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_DOING BUSINESS IN BRAZIL

GAMES INDUSTRY

AN INTRODUCTION TO BRAZIL´S LEGAL ENVIRONMENT IN THE GAMES INDUSTRY

Doing Business in Brazil:

Games Industry

An introduction to Brazil's legal environment in the Games Industry

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_about this guide

This is a guide for international companies interested in operating in the Brazilian games industry. Here, you will find a fast and introductory summary with indispensable information that must be taken into consideration when starting or investing in a game company in Brazil.

We will begin by presenting legal insights regarding the Brazilian gaming sector, addressing topics like intellectual property, consumers' claims and eSports. Later, in the second chapter, we will present a short overview on the legal and political structure of the country, then an introduction to the Brazilian industry, presenting some specific legal matters on Commercial, Tax, Labor, Data Protection Law and Foreign Investment.

Disclaimer: *the content of this guide has been updated with specific insights and recommendations considering the present Covid-19 scenario we are experiencing. Nonetheless, after these unconventional circumstances have passed, we will release a "standard" version of this guide which will be sent to you at the earliest opportunity.*

_about us

Founded in 2004, Baptista Luz Advogados is a full-service legal boutique that covers all areas of Corporate Law. Among our clients we have the experience of performing in diverse sectors of the economy, such as technology, internet, financial institutions, advertising, entertainment, entrepreneurs. With prominent practices in the sectors are technology, telecom and advertising, entertainment, financial institutions, real estate, transportation, retail and agribusiness, among others. We have extensive experience with cross-border negotiations, and our branches are present in four different Brazilian cities: São Paulo, Florianopolis, Porto Alegre and Londrina.

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Topics on the Brazilian games industry

The last few years have been a period of strengthening for the Brazilian gaming sector. It is estimated that 1.5 billion dollars were generated by it – which places the country as 13th in the world ranking of revenues from game consumption – accumulating a total of 78 million players. Researches indicate that, as for Brazilian gamers' profile, 53% are women, most gamers are between 25 and 54 years old and smartphones are gamers' favorite platform.

Also, 83% of paying gamers spent money on in-game items or virtual goods in a 6-month period. In fact, research shows that in 2018, sales in-game were responsible for about one third of revenues generated in the market. Beyond that, 59% of the online population watches gaming video content (35% watch on their PC and 16% watch but play less than once/month).

In short, games are among the main forms of fun and entertainment for Brazilians. With the increase and cheapening of the quality and capacity of smartphones and consoles, as well as a greater offer of games, the tendency is for Brazilians to play and consume even more.

By understanding this trend, companies have been investing more and more in the sector. The outstanding case of 2019 is the Brazilian company Wildlife (formerly known as "Top Free Games"), founded in 2011, which with a contribution led by the investment fund Benchmark was valued at US$ 1.3 billion. Nowadays, they are among the ten largest mobile game companies in the world. Overall, in 2018 there were 375 game companies in the country, an expansion of 182% compared to 2014.

With the growing expansion of the sector, not only in Brazil but internationally, it is important that companies interested in expanding their gaming business into the country - whether by opening companies or investing - have minimal knowledge to plan their business and proceed with confidence within the Brazilian market. This document provides access to some key concepts and sensitive points analyzed by our expert lawyers, with special attention to the Brazilian games industry.

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Terms of use: a contractual analysis under American and Brazilian law

When someone interacts with an application, website or platform, a contractual relationship is established in the form of a subscription contract (called Terms of Use - ToS). They establish both the user's and the platform's obligations, responsibilities and rights, and can be found in the form of a clickwrap agreement or a browsewrap agreement. Clickwrap agreements are the ones that require active conduct by the user, such as a mouse click in a checkbox indicating their consent to the ToS. On the other hand, browsewraps agreements are those where the user's navigation on the application or site itself corresponds to the ToS acceptance.

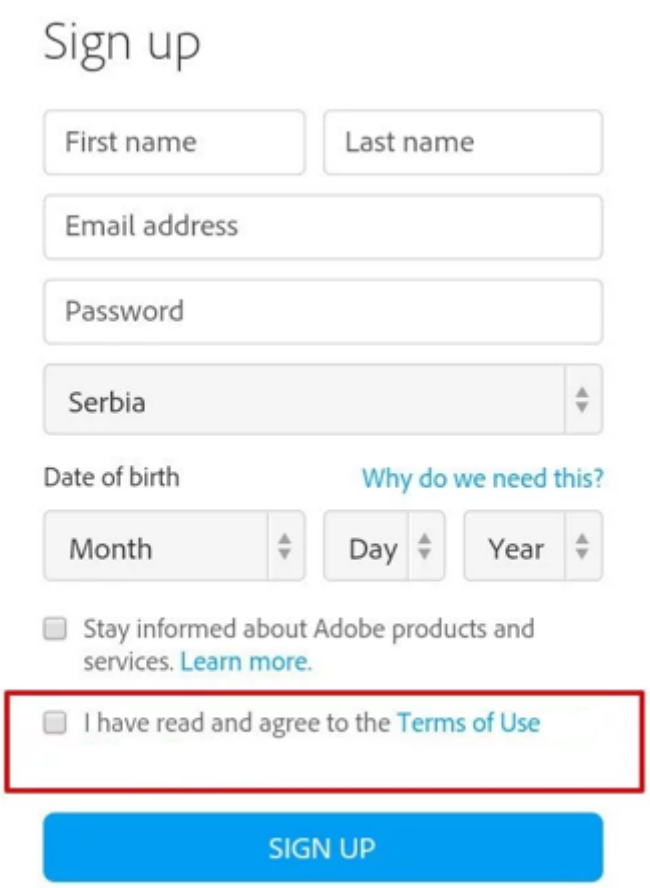

Figure 1. Clickwrap agreement example

For the US law, the parties' state of mind during the formation of these agreements is irrelevant. Courts consider what the parties objectively conveyed to each other in what is known "the objective theory of contracts". As a matter of fact, they analyze online contracts according to traditional principles of contract law. The decisions are focused on whether the plaintiff had reasonable notice of and manifested assent to the online agreement, which brings concerns to the issues regarding the noticeable offers' presentation and assent formation.

Special attention should be given to browsewrap agreements, as their validity will depend on whether the user has actual or constructive knowledge of the terms and conditions presented by the application, site or platform. Terms of Use differ from contracts in general because they do not necessarily require the "meet of minds", just a reasonable communication of the terms to the user. Also, American Courts appear to have reached a loose consensus in applying standard-form doctrine to online agreements, because the use of clickwrap agreements are enforced and the use of browserwrap agreements is not.

As for the Brazilian law, if there is a case of consent defect, the Terms of Use or even some of their clauses can be considered abusive. This means that they can be annulled. This sanction is justified by the application of the Consumer Defense Code, as there is a consumer's relationship between the parties. Therefore, for clickwrap agreements to be understood as valid to Brazilian Law some precautions must be taken, such as

(i) easy visualization of the contractual terms by the users, **(ii)** allowing the user's consent to be given from direct action, **(iii)** making the Terms of Use available before allowing interaction with the platform, **(iv)** presenting all the restrictive rights terms in a prominent manner and **(v)** avoiding confusing and unclear language. As for browserwrap agreements, Brazilian law does not require contracts to present a specific form, being only necessary the expression of the parties will, whose form is also free. However, it is important to pay attention to requirements **(iv)** and **(iv)** mention above when drafting a browsewrap agreement.

One could argue about the impossibility of making this kind of comparison between such different legal systems. However, the different logics found at Common Law and Civil Law systems vanishes when analyzing contracts because when it comes to this subject there is substantial similarity between these two legal systems. The Second Restatement of Contracts defines contracts as "[...] the promise or set of promises whose non-fulfillment the Law offers a remedy or whose observance the Law somehow recognizes as a duty", a concept that does not distance itself from the concept of contract presented by the majority of Brazilian doctrine as: the agreement of wills or the agreement to create, transmit and extinguish obligations.

One of the main similarities between American and Brazilian contractual law is its principiological basis. Objective good faith, contractual freedom, contract obligation, contractual balance and protection of the most vulnerable party are principles that guide the contractual relations in both Civil Law and Common Law. On the other hand, the elements of a contract differ in each system. In the Brazilian legal system, there is only the "offer" and "acceptance", while in the Anglo-American system, there is also the consideration element, i.e., it is necessary to have the mutuality of obligations materialized in a consideration.

Furthermore, there is a correspondence in both systems between the plans of the juristic acts, and the contractual analysis must be performed taking account the plans of existence, validity and effectiveness. In this sense, for the Common Law to verify the existence plan it is necessary to have the "meetings of the minds" or, as known in Brazil as the meeting of wills, a requirement that makes it possible to give consent a place of substantial importance in the formation of a contract.

It is in the analysis of the so-called **subscription contracts** that consent assumes protagonism as a fundamental concern. Since this type of contract has as its essential element the absence of the negotiation phase, consent is given by simple adherence to the agreement provisions proposed by the other party. Therefore, there is no contractual freedom and this model is known as "take-it-or-leave-it-basis" in American doctrine.

When talking about clickwrap and browsewrap agreements, as already mentioned, the users consent and the platform obligation to be transparent must be taken into consideration. That is why these contractual models are understood as subscription contracts, both by Brazilian and American law. However, the legal classification of these instruments should not prevent or discourage their use, but only arouse greater care when drafting them.

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games and consumer's claims

Although game companies are not the target of a significant volume of consumer's lawsuits, they have been called to Court with increasing frequency to respond complaints from gamers in Brazil. Among the most discussed topics in Court are the effectiveness of the Terms of Use and the penalties imposed on gamers for noncompliance with conduct policies.

_prohibition of conducts

In games involving online competition, it is common for players to offend each other. Sometimes, these offenses can be discriminatory and undermine the honor of those involved. For platforms, it can be difficult to prevent this type of attitude from happening in matches. In fact, aiming at creating healthier competitive environments in which all players feel comfortable, some companies have developed routines that match players with similar personalities and behaviors, so as to prevent the pairing of players with mismatching profiles that can lead to overly-aggressive encounters.

Another common behavior is the use of automation tools that alter the functioning of the game, such as hacks and cheats that interfere with the software activity and are used to enhance the performance of a player and/or harm others.

Practices like these are often prohibited in game's Terms of Use or Community Rules and may be subject to some types of penalties imposed by companies. Some game developers have approached the issue in different ways: *League of Legends*, for example, has created an internal "Court" responsible for judging users' behavior and defining applicable disciplinary measures. Thus, users can report other players who have violated community policies, and the Court, in its sole discretion, determines whether there has been a violation, and can suspend or block the player's account.

However, the penalties often are not well received by users, especially because some terms of service – such as the *League of Legends* itself – provide that, in the event of deletion of the player's account, the player will no longer have access to any of its elements. This can mean losing items purchased in the game, which were paid for with "real money", through microtransactions. In its Terms of Use, *League of Legends* declares that it is not obliged to offer a refund, nor does it assume any liability to the player.

_judicial system

The legality of such disciplinary measures has already been questioned by gamers in Court. There are lawsuits in which compensation was requested by gamers, claiming that the games rules of conduct and their interpretation can be too subjective and demanding that game companies return the investments in items, loot boxes, skins etc. made by the player.

Some of these lawsuits were judged by the Rio de Janeiro State Court of Justice, which recognized the games companies' prerogative to impose such sanctions. Evidence of players misconduct was analyzed and claims for damages were thus rejected. In a specific case, it was also confirmed that the company had no duty to repair the player for the unused game assets, such as items and skins. Nevertheless, the Court also found that the Terms of Use clauses that exonerate or attenuate the company's liability for defects in the provision of the service or that imply waiver, by the player, for compensation resulting from these defects are null.

Diversely, when analyzing a case involving another company, the same Court recognized the player innocence, in view of the company not proving the player's use of bots to benefit him/her in the matches. Thus, his re-entry into the game was determined, with the reactivation of his/her account, preserving the characteristics that his/her character had at the time of the ban.

In this case, moral damage to the player was also recognized. The Court found that there was an offense to the player's dignity, due to public exposure for a period considered excessive, of his/her virtual name in the list of community banned profiles. The player banning was interpreted as equivalent to a negative creditors' records. Similar cases were analyzed by other Brazilian Courts, such as in the states of São Paulo and Minas Gerais. In general, the Court's conclusions have expressed similar understandings and, in their majority, result in the rejection of the players' requests.

_conclusions

Although we have samples of how the judiciary has been deciding these cases, it should be noted that there is still not fully consolidated and coherent jurisprudence on the subject. However, as described above, we can identify some trends:

- the recognition of companies' autonomy in defining the rules applicable to their games, especially in relation to the imposition of disciplinary measures on their players.
- the inability of companies to use documents such as Terms of Use to exempt themselves from typical service providers responsibilities; and
- the existence, in the "virtual world", of typical rights of the "physical world", such as the protection of the individual's honor and image.

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_loot boxes and brazilian legislation

Electronic games and micro transactions, including loot boxes, have an intrinsic relationship with the financial development of the game market and games increased profitability. However, as it has been happening in several other countries, Brazil has presented some particularities and legal issues in relation to the subject, which should be a point of attention for publishers, from a preventive point of view.

At first, it is important to define loot boxes, as they can be expressed as digital consumable items present in electronic games that distribute items, characters and/or skills at random. They can be bought with real money, through micro transactions, and today are present in both online and offline games. There is a strong criticism in the gamer community that involves the high randomness factor of loot boxes, which increases the players' chance of spending, through micro transactions, a high amount of money without winning the desired item.

Some games use loot boxes to distribute skills and products that can influence players' performance, and others use the loot boxes to offer consumables that only interfere with the characters' appearance by raffling off clothing, accessories, or other aesthetic aspects that complement the player's character look (skin), generating no impact on the competition between players.

Based on this scenario and in the recent controversies involving the subject, it is of utmost importance that companies inserted in the Brazilian market are prepared for discussion at a national level, including compliance with the relevant legislation. In this sense, attention is required to the rules and principles present in the following provisions:

- Law No. 8.078/1990 (Consumer Protection Code - CDC): the online purchase of loot boxes can be characterized as a consumer relationship because there is connection between consumer, supplier and product. In addition, the possible gratuity of electronic games does not exempt the Code application, according to its section 3 provisions, which defines a consumer relationship;

- Law No. 8.069/1990 (the Child and Youth Statute- ECA): the application of this law to the sector is clear to the extent that the public of electronic games is composed of a significant number of adolescents and children, which are considered "hyper vulnerable consumers" due to the stage of maturity in relation to the psychological, social and emotional tools an adult human being have; and

- Law no. 12.965/2014 (Brazilian Civil Rights Framework for the Internet) and Decree no. 7.962/2013 (E-commerce Law): considering the very definition of electronic games, it is inevitable that the rules related to the Internet and electronic commerce are applied, with emphasis on the legislators' understanding that the consumer is more susceptible to fraud in the electronic environment, so that many CDC devices are reflected in this theme.

- From the above-mentioned legislation, it is possible to define bases and principles that are applicable to all the rules on the subject, helping to guide loot boxes operations in Brazil.

In this perspective, it is worth highlighting the principle of information and transparency in the rewards available in the loot boxes, present at E-commerce Law section 5 and Consumer Protection Code section 4. In general, it can be characterized as the duty to make available, in a place of easy access and/or visualization, the essential product or service characteristics, including, but not limited to, its composition, quantity, quality, taxes, price and all the risks that consumers are subject to with the transaction. According to the legal system, it is a matter of seller's good faith and consumer rights. Thus, the choice for the use of loot boxes must be based on transparency that the consumer will be aware of all the necessary information for that consumer relationship, without the possibility of being misled according to the items, skills and characters available in the electronic game loot box. There are cases in which some games began to indicate the percentage of obtaining the items, however, it is not an established rule that all franchises should follow.

Moreover, another pillar for the issue is consumers vulnerability, a central point in such laws drafting and in court rulings involving companies and consumers. Consumers vulnerability basically consist of the need to restore the balance of an unequal relationship, given the technical and informational disparity between the parties. In this sense, the reflection for the loot boxes should take into account the ways of acquiring the items and/or skills, so as not to bind to an exclusive way, which, if solely based on randomness, can deepen the relationship of dependence and vulnerability between consumer and selling company. The issue becomes even more sensitive when consumers are children and adolescents ("hyper vulnerable consumers"), so that the mechanisms of parental control and information are fundamental for the relationships balance, as well as, for example, to limit purchases for short periods of time, among other alternatives according to the format chosen. Furthermore, the business model linked to items and/or cosmetics of an exclusively aesthetic nature is more secure from this perspective, in order not to interfere in the game competitiveness and/or its playability.

Finally, one of the central discussions involving loot boxes around the world is the possibility of framing it as a "game of chance", and this topic can also be the subject of debate in Brazil. Despite Bill no. 186/2014 which aims to regulate the exploitation of games of chance in the Brazilian territory, it is currently a prohibited practice according to Decree-Law no. 3.688/1941 (Criminal Contraventions Law) section 50. In this sense, it is important to develop mechanisms that make it impossible to apply this law to loot boxes. In a recent release from the French Online Gaming Regulatory Authority (ARJEL), it indicates a way for developers not to apply the legislation regarding games of chance. According to ARJEL, there are loot boxes that are not a form of gambling, because the items have no real value, only within the game and/or platform. As long as the publisher does not participate in the sale (to third parties) and makes its diligence to prohibit resale, it cannot be held responsible as a gambling platform, according to the French authority.

Thus, the loot boxes that simply provide an autonomous economy for each game, or are impassive of sale or exchange by the user, represent a format that offers greater legal security for developers, compared to the model that allows the immediate conversion to the market and out of the game. Despite the laws particularities in each country, to be classified as a game of chance in Brazil it is enough that "the game in which the gain and loss depends exclusively or mainly on luck" (section 50, paragraph 3, a, of the Law of Criminal Contraventions). However, those discussions at a global level can influence the decision on a case-by-case basis in Brazilian territory, especially taking into account the lack of specific legislation on the subject, the novelty related to technology and the hypothesis of not suitability to a law drawn up in 1941.

One may conclude that for achieving greater legal security in Brazil to the operation of loot boxes, it will be indispensable the adequate legal support, so that the above legislation is obeyed and, at the same time, does not make the business model impossible. Thus, the principles of information, transparency and consumer vulnerability should permeate the development of loot boxes and their offer to the consumer since they can even help in the removal of its classification as a game of chance

Intellectual property and new ways of game consumption

The ways of consuming games have become increasingly diverse: if before the gamer was strictly the one who played on what the developers offered, today he is also the one who actively contributes to the game experience. This can be done, for example, through streaming gameplays or through the practice of modding ("mods").

In a dynamic way, the game industry's own business models have also changed. In recent years, free-to-play models have gained prominence, proving to be one of the most profitable modalities. In these models, most of the revenue generated comes from the low-cost purchases that gamers make inside the games, from items that can improve the player's performance, to merely cosmetic objects, which only serve to enrich the character's look. The practice of purchasing low-cost items inside the games is called microtransactions.

_microtransactions and games as a service

Research show that, in 2018, 83% of gamers spent money on in-game items or virtual goods in a 6-month period. In fact, in-game sales were responsible for about one third of revenues generated in the market. Games like Fortnite were able to generate billions of dollars with this practice: of the US$ 2.4 billion in revenue obtained in 2019, more than one billion was generated through the sale of items in the game. Among the available items for purchase, players can choose from new cars and weapons, to new clothes or changes in the look of their characters (the so-called “skins”).

The high yields of microtransactions in the free to play models have officiated a trend in the industry: game as a service (GaaS), that represents providing video games on a continuing revenue model, like software as a servisse (SaaS). Therefore, GaaS are ways to monetize video games either after their initial sale, or to support a free-to-play model. Games released under this model typically receive a long or indefinite stream of monetized new content over time to encourage players to continue paying to support the game, through microtransactions.

Also, with the launch of subscription service for games like Google Stadia or Apple Arcade, the trend is that gaining access to games becomes easier and easier. Currently, it is estimated that gamers are dedicating 7.1 hours a week with their favorite titles. Forecasts indicate that with cloud games popularization, these hours may double.

In fact, during the COVID-19 pandemic that forced several countries to adopt the quarantine regime, the access to gaming platforms has increased. Steam, the digital games platform, registered the largest number of users simultaneously online in its 16-year history: 22.6 million users were logged into the system at the same time. The peak broke the record that had been set seven days earlier, when just over 20 million people were active. In the countries most affected by the coronavirus (China and Italy), this is already evident. According to figures released by Bloomberg, Telecom Italia saw a 70% increase in traffic on its fixed network, with the famous game Fortnite playing a significant role. The most popular Chinese live streaming service, Douyu, had the highest number of views on the country’s most popular games.

The development of cloud gaming platforms and consolidation of microtransactions and the GaaS model structure a favorable environment for increasing profits generated through in-game sales.

Furthermore, around the structuring of this new business model, differentiated economic practices have also been developed. It is common to find developers who build and encourage the creation of new skins and mods in their games, either professionally or by the gamer community itself. Also, the hiring of third parties to provide these services is increasing. As an example, the DMarket platform has years of experience in trading virtual items and building “economy environments” in games.

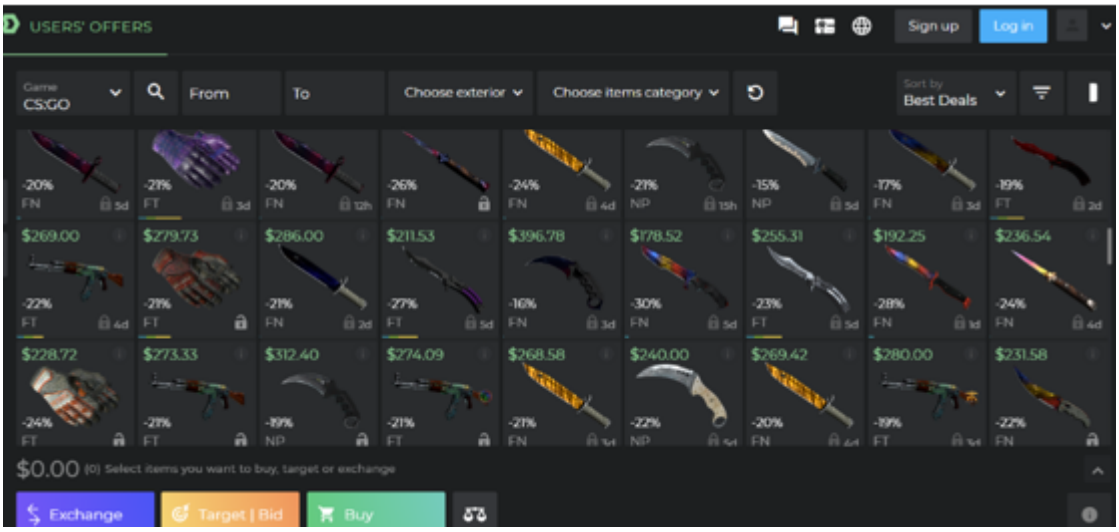

Figure 2. DMarket marketplace

The company provides a set of tools to operate a place where gamers can buy, sell, collect or exchange a wide variety of collectible items, which can come from the developers' own creations or created by other gamers. These features allow users to instantly trade their assets and equipment in games. Other gamers can bid and offer their own price.

_modding and marketplace

Those who venture to create and modify game content or technology are known as modders. A mod can change sounds, graphics, maps, game mechanics, narratives and the physics of the game itself. Elseways, the alteration can be merely aesthetic, changing attributes of the game characters such as clothes, hair, accessories (skins) or modifying the textures of the game. Aesthetic modding can be considered one of the most popular among players, both because it presents a lower degree of complexity to be applied, as well as because it does not interfere with the functioning of the game.

Another type of mod is the unofficial patches: the one in which, through the mod, a correction of some error (bug) present in the game is made. There are also modifications that aim to turn the game into an artistic creation. In this sense, the game is now understood as a platform for artistic creation used to create movies, parodies and other animation formats, using video editing tools to edit images that players capture, known as machinima.

As seen, to encourage gamer involvement in the GaaS model and to fortify microtransactions, it is noticeable the choice of the game market to some extent encourage the practice of modding. Steam, one of the main online services for buying and downloading games, makes available to the community the "workshop" function, in which modders register their creations and interested players choose to integrate them into the game.

_intellectual property

Producing a game means being creative in all its stages and processes, from writing the code, creating the plot that involves the game, music that accompanies the whole gameplay of the user, etc. All these products are the fruit of creativity and are protected by Intellectual Property Rights (IP), so the practice of modding and selling items in marketplaces, essential for the development of GaaS, may give rise to some reflections.

There are several implications related to intellectual property, such as the games and displays copyright, the soundtracks used, the weapons and skins design etc., beyond the extensive brand licensing that is made for streamers to advertise products during their gameplay. In addition, there is a wide variety of contractual arrangements that will increasingly become more specific to the intricacies of the game industry.

About the type of protection that IP offers for games, there is a controversy in the legal community that is divided between those who understand that games should be protected in a similar way to audiovisual works, according to Author Rights Law (Law No. 9.610/98), and those who understand that games are closer to a software, according to the Software Law (Law No. 9.609/98).

The understanding that games are only computer programs is justified by the notion that their creation is based on the elaboration of computer codes. However, with the industry's development, especially in the artistic aspect, resembling games to audiovisual works began to make more sense, covering photographic elements, animations, musical compositions and character construction. However, it is still common in Brazilian courts for games to be understood as software for tax purposes.

Both classifications have consistent arguments that support them. That is why the understanding oscillates between countries, and there are even sui generis classifications that mix the concepts. On one hand, for example, there are countries like Argentina, Canada, China and Israel that understand digital games as functional software with a graphic interface. On the other hand, other countries like Belgium, France, Germany and the United States share a more pragmatic view of the situation, conferring a "distributive classification", that is, each element of the game has a specific nature and, therefore, has a separate type of protection.

In case of Copyright Law enforcement, marketplaces dynamics and moddings development may be affected. Therefore, the developer should pay attention to the contracts it applies when hiring outsourcers to develop elements of its games. Similarly, when allowing the gamer community to make modifications to the game, one must also pay attention to whether the modification does not infringe the third party's rights. A common example is when players try to insert elements from other games into a game.

Figure 3. Mod example, where elements from the famous Star Wars franchise is inserted on another game (Grand Theft Auto).

These uses can lead to the infringement of third party copyrights, and therefore the Terms of Use, Community Rules and especially the developer's contracts must specifically address the intellectual property issue, in its most diverse practices in the dynamic business model that surrounds the gaming industry.

Important: It is important to emphasize that especially contracts involving intellectual property should be drafted to collaborate with the game development, stimulating artistic collaborations and protecting the investments made, so as not to hinder the bold and growing development of today's industry.

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_streaming and digital influencers

The relationship between people and digital games has changed significantly with the arrival of content platforms. The so-called “games” are no longer just something that people play. Today, many people spend long hours watching others playing titles such as “League of Legends”, “Fortnite” and “Counter-Strike”. In this scenario, several gamers have become widely known for producing and publishing content related to digital games, accumulating thousands and even millions of followers.

From reviews of the latest releases to tutorials for cheats and game strategies, live gameplay broadcasts and finishing an entire game before the screen, there are countless types of content developed by vloggers in this segment, which today have an expressive presence in streaming services such as YouTube, Twitch, Mixer and Facebook Gaming.

The channels that produce this type of content, professionally or not, occupy a special spot in the digital scene, with representatives among the highest spots in the world channels ranking with the most subscribers on YouTube. The "PewDiePie" channel, for example, has approximately 100 million subscribers. YouTube even launched an independent service dedicated to this kind of videos, with new features adapted to this market, the "YouTube Gaming", later incorporated into the main platform.

With all this visibility, this segment has been catching the attention of major advertising brands, as well as of third parties whose copyright may be included in the content displayed in such channels. Some legal aspects of the relationship between these subjects and gamers on streaming platforms and social networks need to be clarify.

_games and streaming platforms

Streamers who deal with the gaming universe invariably encounter an obstacle in their path: the rights owned by third parties. After all, their content is based on digital games, which, by themselves are works owned by third parties and protected by copyright. These rights apply to game elements such as characters, scenery, soundtrack, brand, among other creative aspects that permeate them. These rights are owned by people or, in most cases, by large companies, which means that, in principle, it would be necessary for the streamers to have their authorization to broadcast any video that contained these materials.

However, in most cases this permission is not requested to the game's rights holders, which has caused the retaliation from certain companies. Nintendo, for example, used platforms' notice and takedown tools to report high-profile streamers in 2013 and obtained part of the remuneration from monetizing its videos with advertisements.

Since 2007, YouTube has used an algorithmic system called Content ID to monitor and combat the unauthorized use of copyrighted material in videos published on the platform. With each new video uploaded to the website, the system compares its content with the materials (videos, images and sounds) stored in its database1 and, if it finds a match with materials owned by third parties, they are notified and can move a "Content ID claim" against the channel that published the video, choosing to suspend it (in certain locations, or globally), restrict the applications or websites where the content may appear, or require ads to be served along with the video, appropriating its income.

This function is also used in live streams on the platform. When third party content is identified, a marker image replaces the live stream until the match is no longer detected by the system. In certain cases, the transmission may be terminated. The channel owner can avoid these measures by immediately ceasing to serve third-party content upon receiving a notification from the platform, which will allow the transmission to continue. Ultimately, maintaining infringing content may result in suspension of access to the platform's live streaming resources.

Copyright infringements on YouTube can also be manually reported by the rights holder, using the "strike" feature. The strikes accumulation may impose progressive penalties on the channel, such as the temporary suspension of part of the platform's resources. Receiving three strikes in the 90-day period may result in the permanent channel deletion from the platform.

However, the Content ID system does not always make correct decisions. There have been cases reports where the original content of the videos was confused with materials from its database, resulting in incorrect blocking. The strike tool is also not error-proof, it has been commonly used in an abusive manner by network users to intentionally harm a channel for different reasons that go beyond copyright protection. There are reports of profiles on the platform that suffered strikes based on unfounded complaints, in which the use of the work was clearly authorized by the Copyright Law, or when there was simply no protected content in the video.

Due to YouTube's strictness on this issue and the possible abuses committed in the platform, many gamers have chosen to use Twitch alternatively. Acquired by Amazon in 2014, Twitch is today one of the main live streaming tools used by the gamer community, which composes its major audience and focus. Although it practices an infringement response system similar to the one used by YouTube, Twitch is known for not adopting, so far, a stance as incisive as that of the competitor in penalizing conducts that violates copyright. However, even with the insecurities generated by Content ID, YouTube seems to maintain a firm position in this market.

Intellectual Property rights violations occur, in this context, not only when game elements are played, but also when other materials protected by intellectual property are inserted into the video composition, such as background music or a scene taken from a film, used as a "meme" for humorous effect.

There is also the possibility of using materials that contains third party's personality rights, e.g. elements such as name, image, voice, biographical data and persons interpretation, may be used in the video. This is very common, for example, when games are inspired by real people or when "memes" with people images are used to create a comic element in the video language. These rights, as well as Intellectual Property rights, are exclusive to their owner, and their use must be authorized.

Therefore, it is possible that people eventually portrayed in the video may feel offended, or simply disapprove of the linking of their image or other element of their personality to the content in question and may demand that they be removed. It is therefore necessary to avoid the use of these elements or seek their owner's authorization, whenever it is intended to use them in the video production.

There is also discussion whether the content produced by the vloggers - the recording of their performance in the game and the comments they make during the recording or transmission of the match, for example - are copyrighted works, as they represent gamers creative expression. Some even compare the characters movements in the game to a choreography, considered an intellectual work protected by copyright.

This is a problematic issue, as a possible intellectual property right on such materials could be classified as a derivative work, since it is based on and supported by works of third parties, the use of which is often not authorized. It could also be argued that the act of playing the game would be a form of execution of the work, and not the creation of a new work, so that an intellectual property right in this scenario, if existing, would resemble more to a new form of related right. The discussion is quite complex and there are still no conclusive decisions regarding it.

Another legal aspect present in the gamers relationship with streaming platforms is the use of hate speech and the occurrence of crimes against honor, such as insult, affecting both vloggers and spectators. The chat and commentary fields in these networks, as well as the videos themselves, end up incorporating a common toxic element in the gamer community culture: the use of verbal insults, which can be racist, misogynistic and discriminatory in general.

Some users even perform this conduct in a systemic manner, denominated cyberbullying, by pursuing individuals with threats and offenses. They are known as trolls, and their actions are often directed against female audiences. These offensive attitudes are generally prohibited by platforms in their terms of use and community norms, imposing penalties against users and the channels that carry them out or promote their practice.

Regardless of the differences in vlogger and user approaches to video production and platform interaction, it is always important that creators and viewers comply with the platform's terms of use and other rules, as

well as the relevant legislation.

/ gamers influencers

- Around 30% of game companies' revenue is spent on marketing each year. However, large campaigns do not always reach their entire target audience. There are specific clusters that can be more difficult to impact, requiring more personal advertising strategies. Influence marketing is an alternative in this scenario.

- In 2018, about two percent of companie's spend in marketing went to influencer marketing. According to studies made by the Mediakix channel, 89% of advertisers say that the return on investment in marketing strategies with influencers is comparable or better than other marketing channels. This industry has been growing year by year and it is estimated that in 2020 it will be worth approximately 5 to 10 billion dollars.

- The influence marketing success is due to the influencers ability to relate to their audience and gain their trust due to the transparent way in which they deal with their followers. Their personal opinions and impressions about products or services are interpreted as the validation of a cluster authority and may be more influential than traditional commercials. According to Forbes, the highest-paid YouTuber of 2018 earned around $22 million.

- This phenomenon also happens in the context of digital games. Gamers influencers, people who become famous for publishing content on the Internet related to digital games - whether playing or commenting on them - accumulate legions of followers on YouTube, Instagram, Twitter, Twitch, among other networks.

- Such professionals are taken as a quality filter by the public, especially among young people, impacting their purchasing decisions. Therefore, they are often approached by game developers to publicize their new products and evaluate them in their channels.

- Gamers influencers are a separate market, even having companies specialized only in managing them. Their partnerships are not restricted to the digital game market, they are also explored by other segments, such as energy drinks and, in the case of female gamers, fashion and beauty branches.

- Its scope of action is broad, and its audience is especially motivated to consume. According to a study published on the blog Think With Google in 2015, gamers are more likely to buy computers, smartphones, media and entertainment products such as movie tickets, music albums and even cars than the general online population. They are also more likely to buy products considered "premium", of higher quality and, consequently, higher price.

- In addition, according to the same study, forty percent of YouTube players who had recently purchased a product from the media and entertainment, food and beverage, or consumer electronics industries said they were influenced by online video viewing, suggesting the great potential for influencers to work within this community.

/ hiring gamer influencers

- Influence marketing has an organic language that, inserted between gameplays and game reviews, ends up creating a deeper connection between the influencer audience and the advertised brand. However, this format cannot be allowed to mask the advertising aspect of the communication.

- The Consumer Protection Code and the CONAR Self-Regulation Code require that all advertising communication be easily identified as such. Thus, it is the influential gamer duty to distinguish his spontaneous reviews, for example, from products and services reviews object of commercial partnerships. The lack of clear advertising identification in the publications may lead to questioning at CONAR, leading to the request for content alteration or removal from the air. As for this, in data published by CONAR itself, it was found that youtubers and content producers were more punished than advertising brands in 2018.

- When hiring an influencer, although speed and informality are common characteristics in the negotiation, formal measures must be adopted so that obligations such as this are fulfilled by the influencer, in order to prevent damage to the brand.

- It is important to have a contract that, even if simple, clearly defines the influencer (and/or the agency, if applicable) responsibilities, such as in relation to the duty to identify advertisers and to respect third party's copyrights. In addition, the document must specify in detail the content to be delivered, establish ethics and confidentiality obligations, define metrics for measuring the results of publications, provide for intellectual property transfers and authorizations to use the influencers personality rights such as his image, name, sound of voice and interpretation, among other aspects.

- In addition, it is essential that the influencer strictly comply with the digital platforms rules on which the advertising content will be made available, such as their terms of use, promotion guidelines, community rules and any document establishing conduct that, if violated, could lead to the inactivation or content alteration in any way.

- It is also necessary to pay attention to the partnership tax aspects, such as the incidence and form of payment of income tax (IR) and tax on services of any nature (ISS), which may vary as a result of the content, the location and the influencer and/or the agency hiring form.

- It is also important that the contract signed with the influencer does not institutionalize obligations that constitute an employment relationship between him and the contracting company. This is especially important in medium- and long-term partnerships. For this, it is necessary to avoid that the four elements of an employment relationship are present concomitantly in the contract: personality, onerosity, subordination and habituality. A recommended measure is the inclusion of clauses establishing the autonomy and indepen-

dence of the parties and the non-existence of a labor relation.

- A sensitive aspect of the digital influencer's performance, especially in the universe of digital games, is the reception of advertising by children and teenagers, who make up a significant part of gamers influencers followers. This is due to the special treatment granted by the Brazilian legal system to children's advertising, aiming to preserve the dignity and healthy development of children and adolescents.

- In this sense, the National Council for the Rights of Children and Adolescents (Conanda) Resolution no. 163 of 13/03/2014, although it cannot be considered binding due to the lack of competence of the Council to regulate matters of consumerist and criminal order, brings a relevant perspective - although quite severe - on the subject. It mentions examples of elements considered abusive in children's advertising, such as the use of children's language; of special effects and excess of colors; of people or celebrities with appeal to children; of cartoons or animations, among other aspects.

- The CONAR Self-Regulation Code also deals with this issue, prohibiting children and adolescents' images association with products such as firearms, alcoholic beverages, and other legally prohibited products. The Code also prevents the use of indirect means of advertising or merchandising that contain any elements intended to capture the children's attention, which includes hiring children actors and using child-related elements.

- Finally, it is necessary to observe labor aspects involved in hiring young digital influencers, which are protected by the Child and Youth Statute (ECA), and special care is needed in negotiations with this category of influencers. In order to act in advertising campaigns, it is necessary to obtain a judicial license. In addition, his legal guardians must approve all the activities he performs.

- You can find more details about hiring influencers by accessing our Digital Influencers Legal Manual, available on our website.

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_eSport: scenario consolidation and indispensable legal support

Training center, crowded arena, fans, awards and championships around the globe. These characteristics are generally associated with traditional sports such as football, basketball and rugby, however, they are directly related also to electronic sports (eSport), which is an area that continues to grow and has consolidated itself as a safe and profitable market, both from a sports and business point of view

Training center, crowded arena, fans, awards and championships around the globe. These characteristics are generally associated with traditional sports such as football, basketball and rugby, however, they are directly related also to electronic sports (eSport), which is an area that continues to grow and has consolidated itself as a safe and profitable market, both from a sports and business point of view.

In this sense, according to Newzoo's Global eSports Market Report, there are two gamers for each football practitioner in Brazil, besides the fact that, from the people who follow the modalities between 10 and 20 years old, football appears with 24% and eSport with 43% in this same age group. According to Intel business development specialist Brittany Williams, the eSports audience in 2019 was close to 440 million worldwide, with more than 500 million people expected to engage as eSports viewers. There is even an official statement from the International Olympic Committee (IOC) on the possibility of including eSports in the 2024 Olympic Games.

Considering this scenario and its application in the Brazilian reality, companies in the market also followed the sport development and popularization, including the eSport "business clubs" that opened training centers (gaming house and/or gaming office2) to provide all the necessary structure for the practice, serving as a model for the restructuring of large football clubs, usually operated as associations.

Nevertheless, it is still necessary to overcome the barrier regarding the eSport classification as a sport, which is sometimes raised by the traditional sports public in front of a reality it never had access to, as well as by those involved in the eSport development, given the fear that the bureaucratic apparatus for traditional sports could make the sport continuity impossible. The fear is justified to the extent that there are bills in progress that are not in line with the basic eSport guidelines.

It is important to highlight that eSports cannot be considered to belong to the same "category" enjoyed by traditional sports without taking into consideration their particularities, especially as regards the fact that electronic games are the intellectual property of their respective developers or publishing companies ("publishers", as they are commonly known), who have control over the games use and distribution, being the only ones legally capable of modifying their internal functioning mechanisms.

Thus, considering all companies and people involved, the eSports path in Brazil must be aligned with the factual reality that it is a sports practice, as detailed below, as well as how the market must have its own and adequate administrative structure, in addition to consistent treatment by the public authorities.

_eSport is a sport

It is of great importance to emphasize that eSports, regardless of the bills in progress in the Brazilian Congress, are already considered sports in accordance with current legislation. In this sense, Law no. 9.615, from March 24, 1998, popularly known as the "Pelé Law", presents the specific regulation on the subject, especially regarding its section 3, which presents the forms of sport recognition by four manifestations:

(i) Educational: purpose of achieving the integral individual development and his formation for the citizenship exercise and leisure practice;

(ii) Participation: voluntary, comprising the sports practiced with the aim of contributing to the practitioner's integration in social life, the health and education promotion and the environment preservation;

(ii) Income: purpose of obtaining results and integrating people and communities from the country and them with those from other nations; and

(iv) Training: promotion and initial acquisition of sports knowledge to ensure technical competence in sports intervention, with the aim of promoting the qualitative and quantitative improvement of sports practice in recreational, competitive or high competition terms.

Through the analysis of each form of sport recognition, it becomes clear that eSport is widely contemplated in Pelé Law section3, assuming, in countless opportunities, the educational character in schools, the participation in social projects based on electronic games, performance in competitions and, finally, the formation in schools and clubs that train athletes.

Thus, the lack of framing due to the lack of express prevision in the law, evidences technical imprecision and, above all, incoherence with the eSport scenario in the world and in Brazil. Considering eSport as a sports practice is not a mere formality, the classification gives greater legal security to all involved in the scenario, including clubs, athletes, broadcasters, publishers and investors. In this sense, the issuance of a special type of visa for eSport athletes in the United States has shown the importance of recognizing the existing professional sports bond and how this can speed up the market, provide greater legal security and make the sector more attractive and safer for investments.

_athletes' legal framework

Notwithstanding the four forms of recognition set forth above, it is important to highlight the income character, responsible for indicating the contract to be signed with the cyber-athlete. In this sense, according to paragraph 1 of the Pelé Law section 3, performance sports may be organized and practiced (i) in a professional manner, characterized by the remuneration agreed upon in a formal labor contract between the athlete and the sports practice entity, or (ii) in a non-professional manner, identified by the freedom of practice and by the non-existence of a labor contract, being allowed the receipt of material incentives and sponsorship.

It is of great importance that eSport organizations are aware and attentive to what is foreseen in the legislation so that they adapt according to their operation and their objectives in the scenario, including the treatment according to professional or non-professional mode. In addition to the Pelé Law, the company's attention must also be directed to Decree-Law No. 5452 from May 1, 1943 (Labor Laws Consolidation - CLT), especially regarding the elements of a labor relationship, i.e., onerosity, personality, subordination and habituality.

Thus, if the option is to address a sport generating income in a non-professional way, signing a service contract must be in line with routine and procedures that do not adopt the characteristics of an employment relationship, including the four elements mentioned above. In these cases, it is not recommended to set timetables for training, nor gaming-house housing, or obligations to participate only in championships on the organization's behalf.

On the other hand, in the event of the onerosity, personality, subordination and habituality characteristics being present in the relationship between an eSport athlete and a company club, it is necessary to sign an employment contract. As the Pelé Law is applicable because it is an income sport practiced in a professional manner, the particularities of such law may also be used, including the "special sports employment contract" modality based on sections 26, 28 and 30, which must be for a determined period of time and in accordance with the rules adopted for athletes of the conventional modalities. In this sense, the possibility of entering into an image contract with the athletes pursuant to Pelé Law section 87-A is opened, in order to allow the athletes' image exploitation through a contract of a civil nature, always respecting the legal limit that the value corresponding to the image use may not exceed 40% of the total remuneration paid to the referred athlete.

From the image contract signing, it is clear that the athlete professionalization can also offer new business opportunities for the club itself, including the exploitation of the athlete's image with sponsors, traditional media, streaming portals, product sales, advertising, among other activities. Thus, despite the higher investment compared to a service contract, the professionalization, accompanied by an efficient administrative structure, can provide the company growth in areas related to eSports, offering new sources of income and business models.

Finally, although today there is no requirement from publishers regarding the contract signed between athlete and organization for participation in competitions, this may be a model adopted in the future based on the exponential growth of the modalities and the fixation in the national scenario, which should always be on the "radar" of all companies involved. Moreover, if all the elements of a professional sports work relationship are verified, the professionalization can avoid future lawsuits and offer more legal security to all parties, considering, even, recent decisions from the Brazilian Courts that recognized the work bond between club and cyber athlete.

_conclusion

Considering these considerations, it is essential that the administrative structure follows the growth of the eSport scenario, including legal support in accordance with each company's objectives and operating segments. In this sense, the appropriate contract to be signed with the athlete may vary according to the operation (professional or non-professional), being necessary the legal analysis for each case to prepare an action plan, including the new business possibilities from the professionalization.

From this perspective, the eSport professionalizing process should not be seen only as an increase in costs and/or risk, there are commercial opportunities that can be taken advantage of, as mentioned above in image contracts, as well as gains in agility and special treatment for athletes nationwide. For publishers, sports professionalization does not represent an obstacle in the exercise of their activities, as long as their Intellectual Property is respected and eSport in Brazil is regulated considering its particularities

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_data privacy law implications on games

"Gathering analytics is a key component of offering a game as a service and is also an increasingly important part of running a successful mobile games business". This is statement, extracted from the official webpage of Google Player Analytics (a tool for game developers to monitor their players), is a clear demonstration on how the game industry now depends on use of personal data of its players. In this context, this text presents how different business models need to comply with the Brazilian General Data Protection Law (Lei Geral de Proteção de Dados Pessoais - LGPD).

_why player's personal data is essential

The main business model of the game industry, mainly before the smartphone and apps era, was based on selling the game per se to obtain profits. However, nowadays, monetization models are more diverse in part because players' personal data can be used as an important or even an indispensable asset. This is clearly demonstrated when we look to the following business models (Fahy, Hoboken e Ejik):

1) **Free Model:** users do not pay to play, but the app earns revenues by displaying advertisements.
2) **Freemium Model:** users do not pay to play, but make in-app purchases for premium features, additional content, subscriptions, or digital goods.
4) **Subscription Model:** users can buy in-app purchases to access content.
5) **Paymium Model:** players pay to download the game and can buy additional content.

These examples clearly demonstrate the importance of personal data use. To optimize the use of in game advertisement, for the company's own products or for third parties, profiling is an important tool.

These models also demand players active engagement. In order to accomplish that, analyzing players' personal data is important to understand what makes them to play and spend more. This fact is clearly demonstrated on the 2017 Offering Circular of Ravio Entertainment, the owner of Angry Birds, which declares that:

> *"the Company has a sophisticated, data-driven process for paid user acquisition with clear return on investment targets [...] In addition to attracting new users, Rovio has demonstrated its ability to engage users and monetize user activity within its games."*

Both Google and Apple app platforms incentivize developers to use players' personal data by providing app developer analytics tools.

_legal requirements and players' rights on data protection

Companies that offer games to the Brazilian market must comply with the local data protection law, since the data subjects located in Brazil (player) have a set of rights stated in the LGPD. It is important to highlight the following: **(i)** the right to access and obtain adequate information on how its personal data is being processed (e.g. what is collected, for what purposed, with whom is shared); **(ii)** the right to erasure personal data; **(iii)** the right to obtain a copy of the personal data; and **(iv)** the right to erasure, to oppose or to request the anonymization of data which is excessive, unnecessary or that the processing violates the law.

The LGPD demands that any personal data processing activity must have an adequate legal basis (consent, legitimate interest, performance of a contract, etc). Depending on the legal basis used the company must comply with different obligations. For example, if the processing is based on consent, like it is common in many apps, it is necessary that the data subject must be duly informed about the processing and with whom the data is shared. The use of generic information or statements like "your data is shared with our business partners to improve our services" may invalidate the consent. It is important to notice that this information could be difficult to obtain even for the developers since many games use software development kits provided by third parties which have code to share information with others.

_children and adolescents

Another important topic is the fact that many companies have children and adolescents as its mains public. The LGPD establishes special requirements for processing personal data of these categories of data subjects. To process children's personal data (a children is defined in the Brazilian law as someone younger than twelve years old) their parents or guardians need to give specific consent. The company has the obligation to reasonably verify if the consent was really given by their parents.

The LGPD also states that internet applications and games cannot demand children and adolescent's personal data beyond the necessary to provide the services. Advertisements for children is also a controversial topic in Brazil. Some civil society organizations and federal government agencies, such as the National Council for the Rights of Children and Adolescents (*Conselho Nacional dos Direitos da Criança e do Adolescente)*, have a restrictive legal interpretation of the use of this type of advertising. In another sense, the National Advertising Self-Regulation Council (CONAD) defends the possibility of its use.

_final remarks

Thus, game companies must check if their practices are complying with Brazilian data protection law in order to improve consumer's trust in their products and to have a competitive advantage in the market as a pro consumer privacy business. To do so it has to offer adequate Privacy Policies to consumers, develop privacy by design and by default practices, to have adequate channels to receive and analyze data subject request, among other practices

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Games and public policy

Since 2011, public policies aimed at developing the Brazilian games market have been presented as expansions of public policy related to the audiovisual sector and, even more broadly, to the cultural sector itself. At the federal level, such policies are managed by the Audiovisual Secretariat, currently part of the Ministry of Tourism, and by the National Film Agency - "Ancine".

- At the state and municipal levels, their respective Culture Secretariats centralize such policies, together with other specific public bodies - in the city of São Paulo, for example, "SPCine", a municipality public company created with the objective of developing the city's audiovisual industry, also operates in the games market. In addition to their own direct actions - such as publications, awards and festivals - these public bodies also carry out promotion policies, providing resources for the development of the Brazilian market, in direct and indirect formats.

- Direct promotion policies are those in which the State applies public funds (proceeds from taxes, i.e. the Contribution to the Development of the National Film Industry - Condecine, fines, etc.) to enable the production of movies and games. A good example of direct promotion are the public notices published by Ancine to transfer funds from the Sectorial Audiovisual Fund ("FSA") to private productions.

- Indirect promotion policies are those in which the State waives the collection of a certain tax, provided that the taxpayer chooses to apply the respective amount (or part of it) in a project previously approved by a competent public agency. It is, therefore, a triangular relationship, which links the game producer (the one who presents the project), the public agency in charge of the public policy in question and the taxpayer. This mechanism is usually called "cultural tax incentive".

- If the incentive mechanism is federal (like those created by Ancine), the tax will also be federal (basically Income Tax or Condecine); if the incentive is a state mechanism, the tax will be the ICMS (state tax); and if the tax incentive mechanism in question is municipal, the tax to which it refers will be municipal (ISS and IPTU).

Important: in order to access public funding, game producing companies must be regularly incorporated in Brazil, have most of the voting capital of Brazilians and not be linked to broadcasting companies or electronic mass communication by subscription companies. Depending on the mechanism that is used, other requirements will also need to be met, such as time of existence.

- It is essential to be clear that the tax benefit of the indirect promotion mechanism applies to those who allocate funds to games projects, and not directly to those who develop the games - the latter will only receive the resources and develop the project. The relationship between these two parties must be regulated in contract, which will establish, among other topics, responsibilities, schedule and fund transfer format.

- Depending on the incentive mechanism, different formats of transfer can be used, such as donation (transfer which aims only to contribute to the production of the game, without any return beyond the tax - as occurs in the Federal Law of Culture Incentive); sponsorship (when the sponsor has an interest in actively promoting his brand within the game - as is the case with the mechanism of article 1A of

the Audiovisual Law); and investment (when the investor, in addition to publicizing his brand and obtaining tax benefits, also seeks the game profit share - as is the case with the "FSA" and section 1 of the Audiovisual Law).

- As it involves - directly or indirectly - public funds, the promotion mechanisms will always demand from the game producer the presentation of accountability documents to the public agency, detailing both technical aspects of the game's production as well as accounting and tax aspects related to the use of the transferred funds.

- Public policies aimed at games seek to strengthen the capacity for innovation, generate local technologies, enable the internationalization of companies and boost the exportation of games. On the other hand, they represent a decrease in tax collection and demand an active positioning of governments - in times of economic recession and public debt, the tendency is that investments in culture and, consequently, in games, are downgraded.

_indicative rating

Electronic games are considered audiovisual works by the Ministry of Justice and, therefore, are subject to the indicative rating obligations imposed by the National Secretariat of Justice (SNJ), which has the competence to regulate the subject.

_what is indicative rating?

The indicative classification is intended primarily as a measure to safeguard children and adolescent's healthy development. In short, it is an audiovisual works categorization that gives an age group gradation, based on the gravity of their content. For the purposes of the classification, 6 categories are considered: free, 10, 12, 14, 16 and 18 years old.

_how is it measured?

This measurement is based on the evaluation of the occurrence of factors such as violent situations, drug use and sexual practices on the work. Graduations are high as such elements are represented in a more complex, recurrent, intense and/or impacting manner, and the combination of one or more elements may be an aggravating factor in the classification.

Recently, the Ministry of Justice updated its indicative rating manual in order to make it more flexible to evaluate the factors mentioned above, when in presence of mitigating or aggravating classification indicators. Thus, the presence of an aggravating factor (such as violence) is considered within the illustrated context, pondering its relationship with the plot, frequency and form of presentation. This analysis contemplates several aspects of the works composition, such as framing, special effects, editing, characters construction, among other elements.

The classification also includes the content descriptors, which represent a synthesis of the main indication patterns present in the classified work (e.g. inappropriate language, extreme violence, etc.). In the case of electronic games, is also considered the interactive elements, i.e. mechanisms indicative present in them that may cause youth excessive exposure in the virtual context or result in real money spent. Interactive elements are the possibility of location sharing, online shopping, and user interaction.

_who does the rating?

The indicative classification may be made by the Ministry or by the distributors of the work themselves, depending on their form of marketing. Games and applications sold in physical media must be submitted to the classification by the Secretariat prior to their distribution. The evaluation is free and performed in a confidential manner. It requires sending the Ministry a technical file, synopsis and copy of the game, or comprehensive gameplay video with content relevant to the rating. Within 30 calendar days, the rating assigned to the game is published in the Union Official Journal.

In the case of games distributed exclusively in digital media, being downloaded directly by users, the rating can be performed by the distributor itself, since it complies with the criteria and guidelines provided by the Ministry of Justice.

As an alternative, digital games can be rated by the International Age Rating Coalition (IARC). This mechanism, jointly developed by international classification bodies, allows classifying the work submitted according to classification standards from different nationalities. The process is carried out almost immediately, from the completion of questionnaires, being a tool to facilitate the games in various locations around the world.

_where to display it?

The indicative rating should be present not only on digital games packaging (when sold in physical media), but also in all forms of its dissemination, whether in physical formats such as posters, flyers, banners, displays (cubes, boxes, silhouettes, totems, etc.); printed media (newspapers, magazines, comic books, pamphlets, among others); websites for the digital games distribution and download services for computers, smartphones, among others; ads in electronic media (television, cinema, radio and internet), such as television clips, etc.

chapter 02

brazil: an overview

The Federative Republic of Brazil is formed by its states, municipalities and the Federal District. The federate states have powers to adopt their own Constitutions and laws according to the autonomy established in the Federal Constitution. Different from other federations, Brazilian municipalities also have restricted autonomy, with their own executive and legislative powers.

The powers of the Union (defined by the Constitution) are the Executive, the Legislative and the Judiciary, being independent from each other. The head of the Executive is the President of the Republic, which is both the Chief of State and the Head of Government, being directly elected by the citizens. The Legislative is formed by the National Congress consisting of two houses: The Chamber of Deputies and the Federal Senate, also elected directly by the citizens. The Judiciary has both Federal and State branches which have two higher Courts: the Federal Supreme Court (for constitutional matters) and the Superior Court of Justice (for matters not regarding constitutionality). There are also other specialized Courts to deal with electoral, labor and military cases.

Since the Brazilian legal tradition is of Civil Law, all norms must necessarily obey the Constitution and are submitted to it in a hierarchal organization. The Constitution addresses several different topics such as citizen rights and guarantees, principles for public administration, a framework for penal, labor, tax and others. More specific regulations are established by the legislative powers of the union, states and municipalities. The topics and limits of what each of them can legislate about is defined by the Constitution.

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_corporate law

Corporate Law in Brazil is mostly regulated by Federal Law nº 10.406 of January 10th, 2002 ("Brazilian Civil Code") and Federal Law nº 6.404 of December 15th, 1976. The regulation that should be applied will depend on the company's type. For that reason, we will present the most common company types and important legal aspects regarding each of them.

_company types

There are three main types of companies that are used in most business operations in Brazil: *Empresa Individual de Responsabilidade Limitada ("EIRELI")*, *Sociedade Anônima ("S.A.")* and *Sociedade Limitada ("Limitada")*. Depending on the company's characteristics, a different company type will be more suitable for its operation. The choice between each type should consider variables such as the company's income, if it wishes to access capital markets, its tax structure, among others.

The following sections describe the main features and characteristics of EIRELI, *Limitada* and S.A. companies:

_sociedade limitada

- *Limitadas* are governed by the Brazilian Civil Code.
- They are organized by the Contrato Social ("Articles of Association" in English) and can be formed by one or more quota holders.
- Quota holders may be individuals or legal entities (Brazilian or otherwise).
- The *limitada's* capital stock is divided into "quotas" (which are portions of the capital stock, similar to a share of a corporation).
- All quotas of a *limitada* grant their owners a right to vote at the general quota holders meetings. Most decisions require the favorable vote of quota holders representing at least 75% of the capital stock.
- The responsibility of each quota holder is limited to the value of their quotas of the capital stock, but the quota holders are all jointly liable for the full payment of the capital stock.
- The management of a *limitada* is carried out by one or more officers residing in Brazil who can be quota holders or not. They must be appointed in the Articles of Association or in a quota holders' meeting, for a definite or indefinite term.
- A *limitada* is a contract in its essence and therefore is primarily regulated by the terms and conditions of the Articles of Association. The Brazilian Civil Code provides the boundaries to which the Articles of Association should be developed, but within those boundaries the quota holders are free to choose the rules that shall apply to their company.
- The Articles of Association may authorize a *limitada* to distribute profits to its quota holders in a proportion that is different from their equity in the company.
- The quota holders of a *limitada* may execute a private *Quota holders'* Agreement to regulate matters such as distribution of profits, transfers of quotas, noncompetition etc.

_empresa individual de responsabilidade limitada (EIRELI)

- EIRELI or *Empresa Individual de Responsabilidade Limitada* ("individual company with limited liability" loosely translated to English) is a company type governed by the Brazilian Civil Code, and subject to most of the rules applicable to *limitadas*.
- It is organized by a single person (private individual or a legal entity) who owns the total capital of the company, which shall: **(i)** be fully paid at the time of formation; and **(ii)** not be lower than 100 times the highest minimum wage in Brazil.
- A private individual can only hold interest in **1** EIRELI (though this restriction is not applicable to legal entities).
- Initially, the EIRELI was introduced as an alternative to *limitadas*, since this company can be formed by one single member (at the time, *limitadas* had to have at least two quota holders). However, in 2019 the Brazilian Civil Code was changed, allowing *limitadas* to be organized by a sole quota holder. Because of that, the number of EIRELIs should decrease in the future, since the formation of a limitada with one quota holder currently represents an easier alternative in respect to single-member structures.

_sociedade anônima

- *Sociedades Anônimas* or simply S.A. are governed by Federal Law n° 6.404 of December 15th, 1976.
- They are organized by the *Estatuto Social* (or "bylaws" in English).
- 2 or more shareholders (individuals or legal entities, Brazilian or otherwise) are necessary for the incorporation of an S.A. The only exception to this rule is the wholly owned subsidiary (*"subsidiária integral"*), which is an S.A. that has another Brazilian company as sole shareholder. Wholly owned subsidiaries must be incorporated by public deed. Alternatively, an existing S.A. can be converted into a wholly owned subsidiary through the acquisition of all its shares by a Brazilian company.
- At least 10% of the capital stock must be paid at the time of the incorporation of an S.A.
- The capital stock is divided into shares. There are three different types of shares, the most commonly issued being: **(i)** common shares, which provide standard financial and voting rights; and **(ii)** preferred shares, which may provide their owner political and economic privileges within the company, such as priority in the distribution of profits and capital stock repayment. Also, preferred shares may have restricted voting rights or even no voting rights at all.
- Preferred shares – and, exclusively in privately held S.A., common shares – can be divided into different classes, each providing different benefits and restrictions.

- Each shareholder must pay in the total price for their shares (and their liability is limited to that amount). However, they are not liable for the full payment of the capital stock (unlike the members of *limitadas*).
- Usually, decisions must be made by shareholders representing more than half of the shares with voting rights present at the shareholders' meeting. However, the bylaws and/or a shareholders' agreement may require supermajority for certain decisions to be made.
- An S.A. can only distribute profits to its shareholders in the proportion to their equity in the company.
- The management of an S.A. is carried out by at least two officers residing in Brazil. They must be appointed in a shareholders' meeting for a term of office of no more than 3 years.
- At the discretion of the shareholders, an S.A. may also have a Board of Directors (*"Conselho de Administração"*) with powers to vote and decide on several corporate matters (in some cases, such as for publicly held S.A., the Board of Directors is mandatory).
- The bylaws must provide for an Audit Committee (*"Conselho Fiscal"*), which will supervise the administration of the company (namely the actions taken by its officers and directors). The Audit Committee may function permanently or only during specific fiscal years (at the shareholders' request).
- An S.A. is required to publish the minutes of every general shareholders meeting, as well as its annual financial statements. Exceptionally, privately held S.A.s **(i)** with less than 20 shareholders and **(ii)** up to BRL 10 million in total equity are not required to publish their financial statements.
- The shareholders of an S.A. may execute a Shareholders' Agreement to regulate matters such as voting rights, transfer of shares, non-competition obligations etc.
- An S.A. must keep and update corporate books to register information such as share ownership, share transfers, minutes of shareholders, officers and board meetings.

_labor law

Since Labor Law is a very important subject regarding the routine of any company, we have selected a few important topics that should be taken into consideration when starting a company here. Employment in Brazil is mostly regulated under a single rule, referred to as the Consolidation of Labor Laws or Consolidação das Leis do Trabalho ("CLT"), in Portuguese, which has recently been amended by Federal Law n° 13.467 of July 13th, 2017, commonly known as the "Labor Reform".

_general facts

- Employment is guided under the "Principle of Prevalence of Reality". This means that the reality of the labor relationship prevails over the formality established by a contract.
- Companies' labor responsibilities are solidary if they belong to the same economic group.
- Regarding business succession, usually, labor liability is passed on.
- Lifting the corporate veil is possible in some cases of fraud specially when done to get away with owning to labor related debts. This only happens if Court ordered, however, it still is a very sensitive topic. Investors usually take this into consideration before doing any kind of equity-based investment.
- The permitted work time is 44 weekly hours, being 8 daily hours with 2 possible extra hours if needed as overtime.
- Overtime must be paid with a minimum increase of 50% over the usual hourly pay.
- Night shift is paid with a minimum increase of 20% over the daytime hour.
- It is possible to establish a bank of hours using an agreement between employee and employer, provided that the compensation occurs within a maximum period of 6 months.
- In addition to their salary, employees must be paid an extra 13th salary once a year, usually in December. Should an employee have worked less than a year, the "thirteenth pay" should be proportional to the months worked until then.
- Employers must deposit 8% of their salary into a separate bank account, as compulsory savings, administered by the Government, referred to as FGTS or *Fundo de Garantia do Tempo de Serviço* in Portuguese. An employee can only withdraw this amount in cases provided by law or if dismissed without cause.
- Outsourcing activities are allowed.

_facts about hiring

- Records of a person's work status and past work experiences must be registered in a personal document called the Work and Social Security Booklet or *Carteira de Trabalho* and *Previdência Social*, in Portuguese.
- There is the possibility of hiring an employee either by undetermined or predetermined periods.
- Temporary contracts are authorized in order to grant transitory substitution of the staff and to fulfill complementary demand of services limited to 180 days, either consecutive or not, renewable for 90 days only if the same conditions remain.
- Negotiation between employees and employers is allowed, including over variable remuneration (for example, premium - without

effects on labor funds and levy on social contributions).

- Collective bargaining prevails over the law (with the participation of the trade union).
- Labor relations are flexible, especially towards the regulation of work on demand, home office and self-employment.

_facts about vacation

- Employees are entitled to 30-day vacation period every 12 months, which may be granted in up to three periods: two of them no less than 14 days long and the third no less than 5 days long.
- Not only vacation time is paid, but the law also determines that it should be 1/3 more than the usual salary

_facts about termination

- Programs of voluntary resignation can be implemented.
- Termination payment shall be made within 10 days after the end of the contract otherwise a fine will be applied in the amount of the employee's salary.
- Pregnant employees are protected from work termination during pregnancy and 5 months after delivery.
- Employees who suffered labor accident are guaranteed employment for a period of 12 months as from the time of discharge by the social security.
- Employer is required to notify employee of the termination of his employment contract 30 days in advance, such is referred to as prior notice, otherwise the period will have to be indemnified.

_social security

- The social security system is financed with monthly employee contributions (11% of employee's salary, limited to R$621.00) which is withheld by employer, plus monthly employer contributions (up to 28%).

_tax law

The Brazilian Tax System is very complex, having several specific norms and resolutions. For that reason, we will briefly explain some of the most common corporate taxes and how they work. As previsouly commented, the Brazilian Constitution provides many guidelines for the Tax Law System. The several tax regulations obey what was previously determined by the Constitution. Complementary to that, Federal Law nº 5.172 of October 25th, 1966 also helps provide general rules.

_corporate income taxes (IRPJ and CSLL)

- Companies domiciled in Brazil are subject to 2 Federal Corporate Income Taxes, the *Imposto de Renda de Pessoa Jurídica* ("IRPJ") and the *Contribuição Social sobre o Lucro Líquido* ("CSLL"). All companies have the right to calculate both taxes on their taxable income. The taxable income is the net income of the company pursuant to the Generally Accepted (in Brazil) Accounting Principles (the Brazilian GAAP), with some adjustments (additions and reductions) provided for by the law. This is the so-called "real profit regime".

- Tax losses incurred by companies (in the "real profit regime") may be carryforward. However, tax losses carryforward can only be used to offset taxable incomes of subsequent fiscal year up to a maximum of 30% of each year's taxable income.

- There is no State or Local Income Tax in Brazil.

- The IRPJ is calculated at a tax rate that ranges between 15% and 25% according to the amount of taxable income produced by the company in the respective fiscal year.

- The CSLL is calculated at a flat rate of 9%.

- Alternatively, both taxes may be calculated with basis on a "presumed income", which is the product of the multiplication of the company's revenues by certain presumed profit margins set forth in the Tax Law (different activities have different presumed profit margins). Such regime is called the "presumed profit regime" and is only applicable to companies that have expressly chosen to submit themselves to such special regime. Once a company has chosen to pay its Corporate Income Taxes under the "presumed profit regime" it cannot go back to the "real profit regime" before the end of the respective fiscal year.

- Not all companies may choose to pay their Corporate Income Taxes under the "presumed profit regime". For instance, companies with annual revenues higher than R$78.000.000,00 and/or companies that has any profits or gains arising from abroad may not benefit from such regime.

- The presumed profit margin set forth by Brazilian law is of approximately 8% for activities like retail, wholesale, manufacturing and sale of real estate.

- A 32% presumed profit margin is applicable to services in general and real estate leasing, as well as intermediation activities. It is important to emphasize that this regime cannot be applied to certain activities, requiring the use of the real profit regime, especially the companies that have profits, income or capital gains from abroad.

- In summary, companies which actual profit margin is higher than the profit margin presumed by the tax law will actually have a benefit if they choose to adopt the "presume profit regime". Companies with a lower actual profit margin (or with losses) should choose the "real profit regime".

_the social integration program (PIS) and the social security tax on revenues (COFINS)

- The *Programa de Integração Social* ("PIS") and the *Contribuição para o Financiamento da Seguridade Social* ("COFINS") are both federal taxes created to fund the Brazilian social security.
- They are both calculated on the companies' gross revenues on a monthly basis.
- There are two basic regimes for the calculation of such taxes: the value-added regime and the "old" regime.
- The value-added regime was created in 2002 and is today the standard regime, i.e., is the regime that applies to all companies, except for those that have been kept in the old regime by the law.
- The value-added regime allows companies to deduct from their revenues the cost of certain acquired goods and hired services, provided that such goods and services are acquired from/provided by a Brazilian company and are used by the acquiring/hiring company to produce goods or the provision of services.
- In the value-added regime, the PIS and COFINS rates are respectively 1.65% and 7.6%.
- In the old regime, which is much simpler, companies calculate the PIS and the COFINS on the amount of their revenues at tax rates of 0.65% and 3% respectively.
- Because in the value-added regime the allowed deductions from the revenues are not so broad as expected and the tax rates are substantially higher, to many companies (especially services companies) the old regime is preferable to the value-added one.
- As a rule, companies that pay the Corporate Income Taxes in the "presumed profit regime" are automatically obliged to pay the PIS and the COFINS in the old regime.
- There is no assessment of PIS or COFINS on revenues from exportation of goods and services.

_municipal tax on services (ISS)

- Most services are subjected to the *Imposto Sobre Serviços* ("ISS"), a Municipal Tax that is calculated on the revenues of services companies.
- Since the ISS is a Municipal tax its rates may vary from city to city but its minimum and maximum rates are 2% and 5%.
- As a rule, the ISS is owed to the Municipality in which the provider has the infra-structure necessary to provide the services.
- Since taxes in Brazil can only be created by law, ISS is instituted by the legislative of each Municipality.

_data protection

The Brazilian General Data Protection Law nº 13.709 of August 14th, 2018, popularly known in Brazil as *Lei Geral de Proteção de Dados* ("LGPD"), was finally approved after eight years of debates, public consultations and other discussions, and it will come into force in August 2020, and the sanctions of the law will take effect in August 2021. In this section we will present relevant information about this new regulation that profoundly impacts on how companies must adjust practices in order to not be sanctioned.

_ LGPD: the Brazilian general law for data protection

- The LGPD was in great part inspired on the General Data Protection Regulation ("GDPR") of the European Union. The objective is to regulate the processing of personal data both online and offline, in public and private sectors ensuring higher legal protection.
- Brazil already has more than 40 legal norms at the federal level that directly and indirectly deal with the protection of privacy and personal data in a sector-based system. The LGPD is replacing and/or supplementing this sectoral regulatory framework.
- Although the LGPD has already been enacted it will only begin to be enforced in August 2020, 24 months after its publication and the sanctions of the law will only take effect from August 2021x. This time-lapse was given for companies, organizations and public institutions to adapt their activities.
- The LGPD focuses on empowering data subjects and requires that a processing activity must have a lawful base specified by the regulation, such as when consent is given or based on the legitimate interest of the data controller. This law also establishes obligations and limits that should be applied to entities that process personal data.
- Any foreign company that has at least a branch in Brazil, or that offers services to the Brazilian market and collects and process personal data of data subjects located in the country (regardless of the nationality) will be subject to the LGPD, even if it not established in the country.
- The LGPD distinguishes between "personal data" and "sensitive personal data". The latter is defined as information which may subject the person to discriminatory practices, such as data on racial or ethnic origin, religious belief, political opinion, health or sexual life data. Such "sensitive personal data" also could allow unequivocally and persistent identification of the data subject (for example: genetic data or biometric). This kind of data should be treated differently, with additional safeguards, and with different legal basis, such as the express consent of the data subject.
- The LGPD has 10 legal basis that must be considered when processing personal data while the GDPR has 6. Some of them are legitimate interest, unambiguous consent, protection of life and physical safety, protection of credit, etc.

- The LGPD will be enforced by the National Data Protection Authority (*Autoridade Nacional de Proteção de Dados* – ANPD) which can request documents (e.g. data protection impact assessments), receive complains from data subjects, do investigations, receive notifications on data breaches, and impose administrative sanctions (e.g. fines, restrictions on data processing). A data subject which is also legally categorized as a consumer can request its rights to consumer protection authorities, like state prosecutors. The LGPD also establishes rules to allow the international transfer of personal data. The main rule is the adequacy level, when a third country is considered by the ANPD to have an adequate level of protection of personal data. If the data needs to be transferred to country that is yet to be considered adequate, other legal instruments are necessary, such as standard clauses, binding corporate rules and an express and separate consent to the transfer.

- Administrative sanctions may be applied in cases of violation of the LGPD. Possible sanctions are notices and fines, that may vary from 2 percent of the company's, group's or conglomerate's turnover of the last fiscal year, limited in total to R$ 50,000,000.00 (fifty million reais) per infraction. The infractions are applicable only to the Brazilian part of an economic group and to the turnover acquired in Brazil, different from what happens in the European regulation.

_foreign investments

Foreign investment in Brazil is governed by Federal Law nº 4.131 of September 3rd, 1962 ("Foreign Capital Law") and Federal Law nº 4.390 of August 29th, 1964.

According to the Foreign Capital Law, foreign capital is considered as: "any goods, machinery and equipment that enter Brazil with no initial disbursement of foreign exchange, intended for the production of goods or services, as well as any funds brought into the country to be used in economic activities, provided that they belong to individuals or companies resident or headquartered abroad".

_registration of foreign capital

- Registration of foreign investment must be made through the RDE-IED (which in Portuguese is the *Registro Declaratório Eletrônico – Investimento Externo Direto*) System. It is part of the Central Bank Information System *(Sistema de Informações do Banco Central – SISBACEN).*
- Foreign direct investment is defined as the permanent ownership interest held in a Brazilian company by a nonresident investor, whether an individual or a legal entity, through the ownership of shares or quotas representing the capital stock of the Brazilian company.
- The foreign investor must first obtain a taxpayer number ID. For this purpose, if the foreign investor is an individual, the person should obtain a CPF (Cadastro de Pessoas Físicas) before the Brazilian Federal Revenue Office (Receita Federal do Brasil). If the foreign investor is a legal entity, however, the entity should enroll in SISBACEN, thus obtaining a CNPJ (Cadastro Nacional de Pessoa Jurídica). Following such enrollment, as applicable, the investee shall update the RDE-IED in order to record the foreign direct investment under a permanent number for that investor-investee case, and subsequent changes/additions are made under the same number.
- Since 2000, the foreign investment to be performed and registered is not subject to preliminary review or verification by the Central Bank of Brazil. The RDE-IED control is thus declaratory, based on a statement of the investee, which means that the Brazilian investee and/or the representative of the foreign investor are responsible, themselves, for any information used in the registration of the foreign investment.
- All foreign investments must be registered with the Central Bank of Brazil. This registration is essential for remittances of profits, capital repatriation and profit reinvestment.

_currency investments

- No preliminary authorization is required for foreign investments in currency. Funds allocated for subscribing capital stock or to buy shares of an existing Brazilian company can be remitted to Brazil through any banking establishment authorized to deal in foreign exchange. However, for closing the exchange transaction an RDE-IED registration number for the foreign investor and the Brazilian investee is required.
- The registration of the investment must be made through the RDE-IED System by the Brazilian investee.

_basic documentation for the foreign investor

Although there may be practical differences between a foreign investment in a *Limitada* and in an S.A., the basic documentation the foreign investor may be required to present in Brazil is the following:

- Basic corporate documents (Certificate of Incorporation) evidencing existence of the foreign investor.
- Corporate documents (certificates of incumbency, minutes of Board meetings, resolutions etc.) evidencing powers to represent the foreign investor.
- Power of Attorney duly signed by the legal representative(s) of the foreign investor, granting a Brazilian resident individual all powers required by Brazilian law to act on behalf of the foreign investor before Brazilian authorities.
- If you are a non-Brazilian individual, the documents required are: power of attorney for a person residing in Brazil and an identification document.

Important: Usually, all foreign documents to be accepted by Brazilian authorities must be notarized and apostilled in the country where the foreign investor is domiciled and, after that, translated into Portuguese by a sworn translator and registered before a Brazilian notary.

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