

## Supreme Court (Civil Chamber 1) Judgement No. 419/2017 of 4 July

The Supreme Court, in this judgement, establishes the criterion for imposing the costs of previous instances when an appeal to the supreme court is upheld in proceedings on the invalidity of interest rate floor clauses, all based on the European judgement of 21 December 2016, according to which the Court of Justice of the European Union (CJEU) declared that abusive clauses in contracts entered into with consumers are void, wherefore the effects of restitution linked to the declaration of the abusive nature cannot be limited over time, which is what national case law had been doing to date.

Thus, as a consequence of said European judgement, which is binding for Member States, at the beginning of the current year the Supreme Court modified its case law on the retroactive effects of the declaration of invalidity of interest rate floor clauses, thereby declaring the full retroactivity of the invalidity of floor clauses and eliminating the time limitation for the refund of amounts unduly paid, due to being considered by European legislation as a deprivation of the rights of consumers to obtain restitution of amounts that they unduly paid to banks and, consequently, due to representing incomplete and insufficient protection for consumers.

In the judgement that concerns us today, the Supreme Court upholds the appeal filed by a consumer which, in application of the aforementioned judgement of the CJEU, advocates the right of consumers to not be bound by an abusive clause, in this case pertaining to the procedural costs of previous instances. Thus, the appeal of the judgement to the supreme court involves rejection of the appeal filed at the time by the defendant bank (La Caixa), it means confirmation of the judgement of first instance (decided in favour of the consumer), and it means the non-imposition of costs of the appeal to the supreme court upon either party.

In turn, the appealed bank objected to the appeal to the supreme court, concerned that the costs of the first and second instance should not be imposed upon the bank, to the extent that case law of the Supreme Court regarding the retroactivity of abusive clauses, at the time, was different from what it is now.

Thus, the bank indicated that, during the prior instances, the retroactive effects of declaring the invalidity of the floor clauses posed serious legal doubts, and in 2013, they had even been the object of the establishment of case law doctrine by the same Supreme Court chamber in the sense of limiting said retroactive effects, meaning the opposite sense of what is currently in force.

Thus, this recent judgement, the Civil Chamber of the Supreme Court, sitting in a plenary session, **has established a criterion on imposing the costs of prior instances**, therefore interpreting Articles 394 and 389 of the Civil Procedure Act according to the **general principle of expiry** regarding the **non-binding and effectiveness principles**, which we briefly explain below:

- The **effectiveness principle of European Union Law** maintains that the change of doctrine at the national level is covered by the obligation to respect the judgement of the CJEU of 21 December 2016, which is essentially based on the right of consumers to not be bound by an abusive clause, who must be protected in any event; and
- The **principle of not binding consumers to abusive clauses**, interpreted in the same sense as the referenced European judgement, sets forth that the conditions stipulated by national law may not bind consumers whenever such conditions may concern contracts with professionals that might contain abusive clauses.

Consequently, the Chamber concludes that, pursuant to the aforementioned, **the most fitting criterion for determining the applicable procedural costs** according to the effectiveness principle and the non-binding principle **is that the costs of the instances in cases that are similar to this one should be imposed upon the defendant bank**, given that otherwise, it would mean prejudice for the consumer who, despite winning the litigation and due to having to wholly pay the expenses derived from their defence and representation in the instances or, if applicable, due to having to pay for expert reports or fees, the situation would not be re-established proportionally to the situation if the abusive floor clause had not existed when the consumer contracted with the bank, and therefore the consumer would not remain harmless, despite having a national and European procedural rule in their favour.

In brief, the Chamber states that, **if the imposition of costs is established other than how it is explained here**, meaning that in court proceedings due to abusive clauses that had been initiated before December 2016, the procedural costs of the first and second instances are charged to the bank, **it would cause an inverse dissuasive effect that would lead consumers to not file suits for moderate amounts**.