

Benchmarking of existing national legal e-business practices

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Country report - Spain

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Spain

1.1 General information about the national legal system¹

The Spanish Constitution of 1978 is Spain's supreme body of law and establishes a system based on a parliamentary monarchy. The King is the official head of state and his powers are limited by the Constitution and his actions must be endorsed by the President of the Government or other competent minister.

Territorially, the Constitution defines a unitary, but highly decentralised state. Accordingly, Spain is composed of 17 Autonomous Regions, each of which has an autonomous Parliament and Executive.

The Spanish legal system is a civil law system. Strictly speaking, law is not created by judicial decisions (*jurisprudencia*), but by codified legislation and custom applied by the courts.

Sources of Law

The Spanish legal system is hierarchical, all legal norms having a different rank or order. Provisions with a lower status which conflict with those of a higher status will generally be invalid.

1. *Organic Laws*. Aside from the Constitution, this is the highest form of law, which relate to fundamental rights and freedoms, the approval of the statutes of the Autonomous Regions, the electoral system and certain other matters. An absolute majority of Congress is required to pass or amend an organic law.
2. *Ordinary Laws*. This is the 'normal' form of legislation, which is debated and approved by Parliament.
3. *Decree-Laws*. These norms have the same status as ordinary laws, the only difference being that they are provisional, issued by the executive in special or urgent cases.
4. *Legislative Decrees*. This is a form of delegated legislation, where the Spanish Parliament delegates to the Government the power to issue executive orders on particular matters. Such orders are known as legislative decrees and have the status of ordinary law.
5. *Decrees, Ministerial Orders and Resolutions*. Of lower status are all other executive orders and regulations.
6. *Autonomous Regions*. The Autonomous Regions may also legislate within their jurisdiction. The laws have similar status to those passed by central government, although they are applicable only within the autonomous region.

¹ Please note that the full references to legislation and corresponding hyperlinks are provided in Annex 1 to this document.

International Treaties

International treaties are not directly applicable in Spain and must be ratified by Parliament and published in the Official State Gazette (*BOE*) in order to come into force. The Constitution draws a distinction between different types of treaties:

1. *Article 93 treaties*, which confer some of the powers of the State on an international organisation (e.g. the Treaty of Accession of Spain into the EU). An Organic Law authorising the signing of the treaty is required, but once that law is published in the Official State Gazette, it will automatically become part of national law.
2. *Treaties requiring prior authorisation by Parliament*. These treaties are of a political or military nature (e.g. the participation of Spain in NATO) and affect the territorial integrity of the State, fundamental rights or create financial obligations on the State.
3. *Other treaties*. Any treaty not included within the above categories may be signed and ratified by the Executive. The only additional obligation is to inform Parliament.

EU Law

The Supreme Court has recognised that EU law has direct effect and supremacy over national law. Despite this, Directives are usually implemented into Spanish law by way of enacting legislation, which invariably reflects in relatively literal fashion the content of the Directive. Although a Directive may be implemented by various laws, it is more common for this to be effected through one body of legislation.

Court System

Case Law and Legal Precedence

Article 1 of the Spanish Civil Code is clear on the authority of judicial precedent; "*the sources of Spanish law are laws, customs and the general principles of law*", with no express reference to case law, which is stated simply to "*complement*" these sources of law. Only decisions of the Supreme Court have binding force and carry weight in the application and interpretation of the law.

Structure of the Courts

The structure of the judicial power is organised according to:

1. Subject matter (civil, criminal, employment / social, administrative, military)
2. Territory (municipalities, judicial districts, provinces, Autonomous Regions and the national territory)
3. Hierarchy

Of particular note, the Constitutional Court is an organ of the State, established to interpret the Constitution and assess the conformity of sources of law with the Constitution. The value of the case law of the Constitutional Court is very different to that of the Supreme Court. If the Constitutional Court declares legislation to be unconstitutional and so null and void, such interpretation is superior to that of the legislator.

The Supreme Court is the supreme tribunal of the jurisdictional order and has jurisdiction throughout the national territory on civil, criminal, employment / social, administrative and military matters.

The *Audiencia Nacional* is a court with jurisdiction throughout the national territory on criminal, administrative and employment / social matters

2. Electronic signatures

2.1 National legislation and administrative practice

Spain has implemented Directive 1999/93/EC on a Community framework for electronic signatures by Law 59/2003, of December 19, on Electronic Signatures. The implementation was quite comprehensive, and there are no other laws that complete the regulation of the electronic signature. The intention of this Law is to develop e-government and electronic commerce in Spain. We are not aware of any major problems with implementation.

The Spanish law describes 3 types of signatures: 1) the electronic signature, 2) the advanced electronic signature, and 3) the recognized signature based on a qualified certificate and generated with a secure device.

The **electronic signature** is defined as those electronic data that can be used as a way to identify someone. The **advanced electronic signature** is based on an electronic certification and permits the identification of the person that signs the documents, as well as the detection of any other change in the electronic document that has been signed. The **recognised electronic signature** is the equivalent to the advanced electronic signature defined in Article 2 of Directive 1999/93, is based on a recognised certificate, and meets the following requirements: (a) it is uniquely linked to the signatory, (b) it is capable of identifying the signatory, (c) it is created using means that the signatory can maintain under his sole control, and (d) it is linked to the data to which it relates in such manner that any subsequent change of the data is detectable. Spanish law is based on the functional equivalence of the recognised electronic signature (in respect of electronic documents) and the written signature (in respect of physical documents), which both have the same legal value. In this sense, Article 3.4 of the Spanish law implements Article 5 of the Directive.

"Electronic document" in this context is defined as a document drafted in an electronic support, which incorporates the data signed electronically. Electronic documents may therefore replace or constitute:

- Public documents, which are signed electronically by civil servants who are legally attributed the power to attest judicial, notarial or administrative documents (*fe pública*), provided that they act within the limits of their competence and the relevant legal requirements.
- Documents issued and signed electronically by civil servants or public employees in the exercise of their public functions, in accordance with their specific legislation.
- Private documents.

The electronic support of data which has been signed electronically is also admissible in evidence (Article 3.8 of Law 59/2003). While the concept of the electronic signature under Spanish legislation is relatively broad, the use of such signatures has not been fully embraced in Spain across all sectors, despite the fact that in our opinion the necessary legal certainty for their use does arguably now exist.

There have been a number of successful initiatives in the public sector to promote the use of electronic signatures (e.g. for the filing of tax returns), although these initiatives have not yet enjoyed any significant spill-over into the private sector. In our opinion, a number of reasons may exist for this, including:

1. The increased, relative benefits of using electronic signatures are only evident where the alternative real world procedures are cumbersome and bureaucratic.
2. The availability of simple, alternative, existing technologies (e.g. SSL), which provide consumers with a sufficient level of security / comfort for low and moderate value e-commerce transactions.
3. The relatively lengthy procedural requirements connected with the obtaining of recognised electronic signatures. If recognised electronic signatures were widely accepted in the private sector, the initial effort and investment in obtaining one would be more readily assumed by consumers.
4. The specific requirement under Spanish legislation for the holder to be physically present at some stage for identification purposes when requesting a recognised certificate. This requirement may be dispensed with if the signature on the application form has been authenticated by a notary public.

Although it is still too early to say, the introduction of the electronic identity card or e-DNI (see below) may provide the necessary impulse to bring electronic signatures into the mainstream in Spain. The Spanish Law describes the electronic certification as an electronic document signed electronically by a certification service provider which links signature-verification data to a person and confirms the identity of that person.

The recognised certificate is that electronic certificate provided by a certification service provider that has satisfied special legal requirements, which are similar to those established by Directive 1999/93/EC. Regarding the financial resources to bear the risk of liability for damages, in Spain service providers must possess civil liability insurance of at least 3,000,000 Euros.

It is important to mention that entities that provide certification services do not need an administrative authorisation. According to information provided by the Ministry for Industry, Tourism and Commerce, the following companies provide certification services in Spain in relation to advanced and recognized electronic signatures:

- The National Mint (*FNMYT Fabrica Nacional de Moneda y Timbre*)
- Spanish Certification Agency (*ACE Agencia de Certificación Española*)
- Telecommunications Studies Foundation (*FESTE Fundación de Estudios de Telecomunicaciones*)
- ANCERT - Agencia Notarial de Certificación
- ANF AC

- Autoridad de Certificación de la Comunidad Valenciana (ACCV)
- BANESTO CA
- CAMERFIRMA
- CATCert
- CICCP
- FIRMAPROFESIONAL
- Izenpe, S.A

The Spanish Electronic Signature Law allows corporations to apply for electronic signatures via their directors. Corporations are able to use registered electronic signatures in relations with the Public Administration as well as in the normal contractual relationships of the company. Examples of the common use of corporate electronic signatures are tax declarations and the filing of annual accounts at the Corporate Registry, that can be made in digital format but only if they are signed with a recognised electronic signature.

An additional feature of the Spanish Law is the **Electronic National Identity Card** (e-DNI), which is a National Identity Card that permits the electronic identification of the holder and the electronic signature of documents. The e-DNI will have the same legal effects as the regular National Identification Card and must be universally accepted (by both private individuals and public and private corporations). The e-DNI will have two chips corresponding to two different functions. One to verify the signatory's identity, so individuals will be able to identify themselves over the Internet. This would allow them to complete various administrative processes with the Government, that currently must be undertaken in person. The second chip will permit the holder to sign documents electronically. The Ministry of the Interior will act as a certification service provider issuing qualified certificates for e-DNI.

The implementation of the e-DNI commenced during the first three months of 2006, and is currently only operative in certain parts of Spain. It will be fully in force by 2009.

We have been provided with input from the Ministry for the Public Administration (MAP) in relation to electronic signatures and we include some of their comments below in this section.

Royal Decree 1553/2005² regulates the issue of the e-DNI and the corresponding authentication certificates and electronic signature. The introduction of the e-DNI is seen by the Spanish government as an important milestone in the development of the information society, since it will extend digital identity and the electronic signature to all citizens.

²

https://www.agpd.es/upload/Canal_Documentacion/legislacion/Normativa_Estatal_Co nexa/Real%20Decreto%20dni-e%20y%20firma%20e.pdf#search=%221553%2F2005%22

Although the e-DNI is issued by the General Directorate for the Police (Ministry for the Interior), within the public administration verification and validation of the e-DNI certificates has been delegated to four entities:

1. The National Mint (*FNMYT Fabrica Nacional de Moneda y Timbre*)
2. Ministry for the Public Administration (MAP)
3. Tax authorities (*Agencia Tributaria*) for internal purposes
4. Social Security IT Management (*Gerencia Informática de la Seguridad Social*) for internal purposes

As an initiative designed to encourage e-government, MAP has created a platform for the validation of recognised electronic certificates, which is available free of charge to the public administration. This allows any public body to validate the electronic certificates of the principal certification service providers (CSPs), including those relating to the e-DNI. In order to do this, MAP has signed agreements with the CSPs for the recognition of their certificates.³ The platform offers the following benefits:

1. It provides citizens with simple mechanisms to generate and verify recognised electronic signatures so as to facilitate their use with the same guarantees as written signatures.
2. It unifies and guarantees compliance with other legal obligations, such as data protection requirements, as regards the software applications used.
3. It allows access to different public key infrastructures of different CSPs in a transparent manner, allowing a greater range of electronic certificates.
4. It reduces the technology barrier which can arise as a result of the incorporation of the electronic signature into applications.
5. It reduces costs and creates economies of scale.
6. It allows the auditing of all electronic signature activity and the guarantee of no repudiation over time.

We are informed by MAP that at the present time the public administration is working on providing similar validation services for the electronic identity card for online services in the private sector.

In the public sector, aside from the comments made above, we would draw your attention to the following legislation which regulates documents of the Administration:

1. Royal Decree 209/2003⁴ regulating electronic registers and notifications and the use of electronic means to substitute certificates for electronic certificates.
2. Order Pre 1551/2003⁵, which develops the first final provision of the above Royal Decree. The Order establishes the authenticity, integrity, availability and confidentiality requirements relating to register and notification equipment and software, the technical

³ Further information regarding this system can be found at http://www.dnielectronico.es/seccion_aapp/index.html.

⁴ <http://www.cert.fnmt.es/legsoporte/RealDecreto209.PDF#search=%22real%20decret%20209%2F2003%22>

⁵ <http://www.cert.fnmt.es/legsoporte/Ordenpre1551.PDF#search=%22Orden%20Pre%201551%2F2003%22>

criteria to which they must be submitted and the conditions which the body controlling the single electronic address must meet.

3. Royal Decree 522/2006⁶ which removes the requirement to provide photocopies of identity documents when dealing with the General State Administration and thus simplify and modernise procedures. This reform complements the move towards electronic identity cards.

Royal Decree 523/2006⁷ which removes the requirement to provide photocopies of census register certificates (*certificados de empadronamiento*) when dealing with the General State Administration and its dependent bodies.

Please note that there is no regional (Autonomous Community) legislation relating to electronic signatures. Nevertheless regional governments and, in particular, the regional tax agencies accept the use of recognized electronic signature for transactions with them.

2.2 Cross border regulatory issues

Electronic certificates, both simple and qualified, provided by certification service providers of other EU Member States, will have the same legal effects as those provided by Spanish certification service providers.

Regarding certification service providers outside of the EC, Spanish law recognises the same validity if the provider fulfils one of the following requirements:

- The provider fulfils the requirements established in the Directive 1999/93/EC for the issue of recognised certificates and has been certified under an EEA voluntary scheme.
- The provider is established in the EEA and complies with EU requirements for the issue of recognised certificates.
- The government of the certification service providers has arranged a bilateral international agreement (bilateral o multilateral) with the EC regarding to the legal effects of electronic signatures.

In theory, therefore, the necessary legal framework is in place to allow the use of foreign electronic signatures in Spain (both EU and non-EU). However, on a practical level, we are not aware of cross-border electronic signatures being used at a significant level in practice under the Spanish legislation.

Foreign companies may obtain electronic certificates for electronic signatures in Spain, the only requirement being to have a Spanish Tax Identification (or VAT) number.

As regards the public sector, we are informed that the MAP platform for the validation of certificates has been designed in such a way as to permit future incorporation into the European initiative for the mutual recognition of certificates (European Bridge / Gateway CA / IDABC).

⁶ http://www.aeat.es/normlegi/otros/rd_522_2006.htm

⁷ <http://www.boe.es/boe/dias/2006/05/09/pdfs/A17581-17581.pdf#search=%22real%20decreto%20523%2F2006%22>

3. General elements of electronic contract Law

Directive 1997/7/EC on the Protection of Consumers in Respect of Distance Contracts has been implemented through Law 7/1996, January 15 on Retail Commerce. That legislation was modified in order to implement the abovementioned Directive by Law 47/2002, that has also introduced some aspects of Directive 99/44/EC, which is not fully implemented in Spain.

Directive 2000/31/EC on information society services was implemented in Spain by Law 34/2002, of July 11, on information society services and electronic commerce, as amended.

3.1 National legislation and administrative practices

3.1.1 National Legislation

The regulatory framework for electronic and all other types of contacts is contained in the Spanish Civil Code of 1889. This regulation is fully applicable to electronic commerce because Law 34/2002, of July 11, on information society services and electronic commerce ("LSSI"), only regulates certain aspects of electronic contracting.

The Civil Code establishes that contacts come into force with simple consent. The three basic elements of every contract are (i) the consent of the parties, (ii) the certain object of the contact, and (iii) the cause of the obligation (Article 1262).

Consent occurs with the meeting of the offer and the acceptance relating to the object and the cause of the contract. In the case of automatic contracts, the Civil Code establishes that the consent will be acceptance (Article 1258). The Civil Code was modified in 2002 by the LSSI, which adapted the traditional offer and acceptance model of contracting to the electronic age. Following the reform, the requisite contractual consent arises once the offeror is aware of acceptance or where he cannot ignore the acceptance without the absence of good faith.

These general rules are echoed by the Spanish Commercial Code which is applicable to contracts and relations between traders and companies. In connexion with the abovementioned general rules regarding the perfection of contracts, the LSSI has established that electronic contracts will have the same legal effects, provided that the consent and other legal requirements (object and cause) have been satisfied.

The Spanish Civil Code (Article 1278) has established too the general rule that contracts do not need to have any special form in order to have full legal effects and so electronic contracts have the same legal effects as written or verbal contracts. No prior arrangement between the parties relating to the use of electronic means is required. Any kind of contract can be formalized electronically, except family and inheritance contracts, and contracts that must be formalized in public deed, such as certain real estate contracts (Article 23.4 LSSI).

The LSSI recognizes that the electronic support of the contract will have full legal effects as evidence and to facilitate such proof the LSSI expressly allows and foresees the intervention of trusted third parties in the contracting process. Such third parties, usually information services providers, record the consents of electronic contracts, as well as certain significant data, such as the date and the time when the consent was declared. The trusted third parties must store such data for at least five years.

In practice, many of the more prominent web pages in Spain where electronic contracts are entered into use secure information services providers (e.g. VeriSign) in order to guarantee that the legal requirements are being observed.

3.1.2 *Administrative Practice*

Worthy of mention in this context are three strategic plans introduced by the Spanish government known as *Plan Moderniza* (2006-2008), *Plan Conecta* (2005-2007) and *Plan Avanza* (2006-2010), with a view to bringing the public administration further into the online world by offering a broad range of electronic services to Spanish citizens.

- Plan Conecta, launched in 2004, was designed to modernise the public administration by introducing new information society and telecommunications technologies into the public sector.
- Plan Moderniza, approved in December 2005, has similar objectives, but is broader, and covers organisational measures as well as digital administration. It aims to "*improve and modernise the public administration and to align it more with the needs of citizens*". The three-year action plan consists of 16 measures to be implemented from early 2006 until the end of 2008, and is expected to give rise to significant steps towards electronic government in Spain.
- Plan Avanza (2006-2010), also approved towards the end of 2005, is lead by the Ministry for Industry, Tourism and Commerce and is designed to develop the information society and European convergence. The plan includes digital services amongst its five areas of application. One of the core concepts is that the public administration can and must play a role in the development of the information society.

In response to these plans, some individuals have commented⁸ (with some justification) that there is no need for more strategic plans. Rather, the existing plans need to be properly followed through. This criticism centres on the fact that plans can become a political objective in themselves, which are seen to be achieved upon their creation / publication, irrespective of implementation and what follows. What is required, according to this

⁸ See for example <http://eadmin.blogspot.com/2006/01/tiempo-de-plan.html>

argument, is more effective and constant monitoring of implementation of the existing plans.

Also of interest in this context is the web page created to publicise and stimulate the use of the electronic identity card, www.dnielectronico.es. Published on that site is a list of services⁹ that are available to holders of such cards. The electronic identity card is considered in more detail above.

3.1.3 *Electronic invitation to make an offer, submission of an offer and acceptance of an offer*

As mentioned before, under Spanish law there are generally no formal requirements for the assumption of contract obligations.

The contract (electronic or written) will come into force once the acceptance has been made. In electronic commerce there are principally two different forms of acceptance, (i) by e-mail, or (ii) by click-wrap on a web page.

In practice, confusion may arise as to whether a particular declaration constitutes an invitation to treat or to make an offer, which will not be binding if accepted, or a binding offer, which if accepted will create a contract.

In order to amount to a binding offer, the declaration must be precise, complete and definitive, such that it clearly and unequivocally reveals an intention to be bound by the party making the declaration. Such an intention may be expressly manifested in the declaration, where the party states that it is an offer to be bound, or it may be implicit. Thus a B2B invitation to tender will not in the ordinary course give rise to legal obligations. Rather, only once a tender is submitted and then fully accepted (whether electronically or otherwise) will a binding contract come into existence.

In the case of B2C, it is worth mentioning that Article 39.1 of Law 7/1996 on Retail Commerce (*Ley 7/1996 de Ordenación del Comercio Minorista*) requires that all contractual proposals must unequivocally state that they constitute a commercial offer. Despite this legal requirement, it is still common for significant doubts to exist in practice as to the legal nature of a particular declaration. The same distinctions between (i) an invitation to treat or submit an offer, and (ii) a binding offer that can be immediately accepted so as to create binding relations, also exist in the case of B2C, although any doubts or grey areas in this situation are more likely to be resolved in favour of the consumer.

The information requirements of the LSSI have served to reduce these potential doubts, although compliance is not yet at a maximum. In essence, service providers are required to set out clearly the different steps to be taken in order to perfect a contract, in theory removing any confusion as to whether a particular declaration constitutes a mere invitation to make an offer or a legally-binding offer which may be accepted to form a contract. These information requirements are dealt with in more detail below.

⁹ http://www.dnielectronico.es/servicios_disponibles/

In addition, the information requirements under Article 5 of the Distance Selling Directive 97/7/EC have been implemented into Spanish law by Article 40 of the Spanish Law on Retail Commerce¹⁰ (as amended), which is considered in more detail below. However, that Article does not apply to contracts for the supply of accommodation, transport, food and amusement / relaxation services. The precise ambit of this exception is not always clear in practice and the Spanish Law on Retail Commerce provides insufficient detailed guidance.

Under Spanish Law 34/1988, of November 11, on Advertising, any advertising made to consumers online will constitute a binding offer.

On web pages, although service providers are free to employ electronic signature procedures in order to improve legal security and security generally, at the current time this is not at all common in B2C transactions. As mentioned above, electronic signatures (advanced or recognised) are still primarily the reserve of relations with the public sector. In our opinion, ease and speed are more relevant for e-commerce consumers in Spain than how legally secure a service could be. This is especially the case if the services provider is well-known and instils confidence in consumers. Nevertheless there is a significant proportion of the population that still believe that electronic commerce is insecure. In our opinion this number may not be significantly reduced simply by widespread use of recognised electronic signatures.

Turning to the specific issue of Article 9 of Directive 200/31/EC, these provisions have been implemented by Article 23 of Law 34/2002 on information society services and electronic commerce ("LSSI"). In essence, that article provides that:

1. Electronic contracts are perfectly valid, provided that consent and the other legal requirements for formation of a contract are present;
2. Electronic contracts are governed by Title IV of the LSSI, the Civil Code and the Commercial Code and by the other civil and mercantile provisions relating to contracts, and in particular, consumer protection and retail / commercial law;
3. For electronic contracts to be valid, no prior agreement as to the use of electronic means is necessary;
4. If any law requires written form, this requirement is satisfied by the electronic form;
5. Contracts relating to family law and succession are excluded from the provisions under discussion;
6. Where general law requires a contract to be executed in a public document or with the intervention of jurisdictional bodies, notaries, registrars or public authorities, such contracts are governed by their specific legislation and not the LSSI.

¹⁰ Ley 7/1996 de 15 de enero de 1996 de Ordenación del Comercio Minorista.

As regards standard terms and conditions, pricing information and unfair B2C commercial practices, the situation under Spanish law is as follows:

- Directive 1993/13/EC was implemented into Spanish law through Law 7/1998 of 13 April relating to Standard Terms and Conditions.
- Directive 1998/6/EC on prices of products was implemented into Spanish law through Royal Decree 3423/2000 regulating price information of products offered to consumers.
- Directive 2005/29/EC concerning unfair B2C commercial practices has not yet been implemented into Spanish law (Member States have until 12 June 2007). Implementation will require a modification to the Law of Unfair Competition and other consumer protection provisions.

3.1.4 Information obligations in relation to electronic contract conclusion

Under the LSSI, there are various information requirements that service providers must fulfil in order to maintain recipients of the services properly and adequately informed. Failure to provide such obligatory information may constitute an administrative infraction and give rise to fines, but it will not ordinarily affect the validity of the contract itself.

The following information must be supplied prior to commencement of the contracting process:

- The different steps to be taken to form the contract.
- Whether the services provider will store the electronic contract and whether it will be available.
- The technical measures used to correct and identify errors.
- The languages in which the contract may be formalized.

Under Article 27.4 of the LSSI, prior to commencement of the electronic contracting process, the service provider must also provide the recipient with the standard terms and conditions to which the contract is subject, such that they can be stored and reproduced by the recipient of the service.

In addition to the above information, Article 40 of the Law of Retail Sales requires certain additional information to be supplied:

The identity and address of the vendor (this information is actually covered under the requirements of Article 10 LSSI).

- The price, including taxes.
- Postage and packaging costs, if relevant.
- Manner of payment and form of delivery.
- The right to withdraw from the contract (unless the exceptions apply).
- The cost of using the distance communication.
- The period of validity of the offer and the price.
- The minimum duration of the contract, if relevant.

- The circumstances under which the service provider may provide alternative goods / services.

If relevant, whether the service provider adheres to any ADR procedures.

Following formation of the contract, the offeror must send an acknowledgement of receipt of the acceptance to the offeree (i) by e-mail or other equivalent method, within 24 hours after the acceptance, or (ii) by similar means to that used for the contracting process. An example of (ii) would be a confirmation screen following a series of pages comprising the contracting process.

The above procedure would not be applicable if both parties agree and neither acts as a consumer, or if the electronic contract is formalized by e-mail.

Identification of the country of origin of goods sold online

There are no specific rules regarding the origin of goods sold online, other than the requirement for the service provider to state its address, etc. However, under general consumer protection law (which does not generally apply to companies), we would mention the following relevant provisions:

Law 23/2003 relating to consumer guarantees. Article 10 provides that the producer of goods is liable for failure of goods to be of a certain origin.

General Law 26/1984 on Consumer Protection. Article 13 requires products and services made available to consumers to bear clear and sufficient information about *inter alia* their origin. Under Article 27.a of the same Law, the manufacturer, importer, seller or supplier of products to consumers shall be liable in respect of their origin.

General Law 34/1988 on Advertising. In establishing whether any particular advertising is misleading under the Law, Article 5 requires the origin to be taken into account.

Real Decree 1988/2441 relating to the labelling, presentation and advertising of industrial products destined for direct sale to consumers. Article 7.8 requires the labelling to include the place of origin, if the omission of such information could induce error in the minds of consumers as to the precise origin of the product. Products imported from third countries not party to the Geneva Agreement on technical barriers to trade (12 April 1979) must include the country of origin in the labelling.

Generally speaking, the major retailers do comply with the information requirements of distance selling and e-commerce law, despite the fact that they are spread over various legislative provisions, the application of which is not always immediately clear. However, compliance is less complete in the case of small and medium-sized online retailers.

By way of background information, recent studies, like the 2005 B2C E-Commerce Red.es Report, established that in 2004, 3,959,648 buyers spent an average of 464 Euros each, which means a total of 1,837 million Euros, a 20% increase on the previous year. The principal sales by e-commerce in Spain are airplane tickets (23.8%), electronic products (13.1%), books (10.8%), music (4.8%), hotel reservations (3.3%) and software (3.2%).

3.1.5 *Standard terms and unfair clauses*

B2C electronic commerce is fully subject to Spanish Law 26/1984 of July 19 on Consumer Protection, which establishes that unfair clauses will be void vis-à-vis end users. Unfair clauses are defined as those non-individually negotiated clauses that can cause special damage to the consumer (Article 10 bis). This definition is quite significant in e-commerce, where the vast majority of contracts are formed on the basis of standard terms and conditions.

Spanish Law 7/1998 on Standard Terms and Conditions has its origin in EU law (Directive 93/13/EEC) and defines standard terms and conditions as any partial terms imposed by one party and which have been drafted with a view to their inclusion in several contracts.

The Law applies in favour of consumers in the ordinary sense, but also to professionals adhering to the standard terms and conditions of a third party. The basic requirements of this Law are as follows:

- The terms must form part of the contract (i.e. by reference and by supplying a copy).
- They must be known to the consumer or be available in advance. Accordingly, contract terms supplied subsequently will not be validly incorporated and will not bind the adhering party.
- They must be drafted in a transparent, clear, concise and simple manner.
- When the contract is with a consumer, the terms must not be abusive or unfair (the Law provides specific examples of when provisions may be deemed to be unfair - see **Annex 2**).
- Registration of the terms and conditions is obligatory under certain circumstances.

Failure to comply with the provisions can lead to invalidity and/or fines. In particular, unfair contract terms will be void when applied to consumers, as defined in the General Consumer Protection Law. However, the remaining provisions of the contract will, in principle, continue to remain valid.

The courts do not have general powers to "re-balance" the contract terms, but they can eliminate unfair terms and order that they not be applied in future. However, prior to involving the courts, the parties can submit disputes to conciliation before the Registrar of Standard Conditions under Article 13 of the Law.

Some of the significant problems that have arisen in relation to standard terms and conditions relate simply to the stronger bargaining position of the professional and inadequate responses by the latter to complaints made by consumers. Even more reputable entities (e.g. certain airlines) do not always respond adequately to consumer complaints, particularly claims for compensation, until faced with a writ.

Under Article 27.4 of the LSSI, prior to commencement of the electronic contracting process, the service provider must provide the recipient with the standard terms and conditions to which the contract is subject, such that they can be stored and reproduced by the recipient of the service.

In this regard, it is good practice to require customers to view and scroll down through all applicable standard terms and conditions to an "I accept" type icon at the end, which must be checked in order to continue with or complete the contracting process. Although such mandatory viewing of standard terms and conditions is evident on several major Spanish web sites, it is not a legal requirement, nor can it be said to be standard practice. From a legal standpoint, the service provider merely needs to make the terms and conditions available, for example, via a link (whether viewed or not) in order to incorporate the terms into the contract.

One of the principal obstacles faced by service providers in this area is compliance with a disparate set of rules, spread across a number of different areas of the law (consumer protection, standard terms and conditions, retail sales, e-commerce, etc.). In our opinion, this contributes to the relatively moderate levels of compliance generally.

3.1.6 *Choice of law and forum*

The country of establishment of the service provider is an essential element under the LSSI, since it determines the law and competent authorities, in accordance with the country of origin principle.

In general terms, the LSSI follows EU law and states that the law applicable to electronic contracts shall be determined by private international law. Spanish legislation regarding electronic contracting will be fully applicable to those service providers:

- Which are established in Spain, i.e. with residence or corporate domicile in Spain, provided that this corresponds to the effective place of management.
- With a permanent establishment in Spain, including a registered branch of an international corporation, or commercial offices where most of the commercial activity is carried on.

It is important to clarify that should Spanish law apply, not only will the LSSI be applicable, but also the complete Spanish legal system, and in particular, the laws mentioned above.

Spanish law will also be applicable to service providers established in other Member States if they offer services to in Spain (note that the final addressee does not have to be a consumer) relating to the following matters: (i) intellectual property, (ii) advertising of collective investment funds, (iii) direct insurance (iv) contracts with individual consumers, (v) election by the parties of the applicable law in a contract, and (vi) commercial communications by e-mail.

In the case of electronic contracts with consumers, it will be *presumed* that the contract has been formed in the location of the habitual residence of the consumer, which in accordance with the Rome Convention on the law applicable to contractual obligations will determine the applicable law.

Spain is subject to Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. It has also ratified the UN Convention on the International Sale of Goods. Choice of law / forum is not considered to be a specific barrier for e-business in a B2B context, over and above that encountered in a non-electronic environment.

3.2 Cross-border regulatory issues

Service providers established in other Member States will face the same legal framework as service providers established in Spain.

For service providers established in other countries not members of the EC, international, bilateral or multilateral conventions must be taken into account. At the time of writing, Spain does not have any specific international convention relating to this matter.

On a practical level, beyond reputable international traders such as Amazon, Spanish consumers tend to be more wary of contracting with overseas entities, especially if they are not located in the familiar territories of western Europe. It is difficult to say whether this wariness is greater in the case of online transactions than in the real world.

Electronic invoicing, payment and other matters related to execution of electronic contracts

3.3 National legislation and administrative practice in the fields of electronic invoicing, payment and delivery

3.3.1 Electronic Invoicing

Electronic invoicing is regulated in Royal Decree 2402, of December 18 relating to Value Added Tax, and in Order HAC 3134/2002, December 5, about electronic invoicing. Directive 2001/115/EC has been implemented into Spanish law by way of Royal Decree 1496/2003. We are not aware of any problems with implementation.

The electronic invoices regulations will be applicable to tax payers (corporations and individuals) with residence in Spain or that operate with a permanent establishment in Spain.

Spanish law makes clear that electronic invoices have the same legal value as traditional printed invoices, provided that the creation process has employed technologies that guarantee both the authenticity of the origin, as well as the integrity of the content.

In consequence, the Spanish tax authorities have the obligation to give electronic invoices the same legal effects and value as printed invoices.

Electronic invoices are defined as those invoices that have the same legal requirements established by tax regulation, and that have been created with an electronic system that guarantees the authenticity of the origin and the integrity of the content.

The Spanish regulations are flexible regarding the electronic system used to create electronic invoices. In particular, the system may be based on advanced electronic signatures recognized by the Spanish Tax Authorities, or any other electronic data exchange system that guarantees the authenticity of the origin and the integrity of the content. Nevertheless, the use of this alternative electronic system has to be previously authorised by the tax authorities.

Electronic invoices have to be conserved by tax payers for at least six years (the same as printed invoices).

The Spanish government and, in particular, the Spanish tax authorities are working hard towards the practical implementation of electronic invoicing. An example of this is the fact that the Corporate Registry is now using an electronic invoicing system. As regards social security, a Resolution of the General Directorate of the General Social Security Treasury was issued on 26 September 2001 (we have not been able to find a copy available on the internet). The Resolution requires companies, groups and other social security payers which on 1 January 2001 had more than 20 registered employees, and which request or obtain reductions, allowances or any other benefits in social security rates and quotas, must use the "RED System" (*Sistema RED*) in order to maintain those benefits. The RED System is essentially an electronic system of dealing with the social security authorities in Spain. Using the system, a company may register its employees and pay social security quotas, manage registration and notify work related accidents and illnesses.

Also of interest is a second Resolution of the same entity, dated 10 April 2002, which obliges certain claimants and recipients of benefits to adhere to the RED System.

3.3.2 *Electronic payment*

Article 46 of the Law on Retail Commerce implements Article 8 of Directive 97/7/EC and provides that when payment is made by card without presentation of the card itself or electronic verification of the same, the holder may request the immediate cancellation of the payment. That refund / cancellation of the payment must be effected as soon as possible. These provisions are aimed at combating fraud and so if it later transpires that the cardholder did indeed make the payment and that cancellation had been improperly requested, the customer will be liable to cover any loss to the business arising as a result.

3.3.3 *Delivery of the good or provision of services ordered electronically and withdrawal period*

Article 43 of the Law on Retail Commerce establishes that, unless agreed otherwise, the seller must execute the order within a maximum period of 30 days from the day following communication of the order.

Should the seller be unable to execute the contract due to lack of availability of the product ordered, the purchaser must be informed of this fact and must be able to recover, within a maximum period of 30 days, any amounts paid over. If the seller fails to comply within the stated period, the purchaser is entitled to recover double the amount due, without prejudice to the right to claim damages.

Where the goods ordered are not available and where the consumer has been informed of this, the seller may supply a similar or superior product for no increase in price.

The Right to Withdraw

The right to withdraw is governed by Article 44 of the Law on Retail Commerce, which provides that in distance selling contracts a consumer may withdraw within the period of seven days from the date the product is received. The right extends to any associated credit agreement. No special formalities are required for the exercise of the right. The right of withdrawal may not give rise to any penalties, although the purchaser must pay the direct costs of returning the goods. Nevertheless, in cases where the seller may supply a product of equivalent quality and price, substituting the one

requested by the consumer, the direct costs of returning the goods should the right be exercised shall be borne by the seller and the consumer must be so informed.

If the seller has not complied with its information obligations, the consumer may withdraw within the period of three months from the date of delivery of the goods. If the information is supplied during that three month period, the seven day withdrawal period runs from the date the information is provided. If the buyer exercises the right to terminate for failure to provide the obligatory information, the buyer may not be required to pay the costs of returning the goods.

Upon exercise of the right to withdraw, the seller must refund all amounts paid as soon as possible and, in any event, within 30 days of withdrawal. If the seller fails to comply with this requirement, the consumer has a right to claim double the amount, without prejudice to any additional damages which may be claimed.

The right to withdraw does not apply to the supply of the following:

- Goods with a fluctuating price based on financial market rates, which the seller cannot control
- Goods supplied in accordance with the customer's specifications or which have been personalised or which, because of their nature, cannot be returned or will deteriorate
- Sound recordings or video, software programmes which have been unwrapped by the consumer, downloaded files which can be immediately reproduced and used permanently
- Press, periodicals and magazines.

The right to withdraw does not apply to contracts for the supply of accommodation, transport, meals and relaxation / amusement, where the supplier agrees to supply the same on a fixed date or over a fixed period.

Failure to comply with these obligations can give rise to administrative sanctions.

Under the General Law on Consumer Protection¹¹, non-profit consumer associations are granted various rights to represent and defend the interests of their members and the broader interests of consumers as a whole. Such associations also have a right to be heard in relation to issues directly affecting consumers, such as proposed legislation / regulation.

Consumer protection is also regulated at a local level by the autonomous communities. The Madrid Autonomous Community has set up an informative web site for consumers wishing to find out more about their rights and via which complaints may be made¹². Complaints against commercial entities, including complaints for non-delivery, may be filed online or on paper via a simple procedure.

¹¹ Ley 26/1984 general para la defensa de los consumidores y usuarios.

¹²

http://www.madrid.org/cs/Satellite?idioma=_es&c=Page&pagename=PortalConsumo%2FPage%2FPTCO_HomeTemplate&cid=1136192682783

However, filing online requires an electronic signature, therefore vastly limiting the number of consumers who may use this service.

Awareness of these procedures may not be high amongst consumers, but finding information about how to lodge complaints is not difficult. Businesses may not qualify for these procedures and may have to enforce their rights through the ordinary courts.

Financial Services

A draft bill on the distance selling of financial services to consumers has been put before parliament. The purpose of the bill is to implement Directive 2002/65/EC, which has already been partially implemented by Law 4/2003 of 4 November relating to private insurance.

The draft bill covers a broad range of financial services (banking, credit, payment, investment, pension and insurance services).

The right to withdraw from contracts for the supply of financial services would be set at 14 days, extended to 30 days in the case of life assurance. The right would not apply:

- To cases where the price may fluctuate on financial markets which the supplier cannot control (e.g. foreign exchange)
- To insurance contracts where the policy holder assumes investment risk
- To travel and luggage insurance with a term of less than one month

Under the draft bill, conflicts may be submitted to consumer arbitration.

Delivery of goods not in conformity with contract Directive 1999/44/EC was implemented into Spanish law by Law 23/2003 relating to consumer guarantees. We are not aware of any problems relating to the implementation of this Directive which are of relevance to the subject matter of this report.

4. General assessment

4.1 Main legal and administrative barriers to e-business

4.1.1 Limited Practical Use of Electronic Signatures

As mentioned in this report, although there have been many interesting and energetic developments in the legal and administrative practices in the fields of electronic signatures, electronic contracting and electronic invoicing and payment, in our opinion there is a noticeable divergence between common practice in the private sector (which has developed practical solutions, which may not be entirely legally secure) and in the public sector (which has been directed towards solutions based on advanced and recognised electronic signatures). In our opinion, recognised electronic signatures are still too awkward and inconvenient to be widely adopted in B2C commerce.

However, their deployment in the public sector has shown how effective they can be and that there is no overwhelming public objection to their introduction in Spain.

Information provided by the public sector (MAP) demonstrates that the public administration is making efforts to promote and develop e-government in Spain by strengthening the use of digital identity and the recognised electronic signature. Indeed the launch of the electronic identity card in March 2006 was a milestone which will hopefully have a positive impact on the use of electronic signatures and e-government services in Spain. Over the coming years, it is expected that all Spanish citizens will hold an electronic identity card which will include personal electronic identity certificates and a recognised electronic signature. This will allow citizens to identify themselves electronically and to sign electronic documents in a manner which provides functional equivalence. The Interior Ministry and MAP have lead this initiative, which is complemented by the creation by MAP of the platform for validation of the electronic identity card.

Electronic Contracting

As a result of recent reforms, Spanish legislation now fully embraces the concept of electronic contracting and the legal weight of electronic contractual documents.

Outside of the cases where specific documents may not take electronic form, the LSSI has established that electronic contracts will have the same legal effects, provided that the consent and other legal requirements (object and cause) have been satisfied. The LSSI recognizes that the electronic support of the contract will have full legal effect as evidence and to facilitate such proof the LSSI expressly allows and foresees the intervention of trusted third parties in the contracting process.

Confusion may still arise as to whether a particular declaration constitutes an invitation to make an offer or a binding offer, although the information requirements of the LSSI have served to reduce these potential doubts. Unfortunately, compliance with those requirements is still very much incomplete, possibly because of the absence in practice of any sanctions for non-compliance.

Consumer Protection and Standard Terms and Conditions

Under the LSSI, prior to commencement of the electronic contracting process, the service provider must provide the recipient with the standard terms and conditions to which the contract is subject, such that they can be stored and reproduced by the recipient of the service. Although it is good practice to require customers to view and scroll down through all applicable standard terms and conditions, this is not a legal requirement, nor can it be said to be standard practice.

One of the principal obstacles faced by service providers in this area is compliance with a disparate set of rules, spread across a number of different areas of the law (consumer protection, standard terms and conditions, retail sales, e-commerce, etc.). In our opinion, this contributes to the relatively moderate levels of compliance generally.

Electronic Invoicing

Electronic invoices have the same legal value under Spanish law as traditional printed invoices, provided that the creation process has employed technologies that guarantee both the authenticity of the origin, as well as the integrity of the content.

Regulation 2560/2001 and related issues

The Bank of Spain does not have any special legal requirements regarding cross-border payments in euros. Consequently payments made to Spanish banks, which originate from European banks will have the same treatment as payments between Spanish banks. Nevertheless banks and financial entities are only obliged to notify cross-border payments which originate from tax-havens under money laundering legislation.

Our study has not permitted us to draw any definite conclusions amongst Spanish businesses as to the contents or consequences of Regulation 2560/2001.

4.2 Awareness about national authorities in charge of solving legal problems in e-business

The awareness about national authorities in charge of solving legal problems in e-business amongst consumers and businesses has not been subject to detailed study. However, we would not expect such awareness to be widespread, partly because of lack of publicity of the bodies that do exist. The Ministry for Industry, Tourism and Commerce (www.mityc.es) is responsible for the development of the information society in Spain and for solving legal problems in this area. A particular department of the Ministry (Secretariat for Telecommunications and the Information Society) focuses on information society issues (<http://www.mityc.es/dgdsi/>). The Ministry has set up a web site dedicated to legislation in this area (www.lssi.es), which also includes details of dispute resolution procedures and bodies.

At an autonomous region level, each of the 17 regional governments has a department responsible for technology / information society issues. In Madrid, this function is performed by the Council for the Economy and Technological Innovation (*Consejería de Economía e Innovación Tecnológica*)¹³.

The continuing insecurity of many consumers towards e-commerce is also a sign, whether justified or not, of lack of confidence in e-commerce. It is worth pointing out that such lack of confidence may be more to do with the continued presence of rogue service providers (in Spain and abroad), rather than an inadequate legal structure. It is also clear that enforcement is woefully inadequate and even respectable service providers are not unduly concerned about the possible consequences of non-compliance.

¹³

http://www.madrid.org/cs/Satellite?idConsejeria=1109266187242&idListConsj=1109265444710&c=CM_Agrupador_FP&pagename=ComunidadMadrid%2FEstructura&pid=1109265444699&language=es&cid=1109266187242

4.3 Legal and administrative best practices in e-business

We have mentioned in this report various examples of good practice in Spain.

The Ministry for Industry, Tourism and Commerce has included a list on its web site of systems of self-regulation in Spain¹⁴. On the same web site can be found a set of FAQs, which help explain and interpret the requirements of e-commerce rules and explain best practice.

It is also worth noting that the Spanish Data Protection Agency has recently issued a guide¹⁵ to users of the Internet, although this is largely aimed at privacy issues and unsolicited commercial communications. However, the guide does refer to phishing, identity theft, viruses, instant messaging, chat rooms, protection of minors, P2P services and VoIP. It does not, however, amount to a code of best practice.

Finally, it is worth mentioning the initiatives of MAP (acting together with other ministries and public bodies) aimed at promoting the information society and e-government. Of particular note is the creation of the www.dnielectronico.es web site relating to the electronic identity card, which is designed *inter alia* to increase awareness about the use of the card and the services available. The site also contains information about the MAP validation platform, which provides validation services for the electronic identity card and the main national CSPs, within the ambit of the public administration.

¹⁴

<http://www.lssi.es/servlet/ContentServer?cid=1027491516816&pagename=OpenMarket%2FXcelerate%2FRender&c=Page>

¹⁵

https://www.agpd.es/upload/Recomendaciones%20Internet%20_16%20mayo_%20v2.pdf

ANNEX 1

NATIONAL LEGISLATION ON E-BUSINESS

- The Spanish Civil Code¹⁶
<http://www.ucm.es/info/civil/jgstorck/leyes/ccivil.htm>
- General Law 26/1984 on Consumer Protection¹⁷
http://www.consumo-inc.es/guiacons/INTERIOR/Codigo_Consumo/Derecho_Estatal/Leyes/Ley_26_1984.htm
- Law 26/1991 on Contracts formed away from business premises¹⁸
http://www.consumo-inc.es/guiacons/INTERIOR/Codigo_Consumo/Derecho_Estatal/Leyes/Ley_26_1991.htm
- Law 59/2003 on Electronic Signatures¹⁹
http://www.mityc.es/setsi/legisla/internet/ley59_03/disposiciones.htm
- Royal Decree 1553/2005²⁰ regulating the issue of the e-DNI and the corresponding authentication certificates and electronic signature
http://www.dnielectronico.es/marco_legal/RD_1553_2005.html
- Law 7/1996, of January 15 on Retail Commerce²¹
http://www.consumo-inc.es/guiacons/INTERIOR/Codigo_Consumo/Derecho_Estatal/Leyes/Ley_7_1996.htm
- Law 47/2002 implementing Directive 97/7/EC on distance contracts
http://www.consumo-inc.es/guiacons/INTERIOR/Codigo_Consumo/Derecho_Estatal/Leyes/Ley_47_2002.htm
- Law 34/2002, of July 11, on information society services and electronic commerce²² ("LSSI")
http://217.116.15.226/xml/disposiciones/min/disposicion.xml?id_disposicion=52411&desde=min
- Law 7/1998 on Standard Terms and Conditions²³

¹⁶ Código Civil.

¹⁷ Ley 26/1984 General para la Defensa de los Consumidores y Usuarios.

¹⁸ Ley 26/1991 sobre contratos celebrados fuera de los establecimientos mercantiles

¹⁹ Ley 59/2003, de 19 diciembre de Normas reguladoras de firma electrónica

²⁰

https://www.agpd.es/upload/Canal_Documentacion/legislacion/Normativa_Estatal_Conexa/Real%20Decreto%20dni-e%20y%20firma%20e.pdf#search=%221553%2F2005%22

²¹ Ley 7/1996 de Ordenación del comercio minorista

²² Ley 34/2002, de 11 de julio, de servicios de la sociedad de la información y de comercio electrónico

²³ Ley 7/1998 que regula las condiciones generales de la contratación

http://www.consumo-inc.es/quiacons/INTERIOR/Codigo_Consumo/Derecho_Estatal/Leyes/Ley_7_1998.htm

- Royal Decree 1906/1999 on telephonic and electronic contracting using standard terms and conditions²⁴

http://www.consumo-inc.es/quiacons/INTERIOR/Codigo_Consumo/Derecho_Estatal/Reales_Decretos/REAL%20DECRETO%201906_1999.htm

- General Law 34/1988 on Advertising²⁵

http://www.consumo-inc.es/quiacons/INTERIOR/Codigo_Consumo/Derecho_Estatal/Leyes/Ley_34_1988.htm

- Royal Decree 3423/2000 regulating price information of products offered to consumers

http://www.derecho.com/xml/disposiciones/min/disposicion.xml?id_disposicion=35785&desde=min

- Law 23/2003 relating to consumer guarantees

http://www.consumo-inc.es/quiacons/INTERIOR/Codigo_Consumo/Derecho_Estatal/Leyes/Ley_23_2003.htm

- Real Decree 1988/2441 relating to the labelling, presentation and advertising of industrial products destined for direct sale to consumers

http://www.uclm.es/cesco/legislacion/3RD1468_1988.pdf#search=%22real%20decreto%201468%2F1988%22

²⁴ Real Decreto 1906/1999 que regula la contratación telefónica o electrónica con condiciones generales en desarrollo del artículo 5.3 de la Ley 7/1998, de 13-4-1998, de condiciones generales de la contratación

²⁵ Ley 34/1988, de 11 de noviembre, General de Publicidad

ANNEX 2

UNFAIR CONTRACT TERMS

Without limitation, the Law on Standard Terms and Conditions provides specific examples of when provisions may be deemed to be unfair, which include clauses which:

Link the contract to professional's volition

- Reserve to the professional an excessively long or indefinite period to accept / reject the offer or provide the product / service
- Envisage the automatic extension of the term, unless the consumer objects within a specified period which does not effectively allow the consumer to object
- Reserve to the professional the right to unilaterally interpret or modify the contract without valid reasons
- Reserve to the professional the right to (i) unilaterally terminate a fixed term contract, unless the consumer has a similar right, or (ii) terminate on disproportionately short notice or without prior notice, unless for breach
- Bind the consumer, even when the professional is in breach
- Provide for disproportionate compensation to the professional for breach by the consumer
- Subject the obligations of the professional to its (i.e. the professional's) volition, whereas the consumer's obligations are firm
- Subject delivery dates to the volition of the professional
- Exclude or limit the professional's obligation to comply with the obligations assumed by its representative
- Allow price to be fixed at the time of delivery or be increased by the professional, unless based on objective criteria or unless the consumer has a right to rescind
- Grant the professional the right to decide whether the goods / services comply with the contract

Deprive the consumer of basic rights

- Inappropriately exclude or limit the consumer's rights in respect of breach or partial compliance by the professional.
- Modify, to the prejudice of the consumer, the legal rules regarding hidden defects, unless they are limited to the repair / substitution of the object of the contract with no cost to the consumer and without limiting the consumers rights to claim damages for the defects and compensation in accordance with law, should the repair / replacement be impossible or unsatisfactory.
- Exclude or limit liability for death or personal injury, or for assignment of the contract without consent if it endangers rights
- Restrict the consumer's rights of set off, retention or deposit
- Inappropriately exclude or limit the consumer's right to terminate due to the professional's breach
- Impose a waiver of the right to receive documentation accrediting the operation
- Impose a waiver or limitation of the rights of the consumer

Lack reciprocity

- Oblige the consumer to comply with all its obligations, when the professional has breached
- Provide for the retention of sums paid by the consumer for relinquishment, without the equivalent should the professional relinquish
- Authorise the professional to (i) rescind discretionally, unless the consumer has a similar right, or (ii) retain amounts paid for services not yet rendered when the professional rescinds

Guarantees

- Impose guarantees which are disproportionate to the risk assumed
- Impose the burden of proof to the prejudice of the consumer, when it should fall on the other party

Other

- Declare receipt or conformity based on false facts
- Require the consumer to accept standard clauses of which it has not had a real opportunity to have knowledge prior to signing the agreement
- Impose the consequences of administrative errors on the consumer when not attributable to the latter
- Impose on the customer the costs of documentation / processing, which correspond to the professional by law
- Impose unsolicited goods / services on the consumer
- Increase the price for auxiliary services, financing, deferment, surcharges, indemnities or penalties which do not correspond to additional products / services, susceptible of acceptance / rejection
- Express rejection of compliance with the obligations of the provider / supplier, with automatic remittance to administrative or judicial procedures
- Submit disputes to non-consumer arbitration, unless legally created for a particular sector or circumstance
- Submit disputes to a judge or court other than that which corresponds to the residence of the consumer, the place of performance or the location of the real property concerned
- Waive the right of the consumer to choose a notary public to formalise the contract
- Submit the contract to a foreign law, with respect to the place where the consumer grants his / her contractual intent or where the professional carries on its activity relating to the promotion of similar contracts
- Impose credit conditions for overdrafts, which exceed the limits set out in Article 19.4 of the Consumer Credit Law