THE CIRCULAR ECONOMY IN THE REAL ESTATE SECTOR. CHALLENGES AND OPPORTUNITIES IN SPAIN

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Abstract: The purpose of this paper is to analyse whether Private law could determine the fate of the Circular Economy. The article will first assess the legal relationship that the service creates between the supplier and the consumer. This relationship establishes a contractual bond in which the quality of performance is at stake. Next, the paper moves on to the complex proprietary consequences of the service, an issue that is aggravated in the context of real estate. The erga omnes effects of property rights justify the chapter's focus on the supplier-customer relationship but also on the interaction of third parties with the goods deployed in the service. Lastly, the article addresses an issue that affects both the contracting parties and third parties: non-performance and insolvency.

Keywords: circular economy, consumer protection, real estate, property law

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1. Introduction

The environmental and economic rationale behind the circular economy[1] justifies the existing and prospective initiatives in the real estate sector. This area of the economy not only includes the construction of immovable property (buildings, houses, etc.) but also its use, maintenance, functioning and demolition. The activities related to it generate more than 10 per cent of greenhouse gases in the EU (35 per cent in Spain)[2] and 30 per cent of the total waste (40 per cent in Spain).[3] Furthermore, the construction and use of buildings in the EU account for half of the extracted materials and energy consumption.[4] The concern of the EU institutions for the environmental impact of real estate is therefore comprehensible and not new.[5]

However, the circular economy is starting to offer innovative solutions to the real estate sector. As a result, new business models, which are environmental and economically sounder, challenge established legal frameworks. The circular economy would foster a

[1] The Ellen MacArthur Foundation, "Towards the Circular Economy", 2013, 63 et seq., accessible: https://www.ellenmacarthurfoundation.org/assets/downloads/publications/Ellen-MacArthur-Foundation-Towards-the-Circular-Economy-vol.1.pdf (last visited 12 July 2018). The Ellen Mac Arthur Foundation, "Growth within: A Circular Economy Vision for a Competitive Europe", 2015, 12 et seq., accessible: https://www.ellenmacarthurfoundation.org/assets/downloads/publications/EllenMacArthurFoundation_Growth-Within_July15.pdf (last visited 12 July 2018). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 2 December 2015, "Closing the loop – An EU action plan for the Circular Economy", COM (2015) 614 final, 2.

[2] For the EU, http://ec.europa.eu/eurostat/statisticsexplained/index.php/Greenhouse_gas_emission_statistics_air_emissions_accounts#Analysis_by_economic_activity. For Spain, Ministerio de Agricultura y Pesca, Alimentación y Medio Ambiente and Ministerio de Economía, Industria y Competitividad, "España Circular 2030. Estrategia española de economía circular" (borrador), febrero 2018, 39, accessible: www.mapama.gob.es/es/calidad-y-evaluacion-ambiental/participacion-publica/180206economiacircular_tcm30-440922.pdf (last visited 16 July2018).

[3] For the EU, http://ec.europa.eu/environment/waste/construction_demolition.htm (last visited 12 July 2018). For Spain, "España Circular 2030" (n 2), 39.

[4] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 1 July 2014, "On Resource Efficiency Opportunities in the Building Sector", COM (2014) 445 final, 2.

[5] Among many, Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008, on waste and repealing certain Directives, OJ 2008 L 312/3.

shift in finance[6] and an increase in B2C and B2B services vis-à-vis purchases – the former being better suited for recycling and reuse, which are core values to the circular economy.

The new scenario is particularly interesting from a private law perspective. The provision of services in real estate touches upon traditional principles and rules of property law, an area that is largely mandatory and that remains mostly an issue of national law. Property law determines the ownership of the goods deployed in the service, which on occasion leads to a non-consented transfer to the customer. If the supplier were to lose ownership, it would also affect its financer's security rights over the goods. This risk would create a serious barrier to the circular economy in those countries that adopt this rule while fostering it in others – an outcome that would depend on each specific property law. Besides, the new business models would challenge consumer protection laws which, in key aspects, and notoriously as regards quality, have been designed for sales and not services. Hence, the circular economy would foreseeably require a reform of consumer contract rules.

The purpose of this chapter is to analyse the legal challenges that arise from private law in Spain, which is the fourth economy in the Eurozone. The chapter will first assess the legal relationship that the service creates between the supplier and the consumer. This relationship establishes a contractual bond in which the quality of performance is at stake. Next, the chapter moves on to the complex proprietary consequences of the service, an issue that is aggravated in the context of real estate. The *erga omnes* effects of property rights justify the chapter's focus on the supplier-customer relationship but also on the interaction of third parties with the goods deployed in the service. Lastly, the chapter addresses an issue that affects both the contracting parties and third parties: non-performance and insolvency.

2. The consumer-supplier relationship

It is common for the circular economy to embrace service contracts as the legal support for its business model. Consumers (and other service recipients) would cease to be buyers of products, which makes them the final users of objects. Sales complicate at least two of the stated aims of the circular economy: recycling and reuse. Instead, in the circular economy, businesspersons would provide services, at the end of which, the goods should revert to the business for recycling and reuse.

Therefore, the analysis of the consumer-supplier relationship should take into account the main contractual obligations arising from the service contract. Additionally, it should reflect on the proprietary consequences that may derive from the transfer of possession (albeit designed to be temporary in nature) of the goods deployed under the service, with a special focus on accession. I will address both matters in that order.

2.1. Quality of the service

[6] ING, "Rethinking finance in a circular economy. Financial implications of circular business models", May 2015, accessible: https://drive.google.com/file/d/1hZCKSe0-LxSq4d7x0zPBJkiUvlKyGkTc/view (last visited 12 July 2018).

2.1.1. Dichotomy between obligations of means and obligations to achieve a result

The quality of services in Spanish law is dominated by the distinction between the obligations of means or skill and care (*obligaciones de medios*) and the obligations to achieve a result (*obligaciones de resultado*).[7] Despite the antiquity of this dichotomy (it can be traced back to Demogue in France and some scholars go as far back as Roman law),[8] it continues to be relevant. Moreover, it still[9] provokes discussions over its usefulness in many of the legal systems that have adopted it.[10] However, the dichotomy seems to experience a '*nouvelle jeunesse*' in Spanish law and in the harmonization of European contract law, following its recognition by the Draft Common Frame of Reference (DCFR) and the Regulation Proposal on a Common European Sales Law (CESL), and it seems to have survived the reform of the French Civil code.[11]

Demogue classified the obligations in those of means and those to achieve a result (*obligations de moyens*/*obligations de résultat*) when assessing the burden of proof in the event of non-performance[12] and, according to the majority in French legal doctrine,[13] this is the main effect of the dichotomy. The classification of obligations in this way sought to resolve the contradictions that stemmed from the wording of the original Arts 1137 and 1147 of the French Civil code (currently, but not identically, Arts 1197 and 1231-1 of the

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[7] For a detailed discussion, see F de Elizalde, "Las obligaciones de medios y de resultado en la Propuesta de Código Mercantil", *InDret* 3/2014, 1-40, accessible: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2501005. Important (but not definitive) provisions in this discussion are Article 1104 (negligence) and Articles 1589-91 (work contract) of the Spanish Civil code.

[8] R Demogue, *Traité des obligations en général*, V, Librairie Arthur Rousseau, 1925, § 1237 (pp. 536-544)] and R Demogue, *Traité des obligations en général*, VI, Librairie Arthur Rousseau, 1931, § 599 (p. 644). For the Roman origins of the dichotomy, H Mazeaud, L Mazeaud and A Tunc, *Tratado teórico y práctico de la responsabilidad civil, delictual y contractual*, I-1, Ejea, 1961, § 103-2 (p. 127). Against, J Frossard, *La distinction des obligations de moyens et des obligations de résultat*, LGDJ, 1965, pp. 12-24. In any case, the importance of Demogue in case law and scholarly writings is highlighted by R. Nerson, "Préface", in Frossard (ibid), pp. V-VII.

[9] Indeed the polemics over the dichotomy are as old as the classification itself. In France, see P Esmein, "Obligations", in M Planiol and G Ripert, *Traité Pratique du Droit civil français*, VI, LGDJ, 1952, § 378 ter. Also, MG Marton, "Obligations de résultat et obligations de moyens", 1935 *Revue Trimestrielle de Droit Civil* 499, 510-518. In the same vein, A Planqueel, "Obligations de moyens, obligations de résultat (Essai de classification des obligations en function de la charge de la prevue en cas d'inexécution)", 1972 *Revue Trimestrielle de Droit Civil* 334, 336.

[10] See the debate that is taking place in Italy, F Piraino, "Obbligazioni di resultato e obbligazioni di mezzi overo dell'inadempimento incontovertibile e dell' inadempimento controvertibile", 2008 *Europa e Diritto Privato* 83, 95-104; and A Nicolussi, "Il commiato della giuirisprudenza dalla distinzione tra obbligazioni di risultato e obbligazioni di mezzi", 2006 *Europa e Diritto Privato* 797, 797-823. -

[11] C von Bar and H Schulte-Nölke (eds), *Principles, Definitions and Model Rules on European Private Law: Draft Common Frame of Reference* (DCFR), Sellier, 2009, Arts IV. C. 2: 105 and IV. C. 2: 106; Art 148 of the Proposal for a Regulation of the European Parliament and of the Council on a common European Sales Law, COM (2011) 635 final (CESL). In respect of French law, see P Jourdain, "Quel avenir pour la distinction des obligations de résultat et des moyens?", 2016 *JCP* 36, 1557. Cfr. D. Mazeaud, "La distinction obligation de résultat - obligation de moyens: le saut dans le vide?", D. 2017, 198.

[12] Demogue (n 8, 1925), § 1237 (pp. 536-537).

[13] Mazeaud, Mazeaud and Tunc (n 8), § 103-5 (pp. 132-133). Also, A Weill and F Terré, *Droit civil. Les obligations*, Dalloz, 1986 § 396 (pp. 399-403); and J Carbonnier, *Droit Civil*, IV, PUF, 1994, § 156 (pp. 261-263).

Code).[14] The former referred to the diligence of the reasonable person[15] in the duty to guard a thing; the latter admitted the exoneration of the debtor from non-performance or delay in performance of an obligation if it proved force majeure. The *summa divisio* introduced by Demogue intended to harmonize both rules by linking Art 1137 to the obligations of means and Art 1147 to the obligations to achieve a result.[16]

In this way, the obligations to achieve a result would presume the debtor's fault in the event of a breach. The debtor should thus prove force majeure to be exempted from the liability arising from non-performance. In the obligations of means, on the other hand, it would be up to the creditor to prove the negligence of the debtor to make the latter responsible for the breach.[17]

The evidentiary consequence (the burden of proof, *onus probandi*) that may result from the distinction between obligations of means and obligations to achieve a result is not the main utility that this dichotomy has in Spanish law. In fact, legislation[18] and case law[19] recognize cases (the liability of architects, for example) in which the burden of proof does not follow the aforementioned distinction.[20] For example, an architect is bound by an obligation of means (skill and care) but case law and legislation presume its liability in the event of damage – the typical burden of proof applied to obligations to achieve a result.

The division introduced by Demogue seems better suited (at least in Spanish law) to determine the allocation of risks between the parties. In the obligations of means, the debtor does not guarantee the purpose of the contract (healing a patient, winning a lawsuit, etc.). It only undertakes to perform an activity as promised and, in the absence of agreement, with due skill and care. Instead, in the obligations to achieve a result, the debtor guarantees the purpose of the contract, which forms part of the terms, whether agreed or as default rules.[21]

That is why despite following the French terminology of obligations of means and obligations to achieve a result, it can be argued that Spanish law is more consistent with the approach in German law, which distinguishes between a service contract (*Dienstvertag*) and a work contract (*Werkvertrag*).[22] The distinction is done in the terms

[14] Table des articles 1100 à 1381-1 au JO du 11/02/2016, accessible: https://www.legifrance.gouv.fr/Droit-francais/Codification/Tables-de-concordance/Code-civil/Table-des-articles-1100-a-1386-1-au-JO-du-11-02-2016-ancienne-nouvelle-reference (last visited 18 July 2018).

[15] In its ultimate version, after the reform introduced by Art 26 of Loi nº 2014-873 du 4 août 2014 pour l'égalité réelle entre les femmes et les hommes, JORF nº 179, du 5 août. Previously, the parameter of diligence was set by reference to the "*bon père de famille*".

[16] See (n 13) and Demogue (n 8, 1931) § 600 (pp. 644-645).

[17] Mazeaud, Mazeaud and Tunc (n 8), § 103-5 (pp. 132-133).

[18] E.g. Ley 38/1999, de 5 de noviembre, de Ordenación de la Edificación, BOE nr 266 of 6.11.1999.

[19] SSTS (1ª) 7.11.1989, ES:TS:1989:9434; 27.6.1994, ES: TS: 1994:22422; 29.5.1997, ES: TS:1997:3772; and 19.10.1998, ES:TS:1998:5986. M Jiménez Horwitz, "La distinción entre los contratos de obras y servicios en el Derecho español (estudio comparativo con el Derecho alemán), 2012 *Anuario de Derecho Civil* 551, 563.

[20] A Cabanillas Sánchez, *Las obligaciones de actividad y de resultado*, Bosch, 1993, pp. 155-173.

[21] Cfr. challenging the use of the dichotomy, AM Morales Moreno, "Problemas que plantea la unificación del concepto de incumplimiento de contrato. Respuesta a Enrique Barros", in E Barros Bourie, MP García Rubio and AM Morales Moreno, *Derecho de Daños*, Fundación Coloquio Europeo, Madrid, 2009, pp. 215-220.

[22] § 611 BGB and §§ 631 and 633 BGB, respectively.

of the contract, not as regards the burden of proof. In a service contract the debtor promises a certain activity whereas in a work contract it is bound to a result – that agreed to or what is customary and meets the expectations of the customer in view of the type of work.[23] The same outcomes apply in Spanish law, correspondingly, to the obligations of means and the obligations to achieve a result.

2.1.2. The dichotomy in the circular economy

The contractual arrangements used in the provision of services in the circular economy would probably fall under obligations to achieve a result. The business is expected to provide a service that meets the ultimate purpose of the customer (e.g. a lightning system that works) and not just an activity.

However, the definition of the obligations of the parties in service contracts remains in the realms of agreement. The dichotomy 'obligations to achieve a result/obligations of means' is just a default rule. It could therefore occur that the business, most probably using standard terms, could reduce its commitment to an obligation of means (skill and care), thus assigning the risk of the result to the customer.

At present, legislation on the quality of the subject matter of the contract in EU consumer law does not cover all types of contracts. It is mostly restricted to sales.[24] As regards services, EU law only addresses the quality of some particular ones, such as package travel.[25] In both cases, the standard required from the product or service is benchmarked by the principle of conformity, which is mandatory law. According to it, the business must deliver an object or provide a service that is fit for purpose. However, in the absence of harmonization, the quality requirements of other services is left to national law. Spain has implemented the principle of conformity in accordance with EU law but has not extended it to other (not envisaged) contracts. Therefore, the quality of the services that could foreseeably be provided in a circular economy are currently not covered by the (mandatory) principle of conformity.

Taking advantage of this, a business could define the subject matter of the contract to fit the less demanding category of obligations of means. In the absence of mandatory law, this would be valid. Moreover, as it would concern the definition of the subject matter of the contract, it could not be challenged as unfair (if transparent), even though its likelihood of being a standard term (Art 4(2) Unfair Contract Terms Directive, UCTD).[26] However, this would not be the case if the term did not define the subject matter of the contract but, instead, limited the liability of the business (Annex, 1(b) UCTD).

Overall, EU consumer law should probably adapt to the changing scenario that a circular economy would imply, in order to reinforce the quality of the service that a consumer is

[23] W Fikenstcher and A Heinemann, *Schuldrecht*, de Grutyer, Berlin, 2006, paras. 1129-31.
[24] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999 L 171/12, Art 2.
[25] Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, OJ 2015 L 326/1, Art 13.
[26] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L 95/29.

entitled to demand – an objective to which the requirement of conformity seems appropriate.[27]

2.2. Proprietary effects of the service. Accession?

The move from buying products to hiring services, the natural contractual infrastructure of the circular economy, could face a major challenge in real estate from the rules on accession (*accessio*). Because of accession, under certain circumstances the supplier of the service could lose ownership over the objects it incorporates in the immovable of the customer (e.g. the air conditioning equipment in a 'pay-per-use' service). This would represent a major drawback to the circular economy, through undermining strategic interests of the supplier – the retention of ownership and the financing opportunities that derive therefrom.

The rules on accession, in those jurisdictions that recognize it, aim at the preservation of value, as accession prevents the destruction of the enlarged main object (after the incorporation of another one). This seems to have been the rationale for this institution since at least the Roman Law of the Twelve Tables, in which it was decided that the owner of a beam which was introduced in an alien building (*tignum iunctum*) could not recover it.[28]

Additionally, accession intimately relates to two important principles of property law: specificity of the object (which should exist and be certain, as well as the rights over it) and publicity of the proprietary right over the object, a requirement for the right to have *erga omnes* effects.[29] To them, civil law jurisdictions include, when it comes to accession, the unitary character of ownership.[30] Accession relates to specificity when it permanently enlarges an object (the building with the movable incorporated into it). It relates to publicity as third parties are, in principle, entitled to rely on the physical appearance of that 'enlarged object' and on the presumed ownership of the owner of the building over it. Lastly, the unitary character of ownership is, in principle, against the existence of more than one owner over the same space.

From this common core, jurisdictions diverge as to the content and extent of the rationale (the preservation of value) and the principles mentioned, with a different degree of flexibility in the application of accession. In the most rigid systems (Germany among them), accession is treated as an original acquisition of ownership. Because of accession, the owner of the movable loses ownership if the object becomes an essential component ('*wesentlicher Bestandteil*' in German law)[31] of the building. This rule, being mandatory law, cannot be altered by agreement. In contrast, other legal systems, including Spanish

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[27] However, the principle of conformity would be unsuitable for certain kinds of services, as claimed in F de Elizalde, "Should the implied term concerning quality be generalized? Present and future of the principle of conformity in Europe", 2017 *European Review of Private Law* 71, 96.

[28] Tab. 6.7 and 6.8. According to A Guzmán Brito, *Derecho Privado Romano*, I, Editorial Jurídica de Chile, 1996, p. 561, the *ratio legis* of the rule was to keep the integrity of the city, preventing the destruction of buildings (*ne urbs ruinis deformetur*; D. 43.8.2.17). G Melillo, *Tignum Iunctum*, Jovene, 1964, pp. 2-3.

[29] For a comparative overview, see van S van Erp and B Akkermans (ed.), *Cases, materials and text on Property Law*, Hart, 2012, pp. 75 et seq. As regards Spanish law, L Díez-Picazo, *Fundamentos del Derecho Civil Patrimonial*, III, Thomson Civitas, 2008, pp. 155-156.

[30] van Erp and Akkermans (n 29), pp. 224-226.

[31] §§ 93, 94, 946 and 947 BGB.

law, take a more flexible approach while adhering to the common principles of property law (specificity and publicity). Accession is treated as a rule to solve conflicts rather than an institution of mandatory character. This approach prevents accession in a great variety of situations, especially when the parties agree otherwise, while meeting the principle of specificity and, in respect of third parties, the principle of publicity. Therefore, the way in which accession works in Spanish law does not normally affect the supplier's right of ownership.

Under the heading 'Right of Accession' (Book II, Title II, Chapter II) the Spanish Civil code (CC) regulates a variety of situations that imply a change in the composition of objects (movable and immovable) and, consequently, on the property law relations that exist over them.[32] Under this broad regulation, accession in the CC comprises the incorporation of a movable into an immovable[33] or into another movable[34] (in both cases, an accession *stricto sensu*) but also the combination of movables (commingling)[35], the creation of new objects (*specificatio*)[36], and the acquisition of fruits (natural, civil and industrial) by its owner.[37]

If we focus on accession *stricto sensu,* as the most relevant to services provided in the real estate sector, it is a fact («*accedere*» in Roman law would have had a vague meaning of physical change, production or augmentation of things)[38] that it would lead to the acquisition of a right of ownership only in certain circumstances.[39] For that to occur the incorporation of a movable object into an immovable (or into another movable) should be irreversible and one of the objects should be ancillary to the other one.[40] Moreover, the incorporation of the movable into the immovable (we restrict our analysis to real estate) should be done on a fixed basis, so that it cannot be separated therefrom without breaking the material or impairing the object (Art 334.3 CC).[41] Whether the incorporation meets this requirement necessarily has to be decided on a case-by-case basis.[42]

2.2.1. Accession as a source of non-mandatory rules

The difficulties and risks involved in deciding when a movable becomes irreversibly incorporated into an immovable, in a way that could lead to accession, are overcome by the possibility that the parties have to agree against accession. A mainstream position in Spanish law understands that the owner of the movable can agree with the owner of the immovable that despite factual incorporation accession does not occur. In this way, each

[32] L Díez-Picazo, "La modificación de las relaciones jurídico-reales y la teoría de la accesión", 1966 *Revista Crítica de Derecho Inmobiliario* 829, 840.
[33] Arts 358 CC et seq.
[34] Arts 375 CC et seq.
[35] Arts 381 and 382 CC.
[36] Art 383 CC.
[37] Art 354 CC et seq.
[38] D. 41.1.56; D. 6.2.11.6 and 7. A Carrasco Perera, *Ius aedificandi y accesión*, Montecorvo, Madrid, 1986, p. 59. Díez-Picazo (n 29), p. 278.
[39] Díez Picazo (n 29), p. 281. Against, see G Cerdeira Bravo de Mansilla, "El automatismo en la accesión inmobiliaria", 2012 *Revista Crítica de Derecho Inmobiliario* 43, 53.
[40] Carrasco Perera (n 38), p. 67. M de los D Núñez Boluda, *La accesión en las edificaciones*, Bosch, Barcelona, 1994, p. 28.
[41] As regards the relationship between the classification of immovable objects (Art 334 CC) and accession, Carrasco Perera (n 38), pp. 181-183.
[42] Núñez Boluda (n 40), p. 32.

party maintains its property right over its respective object. The contractual relationship is sufficient to impede accession.[43]

According to this prevailing understanding, the rules on accession would be non-mandatory. They would operate in the event of an unlawful interference with an alien property (to solve a conflict of interests), but not when the incorporation resulted from agreement. This has led some scholars to include the lack of a contractual relationship as a fundamental requirement for accession to occur.[44] In contrast, others consider that the legal regulation of accession should supplement the contract.[45]

The possibility to agree against accession is coherent with the consideration of property rights in Spanish law as *numerus apertus* – a minority stand in the comparative arena. Freedom of contract allows for the creation of new property rights (with limitations) and grants the parties the possibility to shape the content of existing ones.[46] Additionally, it is consistent with the principle of specificity as the parties identify the distinct ownership of the immovable and the goods.

As an example of the non-mandatory character of accession, the Spanish Supreme Court (*Tribunal Supremo*) decided that the rules on accession did not apply in a case in which one party had constructed an industrial building over its counterparty's land to pursue a joint poultry business, as the contract impeded accession.[47]

2.2.2. The classification of immovable property. Case law

The existence of a contractual relationship between the owner of the immovable (customer of the service) and the supplier of the movable that excludes accession is certainly the most convenient scenario for the latter, as it retains ownership. However, a behavioural analysis proves that incompleteness of contracts is customary. It is important, therefore, to address accession in the absence of agreement.

On this, it can be recalled that accession only takes place (in real estate) when a movable becomes irreversibly incorporated into an immovable, in the sense that it cannot be separated therefrom without breaking the material or impairing the object (Art 334.3 CC).

This does not always follow the attachment of a movable to an immovable. In fact, the Spanish civil code provides for a classification of immovable objects (Art 334.1-10 CC) and only one category leads to accession. Scholars agree about organizing that classification into four: (i) immovable by nature (land); (ii) immovable by incorporation (movable incorporated into an immovable); (iii) immovable by destination (movable destined to serve the functioning of an immovable, which is to be decided by the owner

[43] Núñez Boluda (n 40), pp. 38-43. Carrasco Perera (n 38), pp. 392-395. M Alonso Pérez, "Art 358", in M Albaladejo and S Díaz Alabart (ed), *Comentarios al Código Civil y compilaciones forales*, V-1, Edersa, 1986, pp. 264-265. STS (1ª) 14.3.1983, ES:TS:1983:45.
[44] Núñez Boluda (n 40), p. 28.
[45] Díez-Picazo (n 29), p. 298.
[46] Diez-Picazo (n 29), pp. 133 et seq. This has allowed for the creation of new rights such as *superficie* (even before the actual existence of a statute allowing it) or concepts such as *medianería horizontal* (DGRN 5.4.2002 and 24.2.2007).
[47] STS (1ª) 18.4.1986, ES:TS:1986:1919.

of both objects); and (iv) immovable by analogy (including property rights over real estate).[48] The rules on accession only apply to an immovable by incorporation.[49]

This gives a second chance to suppliers of movable objects that are attached to an immovable (in the absence of agreement) as the loss of ownership that follows accession only occurs if the physical attachment is classified as an immovable by incorporation. This depends on whether the union is irreversible and on the possibility of separating the movable without impairing the object (it is unclear if the law refers to the movable or to the immovable). Despite the factual elements at stake, the issue of classification has been deemed one of law.[50]

It is therefore interesting to analyse case law to consider in which situations the Spanish Supreme Court has decided that a good became irreversibly attached to a building, thus classifying the outcome as an immovable property by incorporation to which the rules on accession apply. Even before the introduction of circular economy elements, the Spanish Supreme Court has had the opportunity to classify immovable objects, and thus directly or indirectly decide upon accession. On this point, it is worth mentioning case law in which the objects were classified either under immovable by destination or immovable by incorporation.

a. Immovable by destination (i.e. impeding accession)

- Cable that conducts electricity to a plot of land[51]
- Artificial waterway channel for irrigating land[52]
- Electrical appliances used in a hospital[53]

b. Immovable by incorporation (that would lead to accession)

- Washbasin
- Bath
- Toilet
- Radiators[54]

The uncertainties that arise from case law justify, for the circular economy model to work, the drafting of an agreement in which the parties reject accession.

2.2.3. Excursus. Ancillary and main. *Superficie solo cedit*?

A final argument against accession that a supplier could bring is that, despite accession, it and not the customer should gain ownership. The consequence of accession is that the ancillary object is incorporated into the principal (*accessorium sequitur principale*). The prevailing understanding in Spanish law is that the rule '*superficie solo cedit*' (the building accrues to the land) is just an application of the overarching rule '*accessorium*

[48] Díez-Picazo (n 29), p. 213.
[49] Carrasco Perera (n 38), pp. 180-181.
[50] STS (1ª) 3.7.1987, ES:TS:1987:4672.
[51] STS (1ª) 19.1.1927, JC 1927, 42.
[52] STS (1ª) 19.1.1927.
[53] STS (1ª) 3.7.1987.
[54] For all, STS (1ª) 18.3.1961, JC 1961, 213. Scholars heavily criticized this decision.

sequitur principale'.[55] Therefore, in the event of the movable goods being more valuable than the soil, ownership could revert to the supplier. It is expected that this would only occur in a large scale circular economy in which more substantial elements of construction could exceed, in value, that of the land.

3. Ownership and third parties

3.1. Third party acquirers in good faith

In order to escape the harsh consequences of accession it is foreseeable that suppliers in a circular economy would include in their (presumably standard) terms a 'non accession' clause. In this way, they would aim to ensure that they retain ownership over the movable objects that become attached to buildings under the contractual relationship.

However, due to the principle of relativity of contracts[56] this agreement between the customer and the supplier is not opposable to third parties. Therefore, a third party who deals with the owner of an immovable could legitimately ignore the supplier's rights over the movables attached to the building.

The physical appearance of an immovable with elements of the circular economy could lead a third party to believe, among others things:

(i) that the movable is permanently incorporated into the immovable and belongs to the owner of the property (because of accession);

(ii) that the movable serves the functioning or use of the property (immovable by destination, Art 334.5 CC)[57] or

(iii) that it is a movable, owned by the customer and not the supplier.

If the third party legitimately ignores, in good faith, the supplier's rights, it could prevail in the event of conflict even though it acquired from a non-owner. This could happen in the three different scenarios described.

As regards the first scenario, if the movable is irreversibly incorporated into the immovable, accession may occur when the supplier is unable to oppose its contract, including a 'non-accession' clause, to the third party. The third party acquirer of the immovable in good faith would also acquire the incorporated movable.[58]

In the second scenario, the event of the movable serving the functioning or use of the property but not being irreversibly incorporated into it, the movable may become an

[55] Díez-Picazo (n 29), pp. 288-289.

[56] Art 1257 CC.

[57] In relation to immovables by destination, the default rule in obligations to give (*dare*) is that the 'accessories' must be delivered together with the main object (art 1097 Spanish CC). This rule would reinforce third parties' claims. See Carrasco Perera (n 38), pp. 68 and 192. These immovables by destination (movables that serve the use or functioning of the immovable) are not contained in the subject matter of the mortgage (*hipoteca*) over the property, unless otherwise agreed (Art 111.1 Decreto de 8 de febrero de 1946). The agreement by a third party who ignores in good faith the supplier's ownership would be opposable to it.

[58] Arts 334.3 and 358 CC; Arts 34 and 38 Decreto de 8 de febrero de 1946, BOE nr 58 of 27.2.1946.

immovable by destination (Art 334.5 CC). For this to occur, it requires a decision from the owner of both the movable and the immovable, who should be the same person.[59] One of the most important effects of this decision is that, after it takes place, in the event of a transfer of the immovable to a third party, the transferor is obliged to deliver not only the real estate property but also the movable ancillary to it.[60] In any case, if the owner of the immovable property does not own the movable, the latter cannot become an immovable by destination.[61] The reliance that a third party could place on the customer's possession (i.e. the movable appearing to belong to him) can be protected under the rules that govern the acquisition of movables but not those governing real estate.[62] Vis-à-vis third parties, the situation of this kind of ancillary movable is similar to that of other movables.

This leads to the third and final scenario: the protection of third party acquisition of movables in good faith. On this, Spanish law is far more intricate compared to other European counterparts, such as Germany and France. Complexity arises from the wording of the applicable provisions of the Spanish civil code (especially Arts 464 and 1955 CC) and the two different readings of them – a 'Germanistic' and a 'Romanistic' one. According to Art 464 CC, '[p]ossession of movable property, acquired in good faith, is equivalent to title. Notwithstanding the foregoing, any person who has lost movable property or has been deprived of it illegally may claim it from its possessor'. In turn, Art 1955 CC establishes that '[o]wnership of movable property prescribes [in the sense of acquisitive prescription, *usucapio*] after three years of uninterrupted possession in good faith'.[63]

According to the 'Germanistic' interpretation, a third party acting in good faith acquires ownership even if the transferor is not the owner. An exception to this rule is the situation of the object being lost or stolen – the expression 'illegally' of Art 464 CC being restricted to those cases. The period of three years to acquire ownership of Art 1955 CC is only required when the elements for 'possession (…) equivalent to title' are not met (i.e. objects that are lost or stolen).

In the 'Romanistic' interpretation, a third party acting in good faith cannot acquire a property right from a non-owner – the contrary being against the rule *nemo plus iuris*, according to which no one can transfer a bigger right than its own. A defect in the title can be offset by acquisitive prescription (*usucapio*), which arises from possessing the movable during three years in good faith (Art 1955 CC, ordinary or abridged acquisitive prescription). For the ordinary *usucapio* to occur the possessor needs a 'just' title. This is a title that would be perfect, valid and sufficient to transfer ownership were it not for one vice – that the transferor was not the owner.[64] Possession would presume the existence of that just title.[65] Support for this 'Romanistic' interpretation would come from the

[59] Díez-Picazo (n 29), p 219. STS (1ª) 3.7.1987.

[60] Art 1097 CC. Carrasco Perera (n 38), pp. 68 and 197. F Badosa Coll, "Art 1097" in C Paz-Ares, L Díez-Picazo, R Bercovitz and P Salvador (eds.), *Comentario del Código Civil*, II-I, Ministerio de Justicia, 1991, p. 26.

[61] STS 3.7.1987.

[62] Movables ancillary by function to an immovable (immovable by destination) are legally autonomous from the real estate property. See M Albaladejo, "Art 334", in Albaladejo and Díaz Alabart (n 43), p. 15.

[63] For these articles of the Civil code, I used the official translation prepared by the Ministry of Justice of the Kingdom of Spain.

[64] Art 1952 CC.

[65] L Díez-Picazo and A Gullón, *Sistema de Derecho Civil*, III, Tecnos, 2000, p. 211.

expression 'deprived of it illegally' (Art 464 CC) which would be broader than its French or German counterparts (restricted to objects lost or stolen).[66] Any situation in which the owner does not consent to the transfer of a property right would one in which it was 'deprived of it [the object] illegally'. Therefore, the owner would be entitled to claim restitution (under an action in rem: *reivindicatio*).

The Spanish Supreme Court has been uncertain about the interpretation to follow and has alternatively opted for one and then the other.[67] The Germanistic interpretation better protects third parties while the Romanistic one is more respectful of the previous owner's rights. In the context of a circular economy, it is probably unlikely that it would be argued that the movables deployed in a service were lost or stolen. According to the Germanistic interpretation, the third party acquiring those movables from the customer would be protected, while if the Romanistic interpretation were to prevail, the supplier of the service could claim restitution under a real right action, before the third party possesses them for the three years needed for acquisitive prescription (*usucapio*).

3.2. Registration

The most efficient tool to prevent the use of the 'third party in good faith' argument is registration, which gives publicity to the ownership of the supplier and any other property right that the financer of the supplier may have over the movables used in the service. In addition to a traditional land registry, Spain has established a special registry for movable objects, under the organization of the commercial registries.[68] In it, it is possible to register any identifiable movable object as well as all property rights (and others) over it. Suppliers can therefore record their rights (and their financers their own) in order to prevent third party protection.

The closest equivalent to that of the supplier in the circular economy, in respect of registration and its effects, is that of a seller under a retention of title clause. In these early stages of the circular economy, it provides a good point of comparison. Registration of retention of title clauses in the sale of movables has long been in place in Spain, even before the creation of the Registry for movable objects. Their registration has prevented third party acquirers of an immovable from gaining protection, for example, claiming ownership over electric appliances that had been sold to the transferor of the property. Following a lack of payment, the Supreme Court established that the supplier had the right to regain ownership and prevail over the third party, precisely because of registration.[69] Under the current structure of the Registry for movable objects, the supplier can record its rights, which should prevent third party protection.

The requirement of identification of the movable in order to access registration can be an issue for certain objects (e.g. bricks or beams) of the circular economy. This is where the BIM (Building Information Model), blockchain and the internet of things can have a

[66] § 935 BGB and Art 2276 French CC.
[67] SSTS (1ª) 19.6.1945, 2.12.1999 and 22.1.2002 (Romanistic, ES:TS:1999:7706 and ES:TS:2002:280); SSTS (1ª) 15.2.1990 and 25.2.1992 (both Germanistic, ES:TS:1990:1342 and ES:TS:1992:1502).
[68] Created by Disposición Adicional Única, Real Decreto 1828/1999, de 3 de diciembre, por el que se aprueba el Reglamento del Registro de Condiciones Generales de la Contratación, BOE nr 306, 23.12.1999.
[69] STS 3.7.1987.

major role in the creation of powerful product passports.[70] They are relevant to a truly circular economy in which the three 'Rs' (reduce, reuse and recycle) can be potentiated throughout the lifecycle of a building by allowing a constant and updated identification of objects. From a legal perspective, this technology could be the best way for most products to be reliably identifiable, allowing for registration and so securing property rights over movables. This innovation would provide the circular economy with endless possibilities.

4. Non-performance and insolvency

The last section of this chapter deals with unhealthy situations that could affect the service: non-performance of the contract and insolvency. Although non-performance is inherently an issue of contract law, it is analysed here and not in the 'supplier-customer' section because of the remedy of termination that could involve third parties. In Spanish law, termination reverts ownership over the goods to the supplier but only in the absence of a third party that deserves protection. In turn, it is self-evident that insolvency affects the rights of third parties.

4.1. Non-performance

The contract might be breached by the customer, normally due to a lack of payment of the service, or by the supplier, typically in the event of a flawed service. In both cases, the remedies available to the parties are those of general contract law: specific performance, withholding performance, reduction of price, termination and damages.[71] Unlike for sales, Spanish consumer law does not envisage a specific remedial regime for a B2C service relationship.[72]

In the context of a circular economy, two of the remedies mentioned could be particularly problematic. First, the remedy of specific performance when claimed by the consumer. In modern contract law, specific performance includes repair and substitution at the creditor's choice. However, this scheme, which enhances the rights of the consumer, was designed without considering sustainability. Allowing the creditor to opt for substitution seems to be a normative decision that is less sustainable than repair, even though the supplier could reincorporate the goods, on occasion, into its manufacturing or service processes.

The second problematic remedy could be termination of the contract by the business. If the customer defaults, the supplier would be entitled to an action to claim payment of the

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[70] Cfr. E Schut, M Crielaard and M Mesman, *Circular Economy in the Dutch Construction Sector. A perspective for the market and government*, RIVM, 18 December 2015, 9 and 22, accessible: rivm.nl/dsresource?objectid=806b288e-3ae9-47f-1-a287c208f884b36&type=org&disposition=inline (last visited 16 July 2018). C Kinnaird, M Geipel and M Bew, *Blockchain technology. How the inventions behind bitcoin are enabling a network of trust for the built environment*, Arup, 2017, accessible: www.arup.com/en/perspectives/publications/Research/Section/Blockchain-Technology (last visited 16 July 2018).

[71] Arts 1101 and 1124 CC. For consumer contracts, see Art 59 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 nr 287, of 30.11.2007.

[72] The difference is a result of the transposition of Dir 99/44.

outstanding debt and another action (in rem) to claim restitution of the movables deployed in the service. While the action arising from the obligation (debt) would always be available, the action in rem would depend on the supplier actually retaining ownership. This would not be the case in the presence of a third party entitled to a property right over the goods who deserves protection or in the event of accession, as seen in the previous sections. Therefore, despite the fact that termination should revert ownership to the business, it could be impeded under the rules of third party protection and accession.

The precise procedural paths that the action for termination must follow would depend on the formalities involved in the service contract. In the current framework of Spanish procedural law, the supplier should file an action in rem (*reivindicatio*) to recover the goods, in an ordinary procedure. The claim is viable because the supplier retained ownership of the goods. For this to happen, in the event of a movable object irreversibly attached to an immovable, the parties should have agreed on a 'non-accession' clause. Repossession can involve destruction of the improvements of the immovable as long as it is not left in a worse situation than its original condition (prior to the service).[73]

It is doubtful whether the real right action admits aggregation of the claim for the debt. If not, the debt should be claimed in an autonomous declarative proceeding (verbal or ordinary, depending on the amount) or in a specific order for payment procedure (which could end up in a declarative one if the debtor opposes the claim).

Instead, if the contract is formalised in a public deed the supplier would have the option to resort to an expedited execution procedure. In it, the supplier could claim both the outstanding debt and repossession of the goods.[74] Following the reform of the Spanish Procedural Act (as a result of CJEU *Aziz*[75]), the consumer is entitled to challenge, even in this expedited procedure, any unfair term that the contract may contain.[76]

As regards retention of title clauses in the sale of goods, the law has provided for a special verbal (declarative) procedure to recover possession of the goods.[77] In the absence of a legal provision, it would not be applicable to defaults outside that scope. However, if the circular economy were to expand, it is foreseeable that the legislator would design a similar procedure for services.

4.2. Insolvency

Similar to non-performance, insolvency could affect both the consumer and the supplier, financially speaking but also in procedural terms. In fact, the Spanish Insolvency law recognizes the possibility of filing an insolvency procedure for a business but also for an individual person.[78]

Starting with the latter, if the supplier meets the conditions required to retain ownership over the goods, the insolvency of the customer should not affect its rights. The goods

[73] Carrasco Perera (n 38), pp. 214 and 262.
[74] Arts 517.2.4º, 572.2 and 701 LEC.
[75] Case C-415/11, *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, ECLI:EU:C:2013:164.
[76] Art 557.1.7º LEC.
[77] Art 250.1.11º LEC and Art 16.2.d Ley 28/1998, de 13 de julio, de Venta a Plazos de Bienes Muebles, BOE nr 167 of 14.7.1998.
[78] Art 1 Ley 22/2003, de 9 de julio, Concursal, BOE nr 164 of 10.7.2003 (LC).

would not form part of the assets of the insolvent and, hence, the supplier could separate its assets from those of the insolvent and recover them.[79] During an interim period, however, there is a risk that recovery is banned, depending on the interpretation of the Insolvency Law, which establishes that similar situations (such as retention of title clauses in the sale of goods) are covered by the interim non-recovery order.[80] A restrictive interpretation of that order should prevail as it entails a limitation to the right of ownership.[81]

Lastly, the scenario could be the opposite, with the business filing for insolvency. In this case, the service contract stands, in principle, as the Insolvency Law aims for the survival of the business.[82] However, the ultimate effect would depend on the outcome of the insolvency proceedings and the actual capacity of the business to continue its activities. The insolvency managers can always seek termination of the contract. If successful, termination would include any compensation due to the consumer, which would be charged to the aggregate assets of the business and paid prior to any other non-secured claim.[83]

5. Conclusion

Spain is one of the largest economies in the EU and so the decisions that the country adopts have a significant weight in the fulfilment of the objectives of the Union. Therefore, it is disappointing that the draft strategy plan for a circular economy (*España circular* 2030)[84] lacks ambitions and mostly implements mandatory EU standards. Despite it selecting construction and demolition as priority sectors,[85] the strategy basically restricts itself to waste (which is understandable, as it amounts to 40% of the total, yet insufficient).

The public sector seems to be unaware of the enormous possibilities that Spanish private law provides for the development of a top-notch circular economy. Property law offers flexible rules that restrict accession (one of the main impediments to the circular economy in real estate) as it does not operate against an agreed term in which the supplier retains ownership. The prevalence of agreement is a determinant for the circular economy to be sound from business and financial perspectives.

However, for an adequate amount of customer protection, consumer rules should be updated to meet the circular economy model of services, which is more sustainable than that of sales. This should probably be done at an EU level. In particular, a mandatory quality of services, under the requirement of the principle of conformity, should be put in place. Nevertheless, for the sake of sustainability, the new rules should ensure an

[79] Art 80.1 LC.
[80] Art 56 LC.
[81] An additional argument is that the Insolvency Law treats retention of title clauses (in the context of sale of goods) as a pledge (e.g. Art 90.1.4º LC), granting them a privilege over the assets – but not ownership.
[82] Art 61 LC.
[83] Art 61 LC.
[84] Ministerio de Agricultura y Pesca, Alimentación y Medio Ambiente and Ministerio de Economía, Industria y Competitividad (n 2).
[85] Ministerio de Agricultura y Pesca, Alimentación y Medio Ambiente and Ministerio de Economía, Industria y Competitividad (n 2), 38.

innovative hierarchy of remedies that privilege repair over substitution. The circular economy would thus contribute to the ongoing reflection on consumer law that is being fostered by other technological advances such as artificial intelligence.