PINTÓ RUIZ & DEL VALLE
Lawyers & Economists

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CIVIL

THE SUPREME COURT ANNULS LATE-PAYMENT INTEREST AS ABUSIVE IN A MORTGAGE WITH AN AIM OTHER THAN PURCHASING A HOME

The Plenary of the Supreme Court has declared null and void the contractual clause that contemplated late-payment interest of 19% as abusive in relation to a mortgage arranged with the Banco Bilbao Vizcaya Argentaria, S.A. (STS 364/2016, of 3 June 2016).

This is not the first time that it has ruled on the extra-limitation of late-payment interest, with the most recent cases being rulings 705/2015, of 23 December 2015, and 79/2016, of 18 February 2016. However, the important part of this case is that the mortgage was applied for in 2004 to purchase the claimant's home, but was extended one year later and this new financing was for a different activity.

Even when there is a double purpose for the loan, the Supreme Court understands that the contract is still protected by consumer regulations for two reasons: for its particularly irrelevant amount (€ 8,000) compared to the initial amount of the loan (almost € 300,000); and because it has not been accredited that the reason for extending the loan was an activity other than personal consumption or use.

In terms of content control, remember that both the EU Directive and the Revised Text of the Consumers and Users Protection Act consider this type of clause abusive "when there is disproportionate compensation for non-fulfilment by the consumer with patrimonial loss" caused to the company, so the proportionality needs to be examined in light of the now customary criteria, such as comparing the rate agreed with national law regulations in the absence of agreement between the parties (or with other contracts on the matter entered into with consumers), or the possibility that the consumer has accepted the clause if it has been negotiated individually.

In the same vein, the Plenary states that the limit for late-payment interest contemplated in Article 114 of the Mortgage Act (three times the legal interest of money and which can only be accrued on the principal pending payment) is not a guideline in the legal control of abusive clauses, but the result of applying it in the prior control which should be carried out by notaries public and registrars. The criteria of the Court of Justice of the European Union is contained in the 17 March 2016, C-613/15 ruling (the Ibercaja case).

Consequently, it concludes that the late-payment interest agreed may be less than the limit of the Mortgage Act and, at the same time, abusive.

The Court therefore establishes two objective criteria regarding this. First, that late-payment interest in excess of the remunerative interest agreed increased by 2 points is abusive. This develops the argument that it had followed regarding late-payment interest on personal loans for consumption with STS 265/2015, of 22 April 2015.

Secondly, that late-payment interest calculated in accordance with Article 114.3 of the Mortgage Act will also be considered abusive in the case of contracts with general conditions between professionals and consumers.

Finally, the Plenary established that the annulment of the clause does not lead to a reduction in the rate of interest up to admissible limits, but is eliminated from the contract. However, it is made clear that the late-payment of remunerative interest is not affected.

TAX

THE SUPREME COURT RATIFIES THE POSSIBILITY OF APPLYING A REDUCTION OF 95% TO INHERITANCE AND GIFT TAX

On 14 July 2016, in ruling No. 3776/2016, the Supreme Court ratified the possibility of applying the rebate of 95% established in Article 20.2 c) of Inheritance and Gift Tax to the heirs of a family business.

In the ruling, the Spanish High Court clarified one of the requirements included in this precept and that the Madrid Tax Authorities applied it restrictively. Consequently, the Madrid court required that in order to receive this rebate as part of a succession in which the inherited asset are shares in a family company, the heir must, among other requirements, be the owner of the shares or stocks of this family company before the death occurs.

In particular, in the case examined, ownership of shares in a family company passed from the deceased to her two daughters and husband, with the two daughters in the posts of managers of the family company, roles for which they receive an income that constitutes 100% of their annual income.

The question under debated was that if to enjoy this tax benefit, the heirs need to be managers of the company, and for this work they also receive income in excess of 50% of the totality of their income, whether, prior to succession, they should also be the owners of shares in the share capital of the company or not.

In this respect, the Administration was rejecting this rebate as there was no record of the daughters of the deceased being owners of any share in the company prior to the accrual of the tax. However, in the ruling in question, the Supreme Court has replied by contradicting this stance, explaining that nowhere is the need stipulated for the taxpayer to be the owner of any share prior to the accrual for this exemption to apply. This, it continues to relate, is due to the exemption coming from a regulatory transplant that has been made from Wealth Tax to Inheritance and Gift Tax, and therefore, as the Court interprets, insofar as these shares enjoyed the 95% reduction in Wealth Tax, they should also enjoy this in Inheritance and Gift Tax.

In conclusion, the Court finished by highlighting that the case is one of the most typical in terms of family business transfers, meaning that the benefit in question is intended to favour these transfers and so prevent the closure of the family business when paying Inheritance and Gift Tax.

DATA PROTECTION

THE COMMISSION APPROVES THE "PRIVACY SHIELD", THE NEW DATA PROTECTION AGREEMENT

On 12 July, the European Commission approved a new agreement on data protection with the United States, called the Privacy Shield, with the aim of making up for the lack of regulation that there was in this area. This new regulation is preceded and motivated by the declaration of the invalidity of the Safe Harbour agreements by the Court of Justice of the European Union on 6 October 2015. The legal framework enshrined by these agreements permitted non-European companies to transfer personal data to third countries if there was a guarantee of a high level of protection and the legislation of the member states was respected. However, in practice, the level of data protection could not be verified, so there were no guarantees whatsoever of the required measures regarding protection or observance of EU rules on privacy. In approving this agreement, the European Commission has taken into account the European Parliament ruling in May, and an opinion drafted by the Article 29 Working Group, an independent consultative body comprised of the Data Protection Authorities of all the member states and the European Data Protection Supervisor, and has agreed with the United States government that additional clarifications will be introduced regarding the gathering of data in a block, the Ombudsman mechanism will be strengthened and more explicit obligations will be introduced for companies with regard to the limits of data conservation and transfer.

The aim of this agreement is to oblige organisations in the United States to adapt to the provisions of this new regulatory framework to be able to carry out international data transfers adequately. This way, US organisations will be able to import personal data without the need for the different exporting organisations in Europe to have to obtain authorisation by the European authorities in terms of data protection. The final text of the regulatory framework regulated by these agreements must be published in the Federal Register, which will allow US organisations that are interested in its adoption to become certified and registered in the Privacy Shield from 1 August 2016 with the US Department of Commerce, adapting to this.

Certification and registration in the Privacy Shield by organisations that work in personal data transfer will entail stricter obligations for US data importers, greater transparency in the access to these data by the US Administration and greater protection of citizens' rights with the possibility of appealing against these private organisations.

In conclusion, this is a significant advance in terms of data trafficking that will afford much more exhaustive control of the use of European citizens' data and that also has the capacity to adapt to changing needs, as it has been agreed that the Privacy Shield framework will be reviewed annually by the European Commission and the United States Department of Commerce.

SPORTS

35TH AMERICA'S CUP HEARINGS IN LONDON

Due to the sporting and financial significance of the 35th America's Cup, considered to be the most important sailing competition in the world, a specialist Court of Arbitration was set up to rule on any lawsuits that may arise during this year's competition. This Court of Arbitration, comprised of US lawyer Jeffrey A. Mishkin (acting as President), Australian Mathew C. Allen and Lucas Ferrer, director of the sports law department at Pintó Ruiz & Del Valle, met in London on 11, 12 and 13 July to conduct the first two hearings relating to lawsuits filed by *Emirates Team New Zealand* and by the *Commercial Commissioner* of the 35th America's Cup. By express imposition of the competition rules, the details of the arbitrations are confidential.

PLAYER CONTRACTS: LAW AND FOOTBALL DIALOGUES

The partners in our firm José Juan Pintó Sala, Lucas Ferrer and Jordi López took part in the "Law and Football Dialogues" event, organised by World Sports Law Report in collaboration with the Spanish National Football League, in which various international sports law experts, particularly specialising in football, debated various current issues in these areas, such as corruption in football, audiovisual rights, claims for due debts in accordance with the latest features of the FIFA Regulations on the Status and Transfer of Players and transfers and registrations of under-age players. The event was opened by the President of the Spanish League Javier Tebas and by José Juan Pintó. Jordi López and Lucas Ferrer gave the paper on "The transfer of under-age players: the situation of Spanish clubs in light of the existing rules and recent case law pronouncements".

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