

**Case C-497/19****Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

26 June 2019

**Referring court:**

Audiencia Provincial de Zaragoza (Spain)

**Date of the decision to refer:**

14 June 2019

**Applicant:**

Ibercaja Banco, S.A.

**Defendant:**

SO

TP

**Subject matter of the main proceedings**

Action challenging an order made in mortgage enforcement proceedings to stay that enforcement on the ground that the accelerated repayment clause in the mortgage loan agreement concluded between the parties is unfair.

**Subject matter and legal basis of the request for a preliminary ruling**

The referring court has referred three questions for a preliminary ruling. The first question seeks to determine the compatibility with EU law of national legislation from which it may be inferred that if, at the time the enforcement order is made, the court seised does not assess of its own motion whether a term is unfair, that court cannot re-examine that term of its own motion even if, during its initial review, the court did not express any considerations on the validity of the terms examined.

The second question asks whether, where the party against whom enforcement is sought does not argue that terms are unfair in the preliminary application stipulated for that purpose by the Law, once that application objecting to the enforcement proceedings has been resolved that party can make a further application even though no new factual or legal material exists.

The third question asks whether, if the second question is answered in the negative on the ground that a time-barring effect is created which prevents the debtor from being able to raise again the unfairness of the terms, the court may carry out such a review of its own motion.

### **Questions referred for a preliminary ruling**

- (1) Is national legislation compatible with EU law where it may be inferred from that legislation that, if a particular unfair term withstood an initial review conducted by a court of its own motion when making an enforcement order, that review prevents the same court from subsequently assessing that term of its own motion where the factual and legal elements existed from the outset, even if that initial review did not express, in the operative part or in the grounds, any considerations on the validity of the terms?
- (2) Where factual and legal elements exist which determine the unfairness of a term in a consumer contract and the party against whom enforcement is sought fails to rely on that unfairness in the application objecting to enforcement laid down for that purpose by the Law, can that party, following the resolution of that application, make a further preliminary application aimed at determining whether one or more other terms is/are unfair when that party could have relied on those terms at the outset in the ordinary procedural step provided for in the Law? In short, is a time-barring effect created which prevents the consumer from raising again the issue of unfairness of another term in the same enforcement proceedings, and even in subsequent declaratory proceedings?
- (3) If the conclusion that the party is not entitled to make a second or subsequent application objecting to the enforcement proceedings, in order to allege the unfairness of a term which that party could have raised earlier because the necessary factual and legal elements had already been determined, is held to be compatible with EU law, can this serve as a basis for use as a means whereby the court, having been alerted to the unfairness of that term, is able to exercise its power of review of its own motion?

### **Provisions of European Union law relied on**

*Case-law of the Court of Justice of the European Union*

Judgment of 26 January 2017, *Banco Primus* (C-421/14, EU:C:2017:60), paragraphs 51 and 52.

Judgment of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164).

Judgment of 29 October 2015, *BBVA* (C-8/14, EU:C:2015:731), paragraphs 37, 38 and 39.

### **Provisions of national law relied on**

#### *Provisions of national law*

Law 1/2000 on Civil Procedure (*Ley 1/2000 de Enjuiciamiento Civil*) of 7 January 2000, in particular, Articles 136, 222, 447(2), 517, 552(1), 557, 571 and 695.

Law 1/2013 on measures to strengthen the protection of mortgagors, restructuring of debt and social rent (*Ley 1/2013 de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de deuda y alquiler social*) of 14 May 2013.

Civil Code (*Código Civil*), in particular, Article 1129.

#### *National case-law*

S[entencia del]T[ribunal]S[upremo] (Judgment of the Supreme Court) 461/2014 (ECLI: ES:TS:2014:4617)

STS 4972/2014 (ECLI:ES:TS:2014:4972)

STS 3373/2017(ECLI: ES:TS:2017:3373)

STS 3553/2018(ECLI:ES:TS:2018:3734)

STS 3734/2018 (ECLI:ES:TS:2018:3734)

STS 5618/2015 (ECLI:ES:TS:2015:5618)

### **Succinct presentation of the facts and the procedure in the main proceedings**

- 1 IBERCAJA BANCO, S.A. brought mortgage enforcement proceedings against TP and SO, in which the competent Juzgado de Primera Instancia de Zaragoza (Court of First Instance, Zaragoza, Spain) made an order (i) declaring of its own motion that the accelerated repayment clause included in the loan agreement to which the enforcement related was null and void because unfair and (ii) staying the enforcement proceedings. The applicant lodged an appeal against that order, which was served on the opposing party who lodged an objection. The

proceedings were transferred to the Audiencia Provincial de Zaragoza (Provincial Court, Zaragoza, Spain), the referring court.

- 2 The facts of the case date back to the application for enforcement under the special procedure for mortgage enforcement proceedings, lodged by Ibercaja Banco, S.A. on 27 May 2015 against the married couple TP and SO, on the basis of the loan secured by a mortgage taken out on 30 June 2005. The amount of the loan was EUR 240 000 and the mortgage was taken out on a dwelling and a parking space. The loan was set to mature on 30 June 2040 and it had to be repaid in 420 monthly instalments; nine instalments were owing.

The loan was novated on 26 September 2012, as a result of which the period for repayment of the loan, together with interest, was extended to 30 June 2043, while the other conditions remained in force. Clause 6a of the contract, headed ‘Early termination by the credit institution’, set out the situations in which the borrower would lose the entitlement to the period granted for repayment of the capital and the bank would be able to claim immediate repayment in full; these included the ‘failure to pay any instalments of interest and any loan capital repayment instalments’.

- 3 The enforcement order was made on 15 June 2015. That order did not assess whether any terms were unfair or set out any arguments in that regard. The amount in respect of which enforcement was ordered was EUR 213 988.74 in respect of the principal and EUR 63 000 in respect of costs and interest. Default interest was not calculated.
- 4 After the order for payment was made, the debtors lodged an objection on 2 September 2015 in which they alleged unfairness on the grounds of (i) the commissions for the management of payments and missed payments, (ii) the default interest, which they submitted was unfair, (iii) the universal liability imposed on the debtors in the mortgage deed, (iv) the refusal to assign rights, (v) the order in which payments were applied, (vi) the prohibition on renting, transferring ownership and encumbering, and (vii) the requirement to bear costs.

That objection was dismissed by order of the first-instance court of 5 November 2015, which was in turn set aside by this court on 11 March 2016, solely for the purposes of declaring that the default interest stipulated was null and void because unfair.

- 5 By procedural decision of 18 May 2017, the first-instance court opened a hearing for the parties in relation to two matters: the possibility of assessing whether the accelerated repayment clause was unfair and the possibility of staying the proceedings pending the preliminary ruling by the Court of Justice on the reference made by the Tribunal Supremo (Supreme Court, Spain) in its order of 8 February 2017.
- 6 Following the parties’ submissions, the second matter, relating to the stay of proceedings, was resolved by order of 15 June 2017 without hearing the parties’

views on the unfairness of the accelerated repayment clause. This Provincial Court set aside that stay of proceedings by order of 20 November 2017.

- 7 A letter sent on 22 February 2018 reiterated the application to stay the enforcement proceedings on the ground that the accelerated repayment clause was null and void and, in the alternative, to stay the proceedings; the enforcement proceedings were stayed by order of 3 September 2018 on the ground that the accelerated repayment clause was null and void. That is the order which is under appeal and in relation to which the reference for a preliminary ruling is made.

### **Essential arguments of the parties to the main proceedings**

- 8 The arguments of the parties were set out above in paragraphs 1, 2 and 4.

### **Succinct presentation of the reasoning in the request for a preliminary ruling**

- 9 The most significant difficulty to be resolved in the sphere of civil procedure in Spain in matters relating to consumer protection is the effect of the new procedural criteria derived from the case-law of the Court of Justice on the force of *res judicata*.

The force of *res judicata* has been shaped by the obligation imposed on courts in relation to the conduct of proceedings to the effect that they must, of their own motion, identify and annul unfair contractual terms. In practice, when dealing with the limits and applicability thereof as far as consumer protection is concerned, national courts must address relevant uncertainties resulting from the lack of precision. In particular, it has not been clarified whether, in enforcement proceedings, the effect is created of closing the proceedings as regards the possibility of determining the validity of any of the terms of consumer contracts.

- 10 In Spanish procedural law, the Ley de Enjuiciamiento Civil (Law on Civil Procedure; LEC) includes two broad categories of civil proceedings: declaratory proceedings and enforcement proceedings.

Declaratory proceedings are substantive proceedings which must be used as an ordinary legal remedy whereby, in relationships between individuals, legal protection is claimed for a right which has been ignored or infringed by the defendant and a definitive adjudication sought, while it is not possible afterwards to seek to raise the same issue before the courts on subsequent occasions or the same protection based on the same cause of action (Article 222 LEC).

In addition to that category are enforcement proceedings, which are characterised by the fact that they do not require a prior delimitation of rights. In such proceedings, the substantive action necessary to give effect to a right has already been initiated. The requirement for direct access to enforcement proceedings is that the right whose enforcement is sought must be recognised in an instrument or

a document which is enforceable by law. The list of documents or enforceable instruments is included in Article 517 of the LEC, which governs in a unitary fashion so-called enforceable procedural instruments (including, principally, a judgment which brings to an end declaratory proceedings) and contractual instruments. The latter are created outside proceedings and are contracts which give rise to an obligation on the part of the debtor to pay the creditor a monetary amount which is due, payable and liquid (Article 571 LEC). The reason why the legislature allows direct access to enforcement proceedings in the situations governed by that article and the avoidance of declaratory proceedings in which the right is recognised is that the debt is acknowledged using a set of legal guarantees which make it possible to assume that the debt exists and is real.

- 11 It should be noted that *res judicata* applies not only to decisions in substantive proceedings but also to matters which could have been raised, as a cause of action in the proceedings brought by the applicant or as a plea by the defendant, but were not: this is the effect of time-barring.

Time-barring tends to be known as ‘virtual *res judicata*’ because it also creates the effect of closing or concluding the proceedings and the forms of order sought. Since *res judicata* is closely linked to the principle of legal certainty, time-barring is also closely related to it, in that the legislature is seeking to avoid an endless succession of proceedings to determine the same right.

Like *res judicata*, time-barring can be regarded as a formal aspect, as an effect in the proceedings themselves or as an effect on actions or defences in a substantive sense. As a formal effect, time-barring prevents reliance by a party, in the same proceedings, on a procedural right where that party had the appropriate opportunity in the proceedings to do so but did not make use of it (Article 136 LEC), while, as a substantive effect, it precludes the party from bringing in different proceedings an action based on a cause of action or a plea which he could have relied on in the first proceedings (Article 222 LEC).

- 12 Spanish law provides that a debtor may make a preliminary application in which a limited scope for objection to the enforcement proceedings is lawfully established. Before Law No 1 on measures to strengthen the protection of mortgagors, restructuring of debt and social rent of 14 May 2013, issues relating to the validity of a debt were restricted to potential declaratory proceedings which had to be initiated by the debtor. That Law introduced the possibility of arguing that contractual terms are unfair in ordinary enforcement proceedings (Article 557(1)(7) of the LEC) and in special mortgage enforcement proceedings (Article 695(1)(4) of the LEC). It became possible to lodge an objection in order to argue that clauses in a standard consumer contract are unfair and therefore null and void and, furthermore, an obligation was imposed on courts to review of their own motion, at the outset, whether those contracts are unfair (Article 552(1), second subparagraph, of the LEC).

An objection based on unfairness raised by the debtor and a court's initial review of its own motion, as laid down in the Law, relate to terms which may form the basis for an enforcement order or for the amount of the debt.

- 13 Controversy resulted from the provision in the LEC concerning the effect of *res judicata* created by a judicial decision on an objection in enforcement proceedings. The view of the Supreme Court on the force of *res judicata* in enforcement proceedings is generally to find that that effect has occurred as regards any grounds for objection which were actually raised and which were determined by the court; matters adjudicated on in an objection raised in enforcement proceedings also create the force of *res judicata* in respect of grounds of objection which could have been relied on but were not. This is the effect of time-barring: pleas which could have been put forward were not, with the result that the debtor cannot later bring declaratory proceedings in which such pleas are upheld. That is the line of case-law followed in relation to enforcement proceedings by judgments of the Supreme Court 4617/2014 and 4972/2014.

The Supreme Court applied that case-law to pleas relating to unfair terms in consumer contracts. In that connection, it is appropriate to cite judgments 3373/2017, 3553/2018 and 3734/2018 of that court.

- 14 The difficulty arises from the possibility of applying that case-law or making it compatible with the requirements of the debtor/consumer's right of defence derived from the case-law of the Court of Justice.

The judgment of the Court of Justice which could be considered most relevant is that of 26 January 2017, *Banco Primus* (C-421/14, EU:C:2017:60). That judgment addressed the difficulty relating to the effect of *res judicata* and consumer protection and found that such protection cannot be regarded as unlimited and that it yields to a universal principle of cohesion in the legal system: the principle of legal certainty.

That judgment also states that the effect of *res judicata* is determined by reference to national law. Accordingly, regard must be had to the stipulations laid down by the Supreme Court and that court's general statement of the law, which it appears to have extended to the sphere of consumer protection, must be applied. Accordingly, where a court conducts a prior review while adjudicating on enforcement proceedings but does not, in any sense, set out any formal reasoning or relies only on the potential unfairness of a specific ground of objection and, later, in a possible objection raised by the debtor, that ground is not put forward in relation to any unfair terms, that would create the effect of *res judicata* or the effect of terminating the proceedings; that party would be time-barred from exercising, or would lose the right to exercise, the procedural right to claim before a court, after the time limit for objection had elapsed, that a term in the contract is unfair, both in the enforcement proceedings following the application objecting to those proceedings, and in any future declaratory proceedings.

However, that judgment does not confine itself to referring to national law for the purpose of defining the effect of *res judicata* and instead it sets out a number of constraints or limits, in particular, in paragraphs 51 and 52. Paragraph 51 states that ‘the conditions laid down in the national laws to which Article 6(1) of Directive 93/13 refers may not adversely affect the substance of the right that consumers acquire under that provision not to be bound by a term deemed to be unfair’, while paragraph 52 stipulates that ‘in the case where, in a previous examination of a contract in dispute which led to the adoption of a decision which has become *res judicata*, the national court limited itself to examining of its own motion, with regard to Directive 93/13, one or certain terms of that contract, that directive requires a national court, such as the one in the main proceedings, before which a consumer has properly lodged an objection to enforcement proceedings, to assess, at the request of the parties or of its own motion where it is in possession of the legal and factual elements necessary for that purpose, the potential unfairness of other terms of that contract. In the absence of such a review, consumer protection would be incomplete and insufficient and would not constitute either an adequate or effective means of preventing the continued use of that term, contrary to Article 7(1) of Directive 93/13’.

As pointed out, under national law, the court is required to examine all the terms, even if it only sets out its assessment with regard to terms which may be regarded as unfair. In accordance with Article 552(1) of the LEC, the enforceable instrument must be examined in its entirety; even if *inter partes* proceedings are commenced only in respect of terms which are identified as potentially being unfair; the exercise of that review implies that the remaining terms are considered to be valid.

- 15 In order to understand properly the scope of the uncertainty which the reference for a preliminary ruling seeks to dispel, it is helpful to refer to the rulings of the Court of Justice which, first, held that an accelerated repayment clause was unfair and, secondly, determined the effect of *res judicata* in relation to the forms of order sought by the debtor based on the unfairness of one of the terms contained—in that case—in a loan contract.

As regards the first aspect, it can be stated in general terms that an accelerated repayment clause is not, in itself, unfair. Under Spanish law, that concept, which is governed by Article 1129 of the Civil Code, leads to the loss of entitlement to the period which the parties may have agreed, in the case of a loan, for repayment of the money. Under the provision cited, the loss of that entitlement is related to the loss of the debtor’s initial solvency which may reasonably lead the creditor to doubt whether the debtor is in a position to discharge his obligations in the future. As a result of the power of self-regulation which individuals have in their relationships, other grounds, relating to the debtor’s non-compliance, can be added to those referred to in the law; for example, in the case of a loan, the regular payment of the instalments of the principal and ordinary interest.

- 16 The Court of Justice laid down the legal criteria which determine that an accelerated repayment clause is unfair in the judgment of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, which, in particular in paragraph 73 thereof, clearly defined the unfairness of such terms.

The Supreme Court also delimited the scope of unfairness in judgment 5618/2015.

- 17 In relation to the second point mentioned, the Court of Justice has drawn attention to the relevance of *res judicata* in legal proceedings, in view of the fact that the inability to change what has been decided is necessary in order to comply with the principle of legal certainty. This is closely related to time-barring, which means that, once the period for lodging a procedural act has expired, a party loses the right to do so.

The admissibility under EU law of time-barring construed in that way has been accepted in the case-law of the Court of Justice, in particular the judgment of 29 October 2015, *BBVA*, C-8/14, EU:C:2015:731; this concerned the transitional rules laid down in national Law 1/2013 on measures to strengthen the protection of mortgagors, restructuring of debt and social rent, in which, in order to comply with the case-law of the Court of Justice, a right was inserted for a debtor/consumer to argue in mortgage enforcement proceedings that a number of terms in the mortgage loan contract are unfair and, as regards instances where the ordinary time limit for objection has elapsed a special time limit of one month was granted, under the transitional provisions of that law, to lodge *de novo* an objection alleging unfairness. The Court held that that procedural tool, the time limit being classified as extraordinary, was incompatible with EU law. The Court's reasoning is as follows:

'However, that notification, prior to the date of entry into force of Law 1/2013, did not contain any information concerning their right to bring an application objecting to enforcement by raising the unfairness of a contractual term constituting the basis of the enforceable order, since that possibility was incorporated into Article 557(1)(7) of the Civil Procedure Code only by Law 1/2013.

In those circumstances, in particular having regard to the principles of the rights of the defence, legal certainty and the principle of the protection of legitimate expectations, consumers could not reasonably take advantage of a further opportunity to make an application objecting to enforcement if they were not notified about it through the same procedural means used to convey the initial information.

Therefore, it should be found that the contested transitional provision, in so far as it provides that the time limit begins to run in the present case without the consumers concerned being personally informed of the possibility to raise a new ground of objection in enforcement proceedings which were already in progress before the entry into force of that law, is not such as to guarantee full enjoyment

of that period and, therefore, the effective exercise of the new right recognised by the legislative amendment concerned.’

That case-law can be understood only in the light of the fact that the Court of Justice allows limitation periods. In turn, it must be pointed out that paragraphs 27 and 28 of the same judgment invoke the principles which lie at the basis of the national legal system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings. In short, it follows from the case-law of the Court of Justice that, although the Court found that the transitional provisions of Law 1/2013 did not guarantee the rights of the defence, that was because it is assumed that limitation periods existed which were compatible with EU law, as an expression of a minimum procedural order and in accordance with the principle of legal certainty.

- 18 In those circumstances, uncertainties arise regarding the coordination of such principles between the different judgments of the Court of Justice and the case-law of the Supreme Court and national legislation.

In order to comply with the case-law of the Court of Justice, the national procedural law introduced a review of unfairness in ordinary enforcement proceedings and in mortgage enforcement proceedings. The initial review is of the court’s own motion and must be carried out by that court before the enforcement procedure commences and before the enforcement order is made. The specific feature of that review is that it involves a merely conditional and negative assessment. No ruling is given on the validity of the terms but only on their invalidity. It is not a positive but a negative assessment of their validity; as a result of the review of an enforceable contractual instrument, only terms which the court finds to be unfair are taken into consideration, in respect of which *inter partes* proceedings will be commenced, resulting in a ruling on the validity of those terms.

As regards the other terms, where they pass the validity test performed by the court seised of the enforcement proceedings, that court will not set out any reasoning. There is no express declaration that the terms are valid although the initial review implies an assumption that they are. That is what occurred in the mortgage enforcement proceedings which gave rise to this reference for a preliminary ruling.

It is important to stress that that initial procedural step entails only a negative assessment, which is consistent with enforcement proceedings, in which there is in principle no declaration of rights. In the case of the negative assessment, there is nothing to preclude the debtor’s rights of defence and therefore, once enforcement has been ordered, the debtor may raise an objection on the ground that other terms, which were not explicitly examined in the initial review of the court’s own motion, are unfair.

However, as regards the terms which the debtor initially claimed are unfair, that must lead to a declaratory judgment which may be negative, if the court finds the terms to be unfair, or positive, in the opposite case.

What is clear for the present purposes is that such judgments, given following the necessary exchange of argument between the parties, will have the force of *res judicata*, meaning that neither a debtor objecting to enforcement nor a court exercising its powers to carry out a review of its own motion can seek to re-examine a ruling previously made against the debtor.

The uncertainties relating to the specific case arise where, as a result of the court's review of its own motion, that court does not order that the parties be heard because it has not found that any terms are unfair or has found that only one particular term is unfair. In other words, an enforcement order is made and no positive or negative view on the validity of the terms is expressed, even if those terms have been reviewed by the court.

- 19 For its part — and this is the second uncertainty — the difficulty arises as to whether a debtor who made an initial application objecting to enforcement, claiming that certain terms are unfair, can subsequently, notwithstanding that that right is time-barred, make another application based on a term which he considers to be unfair but which he did not raise at the relevant point in the proceedings, taking account of the fact that the factual and legal elements determining that unfairness already existed at the time when the first, timely objection to enforcement was raised.

In short, given that time-barring is permitted by the case-law of the Court of Justice, where a debtor does not raise an objection during the enforcement proceedings, the question turns on whether or not the principle of effectiveness has the effect of bringing the proceedings to an end, which precludes both the debtor and the court of its own motion from being entitled to reconsider matters which were previously the subject of a review or object to matters which could have been the subject of an objection but were not.