BRILL

Spanish Yearbook of International Law XVI (2012): 307–383

SYIL

Spanish Judicial Decisions of Private International Law, 2010

Supervised by: Prof. Prof. Dr. Carlos Esplugues Mota, LLM (Harvard), MSc (Edinburgh), Professor of Private International Law, University of Valencia.
Compiled and collated by: Manuel Alejandro Penadés Fons, LLM (LSE), PHD Candidate, Research fellow; Pablo Quinzá Redondo, PHD Candidate, Research fellow; Ada Vázquez Enguix, Intern; and Arantxa Cuadrado Pérez Broseta, Intern.
Private International Law Section, "Adolfo Miaja de la Muela" Department of International Law, University of Valencia (Spain).

DOI: 10.1163/221161212X650443

2. Protection of subjects lacking legal capacity
   a) Persons over the age of majority lacking legal capacity
   b) Minors lacking legal capacity
3. Name

X. Family

1. Filiation and parent-child relations
   a) Some general issues
   b) Natural filiation
   c) Adoptive filiation
2. International child abduction
3. Matrimony
   a) Capacity to marry
   b) Marriage act and registration
   c) Marriages of convenience
   d) Effects
   e) Nullity
   f) Separation
   g) Divorce
4. Unmarried partners
5. Maintenance
6. Guardianship, care or custody of children

XI. Succession

XII. Contracts

XIII. Non-Contractual Obligations

XIV. Form of Legal Deeds and Instruments

XV. Rights in Rem

XVI. Registry Law

XVII. Intangible Goods

1. Intellectual property
2. Copyright

XVIII. Competition Law

XIX. Foreign Investment and Exchange Control

XX. Foreign Trade

XXI. Commercial Companies/Corporations/Legal Persons

II. INTERNATIONAL JUDICIAL JURISDICTION IN CIVIL MATTERS

1. General principles

Decision of Barcelona Provincial High Court (Section 4) of 14 September 2010 (JUR 2010\387047)

Exception: Submission to arbitration: not appropriate: exception of express submission to private international arbitration: not sustainable: clause in distribution agreement for any dispute between the parties to be submitted to the Arbitration Commission of the Paris Chamber of Commerce: but the Arbitration Rules of the Paris Chamber of Commerce in force at the time the complaint was filed required that one of the parties possess French nationality, which is not the case here: Refusal: appropriate: competence of the Court of Florence: under Art. 5 of Regulation (EC) 44/2001, the place of performance of the obligation was the place where the goods were delivered or should have been delivered, and hence jurisdiction lies with the Courts of Florence.

"LEGAL GROUND: . . . THREE. Both parties accept that it is not controversial that in the document amending the distribution agreement of 14 June 1997, document 13 of the complaint, it was expressly agreed that any dispute that might arise between the parties as to the interpretation of that agreement would be submitted to the Arbitration Commission of the Chamber of Commerce of Paris (France).

There is therefore no question that arbitration was agreed; the point at issue in this appeal is whether the applicable rules are those of the Paris Chamber of Commerce which were in force at the time the complaint was filed (document 38 of the complaint) or those of the Paris Chamber of Commerce dated 14 June 2005 as claimed by the defendant in document number 1 accompanying his reply, which raises an issue of international competence owing to lack of jurisdiction (pages 286 et seq.).

According to the latter Rules, which supersede the former, there is nothing whatsoever to prevent the two parties, even although aliens, from submitting to the arbitration of that Chamber of Commerce if they expressly so agree.

To determine whether a procedural exception arises we must assess whether an exception as raised by the defendant was in order at the time the complaint was filed.

In this connection, as Article 410 of the Civil Procedure Act provides, '*lis pendens*, with all its procedural effects, takes effect as from the filing of the complaint, if it is eventually admitted'.

What we have to look at, then, is whether or not the exception of submission to arbitration stood at the time the original complaint was filed, and to do that we must determine the circumstances that held on that date, namely 2 October 2001, and not any amendments that may have been introduced subsequently while the proceedings were in progress.

And in that respect there is no question but that the applicable Rules are the ones in force at the date of filing of the complaint, which is when *lis pendens* takes effect, regardless of any subsequent amendments.

And both parties agree that according to Article 2 of the Rules of Arbitration of the Paris Chamber of Commerce, in force at the time the agreement was signed, on 14 July 1997 and in force at the time the complaint was filed, on 2 October 2001, for the French Arbitral Tribunal to be able to consider the issue put to arbitration, it was a *conditio sine qua non* that one of the parties hold French nationality, which is not the case here, and hence it was not possible for the plaintiff to put the matter to arbitration.

We must therefore rule out the exception of express submission to private international arbitration and overturn the appealed order on this point.

FOUR. [...] the second issue raised here is to determine the place where the obligation had to be met.

The case-law has repeatedly established that in mercantile contracts of sale the place of performance of an obligation, for the purposes of Article 62(1) of the Civil Procedure Act, is the establishment of the seller, this being where the goods are understood to be delivered, as provided in Articles 1(171) and 1(500) of the Civil Code, in relation to Article 50 of the Code of Commerce.

For instance, according to the Supreme Court judgment of 20 April 1989, 'as the freight costs are charged to the buyer and the goods are carried "at the latter's risk", delivery is understood to take place at the domicile of the seller'.

Therefore, unless it is stipulated in a sale and distribution contract that the goods are to travel 'carriage paid', as stated by the defendant, the place of performance of the obligation is the place of delivery of the goods, and that is the seller's establishment, as it is assumed that the goods are to be carried at the buyer's risk (Supreme Court Judgment of 9 April 1984). [...]

The transcription of the agreement shows that the parties agreed that delivery of the goods would take place at the GUESS warehouse, and the defendant submits that this understanding was not altered when, on 14 July 1997, MACCO APPAREL S.P.A. was subrogated to the original position of GUESS INC.

This submission is not challenged by the appellant in his appeal, which makes no reference whatsoever to the place of delivery of the goods, or hence to what is the supposed place of performance of the obligation, for purposes of determining the jurisdiction of one or the other contracting State, Spain or Italy, pursuant to the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and Protocols.

The submission has therefore been accepted by the defendant, and we must conclude that if the place of delivery of the goods was the warehouses of GUESS INC, pursuant to the 1994 contract, and if this clause was not amended following the subrogation of MACCO APPAREL S.P.A. to the original position of GUESS INC on 14 July 1997, then this must be assumed to be the place where the obligation was or ought to have been performed, and hence jurisdiction lies with the Courts of Florence.

LEGAL GROUND FIVE. Therefore, we consider that at the time the complaint was filed the exception of submission to arbitration did not arise and we must reject the exception of express submission to private international arbitration.

Nonetheless, we uphold the plea to the jurisdiction inasmuch as we find, pursuant to Article 65(2) of the Civil Procedure Act, that the Courts of Vilafranca del Penedés do not have jurisdiction as the matter has to be judged by whatever Courts of Florence (Italy) are competent to do so in accordance with Italian legislation. We therefore confirm the appealed ruling insofar as it means declining jurisdiction and discontinuing the proceedings."

Decision of the Madrid Provincial High Court (Section 9), No 423/210, of 15 September 2010 (AC\2010\1526)

Spanish courts jurisdiction: upheld. Action for declaration of title: sustained: shares of off-shore Uruguayan company; denied: failure to prove fiduciary ownership of the properties situate in Spain by a foreign company.

"LEGAL GROUND:... TWO. Given that in his writ of appeal counsel for Santiago, Candida, Irene and Rosana contests the jurisdiction of the Spanish courts in respect of this case, even although the court examined the issue ex officio before admitting the complaint, as this is an issue that can be examined ex officio and was raised in this appeal by the said defendants, it is necessary to rule on this issue beforehand.

Article 9 of the Judiciary Act provides that the courts shall have jurisdiction solely in those cases where it is warranted by that or another Law. Article 21 of the Act provides that the Spanish courts shall be competent to judge issues arising in Spain between Spaniards, between aliens and between Spaniards and aliens subject to the provisions of this Act and of any international treaties to which Spain is a party.

Article 51 of the Civil Procedure Act provides that legal persons shall be sued in the place of their domicile, but they may also be sued in the place where the situation or legal relationship referred to in the suit arose or is enforceable, provided that they have an establishment open to the public or a representative authorised to act for the party in that place.

Such rules of internal law must be viewed in relation to the legal cooperation agreement between the Kingdom of Spain and the Oriental Republic of Uruguay of

4 November 1987 and to the claims made in the competent in order to determine whether or not the Spanish courts are competent, i.e. whether or not they have jurisdiction in this case.

Article 5 of the Convention establishes different forums depending on the actions brought to determine what court has jurisdiction. In matters of contractual obligations, jurisdiction lies with the courts to which the parties have expressly agreed to submit to, or failing that the courts of the country of domicile of the defendant. In the case of extra-contractual obligations jurisdiction lies with the courts of the country where the event giving rise to the obligations took place. In the case of actions concerning property, jurisdiction lies with the courts of the country where it is situated.

With regard to obligations, this article also acknowledges subsidiary jurisdiction of the courts of the country where the legal person has its head office or main establishment, but it allows for the defendant to be sued in any place where it has an establishment, branch or agency with its own organisation if the suit concerns the activity carried on at that establishment, branch or agency.

In the present case, given that the only goods to which DUANAL INVESTIMENT holds title are the shares in the companies ALPES INGENIEROS and ANDES INGENIEROS and properties 16.918, 16.922 and 16.924 in the Altea Registry of Property, number 212.551 in the No 6 Alicante Registry of Property, and No 45.316 in the Alcira Registry of Property, are situated in Spain, that the intent is essentially to secure real title or ownership of those goods, that José Ignacio has been the company's agent, domiciled in Spain, that all the acts of disposal at issue were carried out by him through his organisation in Spain, and that according to the statements of the witness who appeared in the original proceedings and the witness who testified in this appeal, he was the sole manager of the company DUANAL INVESTIMENT, by virtue of the internal rules of jurisdiction of the Spanish courts, especially Article 22(1) of the Judiciary Act, Article 51(1), second paragraph of the Civil Procedure Act, and Article 5 of the Convention of 4 November 1987, we conclude that the Spanish courts are competent to judge this case."

Order of Barcelona Provincial High Court (Section 16), no 200/2010 of 20 October 2010 (JUR 2010\383112)

Competence of judges and courts: territorial: European monitoring process: jurisdiction of the Court of Barcelona as the place of performance of the services and because it is a question of a statute currently in force and specifically applicable to this situation.

"LEGAL GROUND: . . . THREE. This is evidently a cross-border claim as defined in Art. 2 of the Regulation on European summary procedure, and therefore the regulation cited by the plaintiffs is applicable. This is a specific rule, in force, and hence takes precedence over any other general rule.

One of the main points of the Regulation is precisely to determine jurisdiction, and this is addressed in Article 6, which refers to Regulation (EC) 44/2001 except in the case of contracts with consumers for purposes that may be considered unconnected with their professional activity. In this case the claim is based on legal services furnished to the defendants in the context of an action apparently connected with their professional activity. In this connection Regulation (EC) 44/2001 provides that in

contractual matters jurisdiction lies with the court of the place where the obligation founding the complaint was or ought to have been performed, following which it stipulates that in the case of the provision of services it is the place in the Member State where the services were to have been provided according to the contract. Therefore, the Court of Barcelona not only has jurisdiction but also territorial jurisdiction under European summary procedure, as the place of performance of the services and because this is a rule, currently in force, which is specific to the situation.

The fact that the request was addressed to two persons does not raise any special procedural difficulty given that there is a single *causa petendi*, the domicile for notification is the same, and the amounts sought from each one are independent."

2. Express and tacit submission

Order of Barcelona Provincial High Court (Section 1), no 72/2010) of 17 March 2010 (AC\2010\442)

Spanish courts have jurisdiction as the courts of domicile of the defendant and absent express or tacit submission to the Spanish courts by the litigants, in an agency contract.

"LEGAL GROUND:... THREE. The Spanish civil courts must refrain from judging cases submitted to them when the matter is reserved exclusively to the jurisdiction of another State pursuant to an international treaty or convention to which Spain is a party, as provided in *Article 36(2)(2) of the Civil Procedure Act*.

We would note first and foremost that Regulation 44/2001 (Article 71), like Article 57 of the Brussels Convention, provides that it does not affect any conventions to which the Member States (or Contracting Parties) are signatories and which in relation to particular matters govern jurisdiction or the recognition or enforcement of judgments. In its judgment of 6 December 1994 the CJEC ruled that this article means that 'where a Contracting State is also a contracting party to another convention on a specific matter containing rules on jurisdiction, that specialized convention precludes the application of the provisions of the Brussels Convention only in cases governed by the specialized convention and not in those to which it does not apply'.

For the present, in order to assure a uniform interpretation, Article 71(2) provides that 'this Regulation shall not prevent a court of a Member State, which is a party to a convention on a particular matter, from assuming jurisdiction in accordance with that convention, even where the defendant is domiciled in another Member State which is not a party to that convention'.

What the defendant submits is precisely that Spain and Mexico have a convention under which jurisdiction lies with the Mexican courts, Estrumat, SL refers to the Convention signed between Spain and Mexico on 17 April 1989, which was ratified on 10 July 1990 and published on 9 April 1991.

However, that convention does not regulate jurisdiction, but only the recognition and enforcement of judgments and arbitral awards in civil and commercial matters. The reference that Article 4–1b – cited by the defendant – makes to tacit submission as resulting from failure to challenge the jurisdiction of the court first seised is only for the purposes of Article 11 paragraph b, that is the enforcement of judgments. In

any case, in the present instance the alleged tacit submission (or rather recognition of the jurisdiction of the Mexican courts to which Estrumat, SL took their case) to the Mexican courts, which would mean they had exclusive jurisdiction to try this matter, would have been raised in a voluntary jurisdiction procedure or pre-trial act by Estrumat, SA, and the litigant would have to furnish evidence thereof (Article 281(2) Civil Procedure Act). The fact is that the report submitted is not adequate for those purposes as none of the judgments cited, which constitute the case-law on which the reports base their opinion, refers to an issue like the one raised in these proceedings. And in any case it is not clear that even if they did so refer, jurisdiction would lie exclusively with the courts of that other State.

Be it remembered that what Article 4 of the Convention provides is that for purposes of recognition and enforcement of judgments, the requirement that the trial court have jurisdiction shall be deemed to be met, inter alia, 'if in the matter of waivable forums the defendant has accepted, in writing, the jurisdiction of the court that delivered the judgment, or if despite having appeared in the proceedings he did not duly challenge the jurisdiction of the court first seised'.

In short, as we have seen, there is no particular convention that imposes a forum other than the one corresponding to the defendant's place of domicile, pursuant to Article 22(2) of the Civil Procedure Act and Regulation 44/2001.

Finally, it only remains to note our puzzlement as to what legitimate interest Esfrumat, SL could have in invoking the jurisdiction of the Mexican courts when they have been summoned by the courts of their own place of domicile. In this connection, in a judgment of 10 November 1993 the Supreme Court asserted that 'the plaintiff having demonstrated tacit submission to the Spanish courts by bringing his complaint there, it could be argued that by suing the defendants (...) in the courts of their place of domicile, their right of defence is assisted and the forum is the one that best suits them', in view of which a challenge to the jurisdiction smacks strongly of a fraudulent attempt to put off a conclusion to the action". The Supreme Court took a similar view in a judgment of 10 March 1993 which found that the plaintiff's choice of forum, which benefited the defendant, was legitimate.

Also, to the question as to the possibility of applying the *forum non conveniens* exception, in a judgment of 1 March 2005 the CJEC, in plenary session, replied that 'the Brussels Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action'.

In conclusion, the appeal lodged against the ruling of 15 May 2009 must be upheld. Hence, it is this court's decision to dismiss the challenge to the jurisdiction entered by Estrumat, SL and to recognise the jurisdiction of the courts of Granollers, the defendant's place of domicile, where the plaintiffs filed their complaint."

Order of Tarragona Provincial High Court (Section 1), no 43/2010, of 12 April 2010 (JUR\2010\277979)

Jurisdiction of Spanish courts: upheld: claim based on a 'Protection and Compensation' insurance policy taken out by the owner of the Spanish vessel with a Netherlands insurer:

no jurisdiction clause or verbal agreement: in policies of this kind there is no well-known and regularly observed practice of referring disputes to the London Tribunal: plaintiff did not consent to or know of a jurisdiction clause.

"LEGAL GROUND: ONE. [...] In view of the consensus on the subject that this is an issue of international Community jurisdiction given the fact that the contract contains a foreign element, namely the nationality of the insurer, the applicable rules are those of the cited Community Regulation (Brussels I). Jurisdiction in insurance matters is governed by the regulation contained in Section 3 thereof. The possibility of choice of jurisdiction is contemplated in Article 13, which allows 'an agreement' in an insurance contract (section 5) in so far as it covers one or more of the risks set out in Article 14.

TWO. On the matter of prorogation of jurisdiction, Art. 23 of the Regulation sets out the requirements for a choice-of-jurisdiction clause to be binding and requires that the agreement conferring jurisdiction be presented in one of a list of alternative forms evidencing express (section a) or inferred (sections b and c) consent.

Therefore, for choice of jurisdiction to be applicable in the Community context, Art. 54(2) of the Civil Procedure Act does not apply, nor does the case-law doctrine on choice-of-jurisdiction clauses in an insurance contract in the sense of requiring express subscription and signature, a requirement deriving from the regulation of insurance in our internal law and differing from the Community regulation, wherein express or tacit consent suffices, in the terms set out in that regulation.

THREE. The first of the forms laid down in Art. 23(1) of the Brussels 1 Regulation is express agreement in writing or evidenced in writing, whereby both parties have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which may arise. This requirement is not met inasmuch as not even a verbal agreement can be considered to have been made when there is no written evidence in the document presented as an insurance certificate and it has been duly shown (doc. no 2) that during the communications for the writing of the policy the issue was not raised nor was there any negotiation in respect of jurisdiction.

Absent any clause in the basic document, namely the Insurance Certificate, it is argued that such an agreement is manifest in that it is included in the general conditions of the policy as published by the insurer. Referral to general conditions is not admissible if the insured has not been furnished with a copy of the conditions and has not accepted any that constitute a limitation: in this respect there are specific rules on the validity and enforceability of jurisdiction clauses relating to the manner in which consent as regulated by the provision examined here is given. Such consent is not given by the mere fact of accepting a policy which refers to an unseen document in which the choice-of-jurisdiction clause appears as a general condition which the insured neither accepted nor knew of.

FOUR. Absent an express agreement, given that evidently there could be no established practices between them as referred to in paragraph (b), we must perforce examine the possibility of inferred consent as set out in paragraph (c) of Art. 23(1) of the Brussels 1 Regulation.

This paragraph assumes 'in international trade or commerce' awareness of and general consent to a choice-of-jurisdiction clause if it accords with a usage which is

widely known to, and regularly observed by, parties to contracts of the same type. There being no question but that the writing of the policy comes under the heading of 'international trade' as referred to in that paragraph, we have to determine whether there is such a usage in this commercial sector relating to policies of this kind.

The case-law doctrine interpreting Article 17 of the Brussels Convention (background to the rule applied here) has been that there is a practice where a particular course of conduct is generally and regularly followed by operators of a branch of trade or commerce when concluding contracts of a particular type – CJEC Judgment of 20 February 1997, case C-106/95. It is not necessary for such a course of conduct to be established in specific countries; the determining factor is whether the course of conduct in question is generally and regularly followed by operators in the branch of international trade in which the parties to the contract operate – CJEC Judgment of 16 March 1999, case C-159/97.

On that basis it cannot be said that there is a practice generally known to and followed by the parties in insurance contracts of this type, whereby disputes are referred to the London Tribunal. The documentation accompanying the plea of lack of jurisdiction, which presented the clauses included by five different insurers in their conditions, is not conclusive evidence of a practice constituting commercial usage, given the evident lack of sufficient instances and the absence of evidence of acceptance of this clause and of a generally binding nature. Although the case-law recognises that the inclusion of choice-of-jurisdiction clauses in policies of this type is a frequent practice (Supreme Court Judgment of 3 July 2003), that does not make it a commercial usage as defined in the Community regulation, given that it is not generally known and accepted.

This Court does not accept the force of the judicial precedent cited in support of plea of lack of jurisdiction (Order of the Provincial High Court of Pontevedra of 5 December 2007) on the applicability of the form defined in Article 23(c), based on the previous Art. 17 and contained in the Supreme Court Judgments of 29 September 2005 and 5 July 2007, which cite the above-mentioned arguments of the Court of Justice of the European Communities, all concerning usages in international maritime transport, on the inclusion of a choice-of-jurisdiction clause in the bill of lading. There are considerable differences between the two cases: the conditions in international maritime transport contracts and insurance contracts are very different; in the former case there are different nationalities involved, and moreover the clause is written on the document handed over at delivery (bill of lading). The shipper receives and is aware of it even if he does not sign it, and therefore it seems more likely that he has knowledge of it when accepting the document than in the case of the general conditions of a policy that are not made available and whose content is not included in the certificate that is issued.

. . ."

3. Family

Order of the Provincial High Court of Valencia (Section 10), no 227/2010, of 15 June 2010 (JUR\2010\312733)

Action to amend measures to cancel maintenance inadmissible as Spanish courts lack jurisdiction. As the debtor is domiciled in Spain and the mother and daughter for whom maintenance is claimed live in Austria, pursuant to Regulation 44/2001 jurisdiction lies with the courts of the country of the defendants and creditors.

"LEGAL GROUND:... TWO. Therefore, from this last position we need to determine what court has jurisdiction in respect of the action for amendment of maintenance as if it were a claim, pursuant to Regulation 44/2001, whereby the following courts have jurisdiction: 1) the courts of the Member State expressly or tacitly chosen by the parties (Arts 23 and 24 of the Regulation) 2) the courts of the Member State where the defendant is domiciled (Art. 2); 3) the courts for the place where the maintenance creditor is domiciled or habitually resident (Art. 5(2)(1)).

As cancellation of maintenance is sought, either of the latter two forums is appropriate in so far as they reflect the position of the daughter and mother as defendants and as creditors in respect of the maintenance originally ordered. This forum, as provided in Art. 5(2) of the Regulation, reinforces the legal position of the maintenance creditor, the party most in need of judicial protection, and determines the international jurisdiction for its cancellation, and given that neither of them is domiciled in Spain, the complaint is not admissible."

5. Contractual obligations

Vizcaya Provincial Hight Court (Section 1), no 545/2010, of 29 June 2010 (JUR\2010\409014)

Jurisdiction: Brussels Convention of 27/09/1968: commercial contracts: admissibility of choice-of-jurisdiction clauses naming the courts of a foreign State: admissible.

"LEGAL GROUND:... THREE. The second ground of appeal maintains that since this is a suit between Spanish nationals, the choice-of-jurisdiction clause cited must be examined in the light of the national legislation, pursuant to the Contracting (General Conditions) Act, Law 77/1988, and therefore such a clause in a membership agreement does not meet the requirements of validity laid down in Art. 54 of the Civil Procedure Act.

The parties are businessmen engaged in their business activities, and hence consumer protection rules do not apply, particularly in respect of controls to prevent abusive choice-of-jurisdiction clauses. Therefore, the Consolidated Text of the Consumer and User Protection Act (Legislative Royal Decree 1/2007 of 16 November 2007) is not applicable for purposes of determining whether the jurisdiction clause is abusive.

The system of legal protection against abusive clauses is confined to relations with consumers (Art. 8 Law 7/98, Art. 82 of the Consolidated Text), and only in such cases does the blacklist system set out in Arts 85 to 90 of the new regulation come into play; and in particular the rule annulling choice-of-jurisdiction clauses naming courts other than those of the consumer's domicile or of the place of performance of the obligation in Art. 90(2) does not apply to relations between businessmen.

The international rule applied in the judgment of the court first seised – viz. Art. 23 of European Regulation 44/2001 – provides that in international trade or commerce, a jurisdiction clause is valid as long as it is agreed 'in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned', as is indubitably the case here (in this connection, see the Supreme Court Judgment of 29 May 2008 and the ruling of the Provincial High Court of Las Palmas of 1 February 2007).

The international jurisdiction of the Spanish courts is regulated in two kinds of rules – international and internal – the first of which take precedence.

Therefore, given that there is a special set of international rules regulating jurisdiction clauses, the internal rule contained in Art. 54 is not applicable, and what is more, it is a rule for purposes of determining territorial jurisdiction and hence not germane to the subject of the present suit."

9. Interim measures of protection

Barcelona Provincial High Court (Section 11), no 119/2010, of 31 March 2010 (JUR\2010\243719)

Plea of lack of jurisdiction for interim measures denied, as Spanish courts have jurisdiction pursuant to Article 31 of Regulation 44/2001, whereunder "[a]pplication may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter."

"LEGAL GROUND:... TWO. [...] As we can see from the above article, the principle followed by the regulation is different from the one cited by the Civil Procedure Act for the determination of jurisdiction in matters of interim measures under internal rules. According to the Civil Procedure Act – *Art. 723* – as far as jurisdiction is concerned, interim measures and consideration of the principal issue or the substance are inseparable, and hence the court that has jurisdiction for purposes of interim measures will be the court seised of the case, or if proceedings have not commenced, the court that is competent to consider the principal complaint. On the other hand, the European Regulation specifically allows for the possibility of separate jurisdiction.

The point here then is whether in the present case that principle of separation should be followed, or whether, as the defence maintains in its appeal, there is some circumstance to prevent it.

THREE. According to the appellant, the possibility enshrined in Art. 31 may materialise as long as jurisdiction in respect of the substance is determined by the jurisdiction rules set out in the convention, but not if, as in this case, the court is competent by virtue of a choice-of-jurisdiction clause. Thus, Art. 31 does not bar application of the choice-of-jurisdiction rule set out in Art. 23 (prorogation of jurisdiction) of the cited convention, since it only regulates the possibility of adopting interim measures in another Member State where a given Member State has jurisdiction by virtue of

the rules in that respect contained in its own general and special provisions; but the article certainly does not mean that an express choice of jurisdiction agreed by the parties and expressly recognised in Art. 23 cannot apply also to interim measures.

FOUR. We tend to favour the view of separation of jurisdiction, even where there is a choice of jurisdiction clause – set out in general terms – for the settlement of disputes between the parties, as commonly occurs and is the case here, for obviously if the agreement made specific provision for interim measures, then that would apply and there would be no doubts and no problem.

Although appealing, the appellant's argument is unconvincing. If the separability of jurisdictions applies to cases where jurisdiction on the merits is determined by the jurisdictional rules contained in the convention, then it equally applies to prorogation as in *Art. 23*. It is simply one of several rules in the Regulation whose function is to determine the attribution of jurisdiction. It serves the purposes of the precept "if pursuant to this Regulation." We fail to see why only the general and special rules of jurisdiction applicable absent agreement by the parties on choice of jurisdiction should be considered when all of them – without exception and as part of a systematic and comprehensive set of rules for determining jurisdiction – are regulated in the Regulation. Each rule is as valid as any other.

Moreover, the appellant's contention that the questions of interim measures and the merits revolve around the same case and hence it may be presumed that the parties' intent was for the *choice-of-jurisdiction clause to apply also to the former* cannot at all be taken as axiomatic. The parties may well have decided that their disputes should be settled by the courts of a particular country; but it equally be argued, in the interests of utility and effective precaution, that interim measures should be taken by the courts of another country better placed to achieve their purpose given their special connection with whatever it is sought to secure. And that is precisely the rationale behind the Community regulation. As Gascón Inchausti – one of the writers who support the possibility of separation of jurisdiction – has said, it makes little sense to rule out interim measures merely because the parties wished to have their disputes settled by the courts of a particular State, for it must be remembered that interim measures serve not to settle disputes but simply to assist the practical enforcement of a judgment. And we would add that that purpose – to determine the jurisdiction for settlement of disputes – does not by any means signify that such was also the jurisdiction envisaged and desired in the event of the adoption of interim measures. There is no basis for an assumption that the agreement is extensive. Also, the observation in *Art. 23 of the Regulation* that 'such jurisdiction (that agreed for the settlement of any dispute between the parties) shall be exclusive' need not necessarily be taken to refer also to the issue of interim measures but may – or rather ought to – mean that that jurisdiction is exclusive and takes precedence over any other forum, albeit only in respect of the examination of the substance.

We mentioned earlier the desirability of achieving greater precautionary efficacy through the courts of a particular country having a special connection with whatever it is sought to protect. Take for instance the securing of maritime credits on a vessel wherever it may be or when the assurance is generally something tangible – CJEC Judgments of 17/11/1998, Van Uden and the cited judgment of 21/5/1980, Denilauler,

or that of 27/4/1999, Hans Hermann Mietz, justify and found the application of the rules on separation of jurisdiction upon the existence of a real point of connection between the object of the measures petitioned and the territorial jurisdiction of the court dealing with them. And the fact is that the issue of interim measures cannot be divorced from the issue of enforcement that they serve, which is what gives rise to the petition and the adoption of interim measures; and if such enforcement can, and oftentimes should, be ceded to a court other than the one examining the merits of the dispute, we see no reason why the same should not apply to interim measures.

In the present case there is no question of a tangible interim measure, but the connection with the Spanish courts is evident from the fact that what is sought is a halt to actions which are geographically situated in Spain."

11. International lis pendens

Supreme Court Decision (Chamber for Civil Matters, Section 1) of 4 March 2010 (RJ 2010\1454)

Action pursued between the same parties in the Italian courts on trade mark law and unfair competition (lack of identity between object and action), products presented differently in the two countries and trade marks protected by different registrations (doubt as to the competence of the Italian courts to examine the infringements denounced in the Spanish complaint).

"LEGAL GROUND: . . . TWO. [. . .] In order to prevent parallel proceedings in the courts of different contracting States and to avoid conflicts between decisions which might result therefrom even although the parties in both proceedings are the same – as the Court of Justice of the European Communities noted in a judgment of 19 May 1998 (C-351/96) – Article 21 of the Brussels Convention provides, with respect to lis pendens, that where proceedings 'involving the same cause of action and between the same parties' are brought in the courts of different Contracting States, the court seised of the second action – in this case indubitably the Spanish case – 'must decline jurisdiction' in favour of the other, once the latter has accepted jurisdiction.

Article 22 – referring to related actions – whose requirements and scope are more flexible, provides that if the cause of action is not the same but the actions are 'so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings', the second court 'may also, on the application of one of the parties, decline jurisdiction', if the law of that court permits the consolidation of related actions and 'the court first seised has jurisdiction over both actions'.

On the other hand Article 26, which is also cited, regulates the recognition of 'judgments given in a Contracting State' in the other Contracting States without 'any special procedure being required' including incidental questions. What the appellant seeks in such recognition is to take advantage of the 'res iudicata' for the Spanish proceedings.

However, of the requirements necessary for the Court of First Instance and the Provincial Court to acknowledge lis pendens between the two proceedings, at least

those relating to the identity of the cause of action are lacking; in both cases the courts have examined the compatibility of the presentation of the product manufactured by Zaini Luigi, S.p.A., on the one hand with the one manufactured by Ferrero S.p.A., and on the other hand with the trade marks owned by this company; but the form in which the former is marketed in Spain differs from that of the Italian product in an essential element for the risk of confusion, viz. the name of the chocolate egg – which is marketed as 'supermario' and the other as 'sorpresa' – while the trade marks behind the dispute are completely different, one set being Spanish and the other Italian.

Again, there lacks the close connection between the actions required by Article 22 of the Brussels Convention to prevent irreconcilable judgments. Rather, the 'res de qua agitur' in either proceedings is different enough to amply justify the compatibility of the two judgments.

Finally, the appellant has not furnished details in support of the jurisdiction of the Italian courts over the infringements denounced in the Spanish action. [...]"

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND DECISIONS

1. General principles

Supreme Court, Chamber for Civil Matters, Section 1, Court Order of 9 March 2010 (JUR 2010\103832)

Spanish courts lack jurisdiction over exequatur in respect of a judgment delivered by the Diez de Octubre Municipal People's Court of Ciudad de la Habana, Cuba, decreeing the divorce of the parties in the case.

"LEGAL GROUND: ONE. Pursuant to Article 11 of Organic Law 19/2003 of 23 December 2003 amending the Judiciary Act, Organic Law 6/1985 of 1 July 1985 (BOE of 26 December 2003), which has been in force since 15 January 2004, according to which 'in civil cases Courts of First Instance shall be seised: 5. Of petitions for recognition and enforcement of foreign judgments and other judicial and arbitral decisions unless jurisdiction should lie with a different court under treaties or other international rules'. Therefore, given that the request for enforcement of the judgment whose recognition is sought was submitted to this Court on 4 November 2009, while the cited Organic Law was in force, this Chamber is not competent to deal with the enforcement request.

TWO. The rules governing objective jurisdiction constitute ius cogens and must therefore be examined ex officio by the court seised of the case; hence, as provided in Art. 48(1) of the Civil Procedure Act, Law 1/2000 (whereunder the issue of 'lack of objective jurisdiction shall be declared ex officio by the court seised of the matter whenever it becomes cognizant thereof'), the court must decline jurisdiction if, having heard the opinion of the Prosecution Service and the parties appearing therein,

it considers that it so lacks *ratione materiae*, and it shall then instruct the parties to exercise their rights in the appropriate forum.

THREE. Under Art. 955 of the 1881 Civil Procedure Act as amended by Art. 136 of the Fiscal, Administrative and Social Measures Act, Law 62/2003 of 30 December 2003 and other international norms, jurisdiction in respect of requests for the enforcement of foreign judgments and other judicial or arbitral decisions lies with the Courts of First Instance of the domicile or residence of the party against whom the request for recognition and enforcement is brought, or the domicile or residence of the person affected by such decisions; territorial competence is to be determined subsidiarily by the place of enforcement or the place where such judgments or decisions are to take effect."

Order of Asturias Provincial High Court (Section 1), no 16/2010, of 29 January 2011 (JUR\2010\112927)

Admission of recognition by virtue of exequatur; applicant not required to designate an address for service of process at a place within the jurisdiction of the court seised of the application.

"LEGAL GROUND:... TWO. Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters provides a binding Community legal instrument designed to facilitate the free circulation of judicial decisions in civil and commercial matters. The basis for achieving that end is mutual trust in justice within the Community, and with that the necessary efficiency and rapidity in the procedure for enforcement in one Member State of a decision handed down in another. This notion of efficiency and rapidity is reflected in Recital 17 of the Regulation, where it states that 'To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation'. Thus, Art. 41 of the Regulation provides in connection with the enforcement of judgments given in a Member State, that 'The judgment shall be declared enforceable immediately on completion of the formalities in Article 53, without any review under Articles 34 and 35. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application'. In other words, the only control that a court may exercise ex officio is to check that the proper procedure has been followed, which is done without reference to the subject and is confined to the formal checks set out in Art. 53 of the Regulation; this check obviously does not include the requirement that the applicant designate an address for notifications at a place within the jurisdiction of the court seised of the application, since that is a requirement set out in Art. 40(2) of the Regulation. This ground alone would warrant overturning the decision here challenged, since the cited requirement is not in itself sufficient to bar the admission of the application *ad limine litis*.

THREE. We should add, however, that the application for maintenance considered here was made in pursuance of the New York Convention of 20 July 1956, and that Convention provides for the designation of an official authority of the place where

the claimant of maintenance is situated as a transmitting agency and a receiving authority as a competent body of the State where the respondent is resident and where the claim should be made. Each contracting party must designate these authorities at the time when the instrument of ratification or accession is deposited. For its part, on 2 November 1971 the Spanish State announced, through the Foreign Ministry of Affairs, that the Ministry of Justice had been designated to act as both transmitting and receiving authority. At the present time it must be assumed that the body empowered to act in maintenance claims from abroad is the Attorney General's office pursuant to Art. 9 of the Legal Aid Act, Law 52/1997 of 27 November 1997, as set out in Instruction 1/04 of the State Prosecution Service. However, this claim for maintenance also comes within the scope of Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which details the requisite procedural steps. Be it recalled, however, that the Community Regulation assumes that it is directly up to the parties to show legitimate standing for recognition and enforcement of the foreign judgment, and to that end Art. 40(2) establishes a mechanism to facilitate the necessary communication between the Court of First Instance and an applicant domiciled in another Member State, which is not the situation in the present case.

In addition to the foregoing, it is worth recalling that the national procedural system in fact has a number of particularities where one of the litigants is the State Attorney's Office in exercise of the functions of representation and defence conferred on it by law, and thus for instance chapter III of the Legal Aid Act, Law 52/1997 of 27 November 1997, regulates the special procedural conditions applying to the State. These include special conditions in respect of notifications, citations, summonses and other procedural communications. Art. 11(1) provides that 'In proceedings in any jurisdiction where the General State Administration, autonomous bodies or constitutional bodies are parties – in the latter case unless their internal rules or procedural laws dictate otherwise – notifications, citations, summonses and other procedural communications shall be made directly to the State Attorney at the official address of the State Attorney's Office concerned". Paragraph (3) further provides that "notifications, citations, summonses and other procedural communications shall be without effect if they do not adhere to the terms of this article'. Given then that the State Attorneys in the State Legal Service cannot designate a prosecutor or a representative ad litem (Art. 40(2) in fine Regulation) on their behalf since they are legally bound to represent the State and its autonomous bodies (Art. 1 Law 52/1997), and that they cannot receive procedural communications of any kind in a form other than provided in Art. 11(1), and given also that the rule contained in Art. 40(2) of Regulation (EC) 44/2001 applies to a different case from the one at issue here, we have no option but to conclude that the State Attorney's Office may act as representative in the proceedings as provided in the specific rules contained in Law 52/1997 of 27 November 1997."

2. Family

Judgment of the High Court of Justice of the Community of Valencia (Section 1), no 1045/2010, of 31 March 2010 (AC\2010\1101)

Determination of the right to, and the amount of, a widow's pension in the case of a French divorce decree that has been recognised in Spain.

"LEGAL GROUND:... TWO. [...]Pursuant to Article 89 of the Civil Code, the divorce decree is effective as soon as it it is firm; however, since the matter here concerns the judgment not of a Spanish court but of a French one, we must look at what the rules have to say about enforcement in Spain of judgments delivered by foreign courts. To that end we must look to Article 951 of the Civil Procedure Act of 1881, which was declared to be in force by the sole repeal provision of Law 1/2000 of 7 January 2000 pending the entry into force of the Law on international legal cooperation in civil matters, since Council Regulation (EC) No 1347/2000 of 29 May 2000 – now replaced by Regulation (EC) No 2003/2201 of 27 November 2003 – on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses is not applicable to the case at issue, as stated in the appeal here examined and as acknowledged in the judgment. The above-cited article of the 1881 Civil Procedure Act provided that 'firm judgments delivered in foreign countries shall be enforceable in Spain as established in the relevant Treaties'. The applicable treaty for the date – 1975 – on which the French court handed down the divorce decree is the Convention on recognition of judicial and arbitral decisions in civil matters, concluded between France and Spain on 28 May 1969. Article 3 of the Convention provides that 'decisions delivered by the Courts of each of the Contracting Parties shall be recognised in the territory of the other without the need of any special procedure, provided that two requirements are met: a) it is demonstrated that the court of origin had jurisdiction according to the rules laid down for those purposes in Article 7 of the Convention; and b) the decision cannot be the subject of an extraordinary appeal and is susceptible of enforcement in the State of origin, that is to say it is a firm decision'. The 'Court of origin' means the court that delivered the decision recognition or enforcement of which is requested /Article 2). This court has jurisdiction 'where, at the time of filing of the complaint, the defendant's habitual domicile or residence is in the State of origin'. Therefore, since at the time of their divorce the appellant and the deceased were habitually resident in France, the Court of First Instance of Versailles which issued the divorce decree on 18 April 1975 was the competent court, and hence the presumption of marital cohabitation was extinguished with that decree, which became firm on the cited date – there is not record of its being appealed [...]".

Order of Zaragoza Provincial High Court (Section 2), no 158/2010, of 16 March 2010 (AC\2010\974)

Divorce decree delivered in Egypt not recognised in Spain and devoid of legal force. This is a decision delivered in the absence of the present appellant and without any measure being adopted to safeguard the interests of the children (plaintiff and defendant domiciled in Spain; children born in Spain).

"LEGAL GROUND:... TWO. Art. 403 of the Civil Procedure Act provides that complaints may only be admitted in cases and for reasons expressly provided for in the Law. It is obvious that the reason adduced for the appeal – the Egyptian divorce

documented at folios 16 to 18 as *res judicata* – cannot be entertained since it is a decision not recognised in Spain and hence devoid of legal force in our country, particularly considering the obstacles posed to its recognition by the fact that it was delivered in the absence of the present appellant and with no provision to safeguard the interests of the children. For the rest, the record shows that the plaintiff and the defendant have been domiciled in Zaragoza for years – their daughters Crescencia and Felisa were born in this city on 14/8/03 and 17/11/05 – and therefore the Spanish courts have jurisdiction over the action brought; for absent any Treaty, that is the provision of Article 3 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, which is also applicable to non-Community nationals, given that in matters concerning divorce, legal separation and annulment of marriage jurisdiction lies with the courts of the Member State in whose territory the spouses have their habitual residence. [. . .]"

Decision of the Madrid Provincial High Court (Section 11) of 26 March 2010 (JUR 2010\195040)

Dismissal of appeal on procedures for enforcement of judicial orders (Double enforcement in Member State of origin and in Spain)

"LEGAL GROUND: . . . THREE. There are two circumstances in this case which this Court views as crucial for its resolution:

Firstly, in the action for enforcement there is no mention of the fact that the judgment delivered by the Commercial Court of Bordeaux (France) of 17 February 2006 in civil proceedings no 2004F00308, brought by the present plaintiff against GUTTER TRADE IBÉRICA, S.L. and Aníbal, had been appealed by the defendants prior to the filing of that writ and no indication was given that the enforcement is provisional, despite the fact that in legal ground IV.2 the appellant notes the obligation under French law to put up a guarantee and appended that guarantee as document no 9, which document not only states that it is issued in guarantee of provisional enforcement of the judgement but is for the amount stated in the judgment itself, which reads: 'Orders the provisional enforcement of this judgment, without prejudice to the obligation of the company DAL'ALU, S.A.S., excepting the sum indicated in Article 700 of the New Code of Civil Procedure, to put up a valid surety for the amount of €2,150,000 (TWO MILLION ONE HUNDRED AND FIFTY THOUSAND EUROS)'.

Secondly, DAL'ALU, S.A.S. has not only petitioned the Spanish court for enforcement, but at the same time filed for provisional enforcement with the court that delivered the judgment, in which procedure the extent of such provisional enforcement was limited and the enforcee paid the amount set therefore.

Given that Regulation (EEC) No 44/2001 remits the fundamental debate on the admissibility of enforcement to the appeal established in Article 43 thereof, it is obvious that the court to which the petition for enforcement is addressed must first examine the requirements of Article 53, and that necessarily means that the petitioner of enforcement must furnish all the details of the proceedings whose enforcement is sought, which he has not done in this case. Here, wittingly or unwittingly, the initial writ omits any reference to provisional enforcement, and in our view that omission

is important given that the issue of the admissibility of provisional enforcement of foreign judgments is at the very least debatable in the light of Article 525(2) of the Civil Procedure Act, which lays down as a general rule that such judgments cannot be enforced provisionally unless the international treaties in force in Spain 'expressly' provide otherwise, and there is no such express statement in Regulation EEC 44/2001 unless one cares to consider as such the lack of any reference to the firmness of the judgments whose enforcement it regulates. But in any case, in accordance with Article 46, the lack of a firm judgment may definitively compromise enforcement when an appeal against the enforced judgment can cause the suspension of that enforcement.

There is also a difference, significant for this case, in the scope and requirements of provisional enforcement depending on whether it is to take place in the country of origin or in Spain; it is moreover important that what was ordered in France was partial provisional enforcement of the judgment subject to the provision of surety, an outcome that would have been impossible had enforcement been sought only here.

Apart from its singularity, this situation of double enforcement raises an essential point in favour of dismissing this appeal and confirming the decision of the lower court, for in any event it is unacceptable to petition double provisional enforcement of a judgment under Regulation EEC 44/2001. The party seeking enforcement may request it in the country of origin or in any other that the Treaty permits, but what he cannot do is initiate double enforcement proceedings; notice of such duplication must necessarily cause the discontinuation of one of the proceedings and renders the party seeking enforcement liable to pay the costs thereof.

Therefore, provisional enforcement having been pursued in the court that issued the judgment, the conclusion of the present proceedings here under appeal must stand, and likewise the award of costs – the essential point of the appeal – which is entirely warranted by the duplication of the enforcement proceedings, which justifies the order for the person responsible for the anomalous situation to pay the costs of one of them."

Decision of Burgos Provincial High Court (Section 2) no 451/2010 of 21 October 2010 (JUR 2011\5199)

Effects of actual res judicata in divorce of foreign litigants in Spain. Consideration of divorce decree issued by Dominican courts as binding and enforceable in Spain. To that end the document submitted must be materially valid in Spain and be recognised by the Spanish courts pursuant to the last point in Art. 22(1) of the Judiciary Act. However, the documents submitted by the defendant and plaintiffs from a foreign court have not been recognised as valid by the Court of First Instance having territorial jurisdiction pursuant to Art. 85(5) of the Judiciary Act and Art. 955 of the Civil Procedure Act. In this respect the divorce decree submitted is not materially valid in Spain.

"LEGAL GROUND: ONE. The judgment here appealed dismisses the complaint on the grounds that there is an exception of *res judicata* and that a decree of divorce by mutual consent handed down by Second Chamber of the Civil and Commercial Division of the Court of First Instance of the Province of Santo Domingo (Dominican

Republic) is binding and enforceable in Spain. Examination of the record of proceedings and the documentary evidence submitted prompts the following initial considerations:

1. As to the divorce decree issued by the Dominican courts (f. 41), it was indeed legalised and formally apostilled, and again, pursuant to *Art. 323–2 of the Civil Procedure Act*, it could be formally valid as a foreign document submitted in proceedings before a Spanish court.

2. In this case, however, the essential issue is not so much the formal *res judicata* but the validity of the material *res judicata*, that is the divorce of alien litigants in Spain. In other words, the document offered in evidence must be materially valid in Spain and must be recognised by the Spanish courts pursuant to the last point in *Art. 22–1 of the Judiciary Act*; and that constitutes an ordinary legal process (Supreme Court Decisions 94/1984; 43/1986; 54/1989 and 132/1991).

3. The Judgment of the Provincial High Court of Valladolid, Section 1, of 12 June 2006, states: 'Therefore, as this is not a matter of foreign administrative documents (like the ones accompanying the complaint) enforceable in Spain, as argued further above, by dint simply of appending an apostille and translation (*1961 Hague Convention*), but of foreign decisions that still (other than exceptions regulated in the relevant Conventions or Community Regulations) require recognition (*exequatur*) by the State in which it is sought to enforce them. Hence, for the fact of a prior severance of matrimony to be accepted as such through the submission of documentary evidence of such Decisions of Foreign Courts and for these to be valid, they must be recognised in Spain, for which it is not sufficient simply to present them. The documents here presented are thus not valid and hence the prior divorce is not proven'.

4. This means that for the documents submitted by the defendant to be materially valid they would have to have been recognised as such by the Court of First Instance with territorial jurisdiction pursuant to *Art. 85-5 of the Judiciary Act* and *Art. 955 of the 1881 Civil Procedure Act* in the wording of *Law 62/2003 of 30/12/2003*, so that the divorce decree formally submitted by the defendant and issued by a foreign court could be validated through recognition by the Spanish courts and via the procedure set out in Arts. 951 et seq. of the 1881 Civil Procedure Act, which is in force by virtue of points 1–3 of the Sole Repeal Provision of *Law 1/2000*.

In this connection, in a decision dated 19/05/2006, also concerning citizens of the Dominican Republic, Section 12 of Barcelona High Court stated: 'Of those *parts of the 1881 Civil Procedure Act* which have been kept in force until such time as a Law on International Judicial Cooperation is enacted, Articles 951 and following regulate matters concerning recognition and enforcement of judgments issued by foreign courts and establish a set of recognition procedures that have to be followed in a particular order of succession. Firstly, the preferred system is the convention-based criterion or rule, which does not apply in the present case as there is no bilateral convention on the subject between the Kingdom of Spain and the Dominican Republic and neither State has signed or ratified any International Convention that does regulate it. Failing an International Treaty, the default procedure for securing recognition of foreign judgments in Spain is contingent on their meeting the requirements set out in *Article 954* of the said Act'.

TWO. Therefore, since the validity of the divorce decree submitted has not been proven, we must examine the merits of the case and analyse the three points in the plaintiff's petition.

1. Legal separation. Under *Arts 9 and 107 of the Civil Code* the applicable law is the Common National law of the spouses at the time of separation, in this case the civil legislation of the Dominican Republic, *Art. 58* of which allows separation. Moreover, in the present case the husband has raised no objection regarding the fact of the separation, as his sole reason for objecting is founded on the *res judicata* exception, on the ground that the spouses were already divorced in their own country (see legal grounds and point one of the statement of defence).

2. The second point in the complaint must also be upheld, and consequently the matrimonial property regime must be declared null and the spouses' mutual powers of attorney cancelled. This means that the litigants will have to dispose of the sole common asset referred to in the complaint, namely the dwelling-house situated at Plaza ADDRESS000 No NO000 – NO001 – NO002 in Burgos and its furnishings.

3. As to the use of the dwelling, in her petition the plaintiff asks that it be awarded to the husband, who is the party currently in occupation thereof. In the petition of appeal this request has changed and it asks that the flat be awarded to the wife/plaintiff and the son who lives with her. This petition must be denied as it is new and violates the principle *pendente apelationem nihil innovatur*, and its acceptance would violate the defendant's right to legal protection. Furthermore, it has not been shown that the plaintiff's need is any greater than the husband's, as she does not live at the common home and the son referred to (Alexander) is in his majority (32 years old), and in the complaint it was stated that he was already living in the dwelling with the husband.

4. As regards setting maintenance at 200 € in favour of the wife, this petition cannot be accepted for two reasons. Firstly because it has not been shown, as required by *Art. 97 of the Civil Code*, that there is a real imbalance such as to warrant setting compensatory maintenance. Secondly, it has also not been shown that the husband is effectively able to pay such maintenance; indeed, as the appellant has asserted, Abelardo is in financial difficulties and is ceasing to pay the mortgage, whereas 'if she were to live in the flat she could pay the mortgage'. In other words, if the husband is in financial difficulties and at present is not even able to pay the mortgage, the more needy of the spouses is the defendant; thus, if the use of the flat were awarded to the wife who formerly paid the mortgage, Abelardo would be left without a home but under obligation to pay the mortgage and without any known income to meet his own needs. It is hardly acceptable that the person with the financial means be awarded the use of the dwelling and the person lacking means and currently occupying the dwelling be forced to leave. Furthermore, it seems that the husband lives with his son, who is not therefore in any great need of another dwelling, and indeed the wife herself has stated that she does have financial means, having said that she would undertake to make the mortgage payments to the bank when she occupied the dwelling. This means not only that she has the financial means to pay the mortgage until the dwelling is sold, but that she has hitherto not been paying her part of the mortgage, without good reason since she is still part-owner – not to

mention the fact that in the complaint she asked that the dwelling be awarded to the defendant."

VI. DETERMINATION OF APPLICABLE LAW: SOME GENERAL ISSUES

1. Proof of foreign law

Supreme Court Decision (Chamber for Civil Matters, Section 1), No 722/2009 of 23 March 2010 (RJ 2010\2417)

Proof of foreign law in traffic accident in Switzerland.

"LEGAL GROUND:... FOUR. [...] What is really at issue, based on a number of submissions in which questions of various different natures are mingled – for instance the retroactive application of rules that were not in force at the time of the accident, the multilateral guarantee Convention signed between Spain and Switzerland, the London Convention of 7 June 1968 on information on foreign law, along with various Directives, which have little or nothing to do with the legal provisions cited in the grounds – is a matter of fact, namely the proof of foreign law, the review of which, even in the extraordinary appeal, is very limited. Article 216 on petitioned redress is not infringed since the judgment conforms to Swiss law, the conflict of laws having been settled as required under Spanish law.

Article 217 on the burden of proof – which is applicable where no certainty has been reached regarding major disputed facts in any proceedings – is likewise not infringed. For the foreign law to be applicable in the proceedings, its currency and content must be proven (Supreme Court Judgments of 11 May 1989, 7 September 1990, 23 March 1994 91, 25 January 1999, 27 December 2006, 4 July 2007, and many more). The facts are governed by the rule of production of evidence by parties (*quod non est in actis non est in mundo*), while in our system the court is empowered to use whatever means it deems necessary to apply the foreign law (Art. 12(6)(2) of the Civil Code in the wording pre-Civil Procedure Act, Law 1/2000 of 7 January 2000, which was in force at the time the complaint was brought, and Art. 281(2) of the same Act) – Supreme Court Judgment of 10 June 2005.

The point here being to apply this right in Spanish civil proceedings, pursuant to *Art. 281.2 of the Civil Procedure Act, evidence was examined in the second* instance to accredit this through conventional mechanisms, in this case the *1968 European Convention on Information on Foreign Law (BOE 7.10.1974)*, signed by the member countries of the Council of Europe, among them Switzerland, and ratified by Spain on 1 June 1982 (BOE 28 August 1972), on cancellation of legalisation of documents issued by diplomatic or consular agents.

The evidence was obtained solely at the request of the defendant, by means of various questions which were answered by the Federal Social Security Office and the Federal Department of Justice and Police, through the Federal Insurance Office, in consideration of which the judgment considers the Swiss law to be accredited as far as is necessary to settle the dispute. [...]

Admittedly in some of its grounds the appealed judgment refers to Spanish law in a supplementary role, but that does not mean that Swiss law is not being applied to the legal relationship at issue. Undoubtedly – cf. Supreme Court Judgment of 4 July 2006 – 'the applicable law may be infringed, not applied and so forth, and the foreign law and the national law should not be treated differently once it is established that the former is applicable to the case before the court, for to act otherwise would be tantamount to denying access to the appeals established by law *(Article 24 of the Spanish Constitution*), in addition to breaching the Spanish rules of conflict. However, the doctrine formulated in an appeal in cassation for breach of the foreign law may not be accepted as legal doctrine for the purposes of *Article 6(1) of the Civil Code*, albeit it may serve as a point of reference for subsequent disputes that may arise before Spanish courts in connection with similar problems where the same legal rules have to be applied'.

That said, none of this has to do with the rules governing the burden of proof, but with the court's application and interpretation of Swiss law. The plaintiff did not found his complaint on this law, nor did he trouble to show what harm could ensue from the application of its rules – that is, whether with Spanish law the claims presented would have been satisfied – but sought solely to prevent its application in favour of the national law by accusing the insurance company of having manipulated the law in it own interest when he could have avoided it by taking a more active part in the invocation and proof of that law. [...]

All this leaving aside the fact that *Art. 12(6) of the Civil Code* is not an inflexible rule of evidence, but to the contrary authorises the court to take whatever steps it deems appropriate. [...]"

Judgment of the High Court of Madrid (Social Chamber), No 157/2010 of 12 April 2011 (AS 2010\1609)

Revocation of widow's pension from a marriage concluded in Denmark, for failure to invoke and accredit the applicable Danish rules.

"SOLE LEGAL GROUND. [...] According to *Art 9(2) of the Civil Code*, the effects of marriage are governed by the personal law common to the spouses at the time of marrying, and failing that by the personal law or the law of the habitual residence of either of the two as chosen in an authentic document formalised prior to the marriage – in this case there is no record of such a document – and failing such a choice by the law of their common habitual residence immediately after marriage, or failing that the place where the marriage was held. In the present case, the last two options, which would apply in the same order, appear to coincide and therefore count as one, which is in any case Danish law, according to which the court of first instance had to decide whether or not there was such a marriage and whether it was effective in law, and in that connection the case-law (Supreme Court Judgment of 4/11/04) determines that there is no need to demonstrate the applicable rule but that 'The issue that has then to be resolved in this appeal, as it has been put to the court, is to determine the legal effects that ensue from the absence of proof of the foreign law when, as in the present case, the rule of conflict says that this is the applicable one. This is a far from straightforward legal problem in which this

Supreme Court Camber of Social Affairs had occasion to rule in a judgment of 19 February 1990, maintaining that "failure to invoke and prove cannot, as the appellant claims in ground seven, determine the application of Spanish law, since that would be tantamount to the absurdity of penalising the deliberate omission of the foreign rule by applying Spanish law when the latter is considered more beneficial" '. This was recalled in a more recent judgment by the General Chamber, dated 22 May 2001 (appeal 2507/2000), in which although the appeal in cassation for unification of doctrine was dismissed for absence of contradiction in the judgments compared, given the importance of the matter it opted for the same doctrine as in the ruling of 19 February 1990, stressing that the absence of proof of the foreign law would determine the dismissal of the claim, since in such cases' . . . it is not a matter of introducing a fact in the proceedings the lack of proof of which is prejudicial to the party who based his claim or opposition on it, but of a rule or a set of rules that have to be applied to the case by reason of another imperative rule. Therefore, we cannot say that the national law is applicable if the foreign law is not proven by the party seeking its application. On the contrary, what happens is that if the foreign law is the applicable one, the party making the claim must invoke and prove that law if his claim is to be accepted'.

This doctrine, which was reiterated in our judgment of 25 May 2001 (appeal 556/2000), albeit likewise in a case where the appeal was dismissed for lack of contradiction, overturned the Chamber's earlier, opposing doctrine – which is precisely the one maintained by the judgment of 16 March 1999 invoked here as contradictory, which in turn referred to the doctrine of the First Chamber of the Supreme Court set out in the judgments of 11/5/1989, 21/5/1989, 23/3/1994, 25/1/1999, 5/6/2000 y 13/12/2000. In short, the doctrine laid down in the comparative judgment was abandoned in the two judgments just cited, in which the rationale for the change was explained.

Also, on three recent occasions the Constitutional Court has dealt with the underlying problem addressed here today. The first was in Supreme Court Judgment 10/2000 of 17 January 2000, the second in Supreme Court Judgment 155/2001 of 2 July 2001 and the third in Supreme Court Judgment 33/2002 of 11 February 2001.

In the first of these – the only one predating the Supreme Court Judgments (Chamber 4) of 22 and 25 May 2001 – the Constitutional Court, while making it quite clear that the case was a very specific and particular one, upheld the petition of the appellant, an Armenian national, who sought the application of her country's law in the suit she filed in Spain for separation from her husband, of the same nationality. Although the applicability of Armenian law was unanimously admitted, the court of first instance denied the petition for separation on the ground that the applicable foreign law had not bee adequately proven, owing to the unreliability of the private translation thereof. On appeal the Provincial High Court had decided, at the appellant's request, to issue two letters rogatory so that the record of the proceedings should reliably reflect the existence and currency of the applicable foreign law; however, in view of the delay and the difficulties encountered in the process, it did not wait for the procedure to be duly completed and delivered judgment, dismissing the appellant's petition on the ground that the foreign law applicable to the case was not proven. The Constitutional Court upheld the appellant's rights in this case,

on the ground that the Provincial High Court not only prevented the submission of evidence decisive for the appellant's case, but moreover had left her defenceless (*Art. 24(1) of the Spanish Constitution)*, for her petition was denied on the ground of absence of proof of the foreign law. The Provincial High Court, then, is accused of infringing the appellant's right to effective judicial protection, by dint specifically of failure to conclude the enquiry procedure it had ordered. For all these reasons the Constitutional Court explained that in cases like the one concerned 'considering the particular circumstances, accreditation of the foreign law and the court's intervention in the proof thereof may go beyond the mere evaluation of the evidence of a fact alleged by the party in support of its petition, which is indubitably the exclusive province of the ordinary courts'. However, this judgment contains no constitutional doctrine determining a need to apply the lex fori in the absence of proof of the foreign law when the rule of conflict requires it to be applied. For that reason the judgment of 22 May 2001 cited above (appeal 2607/2000) asserts in a final point that the doctrine of Constitutional Court Judgment 10/2000 does not contradict the doctrine contained in it, but rather corroborates it.

The second of the two Constitutional Court Judgments cited is 155/2001. It is worth noting that this latter one upheld the rights of the workers affected (claiming other kinds of differences) by the judgment invoked as contradictory in this appeal, the Supreme Court Judgment of 16 march 1999 (appeal 1962/98). As noted earlier when reporting its content in order to ascertain whether it contradicts the judgment under appeal, this was a matter of two Spanish workers who had been engaged in Beijing to serve at the Spanish Commercial Office that the Ministry of Economy and Finance had in that city, and who were protesting the pay differences that had arisen, in their opinion, because their salaries came unilaterally to be paid in dollars when the agreement was that they be paid in marks. The court took the view that the currency of the Chinese law applicable to the case had not been accredited, but it upheld the complaints, applying Spanish law in its stead. However, in settling the appeal for reversal lodged by the Administration, the Chamber for Social Affairs, having accepted the applicability of Chinese law, ruled that the absence of proof of its content and currency required that the complaint be dismissed, not that internal law be applied. In the judgment under discussion here, the Constitutional Court asserted that 'the point at issue, from a constitutional standpoint, which is what interests us here, is to determine, pursuant to *Art. 24(1) of the Spanish Constitution*, whether or not the grounds for the judgment in the appeal for reversal were sufficient, it having declared that Chinese law was applicable and that the plaintiff was required to prove it, but without in any way arguing, substantiating or justifying the reason for its decision to overturn the original judgment (which acknowledged the circumstances but applied Spanish law in its stead, on the basis of the Supreme Court's own doctrine)'. And it concluded from this that 'the court did not let the plaintiff know the *ratio decidiendi* of its decision – that is, the reasons why it overturned the original judgment, denying him his right to be paid the differences in salary he claimed, contradicting not only the acknowledgement of that right by the court *a quo* but also the actual acknowledgement by the defendant of the debt outstanding with the plaintiffs, and for purposes of applying the current law, generally contradicting the doctrine laid

down in this connection by the Supreme Court, to wit that absent proof of the foreign law invoked in the proceedings, Spanish law must apply as repeatedly determined by the case-law. And this doctrine is in fact closer to the letter of *Art. 24(1) of the Constitution* than the solution adopted in the appealed judgment, dismissing the complaint, since in a context of foreign trade, Spanish law, when applied in default of the applicable law, can also provide the solution, founded in law, that the above-cited article of the Constitution demands'. *This Constitutional Court judgment, which was practically coetaneous with that of Supreme Court Chamber Four* but subsequent to it, stated quite clearly that it is more respectful of the right to effective judicial protection to apply Spanish law in the absence of proof of the foreign law and ruled accordingly, upholding the claims of the same persons whose claims had been upheld in our judgment of 16 March 1999, which judgment was invoked by the plaintiffs in the appeal for protection after it had commenced and was appended to the appeal, as recorded in the the sixteenth matter of fact.

The third of the Constitutional Count Judgments that we refer to is number 33/2002 of 11 February 2002, deciding on a case where the same legal problem was at issue, in factual circumstances practically identical to those in the case at issue here. An English worker, engaged in England, was dismissed and contested the decision to dismiss her at the Social Affairs Court in Madrid which, having accepted jurisdiction, dismissed the complaint for unfair dismissal for failure by the plaintiff to provide proof of the foreign law. This decision was confirmed by the Social Chamber of the High Court of Justice of Madrid in an appeal for reversal that was lodged against it. The Social Chamber of the Supreme Court in turn refused to admit an appeal in cassation for unification of doctrine brought by the plaintiff on the ground that the appealed judgment and the one cited as contradictory were one and the same.

In the judgment discussed here the Constitutional Court took the view that such decisions at first instance and on appeal are contrary to *Article 24 of the Spanish Constitution* on the right to effective judicial protection in the form of the right of access to proceedings in order to secure a ruling on the merits of the claim. The Constitutional Court argued in this respect that '. . . given the absence of proof of the foreign law (which was the one that both courts considered applicable to the case), it was decided not to rule on the plaintiff's petition (classification of her dismissal), and moreover not to apply the lex fori – i.e. Spanish labour law – in default thereof. However, that obstacle (lack of proof of the foreign law) was in fact not an obstacle at all, given that it was the defendant who invoked English law and hence it was up to the latter (and not the plaintiff) to furnish evidence of its content and currency, as provided in the *Art. 12(6) of the Civil Code* then in force (substituted today by the rules laid down in *Art. 281 of the Civil Procedure Act, Law 1/2000 of 7 January 2000*). But despite that, it was the plaintiff who was required to furnish the proof, and at no time was she given the opportunity to do so through the appropriate procedural channels, while the lack of evidence of the content and currency of the English law was adduced in support of the dismissal of her petition (in the case of the court of first instance) and the inadmissibility of the complaint, albeit by way of a Judgment (in the case of the High Court of Justice). It is therefore evident that the plaintiff was unreasonably denied a judgment on the merits of her case (as in the case dealt with in Constitutional Court Judgment 10/2000 of 31 January 2000, FJ 2)'.

An examination of the doctrine contained in the judgment transcribed above shows that it is deemed constitutionally unacceptable for the Social Court not to rule on the merits when the foreign legislation is not accredited in cases (like the present one) where it is applicable according to the rule of conflict, for in such an event the lex fori – Spanish labour law – is applicable by default. That is the real reason for the Constitutional Court's decision, irrespective of the additional arguments set out in the judgment regarding the particular circumstance that in this case the plaintiff's case should not be dismissed for lack of evidence of the existence and scope of a foreign law, which she never invoked, whereas it is the defendant, who did invoke that law, who ought to suffer the adverse effects thereof. But as we have said, the Constitutional Court did not solve the problem by applying the principles of the burden of proof and their consequences to the petition; where it found an infringement of the right to effective judicial protection in the failure of the Social Chamber of the High Court of Justice to compensate for the actual absence of proof of the foreign law by applying Spanish law to settle the dispute.

To conclude, the doctrine of the Constitutional Court – the supreme interpreter of the Spanish Constitution and the scope of fundamental rights *(Art 53(2) and 161 of the Spanish Constitution*) – is clearly opposed to the doctrine invoked by the Bench of this Chamber in the above-cited judgment of 22 May 2001, and that being the case the proper course is to rectify that doctrine and adjust it to the arguments of the Constitutional Court as noted, which constitute the doctrine to which we ought to refer. Therefore, by dismissing the suit for unfair dismissal due to absence of proof of the foreign law the appealed judgment was in breach of *Article 24 of the Spanish Constitution* in that given the lack of evidence as to the existence and currency of the English law it failed to apply Spanish labour law by default in order to settle the case.'

In short, therefore, in this case given the absence of any invocation or evidence of the applicable Danish rules, we must have recourse to the Spanish legislation, which in all such cases must be applied in default of the other; and this provides *(Art 49 of the Civil Code*) that any Spaniard may be married, inside or outside Spain, by a Judge, mayor or other public functionary so designated by the Code or in the legally-sanctioned religious form, and also in the case of marriages conducted outside Spain, 'in accordance with the form established by the Law of the place of celebration'. And that is what has not been proven, so that all that remains in the present case is the 'legally-sanctioned religious form' stipulated in the Code, *i.e. Arts. 59 and 60 of the Civil Code*, the first of which requires that the religious denomination be registered in the terms agreed with the State, or failing that, authorised by the legislation of the State, which has established Agreements, in addition to the catholic Church, with the Federation of Religious Entities of Spain, with the Federation of Jewish Communities in Spain and with the Islamic Commission of Spain. It has neither been claimed not proven that the People's Church of Denmark appears in the Register of Religious Entities or that it is a member of the FEREDE, and hence it cannot be considered to have been shown that the marriage conducted by that church is legally valid in Denmark, or consequently in Spain. The appeal is therefore dismissed. [. . .]"

Judgment of the Provincial High Court of Valencia (Section 9), No 32/2010, of 27 January 2010 (JUR 2010\491)

Appeal dismissed as being a maritime insurance contract governed by English law. Case coming under the Rome Convention of 19/6/1980 and Spanish law not relevant in application of the rule of conflict invoked by the applicant.

"LEGAL GROUND FIVE. The last point that this court has to settle is whether the Judge in the court of first instance was justified in applying English law. On this subject it is obvious from the legal grounds for the judgment that the court made a thorough examination of the reports from the English experts in English maritime law, which examination this Chamber considers accurate and relevant. The application of the foreign law is then a mere matter of fact (*Article 281(2) of the Civil Procedure Act*) and hence susceptible of solution through examination of the evidence. At this point the Court is struck by the fact that the plaintiff submitted various reports (three) from English lawyers dealing both with the issue of arbitral agreements and with the validity of the agreement excluding cover, at issue here, on the risk of refusal from the standpoint of English law. Now, according to *Art. 217(2) of the Civil Procedure Act*, it is up to the plaintiff to furnish such evidence, and the fact is that in the preliminary hearing the defendant did not challenge these instruments; moreover, despite the urging of the litigants that it was a mere legal technicality and hence did not warrant initiating the procedure (*Article 428(3) of the Civil Procedure Act*), the acting Judge decided to call and examine the evidence, in which procedure two of the experts in English law intervened to a considerable extent as reflected in the judgment. In the procedural problem described, to submit now at the appeal stage that these are mere opinions or that one of them did not give evidence can detract nothing from the procedure and conclusion of the court, when there is moreover no other kind of evidence against it, and we can therefore see no error in the court's finding."

Judgment of Castellón Provincial High Court (Section 3), No 143/2010, of 1 September 2010 (JUR 2010\391383)

According to Article 3 of the Civil Code, the rules must be interpreted in accordance with the times in which they have to be applied, and in the case of Art. 281 of the Civil Procedure Act, given the new social reality of tourism, foreign law must be treated as a fact for procedural purposes, subject to allegation and proof by the parties if it is to be applied. It is coming to be treated as a genuine right that the Judge is required to know and that can be enforced directly, in line with the criterion laid down in the administration of registries and in the new systems of Private International Law whereby the courts are bound to apply the foreign law ex officio.

"LEGAL GROUND:... TWO. [...] As regards the error attributed to the Notary and Property Registrar, the first in stating in the deed of purchase that 'they were married under a regime of *Comunidad de Bienes* [shared matrimonial assets], and the second in assuming that the regime was one of *Gananciales* [sharing of acquired assets]', we should clarify that it is the expression commonly used in the case of foreign marriages, taken purely as a reference and subject to the legal matrimonial system in their country of nationality, and there is no legal form obliging them to

state at the time of acquisition what their matrimonial regime is or its content. In conclusion, at the time of acquiring an asset, the purchasers do not have to state the nature of their matrimonial regime or establish undivided ownership, and there are innumerable decisions by the Directorate-General of Registries and Notaries to that effect. That ground is therefore dismissed.

As regards the application of Spanish rather than German law, we disagree: firstly, according to *Article 3 of the Civil Code* the rules have to be interpreted in accordance with the times in which they have to be applied, and in the case of *Art. 281 of the Civil Procedure Act*, given the new social reality of tourism, foreign law must be treated as a fact for procedural purposes, subject to allegation and proof by the parties if it is to be applied. It is coming to be treated as a genuine right that the Judge is required to know and that can be enforced directly, in line with the criterion laid down in the administration of registries and in the new systems of Private International Law whereby the courts are bound to apply the foreign law ex officio. But in addition to that, the German law – the law that was applied – was duly proven, even if the appellant believes not adequately, using testimony from the jurisconsult named in the record and citing the applicable laws. Ample evidence has therefore been given of the German law.

Naturally the marriage partners are normally desirous that things belonging solely to one not be registered as the property of both, and so in consenting to the appearance of both as parties in the deed and to the sharing of title and of the bank account, and in jointly signing the mortgage agreement on the same day as the deed of sale, they implicitly acknowledge the form in which it was notarised and entered in the Property Registry. Moreover, in the declaration of foreign investments, both hold title in the investment, and both litigants have acknowledged that the plaintiff worked as a nurse and later as an employee of the defendant, and therefore clearly the ex-wife earned income from her work – but that is no basis for mere hypothetical assumptions that it was not enough to earn her a share in the property investment, nor is the absence of an official translator, the notary authorising the deeds having accredited her familiarity with the German language. And as for the nuptial agreements referred to by the appellant, there is nothing to prevent engagement in any kind of business, as the first point expressly provides. But even if we accept the defendant's claim, as the fourth legal ground of the appealed judgment asserts, the German Civil Code contains no provision that warrants a change in what was documented at the time. As for the mortgage loan, a piece of paper with the amortisement table has no bearing on the matter, and in any case the loan is one thing and the real security another. Although no evidence was produced, the Registry entry shows without a doubt that the mortgage was signed by both, for there is no possibility of a bank issuing a mortgage on half of the undivided properties in dispute. In short, the will of the present litigants to hold the cited properties in common is evident, for that will is demonstrated by a number of factual considerations (deed of purchase, mortgage loan, Property Registry, bank statement, foreign investment declaration form) that can only be rebutted by effectively challenging the evidence, which was examined in due legal form, and there was no such rebuttal in the present case."

2. Public policy

Supreme Court Decision (Chamber for Civil Matters), No 602/2010, of 8 October 2010 (RJ 2010\8009)

Hereditary succession: governed by the national law of the deceased; public policy as a limitation on the application of foreign law: the revocability or irrevocability of a will is not part of Spanish public policy. Hereditary Succession: Joint will in German Law; Null effect of will made in Spain and setting aside the earlier joint will made by a German citizen: the mutual joint will between spouses becomes irrevocable on the death of either one according to the B.G.B., which is applicable pursuant to Article 9(1) of the Civil Code.

"LEGAL GROUND: ONE. [...] A number of preliminary points need to be addressed before going on to examine the grounds of the appeals. First of all, we must consider the rule of international law set out in *Article 9.() of the Civil Code* which provides that *the personal law applicable to natural persons is that determined by their nationality* and that that law governs, inter alia, *succession mortis causae,* a rule referred to in this Chamber's judgment of 2 December 2004. In this case, therefore, German law is applicable since that is the nationality of the deceased whose wills are in dispute, and hence the B.G.B. (*Bürgerliches Gesetzbuch* = Civil Code) must be applied. This deals with joint wills in sections § 2265 to 2273, the first of which provides that *a joint will may only be made by spouses.* Section § 2269 deals with reciprocity in joint wills, as in the present case, and subsection one provides that *if the spouses have made a joint will in which they appoint each other mutual heirs, upon the death of the survivor the estate of both must go to a third party; in case of doubt, the third party is understood to inherit the entire estate of the spouse who dies last.*

And section § 2271, dealing with the revocation thereof, provides, among other things not germane here, that *the right of revocation is extinguished with the death of the other spouse.*

A joint will – which is not admitted in the *Spanish Civil Code (Article 669: two or more persons may not make joint wills*....) but is admitted in the regional laws of some Autonomous Communities (Catalonia, Aragon and Navarre) – is made when the persons, who must be spouses according to the B.G.B., make a common will in a single public document or in a private document, such as a holograph will. Although its desirability is much disputed, it has been admitted in German law since the middle ages and has survived in the B.G.B.

There, an essential feature of the joint will is that its *provisions are mutual and cannot be revoked unilaterally, and after the death of one of the spouses the survivor may only revoke it if he/she renounces what was bequeathed him/her by the predecedent spouse*. In the present case, the record shows that the husband expressly accepted the inheritance from his predecedent spouse, Margrit. Therefore, the freedom of the surviving spouse to testate was limited, as any provisions that he may have made contrary to the earlier joint will are not valid; and if that limit is contravened or exceeded, section § 134 provides that *a legal act that contravenes a legal prohibition is null and void.*

...THREE. The appeal in cassation was brought by the plaintiff María Virtudes, who alleges infringement of *Article 12(3) of the Civil Code*, which provides that *in no*

case shall the foreign law be applicable if it is contrary to public policy, in relation to Articles 737 and 739 of the Code, according to which wills are revocable – in Spanish law of course. In support of this ground the appellant repeatedly insists throughout that the revocability of wills is a principle of public policy that bars the application of a foreign law which makes wills irrevocable, even in the case of a joint will. The concept of public policy in private international law is one of a number of particular aspects of the general notion in the Spanish legal system. When *Article 12(3) of the Civil Code* introduces the public policy exception in remittal to a foreign law, that places an absolute limit on the application of that law. However, it is an indeterminate concept that embraces the set of values or principles which inspire and govern the national legal system, operating as a benchmark for its proper functioning. *Public policy* might be said to lay down the 'minimum conditions' to which the existence of the legal system is subject; these are the conditions that operate to 'safeguard the integrity of the legal system'. Simply put, it is the ideal system of values that inspires the legal system as a whole. It means that the system is absolutely binding and irrevocable and acts as a screen to deny legal force and inclusion in the national system to foreign laws that clash with it. That is the situation contemplated in *Article 12(3) of the Civil Code*, but it is not the one contemplated in the special rule imposing irrevocability when it is sought to unilaterally revoke a joint will. Since Spanish law, in the variants of Aragon, Catalonia and Navarre, allows joint wills, the irrevocability of which in certain cases – essentially revocation by only one of the testators – is part and parcel of the very concept, it cannot be a matter of public policy. However vague, the entire concept is such as to bar consideration of the revocation or irrevocability of a particular will as a matter of public policy: it is not one of the principles inspiring and governing our legal system; it is not a benchmark for its proper functioning; it is not one of the minimum conditions to which the existence of our legal system is subject; and it is not a condition that operates to safeguard the integrity of the legal system. This ground is therefore rejected. The court cannot entertain submissions regarding particular documents nor the submission regarding proof of the German law, with which this Chamber is familiar and which do not appear as such a ground in the preparation, presentation and citation of an allegedly infringed rule. [. . .]"

VII. NATIONALITY

Supreme Court Decision (Chamber for Administrative Proceedings, Section 5), No 5507/2006, of 26 February 2010 (RJ 2010\1571)

Denial of nationality by reason of residence: person not sufficiently integrated in Spanish society (polygamy is contrary to Spanish public policy).

"LEGAL GROUND: . . . FOUR. [. . .] Given the fact – which the Court considers sufficiently proven – that the applicant has a polygamous family structure in his country of origin, it remains only to reiterate once again what this Court said in judgments of 14 July 2004, 19 June 2008 and 14 July 2009, to wit that polygamy is not simply something contrary to Spanish law but is intolerable to Spanish public policy, which in all cases sets an impassable limit on the enforceability of foreign laws (Art. 12(3) of the Civil

Code). If we define public policy as the set of fundamental and inalienable values upon which our entire legal system rests, polygamy is clearly incompatible with it, if only because polygamy is premised on inequality between men and women and the submission of the latter to the former. Polygamy is so alien to Spanish public policy that the act of contracting matrimony while a previous marriage is still valid is a criminal offence in Spain (Art. 217 of the Penal Code). It is therefore perfectly lawful for the Spanish Administration to consider that someone whose marital status is contrary to Spanish public policy has not accredited 'sufficient integration in Spanish society'."

Supreme Court Decision (Chamber for Administrative Proceedings, Section 6), No 1078/2007, of 11 May 2010 (RJ 2010\4943)

Acquisition by reason of residence: fulfilment of requirements, namely ten years' continuous legal residence immediately prior to application. The mere lapse of the Community resident's family card does not mean that the holder automatically ceases to be legally in Spain.

"LEGAL GROUND: ONE. [...] The background to this case, according to the judgment here challenged, is as follows:

1) On 9 April 2002 the appellant, an Algerian national, applied for Spanish nationality by reason of residence.

2) After processing of the case file, the Directorate-General of Registries and Notaries, acting for the Minister of Justice, issued a decision dated 5 March 2004 refusing the appellant's application for nationality.

According to that decision, although the appellant had been legally resident in Spain for more than ten years, that time had not been continuous immediately prior to the application for nationality; he had been legally separated from his Spanish spouse on 3 January 2002, and therefore thenceforth his Community Resident Family Card was no longer valid since the circumstances warranting its issue no longer held, pursuant to Articles 2 and 7 of Royal Decree 766/1992, as amended by Royal Decree 737/1995. [...]

THREE. The State Attorney is not entirely wrong in denying the importance of the short time elapsing between the loss of validity of the Community resident family card and the application for Spanish nationality by reason of residence, or of the fact that the applicant had custody of the child born to him and his Spanish ex-spouse. This last relates specifically to the requirement of 'integration in Spanish society', also laid down in Art. 22 of the Civil Code, not to the requirement of ten years' legal residence immediately prior to the application.

And as for the lapse of the card, it is indeed a matter of indifference that this should have happened shortly before the appellant applied for Spanish nationality: part three of Art. 22 of the Civil Code requires that the legal residence of at least ten years occur 'immediately prior to the application' – a requirement that can by no means be described as an indeterminate legal concept. One thing is either immediately prior to another or not; there can be no grey areas or room for doubt.

That said, let it not be forgotten that, as the challenged judgment stressed, when the applicant's card ceased to be valid as a consequence of the separation, he had already more than satisfied the requirement of ten years' legal residence in Spain.

This means that the only basis for asserting that the applicant was not legally resident in Spain at the time of applying for Spanish nationality is to maintain that such a situation is necessarily an automatic consequence of the lapse of the Community resident's family card. However, this was not clearly stated by the Ministry at the time to justify the denial of Spanish nationality by reason of residence, nor was it later argued by the State Attorney in court. It is not clear that simply because the Community resident's family card ceases to be valid its holder automatically ceases to be legally resident in Spain – all the more so where, as in the present case, the applicant was surely entitled to reside in Spanish territory on other counts, such as having custody of a Spanish minor.

It follows, then, that since it has not been established beyond any doubt that the applicant had lost the status of legal resident in Spain at the time of applying for Spanish nationality by reason of residence, the challenged judgment cannot be said to be in breach of part three of Art. 22 of the Civil Code, which provides that the ten years' legal residence must be 'immediately prior to the application'. The appeal in cassation is therefore dismissed."

Decision of the National High Court (Chamber for Administrative Proceedings, Section 8), No 21/2009, of 21 May 2010 (JUR 2010\214884)

Statelessness: status may only be granted if it is shown that it was not possible to obtain the nationality of a State pursuant to its legislation, and therefore denial is appropriate.

"LEGAL GROUND: ONE. Challenge to the Decision of the Minister of the Interior, dated 10 November 2008 denying recognition of Stateless Person status to the plaintiff Luis Pedro.

The decision to deny was founded on the argument that he can obtain Moroccan nationality since his father possessed that nationality. The difficulties involved are of a bureaucratic nature, and the case is therefore one of *de facto* statelessness.

In his action the appellant states that he was born in El Cairo (Egypt) on 17 January 1989, of an Egyptian mother and a Moroccan father. Before he was born his father, a professional soldier, deserted from the Moroccan army and fled to Egypt. There he met the appellant's mother and had several children with her. After a time his father returned to Morocco, where he was imprisoned for desertion. While still a minor the appellant moved to Spain, where he was declared abandoned, and in that situation he applied to be recognised as a stateless person.

Under Article 1 of the Convention Relating to the Status of Stateless Persons, the term 'stateless person' means aperson who is not considered as a national by any State under the operation of its law. Article 34 of Organic Law 4/2000 of 12 January 2000 on rights and freedoms of aliens in Spain and their social integration, as reformed by Organic Law 8/2000 of 22 December 2000, provides that the Ministry of the Interior shall recognise as a stateless person any alien lacking a nationality and meeting the requirements laid down in the Convention. Article 1 of Royal Decree 865/2001 approving the Regulation of Recognition of Stateless Person status provides that such status shall be recognised in the case of 'any person who is not considered as a national by any State under the operation of its law and manifestly lacks a nationality'. Considering that regulation, an examination of the appellant's submissions indicates that he

should have attempted to obtain nationality at least in Morocco where his family currently resides, and in Egypt. However, he has furnished no evidence of having applied for or being refused nationality in either of the two States referred to. There is therefore no proof of the first of the requirements to obtain stateless person status, to wit refusal by the two States concerned to grant nationality. The appellant has not even asked for the examination of evidence in the proceedings, and the record shows no evidence that might persuade the court that he has done anything at all to obtain nationality in Morocco or Egypt since coming of age.

Recognition of Stateless Person status is not an option but is determined by refusal of the States concerned to grant nationality. That poses certain legal requirements which in this case are not shown to have been satisfied. . . ."

VIII. ALIENS, REFUGEES AND NATIONALS OF MEMBER COUNTRIES OF THE EUROPEAN UNION

1. Aliens regime

a) General rules

Ruling of the Constitutional Court (plenum), No 54/2010, of 19 May 2010 (RTC 2010\54)

Question of unconstitutionality in connection with Art. 31(4) of Organic Law 4/2000 of 11 January 2000 on rights and freedoms of aliens in Spain and their social integration, raised in an internal appeal against refusal to issue a work and residence permit by reason of social integration for failure to satisfy the requirement of lacking a criminal record.

"LEGAL GROUND: . . . SIX. [. . .] The Supreme Court [Chamber for Contentious Administrative Proceedings, Section 6], of 7 September 2006 [Appeal No 7201/2001], cited in the administrative appeal here contested, refers to a case of acquisition of Spanish nationality pursuant to *Art. 22 of the Civil Code*, where the applicant was in possession of a Community resident's family card as sanctioned by *Royal Decree 766/1992 of 26 June 1992, Art. 2* c), as the mother of a Spanish minor afflicted with a severe disability. That judgment therefore has no bearing on the case of the administrative procedure at issue here, which concerns not the granting of Spanish nationality by reason of residence but of the granting of an individualised temporary residence permit for exceptional circumstances.

To the contrary, in a decision of 1 December 2003 [Appeal in Cassation No 5479/1999], the Supreme Court [Chamber for Contentious Administrative Proceedings, Section 6], after first noting the circumstances of the case ('On 6 June 1996 the appellant, a Peruvian national holding a validated passport, presented an application at the Government Delegation in Madrid for a visa exemption for the purpose of obtaining a residence permit without the right to work, on the ground that he desired to reside in Spain and was the father of a Spanish national and hence qualified for family reunification with his daughter, her husband and his two grandchildren. His travel document bears a Schengen States visa stamp of the Spanish Consulate in

Lima issued on 15 May 1996 and valid from 25 May to 10 September 1996. He left his country on 26 May 1996'), ruled as follows:

'The contested judgment, which is carefully worded, analyses the problem in detail. After addressing the question of the extent to which the the Judiciary is bound by the limitative list of circumstances contained in that ministerial order, and following a thorough analysis of the applicable legislation and the case-law supplementing it, arrives at the conclusion – one shared by this Chamber – that the denial here contested should be set aside as contrary to the relevant set of rules when this is interpreted in the context of protection of the family and procedural good faith. This is not the place to reproduce the detailed arguments set forth by that Chamber of the Supreme Court, whose conscientiousness in this case deserves our recognition. Suffice it to recall what the Supreme Court has repeatedly stated in similar cases, for example Judgment of the Supreme Court (Chamber 3, section 6) of 14 January 1997, cited in the judgment contested by the State Attorney. For it is indeed the doctrine of this Chamber and section, as expressed in that and other judgments in cases like the present one, that: 'the proven facts warrant dispensing with a visa in a case of legitimate family reunification, since all the members of the family are in Spanish territory and the husband is entitled to work and reside in Spain alongside his underage children, which is an overriding reason to exempt the wife from having to leave Spanish territory in order to obtain a residence visa, and that exemption, contrary to the established rule, has been wrongly denied her. If the Regulation referred to heretofore provides (Article 7(2)) that the spouse of an alien resident in Spain may apply for a visa for family reunification, it is neither reasonable nor justifiable to oblige that spouse, if he or she is also in Spain, as in this case, to leave Spain in order to obtain the visa required to apply for a residence permit. This is undoubtedly one of the situations contemplated in the cited Articles 5(4) and 22(3) of the Regulation approved by Royal Decree 1119(86 of 26 May 1986 on exemption from the visa requirement for residence for exceptional circumstances, as rightly considered by the court of first instance, whose judgment we are therefore bound to confirm, setting aside the appeal brought by the State Attorney in its entirety'.

Turning now to Art. 31.4) of Organic Law 4/2000 of 11 January 2000, as set out in Organic Law 8/2000 of 22 December 2000 ['4. A temporary residence permit may be granted for humanitarian reasons, for exceptional circumstances or when there is evidence of social integration, in those cases contemplated by the law'], the Supreme Court [Chamber for Contentious Administrative Proceedings, section 5] Judgment of 5 July 2007 [Appeal in Cassation No 1345/2004] noted that such expressions are 'Genuinely indeterminate legal concepts that bar any attempt by the Administration to exercise discretionary powers; having said which, evidently the party invoking them must show that they are relevant to the case and prove that the requisite circumstances arise'.

And as for Art. 45, and likewise point 4 of the first additional provision of the Regulation approved by Royal Decree 2393/2004, we would cite the judgment of the Chamber for Contentious Administrative Proceedings [Section 4] of the Supreme Court of 08/01/2007 in contentious-administrative appeal No 38/2005 against Royal Decree 2393/2004 of 30 December 2004, which stated that: 'With regard to this rule

we cannot accept the argument that failure to incorporate situations provided for in the previous Regulation is unlawful by omission, for the Government is free not to regulate them. Moreover, that applies equally to the point at issue here and to authorisation for humanitarian reasons. The regulation on this point is not exhaustive, and apart from the fact that Article 31(3) of the Organic Law is directly applicable, there are other points which contemplate authorisations of this kind, for instance Article 94(3) in respect of children, and point 4 of the First Additional Provision. In any case such a challenge cannot be entertained. This is the implementation of a Law and therefore the literal wording of the articles is not unlawful; and even situations not provided for may be dealt with by directly applying the Organic Law or else other statutory provisions.'

From which we may conclude that the situation as stated by the appellant when applying for a temporary residence authorisation, citing the circumstance of being an ascendant of a minor holding Spanish nationality by birth as assumed in a simple declaration by the Registrar, comes within the meaning of Section 4 *in fine* of the first additional provision of the Regulation approved by Royal Decree 2393/2004 of 30 December 2004 as an exceptional circumstance not contemplated in Art. 45 of the Regulation approved by Royal Decree 2393/2004. For this is one which in the earlier regulation was listed among the exceptional circumstances warranting exception from the visa requirement [Royal Decree 864/2001, Art. 49: 'The competent authorities may exceptionally grant an exemption from the visa requirement, according to Article 51(5) of this Regulation, provided that there is no bad faith on the part of the applicant and one of the following situations arises: (...) f) Aliens providing evidence of being direct ascendants or guardians of a minor or disabled person, if that minor or disabled person is Spanish, resides in Spain and lives at the former's expense'], and which in the current regulations must needs be treated in the same way if we are to follow the doctrine laid down by the above-cited judgment of the Supreme Court Chamber for Contentious Administrative Proceedings [Section 4] of 8/01/2007. [...]

LEGAL GROUND SEVEN. Therefore, if we apply the same doctrine to the present issue, we must conclude that there are exceptional circumstances, and since no objection was raised to the application either in the administrative decision or in the statement of defence as regards the formal requirements laid down in point 4 of the First Additional provision in relation to Art. 46 of the Regulation approved by Royal Decree 2393/2004 of 30 December 2004, the correct procedure is to accept the application, either in the terms laid down in point 4 of the First Additional provision in relation to Art. 46 of the Regulation approved by Royal Decree 2393/2004 of 30 December 2004 ['... grant individual temporary residence authorisations ..."]' in relation to Art. 45(7) of the said Regulation, and not in the terms proposed in section 2 of the complaint ['work and residence permit'], and therefore the appeal must be partially upheld and the cited administrative decision overturned as contrary to law [Arts. 70(2) and 71, Law 29/1998 of 13 July 1998]."

c) Family reunification

Judgment of the High Court of Justice of Madrid (Chamber for Contentious Administrative Proceedings, Section 1), No 610/2010, of 25 June 2010 (RJCA 2010\690)

*Residence visa for family reunification by reason of granting of guardianship by the child's parents (*kafala *in Islamic law) improperly refused.*

"LEGAL GROUND: ONE. This contentious-administrative appeal is brought against a decision by the Spanish Consulate-General in Nador, dated 30 May 2006, refusing a residence visa application by the appellant for reunification with her brother Nicanor, pursuant to Organic Law 14/03 of 20 November 2003 reforming Organic Law 4/00 of 11 January 2000 on rights and freedoms of aliens in Spain, and in particular for not being reunifiable relatives.

Against the decisions of the consulate the appellant argues that these are based on insufficient grounds and these are indeed reunifiable relatives given that she was granted the guardianship of her brother, a minor, by Act of *Kafala*, on the date of the visa application.

The State Administration asks for the dismissal of the appeal.

TWO. To arrive at a satisfactory solution to the problem here, we should bear in mind that under the present Spanish aliens system as established by Organic Law 4/2000 of 11 January 2000 on rights and freedoms of aliens in Spain and their social integration, as reformed by Organic Law 8/00 and Organic Law 14/03 – which was applicable at the time of the application – a visa is normally required to enter the national territory. The visa will be issued by Spanish embassies and consulates. Reasons must be given for refusal in the case of residence visas for family reunification or for salaried employment permits and applicants must be informed of the available channels of appeal (Art. 27).

Article 17(1)c) of the same Law provides that aliens resident in Spain are entitled to have family members aged under eighteen or disabled reunified with them in Spain if the alien resident is their legal representative.

THREE. That being the case, we must now ask whether the conditions required by the regulations for granting of the visa application are given in the present case. As we can see, then, the central issue is to determine whether the guardianship (*kafala*) granted to the appellant by the parents of the minor meets the requirements for legal recognition in Spanish territory.

It is true that personal status, family relationships and guardianship are governed by the person's national law (Article 9 of the Civil Code); however, although the appellant bases her appeal on that law, in these proceedings she has not satisfied the burden of proof in respect of the foreign law invoked.

Be it remembered that the decision/circular of the Directorate-General of Registries and Notaries of 15 July 2006 – albeit concerning recognition and registration of international adoptions in the Spanish Civil Registry – classified *kafala* in Islamic law as an institution whereby a minor may enjoy the material care and upbringing of a foster family, but without that constituting a relationship between the *kafils* (the person accepting *kafala* of the minor) and the latter other than a personal obligation whereby the former takes charge of the minor and undertakes to maintain and educate him/her. This creates a situation comparable to fostering [*acogimiento* or *prohijamiento*] in Spanish law (see Decisions of 14 May 1992, 18 October 1993, 13 October 1995, 25 April 1995 and 27 of February and 21 March 2006), wherein the minor participates fully in the family life and the fosterer is obliged to take care of him/her, keep him/her in his/her company, feed him/her, educate him/her and

provide him/her with a proper upbringing, but this does not create new permanent ties, sever existing ties nor deprive the parents of parental responsibility (cf. *Arts. 173 and 173 bis of the Civil Code and decisions of 14 May 1992, 18 October 1993, 13 October 1995 and 1 February 1996*).

That Decision/Circular further declared that *kafala* is a situation that is susceptible of being recognised in Spain if it has been duly constituted by a foreign authority, as long as it is not contrary to Spanish public policy, and if the documents recording it are presented in duly legalised form and translated into an official Spanish language.

However, the issue needs to be further qualified when addressed in connection with an application for an entry visa to Spain for an alien minor from a country with a Koran-based legal tradition for purposes of family reunification. In this respect the Directorate-General of Immigration instruction of 27 September 2007 sought to address the issue and clear up any doubts as to what kind of family situation *kafala* is assimilable to. It concluded that it does establish a legal relationship between the Spanish citizen, or alien resident in Spain, and the alien minor comparable to guardianship when awarded not by the biological parents but by a Public Authority, be it administrative or judicial, in which case the Spanish citizen or resident alien may be considered the legal representative of the alien minor, and on that basis the fostering arrangement could be deemed permanent and family reunification would be a valid means of having the minor transfer his residence to Spain.

However, that is not so in the present case, where *kafala* was granted by the child's biological mother, who acknowledged the fact in sworn testimony.

Given the circumstances, then, the *kafala* granted in favour of the appellant cannot be accepted as producing the legal effects claimed in the action; that is not possible under our Civil Code, Article 154 of which provides that parental responsibility must always be exercised to the benefit of the offspring and includes the duties and powers of looking after them, keeping them in their company, feeding them, educating them, providing therm with a proper upbringing, representing them and administering their property.

We should note that the doctrine and the case-law are unanimous in considering that the right of parents to parental responsibility for their under-age children is a right or function that transcends the strictly private sphere and whose exercise is therefore obligatory rather than optional for the subject. It cannot therefore be assigned or renounced; the bearer may not abandon it, and it can only be extinguished for legal reasons as set out in Articles 169 and 170 of the Civil Code, namely by reason of the death or declaration of decease of the parents or of the child, by the adoption of the child or by a court decision founded on failure to perform the duties inherent in parental responsibility or handed down in a criminal or matrimonial action.

Our legal system does not allow parents freedom of disposal in respect of the right or function of parental responsibility, and therefore the appellant cannot be considered her brother's guardian for purposes of family reunification. The proper course is thus to dismiss the contentious administrative appeal, as the legal grounds of the challenged decision have not been rebutted. [. . .]"

2. Right of asylum

Supreme Court Decision (Chamber for Administrative Proceedings, Section 5), of 19 February 2010 (RJ 2010\1544)

Right of asylum: appeal in cassation upheld in view of sufficient indications that the applicant suffered political persecution in his country, Colombia, and no further proof is necessary.

"LEGAL GROUND:... TWO. The sole ground of this appeal in cassation, based on Article 88(1)d) of the Judiciary Act, argues that the appealed judgment is in breach of Article 3, in relation to Article 8 of Law 5/1984 of 26 March 1984 regulating the Right of Asylum and Refugee Status, Article 1 of the Geneva Convention, and also Article 17 of the said Asylum Act. The first point on which the legal ground is based is the account contained in the asylum application of the circumstances that prompted the appellant to leave his country, Colombia, and come to Spain to seek asylum. The second is an objection to the appealed decision, to the effect that *'he alleges persecution for political reasons, providing a detailed account and supporting documents, and we consider that there is good reason to believe that there have been cases of persecution in Colombia and that his fear of suffering such is warranted'*. It analyses the substance of the appealed decision. And lastly, it transcribes some paragraphs of the conclusions presented in the contentious-administrative appeal and concludes with an argument as to the applicability of humanitarian reasons in the case as provided in Article 17(2) of the Asylum Act. The State Attorney, for his part, alleges that there has been no persecution nor is there any rationally-grounded fear of persecution. And again, no proof is offered or any other indication regarding the alleged persecution.

THREE. The ground raised for cassation must be admitted, for despite the brevity of the argument, it offers a succinct account of the reasons why the challenged decision is in breach of the rules. Specifically, we believe that it is in breach of Article 8 of the Asylum Act. For the asylum application to be successful, according to Article 8 of the Asylum Act following the reform introduced by Law 9/1994 of 19 March 1994, it is sufficient that there be 'sufficient grounds', depending on the nature of the particular case, to conclude that the applicant satisfies the requirements referred to in Article 3(1) of the said Act. It follows from this article, then, that for the right of asylum to be granted, it is enough that there be *sufficient grounds* for a reasonable fear on the applicant's part of being persecuted for reasons of race, religion, nationality, membership of a certain social group or political opinions. In short, there does not have to be conclusive evidence of the facts on which the application is founded. In other words, when a denying decision is founded on the requirement of a qualitatively stricter level of proof than the law demands, which is sufficient grounds, the decision is in breach of Article 8 of the Asylum Act. We must conclude that the argument in the decision, particularly in the fifth ground, in the terms transcribed here in the ground above, is in breach of Article 8 of the Asylum Act in requiring conclusive proof of the facts alleged in the application. Hence, we cannot entertain the references made in the decision to the effect that 'for the protection entailed in the right of asylum to be justified, *evidence* must be produced to confirm not only

the state of insecurity in the country of origin, but also that this directly affects the applicant', or that the facts 'in addition to *not being proven* (. . .)'.

FOUR. Be it said in this connection that while grounds do not mean conclusive evidence, as they do not entail the same degree of certainty as the latter, such certainty is not required in cases of this kind. Thus, although the facts on which the asylum application is founded have indeed not been accredited or proven, there are sufficient grounds for the purposes of Article 8 of the Asylum Act; various documents have been submitted – his employment as a supervisor at the university, photographs of wall-paintings threatening the appellant and other persons, and of course the reports to the authorities – showing the threats to which he was subject and which produced in him a reasonable fear of persecution in his country of origin. Moreover, the appealed decision entirely passes over the documentation submitted by the appellant along with his statement of claim, and hence omits any evaluation of that documentary evidence. The claim was accompanied not only by reports on the general situation in Colombia, such as reports by Amnesty International, but also various other documents showing how the general lack of security in his country of origin particularly and specifically affected the appellant here and the claimant of asylum in the original proceedings. For instance, he submitted the complaints made to the authorities following receipt of the threats, accreditation of his position as supervisor at Universidad del Valle, and he also submitted photographs of the messages painted on walls at the university threatening various persons including the applicant for asylum, and yet the court of first instance made not the slightest allusion or reference to that evidence. For all those reasons we accept this ground and consequently find that the appeal in cassation was proper and the contentious-administrative appeal is upheld."

IX. NATURAL PERSONS: LEGAL PERSONALITY, CAPACITY AND NAME

3. Name

Instruction of the Directorate General of Registries and Notaries of 24 February 2010 (JUR\2010\58561)

Civil Registry: Surnames: recognition of surnames registered in the Civil Registries of other EU member countries: Spaniards born outside Spain in the territory of an EU Member State whose birth is registered in the local Civil Registry of his/her country of birth with the surnames determined by the laws of that country, provided that at least one of the child's parents is a permanent resident there, may be registered with the same surnames at the requisite Spanish Consular Civil registry; registration of the birth in the Spanish Civil registry with the surnames given and registered in the foreign Civil Registry: requirements and exception; when the application to opt for the surnames corresponding to the place of birth is formally made to the Spanish Consular Civil Registrar subsequent to registration of the child's birth in that Registry; and as long as the child remains habitually resident in his/her country of birth, this must be done through the procedural channels for change of

surnames regulated by Articles 57 and following of the Civil Registry Act, but subject to the material criteria in the Judgment of the Luxembourg Court of 14 October 2008 contained in this Instruction, which take precedence over the material requirements laid down in the above-mentioned Act.

"[. . .] The principle of the primacy of Community Law determines that the doctrine laid down by the Judgment of the Luxembourg Court of 14 October 2008 (TJCE 2008, 235) in *Grunkin-Paul* must take precedence over the rules of internal Spanish law, according to which the name and surnames of Spanish nationals, even if they also possess another nationality, are regulated by the Spanish law (cf. Art. 9(1) and (9) of the Civil Code), which in these matters is basically contained in Articles 109 of the Civil Code and 55 of the Civil Registries Act (and also in the 19th Convention of the International Commission on Civil Status, done at Munich on 5 September 1980 and applicable to Spain since 1 January 1990, on the law applicable to surnames and forenames).

The purpose of this Instruction is to clear up any doubts that may arise in the practical application of the doctrine established by that Judgment and setting out the criteria and guidelines that will govern the practice of registries in these matters, with a view to achieving a desirable uniformity and legal certainty in the work of Spanish Registrars.

I. Through the request for a preliminary ruling in the *Grunkin-Paul* case the referring Court put the question of whether '[i]n light of the prohibition on discrimination set out in Article 12 of the EC Treaty and having regard to the right to freedom of movement for every citizen of the Union laid down by Article 18 of the EC Treaty, is the provision on the conflict of laws contained in Article 10 of the EGBGB valid, in so far as it provides that the right to bear a name is governed by nationality alone'. In practical terms this is tantamount to questioning whether the cited Articles 12 and 18 EC bar the competent authorities of one Member State from refusing to recognise a child's surname as it is determined and registered in another Member State where the child was born and has lived ever since, which child, like his parents, possesses only the nationality of the first Member State.

II. The Court of Justice acknowledged that in the present state of EC Law the rules governing a person's surname are the province of the Member States, but at the same time it warned that these must observe Community law when exercising that competence in cases which are not strictly internal and hence have some connection with Community law. The Court had already declared that such a Community dimension existed in the case of children who are nationals of one Member State and are legally resident in another Member State (see Judgment of 2 October 2003 in *García Avello*, C– 148/02). Now again, in the ruling of 14 October 2008 on *Grunkin-Paul*, the Court declared that there is a connection with Community law even although in this case, unlike the one cited above, there is no situation of dual nationality, since both the father and the mother, like the child, possess only one nationality (German). In this respect it stressed that, from the point of view of safeguarding the principle of freedom of movement and residence in the territory of another Member State, it is a matter of indifference whether the difficulties arising from differences in surnames, which can place constraints on that principle, are a consequence of the dual nationality of the

parties (the *García Avello* case), or of the fact that in the Member State of birth and residence the determination of the surname is linked to residence, as is the case in Denmark, while in the State of which the parties are nationals such determination is linked to nationality as in Germany (*Grunkin-Paul* case).

III. The Court of Justice considers that 'having to use a surname, in the Member State of which the person concerned is a national, that is different from that conferred and registered in the Member State of birth and residence is liable to hamper the exercise of the right, established in Article 18 EC, to move and reside freely within the territory of the Member States' when differences of surnames cause serious problems, both professional and private, for the persons concerned owing to the difficulties such a situation causes for proof of identity. These serious problems arise in the case of the principal action, where the child whose surname is in dispute has close relations both with Denmark (where he is resident) and with Germany (his country of nationality, where his father lives).

IV. The Court took the view that a constraint on freedom of movement like the one described, arising from the rule in German law – shared by many other Member States – whereby determination of the surname is exclusively linked to the individual's nationality, would only be justifiable for objective reasons proportionate to the end pursued, and it ruled that these requirements were not met by the arguments put forward by the German government based on the idea of assuring that the person's surname is determined in a certain and continuous manner, given that that end is thwarted if the individual is forced to change his surnames every time he crosses a border. Other arguments put forward by the German government, such as the criterion of maintaining the same surname between siblings, cannot be accepted as a decisive element in the present case since the problem does not arise in the principal action. Finally, the Court stressed that no issue of public policy had been invoked in the proceedings as contrary to recognition by the German authorities of the surname given and registered in Denmark.

Based on these considerations the Court declared that 'in circumstances such as those of the case in the main proceedings, [Community law] precludes the authorities of a Member State, in applying national law, from refusing to recognise a child's surname, as determined and registered in a second Member State in which the child – who, like his parents, has only the nationality of the first Member State – was born and has been resident since birth'.

Therefore, in exercise of the powers vouchsafed it by Article 9 of the Civil Registry Act and Regulation and Article 7 of Royal Decree 1125/2008 of 4 June 2008, this Directorate-General has decided to lay down and make public the following guidelines:

One: Spaniards who are born outside Spain in the territory of a Member State of the European Union and whose birth has been registered in the local Civil Registry of his/her country of birth with the surnames determined by application of the laws of that country may, provided that at least one of the child's parents is habitually resident there, register the child with the same surnames in the competent Spanish Consular Civil Registry.

Two: The above rule will apply even if the surnames with which the child is registered at the foreign Civil Registry of his/her country of birth are not those that would have resulted from the application of Spanish law if in the child's country of birth the point of connection for determination of surnames is not the law of his/her nationality but of the habitual residence, even if the child does not possess the nationality of his/her country of birth in addition to Spanish nationality.

Three: Registration of the birth at the Spanish Civil Registry with the surnames determined and registered in the foreign Civil Registry shall be subject to the following requirements:

1. The birth must have taken place outside Spain but within the territory of another Member State of the European Union.

2. Both parents, or at least one of them in the case of bilateral determination of filiation by both lines, or the sole parent whose filiation is determined, must have their habitual residence in the country where the child was born.

3. The legislation of the country of birth on Private International Law must apply the criterion of habitual residence to the determination of surnames.

4. The entry of the child's birth in the Civil Registry of the country of birth must show the surnames appropriate under the material laws of that country, and any reference in its rules of conflict to laws other than those of Spain cannot be accepted (cf. Art. 12(2) of the Civil Code).

5. The option of the surnames as determined according to the law of the country of birth must be requested by both parents, or by one of them with the consent of the other, in accordance with the general principle set out in the first paragraph of Article 156 of the Civil Code, unless one of the parents has been relieved of or suspended from parental responsibility.

Four: Exceptionally, the rule set out in the first guideline of this Instruction shall not apply, even where the above-mentioned requirements are met, in the following cases:

1. Where surnames determined in accordance with the foreign law of the country of birth are contrary to Spanish public policy. The public policy exception in this respect applies in the cases contemplated in the third guideline of the Instruction issued by this Department on 23 May 2007 on surnames of foreigners acquiring Spanish nationality, and any other case where the paramount values of the Spanish legal system are infringed.

2. Where application of the rule in the first guideline would result in an infringement of the principle of uniformity of surnames between full siblings in that the surnames entered in the foreign local Civil Registry would be different from the ones legally borne by another, older child with the same filiation (cf. Art. 55 of the Civil Registry Act).

Five: Where the application to opt for the surnames appropriate under the law of the place of birth is made to the Spanish Consular Civil Registrar at a later date than the registration of the child in that Registry, provided that the child remains habitually resident in the country of birth, it must be processed through the procedural channel for registration of changes of surname regulated by Article 57 and following

of the Civil Registry Act, but a decision must be based on the material criteria set out in the Judgment of the Luxembourg Court of 14 October 2008 as interpreted in this Instruction, which shall take precedence over the material requirements laid down in that Act.

Six: Cases of differences in surnames arising out of conflicts of laws produced by pluri-nationality of children born in Spain in the case of Spaniards who also possess the nationality of another member country of the European Union shall be settled in the manner provided in this Department's Instruction of 23 May 2007 on surnames of persons acquiring Spanish nationality and their entry in the Spanish Civil Registry."

X. FAMILY

1. Filiation and parent-child relations

Decision of No 15 Court of First Instance of Valencia (No 193/2010) of 15 September 2010 (JUR 2010\412270)

Cancellation of the registration in the Consular Civil Registry of Los Angeles (and ordered by the DGRN–Directorate-General of Registries and Notaries) of minors Carlos María and Ángel, both born under a surrogacy contract prohibited by Spanish law. The bearer is considered to be the legal mother of the child and the adopters are a homosexual couple.

"LEGAL GROUND:... THREE. [...] There is no doubt that Law 14/2006 is a Spanish law and hence the registrar is compelled by this Article 23 to determine whether the foreign certification infringes that law, and therefore in order to settle the matter we need to determine whether or not the law has been infringed.

1. A contract whereby a woman agrees to bear a child and renounce her maternal filiation in favour of a contracting or a third party is legally null and void.

2. The filiation of children born under a surrogacy arrangement shall be determined by their birth.

The first question that arises is whether this is a case of surrogacy. As noted at the outset, the documentary evidence furnished is confined to certificates and testimony of the decisions given. No evidence is provided or offered as to whether or not there was a surrogacy arrangement, but that is the assumption both in the order and in the appeal and is accepted by the parties, who at no time have denied that this is the case. The defence of Bienvenido and Genaro argues that what the public prosecutor is asking is for the court to check on the legality of documents not submitted in the proceedings; but that is not the nature of this procedure, whose purpose is to determine the legality not of the certificates but of the decision of the Directorate-General of Registries and Notaries, and given that the Directorate-General assumes on the basis of the dossier that this is a case of surrogacy and bases its decision on that assumption, the fact cannot be said to be controversial. [...]

According to Article 10 surrogacy contracts are null and void regardless of whether or not a price is stipulated. It is true, as the State Attorney has argued, that the law does not provide for any administrative penalty attaching to a declaration of nullity

of the contract, nor does the conclusion of such an agreement carry any criminal charge, but that simply means that there is no penalty attached to the agreement of the parties expressed in the contract; it does not mean that no legal consequences ensue either from the making of the contract or from its result – to wit, the children born of a surrogacy arrangement. The law expressly provides that their filiation is determined by the act of birth; in other words, the filiation of a child so conceived is determined by the law of the mother who bore it, and Spanish law expressly forbids the registration of filiation in the name of any person other than the birth mother. In short, the Spanish legislation prohibits surrogacy, and given that Article 23 of the Civil Registry Act obliges the consular registrar to examine the the legality of the certificate issued by a foreign registry in the light of Spanish law before it can be entered in the Spanish Civil Registry, since surrogacy is prohibited in Spain, any attempt to register in such a way must be prevented.

FOUR. The first argument proffered in the DGRN decision to the effect that registration does not infringe Spanish international public policy is couched in terms of a syllogism, thus: if adopted children can have two male parents and the law makes no distinction between adopted and natural children, then natural children must be able to have two natural male parents. The argument contains its own disproof: natural children cannot have two natural male parents for the simple reason that in the present state of the science, men can neither conceive nor give birth.

The second argument is that not to allow registration of filiation in the civil registry with the two males as natural parents cannot be entertained nowadays as it is discriminatory against persons of the same sex. But the bar on registration does not arise from the fact that the applicants are males, but from the fact that the babies were born as a consequence of a surrogacy contract, and in such a case this legal consequence would apply alike to a couple of males, a couple of females, a male or a female alone, or a heterosexual couple, for in such cases the law does not distinguish between sexes; the determining factor is the manner of the birth. In cases of women or heterosexual couples the problem may possibly arise of whether the registrar is aware that there is a surrogacy arrangement, but once that is known, the outcome must be the same, namely refusal of registration, as happened in a similar case in France; there, however, it was a heterosexual couple, the Mennessons, who were not allowed to register twins at the French consulate in Los Angeles because the failure of the wife to produce evidence of the birth raised a suspicion of surrogacy. This cannot therefore be considered a discriminatory decision.

The third argument is that it is in the paramount interest of the child to register the filiation in the Spanish Civil Registry as it appears in the foreign registry, as otherwise the children might be deprived of registration of their filiation in the Civil Registry and children are entitled to possess a single identity. That assertion is undoubtedly true, but the end does not justify the means. The Spanish legal system possesses sufficient ways and means to achieve that concordance and have the children registered in the names of Bienvenido and Genaro, but the achievement of that end does not legitimise actions contrary to that public policy; that must be done through the channels provided by Spanish law.

The next argument is based on the assertion that there is no legal obstacle to prevent registration in the name of two Spanish males. This is merely reiterative, and we have already stated that it is a matter of indifference that they be two males, but that there is indeed an obstacle to such registration, to wit, Article 10 of Law 14/2006 in relation to Article 23 of the Civil Registries Act.

The last of the arguments is that there has been no fraudulent forum shopping on the part of the parties. Without going into whether or not the action was fraudulent, what is clear is that we have a Spanish couple who went to California, an American State where, like others in the same country and several other countries around the world (Belgium, Russia, India and others), surrogacy is legal, unlike in Spain. There is only one possible explanation for their action: clearly, they were aware that surrogacy is forbidden in Spain and that were the children born in this country they could not be registered as the natural children of the two, and that is precisely why they went to California, knowing that it is allowed there and that the babies could be registered in the civil registry there as their natural children; but they were also aware that Spanish registries raise objections to registration in the manner they sought. Nonetheless, they took the risk and acted in the knowledge that at any of the successive stages up to the present, and even at future stages, their wish to have the children registered as their natural offspring could be denied, and would most certainly be denied were the birth to take place in Spain. Therefore they decided go to the USA and had to be prepared to accept the consequences of that decision."

Instruction of the Directorate General of Registries and Notaries of 5 October 2010 (JUR\2010\58561)

Civil Registry: Registration of birth abroad under surrogacy arrangements: Ways of proceeding: requirements for proceeding: by decision of a competent court; enforcement in Spain of a foreign judgment; analogous cases of foreign procedures; requirements of Spanish incidental verification of legality.

"One. 1. The birth of a child abroad under surrogacy arrangements can only be registered by presenting, along with the application for registration, the decision handed down by a competent court determining the filiation of the child.

2. Unless there is an applicable international convention, a request must be received for enforcement of the foreign judicial decision following the procedure provided in the 1881 Civil Procedure Act. Before the birth can be registered, the application for registration and the court order concluding the said enforcement procedure must be presented at the Civil Registry.

3. Notwithstanding the foregoing, if the foreign judicial decision should be the outcome of a procedure analogous to Spanish voluntary jurisdiction proceedings, the Registrar shall incidentally verify, as a prerequisite for registration, whether such a jurisdiction of decision can be recognised in Spain. Such incidental verification must show:

a. that the foreign judicial decision and any other documents presented are formally in order and authentic;

b. that the court of origin bases its international jurisdiction on criteria equivalent to those applied in Spanish law;
c. that the procedural rights of the parties, particularly those of the biological mother, have been guaranteed;
d. that there has been no infringement of the paramount interest of the child or of the biological mother's rights. In particular, it must be verified that the latter's consent was given freely and voluntarily, without any error, dolus or violence, and that she possesses sufficient natural capacity;
e. that the judicial decision is final and that the consent of the parties is irrevocable or else, if there is a revocability period under the applicable foreign legislation, that such period has expired without any party with the right of revocation having exercised that right."

3. Matrimony

c) Marriages of convenience

Judgment of the High Court of Madrid (Chamber for Administrative Proceedings, Section 1), No 603/2010, of 18 June 2010 (ROJ 2010/12753)

Appeal granting residence visa for purposes of family reunification against decision of the Spanish Consulate in Santo Domingo. The hypothesis of a marriage of convenience is not strong enough to warrant application of Art. 43(4) of the Aliens Regulation, that is to raise what is no more than a suspicion or intuition to the category of indicative evidence.

"LEGAL GROUND:... TWO. [...] To prove adequate mutual knowledge of the contracting parties' basic personal details, it is quite useful, in view of their degree of elaboration, to follow the rules set out in the Instruction of the Directorate-General of Registries and Notaries of 31 January 2006 on marriages of convenience, which in turn takes account of the Decision of the Council of the European Communities of 4 December 1997 on the measures that should be taken to combat marriages of convenience (OJEC C 382 of 16 December 1997).

While recognising that there can be no 'set list' of basic personal and family details that must necessarily be known, for that may depend on the particular circumstances, one can accept an 'approximate list' with the most common basic personal and family details that contracting parties ought to know about each other. These details are: date and place of birth, address, occupation, significant likings, well-known habits and nationality of the other party, previous marriages, number and basic identifying details of each other's closest relatives (non-shared children, parents, siblings), and the factual circumstances in which the parties met.

Such knowledge in one party of the basic personal details of the other must evidence familiarity with the 'conceptual core' of that information, without the need to go into exhaustive detail. And ignorance of any isolated basic detail is not sufficient to automatically infer that a marriage is simulated. The proper course is therefore to conduct a global assessment of the knowledge or lack of knowledge of one party with respect to the other.

Also, there are 'personal details' of a party that must be considered 'accessory' or 'secondary' and hence not relevant. Such 'accessory personal details' would include personal knowledge of the other party's family members (not knowledge of their existence and basic identifying details such as names or ages) and the facts of the past lives of either party. Knowledge or lack of knowledge of such 'non-basic' personal details is simply an element that can help to reach a conclusion, but by themselves they are not sufficient to support an inference as to whether or not a marriage is simulated. [. . .]

The hypothesis of a marriage of convenience is not strong enough to warrant application of Art. 43(4) of the Aliens Regulation, that is to raise what is no more than a suspicion or intuition to the category of indicative evidence, especially when the justification given by the Consulate refers more to ignorance of personal details than to the absence of relations between the spouses and given that, as we have stressed, by its very structure inferential reasoning requires – other than in obvious cases – at least some explanation of the path whereby the conclusion was arrived at."

Judgment of the High Court of Madrid (Chamber for Administrative Proceedings, Section 1), No 870/2010, of 8 October 2010 (ROJ 2011/33508)

Simulated marriage or marriage of convenience entered into for money. In cases involving indicative evidence, it is not satisfactory to set out the conclusion arrived at or a summarised assessment without explaining the deductive path followed and the particular factual circumstances or objective elements leading to the belief that a marriage is simulated. When following an assumption it is essential to state the line of reasoning that led the Consulate to make such an assumption. If the wife has demonstrated knowledge of personal details of the husband and there has been no question of the existence of relations before and after the marriage, according to the general principle of good faith, the assumption must be that the marriage is not simulated.

"LEGAL GROUND: . . . TWO. [. . .] The details from which the simulation of matrimonial consent can be inferred, as the DGRN reminds us in its Instruction of 31 January 2006 on marriages of convenience, are firstly lack of knowledge in one or both parties of the basic personal and/or family details of the other, and secondly the absence of relations between the contracting parties.

In cases of an interview to rule out the possibility of a marriage of convenience, it is likewise to be recommended that the questionnaire address the knowledge of basic personal and family details of the spouse, for which it must have sufficient quantitative and qualitative depth, for if it is very brief, it is difficult to make a proper analysis in support of a hypothesis of simulation. Ignorance of some isolated personal detail cannot be considered sufficient to support an automatic inference that the marriage is one of convenience, and the proper course is to make a global assessment of the level of knowledge or ignorance of one party with respect to the other.

In the case in point, if the elements founding the inference are the ones noted in pencil on the file – namely that the spouses had been married less than a year, that the spouse for whom reunification is sought left in 2006 for reasons of work, and that there is an age difference of 9 years – then the presumptive process is faulty, for the parameters of experience (implicitly) applied are wrong.

Also, leaving aside the pencilled notes, there was one very striking answer in the interview. This was regarding Juan Francisco's journeys back to his country, where the applicant says that he returned in 2008 because one of his sisters fell ill – she could not remember in what month – then returned to marry in October (when the marriage certificate shows the date as 19 May 2008).

In fact at the start of the interview the applicant was asked about the date of her marriage and gave the correct date, 19 May 2008; it could therefore very well have been a simple mistake when she said that Juan Francisco returned in October to be married, and in any case such an isolated mistake about an isolated detail is not sufficient to found an automatic inference that the marriage is simulated, for in such cases the assessment of the knowledge or ignorance of one party with respect to the other must be a global one.

Earlier in these proceedings supporting documents were presented for the dispatch or remittances by the appellant to his wife, dated 3 March 2008, 5 July 2008, 31 October 2008, 6 November 2008, 4 February 2009, 1 April 2009, 7 August 2009, 30 November 2009, 30 December 2009 and 27 January 2010.

Therefore, although the sending of remittances cannot be considered sufficient to demonstrate the authenticity of a marriage, the fact is that the Consulate never questioned either the existence of relations before and after the marriage or ignorance of basic personal details of the other spouse. Ascension provided those personal details of her husband about which she was asked and these were correct (albeit, as we noted, the questionnaire is rather short). Therefore, if she demonstrated knowledge of these details and there is no question of the existence of relations before and after the marriage, following the general principle of presumption of good faith it must be presumed that the marriage is not simulated, and hence the appeal is upheld."

Judgment of the High Court of Madrid (Chamber for Administrative Proceedings, Section 1), No 916/2010, of 21 October 2010 (ROJ 2011/33526)

In cases of marriages of convenience, absent direct proof of simulation and of real intent to defraud by the parties, the evidence in support of a presumption must offer a high degree of certainty, for the existence of fraudulent intent can only be accepted if it is established unequivocally. The difference in age between the spouses is not an experience-based rule but a matter of prejudice.

"LEGAL GROUND: . . . TWO. To address the problem of whether a marriage is genuine, we need to look at the basic details from which to infer a simulation of consent to marry, which it has been the practice of this to divide into two parts: a) ignorance on the part of one or both of the contracting parties of the 'basic personal and/or family details' of the other; and b) absence of prior relations between the parties. One of the criteria for evaluation of these elements is that where one party is familiar with the 'basic personal and/or family details' of the other party, there must be considered and presumed to be genuine 'consent to marry'.

The basic personal details according to the Decision of the Council of the European Communities of 4 December 1997 on measures to be adopted on the combating of marriages of convenience (OJEC C 382 of 16 December 1997) concern the date and place of birth, address, occupation, significant likings, well-known habits and nationality of

the other party, previous marriages, number and basic identifying details of each other's the closest relatives (non-shared children, parents, siblings), and the factual circumstances in which the parties met.

In the interview Julia demonstrated adequate knowledge of these basic personal and family details of the appellant (she said she knew his names and number of his siblings, etc.).

At the same time, as regards proof of the existence of genuine relations between the parties, these may be relations before or after the marriage and may be personal relations (visits to Spain or to the foreign country of the other party), or else letters or telephone calls or relations through other media such as the Internet. In this case the interview does not provide a great deal of information on the subject, for no questions were asked regarding these elements; however, the witness evidence is clear in that respect, providing details of these relations through the husband's journeys to his country.

As regards cohabitation, following the highly-developed criteria of the Directorate-General of Registries and Notaries, which takes into account the Decision of the Council of the European Communities of 4 December 1997 on measures to be adopted on the combating of marriages of convenience, we should note that details or facts concerning the marriage that do not bear on the mutual personal knowledge of the parties or the existence of prior relations between them lack sufficient weight of themselves to support an inference of simulation.

The list of facts which are insufficient of themselves to support the hypothesis of a simulated marriage includes precisely that the parties do not live together, or even that they have never lived together where there are circumstances that prevent it, such as the impossibility of travelling for legal or economic reasons (see DGRN Instruction of 31 January 2006 on marriages of convenience). The file is too scanty to tell if such exceptional circumstances exist.

There is another very important element in such an examination, namely that the existence of children in common is sufficient evidence of 'personal relations'. However, in the interview it was stated that there were no children in common.

All in all, then, it would seem that the conclusion reached by the Consulate regarding a marriage of convenience is founded solely on the difference in age between the spouses, a conclusion that this Chamber cannot entertain given that it is not a rule based on experience but a prejudice – to wit that in matters of the heart the woman should not be older or much older than the man. And since neither subjective intuitions nor prejudices may be used in a line of argument and the spouses, given that they were sufficiently familiar with each other's details and it has been shown that there were relations, the application is upheld."

g) Divorce

Judgment of the Provincial High Court of Mallorca (Section 4), No 24/2010, of 26 January 2010 (ROJ 2010/107)

Divorce in Palma de Mallorca between two Ecuadoran nationals, for whom the applicable law is the law common to the spouses, namely Ecuadoran law, as invoked by the plaintiff.

"LEGAL GROUND:... TWO. [...] In that respect the appellant submits as significant the fact that Lázaro has not proven that he is dependent on public social assistance or that there is any record in the municipal social services of his seeking assistance; moreover, he has not been declared unfit for his occupation or for another kind of employment, and furthermore he is well qualified. These facts, none of which have been denied in rebuttal, mean that the defendant/appellee should be obliged to pay a larger amount of maintenance than was ordered in the first instance. While such maintenance must be less than 500.-# as petitioned in the appeal, since such a claim is not appropriate given the facts of the case, it should be brought up to 300-# per month, the appropriate figure for the situation when examined in the light of the above-referenced doctrine and the legal obligation to award priority to the principle of 'favor filii'. At the same time, it is well-known, despite the arguments of the appellee, that the expenses of two minors of the ages in question, one an adolescent and both studying, more than justify such a figure, which ought obviously to be larger were it not for the straitened circumstances of the father. All this notwithstanding, as noted in the judgment at first instance, should his fortunes improve, the father may be obliged to pay a higher rate of maintenance, which however must, if applicable, be determined by means of the appropriate procedure for amendment of measures. [...]

THREE. Next, as regards the second ground of appeal, the plaintiff/appellant requests that the defendant be obliged to pay half of the extraordinary expenses as follows: [...]

However, as the appellee has noted, such a division is not in accordance with the majority doctrine – also followed by this Chamber – whereby expenses for the payment of school fees, purchase of books and study materials do not qualify as extraordinary expenses inasmuch as many school expenses, largely foreseeable general expenses of education – commonly known as 'regulated education' expenses, such as matriculation fees, books, monthly dues, transport or meals – fall within the meaning of maintenance as defined in Article 142 of the Civil Code, specifically in the chapter on 'education and instruction of the maintainee' and therefore cannot count as extraordinary expenses. [...]"

Judgment of the Provincial High Court of Tarragona (Section 1), No 350/2010, of 30 July 2010 (ROJ 2010/387606)

The High Court rejects the claim for payment of alleged expenses arising from family reunification with a daughter of the appellant, since although an application was made to the Spanish Consulate, there is no record whatsoever to show that the reunification actually took place.

"LEGAL GROUND:... THREE. The appellant here claims payment for alleged expenses arising from family reunification with the her daughter Erika, citing an application for reunification with the child made at the Spanish Consulate by the appellee on 3 August 2009 and basing her claim on Art. 91 of the Civil Code under the heading of family charges.

The claim is rejected since despite the aforementioned application there is absolutely no record of the reunification actually having taken place. The couple arrived

in Spain on 6 August and there is no record of their being accompanied by the appellant's daughter; there was never any cohabitation in this country, and in the appellant's complaint of 24/10/2006 it was stated that the child had remained in Colombia (folio 60), which shows that the reunification never took place. The claim is therefore inappropriate and groundless, and if after the break-up of the marriage the child nonetheless travelled to Spain, that cannot be presented as the reunification of a family group that no longer existed.

FOUR. The second ground of appeal seeks compensatory maintenance of *84,000 # under Art. 97 of the Civil Code* against the goods disposed of in Colombia to defray the costs of the wedding, the abandonment of her employment, the loss of maintenance for schooling that she would have been entitled to for her daughter, all expenses that she had to bear as a result of the break-up, the costs of the aforementioned defence and counsel, and the psychologist's fees.

The claim does not qualify as compensatory maintenance, whose purpose is to remedy the imbalance resulting from the divorce or separation between the situation existing during the marriage and the foreseeable situation following the break-up, given the personal and professional circumstances of the beneficiary, and therefore there would have to have been a period of cohabitation in which the family achieved a certain socio-economic level capable of being compared with the level affecting each of the spouses as a result of the divorce; and since the litigants' cohabitation was either non-existent or was too short to count during the marriage, there is no ground for claiming compensatory maintenance, which moreover was not requested in the first instance. All that was claimed then was monthly maintenance of 1200 #, which could not be included under the heading of matrimonial costs since these apply to a family that is cohabiting and in the present case there is no evidence of this other than the brief periods noted, and the claim is therefore rejected. And be it said that the appeal contains many bald assertions but little or no evidence to support them, in a claim for damages based on a list of items and figures unilaterally drawn up without any supporting evidence.

FIVE. [. . .] The answer to the first question is that such a statement is not essential in the divorce decree, as it is not required by the statutes cited, which simply note that the dissolution is the result of a firm decision, which stands with or without such an express statement. As to the second question, which was not raised in the first instance, clearly the marriage conducted in Colombia by the Colombian authorities is governed by the law in force in Colombia, and since that law stipulates community of property, that is the economic regime applicable to the litigants' marriage."

Judgment of the Provincial High Court of Burgos (Section 2), No 451/2010, of 21 October 2011 (ROJ 2011/5199)

The applicable law is the national law of the spouses, which in this case is the civil legislation of the Dominican Republic, which does recognise separation.

"LEGAL GROUND: . . . TWO. Since, then, the material enforceability of the divorce decree submitted is not proven, we must examine the merits of the case and analyse the three points in the complaint.

1. Legal separation. Under *Arts 9 and 107 of the Civil Code* the applicable law is the common national law of the spouses at the time of separation, in this case the civil legislation of the Dominican Republic, *Art. 58* of which allows separation. Moreover, in the present case the husband has raised no objection regarding the fact of the separation, as his sole reason for objecting is founded on the *res judicata* exception, on the ground that the spouses were already divorced in their own country (see legal grounds and point one of the statement of defence).

2. The second point in the complaint must also be upheld, and consequently the matrimonial property regime must be declared null and the spouses' mutual powers of attorney cancelled. This means that the litigants must dispose of the sole item of common property referred to in the complaint, to wit, the dwelling situate at Plaza DIRECCIONooo No NUMooo – NUMoo1 – NUMoo2 in Burgos and its furnishings and fitments.

3. As to the use of the dwelling, in his petition the plaintiff asks that it be awarded to the husband, who is the party currently in occupation thereof. In the petition of appeal this request has changed and it asks that the flat be awarded to the wife/plaintiff and the son who lives with her. This petition must be denied as it is new and violates the principle *pendente apelationem nihil innovatur*, and its acceptance would violate the defendant's right to legal protection. Furthermore, it has not been shown that the plaintiff's need is any greater than the husband's, as she does not live at the common home and the son referred to (Alexander) is in his majority (32 years old), and in the complaint it was stated that he was already living in the dwelling with the husband.

4. As regards setting maintenance at 200 # in favour of the wife, this petition cannot be accepted for two reasons. Firstly because it has not been shown, as required by *Art. 97 of the Civil Code*, that there is a real imbalance such as to warrant setting compensatory maintenance. Secondly, the financial capacity to pay this maintenance is not proven, for as the appellant states, Abelardo is in financial difficulties and is not paying the mortgage, while 'if she lived in the house she could pay the mortgage'. In other words, if the husband is in financial difficulties and at present is not even able to pay the mortgage, the needier of the spouses is the defendant; thus, if the use of the flat were awarded to the wife who formerly paid the mortgage, Abelardo would be left without a home but under obligation to pay the mortgage and without any known income to meet his own needs. It is hardly acceptable that the person with the financial means be awarded the use of the dwelling and the person lacking means and currently occupying the dwelling be forced to leave.

Furthermore, it seems that the husband lives with his son, who is not therefore in any great need of another dwelling, and indeed the wife herself has stated that she does have financial means, having said that she would undertake to make the mortgage payments to the bank when she occupied the dwelling. This means not only that she has the financial means to pay the mortgage until the dwelling is sold, but that she has hitherto not been paying her part of the mortgage, without good reason since she is still part-owner – not to mention the fact that in the complaint she asked that the dwelling be awarded to the defendant."

XI. SUCCESSION

Judgment of the Provincial High Court of Barcelona (Section 16), No 540/2010, of 16 June 2010 (RJ 2010\383023)

Determination of the inventory of the estate: Marital economic regime: Community of property existing at the time of death of the deceased. Article 9.2 of the Civil Code applicable.

"LEGAL GROUND:... TWO. In our view the conceptual issue as to what was the marital relationship between the deceased and Ceferino was properly resolved in the judgment here appealed, which made a comprehensive analysis of Constitutional Court Judgment 39/2002 of 24 February 2002; this confirmed the derogative effect of the 3rd repeal provision of the Act and the interpretation of the Supreme Court Judgment of 14 September 2009, and in fact the Court of first instance settled the question in the same way as did this Court (Section 12) in judgments of 10 July 2008 and 20 May 2009, the first in a case practically identical to the present one (marriage held in 1983 where the wife possessed Catalan and the husband Galician regional citizenship), and the second contained a thorough explanation of the doctrine on the subject. We share and take as read the the arguments set out in this point of the appealed judgment, particularly the assertion (contained in this Court's judgment of 10 July 2008), that the lack of regulation concerning marriages celebrated between the coming into force of the Constitution and the amendment of Art. 9(2) of the civil code introduced by Law 11/1990 of 15 October 1990 must be addressed by seeking a non-discriminatory point of connection like the one legally accepted in the said Law of 1990.

The plaintiff does not dispute – in the abstract – the derogative effect of the Constitution in respect of discriminatory rules like the one that attributed the husband's regional citizenship to the wife (former wording of Art. 9(2) of the civil code) but proposes that the principle of immutability of the marital regime prevailing at the time of marrying compels the application of the husband's regime of community of property. To accept such an argument would in practice be to circumvent the derogative effect of the Constitution on this point, which we consider contrary to the law and to the rulings of both the Constitutional Court and the Supreme Court and to previous decisions of this High Court.

Finally, we feel bound to comment on the manner in which the issue of the marital property regime has entered into these proceedings. It is true that the defendants' writ contesting the inventory proposed by the plaintiff did not expressly raise this issue (nor did it make express mention of the fact that the marital regime was one of community of property). The question arose formally in the hearing in the light of the evidence proposed by the defendant, which prompted the court to demand clarification of their procedural position. But this produced no effective defencelessness, firstly because the court offered the plaintiff the opportunity to act, and secondly because clearly this issue had already been raised as a point of conflict between the parties, which was manifested both in the response to the terms of conciliation and in the very fact that the plaintiff requested preliminary enquiries precisely to obtain a historical record of the registered domiciles of the deceased's husband."

XII. CONTRACTS

Judgment of the Provincial High Court of Barcelona (Section 16), No 450/2010, of 9 September 2010 (RJ 2010\375904)

Civil trading: Judgment: Upheld: non-performance by the seller: property situated in France: omission of insurance constitutes failure to perform the obligation of conveying the house concerned subject to the conditions required by the rules in force in the place of situation, to wit France. Foreign law: applicable in Spain: upheld.

"LEGAL GROUND:... TWO. In this case a contract was clearly concluded between the parties. According to the Rome Convention of 19 June 1980, which is applicable to contractual obligations, contracts are to be governed by the law chosen by the parties. Article 10(5) of the Civil Code provides in the same way.

The contract at issue contains no express choice of law. However, there is express reference to a rule of Spanish law, namely Article 1.454 of the Civil Code, which is mentioned and transcribed in the contract. There is therefore a concrete invocation of Spanish law, which prompts the view that our law is applicable to the said contract.

Nonetheless, the Court is right as to the applicability of French rules since the dwelling in the contract is in France. Article 10(1) of the Civil Code provides that ownership of immovable property shall be governed by the law of the country where it is situated. Therefore, the question of whether the requirements for conveyance of an item of immovable property are met must be judged in accordance with the laws of the country where it is situated.

The same applies to all the rules governing immovable property. Hence, the rules of the place of situation will apply to everything concerning the requirements that any property must meet both as regards its construction and at all other times in its existence. We do not believe there can be any argument about that.

The regulatory sphere reserved to the law of the place of situation must encompass guarantees as to the propriety of the construction process. If a house is built in Spain, the agents intervening in the process must accept the liability imposed on them by Spanish law. The liability of the persons who brought the property into existence, i.e. who built it, comes within the laws applicable to the property. For the same reason, the law of the country of situation must apply to the insurance policies that have to be taken out to secure the liabilities deriving from the construction. These rules are an integral part of the law governing immovable properties. These must be built to the standards of solidity required by the regulations of the country where they are situated, and that solidity must be guaranteed in the manner required by those regulations. These, then, are the legal rules governing immovable properties and they are more or less comprehensive depending on the legal system.

For instance, it is inconceivable for a property to be built in Spain without insurance being taken out as required by the Building Act, no matter that the buyers or sellers be foreigners. The new building could not be entered in the property registry, and nor could the first and successive transfers of ownership. Nor can it be accepted that because the parties to the contract of sale have chosen Spanish law, the guarantees in the form of insurance required by French law for properties situated in France

should not apply. Properties situated in France must possess the physical and the legal solidity required by French law.

THREE. Article 1.792 of the French Civil Code provides that any builder is liable to the owner or the purchaser of the building for any damage, including damage arising from a fault in the ground, that compromises the solidity of the work or that affects one of its constituent parts or any fitments, rendering it unfit for its purpose. Article 1.792-1 of the same code defines as builders, inter alia, any person who sells a building that he has built or has had built once it is completed. The defendants are therefore to be considered builders, since they had the house in the contract of sale built and sold it by virtue of a contract concluded in Spain.

Article 241-1 of the Insurance Code, referred to by L 111–28 of the Building and Housing Code, again of France, provides that any natural or legal person who has a ten-year liability under the above-cited articles of the Civil Code must have insurance cover. Article 242-1 of the first of these codes requires that before commencing work, on his own account or on behalf of future owners, any owner or seller of a building work who undertakes construction works or has them performed must take out an insurance policy that guarantees payment in full of any work to repair damage of a kind for which the builders are liable under Article 1.792-1 of the Civil Code.

In the event of the sale of completed buildings, the acquirer becomes the assured party in these compulsory policies, in the same way as in the case of insurance under Article 19 of the Spanish Building Act. Therefore, such insurance is an integral part of the normal obligations attaching to the seller in a contract for the sale of properties situated in France. If Spanish law were deemed applicable to this aspect of the contract the conclusion would be the same under the cited article of the Building Act in relation to the second additional provision thereof.

Obviously in France the purchaser may decline the insurance we refer to, as he may in Spain under the additional provision just cited. Clearly these policies can be waived in France as evidenced by the fact that the house in question was sold to third parties without such insurance and the deed of sale was duly notarised, which would not have happened had the right to have insurance not been waivable.

This is therefore a normal condition in the law governing properties built in France. It is neither imperative nor compulsory, since the purchaser may waive the requirement of insurance. Obviously, however, he may not be forced so to waive, nor may the seller force him to accept a property lacking the legal cover afforded by insurance. Thus, the contract of sale here at issue could have stipulated the waiving of insurance, in which case the purchasers would not have been able to demand it nor terminate the contract on the strength of its absence. But there is no such provision in the private contract of sale concluded between the parties. Abel and Inmaculada were therefore not obliged to accept a house lacking the legal protection referred to.

The seller was therefore in breach of the contract of sale in seeking to transfer to the plaintiffs a property not meeting the legal requirements demanded by the legislation of the place where it is situated – and, we would add, by the Spanish legislation.

FOUR. The plaintiffs initially terminated the contract without citing the above circumstances. The writ of 5 May 2008 cited the house's connection to the public sewerage system and other issues. However, on 19 May following, the purchasers reiterated their decision of 5 May to terminate and added other circumstances of which they had learned, among them the lack of liability insurance regulated by French law. In these proceedings they also cited this ground for termination of the contract.

Since the omission of insurance constitutes a breach of the obligation to transfer ownership of the house in the contract in the conditions required by the regulations in force in the place of situation, the sellers must be deemed to have breached the contract and the purchasers to be entitled to exercise the right of termination recognised in the general rules governing obligations and contracts laid down in Article 1.124 of the Civil Code. The failure to provide the guarantees required by law, which the plaintiffs at no time waived, is ground enough to warrant termination. One might think it a minor aspect, but that is not the case. The fact that the legislation provides for such insurance shows that it is something to which the law attaches considerable importance. There is no reason why the purchasers should accept omission of the guarantees provided by law. Its importance is evident in this country from the fact that under Article 20 of the Building Act it is forbidden to notarise or register new works declarations for buildings lacking insurance. The second additional provision of the Act contains a similar ban on transfer of ownership of properties for which there is no record of insurance, unless the purchasers sign a waiver.

FIVE. For the above reasons, the appeal and the complaint are upheld, and there is no need to go into any other issues, as they would be superfluous. As a consequence of the termination of the contract, the amount originally paid by the purchasers is to be returned, with the legal interest accruing since the date of the notice of termination of 19 May 2008, in accordance with the general rules on arrears in the fulfilment of obligations laid down in Articles 1.101 and 1.108 of the Civil Code.

The costs at first instance are to be paid by the defendants pursuant to Article 394 of the Civil Procedure Act. No ruling is required on the appeal, as it is upheld."

XIII. NON-CONTRACTUAL OBLIGATIONS

Judgment of the High Court of the Basque Country (Social Chamber, Section 1), 11 February 2010 (AS 2010\1023)

Claim for compensation for damages amounting to 94,000 euros filed by the wife and daughters of a worker deceased in Belgium while he still possessed Cuban nationality and his Spanish nationality was pending registration in the Civil Registry, holding the position of 2nd engineer on a Panamanian-registered vessel, where he is said to have been on watch.

"LEGAL GROUND:... FOUR. As regards legal reviews, pursuant to Article 191 c) of the Labour Procedure Act [LPL] setting out the grounds for filing an extraordinary appeal in examination of the infringement of the substantive rules or the case-law, be it remembered that the term 'rule' covers a broad legal and general spectrum that includes legislative provisions, customary law, conventional norms and even ratified and published International Treaties. But in addition to that, the reference

to the idea of substantive rules does not mean that the procedural rules determining the verdict cannot also be raised and cited as an infringement of accessory aspects, which may include exceptions of *res judicata*, incongruence and others. The allegation of a legal infringement must be confined to the substance of the verdict, and therefore the plea cannot be argued against the legal foundations but only against the operative provisions, citing the rules allegedly infringed, and a general citation of rules without specific reference to the infringed provision cannot be entertained, so that in any case the Court could not consider it unless there were some obvious error *jura novit curia* or infringement of fundamental law, depending in any event on the examination and resolution of the issue raised.

Since in the present case the appellant joint heirs base their appeal on four grounds – applicability of Spanish law, the right of the joint heirs to act, presumption of an industrial accident, and lastly the joint and several liability of the consignee – we shall start by addressing the initial, undisputed premise regarding the rules of international judicial jurisdiction, in particular the proof of foreign law.

For even if the parties did not claim that the court lacked jurisdiction or competence, assuming that the Social Affairs Court of Bilbao was the one normally predetermined by law, be it remembered that the rules on international judicial jurisdiction – which according to Art. 25 of the Judiciary Act are based on Council Regulation C 44/2001 of 22/12/2000 and the International Treaties and Conventions to which Spain is a party – permit the Spanish courts to accept jurisdiction if there are certain points of connection or criteria for the assignment of jurisdiction by means of a complex system involving different legal regimes dealing with hiring, provision of services and other matters, and in this particular case dealing with the seaman's employment contract, which mentions the offer made in Spain as set out in the factual account regarding the contract signed at Bilbao by the consignee on behalf of the shipping company and the deceased worker.

That said, the decision at first instance insists on denying the active legal capacity of the claimants pursuant to Art. 23 of the Judiciary Act, citing in support the civil rules and in particular Art. 98 of the Civil Code. concluding that the applicability of the foreign, specifically Cuban law is not proven and hence ultimately denying the plaintiffs' active legal capacity; and therefore this Chamber strongly rebuts these arguments, which call for unnecessary preliminaries and evidence ignorance of the jurisprudence on the proof of foreign law. For not only will this Court operate from the preliminary, civil-law premise that they are wife and daughters (only the continued validity of the marriage is disputed, not its erstwhile existence or its issue), but also from the other indications we may apply a rule in benefit of the joint heirs, which neither debilitates nor interferes with any other declaration of inheritance under any law.

Moreover, since it was the defendants who invoked the alleged applicability of a foreign law to deny active legal capacity and ultimately Spanish law itself, this Chamber is bound to recall that where an applicable rule of conflict is involved that determines the possibility of applying a foreign law, if its substance and currency pursuant to Art. 281(2) of the Civil Procedure Act is not proven, then the courts must apply the internal law in default. That is the case-law whereby, on the basis

of the Constitutional Court judgment of 4/11/2004 in appeal 2652/03, it is sought to integrate the constitutional criteria set out in Constitutional Court judgments 10/2000, 155/2001 and 33/2002, which corrected the doctrine espoused by the Fourth Chamber in an earlier judgment of 22 May 2001 in appeal 2507/00. For founded on pertinent case-law doctrine, the operative article of the Civil Procedure Act authorises the court seised of the case to use whatever means of enquiry it deems necessary to incorporate the applicable foreign law into the proceedings. If that is not possible, or it is simply not done, or difficulties are encountered by the parties in meeting the necessary requirements regarding the availability of an applicable rule, its currency, translation or other aspects, Spanish law may simply be applied, and there is no reason why, in the absence of evidence, we should deny the claim, thus infringing the right to effective judicial protection.

In other words, while the substance and the currency of the foreign law has to be proven, if it is not proven and is applicable for the purpose of settling the conflict, then Spanish law must be applied. Because rules of conflict are mandatory, they cannot be set aside or annulled through lack of diligence by the parties in proving the foreign law in obedience to strategies seeking better advantages than offered by Spanish law. It is evident that since proof of the foreign law is a matter of fact, it is up to the party claiming it to prove its currency, given that the lack of proof will be detrimental to the party whose claim or opposition is founded thereon – in this case the defendant undertakings.

In short, the trend of constitutional jurisprudence has finally wrought a change in the criterion of the Fourth Chamber, sustaining the application of national law in the above-cited decision, which we follow for the sake of legal certainty. Therefore, the joint heirs must be recognised as having standing to act, whether for the reasons adduced in favour of their acting in their own interests regardless of their declared civil law status and absent a detailed declaration of heirs, or on the basis of proof of the foreign law under national rules, which would be applicable by default. For all those reasons, the wife and daughters of the deceased possess sufficient procedural standing to act on in the interests of the joint heirs, above all given that no-one has questioned the fact of descent or even the existence of the marriage (irrespective of its continued validity). The opposing parties say that they lack standing to take legal action because the declaration of heirs is not or has not been proven, but that argument is rebutted by our own considerations.

FIVE. Since in the present case the appealing joint heirs claimed infringement of *Art. 115(3) of the Social Security Act* [*LGSS*] and petitioned acknowledgement of an industrial accident warranting a voluntary increase of compensation, we shall examine that legal aspect in light of such a presumption.

As we all know, the legal definition of an industrial accident is 'any bodily injury that the worker receives in the course or as a consequence of carrying out salaried work' (Art. 115(1) of the LGSS), and hence an industrial accident comprises three basic elements: there must be bodily injury (any bodily damage or harm, including psychological or mental), the injured party must be a salaried employee, and there must be a causal relationship between the work and the injury, which the case-law requires to be twofold – on the one hand the relationship between the work

and the injury, and on the other hand the relationship between the injury and the disablement for which protection is sought (Supreme Court Judgment 27/11/1989). These requirements have long been interpreted generously in the case law of the Supreme Court and the now-defunct Central Labour Court with a view to providing maximum protection for employees, particularly in instances of coronary diseases, as in the present case.

According to the definition of an industrial accident in paragraph 1 of Article 115 of the LGSS, if an injury does not occur in the course or as a consequence of work, it is not an industrial accident, except in certain circumstances which paragraph two of the article specifies as additional causes of an industrial accident, or if there is a legal presumption *juris tantum* as defined in paragraph 3 of the same article. In fact this conception of an industrial accident is broader since the law presumes that the definition strictly speaking includes injuries sustained during working time and at the workplace. This *juris tantum* presumption is very important for an injured worker since he may be relieved of the need to prove a causal relationship between the work carried on and the injury sustained. On the other hand, any claim that an accident occurring during working hours and at the workplace is unrelated to the paid work being carried out must be accompanied by clear evidence.

The abundance of precedents in the social courts regarding what qualifies as an industrial accident and what does not clarifies the applicability of the above-cited presumption. At least two requirements must be met in all cases: the worker must sustain injuries during working hours and at the workplace, and there must be no evidence to the contrary (see inter alia Judgments of the High Court of Justice of the Basque Country of 22-02-00, 23-11-99, 2 and 16-02-99, 15-02-98, 19-03-97, 01-10-96, 24-09-96, 26-03-96, 09-05, 28-02 and 17-01-95, and 16 and 28-06-94; Appeals nos 2454/99, 1573/99, 1292/99, 262/99, 3145/98, 2697/98, 1174/98, 1688/96, 2742/95, 2026/96, 1104/95, 2071/94, 1684/94, 1405/94, 2106/93 and 2641/93 respectively). The Social Affairs Chamber of the Supreme Court has likewise laid down a solid body of doctrine, contained inter alia in judgments of 29 September 1998, 07-03-87, and 22-09-86, and also more recent ones of 27 December 1995, 15-02-96, 18-10-96, 27-02-97, 18-06-97, 11-12-97, 23-01-98, 04-05-98, 18-03-99, 12 and 23-07-99, which possess the added virtue of having been pronounced specifically to set out the accepted doctrine in the matter. According to this doctrine, there is such a presumption when an injury sustained in due time and place is the result of a disease, unless there is reliable evidence that the person's work was not a decisive element in the production or onset of the bodily injury sustained. The doctrine may be definitively summarized to the effect that an industrial accident is defined as one in which there is some connection with the performance of work, to demonstrate which it is essential but sufficient that there exist a causal nexus of some kind or degree, irrespective of whether the connection is strong or weak, immediate or remote and there is no demonstrable absence of causality between the work and the injury – unless there have been events which clearly and absolutely negate the existence of such a connection. The presumption must yield to any definite and convincing evidence that the cause of the accident is unrelated to the person's work, in which case the burden of proof lies with the party denying that the event constitutes an industrial accident.

Now, since it has been demonstrated independently and considering the review of the facts, that the worker died on the vessel while ostensibly on watch, the causal relationship supporting the presumption *juris tantum* is met in terms of working hours and workplace, and ensuing injury or death. It was therefore up to the opposing parties, if they considered that there was no connection between the accident and the deceased's work, to furnish good and convincing proof to the contrary, and not up to the deceased's heirs (Supreme Court Judgment of 12 June 1989). Thus, while the defendants wished to show a clear absence of connection and causality arguing that death was due to unrelated or personal reasons (Judgment 22/98 of the High Court of Justice of Catalonia), the ultimate token of the causal factor of a case of death at the hands of a third person, also an employee (said to be Filipino), whether murder or homicide, which is not clearly specified, that in itself would admit a presumption of an industrial accident since the death occurred during working hours even if due to causes not directly known (Supreme Court Judgment of 24 October 1989). Any other condition negating the connection between work and death, be it reckless imprudence (*Art. 115.4b of the General Social Security Act*) or dolus, is not fulfilled since the deceased's conduct is not known, nor is there any evidence that he ran any unnecessary risk, knowingly and willingly placing his life at risk and failing to observe the most elementary rules of forethought, prudence or caution in respect of events having no direct or indirect connection with the work performed by the employee (suicide) and having nothing to do with the accident.

Finally, be it remembered that according to *(Article 115.5b of the General Social Security Act)*, accidents ensuing from the action of another person that may be a consequence of civil or criminal culpability, be it of an employer, a workmate or a third party, constitute actual industrial accidents as long as they have some connection with the work, even if the decisive element for classification of the accident is or is not a cause-effect relationship with the actual work. If the assault arises from circumstances to do with the work and not from personal issues unconnected therewith, it likewise constitutes an industrial accident; for the fact is that an injury sustained during a fight between workmates is an industrial accident if it has some connection with the work being performed.

Therefore, in this case, the facts and the evidence provide a clear basis for a presumption, solidly backed by the case-law, requiring it to be demonstrated that the injury and death occurred while the person was on duty on the ship, in which presumption the burden of proof is inverted and the co-defendants have not disproved the industrial nature of the accident. Thus, if the worker died on board the ship as a result of lacerated and contused wounds possibly constituting an offence of murder or homicide at the workplace and during working hours, the law clearly supports a presumption that the events constitute an industrial accident, given a causal connection and the absence of any rebutting evidence.

The appeal must therefore be upheld and a voluntary increase of compensation for damages awarded in the amount, not disputed, of 94,000 euros, to be paid by the corporate defendants specified in the following legal ground.

SIX. In order to determine liability for accrual and payment, the demarcation and legal nature of the defendant counterparties or employers as invoked by the appellant

in demand of joint and several liability must be registered, on the basis not only of Art. 73 of law 27/92 but also of the rules of the Special Social Security Scheme for Seamen, and therefore finally this Chamber must address the issue of the standing of the counterparties to be sued. We conclude that there is indeed joint and several liability since in the court's view not only the shipping company as the principal employer but also the consignee as recognised agent and representative, which is a signatory to the contract of employment and liable in the terms related further below, constitute, in the context of employer liability for the purposes of the social court system, an association of businesses that must accept liability not only for the common aspects of labour and social security (payroll and contributions), but also for additional benefits that are implicit or related.

For even if we ignore Art. 73 of the State Ports and Merchant Marine Act and Law 27/92 of 24 November 1992 as amended by Law 48/03, which in fact makes specific reference to shipping agents, they so constitute for purposes of determining joint and several liability for the payment of certain dues or rates to the port authority, in the context of a public area and the merchant marine; and it is equally the case that the imposition of joint and several liability of the shipping company, the shipowner and the shipping agent in respect of payment obligations provides an indirect point of reference which, although not defined as specifically applicable in the social domain, is indicative of the intent in such liability, even in the application of another body of law.

But as the doctrine of this Social Chamber assigns joint and several liability to the agent, representative or consignee, who is a signatory of the seaman's employment contract and evidently an employer of the deceased worker for purposes of his engagement, payment and inclusion in the Special Social Security Scheme regardless of whether he worked on a foreign-registered vessel or in another capacity, according to the terms of the Special Seaman's Scheme as regards the applicability of Decree 1867/70, Art. 2s) and Royal Decree 84/90 Art. 10.4), the employers are the shipping company, the shipowner and the consignees, agents and representatives, and as such this lends additional credence and support not only to the counterparties' standing to be sued but also to their joint and several liability, without the need of recourse to civil-law or case-law doctrine – all this, incidentally covered by the First Chamber of our Supreme Court (Supreme Court Judgments of 26/11/2007 and 14/2/2008).

In short, we consider that liability lies not only with the shipping company but also with its shipping agent and representative, which possess standing to be sued and are to be held jointly and severally liable for the voluntary increase which they are required to acknowledge and pay."

XXII. BANKRUPTCY

Decision of the Directorate-General of National Registries, 11 June 2010 (RJ 2010\4160)

Appeal against statement of impediments by the Registrar of Property Registry No 1 of San Javier basing refusal to register two judicial bankruptcy decrees issued by an English court.

"LEGAL GROUND:... TWO. [...] Firstly, contrary to what the statement of impediments says, Regulation 44/2001 does not apply to the recognition of foreign bankruptcy proceedings, given that Article 1 specifically excludes application to proceedings relating to the winding-up of insolvent companies (see Supreme Court Ruling of 4 December 2007). This matter also does not come within the scope of Article 10(1) of the Civil Code, a provision containing the rule of conflict that determines the law applicable to the constitution and enforcement of a right *in rem*, issues that do not arise here in any case. [...]

Article 16 of the Community instrument, on this point following the path already commenced by Regulation 44/2001, provides for automatic recognition of judgments opening proceedings by the authorities of a Member State, viz. 'Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings' (see Judgment of the Court of Justice of the European Union of 21 January 2010, case C-444/2007). The rule in Article 16 is a new instance of the aforementioned 'EU principle of confidence' (see Judgment of the Court of Justice of the European Union of 2 May 2006, case C-341/2000) and complements the one set out in Article 17(1), whereby 'The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings (...)'. In other words, the judgment opening insolvency proceedings by the authorities of a Member State must be recognised in all other Member States *ex lege* and with the same effects as under the law of the State of origin, and hence without the need of any prior procedure of judicial recognition of the decision in the State where it is sought to have the judgment enforced. Moreover, Article 22 empowers the Liquidator to request registration of the judgment in any register of the Member State provided that it is a mode of Liquidatorship included in Annex C of the Regulation.

On the other hand, the regulation in Article 220 of the Bankruptcy Act regarding enforcement in Spain of foreign judgments adopts a radically different conception and consigns recognition of a judgment opening insolvency proceedings to the exequatur system, which means that before it can be registered such a judgment would have to go through procedure laid down in the 1881 Civil Procedure Act.

As Community regulations take precedence over national ordinances, the solutions provided by the Bankruptcy Act are only applicable if the case does not come within the meaning of Regulation 1346/2000. In the specific case of the rules relevant to the present appeal – viz., those relating to the recognition and enforceability of judgments in cases of insolvency – the rules of Regulation 1346/2000 are applicable to the recognition or enforceability of all foreign judgments in a Member State, provided that three conditions are met: 1) judgments must have been delivered in a Member State other than Denmark, to which this instrument does not apply; 2) the jurisdiction of the authorities of the Member State concerned must be based on the rules of the Regulation itself, which according to Article 3 will always be the case where the centre of the debtor's main interests is situated within the territory of a Member State; and 3) judgments must come within the material scope of the

Regulation, which means that they must have been handed down in proceedings meeting the requirements set out in Article 1, and also listed in Annex A or B of the Regulation. Other than in such cases, recognition of the opening of foreign proceedings, whether or not in an EU State, will come under Article 220 of the Bankruptcy Act and hence will be subject to exequatur.

Be it noted in addition that an automatic recognition model like the one introduced by the Insolvency Regulation does not imply an absolute absence of control. On the contrary, if recognition of the opening of foreign insolvency proceedings is sought, according to the Regulation this may be refused where its effects would be manifestly contrary to that State's public policy (Article 26). As to the recognition of other decisions deriving from foreign insolvency proceedings, the Regulation established a further ground for refusal in addition to the public policy of the requested State – namely a limitation of personal freedom or postal secrecy (Article 25).

However, although it does not signify an absence of control over foreign judgments, the option of a model of automatic recognition does particularly affect the way such control is implemented. Whereas in a model requiring prior certification like the one in the 1881 Civil Procedure Act, where for purposes of recognition an authorisation must be issued by the authorities of the requested State allowing its enforcement in that State, as a primary action with the effect of *res judicata*, under Regulation 1346/2000 recognition may be obtained as an incidental issue of a foreign judgment from the authority of the requested State where it is sought to enforce that judgment, be it a court or – as in the present case – a Registrar. This means that in a case like the present one, it is up to the Registrar to verify, as an incidental issue, whether the foreign judgment opening insolvency proceedings meets the requirements for recognition in Spain before registration can take place.

In short, despite the flexibilisation of the rules for recognition of foreign judgments proposed in Regulation 1346/2000, the Regulation itself requires positive action from the Registrar, who must verify on the one hand that the foreign insolvency judgment falls within the scope of the said regulation and hence qualifies for the preferential recognition procedure contained therein, and on the other hand contains none of the elements that warrant refusal (VIRGÓS/SCHMIT report, cited in VISTOS, no 183). However, the Regulation itself contains no rules laying down the procedure that national authorities must follow in the incidental control of a foreign judgment, and therefore the national rules have to be applied; and in the case of the Registrar these are the rules governing the determination of legality. This means that in such determination the Registrar must examine the requirements for enforceability of a foreign judgment opening insolvency proceedings. Such an examination is necessarily limited and must confine itself to the requirements mentioned – that is, whether the case falls within the scope of the Regulation and hence qualifies for incidental recognition, and if the regulation does apply, that recognition of the foreign judgment is not clearly contrary to Spanish public policy. Then again, the Regulation does not regulate the form and content of registration, which must therefore comply with the rules of the authority in charge of the national registry (in this connection, see VIRGÓS/SCHMIT report, no 182), compliance with which requirements must obviously be verified by the Registrar, including those relating to the registration of

foreign documents set out in Article 3 of the Mortgage Act and Article 36 of the Mortgage Regulation.

We should further note that whenever the procedure for recognition of foreign judgments contained in the Insolvency Regulation applies, this nullifies the reference in Article 4 of the Mortgage Act to the internal enforcement system laid down in Articles 951–958 of the 1881 Civil Procedure Act; therefore, contrary to the statement of impediments, this rule cannot be invoked to require enforcement of a foreign judgment as a prerequisite of registration. As the Court of Justice of the European Union has pointed out, the principle of mutual trust between Member States on which the Insolvency Regulation is founded entails – aside from a unified set of rules of jurisdiction – 'the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of decisions handed down in the context of insolvency proceedings' (Judgment of the Court of Justice of the EU of 2 May 2006, Case C-341/2004, rec, 40). [...]

In the present case registration was refused on the ground that before registration, a court decision was required to validate foreign judgments.

However, as we have just seen, that conclusion is not correct. We have already noted that Article 16 of the Insolvency Regulation is founded on automatic recognition of foreign judgments opening insolvency proceedings and authorises the Registrar to incidentally verify such decisions in the terms discussed. Also as noted, among the rules cited by the Registrar in support of the need for prior exequatur of the English judgments were Articles 38(1) and 39 of the Regulation; and it is certainly true that Article 25 of Regulation 1346/2000 refers to the rules set out in Articles 31 to 51 of the 1968 Brussels Convention (currently Articles 38–58 of Regulation 44/2001), with the exception of Article 34(2) (Article 45(1) of Regulation 44/2001). However, aside from the fact that Regulation 44/2001 also provides for automatic recognition and as noted is the model provision for the Insolvency Regulation in this respect, we should make it clear that that reference, besides being applicable not to judgments opening proceedings but to other judgments concerning the course and conclusion of insolvency proceedings, refers not to recognition but to the procedure for obtaining a declaration of enforceability of such judgments – in other words the procedure for declaring a foreign judgment enforceable as a prerequisite for subsequent enforcement, and hence a different issue from the one raised in this appeal."

XXIV. LABOUR AND SOCIAL SECURITY LAW

2. Individual contract of employment

Supreme Court Decision (Chamber for Social Affairs, Section 1), of 21 January 2010 (RJ 2010\1264)

Contract of employment null and void because the worker is an alien lacking a residence or work permit and had impersonated another.

"LEGAL GROUND: . . . THREE. 1. The question at issue in these proceedings is whether a foreign worker who suffered an industrial accident while working for an enterprise which had registered and hired him in the belief that he was a certain person can be entitled to the benefits attached to such employment when it is demonstrated that the worker had impersonated another and further lacked a residence or work permit which the person he was impersonating did have, it being through such impersonation that he was able to be hired and registered with the Social Security by the employer. 2. The rule that the appellant claims is infringed by the original judgment is Art. 42 of Royal Decree 84/1996 in the wording contained in Royal Decree 1041/2005, section 1 of which provides that only aliens legally resident in Spain shall have equivalent rights to Spanish nationals for purposes of registration with the Social Security, and section 2 of which provides as an exception that *'notwithstanding the terms of the foregoing paragraph, alien employees from countries which have ratified International Labour Organization Convention No 19 of 5 June 1925 working in Spain without a work permit or document excusing them from the obligation to obtain one shall be deemed to be included in the Spanish Social Security system and eligible for registration in the appropriate scheme for purposes of protection against industrial accidents and industrial diseases',* and adds that *'this is without prejudice to the applicability, for such purposes of protection, of the principle of reciprocity, whether expressly or tacitly recognised'.* On the basis of that provision it is claimed that the situation arising in this particular case should be dealt with in the same way as generally applies to an alien worker hired by an employer who is aware that the former lacks a residence permit, which our case-law has generally considered equivalent to that of a Spanish worker for purposes of protection against contingencies deriving from industrial accidents, as ruled for example in the judgments handed down by this Chamber of 9/6/2003 (app.- 4217/02) and 7/10/2003 (app.- 2153/2002). 3. However, the appellant forgets that the two above-cited judgments concerned cases of alien workers lacking a residence permit who were hired by an employer who had failed to request the authorisation required by *Art. 36 of Law 4/2000 of 11 January 2000* on rights and freedoms of aliens in Spain and their social integration (hereafter LOEX), meaning that a contract of employment had been concluded that breached a legal prohibition which according to Art. 36.3 of the Law was of limited scope and difficult to determine. Nevertheless, the situation in the present case is not the same as in the above judgments, which is where the discrepancy arises, for whereas in the two previous cases the parties had formalised the contract in full awareness of the circumstances albeit in breach of the requirement in *Art. 36(3) of the LOEX* that before an alien can be hired a work permit must be obtained, in the cases considered in the two judgments here at issue the employer who hired the plaintiff cannot be said to have validly given his consent to hire, since in both cases the employer signed a contract on the understanding that he was hiring a worker in possession of a work permit when in fact he was consenting to a different contract containing an error not only of substance but one knowingly induced by a worker who was actually impersonating another by means of documentary fraud. In this case, unlike the Chamber's judgments cited above, it is plain that there was no contract inasmuch as one of the essential requirements of such was lacking according to *Art. 1261 of the Civil Code*; as the Code provides in

such cases, 'there is no contract', since this error, intentionally induced, affects a substantial element – not the worker as such but his real identity, origin and legal status with regard to the requirements of the LOEX – thus producing an error of substance that invalidates such consent pursuant to *Art. 1266 of the Civil Code*. And it is this substantial difference that negates the arguments put forward by the appellant; for the crux of the matter is not a contract concluded in contravention of the LOEX, with the effects deriving from the provisions of that Law, but a contract that is non-existent or null and void according to the basic provisions of our entire hiring system. 4. In fact, since what we have is a contract that is non-existent (or null and void as the case may be), the system of social protection to cover damages resulting from an industrial accident ceases to apply if we consider that from the first *Spanish Industrial Accidents Act of 1900* until now, the entire protective apparatus that it entails has been founded on the existence of a contract of employment for which an employer is liable; for even if in normal situations the Social Security pays all or part of the damages sustained as a result of the accident, it does so in place of that employer, as currently provided in *Arts 123 et seq. of the Social Security Act*; and this is evident from the fact that despite the system of automatic advance provision of services that the model operates, ultimate liability for the subrogation lies with the employer when he is found not to have discharged his prior obligations in this respect, as is clearly set out in *Art. 126(3) of the Social Security Act*. And this is even more evident when the value of the damages resulting from the accident exceeds what is covered by the system, in which case the employer and the employer alone becomes directly liable for any 'extra' that may be claimed from him – Arts 123(3) and 127 of the Social Security Act in relation to *Art. 1101 of the Civil Code* and consistent doctrine of this Chamber and of Chamber 1 of the same Court. Thus, in our model of protection, which is not exactly a system of socialised insurance, the existence of a contractual relationship of this kind is still an essential requirement for obtaining protection; after all, it is also one of the requirements laid down by *Art. 7(1) of the Social Security Act* for an employee to be considered as coming within the scope of the Social Security system.

FOUR. 1. Regardless of the foregoing arguments, although these are closely connected, if we go by the terms of *Art. 36(3)(2) of the basic Law on aliens* (hereafter LOEX), we are forced to the same conclusion inasmuch as not only the protection provided for an industrial accident but also any type of employer liability – and liability for damages resulting from an industrial accident must be considered to fall within the scope of that regulation – is contingent on the 'employer's failure to obtain the requisite authorisation', and hence such protection only applies in cases where the employer has failed to apply for and obtain authorisation for the employee to reside in Spain while he is employed before hiring a worker, as required by the legislation *(Art 36(3) of the LOEX)*, since it is the employer and not the worker who is required to apply for such authorisation. However, in a case like the present one where the employer could not request such an authorisation for the injured worker but did so for another due to the fraud on the part of that worker, the lack of a permit cannot be laid at the door of the employer, and therefore the latter cannot be held liable for any of the consequences, including those relating to the Social Security as provided

in the above-cited Act. 2. As noted, under *Art. 36 of the LOEX* the employer and not the employee is responsible for applying for the residence and work authorisations, whereas under the previous aliens legislation it was up to the worker to secure these authorisations (now called permits). Hence, under the new legislation the 'irregularity' attaches not only to the alien working in Spain but also to an employer who hires him without such authorisations; and in the case of such 'irregularity' on the part of the employer paragraph three of the cited article provides that the contract cannot be deemed invalid and that the employer is liable in that respect, as that paragraph makes clear from the outset, attaching all such liability to the 'employer's failure to obtain the requisite authorisation'. The legislator has relativised the effects of something that would otherwise have no force in that it infringes a basic rule whereby any alien worker 'must have' such authorisations to work in Spain according to the exceptions in *Art. 6(3) in fine of the Civil Code*, given such an irregularity on the part of the employer, if we accept the criterion in justice that if the irregularity was committed by the employer then the employer and not the worker must be held liable for damages of any kind arising from that irregularity.

That said, where the lack of such authorisations is not due to an infringement by the employer but to malfeasance on the part of the worker as in the present case, the relativising condition in *Art. 36(3) of the Civil Code* ceases to apply given that a legal prohibition has been clearly breached with all that it entails, namely that the contract is null and void.

All this rests on the fact that in the present case neither has it been claimed nor does the evidence or any allegation by the parties suggest that the employer was aware of or complicit in the fact that the contract was illegal.

FIVE. Given that the contract concluded in this case between the alien worker and his employer is null and void, the only effects thereof are those provided in *Art. 9 of the Workers' Statute*, those applying to any alien worker under *Art. 14(3) of the LOEX*, or those arising from extra-contractual liability – traffic-related in the present case of an industrial accident '*in itinere*' or attaching to the employer in cases where there is evidence of extra-contractual culpability or negligence, which is not the case here – and the Social Security regulations do not permit protection for persons in an illegal situation like the plaintiff."

XXV. INTERNATIONAL CRIMINAL LAW

Supreme Court Decision, Chamber for Administrative Proceedings, Section 6, of 27 January 2010 (RJ 2010\226)

Dismissal of appeal against a Cabinet Decision agreeing to extradite the appellant to the Moroccan authorities. The Cabinet considered that the conditions for use of the exceptional power to refuse to carry out the agreed extradition as an exercise of national sovereignty, were not met.

"LEGAL GROUND: . . . THREE. As the State's Attorney continues to explain, this appeal denounces an infringement by omission of *Article 6 of the Passive Extradition Act* and maintains that the Government ought to have refused the extradition authorised by

the Audiencia Nacional, and that it should have used its exceptional powers under that Act. In short, it is asking this Chamber to supplant the Government in the exercise of a typical act of sovereignty – which is obviously outside its remit – as expressly mentioned in *Article 6 of the said Act* where it provides that the decision of court authorising extradition shall not be binding on the Government, which may refuse it in the exercise of national sovereignty, based on the principle of reciprocity or for reasons of security, public policy or other essential interests of Spain.

That concession is thus essentially a political decision beyond the control of the courts as regards the merits of the case, in respect of which the courts can only supervise those elements of the decision that are regulated – to which the appeal makes no reference whatsoever.

And again, as the State's Attorney has also noted, it should be stressed that the Government has not decided on the extradition per se but on its execution, in not using the exceptional powers vouchsafed it by the above-cited Act, as it finds that the exceptional conditions necessary for an act of sovereignty are not given, and hence there has been no infringement either of the *Extradition Agreement between Spain and the Kingdom of Morocco of 30 May 1997* (in force at the time the decision here contested was made), and reiterated in the Agreement of 24 June 2009, published in the Official State Gazette on 2 October 2009, in which '*both contracting parties undertake to hand over to each other, in accordance with the rules and in the conditions laid down in this Agreement, any persons found in the territory of one of the two States who has been tried or convicted by the judicial authorities of the other State*'."

XXVI. INTERNATIONAL TAXATION LAW

Supreme Court Decision, Chamber for Administrative Proceedings, Section 2, of 10 June 2010 (RJ 2010\5639)

International taxation and double-taxation agreements: award subject to the Tax in Spain and subsequent sale in Germany, pursuant to the Hispano-German Agreement for the avoidance of double taxation.

"LEGAL GROUND: . . . THREE. The appeal in cassation lodged by counsel for María Milagros is founded on a single ground, citing Article 88(1)d) of the Contentious-Administrative Jurisdiction Act and claiming infringement of Articles 4(1), 6(1). 20(8)c) and 20(8)d) of the personal Income Tax Act, law 44/1978 of 8 September 1978; Articles 2(1) and 13(3) of the Hispano-German Taxation Agreement; Articles 9(10) and 52 of the General Taxation Act of 1963; Article 80(1)2) of the State Budget for 1989, Law 37/1988 of 28 December 1988; Article 81, sections B) and C) of Royal Decree 2384/1981 of 3 August 1981 approving the Personal Income Tax Regulation; Articles 60(4) and 31(3) of Royal Decree 939/1986 of 25 April 1986 approving the Tax Inspection Regulation; and Article 44 of the Public Administrations and Common Administrative Procedure (Legal Regime) Act, Law 30/1992 of 26 November 1992.

Therefore, although there is only one ground of appeal, it raises various issues.

In fact the ground of appeal is organised on the following basic lines: a) the appellant is resident in Germany, so that since the initiation of the investment in

1970 all declarations have been submitted to the Spanish Administration as a non-resident and the Administration has accepted this; b) there is no Spanish legislation on the specific case of residence mentioned in Article 4(4) of the Hispano-German Taxation Agreement, which does not regulate elements of taxes such as the taxable event, the person liable for the tax, or residence; c) the company makes no profit and the appellant has received no income from sale of the shares; d) the appellant's capital gains are not taxable in Spain; e) the value of acquisition was not determined on the basis of the market value at 31 December 1978, the cost of holdership was not taken into account and the coefficients for adjustment of the monetary value of assets was not applied; and f) inspection procedures were halted and the tax liability has lapsed.

Starting with the claim of prescription, the original judgment argued that the proceedings had not lapsed according to the case-law laid down by this Chamber, a point not rebutted in the writ of appeal in cassation. While the inspection procedures were indeed interrupted for more than six months – the responses to the inspectors' report were issued on 10 July 1991 and the winding-up decision is dated 30 December 1993 and was notified on 14 July following, thus interrupting the statute of limitations (Article 31(4) of the Inspection Regulation as approved by Royal Decree 939/1986 of 25 April 1996) – it is no less true that the right to wind up cannot be deemed to have lapsed since the tax declaration was submitted on 19 April 1990, and therefore since the winding-up order was notified on 14 June 1994, even although there was indeed a considerable delay of almost three years from the responses to the inspectors' report, it was still less than the five years then stipulated for prescription in Article 64 of the General Taxation Act.

That said, the basic issue raised by this appeal is whether or not the capital gains of the appellant, resident in Germany, from the award of its share in the assets of Interfleur Grete Schickedanz & Cía S.C. are taxable in Spain.

As noted in the Background, Article 4(4) of the Hispano-German Agreement for avoidance of double taxation and tax evasion of 5 December 1966 (BOE of 8 April 1968) provides that 'for the purposes of Articles 5 to 22, in respect of the taxation of income from partnerships or from the assets that they possess through these, the members of such partnerships are considered to be resident in the Contracting State where the company's effective seat of management is located. Such income or assets may be taxed in the other State to the extent that they are not subject to taxation in the State where their effective seat of management is located.'

Therefore, in the case of income from partnerships or assets possessed through them, under the Agreement preference for taxation is given to the State where the company's effective seat of management is, given that for those purposes the partners are considered to be resident in that State (hence, Spain in this case). The other State (in this case Germany) may only levy a tax if the first does not.

This means that for tax purposes in respect of capital gains from participation therein (other than from the disposal of tangible and intangible assets as referred to in Article 13 of the Agreement) the partners in the company 'Interfleur Grete Schickedanz & Cía', which is a partnership resident in Spain, must be treated as residents in Spain even although they actually reside in Germany.

We cannot therefore accept the appellant's argument that the concept of residence has to be determined by the law of each country and that Spain has not made use of the power vouchsafed it in the Agreement and hence the tax cannot be levied. The reason why it is unacceptable is that the clause could not be any clearer: it provides that for the aforementioned purposes of taxation of income from partnerships or from the assets possessed by them, the members thereof 'are considered to be resident in the Contracting State where the company's effective seat of management is located.'

Equally unacceptable is the submission that Article 4(4) of the Agreement is intended to protect residents in Spain who are members of partnerships resident in Germany from double taxation, given that in Germany, in the case of partnerships the taxpayer is the partner and not the company. If that were its intent, the wording of the provision referring generically to the 'Contracting State where the company's effective seat of management is located' would be quite different, and in that case would mean quite simply the unwarranted exclusion from the Agreement of partnerships resident in Spain whose members reside in Germany.

Having recognised the competence of the Spanish State, the applicable provision is Article 20(8)d) of the Personal Income tax Act, Law 44/1978 of 8 September 1978, which provides that when the value of assets changes as a result of the winding-up of companies, the capital gain or loss shall be the positive or negative difference between the stake in the disposal of the company and the purchase price of the title or share in the capital corresponding to each stake.

It follows from the foregoing that the appellant is the recipient of the increment from the award of the company's assets, which are therefore taxable in Spain.

As for the determination of the increase, the only point in dispute is the acquisition value of the shares, but in this case the Administration acted correctly in considering the net value declared by the interested party in Form 210, as referred to in the Background.

True, the appeal in cassation calls for application of the monetary correction coefficient and the cost of title; however, as the judgment does not address the issue, attention ought to have been drawn to that omission by way of Article 88(1)c) of the Jurisdiction Act and not through the substantive legal provisions that are considered to have been infringed and are covered by paragraph d) of that section.

In the case of the disposal value, on the other hand, the appellant himself states that 'we concur with the view of the Audiencia Nacional that the disposal value should be that shown in the balance sheet of Compañía Cervecera de Canarias, S.A. at 31 December 1988 (808,915,226 ptas.)' . . ."

XXVIII. INDUSTRIAL PROPERTY

Supreme Court Decision, Chamber for Administrative Proceedings, Section 3, of 31 March 2010 (RJ 2010\2755)

A case of registration of an international trade mark: features whose phonetic or graphic resemblance to others already registered may lead to error or confusion in the market: ('MacCoffee' and 'McCafé').

"LEGAL GROUNDS. . . . NINE. Although it means reversing the order of the last two grounds, both citing *Article 88(1)d) of the Jurisdiction Act*, we shall look first at the sixth, which claims an infringement of *Article 6(1)b) of the 2001 Trade Marks Act.*

This ground – whose acceptance 'Future Enterprises' declined to oppose when it appeared in the appeal – is upheld. The comparative proceedings conducted by the court of instance contain two manifest errors, the first concerning the scope of application of either trade mark and the second the comparison between the two signs.

A) As regards the product and services protected respectively by 'MacCoffee' and 'McCafé', the court simply considers that they belong to 'different classes'. So narrow a view is inaccurate. We have consistently asserted that the analysis – essential for application of *Article 6 of Law 17/2001* – cannot be reduced to a mere comparison of classes without examining in particular the product or services concerned. Classes are a factor but not the only one, and so the spheres of use must also be compared, given that there may be a resemblance between certain products and services which nonetheless belong to different classes in the Nomenclator,

as in the present case, where the priority trade mark 'McCafé' identifies catering (food) services and the candidate trade mark 'MacCoffee' seeks to protect certain products likewise belonging to the food sector and frequently consumed in catering establishments, for instance coffee and other bakery or suchlike products normally sold along with them. For the purposes of the Act there is therefore a connection or affinity between the two trade marks. In ruling that the trade marks were not similar solely on the basis that they belonged to different classes in the Nomenclator, the court has ignored the connection between class 30 products protected by the contested trade mark ('MacCoffee') and the class 42 services that protect the prior mark ('McCafé'). B) Also, 'MacCoffee' and 'McCafé' cannot be said to differ greatly overall. They are certainly not very different conceptually, or indeed in name. Given the use of the prefix 'Mac' or 'Mc' – common in many Irish and Scottish surnames – in conjunction with the term 'Café' (or 'Coffee' as in English, well known by the average Spanish consumer to designate the same product), the two terms may be taken to be similar.

TÉN. Having upheld the appeal in cassation, this Chamber must issue a decision within the limits of the suit. On the basis of the arguments set out in the above-cited ground of appeal, the decision here contested must be upheld given that the two conflicting trade marks are not compatible in Spain.

The debate in the proceedings had focused largely on the notoriety of the trade marks belonging to the McDonald's Corporation 'family' and the extent to which the use of the prefix 'Mac' (or the shorter form 'Mc') in the candidate mark could affect the course of the litigation. In fact the Spanish Registry Office stated that the requested trade mark 'MacCoffee' was incompatible with the prior 'McCafé', among other things because '[. . .] the inclusion therein of the perfix Mac, phonetically equivalent to Mc, could lead a consumer to think that both belong to the same undertaking, given the notoriety of McDonald's, owner of the earlier trade mark, in the catering sector'.

For our part, we are inclined to dismiss the contentious-administrative appeal without necessarily agreeing entirely with this line of argument. In the present case registration has been barred by reason of sufficient resemblance between the two signs and the referential relationship, affinity or proximity of their respective spheres of protection. The conjunction of the two factors is such that the candidate trade mark, intended to identify very widely-disseminated products, could very readily be associated with the easrlier mark in the food catering sector – that is, a consumer could be led to believe that it belongs to or represents the undertaking that owns the previously-registered trade mark.

However, this does not mean that 'McDonald's Corporation' has an absolute monopoly or an exclusive right in any trade mark that merely includes the prefix 'Mac' or 'Mc', as we noted in our judgment of 16 April 2008, dismissing appeal in cassation number 4768/2005 lodged by the same American undertaking against the judgment confirming the refusal to register the 'McSalad Shaker' mark in Span.

Some of the decisions cited in our judgment of 16 April 2008 on trade marks belonging to the food sector such as 'Mc Pizza' (denied) or 'McPapa's Andorra' (admitted) point to the need to consider the particular features of each mark rather than make general judgements as to the admissibility or inadmissibility of marks including the prefix 'Mac' or 'Mc' along with other additional terms. Also, in the case of Spain the precedents cited by 'McDonald's Corporation' in this connection are not such as to warrant blanket conclusions regarding the indiscriminate use of those prefixes, even in the catering sector.

The really decisive factor for the purposes of this dispute is – we repeat – that the two contending marks resemble each other phonetically and conceptually and further cover products or services that are very closely connected – given which there is in fact no need to cite the prohibition contained in Article 8(1) of the Trade Mark Act. The undertaking 'Mc Donald's Corporation' undeniably has a reputation in the catering (fast food) sector and operates in many countries; however, the outcome of the suit would be the same even if the prior trade mark 'McCafé' belonged to another company, for it would still take precedence over and be incompatible with 'Mac Coffee' in any case."

Supreme Court Decision, Chamber for Administrative Proceedings, Section 3, of 25 June 2010 (RJ 2010\5882)

This is a case of registration of an international trade mark: features whose phonetic or graphic resemblance to others already registered may lead to error or confusion in the market: ("Power Race" and "Race").

"LEGAL GROUND: . . . SIX. [. . .] As we have consistently maintained, the relative prohibition laid down in Article 6(1)b) of the Trade Marks Act, Law 17/2001, requires all the following circumstances together: a) the new sign must be phonetically, graphically or conceptually identical or similar to a mark that has already been applied for or registered; b) the new sign must identify products or services identical or similar to those already identifying a mark that has already been registered or applied for; and c) these circumstances must be such as to cause a likelihood of confusion or undue association with the earlier mark on the part of those to whom the sign is

addressed. In addition, it is necessary to assess the distinctiveness of the earlier mark, as indicated by judgments of the CJEC. The judgment of 11 November 1997 in case C-251/95, SABEL, established that . . . *'the more distinctive the earlier mark, the greater will be the likelihood of confusion. It is therefore not impossible that the conceptual similarity resulting from the fact that two marks use images with analogous semantic content may give rise to a likelihood of confusion where the earlier mark has a particularly distinctive character, either per se or because of the reputation it enjoys with the public.'*

Having regard to this criterion, in a judgment dated 29 September 1998 in case C-39/97, CANON. the CJEC declared that the distinctive character of the earlier trade mark, and in particular its reputation, must betaken into account when assessing the likelihood of confusion between marks.

In this case, comparison of the conflicting marks must be performed with the utmost care, for two reasons. The first is that both the candidate mark POWER RACE, international number 811,166 and the opposing marks RACE, mixed and coloured, number 2,389,430 and the mark RAC RACE, also mixed and coloured, protect products belonging to the automotive sector and hence coincide. Despite the plaintiff's submission regarding the specific nature and the differentiation of the products for which the claim is made, the fact is that if we look at the scope of application, we can see the specificity of the products as argued by the applicant – viz. '*tyres and inner tubes for vehicle wheels; bands for retreading tyres; tracks for caterpillar-type vehicles*' in class 12 of the International Nomenclator – but the same cannot be said of the earlier marks, whose scope of application – 'vehicles; apparatus for locomotion by land, air or water' – is worded as broadly as the Nice Classification rules permit. None of these therefore excludes any part, additional feature or spare part for the protected vehicles, and hence the products identified by the applicant cannot be or be deemed to be excluded from among those protected by the earlier marks.

The other ground cited is the notoriety of 'RACE' in the automotive sector and its benchmark status there in the eyes of consumers, which is the key consideration in a comparative examination of the trade mark in question.

Having examined the signs, we find that overall, in graphic, phonetic and conceptual terms, the candidate international mark 'POWER RACE', number 811,166, is conceived as a denominative mark, in which, however, the preponderant element is RACE, as the part most readily recognisable by consumers. The opposing marks have been adopted as mixed signs. Nonetheless, even given the graphic-denominative complexity typical of signs of this kind, the size, position in the sign and recognisability of the word RACE for consumers in the opposing mark 'RACE', number 2,389,430, is important, while the small crown and blue colouring are secondary elements. As regards appearance, the opposing mark 'RAC RACE' shows an escutcheon and crown with the letters RAC intertwined inside and the word RACE below; this word is smaller in the relation to the sign as a whole, which has been applied for in several colours. A comparison of the appearance of the marks at issue shows that there is a clear resemblance between the candidate 'POWER RACE' and the first of the opposing marks, 'RACE', mixed number 2,389,430 and that the former is sufficiently different in appearance from the second opposing mixed mark, 'RAC RACE'.

Phonetically, to consumers who lack some knowledge of English, particularly of its pronunciation, it is undeniable that the applicant mark 'POWER RACE' and the mark 'RACE' number 2,389,430 sound very similar due to the shared word RACE, which moreover would be easier for the consumer to pronounce and remember. As to the opposing mark 'RAC RACE' number 2,181,158, there are also resemblances due to the fact that the predominant word in both is the same. Conceptually, to consumers not familiar with English, the conflicting marks 'POWER RACE' and 'RACE' number 2,389,430 and 'RAC RACE' number 2,181,158 all call to mind the word RACE and what it connotes.

What is decisive in the comparison is not the existence of differences in any of the aspects considered but the existence of a resemblance on some levels; for it is in this resemblance, in a general sphere, given the notoriety of the sign RACE, that the likelihood of confusion lies, and hence the candidate mark comes within the meaning of Article 6(1)b) of the Trade Marks Act.

Be it said in addition that such likelihood of confusion is avoidable if one considers the innumerable combinations of letters, numbers and graphics that can be used to devise a sign that is distinguishable from one already registered in order to avoid the likelihood of confusion that the law prohibits.

Therefore, the coincidence in scope of application, the graphic and phonetic resemblance and the evocative similarity between the candidate mark 'POWER RACE' and the opposing mark 'RACE' number 2,389,430, and the coincidence in scope of application, phonetic resemblance and phonetically evocative similarity to 'RAC RACE' number 2,181,158, raises a likelihood of association between the conflicting marks. In conclusion, therefore, the decision to refuse registration of the mark in response to the opposition pursuant to Article 6(1)b) of the Trade Marks Act was correct, and the refusal of the candidate mark as incompatible with the two opposing marks stands."