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Purchasing A Property In Spain

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Abstract: The essay describes Conveyancing according to the Spanish civil law system, the process of transmission of ownership on a immovable asset and the role of the land registry. In doing so the author makes comparative comments on other legal systems, such as France, Germany, or England. The essay may operate as a source of information for further comparative research and help anyone interested in knowing the steps to take and the professionals who should be involved in ensuring a secure transaction with a Spanish house.

This paper introduces to the basics of the Spanish conveyance system in English language. It considers the role played by the private autonomy of the parties in the process of property transfer and the effects of invalidity of the contractual agreement. The essay also studies the role played by registration in reinforcing the property right against third parties. By these means the different actors involved in the process of property transfer are introduced. It should be a useful source of information for further comparative research and of interest to anyone contemplating a house purchase in Spain.

Whoever studies the systems of conveying land (that is immovable) from a comparative perspective must be astonished by the huge diversity displayed between the different legal systems, even those derived from a single legal tradition. The Spanish hybrid system is a perfect example of such variety. According to the Spanish system of “title and tradition”, indeed, property is considered to have been transferred when a valid contract¹ has been celebrated and the property has been delivered, whether movable or immovable. This represents an intermediate solution between the French consensual system and the German abstract delivery system. In principle, then, a valid agreement and some type of

¹ “Title” is used in its Roman law meaning (valid underlying contract or other juridical act, justifying the transfer) and not in its English meaning (ownership or property right).

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delivery appear at first sight as necessary and distinctive elements of the property transfer. However, as we will see, this is not always true. This is quite different from the modern English rule that land lies in grant – that is it is conveyed by deed – a system which also separates rigorously the agreement to transfer in the contract and the dispositive effect of the conveyance or transfer.

In terms of registration of immovables, Spain is a hybrid land registration system, which found inspiration in the Genève bill 1827 and the Belgium registration act 1857. By contrast to Germany, registration on the Land Register is not compulsory for full effect to be given to a transfer and therefore the lawful owner may be unregistered. Registration is primarily designed to give publicity to matters registered, that is it is declarative, rather than being constitutive as in the German system, and to a somewhat lesser extent, in England. However, registration is strongly encouraged by the effects deriving from the system. Indeed, we will explain how a purchaser who gives value and acts in good faith can, through registration, protect his acquisition as well as if registration were constitutive, regardless of the invalidity of the transferor's title.

Contract, delivery and transfer of property

Spain is firmly in the civilian tradition in that the legal principles of the transfer of immovables (that is land) are not widely dissimilar from those applying to movable property. There is no sharp division between land and chattels as there is in England. The basic methods of acquisition of property of any form, including rights *in rem*, through transfer, are “by law, by gift, by testate and intestate succession, by acquisitive prescription (*usucapio*) and by certain contracts through tradition”, the last word meaning delivery.

The common requirements for a contract operating as the basis of a transfer of property are consent, cause and object.² Little needs to be said about the first and last. A contract is made by the assent of the parties to definite terms, and in particular upon agreement upon the object of the transaction. In particular the object must be identified with certainty, and there is no possibility of transacting with items that are not precisely defined in the way that English equity sometimes allows. Mere consent is not sufficient alone to ensure the contract validity and in addition there must be established the parties' intent to be legally bound using the terminology which found its way into the PECL³ and the Unidroit

² Spanish Civil Code art.1261.

³ Principles of European Contract Law art-2:101.

Principles.⁴ These are essentials before a contract can have the effect of transferring the ownership of property.

Spanish property law is notable for the absence of a formality requirement for the contract which transfers property⁵. The contract establishing the obligation to transfer may be written or oral, since it is not required to conform to any particular formality. Of course, if the agreement is set down in writing; it will be easier to utilize and prove both its existence and the terms agreed if one of the parties refuses to perform and denies that there was an agreement. This is why, in practice, the sales of land and other valuable items are done in writing. But, according to the law and, with a few exceptions, writing is not a requirement for the contract to be considered valid. Where, exceptionally, formality is imposed, there is invariably a requirement of notarisation,⁶ but this is not the general rule as in many civilian states. The contrast with English law is very stark. In England writing is essential for any land contract and the tighter deed formality for the subsequent transfer of land. The Spanish laxity on this point suggests substantial risk that a purchaser (especially an English purchaser struggling with the Spanish language) might enter into a contract long before they are in a position to proceed with a purchase. Although in practice the parties will require a writing document, an oral agreement whose existence could be proved by witnesses is sufficient for the seller to enforce performance.

In Spain there is no equivalent of the French cooling off period⁷ so, if the buyer waives in buying the property but he fears for losing a good deal, it might be wise to enter first into a contract of sale involving a deposit of earnest money, known in Spanish as a *contrato de arras*. This transaction is again a sale, entailing obligations for both parties – the seller to transfer the property, the buyer to pay the price (art.1445 Spanish Civil Code) – but, unlike a firm sale, where, if one party fails to perform, the non-breaching party may either enforce performance or rescind the contract, under a sale involving earnest money either party is free to abandon his or her obligation. If the buyer abandons, he or she is released only by forfeiture of the earnest money deposited; if it is the seller who abandons, he or she is released by refunding the buyer with double the amount of the earnest money. The earnest

⁴ Unidroit Principles of International Commercial Contracts art.3.2.

⁵ Freedom of form is the general rule in Spanish contract law. Spanish Civil Code, art.1278 and 1279.

⁶ One example is a donation of immovable property: Spanish Civil Code art.633. Notarization of mortgages is a prerequisite of compulsory registration: Spanish Mortgage Act art.145.

⁷ According to art. L.271–1 of the French Code of Construction and Housing, the buyer is entitled to a seven day period, following the signing of the sale agreement to change his mind and give notice of withdrawal

money, termed *arras*, is usually 5 to 10% of the original price of the property; if the sale is completed, *arras* count towards the total agreed price. Nowadays, almost all land sales organised by real estate agents -whose only task is to put both parties into contact and to write the contract- are done this way.

Although a contract in Spain is sufficiently similar to an English contract for the same word to be used for both, the differences concealed by this straightforward translation must never be forgotten. In English law the existence of a contract is controlled by the presence or absence of consideration, so sale contract is quite different from a gift, the latter generally requiring the formality of a deed and being unenforceable while it remains imperfect, that is before legal title is vested in the intended donee. Spanish law identifies a binding contract through the presence or absence of a valid *causa*, the legal ground justifying fulfilled. A sale for value is certainly an adequate cause, so sale contracts work much the same in the two systems, but a gift can also be a valid cause.

If the requirement of cause is satisfied, the contract will transfer ownership, whether in pursuance of a sale or a gift or some other transaction. But causal systems, such as the one in Spain, link together the transfer of ownership and contract validity.

In Spain, the transfer of possession is necessary for the ownership to be transferred under a valid contract⁸. However, a physical delivery is not required, since movable and immovable property can be delivered symbolically by handing over of the keys of the property (symbolic delivery) or by the execution of a declaratory deed (instrumental delivery). Sometimes agreement on its own is sufficient, for example, if the buyer was already living in the property as a tenant (*traditio brevi manu*)⁹ or if the buyer and seller agree that the seller will continue to live in the property as a tenant (*constitutum possessorium*).¹⁰ These few exceptions apart, the transfer of land (by contrast with the transfer of movables where Spanish law has moved, in practice, to the consensual system at least between the parties¹¹) requires an outward signal to third parties that possession has

⁸ Spanish Civil Code arts. 609 and 1095 state it.

⁹ Spanish Civil Code art.1463 states this expressly regarding movable assets.

¹⁰ Scholars and case law have admitted this possibility on the basis of analogy with Spanish Civil Code art.1463. *Traditio brevi manu* and *constitutum possessorium* are also accepted by some scholars regarding the transfer of immovable property: C. Lasarte, *Propiedad y derechos reales de goce*, vol. IV, (Madrid: Marcial Pons, 10^aed., 2010 p.31. Nevertheless, it would be unwise not to attest the private contract of sale as a notarial deed in order to avoid possible actions by the seller's creditors.

¹¹ Actual delivery of the goods is necessary for the buyer's title to be good against the seller's creditor: STS. 28/10/2003 (RJ 2003/ 7771), 25/2/2004 (RJ 2004/854), 1/12/2004 (RJ 2004/7904), 28/3/2006 (RJ 2006/1864).

shifted or the fulfilment of an additional formality (notarial deed). The normal procedure followed by the parties to a transaction involving the transfer of immovable property is to sign a private contract (a firm sale or a *contrato de arras*) and to postpone the fulfilment of delivery until the moment of final payment. The *traditio* requirement takes place in front of a notary, through the execution of a notarial deed and sometimes -in the case of urban property-, simultaneously, through the handing over of the keys of the property. This is very different from the German system of abstraction by which the transfer of property by notarised documents is separated from the effect of the earlier contract, and also from English law where a contract gives a right to the land, but title only passes under a deed; the medieval concept of a transfer of seisin to make a transfer of land fully effective was dropped when land was made to lie in grant.

Delivery is a requirement for transfer of land, but the transfer of property may be delayed after possession of land has been delivered to the purchaser. Retention of title clauses may be included in the (public or private) document attesting the existence of the contract; the Civil Code states that “transfer may be accomplished by the execution of a notarial deed, so long as the parties have not expressly excluded this effect”.¹² Transfer of title is generally postponed as a guarantee towards full payment. So long as the retention of title clause has been registered in the Land Register, the seller will be able to enforce it before third parties, either the buyer’s creditors or subsequent transferees. Spanish scholars hold different theories regarding the nature of retention of title clauses. The predominant view is that the property transfer occurs only after full payment. In the meanwhile, the buyer can enjoy the property as an owner but cannot transfer it. If he does, the seller will be entitled to claim the asset through the *reivindicatio* (if the defendant is possessing the asset and alleges to be the owner) or the so-called “third party ownership action” (if the purpose is to oppose to the seizure in executive proceedings). The defendant will only be protected if fulfilling the requirements to become a bona fide purchaser.¹³ Other views which have some support from a case law which is not consistent are, secondly, that the property transfer occurs at the moment the contract has been celebrated and the property delivered but if the buyer does not fulfil his obligation, the seller can recover the property of the immovable from whoever possesses it, or, thirdly, that the title retention clause plays the role of a guarantee, similar to a mortgage. This third

¹² Spanish Civil Code art. 1462

¹³ Spanish Mortgage Act art.34 requires acquisition in good faith, for value, from a person named in the Land Register as entitled to transfer ownership; and registration of the right acquired.

view corresponds to the unpaid vendor's lien, the way that this situation would normally be handled were the land to be in England.

The Spanish Civil Code recognizes the principle of the private autonomy of contracting parties, who may include such "agreements, clauses and conditions they deem convenient, so long as not in contradiction with statutory provisions (*mandatory rules*), morality or public order".¹⁴ This permits a title retention clause which can be enforced by the seller against the buyer,¹⁵ the buyer's creditors¹⁶ and subsequent transferees¹⁷ until full payment. Nevertheless, the Spanish Supreme Court does not always recognize the title retention clause when the action comes from the seller's creditors. In most cases, the Court has allowed the buyer to oppose to the seller's seizure in individual executive proceedings, by means of the "third party ownership action". Although not fully an owner, the buyer possessed the asset as an owner and therefore, so long as he continued paying the instalments, his possession had to be protected.¹⁸ Actually, the title retention clause is considered a seller's guarantee towards full payment, whose effects should be limited even if the price is not paid. This is well illustrated by a case which considered the position of a co-owner who sold his interest in the property, with a title retention clause; this former co-owner was denied the possibility to exercising a pre-emption over the interest of the other co-owner's interest. The Supreme Court considered that, for the purpose of the co-owners preferential acquisition right, the seller could not be considered a co-owner anymore. The title retention clause only played the role of a guarantee towards full payment, preventing the seizure of the asset by the buyer's creditors.¹⁹

If the parties involved in the transaction come to an agreement to sell and buy the property at a specified price, the agreement is valid and binding on the parties. However, if the contract does not come along with the delivery of the

14 Spanish Civil Code art.1255.

15 Spanish Supreme Court, 19/10/1982 (RJ 1982/5563): the seller who had reserved title was the owner authorized to sign the notarial deed necessary to enter into the condominium system. The consent of the buyer was not required.

16 The seller is entitled to oppose to the seizure in individual executive proceedings, by means of the "third party ownership action" but the Spanish Mortgage Act does not treat him as an owner – *separatio ex iure domini* – in insolvency proceedings. Art. 90.1.4^a only recognizes the seller as having a privileged claim.

17 Spanish Supreme Court, 14/10/2003 (RJ 2003/6498): the title retention clause was not registered in the Land Register, but the title of the buyer depended upon the document containing the retention, and a subsequent purchaser was obliged to call for production of this document.

18 19/05/1989 (RJ 1989/3778), 16/07/1993 (RJ 1993/6450), 2/07/1994 (RJ 1994/6423), 23/02/1995 (RJ 1995/1701), 21/03/2003 (RJ 2003/2761).

19 Spanish Supreme Court 11/03/1991 (RJ 1991/2210).

property, the handing of the keys or the execution of the notarial deed, ownership will not have been passed on. In such a case, the buyer may apply to a court to enforce performance, that is, to enforce the seller to deliver the property; or, if not interested in the contract anymore, the buyer may also apply to the court to rescind the contract by reason of breach, and, in either case, seek damages. If the buyer wants to go on with the purchase and the seller is reluctant (for example because the land prices have increased and he could try to do a future better sale), the buyer might enforce them to execute a notarial deed, which will imply the subsequent transfer of land²⁰. Obviously this requires the buyer be willing to pay the agreed price²¹.

Contractual invalidity and restitution

Contractual invalidity interferes with the process of transfer of ownership, either, at the origin or once accomplished. As in English law, contracts may be either void or voidable.²² A contract can be considered to be void (and therefore an absolute nullity) on a number of grounds:

- Infringement of mandatory rules, morality or public order (that is, by failing to respect the limits of private autonomy²³);
- Lack of the legal requirements of transactions (consent, cause and object²⁴);
- An unlawful cause or object; or
- Omission of an essential formal requirement (eg. notarization of a gift of immovable property).

The invalidity can be invoked at any time in the future without any time limit and without any personal limitation, and this removes the apparent legal effect from the transaction.

20 Spanish Civil Code Art.1279

21 Spanish Civil Code art.1124.

22 We won't refer here to rescission. Actually, although it is one of the cases where the contract can be declared judicially ineffective, because causing a detriment to one party or to a third person, the contract is perfectly valid. Rescission may be claimed only on the specific grounds related in article 1291 of the Spanish Civil Code and provided damages have been sustained by the aggrieved party. For example, sales concluded by guardians when the price is less than three-fourths of the real value of the asset, or contracts concluded in the name of the absentees under the same requirement (lesion of one-fourth).

23 Spanish Civil Code art.1255.

24 Spanish Civil Code art. 1261.

On the other hand, contracts are considered to be voidable where the defect relates to the consent of one of the parties to the contract (perhaps lack of capacity, mistake, fraud, threat or duress). A time limit of 4 years operates within which an avoidable contract must be invalidated, either by action taken for avoidance or by way of defence invoked against a party seeking to enforce the contract. Whenever a contract is invalid (whether void or voidable), invalidity obliges the parties to return what they received under the contract, in accordance with the rules stated in articles 1301 to 1307 of the Spanish Civil Code.²⁵

If the contract is void (absolute nullity), property cannot pass to the transferee. Therefore, if the possession of the immovable property had been delivered, the transferor may claim its restitution from the counter-party so long as the transferee did not acquire it through acquisitive prescription (*usucapio*)²⁶ and the transferee can withhold performance so long as they do not get back what they delivered under the contract. If the immovable is not in their possession anymore, the defendant should restore the value of the asset at the moment they lost possession, along with the monetary interests.

Nevertheless, the mutual restitution obligation encounters an exception when the contract is void because the cause was unlawful or against morality. The Spanish Civil Code punishes the party or parties responsible on the ground of nullity with the impossibility to recover what they had already delivered under the contract, independently of the counter-party's state of performance (arts.1305 and 1306 Spanish Civil Code). Additionally, the party who relied on the validity of the contract can claim tort for the damages caused by the counter-party.

Alternatively to the personal mutual obligation of restitution, the owner can address a *reivindicatio* or claim *in rem* against their counter-party or to a subsequent transferee, who will have to return possession unless protected by the rules of a *non domino* acquisition (that is, unless the subsequent transferee acquired it in good faith, for value, from a person named in the Land Register as entitled to transfer ownership; and registered the acquired right: art.34 Spanish Mortgage Act). According to art.33 of the Spanish Mortgage Act, registration does not render valid an act that under the law is invalid. This implies that a registered void title cannot transfer ownership to the buyer. However, even if the registered void title of the purchaser is removed, a bona fides purchaser will receive priority in front of the person claiming to invalidate the title. *Reivindicatio* requires the asset to

²⁵ Generally, a good source regarding general Spanish transfer rules in English language will also be I. González Pacanowska, & C Díez Soto, "Contract and Transfer of Ownership", in A. Vaquer, *European Private Law Beyond the Common Frame of Reference*, (Groningen: Europa Law Publishing, 2008), pp.187–194.

²⁶ Spanish Supreme Court 19/11/2012 (RJ 2013/1246).

still exist, proof of ownership and the defendant to be in possession. The owner will be successful so long as the defendant does not fulfil the requirements of art.34 of the Spanish Mortgage Act or seek protection in the rules on acquisitive prescription (*usucapio*).²⁷ Then the central difference with English law, which is strictly based on the *nemo dat* principle since the middle of the nineteenth century, is the possibility in Spanish law of a bona fide acquisition “derived” from a void title. The reason behind is the protection of the property right itself rather than the contract. The purchaser becomes owner by disposition of law and not from a contract of sale.

If the contract is voidable, property is transferred to the transferee. So long as the contract has not been invalidated by the party who suffered the defect of consent (or his legal representative) within the time limitation of 4 years, the contract is valid. The contract can also be confirmed within this time limitation period, expressly or impliedly, by the party entitled to avoid it, excluding the possibility of avoidance (arts.1309–1313 Spanish Civil Code). However, if the contract is invalidated, the property will be considered to have never passed to the transferee: the plaintiff may plead for restitution as a consequence of the declaration of nullity²⁸ or may decide to use the rules on protection of property. Both remedies are available.²⁹

Avoidance of a voidable contract has retroactive effects at the moment the contract was celebrated. The contract will be treated as never having been made and subsequent transfers that occurred when the contract was still valid will also be affected by the declaration of invalidity. Therefore, the subsequent transferee may be required to restore possession, unless protected by the rules of a *non domino* acquisition (art.34 Spanish Mortgage Act) or by acquisitive prescription (*usucapio*).³⁰

27 30 years in possession: Spanish Civil Code art.1959.

28 Nevertheless, if the ground for avoidance was the incapacity of one party, the minor or the party lacking capacity to enter into the contract is only liable for his/her actual enrichment: Spanish Civil Code art. 1304.

29 Regarding the relationship between the rules on concurrent restitution in case of avoidance and the rules on protection of property: I González Pacanowska & C. Díez Soto, “Contract and Transfer of Ownership”, in A. Vaquer, *European Private Law Beyond the Common Frame of Reference*, (Groningen: Europa Law Publishing, 2008) pp.187–194.

30 10/20 years in possession and good faith (arts.1957–1958) or 30 years in possession (Spanish Civil Code art.1959).

The registration system

Spain has a hybrid registration system organized on the basis of plots of land (*real folium system*). What enters in the land registers are not the documents (registration of deeds system) but rights or interests (registration of titles system). The new owner submits the documents (only public documents)³¹ that are thoroughly examined by the land registrars and then returned to them. Only property rights and rights *in rem*, not in contradiction with some other right previously recorded can be registered, regardless of who is the actual owner. If the content of the Land Register, in conflict with the intended new right, is wrong, the applicant has to proof the mistake and require the correction of the Land Register's entry in order to be able, successively, to register the new right.

Spanish law does not make registration of rights with the Land Register compulsory. The function of the Land Register is to provide information to interested parties and the community at large on ownership rights and other rights *in rem*, in previously registered immovable properties. Registration does not have constitutive effect, with the exception of mortgages and other less frequent rights. Ownership can be acquired and rights *in rem* can emerge and exist to full effect outside the Land Register and, sometimes, in contradiction with it. The person named in a Register entry as the owner of a property, may no longer be owner, having transferred ownership of the property by a valid contract and delivery. This follows from the fact that the purchaser is not required to register the purchase with the Land Register, an omission which would not prevent the person who did not register his ownership right from being the actual owner.

The act giving rise to the registered right may also be void, for instance, because it contravenes a statutory prohibition. A void act should not attain registration. But, if it does, the registration does not render valid an act that, under the law, is invalid.³² A court could declare the sale void, and this would affect the registered ownership.

However, even though registration is not necessary for property to be transferred, it does protect the purchase against third parties. Through registration, the purchaser is protected against the transferor and against third parties because the Land Register protects those who trusted its content. Indeed, the law applies a rebuttable presumption (*iuris tantum*) of accuracy of the Land Register in favour of the presently registered owner.³³ And that presumption becomes non-rebutta-

31 Art.3 Spanish Mortgage Acr.

32 Article 33 Spanish Mortgage Act.

33 Article 38 Spanish Mortgage Act.

ble (*iuris e de iure*) in favour of a purchaser satisfying the requirements of a good faith acquisition under article 34 of the Spanish Mortgage Act.³⁴ This means that, if the sale is done by the registered owner and the buyer acts in good faith (because he truly believes the registered owner is entitled to sell) and, in turn, the buyer registers the deed of sale with the Land Register, then their acquisition is protected. The system covers the acquisition of registered rights from who had no right to transfer them, because the right had previously been transferred to who did not register the acquisition or because the act giving rise to the transferor's right was void.³⁵ If the buyer fails any of the requirements stated by article 34 of the Spanish Mortgage Act, – for instance, they don't register the sale– they nonetheless enjoy the benefit of the presumption of accuracy of the Land Register. It is anyone claiming that the Land Register is inaccurate who must prove 1) that the Register entry or the title giving rise to it is void, false or mistaken, or 2) that there exists a non registered title that modifies the facts as registered, or 3) that the registered right is extinct.

Therefore, even though it is not compulsory³⁶, registration is strongly encouraged by the effects deriving from the system, either the positive effects of registration and what is more important, the dangerous effect of the lack of registration. From a positive point of view, registration reinforces the real right against third parties. From a negative point of view, the strong assumptions derived from the Law and the protection given to those who acquire rights from who appears in the registry as owner, put in serious risk those new owners who do not register their title. In Spain, any transaction involving land should start by applying to the Land Register for an Information Extract, which will disclose the registered owner and any charges or encumbrances on the property. This document can be asked for through the Land Register's website for 9 euros. The website includes an Interactive Information Service, in English, created to help international users. By filling in an Information Request form, an ordinary Information Extract will be issued and then passed on to a team of translators who will translate it into English for 30 euros.

The transaction should end with the execution of a notarial deed. With a few exceptions, notarial deeds are not a requirement for the contract to be valid but they are a requirement for subsequent registration in the Land Register. Therefore, if the buyer wants to take advantage of the Land Register's protection, they should compel the seller to engage a civil-law notary to attest the private contract

³⁴ Those requirements are acquisition in good faith, for value, from a person named in the Land Register as entitled to transfer ownership; and registration of the acquired right.

³⁵ Spanish Supreme Court 5/3/2007 (RJ 2007/723)

³⁶ Art.32 Spanish Mortgage Act.

of sale as a notarial deed. The execution of the deed will transfer ownership over the land and entitle the new owner to register their property right. The complement of 'title insurance' does not exist in legal practice because it is unnecessary: anyone concluding a contract for value by trusting what has been published in the register is fully protected.

The purchaser is the person required to apply for registration but in order to prevent gaps between the moment of the execution of the notarial deed, which frequently coincides with the moment of the property transfer, and the time of publication in the Register, the notary immediately informs the Land Register through an electronic or a fax connection. This prevents problems such as the registered owner selling the same property twice before the first buyer has had time to register it. In fact, under Spanish law, when the person who appears as the titleholder in the Register sells the property twice, the buyer registering first will be the owner, provided he acquired in good faith, even though he was not the first one the property was transferred to. If neither of the buyers registered their rights, the first one to possess the property in good faith will be the owner (art.1473 Spanish Civil Code).

The possibility to fulfil the delivery requirement through the execution of a notarial deed and the fact that the public document is normally registered in the Land Register immediately afterwards has led to the misunderstanding that, in Spain, registration could be a substitute for the title and tradition system. It is necessary to bear in mind the distinction between the role played by the notarial deed, as a form of *traditio* necessary to complete the property transfer, and the role played by registration – once the property transfer has taken place-, as a formality necessary for the full effectiveness of the contract.

Professionals engaged in the process of property transfer

From the point of view of buyer and seller, notaries are the most obvious professionals engaged in the process of the sale and purchase of land. The notary, who is chosen by the buyer, controls the legality of the documents presented to them in order to authenticate the content of the deed of sale. They set out the identities of the parties, a description of the property, the price, the terms of payment, any charges or encumbrances on the house, the date of handover of the property, and any penalty clauses that would apply in the event of breach. The parties could in fact go straight to the notary, without first signing a private contract, but this would be unwise if there was a considerable lapse of time between the agreement

and the parties' appointment with the notary, or if the buyer needed to apply for a mortgage. It is in the buyer's interest to make sure that, if the seller has a change of heart, the existence of the contract will be proved, and this is far easier to do if there is a written document to rely on, whether a firm sale or a "*contrato de arras*".

Once the notarial deed has been executed by the notary, it is submitted to the land registrar, whose authority is established by law, depending on the area the property is located in. The registrar verifies the formal validity of the documents, checks that the contract complies with the existing legislation and that there is no conflict with other registered entries. Notaries and registrars are public servants appointed by the government after a state examination but the notary attends to the requirements of the parties, according to the law, whereas the registrar looks after the interests of third parties and the community at large. Their fees are normally paid by the buyer and amount to about 2 to 3% of the total value of the sale. The transfer of immovable property also involves other costs, such as the Transfer Tax (*Impuesto sobre Transmisiones Patrimoniales*), at a rate of 6% of the value of a resale property or the VAT (*Impuesto sobre el Valor Añadido*), currently calculated at 10%, plus a Stamp Duty (*Impuesto sobre Actos Jurídicos Documentados*) at 1%, in the case of a new build property. Either of these taxes are paid by the buyer, in contrast to the Loan Capital Gain Tax (*Impuesto sobre el Incremento de Valor de los Terrenos de Naturaleza Urbana*), a tax on the difference between the value of the cadastral value when the property was purchased and when it is sold, which is normally paid by the seller. These high rates normally discourage people from moving before every 10 years. In contrast to the Land Register, which provides information on ownership rights, in Spain there is another register, the so-called Cadaster (*Catastro*), which provides information both on the physical description of the properties (surface area, location and boundaries, year of construction, and so forth) and on its economic specifics (value of the underlying land, value of the building and cadastral value). The cadastral value is composed of the value of the land and the value of the building, and is used in Spain for the purposes of tax matters.

The owner of the property is the person bound to register it with the Cadastre but today the Land Register is coordinated with the Cadaster and when property is registered, the land registrar reports the change of ownership.

Together with the notary, the registrar and the Cadaster, other professionals may be engaged to complete the purchase. Of course, if necessary, estate agents will be pleased to help seller and buyer to get in touch, in exchange to a considerable percentage (5 to 10%) of the total sale price. And if the property is under a mortgage that, under the transaction, is now paid off or passed on to the new owner, or if it is clear of charges but the buyer is using a new mortgage to buy it,

then it is especially common for the parties to retain a firm known as a *gestoría*. This firm handles the steps required to complete the sale and – if applicable to pay off any existing mortgage or create a new one; such steps include paying taxes and filing documents with the Land Register. If the buyer is using a mortgage, the *gestoría* firm attached to the mortgage lender handles the loan application. The buyer is generally asked for a down payment to cover the expenses of the sale and the mortgage loan and the *gestoría*'s own fees. Any surplus is returned to the client at the end of the process.

Spanish law contains no requirement of physical inspection of the property prior to sale. But if the buyer wishes to use a mortgage, the mortgage lender retains a surveyor to value the property, at the buyer's expense. This surveyed value, which is as a rule higher than the cadastral value but slightly lower than market value, is the bank's reference figure for the purposes of considering the buyer's loan application.

Conclusions

In conformance with Roman law tradition, Spain belongs to those systems which require, along with *consensus*, the *traditio* element to transfer property. Nevertheless, different forms of *traditio* are accepted (symbolic *traditio*, instrumental *traditio*, *traditio brevi manu*, *constitutum possessorium*) and the parties' private autonomy may play a decisive role regarding the exact moment when property is considered to have been transferred.

The invalidity of the contractual agreement interferes in the process of ownership transfer, in different ways, depending on the degree of invalidity. Nevertheless, the contract's effects may be maintained as a punishment to the party responsible of the invalidity or to protect the bona fides purchaser who fulfils the requirements established in art.34 of the Spanish Mortgage Act, leaving aside the case of acquisitive prescription.

Registration is not compulsory. Ownership can be acquired and rights *in rem* can emerge and exist to full effect outside the Land Register and sometimes, in contradiction with it. But the lack of registration undermines the efficacy of the contract with respect to third parties, placing in serious risk those new owners who do not register their title. The efficacy provided by registration relies, on one hand, on the participation of highly trained professionals in the registration system, who control the basic legality and form of the documents presented to them and, on the other hand, on the presumption of accuracy of the Land Register.