

TWO JUDGMENTS ON CANCELLING INVESTMENT PRODUCT CONTRACTS - SQUIRE PATTON BOGGS

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As a result of the financial crisis and the losses derived from investments, as well as certain poor banking practices, invalidity actions against investment products contracted by consumers with

banks have proliferated widely. Usually, the actions for annulment have been based on the error of consent as well as on the violation of the rules of the Securities Market Act and the General Law on Consumers and Users

Two recent judgments clarify two aspects usually examined by the Courts of First Instance and the Courts of Appeal. These aspects are the consequences derived from the breach of the duties of information, and the beginning of the limitation period of an action for annulment for lack of consent.

Regarding the first issue, the judgment of the Supreme Court rendered on December 15, 2014 examines whether the breach of the duty to carry out the appropriateness or suitability tests determines the invalidity of the contract.

For such purposes, the judgment examined the MiFID directive and concluded that the directive did not impose the nullity of the contract due to the lack of the aforementioned tests.

Pursuant to Article 6.3 of the Civil Code, the acts contrary to mandatory regulations are considered null, except in those cases when those regulations establish different effects in the event of infringement. Since the Securities Market Act established a specific penalty for breach of the information duties, the conclusion of the Supreme Court is that the lack of a test does not determine by itself the invalidity of the contract.

This does not mean that the Supreme Court considers that the lack of information cannot have an effect on the validity of the contract if it is established that the lack of information involved an error of consent, but this must be evidenced by the person who argues it.

The other issue that has been clarified as a result of a Supreme Court ruling concerns the initiation of the limitation period. Pursuant to Article 1301 of the Civil Code, an action for annulment for lack of consent shall expire in four years from the completion date of the contract. The meaning of the time in which completion of the contract occurs has led to disparate judgments. The most established line of case law has held that the moment of completion should not be confused with the perfection of the contract, that is, when the contracting parties agree in the object of the contract, but when all the obligations under the contract are performed. Thus, in this type of banking contract, the most consolidated line of case law has considered that said time coincided when the investment term ended.

The Supreme Court Judgment rendered on January 12, 2015 set that the time of completion is that on which the customer has acknowledged the error. For example, the Supreme Court states that this time coincides with the suspension of liquidation of profits or interest accrual or generally any other time that allows actual understanding of the characteristics and risks of the product.

Therefore, the moment of completion should not automatically be confused with the end of the term of the investment, but when the customer may notice that his investment is subject to risks that were not foreseen.

Fernando González is a partner at Squire Patton Boggs. He can be contacted at fernando.gonzalez@squirepb.com

