

**Decisions numbers 10444/2016 and 10445/2016, dated 19 October, of the Department of Registries and Notaries (DGRN)**

In these decisions the DGRN provided its opinion regarding the nullity of abusive mortgage clauses and, in particular, the retroactive nature of said nullity, in connection with the appeals filed as a result of the refusal by the Property Registrar to register certain mortgage deeds establishing abusive late payment interest.

The registrar refused to register the mortgage guarantees as they stipulate late interest payments that are more than two percentage points higher than the agreed remunerative interest, implying an objective criterion of abuse in relation to the late payment interest in loan and credit contracts, according to the recent Supreme Court judgements of 22 April 2015 and 3 June 2016, which exclude application of article 114.3 of Spain's Mortgage Act in cases of contracts with consumers under general conditions.

The appellant argued, among other things, that the registrar was applying Supreme Court jurisprudence retroactively, since the deeds in question were granted when said "rule of jurisprudence" did not yet exist, and neither had it been published in any official gazette, and nor was there "vacatio legis". Consequently, the appellant explained, quoting word-for-word what previous DGRN decisions had said, that "In short, the principle of non-retroactivity prevails with respect to the legislation and jurisprudence, but not with respect to the doctrine interpreting them, although the requirements of applicable legal texts should also apply to the deed, (...), for acts that are purely for registration purposes, it shall also apply in respect of the requirements and authorisations that may be needed for presentation at the register." Consequently, the appellant argued that the registrar could not refuse registration by applying jurisprudence that was issued after the deeds constituting the mortgage.

In this regard, the decisions focus on determining whether said objective criterion of abuse in late payment interest on mortgage loans between professionals and consumers is or is not applicable to the deeds of mortgages granted prior to the issuance of said Supreme Court judgements. The DGRN cites jurisprudence from the European Court of Justice concerning consumer protection, which has often reiterated that "article 114.3 of Spain's Mortgage Act may constitute a general legal limit on the arrangement of mortgage loans in that sphere (loan or credit granted for the acquisition of the habitual residence of the borrower that constitutes the mortgaged item), but never a canon of abuse when professionals and consumers are involved, (...)".

As the decisions set forth, the nullity of this kind of abusive clause is pursuant to the need to protect all consumers from the imposition of clauses that may harm them; in other words, consumers are protected since they do not negotiate the clause, but rather the lender imposes it, so that if the clause establishes manifestly high interest rates it may be considered to be abusive and null, even if it does not exceed the limit provided in article 114.3 of the Mortgage Act.

The DGRN further explained that, in accordance with the European Court of Justice, these abusive clauses are annulled "ipso jure", with no need for a prior legal statement as a consequence of a complaint filed by a consumer.

Furthermore, with respect to the principle of non-retroactivity alleged by the appellant, the DGRN stipulates that the "nullity of a mortgage clause due to abuse is applied to all mortgage loans in place, regardless of the time of their arrangement and whether such a clause has effectively been invoked, even if the mortgage has been registered in the property register". In this regard, the DGRN indicated that the principle of non-retroactivity operates with respect to laws and jurisprudence, but not with respect to the doctrine interpreting them, which may take into consideration the social reality at the time said doctrine must be applied.

Likewise, following the same thread of argument, the DGRN recalled that the scope of categorisation of the Property Registrar in connection with abuse enables the registrar to refuse to register such clauses when their abusive nature can be objectively, directly and manifestly observed. Accordingly, the registration of a clause implying late payment interest exceeding two points above the agreed remunerative interest should be refused by the registrar as this parameter was expressly established by the Supreme Court as an objective criterion of abuse for reasons of legal security with "ex tunc" effect; in other words, retroactively.

Finally, in response to the appellant's allegation that there were not sufficient Supreme Court judgments in this regard (and, accordingly, the "rule of jurisprudence" examined here cannot be considered to be a criterion applicable by the Property Registrar in his categorisation), the DGRN cited the so-called "principle of effectiveness" provided in the Consumer Protection Directive. According to said principle, Registrars should refrain from cooperating in applying abusive clauses when there are objective grounds for them to be considered as such, as in this case are the reiterated judgements by the Supreme Court. In short, and citing a previous decision by the same body, the DGRN concludes that "the Property Register is an institution in the service of preventive legal security (Article 9.3 of the Spanish Constitution) which, as such, acts *ex ante*, preventing litigation and conflicts in keeping with its preventive and cautionary nature, and in this particular field of consumer protection, it acts by excluding abusive clauses from contracts before they can have any effect on the borrower".

In conclusion, these decisions sustain that clauses that are abusive, due to involving late payment interest in excess of two percentage points higher than the agreed remunerative interest are indeed retroactively null.