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The Rule of Legal Ignorance in Spanish Law: Relevance, Meaning, and Scope*

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Abstract: The rule ignorantia juris non excusat constitutes a historical principle in Spanish law as a key pillar of the collective organization of the legal system. The rule embodies the assumption that the effectiveness of the laws cannot rely on subjective elements, such as knowledge or ignorance, interest or carelessness, but it is based on an objective and social component of the legal system aimed to ensure that the enforcement of the laws is general and unconditional. Today, it is still inspiring the legal system and expressly enshrined in Article 6.1 CC, but their meaning must be duly contextualized in the current exuberance of legislation and regulations. Last decades, continuous efforts have been made to enhance the publicity of laws, improve comprehensibility, and implement technological solutions aimed to ensure accessibility of legislation, case law, and public authorities' decisions. This article traces the origin and the evolution of the principle in Spanish law and the current expressions and applications of legal ignorance in private law. The analysis of the state of the doctrinal debate and the latest case law invites two reflections. First, the excessive use of legal ignorance as an invalidating mistake as a tool to alleviate contractual unfairness, inadequate institutional practices, or commercial abuse blurs its contours, debilitates the principle of contract preservation, deteriorates legal certainty, and discourages transactions. Second, the regulation of increasing information duties as a strategy to attenuate the impact of legal ignorance is making pre- and contractual processes complex, overinformed, and formalistic, with the risk of inviting purely formal compliance.

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Résumé: La règle *ignorantia juris non excusat* constitute un principe historique en droit espagnol en tant que pilier essentiel de l'organisation collective du système juridique. La règle reflète l'assomption selon laquelle l'efficacité des lois ne peut s'appuyer sur des éléments subjectifs tels que la connaissance ou l'ignorance, l'attention ou la négligence, mais qu'elle est basée sur un élément objectif et social du système juridique dont le but est de s'assurer que l'application des lois est générale et inconditionnelle. Aujourd'hui, elle inspire encore le système juridique et est expressément stipulée à l'article 6.1 du Code civil espagnol, mais sa signification doit être dûment contextualisée dans le foisonnement actuel de législations et réglementations. Des efforts incessants ont été faits ces dernières décennies pour renforcer la publicité des lois, améliorer leur compréhension et appliquer des solutions technologiques visant à assurer l'accessibilité des lois, de la jurisprudence et des décisions des autorités publiques. Cet article retrace l'origine et l'évolution du principe en droit espagnol ainsi que les expressions actuelles et les applications de l'ignorance de la loi en droit privé. L'analyse de l'état du débat doctrinal et de la jurisprudence récente invite à deux réflexions. D'abord, l'usage excessif de l'ignorance de la loi comme erreur invalidante permettant d'alléger le caractère abusif de contrats, de pratiques institutionnelles inadéquates ou d'abus commerciaux brouille ses contours, affaiblit le principe de la protection des contrats, déteriore la sécurité juridique et décourage les transactions. Ensuite, la réglementation d'obligations d'informations croissantes comme stratégie d'atténuation de l'impact de l'ignorance de la loi rend le processus (pré-) contractuel complexe, surinformé et formaliste, risquant d'encourager une conformité purement formelle.

Zusammenfassung: Der Grundsatz ignorantia juris non excusat ist ein traditionelles Prinzip des spanischenRechts und stellt eine zentrale Säule des Rechtssystems insgesamt dar. Der Grundsatzbasiert auf der Annahme, dass die Bindungswirkung der Gesetze nicht von subjektivenFaktoren wie Kenntnis oder Unkenntnis, Interesse oder Gleichgültigkeit abhängen kann, sondern vielmehr auf einer objektiven und sozialen Komponente des Rechtssystems begründet ist, die darauf abzielt, die Durchsetzung der Gesetze allgemein und unbedingt sicherzustellen. Der Grundsatz beeinflusst das Rechtssystem noch heute und er ist ausdrücklich niedergelegt in Artikel 6.1 CC, aber seine Bedeutung muss im Kontext der gegenwärtigen Flut von Gesetzgebung und Regulierung verstanden werden. In den letzten Jahrzehnten wurden andauernde Bemühungen unternommen, um die Publizität von Gesetzen und ihre Verständlichkeit zu verbessern und um mit technischen Mjtteln die Zugänglichkeit von Gesetzen sowie von Entscheidungen von Gerichten undBehörden zu sichern. Dieser Artikel beschreibt die Ursprünge und die Entwicklung dieses Grundsatzes im spanischen Recht sowie die heutigen Formen undAnwendungsfälle der Rechtsunkenntnis im Privatrecht. Die Untersuchung des Stands der rechtswissenschaftlichen Diskussion und der jüngeren Rechtsprechung erlaubt zweiSchlussfolgerungen: Zum ersten führt die übermäßige Heranziehung der Rechtsunkenntnis im Sinne eines zur Unwirksamkeit führenden Willensmangels mit dem Ziel, ungerechten Vertragsgestaltungen, unangemessenen Handeln vonInstitutionen oder unlauteren Geschäftspraktiken zu begegnen, zu einer Konturenlosigkeit dieses Grundsatzes, zu einer Schwächung des Grundsatzes derVertragserhaltung sowie zu einem Verlust an Rechtssicherheit und hält vonVertragsschlüssen ab. Zum zweiten führt die Schaffung strengererInformationspflichten als Mittel zur Abschwächung der Folgen einer Rechtsunkenntnis dazu, dass vorvertragliche und vertragliche Verfahren komplex, überinformiert und formalistisch verlaufen mit dem Risiko einer lediglich formalen Erfüllung dieser Pflichten.

1. The Principle of Legal Ignorance in the Context of the Spanish Legal System

1. Spanish Civil Code of 1889 (hereinafter, CC),[1] as currently drafted, contains a provision (Art. 6.1) that explicitly enshrines the principle that 'ignorance of law does not excuse from its compliance'.[2] The rule, inspired by the Roman-law *ignorantia iuris nocet*, was incorporated in Spanish legal system since its express acknowledgment in *Las Partidas* of 1265 *(Las Siete Partidas).*[3] And, subsequently, also proclaimed in the *Novísima Recopilación* of 1805,[4] that, interestingly, did however eliminate several exceptions to the rule provided for by *Las Partidas.* The rule, as initially drafted in *Las Partidas*, exempted certain groups – namely, minors, farmers shepherds, and women living in the countryside out of villages, and working in mountains and uninhabited areas; and knights defended the land – from knowing the laws in certain circumstances.[5] It was deemed unreasonable to expect legal awareness and knowledge of laws from people living far from urban centres and engaged in demanding jobs. Interestingly, however, such exception was not intended to those groups from the criminal consequences of their acts in violation of laws, even if they were ignored.[6] With no exceptions, however, the rule was received in the successive projects of the Spanish Civil Codes (1851 Bill, 1882–1888 Bill) and, finally, in the current CC – initially in Article 2, subsequently, in the current Article 6.1 CC.[7]

2. The rule, as expressly contemplated today in Article 6.1 CC, is interpreted as a declaration of the effectiveness and the enforcement of laws. It embodies neither a

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1 Official publication of the consolidation version, as currently in force, in the State Official Bulletin (BOE), http://www.boe.es/buscar/pdf/1889/BOE-A-1889-4763-consolidado.pdf. English translation, http://www.wipo.int/wipolex/es/text.jsp?file_id=221320.

2 Article 6.1 CC: *La ignorancia de las leyes no excusa de su cumplimiento* (...).

3 *Las Siete Partidas* are a body of rules drafted by the Crown of Castile under the reign of Alfonso X, a.k.a. 'The Wise', with the aim of achieving legal uniformity for the kingdom. It is deemed one of the most important contributions to the History of Law and a 'humanist encyclopaedia' as it tackled philosophical, moral, and theological issues with a Greco-Latin approach. It is written in Castilian Spanish and constitutes an instrument of ordinary law based on Justinian Roman Law, Canonical Law and Feudal Law, www.boe.es/biblioteca_juridica/publicacion.php?id=PUB-LH-2011-60&tipo=L&modo=2.

4 The *Novísima Recopilación* of the Laws of Spain is a compilation of 4,044 laws in 340 chapters and 12 books published in 1805. The facsimile, www.boe.es/publicaciones/biblioteca_juridica/publicacion.php?id=PUB-LH-1993-63_NOV%C3%8DSIMA_RECOPILACI%C3%93N_DE_LAS_LEYES_DE_ESPA%C3%91A&tipo=L&modo=1.

5 Minors, women, farm workers, or knights defending the land were exempted. *Las Partidas* (P. 1,1,21; P. 3,14,6).

6 J. Costa, *El problema de la ignorancia del Derecho y sus relaciones con el status individual, el referéndum y la costumbre* (Barcelona-Buenos Aires: Sucesores de Manuel Soler 1910), p 14.

7 The evolution of the rule and its treatment in Spanish legal system is explained by L. Hierro, 'El modesto principio de que la ignorancia del derecho no excusa de su cumplimiento', 29. *RJUAM (Revista Jurídica Universidad Autónoma de Madrid)* 2014, p 17.

legal obligation to know in its entirety all legal provisions, nor a penalty to punish those who ignore them. In short, inexcusability of ignorance does not mean a duty to know.[8] In fact, as further explained below, knowledge is presumed but not required, as an inevitable instrument to ensure the sustainability of an effective legal system. Then, the rule, as consecrated in Article 6.1 CC, does simply reaffirm that laws must be obeyed. Ignorance cannot be an excuse or an obstacle for the laws to be complied with.[9]

3. From that perspective, the rule *ignorantia juris non excusat*[10] represents a key pillar of the collective organization of the legal system.[11] Should the enforcement of the law depend upon the individuals' behaviour, the legal system becomes weak and ineffective. Therefore, it is argued that the effectiveness of the laws cannot rely on subjective elements, such as knowledge or ignorance, interest or carelessness, but it is based on an objective and social component of the legal system aimed to ensure that the enforcement of the laws is general and unconditional.[12]

2. The Scope of the Rule in Spanish Law and Its Legal Consequences

4. Spanish legal literature and case law have interpreted this classical rule as a presumption *iuri et de iure* and delimited its scope under the following criteria.

2.1. Presumption iuri et de iure

5. Scholars and Spanish Supreme Court – *Tribunal Supremo* (hereinafter, TS) – have widely maintained that the rule *ignorantia juris non excusat* operates under a presumption of knowledge *iure et de iure.* Thus, the TS in its judgment of 18th of March of 1928 held that it is of general interest to presume *iure et de iure* that all laws, upon their entering into force, are known by everyone and must be obeyed. Hence, a proof of actual ignorance would not suffice to depart from the rule and excuse from compliance.

6. Despite the majority opinion on the *iure-et-de-iure* character of the presumption, some scholars have questioned its reasonability and proposed an *iuris tantum*

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8 A. Cabanillas, 'Artículo 6', in Albaladejo & Díez Alabart (dirs), *Comentarios al Código Civil y compilaciones forales, Tomo I,* Vol. 1.º (Madrid: EDERSA, 2.ª edn 1992).

9 A. Gullón Ballesteros, 'Artículo 6', in *Comentarios al Código Civil* (Madrid: Ministerio de Justicia 1991), p 33.

10 As per the Legal Spanish Dictionary, Royal Academy of Language (*Real Academia de la Lengua*), the maxima adopts different variants to express the same rule https://dej.rae.es/lema/iuris-ignorantiam-non-prodesse '*iuris ignorantiam non prodesse* (Paulo: *Digesto* 22, 6, 9, 3), *ignorantia iuris licet a dolo excusat, ignorantia iuris neminem excusat, ignorantia iuris nocet, ignorantia iuris non excusat, ignorantia legis non excusat*'.

11 A.E. Pérez Luño, *La seguridad jurídica* (Barcelona: Ariel 1991).

12 G. García Valdecasas, *Parte general del Derecho civil español* (Madrid: Civitas 1983), p 73. M. Albaladejo, *Derecho civil, I, Introducción y parte general* (Madrid: Civitas, 16.ª edn 2004), p 27.

approach.[13] If a presumption is *iure et de iure*, no evidence is permitted to reverse or counter it; whereas in an *iuris tantum* presumption, evidences to challenge the presumption are admissible and, therefore, the presumption is only upheld, unless otherwise proven. Should the rule of *ignorantia juris non excusat* operate as an *iure-et-de-iure* presumption, the principle cannot be reverse and, consequently, ignorance cannot ever be excused. Those who sustain an *iuris tantum* approach advocate for the possibility of providing evidence and considering circumstances to prove ignorance and excuse compliance. These views questioning the principle of inexcusability did essentially allege, on the one hand, practical reasons such as the extreme complexity of some legislations, the abundance of laws and the increasing pace of enactment of new laws, and on the other hand, social reasons based on the risk of discrimination of disadvantaged groups in society and the increase of dominant control of community elites.

7. Although some solutions, as further detailed below, are proposed to alleviate the most radical effects of inexcusability, scholars and courts reject the viability of an ignorance proof as a valid excuse. The TS in its judgment of 16th of May of 1907[14] held that nobody can validly allege ignorance of laws. In order to counter the allegations of unfairness, it is reminded that the rule of inexcusability is, on the contrary, a basic rule of justice; otherwise, the effectiveness of the legal system would be subjected to the discretion of each individual.

8. Likewise, the inexcusability of legal ignorance is defended on the following grounds. First, it is widely shared by and, expressly or impliedly, acknowledged by most modern Civil codes. Second, it can be affirmed that the inexcusability is founded in the Spanish Constitution of 1978 whose Article 9 declares that all citizens as well as public authorities must abide by the Constitution and the entire legal system. To that end, publicity and publication are consubstantial to law itself.[15] Third, it can be also sustained that an excusable ignorance would frontally infringe the constitutional right to equality before the law and non-discrimination, as legal consequences would be applied differently depending on the proof of knowledge or ignorance.

9. Nonetheless, it could be alleged, contrariwise, that accepting the excusability of legal ignorance is perfectly justified and is indeed a fairer understanding of the right to equality. It would be reasonable to admit a different treatment of those who are legally better equipped and those who are unfamiliar with the law. Nevertheless, legal consequences would depend upon personal and social circumstances whose

13 A. Calderón, 'Efectos jurídicos de la ignorancia', 33. *R.G.L.J.* (*Revista General de Legislación y Jurisprudencia*) 1885, p 123; J. Costa, *El problema de la ignorancia del Derecho y sus relaciones con el status individual*, p 10.

14 Cited by A. Cabanillas, in *Comentarios al Código Civil y compilaciones forales*, p 20.

15 J. Bermejo Vera, *La publicación de la norma jurídica* (Madrid: Instituto de Estudios Administrativos 1977); P. Biglino Campos, *La publicación de la ley* (Madrid: Tecnos 1993).

proof might be difficult and uncertain. Hence, a personalized application of the law is usually observed with caution and suspicion insofar as it could easily lead to unpredictable application of legal consequences and bring about more unjust situations than those to be prevented. As a consequence, and despite these valid arguments, the right to equality is still frequently used as one of the fundamental legal grounds to defend the inexcusability of legal ignorance.

2.2. Personal Scope

10. Upon the removal of the historical exceptions still laid down in *Las Partidas*, the inexcusability of legal ignorance in contemporary Spanish legal system applies to all individuals with no exception.

11. Especially, it binds civil servants, officials, and, among them, judges. According to the *iura novit curia* aphorism, reiteratedly recognized by case law, judges and courts have the inescapable obligation to decide on any dispute they hear in conformity with the sources of law (Art. 1.7 CC). Thus, judges cannot refuse to decide on the grounds of legal gaps, insufficiency, or obscurity of the laws. Accordingly, applicable laws cannot be ignored by the judge, and only foreign laws or customs must be proved[16] by the parties.[17]

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16 In relation to the allegation and proof of foreign laws and customs, Spain follows a mixed model that combined that principle of allegation and proof of the content and the effectiveness of foreign law on the party alleging it, with powers of further investigation and interpretation of the court to complete party's evidences. As per Art. 33 *Ley de Cooperación Jurídica Internacional* (International Legal Cooperation Act) – published in the Official Bulletin BOE no. 182, 31 July 2015 – , Spanish courts will assess the probative value of the evidence of foreign law in conformity with the principle of 'sound judicial discretion' (in Spanish, *sana crítica*). Despite the plurality of possible translations in English of that principle of *sana crítica,* 'this concept has a clear meaning in Hispanic civil law systems'. As A. Paúl, '*Sana Crítica*: The System for Weighing Evidence Utilized by the Inter-American Court of Human Rights', 18. *Buffalo Human Rights Law Review* 2012, pp 193-221 explains 'Sana crítica is a method for evaluating evidence in which a court or tribunal is not constrained by the evidentiary rules of legal proof, but rather is obliged to judge in accordance with the rules of logic and experience, and to state the grounds for its evaluation of evidence'.

> '*Artículo 33. De la prueba del Derecho extranjero.1. La prueba del contenido y vigencia del Derecho extranjero se someterá a las normas de la Ley de Enjuiciamiento Civil y demás disposiciones aplicables en la materia.2. Los órganos jurisdiccionales españoles determinarán el valor probatorio de la prueba practicada para acreditar el contenido y vigencia del Derecho extranjero de acuerdo con las reglas de la sana crítica.3. Con carácter excepcional, en aquellos supuestos en los que no haya podido acreditarse por las partes el contenido y vigencia del Derecho extranjero, podrá aplicarse el Derecho español.4. Ningún informe o dictamen, nacional o internacional, sobre Derecho extranjero, tendrá carácter vinculante para los órganos jurisdiccionales españoles*'.

17 M.V. Cuartero Rubio, 'Prueba del derecho extranjero y tutela judicial efectiva', 14. *Derecho Privado y Constitución* 2000, pp 21-61; F.J. Garcimartín Alférez, 'Nota a STS 17 diciembre 1991', XLIV. *REDI* 1992, pp 239-243; A. Ortega Giménez & P. Heredia Ortiz, 'Cuestiones

2.3. Material Scope

12. The concise wording of Article 6.1 CC does not specify the material scope of those 'laws' whose unawareness is not excusable.

13. It is undisputed that 'law', under Article 6.1 CC, comprises any legal instrument, including both legislation and regulations, when duly adopted and in force. Therefore, it has been considered unreasonable in the Spanish literature any attempt to distinguish between public order provisions and legal rules of private interests, with the aim of only extending the inexcusability of ignorance to the former ones.[18] To that end, it is countered the need to ensure the same general effectiveness of any law.

14. Despite the dispersion and the massive number of infra-legal provisions, case law confirms that 'law' does also cover decrees, ministerial orders, instructions and other regulatory actions.[19] Interestingly, the TS in its decision of 29th of April of 1972[20] did even include an Urban Development Plan/Zoning Plan on account of the publication in the State Official Bulletin (BOE – *Boletín Oficial del Estado*).

15. More disputed has been, however, the inclusion of customs and consuetudinary rules under the legal ignorance principle. Authoritative voices[21] had concluded that customs should not be subject to the principle of *ignorantia juris non excusat* on the grounds that customs are not published, can be widely ignored by citizens, and, as a matter of fact, must be proved before judges and courts. Nevertheless, as recognized scholars support,[22] a distinction must be made between the existence of the custom and its ignorance. Thus, where the custom is notorious, a proof that exists and is widely known and regularly observed must not be required, but irrespective of the actual knowledge, its compliance cannot be excused.

16. Likewise, 'law' embraces general legal principles, as they are sources of law (Art. 1.1 CC), along with law and customs, and informs the whole legal system (Art. 1.4 CC).

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prácticas acerca del régimen de alegación y prueba del derecho extranjero en España. ¿Por qué debe probarse, qué debe probarse y cómo debe probarse el derecho extranjero en España?', 168. *Revista Economist & Jurist* 2013, pp 80–85.

18 Explaining the application of the principle to default rules, in the sense of non-mandatory rules susceptible of being applied (opt-in) o disapplied (opt-out) by parties, M.P. García Rubio, 'Ignorancia de la ley y normas dispositivas', 18. *Teoría y Derecho. Revista de pensamiento jurídico* 2015, pp 34–51.

19 M. Coca Payeras, 'Artículo 2', in Albaladejo & Díez Alabart (dirs), *Comentarios al Código Civil y compilaciones forales, Tomo I,* Vol. 1.º (Madrid: EDERSA, 2.ª edn 1992), p (421) at 443.

20 Tribunal Supremo 29 April 1972, STS 2333/1972, ECLI: ES:TS:1972:2333.

21 A. Cabanillas, in *Comentarios al Código Civil y compilaciones forales.* R. Martín Mateo, 'La ignorancia de las leyes. Las actuales circunstancias', 153. *Revista de la Administración Pública* 2000, p (53) at 59.

22 J. Martí Miralles, 'De iuris et facti ignorantia', 3. A. D. C. (*Anuario de Derecho Civil*) 1969, p 493.

17. Case law, however, is not a source of law. Its role, as Article 1.6 CC clarifies, is to complement the legal system with the doctrine of the TS in the interpretation and the application of law, customs, and general principles. In that regard, it has been argued[23] that should TS doctrine be ignored or infringed, the original legal rule, as interpreted and applied by the TS, has been indeed ignored or infringed in fact. Such a majority reasoning would lead then to extend the *ignorantia juris non excusat* rule to the TS jurisprudential doctrine. Furthermore, judgments and decisions of all judicial instances are of public access, published and readily available online at the Consejo General del Poder Judicial (General Council of the Spanish Judiciary) (CGPJ) platform.[24]

3. Legal Ignorance under Consideration: State of the Debate, Proposals, and Possible Solutions in a Modern Legal System

18. The principle of inexcusable legal ignorance is still admitted today as a non-renounceable feature of an effective legal system. Although it is indisputable that it is neither presuming not obliging the actual knowledge of all legal provisions, in modern societies, the sophistication in number, complexity, and variety of legal norms intensifies the unreality of the inexcusability.[25] It is frequently noted that as the complex and extensive legal system is not known in its entirety by legal professionals, it would be unreasonable not to excuse the lack of knowledge of general public.

19. Nonetheless, the principle in its essence has not been questioned, even if certain solutions and proposals to mitigate its extreme effect[26] have been proposed.

20. First, the deployment of general educational programs on legal basics have been historically referred as a palliative of the inexcusable ignorance.[27] Second, the resort to informative solutions in specific sectors, to specific groups, or under certain circumstances (e.g., employees, tourists and visitors upon their arrival). Third, the improvement in the quality of drafting to enhance clarity, and

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23 A. Cabanillas, in *Comentarios al Código Civil y compilaciones forales.* R. Martín Mateo, 153. *Revista de la Administración Pública* 2000.

24 Within its scope of attributed power, the *Consejo General del Poder Judicial*, through the *Centro de Documentación Judicial*, is responsible for the official publication of all judgments, resolutions, and decisions, http://www.poderjudicial.es/search/indexAN.jsp.

25 The principle arguably becomes an unrealistic presumption or a fiction in contemporary societies, as critically note J.A. García Amado; P. Gutiérrez Santiago, 'La ignorancia de la ley no excusa de las consecuencias de su incumplimiento (pero a veces sí)', 18. *Teoría y Derecho. Revista de pensamiento jurídico* 2015, pp 64-90.

26 L. Hierro, 'Imperio de la ley e ignorancia de la ley (sobre el modesto principio de que la ignorancia de la ley no excusa su cumplimiento)', 18. *Teoría y Derecho. Revista de pensamiento jurídico* 2015, pp 52-63, delimits the scope of the principle in relation to the nature of the rules rendering the principle reasonable and asumible in a modern society under the rule of law.

27 R. Martín Mateo, 153. *Revista de la Administración Pública* 2000, p 53.

comprehensibility of legal provisions by citizens.[28] Finally, and more importantly, the improvement of publication methods[29] and publicity strategies[30] in conjunction with modern participative legislative techniques.

21. In line with these proposals aimed to enhance the knowledge of legislation by citizens, digital technology has not only facilitated the basic goal of publication, but has also equipped legislators and public authorities with more sophisticated methods to develop genuine legislative policies to stimulate availability, accessibility, and comprehensibility of laws.[31] A general online publication of laws in a digital platform as a public service (www.boe.es) is an highly-achieved initial goal. Nowadays, however, more interactive methods are required. To that end, indexation and effective searching services have been implemented to more effectively ensure the access of citizens to public documentation and legislation.

4. Legal Ignorance, Error Iuris, and Facti Ignorantia: Differentiating Concepts and Consequences

22. Historically,[32] the interpretation of the *ignorantia juris non excusat* principle led not to properly differentiate legal ignorance and *error iuris*. Legal ignorance describes the non-compliance of a legal rule because it is unknown, *error iuris* denotes a mistaken interpretation of a legal rule that leads to a vitiated consent or wrong declaration of will.[33] As a consequence, case law and doctrine tended not to admit the excusability of any *error iuris*. Thus, the TS decisions of 20th of February of 1861, 9th of May of 1867, or 18th of December of 1867 held that legal ignorance is neither excusable, nor favour anyone, nor allow to avoid what has been agreed.[34] As it has been affirmed,[35] legal ignorance and *error iuris* were mixed and confused, while they should be treated separately as they operate over distinct spheres.

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28 Nevertheless, about the balance between the need of clarity and the convenient use of indeterminate legal concepts for the purposes of legal certainty, F. Centenera Sánchez-Seco, 'Los Paradigmas de Redacción Normativa como medio para alcanzar la Seguridad: ¿Una apuesta segura?', 3. *Ius Humani. Revista de Derecho* 2012/2013, p 189.

29 C. Muñoz de Bustillo, 'De una ignorancia, la del Derecho (A propósito de la publicación de las normas)', 31. *HID* (*Historia Instituciones Documentos*) 2004, p 437.

30 C. Jerez Delgado, 'Publicidad de las normas y técnica legislativa en la sociedad de la información', 58. *Anuario de Derecho Civil* 2005, p 765.

31 A. Lucini Casales, 'La ignorancia de las leyes y el error de derecho', in *Estudios sobre el Título preliminar del Código Civil, tomo I,* Vol. I (Madrid: Academia Matritense del Notariado-Ederse 1977), p 207.

32 B. Gutiérrez Fernández, *Códigos o estudios fundamentales sobre Derecho civil español*, II (Madrid: Imp. A. P. 1881).

33 S. Carrión Olmos, 'Algunas consideraciones sobre el error de derecho', 3. *Actualidad Civil* 1990, pp 695–718.

34 Cited by A. Cabanillas, in *Comentarios al Código Civil y compilaciones forales.*

35 A. Cabanillas, in *Comentarios al Código Civil y compilaciones forales.*

23. Upon the reform of the CC in 1974, the *error iuris* is expressly recognized and distinguished from the legal ignorance. Article 6.1 CC, after declaring the inexcusability of the legal ignorance, clarifies that the *error iuris* will produce solely those effects determined by the laws. This current wording expresses the relevance of the mistake of law (*error iuris*) and its specificity as regards the general principle of inexcusability. Although the acknowledgement of the *error iuris* might seem to contradict the inexcusability of the legal ignorance, scholars explain that they are indeed addressing different situations. Whereas the legal ignorance refers to the non-compliance of a legal rule due to the lack of awareness, the *error iuris* entails a wrong knowledge or interpretation of a legal rule that determines a vitiated or mistaken declaration of will or consent.[36]

24. Likewise, a distinction must be made between mistake of law (*error iuris*) and mistake of fact (*error facti*), where the inexact interpretation or knowledge is related to facts (situations, goods, persons). A mistake of fact may be then referred to factual circumstances, the conditions of the goods, the identity or the attributes of the person, or the aim of the transaction. In both cases, the decision-making process is affected by an inexact knowledge of relevant elements that impede the formation of a conscious rational decision.

25. Therefore, the current drafting of Article 6.1 CC invites to make the following conclusions. First, legal ignorance and *error iuris* are different and compatible each other. Second, the effect of a mistake of law will be exclusively the one provided for by the law. Third, the mistake of law must be applied exceptionally (Tribunal Supremo 6 April 1962). Four, the *error iuris* cannot be presumed, it has to be proved (Tribunal Supremo 17 June 1955). Finally, if a legal provision referring to an error does not explicitly distinguish between *error iuris* and *error facti*, interpretation criteria should be applied to construct the provision.

5. Legal Ignorance in Contract Law as an Invalidating Mistake

26. Within the framework designed by the Supreme Court (TS) to delimit the scope of the principle of legal ignorance, the impact of *error iuris* on the validity and enforceability of a contract is determined by two interpretative issues.

27. First, Article 1266 CC expressly states that 'error', in certain conditions, may invalidate consent. The use of the term 'error' without qualifier (*iuris* or *facti*) has been interpreted so as to comprise both of them; insofar as where law does not discriminate, no distinction should be made.

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36 S. Carrión Olmos, 'Algunas consideraciones sobre el error de derecho', 3. *Actualidad Civil* 1990, p 695.

28. Second, a case-by-case analysis is needed to assess whether the protection of error should prevail over the interest protected by the ignored legal rule, or, contrariwise, it should be superseded thereby. It would be addressed[37] as a matter of interpretation of the law that has been ignored and the interest protected thereby. Should the allegation of error be accepted, interests protected by the public-order law would become fraudulently defenceless. That would be the case of an employment contract concluded ignoring the employees' rights as per the collective bargaining agreements or a sale agreement providing a guarantee period shorter than the statutory minimum time limit. In both cases, the protection of the interests should prevail over the admission of the error to invalidate the contract. In the Spanish legal system, conversion is not provided for as a general remedy.[38] Despite the efforts of authoritative doctrinal voices to find specific examples of conversion in Spanish laws, most of them are not proper illustrations of material conversion.[39] Indeed, the Supreme Court case law has consistently ignored the institute of conversion in those cases where the applicability could have been alleged, opting for other alternative solutions.[40]

29. From this perspective of a conflict of protected interests, several situations are particularly relevant as regards the relevance of legal ignorance.

30. First, as per the former Article 1234 CC (now regulated by the Civil Procedural Act 1/2000, Arts 301–316) confession as evidence in a court trial can be declared ineffective exclusively on the basis of *error facti.* Then, legal ignorance is totally irrelevant for confession. Legal scholars do unanimously uphold that confession will not be affected by the unawareness of its legal effects, or the legal consequences of the confessed fact. Indeed, confession is related to facts, not to law.

31. Second, as further discussed *infra* 5.1, case law and scholars have traditionally rejected the relevance of legal ignorance (*error iuris*) to invalidate compromises and legal settlements between parties in a dispute. Rationale behind extrajudicial settlements is arguably to avoid a judicial assessment on the law and the facts and decide to consent on a self-arrangement. Thus, any possibility of alleging legal ignorance against the agreed arrangement would be to undermine the value and effectiveness of out-of-court settlements. Notwithstanding that, legal provisions are

37 A.M. Morales, *El error en los contratos* (Madrid: Ceura 1988).

38 A thorough study of conversion and its existence in the Spanish legal system, C.M. Díaz Soto, *La conversión del contrato nulo (Su configuración en el Derecho comparado y su admisibilidad en el Derecho español)* (Barcelona: Bosch 1994).

39 J.L. De los Mozos, *La conversión del negocio jurídico* (Barcelona 1959), p 162; J.B. Vallet de Goytisolo, 'Donación, condición y conversión jurídica material', V. *Anuario de Derecho Civil* 1952, p (1.205) at 1307.

40 F. De Castro, *El negocio jurídico* (Madrid 1967).

confusing and do not clearly corroborate the irrelevance of legal ignorance for settlements. Specifically, Article 1819 CC entitles any of the parties to avoid the settlement agreement if the arrangement was concluded in ignorance of a prior final judgement settling the same dispute. Scholars[41] warn that the disregard of a final judgement should be treated as legal ignorance.

32. Third, Article 1895 CC stipulated that whoever receives undue payment must return what is mistakenly paid. The TS in its decision of 7th July 1950 held that the duty to return does also arises where the undue payment was based on *error iuris.* Hence, legal ignorance is relevant here to prevent an unjustified enrichment based on a mistake.

33. Furthermore, a few legal provisions provide for specific effects of *error iuris*, as per Article 6.1 CC. Among other, for instance, as regards the nullity of marriage, Article 78 CC states that the marriage will not be declared null on the grounds of form defects where one or both spouses acted in good faith; however, in the partition of estate in favour of someone who is not entitled to, Article 1080 CC declares its total nullity; or the undue payment made in good faith to whom is in possession of the credit right will free the debtor (Art. 1164 CC).

5.1. Legal Ignorance as an Invalidating Error: Requirements and Conditions

34. As error in the CC does generally cover *error iuris* and *error facti*, it might be assumed that both errors should meet the same conditions to be relevant: essentiality and excusability. First, the error must be substantial and refers to essential elements of the transaction (Tribunal Supremo 21 May 1963). Second, the mistake could not be avoided despite a diligent behaviour.[42] From a different perspective, it can be said that the error of a contracting party is excusable where it was provoked or not corrected by the counter-party in conformity with the standards of good faith. Therefore, the requirement of excusability would transform into a rule of imputability. The mistaken party is protected where the error can be imputed to the other party. Thus, the error is deemed to be provoked by the other party, either by active behaviour (not necessarily fraudulently or intentionally) or omission. The rationale behind is a frustration of reasonable confidence or expectation in transactions.

35. Both requirements should be then applicable to legal ignorance to declare it relevant to invalidate consent in a contract. Notwithstanding that, courts are particularly careful in assessing the invalidating force of legal ignorance in

41 A. Cabanillas, in *Comentarios al Código Civil y compilaciones forales*, p 20; A. Luna Serrano, 'La ineficacia de la transacción', XXIII. *Actas de la Academia Matritense de Notariado* 1983, p 148.

42 A.M. Morales, *El error en los contratos*, p 226.

commercial transactions but clearly more receptive to admit evidence of invalidating mistake in consumer contracts. Hence, it must be affirmed that courts are reluctance to support a general application of legal ignorance to invalidate transactions. To that end, essentiality and excusability must be soundly proved in the ignorance of the relevant laws upon the expression of consent. Thus, only when the misunderstanding of the laws or the unawareness of their applicability can substantially deviate the perception of the reality surrounding the transactions and seriously vitiate the manifested consent, courts have acknowledged their invalidating value.

36. It might be well worth reminding here how in the application of legal ignorance in contract law the clear distinction between the rule *ignoratia iuris nocet* and the pure *error iuris* must be sustained. To the extent that *error iuris* was closely linked to the classical principle, as previously explained, excusability were not acceptable, as the inexcusability of legal ignorance was indeed the foundational basis of the effectiveness of legal system. Nevertheless, one the concept of *error iuris* was subtly separated from the realm of legal ignorance maxima, and assimilated to *error facti*, excusability is admissible so as it is interpreted in the field of contract law.

37. The excusability requirement interpreted as a rule of imputability shifts the narrative towards the establishment of duties to inform, diligence, and good faith standard. General contract principle of good faith or specific rules on sectorial legislation (banking and investment services, among others) and on consumer protection regulations provide the framework to assess whether the error of the party was excusable or not given the conduct of the other party.

5.2. Precontractual Duties and Legal Ignorance: Case Analysis

38. Spanish codes have been traditionally silent in respect to pre-contractual stage[43] and, accordingly, a systematic set of rules governing, on a comprehensive basis, parties' obligations and eventual liability in the negotiation period prior to the reaching of the agreement are lacking. On the one hand, basic duties were to infer from the general principle of good faith. Nonetheless, on the other hand, specific pre-contractual duties[44] started to be typified in special legislation mainly tackling consumer transactions or transactional situations whose context or circumstantial conditions increase the need to protect one of the prospective contracting party – information obligations in electronic contracting (Art. 27

43 M. Alonso Pérez, 'La responsabilidad precontractual', 485. *RCDI (Revista Crítica de Derecho Inmobiliario)* 1971.

44 X. Basozabal, 'En torno a las obligaciones precontractuales de información', LXII. *A.D.C. (Anuario de Derecho Civil)* 2009; E. Gómez Calle, *Los deberes precontractuales de información* (Madrid: La Ley 1994).

Law 34/2002)[45] – or information asymmetries need to be repaired – traditional duty to disclose risks in insurance contracts (Art. 10 Law 50/1980 on Insurance).[46] The regime is then fragmented in scattered legal rules of diverse scope and aims and fuelled by a powerful, albeit indeterminate, principle of good faith. Hence, the general principle of good faith would cast over the pre-contractual stage naturally.

39. In contrast with the absence of a general regulation in domestic legislation, several supranational texts of different nature and scope, are expressly including rules on pre-contractual duties: Article 2.1.15 UNIDROIT Principles,[47] Article 2:301 Principles of European Contract Law[48] or Article I.-1:103 Draft Common Frame of Reference.

40. Against such a backdrop, very recently, the Proposal of a new Commercial Code[49] elaborated by the Spanish Codification Commission, albeit neither in force nor scheduled to become law in the near future, has nevertheless included two legal provisions dealing with pre-contractual issues (confidentiality obligation and pre-contractual liability): Articles 412-1 and 412-2,[50] respectively. Previously,

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45 Law 34/2002, of 11 April, published in BOE num. 166, 12 July 2002.

46 Law 50/1980, of 8 October, published in BOE num. 250, 17 October 1980.

47 Article 2.1.15 UNIDROIT Principles:

(1) A party is free to negotiate and is not liable for failure to reach an agreement.

(2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.

(3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.

48 Article 2:301 EPCL:

(1) A party is free to negotiate and is not liable for failure to reach an agreement.

(2) However, a party who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party.

(3) It is contrary to good faith and fair dealing, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party.

49 T. Rodríguez de las Heras Ballell, 'A codificação da responsabilidade pré-contratual: notas sobre a sua regulação no anteprojeto de lei do novo código mercantil espanhol', *Revista Forum di Direito Civil (RFDC)* 2016; and T. Rodríguez de las Heras Ballell, 'La etapa precontractual en la contratación mercantil', in M.J. Morillas, P. Perales, & J. Porfirio (dirs.), *Estudios sobre el futuro Código Mercantil* (Madrid: UC3M 2015), pp 1801–1820.

50 Article 412-1. *Deber de confidencialidad.*

> *Cada una de las partes deberá mantener confidencialidad sobre la información reservada que con este carácter reciba de la otra en el curso de las negociaciones.La parte que infrinja el deber de confidencialidad responderá de los daños y perjuicios que ocasione a la otra parte la infracción de ese deber.*
> *Each party must maintain confidentiality regarding the information of that character received from the other party in the course of negotiations.The party who breaches that duty will be liable for the losses caused to the other party.*

in 2009, the Proposal for the Modernization of the Law of Contracts and Obligations, by the Spanish Codification Commission, expressly addressed pre-contractual liability as well in Article 1245[51] CC.[52] This proposal is not scheduled to become law either.

Article 412-2. *Responsabilidad por los daños causados en la fase preparatoria del contrato.*
1. En el caso de que se hubieran entablado negociaciones para la celebración de un contrato mercantil, ninguna de las partes incurrirá en responsabilidad por el solo hecho de que no se consiga un acuerdo definitivo.
2. La parte que hubiera negociado o interrumpido las negociaciones con mala fe será responsable por los daños causados a la otra parte. En todo caso se considera mala fe el hecho de entrar en negociaciones o de continuarlas sin intención de llegar a un acuerdo.
(1) When parties are negotiating an agreement, none of the negotiating parties is liable for failure to reach an agreement.
(2) However, a party who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party. It will be deemed contrary to good faith and fair dealing, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party.

51 Article 1245 as drafted in the Modernization Proposal:

1. Las partes son libres para entablar negociaciones dirigidas a la formación de un contrato, así como para abandonarlas o romperlas en cualquier momento.2. En la negociación de los contratos, las partes deberán actuar de acuerdo con las exigencias de la buena fe.3. Si durante las negociaciones, una de las partes hubiera facilitado a la otra una información con carácter confidencial, el que la hubiera recibido solo podrá revelarla o utilizarla en la medida que resulte del contenido del contrato que hubiera llegado a celebrarse.4.La parte que hubiera procedido con mala fe al entablar o interrumpir las negociaciones será responsable de los daños causados a la otra.En todo caso, se considera contrario a la buena fe entrar en negociaciones o continuarlas sin intención de llegar a un acuerdo.5. La infracción de los deberes de que tratan los apartados anteriores dará lugar a la indemnización de daños y perjuicios. En el supuesto del apartado anterior, la indemnización consistirá en dejar a la otra parte en la situación que tendría si no hubiera iniciado las negociaciones.
1. Parties are free to negotiate and they are not liable for breaking off negotiations any time.2. In negotiating a contract, parties must act in conformity with the good faith standard.3. If one party receives during negotiations confidential information from the other party, the former can only reveal or use that information in accordance to the agreement resulting from the negotiations. 4.A party who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party. It will be deemed contrary to good faith and fair dealing, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party5. The breach of duties provided for by previous paragraphs will entail the compensations of damages. In the case referred in the previous paragraph, compensation will place the other party in a situation where no negotiations were initiated.

52 C. Cuadrado Pérez, 'La responsabilidad precontractual en la reforma proyectada: ¿una ocasión perdida? (Parte I)', 744. *Revista Crítica de Derecho Inmobiliario* 2014, p 1717. M.P. García Rubio, 'La responsabilidad precontractual en la propuesta de modificación del derecho de obligaciones y contratos', LXIII. *A.D.C. (Anuario de Derecho Civil)* 2010.

41. In absence of approval of the above-mentioned legislative proposals, good faith principle is the only guiding rule governing the negotiation period. Parties are expected to bargain in good faith. Unlike Article 1245 CC as proposed by the Modernization Proposal that included an express declaration of good faith in negotiations,[53] Proposal of a new Commercial Code aligns with uniform texts and does only utilize the negative formula. So, Article 412-2 devises the pre-contractual liability scheme around the element of bad faith without a general declaration of the duty to act in good faith: *'(l)a parte que hubiera negociado o interrumpido las negociaciones con mala fe será responsable por los daños causados a la otra parte*' – 'the party who entered into or continued negotiations in bad faith shall be liable for the losses caused to the other party'.

42. The general principle of good faith would distil in a varied set of specific pre-contractual duties considering transactional circumstances, condition of the parties and other concurring factors. An exhaustive list of pre-contractual obligations, drafted in general terms, is not provided for by existing laws. Some special laws have expressly formulated specific duties for the pre-contractual stage: consumer law, laws governing electronic commerce and Internet service provision, or financial markets law. Although these provisions serve to signal the main angles of pre-contractual duties and help to better understand the principle of good faith in practice, their assistance in interpretation is limited. On the one hand, for their compliance and enforcement are confined to the scope and conditions set out by each legislation, and, aimed to meet specific goals. On the other hand, because a mere formalistic compliance does not necessarily exhaust all manifestations of good faith and, in reverse, the non-fulfilment of such provisions does not automatically entail consequences in the validity and the enforceability of the final agreement.

43. Recent practices in bank sector provide illustrative examples in that regard. Interestingly, a numerous case law in Spain has tackled the validity of controversial swaps contracts[54] linked to mortgage loans as risk-coverage mechanisms.[55] In most cases, bank clients – including companies, professionals, and consumers – have

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53 Article 1245.2 as drafted by the Modernization Proposal:

> (...)*2. En la negociación de los contratos, las partes deberán actuar de acuerdo con las exigencias de la buena fe.*(...).

54 A detailed analysis of main controversial issues in swaps-related claims before courts and arbitration tribunals in H.D. Marín Narros, 'Los principales aspectos controvertidos en la litigiosidad de los swaps', 737. *Revista Crítica de Derecho Inmobiliario* 2013, p 1477.

55 E. Díaz Ruiz, 'El contrato de Swap', 36. *Revista de Derecho Bancario y Bursátil* 1989, pp 733-806; E. Díaz Ruiz, *Contratos sobre Tipos de interés a Plazo (FRAs) y Futuros Financieros sobre Intereses* (Madrid: Civitas 1993); P. Lamothe & J.A. Soler, *Swaps y otros derivados OTC en tipo de interés* (Madrid: McGraw-Hill 1996); R. Manso Olivar, *Los contratos de permuta financiera como coberturas del riesgo de tipo de interés* (Madrid: Universidad Europea - CESS 1996); J.A. Vega, *El contrato de permuta finaciera (Swap)* (Navarra: Aranzadi 2002).

challenged the validity of the swap contract on the grounds of vitiated consent. Claims for nullity has been based on commonplace allegations: banks did not fulfil their statutory duties, basically, to clearly inform the client of the risks, implications and operation of such sophisticated financial transactions. As a consequence, clients could not gain a full insight into the nature and extent of the contractual obligations they were taking on. In all these cases, legal ignorance is referred to contractual obligations. Where the decision has been issued in favour of the bank client, courts (or arbitral tribunals) have invalidated the consent given by the client upon entering into the agreement ignoring the nature, the extent, and the risk of the legal contract.

44. Court decisions[56] differ but most of them do deeply rely on pre-contractual stage to assess whether clients were sufficiently informed in reasonable terms. In other words, whether the mistake the client incurred in was essential and excusable. In assessing the occurrence of an error invalidating consent, courts mainly consider the due fulfillment by the bank of information duties and other pre-contractual obligations as provided for by applicable regulations. Three recent Spanish Supreme Court judgments refine such a line of reasoning and clarify the consequences of the non-compliance – Spanish TS judgments 840/2013, of 20th of January of 2014,[57] 385/2014, of 7th of July of 2014,[58] 384/2014, of 7th of July of

56 Among many others – (hereinafter, SAP means a judgment of a Provincial Court, *Audiencia Provincial*, and FD is referring to the paragraph of the legal decision): Audiencia Provincial Álava (1ª) 9 Sep. 2011 (FD 2); Asturias-Gijón (7ª) 29 Oct. 2010 (FD 5); Asturias-Oviedo (5ª) 27 Jan. 2010 (FD 7); Ávila (1ª) 12 Jan. 2012 (FD 4); Badajoz (2ª) 17 May 2011 (FD 2); Barcelona (11ª) 16 Dec. 2010 (FD 2) and (19ª) 9 May 2011 (FD 2 and 4); Girona (1ª) 18 Feb. 2011 (FD 5); Islas Baleares-Palma de Mallorca (5ª) 20 June 2011 (FD 4 and 5); Jaén (3ª) 27 Mar. 2009 (FD 2); León (2ª) 22 June 2010 (FD 2); Navarra (1ª) 11 July 2011 (FD 4); Orense (1ª) 3 Jan. 2012 (FD 8); Palencia (1ª) 30 June 2011 (FD 4); Pontevedra (1ª) 7 Apr. 2010 (FD 8); Salamanca (1ª) 31 Jan. 2011 (FD 3); Santa Cruz de Tenerife (3ª) 2 May 2011 (FD 4); Soria (1ª) 10 Oct. 2011 (FD 4); Toledo (1ª) 2 Nov. 2011 (FD 4); Valladolid (1ª) 3 Nov. 2011 (FD 6); and Zaragoza (5ª) 20 June 2011 (FD 10).

57 Roj: STS 354/2014; ECLI: ES:TS:2014:354. A swap agreement was concluded between the bank and a company (S.L. – limited liability company) with no prior dealings between them. The pre-contractual stage was limited to a brief exchange of emails where the swap agreement was described as a 'insurance' and the client was not advised of the risks was provided. No evidence was provided to demonstrate that the legal representative of the company had sufficient financial knowledge or previous experience. Likewise, the company did not meet the requirements to be deemed as a professional investor. Concurrently, the facts revealed that the bank delivered an investment advice but failed to carry out the suitability and appropriateness tests according to applicable regulations. The Court held that even if the mere infringement of regulatory duties by the bank – test of suitability, test of appropriateness, duty to inform in precontractual dealings – is not enough to invalidate the contract, it helps to appreciate the lack of knowledge of the client.

58 Roj: STS 2660/2014 – ECLI: ES:TS:2014:2660. The swap agreement was offered by the bank to the client (a LLL-type company) with no specific experience in financial products. Dossier with information about swaps was provided and the swap contract was made available to the client in advance before being signed by the client. But no tests of suitability and of appropriateness were

2014 and 387/2014, of 8th of July of 2014[59]. The Supreme Court held that the non-compliance of pre-contractual obligations does not automatically imply the nullity of the contract on grounds of error in consent. As a matter of fact, non-fulfilment or a defective compliance of obligations provided for by regulations influence the appreciation of a mistaken consent, whether the client could effectively understand the risks and the consequences of signing the contract, considering the circumstances, contract was not vitiated.

45. In all these cases, the contract is concluded but it is to any extent affected by the violation of pre-contractual duties. At least two issues on remedies arise at a first sight.

46. Firstly, whether a claim to declare nullity[60] of the contract on grounds of error[61] would be compatible to a claim of compensation for violation of pre-contractual obligations.[62] The Spanish TS in the recent judgments of 13 September of 2017 (STS 3247/2017),[63] of 16 of November of 2016 (STS 5113/

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carried out. The lower courts held that the reading of the contract by the client was sufficient to understand the operation of the agreement and the future evolution of interest rate should not have been part of the scope of the duty of information by the bank. The Supreme Court, however, held that the duty of information of the bank must be interpreted as an active obligation instead of a mere duty of making available. In that regard, as no test was conducted, the bank could not assure that the product was indeed suitable for the client's profile. In addition, the evidence proved that the swap agreement was marketed as an insurance. That description was misleading and invalidated the consent of the client that was unable to appreciate the inherent risks of a speculative risky product whose functioning is very different from the operation of an insurance agreement.

59 Roj: STS 5531/2014 – ECLI: ES:TS:2014:5531. The facts here differ from previous cases. The clients of the bank are individuals and the investment advice is not referred to the offering of a swap agreement but the acquisition of preferential shares of an Icelandic bank. The clients expressed their interest in reducing risk and the advisor recommended an investment in fixed income products. The advice was to acquire preferential shares of an Icelandic bank. The advisor did not provide any information to the clients about the risks of that investment that was indeed offered as a low-risk fixed-return product.

60 D. Barcelo, 'La anulación del contrato de Swap por error en el consentimiento', 96. *Revista de Derecho Privado* 2012, pp 3–46.

61 A.M. Morales, *El error en los contratos.*

62 In the affirmative, F. Pantaleón, 'Responsabilidad precontractual: propuestas para un futuro Código Latinoamericano de contratos', LXIV. *Anuario de Derecho Civil* 2011, p 921, has answered thereto.

63 Roj: STS 3247/2017 – ECLI: ES:TS:2017:3247. In this case, the bank client alleges lack of precontractual information provided by the bank in relation to a contract of securities custody and administration. The Supreme Court held that the proved lack of sufficient information may invalidate the consent. But, in that case, only an action of nullity is allowed, insofar as the consent was vitiated. Nonetheless, an action of breach of contract, as exercised by the client, is incompatible with the nullity and inoperative.

2016),[64] and, previously, of 30 of December of 2014[65] have confirmed the admissibility of a compensation claims on the grounds of the non-compliance of pre-contractual (and contractual) information duties of banks to their clients. Facts are highly similar in all cases. In the context of a negotiation between a bank and its client to enter into a credit agreement (loan, mortgage, credit line), concerns about the future increase of interest rate arouse. Thus, the bank (sometimes upon the request of the client) offers the client a swap agreement as a risk-mitigating mechanism to be added to the credit agreement, either exclusively or as one of a set of other alternatives (caps, insurances, fixed interest). Problems arise in the commercialization[66] process, as, according to evidence provided in the above cases, the swap agreement is misleadingly offered as 'an insurance for changes in interest rate', or commercialized in a way where no explanations are given about scenarios of risks, volatility, margin of losses, or right and cost of cancellation prior to termination. The legal basis for the claim is the violation of the duty to act in good faith in negotiations or preliminary dealings. Specifically, the violation of the duty to act in good faith is concretized in defective fulfilment of the duties to inform the client. According to the TS's reasoning, the defective fulfilment of information duties – inadequate provision of information, insufficient explanations, omissions of warnings on risks, complex and incomprehensible contractual terms, succinct explanation of essential elements in commercial phone call, no sending of explanatory documentation in advance – would be the harmful conduct likely to cause losses to the client.[67] Hence, provided that the losses are proved and accredited and the causal link between the lack of information and the conclusion of the swap contract under a vitiated consent are proved, a compensation claim against the bank is admissible – TS decision of 16 of November of 2016 (STS 677/2016).

47. Secondly, whether remedies for breach of contract would be actionable in those cases as well. The factual scenario might be as follows. One of the contracting

64 STS 5113/2016 – ECLI: ES:TS:2016:5113. A company – LLC without special experience in financial markets – entered into swaps agreements offered by the bank. The bank failed to provide sufficient information about the risks stemming from the evolution of interest rates, and therefore, the company could not understand and assume that eventual risk. The court held that the infringement of pre-contractual duties invalidated the consent.

65 Roj: STS 5531/2014 – ECLI: ES:TS:2014:5531. As previously cited.

66 A.J. Tapia Hermida, 'Jurisprudencia de Audiencia Provinciales sobre responsabilidad de los bancos por falta de información adecuada en la comercialización de instrumentos financieros complejos', 115. *Revista de Derecho Bancario y Bursátil* 2009, pp 236–255.

67 In the following decisions, the Tribunal Supremo (Spanish Supreme Court) have expressly admitted the viability of a compensation claim against the bank on the grounds of lack of information and poor advice: Tribunal Supremo 30 December 2014, STS 754/2014, ECLI: ES:TS:2014:5531; Tribunal Supremo 13 July 2015, STS 397/2015, ECLI: ES:TS:2015:3221; and Tribunal Supremo 10 July 2015, STS 398/2015, ECLI: ES:TS:2015:3219.

parties provides during negotiations false or inaccurate information about the product, its quality, authenticity or characteristics. The other party agrees to conclude the contract relying on such information that becomes part of the contract. Accordingly, the performance will not be in conformity with contract terms. The injured party would be entitled to enforce contract terms and exercise remedies for breach of contract.

5.3. Legal Ignorance in the Consumer Protection Rules

48. The protective goal of consumer rules is pursued with the establishment of rights and privileges in favour of consumers and duties and obligations on the professional party, along with some prohibitions or limitations on private autonomy. Within the European Union normative framework on consumer protection, the Spanish Law 1/2007[68] (hereinafter, LCP) provides a consolidated text, a sort of codification, comprising consumer protection rules.

49. It might be well worth wondering whether the strong protective aim, the educational role of public authorities,[69] and the rationale of the structural asymmetry in consumer transactions could also justified a different treatment of legal ignorance. In short, the question here is whether, in order to protect consumers, a general principle of excusable legal ignorance of consumer is enshrined in consumer protection legislation.[70] A thorough review of LCP legal provisions lead to conclude in the negative.

50. First, despite the inflationary increase of information duties on the professional party in consumer transactions provided for by the consumer protection legislation and exacerbated by a very protective case law on bank, investment, and financial-services contracts, in particular, there is not a general duty on the professional party to warm, educate, or explain to the consumer party the applicable law, his/her rights, or other legal consequences of the transaction – specific duties are contemplated in sectoral rules or for special transactional situations. The information that the professional party must supply to the consumer is essentially related to factual, material, or circumstantial aspects of the specific transactions – object, scope, quality of goods, price, contractual conditions, risks. Therefore, in case of infringement of those information duties, on the one hand,

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68 *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*, published in BOE num. 287, of 30 of November of 2007.

69 Article 17 LCP states the obligation of public authorities to promote the education of consumers on their rights and available remedies.

70 The debate is addressed in S. Baz Barrios, 'La problemática de los swaps o contratos de permuta financiera', 8. *Revista CESCO de Derecho de Consumo* 2013, pp 453-478; and in A. Carrasco Perera, *¿Perjudica al consumidor la ignorancia del Derecho?* 2014, www.uclm.es/centro/cesco.

an administrative sanction, where applicable, could be imposed to the infringing company/professional and/or, on the other hand, the lack of information could support a claim for vitiated consent.

51. Second, in fact, only in the case of the right of withdrawal (Arts 60, 69, 97 LCP), a real duty to inform of a protective rule, the existence of this right and how to exercise it, even providing a model document to exercise the right, can be found. The need to inform the consumer of the existence of this right is justified, as the consumer would not reasonably expect to have this privileged right. The legal ignorance is then prevented by allocating on the strongest party the duty to inform of and facilitate the exercise of the right to withdrawal. Upon the non-fulfilment of this duty to inform, the ignorance of the consumer is protected by granting a significantly longer period to exercise the right – adding twelve months.[71]

52. Third, where the consumer legislation provides for rights, advantages, or privileges in favour to the consumer (Arts 60 bis, 60 ter, 61, 62, 63, 64, 66 bis, 66 ter, 66 quarter, among other), it might well worth considering which are the legal effects of consumer's legal ignorance. It has been convincingly defended[72] that all these cases must be approached from the perspective of the key principle in consumer law that consumers cannot waive their rights. Any advance waiver of consumer rights will be deemed null and void.[73] Accordingly, any waive of rights in the ignorance of that banning provision will be ineffective as well as the mere ignorance of being entitled to exercise the rights so as acknowledged by the law will not be treated nor have the effect of a waiver.

53. In conclusion, consumer protection legal tools do not include a general rule of excusability of legal ignorance. The protection aim is achieved combining a set of ample and intense duties of information on the professional party and a ban on waiving of consumer rights.[74]

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71 Article 71.3 LCP:

> (...)*3. Si el empresario no hubiera cumplido con el deber de información y documentación sobre el derecho de desistimiento, el plazo para su ejercicio finalizará doce meses después de la fecha de expiración del periodo de desistimiento inicial, a contar desde que se entregó el bien contratado o se hubiera celebrado el contrato, si el objeto de éste fuera la prestación de servicios* (...).

72 A. Carrasco Perera, *¿Perjudica al consumidor la ignorancia del Derecho?.*

73 Article 10 LCP:

> *Artículo 10. Irrenunciabilidad de los derechos reconocidos al consumidor y usuario.La renuncia previa a los derechos que esta norma reconoce a los consumidores y usuarios es nula, siendo, asimismo, nulos los actos realizados en fraude de ley de conformidad con lo previsto en el artículo 6 del Código Civil.*

74 M. Castilla Barea, 'Ignorancia de la ley, error de Derecho y deberes de información al consumidor', 18. *Teoría y Derecho. Revista de pensamiento jurídico* 2015, pp 142–153.

6. The Effect of Legal Ignorance in Relation to Statutory Prescription or Limitation Periods

54. The starting date (*dies a quo*), the elapsing, and the effective interruption or suspension of statutory prescription periods do frequently give rise to a set of issues that are, at least partially, related to legal ignorance situations. Legal ignorance impact may cast over three elements of statutory prescription periods. First, where the ignorance of the existence of a prescription period to exercise an action and of its length may have any relevance in the extemporaneous exercise of the right. Second, the relevance of the awareness of the invalidating mistake in the initiating of the prescription period. Third, whether an inadequate action before a court that is not competent to hear the case due to the existence of a valid and enforceable arbitration clause could suspend the lapsing of the prescription period.

55. The massive wave of cases related to the above-mentioned swap agreements links to loans and other finance schemes as risk-coverage instruments have reopened the debate[75] on the application of the classical prescription periods in relation to the above-mentioned controversies.

56. The following discussion must be framed within a clear and decisive statement: legal ignorance on prescription periods cannot be excused and should not have any impact on the inexorable lapsing of the period to exercise an action or right. For the sake of legal certainty, the lapsing of prescription periods cannot depend upon the subjective conditions. Even in consumer transactions, unless the other party had acted with fraud or intention, ignorance of a prescription period, its length, or the legal consequences of its expiration will not avoid the loss of the action or right.

57. Against such a backdrop, the relevance of mistake (*error facti* and *error iuri*) in the starting or the suspension of the prescription period will be analysed below.

58. As per Article 1301 CC, an action to declare the nullity of a contract on grounds of vitiating error shall be exercised within a period of four years. The following issues require attention:

59. First, whether the period of exercise operates as a period of prescription, that entails that in case of being suspended or interrupted, it restarts from the beginning for a new 4-year period, or, contrarily, it runs as a 'caducity' period (*periodo de*

75 M. Gracia, 'La caducidad de los swaps o permutas financieras: interpretación de la STS, Pleno, Sala de lo Civil, 629/15 de 12 de enero por la jurisprudencia menor', 148. *Revista de Derecho vLex* 2016; S. Muñoz, 'El plazo de prescripción del artículo 945 del Código de Comercio, referido a las acciones de responsabilidad contractual contra los agentes de bolsa', 10. *Revista Doctrinal Aranzadi Civil-Mercantil* 2017.

caducidad), that after an interruption, it continues and reinitiates for the remaining part of the total period.[76] Most case law[77] and legal doctrine[78] are inclined towards the latter.

60. Second, when the 4-year period should start (*dies a quo).*

61. Third, whether the period can be suspended or interrupted. Clarity and predictability in answering to the last two questions are essential, as an annullable contract remains in the meantime, until the total elapse of the 4-year period, in a provisory situation. Within that statutory period, the contract can be still challenged on grounds of nullity if the corresponding right is properly and successfully exercised. Such an uncertainty is undesired to endure for an unlimited period of time. Therefore, a limited period of exercise (*periodo de caducidad*) is provided for by the statute.[79] In that regard, the Article 1301 clarifies that the 4-year period shall start, in cases of mistake, upon the total fulfilment of parties' obligations as agreed in the contract. The TS decision of 11 of June of 2003 explains the rationale behind the determination of the total fulfilment as the starting date as the need to set a fair balance between the legal security, that advise not to excessively prolong the uncertain situation, and the protection of the mistaken contracting party who may be unaware of the error until the completion of the contractual process.

62. Nonetheless the wording of Article 1301 CC and the classical case law, recent TS decisions maintains a differing interpretation line. The TS decision of 12 of January of 2015[80] clearly held that the *dies a quo* should not be determined by the fulfilment of the obligations but by the awareness of the mistaken party of the error likely to trigger the exercise of the action. This interpretation is aligned with the European principles of Contract Law (Art. 4:113). Nevertheless, although its formulation was essentially aimed to better protect the mistaken party who should not be deprived of a right to

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76 E. Fernández García, 'Prescripción y caducidad en Derecho Mercantil', 15. *Economist & Jurist* 2007 (109), pp 50–77.

77 Tribunal Supremo 17 February 1966; Tribunal Supremo 4 April 1984; Tribunal Supremo 17 October 1989; Tribunal Supremo 25 July 1991; Tribunal Supremo 27 October 2004; and Tribunal Supremo 5 April 2006. Decisions can be found at the search portal, http://www.poderjudicial.es/search/indexAN.jsp.

78 L. Díez-Picazo, *Fundamentos de Derecho Civil Patrimonial* (Cizur Menor: Thomson-Civitas, 6ª edn 2007), p 597.

79 Tribunal Supremo 19 June 1987 and Tribunal Supremo 27 September 1950. http://www.poderjudicial.es/search/indexAN.jsp.

80 Roj: STS 254/2015 – ECLI: ES:TS:2015:254. A German citizen, who had signed a 'unit linked' insurance agreement. was advised by the bank in 2011 that her investment had been affected by the so-called 'Madoff case' and periodical returns were suspended. She alleged that she had not be duly informed of the nature of the product and risk of losing the investment. Hence, her consent was vitiated and she initiated an action against the bank to declare the contract null and void. The Court discussed the determination of the *dies a quo* as explained in the text above.

exercise an action due to the very unawareness of the vitiating elements, a knowledge-based *dies a quo* might, in principle, function reversely. As a matter of fact, in complex long-term financial transactions, investment contracts, or bank relationships, where obligations are performed successively throughout the term of the contract, the mistaken party may become aware of the mistake before the full fulfilment of the obligations and, therefore, prior to the expiration of the contract term.

63. Likewise, the fixing of the starting date becomes more uncertain and complex. As the full awareness of the mistake belongs to the private sphere of the person, subjective acts are difficult or impossible to prove. Hence, only when such an internal awareness exteriorizes under the form of declarations or behaviours revealing so, it can be proved that the 4-year period starts.

64. At this point, the analysis invites to make two conclusions of relevance in relation to the effect of legal ignorance as regards statutory prescription periods.

65. First, the awareness of the invalidating mistake is critical for determining the starting date of the 4-year statutory period to exercise the action. This interpretative line departs from the wording of Article 1301 CC that explicitly fixes the *dies a quo* at the completion of the performance contract. Hence, it can be argued that the ignorance does not disfavour the injured party.

66. Second, however, it is not clear whether the awareness triggering the prescription period refers to the factual dimension of the mistake, the legal consequences thereof, or even the existence of an expiration period. As a general appreciation, it can be affirmed that case law tends to focus on the factual dimension of the mistake for the purposes of the starting of the prescription period. In that regard, the awareness of the existence of a prescription period is arguably irrelevant. The trigger of the start date is primarily the awareness of the mistake. Accordingly, evidences that the mistaken party could know or should have reasonably realized his error are required to prove the awareness.

67. As it was previously advised, awareness is an internal personal state difficult to proof if it is not materialized in external actions or meaningful indicia providing reasonable presumption. Therefore, in the recent series of cases related to swaps, and other sophisticated financial instruments whose nullity on grounds of invalidating mistake have been asked before courts and arbitrators, the sufficient proof of awareness has been frequently questioned.[81] Under certain circumstances, when the difference between the two payments turns negative for the bank client is deemed enough to presume awareness of the mistaken understanding of the nature and the risks of the transactions. However, in other cases, it has been required

81 J.I. Martínez Pallarés, 'Acerca de la caducidad de la acción de nulidad de los swaps en la jurisprudencia del Tribunal Supremo ¿Un salto en el vacío?', 4. *Revista de Derecho actual* 2017, pp 20–41.

further evidence such as an explanatory letter received from the financial entity in response to the request of the client, or a conversation with the bank director.

68. The recent TS decision of 19 of February of 2018 (STS 398/2018)[82] changes the interpretation[83] of the previous jurisprudential line towards a completely different direction. Until then, case law had interpreted that the starting date for the prescription period should be the time when the client becomes aware of the mistake and realizes that the consent had been given with a wrong representation of the contract. Contrarily, the TS states (in the decision of 2018) that the relevance of the awareness of the mistake cannot limit the extension of the prescription period as fixed by Article 1301 CC to the detriment of the mistaken party. Hence, as Article 1301 CC provides for the 4-year prescription period starts at the completion of the contract, it must be understood that the period will not be initiated until the contract terminates, either by the expiration of the duration or by the cancellation of the contract in advance. Additionally, the TS in this recent decision explains that the relevance of the awareness of the mistake should only favour the mistaken party in the sense that if that awareness occurs later than the termination of the contract, the starting date would be the latest one. As in previous cases, the facts referred to swap agreements entered into the client (a company) and the bank. The client challenged the validity of the agreement on grounds of vitiated consent due to the infringement of the precontractual duty to inform by the bank. In this case, the client had concluded three swap agreements, two of them had been terminated before the action was initiated. The third one, with a contractually agreed duration of 5 years, ended in November 2011. The court simply held that, as the judicial proceedings was initiated in 2011, the 4-year prescription period had not been completed yet. Therefore, the exercise of the nullity action was still feasible.

69. Once the start date of the prescription period is fixed as described above on the basis of the (proved/presumed) awareness of the error, a second dimension of the legal ignorance arises afterwards. As the completion of the 4-year prescription period entails the radical effect of total precluding the exercise of any right or action, the possibility of suspending or anyhow interrupting the course of the period becomes a critical decision.

70. In this context, insofar as most interest-rate swaps agreements included an arbitration clause,[84] it has been discussed whether the initiation of an action before

82 Roj: STS 398/2018 – ECLI: ES:TS:2018:398.

83 J. González Guimaraes-Da Silva, 'Comentario a la sentencia 89/2018, de 19 de febrero, del Pleno de la Sala de lo Civil del Tribunal Supremo. ¿Un nuevo plazo para el ejercicio de la acción de anulabilidad en la contratación bancaria o financiera?', 48. *Actualidad Jurídica Uría Menéndez* 2018, pp 91–101.

84 P. Perales Viscasillas, 'Los laudos sobre swaps en la jurisprudencia del TSJ de Madrid (2011-2015)', 8699. *Diario La Ley* 2016.

a non-competent judge who admits or frontally rejects and refers to arbitration could suffice to suspend the lapse of the 4-year period.

71. TS opinion[85] has been very clear and consistent in denying the possibility of interrupting and resuming the 4-year period – understood as a period of expiration (*caducidad*). Nonetheless that sound jurisprudential line, courts have admitted that suspension could be attained under selected specific circumstances. Specifically, the undertaking of required activities directed to initiate the judicial proceedings – i.e., compulsory prior mediation. However, it is highly debatable whether an action before a judge who is not competent to hear the case could amount to a suspending action. A two-fold problem of legal ignorance emerges here. On the one hand, should the unawareness of the arbitration clause is excusable. On the other hand, whether the ignorance that the court is not competent to hear the case where an arbitration clause has been agreed is relevant and excusable as well. Whereas the first angle of the problem is related to the awareness and the understanding of a contractual clause included in a standard terms contract, the second angle relates to the ignorance of legal rules regarding access to justice, the judicial system, the arbitration legislation, the existence of a legal right (and its duration), and procedural laws. Likewise, the need of professional legal advice raises concerns about the real role of lawyers as gatekeepers and, even, their potential exposure to liability, insofar as, independently of what the client could know or ignore, a lawyer should have informed the client of the existence of the arbitration clause and the unviability of initiating an action before courts.

72. Some regional courts[86] seem inclined to excuse the legal ignorance in selecting the competent authority to hear the case and accept the suspending effect on the period of a wrong lawsuit.[87] Such attempts of flexibility reveal an intent to favour weak parties and remove procedural obstacles in cases with high social impact and in a socioeconomic context severely damaged by the economic crisis.

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85 Tribunal Supremo 27 April 1940; Tribunal Supremo 25 September 1950; or more recently Tribunal Supremo 12 February 1996. http://www.poderjudicial.es/search/indexAN.jsp.

86 Audiencia Provincial (Provincial Court) of Cuenca 16 June 2009 (Roj: SAP CU 276/2009 – ECLI: ES:APCU:2009:276) held that a lawsuit presented before a wrong court does interrupt the passing of the prescription period, as it clearly expressed the will of exercising the right despite the ignorance. The same line of reasoning was followed by the same Court in its decision of 13 May 2009 (Roj: SAP CU 187/2009 – ECLI: ES:APCU:2009:187).

Roj: SAP O 3361/2016 – ECLI: ES:APO:2016:3361, Audiencia Provincial (Provincial Court) of Oviedo 23 December 2016 held that only when the performance of the contractual obligations is entirely completed the prescription period should start.

87 Roj: STS 3450/2016 – ECLI: ES:TS:2016:3450. The Supreme Court endorses the jurisprudential line marked by the above-referred lower case law in relation to the admission of the suspension in the prescription period even if the lawsuit was wrongly submitted. In all cases, the court was not the one territorially competent to hear the case.

Notwithstanding, a generous application of flexible expiration periods to exercise actions infuses a high level of uncertainty in the market, leads to unpredictability in assessing the lapse of periods, and enables to take advantage of subjective ignorance in the exercise of rights, even where professional legal advice is expected or required.

7. On the Legal Ignorance in Tort Law

73. Legal ignorance plays a significant role in tort law as well. From a conceptual point of view, ignorance of the illegality of the harmful conduct excludes wilful misconduct or malice (*dolo).*[88] Case law[89] and scholars[90] are clear in stressing that a *dolo* entails the knowledge of the unlawfulness of the harmful action.[91] Therefore, the ignorance of the unlawfulness removes the intentionality element from the harmful situation and excludes *dolo.* Allegation of ignorance will be inadmissible where the ignorance is deliberate, as concurring circumstances prove that the alleging party could have not ignored.[92]

74. One of the consequences of acknowledging legal ignorance in tort law might be then the delimitation of compensation. As per Article 1107 CC,[93] in case of *dolo*,[94] all proved damages arising from the intentional breach of the obligation shall be compensable, whereas, only those damages that could have been expected at the time of concluding the contract (or the obligation) should be compensated by a debtor of good faith. As a consequence, insofar as legal ignorance allows to negate intentionality, the scope of compensation will be reduced to expected damages at

88 Contrarily, Audiencia Provincial (Provincial Court) of Salamanca 25 June 2014 (SAP SA 336/2014 – ECLI: ES:APSA:2014:336) held that the swap agreement was null and void on grounds of invalidating mistake and *dolo.* The court found that the bank knew that the interest rates could likely decrease but it did intentionally omit that information and offered the client a complex and speculative product designed to protect the client against an increase of interest rate.

89 Tribunal Supremo 9 March 1962; Tribunal Supremo 31 January 1968; Tribunal Supremo 27 April 1973; Tribunal Supremo 19 May 1973; and Tribunal Supremo 23 October 1984, http://www.poderjudicial.es/search/indexAN.jsp.

90 J.L. Lacruz, *Elementos de Derecho civil* (Barcelona: Bosch 1985), p 505; L. Díez-Picazo, *Fundamentos de Derecho Civil Patrimonial*, p 708; J. Puig Brutau, *Fundamentos de Derecho civil* (Barcelona: Bosch 1979), p 505; A. Cossío, *Instituciones de Derecho civil*, Vol. I (Madrid: Alianza 1975), p 297.

91 A. Cossío, *El dolo en el Derecho Civil* (Madrid: Ed. Revista de Derecho Privado 1955).

92 Tribunal Supremo 21 May 2012, STS 429/2012, Roj: STS 3764/2012 – ECLI: ES:TS:2012:3764.

93 Formulating a corrective interpretation of the second paragraph of Art. 1107 CC, deemed as an 'absurd provision', F. Pantaleón Prieto, 'El sistema de responsabilidad contractual (Materiales para un debate)', 3. *A. D. C. (Anuario de Derecho Civil)* 1991, p (1019) at 1088.

94 Explaining the meaning and the scope of *dolo* in the regime for breach of contract and its legal consequences as Art. 1107 refers to, F. Gómez Pomar, 'El incumplimiento contractual en Derecho español', 3. *InDret* 2007.

the time when the obligation came into existence. It is argued that there is no need to frame within the contractual liability scope, as per Article 1107 II CC, damages caused by *dolo* insofar as tort law (the general clause of Art. 1902 CC) might provide full compensation.[95]

75. Yet, Article 1107 CC is formulated as a provision governing the consequences of breach of contract. Thus, it is discussed whether it may be extended to tort law (extracontractual liability) as well. Some authors[96] advocate for an extensive application based on criteria of justice or fairness. Accordingly, consequences of willful misconduct, malice, or bad faith should be more severely punished. While other voices[97] reject the analogy explaining that the ratio of the rule provided for Article 1107 II CC is the primacy of party autonomy. Hence, the lack of identity of ratio with rules governing tort law advises against applying Article 1107 CC to tort law.

8. Conclusions

76. The rule *ignorantia juris non excusat* constitutes a historical principle in Spanish law as a key pillar of the collective organization of the legal system. The rule embodies the assumption that the effectiveness of the laws cannot rely on subjective elements, such as knowledge or ignorance, interest or carelessness, but it is based on an objective and social component of the legal system aimed to ensure that the enforcement of the laws is general and unconditional. Today, it is still inspiring the modern legal system and expressly enshrined in Article 6.1 CC.

77. The legislative exuberance in modern societies renders, nevertheless, this classical rule extremely challenging and totally unrealistic if it were remotely understood as a legal obligation to know all laws. The maxima is far from being interpreted in that sense. Simply, ignorance cannot be alleged as an excuse or an obstacle for not complying with the laws. Notwithstanding, continuous efforts have been made to enhance the publicity of laws, improve comprehensibility, and implement technological solutions aimed to ensure accessibility of legislation, regulations, case law, and public authorities' decisions.

78. Under the above-described interpretation, the inexcusability of legal ignorance has been then preserved in current Spanish legal system with the same historical meaning and no exception.

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95 A.M. Morales Moreno, *Incumplimiento del contrato y lucro cesante* (Madrid: Thomson 2010).

96 A. Cristóbal Montes, 'El enigmático artículo 1107 del Código Civil español', in *Centenario del Código Civil* (Madrid: Centro de Estudios Ramón Areces 1990), pp 559–575.

97 F. Peña López, *La culpabilidad en la responsabilidad civil extracontractual* (Granada: Comares 2002); F. Pantaleón Prieto, 'El sistema de responsabilidad contractual (Materiales para un debate)', 3. *A. D. C. (Anuario de Derecho Civil)* 1991, p (1019) at 1020.

79. Upon the reform of the CC in 1974 and finally overcoming a historical misinterpretation, a distinction is expressly made between the inexcusable legal ignorance and the *error iuris*. Whereas the legal ignorance refers to the non-compliance of a legal rule due to the lack of awareness, the *error iuris* entails a wrong knowledge or interpretation of a legal rule that determines a vitiated or mistaken declaration of will or consent. Accordingly, *error iuris* can be excusable and may have specific legal effects.

80. The third layer of the discussion that must be explained here to understand the current role of legal ignorance today is the relationship between mistake of law (*error iuris*) and mistake of fact (*error facti*). As, in both cases, the decision-making process is affected by an inexact knowledge of relevant elements that impede the formation of a conscious rational decision, if a legal provision referring to an error does not explicitly distinguish between *error iuris* and *error facti*, it should be interpreted as applicable to any of them.

81. Therefore, the preservation in Spanish law of the inexcusability of legal ignorance coexists and is compatible with the concurrent recognition of *error iuris* as a mistake likely to invalidate consent in private law provided that it is essential and excusable.

82. The massive wave of cases related to swap agreements, investment services, bank contracts, and other agreements in the financial market with professional and non-professional clients has triggered a recent revival of the allegation of legal ignorance (in sense of *error*) before courts and arbitration tribunals to challenge the validity of the contract on the grounds of vitiated consent. All these cases reveal that the requirement of excusability is interpreted as a matter of imputability and, therefore, the scrutiny of the courts is fundamentally focused on the compliance by the counterparty of the information obligations, the duty of diligence, and the assessment of investor/client profile.

83. The significant number of cases dealing with the nullity of contracts on the grounds of legal ignorance in the above-referred transactions allows to put some remarks forward. First, the essence and the limits of legal ignorance (*error iuris* and *error facti*) are forced too much and the contours of this classical legal institution are unjustifiably deformed. The rationale behind that excessive application seems to be the reasonable intent of sanctioning incorrect institutional practices during the years preceding the latest financial crisis and, probably, deterring the reproduction of those commercialization processes, and the reappearance of a massive distribution of those questionable financial products. An excess in the resort to legal ignorance is perceived with the aim of questioning banking practices during a period. Likewise, the assessment of the criteria for legal ignorance to be an invalidating mistake has transformed into a formalistic scrutiny. In particular, as the burden of the proof on the compliance of the information obligations places on the bank/investment company, court decisions are primarily based on a detailed

factual analysis of the marketing, commercialization, and signing steps of the contract formation with a more limited attention, in general, to the client's behaviour, expertise, and knowledge. In addition, an incomprehensibly flexible application of prescription period for the exercise of actions could create an undesired legal uncertainty for market transactions.

84. In such a context, the consumer protection legislation, in particular, is entirely oriented towards the establishment of information duties, warning duties, and explanations on the business side. Apart from such commonplace protective legal tools, however, no general exceptions to the inexcusability of legal ignorance have been introduced in consumer laws. Except for certain specific cases where the counterparty must inform the consumers of their rights (the most illustrative, among a few others, is the information on the right of withdrawal), warn of risks, or explain issues with legal relevance, there is no a general comprehensive obligation to inform/explain consumers the applicable law and their rights.

85. In tort law, the role of legal ignorance is significant as well. It has a direct impact on the assessment of intentionality or *dolo*, but it is highly debatable whether it may influence the determination of the scope of compensable damages.

86. Against such a backdrop, I consider that the following debates may be opened to lead future developments in this area.

87. First, the excessive use of legal ignorance as an invalidating mistake as a tool to alleviate contractual unfairness, inadequate institutional practices, or commercial abuse blurs its contours, debilitates the principle of contract preservation, deteriorates legal certainty, and discourages transactions. Such a use of legal ignorance should be abandoned, and proper protective measures, competition rules, or consumer legislation, where applicable, should be developed (and applied) instead.

88. Likewise, legal ignorance on prescription periods cannot be excused and should not have any impact on the inexorable lapsing of the period to exercise an action or right. For the sake of legal certainty, the lapsing of prescription periods cannot depend upon the subjective conditions. Even in consumer transactions, unless the other party had acted with fraud or intention, ignorance of a prescription period, its length, or the legal consequences of its expiration will not avoid the loss of the action or right.

89. Second, the regulation of increasing information duties as a strategy to attenuate the impact of legal ignorance is making pre- and contractual processes complex, overinformed, and formalistic. It might arouse the risk of formal compliance. Digital technologies facilitate these formal-compliance strategies with easy, no-costly, extremely efficient methods to provide information. Although the accelerated pace of modern societies does unlikely give an alternative, it should be studied whether the formal compliance is materially enhancing the manifestation of a free, informed consent.