

**Translation**

**INTERNATIONAL ARBITRATION UNDER THE RULES OF THE  
INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT  
DISPUTES (“ICSID”)**

**OMEGA ENGINEERING LLC**

**AND**

**MR. OSCAR RIVERA**

*COMPLAINANTS*

**v.**

**REPUBLIC OF PANAMA**

*RESPONDENT*

---

**EXPERT REPORT OF JOSÉ A. TROYANO**

---

17 January 2020

Translation

TABLE OF CONTENTS

I. INTRODUCTION..... 4

II. FACTUAL BACKGROUND AND SCOPE OF THE REPORT ..... 5

III. SUMMARY OF CONCLUSIONS..... 5

IV. ANALYSIS OF THE PROMISE OF PURCHASE AND SALE AGREEMENT ..... 8

    A. Definition and Legal Standards Governing Promise of Purchase and Sale Agreements..... 8

    B. What are the Differences between a Purchase and Sale Contract and a Promise of Purchase and Sale Agreement?..... 13

        1. *The Promise of Purchase and Sale Agreement.* ..... 13

        2. *The Purchase and Sale Contract*..... 15

    C. Analysis of the Promise of Purchase and Sale Agreement between Punela Development Corp. and JR Bocas Investments Inc. and its legal validity..... 18

    D. Analysis of the Addendum to the Promise of Purchase and Sale Agreement signed by Ms. Reyna (but not by Punela)..... 19

    E. Comments on Mr. Arjona’s Criticisms of the Promise of Purchase and Sale Agreement between Punela Development Corp. and JR Bocas Investments Inc..... 21

        1. *With respect to Clause 9(c) of Mr. Arjona’s Expert Report, are the elements mentioned by Mr. Arjona essential elements of a Promise of Purchase and Sale Agreement?* ..... 21

        2. *What are the legal consequences of the fact that the 180 day period to sign the public deed has passed and the obligation has not been complied with?* ..... 23

        3. *What is the effect of the alleged error contained in the Promise of Purchase and Sale Agreement that the irrevocable letter of payment must be delivered before the title is transferred?*..... 24

        4. *Is there an indication that the Promise of Purchase and Sale Agreement that is the subject of this expert opinion was entered into with malicious intent and that it lacks the reasonable minimum standards of diligence by the Promissory Buyer?* ..... 26

## Translation

5.	<i>Does the fact that the Promise was drafted as a private document, and not as a public deed, make it invalid?.....</i>	26
6.	<i>Must the signatures on a Promise of Purchase and Sale Agreement be authenticated by a Notary Public and is this a usual practice in Panama? .....</i>	26
7.	<i>Is the method of payment contained in the Promise of Purchase and Sale Agreement unusual? .....</i>	27
8.	<i>Do the parties to a Promissory Purchase and Sale Agreement have any legal requirements to fulfill in accordance with maximum and minimum percentage of the initial payment for the property? .....</i>	29
9.	<i>What are the legal consequences of the typographical error in the pricing clause of the Promise of Purchase and Sale Agreement? ...</i>	30
10.	<i>Does the Promise of Purchase and Sale Agreement in question suffer from relative nullity based on the persons who signed the Promise? .....</i>	31
11.	<i>Does the lack of a day in Promise of Purchase and Sale Agreement's date suggest a lack of due diligence and care?.....</i>	34
12.	<i>Is it necessary in a Promise of Purchase and Sale Agreement that the Promissory Buyer carry out an appraisal or topographical study, and if not, does this have any legal consequences for the validity of the Agreement?.....</i>	34
13.	<i>Does the fact that PUNELA did not claim any money or terminated in writing the Promise of Purchase and Sale Agreement in writing has any relevance? .....</i>	35
<b>F.</b>	<b>The Statute of Limitations for the Promise of Purchase and Sale Agreement.....</b>	<b>35</b>
<b>V.</b>	<b>THE PRINCIPLES OF GOOD FAITH AND REASONABLENESS IN PANAMANIAN LAW</b>	<b>37</b>
<b>VI.</b>	<b>OBLIGATIONS OF THE STATE WITH RESPECT TO ADVANCE PAYMENTS AND PARTIAL PAYMENTS UNDER LAW 22 OF 2006 (SINGLE TEXT).....</b>	<b>40</b>
<b>ANNEX A – CURRICULUM VITAE.....</b>		<b>43</b>
<b>ANNEX B – DOCUMENTS REVIEWED AND CITED BY THE EXPERT .....</b>		<b>51</b>

## Translation

### I. Introduction

1. I am a Panamanian citizen and I have practiced law since 28 February 1973. A copy of my *curriculum vitae* is attached hereto as Annex A. This Expert Report has been prepared based on my experience as a:

- Legal professional with more than 35 years of legal practice in topics specifically related to civil, commercial and administrative matters;
- Attorney for Administrative Affairs in the Office of the Federal Attorney General, with duties and authorities related to administrative and constitutional matters;
- Deputy Minister of Commerce and Industry, with duties related to international treaties, among other matters;
- Justice of the Civil Division of the Federal Supreme Court for 10 years, with authority and duties related to the topics of civil law or private and commercial law; I was also a member of the Plenary Court, with jurisdiction over constitutional matters.

2. I have received instructions from Jones Day and Shook, Hardy & Bacon, counsel for claimants Omega Engineering LLC and Oscar I. Rivera Rivera (the “Claimants”) to provide a legal opinion on Panamanian law related to these arbitration proceedings (the “Arbitration”) between the Claimants and the Republic of Panama (the “Respondent”, and together with the Claimants, the “Parties”).

3. I have no connection to the Parties to the Arbitration, the law firms or the Tribunal presiding over the Arbitration.

4. I confirm that all of the opinions expressed herein are my own, and are not related to questions of fact that may be presented by the parties. They relate only to my opinion regarding Panamanian law, based on the questions presented by counsel for the Claimants.

5. I understand that my primary duty is to provide objective assistance to the Arbitration Tribunal in matters within my area of expertise, and that this duty has primacy over any obligation to the Claimants or their legal counsel.

6. In conducting my work, I have been provided with various documents, including some sections of the briefs submitted by the Parties in the Arbitration and expert reports. The documents I have reviewed in preparing my report are listed in Annex B. I have also conducted legal research and I have used external sources related to the topics covered by my report. To the extent I have relied on these external sources in forming my opinion, they are listed in Annex B.

7. In view of the above, and to the best of my knowledge and belief, in the following sections I will proceed to answer the various questions that have been submitted to me by the Claimants through their counsel. I reserve the right to modify any of the opinions herein based on any new information I might later receive.

## Translation

### II. FACTUAL BACKGROUND AND SCOPE OF THE REPORT

8. I have been informed that, in this Arbitration, the Respondent is challenging the veracity and validity of a Promise of Purchase and Sale Agreement entered into by JR Bocas Investments, Inc. and Punela Development Corp.<sup>1</sup> In support of its conclusions, it is my understanding that the Respondent bases its beliefs on the expert report prepared by Mr. Adán Arnulfo Arjona L. (“**Mr. Arjona**”) dated 13 November 2019, which includes an analysis of Panamanian law related to the aforementioned Promise of Purchase and Sale Agreement.

9. In that regard, I have been contracted by Jones Day and Shook, Hardy & Bacon (“**Counsel for Claimants**”) to offer my opinion regarding the legality of the Promise of Purchase and Sale Agreement under Panamanian law, as well as Mr. Arjona’s legal conclusions as set forth in his opinion.

10. Furthermore, Counsel for Claimants have asked that I offer an opinion regarding some aspects related to the principles of reasonableness and good faith in contracts under Panamanian law. They have also requested that I offer opinions regarding the state’s obligations with regard to advance payments and partial payments under Panamanian law, particularly Law 22 of 2006 related to public contracts.

11. I hereby affirm that the opinions or final conclusions of this Report or this Arbitration do not depend on any compensation I receive as an expert witness in this Arbitration.

### III. SUMMARY OF CONCLUSIONS

12. With respect to the questions related to the Promise of Purchase and Sale Agreement, I confirm that in the Republic of Panama, our Civil Code, the writings of legal scholars and established precedent state that the only requirements for a Promise of Purchase and Sale Agreement for *Real Property* is that it must be in WRITING and it must specify the contents of the promised contract and the term or condition establishing the time when the promised contract will be signed, as well as the requirements applicable to all contracts in general, such as consent, purpose, cause and legal capacity.<sup>2</sup>

13. It is important to clarify that there is a fundamental difference between a so-called “Promise of Purchase and Sale Agreement” and a “Purchase and Sale Contract.” The Promise of Purchase and Sale Agreement is a preliminary contract, while the Purchase and Sale Contract is a final contract. Furthermore, the differences between these contracts are obvious and palpable, as outlined in the following table<sup>3</sup>:

---

<sup>1</sup> Promise of Purchase and Sale Agreement, dated April 2014 (“Promise of Purchase and Sale Agreement”) (C-0078-SPA resubmitted).

<sup>2</sup> See *infra* Section IV.C.

<sup>3</sup> See *infra* Section IV.B.2.

## Translation

Promise of Purchase and Sale Agreement	Purchase and Sale Contract
This is a preliminary contract that creates the obligation to enter into a future contract.	This is a definitive future contract or the primary contract.
Creates an obligation to perform.	Creates an obligation to deliver a specific thing.
Fulfills the function of guaranteeing the signature of a future contract.	It is an instrument that transfers ownership.
It necessarily requires the stipulation of a term or deadline for signature of the definitive contract.	Does not require the stipulation of a term or deadline in order to be valid.
In the case of real property, the required formality is that the document must be in writing (private document) in order to be valid.	Requires a Public Deed (public document) and recording in the Public Registry in order to be valid.
Recording the document in the Public Registry (optional) limits ownership rights but does not constitute transfer or conveyance of the property.	Recording of the deed transfers ownership or proprietorship of the real property in question.
Bilateral agreements are innominate or atypical. The provisions of Article 1221 of the Civil Code apply to them by analogy in addition to the general rules related to obligations and contracts.	These are nominate or typical contracts regulated by their own specific provisions in the Civil Code.

14. In my experience, and after analyzing the documentation that was provided to me, I conclude that the Agreement signed by JR Bocas Investment Inc. and Punela Development Corp. is a *Promise of Purchase and Sale Agreement for Real Property*, as its title indicates, and this Agreement is legally valid. This conclusion is based on the intrinsic content of the clauses contained in the Agreement in question, and in particular those clauses in which the literal meaning and evident intention of the parties show that the parties intended to enter into a Promise of Purchase and Sale for real property.<sup>4</sup>

15. However, in his Expert Report, Mr. Arjona appears to confuse the requirements for a Purchase and Sale Contract and a Promise of Purchase and Sale Agreement, and he gives conclusions related to a “Purchase and Sale Contract”, which is not the type or nature of the contract under analysis in this case.<sup>5</sup> As I will explain in detail in this Report, the Promise of Purchase and Sale Agreement does not require a Public Deed, nor does it need to be recorded with the Public Registry, nor is it required for the signatures to be notarized by a Notary Public.<sup>6</sup> *The only formality required for the validity of a Promise of Purchase and Sale Agreement is that it be in writing.*

---

<sup>4</sup> See *infra* Section IV.C.

<sup>5</sup> Arjona ¶ 9 (c); see *infra* Section IV.E.

<sup>6</sup> See *infra* Section IV.E.5.

## Translation

16. Another point of confusion for Mr. Arjona is evident by his opinion that the Theory of Agreement to Transfer and Deliver applies to the Promise of Purchase and Sale Agreement at issue in this case.<sup>7</sup> This is incorrect, since the Theory of Agreement to Transfer and Deliver, which is essentially the principle followed by our law in registry matters, is applicable to the Purchase and Sale Contract, but not to the Promise of Purchase and Sale Agreement.

17. I also do not share the rest of the opinions offered by Mr. Arjona,<sup>8</sup> as I explain in detail in Section E *infra*. In particular, and after reviewing the Promise of Purchase and Sale Agreement, it is my opinion that the Agreement in question is valid, and none of the criticisms or comments made by Mr. Arjona have led me to the conclusion that the Agreement is legally invalid or has in any way been prepared in bad faith.

18. The Promise of Purchase and Sale Agreement has a statute of limitations of *seven years*, not five years as Mr. Arjona concludes.<sup>9</sup> As I explain below, when the Promise of Purchase and Sale Agreement is a bilateral agreement, such as the agreement at issue in this case, Article 1221 of the Civil Code is applied by analogy, and therefore it is its *civil and not commercial* nature that determines the applicable statute of limitations. To be clear, the fact that PUNELA has not claimed money or terminated the Promise of Purchase and Sale Agreement in writing has no legal relevance, since the period to file claims has not expired. The seven-year statute of limitations for the action expires on 29 September 2020, taking into account the date on which, according to Mr. Arjona, the statute of limitations period should begin to toll.<sup>10</sup>

19. I have also been provided with a “Addendum” or “Meeting of the Minds” document signed on 3 September 2013. Although this Promise of Purchase and Sale Agreement was not amended by the Addendum because only one of the parties (the Promissory Seller) signed the Addendum, my opinion is that the unilateral statements or considerations contained in the Addendum are binding or mandatory for the Promissory Seller. This is because the document was signed by that party and refers to a true and specific fact, meaning the previous document to which that party consented, in other words, to the Promise of Purchase and Sale Agreement signed in April 2013.

20. I was also asked to comment on the existence of the principles of good faith and reasonableness in Panamanian law. Thus, I have explained that the principles of good faith and reasonableness are part of Panamanian law. These principles are applicable to all types of contracts, including civil, commercial or administrative agreements, *including public works contracts*.<sup>11</sup>

21. I have also analyzed the matter of the State’s obligations regarding advance payments and partial payments under Law 22 of 2006. In that regard, I have concluded that, under Law 22 of 2006, a contractually stipulated advance payment included in a public

---

<sup>7</sup> Arjona ¶ 9 (c).

<sup>8</sup> See Arjona Sectiones III-IV.

<sup>9</sup> Arjona ¶¶ 23, 70, 72; see *infra* Section IV.F.

<sup>10</sup> Arjona ¶ 73; see *infra* Section IV.F.

<sup>11</sup> See *infra* Section V.

## Translation

works contract does not exempt the public entity from its obligation to make the subsequent partial payments also stipulated in the contract.<sup>12</sup>

### IV. ANALYSIS OF THE PROMISE OF PURCHASE AND SALE AGREEMENT

#### A. Definition and Legal Standards Governing Promise of Purchase and Sale Agreements

22. To begin, it is important to clarify that, in Panamanian Positive Law, Article 1221 of the Civil Code<sup>13</sup> expressly defines the Unilateral Promise of Sale Agreement and the Unilateral Promise of Purchase Agreement; as such these are typical or nominate agreements. However, according to the opinions of our legal scholars and established precedent, a Bilateral Promise of Purchase and Sale Agreement, in other words an agreement in which both parties have reciprocal obligations, is categorized as an atypical or innominate agreement to which Article 1221 of the Civil Code also applies by analogy.

23. According to the late Dr. DULIO ARROYO, former professor of Civil Law and Dean of Panama University's School of Law, the concept of the Promise Agreement as conceived in classic legal theory is the one followed by our Civil Code. This author has also defined this type of agreement as "an agreement whereby one or both of the participating parties promise to sign a specific future agreement which they are presently unable or unwilling to sign, after a certain period of time has passed or when the stipulated conditions and other legal requirements have been fulfilled."<sup>14</sup>

24. With regard to a Promise of Purchase and Sale Agreement for real property, Article 1221 of the Civil Code refers to this type agreement, stating that:

*"A promise to sell or buy the agreed subject of the sale, at the price and under the terms that establish the time the contract is to be signed, shall entitle the person to whom the promise has been made to demand that the party who made the promise comply with the commitment, which must be set forth in writing when the agreement relates to real property or hereditary rights.*

(...)

A promise to sell real property, when set forth in a public deed and recorded with the Property Registry, constitutes a limitation on ownership under which a party to a promissory agreement may not convey the property until the recording of the promise is cancelled, nor may the property be encumbered without the consent of the potential buyer ... ."<sup>15</sup>

---

<sup>12</sup> See *infra* Seccion IV.

<sup>13</sup> Civil Code of the Republic of Panama, dated 22 Aug. 1916 ("Civil Code"), Art. 1221 (C-0742).

<sup>14</sup> Arroyo Camacho Dulio, Civil Contracts, T.I Panama. Mizrachi & Pujol, S.A. (C-0752), pag.8.

<sup>15</sup> Civil Code (C-0742), Art. 1221.



## Translation

25. The Civil Division of the Supreme Court has repeatedly cited this article, and has indicated that the essential elements of a Real Property Promise of Purchase and Sale Agreement are:

- a. The agreement must be in writing, explaining that it is not a requirement for the document to be notarized or recorded, and
- b. The agreement may not violate the Law, good morals, or public order.

26. In that regard, the Civil Division of the Supreme Court later clarified:

“(…)

The same question may be asked regarding the *Ad quem* holding<sup>16</sup> with respect to the extreme permissiveness allowed by the Ruling to the extent that, since the Promise in question was not recorded in the Public Registry, according to the authority conferred by the last paragraph of Article 1221 of the Civil Code, therefore, *JOSÉ ESTEBAN CONTRERAS* had full freedom to convey the real property in question and disregard the commitment he had undertaken.

In that regard, the Court would like to clarify that it does not share this opinion since, in principle, *when the agreement relates to the promise to sell or buy real property, the only requirement is that the agreement must be in writing*. However, since the last paragraph of that legal provision states that *“the promise to sell real property, set forth in a public deed recorded with the Property Registry, constitutes a limitation on ownership under which the promising party may not convey the real property until the recording is canceled, nor may the property be encumbered without the consent of the promissory buyer,”* in reality what the Law is granting to the Promissory Buyer is the right to restrict the sale or encumbrance of the real property that is the subject of the commitment, *which does not release the Promissory Seller from the duty to comply with the obligation acquired and to respect the agreed Promise, nor does it extinguish the right of the Promissory Buyer to demand compliance*.

And since the authority granted by Article 1221 of the Civil Code is granted to the Promissory Buyer and is exclusive with respect to the Promissory Seller, *given that the principle of good faith must govern the signature of any contract, the obligation to record the document with the Property Registry is optional*. However, this does not mean that if the Promise has not been so formalized the Law would not protect a good faith Promissory Buyer who in good faith and trusting the Promissory Seller did not demand such a restriction.

---

<sup>16</sup> Ad Quem means: “To which, for which ... the judge or court appealed to against a specific resolution of another inferior.” Cabanellas G. Legal Dictionary. Cabanellas G., Ed. Heliasta, 1997, pag. 63.

## Translation

In summary, the Court holds that the Promise of Purchase and Sale Agreement is not included among those documents for which Article 1131 of the Civil Code requires a Public Deed.

In this case, it is the duty of this Court to point out the indispensable requirement established by Law, which is that the general rule in the signature of any Contract is that the parties must comply with their reciprocally acquired commitments and if it is understood that this should be the common or general rule, the Courts should not interpret and apply the laws in favor of those who have not acted in “good faith”, since even though Article 1221 of the Civil Code grants Promissory Buyers this “preventive authority” to demand that the Promise be notarized and recorded in the Public Registry, it is not valid to hold that the fact that such restrictive authority was not used against the party who promised to sell the property would validly permit that the rights acquired by the Promissory Buyer are not guaranteed since the Promissory Seller has not honored his obligation as clearly set forth in a Contract of this type.

Therefore, the Court holds that the principle set forth in Article 1106<sup>17</sup> of the Civil Code should be taken into account in resolving this dispute, since it allows the parties to “*establish the pacts, clauses and conditions to which they wish to agree, if they are not contrary to the Law, good morals, or public order.*”<sup>18</sup>

27. The Civil Division of the Court reached a similar conclusion in referring to this type of agreement, when it again clarified that, according to Article 1221 of the Civil Code, the formality required for a Real Property Promise of Purchase and Sale Agreement is that it be in writing, not that it be set forth in a Public Deed and subsequently recorded with the Public Registry.

“(…)

*In addition to the above, the Court holds that mere consent is insufficient for a Promise of Purchase and Sale Agreement to be formalized, but rather the formalization requirement established for this specific type of contract must be met, which is that it must be in writing, according to the provisions of Article 1221 of the Civil Code, which states the following in that regard: ‘The promise to sell or buy, when the parties have agreed to the subject of the sale, the price and the terms or conditions established at the time the contract is to be signed, entitles the person to whom the promise has been made to demand that the person who has made the promise comply with the promise, which must be set forth in writing in the case of real property or hereditary rights’ (emphasis added by the Court).*

*The Court notes that the Appellant on Cassation fully complied with the*

---

<sup>17</sup> Civil Code (C-0742), Art. 1106.

<sup>18</sup> *Las Olas v. Jose Esteban Contreras*, Supreme Court of Justice of Panama, dated 11 feb. 2000 (C-0755).

## Translation

*formalities described in the cited article, as shown by pages 64-67 of the case file related to the Contract in question. Contrary to the holding of the Ad quem Court, this does not require that the document be set forth in a public deed, as it is required for a purchase and sale contract for real property or hereditary rights, nor is it required that the document be recorded with the Public Registry, as is the case with an antichresis contract.”<sup>19</sup>*

28. With the same level of clarity related to the formalities under the law with which a Promise of Purchase and Sale Agreement of Real Property must comply, it is appropriate to reproduce the pertinent portions of the ruling issued by the Civil Division, which states:

“(…)

It is a well-known fact that legal scholars identify the promise of purchase and sale agreement as a “preliminary contract”, which in essence constitutes an ulterior aspect of the phenomenon of progressive formation of the contract. This is the case in the particular sense that, through the preliminary agreement, the normal legal effects of the contract do not all take effect immediately; only some of them take effect, because the parties wish it to be so. In all other points, the preliminary agreement is a common contract and, as such, requires compliance with the requirements of contracts, particularly the capacity to enter into contracts, as well as requirements related to form.

Article 1221 of the Civil Code, cited above, which regulates bilateral Promise of Purchase and Sale Agreements, thus implies that it coincides with legal scholarship in many aspects, since legal scholars agree that like a real property purchase and sale contract, the contract is formal, since it must be set forth in writing; that the purpose of the commitment is to sign the promised contract; that it is necessary to determine the consideration and subject of the sale that will be included in the final agreement; that it is a consensual binding legal agreement, because the only requirement for its formalization is the consent of the parties, in other words, it is legally valid; and this type of agreement also requires that a term or condition be established that indicates when the promised contract will be signed, since the binding consensual agreement would not be valid if this requirement is not met.

The general rule in our law is that contracts are consensual, in other words they are formalized by mere consent. This is stipulated in Article 1109 of the Civil Code.<sup>20</sup>

---

<sup>19</sup> *González Montenegro v. Helmer Espinoza Montenegro*. Supreme Court of Justice of Panama, dated 14 dec. 2017 (C-0754).

<sup>20</sup> Civil Code (C-0742), Art. 1106.

## Translation

On the other hand, Article 1112 of the same code states that the essential requirements for the validity of contracts are consent, subject and cause, since it is stated that no contract exists if such requirements are not met.

However, Article 1109 notes an exception to the rule of consent, stating that:

‘The acts and contracts listed in Article 1131 are exceptions to this rule, since they are not formalized unless they are set forth in writing, with full specification of the conditions of the act or contract and a precise determination of the subject of the contract.’

This exception is confirmed by Article 1130 of the Civil Code which states:

‘Article 1130: If the law requires the issuance of a public deed or other special requirements to formalize the obligations of a contract, the contracting parties may reciprocally demand compliance with those formalities if the consent or written document requirements have been fulfilled, as well as other requirements necessary for validity, as applicable.’

However, in order for the contract to be legal, it is required for the consent to be set forth in writing in situations in which the contract is among those listed in the following article.’<sup>21</sup>

The article transcribed above clearly shows that a real property purchase and sale contract is legal, in other words, it is legally recognized, if it is set forth in writing. The requirement that the document be set forth in a public deed, as required by Article 1131 of the Civil Code as it relates to Article 1220 of that law, is an essential requirement for the legal formalization of the contract, so that it is legally recognized. However, the provisions reproduced herein refer to a purchase and sale contract and not to a Promise of Purchase and Sale Agreement, which is the type of agreement the parties have signed, and in order for it to be formalized it is sufficient for the document to be in writing and that it meet the requirements contained in Article 1221 of the Civil Code, transcribed above.’<sup>22</sup>

29. In conclusion, I affirm that, according to our Civil Code, the writings of legal scholars and established legal precedent, in addition to general requirements for a Promise of Purchase and Sale Agreement, a Promise of Purchase and Sale Agreement *for real property* must: (a) specify the terms of the promised contract; (b) contain a term or condition establishing the time when promised contract would be signed; and (c) be set forth in writing as the limiting formality for this type of agreement.<sup>23</sup> For the above reasons, I unequivocally conclude that only in the event that the parties wish to limit the

---

<sup>21</sup> *Id.*, Art. 1130.

<sup>22</sup> *El Faro v. M. Ortega*, Supreme Court of Justice of Panama, dated 5 oct. 2000 (C-0756).

<sup>23</sup> Arroyo Camacho Dulio. *Contratos Civiles*, T.I. Commemorative Ed. Portobelo. Panama, dated 2017 (C-0757), pag. 99.

## Translation

ownership rights to the property would a Promise of Purchase and Sale Agreement need to be set forth in a Public Deed and recorded in the Property Registry.

### **B. What are the Differences between a Purchase and Sale Contract and a Promise of Purchase and Sale Agreement?**

30. In order to answer this question, I believe it is necessary to first define each instrument separately:

#### *1. The Promise of Purchase and Sale Agreement.*

31. Panamanian jurist and Doctor of Law Alexander Valencia Moreno<sup>24</sup> agrees with the late Dr. Dulio Arroyo in his definition of the Promise of Purchase and Sale Agreement.<sup>25</sup> As I commented in the preceding section, in addition to the requirements applicable to all contracts, the Promise of Purchase and Sale Agreement must fulfill the following requirements: (1) identify the subject of the sale; (2) specify the price of the thing that is to be sold; and (3) include terms or conditions determining the time when the purchase and sale is to be formalized.<sup>26</sup>

32. With regard to the Promise of Purchase and Sale Agreement, it would be appropriate to transcribe the pertinent portion of the ruling issued by the Civil Division of the Court<sup>27</sup> related to the characteristics and effects of this type of contract, which echo the concepts stated by professor and jurist ARROYO CAMACHO:

“(…)

In that regard, this Court believes it is appropriate to illustrate the concept, purpose and effect of promissory contracts, and in this case we cite the Panamanian author DULIO ARROYO CAMACHO, who states the following regarding this type of contract:

‘... we may define it as an agreement whereby one or both of the participating parties promise to appear to sign a specific future contract which they are presently unable or unwilling to sign, after a certain period of time has passed or until the stipulated conditions and other legal requirements have been fulfilled.’

The above definition, according to classic theory, indicates that the following are characteristic elements of a promissory agreement:

a. That the promise basically creates the obligation to enter into a specific future contract other than the promissory agreement.

---

<sup>24</sup> Valencia Alexander. *The Main Civil Contracts*, Ed. Institute of Political Studies, dated 2003, (C-0758), pags. 80-81.

<sup>25</sup> *See Supra* ¶ 23.

<sup>26</sup> Civil Code, Art.(C-0742).

<sup>27</sup> *Ganadería Panamenav. Caribbean Paradise Panama S.A.*, Supreme Court of Justice of Panama, dated 6 dec. 2012. (C-0759).

## Translation

- b. That such obligation constitutes an obligation to perform a specific act.
- c. That a promissory agreement may be unilateral or bilateral.
- d. The document must indicate a term or condition, or both, that establish the time when the future contract will be signed.
- e. The parties resort to a promissory agreement, which is an independent and distinct agreement, because at that time they are unable or unwilling to enter into the promised contract.
- f. All other requirements stipulated by law must be complied with.’ (CIVIL CONTRACTS, VOLUME I [*CONTRATOS CIVILES, TOMO I*], Dulio Arroyo Camacho, Editorial Mizrachi & Pujol, Panama, 1997, pages 8-9).

Further, with regard to the effects produced by Promise of Purchase and Sale Agreements, the same Author states the following:

‘(...)

### THEIR EFFECTS

The effects of contracts are reduced to the rights and obligations derived therefrom for the contracting parties. In the promissory agreement, the party or parties undertake a specific obligation: the obligation to enter into a promised contract, in other words, the obligation to perform a specific obligation...” (Idem, page 40) (emphasis added by the Court).

Thus, it is clear that the purpose of a promise of purchase and sale agreement is compliance with the obligations contracted by the parties who sign it to enter into a subsequent contract, which is the purchase and sale contract. The effects produced by these types of promissory agreements do not extend beyond the obligations undertaken by the parties.

Since this is the case, and since the subject of the petition in these Ordinary Proceedings is nothing more than performance of a Promise of Purchase and Sale Agreement, it may not be held that the claims of the plaintiff are *en rem*, since no claims have been made regarding his certain right to a specific or specifiable item, but rather the personal right to claim performance of the obligations undertaken by reason of the signature of a contract, which include the signature of a different, subsequent contract.

The fact that the promise of purchase and sale agreement contains the obligation to subsequently sign another purchase and sale contract related to specific real properties, does not make the claims in these Proceedings *en*

## Translation

*rem* claims, because what is being claimed is not the acquired rights to the specific or specifiable property.”<sup>28</sup>

33. In other words, in the case of real property, the Promise of Purchase and Sale Agreement is formalized since the requirement is that it be in writing and its requirements or specific or special elements which must necessarily be included in accordance with our law are: a) determination of the object of the sale and the price to be paid, and b) a stipulation of the term or condition that sets the time when the promised contract will be signed,<sup>29</sup> obviously subject to compliance with all legal requirements applicable to all contracts in general, such as consent, purpose, cause and legal capacity.

34. Thus, Professor ARROYO refers to the common characteristics of this type of contract, stating:

- a. The Object of the Sale and the Price: The object of the promised sale must be specified, itemized if possible...for the law “it is sufficient for the object of the sale to be specifiable. Therefore, it may be only generically described.” With regard to the Price, when the price is stated, as was the case with the item that was “the mediate subject of the promissory agreement, it is logical for the legislator to require that an agreement between the parties contain a stipulation in that regard...”<sup>30</sup>
- b. Terms or conditions that establish the date of the Promised Contract: This requirement is established in the first paragraph of Article 1221 of the Civil Code, cited above, to the extent that “if the parties are unable to stipulate [the term or condition] the promise is null and void, it cannot be effective, and therefore the judge cannot state it.”<sup>31</sup>

### 2. The Purchase and Sale Contract

35. In our positive law, this type of contract is defined in Article 1215 of the Civil Code and correlative articles of the same code.

36. The above article contains the following text:

“Under the terms of a purchase and sale contract, one of the parties to the contract is obligated to deliver a specific thing to the other party, and the other party is obligated to pay a specific price or consideration in exchange for the thing.”<sup>32</sup>

---

<sup>28</sup> *Ganadería Panamena v. Caribbean Paradise Panama S.A.*, Supreme Court of Justice of Panama, dated 6 dec. 2012. (C-0759).

<sup>29</sup> Arroyo Camacho Dulio, Civil Contracts, T.I Panama. Mizrachi & Pujol, S.A., dated 1997 (C-0752), Pag. 60-62.

<sup>30</sup> *Id.* Pag. 61.

<sup>31</sup> *Id.* Pag. 62.

<sup>32</sup> Civil Code (C-0742), Art. 1215.

## Translation

37. The above definition makes it obvious that a Purchase and Sale Contract, contrary to a Promise of Purchase and Sale Agreement, “is a primary contract, because it may exist without the need for the existence of a prior primary obligation from which it derives.”<sup>33</sup>

38. Likewise, it is clear from the definition or conceptualization of each type of contract in the Civil Code, established legal precedent and the writings of legal scholars, that while one of the effects of the Promise of Purchase and Sale Agreement is that it is a preparatory or preliminary agreement that creates the obligation to sign a final purchase and sale contract, the latter is a primary contract that creates the obligation to confer or transfer ownership of the thing sold.

39. To further clarify, it is important to transcribe some extracts from the Ruling issued by the Civil Division of the Court, which underscore and analyze matters related to the differences between the Promise of Purchase and Sale Agreement and the Purchase and Sale Contract based on positive law principles and the writings of legal scholars.

“(…)

The conceptual category of the contract (atypical contract) with which the Court is concerned, though it is not fully settled, is categorized into what legal scholars refer to as pre-contracts, the purpose of which is to enter into another contract (final) for which the pre-contract or preliminary contract only establish the indispensable key points to identify it. These include the “agreement” as to the price, the object of the sale, and the time (“the period”) when the contract is to be signed. The contract rules described and regulated in Article 1221 of the Civil Code must be applied to reciprocal purchase and sale promises, since they have a similar contractual structure. (See rulings of 17 February 1967 and 14 August 1975, in DULIO ARROYO, “20 years of established precedent of the First Civil Division of the Supreme Court of Justice, pages 203-304).

In that regard, the late esteemed civil law scholar DULIO ARROYO affirms that, in addition to specifying that the purpose of the promise is the promised or primary contract (page 60), he points out the differences between the purchase and sale contract and the promissory agreement in the text transcribed below:

‘(…)

Because an examination of the provisions of the Civil Code clearly shows that our Lawmakers did not intend to assimilate it into the purchase and sale contract, and categorized it as a different type of agreement, though they did not make it the subject of any special rules. Thus we see that: a) the purchase and sale contract is a nominate or typical contract, while the bilateral promise of purchase and sale agreement is an innominate or atypical contract, as the Court has acknowledged in a decision cited previously; b) because, as the Court has also ruled in the decision referenced above issued on 17 September 1969, the promise creates a duty to perform an obligation: enter into the promised or primary contract, while the purchase and sale contract imposes upon the seller the obligation to transfer ownership to the buyer (obligation to give), and the obligation of the buyer to pay the price of the item; c) while the purchase and

---

<sup>33</sup> Arroyo Camacho Dulio, Civil Contracts, T.I Panama. Mizrachi & Pujol, S.A., dated 1997 (C-0752), Pag. 83.



## Translation

sale contract constitutes a transfer of ownership, the promise of purchase and sale agreement is limited to acting as a preliminary and preparatory agreement, which rather serves the purpose of a guarantee; ch) the purchase and sale contract constitutes an act of conveyance, which is not the case with the promise of purchase and sale; d) in our Law, the promise of purchase and sale necessarily requires that the parties stipulate terms or conditions that establish the time when the sale will occur (Article 1221); in other words, in this case these modalities constitute by mandate of the law an element of the essence of the contract; on the other hand, the purchase and sale agreement contains merely incidental elements; e) in the case of real property, the promise of purchase and sale is formalized in writing (Article 1221), while the purchase and sale contract is set forth in a public deed (Article 1220); f) if the promise of purchase and sale is recorded, based on Paragraph 3 of Article 1221, the recording does not constitute transfer of the property, while if the contract corresponds to a sale (of real property) it does result in a transfer (Article 1232, Paragraph 2); g) these contracts are not subject to the same rules. Since it is a nominate contract, the purchase and sale contract has its own specific rules, to which it must be subject (Article 1215 and following of the Civil Code); the bilateral promise of purchase and sale agreement, on the other hand, is an innominate contract, which is not subject in principle to the rules of the purchase and sale contract, but solely with respect to those rules that are compatible with its nature; by analogy, it is subject to the provisions of 1221 and in all other matters it is governed by general rules of obligations and contracts (see Article 1221, paragraph 2).

(...) (DULIO ARROYO CAMACHO, “Civil Contracts”, Volume I, Second edition, reviewed and updated, Editorial Mizrahi & Pujol, S.A., Panamá, 1997: pages 53-54).”<sup>34</sup>

40. In order to conclude this matter and dissipate any confusion that may exist between the Promise of Purchase and Sale Agreement and the Purchase and Sale Contract, following is a list of the most relevant elements or characteristics of these types of contracts in accordance with our law, the writings of legal scholars and established legal precedent:

<b>Promise of Purchase and Sale Agreement</b>	<b>Purchase and Sale Contract</b>
This is a preliminary agreement that creates the obligation to enter into a future contract.	This is a definitive future contract or the primary contract.
Creates the obligation to perform a duty.	Creates an obligation to deliver a specific thing.
Fulfills the function of guaranteeing the signature of a future contract.	It is an instrument that transfers ownership.
It necessarily requires the stipulation of a term or deadline for signature of the definitive contract.	Does not require the stipulation of a term or deadline in order to be valid.
In the case of real property, the required formality is that the document must be in	Requires a Public Deed (public document) and recording in the Public Registry in order to be

<sup>34</sup> *Inversiones Ebelle S.A. v. Mirian Coto Cabrera*, Supreme Court of Justice of Panama, 13 Mar. 1917 (C-0760).

## Translation

writing (private document) in order to be valid.	valid.
Recording the document in the Public Registry (optional) limits ownership rights but does not constitute transfer or conveyance of the property.	Recording of the deed transfers ownership or proprietorship of the real property in question.
Bilateral agreements are innominate or atypical. The provisions of Article 1221 of the Civil Code apply by analogy and the general rules related to obligations and contracts also apply.	These are nominate or typical contracts regulated by their own specific standards in the Civil Code.

### C. Analysis of the Promise of Purchase and Sale Agreement between Punela Development Corp. and JR Bocas Investments Inc. and its legal validity

41. Having set forth the legal requirements and the differences between a Promise of Purchase and Sale Agreement and a Purchase and Sale Contract, I will now move on to examine the contract between JR BOCAS INVESTMENTS INC. and PUNELA DEVELOPMENT CORP., which was provided to me.<sup>35</sup> After reviewing the document, and based on my professional experience in private and public matters, I have concluded that, in my opinion, this is a *PROMISE OF PURCHASE AND SALE AGREEMENT FOR REAL PROPERTY*, as the title indicates.

42. The above opinion is based on the intrinsic contents of the clauses contained in said Agreement and their reading, particularly the clauses that state the intent of the parties.

43. In this regard, it is clear that through this Agreement or Contract the parties entered into the following mutual agreements:

- a. In Clause TWO, the promissory seller undertook the obligation to enter into a definitive purchase and sale contract with the promissory buyer for a real property registered under No. 35659; the agreement also established the price of the purchase and sale as well as the conditions or manner in which the price would be paid;<sup>36</sup>
- b. In Clause THREE, the parties agreed to sign a public deed within a specific period of time for the transfer or sale of the Real Property they had agreed to buy and sell;<sup>37</sup>
- c. In the subsequent clauses, the parties establish that the signature of the purchase and sale contract and its recording in the Public Registry for formalization and validity depended on other conditions such as, for

---

<sup>35</sup> Promise of Purchase and Sale Agreement, dated April 2013 (C-0078-SPA resubmitted).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

## Translation

example, the Minute of the Mortgage Cancellation and Tax Clearance Certificate for the property.<sup>38</sup>

- d. In most of the clauses, the parties agreed and referred to themselves as the PROMISSORY SELLER and the PROMISSORY BUYER.<sup>39</sup>

44. The above leads me to the unequivocal conclusion that the agreement under analysis is a PROMISE OF PURCHASE AND SALE AGREEMENT, in this specific case corresponding to REAL PROPERTY.

45. Consequently, I conclude that, in principle, the Purchase and Sale Agreement for real property analyzed above is valid since it was formalized in compliance with all of the formal conditions required by Panamanian law and no elements were noted in the contract that would lead me to believe that it is a fictitious or fraudulent agreement.

### **D. Analysis of the Addendum to the Promise of Purchase and Sale Agreement signed by Ms. Reyna (but not by Punela)**

46. It is clearly understood that an addendum or meeting of the minds is an agreement of wills whereby the parties to a contract agree to modify or otherwise amend the terms that have been agreed in a prior agreement, in this case the Promise of Purchase and Sale Agreement.

47. Consequently, in my opinion, since one of the parties, the Promissory Buyer, did not sign the addendum, in other words, did not exteriorize the party's intent, the addendum referred to has no value or effect regarding what was agreed, modified or stipulated in that document. The only exception would be if, by any means, the Promissory Buyer had performed any act consequent to the agreement or matters related to the addendum, and if the Promissory Seller was aware of that act.

48. However, in my opinion, the statements or CONSIDERATIONS contained in the addendum (or "MEETING OF THE MINDS") dated 3 September 2013 signed only by the Promissory Seller, are binding for the Promissory Seller. The reason for this conclusion is that the addendum was signed by that party and the addendum refers to the previous document to which the Promissory Seller consented, namely the Promise of Purchase and Sale Agreement signed in April 2013. My conclusion is in accordance with Article 1109 of the Civil Code, which states:

*"Contracts are formalized by mere consent, and from that point forward they are binding not only for compliance with their express terms, but also for all consequences that, according to their nature, are in accordance with good faith, normal usage and the law..."*<sup>40</sup>

---

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Civil Code (C-0742), Art. 1109 (highlighted).

## Translation

49. In other words, once the Promise of Purchase and Sale Agreement that creates obligations for the parties is legally formalized through the mere consent of both parties, the parties are also obligated by any addendum or statement made in good faith and according to customary uses, to the consequences attached to the agreement, due to its nature and content, that is, those of the Promise of Purchase and Sale Agreement they entered into. The foregoing is based on the provisions of Article 1133 of the Civil Code, which contains the method of interpretation known in the doctrine as "Historical Interpretation" and which is applicable in the interpretation of contracts to determine the intention of the contracting parties and is as follows:

“The parties’ acts that are contemporaneous or subsequent to the contract should be the primary factors taken into consideration in judging the intent of the contracting parties.”<sup>41</sup>

50. It should be noted that the aforementioned Addendum comes from an existing, perfected Promise of Purchase and Sale Agreement, whose statement of intent was embodied in a subsequent act.

51. By way of clarification, it is pertinent what the Civil Chamber of the Supreme Court states regarding Article 1133 of the Civil Code and its application and effects in relation to the need for the existence of the contract in the sense that “(...) if the existence – or conclusion - of the contract has not been proven, the contemporary or subsequent acts are not complementary, since legally the contract does not exist, which constitutes its cause (...).”<sup>42</sup>

52. Similarly, the Supreme Court, with reference to Article 1133 of the Civil Code, emphasizes the importance of the conduct demonstrated by the parties after the conclusion of the contract, in order to determine their true intention, when it states that:

"(...)

The decision clearly shows the efforts of the Superior Court to unravel the common intention of the parties, in the absence of a contractual clause establishing the regularity with which the appellant LUDOVINO GONZÁLEZ had to carry out the fruit transport service for the defendant company. To this end, the contested judgment examined the conduct displayed by the contracting parties after the contract, as evidenced by the arguments made by the ad-quem court regarding the expert opinions rendered by the expert appointed by the court of the case, DIGNA GRAJALES (fs. 803-814), the plaintiffs' experts, CARLOS ALMEGOR and RICAUTER BONILLA (fs. 769-774), as well as the sworn statement made by ILALCIDES FONSECA GALLARDO (f. 525-535), directive of the

---

<sup>41</sup> Civil Code (C-0742), Art.1133.

<sup>42</sup> *Fran John Bru v. Esteban Antonio Jiménez*, Supreme Court of Panama, dated 20 Jan. 1998 (C-0918).

## Translation

defendant Cooperatives, concluding that such evidence did not accredit the amount claimed by the appellant for trips that were not made.”<sup>43</sup>

53. In my opinion, the so-called Meeting of the Minds (the Addendum) constitutes an act subsequent to the signature of the Contract to which Article 1133 refers and therefore is binding for the contracting party in accordance with the declaration made therein. This Meeting of the Minds agreement included new obligations with which the Promissory Seller was required to comply, such as: (1) the installation of public electricity service for the property; (2) the installation of an aqueduct or the provision of evidence that water sources exist on the property that could subsequently be used for a water well; (3) and compliance with the previously described obligations within a term of 24 months after the signature of the Promise of Purchase and Sale Agreement.<sup>44</sup>

### **E. Comments on Mr. Arjona’s Criticisms of the Promise of Purchase and Sale Agreement between Punela Development Corp. and JR Bocas Investments Inc.**

54. In this section I will analyze Mr. Arjona’s Expert Report for the purpose of commenting and determining whether or not the elements mentioned by Mr. Arjona are essential elements of a Promise of Purchase and Sale Agreement. I will do this using a question and answer format or expert questionnaire, accompanied by my answers immediately after the questions.

#### *1. With respect to Clause 9(c) of Mr. Arjona’s Expert Report, are the elements mentioned by Mr. Arjona essential elements of a Promise of Purchase and Sale Agreement?*

55. As a preliminary point, in his Report, Mr. Arjona shows evident confusion in his failure to consider that there are many legal differences between a Promise of Purchase and Sale Agreement and a Purchase and Sale Contract, which legal scholars refer to as the definitive contract. This is evident because, in section (c) of paragraph (9) of his Report,<sup>45</sup> in referring to the Promise of Purchase and Sale Agreement, he makes conclusions regarding the “PURCHASE AND SALE CONTRACT” which is neither the type or nature of the contract being analyzed, thereby showing that he is obviously confusing the two types of contracts which, I repeat, our legislation, legal scholars and established precedent have set clear differences, as I have clarified in previous sections of this Report.

56. In that regard, I note that Mr. Arjona affirms in paragraph 9(c) that, “according to Panamanian law, the *purchase and sale contract* for real property must be set forth in a public deed witnessed by a Notary Public (...).”<sup>46</sup>

57. It is important to note that I do not share the above statement and others made in the context of the formation of a *promise of purchase and sale agreement* and its legal validity, and I base my opinion not only on the legal standards applicable to the matter in question

---

<sup>43</sup> *Ludovino González v. Palma Aceitera Barú*, Supreme Court of Panama, dated 25 Sep. 2006 (C-0919).

<sup>44</sup> Addendum to the Promise of Purchase and Sale Agreement, dated 3 Sep. 2013 (C-0374).

<sup>45</sup> Expert Report of Attorney Arnulfo Arjona, dated 13 Nov. 2019 (“**Arjona**”), cl. 9(c) (highlighted).

<sup>46</sup> Arjona ¶ 9(c).

## Translation

(Article 1221 of the Civil Code), but also on repeated precedent in rulings issued by the Supreme Court of Justice of Panama, Civil Division, cited above, which indicate and clarify that, in order to be valid, a Promise of Purchase and Sale Agreement for real property need only be *in writing*.

58. Therefore, it is not necessary for a Promise of Purchase and Sale Agreement for real property to be set forth in a Public Deed with subsequent recording in the Public Registry. Nor is it necessary for the signatures on the contract to be certified by a Notary Public. This is the case because, as a private document, its authenticity is an evidentiary matter that, if its authenticity is challenged, may be debated and proven in a legal action subject to compliance with the requirements of procedural law and in keeping with the applicable evidence production rules.

59. The Court has held that the text of Article 1221 of the Civil Code states that it is optional for the parties to record the promissory agreement in the Public Registry if they wish to limit ownership rights related to the property, in which case, according to Article 1131, any such agreement must be set forth in a public deed.

60. In conclusion, based on the above, the only formality required for the validity of a Promise of Purchase and Sale Agreement IS THAT IT BE IN WRITING.

61. In the same section (c), Mr. Arjona, states that “in order for the transfer of ownership of real estate to take effect, the public deed must subsequently be registered in the Public Registry of Panama. In this sense, the Panamanian system is designated as one of title and form (“*de título y modo*”)...”<sup>47</sup> This statement obviously shows a second point of confusion in Mr. Arjona’s opinion, since the Agreement to Transfer and Deliver theory, which in effect is followed by our legislation in registry matters, is applicable to the PURCHASE AND SALE CONTRACT but not to the PROMISE OF PURCHASE AND SALE AGREEMENT which is the type of agreement at issue in this case, and to which I referred in previous sections regarding validity, and for which the formalities and requirements of our law for validity are different from those of the Purchase and Sale Contract and obviously, in Mr. Arjona’s report, one is clearly being confused with the other.

62. The Theory of Agreement to Transfer and Deliver is included in our positive law in Articles 1232 and 1753 of the Civil Code, which state:

“Article 1232. It shall be understood that the thing owed is delivered when it is placed in the power and possession of the buyer.

When the sale is formalized through a public deed, the recording of the deed shall be equivalent to the delivery of the thing that is the subject of the contract, in the case of real property...”

“Article 1753. ‘ARTICLE 1753. The Public Registry has the following two purposes:

1- To be used as a mechanism for the creation and transmission of ownership of real property and other *in rem* rights created thereby;...”

---

<sup>47</sup> Arjona ¶9 (c).

## Translation

63. It is clear from the provisions transcribed above that, in our country, transfer of ownership of real property *requires that the purchase and sale contract must be set forth in a Public Deed (Transfer) and that this document must be recorded in the Public Registry (Delivery)*. Unless these requirements are met, transfer of real property through a purchase and sale contract is not legally recognized. In that regard, the Supreme Court has made that clarification in a case analyzing the above provisions, stating that “(...) In another ruling issued on 26 April 1945, this High Court clarified that the public deed is the formalization of the contract and the recording of the deed is the transfer .... ‘In the case of real property, in which case it is indispensable for the contract to be set forth in a public deed, while the transfer of the property, and therefore the transfer of the ownership, shall not be considered to have been completed without the recording of the respective contract in the Public Registry. This is the case because this (sic) the mechanism established by law for the transfer of ownership of real property’. (Judicial Record, 1945, No. 4, P. 27).”<sup>48</sup>

64. In conclusion, in consideration of the principles set forth above and in accordance with Panamanian law, established legal precedent and the writings of legal scholars, it is my conclusion that the Theory of Agreement to Transfer and Delivery cannot apply to a Promise of Purchase and Sale Agreement since this type of agreement in no way implies a contract that transfers ownership.

65. Therefore, I unequivocally affirm that the elements established by Mr. Arjona in his Report are not those that either our legislation or Supreme Court precedent establish as essential elements of a Promise of Purchase and Sale Agreement for real property.

2. *What are the legal consequences of the fact that the 180 day period to sign the public deed has passed and the obligation has not been complied with?*

66. If one adheres to the clauses of the Promise of Purchase and Sale Agreement, according to CLAUSE SEVEN, the Promissory Seller was obligated to deliver the minute of the mortgage cancellation on the property that was the subject of the promised sale within 45 days after the signature of the agreement, with the express statement that this was to occur “against delivery of the Irrevocable Letter of Credit.”<sup>49</sup> Thus, if the Promissory Seller failed to comply with its obligation to deliver the minute of the mortgage cancellation, the Promissory Buyer was not obligated to comply with its obligations, since the agreement was a synallagmatic contract or contained reciprocal obligations (*exceptio non adimpleti contractus*). This is based on the provisions of the final section of Article 985 of the Civil Code which states:

“(...

In reciprocal obligations, no obligated party shall be guilty of default if the other party fails to comply or fails to facilitate compliance with the obligations for which it is responsible. If one of the obligated parties

---

<sup>48</sup> *Gloria Melgar de Mizrachi v. Isaac Ramon Mizrachi*, Supreme Court of Justice of Panama, dated 17 Jul. 2006 (C-0761).

<sup>49</sup> Promise of Purchase and Sale Agreement (C-0078-SPA resubmitted), cl. 7.

## Translation

complies with its obligation, the other party will be considered to be in default as of that time.”<sup>50</sup>

67. This “contract breach defense” is also included in the first paragraph of Article 1009 of the Civil Code and clearly applies if and when the Promissory Buyer has made the payments of the price under the terms agreed in sections a) and b) of Clause TWO of the contract, which I understand did, in fact, occur.

68. It would be logical for the Promissory Buyer to refrain from delivering the Irrevocable Letter of Credit if the Promissory Seller had not first complied with its obligations, in other words, the Promissory Buyer had not been given the assurance of the referenced minute of the cancellation of the mortgage on the property the Promissory Buyer was purchasing, this is even more so since the Promissory Buyer had already complied with its obligation to pay the sum of USD 250,000.<sup>51</sup> I understand that in this case the Promissory Buyer made a second payment in the amount of USD 250,000.<sup>52</sup> In my opinion, I do not find it unusual to make a second payment, since the Promissory Buyer was fulfilling its obligation.

69. It follows from the above that upon expiration of the term of 180 days to sign the public deed for the definitive purchase and sale contract without this obligation having been fulfilled, according to Article 1009 of the Civil Code, the following alternatives are available to the Promissory Buyer:

- a) Request rescission or termination of the contract with compensation of damages and payment of interest; or
- b) Demand performance of the obligation; in other words, require that the Promissory Seller sign the Purchase and Sale Contract, also with compensation of damages and payment of interest.

70. That the Promissory Buyer has not decided to choose one of these alternatives does not raise concerns since, as I will explain later, the statute of limitations for the Promise of Purchase and Sale Agreement is still in effect.

3. *What is the effect of the alleged error contained in the Promise of Purchase and Sale Agreement that the irrevocable letter of payment must be delivered before the title is transferred?*

71. In my opinion, given the experience gained on drafting and related topics to Promise of Purchase and Sale Agreements, I affirm that it is not at all unusual that these contracts stipulate that the final payment of the agreed price is made after the public deed containing the definitive Purchase and Sale Contract has been registered.

72. On the contrary, in general the final payment is subject to the registration of the Public Deed in the Public Registry, a condition which the Promissory Seller generally accepts since he has the guarantee that if this final payment is not made he retains the prior

---

<sup>50</sup> Civil Code (C-0742), Art. 985.

<sup>51</sup> Check from PR Solutions to Reyna and Associates, dated 25 Apr. 2013 (C-0079).

<sup>52</sup> Check from PR Solutions to Reyna and Associates, dated 12 Jul. 2013 (C-0080).



## Translation

payments made by the Promissory Buyer as stipulated in the FIFTH clause of the Promise of Purchase and Sale Agreement and, in addition, can claim or demand the payment of the insolvent portion of the agreed price through the corresponding process, plus damages and interest.

73. On the other hand, it must also be taken into account that the parties may agree and obligate themselves as they have, this based on the autonomy of will that rules in our country (art. 1106 of the C.C.) so long as what is agreed to is in good faith and does not violate any morals, the customs of the law or public order.

74. On the freedom of contract, the ruling pronounced by the First Civil Division of the Supreme Court is pertinent, where it explains that Article 1106 of the Civil Code determines that the contracting parties may establish the agreements, clauses and conditions they deem appropriate. Thus, the Court goes on to say that denying binding value to what was agreed between the parties would be to sponsor an enrichment without legal justification, which is obviously contrary to the legal system and good faith.<sup>53</sup>

75. Therefore, in my opinion, I do not see that there is an error in the Promise of Purchase and Sale Agreement that the irrevocable payment letter had to be delivered before the title was transferred. And, in any event, that was the way the parties chose to contract, which is provided for in our legislation under Article 1106 of the Civil Code as I have indicated previously.

---

<sup>53</sup> *Liborio Caballero v. Nicolas Villareal*, Supreme Court of Justice of Panama, dated 12 Oct. 2001 (C-0762) (“(...) Obviously it does not comply with the rules applicable to the purchase and sale or a contract for the purpose of entering into another contract, in other words, the promise of a contract, because it also lacks the pact of the requirements with which this type of contract must comply. However, it is evident that this is a legal business transaction related to property, in other words, an act of private autonomy that regulates a specific legal relationship or status for its authors. The possibility of establishing this type of legal business transaction, whether or not the typical contracts established in our legal texts are used, is a consequence of the cardinal principle of asset law of the autonomy of wills, which does respond to the legal categorization corresponding to typical legal business transactions, and if it does not, the situation involves an atypical legal business transaction, which is perfectly plausible in accordance with the principle cited above, by reason of the provisions of Article 1106 of the Civil Code. With respect to the principle in question, the jurist LUIS DIEZ-PICAZO has stated: “The autonomy of wills in the contractual field is, above all, the freedom to contract, which means the free option of the individual to enter into a contract or not to do so, in other words, it means the freedom to establish contractual relationships, with the consequent freedom to select the contract type (Typenfreiheit). Individuals do not need to limit themselves to the typical contracts regulated by the laws, but they are free to construct other different types of contracts. Lastly, this also signifies the possibility of modifying, also freely, the contracts regulated by the Law, the legal contents of these contracts, replacing them with another different type of contract. In the Civil Code, this cardinal principle is regulated by Article 1.255, according to which “the contracting parties may establish the pacts, clauses and conditions they believe to be appropriate”. This should be understood to refer both to the freedom to choose the types of contracts as well as the freedom to add content to legally recognized types of contracts other than the content established by Law.” (DIEZ-PICAZO, Luis. “Basics of Civil Property Law, Volume I (Introduction-Contract Theory), 4<sup>th</sup> Ed., Editorial Civitas, Madrid, 1993, p.128) To deny the parties binding value would be to sponsor unlawful enrichment, which is clearly contrary to the rule of law and good faith. In this case, the Court agrees that this case involves an atypical legal business transaction that partially uses different contractual structures which may not be subsumed in any of the legal categories set forth in civil law”).

## Translation

4. *Is there an indication that the Promise of Purchase and Sale Agreement that is the subject of this expert opinion was entered into with malicious intent and that it lacks the reasonable minimum standards of diligence by the Promissory Buyer?*

76. Based on my experience, and after reading the clauses and content of the Promise of Purchase and Sale Agreement in question, I see no malicious or fraudulent intent on the part of the Promissory Buyer and I consider that in general terms it was drafted and contains the clauses and conditions that are commonly used in this type of contract.

5. *Does the fact that the Promise was drafted as a private document, and not as a public deed, make it invalid?*

77. As was clarified above, and basing my opinion on the Law, the writings of legal scholars and established legal precedent, the Promise of Purchase and Sale Agreement, which is a private document, is valid since according to the law *it is not required to be drafted as a public instrument, nor does it have to be recorded in the Public Registry.*

78. Given my experience in and knowledge on this topic, I do not believe that it is typical in Panama that Promise of Purchase and Sale Agreements are created as public deeds and registered in the Public Registry, but there is nothing preventing it and the law allows it when the party has an interest in placing a limitation on the control of a real property so that the promissory seller cannot transfer the property, which is stipulated in the last paragraph of Article 1221 of the Civil Code.

79. But the lack of formality in the authenticity of the document does not in any way prevent the Promissory Buyer from demanding and exercising his rights toward the Promissory Seller, if the latter does not fulfill the obligations imposed by the Promise of Purchase and Sale Agreement, for which the law protects him. Regarding the obligations of the contracts, we must keep in mind what is stated in Article 1109 of the Civil Code:

“Contracts are formalized by mere consent, and from that point forward they are binding not only for compliance with their express terms, but also for all consequences that, according to their nature, are in accordance with good faith, normal usage and the law. (...)”<sup>54</sup>

6. *Must the signatures on a Promise of Purchase and Sale Agreement be authenticated by a Notary Public and is this a usual practice in Panama?*

80. I reiterate the concepts expressed earlier in this Report, which clearly lead to the conclusion that in Panama, a Promise of Purchase and Sale Agreement for real estate needs only be in writing for it to be valid and have legal effect.

81. In Panama it is a usual practice that in these written private contracts the signatures of the contracting parties are authenticated by a Notary Public, but I must point out that the

---

<sup>54</sup> Civil Code (C-0742), Art. 1109.

## Translation

lack of such authentication does not invalidate or annul the Contract, nor does it in any way make the Contract suspect.

82. The grounds for nullity or invalidity of the contracts are contained in Articles 1141 and 1142 of the Civil Code and these do not include the lack of authentication of the signatures on the contract by a Notary Public.<sup>55</sup> I do not believe there is any attorney who would file a petition before a judge claiming that a Promise of Purchase and Sale Agreement should be declared null and void because it lacks signatures authenticated by a Notary Public.

83. Where I do agree with Mr. Arjona is that the authentication of signatures by a Notary Public provides probative value to the contract as an authentic private document, an authenticity that facilitates its use in court or a trial. However, according to our procedural laws, this authenticity may also be obtained through other evidence, such as, for example not objecting to the document or the signatures, or expressly recognizing them in the proceedings, but I reiterate, the lack of authentication does not detract from the legal validity of the contract, thus the contracting parties may reciprocally demand compliance with their obligations, even when the signatures on the contract have not been authenticated by a Notary Public.

7. *Is the method of payment contained in the Promise of Purchase and Sale Agreement unusual?*

84. I have expressed earlier that the contract I am analyzing is governed by and falls under the Principle of Autonomy of Will granted by our Civil Code in its Article 1106, according to which “The parties may establish the pacts, clauses and conditions to which they wish to agree, if they are not contrary to the Law, good morals, or public order.”<sup>56</sup> From reading the SECOND clause, sections a) and b), to which Mr. Arjona refers,<sup>57</sup> it does not follow, nor do I observe, that they are UNUSUAL, CONTRARY TO THE LAW, IMMORAL OR CONTRARY TO PUBLIC ORDER.

85. In this type of contract, clauses such as the ones in question are commonly used. In addition, the Principle of good faith contained in Article 1109 of the Civil Code, among others, prevails in contractual matters, a principle under which the Promissory Buyer is presumed to have acted in this contract, in that he would honor the fulfillment of his obligations.

86. With respect to this topic related to the Principle of Good Faith on the part of the contracting party, it is appropriate to reproduce part of the ruling from the Civil Division of the Court, from which the following was highlighted:

“(…)

On the matter, this Court finds that if the respondent *JOSÉ ESTEBAN CONTRERAS* preferred to sell lot No. 77500 indicated above to Ms. *JILMA ROSA LARA DE CONTRERAS*, instead of transferring it to the company *LAS*

---

<sup>55</sup> Civil Code (C-0742), Arts. 1141-1142.

<sup>56</sup> Civil Code (C-0742), Art. 1106.

<sup>57</sup> Arjona ¶ 16.

## Translation

*OLAS S.A.* with which he had a written commitment contained in a pre-contract, even if it was because the price offered by the current owner was better than what was agreed with that company, the Court cannot validate an act of this nature which violates the laws and morality, under the terms provided in Article 1126 of the Civil Code and in the absence of a legal cause existing in the aforementioned real estate transfer, and must decide thusly.

The foregoing finds support, among other legal elements, in an important case-law precedent pronounced by the Supreme Court of Spain, contained in the Judgment of 5 October 1961, in which the court held:

‘Thus configured, there is no doubt that the pre-contract or promise of a contract creates obligations for the contracting parties, that of developing or supplementing the bases established in the pre-contract, carrying out the precise activity for it; and breach of such an obligation may be sanctioned by the Judge if so required ... and whenever the pre-contract establishes the fundamental bases of the future, primary or promised contract, which are, for example, the promise of purchase and sale, the basis and determined or determinable price, even if other contractual details have not been specified.’ (emphasis added by the Court). (See CIVIL RULINGS OF THE SUPREME COURT, Years 1961-1966); page 687, Compiled by MANUEL RODRÍGUEZ NAVARRO, Aguilar S.A. DE EDICIONES, Juan Bravo 38, Madrid, Spain, 1967.

Therefore, in the opinion of this Court, it is mandatory to cancel the purchase and sale contract for Lot No. 77500 mentioned above, which was signed between *JOSÉ ESTEBAN CONTRERAS and JILMA ROSA LARA DE CONTRERAS*, as well as any consequences reflected in the Public Registry, primarily because these acts were based on an illegal cause, opposed to the laws and morality; a decision made to strengthen *the legal principle of autonomy of will* contained in Article 1106 of the Civil Code, *which does not allow the validation of actions that violate the pertinent legal standards, by virtue of being against the Law, morals and good practices*, as also specified in Article 1126 of the Civil Code and also observing the strict legal consequences that this law imposes, *for having executed this Purchase and Sale ignoring an earlier Promise of purchase and sale signed between JOSÉ ESTEBAN CONTRERAS and the company LAS OLAS S.A., whose direct consequence has as a legal sanction the “cancellation of any legal effects” between the parties who signed it.*

For this Court, failure to do so would imply issuing a ruling against the Law, since it would allow it to validate an action that is contrary to the Law and outside the principle of good faith, which must govern the contracting parties at all times, with a legal pronouncement, since, as the aforementioned Court of Spain stated in its Ruling of 22 March 1963, ‘the Courts must issue timely rulings when the agreements and clauses that make up the content of the contract are manifestly and notoriously immoral or illegal, because the opposite would mean that the rulings of the Courts, through the silence of the

## Translation

parties, could support disreputable or criminal acts, an inadmissible legal-ethical absurdity.’ (Op. Cit. Page 503).”<sup>58</sup>

87. In conclusion, and as I mentioned previously, there is nothing unusual or contrary to the law, morality, or public order in the way in which the parties to the Promise of Purchase and Sale Agreement drafted the form of payment.

8. *Do the parties to a Promissory Purchase and Sale Agreement have any legal requirements to fulfill in accordance with maximum and minimum percentage of the initial payment for the property?*

88. According to my experience in reviewing contracts related to the subject matter of the contract at issue in this case, and also according to the legal standards that govern the contract, there is no legal requirement that demands such percentages for initial payment. What the law requires (Art. 1221 of the Civil Code) is that, among other things, the price to be paid is fixed in the contract, but not the means of payment, which depends on what the parties freely agree. The article in question states, “the promise to sell or purchase, having agreement... on the price... shall give rights to the person to whom the promise is made...”<sup>59</sup>

89. I am unaware that in Panama there exists and that it is normal to apply a formula of between 10% and 15% of the sales price agreed in the promise of purchase and sale agreement.<sup>60</sup> The amount of the sale price payments is always subject to the willingness and economic capacity of the party who is obligated to pay, with the agreement of the promissory seller, as I have indicated, based on what the parties were able to establish in the agreements and conditions they have set, as long as they are not against the law, morality or public order.<sup>61</sup> Nothing in our law prevents the parties from agreeing to an initial payment of 25 or 50 percent.

90. As for the freedom to contract, in conjunction with the evolution seen over the last few years in these types of contracts via a Promise of Purchase and Sale, it is relevant to bring up a ruling from the Civil Division of the Court<sup>62</sup> in which it cites Colombian case law clarifying the issue by explaining:

“In this sense, it bears mentioning that, in Colombian case law, there is a reference to this complex legal phenomenon, in which things like the price, specific elements of the purchase and sale (such as the price to pay and delivery of the thing) are incorporated into a contract, which does not negate its nature, it and its use has come to be justified because of the evolution this contractual form has seen in recent years.

‘As the Court has repeatedly upheld the promise of purchase and sale, by its nature, simply creates the obligation to go through with the promised contract.

---

<sup>58</sup> *Las Olas v. Jose Esteban Contreras*, Supreme Court of Justice of Panama, dated 11 Feb. 2014 (C-0742).

<sup>59</sup> Civil Code (C-0742), Art. 1121.

<sup>60</sup> Arjona ¶ 17.

<sup>61</sup> Civil Code (C-0742), Art. 1106.

<sup>62</sup> *Inversiones Ebelle S.A. v. Mirian Coto Cabrera*, Supreme Court of Justice of Panama, dated 9 Apr. 2003 (C-0760).

## Translation

The promise of a contract reflects a negotiation, to the point that the Legislature incorporated it into the legal order with some special requirements. However, the development of this form of negotiation, particularly in the large cities, where real estate ownership undergoes constant changes due to conventional interests, has made or prevailed (sic) that the promise, in matters related to purchases and sales, has become a legal business class of unquestionable use in transactions, to such a degree that a real estate purchase and sale contract is almost always preceded by a promise as a legal means of binding the parties in pursuit of the performance of that contract.

The frequent use of these promise of a purchase and sale agreements for real estate has also led to the parties not limiting themselves to defining the profiles of the transaction in accordance with their own provisions and those that emanate from Article 89 of Law 53 of 1887, but the expression of will lets them incorporate other contractual stipulations which, while not negating their nature, make them complex in their development and execution and obliges the promising parties to fulfill all the points in the document.

Among the negotiation points, there are many that revolve around the elements of the sale such as the price and the object, particularly with regard to the payment of the former and the delivery of the latter. In other words, the contracting parties most often agree, in the majority of cases, on points that do not necessarily lead to obligations but foretell commitments or duties to reach the main purposes desired by the parties, because what is pertinent is that those items be formalized when the purchase and sale contract is finalized.’

The obligations that the parties establish, as a preliminary step before formalizing their obligations, acquire an indisputable legal relevance: they must be fulfilled by the contracting parties in the agreed order and manner. Whatever is done, deviating from these contractual criteria or designs, will have an impact on the performance or nonperformance of the agreement, which will later enable the pertinent actions of termination of the contract or its fulfillment, but certainly leaving aside the disciplinary exceptions in the private order, like the unperformed contract.”

91. Furthermore, I must say that in these types of contracts I have noticed that the parties have agreed to and applied different types of percentages as payments of the purchase price.

9. *What are the legal consequences of the typographical error in the pricing clause of the Promise of Purchase and Sale Agreement?*

92. I believe that an error of the type mentioned by Mr. Arjona,<sup>63</sup> which occurred in the drafting of the SECOND clause, is an oversight and, although it can be significant, it is not unusual because it happens, not only in this, but in all types of contracts.

---

<sup>63</sup> Arjona ¶ 52.

## Translation

93. Nevertheless, when this type of error occurs, which creates numerical discrepancies between the words used and the fixed number, the words prevail. This must be the conclusion resulting of the application by analogy that I make according to Article 17 of Law 52 of 13 March 1917, “On Negotiable Documents,” which states:

“When the phrases in a document are ambiguous or when omissions exist, the following rules of interpretation must be followed:

1. When the amount to be paid is expressed in words and also in numbers and there a difference between them, the amount indicated in words is the amount payable; ... .”<sup>64</sup>

94. On the other hand, in this particular case and applying the rule of interpretation of contracts, in my opinion Article 1133 of the Civil Code also applies, which states that:

“To judge the intent of the contracting parties, one must primarily consider their actions, contemporaneous with and after the contract.”<sup>65</sup>

95. In other words, with respect to the case under consideration, we must interpret and conclude that the payments and contributions made are a determining factor in establishing the price agreed upon in the contract.

96. In conclusion, if one takes into account that through subsequent actions the intent of the contracting parties emerged, and that each of them acted according to what they actually understood, the typographical error becomes irrelevant, since it is corrected by the intent of the parties.

10. *Does the Promise of Purchase and Sale Agreement in question suffer from relative nullity based on the persons who signed the Promise?*

97. In effect, as Mr. Arjona indicates,<sup>66</sup> according to the Law for corporations (Law 32 of 1927), in any type of contract involving a legal entity or company where goods are being conveyed or acquired, those who enter into a contract must be duly authorized by the Board of Directors. If this is not the case, the contract *could* be subject to the defect of relative nullity according to the provisions of number (2) of Article 1142 of the Civil Code in concordance with Article 1110 of the same code, which states that “no one can sign a contract on behalf of another without being authorized by that person or without being appointed as a legal representative in accordance with the law,” in which case, the contract shall be null and void, “... unless it is ratified by the person in whose name it is granted...”<sup>67</sup>

98. Notwithstanding the above, it is important to clarify the following:

99. In paragraph 55 of his report, Mr. Arjona says that both Ms. María Gabriela Reyna and Mr. Luis E. Montaña stated that they had allegedly been authorized to sign the contract

---

<sup>64</sup> Law No. 52 of 13 Mar. 1917, On Negotiable Documents dated 13 Mar. 1917 (C-0763), Art. 17.

<sup>65</sup> Civil Code (C-0742), Art. 1133.

<sup>66</sup> Arjona ¶¶ 55-60.

<sup>67</sup> Civil Code (C-0742), Art. 1110.

## Translation

in question representing JR Bocas Investments, Inc. and Punela Development Corp. However, no decision by the Board of Shareholders or the Board of Directors of the companies was confirmed that authorized the signature of the Promise of Purchase and Sale Agreement.

100. In this regard, it is interesting, and Mr. Arjona failed to mention, that Ms. Reyna, on behalf of JR BOCAS INVESTMENTS, committed in clause EIGHT at the end of the Promise of Purchase and Sale Agreement, to providing “Minutes of the Extraordinary Shareholders Meeting authorizing the sale of THE PROPERTY ... within a term of no more than forty-five (45) days following the signature of this contract.”<sup>68</sup> In other words, the Promissory Seller was willing and committed to meeting this requirement, so in our opinion to now argue that there is a defect of relative nullity for this reason is to go against the actions of the parties themselves [*“actos propios”*], and such hypothetical action would be an act of bad faith.

101. The foregoing is important for the effects of relative nullity in that within the provisions of the Civil Code which governs this type of nullity, Article 1144 states that these can be corrected by ratification or by a lapse of four years,<sup>69</sup> and Article 1146 states that confirmation may be expressed or implied.<sup>70</sup>

102. In turn, Article 1148 of the Civil Code states that “The confirmation purifies the contract of the defects that it suffered from the moment of its signature,”<sup>71</sup> however, in order for the confirmation, whether expressed or implied, to be effective, it must be done by the person who has the right to request the termination or nullity of the contract.<sup>72</sup>

103. On the other hand, it is also very important to take into account that according to our laws, relative nullity, as opposed to absolute nullity, cannot be declared ex officio by the judge and the action for which the injured parties can act and petition, has a statute of limitations of four (4) years.<sup>73</sup>

104. Likewise, according to Professor of Civil Law at Santa Maria la Antigua Catholic University, NARCISO JOSÉ ARELLANO, “(...) only the party affected by the defect of nullity is entitled to file the rescission action. As a result, the party who caused the error has no standing to do so, nor does the party who through coercion, intimidation or fraud, was able to extort or obtain the consent of the other party.”<sup>74</sup>

105. In accordance with the above I refer to the Civil Division of the Supreme Court, clarifying that it is the party affected by the nullity who is legally entitled to act and request it, indicating the following:

“(...

The Complainant alleges that PILADORA LAS MERCEDES, S.A., by agreeing to the pledge with PRIMER BANCO DEL ISTMO, S.A., and

---

<sup>68</sup> C-0078-SPA resubmitted, C1.8.

<sup>69</sup> Civil Code (C-0742), Art. 1144.

<sup>70</sup> Civil Code (C-0742), Art. 1146.

<sup>71</sup> Civil Code (C-0742), Art. 1148.

<sup>72</sup> *Id.*

<sup>73</sup> Civil Code (C-0742), Art. 1144 and 1151

<sup>74</sup> Arellano, Narciso, General Rules About Civil Contracts, Panama, dated 2003 (C-0764), Pag. 143.



## Translation

agreeing that the rice pledged would be deposited in the silos owned by MOLINO SANTA ISABEL, S.A., located on the farm owned by COCLÉ AGRICOLA S.A., what occurred was that the assets of the latter two companies were conveyed without their consent, in other words, a contract was entered into on their behalf.

The truth is that none of the clauses of the Commercial Pledge Contract (p. 30), signed on 20 December 2006 commit or bind the aforementioned companies in any way.

If we observe, only the third clause of this contract refers to MOLINO SANTA ISABEL, SA, when establishing that ‘the goods given in pledge will be deposited’ in the silos of the latter company, a deposit that is charged to the debtor, according to the same clause.

An obligation is thus created, but not charged to MOLINA SANTA ISABEL S.A., but to PILADORA LAS MERCEDES S.A.

Regarding the fact that PILADORA LAS MERCEDES, S.A. had rice belonging to MOLINO SANTA ISABEL, S.A. or COCLÉ AGRÍCOLA, S.A., the Court must state that the First Superior Court gave as evidence that PILADORA LAS MERCEDES, S.A. deposited national rice in the silos of MOLINO SANTA ISABEL, S.A. before the seizure against the latter, plus, this matter concerning whether or not rice ownership was proven cannot be examined through the Cause of direct violation of the substantive law.

It should also be noted that entering into a contract on behalf of another, without authorization, constitutes grounds for nullity of the contract under the stipulations of Article 1110 of the Civil Code, which may only be claimed by the person affected, as established in Article 1144 of the same code.

Thus, if one accepts that by agreeing to the pledge with PRIMER BANCO DEL ISTMO, S.A., PILADORA LAS MERCEDES, S.A. entered into a contract on behalf of COCLÉ AGRÍCOLA, S.A and MOLINO SANTA ISABEL, S.A. without their authorization, such nullity can only be claimed by COCLÉ AGRICOLA S.A. and MOLINO SANTA ISABEL, S.A., which did not occur.

Because of the above, therefore, the objection of the appellant in relation to this topic is inadmissible, since it has no standing to make the claim of relative nullity of the Pledge Contract that led to the partial lifting of the seizure ordered in its favor.”<sup>75</sup>

106. In view of the above, it is clear that the party with the legal authority to make a claim of relative nullity or rescission of the contract and within a term of 4 years from when they became aware of the defect (done through evidence) was the Promissory Buyer, in other words the company that would be deprived of the real property it owned.

---

<sup>75</sup> *Banco del Istmo v. Molino Santa Isabel*, Supreme Court of Justice of Panama, dated 5 May 2011 (C-0765).

## Translation

11. *Does the lack of a day in Promise of Purchase and Sale Agreement's date suggest a lack of due diligence and care?*

107. In my opinion, it is logical to assume that any contract or agreement should indicate the day, month and year to give the exact date on which it is signed, which is important for the legal effects and consequences that this information generates. But at the same time, in my opinion an omission of this nature, unless proven otherwise, cannot be construed as being done in bad faith, lack of diligence or malice, but a simple omission resulting from an oversight that in this case is a minor oversight due to failing to include the day on which it was signed.

108. However, as for the legal effects or consequences that depend on the contract's exact signature date, it is somewhat irrelevant because even though the day is not specified, this can be determined by other evidence that can lead to its determination (for example, the date the check for the first payment was sent, or some simple means that provides this clarification). In other words, the fact that the date is not specified is not fatal to the validity of the Promise of Purchase and Sale Agreement.

109. On the other hand, Article 1112 of the Civil Code, which provides the essential requirements for the validity of contracts, does not include the obligation that they express the date on which they are signed,<sup>76</sup> which is also not required by Articles 1129 to 1131 *ibid*,<sup>77</sup> contained within CHAPTER III related to the EFFICACY OF CONTRACTS.

110. As a result of the above, I believe it is unsupported to say that the fact that the Promise of Purchase and Sale Agreement in question does not express the day on which it was signed represents an impediment to determining the day on which the obligations to which the parties committed themselves, or that it is an element that affects the validity of the Contract.

12. *Is it necessary in a Promise of Purchase and Sale Agreement that the Promissory Buyer carry out an appraisal or topographical study, and if not, does this have any legal consequences for the validity of the Agreement?*

111. In the first place I must indicate that doing an appraisal and/or topographical study for a Promise of Purchase and Sale Agreement or any other type of contract in which a person intends to obtain a movable property or real estate, it would be logical that the buyer would want to have some assurances regarding the condition, measurements, etc. of the asset he intends to buy. But in my opinion, the lack of due diligence or verification of the item to be purchased does not have any legal consequences on the validity of the contract, provided, as I have stated, that it meets the validity requirements set forth in Article 1112 of the Civil Code and related articles pertaining to certain formalities or solemnities.

112. In this respect, since the document in question is a Promise of Purchase and Sale Agreement for a real property, I must note that verifications through an appraisal and other types of procedures are instead completed for the final Purchase and Sale Contract. In that

---

<sup>76</sup> Civil Code (C-0742), Art. 1112

<sup>77</sup> Civil Code (C-0742), Art. 1129-1131.

## Translation

regard, there is precedent from the Supreme Court that precisely addresses disputes related to the boundaries and measurements of a property if after the contract was signed it is discovered that what was sold does not coincide with the physical reality of the property offered for sale or other conditions thereof, circumstances that result in a decrease in the price or termination of the contract.

113. What is more, through experience in managing these types of Promise of Purchase and Sale Agreements for real estate and especially the final Purchase and Sale Contract, I can say that with respect to the description of the subject property in the transaction it is usual to include in the respective clauses phrases like, for example, “whose boundaries, measures and the rest are recorded in the Public Registry,” without it being necessary to give exact descriptions of the property in the respective Promise of Purchase and Sale Agreement.

114. Moreover, I must reiterate what I said in reference to the essential elements of the Promise of Purchase and Sale Agreement and within them the object of the contract, in the sense that the same may be determined in a generic or DETERMINABLE way.

13. *Does the fact that PUNELA did not claim any money or terminated in writing the Promise of Purchase and Sale Agreement in writing has any relevance?*

115. The fact that there has not been a claim from PUNELA has no legal relevance so long as the term for submitting a claim has not expired, in which case the right to act in defense of their interests could be considered to have been abandoned. As I will explain in the next section, the statute of limitations for the Promise of Purchase and Sale Agreement has not expired. Therefore, at present this point is legally irrelevant.

### **F. The Statute of Limitations for the Promise of Purchase and Sale Agreement**

116. Mr. Arjona states that the action for claims for the breach of the obligations contained in the Promise of Purchase and Sale Agreement has expired since the statute of limitations of 5 years for commercial matters has passed.<sup>78</sup> Mr. Arjona calculates this term using the date the contract was signed, 2 April 2013,<sup>79</sup> which he considers as the signature date of the contract. From this, Mr. Arjona concludes that the 5 years expired on 29 September 2018, based on Articles 1949 and 1650 of the Commercial Code, which according to Mr. Arjona, is the applicable law for handling a promissory contract for a business transaction,<sup>80</sup> given that the contracting parties are businesses or were created as mercantile companies to carry out commerce.<sup>81</sup>

117. In this respect I must point out that I do not agree with the opinion expressed by Mr. Arjona because the Promise of Purchase and Sale Agreement in question, even if it was

---

<sup>78</sup> Arjona ¶¶ 70, 72.

<sup>79</sup> Arjona ¶ 73.

<sup>80</sup> Arjona ¶ 70.

<sup>81</sup> Arjona ¶ 71.

## Translation

signed by two public corporations, is a bilateral promise of purchase and sale which, as I have said, is governed by Article 1221 of the Civil Code.

118. Therefore, what is indispensable in this case is determining the commercial or civil nature of the Promise of Purchase and Sale Agreement, an issue where I reiterate that in my opinion, as previously stated, it is of a civil nature, also coinciding in this respect with that was expressed by the Supreme Court,<sup>82</sup> which stated:

“(…)

In this sense, economic compensation can hardly be claimed if a lease agreement has not been signed, as the cassation appellant purports, since that would mean going against the agreement, as well as civil norms being violated which is where the dispute in question originates, therefore, this Court upholds the decision of the Court of Second Instance which states ‘... that it would be a true mistake to transfer the implications emanating from the Promise of Purchase and Sale Agreement, under the premise of Use and Customs in commercial matters, allowing the predominance of the latter, when with sufficient evidence the effects of what is agreed to by the parties, are civil in nature.’”

119. This being the case, and faced with a contractual liability that generates a personal obligation, the statute of limitations is *7 years* as provided in Article 1701 in concordance with Article 986,<sup>83</sup> both in the Civil Code, this being the legal body that particularly governs the Promise of Purchase and Sale Contract. In this regard, in addition to the legal dispositions cited, there is a precedent from the Supreme Court<sup>84</sup> which, for the statute of limitations for this type of contract, clarified the following:

“(…)

As the second instance court indicated, the claim in the case in question finds its support in a personal action, since the property belonging to the claimant and corresponding to Lot No. 20724 is in the possession of the respondent, by virtue of the promise of purchase and sale agreement signed with Constructora 2,000 S.A.

While it is true that the plaintiff has indicated that Articles 337, 582, and 1700 of the Civil Code were violated by the second instance ruling, because they were not applied by the Ad-quem, this is due to the fact that these articles are related to an *in rem* claim, which does not follow the case in question, because as noted, the action is of a personal nature emanating from a promise of purchase and sale agreement which according to the appellant the defendant did not comply with. Therefore, the way to comply with this obligation or leave it without effect, was effectively to act based on this contract, which is

---

<sup>82</sup> *Banco Nacional de Panama v. Ismaelina Lopez de Zeballos*, Supreme Court of Justice of Panama, dated 29 Dec. 2011 (C-0766).

<sup>83</sup> Civil Code, (C-0752), Art. 986.

<sup>84</sup> *Constructora 2000 S.A. y Benedetti Diaz v. Enrique Dominguez*, Supreme Court of Justice of Panama, dated 7 Feb. 2012 (C-0767).

## Translation

the reason why the asset is in the possession of the respondent, which corresponds to a personal action, and not an *in rem* action, as held by the First Superior Court.

And due to the fact that this involves a personal action, the provisions of Article 1701 of the Civil Code must be applied, since no specific statute of limitations is provided, and this period is clearly 7 years: and Article 1700 of the Civil Code is not applicable as indicated by the cassation appellant, since it regulates the limitation term of *in rem* actions, which does not correspond to the case at hand.

In that sense, as the Ad-quem correctly stated, the personal action that the claimant counted on to act was limited too much, so in that sense, this Judicial Body concludes that the articles indicated by the appellant were not violated, and the correct course of action is to uphold the decision of the second instance.”

120. Taking into account for the issue I am analyzing, that in the cited precedent, one of the parties was a mercantile company, in other words, a merchant, and the Court nonetheless applied the standards of the Civil Code in its decision.

121. In conclusion, the applicable 7-year statute of limitations for claims ends on 29 *September 2020*, taking into account the date on which the statute of limitations began to toll, according to Mr. Arjona.<sup>85</sup>

122. Mr. Arjona then explains that he considers “it striking and completely unusual that the Claimants assert a breach of the referenced contract but concede that, at this point in time, Punela Development Corp. has [not] sent written communications to JR Bocas Investments, Inc. advising of the termination of the Purchase and Sale Promise Agreement... .”<sup>86</sup> In this regard, it is important to consider in the first place that Punela may be considering that it is within the legal term within which it can exercise its right, and secondly, according to the facts presented and Mr. Rivera being immersed in domestic and international legal actions, it clearly creates a situation that requires priority attention and prompt resolution given severity and urgency of the situation.

## V. THE PRINCIPLES OF GOOD FAITH AND REASONABLENESS IN PANAMANIAN LAW

123. The principles of good faith and reasonableness are part of Panamanian law and are contained in Articles 1109, 1134, 1135, 1137, among others, of the Civil Code.<sup>87</sup>

124. These principles apply to any type of contract, whether civil, commercial or administrative. That is to say, these principles and particularly the Principle of Good Faith in contracts originate with Roman law, are accepted by our legislation, and are generally applicable to all contracts, as indicated by the Third Division of the Court explaining the following:

---

<sup>85</sup> Arjona ¶ 73.

<sup>86</sup> Arjona ¶ 21.

<sup>87</sup> Civil Code (C-0742), Arts. 1109, 1134, 1135 and 1137.

## Translation

“Applying this to the case at hand, it means that the concession contract in question cannot be disregarded by the Administration, as it would cause very serious consequences to the detriment of the contractor HOTELES DECAMERON S.A. and a violation of the principle of *contractual good faith* set forth in Article 1109 of the Civil Code, applicable in Administrative Law, following the guidance of reputed legal-administrative principles.

Therefore, the concession contract being the law between the parties, a principle that is not outside of the scope of nor does it exclude the State and its agencies, this contract must be performed according to its clauses, none of which have been declared illegal by a legal authority with jurisdiction. Thus, the endorsement of the purchase and sale contracts with HOTELES DECAMERON S.A. must be carried out.”<sup>88</sup>

125. The Court also stated that:

“In the Court's opinion, the court writings of legal scholars applied in cases similar to this one regarding the principle of good faith in administrative proceedings are pertinent with emphasis on that inescapable relationship that exists between the Public Administration and private individuals. And since the Court has not issued contrary rulings on this point for more than a decade, ‘compared legal writings and case law agree that this principle is applicable to Administrative Law’ (See Ruling of 13 June 1991. Case: The Republic’s Comptroller General’s Office disputes the interpretation and legal value of an Agreement signed between the former National Port Authority and port trade union associations of the Port of Balboa and the Port of Cristóbal. Judge Rapporteur: Arturo Hoyos).

The Spanish writer Jesús González Pérez has pointed out that the ‘principle of good faith must govern the relations of the State with those it administers since it allows them to regain confidence in the Administration consisting of the fact that in the procedure to dictate the act that will give rise to the relations between Administration and the Administrated, it will not use confusing or misleading conduct that will later allow it to elude or misrepresent its obligations’ (this guideline opinion was used, for example, in the ruling of 19 December 2000).

According to the decision of 18 May 2001, in a matter of the recognition of benefits due to a change of category, the Court applied the aforementioned principle as follows:

‘The principle of good faith must then be applied to the case in question, which is one of the general principles that underlie the legal system and is provided for in Article 1109 of the Civil Code, so, seeing as Ms, Elsie de Ayuso is classified in different categories as an Occupational Therapist, there is no way that the administration can deny that right and further order through

---

<sup>88</sup> *Solicitud Viabilidad Jurídica en Representación de la Contraloría General de la República*, Supreme Court of Justice of Panama, dated 18 Oct. 2004 (C-0768).

## Translation

another administrative act to deduct a sum of money that by law was received as a salary and that corresponds to the various categories through which it was earned. This omission is not attributable to the administrated' Case: Elsie de Ayuso versus IPHE. Judge Rapporteur: Arturo Hoyos).

Such is the resurgence of the aphorism of good faith with binding character in the public space, which in Federal Constitutions such as the 1991 Colombian Constitution (Article 83) is expressly consecrated, in the sense that 'The actions of individuals and public authorities *must* adhere to the principles of good faith, which will be presumed in all of their interactions.'

With a standard of this kind, as stated by the commentators on that Constitution, it seeks to recover the real practicality and validity of the principle, extending it to the realm of public law; especially to relations between individuals and the authorities, to highlight the criterion of public service that must prevail in all the actions of the Administration over and above the formalistic and cumbersome conditions. In addition, it aspires to covert this right into the guiding criterion of the entire legal system, converting it into a direct source of rights and obligations overcoming the purely interpretive criterion of it (Please see Legal applications, Colombian legislation)."<sup>89</sup>

126. As we have seen, these principles also apply to public works projects, given that (1) these are applicable to all contracts, with no type of distinction, and (2) Law 22 of 2006 which governs public works contracts, says in its Article 17 that "the general principles of the law" and "the standards in civil matters" shall apply.<sup>90</sup> This includes the provisions cited in the previous paragraph.

127. Likewise, Articles 17 to 21 and especially Article 22 referring to the INTERPRETATION OF CONTRACTUAL RULES of Law 22 of 2006<sup>91</sup> contain express provisions that leave no doubt about the application of the principles of good faith and reasonableness in public contracting. Article 22 expressly indicates that in contractual matters "good faith, balance between obligations, equality, the rights that characterize commutative contracts"<sup>92</sup> shall be taken into consideration, that is, reciprocity and proportional balance between the benefits of the contracting parties. The principles of proportional reciprocity and balance imply that when one of the parties fails to comply with its obligations, the other party has the right to demand compliance, demand termination of the obligation, or take reasonable and appropriate measures to mitigate damages incurred in the performance of the contract.

128. As we can appreciate, our case law, based on the law, writings of legal scholars and comparative law, has given such preponderance to the principle of good faith that it is extended to all types of contracts, including contracts of all Public Entities.

---

<sup>89</sup> *Demanda Contencioso Administrativa de Jimenez Aviles sobre Resolucion No. 0338-2002*, Supreme Court of Justice of Panama, dated 23 Jul. 2003 (C-0769).

<sup>90</sup> Law 22 of 2006 (C-0280 resubmitted 2), Art. 17.

<sup>91</sup> Law 22 of 2006 (C-0280 resubmitted 2), Art. 22.

<sup>92</sup> Law 22 of 2006 (C-0280 resubmitted 2), Art. 22.

## Translation

### VI. OBLIGATIONS OF THE STATE WITH RESPECT TO ADVANCE PAYMENTS AND PARTIAL PAYMENTS UNDER LAW 22 OF 2006 (SINGLE TEXT)

129. Law 22 on Public Contracts establishes the following in Article 13, number 10, and Article 14, number 1:

Article 13: Obligations of contracting entities. The following are obligations of contracting entities:

“(...) 10. To make the corresponding payments within the term set forth in the schedule of charges and in the respective contract. If such payments are made by the contracting entity after the agreed date, for reasons not attributable to the contractor, it has the right to the payment of default interest based on the precepts of Article 1072-A of the Tax Code. This also applies in cases where the contractor cannot complete the work within the agreed period, due to non-fulfillment of the responsibilities of the entity as stipulated in the respective contract...”

Article 14. Rights of contractors. The following are the rights of contractors: To receive payments within the term set forth in the schedule of charges and in the respective contract...”<sup>93</sup>

130. In accordance with the transcribed norms, it is established that the manner in which payments of the agreed price must be made is expressed in the bid proposal documents and in the final contract signed by the contractor and the State.

131. In turn, Article 86 of Chapter X concerning Work Contracts, specifically, refers to ADVANCE PAYMENT FOR WORK, stipulating the following in that regard:

---

<sup>93</sup> Art. 1072-A of the Fiscal Code stipulates that:

As of January 1, 2015, credits in favor of the National Treasury, due and not paid within the established legal term, will accrue a 10% surcharge and additionally a moratorium interest of two percentage points per month or fraction of month on the market reference rate indicated annually by the Superintendency of Banks, counted from the date on which the credit had to be paid and until its cancellation.

(...)”

The same article, in its previous version, stipulated that:

The credits in favor of the National Treasury will accrue a default interest per month or fraction of the month, counted from the date on which the credit had to be paid and until its cancellation. This default interest will be of two (2) percentage points over the market reference rate indicated annually by the Superintendency of Banks. The market reference rate will be set in accordance with that charged by local commercial banks during the previous (6) months prior in commercial bank financing.

(...)

Taxes withheld and not paid to the treasury within the legal term will result in a surcharge of ten percent (10%), without prejudice to the interest and penalties that may apply.”

See Art. 1072-A of the Tax Code of Panama, modified by Art. 40 of Law 6/2/2005 and Art. 10 Law 25 of 2014 respectively. (C-0770); Commercial Reference Rate – Superintendency of Banks, undated (C-0771).



## Translation

Article 86. Advance payment for work. Payments are made in the form prescribed in the work contract. For this purpose, the contracting party will send monthly reports on the progress of the work as a budget for payment. Partial payments, based on the progress of the work, are subject to the following rules:

1. In the schedule of charges, it is mandatory to stipulate the withholding of a percentage, by the contracting entity to the contractor, to guarantee fulfillment of the contract.
2. The cancellation of payments must be stipulated in the schedule of charges and in the contract, and this will be done from the presentation of the respective account with all the documentation required by current regulations in force.
3. Once half the work on the contracted project has been completed, payments can continue to be made, even in spite of minor discrepancies between the contractor and the contracting entity. The latter, together with the Republic's Comptroller General's Office, will define the scope of these discrepancies.
4. If the withholding is greater than the cost of the work to be done until the substantial completion of the project, up to fifty percent (50%) of the surplus will be returned to the contractor, in accordance with the formula established by the schedule of charges or the regulation.
5. If the work is contracted in stages, the withholding will affect each of the stages, and will be returned when the stage has been completed to the satisfaction of the contracting entity.
6. Within a maximum period of sixty days after the final delivery of the work, the contracting entity will pay the contractor the amounts withheld and any balance due."

132. In view of the above, in the first place, the parties are bound by what was agreed in the contract, so that the contractor has the right to receive the payments established in the contract as provided in number (1) of Article 14 of the Law. In addition, it must be taken into account that State contracts must comply with the ENDORSEMENT requirement or approval by the Republic's Comptroller General's Office, without this approval, even if there is compliance with the legal requirements, the contract will not be valid or legally effective.

133. In conclusion, under Law 22 of 2006, it could be considered that an advance payment contractually established in a public works contract *does not excuse* the public entity from making the subsequent partial payments also established contractually.

134. However, it sometimes happens that these payments for one reason or another are not made to contractors within the *reasonable term* that should be followed as a result of different circumstances that an Administration may face, but as far as I have been able to observe, the State must seek a way to honor its obligation. In other words, if the State has pending debt obligations to suppliers and contractors, the State must seek the necessary

## Translation

economic and budgetary formula in order to fulfill obligations previously contracted,<sup>94</sup> such that there is judicial certainty afforded to the State's contractors. This is because, as I commented earlier, paying contractors is an obligation of the State which is contained in the Law, in the bid proposal documents and the contract, and, in general, is based on the Principle of Good Faith.

Date: 17 January 2020

Panama City, Republic of Panama

[a signature]

---

Mr. José A. Troyano

---

<sup>94</sup> EL CAPITAL, *Empresarios Consideran que Pago a Proveedores Tendrá Impacto Positivo en la Economía* de fecha 16 may. 2019 (C-0772).

Translation

ANNEX A – CURRICULUM VITAE

**CURRICULUM VITAE**

**JOSÉ A. TROYANO P.**

**PERSONAL INFORMATION**

Date of Birth: September 27, 1945

Place of Birth: Panamá

Marital Status: Married

Identity number: 8-151-555

Address: El Cangrejo, Bella Vista, Condominio Mirador  
El Cangrejo, Apto.26-A

Telephone number: (507) 396-4623

Cell phone number: (507) 6674-8206

Email: [josetroyano@hotmail.com](mailto:josetroyano@hotmail.com)

**EDUCATION**

Bachelor of Law and Political Science

University of Panama - February 1973

Eligible to practice law

Supreme Court of Justice - February 28, 1973

Eligible to hold the office of Judge of the Supreme Court of Justice

Executive Body - September 1983

**PROFESSIONAL EXPERIENCE**

**PRACTICED AS A LAWYER FOR MORE THAN 30 YEARS IN THE FOLLOWING AREAS: CIVIL, COMMERCIAL, ADMINISTRATIVE, AND CONSTITUTIONAL LAW.**

**PARTICIPATION IN DOMESTIC AND INTERNATIONAL ARBITRATIONS (AS LAWYER, ARBITRATOR, AND EXPERT).**

## Translation

Partner of the Law Firm TROYANO & TROYANO

Associate of the Law Firm WATSON & ASSOCIATES (2010-2017)

Partner of the Law Firm TROYANO Y VILLALAZ (January 2008-January 2010).

Consulting Lawyer of the Comptroller General's Office (February 2008-December 2009).

Judge of the Supreme Court of Justice.  
January 1998-December 2007

President of the First Civil Chamber of the Supreme Court  
January 2002-December 2007

President of the Supreme Court of Justice  
October 2004-December 2005

Vice President Judge of the Supreme Court of Justice. January 2002-December 2007.

Vice-Minister of Commerce and Industries commissioned on several occasions. September 1994-1997

Professor of Administrative Law and Customs Law. National University.

Professor of Civil Law. Latin University of Costa Rica.

Juvenile Court Judge  
May 1987-January de 1990

Judge of the Second Superior Court of Justice  
October 1986-May 1987

Senior Prosecutor of the Office of the Attorney General  
April 1986

## Translation

Director of Legal Advice at the Savings Bank  
February 1985 - April 1986

Administration Attorney  
November 1983 - December 1984

Director of Legal Advice, Ministry of the Presidency  
October 1982-November 1983

Advisor and Director of Legal Advice, Ministry of Commerce and  
Industries  
July 1973 - November 1982

1st and 2nd Circuit Court, Civil Branch (Porter, Scribe, Senior Office  
and Secretary)  
January 1965 – July 1973

## **PROFESSIONAL MEMBERSHIPS AND OTHER EXPERIENCES**

Member of the National Bar Association  
February 1973 to date

Vice President of the Justice Administration Commission of the  
National Bar Association - 1993 -

Member of the Procedural Law Commission of the National Bar  
Association 1993 - 1994

Advisor a.i. to the National Economic Council  
1994 - 1997

President a.i. of the Board of Directors of the Panamanian Tourism  
Institute 1994 - 1997

President a.i. of the National Securities Commission  
1994 - 1997

President a.i. of the Technical Council of Insurance and Reinsurance  
1994 - 1997

## Translation

Director a.i. of the Board of Directors of the Institute of Hydraulic Resources and Electrification (I.R.H.E.)

1994 – 1997

Member of the Negotiating Commission for the entry of Panama into the World Trade Organization.

1994 – 1997

Representative of Panama to the Program for the Development of Fisheries in the Central American Isthmus (PRADEPESCA) 1994–1996.

President a.i. and Commissioner of the Committee on Free Competition and Consumer Affairs 1994 – 1997

Representative of Panama to the Central American Fisheries and Aquaculture Sector Agency (Ospesca)

Member of the Foreign Trade Council (CONCEX), 1995-1997

Member of the High-Level Commission to modernize capital markets. April - December 1997

Member of the State Commission for Justice on behalf of the Judicial Branch. 2005-2007

Active member of the Colombo-Panamanian Institute of Procedural Law.

### **PARTICIPATION IN SEMINARS AND OTHER ACTIVITIES:**

1- “Maritime and Port Policy in Panama” (“Política Marítima y Portuaria en Panamá”). Held in Panama City.

2- “Third Meeting of the Fisheries Commission for the Central-Western Atlantic” (“Tercera Reunión de la Comisión de Pesca para el Atlántico Centro-Occidental”). Held from November 18-22, 1982 and sponsored by the United Nations Organization.

## Translation

- 3- Participation in the seminar “Unification of Criteria Law #25” (“Unificación de Criterios Ley # 25”). October 1994.
- 4- Seminar on Disclosure of the New Judicial Code. Held in the City University of Panama, on April 18, 19, and 20, 1985.
- 5- Seminar about aspects of the new Judicial Code held at the National Bar Association, on September 23, 24, 25, and 26, 1985.
- 6- Participation in the Round Table on “Child Begging in Panama” (“La Mendicidad Infantil de Panamá”). University of Panama – Humanities Department. January-1989.
- 7- Participation in the Ninth International Judicial Conference. Budapest, Hungary. May-2001.
- 8- Participation in the “Professional Ethics and Forensic Practice” Seminar (“Ética Profesional y Práctica Forense”). University of Panama – Faculty of Law and Political Sciences. November- 2001.
- 9- Participation in the Regional Conference on the “Promotion of Judicial Independence and Impartiality” (“Promoción de Independencia e Imparcialidad Judicial”). Tegucigalpa, Honduras. April-2002.
- 10- Participation in the “First Regional Forum Access to Information and Impact on the Administration of Justice” (“Primer Foro Regional Acceso a la Información e Impacto en la Administración de Justicia”). Held in Panama City. May- 2002.
- 11- Participation on behalf of the President of the Supreme Court of Justice, in the VII Ibero-American Summit of the Presidents of Supreme Courts and Supreme Courts of Justice. La Antigua, Guatemala. September-2002.
- 12- Participation in the Conference “International Commercial Arbitration: New Trends” (“Arbitraje Comercial Internacional: Nuevas Tendencias”). October-2002.

## Translation

13- Observation Tour of the Federal Judicial Center and the Supreme Court of Justice of the United States of America. Washington, D.C. May-2003.

14- Jury participant in the “II Inter-University Contest of Legal Debates for Law Students” (“II Concurso Inter-Universitario de Debates Jurídicos para Estudiantes de Derecho”). Panamá, July-2003.

15- Participant in the “VIII Ibero-American Summit of Presidents of Supreme Courts” (“VIII Cumbre Iberoamericana de Presidentes de Cortes Supremas”). San Salvador, June- 2004.

17- Participant in the “International Congress XV Anniversary of the Political Constitution of Colombia” (“Congreso Internacional XV Aniversario de la Constitución Política de Colombia”). Bogotá D.C., Colombia. July-2006.

18- Participant in the “XIII Meeting of Presidents and Judges of the Constitutional Courts and Constitutional Chambers of Latin America” (“XIII Encuentro de Presidentes y Magistrados de los Tribunales Constitucionales y de las Salas Constitucionales de América Latina”). Cuernavaca, Morelos, México. September-2006.

19- Participant in the VI Panamanian Congress of Procedural Law. Panamá, August 26-28 2009.

20- Jury participant in the Inter University Contest of Legal Debates for Law Students on the topic of “Judicialization of Social, Economic and Cultural Rights” (“La Judicialización de los Derechos Sociales, Económicos y Culturales”). Panamá, 2009.

21- President of the Round Table “Achievements and Expectations of Constitutional Jurisdiction at its 70 years” (“Logros y Expectativas de la Jurisdicción Constitucional a sus 70 años”) (VIII Panamanian Congress of Procedural Law of the Colombo Panamanian Institute of Procedural Law, August 17, 18 and 19, 2011).

22- Jury participant in the Inter-University Contest of Legal Debates for Law Students on the topic “Sentences Issued by Constitutional



## Translation

Courts” (“Las Sentencias que dictan las Cortes Constitucionales”). Panamá, 2012.

### **SPEAKING ENGAGEMENTS AND PUBLICATIONS**

1-. “Legal Regulations for Agencies, Distributors and Representatives, procedures and operation” (“Regulaciones Legales para Agencias, Distribuidores y Representantes, su trámite y operación”). Seminar given by the Center for Higher Studies of the APEDE. Panamá - 1981.

2-. “The Forced Collection of Debts” (“El Cobro Forzoso de las Obligaciones”). Seminar given by the Savings Bank. Panamá, May-1985.

3-. “Joint Bank Deposits”( “Depósitos Bancarios Conjuntos”). Seminar given by the Savings Bank. Panamá, May-1985.

4-. “Budget Autonomy and Independence and Judicial Training in Latin America” (“La Autonomía e Independencia Presupuestaria y Capacitación Judicial en Iberoamerica”). II Ibero-American Summit of Court Presidents and Superior Courts of Justice. Caracas, Venezuela, March-1999.

5-.“Jurisdictional Intervention in Arbitration” (“La Intervención Jurisdiccional en el Arbitraje). The First International Day of Arbitration Law. Panamá, May-2003.

6-. “The Status of the Civil Process in the Republic of Panama” (“La Situación del Proceso Civil en la República de Panamá”). Cartagena de Indias, Colombia, February-2004.

7-. “The Importance of the Development of Procedural Law in Panama” (“La Importancia del Desarrollo del Derecho Procesal en Panamá”). First Panamanian Congress of Procedural Law, organized by the Colombo-Panamanian Institute of Procedural Law, Panamá, August-2004. (Published in Memories)

8- “Constitutional Jurisdiction – Ordinary Jurisdiction” (“Jurisdicción Constitucional – Jurisdicción Ordinaria”). Iberoamerican Constitutional Justice Conference. Sevilla, España, October-2005.

## Translation

9.- “Procedural Law and its Importance in the World of Law” (“El Derecho Procesal y su Importancia en el Mundo del Derecho”). IV Panamanian Congress of Criminal Procedure Law, organized by the Colombo-Panamanian Institute of Procedural Law. Panamá, August-2007. (Published in Memories)

10.- “The Participation of the Judicial Branch in the Arbitration Process” (“La Participación del Órgano Judicial en el Proceso Arbitral”), with emphasis on the Kompetenz-Kompetenz Principle. III International Seminar “New Trends in Procedural Law”, organized by the Colombo Panamanian Institute of Procedural Law, Chiriquí. Chiriquí, October 14, 2009.

11.- “The Importance of Commercial Courts in Panama” (“La Importancia de los Tribunales de Comercio en Panamá”). VII Panamanian Congress of Procedural Law held by the Colombo Panamanian Institute of Procedural Law from July 28 to 30, 2010. (Published in Memories)

## **RESEARCH WORK**

“The Dispositive Principle Before the Powers of the Judge in Civil Procedure” (“El Principio Dispositivo frente a los poderes del Juez en el Proceso Civil”) Graduation Thesis (1972-1973)

“Of the Contracts of Representation, Agencies and Distribution in Panama” (“De los Contratos de Representación, Agencias y Distribución en Panamá”) 1981 (Unpublished)

Compilation and Publication of “Contentious Administrative Jurisprudence 1971 - 1985” (“Jurisprudencia Contenciosa-Administrativa 1971 - 1985”). Panamá 1987.

Estudio, Análisis y Comentarios al Proyecto del Código de la Familia y del Menor. Panamá 1988 - 1989 (Sin publicar)

Panamá, Noviembre de 2019.

## Translation

### ANNEX B – DOCUMENTS REVIEWED AND CITED BY THE EXPERT

Document No.	Date	Description
<b>DOCUMENTS PREVIOUSLY EXHIBITED AND REVIEWED BY THE EXPERT</b>		
AA-0002	Various	Text of the legal authorities cited by Adan Arnulfo Arjona L. in the expert report [ <b>Civil Code; Judicial Code</b> ]
AA-0003	2017	Arroyo C., Dulio; Civil Contracts; Portobelo Publishing, Third Edition; Panama; 2017; First Volume; Pages 136-137
AA-0004	2019-10-16	Certificate of Ownership of the parcel of land identified by lot number 35659 (the Property) issued by the Public Registry of Panama on 16 October 2019
AA-0005	2007-03-13	Deed number D.N.7-UTO-00912 dated 13 March 2007 issued by the National Program of Land Administration of the Ministry of Agricultural Development whereby the National Office of Agricultural Reform adjudicates a parcel of unoccupied land to Diogenes Nunez
AA-0006	2008-02-115	Public Deed number 338 of 15 February 2008 issued by the Notarial Circuit of Herrera, whereby Diogenes Nunez sells lot number 35659 to JR Bocas Investments, Inc.
AA-0007	2003	Arellano Moreno, N.; General Rules of Civil Contracts; Universal Books Publishing, First Edition; Panama; 2003; Pages 134, 139-140.
AA-0008	1992	Arroyo C., Dulio; Legal Studies, Volume IV; Litho Publishing Panama, S.A., First Edition; Panama; 1992; Pages 360, 470
AA-0009	2005-04-04	Public Deed number 6484 dated 4 April 2005 issued by the Fifth Notary of the Panama Circuit whereby the Articles of Incorporation of the corporation known as JR Bocas Investments, Inc. are recorded, page 3, lines 3-5
AA-0010	2013-01-02	Public Deed number 27 dated 2 January 2013 issued by the Ninth Notary of the Panama Circuit whereby the Articles of Incorporation of the corporation known as Punela Development Corp. are recorded, page 1, lines 20-23.
C-0042-SPA resubmitted	2012-07-06	Contract No. 093-12
C-0077-SPA-resubmitted	2013-01-02	Public Registry of Punela Development Corp.
C-0078-SPA-resubmitted	2013-04	Sale and Purchase Agreement between JR Bocas Investments, Inc. and Punela Development Corp.

## Translation

C-0079-SPA-resubmitted	2013-04-25	Check from PR Solutions, S.A. to Reyna y Asociados
C-0080-SPA-resubmitted	2013-07-12	Check from PR Solutions, S.A. to Reyna y Asociados
C-0089-SPA-resubmitted	2015-07-14	Supplemental Declaration of Maria Gabriela Reyna Lopez
C-0199	Undated	Drawing of Verdanza Residences
C-0200	Undated	Conceptual Layouts of Verdanza Residences
C-0201	Undated	Verdanza Residences Preliminary Financing Executive Summary with diagrams & charts
C-0202	2013-01-31	Tonosí Land Registration Information
C-0203	2015-07-07	Email from Ricardo Ceballos to Ana Graciela Medina
C-0210	2015-01-28	Email from Maria Gabriela Reyna to Frankie Lopez
C-0243	2015-01-27	Decree No. 001 of the National Institute of Culture
C-0374	2013-09-03	Extension to the Purchase-Sale Agreement for Tonosi Land
C-0557	2013-04-25	Email chain between Frankie Lopez, Oscar Rivera, and Ana Graciela Medina
C-0558	2013-05-01	Invoice from IGRA for Preparation of the Purchase of Finca, Contract No. 35659
R-0026	2006-06-27	Law 22 of June 27, 2006
R-0053	2000-07-31	Law 38 of July 31, 2000
R-0054	2015-03-25	INAC certification requested by IGRA
R-0055	2015-03-26	Omega's Application for Administrative Review
R-0056	2016-07-19	Resolution No. 025-16 J.D.
R-0087	2015-07-22	Letter from Franklin Amaya Jovane to the Prosecutor Against Organized Crime regarding the addition of written evidence
R-0088	2015-11-20	Alexis Rodriguez, Legal Secretary of the Special Prosecutor's Office Against Organized Crime, Diligence Report
R-0089	2015-11-20	Alexis Rodriguez, Legal Secretary of the Special Prosecutor's Office Against Organized Crime, Diligence Report
R-0090	2015-11-23	Esperanza L. Montenegro, General Secretary of the Special Prosecutor's Office Against Organized Crime, Diligence Transcript of Inspection
R-0098	2016-08-12	IGRA notification of Resolution No. 025-16 J.D.

## Translation

R-0139	2015-01-27	National Assembly Interview with Maria Gabriela Reyna López
R-0140	2015-01-23	INAC Notification Report
R-0141	2015-01-26	INAC Notification Report
	2018-06-14	Claimants' Memorial ¶¶ 46, 79, 91-98.
	2019-01-07	Respondent's Counter-Memorial ¶¶ 107-115.
	2019-05-30	Claimants' Reply ¶¶ 203-227, 245-250.
	2019-11-18	Respondent's Reply ¶¶ 34-36, 345-364.
<b>NEW DOCUMENTS CITED IN THE REPORT</b>		
C-0752-SPA	1997	Arroyo Camacho Dulio. Contratos Civiles, T.I Panamá. Mizrachi & Pujol, S.A. Pages 8, 60-62, 83.
C-0753-SPA	1997	Cabanellas G. Diccionario Jurídico. Ed. Heliasta. Page 63.
C-0754-SPA	2017-12-14	<i>Gonzalez Montenegro v. Helmer Espinoza Montenegro</i> , Supreme Court of Justice of Panama
C-0755-SPA	2014-02-11	<i>Las Olas v. Jose Esteban Contreras</i> , Supreme Court of Justice of Panama
C-0756-SPA	2000-10-05	<i>El Faro v. M. Ortega</i> , Supreme Court of Justice of Panama
C-0757-SPA	2017	Arroyo Camacho Dulio. Contratos Civiles, T.I. Ed. Conmemorativa. Ed. Portobelo. Panamá. Page 99
C-0758-SPA	2003	Valencia Alexander. Los Principales Contratos Civiles, Ed. Instituto de Estudios Politicos. Pages 80-81.
C-0759-SPA	2012-12-06	<i>Ganadería Panameña v. Caribbean Paradise Panama S.A.</i> , Supreme Court of Justice of Panama
C-0760-SPA	2003-04-09	<i>Inversiones Ebelle S.A. v. Mirian Coto Cabrera</i> , Supreme Court of Justice of Panama
C-0761-SPA	2006-07-17	<i>Gloria Melgar de Mizrachi v. Isaac Ramon Mizrachi</i> , Supreme Court of Justice of Panama
C-0762-SPA	2001-10-12	<i>Liborio Caballero v. Nicolas Villareal</i> , Supreme Court of Justice of Panama
C-0763-SPA	1917-03-13	Law No. 52 of 13 March 1917, on Negotiable Documents – Article 17
C-0764-SPA	2003	Arellano, Narciso. Reglas Generales de los Contratos Civiles,

## Translation

		Panamá. Page 143.
C-0765-SPA	2011-05-05	<i>Banco del Istmo v. Molino Santa Isabel</i> , Supreme Court of Justice of Panama
C-0766-SPA	2011-12-29	<i>Banco Nacional de Panama v. Ismaelina Lopez de Zeballos</i> , Supreme Court of Justice of Panama
C-0767-SPA	2012-02-07	<i>Constructora 2000 S.A. y Benedetti Diaz v. Enrique Dominguez</i> , Supreme Court of Justice of Panama
C-0768-SPA	2004-10-18	<i>Solicitud de Viabilidad Juridica en Representacion de la Contraloria General de la Republica</i> , Supreme Court of Justice of Panama
C-0769-SPA	2003-07-23	<i>Demanda Contencioso Administrativa de Jimenez Aviles sobre Resolucion No. 0338-2002</i> , Supreme Court of Justice of Panama
C-0280 resubmitted 2	2006-06-27	Law 22 of 2006
C-0770-SPA	1956-01-27	Panamanian Tax Code
C-0742-SPA resubmitted	1916-08-22	Panamanian Civil Code
C-0771-SPA	Undated	Commercial Reference Rate – Superintendencia de Bancos
C-0772-SPA	2019-05-16	EL CAPITAL, <i>Businessmen Believe that Payment to Suppliers Will Have a Positive Impact on the Economy</i>
C-0918-SPA	1998-01-20	<i>Frank John Bru v. Esteban Antonio Jiménez</i> , Supreme Court of Justice of Panama
C-0919-SPA	2006-09-25	<i>Ludovino González –vs. Palma Aceitera Barú</i> , Supreme Court of Justice of Panama