Outsourcing in Brazil: Overview

by Ricardo Barretto Ferr:eira, Juliana Petrella Hansen, Danielle Chipranski Cavalcante, Juliana Sene Ikeda, Lorena Pretti Serraglio, Fábio Capelletti, Ivana Cota, Natasha Midori Hinata, Sylvia Werdmüller von Elgg Roberto and Lucas Bianchini*, Azevedo Sette Advogados

Country Q&A | Law stated as at 01-Nov-2022 | Brazil

A Q&A guide to outsourcing in Brazil.

This Q&A guide gives a high-level overview of legal and regulatory requirements on different types of outsourcing; commonly used legal structures; procurement processes; formalities required for transferring or leasing assets; data protection issues; supply chain compliance; specification, service levels and escalation; flexibility in volumes purchased; charging methods; customer remedies and protections; warranties and indemnities; term and notice period; termination and its consequences; liability, exclusions and caps; dispute resolution; and the tax issues arising on an outsourcing.

Regulation and Industry Requirements

National Regulations

1. To what extent does national law specifically regulate outsourcing transactions?

There is no specific legislation regulating outsourcing transactions even in the event of cross-border transactions.

However, from a labour law perspective, outsourcing transactions are regulated by Law No. 13,429/2017 (Labour Law). Under this law, the outsourcing of any type of activity/business is possible provided:

- The legal requirements for the outsourcing are met.
- Any outsourcing performed for the purposes of contracting out are specific and in relation to the determinate services.

There are also specific tax provisions related to outsourced industrialisation (*industrialização por encomenda*).

Sectoral Regulations

2. What additional regulations may be relevant for the following types of outsourcing?

Sector-specific Regulations

IT and cloud services. There are no additional regulations relevant to private IT outsourcing. However, there are specific regulations for government IT outsourcings (see below, *Public sector*).

Telecoms. Telecommunications services are regulated in Brazil by Federal Law No. 9,472/1997. In addition to regulating the telecommunication sector, this law established the national regulatory agency for telecommunications in Brazil, the National Telecommunications Agency (*Agência Nacional de Telecomunicações*) (ANATEL).

Federal Law No. 9,472/1997 was amended by Law No. 13,879/2019, which created the possibility to change the form of operation of fixed switched telephone telecommunications services from a concession process to a procedure for attaining authorisation, provided certain legal requirements are met (such as investment commitments, prioritising the deployment of high-capacity network infrastructure for data communication in areas without adequate competition and the reduction of inequality).

Decree No. 10,402/2020 also regulates the adaptation, as well as the extension and transfer of radiofrequency authorisation, the granting of telecommunication services and satellite exploitation rights.

Decree No. 10,480/2020, which regulates Law No. 13,116/2015 (known as the General Law of Antennas), establishes the measures required for developing telecom infrastructure networks, and sets out the rules for examining parties interested in installing such infrastructure.

The recent Law No. 14,173/2021 amends Law No. 9,472/1997 and now provides (in item VII of Article 2) that the public sector must create conditions to expand connectivity and digital inclusion, prioritising internet coverage of public education establishments

There are no further regulations relevant to outsourcings in the telecommunications sector, although specific regulations apply to public sector outsourcings of telecommunications (see below, *Public sector*). However, if the outsourcing concerns telecommunication services, the customer remains accountable to ANATEL and consumers for the outsourced services.

Public sector. The Federal Constitution allows the federal government, states and the municipal districts to outsource certain public services, such as telecommunication and energy services (among others) through public concessions and permits. The Brazilian legal system provides for several types of public concession, which includes (among others):

- Public service concession.
- Administrative concession.
- Sponsored concession.
- Concession of use of public goods.

These forms of public concession are governed by various laws among which we highlight:

- Federal Law No. 8,987/1995 and Federal Law No. 9,074/1995, which regulate public service concessions, including those preceded by construction.
- Federal Law No. 11,079/2004, which regulates Public Private Partnerships (PPPs), which covers administrative and private concessions.
- Federal Law No. 14,133/2021, which recently came into force, updates Law No. 8,666/93 in relation to public concessions, biddings, and administrative contracts.

All public concessions, regardless of their type, must be preceded by a structured bidding process (Law No. 8,666/1993, as superseded by Law No. 14,133/2021 (Bidding Law) and the concession contracts, observing the specificities of each case, should provide for the distribution of risks between the granting authority and the concessionaire. Generally, the risks identified during the planning of the concession are ordinary transferable to the concessionaire, while any risks considered extraordinary would remain under the responsibility of the government.

Although the Bidding Law supersedes Law No. 8,666/93, it is legally possible to launch concessions under the old regime during a two-year transitional period. This allows agencies and other entities to gradually adapt to the new rules of public concession and administrative contracts. As the Bidding Law was published and took effect on 1 April 2021, the aforementioned two-year transitional period is due to end on 1 April 2023. The new provisions introduced in the Bidding Law would be relevant and applicable in an outsourcing context, provided the transaction involves the outsourcing of public services through public concessions and permits. Notable provisions include (among others):

- The reinforcement of effective planning, transparency and competition in the public sector concession process.
- The reinforcement avoiding poor quality public services and products wherever possible.
- Provisions balancing financial risks in public sector contracts.
- That all concessions should (preferably) be conducted electronically (Item VI, Article 12, Bidding Law).
- The introduction of a new form of concession process called the "Competitive Dialogue" (*Diálogo Competitivo*). Using this process, public authorities should maintain a dialogue with previously selected contractors based on objective criteria, to create alternative contractors and encourage competition when offering public sector contracts.
- The introduction of clauses which provide mandatory deadlines for receiving responses to requests to renegotiate prices or adjust the apportionment of finances.
- The introduction of step-in clauses in insurance policies for public concessions.
- Reducing the permissible period of delay when making payments to public authorities (reduced from 90 days to 60 days)
- Provisions setting out rigorous criteria and requirements that must be met before a public sector contract can be cancelled or suspended.

The aforementioned points are all relevant and apply in an outsourcing context, as long as it involves the outsourcing of public services through public concessions and permits.

Other important characteristics that must be highlighted in the concession contracts are:

- The supplier is liable to the public administration for the services provided, observing the contract's risk matrix.
- The public administration can unilaterally modify or terminate the agreement based on the public interest, subject to due legal process and safeguarding the right to any indemnities to the private as a result of unamortised investments.
- In contracts for essential services, the public administration has, among others, the right to temporarily take over the services and the relevant premises when the agreement is terminated to enable an uninterrupted service.

Any contract between an employee and the public administration entered into without a public contest has no effect and only guarantees the employee the right to receive:

- Compensation for the hours worked.
- Payment into the employee's severance fund account (*Contribuição ao Fundo de Garantia por Tempo de Serviço*) (FGTS).

(TST Precedent No. 363.)

PPPs are a special type of public services outsourcing. The law allows more contractual flexibility for these types of projects. In a PPP, the public administration pays a service fee to suppliers and, depending on the contract, the supplier may also receive tariffs paid by consumers. The following limitations apply to PPPs:

- The contract value must be over BRL10 million.
- The minimum term is five years and the maximum term is 35 years**.**
- Contracts that have as their sole object the supply of labour, the supply and installation of equipment or the execution of public works cannot be the object of a PPP.

There are also specific rules governing public sector outsourcings of IT and automation services (Decree No. 7,174/2010). The preference order below must be followed for the government to outsource in this field of activity:

- Goods and services produced with technology developed in Brazil in accordance with the Basic Productive Process, as defined by the Brazilian government. (The Basic Productive Process consists of the minimum manufacturing steps required by companies to manufacture a certain product as one of the counterparts to the tax benefits established by law. The Basic Productive Process is used by the Federal Government as a counterpart to the tax incentives promoted by the Manaus Free Trade Zone legislation and by the incentive legislation for the computer, telecommunications and automation goods industry (Informatics Law). The competence for establishing the Basic Productive Process lies with the Ministers of State for Economy and Science and Technology and are established through Interministerial Ordinances. (The rules for the Basic Productive Process concerning consumer goods, for example, are established by Interministerial Ordinance 317/2015.)
- Goods and services produced with technology developed in Brazil.
- Goods and services produced in accordance with the Basic Productive Process.

Micro and small-scale companies that meet the above requirements have priority over medium-sized and large companies that meet these requirements. Outsourcings of IT services classified as "common" (services that can be objectively defined in

terms of quality and performance during the bid process) can be done through electronic auction-type public bids provided the participating companies comply with the Basic Productive Process.

In contrast to other outsourcings, in irregular outsourcings of employees by a private entity to the public administration, no direct employment relationship is formed between the public administration and the employees (TST Precedent No. 313) (see *Question 9*).

Financial services. There are no additional regulations relevant to outsourcings of financial services.

Insurance. There are no additional regulations relevant to outsourcings of insurance processes.

Manufacturing. There are no additional regulations relevant to outsourcings of manufacturing processes.

Other Legal or Regulatory Requirements

Outsourcings are subject to the Brazilian Federal Constitution guarantees and also to the statutory consumer protection rules (see *Question 19*).

3. What industry sectors require (formally or informally) regulatory notification or approval for outsourcing transactions?

Telecoms

The telecoms sector is specifically regulated by ANATEL. Telecoms services may only be provided by companies established under Brazilian law and which have their principal place of business and administration in Brazil. This means that any outsourcing of telecom services must involve a Brazilian company established with the sole purpose of providing such services, as required under Article 86 of the Federal Law No. 9,472/97 (General Telecommunication Law).

The concessions process for telecoms must follow the general procedure established in Article 17 of the Biddings Law, whereby the following concession phases must be carried out:

- Preparatory phase.
- Announcement of the concession notice.
- Presentation of proposals and biddings.
- Trial phase.
- Qualification.
- Appeal review.
- Approval.

Public Sector

The concessions process for public sector contracts must follow the general procedure established in Article 17 of the Bidding Law (see above, *Telecoms*).

The Biddings Law has established the National Public Procurement Portal (*Portal Nacional de Contratações Públicas*) (PNCP), which is a public website for the disclosure of public sector contracts. The PNCP also provides a centralised process for awarding public consents and sets out rules in relation to announcing the chosen contractor and the selection criteria (including the specific limitation periods for reviewing and announcing the awarded party).

According to Article 94 of the Bidding Law, disclosure in the PNCP is a mandatory requirement for the contract to be effective against third parties. In addition, to be effective against third parties, any amendments to the contract must also occur within the following timeframes, counted from the date of signing:

- For a bidding: within 20 working days.
- For a direct contracting: within ten working days.

As mentioned previously, these rules would apply in an outsourcing context when the transaction involves the outsourcing of public services through public concessions and permits.

PPPs require a different concession process. The bidding process allows any interested party to compete in a preliminary phase (provided they comply with the minimum qualification requirements established on public notice). The phases for bidding are similar to the general concessions process:

- Preparatory phase.
- Announcement of the bid notice.
- Presentation of proposals and bids, when applicable.
- Trial phase/decision.
- Qualification.
- Appeal review.
- Approval.

Financial Services

There are no requirements for regulatory notification or approval of outsourcing transactions regarding financial services in Brazil.

Insurance

There are no requirements for regulatory notification or approval of outsourcing transactions regarding insurance in Brazil.

Joint Ventures and Merger Control

There are no requirements for regulatory notification or approval of outsourcing transactions regarding joint ventures and merger control in Brazil.

Structuring the Transaction

4. What transaction models are commonly used in an outsourcing in your jurisdiction? What are their respective advantages and disadvantages?

Service Agreements

The most commonly used structure in an outsourcing is a services agreement that regulates the relevant terms and conditions. If the outsourcing is complex, it may be regulated by a set of agreements (including agreements for the transfer of assets). In addition, the outsourcing may be at the customer's or the supplier's premises. If so, agreements may become more complex and increase the risk of creating a direct employment relationship (see *Question 9*).

This structure has the advantage of being more cost-effective for the customer to set up and gives him more control over the price (as the agreement will specify either a fixed services fee or a determinable price). The disadvantage is that the customer may lose some control over the services provided, as the supplier has the expertise in the area. Although the customer can audit the supplier's work, it may not be able to control the quality of the services and details of the transaction.

Multi-sourcing

Multi-sourcing can be an effective alternative for businesses needing to outsource to different areas. It is most likely used to hire suppliers and render activities in accordance with determined and specific business process objectives set out in the related agreements.

This structure allows the customer to have a specific service and to compare the prices with similar suppliers, which means the services are likely to be provided with more efficiency. The disadvantages relate to managing the many suppliers in the same area and integrating them with the same scope of activities.

Direct outsourcing

Direct outsourcings are not applicable to Brazil.

Indirect outsourcing

Indirect outsourcings are not applicable to Brazil.

Joint Venture or Partnership

Another possible structure is to incorporate a new entity as a joint venture, to which the supplier and the customer contribute capital, technology and/or assets. Under this structure, the customer may need to pay more to implement the outsourcing and to maintain the joint venture company than it would under another type of structure.

The advantage of this structure is that the customer is able to participate more closely in the provision of services. The disadvantage relates to cost (see above, *Joint Ventures and Merger Control*) and difficulty in establishing the limits of liability of each contracting party in practice.

Captive Entity

Captive entity outsourcings are not applicable to Brazil.

Build Operate Transfer (BOT)

A BOT contract is a model used to finance large projects, typically infrastructure projects developed through PPPs (see *Question 2*). The BOT refers to the initial concession by a public entity to a private firm to both build and operate the project in question.

The use of this model is advantageous insofar as the public sector uses the participation of the private sector to advance its public policy agendas and the realisation of public services. There is an efficiency gain from two perspectives:

- Firstly, the participation of the private initiative tends to bring more efficiency to the provision of public services, so the public sector benefits from the means of production and the know-how of the private initiative.
- Secondly, there are efficiency gains related to the comparison of costs between public procurement using the traditional model provided for under Law No. 8666/93 and a PPP contracting, due to the efficient allocation of risks, which follows the logic of risk attribution according to the parties' ability to manage them, should they materialise.

Procuring the Supplier/Service Provider

5. What procurement processes are used to select a service provider or supplier of outsourced services?

Market Testing

Market testing is used in Brazil. The outsourcing customer should analyse the performance of the supplier and compare its performance other companies of the same segment.

Request for Information

It is possible for the outsourcing customer to verify whether the supplier complies with the relevant labour laws by analysing its certificates regarding:

- Collections from the FGTS (that is, a workers' fund provided by the Brazilian Federal Government).
- Labour claims distribution.
- Labour debtor's registration (BNDT).
- Usually, these certificates are promptly available to the customer and the customer's legal and business teams should, as best practice, analyse such documents.

Request for Proposal

Typically, the customer determines internally which services or activities are going to be outsourced, and the requirements for the outsourcing and supplier. It then issues a request for proposal (RFP) to identify possible suppliers. The RFP describes in detail what the customer expects from the outsourcing.

Invitation to Tender

The invitation to tender is often used by government entities subject to the provisions of the Public Bidding Law when contracting services and goods (see *Question 2*). Government entities using this process must (unless the law provides otherwise) issue a call for bids describing, among other things:

- The service to be contracted.
- The requirements to be met by the bidder.
- The bid procedure.
- The date of bidding.
- A draft of the contract to be executed with the company that will provide the outsourced services.

Request for Quotation

When requesting a quotation from the supplier, the outsourcing customer should ensure that the budget stretches far enough to cover all services and comply with all legal obligations concerning the applicable labour, tax and regulatory rules.

Due Diligence

After analysing bid proposals, the customer selects a few potential suppliers and carries out a due diligence process to verify which supplier is the most suitable for the outsourcing. The due diligence could include, for example, analysing the requested documents and the performance of the supplier in connection with the provision of the services. Before due diligence, the parties sign non-disclosure agreements. Once a supplier is selected, the parties negotiate the agreement (or agreements) and then implement the outsourcing.

Negotiation and Further Due Diligence

When the supplier and customer are private companies, both parties are free to lead the negotiation in the direction that best suits their interests. However, when contracting with a public entity, a supplier has no other rights of negotiation than those stated in the call for bids.

Transferring or Leasing Assets

Formalities for Transfer

6. What formalities are required to transfer assets on an outsourcing transaction?

The customer may retain ownership of its assets used in the outsourcing, as this gives it more control and flexibility if it intends to change supplier. The customer can grant the supplier the right to use the assets in the outsourcing while retaining ownership. Where the supplier acquires assets from the customer or from third parties specifically for the outsourcing, the outsourcing agreement normally gives the customer an option to re-purchase the assets on the termination or expiry of the outsourcing agreement.

Immovable Property

The transfer of title to immovable property must be in writing and the relevant transfer document (for example, the purchase and sale agreement) must be:

- Executed before a notary public as a public deed.
- Registered with the relevant real estate registry.

IP rights and Licences

As a general rule, the transfer of IP rights must be in writing and, depending on the nature of the IP right, registration of the transfer with the Brazilian authorities is required, as follows:

- Trade marks, patents, industrial designs and geographical indications must be registered with the Brazilian Patent and Trade mark Office (*Instituto Nacional de Propriedade Industrial*) (INPI).
- Domain names must be registered with the Centre for Information and Co-ordination (*Núcleo de Informação e Coordenação do Ponto br*) (*www.nicbrazil.com/nic_brazil_english.html*).
- Plant varieties must be registered with the National Service for Plant Variety Protection.

Registration of software and copyright is not mandatory. However, if they are registered in Brazil, then their transfer must also be registered, as follows:

- Software transfers must be registered with the INPI.
- Copyright transfers must be registered, depending on the work, with specific national entities.

Generally, the transfer or assignment of IP licences must be in writing and, depending on the terms and conditions of the licence agreement, the consent of the other contracting party may be required. The following agreements must be registered with the INPI to be effective against third parties and to allow remittances abroad:

- Supply of technology and technical assistance.
- Trade marks, patents and industrial designs assignment or licence.
- Franchise.

Movable Property

As a general rule, there is no specific formality required to transfer movable property in Brazil, although it is advisable that the assignment be made in writing.

Key Contracts

The assignment of key contracts must be in writing and, depending on the terms and conditions of the agreements, the consent of the other contracting party may be required.

Offshoring

This will depend on the type of service/product and the country/state applicable to the offshoring. Notwithstanding the foregoing, as a general rule, there is no specific formality in this regard in Brazil.

Data and Information

The shared use of personal data and information on the transfer of assets in an outsourcing transaction are regulated by the Brazilian General Data Protection Law (*Lei Geral de Proteção de Dados Pessoais*) (Law No. 13,709/18) (LGPD). If the outsourcing occurs within the territory of Brazil, one of the legal bases set out in Articles 7 or 11 of the LGPD, may be applied to the processing of any personal and sensitive personal data. If the outsourcing occurs outside of the territory of Brazil but relates to an international transfer of personal data, one of the mechanisms from Article 33 may apply to the processing (see *Question 9, Data Protection and Data Security*). If the transfer of assets on the outsourcing transaction involves only non-personal data and information, there is no specific regulation to be observed.

Formalities for Leasing or Licensing

7. What formalities are required to lease or license assets on an outsourcing?

Immovable Property

There is no specific formality required for the lease of immovable property, but the agreement is subject to specific regulation and it is advisable that the lease agreement be in writing (Law No. 8,245/1991; Civil Code (*Código Civil*) (Law No. 10406/2002)). For the lease agreement to be effective against third parties, it must also be registered with the relevant real estate registry.

IP rights and Licences

Brazilian law does not set out any specific formality for most IP licences. However, it is advisable for a licence agreement to be in writing. In addition, to be effective against third parties, certain agreements and licences must be registered with the INPI (see *Question 7*, *IP Rights and Licences*).

Where the licensor is a foreign entity, for those agreements and licences that must be registered with the INPI to be effective against third parties, registration of the licence agreement with the INPI is necessary to enable the remittance of payments abroad and the deductibility of payments by the Brazilian licensee for local corporate income tax purposes.

Movable Property

Brazilian law does not require any specific formalities for leasing movable property, but it is advisable that the lease agreement be in writing.

Key Contracts

Contracts cannot be licensed or leased, but only assigned. Subcontracting part of the obligations may be possible, depending on the terms and conditions of the relevant contract. If a customer does not want the supplier to subcontract, it is important to express it in the outsourcing agreement.

Transferring Employees on an Outsourcing

8. Are employees transferred by operation of law?

For information on transferring employees in an outsourcing transaction in Brazil, including structuring employee arrangements (including any notice, information and consultation obligations) and calculating redundancy pay, see *Country Q&A: Transferring Employees on an Outsourcing in Brazil: Overview*.

Data Protection and Secrecy

9. What legal or regulatory requirements and issues may arise on an outsourcing concerning data protection?

Data Protection and Data Security

Use of processors and sub-processors. The LGPD applies to individuals and entities that process personal data within the territory of Brazil, regardless of the location of the data controller or data processor. The LGPD, which is strongly inspired by the EU's General Data Protection Regulation (*(EU) 2016/679*) (GDPR)), has been in effect since September 2020 (and the associated administrative penalties in effect since August 2021).

The LGPD establishes core principles relating to the processing of personal data, data subjects' rights, legal basis for processing, accountability measures, rules for international transfer of personal data, penalties and civil liability for data breaches or any other form of improper processing of personal data. In addition, the LGPD also established the Brazilian Data Protection Authority (*Autoridade Nacional de Proteção de Dados*) (ANPD), tasked with overseeing, implementing, and enforcing compliance with the LGPD. The ANPD has also issued specific guides and regulations concerning data protection and data security.

According to the LGPD, a data processor can be a natural person or legal entity, governed by public or private law, which processes personal data on behalf of a data controller. The LGPD does not expressly refer to "sub-processors" although according to the ANPD's Guidance for Definitions of Personal Data Processing Agents, sub-processors are defined as those "hired by the operator to assist in the processing of personal data on behalf of the controller." All sub-processors must also follow the same rules as those established for data processors under the LGPD.

Data processors (and sub-processors) must keep records of all personal data processing operations carried out by them, especially when based on a legitimate interest. Data processors must also carry out their processing activities strictly in accordance with the instructions provided by the data controller and must verify that they have complied with the data controller's instructions and of the rules governing the subject (for example, through the use of data processing audits).

With regard to the liability for personal data breaches requirements (for both the customer and supplier), the data controller and data processor who, due to the exercise of the personal data processing activity, cause any material or moral damage in violation of the applicable law, will be responsible for compensating for the damage caused (Article 42, LGPD).

The LGPD specifically provides that the data processor will be jointly and severally liable if it fails to comply with its data protection law obligations or if it fails to follow the lawful instructions of the data controller (in which case the data processor will be equivalent to the data controller). In addition, if the data processor causes damage by not following the necessary data security measures, it will be liable for any damage arising from its violation.

The data controller and data processor will not be liable only if they can demonstrate any of the following:

- That they did not carry out the personal data processing attributed to them.

- That when they carried out the processing, there was no violation of the data protection law.
- That the moral or material damage resulted from an exclusive fault of the data subject or a third party.

Data protection agreements. Both the LGPD and the ANPD's Guidance on Processing Agents reinforce the importance of adopting agreements to align the responsibilities of those handling personal data. They encourage the use of formalising instruments in the form of data protection agreements, which should be used between data controllers and data processors, as well as between processors and sub-processors. These agreements should include, among other things, provisions concerning the processing of personal data, setting out the:

- Personal data that is being processed.
- Purposes of the processing.
- Adoption of relevant security measures.
- Notification process in the case of data security incidents, and requests for rights of data subjects, and indemnities.

Transfer of personal data to third countries. According to the LGPD, transfers to third countries may occur when certain legal mechanisms is used for processing. These include, for example, when the data transfer is made to international bodies which already provide an adequate level of protection, when the data controller can demonstrate and guarantee compliance with the principles, rights and data protection regime established in the LGPD (through specific contractual clauses for the given transfer, standard contractual clauses and so on), or when the transfer is necessary for international legal co-operation between public intelligence, investigative and prosecutorial agencies, in accordance with the instruments of international law, or is necessary to protect the life or physical safety of the data subject or third party (among others). At the time of writing, the ANPD has so far not issued any opinions on the subject and has not conducted an analysis of the adequacy of data security levels of other countries. It is anticipated that this will be reviewed in 2023, according the new regulatory agenda of ANPD, published on 4 November 2022. For now, companies have been relying on their global contracts.

Security requirements. The LGPD provides that data controllers and data processors must adopt security, technical and administrative measures that are capable of protecting personal data from unauthorised accesses and accidental or unlawful situations or any form of inappropriate or unlawful processing. Minimum security standards may therefore be established by the ANPD, and the data controller and data processor must therefore adopt any measures designed by the ANPD to ensure proper data security.

In January 2022, the ANPD published Resolution No. 2: Application of the LGPD for Small Agents, which establishes specific rules for small processing agents. According to Resolution No. 2, small processing agents can adopt a simplified information security policy, which would encompass only the requirements essential and necessary to process the personal data without the processing leading to any unauthorised access, accidental or unlawful destruction of data, or loss, alteration, communication or any form of inappropriate or unlawful processing. Resolution No. 2 considers "small agents" to be (among others) start-ups, micro-enterprises, small businesses, non-profit corporate entities, natural persons and depersonalised private entities that process personal data which would have typical controller or processor obligations, and spaces open to the public (such as squares, shopping centres, public roads, bus, subway and train stations, airports, ports, public libraries) provided they satisfy the following criteria:

- They do not perform high-risk data processing activities
- They do not have a gross revenue higher than the limits provided in Article 3, II, of Complementary Law No. 123/2006 or for start-ups, in Article 4, § 1, I, of Complementary Law No. 182/2021.

- They do not belong to a de facto or *de jure* economic group, whose global revenue exceeds the limits referred to above.

Mechanisms to ensure compliance. Following the principle of accountability, several Articles of the LGPD deal with organisations' obligations to employ the technical and organisational measures necessary to demonstrate compliance.

Sanctions for non-compliance. If the data processor and/or data controller infringes the rules set out in the LGPD, they will be subject to the administrative sanctions applied by the ANPD.

These can include, for example, a warning, with an indication of the time period within which to adopt the necessary corrective measures, a simple fine of up to 2% of a private legal entity, group or conglomerate's revenues in Brazil, for the prior financial year, excluding taxes, up to a total maximum of BRL50 million for each infringement, or a daily fine, subject to the total maximum of BRL50 million for each infringement (among others).

These sanctions are applied following an administrative procedure that provides the data processor and/or operator with the opportunity to state its full defence, in a gradual, single or cumulative manner, in accordance with the specifics of the particular case and taking into consideration the parameters and criteria provided in the LGPD (for example, based on the severity and the nature of the infringement, whether any personal rights were affected, whether the infringer co-operated with the case, whether the infringer had adopted good practices and governance policies, among others).

These penalties also do not replace the application of administrative, civil or criminal sanctions defined in Law No. 8,078 of 11 September 1990 (Consumer Protection Code) and under specific legislation.

Banking Secrecy

General requirements. Financial institutions can outsource their services provided the outsourcing complies with Complementary Law No. 105/2001, which governs banking secrecy in Brazil and the following resolutions from the Central Bank of Brazil (*Banco Central do Brasil*) (BACEN):

- BACEN Resolution No. 3,935/2021, which governs outsourcing by financial institutions.
- BACEN Resolution No. 01/2020, which governs the new instant payment system (PIX) in Brazil.
- BACEN Resolution No. 32/2020, which establishes the technical requirements and operational procedures for the implementation of the Open Financial System (Open Banking).

All confidential information provided to companies by its customers must be kept secret, that is, the information can only be disclosed in situations permitted by law or with the authorisation of the customer.

Security requirements. In addition to the security requirements regarding data protection and data security set out above (see above, *Data Protection and Data Security*), BACEN has issued BACEN Resolution No. 4,658/2018, which sets out BACEN's general cyber-security policy and the requirements for any outsourcings of data processing, data storage and cloud computing services that must be observed by financial institutions and other institutions licensed by BACEN. It is worth mentioning, although in parallel, the recent BACEN Resolution No. 4,893/2021, which provides for the cyber data policy and establishes requirements for contracting cloud processing services must be observed by companies subject to regulation by BACEN.

Mechanisms to ensure compliance. The most common way of ensuring compliance with secrecy requirements is to include a confidentiality obligation in an outsourcing agreement, which imposes a fine for breach of the obligation. A breach of the rules on banking secrecy, except in circumstances expressly permitted by law, is a criminal offence; anyone who breaches the law may be subject to a fine and up to four years' imprisonment (Law No. 105/2001).

In addition, Article 12 of BACEN Resolution No. 4,658/2018 requires financial institutions and other institutions licensed by BACEN to adopt procedures (which must be documented) prior to outsourcing their services if this involves services related to data processing and the storage of data and cloud computing.

These procedures generally require the bank to adopt the necessary corporative governance and management practices, which must be proportional to the relevance of the service being outsourced and the risks to which they are exposed. These procedures require the bank to verify that the potential supplier has the capacity to:

- Comply with the current legislation and regulations in force.
- Securely access, process and store the relevant data and information.
- Ensure the confidentiality, integrity, availability and recovery of the data and information being processed or stored by the supplier.
- Adhere to the necessary certifications required for the provision of the services to be outsourced.
- Access the outsourcing customer's reports (prepared by an independent specialised audit firm) regarding the procedures and controls for the provision of the services to be outsourced.
- Provide information and management resources adequate for the monitoring of the services to be provided.
- Identify and segregate the outsourcing customer's client data through physical or logical controls.
- Match the quality of access controls required to sufficiently protect the outsourcing customer's client data and information.

Article 21 of BACEN Resolution No. 4,893/2021 also requires financial institutions and other institutions licensed by BACEN to establish monitoring and control mechanisms to ensure the proper implementation and effectiveness of the BACEN's cyber-security policy, implement a related action and incident response plan and adhere to the general requirements relating to data processing and storage of data and cloud computing services. This includes introducing mechanisms to:

- Set out the relevant processes, tests and audit trails.
- Set out the appropriate metrics and indicators.
- Identify and correct and relevant deficiencies.

Notifications regarding the outsourcing of the relevant services received by the outsourcing customer from the supplier must be considered in the definition of these mechanisms. These mechanisms must also be subject to periodic testing by internal audit, when applicable, which must be compatible with the bank's own internal controls.

Finally, Article 26 of BACEN Resolution No. 4,893/2021 provides BACEN with the right to veto or impose restrictions on the outsourcing of the data processing and storage and cloud computing services if it finds any failure to comply with the provisions of that Resolution.

Sanctions for non-compliance. See above, *Data Protection and Data Security*.

Confidentiality of Customer Data

General requirements. If the customers' data refers to legal entities, there is no law providing standards for confidentiality. However, it is a good practice to adopt clauses addressing aspects such as security measures to ensure the confidentiality of information by the customers and supplier, and limits to the shared use of confidential information.

Security requirements. There are no legal or regulatory requirements regarding the security of confidential customer data. However, it is a good practice for the management to apply technical and organisational security measures to avoid the potential for unauthorised access and to prevent security incidents from happening with the confidential data.

It is also highly recommended that companies put in place policies and other instruments to guarantee the quality of data (for example, through an Information Security Policy (ISP)), as well as provide adequate training to the employees and third parties, in order to avoid the improper use of confidential customer information.

See also above, *Data Protection and Data Security*.

Mechanisms to ensure compliance. Online business operators must integrate systems that comply with Brazilian laws regarding the collection, storage or processing of data, as well as the respect for privacy and confidentiality of communications (paragraph 3, Article 11, Law No. 12,965/2014 (known as the Internet Act)).

See also above, *Data Protection and Data Security*.

Sanctions for non-compliance. See above, *Data Protection and Data Security*.

International Standards

Compliance with international data privacy standards is needed in order for certain international data transfers to be carried out. Therefore, compliance with international standard is important, although not legally required for all situations. In addition to complying with international standards, there may be significant differences in the laws of other countries (which may not be necessarily in Brazil or which may not already be complied with in Brazil).

Supply Chain Compliance

10. What (if any) compliance provisions should an outsourcing customer include in the contract?

The outsourcing customer should ensure they include compliance-related provisions regarding anti-bribery, anticorruption, anti-slavery and human trafficking issues in the contract documentation. The customer should also ensure these provisions are cascaded down to the supplier in the documentation. The depth and coverage of such provisions will depend on the nature of the supplier's economic activity, past reputation and on the type of engagement with the customer.

Following the introduction of Law No. 12,846/2013 (known as the Brazilian Anti-Corruption Act), many companies are now including compliance-related clauses in their outsourcing agreements to bind every participant in the supply chain (the customer, supplier, clients, and any third parties). Under the Anti-Corruption Act, outsourcing customers can be held responsible for any corrupt conduct made in its interest or benefit by the supplier.

Compliance clauses may subject customers to legal obligations, especially in outsourcing contracts, and the following compliance-related clauses should be included (among others):

- Anti-bribery and corruption obligations.
- Anti-conduct deviation obligations.
- Anti-human rights violation obligation (for example, clauses in relation to anti-slavery and human trafficking).
- Confidentiality and security terms (to ensure the security of the supplier's network and information systems.)
- Clause ensuring the avoidance of practices which may be harmful to competition.

Moreover, it is recommended that clauses are included in the agreement in which the customer would be compensated for all kinds of damages, primarily in relation to any expenses due to labour claims. The outsourcing customer will be subject to secondary liability in cases where the servicer provider fails to adhere to its requirements concerning labour claims (provided there has been no instance of fraud). In such case, parties involved further up the supply chain would be required to comply with the requirements of any outsourcing contracts and the Labour Law. The parties involved in the supply chain must comply with the legal obligations established in the outscoring contracts and the Labour Law (although where there are instances of fraud in the outsourcing process (from customer to supplier) the parties would be jointly liable (including for labour and employment purposes)).

Both the Labour Law and TST Precedent No. 363 establish illicit practices in labour contracts, including those occurring in other stages of the supply chain. Where an illegal act is proven, both the service provider and the customer are liable under Article 942 of the Civil Code.

Services: Specification, Service Levels and Escalation

11. How is the service specification typically drawn up and by whom?

The services specification is initially drawn up by the customer in the request for proposal (RFP). During the course of negotiations with the supplier, the parties typically amend or add to the services specification and description. The specification is then usually included in the relevant agreement. It is also common practice to include a customer's RFP as a schedule to the agreement.

12. How are the service levels and the service credits scheme typically dealt with in the contract?

The service levels and key performance indicators are usually described in the relevant agreement (or a schedule to the agreement). Service credits schemes are usually included in the payment section and in a schedule to the agreement. The customer sometimes replaces the service credits scheme with non-compensatory penalties for failure to reach performance levels. In any event, service levels and service credits schemes are specific to each type of outsourcing and vary according to the customer's needs.

It is important that service levels:

- Are objectively measurable.
- Are based on availability, response times and so on.
- Have their breach measured by level of severity.

If not, it can be very difficult to enforce the service credits scheme and reduce the fees where the supplier does not perform its obligations according to the agreement. The parties should review the service levels from time to time to ensure that they meet the customer's needs.

The agreement may also provide for the payment of a bonus to the supplier if performance exceeds certain thresholds.

13.Are there any service escalation mechanisms that are usually included in the contract? How often are these exercised and how effective are they in restoring the services to the required levels?

Service escalation mechanisms are not expressly forbidden by law in Brazil. However, since using them may increase the outsourcing customer's labour liability, they are not usually included. Outsourcing agreements usually include monetary penalties to the supplier and the right of termination of the contract by the customer in the event of the service provider's default.

Service or staff augmentation is implemented in order to increase capacity in everyday work, as well as in long-term when hiring a permanent team, increases specialized skills and enhances the organisation strategy.

Step-in rights clause is foreseen in Law No. 11,079/2004 which intends to minimize eventual economic risks in PPP contracts. Outside the scope of PPP, the step-in right clause is applied to concessions in the following terms:

- Necessity of provision (including terms and conditions) in the concession contract.
- SPC must have its financial situation weakened.
- Financiers must meet legal and fiscal capacity requirements.
- Maintenance of the status quo of the obligations assumed by the concessionaire and its controllers with the granting authority.

Transaction Management

Organisational Structures and Change Management

14. What types of organisational structures are commonly used to govern outsourcing transactions?

Change management models are used to ensure the adequate transition of new organisational structures during outsourcing transactions, which compasses a great deal of permanent transformations for all the parties involved.

There are many change management models that have proved to be efficient in transitional processes (John Kotter's change management model, Kurt Lewin's, McKinsey's, Kubler-Ross's, Bridges' transitional model, ADKAR model, Cycle PDCA model, and others (see *Question 15*)). These models set out strategic measures to ensure the entire team is aligned towards the same goal, including third-parties from outsourcing contracts.

Each model is designed to address a specific change to the structure of the transaction that may result from:

- Changes to the company's systems, or the scope of services.
- Changes in leadership.
- Modifications to regulatory requirements.
- introduction of a new competitor in the market.

However, the chosen model will depend on the company's profile, and that of its employees. The types of transition in the process of organisational change management include:

- Incremental, consisting of small adjustments to increase productivity, or to adopt new technologies or new products.
- Planned strategic changes, to take into account periods of smaller demand and which require less operational impact.
- Emergent changes, which would lack planning due to their urgent nature.
- Radical changes, which are commonly used in larger operations (such as M&A transactions) which require a whole redirection of the company's strategy, causing more instability.

Change management is also crucial to outsourcing transactions, since the outsourcing will affect not only the company as a unit but also its employees and the entire organisational structure within the workspace. To ensure effective transition, the most common organisational structures used to guide such process are:

- Special co-ordinating committees responsible for organising the daily activities of the company, to implement the structure the transition gradually and effectively through periodic meetings.
- An analysis of non-value-added activities that hold back the company's productivity and profits.

- Compliance committees to ensure labour rights are protected according to the applicable regulations. This involves employees' assistance through initiatives to reassure employees that their positions will be maintained, especially when dealing with outsourcing transactions (many employees may be concerned with losing their position in the company, which can create difficulties for the outsourcing relationship between the parties).

15. What change management models are commonly used to govern outsourcing transactions?

The customary change management models used when conducting outsourcing transactions should incorporate strategies to ensure the effectiveness of the organisational transition (see *Question 14*). These may also include:

- Communication strategies for the company groups (involving employees, managers, directors, human resources and board members).
- Staff transition strategy, to ensure the effectiveness of HR initiatives, including acceptance strategy and integration policies.
- Regular meetings to monitor the staff transition and the activities of both the service provider and the customer.
- Training programmes to maintain the organisation in the post-outsourcing environment.

The most commonly used change management models in outsourcing transactions are:

- Kotter's change management model, which focuses on the reaction of employees to the change in the company's environment.
- The ADKAR model, which brings five goals to be accomplished by the organisation (awareness, desire, knowledge, ability, and reinforcement).
- Lewin's model, that involves a process of transition through three stages. With this model, the change managers must first unfreeze a certain process, then they must implement the change and evaluate it, then further freeze the process following employee feedback.

Flexibility in Volumes Purchased

16. What mechanisms are commonly used to manage adjustments in the volume of services?

The parties are free to contract, provided that the limits stated by the Brazilian laws are observed. In principle, there is no limitation regarding the minimum and maximum volumes involved in this type of agreement.

Exclusive agreements are not prohibited by law. However, exclusive agreements between parties may lead to competition law risks. Law No. 12,529/2011 (known as the Anti-trust Law) provides for the control of market structures and business conduct. The law prohibits conducts that could restrict commercial transactions or result in the abuse of a dominant market position.

Charging Methods and Key Terms

17. What charging methods are commonly used on an outsourcing?

Fixed Price Plus

The most common method used on an outsourcing is a fixed fee combined with other charges based on variation mechanisms (such as the number of employees, requests and so on).

Cost Plus

It is also common to charge based on time and materials using a cost-plus model (or to use either of these plus a fixed price). In cost-plus models, the customer should be able to review the budget and the costs incurred.

18. What other key terms are used in relation to costs, including auditing and benchmarking mechanisms?

The parties normally agree on benchmarking to set the fees charged under the agreement and engage a third party to compare the contractual fees with those generally charged in the market.

The agreement may also provide for a lump sum payment to the supplier for the initial costs of implementing the outsourcing.

There may also be charge variation mechanisms (see *Question 12* and *Question 14*).

When fixed prices are used, the agreement may specify that the service fees are subject to indexation on an annual basis according to a particular index, such as the Index of Prices to Consumers (IPC).

Customer Remedies and Protections

19. If the service provider fails to perform its obligations, what remedies and relief are available to the customer under general law?

If the supplier fails to perform its obligations, the customer can:

- Suspend compliance with its obligations under the agreement.
- Terminate the agreement for cause (subject to compliance with the agreement's termination provisions).
- Seek indemnification for the damages caused to it arising from the supplier's breach, plus interest, indexation and legal fees.
- Seek specific performance. Depending on the nature of the services, a court can authorise a third party to provide the services on the supplier's behalf and then charge the supplier a services fee. Alternatively, the customer could seek specific performance by asking the judge to determine the supplier pay its associated costs (Article 249, Civil Code).

20. What customer protections are typically included in the contract to supplement relief available under general law?

The following customer protections are typically included in outsourcing agreements:

- Penalties for breach or delay of key obligations.
- Audit rights.
- Periodic reports.
- Step-in rights for the customer to temporarily take over the outsourced services in cases of severe breaches by the supplier.
- Service levels (see *Question 12*).
- Minimum insurance coverage, depending on the type of agreement.
- The ability to review or adjust services fees based on service levels, benchmarking and so on.

As above mentioned in *Question 19*, the agreement can provide customer protections by including an indemnification clause, as well as provisions concerning termination and payment of damages. A step-in rights clause can also be applied to PPPs and concession contracts under general law.

To assure further security in outsourcing contracts, companies often subject outsourcing transactions to contract auditing, either by structuring an internal specific area for the matter, or delegating the monitoring to a third party or even opting for a hybrid model.

Contract auditing must be carried out exclusively by attorneys (Ruling No. 66/88 of the Federal Council of the Order of Attorneys of Brazil (OAB)). The process of auditing includes monitoring, registering and officialisation of the contracts and it must observe confidentiality and secrecy of documents, facts, and information.

Benchmarking is also a common practice, which allows for a precise analysis on the business performance and market trends. Benchmarking must be based on the principles of lawfulness, mutuality and confidentiality.

The types of possible benchmarking vary according to the outsourcing contract subject, but generally can be competitive, generic, functional, internal and co-operation.

The process of benchmarking is divided into five phases:

- Planning.
- Data collection.
- Data analysis.
- Adaptation.
- Implementation.

Warranties and Indemnities

21. What express warranties and/or indemnities are typically included in the contract documentation?

Warranties and indemnities vary according to the type of outsourcing and the nature of the services being performed, but typical provisions included in outsourcing agreements are:

- Confirmation that the parties are validly existing entities and are authorised to enter into the agreement.
- Confirmation that the parties are independent contractors and that there is no employment, joint venture or agency relationship between them.
- Confirmation that each party is responsible for its own employees, and indemnification against an employee filing a lawsuit or complaint against the other party.
- Warranties of IP ownership and indemnities against IP rights' infringement.

- If products are supplied, warranties regarding the product's quality or use.
- Confirmation that the supplier will comply with applicable laws when providing the services.
- Warranties from the supplier that the services will meet the contractual specifications.
- Confirmation that the supplier has technical and operational structure to perform the agreement with no need of additional investments.

22. What requirements are imposed by national or local law on fitness for purpose and quality of service, or similar implied warranties?

A contracting party can reject a defective good or product, or demand a proportionate price reduction, within 30 days of delivery for visible defects, or 180 days from the day on which the defect is shown in the case of hidden defects (Civil Code).

If the agreement sets a warranty period, this overrides the term provided for by the Civil Code for the buyer to make a claim. However, even while the contractual warranty is in force, a buyer or contracting party who is harmed by the product defect must notify the other party of the defect within 30 days of the defect becoming apparent. Failure to do so renders the warranty unenforceable.

Consumer contracts have minimum protection requirements (statutory warranties), and a strict civil liability regime governing damages caused by the product or service or for a product's imperfections. Statutory warranties cannot be waived, as a matter of public policy.

The consumer can claim against visible or easily verifiable defects of durable products within 90 days of the actual delivery of the product. For hidden imperfections or defects, the 90-day term starts when the defect is shown. If the supplier does not correct the imperfection within 30 days, the consumer can demand one of the following, at the consumer's option:

- Replacement of the product by another without defects of the same kind.
- Immediate reimbursement of the amount paid, with indexation. This does not affect the consumer's right to recover any losses and damages.
- A proportionate price reduction.

23. What types of insurance are available in your jurisdiction concerning outsourcing? Are there any types of insurance required by law?

There is no specific regulation concerning insurance issues on an outsourcing. Companies can, however, obtain insurance to cover potential liabilities arising from services and employee actions to be provided under an outsourcing arrangement.

As a customer has subsidiary liability for services provided by a supplier, and may be held liable for any damage caused to clients or third parties (see *Question 20*), it may wish to obtain insurance to cover these risks.

In addition, companies can obtain insurance to cover predetermined risks that may affect the company's business (Civil Code). However, if a company acts fraudulently to obtain insurance, the insurance agreement is null and void (Article 762, Civil Code).

Termination and Termination Consequences

Events Justifying Termination

24. What events justify termination of an outsourcing without giving rise to a claim in damages against the terminating party?

As a general rule, a breach of contract justifies the termination of an agreement by the innocent party, provided that the breach is relevant.

Insolvency Events

Although most agreements specify that insolvency or bankruptcy events terminate the agreement, this may be deemed unenforceable (Law No. 11,101/2005 (known as the Bankruptcy Law)), in which case termination may give rise to a claim in damages against the terminating party.

Termination for Convenience

In an agreement for an indefinite term, termination for convenience cannot give rise to a claim in damages against the terminating party provided that:

- The agreement specifies that either party can terminate it without cause.
- The prior notice period for the termination is reasonable in view of:
    - the investments made by the terminated party;
    - the length of time that the agreement remained in force; and
    - the impact that the termination may have on the terminated party's business.

25. What remedies are available to the contracting parties?

If the termination is due to *force majeure* or act of God, it will occur without payment of damages and losses. However, if the failure is due to a party's fault, that party will be subject to payment of a contractual penalty and/or indemnification for damages, including, in some cases, incidental damages and loss of profits.

Exit Arrangements

26. What mechanisms are commonly used to address exit and post-termination transition issues?

The supplier has no implied rights to continue to use licensed IP rights after termination or expiration of the agreement, although the parties can allow for this in the agreement (see *Question 28*). If a customer does not want the supplier to continue using its IP rights, the inclusion of the correspondent prohibition in the agreement is strongly recommended.

27. To what extent can the customer (or if applicable, its new service provider) gain access to the service provider's know-how post-termination and what use can it make of it?

The supplier generally retains title to its know-how, that is, confidential information disclosed by the supplier and protected under the agreement's confidentiality obligations. On termination or expiry of the outsourcing, the customer is usually required to stop using the know-how and maintain its confidentiality (although the parties can allow the customer to continue using some of the know-how).

If the supplier licensed the know-how to the customer under a separate agreement registered with the INPI, it is likely that the supplier will not be entitled to prevent customer from using the know-how after the termination of the agreement. This is because the INPI does not recognise the concept of a technology (temporary) licence and considers the technology to have been permanently transferred to the Brazilian recipient.

Liability, Exclusions and Caps

28. What liability can be excluded?

Contractual liability is based on three requirements:

- Wilful misconduct or a negligent act or omission.
- Evidence of the damage caused.
- A connection between the negligent act and the damage.

Indemnification is only due if these requirements are met and, in this case, liability cannot generally be excluded. However, this only covers:

- Losses arising directly and immediately from the contractual breach.
- Profits that could have been reasonably obtained if the contractual breach had not occurred.
- Pain and suffering (moral damages).

Moral damages are only awarded for breach of contract where serious damage has been done to the image or personality rights of the other contracting party. Any other indirect, consequential or punitive damages are not available.

In IT contracts, contractual provisions are void if they purport to exempt either party from liability regarding claims brought by third parties as a result of software imperfections, software defects or copyright infringement (Law No. 9,609/1998 (known as the Software Law)).

Liability for torts, environmental risks, consumer contracts or the supply of products in the marketplace cannot be excluded under Brazilian law.

29. Are the parties free to agree a cap on liability and, if desirable, a cap on indemnities? If so, how is this usually fixed?

Brazilian courts normally accept limitation of liability provisions in commercial contracts as valid and enforceable, provided that:

- Both contracting parties are legal entities and have negotiated the limitation.
- The limitation is reasonable, that is, the cap is not so low that it would be considered a disclaimer.

- There is a justification for the limitation and there is consideration or a reduction in costs in return for the limitation.
- Damages are not caused by a high level of negligence or wilful misconduct.
- The limitation does not violate Brazilian public policy rules (for example, a limitation on liability for damage to the environment).

The courts define reasonable limitation on a case-by-case basis, and do not uphold limitation of liability provisions that are excessively low in relation to the risks involved in the transaction. In addition, if there is a great discrepancy between the party's negligence and the damages caused, the courts may reduce the monetary compensation due (Civil Code).

The parties to an agreement can agree on contractual penalties or liquidated damages for delay in performance, partial performance or breach of contract. The enforceability of these provisions depends on the following:

- The parties must have agreed on the liquidated damages before the breach of contract occurred.
- Liquidated damages do not apply in cases of breach due to *force majeure* events, unless otherwise expressly agreed by the parties (Civil Code).
- Liquidated damages cannot exceed the contract price.
- Where the breached obligation has been partially fulfilled, or if the liquidated damages agreed to by the parties are excessively high in view of the purpose and the nature of the contract, the court will reduce the amount to be paid to the non-breaching party.

The parties can specify in the agreement that the liquidated damages clause does not prevent the claiming of additional indemnification for damages arising from a breach of the agreement. If so, the amount of liquidated damages specified in the agreement is deemed to be the minimum amount of indemnification available. If the damages exceed the cap, it is possible to recover additional indemnification from the breaching party.

Both supplier and customer are jointly liable for violations of consumer rights (CDC).

30. What other provisions may be included in the contract to protect the customer or service provider regarding any liabilities and obligations arising in connection with outsourcing?

The parties should consider the contractual provisions very carefully. The customer and service provider should therefore conduct a thorough analysis of the contract to avoid the potential for any risks.

The service provider is responsible for guaranteeing payment of its employees and other related labour rights, collecting taxes and social security. If the customer does not proceed accordingly, it may be considered responsible, so the consumer should ensure that any such obligation is considered in the contract.

Also, the service provider must present documents to prove it can comply with the obligations imposed by customer and that it has the relevant certificates and accreditations to carry out such obligations. If the contract does not require the party to proceed in this way, the service provider will be considered responsible for the omission.

The contract should also impose the obligation on the service provider to present evidence that it is compliant with the rules concerning mandatory payments (for example, concerning tax and labour payment obligations). This will ensure the outsourcing customer is protected against financial liabilities that could arise from tax and labour claims.

Provisions that should be included in the agreement to provide protections for both customer and service provider are as follows:

- That the service provider will be liable for any eventual damage caused by its services, or will be liable in cases where the service provider failed to provide sufficient information regarding the operation and risks of the services being rendered.
- That all participants in the chain of supply will be liable for damages, and will be subject to indemnifications established by law.

With regards to liability, the obligations of both the service provider and customer should be specified in the outsourcing contract, and must comply with the provisions established by law regarding civil liability, indemnification and damages (see *Question 29*).

The Civil Code and Consumer Protection Code (Federal Law No. 8,078/1990) provide legal protection for the customer in situations where the contract has been breached to due to the service provider's failure to comply with its contractual obligations.

Dispute Resolution

31. What are the main methods of dispute resolution used?

The dispute resolution methods mostly used in Brazil are the court litigation and arbitration. Arbitral awards rendered in Brazil have the same effects as a court judgment.

The main advantages of using arbitration to resolve disputes are the:

- Celerity compared to the Brazilian judiciary.
- Possibility of conferring confidentiality to the procedure (arbitration proceedings are usually confidential while a court litigation to be under seal depends on a decision to be rendered).
- Judgment by specialised arbitrators with knowledge of international transaction structures and agreements.

If the parties opt for arbitration, they gain considerable freedom to choose the governing law, the venue, the language of the proceedings, and also as to whether the arbitration will be managed by an institution or held in an ad hoc manner.

In addition, conciliation and mediation are also used in Brazil (Law No. 13140/2015). Therefore, if the outsourcing contract agreed by the parties contains a clause expressing that mediation will be used as a method of dispute resolution, it must be observed. It is important to highlight that use of mediation has been steadily increasing in Brazil.

Where labour and employment relationships are disputed in the Brazil Labour Courts, it is common for the worker (that is, the supplier's employees) to file a claim to request labour rights against the real employer (that is, the supplier/outsourcing service provider) and for secondary liability against the outsourcing customer. For the claim in secondary liability to be effected, the secondary liability must be judicially declared and the outsourcing customer must be found liable in the labour claim, to which the outsourcing customer has not paid, with the responsibility for payment falling on the outsourcing customer.

Tax

32. What are the main tax issues that arise on an outsourcing?

Transfers of Assets to the Supplier

Where the customer transfers assets to the supplier, the supplier is deemed to have received income equal to the assets' fair value, to the extent that the supplier does not pay fair consideration.

The customer is subject to income tax levied on any capital gain it arises from the transfer of assets.

However, the transfer of assets from a customer to a supplier rarely occurs in an outsourcing transaction. Instead, the parties usually enter into a free lease or a loan.

Transfers of Employees to the Supplier

If employees are transferred to the supplier, the supplier is responsible for withholding payroll taxes and social security contributions, as well as paying and depositing other taxes and social contributions. The customer and supplier remain jointly liable for outstanding labour and social security debts.

VAT or Sales Tax

There are two main taxes levied on purchases in Brazil, which are forms of VAT:

- **Federal excise tax (*Imposto sobre Produtos Industrializados*) (IPI).** IPI is levied on:
    - industrial products, when they leave the plant/premises where they were manufactured; and
    - imported industrial products. There are two operations that the imported industrial products are subject to IPI: on the importation and on the resale derived from the importer.

    IPI rules allow the tax paid on previous transactions in a given production chain to be offset against future charges (called a "non-cumulative system"). In an outsourcing transaction that qualifies as a tolling arrangement/production outsourcing (that is, where the customer purchases only the raw materials/intermediary product/package and sends them to the supplier for manufacturing, and the final products are returned to the customer's premises), it is possible

to suspend the IPI levied on inputs sent by the customer to the supplier, provided the industrial products return to the customer. If so, the customer does not receive an IPI credit to offset its sales and the IPI is ultimately charged on the sale of the manufactured product by the customer. IPI rates vary:

- depending on how essential a product is for consumers and for the development of the country;
- in accordance with the product's tax code, as determined by the harmonised system set by the Mercosur Common Nomenclature (*Nomenclatura Comum do Mercosul* (NCM)).

- **State sales and services tax (*Imposto Sobre Circulação de Mercadorias e Serviços*) (ICMS).** ICMS is another form of value added tax on sales and services, similar to IPI, payable on:
  - the importation of products into Brazil;
  - the sale or transfer of products within Brazil; and
  - certain communications and intra- and inter-state transportation services.

  ICMS rules allow the tax paid on previous transactions in a given distribution chain to be offset against future charges (called a "non-cumulative system"). This is a state tax and its regulation varies from state to state within Brazil. In an outsourcing transaction that qualifies as a tolling arrangement/production outsourcing, most states suspend ICMS on inputs sent by the customer to the supplier, provided the products return to the customer. If so, the customer does not get an ICMS credit to offset its sales, and ICMS is charged only over the amount related to the inputs and services added by the supplier. The remaining ICMS is then ultimately charged on the customer's sale of the manufactured product.

  In the case of imported products, the tax rate on interstate operations with regard to products that have more than 40% of imported contents is 4%, regardless of the state through which the product enters Brazil.

  In relation to imported products, the tax basis of ICMS is the CIF value (Cost, Insurance & Freight), plus the amounts paid as Import Tax, IPI, PIS-Import, COFINS-Import and customs expenses, such as the Additional Freight Charge for the Renewal of the Merchant Navy (AFRMM).

  In the internal operations, ICMS is due at rates varying from 7% up to 25%, depending on the state (in general, Rio de Janeiro the rate is 19%; in São Paulo, Minas Gerais and Paraná, 18%; and in other States, 17%).

  In interstate operations, the ICMS tax rate is:
  - 4% if the imported product is not submitted to industrialisation following its import;
  - 4% if the imported product is submitted to an industrialisation process following its import, but the imported content thereof continues to be more than 40%;
  - 7% or 12% (as applicable) when the product does not have a similar national product according to Camex (Council of Ministers of the Chamber Foreign Trade) or when the product was manufactured in accordance with basic productive process (*processo produtivo básico*) set out in Decree-Law No 288/1967 and Law No 8,387/1991).

Service Taxes

Services provided by a supplier to a customer under the outsourcing agreement may be subject to municipal services tax (*Imposto Sobre Serviços*) (ISS). ISS rates can vary between 2% to 5%, depending on the nature of the service and the municipality in which the taxpayer is located.

Stamp Duty

There are no applicable stamp duty taxes.

Corporation Tax

There are no specific provisions on outsourcing that affect corporate income tax.

**The authors wish to thank Gabriela Soares Mussalam for her contribution to this Q&A.*

Contributor Profiles

Ricardo Barretto Ferreira, Senior Partner

Azevedo Sette Advogados
T +55 11 4083 7600 / +55 11 9 9292 3172
F +55 11 4083 4601
E *barretto@azevedosette.com.br*
W *www.azevedosette.com.br*

Professional qualifications. LLB, University of São Paulo, 1973; Post-graduate, Tax and Corporate Laws, University of North Dakota, US, 1975; Institute of World Affairs, New Canaan, Connecticut, US, 1974

Areas of practice. Corporate and M&A; tax; technology; media, telecommunications and intellectual property in general.

Professional associations/memberships. Former Vice-President and board member of the Computer Law Association (*www.itechlaw.org*) (1995 to 2005); former co-founder and Chairman of the Brazilian Association for Information Technology and Telecommunications Law (ABDTIC) (1986 to 1998).

Languages. Portuguese, English, French, Spanish

Publications

- Editor and co-author, *Computer Law in Latin America*, published by the Computer Law Association, Washington DC, US, 1998.
- Co-editor, *Doing Business in Brazil*, published by ABA, US, January 2002.

- Leading editor and co-author, *Legal Guide to Doing Business in South America*, published by ABA, US, April 2011 and in June 2015 (Second Edition).
- Leading editor and co-author, *Foreign Investment in South America – Comprehensive Guide to Infrastructure and the Legal Environment*, published by ABA, US, February 2018.

Juliana Petrella Hansen, Partner

Azevedo Sette Advogados
T +55 11 4083 7600
F +55 11 4083 7601
E *jhansen@azevedosette.com.br*
W *www.azevedosette.com.br*

Professional qualifications. LLB, Catholic University of São Paulo, Brazil; Specialisation degree in Labour Law and Labour Proceeding, Catholic University of São Paulo, Brazil

Areas of practice. Labour and employment.

- **Languages.** Portuguese, English
- **Danielle Chipranski Cavalcante, Partner**

Azevedo Sette Advogados
T +55 11 4083 7600
F +55 11 4083 7601
E *dcavalcante@azevedosette.com.br*
W *www.azevedosette.com.br*

Professional qualifications. Bachelor's degree from Pontifical Catholic University of São Paulo (PUC-SP), 2008; Specialization degree in civil procedure at Pontifical Catholic University of São Paulo (PUC-SP), 2014

Areas of practice. Civil law; technology; media; telecommunications.

Languages. Portuguese, English

Juliana Sene Ikeda, Partner

Azevedo Sette Advogados
T +55 11 4083 7600
F +55 11 4083 7601
E *jikeda@azevedosette.com.br*
W *www.azevedosette.com.br*

Professional qualifications. LLB, Catholic University of São Paulo, Brazil 2006; Specialization degree in Contracts, Fundação Getúlio Vargas, 2010; LLM in Intellectual Property, University of Turin, 2013

Areas of practice. TMT; intellectual property and regulatory.

Languages. Portuguese, English, Spanish

Lorena Pretti Serraglio, Senior Associate

Azevedo Sette Advogados
T +55 11 4083 7600
F +55 11 4083 7601
E *lserraglio@azevedosette.com.br*
W *www.azevedosette.com.br*

Professional qualifications. Bachelor's Degree from Toledo University; MBA in Digital Law from Escola Paulista de Direito; Graduated in School of Internet Governance run by the Brazilian Internet Steering Committee, and graduated in Protection of Personal Data and Privacy provided by Data Privacy Brazil

Areas of practice. Digital; privacy and data protection.

- **Languages.** Portuguese, English

Fábio Capelletti, Senior Associate

Azevedo Sette Advogados
T +55 11 4083 7600
F +55 11 4083 7601
E *fcapelletti@azevedosette.com.br*
W *www.azevedosette.com.br*

Professional qualifications. LLB, Mackenzie Presbyterian University Law School; Specialisation degree in Business Administration, Fundação Getúlio Vargas – FGV/CEAG

Areas of practice. Tax.

Languages. Portuguese, English

Ivana Cota, Senior Associate

Azevedo Sette Advogados
T +55 11 4083 7600
F +55 11 4083 7601
E *icota@azevedosette.com.br*

W *www.azevedosette.com.br*

Professional qualifications. LLB, Faculdades Metropolitanas Unidas; MBA in PPP and Concessions at Fundação Escola de Sociologia e Política de São Paulo; Extension course in Real Estate Law at Escola de Direito de São Paulo da Fundação Getúlio Vargas (FGVLaw) and Escola Superior de Advocacia; Specialisation degree in Contracts Law at Pontifícia Universidade Católica de São Paulo

Areas of practice. Corporate advisory/infrastructure.

Languages. Portuguese, English

Natasha Midori Hinata, Associate

Azevedo Sette Advogados
T +55 11 4083 7648
F +55 11 4083 7601
E *nhinata@azevedosette.com.br*
W *www.azevedosette.com.br*

Professional qualifications. LLB, from Law School of Universidade Presbiteriana Mackenzie, Brazil; Specialisation degree in Corporate Law, INSPER/ SP, Brazil

Areas of practice. Corporate and M&A.

Languages. Portuguese, English

Sylvia Werdmüller von Elgg Roberto, Associate

Azevedo Sette Advogados
T +55 11 4083 7600
F +55 11 4083 7601
E *selgg@azevedosette.com.br*
W *www.azevedosette.com.br*

Professional qualifications. LLB, Mackenzie Presbyterian University Law School; Specialisation degree in Digital Law, Escola Paulista de Direito (EPD)

Areas of practice. Technology, media and telecommunications.

Languages. Portuguese, English

Lucas Bianchini, Senior Associate

Azevedo Sette Advogados

T +55 11 4083 7600
F +55 11 4083 7601
E *lbianchini@azevedosette.com.br*
W *www.azevedosette.com.br*

Professional qualifications. LLB, Pontifícia Universidade Católica de São Paulo (PUC-SP); Masters' in Business Economics from Fundação Getúlio Vargas (EESP-FGV); Certified Compliance & Ethics Professional - International (CCEP-I)

Areas of practice. Compliance and anti-corruption; competition law; international trade and WTO law.

Languages. Portuguese, English, Spanish, French

**The authors wish to thank Gabriela Soares Mussalam for her contribution to this Q&A.*

END OF DOCUMENT

