Electronic signatures and digital certification: the liability of registry authorities under Brazilian legislation

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The establishment of a framework to provide legal validity for signatures[1] in electronic documents in Brazil was introduced through Provisional Measure n° 2.200, subsequently revoked by the Provisional Measure n° 2.200-2 of 24 of August, 2001[2]. A range of regulations, such as Ministerial Decrees, Executive Orders (*Portarias*) and Resolutions relating to the electronic signature infrastructure and relevant technical issues for implementation have also been passed, having created and designed a Brazilian Public Key Infrastructure[3].

This infrastructure, known as "ICP-Brazil" is the entity responsible for digital certification that aims to ensure the secrecy and privacy of correspondence and personal communications[4] as well as to provide for the integrity and authenticity of electronically signed documents[5]. The network of ICP-Brazil is composed of Registry Authorities, which transmit data received from individuals and companies to an accredited Certification Service Provider, so that the latter can process digital certificates.

In this paper we discuss the civil liability of Registry Authorities under the Brazilian legislation, whose role is to identify and register users on the network, to process requests for certificates and forward the requests on to the Certification Service Provider and to maintain the Registration system.

The Registry Authorities can be public or private companies, and they undertake the link between the network and the final users, guaranteeing that the data originator is indeed an existing person. The Registry Authorities are responsible for the translation of data received from a physical to a digital format, similar to the service provided by a Public Notary.

Strict Liability - The Constitutional Approach

Public Notary services are provided directly by the State or by accredited private bodies through delegation of public powers[6]. In the case of digital certificates and electronic signatures, the Executive Power has delegated the competence to provide this service to a federal entity called INTI, which is also the highest level Certification Service Provider within the infrastructure of ICP-Brazil. Under the ICP-Brazil hierarchy, no private body or entity may provide digital certificates or electronic signatures without being authorized by the INTI and without undergoing regular audits by this entity[7].

As providers of a privately administered public service, the liability of Registry Authorities falls under the regime of Article 37 paragraph 6 of the Federal Constitution, according to which Public Notaries are liable for any damage related to the service, irrespective of any fault on the service provider's part. It should be noted that there is a constitutional provision in Brazil that does not limit liability to any type of damage sustained by the claimant. The Registry Authorities may be liable for physical injury, property damage, moral damage or pure economic loss.

The Infra constitutional Approach – Resolution no 21 and the Consumer Protection Code

Even though MP 2002-2 does not specifically refer to the liability of the Registry Authorities, there are rules relating to these liabilities within Resolutions enacted by the competent authority.

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[1] In Brazil, legislation does not distinguish between "electronic signatures" and "advanced electronic signatures" as the European Directive does. It is worth mentioning that under the Brazilian applicable law the term does not encompass the use of scanning equipment to create a digital image of a person's signature.

[2] Provisional Measures (MP) are normally Presidential Bills, which need to be sanctioned by Parliament after 30 days of publication. If not sanctioned, they cease to be enforced after this period. If sanctioned, they become law. This specific MP is still in force as determined by Constitutional Amendment no. 32 of 2001, according to which all MP not yet sanctioned by Congress by September 2001 but which were still in force at that time, should remain in force.

[3] http://www.icpbrasil.gov.br/.

[4] Article 1, I of Ministerial Decree N. 3.505 of June 2000.

[5] Article 1 of the Provisional Measure 2002-2.

[6] Article 37 of the Brazilian Federal Constitution.

[7] See Article 5 of the Provisional Measure 2002-2.

Resolutions no. 1, 6, 7 and 8 established a regime of non-strict liability, although this regime has been changed by Resolução ICP-BRASIL nº 21, de 29.08.2003 (Resolution no. 21 dated 29 august 2003). Prior to Resolution 21, a claimant needed to prove negligence on the part of the Registry Authority in order to obtain compensation. This position was clearly unconstitutional and has been replaced by the strict liability approach. Once the claimant establishes that he has suffered damage due to a defective service, he will have a choice of which defendant to take action against. He might choose to sue the Registry Authority or the Certification Service Provider, the latter being hierarchically above the Registry Authorities.

The new provisions, reworded by article 3 of Resolution 21, read as follows:

• 2.2.1. Responsabilidades da AC • A AC responde pelos danos a que der causa. • A AC responsável pela PC responderá solidariamente pelos atos das AC das cadeias a ela subordinadas. • 2.2.2. Responsabilidades das AR • A AR será responsável pelos danos a que der causa."	• 2.2.1. CA's Liability • The CAs will be liable for any damage they cause (in relation to the service). • 2.2.2 AR's Liability • The ARs will be liable for any damage caused by them (in relation to the service)."

Regarding limitation of liability, Resolution no 21 states that liability may be limited only if the claimant is a company[8]. One might question the effectiveness of this provision in a case where the claimant invokes the application of the Consumer Protection Code, which prohibits the limitation of liability in relation to "consumer transactions", since in the Brazilian system a law or code supersedes these resolutions and even an MP[9].

It might be argued whether the relationship between the Registry Authority and the users of its services could be characterised as a "consumer transaction", since the Consumer Protection Code cannot be applied where the remuneration of the service constitutes any type of tax[10]. As Notary services have a public nature, some authorities have considered that payment for such services may correspond to a specific tax, and therefore not considered to be part of a "consumer transaction".

Criminal Liability

The Brazilian constitution has not provided for the criminal liability of companies, except in cases of environmental crime (art. 225 of the Federal Constitution). As Registry Authorities must be companies, according to article 8 of the MP 2002-2, they would probably not be liable in a criminal lawsuit, although an employee of the Registry Authority who acted illicitly can be responsible for his own actions made on behalf of the Registry Authority.

Conclusion

As most users of the services of Registry Authorities prove to be companies rather than individuals, failure to comply with any provision of the MP or even with the duty of care imposed by the Consumer Code will not, of itself, lead to criminal proceedings. More than that, as the Registry Authorities themselves might limit indemnities, when the claimant is a company, civil proceedings against the person concerned may prove to be ineffectual. The impression given by the legislation is that its main concern is to protect the Registry Authorities rather than guaranteeing society general security.

The current legislation related to the ICP Brazil does not specify how the interests of owners of seized keys will be safeguarded; it sets very limited standards for the protection of keys that are not intercept related. Issues of abuse that occur during the registration of data are not covered at all, and the overall impression is that that there is no significant commitment to protect the interests of any non-related third party. Thus any person relying on an electronic signature system would have to seek redress through traditional remedies for fraud and at the current time it is uncertain how or whether the Courts would apply them in the context of electronic signatures.

As a response to such criticism, two new projects of law have been proposed to the Government and are currently under analysis: PCL no. 1.589/99, presented by the Brazilian Bar Association of Sao Paulo, and PCL no. 672, inspired on the UNCITRAL rules. If voted to become law, the successful project will substitute the existing legislation relating to digital signatures. ∎

[8] Article 2.3.2 of Resolution no 7, as reworded by Article 3 of Resolution no. 21. The original text reads: "2.3.2. Relações Fiduciárias Neste item deve constar que a AC responsável ou AR vinculada indenizará integralmente os danos o que der causa. Em situações justificáveis, pode ocorrer limitação da indenização, quando o titular do certificado for pessoa jurídica."
[9] For a detailed analysis, see WALTER CENEVIVA, Lei dos Registros Públicos Comentada, Saraiva, 2002.
[10] Article 3, paragraph 2 of Law 8.078/90 (Consumer Code).

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