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## **FOREIGN CURRENCY LOANS: A customer's bad bargain or a breach of banker's duties?**

In recent years, a considerable number of individuals and legal entities have concluded loans in CHF with Cypriot banking institutions, due to the attractive low interest rate that the banks charge on these loans. Yet, these loan agreements carry a different kind of risk. The instalments must be repaid in the selected currency of the loan that is the CHF, despite the fact that the borrower's source of income is usually in Euro. Subject to the specific contractual terms in each case, the instalment is usually calculated with reference to the exchange rate between the Euro and the CHF at the time of payment of each instalment. Subsequently, the fluctuation in the exchange rate of the relevant currencies may lead to significant losses or profits for the borrower or the banking institution, depending on the case. The fluctuation is an accounting entry and there cannot be certainty on whether it will eventually benefit the borrower or the bank until the last instalment has been paid. However, the appreciation of the CHF in relation to the Euro, which occurred in the last years, has led to an increase of the instalment amount a borrower must pay. Furthermore, despite the ordinary payment of instalments by a customer, the loan would not be repaid by the time which it would have been repaid if the exchange rate had not fluctuated. As most of these loans are long term mortgage loans, the borrowers, having seen significant increases in their instalments, have brought legal actions against the banking institutions seeking to escape these contracts.

These claims give rise to multiple legal issues. To begin with, borrowers are arguing that the loan agreements contain unfair terms, which should be invalidated by the Court or interpreted in their favour. It should be noted that the protection offered by the European legal framework against unfair terms is not as extensive when the borrower is a legal entity borrowing in the course of its business, as when the borrower is an individual borrowing for his own personal purposes i.e. a consumer. The distinction is of course based on the assumption that professional customers are in a much better bargaining position and they possess the requisite knowledge to appreciate the risk of a sophisticated contractual arrangement. Secondly,

borrowers usually maintain that they agreed to the terms as a result of misrepresentation and fraud on behalf of the bank. Of course, these issues must be determined based on the specific facts surrounding each case.

On the other hand, the traditional common law approach is that a banker has no duty to provide financial advice to its customer, as the relationship between banks and customers is purely contractual. It is well established that customers ought to realise that banks are profitable institutions. Therefore, the bank should not be held responsible if the customer has freely decided to enter an agreement which eventually proved to be an unwise financial step. At the same time, 'freedom of contract' is a fundamental principle under which the courts should not normally intervene in the agreed terms, as a party should not escape what was freely agreed if for any reason the agreement proves to be a "bad deal". Conversely, a banker's duties seem to slightly vary when the product offered is considered to be 'sophisticated', as although there is no duty to advise, the bank should take reasonable care not to misstate the implications of the product. Also, a banker's duty may alter if by any way of conduct the bank has assumed the role of a financial adviser. Once again, these are matters to be determined on a case by case basis.

Eventually, the ultimate issue which may affect the majority of these cases seems to be whether the customer was objectively in a position to appreciate the nature of the agreement and the risk involved in the calculation of the instalments, at the time of concluding the contract. So far there is only an interim order of the District Court of Nicosia which confirms that the issue of clarity of the terms determining the aforementioned issues constitutes a serious question to be tried.

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