Justice for both

Effective judicial protection under Article 47 of the EU Charter of Fundamental Rights and the Unfair Contract Terms Directive

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4. ARTICLE 47 IN UNFAIR TERMS CASES IN SPAIN

Chapter outline
This chapter examines the role of Article 47 of the Charter by Spanish civil courts in unfair terms cases. Almost all references to Article 47 are part of a broader citation of the CJEU's case law, to justify a certain interpretation and/or explain why procedural rules were changed. Therefore, the impact of the CJEU's case law on Spanish civil procedure will be discussed first, as well as possible reasons for the high number of preliminary references from Spain (section 4.1). Special attention will be paid to the position of civil courts vis-à-vis the Constitutional Court, with a view to understanding what is behind, in particular, *Sánchez Morcillo* and *Finanmadrid*.

The rest of this chapter follows the same structure as chapter 3. The national background and implementation of key CJEU judgments – *Asturcom*, *Finanmadrid* and *Margarit Panicello* – will be examined in respect of the right of access to court (section 4.2). *Aziz* and *Sánchez Morcillo*, which specifically concern the Spanish mortgage enforcement regime, will be analyzed separately in respect of the right to an effective (judicial) remedy and the principle of equality of arms (sections 4.3 and 4.4). Lastly, a landmark judgment of the Spanish Supreme Court and the preliminary reference in *Irles López* on so-called *cláusulas suelo* ('floor clauses') will be further explored in respect of the right to be heard (section 4.5). Here, Article 47 operates as a hinge between EU (consumer) law and national (procedural) law. It may fulfil a reconciliatory function in cases of a (perceived) conflict, where it is used to open up rigid or restrictive rules with due regard for the principles underpinning civil procedure. However, there is another side to this, where Article 47 is invoked for the protection of traders instead (or even to the detriment) of consumers.

4.1 BACKGROUND: MANY PRELIMINARY REFERENCES FROM SPANISH CIVIL COURTS

4.1.1 Impact of the UCTD on Spanish civil procedure

A missing link between substantive and procedural protection
In 2008, fifteen years after the adoption of the UCTD, the Spanish government believed that Spain was among the EU Member States that offered the strongest legislative protection to consumers against unfair

terms.[638] Over the next twelve years (2008-2020), the CJEU held on various occasions that Spanish procedural law, in particular, did not offer sufficient protection. Spanish civil courts have been very active in asking questions to the CJEU about the interpretation and implementation of the UCTD, in particular as regards the role of national courts. There are many cases before the CJEU concerning the (in)compatibility of procedural rules with the UCTD, some of which explicitly refer to Article 47 of the Charter.[639] This does not necessarily mean that Spanish civil courts tend to rely on the CJEU to resolve interpretative issues or that they are particularly committed to a judicial dialogue; compared with the total number of unfair terms cases adjudicated in Spanish courts, the number of cases before the CJEU is still low.[640] Still, of all decisions of the CJEU regarding the UCTD, by far the most pertain to Spain.[641] Many of those relate to procedural issues that have surfaced after the 2008 financial crisis, in particular:

- the (im)possibility of *ex officio* control with regard to the unfairness of jurisdiction and arbitration clauses;[642]
- the (im)possibility of unfair terms control – whether *ex officio* or at the consumer's request – and the lack of court involvement in special expedited procedures;[643]

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638 Written observations of the Kingdom of Spain, submitted to the CJEU in Case C-40/08 *Asturcom* on 11 August 2008 (*Observaciones del Reino de España en el asunto C-40/08 Asturcom*; not published).

639 Case C-40/08 *Asturcom*; Case C-169/14 *Sánchez Morcillo I* and Case C-539/14 *Sánchez Morcillo II* (pertaining to the same case); Case C-49/14 *Finanmadrid*; Case C-7/16 *Banco Popular Español*, Case C-380/15 *Garzón Ramos*; Case C-308/15 *Irles López* (part of the CJEU's judgment in Joined Cases C-154/14, C-307/15 and C-308/15 *Gutiérrez Naranjo*, but hereinafter separately referred to as ***Irles López***); Case C-503/15 *Margarit Panicello*; C-426/17 *Barba Giménez*; Case C-869/19 *L v Banco de Caja España de Inversiones*, request for a preliminary ruling from the *Tribunal Supremo* (pending).

640 Klaus Jochen Albiez Dohrmann and Sixto Sánchez Lorenzo, 'National Perspectives: Spain' in Karl Riesenhuber (ed), *European Legal Methodology* (Intersentia 2017) 702–703.

641 In EUR-Lex 22 judgments (out of 67) and 12 orders (out of 27) as per 22 June 2020.

642 Joined Cases C-240/98 to C-244/98 *Océano*; Case C-168/05 *Mostaza Claro*; C-40/08 *Asturcom*.

643 Case C-618/10 *Banesto*; Case C-49/14 *Finanmadrid*; Case C-122/14 *Aktiv Kapital Portfolio*; Case C-503/5 *Margarit Panicello*.

- the (im)possibility of unfair terms control in mortgage enforcement proceedings;[644]
- the binding (*res judicata*) force of a judicial decision on the same subject matter between the same parties;[645]
- the procedural position of consumer protection associations;[646]
- the relation between collective actions and individual actions;[647] and
- legal costs.[648]

Consumer protection is recognised as a basic principle in Article 51 of the Spanish Constitution (*Constitución Española* 1978).[649] This principle does not grant subjective rights to individuals, and leaves the legislature a wide margin for enacting consumer protection laws.[650] Article 51 of the Constitution has led to the introduction of General Act for the Defence of Consumers and Users (*Ley General 26/1984 para la Defensa de los Consumidores y Usuarios*; **LGDCU**), which envisaged domestic regulation of unfair terms in consumer contracts. For the transposition of the UCTD, the Spanish legislator has opted for a dual approach, through both an amendment of the LGDCU and the adoption of Law on general contractual conditions (*Ley 7/1998 sobre condiciones generales de la contratación*; **LCGC**).[651] The LCGC governs all kinds of contracts; the

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644 Case C-415/11 *Aziz*; Joined Cases C-537/12 and C-116/13 *Banco Popular Español*; Case C-169/14 *Sánchez Morcillo I*; Case C-539/14 *Sánchez Morcillo II* (pertaining to the same case); Case C-8/14 *BBVA* C-8/14; Case C-421/14 *Banco Primus*; Case C-598/15 *Banco Santander*.

645 Case C-421/14 *Banco Primus*.

646 Case C-413/12 *Asociación de Consumidores Independientes de Castilla y León*.

647 Joined Cases C-381/14 and C-385/14 *Sales Sinués*; Case C-568/14 *Fernández Oliva and Others v Caixabank*; Case C-308/15 *Irles López* C-308/15.

648 Case C-482/19 *JF and KG v Bankia*, Case C-455/19 *BX v BBVA* and Case C-732/19 *LL and MK v BBVA*, requests for a preliminary ruling from *Juzgado de Primera Instancia de Ceuta* (pending); Case C-224/19 *CY v Caixabank*, request for a preliminary ruling from *Juzgado de Primera Instancia de Palma de Mallora* (pending).

649 Article 51.1 CE reads: "The public authorities shall guarantee the protection of consumers and users and shall, by means of effective measures, safeguard their safety, health and legitimate economic interests." [English translation: https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf]

650 J Ribot and J Conrad, 'National Report: Spain' in Gert Brüggemeijer, Aurelia Colombi Ciacchi and Giovanni Comandé (eds), *Fundamental Rights and Private Law in the European Union, Volume I: A Comparative Overview* (Cambridge University Press 2010) 651–652.

651 See Albiez Dohrmann and Sánchez Lorenzo (n 640) 709.

LGDCU only applies to consumer contracts. The former mainly contains rules on the incorporation of general terms and conditions, the latter specifically regulates unfair terms that are not individually negotiated.

In 2004, the CJEU held that Spain had failed to correctly transpose Articles 5 and 6(2) of the UCTD into national law.[652] The LGDCU was subsequently modified[653] and a consolidated version (*texto refundido*; **TR-LGDCU**) was adopted in 2007.[654] Pursuant to Article 83 TR-LGDCU (and Article 8.2 LCGC), unfair contract terms are automatically void.[655] However, it is one thing to make a statutory provision for this; it is quite another to ensure that unfair terms are neither used nor invoked in practice, as *Océano* famously shows.[656]

For the purposes of this study, it is relevant to consider why Spanish civil courts resorted to the CJEU in unfair terms cases, especially after the 2008 financial crisis. Several explanations have been given – by Spanish scholars and by the courts themselves in their judicial decisions – that help to get an understanding of the case law discussed in this chapter. A first explanation is that it was a judicial response to a social emergency, a "judicial mobilisation"[657] triggered by the socio-legal context in Spain. Secondly, and more importantly from the perspective of Article 47 of the Charter, Spanish civil procedure is said to be too rigid for the courts to

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652 Case C-70/03 *Commission of the European Communities v Kingdom of Spain*.

653 *Ley* 44/2006, *de mejora de la protección de los consumidores y usuarios*, BOE no. 312 of 30 December 2006, p. 46601.

654 *Real Decreto Legislativo* 1/2007, *por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuaris y otras leyes complentarias*, BOE no. 287 of 30 November 2007, p. 48181.

655 Article 83, first sentence TR-LGDCU reads (since 29 March 2014): "Unfair contractual terms shall automatically be void and deemed not to have formed part of the contract. For those purposes, having heard the parties, the court shall rule that the unfair terms included in the contract are invalid, though the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms." [English translation is taken from Joined Cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo*, para 14]

656 Joined Cases C-240/98 to C-244/98 *Océano* (on jurisdiction clauses). See further Esther Arroyo Amayuelas, 'No vinculan al consumidor las cláusulas abusivas: del Derecho civil al procesal y entre la prevención y el castigo' in E Arroyo Amayuelas and A Serrano de Nicolás (eds), *La Europeización del Derecho privado: cuestiones actuales* (Marcial Pons 2016) 73–74. The relevant legislative provisions on territorial competence and jurisdiction clauses are Articles 52.3 and 54.2 LEC, as well as Article 90.2 TR-LGDCU.

657 Juan A Mayoral and Aida Torres Pérez, 'On Judicial Mobilization: Entrepreneuring for Policy Change at Times of Crisis' 40 Journal of European Integration 719.

be able to fulfil their role as decentralised EU judges. Crisis-induced litigation highlighted a missing link between substantive and procedural protection of consumers. Until the crisis, consumers were considered as regular debtors, and severe restrictions of their procedural rights were not seen as problematic. This prevented courts from offering effective judicial protection against infringements of substantive rights. Thirdly, the CJEU has assumed a role the Spanish Constitutional Court (***Tribunal Constitutional***) has declined to take in respect of the protection of fundamental rights of mortgage debtors in particular.[658] These explanations are interrelated, and not exhaustive. The position of civil courts vis-à-vis the *Tribunal Constitucional* will be discussed separately,[659] also because it specifically concerns the fundamental right to effective judicial protection in the Spanish Constitution (Article 24) – which, according to the Spanish Supreme Court (***Tribunal Supremo***) is the "functional equivalent" of Article 47 of the Charter.[660]

Judicial response to a social emergency

During the financial crisis, Spanish (civil) courts were confronted with a social emergency. The Spanish economy was heavily dependent on construction, and Spain had high levels of home ownership and mortgage debt.[661] Spanish law is said to be not very protective or supportive of over-indebted consumers in (mortgage-secured) loan

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658 Fernando Esteban de la Rosa, 'The Treatment of Unfair Terms in the Process of Foreclosure in Spain: Mortgage Enforcement Proceedings in the Aftermath of the ECJ's "Ruling of the Evicted"' [2015] Zeitschrift für Europäisches Privatrecht 366; Teresa Jiménez París, 'El incidente de oposición en la ejecución hipotecaria por existencia de cláusulas abusivas y las SSTJUE de 17 de julio de 2014 y 21 de enero de 2015' [2015] Revista Crítica de Derecho Inmobiliario 982/1004, 985.

659 See subsection 4.2.2 below.

660 Case C-869/19 *L v Banco de Caja España de Inversiones*, request for a preliminary ruling from the *Tribunal Supremo* (pending), discussed in subsection 4.5.3.

661 Pablo Gutiérrez de Cabiedes Hidalgo and Marta Cantero Gamito, 'Spain' in Irina Domurath, Guido Comparato and Hans-W Micklitz (eds), *The over-indebtedness of European consumers: a view from six countries* (EUI LAW 2014/10) 108 <http://cadmus.eui.eu//handle/1814/32451>; Fernando Gómez Pomar and Karolina Lyczkowska, 'Spanish Courts, the Court of Justice of the European Union and Consumer Law. A Theoretical Model of Their Interaction' (2014) 4 InDret 6 <www.indret.com/pdf/1093.pdf>; Casla (n 537) 285; Esther Arroyo Amayuelas, 'Mortgage Credit in Spain' [2017] Journal of European Consumer and Market Law 132, 132.

contracts.[662] Large numbers of foreclosures affecting thousands of citizens, as well as the government's reluctant response and a lack of guidance from the highest courts, increased the number of cases in lower courts.[663] Some legislative measures were taken to mitigate the harsh consequences for vulnerable mortgage debtors who could no longer meet their contractual obligations, but those measures were generally considered to be inadequate and have even been called "palliative".[664] Macroeconomic challenges to the Spanish financial system and the mortgage market were a major concern for the Spanish legislator, the *Tribunal Constitucional* and the *Tribunal Supremo*, which were deemed to outweigh the needs of debtors.[665] Meanwhile, demonstrations organised by the Platform for Mortgage Victims (*Plataforma de Afectados por la Hipoteca*) were held all over the country.[666] The creditor-debtor relationship came to be viewed as asymmetrical, unbalanced, exploitative and predatory.[667] Lower courts found it unfair that the burden of a decrease in value of the house was borne entirely by the debtor.[668] The Spanish mortgage enforcement regime gave creditors a double benefit: they could acquire the mortgaged property for a fraction of its original value and sell it on to a third party, while they could still claim the residual debt from the original mortgage debtor.

The precarious position of mortgage debtors gave rise to questions of Spanish civil courts about the balance struck between the interests at

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662 Fernando Gómez Pomar and Karolina Lyczkowska, 'Spanish Courts, the European Court and Consumer Law: Some Thoughts on Their Interaction' in Fabrizio Cafaggi and Stephanie Law (eds), *Judicial Cooperation in European Private Law* (Edward Elgar Publishing 2017) 115–117.

663 Gómez Pomar and Lyczkowska (n 662) 95–97; González Pascual (n 515) 273; Barral-Viñals (n 12) 70; Iglesias Sánchez (n 601) 955–956.

664 Díez García (n 541) 203–205. See also Juana Marco Molina, 'Spanish Law in 2010-2012: The Influence of European Union Law and the Impact of the Economic Crisis' (2013) 6 Journal of Civil Law Studies 401, 430–433; Iglesias Sánchez (n 601) 955–956; Esteban de la Rosa (n 658); Sabaté (n 572) 112; Miriam Anderson and Héctor Simón Moreno, 'The Spanish Crisis and the Mortgage Credit Directive: Few Changes in Sight', *The Impact of the Mortgage Credit Directive in Europe. Contrasting Views From Member States* (Europa Law Publishing 2017) 95–98.

665 See e.g. Joined Cases C-154/14, C-307/15 and C-308/15 *Gutiérrez Naranjo,* Opinion of AG Mengozzi, point 72. See also Díez García (n 541) 234.

666 Gutiérrez de Cabiedes Hidalgo and Cantero Gamito (n 661) 115.

667 Sabaté (n 572) 118–119; González Pascual (n 515) 262, 281.

668 Marco Molina (n 664) 427.

stake.[669] Inequalities between the parties – natural persons (consumers) vis-à-vis financial institutions (traders) – were aggravated by a lack of effective (judicial) remedies and procedural safeguards for mortgage debtors.[670] However, the *Tribunal Supremo* had ruled that as long as the foreclosure took place in accordance with the legal procedure, it was not an abuse of rights when creditors exercised the rights conferred on them by law.[671] The *Tribunal Constitucional* confirmed this; it was up to the Spanish legislature to make changes in the law, not the judiciary.[672] Against this background, lower courts began to question the applicable legislation in light of EU (consumer) law, by elevating 'cracks' in their national legal system to EU level.[673] They resorted to the CJEU to mitigate some of the harsh effects of mortgage enforcement proceedings.[674] In a way, they can be seen as "judicial entrepreneurs" who resorted to EU law to induce policy change and legislative reform when the Spanish legal order failed to give a satisfactory solution.[675]

The CJEU has indeed adopted a more consumer-friendly approach. The judgment in *Aziz*, in particular, has been attributed "enormous social significance".[676] This has not been received with unanimous support. The protection of consumer-debtors by Spanish courts has been called "Robinhoodian"; it has helped to rebalance the consumer-creditor relationship, but it has also allegedly distorted the civil law system and caused legal uncertainty.[677] Perhaps this is partly due to the ad hoc nature

669 Gómez Pomar and Lyczkowska (n 662) 116; Beka (n 31) 257.

670 González Pascual (n 515) 269–272.

671 *Tribunal Supremo (Sala de lo Civil)*, judgment no. 681/2006 of 16 February 2006, ECLI:ES:TS:2006:681. See also Marco Molina (n 664) 429–430.

672 See e.g. *Tribunal Constitucional*, order no. 113/2011 of 19 July 2011, ECLI:ES:TC:2011:113A, further discussed below in subsection 4.3.2.

673 Marien Aguilera Morales, 'TJUE, proceso civil y tutela del consumidor: repaso de un año que termina y previsiones en torno a otro que comienza' (2018) 44 Revista General de Derecho Procesal 29; Gómez Pomar and Lyczkowska (n 661) 11.

674 Iglesias Sánchez (n 18) 970; Pérez Daudí (n 31) 81.

675 Mayoral and Torres Pérez (n 657) 720; Joaquim Bosch Grau and Ignacio Escolar, *El secuestro de la justicia: Virtudes y problemas del sistema judicial* (Roca Editorial de Libros 2018) 106–116.

676 Case C-415/11 *Aziz*; introduced in subsection 3.3.2. See e.g. *AP Lleida (Sección 2ª)*, order no. 55/2013 of 25 March 2013, JUR\2014\294266.

677 Sergio Nasarre-Aznar, '"Robinhoodian" Courts' Decisions on Mortgage Law in Spain' (2015) 7 International Journal of Law in the Built Environment 127, 128, 138.

of the CJEU's case law,[678] but the Spanish legislature's efforts to implement this case law have not cleared all the doubts either – as will become apparent in this chapter. While in theory codification of the CJEU's case law could contribute to more clarity, there is a danger that it curbs the courts' powers and gives rise to additional questions or conflicting interpretations.

Rigidity of Spanish civil procedure

A second explanation for the high number of preliminary references is that Spanish civil procedure is quite rigid, which clashes with the more active role required of national courts under EU consumer law. The role imposed on them by the CJEU – a positive obligation to intervene, not only by applying EU consumer protection legislation *ex officio* but also by stepping in if domestic (procedural) law offers insufficient protection – goes further than the competences attributed to Spanish (civil) courts.[679] The Court of Appeal (*Audiencia Provincial*; **AP**) in Barcelona has observed that Spanish civil procedure is very restrictive, and that some "rigorisms" should be made more flexible pursuant to the CJEU's case law.[680] In the words of another Court of Appeal, AP Toledo:

> "Procedural principles must be relaxed in order to ensure that the rights conferred on consumers by [the UCTD] are real and not merely theoretical".[681]

Spanish civil procedure has been characterised traditionally by the limited scope for judicial intervention, as well as rigid notions of party

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678 Ángel Francisco Carrasco Perera and Maria Carmen González Carrasco, 'La doctrina casacional sobre la transparencia de las cláusulas suelo conculca la garantía constitucional de la tutela judicial efectiva' [2013] Revista CESCO de Derecho de Consumo 150.

679 Francisco Moya Hurtado de Mendoza, 'Efectividad del Derecho de la Unión Europea vs. principio constitucional de imperio de la Ley' [2017] Revista de Derecho Político 399, 411, 417.

680 *AP Barcelona* (*Sección 15ª)*, judgment no. 407/2014 of 15 December 2014, JUR\2015\86196; further discussed in subsection 4.3.2. See also *Tribunal Supremo (Sala de lo Civil)*, judgment no. 1916/2013 of 9 May 2013, ECLI:ES:TS:2013:1916, discussed in subsection 4.5.2 below.

681 *AP Toledo (Sección 2ª)*, order no. 297/2018 of 12 December 2018, JUR\2019\72784, with reference to *Sánchez Morcillo* and Article 47 of the Charter. Translated from Spanish: "*Los principios procesales han de flexibilizarse para viabilizar que los derechos conferidos por la Directiva (…) a los consumidores sean reales y no meramente teóricos*".

disposition and party autonomy.[682] All judicial decisions discussed in this chapter that refer to Article 47 of the Charter concern rules that restrict or exclude procedural rights of the parties and/or powers of the court. The CJEU's case law gives rise to the question of how Spanish civil courts can reconcile their role as decentralised EU-judges with traditional principles of civil procedure. An example is the dispositive principle, which entails that the parties take the initiative in civil litigation.[683] *Ex officio* control in particular could be seen as an exception to this principle, and being at odds with the notion of party autonomy.[684]

The cases discussed in this chapter show that the judicial protection of consumers in Spain is determined by a continuous interplay between the legislature and the judiciary, with a strong European dimension. As a result, two procedural models have been created: one for consumers and one for other litigants.[685] The first major reform of the Spanish Code of Civil Procedure (*Ley de Enjuiciamiento Civil* 2000; **LEC**)[686] to comply with the CJEU's case law on the UCTD took place in 2013. More reforms have followed. For the purposes of this study, the most relevant Laws are:[687]

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682 Ignacio Díez-Picazo Giménez, 'Civil Justice in Spain: Present and Future, Access, Cost, and Duration' in Adrian Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford University Press 1999) 388, 405; Gascón Inchausti (n 420) 122.

683 Arroyo Amayuelas (n 656) 71–72; Pérez Daudí (n 31) 161. See also subsection 2.1.2.

684 See e.g. Maria Pía Calderón Cuadrado, 'Derechos, proceso y crisis de la justicia' (2015) 37 Revista General de Derecho Procesal 32, 37, 43; Rosa Barceló Compte, *Ventaja injusta y protección de la parte débil del contrato* (Marcial Pons 2019) 222.

685 Calderón Cuadrado (n 684) 43.

686 *Ley* 1/2000, *de 7 de enero, de Enjuiciamiento Civil*, BOE no. 7 of 8 January 2000. The complete text of the LEC (in Spanish) can be accessed via: noticias.juridicas.com/base_datos/Privado/11-2000.html. An English translation (made in 2015) can be found on: http://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/documentacion-publicaciones/publicaciones/traducciones-derecho-espanol.

687 See for an overview: María García-Valdecasas Dorrego, *Dialogue between the Spanish Courts and the European Court of Justice Regarding the Judicial Protection of Consumers under Directive 93/13/EEC* (Fundación Registral 2018) 179–181.

- ***Ley* 1/2013**,[688] which was adopted shortly after *Aziz* and also implemented *Banif Plus Bank*.[689] The preamble refers to exceptional financial and economic circumstances and the "social drama" caused by foreclosures. Pursuant to its preamble, one of the aims of *Ley* 1/2013 was to streamline the mortgage enforcement procedure and make it more flexible in order to ensure that the rights and interests of mortgage debtors are adequately protected.
- *Real-Decreto-ley* 11/2014 (**RD 11/2014**),[690] which was adopted after *Sánchez Morcillo I*.[691]
- ***Ley* 42/2015**,[692] which was introduced, inter alia, to comply with *Asturcom* and *Banesto*.[693]
- ***Ley* 5/2019**,[694] which transposes the Mortgage Credit Directive[695] into Spanish law.[696]

These Laws will be elaborated further below. The dynamics are usually as follows: different courts have divergent interpretations of a set of procedural rules. When those rules are questioned in light of EU consumer law, a request for a preliminary ruling is made to the CJEU. Insofar as the CJEU's ruling entails that a certain procedural arrangement is precluded, the ruling then needs to be implemented through judicial interpretation and/or legislative amendments. This, in turn, may trigger new preliminary references.

Efforts to bring Spanish procedural law in conformity with the case law of the CJEU have been largely driven by courts, in response to

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688 *Ley* 1/2013, *de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de deuda y alquiler social*, BOE no. 116 of 15 May 2013, p 36373.

689 See sections 4.3 and 4.5 respectively.

690 *Real Decreto-ley* 11/2014, *de medidas urgentes en materia concursal*, BOE no. 217 of 6 September 2014, p. 69767.

691 See section 4.4.

692 *Ley* 42/2015, *de reforma de la Ley de Enjuiciamiento Civil*, BOE no. 239 of 6 October 2015, p. 90240.

693 See section 4.2.

694 *Ley* 5/2019, *reguladora de los contratos de crédito inmobiliario*, BOE no. 65 of 16 March 2019, p. 26329.

695 Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property (OJ L 060 28 april 2014, p. 34). The European Commission had started infringement proceedings against Spain for failure to transpose the Directive in time, but the procedure was withdrawn on 17 June 2019: Case C-569/17 *European Commission v Kingdom of Spain*.

696 See section 4.3.

hesitation by the Spanish legislator.[697] As the president of the Civil Division of the *Tribunal Supremo*, Francisco Marín Castán, put it: the case law of the CJEU had left Spain "without law" in the field of mortgage enforcement; therefore, courts must resolve issues that had not (yet) been regulated.[698] They must provide effective judicial protection in practice, but the question is how they are supposed to do this if national (procedural) law gives no (clear) guidance. Pursuant to Article 5 of the Law of the Judiciary (*Ley Orgánica del Poder Judicial*; **LOPJ**),[699] Articles 1.1 and 1.6 of the Spanish Civil Code (***Código Civil***) and Article 1 LEC, Spanish courts must apply the law and interpret it, but they cannot create or change it.[700] Perhaps, then, it is not so surprising that Spanish courts tend to "shield" themselves in their decisions behind citations from CJEU case law.[701]

4.1.2 Duality in the protection of fundamental rights

This brings us to a third explanation for the many preliminary references from Spain: the *Tribunal Constitucional* not being able or willing to play a role in a critical reassessment of the Spanish mortgage enforcement regime. Similar questions as the ones raised in *Aziz* and *Sánchez Morcillo* had already been posed to the *Tribunal Constitucional*, to no avail.[702] The CJEU provided a higher level of (fundamental rights) protection than the *Tribunal Constitucional* in similar cases regarding the same constellation of (procedural) rules. In a way, the CJEU could be seen as a "court of last resort" to provide justice denied to mortgage debtors at the national

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697 Carlos Teijo García and Carlos Durán Suárez, 'Crónica sobre la aplicación judicial del derecho de la UE en España (2014)' [2016] Revista Electrónica de Estudios Internacionales 18 <http://www.reei.org/index.php/revista/num31/cronicas/cronica-sobre-aplicacion-judicial-derecho-ue-espana-2014>.

698 See http://noticias.juridicas.com/actualidad/noticias/11185-la-jurisprudencia-del-tjue-ha-dejado-a-espana-quot%3Bsin-leyq/

699 *Ley Orgánica* 6/1985 *del Poder Judicial*, BOE no. 157 of 2 July 1985, p. 12666.

700 See further Nasarre-Aznar (n 677) 129.

701 See Gómez Pomar and Lyczkowska (n 661) 9–10; Juan A Mayoral, '"Government Contained?" Explaining Spanish Supreme Court's Decisions on EU Law' <https://www.researchgate.net/publication/228543154>.

702 Case C-415/11 *Aziz* and Case C-169/14 *Sánchez Morcillo*; see subsections 4.3.2 and 4.4.2 respectively.

level.[703] As Judge José Maria Fernández Seijo, who made the preliminary references to the CJEU in both *Océano* and *Aziz*,[704] has remarked:

> "It is doubtful whether Article 24 of the Constitution is of any use; (…) therefore I ventured to take one step down and, instead of taking the route of fundamental rights, I raised an issue of consumer protection, of rights that are broader."[705]

In Spain, the system of judicial review is centralised; ordinary courts are obliged to submit a question to the *Tribunal Constitucional* if there are doubts as to the constitutionality (and thus validity) of a statutory provision or if there is no specific legal provision or instrument available to solve the case.[706] The *Tribunal Constitucional* has a monopoly on the constitutional review of domestic law; the ordinary courts must guarantee the correct application of EU law, including the Charter.[707] Since 2015, the LOPJ stipulates that Spanish courts and tribunals are obliged to apply EU law in conformity with the case law of the CJEU, and that civil courts have jurisdiction to hear claims arising in Spanish territory in accordance with, inter alia, EU law.[708]

It has been observed that the *Tribunal Constitucional* shows a certain "*apatía europea*"[709] by considering an infringement of EU law as a matter of (dis)application of the domestic legal norms in question by the ordinary courts, not as a constitutional matter. At the same time, the *Tribunal Constitutional* has held that if reasonable doubt exists as to the incompatibility of national law with EU law, it is contrary to the right to

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703 Micklitz and Reich (n 43) 805.

704 Joined Cases C-240/98 to C-244/98 *Océano*; Case C-415/11 *Aziz*.

705 In: Javier Álvarez and Luis Fernando Rodríguez, La Última Trinchera (Planeta 2016) 107. Translated from Spanish: "Te surge la duda si el artículo 24 de la Constitución sirve para algo; (…) así que me arriesgué a bajar un escalón y en vez de abordar un caso de derechos fundamentales me planteé un problema de tutela de los consumidores, de derechos más difusos."

706 Ribot and Conrad (n 650) 624; Victor Ferreres Comella, *The Constitution of Spain. A Contextual Analysis* (Hart Publishing 2013) 222.

707 Ferreres Comella (n 706) 219; Albiez Dohrmann and Sánchez Lorenzo (n 640) 699. See also Camilo B Schutte, *Constitutionele rechtspraak in Spanje. Het Tribunal Constitucional en zijn jurisprudentie in hun historische context* (Shaker Publishing 1999) 195.

708 Articles 4bis and 21 LOPJ respectively, added and amended by *Ley Orgánica* 7/2015, *por la que se modifica la Ley Orgánica del Poder Judicial*, BOE no. 174 of 22 July 2015, p. 61593.

709 Mayoral Díaz-Asensio, Berberoff Ayuda and Ordóñez Solís (n 78) 146.

due process (Article 24 of the Constitution) for an ordinary court to disapply national law without first raising a question of constitutionality (*cuestión de inconstitucionalidad*) to the *Tribunal Constitucional* or making a preliminary reference to the CJEU.[710] Whilst this seems to be in line with the principle that courts are not supposed to change the law, it gives rise to the question as to what a Spanish civil court must do in case of a potential conflict between domestic law and EU law or EU fundamental rights.[711] The *Tribunal Constitucional* has framed this as a choice between the *Tribunal Constitucional* or the CJEU,[712] which does not seem to leave space for ordinary courts disapplying national law on their own. As Torres Pérez has observed, this framing is problematic from the perspective of EU law, where the obligation to make a preliminary reference only exists for courts in last instance.[713] This could explain why there are so many requests for preliminary rulings from lower courts, even when they are not obliged to do so under EU law – especially when they expect more support from the CJEU.[714] Indeed, the *Tribunal Constitucional* is said to be reluctant to deal with socio-economic issues that are considered as prerogatives of the legislature and the executive.[715]

The possibility for ordinary courts to make preliminary references to the CJEU or to set aside domestic law that conflicts with directly applicable Charter provisions challenges the role of the *Tribunal Constitucional* in the system of fundamental rights protection.[716] The

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710 Aida Torres Pérez, 'The Judicial Impact of European Law in Spain: ECHR and EU Law Compared' (2011) 30 Yearbook of European Law 159, 165–167. See further Encarnación Roca Trías and Susana García Couso, '¿Es real el diálogo entre tribunales? Cuestión prejudicial y control de constitucionalidad por vulneración de derechos y libertades fundamentales' [2017] Teoría y Realidad Constitucional 529.

711 Torres Pérez (n 710) 173.

712 *Tribunal Constitucional*, judgment no. 241/2015 of 30 November 2015, ECLI:ES:TC:2015:241. See also Pérez Daudí (n 31) 134–135. And, more elaborately, Pilar Concellón Fernández, *Dialogando con Luxemburgo: Los órganos jurisdiccionales españoles y la cuestión prejudicial (1986-2017)* (2018) 123ff <http://digibuo.uniovi.es/dspace/handle/10651/46902>. If the case law of the CJEU is sufficiently clear and the court applies Spanish law in accordance with it, there is no violation of Article 47 of the Charter and Article 24 of the Constitution: see e.g. *AP Madrid (Sección 10ª)*, order no. 425/2015 of 14 December 2015, JUR\2016\15218.

713 Torres Pérez (n 710) 169–171.

714 See also subsection 4.1.1 above.

715 Casla (n 537) 294.

716 Torres Pérez (n 710) 178–179; Teijo García and Durán Suárez (n 697) 6. See also Case C-399/11 *Melloni*, discussed in subsection 2.2.2.

duality between the protection of constitutional and Charter rights has led to a discussion in Spain about cooperation and coordination between the *Tribunal Constitucional* and the CJEU.[717] The *Tribunal Constitucional* itself seems to preserve this duality by distinguishing between the supremacy of the Constitution and the primacy of EU law;[718] EU law does not enjoy constitutional status. Roca Trías has criticised this (formalistic) distinction and submitted that the *Tribunal Constitucional* should assume its responsibility under EU law as well.[719] She has argued that EU law and EU fundamental rights cannot be put on a par with the ECHR, which does not constitute an autonomous parameter for the *Tribunal Constitucional*.[720] By contrast, the Charter is binding on national courts regardless of the status accorded to it in domestic (constitutional) law.[721]

So far, the *Tribunal Constitucional* has limited its own role in respect of EU law to checking whether there is an infringement of procedural safeguards or whether the ordinary courts have applied an unreasonable and arbitrary selection of applicable rules (including EU law), which gives rise to a violation of Article 24 of the Constitution.[722] Only in that case does it become a constitutional matter. Article 24 of the Constitution contains the right to effective judicial protection, which citizens may directly invoke.[723] An 'infringement of procedural norms or guarantees'

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717 Pérez Daudí (n 31) 58.

718 Torres Pérez (n 710) 167.

719 Roca Trías and García Couso (n 710) 544. See also Pérez Daudí (n 31) 56.

720 Roca Trías and García Couso (n 710) 546–547.See also Torres Pérez (n 710) 166; Ribot and Conrad (n 650) 615–618.

721 See also Roca Trías and García Couso (n 710) 543.

722 See e.g. *Tribunal Constitucional*, judgment no. 145/2012 of 2 July 2012, ECLI:ES:TC:2012:145; *Tribunal Constitucional*, judgment no. 241/2015 of 30 November 2015, ECLI:ES:TC:2014:241. See also Mayoral Díaz-Asensio, Berberoff Ayuda and Ordóñez Solís (n 78) 148.

723 Article 24 of the Constitution reads: "1. Every person has the right to obtain the effective protection of the judges and the courts in the exercise of his or her legitimate rights and interests, and in no case may he [or she] go undefended. 2. Likewise, all persons have the right of access to the ordinary judge predetermined by law; to the defence and assistance by a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defence; to not make self-incriminating statements; to not declare themselves guilty; and to be presumed innocent. The law shall determine the cases in which, for reasons of family relationship or professional secrecy, it shall not be compulsory to make statements regarding alleged criminal offences." [English translation: https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf]

or a 'procedural infringement' in civil proceedings is primarily a ground for appeal before the ordinary courts (Articles 459 and 468 LEC).[724] If the judgment has become final, a so-called 'exceptional application for nullity of procedural actions' (*incidente excepcional de nulidad de actuaciones*) may be brought (Article 228 LEC).[725] In case of an alleged violation of Article 24 of the Constitution, they may bring an individual complaint (*recurso de amparo*) before the *Tribunal Constitucional*, which acts as the ultimate guarantor of national fundamental rights.[726]

A *recurso de amparo* against a judicial decision may provide a last resort for parties to obtain effective judicial protection. An example can be found in a case concerning mortgage enforcement and the UCTD.[727] The debtors involved complained that they should have been treated as consumers, i.e. natural persons acting for purposes outside their trade, business or profession with no link of a functional nature with a company (Article 3(b) TR-LGDCU). Therefore, their opposition against the enforcement and, later, their appeal should not have been dismissed, and their application for nullity of procedural actions should have been granted. The *Tribunal Constitucional* reaffirmed its position that it is not its task to control the conformity of the actions of the national (judicial) authorities with EU law. The *Tribunal Constitucional* must only determine whether judicial decisions are contrary to Article 24 of the Constitution. Insofar as a judicial decision deliberately disregards the case law of the CJEU, it is unreasonable and arbitrary – which could, indirectly, be seen as a form of judicial review in light of EU law. The *Tribunal Constitucional* held that in this case, the CJEU's interpretation of the UCTD had indeed been disregarded.[728] As a consequence, the proceedings were declared null from the moment of dismissal of the initial opposition, and a new decision was required.

In a more recent decision, the *Tribunal Constitucional* found that the CJEU's judgment in *Banco Primus*[729] had been disregarded by a court in

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724 Vicente Pérez Daudí, *La protección civil de los derechos fundamentales* (Atelier 2011) 85.

725 Pérez Daudí (n 31) 143.

726 Pérez Daudí (n 724) 103.

727 *Tribunal Constitucional*, judgment no. 75/2017 of 19 June 2017, ECLI:ES:TC:2017:75.

728 In particular, the CJEU's order in Case C-74/15 *Tarcău v Banca Comercială Intesa Sanpaolo România*.

729 Case C-421/14 *Banco Primus*; see further subsection 4.4.3.

first instance.[730] The debtors' application for nullity of procedural actions should have been granted, or, alternatively, the court should have made a preliminary reference to the CJEU. Since it had not done so, it had violated the primacy of EU law and the right to effective judicial protection of Article 24 of the Constitution. Whether this means that the *Tribunal Constitucional*'s *apatía europea* has come to an end, remains to be seen; the relation between Article 24 of the Constitution and Article 47 of the Charter still has to crystallise further.

4.1.3 Overview of references to Article 47 in Spanish case law

The many preliminary references from Spain are a clear sign that, in the view of the referring courts, Spanish civil procedure offers insufficient protection of consumer-debtors.[731] EU (consumer) law is said to have "transformative capacity",[732] which resonates with the transformative function of Article 47 of the Charter. The CJEU's case law has led to a transformation of procedural rules and the amplification of procedural rights of consumers and powers of civil courts, although the legal framework has also become more fragmentised.[733]

For this study, I have analysed more than 350 decisions of Spanish civil courts, not counting the case law of the *Tribunal Constitucional*. In so far as Article 47 of the Charter has become a new parameter for judicial interpretation in Spain,[734] most references to it are part of a more elaborate citation of the CJEU's case law on the UCTD. This corroborates the above-mentioned observation of Spanish courts shielding behind the CJEU citations. Therefore, I will primarily focus on the original decisions to make a preliminary reference to the CJEU that explicitly refer to Article 47, in particular *Finanmadrid* and *Sánchez Morcillo*.[735] They are discussed in the sections corresponding to the judgments of the CJEU. The existence of a fundamental right to effective judicial protection in the

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730 *Tribunal Constitucional*, judgment no. 31/2019 of 28 February 2019, ECLI:ES:TC:2019:31. See also *Tribunal Constitucional*, judgment no. 34/2019 of 14 March 2019, ECLI:ES:TC:2019:34, discussed in subsection 4.2.3 below.

731 Mª Paz García Aburuza, 'Directiva 93/13 CEE versus Derecho Procesal Civil Español' Revista Aranzadi Doctrinal 9/2014 parte Estudio 13–15.

732 Mayoral and Torres Pérez (n 657) 729.

733 Pérez Daudí (n 31) 20; Albiez Dohrmann and Sánchez Lorenzo (n 640) 710.

734 Medina Guerrero (n 573) 279.

735 Case C-49/14 *Finanmadrid* and Case C-169/14 *Sánchez Morcillo*.

Spanish Constitution may have inspired some of the references by Spanish civil courts to Article 47. A few decisions ascribe a role to Article 47 that is analogous or equivalent to Article 24 of the Constitution.[736] An important difference, of course, is that Article 47 is connected to EU (consumer) law; its application is limited to cases involving consumers.[737] However, a reference to Article 47 also reveals a constitutional dimension. The prohibition of *indefensión*, i.e. a denial of the parties' rights of defence,[738] plays a central role in this respect and will be referred to throughout this chapter.

The analysed case law touches on a range of topics, that have been debated extensively in Spanish jurisprudence and legal doctrine. Recent examples are the assessment and substantive consequences of a finding of unfairness of clauses on default interest (*interés moratorio*),[739] early maturity or accelerated repayment of the loan (*vencimiento anticipado*)[740] and minimum interest rates or 'floor clauses' (*cláusulas suelo*).[741] While some of the judicial decisions that refer to the Charter also concern these issues, Article 47 has not been used to address them so far. The *Tribunal Constitucional* also considers them as substantive issues, not procedural.[742] Therefore, these issues will only be mentioned to the extent

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736 See e.g. *AP Madrid (Sección 10ª)*, order no. 425/2015 of 14 December 2015, JUR\2016\15218; *AP Barcelona (Sección 15ª)*, judgment no. 136/2016 of 9 June 2016, JUR\2016\180303; *Juzgado de Primera Instancia de Madrid*, judgment no. 379/2016 of 13 October 2016, JUR\2016\237072; *AP Málaga (Sección 5ª)*, order no. 356/2016 of 31 October 2016, JUR\2017\93140.

737 See e.g. *AP Almería (Sección 1ª)*, order no. 591/2017 of 19 December 2017, JUR\2018\200435, ECLI:ES:APAL:2017:781A; *AP Barcelona (Sección 19ª)*, order no. 194/2018 of 5 July 2018, JUR\2018\210473, ECLI:ES:APB:2018:4118A; *AP Girona (Sección 2ª)*, order no. 65/2019 of 11 April 2019, JUR\2019\127067, ECLI:ES:APGI:2019:167A.

738 Further explained in subsection 4.5.1.

739 Joined Cases C-482/13, C-484/14, C-485/13 and C-487/13 *Unicaja*; Case C-602/13 *BBVA v Quintano Ujeta and Sánchez García*; Joined Cases C-96/16 and C-94/17 *Banco de Sabadell*.

740 Case C-70/17 *Abanca*. *Vencimiento anticipado* means that when the debtor fails to fulfil their payment obligations, the creditor can claim the totality of the loan on the expiry of a stipulated time-limit (advanced expiration date).

741 Joined Cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo*. See further e.g. Arroyo Amayuelas (n 656); José Maria Fernández Seijo, *La tutela de los consumidores en los procedimientos judiciales* (Wolters Kluwer 2017); García-Valdecasas Dorrego (n 687).

742 *Tribunal Constitucional*, judgment no. 31/2019 of 28 February 2019, ECLI:ES:TC:2019:31, cited above.

they are relevant for the cases discussed in this chapter. A large part of the case law relates to the mortgage enforcement regime, which has been an important topic of debate in Spain. This debate provides relevant background information, but it is as such not the subject of this chapter, nor is it the purpose of this chapter to give an elaborate overview of all procedural issues in light of EU consumer law. The focus is on the role Article 47 has played so far in the reasoning of Spanish civil courts in unfair terms cases.

4.2 ACCESS TO COURT

4.2.1 Introduction: privileged procedures

The present section deals with Article 47 of the Charter in respect of consumer arbitration (in particular, the case of *Asturcom*[743]) and order for payment procedures, which are so-called "privileged procedures"[744] (in particular, *Finanmadrid* and *Margarit Panicello*[745]). These procedures have in common that decision-making is removed from the judicial realm. It is the arbitral tribunal respectively the court registrar (*Secretario Judicial*, currently called *Letrado de la Administración de Justicia*), not a court, that issues an arbitral award respectively order for payment. They allow creditors to obtain an enforceable title that has the same status as a judicial decision for the purposes of enforcement, without having to follow ordinary court proceedings. Creditors just need leave to enforce the title they have obtained against the debtor, which ensures rapid debt collection for uncontested claims.[746] For those who are not familiar with Spanish civil procedure, it must be noted that the enforcement (forced execution) of enforceable titles – such as judicial decisions and arbitral

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743 Case C-40/08 *Asturcom*, discussed in subsection 3.3.2.

744 *AP Girona (Sección 2ª)*, order no. 14/2015 of 14 January 2015, JUR\2015\116526; *AP Toledo (Sección 2ª)*, order no. 151/2017 of 2 February 2017, JUR\2017\142012; *AP Almería (Sección 1ª)*, order no. 232/2018 of 23 May 2018, JUR\2018\201290, ECLI:ES:APAL:2018:127A. See also Aguilera Morales (n 453) 3; Díez García (n 541) 230.

745 Case C-49/14 *Finanmadrid* and Case C-503/15 *Margarit Panicello*, discussed in subsection 3.2.3.

746 Luis Gómez Amigo, 'Control de las cláusulas abusivas y garantías procesales en los procesos con técnica monitoria, a la luz de la jurisprudencia reciente' Revista General de Derecho Procesal.

awards – requires court involvement.[747] The enforcing party must bring an enforcement action before the competent court. The general enforcement proceedings are governed by the rules laid down in Articles 517-570 LEC; the rules for the enforcement of mortgages and pledges are to be found elsewhere (Articles 681-698 LEC).

The above-mentioned procedures entail a shift of procedural initiative: it is the *defendant* – i.e. the debtor – who must initiate adversarial (i.e. *inter partes*, or: contentious) proceedings.[748] In principle, the case only comes before a court when the debtor challenges the claim within a relatively short time-period, and even then the space for judicial intervention (an examination of the merits of the case) is limited, if possible at all. All three cases concern the principle of *res judicata*.[749] From the perspective of Article 47 of the Charter, this gives rise to doubts regarding the effective judicial protection of consumers. The analysed cases illustrate why it is problematic to give creditors a particularly strong procedural position vis-à-vis consumer-debtors, who may not be able to exercise their rights under the UCTD and defend themselves against (the enforcement of) claims that are potentially based on unfair contract terms.

The courts that made the preliminary references in *Asturcom* and *Finanmadrid*, as well as the court registrar in *Margarit Panicello*, seem to have been aware of the constitutional dimension of these cases, which was accentuated by an explicit reference to Article 47 of the Charter in the latter two cases. Both the referring court in *Finanmadrid* and the court registrar in *Margarit Panicello* referred to Article 47 to signal problems that touch upon the core of judicial protection. Neither the CJEU nor the Spanish legislature have picked up the signalling function of Article 47 in this respect; only the *Tribunal Constitucional* has, but indirectly – by reference to *Margarit Panicello*. The referring court in *Asturcom* brought up the consumer's right of access to court and the rights of defence, but did not explicitly mention Article 47; possibly because the preliminary reference predated the Charter's entry into force and there had not yet been any CJEU judgments on the connection between Article 47 and the

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747 This is different in the Netherlands, where enforceable titles can in principle be enforced by the parties themselves through the engagement of a bailiff.

748 See subsection 3.2.1.

749 Introduced in subsection 3.2.2 and laid down in Article 207.3 and 4 LEC.

UCTD. The national context of the case will still be discussed, because it illustrates the potential empowering function of Article 47.

4.2.2 Consumer arbitration

Consumer as claimant or defendant: a crucial difference

Article 47 of the Charter may play a role in respect of arbitration clauses in consumer contracts: (i) horizontally, as a parameter for an assessment of the validity or fairness of arbitration clauses in consumer contracts, and (ii) vertically, as an instrument to create space for such an assessment insofar as national (procedural) law does not provide for it.[750] *Asturcom* provides an example of a case which could have had a different outcome in respect of the latter, by reference to Article 47.

Article 47 does not seem to have played a (direct) role as regards the invalidity as such of arbitration clauses in consumer contracts under Spanish law. However, the fundamental right to effective judicial protection as enshrined in Article 24 of the Spanish Constitution is relevant in this regard. The *Tribunal Constitucional* has held that the free will and autonomy of the parties is the essence of arbitration; their consent is a prerequisite. Restrictions of the right of access to court are allowed for constitutionally protected reasons or objectives, as long as they are proportional (Article 53 of the Constitution). One of these objectives, recognised by the *Tribunal Constitucional*, is preventing excessive litigation and unburdening the courts through facilitating ADR. According to the *Tribunal Constitucional*, it is nevertheless contrary to Article 24 of the Constitution to prescribe arbitration as the default route.[751] As regards arbitration clauses in consumer contracts, it is dubious whether 'free will' can ever be presupposed, especially where standard terms and conditions are not individually negotiated. Therefore, the Spanish legislator has decided that, in the case of consumers, arbitration clauses are generally not allowed: if the contract that contains an arbitration clause was concluded *before* the dispute had

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750 See also subsection 3.2.1.

751 *Tribunal Constitutional*, judgment no. 185/1987 of 18 November 1987, ECLI:ES:TC:1987:185; judgment no. 174/1995 of 23 November 1995, ECLI:ES:TC:1995:174; judgment no. 352/2006 of 14 December 2006, ECLI:ES:TC:2006:352. See further Ana I Mendoza Losana, '¿Existe un derecho absoluto a accedar a los óganos jurisdiccionales en nombre de la tutela judicial efectiva?' [2017] Centro de Estudios de Consumo - Publicaciones Jurídicas.

arisen, the clause is not binding on consumers (Article 57.4 TR-LGDCU).[752] The main reason for this is the weaker position of consumers vis-à-vis their counterparties: they cannot properly evaluate beforehand whether they want to go to arbitration, and they are effectively forced to waive their legally recognised rights.[753] As a result, consumers can, in principle, not be subjected to arbitration when they are the *defendant*.[754]

When they are the *claimant*, consumers can choose which dispute resolution mechanism they prefer, i.e. whether to submit their claim to a court or to opt for consumer arbitration. There is a special *Sistema Arbitral del Consumo* (consumer arbitration system), which is regulated by law.[755] The *Sistema* was introduced in 1984 and formally established in 1993; it is regulated under the *Ley de Arbitraje* (Arbitration Act; **LA**) of 2003.[756] Article 58.1 TR-LGDCU emphasises that submission to the *Sistema* must be voluntary and consent must have been expressly given. Only consumers can bring a claim before the *Juntas Arbitrales de Consumo* (**JACs**), the arbitral tribunals that are part of the *Sistema*. The JACs are competent on the basis of a public declaration of adherence to the system by the professional party (trader); the arbitral agreement is completed

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752 As amended by *Ley* 3/2014, *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, BOE no. 76 of 28 March 2014, p. 28967. See further Diana Marcos Francisco, 'Consumidores, sujetos privilegiados en el nuevo paradigma de justicia civil europea: medidas procesales y extraprocesales para su protección' [2015] InDret 16ff <http://www.indret.com/pdf/1155_es.pdf>; Beka (n 31) 163–164.

753 *Ley* 44/2006, *de 29 de diciembre, de mejora de la protección de los consumidores y usuarios*, BOE no. 312 of 30 December 2006, p. 46601, preamble VII. See also *Tribunal Constitucional*, judgment no. 1/2018 of 11 January 2018, ECLI:ES:TC:2018:1.

754 For further background on the consumer ADR scheme in Spain, see Pablo Cortés, 'The Impact of EU Law in the ADR Landscape in Italy, Spain and the UK: Time for Change or Missed Opportunity?' (2015) 16 ERA Forum 125, 133ff.

755 *Real Decreto* 636/1993, *por el que se regula el sistema arbitral de consumo*, BOE no. 121 of 21 May 1993, p. 15400; *Real Decreto* 231/2008, *por el que se regula el Sistema Arbitral de Consumo*, BOE no. 48 of 25 February 2008, p. 11072. See further Mª Teresa Álvarez Moreno, 'Resolución alternativa de litigios con consumidores y arbitraje de consumo' in Silvia Díaz Alabart (ed), *Manual de Derecho de consumo* (Editorial Reus 2016). The submission of disputes to arbitration other than consumer arbitration is considered to be an unfair term, except in the case of arbitration bodies established by statutory provision in respect of specific sectors or circumstances (Article 90.1 TR-LGDCU).

756 *Ley* 60/2003 *de Arbitraje*, BOE no. 309 of 26 December 2003. See also Real Decreto 231/2008, por el que se regula el Sistema Arbitral de Consumo, BOE no. 48 of 25 February 2008 (referring to Article 51 of the Constitution).

when the consumer brings a claim against that party.[757] In the cases discussed below, however, the consumer was the defendant.

Asturcom further explored: a potential empowering function not realised

Before *Mostaza Claro* (2006),[758] it was unclear whether judicial control of the unfairness of the arbitration clause on which an arbitral award was based was even possible under Spanish law. Pursuant to Article 41.1 of the *Ley de Arbitraje*, an arbitral award can be annulled at the request of one of the parties if there is no valid arbitration agreement (Article 41.1 LA, ground a) or if the award is contrary to public policy (ground f), e.g. in case of a violation of Article 24 of the Constitution due to a procedural defect.[759] In *Mostaza Claro*, the CJEU held that in an action for annulment, the court must determine whether the arbitration agreement is invalid because it contains an unfair term, even if the consumer has not pleaded that invalidity in the course of the arbitration proceedings. This would be an annulment for lack of a valid arbitration agreement (ground a) rather than for reasons of public policy (ground f).

Asturcom (2009) did not concern an action for annulment, but the enforcement of an arbitral award in default of appearance of the consumer. The referring enforcement court – the *Juzgado de Primera Instancia* (Court in First Instance) in Bilbao – considered whether it should refuse to recognise and enforce the award of its own motion. It considered the arbitration clause at issue to be unfair, because it caused a serious imbalance between the parties and impaired the consumer's access to court and rights of defence.[760]

> Both *Mostaza Claro* and *Asturcom* pertained to arbitration clauses in mobile telephone contracts that referred to the same Spanish ADR body, the *Asociación Europea de Arbitraje de Derecho y Equidad* (**AEADE**). This cast doubt on the impartiality and independence of the arbitral tribunal; the ADEADE was associated to the trader and it had drafted the arbitration agreement itself. Article 57.4 TR-LGDCU had not been amended yet, so arbitration clauses in contracts concluded before the dispute arose were still allowed insofar as they referred to an arbitration body for a specific sector.

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757 Álvarez Moreno (n 755) 286.

758 Case C-168/05 *Mostaza Claro*.

759 Álvarez Moreno (n 755) 296.

760 *Juzgado de Primera Instancia No. 4 de Bilbao*, order of 4 December 2007 in case no. 1147/2007, JUR\2011\403897, ECLI:ES:JPI:2009:9A.

However, the referring court in *Asturcom* still had doubts as to the unfairness of the arbitration clause at issue. The location of the AEADE was not indicated in the contract; its seat was located in Bilbao at a considerable distance from the consumer's place of residence and the costs of the arbitration proceedings almost exceeded the claimed amount.[761] Moreover, the court observed that (almost) all arbitral awards by the AEADE were rendered in default of appearance by the debtor.

The consumer involved had neither appeared in the arbitration proceedings nor brought an action for annulment of the arbitral award within the prescribed period of two months (Article 41.4 LA). Thus, the award had acquired the force of *res judicata* (Article 43 LA). In Spain, arbitral awards enjoy the same status as judicial decisions for the purpose of enforcement (Article 517.2.2° LEC). The party against whom enforcement is sought can oppose it within 10 days on a limited number of grounds (Articles 556 and 559 LEC), which do not include unfair terms. Articles 551 and 552 LEC restricted the scope of judicial review to procedural requirements (not including publicy policy). This notwithstanding, some Spanish courts considered it possible to refuse to enforce the arbitral award when it was based on an unfair arbitration clause within the meaning of the UCTD; whilst other courts assessed whether the award itself was contrary to public policy, e.g. because of a lack of impartiality of the arbitral tribunal.[762]

But there were also courts that held the unfairness of an arbitration clause could not be established *ex officio*, only at the request of the consumer-defendant in (a) an action for annulment or (b) opposition against enforcement. The referring court in *Asturcom* seems to have questioned this approach, which was followed inter alia by its own Court of Appeal, the *Audiencia Provincial* (**AP**) in Bilbao.[763] According to AP Bilbao, judicial intervention outside the scope of Article 552 LEC would be against legal certainty and the principle of *res judicata*; judicial protection cannot go further than what the parties demand or what is authorised by law. This approach appears to be based on a strict interpretation of the traditional procedural principles and the idea that courts cannot create or change the law. AG Trstenjak shared the *Juzgado's*

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761 Case C-40/08 *Asturcom*, para 25.

762 García-Valdecasas Dorrego (n 687) 47; Beka (n 31) 170.

763 *AP Bilbao*, order no. 396/08 of 6 June 2008 (not published; copy obtained from the court upon request), reversing an order in which the enforcement had been refused.

doubts as to the impartiality of the arbitral tribunal and the consumer's rights of defence.[764] However, the CJEU held that the principles of equivalence and effectiveness do not automatically entail that an arbitral award with *res judicata* effect must be set aside. The *Juzgado* in Bilbao subsequently found it had no other choice than to issue an enforcement order against the consumer involved.[765]

As shown in chapter 3, Article 47 of the Charter could have led to a different conclusion. Its potential empowering function in this regard was not picked up by the CJEU. The Spanish legislature finally opted for the solution proposed by AG Trstenjak – judicial control at the enforcement stage – several years later. *Ley* 42/2015 confirmed the duty of *ex officio* control of unfair terms in respect of arbitral awards, with explicit reference to *Asturcom*.[766] The second transitional provision of *Ley* 42/2015 declares Article 552.1 LEC to be applicable in all enforcement proceedings.[767] Article 552.1 LEC now provides that the enforcement court shall examine *ex officio* whether the enforceable titles listed in Article 557.1 LEC contain unfair terms.[768] Article 557.1 pertains to non-judicial and non-arbitral titles; strictly speaking, it does not include arbitral awards (Article 517.2.2° LEC). However, this appears to be a legislative error:[769] judicial review of arbitral awards is now possible in respect of unfair terms, regardless of any *res judicata* effect. Since it is unclear whether arbitral tribunals can (be obliged to) exercise unfair terms control, it should not matter if they have already performed such control. What matters is whether or not such control has already taken place in earlier *judicial* proceedings.

It should be noted that an appeal can only be brought by the *creditor* against a refusal to enforce an enforceable title (Article 552.2 LEC); the debtor cannot appeal a decision that allows the enforcement. The question as to what extent an asymmetric restriction of the right to appeal

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764 C-40/08 *Asturcom*, Opinion of AG Trstenjak, discussed in subsection 3.2.2.

765 *Juzgado de Primera Instancia No. 4 de Bilbao*, order of 26 October 2009 in case no. 1147/2007, JUR\2011\403897, ECLI:ES:JPI:2009:9A.

766 Arroyo Amayuelas (n 656) 79.

767 *Ley* 42/2015, *Disposición transitoria segunda: Procesos monitorios y ejecución de laudos arbitrales*.

768 *Ley* 42/2015, preamble V.

769 Arroyo Amayuelas (n 656) 79–80.

is problematic from the perspective of Article 47 will be discussed further in section 4.4 below.[770]

4.2.3 Delegation of judicial functions to the court registrar

Finanmadrid further explored: Article 47 in its signalling function

The case of *Finanmadrid* concerned the Spanish order for payment procedure (*proceso monitorio*), which is regulated by Articles 812-818 LEC. The referring enforcement court – the *Juzgado de Primera Instancia No. 5* in Cartagena – found that the order for payment issued by the court registrar had acquired the force of *res judicata*. Therefore, it could no longer be examined whether the underlying contract contained any unfair terms.[771] In the decision to make a preliminary reference to the CJEU (in 2014), Article 47 of the Charter was referred to in its signalling function, to question the issue of a lack of court involvement in the procedure itself.[772] This issue was subsequently picked up by the Spanish legislature (in 2015) and by the *Tribunal Constitucional* (in 2016).

> In 2006, Mr. Albán Zambrano entered into a loan agreement with Finanmadrid E.F.C., S.A. to finance the purchase of a vehicle. His wife, brother and sister-in-law were joint guarantors. After Mr. Albán failed to meet his payment obligations in 2011, Finanmadrid initiated an order for payment procedure against him as the principal debtor and the three guarantors. The procedure was handled entirely by a court registrar, not a judge. It is unclear why the defendants failed to appear; perhaps they did not know that (and on which grounds) they could contest the claim, perhaps they could not afford legal representation or perhaps they did not have time to hire a lawyer to lodge an objection for them (within 20 days). The court registrar checked only whether the formal admissibility requirements were met, and issued an order for payment against all four defendants in 2012.

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770 See section 4.4.

771 Case C-49/14 *Finanmadrid*, para 24; introduced in subsection 3.2.3.

772 *Juzgado de Primera Instancia No. 5 de Cartagena*, order of 23 January 2014 in case no. 352/2013 (not published; copy obtained from the court upon request). The national judicial decisions in the case of *Finanmadrid* have not been published (yet); they are available upon request at the referring court.

The order for payment procedure is a widely used procedure by creditors in Spain.[773] It was designed to strengthen the procedural position of creditors in respect of uncontested claims, so that they can quickly obtain an enforceable title.[774] In the case of *Banesto*,[775] the bank had argued that *ex officio* control was contrary to its right to effective judicial protection (Article 24 of the Spanish Constitution).[776] After the CJEU's judgment, however, it was clear that unfair terms control extended to this type of procedure. Article 552.1 LEC was changed to the extent that the unfairness of contract terms could be examined in the course of general enforcement proceedings.[777] *Ley* 42/2015 clarified that the enforcement court must do so *ex officio*.[778] It was not until *Ley* 42/2015 was adopted, that provision was made for *ex officio* control of unfair terms in the order for payment procedure as well (Article 815.4 LEC). Before that, Spanish courts applied *Banesto* with no explicit legislative basis.[779] The case of *Finanmadrid* predated *Ley* 42/2015, and *Banesto* did (strictly speaking) not pertain to the court registrar, to whom the court's competence had been delegated in 2009.

As discussed in chapter 3, *Finanmadrid* concerned four problems: the limited role of the court registrar in the procedure; the *res judicata* effect attributed to the order for payment by the enforcement court; the court registrar not being a judge; and an apparent violation of the rights of defence.[780]

The court registrar is not a judge, but a public servant who is considered as a staff member ("*dependiente*") of the Ministry of Justice.[781] The Spanish legislator had introduced a procedural reform – ***Ley* 13/2009** – that instituted a new *Oficina judicial* (Judicial Office), which was meant

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773 See e.g. *Ley* 13/2009, *de reforma de la legislación procesal para la implementatción de la nueva Oficina judicial*, BOE no. 266 of 4 November 2009, p. 92103 (also referred to as **LNOJ**), preamble IV. See also Joan Picó i Junoy, 'Requiem por el proceso monitorio' (2015) 2 Justicia 523.

774 Díez-Picazo Giménez (n 682) 410; Picó i Junoy (n 773) 524.

775 Case C-618/10 *Banesto*; also discussed in subsection 3.2.3. On the national follow-up, see also Beka (n 31) 244–245, 316.

776 *Audiencia Provincal de Barcelona*, order no. 222/2012 of 29 October 2012, ECLI:ES:APB:2012:7113A. See further Beka (n 31) 241–245.

777 *Ley* 1/2013; see further section 4.3.3. See also Amayuelas (n 123) 81–82.

778 See also subsection 4.2.2 above.

779 García Aburuza (n 731) 4; Arroyo Amayuelas (n 656) 80.

780 See subsection 3.2.3.

781 Article 440 LOPJ.

to take over judicial functions that were not strictly constitutional for the purpose of streamlining civil and administrative proceedings. The court registrars already supported the courts in their task to adjudicate cases on the merits and in a timely manner, but now they were also attributed competences that allowed them to make decisions themselves in matters "collateral to the jurisdictional function".[782] For instance, the admissibility of the case was assessed by the court registrar. If one of the formal admissibility requirements was not met, the case would be put before a judge.[783]

As regard the order for payment procedure, *Ley* 13/2009 raised the maximum amount to EUR 250.000, to widen the scope for the handling of uncontested claims in a speedy and efficient manner.[784] Again, it was up to the court registrar to assess admissibility. Moreover, the court registrar could close the procedure by issuing an order if all formal requirements were met, and the debtor did not comply with the request for payment or failed to appear (Article 816.1 LEC). The court would only be involved if the documents indicated that the claimed amount was incorrect, or if the debtor lodged an objection within 20 days (Articles 815.3 and 818 LEC).[785] If debtors do not file an opposition, they can no longer claim restitution in subsequent proceedings (Article 816.2 LEC). Some courts, including the *Juzgado* in Cartagena that made the preliminary reference in *Finanmadrid*, understood this as meaning that the order for payment had *res judicata* effect, which prevented them from examining the case on the merits and performing unfair terms control.[786]

The *Juzgado* framed its preliminary reference to the CJEU as an issue of effective judicial protection.[787] Pursuant to Article 117 of the Spanish Constitution, justice is administered by independent judges and magistrates who are members of the judiciary, and the exercise of judicial authority is vested exclusively in courts and tribunals foreseen by law. In

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782 *Ley* 13/2009 (LNOJ), preamble II.

783 *Ley* 13/2009, preamble III.

784 *Ley* 13/2009, preamble IV.

785 The court would also be involved if the debtor could not be located or if they had their domicile in another jurisdiction (within Spain), which would terminate the procedure but without prejudice to the creditor's right to make a new request: Article 813 LEC.

786 Arguably erroneously: Arroyo Amayuelas (n 656) 80; Gómez Amigo (n 746) 5.

787 *Juzgado de Primera Instancia No. 5 de Cartagena*, order of 23 January 2014 in case no. 352/2013 (not published, copy obtained from the court upon request).

2016 the *Tribunal Constitucional* held that a complete lack of judicial review of decisions of court registrars amounts to jurisdictional immunity, which is contrary to Articles 24 and 117 of the Constitution.[788] The process of "dejudicialisation"[789] under *Ley* 13/2009 deprived courts of their jurisdictional competence, and parties of their access to an independent tribunal. Therefore, it could be problematic from the perspective of Article 47 of the Charter as well.[790] In the words of the *Juzgado* in the case of *Finanmadrid*:

> "All this could constitute a violation of the Directive 93/13/EC, where judicial *ex officio* control of unfair terms is not allowed – neither in the decision-making phase nor in the enforcement. It could also be contrary to the right to effective judicial protection recognised in Article 47 of the Charter of Fundamental Rights, because the order for payment procedure without opposition is a procedure in which the court does not intervene, whereas its final resolution produces the effects of *res judicata*."[791]

In addition, the *Juzgado* found that the course of the proceedings jeopardised consumer-debtors' right to be heard. Their only opportunity to contest the claim was in the order for payment procedure itself, by lodging an objection. If they did not make use of this opportunity, an order would be issued, without an assessment of the unfair nature of the terms of the contract on which the claim was based. The defendants needed to exercise their right to be heard within 20 days after the initiation of the procedure, otherwise it was too late. The creditor did not even have to wait until notification of the order to the defendants before requesting and dispatching the enforcement. Moreover, legal representation by both a lawyer (*abogado*) and a court representative

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788 *Tribunal Constitucional*, judgment no. 58/2016 of 17 March 2016, ECLI:ES:TC:2016:58. See also José Bonet Navarro, 'La necesaria reforma de la mal llamada "jura de cuentas"' [2017] Revista de Derecho UNED 73, 101; Concellón Fernández (n 712) 57–58.

789 Gascón Inchausti (n 420) 138.

790 Aguilera Morales (n 453) 5–6; Bonet Navarro (n 788) 90.

791 *Juzgado de Primera Instancia No. 5 de Cartagena*, order of 23 January 2014 in case no. 352/2013, para 56. Translated from Spanish: "*Todo esto podría suponer una vulneración de la Directiva 93/13/CEE, no se permite el control judicial de oficio sobre las cláusulas abusivas – ni en fase declarativa ni en ejecución. Además podría ser contrario al derecho a tutela judicial efectiva reconocido en el artículo 47 de la Carta de Derechos Fundamentales, pues el proceso monitorio sin oposición es un procedimiento en el que no interviene el Juez, sin embargo su resolución final produce efectos de cosa juzgada.*"

(*procurador*) was required to lodge an objection.[792] Another problem in the *Finanmadrid* case itself was that only the debtor and his wife were officially notified of the order for payment procedure; the debtor had been instructed to inform the other two guarantors, but it was uncertain whether they were actually made aware of the procedure. Thus, they might not even have had an opportunity to lodge an objection.

The CJEU focused in its judgment on judicial control at the enforcement stage. In the meantime, *Ley* 42/2015 had been adopted, providing for such control in the order for payment procedure itself (Article 815.4 LEC). *Ley* 42/2015 also introduced a right to be heard for both parties within 5 days – legal representation is no longer required – and confirmed that there is no *res judicata* effect.[793] In addition, the court's decision can be appealed. While it would go too far to claim that these legislative reforms were directly triggered by Article 47 (in its transformative function), they were meant to prevent *indefensión*, i.e. a denial of justice.[794] It has been said that as a consequence, the character of the order for payment procedure was fundamentally changed, which loses its efficiency benefits and might overburden the courts.[795] In this respect, it has been observed that Article 552.1 LEC – read in conjunction with Articles 557.1 and 517.2.9° LEC, referring to (enforceable) procedural decisions – could have been interpreted in such a way that unfair terms control was already possible (or even mandatory) at the enforcement stage.[796] Clearly, the *Juzgado* in *Finanmadrid* did not share this interpretation. In its final decision, it nevertheless viewed the CJEU's judgment as allowing for an exception, so it could perform unfair terms control at the enforcement stage.[797]

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792 Art. 818.1 LEC, read in conjunction with Art. 23.2.1º and 31.2.1º LEC: legal representation is mandatory when the claim exceeds 2.000 euros. By contrast, legal representation is not required to initate an order for payment procedure: Art. 814.2 LEC.

793 *Ley* 42/2015, preamble V.

794 Gómez Amigo (n 746) 8.

795 Picó i Junoy (n 773) 525–526; Gómez Amigo (n 746) 11.]

796 Aguilera Morales (n 453) 7–8; Picó i Junoy (n 773) 527. See also Case C-503/15 *Margarit Panicello*, Opinion AG Kokott, point 52; Case C-49/14 *Finanmadrid*, Commission's written observations, para 76.

797 *Juzgado de Primera Instancia No. 5 de Cartagena*, order of 11 April 2016 in case no. 352/2013 (not published; copy obtained from the court upon request). The default interest clause and the penalty clause were declared to be unfair, and the corresponding amounts were excluded from the claim.

Margarit Panicello further explored: a signal of unconstitutionality

Margarit Panicello concerned a procedure where the door to the court was completely shut.[798] The so-called 'unpaid fee recovery procedure'[799] (*jura de cuentas*, literally: sworn accounts; Articles 34 and 35 LEC) is specifically designed for lawyers as a pathway to recover unpaid fees from their clients. The role of the court registrar is confined to reviewing the legal services provided and determining the payable amount.[800] The decision of the court registrar is considered to be of an administrative nature; it has no substantive *res judicata* effect, yet it is binding and enforceable.[801] There was no (administrative) recourse against the decision.

> Mr. Margarit Panicello, a Spanish lawyer, was hired to represent his client in proceedings concerning the custody of her children before the *Juzgado Único de Violencia sobre la Mujer* (Single-Member Court dealing with matters involving violence against women) *de Terrassa*. In 2015, the lawyer brought a *jura de cuentas* procedure against his client for the recovery of fees. The court registrar had doubts regarding unfair contract terms and unfair commercial practices on the part of the lawyer, in particular as to information that had been given prior to the engagement about the estimated cost of his services.

The court registrar in Terrassa, who made the preliminary reference to the CJEU, distinguished the question (a) whether an *ex officio* examination under the UCTD (and the Unfair Commercial Practices Directive[802]) should be possible, from (b) whether the rules governing the procedure were incompatible with Article 47 of the Charter insofar as they excluded judicial review.[803] This distinction lays bare the difference in perspective: how the problem is framed – as an issue with unfair terms control or as a signal of unconstitutionality, i.e. a violation of the fundamental right to effective judicial protection – defines how it is perceived and what the solution should be.

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798 Case C-503/15 *Margarit Panicello*; introduced in subsection 3.2.3. See also Bonet Navarro (n 788) 85; Aguilera Morales (n 673) 5.

799 Case C-503/15 *Margarit Panicello*, Opinion AG Kokott, point 1.

800 Case C-503/15 *Margarit Panicello*, Opinion AG Kokott, para 84.

801 Aguilera Morales (n 453) 5–6.

802 Directive 2005/29/EC concerning unfair business-to-consumer comercial practices in the internal market (OJ L 149, 11 June 2005, p. 22).

803 Case C-503/15 *Margarit Panicello*, para 25.

The preliminary reference to the CJEU was made by a court registrar, not by a court, which, as Aguilera Morales has observed, makes the reference to Article 47 extra salient: the court registrar, who is not a judicial organ, questioned his own competence to exercise judicial functions, clearly signalling a problem from the perspective of access to court.[804] The CJEU found it had no jurisdiction, precisely due to the procedure lacking a judicial nature. This left the issue – quite unsatisfactorily – unresolved.

In a judgment of 15 April 2019, the *Tribunal Constitucional* nevertheless declared the lack of judicial review of the decision of the court registrar in the *jura de cuentas* (see Articles 34.2 and 35.2 LEC) to be unconstitutional.[805] The *Tribunal Constitucional* referred to *Margarit Panicello* to describe the characteristics of the procedure and the decision-making powers of the court registrar, who is not a judicial body. Even the opposition grounds of Article 557 LEC – which include unfair terms[806] – are assessed by the court registrar, not a court. Thus, obligations are settled between the parties in a procedure outside the judicial system. According to the *Tribunal Constitucional*, it is also relevant that it is always the lawyer who initates the procedure, never the debtor. The fact that the decision lacks (substantive) *res judicata* effect – because it is given in summary proceedings – is not sufficient to guarantee judicial protection of the debtor's rights and legitimate interests. Subsequent legal action entirely depends on the party's initiative. The court registrar's decision is not subject to judicial review and can still be enforced. This creates a space of jurisdictional immunity that violates Articles 24 and 117 of the Constitution.

The *Tribunal Constitucional* appears to share AG Kokott's view that the procedure results in an order of a (quasi-)judicial nature. From a constitutional perspective, the problem of jurisdictional immunity can be solved by making a means of recourse against the order available, which is what the Tribunal Constitucional has proposed – i.e., revision (Article 454bis LEC). From the perspective of the UCTD, however, this does not address the concern raised by Kokott that the decision will be enforced before unfair terms control has taken place. Even if a court can perform such control in the course of revision or at the enforcement stage, it may

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804 Aguilera Morales (n 453) 13, 16. See also Bonet Navarro (n 788) 100.

805 *Tribunal Constitucional*, judgment no. 34/2019 of 14 March 2019, ECLI:ES:TC:2019:34.

806 Since *Ley* 1/2013; see subsection 4.3.3.

be too late. Therefore, a return to the situation pre-*Ley* 13/2009 has been proposed, which would reinstate the (exclusive) competence of the courts to issue payment orders. An alternative would be to bring the *jura de cuentas* procedure under the umbrella of the *proceso monitorio*, or at any rate to apply Article 815.4 LEC by analogy in the *jura de cuentas* procedure as well.[807]

4.3 EFFECTIVE (JUDICIAL) REMEDY

4.3.1 Introduction: mortgage debtors as European consumers

The cases in the previous section show how traders could circumvent judicial control by resorting to privileged procedures, with little or no court involvement. A similar issue has arisen in respect of mortgage loan agreements, which in some cases triggered a reference to Article 47 of the Charter.[808] The national background and follow-up of *Aziz* and *Sánchez Morcillo* is of special interest for the purposes of this study, also in light of earlier decisions of *Tribunal Constitucional* in similar cases.

Under Spanish procedural law, creditors have two different types of enforcement procedures at their disposal: the general enforcement procedure of Article 517 et seq. LEC and the special procedure for mortgages and pledges of Article 681 et seq. LEC. The Spanish mortgage enforcement regime is designed as an expeditious path toward recovery of the loan by the creditor upon default of the debtor.[809] It gives the creditor direct access to enforcement on the basis of a public deed, which constitutes an enforceable title.[810] The sale of the mortgaged property may also take place in front of a notary instead of a judge, if the parties have agreed to an extrajudicial auction (Article 129 *Ley Hipotecaria*).[811] The debtor's rights of defence are so severely restricted, that the extrajudicial

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807 Bonet Navarro (n 788) 103–105.

808 See e.g. Case C-415/11 *Aziz*, para 62; Joined Cases C-537/12 and C-116/13 *Banco Popular Español*, para 60; Case C-169/14 *Sánchez Morcillo I*, para 28.

809 Anderson and Simón Moreno (n 664) 56. See also Díez García (n 541) 233, 246; Jiménez París (n 658) 986.

810 See e.g. *AP Toledo (Sección 2ª)*, order no. 185/2017 of 7 March 2017, JUR\2017\146402; *AP Almería (Sección 1ª)*, order no. 52/2017 of 23 January 2017, JUR\2017\112584.

811 *Ley Hipotecaria* (Mortgage Act**)**, BOE no. 58, 27 February 1946, p. 1518. Art. 129 of the Mortgage Act was subsequently reformed by *Ley* 1/2013 and *Ley* 19/2015. See also Casla (n 537) 287.

title gives the creditor a stronger instrument for enforcement than a judicial decision given in ordinary contentious proceedings.[812] From a procedural point of view, the (contractual) credit relationship has almost become ancilliary to the creditor's security interests, instead of vice versa.[813]

In the wake of the 2008 financial crisis, two main problems concerning the Spanish mortgage enforcement regime came to the fore: (i) many debtors still owed significant outstanding amounts after the foreclosure, and (ii) there was a lack of (procedural) means to remedy the numerous unfair terms in mortgage loan agreements.[814] Mortgage enforcement in Spain is procedurally separated from the contractual relationship between the parties, even though there is obviously a substantive connection between the creditor's security interests and the loan agreement.[815] Mortgage enforcement is considered to be an action *in rem*, not *in persona*.[816] It is subjected to strict formal requirements that must be observed scrupulously, with a view to the privileged position of the mortgage holder.[817] The merits of the case, including, the nullity or validity of the contract itself, are dealt with in separate declaratory proceedings on the merits before a different (ordinary) court (Article 698.1 LEC).[818]

As discussed below, the fact that the debtor still had access to separate declaratory proceedings was reason for the *Tribunal Constitucional* not to declare the mortgage enforcement procedure unconstitutional. The same separation between two types of proceedings was reason for the CJEU to find that the Spanish regime undermined the effective (judicial) protection of consumers against unfair terms.[819] The interest of creditors in effectuating their rights in an expedient manner does not justify a lack of procedural means for consumer-debtors to

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812 Pérez Daudí (n 31) 16; Díez García (n 541) 258.

813 Díez García (n 541) 257.

814 Yolanda De Lucchi López-Tapia, 'Spanish Mortgage Foreclosure and Unfair Terms in Banking Contracts' (2015) 6 Civil Procedure Review 140, 141–142. See also González Pascual (n 515) 265–266.

815 Guillem Soler Solé, 'Ejecución hipotecaria. Limitaciones al derecho de defensa del ejecutado. Cuestión de inconstitucionalidad' [2013] Revista Xuridica Galega 13, 20.

816 *AP Toledo (Sección 2ª)*, order no. 151/2017 of 2 February 2017, JUR\2017\142012.

817 See e.g. *AP Barcelona (Sección 16ª)*, order no. 283/2015 of 18 September 2015, JUR\2015\261047.

818 Arroyo Amayuelas (n 656) 75.

819 Case C-415/11 *Aziz*, introduced in subsection 3.3.2.

suspend or terminate the enforcement. This entailed a switch from the perspective of (national) constitutional rights to (EU) consumer rights.[820] Mortgage debtors were now seen in their capacity of (European) consumers instead of (Spanish) citizens, although the underlying issues remained the same.[821] It is their status of consumer that determines their rights, and underlines the need to open up rigid or restrictive rules that stand in the way of effective judicial protection.

4.3.2 *Aziz* further explored

Referring court: a clear impediment to the exercise of judicial remedies

Before *Aziz*,[822] unfair terms did not constitute a ground for opposition against mortgage enforcement. In order to dispute the debt, the debtor had recourse to separate declaratory proceedings, which did (and still do) not have the effect of suspending or terminating the enforcement (Article 698.1 LEC). The only interim measure available to debtors was that they could ask for a retention of (part of) the amount to be paid (Article 698.2 LEC), but this would not prevent foreclosure. Debtors might be able to obtain compensation, but they would still lose their home. The final vesting of the mortgaged property in a third party was irreversible. Once a transfer of ownership took place it would be too late, as the case of *Banco Santander* shows.[823] The debtor could make a preliminary, preventive registration of an application for annulment of a mortgage (Article 131 of the *Ley Hipotecaria*). However, there was a significant risk that consumer-debtors would not make such a registration in time, because of the rapidity of the enforcement proceedings or because they are unaware or do not appreciate the extent of their rights.[824]

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820 Iglesias Sánchez (n 18) 971.

821 Guillem Soler Solé, 'Las ejecuciones hipotecarias en España, ante la cuestión prejudicial europea' [2013] Revista Xuridica Galega 25, 30; José Humberto Sahián, *Dimensión constitucional de la tutela de los consumidores. Progresividad y control de regresividad de los derechos de los consumidores* (Universidad Complutense de Madrid (doctoral thesis) 2017) 455 <https://eprints.ucm.es/43562/>.

822 Case C-415/11 *Aziz*.

823 Case C-598/15 *Banco Santander*; see subsection 3.3.2.

824 Case C-415/11 *Aziz*, paras 56-58. See also Díez García (n 541) 247–248.

> The case of *Aziz* concerned declaratory proceedings brought by Mr. Aziz against Catalunyacaixa following the sale of the mortgaged property, his family home. Mr. Aziz had failed to pay 5 monthly instalments. Catalunyacaixa then exercised its right to call in the totality of the mortgage loan – on the basis of an 'early maturity' or acceleration clause (*vencimiento anticipado*) – and to unilaterally determine the amount of the debt. It instituted mortgage enforcement proceedings against Mr. Aziz, who did not lodge an objection. The enforcement court did not exercise unfair terms control. Mr. Aziz subsequently brought an action for a declaration seeking the annulment of the unilateral debt determination clause and nullity of the enforcement proceedings.

In *Aziz*, the referring court – the *Juzgado de lo Mercantil* (Commercial Court) *No. 3* in Barcelona – pointed out that Mr. Aziz' failure to meet his payment obligations was neither temporarily nor quantitatively serious, and that the availability of an effective remedy for the consumer was at least questionable. In its request for a preliminary ruling, it highlighted "both formally and substantively, a clear impediment to the consumer's exercise of rights of action or judicial remedies of such a kind as to guarantee the effective protection of his rights".[825]

Tribunal Constitucional on effective judicial protection pre-Aziz

A similar question had already been put before the *Tribunal Constitucional* by the *Juzgado de Primera Instancia No. 2 de Sabadell* in 2010 by way of a *cuestión de inconstitucionalidad*.[826] The *Juzgado* referred not only to the debtor's fundamental right to effective judicial protection (Article 24 of the Constitution), but also to the principle of procedural equality derived from the prohibition of discrimination (Article 14), the prohibition of arbitrary action of public authorities (Article 9) and the right to housing enshrined in Article 47 of the Constitution. Previously, in 1981, the *Tribunal Constitucional* had declared the Spanish mortgage enforcement regime to be in conformity with the Constitution.[827] However, the regime at issue here – in particular Articles 695 and 698 LEC – dated from 2000, thus it had not yet been tested. The *Juzgado* questioned the extraordinary

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825 See Case C-415/11 *Aziz*, para 31 and *Juzgado de lo Mercantil No. 3 de Barcelona*, judgment of 2 May 2013 in case no. 13/2011, ECLI:ES:JMB:2013:21. See also Iglesias Sánchez (n 18) 967.

826 *Tribunal Constitucional*, order no. 113/2011 of 19 July 2011, ECLI:ES:TC:2011:113A.

827 *Tribunal Constitucional*, judgment no. 41/1981 of 18 December 1981, ECLI:ES:TC:1981:41. See also Iglesias Sánchez (n 18) 970.

and disproportionate limitation of opposition grounds, which denied the debtor the possibility to challenge the contract (including the unfairness of specific terms) on which the enforcement was based and which prevented the court from assessing all relevant circumstances of the case. Moreover, the effectiveness of a decision in the declaratory proceedings was not sufficiently guaranteed if the court could not suspend or terminate the enforcement proceedings. Thus, not all issues could be dealt with in a timely manner with the appropriate procedure, which resulted in *indefensión* of the debtor.[828] In this respect, the *Juzgado* also pointed out the serious consequences for debtors due to their weak economic situation.

The *Tribunal Constitucional* declared the *cuestión de inconstitucionalidad* inadmissible. While it acknowledged that the adversarial nature of the mortgage enforcement proceedings was severely limited, it found that this did not amount to a violation of the debtor's right to effective judicial protection. It considered that there was no (real) dispute between the parties; the mortgage enforcement proceedings were an "avenue of urgency" for creditors to effectuate their security rights in court. The reason the opposition grounds were restricted is that only a few exceptions may cause suspension or termination of the enforcement. The proceedings did not result in a final and binding decision and, more importantly, the door to declaratory proceedings was left open for the debtor.[829] Thus, there was no *indefensión*. The *Tribunal Constitucional* emphasised that the debtor had consented to the mortgage arrangement and thus, to a limitation of his defense possibilities – an unconvincing argument in respect of non-negotiated terms, especially in consumer contracts. According to the *Tribunal Constitucional*, the debtor could always stop the enforcement by means of paying the installments due – which overlooks the problem that debtors like Mr. Aziz were given mortgage loans they would most likely be unable to repay in the first place.

In addition, the *Tribunal Constitucional* pointed out that a (hypothetical) violation of Article 24 of the Constitution depended on the violation of other constitutional rights and principles, such as the right to housing.[830] The right to housing is a guiding principle for social and

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828 See further Soler Solé (n 815) 25.

829 See also Díez García (n 541) 225, 231–234, 243–245.

830 See also González Pascual (n 515) 267.

economic policy that could not give rise to a separate fundamental rights violation: the legal norms at issue merely provided for a procedural instrument to effectuate competing rights, namely the creditor's right to claim payment and the debtor's right to oppose enforcement. Here, the *Tribunal Constitucional* clearly did not take the criticism into account that the balance was off in light of the precarious position of mortgage debtors.[831] In this respect, the approach of the *Tribunal Constitucional* has also been criticised for not taking the case law of the ECtHR into account on the need for procedural guarantees to ensure the protection of substantive fundamental rights, such as the right to respect for the home (Article 8 ECHR).[832]

Lastly, the *Tribunal Constitucional* reiterated that this was not a suitable channel for judicial organs to question the constitutionality of a legislative scheme in a general or abstract way. It is neither for the courts nor for the *Tribunal Constitucional* to formulate or assess an alternative scheme; that is the exclusive competence of the legislature, who has a wide margin of freedom of choice – within the constitutional limits – that cannot and should not be restricted by the *Tribunal Constitucional*. In a concurring opinion, Magistrate Eugeni Gay Montalvo nevertheless warned against "reductionism in constitutional review". In his view, the constitutional doctrine established in 1981 could not automatically be extended to the current economic and financial situation, which is radically different from the situation at the beginning of the 80s. The legislation at issue should have been interpreted in light of the new context, because the *Tribunal Constitucional* cannot be insensitive to the social reality to which the legal norms, values and principles of the Constitution apply.

Audiencia Provincial de Barcelona on Article 47 in the case of Aziz

In *Aziz*, the CJEU held that the UCTD precluded national legislation that, on the one hand, did not provide for grounds of objection in mortgage enforcement proceedings based on unfair terms, and, on the other hand, did not allow the court to grant interim relief in declaratory proceedings and suspend the enforcement if that is necessary to guarantee the full effectiveness of its final decision.[833] On 2 May 2013, the *Juzgado* in

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831 See subsection 4.1.2.

832 Díez García (n 541) 252–254; González Pascual (n 515) 260,263.

833 Case C-415/11 *Aziz*, para 59.

Barcelona gave judgment in the case of Mr. Aziz.[834] It considered that the function of courts is to apply and interpret the law in the context or social reality in which the dispute must be resolved. It referred to the public debate (political, legislative, social and economic) that had led to a process of legislative reforms, but had not been completed by the date of the judgment (*Ley* 1/2013 was adopted two weeks later).[835] The court's goal was to contextualise the submissions of the parties in the procedural and substantive environment of the Spanish law in force, in accordance with the UCTD.[836]

Mr. Aziz had requested that one of the terms in the mortgage loan agreement – the unilateral debt determination clause – be declared null and void, as well as requesting nullity of the enforcement proceedings. The *Juzgado* declared the unilateral debt determination clause and two other clauses – the acceleration clause and a default interest clause – to be unfair and therefore null and void. Thus, the amount claimed by the bank was not due and payable. This did not completely negate the debt incurred by the principal loan, nor did it preclude the creditor from bringing a claim in declaratory proceedings where a procedural imbalance did not exist (at least, not to same extent).[837] The *Juzgado* considered that the creditor had been allowed access to an enforcement regime in which the debtor could not file an opposition based on unfair terms (Article 695.1 LEC), whilst, at the same time, he could not apply for interim measures in declaratory proceedings either (Article 698 LEC). This had caused an irreparable harm to Mr. Aziz, but he had not claimed any damages.[838] Since the issues raised in *Aziz* – regarding the Spanish mortgage enforcement system in general – transcended the individual case, no cost order was pronounced.[839]

Both parties brought an appeal, arguing that the *Juzgado* had gone beyond the ambit of the dispute. This is related to the so-called principle of 'procedural congruence' (*congruencia procesal*), i.e. alignment between the submissions of the parties and the judgment of the court.[840] When

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834 *Juzgado de lo Mercantil No. 3 de Barcelona*, judgment of 2 May 2013 in case no. 13/2011, ECLI:ES:JMB:2013:21.

835 See subsection 4.3.3 below.

836 Above-cited judgment of *Juzgado,* paras 4.3-4.4.

837 Above-cited judgment of *Juzgado*, para 12.6 and 12.8.

838 Above-cited judgment of *Juzgado,* paras 11.6, 12.3 and 12.7.

839 Above-cited judgment of *Juzgado,* para 13.5.

840 Pérez Daudí (n 31) 94; Barceló Compte (n 684) 218–219.

there is no such alignment, so-called *incongruencia* occurs. Like *res judicata*, procedural congruence is a mandatory principle of civil procedure, aimed at legal certainty within the process.[841] Mr. Aziz argued there was *incongruencia*, because no decision had been given on his request for nullity of the enforcement proceedings. The bank alleged that the *Juzgado* had awarded more than had been claimed; Mr. Aziz had only asserted the unfairness of one clause, not three clauses.

On 15 December 2014, AP Barcelona held that, although Mr. Aziz was right from a formal point of view, there was no substantive *incongruencia*. The judgment in first instance must be read as dismissing his request for nullity of the enforcement proceedings. The foreclosure had already taken place; it was unclear who presently had possession over the property and, therefore, the consequences of such nullity would be unclear as well.[842] AP Barcelona also dismissed the bank's allegation of *incongruencia*. Mr. Aziz had indeed requested nullity of the enforcement, which meant that the court could examine all contractual terms on which it was based *ex officio*, without violating the principle of procedural congruence.[843]

In this respect, AP Barcelona referred to Article 47 of the Charter to underline that the requirements of a fair trial are observed, including the principle of procedural congruence and the right to be heard.[844] This is one of the few self-standing references to Article 47 I have found, which will be further explored below.[845]

AP Barcelona ultimately came to a different conclusion than the *Juzgado*. It did not find the terms at issue to be unfair, except the default interest clause. Even if there was *incongruencia*, this would not improve the legal position of Mr. Aziz. He had failed to meet his payment obligations; therefore, the bank could reasonably assume that it was entitled to terminate the contract and initiate the enforcement. To prevent the foreclosure, Mr. Aziz could have complained to the bank and/or he

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841 *AP León (Sección 1ª)*, judgment no. 192/2017 of 19 May 2017, JUR\2017\171244, ECLI:ES:APLE:2017:536.

842 *AP Barcelona (Sección 15ª)*, judgment no. 407/2014 of 15 December 2014, JUR\2015\86196, paras 16-22. See also the above-cited judgment of the *Juzgado*, para 12.9.

843 Above-cited judgment of *AP Barcelona*, para 52.

844 Above-cited judgment of *AP Barcelona*, paras 24-26; see further subsection 4.5.2.

845 See subsection 4.5.2.

could have paid the installments due, but he did not do so.[846] The judgment of the *Juzgado* was reversed, and AP Barcelona ordered a recalculation of interest. In this respect, the CJEU's judgment was a Pyrrhic victory for Mr. Aziz. To my knowledge, his case is still pending before the *Tribunal Supremo*.

4.3.3 Implementation and follow-up

A new opposition ground and an empowering function of Article 47?
The CJEU found that the UCTD precluded the procedural rules at issue in *Aziz*, but it did not prescribe a specific solution, let alone invent a new remedy.[847] The judgment presented the Spanish legislature with two options: (a) expand the grounds for opposition in the enforcement proceedings, or (b) allow the court in declaratory proceedings to provide interim relief and suspend the enforcement.[848] The first option was chosen. *Ley* 1/2013 introduced a new opposition ground in Article 695.1.4 LEC.[849] This opposition leads to suspension of the enforcement proceedings until the parties are heard and a decision is taken (Article 695.2 LEC). This has made the enforcement proceedings slightly more adversarial, but only in respect of unfair terms. If the opposition succeeds, the enforcement is terminated insofar as it is based on the unfair term(s) at issue; in all other cases, it will be continued without the application of the unfair term(s) (Article 695.3 LEC).

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846 Above-cited judgment of *AP Barcelona*, paras 76-79.

847 See also subsection 3.3.2.

848 See e.g. *AP Girona (Sección 2ª)*, order no. 116/2015 of 10 March 2015, JUR\2015\153253; *AP Almería (Sección 1ª)*, order no. 206/2016 of 9 May 2016, JUR\2017\86409.

849 Article 695.1 (new) LEC reads as follows: "In proceedings under this chapter, an objection to enforcement by the party against whom enforcement is sought may be admitted only if it is based on the following grounds: (1) Extinction of the security or the secured obligation, … (2) An error in determining the amount due, … (3) In the case of enforcement against movable property mortgaged or property subject to a non-possessory pledge, the existence of another pledge, movable-property or immovable-property mortgage on, or seizure of, that property registered before the charge giving rise to the procedure, which must be proved by means of the corresponding certificate from the Registry. (4) The unfairness of a contractual term constituting the grounds for enforcement or that has determined the amount due." [English translation taken from Case C-169/14 *Sánchez Morcillo I*, para 9]

Ex officio control was introduced in the general enforcement proceedings (Articles 552.1 and 557.1.7ª LEC), but not specifically in the *mortgage* enforcement proceedings. However, it seems clear that Article 552.1 LEC should apply there as well.[850] According to AP Barcelona, the new opposition ground provides an extra opportunity for the consumer's defence, in addition to *ex officio* control – one does not exclude the other.[851] There is still some debate as to whether the debtor should be able to file an opposition and/or whether the enforcement court should be able to perform unfair terms control (*ex officio*) at any stage of the enforcement, not just at the beginning, with due observance of the right to be heard.[852] According to AP Toledo, *ex officio* control in the enforcement proceedings should be possible until a final decision has been given. It referred to *Sánchez Morcillo* and Article 47 to justify a flexible approach, and held this does not run counter to the principle of legal certainty.[853] This could be seen as an example of an empowering function that will be further discussed in respect of *Sánchez Morcillo*.

Ley 1/2013 contains a transitional provision that the legislative amendments will be applicable to enforcement proceedings that are pending at the moment of its entry into force. Insofar as the time period of 10 days to file an opposition has already elapsed, debtors have one month after the publication of *Ley* 1/2013 to formulate an extraordinary opposition on the basis of unfair terms. The CJEU found it problematic that debtors were not individually notified of this possibility, with a view to the rights of defence, legal certainty and the protection of legitimate expectations.[854] *Ley* 5/2019 clarifies that a new period of 10 days starts running from the moment of personal notification of this possibility to

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850 Arroyo Amayuelas (n 656) 76.

851 Above-cited judgment of *AP Barcelona*, cited above, para 45. See also *AP Barcelona (Sección 17ª)*, order no. 372/2015 of 26 November 2015, JUR\2016\101861.

852 Pérez Daudí (n 31) 69; Faustino Cordon Moreno, 'Acción colectiva y acción individual para la tutela de los derechos de los consumidores' [2016] Centro de Estudios de Consumo - Publicaciones Jurídicas. See also *AP Valencia (Sección 6ª)*, order no. 255/2017 of 27 June 2017, JUR\2018\25068, ECLI:ES:APV:2017:3327A.

853 *AP Toledo (Sección 2ª)*, order no. 297/2018 of 12 December 2018, JUR\2019\72784.

854 The CJEU has held that a one-month time limit could not be imposed on consumers without a personal notification: Case C-8/14 *BBVA*, para 38. See also Medina Guerrero (n 573) 275–277.

the debtor, which must take place within 15 days of the *Ley's* entry into force.[855]

In cases where the enforcement takes place extrajudicially, *Ley* 1/2013 stipulates that the notary must stay the extrajudicial auction if one of the parties brings a case before a court, alleging that the mortgage loan agreement on which it is based is unfair (Article 129.2/f *Ley Hipotecaria*, with reference to Article 695.1.4 LEC). The notary must also notify the parties of (potential) unfair terms in the mortgage loan agreement, so they can take legal action.[856] There is – at least in theory – a register of terms that have been declared invalid by a final judicial decision; notaries cannot declare contractual terms unfair themselves, even though their main role is to control the legality of the transaction.[857]

It should be noted that Article 695 LEC was not specifically written for consumers; it pertains to all kinds of mortgage debtors. At first sight, the amendments are not limited to unfair terms in consumer contracts. However, courts do interpret it as such: only consumers (within the meaning of the TR-LGDCU) can rely on them.[858] Professionals and companies can invoke the unfairness of standard terms under the LCGC, but only in ordinary (declaratory) proceedings.[859] This does not lead to *indefensión*.[860] If a party is erroneously not considered to be a consumer and therefore wrongfully denied a judicial remedy, this might nevertheless constitute a violation of Article 24 of the Constitution.[861] Here, the protection of Article 24 of the Constitution goes beyond the scope of Article 47 of the Charter, read in conjunction with the UCTD, which is in line with Article 47's accessory character

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855 This possibility only applies to enforcement proceedings pending when *Ley* 1/2013 entered into force; proceedings initiated afterwards are governed by the new provisions (transitional provision 3).

856 See also subsection 3.3.2.

857 Anderson and Simón Moreno (n 664) 68. Because the notary does not exercise a judicial function, there is arguably no conflict with Article 117 CE: Díez García (n 541) 257.

858 See e.g. *AP Las Palmas (Sección 5ª)*, order no. 189/2014 of 22 July 2014, JUR\2015\9437. See also subsection 4.1.3 and the case law cited there.

859 See e.g. *AP Castellón (Sección 3ª)*, order no. 185/2015 of 3 September 2015, JUR\2015\271187; *AP Girona (Sección 2ª)*, order no. 52/2016 of 9 February 2016, JUR\2016\192307.

860 *AP Girona (Sección 2ª)*, order no. 274/2014 of 18 December 2014, JUR\2015\81699; *AP Girona (Sección 2ª)*, order no. 185/2015 of 6 May 2015, JUR\2015\166350.

861 See subsection 4.1.2.

No interim relief contrary to Article 47?

There is still no direct link between the enforcement proceedings and the declaratory proceedings of Article 698 LEC, which could be viewed as problematic from the perspective of effective judicial protection. Article 698 LEC even expressly prohibits any suspensory effect of the declaratory proceedings (see also Article 565 LEC). It has been argued that this provision is contrary to Article 47 of the Charter, read in conjunction with the UCTD.[862] According to AP Madrid, the court must do everything in its power to ensure the full effectiveness of the UCTD; this requires suspension of the enforcement proceedings until a decision has been taken in the declaratory proceedings.[863] AP Madrid referred to the CJEU's judgments in *Aziz* and *Sánchez Morcillo* – and thus, indirectly to Article 47, which again fulfilled an empowering function; it authorised the court to disregard Article 698 (and Article 565) LEC and thus, moves in the direction of an eliminatory function. According to AP Granada, however, courts cannot suspend the enforcement without a legislative basis, not even in the interest of consumer protection.[864] The purpose of opposition in mortgage enforcement proceedings is to terminate the enforcement, not to suspend it; the aim of the declaratory proceedings is to compensate the debtor, not to undo the effects of the enforcement.[865]

It has been argued that the Spanish legislator should have opted for suspension of the enforcement in the declaratory proceedings, in addition to or even instead of expanding the opposition grounds in the mortgage enforcement proceedings.[866] This changed the nature of the mortgage enforcement proceedings, which now involved contractual

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862 See e.g. Case C-380/15 *Garzón Ramos,* with explicit reference to Article 47 of the Charter. See also Iglesias Sánchez (n 601) 964. The case did not fall within the competence of the CJEU, because it concerned mortgage enforcement proceedings against a real estate agent that had financed the purchase of the property. The consumers who lived there were third parties, who could not challenge the mortgage or the enforcement. This illustrates the lack of defence possibilities in the Spanish mortgage enforcement system, not only for mortgage debtors, but also for third parties such as tenants: Díez García (n 541) 236.

863 *AP Madrid (Sección 10ª)*, order no. 223/2015 of 9 July 2015, JUR\2015\186525.

864 *AP Granada (Sección 3ª)*, order no. 208/2015 of 11 December 2015, JUR\2016\114214; *AP Granada (Sección 3ª)*, order no. 135/2016 of 30 June 2016, JUR\2016\222262; *AP Granada (Sección 3ª)*, order no. 10/2017 of 31 January 2017, JUR\2017\91912. See also *AP Almería (Sección 1ª)*, order no. 118/2017 of 9 March 2017, JUR\2017\157110.

865 See also Díez García (n 541) 239–240, 245, 250.

866 Díez García (n 541) 215.

and consumer law issues as well.[867] The court in the declaratory proceedings could be seen as a better forum to address the (potential) unfairness of contract terms, because that is where debtors are supposed to exercise their rights of defence and contest the claim on the merits.[868]

There is no legislative provision that prescribes *ex officio* control by ordinary courts in declaratory proceedings.[869] Pérez Daudí has argued that these courts should be able to interfere in pending enforcement proceedings on the basis of Articles 721 LEC, with due regard to the rights of defence.[870] Article 721 LEC provides that the parties may request interim measures that are deemed necessary to ensure the effectiveness of the judicial protection sought, but the court may not adopt such measures *ex officio*. There is a risk that consumers will not expressly apply for interim relief, because they are unaware of or do not appreciate the extent of their rights.[871]

Some courts have ordered suspension of the enforcement as a preventive measure, but only in cases where enforcement proceedings had not (yet) been initiated.[872] A legislative solution, proposed by Díez García, would be to automatically suspend enforcement proceedings when declaratory proceedings are brought regarding the same case.[873] The declaratory proceedings could then be seen as an extension of the enforcement proceedings, where all (other) issues can be raised that do not constitute an opposition ground.[874] Of course, this would make the enforcement proceedings less attractive for creditors, which might explain why the Spanish legislator does not seem to have considered such a profound solution. Thus, the implementation of *Aziz* could be seen as incomplete and only causing more legal uncertainty,[875] as confirmed by further preliminary references on this issue.[876]

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867 Medina Guerrero (n 573) 269.

868 See also Micklitz, 'Unfair Contract Terms – Public Interest Litigation before European Courts' (n 342) 642.

869 Arroyo Amayuelas (n 656) 74.

870 Pérez Daudí (n 31) 90.

871 See also Case C-568/14 *Fernández Oliva*, paras 33-35.

872 Pérez Daudí (n 31) 88–89.

873 Díez García (n 541) 256. See also Barral-Viñals (n 12) 94.

874 *AP Barcelona (Sección 15ª)*, judgment no. 407/2014 of 15 December 2014, JUR\2015\86196, para 49.

875 Medina Guerrero (n 573) 269; Pérez Daudí (n 31) 90. See also MPI report, p. 53.

876 See e.g. the above-mentioned cases C-380/15 *Garzón Ramos* and C-568/14 *Fernández Oliva*.

Consequences for enforcement?

A follow-up question to consider is to what extent it would have helped Mr. Aziz if the mortgage enforcement proceedings could have been suspended and/or the terms at issue had been deemed unfair. According to the *Juzgado*, the consequence of its finding of unfairness was that all three clauses should be declared null and void and that the claimed amount was not due and payable.[877] AP Barcelona found that nullity of the enforcement proceedings could not be proclaimed; the amount owed by Mr. Aziz should simply be recalculated.

As regards (default) interest clauses, it could be argued that the debt can be recalculated: the nullity of certain terms does not automatically render the entire contract invalid.[878] If the clause is not the basis of the enforcement and the enforcement proceedings have not yet been concluded, they may proceed (Article 695.3 LEC).[879] In respect of the two other clauses at issue in the case of Mr. Aziz, it could be argued that the enforcement should have been terminated. When a unilateral debt determination clause is declared to be null and void, this means the creditor was not entitled to unilaterally determine the amount owed by the debtor. The expedited enforcement procedure is an action *in rem* directed against the assets of the debtor, which is based on certainty of the claimed amount.[880] Thus, the creditor should have been barred from the procedure. This does not mean the debtor is 'off the hook', but the creditor loses a procedural advantage.[881]

The same could be argued as regards acceleration clauses, insofar as a debtor's non-compliance with their payment obligations does not warrant early termination. There were different views as regards the consequences of a finding of unfairness, which reveal tension between the (consumer-)debtor's right to effective judicial protection and the creditor's security interests. There were also different readings of the

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877 *Juzgado de lo Mercantil No. 3 de Barcelona*, judgment of 2 May 2013 in case no. 13/2011, ECLI:ES:JMB:2013:21, para 12.8.

878 *AP Tarragona (Sección 1ª)*, order no. 64/2013 of 10 June 2013, JUR\2014\294027; *AP Castellón (Sección 3ª)*, order no. 175/2014 of 10 September 2014, JUR\2015\52954. See also Barral-Viñals (n 12) 94.

879 *AP Barcelona (Sección 13ª)*, order no. 210/2014 of 6 October 2014, JUR\2014\295342.

880 *AP Toledo (Sección 2ª)*, order no. 185/2017 of 7 March 2017, JUR\2017\146402. See also Barral-Viñals (n 12) 81.

881 Barral-Viñals (n 12) 83.

CJEU's judgment in *Abanca*.[882] When an unfair acceleration clause is struck from the loan agreement, it seems obvious that the creditor can no longer claim the entire loan in the enforcement proceedings.[883] However, the *Tribunal Supremo* has allowed enforcement on the basis of Aricle 693.2 and Article 24 of *Ley* 5/2019, if the statutory requirements are met.[884] After *Aziz*, the minimum period for access to the enforcement proceedings is when the debtor is in default of three monthly instalments (Article 693.1 LEC); in cases concerning mortgaged residential properties of natural persons, the period is at least 12 months. New proceedings can be brought, even if the enforcement was terminated earlier because of an unfair (and thus invalid) acceleration clause. Apparently, such a termination does not have *res judicata* effect.[885]

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882 Case C-70/17 *Abanca*.

883 It also seems obvious that the mortgage loan agreement can continue to exist without the term: Francesco de Elizalde, 'Partial Invalidity for Unfair Terms? CJEU in Abanca - C-70 & 179/17' [2019] Journal of European Consumer and Market Law 147; Anderson and Simón Moreno (n 664) 58. Anderson and Simón Moreno (n 664) 58. See e.g. *AP Toledo (Sección 2ª)*, order no. 663/2017 of 1 December 2017, JUR\2018\64957, ECLI:ES:APTO:2017:377A; *AP Toledo (Sección 2ª)*, order no. 31/2019 of 28 January 2019, JUR\2019\128090, ECLI:ES:APTO:2019:68A. The Spanish government seems to have argued differently before the CJEU: Case C-70/17 *Abanca*, Opinion of AG Szpunar, point 114; see also Candida Leone, 'Case Note Abanca Corporación Bancaria, S.A. v Alberto García Salamanca Santos' [2020] Revue européenne de droit de la consommation. Leone observes that it is ultimately for the consumer to decide whether to opt for invalidity of the contract, with reference to Case C-260/18 *Dziubak v Raiffeisen Bank International*.

884 *Tribunal Supremo (Sala de lo Civil)*, judgment no. 463/2019 of 11 September 2019, ECLI:ES:TS:2019:2761. The question whether this interpretation is compatible with the Charter was declared inadmissible, because it was not clear how this was relevant for the resolution of the case at hand: Case C-92/16 *Bankia v Rengifo Jiménez and Felix Caixa*, paras 33-38.

885 Case C-486/16 *Bankia v Sánchez Martínez and Sánchez Triviño*, paras 35 and 49. According to the *Tribunal Supremo*, Article 552.3 LEC does not apply, because the enforcement is based on a mandatory statutory provision (Article 24 of *Ley* 5/2019), not on the unfair acceleration clause. Article 552.3 LEC stipulates that once a decision that terminates the enforcement proceedings becomes final, the creditor only has recourse to ordinary proceedings, unless *indefensión* has occurred, which is a ground for nullity of the decision: see e.g. *AP Málaga (Sección 5ª)*, order no. 311/2015 of 12 November 2015, JUR\2016\84863.

4.4 EQUALITY OF ARMS

4.4.1 Introduction: asymmetric appeal in mortgage enforcement proceedings

The discussion above shows that the CJEU's case law cannot solve all systemic dysfunctions of Spanish procedural law, in particular the mortgage enforcement regime.[886] The outcome in the case of *Aziz* illustrates that the harsh consequences of 'predatory lending' cannot be fully addressed through increased procedural protection of consumer-debtors. Moreover, Article 47 of the Charter is not a universal remedy; its functions only manifest themselves on the national level as it is used by courts to justify the (dis)application of procedural rules in a certain way.

The case of *Sánchez Morcillo* and its follow-up provide another example of the imperfect trialogue between Spanish civil courts, the CJEU and the Spanish legislature.[887] It can be regarded as proof that the efforts of the Spanish government to upgrade the procedural framework of mortgage enforcement proceedings to EU standards have been insufficient.[888] After the CJEU's judgment in *Aziz*, a new ground for opposition was included in Article 695.1.4 LEC.[889] It could be said that this already removed the procedural disadvantage for consumer-debtors, but it also shifted the problem to the appeal phase. Article 695.4 LEC contained an asymmetric restriction of the right to appeal for mortgage debtors, which was justified by the privileged position of the mortgage holder.[890] Mortgage enforcement proceedings are not considered to be fully adversarial. There was (and is still) no procedural connection with ordinary proceedings on the merits: the enforcement could go ahead once the debtor's opposition against it was dismissed, or when the decision to terminate the enforcement was overturned in appeal. Thus, the problem of irreversibility was not completely resolved after *Aziz*.

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886 Iglesias Sánchez (n 601) 973; García Aburuza (n 731) 13–15; Barral-Viñals (n 12) 95.

887 Case C-169/14 *Sánchez Morcillo I* and Case C-539/14 *Sánchez Morcillo II* (pertaining to the same case); introduced in subsection 3.4.2.

888 Gómez Pomar and Lyczkowska (n 662) 110–111. See also Díez García (n 541) 235; Jiménez París (n 658) 986.

889 See subsection 4.3.3.

890 Medina Guerrero (n 573) 272.

As discussed in chapter 3, *Sánchez Morcillo I* could be seen as an example of how Article 47 of the Charter – read in conjunction with the UCTD – and effectiveness may lead to a different outcome.[891] From an effectiveness perspective, unfair terms control (*ex officio*) in one instance could be sufficient. Article 47 requires equality of arms, which means in unfair terms cases that consumers must be able to bring an appeal as well. In this respect, it must be noted that in Spain, appeal is not considered to be a second chance to relitigate the case. The ambit of the dispute is limited; litigants cannot present new claims or defenses in appeal,[892] with a view to the right to be heard of the other party, who has lost the opportunity to respond to these claims or defences in the first instance.[893] The first instance is the initial and essential phase of the process and provides the core of judicial protection; the right to appeal (in civil proceedings) is not a constitutional guarantee.[894] This could be another explanation why the preliminary reference in *Sánchez Morcillo I* was framed as an issue of equality of arms, rather than the lack of an effective (judicial) remedy as such.[895]

4.4.2 *Sánchez Morcillo I* further explored

Tribunal Constitucional: access to court in first instance guaranteed

In *Sánchez Morcillo*, it was the referring court that raised the reference to Article 47 of the Charter. It is interesting to note that the request for a preliminary ruling was made on 2 April 2014, only three weeks after the *Tribunal Constitucional* had dismissed a *cuestión de inconstitucionalidad* regarding Article 695.4 LEC.

In November 2013, the *Juzgado de Primera Instancia No. 7* in Avilés had posed two *cuestiónes de inconstitucionalidad* regarding Article 695.4 LEC. It pointed out that the lack of possibility for the debtor to appeal would make it difficult to remedy the consequences of mortgage enforcement. According to the *Juzgado*, the discriminatory and unequal treatment of the parties to the proceedings constituted a violation of

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891 See also Moya Hurtado de Mendoza (n 679) 411.

892 Díez-Picazo Giménez (n 682) 391.

893 *AP Almería (Sección 1ª)*, order no. 471/2017 of 24 October 2017, JUR\2018\201909, ECLI:ES:APAL:2017:1035A]

894 *AP Lleida (Sección 2ª)*, order no. 55/2013 of 25 March 2013, JUR\2014\294266.

895 See also subsection 3.4.1.

Articles 14 and 24 of the Constitution. However, the *Tribunal Constitucional* found in its judgment of 10 March 2014 that the procedural requirement of *juicio de relevancia* was not met.[896] This requirement means, in short, that the validity of the norm in question must be relevant or necessary for the outcome of the case.[897] No decision had been given yet in the enforcement proceedings at hand, so appeal was not (yet) at issue. Moreover, it was not clear in advance that the debtor's objection would be dismissed. It appeared that the *Juzgado* anticipated the debtor's intention to appeal and did not consider other options, such as the termination of the proceedings or the route of Article 698 LEC. Therefore, the question was hypothetical and premature.

This strict interpretation by the *Tribunal Constitucional* led to a paradox: the enforcement court in first instance could not pose a *cuestión de inconstitucionalidad*, but appellate courts could not do so either, exactly because there was no possibility of appeal for the debtor.[898] In the case of *Sánchez Morcillo*, AP Castellón had circumvented this paradox by making the preliminary reference before declaring the appeal inadmissible. It considered that the answer of the CJEU to the question whether Article 695.4 LEC was compatible with Article 7 of the UCTD and Article 47 of the Charter was necessary to determine whether the appeal was admissible and thus, whether the case could proceed or not.[899] Needless to say, if the appeal was inadmissible, the Court of Appeal would not be able to exercise *ex officio* control of unfair terms either. It also found it was the highest instance in this case, because against a decision dismissing the appeal no cassation appeal would be available before the *Tribunal Supremo*.

Such an approach would most likely not have led to a different outcome before the *Tribunal Constitucional*: in a later judgment, given

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896 *Tribunal Constitucional*, order no. 70/2014 of 10 March 2014, ECLI:ES:TC:2014:70A. See also *Tribunal Constitucional*, order no. 71/2014 of 10 March 2014, ECLI:ES:TC:2014:71A; *Tribunal Constitucional*, order no. 111/2014 of 8 April 2014, ECLI:ES:TC:2014:111A, *Tribunal Constitucional*, order no. 112/2014 of 8 April 2014, ECLI:ES:TC:2014:112A and *Tribunal Constitucional*, order no. 113/2014 of 8 April 2014, ECLI:ES:TC:2014:113A.

897 Díez García (n 541) 218.

898 Díez García (n 541) 221–222.

899 AP Alava had come to a similar conclusion – either the appeal was inadmissible because it had been brought by the debtor, or it was admissible because Article 694.4 LEC (old) was contrary to the right to a fair trial and equality of arms: *AP Álava (Sección 1ª)*, order no. 94/2014 of 24 September 2014, JUR\2014\255268.

only 5 days after the CJEU's judgment in *Sánchez Morcillo I* but without any reference to it, the *Tribunal Constitucional* added that the debtor had access to a court in first instance, so there was no violation of Article 24 of the Constitution.[900] The debtor had (and used) the opportunity to raise objections in the enforcement proceedings, and they could claim compensation in separate, ordinary proceedings. Again, the *Tribunal Constitucional* did not distinguish between different types of mortgage debtors.

Audiencia Provincial Castellón: an unjustified procedural advantage

The case law of the *Tribunal Constitucional* provided a reason for AP Castellón to make a preliminary reference to the CJEU.[901] Neither the consumer-debtors nor the court in first instance had referred to the existence of unfair terms in the mortgage loan agreement.[902] It was AP Castellón that brought up Article 47 of the Charter; a reference to the UCTD was only added following an observation by one the parties.[903]

According to AP Castellón, the enforcement initiated against Mr. Sánchez Morcillo by the bank appeared to be based on at least one unfair term, concerning a default interest rate of 19 % per year (15% higher than the statutory interest rate in Spain at the time). In this case, the debtors could not have based their opposition on unfair terms, because it had been filed on 12 March 2013, two months before *Ley* 1/2013 entered into force. Pursuant to Article 695.4 LEC, appeal could only be lodged by the creditor against the termination of the enforcement and/or the disapplication of an unfair term. Consumer-debtors could not bring an appeal against a rejection of their opposition. Separate declaratory proceedings would not suspend the enforcement. AP Castellón observed that this was problematic in light of *Aziz*, and contrary to Article 47 of the Charter:

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900 *Tribunal Constitucional*, order no. 206/2014 of 22 July 2014, ECLI:ES:TC:2014:206A.

901 *AP Castellón (Sección 3ª)*, order of 2 April 2014, JUR\2014\179524.

902 The debtors' opposition was based on the (alleged) lack of an enforceable title due to a formal defect and a lack of competence of the court. See also Case C-169/14 *Sánchez Morccilo I*, View of AG Wahl, point 26.

903 Mr. Alejandro Rubio González, State Attorney representing the Government of Spain at the CJEU, in a speech delivered in Brussels on 17 December 2014, available at http://www.academia.edu/9846524/The_application_of_the_Charter_of_Fundamental_Rights_of_the_European_Union_by_legal_practitioners. See also subsection 2.3.2.

> "This court considers that the aforementioned Article 695.4 of the Code of Civil Procedure [LEC] is incompatible with the right to a fair trial and equality of arms set forth in Article 47 of the Charter of Fundamental Rights of the European Union."[904]

AP Castellón used Article 47 as an additional argument to explain why *Ley* 1/2013 was still insufficient from the perspective of the effective judicial protection of consumers under the UCTD. It drew attention to procedural advantage for the creditor that was, in its view, unjustified. Article 47 aims to ensure a balance between the parties to the proceedings, which – according to AP Castellón – entails that they must be able to bring an appeal under the same conditions. The reference to Article 47 thus fulfilled a strengthening function in respect of consumers' procedural rights, but also an empowering function as to the role of courts. The principle of equality of arms amplifies the duty of the (national) legislator and courts to counterbalance consumers' weaker position in the procedural realm.[905] Such an empowering function has been picked up by other courts as well, e.g. in the above-mentioned decision of AP Toledo;[906] *Sánchez Morcillo* seems to have paved the way.

4.4.3 Implementation and follow-up

A transformative function of Article 47, to a certain extent

The CJEU gave judgment on 17 July 2014. It held that Article 7 UCTD, read in conjunction with Article 47 of the Charter, precluded the asymmetric restriction of the right to appeal at issue. In chapter 3, the transformative function of Article 47 has already been highlighted – with certain limitations, as the national follow-up shows. RD 11/2014 of 5 September 2014 amended Article 695.4 LEC: mortgage debtors are now

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904 Translated from Spanish: "*Este tribunal considera que el citado art. 695.4 de la Ley de Enjuiciamiento Civil es incompatible conel derecho a un juicio equitativo y en igualdad de armas enunciado en el artículo 47 de la Carta de Derechos Fundamentales de la Unión Europea*."

905 Medina Guerrero (n 573) 273.

906 *AP Toledo (Sección 2ª)*, order no. 297/2018 of 12 December 2018, JUR\2019\72784, discussed in subsection 4.3.3. See for another example *AP Almería (Sección 1ª)*, order no. 426/2017 of 25 September 2017, JUR\2018\200338, ECLI:ES:APAL:2017:727A. AP Almeria referred to the inequality of arms between consumers and traders as an argument for *ex officio* control in mortgage enforcement proceedings, with due regard for the right to be heard.

allowed to bring an appeal against a decision dismissing their objection on the basis of unfair terms.[907] In the preamble of RD 11/2014 (VI), explicit reference was made to the CJEU's judgment. Some appellate courts that applied Article 695.4 (new) LEC also referred to the principle of equality of arms to explain why the amendment had been made.[908] RD 11/2014 contained a transitional provision that Article 695.4 (new) LEC is applicable to enforcement proceedings that had not yet been concluded with a transfer of possession to the party that acquired the property. In cases where the debtor's objection had been dismissed, the debtors had a period of one month after the day RD 11/2014 entered into force to bring an appeal on the basis of Article 695.4 (new) LEC.[909] *Ley* 9/2015 changed this period into two months after its entry into force.[910]

After the CJEU's judgment in *Sánchez Morcillo I*, AP Castellón found it could still not examine the appeal on the merits. The recent legislative reform had not addressed the uncertainty: pursuant to Article 695.4 (new) LEC, appeal was only possible against a ruling of the court in first instance dismissing an objection based on unfair terms. In the case of Mr. Sánchez Morcillo, no such objection had been raised, which meant that

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907 Article 695.4 (new) LEC reads as follows: "An appeal may lie against the order discontinuing enforcement or disapplying an unfair term or rejecting the opposition on the ground laid down in paragraph 1(4) of the present article. Save in those circumstances, no appeal shall lie against orders adjudicating upon the objection to enforcement referred to in the present article and the effects of those orders shall be confined exclusively to the enforcement proceedings in which they are made." [English translation taken from Case C-539/14 *Sánchez Morcillo II*, para 8] Strictly speaking 'discontinuing enforcement' or 'disapplying an unfair term' is not the same as 'rejecting the opposition', which is why the latter was added to Article 695.4 LEC by *Ley* 9/2015 (see below): *AP Valencia (Sección 9ª)*, order no. 123/2015 of 25 February 2015, JUR\2015\124382; *AP Valencia (Sección 9ª)*, order no. 460/2014 of 11 September 2014, JUR\2015\51381. See also: Roca Trías and García Couso (n 710) 531.

908 See e.g. *AP Lleida (Sección 2ª)*, order no. 36/2015 of 26 February 2015, JUR\2015\158435; *AP Valencia (Sección 9ª)*, order no. 455/2014 of 8 September 2014, JUR\2015\51807.

909 See e.g. *AP Barcelona (Sección 16ª)*, order no. 168/2015 of 19 May 2015, JUR\2015\160073.

910 *Ley* 9/2015, *de medidas urgentes en materia concursal*, BOE no. 125 of 26 May 2015, p. 43874. Questions have been raised as to the constitutionality of making the calculation of this period dependent on the publication of RD 11/2014 in the BOE, given the requirement of personal notification of the enforcement to the debtor: Medina Guerrero (n 573) 278.

Article 695.4 (new) LEC did not apply either.[911] Therefore, the appeal was, strictly speaking, still not admissible and the Court of Appeal could not exercise *ex officio* control of unfair terms. This would not only apply to Mr. Sánchez Morcillo, but to all consumers in his situation. AP Castellón decided to make a second preliminary reference to the CJEU.[912] In addition to Article 47 of the Charter, AP Castellón raised the right to housing (Article 34 of the Charter) and the right to family life (Article 7 of the Charter). Unfortunately, the CJEU did not provide any further assistance.[913] In its final decision of 3 September 2015 in *Sánchez Morcillo I*,[914] AP Castellón found that it inevitably had to dismiss the appeal.

In a way, the empowering function of Article 47 was cut short by the legislative amendment. In this respect, it is interesting to note that AP Castellón had already started allowing appeals by consumer-debtors in enforcement proceedings on 29 July 2014, less than two weeks after the CJEU's first judgment. AP Castellón referred in this respect to the judgment and Article 47 of the Charter, as well as the primacy of EU law and the obligation of national courts to set aside conflicting provisions of national law.[915] These appeals were declared admissible despite the fact that Article 695.4 LEC had not been amended yet. Other courts, such as AP Barcelona and AP Pontevedra, also allowed appeals brought before the entry into force of RD 11/2014, with reference to Article 47 of the Charter.[916] In a case where the opposition of the consumer-debtors as to the unfairness of a default interest clause had been successful, i.e. not dismissed, AP Barcelona still allowed an appeal against the ruling, because it challenged the consequences of the unfairness. The court in first instance had ordered a recalculation of the debt and interest, but the

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911 See also *AP Tarragona (Sección 3ª)*, order of 30 September 2014, JUR\2015\43480; *AP Castellón (Sección 3ª)*, order no. 216/2015 of 30 September 2015, JUR\2015\271027.

912 *AP Castellón (Sección 3ª)*, order of 21 November 2014, JUR\2015\5684.

913 Case C-539/14 *Sánchez Morcillo II*.

914 *AP Castellón (Sección 3ª)*, order no. 187/2015 of 3 September 2015, JUR\2015\271900, ECLI:ES:APCS:2015:91A.

915 *AP Castellón (Sección 3ª)*, order no. 171/2014 of 29 July 2014, JUR\2015\10598, ECLI:ES:APCS:2014:55A. The Commission had also suggested this possibility in its written observations, paras 70 and 72.

916 *AP Pontevedra (Sección 1ª)*, order no. 148/2014 of 28 July 2014, JUR\2014\225714; *AP Barcelona (Sección 17ª)*, order no. 259/2014 of 3 September 2014, JUR\2014\295502, referring to *Von Colson*; *AP Barcelona (Sección 4ª)*, order no. 196/2014 of 18 September 2014, JUR\2014\297187; *AP Granada (Sección 3ª)*, order no. 162/2014 of 22 September 2014, JUR\2015\2137.

consumer-debtors claimed there was no interest due at all. AP Barcelona agreed with the debtors and held that the appeal was admissible, with a view to the "tenor" of the CJEU's judgment in *Sánchez Morcillo I*. It also referred to the need to ensure access to justice, reasons of procedural economy and the above-mentioned transitional provision that establishes retroactivity in favour of consumers.[917] Thus, it went beyond the CJEU's judgment in *Sánchez Morcillo II* and AP Castellon's final decision in that case.

By contrast, AP Madrid has defended a strict interpretation of Article 695.4 LEC, considering that a maximalist interpretation should be avoided for the sake of consumer protection, because it would have the paradoxical consequence of limiting consumers' access to mortgage credit and taking away certain advantages of mortgage enforcement that *Ley* 1/2013 awards them, such as the guarantee that the property will not be sold for less than a certain percentage of its estimated value.[918] However, it could be argued that it is up to the debtor to decide; if they bring an appeal, it is clearly with the objective of terminating the enforcement.

Spanish procedural law still does not put appellate proceedings on a par with the first instance.[919] Firstly, if consumer-debtors do not file an opposition, it seems they forfeit the right to appeal; Article 695.4 (new) LEC does not give them a right to appeal against an *ex officio* finding that the terms at issue are not unfair.[920] Secondly, consumers only have the option to appeal in mortgage enforcement proceedings; asymmetric appeal still exists in the general enforcement proceedings.[921] Thirdly, an appeal does not suspend the enforcement, unless the debtor can

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917 *AP Barcelona (Sección 1ª)*, order no. 253/2014 of 26 September 2014, JUR\2015\10332. See also *AP Barcelona (Sección 13ª)*, order no. 221/2014 of 16 October 2014, JUR\2014\294909; *AP Lleida (Sección 2ª)*, order no. 36/2015 of 26 February 2015, JUR\2015\158435; *AP Valencia (Sección 6ª)*, order no. 188/2015 of 8 September 2015, JUR\2016\130308; *AP Barcelona (Sección 16ª)*, order no. 385/2015 of 17 December 2015, JUR\2016\47092..

918 *AP Madrid (Sección 10ª)*, order no. 452/2016 of 22 December 2016, JUR\2017\25699. See also *Tribunal Supremo (Sala de lo Civil)*, judgment no. 463/2019 of 11 September 2019, ECLI:ES:TS:2019:2761, discussed in subsection 4.3.3.

919 Gascón Inchausti (n 420) 124.

920 Jiménez París (n 658) 986.

921 See subsection 4.2.2.

demonstrate that this would cause irreparable harm.[922] AP Barcelona did not see this as incompatible with the UCTD and/or Article 47 of the Charter, also because unfair terms control is supposed to take place (*ex officio*) in first instance regardless of opposition by the debtor.[923] And fourthly, if an appeal is (partially) successful, no cost order is ordered against the losing party (Article 398.2 LEC). According to AP Guipúzcoa, this is not a violation of the right to effective judicial protection as guaranteed by Article 47 of the Charter: it does not impede access to court, because the 'loser pays' principle applies in first instance if the claim is fully awarded (Article 394.1 LEC) and the consumers involved can obtain restitution of advantages wrongly obtained by the trader.[924] However, if the consumers lose in first instance and have to bring an appeal to correct this, they will have to bear the costs. A question is currently pending before the CJEU as regards the deterrent effect of costs, which impairs the protection of consumers under the UCTD.[925]

Res judicata effect of a decision in the enforcement proceedings?

The question arises whether the "tenor" of the CJEU's judgment in *Sánchez Morcillo I* should have entailed that appeals brought by consumers in the same situation as Mr. Sánchez Morcillo were admissible. When the opposition was filed, unfair terms were not yet recognised as an opposition ground, let alone as a grounds of appeal. The court in first instance did not rule until 19 June 2013, i.e. after the entry into force of *Ley* 1/2013, which meant that it could (and should) have examined the terms of the mortgage loan agreement *ex officio* and/or given Mr. Sánchez Morcillo the opportunity to supplement his opposition grounds.[926] It could be argued that the court's failure to do so

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922 Articles 561.3 and 567 LEC; Díez García (n 541) 239. See also *AP Madrid (Sección 10ª)*, order no. 8/2017 of 16 January 2017, JUR\2017\61994; *AP Almería (Sección 1ª)*, order no. 118/2017 of 9 March 2017, JUR\2017\157110.

923 *AP Barcelona (Sección 17ª)*, order no. 372/2015 of 26 November 2015, JUR\2016\101861.

924 *AP Guipúzcoa (Sección 2ª)*, order no. 229/2019 of 20 March 2019, JUR\2019\172545, ECLI:ES:APSS:2019:355.

925 Case C-732/19 *LL and MK v BBVA*, request for a preliminary ruling from *Juzgado de Primera Instancia de Ceuta* (pending).

926 Carrasco Perera and Lyczkowska (n 541) 4. Perhaps the court in first instance did not do so, because Article 552.1 LEC had not been expressly declared to be applicable in mortgage enforcement proceedings: see also subsection 4.2.2 above and Case C-169/14 *Sánchez Morcillo I*, para 39.

should not be held against the consumer,[927] or that this amounts to *indefensión* if it cannot be remedied.[928] This could constitute a violation of Article 47 of the Charter, which requires an effective remedy for infringements of EU (consumer) rights.

In Spain, so-called 'virtual' *res judicata* effect means that it is no longer possible to debate issues that *could have been* the subject of previous proceedings between the same parties that have resulted in a final decision; it is binding upon those parties, for reasons of legal certainty, procedural economy and to avoid contradictory decisions.[929] It needs to be mentioned as a side-note that virtual *res judicata* is a slightly different issue from that which was at stake in *Duarte Hueros*; that case was about the (im)possibility of introducing new grounds at a later stage in the same instance (*preclusión procesal*, procedural preclusion).[930] Virtual *res judicata* concerns the status of a judicial decision in *subsequent* proceedings and the (im)possibility of bringing a new claim.

Before *Aziz*, the *Tribunal Constitucional* had held that a decision in mortgage enforcement proceedings does not have substantive *res judicata* effect.[931] The question arose whether after the adoption of *Ley* 1/2013 and RD 11/2014, it had virtual *res judicata* effect, in the sense that debtors could no longer bring an objection against unfair terms in subsequent declaratory proceedings. On the one hand, it could be argued that there should be no *res judicata* effect, because both types of proceedings have a different objective.[932] On the other hand, the *Tribunal Supremo* held in 2014 that if debtors had the opportunity to file an opposition but did not do so, they were indeed precluded from bringing declaratory

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927 See also Tribunal Supremo, judgment no. 3373/2017 of 27 September 2017, ECLI:ES:TS:2017:3373, para 4.3: "Resultaría paradójico que una medida destinada a la protección del consumidor, como es el control de oficio de la abusividad contractual, pudiera acabar perjudicándole si no se ejerce por el tribunal."

928 See e.g. *AP Valencia (Sección 6ª)*, order no. 255/2017 of 27 June 2017, JUR\2018\25068, ECLI:ES:APV:2017:3327A; as well as the judgment of the *Tribunal Constitucional* discussed below.

929 Jiménez París (n 658) 987–988. See also Case C-32/12 *Duarte Hueros v Autociba and Automóviles Citroën España*, Opinion of AG Kokott, point 9.

930 Case C-32/12 *Duarte Hueros v Autociba and Automóviles Citroën España.* See also Pérez Daudí (n 31) 69; Gascón Inchausti (n 420) 123–124.

931 See subsection 4.3.2.

932 Díez García (n 541) 237. See also subsection 4.3.3 above.

proceedings and claiming nullity of the enforcement.[933] In the *Aziz*-case, AP Barcelona considered that the court's power of *ex officio* control cannot go so far as to defy the principle of *res judicata*, which forms the core of the right to effective judicial protection:

> "Neither our legal system nor that of any other country around us could accept the abolition of that principle, which constitutes an essential guarantee of the functioning of justice and is part of the core of the right to effective judicial protection enshrined in Article 24 of the Constitution, to the same extent as it is in Article 6 ECHR and Article 47 of the Charter."[934]

In the case of Mr. Aziz, *Ley* 1/2013 had not yet entered into force at the time of the enforcement proceedings and therefore, virtual *res judicata* was not an issue.[935] The court was not precluded from exercising unfair terms control in the declaratory proceedings. However, after *Banco Primus* (2017)[936] – which concerned an extraordinary opposition brought by the debtor under *Ley* 1/2013 – it appears that it no longer matters whether unfair terms *could have been* raised earlier. What matters is that there is no (virtual) *res judicata* insofar as an assessment of unfair terms has not been conducted. The *Tribunal Supremo* followed the CJEU judgment by concluding that it is still possible to raise the issue of unfair terms in subsequent declaratory proceedings, when it was not yet clear that there was a duty of *ex officio* control and that unfair terms constituted an opposition ground.[937]

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933 *Tribunal Supremo (Sala de lo Civil)*, judgment no. 4617/2014 of 24 November 2014, ECLI:ES:TS:2014:4617; see also *AP Granada (Sección 3ª)*, order no. 208/2015 of 11 December 2015, JUR\2016\114214. The transitional provisions of *Ley* 1/2013, RD 11/2014 or *Ley* 9/2015 could be seen as an exception to *res judicata* effect: *AP Barcelona (Sección 16ª)*, order no. 35/2015 of 5 February 2015, JUR\2015\115541.

934 AP Barcelona (Sección 15ª), judgment no. 407/2014 of 15 December 2014, JUR\2015\86196, para 86. Translated from Spanish: "*Ni nuestro ordenamiento jurídico ni el de ningún otro país de nuestro entorno podrían aceptar la derogación de ese principio, que constituye una garantía esencial del funcionamiento de la jurisdicción y está incluido en el núcleo esencial del derecho a la tutela efectiva que consagra el artículo 24.1 CE, en la misma medida en la que lo está en el artículo 6 del Convenio Europeo de Derechos Humanos y en el artículo 47 de la Carta de Derechos*." See also Pérez Daudí (n 31) 48.

935 Above-cited judgment of *AP Barcelona*, para 87.

936 Case C-421/14 *Banco Primus*.

937 *Tribunal Supremo (Sala de lo Civil)*, judgment no. 3373/2017 of 27 September 2017, ECLI:ES:TS:2017:3373, para 5.1. See also Pérez Daudí (n 31) 83–84.

The *Tribunal Constitucional* recently confirmed that an application for nullity of procedural actions would be possible too.[938] The court that had dismissed the application for nullity had found that *Banco Primus* neither had retroactive effect nor provided a reason for revision of the original decision. The *Tribunal Constitucional*, however, ruled that the original decision's *res judicata* effect should be disregarded. Even if the debtors had not filed an opposition, they made an application for nullity, and the court should perform unfair terms control *ex officio* – unless that had already taken place, which was not the case here. Whether *Banco Primus* has retroactive effect did not matter, because the application for nullity was made after the CJEU's judgment came out. If the court was in doubt, it should have made a preliminary reference to the CJEU.

In the case of Mr. Sánchez Morcillo, unfair terms had not been the subject of the enforcement proceedings. The decision lacks virtual *res judicata* effect, because the court in first instance did not exercise *ex officio* control and the appeal was declared inadmissible.[939] From the perspective of effective judicial protection, the most important factor is that the court's failure to perform unfair terms control (*ex officio*) can be remedied by giving consumers like Mr. Sánchez Morcillo an actual opportunity to exercise their rights.

4.5 RIGHT TO BE HEARD

4.5.1 Introduction: the prohibition of *indefensión*

If litigants are denied the opportunity to present their case before a decision is taken that adversely affects their interest, this may constitute a violation of Article 47 of the Charter.[940] This is very similar to the prohibition of *indefensión* laid down in Article 24 of the Spanish Constitution.

Indefensión occurs when a party is denied the right to defend their rights and legitimate interests by exercising their right of action and/or

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938 *Tribunal Constitucional*, judgment no. 31/2019 of 28 February 2019, ECLI:ES:TC:2019:31.

939 See also Pérez Daudí (n 31) 83–84.

940 See subsections 2.2.1(iv) and section 3.5.

right to be heard.[941] It is not tied to unfair terms control; it extends to all elements that are decisive for the case.[942] The prohibition of *indefensión* is a powerful instrument, because it may lead to the nullity of all subsequent procedural actions, including judicial decisions; a consequence that is not prescribed by Article 47. *Indefensión* may be invoked in a regular appeal on the basis of a procedural breach.[943] The appellate court may then declare the nullity of procedural actions and send the case back to the court in first instance.[944] If the judicial decision has already become final, *indefensión* may be the basis for an exceptional application for nullity of procedural actions,[945] which must be brought within 20 days after a party becomes aware of the procedural breach or within 5 years after notification of the decision. There is no possibility of appeal.

In the context of the UCTD, the situation of consumers like Mr. Sánchez Morcillo could amount to *indefensión* in so far as they do not have at least one possibility to challenge an enforcement based on unfair terms. AP Valencia, for instance, has held that there was *indefensión* because the court in first instance had failed to perform *ex officio* control, which obviously (negatively) affects the position of consumers.[946] There may also be *indefensión* in the scenario that the court has performed *ex officio* control, but not given the parties the chance to present their views about the unfair nature of the term(s) at issue and the consequences of a finding of unfairness.[947] In a case where that had not happened, AP Barcelona held that the bank could not invoke the *res judicata* effect of a previous decision in enforcement proceedings against the consumer-

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941 See e.g. Mª Immaculada Sánchez Barrios, 'La acción como derecho a la tutela efectiva' [2010] Justicia: Revista de derecho procesal 167, 180.

942 See also *AP Madrid (Sección 14ª)*, order no. 33/2015 of 18 February 2015, JUR\2015\100490.

943 Article 459 LEC; Pérez Daudí (n 31) 67, 73. See e.g. *AP Valencia (Sección 11ª)*, order no. 67/2017 of 23 February 2017, JUR\2017\130297; *AP Sevilla (Sección 6ª)*, order no. 311/2015 of 17 December 2015, JUR\2016\58585.

944 See e.g. *AP Las Palmas (Sección 5ª)*, order no. 243/2014 of 2 October 2014, JUR\2015\56330; *AP Las Palmas (Sección 5ª)*, order no. 96/2015 of 30 March 2015, JUR\2015\120970; *AP Valencia (Sección 11ª)*, order no. 67/2017 of 23 February 2017, JUR\2017\130297.

945 See also subsection 4.1.2 above.

946 *AP Valencia (Sección 6ª)*, order no. 255/2017 of 27 June 2017, JUR\2018\25068, ECLI:ES:APV:2017:3327A.

947 *AP Málaga (Sección 5ª)*, order no. 311/2015 of 12 November 2015, JUR\2016\84863.

debtor who had not been heard. That would be contrary to Article 24 of the Spanish Constitution and Article 47 of the Charter, as interpreted by the CJEU in *Banif Plus Bank*.[948]

The generative function of Article 47 in *Banif Plus Bank*[949] translates into national (procedural) law. There was no explicit provision for a right to be heard in the procedures discussed in this chapter. In light of *Banif Plus Bank*, however, the right to be heard must be observed in all proceedings that concern potentially unfair contract terms, regardless of their privileged or expedited nature. It could be argued that the right to be heard is so fundamental, that it does not stem from any legislative provisions or the case law of the CJEU.[950] Nevertheless, codification of the requirements following from Article 47 was deemed necessary by the Spanish legislature.[951] *Ley* 1/2013 and *Ley* 42/2015, which introduced *ex officio* control in general enforcement procedures and order for payment procedures, added a stipulation that if the court finds any potentially unfair terms, it will hear the parties within 5 days and take a decision in another 5 days (see Articles 552.1 LEC and 815.4 LEC respectively). Furthermore, the mortgage enforcement procedure was also amended: the enforcement must be suspended and the parties are summoned to be heard by the court in 15 days (Article 695.2 LEC).[952] It has even been codified in Article 83(1) TR-LGDCU that the court must hear the parties when it finds a contractual term is unfair (*Ley* 3/2014).

The prohibition of *indefensión* may be invoked by either party, i.e. both consumers and traders.[953] If the right to be heard is not observed, this is not only a formal defect but also leads to substantive *indefensión*: the decision is based on legal and factual elements that the parties have not been able to respond to.[954] This argument is often successfully used

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948 *AP Barcelona (Sección 11ª)*, order no. 39/2019 of 6 February 2019, JUR\2019\49202, ECLI:ES:APB:2019:279A.

949 Case C-472/11 *Banif Plus Bank*; discussed in subsection 3.5.2.

950 *AP Málaga (Sección 5ª)*, order no. 335/2015 of 15 December 2015, JUR\2016\83571.

951 AP Lleida found it could not determine the procedural path courts in first instance must follow on the basis of *Banif Plus Bank*, and legislative changes implementing *Aziz* could not be anticipated: *AP Lleida (Sección 2ª)*, order no. 55/2013 of 25 March 2013, JUR\2014\294266.

952 Ley 8/2013, de rehabilitación, regeneración y renovación urbanas, BOE no. 153 of 27 June 2013, p. 6938.

953 *AP Málaga (Sección 5ª)*, order no. 207/2016 of 15 June 2016, JUR\2016\240828.

954 *AP Alicante (Sección 8ª)*, order no. 24/2018 of 12 March 2018, JUR\2018\162684, ECLI:ES:APA:2018:174A; *AP Valencia (Sección 6ª)*, order no. 255/2017 of 27 June 2017,

by traders, when one of their terms has been declared unfair and they seek to have the decision repealed.[955]

4.5.2 *Tribunal Supremo* on Article 47: a reconciliatory approach

Indefensión typically occurs when the court awards more (*ultra petita*) or something else than has been claimed (*extra petita*), without giving the parties a chance to respond.[956] As a result, the parties' submissions and the court's decision are not aligned; there is *incongruencia*, i.e. no procedural congruence. As the case of *Aziz* shows, *incongruencia* does not necessarily mean that there is *indefensión*: both Mr. Aziz and the bank had (and made use of) an actual opportunity to defend their rights.[957] In that case, there is not necessarily a fundamental rights violation if the decision is not entirely aligned.[958] *Incongruencia* may nevertheless constitute an infringement of Article 24 of the Constitution. It could be said that, by analogy, this violates Article 47 of the Charter as well. In the words of AP Madrid:

> "It cannot simply be held that (…) we proceed to declare some clauses unfair, that is, without facilitating a contentious debate and with a surprise decision, while we forget that Article 47 of the European Charter of

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JUR\2018\25068, ECLI:ES:APV:2017:3327A; *AP Málaga (Sección 5ª)*, order no. 335/2015 of 15 December 2015, JUR\2016\83571; *AP Málaga (Sección 5ª)*, order no. 311/2015 of 12 November 2015, JUR\2016\84863. This does not go so far as to giving the bank a separate opportunity to also respond to the recalculation of amounts, where they have already been heard on the nullity of unfair terms: *AP Málaga (Sección 5ª)*, order no. 207/2016 of 15 June 2016, JUR\2016\240828.

955 See e.g. *AP Las Palmas (Sección 5ª)*, order no. 207/2014 of 12 September 2014, JUR\2015\55184; *AP Lleida (Sección 2ª)*, order no. 46/2015 of 9 March 2015, JUR\2015\121304; *AP Lleida (Sección 2ª)*, order no. 158/2016 of 27 October 2016, JUR\2017\51706; *AP Las Palmas (Sección 5ª)*, order no. 276/2017 of 17 October 2017, JUR\2018\123083, ECLI:ES:APGC:2017:504A; *AP Alicante (Sección 8ª)*, order no. 24/2018 of 12 March 2018, JUR\2018\162684, ECLI:ES:APA:2018:174A (within the framework of an order for payment procedure); *AP Barcelona (Sección 11ª)*, order no. 38/2019 of 6 February 2019, JUR\2019\49570, ECLI:ES:APB:2019:275A.

956 Pérez Daudí (n 31) 94–96. See e.g.*AP Vizcaya (Sección 5ª)*, judgment no. 250/2013 of 30 September 2013, JUR\2014\144762.

957 See also subsection 4.3.2 above.

958 See e.g. *Tribunal Supremo (Sala de lo Civil)*, judgment no. 1916/2013 of 9 May 2013, ECLI:ES:TS:2013:1916, discussed below.

> Fundamental Rights also proclaims the right to effective judicial protection without producing *indefensión*".[959]

AP Barcelona also read a requirement of procedural congruence in Article 47 of the Charter:

> "In our view it is inconceivable that the dispositive principle could be derogated from by the requirement of the effectiveness of EU law, because this principle also informs EU law through the Charter of Fundamental Rights, in particular the recognition of private property rights therein (Article 17), which includes the right to dispose of rights, and the right to the effective protection [of those rights] (Article 47), which includes the right of action. It also encompasses the right to a fair trial, which has amongst its prerequisites procedural congruence and the right to be heard must be effectively observed."[960]

AP Barcelona elaborated that there is a difference between initiating civil proceedings, which only the parties can do, and determining the object of the proceedings on the basis of the cause of action and the claim, which is a matter of interpretation for the court.[961] As long as there is a link with the claim and/or the parties' allegations, the assessment of unfairness and the declaration of nullity of the clause(s) at issue are within the ambit of the dispute.[962] AP Barcelona's approach can be seen as an attempt to

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959 *AP Madrid (Sección 10ª)*, order no. 452/2016 of 22 December 2016, JUR\2017\25699. Translated from Spanish: "*[N]o puede pretenderse, sin más, que (…) procedamos a declarar abusivas algunas cláusulas, id est, sin facilitar la contradicción procesal y con una respuesta sorprensiva, olvidando que también el artículo 47 de la Carta Europea de los Derechos Fundamentales proclama el derecho a la tutela judicial efectiva sin producción de indefensión*".

960 *AP Barcelona (Sección 15ª)*, judgment no. 407/2014 of 15 December 2014, JUR\2015\86196, para 26. Translated from Spanish: "*Creemos que es inconcebible que el principio dispositivo pueda considerarse derogado por exigencia de la efectividad del derecho comunitario porque ese dispositivo o de la demanda informa también el derecho comunitario a través de la Carta de Derechos Fundamentales de la Unión Europea, y particularmente del reconocimiento en la misma del derecho de propiedad privada (artículo 17), que incluye el derecho de disponer de los derechos y del derecho a la tutela efectiva (artículo 47), que incluye el derecho de acción. Y también incluye el derecho a un proceso equitativo, que exige entre sus presupuestos que se trate de un proceso congruente y en el que se respete la contradicción efectiva*."

961 Above-cited judgment of *AP Barcelona*, paras 30-31.

962 Above-cited judgment of *AP Barcelona*, paras 39 and 41. One of the judges argued in a concurring opinion that the bank's allegation of *incongruencia* was not relevant,

reconcile the rigidities of civil procedure with the requirements of effective consumer protection under UCTD. It aims to resolve the (perceived) tension between *ex officio* control and procedural congruence, by reference to the parties' right to be heard. Article 47 of the Charter fulfils a **reconciliatory function**, where it operates as a hinge between EU and national exigencies.[963] Indeed, it could be argued that there is no conflict at all, as long as the parties get their "day in court": both parties have the opportunity to present their views and adapt their arguments if necessary, and the court's decision can subsequently be based on the parties' submissions.[964]

Another example of how Article 47 has been used to reconcile a more active role of the court with traditional features of civil procedure can be found in the judgment of the *Tribunal Supremo* of 9 May 2013 on so-called *cláusulas suelo* ('floor clauses'). The *Tribunal Supremo* gave this judgment in a collective action brought by the *Asociación de Usuarios de los Servicios Bancarios* (**AUSBANC**) against four Spanish banks.[965]

> *Cláusulas suelo*, which were widely used by credit providers in Spain in their standard terms and conditions, establish a minimum rate below which the variable interest rate cannot fall (usually 2,75-4%). The *Tribunal Supremo* found that *cláusulas suelo* in themselves were lawful, but it formulated a list of six circumstances in which those clauses could be unfair for lack of transparency.[966] The *Tribunal Supremo* ordered the defendant banks to

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because the *ex officio* obligation of the court to protect consumers against unfair terms was mandatory and part of public policy; therefore, applied regardless of the consumer's position in the proceedings.

963 Term "reconciliatory approach" derived from Schebesta (n 143) 862. See also Bech Serrat (n 141) 12. In the words of Schebesta: "Rather than framing an issue as a conflict between European and national exigencies, it creates an overlap, a fiction, of a single norm expressed on both levels." Other authors have also used "reconcile" in respect of competing demands of EU law and national law as well: see e.g. Wilman (n 72) 935; Van Gerven (n 5) 530.

964 Carrasco Perera and González Carrasco (n 678) 150–152. See also Jordi Nieva Fenoll, 'La actuación de oficio del juez nacional europeo' [2017] Justicia 181, 204–205. AP Malaga found there would be no *indefensión* as long as its decision was based on the parties' submissions: *AP Málaga (Sección 6ª)*, order no. 182/2016 of 16 March 2016, AC\2016\1219.

965 *Tribunal Supremo (Sala de lo Civil)*, judgment no. 1916/2013 of 9 May 2013, ECLI:ES:TS:2013:1916.

966 See further Francesco de Elizalde, 'The Rain in Spain Does Not Stay in the Plain – Or How the Spanish Supreme Court Ruling of 25 March 2015, on Minimum Interest Rate

eliminate those clauses from their contracts concluded with consumers. However, the *Tribunal Supremo* also held that a finding of invalidity did not have retroactive effect: neither judicial decisions with the force of *res judicata* were affected, nor payments that had been made before the judgment was published. Thus, consumers could only claim restitution of amounts overpaid *after* the date of publication of the judgment. This constituted a temporal limitation of the right to full restitution under Spanish law (see, in particular, Article 1303 of the *Código Civil*). One of the considerations of the *Tribunal Supremo* was that retroactive effect would give rise to serious economic repercussions; *cláusulas suelo* were widespread and their use had been tolerated for a long time.[967] The CJEU held on 21 December 2016 that Articles 6 and 7 UCTD precluded the adoption of such a temporal limitation in national case law.[968]

In its judgment of 9 May 2013, the *Tribunal Supremo* cited *Banif Plus Bank* and referred to Article 47 of the Charter in respect of the principle of *audi alteram partem*.[969] It stressed the need for coordination between the duty to guarantee the effectiveness of the UCTD on the one hand and procedural congruence on the other, through facilitating the parties to exercise their right to be heard in the course of the proceedings.[970] In the words of the *Tribunal Supremo*:

> "Insofar as it is necessary to achieve the effectiveness of EU law, in unfair terms cases, the courts must temper the classic rigidities of civil procedure in such a way that, in the analysis of the potential unfair nature of the clauses that may be declared null and void, the formal structure of recourses need not be adjusted. The ruling need not be exactly adjusted to the claim either, provided that the parties have had the chance to be heard on the arguments that determine the qualification of the clauses as unfair."[971]

Clauses, Affects European Consumers' [2015] Journal of European Consumer and Market Law 184.

967 See also CJEU *Gutiérrez Naranjo*, para 24.

968 Joined Cases C-154/15, C-307/15 and C-208/15 *Gutiérrez Naranjo*, para 75.

969 *Tribunal Supremo (Sala de lo Civil)*, judgment no. 1916/2013 of 9 May 2013, ECLI:ES:TS:2013:1916.

970 See also *AP Valencia (Sección 11ª)*, judgment no. 586/2013 of 30 December 2013, AC\2014\415; *AP Guipúzcoa (Sección 3ª)*, judgment no. 292/2016 of 1 December 2016, JUR\2017\64956.

971 Above-mentioned judmgnet of the Tribunal Supremo, para 130. Translated from Spanish: "*[E]n la medida en que sea necesario para lograr la eficacia del Derecho de la Unión, en los supuestos de cláusulas abusivas, los tribunales deban atemperar las clásicas rigideces del proceso, de tal forma que, en el análisis de la eventual abusividad de las cláusulas cuya*

Ironically, it has been argued that *indefensión* occurred in the *AUSBANC* case before the *Tribunal Supremo*, because the claim was awarded on grounds that had not been part of the debate between the parties – in short, the lack of transparency of *cláusulas suelo*.[972]

The same reconciliatory approach has been followed by most Spanish civil courts.[973] Only a few courts see the right to be heard as a limitation of the duty of *ex officio* control.[974] Most see it as a precondition to be able to adjudicate the case on the merits. The notion of adversarial or contentious proceedings forms part of a fair trial; it means that the parties must be able to present their views on all elements of fact and law on which the court's decision will be based.[975] Some refer to Article 47 to emphasise the consumer's autonomy: it is ultimately the consumer who decides whether the term at issue should be declared unfair or not.[976]

The introduction of an (extra) opportunity for the parties to present their views in respect of unfair terms has made the above-mentioned expedited procedures slightly more adversarial. This has been met with criticism, because it would fundamentally change the nature of these

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declaración de nulidad fue interesada, no es preciso que nos ajustemos formalmente a la estructura de los recursos. Tampoco es preciso que el fallo se ajuste exactamente al suplico de la demanda, siempre que las partes hayan tenido la oportunidad de ser oídas sobre los argumentos determinantes de la calificación de las cláusulas como abusivas."

972 Carrasco Perera and González Carrasco (n 678) 148ff.

973 See e.g. *AP Valencia (Sección 6ª)*, judgment no. 53/2016 of 2 February 2016, JUR\2016\145999; *AP Vizcaya (Sección 5ª)*, judgment no. 250/2013 of 30 September 2013, JUR\2014\144762; *AP Guipúzcoa (Sección 3ª)*, judgment no. 292/2016 of 1 December 2016, JUR\2017\64956; *AP Las Palmas (Sección 5ª)*, order no. 6/2016 of 11 January 2016, JUR\2016\65926; *AP Valencia (Sección 11ª)*, judgment no. 586/2013 of 30 December 2013, AC\2014\415.

974 See e.g. *AP Málaga (Sección 6ª)*, order no. 182/2016 of 16 March 2016, AC\2016\1219, with reference to *Banif Plus Bank* and Article 47 of the Charter; *AP Alicante (Sección 8ª)*, judgment no. 295/2016 of 28 October 2016, JUR\2016\265901.

975 *AP Madrid (Sección 14ª)*, order no. 33/2015 of 18 February 2015, JUR\2015\100490; *AP Valencia (Sección 11ª)*, judgment no. 586/2013 of 30 December 2013, AC\2014\415; *AP Barcelona (Sección 1ª)*, judgment no. 104/2016 of 11 March 2016, JUR\2016\120913; *AP Barcelona (Sección 11ª)*, order no. 48/2014 of 20 March 2014, JUR\2014\296437; *AP Santa Cruz de Tenerife (Sección 1ª)*, order no. 171/2013 of 17 December 2013, JUR\2015\9254; *AP Alicante (Sección 8ª)*, judgment no. 295/2016 of 28 October 2016, JUR\2016\265901.

976 See e.g. *AP Almería (Sección 1ª)*, order no. 154/2017 of 30 March 2017, JUR\2018\200420, ECLI:ES:APAL:2017:679A; *AP Almería (Sección 1ª)*, order no. 426/2017 of 25 September 2017, JUR\2018\200338, ECLI:ES:APAL:2017:727A.

procedures.[977] However, it has also been welcomed, because it allows the court to align its decision with the parties' submissions by hearing them first. It is about giving due regard to the parties' position rather than limiting the court's power to raise new factual or legal grounds.[978] In this respect, Article 47 of the Charter may be seen as the counterpart of *ex officio* control. Both lead to a more balanced procedure in unfair terms cases:[979] consumer rights under the UCTD are protected, alongside the parties' rights of defence. The prohibition of *indefensión*, which can be read into Article 47, justifies an active court that facilitates the litigating parties. This can be seen as a form of open constitutionalisation; it shows how Article 47 may be used to open up rigid or restrictive rules with due regard for the principles underpinning civil procedure.

4.5.3 The other side of Article 47: the *cláusulas suelo* saga

Third party effects of a collective action

The notion of *indefensión* has internal and external aspects: internal, in the sense that *indefensión* must be prevented within the process, and external, in the sense that an extension of the effects of a decision to third parties who have not participated in the process may amount to *indefensión*. An example of the latter can be found in one of the cases that resulted in the CJEU's judgment of 21 December 2016 on *cláusulas suelo*, where a question was posed on Article 47 of the Charter: *Irles López*.[980] This touches on the meaning of collective actions for individual actions regarding the same subject-matter. Questions have also been raised as to the *res judicata* effect of judicial decisions given before 21 December 2016 that run counter to the judgment of the CJEU. The cases discussed in this subsection reveal the other side (*altera parte*) of Article 47: it can be used as an argument for the judicial protection of traders, which may create tension with the Directive's full effectiveness and the rights of individual consumers.

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977 See also subsections 4.2.3 and 4.3.3.

978 *AP Vizcaya (Sección 5ª)*, judgment no. 250/2013 of 30 September 2013, JUR\2014\144762.

979 *AP Guipúzcoa (Sección 3ª)*, judgment no. 292/2016 of 1 December 2016, JUR\2017\64956, para 130.

980 Case C-305/18 *Irles López* (part of the CJEU's judgment in Joined Cases C-154/14, C-307/15 and C-308/15 *Gutiérrez Naranjo*).

The *Tribunal Supremo* judgment of 9 May 2013 in the *AUSBANC* case was positive for consumers insofar as it declared *cláusulas suelo* to be unfair in certain circumstances. However, the judgment also contained a temporal limitation that restricted the right to full restitution of interest paid after 9 May 2013. The referring court in *Irles López* questioned whether this limitation could be extended to individual actions as well, with regard to Article 47 of the Charter.[981] On 25 March 2015, the *Tribunal Supremo* had held that such an extension was indeed possible.[982] A similar link between collective and individual actions was assumed with regard to a different collective action, brought by the *Asociación de Usuarios de Bancos Cajas y Seguros de España* (**ADICAE**) against 72 financial institutions, seeking an injunction that prohibits the continued use of *cláusulas suelo*.[983] Several courts decided to stay proceedings brought by individual consumers against the same financial institutions pending the *ADICAE* case.[984] This gave rise to concerns as to the effective judicial protection of consumers. Collective actions are an exception to the rule that litigants can only invoke their own subjective rights and legitimate interests in court, not those of others.[985] The effects of a decision in a collective action may be extended to individual consumers who were not a party to the proceedings, to the extent that it may benefit them.[986] However, the temporal limitation at issue here was detrimental to consumers.

Therefore, the question of the referring court – AP Alicante – in *Irles López* was whether the temporal limitation of the restitutory effects of a finding of unfairness of *cláusulas suelo* could be automatically extended to individual actions against other financial institutions that where not a party to the *AUSBANC* case. The financial institutions alleged that such

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981 *AP Alicante (Sección 8ª)*, order no. /2015 of 15 June 2015, JUR\2015\190491, para 91.

982 *Tribunal Supremo (Sala de lo Civil)*, judgment no. 1280/2015 of 25 March 2015, ECLI:ES:TS:2015:1280.

983 This ultimately resulted in a judgment of the *Juzgado de lo Mercantil nº 11 de Madrid*, judgment no. 53/2016 of 7 April 2016, ECLI:ES:JMM:2016:53.

984 Pérez Daudí (n 31) 119, 122–123.

985 Above-cited judgment of *Tribunal Supremo* in *AUSBANC*, para 57. On the role of consumer associations and collective redress in the Spanish legal system, see further Maria Teresa Alonso Pérez, Francesco de Elizalde and Regina Garcimartín Montero, 'An Interdisciplinary View of Enforcement and Effectiveness of Spanish Consumer Law' in Geneviève Saumier and Hans-W Micklitz (eds), *Enforcement and effectiveness of consumer law* (Springer 2018) 600–601, 605–608.

986 Case C-472/10 *Invitel*.

an extension was possible, and the *Tribunal Supremo* confirmed this in its above-mentioned judgment of 25 March 2015. AP Alicante nevertheless had doubts as to the compatibility of the case law of the *Tribunal Supremo* with Article 47 of the Charter. It considered that the effectiveness of the collective action did not justify a limitation to the detriment of the rights of third parties, in this case consumers.[987] Insofar as a judicial decision might affect parties that were not involved in the proceedings leading up to it, concerns as to *indefensión* may arise. The CJEU did not answer the question, presumably because it had already quashed the temporal limitation in its judgment of 21 December 2016.[988]

After the CJEU judgment, the *Tribunal Supremo* reversed its case law and held that its judgment of 9 May 2013 did not produce substantive *res judicata* effect for individual consumers. [989] The reason for this was that the individual consumers were not a party to the collective action, and that the objective and the effects of a collective action are different from those of an individual action (aimed at compensation/restitution). The *Tribunal Supremo* adhered to the list of circumstances that rendered *cláusulas suelo* unfair. Financial institutions can still allege that in a concrete case a *cláusula suelo* was not unfair. AP Pontevedra has held it would be contrary to the principle of equality of arms if the creditor did not have this possibility, with reference to *Banif Plus Bank*.[990]

Moreover, AP Leon has found that if the creditor appeals a finding of unfairness, the Court of Appeal cannot quash a temporal limitation *ex officio*. This would follow from the so-called prohibition of *reformatio in peius*, a mandatory norm of procedural law that entails an appeal cannot put the appellant – here: the creditor – in a worse position (Article 465.6 LEC).[991] According to AP Leon, it could not revise a decision in first instance to the detriment of the appellant bank, because the consumer had not challenged the temporal limitation in appeal. *Banif Plus Bank* merely requires courts to inform consumers of their rights and observe

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987 *AP Alicante (Sección 8ª)*, order no. /2015 of 15 June 2015, JUR\2015\190491, para 92.

988 Joined Cases C-154/14, C-307/15 and C-308/15 *Gutiérrez Naranjo*, para 76.

989 See e.g. *Tribunal Supremo (Sala de lo Civil)*, judgment no. 477/2017 of 24 February 2017, ECLI:ES:TS:2017:477); *Tribunal Supremo (Sala de lo Civil)*, judgment no. 3028/207 of 20 July 2017, ECLI:TS:2017:3028.

990 *AP Pontevedra (Sección 1ª)*, judgment no. 568/2016 of 12 December 2016, JUR\2017\8971.

991 *AP León (Sección 1ª)*, judgment no. 446/2017 of 19 December 2017, JUR\2018\38156, ECLI:ES:APLE:2017:1270.

the adversarial principle.[992] In later judgments, AP Leon clarified that in contentious proceedings the court cannot take decisions for consumers when they pick up their own defence; it is not the court's task to be inquisitorial and/or specify the grounds of appeal.[993] This view reflects the rigidity of Spanish civil procedure and the divide between proceedings in first and second instance.

According to the *Tribunal Supremo*, disregarding the prohibition of *reformatio in peius* in favour of the *ex officio* application of EU law would be contrary to the right to effective judicial protection as guaranteed by Article 24 of the Spanish Constitution and Article 47 of the Charter.[994] This is another example of a traditional principle of civil procedure being defended by reference to Article 47,[995] without properly considering or justifying the (negative) consequences for the effective judicial protection of individual consumer rights. It seems arbitrary that *ex officio* control in appeal would depend on who loses in first instance. The question whether this interpretation of the prohibition of *reformatio in peius* is reconcilable with the UCTD is currently pending before the CJEU.

Res judicata effect of decisions predating the CJEU judgment on cláusulas suelo

Since *Sales Sinués*, it is clear that collective actions for an injunction have a different purpose and character than individual actions.[996] According to the CJEU, the need to ensure consistency between judicial decisions did not justify a stay of individual actions pending a collective action. The *Tribunal Constitucional* has subsequently held that from a

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992 See also and more elaborately *AP León (Sección 1ª)*, judgment no. 346/2017 of 13 October 2017, JUR\2018\277847, ECLI:ES:APLE:2017:998.

993 *AP León (Sección 1ª)*, judgment no. 308/2017 of 23 July 2018, JUR\2018\282480, ECLI:ES:APLE:2018:891; *AP León (Sección 1ª)*, judgment no. 344/2017 of 23 July 2018, JUR\2018\302054, ECLI:ES:APLE:2018:982.

994 Case C-869/19 *L v Banco de Caja España de Inversiones*, request for a preliminary ruling from the *Tribunal Supremo* (pending).

995 See also *AP Barcelona (Sección 15ª)*, judgment no. 407/2014 of 15 December 2014, JUR\2015\86196 on *res judicata* and dispostive principle (cited in 4.4.3 and 4.5.2); *Audiencia Provincial de Madrid (Sección 10ª)*, order no. 452/2016 of 22 December 2016, JUR\2017\25699 on procedural congruence (cited in 4.5.2).

996 Joined Cases C-381/14 and C-385/14 *Sales Sinués*. On this topic, see also Fabrizio Cafaggi and Stephanie Law, 'Unfair Contract Terms – Effect of Collective Proceedings' in E Terryn, G Straetmans and V Colaert (eds), *Landmark Cases of EU Consumer Law: In Honour of Jules Stuyck* (Intersentia 2013) 659.

constitutional perspective, there was no obligation to stay individual actions with a view to individual rights protection. It would hamper the effective exercise of consumer rights to impose (the outcome of) a collective action on individual consumers; this could even be contrary to Article 24 of the Constitution.[997]

In many individual cases where the proceedings were not stayed, a final and binding decision was given in their case prior to the CJEU judgment of 21 December 2016 with respect to the temporal limitation. This gave rise to the question as to whether the *res judicata* effect of such a decision undermined the effective judicial protection of the consumers involved. In a way they were punished for having brought a claim early on. It has been argued that this runs counter to Article 47 of the Charter, and that respecting the *res judicata* effect of such decisions undermines the effective judicial protection of consumers under the UCTD.[998]

The balance between the principle of *res judicata* and the effective (judicial) protection of consumers under the UCTD is unclear. The CJEU has held that national courts are not required to disregard national procedural rules conferring finality on judicial decisions, even if those decisions would violate EU law.[999] That being said, the CJEU has ruled several times on the scope of *res judicata*, inter alia in *Banco Primus*.[1000] Moreover, the CJEU held in *Finanmadrid* that the mere fact that the consumer has not challenged the claim (in time) does not justify the absence of judicial control.[1001] Thus, the effectiveness of the UCTD warranted an exception to the principle of *res judicata*.

The question is whether consumers who had already obtained a final decision in their case could still claim full restitution (i.e. of amounts paid before and after 9 May 2013), or whether the decision's (formal and substantive) *res judicata* effect prevents this. This question pertains to the situation where the court has found the *cláusula suelo* to be unfair, but applied the temporal limitation as promulgated by the *Tribunal Supremo*.

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997 *Tribunal Constitucional*, judgment no. 148/2016 of 19 September 2016, ECLI:ES:TC:2016:148. See further Pérez Daudí (n 31) 124–125; Cordon Moreno (n 852).

998 Bech Serrat (n 141) 13, 54. See also *AP Madrid (Sección 10ª)*, order no. 101/2016 of 17 March 2016, JUR\2016\89139; *AP Álava (Sección 1ª)*, judgment no. 110/2017 of 6 March 2017, JUR\2017\135437.

999 See e.g. Joined Cases C-154/15, C-307/15 and C-308/15 EU *Gutiérrez Naranjo*, para 68.

1000 Case C-421/14 *Banco Primus*, discussed in subsection 4.4.3.

1001 Case C-49/14 *Finanmadrid*, para 54.

There was neither *indefensión* nor inertia on the part of the consumer; on the contrary, the consumer has proactively brought a claim for restitution. Thus, *Banco Primus* and *Finanmadrid* are of little help here. This would mean that a consumer who did not make use of an opportunity to assert their rights derived from the UCTD is better off than a consumer who did, and is as a consequence bound by a decision with *res judicata* effect.[1002]

The *Tribunal Supremo* has held that the *res judicata* effect of judicial decisions given before 21 December 2016 must be respected.[1003] A new CJEU judgment is not a ground for revision under Spanish law,[1004] and according to the prevailing doctrine in Spain it does not constitute a new ground which would set aside *res judicata*.[1005] However, in so far as civil procedure has a compensatory function, this – together with Article 47 of the Charter – may warrant a more flexible approach towards *res judicata*.[1006] The formal *res judicata* effect of the decision could be left intact; only its substantive *res judicata* effect would need to be disregarded when a new claim is brought.[1007] The reason for this would be that consumers should not be punished for courts failing to take proper account of EU law. The fact that a decision was given while the compatibility of the temporal limitation with EU law was debatable and/or that the proceedings were not stayed pending the preliminary reference before the CJEU, could be seen as a violation of consumers' right to effective judicial protection.[1008] As Rott has observed, the expectations of the trader to get away with a breach of EU (consumer) law can hardly be classified as legitimate and worthy of protection.[1009]

1002 See e.g. *AP León (Sección 1ª)*, judgment no. 192/2017 of 19 May 2017, JUR\2017\171244, ECLI:ES:APLE:2017:536 for a strict interpretation.

1003 *Tribunal Supremo (Sala de lo Civil)*, order no. 2684/2017 of 4 April 2017, ECLI:ES:TS:2017:2684A.

1004 See Article 510 LEC and Article 5bis LOPJ.

1005 See also Pérez Daudí (n 31) 110–111, 140.

1006 Bech Serrat (n 141) 37, 55.

1007 Pérez Daudí (n 31) 116. See also Jesús Sánchez García, 'Efectos procesales y sustantivos derivados de la sentencia del Tribunal de Justicia de la Unión Europea de 21 de diciembre de 2016' [2017] Revista de Derecho vLex <http://vlex.com/vid/efectos-procesales-sustantivos-derivados-656589369>.

1008 Pérez Daudí (n 31) 146. See differently *AP Lleida (Sección 2ª)*, order no. 55/2013 of 25 March 2013, JUR\2014\294266. According to AP Lleida, there was no legal basis to suspend enforcement proceedings awaiting the CJEU's decision in *Aziz*.

1009 Rott (n 101) 198.

4.6 INTERIM CONCLUSION: THE ROLE OF ARTICLE 47 IN SPANISH CASE LAW

In Spanish unfair terms cases, courts mainly refer to Article 47 of the Charter as part of a broader reference to CJEU case law, which is used to justify a certain interpretation of procedural rules – e.g. suspension of mortgage enforcement proceedings until a decision is taken in the declaratory proceedings – or to explain why the rules were changed – e.g. the introduction of a possibility of appeal for consumer debtors. For Spanish civil courts, a reference to Article 47, read in conjunction with the UCTD, appears to be one possible avenue to expand consumers' procedural rights, create more space for judicial intervention and trigger legislative reforms to that effect. In this respect, it may fulfil not only a strengthening or an empowering function, but also a signalling and even a transformative function – with some important delimitations.

In *Sánchez Morcillo* and *Finanmadrid*, Article 47 was used to signal systemic issues: a procedural inequality in mortgage enforcement proceedings (*Sánchez Morcillo*) and a delegation of judicial functions in the order for payment procedure (*Finanmadrid*). Both cases had a constitutional dimension. It is about the justiciablity of consumer rights and the availability of a remedy for procedural breaches. Effective judicial protection cannot be guaranteed if the ambit of the dispute is too limited and/or if courts are completely side-lined. In the case of *Sánchez Morcillo*, the *Tribunal Constitucional*'s view on access to court and the system of recourse in appeal was perceived to be too narrow in light of the imbalance between the parties, both substantively and procedurally. In a way, the CJEU has taken up a role the *Tribunal Constitucional* would not fulfil, although *Sánchez Morcillo II* shows the limits of how far the CJEU is able or wiling to go. Article 47's accessory character is not its only constraint; even though it authorises national (civil) courts to set legislative provisions aside or to go against their own Supreme Court, it is unlikely they will do so without backup from the *Tribunal Constitucional* or the CJEU itself.

The analysed case law in this chapter nevertheless shows that Article 47 transcends the UCTD's effectiveness and *ex officio* control of unfair terms. Whereas the CJEU in *Finanmadrid* did not engage with the constitutional dimension at all, and strictly adhered to the question whether unfair terms control was possible at some stage of the proceedings, the referring court had also questioned whether court

registrars could exercise an adjudicative function in the first place. Moreover, at case level, there seemed to be a potential situation of *indefensión* under Article 24 of the Spanish Constitution, i.e. a violation of the rights of the defence, which could run counter to Article 47 of the Charter as well.

The prohibition of *indefensión* has another component: the court's decision must align with the parties' submissions. The parties must get an opportunity to present their views, and the court must take those views into account. In the expedited procedures discussed in this chapter, the tension becomes visible between a more active role of the court on the one hand, and party autonomy, procedural economy and legal certainty (procedural congruence and *res judicata*) on the other. In cases of a (perceived) conflict, Article 47 may fulfil a reconciliatory function. Observance of the parties' right to be heard is a way to avoid *indefensión* and to ensure a more balanced procedure. However, I have also discussed a few cases where Article 47 is invoked to tip the balance (back) to the side of traders.

The analysed case law reveals the boundaries of Article 47 as an interpretive or explanatory tool. For every decision that gives a broad interpretation of the applicable procedural rules, there is another that interprets the same rules in a restrictive manner. And even in case of a broad interpretation, consumers may find themselves without an effective remedy in practice, like Mr. Aziz. The clash between courts adhering to a strict application of the law and others attempting to expand the scope for judicial intervention provides another explanation for the continuous stream of preliminary references from Spain.

Moreover, the different legislative solutions chosen for different types of procedures reveal the 'patchwork' nature of the LEC in general: it does not provide for a comprehensive framework for the adjudication of consumer cases. There does not appear to be much room for Spanish civil courts to interpret the law in a consumer-friendly spirit; the empowering function of Article 47 is apparently not strong enough to change that.