ARTICLE:

COMMENTS ABOUT THE BRAZILIAN SUPREME COURT ELECTRONIC SIGNATURE CASE LAW

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The Brazilian Supreme Court has addressed the use of electronic signatures in court proceedings on more than two occasions. The Supreme Court position has been, since 2002, against the validity of electronic petitioning. This article comments on two cases decided by the Brazilian Supreme Court: STF, AgR RMS 24.257-DF (2002) in 2002 that became the leading case in respect to electronic signatures, and another STF, AI 564.765-RJ (2006) in 2006 that is interesting for two reasons: first, it has a dissenting opinion that accepts electronic signatures, and secondly, because the decision refers to digital signatures in a positive way, as a possible acceptable solution. Finally, this article presents Law n. 11.280, of February 16th, 2006, that amended the Brazilian Code of Civil Procedure and allows electronic petitioning under certain legal requirements.

Introduction

The Brazilian Supreme Court has addressed, in more than one case, the issue of whether or not legal procedural documents electronically filed should be accepted by courts. The first case was decided in 2002, STF, AgR RMS 24.257-DF (2002) and it refers to a document that did not have a digital signature, but a digitalized signature (an electronic image of a handwritten signature). The Supreme Court did not admit the digitalized signature and STF, AgR RMS 24.257-DF (2002) became a leading case for the matter. In 2006, more than one case addressed the issue under the ruling of the 2002 leading case. Despite the fact that the leading case refers to a digitalized signature, it has been applied as a precedent for electronic signatures. Nevertheless, it seems that there is room for a change in the case law: a new statute has amended the Brazilian Civil Procedure Code to address digital signatures and digital certificates. These comments will first briefly address the 2002 and the 2006 Brazilian Supreme Court cases. After that, the amendments to the Brazilian Civil Procedure Code will be set out before briefly discussing the legal concept of "interoperability" with the Brazilian Public Key Infrastructure (Brazil – PKI). Finally, the concluding remarks consider, if on the one hand those two cases might not become "bad law" for documents that are signed with mere electronic signatures, on the other hand the Brazilian Supreme Court has given reasons that it will very likely start to accept digital signatures.

STF, AgR RMS 24.257-DF (2002)

The facts of STF, AgR RMS 24.257-DF (2002) are as follows: a legal document not signed by hand was filed before the Brazilian Supreme Court; it was signed with a digitalized signature (an image of the hand signature attached to it). The Brazilian Supreme Court did not accept the document on the grounds that only a petition that has been signed by hand, by the attorney of law, was legally valid.

It is interesting that there is a Federal Statute (Lei n. 9.800 of 1999, "Lei n. 9.800/99") that was in force at the time of this decision, which allows attorneys to send petitions by electronic means. As a matter of fact, as will be explained, Lei n. 9.800/99 refers to transmission of data and images mostly in the same manner as a facsimile transmission. Besides, Lei nº 9.800/99 establishes that attorneys must file the original document no later than five days after the petition is sent by facsimile transmission (such a term is necessary since the judge's office will verify the authenticity of the

original petition).

Therefore, under the ruling of Lei n. 9.800/99, attorneys are allowed to print their petitions, sign them by hand and simply send their originals to the court by facsimile transmission. The Brazilian Supreme Court interpreted Lei n. 9.800/99 in a strict way, by preventing the use of alternative methods, other than by way of facsimile transmission.

There is a reason for such a strict interpretation of article one of the statute.[1] First, the decision makes it clear that "only a petition signed with a manuscript signature previously by an attorney at law is recognized as valid".[2] Second, when the attorney signs the petition by hand and sends it to the court by facsimile transmission, the petition remains consistent. In other words, it cannot be altered. Further, the filing of the original petition subsequently is a guarantee that the document has not been altered. Since a digitalized signature attached to a digital document is not present in the original paper petition, when the attorney files the petition up to five days later, the petition will not be exactly the same as the one that was electronically sent. It can be argued that the difference is very subtle or even rhetoric, but under formal legal grounds, the paper document that will be filed before the court up to five days subsequently is not exactly the same document as the electronic document filed previously with a digitalized signature.

In conclusion, article one of Lei n. 9.800/99 applies to facsimile transmissions and to other solutions that can literally reproduce the paper petition signed by hand that will be filed up to five days before the court. (An example would be the case of scanning the petition and sending the scanned computer file as an attachment by e-mail – and, of course, filing the paper document within five days). In other words, Lei n. 9.800/99 did not regulate electronic signatures – this was made clear in the decision, by Justice Ellen Gracie, when she said: "However, to promote judicial safeguards, some media relating to informatics and general automation should be legally ruled before being put into operation" – but she only refers to facsimile transmissions and similar devices.

STF, AI 564.765-RJ (2006)

The facts of the STF, AI 564.765-RJ (2006) case are similar to the ones in the STF, AgR RMS 24.257-DF (2002) case, but here, it was the Federal Union of Brazil that filed before courts a document with an electronic signature, not a digitalized signature.[3] The document was again (in 2006) not accepted by the Brazilian Supreme Court. There are two important aspects of the decision that deserve comment: first, the references to digital signatures; second, the dissenting opinion of Justice Marco Aurélio.

The 2006 decision points out straightforwardly that the Brazilian Supreme Court does not accept electronic or digitalized signatures. The 2006 decision also refers to the 2002 decision as a precedent in the matter, but it goes further in addressing the Brazilian Public Key Infrastructure – PKI Brazil (or Infraestrutura de Chaves Públicas – ICP– Brasil).[4]

Justice Pertence, relater[5] for the decision, refers to the PKI Brazil as a good solution created by the Brazilian government. The PKI Brazil is mentioned as an assurance of the authenticity and integrity of electronic documents.

Justice Marco Aurélio wrote an interesting dissenting opinion in which he accepts the electronic signature. His reasons were based on the fact that the Brazilian Supreme Court has regulated a method for attorneys at law to obtain access to the "e-doc" system, this is because the Federal Union is the subject of many law suits, and it is easier for attorneys to be granted electronic petitioning facilities to speed up the process of submitting petitions to the court. Therefore, it is a good policy to find a simpler way that would help attorneys file their petitions. Whereas the "e-doc" system is a method for attorneys to be given passwords; digital signatures were presented as a more reliable solution for the Supreme Court to accept electronic documents.

Law n. 11.280 of February, 16th, 2006

The Brazilian Code of Civil Procedure of 1973 (hereinafter the 1973 CPC) did not address electronic filing of any kind. The 1973 CPC embraces the theory of "freedom of formal requirements" which means that all formal requirements will always be expressly written in the Law for all the parties to comply with. Of course, there are many procedural acts that are legally required to be in writing. This writing requirement is the main

[1] *Art. 10 É permitida às partes a utilização de sistema de transmissão de dados e imagens tipo fac-símile ou outro similar, para a prática de atos processuais que dependam de petição escrita.*

[2] *See also other three other decisions from the Brazilian Supreme Court in the same direction: AI-AgR 563311 / AM, decided on 14-March-2006; AI-AgR 553690 / RJ, decided on 09-May-2006; and AI-AgR 557479 / RJ, also decided on 09-May-2006.*

[3] *See also another decision of the Brazilian Supreme Court, AI-AgR 558995 / RJ, published on 02-June-2006 that also rules that digitalized signatures are not acceptable for filing petitions before courts in Brazil.*

[4] *See http://www.icpbrasil.gov.br.*

[5] *A case before the Tribunals is first sent to a single judge that belongs to a 3 judge, a 5 judge or an 11 judge panel. The single judge is the relater. This judge writes the first opinion and the others simply say "I agree" or write a concurring opinion or a dissenting opinion. If the relater confirms the decision and the two other judges dissent, the relater will be defeated and the case will be reformed.*

source of denying the acceptance of sending a petition electronically. As Brazil is a civil law country, a change in the Code is always a welcome solution for the regulation of technical innovations. Therefore, during the case discussions regarding electronic signatures, a new statute amended article 154 of the 1973 CPC to allow for the use of electronic means.

Article 154 of the 1973 CPC reflects the principle of "freedom of formal requirements" because it establishes that, as a general rule "procedural acts do not depend upon a formal requirement; unless when the law expressly mandates it". Law n. 10.358, of December 27th, 2001 sought to add a paragraph to article 154 that would allow for the practice of electronic procedural acts, but the President of Brazil exercised his veto power and the paragraph did not enter into the Code of Civil Procedure.[6] More than four years later, Law n. 11.280 of February, 16th, 2006 finally added the paragraph to article 154, but with a different requirement: interoperability with the Brazilian Public Key Infrastructure.

The terms of the new law are:

Art. 154. [...]
Parágrafo único. Os tribunais, no âmbito da respectiva jurisdição, poderão disciplinar a prática e a comunicação oficial dos atos processuais por meios eletrônicos, atendidos os requisitos de autenticidade, integridade, validade jurídica e interoperabilidade da Infra-Estrutura de Chaves Públicas Brasileira - ICP - Brasil.

Article 154. [...]
Paragraph. Courts, within their jurisdictions, may regulate the practice and the official communications of procedural acts by electronic means, provided that the requirements of authenticity, integrity, legal validity and interoperability with the Brazilian Public Key Infrastructure – Brazilian PKI are complied.

The interoperability requirement is a very serious one because the Brazilian PKI is governed by a federal agency that establishes the technical requirements for Brazilian certification authorities. Therefore, it is very likely that the agency will have to inform courts whether or not the interoperability requirement is complied in a certain hypothesis.

This new law may act to overrule the 2002 and the 2006 Supreme Court decisions. These decisions refer to electronic petitioning with electronic signatures, not to digital signatures under the Brazilian PKI system. Therefore, the ruling is likely to remain good law for petitions submitted electronically that are not interoperable with the PKI Brazil. The Brazilian Bar will probably play an important role in providing attorneys at law with digital certificates that are acceptable by courts.

Conclusion

At this point in time, the Brazilian Supreme Court has ruled that electronic signatures are not accepted for legal petitioning when the law requires written petitions with signatures by hand. The Brazilian Supreme Court leading case of 2002 was applied as a precedent in cases decided in 2006. Law n. 11.280 of February, 16th, 2006 amended the Brazilian Code of Civil Procedure, which now allows courts to accept electronic petitioning. This new law refers to the requirement of the interoperability with the Brazilian Public Key Infrastructure. The way courts will implement the new law is still open. It is understood that the Brazilian PKI will have to provide courts with the parameters of interoperability. Since the 2002 and 2006 decisions refer to electronic signatures, they will not necessarily be overruled by Law n. 11.280 of 2006. These decisions will very likely remain as a precedent against the use of electronic signatures and for the adoption of digital signatures. Finally, it is probable that the Brazilian Bar will play a very important role in establishing its own Certification Authority for attorneys at law.

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[6] *The text of the vetoed paragraph to be added by Law n. 10.358 of 2001, was: "Atendidos os requisitos de segurança e autenticidade, poderão os tribunais disciplinar, no âmbito da sua jurisdição, a prática de atos processuais e sua comunicação às partes, mediante a utilização de meios eletrônicos"; "Once complied with the safety and authenticity requirements, courts may regulate, in their jurisdiction, the practice and the communication to the parties of procedural acts, through the use of electronic means".*