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## RESTRUCTURING & FINANCIAL LITIGATION

# ARE PRIVATE DOCUMENTS ENFORCEABLE TITLES ONCE AGAIN?

*The Constitutional court, in its recent Judgment no. 847/14, of 03.12.2014, held that suppression of the enforceability of private documents signed by the debtor that establish or recognise obligations, dated prior to 01.09.2013, is unconstitutional.*

With the entry into force of the current Code of Civil Procedure (on 01.09.2013), “private documents, signed by the debtor that establish or recognise pecuniary obligations, the amount of which is or can be determined by simple mathematical calculation”<sup>1</sup> ceased to be enforceable even with legally witnessed signatures. These documents include, for example, admission of debt and/or payment agreements, contracts with debt recognition clauses and bank guarantees. This change meant that creditors with these documents had to begin a declaratory action or special debt recovery proceedings (injunção) to obtain a judicial title enabling them to enforce and then recover the money owed to them.

Under the current wording of the Code of Civil Procedure<sup>2</sup>, only documents registered or authenticated by a notary or other entities with power to do this that recognise or establish obligations are enforceable and allow creditors to enforce their credit rights without first having to bring a (declaratory) action.

The **Constitutional court**, in its recent **Judgment no. 847/14, of 03.12.2014**, held that suppression of the enforceability of private documents signed by the debtor that establish or recognise obligations, dated prior to 01.09.2013, is **unconstitutional** because it violates the principle of legitimate expectations. This judgment confirmed the point of view already put forward in some doctrine and case law.

The question before the Constitutional Court was whether to refuse to apply the

current Code of Civil Procedure to private documents (for example, those not authenticated or registered by a notary or lawyer) which pre-date the entry into force of the law (01.09.2013). The court held that such a refusal violates the principle of legitimate expectations because it suppresses the enforceability of the enforceable titles the creditors thought they had.

After analysing the reason behind the change in the legislation, the Constitutional Court concluded that, despite the existence of a serious public interest in avoiding unfair enforcements, that interest could be ensured in a way less damaging to the interests and expectations of creditors. Specifically, a transitional rule could be created to allow the enforcement of those titles during a fixed period after the entry into force of the current Code of Civil Procedure.

This was the first time the Constitutional Court had ruled on the question. However, there are opposing decisions from the Court of Appeal and it is hoped that the Constitutional Court will be called on to rule on more of the cases that are now

<sup>1</sup> See article 46(1)(c) of the previous Code of Civil Procedure.

<sup>2</sup> See article 703(1)(b) of the current Code of Civil Procedure.

before the courts in which the parties have raised the issue of constitutionality.

This judgment of the Constitutional Court, despite only applying to the case in question, allows the court's position to be argued in other cases that raise the same question.

This means any creditor who is party to an instalment payment or debt recognition agreement that is in default, or is the

beneficiary of a bank guarantee where the payment obligation is due, may now argue the unconstitutionality of the suppression of its enforceability. Consequently, the creditor may move directly to enforcement without first having to bring a declaratory action or special debt recovery proceedings to obtain an order against the debtor. However, it is important to remember that this situation only applies to private documents issued prior to 01.09.2013.

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