



LITIGATION

THE NON-ENFORCEABILITY OF PRIVATE DOCUMENTS UNDER THE NEW CPC

In terms of documents serving as the basis for enforcement proceedings, it is important to note the removal of the reference to “private documents, signed by the debtor, that create or recognise pecuniary obligations, the amount of which are determined or determinable by means of a simple mathematical calculation in accordance with the clauses appearing in such a document” (article 46(1)(c) of the current Civil Procedure Code).

As of 1 September 2013, many important changes to the Civil Procedure Code (CPC) will come into force.

The new version of the Civil Procedure Code, approved by Law no. 41/2013 of 26 June, will apply, with any necessary adaptations, to all enforcement proceedings pending at the date it comes into force (article 6(1) Law no. 41/2013), with the exception of the provisions on the documents serving as the basis for enforcement proceedings (*títulos executivos*), forms of enforcement process, enforcement applications, procedure for the introductory phase and procedures and ancillary events that are declaratory in nature. These provisions only apply to enforcement proceedings issued after the legislation comes into force (article 6(3) and (4) of Law no. 41/2013).

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The above mentioned current article 46(1)(c) of the Code covers (private) documents that create or recognise an obligation, as long as they are signed (whether or not the signature is formally witnessed) by the debtor (e.g.

contracts, agreements admitting debt and/or payment, and invoices or account statements signed by the debtor).

With the removal of such documents from the list of documents serving as the basis for enforcement proceedings, the legislator is seeking to elevate the respective category in order to instil greater legal certainty in enforcement proceedings and to avoid oppositions (formal challenges) to enforcement proceedings solely aimed at addressing the private document and the relationship underlying it.



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Pedro Cabrita Reis (detail)
The Zurich Totem, 2005
Alumínio, tinta de automóvel e madeira
174 x 34,5 x 30 cm
From the Colección of the PLMJ
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This means that, with the new Civil Procedure Code, in line court judgments and arbitral awards, debt securities (even if unsecured) or an enforceable special debt recovery action (known in Portuguese as *injunção*), (private) documents creating or recognising any obligation must be registered or authenticated by a notary or some other entity or professional with power to so act (e.g. lawyers) in order to be valid as the basis for enforcement proceedings.

In other words, to make a private document enforceable, it will be necessary for this document to be authenticated and to ensure that it includes the content necessary for a document creating an obligation by the parties and an expression of their intent to create such obligation: Under the new Civil Procedure Code, the

simple witnessing of a signature is not sufficient¹– i.e. with entry into force of the new Civil Procedure Code, documents that create or recognise any obligation, even with a witnessed signature, will no longer be deemed as documents serving as the basis of enforcement proceedings. In fact, even though this change only applies to enforcement proceedings begun after 1 September 2013, it will apply to the enforcement of documents created before this date. This means that the new rule may be considered unconstitutional (article 703 of the new Civil Procedure Code), in light of a possible violation of the principles of protection of legitimate expectations and legal certainty.

¹ This requirement also applies to any guarantors of the obligation.

We would, therefore, draw attention to the fact that, from 1 September 2013, to enforce private documents that create or recognise any obligation (without the same being authenticated), it will be necessary to use other legal channels such as, for example, issuing special debt recovery proceedings.

This means that it is necessary to analyse all cases of clients/debtors, in default situations, in relation to which all that is available are documents as defined in the current wording of article 46(1) (c) of the Civil Procedure Code. The objective of this analysis is to consider the cost/benefit relationship between immediately beginning the respective enforcement proceedings (which must be issued at the latest on 31 August 2013²) and the future use of other procedural means (declarative in nature) prior to enforcement.

² Although the court recess begins on 15 July, the new law makes reference to “pending proceedings”, which leads us to believe that all enforcement proceedings issued up to and including 31 August 2013 will not be subject to the application of the provisions on documents serving as the basis for enforcement proceedings in the new Civil Procedure code.

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