Fiduciary alienation: Public deed or private instrument?

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Recently, in a move that goes against all the legislative efforts made in the last few years to the bureaucracy and cost involved in loans secured by real estate, Brazil's National Justice Council (CNJ – *Conselho Nacional de Justiça*) issued Provision 172 of June 5, 2024 to include a new article 440-AN in the Rules governing the CNJ's Judicial Administration Service (*Código Nacional de Normas da Corregedoria Nacional de Justiça do Conselho Nacional de Justiça*).

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.

According to the new article 440-AN under the CNJ's Rules, however, a private instrument may be used for fiduciary alienation only when the agreement is 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, a public deed is required.

Article 38 of Law 9514/1997, however, imposes no restriction on the nature of the financing party, and for more than 25 years, private instruments have been used for the fiduciary alienation of properties not only in real estate financing transactions, but in any type of transaction secured by the fiduciary alienation of property.

The CNJ's reasoning in adopting the new rule is that public deeds produce greater legal certainty in fiduciary alienations than private instruments (although both private instruments and public deeds are scrutinized by the registry officials prior to registration). In addition, SFI entities operate with a legal "microsystem" created by special legislation, which allows, for example, contracts for the purchase and sale of property to be made by public instrument rather than by public deed, as required by article 108 of the Civil Code. In the CNJ's view, therefore, restricting the use of private instruments for fiduciary alienations to SFI entities is consistent with that legal microsystem.

The CNJ's objective was to standardize the formal requirements for fiduciary alienation agreements, in view of the significant divergence on the issue in the country's courts on the question. Indeed, the case on which CNJ Provision 172 is based is the CNJ's own decision in Administrative Review Proceeding PCA no. 0000145-56.2018.2.00.0000, which upheld the validity of article 954 of Provision 93/2020 issued by the Minas Gerais Appeal Court, setting out the same interpretation of the law reflected in CNJ Provision 172.

It is not difficult to imagine the wave of questions and uncertainties that flooded Brazil's real estate market when the CNJ issued Provision 172. Sector entities immediately filed an administrative appeal with the CNJ in the hopes of at least establishing some limits for the new interpretation given to article 38 of Law 9514/97, which is binding on all real estate registry offices in the country.

The CNJ issued a new decision on July 15, 2024, and in CNJ Provision 175, stated that securitization companies, fiduciary agents and other entities subject to the regulations issued by Brazil's securities and exchange commission, the CVM, or the Central Bank on the transfer of real estate receivables linked to SFI financing transactions may also use private instruments for fiduciary alienation of properties in the context of real estate receivable securitization transactions.

No less important, CNJ Provision 175 also confirms the validity of all private instruments used for fiduciary alienation and related transactions with parties that are not member of the SFI prior to June 11, 2024, when CNJ Provision 172 came into force.

The CNJ's new interpretation of the formal requirements for fiduciary alienation of properties will certainly have an impact on Brazil's real estate market, making access to real estate even more expensive for those who don't have financing through the SFI.

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