

QUICK LEGAL GUIDE ON HOW TO RECOVER DOWN PAYMENTS FOR HOME PURCHASES

Imagine somebody buys a Spanish apartment which has still not been completely built. When signing the purchasing contract the buyer pays to the developer a down/ advance payment of several tens of thousands of euro. Several months after the agreed upon delivery time the developer has already finished building the apartment but he has still not obtained the first occupancy license (authorization issued by the municipality which allows to use the apartment). Can the buyer recover his down payment?

Article 1 of the Spanish Law 57/1968, of 27th of July (Law on Down Payments for Building and Sale of Housings) says as follows: ***“Those persons (...) who develop the building of homes which have no official protection and which are destined for being a home (...), either permanent or only for some time, (...) and who intend to obtain down payments from the (...buyer...) before starting the building or during the building, must comply with the following obligations:***

First.- (The developers...) must guarantee the return of the paid amounts plus (... The legal interests of the money...) with an insurance contract (...) or with a joint guarantee of a (... bank or savings banks...) in case that the building does not start or is not finished (...) within the agreed upon time frame.

Second.- (The developers...) must receive these down payments of the buyers via a bank entity or savings bank depositing (the advance payment) in a special account (...). For the opening of these accounts or deposits the bank entity or the savings bank, under its responsibility, will require the before mentioned guarantee. “

Article 3 of the same law says as follows: ***“Once the time period for starting the building or delivering the home has expired and neither has happened, the (...buyer...) may choose to cancel the contract with the return of the down payment plus (... the legal interests of the money...) or grant the (...developer...) an extra time (...) specifying the new time frame and the date of termination of the building and the delivery of the home.”***

Article 7 of the same law says as follows: ***“The rights of this law (...) cannot be waived.”***

Let me highlight just some aspects of this consumer friendly law:

- 1.) Generally speaking, the above mentioned rights cannot be waived by the buyer even if the contract which the buyer has signed says the contrary.
- 2.) The developer must deliver the guarantee for the down payment in the moment the parties sign the purchasing contract or the pre-contract/ reservation contract.
- 3.) The law only protects down payments for home buying which is used permanently or just for some time as a home (e.g. holiday use). Normally, the judges rule that this law does not protect down payments for homes bought with investment purposes.
- 4.) Generally speaking, the buyer can recover the down payment from the developer as long as the latter has not obtained the first occupancy license.
- 5.) The buyer can grant the developer some extra time for delivering the home. However, this extra time must be explicit and written.

- 6.) If the developer does not pay back the down payment, the buyer can –if he has a guarantee certificate and if he complies with several other requirements- recover his down payment from the bank, savings banks or insurance company in execution proceedings. These execution proceedings are fast and secure for the buyer because the Spanish execution law essentially restricts the defense options of the other party, that is, of the bank, savings bank and insurance company.

- 7.) Frequently and contrary to the above mentioned law, developers do not hand out the obligatory guarantee certificate to the buyers. Nevertheless, some judges have ruled that under special circumstances the buyers can recover their down payments from the bank, savings bank or insurance company in ordinary proceedings even though the buyers have no guarantee certificate. The drawback is that these ordinary proceedings are slow and the chances of recovering the down payment are lower than in execution proceedings.

However, only a concrete case by case study an independent professional can determine if the down payment for home purchases can or cannot be recovered. The above mentioned aspects only serve as an orientation.

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PS: I would like to clarify above mentioned point 3:

The typical Spanish and international buyer of a flat/ apartment or house in Spain intends to live permanently or just for some time (eg holidays) in that home. At the same time, this typical national and international buyer intends to see the value of his home increase over the years. This typical buyer is a consumer buying a home even if he wanted –casually- to do some “investment.” The 1968 law which protects consumers is to be applied to these typical home buyers.

On the other hand, the fully fledged real estate investors who buy PROFESSIONALLY homes in Spain (real estate companies, brokers and so on) are worse off: the majority of the judges rule that this law which protects the buyers is not to be applied to such purchases, even if the parties have agreed to apply it. See AP Madrid 1st of December 2009. The majority of the judges rule that the intention of this law is to protect exclusively consumers; even if seller and buyer agree otherwise. However, a minority of judges does rule differently.

In between these both extremes is a grey zone which must be examined with more detail case by case.