Momentum

Litigation and Arbitration

May 25, 2012

Reform of the Portuguese Code of Civil Procedure: the Way to Achieve Celerity?

In a system that is widely known to be slow, procedural celerity can be the key to finding new solutions.

It seems that this need to find new solutions was precisely what drove the proposal elaborated by the Commission that revised the Portuguese Code of Civil Procedure (PCCP), as well as the need to simplify said Code.

We will, therefore, try to list some of the main innovations.

The declarative process – now called declaratory process – suffers certain predictable modifications. From now on there will be only two procedural forms: the common declarative procedure and the summary declarative procedure. The summary procedure for small claims ceases to exist since it has been absorbed by the legal regime of Law-Decree 269/98, of September 1 (which regulates special

procedures concerning the fulfillment of obligations arising from contracts).

A relevant change concerns the moment at which evidence is presented in court, a direct consequence of the elimination of art. 512 of the PCCP. All evidence will now be presented with the pleadings. This means that, from now on, parties will no longer be notified to present evidence, and to require that the trial be recorded or the intervention of the full court. In fact, the intervention of the full court is no longer possible, meaning that the hearing in trial will necessarily have to be recorded.

These legal modifications will also be reflected in the preliminary hearing, a tool that tends to be mandatory, and which now has more demanding exemption criteria. There is also a clear intention to create a preliminary hearing that, in most aspects, will anticipate the content of the future trial, and where schedule and number of sessions will be determined in advance. We believe that this (already) important hearing will assume a relevant role in the preparation and advancement of the trial, reason for which we welcome this reform.

In what regards injunctions, it is important to note that judges now have the possibility of converting provisionary decisions into definitive ones, using a mechanism that is now mentioned in law as "litigation reversal", it becoming unnecessary to initiate a declarative procedure in order to prevent the forfeiture of the injunction.

Therefore, the party that wishes to oppose the preliminary decision has the burden of initiating a legal action in order to obtain a dismissal decision with regards to the preliminary declaration of the right. This legal action must be initiated within 30 days following the *res judicata*.

This innovation seems to contradict the underlying principles of this reform. In fact, the claimant once again has the burden to proof his right. In other words, the claimant has to prove what was already considered to be proven by the court with the "litigation reversal".

Regarding to the execution procedure, it is important to consider the following innovations:

i) A more interventionist role played by judges, who now have the possibility of adjusting the part of the salary or other income seized based on the defendant's economic situation, or even of safeguarding the defendant's interests in the case of a residential home being at stake.

ii) The execution can take place within the declarative procedure by simple request, without there being the need to initiate an enforcement procedure.

iii) Creation of a summary execution procedure for amounts not exceeding €10,000.00 (the actual amount of the trial court jurisdiction) and based on a judicial decision or an arbitration award, a decision under the legal regime of the abovementioned Law-Decree 269/98, or based on an extrajudicial instrument concerning a pecuniary obligation.

iv) Waiver of legal authorization for attachment of bank balances.

Lastly, it is important to note that the legal reforms listed above enter into force immediately and are applicable to any pending files.

Momentum

Litigation and Arbitration

In short, simplification and celerity of the judicial system are key factors for economic growth and for attracting desired investment in Portugal. It is not by chance that the Memorandum of Understanding between Portugal and the Troika highlights, as a major guideline, under the section dedicated to the judicial system – cf. the beginning of section 7 – the need to *«Improve the functioning of the judicial system, which is essential for the proper and fair functioning of the economy»*.

Tiago Ponces de Carvalho | Raul Taborda

tpc@servulo.com | rt@servulo.com

Rua Garrett, n.º 64 1200-204 Lisboa - Portugal Tel: (+351) 21 093 30 00 Fax: (+351) 21 093 30 01/02
geral@servulo.com www.servulo.com