Consultancy agreements (short form) Q&A: Brazil

by José Carlos Wahle, Veirano

Country Q&A | Law stated as at 31-Jul-2021 | Brazil

Brazil specific information concerning the key legal and commercial issues to be considered when drafting consultancy agreements for use internationally.

This Q&A provides country-specific commentary on *Practice note, Consultancy agreements: International*, and forms part of *Cross-border employment*.

See also *Standard document, Consultancy agreement (short form): International*, with country specific drafting notes.

Status of the consultant

1. Is there a risk in your jurisdiction that a consultant could be deemed to be an employee of the company and then acquire employment rights?

Yes, if the substance of the agreement contains elements of an employment arrangement, for example, lack of proper independence (subordination). If the consultant is deemed to be an employee, they will be entitled to seek the corresponding benefits in court. The company may also be sanctioned with administrative fines if it is audited by public agents.

Factors indicating a genuine consultancy relationship

The factors that may indicate a genuine consultancy relationship include the situations in which the individual providing the services:

- Can self-manage their work hours and days.
- Has economic independence (that is, they make business revenue from clientele rather than wages from a single company).
- Has administrative independence.
- Can decline work, however, the contract may stipulate a corresponding penalty.

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- Bears administrative costs (overhead and ordinary operational expenses).
- Uses their own professional tools.
- Has the capacity to engage employees or assistants.

Factors indicating an employee relationship

The factors that may indicate that there is an employee relationship include:

- The company has control over the individual's work hours and days.
- The individual is subject to technical supervision.
- The individual can be subject to administrative orders and disciplinary actions.
- The individual depends on the company to pay their wages.
- The individual uses the company's premises and professional tools.

Exclusivity is often associated with employment because most employees have full-time jobs, but this is not a legal requirement nor an indicator of an employment relationship. Conversely, exclusivity is not advisable in independent services agreements.

In any event, the inclusion of a clause such as *Standard document, Consultancy agreement (short form): International: clause 2.1* (devoting a certain number of days) may increase the risk of the relationship being construed as an employment relationship. This may also be the case for *Standard document, Consultancy agreement (short form): International: clause 2.3* if it is not moderately and justifiably used. In addition, *Standard document, Consultancy agreement (short form): International: clause 3.2* may indicate an employment relationship if it is applicable to ordinary expenses and overhead costs.

2. Could the consultant acquire any other status as a result of the agreement?

Independent consultants are not entitled to any rights other than those provided for under the agreement. However, misclassification of an employee frequently leads to litigation.

3. If there is a risk of the consultant being deemed to be an employee in your jurisdiction, what are the tax consequences that could arise for:

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- The consultant?
- The company?

Consultant

If the consultant previously acted as a legal entity, taxation on revenues will be different once the consultant becomes an employee.

Income tax rates for individuals range from 7.5% to 27.5%. As a legal entity, a consultant would most likely pay income tax at the rate of 15%. However, legal entities must also pay local services tax up to 5%, although this may be less depending on the entity's venue.

Social security tax is also payable, which is 11% if the consultant is a legal entity. If the consultant is an employee, the tax rates vary between 7.5% and 14%, depending on wages, up to a maximum payment of BRL713.09. The wage basis for social security taxation is reviewed from time to time.

Company

The company will have employment costs, including social security tax of at least 62% of wages, plus benefits provided under the relevant collective bargaining agreement, including an annual salary review for inflation.

The employment costs are (as a percentage of employee wages):

- **Holiday leave**: 11.23% (benefits of 8.33%, social security of 2.23% and Unemployment Saving Fund (*Fundo de Garantia do Tempo de Serviço* (FGTS)) contribution of 0.67%). (This is an indirect cost, and equates to the payment of 12 months' salary for 11 months of work.)
- **Holiday bonus**: 3.74% (benefits of 2.78%, social security of 0.74% and FGTS of 0.22%).
- **13th month salary**: 11.23% (benefits of 8.33%, social security of 2.23% and FGTS of 0.67%).
- **FGTS**: 8%.
- **Social security**: 26.8%.
- **Total payroll cost**: 62% (benefits of 55.24%, social security of 5.20% and FGTS of 1.56%).
- **Severance**: 4.78% (benefits of 4% and FGTS of 0.78%).
- **Remunerated day off (*Descanso Semanal Remunerado* (DSR))**: 26.96% (benefits of 20%, social security of 5.36% and FGTS of 1.6%). (This is applicable to fees paid by the hour or days worked that are shorter than one week. The exact percentage varies according to the calendar.)

(Note that the amount of social security payable in relation to the above benefits varies according to trade and the history of work accidents.)

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4. If there is a risk of the consultant being deemed to be an employee in your jurisdiction, how can the agreement be worded to minimise or eliminate this risk?

Any elements of the contract that show the consultant's independence are beneficial (see *Question 1*) as long as that occurs in practice. The courts may disregard any provision of the contract that is not adhered to in practice.

5. To minimise any risk of the consultant being deemed to be an employee, is it common practice for provisions to be included in the agreement for:

- The appointment of a substitute at any time as set out in *Standard document, Consultancy agreement (short form): International: clause 2.4*?
- The consultant to carry out other activities for other parties as set out in *Standard document, Consultancy agreement (short form): International: clause 4*?
- Are there any consequences of these clauses that the parties need to be aware of?

Yes, it is common practice to include such provisions. To successfully minimise the risk of the consultant being deemed an employee, they must be adhered to in practice. The appointment of a substitute may entail labour liabilities for the company if the consultant defaults on their employment obligations. The company may be deemed secondarily liable for the rights of the consultant's employees, as the ultimate beneficiary of their services.

Vicarious liability

6.Does the law in your jurisdiction stipulate that the company could be responsible for the consultant's acts and behaviour, if they cause loss or damage to the company, its employees, customers or suppliers, during the term of the agreement?

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The consultant is liable for direct damages caused by their acts. The company is vicariously liable for acts of its employees and representatives. Whether the company is liable for the acts of the consultant will depend on the circumstances, and in particular its degree of control over the professional services delivered.

Duration

7. Are there any limitations or requirements in law that the consultant or the company needs to be aware of in relation to the term or duration of the consultancy agreement (see *Standard document, Consultancy agreement (short form): International: clause 1*)?

If the consultant is an agent of the company and subject to agency law, any subsequent appointment terms will cause the agency agreement to become open-ended. If the company terminates an open-ended agency agreement, the agent will be entitled to compensation of not less than 1/12 of all commissions earned during the agreement.

The same rationale may apply to consultancy agreements. If the nature of the services requires the consultant to make substantial investment that is suited to the company only, the court may award special compensation, if it finds that the consultant did not have sufficient contract time to recover possible investments made to provide the relevant services.

Services

8. Are there any duties or services that would be standard practice to include within the agreement (see *Standard document, Consultancy agreement (short form): International: clause 2*)? Are there any duties imposed by national law on consultants?

No, unless agency law applies (see *Country Q&A, Agency: Brazil*).

Payments

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9. In your jurisdiction, is it permissible to include provisions for any sums due to the company to be deducted from the amounts owed to the consultant as set out in *Standard document, Consultancy agreement (short form): International: clause 3.4* and *clause 10.4*?

In principle, yes. Under the law, however, setting off mutual debts is only valid if both debts are liquid, certain and overdue.

Tax and social security

10. What tax, social security or other payments will the consultant and the company be liable to make in your jurisdiction as a result of the consultancy agreement and how should they be dealt with in the agreement (*Standard document, Consultancy agreement (short form): International: clause 3*):

Consultant

Tax. Individual income tax is imposed at progressive rates (0 to 27.5%). This is withheld by the company. If the company is not in Brazil, the consultant is responsible for payment of this tax.

Social security. A social security contribution of 20% maximum must be paid, up to a maximum value published by the Federal Revenue Service (currently BRL1,220.21). This is withheld by the company. If the company is not in Brazil, the consultant is responsible for payment of this tax.

Other. The consultant is liable for local services tax (*Imposto sobre Serviços*) (ISS)), as per local legislation.

Company

Tax. None

Social security. The company must make a social security contribution of 20% of the employee's wages.

Other. None.

Anti-bribery and corruption

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11. What national and international anti-bribery and corruption legislation may the consultant be required to comply with in relation to services performed in your jurisdiction (see *Standard document, Consultancy agreement (short form): International: clause 2.7*)?

Law 12,846/2013 provides for different sanctions for acts of bribery and the like, all of an administrative nature. These are:

- Fines and indemnification.
- Termination of public contracts.
- Suspension from public tenders.
- Forced liquidation.

Individuals can also be prosecuted under criminal law (*Decree Law 2,848/1940*) for corruption.

References to the UK Bribery Act and the US Foreign Corrupt Practices Act (FCPA) are common. However, if the company wants provisions on compliance with such laws to be binding (and breaches of such provisions to be cause for termination of the contract or the imposition of other contractual penalties), it must provide relevant training and written instructions on the legislation.

Data protection

12. What data protection and privacy issues arise in your jurisdiction as a result of this arrangement and where personal data is transferred internationally? Is *Standard document, Consultancy agreement (short form): International: clause 6* sufficient to address these issues?

Data privacy

The company must observe the new Brazilian General Personal Data Protection Law (Law 13,709/18 or LGPD), published on 14 August 2018 and in force as of September 2020. The LGPD replicates key points of the General Data Protection Regulation (GDPR). The LGPD applies to any agent (individual, legal entity or public agency) who performs data processing, a term defined in the text as "any operation carried out with personal data", ranging from simple access to the data of employees, suppliers and consumers to storage, transfer, classification, erasure, or any other handling of such personal data. As such, the legislation is relevant to several areas within companies, such as the Marketing, HR, IT, Legal and Compliance. The LGPD applies not only to companies established in Brazil, but also to entities that process or collect data in the Brazilian territory and to companies that aim to offer or supply goods and services to individuals located in Brazil.

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Data transfer

The international transfer of data is only authorised in the circumstances set out in the LGDP, which include, but are not limited to:

- Transfer to countries that provide a level of protection deemed appropriate by the competent data protection authority.
- Transfer by means of standard contractual clauses, by which the Controller guarantees compliance with the law.

It should be noted that data from and to other countries that are only passing through Brazil, without undergoing any processing, may not be subject to the law.

Standard document, Consultancy agreement (short form): International: clause 6 is suitable for use in Brazil to a certain extent. The consultant can refuse to provide some medical or criminal record data in accordance with their constitutional rights to privacy.

Intellectual property

13. Other than where it is explicitly stated in the agreement, who will own any intellectual property rights created by the consultant during the term of the agreement under the laws of your jurisdiction (see *Standard document, Consultancy agreement (short form): International: clause 7*)?

The company owns every piece of IP that is a work product within the scope of the agreement. The company and the consultant have joint property rights if the creation is not within the scope of the agreement but derives from its performance or from the company's pre-existing property. However, the issue of whether moral rights can be assigned is debatable (there is court precedent indicating that moral rights are not assignable).

Indemnities

14. Does your national law recognise the concept of one party indemnifying the other as set out in *Standard document, Consultancy agreement (short form): International: clause 10* of the consultancy agreement? If not, what can be included in the agreement to create such protection?

Yes, but see *Question 9* about set-off.

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Discrimination

15. Is the consultant protected against discrimination during the term of the agreement and if so, can any wording be included in the agreement to minimise the risk for the company against a potential claim from a consultant?

Discrimination if often related to employment. In practice, it is quite rare to include wording on discrimination in consultancy agreements, but it is possible. The liability for discriminating against someone arises under general civil law so there is no contractual provision that will effectively mitigate the risk.

Confidentiality

16. Can a confidentiality clause be included as set out in *Standard document, Consultancy agreement (short form): International: clause 5* that continues after termination of the agreement? Could such a clause suggest that the consultant is an employee instead of an independent contractor?

Yes, provided that the protected information is valuable and is actually confidential.

A confidentiality clause will not characterise the agreement as one of employment rather than a consultancy.

Restrictive covenants

17. Can restrictive covenants be included for agreement by the consultant? Is the limitation in *Standard document, Consultancy agreement (short form): International: clause 4* permissible in your jurisdiction?

Yes, a limitation such as that in *Standard document, Consultancy agreement (short form): International: clause 4* is permissible in Brazil. Non-compete provisions are valid during the agreement and may be valid after its expiration

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for a limited period (usually 12 to 24 months) under justifiable circumstances, primarily, as extra protection of confidential information and provided that the employee is reasonably compensated. Non-solicitation clauses are not prohibited but are difficult to enforce.

Termination

18. Under what circumstances can the consultancy agreement be terminated without notice as set out in *Standard document, Consultancy agreement (short form): International: clause 8* by:

- The consultant?
- The Company?

Consultant. Termination without notice can occur for material breach (as provided for in the agreement) or insolvency/bankruptcy (if provided for in the agreement).

Company. Termination without notice can occur for material breach (as provided for in the agreement) or insolvency/bankruptcy (if provided for in the agreement).

Procedure. Termination without notice must be given in writing, stating the cause for termination.

19. On termination, does the law in your jurisdiction stipulate that any mandatory notice period or payments are to be made to the consultant?

Notice of eight days or possibly less must be given, depending on the frequency of payment of fees (*Civil Code*), but it is customary to provide for a mutual 30-day notice period.

The contract must also be long enough to ensure that the consultant can recover any investment specifically made for the purposes of the agreement (*Civil Code*). The acceptable length will differ on a case-by-case basis.

If the Agency Law applies, the required notice term is 30 days, and the company must indemnify the agent either:

- For the average commission earned by the agent during the agency, multiplied by half of the remaining contract term.

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- If the contract is open ended, for 1/12 of all commissions earned during the agency.

Mediation

20.Is it suitable in your jurisdiction to include a CEDR international core mediation clause?

Mediation is not common in Brazil. The mediation law was introduced quite recently (*Law no 13,140/2015*). To date, the author has not seen it put into effect except in relation to small claims between neighbours and professional services provided to consumers, for example, in relation to plumbers, household repairs and so on.

The CEDR international core mediation clause is valid, but it may be held invalid on the grounds of materiality if the costs of the mediation are excessive as compared with the dispute. In addition, the clause will not stand if the consultant makes a claim for employment status and rights.

Governing law and jurisdiction

21. Does the law in your jurisdiction dictate which governing law and jurisdiction will apply to the consultancy agreement (see *Standard document, Consultancy agreement (short form): International: clause 14* and *clause 15*)?

Yes (*Law no 4,657/1942*). If the services are performed in Brazil, then Brazilian laws apply and local courts have jurisdiction as a matter of public policy, irrespective of contractual provision. However, if the arbitration clause is valid (see *Question 20*), the law and venue of choice set out in the clause will have precedence.

Execution and other formalities

22. How does this agreement need to be executed to ensure it is valid and enforceable? Does it need to be registered with any authority in your jurisdiction?

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Execution formalities

None.

Registration formalities

None.

Language

23. Does the agreement need to be in a language other than English for it to be valid and enforceable (see *Standard document, Consultancy agreement (short form): International: clause 16*)?

The agreement can be executed in any language that is comprehensible to both parties. However, a party who wants to submit it to a Brazilian court or to any third party will need to provide a sworn Portuguese translation of it.

General

24. Are there any clauses in *Standard document, Consultancy agreement (short form): International* that are not legally valid or not standard practice in your jurisdiction?

Depending on the circumstances, the following clauses may not be legally valid or enforceable in practice in Brazil:

- *Standard document, Consultancy agreement (short form): International: clause 3.4* on deductions.
- *Standard document, Consultancy agreement (short form): International clauses 6.1(b) and (c)* on sensitive personal data.
- *Standard document, Consultancy agreement (short form): International: clause 7.2* on assignment of moral rights.
- *Standard document, Consultancy agreement (short form): International: clause 10.4* on deducting from payments to satisfy any indemnity.
- CEDR international core mediation clause.

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25. Are there any other clauses that would be usual to see in a consultancy agreement and/or that are standard practice in your jurisdiciton?

No.

Contributor details

José Carlos Wahle, Partner

Veirano
T +55 11 2313 5810
E *jose.wahle@veirano.com.br*

Areas of practice. Labour law, civil law and product liability.

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