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Swiss Francs Loans in Cyprus and the European Court of Justice Ruling in Case – 26/13 Kásler Árpád, Káslerné Rábai Hajnalka v OTP Jelzálogbank Zrt.

On 29/03/2008 Mr and Ms Kasler concluded a contract for a mortgage denominated in a foreign currency with a Hungarian bank. The contract stipulated that the fixing in Swiss francs of the amount of the loan was to be made on the basis of the rate of exchange applicable to the calculation of the amount of the loan when it was made available (the buying rate). The amount of Hungarian fiorints for each monthly installment to be paid, was to be determined on the day before the due date, on the basis of the rate of exchange applied by the bank to the sale of Swiss francs.

The Hungarian Supreme Court lodged a Request for a preliminary ruling on 21/01/2013 (Case – 26/13 Kásler Árpád, Káslerné Rábai Hajnalka v OTP Jelzálogbank Zrt.) asking:

- whether the term concerning the exchange rate applicable to a loan contract denominated in a foreign currency concerns the main subject matter of the contract or the quality / price ratio of the goods or services supplied;
- whether the contested term may be regarded as being in plain intelligible language so that it is not subject to assessment of its fairness pursuant to the directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ('the Directive'); The Directive provides that unfair terms in a contract concluded with a seller or supplier are not binding on consumers. As regards terms which define the main subject matter of the contract and adequacy of the of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, the Directive authorizes the Member States to provide the national implementing legislation that those terms are not subject to an assessment of their unfairness provided they are in plain, intelligible language;
- whether, if the contract cannot continue in existence if the unfair term is deleted, the national court is authorized to amend or supplement the contract.

The European Court replies that the prohibition on determining the unfairness of terms relating to the main subject matter of the contract must be interpreted strictly and may be



applied only to term laying down the essential obligations of the contract. It is for the Hungarian court to determine whether the contested term constitutes an essential obligation of the contract.

The European Court notes that the examination of the unfairness of the term cannot be avoided on the ground that the term relates to adequacy of the price and the remuneration on the one hand as against the services or goods supplied on the other. That term merely determines the conversion rate made between Hungarian forints and Swiss francs for the purpose of calculating the repayments without the Lender providing any foreign exchange service, in the absence of which, the financial costs resulting from the difference between the buying and the selling rates of exchange which must be borne by the borrower, cannot be regarded as remuneration due as consideration for a service.

The European Court further states that a term defining the main subject matter of the contract is exempt from an assessment of its unfairness only if it is in plain intelligible language in that the loan contract must set out in a transparent fashion the reason for and the particularities of the mechanism for converting the foreign currency. Thus it is for the Hungarian Court to determine whether the average consumer who is reasonably well informed and reasonably observant and circumspect would be aware of the existence of the difference between the selling rate of exchange and the buying rate of exchange of a foreign currency and also to assess the consequences arising from the application of the selling rate of exchange for the calculation of the repayments and for the total cost of the sum borrowed.

Finally the European Court observes that if the deletion of an unfair term renders the contract unenforceable as in the present case, the Directive does not preclude the national court from substituting the contested term with a supplementary provision of national law.

Following the above ruling, most Cypriot banks are negotiating at this stage (ie. without Court proceedings) with the restructuring of the loans in Swiss francs.

* Main Sources: www.curia.europa.eu (Press Release No. 66/14 dated 30/04/2014) and www.sigmalive.com

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