

DANIEL



McDermott
Will & Emery

Privacy is coming to Brazil: What to expect and how to prepare

July 13th, 2021





Todd McClelland

Partner and Global Head of Privacy & Cybersecurity

Handles some of the largest and most well-known (and unknown) cybersecurity incidents, as well as pre-breach cyber activities, such as cyber tabletops, incident response plan design, leading client and vendor penetration testing, designing cyber risk management programs, and advising corporate boards on cybersecurity issues

HIGHLIGHTS

- › Recognized nationally by *Legal 500 USA*, *Chambers USA* and *Best Lawyers in America*
- › Advisory Board Member of Georgia Tech's Institute for Information Security & Privacy
- › Member and Host of CISO Executive Network
- › US Patent and Trademark Office credentials



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MCDERMOTT TEAM



Jessi Sawyer

Counsel

Advises clients on matters relating to data localization laws, international data transfers, privacy notices and data subject rights, cryptocurrency, e-commerce security and blockchain applications

HIGHLIGHTS

- › Active pro bono practice for the Coalition to Abolish Slavery and Trafficking
- › California Bar Association member

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Mike Morgan

Partner, US Head of Privacy and Cybersecurity

Recognized as one of the nation's leading lawyers in cybersecurity and data privacy. Guides clients through some of the largest and most complex data breaches

HIGHLIGHTS

- › *Cybersecurity Docket* "Incident Response 40" leading cybersecurity lawyers
- › Recognized by *Legal 500 US*
- › Ranked by *Daily Journal* as a Top Cyber/Artificial Intelligence Lawyer

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Fran Forte

Associate

Focuses her practice on privacy and data security matters, advising clients on domestic and international privacy and cybersecurity laws and regulations, including the EU General Data Protection Regulation (GDPR) and the California Consumer Privacy Act (CCPA)

HIGHLIGHTS

- › Recognized by *Best Lawyers in America* as "One to Watch" in technology law
- › *Georgia Super Lawyers* "Rising Star" in technology transactions

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Thamilla Talarico

Partner and Head of Technology, Privacy and Data Protection

CIPP/E, Masters in Philosophy of Language and Graduated in Law by PUC-Rio. Senior Advisor in Brazil by Access Partnership. Professor in DPO and Digital Law courses at FGV/Rio, columnist at Future of Money, on regulation of new technologies, tokenisation and digital assets

HIGHLIGHTS

- › IAPP KnowledgeNet Chapter Chair in Rio de Janeiro, Brazil
- › Coordinator of the Rio de Janeiro Bar Association Privacy and Data Protection Commission
- › Coordinator of the ABPI Software, Technology and Data Protection Commission
- › MIT Specialist in Blockchain Innovations and Business Applications



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Nuria López

Partner

PhD in Legal Philosophy and Theory at PUC-SP. Professor in postgraduate courses in Digital Law and Digital Compliance at Universidade Presbiteriana Mackenzie and in Data Protection Officer Training at FGV-Rio.

HIGHLIGHTS

- › Researches the development and ethical applications of artificial intelligence and regulation of internet and new technologies.



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Renato Malafaia

Partner

CIPP/E, Post-graduated in Law & Information Technology from The Polytechnic School of Engineering of University of São Paulo and graduated at Law by Mackenzie Presbitheryan University

HIGHLIGHTS

- › Specialized in Digital Law and Information Security at Daniel Law
- › Member of the Permanent Commission for Technology and Information Studies at IASP (Institute of Lawyers of São Paulo);
- › Member of the Law and Artificial Intelligence Commission at IASP.



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SUMMARY

COMPREHENSIVE LEGISLATION

1

PRACTICAL LGPD

2

SCOPE



PERSONAL DATA



LEGAL BASIS FOR DATA PROCESSING



DATA SUBJECT RIGHTS



DPO



DATA BREACH



INTERNATIONAL DATA TRANSFER



3

ENFORCEMENT

- BRAZILIAN DPA (ANPD)
- TECHNICAL COOPERATION AGREEMENTS
- KEY POINTS ON BRAZILIAN JUDICIARY
- REPRESENTATIVE ACTIONS
- JUDICIARY REMEDIES
- LABOR JUSTICE

1 \ COMPREHENSIVE LEGISLATION

>>> CONSTITUTION

Right to Privacy
1988

+ **Proposal for Constitutional Amendment (2019)**

+ **Supreme Court Ruling on informational self-determination (2020)**

>>> FEDERAL LAWS

LGPD
2018

Consumer's Act
1990

Internet Bill of Rights
2014

Labor Regulations

>>> SPECIFIC SECTOR REGULATION

Health Insurance

Cybersecurity for public sector

Banking and Investment Funds

Education

And others

■ WHO MUST COMPLY?

- >>> Any legal entity public or private processing personal data and any natural person who processes personal data for non-private purposes with profitable means
- >>> All sectors
- >>> All sizes

PROVIDED THAT ■

- >>> Data subjects are in Brazil
- >>> Data processing is taking place in Brazil
- >>> Data being processed was collected in Brazil



2 PRACTICAL LGPD PERSONAL DATA

■ DATA SUBJECTS ARE

Natural persons to whom the personal data that are the object of processing refer to:

- › Employees;
- › Board members;
- › Clients;
- › Comercial partners representatives.



PERSONAL DATA IS ■

Any information regarding an identified or identifiable natural person:

- › ID Number;
- › Biometric data;
- › Credit score;
- › Purchase history.

2 \ PRACTICAL LGPD \ PERSONAL DATA \ SENSITIVE DATA

>>> LGPD AND GDPR

Political organization membership
Data concerning health or sex life
Genetic or biometric data of any data subject

+ **DPIA**
+ **Restricted Legal Basis**
+ **Security Measures**

>>> POINTS IN COMMON

Consumer's racial or ethnic origin, religious or philosophical beliefs, or union membership

Consumer's genetic data

>>> CCPA

Consumer's social security, driver's license, state identification card, or passport number

Consumer's credentials and payment information

Consumer's precise geolocation

Content of consumers' communications

2 PRACTICAL LGPD LEGAL BASIS FOR DATA PROCESSING

+ Data Mapping

+ ROPA



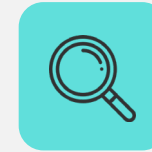
CONSENT



LEGAL OR REGULATORY
OBLIGATION



PUBLIC POLICY
IMPLEMENTATION



RESEARCH



CONTRACT EXECUTION



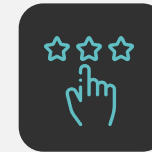
EXERCISE OF
VESTED CIVIL
RIGHTS



PROTECTION OF LIFE
AND PHYSICAL
INTEGRITY



PROTECTION OF
HEALTH



LEGITIMATE
INTEREST



PROTECTION OF
CREDIT

2 \LPGD BASICS \DATA SUBJECT RIGHTS



CONFIRMATION OF
PROCESSING



INFORMATION ABOUT
DATA SHARING



ACCESS



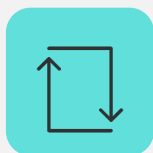
CORRECTION



INFORMATION
ABOUT DENYING
CONSENT



ANONYMIZATION,
BLOCKING OR
DELETION



REVOCATION OF
CONSENT



PORTABILITY

+ **Controller
Response**

+ **No deadline for
response**

+ **Rights are not
absolute**

■ WHO NEEDS ONE?

All controllers must nominate a DPO.

■ WHO CAN BE DPO?

Internal (employee), external or DPO as a Service.

CAN I HAVE A GLOBAL DPO? ■

Yes, but the DPO must be accessible - in our time zone and speaking Portuguese (LGPD defines as a channel of communication).

RESPONSIBILITY ■

No specific civil or criminal responsibilities in LGPD.

■ WHAT SHOULD BE COMMUNICATED?

Any security incident with **relevant risk or damage** to data subject's rights must be communicated **without delay** to

**BRAZIL'S DPA &
DATA SUBJECTS**



WHO HAS THE RESPONSIBILITY ■ TO COMMUNICATE?

THE CONTROLLER

Thus the importance of contractual clauses defining processing agents' roles

■ MINIMAL CONTENT OF COMMUNICATION

What kind of personal data were affected?

What kind of data subject were involved?

What were the security measures adopted?

What are the risks?

If there is a delay to communicate, then what justify the delay?

What were the measures to revert or mitigate the incident effects?

■ **ANPD** has provided a data breach notice form.

The form mentions the processor as a possible communicator alongside the controller.





"NOTICE"

+ Mandatory content



"TRANSPARENCY"

■ SIMILAR RULES TO THE GDPR

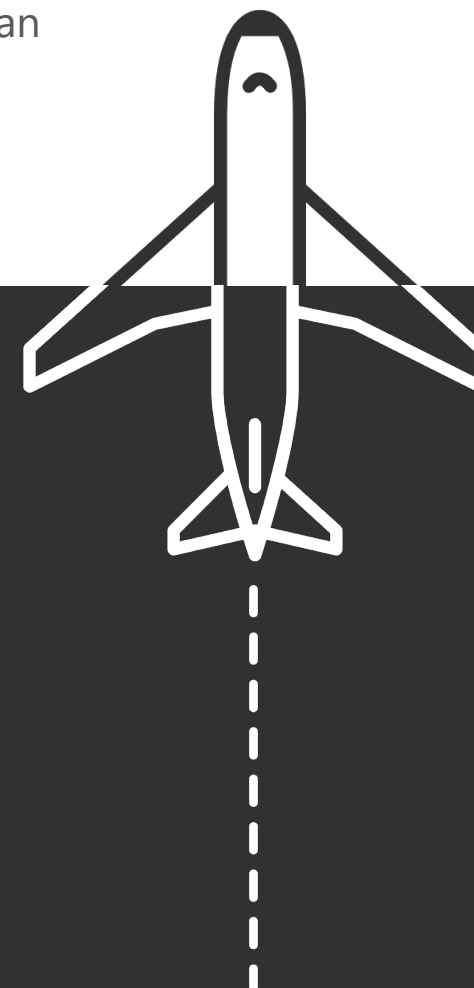
Demands an adequate level of data protection in the third party's country.

BRAZIL'S ADEQUACY DECISION ■

Brazil hasn't been considered a country with an adequate level of data protection yet.

HOW TO ENSURE COMPLIANCE? ■

- >>> Standard Contractual Clauses;
- >>> Specific contractual clauses for each type of international transfer;
- >>> Binding Corporate Rules;
- >>> Certificates, licenses and internal policies regularly updated.





Any questions?

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Starting from
August 1st, 2021

- DISCLOSURE AND
PUBLICIZATION OF THE
INFRACTION

WARNING

■

- BLOCKING, SUSPENSION,
DELETION AND
PROHIBITION OF THE
PERSONAL DATA
PROCESSING



FINES

■

Up to two percent **(2%)** of yearly revenues in Brazil, up to a total maximum of approximately 10 million reais **(USD 10,000,000.00)** per infraction

**From January 2021
to July 2022**



- Resolution on the Role of the DPO;
- Resolution on International Data Transfers; and
- Resolution on Data Subject Rights.

**From July 2022
to December 2024**



- ANPD Internal Regulations and Bylaws;
- **ANPD Strategic Planning;**
- Resolution on Initiatives for Small and Medium Enterprises, as well as Individuals;
- Resolution on Administrative Fines;
- Resolution on Incident Reporting and Deadlines; and
- Resolution on Parameters for Impact Assessments (DPIAs).



**From January 2022
to December 2023**

- Best Practices Guide on the Legal Basis for Data Processing.

3 ENFORCEMENT

BRAZILIAN DPA

ANPD REGULATORY MAIN ACTIONS SO FAR

Public consultation campaign about policies on small companies and startups.

Feb/21

- Published its Strategic Planning.
- Took part in negotiations with the **Consumer Protection State Department** for a technical partnership on data protection.

Feb/21

- Launched the authorities' regulation process
- Publishes technical meetings schedule about DPIA

Jan/21

- Public consultation campaign about policies on data breaches.
- Published a notification template for data breach cases.

Mar/21

- Published guidelines for the definition of processing agents

July/21

3 ENFORCEMENT TECHNICAL COOPERATION AGREEMENTS WITH THE ANPD

■ ANTI-TRUST AUTHORITY (CADE)

>>> Executed on June 2021

>>> One of the main objectives is to coordinate actions in cases of risk to the economic order involving personal data

■ THE NATIONAL SECRETARIAT FOR CONSUMER PROTECTION (SENACON)

>>> Executed on March 2021

>>> The aim is to improve the effectiveness of investigations of data breaches, as well as consumer complaints related to data Protection

- **ANPD AND SENACON,
March 2021**

- >>> Jointly recommended the postponement of the coming into force of the new privacy policy
- >>> The company, then, has collaborated with the authorities and decided to delay the coming into force for three months
- >>> The ANPD has issued guidelines for users of the app explaining the new changes

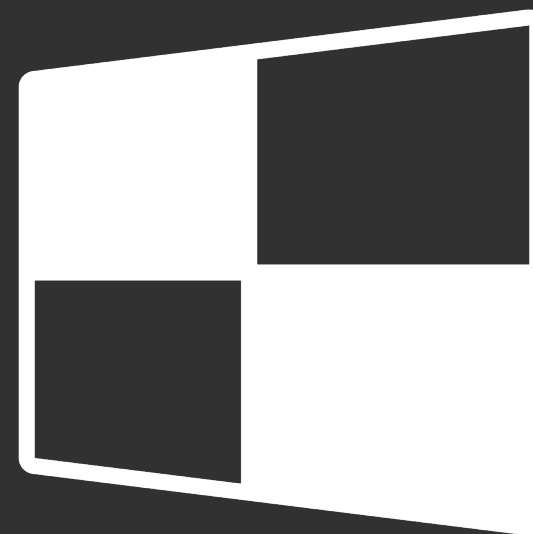


- >>> Trial Jury
- >>> Actual, Statutory or Punitive Damages
- >>> Class Actions

- >>> Cases decided by a single Judge
- >>> Damages can come from financial loss or emotional distress/harm
- >>> Representative Actions

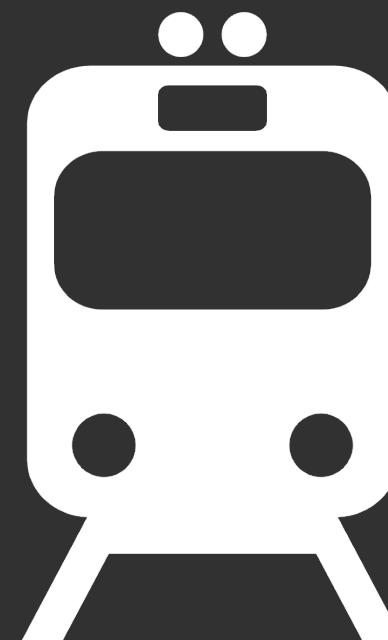
- **PUBLIC PROSECUTION
OFFICE VS. MICROSOFT,
June 2020**

- >>> Public Prosecution settled an agreement addressing privacy issues with the Microsoft 10 Software setup pages design
- >>> Penalty of approx. USD 500,000.00
- >>> Need to adjust Terms of Use, Privacy Policy, and Data Collection Settings



- **IDEC VS. SÃO PAULO
SUBWAY
May 2021**

- >>> Cameras spread throughout the subway station captured people's emotions upon facing an advertisement
- >>> Anonymization claims
- >>> No notices or opposition to the data processing
- >>> Condemned to pay USD 20,000.00



■ DECEMBER 2019

>>> STJ decided the selling of publicly available data (v.g. social media, governmental platforms) would automatically generate **moral damages** to the data subject



\ TAKEAWAYS

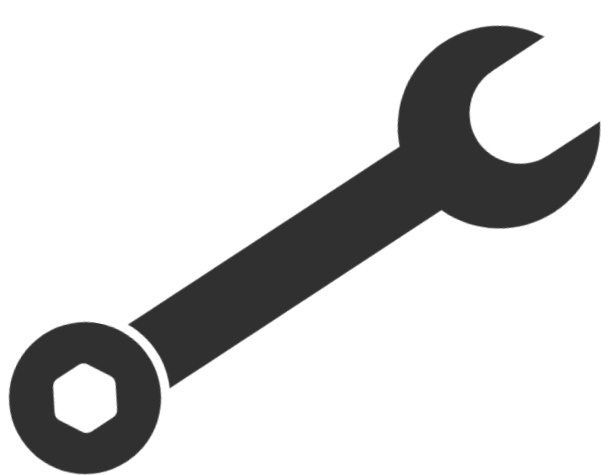
>>> Massive judicialization culture;

>>> First judicial rulings directly related to LGPD are recent;

>>> Courts are considering companies innocent, where Plaintiffs cannot sufficiently prove damages and causal link.

■ PRO-EMPLOYEE APPROACH OF COURTS

Reflections on labor relations and employee rights might bring the risk of judicialization of data subject's rights



TRANSPARENCY ■

Employee-directed Privacy Notices that clarify how the company monitors its employees and in which days or hours

MINIMIZATION ■

Monitoring must be kept minimal, respecting business hours





Any questions?

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