BMA ADVOGADOS

Changes to the remedy of specific performance: The new paragraph under article 499 of Brazil’s Code of Civil Procedure

18.06.2024 3 min read

Authors

Aécio Filipe Coelho Fraga de Oliveira

Fernando Benites Gonçalves

Related areas

Dispute Resolution

Topics

Dispute Resolution BMA Review

Law 14.833 was published on March 28, 2024, one day after it was sanctioned by the President of the Republic, Luiz Inácio Lula da Silva. The Law amends article 499 of the Code of Civil Procedure (CCP), which governs the possibility of converting obligations to do, not to do, or to deliver something into damages, by adding a paragraph that gives the defendant the right to opt for specific performance.

Since the old Code of Civil Procedure of 1973 (CCP/73) was reformed by Law 8.952 in 1994, Brazilian procedural law has given preference to specific performance or giving the claimant the practical result of an obligation over payment of damages (see articles 461 and 461-A, CCP/73).

The preference for specific performance was maintained in articles 497 and 498 of the current CCP, adopted in 2015. The wording of article 499 seems to relax that preference, by giving claimants broad discretion to convert specific performance into damages, even where performance by the defendant would be possible, using one of the coercive measures provided for in articles 536 and 537 CCP, or an equivalent practical result can be obtained.

Even before the amendment to article 499, some legal scholars had argued that the conversion into damages was a last resort, available only after giving the defendant the opportunity to perform the obligation. Their argument wsa based not only on the wording of articles 497 and 498 CCP, but also on the Civil Code (CC), which allows debtors to cure their default by offering "performance [of the obligation] plus the amount of losses", and to convert performance into damages only when performance becomes "useless to the creditor", as provided for in articles 395, sole paragraph, and 401 CC.

The recent amendment to the CCP thus expressly introduces a legal provision to give defendants another opportunity to perform obligations to do, not to do, or to deliver somthing, particularly in claims involving

- contractual liability for hidden defects (redhibitory defects, art. 441 CC)
- contracts of enterprise for the construction of buildings and other constructions (art. 618 CC)
- insurance contracts (art. 757 CC), and
- joint and several liability.

The new paragraph under article 499 CCP thus establishes a safeguard for defendants by ensuring that they have the opportunity to perform the obligations listed above before can those obligations be converted into damages.

According to the report presented in the Federal Senate on Bill PL 2.812/2023 (which became Law 14.833/2024), the amendment seeks merely to "limit claimants' right to obtain, immediately, payment of damages in cases involving the breach of obligations to do, not to do, or to deliver something." The Bill also contained a proposal to include a deadline of 15 days to perform the obligation if the defendant opted for specific performance, but this point was excluded from the Bill as it moved through the Senate, without explanation.

An important question that remains open is what will happen with other claims dealing with obligations to do, not to do, or to deliver something – will claimants continue to be able to choose to convert the obligation into damages, as provided for in the head of article 499, even if it is still possible for the defendant to perform the obligation or to obtain an equivalent result? Or will the defendant be entitled to rely on the new paragraph under article 499 and opt for specific performance?

The courts will have to decide how the amendment to article 499 CCP should be interpreted and applied, and BMA's Dispute Resolution team will be following the developments closely to ensure clients have the best advice.

>>> This content is part of BMA Review #83. Click here for more.

› PROFESSIONALS

Professionals who combine legal insight and market perspective

Aécio Filipe Coelho Fraga de Oliveira

Fernando Benites Gonçalves