

Doing Business in South America: The Data Protection Environment



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Agenda

- General approach to data protection
- Current legislation
- Legislative proposals
- Legislative “drivers” and “inhibitors”
- Why manage emerging risks?
- The challenges
- Approach to managing emerging risks
- Meeting the challenges

General Approach to Data Protection

- Constitutional protections for the “right of privacy”
 - Argentina, Brazil, Chile, Columbia, Mexico, Peru
- *Habeas data*/access rights
 - in constitution;
 - discrete legislation: Argentina, Brazil
- “Omnibus” privacy legislation
 - Argentina, Chile

General Approach to Data Protection – cont'd

- **“Sectoral/Issue Specific” privacy legislation**
 - Argentina: Credit card information - Credit Card Act, Law No.25065 of December 7, 1998
 - Brazil: Privacy rights of children - Federal Law No.8,069, July 13, 1990 as amended by Federal Law No. 10, 764, November 12, 2003
 - Chile: Spam and unsolicited commercial communications Consumer Protection Law (No.19.955)
 - Columbia: Medical records - Medical Records Law No. 23 of 1981
 - Mexico: Restrictions on direct marketing and credit reporting agencies - Federal Consumer Protection Law
 - Peru: private credit reporting agencies - Centrales Privadas de Informacion de Riesgos
 - Uruguay: Processing of personal data in public and private healthcare sectors - Decree No. 396/003
- **Health professional Codes, by-laws etc.**

Current Legislation

➤ Chile

- *Law for the Protection of Private Life*
 - Came into force on October 28, 1999
 - No data protection authority
 - No case law
 - No restrictions on transfers to third countries
 - Each affected person enforces the law individually

➤ Argentina

- *Law for the Protection of Personal Data* (November 2000)
 - *Regulation of the Data Protection Act* (November 2001, Decree No. 1558/2001)
 - Adequacy designation from the EU June 30, 2003
http://europa.eu.int/comm/internal_market/privacy/docs/adequacy/decision-c2003-1731/decision-argentine_e..pdf
 - Data Protection Authority – *Dirección Nacional de Protección de Datos Personales*
 - Disposition 1/2003

Current Legislation

➤ Uruguay

- Law no. 17.838 of 2004 (September 24, 2004)
- Regulation of commercial personal information and *habeas data* action

Legislative Proposals

➤ Mexico

- Most recent proposal from Senator Garcia Torres introduced on February 14, 2001
- Passed by unanimous vote of the Senate on April 30, 2002
- Bill sent to Commerce and industrial Promotion committee (committee of the Chamber of Deputies)
- Commission was to recommend rejection prior to end of session on April 30, 2003
- No action taken because of ChoicePoint scandal
- New deputies elected for fall 2003 session
- Current status: no action

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Legislative Proposals

➤ Brazil

- Bill 3494/2000 *"Bill for the structuring and use of databases regarding third parties and regulating the procedural right of habeas data"*
 - Received at the Committee on Constitution, Drafting on December 17, 2002
 - Rapporteur nominated and had been considering submissions
- Bill 321/2004 *"Bill for the protection, treatment and use of personal data and other matters"*
 - Introduced by Senator Sergio Sambiasi on November 10, 2004
 - Forwarded to the Committee on Constitution, Justice and Citizenship

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Legislative Proposals

- **Columbia**
 - Statutory Law No. 139/2004 (August 31, 2004);
 - Legislative Branch of the Public Power Chamber of Representatives
- **Ecuador**
 - *Constitutional Control Law*;
 - Enacted to establish a court to enforce constitutional rights such as *habeas data*
- **Peru**
 - *Personal Data Protection Law*
- **Venezuela**
 - *Data Protection and Habeas Data Law for Venezuela*
 - "Congress of Venezuela (Asamblea Nacional de Venezuela) has decided to take the Data Protection Bill out of its legislative agenda, based on considerations that the Bill may have been pushed by some interests in the private sector". [January 25, 2005]

Legislative "Drivers and Inhibitors"

There appear to be many pressures promoting the introduction of privacy legislation in the Latin America Region....

- **Spanish-Latin America Data Protection Network:**
 - Primary objective: mutual cooperation and data protection in the Spanish-Latin American countries
 - Argentina, Brazil, Chile, Columbia, Costa Rica, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Paraguay, Peru, Portugal, Spain, Uruguay
 - Established by La Antigua (Guatemala) Declaration, June 6, 2003
 - Initially chaired by the Spanish Data Protection Agency

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Legislative “Drivers and Inhibitors”

➤ International trade

- Mexican-EU Trade Agreement Article 51:
“The parties agree to a high protection to the processing of personal and other data, in accordance with standards adopted by the relevant internal organizations and the community.” Dec.8/97
- Chile - EU Trade Agreement Article 30:
“The parties agree to cooperate in the protection of personal data, in order to improve the protection level and to prevent the trade obstacles required by the personal data transfer.”

➤ Privacy scandals

- ChoicePoint (Mexico/LA summer 2003)

➤ APEC Principles

- Chile, Mexico, Peru

➤ Individual senators/legislators

➤ Roundtable on Emerging Privacy Issues in South America (April 16, 2004) <http://www.thepublicvoice.org/events/buenosaires04/default/html>

Legislative “Drivers” and “Inhibitors”

BUT....

- Little or no “bottom up” consumer pressure/awareness
 - “Potential negative privacy impacts concerning the disclosure of personal information and preferences within such services [“Orkut”] have been mostly neglected by Brazilians in general.”
Privacy and Human Rights 2004
EPIC/Privacy International
- More pressing practical/legislative concerns, e.g., energy, inflation
- No apparent economic incentives; e.g. outsourcing
 - Little government interest/traction
- Resources for enforcement where legislation is in place

Why Manage Emerging Risks?

- No warning of legislation that could negatively impact the business
- Opportunity to make the business case
- Opportunity to work more closely with local offices and educate them about importance of government/stakeholder education
- Engagement of local organizations
- Concerns re: unequal/inconsistent enforcement
- Global corporate positioning

The Challenges

- **Conflicting approaches**
 - Divergence between the EU and the Americas/APEC
 - Commission review of Directive -> pressures for modernization vs. complexity of Directive amendment/implementing legislation
 - Current public policy initiatives, e.g., health vs. data protection

The Challenges

- **Varying philosophical underpinnings**
 - Constitutional rights to privacy and/or *habeas data*, e.g., Brazil, Columbia, Paraguay
- **Issue Awareness**
 - Government/business/consumer, e.g., without consumer awareness and concern difficult for a self-regulatory regime to provide business incentives

The Challenges

- **Source of precedents**
 - Voluntary code – e.g., PIPEDA (Canada)
 - Latin America: look to common language, e.g., Brazil/Portugal; Argentina/Italy/Spain = lack of understanding of impact
- **Education**
 - Government officials proposing legislation
 - Internal business
- **Economic environment and priorities**

IMS Approach to Emerging Risk - Advocacy

- Trade Negotiations – FTAA, APEC
- Country Data Commissioners and other government organizations
- Privacy Community – academics, nonprofit groups
- Business Community – Chambers of Commerce in local countries
- Industry groups – Pharma, Physicians, Technology
- Corporate – IMS business partners, others

Managing Risks in Every Day Compliance

- **Privacy program**
 - CPOs in five regions - Europe, U.S., AsiaPac, Japan, Canada/Latin America
 - Global Privacy Council
 - cross functional representation

Managing Risks in Every Day Compliance

- Corporate and senior regional management buy-in
- Centralized authority at the beginning to educate and coach – deliver consistent messages
- Develop internal and external key contacts 'on the ground': legal, GR
- Ensure 'external expertise' is transferred to internal operations
- Leverage global learnings and credibility
- Gradual hand-off

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Managing Risks in Every Day Compliance

- Awareness session for regional and local management
- Establishment of a local program
- Training
 - Key business person
 - Familiar with all operations
 - Privacy knowledge can be leveraged
- Relationships with local organizations with privacy experience
- 'Virtual CPO'

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Meeting the Challenges - Summary

- Prioritization is key
- Identify the emerging risks and advocate before compliance is required
- Recognize that 'one size does not fit all'
 - "The Latin American Solution"
- Think 'outside the box'
- Be prepared for futures – environmental scanning is critical
 - Introduction of more legislation;
 - More awareness;
 - More enforcement?

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