Opportunities and challenges in the use of electronic signatures on business documents

23.10.2020 4 min read

Authors

Vitor Butruce

Topics

Data Privacy and Cybersecurity

BMA Review Vitor Butruce

The relationship between crises, necessity and opportunity is well known. Crises demand changes in behavior, and efforts to adapt; they push us to explore the potential of available alternatives, and look for new solutions. With the distancing measures imposed by the Covid-19 pandemic, electronic environments provided new ways to work and to interact. In the business world, adapting to the digital era ceased to be an option and became a necessity.

Faced with the reality imposed by the pandemic, many businesses began to assess the use of electronic documentation in different situations, whether to record one-time transactions, or as a means to structure and register all the stages of contracting processes. But this adaptation to changed circumstances brought with it the challenge of maintaining the degree of certainty associated with traditional, paper-based documents while benefiting from the convenience of electronic documentation, given the doubts that still surround the validity, probative value, and enforceability of digital documents.

The issue is not a new one. Provisional Measure 2200-2, which dates from 2001, has long given preferential treatment to documents produced through the certification process made available by the “Brazilian Public Keys Infrastructure” (ICP-Brasil – Infraestrutura de Chaves Públicas Brasileira) – a hierarchical chain composed of various entities, which makes it possible to issue digital certificates through procedures designed to show that a given act must have been performed by a given person, or by some authorized to act on that person’s behalf.

PM 2200-2/2001 distinguishes ICP-Brasil documents from others, however: not only are documents certified by the ICP-Brasil valid, but they benefit from a presumption of authenticity that equates them to documents that have been signed manually. In contrast, documents produced by other electronic means may be valid, if recognized as such by their signatories, but they do not benefit from a presumption of authenticity. As a result, their probative value is less than certified documents; in practical terms, the evidentiary weight of documents that have not been certified by the ICP-Brasil depends on the credibility transmitted by the way they were produced.

Another important aspect of electronic documents is their enforceability: the courts’ current position is that documents certified by the ICP-Brasil are sufficient to bring proceedings for immediate enforcement, which give creditors access to attachments and other types of freezing orders to obtain payment of debts more quickly. It is doubtful whether electronic documents that have not been certified by the ICP-Brasil have this potential.

Brazil's Superior Court of Justice (STJ – Superior Tribunal de Justiça) looked at the question in Appeal REsp 1.495.920/DF in 2018, and held that documents certified by the ICP-Brasil are immediately enforceable. Despite the STJ's finding, decisions by state appeal courts still raise questions as to the immediate enforceability of electronic documents, focusing on two points: (a) whether electronic documents must contain certified signatures of two witnesses, and (b) whether electronic documents not certified by the ICP-Brasil can serve to bring enforcement proceedings.

The STJ now has the opportunity to clarify the law, in two appeals pending before the court.

Appeal REsp 1.850.676 involves enforcement of a bank credit certificate signed electronically by the debtor and two witnesses, with the signatures certified by a non-ICP-Brasil certificate. The São Paulo State court of appeal held that the certificate was not sufficient to bring immediate enforcement proceedings. The question at issue in the case is thus whether an electronic document signed by the debtor and two witnesses and carrying a non-ICP-Brasil certificate is subject to immediate enforcement.

Appeal REsp 1.798.828 deals with a different issue: whether an electronic document that is recognized as authentic by the courts, but lacks certification of the debtor's and witnesses' signatures, can be enforced immediately. The appeal was brought against a decision by the court of appeal of the State of Goiás, holding that the electronic document was authentic, but that, since the signatures were not certified, the creditor could not proceed to immediate enforcement, and would have to bring a monitory action, a proceeding that is usually quicker than an ordinary action but not as fast as an enforcement proceeding.

In these two appeals the STJ has an excellent opportunity to provide some guidance on the enforceability of electronic documents, and advance the law on the question, without having to wait for changes to the legislation. And circumstances at the moment are particularly opportune given the fact that Law 14.063/2020, while introducing greater flexibility in the use of electronic signatures in interactions with public entities, does not apply to interactions between natural persons or between private law legal persons, and does not address the enforceability of electronic documents generally.

At any rate, there is already considerable room for businesses to make greater use of electronic documents, even in high-value and long-term contracts, although companies should first consider implementing policies that take into account the best form for each type of document, given its value, its risks, and specific legal requirements. The current scenario of cultural transition in the Brazilian economy, with its growing acceptance of digital environments, is a propitious one for digital solutions that will allow companies to redesign their methods of producing and keeping documents.

Photo: Jannoon028 /Freepik

› PROFESSIONALS

Professionals who combine legal insight and market perspective

Vitor Butruce