Spanish Judicial Decisions of Private International Law, 2009[1]

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CONTENTS

I. Sources of International Private Law

II. International Civil Jurisdiction

1. General Principles
2. Express and Tacit Submission
3. Family Law
4. Inheritance
5. Contract Obligations
6. Non-Contractual Obligations
7. Property
8. Bankruptcy Proceedings
9. Precautionary Measures
10. Monitoring of International Court Jurisdiction
11. International Litispendency

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[1] Spanish international private case law has notably increased in recent years. This chronicle does not purport to be exhaustive. Its purpose is to provide the reader with as objective a view as possible of trends in Spanish jurisprudence in this very broad and dynamic sector. This is, therefore, a sample taken from the body of 2009 Spanish International Private Law jurisprudence.

III. Procedures with Elements of Alien Law and International Legal Cooperation
1. Proceedings with Alien Elements
a) General System
b) Free Legal Assistance
2. International Legal Cooperation
IV. Recognition and Enforcement of Foreign Judgments and Decisions
1. General Principles
2. Family Law
3. Inheritance
4. Contracts
5. Bankruptcy Proceedings
6. European Executive Title
7. Effectiveness of Foreign Public Documents
8. Canon Law Judgments
V. International Commercial Arbitration
1. General Principles
2. Nullification of Award
3. Recognition and Enforcement of Foreign Awards
VI. Determination of Applicable Law: Some General Issues
1. Evidence of Foreign Law
2. Public Policy
3. Unknown Institution
4. Remission
5. Remission to Multi-Legislative Law
VII. Citizenship
1. Statelessness
2. Obtaining Citizenship
3. Maintaining and Enjoying Citizenship
4. Loss

VIII. Aliens, Refugees And Nationals Of European Union Member Countries
1. Alien Law
a) General System
b) Deportation
c) Family Reunification
2. Right of Asylum
3. Nationals of Member Countries of the European Union
IX. Natural Persons: Legal Status, Capacity And Name
1. Status and Competence
2. Protection of Incompetents
a) Major Incompetence
b) Minor Incompetence
3. Name
X. Family
1. Parental Data and Parent-Child Relationship.
a) General Issues
b) Natural Parental Data
c) Adoptive Parental Data
2. International Child Abduction
3. Marriage
a) Ability to Marry
b) Performance and Registration of Marriage
c) Marriages of Convenience
d) Effects
e) Nullification
f) Separation
g) Divorce
4. Unwed Couples
5. Maintenance Allowance
6. Guardianship, Tutorship and Protection of Children
XI. Inheritance
XII. Contracts

XIII. Non-Contractual Obligations
XIV. Form of Actions
XV. Real Property Rights
XVI. Registration Law
XVII. Intangible Property
1. Intellectual property
2. Copyright
XVIII. Competition Law
XIX. Foreign Investment and Foreign Exchange Control
XX. Foreign Trade
XXI. Companies/Corporations/Legal Entities
XXII. Bankruptcy
XXIII. International Transport Law
1. International Maritime Transport
2. International Land Transport
3. International Air Transport
4. Other
XXIV. Labour and Social Security Law
1. International Court Jurisdiction
2. Individual Employment Contract
XXV. International Criminal Law
XXVI. International Tax Law
XXVII. Interregional Law

II. INTERNATIONAL CIVIL JURISDICTION

2. Express and Tacit Submission

* Supreme Court Judgment (Section 1, Civil Division) of 12 January 2009 (JUR 2009\544)

Clause on submission to the Courts of Barcelona and choice of Spanish Law contained in a contract between foreign companies. Suit filed before a U.S. court seeking $455,000,000 in punitive damages, which are not recognised under Spanish law.

"FUNDAMENTS OF LAW. THIRD. – Liability for damages deriving from breach of agreement to submit to the courts of a country and to the application of its Laws.

In the case at hand, the parties agreed specifically regarding the law applicable to the relationship established between them and the Courts to which they would submit in the event of a dispute. Since Spanish Law (now Article 54.1) was applicable, this agreement determined territorial jurisdiction, through application of Article 56 of the Civil Procedure Act of 1881, in force at the time of the agreement and applicable to the case by reason of provisions of transitory Law (*tempus regit actum* principle [time rules the action], Constitutional Court 1st Transitory Provision). There must be express agreement by the parties to submit to a specific jurisdiction and as such no party is dispensed in subsequent actions from the requirement to abide by what is agreed.

(...)

This argument is not accepted. The agreement to submit to jurisdiction and on applicable law is meaningful in and of itself and carries with it specific consequences in regard to process. However, when it is part of the contractual relationship as just one more rule to be followed by the parties, it generates a requirement, albeit subject to being considered accessory. To determine its importance from the point of view of contract liability, the breach of such requirement, must be evaluated in relation to the importance such breach may have in regard to the economy of the mandatory relationship. This Chamber has been ruling, particularly in regard to actions for termination, that substantial breaches are those that frustrate the economic purpose of the contract for one of the parties, independent of their formal significance (Supreme Court Judgments 27.6.1955, 30.5.1990 (Judicial Repertoire 1990, 4101), 11.7.1991 (Judicial Repertoire 1991, 5345), 14.10.1992 (Judicial Repertoire 1992, 7557), among others).

From this perspective, in this case the choice of applicable law and competent jurisdiction may have been decisive in the decision to enter into the relationship, and clearly important in the contractual economy, since the application of Spanish law establishes a certain contractual framework in regard to assessment of damages (it excludes punitive damages that are admissible under United States law), and involves assessment of attorney's fees as court costs on a quite different scale. The purposeful breach of this agreement by bringing

suit in a U.S. court seeking application of U.S. law, and a high figure as "punitive damages" gave rise to the need for defence and generated costs that exceeded foreseeable levels under a normal or pathological development of the contractual relationship.

The Court that heard this case denies the causal relationship between the breach of the agreement on choice of applicable Law and the submission to jurisdiction and the court costs claimed as damages, as it considers that the court costs correspond to the proceedings undertaken in the courts of Florida and only the court that has tried the case can determine their payment as court costs. However, attorney's fees and other expenses are not dealt with as costs by that jurisdiction and, in regard thereto, objective assignment criteria would enable them to be considered as brought about by the breach of the submission clause, since the action was entered before a different territorial jurisdiction than the one agreed for reasons that can only be invoked before the former, which could result in a much higher amount than any foreseeable under the applicable law in accordance with the contract that were imposed on the current appellant as the charge for its defence. The claim for costs made through the American courts must be understood as arising out of an attempt to be partially compensated for damages suffered. The decision by such courts not to impose court costs has effects in regard to proceedings, but is no obstacle for a claim to be entered for damages by reason of breach of contract in an *ad hoc* proceeding, in which the acceptance of the claim for court costs by the Court of the United States of America would have had no effect other than to reduce the amount able to be claimed."

* Judgment by the Provincial Court of Barcelona (Section 15) of 21 January 2009 (JUR 2009\174194)

Clause on express submission to the German courts in a shipping contract. Custom and usage in trade. Regulation 44/2001 on judicial jurisdiction, recognition and enforcement of judicial decisions on civil and business matters.

"FUNDAMENTS OF LAW. – (…) THIRD. – The second ground is set forth by the appellant, stating that EEC Regulation 44/2001 is not applicable in the case at hand. It must not be overlooked that in this case the parties agreed that the German Courts would have jurisdiction in any type of action against the shipping company or any other entity or person identified with the shipping company or liable for the shipping company. In this regard, except for attributions of exclusive jurisdiction, the desire of the parties prevails over general legal provisions, as established by Art. 22.3 of the Act on Judicial Procedure. In its Art. 23, EC Regulation 44/2001 allows for such provisions to be fully valid when set forth "in writing or evidenced in writing" or, alternatively when "in a form which accords with practices which the parties have established between themselves" or, alternatively, "in international trade or commerce, 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." The appellant never denied the customary nature of such types of clauses in international maritime trade, whereby it must be recognized to be fully in effect in that it was agreed by entities subject to the aforementioned community regulation, jurisdiction was attributed to a jurisdictional body of a Community member country and, lastly, this was done pursuant to the rules and requirements established by Art. 23 of the above mentioned Regulation, as is the use of custom in international trade. (…)."

* Judgment by the Provincial Court of Barcelona (Section 14) of 26 February 2009 (JUR 2009\170250)

Clause on express submission in contract labelled "non-exclusive." Regulation 44/2001 regarding judicial jurisdiction and recognition and enforcement of court decisions in civil and business matters.

"FUNDAMENTS OF LAW. – FIRST. – The respondent has brought suit over declination of jurisdiction, claiming that the parties expressly agreed under contract to submit to the courts of Munich (Germany). The matter must be resolved initially in accordance with Art. 23 of Council Regulation EC 44/2001, of 22-12, that establishes the validity of agreements that extend jurisdiction, as an exception to the general criteria of the domicile of the respondent in matters of insurance, consumer goods and labour contracts and exclusive jurisdictions.

Community doctrine has strictly defended the principle of autonomy of will in determining the competent court, and therefore, once the agreement is established, noncompliance by any of the contracting parties is not accepted. In this regard, it has been said that submission cannot be renounced, not even by a party acting in the Courts corresponding to the domicile of the respondent, and that the parties are bound by the clause of express submission, even though no linking criteria exist (ECCJ Judgment of 10-3-1992, Powel case).

Ultimately, although such clauses must be strictly interpreted (ECCJ Dec. 14-12-1976, Estasis Salotti y Segoura case) the agreement to extend jurisdiction cannot be subject to unilateral renunciation (Decisions by the Provincial Courts of Barcelona, Sect. 15, of 20-5-2003 and of Madrid 17-5-2005-ROJ M 5669/2005), even if it benefits the respondent, and can only be made ineffective if both parties tolerate it not being applied (ECCJ Dec. of 9-11-1978, Meeth case and of 7-5-1985, Spitzley case).

For these same reasons, when abuse of law or miscarriage of justice is alleged, the party invoking same must bear the burden of proof to show that the clause is ineffective for such reasons, which has not taken been done in this case.

SECOND. – In the case analysed, however, there is a special circumstance. It is true that the initial contract of 2-5-2005 and the loan contract dated 3-5-2005 and 9-5-2005 establish the extension of jurisdiction (Final Provision 7 and clause 2.4, respectively). But, with the Perfume letter agreement of 1-12-2005 and precisely in regard to the claim entered in this action (return of VAT) the parties included this clause: "This letter agreement shall be governed by and construed in accordance with German law and we agree to submit to the non-exclusive jurisdiction of the courts of the City of Munich."

The reference to "non exclusivity" in submission to the German courts should be interpreted, as it logically corresponds to the express submission of the previous clauses, as the designation of an alternative jurisdiction, at the option of the contracting parties, which invalidates the previous provisions.

Under these circumstances, Art. 3 of Regulation 44/2001 is fully valid, and since none of the rules of Sections 2 to 7 of the text itself concur, jurisdiction is deferred in favour of the domicile of the respondent, Hospitalet de Llobregat."

* Ruling by the Provincial Court of Barcelona (Sec. 15) of 19 June 2009 EDJ 2009/219812)

Maritime shipping contract of goods under bill of lading. No special jurisdictions. Express submission to non-Spanish courts. Effect on third parties. Insurer subrogated to position of shipper.

"FUNDAMENTS OF LAW: (...) SECOND. – [...] The maritime shipping contract under bill of lading is not affected by exclusive jurisdiction such as provided under Art. 22.1 of the Organic Act on the Judiciary nor, in this case, by the specific jurisdiction for contracts with consumers and insurance (Art. 22.4 Organic Act on the Judiciary). General jurisdiction is therefore applicable, whereby express or tacit submission to the Spanish Courts is in order; and the jurisdiction of the respondent in Spanish territory (Art. 22.2 Organic Act on the Judiciary). In the absence of any of the above points of connection, we must resort to special jurisdictions. In this regard, the courts of Barcelona would have jurisdiction, in principle, since the action taken is contractual in nature and Barcelona, as the port of destination, was the place where the obligation to deliver the goods carried was to be fulfilled. The concurrence of this point of connection attributes the jurisdiction to the Spanish court to judge this case.

However, this criteria yields to the presence of an absolute point of connection that, by application of an international treaty, links the action exclusively to the courts of another state. Art. 36.2.2 of the Civil Procedure Act provides that the Spanish courts must abstain from judging matters that, by virtue of an international agreement or convention to which Spain is a party, are exclusively attributed to the jurisdiction of another State. In this case there is no convention that imperatively attributes any other jurisdiction, since neither the 1924 Brussels Convention, nor the subsequent 1968 and 1979 Protocols amending it contain any provision regarding international jurisdiction for judging a conflict arising over the transport of goods under bill of lading. And, there exists no other international or bilateral Convention that imperatively attributes the jurisdiction in this case to the courts of any other State.

However, the very reason justifying the attribution of jurisdiction to the Spanish courts in the event of express submission, is the one that in turn justifies that it not be judged in the event of the express submission by the parties to another, foreign court. In the case at hand, the business court found the existence of an express submission clause to the High Court of Justice (England and Wales), provision no. 29 of the general text on the back of the bill of lading.

It must be advised that for the bill of lading to be in force and binding on the shipper, the shipper's signature is not necessary since acceptance follows

receipt of the bill of lading at the time the freight is delivered for shipping. And acceptance is overall, not only of the shipping of the goods under bill of lading, but also of the rest of the clauses, in this case the express submission to the High Court of Justice of London.

For its part, the receiver of the cargo, when it received the goods at the port of destination and signed the back of the bill of lading, succeeds the shipper in rights and obligations in regard to proper compliance with the shipping contract by the carrier, enabling said receiver to pursue contractual action as set forth in the complaint. For this reason, as the ECCJ Judgment on of 9-11-2000 regarding Coreck Maritime argued, under Art. 17 of the Brussels Convention of 1968 (precedent of Art. 23 ECR 44/2001): "A jurisdiction clause agreed between a carrier and a shipper which appears in a bill of lading is enforceable against a third party bearer of the bill of lading if he succeeded to the rights and obligations of the shipper under the applicable national law when he acquired the bill of lading." While the 1968 Brussels Convention or Community Regulation 44/2001 on judicial jurisdiction may not be applicable in this case, the above quote by the Court of Justice of the European Communities could be valid because what is being argued is reasonable.

With regard to Supreme Court jurisprudence, there is some evolution. At first, it was understood that an express submission clause signed by the shipper and the carrier did not affect the recipients or purchasers of the goods – unless they had provided their express consent – nor the insurer who, having compensated the loss of or damage to the goods, is subrogated to the actions of the insured – recipient, the purchaser of goods – bringing action against the carrier (Supreme Court Judgment of 30-4-1990, that in turn cites a prior decision, Supreme Court Judgment of 30-6-1983). But this doctrine started to change in Supreme Court Judgment 13-10-1993 (1993/7514), in a case in which the complainant is an insurance company, subrogated by the insured, the shipper in the bill of lading contract in which there is an express clause of submission to the High Court of Justice of London, "excluding the jurisdiction of the courts of any other country," finding that the insurer may be countered by the clause of express submission even though he or she did not subscribe to it, but his or her insured did. And this is so because when compensation is paid under Art. 789 of the Commercial Code, it is subrogated to the insured in regard to all corresponding rights and obligations. It would be quite different if the insurer had exercised recovery action, since it would be an action independent of the insured, and would not be bound by the insured's submission.

(…)".

3. Family Matters

* Judgment by the Provincial Court of Barcelona (Section 18) of 18 February 2009 (AC 2009\1211)

Adoption of precautionary measures by Spanish courts in the framework of international child abduction from Italy to Spain, which should be judged by the Italian courts because that is the child's place of residence.

LEGAL REASONING. – FIRST. – The appellant sought provisional measures by motion of 8-1-2008. It stated that she was married in Castelldefels on 24-4-1999; that they subsequently went to Italy, the spouse's country of origin, where their daughter was born, and (that she) returned with the child on 18-12-2007, and applied for custody and other measures referred to in Arts. 102 and 103 of the Civil Code. The case was admitted, and the State Attorney presented a motion stating that a complaint had been entered against her at the same Court for international child abduction. The court order appealed today states its lack of jurisdiction to judge the proceedings because the Italian courts are considered to have jurisdiction, as the child's habitual domicile was in Italy, and declares the exclusive jurisdiction of the Italian courts to judge matters of substance regarding custody rights and other personal and property measures. The appellant states opposition to same, insisting on the jurisdiction of the Spanish courts, which is subscribed to also by the Public Prosecutor.

SECOND. – Art. 10 of Council Regulation (EC) 2201/2003, on which the appealed judgment is based, establishes that in the event of wrongful removal or retention of a child, the competent bodies of the Member State in which the child resides immediately prior to his or her removal or retention shall retain jurisdiction in regard to parental responsibility until the child acquires a habitual residence in the other Member State. So, since the appellant herself provided together with her appeal an order from the same Court 4-6-2008, refusing restitution and considering that there was no situation of wrongful removal, the grounds contained in the appealed order lack basis in that the point of departure is now non-existent and whereby, in regard to jurisdiction, we must abide by the provisions of Art. 22.5 of the Organic Act on the Judiciary which attributes the jurisdiction to our civil courts for the adoption of provisional measures regarding persons physically in Spanish territory and to be complied with in Spain, terms which Regulation 44/01 also states to be of priority application. Therefore, without requiring any further argumentation, we must accept examination of the appeal."

5. Contract Obligations

* Judgment by the Provincial Court of Asturias (Section 4), of 13 November 2009 (EDJ 2009/306272)

International jurisdiction. Payment for a service provided to a legal entity domiciled in Spain. Rejection of applicability of Arts. 22.2 and 3 of the Organic Act on the Judiciary and Art. 5 of Regulation 44/2001, resorting instead to Art. 51 of the Civil Procedure Act.

"FUNDAMENTS OF LAW: SECOND. – The complainant alleged that she provided services as a translator, interpreter and advisor to the respondent in the course of her business dealings with the E-BEAUDREY & Cie. a company domiciled in France, and claimed payment from them, as documented by the invoice of 18 July 2006 attached as document no. 2 of the initial claim. In her response, the respondent denied that any such services were provided by

the complainant as of 2005 onward and stated that the services for which payment was claimed were never performed, and now in the appeal maintains that since the complaint refers to activities, which in any case had been agreed and performed in France, the Spanish courts lack jurisdiction. We do not share that criteria, even though the invoice may have been issued by the complainant in France indicating as form of payment a certain account at a BBV bank branch in Paris. In this case there is no claim for the performance on French territory of contract provisions or undertaking action due to breach or faulty performance of mediation, whereby neither Article 22.2–3 of the Organic Act on the Judiciary nor Art. 5 of Council Regulation (EC) 44/2001 are applicable, but rather what is sought is payment for a service already provided to a legal entity domiciled in Spain, such domicile being a preferential criterion in determining territorial jurisdiction under Art. 51 of the Civil Procedure Act and in the international domain in line with the rules on predictability as set forth in preamble paragraph 11 of the above mentioned EC Regulation. We thereby confirm rejection of the declinatory plea set forth in the appeal, since it is irrelevant from the point of view of the voluntary concurrence of same as set forth in the order of 1-9-2009 of the Business Court that is part of the appeal."

8. Bankruptcy Procedures

* Ruling by Business Court no. 1 of Bilbao of 4 May 2009 (EDJ 2009/110571)

Voluntary bankruptcy application. Award. Presence of non Spanish national company that does business in Spain. Debtor's principal centre of interests: presumption of coincidence with domicile. Accumulation of orders.

"FUNDAMENTS OF LAW: FIRST. – Jurisdiction: The first issue posed in this case is the issue of objective jurisdiction of the Court, since one of the three companies involved in the joint request is a Hungarian national. The two Spanish national companies have their corporate headquarters domiciled in the historic territory of Vizcaya, where they also accredit having their principal centre of interests, and there is no question regarding objective and territorial jurisdiction in accordance with the provisions of Arts. 21 and 22 of Organic Act 6/1985, of 1 July, on the Judiciary. Furthermore, Art. 10.1 of Act 22/2003 on Bankruptcy, of 9 July, is applied in regard to territorial jurisdiction.

In the case of the Hungarian company, 100 % of whose capital belongs to the Spanish company, Council Regulation (EC) 1346/2000 of 5.29.2000 on insolvency procedures sets forth in its Art. 3.1 that the courts of the Member State in whose territory the debtor's principal centre of interest is located are competent to initiate insolvency proceedings. The company is Hungarian and has its corporate headquarters in that country, in accordance with the rule contained in the above legal provision is that the principal centre of interests is in the place where the corporate headquarters is located.

However, the Regulation allows for evidence to be provided to the contrary, and in this case it is accredited that the project for the Hungarian company did not materialise, since the plant that was going to be established was not

finished. Production is meanwhile being carried out in Mungia, and according to the information provided by the subject of bankruptcy, 100% of its capital belongs to METALES SINTETIZADOS S.L. (METASINT), a Spanish company declared subject to bankruptcy proceedings by Business Court no. 2 of Bilbao; its corporate administrator is also Vizcayan with residence in this historic territory, and business is being conducted from Mungía, as shown by documents no. 25 and onward of the application. This set of data therefore shows that this Business Court has jurisdiction since the principal focus of the interests of the FERSINT CENTRAL EUROPE KFT UNIPERSONAL Company, a national of Hungary, a Member State of the European Union, is in Vizcaya."

9. Precautionary Measures

* Ruling by the Provincial Court of Madrid (Section 28), of 8 June 2009 (JUR 2009\472837)

Precautionary measures in support of international arbitration proceedings carried out in Spain. Jurisdiction to issue them. Legal system.

"FUNDAMENTS OF LAW:... SECOND. First the issue raised by the respondent must be resolved regarding the need, in accordance with Art. 722.2 of the Civil Procedure Act, to accredit being a party in an arbitration proceeding to be able to request the Court to adopt protective measures.

It must be stated in this regard, that systematic interpretation of Arts. 722 and 730.3 of the Civil Procedure Act, would lead to the understanding that the protective measures can be sought both prior to and during arbitration, since the former deals with the grounds for instituting precautionary measures and the latter with the timing for requesting them. The new Arbitration Act offers a definitive solution of this controversial issue in its Art. 11.3. Now, the general terms of the new legislation in regard to the request for measures to be taken prior to the commencement of arbitration require the general system of precautionary measures established for court cases (ex Art. 730 of the Civil Procedure Act) to be adapted and analogically integrated into arbitration proceedings. In this regard, it is not only necessary to accredit reasons of urgency and need for such measures to be adopted, but actions must furthermore be taken to formalize the arbitration in order for such measures to be maintained. It is also important to point out that, in line with Art. 1.2 of the Arbitration Act in force, the precautionary measures in regard to arbitration are applicable both to arbitration inside national territory and arbitration carried out abroad, provided the precautionary measure ordered can be carried out on Spanish territory.

Thus, if the parties have not provided anything in this regard, and neither exclude nor allow the adoption of precautionary measures by the courts of the State, the possibility of requesting courts of the Spanish State to impose precautionary measures must be determined by the Act that regulates the arbitration process, and it is common for State law to expressly allow for such a possibility. The general principal that the courts of the State may be asked to order precautionary measures in the context of an arbitration proceeding is set forth

in Art. VI.4 of the Geneva Convention, «…», and such provision leaves the door open to precautionary measures even if there is submission to international private arbitration. Therefore, the arbitration agreement is no obstacle for the courts of a State other than the State where the arbitration is taking place to be found competent to adopt certain "protective measures".

From an International Private Law standpoint the provision to be considered is, fundamentally Art. 31 of Regulation 44/2001 of 22 December 2000 on Jurisdiction, recognition and enforcement of judgments in civil and commercial matters. This precept indicates the cases in which the Spanish courts have "international jurisdiction" to grant precautionary measures even when such measures are being discussed in the context of international private law arbitration outside Spain. Art. 31 R.44/2001 indicates that a the courts of the State in which the goods and assets over which the precautionary measure would fall, as ordered by foreign judicial bodies or arbitrators performing their functions outside said State, have international judicial jurisdiction to institute precautionary measures. The ECCJ has expressly recognized this possibility in its Judgment of 17 November 1998, Van Uden, finding it to be sufficient for the measure to be covered in substance by R.44/2001 and that the property be located in the territory of the country to whose court the application is being made. This same ECCJ has stated that Art. 31 R.44/2001 covers all protective measures regardless of the arbitrator judging the case, including arbitrators who perform their functions "outside the EU". Therefore the obstacle alleged by the respondent entity is found not upheld."

11. International Litispendency

* Ruling by the Provincial Court of Girona (Section 1), of 30 July 2009 (EDJ 2009/221070)

International litispendency. Petition for divorce made to Spanish courts. Judgment by Italian courts. Dismissal of the petition entered before the Spanish courts. Appeal against this decision. Dismissal.

"FUNDAMENTS OF LAW:…SECOND. – […] Therefore, the jurisdiction set forth in Article 3 in regard to Article 8 prevails when the divorce or separation action is exercised together with regulatory measures concerning children. Since the Italian courts have jurisdiction to judge the separation or divorce petition they therefore also have jurisdiction over matters of parental responsibility, since Mr. Victoriano exercises joint custody with Ms. Maite, notwithstanding any applicability of Regulation Article 15.

THIRD. – Lastly, it is reiterated that the premises of litispendency do not concur, since separation proceedings are underway in the Italian court, while in the Spanish courts the petition was for divorce. The position can also not succeed because while it is true that the legal effects of separation and of divorce are not the same, it must not be overlooked that in both proceedings regulation of the parental responsibility regarding the children is sought. If the Court in La Bisbal is allowed to continue judging the proceedings in parallel with the Italian

courts, both will be ruling on such matters pertinent to the separation or divorce, and contradictory rulings could be handed down that would be impossible to enforce. It does not matter, therefore, that in one proceeding is for separation while the other is for divorce, except that if the claimant is really interested in obtaining a divorce, she should enter a petition that seeks only that and accept the judgment of the Italian courts in regard to the parental matters."

* Judgment by the Provincial Court of Barcelona (Section 11) of 14 October 2009 (EDJ 2009/278302)

International litispendency. Preliminary proceedings in Italy. Non-existence owing to lack of consistency in the requests formulated in the two proceedings.

"FUNDAMENTS OF LAW:...SECOND. – For the reasons set forth in the appeal sustained by the respondent, it is necessary first to consider her allegation regarding litispendency. The appellant refers to the existence of both this proceeding and the proceeding she brought in Italy, but both proceedings should be grouped together in Italy since it was the first Court to hear the matter and declared itself competent to judge it, alleging EC Regulation 44/2001, Section 9 in support of her case. In the response to the action, the respondent brought action in the Italian Courts in turn, seeking payment for goods delivered to BEBE DUE, in the amount of 192,184.04 euros, alleging they were not paid for. Reference is made on page 994 of case file to the Judgment by the Court of Vicenza, dismissing the exception by lack of jurisdiction of the Italian Judge. Now, based on the content of these proceedings, the litispendency sought is not found to exist. In order to argument such a consideration, reference must be made to the fact that as a result of the Supreme Court Judgment de 18-6-2007 litispendency is a procedural matter whose teleological interpretation coincides fully with that of *res judicata*, that serves as anticipation of same, and that, in a protective or precautionary way, seeks to prevent potentially contradictory decisions. It is for this reason that in this judgment it states that "...generally speaking, and to evaluate same, it is also required for there to be three aspects to concur in order to consider the litispendency delay exception: objective, subjective and causal, between the preceding action or actions and the action in which this exception is sought. In this regard, this Court said that "it is a preventive and protective institution of *res judicata* or singleness of process and the legitimate right of the person alleging it not to be subject to two judgments, and therefore, reiterative case law requires that both proceedings, the things in litigation and the cause for bringing the action, must be identical, with no variation whatsoever as regards the subjects, ",..." This judgment continues, stating that "In effect, as set forth in the recent Judgment of 1 March 2007, the case law doctrine underlying the Civil Procedure Act of 1881 accepts the application of litispendency, even if the three elements proper to *res judicata* are not present (Decisions 25-7-2003, 31-5-2005, 22-3-2006), in which the litispendency exception is a provisional or protective institution. This is the case referred to as improper litispendency or litispendency by connection, which in reality involves a civil pre-judicial element. This is referred

to, *inter alia*, in the Decisions of 17-2 and 9-3-2000; 12-11-2001; 28-2-2002; 30-11-2004; 20–1, 19 and 25-4, 31-5, 1-5 and 20-12-2005, and 22-3-2006, emphasizing that it takes place when one suit interferes with or prejudges the result of another, with the possibility of having two contradictory decisions that cannot exist in harmony as they are interdependent; improper litispendency that is even discernible *ex officio* (Decisions including, 17-2 and 12-6-2000, 4-3-2002, 22-3-2006,) and continues stating that "The finding of improper litispendency requires first assessing the existence, the time when alleged, the real interconnection between the cases, the interdependence between the matters discussed, and the danger of ending up with contradictory decisions, a danger that not only must exist but must still be present for this to have a useful effect through appeal. Furthermore, this interconnection cannot be merely instrumental, sought intentionally by one of the parties, because litispendency does not seek individual benefit but rather to ensure judicial protection." So, on this basis, in this case the premises of sameness do not exist to the extent to be able to accept the studied exception, since the allegations exercised in same are independent of those sustained before the Italian Court, and it is observed that in same there was a claim for an amount in relation to the goods received by the appellant in this action. The goal in this action is to obtain a finding that there existed an exclusive, independent distribution contract between the parties from 1995 to May 2003 that was unjustly and unilaterally resolved by the respondent, and for the respondent to be ordered to make immediate payment of 755,564 euros, and to settle the accounts between the parties by establishing the precise financial payments and compensation due. It would therefore not give rise to contradictory decisions, whereby exception is not lawful. Abundant reference is made in the contents of the plea by the respondent to Section 9, Art. 28 of EC Regulation 44/2001 that sets forth that actions are deemed to be related when they are so closely connected that it is expedient to hear and determine them together to avoid risking irreconcilable judgments resulting from separate proceedings, and it is the position of the court that there would not be, under the terms of such provision, any irreconcilable rulings."

III. PROCEEDINGS WITH ELEMENTS OF ALIEN LAW AND INTERNATIONAL LEGAL COOPERATION

1. Proceedings with Elements of Alien Law

a) General Principles

* Judgment by the High Court of Justice of Andalusia (Seville, Administrative-Contentious Court, 2nd Section) of 22 May 2009 (EDJ 2009/163560)

Aliens. Appearance at trial. Administrative-contentious appeal. Requirements similar to those for Spanish nationals. Requirement of lawyer and attorney. Alien whose whereabouts are unknown.

"FUNDAMENTS OF LAW:...FOURTH. – [...] It is no idle matter to refer to a widespread practice in which an alien empowers a specific solicitor through a power of attorney formalised before a Police Officer to represent him or her in administrative proceedings in all matters relating to the administrative case and any appropriate appeals, and is a legally permitted way of providing for representation in the administrative venue (Art. 32.3 of Act 30/92), but not in court proceedings under the provisions cited in the preceding paragraph.

Furthermore, it must be added that both Arts. 6 and 27 of Act 1/96, are based on the premise that participation by a solicitor is required, a circumstance that is not present in proceedings before Administrative-Contentious Courts (Art. 23 of the Act on the Administrative-Contentious Jurisdiction), or such participation is ruled by the Court on specific grounds, which has not been issued by the judging Court, and therefore no procedural representation can be considered to have been granted through the designation of a court-appointed solicitor pursuant to recognition of the right to gratuitous justice.

...The lack of a record of the will to pursue this appeal means that we find ourselves in what has come to be termed "empty" or "virtual" proceedings, meaning that they lack any real content because the appellant, whose whereabouts are unknown for obvious reasons, is not in contact with his solicitor, who, paradoxically does not know his address, and the interested party is not advised as to how the matter is proceeding nor its outcome.

Lastly, it is relevant to refer to the provisions of Art. 65.2 of Act 4/2000 according to which "when an alien is not in Spain, he or she may pursue any appropriate appeals, in either the administrative venue or the judicial venue, through the appropriate diplomatic or consular missions, that will forward them to the appropriate body, so in any case an alien outside Spain does have, therefore, another channel through which to pursue appeals he or she considers appropriate from his or her country of origin. The staying of this appeal does not, therefore, close off possibilities of defending it.

In view of the above considerations, this Court has proceeded to change the criteria it has held up to now. Based on the aforementioned judgment by the Full Court as set forth above, and as the Court's requirement aimed at resolving the lack of representation was not complied with, the appealed judgment is found to be in conformity with the provision of Art. 45.3 of the Act on the Administrative-Contentious Jurisdiction, and the appeal is hereby dismissed." Since the Judgment accepted by the Defence of the State seeks non-admission (in the note the State Attorney only invokes that he or she did not grant representation), the doctrine of the Full Court must be applied and the administrative-contentious appeal found inadmissible."

b) Free legal assistance

* Order by the Constitutional Court (4th Section) of 30 November 2009 (EDJ 2009/291442)

Free legal assistance. Insufficiency of the participation of a solicitor in the administrative phase on behalf of an alien, to later enter an administrative-contentious appeal.

"FUNDAMENTS OF LAW:...THIRD. – (...) It is, in effect, not shown that the interested party requested the benefit of free legal assistance, and such a request was necessary in order to obtain it under Art. 12 of the Free Legal Assistance Act and Art. 8 of the Regulation on Free Legal Assistance, approved by Royal Decree 996/2003, of 25.7. It is obviously also required for a party to make a request for an attorney to be named when the party does not have a right to free legal assistance (Art. 33.2 of Act 1/2000, of 7-1, on Civil Procedure). The solicitor was unable, therefore, to validly make such a designation, since she had not been empowered to do so, and was only appointed by the court to assist the party in administrative proceedings, such designation, obviously, not involving the express, unequivocal consent of the interested party to which we have just referred, nor involving any justification of insufficient resources to litigate, which is required in order to be able to litigate with free legal assistance (Arts. 13 and 15 Free Legal Assistance Act; Art. 22.1 of Organic Act 4/2000, of 11-1, on the Rights and Freedoms of Aliens in Spain and their Social Integration), a requisite that the alien claimant would have had to had verified at his or her own request. Given the implausibility of the damage claimed, even supposing that the statements transcribed in the background could be taken as justification of the special constitutional importance of the appeal, it is not determined that it would warrant a ruling on substance in the form of a Judgment, whereby under Art. 50.1 b) of the Act on the Constitutional Court, it is not admitted."

* Judgment by the High Court of Justice of the Basque Country (Plenary Court no. 3), of 27 November 2009 (EDJ 2009/275147)

Free legal assistance. Suitability of designation of solicitor to represent an alien in the administrative-contentious jurisdiction. Retroactivity of action.

"FUNDAMENTS OF LAW:...THIRD. – (...) The issue is specifically whether after application for and/or granting of recognition of the right to free legal assistance by the alien (Art. 12 Free Legal Assistance Act), provisional (Art. 15 Free Legal Assistance Act) or definitive (Art. 17 Free Legal Assistance Act) designation of solicitor for defence and representation, carries with it in and of itself without requiring a power of attorney or *apud acta* power, the representation of the alien by the court-appointed solicitor. This is an issue to which the Administrative-Contentious Courts of the different High Courts of Justice have given contradictory answers. Without being an exhaustive list, the High Court of Justice of Madrid ruled negatively, after Judgment 3/2007 of 18-5 of the Plenary Court, as did also the High Court of Justice of Andalusia, located in Seville, among others, in its Judgment of 23-11-2007, rectifying the positive criteria followed previously after the Plenary Court Judgment of 19-9-2004. The High Court of Justice of Murcia ruled in the positive in 29-12-2006 (Rec. 477/2005). The same position is taken, among others, in the High Court of Justice of Madrid Judgment of 5-2-09 (ref. 1413/2008), and the Judgment by the High Court of Justice of Andalusia (Seville) of 2-5-08 (rec. 197/2008). The aforementioned Judgment by the High Court of Justice of Madrid of 5-2-09 transcribes the Constitutional Court Judgment of 16-1-06: "It is not rigorous or formalistic to find that the solicitor appointed by the court to defend the

party in the administrative venue is not a representative of same who is able to an administrative-contentious appeal on his or her behalf, as inferred by the provisions in, among others, Arts. 542.1 and 543.1 of the Judicial Procedure Act and in the first paragraph of Art. 15 Free Legal Assistance Act, as well as, in view of the fact that the complainant does not have Spanish citizenship, of the provisions of Art. 22.2 of Organic Act 4/2000, of 11 January, on the rights of aliens in Spain and their social integration. We have said that it can hardly be argued that to act on behalf of another in proceedings requires the express and unequivocal consent of the represented party and such consent is normally conferred through a power of attorney (Constitutional Court Order 276/2001, of 10-29-10, FJ 3), or an *apud acta* power of attorney (Constitutional Court Judgment 205/2001, FJ 5). This Court…has dismissed or not admitted appeals invoking Art. 24.1 of the Spanish Constitution against Administrative-Contentious Court decisions not to admit owing to lack of representation by solicitor (Constitutional Court Decisions 205/2001, of 15-10 and 152/2002, of 15-7), if the party does not so accredit when required to do so, or if it is not possible to offer a redress possibility (Constitutional Court Order 276/2001, of 29-10). In the case pertinent to the this appeal, it was not accredited that the party entering the administrative-contentious appeal was empowered to represent the alleged appellant, wherefore the non-admission of the administrative-contentious appeal and the shelving of the proceedings cannot be considered disproportionate, since the party did not heed the requirement to redress the defects in appearance that were manifested to him or her. This arises from paragraph 3 of Art. 45 of the Act on the Administrative-Contentious Jurisdiction, that expressly provides that the Court must examine *ex officio* whether the appellant has presented the documents relating to paragraph 2 of the same Art., which include the document accrediting the representation of the appellant.…" (Ruling by the Second Section of the First Chamber of the Constitutional Court of 19-1-2006). From what is set forth in the above paragraphs, the Chamber considers that the designation of solicitor is only one of the benefits of the right to free legal assistance, and that no legal provision attributes procedural representation on the basis of having been designated to provide legal assistance. In regulating the preferential administrative deportation procedure, Article 131.2 of the Regulation on Aliens (Royal Decree 2393/04), now in force, in a text similar to that of above Article 110 of Royal Decree 864/01, provides that the alien must be entitled to legal assistance to be provided free of charge, as appropriate, and to be assisted by an interpreter, if he or she does not understand or does not speak Spanish, free of charge if he or she lacks financial means. However, such provision of legal assistance in an administrative proceeding cannot be extended to granting procedural representation to litigate in the administrative-contentious venue against actions that had not been ruled on at the time the legal assistance was granted. As a result of the above, the position of the Court is that the Legal representation should be conferred on the solicitor either through *aped act* appearance or by power of attorney granted for such purpose, or by conferring representation on the

attorney in the same way. It should be pointed out that jurisdictional protection of the right of access to process and defence during same of legitimate rights and interests corresponds to a legal configuration that the judicial authority cannot remove through special application of a sort of dispensational reserve in regard to compliance with legal procedures when same are not disproportionate. Therefore, in the case at hand, a situation of absolute implication of the guarantee of the right to access to process and adequate defence has not been made manifest. It is therefore appropriate to admit the appeal as the appealed judgment incurs not only in the violations as indicated of Arts. 45 and 78 of the Act on the Judiciary but also in the application of Arts. 24 and 33 of the Civil Procedure Act in relation to Arts. 23.1 of the Law on the Judiciary and 6 of the Free Legal Assistance Act, without, however, resulting in the inadmissibility of the appeal entered by the State Attorney. It is appropriate to revoke the appealed judgment and to reinstate the proceedings at the point at which they should have been when the abbreviated proceeding hearing took place, when the Magistrate-Judge should have been aware of the defective accreditation of the procedural representation of the appellant as alleged by the representation of the Administration of the State. And issue an order of reparation to the appearing solicitor to accredit that the appellant conferred procedural representation on him or her, or, as appropriate, on the attorney, in any of the forms as set forth in Art. 24 of the Law on Civil Procedure. Once the incident is substantiated, the court is to proceed with the process."

2. International Legal Cooperation

* Ruling by the Provincial Court of Madrid (Sect. 22), of 21 April 2009 (EDJ 2009/305502)

International legal cooperation. Notification. Requirements. Notification by public notice: value.

"FUNDAMENTS OF LAW:... SECOND. – [...] And the fact is that the current appellant previously told the requesting Judge what he had initially requested, namely, the respondent's latest domicile, so, under Article 177 of the Civil Procedure Act, the case should have been processed making use, where appropriate, of the mechanisms of international judicial cooperation, and after having made all appropriate inquiries, and still not finding out the domicile of the addressee of notification or not finding him or being able to carry out proper notification, the court, after recording such circumstances as provided under Article 164 of the Civil Procedure Act, is to order notification be made by posting a copy of the resolution or the summons on the Court announcement board. Notification by public notice is subsidiary to all the previous means, whereby paragraph 4 of Article 156 provides that "if such attempts at ascertainment are unfruitful, notification shall be carried out by public notice."

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

1. General Principles

* Supreme Court Judgment (Civil Chamber, Section 1) of 24 February 2009 (RJ 2009\1979)

No cassation appeal of the Ruling confirming the dismissal of the action for recognition in Spain of a divorce decree issued by a U.S. court. Absence of rule equating decisions with those contained in the Brussels and Lugano Conventions and in Community regulations.[2]

"FUNDAMENTS OF LAW. – (…) 2. – The criteria of this Chamber, adopted in Plenary Session to unify doctrine on Art. 264 with that held on 12-12-2000, is that only Judgments issued in the second instance by Provincial Courts can be appealed to the Supreme Court (Art. 477.2), and that judgments on recognition and enforcement of foreign decisions can be equated with same, under the Brussels Convention of 12-27-19681 (Arts. 37.2 and y 41), and such equation must also be extended to appeal judgments issued under (EC) Regulation number 1347/2000 of the Council, of 29-5, on jurisdiction, recognition and enforcement of judicial decisions in matrimonial matters and in matters of parental responsibility for joint children (Art. 27 in relation to Annex III) and 44/2001, of 12-22, on jurisdiction, recognition and enforcement of judgments in civil and commercial matters. (Art. 4 in relation to Annex IV) that entered into force on 1-3-2001 and 1-3-2002, respectively, subsequent to the holding of the above mentioned Panel of Magistrates, and therefore excluding appeal when the judgment issued is a ruling or when it should take that form, depending on the judgment issued in the first instance (Art. 456.1 Civil Procedure Act of 2000), and it is also strictly concluded from the Sixteenth Final Provision of the Civil Procedure Act of 2000 that insofar as this provisional regime is maintained only decisions subject to cassation appeal shall be subject to appeal on the basis of procedural violation (16th Final Provision, paragraph 1).

3. The above stated criteria, as clearly inferred from the above, is based on the Law and it is up to this Court to properly interpret legal provisions (Art. 1.6 of the Civil Code), is set forth in…and its application to this complaint to the court shows its inadmissibility, owing to the non-appealability of the challenged decision, since it is not an appeal resolution issued under Art. 27, in relation to Annex III, of (EC) Regulation number 1347/2000 of the Council of 5-29, on jurisdiction, recognition and enforcement of judgments on marriage and parental responsibility for joint children. In the case at hand what is being sought is the recognition, validity and effectiveness in Spain of a judgment

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[2] Consider the reform of Article 956 of the Civil Procedure Act, implemented through Act 13/2009 of 3-11, reforming procedural law for establishing the new Judicial Office Judicial (BOE of 4.11.2009).

by the courts of the United States of America that decreed divorce and other civil matters inherent thereto. The above mentioned Community Regulations are therefore not applicable and are the only instruments under which the judgment by the Provincial Court, in resolving the *exequatur* appeal, would give access to a cassation appeal, and therefore in the case at hand the judgment issued by the Provincial Court is not included in the exception, and it therefore not subject to cassation appeal."

* Supreme Court Judgment (Chamber 1) of 3 November 2009 (EDJ 2009/261204)

Recognition and enforcement of foreign decisions. Impossibility of cassation appeal when the appealed judgment is in the form of a Court Order.

"FUNDAMENTS OF LAW: FIRST. – It must be remembered that this Court has stated on repeated occasions in regard to the transitional regime established in the Sixteenth Final Provision of Civil Procedure Act 1/2000, that "insofar as such transitory regime is maintained, only decisions subject to access to cassation may be appealed for procedural violation," namely, "decisions issued in the second instance by Provincial Courts" (Art. 477.2 on Civil Procedure Act), which excludes appeal when the judgment is in the form of Court Order or when it should be in such form, depending on the judgment issued in the first instance (Art. 456. 1 Civil Procedure Act). Judgments on appeals regarding the recognition and enforcement of foreign decisions, under the Brussels Convention of 12-27-1968 and the Lugano Convention of 9-16-1988 (Arts. 37.2 and 41) can be equated with same and this is the conclusion reached in paragraph 1 of the Sixteenth Final Provision. SECOND. – The above criteria are contained in different Orders by this Chamber, including Supreme Court Orders of 19-5-2009, issued in appeals 196/09 and 136/09, and 28-4-2009, in appeal 146/09 and in application of same it is appropriate to dismiss this appeal, owing to lack of possibility of appeal of the challenged judgment, since what is sought is access to special appeal for procedural infringement of an Order, which is not subject to cassation, and therefore not to procedural infringement, since during the validity of the transitory regime of the Sixteenth Final provision, the latter appeal is limited to Judgments issued in the second instance, which excepts Orders. So, appeal can be formulated against this latter type of resolution based on Art. 4678 of the Civil Procedure Act of 2000, since this provision is inapplicable through the express statement contained in paragraph two of the Sixteenth Final Provision referred to above, whose paragraph One starts by establishing that appeal based on procedural violation can only be entered against judgments subject to cassation, namely judgments issued in the second instance, as stated previously, a condition that is lacking in the appealed judgment since it was in the form of an Order."

* Supreme Court Order (Chamber 1) of 9 December of 2009 (EDJ 2009/301425)

Recognition and enforcement of foreign decisions. Regulation 44/2001. No cassation appeal owing to lack of accreditation of cassation interest. Right to cassation appeal. Application of state regulations.

"FUNDAMENTS OF LAW: FIRST. – This actions was entered against the Order denying preparation of cassation appeal sought against an Order handed down in proceedings regarding the recognition and enforcement of a foreign judicial decision. The Court denied the appeal owing to lack of accreditation of "cassation interest" pursuant to Supreme Court jurisprudence or Provincial Court contradictory jurisprudence. The appellant entity considers that the Court judgment violates the right to effective judicial protection in regard to access to appeal, to the extent that the appeal is the first writ of opposition entered by the appellant, whereby he would be deprived of the possibility to have the judgment reviewed by a court other than the one that resolved in the first instance. It also questions the right to access to cassation on the basis of cassation interest by stating that the rules contained in the Community Regulation were violated. It concludes by alleging that Art. 44 of Regulation 44/2001 does not establish any limitation whatsoever for access to cassation. SECOND. – In regard to the complaint as entered, it only remains to confirm the judgment denying the preparation of appeal without taking into account the allegations by the appellant, as they fall outside this Chamber's doctrine; in this regard in the Order of 29-7-2008 (appeal of complaint 251/2008), after examining the possibility of appeal in cassation of the orders issued on recognition and enforcement of decisions under the Brussels and Lugano Conventions and Community Regulations 1347/2000 (now replaced by 2201/2003) and 44/2001, which is base, as set forth in this Chamber's Orders of 12-3-2002 (appeal of complaint 75/2002) and of 23-11-2004 (appeal 1981/2001), beyond the provisions contained in national procedural rules, it states that the cassation appeal established in Articles 41 of the Conventions of Brussels and Lugano, 27 of EC Regulation 1347/2000, 44 of EC Regulation CE 44/2001, and 33 of EC Regulation 2201/2003, constitute a means of appeal specifically provided under community rules within a procedural scope that is also provided and regulated thereby, and characterised as closed, complete and uniform (Decisions by the Court of Justice of the European Communities of 2-6-1985, as. 184/84, of 27-11-1984, as. 258/83, of 21-4-1991, as. C-172/91, of 10-4-1991, as. C-183/90, and 11-8-1995, as. C-432/93); a means of challenge that is endowed with a specific purpose and content, and circumscribed to the issues of law dealt with in the decision on the foreign judgment exequatur – and only therein –, namely, the review of the application of rules governing the premises and requirements of the declaration of enforceability of the foreign resolution (Judgment by the EC Court of Justice of 27-11-1984, as. 258/83). Therefore, establishment of the appeal and its content is imposed over the internal regulatory provisions through primacy and the direct applicability of community regulations, depending on the ends served and the achievement pursued, that here amount to achievement of the community purpose of free circulation of judgments within a space of freedom, security and justice. However, the conditions, premises and requirements for proceeding and admissibility are governed by domestic law, provided the regulations and the interpretation thereof guarantee the primacy and direct effect of community law – strictly speaking, the practical effect of such direct effect –, and therefore make the appeal established therein possible, with

its own content and purpose, without converting the cassation appeal established in the community rules into worthless paper or a mere regulatory provision lacking any practical application. It adds: "In the aforementioned Orders of 12-3-2002 and 23-11-2004 it was established that the conditions established by the national legislator and their interpretation by this Chamber meet the demands of Community rules, to the extent that they make possible the cassation appeal provided therein, within its specific content and in conformity with the purposes towards which it is oriented, in summary, therefore allowing for the achievement of community purposes. This meeting of the demands imposed by the reiterated principles of primacy and direct applicability of community rules is achieved with no need to make any adjustment whatsoever in the interpretation and application of internal procedural rules, having overcome, where appropriate, the formal obstacle of the class or type of decision that determines enforceability. Such assertion is sustained by the consideration that, since enforcement is a procedural channel that is established by reason of the specific matter of its subject, and therefore, its access to cassation appeal being as offered under domestic law in the third paragraph of Art. 477.2 of the Civil Procedure Act, pursuant to this Chamber's above interpretative criteria, the conditions established by the national legislator to accede to an appeal through this channel, as well as the explanation provided by this Chamber regarding the premises on which the presence of cassational interest is based and justify appeal, because either there is a contradiction with case law doctrine, or contradictory case law. This is in application of rules that have not been in force for over five years and there has not been any jurisprudence by this Chamber in regard to previous rules of equal or similar content. In regard to the requirements imposed to accredit the existence of necessary cassation interest, they guarantee the viability of the appeal, when such premises and requirements are complied with, without detracting from the content imposed by community rules, and ultimately making possible the purposes of the appeal and the objectives served thereby." So, the denial Order challenged does not violate Art. 44 of Regulation 44/2001 of 22 December, as it does not deny the appealability in cassation of the Judgment since it is a procedure by reason of substance, and limits itself to taking stock of the non-appealability derived from the lack of accreditation of the requirements required of all cassation appeals prepared under Art. 477.2.3rd of the Civil Procedure Act, namely the accreditation of the existence of cassation interest by opposition to jurisprudence of the Supreme Court, by contradictory Provincial Court jurisprudence or by being a rule in force for less than five years. This criterion has been reiterated in the recent Ruling by this Chamber, on 6 October de 2009 – complaint to the court 441/2009 –.

THIRD. – Therefore, it is appropriate to dismiss this complaint to the court and the subsequent confirmation of the Ruling denying preparation, while adding that it involves no violation of the right to effective judicial protection since the doctrine of the Constitutional Court itself is quite clear in that it states that there is no constitutionally protected right to be able to enter certain appeals and, therefore, that there is no constitutionally relevant right to cassation appeal,

and it is perfectly imaginable, possible and real for such a possibility not to be provided (Constitutional Court Judgments 37/88,196/88 and 216/98). To the contrary, the right to appeal, of clear characterization and legal content (Constitutional Court Judgments 3/83 and 216/98, among others), is determined by fulfilment of admissibility requirements established by legislation and limited, as interpreted by this Chamber, to what corresponds to the last word on the matter, the sole limit being the prohibition of arbitrariness and avoidance of material errors (Constitutional Court Judgments 37/95, 186/95, 23/99 and 60/99). The interpretation of the rules governing access to cassation does not necessarily have to be the most favourable to the appellant (Constitutional Court Judgments 230/93, 37/95, 138/95, 211/96, 132/97, 63/2000, 258/2000 and 6/2001); and the "*pro actione* principle," projected over the right to effective judicial protection, does not operate with equal intensity in the initial phases of the suit as in later phases (Constitutional Court Judgments 3/83, 294/94 and 23/99), having added, finally, that the referred-to constitutional right is complied with even by a pronouncement on the inadmissibility of appeal, and not necessarily on the substance, when it abides by reasons established by the legislator and provided in relation to the constitutionally protected purposes served by procedural requirements (Constitutional Court Judgments 43/85, 213 /98 and 216/98)".

* Judgment by the Provincial Court of Girona (Sect. 2) of 3 June 2009 (EDJ 2009/226564)

Portuguese Judgment. Enforcement dispatched. Appeal: alleged incompetence of Portuguese body and having issued judgement in default of appearance. Regulation 44/2001. Denial.

"FUNDAMENTS OF LAW:... FOURTH. – [...] In this case the matter on which the judgment was enforced is none of those set forth in Article 35.1, wherefore this court is not authorised to review the competence of the Portuguese court.

SIXTH. – In this case, in the documentation provided with the action there is an acknowledgment of receipt of the communication sent by the court in Portugal that subsequently issued the judgment to be enforced. In same, the court and case number, date of receipt and person who received it are clearly identified.

In regard to the latter, at no time was it alleged that it was a person alien to the company now appealing, which implies that we can consider proven that said company received the communication from the Portuguese court.

Furthermore, if the date of receipt is compared with the date of judgment, slightly under two months transpired from the former to the latter, which would lead one to think that if the appellant had wanted to it would have had more than enough time to appear in the proceedings against it in Portugal and to defend itself.

Furthermore, it has not been alleged that any other proceedings have been brought against it in Portugal before the same court, whereby the allegation of not knowing of the proceedings can be only for convenience's sake: It did not appear before the Portuguese court because it did not want to and now is trying to allege not having been aware of the proceedings.

In regard to not having been summoned in accordance with Spanish procedural law, it has to be taken into account, on the one hand, that the way notification is carried out must be as provided under the domestic law of the country whose court is trying the matter, and on the other, that Article 34.2 speaks of certificate of notification or equivalent document. In no case has it been alleged that the form of notification used by the Portuguese court did not abide by domestic procedural law.

As a result, the default was totally voluntary, which does not authorise a denial of the enforcement sought."

* Ruling by the Provincial Court of Baleares (Sect. 4) of 9 June 2009 (EDJ 2009/234938)

Recognition of foreign judgment. Appeal against ruling recognising the foreign judgment and dispatching enforcement against the appellant. Regulation 44/2001. General principles on recognition. Foreign resolution imposing precautionary measures.

"FUNDAMENTS OF LAW:... SECOND. – [...] As things stand, the reference in Article 37 of the Brussels Convention to "contradictory matters," just as occurred with subsequent Article 43.3 of Regulation EC 44/01 of the Council of 22-12-00 on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters, which in the European Union context succeeds the Brussels Convention of 1968, whose Article 43.3 sets forth that "the appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters." presents, in the absence of greater precision, better and easier accommodation if framed in the context of domestic procedural laws governing such contradictory procedure, in accordance with the principle of "*locus regit actum processum*," understanding that the legal reference to "contradictory judgment" must be considered, therefore, to be aimed at the appropriate declaratory procedure (interpreted as such by this Chamber in Ruling no. 49, of 10-5-05). Such declaratory procedure may be in the context of incidental procedure, as a motion of opposition to the exequatur order. Such procedure was traditionally considered valid for dealing with matters lacking explicit procedural process (Article 388 of the 2000 Civil Procedure Act, ex Article 741 of the 1881 Civil Procedure Act). Under this procedure, the motion for prior pronouncement under Article 390 of the Civil Procedure Act seems preferable to special pronouncement, as it offers a procedural stay effect that fits in with provision of Article 39 of the Brussels Convention (also with Article 47.3 of Community Regulation 44/01). In addition to the guarantee of contradiction with the transfer provided under 393.3 of the Civil Procedure Act, this incidental procedure offers the subsequent summons to appear before the Provincial Court in accordance with the rules of oral judgment, in which the parties are able to propose and practice evidence at no expense to any guarantee."

THIRD. – [...] Therefore, since the enforced parties had property in the state of enforcement – Spain in the case at hand –, it is possible to enforce a judgment here to adopt precautionary measures, since the territorial jurisdiction

is in accordance with Regulation 44/01, as derived from its Articles 22.5 and 39.2.

(…)

FIFTH. – On this point, it can be stated that the notification to which the appellant refers is with regard to the proceedings in the State of origin, whereby it is not appropriate to deal with such allegation in this jurisdiction, with regard to challenge of the exequatur order of Regulation 44/01, and the declaration of recognition and enforceability is made of the British judgment, whose formal requirements do not include the one invoked. Furthermore, in relation to the application for a stay, while Article 46.1 of Regulation 44/2001 allows for the proceedings to be stayed, provided the foreign judgment may be ordinarily appealed in the Member State of origin; the thing is that, on the one hand, the party does not refer to having brought such an appeal or being within the period to do so, and, in any case, keeping in mind that we are dealing with an exequatur for a mere precautionary, or guarantee, measure, the intent to stay the proceedings would not affect their continuity, since embargos and guarantees as ruled would continue to be in force, as derived from the very nature of the term "stay," used by the cited Article.

The appellant maintains that it is not possible for foreign judgments to be recognised and declared enforceable if such has been done without hearing the affected party. However, as the appealed party stated, the documents attached to the exequatur action accredit that the hearing and contradiction phases were held in the judicial proceedings held in England (document number 1 of the action – copy of the foreign judgment –, from whose List A1 and A2 the existence of such hearing is derived). Furthermore, reading of the Certificate in Annex V shows that there is no reference whatsoever in paragraph 4.4. to potential default of appearance, and it must obviously be presumed that in the entire State of the European Union the proceedings followed safeguarded the principles of hearing, contradiction and defence, so that, even in cases in which precautionary measures are ordered "*inaudita parte*," the hearing and contradiction must have been complied with subsequently. In fact, despite the long period of time that transpired since this proceedings began, there is no record that the respondent, who brought the appeal, obtained in the State of origin the lifting of the precautionary measure adopted, or the correction of a potential material error in respect to the Certificate in Annex V.

The appellant goes on to state that in enforcement proceeding it is not possible to rule on the enforcement of judgments that only are declaratory in nature. Nonetheless, the Chamber comments that a mere reading of the Ruling by the English Court issued under Proceedings no. 2005 page 841 before the High Court of Justice of England and Wales, Queen's Bench Division Commercial Court, of the United Kingdom of Great Britain and Northern Ireland, dated 10-3-06, the Ruling that today is the subject of the exequatur, shows that it is not merely a declaratory judgment, as it becomes an enforcement from the moment in which it expressly orders the freezing and embargo of property against the respondents Mr. Cesar, "DEVONSHIRE CAPITAL LIMITED", "5TH AVENUE

PARTNERS GMBH" and "5TH AVENUE PARTNERS LIMITED," one of the complainants being, *inter alia*, the appellant Mr. Cesar, and the freezing and embargo order being aimed at all the property pertaining to the respondents up to the amount referred to therein. So, although precautionary in nature, by referring to its validity as being until such time as a Judgment or another Ruling is issued, it does present an enforcement function, precisely to guarantee by means of the precautionary measure the success of the ultimate final sentence. So, while it is not possible only on the basis of such Ruling to open legal proceedings for collection and carry out the enforcement of the embargoed or preventively listed property, the embargoes and listings are of a precautionary enforcement nature and, therefore, are susceptible to Regulatory support under Article 38 of Regulation 44/01.

The appellant also maintains that the enforcing party has presented to the court a Ruling issued by the English Court within said proceedings (that affects over 16 parties) where it establishes that the amount specifically owed by Mr. Cesar and by "5th Avenue Partners Ldt" to Mr. Apolonio is approximately $12 million, which, according to the appellant, is outside the framework of this appeal, since it judges the opposition to the dispatch of enforcement of the original Ruling. As a result, the same should have been alleged before the Judge of the First Instance in order to accommodate the precautionary measures to the new aspects cited.

The appellant goes on to state that he considers there is a lack of concurrence of the formal-documentary premises necessary for the recognition and declaration of enforcement under Regulation 44/2001, stating that the enforcing party has no legitimacy to seek recognition and enforcement in Spain of the Ruling, because it does not provide the formal documents required under Regulation 44/2001 (Article 33.2 and 53.2 of the Regulation). In view of the fact that the certifications provided in accordance with the standardised form under Annex V of the Community Regulation we can see that in item 4.3.1: First and last name(s) of the complainant(s), it states as the complainant: "HBSC Bank PLC", and the complainant in this appeal is Mr. Apolonio, with a counterposed procedural situation, who, – in the judgment of the appellant – should not be able to take advantage of a certification under article 54 of the Regulation 44/2001 issued for someone that is his procedural opponent, the HBSC Bank; since said bank is one of the four parties sued in countersuit by the appellant Sr. Cesar and three other investors. Also, the appellant states that, based on a literal reading of the freezing orders granted in favour of HBSC Bank in 2005, they could be enforced outside England and Wales, or the HSBC could seek a similar ruling outside England and Wales; but the English Freeze Order of 2006 subject of these proceedings, in favour of the petitioners Mrs. Raquel, Mr. Rogelio, Mr. Apolonio, Mr. Luis María included on List B an item 10 that expressly prohibited trying to enforce it outside England or Wales, or seeking a similar freeze order outside England or Wales. The Chamber finds that, on the one hand, in respect to the certification referred to in item 4.1 of the Order of 10-3-06, that as the appellant himself admits, was issued in favour of the petitioners: Ms. Raquel,

Mr. Rogelio, Mr. Apolonio Mr. Luis María, wherefore one of the complainants therein is today's appellant; on the other hand, the appellant himself, questioning the formalities of the Certification under Annex V, speaks of "errors," stating that in item 4.3.1 of the certificate Mr. Apolonio does not appear as a complainant but rather the HSBC Bank Plc and in the final part after item 5 of the certificate, "there is also another error," since it appears that judgment is enforceable in the Member State of origin against only three parties "5th Avenue Partners Limited", Cesar and "Devonshire Capital Limited." Thus, the Chamber considers that the errors must be dealt with as such, without considering that their presence invalidates the exequatur, since it is derived from the text of the original Ruling accompanying the case file, that the English Court expressly ordered the freezing and embargo of property against the respondents, Mr, Cesar, "DEVONSHIRE CAPITAL LIMITED", "5TH AVENUE PARTNERS GMBH" and "5TH AVENUE PARTNERS LIMITED," including the appellant Mr. Cesar. Furthermore, despite the time that transpired since the exequatur was issued, the respondent (who could have applied to the English Court for correction of the Certificate under Annex V of the Regulation, being legally able to request such correction under Article 54 of Regulation44/01 as an interested party) did not submit any correction of the Regulation Annex V Certificate. Therefore, it must be considered that, the errors denounced here are merely typographical errors explainable in a procedure that involves a multiplicity of parties with reciprocal procedural positions as complainants and respondents. Furthermore, it can be concluded that the provision of Regulation 44/01 allows for the Annex V Certificate to be abstracted from the exequatur procedure, when the rest of the documentation and evidence provides sufficient information, as stated in Article 55.1 of the Regulation, which is also found in the case in question, in which there is a translation of the Order to freeze and embargo, with reference to the respective parties that are now the litigants.

The appellant reiterates that the enforcement dispatched is prior to the notification of the Spanish Ruling granting the recognition and declaring enforceability, despite which, while the period of time for appeal against the recognition and enforcement is open (Arts. 33.2 and 43.5 of Regulation 44/2001) there can be no enforcement, only the adoption of precautionary measures (Art. 47-3 Regulation.) under the legislation of the requested Member State (Art. 47.1 Regulation 44/2001). On this point this Chamber has already ruled in the previous Fundaments of Law."

2. Family Law

* Judgment by the Provincial Court of Las Palmas (Section 3) of 17 February 2009 (JUR 2009\210020)

Nullification of marriage performed in Argentina. Recognition of judgment declaring same. Agreement with the Holy See.

"FUNDAMENTS OF LAW. – (…) SECOND. – The appellant brings the appeal on the following grounds: 1. Unlawfulness of granting of civil effects to a

canonical annulment decision. 2. Violation of the system of public freedoms and fundamental rights of a Spanish citizen. 3. Violation of the *favor matrimonii* principle. 4. Violation of the respondent's constitutional rights.

A proper study of the appeal brought requires that it be recalled that the litigants were married in the San Pio X Parish of Mar del Plata, Buenos Aires, Argentina, on 19-1-1991. The Interdiocesan Ecclesiastic Court of the Second Instance of Seville confirmed the judgment annulling the marriage on 15-6-2004, handed down by the Ecclesiastic Court of the First Instance of the Bishopric of the Canary Islands. The applicant sought effect in the civil sphere of the referred-to judgment.

(…)

THIRD. – (…) As the challenged Ruling correctly states (page 385 of the case file), according to the regulations set forth, it is not required for a marriage held under the rules of Canon Law to be held in Spain in order to have civil effects in Spain, so that while, under Argentine Law the religious marriage entered into in Argentina does not have civil effects in Argentine territory, where civil effects are only recognised for marriages held by civil authorities, the same is not true in Spain, by virtue, precisely of the Agreements between the Spanish State and the Holy See. Focussing the discussion on the terms posed therein, it is perfectly possible from a legal standpoint for a Spanish Court to order that a judgment issued by a competent Ecclesiastic Court has civil effect, along with the recognition of the annulment of marriage on a civil level, without interfering with the annulment or validity of the civil marriage held in Argentina. And the legal solution can be none other, considering that the appealed Ruling limits itself to complying with the cited Article 4 of the Agreement with the Holy See on legal matters of 3-1-1979, in force in Spain, not involving any violation of Articles 80 and 107 of the Civil Code.

Furthermore, the report by the Public Prosecutor sets forth (pages 236-237 of the case file) that: 1. There is no conflict of law, since the only thing that is pursued is to accommodate the ecclesiastic judgment to domestic law, where it be in full legal effect. 2. Both Argentine and Spanish law contemplate vices of consent as grounds for annulment, which was effectively found in the canonical judgment, wherefore any discussion of applicable law lacks sense. On the basis of all the above, the first ground of the appeal is unsustained.

FOURTH. – The second ground of the appeal regarding violation of public freedoms and fundamental rights is also dismissed. In fact, in the application it was found and it is now ratified by this Court, that the ecclesiastic Court judgment does not contradict public policy under Spanish Civil Law, nor does it alter any fundamental rights guaranteed by the Spanish legal system in regard to the basic guiding principles of marriage, having respected the guarantees of hearing and defence in the original canon law procedure, as well as compliance with minimum formal requirements and verification of the authenticity of the judgment by the Ecclesiastic Court. The judicial act, not a civil homologation judgment, but rather a special exequatur, is circumscribed to this point of recognition of the requirements of a formal or procedural nature, without dealing

with the substance of the matter, with no exceptions other than those imposed by necessary control of public policy, as has been done, since it is a matter of making possible the civil effects derived from the judgment by an Ecclesiastic Court with the content, extent and scope conferred by religious law, with no other limitation than those effects that may not be known to domestic law or may be contrary to the public order of the place, as set forth by the Supreme Court in its Ruling of 5-16-2000 (Judicial Repertoire 2000, 3576), that reflects the doctrine recognised in the Supreme Court Orders of 3-12-1996, 21-4-1998 (Judicial Repertoire 1998, 3562), 5-5.1998 (Judicial Repertoire 1998, 4291) , 8-9-1998 (Judicial Repertoire 1998, 6840)]. This does not violate but rather complies with Article 80 of the Civil Code. In conclusion, therefore, the reason the Agreement with the Holy See has become part of internal Spanish Law for the purposes on which we are commenting, is its treatment as an exequatur of a foreign judgment (that of the Holy See) in which the function of the Civil Court, as ruled in the Supreme Court Judgment of 23-11-1995 (Judicial Repertoire 8433), is to verify the authenticity of the judgment and the concurrence of essential requirements in the formal sphere and, furthermore, review the legality of the matter of substance solely in regard to the foreign judgment not violating any of the fundamental rights of the person, as such has been found. In sum, the judgment whose recognition is sought is in line with the constitutional principles governing marriage in accordance with the domestic law of the place, as set forth by the Supreme Court Judgment 23-3-2005 (Judicial Repertoire 2005, 3200)". (…)

* Judgment by the Provincial Court of Santa Cruz de Tenerife (Section 1) of 23 February 2009 (JUR 2009\209610)

Exequatur of Cuban notary's certificate of divorce. Repeated Supreme Court case law admitting non-judicial divorce decrees issued by competent foreign authorities to dissolve marriages.

"FUNDAMENTS OF LAW. – (…) SECOND. – The appealed ruling finds that the notarized certificate, while valid under Cuban Law, has no effect whatsoever under Spanish Law, as declaration of dissolution of marriage by means of such a document is not pursuant to Spanish Law.

Our Supreme Court has issued judgments on this matter on a number of occasions, finding that it is fully in compliance with Spanish Law – in the international sense: Art. 85 of the Civil Code establishes the possibility of divorce, whatever the form or length of time since the marriage was entered into, having set forth in Orders of 1-10 and y 19-11-1996, followed by those dated 15-12-1998, 21-2-1999 and 21-11-2000, that clarify any potential question such type of divorce may pose regarding its compliance with Spanish law, whereby under Cuban Law the activity of a notary is not limited to the function of notary public, authorising mutual dissent regarding the marital bond, but the Notary also has jurisdiction in regard to verification of certain conditions to which the breaking of the bond and the effects derived there from are subject, in relation to the minor children of the married couple, under certain procedures

to which petitions for divorce by mutual consent must abide. It can therefore not be overlooked in the notarial intervention that there exists certain exercise of verification functions stemming from the law of origin that attribute seemingly exclusive powers in such areas to notaries, It cannot be said, therefore, that a divorce obtained in this way is not in consonance with domestic law. Such concept has been developed to the point of acquiring clearly constitutional content, inclusive of the legal principles and customary rights enshrined therein (Constitutional Court Decisions 54/89 and 132/91, *inter alia*), which makes it possible to recognise the notary's certificate declaring it as being in line with the position held by the Chamber in cases such as this one, in which a court body is not involved in granting it, but rather an authority or civil servant of a different type is empowered to do so under the legal system of origin (Supreme Court Rulings 2-7-1996, 16-7-1996, 19-11-1996, 4-2-1997, 24-6-1997, 24-11-1998, 15-12-1998, 30-3-1999, 15-6-1999, 7-9-1999, *inter alia*).

Consistent with this criterion, this same Chamber, in rulings of 10–3 and 28-4-2008, ruled in similar cases that the appealed ruling be nullified and proceedings be followed in the first instance "and for the Court to issue a firm ruling on the matter sought." This is the position taken on this occasion, revoking the appealed ruling and leaving it without effect, and ruling that the homologation be processed by the Court of the First Instance since the notary's certificate presented may be subject to examination, since the appeal is admissible within the proceedings under Articles 951 and subsequent articles of the Civil Procedure Act of 1881, the specific validity of which maintains for such cases the Single Derogatory Provision, first paragraph, third exception, of Civil Procedure Act 1/2000, of 1–7; whereby, once the objective jurisdiction of the Court of the First Instance to judge the appeal and the appropriateness of the procedure is established, it is up to the same venue to evaluate and apply the appropriate legal provisions to conclusively rule on the homologation sought in the specific case at hand. All this amounts to partial admission of the appeal, by giving rise to the revocation of the order, but not that this Court of Appeal directly rule on the appropriateness of the homologation. The judgment on the compliance with the other requirements for homologation is a matter for the Court of the First Instance, once the obstacle is overcome that served as the grounds for the rejection of initial cognizance."

* Judgment by the Provincial Court of Barcelona (Sect. 18) of 2 April 2009 (EDJ 2009/201780)

Marriage performed in Paris by a local authority. Certificate of marriage. Concept of authentic certificate. Non-applicability of the French-Spanish Convention on recognition and enforcement of judgments and arbitrator's decisions of 1969.

"FUNDAMENTS OF LAW. FOURTH. – The Agreement between the Spanish Government and the Government of the French Republic on recognition and enforcement of judicial decisions and arbitration decisions and authentic records in civil and commercial matters (BOE no. 63/ 1970 of 14-3-1970), signed in Paris on 28-5-1969, is not applicable, since as indicated in its first article "This

Convention is applicable to judgments by the Courts of the Contracting Parties on civil and commercial matters, as well as to arbitration decisions and the authentic certificates issued in their territory." A Marriage Certificate issued by the Mayor of Paris cannot be considered to be either a court judgment or an arbitration decision. All documents that, according to the Law of the State of origin, have force, are executive, must be considered "authentic records."

Art. 14 of this same agreement establishes that "authentic records" that are enforceable in the territory of one of the Contracting Parties shall be declared enforceable in the territory of the other by the competent jurisdiction in accordance with the Law of the Contracting Party in whose territory the enforcement is sought. The jurisdiction shall be limited to determining whether the records meet the required conditions of authenticity in the territory of the Contracting Party where they were authenticated and whether the provisions whose enforcement is sought do not violate to the law of the Contracting Party in whose territory the «exequatur» is sought.

It is evident that a Marriage Certificate cannot be considered an executive document in Spain, in accordance with the effects as set forth in Art. 517 of the Law on Civil Procedure, whereby it is in order to dismiss this argument of the appeal."

* Ruling by the Provincial Court of Barcelona (Sect. 18) of 7 May 2009 (EDJ 2009/207926)

Foreign judgment on claim for financial provision. Request for exequatur. Denial: questions regarding irrevocability, absence of knowledge of procedure and of the judgment by the respondent, failure to notify.

"FUNDAMENTS OF LAW: FIRST. – The appellant appealed the challenged order on the grounds that it denies her intent to have the judgment by the Oleksandriya, Ukraine court recognised and enforced. The appealed ruling denies same owing to lack of provision of documentation establishing that the ruling could not be appealed in the State of origin, nor in this case it is enforceable there. In the event of default, as in the case at hand, there is no authentic copy of the action and the documentation that proves that such document has been duly notified in accordance with the Law of the State of origin, Art. 17 The Hague Convention of 2-10-1973 –. It also does not show that the action was notified to the party in default in accordance with Ukrainian law – Art. 6 –. The appellant considers in her appeal that having proven the irrevocability of the judgment, and that it is a claim for financial provision, and that the respondent had at least knowledge through this procedure, that her claim should be admitted to avoid undue delay.

We can only confirm the judgment that is appealed in its own terms. In regard to default, the ruling by Chamber 1 of 1 March 2005 (EDJ 2005, 31342) refers to the jurisprudence in regard to such requirement as follows: "Among the requirements to which the declaration of homologation is subject, Art. 954-2 of the Civil Procedure Act of 1881 requires that the enforcement order 'not to have been issued in default.'" With such requirement, aimed at avoiding effects of decisions issued in proceedings in which the respondent did not appear, and

therefore, was unable to avail him or herself to a sufficient extent of the right to a defence, this Chamber has differentiated the possible types of default depending on the different reasons for not appearing, and has thus distinguished the cases in which, a party is duly notified and summoned – in other words, in accordance with procedural law, and with sufficient time to present a defence –, there is no voluntary appearance either owing to not recognizing the jurisdiction of the Judge of origin, or because it is not in his or her interest, or simply because he or she lets the time period for making an appearance lapse, from others in which the respondent is not present due to not being aware of the existence of the proceedings. In regard to its significance in proper respect for the right of defence, this latter type of default is a barrier to recognition of the foreign judgment (…)." In this case, the text of the appeal itself shows that the respondent did not have knowledge of the judgment, or of the proceedings, or of being notified, and neither is the irrevocability of the judgment established, whereby, not needing any more argumentation, we must dismiss the appeal under examination."

* Ruling by the Provincial Court of Barcelona (Sect. 12) of 4 June 2009 (EDJ 2009/213102)

Mexican divorce ruling. Administrative ruling issued by the Officer of the Civil Registry. Civil Procedure Act of 1881. Allegation of lack of irrevocability of the foreign ruling. Requirement to hear both parties involved. Denial of exequatur.

"FUNDAMENTS OF LAW: FIRST. – The appealed ruling, the operative part of which was transcribed, dismisses, *a limine litis*, the exequatur of a divorce ruling from Mexico. The Public Prosecutor issued a prior recommendation for dismissal owing to lack of accreditation of the irrevocability of the ruling. The appealed ruling alleges that it is an administrative ruling by the Officer of the Civil Registry under the law of the Mexican State of Colima, that provides for the possibility of divorce by mutual consent in the absence of issues other than the divorce action, and this is recorded as a marginal note on the divorce action. The granting of an *exequatur* is sought.

Second. – The issue regarding the irrevocability of the ruling must become a cause of non-admission if, in view of Article 231 of the Civil Procedure Act of 2000, the party did not provide accreditation of irrevocability. The dismissal of the request for exequatur is not appropriate *a limine*.

Furthermore, there seems to be no doubt regarding irrevocability, since being a country with a legal tradition similar to Spain's, the fact that the divorce ruling is recorded as a marginal note (on the back) on the registration of marriage is poor evidence to support the contrary, albeit although it is a judicial ruling.

All told, the granting of the exequatur as sought by the appellant is not appropriate, as the other party involved must be heard, in accordance with Article 956 of the Civil Procedure Act of 1881."

* Ruling by the Provincial Court of Tarragona (Sect. 1) 25 June 2009 (EDJ 2009/227742)

Foreign divorce decree. Initiation of divorce proceedings in Spain. Automatic recognition of the foreign decision. Evidentiary effects.

"FUNDAMENTS OF LAW: FIRST. – [...] The existence of a divorce decree should be taken into account in regard to the possibility of initiating a new procedure in regard to a marriage that has already been dissolved in its country of origin. It is not a matter of recognising the validity of its content but only to have on record that the claim made here was already the object of another proceeding. In this regard, Art. 19 of the cited Regulation regulates the presentation of claim to jurisdictional bodies of different Member States, and calls for suspension of the second claim until jurisdiction is established, whereby the divorce is attributed to the competent court: to the contrary, such jurisdiction is determined in Art. 3 when there is no conflict of jurisdiction, as in the case at hand. Since the Court of the nationality and place of residence of the spouses has already issued a ruling, the Court of another State cannot ignore it to decree divorce again because it considers that the procedural guarantees were not respected. It is quite another matter for it not to be recognised for the purpose of enforcement or compliance with any of its provisions.

SECOND:... The allegation of lack of evidentiary effect of the foreign divorce decree because it was not recognised by exequatur is admissible because Art. 21 of the above mentioned Regulation establishes automatic recognition of judgments issued by a Member State "with no need to undertake any procedure whatsoever."

4. Contracts

* Judgment by the Provincial Court of Lleida (Section 2) of 13 March 2009 (JUR 2009\385212)

Opposition to enforcement under Regulation 44/2001. Period for opposition.

"FUNDAMENTS OF LAW. – FIRST. – For the reasons set forth in its brief of 21-11-2008, the representative of Unipreus SA opposes the judgment accepting the recognition and enforcement of the Judgment of the Court of the First Instance of Bobigny of 11-2-2003, ratified by the 4th Chamber of Section 3 of the Provincial Court of Paris dated 12-1-2005 and by the Supreme Court of France on 20-3-2007. Said brief was responded to by a brief challenging the opposition by Miguel Angel's representative dated 18-12-2008 seeking dismissal of opposition. The sending Court resolved by order of 3-2-2009 to bring the proceedings before this Chamber to have it resolve in regard to the challenge by the applicant based on the provisions of Article 43 of EU Regulation 44/2001 of 22-12.

SECOND. – The procedural system by which an individual or a legal entity may have an irrevocable judicial judgment by a foreign Court recognized by a Spanish Court, depends on the State to which such Court belongs, since there may or may not be a treaty in force between the country of origin of the Judgment and the Spanish State. If there is an International Treaty, it is preferentially applicable under Art. 1 no. 5 of the Civil Code and Art. 93 and subsequent articles of the Spanish Constitution**,** since such texts become part of domestic Law directly upon their approval and publication in the Official State Gazette (BOE). Therefore, if a treaty exists it must be abided by. This

applies to General Multilateral Conventions (a number of States, dealing with large number of matters), such as the Brussels and the Lugano Conventions; specific Multilateral Conventions (a number of contracting States dealing with a specific matter, for example the 1956 Geneva Convention on the Contract for the International Carriage of Goods by Road…); and General Bilateral Conventions, (between the Spanish State and another State, on a number of matters or on a specific matter, for example, the 1992 Convention between the Kingdom of Spain and the People's Republic of China on Judicial Assistance in Civil and Commercial Matters). In any case, it seems that none of the parties question that Community Regulation 44/2001, called Brussels I, is applicable in this specific case on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters.

Article 43 of said Regulation states "…". Annex III specifically and in the case of Spain refers to the Provincial Court as the competent body to hear the appeal. In paragraph 5 it adds the following: "…". It is clear that in this case the legal time period within which to oppose the judgment on the request for enforcement was one month as from the date of notification of the decision, namely as from the order dated 10-27-2008 handed down by the Court of the First Instance no. 3 of Lleida in which enforcement was ordered. However, the party against whom enforcement is sought did not appeal this order to Provincial Court but rather presented a brief in opposition to enforcement to Court Number 3, which is inadmissible from any point of view and in violation of Article 36 of the Regulation that states that "Under no circumstances may a foreign judgment be reviewed as to its substance," a logical consequence of the mutual trust that prevails in the spirit of the regulation.

So, the Spanish court judgment to grant or not to grant enforcement must limit itself (without overlooking that there can be no review of substance of the foreign judgment and that the requirements that it first be recognized must be complied with, namely its effectiveness in Spain and the specific requirements for enforcement) to examining the legality of the request and the sufficiency of the documents required, compliance by the facts and the existence or lack thereof of causes of denial, which as such are weighed along with the fact that it is a valid enforcement judgment in the State in which it was issued.

After analysing the procedure and the requirements of the request along with the form of the judgment accepting it or denying it, the reasons for which the recognition may be denied are considered to be set forth in Articles 34 and 35 of the Regulation, which must be made enforceable by direct appeal and in no case by opposition to dispatch of enforcement, and much less so for reasons other than those weighed and set forth in said provisions.

Specifically, the appeal was not entered within the required time period and the formal requirements against the ruling accepting processing of the petition for enforcement, nor, in any case, against the reasons extemporaneously alleged as halting such enforcement, whereby it is appropriate to dismiss any type of opposition formulated and to order the enforcement to go forward as set forth in the order of 27-10-2008."

5. Bankruptcy Proceedings

* Ruling by the High Court of Justice No. 3 of Madrid, of 4 June 2009 (EDJ 2009/320468)

Foreign bankruptcy judgment. Principal foreign procedure. English ruling. Meeting of prior requirements in Bankruptcy Act to grant recognition of foreign bankruptcy decisions issued outside Spain: procedure similar to ours, irrevocable judgment, not issued in default and not contrary to Spanish law.

"FUNDAMENTS OF LAW:... SECOND. – In this case the ruling whose recognition is sought complies with the requirements indicated above since it is a collective procedure, based on the insolvency of the debtor, by virtue of which its assets and activities are subject to the control or supervision of a court or a foreign authority for the purpose of their reorganisation or liquidation. It is an irrevocable ruling. The attribution of jurisdiction of the ruling court is based on the criteria contained in Article 10 of this Bankruptcy Act. Lastly, it was not judged in default. Furthermore, recognition in Spain of said ruling cannot be considered to be counter to Spanish law in accordance with the report issued by the Public Prosecutor's Office dated 5-11-2009.

Therefore, in view of the above circumstances it is appropriate to accept the request of the requesting party and recognise in Spain the decision to open insolvency proceedings "administration" of Lehman Brothers International Europe issued on 9-15-2008 by the Companies Court (High Court of Justice – Chancery Division) of the United Kingdom. (Ruling 7942 of 2008) as the principal foreign proceedings in accordance with the provisions of Article 220 of the Bankruptcy Act."

7. Effectiveness of Foreign Public Documents

* Ruling by the Provincial Court of Girona (Sect. 2) of 29 April de 2009 (EDJ 2009/214415)

Document in German. Need for translation. Lack of legal effect in Spain.

"FUNDAMENTS OF LAW: FIRST. – [...] In accordance with Art. 144 of the Civil Procedure Act, when a document is not written in an official language of Spain or the Autonomous Community, as required by Art. 144 of the Civil Procedure Act, and no translation of same is provided or prepared, which could be done at the judgment hearing where a translator was available for the statements by Mr. Millan and Ms. Benita, although no provision of the regulation cited nor of any other provision of procedural law, sets forth the consequences derived from lack of translation, putting such rule in relation to what is provided under Art. 142.4 of the Civil Procedure Act, – *a sensu contrario* –, it must be understood that said document can have no effect on or validity in the proceedings and the admission of the non-translated document and its consideration in the proceedings for the purpose of evaluating the complaint amounts to following essential rules of procedure, and should be avoided by the Judge independently of whether the document was or was not challenged, since procedural rules

regulate the effectiveness of documents in a non-official language that are not translated, and are of public order and must be applied *ex officio* in accordance with the principle of procedural legality, Art. 1 of the Civil Procedure Act; this is similarly found in the Rulings by the Provincial Court of Castellon, of 4-4-2004, the Provincial Court of Caceres, of 9-9-2004, the Provincial Court of Las Palmas, of 22-6-2004, *inter alia*."

* Ruling by the Provincial Court of Navarra (Sect. 3), of 17 June 2009 (EDJ 2009/280900)

Foreign document. Evidentiary value. Regulation. Authenticity: apostille.

"FUNDAMENTS OF LAW:...SECOND. – [...] The contradiction to which reference is made must be resolved by turning to document no. 2 of the complaint, consisting of an extract of the Mercantile Register of the Chamber of Commerce and Industry of Haaglanden, that states that Pablo Jesus is the administrator of Heuvel-Fien, and a certificate by the Directorate General of Traffic of the Netherlands, issued at 00:23 a.m. on 24-2-1996, in which said company appears as the owner of the Mercedes Benz tractor trailer model 1938-LS, license plate no. BD-LP04.

The cited document contains the apostille as set forth in The Hague Convention no. XII of 5-10-1961, whose Art. 1 provides that the Convention shall be applied to public documents which have been executed in the territory of one Contracting State and which have to be produced in the territory of another Contracting State, which is indicative of the nature of the document in question, that meets the requirements of Art. 323 of the Civil Procedure Act, the respondent not having accredited that any of the applicable Dutch rules were violated (Supreme Court Ruling 4-3-2003).

And if any fault or defect is found it would only "weaken" the evidentiary value of the document in question (Supreme Court Judgment 19-2-2000). (...)".

8. Canon Law Judgments

* Ruling by the Provincial Court of Castellón (Sect. 2), of 15 July 2009 (AC 2009\1877)

Marriage. Annulment. Judgment by ecclesiastic courts. Validity in Spain. Need for homologation. Meaning and requirements.

"FUNDAMENTS. (...). SECOND. Art. 80 of the Civil Code establishes that judgments issued by ecclesiastic courts on annulment of canonical marriage or resolutions on unconsummated marriage shall be effective in the civil sphere at the request of either of the parties if declared pursuant to the Law of the State by ruling issued by the competent civil judge in conformity with the conditions referred to in Art. 954 of the Civil Procedure Act (...).

THIRD. We begin by pointing out that in the case under consideration the requirements for homologation under Art. 954 of the Civil Procedure Act of 1881, and as provided under transitory Law in the current Civil Procedure Act,

were not violated. Such requirement is, in principle, very simple: verification that the ruling was not issued in default.

From the background provided, Mr. Ramon cannot be considered to be in a situation of default of appearance in this canonical proceeding, as set forth in the Civil Procedure Act of 2000, based on a situation in which the respondent in the proceedings fails to appear, whether voluntarily or otherwise. It is a different concept than that of *absentia*, a perfect idea of which is provided by the Supreme Court Ruling of 24-10-2007 (Mr. Xiol Rios presiding) which supersedes another Ruling by the Court of Andalucia of 27-6-2002 that found that the requirement that the ecclesiastic judgment not have been issued *in absentia* is applicable to both so-called voluntary *absentia* through violation of the defence principle, and cases of voluntary *absentia* by application of the right to ideological and religious freedom of the spouse who decides not to submit to the canonical process of annulment of his or her marriage.

The Supreme Court Ruling of 24-10-2007 states the following considerations: Art. 954.2 of the Civil Procedure Act of 1881, declared in force by the single repeal provision, 1.3., of the Civil Procedure Act of 2000 that establishes, as one of the requirements for a judgment issued by a foreign court to be valid in Spain, that of "not having been issued *in absentia*."

This Chamber, has established general case law in relation to this requirement. It specifically considers the cases in which the lack of the presence of the respondent is involuntary, owing to not having been properly notified and summoned in accordance with the rules regulating the process, or having been notified improperly or with insufficient time to prepare a defence, and has stated that this type of absentia, insofar as it impedes proper respect of the right to a defence, is the only one which constitutes an obstacle to recognition of the foreign ruling.

This premise has been differentiated from cases in which the respondent voluntarily fails to appear, either because he or she does not recognise the competence of the Judge of the case or because it was not in his or her interest, or simply because he or she lets the time deadline elapse without appearing. (Supreme Court Orders, *inter alia*, of 25-2-1985, 28-5-1985, 7-4-1998, 13-6-1988, 1-6-1993, 28-10-1997, 23-12-1997, 17-2-1998, 2-2-1999, 22-6-1999, 7-9-1999, 28-9-1999, 16-5-2000, 19-9-2000, 3-10-2000, 10-11-2002). This doctrine was considered constitutional by Constitutional Court Judgment 43/1986, of 4-15.

Subsequently, the distinction between voluntary and involuntary *absentia* was expressly consecrated in binding community regulations directly applicable by national judges and that take precedence over domestic law. The principles set forth in such community regulations must be taken into account for their interpretive value, even when such rules are not applicable for reasons of timing to the matter of these proceedings.

EC Regulation 44/2001, of 22-12, even though it excludes from its scope the status and capacity of individuals and marriage regimes, establishes, among other circumstances, that rulings issued in a Member State will not be recognised in the other Member States "when issued in default of appearance by the respondent, when he or she did not receive the summons or an equivalent

document in proper form and have enough time to defend him or herself, unless he or she did not appeal said judgment when he or she could have done so." (Art. 44.2).

In the context referred to in this proceeding (although not applicable owing to date), EC Regulation 2201/2003, concerning, *inter alia*, to civil matters relating to divorce, judicial separation and marriage annulment, states that such a judgment shall not be recognised (Article 22.b) "where it was given in default of appearance, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence unless it is determined that the respondent has accepted the judgment unequivocally."

According to its Article 63, said Regulation would be applicable to the "Agreement of 1-3-1979 between the Holy see and Spain on legal matters."

B) It is, therefore, unquestionable that the restrictive interpretation of default of appearance as an obstacle to the recognition of a foreign judgment, restricted to cases in which it was involuntary, relates to the protection of due process and, under our Constitution, the right to effective judicial protection and the principle of legal security in the international sphere, introduced by case law into the interpretation of Article 954 of the Civil Procedure Act of 1881; it is accepted by constitutional case law and is derived today from the community regulations that take precedence over domestic law and, even when not applicable to the case judged, must serve as a guide to its interpretation.

One of the above mentioned regulations is not, in fact, applicable to this case and the other entered into force after the ecclesiastic judgment. Nonetheless, such community regulations certainly express a principle that goes beyond its scope of application and must be followed in domestic law, in conformity with the Constitution and interpretive case law, given the connection between the principles of effective judicial protection and legal security in the international sphere, as indicated by the case law judgments referred to above that establish such interpretation for general application.

C) The recognition of ecclesiastic judgments as equivalent to foreign judgments requires that the judge homologating same act in accordance with the principle of the full jurisdiction of the Spanish judge to decide in regard to the civil effects of ecclesiastic judgments, as recognised by the Constitutional Court.

The Constitutional Court has, in effect, recognised the full jurisdiction of civil Judges and Courts as a requirement derived from the right to judicial protection that is specified in Art. 24.1 of the Spanish Constitution, and has confirmed that the civil effects of ecclesiastic judgments, as regulated by Civil Law, are the exclusive jurisdiction of civil Judges and Courts, as a result of the principles of separation of Church and State (Art. 16.3 Spanish Constitution) and of jurisdictional exclusivity (Art. 117.3 Spanish Constitution) (Constitutional Court Judgments 1/1981, of 26-1, 6/1997, of 13-1, Fundament of Law 6, and 38/2007, of 15-2 Fundament of Law 7).

This principle allows the civil judge to deny recognition of the civil effects of canon law annulment judgments when he or she finds, among other circumstances,

that the request for recognition of civil effect involves abuse of law or procedural fraud, or, ultimately, that it is based on causes contrary to the public policy of the State (Art. 22.a of EC Regulation 2201/2003 and Article 954.3 Civil Procedure Act of 1881) or if resolutions whose recognition is sought are "irreconcilable with an earlier judgment between the same parties in the Member State in which recognition is sought" (Article 22.d of EC Regulation 2201/2003), or ultimately, if any other circumstance concurs that links to such recognition a violation of the right to effective judicial protection or any other fundamental right.

It may turn out, as the Public Prosecutor asserts by invoking this Chamber's judgment of 27-6-2002, that obligating a person to submit to a religious jurisdiction in counter to his or her religious convictions violates the right to ideological and religious freedom (Art. 16 Spanish Constitution) or freedom of thought, conscience and religion (Art. 18 Universal Declaration of Human Rights, 18 International Covenant on Civil and Political Rights and 9 European Court of Human Rights). Freedom of conscience means not only the right to freely determine one's own conscience, but also to act in conformity with the imperatives of same (Constitutional Court Judgment 15/1982, of 23-4). Fundamental rights are directly applicable and conscientious objection is contained in the fundamental right to freedom of ideology and religion (Constitutional Court Decisions 53/1985 and 160/1987).

Nonetheless, – in connection with the case law laid down by this Chamber on the interpretation of Article 954.2, of the Civil Procedure Act of 1881 –, the existence of a Community regulation that is directly applicable in the Member States of the Union and imposes the need to restrict the concept of default of appearance to one which takes place voluntarily, as an obstacle to the recognition of an ecclesiastical judgment pursuant to the Agreement between Spain and the Holy See on Legal Affairs of 1979 and in Art. 80 of the Civil Code, prevents considering such default in the abstract or in a general way as an impediment to recognition of civil effects of ecclesiastic judgments and imposes a fine point on the doctrine of the judgment invoked by the Public Prosecutor as a basis for his or her appeal, issued before the enactment of the Community regulations.

D) In general, the Constitutional Court has stated that the right to freedom of ideology recognised in Art. 16 of the Spanish Constitution is not sufficient in and of itself to exempt citizens by reason of conscience from complying with legally established obligations (Constitutional Court Judgments 15/1982, 101/1983, 160/1987, 161/1987, 321/1994, 55/1996 and Constitutional Court Ruling 1227/1988).

As is the case with the other fundamental rights, freedom of ideology is not an absolute right. To find that freedom of ideology and religion justify non-compliance with the obligation to appear before the ecclesiastical courts and thereby preventing the recognition of the civil effects of the judgment handed down, as an exception to what is established by the legally binding rules applicable under domestic Law, it is necessary to evaluate the circumstances in each case to examine whether the existence of the individual's convictions has been

reasonably established to the extent that it would his or her appearance before the ecclesiastical court incompatible with his or her ideological or religious freedom, and assess the importance of the negative effects of defaulting on the obligation to appear, and the relative importance of such circumstances vis-a-vis the other constitutional values and rights that may be at stake (since the limits of freedom of religion are based on the protection of the right of others to exercise their public freedoms and fundamental rights, as well as the safeguarding of safety, health and public morality: Arts. 16.1 of the Spanish Constitution and 3.1 of Freedom of Religion Act, or on "those which are imposed by respecting the fundamental rights of others and other constitutionally protected legal assets": Constitutional Court Judgments 141/2000, 29-5, Fundaments of Law 4; 154/2002, of 18-7 –, Fundaments of Law 7 and 296/2005, Fundaments of Law 4), including the right to effective judicial protection inherent in the recognition of ecclesiastical decisions under domestic law (Constitutional Court Judgment 66/1982, of 10–12), keeping in mind, among other circumstances, that any person who been married canonically would seem to have, in principle, accepted the religious postulates involved in such a form of marriage, including the jurisdiction of the ecclesiastical courts, whose civil effects are recognised with certain limits by the State, to decide in regard to annulment and separation, a circumstance which, obviously, does not exclude the possibility of a change in a person's convictions which might be relevant to justify his or her lack of appearance before such courts. (…)

E) (…) This Chamber finds that, in addition to the other requirements set forth by Art. 954 of the Civil Procedure Act of 1881, the Provincial Court has examined the scope of the judgment handed down by the ecclesiastic courts with full jurisdiction to examine, finding that the cause of the annulment is analogous to another covered by our Civil Code and, therefore, cannot be considered contrary to law; and that it also examined in detail the circumstances surrounding the individual's default of appearance before the ecclesiastic courts, to find reasonably that the default was voluntarily.

Furthermore, it does not appear to have been alleged at any time that the recognition of the canonical judgment was requested in an abusive or fraudulent way, nor that the judgment is irreconcilable with a civil judgment under domestic law; and it is not found that the affected party invoked at any time that his or her appearance before the ecclesiastic court affected his or her ideological or religious freedom; furthermore, he or she did not make any allegations in the process of the recognition of the civil effects of the canonical decisions, nor has he or she done so in this cassation appeal.

And therefore, as identically indicated in the ruling by the Provincial Court of Las Palmas of 23-10-2007, in regard to the demand that the canonical judgment whose recognition is sought "was not judged in default of appearance" (Art. 954.2 Civil Procedure Act) the concept of default of appearance must be taken into account as determined by international case law in regard to the recognition of foreign judicial judgments, and distinguish between involuntary default, in which notification and summons of the respondent was performed by means

based on legal fiction (edicts on notice boards, in bulletins and newspapers or through persons alien to the respondent's personal circle) and tacit, or convenience default, in which there is a record that the respondent had the necessary knowledge of the existence of the suit and was able to consider its importance and decided not to appear or not to do so in the legally established way. This distinction is today part of what has come to be called the «Public Policy» of international private law, and is dealt with as such in major international agreements and also been included in the Supreme Court case law that, for the purposes of evaluating default criteria under Art. 954.2 of the Civil Procedure Act of 1881, requires «verification that notification was properly served, in accordance with the provisions regulating such acts of procedure, and its timeliness in that it provided the respondent with the possibility of exercising his or her right to defence in its full dimension» (in this regard, the Rulings of 17-2, 4-7 and 23-6-1998 and 28-12-1999). (…).

It is established (for example the Judgment by the Provincial Court of Barcelona, Sec. 18, of 20-3-2007) that the only requirements to be taken into account in homologating canonical decisions are, in regard to form, proof of the authenticity of the judgment and, in regard to substance, whether it conforms to the law of the State, involving no review other than making sure the canonical judgment does not contradict any of the legal concepts enshrined in Spanish Law, which clearly is not the case since the cause invoked for annulment and considered here is analogous to that contemplated in Art. 73 of the Civil Code. (…)."

V. INTERNATIONAL COMMERCIAL ARBITRATION

1. General Principles

* Ruling by the Provincial Court of Barcelona (Sec. 15) of 29 April 2009 (EDJ 2009/260256)

International arbitration. Arbitration agreement. Bankruptcy procedure. Impact of bankruptcy on international arbitration.

"FUNDAMENTS OF LAW:…SECOND. – […] The partial award by the Arbitration Board offers appropriate grounds regarding the effectiveness of the arbitration clause under the law that applies to it (the award argues that the parties made no choice of law to be applied to the arbitration agreement and in the absence of such choice, the Court can refer it to Italian Law, chosen by the parties to be applicable to the substantive part of the contract, or to French Law, which is the law applicable to the site of arbitration, concluding that the arbitrated settlement is autonomous and independent of the principal contract, whereby there exists no reason to apply Italian Law – the substantive law of the contract –, and furthermore LP does not establish that the arbitration agreement is invalid under Italian Law, being valid and effective under French Law) and the effect of Art. 52.1 of the Spanish Bankruptcy Act (the Arbitration Board

considers that the mandatory rules of the Spanish Bankruptcy Act not part of the French concept of international public law; that Art. 52.1 of the Bankruptcy Act is applicable to domestic arbitrations, but international arbitration agreements continue to be valid when international treaties provide therefore, in accordance with such provision; since the provision provides for the application of international treaties on arbitration, the Spanish Bankruptcy Act seeks precisely to establish an exception to the non-validity of the arbitration agreement in the case of bankruptcy, and Spain has ratified the New York and Geneva Conventions, neither of which provide for restriction of the effectiveness of arbitration agreements in bankruptcy cases. On the contrary, both conventions set forth that the States recognise the validity and effectiveness of arbitration agreements, concluding finally that the arbitration agreement included in Clause 34 of the contract is valid and not affected by bankruptcy procedure).

(…)

SIXTH. – Art. 52.1 of the Bankruptcy Act, provides that "Arbitration agreements to which the debtor is a party shall be without value or effect during the bankruptcy proceedings, notwithstanding as provided in international treaties," is applicable to domestic arbitrations but not to international arbitrations as defined by Art. 3 of the Arbitration Act and the International Conventions to which Spain is a party since care is taken to expressly salvage this restriction of the validity of the arbitration convention established for a situation of bankruptcy, depending on what is provided under international treaties that regulate the effectiveness of the arbitration agreements in cases of international arbitration. Such Conventions, to which our country is a party, are the New York and Geneva conventions already cited, and in same, as case law points out, we find no provision similar to the restriction or exception contained in Art. 52 of the Bankruptcy Act, nor any rule that covers it.

Said Article 52.1 of the Bankruptcy Act (as the legal opinion provided by the respondent states) would only be applicable to the case to the extent that the cited International Conventions signed by Spain designated Spanish law as the applicable law for determining the validity of the arbitration agreement. This, however, is not found in the case at hand.

Art. II.3 of the New York Convention does not determine the applicable law for determining whether the arbitration agreement "is null and void, inoperative or incapable of being performed." If we go to the Geneva Convention we see that its Art. 6.2, on analysis of the validity of the arbitration agreement, first designates (paragraph a) "under the law to which the parties have subjected their arbitration agreement," in contrast to the law applicable to the substance of the dispute, to which Art. 7 of said Convention refers. Clause 34 of the contract does not indicate any law applicable to the arbitration agreement itself and it is therefore questionable that it would be Italian law, which, in accordance with Clause 33 governs substantive contract obligations, or rather, the substance of the dispute. In any case (as the partial award by the CCI indicates in the arbitration proceeding in Paris) the complainant LP has not alleged nor accredited (neither has it here) that the arbitration agreement is not effective under Italian Law.

In the absence of the above criteria we must resort to paragraph b) of Art. 6.2 of the Geneva Convention that in such cases remits to "the law of the country where the award is to be determined," namely, France. According to French Law, as both the author of the legal opinion entered by the respondent (by Dr. Juan Pablo, Professor of International Private Law, Autonomous University of Barcelona) and the partial award by the CCI in Paris, the agreement is perfectly valid and in effect.

However, Art. 6.2 of the Geneva Convention provides that "the courts may also refuse recognition of the arbitration agreement if under the law of their country the dispute is not capable of settlement by arbitration." However, as is seen here, remission to *lex fori* is limited to finding whether the matter of the arbitration agreement is capable of settlement by arbitration, and does not extend to including any other possible limitations to the validity of arbitration, not linked to the substance of the matter subject to arbitration.

(…)

EIGHTH. Furthermore, in this case the exception contained in the arbitration agreement cannot be invoked because the dispute is in regard to "precautionary or emergency measures," which is the case the clause excepts from being subjected to arbitration (the arbitration agreement states: "excepting, however, the jurisdiction of the Ordinary Judicial Authority in relation to precautionary or emergency measures as requested by one of the parties"). As argued in the order subject to appeal, a procedural initiative or act of a precautionary or preliminary nature, such as the ones indicated by this clause, cannot be equated with the declaratory process to which judgment of the substance of the matter is submitted under ordinary jurisdiction, no matter how urgent its resolution is, as is the case with all the cases which come before the courts.

Lastly, the lack or insufficiency of economic means to pay the cost of the arbitration proceedings before the CCI is not a legally legitimate reason to establish the ineffectiveness of the arbitration agreement. In the arbitration proceedings LP may make a claim, to be processed as appropriate, since PIRELLI is covering the costs of the arbitration, as confirmed, notwithstanding any order to pay court costs that the final award may establish in regard to the substance of the matter."

* Ruling by the Provincial Court of Barcelona (Sec. 17) of 28 May 2009 (EDJ 2009/220042)

Agency contract. International commercial arbitration. Arbitration agreement: validity and effectiveness.

"FUNDAMENTS OF LAW:…SECOND. – […] Finally, and now entering into the formal requirements of the arbitration clause, and more specifically, its validity, we only have to remember paragraph 2 of Article II of the New York Convention transcribed above, whereby "the term 'agreement in writing' shall include an arbitration clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." As case law points out (among others, Rulings of 13-11-2001 and those cited above) on this

point it is necessary to consider the purpose and object of the rule that is none other than to verify the existence of common will by the parties to include an arbitration clause in their relations, "common will that must spring from the set of communications and acts carried out by each side of the business relationship, provided, however, that silence or inactivity by the party to which an offer may be made directly or indirectly containing a clause of commitment cannot be considered effective." In the case under study, the clause on submission to arbitration is set forth in a contract that was signed by both parties and has been kept in force for over ten years, without, to date, the slightest opposition by the agent to this contractual clause, whereby in accordance with the Supreme Court case law such clause is considered as fully accepted. As indicated by the Supreme Court Ruling of 13-11-2001 the fact that acceptance is expressed does not mean that it must be aimed at the specific clause, but rather is sufficient to refer to the contract in general.

Furthermore, the fact that the clause was not negotiated individually does not lessen its validity nor does it have to be a cause of imbalance between the parties. While it is logical to think that the respondent company would be the party interested in having any conflicts that might arise with the agent in Spain be resolved in Finland and more specifically by the Central Chamber of Commerce, this does not mean that it was a clause unknown to or not accepted by the now complainant. As this Court set forth (Section 17 of the Provincial Court of Barcelona) in its Ruling of 16-3-2007, it is difficult to think that a contract of the characteristics and economic importance (in view of the invoices submitted set forth by the agent herself) of the one that was signed, was not signed without prior negotiation and legal counsel. It must be added to all of this that the contracting parties are not consumers but rather two companies that operate internationally and who subject to a specific arbitration body the resolution of any conflicts that may arise between them and that the mere fact that one is the agent and the other is the manufacturer of the product does not evidence any imbalance between the two contracting companies in a field such as international commerce that is governed by specific rules and principles and in which – as stated in the Supreme Court Ruling of 31-5-2005 – the balance or imbalance between contracting companies is in respect to their market positions, where it is customary and accepted to resort to general conditions that facilitate contracting and commerce by subjecting any conflicts to special arbitration bodies."

* Ruling by the Provincial Court of Salamanca (Sect. 1) of 15 September 2009 (AC 2009\2008)

Standard form Contracts. Submission to arbitration as provided in the New York Convention of 1958. Complainant's knowledge of arbitration clause. General conditions sufficiently known by complainant. Documents sent by electronic mail. Legitimacy for entering a declinatory plea.

"FUNDAMENTS: (…). SECOND. 1. Certainly case law has been demanding that arbitration clauses must be clearly, expressly and unequivocally accepted

by the contracting parties and that the clause must be clear and offer no reasonable doubt regarding the intention of the contracting parties, whereby the words used do not allow for any interpretation other than what is taken from their literal meaning, and all of this is especially important when the arbitration clause is incorporated into general conditions, that are brought together in turn in a contract. Not only does case law recognise this, but this is also inferred from the New York Convention of 1958 and the Model Law on International Commercial Arbitration and the Spanish Arbitration Act of 23-12-2003.

The problem is whether in this case the complainant company can be considered to have known the arbitration clause in the above mentioned way and be understood to have accepted it. (…) If we examine the documents provided regarding prices and business conditions, it turns out that, although reference is evidently mistakenly made to the delivery time when referring to the place of delivery, stating CIP Guijuelo, in accordance with INCOTERMS 2000, delivery conditions according to ORGALIME S 2000, and mechanical guarantee in accordance with general ORGALIME S 2000 conditions. (…). 4. In regard to the application to the case of General Contract Law and Conditions and the impossibility of applying Article 3.1 of the Rome Convention, it turns out that we find ourselves with a stipulation in what we could call a standard form, since it does not show that the terms were not able to be negotiated by the two parties. (…).

THIRD (…). We must keep in mind that, according to Article 7 of the Model Law on International Commercial Arbitration, the arbitration agreement is understood to be in writing when it is contained in a document that is signed by the parties by exchange of letters, telex, telegrams or other means of telecommunication that produce a record of the agreement, with an exchange of demands and responses in writing in which the existence of an agreement is signed by one party and not denied by the other. In this case, the documents were sent by electronic mail and as said, it is surprising that there is acknowledgment of receipt of the parts of interest to the complainant but not of the parts that would be adverse. Article 9.3 of Act 60/2003 of 23-12 on Arbitration, contains practically the same regulation as Article 7 of the Model Law. Furthermore, it must be taken into account that Article of this law establishes that the provisions contained in paragraphs 3, 4 and 6 of Article 8, in Article 9, except paragraph 2, in Articles 11 and 23 and in Titles VIII and IX of this law shall be applied even when the place of arbitration is outside Spain. Therefore, the validity of this way of formalising arbitration is recognised even under domestic law. However, in addition to this provision, since Article 9.2 is excluded, the rules governing standard-form contracts are not applicable. (…)."

3. Recognition and Enforcement of Foreign Awards

* Ruling by the Provincial Court of Burgos (Sect. 3) of 27 April 2009 (EDJ 2009/102800)

Appeal against the order that accepted the "exequatur" of arbitration awards granted in an arbitration proceeding brought by the executant. Arbitration Chamber of Paris. Lack of arbitration agreement. Awards granted in default of appearance. Consideration of the appeal and denial of exequatur.

"FUNDAMENTS OF LAW:... THIRD. – [...] As the Supreme Court Order of 2-10-2001 stated, the certificate issued by the arbitration board is not valid for meeting the requirement of Article IV.1.b) of the Convention: it is up to the Court of the exequatur to verify its concurrence with the effects of the recognition of the applicability of the foreign award, independent of the judgment of the arbitrator or the arbitration body on the existence of agreement on arbitration.

FOURTH. – [...] With this background and in conformity with said judgment by the high court, since no other document or documents are presented in which the arbitral agreement is set forth in the form as required under Article II of the convention, "it cannot be sustained beyond a shadow of doubt that between the parties there was a resolute, unquestionable intent to include the submission clause established in Paris contract no. 19 in the contract," since the two contracts are not signed by either the seller, who is requesting the exequatur, or the buyer, who is being sued, and are only signed by the mediation body to which there is no record of the respondent issuing any order that would reflect its clear and manifest will to submit discrepancies to an arbitration board. And, as the Supreme Court Order adds, in no way can silence or inactivity – by the opposing company – after receipt of repeated confirmation of sale be equated with acceptance of all the terms included therein, including the commitment to submit to arbitration."

QUINTO. – [...] On this basis it is found that the arbitration award was issued in default of appearance of the respondent, and the requesting party did not accredit under said circumstance, as was its responsibility, the way in which the notification was carried out in the claim of origin, namely whether the respondent was notified at the correct corporate address – no original copy of the letter and acknowledgement of receipt was provided –, since in no way does the supposed notification by letter with acknowledgement of receipt that was "returned" accredit that it was actually received by the addressee; the fact that the respondent company did not claim its mail from General Delivery did not inevitably mean that it did not claim it "voluntarily," positioning itself, therefore, in its situation of default of appearance for convenience. (Constitutional Court Judgment 1st of 15-4-1986 and Supreme Court Order of 8-2-2000, among many others). It has not been proven that, once the attempt to notify by letter with acknowledgment of receipt failed, an attempt at personal notification of the respondent in any other form was made, to fully accredit that the respondent was aware of the arbitration proceedings brought against it sufficiently in advance of same to be able to exercise its right to a defence."

VI. DETERMINATION OF APPLICABLE LAW: SOME GENERAL ISSUES

1. Evidence of Foreign Law

* Supreme Court Decisions (Labour Court, Section 1) of 24 March 2009 (JUR 2009\206452)

Evidence of Foreign Law applicable to an employment contract and consequences of lack of evidence: application of Spanish Law.

"LEGAL REASONING. FIRST. – (…) In regard to what is of interest here, the respondent Administration appealed, maintaining that if Ivory Coast law is applicable, lack of proof of same must be attributed to the complainant and such lack of proof should result not in the application of Spanish Law but rather to dismissal of the case. The High Court of Justice of Madrid Judgment of 26-3-2008 dismissed the appeal, arguing that it was the respondent who alleged in the judgment hearing that Ivory Coast law is the applicable law, making it up to said party to prove its validity and content; the judgment by the court does not find this content proven – continues the appealed judgment – and the respondent has not sought to eliminate such omission through paragraphs a) or b) of Article 191 of the Labour Procedure Act. The judgment concludes, citing this Chamber's Judgment of 4-11-2004 (R. 2652/03), that if there is no proof of foreign law, Spanish law must be applied in its absence.

The respondent appealed in cassation to unify doctrine, proposing in contrast the Supreme Court Judgment of 19-2-1990 (R 2736/89), according to which "Such lack of allegation and proof (of foreign law) does not lead, as the appellant seeks in the seventh ground for appeal, to application of Spanish Law, since it would be absurd to sanction the deliberately sought omission of proof of foreign law by application of Spanish Law when considered to be the more beneficial," and along the same lines – that the absence of proof of foreign law should lead to dismissal of the claim – as determined by the Chamber's Judgments of 22-5-2001 (R. 2597/00) and 25-5-2001 (R. 556/00) cited by the State Attorney in his appeal and which abandoned the Chamber's former doctrine contained in its Judgment of 16-3-1999 (R. 1962/98).

However, the appeal lacks cassation content since it resolves the appealed judgment in accordance with doctrine contained in this Chamber's Judgment of 4-11-2004 (R. 2652/03) issued in General Chamber, that amends the doctrine of the judgment proposed in contrast and maintained in the two that decisions cited above and re-establishes the doctrine of the Judgment of 16-3-1999.

The Judgment of 4-11-2004, takes into consideration three Constitutional Court Judgments and concludes by stating the following: "In conclusion, the doctrine of the Constitutional Court – the highest interpretation of the Spanish Constitution and of the scope of fundamental rights (Spanish Constitution Articles 53.2 and 161) – is overtly opposed to that which the Plenary of this Chamber adopted in the above mentioned Judgment of 22-5-2001, and given

this situation it is appropriate to rectify such doctrine and bring it in line with the Constitutional Court doctrine reflected above and to which me must submit. Therefore, if the judgment that was appealed on the basis of the absence of proof of foreign law dismissed the case on dismissal, it violated Article 24 of the Spanish Constitution by not applying Spanish labour law in substitution thereof, given the lack of proof of the existence and validity of English Law, to resolve the case in question."

This doctrine is recalled by the Chamber in its Judgment of 20-7-2007 (R. 76/06), that in its fifth ground refers to the previously cited judgment (although it erroneously states it as being from December) saying that the Chamber thereby "has amended its previous doctrine on the effects of the lack of proof of foreign Law to adapt it to the doctrine of the Constitutional Court. Such lack of proof no longer gives rise to dismissal of the case on account of the party bearing the burden of proof not having proven the legal provisions underlying the claim, but rather, in accordance with the Constitutional Court doctrine, lack of proof of foreign Law leads to application of domestic Law."

* Judgment by the High Court of Justice of Madrid (Labour Court, Sect. 6) of 26 October 2009 (EDJ 2009/312067)

Proof of foreign Law. Impossibility of dismissal of case owing to lack of accreditation of foreign law, having to apply Spanish law in its absence.

"FUNDAMENTS OF LAW: FIRST. – The complainant appealed the judgment dismissing the case on dismissal by retirement of the employee, entered in the proceedings, because the appellant considers that she is covered by the right she refers to in her complaint, supported, in this order, by English Law, or in its absence, by Spanish law. Based on paragraph a) of Art. 191 of the Labour Procedure Act, the appellant first entered plea for nullification of action, citing violation of Art. 24.1 of the Spanish Constitution, in relation to Art. 281.2 of the Civil Procedure Act, by considering that since there is no discrepancy between application of British Law to the case at hand, the Court must use the prerogative contained in Art. 281.2 of the Civil Procedure Act to determine the veracity of the law invoked, consisting of, as alleged in the course of the judgment, Annex 6 of Legislative Instrument no. 1031 of 2006, that entered into force on 10-1-2006 and that sanctioned Equal Employment (Age) Regulations, and in the Employment Rights Act of 1996, according to which, although the normal retirement age is 65, it is also possible – according to the appellant – for employees to continue their employment past that age, whereby if an employer obligates an employee to retire because of having reached the age of 65, it can be sued for age discrimination and for unfair dismissal. After analysing the evidence provided – pages 43 to 125 of the case file-, the original judgment concluded that the content of the application and validity of the British law invoked during the process had not been sufficiently proven, since partial translation of same was provided, but not certified as – 2nd Fundamental of Law – corresponding to the English original provided, "since it was not done

by a sworn translator," and also because there was no accreditation of the interpretation of such law by the appellant to sustain her position in the terms set forth in the proceedings. As gathered from the original judgment, the issue is of an employee who resides in London and who is employed, albeit without a written contract, and therefore lacking express submission to Spanish Law – 2nd Fundament of Law. However, and as stated in the appealed judgment, in the complaint governing these proceedings it only refers to the fact that retirement, under Spanish law, – referring to the General Social Security Act –, is a right held by the employee, not an obligation that may be imposed by the employer. This too can be said of the previous claim – pages 12 and 13 – in which British law is not referred to. It can therefore be concluded that this is a newly "coined" allegation, as it invoked solely and for the first time by the complainant in the course of the proceedings, in violation of Art. 85.1 of the Labour Procedure Act whereby a complainant may not make a substantial variation in his or her complaint in the course of proceedings. Notwithstanding such fine points or exceptions, the original judgment did analyse the issue of discussion by applying the provisions contained in the 3-12-2007 Agreement by the General Negotiating Commission of the General State Administration on employment conditions of labour personnel abroad, "since no regulation was accredited that regulated this situation in any other way," whereby the doctrine contained, *inter alia*, in the Supreme Court Judgement of 4-11-2004, on accreditation of foreign law and the consequences if not accredited is applicable. In fact, as argued in the latter, "the doctrine of the Constitutional Court – the highest interpretation of the Spanish Constitution and the scope of fundamental rights (Spanish Constitution Articles 53.2 and 161) – is in open opposition to the doctrine adopted by the Plenary of this Chamber in its abovementioned judgment of 22-5-2001, and in the face of this situation proceeds to rectify such doctrine and adapt it to that of the Constitutional Court as set forth above, to which we must also submit. Therefore, while the judgment appealed on the basis of absence of proof of foreign law dismissed the case for dismissal, it violated Article 24 of the Spanish Constitution because it did not apply Spanish labour law in substitution for the lack of proof of the existence and validity of English Law, to resolve the case. The Supreme Court Judgment continues arguing that the High Court of Justice or the Labour Court itself, before resolving on the claims, could have used the faculties with which it is empowered in this regard, under the second paragraph of Article 281 of the Civil Procedure Act, which states that "foreign law must be proven in regard to its content and its validity, and the court may make use of any means it deems necessary to do so. However, this power to use inquiry faculties means that now it cannot be understood that there was a violation of such principle, even though such possibility is formulated as an alternative desired by the Legislator to resolve such cases. Therefore, the doctrine pursuant to law is from the contrasting judgment (Supreme Court 16-3-1999), that contains what was sustained earlier by this Chamber before its Plenary revised it in the abovementioned Supreme Court Judgment of 22-5-2001." In sum, and in application of the abovementioned doctrine, the non-accreditation

of foreign law invoked by the complainant and appellant in the course of the proceedings, must not lead to dismissal of the case – which the original judgment did not do –, but rather the application of Spanish Law invoked to the contrary, as reasoned in the 2nd Fundament of Law, which, also in accordance with the appealed judgment, must not serve as a fundament of the complainant's case. Therefore, also considering that the power to prove foreign law, referred to in Art. 281 of the Civil Procedure Act, is a faculty of the court, there are no relevant procedural violations found that would justify the nullification of the proceedings sought in this first ground, whereby it must be dismissed."

* Judgment by the Provincial Court of Castellón (Section 1) of 16 January 2009 (AC 2009\699)

Lack of proof of Moroccan Law to determine status as an heir of a deceased person of such nationality under Civil Code Art. 9.8.

"FUNDAMENTS OF LAW. – (…) THIRD. – (…) In view of the prior considerations there is no questioning the fact that it is up to the complainant to sufficiently accredit that the person against whom he or she has entered a complaint is legitimated in the specific procedure in question ("*ad causam*" legitimacy), and the Courts have *ex officio* power to note the lack of both active and passive legitimacy. The respondent was called forth in the action as his deceased son's heir. Since the deceased was of Moroccan nationality, Moroccan Law must be abided by to determine whether the respondent-appellant is an heir from whom the damages caused by the deceased can be claimed in the case. This is established in Art. 9.8 of the Civil Code: "…".

The appealed judgment recognises the lack of proof of the matter but presupposes the appellant's status as heir and considers that he bears the burden of proof if he is not, an argument on the basis of which it is considered that there is passive legitimacy, and the case is admitted.

The Chamber does not share the criteria used in the appealed judgment because in accordance with the above legal ground it is clear that it is up to the complainant to prove each and every premise of liability by the respondent, including his status or condition as an heir of the person who caused the damages. Nonetheless, we are not knowledgeable of Moroccan Law on such matter. Its validity, application or interpretation has not been proven, whereby it is not possible in this proceeding to determine to the degree of certainty required in civil judgments, whether the respondent is liable as heir for his son's debts.

The Supreme Court Judgment of 31-12-1994 has resolved in this regard, stating that it is illogical and lacks a sound basis to ask the Court to determine the applicable law when such is a matter of foreign law not invoked by the parties. The Judgment by the Provincial Court of Murcia of 11-12-1995 states that pursuant to law, the person who invokes any such law must accredit its content and validity by the means of proof accepted by the Spanish court, which the appellant / respondent has not done. The Judgment of the Provincial Court of Barcelona of 15-8-1998, considers the principles and rules of international

private law in force in Spain to be violated, since the valid law on the matter must be alleged and proven by the respondent, in absence of which judgment of the action is not possible."

(…)

* Judgment by the Provincial Court of Castellón (Sect. 2) of 15 July 2009 (AC 2009\1876)

Married couple of Moroccan nationals. Suit for divorce. Proof of foreign law. Absence of proof. Inactivity of the parties. Non-application of Spanish law. Dismissal of the case.

"FUNDAMENTS. (…). THIRD. The complainant also entered an appeal against the judgment based on the non-application in same of Art. 22.2 and 3 of the Organic Act on the Judiciary and Art. 12.2 in relation to Art. 107.2 of the Civil Code and the incorrect application of Art. 107.2 of the Civil Code. The judge of the case is considered to have interpreted such provision restrictively and to have furthermore overlooked what is established in Arts. 22.2 and 3 of the Organic Act on the Judiciary and Art. 12.2 in relation to Art. 107.2 of the Civil Code. The appellant considers that with regard to the lack of proof of Moroccan law, the thing to do is to abide by application of the pertinent provisions of Spanish Law, so as not to not leave the substance of the matter without a judgment, in accordance with the principle of effective judicial protection enshrined in Art. 24 of the Spanish Constitution. (…).

FIFTH. (…) Let us consider, therefore, that the Judge of the case correctly applied Article 107 of the Civil Code, to which this matter refers, and the conflict provision contained in Article 9.2 of the same legal text, that provides, in general, that separation and divorce are governed by the national Law common to the spouses at the time the action is brought.

Under such legal terms, pursuant to Article 11.3 of the Organic Act on the Judiciary, the requirement by the Judge of the case to the complainant to base his or her application for divorce on the law common to the parties is irreproachable, since both are Moroccan nationals and there is no record of either of them having acquired Spanish citizenship.

In fact, as provisions on conflict are matters of public policy, in accordance with Article 12 of the Civil Code the law applicable to the matter to be judged cannot be left up to the parties to determine. Therefore, in principle, the complainant's invocation of Spanish Law as applicable to the case contradicts the principles of international private law in force in Spain, since in view of the common nationality of the litigants the claim should be based on the law in force regarding divorce in the Kingdom of Morocco, which also must be accredited by the parties, notwithstanding the collaboration that the courts must provide, as set forth in Article 281.2 of the Civil Procedure Act.

Specifically, choice of applicable law is a matter of public policy and cannot be renounced by the parties, nor resolved *ex officio* by the courts, and lack of allegation and proof thereof must not lead automatically to resolution of the case in accordance with Spanish Law.

This solution does not conflict with Article 24 of the Spanish Constitution, since as the Constitutional Court has stated, one of the projections of fundamental law to effective judicial protection recognised in said provision consists of access to jurisdiction, which means that everyone has a right to have a court resolve on the substance of controversies of legitimate rights and interests brought before it, except when prevented from doing so based on an express provision of Law. And it adds that the referenced right to protection is also met when the judicial bodies issue resolutions taking into account the concurrence of a legal ground that prevents consideration of the substance, whereby a finding of non-admission or a merely procedural one is in principle constitutionally admissible, although judicial interpretation of the procedural obstacle in question must be guided by a "*pro actione*" criteria, and always keep in mind the relationship between the rule and a criteria of proportionality between the importance of the fault and the sanction derived from same, and as far as possible, seek to right the wrong, seeking to preserve the effectiveness of procedural acts and proceedings as an instrument for achieving effective judicial protection (Judgments 13/1981, 119/1983 and 193/2000, *inter alia*.)

As set forth in the appealed judgment, in this case there is a lack of proof of Moroccan Law, not owing to impossibility on the part of the litigant, but rather to the total inertia or apathy of the parties, who merely invoked provisions of Spanish Law that were not applicable to them. (…)."

* Judgment by the Provincial Court of Castellón (Sect. 2) of 7 October 2009 (EDJ 2009/328902)

Evidence of foreign law. Application of Spanish law.

"FUNDAMENTS OF LAW: SECOND. – The appellant appealed the original judgment that dismissed the contested petition for divorce under the understanding that Spanish Law was not applicable, but rather Moroccan law was, which was neither alleged nor proven. Faced with such a conclusion, the appellant's legal representative considers that Art. 107 of the Civil Code was violated in that, lacking a common national law, the applicable law is that of the place of common residence, therefore Spanish Law, as derived also from Act 8/2000, of 22-12, on the Rights and freedoms of foreigners in Spain, Arts. 1.7 and 12.6, 86 and 12.3 of the Civil Code, and Art. 22 of the Organic Act on the Judiciary. In this regard, as this Section has already determined in its Judgment of 28-5-2008, the fundaments of which we reproduce: "The Supreme Court Judgment of 5-3-2002 recompiles the doctrine of its First Chamber in regard to application of foreign law, establishing that «Since the appellants state they are not aware of this doctrine, it is worthwhile to recall the content of the following decisions by this Chamber: those of 11-5-1989 and 3-3-1997 that consider foreign law as a matter of fact which, therefore, must be alleged and proven by the party that invokes it; The Judgments of 9-11-1984 and 10-3-1993, that state that the judicial bodies have the power but not the obligation to collaborate in determining the content of foreign Law if invoked, using the means of proof they consider necessary; finally, the Judgment of 31-12-1994, that established the

necessary distinction between the rules of conflict (which are limited to indicating the material law that is applicable to a disputed legal relationship) which, according to the first paragraph of Article 12 of the Civil Code should be observed ex officio, and the material law itself, to which said provisions does not refer and which in no case should be determined by the Court». The lack of accreditation of the content and validity of the substantive provisions of foreign Law means that the issue must be resolved in accordance with the provisions of our own legal system (Supreme Court Judgments of 7-9-1990 and 11-5-1989, 13-12-2000.) This is because, as the Supreme Court Judgment of 17-7-2001 states "…this Chamber has repeatedly stated that when the Spanish Courts are unable to determine with absolute confidence the applicability of foreign Law, they must judge and resolve in accordance with national Law (*inter alia*, Supreme Court Judgments of 11-5-1989, 7-9-1990, 16-7-1991 and 23-3-1994), which is the result of the case law on the fact that application of foreign Law is a matter of fact and as such must be alleged and proven by the party that invokes it, and not only the specific existence of such valid Law must be accredited, but also its scope and authoritative interpretation, so that its application will not give rise to even the slightest reasonable question on the part of the Spanish courts, and all this must be done by means of pertinent reliable documentation (for all, Supreme Court Judgments of 4-10-1982 and 12-1-1989". The Judgment by the Provincial Court of Malaga of 10-2-2005 states: "The Chamber must commence by stating that because this case involves a petition for separation between spouses of Moroccan nationality, it is true that on its face Art. 107 of the Civil Code remits to the law of the Kingdom of Morocco as applicable law, and therefore Art. 12 of the Civil Code requires the party promoting the action to provide appropriate accreditation of the content and validity of such foreign law, by means of proof accepted under Spanish Law. Apart from this, it is a good idea…to also attend to the circumstance of the conjugal domicile…since Art. 769.1 of the Civil Procedure Act, in relation with Art. 22.3 of the Organic Act on the Judiciary, considers that the common residence of the litigants in Spain at the time the separation was applied for determines the jurisdiction of the Spanish Courts. All in all, the interpretation in favour of *lex civilis fori* of the domicile against the common national Law would not be completely refuted, without proceeding to also consider the reasonable suitability of introducing the exception under Art. 12.3 of the Civil Code, if the potential application of foreign Law would contravene public order, taken as the set of both public and private socioeconomic, moral and even religious principles that, as parameters of reality as normally experienced and assessed pursuant to collective criteria in force, are taken as absolutely mandatory for the preservation of a society at any given time. This criterion is supported by case law, such as the Supreme Court Judgment of 5-4-1996, but whose interpretation must always be cautious and restricted so that applicability of foreign law or enforceability of resolutions by foreign courts will not ultimately turn out to be always inaccessible. In any case, the Act on the Rights

and Freedoms of Aliens in Spain (Organic Act 4/2000 of 11-1 and Organic Act 8/2000, of 22-12 must not be ignored insofar as it confers on all aliens the rights and freedoms that are provided for citizens of the Kingdom of Spain in Title I of the Spanish Constitution of 1978, resituating the issue in terms which go beyond any possible restrictions under procedural or substantive law relating to the provisions of Art. 107 of the Civil Code. The complainant clearly chose the application of Spanish Law.…" The Judgment of the Provincial Court of Almeria (Section 3) of 28-6-2004) states the same thing: "(As established in Article 107 of the Civil Code…the applicable substantive law to regulate marriage separation would be the law of Morocco, since both are citizens of said country. However, as set forth in the appealed judgment no proof has been proposed to demonstrate the content of Moroccan Law and its validity, as required under Art. 281.2 of the Civil Procedure Act. So, the proper legal solution of this lack of proof of national law common to the foreign spouses cannot be the one that was adopted by the Judge «*a quo*», with whose criteria this Chamber differs, since in cases such as the present in which there is lack of knowledge of the content of the foreign law whose application is being invoked, the case law of the Supreme Court is uncontroversial in regarding to the application of Spanish Law, by stating that application of foreign law is a matter of fact and as such must be proven by the party that invokes it, to the extent that its application causes not even the slightest reasonable doubt on the part of the Spanish courts. When they are not able to prove with absolute certainty the applicability of foreign law, the judgment shall be made pursuant to Spanish Law (Supreme Court Judgments of 31-12-1994, 25-1-1999, 5-6-2000 and 17-6-2001). Despite the fact that this might run the risk of leaving the choice of applicable Law to the parties (it may not be in their interest to allege the foreign law designated by the rule of conflict, and they may prefer the *lex fori*), according to the Constitutional Court, the jurisprudence that in the absence of proof of foreign law Spanish Law must be abided by, is more respectful of the content of Art. 24.1 of the Spanish Constitution than the solution adopted by the appealed judgment that considers the petition as abandoned, "since the Spanish State, in substitution of any that may be applicable, can also, in a situation involving foreign nationals, offer the response based on law that the cited constitutional provision demands" (Constitutional Court Judgment 155/2001, of 2-7." By virtue of the doctrine set forth above and given that both spouses reside in Vinaroz, we consider that Spanish law is applicable. We must thereby revoke the original judgment and with an overall acceptance of the appeal, declare the marriage, entered into by the spouses by the Islamic rite on 23-4-2004 before the family law judge in charge of marriages of the Nif Judicial Centre as stated in the case file (page 6), hereby dissolved in application of Art. 86 in relation to Art. 81.2, both of the Civil Code."

* Judgment by the Provincial Court of Tarragona (Sect. 1) of 20 October 2009 (EDJ 2009/326675)

Marriage. Applicability of German Law. Action by the judge given the lack of accreditation by the parties.

"FUNDAMENTS OF LAW:…FOURTH. – Financial provision, or maintenance (first ground for appeal), is requested by counterclaim under Arts. 97 of the Civil Code and 84 CF. According to the Supreme Court Judgment of 9-2-1999, "the applicable foreign right must be specified and provided to the Court (…), as "*iura novit curia* is not applicable and Article 12.6 of the Civil Code must be complied with, whereby the person who invokes foreign law must be able to accredit its content and validity by means of proof that are acceptable under Spanish Law, notwithstanding that the Court in judging may use any instruments for verification it considers necessary." In regard to the obligation of the party who alleges having a right based on foreign law to prove its existence and validity and provide it to the Court, see also the Supreme Court Judgment 31-12-1994. The conflict rule (Art. 9.2 Civil Code and, where appropriate Art. 111-3 Civil Code of Catalonia, in regard to the possibility of applying extraterritorial law under the Catalonian legal system) lead us to apply German law, in accordance thereto, which is and should be assessed *ex officio* by this Court (Art. 12.6 Civil Code). According to the Supreme Court Judgment of 4.7.2006, both based on the abolished Art. 12.6.2 of the Civil Code of Catalonia and the current Art. 281.2 of the Civil Procedure Act, which reiterates it in essence, "foreign law is treated as a fact and therefore must be subject to allegation and proof and it is necessary to accredit not only the exact extent of the law in force, but also its scope and authorised interpretation, and if such is not done, Spanish law must be applied." As stated, it is clear, as found in the proceedings, that German law is applicable to the consequences of the economic regime of the marriage that is now being dissolved and that the party who alleges having right to a financial provision in the appeal not only did not prove the existence of such a right under German law in the agreed regime (Art. 217 Civil Procedure Act) but also alleges Spanish and Catalonian law, which are not applicable in this case in accordance with the rules of international private law that we have applied. Nonetheless, under the authorisation to the Court to avail itself of all means to find out the applicable foreign law, we must take into account the possibility set forth by Art. 1569 of the German Civil Code that states that after divorce it is up to each spouse to support him or herself. And it goes on to state that if one is not in a position to do so, he or she can apply for financial provision from the other spouse, only under the provisions made for such a purpose, among which we must pay special attention, in the case at hand and as set forth in the counterclaim, to paragraph 1573 (2) of the German Civil Code that states that if the income obtained through an adequate economic activity is not sufficient for complete sustenance (of the needy party) (paragraph 1578 BGB), the divorced spouse can claim the difference between such income and complete sustenance; for its part, paragraph 1577 (1) of the German Civil Code states that the divorced spouse may not claim financial provision under paragraphs 1570 to

1573, 1575 and 1576, when and to the extent that he or she is able to maintain him or herself with his or her own income and property. Paragraph 1578 BGB sets forth the extent of the provision, to be determined in accordance with the conditions of the conjugal life, covering all vital needs (health insurance, needs and care, academic and professional training, etc.), but paragraph 1581 of the German Civil Code states that the financial provision shall also depend on the economic, employment and property situation of the spouse obligated to provide, whose own maintenance must not be jeopardised, in a reasonable amount based on the needs and employment and property situations of the divorced spouses. All these provisions of the German Civil Code (*Bürgerlisches Gesetzbuch*, BGB), are similar to our provisions under Arts. 84 of the Family Code and 97 of the Civil Code, and are applicable, since in the notarised marriage agreement nothing is specified in regard to financial provision (paragraph 1585c of the German Civil Code *a sensu contrario*), but rather, as has been said, it only refers to the exclusion from the provision of the earnings in paragraph 1373 of the German Civil Code, in addition to complying therefore with the principles governing our Family Law, such as Art. 1 of the Family Code.…".

VII. CITIZENSHIP

1. Statelessness

* Supreme Court Judgment (Contentious-Administrative Chamber, Section 5) of 5 February 2009 (RJ 2009\592)

Requirements for granting stateless status.

"FUNDAMENTS OF LAW. SIXTH. – However, furthermore, while we may find that the appeal complies with the demands made on cassation appeals, such an appeal would also be destined to failure, because the applicable legal system and the background as set forth in the administrative case and in the court proceedings reveal the lack of concurrence of the requirements established for having stateless status. The Convention Relating to the Status of Stateless Persons done in New York on 28-9-1954 provides in its Article 1.1, that "…".

In accordance with this international convention and descending to our own domestic law, we have Organic Act 4/2000, of 11-1, on the Rights and Freedoms of Aliens in Spain, amended by Organic Act 8/2000, regulating stateless person status. This Act, specifically in its Article 34, recognises stateless person status for "aliens who, stating that they lack any citizenship, meet the requirements set forth in the Convention Relating to the Status of Stateless Persons done in New York on 28-9-1954, and will issue the documentation provided under Article 27 of said Convention. Stateless person status shall include the specific regime as regulated." For its part, the Regulation on the Recognition of Stateless Person Status, approved by Royal Decree 865/2001, of 20-7, provides in its Article 1.1 that "Stateless person status shall be recognised in accordance with the provisions of the Convention Relating to the Status of Stateless Persons done

in New York on 28 September 1954, for all persons whom no State considers its citizens, pursuant to its legislation, and who state they lack citizenship. To make such recognition effective, all requirements and procedures provided under this Regulation must be complied with."

Under such provisions, and not thereby including the requirement that the country of citizenship of an applicant for such accreditation not recognise his or her stateless status, we cannot overlook that this consideration is only lawful in regard to a person who is not considered a citizen by any State, under its legislation, and the fact is that the appellant was born in Baku (Azerbaijan) in 10-1964 and lived in Armenia for five years prior to coming to Spain in 1994. She has a passport from the Socialist Republic of Armenia, and educational certificates from Armenia for 1988 and 1991, as well as certificates from the Civil Registry of the Republic of Armenia, and in the asylum case pursued by the appellant there is a reference to Armenian citizenship.

On the basis of all the above, it is pursuant to law to dismiss the grounds invoked, whereby the appeal for cassation is therefore not admitted."

2. Obtaining

* Supreme Court Judgment (Contentious-Administrative Chamber, Section 6) of 7 March 2009 (RJ 2009\2491)

Requirements for the granting citizenship based on residence. Evaluation of "good civic conduct." Not found in this case.

"FUNDAMENTS OF LAW. FOURTH. – The only ground for this cassation appeal is not successful. It is strictly true that, in accordance with constant case law, the requirement for good civic conduct under Art. 22.4 of the Civil Code is an indeterminate legal concept whose presence or lack thereof must be verified by the Administration: if the answer is affirmative, it must grant Spanish citizenship; if it is negative, it must deny citizenship. It cannot, therefore, base its judgment on considerations of opportunity or interest. It is also an established criterion of jurisprudence that the fact of having been convicted criminally is not sufficient, in and of itself, to find good civic behaviour as not accredited, just as the lack of a criminal record is not sufficient to consider such requirement as having been fulfilled. Criminal actions, with or without conviction, that may have been lodged against a person applying for Spanish citizenship through residence are facts to be taken into account, together with others that may be relevant, in evaluating the applicant's attitude in regard to civic behaviour. Hence, the Administration must take into account all the circumstances that concur in each case, making a reasonable evaluation of them on the whole, and as was said, excluding any considerations of opportunity or interest.

This is exactly what happened in the case at hand: the Administration considered the existence of several different misdemeanour proceedings to be an attitude not compatible with the way a good citizen should behave. Even in some cases in which he was acquitted, such as the one regarding electrical supply fraud, the facts charged were proven. Furthermore, as the judging court

finds in confirming the adequacy of the assessment of the facts made by the Administration, this number of proceedings is not in reference to a certain period of time, so that it could be said that the appellant's subsequent behaviour had undergone undeniable change for the good. Faced with all this it is not sufficient to contrast it with orderly family and personal life, since it does not compensate for the repeated accreditation of episodes of unquestionably non-civic behaviour. Therefore, there has been no violation of Arts. 21 and 22 of the Civil Code and the corresponding jurisprudence in the denial by the Administration of the application for Spanish citizenship through residence made by the appellant, nor in the court judgment confirming such denial."

* Supreme Court Judgment (Chamber 3, Sect. 5), of 16 April 2009 (EDJ 2009/82994)

Application for Spanish citizenship by alien. Requirement of integration into Spanish society. Illiteracy of applicant is not sufficient reason for denial of application.

"FUNDAMENTS OF LAW:... THIRD. – [...] In the explanation of the grounds, the appellant argues that, pursuant to the hearing record, it is true that she does not know how to read or write Spanish, but she does understand and speak it, and needs to state that, in reality, what the explanation actually means is that she does not know how to read or write in general, without referring solely to Spanish; it adds that the appellant is fully integrated into Spanish society, not only owing to the time she has been living in Spain (since 1965, when she arrived at age 33, now 74), but also because she has been registered since 1975, and because she is economically tied to Spain as beneficiary of a non-contributory disability pension. Furthermore, she has had residence permits since 1990, and her husband is a naturalised Spanish citizen and their five children are Spanish nationals and reside in Spain. Her good conduct is accredited by witnesses. She has adapted to Spanish customs and way of life, as concluded from the record of the judicial hearing; in this document it states that she speaks the Spanish language, as the interview was carried out without any need for an interpreter. She denies any intention – at age 74 – of going back to Holland, since she only wants to visit a relative there, and her intention is to live in Melilla where her husband and five children live.

FOURTH. – [...] Therefore, and in conclusion, we must revoke the judgment by the judging Court, since the appellant's illiteracy is not sufficient cause in and of itself for denial of Spanish citizenship, as in this case her integration into Spanish society is sufficiently accredited, which now results in the acceptance of the appeal for cassation."

* Supreme Court Judgment (Chamber 3, Sect. 6), of 5 May 2009 (EDJ 2009/83059)

Application for Spanish citizenship by alien. Requirement of good civic conduct. Meaning of requirement.

"FUNDAMENTS OF LAW:...THIRD. – [...] Depending on the circumstances of the case, it is perfectly possible for a person without a criminal record to be considered lacking in good civic conduct and, vice versa, for a person with a criminal record to be considered to have met such requirement. Everything depends on the gravity of the criminal acts of which the individual was convicted and of the applicant's subsequent behaviour, not to mention the fact that good civic conduct is more than just not having committed a crime. Therefore, in the case at hand, it only remains to uphold the appealed judgment, since the appellant has a long (criminal) record considered not petty, that includes the having been prohibited from entering national territory for a period of time. To demonstrate good civic conduct under these circumstances, it would have been necessary to subsequently show a particularly philanthropic attitude that has not been accredited."

* Supreme Court Judgment (Chamber 3, Sect. 6), of 30 June 2009 (EDJ 2009/143930)

Application for Spanish citizenship by a Moroccan national. Denial based on lack of proof of sufficient degree of integration in Spanish society. Meaning.

"FUNDAMENTS OF LAW:...THIRD. – [...] Circumstances that are not found in this case, since contrary to what is maintained by the appellant, the deciding Chamber's conclusion regarding the applicant's lack of knowledge of the Spanish language, as reflected in the appearance before the Registry Official, who made an unfavourable citizenship recommendation in regard to integration in the Spanish society is not illogical, as neither is finding that registration at the same level for two different years indicates a lack of progress in knowledge of the language, that the interested party seeks to try to justify by alleging that family circumstances prevented her from attending classes more regularly. The interest in learning alleged is not materially or concretely shown, and furthermore is assessed to constitute a decisive element for integration into the culture, customs and way of life of a country. The judgment of 5-3-2008 states that "the finding of a sufficient degree of integration into society by the applicant for citizenship required by Article 22.4 of the Civil Code requires the applicant to know the Spanish language to a degree sufficient not only to understand it, but also to speak it and for it to facilitate her relations with third parties in the country in which she intends to live."

Furthermore, in addition to her lack of knowledge of the Spanish language, the applicant does not add any social, cultural or other activities to show active, integrated participation in the community of the nation to which she seeks to belong by acquiring Spanish citizenship and even when it states that she adequately answered the questions of the Registry Officer, it does not appear that the answer was correct in regard to the day on which the Constitution or Easter Week is celebrated. In conclusion, the assessment by the original Court of a deficient knowledge of Spanish and the absence of other elements justifying fulfilment of the requirement at issue is not detracted from in this appeal,

leading to the dismissal of the grounds for cassation and the confirmation of the dismissal of the appeal formulated against the administrative decisions denying the appellant's application for citizenship through residence."

* Supreme Court Judgment (Chamber 3, Sect. 6) of 13 October 2009 (EDJ 2009/234770)

Spanish citizenship through residence. Applicant born in the Western Sahara.

"FUNDAMENTS OF LAW:…THIRD. – None of the arguments given in the single ground for this appeal for cassation is convincing. To begin with, it is worthwhile to point out that the central issue here has already been resolved by this Chamber, specifically in its Judgment of 7-11-1999: persons born in the Western Sahara when it was under Spanish Authority must consider themselves as having been born in Spanish territory for the purposes of Art. 22.2.a) of the Civil Code. This doctrine was followed in subsequent cases, such as the one recently resolved by this Chamber's judgment of 16-12-2008. This is, therefore, true jurisprudence, and therefore to be followed. That said, it is necessary to respond to the specific arguments by the State Attorney. Hence, the fact that in the case resolved by the judgment of 7-11-1999 the exercise of the option provided under Decree 2258/976 is irrelevant, since the distinction established then between "national territory" and "Spanish territory" holds general validity and operates independent of whether such option is exercised or not. This same consideration serves to reject that paragraph b) of Art. 22.2 of the Civil Code has any importance whatsoever in this case: the applicant never sought Spanish citizenship on the basis of having had a right to choose that was not exercised in a timely manner, but rather because of having been born on Spanish territory independently of whether he had such a choice or not. And, as regards the purported contradiction vis-à-vis the situation of the citizens of Equatorial Guinea, who have a two-year period in which to acquire Spanish citizenship through residence, such contradiction does not exist: the two-year period established in Art. 22.1 of the Civil Code is in force for Equatorial Guineans even if they were not born on Spanish soil, which means that it is also in effect also for persons born in Equatorial Guinea after it was no longer under Spanish authority or those born in other countries. This special two-year time period is also in force for nationals of countries that were never under Spanish authority, such as Portugal; or that were under Spanish authority a very long time ago, such as the Latin American countries, not to mention the Sephardic people. The legislative policy reasoning underlying this rule is clearly to promote the acquisition of Spanish citizenship by citizens of countries with which Spain has particularly strong historic and/or cultural ties. This does not mean, however, that the nationals of these same countries, if they were born on Spanish soil, cannot take advantage of the even shorter, one-year period that is applicable to any person born on Spanish soil whatever his or her nationality may be."

* Judgment by the National Court (Administrative-Contentious Chamber, Sect. 3) of 1 December 2009 (EDJ 2009/285667)

Spanish citizenship through residence. Lack of concurrence of legal residence of a person who, while holding a community residence card at the time citizenship was applied for, had already separated from her spouse, which involves the loss of said authorisation.

"FUNDAMENTS OF LAW:…THIRD. – In the matter judged, at the time the Colombian national appellant applied for Spanish citizenship (20.5.2004) she had a community residence permit by reason of marriage to a Spanish national, granted on 22-10-2002, and valid until 22-10-2007, although after obtaining it they were separated by legal judgment of 21-10-2003. At the time the appellant applied for citizenship the rule governing the validity and the coverage of community residence permits was Royal Decree 178/2003, of 14.2. Its Art. 9 established that "1. The validity and renewal of residence permits is determined by the fact that the holder continues in one of the situations that make him or her eligible to have it, and the interested parties are required to notify any change in such circumstances to the competent authorities." The validity of community residence permits is determined by the appellant's continuing to meet the conditions giving rise to its having been granted, as a family member of a community national, one of the requirements being that she maintain stable, permanent cohabitation with the Spanish national and not legally separate from same (Art. 2.a), since if there is any change in the circumstances providing the grounds for the initial granting of the community residence card she is obligated to notify the change of circumstance to the competent authorities. This legal provision determined the period of validity of the community residence permit that gave her legal presence in Spain when she became legally separated from her husband. Therefore she was obligated to notify the administrative authorities of the change in her personal circumstances for the purposes of regularising her presence in our country. Since she did not do so, her community residence permit was no longer valid, as it fell outside the applicability of Royal Decree 178/2003, of 14.2. This is why when the appellant submitted her application for citizenship (on 20-5-2004) she was no longer covered by any legal residence permit from the date legal separation from her husband was decreed (21-10-2003) because her residence no longer complied with the requirements set forth in Art. 2.3 of the Civil Code (continued legal residence immediately prior to the application). The fact that the appellant notified the authorities of her legal separation at the same time she submitted her application for Spanish citizenship and later to the Government Delegation of Asturias (on 27-12-2004), does not change this conclusion, since the last notification aimed at regularising her presence in our country does not detract from the fact that the appellant was not covered by a valid residence permit in the months immediately prior to submitting her application, as the Third Chamber of the Supreme Court has had the opportunity to confirm in its jurisprudence in similar cases, including among many others the Judgments of the Third Chamber of the Sixth Section of the Supreme Court of 16-10-2007 (appeal. 355/2004), even in cases in which the interested party later applied for and received a work and residence permit."

4. Loss

* Supreme Court Judgment (Civil Chamber, Sect. 1) of 10 July 2009 (RJ 2009\4463)

Loss of Spanish citizenship. Spanish national exile in Mexico who in 1947 voluntarily acquired Mexican citizenship by naturalisation. The naturalised Mexican national returned to Spanish territory but did not declare his desire to either recover Spanish citizenship or renounce his acquired foreign citizenship to an officer of the Civil Registry. Meaning of holding a National Identity Document.

"FUNDAMENTS OF LAW (…) SECOND. This cassation appeal poses a complex issue with a main component and a collateral aspect derived there from in regard to the applicant's (now appellant's) father's loss of Spanish citizenship after acquiring Mexican citizenship in 1947 but not reflecting the loss of Spanish citizenship in the Civil Registry. The judgment in the First Instance considers that Mr. Constantino lost said citizenship, while the Provincial Court finds that this is a case of *de facto*, or pathological, dual citizenship, finding that since loss of citizenship was not registered such citizenship was maintained despite the provision in Article 20 of the Code in force at the time.

The first ground for the appeal denounces violation of Art. 24.1 and 2 of the Civil Code, in relation to Art. 26.1.b of the Civil Code and the doctrine established by the decisions of 19-7-1983 and 19-7-1989. It states that the Court of Appeal attributes the fact that Mr. Constantino did not act as a Mexican and as a Spanish national at the same time qualifies him to tacitly recover Spanish citizenship, and should be interpreted as a case of dual citizenship. However, when Mr. Constantino acquired Mexican citizenship his loss of Spanish citizenship was not recorded in the Civil Registry, as such was not regulated until the Decree of 2-4-1955. It must be understood that loss of citizenship is automatic *ex lege*, even if not registered in the Civil Registry, whereas to recover the Spanish citizenship that was lost, registry is essential. This is confirmed by the jurisprudence cited, from which the appellant concludes that neither in 1947, when Mr. Constantino acquired Mexican citizenship, nor in the present was any different rule followed. Mr. Constantino's holding of a National Identity Card cannot be considered a means of maintaining or recovering Spanish citizenship, since although it is a means to accredit same, it can be proven to the contrary. So, the appellant concludes that the circumstance of holding a National Identity Card and presenting it at the legislative elections of 1977 "are factual, administrative issues that should not prevail over the substantive aspects and jurisprudence doctrine" invoked, whereby this is not a case of retention or recovery of Spanish citizenship. The ground is accepted.

The reasons for accepting this ground are structured around the following points: a) Mr. Constantino's loss of Spanish citizenship; b) non-recovery of original Spanish citizenship. This is based on the legislation applicable at the time when the facts took place.

a) The text of Article 20 of the Civil Code in force in 1947 stated that Spanish citizenship would be lost "by acquiring citizenship in a foreign country." The doctrine that interpreted this provision considered that citizenship was not lost

by the mere fact that a foreign country considered a Spaniard as its national, but rather it required the will to acquire such citizenship to be demonstrated when applied for. Therefore a broad interpretation of this article would demand three requirements for the acquisition of foreign citizenship to result in the loss of Spanish citizenship: i) that it be a true naturalisation; ii) that such acquisition be voluntary, and iii) that it be effectively acquired.

At that time, the loss of Spanish citizenship was not required to be registered in the Civil Registry in order to take effect. In effect, the Civil Registry Act of 1-6-1870 did not require registration of loss of citizenship, although its Art. 96 stated that "changes in citizenship have legal effects in Spain only as from the day they are registered in the Civil Registry." The best doctrine found that loss was automatic and independent of the Registry, although such Registry should have a record for the purposes set forth below. And in this regard, this Chamber had already ruled in its judgments of 22-2 and 18-10-1960 and the Decision by the Directorate General of National Registries of 30-11-1974 (also see this same Directorate General's Decision of 8-2-1994).

The above does not mean that registration of the loss was essential, but that in accordance with the rules cited below, registry entries have privileged, although not exclusive, probatory effects, except in cases in which the law requires registration as such. Furthermore, Article 67 of the Civil Registries Act of 8-6-1957, in force when the facts dealt with in this case took place, establishes that "loss of Spanish citizenship always occurs in accordance with law, but must be registered" and the effects of registration are as established in Article 327 of the Civil Code, supplemented by the provisions of Art. 2 of the Civil Registries Act, that give it value as privileged but not exclusive proof. In this way it must be stated that registration of loss of citizenship in the Civil Registry is not essential, but merely probatory, while maintaining original citizenship cannot be based on the absence of such registration.

In conclusion, loss of Spanish citizenship through the acquisition of citizenship in another state was automatic and the rules of registration in the Civil Registry in force at the time in which Mr. Constantino acquired Mexican citizenship did not require registration. This was only one way to prove the loss of Spanish citizenship that, if not on record in the registry, could be accredited by other means.

b) Having said the above, it must be considered now whether Mr. Constantino recovered Spanish citizenship *de facto* as stated in the judgment now being appealed. In accordance with Article 24 of the Civil Code, written in consonance with the Act of 15-7-1954, in force at the time when the alleged recovery hypothetically took place, the requirements for such recovery were: i) return to Spanish territory; ii) declaration to a Civil Registry officer of the desire to recover citizenship, and iii) renunciation of the foreign citizenship acquired. Tacit or *de facto* recovery of Spanish citizenship is therefore not possible. The only requirement that was met in the case at hand was return to Spanish territory, but neither of the other two was met. Therefore, owing to noncompliance with the requirements, the citizenship was not recovered and Mr. Constantino retained his Mexican citizenship until his death.

In accordance with above reasoning, the conclusions are that the registration of the acquisition of the other foreign citizenship in the Civil Registry when Mr. Constantino acquired Mexican citizenship was not required for citizenship to be lost. The original Spanish citizenship was lost in accordance with Article 20 of the Civil Code in force then, and he did not recover his Spanish citizenship, owing to noncompliance with the requirements under Article 24 of the Civil Code then in force. It is therefore concluded that Mr. Constantino was a Mexican citizen when he died, and therefore his Mexican citizenship is the one that governs his estate, in accordance with the provisions of Article 9.8 of the Civil Code.

THIRD. The effects of holding a National Identity Document and of identification and registration in the voting census in 1977 remain to be determined. The reasoning is as follows: As stated by the appealed judgment, Spanish citizenship cannot be recovered through the simple desire of the affected party, since the rules regulating acquisition, loss and recovery of citizenship are of public policy and must be complied with in order to achieve the effect sought thereby. Therefore, the use of Spanish law in an abusive or careless manner, as in the case at hand, must not produce the effect of recovery of the lost citizenship of origin. (…)"

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

1. Alien Law

a) General System

* Supreme Court Judgment (Administrative-Contentious Chamber, Sect. 5), of 28 July 2009 (JUR 2009\360046)

Aliens. Presence in national territory. Visa to remain in Spain for a short period: denial. Illegality: incorrect explanation or justification. Illegal denial.

"FUNDAMENTS OF LAW. (…). SECOND (…) In the case judged, the Court did not realize, and if it did it overlooked any consequence derived there from, that the consular administration denied the applicant a short-stay visa (14 days) for Spain owing to an unfavourable recommendation in the case file that was based on an untruth. Despite the visa applicant's legal representative presenting this incorrect finding to the Court as the cause determining the incorrect exercise of discretional authority to grant such visa, the Court did not give a consistent response thereto, but merely expressed that "in this case the judgment certainly does not justify denial, but it would be equally unfair if produced by negative silence."

It is not simply a matter of not having given the grounds for the denial of the short-stay visa but rather an incorrect explanation or justification is given based on the existence of a negative report in the case file. In the proceedings

no explanation was given of such an error or mistake, and therefore contrary to its obligation, the Administration did not correctly exercise its discretionary power to deny the referred-to visa, which is the reason why this second ground for cassation must be successful.

THIRD. – The acceptance of the second ground for cassation, with the appropriate declaration of acceptance of the appeal, leads, as established in Article 95.2 d) of the Act on this Jurisdiction, to our having to resolve what would be appropriate within the terms of this discussions.

Since the consular Administration denied the short-stay (14 days) visa to the applicant based exclusively on an incorrect fact: the presence of a negative report in the case file, without explaining or justifying the meaning of such assertion during the process, it is lawful to accept the administrative-contentious appeal brought against the decision to deny the visa, while at the same time, as established in Articles 31.2 and 71.1 b and c of the Act on Jurisdiction, we must find that the appellant, Mr. Guillermo, is entitled to have the Consulate General of Spain in Oran immediately grant him the visa he applied for. (…)."

* Supreme Court Judgment (Chamber 3, Section 5) of 27 October 2009 (EDJ 2009/276059)

Prohibition from entering Spain. Measure adopted without procedure.

"FUNDAMENTS OF LAW:…FOURTH. – The argument by the representation of the State is not successful. As we have observed, the judgment by the judging court was based on fact that the measure prohibiting entry into Spain – and the other Schengen Convention countries – was imposed by the Spanish administration through no procedure at all, specifically not giving the appellant a hearing prior to resolving the prohibition from entering the country. It is true that no concrete reference is made either in the legal provision (Article 26.1 of Organic Act 4/2000) or in the Regulation (26 of the Regulation to implement the former), to any procedure for imposing such prohibition on entry, nor is a hearing of the interested party considered essential in any potential proceeding. Nonetheless, in general terms, and under Art. 20.2 of Title I, Chapter III of said Act on Legal Guarantees refers to "administrative procedures established in the area of alien law," going on to state that "same must in all cases abide by the guarantees set forth in general legislation on administrative proceedings;" but the imperative aspect of the provision does not stop there, since within said framework of procedural guarantees, there is emphasis ("especially") on procedural guarantees relating to "public information of rules, hearing of interested parties and grounds for decisions." It is obvious that the matter is an administrative act and that, as such, it is subject to the rules and principles of administrative procedure; specifically the rules established in Title VI of Act 30/1992, of 26-11, on Public Administrations and Common Administrative Procedure (LRJPA), in whose Article 79 it expressly provides for hearing the interested party in order for same to be able to "make allegations and provide documents or other elements of judgment." Furthermore, this is the most essential aspect of administrative procedure, to the point that the requirement for a procedure

in order for the action to go forward and, within same, the hearing procedure – are the few procedural aspects required by the Constitution. Article 105.c) of the Spanish Constitution requires the regulation by law of "procedures for the taking of administrative action," and, "guaranteeing the hearing of interested parties when appropriate." This area matter of common administrative procedure is the exclusive competence of the State, in accordance with Article 149.1.18 of the Spanish Constitution. The same Article 20.2 of Act 4/2000 is the one that contains express reference to "general legislation on administrative procedure," namely, the Act on the Legal Regime of Public Administrations and Common Administrative Procedure, which is expressly reiterated in the Second Additional Provision of the Implementing Regulation of same, approved by Royal Decree 864/2001, of 20-7 "in regard to what is not provided in regard to procedure."

* Judgment by the Provincial Court of Valencia (Section 9) of 9 March 2009 (AC 2009\875)

Right to freedom of movement within the community of aliens who are legal residents of Spain. Documentation needed to travel by air within the Union.

LEGAL FUNDAMENTS. – (…) SECOND. – (…) The specific provision in this regards is contained in Royal Decree 240/2007, of 16-2, on the entry, free movement and residence in Spain of nationals of the Member States of the European Union and of other States parties to the Agreement on the European Economic Area, a provision that regulates the administrative formalities for the exercise of the rights of entry and exit to/from Spain and by which Directive 2004/38/EC of the European Parliament and the Council of 29-4-2004, on the right of citizens of the Union to move and reside freely in the territory of the Member States, became Spanish law. It specifically provides in its Article 3 that the persons included in the scope of application of this Royal Decree are entitled to enter, exit, move and reside freely in Spanish territory, upon compliance with the formalities set forth by same and notwithstanding the limitations established therein." Specifically, Article 4 of this Royal Decree establishes that "entry into Spanish territory of citizens of the Union shall be with the passport or valid identification document in effect and which shows the holder's nationality. Article 5 adds that the citizens of a Member State of the European Union shall have the right to leave Spain to travel to another Member State, independently of having to present a valid passport or identity document to the border control officers if departure is through an official post, for mandatory verification.

It is unquestioned, therefore, that notwithstanding the freedom to move about, the legal provisions in force require compliance with regulations on the identification of persons through documents specifically provided for such purpose, which are none other than the passport, the national identity document or any other valid identity document accrediting the holder's identity and considered valid for entering Spanish territory in accordance with Spain's international commitments, including, of course, the alien identity card whose specific purpose is to "accredit the legal status" of aliens who remain in Spain.

The conclusion as set forth is that the company RYANAIR LIMITED did not violate any legal provision at all, and therefore there is no ground for the pertinent general terms of its contract as an air carrier as it appears on the company's internet web page to be considered null and void because it required specific documentation in order to identify a passenger when issuing a boarding pass – expressly excluding as such document the alien residence permit-, since such a status is only a mere observance of the legal provisions in force in Spain on that matter. (…)".

b) Deportation

* Judgment by the Provincial Court of Barcelona (Sect. 5), of 28 September 2009 (JUR 2009\491569)

Deportation of the alien from national territory for commission of theft. Presumption of innocence: violation non-existent. Existence of proof: witness statements by two police officers who state that they have no doubt as to the fact that the defendant committed the offense. Deportation of the alien from national territory: essential elements to consider. Requirement of grounds for the deportation order.

"FUNDAMENTS. FIRST. (…) It is clear that the regulations in force currently must be interpreted from a constitutional standpoint since the matter can affect fundamental personal rights – whether an immigrant's status is illegal or not – that are recognised not only in the catalogue of fundamental rights guaranteed by the Constitution, but also in the international Treaties signed by Spain and which, pursuant to Art. 10 not only constitute applicable domestic law, but are to be interpreted in accordance with such Treaties and specifically the jurisprudence of the European Court on Human Rights in regard to the interpretation of the European Convention on Human Rights of 4.11.1950, and this is even more a requirement given that, as already stated, the philosophy underlying the reform of Art. 89 of the Penal Code corresponds to merely defence, utilitarian and criminal policy criteria, that are certainly valid, but which must always be preceded by the indispensible judgment of consideration with regard to the matters in conflict, involving an individualized, case-by-case, and therefore, grounded consideration.

In this regard, we must recall that the Report of the General Council of the Judiciary on the then Draft Organic Bill already stressed the omission that was noted in the text – and that remains at present – regarding taking into account the specific personal circumstances of the convicted person when ordering or not ordering deportation. The Council rightly argued that in addition to the nature of the offense as an argument justifying an exception, there should be express reference to another series of circumstances directly related to the convicted individual as a person "….overlooking the potentially important personal circumstances that may concur….and that the European Court on Human Rights values the circumstance of rootedness that is extended to protection of the family, or that the life of the alien may be in jeopardy or he or she may be in

danger of being subjected to torture or degrading treatment contrary to Art. 3 of the European Convention on Human Rights, as elements to be taken into account in imposing deportation. . . ."

c) Family Reunification

* Supreme Court Judgment (Administrative-Contentious Chamber, Section 5) of 9 February 2009 (RJ 2009\597)

Family reunification visa. Lack of accreditation of relationship.

"FUNDAMENTS OF LAW. THIRD. – (. . .) It is true that the provisions invoked first determine that the regime for entry and presence in Spain regulated in Royal Decree 766/1992, amended by Royal Decree 737/1995, are also applicable to the family members of the Spanish nationals and nationals of other Member States of the European communities as listed, regardless of their nationality; and this list includes ". . . b/ his or her children and those of his or her spouse, provided they are not separated *de facto* or *de jure*, and the children are under twenty-one years of age or over such age but supported by him or her" (Article 2.b/ of Royal Decree 766/1992). Such persons shall be entitled to enter, leave, move about and remain freely in Spanish territory and have access to any activity, under the terms as provided in Article 4, although if they do not possess the citizenship of a Member State of the European Communities they will need the appropriate visa (Article 5).

It does not question that such is the legal regime described in the rule, but the Administration found that the documentation provided together with the visa application did not offer sufficient guarantees in regard to the applicant's relationship and age. The discussion centres on this point therefore.

Together with the visa application, an "*in-extenso* record of birth" was provided, from which it turns out that on 2-7-2002 Mr. Rodolfo, a national of the Dominican Republic, appeared before the Civil Status Officer Second Ward of the National District and stated that Esperanza, his daughter by Mrs. Susana, also a Dominican national, was born on 21-8-1983. At the bottom of the document a line is typed in as follows: "Ratified by judgment of 30-10-2002, file NUM000". According to the appellant, this public document is full proof of the parent-child relationship and age of his daughter Esperanza, but we do not share this view.

(. . .)

The Civil Code provisions cited in relation to proof of the parent-child relationship and the evidentiary value of public documents are not considered to have been violated. The case is, simply that the documentation provided together with the visa application – none other was provided to the court – does not prove that in the Dominican Republic, under the country's legal system, the parent-child relationship and date of birth of the visa applicant has been fully established, whereby, as set forth in Article 9.4 of the Civil Code, the nature and content of the parent-child relationship is governed by the personal law of the child." (. . .)

* Supreme Court Judgment (Chamber 3, Sect. 5) of 29 May 2009 (EDJ 2009/112179)

Granting of family reunification residence visas to wife and children. Questions regarding the existence of a marital bond and valid parent-child relationship. Appeal. Denial.

"FUNDAMENTS OF LAW:…SECOND. – The appealed judgment contains the following legal grounds, that we transcribe here as they are of interest: "(…) In the case file submitted there is a certificate of marriage dated 7 May of – (sic) – two, a marriage that took place in the City of Sekondi; as for the children, Eulogio was born on 17-11-1997 and Jeronimo was born on 3 August 1999; in both cases a birth certificate is provided on which Urbano is named as the father. Therefore, with these documents the veracity and existence of such marriage and the prior birth of two joint children cannot be questioned, since while it is true that in said interview the interested party stated that the place of birth of the husband was the City of Takoradi, and also stated this same city as the place where the marriage took place, being that the husband was born in Accra, the reality of the marriage must not determine the paternity of the party to be reunited and in fact it is recorded that the marriage took place in the City of Sekondi-Takoradi, which is also the place where the wife met the husband, and cited thereupon, as his place of birth (…) the explanation provided by the Administration of the reasons for the denial, obtained from the prior interview held with the applicant in the consular office and taking into account objective data, does not seem sufficient in the view of the content of the administrative file. From this perspective it is not a matter of *a priori* acceptance of the existence of a legal fraud through the mere fact of not complying with the minimum requirements derived from a marriage agreement, but rather this is a case of grounds that cause mere suspicion (…) Having stated the above, it is by no means a matter of record that said marriage took place as a legal fraud, nor that there is no father-child relationship regarding the persons cited as children of the reunifier. It should be kept in mind that the Administration in this case does not have discretional authority, as its denial is subject to compliance with the contents of applicable law (…) whereby the purported obstacle preventing the granting of the family reunification visa has disappeared in this way for the reason stated in each of the decisions, since for all intents and purposes the marriage is on record as having taken place on the date cited of 7 March of two thousand two, and the births on the already-cited birthdates of the children, (since the certificates of marriage and of birth issued by the Official in charge of the Civil Registry can be interpreted no other way and have the desired effects, as they are documents that have not been challenged by the respondent upon having knowledge of them, except for generically), it must be determined now that such documentation is valid for all intents and purposes under our domestic civil legislation, and, with the documentation provided, all the doubts of the Administration regarding a potentially fraudulent marriage or the non-existence of the father-child relationship have disappeared. Therefore,

the judgment appealed must be declared null and void as there was an error of assessment and acknowledgment of the documentation provided, and the appealed resolution must be nullified as sought by the appellant in his appeal. Therefore this appeal is accepted and the family reunification visas granted as applied for by the spouse and children."

2. Right of Asylum

* Supreme Court Judgment (Administrative-Contentious Chamber, Sect. 5), of 30 September 2009 (JUR 2009\423571)

Right of asylum. Denial: Improbable account whereby the applicant's true identity and citizenship could not be considered as accredited. Requisites for granting.

"FUNDAMENTS OF LAW (…). SECOND (…). Based on the applicant's account and the rest of the data contained in the administrative case file and in this proceeding, it must be concluded that no well-founded indications are present of the applicant's identity or citizenship, nor, therefore, can it be considered that he was subject to persecution as set forth in the Geneva Convention.

First, as the examination report shows, the appellant's citizenship and identity was not accredited. Mr. Lucio did not provide any documentation through the administrative channel that accredits his identity and by not appearing he avoided being interviewed by the authorities preparing the file for purposes of clarifying, among other issues, his identity and citizenship, as such is key in taking into account the UNHCR recommendation. In this proceeding he provided a photocopy of a passport in his name that was impossible to compare with the original, despite such being ordered by the Chamber, and the photocopy thereby lacked any evidentiary value since its content was not verified by any other element of proof.

The lack of accreditation of citizenship and identity means that the applicant's entire account is improbable since there is no appearance of veracity in regard to the applicant's citizenship or identity. Such lack of appearance of veracity logically extends to the whole of the account. Furthermore, the account is generic and imprecise and does not deal precisely and concretely with the persecution to which the applicant alleges having been subject, nor does it even minimally describe the event that triggered his flight from the country.

In accordance with reiterative Supreme Court jurisprudence on granting asylum, full proof that the applicant suffered the persecution referred to in Article 3 mentioned above is not necessary, but sufficient indicative proof is necessary, especially when adopting a judgment in substance on granting such right.

In this case, the appellant did not accredit his identity or citizenship. His account is thus found improbable and there are no sufficient indications present that he was subject to persecution in the sense described in the Geneva Convention (…)."

* Judgment by the National Court (Administrative-Contentious Chamber, Section 4) of 25 February 2009 (JUR 2009\129000)

Asylum of applicant from Colombia threatened by the FARC. Persecution due to his occupation as a police officer. UNHCR report favourable to acceptance for processing of application for asylum.

"FUNDAMENTS OF LAW. FOURTH. – After setting forth these general principles, and focusing on the case at hand, we must point out that the adoption of the precautionary measure requires a determination of whether the request is based on a real situation of danger to life or physical integrity of the applicant, and in this case, the appellant in his application for asylum referred to being a member of the Specialised Operational Group of the Highway Police which is part of the national police of Colombia, in which he performed investigation work under the Information Seeking Plan, consisting of seeking out cooperating subjects and informants to organise a stable network and thus be able to obtain greater information. In the exercise of such functions he would have been under threat from the FARC together with other fellow members.

In this case, it must be taken into account that the decision to dismiss the request for re-examination established that since the UNHCR report was in favour of admission for processing of the application for asylum, and in accordance with Article 39.2 of the Implementing Regulation for the Asylum Act, the applicant's entry and presence in Spain was authorised until such time as the jurisdictional body resolved on the suspension of the administrative act. This circumstance took place, whereby the permit to remain in Spain was extended by means of an order of 20-12-2007, provided for the record in the documentation attached to the claim.

The UNHCR report indicated the existence of a potential situation of risk for the applicant if he were to return to his country of origin.

In fact, the report states as follows: "The applicant was a member of the Highway Police Intelligence Units of the Colombian Police. Due to this work he is considered to have been subject to persecution by the FARC, as a result of having participated together with his colleague and asylum applicant, Ignacio, in different operations against this group, having provided a detailed account of same and the persecution suffered. These allegations, as set forth in this re-examination, which specifies and sufficiently clarifies the questions derived from this initial interview, cannot be considered improbable in view of the realities existing in his country of origin, and coincide with information available on same. In this regard, it is important to take into account the Considerations on International Protection of Colombian asylum seekers and refugees as set forth by the UNHCR for 2005, that considers retired police officers as a group at risk of persecution in the context of the conflict in that country (paragraphs 98 and 102). Owing to all the above, this Delegation considers a more in-depth study necessary in order to determine if they are in need of international protection.

This potential situation of risk must be evaluated from the perspective of the incidental questions posed by the court and, now, in appeal, after having determined the application of the measures contemplated in 39.2 of the Regulation on

the application of the Asylum Act and, therefore, the suspension of application of the measures contemplated in Art. 23 of the same Regulation ["effects of non-admission for processing in the ordinary procedure"], and not to include in the record the modification of the circumstances taken into account in the aforementioned report. Such reasons signify that it must be considered that the premises under which the jurisprudence doctrine found the precautionary suspension of the positive effect of the non-admission for processing of the application for asylum as lawful. This leads to the acceptance of the appeal, revocation of the order, and the adoption of the precautionary measure consisting in the precautionary suspension, during the substantiation of the administrative-contentious proceeding, of the administrative resolutions challenged in same, which is the precautionary measure which is sought through the appeal brought."

* Judgment by the National Court (Administrative-Contentious Chamber, Sect. 8) of 24 June 2009 (EDJ 2009/138206)

Appeal of denial of refugee status and right of asylum. Existence of sufficient indications of persecution by reason of belonging to a particular social group. This group is more sensitive to and more exposed to persecution or harassment by illegal armed elements operating in Colombia owing to its enjoyment of a more affluent economic status than the majority.

"FUNDAMENTS OF LAW:...FIFTH. – It remains to be determined whether the Colombian authorities have assisted the appellant or whether, on the contrary, they have been incapable and have abstained from providing him any protection against the criminal acts he has suffered, acts which, although aimed at close family members have ultimately affected him directly.

Mr. Demetrio has stated that the protection received from the authorities was minimally, if at all, relevant, since although his complaint was dealt with, he did not receive protection. This perhaps could be no other way, but it seems certain that he tried by all means to be protected.

The Chamber has no doubt that the Colombian authorities, albeit after some stops and starts, did initiate proceedings regarding the facts denounced, but as far as data that we have shows, that is where their intervention seems to have stopped, since either owing to a lack of means or for whatever other reason, they ended up advising the applicant to protect himself when he moved about.

So, keeping in mind that there was reiterated guerrilla activity aimed against the appellant and his family, that Mr. Demetrio and his family enjoyed an economic position of affluence that made them particularly vulnerable, that the account offered present unequivocal indications of being truthful, as well as the social and political situation in Colombia, which is well documented in the United Nations High Commissioner's report, and finally, taking into account that nothing is accredited regarding the possibility of avoiding the potential danger by moving to other areas of the country, the Chamber concludes that the circumstances are present in this case to grant Mr. Demetrio refugee status and the right of asylum in Spain."

IX. NATURAL PERSONS, LEGAL PERSONS, COMPETENCE AND NAME

1. Status and Competence

* Judgment by the High Court of Justice of Andalucía (Court in Seville, Administrative-Contentious Chamber, sect. 4) of 24 April 2009 (EDJ 2009/140368).

Deportation of an alien. Determination of his being of legal age. Applicable law. Article 9.1 Civil Code; law pertaining to the subject's nationality. Bolivian law.

"FUNDAMENTS OF LAW:... SECOND. – [...] The legal status of the appellant, from the perspective of alien law warrants a detailed examination. We have here an alien born on 28-4-1998, and therefore, on 29-6-2006, the day he was identified and detained by members of the National Police at a bus station in Seville he had recently turned eighteen. In our view, we must base ourselves on a concept under International Private Law, regarding the personal law corresponding to natural persons, that in accordance with Article 9.1 of the Civil Code, is determined by the person's nationality, a provision that in cases of foreign legal matters is called upon to govern the competence and civil status, family rights and obligations and inheritance by reason of death. Applying the foreign law *ex officio* to the extent possible – Art. 12.6 of the Civil Code –, it can be seen in accordance with Article Four of the Civil Code of 1975, legal age is reached at twenty-one years of age and in civil acts persons who are incompetent to act (such as minors) act through their representatives, in accordance to law. Pursuant to the 1967 Constitution of the Republic (in force during the time of the proceedings, reformed in 1994, text agreed in 1995, amended in 2002), what is called citizenship is characterized by the right to vote or be elected to form or exercise public powers and to perform public functions, with no requirement other than suitability, barring the exceptions established by Law, and this is enjoyed by male and female Bolivians over eighteen years of age, regardless of their education, occupation or income. Despite recognising that it is impossible for us to go any deeper into Bolivian law to establish whether or not we are looking at conflicting categories, we presume that with private law in hand, the deportee was civilly a minor since he entered Schengen territory (on 4 January 2005), and at the beginning of the deportation proceeding he had limited competence to act, depending legally on his mother...."

X. FAMILY LAW

1. Personal data and parent-child relationship

a) General issues

* Regulation on the Directorate General for Registries and the Notarial Corps of 18 February 2009 (RJ 2009\1735)

Registration in the Spanish CivilI Registry of children conceived by surrogate mothers in California, United States and adopted by a homosexual married couple.

"FUNDAMENTS OF LAW. – (…) FIFTH. – In relation to the legality under international public law in Spain of the California registration certificate submitted, it must be underlined that such foreign registration certificate does not violate said international public law. In fact, the certificate does not violate the basic legal principles of Spanish Law that ensures the moral and legal cohesion of Spanish society. Therefore the inclusion of such foreign registration certification in the Spanish legal order does not harm the general interest, or damage the basic legal structure of Spanish Law, and therefore, neither does it harm the basic, fundamental, general moral or legal organization of Spanish society. Therefore, the introduction into the Spanish legal sphere of the foreign certificate presented does not alter the correct, peaceful functioning of Spanish society as a supra-individual structure, as established by the legislator. Specifically, the fact that the foreign registration certificate is in line with the Spanish international public policy is explained by the reasons below.

First, the registration in the Spanish Civil Registry of the birth and the attribution as parents of persons born in California to two males does not violate the Spanish international public order since under Spanish Law it is also permitted to have two males as parents in cases of adoption, without having to distinguish between adopted children or natural children, since both are equal before the Law. (Art. 14 of the Spanish Constitution). If an adopted child can be registered as having two male parents, the same solution should be pursued also in the case of natural-born children.

Second, the registration in the Spanish Civil Registry of the birth and parents of persons born in California in favour of two males does not violate the Spanish international public order, since Spanish Law permits that a child to be registered in the Civil Registry whose parents are two women, persons of the same sex (Art. 7.3 of Act 14/2006). Therefore, not permitting the registration of two males as parents would be discriminatory by reason of sex, radically prohibited by Art. 14 of the Spanish Constitution of 27-12-1978.

Third, the higher interest of the child warrants proceeding with the registration in the Spanish Civil Registry of the parents from the foreign Registry and the foreign registration certificate in favour of two women or two men. In fact, if registration in the Spanish Civil Registry were to be rejected, Spanish national children would be deprived of having parents registered in the Civil Registry. This violates Art. 3 of the Convention on the Rights of the Child, done in New York on 20.11.1989 (BOE no. 13 of 31.12.1990), in force in Spain since 5.1.1991, whose text states: "…". Denying the registration in the Spanish Civil Registry of the foreign registration certificate also violates this provision whereby the higher interest of the child, set forth in Art. 3 of the cited Convention on the Rights of the Child done in New York on 20-11-1989, requires that the child must be under the care of the persons who have given their consent to be parents, since that constitutes the environment that ensures the child "the protection and the care necessary for their well-being".

Fourth, the "higher interest of the child" referred to in the above mentioned Art. 3 of the Convention on the Rights of the Child done in New York on 20-11-1989 must be kept in mind, as translated into the right of said child to a "single identity", as recently pointed out by the Court of Justice of the European Union (Judgment by the Court of Justice of the European Union of 2-10-2003 in the García Avelló case, Judgment by the Court of Justice of the European Union of 14-10-2008 in the Grunkin-Paul case). This right of children to a single identity is translated into the right of children to have a single registration of parents that is valid in different countries, and not one set of parents in one country and another different set of parents in another country, whereby their parents are change every time they cross the border. The registration of the Californian registration certificate in the Spanish Civil registry is the most effective way to comply with this right of children to a single identity above and beyond state borders. This jurisprudence of the Court of Justice of the European Union presents a supra-community value, since it is not merely a matter of emphasizing the right of community citizens to a single identity, but rather it is jurisprudence that emphasizes the right to a single identity in reference to children. This is in line with the higher interest of the child as set forth in Art. 3 of the Convention on the Rights of the Child done in New York on 20-11-1989.

Fifth, it is necessary to recall that under Spanish Law, the natural set of parents is not determined necessarily by "genetic linkage" between the persons involved, as concludes the previously cited Art. 7.3 of Act 14/2006, a provision that allows the natural set of parents of a child on record in the Civil Registry to be two women, persons of the same sex. Therefore, there are no legal obstacles to the registration in the Spanish Civil Registry of a foreign registration certification that establishes as parents two Spanish men.

Sixth, it cannot be stated that the interested parties incurred in a legal fraud, a phenomenon alluded to in Art. 12.4 of the Civil Code for international cases and, in general Art. 6.4 of the Civil Code. The interested parties did not use a "rule of conflict" or any other rule in order to elude the mandate of Spanish law. There has been no alteration of the point of connection of the Spanish rule of conflict, by which, for example, an artificial change of citizenship of the child born to cause the application of the Law of California by creating an existing but void fictitious connection with the State of California. Neither can it be found that the interested parties incurred in what is known as "Forum Shopping fraud" by having placed the matter of the determination of the registration of parents in the hands of the California authorities in order to elude the mandate of Spanish law. In fact, the California registration certificate is not a court judgment that creates *res judicata* and that is attempted to be brought into Spain to bring about an inalterable registration of parents that would able to be opposed *erga omnes*. Such a matter must be linked to the interest of the child, which is a "higher" interest (see again the aforementioned Art 3 of the Convention on the Rights of the Child done in New York on 20.11.1989), so that, such interest in form and manner takes precedence over any other consid-

eration at stake, as might be the repression of allegedly fraudulent movements to which the appealed order denying the registration did not even refer. And the higher interest of the child requires the spatial continuity of registered parents and its international consistency, along with the unavoidable respect for the right of children to a single identity that prevails, in all cases, over any other considerations.

Seventh, it is unquestionable that surrogate gestation contracts are expressly prohibited by Spanish Law (see Art. 10.1 of Act 14/2006, of 26.5, on assisted human reproduction techniques). It is also unquestionable that «the parent-child relationship of children born by surrogate gestation shall be determined by the birth» (Art. 10.2 of Act 14/2006). So, said provision is not applicable to this case, since it is not an issue of determining the parent-child relationship of children born in California, as it is not appropriate to determine the "applicable Law" in regard to registering parents, nor is it appropriate to determine the registered parents of such persons. It is an issue, on the contrary, to specify whether a parent-child relationship already specified by virtue of a foreign registration certificate can be registered in the Spanish Civil Registry. With the registration in the Civil Registry of the California registration of certificate of birth it is not sought in any way, to execute or comply with an alleged surrogate gestation contract. It is clear that the California registration certificates are issued to accredit the identity of children, and establish a presumption of paternity that may be done away with by court judgment (California Family Code Section 7611). It must be kept in mind, however, that registration in the Spanish Civil Registry of the California registration certificate would give rise to the legal effects as set forth by Spanish registration law (see Art. 2 Civil Registry Act). Therefore, any legitimate party may challenge the content of the registration before the Spanish courts in ordinary civil proceedings. In such an action, the Spanish Courts would definitively establish the parental data of the child. Therefore, the foreign registration certificate does not have a legal effect as «*res judicata*». It must also be pointed out that the registration certificate issued by the California authorities does not state in any way that the birth of the children was by means of surrogate gestation. In regard to the dilemma of leaving children who are unquestionably the children of a Spanish citizen (Art. 17.1 of the Civil Code) without parental data registered in the Civil Registry and accepting a situation of uncertainly in parental data of the children in which the registered parents of said children change every time they cross the United States border en route to Spain or vice versa, in violation of Art. 3 of the Convention on the Rights of the Child done in New York on 20 November 1989, or permitting registration in the Spanish Civil Registry of the parental data determined by virtue of the California certificate, it is always preferable to proceed with such registration on behalf of the "higher interest of the child".

SIXTH. – Lastly, it must be kept in mind that the children born in California have Spanish nationality under Art. 17.1.a) of the Civil Code, persons born as Spanish nationals are native Spanish citizens. The principle cited refers to children «born» of a Spanish father or mother and not the "children" of a Spanish father

or mother. This is an extraordinarily important legal clarification found in Act 18/1990 of 17-12-1990 on the reform of the Civil Code in regard to citizenship. In effect, according to the *jus sanguinis* criteria set forth in Art. 17.1.a) of the Civil Code, children of Spanish nationals are Spanish nationals. But this poses a "circular problem". When the parental data of the child is not accredited a "vicious circle" or "two-sided mirror" situation may be present, because it is necessary to know what parental data the subject has to determine whether they are "Spanish nationals" or not, while it is also necessary to know the subject's "nationality" to know his or her "parental data" (Art. 9.4 of the Civil Code), namely, who his or her parents are. So, Art. 17.1 a) of the Civil Code uses the expression "born" of Spanish father or mother, because this expression would undo the vicious circle and break through the "two-sided mirror". Art. 17 of the Spanish Constitution states that Spanish nationals are persons who are "born" of a Spanish father or mother. Therefore, the provision does not require the parental data to have been "legally determined." It is sufficient for the "physical fact of generation" to be accredited. Therefore, to consider an individual as "born " of a Spanish national, it is sufficient for there to be "rational indications of the individual's physical generation by a Spanish parent.", for example, by possession of status or registration in the Civil Registry (Decisions by the Directorate of Registries and the Notarial Corps of 7-5-1965 [RCL 1965, 1196], of 4-2-1966, of 29-12-1971, of 19-12-1973, RDGRN of 11-8-1975, RDGRN of 19-1-1976, RDGRN of 11-4-1978, RDGRN of 7-5-1980 [Legal Repertoire 1980, 2964], of 5-3-1986, of 28-10-1986 and Circular of 6-6-1981). In this case, therefore, it is not necessary for there to be a legal determination of the parental data of "born individuals", whereby it is not necessary to resort to Art. 9.4 of the Civil Code or the national Law of the "born individual" to accredit whose "child" he or she is. Therefore, since this case deals with the registration of the birth and parental data of Spanish nationals, since the parent is a Spanish national, access to the Spanish Civil Registry is in order (Art. 15 of the Civil Registry Act)".

b) Natural Parent Data

* Judgment by the Provincial Court of Barcelona (Section 12) of 4 March 2009 (JUR 2009\379436)

Application for change of visitation rights. Recognition of French divorce decree as prior issue. Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

"FUNDAMENTS OF LAW. – (…) SECOND. – As a prior issue, it must be stated that the court judgment whose amendment is sought by the claimant is French. Despite that fact, the absence in the judgment by the first instance of any grounds regarding the practice of any required processing before recognising such foreign judgment, since for a foreign separation, annulment or divorce decree

to take legal effect in Spain it must always be recognised and, as appropriate, for it to have enforcement effect, an exequatur is always necessary.

Regulation EC 2201/2003 of 27-11-2003, in force since 1-3-2005, provides a system for recognition and, if appropriate, exequatur of judicial decisions through a simple, speedy process. This Regulation EC 2201/2003 prevails over the international Conventions Spain has signed with certain Community countries, such as the Spanish-French Convention of 1969. The Regulation applies to decisions by public authorities of member states that decree divorce, legal separation or annulment of marriage, as well as parental responsibility measures regarding children (Art. 1 and 2 of same). The authority that judges the main case is competent also to grant recognition of resolutions on marriage issues (Art. 21 of Regulation 2201/2003). However, such recognition, in accordance with the provisions of Art. 22 of EC Regulation 2201/2003, must be verified. This is notwithstanding that the decisions issued in one Member State must be recognised by the other Member States, without subjecting it to any procedure whatsoever, namely, automatically. Nonetheless, a judgment on marriage or parental responsibility may not be recognised for certain reasons; but it can never be reviewed in regard to its substance. Let us consider the following: after Regulation EC 2201/2003 of the Council (concerning jurisdiction and the recognition and execution of judgments in matrimonial matters and the matters of parental responsibility), established in its Art. 21.1 the general principle that a judgment made in one Member State shall be recognised in the other Member States without requiring any special procedures, its Art. 22 established reasons for denial in the four following cases: a) if recognition is manifestly counter to the public policy of the Member State in which recognition is sought; b) if given in default of appearance, if the respondent is not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence; c) if it is irreconcilable with an earlier judgment between the same parties given in the receiving Member State; and d) if the judgment is irreconcilable with an earlier judgment given in another Member State or in a non-member State between the same parties.

The content of the above provisions leads to one possible synthetic operation. Based on the automatic recognition of the French judgment – no need to resort to any proceeding whatsoever – there is, nonetheless, the possibility that one of the grounds for denial of recognition might be present (as contemplated in Art. 22 of the oft-mentioned Regulation); wherefore it must be concluded that the Judge in the first instance (even *ex officio*), having been provided together with the complaint with a copy of the judgment by the French court, should have performed the task of verification that is imposed on him or her by the Regulation, and have expressly referred to its result in his or her Judgment, which was not done.

Nonetheless, after in-depth examination of the judgment by the Court of Appeal of Aix-en-Provence, this Chamber – despite the issue apparently posed

by this matter –, has arrived at the conclusion that it is perfectly valid and effective, since none of the impediments set forth in Art. 22 of Regulation EC 2201/2003 are present and without having to resort to exequatur, since the French Court's judgment (now being amended) is not being enforced. Its recognition is therefore only incidentally necessary, merely for the effects of the current proceedings."

* Judgment by the Provincial Court of Vizcaya (Sect 4) of 18 March 2009 (JUR 2009\322283)

Request for amendment of visitation rights by the father, who provided documents that the Spanish court did not consider. Romanian judgment not previously recognised in Spain. The mother's right of custody is maintained.

"FUNDAMENTS OF LAW. – FIRST. – The respondent husband appealed the original judgment that gave custody of the couple's child, a daughter, to the mother.

He argues that custody should be granted to the appellant, since the child currently resides with her father in Romania, where she is enrolled in school and where she has lived nearly her whole life.

These allegations cannot be admitted, because it is accredited that the fact that the child is currently in Romania is due to the father's unilateral decision, who, without the mother's consent, took his daughter away from her place of residence, the couple's last joint domicile in the town of Berriz.

Nor are the father's allegations that the child is residing with him, true, since what is true and can be inferred from the documentary evidence that the appellant seeks to have admitted, is that the child has been left by the father in the care of her paternal grandparents.

Therefore, the appeal must be rejected and the mother must maintain custody of the child, and such judgment cannot be interfered with by referring to judgments of other types issued in Romania, in circumstances totally unknown to this Court and the complainant, without requesting their enforcement in Spain through the channels established under applicable international treaties, and when, furthermore, none of the parties, not even the appellant in this appeal, has questioned the jurisdiction of the Spanish Courts to judge this case, jurisdiction set forth by order of 22.3.2006, based on the fact that the place of the residence of both the couple and the child, who was born in Vitoria, was in Spain, the last conjugal domicile being in the town of Berriz."

c) Adoptive Parent-Child Relationship

* Judgment by the Provincial Court of La Rioja (Section 1) of 6 March 2009 (JUR 2009\223624)

International adoption. Denial of suitability of adopters. Jurisdictional monitoring of the judgment by public authorities.

"FUNDAMENTS OF LAW. – (…) SECOND (…) It is true that it is up to the public entity to declare the suitability or non-suitability of potential adopters in order for an adoption to be carried out under the conditions stated, but it is also subject to jurisdictional control, in regard not only to compliance with the formal legal and regulatory requirements, but also review of the rationality of the arguments used in the administrative decision, that in the case at hand is based on a strict interpretation of Article 74 of Act 4/1998, of 18.3, on Children, adopted by the Autonomous Community of La Rioja, which only establishes criteria for determining the suitability of the adopter or adopters, but not imperative rules of mandatory compliance.

The case file includes a report on suitability by the Court's Psychosocial Team that considers the appellees capacitated and suitable to adopt, after extensively examining the specific circumstances involved (pages 163 to 173), concluding: "This couple presents conjugal, employment, and economic stability and sufficient family support, in addition to social support for adoption. In addition they live a healthy lifestyle.

The family and social environment in which the couple lives is suitable for a child to grow up in. They feel capable of bringing him or her up and integrating him or her, and are willing to receive the necessary training and help to make possible the child's proper adaptation to the situation.

We consider that even with the risk involved in adopting an adolescent, this couple can be evaluated as being capacitated and suitable for the adoption."

Also, subsequent to the court judgment, in August 2008, as recorded on pages 245 and 246, the appellees took a training course for adopting families from the Directorate General for Children's, Women's and Family Affairs of the Government of La Rioja, as recommended by the Psychosocial Team of the Courts.

And, reviewing the consideration of the evidence performed in the Court judgment, as well as the content of the administrative case file found on pages 25 to 94, that include the psychological reports (pages 46 to 54) and social reports (pages 55 to 64), the report of the Psychosocial Team of the Courts and the documentation on pages 128, 132 and 133, along with the content of the witness and expert testimony provided, we must conclude that the assessment contained in the court judgment is fully in accordance with the mandates of healthy critique, that report their assessment on the civil order, without there being any error found in the evaluation by the Judge of any of the evidence, through sharing the conclusions of the Psychosocial Team of the Courts, based on the circumstances of the appellees as expressed in the court judgment, specifically with respect to the criteria of Article 74 of the La Rioja Act concerning Children of 1998, that was concluded in the administrative case file as not complied with by Mr. Conrado and Mrs. Celestina, as set forth in the judgment (pages 84 to 88) of 5-6-2006, by the Commission for Youth, Family and Social Services of the Government of La Rioja."

* Ruling by the Provincial Court of Toledo (Sect. 2) of 15 June 2009 (EDJ 2009/141811).

"LEGAL ARGUMENTS. FIRST. – Article 22.3 of the Organic Act on the Judiciary states that in the civil venue, Courts are competent "to constitute adoption, when the adopter and the adoptee are Spanish nationals or reside habitually in Spain."

Furthermore, Article 9.5 of the Civil Code states that "International adoption shall be governed by the provisions contained in the International Adoption Act. Also, adoptions established by foreign authorities shall take effect in Spain in accordance with the provisions of the abovementioned International Adoption Act" (paragraph drafted by Act 54/2007, of 28-12 on International Adoption), the latter provision having entered into force the day after its publication in the Official State Gazette, namely, 30-12-2007.

In accordance with said International Adoption Act (applicable to legal relationships or situations affecting the civil status of the persons established before its entry into force but whose effects could take place after its validity or recognition) "adoption constituted by foreign authorities shall be recognised in Spain in accordance with the International Treaties and Conventions and other international provisions in force for Spain, and particularly in accordance with the Hague Convention of 29-5-1993, on Protection of Children and Cooperation in respect of Intercountry Adoption. Such provisions shall prevail in any case, over the provisions contained in this Act" (Art. 25).

Adoption established by foreign authorities shall be recognised in Spain if it complies with the requirements referred to in Art. 26, consisting basically of the decision having been taken by a competent public authority (judicial or non-judicial) and the essential guarantees having been abided by, and in particular when the adopter or the adoptee is a Spanish national it must be found that the legal effects correspond to adoption as regulated under Spanish Law.

Also, the documents in which the adoption established by the foreign authority is recorded must comply with formal requirements of authenticity as provided.

Lastly, if, as the appellant states – the Guatemalan adoption cannot be recognised in Spain as such (because it does not correspond in substance to the effects of adoption as regulated under Spanish Law), the Law itself, in its Article 30.4, allows for simple adoptions or less full-fledged adoptions established by competent foreign authorities to be able to be converted into adoptions regulated by Spanish Law when the requirements provided by are met, without it being necessary, in order to establish the appropriate court file, to have the competent Public Entity enter a proposal. In any case, the competent Spanish authority must examine for concurrence with the requirements it sets forth.

SECOND. – On the basis of the premises and provisions cited here, this Chamber considers that the prerequisites exist for declaring the Court of the First Instance of Ocaña competent, finding the admission of the claim formulated for the processing of the voluntary jurisdiction case to be admissible for conversion of the adoption constituted by foreign authorities into an adoption regulated under Spanish Law, giving same the processing provided under the cited legal provisions and others of general and pertinent application."

* Judgment by the Provincial Court of Córdoba (Sect. 3) of 13 April 2009 (EDJ 2009/144638)

Adoption established abroad. Registration in the Spanish Civil Registry. Registration of place of domicile in Spain as place of birth. Transitional regime. Application of law most favourable to the child.

"FUNDAMENTS OF LAW:...THIRD. – So, if we add to the above considerations: a) that in accordance with Art. 19.1 of the Civil Code the eighteen-year-old foreign minor adopted by a Spanish national acquires, as from the adoption, original Spanish nationality; b) that under the legal system in force for adoption the parent-child relationship is equated to naturalization, in order to bring it in line with the constitutional mandate on equality of children independent of their filiation (Art. 39 Spanish Constitution); c) that in its Art. 14 the Spanish Constitution enshrines the principle of equality before the law, the scope of which consists not only in demanding that any different treatment be objectively justified, but also that it pass a judgment of proportionality in a constitutional venue on the relationship existing between the measure adopted, the result produced and the objective sought by the legislator; Art. 18-1 also consecrates the right to personal and family privacy, providing the ability to exclude from public knowledge information concerning the personal, confidential domain of persons forming part of his or her private life; and furthermore, in its Art. 39 it establishes that protecting the family is a guiding principle of economic and social policy; d) that the Directorate General of Registry and the Notarial Corps, in line with the clear reality of things and making use of elementary common sense, recognises that this can be given irregular publicity through a literal certification of data that affect family privacy; such being the case that one of the revealing circumstances of an adoptive record could be the place of birth; this is the reason why, in the Instruction of 1.7.2004 (later supported legislatively by the reform of Art. 20-1 of the Civil Registry Act), advanced a series of measures to protect personal and family privacy to prevent publicity of adoption records, protecting, in the interest of the child, such records or any other circumstance from which it can be surmised, including the place of birth, from being made known, especially when this was in another country; and this, therefore, makes it possible for the real place of birth not to be in the record of adoption, and request can be made to substitute it by the domicile of the adopter or adopters. The result of all the facts and considerations expressed up to this point can hardly be any other than finding in favour of the appellant.

FOURTH. – [...] The first of the rights referred to is exclusively one of registry, while the second is correctly in line with the meaning, scope and protection that an institution of material law such as adoption deserves. Adoption must continue to project the effects of substantive law throughout time, and therefore nothing can be started that due to so-called tacit retroactivity (in accordance with the above mentioned jurisprudential positions) is owed the beneficial and evident development that legal provisions undergo in regard to protection. The opposite would be to consider any technical registration difficulties that may be caused as more important than the protection of personal and family privacy

and the equal application of the provision in the terms indicated above; these two aspects having been unduly assessed in the appealed resolution.

In sum, absent a provision in Act 15/05 that expressly contemplates the situations of transitory law, including one similar to the one at hand, and combining the principles that inspire Art. 9-3 of the Spanish Constitution and those established in the transitional provisions of civil law (especially in this case the final proposal of the first transitional provision), that constitute a body of general and auxiliary rules aimed at supplementing Art. 2-3 of the Civil Code, we find that through the interpretive venue, attending to the clear spirit and purpose of the new provision, the legality of retroactive effect must be recognized as the most favourable law that can fill the void, in regard to protection and adoption and with respect to setting forth the place of birth of the adoptee, that is offered by legislation at the time the registration in this proceeding was presented to the Civil Registry of Cordoba."

* Ruling by the Provincial Court of León (Sect. 3) of 11 September 2009 (AC 2009\2000)

International adoption of foreign national child (Romanian) in Spain. Nullification of proceedings. Existence of an action of opposition to the pre-adoptive foster care that was submitted to the Court and of which the public administration had knowledge. Lack of hearing of the biological mother (a Romanian national) in both the pre-adoptive and the adoption proceedings. Non-exhaustion of the procedural precautions provided to have the mother summoned in order to be heard.

"FUNDAMENTS. FIRST (…) The enormous human and ethical content of the case, in which the will of the biological mother to recover her daughter is in conflict with the position of the public administration to keep the child with her foster-adoptive parents, makes it especially important to carefully study the circumstances present in each specific case, fundamentally attending to the interest of the child, but without overlooking the need to protect the family to which the child belongs and whose protection is guaranteed by Art. 39 of our Constitution, since as Constitutional Court judgments 143/1990 and 298/1993 state, the moral and physical assistance of children in regard to the declaration of abandonment must be given a restrictive interpretation, seeking a balance in benefit of the child and the protection of his or her parent-child relations, whereby the existence of abandonment is only found when one of the minimal aspects of the child's care is found not to be provided, as required by the most common social conscience, since, ultimately, while the interest of the child is first and foremost, it is necessary to underline the extraordinary importance of the other rights and interests at stake, namely those of the biological parents and those of the other people involved in the matter.

The recognition of the right of both the child and of his or her own parents that he or she grow up within a natural family is sanctioned even under International Law that proclaims the interest of the child to be brought up by his or her own natural parents, particularly the Declaration of the United Nations General Assembly of 3 December 1986, expressly providing in Article 9 of the

Convention on the Rights of the Child adopted by the United Nations General Assembly on 20-11-1989, states "…".

And also Article 19 of the Convention on the Rights of the Child warns of the need to adopt all necessary measures to protect the child against all types of physical or mental violence, injury or abuse, neglect or negligent treatment. And Article 3 states that: "…".

This General Principle is reflected in our legal system, *inter alia*, mainly in Article 172.4 of the Civil Code, and in Article 5 of Act 37/1991, also a result of the parents' *patria potestas*, the exercise of which must be in the interest or benefit of the child (Supreme Court judgment of 14-10-1935, 9-3-1989 and 23-7-1987, *inter alia*) and unless special circumstances are present, the safeguarding and custody of minor children is the responsibility of the parents, provided, however, that it is in the interest of the child, which, as stated, is the interest most needing of protection.

The principle of "*favor minoris*," solemnly consecrated in Art. 39 of the Spanish Constitution and sanctioned in International Conventions signed by Spain, is the keystone not only of the legal measures adopted in regard to children in situations of abandonment, but also of the fundamental principles that must prevail in judgments by the Courts of Justice, whereby the specific circumstances in each specific case must be carefully examined to reach a stable, fair, equitable solution, seeking the concordance and interpretation of the legal provisions with the underlying principles of the most recent legal reforms, both in the Civil Code and in autonomous legislation, among which the principle of the priority of the child's own family is foremost, and involves the interest of the child being, first, the right to be brought up by his or her natural parents, requiring judicial authorities to verify whether the child has been integrated in his or her own family, or has attempted to be, provided it is in his or her interest. Only in cases in which return to the family environment is either a risk or a danger for the higher interest of the child should any of the other measures be considered, to provide for or make possible, with sufficient guarantees, an appropriate environment for an adequate upbringing and development in consonance with the child's age, providing for the child's harmonious, non-traumatic development on a physical, psychological and moral level." (…)

THIRD. The appellant alleges that he or she entered an opposition action against the administrative resolution of 30-4-2006 that ordered the child, Serafina, to be put into pre-adoptive foster care, an action of which Court of the First Instance No. 3 of Burgos (Proceedings no. 995/2006) was cognizant and the judgment of which would have a clear affect on this adoption proceeding, since if the former had been successful the situation of abandonment would have ceased to exist, the protection measure would have ceased and the child should have been returned to her biological family, and her mother would have recovered custody of the child, whereby a case of improper litispendency or civil pre-judiciality exists, as alluded to in Art. 43 of the Civil Procedure Act. In awareness of the importance of the issue posed and given the serious personal consequences that may arise there from, this Chamber considers, for precautionary

reasons, that this judgment should be delayed until a firm judgment exists regarding the pre-adoptive foster care, a necessary antecedent of the adoption proposal.

The judgment was issued in the terms reflected in the above fundament, in an exhaustive, and well-grounded judgment by the Provincial Court of Burgos, that, affirms among other things, that: "…the decision by the guardian Administration to change the simple, provisional regime of care to one that was pre-adoptive was too hasty, given that it would lead to future adoption, and that all the measures necessary under Art. 172-4 of the CCV to try to reinsert the daughter into her biological family had not been exhausted. We must not overlook and emphasize the fact that placement in pre-adoptive foster care requires special caution and care, in regard both to the length of time in which it is decided and to the conditions under which the decision is taken, since we must always keep in mind the fact that it is a status that leads to adoption."

"– The appealed decision on change of guardianship was taken without the knowledge, hearing, or consent of the mother or the guardian. Thus, although an attorney was appointed by the court, given the manifest opposition of interests between the mother and the guardian (*Junta de Castilla y León*, regional government), prior to taking such a quick decision to change her two-year-old daughter's status of care, she should have been heard in the proceedings with more guarantees. She was only notified after the administrative decision was taken 9-05-2006 (pg.187 v of the case file), and she then immediately, on 17-05-2006, stated her opposition."

"– The excessive haste in changing the guardianship is derived not only from what was stated, not only from non-application of Art. 172-4 CV, but also from the Administration's poor provision of the guarantees of protection and defence of the appellant who, it must not be overlooked, as a minor was subject to the direct guardianship of the same Administration that decided to change the guardianship of her daughter. Evidence of this is found not only in the speed with which this change of guardianship took place (from simple to pre-adoptive status), without waiting, in view of the opposing interests, for Tania's defender to be able to intervene or for her to reach legal age to be able to defend herself, but also in the fact that the child's defender, a practicing Attorney and Secretary General of the Illustrious Bar Association of Burgos, went to the Police Headquarters (pg. 270) on 11-2006 to enter a complaint against the *Junta de Castilla y León* (regional government), and specifically against the Child Protection Section, for deprivation of the right to a defence, psychological abuse and for depriving his client of the ability to express what she really wanted." (…).

FOURTH. The importance of the interests at stake and the proper protection of the rights of the biological mother required that the procedural measures provided for notification of the mother be exhausted and for her to have a voice (Art. 177-3-1º Civil Code), or for her to have given her approval for the adoption (Art. 177-2-2 Civil Code), and not having done so amounts to a procedural violation causing lack of proper defence and thereby causing the nullification of the proceedings (Art. 238-3 Organic Act on the Judiciary (…)."

2. International Child Abduction

* Judgment by the Provincial Court of Seville (Section 2) of 16 March 2009 (JUR 2009\314279)

Denial of return of a child to Venezuela based on the principle of the higher interest of the child. Article 13 of the Hague Convention of 1980 on the Civil Aspects of International Child Abduction.

"FUNDAMENTS OF LAW. – ONE. – The Judgment appealed by the State Attorney, refers to the provisions applicable to the return of children and specifically the Hague Convention that in its Art. 13 permits the refusal of the order to return if any of the circumstances listed concur and are proven. It is understood that despite facts such as that the father was granted custody rights by the Courts of Venezuela and that the mother illicitly took the child to Spain, the Convention applies Art. 13 to cases that fall under Art. 12, specifically when a child was taken or retained illicitly, without the consent of the father, but in which a series of justifying facts are proven, providing for refusal of the order to return, since any measure regarding a child must have as its ultimate goal the interest of the child, nothing more than that which is the best, most beneficial and most useful for the child. This prevails over the parent's legitimate right to custody. And, we find that the facts stated in the decision and that allow the conclusion to be reached that return would involve both physical and psychological risk for the child and that the child would be exposed to an intolerable situation, either unbearable or unjust, since Art. 13 speaks of serious risk, meaning that it is considered possible that something would happen that would affect or could affect the child physically or psychologically, by which it seems that she could be seriously affected if made to return to her father in Venezuela against her will and with the perception that the child has of how her relationship would be with her father, are not refuted objectively through clear, specific evidence. There is reasonable assessment of the evidence, and therefore, such facts that can be considered as accredited and which have been proven, enable the denial to be reasonably ruled, since return could be seriously harmful to the child, and of course, maintaining the current situation in an environment that has been suitable for the child is the most beneficial for her moral and material wellbeing, without overlooking the fact, although not decisive nor binding on the Court, that the child unequivocally expressed her desire not to return to Venezuela. The Convention itself, in its Art. 13, provides that the order to return can be refused when opposed by the child having attained an age and degree of maturity at which it is appropriate to take account of his or her views. The State Attorney is correct in his arguments, as it is not reasonable for anyone acting unilaterally to be benefitted and we share his criteria on this, but here we are not judging the correct or incorrect or normal acts of the mother, but rather on the basis of the situation as proven, we must determine what is most beneficial for the child."

* Judgment by the Provincial Court of Cádiz (Section 5) of 26 January 2009 (JUR 2009\199249)

Principles of child welfare and mutual trust that must govern relations between community countries, under the Hague Convention of 1980 on the Civil Aspects of International Child Abduction and Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

"FUNDAMENTS OF LAW. – (…) SECOND. – In regard to the alleged error in the assessment of the evidence, attention is called to the result of the examination of the child along with her desire to continue living with her father in addition to being enrolled in school, having friends and living a normal life, pointing out that the decision to deny the right of return or to turn the child over to her mother should be taken in defence of the higher interest of the child. As the representative of the Office of the State Attorney points out, the procedure for returning children under The Hague Convention of 25-10-1980 and Community Regulation 2201/2003 is warranted on two grounds: 1) the welfare of the child and 2) the principle of mutual trust that must govern relations among community countries. All these countries are democratic countries, with judicial systems that guarantee citizens' rights, wherefore in principle, the requested state must not review substance. Therefore, since there is a judgment by the Family Court of Aix-en-Provence (France) that granted custody of the child to the mother, it is fully lawful and cannot be questioned by Spanish courts. Any change in custody would have to be determined by the French courts, upholding any potential rights or justifications the child's father may have, whose circumstance of being in prison would be another, absolutely conclusive argument for ordering the child's return, as argued by the ruling Judge. Since it is compliant with law and especially with Community Regulation 2201/2003, it is appropriate to confirm the appealed judgment."

* Judgment by the Provincial Court of Barcelona (Sect. 18) of 16 April 2009 (EDJ 2009/201792)

Child in common. Shared custody. Illegal retention of a child. Impossibility of any exception given the fact that the complaint was entered within the first year in which the abduction took place. Dismissal of the appeal. The Hague Convention of 1980 on the Civil Aspects of International Child Abduction.

"FUNDAMENTS OF LAW:…SECOND. – […] In the first case, the case at hand here, there is only one solution and that is the immediate return of the child Gabriela, since the complaint was entered on 7-5-2008, when the entry of the child into Spain with her mother was on 24-10-2007, as shown on Gabriela's passport, and the delay in the resolution of this case must not harm the interests of the party protected by the Convention. The time elapsed since the plaintiff entered the complaint must be taken into account, and in this case it is clear that no more than seven months have gone by, whereby it is in order to grant return, since through the evidence provided it has not been accredited that the circumstances as provided under Art. 13 of said Convention are present.

FOURTH. – [...] This Chamber takes into account that the complaint was entered less than a year after the child was removed, and her return cannot be considered to expose her to any physical, psychological or intolerable danger, since she lived in California until she was removed and her father and brother Jordan live in that country, whereby in view of all the above, this ground for appeal is dismissed...."

* Ruling by the Provincial Court of Santa Cruz de Tenerife (Sect. 1) of 29 July 2009 (JUR 2009\438050)

International child abduction. Absence of wrongfulness that would justify the immediate return of children to Venezuela from Spain, the country of the new residence of the mother and children.

"FUNDAMENTS OF LAW. FIRST (...) In this sense it must be pointed out that the purpose of said Convention as stated in its Article 1 is to: a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States. In Article 3 it states that the removal or the retention of a child is to be considered wrongful where "it is in breach of rights of custody attributed to a person...either jointly or alone..." and it should be taken into account that Article 13 establishes a series of exceptions to the obligation to grant the return of a child if: a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

SECOND. In relation to the first issue, in regard to whether this is a case of wrongful child retention, we must start with the fact that Art. 3 of the above mentioned Hague Convention, states that a removal is wrongful if it is in breach of any right of custody attributed to a person either jointly or alone, under the law in force in the state in which the child was habitually resident immediately prior to removal, and goes on to state that custody rights may arise by operation of law, by reason of a judicial or administrative decision, or by reason of an agreement having legal effect, and also when such right is being effectively exercised either jointly or alone at the time of the removal or would have been exercised if such removal had not taken place, in addition to the content of Art. 5 of the aforementioned Hague Convention that establishes for the purposes of this Convention that "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.

This Chamber must therefore conclude that we are not dealing with a case of wrongful child retention since by this it must be understood that the removal of a child is wrongful when it violates the right of custody of same held by a person other than the person responsible for the removal, whereby in the Judgment

granting the divorce of the parents, it is established that while *patria potestas* is held by both, the mother has custody; and although it may be granted provisionally to the father when the mother travels, when she returns she resumes custody. Such is the criteria of this Court, as set forth in its judgment of 22-11-2006, that establishes in its First Fundament of Law that: "The order appealed denied the request to order the child's return to Venezuela, made by the State Attorney, in representation of the Central Authority of Spain and in application of the Hague Convention no. XXVIII, on the Civil Aspects of International Child Abduction, of 25-10-1980. This denial is based on the judge's finding that in this case the premise does not exist to which the Convention ties the result sought by the complainant, namely, that the child, Pedro Jesus, was not subject to wrongful child abduction by his mother to Spain, which would lead to his immediate return to Venezuela, where his father lives. The Judge hearing the case finds that wrongful abduction does not exist because under Art. 3 of the Convention, such would have taken place if the removal of the child were in violation of custody rights, which in this case are attributed to the mother by judgment of 29-4-2004 by the competent Venezuelan judge. Such right of custody, in accordance with the Convention of reference whose application is the issue at hand, includes the right to care for the child and "in particular, that of deciding his or her place of residence." Therefore, as concluded in the appealed judgment, if the mother who holds the custody decided to establish her residence with her son in Spain she is not violating the right for which the return of the child is sought, only the visitation rights of the father, the organization and guarantee of which, under the Convention, is the responsibility of the requested country, that must adopt the necessary measures, but does not involve the return as sought in the proceeding."

(…) It is true that Mrs. Nuria has acted in a way that seriously hinders what is provided in the divorce decree, since the distance put between father and son does not make the implementation of the visitation rights established feasible. This situation may have other consequences, ultimately at the court with the jurisdiction to regulate the consequences of the divorce and to resolve on what is necessary in the face of noncompliance with such resolutions, and where appropriate, the Spanish State must adopt the necessary measures for the visits to be effective, but what is not lawful is to order the immediate return of the child to the country of origin which, as has been repeatedly stated, would be a consequence of the violation of custody rights, not of visitation rights." (…)

THIRD (…) It must not be overlooked that Article 13 of the Convention establishes a series of exceptions to the mandatory obligation to return a child if: a) the person having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or b) there is grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. Therefore, to resolve this case the guiding principle can be none other than the safeguard of the preferential and higher interest of the aforementioned child who must

be protected and the guarantee of whose welfare is sought, a principle that is consecrated both in supra-national law (Convention on the Rights of the Child of 1989), and under our legislation in different provisions of the Civil Code (Arts. 92, 93, 95, 103.1, 154, 158 and 170), Organic Act 1/1996 on Legal Protection of the Child and in the laws and provisions that regulate matrimonial matters, parent-child relationships and custody situations, being the basic guiding principle of judicial action and coinciding with the constitutional principle of providing full protection of children (Art. 39.2 of the Spanish Constitution).

In this regard, the judgment by the court finds, in a reasoned and reasonable way, that the children are fully integrated in their new place of residence, that the desire of the mother was to seek a different environment for them, and that it was never her intent to cause the father any harm. Furthermore, the evidence entered in the second venue (psychological and social report), does nothing to counter such considerations. (…)."

3. Marriage

a) Ability to Marry

* Judgment by the Provincial Court of Toledo (Sect. 1) of 20 May 2009 (EDJ 2009/118065)

Marriage held in Bolivia between a Spanish and a Bolivian national, both previously married to third parties and whose prior marriages were not dissolved. Effects in Spain. Effects in regard to third parties.

"FUNDAMENTS OF LAW: FIRST. The first issue subject to appeal, a purely legal one, consists of determining whether a marriage held in Bolivia between a Spanish and a Bolivian national while both were still previously married, can be considered valid and therefore subject to dissolution by divorce.

Such marriage, as documented by a certificate from the Civil Register of Bolivia, issued on 11-9-2002, was clearly not registered in the Spanish Civil Register, despite which the judgment, based on the fact that registration of marriage in the Civil Register does not constitute in and of itself the act, but rather a simple means of proof of same, and keeping in mind that neither the bride or the groom nor anyone empowered to do so entered a nullification action, it considered said marriage as initially valid and with full civil effect, especially in the presence of a third party in good faith who is the son of the two litigants.

For the Chamber, however, under Art. 9.1 of the Civil Code, the personal law of physical beings is the law corresponding to the person's nationality. Since the husband is a Spanish national it is clear that he is governed by Spanish law in regard to capability and marital status, family rights and obligations and succession in the event of death, namely, the requirements and effects in regard to marriage are governed by Spanish law even though Art. 49 of the Civil Code allows him to be married outside Spain in accordance with the law of the place where the marriage is held.

Therefore, the form of marriage held in Bolivia may perfectly be legal for such country, but for a Spanish national the requirements of substance continue to be as required under Spanish law, whereby although the marriage acquires civil effects as from the date it is held, its entry into the Civil Register does not legitimate it in and of itself, and full recognition of same is not subject thereto. What cannot be accepted is for a divorce decree to give it formal status and recognition as a valid marriage by dissolving it, a situation which from all appearances is legally null and void from the very outset, despite no nullification action having been exercised, since it is in flagrant noncompliance with the link as set forth in Art. 46.2 of the Civil Code.

One thing is for a valid marriage to be in full effect from the time it was entered into despite not having been registered and another, quite different thing, for an invalid marriage affected by radical, absolute nullification to be recognised as valid because the husband and wife did not want to have it nullified.

If this were so, anyone would be able to avoid matrimonial impediments, that are actually prohibitions, by nothing more than abstaining from seeking nullification, and obtaining full recognition of his or her marriage, because registration of marriage does not establish the marriage in and of itself and the full recognition of its effects are not subject to such registration.

The existence of an undissolved marriage bond (Art. 73.2 in relation to 46.2 of the Civil Code), is a radical and absolute cause for annulment (Supreme Court Judgments of 7.3.1972 and 17.11.2005) and not only is there no limit to the action to make it valid nor is it remediated by the passage of time, but also, in application of Art. 65 of the Civil Code, the Civil Registrar would refuse to register it in compliance with his obligation to be sure of the non-existence of any impediment (Resolutions on Registries and the Notarial Corps of 3-1-2000, 6-6-2000 and 20-9-2005), since it is a marriage that not only should not be registered but also should never have been authorised, and if it was authorised erroneously because the bride and groom stated that they were single to the official of the Registry of Bolivia, when they actually were both married, this non-registered marriage should not be dissolved, since it would amount to implicit recognition of same, just as it would be inconceivable to divorce the unregistered marriage of a father and daughter, or a brother and sister or a grandmother and a grandson, which are all legally null and void from the very moment they are performed and even if no one exercises any annulment action, the Judge cannot dissolve something that is nonexistent.

A different issue is that such appearance of marriage must in no case harm third parties such as, in this case, the couple's son, in accordance with Art. 79 of the Civil Code, wherefore it is lawful as the respondent seeks to dismiss the application for divorce but also to resolve regarding measures to be adopted in relation to the couple's common child as if dealing with a common law marriage."

b) Performance and Registration of Marriage

* Judgment by the High Court of Justice of Catalonia (Social Chamber, sect. 1) of 13 May 2009 (EDJ 2009/211823)

Marriage held in Ghana. Effectiveness in Spain. Absence of registration within established time period. Application for survivor's benefits.

– "FUNDAMENTS OF LAW:... SECOND. – [...] At no time was it questioned that she was married to the deceased, or that Bernardo and Adjoa were their joint children, nor was it questioned that the claimant was married in Ghana in 1987. The discussion is another, quite different one. What is questioned is whether the marriage was legal in accordance with the laws of Ghana, and the most relevant is whether it was in effect in Spain, since it was not duly registered in the time period established for same. The registration was effected sixteen years later, after the husband was deceased. Another issue is whether the age of son Bernardo, the only living child, makes him eligible for the survivor's pension that he was granted. It is true, as stated, that the Social Security Institute issued a resolution acknowledging the rights of the widow, now the appellant, and the children, but it is also true that such rights were suspended by order of 11/04/2006 (page 296), and the fifth proven fact of the challenged order, as a result of the Embassy of Spain to Ghana making known to the Social Security Institute in its report of 27/03/2006 three very relevant circumstances: first, that on the date of the application by Mrs. Olga to request the death and survivor's benefits under discussion here one of the two children, Adjoa, was deceased; second, that the marriage was not legal, because it had not been registered within three months after it was held, but rather sixteen years later, and more suspiciously, after the death of the husband; and third, the Embassy questioned that the child, Bernardo, was a minor, whereby it proposed performing an osteometric test to confirm the real age. Therefore, denouncement of violation of these two provisions must be rejected.

With regard to the violation of Article 9.1 of the Civil Code, the Court was hardly able to violate such provision when, as can be seen from reading the legal fundaments of the appealed decision, it was more than scrupulous in its application. It is observed that the Judge never called into question the existence of Ghanian Law, and does not question what legislation should be applied, but rather, in view of the contradictory information provided in this case by the Embassy of Spain in Ghana and by the Embassy of Ghana in Spain, facts five and six of the complaint, and accepting the value of the Ghanian Law, reaches his or her conclusion owing to the inconsistencies contained in the report issued by the latter dated 8-5-2007, at the request of the appellant's attorney in relation to such relevant facts as the registration of the marriage after the death, and the report issued by the Spanish Embassy on alleged social security benefit fraud, in addition to an application for an orphan's pension for a daughter who at the time was deceased, and with the suspicion that the son was older than claimed. The Judge reached the cautious, realistic conclusion to give greater weight to the

Spanish diplomatic services than to those of Ghana, and even more so when the report issued by the latter contradicts the information provided by the Spanish Embassy in Ghana, that had the appellant and her son on its very premises.

Therefore, on the basis of what is set forth above, the Court, applying Article 281 of the Civil Procedure Act, although it does not cite it, found the foreign law invoked by the appellant as proven, and did so in respect to its content and validity, attending to the criteria that the Spanish Embassy indicated, because it is a common law system. We subscribe to this conclusion, since it is up to the Spanish Judges and Courts to interpret the laws on such matters as are submitted to them for their consideration, whether they be written or customary, Spanish or foreign law, and it is also up to them to establish their true content, scope and purpose, and furthermore when, as in this case, there exist two contradictory versions of the same law, and its validity and the production of legal effects depends on its interpretation.

Therefore, under the circumstance of accepting the Ghanaian law on common-law marriages, according to the report issued by the Embassy of Ghana in Spain, as requested by the party, a report that did not answer all the questions posed – it omitted answering the questions relating to polygamy – and which also contained countless contradictions, or finding that the cited law had the content, limits and demands as described by the Embassy of Spain in its report, it is evident that lacking any other material support to determine the content of the law, the principles of human logic obligate us to find that the such country's law is more in accordance with the spirit and purpose than to seek the creation of any registration of this type of marriages, marriages performed by whatever rite are registered within a time period and it is reasonable for it to be three months and not sixteen years, as the appellant sought for us to believe. This means, just as the Court did, that we give more weight to the information provided by our Embassy than to that provided by the other country."

* Judgment by the Provincial Court of Girona (Sect. 3) of 20 July 2009 (ARP 2009\1094)

Bigamy. Marriage entered into in the knowledge of the existence of a previous marriage in Colombia. Registration in the Spanish Civil Registry: declaratory not constituent.

"FUNDAMENTS. FIRST (…). Civil and religious marriage is considered equally valid in Colombia in accordance with the Concordat signed between the Holy See and Colombia on 12-7-1973 and amended on 20-11-1992, according to which the State recognises marriages performed under canon law as having full civil effect as established by Law. Consistent with the Concordat, Article 115 of the Civil Code of Colombia recognises the full legal effects of marriages performed in accordance with the precepts of any religion that has established a concordat or international treaty, not subjecting the effectiveness of the marriage to the need for registration which, just as under our law, is merely declaratory and does not constitute the marriage itself.

Based on Colombian law, it is not credible that a legal professional would tell the respondent that the religious marriage had no civil effect because it was not registered in the Civil Registry, especially when such registration did exist. It would be quite a different matter that the birth certificate (page 70) provided in the matrimonial case file prepared in Blanes did not record the performance of the marriage in a marginal note, which does not necessarily mean that such marriage did not exist. . . ."

c) Marriages of Convenience

* Judgment by the High Court of Justice of Madrid (Administrative-Contentious Chamber, Sec. 1) of 19 June 2009 (EDJ 2009/159706)

Marriage between Spanish national and a citizen of Ghana. Questions existing regarding the validity of the marriage and in regard to the paternity of the children from same. Insufficiency per se of the questions asked to justify the existence of a simulated marriage.

"FUNDAMENTS OF LAW: . . . FIFTH. – [. . .] The problem in this case lies in the lack of proof that Mr. Cayetano was present at the marriage ceremony which, according to the judgment, he was unable to prove. On this matter, the decision denying the visa applied for by Ms. Mercedes pays special attention to the fact that in one of the photographs provided of the wedding the alleged husband is shown to be signing, and when later compared with the marriage certificate submitted, the signatures appearing in the space reserved for the witnesses do not coincide. It is concluded, therefore, that either the certificate submitted or the supposed ceremony shown in the pictures, or both, are fake. Furthermore, the place where the signatures were done does not look like a public office but rather a private room and there is no public official visible anywhere.

We requested the originals of the photographs (plural) to which the decision refers, as final proceedings, and only one was provided in which Mr. Cayetano appears signing the record. Owing to size and definition we do not consider it sufficient to be able to compare the signatures with the ones that appear on the certificate contained in the case file in support of the statement that the signatures of the witnesses do not coincide. The presence of Mr. Cayetano at the ceremony would be ruled out if Mr. Cayetano was not in Ghana at the time it was held. Of the only two stamps that appear on the husband's passport, one is illegible and the other, an oval stamp, corresponds to an exit stamp from Ghana which reads AUG 25 2005, so it is logical to think that he was in Ghana a few days earlier when the marriage was held (16-8-2005) and there are no elements from which to infer that this stamp is fake. Furthermore, no elements exist to be able to state that the marriage certificate is a fake.

In regard to the second problem, the existence of a real marriage, it is not irrelevant to recall that there are two basic elements from which it is possible to infer simulation of marriage consent: a) lack of knowledge by one or both spouses of the other's "basic personal and/or family data" and b) the nonexistence

of previous relations between the spouses. Among the criteria for evaluating such elements it must be considered and assumed that there exists true "marriage consent" when one spouse knows the other spouse's "basic personal and family data".

According to the Resolution of the Council of the European Communities of 4.12.1997, on measures to be adopted on the combating of marriages of convenience (OJ C 382 of 16.12.1997), basic personal data consist of: date and place of birth, domicile, occupation, relevant hobbies, special habits, and the other spouse's nationality, prior marriages, number and basic information on the identity of each other's closest family members (children not in common, parents, brothers, sisters), as well as the circumstances of how the spouses met.

In the interview, Mrs. Mercedes, displayed sufficient knowledge of Mr. Cayetano's basic personal and family data (says she lives with her mother-in-law, knows the names of his brothers –, sisters, and parents-in-law; she gave the names of the witnesses at her wedding, told the circumstances of how they met, etc.).

Furthermore, the existence of authentic and real relations between the two spouses, can be accredited by referring to relations before or after the marriage was performed and may be personal in nature (visits by the spouse to Spain or the other spouse's foreign country), or correspondence by mail or telephone or by another means of communications such as the Internet. In this case, Mr. Cayetano made two visits, as accredited by the stamps on his passport; and Mrs. Mercedes stated that she speaks with her husband by telephone, although on this point, as correctly indicated by the appellant's attorney, she was asked in the interview when he called her, and therefore it is not logical to object because she did not show receipts for the calls. Apart from that, Mr. Cayetano periodically sent money to Mrs. Mercedes.

In regard to cohabitation, in consonance with the Directorate General for Registries and the Notarial Corps' very detailed criteria that takes into account the Council Resolution of 4-12-1997 on the measures to be adopted to combat marriages of convenience, it must be pointed out that data and facts relating to the marriage that do not affect each spouse's personal knowledge of the other, or the existence of prior relations between the spouses are not relevant, in and of themselves, in concluding the existence of a simulated marriage.

Among the facts not relevant by themselves for reaching the conclusion that the marriage is simulated, is precisely the fact that the spouses do not live together or, even, that they have never lived together when there exist circumstances that would prevent them from doing so, such as the impossibility of travelling for legal or economic reasons (see Instruction by the Directorate General for Registries and the Notarial Corps of 31-1-2006 on marriages of convenience).

There is a very special element that should not be overlooked in this examination perspective and that is the fact that having had joint children is a sufficient indication to accredit the existence of "personal relations". The birth of the two children for whom a visa is being applied for, were registered, Abelardo on

15-12-2003 and Rosse on 24-4-2006, having been born, according to the birth certificates, on 23-10-1998 and 11-9-2006 respectively. The registration of the birth of Jemina, although done nearly five years after the fact, was some time distant from the time the visa was applied for, so the late registration does not indicate that the document is a fraud.

Furthermore, other than the late registrations of birth, there are no major objections in the decisions in these cases or in their respective proposals which would lead one to think they were not Mr. Cayetano's children.

In sum, the evaluation on the whole of the elements of proof contained in the administrative case file and in the proceedings, along with an overall assessment of the evidence leads us to allow this administrative-contentious appeal, since it does not unquestionably follow there from that the conclusion must be that this is a marriage of convenience, or that there is a question in regard to the identities of Abelardo and y Diana as being the children of Mr. Cayetano and Mrs. Mercedes."

d) Effects

* Judgment by the Provincial Court of Barcelona (Section 12) of 24 March 2009 (AC 2009\1383)

Dissolution of the marital bond. Liquidation of the economic system of the marriage under Bolivian Law. Irrelevance of lack of registration in the Consular Registry of Bolivia.

"FUNDAMENTS OF LAW. – (…) FOURTH. – (…) In summary, the economic system of the marriage between the litigants is community property as regulated under Articles 101 and thereafter of the Family Code of Bolivia. This is concluded from the point of connection of Article 9.2 of the Civil Code in force on 2-1-1976, when the marriage was performed. The fact that the marriage was not registered in the Civil Registry of Bolivia is irrelevant for such purposes since the issue here refers to the economic system to be applied to a marriage performed in Spain, under our legal system, between a woman who is a Spanish national and a man who is a Bolivian national. Furthermore, the fact that there is no record of having registered the marriage in the Diplomatic Agent's or Consular Registry of Bolivia, as established by Article 58 of the Civil Register Act of Bolivia, does not prevent the marriage performed in Spain from being valid. The fact that it was not registered in said Civil Registry might be due to other circumstances, but even so, it cannot be concluded that a marriage between Bolivian nationals or between a Bolivian and a foreign national is not valid if such registration is omitted, since the abovementioned provision does not regulate the validity or effectiveness of the marriage. Performance, requirements and validity of marriage is regulated in Articles 41 to 88 of the Family Code of Bolivia, not in a Law on registration."

(…)

f) Separation

* Judgment by the Provincial Court of Barcelona (Sect. 12) of 16 July 2009 (EDJ 2009/219324)

Marriage performed in Morocco between two Moroccan nationals. Declaration of dissolution of the marriage bond by divorce. Application of the Moroccan Family Code. Lack of marital separation. Absence of attempt to conciliate.

"FUNDAMENTS OF LAW:...THIRD. – The case relating to the legality of the divorce decree regarding the marriage of the parties performed in Morocco, invoked in the appeal by the respondent, by application of the Moroccan Family Code, *LA MUDAWANA*, was correctly dismissed in the matrimonial judgment, absent any attempt at conciliation as referred to in Article 113 of the above mentioned Moroccan Code, and in which the rights of the wife must be determined as sought by the respondent, specifically concerning compensation to the divorced wife, known as *MUT'A*.

Based on Article 107 of the Civil Code, the application of Spanish law over the Moroccan Civil Code is because the complainant resides in Spain and Moroccan law does not recognise the legal institution of marital separation, as applied for by the complainant. Therefore, the provisions of law of Article 81.2 of the Spanish Civil Code, after its reform in Act 15/2005, of 8-7 must be applied.

FOURTH. – The respondent has moved to Belgium with her children to find employment, owing to her knowledge of French and should not be obligated to return to Spain and reside in our country. She can establish her residence wherever she sees fit, provided it does not harm her minor children and the father's communication and visitation with the children is respected, which must be adapted to the circumstances deriving from the distance between the domicile of the mother and of her spouse.

Therefore, the complaint as set forth in the appeal by the complainant, seeking that the respondent to be ordered to return to Spain with her children, is dismissed.

...

SIXTH. – In default of implementation of compensation for the wife, in case of divorce, called *MUT'A* under Moroccan Law, and since there is no evidence of any attempt at conciliation under Article 113 of *LA MUDAWANA* – the judicial body having the possibility of granting such a right – under the cited article in relation to Article 84 of the Moroccan Code, it is in order to apply Spanish law, as done by the Judge of the case, granting a compensation allowance to the wife, based on Article 97 of the Civil Code, of two hundred euros per month for two years, in view of the existence of a situation of economic imbalance, as whereby the wife lacks any known income, the complainant receives income on the order of one thousand three hundred euros per month."

g) Divorce

* Judgment by the Provincial Court of Alicante (Section 9) of 30 March 2009 (JUR 2009\259912)

Law applied to divorce of Argentine nationals. Application of common national law, that remits to Spanish Law.

"FUNDAMENTS OF LAW. – (…) SECOND. – (…) So, while it is true that Art. 107.2 of the Civil Code establishes that separation and divorce shall be governed by the common national law of the spouses at the time the case is brought, it is equally true that Art. 12.2 of the Civil Code contemplates that remission to foreign law be understood to be to material law, not taking into account the remission its rules of conflict may make to a law other than Spanish law; paragraph 6 of Art. 12 provides that the Courts and authorities shall apply the rules of conflict of Spanish Law *ex officio*.

Therefore, the Judgment by the Provincial Court of Guipuzcoa of 11-4-2008 (JUR 2008, 171227) states that "The Judge of the case, making no consideration whatsoever, has chosen to apply Spanish material law to decree the divorce of a marriage performed in Argentina between two Argentine nationals who resided until their separation in Aduna. The wife currently resides with her three minor children in Zarautz and the husband in Astigarraga.… Art. 107 of the Civil Code is applicable to the matter of substance, to which Art. 9.2 of same remits. The second paragraph of Art. 107 of the Civil Code establishes the rules of connection of applicable substantive law on separation and divorce, stating that the common national law of the spouses at the time the suit is brought has preference, with the exception expressed in the last paragraph in which Spanish law is to be applied in all cases, but none of such premises have been alleged in this case, nor do they concur.

All this is a matter of public policy which must be applied by both the judicial body and the parties and taken into account *ex officio* by this Court.

Therefore, to resolve this matter, Argentine law must be followed.

Having established the above, Article 164 of the Argentine Civil Code states that "Personal separation and dissolution of marriage are governed (sic) by the law of the last domicile of the spouses notwithstanding the provisions of Article 161," such Article not being applicable to the case at hand. Therefore, Argentine law remits to Spanish law as a substantive provision of law applicable in this case, and, therefore, the law applied by the Judge is correct."

Consequently, the substantive dispute must be governed by Spanish law by virtue of the remission established by Argentine conflict law, the complainant having provided a certification by the Consul of the Argentine Republic accrediting the law applicable to the marital system, including the abovementioned Article 164. So, Articles 81.2 and 86 of the Spanish Civil Code are applicable.

In this case the litigants were married in Buenos Aires on 4 April 1997. They did not have any children. Therefore, since over three months have transpired since the marriage was performed, it is lawful for the court to decree the divorce of the litigants with all the legal consequences inherent in such a decree."

* Judgment by the Provincial Court of Asturias (Sect. 4), of 16 July 2009 (EDJ 2009/168390)

Italian and Spanish divorce. Jurisdiction of Spanish courts to judge same. Law regulating divorce.

"FUNDAMENTS OF LAW.... SECOND. – The exception regarding lack of jurisdiction must be rejected, both for reasons of form, since it was not entered by means of an appropriate declinatory plea within the time period set forth in Art. 64 of the Law on Civil Procedure, and for the decisive reason that the respondent, who is the appellant in this case, has her domicile in Spain, in the City of Oviedo, which is not a matter of debate and a sufficient circumstance to give the jurisdiction to the Spanish courts, in accordance with Art. 22.2 of the Organic Act on the Judiciary and Art. 3 of Council Regulation 2201/2003 (EC) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters.

It is more difficult to determine the applicable law in this case. Art. 107.2 of the Civil Code establishes that separation and divorce are governed by the common national law of the spouses at the time the suit is brought; lacking common nationality, by the law of the customary common residence of the couple at that time, and lacking same, by the law of the last common customary residence of the spouses if one of the spouses still normally resides in said State. It adds that, in any case, Spanish law shall be applicable when one of the spouses is a Spanish national or habitually resides in Spain and, among other circumstances, none of the other laws mentioned above are applicable.

In the case judged here, the husband, Mr. Raúl, is an Italian national and the wife is a Spanish national. After they were married on 28-7-1988 in Gibraltar, they registered the marriage at the office of the Civil Registry of Milan on 16 November that same year. At that time their domiciles appeared as Milan and Oviedo, respectively. The husband stated that the conjugal domicile was always in Oviedo, where they resided when he had vacation, as he was a secondary school teacher who taught in the Italian cities of Milan and Molfetta. Mrs. Soledad, for her part, maintains (fifth fact of the response) that the marriage "has its first and last family domicile in Milan until March 1991" when she moved to Spain, where Mr. Raúl only came on vacation periods. From these statements it is concluded that the information in the marginal note entered on the marriage certificate on the granting of marriage articles in 1995, where it refers to both spouses as residents of Milan, does not reflect the reality of the situation, since such circumstance is denied by both husband and wife in responding to the suit. The wife also submitted a certificate from the company where she works that indicates that for professional reasons she was sent to the commercial headquarters in Milan from 1-1-1991 to 17-3 that same year. The couple's two children were born in Oviedo, the eldest in 12-1988, her birth certificate stating that both parents were domiciled in Oviedo, and the youngest in 8-1999, showing the father's domicile in Italy and the mother's in Avilés.

In view of these circumstances, the best solution in this Chamber's view is what was adopted by the Judge of the case. Lacking a common nationality, the

criteria to follow is one of common habitual residence. This means, as the appellant correctly argues, presence with the intent to stay or stability in a specific location, which becomes the customary centre of the couple's interests. This condition of minimal stability, however, cannot be based on the only period of time in which there is a record of the two spouses living together in Milan, reduced to barely two-and-one-half months. If understood in this way, it is even more reasonable to consider that the residence was established in Spain, to which Mr. Raul travelled for many years during his vacation periods and where the couple's children resided permanently. Therefore, both because of the circumstance lasting a long time and because the family's interests were focused here to the point of being able to place the family home in Spain, priority must be given for such purposes to the stay on national territory. If the label of habitual residence cannot be given to any of the places set forth, owing to its questionability, we would have to resort to the residual criteria stated above, that would also lead to application of Spanish law because one of the spouses is a Spanish national and has her habitual residence in this country."

5. Maintenance Allowance

* Judgment by the Provincial Court of Barcelona (Section 18) of 13 January 2009 (JUR 2009\174708)

The 1973 Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations. Application of Chilean Law.

"FUNDAMENTS OF LAW. – FIRST. – (…) This claim for maintenance is based on the New York Convention on the Recovery Abroad of Maintenance of 20.6.1956. Article 6.3 of this Convention provides that "the law applicable in the determination of all questions arising in any such action or proceedings shall be the law of the State of the respondent, including its private international law." In accordance with Article 10–11 of the Civil Procedure Act, the law regulating the legal relationship from which the faculties of the representative arise will be applied to legal representation. The legal relationship is the obligation to provide maintenance, whereby the 1973 Hague Convention on Maintenance Obligations must be applied over the applicable law (Art. 4, 5 and 6) which refers to the internal law of the place of residence of the creditor of the maintenance, namely Chilean law. As set forth in the appealed judgment, Article 332 of the Chilean Civil Code acknowledges maintenance for descendents up to 21 years of age, except if they are studying for a university degree or a trade, in which case it concludes at 28 years of age, and in other circumstances that are not of interest in the case at hand. Notwithstanding the legal provision of extending the maintenance allowance to twenty-one years of age and under certain circumstances to twenty-eight years of age, when the State Attorney entered the suit on behalf and in representation of Mrs. Susana, the two daughters for whom maintenance was being claimed had already reached legal age according to her law, namely, eighteen years of age. Having reached legal age, they had the procedural ability to enter a claim for a maintenance allowance on their

own behalf, without needing to have the mother, Mrs Susana, represent them to claim the maintenance on behalf of her daughters in a maintenance hearing. It would be different if the daughters were minors when the claim was entered and once the allowance was granted it would continue to be valid until they were twenty-one years of age as ordered by the Chilean Civil Code, or as in other cases, under a judgment by the country of origin of the daughters acknowledging an allowance and its payment instituted by application of the same Convention. However, the provision referred to above does not authorise the mother nor attribute to her any power of representation to claim maintenance for her daughters after they reach legal age in a hearing on maintenance. This is a substantive provision that concerns the content and the limits of the law, but does not alter procedural representation. It is important to point out here that the procedural exception of the mother's lack of active legitimacy to claim an allowance for two of her adult daughters was denounced by the respondent in the response to the suit and, despite the suspension of the proceedings at the request of both parties in order for the State Attorney to request the appropriate Chilean Authorities to provide the pertinent documentation on which to base such claim, no document, specifically a power of attorney on behalf of the daughters, was provided to overcome the denounced lack of active legitimacy. In sum, the claim for a maintenance allowance was submitted on behalf and in representation of Mrs. Susana, who does not legally represent her daughters, Gabriela and Rita, when she entered a claim for maintenance for herself. It is pursuant to law to accept the procedural exception formulated in regard to the daughters, denying for this reason the maintenance allowance sought for them, which leads to the acceptance of the appeal on this matter and the nullification of the maintenance allowance for the daughters, therefore limiting the scope of the proceeding to the maintenance sought by the complainant as the spouse of the respondent."

6. Guardianship, Tutorship and Protection of Children

* Supreme Court Ruling (Labour Chamber, Section 1) of 10 February 2009 (JUR 2009\154016)

Qualification of the Moroccan Kafalah system.

"LEGAL REASONING. – FIRST. – Article 217 of the Labour Procedure Act requires, for a cassation appeal for unification of doctrine, that there exist a contradiction between the judgment and another judgment, that must be by a Labour Chamber of a High Court of Justice or the IVth Chamber of the Supreme Court. The contradiction requires that the resolutions compared contain different decisions on the same matter, namely that there be a diversity in judicial response to conflicts that are essentially the same and although they are not required to be totally identical, it is necessary, as the provision states, that with regard to the same litigants or others in the same situation, such diversity in decisions be arrived at despite their involving "facts, grounds or claims that are substantially the same." Furthermore, it should be taken into account that

the contradiction must not arise from an abstract comparison of doctrine alien to the equality of the conflict, but rather opposition between specific decisions reached in conflicts that are substantially the same. (Supreme Court Judgments of 27 and 28-1-1992, R. 824/1991 and 1053/1991, 18-7, 14-10, and 17-12-1997, R. 4035/4996, 94/1997, and 4203/1996, 23.9.1998, R. 4478/1997, 7.4.2005, R. 430/2004, 25-4-2005, R. 3132/2004, and 4-5-2005, R. 2082/2004).

The complainant, a Moroccan national, was married to the decedent, also a Moroccan national, who died on 12-6-2003. The decedent died as a result of common illness and was the holder of a work and residence permit and enrolled in the Special System for Domestic Employees since August 1991, with no record of owing any payments. Through a judgment by the Court of the First Instance of Larache, the couple had been given custody of two abandoned children, born in 1999, under Moroccan Law 15.01 on guardianship (*kafala*) of abandoned children. The Social Security Institute has refused to recognise the right to the survivor's pension requested by complainant, "because they did not qualify to be beneficiaries of a survivor's pension, according to Article 16 of the Order of 13-02-1967, in relation with Article 21.1 c) of the same Order." According to the Resolution of the Directorate General for Registries and the Notarial Corps of 15-7-2006, classic Islamic law does not regulate any institution similar to full adoption under Spanish law and says that *kafalah* does not amount to a parent-child relationship between the interested parties, but merely establishes a personal obligation whereby the adopters take responsibility for the adoptee and are obligated to provide him or her with maintenance and education in a way similar to foster parenting under Spanish law. *Kafalah* will never be recognised in Spain as adoption but through the legal provision under International Private Law of "qualification by function" the institution can be found to exert a function similar to that of foster parenting and be considered as such in light of its functional similarity. If *kafalah* is considered to be foster parenting, the applicable rule of conflict is Art 9 of the Civil Code, resorting to the technique of "qualification by function;" a technique that the Resolution of the Directorate General of Registries and the Notarial Corps of 30-8-2006 establishes in the case of simple adoptions such as when it is in the interest of the child in Spain (Art. 9.5 Civil Code). The appealed judgment confirmed the judgment by the court accepting the claim and declaring the right of the two children to receive survivor's benefits derived from the death of the decedent, condemning the Social Security Institute to pay such benefits. It considers that *kafalah* should be comparable to "adoption-foster care" to undertake a functional equivalence that is "less drastic because it depends on the legal effect sought." In this regard the judgment takes into account that both *kafalah* and adoption arise out of public or administrative care; *kafalah* establishes an obligation of care and a guardianship identical to adoption; if natural children coincide with the child subject to *kafala*, such child must benefit equally from the means available in the family; and the person providing the *kafalah* is entitled to the subsidies and compensation granted to parents by the State or public institutions. The judgment links these points of connection with what is provided under Arts. 10

and 14.1 of Act 4/2000, in relation to Art. 9.4 of the Civil Code. Finally, what the judgment says is when there is no natural parent-child relationship or such link has ceased to exist, *kafalah* fulfils the function with the same extent of care as adoption, whereby it considers the administrative decision unjustified and in violation of the provisions of Act 4/2000.

The Social Security Institute offers as a contrasting judgment this Chamber's judgment of 3 November 2004, which poses the issue of acknowledging a survivor's pension for the child cared for by the child's grandfather and second wife, upon her death. In the case studied, protection was recognised for the decedent and her husband's joint child, but not the other child under their care, establishing a doctrine that can be summarised as follows: "In effect, the different legal regulation found in Article 175 of the General Social Security Act with regard to natural or adopted children and those under permanent foster care it cannot be found to be in violation of the principle of equality, since respect for such principle requires that equal legal measures be applied to equal cases, and what is prohibited by the principle of equality are inequalities that are deceitful or unjustified because they are not based on objective or rational criteria, meaning that equality is only violated if the inequality lacks an objective or rational justification."

A lack of contradiction is found between the compared judgments because the facts of the cases are different, as is the subject and the terms of the discussion, as we have just observed in examining the situation of the appealed judgment. The position of the Social Security Institute is based on a literal reading of Art. 175.1 of the General Social Security Act and on the Decision by the Directorate General for Registries and the Notarial Corps of 15-7-2006, finding that through "qualification by function" *kafalah* and other foster care institutions that do not create a parent-child relationship between the "*kafils*" and the child perform a function that is similar to that of family foster care under Spanish law. This means precisely that there is no equality in regard to the contrasting decision, where a similar issue is not being discussed; namely, the Social Security Institute bases its determination on the assumption that it is not without controversy to confirm the existence of contradiction, but that it is not the issue under discussion in the contrasted judgment, that refers to a case of permanent foster care in consonance with Spanish law."

* Judgment by the Provincial Court of the Balearic Islands (Sect. 4) of 27 July 2009 (JUR 2009/407772)

Divorce. Guardianship and custody of minors: exclusive attribution to the mother. Opposition to Spanish international public law. Visitation rights and update of support. Children of parents who are both German nationals.

"FUNDAMENTS. FIRST (…). That the court judgment establishes in paragraph 1)" the *patria potestas* over same shall continue to be held by both parents, while the guardianship and custody is attributed to the mother. In the case at hand, both litigants are German nationals and therefore the applicable personal law is German law, in accordance with the judgment and as determined

by provisions of international private law. On page 145 of the case file, there is a certificate issued by the Consulate of the Federal Republic of Germany that states that the *patria potestas* and guardianship and custody of a child of unmarried parents is held by both parents if they have made a publicly authorised declaration or were married subsequently. Otherwise, *patria potestas* and custody is held only by the mother as provided by Article 1.626 a (2) of the BGB. For this reason, *patria potestas* must be given solely to the mother and not the two parents, as provided in the judgment. (…).

FIFTH. In regard to the first ground of the appeal entered by the legal representative of Mrs. Andrea, referring to *patria potestas*, this Chamber considers that it should be dismissed. This is because, as stated by the Public Prosecutor in his opinion, in opposition to this position in the appeal, Article 107 of the Civil Code (second subparagraph of paragraph 2) establishes that in any case, Spanish law must be applied when one of the spouses is a Spanish national or customarily resides in Spain:

a) If none of the aforementioned laws are applicable.
b) If in the suit brought before a Spanish Court the separation or divorce is applied for by both spouses or by one with the consent of the other.
c) If the laws indicated in the first subparagraph of this paragraph did not recognise the separation or divorce or did so discriminatorily or counter to public policy.

Attribution of *patria potestas* exclusively to the mother, without any cause to warrant the exclusion of the other parent, is discriminatory and against public policy, whereby in this matter Spanish Law should be followed, and therefore both parents should have *patria potestas*….

SEVENTH. However, it is pursuant to accept the ground in the respective appeals that refers to how the allowance amount should be updated, taking into account, as alleged by the appellants, that the updates should be in accordance with the Dusseldorf tables: biannually and according to the new tables established by the German government or according to criteria established thereby. (…).

NINTH. As shown in the second Legal Ground in this judgment, in his appeal, Mr. Borja's legal counsel fought the visitation schedule established for him in the court decision, basing his appeal of the judgment fundamentally on the fact that it prohibits the children from leaving national territory. He argued that he does not understand the reason for the children being prohibited from leaving national territory when the father is given the right to be with the children for one and one-half months during the summer vacation, showing that the parent-child relationship is very good and Mr. Borja should, therefore, as argued by the appellant, be allowed to have his visitation with his children in his (the father's) domicile in Germany, thereby avoiding the cost for Mr. Borja of having to visit his children in Spain. Such cost is not only financial but also personal, since Mr. Borja has a new partner with whom he has had a child. Furthermore, if the visitation regime is maintained as set forth in the court judgment, it would mean that Mr. Borja would always have to take his vacation

in Mallorca and therefore not be able to be with his new family, which would hamper the necessary relationship between Chiara and Luca and Mr. Borja's family. In support of the good relationship that exists between the father and his children – the appeal continues to argue – the case file holds many reports from the Meeting Point stating that when the time comes for the children to be with their father they are very happy to be with him, and are anxious to visit him and spend time with him.

As we indicated in the third Fundament of Law of this judgment, the Public Prosecutor challenged the court's judgment on the point we are now dealing with, arguing in its opinion that the supposed prohibition ordered by the Judge in the case, not allowing the children to leave national territory, is not a prohibition as such, and this can be concluded from the judgment. It was determined that in view of the difficult relations between the two parents, as well as the distance between the children and the respondent, the Judge considered it advisable for visits to be held in Spain until such time as the child adapted to visits in Germany, although it is true that in the judgment this point needs to be clarified to establish a gradual system to implement what was recommended by the expert at the hearing which amounted to adaptation to visits in Germany, until ultimately the children's vacation period, which is with the parent that does not hold custody, can be carried out in Germany where he has his domicile. (…)."

* Judgment by the Provincial Court of Madrid (Sect. 24) of 17 September 2009 (JUR 2010\30583)

Custody and visitation of children after the divorce of Romanian national parents. Request by the mother to hold exclusive patria potestas. *Shared* patria potestas. *Grounds that can determine a change in this basic principle.*

"FUNDAMENTS OF LAW. FIRST. (…). Depriving one of the parents of *patria potestas* cannot be ruled automatically under the provisions of the rules of international private law (Art. 2 Civil Code), since it is a matter that affects public policy.

Art. 39 of the Spanish Constitution establishes that the public powers must ensure the full protection of children and impose on parents the duty to support them in all ways while they are minors and in all other cases as pursuant to law. This means that constitutionally parents and the public powers must provide special protection to those who, by reason of their age, are not able to care for themselves or be self-sufficient. *Patria potestas* is the institution *par excellence* that protects children, and is based on the parent-child relationship, whatever form it takes – marital, non-marital or adoption –.

Rather than being a power that is exercised, it is now a function established to benefit the children, to be performed by the parents and involving the protection, education and upbringing of children whose interest always prevails in the parent-child relationship. It is conceived of as a right-duty, or as a "functional right" (Constitutional Court Judgments of 31-12-1996 and 11-10-1991), and because of this approach, it can be restricted or even rescinded by law, when

the right holders, for one reason or another, do not assume the inherent functions or when they exercise them inappropriately or harmfully for the children.

As the Supreme Court Judgment (Civil Chamber), of 28-2-1984 states, the Law conceives of *patria potestas* as a function performed by the father and the mother for the benefit of the child, and attributes it jointly to both parents. This joint attribution of *patria potestas* imposed by Law is because the parent-child relationship is governed by rules of necessary law or "*ius cogens*," and makes any attempt under foreign legislation to have the *patria potestas* of the child granted to only one of the parents to the exclusion of the other unviable, since as indicated, it is a matter of public policy.

So, *patria potestas*, under natural and positive Law is granted to the parents and can only in certain cases be restricted, suspended or denied by law when the right holders, for reason or another, do not assume the functions inherent therein or perform them inappropriately or harmfully for the child. This can lead to the most radical solution in the case of non-fulfilment of the duties involved in this legal institution, as set forth in Article 170 of the Civil Code, that according to doctrinal and jurisprudential interpretation, rather than being a sanction imposed on the non-compliant parent, is a protection for the child and must therefore be adopted in benefit of same when the right holder's conduct is seriously harmful to the higher priority interests of the child, or is not precisely the best for the future upbringing and education of the child. Therefore, not having accredited the concurrence of the special circumstances that would justify such a measure, it is not lawful, through mere application of the national law of the litigants, to deprive one of the parents of exercising *patria potestas*.

(…)"

XII. CONTRACTS

* Supreme Court Judgment (Civil Chamber, Section 1) of 12 January 2009 (RJ 2009\544)

Contract liability. Submission clause to the Spanish courts and determining Spanish Law to be applicable to the contract. Punitive damages.

"FUNDAMENTS OF LAW. (…) SECOND. – (…) In summary, the case is based on: a) the judgment, despite recognising the existence of a breach of contract, rules out damages, ignoring the fact that the parties submitted not only to the jurisdiction of the Courts of Barcelona, but also to Spanish Law, despite which the respondent entered a complaint to a Court of the United States of America seeking a disproportionately high amount in punitive damages, a concept that not recognised under Spanish Law; b) submission clauses constitute an agreement subject to compliance or noncompliance pursuant to the general rule of Article 1101 of the Civil Code; c) pursuant to this system, damages are applicable in the event of breach of contract; d) the Courts of Florida were unable to determine the damages for breach of the submission clause, since court costs and the financial damages derived from the abusive use of the procedure must be

determined in order to achieve the application of a law on substance that the parties had excluded by agreement, and furthermore, in the United States of America lawyer's costs are not included in court costs, and must be claimed in a separate declaratory procedure before a competent Court; e) the suit for compliance by equivalence is based on a lawsuit brought without just cause, a case of abuse of law, which, pursuant to jurisprudence, results in the obligation to compensate for the damages incurred as a result of the court actions.

(…)

THIRD. – (…) From this perspective, the choice of applicable law and competent jurisdiction may, in this case, have been decisive in the will to establish the relationship, with clear importance in the contractual economy, keeping in mind that the application of Spanish Law establishes a certain contractual framework from the perspective of assessment of damages (as punitive damages are excluded, but admissible under United States Law), and includes lawyers' fees in a very different range in the assessment of court costs. Conscious noncompliance with the agreement, by bringing the complaint seeking application of the Law of the United States of America to a court of said country, claiming a sizeable amount as "punitive damages", caused the need for defence, generating costs that went beyond the amount foreseeable under the normal or pathological development of the contractual relationship. (…)

* Judgment by the Provincial Court of Valencia (Section 7) of 6 March 2009 (AC 2009\894)

Contract obligations. Reference to non-national and conventional sources for interpreting breach of contract.

"FUNDAMENTS OF LAW. (…) THIRD. – (…) In the face of a breach of this type, jurisprudence has determined, while not in a linear way, that fundamental or substantial breach of contract allows the contract to be terminated or compliance to be demanded (Art. 1124.2 Civil Code). While a trend in jurisprudence has required what is qualified as "deliberately rebellious intent on the part of the debtor," recent judgments have introduced criteria to determine when there is a case of breach of contract by the frustration of the purpose of the contract, "without requiring tenacious, persistent resistance preventing compliance, it is sufficient […] for the counterpart's legitimate aspirations not to be achieved" (Supreme Court Judgment 18-10-2004, 3-3-2005 and 20-9 and 31-10-2006, *inter alia*). In modern times, international texts on obligations and contracts have echoed a line, grounded in English law, that is summarised by saying that one party may terminate the contract if the failure by the other party to comply with one of the contractual obligations constitutes a fundamental breach of contract (Art. 7.3.1 of UNIDROIT Principles of International Commercial Contracts), and consider it fundamental if they deprive the injured party of what it had the right to expect from the contract, or rather, "if it gives the injured party reasons to believe that it cannot rely on the other's effective compliance." This principle is repeated in Art. 8.101 (1) of the Principles of European Contract Law (PECL), that in its Art. 8.103 sets forth a list of cases of fundamental breach of contract,

including cases in which strict observance of the obligation is part of the essence of the contract, or when breach of contract substantially deprives the injured party of what it would have had a right to expect under the contract. Similar rules are in force in Spain under the United Nations Convention on Contracts for the International Sale of Goods, done in Vienna on 11-4-1980, and ratified by Spain in 1991; in its Article 49.1, dealing with breach of contract by the seller, it states that the contract may be declared avoided when such conduct constitutes "a fundamental breach of contract " (Supreme Court Judgments 5.4 and 22-12-2006)."
(…)

XIII. NON-CONTRACTUAL OBLIGATIONS

* Supreme Court Judgment (Civil Chamber, Section 1) of 4 March 2009 (RJ 2009\1873)

Non-contractual liability. Definition in the community sphere after the civil liability claim against Tabacalera (today Altadis) by the widow and children of a man who is deceased as a result of lung disease associated with tobacco use.

"FUNDAMENTS OF LAW. – (…) THIRD. – (…) Under Community Law, the EC Court of Justice, in dealing with the distinction between contractual and non-contractual liability for the purposes of the application of the Rome I and Rome II regulations (stressing that the concept of non-contractual liability is an autonomous concept for the purposes of application of community regulations independent of the Laws of the Member States), considers non-contractual to be "any liability that is not derived or was not produced in the framework of a relationship freely established between the parties or by one party vis-à-vis the other" (EC Court of Justice Judgments, C-261/90 (ECCJ 1992, 73), C-51/97 (ECCJ 1998, 258), C-96/00 (ECCJ 2002, 228); C-334/00 (ECCJ 2002, 254); C-167/00 (ECCJ 2002, 272)". (…)

XVI. REGISTRATION LAW

* General Resolution on Registries and the Notarial Corps no. 2/2009, of 15 June 2009 (JUR 2009\337102)

Property Registry. Registration. Sale. Need to indicate expressly if the matrimonial property system is community property or the supplementary legal system. Article 159 Notarial Regulation.

"FUNDAMENTS OF LAW:…THIRD The matrimonial community property system may be the supplementary legal system in the absence of marriage articles, when such is determined by application of interregional Law, or one of the possible agreed systems. While it is true that in many cases it was not easy to determine the supplementary legal system, it is necessary that the notary, complying with his or her generic duty to monitor the legality of the acts and business he or she authorises when drafting the public instrument pursuant

to the common will of the contracting parties, must investigate, interpret and bring into line with legality, exercising utmost diligence in reflecting in the authorised document what matrimonial economic system is in force between the two spouses. In this regard, Article 159 of the Notarial Regulation states that if such system were the legal one it would be sufficient to have the statement by the contracting party, which must be understood in the sense that the Notary, after having informed and legally advised the contracting parties, and based on their statements (that principally deal with factual data such as their nationality or place of civil residence at the time of marriage, where such was held or the place of habitual residence and the absence of marriage articles, under Articles 9.2 and 16.3 of the Civil Code), shall conclude that the matrimonial economic system, in the absence of marriage articles, is the appropriate supplementary legal system, having therefore to refer expressly to such circumstance and the legal nature of such system when setting forth the manifestation of the contracting parties in the public instrument in question, especially in cases such as the present, in which the system set forth – community property – is not the supplementary legal system where the marriage was held. In this way, the legal requirements are sufficiently covered outside the process.

Furthermore, the criteria expressed above is clearly confirmed in the last subparagraph of paragraph five of the cited Article 159 of the Notarial Regulation that, in referring to the potential matrimonial economic system as a result of marriage articles, establishes that the notary "shall identify the written articles and, if appropriate, their having been recorded in the registry, and shall bear brief witness to the accredited system, except if it is any other regulated by Law, in which case it will be sufficient to record which one it is. It would not make sense, in this case, for the notary to specify the type chosen from among potential conventional systems, not having to make an equivalent statement – regarding legality – when the system derives from the application of the rules governing potential conflicts of interregional Law, thus doing away with any potential question regarding the legal or conventional origin of the matrimonial economic system set forth in the agreement."

XVII. INTANGIBLE PROPERTY

1. Intellectual property

* Supreme Court Judgment (Civil Chamber, Section 1) of 26 February 2009 (RJ 2009\1518)

Industrial property. Cancellation action: a company that sells Mexican HORNITOS brand tequila, calling for the application of Art. 6 bis of the Convention of the Union of Paris to cancel the registration of the HORNITO brand tequila sold by the respondent company. Illegality owing to the trademark not being well known in our country, preventing the effect that such rule seeks to avoid of taking advantage of an exclusive right over the mark, by a third party registering it in advance in a country where the legitimate holder does not use it.

"FUNDAMENTS OF LAW. SECOND. – (…) Article 6 of the Paris Convention – pursuant to which "The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith," is directly applicable by the Spanish Courts, as immediately self enforcing-, as its content states, since, although it establishes a commitment by the Paris Union Members States, it describes a *de facto* situation and links to same some legal consequences in a sufficiently specific way so as to make subsequent intervention by the domestic legislator unnecessary – in this regard the judgment of 3-3-1978.

It is true that the legislator sought to comply with this commitment by including the rule in Article 3.2 in Law 32/1988, applied in the first instance, which empowered the user of a trademark that was previously well known in Spain to bring action to cancel the registration of a trademark that could generate confusion therewith. However, the legislator in Article 10.3 expressly allowed the persons as set forth – including the claimants – to enter a claim on their own behalf, applying Convention rules "in all cases in which such provisions are more favourable than the rules established in this Law."

Nonetheless, it is one thing to say that Article 6 bis is directly applicable to the case, because the claimants have introduced it – as they consider it is more favourable to them than Article 3.2 of Act 32/1.988 –, and quite another thing to say that the cancellation action regulated by said provision and exercised in the claim must be accepted.

First, it must be stated that this action was correctly dismissed by the Provincial Court of Valencia because it lacked one of the requirements on which Article 6 bis itself based the success of the action to cancel the allegedly illegal registration: the claimant's trademark being well known – in this case, the holder of the Mexican "Hornitos" trademark – in the country of the registry whose cancellation is sought or, in other words, in the country in which Article 6 bis is to be applied.

It must be taken into account that the principle involved has to do with the advisability in international trade of preventing, as a result of the constituent efficacy of the registration regarding the birth of the right over the trademark, the holder in one Paris Union country from not being able to use it in another, despite it being well known there, because a third party has registered it, who normally would have sought to take advantage of the mark being well known and the lack of any registration impediment for obtaining exclusive rights over the mark.

In sum, Article 6 bis does not deal with – nor does Article 3.2 of Act 32/1988 – whether the trademark is well known in the country in which it is recognized as belonging to its legitimate holder – such recognition is sufficient to consider it protected therein and entitled to international protection –, but it requires that it be well known in the country whose registry it seeks to cancel. A literal reading of the rule leaves no question: "…considered by the competent authority of the country of registration or use to be well known in that country…" (…)

* Judgment by the Provincial Court of A Coruña (Sect. 3) of 24 July 2009 (AC 2009\1939)

Trademark rights. Action to cease violation of law. Risk of confusion with the claimant's trademark. Use of same type of lettering. Products marketed similar to those of other trademark. Products not aimed exclusively at a technically qualified professional consumer.

"FUNDAMENTS. (…). FOURTH. A) Generally speaking this should be affected by the doctrine established by the Supreme Court Judgments of 6-10-2008 and 28-11-2008, establishing that:

1º. – The principal purpose of a trademark is to ensure the identification of the origin of products or services [Judgment by the Court of Justice of the European Communities of 29-9-1998, C-39/97, Canon Kabushiki Kaisha vs. Metro-Goldwyn-Mayer Inc]. It should be added that said Court of Justice of the European Communities has established that "to determine the distinctive character of a trademark, the national jurisdictional body must assess overall the greater or lesser ability of the trademark to identify the products or services for which it was registered by attributing to them a specific origin"; specifying that "in making the referred to determination, it is appropriate to take into consideration, in particular, the intrinsic qualities of the trademark, including whether it lacks or not any descriptive element of the products or services for which it was registered, the market share held by the trademark, the intensity, the geographic extension and the length of use of the trademark, the size of the investment made by the company to promote it, the proportion of the sectors involved that identify products or services by attributing to them a specific corporate origin by using a trademark, as well as statements by Chambers of Commerce and Industry or other trade organisations".

2º. – The Article commented on is not applicable if there is a risk of confusion by the public [Judgment the Court of Justice of the European Communities of 22-6-2000, C-425/98, Marca Mode CV vs. Adidas AG and Adidas Benelux BV].

3º. – The risk of confusion must be assessed as a whole, keeping in mind all pertinent factors in the case, among which there is usually some interdependence [Judgment by the Court of Justice of the European Communities of 22 June 2000, C-425/98, Marca Mode CV vs. Adidas AG and Adidas Benelux BV]. It can be added that to determine the similarity between controversial trademarks it is necessary to determine the degree of graphic, phonetic and conceptual

similarity and, where appropriate, evaluate the importance to be attributed to these different elements in view of the product or service category and the conditions in which they are marketed [Judgment by the Court of Justice of the European Communities of 22-6-1999 – Lloyd Schuhfabrik Meyer & Co. GmbH. vs. Klijsen Handel BV].

4º. – The risk of confusion is higher the greater the distinctive nature of the previous trademark [Judgments by the Court of Justice of the European Communities of 11-11-1997, C-251/95, Sable BV vs. Puma AG Rudolf Dassler Sport and 29 September 1998, C-39/97, Canon Kabushiki Kaisha vs. Metro-Goldwyn-Mayer Inc]. It should to be reiterated that said Court, both in the "Sabel" case and in the "Lloyd" case, established the doctrine that the similarity between trademarks can be graphic, phonetic or conceptual; stating that "in order to determine the degree of similarity between the controversial trademarks, the national jurisdictional body should evaluate the importance of such different elements". In regard to design similarity, it should be pointed out that three types can be found: a) denominational, when the trademarks refer to the same concept, but use different words; b) graphic, when the trademarks in question use figures or drawings to represent the same concept; and c) mixed, when one of the trademarks refers by name to the same concept that the other represents graphically.

5º. – The concrete determination of the risk of confusion must be based on the overall impression produced by the opposing trademarks on the average consumer of the product category who is normally informed and reasonably attentive and perceptive; keeping in mind the degree of graphic, phonetic and conceptual similarity, with special reference to the dominant distinctive elements [Judgment by the Court of Justice of the European Communities of 22-6-1999, C-342/97, Lloyd Schuhfabrik Meyer & Co. GMBH vs. Klijsen Andel BV].

It also must be taken into account that highly distinctive trademarks enjoy greater protection. The high distinctiveness of a trademark may be due to one of two things: either the intrinsic structure of the trademark; or the broad diffusion of the trademark in the public as a result of intense use. Along these lines, the Court of Justice of the European Communities has indicated that "the risk of confusion is higher the more distinctive the previous trademark is", also, "they enjoy greater protection than trademarks that are less distinctive"; the judgment in the "Lloyd" case recalling that "there may be a risk of confusion despite there being only a small degree of similarity in the trademarks when the products or services covered are very similar and the distinctive nature of the previous trademark is strong"; therefore, Professor Isaac concluded that "when the distinctive nature of the trademark is strong, this factor can offset the weakness of the factor concerning the similarity of the products or services in confrontation."

B) It is argued that "Intel" is part of the distinctive mark of other trademarks such as "Intellimouse", "Intellikey", etc., whereby the strength of its distinctive effect is lost, involving the Supreme Court Judgment of 10-6-1987. Leaving aside the fact that this Chamber was unable to locate the judgment mentioned,

as the only thing with that date refers to the trademark "KISS MISS," and not to "La Española," and it also was issued by the Administrative-Contentious Chamber, there are notable differences between the trademarks referred to by the appellant as examples, comparing them with:

1º. – The trademarks mentioned do not identify or distinguish manufacturers or companies, but rather specific products. Following the example given, "Intellimouse" does not refer to a company but rather to a product (in this case a computer mouse), the manufacturer being Microsoft, others identify companies and not a specific product.

2º. – The companies that use the distinctive marks referred to also have a very specific distinctive trademark, known by the public at which the products are targeted, and there is no desire for confusion because its trademark is as or more relevant than the trademark of the "Intel Corporation." So, following the same example, in "Intellimouse", what predominates is "Microsoft." The same thing is not seen with, whose trademark is practically unknown (the truly important one would be "Televés"). (…).

EIGHTH. (…) As already indicated, it is very surprising that "Intelsis Sistemas Inteligentes, S.A." would adopt such a name and seek to register the trademark (to later consider it questioned) when the trademark was already known by the public (computer technology sector and telecommunications in general) [having to disagree with the claimant alleging that its international projection was due to the 486 processor, when in reality it was due to the 386 that signified an important qualitative leap forward]; and furthermore using the same type of lettering (and colours too it seems). Namely, it is considered that when the name "Intelsis" was adopted it was not done "fairly," wherefore the "Intel Corporation" can prohibit third parties from using the word "Intel," even in their corporate name.

Nor is the argument that the complete corporate name is "Intelsis Sistemas Inteligentes, S.A.," and therefore no risk of confusion exists, acceptable. What is true is that, as seen on the corporate image documents, the mention of "Intelsis" is systematically highlighted, with "sistemas inteligentes" (intelligent systems) found on the lower part in smaller, lighter print. (…)."

XVIII. COMPETITION LAW

* Supreme Court Judgment (Civil Chamber, Sect. 1) of 30 July 2009 (RJ 2009\4580)

Defence of competition. Double barrier doctrine: an act of competition must overcome two barriers – European law and domestic law – to be considered a licit act. Jurisdiction of civil courts to apply the regulatory provisions of defence of competition, on both the community level and the domestic level, in relation to the declaration of nullification and the determination of its effects.

"FUNDAMENTS OF LAW. (…). THIRD. The first issue to be dealt with refers to the appeal's reproach of the appealed Judgment for applying community

competition laws (Art. 85 – current 81 – of the EC Treaty and Commission Regulation 4087/88) and those of domestic law (Art. 1 of the Act in Defence of Competition) as an absolutely uniform, indistinctive whole, a single conception that – it states – lacks precision and is mistaken, because the laws are independent and autonomous.

The allegation is not shared because the so-called "double barrier" doctrine it found to be applicable, according to which, as an attempt at conduct control an act of competition must overcome two barriers – European law and domestic law – to be considered a licit act. The existence of Community Law on competition is not an obstacle to the effective application of domestic Law, notwithstanding the former's prevalence. Furthermore, the complementary or subsidiary application of domestic law when dealing with matters whose effects are exclusively limited to the domestic market, keeping in mind the different points of view regarding how competition is to be considered, is no obstacle to simultaneous application where appropriate, abiding absolutely by the principle of the primacy of Community Law, that rules out any domestic measure that might compromise the useful effect of the provisions of Community Law.

The double barrier doctrine was adopted (albeit "not fully" in the opinion of an isolated author) by Court of Justice of the European Communities Judgment 14/1.968, of 13-2-1969 – case Walt Wilhelm and others vs. Bundeskartellant –, and is maintained, deviating from the Draft Bill (that followed the criteria of exclusive application of Community Law – single barrier – in the event of the community and domestic markets being simultaneous affected), Regulation 1/2003 (Art. 3).

FOURTH. (…) The allegation is dismissed because the jurisprudence of this Chamber beginning with the Judgment of 2-6-2000 (inter alia, Judgments of 24-3-2008, 22-6-2006 and 3-10-2007) has been recognising the full jurisdiction of the civil courts in the application of the regulatory provisions on defence of competition, both at the community level and domestically, in relation to the declaration of nullification and determination of its effects, whereby the jurisprudence expressed in the appeal contradicting this one is not applicable.

The new jurisprudence abides by Art. 9.2 of the Judiciary Act in relation to the nature of the legal relationship and the effects sought, and is reaffirmed in the most recent legislation (Art. 86. three, f. Judiciary Act; 15 bis, 212.3, 249.4, 404, second paragraph, 434.3, 461.5 and 465.5 Civil Procedure Act, drafted by Act 15/2007, of 3.7, and in Community Regulation 1/2.003, – preamble clauses 7, 8, 21, 22 and 35, and particularly Art. 6 –, which did not create the jurisdiction of ordinary judges but rather attributes the possibility of applying Art. 81 of the Treaty in full, since up to then the Commission had exclusive jurisdiction to grant the exemption. (…).

SIXTH. (…) Finally, it is denied that price imposition exists and it is sustained that what exists is price recommendation, permitted under Community Law and not in violation of domestic law. The appellant discusses how only a reference was made to maximum prices, which is not prohibited, in one case or another to maximum and minimum prices, which does not violate regulation

of competition as it does not affect a broad freedom of the franchise holder to set them given the extensive margin available, and there are only a few cases with minimum prices.

SEVENTH. (…) Aside from that, it is appropriate to comment that for the requirement to be present it is enough to have a sufficient degree of probability of exerting a direct or indirect, real or potential influence on the flow of trade between the States, based on objective factors and not on intentionality or effective results, and in this case there is no factual basis to contradict such a possibility. Both documentary evidence and the acknowledgment by the claimant, now respondent, attest to the fact that numerous establishments exist in a number of countries of the Union, and there is a sizeable network of franchises on Spanish territory, that in this case (subsidiary nature) would justify, at least, the finding of the requirement in the internal market. (…).

EIGHTH. (…) application of the "*de minimis*" rule cannot be accepted ("*non curat lex*") in view of the multiplicity of agreements, the geographical extension and especially the size of the restriction as it affects the imposition of prices, and compliance with the Communication of the Commission of 9-12-1997, replaced by the Communication of 22-12-2001, and, with interpretative value, Art. 2.2. a) of Royal Decree 261/2008, of 22-2 (which implements Art. 5 of Act in Defence of Competition 15/2007, of 3-7). (…)."

* Judgment by the Provincial Court of Valencia (Sect. 9) of 29 June 2009 (EDJ 2009/189118)

Unfair competition. Textile products. Imitation. Finding the existence of undue advantage taken of the efforts of another. Statement of unfairness and cessation action.

"FUNDAMENTS OF LAW:…THIRD. – The judgment dismisses the claim because the textile products manufactured by the litigants were marketed in Europe but not in Spain, whereby the risk of association cannot be judged in competition among Spanish consumers.

At the outset, this Chamber, in view of the litigants' bringing to bear the judgments handed down by this same Court, specifically the Judgments of 22-4-2005 and 9-7-2008, must stated that there exists no contradiction between the two Judgments, since they overlook the specific circumstances of the two proceedings, in particular the circumstances considered in the Judgment of 9-7-2008. In this Judgment, the claimant's case based on patent violation action (desisted) and unfair competition was dismissed, whereby the case was settled exclusively as an act of imitation by risk of association by consumers and the claimant itself admitted that the marketing and competition of the product (blankets) was done exclusively outside Spain, and furthermore was rejected owing to there not being a risk of association. However, in this case, as set forth, together with the factor of imitation owing to the risk of association by the consumer (European, as the claimant has recognised, notwithstanding his legal representative's stammering at the trial, that the product is sold in Europe, while a very small part of their production 1% or 2% is Spanish market), also present is imitation and taking advantage of another's effort, and as both companies manufacture

the product in Spain, both have their corporate headquarters and production plants in Spain, geographically quite close one to the other (Alcoy and Aielo de Malferit) and given the fact that such production and marketing is alleged to be taking advantage of the economic efforts of the claimant through design and investment expenses and the effect of the sales by the respondent on the economic situation of the claimant, therefore with a clear effect in the Spanish market, is why both the premise of concurrence (Article 2) and the effect in the Spanish market (Article 4) must be found to exist, since the judgment by the Judge was based exclusively on one of the modalities of unfair competition by imitation, overlooking the other where the premises concur to make the Unfair Competition Act applicable in principle."

XXIII. INTERNATIONAL TRANSPORT LAW

2. International Land Transport

* Judgment by the Provincial Court of Barcelona (Sect. 15) of 16 April 2009 (EDJ 2009/213276)

Land transport of goods. CMR Convention. Carrier liability. Regulation and establishment. Subrogation of the insurance company by the shipper. Active legitimacy.

"FUNDAMENTS OF LAW:... THIRD. – In this regard, Article 3 of the Convention on the Contract for the International Transport Goods by Road (C.M.R.), done in Geneva on 19.5.1956 and ratified by Spain by instrument of 12.9.1973, establishes for the purposes of the Convention that the carrier shall be responsible for the acts of omissions of his agents and servants and of any other persons of whose services he makes use for the performance of the carriage, when such agents, servants or other persons are acting within the scope of their employment. This provision, which must be viewed in relation to Article 17. 1 and 3 of the same Convention, determines that the respondent may not be exempted from liability for the acts of subcontracted carriers.

FOURTH. – Article 18.1 of the Convention also imposes the burden on the carrier to prove that loss, damage or delay was due to one of the factors set forth in Article 17, paragraph 2. In relation to the above, and as the main ground for the appeal, the appellant invoked the non-applicability of the limit of liability established by Article 23 of the Convention, in relation to Articles 26 and 29 of same. However, the appealed judgment applied such limit since the transport was performed without having made a declaration of value or of special interest in delivery, or involving wrongdoing or infringement equated to wrongdoing by the legislation of the place.

As we stated already in the Judgment of 31.7.1998, wilful misconduct, a subjective component of the debtor's liability as a result of noncompliance with contract obligations, does not require there to have been a desire to harm or damage the creditor, but only that the infringement of the legal duty be voluntary and conscious, (namely that when the debtor failed to perform her obligations

consciously and voluntarily, or in other words, did not want to comply) and be proven by whosoever affirms it, since it is a fact that is inherent in seeking unlimited conviction.

Therefore, as we have reiterated on different occasions, as recently as in the Judgment of 26-2-2008) that "(…) The conviction that is sought and that would be equated with wilful misconduct (Art. 29.1 of the CMR Convention) is not easily equated in the Spanish Civil Code (law applicable by remission of Article 31.1.b of the CMR Convention CMR) since the figure of potential wilful misconduct, while referred to in some jurisprudence, it not covered at all in our positive law, which is what the international convention refers to precisely when it states that such equation (with wilful misconduct) must be by the Law of the Jurisdiction judging the case (…)".

SEVENTH. The appeal entered by the respondent pivots around the following issues.

One is the lack of active legitimacy opposed at the time and the other is the conviction of co-respondent MAPFRE, since it did not, as alleged, have passive legitimacy. It is true that the damaged machinery was sold CIF and there exists certain jurisprudence (Supreme Court Judgments of 31-3-1997 and 7-3-2007) that considers that the payment made to a seller (case of the claimant's policy-holder) by the insurance company, since it was not mandatory, does not free it from liability and therefore, the legal subrogation cannot take place, since the compensated party cannot act against the party who caused the damage. So, since the justification of the cited jurisprudence hinges on the fact that the insurer paid the party that suffered not damages at all, the insurer must be found to be in violation of the premises on which conventionally the seller accepts (by express agreement) all damages arising from transport, so, since the claimant has accredited being a damaged party by contractual agreement, legitimacy should be granted to the claimant. Proof of this agreement is clear, the CIF clause itself is written as CIF STYER, using the name of the Austrian town where the goods were to be delivered. This indicates that the buyer (BMW MOTOREN) assumed no risk at all until such time as the goods reached such place. This explains the fact that, after the accident near the Ulm in Germany, the respondent carrier herself returned to Spain (to Vilanova i la Geltrú), to the site of the seller, MALHE SA. This is why it is appropriate to reject the exception referred to and add that the subsequent release by BMW MOTOREN to MALHE SA is irrelevant, since what actually confers legitimacy is the content of the aforementioned agreement. It is therefore appropriate to reject the allusions to such release that are alleged in the respondent's appeal filing."

3. International Air Transport

* Judgment by the Provincial Court of Madrid (Sect. 28) of 25 June 2009 (EDJ 2009/262141)

Air carriage of goods. Damage to goods. Limited liability of the carrier: potential relevance of free will when setting the terms of liability. Warsaw Convention.

"FUNDAMENTS OF LAW: . . . SIXTH. – International law establishes limitations to the liability that the carrier can demand be applied. The Warsaw Convention sets forth quantitative limits to carrier liability (Article 22), that also cover the potential loss of the goods (not only damage to same, as the appellant seems to think, since the term "damage" in Article 24 includes all cases in which such occur, namely, destruction, such as loss or breakage of goods during transport by air). Therefore, the carrier has a right to limit its liability to what is set forth in the convention, and the claimant cannot seek to have such limitation not taken into account, since it derives from the same convention (that has the rank of international treaty with the force of law as recognised in Article 96 of the Constitution and Article 1.5 if the Civil Code). The existence of limited liability in this area is a constant in air transport, and whether one agrees with it or not, is beyond discussion of "*lege data*", as also indicated in EC Regulation no. 889/2002 (that amends no. 2027/97) and in Act 48/1960 on air traffic.

This limit cannot be overstepped even when the real damage is higher, since the appropriate compensation (included in so-called moral damages) is understood to be within the stated legal limitation, as there is no room in the cited convention to assign damages that are higher than those set forth in the Convention (see Article 24 of same). Furthermore, the Kingdom of Spain may become liable if international commitments are not applied here.

As a stipulation that would benefit the weaker party and that could stimulate competition in the sector, reaching an agreed settlement to increase carrier liability is admissible (expressly included in the subsequent Montreal Convention), although the Warsaw Convention only contemplates this expressly for passenger transport. However, it is strictly prohibited to set an agreed compensation limit that is lower than as established in the Convention (Art. 22.1), and the respondent cannot impose a clause of this type on the claimant.

SEVENTH. – The exclusion of the limitation for wilful misconduct on the part of the carrier is an exceptional system that, as such, is open to extensive interpretation that would tend to devoid the legally designed system of content.

Therefore, first, the text of Article 25 of the Convention, by the Montreal Protocol no. 4, is restricted to passenger and baggage, and not goods. Since this case refers to the latter it is difficult for the appellant to be able to invoke such provision in his or her favour.

In any case, the fact that during the custody of the goods by the carrier two of the packages of a consignment of fifty were lost or that a third party could, incidentally have stolen them would merit classification as negligence; however, that cannot be equated with an intentional act (wilful misconduct) on the part of the carrier since, lacking any proof to the contrary, it would be more an unfortunate incident resulting from the respondent's poor operation of the service, that can occur in the movement of massive amounts of goods that air carriers perform. From there to being able to construct a reproach on account of intentional action or an action that can be equated to same would be going quite far distance and only achievable if not only the damage suffered but also the wilful misconduct is proven as required by law, to make an exception to the liability limit.

Furthermore, the fact that the respondent was unable to explain to the claimant how the disappearance of the packages could have come about can also not be considered to determine the non-application of the referred-to limit of liability. This is because the wilful misconduct that could exclude the carrier's limitation of liability would be in place at the same time as the loss of the transported goods, and the efficiency shown later in the management of the client's later claim would not affect it. As stated in the Judgment by the First Chamber of the Supreme Court, no. 625/1998, of 20 June, in relation to Art. 25 of the Warsaw Convention (providing an exception to the limitation of liability in air transport in the event "the damage is caused as an action or omission of the carrier or any agent of the carrier with the intention of causing damage or acting recklessly and knowingly that it would probably cause damage"), "the lack of justification of the cause of the loss of one of the packages and the incident not being unforeseeable (.) due to insufficiency, do not make it possible to consider that the blame or negligence to be placed with the carrier is the same as or analogous to the wilful intentional or reckless misconduct referred to in Article 25 of the Convention."

EIGHTH. – The compensation amount must be, therefore, limited, by the provisions of Article 22 of the Convention for this type of events (17 SDR for each kilogram). To exceed such limitation by alleging that the goods were worth much more would require two things: 1) that a special declaration of value had been made at the time the goods were turned over to the carrier; and 2) that, as appropriate, a supplemental rate was paid on the carriage invoice. This is a situation that requires a series of express actions to be undertaken with the carrier for there to be entitlement to coverage for the declared amount, which are not found in the appellant's allegations, which are limited to the sale invoice of the material. The carrier is not a party to such transaction nor does it substitute for the need to have made a special declaration of value for the purposes of transport, if desired, which, while increasing the cost, increases the carrier's limit of liability.

Since there is no record of any special declaration of value of the goods at the time the packages were turned over to the carrier, the compensation limit shall be the result of multiplying 16.18 kilograms, corresponding to two packages, by 17 Special Drawing Rights, for a total of 275.06 Special Drawing Rights. Converting this to national currency in accordance with the value of the euro for such reference on the day of this judgment it amounts to 305.61 euros. Since the value of the missing goods, 5,240 euros, exceeds this limit, the compensation shall be limited thereto. This justifies the partial revocation of the judgment to condemn the respondent to pay the compensation within the limits established by international law."

* Judgment by the Provincial Court of Barcelona (Sect. 15) of 3 September 2009 (AC 2009\1973)

International air passenger transport: damages owing to loss of luggage on return flight. Possibility of claiming pain and suffering. Impossibility of property damages exceeding the insuperable limit of the Montreal Convention.

"FUNDAMENTS OF LAW. (…). FIFTH: The damages claimed are, as we have said, both property and non-property damages. This is why it must be recalled that with regard to the former, the appealed judgment accepted the amount initially claimed by the claimants. Such judgment must be maintained.

In this type of situations the Montreal Convention functions under a nearly objective liability system (the passenger only has to prove the contingency set forth in the provision which is sufficient to be able to be compensated in the amount as set by the Convention) since the provision in the Convention (Art. 22) only establishes that "In the carriage of luggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1,000 Special Drawing Rights for each passenger unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passenger's actual interest in delivery at destination." (…)

EIGHTH. From the text of the Convention it seen that pain and suffering can be claimed since the provision refers to all compensation for damages whether it be inherent in a contract or a wrongful act, but it must be subject to the liability limits established by law. In fact, this is referred to in the Convention of reference, the establishment of a uniform system of liability. (…)."

XXIV. LABOUR AND SOCIAL SECURITY LAW

1. International Judicial Jurisdiction

* Ruling by the Supreme Court (Labour Chamber, Sect. 1) of 21 April 2009 (JUR 2009\279732)

Individual employment contract. International judicial jurisdiction. Application of international judicial jurisdiction as set forth in the Lugano Convention.

"FUNDAMENTS OF LAW: 1. – In application of Art. 5 of the Lugano Convention of 16 September 1988, it concludes that in regard to an individual employment contract the criteria for attribution of jurisdiction is the jurisdiction in which the employee customary performs his principal work. Given the special circumstances, it considers the jurisdiction to be that of the Spanish courts, leaving aside what may be the applicable legislation to the issue of conflict.

[….] So, in application of said doctrine and for the purposes of determining the place where work is habitually performed, the appealed judgment accredits that the claimant performs a substantial part of his work in Madrid, since to reach a high level of performance he must train daily for many hours and do many kilometres. These individual training sessions take place in Madrid, where his habitual residence is, although group training sessions with the entire team take place where designated by the team. Furthermore, beyond the control and direction of his team and his participation in international meets outside Spain,

the criteria for attributing jurisdiction is the place where he habitually performs his work, which is in Madrid, where he also has his domicile. However, in the references these facts are not accredited. The references show that the claimant habitually works in different States, without being able to state that it is in Alicante where he customarily performs his services for the respondent. And this leaves aside the issue that is intimately linked to the assessment of the evidence, excluded from this exceptional appeal."

XXV. INTERNATIONAL PENAL LAW

* Supreme Court Judgment (Chamber 2) of 21 December 2009 (EDJ 2009/307308)

International judicial jurisdiction in penal matters. Falsification of official document.

"FUNDAMENTS OF LAW:...SECOND. – The Public Prosecutor, pursuant to the provision of Art. 849.1 of the Criminal Procedure Act, enters a single ground for cassation due to infringement of law by considering Arts. 392 and 390.1.1 of the Penal Code, in relation to Art. 23.3.f) of the Organic Act on the Judiciary, as having been violated. The original judgment found that the Nigerian passport used to identify the defendant was false, as stated in the expert report issued in the case (pages 128 to 137), and that it was subject to cross-examination and ratified in the trial by official experts. The original, now in the name of the defendant and showing her picture, belonged to a male. She must have at least participated as a necessary cooperant for the perpetration of the criminal conduct. However, the Court ended up acquitting the defendant of the charge of falsification since there was no record of the place where the passport was altered. The judgment stated that it could not be presumed that the alteration took place inside national territory. It ends up concluding, therefore, that it was not proven that any of the premises set forth in Art. 23 of the Organic Act on the Judiciary were present to legitimate the intervention of Spanish jurisdiction, and referred the corresponding testimony of private individuals to the Consulate of Nigeria in Spain. The Public Prosecutor appealed the Judgment by the Court of instance in cassation because it considered that the Court had incorrectly interpreted Art. 23.3 f) of the Organic Act on the Judiciary and had deviated from the new doctrine of the Supreme Court in regard to this type of falsification outside national territory, since, contrary to what was stated in the judgment, it does damage the credibility and interests of the Spanish State, and therefore such conduct should be prosecuted within national territory. The Public Prosecutor is right when he argues in regard to the extension of Spanish jurisdiction in prosecuting this type of falsification. In fact, the jurisdiction of this Chamber, as expressed in some judgments, has done a complete turnaround in its analysis of the issue subject to discussion. As a result of applying some of the international treaties that have been ratified by Spain, it has found that everything relating to the identification of persons in our country has special relevance for

and is of special interest to the State, both from the perspective of domestic security, and in the dimension regarding compliance with international security commitments. As such, it abandoned the criteria of exclusion adopted by the non-jurisdictional Plenary of this Chamber of the Supreme Court on 27-3-1998 ruling out the possibility of false identity documents made abroad affecting the interests or the credibility of the Spanish State, interpretation that was specified later in Supreme Court Decisions 170/1998, 217/2000, 2026/2001, 2384/2001 and 800/2003, *inter alia*. This line of jurisprudence has given way, as we already mentioned, to new judgments that blaze a clear trail toward establishing punishment for falsifications of official identity documents perpetrated abroad. To do so, the Supreme Court uses two arguments. The first and fundamental argument is built on the importance of identifying aliens in our country for controlling security, immigration and the circulation of European Union nationals (Supreme Court Judgments 1295/2003, of 7.10; 1089/2004, of 10.11; 66/2005, of 26.1; 1004/2005, of 14.9; 458/2006, of 11.4; and 14/2007, of de 25.1). In these judgments, the Supreme Court finds that the prior basis set forth in the Jurisdictional Plenary of 27.3.1998 can no longer be sustained, because falsification of identity documents always affect the interests of the State on account of the demands derived from Art. 6 of the Schengen Convention of 1985, to which Spain acceded by virtue of the Protocol of 25-6-991. It underlines that no country can be indifferent any longer to the identification of persons within its national territory, given its impact on security, immigration, visas, circulation of persons, etc. Therefore, certain interests of the State are at stake, along with its own credibility in international relations in relation to the different commitments it has made. Furthermore, in specific cases a second line of interpretation has opened along incriminatory lines that is based on considering that the mere identification of foreign nationals to the police using false documents can be included under Art. 393 of the Penal Code, considering that these are generally identifications that take place at the beginning of a judicial process for the purpose of investigating criminal activity (Supreme Court Judgments 1295/2003, of 7.10; and 458/2006, of 11.4). This is perhaps a too broad interpretation of the expression "present at trial" in Art. 393 of the Penal Code, therein covering even the pre-trial investigative phase, namely, the police report that opens proceedings. All in all, the first and foremost interpretation is the first one indicated, and therefore, in this Court's Judgment 602/2009, of 9.6, it specifies that the real or protection principle was given another interpretation by the Supreme Court, considering that situations in which a subject resident in Spain has a counterfeit document to identify him or herself with can affect the interest of Spain and therefore Spain has jurisdiction to judge and punish it, even though the facts may have been committed abroad. Counterfeiting of official identity documents used to identify a person, under the European Conventions signed by Spain, especially within the framework of the European Union, must be considered to affect the interest of the State. In the judgments issued in recent years the criteria that the counterfeiting of identification documents always affects the interests of the state has been consolidated, owing to the demands derived

from Art. 6 of the Schengen Convention and because ultimately no country can be indifferent to the issue of the identification of persons holding counterfeit identity documents, because of how it affects visa, immigration and general security policy. Counterfeiting of official identity documents therefore affects, the interest of the State to at all times be able to screen the residents of the country through the production of personal documentation. This has been understood in the different decisions issued by this Chamber in recent times, and the criteria adopted by the non-jurisdictional Plenary in 1998 (Supreme Court Judgment 975/2002, of 29-6; 1295/2003, of 7-10; 1089/2004, of 24-9; 66/2005, of 19-1; 476/2006, of 5-4; 431/2008, of 5-4; 139/2009, of 24-2; 507/2009, of 28-4; and 688/2009, of 18-6) has become obsolete. In regard to the perpetration of the offenses of counterfeiting, as is known, jurisprudence has established a consolidated doctrine that the perpetrators must be considered as not only the ones who actually personally and physically perform the action of counterfeiting, but also those who do not physically perform it but are involved in its being carried out by an action that enables them to be given joint liability for the action, as appropriate, participating as accessories, or necessary cooperants. Therefore, to charge the offense it is not necessary to determine who is the perpetrator of the actual counterfeiting of the document, which is hard to prove in a large number of cases due to the fact that they operate by imitating sig natures or authentic writings that make it difficult to accredit who the copier is. It is sufficient to prove that the subject participated in decided actions for the counterfeiting of the document to be performed by a third party, especially taking into account the broad concept of perpetrator under Art. 28 of the Penal Code (Supreme Court Judgments 704/2002, of 22-4; 661/2002, of 27-5; 1531/2003, of 19-11; 200/2004, of 16-2; 368/2004, of 11-3; 474/2006, of 28-4; and 702/2006, of 3-7, *inter alia*). So, focussing on the specific case being judged here, it is clear that the conduct of the defendant was consistent with identifying herself to police officers for the purpose of arrest with a false Nigerian passport, having put her own photograph on the authentic original document and having altered the personal data on the document. Pursuant to the new jurisprudential doctrine, this must be included under Art. 392 of the Penal Code in relation with Art. 390.1.1 and 2 of the same Code. And this is because it is an act of counterfeiting, either as direct perpetrator or as necessary cooperant, that affects the interests of the Spanish State in the terms as expressed above in regard to the matters of security and circulation of persons. Therefore, the Public Prosecutor's appeal for cassation is accepted and the acquittal challenged is cancelled, and replaced by a conviction, declaring the costs in this instance *ex officio* (Art. 901 of the Criminal Procedure Act)."

* Ruling by Central Investigative Court No. 6 of Madrid of 4 December 2009 (EDJ 2009/265449)

International penal jurisdiction. Offenses against the International Community.

"FUNDAMENTS OF LAW: FIRST.- From the perspective of offenses against the International Community, and although, *prima facie*, the facts initially reported

might equate to the offenses of Art. 607 bis 1 and paragraphs 4 and 7 of our Penal Code, the recent reform instituted by Organic Law 1/2009, of 3 November, prevents them from currently being prosecuted by the Courts in Spain, since it has just been decided that they will only be prosecuted in accordance with the new text of Art. 23.4 of the Organic Act on the Judiciary if "the alleged perpetrators are in Spain" (which does not concur, since the accused: Provincial Chief of Police, Chief of Judicial Police, other police officers, DST Officer – Moroccan secret police –, RG Officer – General Intelligence Brigade –, DAG Officer – Department of General Affairs-, Airport Commissioner and a Gendarme Officer, are in Morocco) or "if there are Spanish national victims" (aspect that also does not concur in plaintiff) or it is found that there is "some relevant linkage of connection to Spain" (aspect also not present in reference to mere penal legal considerations), leaving this matter up to what the Moroccan authorities or international agencies may consider appropriate, since the Spanish system of Justice in its international facet after the above mentioned reform does not have any possibility of dealing with the matter.

SECOND. – From the perspective of common offenses committed abroad, and although they may offer the features of the offenses in Arts. 404, 511, 537 and 163.2 in relation to 165, of the Penal Code, since Art. 23 of the Organic Act on the Judiciary establishes, in its second paragraph "those criminally responsible must be Spanish nationals or aliens who have acquired Spanish citizenship after the commission of the fact," and if this circumstance does not concur, as provided under Arts. 88 and 1.e) of the Organic Act on the Judiciary, this Court is in the position to declare its lack of jurisdiction to prosecute the facts reported, and to return the case to Investigative Court no. 8 of Arrecife in Lanzarote in regard to the facts also reported as having occurred in Spain."

XXVI. INTERNATIONAL TAX LAW

* Judgment by the High Court of Justice of Andalucía, Granada (Administrative-Contentious Chamber, Section 2) of 26 January 2009 (JUR 2009\199227)

International taxation and double taxation agreements.

"FUNDAMENTS OF LAW. – (…) SECOND. – Article 64 of Act 43/95, of 27 December, on the Special Tax on Real Estate for non-resident entities, after providing in its paragraph 1, that non-resident entities that own or possess by any means of title real estate or property rights to enjoy or use same in Spain are subject to Corporate Tax through a special levy that is due on 31 December each year and must be paid during the following month of January, adding in paragraph 5 that it will not be demanded, inter alia, of: A.b) Entities entitled to the application of an agreement to avoid international double taxation, when the applicable agreement contains a clause on information exchange, and provided that the individuals who ultimately possess the capital or property of the entity, directly or indirectly, are residents of Spain or entitled to the application of an agreement to avoid double taxation that contains an information exchange clause. For the exemption referred to herein to be applied, the non-resident

entities must file a statement listing the real estate that they possess on Spanish territory, as well as the individuals who ultimately hold the capital or holdings in same, showing the tax residence, nationality and domicile of the entity and of said individuals. The tax return, to be presented to the Administration or Delegation of the State Agency for Tax Administration on whose territory the real estate property is located, must be accompanied by a certificate of the tax residence of the entity and the individuals who are the ultimate owners, issued by the competent tax authorities of the State in question. Such tax return must be presented within the same period as provided for payment of the tax.

....d) Companies that are traded on officially recognized secondary securities markets....

THIRD. – The first case of exemption invoked by the appellant under subparagraph b of the aforementioned provision cannot be accepted by the Chamber, not only because, as correctly stated by the Regional Economic-Administrative Court (TEARA) in the challenged judgment, the required tax return was not submitted within the time period set forth, but also because it was not accompanied by the required documentation accrediting the tax residence of the individual owners of the building located in Spain, such conclusion not being able rendered ineffectual, as sought on the basis of the allegation that they were avoidable formal requirements, while it is unquestionable that, in this case, recognition of the exemption, a tax benefit, depends directly on compliance with the formalities imposed and the submission of the documents proving the requirements were met by the interested party, who is ultimately the beneficiary of the tax exemption.

FOURTH. – On the other hand, the second premise of exemption does concur, in the view of this Chamber, since through the evidence shown in the discovery phase of the appeal it was accredited by provision of a certification by the Copenhagen Securities Market, issued by its Vice President and duly authenticated, that the appellant company was traded in such Market, thereby proving the factual premise necessary for the exemption claimed to be recognized, under subparagraph d) of said Article 64.5 of Act 43/1995."

XXVII. INTERREGIONAL LAW

* Judgment by the Provincial Court of Huesca (Section 1) of 13 January 2009 (JUR 2009\240026)

Interregional Law. Law applicable to marriage settlement. Previous provisions to current Article 9.2 of the Civil Code and impossibility of applying the national law of the husband owing to its discrimination against women.

"LEGAL GROUNDS. – (...) SECOND. – (...) 1. For the purposes of determining the economic system that governed the marriage, namely the Catalonian separate property system or the Aragonese community property system, based on the appropriate interregional conflict rule in force at the time the marriage was held, we should taken into account that the litigants were married on 3-6-1988 in the city of Huesca; that at that time the bride was an Aragonese civil

resident and the groom was a resident of Catalonia; that the couple lived in Huesca as from their marriage (as gathered from the documents submitted in the proceedings and the statements made the recording of the hearing) and that they did not sign marriage articles. 2. Based on such data, and as we said in our order of 24-10-2003, the controversy was not able to be resolved, clearly, by the current rule of conflict established in Article 9.2 of the Civil Code, in relation to Articles 9.3 and 16.1 (in the absence of other items, the law on habitual common residence immediately prior to the event, and lacking any such residence, that of the place the marriage was held), since such provision was amended by Act 11/1990, of 15-10, therefore, after the marriage in question was entered into. Nor can it be resolved by the conflict rule contained in Article 9.2 of the Civil Code in its text under Decree 1836/1974, of 31-5, in force on the date the marriage was held (in the absence of common law, the national law of the husband at the time of the event), as we must consider that the point of connection discussed, namely the national law of the husband at the time of the marriage, was abolished by the 1978 Constitution, since it ran in counter to the principle of equality, as stated by Constitutional Court Judgment 39/2002, of 14.2, which concludes that it is up to the judicial bodies to fill, by the means the legal system places at its disposition, the potential void that the cancellation of the inclusion of the questioned provision could cause in setting a subsidiary point of connection. 3. In this case we must resolve in favour of the separate property system based on the acts of the parties themselves as shown by their notarization of their choice of this system in the different public deeds on provisions of real estate property entered into during their marriage, in accordance with the precedent set in our cited ruling of 24-10-2003, and independent of the solution provided in Article 107 of the Civil Code under Act 30/1981 on International Private Law. So, Mrs. Isabel, in accordance with the principle of good faith that limits the exercise of subjective rights, cannot now not be aware of the statements made continually and formally on the type of economic system to govern their marriage."

* Judgment by the Provincial Court of Jaén (Sect. 2) of 6 April 2009 (EDJ 2009/105215)

Succession. Catalonian residence. Application of Catalonian Law. The Hague Convention of 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions.

"FUNDAMENTS OF LAW…SECOND. – The second ground of the appeal questions the grounds of the court judgment determining that the legislation applicable to attempts to nullify the will is contained in Catalonian law, as alleged in the complaint and was questioned by the appellants maintaining that it should be as contained in the common law of the land.

The first thing to point out here is that this is a marginal matter that does not directly affect the findings of the decision that are being appealed, wherefore those relating to the nullification of the will were dismissed in the judgment and consented to by the parties. However, and although only to respond to the

intentions of the appellant, it must be stated that the reasoning in the judgment regarding the issue is absolutely irreproachable, in application of the provisions of Articles 9.8, 14.1 and 40 of the Civil Code and the jurisprudence that interprets them; and that the mention of the Hague Convention of 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, cited by the appellant in defence of his appeal, would not bring about any amendment in relation to the conclusion of the judgment that the legislation applicable to actions undertaken in regard to the nullification of the will is Catalonian law, since Mr. Bienvenido was a resident there at the time of his death.

Precisely in the Convention cited, the validity of the will is contemplated in regard to form if it corresponds, among other criteria, to the law of the nationality held by the testator. [...]

It is clear, therefore, that the pronouncement on the legislation applicable to the action undertaken absolutely does not violate the provisions of said Convention that among different options contemplates the application of the national law held by the testator. Said pronouncement is based on the documentary evidence existing in the proceedings from which it is found that reasonably and in compliance with the rules of healthy criticism that the residence of the testator was in Catalonia, acquired through habitual continued residence with no declaration to the contrary as expressly provided in Article 14.5.2 of the Civil Code, no matter that the will was made in Jaen and the testator spent his last days in Castellar with his siblings."

* Judgment by the Provincial Court of Vizcaya (Sect. 4), of 7 April 2009 (EDJ 2009/149652)

Surviving spouse to whom the deceased granted the power to distribute the inheritance according to her wise judgment. Public deed extended by same. Partial nullity of same. Applicable law: widow's rights.

"FUNDAMENTS OF LAW:...SECOND. – [...] On this point we fully agree with the appealed judgment, this not meaning that there is a possibility of applying to the judged premise the rules on testatorial powers and disinheriting established by the Civil Law of the Basque Country. When Mr. Silvio made out his will it was perfectly valid under Common Civil Law, as it was subject thereto; by express reference to Art. 9.8 of the Civil Code, according to which "the provisions of the will and the beneficiary agreements ordered in accordance with the national law of the testator or the provider at the time it was made out shall retain their validity, despite another governing succession;" and the calculations we must undertake to quantify Mrs. Justa's power to dispose is none other the one under Art. 831 in its text under Act 11/1.981, of 13 May, since that conforms to the will of the testator and his legal powers.

The same Art. 9.8, of the Civil Code continues, stating that "the legal shares shall be adapted, where appropriate, to the latter," namely, the Law governing inheritance, which is none other than the national law of the deceased at the time of his death. Here we must take into consideration the argument by the appellant stating that the legal shares that we must be attending to are those

set forth by the Civil Law of the Basque Country, which governs Mr. Silvio's estate since he died a citizen of Vizcaya; and that, since these are formal and legal, the widow can keep the children out (of the inheritance) because she is empowered to do so.

We do not share this extensive interpretation of Mrs. Justa's powers set forth by the appellant, and we coincide with the appealed judgment. Her powers are set forth by the will in question and its express reference to Art. 831 of the Civil Code; and the will of the testator makes express reference to the thirds established by the Civil Code since, as is well known, the Basque autonomous law does not contemplate the third of betterment nor the strict third, both being included in the broader concept of legal share. If the powers are to be established on the basis of such concepts it is not now admissible to resort to the quantification that the autonomous rule provides, since it does not coincide with the common law used by the deceased.

Nor can it be understood that the deceased established a testatory power of attorney in favour of Mrs. Justa; after the will was drawn up there was sufficient time and opportunity to draw up a new will with a testatory power, for which she was empowered first through Art. 13 of Autonomous Civil Law enabling non-privileged inhabitants of Vizcaya to enact wills by delegation and second, because he had acquired status as a privileged inhabitant of Vizcaya before his death. Furthermore, in no case did the deceased provide for the possibility of keeping out any of his children, for whom he established respect for the strict legal shares, the limit that Mrs. Justa could not surpass in exercising the powers conferred on her in the will.

In conclusion, we agree with the appealed judgment on this first aspect and consider that Mrs. Justa went beyond her powers, attributing to herself the role of autonomous delegate, and keeping two children out of her husband's inheritance. It is in this keeping of the children out of the father's inheritance that the document must be found null and void."

* Judgment by the Provincial Court of Barcelona (Sect. 18) of 30 June 2009 (EDJ 2009/220124)

Divorce decree. Effects derived from same. Alimony. Legal Regulation: Family Code of Catalonia.

"FUNDAMENTS OF LAW:…SECOND. – This judgment contains an analysis of the grounds of the appeals by both parties under Art. 76 of the Family Code, applicable to this case, as while, as indicated in the appealed judgment, it is true that causes of separation and divorce are governed in accordance with the legal criteria set forth in Art, 107 of the Civil Code, the inherent effects of such judgment are regulated under the provisions of Art. 9.2 of the same Code. The Supreme Court Judgment of 10 de December 2003 states in regard to Art. 9.2 of the Civil Code, that "it is a provision of International Private Law aimed at determining the applicable law for personal and especially property effects…"

Since the parties did not have a common personal law, the initial claimant being an Austrian national and Mrs. Alicia being a Spanish national, not having

chosen the applicable law in any legalised document prior to being married, the effects of the divorce shall be governed by the law pertaining to their habitual common residence immediately following their marriage, which was Catalonia, since after they were married they lived in Collbató, Barcelona and Castelldefels successively, as they recognised during questioning. Therefore, the Family Code of Catalonia is applicable for governing the effects of the divorce.

SIXTH. – [...] In the case at hand the parties maintain different positions. Mrs. Alicia alleges that the matrimonial economic system in force throughout the marriage was community property, since Mr. Damaso was not a Spanish national, and followed the law set forth by his own civil law and since he had not lived in Catalonia for ten years when he was married, he maintained that of his city of origin, Castellón, the community property system. On the other hand, the claimant maintains that the matrimonial system was the separate property system, since this Autonomous Community was the place of habitual common residence immediately subsequent to being married.

It should be taken into account that the marriage was held in 1989 in Collbató (Barcelona); when the marriage was held the groom was an Austrian national, while the bride was and is a Spanish national. Neither before nor after being married were any marriage articles executed; and by document of 7-11-1990 the spouses acquired the home in Collbató, in which it states that it was acquired as community property.

In regard to the statements contained in the public deed, there is repetitive jurisprudence that the declaration of a specific matrimonial economic system in a public deed does not have sufficient evidentiary proof, whereby the value or evidentiary effectiveness of the public deed extends to its content, but not to the legal qualifications included. The notary certifies the fact that brought about the granting and the date, but not the statements made by the subjects or by third parties, whereby such statements cannot be taken into consideration in order to determine the matrimonial economic system, which can only be amended by establishing marriage articles.

SEVENTH. – The marriage between the parties took place on 25 February 1989 and the rule of application in force at the time the marriage was held was declared unconstitutional by Constitutional Court Judgment of 14 February 2002. Such rule was Article 9.2 of the Civil Code, that refers to the law of the husband at the time the marriage was entered into as the rule of connection, and the same cannot be applied, as this Chamber has already stated in its Judgment of 17 February 2004. Therefore, the void resulting from the non-application of the pre-constitutional rule must be integrated and for such integration a neutral, objective point of connection common to both spouses must be used, such as the law of the place of residence of the couple after the marriage, a criterion that this Chamber has expressed in the Judgment of 17 April 2007, and which is ultimately the criterion on which the solution contemplated in Article 107 of the Civil Code is based and this was the rule of conflict established in Article 9.2 after the reform undertaken by Act 11/1990 of 15 October.

The rule of conflict imposes application of the legal system of the place of residence of the couple immediately after they are married, and according to

the statement of the respondent herself, and as alleged by the claimant, the parties were already living in Collbató when they were married and continued to live there afterward; they later moved to Barcelona and lastly to Castelldefels, which was the last family domicile. The separate property system is therefore the one that the parties acquired when they were married, as it is the primary system in Catalonia.

Therefore and based on everything set forth above, it is appropriate to declare in these proceedings that the matrimonial economic system is the separate property system regulated by the Family Code of Catalonia."

* Judgment by the Provincial Court of Lugo (Sect. 1) of 23 November 2009 (EDJ 2009/308622)

Interregional Law. Inheritance. Applicability of common or Galician civil law.

"FUNDAMENTS OF LAW:... THIRD. – First the issue regarding applicable law must be resolved, since the case judged has potentially two legal frameworks that converge, on the one hand national legislation (common civil law) and on the other, autonomous law (Galician civil law). The deceased had executed a will in 1984 and died the following year, namely before the entry into force of the 1995 Galician Act of Civil Law that introduces the institution of universal right of use by the widowed spouse, regulating the material context of same. Both this and the current Galician Act of Civil Law of 2006 in its transitory provisions refer to the Civil Code in its provisions of the same type, broadly analysed in doctrine and jurisprudence, establishing that the applicable law in regard to inheritance is the law in force at the time the inheritance is opened. This same chamber has already stated in its Judgment 116/2003: "the transitory provisions of the Civil Code are general legal theory and in regard to inheritance rights transition provisions 2 and 12 establish that the inheritance provisions are to be governed by the law applicable at the time of execution." This criterion is peaceful and a similar conclusion can be reached from a reading of the transitional provision four of the Civil Code. *Inter alia*, this is also followed by the Supreme Court Judgment of 21.12.1990, the Judgment by the High Court of Justice of Galicia of 21-11-2003 and the Supreme Court Judgment of 17-3-1995. Therefore, despite the brilliant legal grounds set forth by the original judge, the Chamber finds that use must be governed by the law applicable at the time of death and since at that time there was no specific regulation under the Galician civil law, we must abide by the regulation in the Civil Code, specifically, Article 485 that specifically deals with use when projected over countryside...."