ARTICLE:

DIGITAL EVIDENCE IN BRAZIL

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Brazilian courts have been addressing the admissibility of electronic documents since the first decisions during the mid 1990s. In 2006, the Brazilian Congress addressed the use of electronic documents for the electronic filing of documents and petitions in legal proceedings through a new federal statute, and under the terms of the law, all communications with courts can be made electronically (including the issuing of an electronic summons). All phases of the proceedings can be digitally stored, and most of the documents and petitions can be electronically filed before courts. Digital evidence is regulated by the new legislation in such a way that electronic documents are considered as original documents with the same strength of evidence given to the corresponding paper based document. Some documents cannot be presented exclusively in digital form, such as negotiable instruments, which must be also presented on paper.

Introduction

The Brazilian Congress passed a new statute, Law n. 11.419 on 19 December 2006 (Law n. 11.419 of 2006) that amended the Brazilian Code of Civil Procedure and created the ability to submit the papers relating to legal proceedings to a court in electronic format. Electronic filing is now legal in Brazil for civil, criminal and labour proceedings. Besides allowing the judiciary to implement proceedings in digital format, Law n. 11.419 of 2006 also regulates digital evidence. Law n. 11.419 of 2006 makes it valid for public agencies and for private parties to produce digital evidence with very few requirements.

This article analyzes the aspects of Law n. 11.419 of 2006 that deal with digital evidence. The first part describes the regulation of electronic filing under the terms of Law n. 11.419 of 2006, in which the requirements that the statute introduced in the Brazilian Civil Procedure rules for the validity of a digital petition will be set out. The second part reviews the theory and the rules that regulate evidence in Brazilian civil procedure; this part begins with a reference to the systems and to the types of evidence, and then explains the disclosure phase and rules for evidence in Brazil. The third part addresses the requirements for digital evidence under the terms of Law n. 11.419 of 2006. Law n. 11.419 has conferred a new status for digital evidence, especially for digitally signed documents in Brazil.

Electronic proceedings under the regulation of Law n. 11.419 of 2006

Filing legal documents electronically to the courts started in the 1990s in Brazil. Many attorneys started to send legal petitions and other supporting documents to courts by facsimile transmission. In 1999, a federal statute (Law n. 9.800 of 1999) permitted attorneys to send their petitions by facsimile transmission up to the last day assigned by the judge or by the law. But there was a requirement that the original paper document had to be filed no later then five days after the document was sent by facsimile transmission. The judge was required to have possession of both documents: the facsimile copy and the original paper document filed no later than five days later. If a single difference was discovered between the two versions, all the documents were rejected because of tardiness of preparation. Due to this requirement, a petition could not be filed by e-mail because the sender would have not signed the e-mail with a manuscript signature (an analysis of an e-mail with a .pdf file attached to it is not considered here).

Chapter 1 of Law n. 11.419 of 2006 is entitled 'Law Suits and Informatics' (Lei nº 11.419, de 19 de dezembro de 2006 Dispõe sobre a informatização do processo judicial; altera a Lei no 5.869, de 11 de janeiro de 1973 – Código de Processo Civil; e dá outras providências) and begins with a plain statement that allows the parties to use all kinds of electronic (including the internet) methods for filing all types of documents in legal proceedings. Chapter one also defines electronic signatures as: digital signatures with a digital certificate issued within the terms of the specific legislation

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applicable to the PKI of Brazil, Medida Provisória nº 2.200-2, de 24.08.2001 (Provisional Measure No. 2.200-2, 24.08.2001) and, by registering the electronic signature, (usually a PIN, but is can be a digital signature) in person before a member of the judiciary as regulated by judicial procedure. For example, a specific court can issue an internal regulation that can permit attorneys that practice before the particular court to have a PIN issued by the court to identify the attorney. All electronic documents sent to courts must bear the electronic signature of the lawyer sending the documents.

Chapter 2 of Law n. 11.419 of 2006 is entitled 'Electronic communications of acts of the law suits' (Da Comunicação Eletrônica dos Atos Processuais) and it regulates the creation of electronic legal gazettes in Brazil. At the time of writing, judges can communicate their acts through the paper publication, the Official Daily. Under the terms of Chapter 2, no paper publication will be required, and courts may use electronic methods to communicate with attorneys, with other judges and with other courts (both domestic and foreign) and even with the parties to the proceedings. All publications that are electronically published must bear a digital signature. Finally, Chapter 2 allows a legal summons to be electronically issued by courts, except a summons in criminal proceedings that must follow the specific rules of criminal procedure (these are not within the scope of this text).

A review of the theory of evidence in civil procedure

The Brazilian Code of Civil Procedure of 1973 (1973 CPC) did not address electronic filing. How evidence is regulated by the Code is briefly addressed below, which will include some of the theory of evidence in Brazilian law.

Evidence

Legislation, within the framework of both ordinary and constitutional statutes, provides for the establishment of the truth in legal proceedings. The Civil Code provides rules that determine the forms of evidence that are admissible, and the Code of Civil Procedure provides for the time and method of submitting evidence during legal proceedings.

The right to produce evidence, considered as a subjective public right, has its origin in the constitutional norms, and article 5, section LV of the constitution provides the right of a litigant to adduce evidence in legal proceedings. It is noted that there is no express constitutional provision that places evidence among the fundamental rights, nevertheless, the right to evidence is 'um desdobramento da garantia constiuticional do devido procresso legal ou um aspecto fundamental das garantias processuais da ação defesa e do contraditório' 'the unfolding of the constitutional guarantees of the due legal process or a fundamental aspect of the process guarantee of action, of defense and of the contradiction'.[1] The constitutional foundations provide for the guarantee of access to the law,[2] of challenge, to due legal process, and to submit evidence to prove their case, or to undermine or challenge the evidence of the other party. The parties produce their own evidence following the principle of the adversary principle, with a guarantee of parity of opportunity and participation for both parties.

It is for the magistrate to come to 'the formation of the conviction concerning the facts'.[3] The purpose of the submission of evidence is to enable the judge to evaluate the facts following their own free conviction. When reaching a decision, a judge must set out the evidence that has convinced them and upon which the

[1] *Eduardo Cambi, Direito Constituicional à prova no processo civil, 2001, (Ed. Revista dos Tribunais), pp 165-166.*

[2] *Federal Constitution of Brazil, article 5, section XXXV.*

[3] *Humberto Theodoro JR, Curso de Direito Processual Civil, (Rio de Janeiro: Forense, 1996), p. 414, v.1.*

decision is founded, thus protecting the parties from judicial discretion. It is for the party to demonstrate why a particular form of evidence is necessary, and it is for the judge to decide on the admissibility of the types of evidence that are valid, in accordance with the claims of the parties. The alleged facts must be linked to the nature of the evidence, and it is for the judge to determine what evidence will be admitted, taking into account the costs of adducing the evidence and the celerity to be given to legal proceedings.

The purpose of the evidence phase in litigation is the reconstruction of the facts with a view of enabling the judge to understand the facts surrounding the issues in dispute. The reconstruction is made independently from the principles of actual truth (actual truth – the absolute truth, where the reality of the issues in dispute are conveyed by means of evidence of what actually happened) and the formal truth (formal truth – evidence adduced by the parties in respect of the issues in dispute and which represent the reality as alleged by the parties), because evidence should be produced in order to obtain the true facts alleged by the parties in the proceedings for the judge to reach a decision based on their free conviction.

Evidence in Brazilian legal proceedings has some restrictions, in keeping with many other jurisdictions across the world. Only the parties, interested third parties and the public prosecutor are able to produce evidence. Equally, the admissibility of some evidence is subject to judicial discretion, which is considered below.

Types of evidence

The Civil Code of 2002 (Código de Processo Civil, Lei No 10.406, de 10 de Janeiro de 2002) sets out the forms of evidence to be used by a party to prove the allegations by means of documents, witnesses, expert technical witnesses, and confessions. The presumption, which is cited as a type of evidence in the Code, is the judge's intellectual activity in examining the evidence.

The rules of civil procedure determine that the collection of evidence is undertaken by the judge using the parties' personal testimony, by means of the confession, by documents or the exhibition of objects, witnesses, technical expert witnesses and by judicial inspection, when the judge actually visits a physical location. It should be noted, however, that these forms of evidence do not exclude evidence deemed atypical or not having been nominated, thus the Code of Civil Procedure admits all kinds of morally legitimate forms of evidence, as provided for in Artigo 332:

> 'Todos os meios legais, bem como os moralmente legítimos, ainda que não especificados neste Código, são hábeis para provar a verdade dos fatos, em que se funda a acão ou a defesa.'
>
> 'All the legal means of evidence, as well as the morally legitimate ones, even though not specified in this Code, are competent to prove the true facts, on which the claim or the defense are based.'

Thus there are many forms of evidence admitted, and there is no difference in value between them.

Admissibility of evidence

It is admissible to use any evidence that is not offensive for an ordinary man or for the ordinary social moral standards.[4] However, whether evidence is typical or atypical, it is forbidden to obtain evidence by using methods that are immoral, illegitimate, illegal or illicit. It is a constitutional rule that the evidence obtained by illicit means is not admissible in legal proceedings, as provided in article 5, section LVI of the Federal Constitution, article 5, section LVI:

> 'Todos são iguais perante a lei, sem distinção de qualquer natureza, garantindo-se aos brasileiros e aos estrangeiros residentes no País a inviolabilidade do direito à vida, à liberdade, à igualdade, à segurança e à propriedade, nos termos seguintes:
>
> .....
> LIV - ninguém será privado da liberdade ou de seus bens sem o devido processo legal;
>
> LV - aos litigantes, em processo judicial ou administrativo, e aos acusados em geral são assegurados o contraditório e a ampla defesa, com os meios e recursos a ela inerentes;
>
> LVI - são inadmissíveis, no processo, as provas obtidas por meios ilícitos;'
>
> 'All are equal before the law, without distinction of

[4] *State Supreme Court of the southernmost State of Brazil, Rio Grande do Sul, TJRS, published in TRRGS 157/233.*

any nature, guaranteeing to Brazilians and to the resident foreigners in the Country the inviolability of the right to the life, the freedom, the equality, the security and the property, in the following terms:

.....
LIV - nobody will be deprived of their freedom without due process of law;

LV - litigants in legal proceedings or in administrative proceedings, and defendants in general, have the right to challenge the evidence and to be legally represented, ...;

LVI – evidence is inadmissible in the legal process, if it have been obtained illicitly;'

The means by which evidence was obtained must be investigated, because it is not admissible if it originates from an illicit action, as decided by the Supreme Court (Caso Fernando Collor) in RTJ 162/3 and RF 335/183.[5]

'Inadmissibilidade, como prova, de laudos de gravação de conversa telefônica e de registros contidos na memória de microcomputador, obtidos por meios ilícitos (art. 5º , LVI, da CF); no primeiro caso, por se tratar de gravação realizada por um dos interlocutores, sem o conhecimento do outro, havendo a gravação sido feito com inobservância do princípio do contraditório, e utilizada com violação à privacidade alheia (artigo 5º, X, da CF); e, no segundo caso, por estar-se diante de microcomputador que, além de ter sido apreendido com violação de domicílio, teve a memória nele contida sido gravada ao arrepio da garantia da inviolabilidade da intimidade das pessoas (artigo 5º, X, XI, da CF) STF – Pleno; RTJ 162/3 e RF 335/183, maioria)'

'Inadmissibility, as evidence, of reports of recordings of telephone conversations and registers contained in the computer memory, obtained by illicit means, in both civil and criminal cases (article 5º , section LVI, of the Federal Constitution); in the first case, because it deals with recordings undertaken by one of the interlocutors, without the other being aware, the recording having been carried out by failing to comply with the principle of the adversary system, and by violating the privacy of the other (article 5th, X, of CF); and, in the second case, because a microcomputer was seized by violating the right of the domicile, had the memory of the computer was recorded contrary to the guarantee of inviolability of privacy (article 5, sections X, XI, of the Federal Constitution) Supreme Court en banc; RTJ 162/3 and RF 335/183, by majority of votes)'.

Thus, evidence obtained by criminal or clandestine acts must not be admitted. Such Brazilian constitutional guarantee is similar to the principle that evidence gathered illegally is not admissible, that is where evidence that originates from being obtained illicitly is not valid.

Production of evidence

The Brazilian Code of Civil Procedure sets out the rules that guide the production of evidence. The procedure provides for the formal petition, the admission and the evaluation of evidence.

The petition

The petition is the parties' request (article 282, section IV of the Brazilian Code of Civil Procedure refers to the plaintiff, and article 300 of the same Code refers to the defendant) made before the judge about the types of evidence they intend to submit in the proceedings. Any documentary evidence each party relies upon, must be included with the initial petition[6] and the defendant's defense.[7] During the proceedings, the judge will also require the parties to specify the evidence they intend to produce.[8] The evidence petition must be specific, and it must set out in detail the type of evidence that applies to each fact that has to be proved.

Admission of evidence

After the evidence requests are submitted, it is for the judge to examine whether the evidence adduced by the parties fulfils the requirements of suitability and conformity with the provisions of the law. The 'admission of evidence phase' of the proceedings begins at this point. During this phase, the judge aims to ensure the evidence that is requested is admissible, to ensure it effectively contributes to clarifying the facts

[5] *Article 5, sections X, XI, of the Federal Constitution) Supreme Court en banc; RTJ 162/3 and RF 335/183, by majority of votes.*
[6] *Article 283 of the Code of Civil Procedure.*
[7] *Article 396 of the Code of Civil Procedure.*
[8] *Article 396 of the Code of Civil Procedure.*

alleged by the parties. The decision must be well founded, and the judge is required to explain if certain evidence is necessary, or the reasons for its inadmissibility. Once the evidence is admitted, it must be produced in the proceedings. In this phase, it is possible to include 'borrowed evidence', that is, evidence from other legal proceedings that must be relevant to the current proceedings, which avoids the repetition of useless acts in the litigation. This borrowed evidence depends on whether the evidence is legitimate, and this aspect is subject to being challenged.

Admission of evidence

The third phase is the admission of the evidence, which usually occurs during a hearing,[9] with exceptions, such as where the documentary evidence has already been adduced, where there is a need for a technical expert witness, the act of hearing a sick witness in situ, or in respect of certain public authorities, who have the privilege of being heard at their place of work. It is important to emphasize that at the moment of producing the evidence, the evidence must be produced to enable the parties to be present at the time the evidence is adduced, and to cross examine the other party on the evidence.

Evaluation of evidence

The evidence is evaluated at the time the decision is reached. In Brazil, evidence does not have a pre-determined value, that is, there is no hierarchy among the various types of evidence. It is for the judge to accept or reject the evidence based on their free conviction, although the judges must set out the reasons by which they understand that some evidence proves a fact, whilst another does not.[10] This is referred to as the principle of the 'rational conviction' or 'rational persuasion', which confers on the judge the freedom to be persuaded by the evidence presented in the case brief, so as to form their conviction, which should be duly founded on the evidence.

Within the valuation rules, the judge may use indicators or inferences. Thus, if the available evidence does not point directly to a fact alleged by the party, the judge should examine the circumstantial elements and the indirect evidence. This means it is admissible for a secondary fact to prove the main fact. In addition, the concept of indicatory proof is accepted in Brazil, which permits the deduction of a fact alleged by a party if it originates from the evidence of a secondary fact that has been demonstrated. From a proved secondary fact, the consequent existence of a primary fact alleged by the party can be proved. Such a conclusion is possible in the face of a rational criterion of logical probability of the coexistence of both facts.

Special rules

The Procedural Code provides for a number of special situations that might arise, such as where one party to legal proceedings aims to raise issues that are of no importance to the case, or that would lead to the creation of privilege for one of the parties. Thus, some allegations by the parties often do not need to be proved, particularly concerning well known facts, or facts stated by one of the parties and accepted by the other party, or facts admitted in the process as being unquestioned by the other party, and to facts to which there is the presumption of existence or truthfulness.[11]

Well known facts are those that are known and predominant in a given region and at a given period of time. These are facts that a judge considers as existing, mainly because they are well known by everyone. A fact confessed by one party is evidence against that party; such facts are determined at the stage of the dismissal of evidence. In the confession, a party admits as true a fact that is unfavorable to them and favorable to the other party's claim. The defendant is also considered to have confessed where they fail to clearly challenge the facts narrated in the initial petition of the plaintiff,[12] and it is assumed that such facts are true and considered unquestioned, and it is concluded that they have been accepted as true facts.

Ultimately, the law grants the presumption that evidence is true in some situations. An example is provided in articles 163 and 164 of the Civil Code, which deals with fraud against creditors, and an administrative act carried out by an official of the state in their official capacity, which has the legal presumption of existence and legality. This may be a rebuttable presumption, because it is possible to admit proof to the contrary, or an absolute presumption, which does not admit proof to the contrary.

Conversely, there are some special rules about evidence that grant the parties certain evidentiary privileges, where, in the search for evidence, the duty to cooperate with the state is not enforced. In general, no person is exempt from the duty to collaborate with the

[9] *Article 336 of the Civil Procedure Code.*
[10] *Article 131 of the Civil Procedure Code.*
[11] *Article 334 of the Civil Procedure Code.*
[12] *Article 302 of the Civil Procedure Code.*

judicial power to discover the truth.[13] However, there are situations that constitute a privilege, granted to the party against self-incrimination and privilege in respect of knowledge about certain matters due to the nature of an office, function or profession.[14] For instance, articles 347 and 363 of the Code of Civil Procedure provides that the party is dismissed from testifying about criminal facts ascribed to them, because it would constitute criminal self-imputation. Another privilege is related to the secrecy required from professional relationships, such as the relationship of attorney-client privilege,[15] physician-patient[16] because of religious bonds, or where they originate from a person serving a public function or specific occupation.[17] The requirement of secrecy must be retained to provide for the proper function of professional activity, otherwise the confidence between the client and the professional would be threatened.

As a result, digital evidence is not necessarily inadmissible in legal proceedings, although the fact that it is relatively easy to forge a digital document renders digital evidence a lesser degree of credibility.

Law n. 11.419 of 2006

Under Brazilian law, digital evidence was, arguably admissible. However, if it was not expressly provided for by statute before the passing of Law n. 11.419 of 2006, it is now lawful, because the law has made digital evidence admissible in legal proceedings and conferred on digital evidence the same status as other forms of evidence. That digital evidence was not regulated by statute in the past did not mean the admission of digital evidence was unlawful. The weight to be given to digital evidence can be discussed and challenged. Under the terms of the Brazilian Code of Civil Procedure, the oral testimony of a witness is always admissible as a valid form of evidence. However, article 401 of the Code provides that: 'A prova exclusivamente testemunhal só se admite nos contratos cujo valor não exceda o décuplo do maior salário mínimo vigente no país, ao tempo em que foram celebrados' 'Oral testimony of a witness, as the only form of evidence, is admissible only for contracts with a value up to ten minimum wages in the moment they were closed'. This means it is not possible to prove a case before a court if the value of the contract is more than ten minimum wages and there is no other form of written evidence. Article 402 of the Brazilian Code of Civil Procedure permits the use of oral evidence in all cases, even if some evidence in writing comes from the other party, which means that oral evidence can be produced by a party if they have some form of written evidence from the other party, such as a facsimile transmission that has not been signed, but includes the logo of the other party on the document. If there is some evidence in writing that comes from the other party, a party is allowed to use that writing as a form of 'starting evidence' to support the use of further oral testimony of a witness for contracts that are of a greater value than ten minimum wages.

At the time this article was written, it can be concluded that the oral testimony of a witness is admissible as the only form of evidence only in contracts that worth less than US$2,000. It follows that what must be considered is whether digital evidence is writing under the teams of article 402 of the Civil Procedure Code. This leads to considering the provisions of Article 221 of the Brazilian Civil Code, which provides that:

> 'O instrumento particular, feito e assinado, ou somente assinado por quem esteja na livre disposição e administração de seus bens, prova as obrigações convencionais de qualquer valor; mas os seus efeitos, bem como os da cessão, não se operam, a respeito de terceiros, antes de registrado no registro público'
>
> 'Private written instruments, made and signed, or only signed by someone who is legally entitled to dispose of his goods, proves the conventional obligations of any amount'.

Therefore, in order to prove obligations that are worth more than ten minimum wages, the best evidence is a written and signed document.

Electronic signatures

In legal proceedings, it is very likely that a digital document will not be understood as a signed document for what appears to be obvious reasons: there is no handwritten signature on the document. The use of a manuscript signature that has been scanned is not safe, partly because it is possible to reproduce the image of a such signature relatively easily, and because the Brazilian Supreme Court has addressed the issue and

[13] *Article 339 of the Civil Procedure Code.*
[14] *Luiz Guilherme Marinoni and Sergio Cruz Arenhart, Manual do Processo de Conhecimento, (São Paulo, Revista dos Tribunais, 2001), p. 330.*
[15] *Article 7 of Federal Law number 8.906 of 1994, Estatuto da Ordem dos Advogados do Brasil, Statute of the Brazilian Bar Association.*
[16] *Article 36 of the Código de Ética Médica, Medial Etichs Code.*
[17] *Articles 154 and 325 of the Penal Code.*

denied the validity of such a signature (RMS (AgR) 24.257-DF, rel. Ministra Ellen Gracie, 13.8.2002 and AI 564765-RJ, rel. Min. Sepúlveda Pertence, 14.02.2006).[18] That digital documents are not signed, together with the risk of forgery, led to a difficulty in legal proceedings, in that digital evidence was not considered a strong type of evidence.

Brazil has adopted a hierarchic system for the legal regulation of digital signatures. Under Provisionary Measure number 2.200-2 of 2001 (M.P. n. 2.200-2/2001), only Certification Authorities that have been accredited and digitally certified by the Root Certification Authority (a Federal Agency) belong to the Public-Key Infrastructure of Brazil (PKI-Brazil). Under the terms of section one of article 10 of M.P. n. 2.200-2/2001, digital certificates that are issued by Certification Authorities within the PKI-Brazil confer to the digitally signed document the same legal effects as those of a paper document with a manuscript signature. Nevertheless, section two of article 10 of M.P. n. 2.200-2/2001 allows for the parties, in advance, to choose a form of electronic signature other than digital signatures within the PKI-Brazil. If they do so, the documents signed with the electronic signature will only be considered valid before the parties, and not against a third party.

Law n. 11.419 of 2006 has gone further than M.P. n. 2.200-2 of 2001. Article 11 of the new 2006 law establishes that electronic documents with a guarantee of the origin of the person signing the document and of the person signing are deemed to be the original for all legal purposes. In addition, article 11(1) provides that digital extracts and scanned documents offered as evidence by the organs of the judiciary or of the prosecutor's office, by state attorneys, by police departments, by public agencies or by attorneys at law have the same legal effects as the originals.

Article 11(1) also allows the other party in legal proceedings to challenge the authenticity of a digital document. Where the digital evidence challenged is a scanned file of a previous existing paper based document, article 11(3) requires that the party that scanned the paper document is required to keep the originals until the end of the proceedings (plus a further two years in circumstances where further legal proceedings may be used to rescind the original decision). This form of digital evidence is the easiest one for judges to decide: they just need to compare the scanned document with the original. If they match, the evidence is admissible, and if they do not match, the digital evidence is not admitted.

In circumstances where all the evidence is in digital format, the digital evidence specialist will have an important role in the decision, should the authenticity of the evidence be challenged.

If a digital document has no signatures at all (such as, for example, and e-mail with no electronic signatures), the party that adduces the document as evidence will have the burden of proving the authenticity and the origin of the document. These are two difficult issues to be proved in courts even with the help of a digital evidence specialist.

If the electronic document has an electronic signature (but not a digital signature within the PKI-Brazil), then the party that uses the document as evidence will have the burden of proving the authenticity of the document. Regarding the origin of the document, article 10(2) of M.P. 2.200/2001 applies. If both parties in the legal proceedings agree, before any legal proceedings were initiated, that they would use such a form of electronic signature, then the origin of the document is upheld:

> 'O disposto nesta Medida Provisória não obsta a utilização de outro meio de comprovação da autoria e integridade de documentos em forma eletrônica, inclusive os que utilizem certificados não emitidos pela ICP-Brasil, desde que admitido pelas partes como válido ou aceito pela pessoa a quem for oposto o documento.'
>
> 'The provisions in this Provisional Measure do not preclude the use of other means of proof of authorship and integrity of documents in electronic form, including those that do not use certificates issued by ICP-Brasil, provided that the document is admitted or accepted as valid by the other party.'

Nevertheless, it remains possible to challenge the authenticity of the document.

Finally, electronic documents that are digitally signed within PKI-Brazil are considered to have originated from the sender and the document is considered to be authentic (article 10(1) of M.P. 2.200-2 of 2001). Therefore, if the other party challenges the digitally

[18] *Professor Carlos Alberto Rohrmann, 'Case Notes: Brazil, RMS-AgR-ED 24257 DF and AI 564765 RJ,' 'Comments about the Brazilian Supreme Court electronic signature case law', Digital Evidence and Electronic Signature Law Review (formerly the Digital Evidence Journal) 2006, 109 – 114.*

signed document, article 10(1) of M.P. 2.200/2001 applies, and the challenging party will have the burden to prove that the document was forged. Both the origin and the authenticity of the digitally signed document within the PKI-Brazil are presumed in favour of the party that uses such a document as digital evidence. If the digital certificate was not issued by a Certification Authority within the PKI-Brazil, then only the authenticity is presumed, whereas the origin is governed by article 10(2) of M.P. 2.200/2001 (parties must have agreed to use a Certification Authority that does not belong to the PKI-Brazil before the legal proceedings began). In both cases, where a party challenges the authenticity of digitally signed documents, it will be necessary to obtain the services of a digital evidence specialist.

Conclusion

Although not all courts have the technology to enable all legal proceedings to be submitted electronically, there is no doubt that the submission of electronic documents in legal proceedings has become a reality in Brazil. The problems relating to the failure of the judges to recognize electronic signatures when filing documents before the courts has been finally addressed, and electronically signed petitions now have to be accepted by the courts. Digital documents supporting electronic petitions are also clearly legal under the terms of Law n. 11.419 of 2006. Digital evidence is also accepted, but the weight will vary, in accordance with the type digital evidence. Digitally signed documents within the PKI Brazil are granted almost the same status as paper documents signed with a manuscript signature. Electronically signed documents are accepted only if the parties have previously chosen to use that kind of electronic signature (and the validity of the electronic signature is only applicable for both parties). Since electronic evidence without a digital signature is considered to be more easily forged, challenges to these documents require technical expertise and an expert witness, and a digital evidence specialist may be appointed by the court. Where the authenticity of a digital document is challenged, the party that relies upon the evidence has the burden to prove that the digital document was not altered.

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