

INNOVATION & COMPETITIVENESS

**HOW  
TO** UNDERSTAND  
**IT LAW  
IN BRAZIL**  
5<sup>TH</sup> EDITION



**AMCHAM**  
*Brasil*

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ADVOGADOS



The American Chamber of Commerce for Brazil, being the largest Amcham outside the United States is serving its members building bridges for Brazilian businesses worldwide. Our foreign investment attraction efforts are a key mission for Amcham. The “How To” guides published by Amcham Brasil are part of this initiative. With the support of some of our members and Brazilian States and cities, we are putting together strategic information on the most various aspects of doing business in Brazil and its opportunities. As part of BRICS (Brazil, Russia, India, China and South Africa) and representing the 9th largest economy of the world, and the 8th largest destination for foreign investment, Brazil has an intrinsic importance for the global market. More than ever it is a strategic time for businesses opportunities in Brazil. We welcome you and hope that the information you are about to read will contribute to your commercial and investment decisions linked to Brazil.

**Deborah Veitas** – CEO, Amcham Brasil

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Brazil is currently the 10th highest earning country in the global IT and telecommunications market. Against this backdrop, expert legal services which understand this industry’s dynamics and are able to assist with respect to the specific industry issues are becoming increasingly more necessary. Properly understanding the Brazilian regulatory scenario from the standpoint of technology use and its consequences, encompassing aspects related to intellectual property, tax and labor impacts, liability scope, consumer rights, online business regulations and many other topics addressed in this project, is decisive for successfully setting up and running companies of any size. Thus, our mission for this title developed with support from Amcham is to provide entrepreneurs with an educational, to-the-point handbook allowing them to understand the legal issues involved in the Brazilian technology business.

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American Chamber of Commerce for Brazil - AMCHAM  
International Affairs Department  
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\*This guide is part of the project

**HOW DO BUSINESS  
TO AND INVEST  
IN BRAZIL**

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# 01. INTRODUCTION – CURRENT INFORMATION TECHNOLOGY OUTLOOK IN BRAZIL



The technology sector in Brazil has been growing above the national economy rate, currently accounting for 7% of the GDP.<sup>1</sup> That, along with a population of over 200 million<sup>2</sup> creates very interesting prospects for Brazil's economic development in the near future.

1 Brazilian Association of Information Technology and Communication Companies (Associação Brasileira das Empresas de Tecnologia da Informação e Comunicação (BRASSCOM)).  
2 Brazilian Institute of Geography and Statistics (Instituto Brasileiro de Geografia e Estatística – IBGE).



According to data from the Ministry of Science, Technology, Innovation and Communication (Ministério da Ciência, Tecnologia, Inovações e Comunicações – MCTIC), Brazil has over 1.6 million people working in the IT industry.



Brazil has great potential to become an IT hub for the Americas and Europe once the country starts exporting software and related services, especially due to its highly westernized culture, flexibility, and professional training investments.



The penetration of fixed broadband remains low in Brazil, reaching 27.9% of the population in 2017<sup>3</sup>. However, demand is rising due to the significant increase of new technologies, such as cloud services and streaming for entertainment purposes.

<sup>3</sup> National Communications Agency (Agência Nacional de Telecomunicações - Anatel)

# 02.

## ONLINE BUSINESS



## ELECTRONIC COMMERCE

While the National Congress is discussing many legislative bills meant to update the Brazilian Consumer Defense Code in order to address the relations taking place in the virtual environment, the Federal Government enacted the Decree No. 7,932/2013 to deal with some of the most important issues related to this matter.

The three main issues regulated by the Decree are:

1

The obligation to provide clear and adequate information about products, services and supplier (e.g. physical address)

2

The obligation to provide easy customer service

3

The right of regret

However, some important issues were not addressed, such as spamming, processing of consumers' personal data, pricing in foreign currency, jurisdiction and applicable law for international purchases, and use of arbitration clauses.

## CONSUMERS IN THE VIRTUAL ENVIRONMENT

Brazil has specific legislation governing the relationship between vendors and consumers, known as the Consumer Defense Code, which also applies to e-commerce. This law stipulates that the consumer is the most vulnerable party in such a relationship. As such, the goal of balancing the interests of the consumer market participants is achieved by guaranteeing certain consumer rights and protections, as described ahead:



### Life, Health and Safety

Vendors planning to do business in Brazil, either through conventional trade or e-commerce, must make sure that the products placed in the market pose no risks to consumers' health or safety, except for those normal and predictable risks, such as fungicides and pesticides. In the event the product or service is found hazardous after it has been placed in the market, steps must be taken to warn consumers and/or immediately remove it from the market.



### Information

Information provided to consumers must be suitable and clear, especially regarding product or service quantity, characteristics, components, quality, price and hazards. Some contents, such as videos, games and apps, must be classified according to the age rating rules, in order to provide parents proper information about the amount of violence, sex, drugs and inappropriate language. In this regard, Brazil follows the rules of the International Age Rating Coalition (IARC) and classifications according to its system might be used directly in Brazil.



### Advertising

Advertising that features discriminatory content, misleads consumers, incites violence, exploits people's fears or superstitions, and takes advantage of their poor judgment, among other things, is considered wrongful. In the case of offers, the information must be accurate, clear, precise, clearly demonstrative and in Portuguese, given that the deal is binding on the vendor.



### Business Practices

Some business practices have been rated as abusive, and the law bars vendors, for instance, from conditioning the supply of a product or service to the purchase of another product or service (i.e. tying). The vendor's liability is objective in consumer relations, meaning that it does not require proof of guilt. It is also a joint liability, given consumers may sue any of those involved in the manufacturing and sale of the product.



### Contracts

Consumers must have the opportunity to read in advance the content of contracts, which need to be written in a clear manner that makes it easy to understand their meaning and scope. Should questions arise, their clauses will always be interpreted in a way that is more favorable to the consumer.

Clauses that may be considered abusive must be avoided, such as those exempting the vendor from liability for product or service defects or allowing the vendor to unilaterally change prices.



### Regret

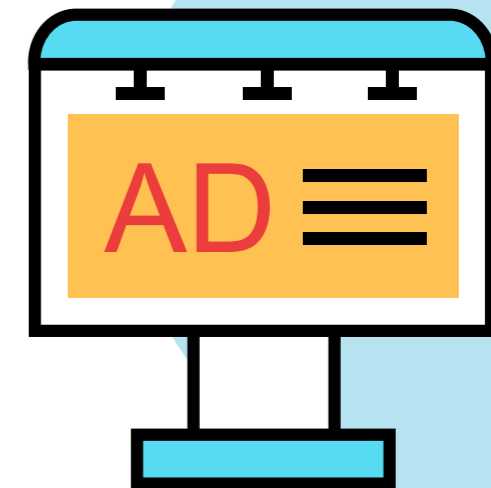
The law grants consumers the right to exchange products purchased outside a commercial establishment within 7 days, regardless of flaw or defect.

## ONLINE ADS

In the case of advertising on search engines (sponsored links and search engine optimization), the main precaution to be taken is against unfair competition caused by targeting the competitors' customers.

Although there are no laws specifically applicable to advertising, advertisers must abide by the Brazilian Advertising Self-Regulation Code from the National Council of Advertising Self-Regulation (Conselho Nacional de Autorregulamentação Publicitária - CONAR), which establishes general principles, special categories of advertising, liability, as well as violations and penalties.

Advertisers commonly offer contests to promote their brands, products and services. However, all contests – except cultural ones – must be previously authorized by a competent local agency upon payment of applicable fees and compliance with certain conditions.



# 03. E-COMPLIANCE



Since 2013, with the enforcement of the Anti-Corruption Law, companies operating in Brazil have a greater concern regarding compliance and the rules, regulations and legislation applicable to their activity sector. These rules may involve labor, tax, accounting, financial, environmental, social security and ethical issues, and lead to policies in accordance with the company's values and goals.

Besides the intention to comply with legislation, there is also the goal of preserving the company's reputation and safeguarding the strategic information that sustains the business.

The e-Compliance is the application of these goals and concepts to the technological resources increasingly present in the corporate environment and which are often related to the personal environment of its contributors. As examples, it is possible to mention home office and adopting the BYOD (bring you own device) method.

In addition to the Civil Internet Framework (Law No. 12,965 of 2014), the law against Internet crimes and the law to combat bullying, there are countless other legislative initiatives involving regulation of the use of technological resources. These could seriously impact the daily routine of companies, such as the proposed data protection act, which will certainly limit practices that generate high commercial value, such as Big Data, Analytics and Machine Learning.

# 04 . IT TAXES



## ONLINE ADVERTISING

Online and mobile advertising has not been devoid of questions on how to tax the activity. While Brazilian states seek to collect ICMS (VAT), municipalities believe that such activity is subject to the service tax (Imposto sobre Serviços – ISS, Sales Tax), charging them accordingly. Therefore, those operating in this sector must adopt a secure strategy, since the issue has yet to be settled by the courts.

### Cloud Computing

Cloud Computing<sup>4</sup> taxation raises discussions about the nature of the services, the place where they are provided, and their possible individuation for collection purposes. That is because its main forms – Software as a Service (SaaS)<sup>5</sup>, Infrastructure as a Service (IaaS)<sup>6</sup>, and Platform as a Service (PaaS)<sup>7</sup> – carry out a variety of activities that may or may not be broken down for purposes of offering and collection, aside from the fact that each is provided at a different location. Identification of the prevailing activity and the actual city where the provider is located may lead to different ISS taxation and collection of Social Integration Program (Programa de Integração Social - PIS), Contribution for Social Security Funding (Contribuição para Financiamento da Seguridade Social - COFINS), income tax, and Contribution for Intervention

in the Economic Domain Economic Domain Intervention Contributions (Contribuições de Intervenção no Domínio Econômico – CIDE). The decisions by the country's main courts have yet to settle the matter.

Hence, it is advisable to analyze which taxes are levied on the planned activity to avoid possible fiscal contingencies.

## SOFTWARE

Although decisions by the Federal Supreme Court (Supremo Tribunal Federal - STF) and the Superior Court of Justice (Superior Tribunal de Justiça - STJ) converge in the sense that computer programs custom-developed for customers are subject to ISS, and that programs created and sold randomly to customers – who buy them like any other goods, the so-called off-the-shelf software – are subject to ICMS, the discussion about software taxation is still complex and likely to take a while before being completely settled.

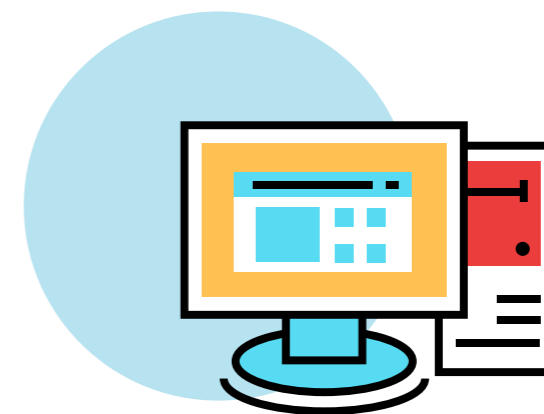
Supplementary Law 116/2003 included the license or assignment of the right to use computer software in the list of services subject to ISS, therefore considering transactions

involving software as a service. As a result, cities continue to charge ISS on all computer software sales, rekindling the discussion in Brazilian courts.

Levying ISS or ICMS is not the only software taxation issue to raise questions. With the advance of electronic commerce, the vast majority of computer program sales began taking place via download. Key concepts such as tax residence and permanent establishment, tax authority and jurisdiction, and other fundamental concepts in the Brazilian tax system, are undefined in such a transaction. The operation starts via electronic media, progresses and finishes through those same means. Hence the need for caution when deciding which taxes are levied on these operations.

Considering the decisions rendered by the highest courts in the country regarding Brazilian-made software downloads, in order to avoid an occasional fiscal contingency, one must assess whether the operation is deemed a service or an exchange of goods, to decide whether ISS or ICMS applies.

When a computer software is imported via regular channels, the basis for calculation of import tax, tax on industrialized products (Imposto sobre Produtos Industrializados - IPI), and ICMS is merely the price of the physical product. The physical product is “dematerialized” when that same software is imported via download, making customs clearance unnecessary. Therefore, questions arise as to the existence of a taxable event, basis of calculation, and moment for taxation of such service. According to this position, the transaction is therefore not subject to ICMS.



<sup>4</sup> Cloud Computing: remote access to files, programs and applications for computer use, dependent upon Internet connection.

<sup>5</sup> Software as a Service (SaaS) model: users can access software that is not installed on their own machine but rather on an online network to which they have a login and password.

<sup>6</sup> Infrastructure as a Service (IaaS) model: users can access all available tools installed in the physical structure of the contracted company.

<sup>7</sup> Platform as a Service (PaaS) model: users can develop, run and manage web applications through a platform. There is no need for the complexity of building and maintaining the infrastructure for creating an app.



## PAYROLL TAX CUT

In Brazil, basic employer's social security contribution had always been calculated over the total compensation paid, owed or credited to the insured and other individuals working for the company, including those without an employment relationship. In other words, the employer's social security contribution was always based on the value of labor, therefore burdening the company's payroll, which was based on section 195 of the 1988 Federal Constitution.

Although Law 12,546/2011 combined with Laws 13,043/2014 and 13,202/2015 established that the 20% basic employer's social security contribution, calculated over total payroll for employees, free-lancers, and individual taxpayers, for companies that exclusively provide IT and Information and Communication Technology (ICT) services, may be replaced (at taxpayer's discretion) with the application of a rate between 2% and 4.5% over the value of their gross revenue, considering legally permitted exemptions.

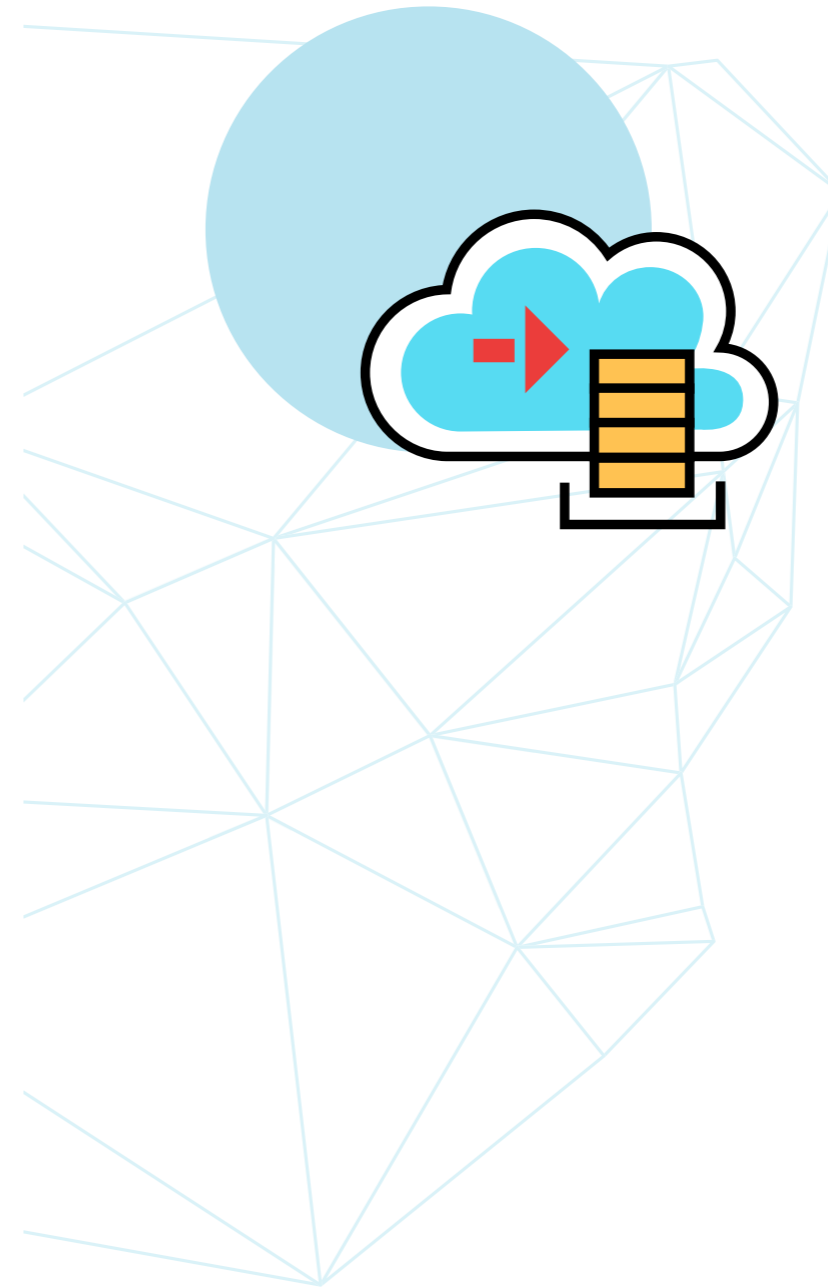
Hence, it is advisable to analyze, on a yearly basis, which is the best tax collection regime regarding the employer's social security contribution.



For the purposes of Law 12,546/2011, activities designated as IT or ICT are:

- Systems analysis and development;
- Programming;
- Data processing and related services;
- Computer program design, including video games;
- Licensing or assignment of the right to use computer programs;
- IT advisory services and consulting;
- IT technical support, including installation, configuration and maintenance of computer software and databases, as well as technical support services for information technology equipment; and
- Web page planning, building, maintenance and updating.

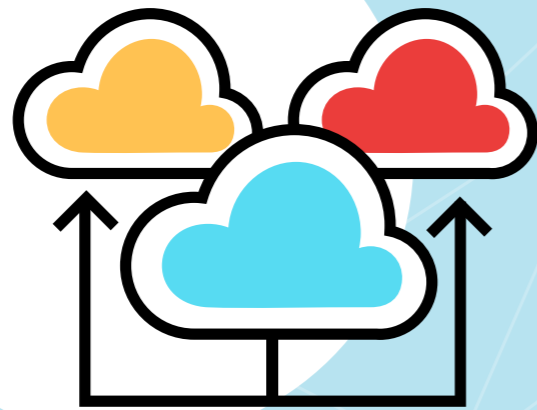
# 05. BIG DATA



Due to the lack of specific legislation on the matter, companies interested in collecting, processing, or simply using the collected and/or treated data need to be extra careful to not violate any rights that may come to be recognized by Brazilian courts. Such precautions include requesting authorization from users, having clearly defined terms and conditions, and paying attention to issues related to data storage and storage security. By exercising such care, the risks from using Big Data are significantly mitigated.

In Brazil, even when services are provided free of charge – such as search engine services, email or social media – users are considered consumers under the law. Databases and consumer registries that request the consumers' express consent for data collection allow consumers to access their data upon request.

# 06. CLOUD COMPUTING



Contracts are one of the main issues that companies providing cloud computing services must address. Given that the law and court decisions have yet to look deeper into the matter to the point of encompassing all the nuances the cloud may entail, contracts signed with cloud computing service providers represent the main tool to clearly define important responsibilities and duties, such as:



Accessibility



System failures and availability



Confidentiality



Backup



The potential return of stored data



Intellectual property



Storage of confidential proprietary information or materials



Security level

When the public administration is involved particular issues arise:

1

The hired company must abide by the manual of good practices, guidelines and prohibitions for hiring cloud computing services

2

For the most sensitive data, data may only be hosted on the public administration's own servers

3


Less sensitive data can be stored in hybrid clouds but must remain in Brazil and the service providers must comply with certain security and confidentiality standards

4

Companies cannot acquire safes and secure rooms, in order to encourage the sharing of existing infrastructure

# 07.

## INTERNET CIVIL FRAMEWORK



In order to lay out the principles, guarantees, rights and duties related to the Internet use in Brazil, Law No. 12,965 of 2014 (Civil Framework) was enacted. The Internet Civil Framework, as enforced, applies to web infrastructure services that deal with the flow arising from the Internet, except private services or services for private networks. It also provides functionalities that can be accessed through a terminal connected to the Internet.

The first provisions in the Civil Framework define the fundamentals for Internet use in Brazil. They acknowledge the worldwide scale of the web and state that their regulations are based on human rights and the exercise of participatory citizenship via digital means, on plurality and diversity, on openness and collaboration, free enterprise, freedom to compete, and consumer defense.

The list below presents a summary of the main Civil Framework regulations:

### MATTER

Collecting and using private data

### REGULATION

Clear, constant and complete information about collection, use, storage, treatment and protection of personal data, with express consent highlighted. Personal data is considered any data related to an identified or identifiable person, including identifying numbers, location data or electronic identifiers, whenever they are related to a person. Use of collected data must be restricted for collection purposes and shall be specified in service agreements.

### Neutrality<sup>8</sup>

Telecommunications service providers responsible for transmission, switching or routing of data packets have a duty to treat Internet data packets in an isonomic manner, regardless of the content, origin and destination, service, terminal or application. Likewise, Internet connectivity service providers, whether paid or free of charge, and transmission, switching or routing of data packets, cannot block, monitor, filter or analyze the content of data packets. A few exceptions to the neutrality principle are possible, always related to serious emergencies.

### Safeguarding connection data

Access to connection data shall be provided to third parties only upon court order. The information requested must have a motivation and be specific, with indication of from who the data is asked and the specific information needed. The service provider can choose not to collect registration information and, in this case, they might inform it to the administrative authorities upon request. Service providers must retain connection data records, safeguarded in a controlled and secure environment, for one year. Connection service providers must not keep data records on user access to Internet application services.

### Safeguarding application data

Access to application data shall be provided to third parties only upon court order. User registration data shall be provided to administrative authorities. Service providers shall maintain application data records, safeguarded in a controlled and secure environment, for six months. Data related to connection with other application providers or excessive information for purpose, in which the collection was authorized by the user, shall not be safeguarded.

### Content exclusion and freedom of speech

Third parties posting content on blogs, social media or service applications have their freedom of speech ensured and may be held liable for the content posted. Application service providers could be held liable for content posted on their services only if they disobey a specific court order to delete content. The only exception to this provision is in case of private sexual or nude images or videos, which must be deleted from the Internet upon simple notice from the aggrieved person to the service provider.

Source: Pinhão & Koiffman Advogados

<sup>8</sup> Neutrality: Refers to equal treatment of users and does not take into consideration the legality of the transmitted content.

# 08.

## TECH TRENDS

### SOFTWARE LICENSE VS. SOFTWARE DEVELOPMENT

Agreements involving computer programs are subject to the following Software Law:

- Rights and duties of companies contracting software licenses and/or developing computer programs;
- The use of software must be the object of a license agreement; and
- Parties cannot include clauses that limit production, distribution or sale, which violate the regulatory provisions in force and/or exempt any of the contracting parties from their liability in potential third-party lawsuits deriving from flaws, defects, or copyright infringement.

Software development agreements: service agreements usually employed in cases where software is made to order or an IT solution is developed for a specific company. In general, such situations result in transferring property rights or ownership of the software or IT solution to the company that commissioned it, except as otherwise provided for in the agreement.

Developers may also retain ownership of the developed program or content until it has been paid in full by the commissioning party, or if the agreement is terminated.

Software license agreements: the software is licensed to a customer for a fixed period of time or on a permanent basis. End-user license agreements, which are usually electronic, legitimate the use of software by the customer and is used mainly for off-the-shelf software. Such license agreements must provide the valid period for technical assistance services.

### SOFTWARE DISTRIBUTION

For software sales via distribution, the conditions must be set forth in an agreement between the parties. In Brazil, foreign software must be distributed by a company established in the country. In this case, the distributor will be granted an authorization from the holder of the rights to license the product in Brazil.

When distributing software, distributors are not allowed to offer to end-users better conditions or more advantages than distributors have been given in the agreement signed with the holders of software rights, otherwise distributors may be held accountable by end-users and will have no right of reimbursement from the holder of software rights. The relationship between distributors (who are not the holders of software rights) and end-users will be governed by end-user license agreements that must comply with the conditions in the respective distribution agreement, which are meant to limit each party's liability.

Regarding the remittance of payments to a foreign software owner for the sale thereof and tax liability in Brazil, the law states that "license agreements on sales of computer programs originating abroad must stipulate the liability for payment of applicable taxes and charges, in addition to providing for payment to the software rights holder residing or domiciled abroad".

### ARBITRATION ON IT AGREEMENTS

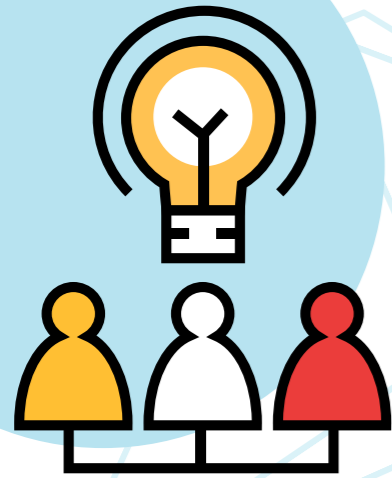
The courts are not always the best alternative to ensure the protection of IT business. In that regard, arbitration is recognized and widely used in Brazil.

One advantage of arbitration is the procedure, in which the confidentiality of both the proceedings and the final decision can be assured. Additionally, a final, binding solution is obtained within a considerably shorter time than in the courts, given that law provides for a decision within 6 months when the parties raise no objections. Most importantly, the parties are allowed to choose the arbitrator(s) that will settle the dispute, enabling the choice of arbitrators who have specific knowledge of the controversy at hand.

Therefore, alternative means of conflict resolution are viable and attractive options for disputes involving expert technical knowledge, such as the field of IT and in relation to intellectual and industrial property. Before arbitration actually begins, it is advisable to use the so-called "full arbitration clause" because it is precise, comprehensive and capable of preventing inaccuracies that may take years to be settled by the courts.



## INTELLECTUAL PROPERTY



As a signatory of the main international treaties on the matter, especially the TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights) and the Berne Convention, Brazil has adapted its rules regarding Intellectual Property rights to international standards. In this sense, this topic aims to briefly explain the main particularities of the Brazilian legislation.

**NEW MEDIA, WEBSITES AND SOCIAL MEDIA**

In Brazil, the Author Rights Law, despite being relatively recent, contains no specific provisions on the matter of media, social media, or protection of author rights on the Internet, but the law is still applicable in these cases.

The use of any materials on the web should abide by the general rules in the author rights legislation in force, along with careful analysis of the use of the contents, the identification of the source originating the piece (when known), and respect for the material created by others. Brazil is gradually updating its rules on the matter, so in the near future it is expected a decrease in the number of legislative gaps and omissions.

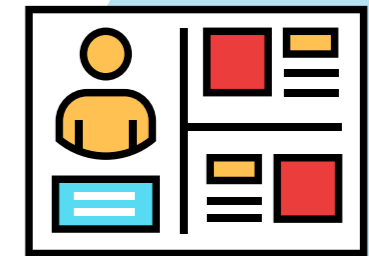
**DOMAIN NAMES**

Brazil is experiencing a veritable rush to register domain names. According to the agency in charge of controlling Brazilian Internet domains (NIC.br), registration applications soared to almost 4 million in 2017.

The procedure to register a domain is quite simple and, provided some minimum identification requirements are met, any individual or company may become a domain holder. Foreign companies may get temporary registration.

On the other hand, this same convenience has been the source of many problems for companies as they are forced to deal with the frequent practice of conduct aimed at getting some financial advantage by registering domains related to renowned names or brands, such as cybersquatting (registration of a domain equal or similar to a famous brand) or typosquatting (registration of a domain similar to a famous brand but with slight changes that draw in users who have mistyped).

Although during the registration application process NIC.br analyzes the equivalency with other existing domain names, this agency does not have the power to bar the request of any applicant, especially in cases where the pre-existing brand is not seen as a highly renowned brand. Registration is granted on a first-to-file basis. Thus, companies must pay attention and find methods to defend themselves against undue commercial use of domains through unfair competition practices.



## UNFAIR COMPETITION IN ADVERTISEMENTS ON THE INTERNET

Similar to the practice of cybersquatting and typosquatting, the use of random trademarks has also become popular in ad campaigns on search engine platforms. The advertising companies link competitor brand names as keywords in their own ads, in order to attract the users searching for the competitor.

Although the advertiser's webpage or the ad itself may have no visible mention of the competitor brand, the Brazilian courts have considered that the act sets up unfair competition. Based on this understanding, Brazilian courts have been ruling against companies that use such practices, ordering them to pay compensation for material and moral damages, also ordering search engines to prevent the transmission of such brands and their new campaigns.

## LEGAL SOFTWARE PROTECTION

Brazilian legislation refers to software as "computer program" although the two terms are not synonyms. A computer program "is the expression of an organized set of instructions in natural or encoded language, contained on any kind of physical media, to be necessarily used in automatic data-processing machines, devices, peripheral instruments or equipment, based on a digital or analog technique, to make them work in a given manner and for specific purposes".

In Brazil, like in the European Union, patents are not usually granted for the individual protection of software, unlike what is seen in the United States. In Brazil, patents are granted only in specific cases, as when the software is intrinsically integrated into the hardware.

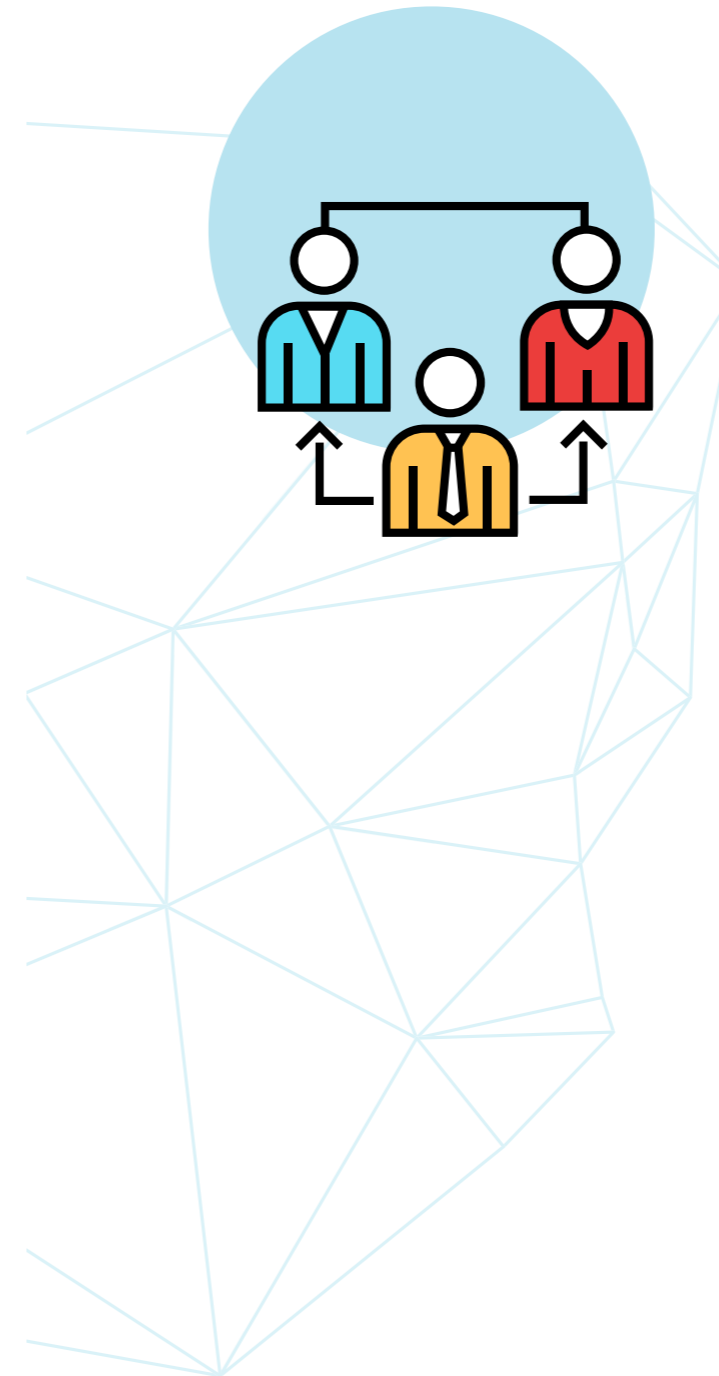
Individual software is protected under a specific law (the Software Law), and complementarily by the Author Rights Law. Such protection is granted for 50 years, counted from its creation or publication and regardless of any registration. The same protection is guaranteed to foreign software, as long as there is reciprocity between the countries.

Specifically regarding the protection guaranteed to software, Brazilian legislation grants its author the right to oppose unauthorized changes that may be aggrieving, as well as the right to control the reproduction of software by third parties by either authorizing it or not, and the conditions to do so.

The Software Law prescribes supplementary obligations for software sellers in Brazil, whether they are the developer or importer of such software. These supplementary obligations include ensuring technical support during the software technical validity, which is established by the software developer in the end-user license agreement.

# 10.

## LABOR RELATIONS



Employment contracts require individual registration, through a medical examination for admission, avoiding embarrassing tests which could generate discrimination (example: pregnancy and HIV tests, criminal records, among others). In addition to a monthly salary, employees are entitled to an additional 13th month salary and 30 days of annual vacation, with additional payment of 1/3 of the salary. Labor relations can initially be established via employment contract of experience, which allows maximum extension of 90 days, and the most common model of indeterminate term employment contract.

## MONITORING EMPLOYEE USE OF TECHNOLOGY AND SOCIAL MEDIA

According to the principle of human dignity contained in the Brazilian Constitution, any and all actions controlling the use of social media must comply with the right to dignity, which is tied to the human person's privacy, and not even the employer's directive power and the subordination relationship maintained with employees and occasional job applicants may be used as grounds for attitudes that violate those fundamental rights.

Hence, accessing data on social media to which the applicant or employee subscribes may represent a form of discrimination and consequently a violation of the constitutional principle of the human person's dignity.

Controversy arises over boundaries of employer supervision over electronic equipment without infringing on private employee rights. In this sense, it is advisable to implement specific internal policies regulating use of equipment provided by the employer, delimiting use exclusively for professional matters, and clarifying that such equipment is subject to employer supervision and control.

Companies must implement detailed policies regarding use of equipment, always aiming at balancing the defense of company interests, security of information and preserving the privacy of its employees.

## OUTSOURCING

Brazilian labor legislation has been modified in 2017 and now allows outsourcing all activities, including those directly related to a company's core business. This will encourage business opportunities in industries, especially when specific expertise is required. However, this measure brings joint liability between the service receiver and the outsourcing company. The employee is entitled to enforce liability for labor credits for both debtors or for only one of them, with no order of preference. The company that complied with the obligation has the right to claim its share against the joint debtor.



## COMMUNICATION TOOLS – EMAIL

The Brazilian Civil Code establishes that damages caused to third parties are to be redressed by those who caused them. Such liability is not restricted only to commercial transactions at a cost – such as purchase/sale or the supply of services – and can be applied to any type of relationship between people or companies, even when free of charge.

The law also allows parties to choose to put the obligation to compensate into perspective or release some of it, choice which must be agreed upon beforehand. Exception is made for consumer relations, regulated in Brazil by the Consumer Defense Code, which establishes that suppliers are not allowed to escape their responsibility for their products or services, and any provisions to the contrary are deemed null.

Email is a tool incorporated into the everyday life of a large portion of the population and used as an instrument of work and leisure. Hence, in the event of provider failures that affect its operation and the routine of its users, serious losses may take place, giving rise to the obligation to compensate.

When legislation is applied to email accounts, there is no difference regarding one's liability for free or paid services. In both cases, the provider is accountable for the security, privacy and integrity of the information stored by such provider.

In the case of consumer relations – that is, when users are considered and protected as consumers – legislation states that the obligation to prove alleged facts lies solely upon the email provider. Hence, companies are supposed to keep a history of recent access activity so that the truth of the facts and alleged losses may be assessed.

The “protection of email content confidentiality” is very relevant since electronic mail is equated with the concept of regular mail as well, and is therefore protected by the Brazilian Constitution. This ensures its inviolability, which was reinforced by the Civil Framework Law. Email content and access information can only be provided upon court order.

Especially in criminal cases, the investigating authorities may ask a judge to breach such confidentiality. The authorities are allowed to access inboxes or monitor new email flows for up to 15 days, and such timeframe may be extended for equal periods. Unduly accessing or disclosing email contents may subject offenders to pay damages and compensation for pain and suffering, in direct relation to the losses suffered by the user.

Given all the confidentiality ensured to email, it is important for providers to do their best to protect accounts against third-party access. In a potential lawsuit, the provider's liabilities may be reduced if it successfully shows that it used systems to prevent unwanted access and constantly educated its users.

## INFORMATION SECURITY – DATA CONFIDENTIALITY

Freedom of speech is protected under the Federal Constitution and also under the Civil Framework Law. Anonymity, however, is barred.

Upon court order, Internet providers must disclose the content of the information and produce all information capable of identifying the author of the content posted to the Internet, such as IP addresses, registration information, and access data. Administrative authorities are entitled to request merely registration data, which would not be included in the list of confidential information laid out in the Federal Constitution.



## IMAGE RIGHTS

Image rights aim to protect human personality. However, the dynamism of the exchange of virtual information makes it more difficult to control the exchange of images. Brazil does not have a specific provision for controlling the media or virtual networks, nevertheless general establishment of Civil Code rules against violation of image rights, which are guaranteed through civil claims.

In addition, the Supreme Court has already ruled that it does not depend on proof of prejudice to determine indemnification for unauthorized publication of a person's image for economic or commercial purposes. Even if the unauthorized publication is not for commercial purposes, the mere disclosure of the image may be subject to damage claims if such image is linked to news, parodies and jokes or harassing information directly affecting the person's honor.

Companies are also subject to protection against image violation and hence entitled to severance payment. Brazilian superior courts have already ruled that the image of companies might be subject to malicious slant, which may cause economic prejudice and violation of image rights.



## SOFTWARE

Responsibility for the performance of software may be regulated according to the type of contract and the parties involved: it may be a consumer relationship or merely an ordinary commercial relationship.

Once it is deemed a consumer relationship, manufacturers are liable for the damage caused by their product. According to the Brazilian legislation, considering that consumers are the weakest part in a consumer relationship, consumers should not be burdened by the obligation to prove the facts they claim. Especially in such a technical market that is difficult for the layperson to understand, it would not be reasonable to expect consumers to be able to investigate the causes and extent of the damage they suffer. Additionally, such liability should be unlimited, and manufacturers must compensate consumers for all damages and losses, regardless of the manufacturer's fault. Any conditions limiting liability are considered abusive, and therefore null.

In case the software is manufactured abroad or the manufacturer cannot be located, the sellers or distributors are liable for the redress, under the Consumer Defense Code.

In relationships other than consumer ones, the parties are allowed to have some flexibility and may limit their civil liability regarding the software. As there are no provisions to that effect in the Consumer Defense Code, the parties are free to, in such case, dispose of rights and set rules deriving solely from business agreements.

Therefore, they are legally allowed to include clauses which, for instance, cap the compensation at the total price of the agreement; provide for prorated payment discounts if the software is unavailable; or exclude any liability for the product and transfer all business risks to the customer.



# 12.

## NEW IT LEGISLATION

In Brazil, the discussion about the need to create specific regulations to protect data related to individual rights, such as the right to privacy, has been going on for a long time. Recently, the Ministry of Justice presented a bill resulting from a public consultation. In the meantime, two other bills with similar content were presented by the Congress. However, while these bills are not considered by the legislature, personal information protection continues to be regulated by other laws in force. There are provisions scattered within the Federal Constitution, the Consumer Defense Code, the Civil Code and the Civil Framework Law containing specific privacy-related rules that may be applied to the protection of personal information.

The legislation in force only offers specific regulations about the protection of personal information for issues associated with the Civil Framework Law. Such protection is currently afforded by the constitutional principle of dignity and people's fundamental rights, especially regarding freedom, equality, and individual and family privacy, pursuant to the Federal Constitution and as specifically mentioned in the framework.



# 13.

## ABOUT THE SPONSOR

### **OVER A DECADE OF DECISIVE WORK IN THE TECHNOLOGY AND HEALTHCARE**

For over 16 years PINHÃO E KOIFFMAN ADVOGADOS has been providing fast, customized, and comprehensive legal solutions to Brazilian and foreign companies operating in a wide variety of industries.

Occupying three floors in the Vila Olímpia district in São Paulo, the firm is currently staffed by over 100 professionals dedicated to the complex issues of Business Law, especially in the firm's specialty areas of healthcare, innovation and IT.

With highly renowned Brazilian and foreign companies in the client portfolio, PINHÃO E KOIFFMAN ADVOGADOS team is composed of experts trained in several technical and scientific fields who are capable of providing clear and uncomplicated legal solutions for contract, tax, labor, and civil issues related to healthcare and IT. The PINHÃO E KOIFFMAN ADVOGADOS team has great expertise in a wide range of legal issues faced by companies operating in the electronic equipment business, such as software companies, hospitals, clinics, manufacturers and providers of technology and telecommunication services, internet, e-commerce, cloud computing and new technologies at large.

In its operations, the firm interacts closely and dynamically with its clients and uses creativity to foster knowledge, enabling the teams to master complex issues and provide answers that streamline processes and boost business. With renowned specialization in legal matters related to technology and healthcare, the firm keeps permanently up to date with new, state-of-the-art technologies and their legal implications to help clients to set up, create and develop innovative business.

The firm provides Brazilian and foreign companies with both consulting and litigation services. PINHÃO E KOIFFMAN ADVOGADOS has taken active part in its clients' development process and always seeks to add value to their activities through the expertise of its partners and staff.

In the past few years, the firm has been assisting companies in their main routine needs by supporting their strategies to decrease liabilities and prevent contingencies. Integrated work allows companies to reach their goals while following generally accepted compliance and corporate governance rules.

**FOR MORE INFORMATION, PLEASE CONTACT:**



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