

Service of Process by WhatsApp

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Authors

Gustavo Kulesza

Serving documents and notices in court proceedings using electronic means depends on specific legislation to govern the matter

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Currently, the Law on Computerization of Judicial Proceedings (Law 11.419/2006) allows the use of electronic means in “the processing of judicial proceedings, communication of acts, and transmission of pleadings” (article 1). WhatsApp appears to fall within the legal concept of “electronic means” under article 246(V) of the Code of Civil Procedure and article 152(I) of Law 11.419/2006. The question, then, is: can procedural acts be communicated via WhatsApp? A categorical answer is not yet possible, but a number of decisions indicate a tendency to favor the use of WhatsApp to service notice in lawsuits.

A recent landmark is a decision by Brazil's highest non-constitutional court, the Superior Court of Justice (STJ – Superior Tribunal de Justiça), issued on November 21, 2019, in a case involving the recognition of a foreign judgment, rendered in Portugal (HDE no. 2935). The court held that service of process by WhatsApp was not null, and consequently there was no obstacle to recognizing the judgment.

In its decision, the STJ took into account the contents of the certificate attesting to successful service of process, and the fact that the defense filed by the debtor's legal counsel did not allege a defect in service of process. As the principle says, “pas de nullité sans grief”: since the debtor did not show any effective loss resulting from service via WhatsApp, service was not null. The same principle was applied by the Court of Appeals of the State of São Paulo (TJSP – Tribunal de Justiça do Estado de São Paulo) in an even more recent decision, which rejected an allegation that service of process via WhatsApp was null.¹

The issue is not without controversy, however: there are also decisions taking the opposite position. In general, the reasoning contrary to service by WhatsApp is based on the lack of legal provision allowing the use of the app, at least for the purposes of service of process in the ordinary courts. Recent decisions by the TJSP² and the Court of Appeals of the State of Minas Gerais (TJMG – Tribunal de Justiça do Estado de Minas Gerais) adopt this reasoning.³

In the past, the TJSP was stricter regarding the use of WhatsApp in judicial proceedings: in Communication CG no. 2265/2017, the court expressly stated that it would not make use of the application for service of process. With the onset of the Covid-19 pandemic, however, new resolutions were issued that relaxed the earlier prohibition, such as Communication CG no. 249/2020 and Communication CG no. 262/2020, which allow court officials to use WhatsApp to serve notice in proceedings under the Maria da Penha Law (Law

11.340/2006, for the prevention of domestic violence against women).

The decisions issued to date offer some practical advice to those who wish to use WhatsApp as a tool for service of process and other types of communications in legal proceedings. To facilitate service using the app, including initial service of process, the adverse party's WhatsApp number should be included in the complaint – even if process is served in person, the app can help the court official locate the party. In addition, when serving notice via the app, it is important to transmit a complete copy of the procedural act to be served, and obtain evidence that the message was accessed by the party, such as screenshots showing that the message was seen (with the blue “checked” symbol), messages sent in response to the notified document, and the notified party's photo and profile name. If the party appears before the court and does not contest service via WhatsApp, service may be accepted as valid, following the decisions discussed above.

Although service via WhatsApp still raises some questions, it is becoming a reality in Brazil. The restrictions imposed by the pandemic have accelerated the process considerably, and it is certainly worth watching the case law to see how the issue evolves, given the importance of this new practice and its consequences.

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NOTES:

1. TJSP, Appeal no. 1001211-31.2019.8.26.0247, Judge Ferreira Rodrigues reporting, issued on September 21, 2020.
2. TJSP, Appeal no. 0003751-40.2020.8.26.0019, Judge Salles Rossi reporting, issued on September 23, 2020; TJSP, Interlocutory Appeal no. 2112063-36.2020.8.26.0000, Judge Marcus Vinicius Gonçalves reporting, issued on June 18, 2020.
3. TJMG, Interlocutory Appeal no. 1.0040.16.006875-1/001, Judge Amauri Pinto Ferreira reporting, issued on February 8, 2016.

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Gustavo Kulesza