

# Spanish Private Law from an International Perspective

## 2. Contract Law



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# Contract Law: Contracts & Freedom of Will

- **Concept:** agreement between two or more persons which creates rights and obligations between them. In a more restricted sense, contract can be defined as a bilateral transaction whose legal consequence is the creation, modification or extinction of a patrimonial juridical relation. 'Patrimonial' means in this context capable of an economic value. Cf. arts.1254, 1089 & 1091CC.
- **Autonomy of the will:** reflects the contractual freedom of the parties who can regulate their interests without the interference of the legal system. The only limits to the autonomy of the parties to stipulate whatever they wish in a contract are set by art.1255CC. *in fine*: the law (mandatory or imperative laws), the moral or public order.
  - Specific limits to private autonomy:
    - Mandatory laws
    - Standard form contracts/ Adhesion contracts.
      - Standard Contract Terms Act, 1998: “no individually negotiated conditions predisposed by the seller or supplier for an indefinite number of transactions, in the context of pre-formulated contracts, to be accepted by the other contracting party (consumer or professional) under the radical alternative take it or leave it”

# Contract Law: Requirements for an Enforceable Contract (art.1261CC.)

- **Consent:** an agreement between parties/concurrence of offer & acceptance
  - **Legal capacity:** minors not emancipated & incapable persons cannot give valid consent (art.1263CC.)
  - Minors- Exceptions in the field of contract law: emancipated minors; those contracts that the laws allow them to perform by themselves or with the assistance of their representatives and those relating to goods and services of the daily life in accordance with the social usage.
  - Insanity- Natural incapacity at the moment the contract was performed has to be proved. In case of legal incapacity (tutor/curator), once declared, no other evidence of insanity is required
  - **Externalization of assent. Defects of consent (art.1165CC.):**
    - Mistake (art.1266CC.)
    - Fraud (deceit). Art.1269CC.
    - Violence (duress) or Threats (art.1267CC.)

# Contract Law: Requirements for an Enforceable Contract (art.1261CC.)

- **Certain object**
  - **Determined or determinable** (art.1273CC.)
  - **Possible** (art.1272CC.)
  - **Lawful** (art.1271CC.)
- **Cause:** the socio-economic function of the contract. *Has to be distinguished from “consideration”*
  - **To exist and be certain** (art.1276CC.)
  - **To be lawful** (art.1275CC.)
- **Form:** not an essential element of the contract, but
  - Form *ad probationem* (art.1280CC.)
  - Form *ad solemnitatem* (arts. 633 & 1327CC.)

*Cf. Statute of Frauds*

# Contract Law: Formation of Contracts (art.1262.1CC.)

- **The offer:** proposal that one party submits to the other, with the intention the offeree (addressee) accepts it or makes a counter-offer.
  - Precise and complete
  - Include the offeror's intention to be bound
  - No subject to any formal requirements
  - Can be revoked as long as it has not been accepted
- **The acceptance:** declaration of the will to accept the offer.
  - May be revoked before it reaches the offeror
  - Must be dispatched while the offer is still in force
  - No subject to any formal requirements
  - Silence itself does not amount to acceptance
  - Must coincide with the offer. *The mirror image rule*
- **¿When is the contract celebrated?** *The mailbox rule*

# Contract Law: Interpretation & Construction

- **Interpretation:** operation that aims at seeking out the true meaning of a contract entered into by its parties

Means of interpretation (art.1281CC.)

- Literal interpretation: the terms of the contract
- Subjective interpretation: the parties' intention
- Systematic interpretation: the contract has to be interpreted as a whole; attention must be paid to the parties' contemporaneous and subsequent acts
- *Favor negotii*: most suitable sense for the contract to be effective
- Teleological interpretation: meaning which may be nearest in accordance with the nature and object of the contract
- *Contra stipulatorem rule*: interpretation cannot favor the party that has introduced obscure clauses into the contract
- Gratuitous contracts: the doubt shall be resolved in favor of the smallest transmission of rights and interests; Onerous contracts: the doubt shall be decided in favor of the greatest reciprocity of interest.

- **Construction:** filling in the gaps of a poorly drafted agreement (art.1258CC.)

## Contract Law: Ineffectiveness of contracts

- **Ineffectiveness:** the contract does not produce the effects wished for and that can be reasonably expected from that contract
  - Nullity: due to a structural defect, the contract is unable to produce legal consequences.
    - Partial nullity: the contract is partially deprived from its effectiveness
  - Avoidance: the contract is affected by a vice that renders its effectiveness weak, in the sense that an action of avoidance can be brought into court in order to set the contract aside.
  - Rescission: the contract is perfectly valid and effective, but it causes a detriment to one party or to a third person, so that a declaration of ineffectiveness may be judicially obtained.

# Contract Law: Ineffectiveness of contracts

- **Nullity**

- Grounds for nullity:

- (a) any contradiction with the law, the morals or the public policy (Art. 6.3, 1255 CC);
- (b) an absolute lack of the legal requirements of transactions (consent, cause and object, art. 1261 CC);
- (c) an unlawful cause or object;
- (d) an omission of the formal requirements, *forma ad substantiam*.

- Ineffectiveness is *ipso iure* (does not need a judicial declaration) but it may be invoked by anybody, including the judge.

- The action to declare a contract absolutely null is imprescriptible.

- Conversion: transformation of a null contract in a different transaction. It requires that the void contract fulfil all the legal requirements of such different transaction. It has to be established by law.



# Contract Law: Ineffectiveness of contracts

- **Avoidance**

- The action to avoid the transaction can only be prosecuted by the party affected by the vice. The transaction is normally effective until the claim for avoidance is successfully brought to court.
- Grounds for avoidance:
  - (a) the vices of the consent (mistake, fraud, violence)
  - (b) the incapacity of one of the parties to enter into the contract (minors & persons declared incompetent)
- Confirmation: purification of the transaction by the party entitled to claim for its avoidance (art.1310 CC). It requires
  - (a) the awareness of the ground for avoidance
  - (b) the disappearance of the ground
  - (c) the capacity of the party confirming the transaction
  - Confirmation may be express or tacit. Its effects are *ex tunc* (art.1313CC)

# Contract Law: Ineffectiveness of contracts

- **Retroactive Effect of Avoidance or Nullity**
  - Effects between the parties: the contract, being null, is in principle without effect *ex tunc*. Each party must make restitution for what he/she has received (arts.1303, 1307, 1308CC.). But,
    - if the ground for avoidance was the incapacity of one party, the minor of age or the party lacking capacity to enter into a valid contract is only obliged to limited restitution (art. 1304 CC). The minor is liable only for his/ her actual enrichment (art. 1304 CC).
    - the claim for nullity will be dismissed if the parties cannot make restitution because of the loss of the object of the contract (art.1314CC.)
  - Effects as regard third parties: since the contract is retrospectively null, any transaction based on it will be null unless,
    - The law specially protects third persons

# Contract Law: Ineffectiveness of contracts

- **Rescission**

- Grounds for rescission (art.1291CC.)

- (a) contracts concluded by guardians without judicial authorization if the ward has suffered a harm in more than one-fourth of the value of the object of the contract.
- (b) contracts concluded in representation of absent people under the same conditions.
- (c) contracts concluded to the detriment of creditors. The creditor has the power to challenge the contracts undertaken by his/her debtor to prejudice his/her right of credit, if the patrimony of the debtor is insufficient to pay such credit.
- (d) contracts regarding litigious items if they have not been approved by the parties to the contract or the court.

- It is an exceptional and subsidiary remedy (arts.1290, 1294CC).

- The party who has suffered the detriment and its successors may claim rescission.

- The limitation period of prescription is four years.

# Contract Law: Performance / Payment

- **Performance:** carrying out the conduct owed to the benefit of the creditor, in such a way that the interest of the creditor is satisfied. The conduct must meet all of the circumstances and requirements foreseen in the obligation (cf. arts.1166, 1157 & 1169CC.), including time (cf. 1125 &1100CC.) & place of performance (cf. 1171CC.)
- Who may pay?
  - the debtor
  - a third person, except ‘highly personal’ obligations (art.1161 CC)
  - Personal Subrogation: in some cases, the person who pays does not extinguish the obligation but takes the position of the creditor vis-à-vis the debtor. That is, a third party pays to the creditor and turns himself into the new creditor, acquiring the guaranties of the credit (art.1209CC.)

# Contract Law: Performance / Payment

- **Performance**
- Whom should one pay?
  - the creditor or the person authorized to receive on behalf of the creditor (art.1162CC).
  - payment to someone other than the creditor shall discharge the debtor in exceptional circumstances in which the good faith of the paying party is decisive, or where the usefulness of this may be beneficial to the creditor.
  - where the creditor does not wish or cannot accept performance, as well as where such discharge may prove difficult owing to certain circumstances, the debtor can discharge his obligation of payment through a deposit by the legal authorities (art. 1177 CC).
- What to Pay?
  - only what is due to the creditor and all what is due to him

## Contract Law: Non Performance / Breach

- **Breach:** when a party does not perform under the terms originally agreed
  - **Late performance.** As a general rule, there is delay from the moment the creditor claims performance of the obligation, whether judicially or extra-judicially (*mora debitoris*). Art.1100CC.. But, there is an automatic delay,
    - when the law or the obligation provides that *interpelatio* is not necessary
    - when it can be inferred from the circumstances of the obligation that the period for performance was decisive (not essential) in order to establish to the obligation
    - in case of bilateral obligations, from the moment one of the parties performs his obligations, the other party shall be *in mora debitoris*
    - Consequences of L.P.: obligation to perform, damages and *perpetuatio obligationis*
  - **Total breach of failure to perform:** the debtor has not performed his obligation and cannot perform it in the future
  - **Defective performance:** the debtor performs in a way that does not satisfy the creditor's interest or it is not conforming with the contract.
    - the creditor bears the burden of diligently examining the performance of the obligation. If he does not do it, acceptance saves the non-conformity and the debtor is released. Specific performance can amount to repair the defect or to replace the defective good.

## Contract Law: Non Performance / Breach

- **Liability for non-performance (art.1101CC.)**
- Delay
- Fault (negligence): when a person is carelessness, neglectful or does not apply the proper expertise to the performance of his obligations
  - If the obligation and circumstances do not require a special diligence, the diligence to be exercised is that of ordinary prudence (art.1104CC: a good family father.). The diligence of a professional is determined by the knowledge, technique and skills of that profession (*lex artis*).
  - It is for the debtor to proof that the conduct was diligent
  - The liability can be modified, within certain limits (art.1255CC.), by agreement of the persons (art.1102CC.) obliged and moderated by the Courts (art.1103CC.).
  - Liability for foreseeable damages (art.1107CC).
- Deceit (intention): conscious and deliberate non-performance
  - Deceit shall never be presumed. It has to be proved by the creditor
  - The action to enforce liability cannot be waived and the Courts cannot graduate or mitigate the debtor's liability.
  - Liability for all damages (art.1107 CC).

## Contract Law: Non Performance / Breach

- **Non-performance without liability** (art.1105CC.)
- Act of God or *Force Majeur*: events which could not be foreseen or which foreseen were inevitable. Events outside the field of control of the debtor (wars, atmosphere catastrophes, floods, fires, earthquakes, expropriations ....)



# Contract Law: Remedies

- Specific performance: performance as originally agreed.
- Performance by equivalent: equivalent in money
- Damages. *Usual remedy awarded in common law traditions (expectation D., reliance D., restitutionary D., nominal D.)*
  - if the debtor is liable for non-performance
  - have to be proved by the aggrieved party
  - Patrimonial damages (loss suffered by the creditor + profit he/she has been deprived of )
  - Pain & suffering
- Synallagmatic remedies (art.1124CC.)
  - termination of the contract (right to terminate the contract)
  - reduction of the obligation (price)
  - withholding performance (aggrieved party's right to refuse to counter perform)

## Exercises

- Wyatt, R., *Check your English vocabulary for Law*, A & G. Black Publishers, Ltd., London: pp.13-16. ISBN:100713675926
- Lindner, A.K. & Firth, M., *Introduction to International Legal English*, Cambridge University Press, 2008, pp.18-21. ISBN: 9780521718998
- “Contract of Sale”, Practice Session Chapter nº3, in Saíinz-Baranda, Y.B., *Handbook on Spanish Civil Patrimonial Law*, Tecnos, 2º ed., 2016. ISBN: 9788430953240

## Leases or tenancy agreements

- **Civil Code (Title VI. Book IV):** the lease may be a rental of things, works or services (art.1542)
  - Rental of work or services: one party is obligated to execute a certain work or to carry out some sort of service in exchange for a price (art.1544)
  - Lease of things: one party is obliged to give to the other the temporary use and enjoyment of a thing in exchange for a price (art.1543)
    - Urban Property and agricultural holdings (arts.1546-1582)
- **Act 29/1994, 24 November, on Leases of Urban Property**
  - Leases of real property for a dwelling -habitual residence- (title II)
  - Leases of real property for purposes different than for a dwelling (title III)
- **Act 49/2003, 26 November, on Leases of Agricultural Holdings**

## Leases. Civil Code regulation

- **Obligations of the Lessor**
  - to deliver the property leased to the lessee
  - to maintain such property in condition to serve the use for which it was leased
  - to provide peaceful enjoyment to the lessee for the duration of the lease
- **Obligations of the Lessee**
  - to pay the stipulated price on the agreed terms.
  - to use the property as a good father of family and according to the purpose of the lease. By default, according to the nature of the property
  - to return the property at the end of the lease
- **Tacit Renewal:** if at the expiration of the agreed term the lessee remains and is left in possession for 15 days, a new lease arises under the same conditions, unless notice of termination is given.

## Leases. Act 29/1994, 24 November, on Leases of Urban Property. Leases of R.P. for a dwelling

- **Duration:** minimum term of three years
  - The compulsory extension of the contract may be avoided if, after the first year of contract, the lessor communicates to the tenant that he/she, or his close relatives, will need to occupy the dwelling
  - Once the three year term is completed, if the parties do not notify the will of extinguishing the lease, it is renewed for one more year
  - The lessee is free to withdraw from the contract and abandon the lease after 6 months. He/she is only obligated to compensate the lessor if such a stipulation was included in the contract (one month of rent for each of the years still to lapse or a proportional amount for periods of less than one year).
  - If the tenant wants to leave, without the consent of the spouse, this latter can continue to lease the dwelling.
  - If the tenant dies during the term of the contract, certain close relatives can subrogate in the position of the deceased tenant
  - If the landlord sells the dwelling, the buyer may evict the tenant from the premises, even if at time of the sale the minimum period of 3 years has not lapsed. However, if the existence of the lease has been registered with the Land Registry, the buyer will have to bear the lease for the rest of the duration of the agreement.

## Leases. Act 29/1994, 24 November, on Leases of Urban Property. Leases of R.P. for a dwelling

- **Rent:** freely agreed by the parties
  - By default, monthly payment in the seven first days of the month. Payment in cash at the leased dwelling
  - Not updated unless expressly agreed in the contract. By default, revised by reference to the annual variation of the Consumer's Price Index (IPC).
- **Works**
  - Landlord's obligation to make the necessary works in the premises in order to ensure the use agreed, unless the damage was caused by the tenant. The tenant has the right to have the rent reduced in proportion to the part of the property of which he is deprived due to the execution of the works if the works last + 20 days.
  - Any reparations needed due to the wear and tear of the property (eg. reparation of a blocked drain or toilet) shall be paid by the tenant.

## Leases. Act 29/1994, 24 November, on Leases of Urban Property. Leases of R.P. for a dwelling

- **Assignment:** not impossible without the express written consent of the landlord. In case of assignment, the assignee shall subrogate himself in the position of the assignor
- **Sublease:** only a partial sublease is possible, being the previous written consent of the landlord necessary.
- **Expenses**
  - Exp. arising from services of the property, such as light, heating, water, telephone and all other referring to utilities to which the property is connected and which can be broken down individually by way of meters shall be paid by the tenant
  - General exp. for the maintenance of the real property, its services, taxes and liabilities, which cannot be broken down individually, shall be paid by the landlord
- **Right of preemption & redemption**
  - In case of sale of the leased dwelling, the tenant has a right of preemption to buy the property in the conditions stated thereof .
  - If the sale was not communicated to the tenant or the conditions of the sale were to be different from the conditions communicated to him, the tenant has a right of redemption which has to be exercised within 30 days

## Leases. Act 29/1994, 24 November, on Leases of Urban Property. Leases of R.P. for a dwelling

- **Deposit:** the tenant has to deliver to the landlord a cash deposit equivalent to a month of rent. The deposit or what remains of it in case of damages having to be paid shall be returned to the tenant at the end of the agreement.
- **Termination.** The landlord can terminate the contract in case:
  - The tenant does not pay the rent or any other amount he has to
  - The tenant does not pay the deposit or its update
  - Not permitted assignment or sublease
  - The tenant carries out non permitted works without the landlord's consent
  - The tenant undertakes in the dwelling, dangerous, illicit, insane or bothering activities
  - The tenant no longer uses the property as a dwelling

The tenant can terminate the contract in case:

  - The landlord does not undertake the necessary works
  - The landlord disturbs the tenant in the use of the dwelling.
- **A fast remedy** for claiming unpaid rent & evicting the tenant (because of lack of payment or due to the lease having come to an end)



# Leases. Act 29/1994, 24 November, on Leases of Urban Property

- **Leases of real property for purposes different than for a dwelling**
  - Leases of premises for a season (summer or any other season)
  - Leases to exercise in the property an industrial, commercial, professional, cultural or educational
- Ruled by the will of the parties and, by default by title III of Act 29/1994. Most of the rules are common with a few exceptions
  - Assignment & sublease: feasible without the landlord's consent. The landlord has the right to increase the rent
  - Subrogation: in case of death of the tenant, when a professional or business activity is undertaken in the property, the heir/legatee who continues the business may subrogate in the rights and obligations of the tenant
  - Compensation: at the end of a lease contract of premises where a business activity of sale open to the public has taken place for the last 5 years, due to the expiry of the term thereof, and when the tenant has duly informed the landlord of his intention to renew the contract for at least five more years, the tenant has the right to a compensation from the landlord.

## Exercises

- “Lease Agreement for a Dwelling”, Practice Session Chapter nº10, in Saínz-Baranda, Y.B., *Handbook on Spanish Civil Patrimonial Law*, Tecnos, 2º ed., 2016. ISBN: 9788430953240
- Lindner, A.K. & Firth, M., *Introduction to International Legal English*, Cambridge University Press, 2008, pp.80-82. ISBN: 9780521718998