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Case Law – European Economic Area

C: 241/2013 TS 9/5 and ST TJEU 21/12/2016

Abusive floor clauses by Spanish banks

Final development of the TJEU about the application of abusive floor clauses in mortgages by Spanish banks that impede users from benefiting of the interest rate reductions.

The fraud of the ground clauses refers to the systematic introduction of abusive ground clauses in variable interest contracts and mortgage loans signed in Spain without enough transparency and clarity for the buyer of the house and signer of the mortgage, so that in these cases, has been considered as an abusive, illegal and void clause which must be eliminated and, where appropriate, reimbursed

In that sense, the *Directive 91/13 EEC* establishes:

Art. 6.1

Member States shall provide that they shall not bind the consumer, under the conditions laid down by their national law, with unfair terms contained in a contract concluded between him and a professional and shall provide that the contract is still binding on the parties on the same terms, whether it can survive without unfair terms.

Art. 3.1

Contractual clauses which have not been individually negotiated shall be considered to be unfair if, in spite of the requirements of good faith, they cause a significant imbalance between the rights and obligations of the parties deriving from the contract to the detriment of the consumer

C: 241/2013 TS 9/5

On the 10th of May 2013, the judgement 241/2013 of the Plenum of the Civil Chamber of the Supreme Court of May 9th, by which the High Court of Spain has resolved for the first time the question related to the abusive character or not of the so-called ground clauses, incorporated in so many mortgage loans

Because the importance of the judgement, then proceed to explain its essential content

The judgement has ended the procedure initiated by the interposed demand by the Association of Banking Services Users against the banks; BBVA, Cajamar Caja Rural, Sociedad Cooperativa de Credito y Caja de Ahorros de Galicia, Vigo, Orense and Pontevedra, through which collective action was taken to cease general contracting conditions in defense of the interests of consumers and users, requesting (i) the nullity declaration of the ground clauses because of their abusive character (ii) the conviction of the defendants to avoid the ground clauses of the

mortgage loan agreements and to refrain from using them subsequently (iii) the publication and inscription of this judgement

The judgement has declared the nullity because the abusive character of the ground clauses which are the object of the procedure, in the following terms

- The judgement considers that the ground clauses are inherently lawful, and that its introduction on the variable interest contracts responds to objective reasons, And its use has been tolerated for a long time by the market, so it can not be concluded that these are unusual or extravagant clauses
- Therefore, The eventual nullity of the ground clauses would be based only in the lack of transparency when incorporating them into contracts with costumers, which can lead (i) its internal darkness or (ii) of the insufficient information sumintrated to each borrower
- In the cases of abstract control (treated in this case), the eventually declared nullity has *ex nunc* effects, because general interest reasons, so it does not oblige to the defendants to Return the amount of the settlements already made but from the date of that judgements publication
- The nullity of the ground clauses object of that procedure are exclusively extended to that other credit institutions that offer identical ground clauses that are being declared void, in their contracts, unless they are complemented with other clauses that avoid the declared abusive aspects (like lack of transparency)

In conclusion, according to the judgement, the relevant criterion to determine if a ground clause is void in a concrete case, lies in determining if the credit institution provided or not all the necessary information to the user so that he controls his willingness to negotiate

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In this latest judgement, the court of Luxemburg shatter the Spanish Supreme Court argumentation and made clear that the bench has to give back all the money charged more to the costumers affected by the ground clauses on their mortgage loans

The European Justice has concluded that this legislation is against the community legislation, and that finally the credit institutions has to reintegrate to the affected customers the totality of the amount since the contracts start date and not only of those which where celebrated since May 9th, how the Spanish Supreme Court determined (C: 241/2013 TS 9/5)

This judgement is so important on the European level because it makes the credit institutions to give back all the money since the contract with abusive clauses starts and its void because lack of transparency.

Anyway, there are a lot of credit institutions that haven't been convicted because they maintains that the clauses were transparent and that they informed correctly the users