

Under certain conditions, the enforcement judge is obliged to examine the unfairness of a clause ex officio, even in the presence of a res judicata decision. (Ruling n° 385 - 21-14.540)

13/04/2023



Ruling No. 385

**Partial quashing**

FRENCH REPUBLIC

ON BEHALF OF THE FRENCH PEOPLE

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## **RULING OF THE SECOND CIVIL CHAMBER OF THE *COUR DE CASSATION* (COURT OF CASSATION) OF 13 APRIL 2023**

Mr [B] [M], domiciled at [Address 2], lodged appeal No. P 21-14.540 against the ruling delivered on 7 January 2021 by the *cour d'appel* (Court of Appeal, Versailles, 16th Chamber) in the dispute between himself and BNP Paribas Personal Finance, a public limited company, whose registered office is [Address 1], respondent in the quashing.

The appellant bases his appeal on two grounds of quashing.

The case file has been sent to the Prosecutor-General.

On the report of Ms Latreille, judge-referee, the observations of Ms Laurent Goldman, lawyer of Mr [M], of SCP Rocheteau, Uzan-Sarano and Goulet, lawyer of BNP Paribas Personal Finance, and the advisory opinion of Mr Adida-Canac, Advocate-General, after debate in the public hearing of 7 March 2023, attended by Ms Martinel, elder judge acting as president, Ms Latreille, reporting judge-referee, Ms Durin-Karsenty, Ms Vendryes, Mr

Waguet, Ms Caillard, judges, Ms Jollec, Ms Bohnert, Mr Cardini, Ms Bonnet, judge-referees, Mr Adida Canac, Advocate-General, and Ms Thomas, Chamber Registrar,

the Second Civil Chamber of the *Cour de cassation* (Court of Cassation), composed, pursuant to Article R. 431-5 of the Judicial Code, of the abovementioned president and judges, after having deliberated in accordance with the law, has delivered the present ruling.

### **ACCOUNT OF THE DISPUTE**

#### **Facts and procedure**

1. According to the ruling under appeal (Versailles, 7 January 2021), on the basis of a notarial loan instrument of 25 June 2008, with the Swiss franc as the account currency and the euro as the payment currency, BNP Paribas Personal Finance (the bank) issued a seizure order to Mr [M] concerning the immovable property for which the loan was granted.
2. By procedural judgment of 10 July 2014, an enforcement judge set the amount of the prosecutor's claim at a certain sum and ordered the forced sale.
3. After having received an amount on 19 October 2015 following the sale of the property, the bank had a garnishment order served on Mr [M] on 4 September 2018 for payment of the balance of the loan, a measure which Mr [M] challenged before an enforcement judge.

### **PLEA**

#### **On the second plea**

#### **Statement of plea**

12. Mr [M] complains that the ruling dismissed his claims and stated that the garnishment order served on him as requested by the bank on 4 September 2018 will have full effect and will amount to EUR 39,459.82 in principal, together with interest, whereas, "the national court is obliged to examine of its own motion the unfair nature of a contractual clause as soon as it has the legal and factual elements necessary for said purpose and that, where it considers such a clause to be unfair, it will not apply it, unless the consumer opposes it; that, although it resulted from the matters of fact and law debated that, according to the disputed contract, the monthly instalments were likely to increase without limit during the last five years, the *cour d'appel* (Court of Appeal), which, notwithstanding the absence of a cross-appeal on the matter, refrained from investigating *ex officio*, in particular, whether the exchange risk was borne exclusively by the borrowers and whether, consequently, the disputed clause had the purpose or effect of creating a significant imbalance between the rights and obligations of the parties to the contract, to the detriment of the consumers, infringed Article L. L. 132-1, which became Articles L. 212-1 and L. 241-1 of the consumer protection code."

## STATEMENT OF REASONS

### Court's response

Admissibility of the plea, contested by the defence

13. The bank disputes the admissibility of the plea. It maintains that it is incompatible with the thesis argued by Mr [M] before the *cour d'appel* (Court of Appeal), according to which the proceedings were not based on the notarial loan contract but on a judgment having the authority of *res judicata*, having replaced the contract.
14. However, insofar as it invokes the obligation for the court to examine of its own motion the unfair nature of a contractual clause, the plea came from the ruling under appeal.
15. The plea is, therefore, admissible.

Merits of the plea

In view of articles 7(1) of directive 93/13/EEC of 5 April 1993 on unfair clauses in consumer contracts, L. 132-1, paragraph 1, which became L. 212-1, paragraph 1 of the consumer protection code:

16. Under the first of these texts, Member States shall ensure that, in the interest of consumers as well as the competing professionals, there are adequate and effective means in place to put an end to the use of unfair clauses in contracts by and between consumers and professionals.
17. Under the second of these texts, in contracts signed by and between professionals and non-professionals or consumers, clauses which have the purpose or effect of creating a significant imbalance between the rights and obligations of the parties to the contract to the detriment of the non-professional or the consumer are unfair and deemed not written. The assessment of the unfair nature of the terms shall not concern the definition of the main object of the contract or the appropriateness of the price or remuneration for the goods sold or the service offered, provided that the terms are written in a clear and comprehensible manner.
18. It is the responsibility of the national court to examine of its own motion whether, in the light of the criteria laid down in the decisions of the Court of Justice of the European Union (CJEU), the clauses included in contracts signed by and between professionals and non-professionals or consumers are unfair.

19. The plea leads the chamber to question the role of the enforcement judge in relation to unfair clauses.
20. The Court of Justice of the European Union has ruled that the national court is obliged to examine of its own motion the unfair nature of a contractual clause when it has the legal and factual elements necessary to do so and that, where it considers such a clause to be unfair, it will not apply it, unless the consumer opposes it (CJEU, ruling of 4 June 2009, Pannon, C-243/08).
21. Then, the Court of Justice of the European Union (CJEU) has ruled that if, in the course of a previous examination of a disputed contract which led to the adoption of a decision having the authority of *res judicata*, the national court has limited itself to examining, of its own motion, in the light of Directive 93/13, only one or some of the clauses of said contract, said directive requires a national court duly seised by the consumer to assess the potentially unfair nature of the other clauses of said contract, at the request of the parties or *ex officio*, provided that it has the legal and factual elements necessary for said purpose (CJEU, ruling of 26 January 2017, Banco Primus, C-21/14).
22. However, the Court of Justice of the European Union has clarified that duty as binding on the national court, holding that Articles 6(1) and 7(1) of Directive 93/13 must be interpreted as not precluding national legislation that does not authorise a national court, acting on its own motion or at the consumer's request, to examine the potentially unfair nature of contractual clauses when the mortgage guarantee has been provided, the mortgaged property sold and the property rights in respect of that property transferred to a third party, on condition that the consumer whose property has been sold who is the subject of mortgage enforcement proceedings may assert his rights in subsequent proceedings with a view to obtaining compensation, under that directive, for the financial consequences resulting from the application of unfair clauses (CJEU, ruling of 17 May 2022, C-600/19, Ibercaja Banco).
23. It follows from the above that, when a dispute relating to a claim whose recovery is pursued on the basis of a writ of enforcement relating to a contract is brought before the enforcement court, said court is obliged, even in the presence of a previous decision having the authority of *res judicata* on the amount of the claim, except where it is apparent from the entirety of the decision having the authority of *res judicata* that the court has carried out said examination, and provided that it has the legal and factual elements necessary for said purpose, to examine of its own motion whether or not the clauses included in the contract signed by and between the professional and the non-professional or consumer are unfair.
24. However, in relation to a loan agreement denominated in a foreign currency, by ruling of 10 June 2021 (C-776/19 to C-782/19), the Court of Justice of the European Union stated that:
  - Article 4(2) of Directive 93/13 must be interpreted as meaning that, in the context of a loan agreement denominated in a foreign currency, the requirement of transparency of terms of that agreement, which provide that the foreign currency is the account currency and the euro the settlement currency and which have the effect that the foreign exchange risk is borne by the borrower, is satisfied where the seller or supplier has provided the consumer with sufficient and accurate information to enable the average consumer, who is reasonably well informed and reasonably observant and circumspect, to understand the specific functioning of the financial mechanism in question and thus to evaluate the risk of potentially significant adverse economic consequences of such terms on his or her financial obligations throughout the term of the agreement;
  - Article 3(1) of Directive 93/13 must be interpreted as meaning that terms of a loan agreement which provide that the foreign currency is the account currency and the euro the settlement currency and which have the effect that the foreign exchange risk, without being subject to an upper limit, is borne by the borrower, are liable to cause a significant imbalance in the parties' rights and obligations arising under that agreement, to the detriment of the consumer, where the seller or supplier could not reasonably expect, in compliance with the requirement of transparency in relation to the consumer, that the consumer would have agreed, in individual contract negotiations, to a disproportionate foreign exchange risk as a result of those terms.

25. On the basis of this ruling by the Court of Justice of the European Union, it was in this regard that the *Cour de cassation* (Court of Cassation) quashed the ruling of a *cour d'appel* (Court of Appeal) which, ruling in a dispute concerning a loan contract denominated in Swiss francs and repayable in euros, ruled that the currency clause was not unfair (1st Civil Chamber, 20 April 2022, appeal No. 19-11.600).
26. After having rejected the preliminary objection of nullity of the seizure of the award and the dismissal made for the statute of limitations applicable to the claim, the ruling, without examining the unfair nature of the terms of the loan denominated in foreign currencies, holds that the seizure of the award is justified in its quantum.
27. In so ruling, the *cour d'appel* (Court of Appeal) violated the aforementioned texts, whereas, since it had the necessary legal and factual elements for the purpose at hand, it was responsible for examining of its own motion whether or not the terms of the notarial loan denominated in a foreign currency, the basis of the garnishment order, were unfair, as defined in Article L. 132-1 of the consumer protection code, in its then-applicable wording.

## **OPERATIVE PART OF THE RULING**

### **ON THESE GROUNDS, the Court:**

QUASHES AND SETS ASIDE, except insofar as it confirmed the judgment and dismissed Mr [M]'s claim for application of the statute of limitations vis-à-vis the debt, the ruling handed down for the parties by the *cour d'appel* (Court of Appeal) of Versailles of 7 January 2021;

Returns, except on this point, the case and the parties to the status that existed prior to said ruling and refers them to the *cour d'appel* (Court of Appeal) of Paris, otherwise composed;

Orders BNP Paribas Personal Finance to pay the costs;

In application of Article 700 of the Code of Civil Procedure, dismisses the application made by the company BNP Paribas Personal Finance and orders it to pay Mr [M] the sum of EUR 3,000;

At the request of the Prosecutor-General of the *Cour de cassation* (Court of Cassation), this ruling shall be forwarded for transcription in the margin or at the bottom of the partially quashed ruling;

Thus decided by the second civil chamber of the *Cour de cassation* (Court of Cassation) and pronounced by the president in the public hearing of the thirteenth day of the month of April of the year two thousand and twenty-three

**President : Ms MARTINEL, elder judge acting as president**

**Advocate-general : Mr Adida-Canac**

**Reporting Judge-referee : Ms Durin-Karsenty**

**Lawyer(s) : Ms Laurent Goldman – SCP Rocheteau, Uzan-Sarano and Goulet**

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Institution judiciaire

Translated rulings