use of electronic documents instead of traditional documents, such as: i) reduction on time for its elaboration as well as reduction of costs for printing, ii) simple filing process and easy recovery of data, iii) high storage capacity with a low cost, iv) difficulty to fraud when proper mechanisms are used, among others. [6]

Therefore, in spite of some conservative arguments, once the integrity of its content is preserved through mechanisms such as digital certification and the "access logs" - which are necessary information for identification of authorship in the network

is required by law with the possibility to be executed even verbally. The services agreement attached to the files although does not have the signature of the defendant is considered evidence to prove the execution of the agreement, once the electronic documents are considered as evidence and the doc. of p. 06-09 indicates that the defendant actually accepted the agreement through the Internet. There is no illegality or abuse on the clause that prescribes penalty of 2%, interests of 1% and monetary correction by the IGP-M due to breach of the agreement. (TJMG, Reporting Judge Pedro Bernardes, Ap. n. 2.0000.00.450396-4/000, in July. 19/10/2004).

[4] Encryption: Art of writing in cipher or in code. In FERREIRA, Aurelio Buarque de Holanda. New Dictionary Aurélio of Portuguese Language. Rio de Janeiro, Nova Fronteira, 1986, 2nd ed., page. 499.

[5] Procedural Act: appeal: electronic seal: requirement for regulation for its use to protect the legal security. 1. Pacific the understanding of the Supreme Federal Court that only the petition on which the lawyer has originally executed his signature is legally valid. Precedents 2. In the records was not filed a digital certificate or the printed version of a digital document protected by digital certificate, this is a simple electronic seal without any regulation and it is not possible to confirm its originality without an audit. 3. The requirement for regulation for the use of digital signature is not simple procedural formality but reasonable requirement which aims to avoid the practice of acts which liability would not be possible. 564765 / RJ - Rio de Janeiro, Reporting judge: Min Sepulveda Pertence, Trial: 14/02/2006, First Panel.

[6] GANDINI, João Donizeti; SALOMÃO, Diana Paola da Silva et al, op. cit., loc. cit.

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or in an "internal" corporate environment" - are also preserved, the electronic documents have been gaining acceptance even at the lower instances.

This means that the electronic document not only contributes to the development of business executed through a virtual environment but also guarantee the legal security needed for its execution as the parties will have the assurance that in case of a possible dispute the documents generated through such environment are possible to be used as a form of defense of their rights in court.

Almeida Advogados is at you disposal for any additional detail related to the matter discussed in this article.

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LIMITATION OF LIABILITY ON SOFTWARE AGREEMENTS

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In Brazilian law, rules that govern the limitation of liability have suffered many changes due to the institution of the new Civil Code[1], which directly affected the *pacta sunt servanda* principle, by which the parties are completely bond 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 illegitimate[2].

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 offended[3].

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 reasons[4].

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.

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disproportionate when compared to the other party[5].

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 void[6].

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.

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[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.

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