Spanish Judicial Decisions in Private International Law, 2008[ab]

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[a] There has been considerable expansion of Spanish Private International Law jurisprudence in recent years. This record does not aim to be exhaustive. Its purpose is to give the reader as objective a picture as possible of the main trends in Spanish case-law in this enormous, dynamic field. What it does, then, is provide a sampling of overall Spanish PIL practice in 2008.

[b] Abbreviations used: STS (Supreme Court Judgment); SAN (National High Court Judgment); STSJ (High Court Judgment); SAP (Provincial High Court Judgment); SJM (Commercial Court Judgment); ATS (Supreme Court Orded); AAN (National High Court Order); AAP (Provincial High Court Order); AJM (Commercial Court Order); RDGRN (Decision of the Department of Registries and Notaries); EDJ (El Derecho Jurisprudencia); RJ (Repertorio de Jurisprudencia Aranzadi); AC (Aranzadi Actualidad Civil); AS (Aranzadi Actualidad Social); JUR (Repertorio de Jurisprudencia Aranzadi); TOL (Tirant on line).

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

XI. Succession

XII. Contracts

XIII. Non-Contractual Obligations

XIV. Form of Legal Deeds and Instruments

XV. Rights in Rem

XVI. Registry Law

XVII. Intangible Goods
   1. Intellectual property
   2. Copyright

XVIII. Competition Law

XIX. Foreign Investment and Exchange Control

XX. Foreign Trade

XXI. Commercial Companies/Corporations/Legal Persons

XXII. Bankruptcy

XXIII. International Transport Law
   1. International carriage of goods by sea
   2. International carriage of goods by road
   3. International carriage of goods by air
   4. Others.

II. INTERNATIONAL JUDICIAL JURISDICTION IN CIVIL MATTERS

1. General principles

* Judgment of Madrid Provincial High Court, Section 13, of 7 October 2008 (EDJ 2008/277851)

Immunity from jurisdiction. Ordinary action against the Holy See in the person of the Pope.

"Legal Grounds:

(…) FOUR. Under Article 36(1) of the Civil Procedure Act, only when Spanish courts have jurisdiction, in accordance with the Judiciary Act and international treaties and conventions, to consider a case put to their judgment may they examine *ex officio* the issue of their territorial competence, provided that this is prescribed by a mandatory provision – Article 58 of the Civil Procedure Act – or at the request of a party in the proceedings – Article 59. Jurisdiction comes before territorial competence. Here the plaintiff and appellant hinges the second ground of appeal on the inapplicability of Articles 50 et seq. of the Civil Procedure Act – Section 2, chapter II, title II, Book I of the Civil Procedure Act – all of which deal with territorial competence when the Court's order resolves the issue of lack of jurisdiction of Spanish courts, and in particular the civil courts, to examine the substance of the complaint. This error of pleading is sufficient in itself to warrant the dismissal of that ground of appeal in that it does not cite, and hence fails to challenge or rebut the arguments set out in the decision of the lower court. Nonetheless, in order not to stint in offering the judicial protection so passionately invoked by the plaintiff Association, elaborating on the decision handed down in the first instance, we would add that Article 22 of the Judiciary Act and Article 36 of the Civil Procedure Act do not empower the civil courts of the Spanish State to examine the innominate action (the heading in the complaint is a claim of the right pertaining to the plaintiff) whose intent is to rehabilitate the Order of the Temple and review the proceedings that concluded with a provisional suspension without trial, implicitly voiding an Apostolic Ordinance issued at the Council of Vienne in the year 1312, which entails recognition by the Church of Rome of all the chrono- and hiero-historical events listed in the complaint, which is why it is levelled at the Vicar of Christ in his physical *persona* as the head of the Church of St. Peter. In light of the criteria of objective competence set out in the above-cited Article 22 of the Judiciary Act, neither the original court nor this civil court have jurisdiction to examine the matter or the personality of the defendant, who enjoys immunity from jurisdiction."

* Judgment of Madrid Provincial High Court (Section 20), 4 November 2008 (EDJ 2008/278198)

International judicial competence. Immunity from jurisdiction.

"Legal Grounds:

(…) THREE. On the stated basis, in the present case as in the case settled by the above-referenced order of 6 November 2007, we take the view that the Spanish courts lack jurisdiction and international competence to examine the complaint laid before the Secretary and the Head of the Treaties Subdivision of the UN Human Rights Committee, which has its seat in Geneva, the case coming under the Convention on Prerogatives and Immunities of the United Nations, to which Spain acceded on 31 July 1974 (BOE no 249 of 17 October 1974), as the defendants are officers of the Committee and according to Article V section 18, (a) officials of the Organisation are immune from any judicial procedure in respect of written or spoken words and any acts carried out in their official capacity, and clearly the publication of the decision of which the plaintiff accuses them was done in that capacity and as such appears on the Committee's website.

FOUR. In light of our comments so far, the refusal to admit the complaint in the order here challenged is correct not because the complaint is a matter for the contentious administrative jurisdiction as the lower court held – a decision with which we do not concur given that the cited jurisdiction lacks the extra-territorial dimension of the civil jurisdiction – but because the Spanish courts lack jurisdiction and competence therefor. This applies to both of the actions joined in the complaint, the principal one because it is brought against two particular officials of the Committee and the secondary one because it is merely a declaratory action regarding the functioning of the Organisation and hence targets the Committee, whose officials are recognised as enjoying immunity. And finally, we do not concur with the appellant's pleadings to the effect that its right to effective judicial protection has been infringed, for the latter does not mean the right to have claims accepted but to receive a reasoned reply thereto, and in the present case the decision handed down is just that; the court cannot be accused of dilatoriness or unwarranted delay when such delay has been due at least in part to the failure in the complaint to identify the persons against whom it was brought."

2. Express and tacit submission

* Judgment of the Supreme Court (Chamber 1), 27 May 2008 (EDJ 2008/82717)

International plea for lack of jurisdiction submitted by the defendant. Upheld. Spanish courts not competent. Territorial competence of the courts of London to examine the merits of the case under the jurisdiction clause in the bill of lading. Existence of jurisdiction clauses. No signature. Determination of the will of the parties.

"Legal Grounds:

ONE. (…) In particular, the appellate court took the view that examination of the complaint was a matter for foreign courts – specifically the courts of London – since the bill of lading contained a jurisdiction clause which was in

fact produced by the plaintiff as proof of the contract for maritime freight of goods in the performance whereof the cargo had suffered the alleged damage in respect of which "E., S.A.", as the consignor, sought compensation from "Marítima S." as the carrier.

The cited Court declared that the circumstances qualified for the application of article 17 of the Convention of 27 September 1968 on jurisdiction and enforcement of judgments in civil and commercial matters, in the wording as amended by the Convention of 26 May 1989 relating to the accession of the Kingdom of Spain ad the Portuguese Republic. (…).

THREE. The appellant states that one of the requirements laid down by article 17 of the 1968 Convention, namely the one concerning consent to the inclusion of a jurisdiction clause, is not met, for which it gives two reasons. The first is that the bill of lading containing the clause does not bear its signature. The second is that it does not engage in the kind of activity – maritime transport – entailed in the service that the defendant was required to perform under the contract entered into with it.

The judgment of the Court of Justice of 9 November 2000 (C-387/98) stressed that by making the validity of a jurisdiction clause subject to the existence of an agreement between the parties, Article 17 of the Convention imposes on the court before which the matter is brought the duty of examining first whether the clause conferring jurisdiction upon it was in fact the subject of consensus between the parties, which must be clearly and precisely demonstrated, and that the purpose of the requirements as to form imposed by Article 17 is to ensure that consensus between the parties is in fact established .

The judgment considered here in cassation recognised the validity of the clause conferring jurisdiction because there was a written record of the consent of the parties, including the plaintiff, and it therefore applied paragraph a) of article 17. According to the appellate court the common will of the parties was proven despite the absence of the shipper's signature because the clause appeared "on the cover page of the contract, clearly highlighted in bold type".

FOUR. (…) It must be borne in mind that what article 17 of the 1968 Convention requires is the consent of the contracting parties, in respect of which the signature is merely the usual instrument whereby it is manifested.

In fact article 17c) of the 1988 Lugano Convention presumes that such consent exists where, in international trade or commerce, the agreement conferring jurisdiction is concluded "in a form which accords with practice in that trade or commerce 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". – judgments of 20 February 1997 (C-106/95) and 16 March 1999 (C-159/97) – .(…)

SIX. (…) the appealed judgment declared that the agreement conferring jurisdiction on the Law Courts of London was binding on the plaintiff because it was set forth in writing and had received the latter's consent."

* Order of Barcelona Provincial High Court (Section 16), 8 July 2008 (JUR 2008\315342)

International judicial competence. Tacit submission. Express submission. Meaning. Competence to order interim measures.

"Legal Grounds:

(…) Two: (…) Under article 24 of Regulation 44/2001, jurisdiction lies with the courts of a Member State if the defendant enters an appearance before them, unless the object was to contest the jurisdiction. In the present case it cannot be said that this was the sole object of the defendant's appearance. And the petition for the court to decline jurisdiction was not even presented as the main pleading; as we have seen, the petition to the court was submitted at the end of the answer to the complaint. In these circumstances the object of the defendant's appearance cannot be said to have been to contest the jurisdiction. Even if the doctrine whereby an answer on the merits is tantamount to tacit submission however strongly the same answer may contest the jurisdiction, it is the view of this court that at the very least the plea for lack of jurisdiction ought to be the principal pleading, which is not the case here as we saw in the foregoing paragraph.

Three: Even if the above criterion were not accepted, the competence of the Spanish courts is also confirmed by article 23 of the above-cited Regulation given that the contracts as signed stipulate that any disputes arising in connection with their performance shall be subject to the jurisdiction of the courts chosen by the plaintiff.

The Court holds that there was no express submission because there was no designation of a country whose courts would be competent to settle disputes. However, the contract did contain a jurisdiction rule. It was agreed that jurisdiction should rest with the courts of the country chosen by the plaintiff whichever party filed the complaint. This rule is sufficient to determine that jurisdiction rests with the Spanish courts, which were chosen by the plaintiff.

The efficacy of the contractual clause is challenged on the ground that it was not accepted "clearly and precisely" by the defendant. But there is no such lack of clarity or precision, and the defendant's signature is certainly stamped only a few lines below the clauses in question. The agreement is therefore in written form as required by the Regulation.

Four: (…) At the same time, article 31 provides that application for provisional measures may be made to the courts of a Member State even if a court of another Member State has jurisdiction as to the substance of the matter. Therefore, the competence of the Spanish courts according to the Regulation and the agreements concluded between the parties is not gainsaid by the fact that proceedings have been instituted in Greece to petition for provisional measures, which is reasonable since it is in that country that the defendant carries on the distribution business which is the subject of the agreements concluded by between the parties. (…)"

3. Family

* Order of Madrid Provincial High Court (Sect. 22), 10 April 2008 (EDJ 2008/85914)

Divorce. Judiciary Act, Art 22(2) and 22(3). Regulation 2202/2003. Prevalence over the Judiciary Act. Spanish courts competent because the plaintiff is domiciled in Madrid and has been so for more than one year, regardless of the fact that the defendant is domiciled in Peru.

"Legal Grounds:

(…) TWO. While the plea for reversal might in principle be dismissed were the provision on which the contested decision is based to be applied, inasmuch as the plaintiff is not Spanish and the defendant was not domiciled in Spain at the time the complaint was brought, we must bear in mind that since the entry into force of European Union Council Regulation No 2201/2003, that rule has been rendered merely residual by article 96 of the Spanish Constitution and article 21 of the cited Organic Law, and therefore the criteria set out in article 22 of the latter regarding the competence of Spanish courts are only applicable to events not contemplated in the international treaties and conventions to which Spain is a signatory.

It might be argued, however, that the cited Regulation is only applicable to nationals of Member States of the European Community, in which case it would not cover situations such as the one considered here, where the spouses engaged in separation, divorce or annulment proceedings have different nationalities.

The fact is, however, that the competence in respect of such proceedings that is governed by the said Regulation does not rest – at least not principally and certainly not exclusively – on the criterion of the nationality of the spouses if they belong to a Member State of the European Union, but on the territorial principle, in particular once again with reference to the habitual place of residence of one or both of the spouses, so that the Community rule is applicable to nationals of non-member States who are resident in the European Community.

Thus, with reference to matrimonial proceedings section a) of article 3 clearly and unequivocally upholds the competence of the courts of the Member State in whose territory the spouses have their habitual place of residence, or their last habitual place of residence provided that one of them still resides there, or in the case of a joint complaint the habitual place of residence of the spouses or the habitual place of residence of the plaintiff if he/she has lived there for at least one year immediately prior to bringing the complaint.

Note that these provisions make no reference at all to the nationality of the spouses, unlike the last part of section a), whereby for such purposes of jurisdiction the plaintiff must be a national of the Member State concerned, or in the case of the United Kingdom and Ireland must have his/her domicile there, as long his/her habitual place of residence is in the Member State and he/she has lived there for at least six months before bringing the complaint.

Therefore, except in this last case, there is no requirement that one of the spouses – the plaintiff in that provision – be a national of a Member State, and

hence in the other hypothetical cases mentioned above, the jurisdiction of the said courts extends to persons meeting the cited residence requirements, quite irrespective of their nationality.

In the case before us here, the municipal register of inhabitants and his employment record at 14 May 2007 (documents appended at folios 12 and 13) show that the plaintiff has been habitually resident in Spain since 2004, and the fact that the defendant is resident in Peru does not bar the jurisdiction of the Spanish courts given that the plaintiff is domiciled in Madrid and had moreover been so for more than one year at the time the complaint was brought.

Therefore, although the appellant has not expressly invoked the Community rule discussed, it is undoubtedly applicable to this case in obedience to the principle *jura novit curia*, and hence his plea for reversal must be upheld".

* Order of Granada Provincial High Court (Section 5), 11 April 2008 (EDJ 2008/180579)

Action concerning guardianship of a foreign minor, in de facto possession of the plaintiff. Appeal. Inadmissibility. International judicial jurisdiction of the Spanish court to examine the case according to Art. 22(3) of the Judiciary Act.

"Legal Grounds:

ONE. (…) In short, although the application – for regularisation or legalisation of the custody of a minor exercised *de facto* by the applicants – is not legally sanctioned by article 303 and related provisions of the civil code since such regularisation or legalisation entails legal recognition of the transfer of certain functions of parental authority by their holder to a third party, added to which the case involves foreigners of known nationality, this is a constitutive claim of the kind referred to in the cited provision, and judgment of the claim for custody cannot be denied *a limine litis*.

TWO. Having said that, the question raised by the appeal is whether the substance of such an application can be judged by the civil courts, given that the order here appealed refused leave to apply – and in that connection be it said that article 5(2) of the Civil Procedure Act provides that "the applications referred to in the foregoing section must be made to the court that possesses jurisdiction and must address the persons who will be affected by the decision that is sought".

Therefore, even although the case concerns the transfer or yielding to a Spanish national of certain functions of parental authority over an alien minor to which his mother – also an alien – is entitled, the Spanish civil courts are competent to examine the application under article 22 of the Civil Procedure Act in concordance with article 9(6) paragraph two of the civil code, since the requirements set out in that article are met – that is, the minor is habitually resident in Spain and the plaintiffs are Spanish nationals habitually resident in Spain. (…)".

* Order of Almería Provincial High Court (Section 3), 9 June 2008 (EDJ 2008/235306)

International judicial jurisdiction: Any modification of measures affecting parental authority, custody or child visiting arrangements must be made through the judicial authorities where the child was habitually resident before his/her wrongful removal. The Provincial High Court dismissed the mother's appeal and confirmed the decision to return the child. The biological parents share custody and the mother is in breach of the visiting arrangements stipulated in the definitive court order, having failed to return the child at the end of the school year.

"Legal Grounds:

(…) TWO. The appeal then goes on to allege that the mother having undertaken to return to her own country for the sole purpose of instituting legal proceedings to modify the visiting arrangements to which the child's father was entitled, since she has been resident in Spain since March 2006 the Spanish courts are competent to be seized of her application, in particular the courts of Huércal Overa, in whose district the locality of Arboleas, where mother and child are domiciled, is situate. In support of her petition the appellant cites art 8 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, which confers on the courts of a Member State competence in matters of parental responsibility in respect of a child who is habitually resident in that Member State at the time the matter is placed before the court.

However, the appellant forgets that under art 10 of the above-cited Community Regulation "In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and…a) each person, institution or other body having rights of custody has acquiesced in the removal or retention". None of the exceptions contemplated in that article apply since the order for the return of the child issued by the court *a quo* is still in force, and therefore as long as this situation continues any modification of the measures regulating parental authority custody or child visiting arrangements must be substantiated before the judicial authorities of the United Kingdom as the State where the child was habitually resident before his removal to Spanish territory, which was wrongful in absence of the father's consent."

* Judgment of Cantabria Provincial High Court (Section 2), 13 June 2008 (EDJ 2008/183168)

International judicial jurisdiction of Spanish courts in matters of divorce by virtue of submission to jurisdiction by two Peruvian nationals habitually resident in Spain, pursuant to arts 22(2) and 22(3) of the Civil Procedure Act. Lack of Spanish jurisdiction in respect of the rights and courses of action available to the grandparents to communicate with their grandchildren, as nationals of another country habitually resident in another country.

"Legal Grounds:

ONE. (…) Art 22(2) of the Civil Procedure Act provides that in civil cases the Spanish courts shall generally have jurisdiction when the parties have expressly or tacitly submitted to the Spanish courts, and when the defendant is domiciled in Spain.

(…) None of the exceptional circumstances cited in Art. 26 sections 1 and 2 of the Civil Procedure Act arise in the present case. Both litigants are Peruvian nationals but are resident in Spain, and they have submitted the matter of their divorce to the civil courts pursuant to art 22 sections 2 and 3 of the Judiciary Act, which means that the original court is competent to decide on the measures referred to in Art. 91 and related provisions of the Civil Code by reason of the parties' submission.

Whether the jurisdiction of the Spanish courts may extend to the rights and courses of action that may in the event be available to the grandparents in order to communicate with their grandchildren is another matter altogether, for legitimacy to exercise these rights, which are beyond the scope of the divorce proceedings before us, lies solely with the grandparents, who are Peruvian nationals resident outside Spanish territory and none of whom have been cited in these proceedings. These issues therefore lie outside the jurisdiction of the Spanish civil courts by virtue of the provisions cited earlier, albeit these rules of competence and legitimacy (rules of public policy and paramountcy) may not be allowed to cause a breach of constitutional principles of equality, (…)."

* Judgment of Madrid Provincial High Court (Section 22), 16 September 2008 (JUR 2008\382458)

International judicial competence. Extra-marital child possessing Spanish nationality. Applicability of Regulation 2201/2003.

"Legal Grounds:

TWO. (…) It is true that at the time the complaint giving rise to these proceedings was brought the common child resided with his grandmother in the Dominican Republic, so that the case could in principle come under the provisions of article 8 of European Council Regulation number 2201/2003, according to which the courts of a Member State have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seized, and the corollary of this could in principle support the position taken in the appealed decision.

It must be remembered, however, that the child concerned here, having been born to a Spanish father, also possesses Spanish nationality as provided in article 17(1)a) of the Civil Code, and was furthermore habitually resident in this country from the time of his birth until he went to stay temporarily with his maternal grandmother in the Dominican Republic, as both parties acknowledged when examined by the original court.

Such legal and residential status brings the case within the scope of article 15 of the Regulation, whereunder the courts of this country have jurisdiction since the child has not only been habitually resident here but also possesses Spanish nationality (…)".

4. Succession

* Judgment of the Supreme Court (Chamber 1), 25 June 2008 (EDJ 2008/118945)

Last will and testament made abroad. Revocation. International judicial jurisdiction. Location of goods in Spain. Meaning of "goods".

"Legal Grounds:

(…) TWO. (…) It is therefore essential to address this issue, which is clearly one of public policy – as stressed in the *ex officio* examination – and determine whether the Spanish courts have jurisdiction to be seized of a set of petitions whose object is to have a last will and testament made abroad revoked in favour of a later one made in Spain and to have those legal acts contingent on the earlier will declared null and void. This examination of international judicial jurisdiction must necessarily be conducted in the light of article 22 of the Judiciary Act, absent any conventional provision or in general any supranational norm that might be applicable, and in particular in the light of the third subsection thereof, it having been verified that none of the fora of exclusive jurisdiction laid down in the first subsection of the said article are concerned, and the general fora laid down in the second subsection having been excluded since there is no express agreement conferring jurisdiction on the Spanish courts nor tacit submission thereto and the defendant's domicile provides no nexus to warrant conferring jurisdiction on the Spanish courts. We are therefore bound by the rule laid down in the last point of article 22 subsection three, according to which the Spanish courts shall have jurisdiction in matters of successions where the deceased had his last residence in Spanish territory or possessed immovable property in Spain; this is a rule of international law that hinges on two alternative nexuses and is applicable in view of the material subject of the chief petition submitted, which is naturally classified in accordance with the *lex fori*. Under that rule, jurisdiction must be assigned to the Spanish courts, as the lower court did in this case, since there is no doubt of the existence of at least one dwelling in Madrid which was owned by the deceased at the time and hence must be considered part of his estate. (…) There is therefore no justification for an interpretation of this rule that excludes cases of possession of a single item of real estate in Spain, particularly inasmuch as the succession may be confined to that property or, as in the present case, it is on the basis of that property that the action was instituted and hence its financial significance is acknowledged by the defendants who have opposed the exception of lack of jurisdiction. It cannot therefore be said that the jurisdiction of the Spanish courts obeys a disproportionate criterion of attribution in that there is no nexus between the court and the object of the proceedings and is hence unwarranted; nor for the same reason can it be said that the court has left the defendants defenceless given that they could readily have brought their defence before a court standing in reasonable proximity to the object of the proceedings and to what must be the object of execution in the event that the plaintiff's petition is upheld. And still less can it be said that the jurisdiction of the Spanish courts is the outcome of an intentional – and hence fraudulent – search for a forum

of convenience on the basis of the law materially applicable to the substance of the matter in view of the deceased's nationality at the time of his death and in light of the provisions of article 9(8) of the Civil Code (…)".

5. Contractual obligations

* Judgment of the Supreme Court (Chamber 1), 21 July 2008 (JUR 2008\249691)

Credit card default. International judicial jurisdiction. Summary procedure. Defendant not domiciled in Spain. Credit card default. Art. 10(5) of the Civil Code and Art. 5 of Regulation (EC) 44/2001.

"Legal Grounds:

(…) THREE. The present negative conflict of jurisdictions raises the issue of applicability of the rule laid down in Art. 813 of the Civil Procedure Act when the defendant is not domiciled in Spain and cannot be located in the national territory. Two of the various purposes of the rule contained in this provision are: that the defendant be advised of the complaint to avoid defencelessness, and to identify a key place where property can be attached in the event the complaint is successful. In this case the complaint itself states that the debtor is domiciled in Rome – and hence in the European Union – albeit the complaint concerns a credit card domiciled in Spain, specifically in Madrid.

In this case be it said first and foremost that the Spanish courts are competent to be seized of the complaint submitted by BBVA for breach of the terms of a credit card contract, pursuant to article 10(5) of the Civil Code, as the contract is subject to the law of the place where it was concluded, namely Spain, as none of the previous nexuses listed in the cited article apply. This means that the applicable norm is the rule contained in article 5 of Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters" (…). Likewise applicable are articles 4 et seq. of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters. As the Spanish courts have jurisdiction, the complaint must be judged by the court of the place where the credit card contract was concluded."

6. Non-contractual obligations

* Judgment of Madrid Provincial High Court (Section 20), 28 January 2008 (EDJ 2008/522)

International judicial jurisdiction in matters of non-contractual liability. Traffic accident in Portugal. Both litigating insurers have domiciles in Spain.

"Legal Grounds:

(…) TWO. Art 52(1)9) of the Civil Procedure Act provides that in proceedings where compensation is sought for damages in connection with the circulation of motor vehicles, jurisdiction shall lie with the court of the place where

the damages were sustained, and in the present case the plaintiff, in subrogation to its policyholder, is claiming damages arising out of a traffic accident. That said, however, we take the view that this rule is only applicable where the accident takes place in Spain and not in a foreign country, in which case the criteria to be followed in determining the scope and limits of Spanish jurisdiction are those contained in Articles 21 and 22 of the Judiciary Act, and where appropriate the provisions of any international conventions that may be applicable and confer jurisdiction exclusively on another State (Art. 36 of the Civil Procedure Act).

The Hague Convention of 4 May 1971 on the Law applicable to Traffic Accidents (Instrument of ratification dated 4 September 1987) provides a specific set of rules (Arts 2–5) for claims and subrogations in respect of insurance companies, stressing the applicability of the law of the State where the accident occurred; however, it is not applicable here inasmuch as it is confined to establishing what Law is applicable to the substantive or material aspect "in whatever kind of proceeding it is sought to enforce this liability" (Art. 1) and does not affect the jurisdiction established by each State, as noted in the record of proceedings of the Provincial High Courts of Girona of 15 January 1999, Salamanca of 4 July 2001 and Barcelona of 26 May 2005.

THREE. In light of the above, we differ from the decision of the original court inasmuch as the Spanish courts do have jurisdiction in the case before us, by virtue firstly of Article 10 second paragraph in relation to Article 8 of the above-cited Brussels and Lugano Conventions, and secondly of Article 22 of the Judiciary Act.

As to the applicability of international conventions, none of the circumstances listed in Arts 16 respectively of the Brussels Convention of 27 September 1968 (Instrument of ratification dated October 1990) and the Lugano Convention of 16 September 1988 Instrument of ratification dated 9 August 1994) on jurisdiction and the enforcement of judgments in civil and commercial matters arise – the only circumstances which, being exclusive, could oblige the court to decline jurisdiction *ex officio* as provided in Arts 19 of the cited Conventions. In circumstances other than those, a number of non-exclusive fora are contemplated. For instance, Art. 5 of the Brussels Convention provides that (…) (and likewise Art. 5 of the Lugano Convention), and Art. 8 provides that in insurance matters, (…), and the Lugano Convention specifies that if it "has a branch, agency or other establishment in one of the Contracting States [it] shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State". Finally, in cases of liability, Arts 9 and 10 of both Conventions allow the insurer to be sued in the courts for the place where the harmful event occurred (option available in cases of direct action) or in the court seized of "proceedings which the injured party has brought against the insured".

For its part, Art. 22(3) of the Judiciary Act provides that Spanish courts shall have jurisdiction in matters of non-contractual obligations if the causal event occurred in Spanish territory or "if the person responsible for the harm and the

victim both have their habitual residences in Spain", and section 4 provides that in insurance matters they shall likewise have jurisdiction "if the insured and the insurer are both domiciled in Spain".

In the present case the insurer of the party injured in the traffic accident in Portugal, which is domiciled in Spain, has brought the action in subrogation against "VAN AMEYDE ESPAÑA, SA", a company acting as Spanish representative of the insurer of the Portuguese-registered vehicle allegedly responsible for the accident; in other words, both are domiciled in Spain, which means that in the light of the foregoing and following the criterion laid down by this same Section in a Judgment of 1 April 2003, the Spanish courts indeed have jurisdiction."

* Judgment of Madrid Provincial High Court (Section 28), 27 March 2008 (EDJ 2008/151443)

International judicial jurisdiction in matters of intellectual property. Plaintiff and defendant both domiciled in Member States of the EU. Regulation 44/2001.

"Legal Grounds:

(…) TWO. The first point that needs to be addressed is the legal frame of reference in which this appeal must be dealt with.

Where an action involves a foreign element domiciled in another Member State of the European Union, international judicial jurisdiction is generally governed by Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Among the Member States this rule replaced the provisions of the 1968 Brussels Convention (according to Art. 68 of the cited Regulation 44/2001, with exceptions not germane to the case before us); as such it has been in force since 1 March 2002 (Art. 76 of the Regulation) and is applicable to judicial actions instituted since that date (Art. 66(1) of the Regulation)

Generally speaking, therefore, the norm of reference for issues concerning international judicial jurisdiction in matters affecting persons domiciled in Spain or France, as in this case, is Regulation 44/2001.

(…)

FIVE. The invocation of Article 5(3) of Regulation 44/2001 to claim a special forum as opposed to the general forum to be deduced from the plaintiff's domicile (Articles 2 and 3 of the cited Regulation) is not mistaken inasmuch as the terms in which the complaint was submitted were not those of a contractual dispute with the French co-defendant but an accusation of infringement of the copyright of the plaintiff, who alleged that the defendant had assigned itself percentages of so-called mechanical rights in Adolfo's musical compositions without any right. These are the terms of the complaint, and although it simply mentions the contract dated 12 July 1928, the actions brought – rightly or wrongly – against SALABERT are not founded on that contract, as plainly indicated in the said complaint. Therefore, rather than the rules of Article 5(1) as invoked by the defendant (regarding special jurisdiction for contractual matters), the applicable rule is the one laid down in Article 5(3) of Regulation 44/2001

for non-contractual liability (included in the heading "quasi-delict", which covers all actions which seek to establish the liability of a defendant and which are not related to a contract, as ruled by the EC Court of Justice in its Judgment in case 189/87 of 27 September 1988, a case-law criterion that is applicable even if applied in connection with the Brussels Convention), under which it is possible to bring an action in a State other than that of the defendant's domicile if it is in "the courts for the place where the harmful event occurred or may occur". It must be remembered that according to the plaintiff the harm alleged in the complaint occurred or may have occurred in Spain, as the said complaint stated that the defendant received income from rights derived from recordings unlawfully obtained at the Spanish copyright organisation SGAE.

(…) Jurisdiction in a complaint must be determined with reference to the terms in which the complaint – however well- or ill-founded its grounds – was brought, and not the terms that the defendant seeks to impose. The latter may serve to define the ultimate object at issue, but jurisdiction as regards the complaint must first have been determined in the light of the terms of that complaint.

SIX. Furthermore, under Article 6(1) of Regulation (EC) No 44/2001 it is possible to sue EDITIONS SALABERT FRANCE in Spain at the same time as suing the Spanish company UNIÓN MUSICAL EDICIONES SL, given that the connection criterion referred to in that article seems likely in the present case. The complaint alleged that the co-defendants were inter-related in such a way that they presented themselves to third parties in connection with certain works by Maestro Adolfo as editor and sub-editor thereof, or vice versa as the case may be, claiming that one worked on behalf of the other, and they appeared as such in the records of the above-cited management entity depending on the work concerned. It is therefore reasonable to try and determine in a single proceeding whether the actions of one or other defendant in connection with the musical works of Maestro Adolfo constitute a violation of intellectual property rights as claimed by the party acting as plaintiff on the latter's behalf. For the concept of a connection contemplated in Article 6(1) of Regulation (EC) No 44/2001 is not confined to situations where a passive joinder might necessarily arise but must also be taken to cover petitions closely linked by reason of the alleged factual basis, so that absent any intent to make fraudulent use of a given forum (of which there is no evidence here), the proper course is clearly to examine the two jointly and thus ensure that there is no possibility of contradictory decisions being handed down in either case; in this way we can guarantee equal treatment of two parties accused of the same kind of unlawful conduct towards the common plaintiff while allowing each to present its own defence and invoke whatever rules of law that it sees fit".

7. Property

* Order of Barcelona Provincial High Court (Section 13), 21 July 2008 (JUR 2008\1624)

Civil jurisdiction. International judicial competence. Action for recovery brought by the State of Egypt in respect of movable (cultural) property situated in Spain against natural and legal persons having Spanish nationality, for alleged illegal exportation or theft from the complainant State. UNESCO Convention on Illicit Import, Export and Transfer of Ownership of Cultural Property.

"Legal Grounds:

(…) THREE: In its complaint the plaintiff, the Arab Republic of Egypt, alleges that it is the rightful owner of a number of items of movable property listed therein which are in the unlawful possession of the co-defendants; it is consequently instituting a recovery action and seeks a judgment to the effect that the items listed in the complaint belong to the plaintiff, ordering the defendants to return the said items and to publish the judgment, at their own expense, in one of the largest-circulation archaeological journals and one of the largest-circulation national newspapers.

This is, then, an action for recovery of movable property located in Spain, brought against natural or legal persons possessing Spanish nationality and domiciled in Spain.

There is provision for a recovery action of this kind in our civil laws (Art. 348 of the Civil Code), and therefore pursuant to Articles 21(1) and 23(3) of the Judiciary Act and Article 45 of the Civil Procedure Act, Law 1/2000, the Spanish courts are in principle competent to be seized of the case.

What is special here is that the movable property claimed allegedly consists of cultural property (items of archaeological value originating in Egypt) which have been illicitly exported and/or stolen from the said State and as such fall within the scope of the international conventions relating thereto, in particular the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property done at Paris on 17/11/1970 and ratified by instrument dated 13/12/1985, and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, signed at Rome on 24 June 1995, the instrument of accession whereto is dated 9/05/2002. Both international treaties, which have been ratified by Spain and published in the BOE, are an integral part of the Spanish legal system and hence directly applicable and must be so interpreted by the Spanish courts (Art. 96 of the Spanish Constitution and Art. 1(5) of the Civil Code in relation to Art. 5(1) of the Judiciary Act and Arts 3 et seq. of the Civil Code). Therefore, pursuant to Art. 21(1) of the Judiciary Act and Art. 36(1) of the Civil Procedure Act, the jurisdiction of the Spanish civil courts in respect of the action instituted is to be established in the terms thereof.

In the case before us, the applicable instrument is the 1970 UNESCO Convention, as the only one that has been ratified by both Spain and Egypt.

In entering their plea for lack of jurisdiction, the defendants maintain that under Article 7b)ii) of the said Convention, diplomatic offices are the sole (exclusive) channel for States of origin (requesting States) to make a request to another State Party to the Convention (requested State) for the recovery and return of any cultural object stolen and imported subsequently to the entry into

force thereof, in which case the Spanish courts would not have jurisdiction. The plaintiff rebuts this, maintaining that the possibility of bringing an action for recovery in the courts under Spanish law is contemplated in Article 13c) of the Convention itself.

In short, the crux of the matter in this appeal and at this stage of the proceedings is precisely the interpretation of Articles 7b)ii) and 13c) of the said 1970 UNESCO Convention.

FOUR: Article 7b) provides that (…)

And for its part, article 13 provides as follows: (…)

As a matter of principle, it is worth noting the following considerations:

– The right of access to jurisdiction is an integral part of the constitutional right to effective judicial protection, and the constitutional doctrine has therefore repeatedly stated that rules are to be interpreted in such a way as to promote the efficacy of that right by favouring access to the courts and to due procedure (*principio pro actione*).

– The literal terms of Article 13 as transcribed do not permit the barring of States Party from bringing an action for recovery; under this provision, then, the parties "undertake" to "admit" an action for recovery, in a manner consistent with their laws, that is brought "by or on behalf of the rightful owners", without any exception, limitation or qualification, and therefore it must be understood that the obligation assumed by the State Party in this provision also extends to an action for recovery brought by a State, as long as it acts as the rightful owner of the cultural object claimed (*ubi lex non distingit nec nos distingere debemus*).

– Subsequently to the Unesco Convention, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects was signed on 24 June 1995 and Spain acceded in 2002. This settled the question, clearly providing the possibility for states Party to use the courts by stipulating in Art. 5(1) that "A Contracting State may request the court or other competent authority of another Contracting State to order the return of a cultural object illegally exported from the territory of the requesting State". Although this international treaty is not directly applicable to the case in point given that Egypt has not acceded, it cannot be ignored as a guide to interpretation.

But in any event, in the case before us the conflict as posed is more apparent than real.

Article 7 is applicable in cases where the State of origin of the items requests the "recovery" and return of stolen or illicitly exported objects provided that "just compensation" is paid to an "innocent purchaser" or a "person with valid title". In such circumstances the requesting State is obliged to make the request ("the request shall be made") through diplomatic offices. However, the case here does not fit the premises of this provision (inasmuch as it is precisely the existence of these circumstances that the State, here the plaintiff, denies), and it is therefore not in principle applicable. The return of the cultural property is requested through diplomatic offices in accordance with Article 7b)ii) by way of recovery, but it has not "claimed" (action to protect title against deprivation

or possession by a person other than the rightful owner and secure its return to the latter) that property.

In effect, the Arab Republic of Egypt maintains that it is the owner (holder of title) of the objects and that the defendants are in illicit possession thereof, having acquired them in bad faith, and seeks to have them obliged to hand them over (return the object to the possession of the owner); in other words, the argument is over titles and rights in the objects concerned, and the difference must be settled by due process in the courts. Let us recall that according to the consolidated doctrine, three essential requirements have to be met for such an action to succeed: the claimant must be the rightful owner, the object claimed must be identified, and it must be held by or in the possession of the defendant; the issues (the substance of the matter) are therefore the plaintiff State's ownership of the objects, the applicable law for its determination, the legality of acquisition by the plaintiff, whether the latter acted in good faith, etc., and these have to examined and resolved by the court. Furthermore, in the event of failure of the action for recovery, if the requisite circumstances are met there is nothing to prevent the Arab Republic of Egypt from requesting the recovery and return of the objects through diplomatic representations to the Spanish State, subject to the payment of appropriate compensation.

In conclusion, this is clearly the kind of action for recovery referred to Article 348 of the Civil Code, and therefore the Spanish courts have jurisdiction, pursuant to Article 13c) of the repeatedly-cited Convention, to settle the dispute."

8. Bankruptcy & insolvency proceedings

* Judgment of Alicante Commercial Court No 1, 16 June 2008 (EDJ 2008/137740)

International judicial jurisdiction to open insolvency proceedings. Plea for lack of jurisdiction entered by the debtor in connection with an application for him to be declared insolvent by a third creditor. Spanish courts competent as his centre of main interests is in Spain.

"Legal Grounds:

(…) THREE. International jurisdiction for the opening of insolvency proceedings is addressed in Article 10 of the Bankruptcy Act, which somewhat confusingly mixes the jurisdiction of Spanish courts (in fact international jurisdiction) with internal territorial jurisdiction – i.e. which particular Spanish court is competent to be seized. What is important, however, is that the first applicable instrument is Regulation (EC) No 1346/2000 on insolvency proceedings, Article 3 of which provides that jurisdiction lies with the courts of the Member State within the territory of which the centre of a debtor's main interests is situated. According to this concept, clarified in Recital 13 of the Regulation and set out in Article 10 of the Spanish Bankruptcy Act, the centre of main interests should be the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. In the case of a debtor which is a legal person, it is assumed that its centre of main interests

is in the place where it has its registered offices. Would a change of domicile six months before the application for insolvency proceedings be without effect for these purposes?

The problem is to determine whether the object of the application for insolvency proceedings has his centre of main interests in Spain.

There are two principles in this respect: i) the administration of these interests takes precedence over their location: the point is not where the interests are situated but from where the debtor administers or manages them; ii) the principle of appearance: the important thing is that this be presented to third parties as the locus of management – in other words this must be the impression given to outsiders; and iii) the principle of unity inherent in the concept of a centre – i.e. there should be only one centre of administration – which means that there would have to be geographically restricted insolvency proceedings wherever the debtor has an establishment, limited to those of the debtor's goods situate in the territory of the Member State concerned.

The centre of main interests can only be presumed to be located at the debtor's registered office in the case of a legal person, and the scientific doctrine maintains that in the case of natural persons who engage in business or professional activities the centre of main interests is where they carry on their business or professional activities; and if they do not carry on such activities, it is their habitual residence, it being assumed that is from there that they administer their assets.

FOUR. Since there is no record of Hugo engaging in any business or professional activity, his habitual residence must be taken as that centre, and for that purpose the following points are important to resolve the issue: (…)

All the facts considered, it is reasonable to suppose that Hugo's residence in Benissa is not sporadic but prolonged and probably permanent; his centre of main interests must therefore be located in that town, and consequently the Spanish courts have jurisdiction, including this commercial court since the town is situate in the province of Alicante."

11. International lis pendens

* Judgment of Seville Provincial High Court (Section 2), 15 February 2008 (EDJ 2008/2173)

Stay on divorce proceedings instituted in Spain in light of a judgment by a Court in Morocco, the country of nationality of both spouses. Grounded in Art. 9(1) of the Civil Code, whereunder the personal law of both spouses is that of Morocco.

"Legal Grounds:

(…) ONE. Having examined and considered the proceedings at first instance and the terms of the writs of appeal and opposition thereto, it transpires that after the plaintiff instituted an action for divorce, evidence was produced of a final judgment in divorce proceedings in Morocco, the country of nationality of the spouses; we must therefore bear in mind that this judgment was made

by the court competent to do so in accordance with the personal status of the spouses, which according to Article 9(1) of the Civil Code is determined by the nationality of the parties. According to this article, that is the law that must govern issues of capacity and marital status, family rights and duties and succession *mortis causa*, and Article 9(2) provides that effects of marriage shall be governed by the personal law of the spouses at the time of marrying. There can therefore be no question of continuing new divorce proceedings in the Spanish courts when a divorce decree has already been delivered by a court in Morocco, the country of nationality of both spouses; moreover, as the court whose decision is here appealed stated, the judgment delivered by the Moroccan court does not require recognition or inscription in the Civil Registry, wherefore it is our duty to dismiss the appeal and confirm the contested order in its entirety; also, in view of the special nature of these proceedings and the nature of the rights here disputed, this court makes no express award in respect of the costs of the appeal".

III. PROCEEDINGS TOUCHING ON FOREIGN NATIONALS AND INTERNATIONAL LEGAL CO-OPERATION

1. Proceedings touching on foreign nationals

* Decision of the High Court of Andalusia (Chamber for Administrative Proceedings, Section 4), 15 January 2008 (JUR 2008\371504)

Representation and defence in proceedings. Legal Aid Act.

"Legal Grounds:

(…) THREE. Hence, as we have repeatedly said, levels of meaning and concepts concerning the ideas of legal aid, representation and power of attorney are clearly being confused.

For instance, as regards legal aid, what the Law seeks is to provide a citizen seeking justice with such means of representation as are actually needed: if different counsels are required to undertake representation and defence, two counsels will be appointed; if one is enough, then only one will be appointed, as provided in Article 27 of the Legal Aid Act and consonant with the aim of minimising the cost to the pubic purse.

(…)

It is claimed that from the wording of Article 23 of the Jurisdiction Act and the use of the term "may" this is clearly a possibility which is left up to the party, who must grant a power of attorney in that respect. Our view is that this is another mistaken interpretation. For instance the term "may", as always when the verb is used in a legal provision, does not have an unequivocal meaning; to the contrary, it is highly ambiguous. The solution can only be deduced from the context and the purpose. Thus, if we are defining the requirements for representation in Administrative proceedings, the fulfilment of these requirements obviously cannot be left up to the party; nor can it be left up to the

party to define the faculties of a regulated profession. What this provision does, then, is to extend the representative faculties of counsel, always with care, as is traditional, to minimise administrative costs. When a party acts at his own expense, he may decide to engage only a solicitor or a solicitor and a barrister, but clearly the solicitor's powers to represent his client in proceedings derive not from the will of the party but from the Law.

FOUR. The power of attorney that the expelled alien is required to grant to his counsel is quite another matter, and the issue may be raised with respect to both barrister and solicitor, for in both cases one might think that in the case of *ex officio* appointment there is no obligation to pay fees but the obligation remains to grant power of attorney. However, the answer to that question, which is not a new one in connection with legal aid, is that there is no need to grant power of attorney in a relationship not founded on a prior contract with counsel.

(…)

FIVE. The fourth ground of the contested judgment maintains that without the appellant's signature on the initial writ or without his granting of power of attorney, his desire to enter the appeal is not established.

This argument we cannot entertain, as the will to appeal is made manifest by the very act of applying for legal aid. For if the mere fact of applying can suspend the statute of limitations and expiry dates in anticipation of the effects of bringing the action, we fail to see how one can argue that the will to litigate is not established. The will to litigate is demonstrated by the application for legal aid in the same terms as the granting of power of attorney. One might even say that such will is clearer in an application concerning a particular case than in a power of attorney *ad litem*, which may have been issued years before when this particular case could not have been imagined.

Moreover, we do not see why the will to litigate is established if a barrister is appointed but not if only a solicitor is appointed.

Apart from that, there is further confusion here in that the recipient of legal aid is required to give concrete instructions to his counsel, forgetting that the requirements for representation are there precisely to ensure that there are technical experts on hand to make the appropriate decisions.

For the rest, this Court has in fact laid down doctrine regarding legal aid, in Judgment 18/1995 of 24 January 1995, which says:

It must be remembered in that respect that with regard to Art. 24(2) of the Spanish Constitution this Court has followed and elaborated on the doctrine laid down by the European Court of Human Rights on Art. 6(3) of the European Convention (JECHR 9 October 1979 – Airey, 13 March 1980 – Arctic case and 25 April 1983 – Pakelli), according to which the obligation of the public authorities to provide a citizen seeking justice with legal aid is not discharged merely by the appointment or engagement of a duty solicitor, for – as the ECHR stresses, Art. 6(3) of the European Convention speaks not of "appointment" but of "aid". In short, the fundamental right of the public to legal aid cannot be allowed to degenerate into a mere ritual appointment tantamount to an absence of

effective aid, and the courts must take particular care to ensure that the right to a defence is not merely a formal or illusory one, but that the legal aid provided is real and effective (Constitutional Court Judgments 178/91, f. j. 3; 132/92, f. j. 3; 162/93, f. j. 4; 91/94, f. j. 4).

In a word, counsel must adopt an active approach, seeking the best defence for his client, and the courts must take every care to see that the aid provided is real and effective".

* Judgment of the High Court of Madrid (Chamber for Administrative Proceedings, Section 1), 15 January 2008 (JUR 2008\99641)

Representation and defence in proceedings. Legal Aid Act. Effective judicial protection.

"Legal Grounds:

(…) THREE. These conclusions do not contradict Article 2(2)e) of the Legal Aid Act where it provides that in the administrative courts and in prior administrative procedures alien citizens demonstrating lack of sufficient means to litigate shall be entitled to free legal aid and defence and representation in any proceedings that may result in denial of entry to Spain, deportation or expulsion from Spanish territory – for the provision cited is to be interpreted and applied in relation to Article 23 of the Administrative Appeal Courts Act, and hence the right to be represented by a barrister must be construed as referring to proceedings in which the engagement of a barrister is a requirement.

FOUR. The effective judicial protection claimed by the appellant, which is guaranteed by Article 24 of the Spanish Constitution, means in practice the right to have access to justice and through the proceedings to secure a judgment founded in Law. The doctrine of the Constitutional Court considers it to be a fundamental subjective public right that is bound by the laws, that is, it is neither unconditional nor absolute but is to be exercised in accordance with the legally established procedure, for it falls to the legislator to determine the organisation of the judicial activity and the proceedings through which the fundamental right to have one's petitions addressed is exercised (Constitutional Court Judgments 95 and 96/1983 of 14 November 1983, 149/1986 of 26 November 1986, 68/1991 of 8 April 1991, 145/1991 of 1 July 1991 and 190/1991 of 14 October 1991). In short, "judicial protection as an abstract concept acquires consistency and is organised in practice by means of the procedural laws whereby this right is implemented in the various judicial sectors", notwithstanding the provisions of a general nature contained in the Judiciary Act (Constitutional Court Judgments 118/1993 of 29 March 1993, 149/1995 and 176/1996 of 11 November 1996).

The Constitutional Court has consistently ruled that the right to effective judicial protection consists in securing a decision founded in Law, favourable or otherwise to the appellant's petition, and therefore that right is not infringed if the appeal is not admitted or is shelved for legal reasons whose interpretation and application to the case concerned is neither unwarranted nor arbitrary – for the appellant has not been left defenceless given that sole reason for the lack of a judicial ruling on the substance was the failure to meet the requirement to remedy the defect of representation".

***** Judgment of the High Court of Madrid (Chamber for Administrative Proceedings, Section 9), 29 January 2008 (JUR 2008\124232)

Right of a minor to effective judicial protection in a context of repatriation to his country of origin. Legal situation of an unaccompanied alien minor irregularly in Spanish territory not involving penalisation for the commission of any misdemeanour. Issue arising in administrative proceedings, thus excluding the right to effective judicial protection.

"Legal Grounds:

(…) THREE: We must dismiss the ground for non-admission of the appeal pressed before the Court by the Public Prosecution Service and the State Attorney's Office and founded on the appellant's lack of capacity to take legal action or represent himself in the original proceedings as a minor for the very reasons set out in our Judgment of 10 July 2007 in the appeal against the Court's ruling in a separate order suspending these same proceedings.

The reasoning of this Section as set forth in the said judgment is fully applicable here and thus may be usefully reproduced:

'The plaintiff's – here the appellant's – lack of capacity to act is founded on his minority on the ground that under Moroccan law (which is applicable pursuant to Art. 9(1) and (6) of the Civil Code) an unemancipated minor lacks capacity take legal action.

Despite the ample margin that Art. 18(1) of the Administrative Justice Act allows for the capacity of minors to take legal action, there is no legal provision that authorises them to institute actions like the one concerned here, however favourable a construction one places on the limitation of capacity (Art. 2 of the Minors (Judicial Protection) Act, Organic Law 1/1996 of 15 January 1996. The Court ought therefore to have compensated for that lack of capacity (Art. 7(2) of the Civil Procedure Act) using the instruments that the Act provides and in the terms set out in Art. 8 of the same Act, given that the cited procedural defect was eminently remediable.

In the present case the Madrid Region is the legal guardian of the minor and the legal action has been brought to contest the order for the minor's repatriation. There is therefore a clear conflict of interests as defined in Arts 221(2) and 299 of the Civil Code, despite the fact that the appellant denies this and maintains that its view is founded on the child's own interest. However, the conflict of interest cannot be substantiated on the basis of the objective criterion of the primacy of the child's own interest, which is the issue underlying the debate in the disputes between the child and his representative, but rather of his own subjective interest, for as Chamber 1 of the Supreme Court stressed in its judgment of 4/03/2003, "there is a conflict of interests when in the course of their duties of guardianship and protection the action of the representatives threatens the good of the minor or incapacitated person because it is contrary to the latter's subjective or personal interest".

Since the entity holding the guardianship of the alien minor and the Public Prosecution Service favour repatriation, the Court ought to have ordered the appointment of a defence counsel (Art. 8 of the Civil Procedure Act), which the party does in fact have capacity to request despite being a minor (Art. 300

of the Civil Code), notwithstanding such provisional measures as should be adopted in extraordinary circumstances of such urgency that there is materially no time for the delay that such appointment involves."
(…)".

In the same vein, note Judgment of the Madrid High Court (Chamber for Administrative Proceedings, Section 4), 8 April 2008 (EDJ 2008/106090).

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND DECISIONS

1. General principles

* Judgment of the Supreme Court (Chamber for Civil Matters, Section 1), 12 February 2008 (JUR 2008\29838)

Enforcement. Present lack of jurisdiction of the Supreme Court. Jurisdiction of Courts of First Instance.

"Legal Grounds:

1. Pursuant to Article 11 of Organic Law 19/2003 of 23 December 2003 amending the Judiciary Act, Organic Law 6/1985 of 1 July 1985 (BOE 26 December 2003), which has been in force since 15 January 2004, according to which "in civil cases Courts of First Instance shall be seized: 5) of petitions for recognition and enforcement of foreign judgments and other judicial and arbitral decisions unless jurisdiction should lie with a different court under treaties or other international rules". Therefore, given that the request for enforcement of the judgment whose recognition is sought was submitted to this Court on 25 October 2007, while the cited Organic Law was in force, this Chamber is not competent to deal with the enforcement request.

(…)

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

* Order of the Supreme Court (Chamber 1), 8 September 2008 (JUR 2008\313484)

Foreign judgment. Recognition and enforcement. Regulation 44/2001. Appealability of the decision granting enforcement. Types of possible appeals. Primacy of Community regulations.

"Legal Grounds:

(…) 2. As outlined in Court Orders of this Chamber dated 12 March 2002 (motion for admission of a denied appeal 75/2002) and 23 November 2004 (appeal 1981/2001), the conclusion reached with respect to the appealability in cassation of judgments rendered in matters of recognition and enforcement of decisions pursuant to the regime established under the Brussels and Lugano Conventions and Council Regulations 1347/2000 (now replaced by 2201/2003) and 44/2001 is not founded on the provisions contained in national procedural laws but on the primacy which supranational enactments forming part of the Community patrimony enjoy over internal enactments, a feature which in the case of international conventions concluded to meet Community goals has a dual basis, namely: on the one hand, its own nature and source (Article 93 of the Spanish Constitution), and on the other the fact that it is of the nature of a treaty (Article 96 of the Spanish Constitution). Together with this primacy, it is a characteristic feature of certain Community laws, and of Community Regulations in particular, that they are directly applicable or enforceable. As a consequence of the principles of primacy and direct enforceability of Community laws, not only are internal laws incompatible with or contrary to Community laws not applicable, but any subsequent enactments incompatible with the latter are not valid, and indeed, the authorities charged with applying the law are obliged to guarantee the full enforceability of such supranational enactments – thus there is an interaction operating between internal and Community legal systems whereby, *prima facie*, internal legality is interpreted in accordance with Community law.

The appeal in cassation established under Article 41 of the Brussels and Lugano Conventions, Article 27 of Regulation (EC) 1347/2000, Article 44 of Regulation (EC) 44/2001 and Article 33 of Regulation (EC) 2201/2003, constitutes a means of challenge specifically envisaged in Community laws, within a procedural channel that is likewise envisaged and regulated by said laws, and that is defined as closed, complete and uniform (decisions of the Court of Justice of the European Communities of: 2 June 1985, case 184/84; 27 November 1984, case 258/83; 21 April 1991, case C-172/91; 4 October 1991, case C-183/90; and 11 August 1995, case C-432/93) – a means of challenge that has a specific subject matter and content and is confined to the points of law raised in the judgment on the enforcement of the foreign decision – and only that – i.e. confined to a review of the application of the laws that govern the prerequisites and requirements for declaration of the foreign judgment's enforceability (CJEC decision of 27 November 1984, case 258/83). Accordingly, the filing of the appeal and its content prevail over internal legal provisions, by virtue of the primacy and direct applicability of Community law, in line with the designated and desired aim, which in this case is confined to attaining the Community goal of free circulation of judgments within an area of freedom, security and justice. However, the conditions, prerequisites and requirements of "proceedability" and admissibility are governed by the internal legal system, provided that its laws and any construction placed thereon guarantee the primacy and direct effect of

the Community laws (strictly speaking, the efficacy of said direct effect), and thereby make it possible for the appeal, with its own content and purpose, to proceed on that basis rather than rendering the appeal in cassation established under Community laws worthless, a simple legal provision devoid of practical application.

3. In the above-cited Court Orders of 12 March 2002 and 23 November 2004, it is taken for granted that the conditions laid down by the national Parliament and the construction placed on them by this Chamber meet the requirements of Community laws, insofar as they render the appeal in cassation envisaged therein possible, within the confines of its specific content and in accordance with the purposes to which it is geared, thereby permitting the achievement of Community goals. The requirements imposed by the already-cited primacy and direct applicability of Community regulations can be satisfied without the need of any adjustment to the interpretation and application of internal procedural rules, other than the purely formal obstacle, if any, of the category or type of decision that is pronounced on the declaration of enforceability. This assertion rests purely on the notion that since enforcement procedure is a procedural channel established by reason of the specific issue comprising the subject matter thereof and hence recourse to appeal in cassation is as laid down in the internal legal system, provided by Article 477(2) subsection three of the Civil Procedure Act, according to this Chamber's criteria of interpretation as described above, the conditions stipulated by the national Parliament for acceding to an appeal via this channel, as well as the explanation given by this Chamber as to the prerequisites for an appeal to qualify for cassation – whether because there is a contradiction with jurisprudential doctrine or there is conflicting case-law, or because it involves the application of laws that have not been in force for more than five years without a precedent having been set by this Chamber with regard to previous laws of identical or like content, and to the stipulated requirements for substantiating the propriety of cassation – are together sufficient to assure that the appeal is viable, provided that such prerequisites and requirements are met and the content demanded by Community laws is not negated, thus affording the means to achieve the aims of the appeal and the purposes that these serve.

4. Following on from the above, it is worth looking at the form of the judgment appealed in cassation. The courts have given no settled response to the question of the proper procedure for settling appeals against the judgment of a Court of First Instance that decides on the enforcement of a foreign decision pursuant to the Community laws referred to above, nor has the stance adopted by legal scholarship in this regard been uniform. Accordingly, it has been proposed that this be made subject to the formalities envisaged under Articles 951 and subsequent provisions of the 1881 Civil Procedure Act – which remain in force until such time as the International Legal Co-operation Act is promulgated (Sole Partial Repeal Provision, subsection one, rule three, of the Civil Procedure Act 1/2000, strictly as it relates to Final Provision twenty thereof) – as this is the procedure specifically established by the internal Parliament for processing

enforcement, and as it suffices to meet the requirement of rebuttal imposed by Community law. This heterogeneous approach to the matter has inevitably resulted in a diversity of types of judgment against which it is sought to bring appeals in cassation – Court Order or judgment – despite the fact that the type of judgment rendered by the Court of First Instance should determine the type that decides the appeal lodged in the Provincial High Court (cf. Articles 455(1), 456(1) and 468 of the Civil Procedure Act 1/2000). Be that as it may, however, this can in no way constitute a bar to access to the appeal in cassation envisaged under Community laws, since supranational legal provisions, whose primacy and direct applicability – their useful effect – take precedence, as has been explained, over the provisions of the internal legal system, render that circumstance irrelevant as regards the appealability of the judgment in cassation. For those purposes, there is a species of formal equivalence between such a judgment – of whatever type – and the final decisions referred to by Article 477(2) of the Civil Procedure Act 1/2000, as indicated in Court Orders of 21 January 2003, 25 May and 10 November 2004, and 17 May 2005 (appeals 841/2002, 1465/2001, 695/2004 and 3411/2001 respectively); with the necessary proviso that this avenue of appeal is solely open to judgments on the specific subject matter of the enforcement proceedings, i.e. on the fulfilment of the prerequisites to which admission of the enforceability of the foreign decision is in each case subordinated, and not on any others having a different subject matter and content, since this is imposed by the interpretation placed on Community laws by the Court of Justice.

5. Furthermore, in the above-cited Orders of 12 March 2002 and 23 November 2003, and likewise in those dated 21 January 2003, 25 May 2004, 10 November 2004 and 17 May 2005, also cited, the court examined the question of whether the requirements of the principles of primacy and direct applicability of Community laws impose the lodging of an appeal on procedural grounds against any judgment that decides on enforcement, and of whether the achievement of the purposes and aims pursued allow of such appeal, when in the internal legislation the appeal in cassation has been split into two, as in this case, giving rise to the novel extraordinary appeal for procedural infringement. In the interests of greater clarity, it is worth noting the wording of Legal Ground No. seven of said judgment – the criterion wherefor is moreover set out in Orders of 19/11/2002, 21/01/2003 and 10/11/2004, issued on the motions for dismissal of denied appeals 539/2002, 841/2002 and 695/2004 respectively – in which the matter is addressed in the following terms:

"The conclusion to be drawn is that there is no place for an appeal for procedural infringement against decisions on enforcement under the Brussels and Lugano Conventions, and Council Regulations (EC) 1347/2000 and 44/2001. The reasons that support such a conclusion are many and varied in nature, but all refer back to the official explanatory reports of these conventions, and the case-law laid down by the Court of Justice. These reasons are as follows: 1) The object pursued by the international instruments referred to is to facilitate free circulation of judgments, a primary aim of which is to simplify proceedings

aimed at securing a declaration of enforceability in the various Member States, within a conception of enforcement as an autonomous, comprehensive procedure that also extends to the sphere of appeals (CJEC Decisions of: 2 June 1985, case 184/84; 27 November 1984, case 258/83; 21 April 1991, case C-172/91; 4 October 1991, case C-183/90; and 11 August 1995, case C-423/93). Consequently, the rule relating to appeals duly brought against enforcement judgments calls for a restrictive interpretation, which would act as a bar to undesirable dilatory tactics inimical to a swift and efficacious recognitory procedure, and irreconcilable with the surprise effect inherent in the recognition system established by the supranational Parliament. 2) The enforcement procedure is structured around an autonomous, comprehensive system independent of States, which moreover rests upon principles of legal certainty and uniformity in the application of the provisions of international instruments. As noted in the CJEC Decision of 11 August 1995, "the Convention established an enforcement procedure which constitutes an autonomous and complete system independent of the legal systems of the Contracting States and, secondly, that the principle of legal certainty in the Community legal system and the objectives of the Convention in accordance with Article 220 of the EEC Treaty, which is at its origin, require uniform application of the Convention rules and the relevant case-law of the Court in all Contracting States"; and, in addition, "Uniform application of the Convention in all the Contracting States precludes parties against whom enforcement is sought in some States from enjoying greater procedural possibilities than in other Contracting States for delaying the enforcement of an enforceable judgment given in the Contracting State of origin". 3) As a result of the foregoing, international instruments limit the number of possible appeals against an enforcement judgment to two, the first of which is directed against judgments of Courts of First Instance that authorise or deny enforcement and has a plural subject matter in which there is room for points of fact and of law, and for procedural along with substantive points; the second, which is directed against the High Court's judgments, has a more limited subject matter, restricted to points of law and hence excluding points of a factual nature or relating to findings of fact, and, needless to say, those that generate a plea or motion of a procedural nature capable of delaying the course of the proceedings. 4) This complete, autonomous and independent system, which is instrumental to the aims and purposes of international instruments, is imposed on the forum by virtue of the principles of primacy and direct effect of the provisions of such instruments. The introduction to the internal legal system of review mechanisms with power to annul, which in general may have the effect of reverting actions to the moment when the procedural defect or flaw occurred, may prove contrary to said purposes, insofar as they bar or limit the objectives of simplicity and swiftness in decisions on the enforcement of foreign decisions and judgments. Such objectives serve the more general purpose of enabling the free circulation of judgments which are fully enforceable, and thus constitute enforcement-procedure guidelines which transcend the bounds of the Community legal system to become part of national procedural laws, and impose an interpretation of their provisions in line with such principles, excluding any interpretative criterion that would detract from

the effectiveness of supranational enactments. 5) It is essential to bear in mind the objective framework that the national Parliament has sought to confer on appeals for procedural breach, in which there is room not only for matters of an undeniably procedural nature, but also for others to which it has sought to afford this treatment even although their content is totally or partially substantive. Hence, findings of fact have been definitively removed from cassation and are now subject to extraordinary appeal for procedural infringement, a matter that the European Court of Justice, for its part, has placed outside the bounds of the appeal in cassation envisaged under the supranational provisions referred to. The delimitation of the content of appeals as envisaged in these instruments against the a High Court judgment therefore bars any appeal hinging on matters expressly excluded from said content. Had the national Parliament wished to strip the content of an appeal in cassation of points of fact and procedure, limiting it to points of law, and had the supranational Parliament delimited appeal against High Court decisions to points of this type, there would be no reason whatsoever to extend the scope of the latter to matters unrelated to content; on the contrary, the appeal in cassation envisaged by the national Parliament in the 2000 Civil Procedure Act conforms fully in terms of content matter to that established under international laws. 6) In addition to the above, be it said in closing that, neither from the standpoint of the ordinary legislator nor from the standpoint of constitutional requirements, is there any need of a mechanism for reviewing procedural legality in order to achieve a system of judicial protection within the ambit of the appeal in cassation or any other extraordinary appeal; and furthermore that the 2000 Civil Procedure Act has definitively opted to give the procedure a configuration that highlights its instrumental nature with respect to the legal issue that constitutes the subject matter, seeking as far as possible to prevent procedural motions from becoming the subject matter of the action." (…)".

Regarding the objection to the enforcement of a French judgment under Regulation 44/2001, note Order of Valladolid Provincial High Court (Section 1), 22 July 2008 (JUR 2008\353525).

* Order of Madrid Provincial High Court (Section 22), 19 February 2008 (EDJ 2008/122121)

Recognition of a divorce decree handed down by a court in Ecuador. Denied by reason of the wife's failure to appear in response to summons (Article 954 of the Civil Procedure Act 1881): interpreted by the Supreme Court as infringement of rights of defence. Constitutional aspect of the condition.

"Legal Grounds:

(…) THREE. […] In the case under examination, although the enforcement sought affects a judgment of dissolution of marriage by divorce, whereby points 1 and 3 of the cited provision [Art. 954 of the 1881 Civil Procedure Act] are satisfied, there can be no ignoring the fact that in the proceedings concluded by that judgment the defendant was nor present, and in our legal system that is equivalent to default of appearance.

The fact is that, as the Supreme Court has consistently maintained, the defendant's absence at the proceedings does not always bar enforcement; there are two different types of default depending on the causes of non-appearance. For instance, we distinguish between cases where the defendant, having been duly summonsed, does not appear voluntarily, either because he does not recognise the jurisdiction of the court of origin, or because it is not in his interests, or simply because he allows the deadline for appearance to pass; and other cases where failure to appear is due to ignorance of the existence of the proceedings. In view of what it signifies in terms of respect for the right to a defence, this second type constitutes a bar to recognition of the foreign judgment (Orders of 28 October 1997, 23 December 1997, 7 April 1998, 2 February 1999 and 3 October 2000 and many more).

In the present case, according to the judgment handed down by the Ecuadorian courts the wife was not summonsed to appear in the divorce proceedings either directly or through a third party who could notify her of the existence of the suit, but by announcements published in one newspaper each in Quevedo and Eaboyo because the plaintiff stated to the court that he did not know where she lived.

That judicial situation is equivalent to public notice of summons [*emplazamiento edictal*] in our procedure, which obviously does not guarantee that the defendant will be apprised of the existence of the suit. Also, it has not been proven that the judgment concluding the proceedings was directly made known to Edurne, nor can it necessarily be inferred from the reference in the complaint to her subsequent marriage, for the latter is a mere allegation entirely unsupported by evidence and Edurne's hypothetical freedom to remarry could have been the result of a judgment other than the one it is now sought to enforce.

As the Supreme Court stated in the above-cited judgments, although possibly correct according to the *lex fori*, this manner of proceeding (notification through the publication of announcements or edicts n the press) cannot rightly be considered sufficient to safeguard the defendant's rights of defence, this from the standpoint of public policy on procedure, which is necessarily linked to control of the premise set out in Art. 954(2) of the Civil Procedure Act and which, as it currently stands in the process of recognition of foreign judgments, has clear constitutional implications linking this aspect to the procedural rights and guarantees enshrined in Art. 24 of the Spanish Constitution. For instance, the Constitutional Court has repeatedly stressed the subsidiary, supplementary and exceptional nature of notice of summons by publication in Spain's internal legal system, which cannot therefore be invoked against a claim of infringement of the right to effective judicial protection, which commences with the right of access to due process and hence cannot tolerate defencelessness (Judgments 26/1999 and 34/1999).

In the present case, then, since the defendant was not personally summonsed and there is no evidence that she was aware of the proceedings, there is no basis for a claim that she failed to appear for reasons of her own interests or through voluntary relinquishment of her rights, and we must conclude that the essential requirement for upholding of the plea under Art. 954(2) of the above-cited Act is not met".

* Order of Barcelona Provincial High Court (Section 15), 24 April 2008 (EDJ 2008/135719)

Appeal against an order granting enforcement of a decision issued by a foreign court; dismissed. Defendant claims not duly summonsed and unaware of proceedings. Proven that the debtor was duly summonsed and default of appearance was due solely to his refusal to accept notice.

"Legal Grounds:

(…) TWO. According to recital 16 of Regulation (EC) 44/2001, "Mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute". (…).

Regulation (EC) 44/2001 does then lay down the taxative causes that may allow the requested court to deny enforcement of a judgment, (…).

Once the plaintiff has completed the formalities required under Articles 53 and 54, i.e. has presented an authenticated copy of the judgment to be enforced and a certificate from the court in the Member State where the judgment was delivered identifying the parties in the enforcement proceedings, the date of summons of the person convicted *in absentia* and the date of notice of the decision (Annex V), the proper procedure according to Article 41 is to immediately order enforcement; the decision may not be examined as provided in Articles 34 and 35 and the party against whom enforcement is sought may not make representations at this stage in the proceedings. Once notice of the order has been issued, the decision can be contested, as in the present case; be it said however that according to Article 45 the requested court may only deny or revoke such grant of enforcement for one of the reasons listed in Articles 34 and 35, cited earlier, and that "under no circumstances may the judgment in the Member State of origin be reviewed on its merits".

(…) again there is reiterated Supreme Court and Constitutional Court case-law according to which the mere fact of an irregularity in an act of notification does not nullify that act in the same way as failure to notify unless it entails deprivation of constitutional rights of defence; in this respect those acts designed to ensure that a party has notice of any proceedings brought against him is of fundamental importance if he is to be allowed an opportunity to defend himself against the complaint that is brought.

THREE. (…) there is not sufficient reason to overturn the appealed order and with that deny the enforcement applied for.

Regulation (EC) No 44/2001 is intended to assure that a default is not fictitious nor the result of circumstances beyond the control of the person subject to enforcement, or – what amounts to the same – that the latter was given the opportunity to intervene in the proceedings and the adversarial principle is observed. (…) they must be verified, *ex officio* if necessary, by the requested court given that they directly affect the right of defence and effective judicial protection, which is of constitutional significance according to Article 24 of the Constitution. (…).

The documents submitted state, and the subject of enforcement admits in its appeal, that upon receiving a first summons to appear before the Portuguese court within 30 days, "H., S.L." presented submissions, not only requesting service of the summons in Spanish or Catalan but also presenting its arguments against the international jurisdiction of the court, and further touching on the substance of the monetary claim lodged by the party seeking enforcement. The Portuguese court repeated its requirement that these submissions be made in accordance with the local law – that is through a solicitor and in Portuguese – but despite that the court did eventually have the party seeking enforcement present a version of the complaint in Spanish; this was sent to the subject of the enforcement, who received it in March 2004. The certification from the foreign court was therefore true, and the record shows that – as indeed is entirely natural – this new translation included a new time limit of 30 days in which to reply, with the possibility of extension for a further 30 days (it would obviously be absurd to agree to send a translation of the complaint and then set a time limit commencing upon reception of the original). There is absolutely no question here of defencelessness of the subject of enforcement. (…)

FOUR. As to the notice of judgment, the subject of enforcement denies the validity of the certificate issued by the Court of Anadia, appended by the party seeking enforcement, to the effect that notice of the judgment was duly served. And yet the documents submitted by the enforcing party in this connection show that the judgment was remitted to the company offices of "H., S.L." in Ripollet, which is the address that appeared in the proceedings and that was used in previous communications, so that the procedural rules of the country of origin were indeed followed. The fact that the court was not apprised of the fact that in the meantime the subject of enforcement had changed its domicile to Barberá del Vallés is entirely due to the latter's decision not to appear or intervene in the proceedings, and therefore there are no grounds now on which to claim defencelessness or infringement of public policy."

* Order of Madrid Provincial High Court (Section 22), 16 September 2008 (EDJ 2008/2029)

American divorce decree. Recognition and enforcement of foreign judgements in Spain. Model of the 1881 Civil Procedure Act. Denial of enforcement. Decision not final. Appeal. Dismissed.

"Legal Grounds:

(…) TWO. (…) In fact the enforcement order was issued in response to a personal action, that is a divorce suit; the obligation whose fulfilment the proceedings sought is lawful in Spain; and the letter requesting enforcement meets the requirements laid down in the country where it was issued for it to be considered authentic, as it does the conditions laid down by Spanish law to be valid in Spain.

Indeed Carlos Manuel did not appear in the US court proceedings concluded by the judgment whose enforcement is sought here, and that could in principle invoke, *a contrario sensu*, section 2 of the provision here considered given

that he was in default. However, in the present context we cannot ignore the consistent case-law doctrine whereby different types of default are identified according to the reasons for the defendant's failure to appear. Thus, on the one hand are cases where a person who has been duly summonsed – that is in accordance with the law governing the procedure – does not voluntarily appear to present a defence within the allotted time, either because he does not recognise the jurisdiction of the court of origin, or because it is not in his interests, or simply because he allows the deadline for appearance to pass; and on the other are those where the defendant fails to appear because he is unaware of the proceedings. In view of what it signifies in terms of respect for the right to a defence, in accordance with the cited provision this second type constitutes a bar to recognition of the foreign judgment (see among many others Supreme Court Orders of 8 February 2002, 11 February 200311 March 2003, 20 May 2003 and 1 March 2005).

In the present case Carlos Manuel was well aware of the divorce proceedings that his wife had brought against him in the US courts; he was duly summonsed in accordance with the procedural rules in force in the State of Illinois, as has been duly substantiated in the course of these proceedings, and therefore the impediment raised by the defendant to enforcement of the decision sought by the opposing party cannot be entertained.

On the other hand, procedural logic demands that under Article 951 of the 1881 Act the judgment whose enforcement is sought should be final, and that is not the case here. The plaintiff did not present any document along with her complaint to certify that the decision she seeks to have enforced is a final one, nor did she do so in response to the report from the Public Prosecution Service complaining that this basic requirement had been omitted, which means that in the circumstances prevailing at the time, the judgment delivered in this case against the contested decision was correct.

In the course of these appeal proceedings the appellant has sought to remedy this lack of evidence by submitting a document issued by the Illinois County Court stating that the judgment is final. However, as regards this Chamber's rejection of that untimely submission on the ground that it cannot be entertained under the provisions of Articles 270 and 460 of Law 1/2000, the fact is that, as both parties acknowledge, the defendant has not yet been notified of the judgment delivered by that court, and that is likewise required by the case-law doctrine for the requirement that the judgment be final to be met before it can be enforced. The appellant's allegations regarding the defendant's attempt to elude notification of the judgment is irrelevant in this respect given that, among other things, the plaintiff has not demonstrated that the court of origin has indeed attempted to effect such notification. (…)".

Regarding the concept of judgments delivered *in absentia*, in the same way as the present one, see Order of Barcelona Provincial High Court (Section 15), 15 July 2008 (JUR 2008\328880).

2. Family

* Order of Santa Cruz de Tenerife Provincial High Court (Section 1), 10 March 2008 (JUR 2008\164798)

Recognition of notarised deed of divorce in Cuba. Not contrary to Spanish public policy. Supreme Court doctrine on equivalence of notarial and judicial functions.

"Legal Grounds:

(…) TWO. The judgment here appealed takes the view that although legally valid under Cuban law, a notarised deed is absolutely unenforceable under Spanish law inasmuch as the declaration of dissolution of marriage by means of such a document is contrary to Spanish public policy.

Our Supreme Court has ruled on this issue on several occasions, maintaining that the conformity with Spanish public policy – in its international dimension – is complete: Art. 85 of the Civil Code contemplates the possibility of divorce regardless of how and when the marriage took place. Orders of 1 October and 19 November 1996, followed later by Orders dated 15 December 1998 and 21 February 1999, and 21 November 2000, dispelled any doubt that might arise as to whether divorces of this kind conform to Spanish public policy, inasmuch as it appears that under Cuban law the Notary's role is not confined to attestation functions and authorisation of a mutual desire to sunder a marriage tie, but he is empowered to verify certain conditions attaching to the severing of the tie and the effects ensuring therefrom as regards any common under-age children, all within the framework of a certain procedure by which all applications for divorce by mutual consent must necessarily abide. It must therefore be recognised that the Notary's role entails some exercise of probative functions in accordance with the legal system of origin, which confers powers of that kind on notaries that are apparently exclusive, and it cannot therefore be said that a divorce conducted in this manner is contrary to Spanish public policy. The latter is a concept that has grown to fully constitutional stature, embracing legal principles and rights enshrined in the Constitution (Constitutional Court Judgments 54/89 and 132/91, *inter alia*), which means that the notarised deed attesting to the divorce can be recognised, in line with the position adopted by the Chamber in cases like the present one where the divorce is granted not by a court but by an authority or public servant of a different kind who is duly authorised to discharge that function under the laws of the State of origin (Supreme Court Rulings 2/7/96, 16/7/96, 19/11/96, 4/2/97, 24/6/97, 24/11/98, 15/12/98, 30/03/99, 15/06/99, 7/09/99 and others).

Therefore, in the present case, where no common under-age children or common marital dwelling are involved, the proper course is to set aside the appealed Order; the proceedings must be continued and the Court must reach a final decision on the petition".

In this connection see Judgment of Santa Cruz de Tenerife High Court (Section 1), 28 April 2008 (JUR 2008\244171).

* Order of Santa Cruz de Tenerife Provincial High Court (Section 1), 21 July 2008 (JUR 2009\15356)

Application for recognition of a Venezuelan divorce decree. Not admitted in proceedings. Appeal against non-admission. Revocation of the decision of the lower court. The latter requires that the applicant furnish evidence of Spanish nationality. Requirement not contemplated in the 1881 Civil Procedure Act. The court concerned is obliged to grant the applicant time to furnish evidence that he possesses Spanish nationality.

"Legal Grounds:

(…) TWO. The plaintiff submits that there is no statute which establishes a need to furnish evidence that the applicant possesses Spanish nationality, and still less in the procedure provided for enforcement in Arts 951 et seq. of the 1881 Civil Procedure Act, and that furthermore he could have remedied the said lack of evidence had he been given the opportunity to do so, the Civil Registry of Orense having shelved his application for recovery of Spanish nationality on the ground that the plaintiff had not lost it upon acquiring Venezuelan nationality. He adds that he needs to have his divorce decree recognised precisely for the purpose of executing it, so that he can register his second marriage with the Central Civil Registry.

Be it said first of all that since there is no treaty with the Republic of Venezuela or any international instrument dealing with recognition and enforcement of judgments that is applicable, we must have recourse to the general rules laid down in Art. 954 of the 1881 Civil Procedure Act, which is applicable in the light of Art. 2 of the 2000 Civil Procedure Act in relation to the second Transitional Provision, and which remains in force in any case once the new Procedure Act comes into force, as laid down by section one exception 3 of the Sole Repeal Provision, since no evidence has been furnished of negative reciprocity as provided in Art. 953 of the 1881 Act (Supreme Court Orders of 26/9/2006 and 17/10/2006, for example).

The fact is that each and every one of the requirements laid down in Art. 954 are met in this case.

Furthermore, as the Madrid Provincial High Court ruled on 6/11/2007, "there is no substantive, procedural or registration-related provision that requires the marriage to have first been registered in Spain in order to grant enforcement; and if it were registered and the enforcement were granted as requested, that would bring into play the provisions regarding marginal annotations set out in Article 76 of the Civil Registries Act and Article 265 of its implementing Regulation. In all other cases – i.e. where there is no registration – in the event that the decision is favourable the provisions of Articles 951 and following of the 1881 Act will apply".

In any event, if, as his submissions suggest, the plaintiff had retained his Spanish nationality at the time the divorce decree was delivered and he still possessed it when he made his application, rather than rejecting it *a limine*

litis, the Court of First Instance ought to grant the party time to produce the evidence, thus upholding the fundamental right to effective judicial protection enshrined in Art. 24 of the Spanish Constitution and Art. 11 of the Judiciary Act, as provided in Art. 231 of the 2000 Civil Procedure Act, and continue with the proceedings, not forgetting the mandatory report from the Public Prosecution Service. (…)".

In contrast to this decision, a Judgment of the Barcelona Provincial High Court (Section 18) of 16 July 2008 (JUR 2008\314624) upheld the denial of enforcement of a Paraguayan divorce decree because the original documents relating to the marriage and the separation order were not furnished.

* Judgment of Madrid Provincial High Court (Section 14), 21 October 2008 (JUR 277928\314310)

Filiation. Foreign judgment. Enforcement. Convention of 14 November 1984 between Spain and Germany. Exceptions: lack of legal capacity, violation of Spanish public policy, defendant not summonsed, incorrect law applied to the substance of the matter, and lack of jurisdiction of the court of origin. Joinder of recognition and enforcement actions.

"Legal Grounds:

…FOUR. The appellants argue that the judgment of the Court of First Instance of Wiesbaden cannot be recognised because it was pronounced without Alberto being duly summonsed as required under Art. 16 of the Convention. For although it is on record that Alberto was notified of the judgment, albeit on "an indeterminable date", there is no record of his being summonsed. However, Alberto was in fact duly summonsed, as shown by a Certificate issued by a Commissioner for Oaths in the office of the Wiesbaden Clerk of Court and appended to the complaint, which states that, as regards the date of service, or issue of the summons where a judgment has been delivered *in absentia* and the defendant has not made a statement, the record of the proceedings that concluded with the judgment of 16 April 1991 shows that the defendant was notified on an indeterminable date. The pleas of fact in the judgment of 16 April 1991 state that the defendant, domiciled in Madrid at Calle ADDRESS000, no NUM000, flat NUM001, petitioned that the complaint be dismissed. Be it added for illustrative purposes that in the exposition of its legal grounds the Court invited the defendant – for the last time and with a two-week deadline ending on 13/11/1990 – to state whether he was willing to undergo a blood test. In other words, Alberto was indeed duly summonsed. Notwithstanding the foregoing, under the above-cited Art. 16, evidence of notice to the defendant is only required in the event that the latter does not make an appearance in the proceedings in which the judgment is pronounced, while the judgment does state, as noted, that the defendant petitioned to have the complaint dismissed. And there is nothing to gainsay that.

FIVE. The appellant considers that the ruling does not examine the issue of how the terms of Art. 6(2) of the Hispano-German Convention could have

been satisfied given that the plaintiff possesses Canadian nationality and that her personal law is determined by her nationality under Spanish rules of private international law, which are applicable to matters of filiation according to Art. 9 (1) and (4) of the Civil Code. In fact what Art. 6(2) of the Convention provides is that recognition may be denied if the Court's decision is founded on a law other than that which is applicable under Spanish Private International Law unless the latter rules would have produced the same outcome. The appellant founds his argument on the plaintiff's Canadian nationality, although according to the documents viewed in the proceedings she only acquired that nationality in 2001. As to her proper nationality at the time of the proceedings which concluded with the judgments whose recognition is sought, the documents submitted only show that she is registered as being born in Mexico and that she was a ward of the Office for the Protection of Minors of the Social Affairs Department of Wiesbaden, "as official guardian". There is nothing to suggest that at that time she possessed Canadian nationality.
(…)".

3. Succession

* Judgment of Las Palmas Provincial High Court (Section 3), 4 June 2008 (EDJ 2008/158336)

Claim for legitimate share of estate as extra-martial child of the deceased spouse and father of the defendants. Right founded on a judgment by the Austrian courts recognising filiation. Dismissed. Foreign judgment not recognised in Spain.

"Legal Grounds:

ONE. (…) However, firstly the enforceability of a foreign judgment in Spain does not depend on whether or not the opposing party accepts it, but on the proper legal procedure having been followed to secure its recognition by a Spanish court; and again, its legality or otherwise does not depend on the will of the parties but on the Spanish court's determining, as required by law, what provision, currently in force, is applicable to the foreign judgment whose enforceability is sought. In this context the terms *fuerza ejecutiva* and *eficacia* applied to a foreign judgment are synonyms, and therefore the applicable provision is Art. 523(1) of the Civil Procedure Act, which only concedes the enforceability of foreign judgments in Spain in accordance with international treaties, or failing that, with Spanish law. Hence, leaving aside the possibility that by means of the recognition procedure a foreign judgment may have the status of an enforcement order in Spain, its efficacy as distinct from its enforceability derives from the "recognition" that is secured through these procedures. In other words, without legal recognition in Spain a foreign judgment is not only not enforceable as such in Spain but is also not enforceable for purposes of *"ejecución impropia"* [*Translator's Note*: incidental actions such as notifications, injunctions, etc.] of constitutive judgments and therefore cannot be recognised as a relationship of filiation enforceable in Spain.

The first question, then, is to determine what legal rule is applicable. Be it said that depending on the answer to that question failure by the defendants to contest the complaint may in fact lead to immediate recognition of the enforceability of a foreign judgment that satisfies certain formal requirements. But that only holds for cases falling within the scope of Regulation (EC) 44/2001, which is not the case here given that, as the appealed judgment rightly pointed out, that regulation is not applicable to documents drawn up since it came into force, as Art. 66 of the Regulation provides.

The norm in force at the time of the foreign judgment was therefore the bilateral Convention of 17 February 1984 between Spain and Austria. In this respect be it said firstly that the Convention is not applicable in any event since for purposes of filiation Art. 8 required that if the defendant did not hold the nationality of the court issuing the judgment – in this case Austrian – he must at least be domiciled in the country, and in this case the defendant was Spanish and domiciled in Spain; and secondly the Convention itself, in Art. 13(2), required that the enforcement procedure conform to the law of the State where enforcement is sought. Hence, either way we are forced to consider Arts 951 et seq. of the 1881 Civil Procedure Act, which require a specific procedure for recognition of a judgment, called *"homologación"* [recognition, certification], and which further require, *inter alia*, that the foreign judgment not have been delivered *in absentia*. Therefore, given that the necessary recognition procedure was not followed to substantiate the filiation on which the legitimacy of the plaintiff's claim is founded for the purposes of Spanish law – which legitimacy and filiation were denied in the answer to the complaint – it is clearly our duty to confirm the appealed judgment, since the foreign judgment cited in evidence of the plaintiff's legitimacy has no force in Spain for the purpose of substantiating the alleged filiation.

And finally, we must point out that there is neither inconsistency nor violation of the dispositive principle in the judgment as delivered – impediments oddly enough raised by the defending party but not by the appellant – for the issue of enforceability of the judgment as a requirement of active legal capacity was in fact the sole exception, and in any event was the one that would have to be examined before considering the merits, which was opposed by the defendants. It is not therefore a matter of deciding whether the claims made in the complaint regarding preterition and his legitimate share of the deceased's estate are lawful or not, for we cannot examine the substance of these claims without evidence that the plaintiff possesses active legal capacity as a son of the deceased, and if that legal capacity is not admitted, then we neither can nor should make any decision on actions bearing on the substance of the matter.

6. European enforcement order

* Order of Almería Provincial High Court (Section 3), 30 July 2008 (JUR 2009\9418)

European enforcement order. Opposition to enforcement. Austrian judgment written in German and certificate of enforcement order written in Spanish. Document duly authenticated by the issuing body. Application denied.

"Legal Grounds:

(…) TWO. The appellant's first ground of appeal is that the contested decision did not strictly comply with the terms of Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, published in the Official Journal of the European Union on 30 April of the same year. The argument is that the court accepted as valid the European enforcement order issued by the Provincial Court of Wels (Austria) in connection with a final judgment delivered on 21/03/2005 ordering the appellant to pay the plaintiff € 42,701.40 plus interest and costs, despite the fact that the certificate was issued by the Austrian court directly in Spanish, contravening Art. 9(2) of the above-cited Community Regulation, according to which "The European Enforcement Order certificate shall be issued in the language of the judgment". The appellant argues that the decision ought to be set aside since it does not satisfy the conditions required by law for it to be considered a genuine European enforcement order certificate and therefore does not satisfy the requirements for enforcement thereunder and as such is null and void under Art. 559(1)3) of the Civil Procedure Act.

Before anything else we should point out that Regulation No 805/2004 was issued for the purpose of abolishing the exequatur procedure, for as Recital (18) notes (…). To that end, if the minimum procedural requirements are met, courts competent to verify such compliance must issue a standardised European Enforcement Order certificate that makes that scrutiny and its result transparent; application for the certificate must be optional for the creditor (Recital 20), who may instead choose the system of recognition and enforcement under Regulation (EC) No 44/2001 or other Community instruments. However, given that with its answer to the appeal the plaintiff has submitted a European Enforcement Order certificate and the appellant's case is simply that it disputes the original court's recognition of the validity of the said certificate, which was issued by an Austrian court, the present dispute must be settled on the basis of the terms of the Regulation.

Regulation (EC) No 805/04 governs the creation of a European Enforcement Order for uncontested claims, this meaning situations in which a creditor, given the verified absence of any dispute by the debtor as to the nature or extent of a pecuniary claim, has obtained a court decision against that debtor. Such failure to contest may consists, *inter alia*, in failure to appear at the hearing or failure to reply to an invitation by the court to present written submissions (Art. 3(1)b).

A judgment which has been certified as a European Enforcement Order in the Member State of origin shall be recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition (Art. 5).

THREE. From the standpoint of the above-cited regulations the first ground of appeal cannot stand, for although Art. 9 of the Regulation provides in a general way that an enforcement order certificate must be issued in the language of the judgment, the fact that the certificate was issued in Spanish and not German – the language of the judgment whose enforcement is sought – does not warrant so serious a consequence as the one proposed by the appellant, to wit invalidation, as the certificate submitted by the plaintiff is not a mere translation of the original but was issued directly in Spanish by the Austrian court and has been duly authenticated and signed by the Clerk of Court. Consequently, the procedural requirement laid down in Art. 20(2) of the Regulation has been fulfilled inasmuch as the certificate satisfies the conditions necessary to establish its authenticity. Furthermore, the fact that the order is drafted in Spanish rather than in the language of the judgment can occasion no harm to the debtor inasmuch as it was issued for enforcement by a Spanish court and the defendant is a legal person registered and domiciled in Spain, as attested by the notarised power of attorney for lawsuits accompanying its objection to enforcement.
(…)".

7. Enforceability of foreign public documents

* Decision of Madrid High Court of Justice (Chamber for Administrative Proceedings, Section 3), 3 June 2008 (RJ 2008\268316)

Residence permit. Authenticity of foreign document. Refused because the extract from the judicial record presented is not in the form required in the country of origin and furthermore lacks the Apostille.

"Legal Grounds:

(…) TWO: (…) along with his application for a resident's permit under exceptional circumstances, in order to satisfy the stipulated requirement the appellant submitted an extract from the judicial record issued by the Nigerian police, legalised by the Nigerian embassy in Madrid and translated from English into Spanish, according to which there was no record of any criminal conviction against him in Nigeria, (…).

(…) the extract from the judicial record does indeed present two deficiencies; in the first place it has not been legalised through diplomatic channels, first by the Spanish Consulate in the country where it was issued and then by the Ministry of Foreign Affairs and Cooperation, a necessary step in that Nigeria is not a signatory of the Hague Convention of 5 October 1961, for which legalisation by the Nigerian embassy in Madrid is not an acceptable substitute; and secondly, there is no evidence that it was issued or drawn up in accordance with the rules and regulations of Nigeria – be it remembered in this connection that according to Arts 217 and 281(2) of the Civil Procedure Act the substance and currency of a foreign law must be proven, and the applicant must furnish evidence of the facts, and in this case also of the foreign Law on which his application is founded.

The appellant, then, has not furnished sufficient evidence to support his claim that there is no regulation governing the procedure for issuing extracts from the judicial record in Nigeria, and much less that such a certificate may be issued in the form in which it has been presented here.

Clearly the extract from the judicial record submitted by the applicant must have been issued in Nigeria without his fingerprints being taken at the time by the police in the country of issue, as it does not appear that the applicant has travelled to Nigeria, there being no Spanish entry or exit stamps on his passport; furthermore, we have no way of knowing how the fingerprints accompanying the extract from the judicial record were taken or checked, there being no record of their having been taken by a Notary or sent to the Nigerian police headquarters for verification before the certificate was issued.

(…) there being no evidence that the extract from the judicial record submitted by the applicant was issued with due regard for the regulations laid down in the country where it was issued, and absent the legalisation or Apostille and other requirements for acceptance as authentic in Spain, it cannot be accepted as adequate proof that the applicant has no criminal record in his country of origin (…) the Civil Procedure Act, which requires that for a foreign public document to be accepted as such in the absence of an international treaty or convention or treaty or special law, it must satisfy the following requirements: 1) it must have been granted or drawn up in accordance with the requirements laid down in the country of issue to be fully acceptable as evidence in court, and 2) it must contain a legalisation or Apostille and meet all other requirements for admission as authentic in Spain."

* Order of Madrid Provincial High Court (Section 19), 13 June 2008 (EDJ 2008/140678)

Foreign public document. Notion. Enforceability in Spain. Law applicable to the form of acts and documents. Parameters for action of a Spanish notary.

Legal Grounds:

(…) TWO. Art. 323(1) of the Civil Procedure Act provides that for procedural purposes foreign documents shall be considered public documents if in accordance with international treaties or conventions or special laws they are to be recognised as having the probative value set out in Art. 319 of this Act; taken in conjunction with the Hague Convention, whereby to be considered public for purposes of evidence in proceedings, documents "must be legalised by a Notary as required by law", it seems unlikely that in cases like the present one the Spanish courts can do more than check that the document is a valid one and that it satisfies the formal legal requirements for enforceability. In addition, according to Art. 9(11) of the Civil Code "the personal law of legal persons is determined by their nationality and is applicable in all matters relating to capacity, incorporation, representation (…), and according to Art. 10(11) of the Code, "legal representation shall be subject to the law applicable to the legal relationship on which the powers of the representative are founded…"

According to the document founding the representative's relationship with the company, appended to the record of the hearing, the notary certifies the capacity of the company's representative and adds that he checked the company Bylaws to be sure that the representative is a managing partner and to determine his powers. To provide additional legal justification under Spanish law as requested is beyond the remit of the Spanish court given that such a document issued abroad – in this case in Lisbon – is both valid and enforceable.

V. INTERNATIONAL COMMERCIAL ARBITRATION

1. General principles

* Judgment of the Supreme Court (Chamber 1), 16 May 2008 (EDJ 2008/73106)

Maritime salvage. International maritime arbitration. Arbitration to be held in London. Exception from arbitration. Upheld.

"Legal Grounds:

(…) TWO. (…) the challenged judgment has been appealed on the ground that the two defending parties had not tacitly submitted to the jurisdiction of the Spanish courts. In fact these three grounds do not challenge the interpretation and enforceability of clause 5 of the bills of lading as express submission by the parties to the court in Rotterdam, but taking the process back a step maintain that there was tacit submission to the jurisdiction of the Spanish courts and therefore that tacit submission must prevail over any contractual clause of express submission.

The first ground, citing paragraph 1 of Art. 1692 of the 1881 Civil Procedure Act, claims infringement of the legal and jurisprudential doctrine on tacit submission, albeit the judgments of this Chamber cited as containing the infringed doctrine (…)

(…) would in this case mean the defendants' tacit submission to the Spanish courts; this Chamber unanimously supports the doctrine that a plea to the jurisdiction is the only possible way to substantiate the absence of territorial jurisdiction in small claims procedures; and finally, the jurisdiction of the Spanish courts has been declared invalid by virtue of submission to arbitration in London as stipulated in the salvage agreement when in fact the complaint was founded on the contract of carriage by sea.

(…) the jurisdiction of the Spanish courts is denied in any case, whether by reason of the submission to arbitration in London as stipulated in the salvage agreement or of submission to the competent court of Rotterdam as stipulated in the bills of lading under the contract of carriage by sea. (…).

(…) the basic reasons for rejecting the stage-by-stage approach of the appellant are as follows:

1. That the 1968 Brussels Convention is applicable as it was in force at the time is neither deniable nor denied, given that the carriage by sea was arranged

in 1995, that at least one of the parties – the consigner insured by the present appellant – was domiciled in Spain, and the submission made was to the courts of Rotterdam, that is of an EC Member State (Art. 17 of the Convention). (…)

5. (…) lack of international jurisdiction may be claimed beforehand in the writ containing the defence on the substance of the action.

6. In short, the proper approach to lack of international jurisdiction is more akin to that of submission to arbitration than to that of territorial jurisdiction between Spanish courts, and the fact is that in the wake of the judgments of 18 April 1998 and 1 June 1999 the unbending jurisprudence regarding the impossibility of challenging a submission to arbitration if not substantiated before replying to the complaint, and quite independently of the defence on the substance of the action, evolved into a flexible approach, still valid today, similar to that of the CJEC in the case of lack of international jurisdiction.

(…) along with its complaint the plaintiff had submitted a number of bills of lading completed only on the one side, and most importantly, the first legal ground, expressly headed "Jurisdiction and Competence", invoked and transcribed clause 5 of the bills of lading, that is the clause whereby any actions against the carrier were to be submitted to the competent court in Rotterdam, and treated it as express submission as provided in Art. 57 of the 1881 Civil Procedure Act, upholding its validity under both the 1924 Brussels Convention for the unification of certain rules on matters of bills of lading, and the 1968 Brussels Convention cited above. The fact that the petitions contained in the said answers to the complaint did not include an express request for admission of the plea of lack of international jurisdiction but simply asked for blanket dismissal of the complaint does not mean that such plea was not clearly set out prior to the defence on the substance of the action – so much so indeed that not only did the courts in both instances consider the case and require an express reply to the plea offered in defence, but they also took the view, in light of the terms of the answer to the complaint, that it would have been illogical not to address the plea as if it had not been offered.

THREE. (…) challenges the judgment here appealed on the ground that the Spanish courts lack international jurisdiction, citing the express submission to the competent court in Rotterdam contained in clause 5 of the bills of lading, without even inquiring into the validity and enforceability of that clause.

(…) It is therefore hard to believe that they were unaware of and did not consent to the conditions of carriage set out on the back of the bills of lading, and in fact kept from the attention of the Spanish courts by the appellant in its complaint, when the fact is that both the manner in which such conditions are included and the submission clause 5 itself are usual in maritime trade.

FOUR. (…) argues that clause 5 of the bills of lading is "not equitable" and hence unenforceable in that it establishes the international jurisdiction of Rotterdam solely for purposes of actions against the carrier. According to the appellant, this clause, which was imposed by the carrier, obliged the other party to bring action in Rotterdam while the carrier was free to bring actions as and where it suited it."

* Judgment of Madrid Provincial High Court (Section 15), 23 April 2008 (EDJ 2008/169170)

International jurisdiction of Spanish courts in respect of the validity of an arbitration clause. Also, the judgment confirms that the clause of submission to arbitration in the event of a dispute agreed between the parties is valid and enforceable and is not contrary to public policy.

"Legal Grounds:

(…) TWO. The defendant grounds its appeal on the following arguments: first, the Barcelona Commercial Court *a quo* lacks jurisdiction according to Article 65(2) of the Civil Procedure Act inasmuch as the agreement whose termination is opposed by the plaintiff in the complaint giving rise to these proceedings contains a clause expressly stipulating the submission of any dispute arising from the agreement to the IFTA Arbitration Tribunal, with the exception of an application for provisional measures, which may be made to the Spanish courts, and moreover the said clause has been declared valid by the lower court; second, MIRAMAX neither tacitly nor expressly agreed in its application for provisional measures to submit to the Spanish courts, while LAURENFILM appeared before the arbitration tribunal and entered a plea of lack of jurisdiction; third, under Article 65(3) of the Civil Procedure Act and Article V(1)e) of the New York Convention the lower court lacks objective competence to examine the validity of the arbitration clause as a question of public policy relating to arbitration, which is the exclusive province of the court (Court of First Instance no 10) that conducted the proceedings for enforcement of the arbitral award requested by MIRAMAX and of the courts of the country where the arbitral award was given (US courts).

(…) we should note that the Spanish courts are competent to examine the validity of an arbitration clause, under Art. 2 of the Judiciary Act, and more particularly in accordance with the express recognition of jurisdiction to examine the non-validity of the arbitration agreement provided in Article II(3) of the New York Convention on recognition and enforcement of foreign arbitral awards of 10 June 1988; in force in Spain since 10 August 1977, this provides as follows: (…).

The Spanish courts must examine the validity of the arbitration clause in the light of Spanish law, with particular reference to the flexible rule on the validity of arbitration clauses, whereby a clause is valid if it complies with any of three regulations listed as alternatives in article 9(6) of the Arbitration Act, Law 60/2003 of 23 December (LA): (…), which is also applicable to international arbitration even if the venue of arbitration is not in Spain (Art. 1(2) LA).

Hence the original Commercial Court is competent to examine the validity of the arbitration clause, and the defendant's ground of appeal must therefore be dismissed.

THREE. It is another matter altogether when the arbitration clause is raised as an issue in proceedings to oppose the enforcement of a foreign arbitral award. (…).

In that case the jurisdiction of the Spanish courts for purposes of enforcement in Spain of arbitral awards delivered outside Spain is derived from merits, in addition to Article 22(1) of the Judiciary Act and Articles 1(2), 8(6) and 46 of the Arbitration Act, the last of which cited the 1958 New York Convention as the rule applicable to enforcement.

Hence, the Spanish court must examine the applicability of the arbitration clause in the light of Article V of the 1958 New York Convention, which contains a weighted list of grounds for opposing recognition and enforcement by a Spanish court of an arbitral award delivered outside Spain.
(…).

FOUR. Having regard to the appeal brought by the plaintiff, the first thing is to examine the ground of appeal founded on the invalidity of the arbitration clause (…).

The plaintiff/appellant claims that the clause of express submission to the IFTA (Independent Film & Television Alliance) arbitral tribunal is abusive and hence void (…) and argues that the arbitration clause at issue is null and void as a general condition of the agreement in that it infringes to the plaintiff's detriment the national rules guaranteeing equality of the parties and the right to an impartial arbiter.

"FIVE: (…) As regards the invalidity of the arbitration clause as partial (…) the fact is that the partiality of the arbitral institution argued by LAURENFILM on the basis of the relationship between the IFTA and MIRAMAX has not been established. (…)."

Appeal for annulment of award

* Order of Alicante Provincial High Court (Section 5), 28 May 2008 (EDJ 2008/137612)

Order admitting a plea of lack of jurisdiction based on submission to arbitration; upheld. Clause of agency agreement considered null and void in the terms of the Agency Contract Act, which provides that jurisdiction for examination of actions arising from such agreements lies with the agent's place of domicile and that any agreement to the contrary is invalid–

"Legal Grounds:

ONE. (…) The agreement in question is titled "general sales agency agreement", (…).

The defendant entered a plea of lack of jurisdiction on the ground that according to clause 15 of the agreement the issue had to be put to arbitration, which argument was accepted in the order here appealed.

TWO. (…) In the second place it is claimed that the clause of submission to arbitration by the Geneva Chamber of Commerce infringes Spanish law and is invalid under the sole additional provision of the Agency Contracts Act, Law 12/92 of 27 May, and objection is further made to the applicability of Portuguese law likewise referred to in the appealed order, based on clause 14 of the agreement of 1 May 1986.

The agency (…) agreement (…) is indeed governed by Law 12/92 of 27 May on agreements of this kind.

The additional provision of this Act expressly provides that jurisdiction to be seized of actions arising in connection with an agency agreement lies with the courts of the agent's place of domicile and that any agreement to the contrary is null and void.

In a case of this kind the above-cited order reasons as follows: This provision must be treated as a matter of public policy, not only because it seeks to assure that proceedings are conducted by the most appropriate court (the agent's place of domicile is normally the place where he carries on his business, where the evidence of the facts at issue is to be found, etc.) but also because it seeks to protect the interests of the economically weaker party, an aspect of undoubted relevance here in that the submission to arbitration was arranged to the sole benefit of the principal, was imposed by the latter and entailed serious inconvenience for the agent, who would be obliged to travel to Switzerland to settle issues arising from an agreement concluded and performed in Spain.

Consequently, the arbitration clause must be considered null and void (Article 6 of the Civil Code) and cannot be invoked in support of jurisdiction for the purpose of application of Article 17 of the agreement relating to jurisdiction and the enforcement of decisions in civil cases done at Lugano on 16 September 1998; and hence international jurisdiction must be governed by Article 22(4) of the Judiciary Act, whereunder Spanish courts have jurisdiction in respect of all "actions relating to the operation of a branch, agency or commercial establishment when this is situate in Spanish territory". These arguments are fully applicable to the clause attributing competence to the Geneva Chamber of Commerce, and therefore the said order is hereby revoked."

2. Annulment of award

* Judgment of Madrid Provincial High Court (Section 9), 5 May 2008 (JUR 2008\177811)

Action for annulment. – Award contrary to public policy. – Lack of arbitral independence: action inappropriate. – Conversations resulting in the merging of the law offices of one of the arbiters with those of one of the parties. – Decision made prior to the commencement of said conversations. – Annulment inappropriate.

"Legal Grounds:

(…) TWO. (…) we must stress the international character of the award, whose annulment is sought under Art. 3 of the Arbitration Act on the ground that all the conditions required by that article are met, the two parties being domiciled in different States and the award affecting international trade; however, since the challenged award was made in Spain, Spanish law is applicable under Art. 1 of the cited Act, which provides that the said Act shall apply to arbitration taking place in Spanish territory, whether domestic or international, albeit the ITC Regulations must be taken into account in examining the appropriateness of the arbitration procedure. (…)

FIVE. (…) we must differentiate between arbitral impartiality and arbitral independence, i.e. his impartiality and his obligation to be and remain independent of the parties. Having regard to the claim that the arbiter has failed in his duty of impartiality, we must begin with the fact, substantiated in the record of proceedings, that the award was unanimously approved by all three arbiters. The draft of the award was submitted to the Office of the Clerk of Court on 10 March 2006 preparatory to its examination by the Court as provided in Art. 27 of the ITC Arbitration Regulations, and in the case in question, as stated by the witnesses who declared in the proceedings – two of them members of the arbitral tribunal, especially José Fernando Merino Merchan – only purely formal aspects of the proceedings were examined, from which it follows that in the present case there was no lack of impartiality on the part of the presiding arbiter such as to cause annulment of the award as contrary to public policy; for while the record shows – and this decision considers proven – that prior to the definitive signing of the award there was a professional relationship between the law office in which the president of the arbitral tribunal was a partner and the law office counselling one of the parties in the proceedings, the arbitral tribunal had already arrived at a unanimous decision and remitted it to the Office of the Clerk of Court before the first contacts took place leading to the merger of the two law offices. From this standpoint the arbiter's impartiality cannot be said to have been affected by such contacts, and from the same perspective the award cannot be considered null under Art. 41(1) of the Arbitration Act since both objectively and subjectively, when the arbitral tribunal adopted its decision there were no contacts between the two law offices. This issue has to be examined not on the basis of merely formal aspects such as the date on which the award was formally announced, but on the date on which the tribunal settled the dispute between the parties and remitted its award to the Office of the Clerk of Court for examination, both of which took place before the first contacts between the two law offices.

SIX. (…) Art. 41(1)d) (…) requires (…) that the party seeking annulment not only state a ground for annulment but that it and not the opposing party prove a flaw or defect in the arbitral proceedings that in its opinion warrants annulment of the award.

(…) under Art. 7 of the Regulations of International Arbitration and Art. 17 of the Arbitration Act, not only must any arbiter be and remain independent of the parties but he must also immediately report in writing to the Office of the Clerk of Court and to the parties any event or circumstance arising in the course of the arbitral proceedings that might cause the parties to doubt his independence.

(…) Having regard to the relevance of these events and whether the arbiter concerned ought to have reported them to the Office of the Clerk of Court and the parties despite the confidential treatment that such negotiations merit, considering that the arbiters must not only be really independent of the parties but must also maintain the formal or external appearance of such independence to prevent any doubt arising as to their independence or impartiality, events like

the negotiations in progress between the two law offices – the office in which the arbiter was a partner and the office that was counselling one of the parties – are sufficiently relevant to require reporting to the parties in performance of the obligation laid down in Art. 7 of the ITC Regulations and Art. 17 of the Arbitration Act; and such omission cannot be justified by the scale or extent of the connection between the law offices concerned or by arguing that there was no conversation between the two offices, since the lawyers and persons negotiating the merger were not the same as the ones counselling one of the parties in the arbitration proceedings.

Nonetheless, we need to determine whether the breach of that obligation necessarily renders the award null under Art. 41(1)d) of the Arbitration Act on the ground that the arbitration proceedings were not conducted in accordance with the terms of the agreement between the parties, i.e. under the ITC Arbitration Regulations, since that relevant fact was not reported by the arbiter. As regards this issue, it is also the case that not all breaches of arbitral procedure can or should cause the annulment of the arbitration proceedings; the breach must be a basic one having a major effect on the conduct of the proceedings, affecting either essential rules of arbitral procedure or basic principles of arbitration.

Given the obligation of the arbiters to be and remain independent and impartial with respect to the parties, we need to determine whether the failure to fulfil the obligation to give notice of events occurring subsequently to the appointment of the presiding arbiter in the present case is to be considered essential or transcendental as regards the propriety of the arbitration proceedings.

(…) that event did not affect the arbiter's impartiality inasmuch as the arbitral tribunal had already reached its decision when these events took place. The negotiations commenced after the draft award had been remitted to the Office of the Clerk of Court on 10 March 2006, that is prior to the commencement of the negotiations, and therefore the fact that the parties were not advised of this is neither sufficiently transcendent nor important to warrant annulment of the award, (…) even although the award was not formally signed and notified to the parties until after the negotiations had commenced. (…)."

VI. DETERMINING APPLICABLE LAW: SOME GENERAL ISSUES

1. Proof of foreign law

* Judgment of Badajoz Provincial High Court (Section 2), 23 April 2008 (EDJ 2008/178646)

Invocation and proof of foreign law by the parties. Meaning of proof of foreign law. Subsidiary application of Spanish law.

"Legal Grounds:

(…) THREE. As regards the applicability of a foreign law, the jurisprudence is very clear, uniform and categorical: the foreign law must be adequately and

reliably proven by the party invoking it. The legal provision on which the case-law is based is Art. 12(6) of the Civil Code. (…).

(…) the applicability of foreign law is a matter of fact and as such must be invoked and proven by the party invoking it; evidence must be furnished of the exact nature of the law currently in force, and also of its scope and official interpretation, in such a way that its application will leave no room for any reasonable doubt on the part of the Spanish courts. All this must be based on the relevant reliable documentary evidence. The habitual practice is that if the Spanish courts are unable determine the applicability of a foreign law with absolute certainty, their judgment and verdict must be founded on Spanish law – judgments of 28 October 1968, 4 October 1982, 15 March 1984, 12 January and 11 May 1989 (…).

FIVE. (…) also, the appellant has not furnished evidence of the interpretation and case-law regarding the statute concerned handed down by the courts of that country, as required under Art. 126 of the Civil Code and Art. 281(2) of the Civil Procedure Act and the interpreting case-law."

* Judgment of Madrid Provincial High Court (Section 18), 20 May 2008 (EDJ 2008/115426)

Proof of foreign law. Invocation and proof by parties. Subsidiary application of Spanish law in the event of inadequate proof of foreign law. Spanish law not applicable in the present case; in the view of the court this was a case of marriage of foreign nationals outside Spain.

"Legal Grounds:

(…) TWO. (…) "Be it noted in the first place that while Spanish judges are under no obligation to be familiar with foreign law as such knowledge falls outside the scope of the general principle of *iura novit curia*, the rules of conflict regulating the private law applicable to this particular case are part of the internal legal system and as such the courts must be familiar with and apply them. That said, regardless of which law – German or Spanish – is in fact applicable in the present case given the nature of the action, there is no point of reference for the infringement claimed in this ground given that, even if the applicable law were German, for instance, according to the rule of conflict applying to the case in point – be it Art. 9(1) or Art. 9(2) of the Civil Code EDL1889/1 – given that Spanish judges are not obliged to be familiar with German law, the parties must prove that such a law exists and is in force, since "if a foreign law is to be applied in the proceedings, its currency and content must be proven (judgments of 11 May 1989, 7 September 1990, 23 March 1994, 25 January 1999 and many more). The reason for this is that neither the court nor the parties can be required to be familiar with it, unlike Spanish law, in accordance with the *iura novit curia* rule (Articles 1(7) and 6(1) of the Civil Code)" – Supreme Court Judgment of 10 June 2005 – or that "the applicable foreign law must be specified and furnished to the court (see *inter alia* Judgment of 31 December 1994), as it falls outside the scope of *iura novit curia* and must conform to Article 12(6) of the Civil Code, whereby the person invoking the foreign law

must furnish evidence of its content and currency by means of proof admitted in Spanish law, notwithstanding all of which in its examination the court may use whatever means of verification it considers necessary" – Judgment of 9 February 1999.…". In this connection Art. 281 of the Civil Procedure Act requires that the foreign law be proven; thus, paragraph 2 of the article specifies (…). Leaving aside the issue of the amendment to paragraph 2 of Art. 12 by the new Act, and likewise whether proof of the law may be undertaken *ex officio* under the new legislation, the fact is that the foreign law must be fully accredited, and in that respect the traditional doctrine of the Supreme Court applies as regards the need for the foreign law to be fully proven, and likewise its applicability to the dispute as claimed. The case-law contains rulings which confine themselves to a literal interpretation of Art. 12(6), declaring that the content and currency of the foreign law must be accredited; examples include Supreme Court Judgments of 4 Oct. 1982, 13 Apr. 1990, 19 Nov. 1992 and 31 Dec. 1994, the last of these adding the obvious requirement that "its applicability to the case in point" must further be demonstrated."

This requirement can be found in numerous judgments, which declare that "the exact nature of the current law, and likewise its scope and official interpretation, must be accredited" (Supreme Court Judgments of 13 January 1989, 10 July 1990, 7 September 1990, 16 July 1991, etc.); they further add that the accreditation of these requirements must be such that "the Spanish courts harbour no reasonable doubt" as to the applicability of the foreign law, as noted in the cited judgments, or require that the said law "be proven with certainty in the proceedings" (Supreme Court Judgment of 23 March 1994) or grounded "with absolute certainty" (Supreme Court Judgment of 11 May 1980).

There is also a strong body of case-law to the effect that with regard to proof of the foreign law by the parties, expert opinions are required from two jurisconsults having the nationality of the country whose law it is proposed to accredit. (…)

(…) on other occasions the documentary evidence has been deemed insufficient to prove the foreign law. (…) "a report drawn up at the behest of the appellants is not sufficient…to accredit the foreign statute, (…).

In the present case it is merely alleged that Peruvian law is applicable, on the ground that the Peruvian legislation regulating marital economic arrangements, which would apply to the plaintiff and one of the defendants, is analogous to community of property, and in particular that the acquisition of property within a marriage confers a right of consort therein. The fact is, however, that neither the currency nor the existence of the Peruvian law invoked has been proven or accredited, and nor has its applicability to the case in point in the form claimed. Not only is there lacking an opinion from two jurisconsults or lawyers practising in Peru, but the plaintiff has not even submitted any kind of official certificate to substantiate the currency and existence of the provisions whose application is sought, which documents ought to have been submitted along with the complaint (…).

THREE. (…) the solution in the event that the existence of the foreign law is deemed not to have been proven is not to absolve the defendants but to settle the issue under the rules of Spanish law. This ground can certainly not be admitted; Peruvian civil law and the rules governing marriage that it contains cannot be applied, nor is there any reason to apply the marital rules of the Spanish Civil Code to a marriage not constituted by Spanish nationals nor governed by or contracted under the rules of that Code but only the rules governing obligations and contracts, or failing that rules governing rights of ownership; in no way can these be construed as meaning that the plaintiff has any right of ownership in the property acquired by her spouse, and there is certainly no question of there being a community of property since the marriage is not governed by the Code and the rules governing Spanish marital economic arrangements do not apply."

* Order of Barcelona Provincial High Court (Section 18), 13 June 2008 (EDJ 2008/169569)

Applicability of foreign law. Invocation of foreign law by the parties; proof of its currency and interpretation.

"Legal Grounds:

ONE. Under Article 12(6)2 of the Civil Code the person invoking the foreign law must furnish evidence of its content and currency by means of evidence permitted in Spanish law; however, the court may avail itself of any means of ascertainment that it deems necessary and may issue any instructions necessary therefor. This provision is similar to that of Article 281(2) of the Civil Procedure Act, as a result of which the Supreme Court (Judgment of 4 July 2006) and the doctrinal commentaries on it have adopted the traditional view whereby the foreign law is treated as a fact and hence must be alleged and proven; it is thus necessary to furnish evidence not only of the exact nature of the current law but also of its scope and official interpretation, so that in the event that such evidence is not forthcoming, Spanish law must apply (Constitutional Court Judgments 10/2000; 155/2002 and 33/2002) and Supreme Court Judgments of 11 May 1989, 7 September 1990, 23 October 1992, 9 February 1999 and others).

(…)".

In the same vein see Judgment of Tarragona Provincial High Court (Section 1) of 15 April 2008 (EDJ 2008/101775); Judgment of Tarragona Provincial High Court (Section 1) of 29 April 2008 (EDJ 2008/101768).

* Judgment of Barcelona Provincial High Court (Section 18), 3 June 2008 (EDJ 2008/135904)

Invocation and proof of foreign law. German law. Impossible to apply as legal separation is not recognised. Spanish law applied subsidiarily. "Codi de Familia" applied since the parties' last place of residence was Catalonia.

"Legal Grounds:

(…) TWO: Art. 12 of the Civil Code provides that rules of conflict may be applied *ex officio*. Art. 9 of the Civil Code states that the personal law applicable to natural persons is that of their nationality; it is that law that governs their capacity and their marital status, their family rights and duties and succession *mortis causae*; it adds that annulment, separation and divorce are to be governed by the law determined by Art. 107 of the Civil Code, that is the national law common to the spouses at the time the action is brought. The parties are German nationals and were married in Germany.

Now, as this Court stated in its judgment of 17/4/2007, it is true that the majority doctrine of the Supreme Court, *inter alia* in judgments of 17/7/2001 and 5/3/2002, has maintained that Spanish law is applicable when the foreign law has not been proven, in order to avoid a legal vacuum and consequent defencelessness; we would note, however, that in its decision of 4/7/2000 the same Court adopted the view that the foreign law is applied because the rule of conflict requires it; it is treated as a fact and therefore must be invoked and proven; indeed a judgment of 10/06/05 asserts that the foreign law is designated by the rule of conflict of the forum, which is part of the law that the Court has to apply *ex officio*. All this means that the force of the rules of conflict empowers judges and courts to order the application of whatever foreign law is identified through the rules of procedure, and therefore it is not essential that such law be invoked by the parties – it may be applied *ex officio* by the judge.

Having settled that issue, we must now deal with the proof of the foreign law. On this subject the Supreme Court Judgment of 04/07/06 (Legal Ground Two-3) considers that while Art. 281(2) of the Civil Procedure Act, which is similar to the repealed Art. 12(6)2 of the Civil Code, provides that the court may avail itself of whatever means of proof it deems necessary, it cannot under any circumstances take upon itself proof of the foreign law but may ask the parties to furnish the requisite documents. It is this consideration that prompted the Court to issue the order as it did, from which it transpires that the rules of German law cannot be applied because it does not recognise legal separation, and as the appellant's counsel says, "negative facts cannot be proven". Hence, if German Law is applicable *ex officio*, if proof of that law has been gathered and if that proof is negative because German Law does not contemplate marital separation, then Art. 107(2) of the Civil Code will apply since the reform introduced by Law 11/2003 makes it obligatory to apply Spanish law, and in this particular instance the *Codi de Familia* since the parties last habitually resided in Castelldefels, starting in 1974."

***** Judgment of Las Palmas Provincial High Court (Section 3), 13 June 2008 (EDJ 2008/158367)

Divorce action between two Ecuadorian nationals. Invocation and proof of foreign law by the parties. Role played by the judge in the process of application of a foreign law.

"Legal Grounds:

(…) As a preliminary issue be it noted that in cases of marital breakdown like the present one, according to the remittal clause in Article 9(2)2 of the Civil Code, the applicable provision is Article 107 of the Civil Code, none of whose provisions – notwithstanding what follows – support the applicability of Spanish law, even subsidiarily, .

In the first place the fact that one of the spouses is resident in Spanish territory does not mean that Spanish law is applicable in any case, but only when one of the circumstances listed in headings a, b and c following the second paragraph of Article 107 of the Civil Code is given; that is, Spanish law is applicable to a divorce (as in the present case) when both of two requirements are met: that one of the spouses is habitually resident in Spain; and that one of the circumstances listed under the cited headings is given; and while there is no dispute as to the first requirement – residence in Spain – there is no claim or evidence as to any of the cited circumstances (none of the laws of reference is applicable; both spouses are applying for a divorce or one is applying with the consent of the other; or the applicable law does not recognise divorce or only does so in a manner that is discriminatory or otherwise contrary to public policy) or that the separation (or divorce) has been applied for by both spouses or by one with the consent of the other.

In the second place, contrary to the argument presented in the appeal, the court did not infringe Article 281 of the Civil Procedure Act. Although this article empowers the court to verify the applicable foreign law by all means that it deems necessary, it does not oblige it to do so; it is up to the party to invoke and prove the validity and content of the Ecuadorian law given that in the light of Article 107 of the Civil Code this case must obviously be settled in accordance with Ecuadorian law as the common national law of the two spouses, and that is a matter of public policy whose effects the parties cannot evade. The court may only supplement the action of the parties; it may never perform in their stead the actions whose absence has been the sole cause of dismissal of the application. These criteria were confirmed by a recent Supreme Court Judgment dated 13 December 2000, which asserts that according to the doctrine of the First Chamber a foreign law is a matter of fact and must therefore be alleged and proven by the party invoking it (Supreme Court Judgments of 11 May 1989 and 3 March 1997); that the courts have the power but not the obligation to assist with such means of verification as they deem necessary (Supreme Court Judgments of 9 November 1984 and 10 March 1993); and that a foreign law cannot be applied *ex officio* in Spain if it has not been sufficiently proven (judgment of 23 October 1992)."

* Judgment of Madrid Provincial High Court (Section 22), 7 November 2008 (EDJ 2008/288452)

Proof of foreign law. Applicable legal system not accredited. Spanish court acts ex officio.

"Legal Grounds:

(…) THREE. (…) Specifically as regards separation and divorce, the cited article remits to Article 107, according to which the new marital status resulting from the severance of the marriage tie must be established in accordance with the common national law of the spouses at the time the application was filed. Given these legal strictures and the fact that both spouses are Ecuadorian nationals, the application for divorce ought in principle to be dealt with in accordance with the substantive law of their country of origin and the parties ought to furnish evidence as to the content and currency of that law, as provided in Article 281 of the current Civil Procedure Act. In this case, along with the writ of application the applicant's counsel submitted a simple copy of the regulation governing marriage and marital breakdown contained in the Civil Code of Ecuador. The fact is that that evidence was not duly certified as regards its compliance with the laws of that country and was therefore insufficient for the purposes of the proceedings as provided in the above-cited Article 107; this meant that in order to avoid the non-admittance of the principal petition, which could infringe Article 24 of the Spanish Constitution, Spanish law would have to be applied subsidiarily, as is established for cases like the one here at issue. We must not forget, however, that after first providing that the foreign law must be proven as regards its content and currency, Article 281(2) of the Civil Procedure Act adds that the court may avail itself of any means of ascertainment that it deems necessary. Basing itself on Article 24 of the Spanish Constitution, the Constitutional Court mentions "the court's obligation to afford effective protection of the rights and legitimate interests of the parties in the judicial proceedings that it is conducting, particularly where the application of a foreign law is imposed by the Spanish legal rules themselves", after which it adds that "the accreditation of the foreign law and the role of the court in the proving thereof may go beyond a mere assessment of the evidence of a fact alleged by a party in support of his claims…" (Constitutional Court Judgment 17/01/2000). For its part the Supreme Court has declared that "if the Court does not feel that the parties have furnished enough conclusive information, it must act *ex officio* and identify the applicable rule (Judgment of 03/03/1997). In the case here, any doubts arising about the reliability of the evidence furnished by the applicant regarding the Ecuadorian legislation could have been cleared up by various means, among them the CENDOJ documentary data base made available by the National Council of the Judiciary through the Judges and Magistrates extranet; this provides access to the current Ecuadorian Civil Code, where the articles germane to this case fully concur with the documentary evidence presented along with the application."

2. Public policy

* Judgment of the Supreme Court (Chamber 3, Section 6), 19 June 2008 (RJ 2008\97598)

Refusal of Spanish nationality. Polygamy. Failure to satisfy the requirement of "sufficient integration in Spanish society". Polygamy considered contrary to Spanish international public policy.

"Legal Grounds:

(…) THREE: (…) polygamy is not merely contrary to Spanish law is repugnant to Spanish public policy and constitutes an insurmountable barrier to the enforceability of a foreign law in all cases (Art. 12(3) of the Civil Code). If we define public policy as the set of fundamental and inalienable values upon which our entire legal system rests, polygamy is clearly incompatible with it, if only because polygamy is premised on inequality between men and women and the submission of the latter to the former. Polygamy is so alien to Spanish public policy that the act of contracting matrimony while a previous marriage is still valid is a criminal offence in Spain (Art. 217 of the Penal Code). It is therefore perfectly lawful for the Spanish Administration to consider that someone whose marital status is contrary to Spanish public policy has not accredited "sufficient integration in Spanish society".

(…) that for purposes of resolving conflicts of laws the Civil Code establishes that persons' marital status is governed by their personal law and that this is determined by their nationality is not the same as to accept the content of national laws on marital status all the world over. Spanish administrative and judicial authorities are of course obliged under Art. 9(2) of the Civil Code to take the view that a person's marital status is regulated in the laws of the country of which that person is a national; however, this in no way bars the same authorities from applying Spanish legal rules, among them Art. 22(4) of the Civil Code, in strict observance of Spanish public policy. In other words, the relevant national laws regulating marital status cannot be invoked as a pretext to circumvent Spanish public policy, which indubitably includes the prohibition of polygamy."

3. Unkown institution

* Judgment of the Supreme Court (Chamber 1), 30 April 2008 (EDJ 2008/48900)

Invocation and proof of foreign law. US law in matters of succession. Not applicable. Subsidiary application of Spanish law. A "trust" cannot be accepted as valid since it is an institution not contemplated in Spanish law, and the deceased's bequest must be deemed valid.

"Legal Grounds: (…)

THREE. (…) The appellant forgets that the challenged judgment recognises that the law applicable to Alberto's succession is that proper to his nationality, specifically that in force in the State of Arizona according to the rule of conflict in Article 9(8) of the Civil Code in relation to Article 12(1) of the same Code, even although the judgment does not actually apply the rules of that State on the ground that the applicant failed to discharge the burden of proof which obliged

him to accredit the content and currency of that law using the means of proof accepted under Spanish law (Article 12(4) of the Civil Code).
(…)

FOUR. (…) the basic premise was that the law applicable to Alberto's succession was indeed that of the State of Arizona under the Spanish rule of conflict (Article 9(8)); however, since the content and scope of the material rules applicable to the present case had not been accredited, it was necessary to apply Spanish law given that the issue had to be settled as provided in Article 1(7) of the Civil Code; consequently, the provisions of Alberto's will had to be applied under the latter rules and not the rules of the trust set up by him on the same date, as this was a case of a type of succession not contemplated in Spanish law.

A trust is an arrangement whereby a legal relationship is created by a person when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.

A trust may be set up either *inter vivos* or *mortis causa*. This is a legal arrangement that is widely used in Common Law countries for various purposes; however, it is not contemplated in either material Spanish law or Spanish private international law.

One measure of their importance and extent of use is the Hague Convention of 1 July 1985 on the law applicable to trusts and on their recognition, which was intended to address problems arising from the fact that many national legal systems do not contemplate them.
(…)

Given that the case involved a trust created *mortis causa*, it is clear that in the absence of a specific rule of conflict in Spanish law to determine what material law is applicable to trusts, it is necessary to resort to the rule of conflict applicable to succession *mortis causa*; this is governed by Article 9(8) of the Civil Code, which remits to the law proper to the deceased's nationality, in this case that of the State of Arizona.

Having established the foregoing, we cannot admit any of the grounds since in the absence of proof of the content of the applicable foreign law, we must reject the trust as a valid legal arrangement since it is not contemplated in Spanish law, in application of which we must accept the deceased's bequest as valid (…)".

Another example of inapplicability of a foreign law appears in a Judgment of Barcelona Provincial High Court (Section 18) of 3 June (EDJ 2008/135904) (cited in this part in "VI. Determining applicable law: some general issues. 1. Proof of foreign law). There, the fact that German law does not contemplate legal separation caused the subsidiary application of Spanish law – in that particular case, the Catalan rules.

VII. NATIONALITY

* Judgment of the Supreme Court (Chamber 3, Section 6), 7 July 2008 (RJ 2008\3419)

Application for recovery of Spanish nationality. Refused. Failure to demonstrate ever having possessed Spanish nationality.

"Legal Grounds:

(…) THREE. It is true, as the appellant maintains, that in the original version of the Civil Code offspring of a Spanish father or mother were Spanish nationals even if they were born outside Spain (Art. 17) and that while under parental authority children had their parents' nationality (Art. 18). In that context it is clear that the appellant's father, whose own father – the appellant's grandfather – always preserved his Spanish nationality, was born Spanish. If we add to this the terms of Art. 22 of the 1954 wording of the Civil Code, cited above, it is equally clear that the appellant's father could not legally lose his Spanish nationality – by virtue of residing in the Dominican Republic and acquiring Dominican nationality – before 1959. So far, the appellant's inferences are correct.

However, no evidence has been produced with regard to events after 1959. Mere invocation of the General Military Service Act does not suffice to show that the father was "liable to perform active military service" until 1976 and that hence he could not have lost his Spanish nationality. This is insufficient for three reasons. First of all, although its substantive content may be similar to that of earlier statutes, the law invoked by the appellant came into force after he was born. In the second place, the appellant identifies liability to perform military service as provided in the original Art. 22 of the Civil Code with the maximum time during which he might be called up, which would include the time when he was simply available or in the reserve. This is a point on which the view of the Directorate-General of Registries and Notaries has not remained unchanged with the passage of time, and nor is the scientific doctrine unanimous. But in any case the decisive point is that this Supreme Court has not established any jurisprudence in the terms alleged by the appellant. In the third place, and most importantly, it has not been demonstrated that the appellant's father actually performed any kind of military service for Spain, given which it is stretching the point to claim that the father could not have lost his Spanish nationality because he was theoretically liable to perform military service. To claim liability to military service as a ground for recognition of a right, the person must have actually performed such military service or been excused from performance for legally-defined reasons. And while on the subject be it not forgotten that the end pursued by the former Art. 22 of the Civil Code was to prevent the renunciation of nationality being used as a back door to evade military obligations.

And on top of that, be it also remembered that the appealed judgment accepts as proven that the appellant's father succeeded in recovering his Spanish nationality in 1996, which can only mean that he had lost it at some indeterminate

point after coming of age. And be it remembered again that the appellant's birth was not immediately registered with the Spanish Civil Register as one might have expected of a parent alive to his Spanish nationality. These other facts show that the assessment of the evidence in the appealed judgment is perfectly reasonable inasmuch as it was never proven that the father possessed Spanish nationality in 1962.

Hence the first ground of this appeal in cassation cannot be admitted. That said, there still remains another point to be cleared up: the appellant's arguments are not founded, as he maintains, on legal presumptions but on simple presumptions. Legal presumptions are presumptions explicitly defined by law, whereas simple presumptions are constructions produced by reasoning on the case in point. None of the legal provisions cited by the appellant establishes a presumption; all merely regulate the conditions applying to the acquisition and loss of Spanish nationality. What the appellant has done is to start from the premise that a given situation was imposed by law and from there to arrive at a certain conclusion, and that is a simple presumption. This clarification is important in that whereas simple presumptions are perfectly admissible in law, they operate in an entirely different way from legal presumptions. The burden of proof is different in either case: legal presumptions may be acted upon unless proven otherwise, whereas simple presumptions must be founded on "a precise and direct link according to the rules of human judgement" (Art. 385 of the Civil Procedure Act). In the present case the appellant has failed to establish such a precise and direct link between one set of facts and the other.
(…)".

* Judgment of the National High Court (Chamber for Contentious Administrative Proceedings), 17 January 2008 (JUR 2008\99278)

Denial of Spanish nationality by virtue of residence. Residence requirement. Ten years as a general rule. Other residence requirements: one year if married to a Spanish national. No record of cohabitation in Spain during the year immediately prior to the application.

"Legal Grounds:

(…) TWO. Articles 21 and 22 of the Civil Code place two kinds of conditions on the granting of Spanish nationality by virtue of residence – one type absolute such as completion of the requisite application and ten, five, two or one year's continuous legal residence immediately prior to application depending on legally specified circumstances; the other type is based on indeterminate legal concepts, either positive like evidence of good civic conduct and adequate integration in Spanish society, or else negative like questions of public policy or national interest which may warrant denial.

The only question raised in the present case is the requirement of "continuous legal residence" immediately prior to application, particularly the couple's cohabitation and residence in Spain for one year immediately prior to the application for Spanish nationality.

Now, for this requirement to be met, three conditions must be satisfied – a) legal residence, entailing compliance with the laws on aliens; b) continuous, uninterrupted residence; and c) that such residence have taken place immediately prior to the application.

(…)

FOUR. Anyone wishing to acquire Spanish nationality by virtue of residence must have really resided continuously in Spain. In fact the jurisprudence (*inter alia* Judgment of the Supreme Court, Third Chamber of 23 November 2000) has qualified the interpretation of the concept of continuous residence in the sense that "this requirement must be interpreted in relation to the concept of residence laid down in Article 13(1) of Law 7/85, such that occasional justified absences from Spanish territory are no basis for a presumption of breach of the continuous residence requirement provided that the habitual residence, and with it the domicile, is not removed from Spanish territory", and it allows that "continuous residence.… does not mean that such residence is to be treated as absolute, for as we asserted in our judgments of the twenty-seventh of July two thousand and four – appeal in cassation 6085/2004 – and the twenty-second of September two thousand and three, an alien legally resident in Spain may travel outside Spanish territory as long as such travel is sporadic or else necessary" (Supreme Court Judgment of 29 November 2005 (rec. 3183/2001)".

The Supreme Court (Chamber 3, Sect. 6) took a similar view in its judgment of 4 June 2008 (EDJ 2008/90809), where it ruled that there had been no conjugal cohabitation and hence the general 10-year residence requirement had to be applied. Also, in a Judgment of 14 November 2008 (EDJ 2008/217266) the Supreme Court (Chamber 3, Section 6) granted the appellant Spanish nationality on the ground that there had been continuous legal residence in Spain. The Court judged irrelevant, in view of the particular circumstances of the case, certain periods of time during which the appellant was not in possession of a resident's permit.

* Judgment of the National High Court (Chamber for Contentious Administrative Proceedings), 22 January 2008 (JUR 2008\114983)

Denial of Spanish nationality for reasons of public policy or national interest. Absence of grounds for denial. Nationality consequently granted.

"Legal Grounds:

(…) THREE. As regards the denial of Spanish nationality for reasons of public policy or national interest on the basis of reserved or secret reports by the National Intelligence Centre, as the State Attorney reminds us in his answers to the complaint, the jurisprudence of the Supreme Court has consistently held that if the Administration considers that an application for Spanish nationality should be denied for reasons of public policy or national interest on the basis of a report classified as "reserved", it must state its reasons for believing that there are material considerations of public policy or national interest. It is not sufficient

to cite the applicant's circle of acquaintances and his activities; and subject to appropriate precautions to avoid harming other interests, it must specify what such reasons are in order to afford the appellant the means of substantiating the appeal to which he is entitled and to enable the Court to exercise the function of control to which the Administration is subject by mandate of Article 106(1) of the Constitution (Supreme Court Judgments of 4 April 1997, 12 April 2004, 30 June 2004, 19 July 2004 and 17 January 2006).

Similarly, the Supreme Court Judgment of 24 November 2004 notes that according to Article 106(1) of the Constitution the Administration is subject to the control of the Judiciary in all of its actions, and such judicial control could hardly be exercised if a simple refusal or omission on the part of the Administration were sufficient to prevent a Court from discovering its reasons for turning down an application for nationality in the course of administrative procedure. There are means whereby, without prejudice to the general duty of discretion and the specific duty of secrecy which in this case would fall not only upon the Administration but also on the judges concerned, the former may provide a reasonable explanation of the reasons for its decision to refuse, which it is also duty bound to do.

FOUR. The foregoing legal grounds leave no doubt that it is our duty to uphold the present contentious-administrative appeal.

From the documentation appended to the administrative record it appears that the appellant has been legally resident in Spain since 1985; he is a physician specialising in traumatology and orthopaedic surgery and has pursued his professional career within the field of that speciality; he is married to a Spanish citizen; he has no criminal record in Spain or in Lebanon, his country of origin; and police reports show that he has not engaged in any civic misconduct during his time in Spain.

The only reason the appellant has been denied Spanish nationality is a confidential report by the National Intelligence Centre dated 29 October 1997, from which the Administration concludes that in view of the appellant's circle of acquaintances and activities, considerations of public policy and national interest warrant the denial of Spanish nationality.

This Chamber has asked the National Intelligence Centre to explain which of the appellant's circle of acquaintances or activities could raise issues of public policy or national interest and eventually issued a formal request for a report on the matter, but the said Centre has not furnished any additional information to what it conveyed to the Administration in the first place.

Therefore, in accordance with the case-law of the Supreme Court as set out in the foregoing legal ground, as this Chamber knows of no considerations of public policy or national interest that might warrant the denial of Spanish nationality to the appellant and the Administration has not questioned the appellant's compliance with all the other requirements for recognition of Spanish nationality, we therefore uphold this appeal, set aside the appealed decision and accord the appellant Spanish nationality".

* Judgment of the National High Court (Chamber for Administrative Proceedings), 11 March 2008 (JUR 2008\164674)

Acquisition of Spanish nationality by virtue of residence. Determination of "good civic conduct".

"Legal Grounds:

(…) TWO. Under Art. 22 of the Civil Code one of those requirements is that the applicant must furnish positive proof of good civic conduct – in other words it does not suffice that the public registers contain no record of activities subject to penal or administrative sanctions which *per se* imply misconduct; what Art. 22 of the Civil Code requires is that the applicant positively prove that during, or even prior to, his residence in Spain his/her conduct has conformed to the rules of civic coexistence; not only must he not have breached any of the prohibitions defined in criminal or administrative law, but he must have fulfilled any civic duties reasonably required of him, and the absence of a criminal record is not sufficient proof of good civic conduct, as ruled in Constitutional Court judgment 114/1987. As to the difficulty of determining exactly what is meant by good civic conduct, in its judgment of 12 November 2002 (Appeal in Cassation no.4857/1998) the Supreme Court (Chamber for Contentious Administrative Proceedings, Section 6) noted that "(…) it is therefore important to make it clear that the term used in Article 22(4) of the Civil Code refers to an average standard of conduct acceptable to any culture and any individual – a standard that is the same for one and all – be it understood that it is not a matter of imposing a uniform mode of living on everyone in the country, or of making anyone seeking to acquire nationality in this way demonstrate that their conduct has been impeccable all their life, but of stating that while every human being is free to organise his life as he sees best – we are given life but not a mode of living; that we must arrange for ourselves – any person not possessing Spanish nationality and wishing to acquire it must have led and continue to lead a life that conforms to the standard of conduct we have just referred to".

THREE. (…) It is therefore not enough for the appellant's purposes that a criminal or police record be absent or removed, for as we noted earlier on, what Art. 22 of the Civil Code requires is that the applicant furnish positive evidence that his conduct conforms to the rules of civic coexistence, not only in not breaching the prohibitions defined in criminal and administrative law but also in fulfilling such civic duties as are reasonably required according to the general standard referred to in the doctrine of the Supreme Court, and as in the present case the absence of a criminal or police record is not sufficient evidence of good civic conduct. Indeed, leaving aside other considerations regarding the applicant's social integration, which has no bearing on the *ratio decidendi* of the judgment here challenged, there can be no ignoring the two cited criminal actions involving the applicant, albeit we do not know the final verdict in the trial for a minor offence or the circumstances causing prescription in the other criminal prosecution in Court of Instruction No 7 of Lleida, so that the appellant has not clarified the circumstances weighing against the presumption of good civic conduct, which requirement he has failed sufficiently to substantiate.

> It is worth noting at this point that in cases like the present one it is up to the appellant to demonstrate fulfilment of the good civic conduct requirement, which he has failed to do in the terms explained above, and at the same time we cannot ignore the relative proximity of dates between the criminal cases and the application for nationality, and we must therefore dismiss the appeal".

For its part, in a Judgment of 17 December 2008 (EDJ 2008/240097), the Supreme Court (Chamber 3, Section 6) took the view that a criminal conviction when considered in conjunction with other circumstances does not rule out good civic conduct. Note also the Judgment of 2 December 2008 (EDJ 2008/227858), in which the Supreme Court (Chamber 3) also accepted the granting of Spanish nationality by virtue of residence considering that the applicant had demonstrated good civic conduct.

The outcome was the reverse in Supreme Court Judgments EDJ 2008/175625 (Chamber for Administrative Proceedings, Section 3) of 2 October 2008 and RJ 2008\3405 (Chamber 3, Section 6) of 2 July 2008, where nationality was denied in view of a conviction for a serious offence. Absence of good civic conduct was also judged and nationality consequently denied in Supreme Court (Chamber 3, section 6) Judgment RJ 2008\6622 of 9 July 2008.

EDJ 2008/240097, Judgment of the Supreme Court Chamber 3, 17 December 2008

* Judgment of the National High Court (Chamber for Administrative Proceedings), 11 March 2008 (JUR 2008\164675)

Nationality by virtue of residence. Degree of integration of the appellant. Monogamy and polygamy.

> "Legal Grounds:
>
> (…) THREE. The crux of the matter lies, in short, in whether the appellant's integration in Spanish society is sufficient to support his claim of a right to nationality. The Administration denies that the applicant meets the relevant requirement in view of a certificate appended to the administrative record stating that on 20/03/1982 the marriage concluded between the appellant and his wife on 10/03/1982 was verified and that "the husband declares that he chooses polygamy with a dowry of eighteen thousand francs". The said certificate is dated 23/04/2002. However, along with his appeal the applicant has submitted a new certificate, issued on 16/05/2006, which contradicts the earlier one and now asserts that the marriage of reference was contracted "in accordance with Islamised Wolof custom, choosing monogamy with separation of assets and a dowry of 18,000 francs".
>
> Be it recalled *hic et nunc* that this Chamber has said several times before that social integration does not consist solely in the extent of knowledge of the language but in the degree to which the applicant's mode of living accords with the principles and values of this society and in the possession of family, all of which must be demonstrated by the applicant or be deducible from the actions registered in the record. We have also said that familiarity with the Spanish language is a component of the degree of adaptation to Spanish

culture, which is in turn a component of the requirement of adequate integration in Spanish society that the applicant must demonstrate; knowledge of the language is, however, a detail that needs to be given its due weight and alone cannot be considered an absolute ground for denial if adequate integration is otherwise demonstrated.

At this point we may fairly advise that this appeal will be upheld in light of the appellant's circumstances, of the regulations and of the applicable legal doctrine. The applicant has been legally resident in Spain since 1991, speaks correct Spanish and has fully adapted to the culture and lifestyle of Spain; he earns a living as a travelling salesman and he conducts himself in his social milieu without problems; and at the time both the Public Prosecutor and the Examining Magistrate were favourable to the grant of nationality. Against these circumstances we must now examine the merits of the reason adduced by the Administration for refusing to grant nationality. The Administration has accepted as proven that the applicant opted for polygamy when he married in Senegal in 1982. That is indeed borne out by the certificate dated 2002 appended to the administrative record; on the other hand there can be no ignoring that it is contradicted by another certificate issued in 2006 concerning the same marriage to the effect that the partners opted for monogamy. The appeal claims that the first certificate is erroneous. This contradiction between the two certificates has not been sufficiently explained or substantiated. It may be fair to suppose that the second certificate post-dates the first and hence overrides it or represents a retraction of the option chosen at the time of marrying – or any other plausible hypothesis that one might care to imagine. Be that as it may, we take note that the issue here is the integration requirement and that both the Public Prosecution Service and the Judge-Magistrate opined in favour of granting nationality, and we must fully consider the importance that either report has. That said, this Chamber does not accept the argument of the defendant authority, even were we to accept for the sake of argument that the appellant's choice of polygamy – on the particular circumstances of which we take issue with the Administration – had been proven. In view of his origins, the applicant's integration in Spanish society demanded that he adapt to a new culture and milieu, and such adaptation would necessarily entail a process of evolution to adapt to the new environment, and the record shows that the applicant has successfully adapted to the Spanish society where he lives. We cannot therefore accept the Administration's citation of a choice – which even if true has not been proven – of polygamy made legitimately by the applicant in 1982 in his home country and in accordance with his religious beliefs, for to do so would be tantamount to denying that in such cases a person can become integrated in Spanish society through a process of evolution. The fact is that the appellant has adapted to his new society and his conduct is not in breach of the public policy protected by law, and Spanish law guarantees respect for his beliefs. For all the foregoing reasons we uphold this appeal. Be it said, however, that this decision has no basis in Articles 14 and 16 of the Constitution as cited in the complaint. The circumstances cited are not comparable, and ideological, religious and cultural freedoms are only guaranteed to the extent allowed by public policy as defined

by law, and so it is not enough invoke the fundamental right of religious freedom, which as we have seen is not an absolute right.

For an example of denial of Spanish nationality due to polygamy on the part of the applicant, see Supreme Court Judgment (Chamber 3, sect. 6) of 19 June 2008 (EDJ 2008/97598)., S 19/06/2008, rec. 6358/2002. In that case it was judged that polygamy as a personal circumstance negated "adequate integration in Spanish society". Polygamy is considered contrary to public policy".

For its part, the Supreme Court (Chamber 3, Section 6, Judgment EDJ 2008/209831 of 15 October 2008) upheld the granting of Spanish nationality by virtue of residence on the ground that the applicant had furnished sufficient evidence of his integration in Spanish society.

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

1. Aliens regime

a) General rules

* Judgment of the High Court of Madrid (Chamber for Administrative Proceedings, Section 9), 10 January 2008 (JUR 2008\125861)

Denial of entry in Spanish territory. Failure to satisfactorily demonstrate and explain the purpose and conditions of a stay for purposes of tourism. Reason for denial.

"Legal Grounds:

(…) SIX. To settle this appeal we must look first at Arts 13 and 19 of the Spanish Constitution, whereunder aliens are entitled to reside in and move about the national territory in the terms laid down by treaties and by the law. Constitutional Court judgment 94/1993 asserts that "freedom of movement across the borders of the State, and the attendant right to reside within them, are not rights essential to the assurance of human dignity (Art. 10(1) of the Spanish Constitution and Constitutional Court Judgment 197/1984, F. 3) and hence are not attributable to all persons regardless of their citizenship. According to the doctrine laid down by that judgment, then, laws and treaties may legitimately modulate the exercise of such rights in accordance with people's nationality and treat Spanish nationals and aliens differently as regards entry to, exit from and residence in Spain".

We would also cite Ground 4 of Constitutional Court Judgment 53/2002 of 27 February 2002, to the effect that an alien "does not possess a fundamental right to freely enter of leave Spain" (Art. 19 of the Spanish Constitution), "which the Constitution only accords to Spanish nationals". This ruling is reiterated in Ground 7 of Constitutional Court Judgment 72/2005 of 4 April 2005, which concludes that "there is hence no ambiguity in the wording of Art. 13(1) of the Spanish Constitution or in the way in which it has consistently been interpreted

as bearing on Art. 19 of the Constitution in relation to international treaties dealing with fundamental rights, from which we are forced to conclude that entry in Spain is a fundamental right only of Spanish nationals and not of aliens".

Compliance with the requirements laid down in the current regulations therefore confers a legal right but not a constitutional right as claimed by the appellant, in which connection Art. 5(1) of the Schengen Implementation Convention provides that (…).

And Art. 5(2) of the Convention adds that "Entry to the territories of the Contracting Parties must be refused to any alien who does not fulfil all the above conditions…".

Article 25(1) of Organic Law 4/2000, as modified by Organic Law 8/2000 and by Organic Law 14/2003, provides that "an alien proposing to enter Spain must do so by way of the posts provided for that purpose, must be in possession of a passport or travel document accrediting his or her identity which is recognised as valid under international conventions signed by Spain, and must not be subject to any express prohibition. These persons must further present such documents as are required by regulation to substantiate the purpose and conditions of their stay and must furnish evidence of possessing sufficient means of support for the proposed duration of the stay in Spain or of being in a position to legally obtain such means". Section 2 of the same article adds that "unless otherwise provided in international conventions signed by Spain or in European Union regulations, a visa shall also be required. A visa shall not be required if the alien is in possession of an aliens identity card, or exceptionally a return permit".

SEVEN. Having examined the law regarding the issue raised here, the administrative record shows that the reason adduced by the appellant for entering Spain was tourism; however, that declaration is not borne out by the documentation furnished by the passenger or by the actions and checks carried out by the agent concerned.

In fact the passenger could have no concrete plans for tourism, ignorant as he was of any place of recreational, cultural or leisure interest in the city where he proposed to spend the duration of his three months' stay – Madrid – so much so indeed that he expressed a desire to visit "the beach". And nor is there satisfactory evidence of the proposed conditions of such a stay, for although he stated that he would be living in his host's house, he did not know her personally, which renders questionable his assertion that he would be staying for three months in the home of a person with whom he had only spoken on the telephone. In addition to which, despite having a sister who had been in Spain for a year and a half, it was not she who had invited him to stay – and moreover the border police found that the said sister was not legally resident in Spain.

From the balance of all these details and contradictions, taken from the applicant's own declaration and the documentation furnished by him, it is reasonable to conclude that the applicant has not furnished convincing evidence that he entered Spain for purposes of tourism or of the conditions of his stay here, no document having been offered in these proceedings to support the claim that

the purpose of travel was tourism, which claim was gainsaid by the fact that he carried only a limited amount of money in cash.

We would note that the documents or other evidence required to substantiate the purpose of travel and the proposed conditions of stay are listed in Art. 7 of Royal Decree 2393/2004 approving the current Implementing Regulation of Organic Law 4/2000, but that list is not exhaustive, meaning that such documents or other evidence need not always be the same but depend on the particular circumstances of each traveller (destination, duration of stay, financial and family situation, etc.). In the present case, as we have seen, there is nothing to suggest that the decision of the authorities was illogical or unfounded, and therefore it cannot be considered arbitrary.

EIGHT. As for the statement of reasons for the action, the jurisprudence has repeatedly stated that the purpose of this requirement is to inform the person concerned of the reasons for the decision so that the latter may properly exercise his or her right of defence, and a short or concise explanation is admissible if it gives an adequate account of the reasons for the action taken by the authority. And that is what has occurred in the present case. As noted, the party was informed of the reason for being refused entry and was duly advised of the grounds on which the authority based its decision. He had access to legal counsel throughout and was therefore not left defenceless".

In the same vein see Supreme Court Judgment (Chamber for Administrative Proceedings, Section 5) of 8 February 2008 (JUR 2008\1521), which overturned a decision to refuse entry to Spain for failure to accredit the purpose of travel and proposed conditions of stay. After analysing the regulations governing entry of aliens, the Supreme Court took the view that these "empower the officials concerned to require documentary evidence of the purpose and proposed conditions of stay – but not, however, in every case or as a blanket or unconditional rule, only: a) where there are facts or circumstances, clearly elaborated in the decision, that raise a suspicion that the declared purpose and/or conditions of the stay are not genuine; and b) where it is normal for the traveller, in view of his nature or some peculiarity, to carry documentary evidence of such purpose and/or conditions of stay. (…)" (Legal Ground Five).

* Judgment of the High Court of Andalusia (Chamber for Administrative Proceedings, Section 1), 15 January 2008 (EDJ 2008/371503)

Moroccan citizen seeking registration in the census of Ceuta. It is sufficient to register the number of a current passport issued by the Moroccan authorities.

"Legal Grounds:

(…) TWO. Indeed the issue here must be settled without reference to the Third Transitional Provision of Royal Decree 2393/2004, but it is equally the case that the original court did not ground its judgment solely on that provision. Contrary to the assertion of the appellant authority, it is for other reasons, also stated in the appealed judgment, that possession of a residence permit is considered unnecessary for registration in the census.

To begin with, that is the literal sense of Art. 16 of Law 7/1985 (…).

From the terms of that provision it follows that in the particular case concerned here, of a Moroccan citizen seeking to register in the census of Ceuta, according to Article 16(2)f)2 of the Local Government (Bases) Act, it would actually suffice to present the number of a current passport issued by the Moroccan authorities. Furthermore, it would be quite illogical to require a residence permit in order to be registered in the census while according to Art. 18(2) of the Local Government (Bases) Act registration of aliens in the municipal census does not constitute proof of legal residence in Spain, nor does it confer any right on persons so registered that is not already conferred by the laws currently in force, particularly those relating to rights and freedoms of aliens in Spain.

The fact that large numbers of Moroccan citizens daily enter Ceuta with the intention of being registered in the census and must return to their country of origin is another matter altogether. Even if this fact constitutes an added difficulty for the normal functioning of public services in Ceuta due to the severe burden of having to check the veracity of claims of residence in support of applications for registration, that does not warrant failure to apply the law, which does not exempt the Autonomous City of Ceuta from the general regime laid down for registration in the census."

* Judgment of the High Court of Galicia (Chamber for Administrative Proceedings, Section 1), 23 January 2008 (EDJ 2008/340199)

Refusal of work permit. Applicant prohibited from entering Italy at the time of applying for a permit in Spain.

"Legal Grounds:

(…) THREE. The appellant's belief that the problem posed by his arrest in Italy had been resolved counts for nothing in light of the evidence that he is still registered as an alien prohibited from entering Italy, not only in the report of 14 June 2006 by the head of the provincial operations coordination unit at Pontevedra Police Headquarters (document no. 8 in the administrative record), but also in a report dated 19 February 2007 by the head of the Labour and Social Affairs Office confirming the continued validity of the court order prohibiting entry and the appellant's status as a person refused entry to Italy, which contradicts the appellant's claim that such status had expired on 7 November 2005.

For the rest, if the appellant feels that the procedure conducted in Italy was improper or that he has been denied a means of defence in that what he signed was not translated and he was not given a copy (claims which he has not proven), it is in Italy that he must make the necessary representations to have the prohibition on entry and the status as a person refused entry lifted, annulled or set aside; meanwhile, however, the Schengen Agreement obliges Spain to enforce that prohibition and status.

Matters relating to aliens fall within a legislative context dominated by the public interest inherent in Spain's obligation to comply with its international commitments, and as a result Article 31(4) of Organic Law 4/2000 of 11 January 2000 on the rights and freedoms of aliens in Spain and their integration in society, as reformed by Organic Law 8/2000 of 22 December 2000 and Organic Law 14/2003 of 20 November 2003 (one of whose implementing provisions is

Article 45(2) of Royal Decree 2393/2004, on which the appellant's application is founded) provides that for an alien to be authorised to reside temporarily in Spain he must not be registered as being refused entry anywhere within the territory of the countries with which Spain has signed a convention to that effect, referring to the Schengen Agreement.

Spain acceded to that agreement (signed on 14 June 1985), whereby controls on the passage of persons across borders between the signatory countries would be gradually eliminated, by virtue of a Protocol dated 25 June 1991, ratified on 23 July 1993 and amended on 11 February 1994, and it came into force in Spain in March 1995. The philosophy (as indicated by Articles 2 to 6) is founded on the reinforcement of the area's external borders in order to create a common space without internal borders, to which end, according to Article 9, the signatories of the Convention would reinforce the cooperation among their customs and police authorities in several respects, one of these being the struggle to prevent the irregular entry and residence of persons, and the improvement of information. In order to keep better track of such actions, a Schengen Information System (SIS) has been implemented, which among other information contains a *common list of aliens for whom an alert has been issued for the purposes of refusing entry*, composed of aliens who have been the subject of judicial or administrative expulsion orders implying refusal of entry in the issuing country; such aliens are refused entry throughout the Schengen area, which since its accession includes Spain, and hence it is logical that Article 31(4) of Organic Law 4/2000 of 11 January 2000 on the rights and freedoms of aliens in Spain and their integration in society, as reformed by Organic Law 8/2000 of 22 December 2000 and Organic Law 14/2003 of 20 November 2003, should include among the requirements for the granting of temporary residence that the applicant not be included in the *list of aliens for whom an alert has been issued for the purposes of refusing entry in the territory of countries with which Spain has signed a convention to that effect*.

Not being included in the *list of aliens refused entry is included in Article 5 of the Convention as a condition for the granting of entry to the territory of one of the contracting parties for stays not exceeding three months, and Article 25 includes the same requirement for the issue of a residence permit. Its inclusion in Article 31(4) of our own Law is hence a consequence of Spain's signature of the Convention and of Article 96(1) of the Constitution.* Therefore, Italy being a party to the Schengen Agreement and the appellant being included in the list of persons refused entry to Italy, this court cannot grant the authorisation requested by the appellant.

This appeal is therefore dismissed".

***** Judgment of the High Court of Madrid (Social Chamber, Section 4), 25 January 2008 (AS 2008\1155)

Alien immigrant without an official work permit. Entitlement to unemployment benefit.

"Legal Grounds:

SOLE GROUND (…) To address the issue in the terms in which it was resolved by the appealed judgment – i.e. there is no question but that the plaintiff is entitled to contribute to social security for the time during which he worked, albeit in an irregular situation, and likewise to the appropriate benefits in that respect – it is our view that in this case the plaintiff, as an alien worker lacking an official permit, is entitled to unemployment benefit since he satisfies all the requirements laid down in the statute in respect of the particular circumstances that have been proven.

It has indeed been the intention to make it possible for alien workers lacking a work permit to accrue Social Security benefits, but this does not mean that they should be awarded benefits without fulfilling the requirements demanded of any worker to achieve entitlement, and that is what has to be considered when deciding whether a person is entitled.

With regard to unemployment, Art. 203(1) of the Social Security Act tells us that the legislator sought to regulate unemployment benefit for persons who are willing and able to work but have lost their jobs or had their normal working hours cut. It is clear from this provision that willingness and ability to work are both elements that are taken into consideration in determining whether a person qualifies, meaning that the person has lost his/her job and is available to accept another one if offered, and these are the conditions that the appellant must satisfy.

Willingness to work is not an issue inasmuch as a worker applying for unemployment benefit does so because he or she is no longer employed and, as we shall see with regard to availability for work, intends to take up some other employment.

It is the ability to work that raises most disputes in such cases. In this context unemployment benefit is defined in Art. 207c) of the Social Security Act, which requires that in addition to being legally unemployed, the person be prepared to actively seek work and accept a suitable situation, which is formalised by the signing of an undertaking to seek work as referred to in Article 231 of the Act.

Readiness to actively seek employment and accept a suitable situation is demonstrated by the act of registering as a seeker of employment (Art. 209(1) of the Social Security Act) and signing an undertaking to seek employment with the Employment Agency (Art. 231(2) of the Social Security Act).

But the fact is that contrary to what the appellant seeks to convey in citing the Supreme Court Judgment of 21 December 1994, an alien worker in an irregular situation is able to work and may actively seek employment and sign an undertaking to seek employment as long as he or she is able to validly reside in Spain, for in that situation – as a legal resident – he or she may be available for work, but not when his or her stay is entirely unauthorised. In such cases we cannot agree with the view of the appellant that the situation of irregularity is not imputable to the worker inasmuch as – bearing in mind that in this case the worker is claiming Social Security benefits – the employer's liability is confined to payment of the contribution corresponding to the worker but does

not extend to the failure to satisfy other requirements in connection with events subsequent to the termination of the contract, which are solely the responsibility of the latter, such as registering as a seeker of employment, being available for work and signing an undertaking to seek employment; and to satisfy these requirements there are legal channels which the alien worker can follow when an unauthorised contract of employment is terminated.

The fact is that an alien worker whose situation is irregular and whose unauthorised employment has been terminated may stay in Spain if he or she obtains a temporary residence permit based on the recognition of an established situation, for as Art. 45 provides in relation to Art. 46(2)b) of Royal Decree 2393/2004 of 30 December 2004, in matters relating to temporary residence permits in exceptional circumstances, "1. In accordance with Article 31(3) of Organic Law 4/2000 of 11 January 2000, in the case of exceptional circumstances a temporary residence permit may be granted to aliens staying in Spain in the conditions cited in this article, provided that the applicant is acting in good faith.

2. A residence permit may be granted in recognition of an established situation, in the following cases:

In the case of an established work situation, permits may be issued to aliens furnishing evidence of having stayed continuously in Spain for at least two years, provided that applicants have no criminal record in Spain or their country of origin and that they can show that they have been in employment for not less than one year".

We therefore maintain that the mere fact of having worked without an official permit does not suffice to meet the requirement of ability to work in the sense of readiness to actively seek employment and to accept a suitable situation, unless the alien can show that he/she is validly resident in Spain.

It is true that Chamber 4 of the Supreme Court – albeit in connection with an earlier regulation but subject to considerations that are entirely applicable to this case – stated that a worker lacking a work permit could remain in Spain seeking employment and as such was entitled to apply for unemployment benefit. The Court said: "Working by aliens in Spain is subject to a system of official permits (Article 15 of Organic Law 7/1985). There are three features of such a permit – the granting of which is subject to a set of legal considerations that the Administration must weigh up – that must be considered in relation to the decision at issue here: 1) in the case of employees, one of the conditions for the granting of a work permit is that the applicant present a written contract of employment or furnish documentary evidence of a formal undertaking by the proposed employer to employ the worker (Article 17(1) of the Act and Article 49(5) of the Regulation approved by Royal Decree 1119/1986); 2) these permits are of limited duration but may be renewed or reissued (Articles 15 and 19(1) of Organic Law 7/1985 and related provisions of the Regulation); and 3) once a work permit expires, the alien worker may remain in Spain with a residence permit (Article 19(2) of Organic Law 7/1985), seek other employment and apply for a new work permit. It is not therefore fair to say that an alien may freely work in Spain until such time as he/she is refused a work permit (the view that the referenced judgment appears to uphold), but neither can it be said that an alien who has been refused a work permit is absolutely unable to work

(the view of the appealed judgment). The issue of an official permit is a form of public intervention classified as official limiting action. This is defined in the scientific doctrine as an action that, in accordance with the law, tends to restrict the freedom of individuals but without any substitute for their activities, and there are various degrees. The practice of requiring permits, which is quite distinct from absolute prohibition, normally takes one of two forms: an official act lifting a relative prohibition contained in a policing regulation (prohibition unless authorised), or a purely formal means of controlling the exercise of a pre-existing right or faculty". And therefore, "nor can it be maintained that an alien who has been refused a work permit is absolutely unable to work". After examining the scope of official intervention in these matters, the Court noted that "Even allowing that work permits fall into the first category of intervention, that is not to be confused with an absolute prohibition that prevents working and precludes recognition as unemployed, for as we have seen, an alien worker may remain in Spanish territory if he/she has a residence permit, he/she may also seek other employment, and lastly may apply for a work permit once he/she has found it. Obtaining a work permit may pose problems in view of the conditions that are applicable under Article 18 of Organic Law 7/1985, but these problems do not absolutely preclude the possibility of working, and therefore a person in such a situation is to be considered unemployed".

The same Court's judgment of 21 September 1995 came to the same conclusion in the case of a worker possessing only a residence permit. However, that doctrine was founded on the case of a worker validly staying in Spain, in possession of a residence permit and as such able to seek employment.

That doctrine is fully applicable to the present case inasmuch as the legal conditions for entitlement to unemployment benefit are founded on the same premise, namely the ability to work, but now set in more specific terms, which was the purpose of the reform of 2002. And in the light of that doctrine we are moved to uphold the appeal inasmuch as although while working the plaintiff lacked an official permit, the statement of facts shows that since his contract terminated, not only has he been ready to work but only a few months after that termination he found another job and is therefore registered with Social Security, as indicated in the record of proven facts, which states that he was dismissed on 7 September 2004 and, in a judgment dated 25 November 2004 the appropriate court acknowledged unfair dismissal; the contract was terminated as of that date and applications for unemployment benefit were made first on 20 January 2005 and again on 17 May 2005, albeit he has been working for another employer since 19 April 2005, all this recorded in the document included in the evidence, at folios 395 and 396 of the proceedings. This may have been an outcome of the normalisation process initiated by an Order issued in 2 February 2005 by the Ministry of the Presidency allowing workers to apply for work permits if they were registered in the census of a Spanish municipality at least six months prior to 7 February 2005, when the Regulation implementing Organic Law 4/2000 of 11 January 200 came into force, for which they were required to present a passport, travel document or registration certificate in evidence that they had been in Spanish territory continuously all that time". In short, the records show that following the termination of his contract of employment not only was he

available to work, but he found a new job and was finally able to put an end to his illegal situation. (…)".

* Judgment of the High Court of Murcia (Chamber for Administrative Proceedings, Section 2), 25 January 2008 (EDJ 2008/106001)

Expulsion inappropriate and renewal of work and residence permits appropriate in that although convicted of ill-treatment, the prison sentence was suspended, and in addition he possessed parental responsibility for his young children, who would be bereft were their father expelled; their interests take priority according to Arts 1 and 2 of the Minors (Legal Protection) Act, Organic Law 1/96.

"Legal Grounds:

ONE. The appealed judgment upholds the contentious administrative appeal brought by Jesús, an Ecuadorian national, against a Decision of the Ministry of Labour and Social Affairs dated 12/01/2006 dismissing his appeal against a decision by the Government Delegation in Murcia, dated 07/07/2005, file number NUM000, refusing to renew the appellant's work and residence permit by reason of an unfavourable preliminary official report prompted by the fact that he had been convicted of ill-treatment, and ordering his expulsion from the national territory as he possesses a criminal record.

The court accepted the grounds of objection adduced by the appellant, which were that his personal circumstances had not been taken into account and that he was separated with two children, of whom he had legal custody, and judging that the decision lacked reasonable grounds, upheld the appeal, set aside the challenged administrative act and ordered that the appellant's residence and work permit be renewed.

In its grounds of appeal, the appellant – the Government Delegation in Murcia – argued that the situation of the party concerned came within the meaning of Art. 53(1)a) of Regulation 2393/2004, whereby applications for residence permits are to be denied if the applicant has a criminal record in Spain or his/her country of origin, and asked that its appeal be upheld.

This Chamber does not accept that view. As we know, the object of this appeal is the contested judgment, and it is essential that the appeal contain a criticism of that judgment. As the appealed judgment states, according to the administrative record, in cases of renewal of work and residence permits the applicant's personal circumstances are to be taken into account, and the judgment provides sufficient evidence of the applicant's criminal record, relating to a conviction by Criminal Court number one of Lorca, dated 16/03/2005 for an offence of wounding within the family, for which he was sentenced to eight months' imprisonment. And indeed, that ground of appeal cannot stand in view of the failure to ground the appealed judgment.

In the present case the appealed judgment ordered that renewal of the applicant's residence and work permit be denied, while according to the documentary evidence furnished, although he had a criminal record, his exceptional personal circumstances – viz. parental responsibility for his young children – had to be taken into account and his case therefore met the requirements laid down in the Third Transitional Provision of RD 2393/2004. And what is more, the record

shows that the prison sentence was suspended and that the appellant has parental responsibility for his two young children who would be left helpless were the appellant expelled and whose interests take precedence according to Arts 1 and 2 of the Children's (Judicial Protection) Act, Organic Law 1/96, which is applicable to all minors staying in the national territory".

* Judgment of the High Court of Murcia (Chamber for Administrative Proceedings, Section 2), 31 January 2008 (EDJ 2008/131744)

Proportionality of expulsion from Spanish territory for staying illegally. Examination of the particular circumstances of the case. Lack of established situation or means of support: existence of circumstances contrary to the expulsion order.

"Legal Grounds:

(…) TWO. (…) Being in Spanish territory irregularly is sufficient to constitute an infringement, regardless of whether the origin of the irregular situation is that the person has not obtained an extension of stay, residence permit or other such document (which would be the case alluded to by the appellant – i.e. an alien entering Spanish territory as a tourist or in an irregular manner and remaining here without applying for any of the cited documents, which is classified as an ordinary irregular stay) – or has allowed an extension of stay, residence permit or suchlike document to lapse for over three months if the party has not applied for a renewal in due time (classified by the appellant as an *ex post facto* irregular stay). And in this case the expulsion decision was made by the Government Delegate, who is so empowered under Art. 55(2) of Organic Law 8/2000 of 22 December 2000.

(…)

When it examined this principle the Supreme Court took the view that since the power to sanction is regulated, the Administration cannot be free to choose different solutions even if they are equally fair and legally equivalent (Supreme Courts Judgments of 23/01/1989 and 3/04/1990), which means that penalties must be imposed in each case with due reference to the scale of circumstances laid down in the applicable regulations. One can therefore not maintain that the penalty of expulsion rather than the fine provided for in Art. 57 of Law 4/2000 as amended by Law 8/2000 may be imposed arbitrarily without taking such circumstances into consideration, or that it may be imposed at the Administration's discretion in all cases of serious infringements like the one committed in this case, or again that such margin of discretion cannot be overseen by the Courts. It is the Administration's duty, by means of a regulated procedure that can be overseen by the Courts, to determine what penalty should be imposed in each case. The point is to identify a fair and proportionate penalty for the infringement committed, and this means that in the event that the conclusion of such regulated identification is a given penalty, then the circumstances that were taken into consideration in that process must be stated in order to allow the above-mentioned oversight by the Courts, especially seeing that any penalising decision must be reasoned as provided in a general way by Art. 113 of the Public Administration (Legal Regime) and Common Administrative Procedure Act, Law 30/92 of 26 November 1992. In this connection the Supreme

Court Judgment of 11 June 1992 states that it is a function of the courts not only to fit the infringer's conduct into a particular legal category but also to see that the penalty fits the infringement, as in either case the aim is to apply statutorily-defined legal criteria that can be inferred from principles underlying the rules governing legal penalties, such as congruence and proportionality between infringement and penalty. And the decision to order his expulsion from Spanish territory and bar him from entering Spain for five years – reduced to three years by the court – cannot be considered proportionate to the infringement committed and hence is not legally sound.

(...)

The case-law as set out in Supreme Court Judgments of 14/10/2005 and 22/12/2005 states thus:

A) An established situation (as a factor susceptible of moderating the penalty) is in no way proven by the mere fact of an illegal stay in Spain. The appellant would have had to furnish evidence of his activities and relationships in Spain; that he has not done, and nor has he furnished evidence of his intent to regularise his situation in Spain. In other words, the necessary evidence to support his representations regarding establishment, family support and intent to regularise his situation is lacking, as the original court determined.

B) In this case, as the original court accepted, the penalty of expulsion is duly reasoned.

Under Organic Law 7/85 of 1 July 1985, expulsion from the national territory was not considered a penalty; this follows from an interpretation of Articles 26 and 27 thereof taken together, in that the penalty they establish for infringements of the Act is a fine and they provide that infringements leading to expulsion may not be subject to monetary penalties. That statute thus made it clear that infringements for which a fine was applicable could not be punished by expulsion.

Organic Law 4/2000 of 11 January 2000 (Articles 49a), 51(1)b) and 53(1)), whose regulating provisions were maintained in the reform enacted in Organic Law 8/2000 of 22 December 2000 [Articles 53a), 55(1)b) and 57(1)], changed that conception of expulsion and provided that in cases of very serious or serious infringements as defined in points a), b), c), d) and f) of Article 53 "expulsion from Spanish territory may be ordered instead of a fine" and introduced provisions to the effect that "for purposes of grading penalties, the body competent to impose them shall apply criteria of proportionality, assessing the degree of culpability and where appropriate the harm caused or the risk posed by the infringement, and its dimension".

It follows from this regulation that:

1. Being in Spain illegally (after the elapse of ninety days as provided in Article 30(1) and (2) of Law 4/2000 as reformed by Law 8/2000, given that during the first ninety days the proper procedure is not expulsion but return) – we repeat, the fact of being in Spain illegally, under Article 53(a) may be punished by a fine or by expulsion. This follows not only from Article 53(a) but also from Article 63(2) and (3), which expressly allow that expulsion may not

be opportune (Article 63(2)) or appropriate (Article 63(3)), referring as it does to the case contemplated in Article 53(a), namely staying illegally.

For its part, Regulation 864/2001 of 20 July 2001 specifically alludes to the choice between a fine and expulsion, for Article 115 provides that the authority "may order expulsion from the national territory unless the body competent to decide determines that a fine is appropriate" (leaving aside for the moment the possibility that the Regulation itself is over-zealous given that, contrary to the terms of the Act, it appears to impose expulsion as the general rule and a fine as the exception). The important thing here is to remember that in cases of illegal stays, the Administration may, depending on the case, opt either for a fine or for expulsion.

2. In the system defined by the Act the principal penalty is a fine, as follows from Article 55(1) and the wording of Article 57(1), according to which in cases of illegal stay (*inter alia*) the authority "may order expulsion from the national territory instead of a fine".

3. As the more severe, and subsidiary penalty, specific reasons must be adduced for expulsion other than or in addition to mere illegal staying, since the penalty for this, as we have seen, is a fine. According to Article 55(3) (which alludes to the grading of penalties but must presumably also be applicable to the choice between a fine and expulsion), if it opts for expulsion the Administration must explain why it is proportionate, the degree of subjectivity, the harm or risk posed by the infringement, and in a general way – we would add – the legal and factual circumstances that militate in favour of expulsion and a bar on entry, which is a more severe penalty than a fine.

4. Nonetheless, it would be excessively formalistic to dismiss this ground simply because it is not set out in the actual decision, as long as it is recorded in the official file.

Thus:

A) In cases where the reason for expulsion is purely and simply staying illegally, absent any other negative factors the Administration must clearly adduce specific grounds for choosing the penalty of expulsion, since the penalty for staying illegally is, as we have seen, a fine.

B) However, in cases where the official file shows evidence of other negative aspects of the party's conduct or circumstances in addition to staying illegally, and these aspects are such as to warrant expulsion when added to staying illegally, the decision is not rendered groundless simply because these are not mentioned in the actual penalising decision. And although no specific grounds are mentioned in the decision of the Government Delegation ordering the appellant's expulsion, the record does show that he has no family in Spain, no established situation and no means of support, and following the criterion maintained by this Chamber in its latest judgments in 2007, among them number 544/07 dated 15 June 2007, as he is only staying with passport number NUM002, the decision must be confirmed and the appeal dismissed.

And it is the ruling of this Chamber that in the present case the principle of proportionality has not been violated.

* Judgment of the High Court of Galicia (Chamber for Administrative Proceedings, Section 1), 31 January 2008 (EDJ 2008/340219)

Refusal of renewal of work permit. Insufficient number of days worked; also, the contract of employment presented with the application for renewal of the work permit is for domestic employment whereas the prior authorisation specified the fishing industry.

"Legal Grounds:

(…) THREE. (…) According to the documentation in the official file and the employment history report, appended at folio 42 of the record of proceedings, the appellant registered with the Social Security on 1 February 2006 and worked a total of 87 days in 2006; there is no record of her having engaged in any kind of work – the course she mentions does not count – in 2005, for which year she had a work and residence permit.

What is more, the contract of employment which she presented along with her application to renew her work permit is for domestic employment whereas the previous permit had been granted for the fishing industry; that constitutes an infringement of Article 54(3) of Royal Decree 2393/2004, and also of 54(4) in that the contract of employment and the rest of the appended documentation refers to 2006.

Moreover, as the original judgment noted, the contract of employment dated 2006 was terminated before the elapse of three months of actual employment: the holder of the contract, Lorenza, took up the employment on 1 February 2005 until 28 April 2005 and has herself admitted that the termination of the contract was voluntary.

Article 54(5) of Royal Decree 2393/2004 remits to the non-contributory benefits referred to in Article 38 b) and c) of Organic Law 4/2000, granted by the competent authority in compliance with the Social Security regulations. In this case the court must dismiss the claim of undue application of paragraphs a) and d) of that Law, as these are not among the cases for renewal cited in Article 54.

And finally, *à propos* of this last claim, she cites the Supreme Court Judgment of 12 April 2004 as evidence that the appealed judgment was contrary to the case-law applicable to the case here at issue.

In that judgment the Supreme Court refused to admit an appeal in cassation against a judgment ordering the renewal of the applicant's work permit on the ground that in determining whether a person has had a regular, stable occupation, account must be taken of both the period covered by the existing permit he/she is seeking to renew and of continuity of employment or business activity or a new offer of employment from a responsible employer. However, the judgment ruled that this was contingent upon an assessment of the change in the circumstances prevailing at the time the permit whose renewal is sought was granted, and upon evidence that the worker presented a new contract of employment along with his/her application and had actually worked throughout the year covered by the existing permit, which requirements are in fact not met

in the case here at issue and hence the doctrine laid down by the Supreme Court in that judgment does not apply.

This appeal is therefore dismissed".

b) Family reunification

* Judgment of the High Court of Madrid (Chamber for Administrative Proceedings, Section 1), 3 April 2008 (EDJ 2008/84442)

Granting of visa to a Moroccan minor for family reunification in recognition of "Kafala". Equivalence of Kafala with filiation for purposes of reunification. Alien as legal representative of the child.

"Legal Grounds:

"(…) TWO. According to Article 17c) of the Organic Law on the Rights and Freedoms of Aliens in Spain and their Integration in Society, children aged less than eighteen or incapacitated persons are susceptible of family reunification if the alien resident is their legal representative. (…).

On 2 February 2005 the Judge Notary in the Court of First Instance of Tangiers acknowledged Kafala in respect of Mari Juana to Ernesto and Paloma, appointing them her guardians, and gave the child into their care by virtue of an Executive Order of the said Court, dated 23 March 2005. (…).

THREE. (…) Regarding the nature of *kafala*, the Circular/Order of the Directorate-General of Registers and Notaries of 15 July 2006 (…) declared that "classical Islamic law does not regulate any institution like full adoption in Spanish law whereby the adopted child's legal position is equivalent to that of a natural child as regards the creation of family ties and a consequent change in the civil status of the persons involved. This is because the Koran prohibits admission of an adopted child into the family with the same surnames and the same rights of succession as natural children (see verses 4 and 5 of Sura XXXIII); it only allows the fostered – never adopted – child the benefit of material care and education provided by the new foster family. This means that there is no change in the order of inheritance upon the death of any member of the new family, nor is any tie of kinship created, and hence nor is there any impediment to marriage (…).

The above-cited Circular/Order takes the view that since in countries whose law is inspired by the Koran the institution of *kafala* does not create a tie of kinship between the *kafils*, or person accepting *kafala* in respect of the child, and the latter, but merely establishes a personal obligation whereby the former takes the latter into his care and undertakes to be responsible for her upkeep and education, it creates a situation similar to fostering in Spanish law (…), wherein the child participates fully in family life and the foster parents assume the duty of caring for her, keeping her in their company, feeding her, educating her and assuring her a well-rounded upbringing, but it does not create new ties of kinship or sever existing ties, nor does it deprive the parents of parental responsibility (…). It further declared that *kafala* is a situation that is

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

Any doubts that there may have been as to the type of fostering to which *kafala* is comparable for purposes of family reunification – for not all the situations contemplated in Articles 172 and following of the Civil Code entail legal representation of the child (…) – have been dispelled by an Instruction on *kafala* from the Directorate-General of Immigration dated 27 September 2007, declaring that "when a visa is requested for entry to Spain of an alien minor from a country whose legal tradition is based on the Koran, based on a certificate of *kafala* not constituted by the child's biological parents (because these are unknown, the child is an orphan or has been declared abandoned by the authority competent according to the internal laws of the country of origin) and a public authority, be it administrative or judicial, has intervened to protect the child, such a certificate shall be deemed to establish a legal relationship equivalent to guardianship (as provided for instance in Moroccan Law 15-01 of 13 June 2002 on the custody of abandoned children) between the Spanish citizen, or alien resident in Spain, and the alien child. In such cases the Spanish citizen or alien resident in Spain shall be considered the alien child's legal representative, and hence the fostering arrangement may be permanent…". And the Instruction accepts family reunification as a valid means of enabling the child to take up residence in Spain. (…)."

* Judgment of the High Court of Madrid (Chamber for Administrative Proceedings, Section 1), 30 May 2008 (EDJ 2008/138924)

Visa for family reunification. Appeal for annulment of a decision to deny family reunification in Spain dismissed. Existence of information indicating intent to obtain a visa under false pretences.

"Legal Grounds:

(…) TWO. (…) available information indicates intent to obtain a visa under false pretences. In all fairness, given the untimely registration, based solely on a declaration by the alleged parent, the absence of matrimony and the fact that the document is not legalised, there is not the slightest assurance as to kinship, and therefore the appeal is dismissed without the need of further argument."

Contrasting with this decision, note Judgment of the High Court of Madrid (Chamber for Administrative Proceedings, Section 1), 20 June 2008 (EDJ 2008/148689) overturning the refusal of a visa for a merely formal error in registering when all the requirements for granting of a visa had been met, or Judgment of the High Court of Madrid (Chamber for Administrative Proceedings, Section 1), 3 April 2008 (EDJ 2008/84436) likewise overturning the refusal of a visa for family reunification, in this case again due to an error in the documentation attesting to the husband's presence at the marriage ceremony.

* Judgment of the High Court of Madrid (Chamber for Administrative Proceedings, Section 1), 23 June 2008 (EDJ 2008/148762)

Family reunification. Apparent marriage of convenience. Visa application apparently made solely for purpose of emigrating. The Chamber upholds the appellants' right to be granted visas for family reunification, overturning the decision of the Spanish Consul-General in Shanghai.

"Legal Grounds:

ONE. (…) The reason given for refusing the visas was the conclusion, founded on a personal interview with Mercedes, that her marriage to Juan Ramón was one of convenience.

(…) The Spanish Consulate-General in Shanghai gave ample details of the reasons that prompted them to refuse the visas in question, (…) the appellant met his present wife, Mercedes, in February 2004, they married in July of the same year and immediately applied for reunification of her and her son; however, in her personal interview Mercedes acknowledged that she had been wanting to leave the country since 2002, appeared confused when asked the reason, and was ignorant of details of her husband's life. (…).

TWO. According to Article 17 of the Organic Law on Rights and Freedoms of Aliens in Spain and their Integration in Society, resident aliens may be reunited in Spain with their spouse unless legally or *de facto* separated, provided that the marriage was not one of convenience, (…).

(…) in cases of marriages of convenience, absent direct evidence of simulation and of the true, concealed intent of the parties, the evidence in support of such a presumption must be extremely compelling, for given the general presumption of good faith and the fundamental nature of *jus nubendi*, a marriage of convenience may only be identified as such if it is clearly shown to be so by the existence of a precise, direct and unambiguous nexus between the proven facts and the presumption it is sought to demonstrate, in accordance with the rules of human judgment, beyond any reasonable doubt. (…).

FOUR. In the light of all the evidence contained in the administrative record, we are inclined to uphold this administrative appeal, for it – and in particular the personal interview with Mercedes – does not show incontrovertibly that her marriage to Juan Ramón was one of convenience. Admittedly there are inconsistencies in some points of the statement made by her, and indeed she did not recall all the events in the life of her husband about which she was questioned; but this Court cannot rule out the possibility that the inconsistencies in the answers to questions about Juan Ramón's latest journey to China or regarding Mercedes' reasons for applying for a passport in 2000 are a consequence of the terms in which some questions were put, and moreover the fact that she sought to leave the country does not necessarily mean that her desire was so strong that she would go to any lengths; and finally, the personal details about Juan Ramón that the declarant did not recall were not as essential as the ones that she did recall. (…).

From the circumstances as described one cannot conclude beyond all reasonable doubt that the sole purpose of both the marriage and the visa applications was to enable the appellant's spouse and her son to reside legally in Spain; and in our opinion that is sufficient reason to conclude that the defendant Administration has failed to demonstrate convincingly that this was a marriage of convenience; (…)".

2. Right of asylum

* Judgment of the National High Court (Chamber for Contentious Administrative Proceedings), 6 February 2008 (JUR 2008\80105)

Asylum. Burden of proof of conditions warranting the grant of asylum.

"Legal Grounds:

(…). THREE Article 13(4) of the Constitution remits to the Law to establish the terms in which citizens of other countries and stateless persons may be granted asylum in Spain. For its part, Law 5/84 of 26 March 1984, as amended by Law 9/94 of 19 May 1994 (Article 3), recognises as a refugee and consequently provides for the granting of asylum to any alien meeting the requirements set out in the International Instruments ratified by Spain, and in particular the Geneva Convention of 28 June 1951 on Refugee Status and the New York Protocol of 31 January 1967 on Refugee Status.

Article 33 of the aforesaid Convention prohibits contracting States from expelling refugees and returning them to territories where their life or freedom is at risk by reason of their race, religion, nationality, membership of a particular social group, or their political opinions.

Thus asylum is conceived in the Law as a means of legal protection for the defence of citizens of other States whose rights may be violated for the reasons listed.

In this connection the jurisprudence has determined how and in what conditions the Administration must act so that its conduct complies with the law, and it establishes that: a) although a discretionary measure, the granting of refugee status referred to in Article 3 of Law 5/84 of 26 March 1984 is not an arbitrary or *ex-gratia* decision (Supreme Court Judgment of 4 March 1989); b) to determine whether a person should be granted refugee status it is not enough that he be an emigrant – there must be persecution; c) the examination and assessment of the circumstances warranting protection must not be carried out in restrictive terms which make it difficult or impossible to prove such circumstances, and therefore a reasonable conviction that these circumstances are real must suffice for such status to be recognised, and – as this Chamber and Section asserted in its Judgment of 4 February 1997 – the Act itself so provides in Article 8, using the expression "sufficient indications", as consistently recalled by the jurisprudential doctrine in Judgments of 4 March, 10 April and 18 July 1989; d) notwithstanding the foregoing, mere claims to have suffered persecution for the reasons mentioned are not sufficient to warrant the grant of refugee status where they are quite unbelievable or there is absolutely nothing

to suggest that they might be true; e) there must be persecution and good reason for the persecuted party to fear (objective and subjective elements) if he is to be granted refugee status.

Then again, when cases are being processed, the aforesaid Law 9/94 provides for a preliminary step in the examination of applications, in which an application may be refused admission for processing if it is abusive or unfounded, which is the case when any of the following circumstances, listed in Article 5(6) of the Law regulating the Right of Asylum, arise:

a) Those contemplated in Articles 1(F) and 33(2) of the 1951 Geneva Convention on Refugee Status.

b) The application does not claim any of the causes warranting recognition of refugee status.

c) The mere repetition of an application already refused in Spain, as long as no new circumstances have arisen in the country of origin that could substantially alter the merits of the case.

d) The application is based on facts, details or claims that are manifestly false or implausible or which are no longer current and hence do not warrant protection.

e) Spain is not responsible for determining whether the application conforms to the International Conventions of which it is a Party. The decision not to admit the application must indicate to the applicant what State is responsible for such examination. In that case, the State referred to will have explicitly accepted such responsibility and in any case adequate guarantees will be secured for the protection of the applicant's life, liberty and other principles enshrined in the Geneva Convention in the territory of that State.

f) The applicant has recognised refugee status and as such is entitled to reside or obtain asylum in a third State or has come from a third State where he could have applied for asylum. In either case, in such a third State there must be no threat to his life or freedom, nor must he be at risk of torture or inhumane or degrading treatment, and he must enjoy effective protection against return to the persecuting State, as provided in the Geneva Convention.

In accordance with the above-mentioned principles and the form in which they are enshrined in the Act, this Chamber has repeatedly ruled that the introduction of this preliminary step allows the Administration, in the light of the content of the application, to refuse to admit it for processing if any of the circumstances listed in Article 5(6) of Law 5/1984 (added by Law 9/1994) arise, and in the case of an application submitted on a border if the applicant alien further fails to meet the requirements laid down for entry to Spain in the aliens legislation. This possibility of refusing to admit an application must be placed in relation to the procedural burden on the applicant to "set out in detail the facts, information or claims on which his application is based" (Article 8(3) of the Regulation approved by Royal Decree 203/95 of 10 October 1995) or, put in another way, to "provide a plausible account of the persecution suffered based upon appropriate evidence or sufficient indications of the circumstances warranting the grant of asylum" (Article 9(1) of the same Regulation).

This being so, refusal to admit an application may be challenged in court on the basis either of violation of the applicable procedural rules – whether of the ordinary procedure provided for applications submitted in Spain or at diplomatic and consular offices, or of the special procedure applying where the person makes his application at a border – or of improper application by the Administration of any of the reasons for non-admission provided in the various sections of Article 5(6) of Law 5/1984 added by Law 9/1994.
(…)".

* Judgment of the National High Court (Chamber for Contentious Administrative Proceedings), 19 February 2008 (JUR 2008\87150)

Refusal to recognise the right of asylum. "Reasonable certainty" regarding the factual account presented in evidence of persecution. Burden of proof attenuated but not entirely lifted.

"Legal Grounds:

(…) TWO. (…) If the dispute is to be viewed in these terms, it should be noted that absolute proof of the situation invoked is not required; however, as the Supreme Court noted in its Judgment of 25 September 2000 on appeal in cassation 10,671/1998, there must be a "reasonable certainty" regarding the factual account presented, and the Supreme Court took the view that "there can only be certainty when there is a precise and direct link according to the rules of human judgement". (…) On issues of refusal of asylum, the Supreme Court has repeatedly laid down doctrine which must be taken into consideration, in Judgments including one by Section Five on appeal in cassation number 5091/2002, dated 28 October 2005, the fifth ground of which reads as follows:

"Be it remembered that the consolidated jurisprudence of the Supreme Court interprets the rules on asylum and refugee status in the sense that they infer an attenuation of the burden of proof but not an absolute release therefrom (see for example the Judgment of 1 June 2000, appeal in cassation 4997/1996, and more recently Judgments of 6 April 2005, appeal in cassation 6306/2000 and 30 May 2005, appeal in cassation 1346/2002). In fact, for asylum to be granted it is enough that there be reasonable grounds for believing that the applicant has a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinions. Reasonable grounds, then, are enough; but they must exist, and the burden of providing them lies with the appellant.

THREE. Nor are there humanitarian considerations arising out of a situation of danger to the physical integrity of the applicant or to his life, which was not demonstrated in the case here at issue, as noted, and such demonstration is required under Article 31 section 3 of the Regulation implementing the Asylum Act, which identifies humanitarian reasons as good reason to believe that a return to the applicant's country of origin would entail a real risk to his life or physical integrity, in the wording of the provision as set out in Royal Decree 1325/2003 of 24 October 2003 . In this connection, in its Judgment of 27 May 2006, Section Five of the Supreme Court (appeal in cassation no 287/2003) noted that the humanitarian reasons referred to in Article 17(2) of

the Asylum Act "are not strictly speaking any humanitarian reasons but reasons having to do with the degree to which rights such as those of life, security and freedom are threatened in the applicant's country of origin as a consequence of serious political, ethnic or religious disturbances."

In a similar vein see Supreme Court (Chamber 3, Section 5) Judgment of 12 May 2008 (EDJ 2008/67054), in which recognition of refugee status and the right of asylum were likewise refused because the applicants had provided no evidence – even *prima facie* – of persecution or good reason to fear it for reasons of race or membership of a particular social group.

* Judgment of the Supreme Court (Chamber for Civil Matters, Section 1), 27 March 2008 (JUR 2008\1447)

Right of asylum. Activities engaged in from Spain against the current political regime in Equatorial Guinea. Lack of evidence of engagement in arms trafficking and hiring of mercenaries.

"Legal Grounds:

(…) SIX. (…) In view of the subject matter, before going any further it must be remembered that in our Judgments of 4 April 1997 – which cited a Supreme Court Judgment of 2 October 1987 and a Constitutional Court Judgment of 15 March 1990 – we said that "the clear jurisprudential position we have alluded to regarding the admissibility of a political activity of the Government becomes blurred and poses genuine difficulties when it has to be applied to a particular case, for at that point ineluctable constitutional principles and rules come into play which tend to restrict such admissibility and which, systematically applied, will frequently make it necessary to fall back on the fund of legal experience acquired in exercise of the judicial function in order to arrive at an individualised ruling that provides a satisfactory solution to the particular dispute that needs to be settled within the Law.

Among these principles and rules, we find first of all that the Constitution provides an important element which is an innovation on the prior legal situation; this is the provision contained in Article 24(1), which enshrines the fundamental right of all persons to effective judicial protection, a right that would appear at first sight to collide with the fact that a part of the Government's activity is not subject to judicial control, as long as someone is able to show that a right or legitimate interest has been violated by such activity.

(…) Another constitutional stricture that we must bear in mind is Article nine, which tells us that the public powers are subject the Constitution and the law in general and that the Constitution guarantees the principle of legality. If we take these precepts together with the fundamental right recognised in Article 24(1) we find it difficult in principle to refuse judicial protection when requested by a person entitled to it claiming illegal action by the Executive Power.

Nonetheless, while acknowledging that our legal system objectively allows the legality of certain acts of political management by the Government in principle to escape judicial control, if not other controls such as political accountability or judicial processing of any claims for compensation that may arise from them,

Articles 9 and 24(1) still oblige us to assume such control when the legislator has placed within the purview of the courts the prior limits or requirements to which such acts of political management must be subject, in which case the courts are obliged to examine any claims that the Government has overstepped or breached those prior requirements in making its decision".

EIGHT. Finally, we must examine these facts in the light of the Resolutions and acts of the United Nations – in cases of coups d'état – and of their classification as "acts contrary to the purposes and principles of the United Nations", which, be it remembered, are the only facts warranting the revocation of refugee status according to Article 1.F.c) of the Geneva Convention on Refugee Status.

Particularly illuminating in this respect is the Report (4) drawn up by the International Legal Department of Spain's Ministry of Foreign Affairs and Cooperation, which is appended to the record in connection with the scope and meaning of the cited Article 1.F.c) of the Geneva Convention on Refugee Status, which regulates a set of clauses on disqualification from refugee status listing the categories of persons considered not to qualify for protection under international conventions; as the report notes, these same clauses are used to justify a subsequent review and, where appropriate, withdrawal of refugee status. As we know, section c) includes "acts contrary to the purposes and principles of the United Nations".

The first conclusion to be derived from an examination of the preparatory work for the 1951 Geneva Convention is that it is not possible, clearly and unambiguously, to extract a list of conducts that are understood to be fall within the category of "acts contrary to the purposes and principles of the United Nations"; moreover, viewed subjectively, the concept would appear to be reserved to States and not to individual persons – in this case refugees.

The report extracts a number of conclusions from the various UNHCR studies and documents concerning the problematics and the complexity of application of these exclusion clauses, in view of which they must be interpreted restrictively and in such a way that they do not produce gaps in international protection, and they must be reserved for persons guilty of the most serious and unacceptable acts, extreme circumstances or when an act and its consequences overstep a very narrow threshold, which has to be defined in relation to the seriousness of the act in question, the way in which it was organized, its international impact, etc. Also, the UNHCR concludes that these clauses do not appear to be intended for a "common, ordinary man" but "only for persons in positions of authority in a State or State-like entity", albeit it cites some isolated cases of "individuals not associated with a State" Again without drawing up a list, the UNHCR would exclude acts relating to drug trafficking and immigrant trafficking but would include "acts of terrorism, albeit subject to severe restrictions".

We derive similar conclusions from an analysis of Council Common Position 96/196 of 4 March 1996 on the harmonised application of the term "refugee", which appears to restrict it to "persons in senior positions in the State" or members of its security forces.

Then again, an examination of the international practice – which is scant, be it said – throws up two instances in which France refused refugee status to a member of a fundamentalist movement in Morocco who had taken part in illegal arms trafficking in connection with the organization of a coup d'état, and a private individual (a former civil servant) who had taken part in a coup d'état against the President of Georgia. In any case the Report does not draw any significant conclusion from the international practice cited. And the story is much the same as regards the doctrine that has dealt with the subject.

As the above relates to this particular case, the Report considers that such a clause would be applicable to the appellant's case in the light of "acts of organisation, preparation and participation in a coup d'état in Equatorial Guinea, this closely connected with and cumulative to the appellant's alleged engagement in acts of illegal arms trafficking and illegal recruitment of mercenaries". The Report of the International Legal Office highlights these two particular actions – arms trafficking and hiring of mercenaries – as what really determined his exclusion under the cited clauses, as they must be treated as "acts contrary to the purposes and principles of the United Nations", considering the appellant's engagement in those particular activities. The Report states that "if as stated in the Report of the General Commissariat for Information, Augusto engaged in the preparation, organisation and execution of coups d'état against the Government of Equatorial Guinea and at the same time and occasion likewise engaged in arms trafficking and the recruitment of mercenaries for that purpose, such actions may be accepted as coming within the meaning of article 1.F. c) of the Geneva Convention".

As we know, however, the appellant's engagement in such particular actions – arms trafficking and hiring of mercenaries – has not been proven, either to our satisfaction or to that of the Court in Equatorial Guinea that tried him *in absentia*, when moreover the actions – which were organised without the direct intervention of the appellant – were carried on in places far remote from the Kingdom of Spain, for instance Zimbabwe.

It is therefore our duty to annul the challenged Cabinet Resolutions revoking from the Equatorial Guinean citizen Augusto the right of asylum that he had been granted by Decision of the Interior Minister on 13 March 1986".

3. Nationals of Member States of the European Union

***** Judgment of the Supreme Court (Chamber for Administrative Proceedings, Section 5), 13 February 2008 (JUR 2008\1362)

Aliens. Expulsion improper. Accession of Bulgaria to the EU. The Government has not ordered specific transitional measures regarding the rules for stays and residence by Bulgarian citizens, but in any case such transitional measures may not entail impairment of their rights as Community citizens, only the requirement of a work permit.

"Legal Grounds:

(…) FIVE. (…) It would be more problematical – in an appeal in cassation – in view of the terms in which the debate has been couched, of the particular arguments proffered by the appellant in the lower court, and of the grounds adduced before this Court (consisting, essentially, in the invocation of Article 59 of Organic Law 4/00) to apply the doctrine laid down, among others, in Supreme Court Judgments of 14 December 2005 and 19 December 2006, regarding the need for express grounds to order the expulsion of an alien rather than imposing a fine in the cases defined in Article 53a) of Organic Law 4/00, to wit, "Being in Spanish territory irregularly by reason of failure to obtain and extension of stay or having allowed it, a residence permit or suchlike document to lapse for over three months where such was required if the party has not applied for a renewal in due time" –

because in the grounds as stated we can see no connection with the cited doctrine.

SIX. However, we are in fact obliged to view the issue from a different perspective, which we might have done even before examining the grounds of cassation proffered by the appellant, in view of the fact that developments of special import for the case have taken place which may determine the verdict and which cannot be ignored since they are a matter of general knowledge and since the constitutional right to effective judicial protection so demands.

These circumstances are a consequence of the accession of Bulgaria, the appellant's country of origin, to the European Union – an issue already examined and settled in a recent Supreme Court Judgment dated 12 February 2008.

The Treaty of Accession of the Republics of Bulgaria and Romania to the European Union was signed in Luxembourg on 25 April 2005. This Treaty was ratified by Spain in an Instrument of Ratification dated 26 May 2006; it was published in the Official State Gazette no 17 of 19 January 2007 and came into force on 1 January 2007, as provided in Art. 4 thereof. Therefore, as of 1 January 2007, nationals of Romania and Bulgaria acquired the status of European Union citizens which, as we all know, carries implicit the recognition of freedom of movement and residence in the territory of the Member States.

It is worth highlighting in this connection that Article 1 of the Treaty of Accession of 25 April 2005 states that both Romania and Bulgaria thereby become members of the European Union, adding that "the conditions and arrangements for admission are set out in the Protocol annexed to this Treaty. The provisions of that Protocol shall form an integral part of this Treaty. The Protocol, including its Annexes and Appendices, shall be annexed to the Treaty establishing a Constitution for Europe and to the Treaty establishing the European Atomic Energy Community, and its provisions shall form an integral part of those Treaties". However, the Protocol and Annexes VI ("transitional measures, Bulgaria") and VII ("transitional measures, Romania") only contemplated the possibility of other Member States introducing transitional measures in the form of safeguard clauses with reference to freedom of movement of workers and

the provision of services – which have a direct impact on the labour market – but not with reference to freedom of movement and residence within European Union territory.
(…)

The fact is that Article 15 of this Regulation, approved by Royal Decree RD 240/07, lays down a number of situations, clearly conceived as exceptional, in which it is allowable to expel a citizen of another EU Member State from Spain, and provides that "an order to expel a citizen of a European Union Member State or of another State party to the Agreement on the European Economic Area, or members of their families, regardless of their nationality, may only be given if there are grave reasons of public policy or public security". Section 7 of the same article makes the qualification that "expiry of the identity document or passport with which the applicant entered Spain, or his residence permit as the case may be, may not be a cause of expulsion" and adds in section 8 that "neglect of the obligation to apply for a resident's card or a registration certificate shall be subject to the monetary penalties laid down in the same terms and for the same situations for Spanish citizens in respect of the National Identity Card". Hence, Romanian and Bulgarian citizens cannot now be expelled merely for not having their personal documentation in order.

Precisely because Romanian and Bulgarian nationals have European citizen status, they are not subject to Organic Law 4/2000, at least for the purposes of the penalty regime concerned here, under Article 1(3) thereof, which provides that "nationals of European Union Member States and persons to whom the Community norms apply shall be subject to the legislation of the European Union. This Law shall be applicable to them in respect of aspects where it is more favourable to them" (obviously the penalty system under this Organic Law is not the most favourable for the present purposes). And this has an important legal consequence – on which we shall elaborate anon – in that under the principle of retroactivity of the most favourable penalty regime (Article 128(2) of Law 30/92), Article 53.a) of this Organic Law 4/2000 (as amended by Organic Law 8/2000) is no longer applicable to Romanian or Bulgarian citizens, for as we have seen, failure and/or delay in completing the administrative formalities required for them to be in Spain (like any other Community citizens) cannot be classified as an "irregular stay" for the purposes of the above-cited Article 53.a), since as of 1 January 2007 they do not require prior permission to be in Spanish territory and are subject only to a simple administrative control in the form of registration, the omission or improper completion of which may produce the consequences contemplated by regulation, but under no circumstances expulsion under Article 53.a).
(…)".

X. FAMILY

1. Filiation and parent-child relations

a) Natural filiation

***** Order of Santa Cruz de Tenerife Provincial High Court (Section 1), 24 March 2008 (JUR 2008\163672)

Filiation. Principle of "favor filii". Contribution of the International Adoption Act in this respect.

"Legal Grounds:

(…) FOUR. A systematic analysis of the applicable rules indicates that the subject of filiation has developed within a context of its own, in which there have been profound changes in the principles on which relations of that kind were historically founded – always with a view to the legal security of the family as identified with the interests of the father as head of the family, and clearly characterised by a restrictive policy affecting any challenge to the husband's paternity, as regards: the persons legally entitled to challenge it, the time allowed to do so, the possible cases and the evidence admissible against a presumption of paternity. Thus, active legal capacity to challenge paternity was accorded solely to the husband, in obedience to a patriarchal philosophy, who moreover was presumed to be the only party affected by the consequences of conjugal infidelity, while third parties were excluded in order to preclude interference in so intimate a matter – which parties according to the doctrine included the child, who ought not to be the judge of his parents' conduct, and his mother as the person at fault, through her adultery, for the child's extra-marital origin. That situation was superseded by the principles enshrined in the Constitution, which wrought major changes in this field in order to bring it into line with the new social conditions; these principles are still in a state of evolution and cannot be said to be consolidated yet in light of the currently-evolving concept of the family and the spectacular advances that there have been in biological research on paternity. Article 39(2) of the Constitution is clear in this sense, providing: "The public authorities likewise ensure full protection of children, who are equal before the law regardless of their parentage, and of mothers whatever their marital status. The law shall provide for the possibility of the investigation of paternity". The Constitutional Court's own doctrine accepts and stresses "the importance of biological tests of paternity, both to protect fundamental rights (Arts 14 and 39 of the Spanish Constitution) and to arrive at a firm conclusion, since the results thereof are irrefutable where paternity is ruled out and overwhelming where it is confirmed"; and in that connection it is significant that the Supreme Court's rulings accord the higher rank to "investigation of paternity", recognising that "biological truth takes precedence over presumption, particularly in a case like the one at issue in which the former is not conceded simply because the action has lapsed". This case law is founded on the view that the time limit of one year as from the date of registration of filiation in the Civil Register cannot be

interpreted strictly where there are clear indications against paternity, as this conflicts with the principles informing the "Law of 13 May 1981, the intent of which is patently that in matters of marital status the reality should prevail over a presumption founded on the fact of matrimony – as enshrined in the Reform Act and reflected in Art. 127 of the Code, which admits all kinds of evidence in filiation proceedings that may rebut presumptions, among them the ones contemplated in Art. 116, which offers the possibility of challenging a mere presumption" and provides that "in conforming to the terms of the Constitution (Art. 39) it affords full protection to the offspring – protection, that is, against erroneous determination of paternity as in the anomaly of recognising the parental authority of one who is not the child's progenitor and has institutionalised comprehensive investigation of paternity in such a way that that authority is not subject to unfounded limitations" (Supreme Court Judgment 30/1/1993). This interpretative doctrine whereby "biological truth takes precedence over presumption, so that the lapse of the action is averted" is likewise reflected and accepted in later Supreme Court Judgments, *inter alia* 30/10/1997; 23/3/2001; 3/12/2002). At the same time it should be remembered that the rules must be applied with due reference to the "social reality prevailing at the time they are applied". That means recognising and appreciating the high status accorded to the investigation of paternity in current society, as evidenced by the fact that in the field of international adoption the recent Law 54/2007 expressly recognises (Article 12) the "right to ascertain one's biological origins" and provides that "Upon reaching their majority, or if minors represented by their parents, adopted persons shall be entitled to ascertain the details of their origin", and that in comparable countries (e.g. England) children are now allowed to ascertain the identity of the donor of sperm, ova or embryos – i.e. their progenitor – with all that such knowledge of biological family ties can mean for purposes of prevention or treatment of genetic disorders. The fact is that new social conditions tend to undermine the historical justifications for time limits which "seek to assure the stability of marital status by preventing the institution of actions that might disrupt family life or abruptly sever parent-child relationships", driven by the new social circumstances, which in turn impose new conditions determining the proper response to the present dispute".

b) Adoptive filiation

* Judgment of the High Court of Madrid (Social Chamber, Section 3), 31 January 2008 (AS 2008\959)

Adoption and the Islamic institution of "kafala". Entitlement to orphan's pension.

"Legal Grounds:

(…) ONE. (…) As noted earlier, filiation only occurs naturally or by adoption, and consequently at this time permanent fostering does not confer entitlement to the orphan's pension – irrespective of other aids such as the one granted by the Autonomous Community of Madrid, as stated in the eighth proven fact.

However reasonable or otherwise we may judge this regulation, which is arguably open to criticism "*de lege ferenda*", the fact is that the difference in protection of natural or adopted children and children in permanent fostering arrangements does not violate the constitutional principle of equality.

Be it said first and foremost that the difference between natural or adoptive filiation and permanent fostering may raise an issue regarding the principle of equality before the law, but it should not be confused with discrimination inasmuch as the two situations are conceptually related but distinct (Supreme Court Judgment of 18 September 2000). Article 14 of the Civil Code contains two strictures which need to be differentiated: the first, in the final paragraph of the article, refers to the principle of equality before the law and enforcement of the law by public authorities; the second prohibits discrimination and seeks to eliminate so odious a form of inequality inasmuch as it implies a worse violation of equality given the particularly unacceptable nature of the differentiating criterion used. In the present case there is clearly no question of discrimination or discriminatory intent – which tends to arise more in private relations – as defined in Article 14 of the Constitution and Article 17 of the Workers' Statute. And the question that needs to be asked is whether the rule laid down in Article 175 of the Social Security Act is contrary to the principle of equality, which normally informs the law (Supreme Court Judgment of 17 May 2000). In this respect the difference in the way that Article 175 of the Social Security Act regulates natural or adopted children and permanently fostered children cannot be said to be contrary to the principle of equality, for what that principle demands is that equal situations produce equal legal consequences; what the principle of equality prohibits are artificial or unwarranted inequalities lacking any foundation in an objective, rational criterion – in other words, equality is only violated if there is no reasonable, objective justification for unequal treatment.

This Chamber does not believe that the principle of equality has been violated by the fact that upon the deceased's death her natural child is entitled to an orphan's pension but her foster child is not, for the nature, constitution and effects of the two situations are different and each is treated differently by the Civil Code.

And again, although possibly open to doctrinal criticism, the present legal rules do not appear to be contrary to the principle of social protection of the family or of children enshrined in Article 39 of the Constitution or the limited protection afforded by Article 53 of the Constitution; the latter, which must inform the action of the public authorities and the courts, can only be invoked in accordance with the legal provisions implementing them (Article 53 of the Constitution), and under no circumstances does it authorise the courts to create or extend a contributory benefit whose conditions are laid down by the legislature.

In short, the appellant is arguing that if "Kafala" is functionally equivalent to fostering and a foster child is not entitled to an orphan's pension, then far from there being indirect discrimination as referred to in the judgment, recognition of such entitlement would discriminate against Spanish foster children in favour of children fostered under "Kafala".

TWO. Mathematics tells us that there are three basic ways to relate two sets – to identify the elements common to both (intersection), to identify the common and non-common elements (joining) and to identify the non-common elements (symmetrical difference).

What we have to do in this case is to compare two legal institutions – normative sets – and decide in which way to relate them. The approach adopted by the judgment is an intersection, in that by identifying only the common elements – the duty of safeguarding and caring for the child inherent in both Kafala and adoption – it assimilates the two and concludes that to treat them differently would discriminate unfairly against alien children resident in Spain.

The appellant managing institution proposes an approach based on symmetrical difference, identifying only the differentiating element, namely that Kafala, unlike adoption, does not create a tie of kinship, and hence justifies differential treatment based on the different nature of the tie.

We believe that the correct approach is to merge; by identifying both the common and non-common elements we arrive at a nuanced comparison of the two forms – a more empirical one than the abstract comparison implicit in the other two approaches.

We must bear in mind that although it does not create a legal tie of kinship equivalent to adoption and hence is not assimilable to the latter – its effects are less favourable to the child than adoption – conversely Kafala is not assimilable to fostering since its effects are more favourable to the child.

This is so given the nature of the tie of "kafils", deriving from the regulation of Kafala (folios 239 to 246 which contain Law no 15-01 on guardianship (Kafala) of abandoned children), especially Art. 25, which provides that "Kafala may be terminated for any of the following reasons:

– The child subject to Kafala reaches his majority. These provisions do not apply to unmarried female children or to children who are disabled or incapable of looking after themselves.

– Death of the child subject to Kafala.

– Death of both spouses responsible for Kafala or of the woman responsible for Kafala.

– Incapacity of the woman responsible for Kafala.

– Dissolution of the body, institution or association in charge of Kafala.

– Annulment of the right to assume responsibility for Kafala by court order in the event of breach of obligations on the part of the person who had assumed responsibility for Kafala or in the event of desistance[sic] of that person or if the overriding interests of the child subject to Kafala so demand".

This differs from Art. 173(4)2) of our Civil Code, which provides that fostering of the child shall be terminated "By decision of the foster parents" or "at the request of the guardian or of the persons possessing parental authority". The commitment to the care of the child is therefore weaker in the case of fostering, where termination is not subject to a judicial decision, and as we shall see, we believe this is decisive given the *ratio legis* of the orphanhood benefit.

What we have to do therefore is compare Kafala not with adoption or fostering but with adoption/fostering together – the functional equivalence need not

be so strict since the important thing is the legal outcome [Comparison is not the same for purposes of rights of succession as for the right to maintenance, for example].

(…)

Having established that, we can now proceed to compare Kafala with adoption as two systems for the protection of children by persons having no natural ties of kinship with them and acting on their own behalf rather than standing in for the parental tie (as a guardian for example).

Both systems are founded on public or official "fostering" [Art. 8 of the cited Moroccan law].

In terms of the duty of care for the child, the Moroccan law of Kafala requires exactly the same judicial supervision and protection as adoption. Indeed, Art. 11 of the cited Law provides that where there are natural children along with a child subject to Kafala, the latter must "benefit equally from the means at the disposal of the family".

And for our particular purposes here [which have no bearing on succession, where there is, be it said, considerable variation in our statutes depending on the degree of testamentary freedom allowed by the various foral laws] it is worth noting that Art. 22 of the Law regulating Kafala provides that "the person guaranteeing Kafala is entitled to the family benefits and aids granted to parents by the State, public or private institutions or local bodies and confederations".

The only difference appears to arise not in the general nature of the two institutions but in the fact that Kafala does not entail the creation of a new relationship of filiation replacing a former natural – or legal – relationship and hence there may be a dual duty of care. But be that – the alternative duty of the biological parents to provide maintenance – as it may, we cannot resolve the question on the basis of the evidence furnished, which is insufficient for these purposes, and in any case, given that the children are not only abandoned but are of parents unknown (f.183 et seq.), that fact is clearly irrelevant.

As already noted, the point here is not to undertake a comparative analysis of adoption and Kafala as institutions – comparative law recognises various different types of adoption and Kafala – in a general way but to do so with particular reference to the right of access to a benefit from the Spanish Social Security, with a view to complying, not so much with a constitutional rule of equality as interpreted in the appealed judgment, which does not in principle exist, but with another legal, and more precise rule of parity under Art. 10 of Organic Law 4/2000, which provides (…) and Art. 14(1) of the same Law, which provides (…). When these provisions are taken together with Art. 9(4) of the Civil Code, which provides that "The nature and the substance of filiation, including adoptive filiation and parent-child relations, shall be governed by the personal law of the child", there can be no resort to a purely national *constructio verborum*; that would render the rule pointless, since if we take "child" to mean a natural or adoptive child as normally defined in our law, any discrepancies on this subject among the various legal regimes that have to be taken into consideration could prevent equalitarian access to benefits.

Moreover, there can be no ignoring the fact that while the concept of natural filiation may be considered universal in that it is in a sense pre-legal and in that respect the function of the law today, based on the premise of equality, is to prevent the kind of discrimination that may arise among children through (culturally-based) legal/formal considerations, causing some to be treated preferentially, the same does not apply to purely legal – or adoptive – filiation, concerning which the function of the law is the opposite, namely to moderate the difference in treatment deriving from the absence of a natural parent-child relationship by establishing something that is like natural filiation and as such is susceptible of graduation by law.

Therefore, the fact that Kafala does not entail as complete an assimilation to natural filiation as does adoption in our present legal system is no more than a divergence in the way that two legal systems deal with the same instances of child fostering, in no way collides with the applicability of the above-cited Arts 10 and 14(1), which necessarily presuppose legal differences in interplay with Art. 9(4) of the Civil Code. What we have to determine, moreover, is not so much or solely the child's mediated or derived right to the benefit but rather the direct right of the alien worker legally contributing in Spain to create a benefit entitlement on behalf of the children for whose care he/she is solely responsible, in the same conditions as Spanish contributors.

What we have to compare is therefore the substance of the appellant's duty of care rather than the name used to designate it in law. Similitude of names is of no importance – it is a matter of translating foreign terms, not transcribing them. And if mere linguistic translation is often a complex matter given the different semantic fields within which any term falls in each language, to the extent that the same word may have a different meaning (what linguists call 'false friends'), the difficulty is all the greater when it comes to translating a second-level language or style, such as legal language, in which notions have come to acquire a meaning different from the usual and hence comparisons need to be made. What we have to examine, then, is the legal semantics of the foreign system and the points on which it matches our own. In this sense we take the usual meaning of "adopted child", as a common term, where the stress is on the noun denoting filiation as descent (son/daughter) as opposed to the legal notion of a means of protecting and caring for children who are not natural descendants, where the emphasis is on the existential option denoted by the adjective (adopted).

As we have explained, the point is to compare the social functions of Kafala and adoption with the general legal framework of protection of children, identifying similarities and differences to justify the application of different or similar treatments when deciding on equality of access to orphans' benefit.

And as we have seen, in cases like this one where there is no record of parental identity or survival of the natural tie, Kafala performs its function with same care content as adoption, and therefore the contrary position of the appellant is unwarranted and contrary to the provisions of Organic Law 4/2000".

Regarding the institution of Kafala, see also the Judgment of the Provincial High Court of Madrid (Chamber for Administrative Proceedings, Section 1) of 3 April 2008 (EDJ 2008/84442) concerning family reunification, reproduced in section VIII of this volume. Aliens, refugees and nationals of member countries of the European Union. 1. General rules. b) Family reunification.

* Judgment of Barcelona Provincial High Court (Section 18), 31 January 2008 (EDJ 2008/146605)

International child adoption. Adoptive parents in Catalonia not suitable to bring up an adopted child.

"Legal Grounds:

ONE. (…) Although, as this Chamber declared in judgments dated 16 February 2006 and 22 November 2007, the Catalan legislation on the subject does not contain a definition of suitability while other regional legislations do – for instance that of Cantabria, where (Article 34 of Decree 58/2002 of 30 May 2002) it is defined as "suitability and fitness of the applicants to perform the duties inherent in parental responsibility, as recognised by the Administration", and that of Castilla-La Mancha, where (Article 6 of its decree 45/2005 of 19 April 2005) it is defined as "the capacity, attitude and motivations of the applicants for adoption to satisfactorily acquit themselves as adoptive parents" – in the Adoption Act, Law 54/2007 of 28 December 2007, chapter III of which regulates the suitability of adopters, Article 10 contains a definition of suitability as "the appropriate capacity, fitness and motivation to exercise parental responsibility and attend to the needs of adopted children, and to accept the peculiar characteristics, consequences and responsibilities that international adoption entails". This definition effectively recognises the need for extra capacity, fitness and motivation suited to the needs of adopted children and acknowledges the existence of peculiarities, consequences and responsibilities entailed in international adoption.

In Catalan law, Article 71 of the *Reglament de Protecció de Menors Desemparats i de l'Adopció* [Regulations on Protection of Abandoned Children and Adoption], approved by Decree 2/1997 of 7 January 1997, lays down the criteria to be taken into consideration in assessing the suitability of persons applying to adopt a child, and it identifies four different aspects: personal, family and social; socio-economic; fitness as upbringers; and the characteristics of the child. Article 10 of the Adoption Act requires a psycho-social assessment of "the personal, family and relational situation of the adopters, their capacity to establish stable, secure ties, their abilities as upbringers and their fitness to care for a child taking its particular circumstances into account, and any other relevant factor related to the peculiar nature of international adoption. The wording of the above article reflects the stress placed by the legislation on the peculiar nature of international adoption, which is structured as a more complex process than biological filiation, with particular features and intrinsic difficulties which require special consideration. (…)".

* Judgment of Malaga Provincial High Court (Section 6), 11 March 2008 (JUR 2008\252201)

International adoption of a child from El Salvador. Suitability of adopters in Andalusia.

"Legal Grounds:

(…) TWO. …Now, the case-law consistently takes suitability for adoption to mean that the person applying to adopt has a secure personal, social and financial situation. The record of these proceedings shows that Virginia was declared suitable for the proposed adoption in 2001, when she was 56 years old, and even given the delay in the procedure, that did not seem to constitute an obstacle to the adoption as far as the administration was concerned. Therefore, if the applicant's age at the time she applied to be declared suitable and at the time she was so declared – and even when new psychological reports were sent in, by which time the much-cited decree was in force – was not an obstacle for the administration, the administration cannot now use the adopter's age upon reviewing her declaration of suitability as an argument to justify declaring her unsuitable….".

* Judgment of Barcelona Provincial High Court (Section 18), 8 July 2008 (EDJ 2008/315373)

Adoption. Adoption procedure. Cases where it is unnecessary. Catalan regulations. Elapse of one year not necessary for adoption to be final. Adoption of an alien child in conditions comparable to fostering or to guardianship formalised abroad: Kafala.

"Legal Grounds:

ONE. (…) Before addressing the particular question at issue here, we must determine what laws are applicable and to what arrangement for the protection of children Kafala as constituted in this case is equivalent, inasmuch as the lower court has based its ruling on a judgment of the Cadiz Provincial High Court the facts of which are entirely dissimilar to those in the present case and which concluded by denying adoption, but for completely different reasons from the ones subsequently stated in the last part of the legal grounds of the appealed judgment. But first we must look at the facts or background circumstances that require special consideration.

Mauricio, the child whom Remedios has applied to adopt, was born in Morocco on 5 December 2006; Remedios obtained a certificate of suitability from the competent authority, the ICAA, on 4 April 2007; on 26 June 2007 the Court of First Instance of Mequinez, Morocco, declared Mauricio to be an abandoned child; on 23 July 2007 the same court assigned "Kafala" or legal guardianship to Remedios; the child has been living in Spain with the applicant since August 2007.

What we have, then, is a situation where a child resides in Spain under the guardianship and care of Remedios, who has been assigned the legal guardianship or "Kafala" by the competent judicial authority in the child's country of origin and who has applied to the Spanish courts to formally adopt him.

TWO. In the wording introduced by the International Adoption Act, Law 54/2007 of 28 December 2007, Article 9(5) of the Civil Code provides that international adoption is to be governed by the rules laid down in that Act and that adoptions formalised by foreign authorities shall be valid in Spain subject to the provisions of the said International Adoption Act.

The authority to formalise an adoption is conferred on the Spanish courts by Article 14 of the International Adoption Act. Articles 18 and 19 of the Act determine what laws are applicable to the present case, and that is Spanish law inasmuch as the adoptee is habitually resident in Spain at the time the adoption is to be formalised (Art. 18a.) and will acquire Spanish nationality by virtue of the adoption (Art. 19(1)b). Since adopter and adoptee both reside in Catalonia, the applicable law is that determined by Articles 115 et seq. of the *Codi de Familia*, the Catalan family code.

As noted in a Decision of the Directorate-General of Registers and Notaries dated 15 July 2006, Kafala is an arrangement for the protection of children comparable to fostering in Spain. The decision notes that "The Muslim institution of "kafala" and other arrangements for family care of children that do not create ties of filiation between the "kafils" – the person taking on the "Kafala" of the child – and the child may be recognised in Spain if they have been validly formalised by a foreign authority, provided that they do not conflict with Spanish international public policy and that the documents substantiating them are duly legalised and translated into an official Spanish language (Arts 323 and 144 of the Civil Procedure Act, Law 1/2000). They may never be recognised in Spain "as adoptions", but through what Private International Law calls "classification by function", it is possible to take the view that such arrangements, although unfamiliar to the Spanish legal system, perform a function under the foreign law similar to that performed under Spanish law by "fostering", where the child participates fully in family life and the foster parent acquires an obligation to care for him, have him in his company, feed him, educate him and provide a comprehensive upbringing, either on a temporary basis – simple fostering – or on a permanent basis – permanent fostering – but which does not create new ties of kinship or sever existing ones and does not annul the parental authority of the parents."

Article 117 of the *Codi de Familia* allows the adoption of children in pre-adoptive fostering arrangements and of children in simple fostering arrangements with the persons wishing to adopt them, if there is no possibility of them returning to their families. In the present case the person seeking to adopt the child whom she is fostering satisfies the conditions of capacity required by our laws and has fulfilled the requirements as regards consent. In short, as argued in the appeal, all the legal requirements for adoption have been met, and the only obstacle to formalisation is the requirement of a period of one year laid down in Article 120 of the *Codi de Familia*.

In the view of this court, in the present case a prior proposal by the public authority is not required to formalise *ex novo* the adoption of an alien child who is in foster care. Such a prior proposal is required in cases of adoption of a child who has first been declared abandoned by the public authority, which is consis-

tent with the regulations on protection of children and with the Administration's attributions or powers in this respect. When a public authority has declared a child to be abandoned and has legally assumed his guardianship, it is up to that authority, as the child's guardian, to consider the conditions in which he may be properly put into foster care; it has the power to arrange simple fostering or to arrange pre-adoptive fostering when there is no objection by the biological parents, and finally it is up to the authority to bring an action for pre-adoptive fostering when the biological parents are opposed. The law therefore requires a prior adoption proposal when the child is in pre-adoptive foster care ordered by the court at the request of the public authority or by the public authority itself, or in certain circumstances when the child is in simple foster care, inasmuch as the public authority acts as the child's guardian and Article 120 of the *Codi de Familia* provides that there is no need for such a prior proposal when a year has elapsed, that is when the fostering arrangement has gone on long enough for it to be certain that there is no need for the Administration to intervene. These situations are completely different from the ones arising in the arrangement of foster care for an alien child, whose care is determined by decision of the competent authority in the child's country of origin. The role of the public authority in such cases is confined to assuring that adopter and adoptee are suitable and to following up the fostering arrangement once the child is brought to Spain, but it is not the institution or authority that arranged or applied for the foster care and it does not intervene as the legal guardian of the alien child. If the child protection measure ordered by the competent foreign authority is comparable to guardianship, then Article 120 of the *Codi de Familia* does not require a prior proposal and the adopters may apply directly to the courts, albeit in such cases, like any other, the judge must decide whether the adopter or the adoptee is suitable and whether all the other conditions required by law are satisfied. We would further note in this connection that Art. 235(45) of the Draft Civil Code of Catalonia expressly provides that there is no need of a prior proposal by the public authority in adoptions of alien children in care comparable to fostering or to guardianship legally constituted abroad.

In short, we find that a systematic interpretation of the statutes regulating these matters, a goal-oriented interpretation of Article 120 of the *Codi de Familia* and the very coherence and rationality of the child protection system prompt the conclusion that in the present case no prior proposal should be required from the public authority and hence there is no need for the child to be in foster care for a year.

Therefore, given that all the other requirements laid down by our laws for the formalisation of adoption are met, that the certificate of suitability is on record and that the child is positively integrated in the adoptive family, as certified by all the documentation furnished, it is our duty to order that the adoption of the child Mauricio by Remedios be formalised. In accordance with the terms of Articles 127 and 128 of the cited Code, the legal ties with the biological parents are hereby severed and the child shall henceforth bear the surname of the adopter."

* Judgment of Barcelona Provincial High Court (Section 18), 20 October 2008 (EDJ 2008/266364)

Adoption. Recognition of adoption formalised in Guatemala.

"Legal Grounds:

ONE. (…) The requirements laid down by Articles 88, 89, 90 and 91 of the Regulation on Protection of Children and Adoption approved by Catalan Law 2/1997 of 7 January 1997 are thus met and therefore there is no question of legal fraud in their action, nor is there any reason to remit statements to the DGAIA to inform them of the child's situation, given that it is the administration itself that has carried out the necessary formalities to enable the adopters to formalise the adoption abroad. It is the duty of the competent authority for these matters and of the courts to try and assure the well-being of children who are in Spain and to prevent them from sustaining any physical or mental harm, voluntary or involuntary, and therefore provision is made for the adoption of whatever measures may be necessary to assure that well-being. Then again, in the wording introduced by the International Adoption Act, Law 54/2007 of 28 December 2007, Article 9(5) of the Civil Code provides that international adoption is to be governed by the rules laid down in that Act and that adoptions formalised by foreign authorities shall be valid in Spain subject to the provisions of the said International Adoption Act. In such cases the authority to formalise an adoption is conferred on the Spanish courts by Article 14 of the International Adoption Act. Articles 18 and 19 of the Act determine what laws are applicable to the present case, and that is Spanish law inasmuch as the adoptee is habitually resident in Spain at the time the adoption is to be formalised (Art. 18a.) and will acquire Spanish nationality by virtue of the adoption (Art. 19(1)b). Since adopters and adoptee both reside in Catalonia, the applicable law is that contained in Articles 115 et seq. of the *Codi de Familia*, the Catalan family code. And in particular Article 117 of the *Codi de Familia* allows the adoption of children in pre-adoptive fostering arrangements and of children in simple fostering arrangements with the persons wishing to adopt them, if there is no possibility of them returning to their families. As we have noted, in this case the persons seeking to adopt the child meet the conditions of capacity laid down in our law and have satisfied the requirements as regards consent, a fostering arrangement is in place as noted by the Public Prosecution Service in its report, and in short all the legal requirements for adoption have been met, and the only obstacle to formalisation is the requirement of a period of one year laid down in Article 120 of the *Codi de Familia*. It is this court's view that in the present case of *ex novo* formalisation of the adoption of an alien child, who is in foster care by decision of the competent authority in the child's country of origin, according to Article 120 of the *Codi de Familia* a prior proposal is not necessary and the adopters may apply directly to the courts, albeit in such cases, like any other, the judge must decide whether the adopter or the adoptee is suitable and whether all the other conditions required by law are satisfied We would further note in this connection that Art. 235(45) of the Draft Civil Code of Catalonia expressly provides that there is no need of

a prior proposal by the public authority in adoptions of alien children in care comparable to fostering or to guardianship legally constituted abroad. In short, it is this court's duty to order the formalisation of the adoption of the child Carmela to all legal intents and purposes, and in accordance with the terms of Articles 127 and 128 of the cited Family Code of Catalonia, the legal ties with the biological parents are hereby severed and the child shall henceforth bear the surname of the adopters."

2. International child abduction

* Order of Las Palmas Provincial High Court (Section 3), 3 March 2008 (EDJ 2008/917)

No evidence of international child abduction. Divorce between a Mexican and a Spaniard; custody awarded to the mother, who did not remove the child illegally.

"LEGAL ARGUMENTS.

ONE. The decision of the lower court to dismiss the plea for the return of the child Marí Luz is challenged by the plaintiff, the Attorney General's Office, as the Central Authority provided by Article 6 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, which presented a motion to overturn that decision and uphold its complaint, and order the child's return to Mexico. The said child resides in Las Palmas de Gran Canaria with her mother.

(…)

THREE. Having clarified this, we must now determine whether the right of custody has been violated as claimed by the appellant.

Be it noted in this respect that under Art. 3 of the Hague Convention just cited, the removal of a child is considered wrongful where it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention, and Article 5 of the Convention provides that for the purposes of the said Convention rights of custody 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.

In the present case the judgment of the Mexican court granting the couple's divorce and settling all other issues relating to the effects of the dissolution of a marriage, among others parental authority and custody, awarded custody of the child to the mother. It is our understanding that the award of custody with no limitation other than the mother's notice of her intent to move to a new domicile in Mexico DF did not circumscribe her freedom of movement, as was ruled in a similar case – a suit for wrongful removal of children, also from Mexico – by Madrid Provincial High Court on 15 October 2002, and therefore the mother was in fact free to change her place of residence, including to a another country as in the present case.

As the appealed judgment argues and as the Convention expressly states, the freedom to determine the child's place of residence is a fundamental element of the right of custody. Therefore, the decision as to where the child is to reside in his or her company is not up to the person sharing parental authority, as the appellant erroneously argues, but the person having exclusive – i.e. not shared – custody of the child, in this case the mother. Hence, given that according to Article 13 of the Convention for "removal" or "retention" to be wrongful it must be in breach of a right of custody, in this case awarded by the court to the mother, if it is she who effected the removal, that can hardly be wrongful if she has been awarded custody, nor can there be wrongful retention. In the present case it is a moot point whether the mother ought to have sought the court's permission to move abroad, as this affected the exercise of the custody of the child that had been awarded to her, and affected the child as regards the father's visiting rights; however, any such doubts are dispelled by the fact that in the judgment denying the transfer of custody to the father – and there has been no notice in this appeal that it was ever revoked, or even contested – the same Mexican court that granted the parents' divorce stated that the father had consented to the child's removal, both by word and by deed, in that he consented to the issue of a passport enabling the child to leave the country. To conclude, it has been shown that the mother never concealed her change of residence and in fact notified the Mexican family court, which again confirms that there was no retention.

Therefore, the appeal being dismissed, the proper procedure is for the father to file, not for the return of the child as the appellant has done, but for assurance and exercise of the right of access to his daughter as provided in Article 21 of the Convention, in order to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. That possibility was noted by the original court".

* Order of Madrid Provincial High Court (Section 22), 17 April 2008 (EDJ 2008/80278)

Against the original decision upholding the complaint lodged by the Attorney-General's Office, declaring that the children had been wrongfully retained in the national territory by their mother and ordering the child's return to Belgian territory, their habitual place of residence prior to their wrongful retention, where they may remain in the company of their father; the Provincial High Court confirmed the ruling, dismissing the appeal lodged by the mother. The court of appeal considers that the lower court ruled correctly since the requirements laid down in the applicable regulations are satisfied; these provide that the courts may not deny return of the child if it is shown that appropriate measures have been taken to protect the child after its return.

"Legal Grounds:

(…) TWO. (…) The defendant's counsel, while admitting in the formal writ of appeal that there was wrongful retention and that less than a year had elapsed since the wrongful retention when the Spanish Central Authority received the request (folio 258), has cited in support of their motion to overturn Art. 13b)

> of the Convention of 25 October 1980, whereby the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that 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, claiming that in the two and a half years that have elapsed the children have become perfectly integrated in the district and in their school, that all their family security is provided by their mother and their mother's family, and that they have become completely detached from their father and his milieu; however, this argument cannot be entertained given that the requirements laid down in Article 11(4) of Regulation (EC) No 2201/2003 to the effect that a court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return have been met. And in fact the document reproduced at folio 191 shows that the Special Juvenile Assistance Committee of the Flemish Community Ministry guarantees follow-up, entailing appropriate assistance when the children return to Belgium. The appellant claims that the measures taken by the Belgian authorities are both inappropriate and inadequate, but there is neither evidence nor any indication to support it; the appellant also considers that the protective measures cannot possibly be efficacious and effective on the basis of the court decision affecting the mother, which is absolutely illogical. (…).

Another example of rejection of an invocation of Art. 13.b) of the 1980 Hague Convention on the civil aspects of international abduction of children is a Judgment of the Provincial High Court of Asturias (Section 7) of 15 January 2008 (AC 2008\1697), which argued "the fact is that there is not the slightest evidence to suggest that returning the children to their country of origin might cause them any kind of harm, for the statements by relatives, teachers and other pupils' parents submitted with the initial application give the impression that the children were perfectly well looked after by their father in every respect and were well integrated in their family and school surroundings; the children have expressed no objection to returning to their father in Argentina, and in the examination during the hearing the eldest of them declared that he was happy here in Spain with his mother but that he was also happy with his father in Argentina, and they have not spent so long in Spain that that in itself could cause so great a sense of uprooting in the children as to be prejudicial to their upbringing, as no evidence has been produced to suggest that". (Legal Ground Seven).

* Judgment of Madrid Provincial High Court (Section 24), 5 June 2008 (EDJ 2008/140978)

Alien mother.

Risk of her abandoning the country with an under-age daughter.Forbidden to leave Spain with her daughter without permission from the father or from a court. Risk of flight. Prohibition of issue of a passport to the child. Interest of the child.

"Legal Grounds:

(…) THREE. (…) be it noted that in this matter the child's interest is the essential consideration. As stated in Article 3 of the Convention on the Rights of the Child, adopted by the UN General Assembly on 20 November 1989 and ratified by Spain on 30 November 1990, in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

(…) a parent's right to visit his or her children not living with him or her, and more generally the right of access to them, as a personal right, falls within the ambit of the duty of care, a purely affective matter divorced from parental rights, which naturally falls upon parents in respect of their offspring. (…).

(…) the exercise of visiting rights requires the cooperation of both parents in good faith, and it is up to the parent having custody of the child to advise the other parent of any change of domicile, of the child's state of health, school attendance times, other out-of-school activities, and generally any situation or event that may prevent or hinder the exercise of that right; (…).

FIVE. This court upholds the second ground of appeal and orders (…), that the couple's youngest child not be allowed to leave the national territory without prior judicial permission, as provided in Article 158(3)b) of the Civil Code 1 as amended by Organic Law 9/2002 of 10 December 2002 on child abduction. This is founded on the report issued by the social worker (at folio 124 of the record), which states that because the parents are from different countries – Colombia in the case of the mother – it is advisable to take certain provisional measures, here again stressing the need for prudence and considering not the fact that the female parent is an alien but that her situation is not stable enough, as recorded in the psycho-social report submitted, and on the inferences drawn from the references to warnings made to the appellant by his own daughters by another union, both in their majority and independent, and the possibility – certainly not to be ruled out and obviously not positive – that she might leave Spain, wherefore every precaution must be taken to safeguard the interests of the child and obviate such risks.

This court deems it insufficient merely to prohibit the mother from leaving the country with the child without judicial permission, for that alone may not be effective; in addition, the Police must be advised of the order so that in their border checks they can prevent the issue of the child's passport to the mother and prevent her leaving the country without the father's or a court's permission, which is considered conducive to the protection of children according to Art. 158(3)a) of the Civil Code. (…)."

3. Matrimony

b) Celebration and registration

* Decision of the Directorate-General of National Registries, 9 January 2008 (RJ 2008/2090)

Cases in which marriages between aliens conducted abroad may be entered in the Spanish Civil Registry.

"Legal Grounds:

(…) THREE. It must be remembered that marriages between aliens conducted abroad cannot be registered with the Spanish Civil Registry in accordance with the principles of personal and territorial connection set out in Article 15 of the Civil Registry Act (the current version of which, as reformed by Law 3/2007 of 15 March 2007, does not alter these conclusions given the type of entry envisaged for indications). That is, the doctrine of this Authority has consistently been that registration with the Spanish Civil Registry of marriages between aliens conducted abroad is only allowable in the event that either of the contracting parties subsequently acquires Spanish nationality and the marriage survives (as a representative example, see the Decision of 6 November 2002–1ª). (…)."

c) Marriages of convenience

* Judgment of Valencia Provincial High Court (Section 10), 21 April 2008 (EDJ 2008/89429)

Marriage of convenience. Marriage entered into not for the purpose of living together and maintaining a relationship proper to marriage but for the purpose of securing a residence visa for a party from another country or the legalisation of his or her situation, or even Spanish nationality.

"Legal Grounds:

ONE. The purpose of these proceedings is to elucidate whether the marriage at issue is of the kind known as a "marriage of convenience" (or "*mariage blanc*" in the French terminology), entered into by a Spanish national and an alien, not for the purpose of living together and maintaining a relationship proper to marriage but for the purpose of securing a residence visa for a party from another country or the legalisation of his or her situation, or even Spanish nationality (Article 22 of the Civil Code). In countries where there is a large migratory flow, unions of this kind are relatively frequent although against the law, for they use the institution of marriage as a formal, innocent-seeming instrument for ends other than the essence of marriage, which is clearly set out in Article 68 of the Civil Code, to wit: "The spouses are obliged to live together, remain faithful to one another and to succour one another". (…).

TWO. The jurisprudence is not absolutely unanimous as to whether marriages of convenience are annullable under Article 73(1) of the Civil Code.

Some decisions take the view that this article is not intended for such cases but for parties with mental problems which render consent impractical. However, that is a minority view; it is sufficient to connect that article with Article 45 to confirm the majority view, namely that for a marriage to exist, for it to come into being as a source of rights and duties, the consent proper to that institution is essential: "There is no marriage without consent". Therefore, the absence of consent – that is the will to accept a relationship founded on permanence, living together, fidelity and mutual succour – annuls *de radice* any such "apparent" marriage.

THREE. (…) the greatest difficulty arises in the evaluation of the evidence (normally indicative and presumptive) relating to outward signs that reveal the party's inner intent at the time of consenting to marry.

Most judgments rejecting annulment do so for two reasons:

a) the necessarily restrictive interpretation of the concept of nullity

and b) the existence of personal relationships between the parties before and/or after the marriage. The first is obvious, not only because of the consequences that any judicial annulment entails, but because it contradicts the conclusions of a judicial procedure, carried out by the Registrar (Article 246 of the Civil Registry Regulation). The second is also obvious in that such relationships are indicators of the personal relations inherent in the physical and sentimental closeness that marriage entails. For that reason it is essential to examine the evidence in each particular case, including the conduct of the parties in the proceedings. (…).

SIX. In the present case the original court was clearly right in the light of the witness statements, given the contradictions in them, which confirm the reality that the sole object of the marriage arrangement was for the husband to acquire Spanish nationality; and indeed that is the only possible conclusion to be drawn from such statements, for there is no doubt that beyond the standard details needed to give the proper answers at the Civil Registry and in these proceedings, the statements as a whole support the view expressed in the original judgment, for there is no other possible interpretation of what they reveal about each of the parties' real ignorance of the most basic details of the other, natural in a couple who do not and never have lived together and who have married solely so that the husband can acquire Spanish nationality. (…)".

d) Effects

* Judgment of Madrid Provincial High Court (Section 14), 31 July 2008 (JUR 2008\376482)

The law of property registration. Marital economic regime. Meaning of "goods". No evidence of the spouses' marital economic regime.

"Legal Grounds:

(…) TWO. (…) Moreover, it is not quite safe to say that the marital economic regime of José Angel and his first, German wife was one of community of property as defined in the Spanish Civil Code. According to Art. 9(2) of the

Civil Code, the effects of marriage are governed by the parties' personal law. Jose Ángel's first marriage was a German one celebrated at Bonn (German Federal Republic) with a German citizen, Begoña (née Daniela), and we do not know the nature of the marital economic regime in German private law – whether it is one of separation of property, marriage settlement or community of property, and whether German citizens may opt for one or the other, or whether there is a single, mandatory regime which cannot be changed, or yet whether the system is one of universal community of property, community of property acquired after marriage, or some other system. In short, we know nothing of José Ángel and Begoña (née Daniela)'s marital economic regime, and without that information we cannot assume that the arrangement was one of community of property as defined in our Civil Code.

We are likewise ignorant of the German rules of succession in general, and in particular whether there are provisions regulating succession between divorced spouses, a very important point in connection with Art. 9(8) of the Civil Code.

It is also the case that the answer to the complaint entered by Pedro against the appellant, which has been joined to these proceedings does not raise objections of community regarding the third of the property at issue here. Furthermore, appended to that answer is f.987, a document drawn up by Jose Ángel's first wife which acknowledges that all the immovable goods in Spain were the sole property of Jose Ángel. (…)".

* Decision of the Directorate-General of National Registries, 9 January 2008 (RJ 2008/2090)

Joint purchase of property on a half-share basis by alien couple having arranged a marriage settlement in Spain but not registered through lack of access to the Civil Registry. Law applicable to the marital economic regime indeterminate as the two spouses have different nationalities, neither Spanish. Admitted in the interests of security of legal business.

"Legal Grounds:

(…) THREE. (…) In this case, moreover, there can be no ignoring the doctrine laid down by this Office in its Decision of 5 March 2007, to the effect that if the purchase was made by two spouses of different nationalities, the law applicable to their marital economic regime must be determined by declaration of the purchaser or purchasers, in accordance with the connection criteria established by the rules of conflict in Spanish private international law (cf. Article 9(2) of the Civil Code), as in that way it may be determined whether the law applicable to their marital economic regime is a foreign law, in which case under Article 92 of the Mortgage Regulation the property may be registered as coming under the marital economic regime defined by that national law without the need to specify what that law is; or whether the marital economic regime is governed by Spanish law, in which case according to Article 519 of the Mortgage Regulation the particular marital economic regime must be stated and proven (if the product of a marriage settlement), since the way in which the

acquisition is registered will affect the future rights of the marriage partnership (cf. Articles 93 to 96 of the Mortgage Regulation).

The above doctrine is fully – and possibly even more justifiably – applicable in this case, for if this marriage settlement is accepted as entirely valid and enforceable under Spanish law (cf. Articles 9(2), 9(3), 11, 12(1) and 12(6) of the Civil Code), it clearly has the virtue of rendering the marital economic regime more secure and thus facilitating proper registration from the outset, albeit it cannot be entered in the Civil Registry since for that purpose – be it remembered – the marriage itself, which is the main point, would have to be registrable, although it will be recorded in a marginal annotation.

Be it said, furthermore, that the outcome of the opposite solution would be an unreasonable one and seriously prejudicial to legal security in general and legal business in particular, for it would be impossible to register legal transactions like the one considered here with the Property Registry, with all the undesirable consequences that that would entail. (…)".

* Decision of the Directorate-General of National Registries, 22 January 2008 (RJ 2008/246)

Preventive annotation of attachment of a common property of British spouses, in indeterminate proportion and subject to their marital economic regime.

"Legal Grounds:

(…) TWO. There is no basis for the claim that the husband is entitled to one half of the property as joint owner, as the entry was made "without stipulation of shares". In principle, therefore, the rules provided by the applicable legislation for common marital property will have to be applied (cf. Article 9(2) and (3) of the Civil Code). In the event that the applicable rules are not substantiated, as in the present case, the problem may be resolved by bringing the action against both spouses – the only case in which the appropriate official could act on behalf of both owners in the event of default should the annotation conclude with the sale of the property. In that case, the attaching authority would moreover benefit, as the attachment could be extended to the entire property. (…)".

In a similar vein see Decision of the Directorate-General of National Registries of 8 October 2008 (EDJ 2008/189527).

* Decision of the Directorate-General of National Registries, 26 February 2008 (RJ 2008/2100)

Sale of a dwelling by a married French citizen, acquired when he was single. The marital economic regime and the spouse's consent to the sale omitted in the deed of sale.

"Legal Grounds:

(…) TWO. (…) In this case a French national sold his dwellinghouse, which he had acquired when single, and the register entry so confirms, while

the deed of sale states that he is now married but does not indicate his martial economic regime.

In this case the applicable doctrine is that cited in the foregoing section: That is clearly the intent of Article 9(1) and 9(2) of the Civil Code, in the sense that for the sale of a dwellinghouse to be recorded in a public document and for that sale to be registered, if appropriate, the Notary certifying the legality of the sale and the Registrar recording it must be apprised of the seller's marital economic regime in order to determine whether he is entitled to sell on his own.

As this Directorate-General has already ruled (cf. Decision of 22 October 2007), legal procedure makes provision for evidence of foreign law, with certain qualifications, as an obligation upon the parties with regard to the actions of courts and authorities (Art. 281 of the new Civil Procedure Act), without prejudice to the specific rules envisaged in the laws governing notaries and registries as enshrined in Article 36 of the Mortgage Regulation and Article 168 of the Notaries Regulation regarding means of evidence of capacity and form according to foreign laws. As stated in the decision of 1 March 2005 in relation to Article 36 of the Mortgage Regulation, this is also applicable to the validity of the act performed in accordance with the applicable law. (…)".

See also Decision of the Directorate-General of National Registries and Notaries of 26 August 2008 (JUR 2008\280752) in connection with an English couple, which states that according to "the doctrine on mortgage issues and the doctrine of this Directorate-General, in the case of acquisitions by foreign married couples, evidence of the marital economic regime is not required at the time of acquisition but at the time of disposal. It is generally known that there is no such regime in the United Kingdom, and hence the Notary states that he is aware of it as common knowledge" (First Legal Ground).

* Decision of the Directorate-General of National Registries, 28 August 2008 ((JUR 2008\280756)

Property Registry. Preventive annotation of attachment. Property in the name of Senegalese spouses. Attachment sought by the Social Security Treasury Department for debts acquired by the husband. Applicability of foreign law. Invocation and proof.

"Legal Grounds:

(…) TWO: The general rule in our registry system, known as the speciality principle, is that the extent of the rights registered in the Property Register be clearly specified (Article 51(6) of the Mortgage Regulation). This rule is in fact flexible for purposes of registration of goods in the name of married acquirers who are foreign nationals, in which case evidence of the marital economic regime does not have to be furnished beforehand; it is sufficient that the entry be made in the name(s) of the married acquirer or acquirers and that the entry carry a note to the effect that it is to be verified in accordance with their marital regime, stating what that regime is if known (Article 92 of the

Mortgage Regulation). In fact *lege data* legal registration does not extend to the kind of marital regime that is applicable. This means that the foreign law must be proven *ex post*, and particularly the capacity of the alien spouses to legally dispose of the goods or rights so registered, unless the notary or the registrar, under his own responsibility, is familiar with that law (see Article 281(2) of the Civil Procedure Act and Article 36 paragraphs two and three of the Mortgage Regulation.

THREE. However, there is another possible solution, namely to bring an action against both spouses, as the doctrine of this Office has consistently been that where evidence of the relevant rules of the applicable law is not furnished, the problem can be solved by taking action against both spouses, the only way in which attachment of the entire good could be registered; simple notification or communication for purposes of establishing the chain of title is not sufficient as it is not known whether in Senegalese law there is an arrangement similar to community of property which would permit the application of Article 144(1) of the Mortgage Regulation. Another advantage of an action against both spouses is that if the annotation procedure should culminate in the forcible sale of the property, the official concerned could act in the name of the two owners in the event of default (see Decisions of this Office of 9 August 2006 and 1 February 2007)."

f) Divorce

* Judgment of Barcelona Provincial High Court (Section 12), 11 April 2008 (EDJ 2008/75431)

Decision decreeing the divorce of the parties. No visiting arrangements made. Arrangements for the father to visit his daughter need to be made in the interests of the child, regardless of the geographical distance – resident abroad.

Legal Grounds: TWO. (…) the original Judgment decreed that "no arrangements have been made for communication between father and daughter as the child lives in Italy with her mother, albeit the father is entitled – at his own suggestion and subject to sufficient notice to the mother – to be with his daughter and have her with him provided that this does not disrupt the child's routine activities, but he may not stay with her overnight",

(…) it should be borne in mind that according to the case law (Supreme Court Judgment of 12 July 2004) "the right of parents not in a position of parental authority to have relations with their children is regulated in Article 160 of the Civil Code (…).

Such was the ruling of the Plenum of the European Parliament on 17 November 1992 (…) "suspension of visiting rights is only applicable if there is a great risk for the child's physical and mental health, or if there is an incompatible decision already enforceable in that respect."

And in our legal system, precisely the question of visiting arrangements, staying and communication with the father or mother with whom the children do not live is one of the aspects that need to be regulated, as provided in Article

76(1)(a) of the Family Code, in cases of annulment, divorce or legal separation, without the legislator making any distinction in relation to the place of residence of either parent, or consequently the residence of the parent awarded custody; and therefore regardless of where the child is living with her mother, visiting arrangements must clearly be made (…)"

In this vein, regarding the requirement that the divorce decree – governed by Peruvian law in this case – stipulate the maintenance to be paid by the wife for the child living with the other parent (both Peruvian), note Judgment of Barcelona Provincial High Court (Section 12) of 25 April 2008 (EDJ 2008/75467).

5. Maintenance

* Judgment of Malaga Provincial High Court (Section 6), 6 March 2008 (JUR 2008\252215)

International claim for maintenance. Regulation 44/2001 and the New York Convention of 20 June 1956.

"Legal Grounds:

(…) THREE. According to Article 1(1) of the New York Convention of 20 June 1956, which was ratified by Spain on 6 October 1966, the purpose of the Convention is to facilitate the recovery of maintenance to which a person (the claimant), who is in the territory of one of the Contracting Parties, claims to be entitled from another person (the respondent), who is subject to the jurisdiction of another Contracting Party; that purpose is to be effected through the offices of agencies referred to as Transmitting and Receiving Agencies. Article 1(2) provides that the remedies provided for in the Convention are in addition to, and not in substitution for, any remedies available under municipal or international law. Article 3 of the Convention lays down the formalities and the requirements for the claimant's application to the Transmitting Agency in his own State in order to recover maintenance from the respondent, which application must be accompanied by all relevant documents and details. Article 5 further provides that the Transmitting Agency shall, at the request of the claimant, transmit any order, final or provisional, and any other judicial act, obtained by the claimant for the payment of maintenance in a competent tribunal of any of the Contracting Parties (subsection 1), and such orders and acts may be transmitted in substitution for or in addition to the documents mentioned in Article 3. Article 6 regulates the functions of the Receiving Agency, which according to the first paragraph are to take all appropriate steps for the recovery of maintenance, including the settlement of the claim and, where necessary, the institution and prosecution of an action for maintenance and the execution of any order or other judicial act for the payment of maintenance. Paragraph three 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 and is supplemented by Article 5(3), according to which proceedings under Article 6 may include, in accordance with

the law of the State of the respondent, enforcement or registration proceedings or an action based upon any order, final or provisional, and any other judicial act, obtained by the claimant for the payment of maintenance in a competent tribunal of any of the Contracting Parties.

FOUR. Therefore, under the Convention, as the original judgment concludes, there are two ways of achieving the end pursued: action for recovery of maintenance or enforcement of any judicial decision that may have been forthcoming on the matter of maintenance, and as the applicable law will be the law of the respondent's State (Art. 6(3) of the Convention) the first of these avenues would entail bringing an action for recovery of maintenance as provided in Article 250(1)8, according to which claims for recovery of maintenance owing by judicial decree or on any other account, whatever their quantity, are to be settled at a hearing; and the second avenue would entail enforcement of a foreign judgment as provided in Article 523 of the same Act, and be it said that the foreign judgment may be submitted either as an additional item of evidence on the propriety of maintenance or else as an order for enforcement following due certification. In the present case, as we have seen in the first section, the two courses of action have been mixed up from the outset, so that Court of First Instance No 5 of Malaga refers to a "procedure for enforcement of a foreign judgment" or a "hearing" without distinction. This has clearly placed the respondent in a position of defencelessness as asserted in the proceedings held in 7 May 2007, for although the respondent was summoned with all the legal cautions proper to a hearing, the commencement of those proceedings would have been the proper time to make clear what kind of action was being initiated so that the respondent could be apprised of the means of defence available to him; and yet on the contrary, the State Attorney as claimant petitioned for enforcement of the foreign judgment as if it were a matter of exequatur, and he asserted that "this executive procedure" was the appropriate one, in which the Public Prosecution Service concurred, citing the rules on enforcement of judgments in Regulation 44/2001. To this the respondent simply contested that the foreign judgment whose enforcement is sought was delivered in default of the respondent, whereas had the action been presented in other terms he could have made whatever submissions he deemed appropriate to contest an action for recovery of maintenance and presented evidence in support thereof. In short, then, the judgment is incongruent with the purposes of Article 218(1) of the Civil Procedure Act in that it rules on a declaratory action that was not clearly conducted as such in the proceedings and makes declarations that the claimant did not ask for. For the foregoing reasons the appeal is upheld inasmuch as the third cause of annulment of judicial acts laid down in Article 238 of the Judiciary Act arises, namely complete and utter abandonment of the essential rules of procedure laid down by law, or breach of the principles of hearing, assistance and defence, provided that the party has in fact been rendered defenceless; and we hereby declare the actions taken null and void and order that the proceedings revert to the stage of the cited judicial act of 7 May 2007, which we also declare null and void for the reasons stated above. We note nonethe-

less that the hearing is appropriate under the terms of Article 250(1)8 of the Civil Procedure Act.

* Judgment of Balearics Provincial High Court (Section 4), 5 June 2008 (EDJ 2008/185691)

Maintenance. Amendment. Invocation and proof of foreign law. Principle of "favor filii". Legislation most beneficial to the interests of the child.

"Legal Grounds:

(…) TWO: (…) the business we are concerned with here (child maintenance) is governed by the principle of *favor filii*, whereby all decisions concerning children must be to their benefit, even if they have not been expressly requested by the parties, according *inter alia* to Judgments 27/1/1998 and 2/5/1983. The judgment of 17/9/1996 declares that the principle informing everything concerning the child is the paramount interest of that child; this applies to the Courts, to all public authorities and also to parents and citizens, so that, according to Organic Law 1/1996, whatever measures are taken must be the ones most appropriate to the circumstances.

What this means is that according to Art. 12(3) of the Civil Code, Spanish courts cannot apply a foreign law which does not provide for the safeguarding of the child's paramount interests.

(…) it was shown in the proceedings (…) that the present appellant received the sum of € 345,000 for the sale of the dwelling that had been the conjugal home, and therefore he cannot claim inability to pay the maintenance decreed in the original judgment."

* Judgment of Madrid Provincial High Court (Section 19), 26 September 2008 (JUR 2009\28045)

Maintenance. Bulgarian judgment recognised in Spain. Amendment of the judgment. Competence. Substance of amendment.

"Legal Grounds:

(…) TWO. Following the foregoing summary be it noted that prior to the complaint setting in motion the proceedings whose outcome is here appealed, a decision was already handed down by Court of First Instance no. 85 of Madrid denying the petition for enforcement lodged by the present appellant in connection with the divorce decree cited in the complaint, and in that decision the court noted that the judgment did not require exequatur, citing the Decision of the Directorate-General of Registries and Notaries of 14 April 2000. Note also that Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility is not applicable to maintenance obligations, as these are already regulated in Regulation (EC) No 44/2001 and are excluded from the scope of 2201/2003. Regulation 44/2001 provides that the courts having jurisdiction under that Regulation will generally have jurisdiction to rule on maintenance obligations by application of Article

5(2) of Council Regulation No 44/2001, even although the rules of competence cited in the other Regulation in matters of parental responsibility are conceived in the child's paramount interest, and subject to the criterion of proximity in particular; Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters states that in matters of maintenance the competent court shall be that of the place of domicile or habitual residence of the maintenance debtor; and Regulation 2201/2003 expressly states that maintenance obligations are excluded from its scope but not divorce, legal separation and marriage annulment, and in the section devoted to definitions it defines a judgment as a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including the terms of such judgment or order, and it defines parental responsibility as all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. It follows from the foregoing that there can be no doubt as to the competence of the Spanish courts to consider both the claim for maintenance and the judgment already delivered by a court in a Member State of the Union on a matter of marriage and parental responsibility without any need for exequatur, The next step then is to decide what is the proper procedure, and in that respect we concur with the appealed judgment in that the proper procedure is not a purely oral one but the one envisaged in Art. 770 by reference to Art. 775, both of the Civil Procedure Act, given that although Art. 770 refers to a hearing it does so with certain conditions which make it a special procedure, and that is not the one that was decreed upon admitting the claim for judgment; therefore, there has indeed been an incongruence in that the Court agreed to the procedure petitioned by the claimant and the matter is one of a change in the measure ordered in a judgment enforceable in Spain and not a mere claim for maintenance. We must therefore dismiss the appeal since Art. 465(4) of the Civil Procedure Act bars this Court from considering in the appeal any issues other than the facts, again in relation to Art. 456 of the same Act, which limits the scope of an Appeal, so that the issue of what procedure to follow being one of public policy, it is not one that can be addressed either by the parties or the courts".

6. Guardianship, care or custody of children

* Judgment of Balearics Provincial High Court (Section 4), 16 January 2008 (EDJ 2008/228223)

Guardianship of children. Broad concept of abandonment. Reference to Hague Conventions on protection of children for purposes of delimitation.

"Legal Grounds:

(…) THREE. (…) Both the Children's Legal Protection Act, Organic Law 1/1996 of 15 January 1996 and the Defenceless Children (Custody and Protection) Act, Balearic Parliament Law 7/1995 of 21 March 1995 envisage two

situations of lack of social protection of children warranting different degrees of intervention: situations where the child is at risk – of any kind – in a manner prejudicial to its personal and social development, and defencelessness. In the first case the competent public authority will take the appropriate steps to mitigate that risk and attempt to eliminate the risk factors by acting on the child's family through measures of family support or assistance; financial measures where the determining cause of the risk lies in a lack or shortage of such resources; educational or psycho-social services aimed at sustaining the family home as a basic support and facilitating the child's normal integration in society; technical measures in the form of professional help to re-establish and facilitate the proper exercise of parental functions, thus improving socio-family relations and promoting the child's development and welfare. Defencelessness means any other situations serious enough to warrant drastic action, removal of the defenceless child from the family environment in which it is living, assumption of guardianship by the competent public authority, and if the child's interests so warrant, arrangements for permanent transfer to a family other than the one of origin. Article 172(1) paragraph 2 of the Civil Code defines defencelessness as a situation "actually arising as a result of failure or inability to properly exercise the duties of protection laid down by the law for the custody of children, when these are deprived of the necessary moral or material care". Defencelessness is a relatively vague legal concept which must be substantiated on the basis of value judgements essentially informed by criteria defined in the above-cited legislation on the protection of children, having regard to which the outdated concept of abandonment has been replaced by that of defencelessness in Law 21/1987 of 11 November 1987, on the ground that the latter is conceptually and grammatically broader, thus enabling the responsible authority to adopt a broader interpretation in which the child's interests are paramount. (…) Unlike the earlier situation, defencelessness is the essential basis for immediate official protective action, with no 14-year age limit, that need not necessarily end in adoption; moreover, defencelessness embraces cases not only of absence of persons to take charge of the child but also cases where there are such persons but they are unable or unsuitable to exercise the duties of protection. In short, it is no longer up to the courts to evaluate and declare a state of defencelessness. (…) This expansion of the concept of defencelessness, whose legal basis is strictly the interests of the child, is the result of the incorporation into our legal system of the principles that inform the system of child protection configured by a set of international treaties including the Hague Conventions of 5 October 1961 on competence and applicable legislation 1961 (…), of 2 October 1973 on maintenance (…), of 25 October 1980 on child abduction (…) and of 29 May 1993 on international adoption (…), or the Universal Convention on the Rights of the Child, approved by the UN General Assembly on 20 November 1989. Defencelessness is substantially defined by three points: a) failure to perform duties of protection; b) absence of the necessary moral and material care of the child; and c) a causal link between failure to perform these duties and the absence of care (…)".

XI. SUCCESSION

* Judgment of Barcelona Provincial High Court (Section 4), 28 October 2008 (EDJ 2008/284056)

Succession. Applicable law. Public policy exception.

"Legal Grounds:

…TWO. The key issue here is to determine what law is applicable to the succession giving rise to these proceedings. The plaintiff sustains – and the original judgment concurs – that Spanish law is applicable under Article 12(3) in relation to Article 9(8) of the Civil Code. The defendant claims that although Article 39(4) of the new Moroccan Family Code prohibits marriages between Muslims and non-Muslims, it contains an exception in the event that the non-Muslim belongs to one of the "peoples of the book". The argument goes that since it has not been determined whether Nuria belongs to a "people of the book", then the marriage can be assumed to be valid and hence non-discriminatory. The appellant further argues that Nuria and her husband did not complete the requisite bureaucratic formalities, namely depositing the marriage certificate with the Civil Registry so that the marriage could be officially recognised in Morocco, and if they failed to do so then it is as if they had never married. The judgment, the appellant concludes, is therefore erroneous in that there is insufficient evidence for a claim that the Moroccan legislation discriminates by reason of religion, and so it should be reversed and the complaint dismissed. However, the original judgment does not state that the Moroccan legislation discriminates against Nuria because she did not complete the requisite administrative formalities and hence her marriage is not officially recognised in Morocco, nor does it cite discrimination by reason of sex; what the appealed judgment does say is that according to Article 332 (Title III On the Causes of Inheritance) "there shall be no right of inheritance between a Muslim and a non-Muslim", concluding that the article is contrary to our laws in that it discriminates by reason of religion, something that is expressly forbidden by Article 14 of the Spanish Constitution. It is not our task here to inquire whether there was any impediment to matrimony between a Muslim man and a non-Muslim woman, or whether the marriage between Nuria and the late Ángel could have been officially recognised in Morocco if the requisite administrative formalities had been completed, and if so whether the two Nurias could have entered the line of succession according to Moroccan law. The point is that Article 332 (Title III On the Causes of Inheritance) of the Moroccan law on inheritance quite clearly states that "there shall be no right of inheritance between a Muslim and a non-Muslim, nor in cases where the laws challenge or do not accept paternal filiation or filiation between a natural child and its progenitor". Article 9(8) of the Civil Code states that succession *mortis causa* is to be governed by the national law of the deceased at the time of death, regardless of the nature of the goods and the country where they are situate. But Article 12(3) of the Civil Code asserts that under no circumstances may the foreign law be applied if it is contrary to public policy. The material law

of the forum allows the national law rather than the foreign law to be applied in certain circumstances by applying the public policy rule set out in Aarticle 12(3) of the Civil Code, according to which a foreign law may never be applied if it is contrary to public policy in that it may infringe the basic principles of the Spanish legal system – for it is not permissible to overstep the boundaries embodied in the system of fundamental rights and freedoms enshrined in our Constitution, the Universal Declaration of Human Rights, the European Convention on Human Rights and other agreements on civil and rights. And as the Supreme Court notes in its judgment of 22 March 2000, the Spanish courts are bound to adhere to and uphold the public policy of the forum. This applies to the present case, in which failure to apply Spanish law in favour of Moroccan law as petitioned by the appellant would constitute a breach of Article 14 of the Spanish Constitution, which prohibits any discrimination by reason of birth or filiation or by reason of religion. In short, Article 332, Title III, of the Moroccan law on inheritance clearly denies any right of inheritance between a Muslim and non-Muslim and in the case of a child born out of wedlock. This means that were the said law to be applied, the child Nuria would be unable to inherit from her father if she is not a Muslim and could not inherit in any case as the offspring of a marriage not officially recognised in Morocco – and that is contrary to Article 14 of the Spanish Constitution, so we must perforce apply the public policy rule set out in Article 12(3) of the Civil Code, which allows us not to apply the foreign law if it is contrary to public policy in that it clashes with the basic principles of the Spanish legal system."

* Decision of the Madrid Provincial High Court (Section 13), 7 November 2008 (JUR 277821\314310)

Succession. Regulating act. Art. 9(8) of the Civil Code. Applicability of French law

"Legal Grounds:

(…) FOUR. A necessary premise before examining the appeal is that the deceased was a French national and therefore French law should apply according to Article 9(1) of the Spanish Civil Code, whereby "the personal law applicable to natural persons is that of their nationality. That law shall govern capacity and civil status, family rights and duties, and succession by reason of death". Article 9(8) of the same Code states that succession *mortis causa* is to be governed by the national law of the deceased at the time of death, regardless of the nature of the goods and the country where they are situate. Nonetheless, any provisions made in the will or any agreements as to succession under the personal law of the testator or of the possessor at the time they are made shall continue to be valid even if the succession is governed by a different law, and the portions reserved to the descendants, where applicable, shall be as determined by the latter law. The rights which the law vouchsafes to the surviving spouse shall be governed by the same Law as regulates the effects of the marriage, other than the portions of the estate reserved to the descendants." This being the case, as neither party disputes that the plaintiff is the daughter of the late

Ana Maria or that in the holograph will drawn up by the latter in Madrid on 14 June 2003 she was omitted as one of the persons entitled to the portions of the estate reserved to the descendants, the only important thing in view of the appellant's claims is to determine what the consequences of that preterition are under French law. For that purpose we should look first to Article 745 of the French Civil Code, according to which children or their descendants inherit from their parents, grandparents and other ascendants irrespective of sex or primogeniture, even if they are born of different marriages. They inherit equal shares per head when all are first degree and succeed by their own right; and they inherit by stocks when some or all succeed by right of representation". Article 913 of the French Code provides that "Gratuitous transfers, either by *inter vivos* acts or by wills, may not exceed half of the property of a disposing person, where he leaves only one child at his death; one-third, where he leaves two children.…". It follows from these two articles, firstly that whether or not the testator named her as an heir in her will, the plaintiff is, along with her brother Jorge, entitled to the reserved portion of her mother's estate; hence, barring unworthiness to inherit as envisaged in Article 727 of the Civil Code, as a legal heir in this case the plaintiff is entitled to inherit from her mother; and secondly that having only one sibling, she is entitled to one-half of two-thirds of the inheritance. This means that any testamentary provisions that she may have made in excess of one-third of the inheritance must be reduced in due proportion. Art. 1014 provides that "Any legacy pure and simple shall entitle the legatee, as from the time of death of the testator, to the thing bequeathed, which may be passed on to his heirs or assigns", and Art. 920 provides that "provisions *inter vives* or *mortis causa* which exceed the freely disposable part may be reduced to that part when succession takes place". Thus, in the present case the bequest made by Ana María in her will in favour of the appellant here is valid, notwithstanding that if the sum or value should exceed one-third of the estate, it may have to be reduced when succession takes place, which according to Art. 718 of the Civil Code is at the time of natural or civil death. As we have seen, there is no particular provision in the French Civil Code regulating preterition as does Art. 814 of the Spanish Civil Code, whose first paragraph provides that "Preterition of a mandatory heir does prejudice the legitimate part. The part of an heir shall be reduced before any bequests, increments or other testamentary provisions"; however, it is clear from the above provisions that the preterition or omission of an heir at law in the deceased's will, whose purpose is to keep the heir at law's share intact, has the effect of disinheriting, and only if disinheriting were not sufficient to cover the legitimate part of the victim of preterition would the bequests be reduced on a pro rata basis. Therefore, since the plaintiff was indubitably preterited, the only course of action is to rescind the appointment as heir of the defendant and heir at law Jorge to the extent that that such appointment affects the rights of the plaintiff, and only if the remaining goods in the estate not left to the appellant Jesús Luis should be insufficient to cover the value to which she is legally entitled (one-half of two-thirds of the estate) should the excess legacy be reduced accordingly. All this

means that the will is valid and the estate must be appraised to set the value of the legitimate portion of the deceased's children and determine whether the legacy of the co-defendant and appellant should be reduced."

XII. CONTRACTS

* Judgment of the Supreme Court (Chamber for Civil Matters, Section 1), 17 January 2008 (JUR 2008\209)

International sales of goods. Discovery of simple defects in vehicles produced by prior use and ownership. Vehicles examined at source by buyer's representative without objection.

"Legal Grounds:

(…) THREE. (…) Be it said first of all that the legal framework within which the issue must be settled is indeed the United Nations Convention on Contracts for the International Sale of Goods done at Vienna on 11 April 1980, which is applicable in terms of both matter and timing according to Articles 1, 2, 3 and 4 thereof, and also Article 99. For the purposes of this appeal in cassation, we would draw attention to Article 7, the first paragraph of which refers to the international character of the Convention and the need to promote the observance of good faith in international trade, while the second paragraph provides a formula for filling in any gaps in the regulations, based first of all on the general principles of the Convention and failing those, the law applicable by virtue of the rules of international law. Article 8 lays down the rules for interpretation of contracts. These focus on the intent of the party according to which any statements or other conduct by that party are to be interpreted when the other party did not know or could not have been unaware of that intent. In any case, any statements or other conduct of the parties must be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances (Article 8.2); and in determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties (Article 8.3).

The rules governing mandatory clauses in contracts coming under the Convention are regulated in Part III, the first chapter of which opens with a statement, in Article 25, to the effect that a breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. The system introduced by the Convention, which is inspired in the principles of common law, distinguishes between a fundamental breach of contract and a breach of contract that might be described as accessory in that either it does

not cause any detriment that cannot be dealt with by repairing and remedying the defects, by compensation or by a reduction in price (Articles 25, 45, 46, 47, 48, 49, 50 and 51). The rule of a fundamental breach of contract, which is derived from Anglo-Saxon law and does not translate exactly into continental European laws, is the origin of a system of contractual liability hinging on a criterion of imputation that is objective but weakened by exceptions – identified with cases of unforeseeable circumstances or force majeure – and on what is considered reasonable (Article 25 *in fine*). The system as laid down by the Convention consists of provisions relating to the obligations of the seller – delivery of goods, Articles 31 and following, and remedies, Article 46 – and the buyer – payment of the price and taking delivery of the goods, Article 53 and following – plus those dealing with the respective rights and actions in the event of non-performance by the other party – Articles 45 and following and 51 and following respectively – further supplemented by the rules governing the passing on of risk – Articles 66 and following – and the provisions common to the obligations of the buyer and the seller contained in chapter V.

Having set out the legal framework of the issue, we shall now make the following points. A) If we read the complaint we find that the plaintiff brought an action for damages sustained as a result of breach of contract, consisting in defects of fundamental or promised quality – in other words failure to perform the agreement. Although one can in theory differentiate between actions for breach of contract and actions to enforce the seller's obligation to remedy latent defects, and these kinds of action are differentiated in Spanish doctrine and case-law, the Vienna Convention, falling more into line with Anglo-Saxon legal systems, prefers a unitary approach to cases of wrong delivery – *aliud pro alio* – and defects of quantity, quality and function, lumping them all together under the heading of lack of conformity, setting a short time limit for complaint and establishing the consequences. B) Thus, the general obligation to deliver the goods established in Article 30 is elaborated in Article 35, the first paragraph of which provides that the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract, while the second paragraph – in its positive sense – provides that goods shall conform with the contract if (a) they are fit for the purposes for which goods of the same description would ordinarily be used; (b) they are fit for any particular purpose expressly or implicitly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement; (c) they possess the qualities of goods which the seller has held out to the buyer as a sample or model; and (d) they are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods. And the third paragraph of the article winds up by providing that the seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware

of such lack of conformity. C) While the seller is obliged to make delivery in the terms of Article 35(2) of the Convention, the buyer is obliged to express his satisfaction or dissatisfaction with the goods, and the seller is entitled to require such expression from the buyer. In practice this obligation means that the buyer must examine the goods and must pronounce on them. Article 38 provides that the buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances, and if the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination. Article 39(1) provides that the buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it; nonetheless, the buyer may reduce the price in accordance with Article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice (Article 44). In any event, the lack of conformity must be notified within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee (Article 39(2)). (…)".

* Judgment of the Supreme Court (Chamber for Civil Matters, Section 1), 12 February 2008 (JUR 2008\5493)

Mercantile commission. Commission charged by a Spanish bank for collection of the price of goods dispatched to Lebanon with the instruction that the documents authorising removal of the goods not be delivered to the buyer without a guarantee of reimbursement from the Lebanese bank. Breach of contract by the commission agent. The International Chamber of Commerce's Uniform Rules for Collections.

"Legal Grounds:

(…) ONE. (…) Having concluded that the contract between the two parties in litigation is a mercantile commission regulated by Arts 244 et seq. of the Code of Commerce and in a general way by the rules of the Civil Code, particularly Arts 1718 and 1719, all supplemented by the Uniform Rules of the International Chamber of Commerce of 1 January 1979, the appeal court considers that the defendant Bank was not negligent. or that in any case it was not obliged to pay the amount claimed, for the following reasons: "There is nothing in the document that says that the documentation is not to be delivered, and when Banco Santander, SA sent the documents on 2 December 1994, it also instructed the foreign bank not to hand them over without a firm guarantee that payment would be made on the due date. It is true that in sending the documents it lost control of them, but the instruction was not that they should not be sent but that the goods should not be delivered until there was a guarantee of payment; but that guarantee was to be furnished not by the defendant but by Credit Libanais Salbeirut. The latter bank, designated by the seller and the buyer, is the only party liable. Thus, if Article 3 of the Uniform Rules provides that banks which use the services of other banks to implement the instructions

of a drawer do so at the latter's risk, then this will apply all the more so when the "presenting bank" has been chosen by the plaintiff itself. One must therefore conclude, like the defendant's legal advisers, that remittal of the documents may have been somewhat hasty, but by no means does it render the bank liable for the amount unpaid in the transaction.

Moreover, there is another important argument against liability, namely that the plaintiff itself handled the partial novation of the payment obligation, so that once the instruction to collect 70,000 dollars was accepted, all earlier provisions were superseded. Since no liability can be placed at the defendant's door, this court must dismiss the complaint, upholding the appeal and overturning the original judgment".

TWO. (…) and the third reason is that it is founded on a breach of the ICC Uniform Rules for Collections, publication 322, whereas, as this Court ruled in judgments of 24 April 1975 and 9 October 1997 on the 1933 Uniform Customs and Practice for Documentary Credits, they lack the normative force that Art. 1(5) of the Civil Code attributes to international treaties, albeit they are of indubitable relevance for interpretation of a contract under Article 1258 of the said Code, for their relevance to commercial practices. (…)".

* Judgment of Madrid Provincial High Court (Section 25), 30 May 2008 (EDJ 2008/121890)

Law applicable to international contracts is Spanish law according to Art. 10(5) of the Spanish Civil Code. Exclusive mercantile concession agreement. Grantor obliged to pay the plaintiff commissions on the sale effected by the latter or by group undertakings in the exclusive area reserved for the appellant.

"Legal Grounds:

(…) THREE: (…) Also, in their agreements the parties expressly undertook to be bound by Spanish law (clause 9.2), a primordial consideration according to Article 10(5) of the Civil Code in determining what law is applicable to the agreement, whose validity and enforceability are confirmed by satisfaction of the requirement that there be some connection between the business and the governing law, so that German law, besides not having been proven, would not be applicable. Therefore, the arguments concerning the report based on the German law regarding the right of the creditors of GÜNTER RUX GmbH to take action against RUX SALES & SERVICES GmbH cannot stand, quite aside from the fact that the foreign law lacks any evidential value if it is not accompanied by the rules applicable to the case. (…)".

* Judgment of Commercial Court no 7, Madrid, 11 April 2008 (EDJ 2008/61267)

Letters of sponsorship. Meaning. Legal status. Effects in bankruptcy proceedings. Culpability or otherwise in initiation of bankruptcy proceedings.

"Legal Grounds:

(…) THREE. (…) And in this respect the Court's case-law (…) admits the possibility and enforceability of such letters of sponsorship in Spanish law,

founded on the principle of freedom to contract, laid down in Articles 1255 *et cetera* of the Civil Code but subject to the following requirements or premises:

1. That there be intent on the part of the parent company to lend financial support to its subsidiary or to acquire positive obligations to cooperate so that the subordinate company can provide the services incumbent on it in its dealings with the third party beneficiary of the letter, while merely informative statements lack any obligatory force. (…).

(…)

The contents of the letter clearly demonstrate an intent to jointly assume all present and future obligations of the Japanese subsidiary in connection with the publishing business carried on by the group, and the person who issued it was empowered to accept such obligation on behalf of the bankrupt company. This is therefore a letter of substance, constituting a genuine guarantee of the obligations undertaken by Del Prado Japan.

The receivers have called Andrés to account and consider that the fault is compounded by the failure to revoke the guarantee. The revocation of a guarantee issued for an indefinite period would not be admissible in Spanish law, but according to the letter the guarantee is to be interpreted in accordance with the laws of Japan, an aspect that is also substantiated by Article 10(5) of the Civil Code. The content of the foreign law applicable to guarantees of this kind has not been proven and therefore we do not know whether or not such a guarantee can be revoked. As to the decision of Civil Chamber Section 4 of Tokyo District Court, sentencing Rapp Collins KK to pay 776,732,584 yen, it is not a firm judgment and there are serious doubts about the possibility of enforcing it in our country inasmuch as the Spanish courts were competent to deal with the action initiated in Japan, according to Article 22 of the Judiciary Act. Therefore, the fact that failure to revoke the guarantee was what prompted the said judgment is not in itself sufficient to found a presumption of culpability in this bankruptcy. (…)".

XVII. INTANGIBLE GOODS

1. Intellectual property

* Judgment of the Supreme Court (Chamber for Administrative Proceedings, Section 3), 5 February 2008 (JUR 2008\1686)

Industrial property. Registration of trade marks which may induce error or confusion in the market owing to their phonetic or graphic resemblance to others. Registration not allowable.

"Legal Grounds:

(…) TWO (…) One cannot make generalised statements applicable to all cases in the matter of detecting similarities or matches between trade marks, since each one has to be considered individually in relation to its own particular circumstances, or put in another way none of the various criteria used to

determine whether or not a similarity exists such as is liable to induce error or confusion in the market are absolute; rather the various different circumstances in each particular case have to be considered, which means that, in so case-specific a matter as that of trade marks – and in particular regarding the existence or otherwise of such a similarity – the claim of infringement of the applicable case-law presented as the ground for appeal in cassation is very weak.

The risk of confusion must be analysed in a rational and logical way, naturally taking into account the average level of cultural knowledge among the public at large, and therefore the result of a strict grammatical and semantic analysis of each of the syllables or letters comprising the chosen name cannot be considered decisive.

The existence of graphic or phonetic similarities, matches or resemblances, and likewise the risk of the consumer confusing different trade marks, are both also questions that the Courts trying such cases must consider for the purposes of the above-cited Article 124(1) of the Industrial Property Statute".

. Supreme Court Decision, Chamber 1, of 21 May 2008 (RJ 2008\4146)

Registrations of international trade mark and establishment sign. Null. Title. Limitation period on action.

"Legal Grounds:

(…) TWO. The first ground of appeal alleges infringement of Art. 533, exception 5, and of the case-law interpreting it.

As noted, the complaint petitioned a declaration of annulment of the defendant's national trade marks numbers 1.794.026 "ERMENEGILDO" and 1.794.027 "ERMENEGILDO". The Judgment of the Provincial High Court states (ground two) that the registrations of these trade marks were annulled by the Chamber for Contentious Administrative Proceedings of the High Court of Justice of Catalonia on 12 May 1998, which became firm and hence the matter has been tried in this objective ambit and cannot be re-tried. In the appeal in cassation it was argued that the judgment was not firm because an appeal in cassation was pending before Chamber No 3 of this Court. And the brief in reply claims that Chamber No 3 delivered Judgment on 15 December 2003 (appeal number 11778/97) confirming the appealed decision.

Considering the foregoing, we dismiss this ground for three reasons:

The first is that the defendant has no legal right to appeal against the ruling on the trade marks concerned since it dismissed the complaint and hence there is no prejudice. Therefore, the ground is contrary to Art. 1691 of the Civil Procedure Act, whereunder an appeal in cassation may be lodged by persons who have been parties or have appeared as defendants in the proceedings giving rise to the appeal to whom the appealed judgment may be prejudicial – and this last condition is not met.

The second reason is that there ceased to be any *litis pendens* when the higher ruling became firm, even although it took effect during the second proceedings.

And the third reason for dismissal is that an examination of the issue is irrelevant to the verdict. The appeal is therefore pointless, and this Chamber has repeatedly laid down the doctrine that an appeal in cassation is only to be examined when the outcome may in any way alter the contested verdict – i.e. be useful.

THREE. The second ground claims undue application and hence infringement of Art. 12(1) sections a) and b) of the Trade Marks Act, Law 32/1998 SIC and of the case-law interpreting it in relation to Art. 659 of the Civil Procedure Act.

The ground alleges both infringement of a substantive and of a probatory provision, which is not allowable in cassation. And apart from that, the ground is dismissed because firstly Aart. 659 of the Civil Procedure Act refers to evaluation of the witness evidence, which the judge is free to evaluate and hence is not susceptible of verification or control by means of an appeal in cassation (inter alia judgments of 27 May, 25 and 28 October, 25 and 30 November and 19 December 2005; 11 May, 4, 5 and 27 July, 21 and 24 November and 20 December 2006; 19 February and 4 May 2007); and secondly, as regards Art. 12(1), prohibitions relating to paragraphs a) and b), we see no evidence of infringement given that the contested judgment estimates, on the basis of common sense and with due regard for the guidelines laid down by the case-law doctrine, that there is a risk of association, which is not tantamount to a risk of confusion but simply serves to specify the scale of the latter (Judgments of the CJEC of 11 November 1997 – "Sabel" – and 22 June 2000 – "Model Trade Mark" – and others).

And to round off the grounds for the decision, be it stressed that these take into consideration three major aspects: a) The renown of the trade mark "ERMENEGILDO ZEGNA" in the marketplace; and what is more the Chamber for Contentious Administrative Proceedings of the High Court of Justice of Catalonia ruled in the same way, although even more firmly, in a judgment of 12 May 1998 (Rec. no 1,439 of 1995) concerning a "well-known trade mark with a strong and well-established position in the market". And be it not forgotten that the risk of confusion – association – is all the greater the more distinctive the earlier trade mark is (Judgments of the CJEC, inter alia of 11 November 1997, Sabel/Puma; 29 September 1998, Canon/MGM; 22 June 1999, Lloyd); b) The fact that the significance and prominence of the denominative elements – the patronymic "ERMENEGILDO" and the surname "ZEGNA" – are greater in the plaintiff's signs as a whole, in most of which they appear; and c) The resemblance, but not absolute likeness, between the single denominative element "ERMENEGILDO" in the defendant's signs (international trade mark 620,108 and establishment sign 214,879, to which the debate was eventually confined) and the sign "ERMENEGILDO ZEGNA" in the plaintiff's trade marks, wherein lies the risk of association. To the asseverations of the original court we might add as supporting arguments the decision of this Court's Chamber for Contentious Administrative Proceedings that there is a risk of association, and the

importance of the way in which the name Ermenegildo is written, as it would not be the same if preceded by the letter H (Hermenegildo) even although it is pronounced the same.

That opinion is not gainsaid by the allegations in the appeal, for the following reasons: a) The error in the contested judgment (which the appellant claims was deliberately induced by the plaintiff) that the sole denominative element in the defendant's trade mark no 159,615 is "ERMENEGILDO", which is not the case, is irrelevant since it is clear from the substance of the judgment that what was considered in identifying a risk of association was the unit formed by the two words (ERMENEGILDO ZEGNA); b) The claim that the preponderant element is Zegna, as shown by the fact that it appears in all the plaintiff's trade marks, and in several of them linked with words other than Ermenegildo, is not a decisive argument against the opinion of the original court, for what is considered in forming such an opinion is the risk of association with the ERMENEGILDO ZEGNA trade marks and not others in which the word Zegna appears along with other terms (Soltex, Astrum, Suflex, Maglieria, Tepor, etc.); c) The claim of lack of priority is a *questio facti* which cannot be addressed in the ground here considered; d) The assertion that the denomination Ermenegildo Zegna constitutes an indivisible grammatical or conceptual unit which in trade is not susceptible of confusion with the defendant's marks does not carry enough weight to rebut the contested judgment. As to the first point this is because a sign with a single denominative element can be associated (by the average consumer: reasonably well informed and reasonably attentive and perspicacious) with another composed of two words, even if one of the two is more distinctive than the other. And as to the second point, it is because the estimation of the risk of confusion – association – in trade is a matter for the trial court and is only relatively verifiable in cassation, meaning that the appeal court can only examine the issue when there is an error in the evaluation of the evidence or the burden of proof is reversed, or when the issue affects a value judgement contrary to common sense or to the guidelines laid down in the case law for proper formation of an opinion; e) As to the claims made regarding compound denominations, the fact is that there are no hard and fast general rules and one must examine the circumstances in each case. There are cases in which distinctiveness is conferred by an ordinary name and surname which are not distinctive when used separately, and there are others in which either of the two denominative elements is distinctive in itself. In this case, the denominative element "Ermenegildo", above all given the literary form in which it is rendered (rather than the sound), poses a risk of association with the plaintiff's compound denominations containing that word; f) As for the evaluation of the witness evidence, the reasons for dismissing it are set out at the beginning of the ground; and, g) The assertion that the appealed judgment did not evaluate the conflicting marks as a whole is rebutted by the foregoing comments.

For all these reasons, this ground cannot be entertained.

FOUR. The upshot of the dismissal of the grounds for the first appeal (by Octavio) was that the appeal was declared groundless and the appellant was ordered to pay the costs, as provided in Art. 1715(3) of the Civil Procedure Act.

Appeal in cassation, Lanificio Ermenegildo Zegna & Figli S.p.A. and CONSITEX

FIVE. The sole ground of appeal claims infringement of Arts 1939, 1964 and 1969 of the Civil Code by referral from the Industrial Property Statute, and of Art. 48(2) and the Second Transitional Provision of the Trade Marks Act, Law 32/1988 of 10 November 1988.

As noted earlier, the complaint petitioned the annulment of the defendant's national trade mark number 941.032 ERMENEGILDO, while the latter invoked as an exception the expiry of the limiting period on the action and insisted on appealing, seeking to have the action declared barred by statute. The Provincial High Court upheld the bar (Judgment fo. ten B), arguing that "it is true that the plaintiffs claimed bad faith on the part of the defendant to shield the action against the passage of time; however, such immunity is provided by Art. 48(2) of the Trade Marks Act, Law 32/1988, which as we have seen – Article 1939 of the Civil Code – is not applicable to the action here concerned". The appeal in cassation challenges the argumentation *ratio decidendi* of the appeal, claiming that the applicable provision is not Art. 1939 of the Civil Code but Art. 48(2) of the 1988 Trade Marks Act, which provides that there is no statute of limitations on actions for annulment of trade marks registered in breach of Arts 12, 13 and 14 when application to register the mark has been made in bad faith, as provided in the Second Transitional Provision of same Act, according to which "trade marks, trade names and establishment signs granted in accordance with the Industrial Property Statute shall be governed by this Act", and it only excepts "rules on duration, payment of five-yearly fees and renewal as provided in the Statute", which it provides are to be applied "from the entry into force of this Act until the first renewal".

The ground must be dismissed because while the subject is controversial with opposing arguments in various directions albeit some Judgments of this Chamber (2 December 1999. 21 July and 7 October 2000) have come down on the side of minimum retroactivity meaning the applicability of Art. 48(2) of the Trade Marks Act as it relates to non-limitation when the statute of limitations on the annulment action has not expired in accordance with the legal regime laid down by the Civil Code (to which the Industrial Property Statute refers) prior to the entry into force of the Trade Marks Act, in this appeal the debate is irrelevant in any case since the essential element of bad faith is lacking. For the appealed judgment does not establish bad faith, confining itself to the observation that "the plaintiff so asserts"; and there can be no question of presumption given

that according to the rule of the normality of costs – *quod plerumque accidit* – good faith is presumed wherever that rule prevails, whether subjectively or objectively, besides which the burden of proof lies with the person who makes the assertion or alleges occurrence of the case cited in the rule whose legal effect he invokes in his favour. Nor can there be any question of enquiring as to the existence of bad faith since the case as presented consists of a factual side and a legal side, and in the first case at the very least it is no ground for cassation, and nor are there any elements in the appealed judgment with sufficient force to warrant a presumption of bad faith at the time the defendant registered trade nark number 941.032.

XVIII. COMPETITION LAW

* Decision of the Council of the National Competition Commission of 21 July 2008 (AC 2008\1634)

Prohibited agreement. Protection of competition. Restriction of passive sales through agreements between licensors and licensees containing clauses that limit such sales, or by means of actions tending to make effective use of such clauses to prevent passive sales in Spanish territory; serious restriction of competition between potential competitors; failure to comply with the exemption requirements provided in Regulation 240/96; intent to exercise absolute control over sales outside the territory of each distributor…

"Legal Grounds:

(…) TWO. The issue in this case is whether the agreements concluded by HALLER with their distributors in Spain and Portugal and the conduct of all of these with respect to MDC constitute a restriction on passive sales of HALLER brand products in breach of the prohibition in Article 81 of the EC Treaty and Article 1 of the Protection of Competition Act.

According to the Report/Motion, that is the case. The instrument governing technology transfer agreements is Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (RECATT), which superseded Regulation (EC) 240/96 of 31 January 1996.

The RECATT entered into force on 1 May 2004. However, Article 10 established a transitional period such that until 31 March 2006 any agreements meeting the exemption requirements set out in Regulation (EC) No 240/96 would be considered exempt.

The Director of Investigation argues that "the acts prompting the initiation of these proceedings, namely the limitation of passive sales of HALLER brand products that the firm SOMA may make in Spain, occurred in 2004 and were founded on the licensing agreements that HALLER signed with SOMA in 1998 and with C.L.G. in 2002. With reference to Article 10 of the RECATT, considering that the object of the complaint took place during the transitional period allowed to adapt agreements to the new regulation (2004), we must perforce

examine the clause of the agreement that presumably prompted the defendants to act in the light of the 1996 Regulation and of the RECATT". This being so, the Service analysed the agreements in the light of both Regulations.

Regulation (EC) No 240/96

This Regulation was the one in force at the time the agreements were signed, and in principle remained so until 31 March 2006 for agreements in force at 30 April 2004. Section 15 of the Preamble states that "…the permitted period for such an obligation (this obligation would ban not just active competition but passive competition too) should, however, be limited to a few years from the date on which the licensed product is first put on the market in the Community by a licensee, irrespective of whether the licensed technology comprises know-how, patents or both in the territories concerned". Article 1(1)6) declares that Article 85(1) of the Treaty shall not apply to an obligation on the licensee not to undertake passive sales, and Article 1(2) provides that "The exemption of the obligation referred to in point (6) of paragraph 1 is granted for a period not exceeding five years from the date when the licensed product is first put on the market within the common market by one of the licensees, to the extent that and for as long as, in these territories, this product is protected by parallel patents". From this the Director of Investigation concludes that "the absolute restriction of passive sales contained in the licensing agreements analysed contravenes Regulation 240/96, which only allows restrictions on passive sales during the five-year period stipulated".

RECATT

The Director of Investigation [DI] argues that the absolute restriction of passive sales contemplated in the technology licensing agreements analysed constitutes an especially serious constraint in the terms of the RECATT, whether the firms analysed are considered competitors or not, the latter being the hypothesis favoured by the DI. Thus, the DI argues:

…the RECATT considers agreements to impose especially serious constraints on competition when (potentially or actually) competing undertakings thereby divide up markets or customers, other than in a number of situations where such restriction, whether of active or passive sales, is warranted. However, far from adapting to the requirements of the RECATT, the licensing agreements analysed impose an absolute restriction on either kind of sales, not confined to a particular territory or group of customers as the RECATT requires.

For its part, Article 4(2)b) of the RECATT provides that where the undertakings party to the agreement are not competing undertakings, the exemption provided for in Article 2 shall not apply to agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object "the restriction of the territory into which, or of the customers to whom, the licensee may passively sell the contract products, except:

ii) the restriction of passive sales into an exclusive territory or to an exclusive customer group allocated by the licensor to another licensee during the first two years that this other licensee is selling the contract products in that territory or to that customer group (…)".

In the opinion of the DI, once again the absolute restriction on passive sales contained in the licensing agreements analysed contravenes the general prohibition in the RECATT on passive sales and falls outside the exceptions provided therein, which would mean they are very serious constraints. "If we take the relationship between HALLER-CLG and HALLER-SOMA to be a relationship between non-competing undertakings, taking into account the statements made by HALLER's representative regarding the commencement of exportation of HALLER products to Spain, and also the date on which the licensing agreements were signed (6 October 1998 and 2 January 2002), this Service considers that the 2-year time limit for the agreements and the action taken by the defendants in implementation thereof to be considered exempt had expired by 2004".

The DI considers that this is the case even if we accept that HALLER's patents have expired, in which case they would be prohibited under Article 81(1) of the Treaty. He also considers that the conduct of CLG and VEICAR in writing to various local authorities warning the latter that they would not accept liability for any HALLER brand trucks not purchased from them is part of a global strategy designed to limit passive sales and as such is prohibited by Article 81(1) of the Treaty and Article 1 of the Protection of Competition Act.

THREE: CLG claims that the case has lapsed inasmuch as it was initiated on 28 February 2006 and when the cited statement of complaint was submitted the time allowed for penalty procedures through the Protection of Competition Service had expired. It considers that the so-called "language question" adduced by the original court in support of its suspension order does not justify the suspension as ordered since it does not fit any of the cases listed for that purpose in the Public Administrations and Common Administrative Procedure (Legal Regime) Act, Law 30/1992 of 26 November 1992, and moreover it contravenes Article 36(1) of the same Act.

It claims that the prohibitions in Article 1 do not apply to the kinds of conduct denounced, in view of their scant importance.

HALLER states that it has not engaged in any conduct susceptible of hindering the complainant's activity. The licensing agreements signed by HALLER with its distributors are not the cause of the conduct denounced by the complainant. These agreements certainly contain restrictions on competition in accordance with Article 81(1), but they do not come under the prohibition in Article 81(3). It acknowledges that the agreements are not worded in line with Regulation (EC) No 77/2004, but states literally that "the contracting parties mutually concurred that the licensing agreements would only exclude active competition between licensor, licensee and other licensees, but not passive competition". And it adds: "…In view of the fact that the conduct of VEICAR/CLG is not covered by the agreement, the Commission has probably interpreted HALLER's agreements regarding possible restrictions on competition more broadly than the wording would allow". In view of all this, it asks that no judgment be made.

VEICAR, SL stresses that it is not a party to the cited licensing agreements and hence has no connection with any restrictions on passive sales that HALLER may have agreed with its licensees many years before. The only action that

this firm has taken is to send to two local authorities a document drawn up by CLG certifying that they can accept no liability for vehicles or spare parts not acquired through their distribution channels. The enquiries made in the proceedings show that there has been no refusal to supply spare parts, but simply the contracting authorities are advised that in such cases MDC Ingeniería and not VICR or CLG is responsible for the post-sales service and the warranty.

Then again, like CLG, VEICAR claims that its conduct is not serious enough to be considered a breach of competition law, but that even should it be considered to infringe that law it should come under Article 1(3) of the Protection of Competition Act, and no judgment should be forthcoming in respect of VEICAR, SL since its action is not important enough to significantly affect competition. In that connection it cites the scant number of HALLER vehicles it has sold in the last few years (less than ten units).

In view of all this, VEICAR takes the view that the case should be dropped. But should it be decided that prohibited practices have been engaged in, albeit through negligence, given the lack of any impact in the market all that would be required would be to order the cessation of such activities, without any need of fines or penalties – or should such be imposed they should be proportionate since the scope of the restriction and its effects are negligible and the market possibly affected thereby and the duration of the alleged conduct are very small.

And lastly VEICAR adds that the irregularities that have occurred during the conduct of the procedure render it null. On the one hand it claims defencelessness in that the Protection of Competition Service did not take account of its submissions for purposes of drafting the Report/Motion, as it received them after it had been drafted. It states that at no time was Veicar, SL notified of the hearing conducted on 10 July 2007 (minutes at pages 1589 to 1591 of the record), which was attended by other interested parties and defendants in these proceedings.

SOMA has not made any submissions.

MDC basically reiterates the substance of the investigation report and asks for the maximum penalties for all the defendants.

FOUR: As to CLG's claim that the procedure has lapsed, be it noted that the Service suspended the time limit, not for a question of language as CLG alleges but because it lacked certain information that it needed to determine whether the Regulations on exemption by categories are applicable to the licence in question. The so-called "language question" is a merely incidental matter raised by HALLER itself. But in any case the suspension of the time limit for the enquiry was carried out in accordance with Article 56(1) of Law 16/1989 and Article 42(5)a) of the Public Administrations and Common Administrative Procedure (Legal Regime) Act, Law 30/1992 of 26 November 1992. The Council therefore considers that the suspension was lawful and that the Report/Motion was delivered within the term established by law.

Regarding the cited language question, we would add that it arises because HALLER made submissions to the Service and replied to requests for information in languages other than Castilian Spanish. After the complaint had been

admitted for examination by the Council, Haller was advised by an order dated 4 October 2007 that the language in which proceedings are conducted by the Central State Administration is Castilian Spanish and no documents addressed to the CNC in any other language would be accepted. Be it noted that this language issue has not left any of the parties defenceless. In the present case, firstly all the parties have had access to the documentation in a language intelligible to them. Secondly, they have been advised of the proven facts and the accusation made on that basis in the investigation report, and they have had the opportunity to make such submissions as they deem appropriate in exercise of their right to an effective defence. As the National High Court has ruled, citing the doctrine of the Constitutional Court, a procedural flaw alone does not suffice to cause defencelessness unless it deprives, limits impairs or negates the right to a defence (National High Court Judgment of 18 January 2004).

FIVE: VEICAR's claims of defencelessness are likewise unfounded. It is true that, as it says in its writs, although it made its submissions regarding the Investigation Report by mail and in due time, it reached the Service some days later, when the latter had already composed its Report/Motion and sent it to the Court. Nevertheless, the Service did pass these submissions on to the Court seized at the time, which included them in the file, and therefore these submissions have been duly taken into account. Again, there is no question of defencelessness for not having been summoned to an alleged hearing, which according to VEICAR is at pages 1589-1591. Those pages state that one of the parties had sight of the record of proceedings, as indeed VEICAR did likewise at other stages thereof (pages 363-373). If VEICAR is referring to the hearing provided for in Article 41 of Law 16/1989, be it remembered that the Court then seized issued an order notifying all the parties and granting them time, as provided in Article 40(1), to propose a hearing of evidence – and in fact VEICAR did not make any such request, so that again there can be no question of defencelessness.

SIX: Turning to the substance of the matter, in this case we need to assess whether the agreements concluded by HALLER and the firms SOMA and CLG comply with the regulations and whether the parties to these agreements, as well as VEICAR as CLG's distributor, acted in such a way as to restrict passive sales, thus infringing the national and Community competition rules.

These are a number of technology transfer agreements concluded between independent undertakings which according to the available information possess very small shares of the relevant geographical markets. This Council also takes the view, as did the Service, that whereas SOMA and CLG are actual or potential competitors of one another, the relationship between them and HALLER is not of the kind described in Article 1 of the RECATT as "competing undertakings", for there is no realistic basis to conclude that in the absence of a technology transfer agreement CLG and SOMA would be competing in the same product and geographical market as HALLER.

The agreements analysed contain absolute restrictions on passive sales as defined in paragraph 50 of the Guidelines on Vertical Restrictions. That consti-

tutes a serious restriction on competition between potential competitors (CLG and SOMA), and therefore these agreements cannot be considered less important, nor as coming under Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices. Article 4 of that Regulation, which came into force on 1 January 2000 and became applicable as from 1 June 2000, excludes exemption for the restriction of passive sales.

However, in the case of the agreements concerned here, the rules on technology transfer agreements apply, and these tend to deal rather more benevolently with passive sales in the interests of encouraging investment and efficiency.

The licensing agreements predate the RECATT, although they have remained valid since the latter came into force. Therefore, as the Service argued in its Report/Motion, they should be examined with reference to both Regulations. For their part, the events giving rise to the initiation of penalty proceedings took place during the transitional period granted to adapt agreements to the RECATT.

The agreements do not meet the requirements laid down in Regulation 240/96 for exemption, given that according to the information furnished by HALLER at the request of the Service, the agreements envisage a restriction of passive sales lasting more than five years as from the first marketing of the product. Nor can exemption therefore be claimed under Article 10 of the RECATT (LCEur 2004\1637) regarding the transitional period for the actions by the accused undertakings that have been accredited in these proceedings.

The rapporteur also agrees with the DI that the clause in the agreements restricting passive sales constitutes a very serious constraint, such that the agreements cannot be considered to come under the RECATT. As explained in section 96 of the RECATT Guidelines, Article 4(2) contains a list of the restrictions that are considered especially serious in cases of agreements between non-competing undertakings. According to this provision, the exemption envisaged in the RECATT does not apply to agreements which are intended, directly or indirectly, on their own or in combination with other factors under the parties' control, to restrict the territory in which the licensee may passively sell the products covered by the agreement or the customers to whom it may sell them. However, the prohibition does not apply to the restriction of passive sales during the first two years in which this other licensee sells the products covered by the agreement in the territory or to the group of customers concerned. As section 101 of the Guidelines states: "…Restrictions on passive sales into the exclusive territory of a licensee by other licensees therefore often fall outside Article 81(1) for a period of up to two years from the date on which the product incorporating the licensed technology was first put on the market in the exclusive territory by the licensee in question. (…) After the expiry of this two-year period restrictions on passive sales between licensees constitute hardcore restrictions. Such restrictions are generally caught by Article 81(1) and are unlikely to fulfil the conditions of Article 81(3). In particular, passive sales restrictions are unlikely to be indispensable for the attainment of efficiencies".

The wording of the clause in the licensing agreements suggests that its intent is to assure absolute control of sales outside the territory of each distributor. Not only does it specify the territory in which the licensee may operate but it stresses the fact that equipment produced by the licensee is to be sold exclusively by the German undertaking through HALLER group companies outside the excusive territory, which effectively bars passive sales. Furthermore, this is an absolute restriction, without qualification. We would recall in this connection that the events giving rise to the procedure occurred two years after the licensee had first placed the product on the Spanish market. Then again, there are no considerations of efficiency to support the claim that restriction of passive sales is indispensable, for instance that the licensee needs to incur major investment to efficiently exploit the licensed technology.

HALLER itself argues in its submissions that the agreements were concluded long before Regulation (EC) No 77/2004 and hence were not drafted to comply with it. It is not the intention of this Council to deliver a merely formal interpretation of a clause in the agreement for the sole purpose of identifying a serious constraint on competition without considering the behaviour of the parties in the market. To the contrary, the fact is that in this case the proceedings contain evidence of certain actions which demonstrate that the parties seek to limit passive sales, particularly in Spanish territory. We would recall in this connection that:

– on several occasions HALLER has reminded its licensees of the need to protect their respective territories. In particular it upbraided SOMA for the fact that MDC was offering its products for sale. It also asked CLG to report back if such a thing should happen again.

– CLG has brought up the clause with HALLER to prevent SOMA selling to MDC and has sought to dissuade the complainant from acquiring products intended for the Spanish market from SOMA. CLG claims to be acting within the terms of its agreement with HALLER, according to which, as CLG itself asserts, SOMA would neither sell nor provide technical assistance for HALLER brand products outside Portugal, an assertion already noted in the record of proceedings.

– Although not a party to the licensing agreement, VEICAR has intervened in these proceedings on the strength of its vertical relationship with CLG, and moreover has been active in seeking to limit passive sales. For instance, it has urged CLG to take action in that respect and has circulated CLG's statements regarding MDC's inability to secure technical assistance to various local authorities, thus hampering the activity of a direct competitor.

– SOMA has signed an agreement containing a clause restricting competition, and although it has not refused to supply MDC with the products requested by the latter, it has declared that it neither sold nor intended to sell these products to Spain unless so authorised by the German company. It has then been a witting party for years to a vertical agreement that protected its territory against passive sales.

The absolute nature of the restriction on passive sales in the agreements, combined with the action of the parties as accredited in the record indicate that the main purpose and effect of that action is to divide up the market by imposing restrictions which have not been shown to be necessary and in the final analysis are inimical to the interests of the customers.

SEVEN: Article 10 of the Protection of Competition Act empowers the Competition Court to fine offending economic agents up to 901,518 euros, which may be increased to as much as 10 per cent of the sales volume of the undertakings thus penalised. The amount is weighted according to the seriousness of the infringement. The Supreme Court has sustained in numerous judgments (inter alia 24 November 1987, 23 October 1989, 14 May 1990 and 15 July 2002) that in implementing the discretionary power vouchsafed to the Government due weight must always be attached to the particular circumstances in order to assure the due proportionality between the offence and the sanction, since the severity of any penalty must be consistent with the seriousness of the infringement committed and, according to the principle of proportionality, must take account of the objective circumstances in which the event took place.

As noted n the sixth Legal Ground, Article 4(2)b) of the RECATT treats the restriction of passive sales as an especially serious constraint in competition. Nonetheless, in the present case there are a number of factors that limit the seriousness of the infringement and should be taken into account when calculating the amount of the penalty. For instance, although the infringement as established is classified as very serious, its scope is highly limited inasmuch as it affects a specific geographical area and a very small number of tenders. Moreover, HALLER brand products account for a relatively small proportion of the sales of urban solid waste collection boxes, and there are other significant competitors. Therefore, in line with the principle of proportionality, the Council takes the view that the penalty should fall within the bottom third of the scale of sanctions.

(…)"

XXI. TRADING COMPANIES/CORPORATIONS/LEGAL PERSONS

* Decision of the Directorate-General of National Registries, 22 January 2008 (RJ 2008/2093)

European public limited-liability company. Application for publication of draft incorporation as a holding company by one of its promoting companies in Spain. Applicability of Art. 33(3) of Regulation 2157/2001/EC and Art. 3 of Directive 68/151/EEC in the absence of national regulation. Competence of the respective national Companies Registers involved in the process.

"Legal Grounds:

(…) TWO. The European public limited-liability company or "Societas Europeae" (hereafter the "SE"), which was first regulated by the cited Regulation (EC) No 2157/2001 following a long preparatory process, is a form whose

governing rules present some difficulties of interpretation, one of which – and by no means the slightest – arises when it comes to reconciling this supranational regulation with the respective Members States' national laws on public limited companies, given the evident lack of harmony between the provisions of the Regulation and those national laws.

There are various procedures for incorporating an SE, and one of them is for it to be created as a holding SE by public and private limited companies which meet certain requirements as laid down un Article 2(2) of the said Regulation.

As regards this peculiar founding procedure we would note the difficulty of determining what Law is applicable to anything not provided for in the Regulation, especially as the sources cited in Article 9 refer to the company once it has been created but not while it is in the process of creation. And since the creation of an SE is an absolutely new procedure, the States' internal company laws provide no answer, producing uncertainty, and indeed legal insecurity. Those whose task it is to apply the legal rules are therefore called upon to work hard on an interpretation to avoid blocking this new incorporating procedure.

(…)

According to the EC Regulation (Article 33(3)), if the conditions for the formation of the holding SE are all fulfilled, that fact is to be publicised in the manner laid down in the national law governing each of those companies.

(…)

The defect claimed in the Registry ruling will not stand up. Granted the Regulation is not clear or explicit enough on this point, and the issue has not been regulated in the reform of the Public Limited Companies Act (Law 19/2005 of 24 November 2005) or the latest amendment of the Regulation of the Companies Register (approved by RD 659/2007 of 25 May 2007); moreover, had such provision been made it would only be applicable to European public limited-liability companies domiciled in Spain, whereas the case here concerns an SE domiciled in Germany.

We should be quite clear, however, that the publication questioned – which is the responsibility of the national Registers of the of the companies involved in the process – must take place before the process of creating the holding company is complete, as witness the fact that the EC Regulation itself (Article 33) allows a further month for shareholders who have not indicated their intention to make their shares available for the purpose of forming the holding SE to do so.

Neither the reformed versions of the Public Limited Companies Act nor the Companies Registry Rules and Regulations provide for any procedure to publicise the fact of compliance with the requirements for creation of an SE, but the Companies' Registrar may not make such publication conditional upon effective creation and registration of the SE in its local Registry, as such registration is a corollary or consequence of incorporation formalities conducted by the companies concerned in their respective registries. That is the logical construction to be placed on Article 3 of Directive 68/151/EEC (First Directive of 9 March 1968),

according to which "All documents and particulars which must be disclosed in pursuance of Article 2 shall be kept in the file or entered in the register". Since the agreement has been published and the second term (one month as from the disputed publication, as provided in Article 33(3) paragraph two of the EC Regulation) has expired, the holding SE may be registered with the Companies Registry once the deed of incorporation has been verified. (…)".

* Decision of the Directorate-General of National Registries, 24 January 2008 (RJ 2008/627)

Foundation created under a foreign law which has acquired goods in Spain through donation. Obligation to have an office in Spanish territory and to register with the Registry of Foundations. Validity dependent on personal law.

"Legal Grounds:

(…) SIX. What we have in the present case is a legal person – called a foundation – created in accordance with the laws of another State, which has acquired goods in Spain through donation, which means that we have to determine whether Article 7 of the State Foundations Act is applicable in this case. As we know, that article obliges foreign foundations seeking to pursue their activities in a continuous manner in Spain to maintain an office in Spanish territory, which is to serve as their domicile for legal purposes, and to register with the appropriate Registry of Foundations depending on the place where they chiefly carry on their activities, to which end they must submit evidence to the appropriate Registry of Foundations that they have been validly constituted in accordance with their personal Law, and such registration may be denied if their purposes are not in the general interest according to Spanish law (as noted, Article 4 of Royal Decree 1337/2005 regulates in detail the prior check on legality that must be made to verify compliance with these requirements).

It follows from the cited provision of the Foundations Act that the registration requirement only applies to foreign foundations whose activity in Spain is susceptible of continuity as referred to in the Act. However, despite the doubts which the registrar prudently raises in his note regarding the very essence of the acquired right (whose existence in perpetuity is well known), there is a clear element of continuity – not to mention permanence – for example as regards all those obligations which (increasingly, be it said) may be introduced by territorially-applicable Spanish regulations and are a consequence precisely, as the note says, of the purpose set out in the deed as pertaining to the donating entity ("…the purpose of the foundation is to preserve the assets and administer and manage the property assigned it…").

(…)"

XXIII. TRANSPORT LAW

1. International carriage of goods by sea

* Judgment of the Supreme Court (Chamber for Civil Matters, Section 1), 14 February 2008 (JUR 2008\2667)

International carriage of goods by sea. Damage to goods carried. Consignee's capacity to be made a defendant. Proper procedure: application to the consignee of the liability in respect of the goods carried attributed to the carrier's agent acting on the latter's behalf. Direct legal liability conferring legitimacy to act on the owner of the damaged goods, regardless of the internal relationship between agent and principal and whether that relationship is occasional or permanent.

"Legal Grounds:

(…) TWO. (…) Briefly, this ground is based on the argument that Article 73(2) of the State-Owned Ports and Merchant Marine Act equates the consignee with the shipping company in that this is a natural or a legal person who represents it and is responsible for paying any dues required by the port or maritime authority, and it holds him liable jointly and severally with the shipping company or ship-owner; in the case here, relations between consignee and shipping company are constant, to the extent that there is a business relationship whereby the consignee is liable in the port for the shipping company, as the case law of the Supreme Court has established, particularly when the consignee presents himself as a shipping company, invoicing the full service in his own name. This ground must be allowed.

THREE.

The consignee's liability.

(…)

B) As the Supreme Court Judgment of 22 March 2006 notes, the variety of connections that may exist between consignee and shipping company, the different functions it may perform and the inadequacy of the regulations governing consignment – added to the fact that it is easier to sue someone who has an established business at the port of origin or destination of the shipment – have prompted a lively debate as to the liability of this assistant of the shipping company in respect of parties with an interest in the cargo when this sustains damage or loss consequent upon inadequate performance of the freight contract.

In the case law, a majority of this Chamber has repeatedly identified the consigner with the shipping company, holding him liable to the consignors or the addressees of the cargo for any damage or loss. Examples include Supreme Court Judgments of 2 November 1983, 14 February 1986, 18 October 1988, 10 November 1993, 23 November 1993 and 2 October 1995, founded on Art. 586 II of the Code of Commerce and Art. 3 of the Maritime Transport Act. Some of these judgments were delivered after the State-Owned Ports and Merchant Marine Act came into force (Supreme Court Judgments of 10 November 1993, 2 October 1995 and 23 November 1996).

There have also been judgments that ruled the opposite, preferring the interpretation advocated by a doctrinal school favouring the view that the carrier's liability is not transferred to the consignee by the mere fact of being the former's agent. These judgments have been founded on the one hand on the difficulty of identifying the consignee as the shipping company's agent in formal legal terms – explained in the Supreme Court Judgment of 22 March 2006 – given that the legal relationship between the carrier is properly governed by the commission agreement (in accordance with a long line of case law, set out in Supreme Court Judgments of 8 October 1966, 27 June 1991 and 8 May 1996 [or in the agency agreement, which only determines the consignee's liability when he acts in his own name, in which case the applicable provision is Art. 246 of the Code of Commerce (or Art. 1 of the Public Administration Procurement Act [LCA], provided – especially in the latter case – that it is not acknowledged that Art. 586 of the Code of Commerce and Art. 3 of the Maritime Transport Act contain any special regulation of the consignee's action.

Then again these judgments are founded partly on the sociological aspect of the interpretation referred to in Art. 3(1) of the Civil Code, when the fact is that the present economic realities and the change that has taken place in the Law of navigation with respect to the Code of Commerce raises a further obstacle to identification of the consignee with the shipping company. Consider in that sense the technological advances, the trend towards international unification of regulations, increased rapidity of transport and the new structure of the professions involved in it, especially in the sphere of management.

Finally, with a view to unifying case law, in a Judgment of 26 November 2007 (appeal number 1127/2000), the Chamber in Full Session adopted the doctrine that, in accordance with Art. 586 of the Code of Commerce and Art. 3 of the Maritime Transport Act, the liability falling upon the agent acting on behalf of the carrier is transferable to the consignee as the agent of the former in respect of the goods carried. This is a direct legal liability conferring legitimacy to act on the owner of the damaged goods, regardless of the internal relationship between agent and principal and whether that relationship is occasional or permanent.

C) As the cited judgment explains, this position was adopted after duly weighing up the various premises involved and considering that, in the light of the legal regulation it seeks to interpret, the sociological aspect – which must be addressed with prudence – does not clearly warrant a change in the case law regarding the specific rules governing the consignee's liability. In fact, as the doctrine has suggested more or less openly in response to the criticism levelled at the cited jurisprudence, the regulation of this subject calls for amendment of the rules, which for the time being the legislator has not decided to undertake, whereas, as we all know, it has taken decisive action in respect of certain commercial management contracts.

D) As the cited judgment explains, the solution favouring the consignee's liability is founded on Art. 586 of the Code of Commerce and Art. 3 of the Maritime Transport Act. The source of the difficulties is not that the latter Act

may be considered to have been repealed, as one part of the doctrine sustains on the basis of the remittal to the Hague-Visby Rules in the 1924 Brussels Convention, because a) in the cases where they apply, these rules do not bar application of the Code of Commerce as long as it does not conflict with them (as implicitly acknowledged in the Supreme Court Judgment of 18 June 1996; b) The Maritime Transport Act has been repeatedly and controversially invoked by our case law since the new Rules came into force (Supreme Court Judgments of 7 April 1994, 17 July 1995, 18 June 1996, 28 July 2000, 19 April 2001, 21 July 2004, 18 November 2004 and 30 March 2006, inter alia; and c) Art. 3 of the 1968 Protocol, in the wording introduced in Art. 4bis2, refers to an action for contractual or extracontractual liability brought against a representative of the carrier – not an independent contractor – thus: "that representative may claim such exonerations and limitations of liability as the carrier is entitled to invoke under the agreement".

A legislative change introduced in the State-Owned Ports and Merchant Marine Act by Law 62/1997 of 26 December 1997, which was not in force at the time of the events, is not then a sufficient basis to argue that the rules on this subject have changed. Moreover, as it is drafted in the amended version of that date, Art. 73(2) of the State-Owned Ports and Merchant Marine Act applies to a material category different from the one in which the present case falls. This must be read in strict relation to Art. 73(1) of the State-Owned Ports and Merchant Marine Act, the heading and substance of which place it in the context of "charges for port services". As worded, it amounts to a simple reservation against application of the regulation governing consignee liability to other areas ("does not extend to"), but not to a direct, general change in those rules of liability that could affect the commercial regulations (although it was proposed in some unaccepted amendments). For the sake of legal security as protected by the Constitution, the rules of interpretation of the *sedes materiae* must be observed, at least in clearer cases, and over-broad provisions should be interpreted restrictively. And there is still less reason to acknowledge a change in jurisprudence if we consider the latest drafting of Art. 73(2) of the State-Owned Ports and Merchant Marine Act, given that the legislator – having the opportunity to sanction certain amendments which fully, precisely and systematically incorporated the view that the rules governing commission or agency agreements are applicable to the relationship between consignee and shipping company for purposes, inter alia, of liability in respect of the owner of the goods – rejected that possibility and opted for the opposite solution, which has been enshrined in the Act since 2003. We are reluctant to accept that the reference therein to specific commercial legislation only covers future legislation or legislation specific to commission or agency agreements, given that a natural reading suggests it is intended as a safeguard for all the current rules, as interpreted by case law, that may be deemed applicable to consignee's commercial activity. Finally, we cannot ignore the fact that there are bills in Parliament that propose a complete and radical new regulation of the subject in the sense hitherto rejected by the legislator.

In view of the need for ongoing regulation of the professions involved in business management, the Full Court, as set out in the judgment here taken as a precedent, considers that there is not sufficient justification to annul the mechanisms for protection of the rights of the owners of goods damaged during carriage that hinge on the liability of the consignee – largely derived from case law and founded on a doctrine which has been challenged scientifically but which seems to be a fixture in maritime trade – until such time as new legislation is forthcoming to introduce a new set of legal rules that adjudicates fairly among the interests concerned".

* Judgment of the Supreme Court (Chamber for Civil Matters, Section 1), 21 February 2008 (JUR 2008\3047)

International carriage of goods by sea. Actions for damages or missing shorts. Recognition of total spoilage of the cargo by the carrier, rendering protests or reservations unnecessary. Liability of carrier and contractor of carriage by sea, obliged to accept liability in respect of the consignor.

"Legal Grounds:

(…) TWO. (…) I. Under Article 952(2)2 of the Code of Commerce, given that the consignee of the goods carried should conduct a diligent examination of the service provided by the carrier in relation thereto, it is up to the former to report any damage or missing shorts immediately or at an early opportunity.

However, that requirement – set out more strictly in Articles 998 and 1000 of the Code of Commerce and mentioned as a condition for the institution of actions, in the preamble to the Draft Code of Commerce of 1882 SIC – is no empty formality but performs a practical function which justifies its imposition.

The need for a timely protest or reservation imposed by Article 952(2)2 of the Code of Commerce relates not only to the possibilities of proving the damage or missing shorts, unlike Article 3(6) of the amended *International Convention* for the Unification of Certain Rules of Law relating to *Bills of Lading* of 25 August 1924 and Article 22 of the Act of 22 December 1949 – which link failure to enter a timely protest to a presumption *juris tantum* that the goods were received from the carrier in the manner set out in the bill of lading, hence constituting an inversion of the burden of proof.

Rather, the forcefulness of the terms of the provision here examined, which expressly exclude the possibility of instituting actions without the timely presentation of protests or reservations – judgments of 22 January 1987, 2 and 23 March 1988 – and the reference to these in the same provision, lead one to conclude that the meaning of the requirement is also the one usually attributed in what is typically a rapid kind of trade, as a concluding act, to a creditor in receipt of a deficient service who does not diligently express his intention to preserve the right to claim from the debtor, or at least to prevent such an omission from being construed as satisfaction with the service received.

However, it is one thing to make the possibility of bringing an action against the carrier contingent on a timely protest or reservation and quite another to deny the logic of identicality and refuse to acknowledge the equivalence of acts

which are essentially different but functionally equivalent – or to insist on their necessity even when the person to whom such declarations should be addressed has taken action that renders them pointless and hence unnecessary.

Following that line of logic, in a judgment of 2 January 1990 this Chamber ruled it unnecessary to present a protest "whose purpose is to place certain facts on record when they may be denied", in a case where these facts had been acknowledged by the addressee. And in a judgment of 24 February 1983, it ruled that certain steps taken by the master and the consignee were equivalent to a protest or reservation despite being of a different nature. (…)".

2. International overland transport

* Judgment of Valencia Provincial High Court (Section 9), 4 February 2008 (JUR 2008\155655)

International overland transport. Liability for theft from a truck in a motorway services area in the Czech Republic.

"Legal Grounds:

(…) TWO. (…) Granted the freight agreement signed by Tránsitos Sagunto and Revival Express did not prohibit subcontracting, and Revival subcontracted the carriage concerned in this complaint with Germán, but that certainly does not mean that liability for the loss of the goods must necessarily fall upon the subcontractor, for Article 3 of the Convention on the Contract for International Carriage by Road done at Geneva on 19 May 1956 clearly and specifically states that "For the purposes of this Convention the carrier shall be responsible for the acts or 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, as if such acts or omissions were his own". Therefore, the loss of the goods during carriage from the Chupa Chups SA factory, where they were loaded, to their final destination in Poznan (Poland) entitles Tránsitos Sagunto, who ordered the carriage in their own name, to proceed directly against the carrier Revival Express, naturally notwithstanding any action that the latter may be entitled to take against the person to whom they subcontracted the carriage".

3. International carriage of goods by air

* Judgment of Barcelona Provincial High Court (Section 1), 5 February 2008 (EDJ 2008/836)

International carriage of goods by air. Liability for loss of baggage. No evidence of intentionality, intent to defraud or recklessness in the cause of damage. Limitation of liability under Art. 22 of the Montreal Convention.

"Legal Grounds:

(…) ONE. (…) Beginning with the first of the issues raised, be it noted that, as acknowledged, this is a case of international carriage by air and as such is

subject to the rules set out in the Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1999, Article 22(2) of which sets a limit on liability, providing that "In the carriage of baggage, 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".

Therefore, it having been shown that the baggage was checked in with no special declaration of value, the limit on liability regulated in the Convention will in principle apply.

The point at issue is then to determine whether in this case the exception contemplated in Article 22(5) of the same Convention applies. This states: "The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment".

As we can see from the wording of this provision, it contemplates intent separately in the terms there specified, clearly signifying more than mere fault or negligence, as was highlighted in the Supreme Court judgment of 20 June 1998, which although referring to an earlier wording of these rules, is equally applicable as this provision has not changed. This judgment stated that "The regulatory provisions in Article 22 and 25 of the Convention indicate that the limit of liability they contemplate may not benefit the carrier if the damage was caused with deliberate intent on its part or through misconduct considered equivalent to intent, which clearly remits to Article 1107 of the Civil Code and means that the instances of fault or negligence included in Article 1104 of the Code do not cover it, unless the carelessness was so monumental and extraordinary as to be assimilable in degree of fault to intent, as was recognised in the judgment of 10 June 1987; and be it said regarding intent that according to the consistent doctrine of the Court, it cannot be presumed and in any case is a matter of fact on which it is up to the courts to pronounce. The above remarks also apply to the amendment introduced in Article 25 of the Convention by the Protocol of 20 September 1955, which alludes to an act or omission by the carrier or its servants with intent to cause damage or recklessly and with knowledge that damage would probably result, for the requirement of intent or recklessness goes far beyond mere fault or negligence and supposes a criminal act, which requires proof as the amendment notes".

If we consider the present case in this light, we must conclude that it does not meet the conditions of the cited exception and therefore the limit referred to applies, given that no evidence has been furnished of any act or omission by

the carrier or its servants or agents with intent to cause damage or recklessly as the exception demands.
(…)

TWO. The limitation of liability in Article 22 of the Montreal Convention means that in the event of loss or delay of baggage, the maximum that can be claimed on all counts, both material damage and pain and suffering, is the amount stated in that article, and compensation for pain and suffering cannot be added on as the said amount is all-inclusive; and Article 29 provides that "In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable".

The fact that non-material damages have been sustained does not mean that they can be included in the claim for compensation, for what the Convention does is set a limit on the liability of the defendant in respect of the consequences of his acts or omissions, which includes both material damage and pain and suffering.
(…)".

4. Others

* Judgment of the Supreme Court (Civil Chamber, Section 1), 16 July 2008 (RJ 2008\4381)

Multi-modal international carriage of goods. Lapse of actions. Spoilage of cargo due to excessive duration of voyage, including deviation from course. Liability of the freight agent as contractual carrier. Article 1964 of the Civil Code not applicable.

"Legal Grounds:

(…) TWO. (…) As the appeal court noted, the defendant had undertaken not to contract multimodal carriage on the plaintiff's account but – as the contractual carrier – to convey the goods from the province of Orense to the Romanian port of destination, whether or not it employed other actual carriers to do so. Therefore, the legal connection between the litigants was that of a contract for multimodal international carriage of goods.

Having settled that point, the remittal to the Civil Code – and hence to Article 1964 thereof – in Article 943 of the Code of Commerce is subject to the condition that there is no fixed term by virtue of the latter Code for the actions concerned to be settled in court.

A special regime for the lapse of actions such as the one laid down for the international carriage of goods with a bill of lading is preferentially applicable to Article 943 and certainly to the Civil Code rules to which the former remits.

It therefore makes no difference for the purposes of the appeal that the code of Commerce contains no provision regulating the period of limitation on actions against the carrier for liability in respect of the performance of multimodal international carriage. The Provincial High Court of Pontevedra, after declaring that the cargo had spoiled during the time that elapsed between the vessel's departure from Lisbon and its arrival at Constanza, applied the rules of limitation specific to the seaborne part of multimodal carriage, namely Article 22 of the Act of 22 December 1949 and Article 3(6) of the Brussels Convention of 25 August 1924.

Consequently, contrary to the appellant's claim, the period of limitation applicable to the plaintiff's action is not the one laid down in Article 1964 of the Civil Code in relation to Article 943 of the Code of Commerce but the one specified in the above-cited rules, which were correctly applied in the appealed judgment.

THREE. (…) The argument on which this ground is founded prompts the observation that, according to the appealed judgment, the goods, loaded on to the vessel Nuova Adria in Lisbon, were not carried directly to Constanza as had been agreed but to an intermediate Italian port, where they were deposited until another vessel could take them on to their destination, as a result of which the seaborne carriage lasted longer than expected: "…loaded on to the vessel Nuova Adria in Lisbon…(they were) discharged in Giosa Tauro, loaded on the vessel Medhope and discharged at the port of destination, Constanza…so that the period of one month cited in the conclusions embraces the entire seaborne carriage stage including the days in deposit at the intermediate port".

This ground is dismissed.

The appellant's line of argument is founded on a factual assumption that does not entirely match what was declared in the original proceedings. The appealed judgment did not conclude that the spoilage occurred in the Italian port referred to but that it was the result of the excessive duration of the complete journey by sea, including the diversion, the stopover and attendant operations.

In short, what the appealed judgment describes is an instance of breach of contract, with a deviation or change of route not specified in the bill of lading and not shown to be reasonable – Article 4(4) of the Brussels Conventions and Article 9 of the Act of 22 December 1949 – which caused excessive prolongation of the carriage and consequent spoilage of the cargo – judgment of 21 June 1980.

Furthermore, given the circumstances of the case, the break-up of the seaborne carriage into stages, determined by the appellant for purely material reasons, is in breach of the legal terms of the contract, according to which the fact that owing to a change of route that was neither agreed nor justified, the goods were discharged and deposited for a time, on his unilateral decision, at an intermediate port, does not release the carrier, even temporarily, from his obligations to convey the cargo – in this case to Constanza – and take care of it up to delivery.

Finally, if in order to get around the limitation rules it is asserted that the sea carrier was not responsible for the spoilage, the reason for the defendant's liability ought at least to have been explained in more detail."

XXIV. LABOUR AND SOCIAL SECURITY LAW

1. International judicial competence

* Judgment of the High Court of Catalonia (Social Chamber, Section 1), 19 September 2008 (AS 2008\2965)

Contract of employment. Stock options. Services rendered in Spain to a Spanish subsidiary of a foreign undertaking. International judicial competence. Applicable law.

"Legal Grounds:

(…) FOUR. The first thing that we have to examine is the jurisdiction of the Spanish courts, since should they be found to lack jurisdiction then we cannot proceed to examine the claim.

Be it added beforehand that the Spanish courts have generally taken the view that stock options are a case-based issue so that each instance has to be examined separately in order to extract conclusions, and it is not easy to establish general rules. Suffice it to cite the Supreme Court judgment (Social Chamber in Plenary Session) of 24 October 2002, which notes that "firstly it would be inappropriate to apply a single, undifferentiated legal yardstick to all situations that might arise in connection with the subscription of stock option schemes, and secondly in the context of employment, stock options are generally treated as a right which the company concedes to the employee, as valuable consideration or as a gratuity, entitling the employee to acquire shares in the company itself or in another related company, on which option a price is set, often the value of the share on the date of granting of the right, so that upon expiry of the term, when the option is exercised, the employee may receive either the difference in the price of the share at the two dates (granting and exercise), or else the actual shares at the price set at the time the right was granted"; "an individualized examination" is required, for according to the Chamber's doctrine, "in view of the particular characteristics of different stock option schemes and agreements concluded in implementation thereof, which in corporate practice can be and normally are highly diverse, it has to be determined in each case whether the profit accruing to the employee through the acquisition of stock options is or is not a part of his salary", as we are reminded by the same court's judgment of 26/01/2006, appeal 3813/2004.

We must therefore examine the facts of this particular case. We should also stress the reminder in the same judgment that for an examination of this issue by the Spanish courts that deal with corporate affairs: "The fact that the options concerned are for shares in the parent company "C" and not in the Spanish subsidiary, which is legally the employer, is not an obstacle. The essential factor for a monetary consideration received by the employee to be considered part of his salary is the profit accruing on it and not the original ownership of the goods or benefits assigned. Also, the fact that the stock options concerned are for shares in the parent company and not in the Spanish subsidiary, the

employer, shows the nexus between this item of remuneration and the company's results, which nexus is not broken since what is considered are the results of the whole business group".

And at this point it should be remembered that the second legal ground of the original judgment introduces a number of elements that this Chamber considers essential for the outcome of the proceedings, and we therefore take the arguments as read. The ground reads: "to resolve this case we must start with the following premises. 1) The complainant concluded a contract of employment in Spain with the firm Acieroid, S.A., for the provision of services in Spain. 2) The firm Acieroid, S.A is part of the Bouygues group (of France), of which it is a Spanish subsidiary. 3) In connection with the contract of employment, the Bouygues group offered the plaintiff a stock option scheme in recognition of his functions or good performance in the company, and also of "the result of his work", which the employee accepted. 4) The stock option scheme states that the employee may exercise options, one from 27/03/2005 to 27/03/2008 and a second from 25/06/2006 to 25/06/2009.

As to the submissions in the appeal regarding the jurisdiction of the Spanish courts, we agree in essence with – and so here reproduce – the reasoning in the appealed judgment where it notes that with regard to the exception of lack of Spanish jurisdiction,

it is a matter of determining the forum, and to do that we must first examine the rules applying to determination of the international judicial jurisdiction of our courts. There are two regulations that must be taken into account. One is the 1968 Brussels Convention, which is part of our internal law (Article 96 of the Spanish Constitution) since it was signed by Spain at San Sebastian on 26 May 1989 and ratified by Instrument of 29 October 1990 (BOE 28 January 1991). Article 1 of that Convention deals with the material scope of thereof, in the following terms: "This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal", and its articles include specific provisions regarding individual contracts of employment (Articles 5(1) and 17(5)). Article 2 of the Brussels Convention provides: "Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State". The Brussels Convention, acceptance of which was mandatory at the time for all States acceding to membership of the European Community (Art. 63 of the Convention), must be taken in conjunction with Council Regulation (EC) No 44/2001 of 22 December 2000 "on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters" (OJEC 16 January 2001), in force since 01/03/2002, which contains provisions regarding individual contracts of employment.... The rules for determining jurisdiction in respect of individual contracts of employment can be found in Section Five of the Regulation, which comprises Articles 18 to 21. Article 19(1) of the Regulation provides that "An employer domiciled in a Member State may be sued: 1) in the courts of the Member State where he is domiciled", in this case Spain for Aceiroid, or according to section 2) of the same Article: "(...) in another Member State: a) in the courts for the place

where the employee habitually carries out his work or in the courts for the last place where he did so; or b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated". This is a forum of choice, and the plaintiff having chosen the Spanish courts to settle the dispute, since one of the defendant companies is domiciled in Spain and the employee habitually carried out his work in Spain, the Spanish courts have international judicial jurisdiction in respect of this lawsuit".

The judgment adds that "obviously, if Art. 25(1) of the Judiciary Act is applicable, the Spanish courts will likewise be competent to settle this dispute". We also agree with this statement inasmuch as the Act referred to declares that the Spanish courts have jurisdiction in matters of rights and obligations deriving from a contract of employment where the work was done in Spain or the contract was formalised in Spanish territory; where the defendant has its domicile in Spanish territory or an agency, branch, office or other form of representation in Spain. In the present case we see that not only was the work done in Spain but one of the defendants is a Spanish undertaking and has its registered office in Spanish territory, and the parent company can be sued in the Spanish courts since it evidently has an agency in Spain, for that is the construction one is forced to place, for the purposes of these proceedings, on the relationship between a subsidiary of a group of companies and the principal company of that group.

In our view, for the purposes of jurisdiction it is unimportant whether the right is exercisable now or in the future: on the contrary, the important thing is the juridical content of the law concerned, and its source: evidently the law is civil in content (in the international law sense and because it must include labour law according to the above-cited EC Regulation), and if we look at the specific terminology of our internal law, we find that the law applicable to this case is determined by the labour relationship between the parties.

For all those reasons we therefore concur that the exception of lack of jurisdiction of the Spanish courts cannot be entertained.

And having recognised the jurisdiction of our courts, there can be little doubt as to the jurisdiction of the social courts, since the obligation evidently arises in connection with the performance of work as an employee, which is the central factor determining the jurisdiction of these courts, irrespective of whether or not the object in dispute is part of the salary.

The grounds adduced in this connection are therefore dismissed.

[…]

SIX. Having regard to the applicable legislation, we have to remember that, to paraphrase the dissenting opinion in the Supreme Court Judgment of 22/05/2001, "it is one thing to determine what judicial bodies are called upon to settle lawsuits in connection with the performance or enforcement of contracts of employment, and it is quite another to determine the labour law regime – the set of substantive rules applicable to contracts of employment which includes an alien element, an issue regulated in the 1980 Rome Convention and in several

provisions of internal Spanish law (Art. 10(6) of the Civil Code, Art. 1(4) of the Workers' Statute, or Law 45/1999 of 19 November 1999 on transnational movements of workers)". Specifically, in order to determine the applicable substantive law we must look to the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations, as ratified by Spain, Article 3 of which ("Freedom of choice") provides that "A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case".

In that respect this court attaches particular importance to the fact that the communications from the chairman of the Buygues group to the plaintiff were sent from France, where the principal company of the group has its registered office, were written in French (accompanied by a Spanish translation, as accredited by the documents submitted by both parties, in particular the plaintiff, at folios 77 to 82 of the roll of evidence) and contain reference to Article 163 bis C of the "Code General des Impôts" which refers to the section headed "Nouvelles Regulations Economiques" (in the case of the first communication of 2001) and also Article 443-6 of the "Code du Travail" (in the case of the second communication of 2002). From what we have seen it is clear that the intent of the party unilaterally offering the stock options is that French law be applicable, and obviously the party accepting that offer without qualification is also accepting the applicability of the laws of the group of companies' country of domicile.

Nevertheless, it is worth recalling in addition that Article 4 of the same Rome Convention ("Applicable law in the absence of choice") also provides that "1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country". As we see it then, in the present case it is quite clear that the closest connections as far as the stock options are concerned are with the French Republic, this being where the proposal was made, the country of residence of the party called upon to honour the obligation established, and finally it is where the option rights will be enforced if the suit is successful. If we accept this second criterion of the rule, the French law is likewise applicable.

In this case we do not concur with the argument in the original judgment inasmuch as although admittedly the right at issue, while unilateral in origin, is closely connected with the contract of employment, this – as noted above – determines only the competence of the Spanish courts, but it does not necessarily imply that Spanish law is applicable.

We therefore feel bound to uphold the companies' appeal in this particular respect, and establish that the applicable law is French law. Let us now look at the consequences of this conclusion.

SEVEN. The second paragraph of Article 12(6) of the Civil Code in the version predating the Civil Procedure Act provided that the substantive foreign law had to be proven by the party invoking it; however, that provision was amended by Article 281 of the Civil Procedure Act, which provides that the "foreign law must be proven as regards its content and currency, and the court may avail itself of any means of ascertainment that it deems necessary for application thereof". The brief in reply opposes this view and invokes a Supreme Court judgment of 04/11/2004, ruling that where the foreign law is applicable, if it is not proven, effective judicial protection is better assured by applying Spanish law; however, this does not gainsay the provision of the Civil Procedure Act which, once it is determined that a foreign law is applicable, to some extent obliges the court – interpreting in the spirit of the Constitution – to avail itself of whatever means of ascertainment it deems necessary; obviously, it is only once that step has been taken (in reasonable terms, with due consideration for other aspects pertaining to judicial protection, such as unnecessary delay) and if it proves unsatisfactory, that Spanish law should be applied.

It is this Court's understanding that what the appeal seeks is to force the application of a restrictive clause contained in both letters offering stock options, the essence whereof is contained in the phrase "cette option sera caduque de plein droit en cas de rupture du contrat…" (translated in the same letter as "this option shall cease to be legally valid in the event of termination of the contract…"), thus adopting the position that the right at issue was subject to limitations and was conditional upon the contract of employment being in force at the time when it was implicitly agreed that the option could be exercised.

It then remains to be seen whether French law and its interpretation in the jurisprudence of its courts concurs with this claim.

Now, the French "Cour de Cassation" (see website http://www.legifrance.gouv.fr/) has accepted the validity of clauses restricting stock option rights, and in particular has upheld the validity of a clause limiting the right subject to the employee's continued engagement in the company at the time when he may exercise the option, without elaborating on possible causes of termination of the contract: see judgments of 09/05/2001 (no. de purvoi: 98-42615) and 15/01/2002 (folio 454 of the record).

The substance of the first of these judgments was as follows:

Whereas Mr X's last position with the company Bureau Véritas was as Head of Sales in Italy; whereas on 20 November 1989, 18 December 1990 and 12 September 1992 the employer granted Mr X a right to acquire shares in the company at a preferential rate; whereas at the time a note was attached to the offer of the stock option advising that "exercise of the stock option is subject to the condition that the beneficiary have neither resigned, had his contract revoked or been discharged on the date of exercise of the option"; whereas on 10 September 1991 the parties concluded an agreement referred to as a transaction relating to the conditions of termination of the contract of employment; whereas Mr X was discharged by letter dated 26 September 1991; whereas in a letter dated 5 July 1994 he informed the company Bureau Véritas of his

decision to withdraw the stock options; whereas the company Bureau Véritas refused on the strength of the informative note cited above, given that by virtue of his discharge, of which he was notified by letter dated 26 September 1991, he had lost the right to exercise the stock option; (…)

Whereas Mr X objected to the judgment (Lyon, 22 January 1998) ruling that his discharge had "contractually" terminated his right to exercise the stock options to which he had been entitled and hence dismissing his complaint, ….. whereas in this particular case the agreement concluded between the parties on 10 September 1991 constitutes an amicable termination and not a transaction consequent upon dismissal.…(…)

But whereas the disputed agreement of 10 September 1991 cannot validly constitute either the termination of a mutual agreement given the suit in which the parties are engaged, by reason of the very terms of that agreement, or a transaction at the same time whose object is in turn to terminate the contract of employment and pursue the consequences thereof, the appeal court decided precisely that the contract of employment was terminated as a result of the discharge notified on 26 December 1991 and that the condition – accepted by the employee – whereby the right to exercise the stock option was contingent on the contract of employment not having been terminated by dismissal barred the exercise of that right [and hence] the appeal is groundless. (…).

The application of this doctrine in a case materially similar to the present one leads one to conclude that the limiting clauses in respect of the stock options are valid, which means that the appeal should be upheld and the complaint dismissed in full.

EIGHT. Nonetheless, we have also considered the possibility of applying the international law theory of "equivalence of institutions", which entails examining whether there is similar legislation in Spanish law and whether or not the limiting clause is valid in that law. We believe that these are in fact clauses of a commercial nature which, although regulating an emolument connected with a contract of employment, have a specific weight because of the moment at which they were formalised (while the contract of employment was in force). They have a definite purpose and scope (numerous employees – not only the plaintiff – of the group of companies in several countries receive the same offer, and the verdict should be the same in all cases); and given their reciprocal nature (these are not free or quasi-free options but carry a certain price – greater than the market value at the time it is proposed to exercise them, folio 446) and the absence of any condition specifying a particular service in return, the offer is unilateral and gratuitous, contingent only on the employee's relationship with the group of companies. We do not agree with the view expressed in the appealed judgment that the options were contingent on any kind of result in the employee's work, for this is neither deducible from the wording of the clause ("this decision is a sign of our intent to identify him closely with the good performance of the group and its future, and with the result of his work"), and it has not been shown – or even attempted to show – that there was any kind of specific performance-related consideration. We would also make it clear

that there is no contradiction in our earlier assertion that the offer is unilateral and gratuitous in origin, albeit in substance the option is contingent on a given payment upon sale, preferential at all events.

This being the case, we are thrown back on our general theory of obligations and conclude that this is a conditional, time-limited obligation whose performance requires the fulfilment of both conditions, namely that the stipulated date arrive (fulfilled in the case at issue) and that at that date the employee continue to work for the company. The latter condition is not fulfilled and therefore the company is not bound to honour the obligation. We are aware that our courts have delivered numerous judgments clearly stating that the termination of a contract of employment for reasons unconnected with the will of the employee (as in the present case, where the company has acknowledged unfair dismissal) is not sufficient to warrant the annulment of the employee's rights to the stock options; however, we are bound to consider a recent judgment by this Court dated 05/12/2007, no 8593/2007, rec. 357/2006, sustaining the doctrine that – in a similar case – the document signed by the two parties does not reflect a real dismissal and the employee's separation is not the consequence of an ostensibly unilateral decision by the employer, but of the common will of both parties to terminate the employer/employee relationship in exchange for compensation, accepted by the plaintiff; and we believe that the same applies in the present case, where following the letter of dismissal (folio 374) alleging absences from work by a person holding a responsible position in the company (product manager), compensation was agreed for exactly 68,000 euros: we, like the average citizen, conclude from this that the severance was by mutual arrangement, and thus the doctrine of the Supreme Court is mot applicable. As we said in the above-cited judgment, "the company did indeed send the plaintiff what purported to be a letter of dismissal, but the Court has reached the conclusion that this was not a case of unilateral exercise of the company's powers but that a document was drawn up in an outward form that was beneficial to both parties and was accepted by employee and employer for reasons unknown on which it is not our place to opine, but which certainly seem neither absurd, futile nor entirely unconnected with the will to separate and the benefit of the two parties. This document does not then express a real dismissal and the employee's separation is the result not of an apparent unilateral decision by the employer but of the common will of the two parties in the labour relationship". And from this we conclude that had Spanish law been applicable, the outcome would have been identical.

As we can see, the case analysed in our own judgment is similar to the one analysed by the French Cour de Cassation, from which we conclude that the outcome of the proceedings would be the same whether French or Spanish law were applied. In short, it is the opinion of this Court that under the French law examined and under the equivalent Spanish law, the appeal would have to be upheld and the complaint dismissed.

In light of the above-cited legal provisions, other concordant provisions and other relevant applicable provisions."

2. Individual contract of employment

* Decision of the Canary Islands High Court of Justice (Las Palmas Division, Chamber for Social and Labour Matters, Section 1), 11 July 2008 (JUR 2009\55191)

Plaintiff registered with the Special Scheme for Seamen. Retirement pension. Skipper of a fishing vessel owned by a company with registered office in Casablanca and flying the Moroccan flag, home port Agadir. Contract of employment formalised in Las Palmas and plaintiff joined ship in Las Palmas.

"Legal Grounds:

(…) THREE. (…) The plaintiff cannot be excluded from the Spanish Social Security system since, as the original judgment rightly states, he had been working for the two defendant companies, one of which (IFM) is Spanish although it has only been formally registered as such since 01/11/1998. This Chamber of the High Court of the Canary Islands in Las Palmas already had occasion to deal with the same undertakings in a judgment of 7 March 2005, where it explained that the present ground for legal censure contained two separate issues, namely determination of the competent national jurisdiction and the legislation applicable to a lawsuit arising from a contract of employment in which there is an alien element.

This Chamber has already addressed these issues at length in a judgment of 21 March 2003 (Appeal for Reversal 861/2002) where, briefly, it said that the activity concerned was confined to supplying labour in such a way that a Spanish undertaking engages Spanish workers in Spain and assigns them to a Moroccan fisheries undertaking for service abroad on vessels flying a foreign flag. The context is maritime fisheries and the applicable legislation is Spanish as the law of the country most closely connected with the contract of employment (Art. 6 of the Rome Convention of 19/06/1980 on the Law Applicable to Contractual Obligations), given that the purpose of the exception or escape clause provided in the Rome Convention is precisely to maintain as far as possible the nexus with the legal system most closely connected with the contract it is sought to impose through joint enterprises or flags of convenience, so that both the legislation and the case-law and doctrine present a common line of action in this respect.

The cited judgment noted that: "As we know, fishing as an activity is subject to a set of authorisations (licences and temporary permits) which considerably restrict the scope of general freedom of enterprise as framed in the Constitution. The purpose of this traditional restriction (which in practice means a species of relative prohibition on the activity) is essentially to address the familiar problems of overfishing, which prompt the need for rationalising and control measures to assure the protection of the limited resources that there are, and with that of the population depending on them. As a result there are manifold regulations at both national and Community level whose purpose is to establish conditions of access to fisheries, whether by imposing operating rules for each mode of fishing (mandatory registration in censuses and specific registers subject to evidence of habitual fishing in a given ground), or through legal rules governing

rights of access, in which aspect Community and national regulations converge (particularly as regards the quota system).

This set of restrictions on the activity, and in particular the reasons for them, have prompted employers in the sector to adopt complex arrangements ultimately intended to gain access to fishery resources and improve the exploitation thereof. The outcome has been on the one hand a considerable increase in corporate concentration in the sector (especially noticeable in the sphere of industrial fisheries), and on the other hand generalised resort to the corporate forms traditionally used for these purposes (joint fishing enterprises, mixed fishing enterprises, temporary business partnerships), which nowadays come under the official heading of "joint enterprises".

Strictly from the standpoint of labour relations, we should stress on the one hand the favourable impact that such solutions have on the maintenance of employment levels and a consequent amelioration of the crisis besetting the sector. But on the other hand there can be no ignoring the threat that such organisational forms pose to the effective enjoyment of their rights by sector workers, especially considering that the "benefits" thus pursued also include the reduction of payroll costs. It has therefore become necessary to introduce complementary measures to guarantee that in such circumstances the promotion of economic activity does not work to the detriment of adequate levels of social protection, and generally to secure a balance among the different interests involved.

At all events we should stress that the labour relationship in the maritime-fisheries sector is strongly influenced by the peculiarities of the workplace, which is the vessel; this affects not only the practical aspects of the relationship and the conditions in which the work is carried out generally, but also the applicable legal status, which is closely connected with a number of administrative aspects concerning the official registration of the vessel.

It is on that basis that we define sea fishing employment as extra-territorial, a situation which poses complex problems in the resolution of conflicts arising from what are known as international seafarers' company service contracts, due to the tendency of shipowning companies to adopt complex forms of incorporation (combining factors such as nationality of the enterprise, country of registration of the vessel and the vessel's flag); this is true of joint ventures, used by Spanish shipowners as a means to get around problems of access to fishing grounds, and in many cases to evade Spanish labour law, which is considerably stricter than that of the third countries with which they enter into fishing agreements and under whose nationality such joint ventures are formally registered.

In view of this, the legislator on the one hand and the doctrine and case-law on the other both seek criteria through which to prevent such evasion of the law affording most protection, and also strive to keep up the social protection of workers through maintenance of the legal system with which there is a genuine connection.

In order to get around the obstacles posed by blanket application of the so-called "flag principle", which tends to be decisive in determining the applicable law, the doctrine in this respect proposes using the techniques habitually resorted

to in the case-law for such purposes (lifting the veil), which have proven highly effective in dealing with controversial issues not normally provided for in the legislation and whose purpose, like other specific instruments such as the "flag of convenience doctrine", is to assure that the worker is not prejudiced by application of the criterion of the law of the flag State; b) following this line of social protection, Spanish legislation on joint enterprises has been establishing that in order to guarantee their Social Security rights, any Spanish nationals going to work for such undertakings shall do so as employees of one of the Spanish undertakings participating therein (Art. 7, RD 830/85); and c) the case law generally applies these same principles, and for instance has been applying the labour regulations of the State other than the flag State where most of the elements of the seaman's employment contract link that relationship to the laws of the non-flag State (e.g. Supreme Court Judgments of 09/05/1988 and 07/11/1999 and Judgment of the Canary Islands High Court of 17/07/1992).

In this connection it is worth citing a Judgment of the Supreme Court (Third Chamber) of 08/07/1989, which reads: "However, through a legal fiction the legal regime governing formally foreign joint fisheries enterprises shall be treated as equivalent to domestic enterprises since the underlying connection is stronger than the apparent one, given that they are substantially ours even if they have to adopt another garb in order to be able to operate in certain countries whose nationalistic oversensitivity renders such a disguise necessary".

In the foregoing we have drawn attention to the problems posed by the fisheries sector, and in particular joint ventures, with regard to the law applicable to seamen's employment contracts, and also to a clear tendency to seek to apply the most socially advantageous law, which employers seek to avoid in order to reduce business costs and which moreover is normally the law of the employee (in this case Spanish law). We now turn to examine the ground of appeal, specifically the issue of determining the substantive law applicable to the dispute.

The appellant cites Articles 1(4) and 1(5) of the Workers' Statute and Articles 10 and 12 of the Civil Code in support of the inapplicability of Spanish law.

The Chamber is thus obliged to clarify the normative framework in which we must situate ourselves in order to locate the State laws which will be invoked to regulate the merits of the contract in question. And to that end we can do no better than transcribe the precept of Spanish law which has been used to solve such problems since 1993, when Spain ratified the 1980 Rome Convention on the law applicable to contractual obligations. This is Article 2 of the Convention, which clearly establishes the *erga omnes* or universal force of its articles, providing that "Any law specified by this Convention shall be applied whether or not it is the law of a Contracting State".

This means that the norms comprising our internal system of private international law on these matters is superseded in most cases (Article 10(6) of the Civil Code and Article 1(4) of the Workers' Statute).

This means that in all matters falling within the scope of the 1980 Rome Convention there can be no remittal to any provisions outside that Convention.

According to the Rome Convention, then, what criterion or *lex fori* must we apply to determine the applicable law?

The first *lex fori* established by the Convention is elective, in that a contract shall be governed by the law chosen by the parties, expressly or tacitly.

That criterion does not apply in the present case, where there is an apparent succession of employer and novation of contract, and therefore we must look to the *leges fori* set out in Article 6, which reads:

«… Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:

(a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or

(b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated; unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.

The Rome Convention thus lays down three objective *leges fori*, namely:

a) The law of the country where the employee habitually works; b) if he does not habitually work in a single country, the law of the country where the establishment that has employed him is situated; and c) an escape clause to be applied where the circumstances are such that the contract of employment is more closely connected with another country, in which case the law of that other country applies. At this point the Court would draw attention to the end pursued by the system designed by the Community legislator with the cited "escape" or "exception" clause, namely that any contracts in which the law of the State cited has little connection with their contents are to be governed by the law of the country with which the contract of employment is most closely connected; these points of connection include the place where the employer's establishment is situated, the habitual residence or common nationality of the contracting parties, the currency agreed for payment, the place where payment is to be made or deposited, any prior relationship between the parties, etc.

This clause, then, applies to certain work relationships which contain an alien element and in which the traditional criterion would tie to a law having little connection with that relationship. This is true: a) in the case of certain seamen's employment contracts most of the elements of which link the work relationship to the law of a country other than the flag State; and b) in cases where the employer's personal status changes, whether by reason of transfer of domicile to another State or by reason of international merger necessitating a change of legal personality, the object being to permit the continuity of the contract in the same legal terms".

As was noted in the first of the cited judgments, these proceedings concern a case of labour leasing, unsanctioned by any internal or international rules and therefore only classifiable as illegal leasing of manpower, in which a company whose principal place of business is in Spain ('IFM, SA') engages Spanish

workers in Spain and assigns them to a Moroccan company in the fisheries sector ('Marona, SA') which employs them abroad (on vessels flying a foreign flag, whose home port is abroad and which fish in international waters and national waters of other countries). In our system of labour law, only temporary employment agencies are allowed to lease manpower, and hence if what the employing company is doing is simply to supply manpower and nothing else, then that activity is illegal.

Under Article 43(2) of the Workers' Statute. both undertakings, the provider ("IFM, SA") and receiver ("Marona, SA") of the services are jointly and severally liable for all legal purposes.
(…)".

* Judgment of Madrid Provincial High Court (Section 5), 20 November 2008 (EDJ 2008/309703)

Contract of employment. Applicable law.

"Legal Grounds:

…TWO. (…) In the present case, according to the eleventh clause of the contract concluded between the parties on 16 October 1989, "Austrian labour law shall apply unless this contract or the laws of the State where the employee works contain mandatory rules". (…) Austrian law being expressly recognised then (clause eleven of the contract concluded by the parties), that is the law that must be applied in accordance with Art. 10(6) of the Spanish Civil Code given that a jurisdiction has been specifically agreed and accepted. (…) For express recognition of jurisdiction to be valid, the following must be taken into account (…): – The nationality of the parties (both Austrian). – The nationality of the workplace (premises of the Austrian Embassy in Madrid). – Pay conditions are better in Austria than in Spain for an employee of the same category. – Control over the functioning of the workplace (Austrian, the workplace being funded from the Austrian national budget), as a Public Law entity. – Where the salary is paid (in Austria). – Where taxes are paid (in Austria). In this case all the conditions indicated in the cited judgment supporting the applicability of Austrian law are met, quite regardless of the fact that the plaintiff has already filed suit in the Austrian courts. The principle of the law most favourable to the employee cannot possibly be entertained for reasons of legal security, as that would mean that a different suit could be filed with a different court each time, and subject to different rules. The argument put forward in the original proceedings encourages recourse to stratagems, in some cases fraudulent, as it means invoking a law that is more favourable for the action concerned in the knowledge that that law is not applicable. Be it said that this type of conduct is especially common in cases involving Spanish Labour Law, as this is especially protective of and beneficial to the employee. The case in these proceedings clearly falls into this category, given that the plaintiff seeks to found his claim on Spanish law when it is absolutely clear that his relationship with his employer is governed by Austrian law."

XXV. INTERNATIONAL CRIMINAL LAW

* Judgment of the Supreme Court (Chamber for Criminal Matters, Section 1), 23 January 2008 (JUR 2008\43)

Crimes against the rights of foreign citizens. Vessel intercepted outside territorial waters and taken to the Spanish coast. Jurisdiction of the Spanish courts according to international rules and the principle of ubiquity.

"Legal Grounds:

SOLE GROUND. (…) 1. It is true, as the Public Prosecution Service maintains, that Art. 318 bis treats as perpetratorship forms of action more properly defined as participation, such as the case of abetting. It must be admitted, however, that there is no reason to consider that such abetting actions may be punishable outside the spatial (territorial) scope of the relevant criminal law, in this case Art. 318 bis of the Penal Code. It seems clear that a rule can only be infringed where it holds sway and that acts directly intended to secure unlawful entry in that area of spatial validity are in fact acts preparatory to or initiating the commission of an offence which is only such within the territorial scope of the rule. The problem that arises in this case cannot therefore be resolved without addressing the issue from the general standpoint of the criterion adopted by the case law regarding the locus of commission of the act or omission, including the case of aiding or abetting.

Furthermore, we must be clear that the locus of commission of the offence or the performance of the act is the place where the perpetrator himself acts. Therefore, the offence is not consummated as a consequence of the accused being conveyed to Spanish territorial waters by the Spanish authorities, as in that case the arrestees are no longer acting on their own account. The reverse might confer legitimacy on the procedure – of dubious legality in international law – known as *male captus bene detentus*, but which has no status in our internal law.

Finally, it is the Court's view that the normative criteria followed to establish the locus of commission of the offence must be derived by interpretation of the rules of international criminal law as instituted in internal Spanish law, as our jurisprudence has established. For instance in Supreme Court Judgments 582/07; 618/07; 662/07 and 788/07, inter alia, in cases similar to the one considered here, this Chamber has ruled that Spain has jurisdiction to be seized of the case, a view that this decision fully ratifies.

The appealed decision is therefore legally erroneous and must be quashed.

2. The doctrine laid down by our jurisprudence must be viewed in the light of the resolution by the Non-Jurisdictional Plenary Session of 3 February 2005, where it was decided, in a reasoned interpretation of the legal silence regarding the locus at which the offence must be deemed to be committed, that the criterion for establishing that locus of commission must be the so-called theory of ubiquity.

The basic premise on which this theory rests is that the offence is consummated wherever the action has been carried out or wherever the result has materialised.

This basic premise gives rise to a number of subordinate premises which further elaborate the criterion to encompass certain particular forms of offence.

In crimes of omission the locus of commission is in principle to be considered the place where the omitter intended to perform the action, save in exceptional cases where the law provides otherwise for special reasons.

In cases of attempt to commit or preparation of the locus for commission, this may be the place where preparations are made or where the attempt to commit commences, or equally the place where the perpetrator intended (but failed) to commit the offence.

That is how the theory of ubiquity works in the criminal law of a considerable number of European countries which have adopted it in a positive sense, for example: § 9(1) of the German Penal Code ("An act is committed wherever the perpetrator has acted or in cases of omission wherever the act ought to have been performed, or wherever the perpetrator intended the action to take effect"); § 67 (2) Austrian Penal Code (in similar terms to the German code); Slovenian Penal Code, Art. 10(2) ("[…] the offence is deemed to have been committed either in the place where the act takes place or in the place where the perpetrator intended the illegal result to materialise or be registered"); Finnish Penal Code, Ch. I, § 10(2): "An attempted criminal offence is deemed to be committed wherever the outcome would have materialised in the event of consummation or in the intention of the perpetrator"; Polish Penal Code, Art. 6, § 2. ("A prohibited act shall be deemed to be committed wherever the perpetrator committed that act or wherever the action omitted ought to have performed or wherever the result of the act should have materialised in the intention of the perpetrator"); Portuguese Penal Code, Art. 7(2). ("In cases of attempt, the act is likewise deemed to be committed in the place where the perpetrator intended the result to materialise"); Swiss Penal Code, Art. 7(2). ("The attempt shall be deemed to have been made wherever the perpetrator attempted or intended to commit the act"). Italian case law has arrived at similar conclusions with regard to various hypothetical cases based on the theory of ubiquity as defined in Art. 6 of the Penal Code (compare for example: Cass IV, 24/11/1995; Cass II, 20/03/1963; Cass II, 23/10/1973; Cass VI, 30/03/1988). This rule is now sufficiently widely accepted in national criminal laws for it to be considered part of the international criminal law of the States of Europe.

Furthermore, there is sufficient consensus as to the basic consequences of the theory of ubiquity to justify its application as a criterion in interpreting our current law, given the silence of the latter on what is an essential conceptual premise for application of the territorial principle. This conclusion is moreover supported by the current doctrine whereby comparative law is recognised as an interpretative method alongside the traditional interpretative procedures of the 19th century.

According to the above-cited European law, therefore, only the territorial principle applies since the offence must be considered to have been committed in the national territory. The reasons behind this special rule whereby the national law is applicable to offences whose commission is prepared or initiated in the

territory of the State concerned are clear and are entirely consistent with the bases of the theory of ubiquity: the locus of commission must be determined not only by the commission or the outcome of the act, but also by the place where the perpetrator intends to break the law of that country.

In the present case, then, the issue is clear: the accused initiated the offence outside Spanish territorial waters, but in intent clearly constituted a violation of Spanish law and of Spanish territory, where they intended to land the immigrants they were conveying. The offence must therefore be considered to have been committed in Spanish territory, since that is where the perpetrators intended to clandestinely land the persons they were conveying. In other words, in such cases territoriality is the only applicable principle and the offence was committed in Spanish territory".

* Judgment of the Supreme Court (Chamber for Criminal Matters, Section 1), 18 February 2008 (JUR 2008\2160)

Crimes against the rights of foreign citizens. Vessel intercepted outside territorial waters and taken to the Spanish coast. Animus lucrandi. Jurisdiction of the Spanish courts according to international rules and the principle of ubiquity.

"Legal Grounds:

(…) TWO. (…) The ground is founded on the claim that the vessel carrying ninety-four Sub-Saharan citizens and the three accused was intercepted outside Spain's sovereign waters.

This ground cannot be entertained, for as stated, inter alia, in a judgment of this Court dated 15 June 2007, to rule on this issue we must take into account: a) that illegal immigration is one of the most serious problems currently facing the International Community and one that normally bears a very close relation to what is known as "transnational organised crime"; b) that the aim of the Convention of 15 November 2000, as stated in Article 1 thereof, is to "promote cooperation to prevent and combat transnational organized crime more effectively"; c) that Article 7 of the Protocol supplementing this Convention provides that "States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea"; d) that the United Nations Convention on the Law of the Sea provides that navigation on the high seas "is exercised under the conditions laid down by this Convention and by other rules of international law" (see Art. 87.1); and e) that Art. 4 of the Geneva Convention of 29 April 1958 provides that "Every State, whether coastal or not, has the right to sail ships under its flag on the high seas", while Art. 12(2) of the same Convention provides that "Every coastal State shall promote the establishment and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea".

We must also bear in mind that the offence of which the appellant has been convicted (Art. 318 bis, paragraphs 1 and 3 of the Penal Code) is one of what are called offences of mere activity and is consummated by the performance of acts to promote, abet or facilitate illegal trafficking or clandestine immigration

of persons, and therefore any action performed at the outset or during the course of the process of emigration or immigration and contributes to the furtherance thereof in illegal conditions comes within the meaning of the offence.

For the rest, in regulating "the scope and limits of jurisdiction", the Judiciary Act provides that "the Spanish Courts and Tribunals shall hear cases arising in Spanish territory between Spanish nationals, between aliens and between Spanish nationals and aliens, subject to the provisions of this Act and the international treaties and conventions to which Spain is a party" (Art. 21(1) Judiciary Act); and that the Spanish courts shall be competent to judge acts committed by Spanish nationals or aliens outside the national territory in the case of any offence "which is susceptible of prosecution in Spain under international treaties or conventions" [see Art. 23(4)h) Judiciary Act].

At this point we must now consider: 1) that the vessel in which the accused and the ninety-four Sub-Saharan passengers travelled flew no flag (see Bill of Evidence); 2) that all the passengers on board the said vessel were headed for the Canary Islands with the intention of entering Spanish territory clandestinely; 3) that the vessel was discovered adrift, some thirty miles from the island of El Hierro, having run out of fuel (see Bill of Evidence); 4) that for the reasons explained, the offence of which the accused have been convicted had been consummated before the vessels was located and towed to a Spanish port; and 5) that there is no record of any State having sought to try this case in its courts.

For all the foregoing reasons, the Spanish courts clearly have jurisdiction in respect of the act that this case concerns. This ground must therefore be dismissed (…)".

XXVI. INTERNATIONAL TAXATION LAW

* Judgment of the High Court of Madrid (Chamber for Administrative Proceedings, Section 5), 17 January 2008 (JUR 2008\451)

Special Duty on Immovable Property of Non-Resident Entities. A Swiss entity resident in Switzerland and owner of property in Spain is subject to the tax. No breach of Art. 24 of the Hispano-Swiss Convention for the avoidance of double taxation. Tax applicable by reason of the entity's residence, not its nationality.

"Legal Grounds:

(…) SEVEN. To settle the issue here raised, we must consider the following rules:

1. Article 24(1) of the Convention for avoidance of double taxation between Spain and Switzerland of 26 April 1966 provides that "nationals of a State Party shall not be subject in the other State to any tax or obligation relating thereto that is not required of or is more burdensome than those to which nationals of the latter State in the same circumstances are or may be subject", and sections 3b) and 6 respectively add that "the term nationals means all legal persons, companies of persons and associations incorporated under the laws currently in

force in a State Party" and that this article is applicable to all taxes, whatever their nature or denomination."

2. Article 64(1) of the Company Tax Act, Law 43/1995 of 27 December 1995, provides that "1. Non-resident entities which are holders of title in or possess in any other form immovable property or rights *in rem* for the enjoyment thereof in Spain shall be subject to Company Tax via a special duty which falls due on 31 December each year and must be paid in the month of January following."

3. Article 8(3) of Law 43/1995 provides that "entities fulfilling any of the following conditions shall be considered resident in Spanish territory: a) having been incorporated under Spanish law; b) having their registered offices in Spanish territory; and c) having their effective managing headquarters in Spanish territory, and likewise companies incorporated in accordance with Swiss regulations possess this nationality under Article 41 of the Federal Direct Taxation Act.

4. Article 43b) of Law 43/1995, having regard to tax domiciles, provides that "taxable persons resident abroad shall have their tax domicile for purposes of their tax obligations in Spain:... b) in the case of income from immovable property in the tax domicile of the representative, and failing that in the place where the property concerned is situated.

In interpreting the first provision in Article 32 of the Non-Resident Income Tax Act, Law 41/1998 of 9 December 1998, which substantially reproduces Article 64 of Law 43/1995 in response to an enquiry of 21 February 2000 regarding a case exactly the same as the present one concerning a a Swiss-resident company owning properties in Spanish territory, the Department of Taxation took the view that the applicability of Article 24 of the Convention regulating non-discrimination depends exclusively on the nationality of the persons or entities concerned and the special duty on immovable property is applicable according to the place of residence of the entity, not its nationality; there is no connection between one and the other, so that a Swiss entity owning property in Spain, although resident in Switzerland, will be subject to the duty in the same way as would a Spanish entity owning property in Spain but having its residence in Switzerland. There is no question of discrimination. This Court concurs with that interpretation, which can equally be arrived at from a reading of Article 43 of the Company Tax Act, Law 43/1995, which supplements Article 64 of the same Act with reference to entities resident abroad, regardless of their nationality, for purposes of determining their tax domicile in the case of income from property. Nor does this conflict with Article 8 of the Act, which addresses the requirements that companies must satisfy to be considered resident in Spanish territory – and this is corroborated by Article 149 of the Public Limited Companies Act (Consolidated Text) approved by Legislative Royal Decree 1564/1989 of 22 December 1989, which under certain conditions allows a public limited company to transfer its domicile abroad while preserving its legal personality.

(...).