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## Aziz Case and Unfair Contract Terms in Mortgage Loan Agreements: Lessons to Be Learned in Spain

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**AZIZ CASE AND UNFAIR CONTRACT  
TERMS IN MORTGAGE LOAN  
AGREEMENTS: LESSONS TO BE  
LEARNED IN SPAIN\***

*Immaculada Barral-Viñals\*\**

INTRODUCTION

This paper provides an overview of the judgments given by the European Court of Justice (ECJ) concerning unfair contract terms (UCTs) in mortgage loan agreements. My analysis of recent ECJ decisions will focus on three aspects. First, focusing on the consumer-friendly interpretation of the UCT Directive,<sup>1</sup> which has led to the development of substantive criteria for ascertaining unfairness, most notably in *Aziz v. CatalunyaCaixa*.<sup>2</sup> Second, I will identify various points at which the Spanish transposition of the UCT Directive needs to be revised. Third, I will focus on the possibility of controlling UCTs in mortgage foreclosure proceedings.

This article's approach will be based on a comparison of developments in ECJ decisions and recent decisions by Spain's Supreme Court, the Tribunal Supremo (T.S.). This comparison indicates that the T.S. has adopted an interpretation rule for mortgage loan agreements that is far from consumer-friendly. This finding is

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\* The final version of this text was ended on October 15, 2014.

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<sup>1</sup> Council Directive 93/13, 1993 O.J. (L 95) (EC).

<sup>2</sup> Case C-415/11, *Mohamed Aziz v. CatalunyaCaixa*, 2013 EUR-Lex CELEX LEXIS 191 (Mar. 14, 2013).

supported by decisions made by the T.S. on May 9, 2013,<sup>3</sup> a month and a half after the ECJ decision in *Aziz*, and September 8, 2014.<sup>4</sup>

The “social engineering” that emerges from ECJ decisions is a clear indication of the situation in Spain today, where judges seek preliminary rulings concerning the scope and interpretation of the UCT Directive to develop principles for a more consumer-friendly interpretation of mortgage foreclosure proceedings.<sup>5</sup> The lower courts in Spain are taking the lead to further develop these principles to protect consumers in real estate transactions, because the Spanish legislature and the T.S. seem reluctant to do so in what has become a major concern of Spain’s social policy.<sup>6</sup> For instance, the most far-reaching legislation requires renegotiation of mortgage terms only when “low-income borrowers” are involved.<sup>7</sup> “Low income borrowers” is a category that varies in the different statutes but which is highly limited in scope to include only those with very low or none incomes, and a high average of the rent used in paying the loan (more than 60%).<sup>8</sup> The ultimate option in this case for this category of consumers is the *datio pro soluto*, i.e., providing the same effects as non-recourse loans available in the United States, which affects an even smaller group of borrowers. Besides carving out an exception for this small, unique group of consumers, legislation reforms have focused chiefly on what constitutes unfair contract terms.

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<sup>3</sup> S.T.S., May 9, 2013 (R.J., No. 1916/2013) (Spain).

<sup>4</sup> S.T.S., Sept. 8, 2014 (R. J., No. 3903/2014) (Spain).

<sup>5</sup> See JOSÉ MARÍA FERNÁNDEZ SEIJO, *LA DEFENSA DE LOS CONSUMIDORES EN LAS EJECUCIONES HIPOTECARIAS* (2013).

<sup>6</sup> Hans-W. Micklitz, *Unfair Contract Terms—Public Interest Litigation before European Courts—Case C-415/11 Mohamed Aziz*, in *LANDMARK CASES OF EU CONSUMER LAW: IN HONOUR OF JULES STUYCK 615* (Evelyne Terryn, Gert Straetmans & Veerle Colaert eds., 2013).

<sup>7</sup> See Urgent Measures to Protect Low Income Mortgage Debtors (B.O.E. 2012, 60) (Spain); Urgent Measures to Strengthen Protection Measures to Mortgage Debtors (B.O.E. 2012, 276) (Spain); Rights of Persons with Disabilities and their Social Inclusion (B.O.E. 2013, 289) (Spain) [hereinafter Rights of Persons with Disabilities].

<sup>8</sup> *Id.*

This article seeks to ascertain the consequences of ECJ Aziz case on UCTs.<sup>9</sup> My main goal is to examine the way in which the ECJ's interpretation of UCTs has given rise to the construction of a substantive concept of unfairness by analysing standard contract terms (SCTs) included in almost all mortgage loans granted in Spain. Further, this paper will focus on the way in which these non-binding clauses can result in a stay of foreclosure proceedings and can also reduce the mortgager's debt. Indeed, UCTs in Spain today constitute an indirect remedy against foreclosure, which can dramatically impact medium to low income families.

#### I. UNFAIR CONTRACT TERMS: WHY THEY SEEM TO BE A USEFUL TOOL IN MORTGAGE LOAN AGREEMENTS

SCTs often used in mortgage loan agreements are considered a means of unilaterally fixing contract clauses. As such, SCTs significantly limit freedom of contract, a notion embodied in the term "free will" in Article 1255 C.C.<sup>10</sup> The seller or supplier of mortgage loans fixes SCTs in advance, and the borrower must accept or reject them on a "take it or leave it" basis. Since SCTs are not individually negotiated, they are subject to both an incorporation and a fairness test when the adherent—the non-professional party—is legally considered a consumer.<sup>11</sup> In Spain, SCTs are governed by two different regulations, depending on whether the adherent is a consumer or not: the Standard Contract Terms Act of 1998 (*Ley de Condiciones Generales de la Contratación (LCGC)*),<sup>12</sup> which governs SCTs in any all kinds of contract, and the General Law for the Protection of Consumers (consolidated by Royal Legislative Decree 1/2007, *Que Aprueba el Texto Refundido de la Ley General para la Defensa de Consumidores y Usuarios y Otras Normas Complementarias*

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<sup>9</sup> I will not conduct an in-depth analysis of mortgage foreclosure proceedings, which is the main issue raised by *Aziz*.

<sup>10</sup> C.C., art. 1255 (2011) (Spain); Elena Lauroba Lacasa, *Rapport Introductif: Les Clauses Abusives*, in *LES CLAUSES ABUSIVES, SOCIETE DE LEGISLATION COMPAREE 9* (Yves Picod, Denis Mazeaud & Elena Lauroba eds., 2013).

<sup>11</sup> General Law for the Defense of Consumers and Users (B.O.E. 2007, 287) (Spain) [hereinafter *TRLGDCU*].

<sup>12</sup> General Conditions of Contract (B.O.E. 1998, 89) (Spain) [hereinafter *LCGC*].

(TRLGDCU)),<sup>13</sup> which only applies to business-to-consumer (B2C) contracts. For contracts that do not involve consumers, if the adherent has knowledge of existence of SCTs in the contract, the contract will be binding on both parties, even if the adherent has not yet read or understood the SCTs. As such, the law deals only with the external control of SCTs by employing the incorporation test, under which SCTs may be considered part of the binding contract if the adherent has had the possibility of knowing that the contract contains SCTs.<sup>14</sup> The incorporation test also applies when a contract containing SCTs involves a consumer. However, a fairness test is an additional internal control applied with respect to the content of the SCTs. This test determines whether there is a significant imbalance between parties' bargaining power so that and if an SCT is deemed unfair, it will not be binding on the consumer.<sup>15</sup>

The Spanish legal framework in relation to UCTs has not evolved due to the economic crisis of 2008, except in one aspect: Article 27 of Act 3/2014<sup>16</sup> referring to the non-revision of a UCT, which is explored further below. However, the ECJ's ruling in *Aziz* lead to the Act 1/2013 of 14 May,<sup>17</sup> on measures to strengthen the protection to mortgagors, debt restructuring and social rent that had

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<sup>13</sup> TRLGDCU (B.O.E. 2007, 287).

<sup>14</sup> However, the adherent's acceptance does not imply that he has actual knowledge of the material scope of each term. Whether the SCTs are incorporated as part of a binding contract depends on "accessibility" of the adherent to the SCTs. Thus, it is unreasonable to uphold that the adherent has consented to the content of the SCTs, since the existence of a possibility for the adherent to know the SCTs does not necessarily mean that the adherent has made an informed decision. *See* EUGENIO LLAMAS POMBO, *COMENTARIOS A LA LEY GENERAL DE DEFENSA DE CONSUMIDORES Y USUARIOS* 284 (2005).

<sup>15</sup> A further condition for enforcing SCTs is that they must be drafted in plain, intelligible language and have an interpretation *contra proferentem*, i.e., the supplier must assume the consequences of confusing wording. A lack of transparency is a ground for non-incorporation, since confusing clauses cannot form part of a contract. LCGC art. 5, 7 (B.O.E. 1998, 89). This idea is developed further in the T.S. judgment of 9 May 2013, S.T.S., May 9, 2013 (R.J., No. 1916/2013) (Spain), which seeks to construe unfairness in terms of a lack of transparency.

<sup>16</sup> *See* Consumer Protection Act (B.O.E. 2014, 76) (Spain).

<sup>17</sup> Measures to Protect Mortgagees, Debt Restructuring and Social Rents (B.O.E. 2013, 116) (Spain) [hereinafter Measures to Protect Mortgagees, Debt Restructuring and Social Rents].

modified the Mortgage Act (Ley Hipotecaria –LH–)<sup>18</sup> and the Code of Civil Procedure (Ley de Enjuiciamiento Civil) with regard to the consequences for mortgage foreclosure proceedings when the mortgage loan agreement contains clauses or terms that are deemed unfair. Although various ECJ cases have redefined Spanish legislation on UCTs in mortgage agreements,<sup>19</sup> these cases are contrary to the May 9, 2013 decision issued by the T.S., which has generated considerable controversy. The practical impact of these ECJ judgments on SCTs is of great importance, since the majority of mortgage loan agreements in Spain contain SCTs.

The lower Spanish courts—*Audiencias provinciales*—have examined a number of frequently used SCTs in mortgage loan agreements that might be deemed unfair, including SCTs relating to: (1) the early maturity of the loan, (2) the default interest rate, (3) the unilateral determination of the amount owed, and (4) the so-called “floor clause” in variable interest loans. In *Aziz*, the ECJ ruled on the fairness of the first three types of SCTs. Preliminary rulings by the ECJ focused on two aspects: the criteria to be applied in examining the fairness of a clause and the effects of an unfair clause. Similarly, the T.S. has ruled on the “floor clause,” which is a problem only in Spain in the context of the UCT Directive concerning the scope of application of the fairness test to the main subject matter of the contract.

We start by examining this latter point as a *prims* for the analysis of the above-mentioned clauses.

## II. THE APPLICATION OF THE FAIRNESS TEST TO THE MAIN SUBJECT MATTER OF THE CONTRACT

An initial set of ECJ and T.S. decisions deal with the transposition of the UCT Directive by the Spanish legislature. Article

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<sup>18</sup> Mortgage Act) (B.O.E. 1946, 58) (Spain) [hereinafter Mortgage Act].

<sup>19</sup> Case C-484/08, Caja de Ahorros de Madrid v. Ausbanc, 2010 E.C.R. I-04785; Case C-618/10, Banco Español de Crédito v. Joaquín Calderón Camino, 2012 EUR-Lex CELEX LEXIS 4274 (June 14, 2012); Case C-415/11, Mohamed Aziz v. CatalunyaCaixa, 2013 EUR-Lex CELEX LEXIS 191 (Mar. 14, 2013); Case C-226/12, Constructora Principado v. José Ignacio Menéndez-Álvarez, 2014 EUR-Lex CELEX LEXIS 7 (Jan. 6, 2014).

4(2) of the UCT Directive states that the assessment of the unfairness of a contractual term should not include the “main subject matter of the contract nor to the adequacy of the price and remuneration . . . as against the services or goods supplied in exchange . . . .”<sup>20</sup> As such, the ECJ has been requested to give a preliminary ruling as to whether it is actually possible to assess the fairness of the subject matter of the contract and the adequacy of the price and remuneration in light of the value of the services or goods supplied in exchange, that is to say, the fairness of the contract price.

The question is whether the transposition of the UCT Directive by the Spanish legislature complies with Article 4(2) of the Directive, given that Spanish law has not expressly transposed this limit to the assessment of fairness. This question was answered by the ECJ in *Caja de Aborros de Madrid v. Ausbanc*.<sup>21</sup> The Court in *Ausbanc* held that a Spanish law providing for an assessment of the fairness of terms relating to the main subject matter of the contract was consistent with the UCT Directive.<sup>22</sup> The ECJ determined that Article 4(2) is not a binding provision. Member States may opt not to transpose Article 4(2) and, in so doing, may afford a higher level of protection than that established by the Directive.<sup>23</sup> This option satisfies the requirement in the UCT Directive of “minimum harmonisation” of national

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<sup>20</sup> Council Directive 93/13, *supra* note 1, art. 4(2).

<sup>21</sup> See *Ausbanc*, 2010 E.C.R. I-04785.

<sup>22</sup> In *Ausbanc*, the T.S. requested the ECJ make a preliminary ruling regarding the unfairness of a SCT that allowed the bank to round up the interest rate in a variable mortgage agreement to the next quarter of a percentage point. See *id.*

<sup>23</sup> It follows from the wording of Article 4(2) of the UCT Directive that “[Article 4(2)] . . . cannot be regarded as laying down the scope *ratione materiae* of the Directive.” *Id.* at I-4837. Article 4(2) cannot be inferred as constituting “a mandatory and binding provision and that, as such, its transposition by Member States was obligatory. On the contrary, the Court merely held that, in order to safeguard in practice the objectives of consumer protection pursued by the Directive, any transposition of Article 4(2) had to be complete, with the result that the prohibition of the assessment of the unfairness of the terms relates solely to those which are drafted in plain, intelligible language.” *Id.* at I-4838. Further, the Court in *Ausbanc* stated that “it must be held that, in authorising the possibility of a full judicial review as to the unfairness of terms such as those referred to in Article 4(2) of the Directive, provided for in a contract concluded between a seller or supplier and a consumer, the Spanish legislation at issue in the main proceedings makes it possible for consumers to be afforded, in accordance with Article 8 of the Directive, a higher level of protection than that established by that directive” *Id.* at I-4838.

legislation.<sup>24</sup> A number of decisions by the T.S. adhere to this interpretation of the UCT Directive, as I will explain. Notably, prior to *Ausbanc*, the T.S. had already ruled in a manner consistent with the ECJ's holding. For example, in T.S. judgement of 1 July, 2010,<sup>25</sup> which concerned clauses defining risks in insurance contracts, the T.S. ruled that courts should assess the fairness of clauses related to the main subject matter of such contracts because it determines the price of the insurance.

Yet, more noteworthy is the judgment against this interpretation, since it deals with mortgage contracts, bearing in mind that only a clause unrelated to the subject matter of the contract or the adequacy of the price can be submitted to the unfairness test. Thus, the question is that the T.S. resolution of 18 June, 2012, which is concerned with remunerative interest rate, states that Spanish legislation on UCTs prohibits the assessment of the fairness of contract clauses that are related to price.<sup>26</sup> It appears that the remunerative interest rate, which is the main tool for calculating the contract price, is outside the scope of the unfairness test.

Control of the remunerative interest rate clearly entails an analysis of the adequacy of the contract price, since the assessment of the nominal interest rate applied is the “price” of the loan. No assessment of fairness, however, is undertaken in fixing this rate. Instead, fairness is assessed as to the price agreed to by the parties. This conceptual separation of Article 4(2) of the UCT Directive of the control of the price as the main subject matter of the contract, and the adequacy of the price and the remuneration, on the one hand, as against the services or goods supplied in return, on the other, was highlighted by the ECJ in *Constructora Principado v. Álvarez*.<sup>27</sup> The nature of unfairness does not require an economic imbalance in the contract, which the Court understands as not being relevant. Instead, unfairness refers to the *legal* imbalance created by those contract clauses that

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<sup>24</sup> *Id.* at I-4836.

<sup>25</sup> S.T.S. Jul. 1, 2010 (R.J., No. 6031/2010) (Spain).

<sup>26</sup> S.T.S. June 18, 2012 (R.J., No. 5966/2012) (Spain).

<sup>27</sup> In *Constructora Principado* (like *Ausbanco*, a preliminary request from a Spanish judge), the ECJ was asked to determine whether obliging consumers to pay for expenses that by law need to be borne by the sellers is unfair. *See* Case C-226/12, *Constructora Principado*, 2014 EUR-Lex CELEX LEXIS 7, ¶ 44 (Jan. 6, 2014).



impose on the consumer certain charges for which he is not liable under the applicable law. In other words, it is unfair to create a legal imbalance, irrespective of the economic impact on the parties.<sup>28</sup>

Spanish scholars<sup>29</sup> have reached a consensus that UCTs are not the appropriate tool for determining the adequacy of the contract price and remuneration as against the services or goods supplied in return. Spanish law calls for complete freedom of parties to determine contract prices, and therefore, there are no remedies<sup>30</sup> for seeking a fair price.<sup>31</sup> Thus, the control assessment of fairness is not about the adequacy of the price, which is separate from the possibility of assessing unfairness, but about the way some clauses help to determine the total price that consumers have to pay for the loan. This is precisely why many SCTs in mortgage loans might be considered unfair.<sup>32</sup>

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<sup>28</sup> See IMMACULADA BARRAL VIÑALS, CENTRO DE ESTUDIOS DE CONSUMO, ABUSIVAS POR DESEQUILIBRIO IMPORTANTE, PERO NO IMPORTA LA CANTIDAD (2014) (detailing a discussion on legal imbalance not being an economic imbalance in the ECJ decisions).

<sup>29</sup> See SERGIO CÁMARA LAPUENTE, EL CONTROL SOBRE LAS CLÁUSULAS “ABUSIVAS” SOBRE ELEMENTOS ESENCIALES DEL CONTRATO 71 (Thompson-Aranzadi ed., 2006) (discussing the tension between unlimited freedom to negotiate the contract price and social justice).

<sup>30</sup> An exception to the general rule that no remedies exist for seeking a fair contract price is the *laesio ultra dimidium* in Catalonia for immovable property under certain circumstances. This exception, however, is beyond the scope of this paper.

<sup>31</sup> See IGNASI FERNÁNDEZ DE SENESPLEDA, PABLO IZQUIERDO WHITE, ADELA RODRIGUEZ SERRA & GUILLEM SOLER SOLÉ, CLÁUSULAS ABUSIVAS EN LA CONTRATACIÓN BANCARIA 86 (2014) (calling for the impossibility of controlling the price by the fairness test). Nevertheless, the argumentation cited deals precisely with the idea of adequacy between the price and the services and goods supplied. See also LAPUENTE, *supra* note 29, at 71 (discussing the liberal doctrine of freedom of pricing and the social justice of the contract). However, we understand that the thesis of social intervention of the contract exceeds the issue of unfair terms and seeks, not to determine whether there is an imbalance in a specific contract, but rather to restore a prior balance when starting from the premise that both parties have very different powers of negotiation.

<sup>32</sup> Article 32 of the Directive on Consumer Rights inserts Article 8 to the UCT Directive, stating that when a Member State adopts provisions in accordance with Article 8, it must inform the Commission, especially if those provisions “extend the unfairness assessment to . . . the adequacy of the price or remuneration.” Council Directive 2011/83, on Consumer Rights, 2011 O.J. (L 304) 64 (EU), amending Council Directive 93/13, *supra* note 1, and Council Directive 1999/44, 1999 O.J. (L

In terms of remunerative rates of interest, it should be stressed that control of the amount, if any, is concerned directly with assessing the adequacy of the service provided against the remuneration. In short, the control of the amount impacts pricing freedom. Article 1 of the Repression of Usury Act of 23 of July 1908 governs the determination of whether the remunerative rate of interest is excessive or not.<sup>33</sup> The Usury Act is useful for controlling the adequacy of the loan price because it mandates that the lending of money cannot be considered binding where there is an “interest notoriously higher than the normal price of money or clearly out of proportion in the circumstances of the case, or leonine. . .”<sup>34</sup> However, when the lending is excessive or leonine, the loan is void in its entirety. Thus, the requirements of the Usury Act differ from the unfairness test, under which only the unfair clauses would be non-binding. In short, there is a specific tool in Spanish law for analysing when the price of the loan is excessive, namely, the adequacy of the price, which lies outside the scope of laws that address UCTs.

An important case that addresses the issue of price control is the Judgement of 9 May 2013,<sup>35</sup> a T.S. decision which was published shortly after the ECJ decided *Aziz*. The T.S. held that, although the rate of default interest constitutes part of the main subject matter of the contract, it can only be deemed unfair if the clause lacks transparency. These issues are discussed below in section IV, sub-

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171) 12 (EC), and repealing Council Directive 85/577, 1985 O.J. (L 372) 31 (EC) and Council Directive 97/7, 1997 O.J. (L 144) 19 (EC). The Directive on Consumer Rights was transposed by the Spanish legislature in the Consumer Protection Act, (B.O.E. 2014, 76) (Spain), amending TRLGDCU. Importantly, note that Article 8 does not deal directly with the price as the main subject matter of the contract, but rather with the adequacy of the price or remuneration.

<sup>33</sup> Represión de la Usura (Usury Repression Act) (B.O.E. 1908, 206) (Spain) [hereinafter Usury Repression Act].

<sup>34</sup> Nevertheless, the main idea of the Usury Repression Act is to provide a subjective approach by taking into account the personal characteristics of the debtor in determining whether the loan is usurious or not. See Immaculada Barral-Viñals, *Freedom of Contract, Unequal Bargaining Power and Consumer Law on Unconscionability*, in UNCONSCIONABILITY IN EUROPEAN PRIVATE FINANCIAL TRANSACTIONS: PROTECTING THE VULNERABLE (Mel Kenny, James Devenney & Lorna Fox O’Mahony eds., 2010) (relating the concept of unconscionability in common law and how this Act might be considered the first Spanish law protecting the weak part of the contract).

<sup>35</sup> S.T.S., May 9, 2013 (R.J., No. 1916/2013) (Spain)

section C in conjunction with the criteria for determining fairness, because unlike remunerative interest rates, default interest rates do not form part of the price. Instead, default interest rates are part of the compensation for the eventual damage suffered by the creditor because of non-payment. In other words, these rates fall outside the notion of price and, as such, are susceptible to an unfairness test.<sup>36</sup>

These T.S. cases permit application of the fairness test to any kind of clause in a mortgage loan, and this application should be the first step in considering individual clauses typically included in mortgage loan agreements in Spain.

### III. SUBSTANTIVE CRITERIA FOR DEALING WITH THE CONCEPT OF “UNFAIRNESS”

The ECJ has issued a number of guidelines on determining the fairness of SCTs. These guidelines are only of persuasive authority for judges in national courts because the Court in Luxembourg only gives instructions to the referring court in accordance with the interpretation of the scope of the fairness control provided in the UCT Directive.<sup>37</sup> In *Azijs*, however, the ECJ provided national courts with direct guidance—which has been cited in subsequent cases such as *Constructora Principado*—for analysing SCTs. All in all, the ECJ analyses

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<sup>36</sup> MARIA CARMEN GONZALEZ CARRASCO, CENTRO DE ESTUDIOS DE CONSUMO, LA CLÁUSULA QUE IMPONE UN INTERÉS DE DEMORA DESPROPORCIONADO DETERMINA LA APRECIACIÓN DE OFICIO DE LA NULIDAD DE LA MISMA SIN POSIBILIDAD DE ONTEGRACIÓN JUDICIAL.(2013).

<sup>37</sup> The judgments that stress the idea that the ECJ only gives instructions to the referring court in accordance with the interpretation of the scope of the fairness control provided in the UCT Directive are numerous. *See* Case C-243/08, *Pannon GSM Zrt. v. Erzsébet Sustikné Győrfi*, 2009 E.C.R. I-04713; Case C-137/08, *VB Pénzügyi Lízing Zrt. v. Ferenc Schneide*, 2010 E.C.R. I-10847; Case C-92/11, *RWE Vertrieb AG v. Verbraucherzentrale Nordrhein-Westfalen eV*, 2013 EUR-Lex CELEX LEXIS 4659 (Mar. 21, 2013). A summary of this construction can be found in Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt.*, 2012 EUR-Lex CELEX LEXIS 4104 (Apr. 26, 2012) (“it is for that [national] court to determine, in light of those criteria, whether a particular contractual term is actually unfair in the circumstances of the case . . . . It is thus clear that the Court of Justice must limit itself, in its response, to providing the referring court with the indications which the latter must take into account in order to assess whether the term at issue is unfair.”).

three different clauses used in virtually all mortgage loan agreements. These clauses are discussed separately below.

#### A. The “Early Maturity of the Loan” Clause

The “early maturity” clause is an SCT that confers on the bank the right to call in the totality of the loan on expiry of a stipulated time limit where the debtor fails to fulfill his obligation to pay any part of the principal or the interest on the loan. This clause implies the acceleration of the loan due to any kind of non-compliance. The ECJ in *Aziz* referred to this clause as the “acceleration clause.”

There is considerable variety of early maturity clauses used for a range of circumstances, such as when a debtor enters into insolvency proceedings and in the sale of an immovable property. The discussion in this section focuses on the type of early maturity clause considered in the case brought before the ECJ: one that provides for early maturity on account of non-payment of a loan installment. For this clause to take effect, there must be a failure to comply with an obligation that is of essential importance in the contractual relationship, such as non-payment in due time by the borrower.<sup>38</sup> But, the substantive issue discussed by the ECJ was the early maturity that occurred, or could occur, as a consequence of the non-payment of a single installment, and whether the early maturity clause may be considered unfair because of being disproportionate. The problem is not the possibility of calling in the loan because of the debtor’s non-compliance. Rather, the problem is the imbalance between the term and the amount of the loan, and the non-payment of a single installment.<sup>39</sup> Some Spanish scholars argue that, since early maturity for non-compliance is authorized by Spanish regulations on UCTs,<sup>40</sup> the central problem is whether absolute non-compliance can be assumed after defaulting on just one installment.<sup>41</sup> The meaning of non-payment is not defined in

<sup>38</sup> See, e.g. S.T.S., Dec. 16, 2009 (R.J., No. 8466/2009) (Spain).

<sup>39</sup> See PASCUAL MARTÍNEZ ESPIN, CENTRO DE ESTUDIOS DE CONSUMO, *ES ABUSIVA LA CLÁUSULA DE VENCIMIENTO ANTICIPADO POR IMPAGO DE UNA CUOTA DE LA HIPOTECA* (2013).

<sup>40</sup> TRLGDCU art. 85(4) (B.O.E. 2007, 287).

<sup>41</sup> See Carlos Ballugera Gómez, *Carácter Abusivo del Vencimiento Anticipado por Impago de una Sola Suota del Préstamo Hipotecario en la STS de 16 de Diciembre de 2009*, 7507 DIARIO LA LEY 10, 10 (2010); Maria Teresa Alonso Pérez, *Cláusulas Frecuentes en Préstamos Hipotecarios para Adquisición de Vivienda: Cláusula Suelo, Cláusula de*

the regulations. However, the ECJ provides three criteria –marked in bold- for determining whether the non-compliance is sufficiently serious: “whether that right is provided for in cases in which such non-compliance is sufficiently serious in the light of the **term and amount of the loan**, whether **that right derogates from the relevant applicable rules** and **whether national law provides for adequate and effective means enabling the consumer subject to such a term to remedy the effects** of the loan being called in.”<sup>42</sup>

Even though the ECJ does not conclude whether this clause is unfair, its criteria reflects the normal circumstances of a mortgage loan for a family home in Spain. Typically, banks in Spain grant mortgage loans with pay back time of at least thirty years.<sup>43</sup> As such, non-payment of a single monthly installment, without more, does not appear to be a severe violation of the borrower’s payment obligation.

In line with these criteria, the Spanish legislature set a limit on the maximum delay of payment, beyond which would indicate a serious intention of the borrower to breach his payment obligation. In 2013, the legislature promulgated Act 1/2013,<sup>44</sup> which modifies Article 693(2) of the Code of Civil Procedure to require a finding of non-compliance with the loan agreement based on non-payment of monthly installments for three or more months or its equivalent if the terms are not quantified in a monthly basis.

Act 1/2013 also takes into account the second criterion provided by the ECJ, and addresses the question of whether the right to call in the loan for the non-payment of one installment derogates from the relevant applicable rules. If there is no early maturity clause in the contract, the mortgage can only be executed following the “essential non-compliance” in the terms provided by Article 1124 C.C.,<sup>45</sup> which seems to require more than the non-payment of a single

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*Vencimiento anticipado y Cláusula de Cntereses Moratorios Excesivamente Elevados, in VIVIENDA Y CRISIS ECONÓMICA* 183 (María Teresa Alonso Pérez ed., 2014).

<sup>42</sup> L.E. CIV art. 693(2) (Spain).

<sup>43</sup> See, e.g., Case C-415/11, *Mohamed Aziz v. Catalunyaixa*, 2013 EUR-Lex CELEX LEXIS 191 (Mar. 14, 2013) (the mortgage loan at issue was for thirty-three years).

<sup>44</sup> See *Measures to Protect Mortgagees, Debt Restructuring and Social Rents* (B.O.E. 2013, 116).

<sup>45</sup> C.C. art. 1124 (Spain).

installment. Thus, by specifically requiring three months of non-payment, Act 1/2013 establishes a criterion in which non-compliance is of essential importance.

However, the last criterion provided by the ECJ on the need to examine whether there are adequate means to remedy the effects of the clause is largely ineffective. Article 693(3) of Code of Civil Procedure clearly provides for the possibility of the debtor thwarting the execution of the mortgage by paying the due installments, a power conceded to the debtor of the mortgage on the family home, without the consent of the creditor. Therefore, in light of the effectiveness of reacting to the implementation of the clause, the Spanish legal system provides reasonable solutions to ensure the clause is not deemed unfair.

Act 1/2013 establishes that, in the absence of non-payment for at least three months, the judge cannot proceed to foreclosure. However, the question remains as to whether, even if the bank has declared the loan is expired after the minimum time limit for compliance established by law, the contract contains a clause for early maturity for non-payment of a single installment. Courts are likely to declare this clause unfair and therefore not binding on the debtor, in which case there would be a stay on mortgage foreclosure due to the lack of necessary procedural prerequisites, i.e., the credit has not fallen due.<sup>46</sup> Here, however, judges must decide on a case-by-case basis whether the elements listed above for determining whether a clause is unfair are present. In fact, the Code of Civil Procedure does not make early maturity clauses unfair only upon one or two non-payments. Instead, the Code of Civil Procedure only limits the foreclosure of the mortgage to three unpaid installments, which indicates a poor understanding of the judgment in *Aziz*.

#### B. The Clause for Unilateral Quantification of the Amount Owed

Clauses for unilateral qualification of the amount owed allow banks to immediately and unilaterally determine the balance of a loan by submitting a certificate indicating the amount owed. This clause is

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<sup>46</sup> Encarna Cordero, *Y Ahora Viene lo Difícil: ¿Cómo Controlar en el Ejecutivo Hipotecario el Carácter Abusivo de la Cláusula?*, 5 REVISTA CESCO DE DERECHO DE CONSUMO 26 (2013).

essential to the security provided by a mortgage because it provides the creditor with recourse to the procedures set out in Article 572(2) of Code of Civil Procedure.<sup>47</sup> Article 572(2) requires providing for the presentation of certification of the amount owed, duly verified before a notary, to determine the outstanding balance to proceed to enforcement. If such certification does not exist, the enforcement proceedings cannot be initiated owing to the absence of one of the procedural requisites, viz., the liquidity of the debt.<sup>48</sup> Prior to the enforcement proceeding, the debtor would be required to initiate a declaratory proceeding to establish the amount due. Therefore, the law allows unilateral declaration to establish the liquidity of the debt.

Clauses for unilateral qualification of the amount owed might seem unfair because they require only unilateral declaration by the bank. However, such a clause whose requirements and effects are provided for by procedural legislation<sup>49</sup> can hardly be considered unfair provided that all the requirements and effects of the clause are clear. In fact, this was the approach used by the Advocate General in *Aziz*, which highlights the essential character of this type of SCT for initiating enforcement.<sup>50</sup> He also pointed out the need to analyze the rules of this procedure and, in particular, the debtor's power of challenge, which appears guaranteed when claiming more than is due as regulated in Art. 558 Code of Civil Procedure.<sup>51</sup>

*Aziz*, however, deviates from Advocate General opinion for analyzing the procedures of mortgage enforcement proceedings and directly adopts the comparison with national legislation in the absence of an agreement.<sup>52</sup> Yet, without a unilateral determination clause,

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<sup>47</sup> L.E. CIV.art. 572(2) (Spain).

<sup>48</sup> See FERNÁNDEZ DE SENESPLENA, *supra* note 31, at 175.

<sup>49</sup> L.E. CIV. art. 572 (Spain).

<sup>50</sup> See Case C-415/11, Mohamed Aziz v. Catalunyaixa, 2013 EUR-Lex CELEX LEXIS 191 (Mar. 14, 2013).

<sup>51</sup> L.E. CIV. art. 558 (Spain).

<sup>52</sup> *Aziz*, 2013 EUR-Lex CELEX LEXIS, at ¶ 75 (“With regard, finally, to the term concerning the unilateral determination by the lender of the amount of the unpaid debt, linked to the possibility of initiating mortgage enforcement proceedings, it must be held that, taking into account paragraph 1(q) of the Annex to the directive and the criteria contained in Articles 3(1) and 4(1) thereof, the referring court must in particular assess whether and, if appropriate, to what extent, the term in question derogates from the rules applicable in the absence of agreement

enforcement proceedings may not be initiated, so, this SCT is clearly carrying consequences detrimental to the consumer. Therefore, *Aziz* indicates that the unilateral declaration of the amount is unfair, since this requires an agreement that derogates the applicable law. In the absence of an agreement, the law provides for the creditor to initiate declaratory proceedings to settle the debt, thus losing the advantages of the mortgage enforcement, which is one of the lender's most obvious advantages. Enforcement based on unilateral declaration of the amount owed offers few safeguards for the debtor, because unilateral declaration does not contain a phase in which objections might be lodged, nor is it corrected by the intervention of the notary. In short, in light of Spanish procedural law, it seems more effective to address the issue of the clauses for unilateral qualification of the amount owed from the perspective of the guarantee of procedures rather than from that of the unfair nature of the clause itself.

### C. Disproportionate Default Interest Rate Clause

The disproportionate default interest rate clause is also analyzed in *Aziz*. Unlike the remunerative rate of interest, which forms part of the price, the default interest is the price (compensation) for the debtor's failure to pay, which derives from the default and is provided for under Article 1108 C.C.<sup>53</sup> Thus, as indicated in Section III, the critical issue is not whether it is possible to control the content of the clause. Rather, the issue is whether the interest rate is disproportionate, and because of that, become unfair.

The ECJ opined in *Aziz* that the rate of default interest should be appropriate for ensuring the attainment of its objectives: so, a disproportioned default interest rate cannot be imposed because it settles a disproportionate compensation. The ECJ establishes two criteria for establishing a proportionate default interest rate: first, a comparison with what is provided for under national law in the absence of any agreement; and second, the rate of default interest applicable in art. 1108 Civil Code.<sup>54</sup> Clearly, the agreement of a default

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between the parties, so as to make it more difficult for the consumer, given the procedural means at his disposal, to take legal action and exercise rights of the defence.”).

<sup>53</sup> C.C. art. 1108 (Spain).

<sup>54</sup> See *Aziz*, 2013 EUR-Lex CELEX LEXIS, ¶ 74 (“regarding the term



interest rate alters the legal framework under Article 1108 C.C., which provides that the legal interest rate should be four percent,<sup>55</sup> a figure that is well above the usual percentage in mortgages. The question is what standard of comparison should be employed, and there are at least three possible answers: first, to take Article 1108 C.C., which establishes the legal interest rate of borrowing in the event of no agreement,<sup>56</sup> as a point of reference; second, to apply in accordance with Spanish legislation the limit on the legal interest rate of tacit overdrafts on personal loans subject to Article 20(4) LCC,<sup>57</sup> which is 2.5 times the legal interest rate;<sup>58</sup> and third, to compare the remunerative rate of interest of the loan itself with the default interest rate.

Consumers often default on their loan payments at the risk of foreclosure proceedings and find themselves unable to pay high rates of default interest. Therefore, RD-L 6/2012, before providing a ruling in the *Aziz* case, determined an upper limit for default interest rate in mortgage foreclosures affecting debtors with few resources (Article 4 RD-L 6/2012).<sup>59</sup> This regulation provides for the so-called “debtor on the threshold of social exclusion,” who enjoys special protection and

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concerning the fixing of default interest, it should be recalled that, in light of paragraph 1(e) of the Annex to the Directive, read in conjunction with Articles 3(1) and 4(1) of the directive, the national court must assess in particular, as stated by the Advocate General in points 85 to 87 of her Opinion; first, the rules of national law which would apply to the relationship between the parties, in the event of no agreement having been reached in the contract in question or in other consumer contracts of that type; and, second, the rate of default interest laid down, compared with the statutory interest rate, in order to determine whether it is appropriate for securing the attainment of the objectives pursued by it in the Member State concerned and does not go beyond what is necessary to achieve them”). *See also* Case C-488/11, Dirk Frederik Asbeek Brusse, Katarine de Man Garabito v. Jahani BV, 2013 EUR-Lex CELEX LEXIS 2538 (May 30, 2013).

<sup>55</sup> State Budget 2014 (B.O.E. 2013, 309) (Spain) (stating the state budget for 2014. Additional disposition 32).

<sup>56</sup> C.C. art. 1108 (Spain).

<sup>57</sup> Consumer Credit Act art. 9 (B.O.E. 1995, 72) (Spain) (derogated by Consumer Credit Act (B.O.E. 2011, 151) (Spain) [hereinafter Consumer Credit Act]. Neither of the two statutes apply to mortgage loan agreements.

<sup>58</sup> *See* FERNÁNDEZ DE SENESPLEDA, *supra* note 31, at 145. This criterion has been followed by provincial courts seeking a limit in the default interest rate in the face of recent legal reforms.

<sup>59</sup> Urgent Measures to Protect Low Income Mortgage Debtors (B.O.E. 2012, 60) (Spain).

is limited to the remunerative interest agreed to by parties at the time of making the loan agreement plus 2.5% of the loan principal. Nevertheless, the requirements for being recognized as this type of debtor are cumbersome and complicated, and few debtors are deemed eligible for this protection.

The ceiling on default interest in Article 114 LH, amended by Law 1/2013 limits default interest to a rate that is three times the statutory interest rate when the mortgage is for the acquisition of the main residence and the mortgage agreement has been secured on that residence. Thus, a solution was implemented to depart from the statutory interest rate provided by the C.C. and to increase the ceiling on personal loans. Today, there is a legal limit on interest rates when the rate has been agreed to in a new mortgage contract. Hence, *disposicion trasitoria* (DT) 2 of Act 1/2013 applies this limit to foreclosures that are pending or to be initiated after the effective date of Act 1/2013 that will have a greater impact as a lot of cases can be in its scope of application.<sup>60</sup> This indicates that the court clerk or notary will recalculate the rate of interest if it exceeds the statutory limit. As such, DT 2 of Act 1/2013 seems to represent an effort to moderate the clause in opposition to ECJ case law and the provisions in Article 85 TRLGDCU, which will be further discussed in Section V below.

Another interesting aspect of disproportionate default interest rate clauses concerns the proceedings taken when an interest rate is declared unfair and therefore void. The provincial courts have adopted two approaches to this issue. The first approach is to apply a zero interest rate if a court declares the default interest rate void as disproportionately high and the judge is unable to moderate the clause, as demonstrated in Section V. The second approach is to apply Article 1108 C.C., which provides that, in the absence of an agreement between the parties, the rate of default interest shall be the statutory interest rate. I favor this second approach because the supplementary application of Article 1108 C.C. does not constitute a revision of the clause, but only a use of the statutory interest rate in the absence of an agreement between the parties, defined as lack of foresight or

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<sup>60</sup> See Measures to Protect Mortgagees, Debt Restructuring and Social Rents (B.O.E. 2013, 116).

unenforceability by other cause.<sup>61</sup> The logic of Article 1108 C.C. is to provide a model for the quantification of the legal obligation for paying default interest, which is used by the ECJ as a reference for finding unfairness. The agreement on a default interest rate modifies the application of this precept.<sup>62</sup>

#### D. The “Floor” Clause

In Spain, most loan agreements for purchasing a family home charge a variable interest rate. A “floor” clause affects the variability of a loan by providing a fixed interest rate. Floor clauses do not allow lower rates of interest to be applied, even if a lower rate is available under the Euribor or other mechanism of calculation. Financial institutions use floor clauses to protect themselves against possible falls in the Euribor. Hence, the potential unfairness of floor clauses has been called into question because such clauses cause an imbalance in the contract, since the debtor is unable to benefit from interest rate cuts lower than the limit established by the floor clause, and it can be deemed unfair because the lack of financial knowledge of the debtor means he may be unaware that the clause might be applied, which has occurred during the present economic crisis. Although the ECJ has not addressed the fairness of floor clauses, the T.S. ruled on this issue in the May 9, 2013<sup>63</sup> and September 8, 2014 decisions<sup>64</sup> and applied much more restrictive criteria.

The T.S. cases considered floor clauses from two points of view. The first, which is contrary to the interpretation by the ECJ in *Aziz*, is that “floor” clauses, insofar as they determine the contract price, cannot be considered unfair. The second is that floor clauses can only be considered invalid for lack of transparency. Thus, the test for fairness is its inclusion within the loan agreement (Articles 5 and 7 LCGC and 80 of TRLGDCU), which is understood to be made when

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<sup>61</sup> See Miguel Martin Casals, *Les Clauses Abusives Dans le Projet de Cadre Commun de Reference*, in *LES CLAUSES ABUSIVES: APPROCHES CROISEES FRANCO-ESPAGNOLES* 73 (Yves Picod, Denis Mazeaud, & Elena Lauroba eds., 2012) (pointing out that the contract remains when a clause is unfair either because the clause is not essential to the contract’s purpose or because the law includes a defective application of the norm. In our case, the defective norm is C.C. art. 1108).

<sup>62</sup> See GONZALEZ CARRASCO, *supra* note 36, at 4.

<sup>63</sup> See S.T.S., May 9, 2013 (R.J., No. 1916/2013) (Spain).

<sup>64</sup> See S.T.S., Sept. 8, 2014 (R.J., No. 3903/2014) (Spain).

the bank complies with all previously established information and documentation requirements.<sup>65</sup> Surprisingly, the T.S. checks the transparency of contractual clauses that cannot be deemed unfair as they form part of the price in function of the criterion of transparency in what is known as “double filter transparency”. Indeed, this criterion for the transparency of contract clauses is not contemplated by Article 82 TRLGDCU, which is limited to requiring only that the content of the clauses shall not be “contrary to the requirement of good faith” or “cause a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer and user.” Nor does Article 3 of the UCT Directive require a check on the transparency of contract clauses. Thus, the transparency control in Spanish law is effectively a control of the incorporation of general contract conditions, and not a control over the fairness of the SCT.<sup>66</sup> Indeed, the control of accessibility tackles the issue of fairness more directly than the control of transparency because the former is based on whether the consumer had the opportunity of knowing the content, while the latter is only a posterior analysis of whether the clause is worded clearly or not. Further, even if the wording of the contract term is unclear, it will be ineffective rather than unfair.<sup>67</sup>

In practice, the T.S. adopts the ECJ’s interpretation of the concept of unfairness due to a lack of transparency, which provides that the clarity of the contract language requires the lender to fulfill its affirmative duty of supplying sufficient information for the consumer to appreciate the circumstances related to contract formation.<sup>68</sup> This requirement is grounded in the idea that the test for unfairness should require that consumers understand the economic significance of the contract terms. This is precisely the concept that the T.S. adopts in

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<sup>65</sup> See Orden Sobre Transparencia de las Condiciones Financieras de los préstamos hipotecarios (May 5, 1994) (B.O.E. 1994/112) (on transparency of the financial conditions of mortgage loans or credits) (derogated by Orden EHA/2899/2011, de Transparencia y Protección del cliente de servicios bancarios (Oct. 28, 2011) (B.O.E. 2011/261) (on transparency and protection of bank clients)).

<sup>66</sup> FRANCISCO PERTÍÑEZ VÍLCHEZ, *LAS CLÁUSULAS ABUSIVAS POR UN DEFECTO DE TRANSPARENCIA* (2004).

<sup>67</sup> See Consumer Protection Act art. 10 (B.O.E. 2014, 76) (Spain) (amended to require clarity with the material delivery of the conditions).

<sup>68</sup> See Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt., *supra* note 37; Hans-W. Micklitz & Norbert Reich, *The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)*, 51 C.M.L.R. 771, 771-808 (2014).

determining the lack of transparency: the floor clause is void due to a lack of transparency because such a clause prevents the consumer from understanding the economic significance of the loan. However, the problem is that both transparency and reporting obligations to highlight the economic significance of the contract are for the ECJ, examples of substantive criteria for determining the unfair nature of a clause because they generate imbalance and are contrary to good faith, regardless of the clarity of writing. In other words, the argument of the economic importance of the contract is useful, but then we talk about content control, which is precisely what the T.S. rejects at the beginning of its argument, indicating that the floor clause refers to an essential contract element. In my opinion, it is more useful to start from the fact that floor clauses are unfair terms, and avoid the question of transparency because the content control would address the fairness issue in a more direct manner.

#### IV. ON THE EFFECTS OF UNFAIRNESS: NON-REVISION AND FULL RESTITUTION

Another important issue concerns the difference between the way in which the Spanish legislature and the T.S. interpret the effects of unfair terms and the doctrine established by the ECJ. First, until 2013, the TRLGDCU had authorized judges to integrate terms that had been declared unfair. Second, the T.S., in its 9 May, 2013 decision,<sup>69</sup> stated that the law did not require restitution of the amounts paid under a “floor clause” that had been declared unfair due to a lack of transparency. Here, the discussion will focus on these two points: the non-revision of an unfair contract term, and the restitution effect when it is declared unfair.

##### A. Non-revision of an Unfair Contract Term

An even more surprising issue that arises from the transposition of the UCT Directive by the Spanish legislature is that Article 85 of RD 1/2007 allowed Spanish courts to revise unfair clauses. However, as reported in a number of ECJ judgments,<sup>70</sup>

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<sup>69</sup> S.T.S., May 9, 2013 (R.J., No. 1916/2013) (Spain).

<sup>70</sup> Case C-76/10, *Pohotovost’ s. r. o. v. Iveta Korčkovská*, 2010 E.C.R. I-11557.

revision of UCTs by courts is not permissible under Article 6 of the UCT Directive.<sup>71</sup>

In 2014, the Spanish legislature amended the TRLGDCU: L 3/2014, which transposes the 2011 Directive on consumer rights, provides in Article 27 that unfair terms are null and void and cannot be revised by judges: Article 27 amends Article 83 of TRLGDCU. So, judges are not permitted to revise unfair contract terms because the supplier or seller bears the risk of the use of the clause, *i.e.*, the supplier or seller cannot benefit from a partial implementation of the agreement when the clause is unfair.<sup>72</sup>

This subject is currently of great interest because of its effects on default interest clauses. Besides what has been discussed regarding the application of the statutory limit provided in art. 1108 C.C. in the absence of agreement, there is another controversial provision, the DT 21/2013 that appears to permit revision by judges upon finding UCTs. DT 21/2013, which amends Article 114 LH, grants the court clerk or notary the power to authorize the creditor to recalculate interest if the clerk or notary finds that the default interest clause exceeds the statutory limit in C.C. This rule, the constitutionality of which has been questioned,<sup>73</sup> seems to permit the revision of a term that is no longer

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<sup>71</sup> See, e.g., Case C-618/10, Banco Español de Crédito SA v. Joaquín Calderón Camino, 2012 EUR-Lex CELEX Lexis 4274 (June 14, 2012). “Article 6(1) of Directive 93/13 cannot be understood as allowing the national court, in the case where it finds that there is an unfair term in a contract concluded between a seller or supplier and a consumer, to revise the content of that term instead of merely setting aside its application to the consumer.” *Id.* at ¶ 71. In addition, it is for the court to ascertain what which national rules are applicable to the dispute and to take the whole body of domestic law into consideration and apply the interpretative methods recognized by domestic law, with a view to ensuring that Article 6(1) of Directive 93/13 is fully effective and achieves an outcome consistent with the objective pursued by it. *Id.* at ¶ 72. See also Case C-282/10, Dominguez v. Centre Informatique du Centre Ouest Atlantique, 2012 EUR-Lex CELEX LEXIS 4658, ¶ 27 (January 24, 2012). The answer to the second question is that Article 6(1) of Directive 93/13 must be interpreted as precluding legislation of a Member State, such as Article 83 of Legislative Decree 1/2007, which allows a national court, if it declares void an unfair term in a contract concluded between a seller or supplier and a consumer, to modify that contract by revising the content of that term. Banco Español de Crédito v. Joaquín Calderón Camino, 2012 EUR-Lex CELEX LEXIS 4274.

<sup>72</sup> See Micklitz & Reich, *supra* note 68, at 793.

<sup>73</sup> Spain’s Constitutional Court has admitted application 4985-2013,

permitted under Article 83 TRLGDCU. If the interest rate in the SCT exceeds the statutory maximum, its unfairness can be assessed by the court or the debtor can make the corresponding allegation so the interest rate is not applied.

#### B. Full Restitution

The unfairness of a term might imply that the debtor has paid more than what he should have been paid, so he is entitled to restitution in accordance with the regulations of each Member State. Restitution is clearly recognized by the ECJ.<sup>74</sup> The T.S., however, has held that the annulment of floor clauses is not retroactive, so restitution is not warranted.<sup>75</sup> Yet, Article 1303 C.C.<sup>76</sup> provides that the nullity involves recovery of benefits and that it acts *ex tunc*. Besides this rather unusual ruling—or “invention”—of non-retroactive annulment, the T.S.’s holding in judgement 9 May, 2013 has no legal basis.<sup>77</sup> The T.S. judgement is presenting four arguments: First, the existence of rules that do not involve retroactivity in case of annulment, but it is clear that in the case of unfair terms, there is no reason to deviate from the general system. Second, the lack of transparency does not entail annulment because the clause could be lawful. However, the reasoning for this argument is clearly circular because the term is either unfair for lack of transparency as held by the T.S., or the term is unfair but does not lack transparency, in which case the law permits annulment. Third, judges may make a retroactive revision. However, this possibility was removed by the amendment of Art. 83 TRLGDCU, which was promulgated after the T.S. judgment.<sup>78</sup>

Finally, the only argument of any weight, although not a legal argument, is the “risk of serious difficulties in the economic public

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presented by more than fifty members of parliament from the Socialist Group, against this precept. Also the judge in the Avilés court of first instance (n° 7) has presented a claim of unconstitutionality.

<sup>74</sup> Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt., *supra* note 37; Case C-397/11, Joros v. Aegon, 2013 EUR-Lex CELEX LEXIS 2540 (July 18, 2013).

<sup>75</sup> S.T.S., May 9, 2013 (R.J., No. 1916/2013) (Spain).

<sup>76</sup> C.C. art. 1303 (Spain).

<sup>77</sup> For an impeccable analysis, *see* Alonso Perez, *supra* note 41, at 170.

<sup>78</sup> TRLGDCU art. 83 (B.O.E. 2007, 287).

order.”<sup>79</sup> So, the T.S. permitted revision of the amount of the execution, but did not allow recovery of the amounts unduly paid.

#### V. EXPLORING THE RESULTS OF UNFAIRNESS CRITERIA IN MORTGAGE FORECLOSURE PROCEEDINGS

The most significant consequence of *Aziz* is the promulgation of Act 1/2013 to reform mortgage foreclosure proceedings. Indeed, besides the unfair nature of certain clauses, *Aziz* holds that the mortgage foreclosure process, by not permitting the control of unfair terms, is inconsistent with the principle of effectiveness in the UCT Directive.<sup>80</sup> *Aziz* also points out that the rules of Member States contradict those of the Community if they do not provide for the possibility of controlling unfair terms in foreclosure proceedings, or if these proceedings cannot be suspended providing interim relief, if the unfair nature of these terms is discussed in a declaratory judgment.<sup>81</sup> Although the law regulates the effects of an unfair contract term in these proceedings, the legislation on unfair terms remains the same: the reforms have led to the redrafting of the Mortgage Act (Article 129) in those cases in which the foreclosure is made extrajudicially before a notary. In these cases, the notary has control of the unfair terms and has the authority to suspend the sale of the mortgaged property if a claim on the UCT has been filed.<sup>82</sup>

For practical purposes, greater importance should be attached to the amendments to the Code of Civil Procedure, which are widely used by lawyers to identify the effect of suspending foreclosure proceedings, although the suspension only delays the loss of the mortgagor’s house as he is unable to repay the loan.<sup>83</sup> Two amendments have been made to the Code of Civil Procedure. First, the Code directly foresees an avenue for controlling the terms by the

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<sup>79</sup> S.T.S., May 9, 2013 (R.J., No. 1916/2013, ¶ 293) (Spain).

<sup>80</sup> See Case C-415/11, Mohamed Aziz v. Catalunyaixa, 2013 EUR-Lex CELEX LEXIS 191 (Mar. 14, 2013)

<sup>81</sup> *Id.*

<sup>82</sup> See Mortgage Act art. 129 (B.O.E. 1946, 58) (Spain).

<sup>83</sup> Andres Dominguez Luelmo, *La STJUE de 14 de Marzo De 2013: Dificultades de Interpretación y aplicación por los Tribunales*, 5 REVISTA CESCO DE DERECHO DE CONSUMO 5 (2013).



judge with a pre-hearing process,<sup>84</sup> the need for which has been called into question.<sup>85</sup> The pre-hearing process is resolved via a judicial writ in which the decision is made as to whether to proceed with the foreclosure as presented given the absence of any unfair terms; or, if unfair terms are thought to exist, foreclosure can be denied if the unfair term is the basis for the foreclosure or to reach an agreement, but for a smaller amount, if the term only affects the amount.<sup>86</sup>

Second, a procedural step was introduced to enable the debtor to invoke the unfairness of a term, which is a direct consequence of *Aziz*; the possibility of objecting to foreclosure because of the existence of an unfair term in the loan agreement.<sup>87</sup> These proceedings (*incidente de oposición*) only permit an allegation of the unfairness of a term that either allows the proceedings to be stayed, or for the amount due to be modified, while all other remedies must be sought in declaratory proceedings.<sup>88</sup> If the judge finds the clause to be fair, the foreclosure proceedings continue; otherwise, the judge must either dismiss the proceedings on grounds that the term forms the basis of the foreclosure or continue the proceeding for a smaller amount of money.<sup>89</sup> The first draft of this *incidente de oposición* only allows the bank to appeal against the writ, which is the subject of the recent judgment of the ECJ of 17 July 2014.<sup>90</sup> The response of the Spanish legislature, in this case, has been nothing short of instantaneous: RD Law

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<sup>84</sup> L.E. Civ., art. 552.1, 681.1 (Spain).

<sup>85</sup> Alberto Lafuente Torralba, *El Control de las Cláusulas Abusivas en la Ejecución Hipotecaria: Luces y Sombras de la Regulación Legal*, in *VIVIENDA Y CRISIS ECONÓMICA* 232 (María Teresa Alonso Perez ed., 2014).

<sup>86</sup> L.E. Civ., *supra* note 42, art. 561.1.3, 695.3.

<sup>87</sup> According to Carrasco Perera a coherent solution would be to allow the judge to arbitrate and then to open contentious proceedings, but not to duplicate the routes available for controlling unfairness. See ANGEL FRANCISCO CARRASCO PERERA, CENTRO DE ESTUDIOS DE CONSUMO, LA LEY 1/2013, DE 14 DE MAYO, DE REFORMA HIPOTECARIA Y LA ARTICULACIÓN PROCESAL DEL CONTROL SOBRE CLÁUSULAS ABUSIVAS EN LA EJECUCIÓN HIPOTECARIA (2013).

<sup>88</sup> L.E. Civ. art. 557.1.7, 695.1.4 (Spain).

<sup>89</sup> *Id.* at art. 695.3.

<sup>90</sup> Case C-169/14, Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA (July 17, 2014), available at <http://curia.europa.eu/juris/liste.jsf?td=ALL&language=en&jur=C,T,F&num=C-169/14>.

11/2014, of 5 September, amending Art. 695 Code of Civil Procedure, allows both parties the right of appeal.<sup>91</sup>

Thus, both in the judge's assessment of unfairness and the *incidente de oposición*, the possibility of avoiding the foreclosure process by analysing the unfairness of the contract terms so far is discrete. Indeed, the appreciation of the early maturity clause is the basis of this *incidente de oposición*, because if the clause is declared invalid, the debt is not due and cannot be executed; however, this SCT can hardly be regarded as unfair. The unfairness of a unilateral declaration of a debt clause suspends foreclosure, because the debt would have no liquidity and cannot be executed. Moreover, neither the unfairness of the default interest clause nor the "floor clause" permits proceedings to be suspended. The unfairness of such clauses only results in modifications to the amount due, and in the latter case, involving only very small amounts relative to the sum for which foreclosure is executed, as occurred in *Aziz*.

Moreover, the criteria of unfairness provided by the ECJ can be used to determine whether a clause is unfair in declaratory proceedings. In addition, *Aziz* focused on the assumption that, after initiating foreclosure proceedings—and without the legal means to analyze the fairness—the debtor can initiate declaratory proceedings concerning the existence of unfair terms that lack suspensory effect of the foreclosure proceedings. The bottom line is that the judge in declaratory proceedings could grant interim relief<sup>92</sup>—the staying of those enforcement proceedings and this possibility was explicitly accepted by the ECJ<sup>93</sup>. However, the Spanish legislature has not addressed this issue, so the possibility of a suspensory effect in the foreclosure proceeding continues to be of uncertain application given the rigidity of the precepts that govern the enforcement process. This is unfortunate because declaratory proceedings are a better forum for discussing the scope of an unfair term than foreclosure proceedings.

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<sup>91</sup> Urgent Insolvency Matters (B.O.E. 2014, 217) (Spain).

<sup>92</sup> See Case C-415/11, Mohamed Aziz v. CatalunyaCaixa, 2013 EUR-Lex CELEX LEXIS 191 (Mar. 14, 2013).

<sup>93</sup> See *id.* at ¶ 77.

## CONCLUSION

The legal developments following *Aziz* on the control of unfair SCTs have been somewhat limited. However, these developments highlight the difference between European consumer protection law and domestic procedural law with regard to enforcement proceedings and have given grounds for challenging the legal system and some lessons are to be learned:

First, in *Aziz*, a consumer-friendly interpretation has been given to the UCT Directive which has led to the development of substantive criteria for ascertaining unfairness in three SCT that almost every housing mortgage loan has in Spain: the early maturity of the loan, the unilateral declaration of the debt and the default interest rate.

Second, coming from *Aziz*, various points at which the Spanish transposition of the UCT Directive needs to be revised have been identified: On the one hand, the non-revision of the unfair clause by the judge has been finally stayed by an amending of art. 83 TRLGDCU, but it still remains in the foreclosure proceedings by the means of DT 2 Act 1/2013. That shows how the Spanish legislature has not understood the *Aziz* doctrine. On the other hand, the ECJ opts for a full restitution when a clause is deemed unfair, nevertheless that has not been the case in the two Spanish T.S. judgements referring to a floor clause considered unfair by lack of transparency.

Third, the possibility of controlling UCTs in mortgage foreclosure proceedings has not become a reality. Even if *Aziz* states that a way of controlling fairness should be granted in the foreclosure proceedings, it is true that the clauses abovementioned have no deep impact on the possibility of staying the foreclosure, and in some cases—disproportioned default rate—are only able to low the amount of the debt.

In short, the problem of defaulting on mortgage loan repayments is not strictly an issue of controlling UCTs, and consumer protection provides no more than indirect tools to stay the mortgage foreclosure. Given that many mortgagors find themselves unable to make their loan payments—and thus at risk of losing their homes—shifting attention to UCT legislation has been helpful in seeking a stay

on foreclosure proceedings and the ECJ judgements have questioned the Spanish procedural law in mortgage foreclosures. Yet, problems still exist in areas such as the over-indebtedness of consumers (a question that the Spanish legislator has largely ignored); weak Spanish legislation protecting consumer rights with regard to financial products and the role of the Bank of Spain as regulator of the sector; and mortgage foreclosure regulations that provide the banks with many facilities of recovery while lenders may fail to clear their debt if the value of their home does not cover the total amount owed. Deeper research in these three mentioned areas is needed to find a legal solution to unpaid housing mortgages as a whole.