Default interest charged for a mortgage repayment at the end of the year

Topic: **Fixed-rate mortgage** Case number: **2018/08**

> The customer had a mortgage due for repayment on 31 December 2017 refinanced by another bank. The repayment was made on the first working day of the new year, in other words on 3 January 2018. The discharged bank should have requested the repayment on the last working day of the previous year however. That would have been 29 December 2017. Consequently, the bank charged the customer default interest of 8% for the first three days of January 2018. The customer did not agree with this and was unable to reach an agreement with the bank. The Ombudsman recommended that the bank repay the default interest to the customer and only charge him the contractually agreed interest rate of 0.8%. The bank was unwilling to accept the recommendation however.

The documents submitted to the Ombudsman by the customer revealed that there had been discussions between him, the bank to be discharged, and the new bank regarding the actual repayment date for his mortgage, which was due for repayment on 31 December 2017. It was obvious that the bank to be discharged continually insisted on payment by the last working day of the old year, namely 29 December 2017. It based this position on local banking practice which, in its opinion, clearly applied to this case. In its promise of payment however, the new bank stated the first working day of the new year as the payment date, in other words 3 January 2018. Attempts to effect payment on 29 December 2017 anyway failed since, according to the discharging bank's liquidity planning, payment on 29 December 2017 was ultimately not possible. The discharged bank charged the customer default interest of 8% for the first three days of January 2018. In a written complaint, the customer requested repayment of the default interest, basing his claim on Art. 78 of the Swiss Code of Obligations, under which the next working day will be the date of performance where the due date for a receivable falls on a Sunday or on a day officially recognised as a public holiday at the place of performance. The bank refused to refund the charge.

The Ombudsman asked the bank to review the case. He pointed out to the bank that the legal provision cited by the customer was, in his view, a relevant basis for assessing this case. This provision is optional and can be changed by agreement between the parties. No such agreement was visible in the documentation however. The Ombudsman therefore felt that there had been no event of default. The bank ought therefore to have only charged the customer the contractually agreed interest rate of 0.8% for the first three days of January 2018. The Ombudsman recommended that the bank reimburse the customer for the difference between the amount payable using the contractually agreed interest rate and that based on the ten times higher default interest rate. Finally, the Ombudsman considered the clause in the bank's lending rules, under which it was able to unilaterally decide the default interest amount without referring to any transparent criteria, a concern.

In its statement on the matter to the Ombudsman, the bank claimed that it had terminated the credit facility offered to the customer and had informed the latter that it would no longer be renewing the fixed-rate mortgage due to expire at the end of 2017 because he had not fulfilled the bank's information requirements. The customer had agreed to the charge of the default interest. The bank further claimed that, even though this was no longer an issue because of the agreement, applying

standard practice did not generally require any contractual agreement. It maintained that payment by 29 December 2017 had failed not for reasons attributable to it, but for reasons attributable to the discharging bank. The default interest applied by the bank was 8% at the time of concluding the agreement and had never changed. The bank was therefore not willing to accommodate the customer’s request.

On the basis of this response, the Ombudsman found it necessary to intervene a second time with the bank. He expressed his surprise that the bank had only now, during the Ombudsman proceedings, claimed that the customer had agreed to the default interest. This argument, a crucial one in the bank’s view, had been omitted from its direct statement to the customer. Furthermore, the Ombudsman felt that customary practices not expressly included in an agreement were merely aids for interpretation. Since, in the case at hand, there was a clear statutory provision and no interpretation issue, a contractual clause to the contrary would be necessary for the customary practice asserted by the bank to apply. No such agreement was visible in the documentation however. The Ombudsman reiterated his belief that there was no event of default here and once again urged the bank to only charge the customer the contractually agreed interest rate of 0.8% and reimburse the difference between that and the default interest of 8%. The bank was still not prepared to accommodate the customer’s request however.

In such cases, the Ombudsman has no choice but to close a case as unresolved since he is reliant upon the cooperation of the parties and is unable to make binding decisions for them. In his concluding report, the Ombudsman stated that he was obliged to respect the credibility of the parties and thus was not in a position to clarify the disputed issue of whether or not the customer actually agreed to the default interest charged by means of a formal evidence procedure. He considered the legal interpretation asserted by the bank in relation to the payment date as incorrect. He expressed his deep regret that an agreement could not be reached in this case through the Ombudsman proceedings.