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RESEARCH ARTICLE

The Silent Transformation of Spanish Contract Law

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Abstract

Several proposals to modernize obligations and contracts law in the Spanish Civil Code have not succeeded. However, Spanish contract law has evolved through judicial interpretation, which has reformulated existing rules and recognized new ones. This article deals with major transformations in general contract law and special contracts. Additionally, the Civil Code has been affected by its interaction with EU law, as interpreted by the CJEU. Updating the Civil Code in this manner has created conceptual obscurity and has increased legal uncertainty. Formal modernization of the Civil Code would be welcome, provided it treats Spanish private law as an integral part of the pluralistic legal order of the EU.

Keywords: Civil Code; reform; EU private law; sales; hardship; mistake; Spain

I. Introduction

In their seminal work *An Introduction to Comparative Law*, Zweigert and Kötz placed Spain in the Romanistic legal family and gave a conclusive opinion on the rules governing obligations in the Spanish Civil Code (CC): '[t]his code, which is still in force, relies heavily on the [French] Code Civil, especially in the area of the law of obligations, where most of the provisions are a simple translation of the French text'.[1] Contracts are one of the main sources of obligations (Art 1089 CC), and contract rules would hence mimic French law in the opinion of the cited scholars.

Zweigert and Kötz were right in underscoring how the Spanish Civil Code resembled its French counterpart (before the latter was reformed in 2016) in regulating obligations. However, treating the Spanish Civil Code as a simple translation of the French looks like an overstatement. That was not the case when it was enacted in 1889. Moreover, even if many contract rules were similarly drafted, or conveyed a similar legal framework (which was not the case in other areas of private law), their judicial interpretation throughout the decades has led to a divergent understanding. Nowadays, the Spanish rules on contracts share the style[2] of the Romanistic legal family but have a character all of their own.

[1] K Zweigert and H Kötz, *Introduction to Compartroduction to Comparative Law*, 3rd ed (Oxford University Press, 1998), p 107. This paper builds upon earlier works published as F de Elizalde, *El contenido del contrato* (Thomson Reuters Aranzadi, 2015); F de Elizalde and S Sánchez, 'Spain' in D Busch and M Lehmann (eds), *Unfair Terms in Banking and Financial Contracts* (Oxford University Press, 2023); F de Elizalde, 'Remedies for unfair terms in light of general principles of EU Law' (2024) 32 (3) *European Review of Private Law* 461; and F de Elizalde and S Sánchez, 'Spain' in D Busch and M Lehmann (eds), *Prospectus Liability in Europe and beyond. Towards Uniformity* (Oxford University Press, 2025) 91.

[2] On the style of legal families, see Zweigert and Kötz, *Introduction to Comparative Law*, ch 5.

An example that showcases the different paths that the same concepts have followed in France and Spain is cause (*causa*). This is a requirement for a valid contract under Article 1261 CC as it was under the former Article 1108 of the French Code Civil. However, French law expanded it to control clauses that limit liability (as in *Chronopost*)[3] and to nullify contracts that were economically inviable (as in the video club case).[4] Spanish courts, on the other hand, have made restrictive use of cause, especially for lawful causes, and have not resorted to this notion to address issues of economic or legal imbalance.

The rules on obligations and contracts in the Spanish Civil Code have remained unreformed, beyond targeted interventions. Proposals for comprehensive reform have not come to anything (the latest one, by the General Codification Commission, was finalized in 2023).[5] In an analogy to what Zweigert and Kötz posited for France,[6] one could question how a code that came into force nearly 140 years ago can cope with the tremendous political, economic and social transformations that Spain has undergone. In the law of contracts, the answer comes from two main actors: the Spanish *Tribunal Supremo* (Supreme Court) and the EU institutions.

National legislation has promoted targeted intervention, with relevance in some specific contracts, for example tenancy.[7] In parallel, regional civil laws, which prevail in certain matters,[8] have undergone legislative changes. However, formal reform has remained at the margins of Spain's 'common' law, as materialized in the Spanish Civil Code.

Against that backdrop, the *Tribunal Supremo* advanced the interpretation of the Spanish Civil Code. Article 1(6) CC establishes that 'reiterated' case law from that court complements the legal system. Case law is reiterated with two judgments of the *Tribunal Supremo* with concurrent ratio decidendi, or just one judgment when the civil law chamber holds a plenary session.[9] The *Tribunal Supremo* has interpreted the Civil Code 'according to the reality of the time' (Art 3(1) CC) to update it. The result of that endeavour might have exceeded interpretation to reform clear provisions in the Civil Code and to introduce rules that it does not contain. This has impacted general contract law and the regulation of archetypical contracts, such as sales.[10]

The EU has been another relevant actor in the de facto reform of the Civil Code, by enacting legislation that prevails over it, and by interpreting EU law in a manner that has pushed the Civil Code backwards. Surprisingly, this has occurred even when EU legislation on contracts has not been incorporated into the Civil Code.

[3] Cass com 22 October 1996, 93-18632, Bull IV n 261.

[4] Cass civ (1) 3 July 1996, Bull civ 1996 I n 286, 200; D 1997, 499, by P Reigne.

[5] *Propuesta de modernización del Código Civil en materia de obligaciones y contratos* (Ministerio de Justicia, 2023). The General Codification Commission (*Comisión General de Codificación*) is the main advisory body to the Ministry of Justice, tasked with drafting legislation and regulations. The Association of Civil Law Professors (*Asociación de Profesores de Derecho civil*) drafted an alternative proposal, *Propuesta de Código Civil* (Tecnos, 2018). An older one by the General Codification Commission was *Propuesta de anteproyecto de Ley de modernización del Derecho de obligaciones y contratos* (Ministerio de Justicia, 2009).

[6] Zweigert and Kötz, *Introduction to Comparative Law*, p 94.

[7] The law in force is Ley 29/1994, de 24 de noviembre, de Arrendamientos Urbanos, BOE n 282, 1 January 1995.

[8] Art 149 (1)(8) of the Spanish Constitution. Especially salient, for the economic relevance of the region and its modernized flavour, is the Catalan Civil Code. An example of modernization is its Art 621-1 that enshrines the principle of conformity in sales.

[9] Sala Primera Tribunal Supremo, 'Acuerdo sobre criterios de admisión de los recursos de casación y extraordinario por infracción procesal. Pleno no jurisdiccional de 27 de enero de 2017', 14 February 2017, www.poderjudicial.es/cgpj/gl/Poder-Xudicial/Tribunal-Supremo/En-Portada/La-Sala-Primera-acuerda-los-criterios-de-admision-de-recursos-de-casacion-y-extraordinario-por-infraccion-procesal.

[10] On occasion, the *Tribunal Supremo* relied on the European proposals to harmonize contract law, such as the PECL. The latest one, to my knowledge, is STS 3 April 2025 (ES:TS:2025:1629). See E Roca Trías, 'The Modernisation of the Law of Obligations Using the Principles of European Contract Law' in F de Elizalde (ed), *Uniform Rules for European Contract Law? A Critical Assessment* (Hart, 2018), p 83.

For contracts, the EU has been active in consumer law and in regulating sectors such as finance,[11] energy,[12] transport,[13] and telecommunications.[14] More recently, EU law has reached the digital environment.[15] In various forms, all these areas affect private contracts, whether business-to-business or business-to-consumer, and provide specific rules that prevail over those in the Civil Code.

Despite its supremacy over national law, EU law rarely regulates the whole life cycle of contracts and, as a pluralistic legal system, it relies on the national laws of Member States, under procedural autonomy. However, the autonomy of Member States is limited by the principles of equivalence and effectiveness. National rules implementing EU law should not be less favourable than those governing similar domestic situations (equivalence). They should not make it impossible or excessively difficult in practice to exercise the rights that EU law grants (effectiveness).[16] In applying those principles, the Court of Justice of the European Union (the CJEU or ECJ, indistinctively) has advanced EU law over the Civil Code in areas that, in principle, should have remained in the realm of national law. This has also been impactful for contracts.

Against that backdrop, this article engages with some of the most relevant transformations that the Spanish Civil Code has experienced in the field of contracts. Leaving aside the EU legislative intervention, which is manifold and familiar to the audience of this journal, the article embarks on the less noticeable, de facto, reform of the Civil Code by the actions of the courts in the apex of the Spanish legal system (the *Tribunal Supremo*) and the EU legal order (the CJEU). That journey will unveil unresolved problems that are shared by other EU Member States, without losing sight of the domestic aspect.

To that aim, the article selects key evolutions in Spanish and EU laws, the latter when impactful to the Civil Code (ie beyond special legislation).[17] The chosen matters concern general contract law and specific contracts to showcase the extent of the transformation. Section II deals with general contract law, focusing on consent as the main requirement for a valid contract. The article delves into the binding effect of pre-contractual information (becoming a term), departing from a voluntaristic approach to consent, as well as the doctrine of *rebus sic stantibus*, which relaxes freedom of contract to deal with hardship. Section III targets sales, the archetype of onerous contracts, dealing with the liability of sellers. Section IV looks at EU contract law in its relationship with the Civil Code on three levels: reform, coexistence, and the unexpected absorption of EU law by national contract law. Section V sets out some conclusions.

[11] Under the MiFID Regime, Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ L 173/349, and implementing legislation.

[12] Notoriously, under Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast) [2019] OJ L 158/125.

[13] Air carriage is a good example of fragmentation under Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 [2004] OJ L 46/1.

[14] See Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) [2018] OJ L 321/36.

[15] Among others, the Digital Markets Act and the Digital Services Act: Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC [2022] OJ L 277/1, and Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 [2022] OJ L 265/1.

[16] *Banco Español de Crédito, SA v Joaquín Calderón Camino*, C-618/10, EU:C:2012:349 para 46.

[17] Selecting topics was inevitable considering the width of transformations affecting the Civil Code.

II. General contract law

A. The binding effect of pre-contractual information

Spanish law relies on the principle of freedom of contract, with limitations arising from mandatory law, morals, and public policy (Art 1255 CC). The common intention of the parties is central to establishing the terms of the contract and how they should be interpreted (Art 1281 CC). In addition to the express terms, others can be implied by resorting to non-mandatory legislation (among which the Civil Code stands out), usage, and good faith (Art 1258 CC). The intensity of the interaction between express and implied terms defines the actual strength of freedom of contract, as a progressive interpretation of implied terms would necessarily restrict the autonomy of the parties to shape their contract, especially if it were to exceed a gap-filling function.

In that interaction, the legal effects of the information that the parties convey during the formation of contracts, as well as the failure to disclose information required by law, reveal the evolution of Spanish law on freedom of contract. In an era dominated by intangible assets, the regulation of incorrect information in contract law gains further relevance.

The information conveyed or not disclosed during the formation of contracts can have three different consequences, as Lord Nourse once described it nicely for English law.[18] In Spanish law, it can: (i) have no contractual effects, (ii) result in pre-contractual effects, for example owing to a vice of consent, and (iii) become a term. A fourth consequence should be added for sales contracts: the possibility to bring an action under the latent defects system of liability (Arts 1484 CC ss) which does not depend on the existence of a term and, hence, does not rely on breach of contract. All those possible outcomes can occur when no term is expressly agreed upon by the parties, as, in such a case, freedom of contract would prevail.

Of the broad spectrum of consequences for information at the contract formation stage, there is one that highlights the evolution of Spanish law. I refer to pre-contractual information becoming a term of the contract in the absence of agreement. This happens even without a clear need to fill in a lacuna, when contract supplementation would be expected. To reach that outcome, the *Tribunal Supremo* relies on several arguments, all pointing at the protection of reliance. This section will explore them in more detail.

Modernizing the Civil Code in this particular aspect reveals a departure from a voluntarist notion of contracts, whereby terms should always be somehow attributable to the common intention of the parties.[19] The process started in the last quarter of the twentieth century, first with public information—notoriously, advertising—and then with private information, considering as such that which parties exchange or fail to disclose in private dealings. An example of this may be information on the status of credits and liabilities in a share purchase agreement.

1. The regulation of pre-contractual information in the Civil Code

The Civil Code does not explicitly establish contractual liability for incorrect information, whether stated or omitted in good faith, without knowledge of its inaccuracy. The solution to such a problem was left to other remedies, notably the vice of mistake, which allows for rescission of the contract (Arts 1266, 1300, and 1303 CC). Mistake is considered a pre-contractual remedy, as is any compensation that could arise from the error (Art 1902 CC).

Instead, the intentional transmission or omission of information carries both pre-contractual and contractual liability, under the concept of *dolo*, which has alternative meanings. As a pre-contractual remedy, *dolo* means fraud, leading to an invalid contract (Arts 1269 and 1270 CC). However, the

[18] *Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* (BAILII: [1989] EWCA Civ 4) [1990] 1 All ER 737, [1991] 1 QB 564.

[19] AM Morales Moreno, *La modernización del Derecho de obligaciones* (Thomson Civitas, 2006), p 233.

compensation that can be claimed for damages suffered by fraud (Art 1270 CC) is contractual.[20] The explanation for the different treatment of a similar situation—mistake as opposed to fraud—is historical. Starting in pre-classical Roman law, buyers were granted the *actio empti* (corresponding to the contractual remedy under the sales contract) for pre-contractual information even in the absence of a formalized pact (*stipulatio*).[21] In modern terminology, it entailed contractual liability even if it did not derive from the breach of an express term. The solution survived in the Civil Code and was expanded to cover all types of contract (Art 1270 CC), not only sales.

Even though the liability that can be claimed under *dolo* is contractual, it does not create a term. The general rules for obligations and contracts in the Civil Code do not go further than granting contractual compensation for intentional mis-statements during the formation of contracts. In the absence of an express agreement, the remaining problems concerning incorrect information are tackled with pre-contractual remedies.

The rules for specific contracts confirm that conclusion. Among these rules, the regulation of sales stands out. The Civil Code enshrines a special liability regime for defective assets, whether movables or immovables: the latent defects system (Art 1484 CC ss). In the absence of legal reform outside of consumer law,[22] the regime that originated in the edictal actions of Roman law is still in force.

However, the latent defects system is not based on a breach of a term and, consequently, it does not grant full contractual remedies.[23] Buyers may demand rescission of the contract or reduction in the price for a defective asset. They cannot claim key contractual remedies, including specific performance (Art 1124 CC) or damages, the latter being available in the case of sellers in bad faith (Art 1486 CC).

The liability under latent defects is strict.[24] Article 1485 (1) CC holds sellers responsible for defects in the assets sold, even if they were unaware of them. Article 1485(1) CC is quite sparse regarding pre-contractual information and does not distinguish the two situations that could arise in relation to debtors in good faith: that they omit to communicate the defect, or that they affirm a quality or the absence of a defect—unaware of the truth, without fault—thereby contradicting the existing situation at the time of contracting.

There can be very little doubt that the omission of information acting in good faith is included in the cited norm. Sellers who do not communicate defects if they are unaware of them—without their silence being attributable to intent or negligence—are still liable for latent defects, as the liability is strict (Arts 1461, 1484, and 1485(1) CC).

It may be more complex to establish the consequences of a statement made in good faith by a seller who attributes certain qualities to the asset or states the absence of defects. For this, it is convenient to separate the information that becomes a term of the contract from that which, on the contrary, remains outside of it. If the parties agree on a guarantee by which the seller assumes the risk of their statement regarding the qualities of the subject matter or the absence of defects, the transmitted information then becomes a term and the seller must respond, in case of non-performance, according to

[20] AM Morales Moreno, 'Comentario a los artículos 1269 y 1270' in M Albaladejo and S Díaz Alabart (eds), *Comentarios al Código Civil y Compilaciones Forales*, XVII, 1-B (Revista de Derecho Privado, 1993), p 434. Against, JR de Verda y Beamonte, 'Algunas reflexiones sobre el dolo como causa de invalidez del contrato y como fuente de responsabilidad precontractual' in AAVV, *Libro-homenaje al profesor Manuel Amorós Guardiola* (Colegio de Registradores de la Propiedad y Mercantiles de España, 2006), I, pp 773 (n 32) and 776.

[21] M Kaser, *Derecho romano privado* (Reus, 1968), p 194; AM Morales Moreno, 'Tres modelos de vinculación del vendedor en las cualidades de la cosa' (2012) 65/5 *Anuario de Derecho Civil* 7. Paul. D. 19, 1, 4, pr; Ulp. D. 19, 1, 13, 5.

[22] Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias, BOE n 287, 30 November 2017 (Consumer Protection Act or CPA), Arts 114 ss.

[23] de Elizalde, *El contenido*, pp 70–73.

[24] R Bercovitz Rodríguez-Cano, 'La naturaleza de las acciones redhibitoria y estimatoria en la compraventa' (1969) 22 *Anuario de Derecho Civil* 777, at 802; AM Morales Moreno, 'El alcance protector de las acciones edilicias' (1980) 33 *Anuario de Derecho Civil* 585, at 634.

the general principles of contractual liability (Arts 1096, 1101, and 1124 CC). In this case, it will prevail over the latent defects system.[25] If not, the latter applies.

Therefore, the general rules on obligations and the regulation of specific contracts lead to the same conclusion. The Civil Code does not recognize implied terms for pre-contractual information. Only in cases of fraud is the liability contractual, but this does not assume that a term was breached.

2. The recognition of implied terms for pre-contractual information

The non-binding nature of pre-contractual information remained the norm until a relevant judgment from the *Tribunal Supremo* on 27 January 1977.[26] The case dealt with the sale of an apartment that lacked the characteristics stated in the advertisement, but which had not been expressly guaranteed in the contract. The court decided that the information conveyed in the advertising was binding, according to good faith. The justification for the ruling referred to Article 1258 CC, whereby contracts lead to obligations concerning not only what the parties agree to but also what non-mandatory law and usages mandate and good faith dictate.

The instrument to imply a term from advertised information, that is, good faith under Article 1258 CC, had always been available. However, until the late 1970s, the *Tribunal Supremo* did not make use of it to make pre-contractual information binding in the absence of an agreement. Commentators described the new approach as a 'bold turn of the helm' in relation to the established law on the non-binding effects of advertising.[27] The judgment of 27 January 1977 became the rule and was followed by many decisions in a number of different areas.[28] Its content was later enacted in consumer legislation.[29] In that context, it profusely evolved through interacting with EU law (especially concerning consumer sales),[30] while Article 1258 CC, in the *Tribunal Supremo*'s interpretation, continued to govern non-business-to-consumer contracts.

The clear theoretical development regarding the effect of advertising information in the content of contracts contrasts with a notorious lack of attention to the potential binding effects of private pre-contractual information. An example would be the information that sellers convey to buyers about the condition of a property or a company's financial situation. The *Tribunal Supremo* recognized that such information can become a term of the contract even in the absence of an agreement. However, the criterion for determining when a party is bound by pre-contractual information remains uncertain. The following lines are meant to infer parameters that could provide clarity.

To showcase this issue, I will refer to the share purchase agreement, as an archetype contract in which information is central. The information on the assets and liabilities that the shares represent determines the decision to contract and the price. The *Tribunal Supremo* has extensively dealt with this contract, in seemingly contradictory manners, to either accept or reject that pre-contractual information (obtained through a due diligence processes and in other ways) becomes a term of the contract.

The chosen example is particularly complex for several reasons, among which two stand out. The first of these is the nature of the subject matter of the contract. Shares are different from other movable

[25] AM Morales Moreno, 'Comentario al artículo 1485' in C Paz-Ares et al (eds), *Comentario del Código Civil* (Ministerio de Justicia, 1991), II, pp 958–59. See STS 1 September 2006 (RJ 2006, 6065), 11 June 2008 (RJ 2008, 3561), 10 June 2010 (RJ 2010, 5439), and 27 March 2019 (ES:TS:2019:1009).

[26] J. Civ. 1977, 26.

[27] JI Font Galán, 'La integración publicitaria del contrato: un instrumento de Derecho privado contra la publicidad engañosa' (1988) 4 *Cuadernos de Derecho y Comercio* 17.

[28] SSTS 21 July 1993 (RJ 1993, 6176), 15 June 2000 (RJ 2000, 4418), 23 May 2003 (RJ 2003, 5215), and 29 September 2004 (RJ 2004, 5688).

[29] Current Art 61 CPA.

[30] Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L 136/28. F de Elizalde, 'Sale of Goods' in S Garben and L Gormley (eds), *The Oxford University Press Online Encyclopaedia of EU Law* (Oxford University Press, 2022).

objects (cars, for example) as the purpose of their acquisition lies behind them, in the assets they represent. The *Tribunal Supremo* has sometimes distinguished between the immediate subject matter of the contract (the shares) and the mediate subject matter (the company's assets). This approach was taken to make pre-contractual information binding.[31] Instead, on occasion the court has stuck to shares as the subject matter of the contract, without giving relevance to the underlying assets, normally done in order to dismiss claims.[32]

The second reason is the latent defects system that applies to sales, which addresses objects that are absolutely or partially unfit for purpose (Art 1484 CC). Incorrect information conveyed or omitted during the formation of a sales contract falls under the scope of the latent defects system if it impacts the fitness of the subject matter of the contract.[33] Again, the first assessment that courts should conduct is determining whether the subject matter includes the company's assets. If so, any incorrect information about them could be covered by the latent defects system, and some believe that it should be covered.[34] In the absence of fraud, the buyer has limited remedies: to rescind the contract or to seek a reduction in price (Art 1486 CC). In addition, the actions are barred after six months (Art 1490 CC), rather than after the general limitation period of five years (Art 1964 CC).

The *Tribunal Supremo* has argued this issue in all possible ways. It has taken a restrictive interpretation of the subject matter of the contract (shares only) and a broad one (shares and assets), with an impact on the effects of pre-contractual information on the contract.[35] While the *Tribunal Supremo* has been contradictory in its arguments, the outcomes of the cases look reasonable. The *Tribunal Supremo* delivered material justice using the tools of an unreformed Civil Code. However, the instrumentalization of the Code has resulted in conceptual confusion.

Digging into the matrix of the facts of the cases helps to understand the contradictions in the Supreme Court's arguments. Based on that assessment, it is possible to conclude that the *Tribunal Supremo* has used the following parameter to declare when pre-contractual information should become a term of the contract: the asymmetry of information between the parties that leads one to reasonably rely on the other.

The asymmetry of information is frequent in share purchase agreements. Typically, the seller possesses considerably more detailed knowledge of the legal and material reality of the company whose shares are being transferred. The buyer usually has limited access, in a due diligence process.

The *Tribunal Supremo* has considered the asymmetry in information and held the seller liable for a breach of contract owing to the 'precontractual activity or conduct of the seller' as 'she ought to have been aware of the situation … or, at the very least, had all the means necessary to obtain full and accurate knowledge of it'.[36] The *Tribunal Supremo* decided that the reliance the buyer places on the seller's representations during the formation of a contract can determine the creation of a term.[37] However, reliance per se does not lead to recognizing a term (without prejudice to other remedies, such as a vice of consent). Whenever the information was similarly accessible by both parties, the court did not infer a term, even following a mis-statement from the seller.[38]

In addressing reliance, the *Tribunal Supremo* assessed the activity of the parties during contract formation. In that sense, it did not grant contractual effects to information conveyed at that stage

[31] SSTS 30 June 2000 (RJ 2000, 6747), 19 January 2001 (RJ 2001, 1320), and 3 September 2010 (RJ 2010, 6950).

[32] SSTS 20 November 2008 (RJ 2009, 283), 21 December 2009 (RJ 2010, 299), and 30 March 2011 (RJ 2011, 3133).

[33] See above II.A.1, The regulation of pre-contractual information in the Civil Code.

[34] JR de Verda y Beamonte, 'STS de 30 de junio de 2000. Incumplimiento contractual: venta por el Estado de la totalidad de las acciones de Industrias Tauro, S.A. (expropiadas a Rumasa), faltando licencia municipal de apertura' (2000) 54 *Cuadernos Civitas de Jurisprudencia Civil* 1343, at 1355.

[35] Restrictive: SSTS 20 November 2008 (RJ 2009, 283), 21 December 2009 (RJ 2010, 299), and 30 March 2011 (RJ 2011, 3133). Extensive: SSTS 30 June 2000 (RJ 2000, 6747), 19 January 2001 (RJ 2001, 1320), and 3 September 2010 (RJ 2010, 6950).

[36] STS 30 June 2000 (RJ 2000, 6747).

[37] STS 24 April 2009 (RJ 2009, 3167).

[38] STS 20 November 2008 (RJ 2009, 283).

when the buyer was negligent in revising the company's situation in a due diligence process.[39] The same outcome resulted when the buyer was aware of the defects in an underlying asset, even if the seller of the shares had stated that they were fit. An example would be where the hotel comprising the main asset of the company, which the buyer had inspected, showed signs of aluminosis.[40]

From the above parameters, it is possible to infer that pre-contractual information that one party conveys (or omits) to the other becomes a term of the contract when *reasonably* relied on. The factual basis of case law shows that statements become terms of the contract when there is an asymmetry between the parties concerning the information, which explains the protection of reliance. However, reliance on information in asymmetric situations is insufficient to justify the creation of a term that was not agreed upon by the parties. Terms can only be implied by legislation, usage, and good faith (Art 1258 CC). The last of these (good faith) could support the binding effects of private information, as it did for advertising, although the *Tribunal Supremo* has rarely argued upon good faith in this context.[41]

The latest proposal to reform the Civil Code (2023) recognized that pre-contractual information can become a term of the contract based on reliance on good faith. In Article 1225 (Terms resulting from reliance), the proposal suggested: 'Representations made by a contracting party prior to the conclusion of a contract bind that party if, in accordance with good faith, they have induced the other party to reasonably rely on them.'[42] It is an excellent grasp of the *Tribunal Supremo*'s case law.

B. Hardship

Another major innovation by the *Tribunal Supremo* on general contract law is the recognition that long-term and non-instantaneous contracts can be adjusted or terminated if unforeseen events alter their economic balance, making it unfairly burdensome for one party to fulfil their obligations. It entails an inroad into freedom of contract (Art 1255 CC) and the principle that agreements must be fulfilled (*pacta sunt servanda*).[43]

The Civil Code lacks a general rule on hardship. However, it emerges in some specific contracts, notoriously in donations and rural leases.[44] The Civil Code allows donors to revoke donations if they have children after donating (Art 644 CC). In rural leases, the tenant may seek a reduction of the rent if at least half of the harvest was lost owing to unforeseeable extraordinary events, including fire, war, pests, and earthquakes. The scarce regulation of hardship in the Civil Code was partially supplemented in legislation, in particular for business-to-consumer contracts.[45]

The absence of a general rule on hardship was not an obstacle for the *Tribunal Supremo* to decide that the principle *pacta sunt servanda* should be complemented with the caveat *rebus sic stantibus*,[46] meaning that parties should stand by their agreement if things remain the same. 'Rebus' became the name of the jurisprudential exception to freedom of contract. The legal grounds for hardship vary, with good faith (Art 1258 CC) standing out. Others are mentioned, for example the disappearance of

[39] SSTS 20 November 2008 (RJ 2008, 283) and 30 March 2011 (RJ 2011, 3133). Carrasco Perera considers not conducting due diligence to be grossly negligent, see Á Carrasco Perera, 'Manifestaciones y garantías y responsabilidad por incumplimiento' in JM Álvarez Arjona and Á Carrasco Perera (eds), *Fusiones y Adquisiciones de Empresas* (Thomson Aranzadi, 2004), p 290.

[40] STS 21 December 2009 (RJ 2009, 299).

[41] de Elizalde, *El contenido*, p 268.

[42] Author's translation.

[43] L Vázquez-Pastor Jiménez, 'El "vaivén" de la moderna jurisprudencia sobre la cláusula "rebus sic stantibus"' (2015) 2(4) *Revista de Derecho Civil* 65, at 65.

[44] For a full account, see E Mocholí Ferrándiz, 'Análisis de la evolución jurisprudencial de la cláusula rebus sic stantibus. Su posible aplicación tras la pandemia Covid-19' (2020) 5 *Actualidad civil*.

[45] Examples are in package travel (Art 158 CPA) and in mortgage loans (protecting vulnerable lessees, under Ley 1/2013). For a full (including historical) account, see STS 13 July 2017 (RJ 2017, 3962). MÁ Parra Lucán, 'Riesgo imprevisible y modificación de los contratos' (2015) 1 *Indret* 17.

[46] L Díez-Picazo, *Fundamentos del Derecho Civil Patrimonial* (Thomson Civitas, 2008), II, p 1057.

the cause of the contract (Art 1274 CC) once the economic equilibrium is broken by the unforeseen event.[47] The proposals to reform the Civil Code recognize hardship.[48]

The application of *rebus sic stantibus* pivots on three cumulative elements: (i) an unforeseeable and extraordinary event, (ii) an excessive imbalance in the parties' performances, and (iii) a causal link between the previous two requirements.[49] In the absence of any of them, freedom of contract reigns.

The event must supervene the formation of the contract and be extraordinary and unforeseeable.[50] It should exceed the sphere of control of the parties[51] and have not been expressly or impliedly assumed by them.[52] The extraordinary nature of the event was historically interpreted restrictively, as it is now. Only situations that the parties could not reasonably foresee at the time of formation of the contract allow rebus. Hardship is not an ordinary remedy. However, following the 2007–08 financial crisis, the *Tribunal Supremo* relaxed its stance. It considered that crises justified hardship,[53] even though they are a part of economic cycles. The change of direction was short-lived.[54] Soon the Supreme Court returned to a restrictive approach to what an extraordinary event means.[55]

The Covid-19 pandemic is an ongoing source of litigation that could further define when an event is extraordinary for the purpose of hardship. The *Tribunal Supremo* has described Covid-19 as 'an exceptional situation' of 'an exorbitant magnitude'.[56] However, it has not yet had the opportunity to decide substantively on the matter.[57]

The second and third requirements for rebus to apply are an excessive imbalance in the parties' performances that emerges owing to the extraordinary event (causal link). The event should cause excessive onerosity—a serious and unforeseeable imbalance in the performances of the parties.[58] However, the *Tribunal Supremo* has not provided clear guidance on which imbalances become intolerable under the contract.[59]

In any case, the imbalance must undoubtedly be the result of an event that occurs during the performance of the contract. Economic imbalances resulting from the agreement are irrelevant. The Civil Code rejects *laesio* (Art 1293 CC). A party to a contract is not entitled to seek rescission based on a lack of equivalence of the counter-performance towards its own performance. In the same vein, the Civil Code does not recognize an action for invalidity based on a disproportionate advantage gained by the exploitation of one of the parties over the other. There is no equivalent provision to that of § 138(2) BGB (*Wucher*) or to Article 1143 of the French civil code (*violence*).

III. Specific contracts: sales

The transformation of the Civil Code by the action of the *Tribunal Supremo* has also reached specific contracts. Among them, sales stand out as an archetype for onerous contracts. The *Tribunal Supremo* has reformed the liability of the seller with the innovative jurisprudential rule of *aliud pro alio*, implying a term that obliges the seller to deliver a thing of satisfactory quality. Consequentially, a defective

[47] E Fernández Ruiz-Gálvez, 'Rebus sic stantibus y crisis ecónomica. Orden público económico versus especulación' (2017) 33 *Anuario de Filosofía del Derecho* 63, at 73–78.

[48] Art 526-5 in the proposal of the *Asociación de Profesores de Derecho Civil* (n 6) and Art 1238 in the 2023 proposal from the *Comisión General de Codificación* (n 6).

[49] I Albiñana Cilveti, 'La reciente doctrina jurisprudencial de la cláusula rebus sic stantibus y su aplicación a las operaciones inmobiliarias' (2018) 49 *Actualidad Jurídica Uría Menéndez* 115, at 117–27. Díez-Picazo, *Fundamentos*, II, pp 1067–70.

[50] Díez-Picazo, *Fundamentos*, II, p 1056.

[51] Vázquez-Pastor Jiménez, 'El "vaivén"', p 73.

[52] STS 18 July 2019 (RJ 2019, 3599). Albiñana Cilveti, 'La reciente doctrina', p 121.

[53] SSTS 30 June 2014 (RJ 2014, 3526) and 15 October 2014 (RJ 2014, 6129). See Parra Lucán, 'Riesgo imprevisible', pp 41 ss.

[54] Vázquez-Pastor Jiménez, 'El "vaivén"', pp 87 ss.

[55] Clearly, with the STS 15 January 2019 (RJ 2019, 146).

[56] STS 3 April 2025 (ES:TS:2025:1629).

[57] Procedural grounds have, so far, impeded this. See STS 19 June 2023 (ES:TS:2023:2770).

[58] Parra Lucán, 'Riesgo imprevisible', p 4.

[59] For some references in lease contracts, see STS 1 January 2019 (RJ 2019, 46).

asset opens to the buyer the full set of contractual remedies: specific performance, termination, and damages (Arts 1101 and 1124 CC). The limitation of the action is five years (Art 1964 CC).

Implying such a term contradicts the Civil Code system of latent defects (Arts 1484 CC ss) that is a *lex specials* for sales contracts. This liability does not stem from a breach of contract and gives access to limited remedies: rescission of the contract and reduction in price (Art 1486 CC). The action is barred after six months (Art 1490 CC). However, *aliud pro alio* does not derogate latent defects; they coexist for both movable and immovable objects. As they contradict,[60] the courts must determine which applies to given facts, with serious consequences for legal certainty.

The *Tribunal Supremo* bases *aliud pro alio* on the principle of identity of performance, as enshrined in Article 1166 CC.[61] According to this principle, the debtor cannot force the creditor to accept a different thing (to the one agreed), even if it is of equal or higher value. The *Tribunal Supremo* considers that there is delivery of a different thing or *aliud pro alio* 'when there is complete non-performance due to the inability of the object and consequent dissatisfaction of the buyer, as the object is unsuitable for the purpose for which it was intended'.[62] Therefore, *aliud pro alio* would apply to objects that are unfit for purpose.

An excursion into case law shows when the *Tribunal Supremo* considers that objects are unfit for purpose and, consequently, subsumes them under *aliud pro alio*. Grouping cases by subtypes of sales contracts, unfitness for purpose means: (i) in the sale of vehicles, their inability to transport people;[63] (ii) in the sale of dwellings, the lack of conditions for habitability;[64] (iii) in the sale of office premises, the impossibility to use the property for such a purpose;[65] (iv) in the sale of storage rooms, the absence of ventilation, leading to dampness;[66] (v) in the sale of machinery, its unsuitability for the intended purpose;[67] (vi) in the sale of materials for manufacturing footwear, their inability to produce it;[68] (vii) in the sale of fabric, its unsuitability for clothing manufacture;[69] (viii) in the sale of paper for butter packaging, its unfitness for such use;[70] (ix) in the sale of parking spaces, their not being of an adequate size for a standard vehicle;[71] (x) in the sale of wood, its infestation by insects;[72] (xi) in the sale of irrigation pipes, their breakage;[73] (xii) in the sale of paper for wine labels, its failure to adhere to the bottles.[74]

[60] SSTS 23 March 1982 (RJ 1982, 1500), 10 June 1983 (RJ 1983, 3454), 13 June 1983 (RJ 1983, 3521), 22 October 1984 (RJ 1984, 4909), 15 April 1987 (RJ 1987, 2710), 7 January 1988 (RJ 1988, 941), 6 April 1989 (RJ 1989, 2994), 26 October 1990 (RJ 1990, 8052), 1 March 1991 (RJ 1991, 1708), 14 May 1992 (RJ 1992, 4121), 7 April 1993 (RJ 1993, 8615), 17 February 1994 (RJ 1994, 1621), commented by CJ Maluquer de Motes, 'STS de 17 de febrero de 1994. Compraventa: pago de precio. Saneamiento por vicios ocultos. Caducidad de la acción por vicios ocultos. Distinción vicios. incumplimiento de contrato. la buena fe en las relaciones económicas' (1994) 35 *Cuadernos Civitas de Jurisprudencia Civil* 603, at 605; 28 February 1997 (RJ 1997, 1332), 23 January 1998 (RJ 1998, 124), 27 November 1999 (RJ 1999, 9137), 1 July 2002 (RJ 2002, 5512), 9 March 2005 (RJ 2005, 2219), 4 April 2005 (RJ 2005, 2700), 15 December 2005 (RJ 2006, 1224), 6 November 2006 (RJ 2006, 6720), and 9 July 2007 (RJ 2007, 5433), among many others.

[61] Á Cristóbal Montes, 'Article 1166', in C Paz-Ares et al (eds), *Comentario del Código Civil* (Ministerio de Justicia, 1991), II-I, pp 192–93.

[62] STS 5 November 1993 (RJ 1993, 8615).

[63] STS 10 June 1976 (RJ 1976, 2696).

[64] SSTS 13 July 1987 (RJ 1987, 5461), 1 October 1991 (RJ 1991, 7255), 10 May 1995 (RJ 1995, 4226), 8 February 2003 (RJ 2003, 1523), 4 April 2005 (RJ 2005, 2700), and 25 February 2010 (RJ 2010, 1406).

[65] STS 16 May 2005 (RJ 2005, 6374).

[66] STS 9 July 2007 (RJ 2007, 5433).

[67] SSTS 7 May 1993 (RJ 1993, 2798), 10 December 2003 (RJ 2003, 8650), and 27 February 2004 (RJ 2004, 1753).

[68] SSTS 5 November 1993 (RJ 1993, 8615) and 15 November 2005 (RJ 2005, 7629).

[69] STS 19 December 1984 (RJ 1984, 6134).

[70] STS 8 March 1989 (RJ 1989, 2026).

[71] STS 28 November 2003 (RJ 2003, 8631).

[72] STS 28 January 1992 (RJ 1992, 273).

[73] STS 7 January 1988 (RJ 1988, 117).

[74] STS 15 December 2005 (RJ 2006, 1224).

From the foregoing, it is evident that case law takes the contract as the basis for determining the required utility (eg the intended purpose of a specific machine), also considering objective criteria that refer to 'the very nature and normal use of the purchased item'.[75] The defect that renders the thing unfit for purpose justifies the application of *aliud pro alio*.

The *Tribunal Supremo* relies on a functional criterion to frame a case under *aliud pro alio* as it pivots on the suitability for purpose of the subject matter of the contract. This is problematic because it is the same factor that triggers the liability for latent defects. Article 1484 CC establishes that the seller is liable for hidden defects if they render the thing sold unfit for the use for which it is intended, or if they diminish that use to an extent that, had the buyer known the defects, she would not have acquired the thing, or would have paid a lower price for it. Therefore, the same criterion—fitness for purpose—could trigger contradictory legal frameworks for the liability of the seller.[76] Evidently, the chosen factor is useless.[77]

An alternative explanation for the functional criterion is that the *Tribunal Supremo* relies on *aliud pro alio* to circumvent the short limitation period of the latent defects system (six months, Art 1490 CC).[78] The court would assess the possibility of discovering the defect within six months after the delivery of the asset.[79] If it were possible, the latent defects system would apply, whereas, if not, the chosen rule would be *aliud pro alio*, which is subject to the longer prescription of five years (Art 1964 CC).

This explanation is plausible, though it is not fully comprehensive of case law. The underlying facts of judgments show that the lapse of the actions to claim under the latent defects system is a reiterated feature. However, it is not always evident whether the buyer did not discover the defect within six months (Art 1490 CC) or whether she did not file an action in court during that period.[80] In addition, from the perspective of legal certainty, the possibility of discovering a hidden defect is an undesirable criterion. It only permits to differentiate between *aliud pro alio* and the latent defects system *ex post*, once the problem has arisen. Legal certainty requires that the parties know the liability regime that applies to their contract *ex ante*, when they enter into it.

A closer look into the case law reveals that the *Tribunal Supremo* recurrently opts for *aliud pro alio* when the seller has a role in the construction or manufacture of the asset (someone who produces and sells, whether goods or immovable property), or is a professional seller of brand-new things.[81]

[75] STS 6 April 1989 (RJ 1989, 2994) and STS 5 November 1993 (RJ 1993, 8615).

[76] R Bercovitz y Rodríguez Cano, 'STS de 6 de marzo de 1985. Compraventa: incumplimiento del vendedor; distinción entre aliud pro alio y cosa con vicios. acción de cumplimiento y acción de saneamiento por vicios' (1985) 8 *Cuadernos Civitas de Jurisprudencia Civil* 2471, at 2476. Á Carrasco Perera, 'STS de 7 de mayo de 1993. Compraventa: distinción entre la civil y la mercantil; saneamiento e incumplimiento' (1993) 32 *Cuadernos Civitas de Jurisprudencia Civil* 557, at 564, highlights that the ratio of judgments that decide under *aliud pro alio* and latent defects is nine to one in favour of the former.

[77] N Fenoy Picón, 'STS de 10 de julio de 2003. Ejercicio extrajudicial de la facultad resolutoria del artículo 1124 CC; Incumplimiento por inhabilidad del objeto y consiguiente insatisfacción del comprador; Inexistencia de vicios ocultos; Incumplimiento resolutorio: incumplimiento esencial' (2005) 68 *Cuadernos Civitas de Jurisprudencia Civil* 509, at 535; N Fenoy Picón, *Falta de conformidad e incumplimiento en la compraventa (Evolución del ordenamiento español* (Colegio de Registradores, 1996), pp 205–207; A Orti Vallejo, *Los defectos de la cosa en la compraventa civil y mercantil. El nuevo régimen de las faltas de conformidad según la Directiva 1999/44/CE* (Comares, 2002), pp 38–39; JR de Verda y Beamonte, *Saneamiento por vicios ocultos. Las acciones edilicias* (Thomson Reuters Aranzadi, 2009), pp 338–40; JR de Verda y Beamonte, 'Algunas reflexiones a propósito de la transposición de la Directiva 1999/44/CE, del Parlamento Europeo y del Consejo, de 25 de mayo de 1999, sobre determinados aspectos de la venta y las garantías de los bienes de consumo, en el Derecho español, operada por la ley 23/2003, de 10 de julio' in MJ Reyes López (ed), *La Ley 23/2003, de Garantía de los Bienes de Consumo: Planteamiento de Presente y Perspectivas de Futuro* (Thomson Aranzadi, 2005), p 240.

[78] Á Carrasco Perera, *Derecho de contratos* (Thomson Reuters Aranzadi, 2010), pp 905–909; N Fenoy Picón, 'La entidad del incumplimiento en la resolución del contrato: análisis comparativo del artículo 1124 CC y del artículo 121 del Texto Refundido de Consumidores' (2009) 63/1 *Anuario de Derecho Civil* 157, at 270; Orti Vallejo, *Los defectos*, p 45.

[79] Carrasco Perera, *Derecho de contratos*, p 905.

[80] de Elizalde, *El contenido*, p 138.

[81] L Prats Albentosa, 'La entrega de cosa diversa a la pactada (aliud pro alio) como incumplimiento resolutorio en la jurisprudencia del Tribunal Supremo (comentario a las sentencias del Tribunal Supremo de 1 de marzo de 1991, de 20 de noviembre

From this perspective, the *Tribunal Supremo* implies an obligation to deliver things of satisfactory quality (fit for purpose) whenever the seller acts in the course of a business, selling new things. A similar rule exists for business-to-consumer sales of goods under the EU Consumer Sales Directive, although also reaching used objects.[82] *Aliud pro alio* would currently cover cases that fall outside the scope of application of that directive.

The seller's professional status serves as a distinguishing factor in defining the terms of the contract. It determines when the seller must render an object that is fit for purpose (with defects leading to *aliud pro alio*). In other cases, the conformity of the asset would not be guaranteed in the contract. However, flaws could be remedied with the comparatively restricted actions of the latent defects system. This approach enhances legal certainty as it ensures that both parties can foresee the risks involved in their legal relationship at the time of contracting. However, in the absence of clear guidance by the *Tribunal Supremo* and lacking legal reform, that uncertainty will remain.

IV. EU contract law and the Spanish civil code

EU law sets out private rules that are instrumental to achieving the internal market (Art 114 TFEU). The EU regulations and directives affecting private law have developed as market law.[83] The instrumentalization of EU private law leads to a complex interaction with national laws that derives from the various goals that each has.

As EU law is a pluralistic legal system, it creates autonomous EU norms that are regularly incomplete. They should be supplemented with national law. However, the goals of the latter, being aimed at corrective justice, are not entirely compatible with market law, which has other aims, including distributive. An example would be preventing unfair market practices beyond an actual contractual relationship. For that purpose, and others, EU law relies on the principle of dissuasiveness, which is absent from national private law.

The problem is aggravated by the jurisdictional organization of the EU, in which national courts act as EU courts. The justified training in national law of the judges deciding private law matters often determines how EU law is applied. Reading EU law through national lenses has led to frequent clashes between Spanish courts and the CJEU, as the final interpreter of EU law. The outcome has often resulted in advancing EU law over national law. However, courts must be proactive in submitting requests for a preliminary ruling to the CJEU (Art 267 TFEU). In the absence of such a request, some rules in the Civil Code could be against EU law but remain unchallenged.

This section presents the interaction of EU private law with the Spanish Civil Code. It leaves aside the obvious outcome when EU legislation overrides the Civil Code to focus on the judicial interpretation of grey areas. To that end, the article structures the uneasy EU–national law relationship on three levels: (i) the reform of the Civil Code by EU law, (ii) the uncertain coexistence, and (iii) the unexpected absorption of EU law by national contract law. The cases covered by each are manifold. For clarity, this section will limit itself to the following: gap-filling (for reform), mistake and transparency (for uncertain coexistence), and prospectus liability (for the absorption of EU law by national contract law).

A. Advancing EU law over national contract law: gap-filling

The Spanish Civil Code foresees the incompleteness of contracts. To remedy this, the Civil Code resorts to non-mandatory legislation (among which the rules in the Civil Code stand out), usage, and

de 1991 y 28 de enero de 1992)' (1992) 573 *Revista General de Derecho* 5081, at 5095; Fenoy Picón, *Falta de conformidad*, p 203; de Elizalde, *El contenido*, pp 140–44.

[82] See n 30.

[83] H-W Micklitz, *The Politics of Justice in European Private Law* (Cambridge University Press, 2018), p 176.

good faith (Art 1258 CC). Those rules and principles are called to fill in the lacunae that contracts may have *ab initio* or *ex post* as a result of partial invalidity.

In the context of lacunae left by invalid unfair terms in business-to-consumer contracts, consumer law (Art 83 CPA)[84] made a cross-reference to Article 1258 CC. The Unfair Contract Terms Directive (Dir. 93/13, UCTD)[85] mandated that unfair terms should not be binding on the consumer (Art 6(1) UCTD). However, it did not regulate the follow-on consequences of invalidity,[86] including how to supplement the gap left by an unfair term. This was delegated to national law, under the procedural autonomy of the Member States, subject to the principles of equivalence and effectiveness. As mentioned, Spanish law regulated those consequences through cross-references to the Civil Code.

In *Banco Español* (Case C-618/10),[87] the ECJ addressed the compatibility of the Spanish rules on gap-filling in the context of the Unfair Contract Terms Directive. The case involved a loan agreement where a default interest rate of 29 per cent was deemed unfair. The Spanish court replaced it with a lower statutory rate, a practice permitted under Article 83 CPA, which cross-referred to Article 1258 CC. However, the ECJ ruled that such judicial revision was incompatible with Article 6(1) UCTD. The ECJ reasoned that allowing national courts to revise unfair terms would undermine the directive's dissuasive effect (Art 7(1) UCTD), as businesses might persist in using unfair terms, knowing that courts would adjust rather than nullify them.[88]

Therefore, the dissuasive aim of the Unfair Contract Terms Directive prevailed over the other goal—party equality[89]—as it deprived the bank of compensation for the default. This is an effect of EU law as market law, which does not focus solely on corrective justice, like national contract law does. Even though the UCTD relied on national law for the follow-on consequences of an invalid term, it limited its efficacy in the context of gap-filling. Following case C-618/10 *Banco Español*, Article 83 CPA was amended to eliminate the cross-reference to the Civil Code.[90] It currently establishes that unfair terms are invalid, but it does not deal with follow-on consequences, in the understanding that gap-filling was not allowed in business-to-consumer contracts.

However, after Article 83 CPA was reformed, the story of gap-filling continued under EU law. The ruling in case C-618/10, *Banco Español*, whereby courts cannot revise the contents of contracts by substituting the unfair term, was nuanced in case C-26/13, *Kásler*.[91] Unlike in *Banco Español*, the disputed term in this case was not ancillary but main (Art 4(2) UCTD) as it related to the contractual interest rate in a mortgage loan. Its invalidity could affect the survival of the contract, triggering restitution that would place the consumer in financial distress. In that context, the ECJ allowed the contract to be supplemented with national law in order to protect the consumer from particularly unfavourable consequences.[92]

In the absence of a specific rule in Spanish consumer law after the reform of Article 83 CPA, the Civil Code (Art 1258 CC) applies to fill in the gap that an unfair (main) term leaves. However, in subsequent rulings, the ECJ restricted the materials that may be used to supplement the contract. It limited the gap-filling function to statutory rules that regulate specific types of contract.[93] More

[84] See n 22.

[85] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29.

[86] *Arkadiusz Szcześniak v Bank M. SA*, C-520/21, EU:C:2023:478, para 64.

[87] *Banco Español de Crédito, SA v Joaquín Calderón Camino*, EU:C:2012:349.

[88] *Banco Español de Crédito, SA v Joaquín Calderón Camino*, EU:C:2012:349, para 65.

[89] *Banca B. SA v A.A.A.*, C-269/19, EU:C:2020:954, para 38. Same in *Arkadiusz Szcześniak v Bank M. SA*, EU:C:2023:478, para 68.

[90] It was amended by Article 'Único', 27, Ley 3/2014, de 27 de marzo, BOE n 76, 28 March 2014.

[91] *Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*, C-26/13, EU:C:2014:282.

[92] *Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*, EU:C:2014:282, para 80.

[93] *Kamil Dziubak and Justyna Dziubak v Raiffeisen Bank International AG*, C-260/18, EU:C:2019:819, paras 59–60.

general provisions have been discarded, including general contract rules,[94] customary provisions,[95] and any others of a general nature.[96]

The ECJ's interpretation restricts the permitted sources of Article 1258 CC to non-mandatory law that regulates specific contracts (sales, loans, leases, etc). It leaves aside the implication of terms by general contract rules, usage, and good faith, though they are also included in that provision. Therefore, the advancement of EU law to areas in principle left to national law has resulted in a de facto reform of the Civil Code regarding elements of the business-to-consumer contracts to which it applies.

B. Uncertain coexistence of EU law and the Civil Code: mistake and transparency

The CJEU has been particularly active in the control of unfair terms. It has issued around 200 rulings under the Unfair Contract Terms Directive, which is unique in EU private law.[97] It should not be surprising that the situation this subsection addresses (on the relationship between EU law and the Civil Code) touches upon unfair terms, as the previous one did.

The 2007–08 financial crisis led to a changed economic landscape, with drops in the prices of assets and a decline in interest rates. The new scenario provoked a thorough revision of existing contracts, often looking backwards to contract formation. In that exercise, many affected investors in financial contracts and borrowers in loans considered that they had misapprehended the terms of their contracts when entering into them.

In the absence of deceit, the more evident action to tackle errors in the formation of a contract is mistake (Art 1266 CC). In fact, this became the major source of cases addressing financial investments. The vice of mistake allows a party to rescind a contract when the decision to contract was affected by incorrect mis-statements by the other party or a failure to disclose information required by law (including under the principle of good faith). The mistake must be essential, meaning that the party would not have contracted had she been in possession of the correct information or would have done so on different terms, and excusable, which is a requirement that looks at the diligence of the mistaken party.[98]

When deciding on claims of mistake in financial contracts, the *Tribunal Supremo* ruled that banks were under an obligation to inform investors. It grounded that obligation in sectorial regulations, both pre- and post-MiFID (Markets in Financial Instruments Directive),[99] and even in the general principle of good faith under the Civil Code.[100] The *Tribunal Supremo* decided that the absence of comprehensive information on financial products leads to mistake when it affects the investor's decision to contract, thus making the error essential.[101] In terms of excusability, the *Tribunal Supremo* looked at the investor's background and expertise. In the absence of evidence of serious expertise in financial markets, errors are deemed excusable and allow rescission of the contract (Art 1300 CC).

The factual problem underlying mistake for incorrect information in the Civil Code, for all types of contract, coexists with a similar remedy that is particular to business-to-consumer contracts. I refer to the requirement of transparency in the EU control of unfair terms (Arts 4(2) and 5 UCTD). In case C-26/13 *Kásler*,[102] the ECJ stated the meaning of transparency under the Unfair Contract Terms

[94] *MJ v AxFina Hungary*, C-705/21, EU:C:2023:352 para 55. *E.K. and S.K. v D.B.P.*, C-80/21, EU:C:2022:646, para 77.

[95] *Kamil Dziubak and Justyna Dziubak v Raiffeisen Bank International AG*, EU:C:2019:819, para 61.

[96] *Luminor Bank AS*, C-645/22, EU:C:2023:774, para 36. *E.K. and S.K. v D.B.P.*, C-80/21, EU:C:2022:646, para 77. *Banca B. SA v A.A.A.*,EU:C:2020:954, para 35.

[97] A Wiewiórowska-Domagalska, F de Elizalde and T Josipović, 'The ECJ on the Unfair Contract Terms Directive (Dir. 93/13/EEC)' (2024) 32(3) *European Review of Private Law* 311.

[98] L Díez-Picazo, *Fundamentos del Derecho civil patrimonial* (Thomson Civitas, 2007), I, pp 213–16.

[99] See n 11.

[100] See SSTS 20 January 2014 (ES:TS:2014:354) and 24 November 2016 (ES:TS:2016:5169), among many.

[101] See n 100.

[102] *Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*, EU:C:2014:282.

Directive as the understanding of an average consumer of the economic consequences of a term.[103] The transparency of a term requires that the business informs the consumer in a way that allows it to be understood.[104] A lack of transparency gives leeway to the control of ancillary terms as well as main terms that, in principle, were exempted from it (Art 4(2) UCTD).[105] A main term that is unfair determines that the contract cannot continue in existence (Art 6(1) UCTD).

Therefore, improper information provided during the formation of contracts leads to two possible actions for the aggrieved party, when she is a consumer. She can challenge the validity of the contract under the (national) action on mistake (Art 1266 CC) or claim a lack of transparency in the framework of the control of unfair terms (Arts 4(2) and 5 UCTD). In the first case (mistake), a successful action will result in an invalid contract (Art 1300 CC). In the second scenario (transparency), it will result in partial invalidity by eliminating the unfair term, or even in absolute invalidity when the contract cannot continue in existence and the gap cannot be filled (Art 6(1) UCTD and *Kásler*).

However, there is an important difference between mistake and transparency in their assessment of a lack of understanding. Mistake pivots on the actual consent of the aggrieved party. This is stressed by the requirement of the excusability of mistake, which scrutinizes the expertise of the party that suffers the mistake. Instead, the Unfair Contract Terms Directive incorporates its market aims in determining transparency. The directive not only is concerned about party equality but also looks at market governance. The result of that approach is that transparency focuses not on the actual contracting parties but rather on the average consumer[106] (a 'legal fiction').[107] Moreover, in case C-110/14 *Costea*,[108] the ECJ decided that a consumer's actual knowledge and expertise are immaterial. This is in striking contradiction to the requirement of excusability in an action under mistake.

Transparency and mistake coexist in Spanish case law, even for cases with similar fact patterns.[109] The *Tribunal Supremo* has relied on consistency[110] to stick to the action lodged in court, whether mistake under the Civil Code or lack of transparency, stemming from the transposed EU consumer protection on unfair terms (the UCTD).[111] This is a questionable approach. The ECJ has considered that Article 6(1) UCTD requires courts to control unfair terms *ex officio*, at every procedural stage.[112] Failing to do so on the grounds of consistency with the action that a consumer filed in court does not seem to be in accordance with EU law. An *ex officio* intervention is independent from the action that governs the proceedings. Against this, it can be argued that Article 6(1) UCTD is a special mandatory provision[113] that combines *ex officio* control with the possibility that the consumer waives protection (*ex post*).[114] Following this line of reasoning, the consumer could have waived the protection granted under EU law (the UCTD) when filing for the national action on mistake (Art 1266 CC). This issue has not been presented to the ECJ and remains within the Spanish boundaries. However, considering the protective stance that the ECJ adopts for consumers,[115] the latter argument would be a surprising outcome.

[103] *Árpád Kásler, Hajnalka Kásslerné Rábai v OTP Jelzálogbank Zrt*, EU:C:2014:282, para 74.

[104] *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, C-472/10, EU:C:2012:242.

[105] *D.V. v M.A.*, C-395/21, EU:C:2023:14, para 48.

[106] *Árpád Kásler, Hajnalka Kásslerné Rábai v OTP Jelzálogbank Zrt*, EU:C:2014:282, para 74.

[107] *Caixabank et al v Adicae*, C-450/22, EU:C:2024:577, para 52.

[108] *Horațiu Ovidiu Costea v SC Volksbank România SA*, C-110/14, EU:C:2015:538, para 21.

[109] The earlier cases reaching the Tribunal Supremo were relating to mistake. The first to be decided on transparency was STS 2 February 2021 (ES:TS:2021:269).

[110] Art 218 Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil, BOE n 7, 8 January 2000.

[111] STS 24 January 2023, ES:TS:2023:271.

[112] *Pannon GSM Zrt. v Erzsébet Sustikné Győrfi*, C-243/08, EU:C:2009:350, para 35. This doctrine was followed in *Asturcom Telecomunicaciones, S.L. v Cristina Rodríguez Nogueira*, C-40/08, EU:C:2009:615, para 53, and thereafter in many others.

[113] de Elizalde, 'Remedies', pp 464–68.

[114] *Pannon GSM Zrt. v Erzsébet Sustikné Győrfi*, C-243/08, EU:C:2009:350; *Banif Plus Bank Zrt v Csaba Csipai and Viktória Csipai*, C-472/11, EU:C:2013:88, para 35.

[115] *Banco Español de Crédito, SA v Joaquín Calderón Camino*, EU:C:2012:349, para 46.

C. Unexpected absorption of EU law by national contract law: prospectus liability

The complex interaction between EU law and national private law is not restricted to business-to-consumer relationships. A good example outside that framework is the liability arising from misleading prospectuses when securities are offered to the public or admitted to trading on a regulated market. EU law addressed that liability first in the Prospectus Directive[116] and currently in the Prospectus Regulation.[117]

The latter retains the procedural autonomy of Member States on relevant aspects of the liability arising from a misleading prospectus. The Prospectus Regulation mandates that Member States must ensure that their national provisions on 'civil liability' apply to those signalled as responsible for the information given in a prospectus.[118] The *Tribunal Supremo* interpreted this to mean that the liability arising from the EU prospectus liability regime is non-contractual.[119]

However, despite the existence of an autonomous, tortious, EU legal framework, it has been scarcely applied in Spain. To the surprise of experts in the field,[120] cases relating to misleading prospectuses have been litigated under the national law action of contractual mistake (Art 1266 CC).

The topic evolved around the case of Bankia, a bank that carried out an initial public offering (IPO) of its shares. In the prospectus for the IPO, Bankia presented itself as a solvent institution, which turned out to be misleading. The discovery of this fact led to a bailout of the bank and a collapse in the bank's share price. The affected investors sought to rescind their contracts with Bankia (Arts 1300 and 1303 CC) under the action of mistake. The *Tribunal Supremo* upheld the claims, finding that the requirements for mistake were met. The incorrect information was essential to investors in the decision to contract. Their error was excusable given the regulated process of disclosing information, on which the investors could rely.[121]

Funnelling prospectus liability through the action of mistake was marked by the investors' choice and the facts of the dispute. In any case, the *Tribunal Supremo*'s rulings will determine future litigation of similar scenarios. For them, the Civil Code will apply when a contract exists between the person responsible for the prospectus and the investor. The result is a marginalization of the EU regime, which was meant to harmonize prospectus liability.

V. Conclusion

The law on obligations and contracts in the Spanish Civil Code remains largely unreformed as several proposals to modernize it have not succeeded. However, Spanish contract law is far from being stagnant. It has evolved through judicial interpretation, which has reformulated existing rules and recognized new ones. The *Tribunal Supremo* has pushed the transformation forwards in the absence of legal reform. The Court of Justice of the European Union has complemented that effort by advancing EU law over national contract law while restricting the scope of procedural autonomy of Member States.

The lack of formal reform raises issues of conceptual clarity and legal certainty. In general contract law, case law sometimes accepts that pre-contractual information can become a term in the absence of agreement, even without the need to fill in a lacuna in the contract. However, the *Tribunal Supremo* does not provide guidance that would allow differentiation among cases. In sales, that court deals with

[116] Directive 2003/71/EC of the European Parliament and the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC [2003] OJ L 345/64.

[117] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC [2017] OJ L 168/12.

[118] Ibid, Art 11(2).

[119] STS 2 June 2022 (ES:TS:2022:2150).

[120] L de Carlos, *Régimen Jurídico de las Ofertas Públicas de Suscripción y Venta de Valores Negociables* (Civitas, 1998).

[121] SSTS 3 February 2016 (ES:TS:2016:91 and ES:TS:2016:92). See M Yzquierdo Tolsada (ed), *Comentarios a las sentencias de unificación de doctrina: civil y mercantil* (Dykinson, 2016), VIII, pp 377–92.

two contradictory systems of liability: the codified latent defects and the jurisprudential *aliud pro alio*. The *Tribunal Supremo* relies on a functional criterion to apply *aliud*, which is the same parameter that determines latent defects. This approach is not useful in practice. Other, more powerful, reasons underlie case law, but they do not emerge in the arguments of the *Tribunal Supremo*, which affects legal certainty.

The interaction between Spanish contract law and EU private law adds complexity as they are mutually dependent. EU law is not self-sufficient because it relies on national law in several aspects of the life cycle of contracts. At the same time, when clarifying boundaries, the CJEU has impliedly reformed the Civil Code, for example by limiting the supplementation of contracts with non-mandatory law. However, other grey areas remain. This article highlighted the incompatibility of the action on mistake in national law with transparency in the control of standard form contracts under EU law. However, as the matter has not yet reached the CJEU, they currently coexist and remain applicable for similar fact patterns. Striking in that interaction between national contract law and EU law is the case of prospectus liability, where the action on contractual mistake under the Civil Code has attracted litigation, hindering the purportedly harmonized EU prospectus liability regime.

The expansion of EU law in (partially) regulating contracts casts doubts on any proposal to modernize the Spanish Civil Code that does not consider the interaction with EU law. Updating the Civil Code in aspects of purely domestic law to incorporate the developments in case law would be a welcome but insufficient enterprise. It is my argument that rules dealing with the contractual effects of EU law, if granted the necessary flexibility, would contribute to the much-needed legal certainty of Spanish contract law. To achieve that aim, it is time to start complementing previous experiences of codification reform with some innovative reflection that treats Spanish private law as part of the EU's pluralist legal order.

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