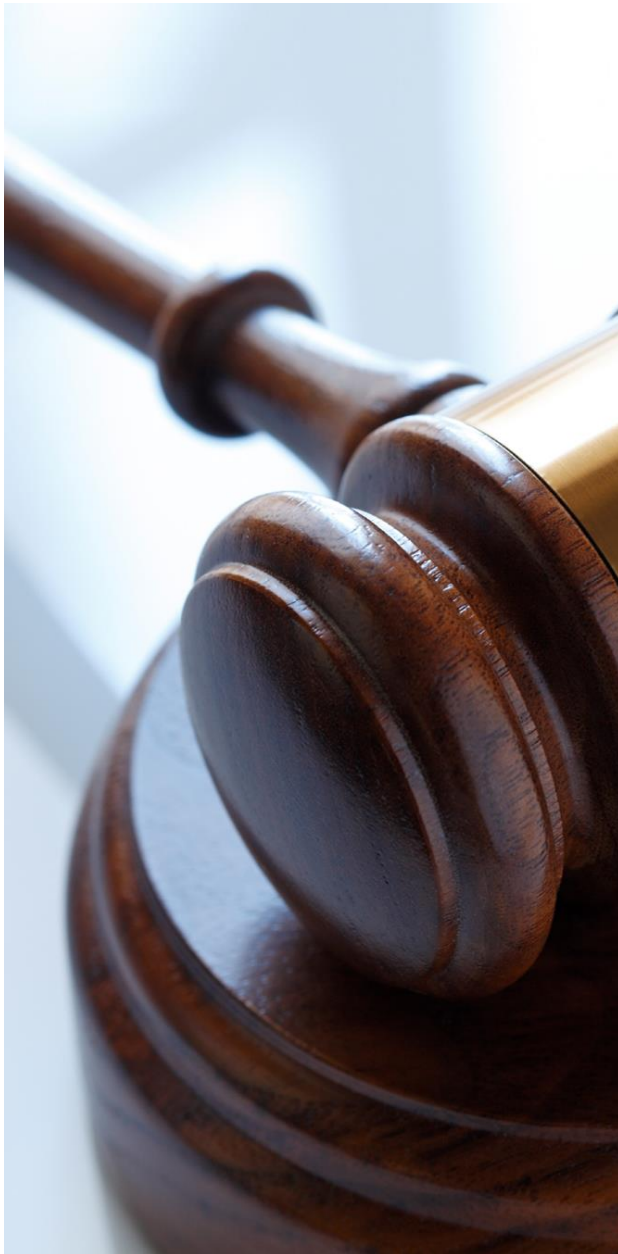

Monitoring abusiveness of accelerated repayment clauses in mortgage loans

Supreme Court judgment (First Chamber) of September 11, 2019

Legal Flash Litigation

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In plenary session, the First Chamber of the Spanish Supreme Court has ruled on the effects derived from annulling accelerated repayment clauses in mortgage loans, in line with the opinion that the Court of Justice of the European Union (“CJEU”) expressed in its judgment of March 26, 2019 (and subsequent decisions of July 3, 2019) in response to the preliminary ruling request submitted by the First Chamber.

The Supreme Court’s ruling is very positive and enhances legal certainty in financing operations involving mortgage guarantees, as it safeguards the lender’s right to enforce the guarantee even when the accelerated repayment clause may be considered abusive and, therefore, void, as it allows this clause to be replaced by the mandatory rule for accelerated repayment provided under article 24 of Act 5/2019, regulating credit agreements relating to immovable property.



The Supreme Court (“SC”), in [Plenary Judgment no. 463/2019 of September 11 \(ES:TS:2019:2761\)](#), has ruled on the effects derived from annulling accelerated repayment clauses in consumer mortgage loan agreements, in line with the decision issued on the request for preliminary ruling it had submitted to the CJEU.

As we explained in our [Legal Flash of February 2019](#), on monitoring the abusiveness of accelerated repayment clauses in consumer mortgage loan agreements, the SC and several other first instance courts had submitted requests for preliminary rulings to the CJEU, regarding the consequences derived from declaring accelerated repayment clauses abusive. In its judgment of March 26, 2019, and as discussed in our [Legal Flash of April 2019](#), the CJEU issued decisions on two of the preliminary ruling requests that had been submitted (cases C-70/17 and C-179/17). Later, through its decisions issued on July 3, 2019, the CJEU ruled on the remaining preliminary ruling requests related to this issue (cases C-167/16, C-92/16 and C-486/16).

Now, by applying the CJEU’s criteria in its judgment of March 26, 2019, and its decisions of July 3, 2019, the SC has handed down a definitive ruling on the issue that motivated its preliminary ruling request, to determine whether a mortgage loan agreement can remain valid after its accelerated repayment clause has been declared void due to abusiveness. Also, since this judgment issued on September 11, 2019, was handed down by the First Chamber in plenary session, the SC has established relevant case law on this issue.

The First Chamber considers that a mortgage loan is a complex legal transaction, where the common ground for the parties is to obtain a lower-cost loan (for the consumer) in exchange for an effective security interest to cover cases of non-payment (for the bank). On this basis, the SC has ruled that a long-term mortgage loan agreement cannot survive if enforcement of the security interest has become unfeasible (which would occur if the accelerated repayment clause is declared null), establishing that, in principle, annulling that clause would effectively annul the whole agreement.

However, the Chamber maintains that full nullity would have particularly damaging effects on consumers, such as the obligation to repay the full outstanding balance of the loan—*ex* article 1124 of the Spanish Civil Code (*Código Civil*), loss of legal advantages provided in mortgage foreclosure proceedings, and the risk of enforcement of a declaratory judgment.

To prevent these consequences, the CJEU enables mortgage foreclosure proceedings to go ahead in circumstances where the loan agreement cannot survive without the annulled accelerated repayment clause and where cancelling the whole agreement would be particularly damaging for the consumer. As discussed in our previous Legal Flash, the CJEU has agreed that the unfair clause may be replaced with the legal provision that inspired the accelerated repayment clauses, in reference to section 693.2 of the Spanish Code of Civil Procedure (*Ley de Enjuiciamiento Civil*) in its wording from 2013.



The SC has now also accepted this option allowed by the CJEU, whereby the abusive clause is replaced by the contents of the act, although the First Chamber believes that, for the time being, it makes more sense to allow new Spanish Act 5/2019 to prevail in these cases, as it is more beneficial for consumers (instead of section 693.2 of the Code of Civil Procedure). It is worth noting that article 24 of Act 5/2019 establishes a mandatory rule, which does not allow any agreement to the contrary, regarding accelerated repayment clauses in mortgage loans to consumers, so that accelerated repayment can only occur when the overdue or unpaid instalments amount to at least 12 months or 3% of the principal borrowed if the default takes place within the first half of the loan term; or 15 months or 7% of the principal borrowed if the default takes place during the second half of the loan term. Also, the lender must have requested payment and have given the borrower a month to fulfil its obligations.

Therefore, based on the above considerations, the First Chamber has established the following case-law guidelines for mortgage foreclosure proceedings in progress, where the asset has not yet been handed over to the acquirer:

- Cases where the loan was accelerated before Spanish Act 1/2013 came into force, by applying a contractual clause acknowledged as void, should be dismissed with no further procedures.
- Processes where the loan was accelerated after Act 1/2013 came into force, by applying a contractual clause acknowledged as void, should also be dismissed if the borrower's default does not meet the requirements on severity and proportionality established in case law, and taking into account, for guidance purposes, article 24 of Spanish Act 5/2019. On the other hand, if the borrower's default reflects the level of severity described in Spanish Act 5/2019, then the processes can continue.
- Dismissal of the processes will not prevent new applications for enforcement, but based on Spanish Act 5/2019 rather than on a contractual accelerated repayment clause.

The SC's ruling is a very positive one, as it enhances legal certainty in financing operations involving mortgage guarantees. This is because it safeguards the lender's right to enforce the guarantee even when the accelerated repayment clause may be considered abusive and, therefore, void, as it allows this clause to be replaced by the mandatory rule established in article 24 of Act 5/2019.

This also means that lenders no longer need to pursue alternative procedures (such as for declaration of cancellation of the borrower's right to make use of the term *ex section 1129* of the Civil Code, or for termination of the loan agreement) offering fewer benefits to borrowers compared to the mortgage foreclosure proceedings, which the creditor can



reinitiate (where those proceedings had been dismissed) if the borrower falls into one of the situations described in article 24 of Act 5/2019.

For further information, please consult your usual contact person at Cuatrecasas.

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