



Recharge and extrajudicial execution of mortgage in Law 14,711 of 2023

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SUMMARY

This article examines the innovations introduced by Law 14.711/2023, the New Legal Framework for Guarantees, particularly regarding mortgage reloading and extrajudicial enforcement, within a historical context of increasing irrelevance of this type of collateral in the real estate market. The article investigates whether these changes can unlock "dead capital" and revitalize the real estate credit market in Brazil, potentially revitalizing mortgages, improving the efficiency of real guarantees, and thereby fostering credit in Brazil.

Keywords: mortgage; recharge; extrajudicial execution.

ABSTRACT

This article examines the innovations introduced by Law 14,711/2023, the New Legal Framework for Guarantees, particularly regarding the reloading of mortgages and its extrajudicial execution, within a historical context of growing irrelevance of this guarantee in the real estate market. It investigates whether these changes can unlock "dead capital" and stimulate the real estate credit market in Brazil, with the potential to revitalize mortgages, improve the efficiency of real guarantees, and thus promote credit in Brazil.

Keywords: mortgage; reloading; non judicial execution.

1. INTRODUCTION

The advent of Law 14,711/2023, called the New Legal Framework for Guarantees, brought profound changes to the legal regime of real guarantees in Brazil, especially with regard to mortgages and fiduciary alienation. This new framework legal has as one of its main objectives to tackle the problem of so-called "capital dead", a term used to describe the impossibility of reusing goods such as guarantees until the debt is fully paid off. This limitation has had an impact significant in the real estate market, as it restricts the circulation of properties collateral, resulting in capital stagnation and limiting the availability of credit.

In this context, the present work is justified by the need to explore the innovations brought about by the new legislation, especially with regard to mortgage reloading and changes in the extrajudicial execution procedure. The study aims to analyze whether these innovations really meet the objectives of the legislator to boost the credit market and increase the efficiency of real guarantees, or if new practical and legal difficulties arise.

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The central theme of this study is, therefore, the description of the legal provisions relating to the reloading of the mortgage and the improvement of the extrajudicial execution, addressing how such changes can contribute to the growth of real estate credit and the use of this type of guarantee by the market. The problem that is sought to investigate is whether these measures effectively provide greater flexibility and legal security for creditors and debtors in the context of real estate guarantees, and if this leads to the possibility of increasing the mortgage's share compared to the fiduciary alienation – main form of guarantee.

The objectives of the work are: (i) to describe the historical context and evaluate the adaptation of legal changes to the light of foreign law that served as inspiration for the mortgage reloading; (ii) analyze the impact of Law 14.711/2023 on the structure of real guarantees, with regard to the recharge of the mortgage and the extension of the foreclosure extrajudicial; and (iii) compare the new legal provisions with the previous regime, checking its impact on the real estate market.

As a hypothesis, it is assumed that the New Legal Framework for Guarantees tends to promote greater efficiency in the use of real guarantees, reducing the impact of dead capital and facilitating access to credit. The methodology adopted in this study will be qualitative, with an analytical-descriptive approach through documentary analysis and bibliographical.

The work will be structured in four chapters, in addition to this introduction and the final considerations. The first chapter will cover the historical context and the background that led to the creation of Law 14.711/2023, emphasizing the problems of previous regime. In the second chapter, the innovation of recharging the mortgage, analyzing its characteristics, limitations and comparisons with alienation fiduciary. The third chapter will be dedicated to the analysis of the extrajudicial execution of mortgage. In the fourth chapter, a comparison will be made with the institute of alienation fiduciary, regarding reloading and extrajudicial execution. Finally, the final considerations will present a summary of the conclusions reached.

2. HISTORICAL CONTEXT

In the Brazilian legal system, until the advent of Law 14,711/2023, the diffusion uncontrolled so-called hyper-guarantees (structured as a form of property) revealed a growing phenomenon in the Brazilian real estate market: the so-called “capital



dead”, or the impossibility of the same asset being traded again until payment full amount of the debt for which it was given as security.

The mortgage, despite its strong ambulatory nature – the encumbered property remains in commerce –, its legal submission to other super-privileged credits and the risk of the debtor's insolvency have shifted it to an increasingly residual role in the market Brazilian real estate after the advent of Law 9,514/1997. In the project that gave rise to the Legal Framework for Guarantees², it was stated that the use of mortgages corresponded to only 6% (six percent) of the country's real estate credit operations. The Central Bank points out for the year 2023 a share of 3% (three percent) of real estate financing.³

With the advantage of extrajudicial execution and the protection assured to the creditor typical of property law, fiduciary alienation assumed a primary role as real estate collateral. Thus, there was a rapid and growing migration of credit, renouncing the ambulatory nature offered by the mortgage in search of more security and successful and swift execution by extrajudicial means. This generated two consequences, remain exposed.

First, the increase in “dead capital”. This phenomenon arises, among other things, reasons⁴ because, unlike the mortgage, which allows successive and simultaneous constitutions on the same asset, the alienation affects its entirety. The ownership of the domain passes to the creditor in a fiduciary manner, preventing (until Law 14,711) the use of the property for new credit transactions, even between the same parties. As the debt was paid off, the greater the economic value of the debtor's real right of acquisition⁵, therefore, the greater his real estate assets⁶, which, however, could not serve as new guarantee. It was a “fixed” asset of the fiduciary debtor.

Second, use for purposes other than those intended for the institution of fiduciary alienation: home financing. Its use has spread for several other segments, unsuitable for their own regime. Law 9,514/1997 did not have mechanisms capable of regulating these new applications.

In addition to the proven advantages of fiduciary alienation highlighted above, it is advisable mention decreasing effectiveness of the mortgage as a means of recovering credits

² Bill 4.188/2021

³ Abelha, Bresolin, 2024. p. 196.

⁴ For example, irregular real estate, a blemish on Brazilian land use planning, is combated through land regularization legislation.

⁵ See art. 1,368-B of the Civil Code.

⁶ See art. 80, I, of the Civil Code.



defaulters and the deterioration of the legal security it offers to creditors. Until the advent of the new law, mortgage execution was mostly carried out through judicial. Although there is an extrajudicial procedure provided for in Decree-Law 70/1966, restriction of its application (as will be seen in the appropriate chapter) and lack of security in the face of to successive questions about its constitutionality and constant cancellations of procedures, led creditors to opt for the slow and costly path of execution by the State-judge, "facing a hateful *ordeal* in the Judiciary, often without happy ending, due to the frequent existence of privileged creditors who, at the end of a years-long process, raised, if not all, a good part of the auction proceeds."⁷

In addition to the fragility of the mortgage in the face of privileged creditors, it is necessary to mention the violation of the soundness of the mortgage and its very nature as a real right enforceable *erga omnes*, by the literal application of Summary 308 of the Superior Court of Justice⁸. In the year of 2005, the Encol construction company case had a profound impact on the real estate market. In view of the harm perpetrated against thousands of borrowing purchasers who were threatened with losing their properties even if they had paid off their debts, the Court Superior recognized fraud, abuse of rights and violations of consumer rights in contracts financing agreements established between creditors, financial institutions and the construction company, harmful to purchasers. Thus, a summary issued in a specific case ended up contain a generic text that simply removes the effectiveness of the mortgage signed between builder and financial agent in the face of the promising buyer, even if it was prior to the celebration of the promise. That is, by the literalness of the summary understanding, to financing of works by the construction company, the mortgage is only binding on it, violating excessively its guaranteeing force, regardless of whether there is fraud, collusion, abuse of rights or violation of the Consumer Protection Code. This was also one of the main reasons for the progressive decline in the use of mortgage guarantees.

This was the context for the genesis of Law 14711/2023, created in conjunction with the Provisional Measure 1,085/2021 (converted into Law 14,382/2022). The diploma, called Legal Framework for Guarantees⁹, sought to bring alternative solutions to the problem of "capital

⁷ Abelha, Bresolin, 2024. p. 196.

⁸ STJ, Summary 308. The mortgage signed between the construction company and the financial agent, prior to or subsequent to the execution of the purchase and sale agreement, is not effective against the purchasers of the property.

⁹ The term "legal framework" given to the law can be misleading. This is because a framework is something that "refounds an institute or area of law, which was never the project's intention. On the contrary, it was a commissioned text, whose scope was quite limited" (Silva, 2024, p. 31). According to the author, the 2002 Civil Code repeated many of the rules of the 1916 Code. What exists in the Brazilian legal system regarding guarantees is a profusion of special laws that resolve case-by-case problems, resulting in legislative confusion, rules that do not apply to the cases in which they are applied, and complex and inconsistent jurisprudence.



dead", as well as streamlining and improving execution through extrajudicial means and increasing the legal security of the real estate market.

According to Silva (2024), among the foreign regulations that served as inspiration for tackling "dead capital" are: (i) the (re)use of the same prior guarantee for new debts; (ii) fiduciary management transactions; (iii) the possibility of offering the debtor's acquisition right as collateral.¹⁰

Among the alternative solutions to the problem mentioned, the Brazilian legislator brought the extension of the mortgage (art. 1,487-A, CC/2002) and of the fiduciary alienation (arts. 9º-A to 9º-D, Law 13,476/2017), and the express positive nature of the fiduciary alienation of property supervening (art. 22, § 3, Law 9,514/1997). The aim was to attack the issue from two fronts: make the use of assets transferred in trust more flexible; increase the attractiveness of the mortgage, which does not restrict the debtor's assets.

Regarding the improvement of extrajudicial execution, it was proposed to promote specific corrections in the implementation of Law 9,514/1997, in addition to expanding the procedure as to the mortgage, making its applicability as the general rule (subsidiary to the very similar procedure provided for in Law 14,711 for mortgages), revoking the former discipline of Decree-Law 70/1966, which greatly restricted its scope.

3. MORTGAGE RECHARGE

The reloading (or extension) of a mortgage is not new in the Brazilian legal system. The right to extension can be found in the stipular pledge of a Rural Pledge Certificate (art. 58 of Decree-Law 167/1967)¹¹. New financing is allowed if there is identity of parts and object, it is enough to mention the extension in the certificate and proceed with the respective endorsement in the rural pledge registry in Book 3 of the Office of the Real Estate Registry of the jurisdiction of the property in which the seized assets are located.

The institute, now applicable to mortgages in general (which also applies to fiduciary alienation), was inserted by art. 1,487-A, of the 2002 Civil Code. The idea is that the same

¹⁰ Silva, 2024. p. 34.

¹¹ Art. 58. In the case of more than one financing, being the same as the issuer of the certificate, the creditor and the pledged assets, the originally constituted pledge may be extended to subsequent financings, by mentioning the extension in the subsequent certificates, considering it a single pledge with different rural certificates.

§ 1º The extension will only be noted in the margin of the previous registration and does not prevent other assets from being linked to the guarantee.

§ 2 (Revoked by Law No. 14,421, of 2022)

§ 3º The guarantee cannot be extended if there has been an endorsement or if the linked goods have already been subject to a new encumbrance with third parties.

¹² Art. 1,487-A. The mortgage may, at the owner's request, be subsequently extended to guarantee new obligations in favor of the same creditor, maintaining the original registration and publicity, but respected, in relation to

mortgage can guarantee new debt to the exact extent of how much has already been amortized original obligation. In other words, the potential of a property to secure new debt under the same mortgage is inversely proportional to the outstanding balance of the main obligation.

The device in question limits the new debt to be guaranteed both in the term as the maximum value of the original debt, as a true top-up (art. 1,487-A, § 1, CC/2002). The entry of this extension into the registration is done by endorsement (art. 1,487-A, § 2, CC/2002), a relevant difference when compared with the constitution of new higher-grade mortgage, which would be included in the registry by registration in the strict sense (cf. art. 167, I, 2, Law 6,015/1973) 13.

In reloading, as in new mortgages in successive degrees, the preference is always given to the date of constitution: the original guaranteed obligation takes precedence to those covered by the extension, in the same way that, among debts guaranteed by successive extensions, preference is given to the chronological order of the respective endorsements (art. 1,487-A, § 2, I and II, CC/2002).

Furthermore, § 3 of art. 1,487-A, of the 2002 Civil Code, implicitly allows the assignment mortgage credit of the extensions, which does not conflict with the restriction of the *caput* of the device, referring only to the constitution of the warranty recharge. In other words, the singleness of creditor is required only in the formation, with the multiplicity of creditors due to possible subsequent credit assignments.

Faced with a multiplicity of creditors, the same § 3 establishes the prerogative for initiate the execution exclusively against the holder of the highest priority credit, but allows for an agreement to be reached in a different sense – in a legal transaction involving the assignment of mortgage grade.

It is important to note that mortgage extensions do not prevail over other higher-grade mortgages previously constituted (art. 1,487-A, *caput*,

extension, the priority of contradictory rights entered in the property registration. (Included by Law No. 14,711, of 2023)

§ 1º The extension of the mortgage may not exceed the term and maximum guaranteed value stated in the specialization of the original guarantee. (Included by Law No. 14,711, of 2023)

§ 2 The extension of the mortgage will be subject to subsequent registration in the property registration, ensuring credit preference in favor of: (Included by Law No. 14,711, of 2023)

I - initial obligation, in relation to the obligations achieved by the extension of the mortgage; (Included by Law No. 14,711, of 2023)

II - oldest obligation, considering the time of registration, in the case of more than one mortgage extension. (Included by Law No. 14,711, of 2023)

13 Art. 167 - In the Real Estate Registry, in addition to the registration, the following will be made: I - the registration: (...) 2) of legal, judicial mortgages and conventional;



CC/2002). “In this way, the effects of the extension will not be opposable to those who contributed to the real estate registry in advance of its occurrence, applying in this in particular the results arising from the application of the general rule (arts. 1,227 and 1,245 of the Civil Code)”.^{14,15} The legislator chose not to create the mortgage recharge as a reservation of degree – the priority of the debt does not retroact to the original constitution of the right real. This is a procedural simplification for contractors, governed by priority in chronological order of enrollment. Whether regarding other mortgages of a higher degree than that extended, whether regarding any other contradictory right.

The extension of the mortgage (and that of the fiduciary alienation) was inspired by the “hypothèque rechargeable” of the French legal system.¹⁶ The main characteristics present in the French institute, which are not replicated in Brazilian law, according to Silva (2024), are: (i) the restriction of reloading to business purposes; (ii) the possibility of the reloading is agreed with a creditor other than the original – while the legislator Brazilian required single creditor in the constitution of the extension and allowed the assignment, as seen; and (iii) reloading in the French system implies a reservation of degree – the priority of the debt goes back to the constitution of the original mortgage – as per art. 1,487-A, caput, of the CC/2002, expressly provides for the observance of the “priority of rights contradictory entries in the registration”, serving only as a facilitator to the contractors due to the lower requirement for formalization.

It is clear that the Brazilian solution is more flexible: there is no restriction on purposes business and the participation of other creditors, although it cannot occur in the constitution of the extension, can be implemented by subsequent assignment of credit. Furthermore, it is also more likely to maximize the economic potential of the asset. property, since the reservation of degree of French law (also present in German law)¹⁷ discourages the creation of subsequent degree mortgages. These, in turn, allow the total amount given as collateral to exceed the value of the first debt guaranteed by mortgage, which is not possible to occur through reloading. Both the Both French and Brazilian regulations limit loading to the original value.

¹⁴ Paiva, 2024. p. 252.

¹⁵ Art. 1,227. Real rights over real estate created or transferred by acts between living persons are only acquired with the registration of said titles in the Real Estate Registry Office (arts. 1,245 to 1,247), except in the cases expressed in this Code.

Art. 1,245. Ownership is transferred between living persons through the registration of the transfer title in the Real Estate Registry.

¹⁶ Silva, 2024. p. 36.

¹⁷ Same, *ibid.* p. 39.



4. EXTRAJUDICIAL EXECUTION OF MORTGAGE

The innovation brought about by Law 14,711/2023 in the field of extrajudicial execution was in the sense of expanding what was otherwise already regulated by Decree-Law 70/1966, but was restricted to loan agreements with mortgage guarantees (except rural credit) and the notes representing the respective credits. Such expansion does not reach the naval and aeronautical mortgages, nor those related to rural credit (such as in previous discipline).

The exclusion of credit originating from agricultural activity¹⁸ is due to the fact that, in the context of agribusiness, there are contingencies of nature itself that lead the producer rural to eventually incur in delay in the payment of the debt. Hence it would be entirely inconvenient to adopt a very fast and simplified execution, without the participation of jurisdiction.

Regarding the mortgage of ships – regulated by Law 7.652/1988 – and aircraft – regulated by Law 7,565/1986, it is understood that the execution continues exclusively by via the courts, since the purpose of Article 9 of Law 14,711/2023 was to reach only assets real estate. This is what is understood by the literalness of the regulation, which provides that all the rite passes through real estate registry offices, with the participation of notaries of notes in the formation of the inscribable title (notarial auction minutes).

The extrajudicialization of mortgage foreclosure is a global phenomenon, which finds parallels in several countries. Examples include the Spanish and Peruvian. In the European country, “the parties may or may not agree in the formalizing title of the mortgage the possibility of future extrajudicial execution in a procedure mediated by a notary”¹⁹. In the Latin American country, the parties can agree to indication of a third party who will carry out the sale of the mortgaged property to satisfy the defaulted credit²⁰.

Extrajudicial foreclosure of the mortgage must be provided for in the instrument of constitution of all mortgages in which its application is possible, as an element necessary part of the contract. This is a mandatory rule, because the express provision of the procedure (with mention of §§ 1º to 10 of art. 9º, of Law 14.711/2023) is a requirement of

¹⁸ § 13. The extrajudicial execution provided for in the caput of this article does not apply to operations involving the financing of agricultural activities.

¹⁹ *Ibid.* p. 257.

²⁰ Bacelar, 2024. p. 257.



validity of the mortgage deed²¹. The contracting parties are not obliged to opt for the extrajudicial procedure, but all contracts must provide for the possibility. The same thing has already occurred with fiduciary alienation since the beginning of its implemented by Law 9,514/1997. This gives wide publicity to the new regulation and, hopefully, its adoption by market participants is encouraged.

Regarding the positive procedure, the legislator opted for an almost reproduction of the discipline of execution in the fiduciary alienation, either by the wording of the devices, or by the subsidiary application command of art. 26 of Law 9,514/1997 (art. 9, § 1, part final, Law 14.711/2023)²² – except for the obvious, the structural differences between the two types of real guarantee. For example, the rules regarding: (i) term of lack; (ii) reuse of summons for other enforcement proceedings; (iii) summons by the real estate registrar, through the registrar of titles and documents or by letter with AR; (iv) summons at a specific time or by public notice; (v) sending of the notification by electronic means provided for in the contract, prior to the notice; (vi) conversion of the nullities of the procedure into losses and damages, unless there is no notification of the debtor or third party guarantor²³.

The last item of subsidiary application indicated above is of paramount importance. The the extrajudicial real estate foreclosure procedure now has a mechanism stabilization of its effects. Except for the defect in the summons, all issues related to the mortgage agreement, as well as in relation to the foreclosure procedure, discussed in court, will be resolved in damages. Only the absence of subpoena allows the use of *querela nullitatis*.²⁴

In summary, the procedure involves the following steps: (i) qualification initial registration, in which the competence of the officer and the legitimacy of the applicant are assessed (in rule, the mortgagee of lower rank), existence of contradictory titles and facts

²¹ Law 14,711/2023, Art. 9 § 15. The mortgage deed must contain, without prejudice to the formal requirements of art. 108 of Law No. 10,406 of January 10, 2002 (Civil Code), or the special law, as the case may be, as a requirement for validity, express provision of the procedure provided for in this article, with reference to the content of §§ 1 to 10 of this article.

²² § 1º If the mortgage debt is due and unpaid, in whole or in part, the debtor and, if applicable, the third-party mortgagee or his legal representatives or duly appointed attorneys will be personally summoned, at the request of the creditor or his assignee, by the real estate registry officer of the location of the mortgaged property, to purge the default within 15 (fifteen) days, in compliance with the provisions of art. 26 of Law No. 9,514, of November 20, 1997, where applicable.

²³ Law 9,514/1997, art. 30, Sole Paragraph. Once the property has been auctioned or ownership has been definitively consolidated in the event of failed auctions, legal actions involving disputes over contractual stipulations or procedural requirements for collection and auction, except for the requirement to notify the debtor and, if applicable, the third-party lender, shall not prevent the reinstatement of possession referred to in this article and shall be resolved in damages.

²⁴ Bacelar, 2024. p. 261.



impediments; (ii) notification of the debtor, third-party mortgagee (if applicable), as well as other co-creditors with guarantees on the same asset; (iii) if there is no payment, certification of the fact with publicity in the occurrence record, which initiates the execution properly speaking (equivalent to the time frame of property consolidation in fiduciary alienation); (iv) holding of public auctions promoted by the creditor plaintiff; (v) auction by a third party or award to the creditor; (vi) in the event of auction, preparation of notarial deed by a notary, which will serve as a title of transfer suitable for registration²⁵.

Regarding the above steps, the issue of minimum bids in the auctions, the existence of other creditors with real guarantees on the same property, and the acting as a notary and registrar.

In the first auction²⁶, the law determines that to be accepted, the bid must be higher than that provided for in the contract for auction purposes (updated in the contracted form) and the appraisal value for purposes of the tax on onerous inter vivos transfer (ITBI). For the second auction²⁷, the minimum value becomes the value of the debt plus all costs (fees, taxes, procedure expenses, insurance premium and contributions condominium fees), and if this value is not reached, the equivalent of half may be accepted. of the appraisal value for ITBI purposes (value that will be considered when the creditor decide to award the property to itself, for the purpose of determining the remainder). Before the sale at auction, the debtor or the third party guarantor is always guaranteed to redeem the execution through payment of the debt plus expenses.²⁸ The new pricing system minimums were intended to bring more legal certainty to the execution system

²⁵ Law 14,711/2023, art. 9, § 11. Once the procedure is concluded and there is a winning bid, the auction records and the extrajudicial mortgage execution process will be distributed to a notary public with delegated jurisdiction that covers the location of the property for the preparation of a notarial deed of auction, which will contain the data of the summons of the debtor and the guarantor and the auction records and will constitute a valid title of transfer of ownership to the successful bidder to be registered in the property registry.

²⁶ Law 14,711/2023, art. 9 § 5 In the event that the bid offered in the first public auction is not equal to or greater than the value of the property established in the contract for the purposes of foreclosure or the value of the assessment carried out by the competent public body for calculating the tax on inter vivos transfers, whichever is greater, the second auction will be held within the following 15 (fifteen) days.

²⁷ § 6º In the second auction, the highest bid offered will be accepted, provided that it is equal to or greater than the full value of the debt secured by the mortgage, expenses, including notary fees, insurance premiums, legal charges, including taxes, and condominium contributions. If there is no bid that reaches said value, the mortgage creditor may accept, at its sole discretion, a bid that corresponds to at least half of the appraised value of the property.

²⁸ § 7 Before the property is sold at auction, the debtor or, if applicable, the mortgage guarantee provider is guaranteed the right to redeem the execution, upon payment of the total debt, the value of which will be increased by the expenses related to the collection and auction procedures, with the property registry officer authorized to receive and transfer the corresponding amounts to the creditor within 3 (three) days.



extrajudicial and end the doctrinal and jurisprudential discussions on low prices. 29,30,31,32

The existence of other creditors was provided for by law as capable of triggering a contest special extrajudicial. It is said special in contrast to the universal competition of creditors³³, as occurs in bankruptcy and civil insolvency, cases in which it would not be possible proceed through extrajudicial means. The contest does not alter the legitimacy to request the initiation of extrajudicial foreclosure: only holders of mortgages or alienation fiduciary may do so. In the case of mortgage, the rule of art. 1,477 must be observed of the Civil Code, which provides that the mortgage creditor of lowest priority (highest degree) can only foreclose on the property if the lower mortgage is already due. As stated previously, the co-creditors are notified to indicate that they require qualification of credit, indicating its value. The consequence of the summoned creditor's failure to respond is serious: he is subject to the loss of the real right of guarantee³⁴, which will be canceled at the end of the procedure for payment to qualified creditors. The registrar sets up a list of creditors, with their respective credits and priorities, so that the creditor the claimant subsequently makes payments on the remaining amount of his debt (whether the auction price or the minimum reference value of the asset, at the time of its award). It is important to enforce the fundamental right to adversarial proceedings and full defense,

²⁹ CPC, art. 891, Sole Paragraph: "A price lower than the minimum stipulated by the judge and stated in the notice is considered vile, and, if no minimum price has been set, a price lower than fifty percent of the appraised value is considered vile."

³⁰ In judicial executions, the appraised value of the property is generally determined by the judge, as is the minimum bid for auctions. If the appraised value or half of the appraised value is not respected, the auction may be annulled, cf. art. 903, §1º, I, CPC: "(...) the auction may, however, be: I - invalidated, when carried out at a low price or with another defect."

³¹ There has been much discussion about the application of the "base price" system to extrajudicial proceedings, which do not involve the asset appraisal stage. Prior to Law 14,711, Law 9,514 established only the debt value as a floor, which could be less than half the asset's contractual or tax value. The application of the Consumer Protection Code (CDC) and the consumer's right to recover part of the installments paid, regardless of the auction result, were also discussed. This last issue was addressed in Repetitive Theme 1,095 of the Superior Court of Justice (STJ), which ruled that the Consumer Protection Code (CDC) was inapplicable to fiduciary alienation transactions, which have their own system. The interpretation is that if the special guarantee system excludes consumer protection legislation (protective by nature), there would be even more reason to exclude the application of the CPC regarding the base price system. Aware of this historical discussion, the legislator decided to establish a mechanism for the minimum auction price. In this sense: Abelha, Bresolin, 2024. It should be noted that any violation of legal standards, resulting in a low price, will result, after the conclusion of the procedure, in the right to claim compensation, without invalidating the auction, as occurs in the CPC system.

³² It should be noted that the prohibition of low prices, using the tax assessment value of the property as a reference, is applicable to contracts prior to Law 14,711, with the STJ having already decided in this regard. (v. Ribeiro, 2024, p. 688).

³³ Ribeiro, 2024, p. 703-704. For the author, the law provided for the procedure for small creditor contests. "Therefore (...) there will be no summons for other creditors [other than mortgagees or fiduciaries], if any. (...) It could not be otherwise, after all, the knowledge of the Real Estate Registry Officer, in the performance of his function of an eminently administrative nature, is limited and must be limited to the content of the royal folio."

³⁴ *Ibidem*. p. 707. In the same sense, Pires (2024), for whom the "certificate itself containing the general list of creditors is a valid title for the cancellation of the real right of the inert creditor."



so as to allow any co-creditor to challenge the list of creditors, as well as by the debtor or third party guarantor.

Regarding the performance of the notary and registry service delegates, it should be noted that the registrar, in registration qualification, has activities restricted to the dictates of the law. Therefore, it is not the official's responsibility to verify compliance with deadlines for holding an auction or minimum bid values, or even to monitor the actions of the executing creditor regarding their obligations. Any unlawful acts must be challenged through the appropriate channels (jurisdictional) and resolved in damages (after final conclusion, unless there is no of summons, as seen above). The notary, on the other hand, does not fulfill the task of drawing up a typical notarial deed (faithful and objective narration of documented facts). It must be carried out notary qualification in order to determine whether the legal requirements were respected, whether there is formal or material defects that prevent the auction, as well as the payment of ITBI.³⁵

5. COMPARISON WITH FIDUCIARY ALIENATION IN GUARANTEE

In terms of the most relevant similarities in reloading, both mortgage and fiduciary alienation as collateral are limited by law in terms of term and value. The new debt has a maximum term and value equal to that of the original debt, in the case of true recharge. The entry of this extension into the registration is done by endorsement – difference relevant when compared with the creation of a new higher-grade mortgage, which would enter the register by registration in the strict sense.

Regarding the distinctions between mortgage reloading and alienation fiduciary, the following stand out: the subjective limitation on the extent of the fiduciary alienation, restricted to members of the National Financial System or Simple Credit Companies³⁶ – restriction does not exist in the mortgage; multiple creditors are prohibited in the reloading of fiduciary alienation, in order to preserve the uniqueness of the creditor, whether in the formation, or in subsequent assignments, which must be joint to the same new creditor³⁷ – unlike the current discipline for mortgages, which also requires the single creditor in the formation, but allows for multiple creditors through assignments

³⁵ Kumpel, Fogolin, 2023.

³⁶ Law 13,476/2017, art. 9º-A § 1º The extension of the fiduciary alienation referred to in the caput of this article may only be contracted, by an individual or legal entity, within the scope of the National Financial System and in transactions with Simple Credit Companies.

³⁷ Law 13,476/2017, art. 9º-A § 2º Credit transactions guaranteed by the same fiduciary transfer, as provided for in the caput of this article, may only be transferred jointly, under any title, preserving the uniqueness of the creditor.



subsequent; the extension of the fiduciary alienation was provided for in Law 13,476/2017, which deals with specifically credit limit opening contracts, while the extension of the mortgage was introduced as a general discipline in the Civil Code itself – although prevails in the doctrine that the recharge of the fiduciary alienation has no limits objectives, applying as a guarantee for new and autonomous credit operations of any nature.³⁸

It has already been stated that the procedures for extrajudicial execution of mortgages and fiduciary alienation are very similar, even due to the subsidiary application of the second to first. These are the same for both institutes: competence of the registering officer; term to clear the arrears; deadline to auction the property; minimum value of the first auction; discharge of the debtor regarding the remaining balance (existing in the credits housing); rules for vacating rented property; vacancy rate; forecast mandatory extrajudicial procedure in contract.

On the other hand, there are differences arising from the nature of the guarantees. First, If the default is not cleared, the mortgage is published in the registration of such fact – by act of endorsement, at the request of the creditor –, marking the beginning of extrajudicial execution of the guarantee by means of public auction³⁹. Differently, in fiduciary alienation, configured as non-purgation of default, the consolidation of the property in favor of the fiduciary creditor by means of a deed of registration, provided that payment of the ITBI and, when applicable, the laudêmio⁴⁰ is proven. Second, if both auctions in the mortgage execution are negative, the creditor will have two possibilities⁴¹: (i) award the property, at any time, for the value corresponding to the minimum benchmark

³⁸ Paiva, 2024. p. 253.

³⁹ Law 14,711/2023, art. 9 § 2 Failure to purge the default within the period established in § 1 of this article authorizes the beginning of the procedure for extrajudicial foreclosure of the mortgage guarantee through public auction, and the fact will be previously recorded in the property registration, from the request made by the creditor, within 15 (fifteen) days following the end of the period established for purging the default.

⁴⁰ Law 9,514/1997, art. 26 § 7º After the period referred to in § 1º has elapsed without the payment of the arrears, the official of the competent Real Estate Registry, certifying this fact, will promote the endorsement, in the property registration, of the consolidation of the ownership in the name of the fiduciary, in view of the proof of payment by the latter, of the inter vivos transfer tax and, if applicable, of the laudêmio.

⁴¹ Law 14711/2023, § 9 In the event that the bid offered in the second auction is not equal to or higher than the minimum reference established in § 6 of this article for the auction, the creditor will have the option to:

I - appropriate the property in payment of the debt, at any time, for the value corresponding to the minimum reference duly updated, by means of a request to the competent real estate registry officer, who will register the negative auction records with the annotation of the ownership transfer in a single registration act, in this case, waiving the notarial deed of specialization referred to in this article and the obligation referred to in § 8 of this article; or

II - carry out, within a period of up to 180 (one hundred and eighty) days, counting from the last auction, the direct sale of the property to a third party, for a value not lower than the minimum reference, waiving the need for a new auction, in which case the mortgage creditor will be invested, by force of this Law, with an irrevocable mandate to represent the mortgage guarantor, with powers to transfer ownership, rights, possession and action, declare the seller's responsibility for the eviction and authorize the purchaser in possession.



duly updated, entering the Property Registry Office through a single registration act, publicizing the occurrence of negative auctions while operating the transfer of ownership; or (ii) carry out the direct sale of the property to a third party, within 180 days after the second auction, invested with a legal mandate to represent the debtor in any transaction aimed at the sale of the property, for a value not lower than the reference value minimum, having as title the sale and purchase contract between the debtor owner – by your legal representative – and the third party buyer. In the execution of the fiduciary alienation, if both auctions remain negative, this fact will be publicized in the registration by act of endorsement, at the request of the fiduciary creditor or interested party, accompanied by copies authentic copies of the auctions and negative records, signed by an official auctioneer – operating the free availability of the property⁴².

There are also differences at the discretion of the legislator. First, regarding applicability, the extrajudicial execution of the mortgage does not apply to credits intended for the activity rural, while the procedure for fiduciary alienation does not have this restriction. Second, as to the title in a formal sense, once the public auctions have been concluded and there has been winning bid, the title for the transfer of ownership to the successful bidder mortgaged is the notarial deed of auction, drawn up by a Notary Public of the district of the property, in view of the auction records and the extrajudicial execution process. On the other hand, On the other hand, in fiduciary alienation, the title for the transfer is the sale and purchase contract between the former selling fiduciary creditor and the successful bidder (or the auto itself auction), there being no need for a public deed⁴³.

FINAL CONSIDERATIONS

Throughout this work, we sought to analyze the innovations brought by the Law 14.711/2023 regarding the reloading of the mortgage and its extrajudicial execution, comparing them with the fiduciary alienation as collateral, in order to assess whether such changes can fulfill the legislative purpose of unlocking “dead capital” and boosting the real estate credit market.

It was possible to trace the historical context and understand how the mortgage institute, although with a strong ambulatory trait, it lost relevance in the face of the growing use of

⁴² Law 9,514/1997, art. 27 § 5 If in the second auction there is no bid that meets the minimum benchmark for auction established in § 2, the fiduciary will be invested with the free availability of the property and exonerated from the obligation referred to in § 4 of this article.

⁴³ Law 9,514/1997, Art. 38. The acts and contracts referred to in this Law or resulting from its application, even those aimed at the constitution, transfer, modification or waiver of real rights over real estate, may be executed by public deed or by private instrument with the effects of a public deed.

fiduciary alienation. The analysis of comparative law, especially the French model of "hypothèque rechargeable", showed that recharging the mortgage in Brazil is a innovation that, although inspired abroad, adapts better to market reality national.

It was shown that the mortgage reloading and the extension of the execution extrajudicial have the potential to increase legal certainty and the efficiency of guarantees. The new possibility of reusing the property as collateral without the need for complete settlement of previous debt significantly reduces the obstacles that previously hindered access to credit and the reuse of assets.

The comparison between the previous regime and the new legal provisions allowed verify that the changes imposed by Law 14.711/2023 are favorable to the market real estate, especially when compared to fiduciary alienation. Although the fiduciary alienation continues to have advantages in certain aspects (it is a super guarantee), the revitalization of the mortgage, through reloading and a faster extrajudicial procedure, rebalances the use of these guarantees, offering more flexibility to market agents. Mortgages are seen as a more agile, simple and capable of granting smaller credits in relation to the asset given as collateral.

We can conclude that the legislative innovations introduced by Law 14.711/2023 have a positive impact, not only on improving the real guarantees regime, but also in the reactivation of the use of mortgages by market agents, contributing to unlock dead capital and stimulate the real estate market in Brazil.

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