ABUSIVENESS OF BANK LOANS GRANTED WITH PROMISSORY NOTE AS A GUARANTEE OF PAYMENT

The 12 September 2014 decision of the Supreme Court declared abusive the clause included within the general terms and conditions of a bank loan which imposed the issuance of a promissory note as security for repayment. Such note, despite the principal amount of the loan being stated as the amount, was subject, by virtue of the particular conditions of the loan, to the accrual of interests in the event of non-payment. In practice, therefore, the amount of the note remained open for future liquidations.

This scenario resulted in a special executive proceeding (*juicio cambiario*) that was initiated by the Bank against the default borrower, that made opposed it alleging, among other reasons, the nullity of such clause as abusive. As both rulings rejected such petition for annulment, an appeal was filed before the Supreme Court which decided such issue, through which doctrine on this subject has been established.

According to the Supreme Court, this type of clause, imposed by banks against consumers, must be considered abusive for multiple reasons.

First, it produces an inequality between the parties, considerably improving the legal position of the Bank against the consumer. The Bank is unilaterally granted a broad power, achieving a reinforced position of enforcement, but without fulfilling all the requirements demanded by the executive actions. This is so, noted the Supreme Court, because these are pre-formulated terms of the contract under which consumers disclaim all warranties offered by the intervention of a public notary during granting, such as the control of legality and legal certainty, information or counseling, plus losing the possibility that the Court determines the abusiveness of the clause.

On the other hand, inequality also manifests itself in the borrower's inability to challenge the liquidation of the loan, given that he would have no way of understanding the terms of such liquidation, that, as noted before, would have been made without the relevant notary guarantees.

As a result, the promissory note will remain issued in blank, and will be completed at the time of the liquidation, thus reducing the possibility of challenge by a defendant except by the abusive complementation of the promissory note. In this way, there would be a reversal of the burden of proof, because the defendant would be the one who would have to prove the facts on which he supports his challenge.

In conclusion, the Supreme Court has created new jurisprudential doctrine which declares null and void clauses laid down unilaterally by banks that, in the manner of lender-held bank loans with consumers, include the obligation of the borrower to grant promissory notes as a guarantee of payment.

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