Fiduciary Alienation of Real Estate in Brazil: Public Deed or Private Instrument? The saga continues...

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Fiduciary alienation is a type of security interest similar to a common law mortgage, and is very commonly used in the Brazilian real estate market. The legislation that created fiduciary alienation, Law 9514/1997, provides in article 38 that fiduciary alienation granted by individuals may be made by private instrument, rather than by public deed, as required by article 108 of the Civil Code for contracts that dispose of rights in immovable property.

In mid-2024, however, Brazil's National Council of Justice (*CNJ – Conselho Nacional de Justiça*) issued Provision 172/2024 to include a new article 440-AN (with subsequent amendments by Provisions 175/2024 and 177/2024) in the Rules governing the CNJ's Judicial Administration Service (*Código Nacional de Normas da Corregedoria Nacional de Justiça do Conselho Nacional de Justiça*), which restricted the use of private instruments for fiduciary alienation to agreements made with an entity authorized to operate within the Real Estate Financing System, know as the SFI (*Sistema de Financiamento Imobiliário*), which includes credit cooperatives, administrators of real estate purchasing pools, and entities that are members of the Home Financing System, the SFH (*Sistema Financeiro de Habitação*). In all other cases, according to the CNJ's rules, a public deed is required.

The commotion caused by the CNJ's new rules is the subject of an article published in BMA Review 84. In response, the CNJ then attempted to make the new rules more flexible by including securitization companies, fiduciary agents, and other entities subject to the jurisdiction of Brazil's securities commission, the CVM, or the Central Bank of Brazil among the entities that could be party to a private instrument of fiduciary alienation (Provision 175), and confirmed the validity of fiduciary alienations granted before June 11, 2024, when the CNJ's new rules came into effect.

Opening a new chapter in the saga, on November 28, 2024, however, the CNJ published a decision granting the federal government's request for a preliminary order suspending the effects of Provision 172, along with the changes introduced by Provisions 175/2024 and 177/2024.

With the preliminary order, article 38 of Law 9514/1997 is back in force, and once again any individual may grant a fiduciary alienation of their immovable property. In the reasons for the decision granting the order, the Head of the CNJ's Judicial Administration Service not only referred to the precedents of the Superior Court of Justice, but acknowledged the requirement for a public deed imposed by the contested rules would generate negative economic impacts by increasing costs, restricting access to credit and compromising free competition in the sector.

The preliminary order issued by the CNJ is in line with 25 years of consolidated practice in Brazil's real estate market, Law 9514/1997 itself, and the prevailing position taken by the nation's courts.

Far from representing a risk for agents operating outside the SFI and related sectors, the ability to grant fiduciary alienation by private instrument reduces notary costs and expands access to credit by fostering a more competitive market, with the participation of new lenders. We hope that the CNJ will maintain the line it has now taken, supporting a stable legal environment and avoiding setbacks that could further compromise the development of the Brazilian real estate market.

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