Judgment no. 367/2016 of 3 June 2016 (CIP 2121/2014)

'Transparency control' does not apply where the acceptor in a pre-formulated standard ('adhesion') contract does not qualify as a consumer

The Civil Division of the Supreme Court, in plenary session, has decided to not uphold the 'cassation' appeal lodged by the claimant-respondent against the judgment made on statutory appeal no. 93/2014 by the A Coruña *Audiencia Provincial* (Fourth Chamber) of 29 May 2014.

The claimant — who had entered into a loan agreement secured by a mortgage to finance the acquisition of premises to open a pharmacy — brought a claim against the lending institution seeking the annulment of an interest rate floor clause (*cláusula suelo*) that had not been individually negotiated.

The court at first instance partially upheld the claim and ordered that said disputed clause be struck out from the agreement between the parties.

Subsequently, the A Coruña Provincial Court upheld the lender's appeal after affirming that the claimant was not a consumer and that the above-mentioned clause was a standard term of the agreement. The appellate court was of the opinion that the information provided to the borrower by the lender was sufficient, that the clause was not illegible, ambiguous or unintelligible, and that what is known as the 'second transparency control' only applied to consumer contracts.

The legal question raised in the appeal of last resort against the provincial court of appeal's judgment is whether the standard terms included in agreements with non-consumer acceptors can also be the subject of the second (or qualified) transparency control.

The judgment under review, reported by Mr. Pedro José Vela Torres, recalls that the transparency control entails that even if grammatically intelligible and written with legible characters, no clause may be used that may mean an abrupt alteration of the subject matter of the agreement or of the adequacy of the price as against the product which could go unnoticed by the average acceptor; that is, which could alter the subjective adequacy of the price as against the product, as viewed by the consumer having regard to the circumstances existing at the time of contracting, not the objective adequacy of the price as against the product, which, generally speaking, cannot be controlled by a judge.

The judgment also highlights that such transparency control, different from a mere control over inclusion, is reserved in EU and national legislation, and therefore, in the case law of the Court of Justice of the European Union and of the Supreme Court, to the standard terms and conditions included in agreements concluded with consumers, as expressly provided by Directive 1993/13/CEE and the Standard Terms and Conditions of Contracts Act (*Ley de Condiciones Generales de la Contratación*). And it has emphasized in several judgments that article 4(2) of the Directive relates such transparency to the assessment of the unfair nature of the clause, since the lack of transparency brings a significant imbalance to the detriment of the consumer, consisting in the impossibility of comparing the different offers existing in the market and of having, according to whether the individual takes out, from amongst those offered, one or another type of loan from one or another financial institution,

a true representation of the economic impact of obtaining the product that is the subject matter of the agreement.

And it concludes that it is precisely this connection between transparency and unfairness that prevents the transparency control in agreements where the acceptor does not qualify as a consumer. Neither the EU nor the Spanish legislature have taken the step of offering special protection to non-consumer acceptors, beyond the referral to general civil and commercial legislation in respect of the requirement of good faith and fair adequacy to avoid situations of contractual unfairness. And it does not lie with the courts to create a *tertium genus* that has not been laid down legislatively, since it does not involve a gap that must be filled by way of analogy, but a legislative option that, in respect of standard contracts, only distinguishes between consumers and non-consumers.

After reaching the above conclusions, the Supreme Court examines the case taking into consideration the referral, regarding contracts between sellers or suppliers, by the explanatory notes to the Standard Terms and Conditions of Contracts Act to the general contractual rules and regulations and by our case law to the general legal regime of negotiated contracts, and that articles 1258 of the Civil Code and 57 of the Code of Commerce state that contracts bind in respect of all consequences that, according to their nature, comply with the requirements of good faith, a general principle that is capable of expunging certain clauses from a contract, at the very least those that involve an imbalance in the contractual position of the acceptor, to the extent that seeking to take advantage of the advance drafting, imposition and non-negotiation of clauses that are detrimental to the acceptor may be contrary to good faith.

As in this case it has not been disputed that the clause passes the inclusion control in terms of grammatical intelligibility, and the appealed judgement held as facts as found that there had been negotiations between the parties, that the lender was informed of the floor clause and that the lender was advised as to its functioning and consequences – findings of fact that must serve as starting point given that no procedural infringement appeal was lodged –, the Supreme Court concludes that it cannot be stated that there was an imbalance or abuse of the contractual position by the lender, nor that the latter's conduct was contrary to that provided in articles 1256 and 1258 of the Civil Code and 57 of the Code of Commerce.