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Financial Law Department
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The Supreme Court declares the interest rate clause in a subrogated loan invalid for lack of transparency

The **First Chamber of the Supreme Court**, in its recent **Judgment No. 161/2026** of 4 February, examines the validity of the remuneration interest clause in a case concerning the sale and purchase of a residential property with the buyer assuming a mortgage loan originally granted to the property developer.

The Supreme Court holds that the deed of assumption does not satisfy the incorporation test, as the conditions governing the interest rate were omitted. The purchasers received no copy of the loan agreement entered into with the developer, nor is there any record of a binding offer or pre-contractual disclosure. The ruling is of particular significance for financial institutions and borrowers — whether consumers or not — who have assumed developer loans. It further reinforces the obligation on lenders to ensure that the borrower has, prior to assumption, sufficient and intelligible information regarding the financial terms of the contract, so as to be fully aware of the clauses that will form part of the agreement.

The incorporation test applies to purchasers who assume mortgage loans

The judgment is especially relevant in the field of secured banking contracts, as it establishes criteria of general application concerning the incorporation of standard terms and conditions, and affords enhanced protection to consumers who assume a pre-existing mortgage loan, imposing a stricter duty of disclosure on lenders

- On 21 November 2003, the borrowers purchased a detached house in Granada, assuming the mortgage loan that had been granted to the property developer by a financial institution for the financing of a residential development. Two subsequent variations were thereafter executed to increase the principal amount.

- The dispute originates in Clause Three bis, Sections B and C of the deed of assumption of the mortgage loan. The deed referred solely to the basic particulars of the loan — the date, the manner of its constitution, the term and the repayment schedule — without specifying the interest rate, which had in fact been fixed in 2000 at IRPH-Entidades plus 0.25% for the following twenty-five years. Neither the sale and purchase deed with assumption nor the subsequent variations clearly set out the conditions relating to the interest rate or the applicable reference index.

- The credit institution, which accepted the assumption without executing the deed, likewise failed to provide the prior binding offer required under the Ministerial Order of 5 May 1994, taking the view that such requirement did not apply to assumptions of existing loans.

> **“The borrowers alleged that they had not received a copy of the original loan deed, nor any binding offer or pre-contractual documentation concerning the financial terms thereof, and that they had been unaware of the reference index applicable at the point of assumption.**

Both the deed of assumption and the two subsequent variation deeds incorporated a specific and highly material clause stating that *"in all matters not varied, the terms agreed in the developer loan deed shall apply."* The Court takes the view that such wording does not amount to actual knowledge or acceptance of the original loan. The purchaser's awareness must be genuine and effective at the point of assumption, which requires either the physical delivery of a copy of the original deed or the full transcription of its clauses into the deed of assumption or variation, as the case may be.

- The Supreme Court examines the matter through the lens of the incorporation test set out in Articles 5 and 7 of the Law on Standard Terms and Conditions of Contract, which requires that the adherent party have had a genuine opportunity to acquaint themselves with the standard terms prior to giving their consent.

- The First Civil Chamber concludes that the interest rate clause was not validly incorporated into the contract, as it was not established that the borrowers had actual knowledge of the financial terms of the loan.

- In particular, the Court emphasises the absence of any clear reference to the interest rate in the deed of assumption, the failure to provide the original loan deed, and the lack of any evidence that the borrowers received adequate information regarding the applicable reference index.

- The Court further notes that the fact that the loan was originally granted to the developer does not relieve the financial institution of its obligation to ensure that the purchasers are aware of the essential terms of the contract upon assuming it.

As a consequence, the Supreme Court declares that the remuneration interest clause must be treated as though it were never incorporated, having failed to satisfy the incorporation test, notwithstanding the claimant's application for a declaration of nullity. The mortgage loan remains in force, but without that clause, thereby obliging the financial institution to repay the borrower all sums received by way of interest since the date of assumption, together with the applicable statutory interest, and to refrain from applying it in future, with the remainder of the contract continuing in full force and effect.