**The Unfair Contract Terms Directive:**

**Using EU Law to Defend Consumers in Mortgage *Enforcement Cases***

**By: Marguerite Angelari[[1]](#footnote-1)**

**Introduction**

The Unfair Contract Terms Directive (UCTD) can be raised in mortgage foreclosure cases to challenge both the terms of the loan agreement and the procedure by which domestic courts adjudicate enforcement of these agreements. In recent years the CJEU has clarified this directive and increased its usefulness for consumers of credit. In this paper, I analyze key provisions of the UCTD and relevant CJEU cases in the hope of generating additional litigation on behalf of consumers challenging unfair terms in individual contracts along with the state’s failure to protect consumers from abusive lending practices and fundamental rights violations.

**1. THE UNFAIR CONTRACT TERMS DIRECTIVE (UCTD)**

***Background on the UCTD***

The UCTD was enacted in 1993 with the dual goal of facilitating the establishment of the internal market and safeguarding consumers. The preamble to the UCTD states that “acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts.[[2]](#footnote-2)” In light of this, the directive aims to protect consumers against abuses of power by sellers/suppliers and, in particular, against standard terms in contracts that have not been individually negotiated. The rationale for this protection is that consumers are in a position of weakness in regards to sellers/suppliers in their bargaining power and level of knowledge and, as a result of this power imbalance, consumers agree to terms that have been drafted in advance by the sellers/suppliers without having an opportunity to influence those terms.

***Key Provisions of the UCTD***

**1.1 The UCTD only applies to pre-formulated contracts that contain standard terms**

* The UCTD ***only*** applies to contracts that contain terms that have not been individually negotiated. (Art. 3(1)). However, these contracts can also contain terms that have been individually negotiated. (Art. 3(2)).
* Terms that have been drafted in advance shall ***always***be regarded as ***not*** individually negotiated. (Art. 3(2)).
* The burden of proof is on the seller or supplier to prove that a standard term has been individually negotiated. (Art. 3(2))

**1.2 The UCTD states criteria for determining whether a term is unfair.**

* A term shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer. (Art. 3)
* The unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all of the other terms of the contract or of another contract on which it is dependent. (Art. 4)
* When the meaning of a term is unclear, the interpretation most favorable to the consumer shall prevail. (Art. 5)
* The Annex to the UCTD contains an indicative and non-exhaustive list of the terms which may be regarded as unfair. (Art. 3(3))

Examples include terms which have the object or effect of:

- requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation (3 (3)(e));

- irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the of the contract (3(3)(i));

- giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter’s agreement (3(3)(p);

**1.3 The terms defining the main subject matter of the contract are exempted from an assessment of unfairness--but there is an exception.**

* The directive exempts terms that have been individually negotiated and those that “define the main subject matter of the contract or the adequacy of the price and remuneration for the goods/services from a determination of unfairness”. (Art. 3)
* However, this exclusion only applies when those terms are in “plain intelligible language.” (Art. 4 (2)). Therefore, a term that defines the main subject matter or quality/price ratio of a supply of goods or services contract could, arguably, be assessed for unfairness if it is not in plain intelligible language.

**1.4 Terms contained in mandatory statutory or regulatory provisions are exempted from an assessment of unfairness.**

* If the term alleged to be unfair is contained in a *mandatory* statutory or regulatory law, then it cannot be assessed for unfairness under this directive. (Art. 1) However, the statute itself may be challenged for violating the principle of effectiveness and undermining compliance with EU law.

**1.5 The UCTD states the obligations of member states**

* Member states cannot enforce unfair terms in a contract but the contract shall continue to bind the parties where possible. (Art. 6)
* Member states shall ensure that adequate and effective means exist to prevent the continued use of unfair terms. (Art. 7).

**2. CJEU CASELAW INTERPRETING THE UCTD**

In this section I analyze key CJEU cases interpreting the UCTD as it applies to consumer credit agreements. For the purpose of this paper, I have divided these cases into four categories:

1) Member states’ duty to ensure that adequate and effective means exist to prevent the continued use of unfair terms in consumer credit contracts (Art. 7);

2) The criteria for determining whether a term is unfair;

3) What constitutes the main subject matter and the clear, intelligible language requirement; and

4) Remedies—the impact of a finding that a term is unfair.

**2.1 Member states’ duty to ensure that adequate and effective means exist to prevent the continued use of unfair terms in consumer credit contracts (Art. 7)**

Starting with *Aziz* (March, 2013), and following along with *Sanchez Morcillo* (July, 2014) and *Kusionova* (September, 2014 ), the CJEU clarified member states’ duty to prevent the continued use of unfair terms and strengthened protections for consumers.

***Mohamed Aziz v. Caixa d’Estalvis de Catalunya***

Mr. Aziz, who had obtained a mortgage from the defendant bank to purchase a home, experienced difficulties making payments and the bank initiated proceedings for enforcement against the property in the simplified mortgage enforcement proceedings provided for under Spanish law. After the conclusion of the mortgage enforcement proceedings but before his eviction from the home, Mr. Aziz complained in separate, declaratory proceedings that a term in the mortgage agreement was unfair. As the judge in the declaratory proceedings had no power to stay the enforcement proceedings pending his ruling on the fairness of the term, the judge in the main proceedings evicted Mr. Aziz from his home while his declaratory action was pending.

At issue in Aziz case were Spanish procedural rules that did not permit parties to challenge the unfairness of a contractual term in the enforcement proceedings themselves but rather, required them to file separate, declaratory proceedings. As noted above, the judge in these secondary, declaratory proceedings did not have the power to stay the main enforcement proceedings. The CJEU ruled that the UCTD precluded these rules as they violated the principle of effectiveness. Importantly, the Court noted that the “system of protection” introduced by the directive was based on the idea that “the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge (*Aziz* at 44 citing *Banco Espanol de Credito*, par. 39).

In holding that the Spanish rules violated the principle of effectiveness,[[3]](#footnote-3) the CJEU noted that while it is up to member states to determine how to implement EU law through national law and procedure under the principle of national procedural autonomy, there are, however, two limitations on procedural autonomy--the principles of equivalence and effectiveness.

The **principle of equivalence** provides that member states cannot make the enforcement of European rights less favorable than the enforcement of comparable national rights. The **principle of effectiveness** requires that even where the treatment of European and national rights is equal, national law cannot make it “impossible in practice or excessively difficult” to exercise the rights conferred on consumers by EU law. The Court held that whether a national procedural provision makes the application of European Union law impossible or excessively difficult must be analyzed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies (*Aziz* par. 53 citing *Banco Espanol de Credito*, par. 49).

In its analysis of the issue, the CJEU reiterated that a national court is required to assess ***of its own motion*** whether a contractual term falling within the scope of the directive is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task. (*Aziz* par. 46 citing *Pannon* GSM, pars. 31 and 32 and *Banco Espanol de Credito*, pars. 42 and 43). In *Pannon*, the Court stated that “the nature and importance of the public interest underlying the protection which the Directive confers on consumers justify the national court being required to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier.” (*Pannon GSM* par. 31 citing *Mostaza Claro*, par. 38). The *Aziz* Court concluded that pursuant to the UCTD, member state law must permit the court before which an application for an order for payment has been brought to assess of its own motion, ***at any point during the proceedings***, whether a term concerning interest on late payments is unfair. (*Aziz* par. 48 citing *Banco Espanol de Credito*, par 57).[[4]](#footnote-4)

The CJEU held that the Spanish procedural rules violated the principle of effectiveness by making it impossible or excessively difficult to apply the protection the directive seeks to confer in that the court hearing the declaratory proceedings could not grant interim relief capable of staying or terminating the mortgage enforcement proceedings and that such relief was necessary to ensure the full effectiveness of the domestic court’s final decision. The Court stated that merely offering the consumer subsequent, compensatory relief would be “incomplete and insufficient” and does not offer an adequate or effective means of preventing the continued use of that term as required by Article 7(1) of the UCTD. (*Aziz* at 60) Importantly, the Court noted that this applies all the more strongly when the family home is involved as payment of damages and interest cannot prevent the “definitive and irreversible loss of that dwelling.” (*Aziz* at 61).[[5]](#footnote-5)

In conclusion, the *Aziz* case established and re-affirmed a number of important rules and principles that can be used to enhance protections for consumers of credit in other contexts: 1) in order to comply with the principle of effectiveness, state mortgage enforcement systems must take into account the fact that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge; 2) a national court is required to assess of its own motion at any point in the proceedings whether a contractual term falling within the scope of the directive is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier; 3) in the mortgage enforcement context, subsequent, compensatory relief would be “incomplete and insufficient” and does not offer an adequate or effective means of preventing the continued use of that term as required by the directives; and 4) loss of the family home warrants additional consideration by the court.

***Juan Carlos Sanchez Morcillo v. Banco Bilbao***

In *Sanchez* *Morcillo* (March, 2014), a follow up case to *Aziz*, the Court went a step further in protecting consumers by applying Article 47 of the EUCFR, which provides a right to an effective judicial remedy, and noting that the loss of the family home “places the family of the consumer concerned in a particularly vulnerable position” (*Sánchez Morcillo*, par. 11).

The applicants in *Sanchez Morcillo* entered into a mortgage with the defendant that contained a term stating the defendant was authorized to claim the accelerated repayment of the mortgage if the applicants failed to make payments and that default interest was to be charged at 19% per annum (the statutory interest rate in Spain at time being 4% per annum). When the applicants failed to meet their obligation to make monthly repayments on the loan, the defendant demanded payment of the entire loan together with ordinary interest and default interest and the enforced sale of the property mortgaged in its favor. The applicants objected to enforcement alleging unfair terms, but their objection was denied by the Spanish court.[[6]](#footnote-6) The applicants then sought to appeal this denial but Spanish civil procedure only allowed a creditor to appeal when the court upheld the objection on behalf the debtor, it did not allow a debtor to appeal the court’s denial of his objection.

The Court held that Article 7(1) of the UCTD (imposing on Member States the obligation to ensure that adequate and effective means exist to prevent the continued use of unfair terms) read in combination with Article 47 of the Charter (creating a right to an effective remedy, to a fair trial, and equality of arms), precluded a system of enforcement that provides that mortgage enforcement proceedings may not be stayed by the court of first instance when, in effect, it can only order compensatory damages to the debtor since the debtor cannot appeal a decision dismissing his objection to enforcement whereas the creditor may appeal a decision terminating the proceeding or finding a term to be unfair. The court noted that the Spanish procedural system reinforced the inequality of arms between creditors and debtors all the more so because the system is incomplete and inadequate for preventing the continued application of unfair terms. (*Sanchez Morcillo* par. 50).

***Kusionova v. SMART Capital***

*Kusionova* (September 2014) was a mixed ruling for consumers in that it upheld the possibility of extrajudicial enforcement of charges but significantly strengthened consumer protections under the directive by raising rights under Articles 7 and 38 of the EUCFR and stating additional criteria which states must take into consideration when implementing the UCTD.

In *Kusionova*, the Court reiterated the significance of Article 47 and specifically held that Article 47 and Article 38 (which provides that European Union policies must ensure a high level of consumer protection) were mandatory requirements that applied to the UCTD. Most importantly, it went one step further and raised substantive rights under the EUCFR by stating that “[u]nder EU law, the right to accommodation is a fundamental right guaranteed under Article 7 of the Charter that the referring court must take into consideration when implementing Directive 93/13.” (*Kusionova* par. 65.) In support, the Court cited jurisprudence from the European Court of Human Rights finding that the loss of the home is one of the most serious breaches of the right to respect for the home and that anyone at risk of such a breach should be able to have the ***proportionality of the measure*** reviewed. (*Kusionova* par. 64 citing *McCann v. United Kingdom* and *Rousk v Sweden*).

*Kusionova* involved a consumer credit agreement for EUR 10,000 that was secured by a charge on the family home. The question before the Court was whether, in light of Article 38 and 47, the UCTD must be interpreted as precluding a law which allows for the recovery of a debt based on a potentially unfair term by extrajudicial enforcement of a charge on immovable property. The term at issue was also contained in a Slovakian statutory provision. The Court noted that while EU directives are silent as to enforcement of charges, it is settled case-law that, in the absence of harmonization of national mechanisms for enforcement under EU law, it is for member state to establish such rules, as long as they satisfy the principles of equivalence and effectiveness. (*Kusionova* pars. 49 and 50)

The court stated that it was necessary to determine to what extent the term made it impossible in practice or excessively difficult to apply the protection conferred by the directive (*Kusionova* par. 54). The Court noted that Slovakian law gave the consumer a right to challenge the sale of a mortgaged property by voluntary auction within 30 days of the notice of enforcement of a charge or to contest the conditions under which that sale took place within a period of three months following the public auction. In addition, under Slovakian law, the national court could adopt any interim measure to prevent an extrajudicial sale from going forward. (*Kusionova* par. 60). In light of this, the Court held that the UCTD does not preclude national legislation permitting the extrajudicial enforcement of charges on immovable property *provided that* this legislation does not make it excessively difficult or impossible in practice to protect the rights conferred on the consumer by the directive, and that this is a matter for the national court to determine. [[7]](#footnote-7) However, as noted above, this decision provided substantial additional guidance to national courts on how to make that determination when the family home is at issue.

**2.2 The criteria for determining whether a term is unfair**

In this section I analyze a number of key cases in which the CJEU provided guidance to member states on how to assess whether a term in a consumer credit contract is unfair. Under Article 3(1) of the UCTD, a contractual term that has not been individually negotiated “shall be regarded as unfair if, contrary to **the requirement of good faith** it causes a **significant imbalance** in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”

In *Aziz*, the CJEU held that Article 3(1) of the UCTD, requires “an assessment of the legal situation of that consumer having regard to the *means at his disposal*, under national law, to prevent continued use of unfair terms, should also be carried out.” (*Aziz* at 76) Therefore, in determining whether there is a *significant imbalance**to the detriment of the consumer*, national courts must look to the rules of national law that apply when there is no agreement between the parties to determine whether, and if so to what extent, the contract places the consumer in a less favorable legal situation than he/she would under national law. In order to assess whether the imbalance arises **contrary to the requirement of good faith**, the national court must determine whether the seller or supplier, “dealing fairly and equitably with the consumer,” could reasonably assume that the consumer would have agreed to the term had the contract been negotiated individually. (*Aziz* at 76)

Subsequently, in *Constructora Principado* (June 2014), the Court held that in determining whether there is a **significant imbalance** the referring court should take into account the nature of the goods or services for which the contract was concluded by referring to all the circumstances attending the conclusion of that contract, as well as all the other terms of contract. (SA)

At issue in *Constructora Principado* was a term in a contract for the purchase of real estate that required the buyer to pay the municipal tax on the increase in the value of the land (capital gains tax). The referring court asked for a ruling on whether the determination of a significant imbalance was to be made solely based upon the economic impact on the consumer or whether the impact on the consumer’s rights and obligations must also be taken into consideration. Importantly, the CJEU held that a **significant imbalance** need not only be due to economic factors but can also be but can result solely from a “sufficiently serious impairment of the legal situation” of a consumer. This can include a “restriction of his rights under the contract, a constraint on the exercise of those rights, or the imposition on him of an additional obligation not envisaged by the national rules.” (*Constructora Principado* SA)

In *Aziz*, the CJEU provided criteria for domestic courts to consider on a range of potentially unfair terms. Notably, relying on the criteria set forth in this decision, the national court annulled all three terms on grounds of unfairness when the case came back before it.

The *Aziz* Court stated the following criteria for determining whether an **acceleration term** in a long-term contract in the event of default was unfair, specifically whether: [[8]](#footnote-8)

- the right of the seller or supplier to call in the totality of the loan is conditional upon the non-compliance by the consumer with an obligation which is of essential importance in the context of the contractual relationship in question,

- that right is provided for in cases in which such non-compliance is sufficiently serious in the light of the term and amount of the loan,

- that right derogates from the relevant applicable rules and

- national law provides for adequate and effective means enabling the consumer subject to such a term to remedy the effects of the loan being called in. (Aziz par. 73)

*Aziz* also provided criteria for determining whether a term fixing the **default interest rate** was unfair, specifically the Court should consider:

- the rules of national law which would apply to the relationship between the parties, in the event of no agreement having been reached in the contract in question or in other consumer contracts of that type and,

- the rate of default interest laid down, compared with the statutory interest rate,

in order to determine whether it is appropriate for securing the attainment of the objectives pursued by it in the Member State concerned and does not go beyond what is necessary to achieve them.” (Aziz par. 74)

Lastly, Aziz stated criteria for determining whether a term permitting the **unilateral determination by the lender of the amount of the unpaid debt** was unfair, specifically:

- whether and, if appropriate, to what extent, the term in question derogates from the rules applicable in the absence of agreement between the parties, so as to make it more difficult for the consumer, given the procedural means at his disposal, to take legal action and exercise rights of the defense. (Aziz at 75).

The CJEU has also ruled that a standard term that has not been individually negotiated purporting to state that **consideration** has been provided in a price reduction is not sufficient proof of **consideration** which the consumer would have benefited from--there must be proof of a reduction of the price. (*Constructora Principado SA* par 29).

**2.3 What constitutes the main subject matter exemption and the clear, intelligible language requirement**

Whether or not a particular term falls within the main subject matter exclusion is open to interpretation and has been addressed in *Kasler* where the Court ruled on what constitutes remuneration. At issue in *Kasler* was a term in a foreign currency mortgage that applied the buying rate of exchange to the initial loan but the selling rate to the repayment installments. The lender claimed that this difference in exchange rates constituted remuneration (price,) and was therefore excluded from an unfairness analysis. The CJEU held that such a term cannot be considered as remuneration stating that in order to determine whether a term falls within the main subject matter, the national court must consider “the nature, general scheme and stipulations of the contract and its legal and factual context, that that term lays down an essential obligation of that agreement which, as such characterizes it.”

In *Bogden Matai*, the CJEU held that terms in two loans providing for **variable interest rates** (one a foreign currency loan) that the bank could alter unilaterally based on “significant changes in the financial markets” and a “**risk charge**” applied by the bank do not, in principle, form part of the **main subject matter of the contract**. The Court stated that the fact that the risk charge constituted an important part of the income for the lender was irrelevant to determining whether it defined the main subject matter of the contract. The Court also noted that the a term allowing a lender to unilaterally alter the interest rate is included in the grey list annexed to the directive and excluding such a term from an assessment of unfairness would deprive the grey list of its effectiveness. (*Bogden Matai* at 60) The *Bogden Court* cited a previous CJEU case holding that a similar mechanism for amending the prices of services provided to the consumer did not fall within the main subject matter exclusion. (*Invitel* at 23)

Even terms that are not assessed for unfairness under Article 3 of the UCTD must meet the requirement of plain, intelligible language, including terms that define the **main subject matter and the adequacy of the price and remuneration**. (*Kasler* par. 68). The CJEU has held that the requirement of plain intelligible language means not only that the terms should be grammatically intelligible to the consumer, but also that the contract should be sufficiently transparent so that the consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him. (*Kasler*) In this case, the Court went on to hold that a foreign currency loan should set out transparently the ”specific functioning of the mechanism of conversion” and the “relationship between that mechanism and that provided for by other contractual terms relating to the advance of the loan.”

**2.4 Remedies—the impact of a finding that a term is unfair**

Under Article 6(1) of UCTD, member states are required to lay down that when a term has been found unfair, it shall not be binding on the consumer and the contract shall continue in force if it is capable of doing so without the unfair term.

In *Banco Espanol de Credito* (*Banesto*), the CJEU held that Article 6 (1) of the UCTD precluded national legislation allowing a court to modify a contract by revising the content of a term found to be unfair. The term in this case concerned a 29% interest late payment rate which the national court had modified to 19%. This was similar to the holding in *Brusse* that upon a finding that a penalty term is unfair, the national court cannot reduce the amount of a penalty imposed on a consumer but can only annul the term. The rationale for this was explained in *Kasler*, where the CJEU emphasized that allowing the court to amend unfair terms included in such contracts would interfere with the dissuasive effect of Article 7 in that “sellers or suppliers would still be tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be adjusted, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers.” However, more recently in *Unicaja Banco* (2015), the CJEU held that a national provision requiring courts to adjust the amount due under a term in a mortgage-loan contract where a default-interest clause and setting a maximum default interest rate was permissible as long as the national court retained the power of removing the term should it find it to be unfair in a particular case pursuant to Article 3(1) of the directive.

**Conclusion**

As indicated above, in recent years, the CJEU has clarified the application of the UCTD and increased its usefulness for consumers of credit. Most notably, the CJEU has stated that domestic courts must review mortgage contracts to determine whether they contain unfair terms and annul any terms identified. Courts must also consider the impact of mortgage enforcement laws and procedures on fundamental rights under the Charter before issuing possession orders and determine whether the remedy is proportional. As discussed in this paper, the UCTD can be raised in enforcement proceedings to challenge both the process by which a national court system adjudicates mortgage enforcement cases and the fairness of a term in a standard term contract. The UCTD and the CJEU cases interpreting it offer additional defenses to lawyers representing consumers in debt enforcement cases. The Open Society Justice Initiative is promoting the use of UCTD on behalf of consumers throughout the EU and would greatly appreciate information about your attempts to use the UCTD in your cases.

1. Marguerite Angelari, a senior attorney at the Open Society Justice Initiative, leads a project on abusive lending practices in Europe that seeks to ensure that fundamental rights under the Charter of Fundamental Rights of the European Union (EUCFR) are taken into consideration at both the EU and domestic levels whenever institutions are drafting or enforcing laws related to abusive lending practices [↑](#footnote-ref-1)
2. Community programmes for consumer protection, OJ No C 92, 25. 4 1975, p. 1 and OJ No C 133, 3. 6. 1981, p. 1. [↑](#footnote-ref-2)
3. Cite from par 50 of Aziz [↑](#footnote-ref-3)
4. The CJEU further explained this holding in its ruling in *Brusse* where it held that where national law gives the court the power, to annul of its own motion a term which is contrary to public policy or to a mandatory statutory it must, also give the court the power to annul, of its own motion, a contractual term which it has found to be unfair in the light of the criteria laid down by that directive.” The Court went on to say that this compensates for the imbalance between the parties. (*Brusse* par. 40) However, subsequently, in *Kusionova*, the Court noted that the consumer cannot be completely inert. (*Kusionova* at 56). [↑](#footnote-ref-4)
5. Subsequently, in *BBVA v. Lopez*, the CJEU held that a transitional national law that provides that a one month time-limit for a consumer to raise the unfairness of a term in mortgage enforcement proceedings begins to run on the day following the publication of the that law in the official journal (but notice is not required to be served on the consumer/defendant individually) violates the principle of effectiveness. (*BBVA v. Lopez* par. 41) [↑](#footnote-ref-5)
6. Following Aziz, Spain amended procedural law to allow the debtor to object to the fairness of a term in the mortgage enforcement proceedings, thereby staying them pending a decision on the objection. The amended law did not, however, allow the mortgage enforcement court to rule on any other objections that a consumer might bring (eg. claims contesting the validity of the instrument). The debtor had to raise these in a separate court which did not have the power to stay the enforcement procedure. [↑](#footnote-ref-6)
7. An additional question for the Court was whether the allegedly unfair term was excluded from an unfairness assessment because it is contained in national law. The Court ruled that the exclusion only applies when the national provision is mandatory—that is, applies by default in the absence of a specific provision in the contract—and that the determination of whether the provision is mandatory must be made by the national court.. [↑](#footnote-ref-7)
8. (Case C-415/11 *Mohamed Aziz v Caixa d´Estalvis de Catalunya, Tarragona i Manresa [Catalunyacaixa]).* 14 March 2013, para 63). [↑](#footnote-ref-8)