## CIVIL PROCEDURES LAW

# NEW CIVIL PROCEDURES CODE – LAW NR 41/2013, JUNE 26

**ON JUNE 26, 2013, WAS PUBLISHED IN THE OFFICIAL GAZETTE LAW NR 41/2013 THAT HAS INTRODUCED AN EXTENSIVE REFORM OF THE CURRENT CIVIL PROCEDURES CODE, AND THAT, AFTER COMING IN FORCE ON SEPTEMBER 1, 2013, WILL NECESSARILY IMPLY AN ALTERATION TO THE PROCEDURAL METHODOLOGY WITH INEVITABLE REFLEXES WITHIN THE CIVIL NATURE DISPUTES SETTLEMENT, DEVELOPMENT AND DECISION METHOD.**

On June 26, 2013, was published in the Official Gazette Law nr 41/2013, comprising an extensive reform of the current Civil Procedures Code, involving not only a systemic and conceptual change of the same, but essentially the implementation of a new civil procedures model, which has lead several forensic professionals to classify the present reform as an effective "New Civil Procedures Code".

As results from the relevant Motivation Exposition regarding Law Proposal 113/XII, the changes implemented by the present reform are the concretization of a "new judicial culture" brought to the Portuguese civil procedures system in order to establish more simple, flexible and efficient proceedings.

Law nr 41/2013, June 26 shall enter in force on September 1, 2013, being immediately applicable to the pending declarative actions, except the dispositions regulating the procedural acts within the written expositions phase and the dispositions regarding the declarative procedures form; the same shall also be immediately applicable to the pending executive actions, except the rules regarding the executive titles, process forms, executive petition, introductory phase proceedings and declarative nature incidents.

After the present law is in force, the regime foreseen in Decree-Law nr 303/2007, August 24, with the present amendments, shall be applicable to all appeals, save the amendments regarding the *double conforming* ("dupla conforme") regime.

During the period from September 1, 2013 to September 1, 2014, the errors regarding the applicable legal regime resulting from the incorrect application of the transitory dispositions foreseen in this legal reform, shall be corrected by the Judge in charge of each process which may also invite the relevant party to do so.

The present Law nr 41/2013 revokes the 1961 Civil Procedures Code, the Simplified Civil Procedures Regime, the Court Hearings Scheduling Regime, the Experimental Civil Procedures Regime, articles 11 to 19 of Decree-Law nr 226/2008, of November 20 and the Urgent Measures Regime to reduce the pending executive actions.

The most representative and renewing amendments are:

**I** - The dispute inversion in provisional remedies ("providências cautelares");

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(CONTINUATION)

**II** - The introduction of restrictions regarding third parties intervention incidents;

**III** - New deadlines to file evidences and parties declarations;

**IV** - The implementation of a single form within the declarative processes and the limitations to the written expositions;

**V** - The prior hearing new regime;

**VI** - The new rules regarding the final hearing, sentences and appeals;

**VII** - The new features of the executive action;

**VIII** - Reorganization of the special procedures and the personality protection.

**I - The dispute inversion in provisional remedies ("providências cautelares")**

The new wording of article 369 foresees a dispute inversion in provisional remedies, i.e., foresees that the petitioner may through a request addressed to the judge, to be filed up to the end of the final hearing, be excused to file the main action regarding which the provisional remedy would be ancillary, whenever **1)** the facts attained in the proceedings allow to conclude in a safe manner that the protected right exists and in case **2)** the nature of the provisional remedy ordered is suitable to settle the relevant dispute in a definitive manner.

This expedient shall not be applicable to seizures and enrolments (which are listed provisional remedies) because the nature of the same does not allow the fulfilment of the second condition above referred.

Still in relation to seizures, it is important to refer that with the present amendment when the seized asset had been transferred within the relevant operation and the credit claimed in the main action corresponds to the relevant acquisition price debt (in aggregate or in part), the creditor will no longer have the just fear to lost patrimonial guarantee burden of proof.

In case the defendant is not heard before the initial decision ordering a provisional remedy, the same may file an opposition to the dispute inversion, as well as to challenge the provisional remedy ordered.

It is not possible to appeal from the decision rejecting the dispute inversion. In turn the decision approving the same may be object of an appeal but only together with the remedy order appeal. Though, in this case and as prior, it is only possible to appeal to the Court of Appeal, i.e., it is not possible to appeal to the Supreme Court of Justice.

Upon the provisional remedy order and being allowed the dispute inversion, the defendant shall be notified to, if so intended, challenge the protected right existence. For such the defendant shall have a deadline of 30 (thirty) days as of the notification of when the decision has become final. In this case, the burden of proof regarding the protected right requisites belongs to the plaintiff, i.e., the defendant in the new action.

The provisional remedy shall turn into a final sentence in case **a)** the defendant does not challenge the same; **b)** the action filed by the defendant ("impugnação") is stationary for more than 30 (thirty) days due to his own negligence; **c)** the defendant, in the scope of the challenging action, is absolved from the procedures and the plaintiff does not file a new action.

**II - The introduction of restrictions regarding third parties intervention incidents**

The active jointly intervention as main party has been eliminated, now only the co-parties may intervene as main parties.

Thus the holders of rights merely parallel or connected with the rights of the plaintiff are now unable to file their claims in a subsequent manner.

This measure aims mainly to avoid that the filing of this type of incidents may disturb the normal developing of the procedures, though being foreseen the possibility of these third parties, if they so intend, to file their respective claims through autonomous actions, and without prejudice of them being able to afterwards require the consolidation of the actions in order to assure a joint trial.

In case of a main intervention caused to effect a reimbursement right, whenever the Plaintiff claim can be immediately accepted and the Defendant does not contest the debt, only alleging that the debt is several, the Defendant shall be immediately sentenced in the claim, in the evidentiary decision, but the action shall proceed between the latter – Defendant in the main action but Plaintiff in the calling – and the joint debtor (that has been called to intervene in the action) strictly in order to settle the reimbursement right.

In a similar manner in case of a caused main intervention, the sentence shall be definitive regarding the merit of the cause in relation to the intervening party, independently of the same having intervened within the process or not.

The judge has now the power to reject, through a decision not subject to appeal, the accessory calling caused to protect a reimbursement right, whenever deemed that the interest subjacent to the calling is irrelevant to the cause or that the same is only a dilatory manoeuver.

In the cases where the Defendant accepts, without reserves, the amount claimed but raises, however, grounded doubts regarding the identity of the creditor, the Defendant must proceed immediately with the deposit of the amount or asset due, being released from the procedures, which shall continue only between the different claiming creditors.

**III - New deadlines to file evidences and parties declarations**

It is foreseen that all evidences must be filed and requested by the parties within the Initial Petition and Defence, although it is foreseen the possibility of changing the same in subsequent written expositions.

The parties are still allowed to present evidentiary documents up to 20 (twenty) days before the final hearing, without prejudice of being condemned to pay a fine, unless they are able to demonstrate that it was impossible to present such evidentiary elements before.

Also new in this matter is the fact that it is now allowed to the party, under its own initiative, to request, up to the beginning of the oral allegations before the court of first instance, permission to make declarations regarding facts in which the same has had a personal intervention or regarding which the same has a direct knowledge. The hearing of the party making declarations is conducted by the judge, and the lawyers may intervene only to request clarifications. In case the party confesses any fact, such shall be duly evaluated, being irrefutable and having full evidentiary effect. In turn, the declarations made by the party that do not comprise a confession are freely evaluated by the Court.

The rule regarding the number of witnesses that each party may present now foresees 10 (ten) witnesses, being admissible the presentation of more than 10 (ten) witnesses in case of reconventional claim.

Nevertheless, the judge may allow that a higher number of witnesses than such above referred is heard, this decision not being subject to appeal.

It is also foreseen that by rule the witnesses are to be presented, i.e., the party indicating the witnesses has the duty to assure that the same will appear in the respective session to be heard. Therefore, the notification by the Court of the witnesses indicated by the party shall be the exception, and will occur only in the cases where the party expressly requires so.

**IV - The implementation of a single form within the declarative procedures and the limitations to the written expositions**

The present amendment has introduced a major reformulation of the rules regarding the common declarative procedures forms, reducing the same to a single form, i.e., the ordinary, summarized and very summarized proceedings forms have been eliminated.

Notwithstanding, the referred reduction to a single proceedings form must not be interpreted as a total standardization of the proceedings.

In fact, simplified proceedings are foreseen for actions which value is set within the first instance court jurisdiction, i.e. up to € 5.000,00, including regarding the number of admissible witnesses that is reduced to 5 (five), as well as regarding the oral allegations duration that is reduced to 30 (thirty) minutes and in the reply reduced to 15 (fifteen) minutes.

In the same manner in relation to actions which value is inferior to half of the Appeal Court jurisdiction, i.e. up to € 15.000,00, collegial expertise shall not be admissible, being also foreseen special proceedings after the expositions phase aiming to make such actions more efficient.

The amendments introduced regarding the admissible parties expositions are also substantial.

Regarding the initial petition, the judge has been granted the power to immediately reject the same in case the petition is clearly ungrounded or in case there are evident dilatory pleas that may not be remedied and which can be officially recognized.

In relation to the defence, now the Defendant will have the obligation to expose, in a separate manner, the essential facts in which the alleged exceptions are based on, otherwise the same shall be considered inadmissible by agreement, even in the cases where the Plaintiff does not refute the same. On the other hand the Defendant is no longer obliged to refer all facts alleged in the initial petition, but may restrain himself to such facts effectively comprising the cause of the Plaintiff's claim. On its turn, with the present amendment it is settled the question regarding the admissibility of a counterclaim in the cases where the Defendant intends his credit to be recognized, either through setoff, or through a payment request of the amount exceeding the credit alleged by the Plaintiff.

The reply is now the last written exposition admissible (excepting the subsequent written expositions that are foreseen but in a very restrictive manner). Nevertheless, even the admissibility of the reply is limited to the cases in which the Defendant has filed a counterclaim, i.e., the Reply may no longer be used as a mean to reply to pleas

alleged in the defence, being also waived the possibility to amend or increase the claim grounds and/or the request. Though, within the negative mere valuation actions, it is foreseen the possibility of the reply to be still used to contest constitutive facts that have been alleged by the Defendant, as well as to allege impeditive or extinctive facts of the right alleged by the Defendant.

The present amendment makes mandatory for Lawyers to file the procedural acts through electronic means, this same principle being applicable to the notifications from the court clerks to the lawyers and to the notifications between lawyers. The filing of procedural acts through other means shall only be admissible in actions that do not require the appointment of a legal procurator and in which the party is not represented.

It shall also be mandatory to indicate the list of witnesses and other evidentiary means immediately with the initial petition and the defence, notwithstanding the evidentiary requirements may be altered later: **a)** by the Plaintiff in the reply whenever the same is admissible or within 10 (ten) days as of the defence notification; **b)** by the Defendant within 10 (ten) days as of the reply notification; or **c)** by both parties within the prior hearing (whenever applicable), or up to 20 (twenty) days before the final hearing date.

**V - The prior hearing new regime**

The occurrence of the prior hearing (which shall "substitute" the preliminary hearing), shall be the rule, and the same will not occur only within actions not contested and within actions that shall terminate with the sentence on formalities accepting the dilatory plea that has been discussed within the written expositions.

Thus, the prior hearing may has as object **a)** the contradictory procedures regarding matters to be decided within the sentence on formalities that the parties did not have the change to discuss in written; **b)** the sentence on formalities issuing; **c)** the conciliation attempt; **d)** the oral debate aiming the elimination of eventual insufficiencies regarding the facts alleged; **e)** the issuing, after debate, of the decision aimed to identify the object of the dispute and the list of the matters to be proved; as well as, **f)** the scheduling of the acts to be performed within the final hearing (dates, number of sessions, ...).

Notwithstanding the prior reference to the issuing of the sentence on formalities, please note that, with the present amendments, the same envisages only the analysis of the dilatory pleas and procedural nullities, as well as to decide on the merit of the cause. Thus, in this sentence it is no longer selected the relevant facts for the final decision, which may only occur with a later decision aimed to identify the dispute object and list the matters to be proved.

The prior hearing can be waived by the judge when the same is aimed only for the issuing of the sentence on formalities, the issuing of the decision regarding the suitability of the process form, the procedural simplification or speed up or the issuing of the decision regarding the dispute object characterization and the listing of the matters to be proved.

The parties shall be notified of the relevant decisions, and may file a claim within a deadline of 10 (ten) days, to require the effective performance of the prior hearing, except in relation to the sentence on formalities, which appeal must be filed through the general terms.

**VI - The new rules regarding the final hearing, sentences and appeals**

**a) Final hearing:**

The acceptable motives to postpone the final hearing are almost inexistent, being foreseen the cases of Court impediment or absence of a lawyer, when the hearing has not been scheduled by the judge through a prior agreement or there is a reasonable impediment. Furthermore the acceptable motives to change the court hearing date by request of a lawyer are limited to the verification of an already scheduled judicial service, nevertheless the Court impediment may be due to the performance of other diligences or any other circumstance not listed.

One of the most significant consequences of the "undelayable final hearing principle" adoption is the fact that from the procedures suspension through agreement of the parties may not result the delay of the already scheduled final hearing.

It is now also foreseen as a rule the recording of all acts performed within the final hearing, independently of a specific request.

On the other side, the hearings shall be performed before a Single Judge, being eliminated the intervention of a Collective Court within the civil procedures.

Regarding the facts and legal allegations, the same must be concentrated in one single moment, their duration may not exceed, by rule, 1 (one) hour and the replies 30 (thirty) minutes, such being reduced respectively to 30 (thirty) and 15 (fifteen) minutes within the procedures which value does not supersede the jurisdiction of the first instance Court.

**b) Sentence:**

After the final hearing the process shall be sent to the judge in order for him to, within 30 (thirty) days, issue the

relevant sentence that must always be prepared by the judge that has presided the hearing.

In the relevant sentence, with the factual grounds, the judge must now refer which facts he considers proved or unproved, in accordance with the evidences filed and further elements included in the process.

Regarding the deficiencies and reform of the sentence, the present amendments eliminate the clarification regime, and limits the powers of the judge a *quo*, after the sentence is issued, to the correction of material errors, elimination of nullities and sentence reform.

**c) Appeals:**

Also in what regards the appeals it is foreseen the implementation of important limits.

Regarding interlocutory decisions in which secondary nullities are in cause, the appeal is only admissible when the specific grounds are the violation of the equality and adversarial basic principles or also when the alleged nullity has a great influence in the merit judgment, affecting the acquisition of facts for the process or the admissibility of evidences.

Another important amendment regarding this matter is the reinforcement of the powers of the 2nd instance. In fact, the Court of Appeal may now change the decision regarding the facts if such is justified to achieve the material truth. Within this measure is imposed the duty to renovate the evidence means, re-evaluate the evidences, order new evidentiary means or annul the decision.

Still in relation to the appeals, it is important to note the acceptability of revision appeals after five years of the res judicata sentence, whenever the sentence regards personality rights; as well as the fact that, whenever a new decision is issued by the appealed court and a new revision or formal appeal is filed, the later should whenever possible be distributed to the same presiding judge.

**VII – The new features of the executive action**

Taking into consideration the law now in analysis, the executive action shall also suffer profound changes, one of the great innovations regarding the executive titles. Private documents signed by the debtor containing the constitution or recognition of pecuniary obligations, which amount is fixed or fixable by a simple arithmetic calculation, or of an obligation to deliver something or supply a fact, will no longer be considered as executive titles. Thus, all documents containing debts confessions as well as invoices or extracts signed by the debtor shall no longer be considered as executive titles.

Therefore, unless the referred documents are authenticated, the creditors holding only documents with such characteristics, shall be obliged to, before the execution, file a declarative action or injunction procedures, which will certainly increase this type of actions in a significant manner.

In turn, and notwithstanding that being already the interpretation of the majority of the jurisprudence, the present amendments now expressly grant executive power to the credit titles, even if merely chirographs (including cheques not filed to be paid within the legal deadline), as long as in the relevant executive petition the plaintiff alleges the facts comprising the subjacent relation.

Contrarily to what is still now in force, the executive petition shall be considered filed only after the amount due upfront to the executive agent as fees and expenses is paid.

The executive procedures regarding the payment of a fixed amount will now have two procedural forms – ordinary and summary.

The ordinary form shall be applicable in the cases where **a)** the obligation must still be paid within the executive phase; **b)** when the obligation is alternative or conditional; **c)** when the existing executive title not being a sentence is against only one of the spouses, and the plaintiff alleges within the executive petition that the debt is communicable to the other spouse; **d)** in the executions filed only against the subsidiary debtor that has not waived the prior prosecution against the debtor benefit. In turn, the summary procedures shall be applicable when the executive title is a judicial sentence, an arbitral sentence or an enforceable injunction petition, as well as when the initial object of the seizure is predefined (extrajudicial title regarding a matured pecuniary obligation, guaranteed by a mortgage or pledge), or in case of smaller value debts, i.e., in an amount equal or inferior to twice the 1st instance jurisdiction. By rule, within the summary procedures is waived the preliminary decision and the prior warning of the defendant, being immediately started the seizure of the assets.

In addition it is also foreseen the execution of the sentence within the declarative procedures, which shall be executed in the same process, being possible to require the aggregate execution of all the claims accepted in the same sentence, notwithstanding the relevant end.

Within the present amendments, it is also evident the executive agent powers limitation, such powers being returned to the judge and the Court, and the court office being granted the powers to accept or refuse the executive petitions in a preliminary manner, as well as being granted

to the judge, namely, the powers to determine the existence of action suspension conditions, authorise the seized immovable division, authorise the necessary acts to the protection of the seized credit right and the anticipated sale of the seized assets.

Although it is still possible for the Plaintiff and Defendant to reach an agreement for the payment of the petitioned amount in instalments, to settle the payment plan terms and inform the executive agent of such agreement – up to the seized asset transfer or, in case of a sale through closed letter proposal, up to the acceptance of the proposal filed -, it is now foreseen that such agreement shall extinguish the execution, the seizures executed by then being automatically converted into mortgages or pledges. Afterwards, in case of breach by the Defendant, the Plaintiff may request the executive instance renovation.

Another important and innovating amendment is the possibility of the Plaintiff, Defendant and Claiming Creditors to accept a global payments agreement, as long as the payment of the executive agent fees and expenses is duly foreseen, and which may be, as an example, a simple moratorium, a total or partial forgiveness of the credits, a total or partial substitution of the guarantees or the granting of new ones.

Finally, it is foreseen that the sale of the seized immovable and movable assets must be effected preferentially through an electronic auction.

**VIII - Reorganization of the special procedures and the personality protection**

Further to a systemic reorganization of the special procedures, it has been foreseen the implementation of a significant amendment regarding the personality protection special procedure, the same being removed from the list of voluntary jurisdiction procedures.

In fact, the personality protection special procedures shall now be an autonomous and urgent procedures aimed to allow the grant of a quick decision in order to guarantee, in a timely manner, the individuals personality fundamental right effective protection. Thus, it is imposed that: **a)** the defendant be directly warned to appear in the hearing, and during the same to file its defence; **b)** the absence of a party in the court hearing shall not prevent the presentation of evidences, nor the issuing of the relevant decision; **c)** with the claim acceptance shall be determined the concrete behaviour that the defendant must adopt and, being the case, the relevant deadline and the mandatory pecuniary sanction for each day in delay or by each infraction; **d)** a provisional decision be issued within the process not subject to appeal but subject to a future amendment or confirmation within the same procedures; **e)** the appeals have an urgent nature; **f)** the decision is officially enforced within the same procedures, whenever the executive decision implies the performance of the measure ordered and comprises the immediate payment of the compulsory pecuniary sanction.

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