Op-Ed "No procedural limits for consumers challenging unfair contract terms? (C-869/19, C-600/19 and C-693/19 & C-831/19) [*]

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Introduction

It is now more than 20 years since the Court of Justice first held that, for the sake of the effectiveness of the Unfair Terms Directive 93/13, national courts have the power – and even the duty – to examine of their own motion whether there are unfair terms in consumer contracts and, where appropriate, to declare those terms null and void and set out the corresponding legal consequences.

In some Member States, like Spain, this jurisprudence created a small revolution because it contradicted a long-established procedural principle (the principle of party disposition, understood as the exclusive right of the parties, arising out of their personal and individual freedom, to define the scope of the proceedings), as well as the traditional understanding of the role of the civil judge (normally seen as a purely passive figure who must remain fully impartial and refrain from helping one party to the detriment of the other). Nevertheless, after several years, with the help of legal reform and national case law, the jurisprudence of the Court seemed to have been well integrated into the judicial practice.

In *Unicaja* (C-869/19), *Ibercaja* (C-600/19) and *SPV Project* (C-693/19 & C-831/19), all of them delivered on 17 May 2022, the Grand Chamber of the Court of Justice has gone much too far and the new procedural revolution that looms ahead seems much greater and much more uncertain. The Court has developed its jurisprudence and has essentially concluded that national courts must disregard almost all of their own national procedural rules and principles in order to provide consumers with the full protection granted by the Unfair Terms Directive, as interpreted by the latest jurisprudence on the matter.

Unicaja

In *Unicaja* (C-869/19), a Spanish consumer had sued her bank, claiming that one of the terms of the contract of loan (the term known as 'floor clause') was unfair and that the bank should be ordered to repay the consumer all the amounts paid under the said term. The court of first instance partially upheld the claim: it found that the term was indeed unfair, but, applying a judgment of the Spanish Supreme Court of 9 May 2013, it only ordered the bank to repay the amounts that had been unduly paid after 9 May 2013 (so that the bank could keep the amounts that had been unduly paid up until the said date); costs were also awarded to the consumer. The consumer did not appeal the decision of the court of first instance; the bank, on the other hand, did appeal, but only disputed the costs award. While the appeal was pending, the Court of Justice issued *Gutiérrez Naranjo* (C-154/15), concluding that the judgment of the Spanish Supreme Court of 9 May 2013 was contrary to Article 6(1) of the Unfair Terms Directive and, thus, that consumers should be entitled to recover any amounts paid on the basis of a contract term that is unlawful under the Directive without any temporal limitation. A few weeks later, the Spanish court of appeal decided the appeal filed by the bank, limiting its decision to the issue of litigation costs.

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Further to a preliminary reference request from the Spanish Supreme Court, the Court of Justice found that the effectiveness of the Directive required that the Spanish court of appeal should have *sua sponte* re-decided the whole case in light of the new jurisprudence in *Gutiérrez Naranjo* and, thus, upheld the consumer's original claim in full with an order to repay all amounts paid under the unfair term, *even if this ultimately entailed the disapplication of a number of 'principles of national procedure'*. Those principles are:

1) Party disposition (para 15: 'principle of the delimitation of the subject matter of an action by the parties'): contrary to this principle, the Court said the appellate court should have extended *sua sponte* the subject matter of the appeal to an issue (the application of the new jurisprudence) that had not been raised by the parties.

2) Consistency of the judgment (para 15: 'the principle of the correlation between claims put forward in the action and the rulings contained in the operative part'): contrary to this principle, the Court said the appellate court should have ruled on an issue (the application of the new jurisprudence) that was neither raised nor discussed during the appellate proceedings.

3) Prohibition that an appellant is prejudiced by her own appeal (para 15: 'the principle of the prohibition of *reformatio in pejus*'): contrary to this principle, the Court said that the appellate court should have decided the appeal filed by the appellant (the bank) to worsen the appellant's position and favour the respondent (the consumer).

4) *Res judicata* (para 16: 'the rule of Spanish law according to which, where part of the operative part of a judgment is not challenged by any of the parties, the appeal court cannot deprive it of its effects or alter the wording thereof, displays certain similarities with *res judicata*'): contrary to this principle, the Court said that the appellate court should have modified the part of the first instance judgment that had been accepted by the two parties and, thus, had become *res judicata*.

5) New case law does not justify setting aside the principle of *res judicata* (see position of the Italian Government in point 29 of Advocate General Tanchev's Opinion for Unicaja (C-869/19): 'the subsequent reversal of national or Union case-law cannot justify setting aside the principle of *res judicata*'): contrary to this principle, the Court said that new jurisprudence may be invoked to set aside a decision that has already become *res judicata*.

Ibercaja and SPV Project

Moreover, in *Ibercaja* (C-600/19) and *SPV Project* (C-693/19 & C-831/19), the Court of Justice concludes that no rigid system of preclusion can be applied to the right of consumers to invoke unfair contract terms under the Directive.

Under such a system, parties to judicial proceedings are strictly required to react in a timely manner, so that if they are given the opportunity to perform a specific act (such as filing a brief or submitting a particular argument or item of evidence) and they fail to do so in the corresponding period or moment, they will be precluded (barred) from doing it at any later stage. This preclusion, which sometimes operates automatically (by the mere fact of the passing of time, without any need for a judicial decision), is to apply, firstly, within the pending proceedings (internal effects of preclusion). And, secondly, it is also to apply in any subsequent proceedings between the same parties with a connected subject matter (external effects of preclusion), normally via the notion of 'implicit' or 'virtual' *res judicata*, which entails the legal fiction that there has been a judicial decision over all the questions

that, even though not actually raised by the parties and decided by the court, were closely connected to the case to which the final judgment refers. Naturally, the rigid system of preclusion intends to favour legal certainty, to structure the proceedings in a way that avoids continuous 'back and forths' and, ultimately, to require the parties (and their lawyers) to sharpen their diligence and refrain from hiding any information, arguments or evidence until the last minute.

In the context of a rigid system of preclusion, in *Ibercaja* (C-600/19), the Court of Justice calls into question the internal effects of preclusion during pending proceedings. Essentially, the Court says that the opportunity of a consumer to raise the issue of the unfairness of contract terms is not subject to preclusion while the proceedings are pending. In the case at hand, the consumer had been duly served and had missed the legal deadline to invoke unfair terms (ten working days after service). More than 16 months after the consumer had appeared before the court represented by a lawyer, the consumer raised the issue of the unfairness of the consumer contract at stake. The Court of Justice finally approved the conduct of the consumer and said that, in light of Directive 93/13 and the principle of effectiveness, no preclusion applied.

In *SPV Project* (C-693/19 & C-831/19), the Court of Justice then moved one step forward by ruling that consumers are not only exempted from preclusion while proceedings are pending (internal effects of preclusion), but also from preclusion with regard to any subsequent proceedings (external effects of preclusion in the form of an 'implicit' or 'virtual' *res judicata*). In *SPV Project*, a creditor had instituted an order for payment procedure against a consumer and submitted the contract upon which the claim was based. The consumer failed to file a statement of opposition on time and, as a result, the court issued a decision declaring the order for payment final and enforceable, a decision which was deemed to have the effects of a final judgment with 'implicit' *res judicata* effects over any reasons the debtor might have had to oppose the claim (an argument which, by the way, is very much in line with *Thomas Cook*, C-245/14). Nevertheless, the Court of Justice said that neither preclusion nor *res judicata* applied and that the existence of unfair contract terms could still be examined and decided: (i) in the context of the subsequent enforcement proceedings (*SPV Project*) or, (ii) if enforcement proceedings happened to be terminated and property of the consumer had already been transferred to a third party, in the context of subsequent proceedings aiming at 'obtaining compensation, under that Directive [93/13], for the financial consequences resulting from the application of unfair terms' (*Ibercaja)*.

Uncertain consequences ahead

Thus, in light of *Unicaja*, *Ibercaja* and *SPV Project*, almost no procedural principle can be an obstacle to the application of Directive 93/13 and, accordingly, consumers – and their lawyers - are granted the greatest leeway to invoke unfair contract terms. Actually, in the view of the Court of Justice, there seems to be just one single scenario where a consumer may be barred from invoking unfair contract terms for procedural reasons, namely, that of the consumer's attempt to relitigate the issue when: (i) there is 'explicit' or 'actual' *res judicata* (that is, an express decision on the matter which has become *res judicata; Banco Primus*, C-421/14);and (ii) there is no new case law justifying the setting aside of *res judicata* (*Unicaja*, C-869/19).

In a way, *Unicaja*, *Ibercaja* and *SPV Project* destroy the principle of procedural autonomy and the architecture of civil procedure of some Member States when it comes to proceedings on unfair terms in consumer contracts. The consequences are very uncertain and many questions arise, for example:

a) Acceptance: the fact that some of the procedural principles considered are meant to stem from constitutional provisions (as occurs with the principle of prohibition of *reformatio in pejus* and Article 24 of the Spanish Constitution; see point 20 of the Opinion of Advocate

General Tanchev, C-869/19) creates the risk of some degree of resistance in the Member States to accept the conclusions of the Court.

b) Legal certainty concerns: the conclusions of the Court strongly undermine the right to legal certainty of the businesses litigating with consumers; this might also have different constitutional implications at the national levels and become a ground for resisting acceptance of the new jurisprudence.

c) Procedural complexity: the coexistence of two opposing procedural principles within the same procedure (one set of principles applying to the right of the consumer to avail herself of the protection granted by Directive 93/13 and another set of principles applying to everything else), as well as the intrinsic procedural inequality of arms created by this coexistence, might be difficult to handle by the courts and by the parties.

d) Extension beyond consumer cases: should the conclusions of the Court be extended, by way of analogy, to other types of proceedings where it may also be assumed that there is an imbalance between a weak and a strong party (for example, employer/employee, or public institution/natural person) and the weak party happens to be protected by an EU law provision?

e) Extension beyond EU law: should the conclusions of the Court be extended, for consistency reasons, also to cases where consumers (or, more generally, weak parties) are protected by a national provision that does not stem from EU law?

f) Recognition and enforcement: do the courts of the State addressed have the power to refuse recognition and enforcement on the grounds of the existence of unfair contract terms in a consumer contract when this issue was not analysed in the State of origin? (the extreme procedural leeway granted to consumers by the Court of Justice, para 24 of *Unicaja* and Article 45(1)(a) of Regulation 1215/2012 seem to support an affirmative answer).

Another approach is possible: *Impulse Leasing*

The many uncertainties created by the conclusions of the Court of Justice may be taken as an indication that, this time, the Court did not follow the right approach.

Indeed, in my opinion, the Court should have refrained from challenging the general principles of civil procedure. Instead, it should have focussed on whether the *particular provisions* – not the general principles - imposing procedural limitations on a consumer really prevent the application of Directive 93/13. Thus, for example, in *Ibercaja*, rather than analysing whether consumers may be generally be exempted from preclusion and time limitations, the Court should have analysed whether Spanish law guarantees that, upon service of process, the consumer is provided with sufficient information to determine the extent of her rights; whether the ten working days given to the consumer after service are enough time to find a lawyer, to study the case and to invoke unfair contract terms; or whether excessive litigation fees unduly deter the consumer from exercising her right of defence.

Interestingly, this is the approach the Grand Chamber of the Court of Justice followed in *Impulse Leasing* (C-725/19), paras 50 and onwards, which, like *Unicaja*, *Ibercaja* and *SPV Project*, was also published on 17 May 2022. Hopefully, the approach in *Impulse Leasing* will end up prevailing. But this still remains to be seen.