

Send to: PUREVDORJ, MUNKHSELENGE
WAKE FOREST UNIVERSITY SCHOOL OF LAW
1834 WAKE FOREST DR
WINSTON SALEM, NC 27109-8758

Time of Request: Monday, November 08, 2010 00:30:00 EST

Client ID/Project Name:

Number of Lines: 778

Job Number: 1861:251844901

Research Information

Service: Terms and Connectors Search

Print Request: Current Document: 1

Source: Doing Business in Spain

Search Terms: § 5.01 Contracts



1 of 1 DOCUMENT

Doing Business in Spain

Copyright 2010, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

CHAPTER 5 Contracts and Extra-Contractual Liability (Torts)

1-5 Doing Business in Spain § 5.01

§ 5.01 Contracts

[1] Elements of the Contract

The Spanish concept of contracting involves three types of contractual elements. They are all essential, natural, and accidental. The essential elements are those required by an absolute and imperative rule, and without which there would be no contract. The essential elements of the contract are consent, the object, and consideration. Natural elements are the ones required by some dispositive rule and which are considered to be incorporated in the transaction if the parties do not expressly exclude them. The accidental elements are those required by the will of the parties and which appear only when the parties specifically agree to them.

[a] Consent

The Spanish contractual system is made up of two basic principles:

- a) Consensus (*consentimiento*): Article 1258 of the Spanish Civil Code establishes that "contracts are perfected by the mere consent of the parties and, from that moment, they are obliged to perform not only that expressly stated but also that which, according to the nature of the contract, is consistent with good faith, uses, and the law."
- b) Freedom of form; which will be analyzed in paragraph [d].

According to the Civil Code, consent is shown by the coming together of the offer and the acceptance concerning the subject matter and the consideration which will constitute the agreement. The following are the requirements for consent:

- the capacity of the contracting parties: Article 1263 of the Civil Code establishes which parties lack such capacity. They are unemancipated minors and the incapacitated;
- expression of intent without defects: According to Article 1265 of the Civil Code, defects are error, violence, intimidation, and fraud;
- manifestation of will: Silence may be the equivalent of manifestation of will, if the party who does not

speak could and should have spoken;

-- harmony between the internal will and the stated will: This harmony may fail to arise due to an unconscious cause, such as the so-called error in the declaration of will, or from a conscious cause, such as mental reservation, declaration without serious intent (*iocandi causa*).

[b] Object

The object of the contract is regulated by Articles 1271 to 1273 which state the following rules:

- Impossible things or services or services may not be the subject matter of a contract.
- The subject matter of a contract must be legitimate.
- The objects must be part of private commerce, not matters of public domain, and they may not be contrary to the law or good custom.
- The subject matter of the contract must be a specific thing. Lack of determination of the quantity will not be an obstacle to the existence of the contract, provided that this aspect can be decided between the parties without a new agreement.

[c] Consideration (*Causa*)

The consideration (*causa*) in contracts is one of the most discussed elements of Spanish civil doctrine. It can be defined as "the proposal of a result or the result proposed which the law has characterized as the basis of the contract."

The Spanish Civil Code regulates consideration in contracts in Articles 1274 to 1277 which state the following rules:

- In onerous contracts, the consideration of each party is understood to be the provision or promise of something. In remunerative contracts, the service or benefit remunerated is the consideration. In charitable agreements, the mere contribution of the well-doer constitutes consideration.
- Contracts without consideration or with an illegal consideration shall be void. Consideration is illegal when it is contrary to law or public morals.
- The expression of a false consideration in a contract will invalidate it, if the contract is not based on another genuine and legitimate consideration.
- Even though consideration is not expressed in the contract, it is presumed to exist and to be legitimate, as long as the contrary is not proven.

[d] Form

As previously stated, one of the main basis of the Spanish contractual system is the general principle of freedom of form. Article 1278 of the Civil Code establishes that "contracts will be binding whatever the form they were executed in as long as they meet the essential conditions for their validity," that is, consent, object, and consideration.

Nevertheless, the Spanish Civil Code sets several exceptions to this principle by requiring certain contracts to have a specific form. We can distinguish a general rule and a special rule.

A) General rule--the cases and their effects must be considered:

- a) cases--according to Article 1280, the following contracts must appear in a public document:
- acts and contracts whose purpose is the creation, transfer, modification, or extinction of rights in real property;
 - leases with respect to such property for six years or more, if they are to be effective *vis-a-vis* third parties;
 - pre- or post-nuptial agreements and modifications thereto;
 - transfer, repudiation, and waiver of succession, or of joint property ownership within a marriage;
 - powers to enter into marriage, general powers for litigation, and special powers which must be presented in proceedings; as well as powers to administer property and any other contract whose object must be written or prepared in a public instrument, or which is intended to be binding against a third party; and
 - the transfer of securities or rights arising from an act set out in a public instrument.

Certain other cases require that the contract appear in a private document. These include all such contracts which involve a sum for services of one or the other parties which exceeds 9.01 euros.

b) effects--article 1280 has to be interpreted in connection with article 1279 which provides that the requirement of certain formalities does, in effect, grant the parties the right to demand from each other completion of those formalities. Therefore, although article 1280 states that said contracts "must" appear in a public document, this requirement should not be understood as an *ad solemnitatem* requirement for the validity of the contract.

B) Special rule--we also must take a look at the cases and their effects:

- a) cases--some articles of the Civil Code specifically require a public document for certain acts, such as: gift of real estate, mortgages, pre- and post-nuptial agreements, and constitution of legal entities with real estate.
- b) effects--doctrine is unanimous that failure to comply with this formality invalidates gifts of real estate, mortgages, and pre- and post-nuptial agreements. Legal entities will be validly constituted among contracting parties but will not produce effects *vis-a-vis* third parties.

[2] Differences Between Administrative, Mercantile, and Civil Contracts

Civil, mercantile, and administrative contracts are governed by different legal rules. Civil contracts are regulated by the Civil Code, mercantile contracts by the Commercial Code, and administrative contracts by the Law 30/2007 of October 30 that established the Law of Contracts of the Public Sector. n2 This Regulation came into force on May 1, 2008.

[a] Special Features of Administrative Contracts (Government Contracts)

Law 30/2007 regulates contracts of the Public Administrations (General State Administration, autonomous community,

local entities, and autonomous organisms depending on the same).

The law establishes the administrative organization for public contracting, including the administrative organs that have competence to contract and the requirements for the contract such as the purpose and price, capacity and solvency of the contractor, and approval of the expense. The law also addresses guarantees, processing of the file, procedures for contracting; open, restricted, and negotiated forms of adjudication; auction and competitive bids, publicity, and announcement of the contracts; and the credits, nullity, effects, compliance, and resolution of the contracts, assignment, and subcontracting, and revision of prices. There is also a special part of the law which is applicable to different contracts which are separately regulated.

Community legislation has an important impact on the contents of the law. This is specially true with regards to the capacity of the businesses, the procedures for tendering, determination of the amounts of the contracts for purposes of publicity and their periods (which are fixed in calendar days, except where otherwise provided), the exceptions to that and requirements established for the negotiated proceeding, as well as the circumstances that accredit the solvency of the businesses.

[i] Contracting Parties

These contracts may be made by Spanish and foreign individuals and legal persons who have the full capacity to act. The classification of businesses is obligatorily established for those contracts for works and those that are entered into with consultants and service providers and for the performance of specific works or those that are specific and not customary for national and foreign non-community companies. Classification is also foreseen for supply contracts. The duty of classification extends to assignees and, on the other hand, professionals are exempt.

The law sets out numerous cases of incapacity to contract with the state including:

- those who have legally established conflicts of interest;
- those who have been convicted of crimes of misrepresentation or crimes against property;
- those who are not duly classified according to the law or do not accredit sufficient technical, economic, financial, or professional solvency.

[ii] Perfection, Formalization, and Interpretation

These contracts are perfected upon adjudication by the competent body. They are formalized in an administrative document. Said document may be filed with any public registry. To complete formalization, the guarantees must be set up as required by law. The bond is established as a normal form of guarantee. For the first time, the possibility of creating a global guarantee covering the totality of the contracts in the same business and with the same public administration or with the same contracting organism is provided for.

The administration has the prerogative to interpret the contracts. Should there arise a legal conflict concerning an administrative contract, the corresponding resolutions will close the administrative appeal process. Said resolutions are enforceable. A contentious administrative appeal may be made against these resolutions. Submission to arbitration will be subject to the requirements established in the General Budget Law or in the corresponding rules of other Public Administrations.

The revision of prices is extended to all contracts except for specific works.

[iii] Contracts Registry

A public registry is provided for in the Ministry of Finance (*Ministerio de Hacienda*). It is designed to provide the administration with information on contracts awarded, their modifications, renewals, and performance.

The Order EHA/1077/2005 of March 31 has established the common guidelines to send to the Administrative Contracts Registry. (This order is designed to standardize the information sent by the parties of Administrative Contracts.)

[b] Special Features of Mercantile Contracts

A contract may be of mercantile type for a variety of reasons. The following factors are significant:

- the place where the contract is made, *e.g.*, fairs, markets, stock exchange;
- the objects which they involve, *e.g.*, transport of goods contracts;
- the intervention of a merchant, *e.g.*, insurance contracts;
- the purpose for the contract, *e.g.*, purchase and sale; and
- the mercantile as distinguished from the civil nature of the parties to the contract.

Mercantile contracts are different from civil contracts in certain respects. In general, they are formed and performed more rapidly. And there are certain rules of evidence applicable to commercial contracts, but not civil contracts. Normally, the Commercial Code fixes shorter periods for the fulfillment of obligations of a mercantile type, as compared to obligations arising from civil contracts. n3 The Commercial Code also establishes certain rules n4 which tend to speed up mercantile contracting, unfortunately, often to the prejudice of legal certainty.

For the determination of the moment of formation of contracts made between "absentee parties," the Commercial Code follows a different criterion from that of the Civil code. Under the Commercial Code, a contract is deemed to be formed at the time of acceptance of the offer. The Civil Code requires knowledge, that is to say, civil contracts are deemed valid when the acceptance is made known to the offering party.

As to matters of proof or evidence, the general provisions of the Civil Code and the Civil Procedure Act are similar; however, the Commercial Code does contain some special provisions. n5

[3] Causes of Cancellation, n6 Invalidity, and Voidability of Contracts

[a] Cancellation (*Rescission*)

Causes for cancellation as listed in the Civil Code are cancellation for "injury" or cancellation for fraud. Cancellation for injury may occur as follows:

- Contracts made by guardians without the authorization of the "family council" are subject to cancellation if the person represented by the guardian has suffered loss to an extent which is greater than one-quarter of the value of the objects which were the subject matter of the contract.
- Contracts made on behalf of missing persons when the latter has suffered a loss equal to or greater than one-fourth of the value of the subject matter of the contract, may be cancelled.
- Testamentary allocations by executors or administrators may be cancelled if they result in a loss

amounting to one-quarter of the value of the injured party's rightful allocation.

Contracts are considered to be fraudulent, and thus cancellable, in the following instances:

- when made in fraud of creditors, if the creditors are not able to collect what is owed to them by any other means;
- contracts whose subject matter is the object of litigation, when made by the defendant without the knowledge and approval of the litigating parties, or of the competent judicial authority; or
- when deliveries or payments are made while in judicially-declared insolvency, as payment for obligations whose fulfillment by the debtor could not yet be compelled at the time of making them.

Injured parties may bring suit in an action to cancel. The basic feature of the rescission action, however, is its subsidiary nature. It may be exercised only when the affected party has no other legal recourse by which to secure the reparation of the damage. The statutory limit for bringing an action for cancellation is four years. It calls for the restitution of the property which was the subject of the contract along with its benefits on the one hand, and return of the contract price plus interest, on the other. Cancellation does not occur in respect to any third parties, who may have acquired the property in good faith. In this case, it is possible to claim loss and damages only against the party which caused the injury.

[b] Invalidity or Nullity (*Nulidad*)

A contract may be held null and void due to:

- failure to meet the essential requirements of a contract, *i.e.*, consent, subject matter, and consideration;
- defects of form if it is a contract which requires a particular form of presentation; and
- conflict between the contract and the provisions of the law, unless the law specifically calls for its validity.

The action for nullity is a declaratory one which any interested party, whether or not a party to the contract, may initiate. It is not subject to prescription or to extinction.

Once an obligation has been declared void, the contracting parties must reciprocally return or replace on the one hand such property as may have been material to the contract along with any benefits arising therefrom, and on the other, the contract price including interest.

[c] Voidability (*Anulabilidad*)

The Civil Code recognizes several grounds for the annulment of contracts in spite of the fact that they meet essential requisites and even though the contracting parties do not suffer any loss. These are contracts which do not include any "fatal" defects. If they did, under the law, they would be null and void, rather than merely voidable. Causes of voidability are as follows:

- the lack of capacity of one of the parties, provided that this does not suppose the complete absence of consent, which would result in total invalidity, rather than voidability;

-- a defect of consent due to error, fraud, or intimidation; or

-- the falsity of the consideration.

.....

.....

.....

.....

.....

.....

Once an obligation has been declared voidable, the parties must reciprocally return the property which was the subject of the contract, along with any benefits obtained therefrom, and the contract price, plus interest. n7

Voidability actions may be brought by any party bound thereby whether as principal or subsidiary. This cause of action survives for four years. It may be extinguished by prescription, by the confirmation of the contract, or as a result of the loss of the property which was the object of the agreement if the loss is caused by fraud or fault on the part of the party who had a cause of action.

[d] Confirmation of Cancelled Contracts

Cancelled contracts may be corrected by removing the defects which they contained from the time of their execution, provided that the following requirements are met:

-- that the correction to the contract be carried out by the party with the right to seek its cancellation;

-- that this same party has had knowledge of the defect and right of cancellation; and

-- that the cause for cancellation has ceased to exist.

Confirmation of a voidable contract may be made expressly or tacitly. Tacit confirmation shall be deemed to have occurred when, with knowledge of the cause of the voidability, and, following the termination thereof, the party, with the right to invoke it, executes an act which must necessarily imply the willingness to renounce that right.

[4] Causes of the Termination of Contracts

Contracts lapse as a result of one of the following causes: payment or completion, loss of property or impossibility of performance, confusion of the rights of creditor and debtor, compensation, or novation.

[a] Payment or Completion

[i] Capacity to Make or Receive the Payment

In obligations to pay or deliver, any payment n8 or delivery made by a party who is legally without authority to dispose of the subject matter, or who is without capacity to transfer, is considered invalid. However, if the payment was an

amount of money or fungible goods, there will be no claim against a creditor who may have spent or consumed it in good faith.

Normally, the creditor or his representatives may receive payment or delivery. However, the law establishes a series of special rules, so that a payment or delivery made to a person without capacity to administer the creditor's property, shall be valid to the extent to which it has been converted to his use.

[ii] Time and Place for Payment

In the case of a "pure obligation," payment is due from the moment the obligation is created. If the obligation is subject to a pending condition, the time for payment is when the condition is met.

Payment must be made in the place designated in the contract. If no such place was stipulated, and there is a specific object to be furnished, delivery must be made where the object was located at the time the obligation was created. In any other case, the place of payment or delivery shall be that of the domicile of the person obligated to pay or to deliver.

[iii] Performance

Performance requires that what is done, paid, or delivered is precisely that which the contract calls for, and not anything else. The payment of debts in money must be made in the currency agreed upon. n9 Where the contract is silent on this matter, payment is presumed to be in euros. The furnishing of negotiable notes or bills of exchange, or of other mercantile documents, will only satisfy payment when actually paid, unless, of course, non-payment is due to the fault of the creditor. Pending collection on the note, the action derived from the original obligation is suspended.

Except where the contract specifically so provides, the creditor may not be compelled to receive only a part of that which is due to him under the contract. However, when the debt is partly liquid and partly non-liquid, the payment of the first, without liquidation of the second, may be sought by the creditor and made by the debtor.

[b] Loss of the Property or Impossibility of Performance

The law provides that an obligation consisting of the delivery of a specific thing will be extinguished when that thing is lost or destroyed without the fault of the debtor, provided this occurs before he has been declared in default. The debtor will also be released from the obligation to act when it is legally or physically impossible to do so. In this regard, the Code establishes the following special rules:

- The obligation must involve the delivery of something specific.
- The obligation will not lapse, as a result of the loss of the property, regardless of what caused the loss, when the debt or obligation arises from an offence or crime.
- If the obligation lapses as a result of loss of the property, any actions which the debtor may have against third parties as a result of the loss will be transferred to the creditor, by operation of law.

[c] Confusion of Rights

Confusion of rights occurs when the debtor and creditor are the same person. Since it is legally and logically impossible for a person to be a debtor to himself, the obligation is deemed to be extinguished. However, an exception is made in the case of such confusion arising as a result of transfer of title by inheritance; if the heir or beneficiary accepted the inheritance "on benefit of the inventory." The use of this device serves to maintain the complete separation of hereditary property and the property of the inheritor.

[d] Forgiveness

This act is the waiver of the right to collect by the holder, that is to say, by the creditor. The forgiveness of the main debt will extinguish any accessory obligations, but the extinction of the latter is always dependent upon that of the former.

[e] Offset (*Compensacion*)

This occurs when two persons, acting in their own right, are both creditors and debtors to each other. By operation of law, each debt is extinguished by the concurrent amount of the credit even though the debtors and creditors may not be aware of this fact. If the debts are payable in different places, the parties may be compensated by way of indemnification for the transport costs or costs resulting from the change of place of the payment. If one person has several debts owing, the priority for offset is as follows: (1) the debt indicated by the debtor; (2) that indicated by the creditor; (3) the interest before debt principal; (4) the most onerous debt; (5) all debts *pro rata*.

[f] Novation

Novation n10 occurs in the following cases:

- The subject matter of the obligation or the main conditions of the obligation is varied by agreement;
- Another person is substituted for the debtor; or
- There is substitution of a third party in respect to the rights of the creditor.

[5] The Pre-Contract, the Promise to Sell, and the Quasi-Contract**[a] The Pre-Contract**

A pre-contract is also called a preliminary or preparatory contract, or a promise to contract. It is the statement of intention to conclude a contract in the future. The most controversial aspect of the pre-contract is that of its effects. Two interpretations are possible: n11

- One approach stems from civil-law; it holds that the declaration of intent which forms the pre-contract, is an extremely personal act and the judge will not find a true contract in a pre-contract.
- The other approach is procedural; according to it, the judge may find the clear intention of a silent party provided that the contents of the declaration of intention are clear from the pre-contractual clauses.

[b] The Promise to Sell

The promise to sell is scarcely distinguishable from the pre-contract. The legal concepts surrounding the mutually given and accepted promises are somewhat confusing. In terms of its legal effects, they are the same as those of all pre-contracts. The subsequent signing of the actual contract for purchase and sale may be demanded by either party. This demand will then give rise to a claim for the delivery of the property or the payment of the price.

[c] The Quasi-Contract

Spanish Law recognizes two types of quasi-contracts. One involves the payment or receipt of something not owed and the other entails the management of matters relating to another without a power of attorney.

[i] Collection or Payment of Something Not Owed

When one receives something without any right to receive it and delivery is in error, the obligation to restore it arises. The party demanding return must normally prove the error by which the payment was made. There are two exceptions:

- when the defendant denies having received that which is claimed, and the plaintiff proves the delivery, the claimant need not establish error;
- when the thing delivered was never owed, or was already paid, the Code assumes that there was an error in the payment, and the party from whom redress is sought has the burden to prove that it was received as a donation or for some other just cause. If he cannot so prove, the object must be returned.

A party accepting in good faith any payment which was not due, shall answer only for the loss of the thing itself, without reference to any enrichment received from it. If the item was sold, the price must be restored. If the recipient has acted in bad faith, he must also answer for the losses suffered by the party who delivered the object.

[ii] Management of the Affairs of Another Without Power of Attorney

When a person (the agent) spontaneously undertakes to administer the affairs of another (the owner of a business) without having received authorization from the owner, and acts with the intent to bind him, certain obligations arise. The obligations of the agent are as follows:

- Once the unsolicited agent commences to act, he must pursue a matter to its conclusion, or he must call upon the interested party to replace him in the matter.
- Once the matter is concluded, accounts must be rendered, and the agent must indemnify the damage and loss caused to the owner of the business, as a result of fault or negligence.
- If the agent has delegated his "authority" to another party, he must answer as well for the actions of the substitute, without prejudice to the direct obligation of the substitute *vis-a-vis* the owner of the business. If there are two or more agents, they are jointly liable.

The owner of the business is only obligated if he has reaped the benefit of the agent's transactions, or if the agent's purpose for the transaction was to avoid imminent and clear loss to the business, although no actual benefit has accrued as a result. Assuming one or both of these pre-conditions, the obligations of the business owner toward the agent are those of reimbursing him for any necessary and useful costs paid, and such losses as may have been suffered in the discharge of the function. Also, assuming the pre-conditions, toward a third party, the business owner is responsible for the obligations contracted by the agent on his behalf.

[6] Brief Analysis of Selected Contracts Under the Civil Code**[a] Purchase-Sale Contract (*Compraventa*)**

Under this type of contract, one of the parties undertakes to supply something specific to the other who will pay a fixed price for it, in money or by some other consideration.

The price must be fixed, and it may never be left to determination by one of the parties. If the contract has involved a downpayment or deposit (*arras*), it may be cancelled. If cancelled by the buyer, he must forfeit his deposit. If cancelled by the seller, he must pay the buyer twice the amount of the deposit.

[i] Capacity

As a general rule, all those parties whom the Code recognizes as having capacity to bind themselves may enter into a purchase-sale contract. There are some expressly stated exceptions, such as an executor (*albacea*), with respect to property put in their charge, and lawyers with respect to property and rights which are the subject of litigation in which they are involved professionally.

[ii] Perfection and Consummation

The sale is considered "perfected" between buyer and seller, and is binding on both, if agreement has been reached as to the subject matter of the contract and the price, even though neither payment nor object has been transferred. However, sales made on a trial basis, and those where it is customary to test the article prior to accepting it, shall be presumed to have been made under a pending condition.

The contract for purchase and sale is consummated when the actions contained therein are made, that is to say, when the seller delivers the property to the buyer and the buyer pays the seller the price. However, the parties may agree that the delivery of the property may not involve the concurrent transfer of the full property rights, rather, this will occur at some time in the future by virtue of the completion of a condition. This is the so-called sale with an agreement reserving ownership (*venta con pacto de reserva de dominio*).

[iii] Obligations of the Seller

The main obligations of the seller in a purchase and sale agreement are delivery and warranty of the thing sold. Together with these fundamental obligations, the seller assumes other accessory obligations, such as preservation and custody of the object up until the time of its delivery, provision to the buyer of the titles of ownership, and payment of the costs of executing the notarial deed, except where otherwise provided.

The seller is not obliged to furnish the object sold if the buyer has not paid the price or the contract does not give a time for payment. Nor shall the seller be obliged to deliver the thing sold if, following the sale, it is discovered that the buyer is insolvent, to the extent that the seller runs the imminent risk of losing the purchase price. An exception to this rule is made where the buyer guarantees the payment within the period agreed upon.

The law implies a seller's duty to "indemnify" (*sanear*) the buyer in certain circumstances of his being dispossessed of the property purchased. If a final judgment, based on a pre-existing right of a third person, awards the property to that third person, resulting in the buyer being "dispossessed" of part or all of the property purchased, the seller is required to indemnify him. This seller obligation is contingent upon his having been notified by the buyer of the third-party's claim against the property. n13 The law also implies a seller's duty to "indemnify" for hidden flaws or non-visible encumbrances. n14

[iv] Obligations of the Buyer

The main obligations of the buyer under the purchase and sale contract are the following:

- to pay the price agreed upon at the time and in the place fixed in the contract;
- to accept the thing sold;
- to pay the interest on the price, if this was agreed, or if there is a delay; and
- to pay the costs n15 (except where otherwise provided). When the sale is made by means of a Public Instrument, the buyer normally pays the costs of the "first copy" and of subsequent copies of the sale

document. The costs of the transport of the property sold are also normally paid by the buyer once the object has been delivered.

[v] Effects of the Failure to Pay the Price

In sales of real property, even where it is stipulated that failure to pay the price in the agreed time will give rise to the right to cancel the contract, the buyer may pay subsequent to the date fixed for payment and even though there has been no extension for payment, until such time as rescission of the contract has been ordered judicially or by a notarial act. In the case of personal property, where a buyer fails to make payment at the fixed time, whether or not the time for payment coincides with delivery, the seller has the right to repudiate the contract.

[b] Redemption (*El Retracto*)

In general terms, redemption is the right of certain persons to acquire, at the same price, something which had been sold to another party, the contract being cancelled in respect of that buyer with the redeeming party being subrogated. This right is one which may be inserted into a contract. There are also a few instances in which it arises by operation of law. In the absence of an express agreement, the ordinary right of redemption shall last four years, counted from the date of the contract. Where stipulated, it may not exceed ten years. n16

[i] Who May Exercise Redemption

The action of redemption may be exercised by the seller, his successors, or by a third party acquiring the said right. It may also be exercised by the creditors of the seller.

[ii] Whom Redemption May Be Exercised Against

The action of redemption may be exercised against the buyer, his successors, or against a third party who acquires the property, provided that, in the case of real property, the right to redeem has been registered in the Property Registry. The Code also allows for multiple redemptions.

[iii] Effects

As a consequence of redemption, the seller must return to the buyer the purchase price, the expenses of the contract, such as notary's fees, and any other legitimate payment arising from the sale as well as any necessary and lawful costs in respect to the property sold, such as repair costs. The buyer, on the other hand, must return to the seller the property, including all improvements. However, he is not bound to return the profits received therefrom, unless they are compensated through payment of interest on the price.

[iv] Legal Redemption

Legal redemption is the right to subrogate oneself in the place of a party acquiring something through purchase or payment in kind. Its mechanics are similar to those of redemptive rights arising out of a contract. Legal redemption arises as a matter of law in the case of co-owners, adjacent neighbors, and holders of interests in divided estates (*e.g.*, life tenant and remainderman) as follows:

-- When a co-owner of a common property transfers his share to someone other than a co-owner, legal redemption may be exercised by the other co-owners.

-- Adjacent owners of rural properties may exercise legal redemption on neighboring real estate which is not separated by streams, ditches, or other apparent easements provided that the property targeted for redemption is less than one hectare.

-- The law implies reciprocal redemption rights between owners of successive interest in real property.

In general, legal redemption may be exercised only within the period of nine days counted from the registration of the transfer at the Registry. If not registered, the period is counted from the time when the redeeming party was advised of the sale. n17

[c] Charitable Gift (*Donacion*)

To be effective, donation requires certain formalities. n18 The formalities required vary, depending upon whether real or personal property is involved. In either case, the Civil Code requires acceptance.

Donation of personal property may be made verbally or in writing. The former requires the simultaneous giving of the property donated. In the absence of this, the donation will not be effective, unless it is made in writing. For the donation of real property to be valid, it must be effected in a public instrument which sets out both the property donated and the value of the charges which the donee must meet. Acceptance may be established in the same public instrument, or in another, but it shall have no effect if not made during the lifetime of the donor. If in a separate instrument, the acceptance must be legitimately acknowledged to the donor and this proceeding must be noted in the instrument. Persons accepting donations on behalf of others, who may not themselves do so, are obligated to obtain the mentioned notification and annotation.

[d] Exchange (*La Permuta*)

This is the contract by which one of the parties undertakes to provide one thing in return for another. It is distinguished from the contract for purchase and sale, under which something is given in return for payment. Here, one object is exchanged for another. n19

The Code establishes two special rules in respect to exchange contracts:

-- If one of the contracting parties has received the object which was promised in exchange and establishes that it did not belong to the party who gave it, there is no obligation to furnish that which was offered in exchange. The return of the property received will constitute fulfillment of the contract.

-- A party who is dispossessed of the property received in exchange may choose between recovery of whatever he gave in exchange or a claim for indemnification of damages and loss. However, the right of recovery of the property given by him shall continue only as long as that property is in the hands of the other party. His recovery rights may not prejudice a third party acting in good faith. For remaining matters, the provisions concerning the contract for purchase and sale apply to the exchange contract.

[e] Bailment (*El Deposito*)

Bailment is where one party receives the property of another with the obligation to retain and return it.

[i] Obligations of the Bailee (*Depositario*)

The bailee's basic obligation is the maintenance and return of the property deposited. With reference to the former, the bailee is prohibited from making use of the property deposited without the express permission of the bailor. With reference to the return of the property, the following complementary rules have been established:

-- The general rule is that the deposited property must be restored to the bailor, his successors, or to such persons as may be provided for in the bailment contract.

- The property deposited must be restored along with all its proceeds and improvements.
- The place for return is as provided for in the contract, and, if not stated, it is presumed to be where the property is deposited.
- As to the time for return, this is whenever the bailor demands it, even where the contract states a specified time for the return.
- When the property is deposited in a closed and sealed state, it must be returned to the bailor in the same state. The bailee must answer for any damage and loss which occurs if the seal or lock has been forced as a result of the fault of the bailee.

[ii] Obligations of the Bailor (*Depositante*)

The obligations of the bailor are the following:

- to pay the price of the bailment when compensation has been agreed on;
- to reimburse the bailee for such costs as may have been paid for the conservation of the property deposited, and to indemnify him for all loss arising as a result of the bailment. As a guarantee of such rights, the bailee may retain the property deposited as a pledge until he has received full payment.

[f] *Mutuum* and *Commodatum* Contracts (*Contratos de Mutuo y Comodato*)

Under a *mutuum* contract, one of the parties furnishes the other with money or another fungible item n20 and the other party promises to replace it with another item of the same type and quality. In the *commodatum* contract, one of the parties furnishes the other with something, which is not fungible, so that the latter party may make use of it for a certain period of time and then return it.

The *mutuum*, being an eminently unilateral contract, only creates obligations for the borrower. He must restore (*i.e.*, return or replace) that which has been lent, and, if so agreed, he must pay interest. n21

The Code makes the following distinctions in the matter of restoration:

- In the case of money, the obligation of the borrower is to return it in the form agreed and, where this is not possible, "in silver or gold coins of legal tender in Spain." There is no implied obligation to pay interest.
- In the case of a consumable thing, the debtor owes an amount which is equal to that received, in the same species and type, in spite of the fact that it may have undergone a change in price.

In the case of a *commodatum* contract, the borrower is bound to preserve the property lent. He must exercise the diligence of a reasonably prudent person. He must also pay such ordinary costs as may be required for the use and preservation of the item borrowed. Following use of the thing borrowed, it must be restored to the lender. It may not be retained even for reasons of costs.

The obligations of the lender in a *commodatum* contract are to pay any special costs arising in relation to the preservation of the thing borrowed, and to notify the borrower of defects in the thing borrowed. Failure to do so shall make him liable for damage suffered by the borrower as a result of the defect.

[g] Leases (*Arrendamientos*)

Leases may be created for property, work, or services. In the case of property, one of the parties undertakes to furnish the other with the enjoyment or use of something for a fixed period and price. In a "lease" for work or service, one of the parties carries out work, or provides a service to the other for a fixed price. The party who transfers the use of the property, carries out the work, or provides the service is called the lessor (*arrendador*). The one acquiring the corresponding right is called the lessee (*arrendatario*); he promises to pay the contract price.

There are many types of leases, of which the following are the most significant:

- leases of personal property, which may be of personal property *per se*, or of livestock;
- leases of real property, whether urban. n22 or rural. n23

The Civil Code applies to leases of personal property and livestock, and to leases of rural property not subject to its own special legislation (*e.g.*, leases between family relations up to the second grade), and to urban leases also not subject to special legislation (*e.g.*, seasonal leases, those for private social clubs, those of the dwelling provided due to the office one holds, etc.). The rights and obligations contained in the Code are the standard ones for this type of contract. Thus, the lessor is bound to furnish the lessee with the property leased, carry out necessary repairs and to assure the lawful and peaceful use of the property. On the other hand, the lessee is bound to pay the price and to use the thing for the purpose stated in the lease contract.

[i] Urban Leases

The Urban Lease Law 29/1994 of November 24 eliminates the traditional distinction between leases of housing and leases of business premises and those that are similar to the latter. It differentiates between housing leases, which are those dedicated to satisfying the permanent housing need of the lessee, the spouse or dependent children, and leases for uses different from that of housing. The latter category includes a second home, seasonal homes, the traditional business premises and offices.

The new law establishes a minimum duration of five years; a right which the lessee may waive. The amount of rent is to be freely agreed to between the parties. Increases in rent are according to the variations in the consumer price index, unless otherwise stipulated by the parties. The lessee must provide a deposit of one or two months rent depending on whether the lease is for housing or uses other than housing.

Proceedings concerning leases are, as a general rule, heard before the Court of First Instance of the place where the property is located. The law affects in a significant manner contracts entered into prior to April 30, 1985. *Intervivos* subrogation, except as result of matrimonial separation, is eliminated and *causa mortis* subrogation is to be gradually suppressed. The law unblocks situations where rent has been frozen and takes into account the economic capacity of the lessees, the rent currently being paid, the duration of the contracts, and inflation rates. A calendar has been established for resolution of leases of business premises that were governed by pre-April 30, 1985 law. Lessees that are physical persons and legal persons are treated differently. As a result, *causa mortis* subrogation rights are maintained in a limited form for physical persons. Leases with physical persons are to be resolved between five and 20 years depending on the economic strength of the lessee. The shorter period of time would apply to those lessees that upon termination of the contract would be considered to be in positions of equality with the lessor at the time of negotiating new lease conditions. Rent for business premises is revised following the scheme established for housing.

To favor the continuity of leases, the law grants the lessee a preferential right to continue in the use of the premises leased upon termination of the contract over any third party in market conditions. Also, significantly, the lessee who

does not continue in the use of the business premises has the right to indemnification when either the owner or the new lessee may benefit from the clientele generated by the activity of the prior lessee.

[7] Brief Analysis of Selected Contracts Under the Commercial Code

[a] Mercantile Purchase and Sale (*Compraventa Mercantil*)

Purchase and sale contracts are deemed to be mercantile in nature when personal property is purchased for the purpose of resale either in the original form or otherwise with the aim of profiting from the resale. The Commercial Code refers only to personal property, but it does not specify that sales of real property may not be mercantile sales.

[i] Purchase and Sale Contracts Excluded from the Mercantile Legislation

The following contracts are expressly not subject to legal provisions regarding mercantile purchases and sales:

- the purchase of merchandise destined for consumption by the purchaser or by the person on whose account they are acquired;
- sales made by owners and farmers or cattle breeders of the benefits or products of their harvests or livestock; and
- sales made by craftsmen in their workshops of objects made or constructed by them.

[ii] Formalities

As a general rule, the mercantile purchase and sale transaction calls for no special formalities. It is a consensual agreement and, as such, it is perfected merely on the giving of consent. There are a few mercantile purchase and sales which do require certain formalities or specific clauses. However, the amounts which are given in mercantile sales by way of deposit shall be seen to be given on account of the price, and in proof of the ratification of the contract, except where otherwise provided. n24

[iii] Obligations of the Seller

The main obligations of the seller under a mercantile contract for purchase and sale are the following:

- Delivery of the subject matter: Delivery must be made within the agreed period. The subject matter need only be put at the purchaser's disposal. The place for delivery is that which has been agreed to and, if no location was stated, it will be the place where the property was located at the time of the fulfillment of the agreement.
- Conservation of the property until the time of its delivery: Unlike the Civil Code, which places the risk of loss on the purchaser from the time of perfection of the contract, the Commercial Code ascribes the risk to the purchaser only from the time of delivery.
- Obligation of guarantee: In any mercantile sale, the seller is bound to warrant title in favor of the purchaser, except where otherwise provided.

[iv] Obligations of the Purchaser

The following are the basic obligations of the purchaser:

1-5 Doing Business in Spain § 5.01

-- Delivery of the price: This obligation arises at the moment the goods which are the subject of the contract are placed at the disposal of the purchaser.

-- Obligation to receive the goods: Should the purchaser fail to accept the goods, the seller may judicially deposit the goods and claim fulfillment.

-- Law 3/2004, of December 29, 2004 implements Directive 2000/35/EC, combating late payments in commercial transactions. The law is applicable to commercial deals between companies, or between companies and public administrations, as well as between contractors and their suppliers and subcontractors. The law permits a seller to retain the title to the goods until payment of the price is completed, provided that it is explicitly agreed before delivery. Penalty interests arise automatically in the event of payment delay. n25

The interest rate is seven percent over the European Central Bank rate. Additionally, the seller may claim as compensation all the recovery costs caused by the payment delay. n26

[v] Special Purchase and Sale Agreements

There are numerous special types of mercantile purchase and sale contracts which are governed by specific laws. One example is that of the purchase-sale of personal property in installments. It is governed by the Law 28/1998 of July 13, which is complemented, to the extent it does not contradict Law 28/1998, by the Order of July 19, 1999 and purchase and sale contracts with "abbreviated clauses," among which are the following:

-- CIF (Cost, Insurance, and Freight) sales: The price includes the value of the goods, the freight or transport, and cost of the insurance.

-- C.F. (Cost and Freight) Sales: Here the price includes only the value of the goods and the cost of freight or transport.

-- F.B. (*Franco Bordo*) sales: This signifies the "alongside price." Here, the seller promises to get the goods to the dock.

-- F.O.B. (Free on Board) sales: The seller promises to place the goods on board, costs up to that point being to his account.

[b] Land Transport (*Transporte Terrestre*)

This is a contract whose aim is the transportation of persons or of things from one place to another, in exchange for payment of a price. It is considered to be mercantile when the materials to be transported are commercial goods and when, irrespective of the objects being transported, the carrier is a merchant, or is one whose business is the performance of transport for the public.

Within the sphere of commercial land transport there are several ways of classifying the transport: (a) that of goods or persons; (b) simple and conditional; (c) by railroad, or river incorporated to land transport.

[i] Formalities

These contracts call for use of a bill of lading. It may be required either by the loader or by the carrier of the goods. It must include the following:

1-5 Doing Business in Spain § 5.01

- the full names and addresses of the loader, the carrier, and the person to whom the goods are to be sent;
- identification of the goods showing their general nature, weight, trademarks, or external signs on the packets in which they are contained;
- the price of the transport;
- the date of dispatch;
- the place of delivery to the carrier and the place and period in which the delivery to the consignee must be made; and
- the indemnification which must be paid by the carrier in the case of delay, if there is any agreement in this respect.

[ii] Obligations of the Carrier

The carrier's obligations are as follows:

- The carrier must receive the goods, but it has the right to reject any packet which is in no condition for transport.
- Given an agreement on the route to be followed in the transport, the carrier may not vary the route, except in case of *force majeure*.
- When the goods arrive, the carrier must deliver them, without delay or obstruction of any type, to the consignee. If the consignee is not in the place set out, or if he refuses either to pay the costs of transport, or to accept the goods, judicial deposit applies.
- The carrier shall answer for losses and averages, including those due to fortuitous causes, *force majeure*, or defects in the things themselves, if it is proven that this occurred, as a result of his fault, or his failure to take the precautions dictated by customary commercial practice.

Goods carried serve as a particular guarantee of payment of the price of the transport, and of the costs and fees arising until the time of delivery.

[iii] Obligations of the Loader

The loader is obligated to pay fees, to deliver the goods for transport, and to bear the risks of transport, with the exception of any special liability of the carrier for negligence, as referred to above.

[c] Mercantile Loans

A loan will normally be considered mercantile when either one of the contracting parties is a merchant, or the objects loaned are destined for commercial purposes. n27 The mercantile loan may be gratuitous or with interest; it may be in money or in kind; and it may be for a determined or undetermined period of time. The borrower has an obligation to pay interest only when this aspect is agreed in writing. It should be noted that usurious interests are void. Interest is considered to be usurious if it is disproportionate when compared to ordinary interest and if it is considered as having been accepted by the debtor either because of his limited powers, or because of his distress and need. Also void are

compound interest agreements, that is, where the agreed interests accrue new interest which is attributed to the capital.

Mercantile loans are essentially "unilateral contracts." They create in the borrower an obligation to pay. The nature of this obligation varies according to the property borrowed:

- If the loan is of money, or a fungible thing, the borrower must restore an amount equal to that received, according to the legal value of the money or item at the time of the payment. If there is agreement as to the currency in which the payment is to be made, it must be so paid, unless impossible to do so.
- If the loan is represented by stock or securities, the debtor must return the same number of the same class and on identical conditions, or their equivalent if they have been extinguished.
- Loans in kind shall be restored by the debtor in the same type and quality, or the cash equivalent, if the type of item no longer exists.

[d] Joint Accounts (*Cuentas en Participacion*)

[i] Concept and Formalities

In this type of contract, one or more persons acquire an interest in the commercial operations of another or others.

This is done through the contribution of capital. It allows them to take part in the profit (or losses) in a proportion to be determined by the parties. As to necessary formalities, no public instrument is required, nor is registration in the Mercantile Registry. It is not possible to adopt a single business name for all the partners. No one, other than the individual who opened the business account, may use these accounts as collateral. n28

[ii] Rights of the Owner or Administrator

The owner or administrator of the enterprise has the following rights:

- to obtain the promised contribution;
- to acquire ownership of the objects contributed;
- to manage the operations;
- to distribute the profits;
- to receive part of the benefits, according to the contract; and
- to charge losses to the partner(s), also according to the contract.

[iii] Rights of the Participant(s)

The rights acquired by the participating contributor(s) are:

- to require the manager to carry out the commercial transactions;
- to make sure that his (the participant's) contribution be applied to the business;

- to make sure that the manager has contributed what he promised;
- to oversee the activity of the manager and to demand the rendering of accounts;
- to see that the manager also bears the losses;
- to receive a share of the profits;
- to prevent the entry of new participants; and
- to seek a declaration of the bankruptcy of the administrator, in the capacity of a creditor.

[iv] Termination

The joint accounts contract is terminated for the following causes:

- by mutual agreement, which may be declared expressly, or may be tacit;
- by the lapse of the time fixed in the contract, where no extension is agreed upon;
- by termination of the contract by one of the parties;
- by the conclusion of the enterprise which was the aim of the joint account;
- by the death of the manager, if the contract does not include a specific agreement for his or her heirs to continue in the joint account;
- by bankruptcy of the administrator or bankruptcy or insolvency of the participant(s); and
- by loss by the manager of his right to function in the capacity of a merchant, for example due to criminal action or fraudulent bankruptcy.

[e] Joint Ventures

Joint Ventures may be formed in a number of ways. Structures range from the use of entities studied in Chapter 12 such as a limited liability company to Temporary Unions of Enterprises (UTE) or Economic Interest Groups (AIE).

[i] Temporary Union of Enterprises

UTES are governed by Law 18/1982 of May 26. This temporary union may be defined as a system of collaboration among companies for a certain period of time to carry out a specific work, service or supply which is complementary to the principal object of the companies forming the union. These unions are formed by means of public deed registered with the Mercantile Registry.

[ii] Economic Interest Groupings

AIEs are governed by Law 12/1991 of April 29 (*Agrupaciones de Interes Economico--AIE*):

- The AIE is a legal entity of commercial nature. It must be registered in the Mercantile Registry. The Directors are jointly liable with the AIE for the acts and agreements executed on behalf of the AIE before it is registered.

- The purpose or aim of the AIE is to facilitate the development or improve the results of the activity carried out by its members. It is a non profit-making organization.
- The AIE can only carry out an economic activity which is auxiliary, related, or linked, to the activity carried out by its members.
- The AIE may neither have a participation interest, direct or indirect, in companies which are its members, nor may it control, directly or indirectly, the activities carried out by its members or other third parties.
- Its members are personally and jointly liable to third parties, for the debts of the AIE. This liability is subsidiary to the liability of the AIE.
- The AIE are subject to the general tax regulations of the State, Autonomous Communities and local entities. However, this law provides for special peculiarities:
 - the increase or decrease in property, evidenced by the contribution to the AIE, of one or various branches of economic activity, shall not be part of the taxable income.
 - Tax on Property Transfers and Stamp Duty--those acts necessary to set up the AIE are exempt from this tax.

[8] Brief Analysis of Specific Legislation Governing Contracts

Law 7/98 of April 13 has as its object to incorporate into the Spanish legal system the Directive 93/12/EEC regarding abusive clauses in contracts entered with consumers and to regulate the general conditions of contracts:

- abusive clauses are those contrary to good faith which cause an important and unjustified breach of the balance in the obligations of the parties.
- general conditions of contract are those incorporated in a plurality of contracts exclusively by one of the parties.

From a territorial point of view, the law is applicable to all the contracts subject to Spanish law and to all those in which, although subject to foreign law, have a party with its domicile in Spain.

From an objective point of view, several types of contracts are excluded such as administrative and labor contracts or those regulating family or succession matters.

There is a Registry of General Conditions of Contract. n29 Filing is voluntary.

The judicial actions which may be exercised against illegal general conditions and the obligatory publicity of certain judicial resolutions are also regulated. Judicial resolutions derived from these actions are registrable in the Registry of General Conditions of Contract to produce effects *erga omnes*.

General clauses not complying with the law are null. Breaches of the provisions of the law are subject to sanctions.

[9] Sample Form: Purchase And Sale Contract

1-5 Doing Business in Spain § 5.01

In Madrid, ____ (day) of _____ (month) of the year ____.

BETWEEN:

On the one part, MRS. _____, widow, of full age, of Spanish nationality, holder of National Identity Card No _____, domiciled at _____.

And on the other part, MISS _____, single, of full age, of Spanish nationality, holder of National Identity Card No _____, Lawyer, domiciled at _____.

THEY APPEAR:

MRS. _____ in her name and on her own behalf, and MISS _____ as verbal agent of _____, married, of full age, of _____ nationality, holder of Passport No _____, issued in _____ on _____, domiciled at _____.

The appearing parties, as they act, mutually recognize their sufficient legal capacity to bind and be bound insofar as required by the law, and

THEY STATE:

10 That MRS. _____ is the lawful owner of the following property:

Plot of land No ____ of _____ m2 situated at _____ as of today named _____, in _____ in the municipality of _____,

BOUNDARIES: to the North with Plot No ____; to the East with Plot No ____; to the West with Plot No ____ and to the South with the Street _____. Inside its perimeters exist: A SINGLE FAMILY DWELLING of _____ m2, having two floors. The first floor contains an entrance hall, a stairway leading to the second floor, five bedrooms, two bathrooms, four powder-rooms, a kitchen, washroom and a pantry. The second floor contains two bedrooms, a corridor, and one bathroom. On the first floor there is also an outside porch of _____ m2.

TITLE: Public Deed executed by the Notary of Madrid, Mr. _____ on the _____ of _____, concerning the Plot. And, Public Deed of _____ of _____, executed by the above-mentioned Notary concerning the house.

REGISTRATION: The property is registered at the Property Registry of _____, on pages ____ and ____ of Book _____, Volume _____.

20 That the said property is charged with a mortgage in favor of _____, as security for a loan of _____ euros;

30 That having agreed on the sale and purchase of the said property, they agree as follows:

CLAUSES:

FIRST: MRS. _____ sells to _____ represented in this act by MISS _____, as verbal agent, who hereby purchases the property described above.

SECOND: The price agreed for this sale is _____ euros which will be paid as follows:

_____ euros at the time of signing the present Contract.

_____ euros at the time this Contract is formalized in a Public Deed.

THIRD: The Vendor reserves legitimate possession of the property until such time as the full purchase price has been paid over by the purchaser.

FOURTH: With the property, which is the object of the present Contract, the ownership of the movable property specified in Annex I of this Contract will hereby be transferred.

FIFTH: The vendor hereby agrees to pay all of the water, gas, electricity, and telephone bills until such time as the purchaser enters into possession of the property.

SIXTH: The parties hereto freely agree that the vendor shall be liable for defects in construction up to six months following the date on which the purchaser enters into possession of the property, provided that such defects are not due to misuse on the part of the users of the property which is the object of this Contract.

SEVENTH: The full cancellation of the mortgage on the property which is the object of the present Contract, and described under the *SECOND* statement is pending the payment of _____ (_____) euros. The vendor hereby undertakes to make such payment, which will cancel the mortgage, and to register the corresponding Public Deed of the cancellation of the mortgage at the Property Registry before the granting of the Public Deed in which the sale which is the object of the present Contract will be formalized.

EIGHTH: In the event that this Private Contract could not be registered to a Public Deed due to causes attributed to the Vendor, or the Property described in the present Contract has charges or encumbrances or there are tenants or other occupants that inhabit the property, this Contract will be automatically terminated, thereby requiring the return of all the sums received by the vendor to the purchaser. Likewise, in the event that this Private Contract could not be raised to a Public Deed due to causes exclusively attributed to the Purchaser, the Vendor will retain as damages the sum paid at the moment of signing this Contract.

NINTH: As the Vendor has now paid the local taxes (*impuesto sobre bienes inmuebles*) and the amount corresponding to the community of owners for the year _____, the Purchaser agrees to pay to the Vendor the correct proportional amount from the moment that the Purchaser enters into possession of the property.

TENTH: All expenses and taxes derived from this Contract as well as from the corresponding Public Deed, will be met by both contracting parties in the following way: the tax on capital gains (*plus valia*) will be paid by the Vendor; and the Public Deed and copies, registration and transfer fees will be paid by the Purchaser.

ELEVENTH: The parties do hereby expressly waive such jurisdiction as may be available to them by virtue of nationality or domicile and hereby clearly and definitively submit to the Courts and Tribunals of

_____.

The parties hereby do so draw up this Sale and Purchase Agreement affirming and ratifying its contents, signing it in duplicate and to a single effect in the place and on the date above noted.

_____ The Vendor

_____ The Purchaser

FOOTNOTES:

(n1)Footnote 1. Article 1261 of the Civil Code provides: "There shall be no contract without the following requisites: (1) the consent of the contracting parties; (2) a determined object which forms the subject matter of the contract; (3) consideration for the undertaking established."

(n2)Footnote 2. *See* Law 13/2003 of May 23 that regulates contracts for the concession of public works.

(n3)Footnote 3. The effects of delay on the fulfillment of the obligations of a mercantile contract will commence as follows: (a) in contracts which stipulate a date for their fulfillment agreed to by the parties or provided for under the law, the day following said date; (b) in those which do not contain these provisions, from the date on which the creditor judicially summons the debtor or notifies the debtor of the claim for damages and loss made against it before the courts, a notary public, or any other public official authorized to issue notification (Article 63).

(n4)Footnote 4. The purchase of goods in stores or shops open to the public immediately creates rights in the purchaser in respect to the goods acquired, even against a true or rightful owner. The true owner, or one with a "superior interest" will have a cause of action against the sellers, rather than the purchaser. The money used for payment of goods purchased for cash in public shops or establishments shall not be subject to claim (Article 86).

(n5)Footnote 5. Variations are contained in Article 51 of the Commercial Code as follows:

(1) Telegraphic communication shall be admitted as proof when previously provided for in a written agreement.

(2) The declaration of witnesses alone shall not be sufficient for establishing the existence of contracts for sums greater than 9.02 euros.

(n6)Footnote 6. The provisions discussed in this section are based on the Spanish Civil Code. Thus, they govern civil contracts. In practice, they also apply to commercial contracts, in the absence of specific provisions in the Commercial Code.

(n7)Footnote 7. The Civil Code adds the following special rules to the general rule stated in the text:

(a) When the property which is the object of the contract cannot be returned because it has been lost, the obligor must furnish the benefits received and the value of the property at the time of its loss, plus interest from that same date (Article 1307 of the Civil Code).

(b) When the voidability arises from the incapacity of one of the contracting parties, the party declared incapable shall not be required to restore more than the benefit he received through the property or the price he received (Article 1304 of the Civil Code).

(c) As long as one party to the contract does not make the restorations required as a result of the declaration of invalidity, the other party may not be compelled to meet his obligations in the same respect. This is a consequence of the general doctrine on reciprocal obligations (Article 1308 of the Civil Code).

(n8)Footnote 8. Payment may be made by any person, whether or not that person has an interest in the fulfillment of the obligation, and regardless of whether the debtor knows, approves, or is unaware of it. In undertakings to perform

an act, the creditor may not be compelled to receive the payment or the service from a third party, when the capacity and circumstances of the person of the debtor were taken into account when the obligation was created (such as in contracts with skilled professionals or entertainers). *See* Articles 1158 and 1164 of the Civil Code.

(n9)Footnote 9. The Civil Code originally called for payment in the form agreed to, and in the event of silence, in gold or silver. Today, of course, bank notes are acceptable. In terms of payment in foreign currency, one should consult Article 520, No. 2 of the Law on Civil Proceedings (*Ley de Enjuiciamiento Civil*), as approved by Law 1/2000 of January 7, which provides for payment in convertible currency, provided that such payment is authorized.

(n10)Footnote 10. For an obligation to be extinguished by another which replaces it, this extinguishment must be unequivocally stated, or the original obligation must be incompatible with the new obligation in all respects (Article 1204 of the Civil Code).

(n11)Footnote 11. Of these two theories, the Supreme Court has shown a preference for the former, treating the declaration of will as a highly personal act.

(n12)Footnote 13. Civil Code Article 1475.

(n13)Footnote 14. Civil Code Articles 1483, 1484, and 1491.

(n14)Footnote 15. The Property Transfer Tax for the purchase and sale.

(n15)Footnote 16. *See* Article 1508 of the Civil Code.

(n16)Footnote 17. *See* Article 1524 of the Civil Code.

(n17)Footnote 18. *See* Articles 618 through 656 of the Civil Code.

(n18)Footnote 19. The Code provides that, if the price of the sale consists partly of money and partly of something else, the contract is classified according to the clear will of the parties. If this is not shown, it is interpreted as an exchange contract if the value of the property given as part of the price exceeds the money value or its equivalent. Otherwise, it is considered a purchase and sale contract (Article 1446 of the Civil Code).

(n19)Footnote 20. A fungible item is one normally designated by weight, number or size. It is not a particular item, but rather an item readily replaceable with another item of the same class.

(n20)Footnote 21. In respect of the obligation to pay the interest, the Code incorporates two rules: (a) Payment of interest is not required unless expressly agreed; and (b) The borrower who has paid interest, without this having been stipulated, may neither reclaim it, nor impute it to the capital. (Article 1756 of the Civil Code)

(n21)Footnote 22. *See* the Urban Lease Law 29/1994 of November 24.

(n22)Footnote 23. *See* the Rural Lease Law 49/2003 of November 26.

(n23)Footnote 24. *See* Article 343 of the Commercial Code.

(n24)Footnote 25. If the parties do not set out the date of payment of penalty interests in the agreement, Law 3/2004 establishes the applicable rules to determine when the obligation arises.

(n25)Footnote 26. The compensation may not exceed 15% of the amount of the debt, except for debts under 30,000 euros. The total amount of the debt, in such a case, is the limit on costs provided that the debtor is responsible for the delay.

(n26)Footnote 27. *See* Article 311 of the Commercial Code.

(n27)Footnote 28. Joint accounts are governed by Articles 239 through 243 of the Commercial Code.

(n28)Footnote 29. *See* Royal Decree 1828/1999 of December 3 that regulates the Registry of General Conditions of Contracts as modified by the Judgments of the Supreme Court dated February 12, 2002 and February 19, 2002 that annul certain articles of said Royal Decree.