Unfair Terms in Banking and Financial Contracts

Edited by

DANNY BUSCH AND MATTHIAS LEHMANN

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

First Edition published in 2023

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data

Data available

Library of Congress Control Number: 2023943537

ISBN 978-0-19-286659-2

DOI: 10.1093/law/9780192866592.001.0001

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

6

Spain

Francisco de Elizalde and Sara Sánchez

I INTRODUCTION

1 Socio/Economic Background of the Country

Spain grew without interruption for fourteen years until 2007.[1] The period of economic expansion as from 2000 featured a sharp rise in private indebtedness of both families—with an

[1] Banco de España, 'Informe sobre la crisis financiera y bancaria en España, 2008–2014 ' (May 2017) 27 ff <https://www.bde.es/f/webbde/GAP/Secciones/SalaPrensa/InformacionInteres/ReestructuracionSectorFinanciero/Arc/Fic/InformeCrisis_Completo_web.pdf/> accessed 26 June 2023 (hereafter Banco de España).

increase in the proportion of real estate loans following the surge in demand for housing—and non-financial enterprises, especially in the real estate sector. This went hand in hand with the parallel higher exposure of financial institutions to real estate risks.

The increase in demand for housing was due to several factors, including expected future income and the ease in obtaining credit, with favourable interest rates and generous maturity dates. Shortly after, the supply of housing also increased, thanks to the availability of credit to real estate companies and the increase of urban land, amongst other reasons. However, even with a larger supply of real estate, there was a major surge in housing prices. At the end of the period, all the hallmarks of a speculative bubble were present.[2]

At the same time, the amount of credit granted to families and non-financial enterprises also grew substantially,[3] especially through credit offered by saving banks.[4] Encouraged by the increased demand and positive housing price trends, the mortgage market boomed. In turn, financial institutions used their client deposits to provide credit and resorted to the issue of financial instruments in capital markets, particularly securitization.[5]

In 2008, the economic imbalances accumulated during the expansion—private indebtedness, housing prices, real estate sector exposure, and others—that were common in many countries became present in the economy. One distinctive characteristic of the Spanish crisis was, however, the severe impact of unemployment rates, which reached 21 per cent in 2011 and 26 per cent in 2013.[6] The demand and price of housing dropped and the number of defaults increased, especially in loans granted by saving banks, which had a higher exposure to the real estate sector.[7]

In this context, it is hardly surprising that there was a parallel surge in litigation regarding financial contracts entered into with credit institutions. Clients in default or in financial difficulties, some of whom risked losing their houses, challenged certain clauses used in contracts by financial institutions during the economic expansion period. The claim of unfair clauses pursuant to Directive 93/13/EEC (Unfair Terms Directive, UTD) was a central issue in such claims.[8] Given the importance of the mortgage market in Spain, litigation notably revolved around clauses included in mortgage loans.

2 Importance of Unfair Terms Control

Spanish law establishes a regime of control of standard terms in consumer contracts, which differs from the more generally applicable rules of the Spanish Civil Code (SCC). The contracting procedure, which consists in the provision of the terms by the professional, instead of an individual negotiation, explains why the general regime differs from the SCC.[9]

[2] ibid 32.
[3] ibid 36.
[4] ibid 37.
[5] ibid, 42.
[6] See Instituto Nacional de Estadística <https://www.ine.es/prensa/epa_tabla.htm> accessed 16 January 2022.
[7] Banco de España (n 1) 85, 90.
[8] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29.
[9] According to the generally applicable Art 1255 Spanish Civil Code (SCC), the only limitations to party autonomy are mandatory law, morality, and public order. Such limits are insufficient in the case of standard terms.

Spanish law controls the incorporation of terms into standard form contracts for both business-to-business (B2B) and business-to-consumer (B2C) contracts. However, the unfairness assessment is restricted to B2C contracts. The Spanish legislators did not go beyond the minimum harmonization benchmarks of the UTD and therefore adopted the theory of abuse of power in the control of standard terms, which justifies the consideration of unfairness due to the weakness of consumers vis-à-vis businesses.[10] We refer to this issue in further detail in Section II 1.

The unfair terms control regime in consumer contracts soon became particularly relevant in Spain in banking and financial contracts. The social and economic context of the last twenty years explains this to a large extent, namely, the period of economic expansion featured, as mentioned in Section I 1, the increase in house prices, and consumer indebtedness in real estate finance. With the financial crisis, the Spanish market experienced not only a drop in such prices but also unusually high—as compared to other jurisdictions—unemployment rates, which led to an increase in delays and default, and a surge in the number of evictions. In a context of social tensions, contracts with credit institutions came under scrutiny. This gave rise to a consequent boom in litigation relating to standard terms in banking contracts—especially mortgage contracts—entered into during the economic expansion period.

3 Description of the General Approach

In this chapter, we address the main challenges that Spanish courts have faced in recent years in the application of the unfair contract terms regime to consumers in financial contracts. As mentioned above, the importance of the mortgage market meant that a significant amount of litigation related to mortgage contracts.

Initially, many consumer disputes focused on floor clauses. In the Spanish mortgage loan market, it was very common for contracts to stipulate variable interest rates with a minimum fixed annual rate (known as the floor clause). When the EURIBOR, the most common index on which clauses were based, plummeted due to the financial crisis, clients could not benefit from the decrease and the Spanish courts faced a first wave of claims against floor clauses.

A different generation of claims referred to the so-called IRPH clauses. IRPH is an acronym for *Índice de Referencia de Préstamos Hipotecarios* (Reference Index for Mortgage Loans), an average interest rate in mortgage loan contracts in Spain that the Spanish Central Bank (*Banco de España*) publishes regularly in the Official Gazette (*Boletín Oficial del Estado*—BOE).

In addition, consumers were very active in challenging other clauses in banking contracts, such as early repayment clauses and taxes, expenses, and arrangement fee clauses. We refer to these clauses in this chapter. Other clauses are mentioned incidentally, such as default interest

[10] Hans-Wolfgang Micklitz, 'Some Reflections on Cassis de Dijon and the Control of Unfair Contract Terms in Consumer Contracts' in Hugh Collins (ed), *Standard Contract Terms in Europe. A Basis for and a Challenge to European Contract Law* (Kluwer 2008) 33–34.

rate clauses. For the sake of conciseness, we have left some contracts out of the scope of this contribution, for example multi-currency loans, which are also relevant in Spanish litigation.[11]

Moreover, Spanish courts have been very active in filing requests for preliminary rulings in relation to such clauses to the Court of Justice of the European Union (CJEU). Following CJEU case law, Spanish courts have modified the interpretation of certain concepts of Spanish law (eg consequences of invalidity of standard terms, see Section V). On some occasions, the CJEU interpretation has triggered legislative intervention in key areas, such as the control of unfair clauses in enforcement procedures and the powers of courts to revise a contract due to the invalidity of one of its clauses (see Section VI 1).

II LEGAL BASIS OF UNFAIR TERMS CONTROL

1 Implementation of the Unfair Terms Directive

The UTD has been transposed into Spanish law in Arts 82–91 of the Spanish Consumer Protection Act (SCPA)[12] and in Arts 5 and 7 of the Spanish Standard Contract Terms Act (SSCTA).[13] The former, only applicable to consumers, establishes the basis of the unfair consumer terms regulation in Spain. The concept of an unfair clause and the assessment of such unfairness are regulated in Art 82 SCPA. The legal consequences of an unfair clause are established in Art 83 SCPA. Interestingly, in 2019, legislation introduced a reference to the consequences of a lack of transparency in the same article.[14] As is well known, the UTD does not expressly provide for the legal consequences of a lack of transparency, beyond the rule of interpretation *contra proferentem* in individual actions. We come back to this issue in Section II 2.

Article 4(2) UTD establishes that the unfairness of terms that relate to the main subject matter of the contract and to the adequacy of the price can only be controlled if they are not drafted in plain intelligible language. However, it has not formally been transposed into Spanish law due to a mistake in the parliamentary vote.[15] The Spanish Supreme Court (SSC), however, understands that Art 4(2) UTD has been implicitly transposed and the interpretation of Spanish rules complies with the Directive.[16] Hence, it considers that the article has indeed been implemented into Spanish law and therefore rules out the need to refer to the CJEU for a preliminary ruling on this.[17]

[11] See, eg, Sentencias del Tribunal Supremo (sala 1ª) de 15 November de 2017 (ECLI:ES:TS:2017:3893) and 17 de julio de 2019 (ECLI:ES:TS:2019:2553).

[12] Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias, BOE n. 287 de 30 de noviembre de 2007, Arts 82–91.

[13] Ley 7/1998, de 13 de abril, sobre Condiciones Generales de la Contratación, BOE n. 89 de 14 de abril de 1998.

[14] Ley 5/2019, de 15 de marzo, reguladora de los contratos de crédito inmobiliario, BOE n. 65 de 16 de marzo de 2019 (hereafter Ley 5/2019).

[15] See Sergio Cámara, 'Transparencias, desequilibrios e ineficacias en el régimen de las cláusulas abusivas' (2015) 55 Anales de la Academia Matritense del Notariado 549, 557–58 (hereafter Cámara, 'Transparencias').

[16] Sentencia del Tribunal Supremo (sala 1ª) de 18 de Junio de 2012 (ECLI:ES:TS:2012:5966) and Sentencia del Tribunal Supremo (sala 1ª) de 9 de mayo de 2013 (ECLI:ES:TS:2013:1916, hereafter decision of 9 May 2013). See, however, AG Szpunar, Opinion of 10 September 2019, Case C-125/18 *Marc Gómez del Moral Guasch v Bankia SA*, ECLI:EU:C:2019:695, who claims that this is insufficient, as it is contrary to the principle of legal certainty.

[17] See Sentencia del Tribunal Supremo (sala 1ª) 10 de diciembre de 2021 (ECLI:ES:TS:2020:4068).

The SSCTA, in turn, is applicable to both B2C and B2B contracts in which standard terms, as defined in Art 1 SSCTA, are included. That is, those clauses that have been drafted in advance for several contracts and which have not been individually negotiated by the parties. In relation to the UTD, it only regulates the incorporation of standard terms in contracts and their grammatical or formal transparency (Arts 5 and 7), but not content control, for which it refers to the SCPA.[18] In other words, content control in Spain only exists for B2C standard form contracts. Article 5(5) SSCTA was also modified in 2019 to establish the nullity of intransparent terms, but only in consumer contracts, with the exact same wording as the new Art 83 SCPA.

2 Distinction between Unfair and Intransparent Terms

2.1 Transparency

The incorporation and transparency of contractual terms is regulated by Arts 5 and 7 SSCTA and Art 80 SCPA, for clauses relating to the main subject matter of the contract[19] as well as ancillary terms. Transparency has a twofold dimension: (1) formal transparency, that is, the clause must be in plain language; and (2) substantive transparency. The latter applies to B2C contracts only (see Section III 1 for more details).[20]

The standard to assess substantive transparency in Spanish case law was originally objective, in line with that established by the CJEU as 'the average consumer, who is reasonably well informed and reasonably observant and circumspect'.[21] Thus, for instance, the SSC decision of 9 May 2013 referred to an 'abstract validity parameter', not linked to the defects of consent regime, for example error.[22] Other judgments, however, move away from the objective assessment to consider subjective and personal circumstances, for example whether the specific consumer entering into the contract has expertise on that kind of contracts.[23]

In 2021, Spanish legislation introduced the concept of 'vulnerable consumer'. In particular, it has modified Art 60(1) SCPA on pre-contractual information.[24] This may have an impact on the assessment of transparency for those considered 'vulnerable consumers', as it may entail a change in the notion of the 'average consumer'.[25]

[18] Art 8(2) SSCTA.

[19] As defined, eg, in Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid y Asociación de Usuarios de Servicios Bancarios (Ausbanc)* (3 June 2010) ECLI:EU:C:2010:309, para 34, which refers to 'contrat terms that have not been indvidually negotiated and that describe the essential obligations of contracts'. See also C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt* ECLI:EU:C:2014:282, para 49 (hereafter *Kásler*), which adds that they are 'those that lay down the essential obligations of the contract and, as such, characterise it'.

[20] *Kásler* (n 19) para 71. See the distinction, eg, in Sentencia del Tribunal Supremo (sala 1ª) de 24 de marzo de 2015 (ECLI:ES:TS:2015:1279) and 23 de diciembre de 2015 (ECLI:ES:TS:2015:5618, hereafter Decision of 23 December 2015).

[21] *Kásler* (n 19) para 74.

[22] ibid 210.

[23] See Sentencias del Tribunal Supremo (sala 1ª) de 9 de marzo de 2017 (ECLI:ES:TS:2017:788) and 8 de junio de 2017 (ECLI:ES:TS:2017:2244).

[24] Real Decreto-ley 1/2021, de 19 de enero, de protección de los consumidores y usuarios frente a situaciones de vulnerabilidad social y económica, BOE n. 17 de 20 de enero de 2021.

[25] Sergio Cámara, 'Hacia el carácter abusivo directo de las cláusulas no transparentes' (2021) Revista Jurídica sobre Consumidores y Usuarios, Núm. Especial, I Congreso sobre el principio de transparencia en la contratación predispuesta y su proyección como valor transversal en la sociedad 31–32.

2.2 Unfairness

Unfair clauses, as defined in Art 82 SCPA—with similar wording to Art 6 UTD—are those that are not individually negotiated and, contrary to the requirement of good faith, cause a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer. This should be assessed at the time of the conclusion of the contract, taking into consideration all the surrounding circumstances, other contractual clauses, and the goods/services for which the contract was concluded.[26]

Articles 85–90 SCPA establish a detailed list of terms, which 'in any case' would be unfair.[27] A literal reading of this provision could lead to the conclusion that the SCPA has only created a 'blacklist' of terms, which are necessarily deemed unfair. However, this understanding is heavily contested. A large number of the listed terms require a judicial assessment of their factual and legal background, as a result of which, certain clauses could be declared valid even though listed.[28] Therefore, it seems more accurate to say that the SCPA has both grey and black lists.[29]

A complex issue has been that of the interplay between a lack of transparency and the unfairness of a contractual term that concerns the main subject matter of a contract. Article 4(2) UTD forbids the assessment of unfairness in the case of transparent terms regarding the main subject matter of the contract and the adequacy of the price. On the contrary, when a clause is intransparent, in Spain it was initially uncertain whether it was automatically unfair or if courts should assess its unfairness, which could exist or not.

The SSC originally linked a lack of transparency to unfairness in its case law on floor clauses, for example, in its landmark decision of 9 May 2013 (see Section III 1). The same approach was taken in subsequent decisions on floor clauses.[30] However, the treatment of other main terms, such as IRPH clauses,[31] has been different (see Section III 2). In their regard, the SSC opted for a twofold control: first, courts must determine whether the term is transparent, and if they find that it is intransparent, they must determine second whether it is unfair. This is in line with the interpretation of the CJEU since *Banco Primus*.[32]

In 2019, Spanish legislation amended the relevant legal instruments to establish that intransparent terms in consumer contracts, which are 'to the detriment of the consumer', are null and void. Apparently, this points to a direct link between a lack of transparency and unfairness.[33] However, the SSC has already indicated, *obiter dicta*, that it might keep its current interpretation, which requires a separate assessment of the unfairness of an intransparent term.[34]

[26] Art 82(3) SCPA.

[27] Arts 82(4) et seq SCPA.

[28] eg Art 86(3) SCPA lists as unfair the assignment of the contract to a third party, by the business, only if it is capable of diminishing the rights of the consumer.

[29] Sergio Cámara, 'Artículo 86' in Sergio Cámara Lapuente (ed), *Comentarios a las normas de protección de los consumidores. Texto refundido (RDL 1/2007) y otras leyes y reglamentos vigentes en España y en la Unión Europea* (COLEX 2011) 832–34.

[30] The SSC agrees that this was its approach for floor clauses. See, for all, Sentencia del Tribunal Supremo (sala 1ª) de 12 de noviembre de 2020 (ECLI:ES:TS:2020:3613).

[31] ibid.

[32] Case C-421/14 *Banco Primus SA v Jesús Gutiérrez García* ECLI:EU:C:2017:60 (hereafter *Banco Primus*), para 64.

[33] See the new wording of Art 5(5) SSCTA and Art 83 SCPA introduced by Ley 5/2019 (n 14).

[34] See n 30.

3 Contra proferentem Rule

The only consequence regulated by the UTD of a lack of transparency of a term is the interpretation *contra proferentem*, in other words, when there is a doubt as to the meaning of the term, it shall be interpreted in favour of the consumer (Art 5 UTD). The rule is only relevant in individual actions. Article 5 UTD has been transposed into Spanish law in both Art 6(2) SSTA and Art 80(2) SCPA. It is therefore applicable not only to B2C contracts but also to B2B contracts.

The *contra proferentem* rule in Art 80(2) SCPA is a consequence of the principle of good faith, which was originally formulated in Art 1288 SCC, and therefore is nothing new in Spanish law. The rule, which is only applicable when a term is ambiguous,[35] performs a two-fold function: it balances the contractual relationship by distributing the risk of ambiguity and poses incentives on the *proferentem* to draft clear terms.[36]

III MAIN EXAMPLES OF UNFAIR OR INTRANSPARENT CLAUSES

1 Floor Clauses

Clauses that set a floor limit on variable interest rate loans were common in Spain in the early 2000s. According to the Bank of Spain, in the first decade of this century around 30 per cent of loans contained a floor clause.[37] When the referral indexes plummeted (EURIBOR being the most widely-used) consumers were not able to profit from the decline, against the backdrop of the 2007–08 financial crisis. This was the origin of two sets of actions: firstly, collective actions filed by consumer associations that were aimed at ensuring that the use of floor clauses ceased and, on occasion, were accompanied by actions for redress;[38] and secondly, actions for individual redress of the amounts overpaid due to floor clauses.

The litigation relating to floor clauses has been extensive, which ultimately led to the decision to concentrate cases of B2C mortgage-secured loans (floor clauses and others) into sole-purpose courts.[39] Before that, the SSC delivered several judgments on floor clauses that provoked the intervention of the CJEU and triggered a legislative reaction. Floor clauses awakened the control of unfair terms in Spain.

[35] See Sentencia del Tribunal Supremo (sala 1ª) de 19 de julio de 2016 (ES:TS:2016:3629), among others.

[36] Sentencia del Tribunal Supremo de 13 de marzo de 2019 (ES:TS:2019:751). The application of the *contra proferentem* rule is more common in other kinds of contracts, such as insurance contracts.

[37] Informe del Banco de España sobre determinadas cláusulas presentes en los préstamos hipotecarios, a fin de dar respuesta a la moción aprobada el 23 de septiembre de 2009 por el Pleno del Senado, en la que se instaba al Gobierno a actuar contra las prácticas abusivas que algunas entidades de crédito vienen realizando con sus clientes en relación a la revisión de la cuota de sus hipotecas, BOCG n. 457 de 7 de mayo de 2010.

[38] Significantly, the 'macro claim' that the consumer association ADICAE filed against a plethora of banks. See Sentencia de la Audiencia Provincial de Madrid de 12 de noviembre de 2018 (ES:APM:2018:12842).

[39] Acuerdo de 25 de mayo de 2017, de la Comisión Permanente del Consejo General del Poder Judicial, por el que se atribuye a determinados juzgados, con competencia territorial indicada para cada uno de los casos, para que de manera exclusiva y no excluyente conozcan de la materia relativa a las condiciones generales incluidas en contratos de financiación con garantías reales inmobiliarias cuyo prestatario sea una persona física, BOE n. 126 de 27 de mayo de 2017, which was repeatedly extended.

1.1 The SSC decision of 9 May 2013

The first floor clause case that reached the SSC was filed by a consumer association against three banks, claiming that they ceased using the clause. The SSC judged the case on 9 May 2013.[40]

Prior to an unfairness assessment, the SSC analysed whether floor clauses met the requirements to be incorporated into standard form contracts.[41] It considered that floor clauses were lawful and, moreover, had been used with formal or grammatical transparency, as borrowers had the opportunity to become acquainted with them. The disputed terms thus passed this filter for incorporation.[42]

The SSC then conducted a second level of control, the unfairness test, which is specific to B2C contracts. Article 82(1) SCPA follows Art 3(1) UTD in establishing that a term is unfair if, contrary to good faith, it creates a significant imbalance in the rights and obligations of the parties to the detriment of the consumer.[43] Under Art 4(2) UTD, the unfairness assessment does not cover the essential obligations of the parties, if the term is drafted in 'plain intelligible language'. However, Art 4(2) UTD was not transposed into Spanish law. This could be a valid option for Member States, as the UTD aimed at minimum harmonization only.[44] Extending the unfairness assessment to main terms would provide a better protection to consumers. In *Caja de Ahorros*,[45] the CJEU had even assumed that this was the status quo under Spanish law. In its decision of 9 May 2013, the SSC made it clear that the CJEU's understanding of Spanish law was mistaken. To determine the scope of its control, the SSC clarified that terms which define the subject matter of the contract lie beyond judicial review.

Following that clarification, the SSC moved on to determining that floor clauses define the main subject matter of the contract. Accordingly, they escape an unfairness assessment if they are drafted in 'plain intelligible language' (Art 4(2) UTD). The requirement of transparency has an overarching impact on standard form contracts pursuant to Art 5 UTD and Art 80 SCPA.

In this judgment, the SSC interpreted transparency in a substantive manner, which requires the consumer to be able to understand the economic and legal implications of a term. To achieve this goal, businesses must provide sufficient information to consumers. The SSC relied on the CJEU in *RWE*[46] and on the Commission Report on the implementation of the UTD.[47] However, the precise meaning of substantive transparency was not explicit in *RWE* nor in the previous CJEU decision in *Invitel*.[48] The contours of the concept were marked out in the subsequent case of *Kásler*,[49] and the SSC therefore had little guidance from the CJEU when it defined transparency with a substantive approach.

[40] Decision of 9 May 2013 (n 16).

[41] Arts 5 and 7 SSCTA.

[42] ibid.

[43] Art 82(1) SCPA refers not only to terms but also to practices.

[44] Art 8 UTD.

[45] Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc)* ECLI:EU:C:2010:309, paras 42–43.

[46] Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* ECLI:EU:C:2013:180, paras 44 and 50.

[47] COM (2000) 248 final, 'Report from the Commission on the implementation of Council Directive 93/13/EEC, of 5 April 1993, on Unfair Terms in Consumer Contracts', 17.

[48] Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* ECLI:EU:C:2012:242.

[49] *Kásler* (n 19), paras 71–74.

The SSC applied the transparency test to floor clauses and decided that they were not transparent. A lack of information deprived consumers from an adequate understanding of the legal and economic consequences of the terms. The sanction for intransparent floor clauses was their invalidity. The SSC explored the requirements for the unfairness control, that is, whether they are contrary to good faith and cause a significant imbalance in the rights and obligations of the parties, to the detriment of the consumer (Art 3(1) UTD and Art 82(1) SCPA). However, the sanction for invalidity seems to have been applied as a direct consequence of the lack of transparency, not as a result of controlling the intransparent term with the general unfairness test.[50]

The SSC recognized that, in normal circumstances, restitution should follow the invalidity of floor clauses (Art 1303 SCC). Nevertheless, it claimed grounds of economic public order to deny a 'retroactive' application of the judgment, which would have led to restitution of the amounts overpaid under the unfair term.[51]

1.2 The SSC decision of 25 March 2015

The decision of the SSC to deny restitution was contested in other proceedings. The SSC had the opportunity to qualify its judgment of 9 May 2013, when it was called on to judge an individual action that sought the declaration of invalidity of a floor clause and redress for the amounts overpaid.

In its decision of 25 March 2015,[52] the SSC confirmed that the floor clause was unfair because of the lack of transparency that existed when the contract was formed. The SSC also confirmed the refusal to grant restitution for the amounts overpaid *until* the date on which the court's first judgment on floor clauses, namely, 9 May 2013, was published. However, the SSC declared that the parties were entitled to seek restitution of the amounts that had been paid *as from* the publication of its judgment of 9 May 2013. The court reasoning was based on subjective good faith. Following the decision of 9 May 2013, users of floor clauses could not ignore their invalidity and restitution should therefore be granted.

1.3 The CJEU in Gutiérrez Naranjo

The compatibility of the SSC rulings with EU law was questioned. Lower courts submitted requests for preliminary rulings to the CJEU (Art 267 TFUE), leading to the CJEU judgment in *Gutiérrez Naranjo*.[53]

In this case, the CJEU assessed the decision of the SSC to restrict restitution against the backdrop of Arts 6(1) and 7(1) UTD. According to the former provision, unfair terms are not binding on consumers. The latter provision aims at dissuading businesses from using unfair terms. The CJEU recognized the procedural autonomy of Member States to define the remedies for unfair terms, with the limitations arising from the principles of effectiveness

[50] Cámara, 'Transparencias' (n 15) 563. See also Sentencia del Tribunal Supremo (sala 1ª) de 11 de abril de 2018 (ECLI:ES:TS:2018:1238).

[51] See, on this, the criticisim of Judge Orduña Moreno in Sentencia del Tribunal Supremo (sala 1ª) de 25 de marzo de 2015 (ECLI:ES:TS:2015:1280, hereafter, Decision of 25 March 2015).

[52] Decision of 25 March 2015 (n 51).

[53] Joined Cases C-154, 307, 308/15 *Francisco Gutiérrez Naranjo v Cajasur Banco SAU; Ana María Palacios Martínez v Banco Bilbao Vizcaya Argentaria SA (BBVA) and Banco Popular Español SA v Emilio Irles López and Teresa Torres Andreu* ECLI:EU:C:2016:980 (hereafter *Gutiérrez Naranjo*). See Charlotte Leskinen and Francisco de Elizalde, 'The Control of Terms that Define the Essential Obligations of the Parties under the Unfair Contract Terms Directive' 55 Common Market Law Review 1595 (hereafter Leskinen and de Elizalde 'The Control').

and equivalence of EU law.[54] However, since *Océano*,[55] the CJEU has been particularly active in providing a uniform interpretation of the key concepts of the UTD, including Art 6(1) UTD, that could be seen as an inroad into national procedural autonomy.

In *Gutiérrez Naranjo* the CJEU further defined the consequences of Art 6(1) UTD. It stated that unfair terms, including intransparent terms, are 'in principle' to be treated as never having existed to ensure the effective application of Art 6(1) UTD. A term that is non-binding *ex tunc* cannot have any effect on the consumer. Therefore, 'in principle' the consumer should be restored to the position that would have been held if the term had not existed. In the event of amounts not due, the unfair term obliges the business to reimburse them.[56] National courts cannot limit the non-binding effects of unfair terms, as doing so would affect the dissuasive effect of the UTD (Art 7(1) UTD).[57]

Therefore, the CJEU ordered national courts to disapply the time limitation on the restitution of unfair floor clauses.[58] However, this obligation did not reach cases that had already been decided with the force of *res judicata* (see more on the consequences of unfair term invalidity in Section V).[59]

The SSC rectified its previous decisions on floor clauses and adapted to the interpretation by the CJEU in its judgment of 24 February 2017, which was followed by many others.[60]

1.4 Novation and settlement of floor clauses

The SSC declaration of unfairness of floor clauses, which until *Gutiérrez Naranjo* limited restitution, triggered agreements between banks and consumers whereby floor clauses were modified. A typical agreement would reduce the minimum interest rate due under the floor clause in exchange for a waiver by the consumer to claim restitution of amounts overpaid.

These agreements were challenged in court, mainly on the grounds that a novation is invalid when the original obligation is also null and void, as stated in Art 1208 SCC. The SSC dismissed this argument. In its decision of 11 April 2018,[61] the SSC considered that novation agreements should be treated as settlements, whereby one party waives the right to claim reimbursement in exchange for having the floor clause reduced. On the understanding that consumers can waive existing rights, the SSC decided in favour of the validity of settlement agreements, provided they complied with the requirement of transparency, if not individually negotiated.

The doctrine of the SSC on this matter reached the CJEU and was ruled on in *Ibercaja Banco*.[62] Overall, the CJEU held that the conclusions of the SSC were compatible with

[54] See, beyond this context, Norbert Reich, 'The Principle of Effectiveness and EU Private Law' in Ulf Bernitz, Xavier Groussot, and Felix Schulyok (eds), *General Principles of EU Law and European Private Law* (Wolters Kluwer 2013) 301; Fabrizio Cafaggi and Paola Iamiceli, 'The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions' (2017) 25(3) European Review of Private Law 575.

[55] Case C-240-244/98 *Océano Grupo Editorial SA v. Rocío Murciano Quintero and Salvat Editores SA v José M. Sánchez Alcón Prades, José Luis Copano Badillo, Mohammed Berroane and Emilio Viñas Feliú* ECLI:EU:C:2000:346.

[56] *Gutiérrez Naranjo* (n 53) paras 61–62.

[57] ibid paras 60 and 73.

[58] ibid para 74.

[59] ibid para 68.

[60] Sentencia del Tribunal Supremo (sala 1ª) de 24 de febrero de 2017 (ECLI:ES:TS:2017:477).

[61] Sentencia del Tribunal Supremo (sala 1ª) de 11 de abril de 2018 (ECLI:ES:TS:2018:1238).

[62] Case C-452/18 *XZ v Ibercaja Banco S.A.* ECLI:EU:C:2020:536 (hereafter *Ibercaja Banco*). The CJEU reiterated its reasoning in the Order rendered in Case C-13/19 *Ibercaja Banco S.A. v TJ and UK* ECLI:EU:C:2021:158.

European Union (EU) law. It confirmed that the protection of the UTD is not mandatory for consumers, who may oppose the non-application of an unfair term.[63] This outcome is in line with previous CJEU rulings, such as in *Pannon* and *Banif Plus*.[64] Therefore, the CJEU considered that freely-consented and informed settlements on floor clauses were not incompatible with the 'non-binding' effects of unfair terms (Art 6(1) UTD).[65] For consent to be free and informed, the consumer should be aware of the non-binding nature of the unfair term and of the resulting consequences.[66]

If the settlement contained terms that were not individually negotiated, they could be invalid when tainted by a lack of transparency (Arts 4(2) and 5 UTD).[67] In this respect, the CJEU specified that for transparency to be met, consumers should have received sufficient information from the banking institutions to allow them to calculate the amounts overpaid under the original floor clause[68] and therefore be able to have a full understanding of the waiver. The CJEU further declared that while the waiver of rights under the original contracts is valid, the waiver to take legal action in the future was not.[69]

The SSC incorporated the ruling of the CJEU in *Ibercaja Banco* in two decisions of 5 November 2020.[70] In substance, the status quo on settlement agreements in Spain prior to the intervention of the CJEU remained unaltered.

1.5 Legislative response

The turmoil provoked by litigation on floor clauses led to legislative intervention that successively reacted to relevant court rulings.

In 2015, following the first two decisions of the SSC on floor clauses, they were banned for vulnerable consumers in the existing Code of Good Practices for the Restructuring of Home Equity Debts, to which banks could voluntary adhere.[71] In 2017, after the ruling by the CJEU in *Gutiérrez Naranjo*, banking institutions were required to implement an extrajudicial procedure to decide on the restitution of amounts overpaid under floor clauses.[72] It was not mandatory for consumers to resort to this procedure (see also Section VI 3).[73]

Finally, when implementing the Mortgage Credit Directive[74] into Spanish law in 2019, legislation prohibited floor clauses in contracts concluded after its entry into force.[75]

[63] *Ibercaja Banco* (n 62) para 26.

[64] Case C-243/08 *Pannon GSM Zrt. v Erzsébet Sustikné Győrfi* ECLI:EU:C:2009:350, para 35; Case C-472/11 *Banif Plus Bank Zrt v. Csaba Csipai and Viktória Csipai* ECLI:EU:C:2013:88, para 35.

[65] *Ibercaja Banco* (n 62) para 28.

[66] ibid para 29.

[67] ibid paras 44–46.

[68] ibid para 55.

[69] ibid para 75.

[70] Sentencias del Tribunal Supremo (sala 1ª) de 5 de noviembre de 2020 (ECLI:ES:TS:2020:3549 and ECLI:ES:TS:2020:3593).

[71] Ley 25/2015, de 28 de julio, de mecanismo de segunda oportunidad, reducción de la carga financiera y otras medidas de orden social, BOE n. 180 de 29 de julio de 2015, Art 2.

[72] Real Decreto-ley 1/2017, de 20 de enero, de medidas urgentes de protección de consumidores en materia de cláusulas suelo, BOE n. 18 de 21 de enero de 2017.

[73] ibid Art 3(1).

[74] Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, [2014] OJ L60/34.

[75] Ley 5/2019 (n 14) Art 21(4).

2 IRPH Clauses

IRPH clauses have been another major source of litigation on variable interest rates that, just like floor clauses, have involved the CJEU. IRPH used to have three subtypes. Two of them depended on the type of institution that used them and were discontinued in 2013.[76] The third, which includes all credit institutions, is still in force. During the years in which interest rates plummeted, the decrease in the IRPH was less significant if compared to EURIBOR, which led to a considerable number of complaints challenging its validity. Consumers sought the invalidity of IRPH clauses mainly on the grounds of a lack of transparency.

In its plenary decision of 14 December 2017,[77] the SSC declared that, for the requirement of transparency to be met, consumers should have been aware that the interest rate based on the IRPH was a main element of the contract. They should also have been informed about how the interest rate was determined. However, the information that credit institutions were obliged to provide did not have to include an explanation of how the IRPH was calculated. In its judgment, the SSC considered that IRPH clauses met the requirement of transparency as credit institutions had informed the consumer that it was the applicable interest rate to the contract. In addition, information on the IRPH was regularly published in the Official Gazette, thus also complying with transparency.

Following a request for a preliminary ruling from a court in Barcelona, the CJEU had the opportunity to interpret the UTD on IRPH clauses in *Gómez del Moral*.[78] The Court agreed with the SSC that the publication of the IRPH in the Official Gazette was sufficient for an average consumer to understand the basis of the reference index.[79] Additionally, the Court referred to an administrative provision of national law[80] that obliged banks to provide information on the fluctuation of the IRPH for two calendar years preceding the contract. According to the Court, the fulfilment of this obligation was relevant to assess transparency.[81]

The SSC implemented *Gómez del Moral* in four plenary decisions given on 12 November 2020.[82] In all four decisions, the SSC perceived that the CJEU had confirmed its approach on transparency, with the exception of the obligation to provide information on the fluctuation of the IRPH prior to the contract, which the SSC had not taken into account. Applying this criterion, the SSC considered, in the four cases, that IRPH clauses were not transparent.

Subsequently, the SSC analysed whether the intransparent clauses were unfair, that is, using an indirect approach to the consequences of a lack of transparency. The SSC concluded that IRPH clauses were fair, as the requirements of Art 3(1) UTD (as transposed

[76] Ley 14/2013, de 27 de septiembre, de apoyo a los emprendedores y su internacionalización, BOE n. 233 de 28 de septiembre de 2013, Disposición Adicional Decimoquinta.

[77] Sentencia del Tribunal Supremo (sala 1ª) de 14 de diciembre de 2017 (ES:TS:2017:4308).

[78] Case C-125/18 *Marc Gómez del Moral Guash v Bankia SA* ECLI:EU:C:2020:138 (hereafter *Gómez del Moral*).

[79] ibid para 53.

[80] Circular 8/1990, de 7 de septiembre, sobre transparencia de las operaciones y protección de la clientela, BOE n. 226, 20.09.1990, Anexo VII. This requirement was not present in the subsequent sectoral norms, starting from Orden EHA/2899/2011, de 28 de octubre, de transparencia y protección del cliente de servicios bancarios, BOE n. 261 de 29 de octubre de 2011.

[81] *Gómez del Moral* (n 78) para 54.

[82] Sentencias del Tribunal Supremo (sala 1ª) de 12 de noviembre de 2020 (ECLI:ES:TS:2020:3613, ECLI:ES:TS:2020:3628, ECLI:ES:TS:2020:3629 and ECLI:ES:TS:2020:3756).

into national law by Art 82(1) SCPA) had not been met. The SSC considered that bad faith could not exist in the use of an official reference index and that no significant imbalance in the rights and obligations of the parties was present at the time the contract was agreed. The subsequent increase in the IRPH, which was more detrimental to consumers if compared to EURIBOR, was deemed non-relevant, as the unfairness assessment refers to the point in time when the contract is agreed.

Shortly after the SSC judgments, the referring court of *Gómez del Moral* submitted a second request for a preliminary ruling by the CJEU that led to *Gómez del Moral II*.[83] In relation to transparency, the referring court asked whether credit institutions were obliged to provide information on how the IRPH functions and if they had to include the fluctuation of the index for two years prior to the contract in a prospectus. The CJEU dismissed both obligations and considered that transparency could be met by reference to the official publications of the IRPH.[84] According to the SSC, in *Gómez del Moral II* the CJEU qualified its prior interpretation on the obligation of credit institutions to inform on the evolution of IRPH.[85]

3 Early Repayment Clauses

3.1 Aziz and the SSC decisions of 23 December 2015 and 18 February 2016

The SSC has stated that early termination clauses are not unfair *per se*, but the terms in which they are established may be.[86] According to Art 4(1) UTD, transposed into Art 82(3) SCPA, unfairness must be assessed in light of the nature of the goods or services and all the circumstances surrounding the conclusion of the contract and other terms of the contract. As stated in *Aziz*, a court must assess whether the claim for repayment of the entire loan takes place upon (1) the consumer's non-compliance with an obligation that is of essential importance; (2) such non-compliance is sufficiently serious in light of the loan; and (3) repeals applicable national rules and national law that provides for effective means to remedy the effects of the loan being recalled.[87]

If, as was common in standard form contracts in Spain during the mortgage boom, the early termination clause provides for early repayment of the debt due to the default of just one instalment, the clause does not meet *Aziz*'s parameters and is therefore unfair and null and void. This is so regardless of whether, in practice, the credit institution has waited longer to trigger the early repayment of the loan, that is, not applied the unfair clause.[88] This was

[83] *Gómez del Moral* (n 78). See also Case C-79/21 *YB v Unión de Créditos Inmobiliarios SA* ECLI:EU:C:2021:945.

[84] ibid para 34.

[85] Sentencias del Tribunal Supremo (sala 1ª) de 27 de enero de 2022 (ECLI:ES:TS:2022:153, ECLI:ES:TS:2022:154 and ECLI:ES:TS:2022:240).

[86] Sentencia del Tribunal Supremo (sala 1ª) de 16 de diciembre de 2009. See, in addition, Sentencia del Tribunal Supremo (sala 1ª), de 4 de junio de 2008 (ES:TS:2008:2599). This same idea also underlies Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* ECLI:EU:C:2013:164 (hereafter *Aziz*).

[87] *Aziz* (n 86) para 73. See also *Banco Primus* (n 32) para 66. In addition, see Case C-90/14 *Banco Grupo Cajatres SA v María Mercedes Manjón Pinilla and Comunidad Hereditaria formada al fallecimiento de D. M. A. Viana Gordejuela* ECLI:EU:C:2015:465 (hereafter *Banco Grupo Cajatres*).

[88] Case C-602/13 *Banco Bilbao Vizcaya Argentaria, S.A., y Fernando Quintano Ujeta, María-Isabel Sánchez García* ECLI:EU:C:2015:397, paras 53 and 54. *Banco Primus* (n 32) paras 74–75.

the conclusion reached by the SSC in its judgments of 23 December 2015 and 18 February 2016 regarding clauses in mortgage loans.[89]

The main difficulty that the SSC faced was how to determine the consequences of the unfairness of these clauses. The general rule is that the unfair term must be removed from the contract. Only if the deletion of the unfair term means that the contract cannot continue to exist, 'thereby exposing the consumer to disadvantageous consequences', can the courts substitute the term with supplementary provisions under national law.[90] Under Spanish law, the nullity of an early repayment clause in a long-term contract—without the application of the Spanish supplementary provisions—would preclude the early termination of the contract, even in situations of ongoing and serious non-compliance on the part of the consumer. Therefore, credit institutions would not be able to recall the total amount of the loan, but instead would be forced to claim each unpaid instalment.[91] Furthermore, credit institutions would not be able to initiate mortgage enforcement proceedings, as they would lack an enforceable title. They would have to bring declaratory proceedings first.[92]

The SSC held that, if as a consequence of the non-application of an early repayment provision, it is not possible to initiate mortgage enforcement procedures, consumers would be exposed to disadvantageous consequences. It supported its argument by referring to certain distinctive features that the Spanish Procedural Act (SPA)[93] establishes in such procedures which protect the mortgagor (consumer). For example, the possibility to consign the amount owed (including the interests)—if it is the habitual residence without the creditor's consent—and thus release the property and avoid enforcement. Or the application of a minimum price below which the debtor's property cannot be sold in the context of mortgage enforcement procedures. According to this view, the conditions were met to replace a null and void early repayment clause with supplementary provisions under Spanish law, thus allowing the early termination of the loan under certain circumstances and the initiating of mortgage enforcement procedures.[94]

This interpretation, based on the benefits of foreclosure proceedings for the consumer, avoids the extreme and, as some scholars have argued, somewhat absurd results that would have followed from the CJEU case law at the time (particularly in *Kásler*).[95] There was a high degree of uncertainty, however, as to its consistency with the CJEU's position. The SSC and

[89] Sentencia del Tribunal Supremo (sala 1ª) de 18 de febrero de 2016 (ES:TS:2016:626) (hereafter Decision of 18 February 2016). See also Auto del Tribunal Supremo (sala 1ª) de 8 de febrero de 2017 (ECLI:ES:TS:2017:271A, hereafter Order of 8 February 2017) referring a request to the CJEU for a preliminary ruling, as discussed below.

[90] See, although not in the specific case of early termination clauses, *Kásler* (n 19) paras 80–85; *Banco Grupo Cajatres* (n 87) para 38; Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13 *Unicaja Banco, SA v José Hidalgo Rueda and Others and Caixabank SA v Manuel María Rueda Ledesma and Others* ECLI:EU:C:2015:21 (hereafter *Unicaja Banco*).

[91] Fernando Pantaleón, 'La sentencia de la Gran Sala del Tribunal de Justicia sobre cláusulas de vencimiento anticipado abusivas' (31 March 2019) <https://almacendederecho.org/la-sentencia-de-la-gran-sala-del-tribunal-de-justicia-sobre-clausulas-de-vencimiento-anticipado-abusivas> (hereafter Pantaleón, 'La sentencia de la Gran Sala') accessed 16 January 2022; Jesús Alfaro, 'El Supremo plantea una cuestión prejudicial al TJUE sobre cláusulas de vencimiento anticipado' (10 February 2017) <https://almacendederecho.org/supremo-plantea-una-cuestion-prejudicial-al-tjue-clausulas-vencimiento-anticipado> accessed 16 January 2022.

[92] Jesús Alfaro, 'Consecuencias de la nulidad de la cláusula de vencimiento anticipado abusiva' (22 January 2016) <https://almacendederecho.org/consecuencias-de-la-nulidad-de-la-clausula-de-vencimiento-anticipado-abusiva> accessed 16 January 2022.

[93] Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil, BOE n. 7 de 8 de enero de 2000.

[94] Decision of 23 December 2015 (n 20) and Decision of 18 February 2016 (n 89).

[95] Pantaleón, 'La sentencia de la Gran Sala' (n 91).

the Court of First Instance No 1 of Barcelona filed two requests for a preliminary ruling in this regard.[96] The responses by the CJEU are examined below.

3.2 The CJEU in Abanca

The CJEU decided on this matter on 26 March 2019 in the *Abanca* judgment, which was well-received by Spanish scholars, who understood that it validated the SSC case law.[97] According to the CJEU, national courts shall examine whether the contract can continue to exist with the unfair term removed and whether this would expose the consumer to particularly unfavourable consequences.[98] The Court established that national courts must make the assessment of whether the contract can continue to exist under national law 'adopting an objective approach', as decided in *Pereničová*.[99] This judgment, in turn, refers to the opinion of the AG Trstenjak, according to which a contract cannot continue to exist if both the professional and the consumer 'held that the basis for the conclusion of the contract no longer existed'.[100] Although referring the question of the assessment to national courts, the *Abanca* judgment implies that a long-term contract, such as a mortgage loan, cannot continue in existence without the possibility of terminating it for serious and ongoing non-compliance of essential obligations under the contract by one of the parties.[101]

According to the CJEU, it is also for the referring court to determine whether the annulment of the contract would expose the consumer to particularly unfavourable circumstances. In doing so, the Court expressly accepts that national courts may consider the procedural position that the consumer would be in.[102] Indeed, as the CJEU admits, the features of enforcement procedures are exclusively a matter of national law and therefore it is solely for the Spanish court to carry out the assessment and conclude whether the substitution of the unfair term with Spanish supplementary law is justified (see also Section V).[103] Following *Abanca*, the Spanish Supreme Court confirmed the previous case law in its judgment of 11 September 2019 on mortgage loan agreements.[104]

[96] Court of First Instance No 1, Barcelona, Spain, by Order of 30 March 2017 (ES:JPI:2017:26A), and the Supreme Court by Order of 8 February 2017.

[97] Joined Cases C 70/17 and C 179/17 *Abanca Corporación Bancaria SA v Alberto García Salamanca Santos and Bankia SA v Alfonso Antonio Lau Mendoza and Verónica Yuliana Rodríguez Ramírez* ECLI:EU:C:2019:250 (hereafter *Abanca*). The Court referred to the *Abanca* ruling to answer similar preliminary questions referred by other Spanish courts in its Orders of 3 July 2019, Case C-92/16 *Bankia, S.A., y Henry-Rodolfo Rengifo Jiménez, Sheyla-Jeanneth Felix Caiz* ECLI:EU:C:2019:560; Case C-167/16 *Banco Bilbao Vizcaya Argentaria SA v Fernando Quintano Ujeta and María Isabel Sánchez García* ECLI:EU:C:2019:570; Case C-167/16 *Bankia SA v Alfredo Sánchez Martínez and Sandra Sánchez Triviño* ECLI:EU:C:2019:572.

[98] *Abanca* (n 97) paras 60–61.

[99] ibid para 60. Case C 453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.* ECLI:EU:C:2012:144, para 32.

[100] Opinion of Advocate General Trstenjak of 29 November 2011, C-453/10, ECLI:EU:C:2011:788, paras 66–68.

[101] Fernando Gómez Pomar, '¿Qué hacemos con los créditos hipotecarios impagados y vencidos? El Tribunal Supremo ante la sentencia Abanca del TJUE' (2021) 3 InDret <https://indret.com/que-hacemos-con-los-creditos-hipotecarios-impagados-y-vencidos-el-tribunal-supremo-ante-la-sentencia-abanca-del-tjue/> (hereafter Pomar, '¿Qué hacemos con los créditos') accessed 16 January 2022. The position of AG Szpunar in Abanca was openly the opposite. See Opinion of Maciej Szpunar of 13 September 2018, Case Case C-70/17 *Abanca Corporación Bancaria SA v Alberto García Salamanca Santos* ECLI:EU:C:2018:724, para 102.

[102] *Abanca* (n 97) paras 61–62.

[103] ibid para 62.

[104] Sentencia del Tribunal Supremo (sala 1ª) de 11 de septiembre de 2019 (ECLI:ES:TS:2019:2761, hereafter Decision of 11 September 2019).

Interestingly, the SSC reached a different conclusion regarding early repayment clauses in personal loans. In its judgments of 12 and 19 February 2020,[105] the Court found that the clauses were unfair,[106] but declared that the contracts can continue in existence without the unfair clauses. Hence, it not possible to apply supplementary rules under national law in lieu of the unfair term.

4 Taxes, Expenses, and Arrangement Fees

4.1 Taxes and expenses

Clauses in mortgage loan agreements that charge any fees, expenses, and taxes associated to the mortgage to the borrower (consumer) without exception were very common in Spain. In its decision of 23 December 2015, the SSC ruled on the unfairness of such clauses in a collective action, distinguishing between fees to be paid to notaries and land registries, taxes, and procedural costs.

According to the SSC, a clause which charges all the costs arising out of executing the public deed and registering it with the Land Registry to the consumer, despite the fact that the rules applicable under Spanish law allow for an equitable distribution and that the lender is the main beneficiary of the registration of the mortgage,[107] generates a significant imbalance that the consumer would have not agreed to, had he negotiated the term individually. In addition, the clause is specifically listed under Art 89(2) and (3) SCPA as unfair. In respect of taxes, Spanish law does not exclude the lender as a taxpayer in relation to certain aspects[108] and, therefore, a clause which establishes that the payment corresponds exclusively to the consumer is contrary to mandatory law, in addition to being unfair under Art 89(3)(c) SCPA. Finally, a clause which requires the borrower to pay all costs relating to the procedure is not only contrary to the rules of cost distribution established under the Spanish Procedure Act as rules of public order and, as such, unfair under Art 86 SCPA and Art 8 SSCTA, but also creates a significant imbalance between the parties.

The SSC thus concluded that the clause was unfair in respect of all the different elements and therefore null and void. Yet, since the action was collective, the Court did not rule on the consequences of the nullity of the clause. The specification of the costs to be assumed by the banks was left to later judgments in individual actions. It was precisely the debate about the consequences of invalidity of these clauses that attracted most of the attention under Spanish law.

Following the 23 December 2015 decision, the SSC heard a number of such individual actions. In line with its previous case law, the Spanish Supreme Court decided on the

[105] Sentencias del Tribunal Supremo (sala 1ª) de 12 de febrero de 2020 (ECLI:ES:TS:2020:336); de 19 de febrero de 2020 (ECLI:ES:TS:2020:500, ECLI:ES:TS:2020:501, and ECLI:ES:TS:2020:503).

[106] The contract fell within the scope of application of the Law on Sale of Goods on Instalment Credit Terms (Ley 28/1998, de 13 de julio, reguladora de la venta a plazos de bienes muebles, BOE n. 167 de 14 de julio de 1998), which provides for the early termination of contracts upon default of two instalments (Art 10(2)) and the nullity of any clause which contravenes this provision (Art 14).

[107] The lender benefits from having an enforceable title (Art 517 Spanish Procedural Act) and access to special foreclosure enforcement procedures (Art 685 Spanish Procedural Act).

[108] Real Decreto Legislativo 1/1993, de 24 de septiembre, por el que se aprueba el Texto Refundido de la Ley del Impuesto sobre Transmisiones Patrimoniales y Actos Jurídicos Documentados, BOE n. 251 de 20 de octubre de 1993.

consequences of the invalidity of the term. Firstly, in its judgment of 15 March 2018, it ruled on the payment of taxes.[109] The SSC declared that, in accordance with Spanish law, the taxable person for the provision of a mortgage is the borrower and the tax on the documentation in the public deed is to be divided between the lender and the borrower. Hence, the Court decided that the bank had to pay the consumer the amounts overpaid under the unfair clause, which was contrary to Spanish tax law applicable at that time.

With regard to notary and land registrar fees, the SSC ruled in its decision of 23 January 2019.[110] According to the Court, as a result of the nullity of the clause, the bank has to reimburse the consumer the amounts wrongly paid by the latter to third parties (notaries and land registrars). To determine the exact amount to be returned by the bank, the SSC (again) applied the relevant rules in force at the time.[111] The 23 January 2019 ruling also decided that a clause requiring the consumer to pay all expenses of the agency which manages administrative issues of the transaction is unfair. Although it is not mandatory to engage such service, Spanish law takes it for granted.[112] Considering that the services are provided to the benefit of both parties, the cost should be split between the lender and the borrower.

In 2020, the CJEU in *Caixabank* confirmed the SSC case law on terms regarding the allocation of costs of creation and cancellation of mortgages.[113] In accordance with the Court of Justice, when such term is unfair and thus regarded as never having existed, the application of national rules in the absence of choice is justified (see further on the consequences of invalidity in Section V). Accordingly, the SSC then continued to apply its previous case law in this regard.[114]

4.2 Arrangement fees

The arrangement fees that consumers have to pay to the credit institution only once when the mortgage loan is granted, and which encompass all costs associated to the analysis of the transaction and its processing (all of which are inherent to banking activity) receive a different treatment. The SSC, in its decision of 23 January 2019 on the unfairness of such clauses, considered that arrangement fees are part of the price of the contract, together with ordinary interest, and thus fall within the scope of application of Art 4(2) UTD. Therefore, their regulation, mainly established in transparency rules, does not require the credit institution to demonstrate that the fees correspond to a service actually provided or to a cost incurred.[115] The SSC thus concluded that an arrangement fee for which such demonstration has not been made is not necessarily unfair.

[109] Sentencia del Tribunal Supremo (sala 1ª) de 15 de marzo de 2018 (ECLI:ES:TS:2018:848), 23 de enero de 2019 (ECLI:ES:TS:2019:101) (hereafter Decision of 23 January 2019); and Decision of 11 September 2019 (n 104).

[110] See also Decision of 11 September 2019 (n 104).

[111] Real Decreto 1426/1989, 17 noviembre, por el que se aprueba el Arancel de los Notarios, BOE de 28 de noviembre de 1989 (hereafter Real Decreto 1426/1989), for notaries, and Real Decreto 1427/1989, de 17 de noviembre, por el que se aprueba el Arancel de los Registradores de la Propiedad, BOE n. 285 de 28 de noviembre de 1989 (hereafter Real Decreto 1427/1989), for land registrars.

[112] Art 40 of Real Decreto-Ley 6/2000, de 23 de junio, sobre Medidas Urgentes de Intensificación de la Competencia en Mercados de Bienes y Servicios, BOE n. 151 de 24 de junio de 2000.

[113] Joined Cases C-224/19 and C-259/19 *CY and Others v Caixabank SA and Banco Bilbao Vizcaya Argentaria SA* ECLI:EU:C:2020:578 (hereafter *Caixabank*), paras 54–55.

[114] See Sentencia del Tribunal Supremo (sala 1ª) de 24 de julio de 2020 (ECLI:ES:TS:2020:2495). In 2019, a new law on real estate credit agreements established mandatory rules on the allocation of costs between borrower and lender (Ley 5/2019 (n 14)).

[115] See Orden de 5 de mayo de 1994, and Circular 8/1990, de 7 de septiembre, in the wording of the Circular 5/1994, de 22 de julio, and later under Ley 2/2009, de 31 de marzo, por la que se regula la contratación con los

The CJEU also analysed the SSC case law in this regard in *Caixabank*. From the transparency perspective, the Court stressed that the contractual term cannot be considered transparent by itself, but rather national courts must take into consideration all the circumstances to determine whether the credit institution has provided the consumer with sufficient information.[116] The Court also analysed, in response to a different question submitted by the Spanish court, the unfairness of an arrangement clause when the credit institution does not demonstrate that the fee corresponds to a service provided or cost incurred. In this scenario, the Court stated that the legal situation of the consumer is impaired and that the term creates a significant imbalance contrary to good faith.[117]

The *Caixabank* ruling was very controversial in Spain and recently led to a new request for a preliminary ruling.[118] According to the SSC, the answer by the CJEU was distorted by the way in which the Court of First Instance of Palma de Mallorca No 17 asked the question. With respect to transparency, the CJEU's answer was distorted because the referring court claimed that, according to the SSC, the arrangement fee clauses automatically pass the transparency test, when the SSC never made such a claim, but rather stated that if the clause is transparent, it cannot be controlled.[119] Secondly, in the unfairness assessment, the referring court omitted part of the relevant legislation: that which is specifically applicable to arrangement fees—as opposed to other fees and expenses—and which justifies the different treatment applied in the decision of 23 January 2019. As a result, many Spanish courts have continued to apply the SSC case law prior to *Caixabank*, as they understand that *Caixabank* does not correctly refer to Spanish law. Others have chosen not to apply it, with the corresponding situation of legal uncertainty that justifies the need for a new request for a preliminary ruling.

IV RELATIONSHIP WITH OTHER CONCEPTS AND RULES

1 Defects of Consent

The binding force of contracts, irrespective of whether their terms are negotiated or not, rests on the agreement of the parties.[120] Therefore, the validity controls under general contract law should apply to standard from contracts. According to Art 1261 SCC, a valid contract requires agreement, a subject matter, and a cause. Of those elements, agreement is the most challenged in court.

consumidores de préstamos o créditos hipotecarios y de servicios de intermediación para la celebración de contratos de préstamo o crédito, BOE n. 79 de 1 de abril de 2009.

[116] The CJEU also provides guidance to determine if the clause can be considered the 'main subject matter', leaving the decision to the national courts (paras 62–65). On transparency, see *Caixabank* (n 113) paras 69–71.

[117] ibid para 78.

[118] Auto del Tribunal Supremo de 10 de septiembre de 2021 (ECLI:ES:TS:2021:10856A). See, on the controversy, Fernando Pantaleón, 'La comisión de apertura, el Tribunal de Justicia y el Tribunal Supremo (y II)' (20 September 2020) <https://almacendederecho.org/la-comision-de-apertura-el-tribunal-de-justicia-y-el-tribunal-supremo-y-ii> accessed 16 January 2022.

[119] Indeed, in the relevant judgment, the transparency or not of the clause was never under discussion and any mention that the SSC made was *obiter dicta* and never in the terms that the referring court claimed.

[120] Art 1261 SCC.

In general contract law, agreement should be voluntary, ensuring that it takes place intentionally and freely. To control procedural fairness in the formation of contracts, parties can resort to an action to avoid the contract due to a defect of consent, including mistake, duress, threat, and fraud.[121]

Spanish law takes a subjective approach to the principle of freedom of contract, whereby the parties alone must determine the equivalence of their performances.[122] Article 1293 SCC explicitly rejects *laesio enormis*. Except for very specific cases, a party to a contract is not entitled to seek nullity based on a lack of equivalence of the counter-performance vis-à-vis its own performance.[123] Neither is there a specific action for invalidity based on a disproportionate advantage gained by one of the parties' exploitation of the other. Spanish law does not recognize any equivalent provision to that of § 138(2) BGB (*Wucher*) nor Art 1143 of the French Civil Code (*violence*, in the sense of abuse).

This legal background could explain why actions claiming defects of consent have frequently been chosen to challenge the validity of financial contracts under general contract law. Mistake has triggered most cases, of which interest rate swap contracts comprise a significant proportion.

Mistake is an action that invalidates a contract[124] when, during its formation, a party provides incorrect information or does not disclose information required by law (including under the principle of good faith) and therefore misleads the other party. The error must be essential and excusable for the mistaken party.[125]

In financial contracts, courts have assumed the existence of an obligation on the part of banking institutions to inform their counterparties. They deduce this obligation from sectorial regulations, both pre- and post-the Markets in Financial Instruments Directive (MiFID I), and even from the general principle of good faith.[126] The SSC decided that the absence of comprehensive information on financial products may lead to error when it affects the decision to contract; in other words, the lack of information does not always invalidate a contract.[127] Additionally, the SSC analysed whether the error was excusable for the mistaken party, considering her expertise. The action for invalidity has normally succeeded, except when brought by a party with considerable experience in financial markets.

The defects of consent under general contract law coexist with the specific incorporation test for standard form contracts[128] and the unfairness control of non-negotiated terms in B2C contracts.[129] However, a control of the formation of a contract under general contract

[121] Art 1265 SCC.

[122] Art 1255 SCC.

[123] Art 1291 SCC acknowledges certain exceptions to this rule: contracts entered into by tutors, in representation of absentees, defrauding creditors (third party to the contract), and over disputed objects. Some regional systems of private law in Spain, such as those of Catalonia and Navarre, have a broader recognition of *laesio* (Arts 499–507 of the *Fuero Nuevo* in Navarre; Arts 321–325 of the old *Compilación catalana*, and Arts 621-45–621-48 of the Catalan Civil Code).

[124] Art 1266 SCC.

[125] Luis Díez-Picazo, *Fundamentos del Derecho civil patrimonial*, vol 1 (Thomson Civitas 2007) 213–16.

[126] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC [2004] OJ L145/1 (MiFID I). See Sentencias del Tribunal Supremo (sala 1ª) de 20 de enero de 2014 (ECLI:ES:TS:2014:354, hereafter Decision of 20 January 2014) and 24 de noviembre de 2016 (ECLI:ES:TS:2016:5169), among many.

[127] Decision of 20 January 2014 (n 126).

[128] Arts 5 and 7 SSCTA and Art 80 SCPA.

[129] Arts 82 SCPA et seq.

law is different to that of the UTD. Notably, mistake is to be distinguished from lack of transparency. Mistake assesses the consent of the actual contracting party and limits the remedy for an inexcusable error, based on actual expertise. Instead, the UTD targets the average consumer, which is an objective concept in which, according to *Costea*,[130] the actual knowledge and expertise of a consumer are immaterial.

Following the evolution of the sanction for unfair terms under the UTD, whereby courts must disapply them *ex officio*,[131] it is uncertain whether in an action for mistake, a court would be obliged to intervene and apply the objective transparency test of the UTD, which is foreign to the logics of mistake. Against the *ex officio* intervention of courts, it could be argued that when a consumer files an action for mistake, he would have waived the unfairness control under the UTD, as it is not mandatory.[132] The SSC has yet to decide on this issue. For the time being, it has not departed from the action filed in court (mistake or intransparent terms). As an example of this, it is interesting to compare the actions challenging the validity of interest rate swap contracts that have been based on mistake (most of them so far) with those based on a lack of transparency under the UTD (the first case reaching the SSC in 2021)—each group of cases has followed a legal reasoning of its own.[133]

2 Compensation for the Breach of Regulatory Law

Under the MiFID regime, investment firms are under an obligation to act 'honestly, fairly and professionally in accordance with the best interests of their clients'.[134] The key provisions specifying this duty are:[135] the obligation of investment firms to adequately inform their clients or potential clients (Art 24(3)–(7) MiFID II)[136] and, when required, to conduct the suitability and appropriateness tests of a service or product ('know-your-customer' duties, Art 25 MiFID II). The European Commission identified these duties among those that are more likely to result in private claims against investment firms.[137]

Private enforcement of regulatory duties was not expressly foreseen under MiFID I,[138] which only set forth administrative sanctions in case of violations (Art 51). However, when deciding on the non-compliance of know-your-customer duties under MiFID I, the CJEU in *Genil* stated that:

[130] Case C-110/14 *Horațiu Ovidiu Costea v SC Volksbank România SA* ECLI:EU:C:2015:538, para 21.

[131] *Pannon* (n 64) para 35. This doctrine was followed in Case C-40/08 *Astrurcom Telecomunicaciones, S.L. v Cristina Rodríguez Nogueira* ECLI:EU:C:2009:615, para 53 and thereafter in many others.

[132] *Pannon* (n 64) para 35; *Banif Plus* (n 64) para 35.

[133] Sentencia del Tribunal Supremo (sala 1ª) de 2 de febrero de 2021 (ECLI:ES:TS:2021:269).

[134] Luca Enriques and Matteo Gargantini, 'The Overarching Duty to Act in the Best Interest of the Client in MiFID II' in Danny Busch and Guido Ferrarini (eds), *Regulation of the EU Financial Markets: MiFID II and MiFIR* (OUP 2017) 85–122.

[135] ibid 89.

[136] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ L173/349 (MiFID II).

[137] European Commission, Public consultation: 'Review of the Markets in Financial Instruments Directive', 8.12.2010 (hereafter Review of Markets in Financial Instruments).

[138] Without prejudice to other sanctions.

> In the absence of EU legislation on the point, it is for the internal legal order of each Member State to determine the contractual consequences of non-compliance with those obligations, subject to observance of the principles of equivalence and effectiveness.[139]

Thus, the prevailing view was that Member States could choose the private law remedy but should necessarily recognize one.[140]

Article 69(2) MiFID II, last paragraph, reinforces this understanding:

> Member States shall ensure that mechanisms are in place to ensure that compensation may be paid or other remedial action be taken in accordance with national law for any financial loss or damage suffered as a result of an infringement of this Directive or of [MiFIR].[141]

This remedy is subject to the principles of effectiveness and equivalence and coexists with public enforcement of the MiFID regime (Art 70 MiFID II).[142]

The SSC has recognized the impact of regulatory law on private law remedies.[143] In chronological order, the SSC admitted firstly that the information duties required by investment law (under MiFID and even before) determine the decision to contract. Therefore, a party that has entered into a contract without comprehensive information is entitled to avoid the contract due to mistake.[144] The 'contractual consequences' of non-compliance with regulatory law, as required by *Genil,* should be interpreted broadly, that is, not only referring to breach of contract, but also including pre-contractual remedies, such as mistake. Under EU law, 'contractual consequence' is a polysemic notion. Therefore, the sanction of mistake for the breach of regulatory law would be compatible with EU law.

However, it seems that *Genil* has been influential on the SSC. In the case, the CJEU interpreted the meaning of 'investment advice' under MiFID I, to clarify that it includes personal recommendations to investors, irrespective of the financial instrument to which they relate.[145] As said, a breach of duties arising under regulatory law should trigger contractual consequences. Following a change in the strategy of claimants and repeatedly citing *Genil,* the SSC has admitted that investors have a right to claim damages for the loss suffered in an investment when the financial institution did not provide comprehensive information or did not comply with the know-your-customer duties.[146]

The SSC supposes that action is contractual in nature (Art 1101 SCC)[147] but the arguments it provides for this view are not convincing. The SSC asserts that financial

[139] Case C-604/11 *Genil 48 SL and Comercial Hostelera de Grandes Vinos SL v Bankinter SA and Banco Bilbao Vizcaya Argentaria SA* ECLI:EU:C:2013:344, para 57 (hereafter *Genil*).

[140] Stefan Grundmann, 'The Bankinter Case on MiFID Regulation and Contract Law' (2013) 9(3) European Review of Contract Law 267, 278; Danny Busch, 'The Private Law Effect of MiFID: Genil and Beyond' (2017) 13(1) European Review of Contract Law 70, 73–74 (hereafter Busch, 'The Private Law Effect').

[141] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 [2014] OJ L173/84 (MiFIR).

[142] Busch, 'The Private Law Effect' (n 140) 74.

[143] See Eduardo Valpuesta, 'Incumplimiento de la normativa comunitaria MiFID en cuanto a los deberes de información y evaluación del cliente: consecuencias en el ámbito contractual según la jurisprudencia española' (2016) 8(1) Cuadernos de Derecho transnacional 271.

[144] See Section IV 1.

[145] *Genil* (n 139) para 53.

[146] See Sentencias del Tribunal Supremo (sala 1ª) de 16 de noviembre de 2016 (ECLI:ES:TS:2016:5109), 13 de septiembre de 2017 (ECLI:ES:TS:2017:3247, hereafter Decision of 13 September 2017) and 24 de noviembre de 2020 (ECLI:ES:TS:2020:4058, hereafter Decision of 24 November 2020).

[147] ibid.

institutions are liable for incorrect investment advice. Yet this advice is imposed upon financial institutions by investment law even in the absence of an investment service contract.[148] Therefore, the SSC has dismissed actions seeking termination when such a contract had not been concluded among the parties.[149] Moreover, it has reiterated that the liability for damages is based on the breach of pre-contractual duties required under investment law.[150] Hence, it is unclear why the action for redress is deemed contractual (Art 1101 SCC) when, under Spanish law, pre-contractual liability is extracontractual by nature (Art 1902 SCC).[151] The real reasons may lie in the SSC's aim to obtain material justice, as actions in contract have a longer statute of limitation period than actions in tort (five years versus one year).[152]

V CONSEQUENCES OF INVALID TERMS

1 The Meaning of 'shall not be binding' in Art 6 UTD

Article 6(1) UTD establishes the consequences of unfair terms with wording that is deliberately open-ended. It determines that they 'shall . . . not be binding', instead of being, for example, 'null and void' and leaves the specific articulation to national law. As a result, Member States have differing regulations on the consequences of invalid terms. In Spain, Art 83 SCPA determines that they are null, while Art 1303 SCC provides for a restitutionary effect of this nullity.

In its decision of 9 May 2013 on floor clauses, the SSC temporarily limited restitution by establishing that the declaration of invalidity does not have retroactive effects. In accordance with the SSC ruling of 25 March 2015, consumers could only seek restitution after the publication of the SSC's judgment of 9 May 2013 (*ex nunc* effects). The CJEU, in *Gutiérrez Naranjo*, stressed that although it is for Member States to establish that unfair terms are not binding, this autonomy is not without limitations. An unfair term is to be treated 'in principle, as never having existed, so that it cannot have any effect on the consumer'.[153] This meant that the consumer, in the case at hand, had 'a right to restitution of advantages wrongly obtained' by the professional 'on the basis of that unfair term', which could not be limited temporarily.[154] The judgment, which reversed SSC case law, implied the intervention of EU law in the delimitation of the effects of unfair terms regulated under national law by establishing two elements: restitution and retroactive effect (see also Section III 1).[155]

[148] See Decision of 13 September 2017 (n 147).

[149] See Decision of 13 September 2017 and Decision of 24 November 2020 (n 146).

[150] ibid.

[151] See Bruno Rodríguez Rosado, 'Omisión de deberes de información en productos financieros: ¿un supuesto de responsabilidad precontractual sin nulidad?' Almacén de Derecho (5 January 2021), <https://almacendederecho.org/omision-de-deberes-de-informacion-en-productos-financieros-un-supuesto-de-responsabilidad-precontractual-sin-nulidad> accessed 8 October 2021.

[152] Arts 1964 and 1968(2) SCC.

[153] *Gutiérrez Naranjo* (n 53) para 61.

[154] ibid paras 66–73.

[155] Leskinen and Elizalde, 'The Control' (n 53) 1607–09.

2 Unfair Term Revision, Blue Pencil Test, and Application of National Supplementary Law

There are three main other aspects with which Spanish courts have dealt extensively and whose requests for a preliminary ruling have had a relevant impact on structuring the CJEU's interpretation of Art 6(1) UTD, namely (1) the revision of terms declared unfair; (2) the so-called blue pencil test; and (3) the conditions under which the invalid term may be replaced by national supplementary law.

2.1 Incompatibility of the revision of unfair terms with the Directive

In reply to a request for a preliminary ruling by the Barcelona Court of Appeal (*Audiencia Provincial de Barcelona*), the CJEU made it clear in *Banco Español de Crédito* that Art 6(1) UTD must be interpreted in the sense that it is incompatible with legislation—Art 83 SCPA, in its wording at the time[156]—that allows a court to revise an unfair term, instead of just setting it aside.[157] According to the Court, this legislation would compromise the long-term objective of the Directive to dissuade professionals from introducing unfair terms in consumer contracts.[158] Following the CJEU judgment, the SCPA was amended.[159]

Thus, as a general rule, the consequence of the invalidity of an unfair term is the partial invalidity of the contract, as long as the contract can continue to exist without the unfair term, which must be determined objectively. This is the case, for example, with floor clauses.[160]

2.2 Incompatibility of the blue pencil test with the Directive

According to the SSC, *Banco Español de Crédito* did not clarify whether the so-called blue pencil test was incompatible with the Directive, in other words, whether the Directive prevents a national court from maintaining the relevant term only in part. In the SSC's opinion, the removal of the unfair part of the term does not equate to a revision of the contract in the sense of *Banco Español de Crédito* nor to the application of supplementary law. On the contrary, such removal is just the specification of the elements of the term that are unfair and, as such, compatible with the Directive. The SSC filed a request for a preliminary ruling in this respect.[161]

[156] See on that version of Art 83 SCPA, Jose María Miquel, 'Artículo 83' in Sergio Cámara Lapuente (ed), *Comentarios a las normas de protección de los consumidores. Texto refundido (RDL 1/2007) y otras leyes y reglamentos vigentes en España y en la Unión Europea* (COLEX 2011) 763–64.

[157] Case C-618/10 *Banco Español de Crédito SA v Joaquín Calderón Camino* ECLI:EU:C:2012:349 (hereafter *Banco Español de Crédito*) paras 69–73. See also *Kásler* (n 19) para 77; and *Unicaja Banco* (n 89) para 32.

[158] Art 7 in relation to recital 24 UTD.

[159] *Banco Español de Crédito* (n 157) paras 69–73. The Ley 3/2014, de 27 de marzo, por la que se modifica el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias, aprobado por el Real Decreto Legislativo 1/2007, de 16 de noviembre, modified the SCPA, by eliminating the possibility of moderating the contract. This same judgment led to the amendment of the Spanish Procedural Act to allow courts to *ex officio* control unfair terms in payment procedures. See *Banco Español de Crédito* (n 157) para 57. Art 815(4) of the Spanish Procedural Act was added by Ley 42/2015, de 5 de octubre, de reforma de la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil, BOE n. 239 de 6 de octubre de 2015.

[160] SSC decision of 9 May 2013 (n 16). See Lucía Moreno García, *Las cláusulas abusivas. Tratamiento sustantivo y procesal* (Tirant lo Blanch 2018) 193–94; Franisco Javier Orduña Moreno, 'Control de transparencia y cláusulas suelo' (2013) Actualidad Jurídica Aranzadi 871, 7 ff.

[161] Order of 8 February 2017 (n 89).

In *Abanca*, the CJEU ruled out the SSC's suggestion. The Court declared that the blue pencil rule cannot be applied when it amounts to revising or adapting the contract.[162]

2.3 Conditions for the substitution of unfair terms by national supplementary law

The last element of the jigsaw puzzle refers to the conditions under which a court can replace an unfair term with national supplementary law. The point of departure is that a court that finds a term unfair must simply refrain from applying it, however 'the contract shall continue to bind the parties under those terms, if it is capable of continuing in existence without the unfair term' (Art 6(1) UTD). Therefore, the court can substitute the unfair term with national supplementary law only if, without the unfair term, the contract is annulled in its entirety, thereby exposing the consumer to particularly disadvantageous consequences.[163]

As we have already explained in Section III 3, following requests for a preliminary ruling by Spanish courts, the CJEU in *Abanca* declared that a contract cannot continue to exist if the basis for the conclusion of the contract between the consumer and the professional has fallen away. The SSC understands that this is the case with contracts in which the early repayment clause is null and void. In addition, the Court of Justice clarified that national courts, in assessing whether the annulment exposes the consumer to particularly unfavourable circumstances, may consider the procedural position in which the consumer would be. The SSC has assumed that the consumer would be in such unfavourable position when the unfair early repayment clause exists in a mortgage contract. Therefore, Spanish courts apply supplementary law in this scenario.

The dividing line between revision, the blue pencil test, and substitution by supplementary law is not, however, always easy to draw. Unfair default interest rate clauses illustrate this. In its decision of 22 April 2015, the SSC established that default interest rates may be unfair—the clause discussed in the decision was—, but the consequence of the invalidity of the clause is only its deletion from the contract, because the contract can continue in existence without it and, therefore, it is not necessary to replace the term with Spanish supplementary law.[164] According to the SSC, the annulment of the unfair term, which established an increase in the ordinary interest in the case of default, entails the application of such ordinary interest—without the increase—as the default interest rate. This was explained by the functions that the ordinary interest and default interest rates perform in the contract. The former is the remuneration for the lender for making the sum of money available. The latter is compensation of the lender for the delay and a penalty for the debtor's failure to fulfil its obligations on time, as well as a deterrent from doing so. When the default interest

[162] *Abanca* (n 97) para 55. The Court asserted that the Directive establishes that an unfair early repayment clause cannot be maintained in part, with the elements that make it unfair removed, as this would be 'tantamount to revising the content of those terms by altering their substance'. See *Abanca* (n 97) para 55. These are the same arguments as in *Banco Español de Crédito* (n 157) paras 69 and 73. Some authors argue, however, that it is unclear whether this conclusion is generally applicable or rather only relevant to the kind of clauses at stake, ie early termination clauses. See Pomar, '¿Qué hacemos con los créditos?' (n 101) 7 and Francisco de Elizalde, 'Partial Invalidity for Unfair Terms? CJEU in Abanca' (2019) 4 Journal of European Consumer and Market Law 147, 149.

[163] Art 6(1) UTD; *Banco Primus* (n 32) para 71. See also Joined Cases C-96/16 and C-94/17 *Banco Santander SA v Mahamadou Demba and Mercedes Godoy Bonet and Rafael Ramón Escobedo Cortés v Banco de Sabadell SA* ECLI:EU:C:2018:643 (hereafter *Escobedo Cortés*) para 73.

[164] Sentencia del Tribunal Supremo (sala 1ª) de 22 de abril de 2015 (ECLI:ES:TS:2015:1723) (hereafter Decision of 22 April 2015), and subsequently in Sentencias del Tribunal Supremo (sala 1ª) de 7 de septiembre de 2015 (ECLI:ES:TS:2015:3828) and 8 de septiembre de 2015 (ECLI:ES:TS:2015:3829).

rate is declared unfair and thus invalid, there is no justification to stop applying the ordinary interest rate, as the same reason to apply it in the first place still exists.[165] The case law on default interest rates in personal loans was later extended by the SSC to default interest rate clauses in mortgage loan agreements.[166]

This interpretation of the consequences of the invalidity of an unfair term posed certain doubts as to whether it entailed a revision of the contract, the application of national supplementary law or the partial nullity of the contract. At the request of the Court of First Instance of Barcelona No 38 and the SSC, the CJEU ruled on this matter in *Escobedo Cortés*. The decision confirmed that the UTD does not preclude the case law of the SSC on the consequences of the default interest rate invalidity and upheld the main arguments used by the SSC in relation to the functions that default interest rates and ordinary interest rates perform.[167] Additionally, the Court clarified that the same conclusion stands regardless of the wording of the default interest rate clause, that is, regardless of whether it is defined as an increase over the ordinary interest rate or regulated independently in the contract.[168] The annulment of the increase cannot be understood as an adaptation of the contract, nor as an application of national supplementary law.[169] After *Escobedo Cortés*, Spanish courts have, therefore, continued to apply the same case law as before.[170]

Finally, SSC case law on the consequences of the invalidity of a clause relating to expenses and taxes, which attributes them all to the consumer (see Section III 4), is also problematic. In a nutshell, the Court declared that, as a result of the nullity of such a clause, the costs should be distributed between the consumer and the professional in the way established by the applicable Spanish rules. In case of payments originally made by the consumer to a third party (eg notary and land registry), there is no claim for contractual restitution upon the invalidity of the term, as Art 1303 SCC does not apply. This situation, on the contrary, can be likened to one of unjust enrichment, in which the banks profit from not paying the amounts attributed to them by law. In order to leave the consumer in the same position as if the clause had never existed, the SSC established that the bank had to reimburse the consumer the amounts overpaid to the third party. To determine the exact amount to be returned by the bank, the SSC applied the relevant rules under Spanish law in force at the time.[171] In other

[165] Legal scholars have discussed the merits of these arguments. According to Fernando Pantaleón, the SSC case law cannot be understood as saying that, as a consequence of the invalidity of the default interest rate term, the ordinary interest rate applies as such ordinary interest rate (and not as the new default interest rate when the early repayment clause is triggered). See Fernando Pantaleón, 'De nuevo sobre los intereses moratorios abusivos en contratos de préstamo' (26 September 2018) <https://almacendederecho.org/de-nuevo-sobre-los-intereses-moratorios-abusivos-en-contratos-de-prestamo> accessed 16 January 2022. The author is, however, aware of the internal inconsistency of the SCC argument, which is explained by the need to reach a similar conclusion without formally revising the contract or replacing the term with supplementary law. See also on the inconsistency Marta Carballo, 'Intereses de demora y vencimiento anticipado del crédito hiptecario en el marco de la legislación sobre cláusulas abusivas y en la Ley de Contratos de Crédito Inmobiliario' (October 2020) Boletín del Ministerio de Justica, año LXXIV, n. 2.234, <https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/1292430962588-Boletin_Octubre_2020.PDF> accessed 16 January 2022, 17.

[166] Decisions of 23 December 2015 (n 20), 18 February 2016 (n 89), and Sentencia del Tribunal Supremo (sala 1ª) de 3 de junio de 2016 (ECLI:ES:TS:2016:2401).

[167] *Escobedo Cortés* (n 163) para 76.

[168] ibid para 77.

[169] ibid para 78 and Opinion of Advocate General Whal of 22 March 2018, Joined Cases C-96/16 and C-94/17 *Banco Santander SA v Mahamadou Demba and Mercedes Godoy Bonet and Rafael Ramón Escobedo Cortés v Banco de Sabadell SA* ECLI:EU:C:2018:216, para 90.

[170] See Sentencia del Tribunal Supremo (sala 1ª) de 28 de noviembre de 2018 (ECLI:ES:TS:2018:3889), 11 de enero de 2019 (ECLI:ES:TS:2019:43), and 31 de enero de 2019 (ECLI:ES:TS:2019:165).

[171] eg Real Decreto 1426/1989 (n 111) and Real Decreto 1427/1989 (n 111).

words, the SSC applied Spanish supplementary law and did so without considering whether or not the contract could continue to exist without such clause.[172] The CJEU confirmed the SSC case law in *Caixabank*.

VI PROCEDURAL ASPECTS

1 Role of Civil Courts

Spanish civil courts have been very active in relation to unfair terms in banking contracts entered into with consumers since the beginning of the financial crisis. The dialogue with the CJEU has also been particularly intense in this area, as shown by the number of CJEU judgments resulting from questions referred by Spanish courts—both the SSC and lower courts.

This dialogue has shaped the application of the UTD by Spanish courts in relevant areas. We have already mentioned some of them, for example the case of the retroactive effects of the annulment of floor clauses in *Gutiérrez Naranjo* and the settlement agreements and waiver to take legal action in future disputes, as in *Ibercaja Banco* (see Sections III 1 and V).

Moreover, this dialogue ultimately led to relevant legislative changes, as illustrated by the fact that after *Gutiérrez Naranjo*, banking institutions were forced by law to establish extrajudicial procedures to decide on the restitution of amounts paid in excess due to floor clauses (see also Section III 1) and that, following *Banco Español de Crédito,* Art 83 SCPA granting the court a moderating power over unfair clauses was amended (see Section V 2).

Among other examples, it is worth mentioning the well-known *Aziz* case. In a matter relating to default interest rates and early termination clauses, the Spanish court requested a preliminary ruling on a question regarding the compatibility of certain provisions of the Spanish Procedural Act with the UTD.[173] According to Spanish law in force at the time, there were no grounds of objection based on the unfairness of a standard term in mortgage enforcement proceedings and the court competent to assess the unfairness in declaratory proceedings was not allowed to grant interim relief. The final vesting of a mortgaged property was therefore irreversible, even if the court in declaratory proceedings decided that the term was unfair and not binding. That only left remedies of a compensatory nature for the consumer. The CJEU decided that Spanish procedural rules made the protection afforded to consumers by the Directive impossible or excessively difficult, contrary to the principle of effectiveness.[174]

The Spanish legislators soon reacted by amending the relevant provisions in the Spanish Procedural Act. New grounds of objection to foreclosure were introduced, namely the debtor can oppose the existence of an unfair clause in the contract.[175] The new law

[172] Some of the rules that attribute the costs have mandatory nature, eg Ley 5/2019 (n 14), while others do not have it. See Fernando Pantaleón, 'De nuevo sobre la consecuencia jurídica de la declaración de abusividad de una cláusula no negociada individualmente (II)' (6 April 2020) <https://almacendederecho.org/de-nuevo-sobre-la-consecuencia-juridica-de-la-declaracion-de-abusividad-de-una-clausula-no-negociada-individualmente-ii> accessed 16 January 2022.

[173] Arts 695 et seq Spanish Procedural Act.

[174] *Aziz* (n 86) paras 59–64.

[175] Ley 1/2013 de 14 de mayo, de medidas para reforzar la protección a los deudores hipotecarios, BOE n. 116 de 15 de mayo de 2013, which modified enforcement procedures as well as extrajudicial enforcement.

introducing the amendments established a transitional provision for enforcement proceedings pending before the entry into force of the new law, which provided for a time limit to object on such grounds. The CJEU later ruled that such a time limit also infringes the principle of effectiveness.[176]

The dialogue between Spanish courts and the CJEU is still ongoing, currently on the limitation period of the action for restitution following an unfair term. The prevailing interpretation, including that of the SSC,[177] is that the action to invalidate an unfair term is not subject to a limitation period. Instead, the action for restitution of the amounts paid under an unfair term is time barred, the limitation period being five years (Art 1964(2) CC). The starting point of that period is the date 'when the obligation becomes enforceable' (Art 1964(2) CC) or, put another way,[178] 'the action may properly be brought' (Art 1969 CC). The Courts of Appeal are inconsistent as to the moment when this occurs although the majority understands that it coincides with the undue payment.[179]

The SSC[180] has considered that the prevailing interpretation is inconsistent with the decisions of the CJEU in *Caixabank*,[181] *Raiffeissen Bank*,[182] and *Profit Credit Slovakia*,[183] as the limitation period could eventually begin before consumers become aware of the existence of an unfair term. Therefore, the SSC has filed a request for a preliminary ruling to the CJEU seeking an interpretation of the starting point of the limitation period that complies with the principle of effectiveness of the UTD.[184]

Another relevant rule that impacts procedure and that is not self-evident in the UTD is that defining the burden of proof. On this, the CJEU in *BNP Paribas* decided that the burden to prove transparency of a term cannot be borne by the consumer.[185] The SSC has not explicitly ruled on this matter. However, it is clear that the business must prove that it provided the information that ensures transparency of terms.[186] Additionally, the SSC has stated that the burden to prove a negative fact (which in this context would be a lack of transparency), if borne by consumers, would hinder their right to an effective legal remedy.[187] Therefore, it seems unlikely that a new thread in the dialogue between the SSC and the CJEU will arise to address the burden of proof on transparency.

[176] Case C-8/14 *BBVA SA, formerly Unnim Banc SA v Pedro Peñalva López, Clara López Durán, Diego Fernández Gabarro* ECLI:EU:C:2015:731.

[177] Auto del Tribunal Supremo (sala 1ª) de 22 de julio de 2021 (ECLI:ES:TS:2021:10157A) (hereafter Order of 22 July 2021).

[178] Manuel Jesús Marín López, 'La doctrina del TJUE sobre el inicio del plazo de prescripción de la acción de restitución de los gastos hipotecarios: influencia del Derecho alemán y efectos en el Derecho español' (26 April 2022), Novedades CESCO, <http://centrodeestudiosdeconsumo.com/images/La_doctrina_del_TJUE_sobre_el_inicio_del_plazo_de_prescripcion_de_la_accion_de_restitucion_de_los_gastos_hipotecarios.pdf > accessed 3 May 2022, 6–7.

[179] See Pedro del Olmo, 'Nulidad de pleno derecho y prescripción' (10 March 2021), <https://almacendederecho.org/nulidad-de-pleno-derecho-y-prescripcion> accessed 3 May 2022.

[180] Order of 22 July 2021 (n 177).

[181] *Caixabank* (n 113) paras 87 and 91.

[182] Joined Cases C-698/18 and C-699/18 *SC Raiffeisen Bank SA and BRD Groupe Societé Générale SA v JB and KC* ECLI:EU:C:2020:537, para 67.

[183] Case C-485-19 *LH v Profi Credit Slovakia s.r.o.* ECLI:EU:C:2021:313, para 64.

[184] Order of 22 July 2021 (n 177).

[185] Joined Cases C-776/19 to C-782/19 *VB and Others v BNP Paribas Personal Finance SA and AV and Others v BNP Paribas Personal Finance SA and Procureur de la République* ECLI:EU:C:2021:470, para 89.

[186] See Sentencia del Tribunal Supremo (sala 1ª) de 8 de junio de 2017 (ECLI:ES:TS:2017:2244).

[187] Decision of 9 May 2013 (n 16).

2 Collective Redress

Through collective redress, it is possible to obtain an injunction to cease the use of unfair terms and compensation for the damages caused. Consumer associations, the Public Prosecutor and, with limits, other sectoral entities have the right to file for collective redress.[188]

The most controversial aspect of collective redress under Spanish law is the extent of *res judicata*. The transposition of the Representative Actions Directive[189] is pending and, at present, the Spanish Procedural Act does not define whether the system is opt-in or opt-out. This element is vital to determine *res judicata* for non-intervening parties.

Article 222(3) SPA directly establishes that judgments in collective actions are binding upon non-litigant parties. Therefore, third parties would be affected by decisions in collective proceedings, without having had the opportunity to opt-out. However, Art 221(1)(2) SPA *authorizes* (ie does not oblige) courts to extend decisions in collective actions to non-litigant parties when the judgment requires a declaration of illegality or unlawfulness.[190] For standard form contracts, this would mean that the third-party effects of judgments would be at the court's discretion.

The complexities of the Spanish collective redress system resulted in the intervention of the CJEU, in relation to the UTD. In *Sales Sinués*,[191] the Court decided that a representative action should not lead to the suspension of an individual complaint as this would affect the right to effective and adequate protection under the UTD. The CJEU was dealing with *lis pendens* and not *res judicata*, although, as the Court observed, they are intrinsically related.[192] The fact that Spanish procedural rules could lead to binding effects on non-litigant parties, even though they did not have the option to refuse participation in the representative action, appears to have been influential in the CJEU's decision.[193]

The Spanish Constitutional Court approved the reasoning of the CJEU in *Sales Sinués*.[194] In turn, the SSC is recognizing the binding effects on non-litigants, but only when the decision benefits consumers.[195]

[188] Art 11 Spanish Procedural Act. Specifically for standard form contracts, Art 16 SSCTA.

[189] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L409/1.

[190] See Isabel Tapia Fernández, 'Art 221' in Faustino Cordón Moreno et al (eds), *Comentarios a la Ley de Enjuiciamiento Civil*, vol I (Thomson Reuters Aranzadi 2011) 1090–94. Teresa Armenta Deu, *Acciones colectivas: reconocimiento, cosa juzgada y ejecución* (Marcial Pons 2013) 90–93.

[191] Case C-381 and 385/14 *Jorge Sales Sinués and Youssouf Drame Ba v Caixabank SA and Catalunya Caixa SA (Catalunya Banc S.A.* ECLI:EU:C:2016:252.

[192] ibid para 30.

[193] ibid para 37.

[194] Sentencias del Tribunal Constitucional 148/2016 (ECLI:ES:TC:2016:148), 3/2017 (ECLI:ES:TC:2017:3) and 4/2017 (ECLI:ES:TC:2017:4). Faustino Cordón Moreno, 'Acción colectiva y acción individual para la tutela de los derechos de los consumidores: relación entre ambos procesos', 20/2016 CESCO 197. Ángel Carrasco Perera, 'El "conundrum" de la legitimación individual autónoma frente a las acciones restitutorias colectivas (en materia de cláusulas suelo)', 22/2017 CESCO 175.

[195] Sentencias del Tribunal Supremo (sala 1ª) 24.02.2017 (ECLI:ES:TS:2017:477), 25.05.2017 (ECLI:ES:TS:2017:2016), and 6.06.2017 (ECLI:ES:TS:2017:2249).

3 ADR Bodies, Ombudsman, and the Role of Financial Supervisors

In Spain, Directive 2013/11/EU on alternative dispute resolution for consumer contracts[196] has been transposed by Act 7/2017,[197] which regulates the ADR entities established in Spain that request accreditation from Spanish authorities. The competent authorities for the accreditation of ADR bodies in the financial sector are the Bank of Spain, the Spanish Capital Markets Commission, and the Directorate General of Insurances and Pension Funds of the Ministry of Economy, Industry and Competitivity. A new ADR body, a financial ombudsman, has not yet been regulated, as required by Act 7/2017, and accredited. Hence, the previous system is still in place,[198] namely, credit and financial institutions must have a customer service that deals with complaints and claims. Credit institutions can also appoint an independent ombudsman (acting alone or with other financial institutions) to decide with binding effect upon the credit or financial institution, while the customer is still allowed to file a claim before a court or ADR bodies.[199] Customers can also resort to the relevant supervisor after having submitted their claim to the customer service or ombudsman. In the case of banking contracts, the relevant supervisor is the Bank of Spain, whose decisions are not binding on the customer or the bank.[200]

4 Publication of Invalid Terms in the Registry

Spanish law provides for the registration of standard contract terms and the registration of both preventive and final decisions on their invalidity or lack of incorporation to a contract in individual and collective actions.[201] The registration of standard terms is, as a general rule, voluntary, with the exception of those falling within the scope of application of the law

[196] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [2013] OJ L 165, 18.6.2013.

[197] Ley 7/2017, de 2 de noviembre, por la que se incorpora al ordenamiento jurídico español la Directiva 2013/11/UE, del Parlamento Europeo y del Consejo, de 21 de mayo de 2013, relativa a la resolución alternativa de litigios en materia de consumo. BOE n. 268, de 4 de noviembre de 2017. See, on the Spanish system, Fernando Esteban de la Rosa, 'El sistema español de resolución alternativa de litigios de consumo y la nueva Ley 7/2017, de 2 de noviembre' in Fernando Esteban de la Rosa (ed) and Ozana Olariu (asst ed), *La resolución de conflictos de consumo. La adaptación del Derecho español al marco europeo de resolución alternativa (ADR) y en línea (ODR)* (Aranzadi 2018) 81-106.

[198] In addition, Art 57 SCPA and Real Decreto 231/2008, de 15 de febrero, por el que se regula el Sistema Arbitral de Consumo, BOE n. 48 de 25 de febrero de 2008, establishes an ADR regime for consumer contracts which is not, however, relevant for financial contracts.

[199] Ley 44/2002, de 22 de noviembre, de Medidas de Reforma del Sistema Financiero, BOE n. 281 de 23 de noviembre de 2002, and Orden ECO/734/2004, de 11 de marzo, sobre los departamentos o servicios de atención al cliente y el defensor del cliente de las entidades financieras, BOE n. 72 de 24 de marzo de 2004.

[200] Ley 44/2002, de 22 de noviembre, de Medidas de Reforma del Sistema Financiero and Orden ECC/2502/2012, de 16 de noviembre, por la que se regula el procedimiento de presentación de reclamaciones ante los servicios de reclamaciones del Banco de España, la Comisión Nacional del Mercado de Valores y la Dirección General de Seguros y Fondos de Pensiones, BOE n. 281, de 22 de noviembre de 2012. The Bank of Spain publishes an annual report with information on the claims and queries received. See the 2020 annual report at Banco de España, Memoria del Servicio de Reclamaciones 2020 <https://www.bde.es/f/webbde/Secciones/Publicaciones/PublicacionesAnuales/MemoriaServicioReclamaciones/20/MSR2020_Cap1_Resumen_de_la_actividad_relativa_a_reclamaciones.pdf> accessed 16 January 2022. For financial instruments, the competent regulator is the Spanish Capital Markets Commission (*Comisión Nacional del Mercado de Valores*).

[201] Arts 11 and 22 SSCTA and Real Decreto 1828/1999, de 3 de diciembre, por el que se aprueba el Reglamento del Registro de Condiciones Generales de la Contratación BOE n. 306 de 23 de diciembre de 1999.

regulating real estate loan agreements, whose registration is mandatory.[202] On the contrary, the registration of court decisions declaring that a contract term is invalid is mandatory, although not all such decisions are indeed registered, in practice. This lack of registration may have effects, for example, on the control performed by land registries, which may deny the registration of invalid terms that are already registered in the Standard Contract Terms Registry.[203]

VII CONCLUSIONS

The 2007–08 international financial crisis had a serious impact in Spain. As a reaction to the crisis, there was a surge in the challenge of unfair terms, especially in mortgage loans, as financially stressed consumers were confronted with the serious risk of losing their homes. These claims brought the UTD, which had been dormant for years, into focus. The increase in consumer litigation had far-reaching effects. It justified the specialization of courts for the sake of efficiency. It triggered multiple challenges to several banking and financial products beyond B2C contracts, in a trend that has changed the former largely passive role of customers. It provoked several legislative reforms on material issues and procedure.

In Spain, the incorporation of terms into a contract is controlled in all standard form contracts. This control includes an assessment of formal or grammatical transparency. However, the control of unfair terms, comprising substantive transparency, is restricted to consumer contracts, to which the UTD applies. Cases originating in Spain on the UTD have been influential in number and content, in what Micklitz and Reich called the 'awakening' of the CJEU on the UTD.[204] The CJEU has been advancing the interpretation of the UTD, often in contradiction to the SSC. Litigation on the UTD has raised awareness of EU consumer law and of its distinctive character.

The first salient case to reach the SSC on unfair terms was the challenge to floor clauses. The SSC decided that floor clauses were not transparent, but initially restricted restitution to the amounts overpaid. The CJEU considered the restriction to be in breach of EU law and is a good example, among many others, of the conflict between the SSC and the CJEU. Litigation on the consequences for the invalidity of certain early repayment clauses shows how the interpretative role assigned to the CJEU could lead to unexpected results. When national courts have to apply a CJEU decision to a case, it could produce an outcome that diverges from what the CJEU had in mind. Other relevant cases on the UTD relate to taxes, expenses, and fees in loans. The use of IRPH, a variable interest rate, was also problematic. The SSC first considered it to be transparent and, hence, valid. Following a request to the CJEU, it was deemed not transparent. However, in both scenarios, the SSC ruled for the validity of IRPH as, in the view of the Court, it did not create an imbalance in the rights and obligations of the parties under the contract.

In parallel to the UTD, banking and financial contracts were challenged under both national contract law, especially the doctrine of mistake, and regulatory law, the application

[202] Ley 5/2019 (n 14).

[203] See Art 84 SCPA. However, the control of land registrars goes beyond those scenarios.

[204] Hans-Wolfgang Micklitz and Norbert Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51 Common Market Law Review 771, 772.

of which has led to compensation for the breach of pre-contractual information. Choosing these laws to sustain an action in B2B contracts is coherent with the unfairness control, which is limited to B2C relations. However, it is surprising that some contracts, such as interest rate swaps, have mostly been challenged for mistake, even in B2C contracts. Path dependency and lacunae in the training of lawyers on EU law could explain this phenomenon, which is slowly changing.

The control of unfair terms has proved to be a powerful tool to restore the balance between the rights and obligations of the parties. It has also reinforced transparency during contract formation. However, key issues for the validity of contracts, especially the notion of agreement in consumer contracts, require further determination. In the same vein, it is unclear whether courts must use EU law standards when a consumer files an action purely pursuant to national law. The mandatory nature of the UTD could require *ex officio* control, which has been absent, for example, in actions relating to mistake. Overall, the intense dialogue between the CJEU and the SSC has defined the contours of the UTD, but it appears that the conversation is not over.