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Consumer loan agreements denominated in Swiss francs: The Supreme Court of the Republic of Slovenia untangles the Gordian knot

In the past years, Slovenian courts have been faced with several actions filed by consumers requesting the court to declare loan agreements denominated in Swiss francs null and void. While the courts of first and second instance seemed to struggle to find a common approach in assessing the validity of Swiss francs loan agreements, the Supreme Court of Slovenia managed to untangle the Gordian knot. Namely, in its decision ref. no. II Ips 201/2017 dated 7 May 2018 (the "**Decision**"), the Supreme Court of Slovenia outlined a clear two-stage procedure of assessing the validity of loan agreements denominated in Swiss francs, or any other foreign currency for that matter.

To present the backdrop to the relevant of the Supreme Court decision, between 2000 and 2010, many Slovenian consumers concluded loan agreements with banks denominated in Swiss francs since the interest rates applicable to such loans were lower compared to loans denominated in the domestic currency. When, in January 2015, the cap on the Swiss franc's exchange rate against the Euro was removed by the Swiss National Bank, the Swiss franc soared in value against the Euro. This, in turn, resulted in the increase of credit liabilities of borrowers with loans denominated in Swiss francs.

In the aftermath, many Slovenian borrowers filed actions against the banks claiming their loan agreements denominated in Swiss francs are null and void. Essentially, the consumers claimed that loan agreements denominated in Swiss francs are contrary to mandatory provisions of Slovenian law and that the respective Slovenian banks did not fulfil their obligation to inform the consumers as to the risk arising out of these agreements for a consumer, in particular the exchange rate risk.

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These arguments were also relied upon by the plaintiff in the revision procedure in front of the Supreme court, ref. no. II Ips 201/2017. By way of a lawsuit, the plaintiff primarily requested the court to establish that the loan agreement, the security agreement and the pledge agreement concluded with the bank in 2008 are null and void. In the alternative, the plaintiff requested that the mentioned agreements be rescinded by the court due to the alleged change of circumstances.

The court of first instance refused both the primary and alternative claim. Further, the court of second instance refused the plaintiff's appeal and confirmed the judgment of the court of first instance. In the revision procedure initiated by the plaintiff against the judgment of the court of second instance, the Supreme court wrote in the reasoning of the Decision that the conclusion of consumer loan agreements denominated in foreign currency was not prohibited nor limited pursuant to Slovenian law. To the contrary; conclusion of such loan agreements falls well within the frame of contractual freedom assuring every individual the freedom to decide whether it will enter the contractual agreement and what content of the agreement it will agree upon. On this underlying finding, the Supreme court outlined a two-stage procedure of assessing the validity of loan agreements denominated in foreign currency in the Decision.

The first step includes assessment whether the bank fulfilled its obligation to provide information to the consumer which enabled the consumer to recognize important characteristics of the loan agreement and adequately assess the potential risks arising from it. Only if the court establishes that the bank did not adequately fulfil its obligation to inform, will it assess the potential unfairness of the contractual provisions of the loan agreement. Namely, in accordance with the guidelines provided by the Court of Justice of the European Union[1] the court will assess the existence of good faith of the bank and the existence of a potential significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.

[1] See Judgment of the Court of Justice of the European Union ref. no. C-186/16 dated 20 September 2017.

The Supreme Court emphasized in the Decision that only when the above assessment leads to the conclusion that the contractual provision is in fact unfair to the consumer, the unfair provision or the entire agreement shall be considered null and void in accordance with Article 23 of the applicable Consumer Protection Act (Official Gazette of the RS, no. 20/1998 with amendments and supplements, hereinafter referred to as "**ZVPot**"). If, on the other hand, the above assessment leads to the conclusion that due to the bank's failure to fulfil its obligation to inform, the provision in question can only be characterized as an unclear provision and not as an unfair one at its core, the consequence of such a failure of the bank is not in the nullity of the loan agreement or its provision, rather, pursuant to Article 22 ZVPot, the applicable consequence is the interpretation of the unclear provision to the benefit of the consumer.

The Supreme court repeated the above conclusions also in two of its recent decisions[2] deciding in a revision procedure against judgments of the courts of second instance on validity of Swiss franc loan agreements.

The general rule stemming from the discussed Supreme Court decisions is that if the respective bank fulfilled its obligation to provide the consumer with adequate information to enable him to take a well-informed and prudent decision, the provisions in question shall be considered clear and intelligible and thus, no assessment of (un)fairness of these provisions shall take place. This is in line with the notion of an individual as a reasonable, autonomous and free subject capable of taking responsible decisions affecting his life - the consumer can decide to take a bigger risk in return for bigger expected benefits or decide for smaller expected benefits accompanied by smaller risk. As pointed out by the Supreme Court in its decision ref. no. II Ips 195/2018 dated 25 October 2018, the law is in no position to dictate to an individual what is good for him and steer him to what the law considers to be good and beneficial for an average consumer.

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[2] See Decision of the Supreme Court of the Republic of Slovenia ref. no. II Ips 137/2018 dated 25 October 2018 and Decision of the Supreme Court of the Republic of Slovenia ref. no. II Ips 195/2018 dated 25 October 2018.

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