



AMENDMENT TO THE LEGAL REGIME FOR THE RIGHT OF RETENTION ON IMMOVABLE PROPERTY

Decree-Law 48/2024 of July 25 was published in the Official Journal. It amends the wording of Article 759 of the Civil Code in order **to limit the situations in which the right of retention on real estate takes precedence over the mortgage.**

According to the Civil Code, a debtor who has a claim against his creditor enjoys the right of retention if, being obliged to deliver a certain thing, his claim arises from expenses incurred as a result of it or damage caused by it. In turn, a mortgage is a guarantee that gives the creditor the right to be paid for the value of certain immovable property (or similar) belonging

to the debtor or a third party, with preference over other creditors who do not enjoy special privilege or priority of registration.

The amendment introduced by Decree-Law no. 48/2024, of July 25, is part of the set of reforms and investments adopted under the Recovery and Resilience Plan, and is designed **to strengthen the position of the mortgage creditor** by limiting the prevalence of the right of retention over the previously registered mortgage, while at the same time **promoting greater speed in insolvency and company recovery proceedings.**

IN PRACTICAL TERMS, WHAT CHANGES?

Article 759 of the Civil Code, in its previous wording, established that the right of retention prevailed over the mortgage, which, in practical terms, meant that, in the context of the ranking of the various creditors to be paid from the proceeds of the sale of a specific thing, the creditor with the right of retention would prevail in the payment over the creditor with the mortgage (even in cases where the mortgage was registered before the right of retention was established).

With the amendment in question, the right of retention will only take precedence over the mortgage when (and if) the credit in question ensures the reimbursement of expenses incurred to preserve or increase the value of the property, and the right of retention will no longer have absolute precedence.

As a result, this right of retention is conditional on the holder of the right of retention having incurred expenses on the property with a view to preserving it or increasing its value, thus serving to ensure the reimbursement of expenses incurred on the property, provided that they have contributed to preserving it or increasing its value, preventing the hypothesis of the

mortgage creditor enriching himself at the expense of the holder of the right of retention.

In practice, the holder of the right of retention only has the right to be paid in preference to other creditors in cases where the claim ensures reimbursement of expenses to preserve or increase the value of the thing retained.

This change significantly reverses the rule previously enshrined and which has been applied by the Portuguese courts with some reservations and through a restrictive interpretation, clearly strengthening the position of the mortgage creditor by creating greater security in the priority of payment, without neglecting the protection of the position of the holder of the right of retention.

ENTRY INTO FORCE

Decree-Law no. 48/2024, of July 25, enters into force 30 days after its publication, i.e. **from August 25, 2024**, applying only to retention rights constituted after that date.

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