

ADHESION ELECTRONIC CONTRACTS (“SHRINK-WRAP” AND “CLICK-WRAP”) AND THE TERMS OF USE (“BROWSE-WRAP”)

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Abstract: This article aims to present a legal discipline for some contractual practices in electronic commerce, identified as “shrink-wrap”, “click-wrap” and “browse-wrap”. In this sense, it presents the concept, the characteristics of these figures, as well as the understanding of foreign courts, in particular, North American and Canadian ones. The inductive method is applied, starting from the analysis of several cases on the existence, validity and enforceability of these commercial practices to establish guidelines in order to guide suppliers, consumers and the lawyers and judges. Finally, it points out the necessary updating of the Brazilian legal system, as intended by Bill no. 3514/2015 to ensure an effective consumer protection in international distance contracting.

Keywords: electronic commerce; consumer protection; unfair terms; Bill No. 3.514/2015.

INTRODUCTION

New information technologies have fostered remote contracting, as they connect people all the time and, in any language, much more quickly and easily. However, the transformation from the digital world to the materialized world (on paper) has brought some regulatory challenges. The virtual dynamics question the traditional rules of the Civil Code (CC/02) regarding existence, validity, and effectiveness when applied to electronic contracts. Furthermore, the Consumer Protection Code (CDC), from the early 1990s, is not suitable for the specifics of e-commerce, leaving consumers unprotected.

Ideally, the Civil Code and the Consumer Protection Code should be updated to incorporate rules on telematic contracting and consumer protection in the context described above. It is important to note that in this regard, the UNCITRAL Model Law on Electronic Commerce of 1996¹ influenced other countries, leading to the development of specific e-commerce laws in many countries in North America, Europe, Asia, and Latin America.

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¹ United Nations, *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment* 1996.

In North America, the federal guideline known as the Uniform Computer Information Transactions Act (UCITA)² and the Uniform Electronic Transactions Act (UETA, 1999)³ stand out. UETA, adopted by almost all U.S. states, regulates electronic contracting, including specific rules on the formation of telematic contracts, their execution, and breach.

In Canada, the approval of the Uniform Electronic Commerce Act (UECA, 1999)⁴ is noteworthy, which is very similar to the UNCITRAL Model Law on electronic commerce.

In addition to these specific regulations for telematic contracting, consumer rights laws have been reformed to ensure effective consumer protection in e-commerce.

In Europe, Directive 2000/31/EC, known as the Electronic Commerce Directive⁵, from the European Parliament and Council, introduced

² McDonald, Brian D. *The Uniform Computer Information Transactions Act*, 16 *Berkeley Technology Law Journal* 461, 2001, 461. The UCITA was proposed to promote the uniformity of state laws in the United States in July 1999 by the National Conference of Commissioners on Uniform State Laws (NCCUSL). However, it did not receive the support of the American Law Institute (ALI) and was subsequently withdrawn in 2002. Nevertheless, the UCITA was adopted by the state of Maryland and the state of Virginia in 2004. Cf. United States, *UCITA Online*, available at <http://www.ucitaonline.com/> (last accessed Jan. 10, 2020).

³ Available at: <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=2c38eebd-69af-aafe-ddc3-b3d292bf805a> (last accessed Jan. 10, 2020). The UETA was widely adopted, with 47 U.S. states adopting it. California was the first to adopt it in 1999 (SB 820), followed by Pennsylvania (2000, SB 555), Maryland (2000, SB 3/ HB 18), Indiana (2000, SB 275/ HB 1395), South Dakota (2000, SB 193), Oklahoma (2000, SB 1598), Idaho (2000, SB 1334), Florida (2000, SB 1334), North Carolina (2000, SB 1266), Utah (2000, SB 125), Maine (2000, LD 2557), Nebraska (2000, LB 929), Minnesota (2000, HF 3109), Iowa (2000, HF 2205), Rhode Island (2000, HB 7694), Kentucky (2000, HB 571), Virginia (2000, HB 499), Delaware (2000, HB 492), Ohio (2000, HB 488), Kansas (2000, HB 2879), Hawaii (2000, HB 2585), Arizona (2000, HB 2069), Wyoming (2001, SF 116), Nevada (2001, SB 49), Texas (2001, SB 393), Mississippi (2001, SB 2678), West Virginia (2001, SB 204), Arkansas (2001, SB 159), New Hampshire (2001, SB 139), Louisiana (2001, HB 888), Michigan (2001, HB 5537), Tennessee (2001, HB 387/ SB 376), Montana (2001, HB 234), New Mexico (2001, HB 232), Oregon (2001, HB 2112), Alabama (2001, HB 170), North Dakota (2001, HB 1106), District of Columbia (2001, 14-51), Connecticut (2002, SB 561), New Jersey (2002, SB 1183), Colorado (2002, HB 02-1326), Missouri (2003, HB 254), Vermont (2003, HB 148), South Carolina (2004, SB908/ HB4720), Massachusetts (2004, SB 2076), Alaska (2004, HB 285), Wisconsin (2004, AB 755), US Virgin Islands (2004, 25-0030), and Georgia (2009, HB 126). It was introduced in the state of Washington in 2020 by SB 6028. Only the states of Illinois and New York have not adopted it.

⁴ Available at: <https://www.ulcc.ca/en/1999-winnipeg-mb/359-civil-section-documents/1138-1999-electronic-commerce-act-annotated> (last accessed Jan. 10, 2020).

⁵ European Union, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), *Official*

regulations on the formation of contracts and the right to information for those acquiring a product through a telematic transaction.

In Brazilian law, there is no regulation specifically addressing the intricacies of electronic transactions, only some proposed bills, such as Bill No. 3,514/2015, which aims to amend certain articles of the Consumer Protection Code to adapt it to the reality of the information consumption society. Some recent laws, such as the Marco Civil da Internet, Law No. 12,965/2014 (MCI), and the General Data Protection Law (LGPD), Law No. 13,709/2018 with amendments from Law No. 13,853/2019, establish rights and obligations in the context of the information society. However, both laws do not provide rules for telematic contracting.

In this regard, the Marco Civil da Internet, in Article 7, paragraph XIII, lists among the rights of Internet users the application of consumer protection laws ("application of consumer protection and defense rules in consumer relations carried out on the Internet"). Furthermore, the General Data Protection Law, in Article 45, determines that: "Violations of the data subject's rights in the context of consumer relations remain subject to the liability rules provided for in the relevant legislation."

Since the 1990s, with the consolidation of the World Wide Web, e-commerce has become the dominant way of conducting online business. Companies began distributing software programs through a license that can be accessed by clicking on a hyperlink, containing all the terms and conditions of software usage. The acquirer, upon installing the product, communicates with the machine, expressing consent or refusal through successive clicks. Previously, these programs were distributed on physical media like a DVD, which the consumer purchased physically in a store. However, only when starting the installation at home or in their office would they gain access to the terms and conditions, which legal scholars began referring to as "shrink-wrap." Canadian and U.S. courts consider these instruments as contracts when the user had the opportunity to access and read the license at the beginning of the installation.

This contractual technique, due to its many advantages in terms of saving time and money, has also been employed in contracts entered into over the Internet, in an electronic environment. Companies began offering their products and services online, on their websites, where, before completing the contract, the acquirer has the opportunity to read the contractual clauses and express their full acceptance or not. This expression of will is externalized through successive clicks in dialog boxes displayed on the computer screen ("click-wrap"). This contractual technique is more readily accepted by

Journal L 178, 17/07/2000, P. 0001 – 0016, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32000L0031&from=EN> (last accessed Jan. 10, 2020).

Anglo-Saxon doctrine and jurisprudence because consent is expressed after the opportunity to read the contract.

Another common practice is to provide terms and conditions of use discreetly linked in a hyperlink at the bottom of the website to bind all those who navigate a particular site ("browse-wrap"). This possibility has drawn the attention of courts and legal scholars, as there is a debate about the existence or absence of a real convergence of wills ("meeting of the minds"). This is because, often, the provider does not even make the existence of the terms clear and easily noticeable, which makes it impossible for the user to be notified of their existence.

These contractual techniques forced the legal community to reconsider the criteria for the existence of a contract, that is, the expressed or implied consent (resulting from the analysis of typical social conduct); the validity of this contract, as well as its effectiveness or enforceability, under the terms of Article 46 of the Consumer Protection Code (CDC).

In this sense, this article provides an approach to electronic adhesion contracts, known as "shrink-wrap" and "click-wrap," as well as the so-called "browse-wrap," terms and conditions of use made available via hyperlink on webpages. This study presents the concept, characteristics, and the issues surrounding the consent expressed in these figures, as well as the rulings on the topic by North American and Canadian courts. Finally, the article provides a well-founded analysis of how these figures are and should be treated under Brazilian law, highlighting the emerging specific jurisprudence on the three figures analyzed in this article. In the end, the article offers some insights into data protection and privacy policies to establish mechanisms for characterizing consent, an essential element for contract conclusion (acceptance), as well as an important basis for the handling of personal data (Article 7, I, LGPD).

I. CONTRACTS AND E-COMMERCE:

THE NECESSARY EVOLUTION OF GENERAL CONTRACT THEORY

The stage of modern civilization, dominated by scientific advances coupled with the development of communication means, demonstrates a new model of behavior: mass contracting through the use of telecommunications and information technology (telematics). This social phenomenon demands greater attention from legal experts to the new patterns of behavior, which should be regulated with a view to social harmony and balance between the contracting parties.

Distance selling was traditionally seen as synonymous with mail-order sales. However, communication means have evolved in a way that distance sales have followed this evolution. Today, for instance, electronic commerce

is structured in distance sales, using the Internet as an efficient means of mass communication.⁶

Cláudia Lima Marques highlights this characteristic, stating that, in a strict sense, electronic commerce can be understood as "one of the modalities of non-face-to-face or distance contracting for the acquisition of products and services through electronic or electronic means."⁷

This understanding aligns with the provisions of Directive 2011/83/EU, which defines distance contracts (Article 7) as contracts between consumers and suppliers, the object of which is goods or services, concluded by an organized means of distance selling or a scheme of service provision structured by the supplier, which exclusively uses one or more means of distance communication for the conclusion of the contract.

However, one of the particularities of the Digital Revolution⁸ and the increasing use of information technology lies precisely in the complexity of social relations, meaning that modern jurists are confronted with various new contractual forms and new norms and contracting techniques.⁹

Regarding terminology, there are various expressions to designate this legal transaction, namely: virtual contracts, computer contracts, online contracts, and electronic contracts.¹⁰ In summary, an electronic contract can be defined as a bilateral legal transaction entirely or partially executed digitally.

It is important to clarify that the term "electronic contracts" essentially encompasses two types: 1) computer contracts, those that have computer goods and/or services as their subject matter, and 2) telematic contracts, those that are entered into using computer and telematic means of

⁶ Marques, Cláudia Lima. *Confiança no comércio eletrônico: um estudo dos negócios jurídicos de consumo no comércio eletrônico*. São Paulo, Revista dos Tribunais, 2004, 35-36; Glanz, Semy. Internet e Contrato Eletrônico, 757 *Revista dos Tribunais* 70, 1998, 72; Lorenzetti, Ricardo Luis. *Comércio eletrônico*. São Paulo, Revista dos Tribunais, 2004, 286.

⁷ Marques, Cláudia Lima. *Confiança no comércio eletrônico: um estudo dos negócios jurídicos de consumo no comércio eletrônico*. São Paulo, Revista dos Tribunais, 2004, 38, freely translated. Originally: "sendo uma das modalidades de contratação não-presencial ou à distância para a aquisição de produtos e serviços por meio de meio eletrônico ou via eletrônica".

⁸ Expression used by: De Lucca, Newton. *Aspectos Jurídicos da Contratação Informática e Telemática*. São Paulo, Saraiva, 2003, 17.

⁹ De Lucca, Newton. *Aspectos Jurídicos da Contratação Informática e Telemática*. São Paulo, Saraiva, 2003, 21-22.

¹⁰ De Lucca, Newton. Títulos e contratos eletrônicos: o advento da Informática e suas consequências para a pesquisa jurídica, in *Direito & Internet: aspectos jurídicos relevantes*. São Paulo, Quartier Latin, 2005, 62; Marques, Cláudia Lima. *Confiança no comércio eletrônico: um estudo dos negócios jurídicos de consumo no comércio eletrônico*. São Paulo, Revista dos Tribunais, 2004, 44: The author uses the expression "consumer legal transactions in electronic commerce" because it is more comprehensive.

communication.¹¹

This distinction is widely acknowledged by legal scholars from various countries, including Spain¹², France¹³, Italy¹⁴, and Argentina.¹⁵

Brazilian legal doctrine also adopts this distinction. Newton De Lucca defines a computer contract as a "[...] bilateral legal transaction that has computer goods or services related to computer science as its object," distinguishing it from telematic contracts, which represent a "[...] bilateral legal transaction that has the computer and a communication network as its basic means for its conclusion."¹⁶

A computer contract is characterized by having a computer-related good as its object. In 1993, Giusella Finocchiaro¹⁷ used the expression "*contratti d'informatica*" to refer to "*il contratto ad oggetto informatico*," emphasizing that this terminology emerged in the 1970s.

The latter, i.e., telematic contracts, an expression that originated in French legal doctrine, as highlighted in the work of Xavier Linant de Bellefonds and Alain Hollande, provides the definition of "*contrats télématiques*" as follows:

The exact meaning of the term 'telematic' is not well defined. The most widely accepted definition in practice includes all applications that combine the computer with telecommunications within the scope of telematics. This definition aligns with that of the administration, for which telematic services are 'a set of services of an informatic nature or origin that can be provided through a telecommunication network.'¹⁸

¹¹ De Lucca, Newton. *Aspectos Jurídicos da Contratação Informática e Telemática*. São Paulo, Saraiva, 2003, 19.

¹² Lozano, Jorge Vila. *Breves comentarios a la ley 34/2002, de 11 de Julio de servicios de la sociedad de la información y de comercio electrónico y su impacto* (personal message, Nov. 20, 2007).

¹³ Bellefonds, Xavier Linant de, and Alain Hollande. *Contrats informatiques et télématiques*. 3rd ed., Paris, Delmas, 1992, 146.

¹⁴ Finocchiaro, Giusella. *I contratti ad oggetto informatico*. Padova, Cedam, 1993, 3; Ippolito, Fulvio Sarzana di S. *I contratti di Internet e del commercio elettronico*. Milan, Dott. A. Giuffrè Editore, 2001, 1-10 (Regarding the evolution of terminology from "computer contract" to "telematic contract").

¹⁵ Lorenzetti, Ricardo Luis. *Tratado de los contratos*. Buenos Aires, Rubinzal-Culzoni, 1999, t. III, 22nd sect. ("La informática e Internet en los contratos", p. 815-868), 817.

¹⁶ De Lucca, Newton. *Aspectos Jurídicos da Contratação Informática e Telemática*. São Paulo, Saraiva, 2003, 33, freely translated. Originally: "[...] *negócio jurídico bilateral que tem por objeto bens ou serviços relacionados à ciência da computação*"; *distinguindo este do contrato telemático, que representa o "[...] negócio jurídico bilateral que tem o computador e uma rede de comunicação como suportes básicos para sua celebração*".

¹⁷ Finocchiaro, Giusella. *I contratti ad oggetto informatico*. Padova, Cedam, 1993, 3. "*Rientrano così all'interno della categoria i contratti per l'acquisizione o l'utilizzazione di hardware e di software, i contratti per l'acquisizione, l'elaborazione o la diffusione di dati attraverso mezzi informatici, nonché i contratti conclusi mediante strumenti informatici*".

¹⁸ Bellefonds, Xavier Linant de, and Alain Hollande. *Contrats informatiques et*

This expression can be used by Brazilian legal doctrine, given the existence of the term "*telemática*"¹⁹ in the vernacular. Thus, Brazilian legal doctrine²⁰ defines telematic contracts as "a bilateral legal transaction that has the computer and a communication network as its basic means for its conclusion."

Regarding the formation of telematic contracts, Section 202 of UCITA establishes the existence of an electronic contract, even when concluded by electronic agents: "(a) A contract may be formed in any manner sufficient to show agreement, including offer and acceptance or conduct of both parties or operations of electronic agents which recognize the existence of a contract." Similarly, Section 8 of UETA establishes: "(a) If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt." Article 9 of Section 3 of Directive 2000/31/EC imposes on Member States the obligation to adopt legal measures to ensure the validity and effectiveness of contracts concluded electronically. This directive is established in Article 11 of the UNCITRAL Model Law on Electronic Commerce.

It is advisable for Brazil to adopt specific legislation emphasizing the existence, validity, and effectiveness of electronic contracts, based on the principle of non-discrimination, under which the validity of contracts should not be denied solely because they were concluded electronically, as specific laws do, namely Section 202(a) of UCITA²¹, Section 7(b) of UETA²², Section

télématiques. 3rd ed., Paris, Delmas, 1992, 146. "Le sens exact du terme « télématique » n'est pas bien fixé. La définition la plus largement reçue en pratique fait entrer dans le cadre de la télématique toutes les applications qui associent l'ordinateur aux télécommunications. Cette définition rejoint celle de l'administration pour laquelle les services télématiques sont « un ensemble de services de nature ou d'origine informatique pouvant être fournis à travers un réseau de télécommunication »".

¹⁹ "Telematics. [From tele(communication) + (infor)matcs.] Noun. 1. The science that deals with the manipulation and utilization of information through the combined use of computers and telecommunications means." In: Aurélio Dictionary (CD-ROM), electronic version. Originally, in Brazilian Portuguese: "*Telemática. [De tele(comunicação) + (infor)mática.] Substantivo feminino. 1. Ciência que trata da manipulação e utilização da informação por meio do uso combinado de computador e meios de telecomunicação.*" In: *Dicionário Aurélio (CD-rom), versão eletrônica*".

²⁰ De Lucca, Newton. *Aspectos Jurídicos da Contratação Informática e Telemática*. São Paulo, Saraiva, 2003, 33.

²¹ "(a) A contract may be formed in any manner sufficient to show agreement, including offer and acceptance or conduct of both parties or operations of electronic agents which recognize the existence of a contract".

²² "(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation".

5 of UECA²³, and Article 5 of the UNCITRAL Model Law on Electronic Commerce.²⁴

In this context, the decision of the Court of Justice of Rio Grande do Sul, which ruled that an email communicating the contract's cancellation fulfills the requirement to send a letter for such purpose, was correct:

HEADNOTE: CABLE TV SERVICES. TERMINATION OF THE CONTRACT. TERMINATION MADE VIA EMAIL. VALIDITY. NON-EXIGIBILITY OF FUTURE PAYMENTS. UNJUSTIFIED INCLUSION IN THE CREDIT REPORT. MORAL DAMAGES. AMOUNT OF COMPENSATION. The general conditions of the contract stipulate that the termination must be preceded by written notice with a minimum notice period of thirty days, and such condition was met through an email sent, the defendant could not condition the cancellation of the contract on the return of the decoder to the defendant's store. As the installments charged after the termination are unenforceable, the inclusion of the author's name in the credit report is also unwarranted, resulting in exacerbated moral damages in this case, through extreme disregard for consumer rights. Compensation reduced in compliance with the principles of reasonableness and proportionality. Judgment confirmed on its own merits. Appeal dismissed.²⁵

Specific regulations on electronic contracts (computer and telematic) are not expected, but rather a reform of the CC/02 and the CDC to insert some rules considering the peculiarities of distance contracting. In fact, this is a characteristic of electronic commerce, namely, the prevalence of international distance contracts.

²³ “Legal recognition – 5. Information shall not be denied legal effect or enforceability solely by reason that it is in electronic form”.

²⁴ “Article 5 – Legal recognition of data messages – Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message”.

²⁵ Court of Justice of Rio Grande do Sul, *Civil Appeal No. 71000729954*, First Civil Recourse Panel, Recourse Panels, Reporter: Ricardo Torres Hermann, Decided on September 29, 2005. Original headnote: “*EMENTA: PRESTAÇÃO DE SERVIÇOS DE TV VIA CABO. RESILIÇÃO DO CONTRATO. DENÚNCIA FEITA POR MEIO DE E-MAIL. VALIDADE. INEXIGIBILIDADE DE PRESTAÇÕES FUTURAS. INSCRIÇÃO INDEVIDA NO SPC. DANOS MORAIS. VALOR DA INDENIZAÇÃO. Dispondo as condições gerais do contrato que a rescisão deva ser precedida de comunicação por escrito, com antecedência mínima de trinta dias, e tendo sido satisfeita tal condição, mediante missiva encaminhada por e-mail, não poderia a ré condicionar o cancelamento do contrato à entrega do aparelho decodificador em loja da ré. Sendo inexigíveis as parcelas cobradas posteriormente à denúncia, indevida também é a inscrição do nome do autor no SPC, a gerar danos morais exacerbados no caso em tela, pela extrema desconsideração ao Direito do Consumidor. Indenização reduzida em observância aos princípios da razoabilidade e proporcionalidade. Sentença confirmada por seus próprios fundamentos. Recurso improvido”.*

On this topic, Directive 2011/83/EU provides a series of definitions in Article 2(7), including the definition of a distance contract:

“distance contract” means any contract concluded between the trader and the consumer under an organized distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded;

This directive is aimed at consumer protection; however, what characterizes a distance contract, whether it is consumer-related or not, is the means of communication used and the negative assumption, which is the absence of simultaneous physical presence. Therefore, a distance contract is understood as a contract concluded without the simultaneous physical presence of the contracting parties, using exclusively or not one or more means of distance communication.

Bill No. 3,514/2015 in the Chamber of Deputies introduces a concept of a distance contract in the proposed amendment to Article 49 of the Consumer Protection Code:

§ 2. By distance contract, it is understood to be one carried out outside the establishment or without the simultaneous physical presence of the consumer and the supplier, especially at home, by telephone, by mail order, or by electronic or similar means.²⁶

This provision does not distinguish between a distance contract and a contract outside the establishment. Ideally, it would be best to distinguish these concepts as European Community law does, which defines a contract outside the establishment in item 8 of Article 2 of Directive 2011/83/EU:

“off-premises contract” means any contract between the trader and the consumer:

- (a) concluded in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader;
- (b) for which an offer was made by the consumer in the same circumstances as referred to in point (a);
- (c) concluded on the business premises of the trader or through any means of distance communication immediately after the consumer was personally and individually addressed in a place which is not the business premises of the trader in the simultaneous physical presence of the trader and the consumer; or
- (d) concluded during an excursion organized by the trader with the aim

²⁶ Originally: “§ 2º Por contratação a distância entende-se aquela efetivada fora do estabelecimento ou sem a presença física simultânea do consumidor e do fornecedor, especialmente em domicílio, por telefone, por reembolso postal ou por meio eletrônico ou similar”.

or effect of promoting and selling goods or services to the consumer;

In this sense, a contract outside the establishment is understood to be a contract concluded in the physical presence of the parties at a location other than the commercial establishment, or when the offer is made under these same circumstances, or when the contract is concluded during a campaign organized by the supplier to promote or sell goods and services. By way of example, this could include door-to-door sales or mail-order sales.

However, Bill No. 3,514/2015 goes further, as it equates a distance contract to a contract concluded at the supplier's establishment, provided that the consumer "has not had the prior opportunity to become acquainted with the product or service, either because it is not on display or due to the impossibility or difficulty of accessing its content" (§ 3 of Article 49). For example, if a consumer goes to a store to purchase a product, but the product is not available, and there is no physical contact with the product, it resembles a distance contract.

II. FORMATION, VALIDITY, AND ENFORCEABILITY OF ELECTRONIC CONTRACTS: CHALLENGES TO TRUST IN E-COMMERCE

Now, if trust is the very justification for the law, when it is lost, what is built upon it, in this case, the law, loses its entire reason for being. This is what cannot be allowed to happen in the informational society, whose foundation, above all, is trust. In this regard, new technologies, such as Blockchain, have been developed to ensure greater trust in remote electronic transactions.

Cláudia Lima Marques defines trust as "the necessary new paradigm to take 'this step forward' in adapting our current Consumer Law to this new mode of commerce."²⁷

The way consent is given in electronic contracting presents a clear distinction between electronic contracts and traditional ones. In this new technological context, parties can express their will in various ways, including through silence, when the law allows it, or through behavior, such as clicking on a specific icon or downloading a computer program, and so on.

The manner of contracting in the digital medium has evolved, namely through the figures of "shrink-wrap," "click-wrap," and "browse-wrap." In the first figure, consent is expressed through conduct (opening the CD and installing the computer program) and through silence (not returning the product in case of disagreement with the contract terms). In the case of the so-called "click-wrap," consent is given by clicking on expressions like "I

²⁷ Marques, Cláudia Lima. *Confiança no comércio eletrônico: um estudo dos negócios jurídicos de consumo no comércio eletrônico*. São Paulo, Revista dos Tribunais, 2004, 34-35.

agree," "accept," "yes," or other synonymous expressions. Thus, in this scenario, the user has the opportunity to become aware of the contract terms beforehand to make a conscious decision about whether or not to agree with them. Finally, "browse-wrap" consists of terms imposed by one party on the other as a user browses a specific webpage on the Internet, where the absence of consent is evident.

Ana Paula Gambogi Carvalho²⁸ summarizes the scenario outlined above, stating that in the first two cases, the declaration of will is "pre-formulated" because it simply requires clicking on the icon corresponding to the expression "yes" or "no."

However, the distinguished professor Cláudia Lima Marques emphasizes caution when interpreting these expressions of will:

Therefore, if the consumer clicks to open the contract, **this cannot be interpreted as if they were accepting the offer** or that the contract has been finalized. **It should be possible to read the contract and even print it** without concluding it because the contract is information for the consumer, and it is the right of the latter to choose that is at stake. The abuse of the 'order' of electronic impulses or the order of open screens is precisely to only provide the contract's content when it is already accepted or to allow it to be downloaded when the consumer has already become a party to the contract. (emphasis added)²⁹

The computer is merely a means of conveying a will that has already been perfected when the declarant expressed it or formatted the computer program to transmit it.³⁰ In all cases, the prevailing doctrine follows the general rule of attribution, where the declaration of will expressed through the use of the computer is attributed to the declarant.³¹ In summary, the declaration of will is attributed to the declarant, who is responsible for fulfilling what was declared, unless they can prove that another person used their machine without authorization or some other fact that negates this attribution.

²⁸ Gambogi Carvalho, Ana Paula. *Contratos via Internet*. Belo Horizonte, Del Rey, 2001, 32.

²⁹ Marques, Cláudia Lima. *Confiança no comércio eletrônico: um estudo dos negócios jurídicos de consumo no comércio eletrônico*. São Paulo, Revista dos Tribunais, 2004, 34-272, freely translated. Originally [without emphasis]: "Assim, se o consumidor faz um click para abrir o contrato, isto não pode ser interpretado como se ele estivesse aceitando a oferta, ou que o contrato se perfectibilizou. Deve ser possível ler o contrato e mesmo o imprimir, sem o concluir, pois o contrato é informação para o consumidor e é o direito de escolha deste último que está em jogo. O abuso da 'ordem' de impulsos eletrônicos, ou da ordem de telas abertas é justamente o de somente informar o conteúdo do contrato quando este já está aceito, ou de somente permitir baixá-lo (download), quando o consumidor já se tornou contratante".

³⁰ Parisi, Francesco. *Il contratto concluso mediante computer*. Padova, Cedam, 1987, 3.

³¹ Lorenzetti, Ricardo Luis. *Comércio eletrônico*. São Paulo, Revista dos Tribunais, 2004, 293.

To minimize this controversy, specific legislations provide rules on this matter. For example, Article 13 of the UNCITRAL Model Law on Electronic Commerce establishes the rule of attribution of the message to the sender when they send it themselves or when the message is sent by another person authorized to do so, or by a previously programmed information system to operate automatically. The receiver's knowledge of this declaration of intent occurs when the message enters their sphere of control. This understanding is adopted in Article 15 of the UNCITRAL Model Law on Electronic Commerce and in Section 23.1 of the UECA in Canada. Therefore, it does not require the psychological knowledge of the message's content by the receiver; it is sufficient that it has entered their information system, beyond the control of the sender.³²

In the context of electronic commerce, acceptance can occur in various ways, such as when the offeree drafts their acceptance and transmits it via email or when the offeree performs certain acts demonstrating their acceptance (typical social behavior). For example, when they agree to the terms by clicking on icons showing their consent ("I agree").³³ In all these cases, according to Brazilian doctrine³⁴, there is a meeting of the minds in these contracts, even if it arises from socially typical conduct.

In the current massified post-modern society immersed in new technologies, the vulnerability of users of these products and services becomes evident due to the social, economic, and technological imbalance between users and suppliers. In summary, doctrine³⁵ concludes that users in this context of freedom, speed, and globalization face a new vulnerability.

In telematic contracting, there is a considerable increase in the vulnerability of users who are generally not as familiar with new technologies, giving rise to another criterion for analysis within this principle: technological or informational vulnerability.

Cláudia Lima Marques³⁶ points out various situations that exacerbate consumer vulnerability, such as the significant power imbalances among suppliers. Additionally, marketing tactics are highly aggressive and appealing, leading to what the author calls the "power of need" and the

³² Lorenzetti, Ricardo Luis. *Comércio eletrônico*. São Paulo, Revista dos Tribunais, 2004, 295.

³³ Lorenzetti, Ricardo Luis. *Comércio eletrônico*. São Paulo, Revista dos Tribunais, 2004, 10-17.

³⁴ Marques, Cláudia Lima. *Contratos no Código de Defesa do Consumidor*, 4th ed., São Paulo, Revista dos Tribunais, 2002, 99.

³⁵ Marques, Cláudia Lima. *Confiança no comércio eletrônico: um estudo dos negócios jurídicos de consumo no comércio eletrônico*. São Paulo, Revista dos Tribunais, 2004, 40-41, quoting the conclusions of Erik Jayme.

³⁶ Marques, Cláudia Lima. *Contratos bancários em tempos pós-modernos: primeiras reflexões*, 25 *Revista de Direito do Consumidor* 19, 1998, 27.

"seduction of new needs." In other words, through aggressive advertising, suppliers drive consumer needs.

This situation is even more pronounced in the context of the information society, where new technologies are used to conduct direct marketing. In this approach, the information system determines user preferences automatically and delivers advertisements for products and services that match those preferences. Another factor that increases vulnerability is adhesion contracts and the provision of terms and conditions of use, as will be discussed below.

III. ELECTRONIC ADHESION CONTRACTS AND TERMS AND CONDITIONS OF USE

Claudia Lima Marques³⁷ emphasizes the evolution of the concept of contracts. Traditionally, there were predominately negotiated or individual contracts in which the parties discussed contract clauses on an equal footing. However, this reality has drastically changed due to the prevalence of adhesion contracts in consumer society, where any physical contact between the parties is lost. This phenomenon is referred to as the "impersonalization of the contract," which is even more pronounced in the context of e-commerce.

In summary, negotiated or individual contracts are characteristic of a society with an economic foundation in craftsmanship and family farming. In contrast, impersonal or adhesion contracts are typical of an industrialized, mass-consumer society.³⁸

An adhesion contract, as defined in Article 54 of the Consumer Defense Code (CDC), can be described as a "legal transaction in which the participation of one of the parties occurs through the acceptance in bulk of a series of clauses formulated in advance, in a general and abstract manner, by the other party, to establish the normative and obligatory content of future concrete relationships."³⁹

³⁷ Marques, Cláudia Lima. *Contratos no Código de Defesa do Consumidor*, 4th ed., São Paulo, Revista dos Tribunais, 2002, 52-53.

³⁸ Lorenzetti, Ricardo Luis. *Tratado de los contratos*. Buenos Aires, Rubinzal-Culzoni, 1999, t. I, 138.

³⁹ Gomes, Orlando. *Contratos de adesão: condições gerais dos contratos*. São Paulo, Revista dos Tribunais, 1972, 3; or, also, the definition of Miranda, Custódio Ubaldino. *Contrato de adesão*. São Paulo, Atlas, 2002, 27: "[...] aquela forma de contratar em que, emitida pelo predisponente uma declaração dirigida ao público, contendo uma promessa irrevogável para esse efeito, mediante cláusulas uniformes, formuladas unilateralmente, o contrato (individual, singular) se forma, com o conteúdo assim prefixado, no momento em que uma pessoa, aceitando essas cláusulas na sua totalidade, ainda que com eventuais aditamentos, adere a tal conteúdo"; Lorenzetti, Ricardo Luis. *Tratado de los contratos*. Buenos Aires, Rubinzal-Culzoni, 1999, t. I, 140: "El contrato se celebra por adhesión cuando la redacción de sus cláusulas corresponde a una sola de las partes, mientras que la

Similarly, the Uniform Computer Information Transactions Act (UCITA) provides a definition of what Anglo-Saxon doctrine refers to as a "standard form" in Section 102(61): "'Standard form' means a Record or a group of related records containing terms prepared for repeated use in transactions and so used in a transaction in which there was no negotiated change of terms by individuals except to set the price, quantity, method of payment, selection among standard options, or time or method of delivery."

It is important to distinguish between adhesion contracts and the general terms of contracts. This distinction is made based on the work carried out by the European Commission, as reported by Professor Claudia Lima Marques⁴⁰:

We will understand adhesion contracts in a narrow sense as written contracts, prepared and printed in advance by the supplier, in which only the spaces related to the identification of the buyer and the goods or services, the subject of the contract, need to be filled in. On the other hand, contracts subject to general business conditions are those, whether written or unwritten, in which the buyer tacitly or expressly accepts that clauses, unilaterally and uniformly pre-drafted by the supplier for an indefinite number of contractual relationships, will govern their specific contract.

Applying these concepts to telematic contracting, adhesion contracts are written contracts, previously printed or printable during telematic contracting, in which the consumer only needs to fill in the spaces for their personal identification and click on the icon indicating their agreement ("I accept"). This phenomenon is observed in "shrink-wrap" and "click-wrap" contracts. It is also possible for the supplier to distribute their products and services by unilaterally imposing contractual terms, whether written or unwritten. These terms may also be accessible through successive clicks on hyperlinks, as is the case with "browse-wrap" agreements.

Foreign laws, as previously mentioned, validate electronic contracts, such as Section 7(b) of the UETA, Section 202 of the UCITA, Section 2(7) of the UECA, Article 11 of the UNCITRAL Model Law on Electronic Commerce, the Bill No. 3.514/2015 (which aims to add legal provisions to the Consumer

outra se limita a aceitarlas o rechazarlas, sin poder modificarlas, [...]”.

⁴⁰ Marques, Cláudia Lima. *Contratos no Código de Defesa do Consumidor*, 4th ed., São Paulo, Revista dos Tribunais, 2002, 56, freely translated. Originally: “*Como contratos de adesão entenderemos restritivamente os contratos por escrito, preparados e impressos com anterioridade pelo fornecedor, nos quais só resta preencher os espaços referentes à identificação do comprador e do bem ou serviços, objeto do contrato. Já por contratos submetidos a condições gerais dos negócios entenderemos aqueles, escritos ou não escritos, em que o comprador aceita, tácita ou expressamente, que cláusulas, pré-elaboradas unilateral e uniformemente pelo fornecedor para um número indeterminado de relações contratuais, venham a disciplinar o seu contrato específico*”.

Protection Code for specific issues related to electronic commerce), and Article 11 of the Brazilian Bill No. 4.906/2001. These rules also establish the principle of non-discrimination between traditional (paper-based) and electronic means. However, this does not mean that potentially abusive clauses cannot be invalidated.⁴¹

A. Usage licenses referred to as "Shrink-wrap"

"Shrink-wrap" licenses, also known as "*la licenza a strappo*" in Italian legal doctrine⁴², have been used by suppliers for decades⁴³, particularly in the software distribution market. These products were distributed as follows: off-the-shelf software was purchased, packaged in a box that contained the installation CD or DVD. At this point, the purchase and sale contract was concluded, meaning the offer was accepted.⁴⁴

However, the purchaser would only become aware of the terms of the software license after this point, specifically during the installation process of the software. In a preliminary stage, the purchaser would encounter a screen on their computer displaying the terms they were bound by, and they had to accept them as a whole in order to use the already-purchased product. During this phase, the supplier provided the user with the opportunity to unilaterally accept or reject the imposed terms, which was done by the user through two options for clicking: "I agree" or "I do not agree," respectively.

1. Concept

"Shrink-wrap" licenses⁴⁵ are adhesion contracts that contain the terms of

⁴¹ Marques, Cláudia Lima. *Contratos no Código de Defesa do Consumidor*, 4th ed., São Paulo, Revista dos Tribunais, 2002, 333-334.

⁴² Finocchiaro, Giusella. *I contratti ad oggetto informatico*. Padova, Cedam, 1993, 98: "Un particolare contratto di licenza d'uso è costituito dal c.d. contratto a strappo o contratto di licenza a strappo, shrink-wrap license, nell'originaria formulazione statunitense."

⁴³ The American jurisprudence is rich on these contracts; see *Advent Systems Ltd. v. Unisys Corp.*, 925 F.2d 670, 675-77 (3d Cir. 1991); *RRX Industries, Inc. v. Lab-Con, Inc.*, 772 F.2d 543, 546-47 (9th Cir. 1985); *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737, 74 (2d Cir. 1979); *North Am. Systemshops Ltd. v. King*, [1989] 68 Alta.L.R.2d 145 (Can.).

⁴⁴ Moringiello, Juliet M. Signals, Assent and Internet Contracting, 57 *Rutgers Law Review* 1,307, 2005, 1307-1359 [electronic document, without pagination]: "First came the "shrinkwrap" licenses included in retail software packages. In the classic shrinkwrap license transaction, a statement that use of the software is subject to terms to be found inside the box appears on the face of the box containing the software. The written license often states that use of the software constitutes acceptance of the license terms".

⁴⁵ Also called "'box-top,' 'shrink-wrap,' 'tear-open,' 'tear-me-open' and 'blister-pack'

use for computer software or other goods, with their clauses unilaterally established by the supplier. In the past, these terms were inside the physical support of the software, such as a CD-ROM or DVD.⁴⁶ Nowadays, there is an emphasis on the possibility of using a "shrink-wrap" on any electronic devices that aim to provide the stored clauses, typically with the ability to connect to the Internet (Internet of Things).

Therefore, the "shrink-wrap" contract should be equated with a distance contract due to their similarities. In other words, the contract's full terms are accessible to the purchaser after the contract has been concluded. Hence, we argue for the recognition of the purchaser's right to change their mind if they do not agree with the license terms, the content of which is revealed after the purchase has been completed.

In this regard, a court in the U.S. state of New York⁴⁷ provided a technical definition of this contractual arrangement, making it clear that the supplier must indicate the option to return the product if the purchaser does not agree with its terms. The court's statement is as follows:

For example, software commonly is packaged in a container or wrapper that advises the purchaser that the use of the software is subject to the terms of a license agreement contained inside the package. The license agreement generally explains that, if the purchaser does not wish to enter into a contract, he or she must return the product for a refund, and that failure to return it within a certain period will constitute assent to the license terms. These so-called "shrink-wrap licenses" have been the subject of considerable litigation.

2. Contract formation

Consent in the contractual modality known as "shrink-wrap" is expressed at the time of the conclusion of the purchase and sale contract, which is carried out at the supplier's commercial establishment or over the phone. However, this purchase and sale are contingent on the purchaser's agreement with the license terms, which they will become aware of when they start the

licenses. Cf. Einhorn, David A. Shrink-wrap licenses: the debate continues, 38 *IDEA - The Journal of Law and Technology* 383, 1998, 383-401 [In: Quicklaw, electronic document, without pagination].

⁴⁶ Maher, David W. The shrink-wrap license: old problems in a new wrapper, 34 *Journal of the Copyright Society of the U.S.A.* 292, 1986-1987, 292: "The shrink-wrap license typically is a contract of adhesion printed in reasonably legible type on the outer wrapper of a package for a computer program that is stored on magnetic media, usually floppy disks".

⁴⁷ 150 F. Supp. 2d 585; 2001 U.S. Dist. LEXIS 9073; 45 U.C.C. Rep. Serv. 2d (Callaghan) 1; affirmed by *Specht v. Netscape Communs. Corp.*, 306 F.3d 17, 2002 U.S. App. LEXIS 20714 (2d Cir. N.Y., 2002), p. 10.

software installation process.⁴⁸

In this contractual modality, acceptance is expressed through a typical social behavior, meaning the act of opening the package, installing the program, and using it after having the opportunity to accept or reject the license terms.⁴⁹ Another way to conclude this contract is by requiring the user to click on the icon expressing their agreement to the license terms.

The legal regime for these contracts should be governed by the provisions of the Brazilian Civil Code of 2002 (CC/02) and the Consumer Defense Code (CDC) for adhesion contracts. In particular, these contracts must adhere to certain rules: 1) They should be written in a clear and legible manner with conspicuous and readable characters (font size not less than 12 points); 2) Clauses that limit rights must be highlighted from the others; 3) The possibility of annulling abusive clauses must exist; 4) The effective opportunity to read and print the contract should be provided; 5) The interpretation should be in favor of the consumer according to Article 47 of the CDC and in favor of the adherent in cases of ambiguities or contradictions in civil and business relationships under Article 423 of the CC/02.

It's important to pay attention to Section 2 of Article 113 of the CC/02, added by the Economic Freedom Law (Law No. 13,874 of September 20, 2019), which allows parties to "freely" stipulate how contracts will be interpreted. However, "shrink-wrap" adhesion contracts do not allow for such freedom because the clauses are unilaterally established by the stipulator. Therefore, this legal provision cannot be applied due to manifest contractual injustice. It is unreasonable to allow the contracting party that drafts the

⁴⁸ Einhorn, David A. Shrink-wrap licenses: the debate continues, 38 *IDEA - The Journal of Law and Technology* 383, 1998, 383-401 [In: Quicklaw, electronic document, without pagination]: "In this situation, a valid bilateral contract, including the terms in the shrink-wrap license, is formed at the moment of sale. The opening of the package has no independent significance. If the terms of the license agreement are hidden beneath opaque packaging, payment of the purchase price may even then represent acceptance of a conditional offer, so long as the buyer is given adequate notice that a license is contained inside".

⁴⁹ Finocchiaro, Giusella. *I contratti ad oggetto informatico*. Padova, Cedam, 1993, 100: "Il contratto di licenza a strappo si perfeziona, dunque, con l'atto dell'apertura della confezione. Tale atto vale come accettazione. La manifestazione del consenso potrebbe essere ricondotta anche al silenzio, cioè alla mancata restituzione del programma al rivenditore, o all'inizio dell'esecuzione del contratto, cioè all'utilizzo del software". Also: Kidd Jr., Donnie L., and William H. Daughtrey Jr. Adapting contract law to accommodate electronic contracts: overview and suggestions, 26 *Rutgers Computer and Technology Law Review* 215, 2000 [electronic document, without pagination]; Kaufman, Page M. The enforceability of state "shrink-wrap" license statutes in light of *Vault Corp. v. Quaid Software, Ltd.*, 74 *Cornell Law Review* 222, 1988, 222-244 [In: Quicklaw, electronic document, without pagination]: "'Shrink-wrap' license agreements are identifiable by their means of acceptance. The purchaser indicates acceptance of the terms of the license by tearing open the plastic wrapper enclosing the software package".

contractual clauses to determine how they should be interpreted.

For example, according to Italian doctrine⁵⁰, onerous clauses that limit the supplier's liability or restrict contractual freedom regarding third parties and forum selection should be considered ineffective.

In fact, there is no uniformity in Common Law courts, notably in the United States, regarding the validity of these contracts. In some cases, the courts have deemed them invalid. However, the 7th Circuit Court of Appeals (which is responsible for hearing appeals from the courts of Illinois, Indiana, and Wisconsin) demonstrates the trend of courts to accept the validity of these licenses, as seen in the analysis of the following cases.

3. Foreign jurisprudence on the (in)validity of so-called "shrink-wrap" contracts

In Canada, the invalidity of "shrink-wrap" licenses is justified when, in a specific case, the supplier does not inform the user of the license terms, as was the case in *North American Systemshops Ltd. v. King*.⁵¹ On April 3, 1986, the defendant company, King & Company, purchased a disk containing software called "With Interest" from the plaintiff, North American Systemshops Ltd. Shortly thereafter, the defendant encountered issues with printing documents generated by the software, leading to contact with the plaintiff. However, it was discovered on April 30, 1987, that the defendant had purchased only one disk, but the program had been installed on multiple machines, violating the license terms. In November of the same year, North American Systemshops Ltd. filed a lawsuit seeking compensation for unauthorized copies totaling \$15,000, as well as \$25,000 in punitive damages and a judgment against the defendant for costs and legal fees. In this case, it was proven that when the program installation began, there was no screen displaying the license terms that should have been notified to the user. In these circumstances, the Canadian court in the Province of Alberta declared the license invalid because the supplier had not informed the buyer of its terms.⁵²

Subsequently, the case of *ProCD, Inc. v. Zeidenberg*⁵³ was responsible for a shift in American jurisprudence, affirming the validity of "shrink-wrap"

⁵⁰ Finocchiaro, Giusella. *I contratti ad oggetto informatico*. Padova, Cedam, 1993, 101: "Quindi quelle clausole, spesso presenti nei contratti standard di licenza d'uso, che stabiliscono limitazioni di responsabilità, restrizioni all' libertà contrattuale nei rapporti con i terzi e deroghe alla competenza dell' autorità giudiziaria devono considerarsi inefficaci. Giova precisare che, secondo la giurisprudenza, non è da ritenersi vessatoria la clausola di divieto di cessione di locazione e di sublocazione".

⁵¹ 68 Alta. L.R.2d 145 (Alta. Q.B. 1989) (Can.).

⁵² 68 Alta. L.R.2d 145 (Alta. Q.B. 1989) (Can.).

⁵³ 86 F.3d 1447, 1450 (7th Cir. 1996).

licenses. ProCD is a company that developed software for managing a database of phone numbers, consisting of about 3,000 phone directories that need to be kept up to date, with a cost exceeding \$10 million. The product was marketed by ProCD as SelectPhone on a CD-ROM, which had to be installed by the user. The price of the program varied depending on the intended audience. In other words, if the software was sold to a consumer, it would cost only \$150, but if sold to a company, the price would be much higher. To make this price discrimination effective, a system was developed to control the program's use by unilaterally imposing a clause restricting its use by the end user for non-commercial purposes. However, unlike the case mentioned earlier, the CD-ROM package included a notice that the program contained restrictions specified in the attached license. In addition to this notice, the company included a printed manual with all these restrictions, drawing the user's attention to them. Furthermore, to avoid any discussion about the consumer's right to information, when the program was started, the license would appear on the computer screen, which could be printed by the user. In 1994, Matthew Zeidenberg purchased the software intended for the consumer market, but without being aware of the license's restrictions, he created a company called Silken Mountain Web Services Inc. to resell the information to interested parties. ProCD filed a lawsuit seeking an injunction to stop Matthew Zeidenberg from distributing the program to anyone and to hold him liable for violating the license's restrictions. The district court found these restrictions invalid because the license was not included in the package.⁵⁴

However, ProCD appealed to the 7th Circuit Court of Appeals, which found the "shrink-wrap" license, the terms of which are accessible after the purchase, to be valid. The user must fully accept the terms imposed by the supplier, constituting an adhesion contract. The court held that this transaction is not different from the purchase and sale of a physical item, like a radio, where the consumer, upon arriving home, would read the instruction manual. Therefore, the court declared that Section 2-204 of the UCC⁵⁵ applies in this case because ProCD offered a contract in which the buyer would manifest acceptance by using the program, giving the user an effective opportunity to read the license terms since the license would appear on the computer screen every time the program was started, requiring agreement to

⁵⁴ "Zeidenberg does argue, and the district court held, that placing the package of *software* on the shelf is an 'offer,' which the customer 'accepts' by paying the asking price and leaving the store with the goods". *In*: 86 F.3d 1447, *1450; 1996 U.S. App. LEXIS 14951, **7; 39 U.S.P.Q.2D (BNA) 1161; Copy. L. Rep. (CCH) P27,529.

⁵⁵ "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract".

use the software.⁵⁶

B. Electronic adhesion contracts referred to as "click-wrap"

Commercial practices, coupled with new technologies, have applied the same method of contracting used in "shrink-wrap" licenses to entirely online contracts, known as "click-wrap" contracts.⁵⁷ The advantage of this type of contracting is the imposition of contract clauses by the provider, with little room for potential modifications by the purchaser. This phenomenon is described by Juliet Moringiello, as follows:

One can find click-wrap agreements both on the Internet and in software. These agreements are so named because the software purchaser or the purchaser of goods or services on the Internet must click an icon to signify agreement before obtaining the desired product or service. In the classic click-wrap scenario, the buyer cannot complete a purchase without at least clicking an "I agree" icon. In some cases, as when someone installs software on a computer, the license terms are presented so that the user must view (but not necessarily read) them before clicking "I agree." On many web sites, however, the contract terms can only be found behind a hyperlink presented near the "I agree" button and the buyer need not even view them before clicking the "I agree" button.⁵⁸

1. Concept

"Click-wrap" can be defined as a telematic adhesion contract, the subject of which is either an intangible (digitized) or tangible item, in which the provider unilaterally establishes the contract clauses, notifying the purchaser about them before obtaining their expression of will, which is expressed by clicking on a specific icon.

Its operation differs from "shrink-wrap" in that it is entirely conducted online.⁵⁹ For example, a consumer who purchases a certain product or service

⁵⁶ "ProCD proposed a contract that a buyer would accept by using the *software* after having an opportunity to read the license at leisure. This Zeidenberg did. He had no choice, because the *software* splashed the license on the screen and would not let him proceed without indicating acceptance". *In*: 86 F.3d 1447, *1450; 1996 U.S. App. LEXIS 14951, **7; 39 U.S.P.Q.2D (BNA) 1161; Copy. L. Rep. (CCH) P27,529.

⁵⁷ Gatt, Adam. Electronic commerce - Click-wrap agreements: The enforceability of click-wrap agreements, 18 *Computer Law & Security Report* 404, 2002, 405.

⁵⁸ Moringiello, Juliet M. Signals, Assent and Internet Contracting, 57 *Rutgers Law Review* 1,307, 2005 [electronic document, without pagination].

⁵⁹ Moringiello, Juliet M. Signals, Assent and Internet Contracting, 57 *Rutgers Law Review* 1,307, 2005 [electronic document, without pagination]; also: Gatt, Adam. Electronic commerce - Click-wrap agreements: The enforceability of click-wrap agreements, 18

that can be downloaded onto their personal computer or delivered to their home, provided that the purchaser clicks on an expression representing their agreement, such as "I accept," "I agree," etc.

2. Contract formation and the myth of consent

In light of the fact that "click-wrap agreements" are formed entirely online, the consent of the purchaser is expressed electronically. Therefore, the interpreter's emphasis should be on verifying whether electronic consent was given or not.

In the Canadian case of *Rudder versus Microsoft Corp*⁶⁰, the court analyzed the expression of consent in "click-wrap agreements." In this case, the provider notified the user as soon as they attempted to register about the contractual clauses they would be bound by. The completion of the registration would only occur upon the user's express agreement. The court observed this fact and concluded that a valid agreement of will existed in this contractual technique.

Furthermore, Cláudia Lima Marques⁶¹ argues that there is an agreement of will, even in distance contracts in e-commerce that are concluded in an automated manner. In other words, the interpreter should evaluate the existence of consent not solely through language analysis but, in certain circumstances, should seek it in silence (a "contract without dialogue") or in actions like clicking on an icon or saving a program on one's computer, relying on multimedia elements such as images and sounds.

We understand that electronic consent in "click-wrap agreements" is expressed when the purchaser clicks on the icon corresponding to the agreement expression, such as "I accept," "I agree," "yes," etc. From that moment, the purchaser is bound by the contractual clauses to which they expressly agreed. However, this does not preclude the possibility of annulling the contract in cases of consent defects or certain clauses considered abusive, particularly in consumer relationships.

Anglo-Saxon doctrine leans toward the existence of "click-wrap agreements" as long as certain requirements are met, namely: 1) The contract clauses should be displayed in a way that facilitates their visibility for the adherent; 2) The purchaser must be asked whether they accept these clauses or not, either by clicking on the corresponding icon or by typing the agreement expression; 3) Access to the site should not be allowed before obtaining the express consent of the consumer; otherwise, the contract

Computer Law & Security Report 404, 2002, 406.

⁶⁰ Ontario Superior Court of Justice (1999) 2 C.P.R. (4th) 474.

⁶¹ Marques, Cláudia Lima. *Contratos no Código de Defesa do Consumidor*, 4th ed., São Paulo, Revista dos Tribunais, 2002, 99.

becomes ineffective; 4) Require the contracting party to expressly provide their personal identification, ensuring that the adherent is indeed who they claim to be, often done through electronic signatures; 5) Mention the application of traditional contractual rules (in accordance with the principle of non-discrimination established in specific legislation).⁶²

3. Foreign jurisprudence on the (in)validity of so-called "click-wrap" contracts

The rulings on the validity of "click-wrap" contracts are not unanimous, as they depend on the specific formats used by suppliers. Common law jurisprudence tends to examine the circumstances of each case to determine invalidity, particularly when the adherent was not adequately informed of the contractual clauses or when the supplier does not require the explicit consent of the adherent.

In the case of *Comb v. PayPal, Inc.*⁶³, the online payment company provided its services and products through a "click-wrap" agreement. Users were required to click an icon in the lower corner of the computer screen to indicate that they had read and agreed to the terms ("you have read and agree to the User Agreement and PayPal's privacy policy"). The extensive 25-page, 11-section contract was accessible through a hyperlink, which users could click to review. On February 15, 2002, the defendant withdrew \$110 and \$450 from Craig Comb's account without his knowledge, consent, or authorization, as these were errors made by the company. The user attempted to notify PayPal several times. Eventually, on February 25, 2002, the defendant reimbursed the plaintiff with \$560. However, the delay in the reimbursement resulted in economic losses for the plaintiff, as his bank account had insufficient funds, and he was charged a fee of \$208.50. PayPal did not reimburse this amount. On August 30, 2002, the court determined that this contract was invalid due to the supplier's format, which prevented the adherent from having prior knowledge of the contractual clauses.⁶⁴

In another case, *Groff v. America Online Inc.*⁶⁵, AOL provided services to consumers in the state of Rhode Island, and the lawsuit was filed in that state. The consumer, Lawrence Groff, contracted AOL's services with a fixed

⁶² Moringiello, Juliet M. Signals, Assent and Internet Contracting, 57 *Rutgers Law Review* 1,307, 2005 [electronic document, without pagination]

⁶³ 218 F. Supp. 2d 1165 (N.D. Cal. 2002).

⁶⁴ "Having considered the terms of the User Agreement generally and the arbitration clause in particular, as well as the totality of the circumstances, the Court concludes that the User Agreement and arbitration clause are substantively unconscionable under California law and that arbitration cannot be compelled herein. Good cause therefore appearing, IT IS HEREBY ORDERED that the motions to compel individual arbitration are DENIED."

⁶⁵ No. PC 97-0331, 1998 WL 307001 (R.I. Super. Ct. May 27, 1998).

fee, regardless of the hours used, through a "click-wrap contract." During the program installation, the user had to click on the "I agree" icon to express full consent to the contractual clauses.⁶⁶ The consumer claimed that he was unaware of the contractual clauses because he never had the opportunity to read them. However, AOL demonstrated that it was not possible to access the program without the user having previously agreed to the contractual clauses by clicking the "I agree" icon.⁶⁷ Therefore, the court considered there to be a valid contract between the parties, upholding the forum selection clause (in this case, the state of Virginia) and dismissing the case.⁶⁸

C. "Browse-wrap" terms and conditions of use

The "browse-wrap" method involves little or no interaction with the user, who usually doesn't even become aware of its existence. This is due to the format used for displaying the hyperlink, typically presented in small letters at the bottom of the web page (often not visible when accessing the site) and with an excessively light color, making it almost imperceptible against the background color of the screen. As a result, consumers who innocently access a web page may be binding themselves to terms and conditions they are not even aware of. Therefore, this telematic commercial practice has caught the attention of legal experts, as they strive for justice and contractual balance, especially in consumer relationships.

The risk of judicial invalidation is related to the absence of mutual agreement on these terms and conditions, which essentially means the non-existence of the contract itself, depending on the circumstances of the specific case. Additionally, the use of hyperlinks to indicate the existence of a contract, as currently described, is not accepted by the courts due to the difficulty of noticing them, often constituting an unfair practice by the site

⁶⁶ "The affidavit outlines the process each subscriber must follow. The affidavit asserts in paragraph 7 after reading the Terms of Service (TOS) "... the user is unable to proceed onto the AOL system or become an AOL member without affirmatively choosing to accept the TOS. The user has the option of clicking 'I Agree' or 'I Disagree' after reading the TOS." (Exhibit 1 at page 79)". Available at: <http://legal.web.aol.com/decisions/dlother/groff.html> [electronic document, without pagination]

⁶⁷ "Indeed as pointed out in defendant's affidavit and argued in his memorandum, one could not enroll unless they clicked the 'I agree' button which was immediately next to the 'read now' button (Exhibit 1, page 33) or, finally, the 'I agree' button next to the 'I disagree' button at the conclusion of the agreement (Exhibit 1, page 79)." Available at: <http://legal.web.aol.com/decisions/dlother/groff.html> [electronic document, without pagination]

⁶⁸ Also, cf. *Novak versus Overture Services, Inc.* 309 F. Supp. 2d 446 (E.D.N.Y. 2004); *Mortgage Plus, Inc. versus DocMagic, Inc.* No. 03-2582-GTV-DJW, 2004 WL 2331918 (D. Kan. Aug. 23, 2004).

owner.⁶⁹

1. Concept

The term "Browse-wrap," also referred to as "Web-wrap"⁷⁰, designates a commercial practice in which the owner of an Internet page links the terms and conditions of use and access to the site unilaterally, imposed by them, placed in the bottom corner of the page as a hyperlink, which the user must access to become aware of the content of these terms. These terms can be made available in other formats but are generally referred to by expressions such as "user agreement," "conditions of use," "terms of use," "legal notices," "terms," or "terms and conditions of use."

In Anglo-Saxon doctrine, they are defined as an agreement typically displayed as a small-font hyperlink in the bottom corner of the site. When the user clicks on the hyperlink, they are redirected to a specific web page containing the terms of use and access to the Internet page.⁷¹

Regarding their legal nature, Anglo-Saxon doctrine defines them as "adhesion contracts"⁷²; however, the best legal technique considers them as general conditions of contracts (also known as standard contract clauses) provided they meet certain requirements.

General conditions of contracts are understood as a "list of pre-prepared contract clauses unilaterally created for a multitude of contracts," which may or may not be included in the actual contract document.⁷³ Therefore, the characteristics of these conditions are their independence from the type of contract they aim to regulate, which can be linked to airline tickets, receipts, or purchase orders. They are pre-prepared unilaterally, meaning they are created by the supplier or service provider and are intended for an indefinite

⁶⁹ Marques, Cláudia Lima. *Confiança no comércio eletrônico: um estudo dos negócios jurídicos de consumo no comércio eletrônico*. São Paulo, Revista dos Tribunais, 2004, 183: "[...] permite entrar no site de um terceiro 'linkado' e visualizar só uma parte de seu site, sem ter que passar pelas páginas iniciais, logo, sem identificação, ficando uma aparência de 'domínio' da informação do site, que permite uma série de abusos perante consumidores de boa-fé".

⁷⁰ Femminella, Jennifer. Online Terms and Conditions Agreements: Bound by the Web, 17 *St. John's J.L. Comm.* 87, 2003 [electronic document, without pagination].

⁷¹ Block, Drew. 227 *Caveat Surfer: Recent Developments in the Law Surrounding Browse-Wrap Agreements, and the Future of Consumer Interaction With Websites*, 14 *Loy. Consumer L. Rev.* 227, 2002 [electronic document, without pagination]: "Generally, they are found in small print hyperlinks at the bottom of home pages, and these hyperlinks generally link to another page that lays out the terms of use for the particular website".

⁷² Femminella, Jennifer. Online Terms and Conditions Agreements: Bound by the Web, 17 *St. John's J.L. Comm.* 87, 2003 [electronic document, without pagination].

⁷³ Marques, Cláudia Lima. *Contratos no Código de Defesa do Consumidor*, 4th ed., São Paulo, Revista dos Tribunais, 2002, 66-67.

number of individuals.

As derived from the analysis of Anglo-Saxon legal doctrine, the definition of "browse-wrap" is based on the judgment of the case *Pollstar v. Gigmania Ltd.*⁷⁴ (decided on October 17, 2000), which revealed the position of the California state court in the United States in distinguishing it from similar concepts. Pollstar provided online information services about shows and concerts through its website, pollstar.com. At the bottom of the web page, there was a hyperlink containing the terms and conditions for accessing the site's information. Among other clauses, the use of this information for commercial purposes was prohibited.⁷⁵ However, Pollstar filed a lawsuit against Gigmania (www.gigmania.com), claiming that it had violated this clause by downloading Pollstar's information from its website and incorporating it into its own site, in violation of the "browse-wrap" terms. In defense, Gigmania argued that they were entirely unaware of these terms, which were indicated in small gray letters, with the web page's background also in gray, making it impossible to notice the existence of these terms and conditions.

Based on this fact, which was adequately proven by the defendant company, the court disregarded the existence of any contractual relationship between the companies due to the format of the "browse-wrap," which does not clearly notify users of the terms, access to which depends on clicking the hyperlink, directing the user to another web page.

In this judgment, the court stated that Pollstar used a different system than what is seen in "shrink-wrap" licenses or "click-wrap" contracts because the user must "browse" through various web pages ("deep linking") to access the terms and conditions for accessing the site's content:

The subsequent use of this term has been imprecise and has conveyed

⁷⁴ No. CIV-F-00-5671 REC SMS, United States District Court for the Eastern District of California, 170 F. Supp. 2d 974; 2000 U.S. dist. LEXIS 21035; Copy. L. Rep. (CCH) P28, 329; 45 U.C.C., Rep. Serv. 2d (Callaghan) 46: "Gigmania contends that the breach of contract claim fails as a matter of law because Pollstar cannot allege the required contract element of mutual consent. Viewing the web site, the court agrees with the defendant that many visitors to the site may not be aware of the license agreement. Notice of the license agreement is [*981] provided by small gray text on a gray background. Moreover, unlike the shrink-wrap license held enforceable in *ProCD v. Zeidenberg*, 86 F. 3d 1447 (7th Cir. 1996), the license agreement at issue is a browse wrap license. A shrink-wrap license appears on the screen when the CD or diskette is inserted and does not let the consumer proceed without indicating acceptance. By contrast, a browse wrap license is part of the web site and the user assents to the contract when the user visits the web site".

⁷⁵ The licensing terms are: "License Agreement: Any person using information from this web site hereby agrees to the following terms: 1. All documents and information may only be used for informational purposes. 2. All documents and information may only be used for non-commercial purposes. 3. Any copy of these documents or information or portions thereof must include the copyright notice and this License Agreement".

different meanings, including an agreement that covers a user's browsing of a Web site or an agreement for a transaction in which the user can browse the terms but does not have to assent by express means.⁷⁶

In summary, the widely adopted terminology in Anglo-Saxon legal doctrine, which has been studying the subject, stems from the terms used in this judgment, namely, the terms "[...] browsing of a Web site [...]" and "[...] in which the user can browse the terms [...]."

2. Contract formation and the myth of consent

Considering the significant role played by "browse-wrap" in mass information society, legal doctrine supports the continuation of this commercial practice as long as user consent is obtained, similar to the "shrink-wrap" licenses and "click-wrap" contracts.⁷⁷ It distinguishes "browse-wrap with notice," where the website owner draws the user's attention to the existence of the terms available in an easily noticeable hyperlink, as is commonly done for providing cookie usage policies, indicating that continuing to browse implies consent and enabling the user to disable the tool if they choose to do so. In contrast, "browse-wrap without notice" disregards the duty to inform. This latter form is more common, where the provider only provides the terms in a discreet and imperceptible hyperlink, making it impossible for the user to know of their existence and, as a result, their consent.

In this regard, U.S. courts acknowledge the fragility of "browse-wrap," as exemplified in the case of *Specht v. Netscape Comms. Corp.*⁷⁸, where the New York court ruled that merely downloading does not signify agreement with the contract terms:

Netscape argues that the mere act of downloading indicates assent. However, downloading is hardly an unambiguous indication of assent. The primary purpose of downloading is to obtain a product, not to assent to an agreement. In contrast, clicking on an icon stating "I assent" has no meaning or purpose other than to indicate such assent. Netscape's failure to require users of SmartDownload to indicate assent to its license as a precondition to downloading and using its software is fatal to its argument that a contract has been formed. Furthermore, unlike the user of Netscape Navigator or other click-wrap or shrink-wrap licensees, the

⁷⁶ *In: LEXIS 21035* [electronic document, without pagination].

⁷⁷ Streeter, Dan. Into Contract's Undiscovered Country: A Defense of Browse-Wrap Licenses, 39 *San Diego L. Rev.* 1363, Winter 1986 [electronic document, without pagination].

⁷⁸ 150 F. Supp. 2d 585 (S.D. NY 2001); 2001 U.S. Dist. LEXIS 9073; 45 U.C.C. Rep. Serv. 2d (Callaghan) 1.

individual obtaining SmartDownload is not made aware that he is entering into a contract.

It should be noted, however, that the actual knowledge of these terms does not depend on the user's complete reading. In other words, it only requires the provider to draw attention to the existence of these terms, making them accessible to the user, who may choose to read them or not. In essence, the objective consent is sought, not the subjective one.⁷⁹ This is because the user cannot benefit from their own negligence, claiming the absence of consent based on their failure to read the contract, which would lead to the application of the doctrine of "*venire contra factum proprio*" (acting against one's own actions). On the other hand, the provider must employ fair contractual practices, meaning that they must obtain explicit consent or indicate specific behavior that results in the user's agreement as a necessary condition for validating this electronic transaction.

3. Foreign jurisprudence on the (in)validity of so-called "browse-wrap" contracts

As for the doctrinal position regarding the validity of "browse-wrap" agreements, those who support their validity condition it on specific circumstances, including⁸⁰: (i) The user must be adequately notified of the existence of the terms; (ii) The user must have an effective opportunity to review the terms; (iii) The user must be properly notified about the consequences of their actions, such as accessing the site, which amounts to agreeing to the terms; (iv) The user must then act in accordance with this final notice.

In the case of *Register.com versus Verio, Inc.*⁸¹, which involved companies engaged in domain name registration and website hosting services, Verio accessed Register.com's customer database⁸² and collected client contacts. Verio later sent messages to Register.com's customers

⁷⁹ Streeter, Dan. Into Contract's Undiscovered Country: A Defense of Browse-Wrap Licenses, 39 *San Diego L. Rev.* 1363, Winter 1986 [electronic document, without pagination].

⁸⁰ Moringiello, Juliet M. Signals, Assent and Internet Contracting, 57 *Rutgers Law Review* 1,307, 2005 [electronic document, without pagination]: "[...] a user validly and reliably assents to a browse-wrap agreement if the following four elements are satisfied: (i) The user is provided with adequate notice of the existence of the proposed terms; (ii) The user has a meaningful opportunity to review the terms; (iii) The user is provided with adequate notice that taking a specified action (which may be use of the Web site) manifests assent to the terms; (iv) The user takes the action specified in the latter notice".

⁸¹ 356 F. 3d 393 (2d Cir. 2004).

⁸² Companies of this nature are required to maintain a database containing registrar information.

offering the same services. Register.com filed a lawsuit, alleging a breach of the terms and conditions of use, as the "terms and conditions of use" were always present at the bottom of Register.com's website whenever Verio accessed it. The specific term violated prohibited the use of Register.com's information for sending unsolicited commercial messages, such as advertisements or service offers. In its defense, Verio claimed the invalidity of the "browse-wrap" because Register.com did not provide effective notice of the existence of these terms. However, the court decided that the terms were clearly available on Register.com's website, and Verio agreed to them every time it accessed information on the Plaintiff's website.⁸³

In another case, *Ticketmaster Corp. versus Tickets.com, Inc.*⁸⁴, involving entertainment companies that provided information and a ticket purchasing system for shows and concerts, Ticketmaster had exclusive rights to sell tickets for certain events. However, when Tickets.com couldn't sell tickets due to Ticketmaster Corp.'s exclusivity, Tickets.com provided a hyperlink that led users to the exclusive rights holder's webpage. When Ticketmaster discovered this practice, it filed a lawsuit, alleging, among other violations, a breach of the terms and conditions of use indicated at the bottom of the page, which prohibited the commercial use of the information on its website. In its defense, Tickets.com claimed the invalidity of these terms because there was no mutual consent due to a lack of awareness of their existence.

The court in the state of California decided that the "browse-wrap" used by Ticketmaster was not valid because it made it impossible for users to have effective knowledge and provide consent.⁸⁵

⁸³ "The District Court for the Southern District of New York, with little reasoning but clearly bothered by Verio's behavior, ruled in favor of Register.com's terms. The District Court opinion did not explain how the terms were presented, glossing over the fact that the terms were presented *with the results* of each WHOIS query, and held that because the terms were 'clearly posted' on Register.com's website, Verio manifested its assent to the terms every time it submitted a WHOIS query". In: Moringiello, Juliet M. Signals, Assent and Internet Contracting, 57 *Rutgers Law Review* 1,307, 2005 [electronic document, without pagination].

⁸⁴ No. CV. 99-7654, 2000 WL 525390 (C.D. Cal. Mar. 27, 2000).

⁸⁵ "*Ticketmaster* stands for the notion that browse-wrap agreements are far from *per se* enforceable. Seemingly, Ticketmaster's agreement could not be valid unless it could prove that Tickets.Com had actual notice of the agreement. Therefore, the clear message of the *Ticketmaster* court is that websites with terms and conditions should be presented in the *click-wrap* format in order to force actual notice upon users of the website, and consequently avoid the risk of litigation resulting from lack of notice". Block, Drew. 227 *Caveat Surfer: Recent Developments in the Law Surrounding Browse-Wrap Agreements, and the Future of Consumer Interaction With Websites*, 14 *Loy. Consumer L. Rev.* 227, 2002.

IV. DISCUSSIONS ON THE (IN)VALIDITY OF THE CHOICE OF LAW CLAUSE,
ARBITRATION CLAUSE, AND CHOICE OF APPLICABLE LAW IN ELECTRONIC
ADHESION CONTRACTS

In these electronic adhesion contracts, as well as in terms and conditions of use, the most common question pertains to the (in)validity of forum selection clauses, arbitration agreements, and the choice of applicable law.

Regarding the first issue, in the context of consumer relationships, even though the forum selection clause is not explicitly listed in Article 51 of the Consumer Protection Code (CDC), it can be declared null and void under certain circumstances. First, the list in Article 51 is merely illustrative, and as such, the judge has the discretion to nullify a contractual clause when abuse by the supplier is evident. Therefore, under Brazilian law, the judge can invalidate a forum selection clause if it represents an obstacle to consumers' access to justice, in accordance with Article 6, Sections VI, VII, and VIII of the CDC.⁸⁶

This interpretation aligns with the jurisprudence of the Superior Court of Justice, the relevant excerpt of which is as follows:

HEADNOTE: COMPETENCE CONFLICT. REPOSSESSION ACTION. FINANCING CONTRACT. FIDUCIARY ALIENATION. FORUM SELECTION CLAUSE. ABUSIVENESS. APPLICATION OF THE CONSUMER PROTECTION CODE. POSSIBILITY OF OFFICIAL RECOGNITION. PRECEDENTS.

1. In the context of a consumer relationship, considering the principle of facilitating consumer defense, the contractual forum selection clause does not prevail, as it is deemed an abusive clause. The action must be filed in the defendant's domicile, and the judge may recognize their incompetence *ex officio*.

2. The conflict is acknowledged, and the Court of the 3rd Civil Court of Macaé/RJ, the applicant, is declared competent.⁸⁷

⁸⁶ Marcato, Antônio Carlos. O reconhecimento *ex officio* do caráter abusivo da cláusula de eleição de foro, 1 *Revista da Escola Paulista da Magistratura* 23, 1997, 29-30.

⁸⁷ Superior Court of Justice, CC 48097/RJ - Competence Conflict 2005/0014538-4, 2nd Section, Judge: Min. Fernando Gonçalves, decided on 04/13/2005, In: DJ 05/04/2005 p. 153, freely translated. Originally: “*CONFLITO DE COMPETÊNCIA. AÇÃO DE BUSCA E APREENSÃO. CONTRATO DE FINANCIAMENTO. ALIENAÇÃO FIDUCIÁRIA. CLÁUSULA DE ELEIÇÃO DE FORO. ABUSIVIDADE. INCIDÊNCIA DO CÓDIGO DE DEFESA DO CONSUMIDOR. POSSIBILIDADE DE RECONHECIMENTO DE OFÍCIO. PRECEDENTES. 1. Em se tratando de relação de consumo, tendo em vista o princípio da facilitação de defesa do consumidor, não prevalece o foro contratual de eleição, por ser considerada cláusula abusiva, devendo a ação ser proposta no domicílio do réu, podendo o juiz reconhecer a sua incompetência *ex officio*. 2. Conflito conhecido e declarado competente o Juízo de Direito da 3ª Vara Cível de Macaé/RJ, o suscitante”.*

To put an end to this discussion, Bill No. 3,514/2015 aims to include the forum selection clause in the list of abusive clauses under Article 51 of the CDC, suggesting the addition of § 1 to Article 101 of the CDC: "§ 1 Forum selection and arbitration clauses entered into by the consumer are null and void." This has been done in various specific legislations that prohibit the inclusion of this clause, except when the legal formality is observed. In this regard, the Consumer Protection Law of Quebec establishes in Article 22.1 the prohibition of stipulating the forum selection clause in consumer contracts unless the parties do so by means of a public deed.⁸⁸

In summary, jurisprudence and doctrine tend to analyze the forum selection clause from two perspectives: 1) when it complies with the parameters of contractual justice and alters jurisdiction based on value or territory, it is valid and can only be contested through a timely objection; 2) when it is deemed abusive, it leads to nullity, as provided by Article 51 of the CDC. In consumer relationships, if the clause's abusiveness is recognized⁸⁹, it may be declared *ex officio* by the judge as a nullity of full right. In non-consumer contracts, even if it's an adhesion contract, the prevailing understanding is that the clause should be upheld.

In the case of *America Online, Inc. versus Superior Court (In re Mendoza)*⁹⁰, Al Mendoza Jr. contracted the services of AOL, an internet service provider. Even after canceling the services, fees were charged and debited from his credit card. In response, Al Mendoza filed a class action against AOL in the state of California. In its defense, AOL claimed the court's lack of jurisdiction ("inconvenient forum") due to the forum selection clause designating the state of Virginia. However, the California judge disregarded the clause because it contradicted Section 1.750 and following of the

⁸⁸ "Élection de domicile. 22.1. Une élection de domicile en vue de l'exécution d'un acte juridique ou de l'exercice des droits qui en découlent est inopposable au consommateur, sauf si elle est faite dans un acte notarié". 1992, c. 57, a. 671.

⁸⁹ Lucon, Paulo Henrique dos Santos. Competência no comércio e no ato ilícito eletrônico, in *Direito & Internet: aspectos jurídicos relevantes* (edited by Newton De Lucca and Adalberto Simão Filho). 2nd ed. São Paulo, Quartier Latin, 2005, 399-401. The author asserts the abusiveness of the forum selection clause when three conditions are met, namely: "a) if, at the time of entering into the contract, the adhering party did not have sufficient understanding to comprehend the meaning and effects of the contract; b) if the agreement results in the unfeasibility or significant difficulty in accessing the judiciary; c) if it is determined that the contract is of mandatory adhesion, understood as one that has as its object a product or service provided exclusively by a particular company." [Originally: "a) se, no momento da celebração, a parte aderente não dispunha de inteligência suficiente para compreender o sentido e os efeitos do contrato; b) se do pactuado resultar inviabilidade ou especial dificuldade de acesso ao Judiciário; c) se for constatado que o contrato é de obrigatoria adesão, assim entendido o que tenha por objeto produto ou serviço fornecido com exclusividade por determinada empresa".]

⁹⁰ 108 Cal. Rptr. 2d 699 (Ct. App. 2001).

California Civil Code ("California Consumers Legal Remedies Act"). Additionally, the legislation of the state of Virginia restricts the possibility of class actions in consumer matters, among other consumer rights restrictions.

Dissatisfied, AOL appealed to the California Court, which upheld the decision, explicitly stating that the forum selection clause is only considered valid when it has been freely inserted by the parties, taking into account contractual justice, among other values.⁹¹

As for the second aspect, the arbitration agreement⁹²⁻⁹³, typically found in contracts, involves submitting any potential future disputes to arbitration. However, the validity of the arbitration clause in consumer contracts is debated due to consumer vulnerability. Hence, Directive 93/13/EEC of the European Union establishes the compulsory arbitration clause as one of the abusive clauses, inserted in § 3 of Article 3.⁹⁴

In Canada, this prohibition has been established by consumer protection legislation adopted in some provinces and territories. In the province of Quebec, for instance, the *Loi sur la Protection du Consommateur*⁹⁵, amended in 2006, prohibits the inclusion of mandatory arbitration clauses in consumer contracts. However, the law allows the consumer, after the contract's conclusion, in case of a dispute, to choose to resolve it through arbitration. In the province of Ontario, the legislative choice was different, and the

⁹¹ "Our law favors forum selection agreements only so long as they are procured freely and voluntarily, with the place chosen having some logical nexus to one of the parties or the dispute, and so long as California consumers will not find their substantial legal rights significantly impaired by their enforcement. Therefore, to be enforceable, the selected jurisdiction must be 'suitable,' 'available,' and able to 'accomplish substantial justice.'"

⁹² Azevedo, Antônio Junqueira de. *A arbitragem e o direito do consumidor*, in *Estudos e Pareceres de Direito Privado*: Com remissões ao novo Código Civil (Lei n. 10.406, de 10-1-2002), São Paulo, Saraiva, 2004, 242.

⁹³ Lei n. 9.307/96: "Art. 3º As partes interessadas podem submeter a solução de seus litígios ao juízo arbitral mediante convenção de arbitragem, assim entendida a cláusula compromissória e o compromisso arbitral".

⁹⁴ In the list in the annex referred to in paragraph 3 of article 3, in item (q): "excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable Law, should lie with another party to the contract".

⁹⁵ This subsection was added in 2006, following the discussion of the case *Dell Computer Corp. v. Union des Consommateurs* (described below), by Law C-56, Art. 2: "Stipulation interdite. 11.1. Est interdite la stipulation ayant pour effet soit d'imposer au consommateur l'obligation de soumettre un litige éventuel à l'arbitrage, soit de restreindre son droit d'ester en justice, notamment en lui interdisant d'exercer un recours collectif, soit de le priver du droit d'être membre d'un groupe visé par un tel recours. Arbitrage. - Le consommateur peut, s'il survient un litige après la conclusion du contrat, convenir alors de soumettre ce litige à l'arbitrage".

legislature prohibited the arbitration clause in consumer contracts. This is outlined in section 7 ("Limitation on effect of term requiring arbitration"), subsection 2:

(2) Without limiting the generality of subsection (1), any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act.⁹⁶

However, this section also outlines the consumer dispute resolution procedures. First, an attempt is made to reach a settlement (subsection 7.4). If that's not possible, one can resort to the judiciary or arbitration. In the case of opting for the latter, at the outset of the proceedings, the consumer may choose to submit to arbitration or not (section 7.5).⁹⁷

The acceptance of the arbitration procedure, however, is solely up to the consumer. This seems advisable considering the delays and legal costs, and the consumer may prefer arbitration, and the law cannot restrict this right.

In cases of consumer relationships, similar to Directive 93/13/EEC, Brazilian consumer protection law (CDC) considers mandatory arbitration clauses abusive (Article 51, item VII). In line with this, Bill No. 3,514/2015 reinforces this understanding by seeking to add §1 to Article 101 of the CDC, which would determine the nullity of both elective forum and mandatory arbitration clauses.

In the case of *Dell Computer Corp. vs. Union des Consommateurs*⁹⁸, originating in the province of Quebec, Canada, it was even considered by the Canadian Supreme Court, which declared the arbitration clause valid. This case involved an error in the product's price listing (a computer), where the Dell website displayed the price as \$89 Canadian dollars instead of \$549. Several consumers placed orders at the lower price. Dell subsequently blocked these orders, but some consumers managed to place orders using other links. The fact that some consumers acted in bad faith by trying to place orders after discovering the error, which had been blocked through regular means, may have influenced the Supreme Court's decision to uphold the arbitration clause. Therefore, before considering the merits, the Canadian Supreme Court decided that the arbitration clause was valid since consumers

⁹⁶ 2002 c. 30.

⁹⁷ "Non-application of Arbitration Act, 1991 - (5) Subsection 7 (1) of the Arbitration Act, 1991 does not apply in respect of any proceeding to which subsection (2) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration". 2002, c. 30, Sched. A, s. 7 (5).

⁹⁸ 2007 SCC 34 (CanLII).

could access them via the company's website.⁹⁹

Lastly, the third issue pertains to the choice-of-law clause, a common practice in these countries to eliminate the risks associated with being subject to different laws, given the lack of uniformity within a single nation. This practice is also observed in international telematic contracting. The possibility of including such a contractual provision arises from private autonomy.¹⁰⁰

Considering this, Bill No. 3,514/2015 expressly allows the inclusion of a choice-of-law clause in contracts, suggesting the addition of Article 9-A to the Introductory Law to the Brazilian Legal Norms, which states: "Article 9-A. The international contract between professionals, businessmen, and merchants shall be governed by the law chosen by the parties, and this choice must refer to the entirety of the contract and be made by express agreement between the parties."

The solution will be different if the relationship is a consumer one. In this scenario, a choice-of-law clause that derogates the application of Brazilian consumer protection law (CDC) may be void when harmful to the consumer. This is because the CDC is a public policy rule (Article 1 of the CDC), meaning it is a mandatory rule, and its application cannot be excluded by the will of the parties. In this regard, Bill No. 3,514/2015 suggests adding §2 to Article 101 of the CDC with the following wording: "§ 2. In conflicts arising from international distance selling, the law of the consumer's domicile shall apply, or, if more favorable to the consumer, the state law chosen by the parties shall apply, with consumer access to justice guaranteed in any case."

V. DOUBT REGARDING THE APPLICABLE LAW AND COMPETENT JURISDICTION IN THE DIGITAL AGE

The criterion applied by Brazilian interpreters to determine the applicable law in international contracts is that of the place of celebration, known as *lex loci celebrationis*.¹⁰¹ Regarding wrongful acts, the applicable law is that of

⁹⁹ "In the instant case, the evidence *shows* that the consumer could access the Page of Dell's Web site containing the arbitration clause directly by clicking on the highlighted hyperlink entitled 'Terms and Conditions of Sale'. This reappeared on every page the consumer accessed. [...] From this point of view, the clause was no more difficult for the consumer to access than would have been the case had he or she been given a paper copy of the entire contract on which the terms and conditions of sale appeared on the back of the first page".

¹⁰⁰ Zhang, Mo. Contractual Choice of Law in Contracts of Adhesion and Party Autonomy, 41 *Akron L. Rev.* (2007), Temple University Legal Studies Research Paper No. 2007-25, available at SSRN: <http://ssrn.com/abstract=1017841> (last accessed Jan. 7, 2009).

¹⁰¹ Lucon, Paulo Henrique dos Santos. Competência no comércio e no ato ilícito eletrônico, in *Direito & Internet: aspectos jurídicos relevantes* (edited by Newton De Lucca

the place where the harm occurred, which is known as *lex loci delicti*. However, if it is a consumer legal relationship, these articles must be interpreted in direct dialogue with Article 101, section I of the Consumer Protection Code (CDC), which establishes the competent court as the consumer's place of residence in the case of a consumer legal relationship.

Cláudia Lima Marques¹⁰² emphasizes the necessary dialogue between the former LICC, now LINDB, and the CDC.¹⁰³ However, the jurist points out that the LINDB is outdated, having been promulgated in 1942, and thus no longer meets the needs of the post-modern society.

In the 2010 reform, it was expected that the law could be substantially revisited. However, the changes were superficial, and it is still not adapted to the reality of e-commerce.

In this regard, Cláudia Lima Marques¹⁰⁴ stresses the need to update the LINDB to adapt it to consumer relationships, considering the effective protection of the consumer. The jurist provides an example that, according to section 2 of Article 9 of the LINDB (which states that the contract is deemed concluded where the proponent resides), combined with Article 30 of the CDC (which establishes the supplier as the proponent), would result in the applicable law being the one in force in the city where the supplier has established its headquarters.¹⁰⁵ This situation contradicts the consumer protection system itself, which aims to protect the weaker party (Article 4, section I of the CDC).

Newton De Lucca¹⁰⁶ considers that the promulgation of a new Civil Code does not necessarily imply the need for a new LICC (now called LINDB). Nevertheless, the jurist agrees with Cláudia Lima Marques that a new set of

and Adalberto Simão Filho). 2nd ed. São Paulo, Quartier Latin, 2005, 391.

¹⁰² Marques, Cláudia Lima. *Contratos no Código de Defesa do Consumidor*, 4th ed., São Paulo, Revista dos Tribunais, 2002, 121; Marques, Cláudia Lima. *Confiança no comércio eletrônico: um estudo dos negócios jurídicos de consumo no comércio eletrônico*. São Paulo, Revista dos Tribunais, 2004, 306. The author criticizes the fact that the new Civil Code of 2002 was not accompanied by a new Law of Introduction to the Civil Code. However, it will be up to Brazilian doctrine and jurisprudence to give the rules of the existing LICC since 1942 a new form, in order to accept the "[...] pluralism of methods (conflictual and material) in Brazilian Private International Law." ["[...] pluralismo de métodos (conflituais e materiais) no Direito Internacional Privado brasileiro".]

¹⁰³ Cf. Marques, Cláudia Lima. Diálogo entre o Código de defesa do Consumidor e o novo Código Civil: do "diálogo das fontes" no combate às cláusulas abusivas, 12 *Revista de Direito do Consumidor* 71, 2003.

¹⁰⁴ Marques, Cláudia Lima. *Confiança no comércio eletrônico: um estudo dos negócios jurídicos de consumo no comércio eletrônico*. São Paulo, Revista dos Tribunais, 2004, 334.

¹⁰⁵ Marques, Cláudia Lima. *Contratos no Código de Defesa do Consumidor*, 4th ed., São Paulo, Revista dos Tribunais, 2002, 128.

¹⁰⁶ De Lucca, Newton. *Preface to "Confiança no comércio eletrônico: um estudo dos negócios jurídicos de consumo no comércio eletrônico"*, by Cláudia Lima Marques. São Paulo, Revista dos Tribunais, 2004, 14.

Private International Law rules is necessary, given the nature of Decree-Law 4,657/42, which is a *lex legum* (over-law), and not a specific Private International Law norm.

Regarding international telematic contracts, as per the Article 9, caput of the LINDB¹⁰⁷, the applicable law is that of the place where the contract was celebrated (*lex loci celebrationis*). Additionally, section 2 of the same legal provision introduces a legal fiction, determining that in cases of contracts between absentees, the contract is considered concluded where the proponent resides.

To address these issues, Project Law No. 3,514/2015 aims to make the necessary amendments to the LINDB, suggesting the repeal of Article 9 paragraphs and the addition of Article 9-A:

Article 9-A. The international contract between professionals, businessmen, and merchants shall be governed by the law chosen by the parties, and this choice shall pertain to the entirety of the contract and be made through an express agreement between the parties.

§ 1. There is no requirement for a connection between the chosen law and the parties or the transaction.

§ 2. The choice mentioned in the caput also includes the indication, as applicable to the contract, of a set of legal rules of an international, optional, or uniform nature, accepted on an international, supranational, or regional level as neutral and just, including the *lex mercatoria*, provided they do not contravene public order.

§ 3. In the event of the absence or invalidity of the choice, the contract shall be governed by the law of the place of its celebration, considering, in the case of contracts concluded at a distance, the place of the proponent's residence as the place of celebration.

§ 4. If the obligation resulting from the contract is to be performed in Brazil and its form is essential, it shall be observed, while allowing for the peculiarities of the foreign law regarding the extrinsic requirements of the act.

§ 5. Notwithstanding the provisions of this article, in the case of standard or adhesion contracts concluded in Brazil or to be executed here, the imperative provisions of Brazilian law shall necessarily apply.

§ 6. This article does not apply to contracts and obligations governed by international treaties and agreements on arbitration or choice of forum.¹⁰⁸

¹⁰⁷ “Art. 9º. Para qualificar e reger as obrigações, aplicar-se-á a lei do país em que se constituírem.”

¹⁰⁸ Originally: “Art. 9º-A. O contrato internacional entre profissionais, empresários e comerciantes reger-se-á pela lei escolhida pelas partes, devendo esta escolha referir-se à totalidade do contrato e ser efetuada mediante acordo expresso entre as partes. § 1º Não é necessário que haja conexão entre a lei escolhida e as partes ou a transação. § 2º A escolha

In addition to connecting elements such as the place of celebration, execution of the contract, or the domicile of the contracting parties, the autonomy of the parties prevails as the strongest of them; however, an extreme emphasis on private autonomy is not the best solution, as it can exacerbate the asymmetry between the contracting parties. In consumer relations, the choice of applicable law and the competent forum can only prevail when they are more beneficial to the consumer.¹⁰⁹

To eliminate any doubt, Project Bill No. 3,514/2015 suggests another amendment to the LINDB by adding Article 9-B:

Article 9-B. The international consumer contract, understood as one concluded between a natural person consumer and a supplier of products and services whose establishment is located in a country other than that of the consumer's domicile, shall be governed by the law of the place of celebration or, if executed in Brazil, by Brazilian law, provided it is more favorable to the consumer.

§ 1. If the contracting is preceded by any business or marketing activity by the supplier or its representatives directed at or conducted in the Brazilian territory, including sending advertisements, correspondence, emails, commercial messages, invitations, prizes, or offers, the provisions of Brazilian law that have mandatory characteristics and are more favorable to the consumer shall apply.

§ 2. Contracts for international travel packages or combined trips involving tourist groups or hotel and tourism services, with performance outside of Brazil, contracted with travel agencies and operators located in Brazil, shall be governed by Brazilian law.¹¹⁰

de que trata o caput inclui também a indicação, como aplicável ao contrato, de um conjunto de regras jurídicas de caráter internacional, opcional ou uniforme, aceitas no plano internacional, supranacional ou regional como neutras e justas, inclusive da lex mercatoria, desde que não contrárias à ordem pública. § 3º Na hipótese de ausência ou de invalidade da escolha, o contrato será regido pela lei do lugar de sua celebração, assim considerado, em contratos celebrados a distância, o lugar da residência do proponente. § 4º Caso a obrigação resultante do contrato deva ser executada no Brasil e dependa de forma essencial, esta será observada, admitidas as peculiaridades da lei estrangeira quanto aos requisitos extrínsecos do ato. § 5º Não obstante o disposto neste artigo, no caso de contrato standard ou de adesão celebrado no Brasil ou que aqui tiver de ser executado, aplicar-se-ão necessariamente as disposições do direito brasileiro que possuírem caráter imperativo. § 6º Este artigo não se aplica aos contratos e obrigações regulados por tratados internacionais e aos acordos sobre arbitragem ou eleição de foro”.

¹⁰⁹ Marques, Cláudia Lima. *Contratos no Código de Defesa do Consumidor*, 4th ed., São Paulo, Revista dos Tribunais, 2002, 130; Lucon, Paulo Henrique dos Santos. *Competência no comércio e no ato ilícito eletrônico*, in *Direito & Internet: aspectos jurídicos relevantes* (edited by Newton De Lucca and Adalberto Simão Filho). 2nd ed. São Paulo, Quartier Latin, 2005, 397.

¹¹⁰ Originally: “Art. 9º-B. O contrato internacional de consumo, entendido como aquele realizado entre um consumidor pessoa natural e um fornecedor de produtos e serviços cujo

Until this bill is approved, the question remains whether the CDC Article 101, I, only regulates domestic consumer relationships or also extends to international consumer relationships, incorporating it into Private International Law (PIL)?

The answer is affirmative, meaning that the mentioned provision is a special law that governs all consumer relationships, whether they are of a national or international nature. Therefore, this provision is indeed a connecting element in accordance with the Brazilian legal system.

The consumer's domicile is also the connecting element chosen by the Rome Convention of 1980¹¹¹, whose Article 5.3. states: "3. Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this Article."

In summary, the consumer's domicile has commonly been the connecting element used by international legislation. For example, the Santa Maria Protocol in MERCOSUL, although not in force, also establishes the rule of the consumer's privileged forum.¹¹² This is the criterion supported by legal doctrine¹¹³, which advocates for the analogical application of CDC Article

estabelecimento esteja situado em país distinto daquele de domicílio do consumidor, rege-se-á pela lei do lugar de celebração ou, se executado no Brasil, pela lei brasileira, desde que mais favorável ao consumidor. § 1º Se a contratação for precedida de qualquer atividade negocial ou de marketing, por parte do fornecedor ou de seus representantes, dirigida ao território brasileiro ou nele realizada, em especial envio de publicidade, correspondência, e-mails, mensagens comerciais, convites, prêmios ou ofertas, aplicar-se-ão as disposições da lei brasileira que possuírem caráter imperativo, sempre que mais favoráveis ao consumidor. § 2º Os contratos de pacotes de viagens internacionais ou viagens combinadas, que envolvam grupos turísticos ou serviços de hotelaria e turismo, com cumprimento fora do Brasil, contratados com agências de turismo e operadoras situadas no Brasil, rege-se-ão pela lei brasileira”.

¹¹¹ “Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (80/934/EEC)”. In: *Official Journal* L 266 , 09/10/1980 p. 0001 – 0019.

¹¹² This Protocol is not in effect, as reported by Marques, Cláudia Lima. *Confiança no comércio eletrônico: um estudo dos negócios jurídicos de consumo no comércio eletrônico*. São Paulo, Revista dos Tribunais, 2004, 435: “Este Protocolo não está em vigor, pois seu art. 18 estabelece que tal protocolo “[...] só entraria em vigor depois de terminados os trabalhos de ‘unificação’ da CCM, isto é, findo o hoje superado ‘Regulamento Comum de Defesa do Consumidor em sua totalidade’, o que nunca aconteceu. [...] O futuro do Protocolo de Santa Maria é incerto. Melhor seria para os consumidores do Mercosul que ele fosse reativado mesmo com o seu texto atual”; cf. Marques, Cláudia Lima. Conclusões do V Congresso Brasileiro de Direito do Consumidor em Belo Horizonte, 2000, 35 *Revista de Direito do Consumidor* 265, 2000, 265 et seq: in favor of the urgent approval of the aforementioned Protocol.

¹¹³ Marques, Cláudia Lima. *Contratos no Código de Defesa do Consumidor*, 4th ed., São Paulo, Revista dos Tribunais, 2002, 131-132; Lucon, Paulo Henrique dos Santos.

101, I.

VI. DATA PROTECTION AND PRIVACY POLICIES: WHAT CHANGES WITH THE GENERAL DATA PROTECTION LAW

Data protection and privacy policies, available on the websites of personal data processing agents¹¹⁴, can take one of the three forms analyzed in this work: "shrink-wrap," "click-wrap," or "browse-wrap." This makes the study of electronic adhesion contracts and terms and conditions of use even more relevant.

The right to personal data protection is an evolution of the right to privacy, as synthesized by Stefano Rodotà¹¹⁵, who highlights four phases of the evolution of the right to privacy: 1) from the right to be left alone to the right to maintain control over one's own information; 2) from privacy to the right to informational self-determination; 3) from privacy to non-discrimination; 4) from secrecy to control.

In this sense, beyond privacy, informational self-determination is guaranteed, which is understood as the control of data subjects over their information. Therefore, this right ensures several tools for the exercise of various rights, as currently provided in Articles 18 and subsequent of the General Data Protection Law (LGPD), namely: confirmation of data processing and access to data, correction of incomplete, inaccurate, or outdated data, anonymization of data as required by law, data portability, data deletion as required by law, and revocation of consent, among others.

In fact, this distinction was already present in the Brazilian Internet Bill of Rights, which in Article 3 provides for the protection of privacy (item II) and the protection of personal data (item III) in separate clauses. Although the Internet Bill of Rights has provisions for some of these data protection tools (Article 7, items VI to X), the LGPD introduced a data protection system, clearly inspired by the European General Data Protection Regulation (GDPR, Regulation 2016/679).

As a result, these privacy and personal data protection policies must be

Competência no comércio e no ato ilícito eletrônico, in *Direito & Internet*: aspectos jurídicos relevantes (edited by Newton de Lucca and Adalberto Simão Filho). 2nd ed. São Paulo, Quartier Latin, 2005, 392.

¹¹⁴ In accordance with article 5, section IX of the LGPD (General Data Protection Law), agents are the controller and the processor, defined respectively in section VI and VII of the law. The controller is the natural or legal person, whether public or private, who is responsible for decisions regarding the processing of personal data, and the processor is the natural or legal person, whether public or private, who processes personal data on behalf of the controller.

¹¹⁵ Rodotà, Stefano. Persona, riservatezza, identità. Prime note sistematiche sulla protezione dei dati personali, 15 *Rivista Critica del Diritto Privato* 583, 1997, 588-591.

easily available with clear and complete information about the contracts (Article 7, item XI). According to current regulations, personal data processing agents must indicate, at a minimum, in personal data protection policies the specific purpose of processing, the method and duration of processing, the identification and information of the controller, information about the sharing of personal data, and the responsibility of processing agents.

The LGPD introduces the concept of consent in Article 5, item XII, which is defined as the "free, informed, and unequivocal expression by which the data subject agrees to the processing of their personal data for a specific purpose." The LGPD qualifies consent, which must be informed, emphasizing the duty to inform and ensure transparency, as mentioned above. In other words, the data subject must be given a real opportunity to become aware of the terms of data protection policies.

However, the Brazilian Internet Bill of Rights established as a user's right the "express consent regarding the collection, use, storage, and processing of personal data, which must be obtained separately from other contractual clauses."

This creates an apparent conflict of norms. However, the Internet Bill of Rights is a general law because it establishes principles, guarantees, rights, and duties for the use of the Internet in Brazil. On the other hand, the LGPD, in addition to being more recent, is specific in comparison to the Internet Bill of Rights. Therefore, following the rules for solving normative antinomies, the later and more specific law prevails. Although the title of the normative text is "General Data Protection Law," as expressly indicated in the amendment made by Law No. 13,853 of July 8, 2019, the LGPD should be understood as a microsystem of personal data protection, similar to the Consumer Protection Code (CDC). However, it is important to note that some sectoral laws, such as the Positive Credit Registry Law, are considered special compared to the LGPD, which is considered a general law in relation to them.

Therefore, the LGPD should prevail, and it is sufficient for transactions to have the unequivocal consent of the data subject, which can be obtained through typical social behaviors. In summary, data processing agents must demonstrate that privacy and personal data protection policies are clearly drafted and made easily accessible to the data subject, should they wish to access them.

CONCLUSION

Day by day, e-commerce has transformed commercial practices conducted in the digital (online) environment, and sometimes, consumer

rights have been neglected. With new forms of contracting, consumers rarely have the chance to express their consent after reading the contract clauses, which are often presented in hyperlink format. This imposes on the consumer the burden of clicking through a series of web pages to access the content of the clauses that will bind them. Sometimes, the provider directs the consumer to their website to become aware of the contract clauses. All of this poses a risk to consumer protection and the development of e-commerce itself, as the expression of consent is essential to ensure the basic rights of the contracting parties.

It is important to note that the defining characteristic of telematic contracting is distance. In fact, an electronic contract is a form of distance and non-personal contracting. Regarding the terminology "electronic contract," it should be indicated that this is the genus of which computer contracts and telematic contracts are species. The former are contracts whose object is computer goods or services, designated by Italian doctrine as "contratti ad oggetto informatico"; the latter, on the other hand, are contracts concluded using computers as a means of communication, designated by French doctrine as "contrats télématiques."

These contracts are characterized by standardization ("standards contracts") and intense depersonalization. As for the existence of telematic contracts, it is necessary to study the consent expressed electronically (electronic consent), which encompasses various species. In contracts where the user is only allowed to click on a statement previously prepared by the provider, it is said that consent is pre-formulated. It is possible for the manifestation of will to be mediated by software programmed to conduct legal business on behalf of the user. In this case, it is called automated consent, attributed to the user who has formatted the computer program to act on their behalf. If it can be demonstrated that there was a convergence of will between the contracting parties ("meeting of the minds"), the telematic contract can be considered to exist.

Furthermore, certain aspects of electronic adhesion contracts, especially "shrink-wrap," "click-wrap," and "browse-wrap," require legal regulation. "Shrink-wrap" licenses are adhesion contracts that may be found within a physical medium, such as a SmartTV, with clauses unilaterally established by the provider. The formation of this contract is characterized by staggered expression of will. In other words, the consumer first purchases the product and only after using it gains access to the license terms. These terms are accepted through typical social behavior when starting to use the product or explicitly agreeing when prompted by the program. Therefore, the right to return the product (right of withdrawal) should be ensured if there is no agreement with unilaterally imposed clauses.

"Click-wrap" is a telematic adhesion contract, the object of which is an

immaterial (digitized) or material good, in which the provider unilaterally establishes the contract clauses, notifying the acquirer about them before obtaining their expression of will, which is externalized by clicking on a specific icon. In this case, knowledge of the contract clauses occurs before the user expresses their will. Therefore, U.S. and Canadian courts have validated these contracts.

Electronic consent in "click-wrap" contracts is expressed explicitly when the acquirer clicks on the icon indicating agreement, using phrases such as "I accept," "I agree," "yes," etc. From this moment, the acquirer is bound by the contract clauses to which they have expressly agreed. This does not mean, however, that the contract cannot be annulled in the case of a defect in consent or if some clauses are considered abusive, especially in consumer relations.

Finally, "browse-wrap" is a set of contractual terms, usually stored as a hyperlink in small letters at the bottom of a website. By clicking on the hyperlink, the user is redirected to a specific page containing the terms of use and access to the website. The weakness of this contractual technique lies in the lack of consent from the other party, who often is not even aware of the existence of these terms discreetly posted at the bottom of the website.

Therefore, there are two types of "browse-wrap": with notice ("with notice") in which the provider or service operator conspicuously and easily indicates the existence of these terms and describes what actions by the user will be interpreted as acceptance of the terms. In this case, they are considered "general conditions of contracts" because they become part of the contract when the consumer is aware of them or has the actual opportunity to learn about them before expressing acceptance. On the other hand, "browse-wrap" without notice ("without notice") are not considered adhesion contracts or general conditions of contracting, as there is no notification to the user regarding their existence, nor is there a real opportunity to review them. This places the user in a state of obvious ignorance, which prevents the inference of will expression.

In both of these cases, the contracts will only bind the consumer if they have the opportunity to become aware of the terms as provided in Article 46 of the Consumer Protection Code (CDC). Therefore, attention should be given to these contracts, allowing for their reading and printing by the consumer.

Although these contracts are considered to exist, there remains the possibility of annulling some contract clauses when they are deemed abusive. This is the case with the forum selection clause in adhesion contracts. In consumer contracts, this clause can be considered null and void when an excessive disadvantage to the consumer is evident (Article 51, Section IV of the Consumer Protection Code). In these cases, the judge can recognize their relative incompetence *ex officio*, which is an exception to the established rule

that relative incompetence cannot be recognized *ex officio*. Even among consumer protection advocates, there is a divergence of opinions on this issue: some believe that the elective clause should be deemed null and void automatically, while others condition this conclusion on a case-by-case analysis, requiring evidence of harm to the consumer.

However, Bill No. 3,514/2015 aims to add Section 1 to Article 101 of the Consumer Protection Code, considering the elective clause null and void. Nevertheless, in the suggested wording of Article 101 of the Consumer Protection Code, Section II, when the consumer is the plaintiff, they can choose to file the action: at their domicile; at the domicile of the supplier; at the place of contract formation or execution; or any other related to the contract. Therefore, it seems that, similar to this provision, the elective clause would be another option for the consumer.

In contrast, the Consumer Protection Code expressly states that compulsory arbitration clauses are null and void when included in consumer contracts (Article 51, Section VII of the Consumer Protection Code), a position reinforced by Bill No. 3,514/2015. However, the consumer protection legislation is silent about optional arbitration clauses. Should these be considered null as well? It would be better to consider optional arbitration clauses as valid when they have been freely chosen by the consumer, who may have an interest in this faster method of dispute resolution. This is because the current wording of the Consumer Protection Code aims to rebalance the legal relationship between the supplier and the consumer. Therefore, consumers should be given the freedom to choose, freely and consciously, to submit to arbitration. However, Bill No. 3,514/2015 (Section 1 of Article 101) stipulates the nullity of the arbitration clause entered into by the consumer, suggesting that optional arbitration clauses would also be null and void (as compulsory ones are already considered null).

As for the choice-of-law clause, its validity depends on the type of relationship it concerns. In principle, the stipulation of this clause is valid, based on the principle of contractual freedom. It should be noted that this clause must be examined with caution because in adhesion contracts, it will not be "freely" chosen but unilaterally established by the stipulator. However, in consumer legal relationships, it will only be valid if it is more favorable to the consumer. In this regard, Bill No. 3,514/2015 makes it clear in the suggested wording of Section 2 of Article 101 of the Consumer Protection Code.

As for the uncertainty about the applicable law and competent jurisdiction, the criterion applied by Brazilian law to determine the applicable law for international contracts is static, defined by the place of contract formation, that is, *lex loci celebrationis*, as per Article 9 of the Private International Law Act (LINDB). As expressed, this criterion is not suitable

for the characteristic of electronic contracts, which are often formed at a distance.

Bill No. 3,514/2015 aims to amend the text of the LINDB by suggesting the addition of Article 9-A. This article provides that the parties can establish the applicable law for the contract and choose the forum. In the absence or invalidity of this clause, the law of the place of contract formation is applied, understood as the place where the proponent resides.

Conversely, for consumer contracts, the same bill suggests in Article 9-B that the applicable law will be the one most beneficial to the consumer, ensuring them the privileged forum when they are the defendant or several options they can choose to file an action as the plaintiff.

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