

How The Financial Crisis In Spain Has Affected Enforcement Of Secured Loans

Article By:

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TMA Europe held its second roundtable discussion in Madrid, Spain on Thursday May 28, 2015. The Roundtable featured a panel of senior professionals from central banks, regulators and law firms, together with alternative investors, PE firms and financial advisory firms.

The crisis that began in 2007 has directly affected two areas of banking contracts: mortgage contracts and investment contracts with consumers. In both areas, the crisis has affected and is still affecting applicable law. It has also led to a major jurisprudential and institutional dispute involving the European Commission, the Courts and Spanish institutions.

In the area of banking contracts with consumers, banking practices in Spain have changed. For example, the law has affected areas such as consumer information rights and invalidity actions. In mortgage law, however, change has come through several European judgments and Spanish jurisprudence and also through legislative reforms.

The figures for foreclosures in Spain doubled between 2007 and 2008 and almost quadrupled in 2012. In 2007, when the crisis began, there were 25,943 foreclosure proceedings. Three years later, foreclosure proceedings peaked at 93,636 and then started to decline, down to 80,749 in 2014. Spanish foreclosure proceedings had to be modified in 2013 following a European judgment dated March 14, 2013, which ruled that foreclosure proceedings in Spain left consumers unprotected and vulnerable to direct enforcement without the necessary analysis of their banking contracts.

This ruling prompted the statutory reform of 2013, which allowed consumer to argue that there were unfair terms during the foreclosure proceedings. The objective of the reform was to put the foreclosure proceedings on hold and allow an examination of the contract before the debtor lost its property.

However, this reform did not satisfy the European court. In its judgment of July 17, 2014, the ECJ ruled that it was against European law for a debtor not to be able to appeal a decision dismissing his opposition to foreclosure, while the creditor could appeal a decision staying foreclosure or declaring the unenforceability of an unfair term.

On April 22, 2015, the Spanish Supreme Court ruled that courts can review the unfairness of

contractual clauses on their own initiative if such clauses are contrary to public policy. The EU's Commissioner for Justice, Vera Jourová, confirmed on April 30, 2015 that infringement proceedings will be opened against Spain if it does not change mortgage laws and adapt them to comply with the EU legislation.

What is the situation in the rest of Europe? Surprisingly, it is not very different from Spain. We have looked at the UK, France, Germany, Poland, Hungary and Russia.

With respect to the possibility of claiming that a clause is abusive, in Germany and Hungary this has to be argued in proceedings other than foreclosure proceedings and the debtor cannot make this argument during foreclosure proceedings.

With respect to the possibility of a declaration of abusiveness on the judge's own initiative, this is not possible in any jurisdiction other than in Germany and Hungary, but only in different proceedings.

With respect to the possibility of the debtor appealing a decision dismissing his objection to the initiation of foreclosure proceedings, this is not possible in Poland and in Hungary, where the debtor is only allowed to do so in separate proceedings.

With respect to the possibility of the enforcement being postponed, this is not possible in any country other than in the UK and Russia. It is available elsewhere only if requested in separate proceedings.

Lastly, the country that best protects the debtor is Russia.

To conclude, the current situation does not create an easy path for financial institutions in Spain when they seek to enforce their secured loans. This results in a more complicated and difficult credit market, and clarification in the near future would be welcome.

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