The Banking Litigation Law Review

Fifth Edition

Editor
Deborah Finkler

The LawReviews

© 2021 Law Business Research Ltd

THE BANKING LITIGATION LAW REVIEW

FIFTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in November 2021
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Deborah Finkler

THE LAWREVIEWS

© 2021 Law Business Research Ltd

PUBLISHER
Clare Bolton

HEAD OF BUSINESS DEVELOPMENT
Nick Barette

TEAM LEADERS
Joel Woods, Jack Bagnall

BUSINESS DEVELOPMENT MANAGERS
Rebecca Mogridge, Katie Hodgetts, Joey Kwok

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Isabelle Gray

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Felicia Rosas

SUBEDITOR
Jane Vardy

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK
© 2021 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.
The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at November 2021, be advised that this is a developing area.
Enquiries concerning reproduction should be sent to Law Business Research, at the address above.
Enquiries concerning editorial content should be directed
to the Publisher – clare.bolton@lbresearch.com

ISBN 978-1-83862-761-4

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

BGP LITIGATION

CERHA HEMPEL

CLEARY GOTTLIEB STEEN & HAMILTON LLP

GILBERT + TOBIN

KANTENWEIN

PÉREZ-LLORCA

PINHEIRO NETO ADVOGADOS

SÉRVULO & ASSOCIADOS

SLAUGHTER AND MAY

WENGER VIELI AG

© 2021 Law Business Research Ltd

CONTENTS

PREFACE v
Deborah Finkler

Chapter 1 AUSTRALIA 1
Richard Harris, Philippa Hofbrucker, Kasia Dziadosz-Findlay, Dominic Eberl and Bradley Edwards

Chapter 2 AUSTRIA 11
Holger Bielesz and Paul Krepil

Chapter 3 BRAZIL 23
José Luiz Homem de Mello, Pedro Paulo Barradas Barata and Sasha Roéffero

Chapter 4 GERMANY 37
Marcus van Bevern

Chapter 5 HONG KONG 50
Wynne Mok and Kathleen Poon

Chapter 6 PORTUGAL 63
Manuel Magalhães, Mafalda Ferreira Santos, Francisco Boavida Salavessa and Maria José Lourenço

Chapter 7 RUSSIA 76
Dmitriy Bazarov, Anton Pomazan and Ekaterina Smelkova

Chapter 8 SPAIN 88
Javier Izquierdo and Marta Robles

Chapter 9 SWITZERLAND 98
Nicolas Bracher and Meltem Steudler

© 2021 Law Business Research Ltd

Chapter 10 UNITED KINGDOM 107
Deborah Finkler and Chris Wilkins

Chapter 11 UNITED STATES 118
Rishi N Zutshi, Jonathan I Blackman, Pascale Bibi and Vishakha S Joshi

Appendix 1 ABOUT THE AUTHORS 137
Appendix 2 CONTRIBUTORS' CONTACT DETAILS 147

© 2021 Law Business Research Ltd

PREFACE

This year's edition of the *The Banking Litigation Law Review* highlights that litigation involving banks and financial institutions shows little sign of slowing. The legal and procedural issues that arise in banking litigation continue to evolve and develop across the globe, in the context of both domestic and cross-border disputes.

The covid-19 pandemic continued to loom large in 2021, with judicial systems taking part in a forced experiment of embracing new technology to minimise the disruption caused by pandemic restrictions; in some jurisdictions we may see the permanent adoption of measures taken up in response to the restrictions imposed by the pandemic, as well as a general shift towards the greater use of new technology in dispute resolution. This extends to the increased use of virtual hearings (as well as electronic trial bundles and filing systems), although we can expect that physical hearings will continue to play a prominent role, particularly in complex cases. While it is too early to predict the future with any certainty, it seems likely that some form of hybrid approach is here to stay.

Outside the court room, the effects of the pandemic continue to be felt throughout the wider economy. As various restrictions and financial interventions by governments are scaled back, the early signs of the long-term, negative economic effects of the pandemic are now beginning to emerge in many parts of the world. From the perspective of the financial sector, these conditions are likely to translate into an increase in loan arrears and defaults, debt restructurings, bankruptcies and insolvencies affecting banks, their customers and counterparties. These conditions typically presage an uptick in banking litigation and it seems likely that disputes arising from the economic fallout of the pandemic will feature in future editions of this Review.

A continuing trend this year has been the broadening of obligations placed on financial institutions in the name of improving consumer protection. Faced with the challenge of increasing bank fraud and other illicit transactions, governments and courts alike have continued to develop the nature and scope of duties imposed on banks to protect their customers. Claimants will no doubt continue testing the limits of these obligations and duties in the courts.

Last year's preface highlighted the political and economic uncertainty produced by Brexit as the transition period drew to an end. Since then, some welcome clarity has emerged around the foundations of the United Kingdom's new relationship with the European Union, including in the area of jurisdiction and enforcement of judgments. However, the new relationship will take time to bed down, with additional complexities (and potentially disputes) likely to emerge as parties navigate the new reality. That said, there is little evidence that commercial parties, including banks and financial institutions, have been deterred from choosing the United Kingdom as a forum for litigating their disputes.

© 2021 Law Business Research Ltd

While 2021 has been another challenging year for many, there has been some cause for optimism: globally stock markets have continued to perform well as economic recoveries gather pace in many parts of the world, while the roll-out of the covid-19 vaccine has allowed many jurisdictions to emerge from a period of seemingly endless lockdowns and suppressed economic activity. Despite these positive signs, however, the global economy is likely to feel the effects of the covid-19 pandemic for some time and in various (and often unexpected) ways, as highlighted by the recent emergence of a crisis in the global supply chain. At the same time, other global challenges, such as climate change, will increasingly dominate the political and economic agenda. Given the various headwinds and challenges ahead, the high volume and broad nature of litigation in the financial sector look set to continue.

Deborah Finkler
Slaughter and May
London
November 2021

© 2021 Law Business Research Ltd

Chapter 8

SPAIN

Javier Izquierdo and Marta Robles[1]

I OVERVIEW

In recent years, banking litigation in Spain has been governed by several judicial resolutions that have increased the number of claims brought against financial entities. Given that a significant number of Spanish courts have positioned themselves as pro-consumer, judicial proceedings against financial entities have overwhelmed Spanish courts in the past decade. This led to the constitution of specialised courts for certain banking litigation proceedings, the aim of which was to reduce the workload of other courts that were accumulating significant delays.

Spanish courts have shaped the current landscape of banking litigation, determining how to apply the corresponding regulation, which, in truth, has not changed significantly in recent years. European Directive 93/13/EEC of 5 April 1993, on Unfair Terms in Consumer Contracts, constitutes the basis on which Member States have adapted their own national regulations. Its implementation in Spain was carried out through the introduction of laws such as Law 7/1998 of 13 April, on General Conditions of Contracts, and Royal Decree-Law 1/2007 of 16 November, approving the consolidated text of the General Defence of Users and Consumers Act and other complementary laws.

These laws constitute the fundamental framework of banking litigation in Spain. Indeed, most legal proceedings against banks are initiated in our local jurisdiction based on their provisions and, essentially, on the provisions regulating unfair clauses.

To reduce the number of proceedings affecting financial entities, several laws have been enacted in Spain in the past few years. Their ultimate aim is to ensure that consumers are protected against abuse from banks, and that financial entities are protected from allegations of unfairness or invalidity of their contracts. Examples include Law 5/2019 of 15 March, on Real Estate Credit Agreements (the Real Estate Credit Agreements Act), and the different regulations implemented by the European Markets in Financial Instruments Directive (MiFID), in the most recent version enacted in Spain in 2014.[2]

The main changes introduced by those rules will be analysed below, following a review of the most relevant judicial cases that have decisively influenced the current banking litigation situation in Spain.

1 Javier Izquierdo is a litigation and arbitration partner and Marta Robles is a litigation and arbitration associate at Pérez-Llorca.

2 European Directive 2014/65/EU of the European Parliament and of Council, of 15 May 2014, on Markets in Financial Instruments, and Directive 2002/92/EC and Directive 2011/61/EU have been amended (MiFID II).

© 2021 Law Business Research Ltd

II RECENT BANKING JUDICIAL PROCEEDINGS

Most judicial proceedings initiated against financial entities in recent years have been related to seeking a declaration of invalidity of clauses included in mortgage loan agreements on the grounds that they are unfair. This has led to several judgments declaring the clauses questioned by consumers to be either valid or invalid, depending on the case.

Prior to focusing on those judgments, it is worth mentioning the Supreme Court judgment of 23 January 2020, which declared that courts can only conduct an *ex officio* review of unfair clauses in mortgage loan agreements if the validity of the questioned clauses is relevant and pertinent to solving the claim brought before them.

This has a significant impact on all proceedings initiated by consumers questioning unfair clauses in their mortgage loan agreements, as it limits the possibility of requesting that courts conduct an *ex officio* review of every clause included in their contracts. This practice was widespread in these types of claims but, according to this judgment of the Supreme Court, consumers now need to clearly identify the clauses whose unfairness should be analysed by the court.

With the foregoing in mind, we will now focus on the most common types of judicial proceedings relating to banking litigation, as well as on certain significant judicial decisions rendered during the past few years in relation to unfair clauses incorporated in banking agreements.

i Judicial proceedings concerning the invalidity of the floor clause

The floor clause (establishing a minimum interest rate below which the floating interest rate may not fall), which is no longer used in banking practice following judgments on the matter, set a minimum interest rate to be paid by the borrower, despite the parties having agreed on a floating interest rate, which was normally based on Euribor. In practice, as purported by consumers, this clause established a fixed interest rate despite the fact that the interest rate was labelled as a floating rate in the mortgage loan agreement.

The fall of Euribor in 2009 led to the floor clause being applied. Therefore, the consumers who had agreed to the application of a floating interest rate on their mortgage loans could not benefit from the widespread fall in interest rates. On this basis, consumers have been requesting that the floor clause be declared null and void on the grounds that it is unfair.

In the light of the above, the Supreme Court carried out an abstract and general analysis of these clauses and, in its judgment of 9 May 2013, declared them unfair and hence null and void. This judgment became essential, establishing itself as the judicial decision of reference on this matter. Notably, the invalidity of this clause on the grounds of unfairness entails the consumer being refunded the amounts paid in excess due to the application of the minimum interest rate.

Notwithstanding the importance of the above-mentioned judgment, there are still pending judicial proceedings dealing with the validity of these clauses. We refer to the proceedings initiated in 2010 by a well-known banking consumer organisation against the majority of financial entities operating in Spain. Commercial Court No. 11 of Madrid, in its judgment of 7 April 2016, confirmed that, in general terms, this kind of clause is null and void as it is unfair. On 12 November 2018, the Court of Appeal of Madrid confirmed this judgment, although it made several highly significant considerations.

In particular, the Court of Appeal established that the abstract and general analysis of floor clauses does not prevent consumers from initiating individual proceedings challenging

© 2021 Law Business Research Ltd

their validity. In those individual proceedings, the specific clause must be analysed based on the information provided to the consumer, as well as how it was included in the contract by the bank. It is therefore possible for a court to conclude that the latter acted with the necessary diligence, and thus agree that the clause, in that case, is valid, as the consumer was informed of its content and the consequences.

The judgment rendered by the Court of Appeal of Madrid is currently being appealed before the Supreme Court. The Supreme Court is expected to render a judgment that could determine whether these clauses are invalid in general.

Another subject of great significance in relation to these types of clauses is the validity or invalidity of the agreements financial entities entered into with consumers in order to eliminate this clause from their contracts.

Since the above-mentioned judgment of 9 May 2013, financial entities have been entering into agreements with some of their clients that include a clause by means of which those clients waive their right to initiate judicial proceedings against the bank in relation to this clause. Some consumers have questioned the validity of these agreements, but the Spanish Supreme Court, in its judgment of 11 April 2018, declared that they are valid insofar as they pass the aforementioned transparency test. This means that if the consumer entered into the agreement having been made fully aware of the consequences – that it would be impossible to initiate judicial proceedings to request the declaration of invalidity of the floor clause and a refund of the amounts paid – it should be considered valid.

This approach was recently confirmed by the European Court of Justice (the ECJ) in its judgment of 9 July 2020, C-452/2018, in resolution of a preliminary question raised by Court of First Instance No. 3 of Teruel. In particular, the ECJ considered that the consumer's waiver is valid when consent has been given freely, consciously and on an informed basis, insofar as the consumer is in a position to understand the financial consequences of what was agreed. The position of the ECJ is therefore in line with the previous judgment of the Spanish Supreme Court.

This approach was recently confirmed by another new resolution rendered by the ECJ on 3 March 2021, C-13/2019, again in resolution of a preliminary question raised, but this time by the Appeal Court of Zaragoza: if the waiver is the result of the free and informed consent of the consumer, then it is perfectly valid. However, and as an additional matter, this decision clarifies that a clause under which the consumer waives, in respect of future disputes, legal proceedings based on the rights that he or she holds under Directive 93/13 is not binding on that consumer. Therefore, the waiver cannot be absolute in time and content, but only refers to the clause in question.

Lastly, it should be noted that the Supreme Court judgment of 11 March 2020, No. 168/2020, declared that it is also possible for a floor clause to be declared null and void even if the loan was not designed for consumer use. In particular, this judgment refers to a mortgage loan that was aimed at financing the acquisition of a taxi licence, that is, a loan with a professional purpose to which the regulation of consumers and users does not apply.

This judgment considered that, even if the special consumer and user protection regulations do not apply, in light of the Law on General Conditions of Contracts, it is possible to consider that the clause was included in the contract in a non-transparent manner.

© 2021 Law Business Research Ltd

ii Judicial proceedings concerning the invalidity of clauses that foresee that the borrower must pay all costs arising from the granting of the mortgage loan

Some of the most frequent judicial proceedings in banking litigation are those initiated to request that clauses that compel the borrower to pay all the expenses related to the granting of the mortgage loan (essentially, the Property Registry and Notary Public fees, taxes, expenses of the agency in charge of processing the granting of the loan and expenses resulting from the appraisal of the mortgaged property) be declared null and void.

The judgment that triggered claims challenging these clauses was the Supreme Court judgment of 23 December 2015, which analysed several typical clauses included in mortgage loan contracts, including this clause, and declared it to be unfair, and therefore null and void. However, subsequent Supreme Court rulings have qualified this judgment, particularly in relation to the consequences of the invalidity of this clause. We refer to Supreme Court judgments Nos. 44, 46, 47, 48 and 49, of 23 January 2019.

In particular, the Supreme Court agreed that the invalidity of this clause does not imply that the bank should repay all the fees and expenses that have already been paid by the borrower. It should depend on which party benefited from the services that accrued the fee or expense, as well as on what is regulated in the specific rules for each expense. For example, it is understood that, as the mortgage loan is registered with the Property Registry in favour of the financial entity, it is the latter that should pay the corresponding fee. However, it is also understood that the bank and the borrower should each pay half of the Notary Public fees because this service benefits both parties when the loan is granted.

The issue of stamp duty has been particularly controversial because this is the highest amount that borrowers usually pay when securing a mortgage loan, and rules that govern who must pay it are not very clear. The Supreme Court, when interpreting these unclear rules[3] in the above-mentioned judgments, has clarified that the borrower should pay the stamp duty.[4]

In any case, and as we will see later, the Real Estate Credit Agreements Act has definitively regulated which expenses arising from the granting of a mortgage loan must be paid by the bank and which by the borrower, to avoid further judicial proceedings in this regard.

Furthermore, the ECJ, in its judgment of 16 July 2020 (joined cases C-224/19 and C-252/19), has confirmed that, if the clause is declared null and void, national regulations should be used to determine which party should have paid the corresponding fees and expenses in the first place.

The ECJ stated in this judgment that, when a clause is declared null and void on the grounds of unfairness, national judges cannot moderate it, but must remove it from the contract. Some have understood that, in relation to the fee and expenses clause, this means that the bank should return all the fees and expenses paid when the contract was formalised to the consumer. However, this is not what the ECJ actually says: it says that, if the clause is

3 Article 29 of Royal Decree-Law 1/1993, of 24 September, approving the Revised Text of the Property Transfer Tax and Stamp Duty Act, and Royal Decree 828/1995, of 29 May, approving the Regulation of Property Transfer Tax and Stamp Duty.

4 These judgments differentiate between the variable and fixed tax rate, indicating that the borrower must pay the fixed rate. The previous judgment of the Civil Chamber of the Supreme Court of 15 March 2018 already agreed in this sense; however, the Public Administration Chamber of the Supreme Court, *ex post*, contradicted the resolution. The Supreme Court, in plenary session and by means of these judgments, settled the contradiction by confirming that the borrower must pay stamp duty.

© 2021 Law Business Research Ltd

declared null, it should be considered as if it had never existed, which thus justifies 'applying the provisions of national law governing the allocation and distribution of the expenses related to the granting of the loan'. Therefore, the ECJ's judgment is in line with Spanish case law.

This ECJ judgment confirms that it is in accordance with European law to establish a statute of limitations for bringing action before the courts to seek a refund of the corresponding fees and expenses, namely, the term of five years foreseen in Spanish law. However, the ECJ has not solved the question of when such a term starts.

The majority of Spanish legal opinion understands that it should start on the date the above-mentioned judgment of the Supreme Court of 23 January 2019 was published, as this is the date when consumers could have been aware of the invalidity of their clauses. It therefore remains to be seen how national courts will apply the ECJ judgment.

In relation to this matter, the Spanish Supreme Court, in light of the ECJ's above-mentioned case law, has rendered its judgment of 27 January 2021, which finally defines who must pay the expenses associated with the appraisal of the mortgaged property, in the event that the clause in question is declared null. In general terms, this ruling understands that appraising the property is in the lender's interest, as the appraisal does not constitute a requirement for the validity of the mortgage but for the direct judicial execution of the mortgage by this lender. This has finally clarified who must pay the appraisal expenses, as the issue was still pending a verdict from the Supreme Court.

iii Judicial proceedings concerning the invalidity of clauses that oblige mortgage borrowers to pay certain banking fees or service fees

The payment of banking fees has also given rise to a significant number of judicial proceedings against banks that have considered the unfair nature of some of these fees. In general, Spanish courts consider the payment of banking fees by consumers to be justified if the bank has incurred an expense in providing an effective service, and the service provided is proportionate to the fees charged. For example, in relation to the debt claim fee, if a bank proves that it had to incur expenses in order to claim the non-payment from the debtor on several occasions, and the latter did not comply with the request, the fee to be paid by the debtor would be valid.

In particular, the validity of the arrangement fee, which is accrued as a result of granting a new mortgage loan, has been questioned. The judgments of the Supreme Court of 23 January 2019 mentioned above considered this fee to be part of the price of the loan. The Supreme Court stated that interest and the arrangement fee make up the main remuneration received by the financial entity for granting the loan. Thus, it is a fee duly charged by the bank.

Moreover, and as stated by the Supreme Court, when preparing and granting the loan, the bank carries out a series of activities that go beyond merely providing money (e.g., examination of the application form, collection and analysis of solvency information, evaluation of the guarantees provided and preparation of the contract). All of these actions, which are obviously necessary to grant any loan, would justify the lender charging an arrangement fee as part of the loan's price.

Notwithstanding the foregoing, the aforementioned Real Estate Credit Agreements Act also regulated which banking fees are valid and should be paid by borrowers (specifically, restricting the banking fees to be paid by the borrowers to those corresponding to the appraisal of the property for which the mortgage is granted).

© 2021 Law Business Research Ltd

iv Judicial proceedings concerning the invalidity of clauses that apply the Mortgage Loan Reference Index to mortgage loans

The Mortgage Loan Reference Index (IRPH) is one of the indexes used by Spanish financial institutions instead of Euribor (the usual reference rate for mortgage loans) to calculate mortgage interest. This index has been defined as being higher than Euribor (normally between 1.5 per cent and 3 per cent) and more stable (it drops less severely than the latter). Thus, some holders of mortgage loans who use this reference index have gone to the Spanish courts to request that it be declared invalid on the grounds that it is unfair, and that it be substituted by Euribor, seeking refunds for the amounts paid in excess.

To date, Spanish courts have approached these requests for invalidity in a variety of ways. The Supreme Court, in its judgment of 14 December 2017, agreed that this index is valid and therefore, so are the clauses that apply it to mortgage loans. This judgment, which could have led Spanish courts to adopt a consistent stance, has not, however, been followed by all.

Within this context, the Court of First Instance No. 38 of Barcelona, by means of its Court Order of 16 February 2018, requested that the ECJ render a preliminary ruling on the validity of the clauses applying this reference rate to mortgage loans. The final decision of the ECJ was handed down on 3 March 2020, following the conclusions rendered before by the General Advocate.

According to the decision of the ECJ, clauses that incorporate this index should be subject to the control of national courts and therefore, it is these courts that will have to determine whether using the IRPH was unfair. Hence, the ECJ does not consider the index (especially, clauses that incorporate it into mortgage loan agreements) to be null and void in principle. The validity would depend on the knowledge that the borrower had of the financial consequences of applying this index when entering into the agreement.

If it could be demonstrated that the borrower had full knowledge of the consequences, the clause incorporating the index would be considered transparent and therefore valid. Otherwise, the clause would be considered null and void, and as if it had never been incorporated into the contract. However, the consequence of this is not that the loan becomes free of interest. On the contrary, the ECJ has clarified that, in this scenario, national courts can substitute the IRPH for the applicable legal index (i.e., the corresponding legal interest), in the absence of any other agreement reached between the parties.

From this ECJ judgment, we can conclude that, once again, the ECJ refers to national courts in order for them to carry out the corresponding transparency analysis. The ECJ has clarified again, as is usual with clauses incorporated into mortgage loan agreements, that the validity of this clause will depend on each case, and that national courts have the authority to carry out the corresponding analyses.

In this regard, the Supreme Court ruled, in several judgments rendered on 12 November 2020, that a clause establishing the IRPH as the reference index for a loan that did not pass the transparency test was not abusive and was therefore valid.

In particular, the court ruled that there was a lack of transparency because borrowers were not offered information on the evolution of the index two years prior to the signing of the contract. However, that lack of information and thus of transparency 'cannot in itself determine the nullity of the disputed general condition'. Since the clause determines the price, an essential element of the contract, lack of transparency 'only allows a control of the content of the clause to be carried out'. In this regard, these judgments conclude that

© 2021 Law Business Research Ltd

the content of the clause is fair and thus valid; because the IRPH index was 'adopted by various regulatory regulations enacted by the competent public administrations', it cannot be considered that it goes against the requirements of good faith.

Currently, and despite the approach adopted in the above-mentioned judgments, the Supreme Court has halted all pending proceedings related to the abusiveness of the IRPH clause until the ECJ rules on whether it will admit a new preliminary question raised by the Court of First Instance No. 38, Barcelona (the one that first raised a preliminary question regarding the IRPH index). This court now bases its new preliminary question on the Supreme Court's apparent contradiction in its latest rulings, where, as we have seen, it stated that this reference clause would not be transparent but, nevertheless, confirmed its validity by understanding that, in such cases, it would not be abusive.

v Judgment rendered by the ECJ in relation to the consequences of nullifying an early maturity clause in a mortgage loan

The ECJ, and consequently the Supreme Court, had already ruled on the unfairness of a clause that allows the early maturity of a mortgage loan in the event of non-payment of a single monthly instalment. However, in its judgment of 26 March 2019, the ECJ ruled on a number of preliminary questions raised by the Spanish courts that had yet to be clarified, concluding that:

a it is not possible to partially retain the early maturity clause in the contract; and

b taking into account the damages that would be caused to the debtor if the clause were to be eliminated from the contract and enforcement proceedings were to be terminated, thereby enabling the creditor to claim all the debtor's property via ordinary enforcement proceedings, it is possible to replace, exceptionally, the clause declared unfair with the alternative rule established in Article 693.2 of the Spanish Civil Procedure Act. This would mean including an early maturity clause that enables early maturity when three or more instalments are not paid.

The Real Estate Credit Agreements Act has also regulated this issue, setting forth the requirements that an early maturity clause should meet in order to be considered fair and therefore valid.

III RELEVANT REGULATIONS ENACTED OVER THE PAST FEW YEARS

i The Real Estate Credit Agreements Act

The Real Estate Credit Agreements Act aims to implement in Spain Directive 2014/17/EU of the European Parliament and of the Council on credit agreements for consumers relating to residential immovable property.[5]

The purpose of this law is to strengthen protection for the consumer and, at the same time, for the bank, by protecting it against possible allegations regarding unfair clauses and a lack of information provided to consumers on the conditions of their mortgage loan. The

5 Its scope is thus restricted to this type of contract and, in particular, loans secured by mortgage or other security rights over real estate for residential use, provided that the borrower or guarantor is a natural person, and the lender is a natural or legal person who carries out that activity on a professional basis.

© 2021 Law Business Research Ltd

Real Estate Credit Agreements Act regulates the content of many of the clauses referred to above that have traditionally been challenged before the courts. The main changes introduced by this act are as follows.

Pre-contractual information and transparency

Pre-contractual information must be provided to the consumer at least 10 days before the contract is executed before a Notary Public. The following documents should be provided:

a the Standard European Consumer Credit Information Sheet (known as SECCI);

b the Standard Warning Consumer Credit Information Sheet (known as FIAE); and

c the draft contract to be signed by the borrower.[6]

Under this new Real Estate Credit Agreements Act, the information provided must be more detailed and should ensure that the borrower is fully aware of all the implications of the loan.

The Notary Public takes a leading role in ensuring that consumers are made aware of all conditions and clauses of their loan. For this purpose, the Real Estate Credit Agreements Act states that, before the contract is signed, the Notary Public must grant a notarial certificate to certify that sufficient advice has been given to the borrower, and that the latter understands and accepts the content of the contract and its risks. In addition, the Notary Public must perform a kind of test on the borrower, who should receive all the relevant information in writing.

Early repayment fees

The Real Estate Credit Agreements Act restricts early repayment fees. In particular, with regard to floating interest rate mortgage loans, the early repayment fee may only consist of a maximum of 0.25 per cent over the capital amount redeemed in the first three years, and for the remaining term of the loan, a maximum fee of 0.15 per cent must be applied. For fixed interest rate mortgage loans, the maximum fee to be applied during the first 10 years of the loan's term is 2 per cent, and 1.5 per cent during the remaining term of the loan.

Possibility for the bank to enforce early maturity

Before the Real Estate Credit Agreements Act came into force, the early maturity of mortgage loans was considered valid after the borrower defaulted on a third instalment. However, under this act, it will depend on the number of instalments due and not satisfied as well as on the phase of the loan's term in which the defaults occur. Specifically, early maturity would be valid during the first phase of the loan's term when the unpaid instalments correspond to 3 per cent of the capital granted or to 12 monthly instalments; during the second phase of the loan's term, the unpaid instalments would need to correspond to 7 per cent of the capital granted or to 15 monthly instalments.

Default interest rate and incentives to convert the loan to a fixed interest rate

The Real Estate Credit Agreements Act sets forth that the default interest rate should be three times the legal interest. Similarly, it stipulates that the borrower must be given incentives for switching their loan from a floating interest rate to a fixed rate.

6 The content of these documents is regulated in the Real Estate Credit Agreements Act itself.

© 2021 Law Business Research Ltd

Fees and expenses arising from the granting of the loan

This is one of the most important measures introduced, given its impact on banking litigation. By virtue of the act, it is finally established that the lender must pay all Notary Public, Property Register and administrative fees and expenses, including stamp duty,[7] that arise from the granting of the mortgage loan. The borrower must only pay expenses resulting from the appraisal of the mortgaged property.

ii European Markets in Financial Instruments Directive

The initial deadline for the Member States of the European Union to implement MiFID II was 3 January 2017. As the European Commission ultimately extended this deadline, the Spanish government arranged an implementation process consisting of three phases, by means of three different laws:

a Royal Decree-Law 21/2017, of 29 December, on urgent measures for the adaptation of Spanish law to European Union regulations on securities markets;
b Royal Decree-Law 14/2018, of 28 September, amending the Securities Market Act; and
c Royal Decree 1464/2018, of 21 December, implementing the Securities Market Act and Royal Decree-Law 21/2017, of 29 December, referred to above. As this Royal Decree entered into force at the end of December 2018, it was implemented in 2019.

The main changes introduced, in terms of investments and investor client protection, were as follows:

a suitability and convenience test: investor clients must undergo a test to determine their risk profile, so that investment institutions can offer them suitable products. Depending on the results of the test, customers must be classified as retailers, professionals or an eligible counterparty, with less to more experience and knowledge, respectively. Investment institutions are obliged to review the products that their clients have contracted annually, and to confirm that they are the most suitable for them;
b advice and incentives: depending on whether the financial advisers are dependent or independent (they are obliged to report this to the client), they may or may not collect incentives and retrocession commission.[8] In general, independent advisers may not collect incentives corresponding to the sale of funds.[9] Non-independent advisers may continue to obtain incentives, if they can provide evidence that they have improved the quality of the service provided (e.g., if they give the client access to a wide range of third-party products), and it is ensured that no benefit is being generated for the investment services firm without there also being a benefit to the client;
c contracts: the provision of investment services, with the exception of advisory services, must be duly set out in a contract signed by both parties, indicating each of their rights and obligations. For advisory services, the recommendation made must be recorded in writing or by other reliable means;

7 Specifically, Article 14 stipulates that the corresponding property transfer tax and stamp duty must be paid in accordance with the applicable regulation.

8 We refer to incentives such as rewards provided by the owners of the funds, corresponding to the achievement of sales targets; retrocession commission is part of the service charge that the marketer of an investment product, usually a fund, retains, including those within the final price.

9 In other words, they can only charge a service charge to their clients and cannot collect incentives from the managers of the investment funds that they market.

© 2021 Law Business Research Ltd

d training: MiFID II requires a more personalised service to be provided to each investor. Financial institutions that provide advisory services must ensure and certify that their investment employees are sufficiently trained. Thus, new training and knowledge requirements were established for those who provide advisory services; and

e transparency and necessary information: there is an increasing obligation to inform investors of the costs involved in acquiring financial products, as well as to provide pre-contractual information and include more details in periodic reports. In relation to this, and depending on the case, there will be a periodic evaluation of the suitability of the financial instruments recommended to clients. The new information requirements set out in MiFID II focus on three main aspects:
  - information on the advisory service to be provided, namely independent or non-independent, as well as the range of financial instruments analysed and their selection process;
  - information on costs and associated expenses, both for financial instruments and for investment and ancillary services; and
  - information regarding financial instruments and associated investment strategies, including associated risks and how the financial instrument in question may operate in different scenarios (both favourable and unfavourable).

The obligation to record all communications related to transactions carried out when negotiations are performed independently, and to the provision of services related to the reception, transmission and execution of client orders, was also introduced. All of this compulsory information must be collected on a durable medium (hard copy or the internet), for a minimum period of five years.

IV OUTLOOK AND CONCLUSIONS

Banking litigation in Spain has been characterised in recent years not so much by the applicable regulation but by the courts' interpretation of it, often seeking help from the ECJ.

The current trend is to encourage greater protection for the consumer and, in turn, for the bank, by protecting the former to avoid the litigation against the latter, as the significant number of judicial proceedings initiated against financial entities overwhelmed some courts, leading to substantial delays. A good example of this trend is the two laws mentioned: MiFID II and the Real Estate Credit Agreements Act.

The legislator's response to the deluge of banking litigation has been to exercise extreme caution and ensure the protection of consumers and investor clients, thus reducing the chances of questioning, *ex post*, the transactions into which they have entered. This is as a result of significant judgments rendered in relation to the unfair nature of certain clauses traditionally included in banking contracts, and some questionable attitudes of financial institutions.

It is therefore expected that judicial proceedings questioning the validity of clauses such as the ones referred to in this chapter will decrease, taking into account that almost all financial entities have now accepted the claims filed by their clients and have paid the amounts due out of court.

© 2021 Law Business Research Ltd

Appendix 1

ABOUT THE AUTHORS

JAVIER IZQUIERDO

Pérez-Llorca

Javier Izquierdo joined Pérez-Llorca as a partner in 2018 after working for almost 15 years at national and international firms.

Javier has advised on civil litigation and arbitration regarding banking law, construction law, distribution contracts, energy law, challenging corporate agreements, and the recognition and enforcement of judgments and international arbitration awards. Javier also has extensive experience in domestic and international arbitration and has taken part in important arbitrations regarding various matters before the Madrid Chamber of Commerce (CAM), the Commercial and Civil Arbitration Court (CIMA) and the Arbitration Court of the International Chamber of Commerce (ICC).

With regard to insolvency-related matters, Javier has advised both debtors and creditors at various stages of the proceedings, including rescissory actions, the termination of contracts due to a breach of the insolvent company and the negotiation, and the entering into, of various agreements during insolvency proceedings.

Javier features in various legal directories, such as *Legal 500 EMEA* for Dispute Resolution and Restructuring and Insolvency, and *Best Lawyers* for Litigation.

MARTA ROBLES

Pérez-Llorca

Marta Robles joined Pérez-Llorca in 2018. Before joining the firm, she worked as a civil litigation lawyer for four years at Gómez-Acebo & Pombo. Marta advises on civil litigation, acting as a legal representative and advising on various matters and in judicial proceedings involving insolvency proceedings and corporate litigation.

More specifically, Marta advises national and international clients on matters related to faults and defects in construction works, electrical energy and specific regulations, banking and financial products, distribution and supply contracts, inland freight transport, contractual and tort liability, and compensation for damages and losses, among others.

© 2021 Law Business Research Ltd

PÉREZ-LLORCA

50 Paseo de la Castellana
28046 Madrid
Spain
Tel: +34 91 436 04 20
Fax: +34 91 436 04 30
jizquierdo@perezllorca.com
mrobles@perezllorca.com
www.perezllorca.com

© 2021 Law Business Research Ltd

an **LBR** business

ISBN 978-1-83862-761-4

© 2021 Law Business Research Ltd