

Illegal Clauses in a CHF-denominated Loan Agreement

Supreme Court Judgment of 5 April 2023, II NSNc 89/23

1. The manner and extent of implementation of conversion clauses contained in a typical CHF-denominated credit agreement are irrelevant for the assessment of their fairness under Article 385(1) of the Civil Code in conjunction with Article 385(2) of the Civil Code.
2. The foreign exchange risk clause is an inherent element of a CHF-denominated credit agreement which should be clearly explained to the consumer by the trader before the agreement is concluded.
3. The court is obliged to examine of its own motion the fairness of the terms of any contract concluded between a trader and a consumer regardless of the type of proceedings or the source of the claim asserted.
4. The consumer does not have the opportunity or obligation to prove the negative circumstances and the extent of the damage suffered in a dispute with the trader on the basis of a contract containing prohibited clauses.

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Commentary

Today, sustainable development is not only a leading idea, but above all a blueprint for an all-human development agenda.¹ It has emerged as an alternative to the widely understood global crisis, including the economic crisis.² The multidisciplinary nature of this idea has contributed to the focus of detailed solutions in legal systems seeking

¹ L. Gawor, *Vision of a new human community in the idea of sustainable development*, "Problems of Eco-development" 2006, vol. 1, no. 2, pp. 59–66.

² A. Klimska, A. Syryt, *Ethical and legal conditions of sustainable development – introduction to research*, "Zeszyty Naukowe Politechniki Śląskiej" 2018, series: Organisation and Management, no. 123, p. 199.

to find a normative solution that reconciles legally protected values in conflict with each other while taking into account the needs of future generations.³

In the Polish legal system, the principle of sustainable development is regulated in Article 5 of the Constitution of the Republic of Poland of 02.04.1997. Its addressee is undoubtedly the public authority, which is obliged, *inter alia*, to protect consumers (Article 76 of the Constitution of the Republic of Poland). At the same time, it should be noted that this principle is most fully realised only at the stage of the application of the law. Although it is not procedural in nature, its procedural dimension, which was not realised in the decision voted upon, should be taken into account. This is because the Supreme Court (hereafter SC) not only disregarded Article 76 of the Polish Constitution, but also the provisions of Article 385(1) of the Civil Code *et seq.* and its own body of case law issued on these grounds, and above all CJEU case law interpreting the provisions of Directive 93/13/EEC.

At the outset, it should be noted that the ruling in question was made in an action brought by a bank (trader) against a consumer for payment on account of the borrower's failure to repay a benefit under a CHF-denominated loan agreement based on conversion clauses based on reference to CHF/PLN buy and sell rates determined independently by the lender.

In the decision under review, the Supreme Court stated that the key "is not to establish that the contract concluded between the plaintiff and the defendant contained abusive clauses, but whether the court of appeal correctly verified their impact on the defendant." In doing so, the Supreme Court had no doubt that "some of the contractual provisions involved abuse of the bank's dominant position and the defendant's inability to negotiate their content." However, according to the Supreme Court, "the Court of Appeal [...] did not question these circumstances, but at the same time accepted that the occurrence of abusive clauses, resulting in the need to eliminate them from the content of the agreement, did not render the agreement invalid in its entirety. Indeed, the reason for the termination of the loan agreement was the defendant's cessation of payment of successive matured loan instalments." In view of this, the Supreme Court held that "In examining the defendant's legal position, it was necessary to verify the content of the agreement in its entirety after eliminating the disputed clauses from it, as well as the very manner in which the contractual obligations were performed in order to assess the compliance of the plaintiff's conduct with the law and good morals." In this context, the Supreme Court accepted that:

- firstly, "the Respondent had a real right to choose the method of repayment of the loan instalments and the Claimant did not prevent or hinder them from repaying further instalments in the currency of the loan," therefore the bank's actions were not contrary to good morals;
- secondly, "the reason for the termination of the loan agreement was the failure to pay and be timely in the repayment of the outstanding debt, and the defendant

³ B. Rakoczy, *The procedural dimension of the principle of sustainable development*, "Białostockie Studia Prawnicze" 2015, no. 18, pp. 35–44.

has not shown that this was related to the existence of prohibited clauses in the loan agreement;”

- thirdly, “the unfavourable actualisation of the exchange rate risk for the defendant, related to borrowing in a foreign currency, does not affect the validity of the loan agreement itself;”
- fourthly, the “clauses deemed abusive” contained in the contract at issue did not “affect the validity of the entire contract or the plaintiff’s right to pursue his claim.”

In addition, the Supreme Court pointed out that “the mere fact that a party [the defendant – A.N.] enjoys the status of a consumer does not mean that there cannot be an unfavourable outcome in this case. Indeed, the consumer is still a party to the legal relationship and is not exempt from the obligation to comply with the law. When issuing a ruling in which one of the parties is a consumer, the court may not at the same time disregard the interest of the other party. Moreover, when invoking the protection of the consumer’s interests, the court may not fully compensate for all acts or omissions on the part of the consumer (cf. the judgment of the Supreme Court of 17 May 2022, I NSNc 622/21).”

In these circumstances, the Supreme Court held that the judgment of the Court of Appeal dismissing the defendant’s appeal against the judgment awarding it the amount of the loan granted to the bank in the unpaid portion did not violate the constitutional principle of equality before the law or the right to a fair trial.

The judgment under review was issued in an extraordinary complaint proceeding (the aim of which is to eliminate defective court judgments that simultaneously violate the principles of social justice from circulation when cases concern individualised entities). In order to understand its motives more fully, it is necessary to cite the position of the Court of Appeal in Krakow.

The Court of Appeal in Krakow, in the justification of the judgment of 11.12.2019, I ACa 100/19, first stated that the loan granted to the respondent “was not a *strictly* foreign currency loan” (this is what the Court of first instance held), but a denominated loan, “and the essence of the assessment of this loan lies in the assessment of the provisions of the agreement concerning the rules of denominating the loan granted.”⁴ It went on to emphasise that “the provision in the loan agreement providing for the adoption of buy and sell rates for the conversion of the defendant’s liability and balance from CHF to PLN, as applicable in the plaintiff Bank’s exchange rate table, is abusive in nature [...]” This, however, did not affect the assessment of the decision of the Krakow District Court (i.e. the acceptance of the bank’s claim). This is because the Court of Appeal pointed out that “the recognition of a violation of the defendant’s rights as a result of the omission of the defendant in the procedure for determining the mechanisms for converting the value of individual instalments does not imply an automatic

⁴ On the difference between a foreign currency loan and a loan denominated in CHF, see M. Penczar, *Analysis of irregularities in the mortgage market with currency risk* [in:] *Manipulations and frauds in the financial market. Perspektywa konsumenta*, eds. A. Jurkowska-Zeidler, E. Rutkowska-Tomaszewska, A. Wiktorow, M. Monkiewicz, Warszawa 2020, p. 128.

deterioration of their economic interests.” According to the Court of Appeal, “the defendant made no attempt in the initial period of repayment of the loan to repay the loan in the currency in which the loan was granted, and yet the loan instalments repaid in Polish zloty had to be converted into the currency of the loan. It is characteristic that, despite the passage of eight years from the date of termination of the repayment of the loan by the defendant in Polish zloty, the defendant did not concretise the allegations as to the gross violation of its interests in terms of the violation of the economic aspect of their interests.” Summarising this, the Court of Appeal stated that “If the parties were still bound by the loan agreement, the finding that the amount of the instalment to be repaid is converted on the basis of the bank’s exchange rate table would be relevant, as it would have to be determined how to replace the abusive clause referred to above [...]. However, the dispute does not concern a factual situation in which the loan agreement is still in force. The subject matter of the dispute is a claim for payment of the amount of credit granted and not repaid after the termination of the credit agreement. It is not disputed that the defendant ceased to repay the loan and, if so, a finding that the plaintiff applied a method of converting the loan instalment that is an abusive clause could affect the outcome only if it were to be held that declaring the aforementioned contractual provision abusive leads to the invalidity of the agreement. However, in the case at hand, such a conclusion would be unjustified not only because in the case it would be possible to replace the abusive clause applied by the plaintiff with a different method of converting the loan instalment [...].”

In reviewing the evidence in the case, the Court of Appeal, among other things, accepted that the assessment of the defendant’s awareness and knowledge of the nature of the loan granted to them could be made on the basis of “their testimony, the fact that the loan granted to them was not the first loan of its kind, their belief that it was profitable to take a loan in a foreign currency” and not on the basis of the information material provided by the bank.

The view presented by the Supreme Court, based entirely on the reasoning of the Court of Appeal in Krakow, should be regarded as extremely inappropriate and deserving of disapproval, especially as it is contrary to the provisions of Article 385(1) of the Civil Code and Article 385(2) of the Civil Code, as well as EU law in the case-law of the CJEU interpreting Directive 93/13/EEC.

What is surprising in the position of the Supreme Court is the reference to the “manner of performance of contractual obligations”, as this is in clear contradiction with the regulation of Article 385(2) of the Civil Code. This is because it is clear that the assessment of whether a contractual provision is prohibited is made according to the state of affairs at the time of the conclusion of the contract (SC in its resolution of 20.06.2018, III CZP 29/17). The linguistic interpretation of the first sentence of Article 385(1) § 1 of the Civil Code does not provide grounds for assuming that, within the framework of the assessment of the abusiveness of a provision, the manner in which it is applied by the trader is relevant. On the contrary, it leads to the conclusion that the decisive factor is not how the trader applies the provision and for whom it is beneficial, but how the provision shapes the consumer’s rights and obligations. It follows directly from this

provision that the subject of assessment is the provision itself, i.e. the normative content expressed in a specific form (SC in its resolution of 20.11.2015, III CZP 17/15), and its point of reference – the way in which the provision affects the consumer's rights and obligations. The provision itself may directly shape rights and obligations only in a normative sense, affecting the scope and structure of the rights or obligations of the parties. Such an interpretation is in line with the disposition of Article 385(2) of the Civil Code and the generally accepted view that Article 385(1) of the Civil Code is an instrument for controlling the content of the contract (legal relationship). Consequently, how a provision is applied is a separate issue to which Article 385(1) § 1 sentence 1 of the Civil Code does not explicitly refer (SC in its resolution of 20.06.2018, III CZP 29/17).

Based on the preceding, the Supreme Court derived yet another unsubstantiated thesis, according to which "it was up to the defendant to freely shape the form of performance." In this way, the Supreme Court exposed the lack of basic knowledge of the nature of a CHF-denominated loan in this case. Irrespective of this, it should be emphasised that the SC has previously emphasised on several occasions that "[t]he choice of one of the available ways of repaying the loan already constitutes conduct on the part of the consumer subsequent to the conclusion of the contract" (instead of many SC in the order of 22.02.2023, I CSK 3231/22). Furthermore, in the judgment of 08.02.2023, II CSKP 978/22, the Supreme Court noted that "allowing the consumer to perform the contract in a certain way (in this case, repayment of the loan in CHF) does not eliminate the fundamental defect in the contract, existing from the moment of its conclusion."

In the context of the characteristics of a loan denominated in CHF, the currency risk must undoubtedly be pointed out. The SC referred to this risk only in terms of its materialisation on the part of the borrower on the basis of an assessment of the evidence (narrowed down in this case to a review of the evidence of the consumer's hearing). Such a procedure by the Supreme Court, setting aside the comments made above, raises legitimate doubts, since in a CHF-denominated credit agreement "the exchange rate risk borne by the trader is limited, whereas the risk borne by the consumer is not" (CJEU in its judgment of 10.06.2021, C776/19 to C782/19). Consequently, the terms of the CHF-denominated credit agreement "impose an unlimited and unhedged currency risk on the consumer in the event of a fall in the value of the domestic currency against the foreign currency", which the consumer does not have to prove at trial (as does the scale of the currency risk). It is also clear that the key issue in assessing the trader's conduct in terms of compliance with good practice is the nature and extent of the information provided to the customer at the pre-transaction and pre-contractual stage (CJEU in decisions of: 03.03.2021, C-13/19; 24.03.2022, C-82/20), rather than the consumer's experience or knowledge from other (non-bank) sources. The Court further clarified in its judgment of 18.11.2021, C-212/20, that the transparency condition must be interpreted broadly so that, on the basis of the condition of the denomination of the credit, the average consumer is able not only to know about the possibility of an increase or decrease in the value of the foreign currency to which the credit is denominated, but also to estimate the potentially significant economic consequences of such a condition on their financial obligations. This is because pre-

contractual information about the contractual conditions and the consequences of that conclusion is of fundamental importance for the consumer. It is in particular on the basis of this information that the consumer decides whether they intend to be bound by the terms and conditions formulated in advance by the trader in the contract (judgments of: 21.03.2013, C-92/11; 30.04.2014, C-26/13; 21.12.2016, C-307/15 and C-308/15; 20.09.2017, C-186/16). In addition to this, it should be stressed that the consumer's statement "that he is fully aware of the potential risks arising from the conclusion of the said contract is not in itself relevant for the assessment of whether the trader has complied with the said transparency requirement" (CJEU in its order of 6.12.2021, C-670/20).

On the other hand, the most astonishing is the position of the Supreme Court as to the fact that, in the case at hand, "the defendant has not shown that the failure to repay the loan was linked to the existence of prohibited clauses in the credit agreement", since the repayment of credit instalments relates to the sphere of the execution of the credit agreement, and the examination of the clauses contained in a contract signed between a consumer and a trader in terms of unfairness is to be carried out by each court of its own motion. The CJEU has indicated on several occasions that "the national court is required to examine of its own motion whether the terms of a contract falling within the scope of Directive 93/13 are unfair and, having carried out that examination, to correct the imbalance between the consumer and the trader, in so far as it has the necessary legal and factual information for that purpose" (Case C-415/11 and the case law cited therein; C-154/15, C-307/15 and C-308/15). The purpose of ex-officio inspection is to ensure that the result indicated in Article 6(1) of Directive 93/13/EEC is achieved in individual cases and to contribute to the objective set out in Article 7 of that act, since such inspection may act as a deterrent to unfair contractual terms in general.⁵ The obligation of ex officio control applies all the more when the consumer essentially questions the validity or fairness of the contract, but without specifically invoking the legal provisions on unfair contractual terms (CJEU in its judgment of 30.05.2013, C-397/11). Thus, the issue of performance of the agreement from which the trader derives the asserted claim cannot be relevant in a situation where it contains unfair provisions concerning the borrower's main benefits (and such provisions include conversion clauses, as the exclusion of the denomination mechanism and reference to the CHF/PLN purchase rate set by the bank makes it impossible to determine the amount made available to the borrower in PLN, in turn, the lack of a denomination mechanism and reference to the CHF/PLN selling rate makes it impossible to determine the amount of the loan instalments payable in PLN which are equivalent to the instalments in the denomination currency, which ultimately leads to the fact that the agreement without the prohibited provisions does not specify the *essentialia negotii* of the loan agreement under Article 69 of the Banking Law).

Finally, it is worth noting that the Supreme Court has shared the Court of Appeal's view regarding the need for the consumer to demonstrate damage (in the economic

⁵ EC Notice entitled *Guidelines on the interpretation and application of the Council Directive on unfair terms in consumer contracts* (OJ EU.C.2019.323.4, 27.09.2019, p. 51).

sense) in the context of benefiting from the protection guaranteed under Article 385(1) of the Civil Code *et seq.* This position is not correct, as a gross infringement of the consumer's interests does not have to have an economic dimension, reduced to an assessment of a quantitative nature (CJEU in the judgment of 13.10.2022, C-405/21). The CJEU, in its judgment of 18.11.2021, C-212/20, emphasised that "a significant imbalance may arise from the mere fact of a sufficiently serious breach of the legal position in which the consumer, as a party to the contract in question, finds himself under the relevant national rules, whether in the form of a limitation on the content of the rights to which he is entitled under the contract in question, an impediment to the exercise of those rights, or the imposition on him of an additional obligation not provided for by national rules."

The judgment under review contains more statements which fail to comply with the regulations concerning systemic consumer protection or their legal interpretation. Due to the space limitations of this gloss, the author did not comment, assuming that their significance is secondary. This does not mean that the arguments of the Supreme Court omitted in the gloss are less important, but only that they are in obvious contradiction with the existing case law of this Court (e.g. in the Supreme Court the prevailing view is that the clauses in a credit agreement denominated in CHF shaping the mechanism of denomination define the main benefit of the borrower [e.g. judgments of the Supreme Court of: 4.04.2019, III CSK 159/17; 9.05.2019, I CSK 242/18; 11.12.2019, V CSK 382/18; 21.06.2021, I CSKP 55/21; 3.02.2022, II CSKP 459/22], while in its order of 9.08.2022, I CSKP 2357/22, the SC stated that "As a rule, if the court perceives that a contract cannot be maintained after the removal of an abusive clause from it, it is obliged to declare such contract null and void").

It is difficult to find rational arguments in favour of defending the reasoning presented in the decision voted upon. What is striking is the fact that the Supreme Court, in its ruling of 5.04.2023, II NSNc 89/23, disregarded the basic legal principles stemming from the provisions of the Civil Code, as well as the CJEU case-law interpreting Directive 93/13/EEC. The inconsistency of this ruling with the previous position of the Supreme Court on the institution of credit denominated in CHF, formally admissible, may affect the deepening crisis of confidence in the national judiciary. Meanwhile, the protection of the rule of law in Poland is one of the main objectives of sustainable development, determining the shape and development of the new paradigm of public finance based precisely on stable law.

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Summary

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Illegal Clauses in a CHF-denominated Loan Agreement

In extraordinary complaint proceedings, the Supreme Court shared the findings and considerations of SA in Krakow, assuming that the elimination of conversion clauses from the loan agreement denominated in CHF does not result in its invalidity *ex tunc* and *ab initio* since the agreement was terminated due to the lack of repayment of loan installments, and the consumer did not demonstrate that the discontinuation of the provision in this respect resulted from the existence of prohibited provisions. In the glossed judgment, the Supreme Court devoted a lot of attention to the issue of the performance of the loan agreement, pointing out, among other aspects, that the consumer could have paid the loan installments directly in CHF from the beginning, which would have excluded the need to use the unfair conversion mechanism. The Supreme Court also emphasised that the consumer did not prove in this case damage caused by the materialization of the currency risk on their side. All these issues are analyzed in this critical gloss. In the opinion of the author, the judgment in question is inconsistent with the law *sensu largo*.

Keywords: consumer protection, contract performance, conversion clauses, CHF-denominated loan agreement, illegal clauses.

Streszczenie

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Niedozwolone klauzule w umowie kredytu denominowanego w CHF

W postępowaniu ze skargi nadzwyczajnej Sąd Najwyższy podzielił ustalenia i rozważania Sądu Administracyjnego w Krakowie, przyjmując, że wyeliminowanie z umowy kredytu denominowanego w CHF klauzul przeliczeniowych nie skutkuje ustaleniem jej nieważności *ex tunc* i *ab initio*, skoro umowa została wypowiedziana z uwagi na brak spłat rat kredytu, zaś konsument nie wykazał, aby zaprzestanie świadczenia w tym zakresie wynikało z istnienia niedozwolonych postanowień. W głosowanym orzeczeniu SN wiele uwagi poświęcił zagadnieniu wykonania umowy kredytu, wskazując m.in., że konsument mógł od początku spłacać raty kredytu bezpośrednio w CHF, co wykluczałoby konieczność zastosowania nieuczciwego mechanizmu przeliczeniowego. SN podkreślił też, że konsument nie udowodnił w tej sprawie szkody powstałej

w związku z materializacją ryzyka walutowego po jego stronie. Wszystkie te kwestie zostały poddane analizie w glosie, która ma charakter krytyczny. W ocenie autorki badany wyrok jest bowiem niezgody z prawem *sensu largo*.

Słowa kluczowe: klauzule przeliczeniowe, kredyt denominowany w CHF, ochrona konsumenta, postanowienia niedozwolone, wykonanie umowy.