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STUDIES IN FOREIGN AND TRANSNATIONAL LAW

TERESA RODRÍGUEZ DE LAS
HERAS BALLELL

*INTRODUCTION TO SPANISH
PRIVATE LAW*

FACING THE SOCIAL AND ECONOMIC CHALLENGES

INTRODUCTION TO SPANISH PRIVATE LAW

Facing the social and economic challenges

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With the collaboration of Jorge Feliu Rey



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INTRODUCTION TO SPANISH PRIVATE LAW

The topics addressed in this book have traditionally been covered in separate publications on Civil and Commercial law. This dualism of regimes has made it difficult for students and professionals alike to comprehend Spanish Private Law as a whole. In the past, this has led to inefficient duplication of explanations, gaps in key areas, and an altogether fragmented picture.

Introduction to Spanish Private Law presents a consolidated, modern and realistic image of today's Spanish private legal system. It combines both Civil and Commercial Law and integrates them in the same book, making the overall subject far more accessible to readers. This united approach results in a more logical and efficient process of learning. Finally, the issues that are addressed reflect the reality of today's economic and legal scene. This book attempts to provide the readers with the necessary legal instruments to tackle the real problems arising from a globalized modern society. The general principles in this book are presented from a practical point of view that emanates from the author's conception of a legal system as an instrument to solve social problems in accordance with a set of principles, values and aims.

Teresa Rodríguez de las Heras Ballell is Associate Professor of Private and Commercial Law at the Universidad Carlos III in Madrid.

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Foreword |

The book that the reader has in his or her hands is an unusual book. And so it is in the world of the Spanish legal publishing. As is well known, Spain is a country of Roman legal tradition and also a country with a dual Private Law system. This means that usually for most contracts a double regulation can be found, as occurs in many countries of the continental legal system: the civil one and the commercial one.

The dual contractual regime is established by means of two differentiated codes: the *Civil Code* and the *Commercial Code*. Each of them focuses on the features usually linked to the different circumstances or the context of the relationship concerned – commercial or merely private and non-professional.

As a result of the legislative situation, the Private Law sphere in Spain – as in many continental jurisdictions – is divided into two deeply differentiated hemispheres: in the academic, professional, journalistic and scientific fields, there are civil or non-commercial areas – with their literature, practitioners and journals – and correlating commercial ones. Since 2003 this split also appears with regard to the Courts: along with Civil Courts, new Commercial Courts, lost in 1869, have been born again at the beginning of the twenty-first century.

This split of Private Law produces, from the publishing point of view, the effect that books, handbooks and treatises also grow separately. The commercial institutions are studied and discussed in commercial books, the civil institutions in civil books.

This situation is not surprising and occurs almost everywhere there is Roman law around the world. It is more surprising, however, when it occurs in countries with a double codification in force, which is not a necessary feature of that Roman tradition.

Introduction to Spanish Private Law by Teresa Rodríguez de las Heras Ballell is unusual among Spanish works precisely because of the joint treatment of Spanish Private Law as a whole – both Civil and Commercial. This kind of intellectual exercise is not very frequent in my country. Therefore, and quite paradoxically, while the Spanish reader will still need two books, the English-speaking reader will have a single one: Professor Rodríguez de las Heras Ballell's book.

The effort at aggregation made by the author yields surprising results: it presents a systematically divided Private Law system – the Spanish one – in a consistent way and in a manner that is much easier to understand. Furthermore, under this approach, Spanish Private Law probably appears even simpler than it actually is.

There is another aspect of the book that I need to highlight, which is that its pages provide a fully contemporary and up-to-date vision of all the matters therein addressed by the author. In the choice between the classical and the modern way of understanding and explaining all the many contracts and relationships found in its chapters the author's decision is always the same: in keeping with the mood of our times.

This approach is consistently maintained all through the book: the choice in favour of the contemporary view can be perceived not only in the treatments given to all issues but also in the selection of the topics tackled. It is by now obvious that every legal system is in a very significant measure influenced by business life and daily economic activity: rules become outdated as soon as the realities they govern disappear. With the emergence of new realities, the need for new norms is felt. In the case of the *Codes*, the question is that old rules remain inside the texts, whereas accommodation of new ones entails the need to reform and modernize the *Code* structure. In some way, a degree of 'petrification' of the law occurs. Academics, in this situation, need to make a choice between the legal – but outdated – formulation, on the one hand, and the up-to-date text that has been produced by legal practice – operators and their advisers – and Courts.

For Teresa Rodríguez de las Heras Ballell the choice to be made appears clear. The contents of her book offers powerful signals about the meaning of the choice of the contemporary approach, understanding and interpretation of the Spanish *Codes* enacted – both *Civil* and *Commercial* – by the end of the nineteenth century. A wise decision.

Various chapters in the book provide proof of this. In my opinion, the insertion in the Introduction of a number of topics, among others: the impact of new technologies on the legal system; the rising phenomenon of self-regulation by means of codes of conduct and reference to international standards; the identification of the irruption in Private Law of trusted third parties and the inclusion of arbitration and other alternative dispute resolution methods are of the greatest interest. The whole presentation of the various kinds of commercial companies and their statutes, under the predominance of the *Sociedad Anónima* (or public limited company), is full of information and accurate opinions. The chapter on the electronification of shareholder's rights is very convincing, as also is the chapter on the market and the electronic marketplaces.

This preference of the author for, if not commitment to, the contemporary vision of the Spanish Private Law does not cause any inconvenience and does not prevent her from providing a precise and exact description of the most traditional institutions, such as some contracts, guarantees, security interests and property rights. Deeply rooted in the *Codes*, these fundamental institutions of the Spanish legal system also constitute another relevant part of the book.

I can conclude that it is a pity not to have access, for the time being, to a Spanish translation of this accurate and balanced book. It deserves to be read by our students in Spanish universities.

My opinion can, however, not be entirely impartial: Teresa Rodríguez de las Heras Ballell and her collaborator Jorge Feliu Rey are members, like me, of the Department of Private Law at the Carlos III University in Madrid. Teresa was a doctoral student there under my supervision and now is my colleague teaching Commercial Law in the south of Madrid. For 10 years we have reciprocally benefited from common activities in research programmes and participated in common academic endeavours. Under these circumstances, I might be accused of some degree of exaggeration. Anyway, the reader has the final word on this *Introduction to Spanish Private Law*.

Es su turno!

Rafael Illescas
Professor of Commercial Law
Chairman of UNCITRAL
Getafe, Madrid,
February, 2009

Preface |

This Series is gradually fulfilling the vision of its founder, Sir Basil Markesinis, in becoming a rich source of information about foreign and transnational law, and it is with pleasure and some pride that we are now able to present this introduction to Spanish Private Law as our ninth contribution to the international legal discourse.

The work of Teresa Rodríguez de las Heras Ballell and her collaborator Jorge Feliu Rey of Universidad Carlos III de Madrid is important for a number of reasons, both academic and practical.

There is, first, a demand for more material on the Spanish legal system in the context of developing and delivering a foreign law curriculum. An increasing number of universities in the United Kingdom are offering law degrees which combine the traditional LLB with elements of Spanish law, and both students and their teachers at University College London, Oxford, Nottingham and several other faculties across the country will profit immensely from this up-to-date account of Spanish private and commercial legal issues. Though still nascent, a similar development is currently taking place across the Atlantic, where American law schools are looking towards the Iberian Peninsula both for the purposes of establishing links with Europe and, indirectly, developing common projects with their counterparts in Latin America – schools located in civil law systems which still maintain close cultural, legal and economic ties with Spain and Portugal. American students wishing to familiarize themselves with Spanish law, be it as part of a JD offering in the United States or as preparation for studies abroad, will again appreciate the work of our colleagues in Madrid.

Closely related to this first audience is a second – academic researchers. European legal systems are no doubt converging. This trend, largely due to the influence of the European Union and the creation of a common market of nearly 500 million consumers, is now reaching far beyond the confines of Community competence and is increasingly palpable in areas of private and commercial law which have traditionally been regarded as purely national. For researchers interested in bringing closer together Europe's diverse legal traditions, either in the form of model laws or more modest comparative endeavours, this book – written in the Continent's

new lingua franca – will offer a convenient point of first entry to the world of Spanish private law doctrine and jurisprudence.

Finally, there is legal practice. In the United Kingdom, particularly, there is an increasing demand for professional advice concerning Spanish law, including the purchase or sale of land, family law, questions of inheritance, and tort law. A growing number of specialized law firms cater to these particular needs, but even the local high street solicitor may from time to time be confronted with cases involving Spanish law and profit from a resource which provides some basic background on these issues. While a book of this size will, inevitably, not be able to give *comprehensive* answers to *every* inquiry, it does offer reliable and detailed information on a wide range of practically relevant areas including family law, the law of succession, contract and tort law, consumer protection, insurance law, commercial and business transactions, and the Spanish court system.

I have had the privilege of working with both authors over the past years and can attest to their continued efforts in building bridges (institutional and scholarly) between Spain and other legal systems, and in making their own law more accessible to the outside world. This strong commitment to the international exchange of ideas, combined with their deep understanding of Spanish private and commercial law, make them the perfect authors of the book you hold in hand.

Professor Dr Jörg Fedtke
General Series Co-Editor
A.N. Yiannopoulos Chair in Comparative Law
Tulane University Law School, New Orleans
29 April 2009

Abbreviations |

AAVV	Autores varios/Several authors
ABA	American Bar Association
AC	<i>Actualidad Civil</i>
ADC	<i>Anuario de Derecho Civil</i>
ADI	<i>Actas de Derecho Industrial</i>
ADM	<i>Anuario de Derecho Marítimo</i>
ADR	Alternative Dispute Resolution
AECE	Asociación Española de Comercio Electrónico
AEIE	Agrupación Europea de Interés Económico/European Economic Interest Grouping
AIE	Agrupación de Interés Económico/Economic Interest Grouping
<i>Am.Ec.Rev.</i>	<i>American Economic Review</i>
<i>Am.J.Comp.L.</i>	<i>The American Journal of Comparative Law</i>
<i>Am.U.L.Rev.</i>	<i>American University Law Review</i>
ap.	Apartado
art.	Artículo/Article
ATS	Alternative Trading System(s)
<i>Berkeley Tech.L.J.</i>	<i>Berkeley Technology Law Journal</i>
BOE	<i>Boletín Oficial del Estado/Official Bulletin</i>
<i>Bus.Law.</i>	<i>The Business Lawyer</i>
<i>Cal.L.Rev.</i>	<i>California Law Review</i>
<i>Camp.L.Rev.</i>	<i>Campbell Law Review</i>
<i>Cardozo L.Rev.</i>	<i>Cardozo Law Review</i>
<i>Cardozo Online J.Confl.Resol.</i>	<i>Cardozo Online Journal of Conflict Resolution</i>
<i>Cath.U.L.Rev.</i>	<i>Catholic University Law Review</i>
CECA	Confederación Española de Cajas de Ahorro

<i>Cc</i>	<i>Código Civil/Civil Code</i>
<i>Cco</i>	<i>Código de Comercio/Commercial Code</i>
CISG	United Nations Convention on Contracts for the International Sales of Goods 1980
CNMV	Comisión Nacional del Mercado de Valores
CNUDMI/UNCITRAL	Comisión de Naciones Unidas para el Derecho Mercantil Internacional/United Nations Commission on International Trade Law
<i>Colum.L.Rev.</i>	<i>Columbia Law Review</i>
<i>Conn.L.Rev.</i>	<i>Connecticut Law Review</i>
Coord.	Coordinador/coordinación/Coordinator
<i>Cornell Intl L.J.</i>	<i>Cornell International Law Journal</i>
<i>Cornell L.Rev.</i>	<i>Cornell Law Review</i>
CV	Convención de Naciones Unidas sobre los Contratos de Compraventa Internacional de Mercaderías, hecha en Viena el 11 de abril de 1980
DGRN	Dirección General de los Registros y del Notariado
Dir.	Director/dirección/Director
Dir.Comm.Int.	Diritto del Commercio Internazionale: pratica Internazionale e diritto interno: giurisprudenza commerciale
Dir.Mar.	Il Diritto Marittimo
DMCA	Digital Millennium Copyright Act
DMIF/MIFID	Directiva 2004/39/CE del Parlamento Europeo y del Consejo, de 21 de abril de 2004, relativa a los mercados de instrumentos financieros, por la que se modifican las Directivas 85/611/CEE y 93/6/CEE del Consejo y la Directiva 2000/12/CE del Parlamento Europeo y del Consejo y se deroga la Directiva 93/22/CEE del Consejo/EU Directive 2004/39/EC
DN	Derecho de los Negocios

DUCI/ULIC	Derecho Uniforme del Comercio Internacional/Uniform Law for International Commerce
DUE	Documento Único Electrónico
<i>Duke L.J.</i>	<i>Duke Law Journal</i>
<i>E.L.Rev.</i>	<i>European Law Review</i>
ECJ	European Court of Justice
ECLIP	Electronic Commerce Legal Issues Platform
ECLR	European Competition Law Review
ECN	Electronic Communication Network(s)
Ed.	Edición/ Edition
EDI	Electronic Data Interchange
EEE/EEA	Espacio Económico Europeo/ European Economic Area
<i>et al.</i>	Y otros/and others
EU	European Union
<i>Fed. Comm. L.J.</i>	<i>Federal Communications Law Journal</i>
FESCO	The Forum of European Securities Commissions
FTC	Federal Trade Commission
<i>Geo.Wash.L.Rev.</i>	<i>The George Washington Law Review</i>
GJ	Gaceta Jurídica de la Unión Europea y de la Competencia
<i>Harv.Negotiation L.Rev.</i>	<i>Harvard Negotiation Law Review</i>
<i>Harv.J.L. & Tech.</i>	<i>Harvard Journal of Law & Technology</i>
<i>Harv.J.L.& Pub.Pol'y</i>	<i>Harvard Journal of Law and Public Policy</i>
HBR	<i>Harvard Business Review</i>
HLR	<i>Harvard Law Review</i>
Ibid.	En el mismo lugar/At the same place
ICO	Instituto de Crédito Oficial
IDEA	IDEA – <i>The Journal of Law and Technology</i>
<i>Ill.L.Rev.</i>	<i>Illinois Law Review</i>
IOSCO	International Organization of Securities Commissions
<i>J.App.Corp.Fin.</i>	<i>Journal of Applied Corporate Finance</i>
<i>J.Bus.L.</i>	<i>The Journal of Business Law</i>

<i>J.Corp.L.</i>	<i>The Journal of Corporation Law</i>
<i>J.Ec.Behavior & Org.</i>	<i>Journal of Economic Behavior & Organization</i>
<i>J.Fin.</i>	<i>The Journal of Finance</i>
<i>J.Fin.Ec.</i>	<i>Journal of Financial Economics</i>
<i>J.L.& Ec.</i>	<i>Journal of Law and Economics</i>
<i>J.L.Econ.& Org.</i>	<i>Journal of Law, Economics & Organization</i>
<i>J.Legal Stud.</i>	<i>Journal of Legal Studies</i>
<i>L.Rev.</i>	<i>Law Review</i>
<i>La.L.Rev.</i>	<i>Louisiana Law Review</i>
<i>Law & Poly Intl Bus.</i>	<i>Law and Policy in International Business</i>
LCD	Ley 3/1991, of 10 January, de Competencia Desleal/Law on Unfair Competence
LCGC	Ley 7/1998, of 13 April, sobre Condiciones Generales de Contratación/Law on Standard Contract Terms
LFE	Ley 59/2003, of 19 December, de firma electrónica/Law on Electronic Signature
LGDJ	Librairie Générale de Droit et de Jurisprudence
LID	Ley 20/2003, of 7 July, de Diseño Industrial/Law on Industrial Designs
LISI	Ley 56/2007, of 28 December, de medidas de impulso de la sociedad de la información/Law promoting information society
<i>Ll.M.C.L.Q.</i>	<i>Lloyd's Maritime and Commercial Law Quarterly</i>
LOPJ	Ley 6/1985, of 1 July, de Poder Judicial/Organic Law of Judicial Power
<i>Loy.L.A.L.Rev.</i>	<i>Loyola of Los Angeles Law Review</i>
<i>Loy.L.Rev.</i>	<i>Loyola Law Review</i>
LSA	Texto Refundido de la Ley de Sociedades Anónimas que aprueba el Real Decreto Legislativo 1564/1989, of 22 December/Law regulating 'Sociedades Anónimas'

LSLNE	Ley 7/2003, of 1 April, de la Sociedad Limitada Nueva Empresa, por la que se modifica la Ley 2/1995, de 23 de marzo, de Sociedad de Responsabilidad Limitada/Law regulating 'Sociedad Limitada Nueva Empresa'
LSRL	Ley 2/1995, of 23 March, de Sociedad de Responsabilidad Limitada/Law regulating 'Sociedad Limitada'
LSSICE	Ley 34/2002, of 11 July, de servicios de la sociedad de la información y comercio electrónico/Law on Electronic Commerce
N.Y.L.J.	<i>New York Law Journal</i>
N.Y.U.L.Rev.	<i>New York University Law Review</i>
Noticias C.E.E.	Noticias C.E.E.: servicio de informaciones sobre la Comunidad Económica Europea
Noticias UE	Noticias de la Unión Europea
no.	Number
<i>Nw.J.Intl L. & Bus.</i>	<i>Northwestern Journal of International Law & Business</i>
<i>Nw.U.L.Rev.</i>	<i>Northwestern University Law Review</i>
O.J.	Official Journal
ODR	Online Dispute Resolution
OFT	Office of Fair Trading
op.cit.	obra citada/work cited
p.	page
<i>Pace Intl L.Rev.</i>	<i>Pace International Law Review</i>
<i>Pace L.Rev.</i>	<i>Pace Law Review</i>
PECL	Principles of European Contract Law
pp.	pages
PTS	Proprietary Trading System(s)
<i>RAND J.Ec.</i>	<i>The RAND Journal of Economics</i>
RCC	<i>Revue de la Concurrence et de la Consommation</i>
RCDI	<i>Revista Crítica de Derecho Inmobiliario</i>
RCE	<i>Revista de la Contratación Electrónica</i>
RD	Real Decreto

RDBB	<i>Revista de Derecho Bancario y Bursátil</i>
RDM	<i>Revista de Derecho Mercantil</i>
RDN	<i>Revista de Derecho Notarial</i>
RDP	<i>Revista de Derecho Privado</i>
RdS	<i>Revista Aranzadi de Derecho de Sociedades</i>
REDA	<i>Civitas: Revista Española de Derecho Administrativo</i>
<i>Rev.Trim. Dr.Civ.</i>	<i>Revue Trimestrielle de Droit Civile</i>
<i>Rev.Trim.Dr.Comm</i>	<i>Revue Trimestrielle de Droit Commercial</i>
RGD	<i>Revista General de Derecho</i>
RGLJ	<i>Revista General de Legislación y Jurisprudencia</i>
<i>Riv.Dir.Civ.</i>	<i>Rivista di Diritto Civile</i>
<i>Riv.Dir.Comm.</i>	<i>Rivista di Diritto Commerciale</i>
<i>Riv.Dir.Ind.</i>	<i>Rivista di Diritto Industriale</i>
<i>Riv.Soc.</i>	<i>Rivista delle società</i>
<i>Riv.Trim.Dir.Proc.Civ.</i>	<i>Rivista Trimestrale di Diritto e Procedura Civile</i>
RJ	Repertorio de Jurisprudencia Aranzadi/Jurisprudence Collection
SAP	Sentencia de la Audiencia Provincial/Provincial Court judgment
SEC	Securities Exchange Commission
<i>Sec.L.Rev.</i>	<i>Securities Law Review</i>
SL	Sociedad Limitada
SLNE	Sociedad Limitada Nueva Empresa
<i>Tex.L.Rev.</i>	<i>Texas Law Review</i>
TTP	Trusted Third Party
<i>U.Pa.J.Intl Bus.L.</i>	<i>University of Pennsylvania Journal of International Business Law</i>
<i>U.Pa.J.Intl Econ.L.</i>	<i>University of Pennsylvania Journal of International Economic Law</i>
<i>U.Pa.L.Rev</i>	<i>University of Pennsylvania Law Review</i>
<i>UCLA L.Rev.</i>	<i>The University of California Law Review</i>
ult.op.loc.cit.	Última obra y lugar citados/Last work cited and page
UNIDROIT	UNIDROIT Principles of International Commercial Contracts 2004

Va.J.Intl L.

Va.J.L.& Tech.

Va.L.Rev.

Vand.L.Rev.

Vol.

Yale L.J.

Virginia Journal of International Law

*Virginia Journal of Law and
Technology*

Virginia Law Review

Vanderbilt Law Review

Volume

Yale Law Journal