Spanish Judicial Decisions in Private International Law, 2007

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2. Express and tacit submission

* Supreme Court Decision (*Sentencia del Tribunal Supremo – STS*) No. 116/2007, (Chamber for Civil Matters, Section 1) of 8 February 2007 (RJ 2007\558)

International judicial jurisdiction. Tacit submission. Article 18 of the 1968 Brussels Convention: meaning and interpretation.

"Legal Grounds:

(…) TWO (…) Nevertheless, this Chamber cannot share the line of reasoning pursued by the Provincial High Court (*Audiencia Provincial*). Above all, it must be recalled here that precedent set by the European Court of Justice has construed Article 18 of the above Brussels Convention in accordance with a flexible criterion, due to this being more in line with the purposes and aims of the international instrument, whereby said provision "does not apply where the defendant not only contests the court's jurisdiction but also makes submissions on the substance of the action, provided that, if the challenge to jurisdiction is not preliminary to any defence as to the substance, it does not occur after the making of the submissions which under national procedural law are considered to be the first defence addressed to the court seised" (Decision of the CJEC of 24 June 1981, case 150/80). The Decision of 22 October 1981 (Case 27/81, Etablissements Rorh Societé Anonyme v. Dina Ossberger) holds that: "Article 18 of the Convention of 27 September 1968 must be interpreted as meaning that it allows the defendant not only to contest the jurisdiction but to submit at the same time in the alternative a defence on the substance of the action without, however, losing his right to raise an objection of lack of jurisdiction". The Decisions of 31 March 1982 (Case 25/81, CHW v. GJH) and 14 July 1983 (Case 201/82, Gerlin Konzern Kreditversicherungs-AG and others v. Amministrazione del Tesoro dello Stato) are expressed in the selfsame terms.

(…)

The consequence of the above can be none other than to reject the tacit submission relied upon by the Court of First Instance to assert the competence of Spanish jurisdiction. It thereupon becomes necessary to analyse the effectiveness of the foreign forum in terms of prorogation and that of the national forum in terms of derogation, deriving from the agreement of express submission contained in the contractual document, in all cases in the light of the requirements laid down by Article 17 of the 1968 Brussels Convention, which, let it not be forgotten, contains a rule of exclusive jurisdiction for the parties. This rule lays down that, if the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be

either: a) in writing or by an oral agreement evidenced in writing; or, b) in a form which accords with practices which the parties have established between themselves; or, c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned".

* Decision of the Pontevedra Provincial High Court, No. 465/2007 (Section 6), of 31 July 2007 (JUR 2007\355464)

Towage contract ("TOWCON"). Clause containing express submission to English courts. Spanish courts lack of jurisdiction.

"Legal Grounds:

…THREE. – The Defendant-Appellant maintains that the clause of submission to the London High Court of Justice of any dispute arising between the parties under the towage contract between Italy and Spain, meets the requirements stipulated by Article 23.1 of Council Regulation No. 44/2001 of 22 December 2000, which is applicable to the case due to its having entered into force on 1 March 2002. This being so, the reality of the agreement has not been questioned by a Plaintiff which, precisely, bases its action on the existence of the "TOWCON" contract of 14 February 2003. The Defendant-Appellant therefore concludes that Court of First Instance No. 6 in Vigo had no jurisdiction to settle the claim brought by Capensis Trade, since the parties had mutually consented to submit to the courts of another State.

Accordingly, the essential point here is to decide whether or not the Spanish court had jurisdiction to hear the case, having due regard to the clause of submission, which appears as Clause 25 in the agreement of 24 February 2003 entered into by the parties now in dispute, which clause is relied upon by the Appellant as the ground for its contention, and which states, "This Agreement shall be construed in accordance with and governed by English law. Any dispute or difference which may arise out of or in connection with this Agreement or the services to be performed hereunder shall be referred to the High Court of Justice in London.

No suit shall be brought in any other state or jurisdiction except that either party shall have the option to bring proceedings *in rem* to obtain conservative seizure or other similar remedy against any vessel or property owned by the other party in any state or jurisdiction where such vessel or property may be found."

As the Barcelona Provincial High Court stated in its Decision of 29 November 2006, it is widely known that Article 23 of Council Regulation 44/2001 contains the discipline of express submission under international Community-based Civil Procedural Law. There are innumerable references to the erstwhile 1968 Brussels Convention on international judicial jurisdiction and recognition and enforcement of decisions in civil and commercial matters, and to the 1980 Rome Convention on the law applicable to contractual obligations. If anything

is clear from a reading of the Regulation it is that submission to specific courts generates exclusive jurisdiction, which is imposed without any possible conditions or discussion upon all the remaining European courts as soon as the party wishing to have recourse to such jurisdiction, does so. Furthermore, this rule cannot be understood without the extensive baggage of doctrine which has been generated over the years by the Court of Justice of the European Communities (CJEC), since the entry into force of the Protocol of Interpretation of the Brussels Convention. It is no coincidence that Article 17 of the Convention – from which the current Article 23 of the Regulation stems – received extraordinary development by the courts, being amended in line with the CJEC's rulings, and this provision's present wording is no more than the end-result of the score of judgements that appraised it.

Article 23 of the Regulation confines itself to regulating the way in which a prorogation of jurisdiction is effected, by attaching the aforesaid consequences to it. What it fails to regulate is the material scope of submission clauses. Moreover there is no ruling that elaborates and sheds light on this aspect, with its interpretation exclusively corresponding to the national courts (CJEC Decision of 10 March 1992). Nevertheless, principles of construability can be drawn from the precedent set by the Luxembourg Court, which enable a rule favourable to a broad understanding of prorogation clauses to be seen as implicit in this Regulation's provisions. In the interests of predictability and certainty, it evinces an undisguised leaning towards maintenance, not only of the validity, but also of the widest possible effectiveness of agreements attributing jurisdiction, and, as a consequence, it holds, for instance, that the designated courts have jurisdiction even to settle compensation linked to the disputed legal nexus (CJEC Decision of 9 November 1978).

Secondly, the need to avoid the multiplication of the bases of jurisdiction as far as possible is a constant in its case-law, "allowing the plaintiff easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued" (Decision of 3 July 1997). Indeed, the European Parliament provides a good example of the extent to which this aim is valued in the new wording of Article 5.1 of Council Regulation 44/2001, by abandoning analytical solutions and concentrating all disputes that might derive from the same cause of action and placing them before a single court. Hence, it is to be inferred that, save where the parties provide otherwise, a single court should be seised of all disputed issues deriving directly or indirectly from the contract.

This idea ultimately leads to what amounts to the system's prime aim, namely, the prevention of the risk of contradictory decisions within the European Judicial Area. If one admits that to separate disputed aspects stemming from same contract poses this risk, one would have to presume that, unless it were clearly proven otherwise, rational contracting parties acting in good faith could not have wished for such a result.

FOUR. – Accordingly, taking the above into account, the plea for lack of jurisdiction must be allowed in the case heard, for the following reasons:

a) Firstly, because the clause attributing jurisdiction must be deemed valid, in the light of the above-mentioned Regulation, if it is analysed from the standpoint of its requirements of form. Although this stipulation responds to a set form, this is nevertheless due to the fact that in towage contracts, the use of general terms and conditions of contract is very usual at an international level, to the extent that in 1985 the Baltic and International Maritime Council (BIMCO), a private body with an important role in the process of unification of Maritime Law institutions, approved (along with "TOWHIRE") the form known as "TOWCON", which is the most widely accepted contract of its type in the market, and indeed the one to which the contract binding the parties currently in dispute corresponds. What this means is that the Plaintiff cannot plead ignorance or imposition of the "Law and Jurisdiction" clause. The Plaintiff is barred from pleading ignorance because, apart from the clause's existence and inclusion in towage contracts being internationally known, i.e., in international maritime practice, it so happens that the same parties had entered into a similar contract on 23 December 2002 (i.e., only two months prior to the contract that now brings us here), which also responds to the "TOWCON" model and has the selfsame stipulation in Clause 25; and the Plaintiff is likewise barred from pleading imposition of said clause, inasmuch as our case-law has already laid down that on involving businessmen accustomed to intervening in international legal and commercial transactions – in which it is normally and commonly accepted usage for business relations to be subjected to model contracts, standard contracts or contracts with general terms and conditions (which usually reflect commercial practices) – one contracting party cannot be said to be in an inferior or weaker negotiating position that may be abused or taken advantage of by the other. The simple fact that a contract is a standard contract does not automatically render it null and void, since certain types of agreement, whether because they are conducted *en masse*, or because they correspond to a constant or high number of transactions, require uniformity in their structure and clauses, which is not to say that the parties are in any way prevented from individually negotiating the acceptance, amendment or rejection of some clauses or of those essentials that define the content of the service to be performed. It is therefore highly difficult to plead the abusive nature of the clauses contained in standard contracts with respect to party who is not a consumer in the sense defined by Directive 93/13 EEC, the Defence of Consumers Act (*Ley General para la Defensa de los Consumidores y Usuarios*), or the General Terms & Conditions of Contract Act (*Ley sobre Condiciones Generales de la Contratación*).

b) Secondly, in line with the above, it appears that in the original contract produced by the Appellant-Defendant (not so in the case of the copy submitted by the Plaintiff) each and every one of the constituent pages is initialled by Capensis Trade in its capacity as charterer, including the page that contains the disputed clause, so that express and explicit acceptance thereof is undeniable – with the ensuing submission, implicit therein, to English law and jurisdiction.

c) Thirdly, it is true to say that the towage contract concluded between Capensis Trade and Remolcanosa lacks elements of connection with the United

Kingdom and this in no way ceases to be an argument of certain weight, but it must be borne in mind that Article 23 of Council Regulation 44/2001 links this requirement, not to the validity and effectiveness of the clauses of prorogation of jurisdiction, but rather to two specific conditions, namely: that at least one of the contracting parties has his domicile in a Member State; and that both have agreed that a court or courts of a Member State (which may be different to that in which each party has his respective domicile) shall enjoy jurisdiction to settle such disputes as may arise between them. Moreover, the agreement has been concluded in writing, whereby the requirement stipulated at subsection 1 a) of said rule has also been fulfilled.

d) Fourthly, at point 11, the Preamble to the above-mentioned Regulation itself expresses the desire that the rules of jurisdiction be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile, save in a few well-defined situations "in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor", which goes to the case in point since the parties willingly, within the scope of their autonomy, have agreed on a clause of submission which, in addition, corresponds to generalised usage in international maritime trade (let us recall here that, as its heading, the contract bears the phrase 'Recommended International Ocean Towage Agreement (LUMPSUM) Code Name: "TOWCON"').

3. Family

* Decision of the Madrid Provincial High Court, No. 194/2007 (Section 22) of 16 March 2007 (JUR 2007\314001)

International judicial jurisdiction in family matters. Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. Convention between Spain and Tunisia of 24 September 2001 governing judicial assistance in civil and commercial matters and recognition and enforcement of judgments. International lis pendens.

"Legal Grounds:

(…) TWO:… Moreover, it cannot be forgotten that, on the day, the Lower Court by Court Order (*auto*) of 3 March 2005 had already issued its response to the problem pertaining to international jurisdiction, on deeming applicable – and this is right in law – the provisions of Article 3 of Regulation 2201/03 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, as well as the rule of jurisdiction in favour of the Member State (Spain), because in said Regulation and insofar as general jurisdiction is concerned, it is correct that in cases involving divorce, legal separation and marriage annulment, jurisdiction lies with the courts of the Member State, in whose territory the spouses are habitually resident. There can be no discussion as to the fact that the last matrimonial domicile was in Madrid, and that both spouses reside in Spain. It only remains for this Court to make mention of the provisions of Article 22.3 of the Judiciary

Act (*Ley Orgánica del Poder Judicial*), which determines the extent of Spanish jurisdiction for the purpose of being seised of the present proceedings.

Similarly, it is not possible to accept the defence plea of *lis pendens*, not only on the basis of the Regulation cited above, but also on the basis of the provisions of Article 19 as they relate to Article 17 of the Convention of 23 September 2001 between Spain and Tunisia, and to the above-mentioned matter.

It has to be pointed out that, irrespective of the initial procedural formalities undertaken in the Courts of Tunisia in terms of the first notices of action and writs of summons served on the now Respondent, it is true to say that on 14 November 2005 the claim was filed by the Plaintiff in the Spanish Court, without any reference, on the one hand, to the procedural steps pursued in the case instituted in Tunisia at the date of lodging the claim in Spain, and, on the other hand, to the fact that any judgement might have been passed in the Appellant's country of origin.

Accordingly, in the light of the above, and rejecting the defence plea of *lis pendens*, as well as that of lack of international jurisdiction, the plea for a stay of proceedings is dismissed".

* Decision of the Valladolid Provincial High Court, No. 82/2007 (Section 1), of 10 April 2007 (JUR 2007\262864)

International judicial jurisdiction. Divorce. Application of Regulation 2201/2003 in preference to the Judiciary Act, regardless of the nationality of the spouses.

"Legal Grounds:

…THREE. – This Chamber does not, however, share the view held by the Lower Court. The extent and limits of Spanish jurisdiction to specify and determine the jurisdiction of Spanish Courts in Civil Jurisdiction is determined by the Judiciary Act – Article 21 – and the Civil Procedure Act (*Ley de Enjuiciamiento Civil – LEC*) – Article 36 – provisions from which it is clear that Spanish courts also have jurisdiction to hear disputes that arise on Spanish territory between foreign nationals, in accordance with the provisions laid down by the Judiciary Act itself and by International Treaties and Conventions to which Spain is a party. In this regard, it is true to say that the Judiciary Act as well as the Civil Procedure Act determine the extent and limits of jurisdiction, but it must also be borne in mind that Community Regulations are mandatory in all their facets and are directly applicable in European Union Member States under the Treaty Establishing the European Community, going to form the internal law of each Member State. This being so, it is evident that the above-mentioned Regulation (EC) 2201/2003 of 27 November concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, an enactment that has been of mandatory application in our country since 1 March 2005, establishes an obligatory rule which takes precedence over the Judiciary Act itself which applies save where international treaties or agreements provide otherwise. Article 3.1 a) of said Regulation expressly provides that in cases relating, *inter alia*, to divorce, jurisdiction will lie with the courts of the Member State in whose territory

the Plaintiff is habitually resident, if he has resided there for at least one year immediately before the filing of the action. Said Article makes no mention of any limitation or restriction on the application of this rule, and thus its application is not conditional upon the fact that the litigants must both be nationals of some European Union Member State, since what emerges from a reading of the above provision is the exclusive requirement of a real nexus in the person of the Plaintiff, which is the nexus furnished by the place of residence. This being the case, given that the Plaintiff has been residing in Spain for over one year, and aside from any subsequent decision as to which substantive law is to be applicable to the present divorce, this Chamber holds that jurisdiction to be seised of the case extends to the Spanish courts, and that the judgement rendered in this regard must therefore be set aside".

* Decision of the Barcelona Provincial High Court, No. 124/2007 (Section 12), of 13 April 2007 (JUR 2007\242968)

International judicial jurisdiction. Divorce between two Ecuadorian citizens. Cognisance of the dispute by the Spanish courts.

"Legal Grounds:

...ONE. – The Ecuadorian nationality of the bride and groom in the civil marriage that was performed in Guayaquil, Republic of Ecuador, on 12 November 1987, and duly entered at the Civil Registry of said city, is no bar to the parties who contracted said marriage and who have been domiciled in Spain since before 2004, being able to seek the dissolution of the conjugal bond, either by mutual consent or by means of a contested action, in the Spanish courts, notwithstanding the nationality that they bear. Article 22.3 of the Judiciary Act of 1 July 1985 determines the jurisdiction of the Spanish lower and higher courts to settle matters relating to marriage annulment, separation and divorce, when both spouses have their habitual residence in Spain at the date of the action. Such jurisdiction extends to court cases that arise on Spanish soil, not only between Spanish nationals, but also between Spanish and foreign nationals, and solely between foreign nationals pursuant to the provisions of Article 21 of the Judiciary Act. The jurisdiction of the Spanish lower and higher courts to be seised of the divorce action filed at the Court of First Instance 5 of Mollet del Vallès, stems from application of the above provision of the Judiciary Act, and Article 36.1 of the Civil Procedure Act. Finally, mention must also be made of Regulation 2201/2003 of the Council of the European Community of 27 November 2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, which at Article 3.1 states that jurisdiction to settle matters relating to divorce, legal separation or marriage annulment shall, alternatively, lie with the courts of the Member State in whose territory the spouses are habitually resident".

* Decision of the Valencia Provincial High Court, No. 653/2007 (Section 10), of 17 October 2007 (JUR 2008\4133)

International judicial jurisdiction in matters of divorce, parental responsibility and international abduction of minors. Regulation (EC) 2201/2003.

"Legal Grounds:

ONE (…) As already stated by this Chamber by virtue of its Court Order of 4 May 2006, Spanish jurisdiction and that of the Valencian Lower Court must be reaffirmed as being competent to be seised of a divorce action pursuant to Article 3–1–b) of EC Council Regulation 2201/2003 of 27 November, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. Indeed, this competence determines jurisdiction relating to the declaration of the right to receive maintenance under Article 5–2 of EC Council Regulation 44/2001 of 22 December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. This provision allows for a claim for maintenance to be filed in the courts which, according to their own law, have jurisdiction to entertain proceedings concerning the status of a person, i.e., divorce. The exception envisaged under said Article is not applicable, since jurisdiction to pronounce upon divorce is not based exclusively on the nationality of one of the parties but instead on that of both parties, inasmuch as the two litigants both possess Spanish nationality. The issue regarding jurisdiction to hear problems of parental responsibility must be decided by giving due consideration, on the one hand, to the suitability of having all measures that are going to govern the life of the children as a consequence of the divorce of their parents settled in a single court case; as has been stated, both the decision on the divorce and that relating to maintenance correspond to Spanish jurisdiction, and to the Valencian Lower Court. On the other hand, for the benefit of the children, "international forum shopping" should also be avoided, something that would ensue if competence to decide on parental responsibility were now to be declared outside the scope of Spanish jurisdiction. In Court Order of 4 May 2006, no pronouncement was made as to jurisdiction over parental responsibility since this had not been expressly requested. However, said ruling did affirm the court's jurisdiction to be seised of divorce "without prejudice to such judgement as may finally be issued with regard to the proceedings instituted by the Defendant for the return of the children to Germany", proceedings which at that time had not concluded in a final decision, which was only to arrive with the Court Order of this Court of 24 November 2006, whereby the decision to uphold the Defendant's application was confirmed. At this stage of the proceedings, in which there is evidence to show that the children reside with their mother in Germany, jurisdiction cannot be based: on Article 8 of Regulation 2201/2003, since the presence of the minor at the date of the filing of the claim (September 2005) cannot be construed as habitual residence in Spain, when said child's transfer to Spain was subsequently deemed unlawful; or on Article 12 subsections (1) and (3) of said Regulation, since the Defendant has not unequivocally accepted the jurisdiction of the Spanish courts, though sight must not be lost of the fact that, on raising the matter of international jurisdiction, the Defendant referred solely to divorce and not to parental responsibility (page 128). At all events, evidence has been adduced showing a number of judgements rendered in Germany, which hold that Spanish jurisdiction is the preferred jurisdiction, not only for the divorce, but also for parental responsibility (court orders of 4 and 21 April, and of 2

and 31 January 2007). In practice, this is equivalent to a procedural situation envisaged under Article 15 of Regulation 2201/2003, which provides that the dispute may be heard by the court of another Member State with which the child has a particular connection and which would be better placed to hear the case, where this is in the best interests of the child. The special tie with Spain is determined by the selfsame Regulation, at Article 15–3 subsection c), since the two children, like their parents, have Spanish nationality; the Spanish court's status as better placed to hear the case stems from its jurisdiction to hear matters of divorce and maintenance; and the fact that this would be in the best interests of the children is clear from the reasons outlined above. Accordingly, this Court sees it fitting for the ground of appeal pleading lack of jurisdiction on the part of the Spanish courts, to be dismissed."

4. Contractual obligations

* Decision of the Madrid Provincial High Court, No. 62/2007 (Section 12) of 31 January 2007 (AC 2007\1036).

International judicial jurisdiction in contractual matters. Arbitration. Plea for lack of jurisdiction.

"Legal Grounds:

(…) THREE With respect to the plea for lack of international jurisdiction, in this administrative appeal the Defendant insists on raising the possible jurisdiction of Dutch courts to hear the case now before the court, pointing out that in its Court Order of 7 March 2003, the Court of First Instance held that the Spanish courts had jurisdiction on the basis of Articles 5 and 23 of the Brussels Convention, said Court Order indicating that: in matters of contractual obligations, the Spanish courts had jurisdiction where such obligations had originated or were to be performed in Spain; and that the goods in dispute had been unloaded or delivered in a number of Spanish cities. The Appellant argues further that it is obvious that the contracts of sale have originated not in Spain but rather in Holland, on their being signed and dated in all cases in the town of Breda. Insofar as performance of such contracts is concerned, while the court holds that the place of performance was that in which the services due from the other party to the contract were rendered, the Appellant indicates that the place of fulfilment of the obligation was Holland and not Spain, in view of the fact that all the contracts were concluded under the CIF system, which, in accordance with case-law doctrine laid down by the Supreme Court, leads to the conclusion that, in this type of sale, the place of delivery of the goods sold is to be deemed the place where the vendor has his establishment.

FOUR. This ground must be dismissed, since throughout the proceedings the Defendant has sought to argue that jurisdiction should be examined from the stance of what is understood to be the true nature of the contract that bound the parties, and not on the basis of analysis of the nature of the actions and claims brought by the Plaintiff. It is obvious that procedural matters, such as the appropriateness of the action and jurisdiction, among others, must be examined,

not on the basis of what may indeed unfold and be decided in the proceedings, but rather on the basis of what is stated by the Plaintiff in his claim, since it is not a matter of deciding beforehand what the nature of the contract is for the purpose of determining jurisdiction. Indeed, it is for this precise purpose that a court case is conducted. Instead, it is a matter of ascertaining what the actions brought by the Plaintiff are, and on this basis – regardless of what may be decided once the proceedings are under way – determining which court has jurisdiction to hear such actions and settle the issues so raised. Otherwise, on would have to decide, on sight of the simple claim and plea for lack of jurisdiction submitted by the Defendant, whether what one was really dealing with here was a distribution contract, as submitted by the Plaintiff, or whether one was faced with a mere series of interconnected CIF sales, as submitted by the Defendant, and it would be truly absurd (Article 3.1 of the Civil Code and 218.2 of the Civil Procedure Act) to proceed to rule on the nature of a contract in order to go on to determine jurisdiction on such a basis, when really the whole purpose of the suit is, basically, to conclude precisely whether the contract really is what the Plaintiff or the Defendant states it to be. In other words, and merely assuming for argument's sake that the Defendant's position were correct, the Spanish court would have to rule on whether there was a distribution agreement or a simple contract for successive sales, and once this had been decided, then remit the case to the foreign court, which would receive a case in which one of the issues – precisely the crux of the matter being heard – would have to be decided by a court deemed to lack jurisdiction. The fact of the matter is, as pointed out, that procedural issues, at least those relating to jurisdiction and the amount of claims, have to be resolved, not on the basis of the definition which is to be attributed either to the contract or, in general, to that which forms the subject of the dispute between the parties, but instead on the basis of the actions brought by the Plaintiff in his claim. This is so, not only by reason of logic, as has been indicated all along, but also by virtue of the very regulation of jurisdiction effected by the Civil Procedure Act. Thus, for instance, Article 58 of the Act lays down that jurisdiction may even be examined on an *ex officio* basis after the filing of the claim, yet from the claim it is obviously not possible for any definitive conclusions to be drawn about the matter in dispute: such conclusions can solely and exclusively be drawn about what is alleged by the Plaintiff. Hence, Article 63.1 of the Civil Procedure Act provides that the lack of jurisdiction of the court in which a claim has been filed may be challenged via a plea for lack of jurisdiction, and that this would moreover have to be submitted within the first 10 days in order to answer said claim, and prior to any such answer. Evidently, this procedural formality underscores what has already been made clear, namely, that assessments or decisions are to be made, not as regards what contractual relations really bind the parties, but simply as regards those pleaded by the Plaintiff and, on this basis, whether jurisdiction should then be attributed to the court in which the claim was filed. To understand the matter in any other way would lead to the absurdity described above. Furthermore, such considerations are not unknown to the Appellant,

who on submitting his plea for lack of jurisdiction, already indicated – as will be seen in greater detail below – that, though the contracts of sale contained an arbitration clause, "the Plaintiff does not base his action on the contracts of sale, but rather on a non-existent distribution agreement. Accordingly, and as will be seen further below, rather than being based on submission to arbitration, the present plea for lack of jurisdiction may be based on the general rules of international jurisdiction". In other words, the Plaintiff himself is not ignorant of the fact that, in order to categorise actions for the purpose of procedural objections that determine jurisdiction, it is necessary to confine oneself to the actions brought and submissions put forth by the Plaintiff in his claim, without prejudicing the real nature of the relations existing between the parties, despite the fact that this very argument which he himself put forward is then ignored when it comes to filing the present appeal by way of challenge.

In the light of the above, it is obvious that, to the extent to which the Plaintiff maintains that he has been rendering his services in Spain and, by application of the provisions cited in the Court Order brought on appeal, jurisdiction to be seised of such an action corresponds to the Spanish courts, since the contract of distribution – which it must be repeated is the one upon which the Plaintiff bases his action, regardless of whether or not its existence is deemed to be shown by the evidence adduced in the proceedings – gives rise to its effects precisely in Spain, so that, pursuant to Articles 5 and 23 of the Brussels Convention, and Article 22.3 of the Judiciary Act, the Spanish courts have jurisdiction to be seised of such actions.

FIVE.... To sum up, while the reasons set forth more than suffice for the purpose of dismissing the objection analysed, it should, at all events, be noted that, since arbitration clauses are inserted into contracts of sale for the purpose of settling such matters as may arise from the agreed sales, and since what is being decided here is whether there is a distribution contract between the parties – something that is different from the generation and performance of individual sales construed singly – this is the reason, aside from its having been brought of time, why it behoves the Court to dismiss said plea".

* Decision of the Malaga Provincial High Court, No. 179/2007 (Section 5) of 28 March 2007 (JUR 2007\272153)

International judicial jurisdiction in contractual matters. Erroneous consideration of the issue as exclusive jurisdiction. Community law not applied to decide Defendant's international judicial jurisdiction in Germany. Determination of Defendant's domicile. Concept of domicile. Challenge to international judicial jurisdiction.

"Legal Grounds:

(...) TWO. Taking the position that in principle one should start from a review of the proceedings to date, this Chamber is inclined to agree wholly with the criterion sustained by the Lower Court, "on the lack of jurisdiction of Spanish courts to hear the matter forming the subject of the present proceedings", agreeing in every respect with the legal grounds which underlie the above-mentioned judgement and which it is unnecessary to reiterate in the pres-

ent judgement, without it in any way being possible to infer that the decision appealed and now under examination might suffer from the flaws complained of by the Appellant, inasmuch as the grounds upon which the German rather than the Spanish courts are deemed by the court to be seised of jurisdiction are set forth in sufficient detail. Accordingly, and solely by way of fuller explanation, it should be stressed that we are faced with an agreement for a loan granted by the Plaintiff company – a Savings Bank (*Caja de Ahorros*), domiciled in Kassel and possessing German nationality – to the Defendant, a natural person possessing German nationality and having his domicile in said country. From the agreement it is to be concluded that the place of performance is that of the Defendant's domicile at DIRECCION000 NUM000, 3507 Baunatal-Altenritte; and from the content of the claim it is to be concluded that the Defendant's breach of his payment obligations and his move to the Spanish town of Marbella, with the aim of disembarrassing himself of the obligations contracted" led to the suit being instituted for fear of the assets being concealed and reduced in value by Mr. Agustín. The contract contains no clause of express submission to the Spanish courts and, by extension, to determination of Spanish national and, less still, local Marbella jurisdiction competent to be seised of the principal claim in the complaint that gave rise to the ordinary action for lesser claims, and in turn to this motion followed by the filing of the plea for lack of jurisdiction. It is likewise not possible to arrive at the Appellant's conclusions by application of Article 22 of the Judiciary Act, since the dispute comes within matters over which the Spanish lower and higher courts enjoy exclusive jurisdiction. Furthermore, the procedural mechanism for addressing lack of jurisdiction is, as in the case before the court, via the established channel for pleas for lack of jurisdiction, it being inconceivable that a foreign court might issue a restraining order calling upon a Spanish court to stand down from hearing a case, as this would constitute an invasion of sovereignty. Furthermore, the plea for lack of jurisdiction will conclude at the appropriate juncture, i.e., not with the remission of the case to the competent court but rather with the indication to the parties as to which country should, in the opinion of the Spanish court, be seised of the matter.

THREE. Considering that, in the light of the foregoing, it now falls to this Court to study the argument of domicile, insofar as evidence has been furnished to show that the contract contains no clause of express submission to the Spanish courts. It is evident that "domicile" is not precisely one of the most clearly delimited concepts, be it in our positive law, substantive as well as procedural, or by extension, in our doctrine, whether shaped by legal scholars or the courts, having due regard to the use by Parliament of terms as closely linked, though not exactly synonymous, as "domicile" and "residence", not always sufficiently defined by our case-law, which tends to resort in such cases to essay a better delimitation of terms such as stay, permanence or habitualness to determine domicile and distinguish it from prolonged residence of one degree or another. Furthermore, these difficulties are also compounded by the fact that Parliament itself draws a distinction between different manifestations of residence, such

as legal residence, residence of choice, real residence and habitual residence. Article 40 of the Civil Code determines the domicile of natural persons, by indicating that, for the exercise of rights and performance of civil obligations, the domicile of natural persons is their habitual place of residence, and where applicable, such domicile as may be determined by the Civil Procedure Act. In addition, according to the Supreme Court Decision of 30 January 1993, this substantive rule only contains an approximation of what is to be understood by domicile of natural persons: the concept of domicile embraces a wide and varied spectrum, since, apart from real domicile, which corresponds to permanent, intended residence in a specific place taking into account effective dwelling and habitualness, with family and financial roots, the legal system also envisages so-called legal domicile, as well as administrative *vecindad* [*Translator's Note*: residence in a neighbourhood or vicinage for administrative and/or legal purposes] which does not always coincide with the effective domicile. Moreover, there is the so-called domicile of choice, by virtue of which parties in a given business enterprise dispense with their own domicile in order to submit to a domicile freely designated by them in the contractual relationship that they create – their designated domicile or domicile of choice – thereby giving rise to a domicile that, albeit fictitious and restricted, nonetheless performs a function analogous to that of real domicile in the legal sphere and in the context of the relations for which it was expressly furnished, and that is binding owing to the fact that it is not prohibited by the aforesaid Article 40 of the Civil Code. In the case before the court, the Chamber holds that the appeal lodged is equally barred from prospering on the basis of the argument of domicile, and this is because the court record of proceedings clearly shows that Mr. Agustín, both at a real level, i.e., permanent residence with the connotations outlined above, and at an elective level, i.e., designated in the contract before the court, appears as being domiciled in Germany, without prejudice to the fact of his having sporadic residence and assets on the Costa del Sol".

5. Non-contractual obligations

* Decision of the Barcelona Provincial High Court, No. 122/2007 (Section 15), of 26 April 2007 (JUR 2007\270652)

International judicial jurisdiction. Plea for denial of trademark infringement. Registration and use of an Internet domain. Application of the forum in extracontractual matters pursuant to Article 22.3 of the Judiciary Act.

"Legal Grounds:

…THREE. – While Article 125 of the Patent Act (as amended by the prevailing Trademark Act, and applicable to trademark actions by remission of its first additional provision) lays down objective and territorial rules of jurisdiction for settling any such disputes as may arise under the terms of said Act, it nevertheless presupposes the jurisdiction or international judicial jurisdiction of the Spanish courts. As the Article contains no specific rule on the matter, the general provisions contained in the Judiciary Act apply, without prejudice to any international

Treaties and Conventions to which Spain is a party. As Council Regulation 44/2001 was not applicable, the Defendant invoked the Bilateral Convention concluded with Brazil on 13 April 1989 (BOE: *Boletín Oficial del Estado* – Official Government Gazette of 10 July 1991), Article 17.1 of which provides that, for the purposes of the Convention, the courts deemed to have jurisdiction over matters pertaining to obligations are: a) those to which the parties have submitted, provided that said courts belong to the Contracting State of domicile of one such party, the agreement to submit is expressed in writing in respect of any disputes as may arise by reason of a specifically defined legal relationship, and such jurisdiction has not been established unfairly; or, b) in default thereof, those of the Contracting State in which the Defendant had his domicile or habitual residence at the time the dispute arose. However, aside from the fact that said Convention addresses jurisdictional co-operation and recognition and enforcement of judgments rather than international judicial jurisdiction, laying down the rules of jurisdiction for the former purposes (control of recognition by the requested State), the provision in question is not applicable to the present case, since the dispute does not turn on the validity of, effectiveness of, compliance with or breach of a contractual obligation (moreover, nowhere is there any express submission to the courts of Brazil). The provision to be borne in mind would, where applicable, be subsection 3 of said Article 17, inasmuch as it refers to questions of non-contractual obligations. This Article attributes jurisdiction to the Contracting State where the events or facts that generated the obligation took place, or to the courts of the Contracting State in which the harmful effects occurred. Yet, the identical solution is arrived at by applying the appropriate provision, i.e., one that is internal, unilateral in structure and attributes international jurisdiction to the Spanish courts, contained in Article 22.3 of the Judiciary Act, whereby "In civil law, the Spanish lower and higher courts shall have jurisdiction: 3. (…) in matters of non-contractual obligations, where the event or fact from which such obligations derive has occurred on Spanish soil or the perpetrator and the victim of the damage both have their habitual residence in Spain." There can be no doubt that by its very nature and origin, a plea for denial of trademark infringement, relating to the registration and use of the domain name, "mundial.com", is inherently an extracontractual rather than a contractual matter, inasmuch as the claim does not arise from the effectiveness or performance of a contractual relationship between the parties. Furthermore, the application of Article 22.1 of the Judiciary Act, relating to claims brought in connection with patent registrations or validity and other rights subject to deposit or registration, must be excluded, because this is not an action aimed at obtaining a declaration of nullity or expiration of a trademark right, or the claim thereto. On the court being requested for a ruling on the non-existence of infringement of an exclusive right over intangible property, recognised by Spanish law, of territorially limited effects and powers, the decisive nexus of jurisdiction, according to the text of the unilateral internal rule, is that the generating event has occurred on Spanish soil, and that in such a case there is evidence to indicate the use by a third party of the registered device or any

other device with which it can be confused, without the intervening presence of a contractual agreement, over the Internet, via a domain that designates a website or webpage to which access can also be had on Spanish territory. Although the phenomenon of the Internet allows for simultaneous usurpation of another's sign or device world-wide, the alleged act of infringement, to the extent to which such a device or mark is the subject of an exclusive right conferred by Spanish law, took place in our country, since, by virtue of the principle of territorial protection, a Spanish trademark may only be infringed by legally envisaged actions undertaken on Spanish territory (supranational trademark systems excepted). The point at issue then is to decide whether or not the domain in question infringes the exclusive right conferred by registration of the Spanish trademark. However, this in no way means that, by virtue of the fact that the Spanish Trademark Act is applicable (since the scope of the exclusivity and protection afforded to the registered trademark only covers the territory subjected to the sovereignty of the state whose administrative organs have granted or recognised it, i.e., Spanish territory), jurisdiction must therefore be automatically attributed to the Spanish courts, This is because the material law applicable is one thing and jurisdiction quite another, and the latter is determined – in this specific case – by Article 22.3 of the Judiciary Act, which attributes jurisdiction to the Spanish courts where, as in this case, the alleged act of infringement occurred or materialised on Spanish territory, without the aterritoriality or universality of the virtual space in any way posing an obstacle to such attribution".

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

2. International legal co-operation

* Constitutional Court Decision (*Sentencia del Tribunal Constitucional – STC*), No. 228/2007 (Chamber Two), of 5 November 2007 (RTC 2007\231)

Notice and service of judicial deeds and documents. Appeal for legal protection: fitting and proper. Effective judicial protection: violation. Public subpoenas citing a foreign Defendant where there was both registry – and court-based information on domiciles, one of them, abroad.

"Legal Grounds:

...2. In brief, this Court has repeatedly stressed the overriding importance of correct and scrupulous constitution of the legal-procedural relationship for filing and conducting judicial proceedings, with full observance of the constitutional rights of defence (Article 24. 1 and 2 of the Spanish Constitution) accorded to the parties. A pivotal instrument in this correct constitution of the legal procedural relationship, the breach of which may *per se* constitute a violation of the right to effective judicial protection (Article 24.1 of the Spanish Constitution), is undoubtedly the procedural regime of summonses, subpoenas and notifications to the parties of the respective procedural acts that take place in the context

of a court case, because only in this way can the indispensable principles of rebuttal and equal footing of the parties to the dispute be guaranteed. Hence, failure to effect service, or defective service of summons on a person who should or could be a party to the suit places the person concerned in a situation of defencelessness, which violates the aforesaid fundamental right, except where the situation of procedural non-communication is attributable to the affected party's own conduct for having placed himself voluntarily or negligently outside the bounds of the court case, despite being otherwise made aware of its existence. While it has to be said that possible negligence, lack of care or skill attributable to the party, or extraprocedural knowledge of a case held by the court *inaudita altera parte*, which would exclude the constitutional relevance of the complaint, cannot merely be based on a presumption founded on simple conjecture, but must instead be properly proved in order for the stigma of defencelessness to have its invalidating effect, nevertheless there is, precisely, a presumption of ignorance of the proceedings if this is pleaded. For the reasons outlined above, the duty falls to the court, not only to safeguard the correct execution of the acts of service of summons, but also to ensure that said acts serve their purpose of guaranteeing that the party be heard in the proceedings. This entails the need for summonses to be personally served on parties as far as possible and, viewed from another angle, the limitation of the use of publicly displayed subpoenas to those cases where there is no evidence of the domicile of the person on whom the document is to be served or, alternatively, his address is unknown. In congruence with the above, we have pointed out that, though constitutionally valid, due to its status as the remedy of last resort in terms of communication, the method of the public subpoena requires, not only that other surer methods affording formal proof of having been tried must previously have been essayed, but also that the resolution or ruling of the court holding the party to be a person of unknown address or of unknown domicile – a necessary prerequisite for summons by public notice – be grounded in criteria of reasonability that lead to the conviction or certainty of the futility of such other normal means of service of notice. Hence, without denying the constitutional validity of the form of communication and summons by public notice, our doctrine has been particularly strict insofar as recourse to same is concerned, in view of this means of communication's innate limits in successfully ensuring effective knowledge on the part of the addressee. Specifically, this Court has underscored the strictly subsidiary nature of the role that summons by public notice, as envisaged under the Civil Procedure Act, should play in the civil procedural system, and has stated that the constitutional validity of this form of summons demands that, as far as possible, every single suitable method for ensuring receipt of notice by the intended recipient must previously have been attempted by the court; to which end, said court must spare no effort in ascertaining the whereabouts of such recipients by all normal means available, so that the judicial resolution or ruling that causes a party to a court case to be deemed a person of unknown address must be based on criteria of reasonability that lead to the certainty, or at the very minimum, a reasonable conviction of the uselessness of the normal means of summons.

3. The application of the constitutional doctrine outlined above to the circumstances attending this case necessarily leads to the appeal for legal protection being allowed. Indeed, examination of the evidence of the judicial proceedings shown on the court records enables one to establish, in the first place, the existence in this case of the basic elements that define the factual circumstances from which the constitutional doctrine described stems, namely, the existence of proceedings conducted *inaudita altera parte* which have led to an effective prejudice to the legitimate interests of the party bringing this appeal for protection, on his being deprived of the property owned by him. Furthermore, neither the content of the court proceedings, nor the pleadings submitted by the parties contending this appeal for legal protection, accredit the existence of data or facts from which it might be inferred that the defencelessness complained of might be the consequence of the Appellant's own voluntary or negligent attitude vis-à-vis the case, or that he might have had extraprocedural knowledge thereof. On the contrary, this Court cannot take cognisance of the evidence of a negligent procedural attitude on the part of the Plaintiff, rightly argued by the Public Prosecutor's Office in its written submission, said party's possible defaulting conduct and a possible breach of his tax obligations as the owner of the foreclosed property, since none of these reasons can amount to any obstacle whatsoever to the Lower Court's duly endeavouring to serve summons on him personally in these proceedings. In addition to the above, these same court actions enable one to conclude that the court failed to act with the diligence required for correct constitution of the procedural relationship, in proceeding, at the Plaintiff's instance, to serving summons by public notice on the now Appellant in this appeal for legal protection, on deeming him to be of unknown address, without having duly implemented the necessary measures designed to ascertain a domicile or residence at which it might be possible to serve notice of the suit personally.... In conclusion, the court's lack of diligence in ascertaining the domicile for service of notice, which then led to the case being heard in default and the ensuing judgement against the Appellant now seeking protection, taken together with the fact that there are no data or circumstances from which it might be inferred that said Appellant had extrajudicial knowledge of said court case, means that the protection sought must be granted. For the purposes thereof, the Court Order challenged and all actions taken with regard to the Appellant dating from the time of service of the defective summons in said case and the foreclosure to which it led, must be deemed null and void, with retroactive effect of the proceedings to said procedural moment in time so that summons may be served with respect for his right to effective judicial protection."

* Decision of the Catalonian High Court of Justice (*Sentencia del Tribunal Superior de Justicia de Cataluña – STSJ*), No. 6769/2007 (Chamber for Social and Labour Matters, Section 1), of 10 October 2007 (JUR 2008\13068)

International judicial co-operation. Social Security: matter excluded from the scope of application of Council Regulation 44/2001. Institutional regime: "Mutual administrative aid relating to the recovery of benefits which were not due": Council Regulations EC 574/72, 1481/1971 and 883/2004.

"Legal Grounds:

ONE. – TWO. – The point raised in the present case consists, in substance, of deciding which law is applicable to the manner of seeking enforcement of a Spanish decision in Social Security matters by the competent institution in Germany, and specifically: whether this has to be done via the medium of international judicial co-operation – directly or by diplomatic channels – or through internal co-operation between competent European institutions, such that the competent German institution should go before the German court to request the pertinent actions on behalf of the National Social Security Institute (*Instituto Nacional de Seguridad Social – INSS*); or alternatively, whether the National Social Security Institute must directly request the enforcement sought in the court having jurisdiction in Germany. To this end, consideration must be given to the following: a) under the head of "international judicial co-operation" Article 177 of the Civil Procedure Act provides that "dossiers for the conduct of judicial actions abroad shall be processed pursuant to international treaties to which Spain is a party or, in default thereof, to such internal legislation as may be applicable". The matter, inasmuch as it pertains to issues that concern relations between states, is therefore referred to international treaties entered into by Spain. Only in default of international treaties is it possible to apply the general internal legislation, which thus has a merely subsidiary nature; b) the general internal rule in the case of the non-existence of international treaties is contained in Article 276 of the Judiciary Act, which provides that "requests for international co-operation shall be submitted via the conduit of the President of the Supreme Court, High Court of Justice or National High Court to the Ministry of Justice, who shall see that these are placed before the competent authorities of the requested State, whether by consular or diplomatic channels, or directly in cases where so envisaged under international treaties"; c) accordingly, one has to ascertain whether there is an International Treaty governing the matter in question, other than the Brussels Convention of 27/9/1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which at Article 1.3 excludes matters of Social Security from its scope of application, or Council Regulation EC 24/2001 [*sic: Translator's Note*: this would appear to be an error and should instead refer to Council Regulation EC 44/2001] on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which replaces the Brussels Convention and which at Article 1.2c) likewise excludes Social Security; d) it is Council Regulation EC 574/72 of 21/3/71 that lays down the procedure for implementing Council Regulation 1481/1971 on the application of social security schemes to employed persons, to self-employed persons and to their families moving within the Community, which at Article 110 under the head, "Mutual administrative aid relating to the recovery of benefits which were not due", provides that, "If the institution of a Member State which provided benefits intends to take action against a person who has received benefits which were not due to him, the institution of the place of residence of such person, or the institution designated by the competent authority of the Member State in whose territory that person resides, shall lend

its good offices to the first institution". This rule is akin to that currently contained in Article 84.2 of Council Regulation EC 883/2004 which has replaced 1481/1971, but which is not yet applicable owing to the fact that its Implementing Regulation has not been issued. Consequently, the 1972 Implementing Regulation, quoted in the preceding paragraph, is applicable. Under this latter enactment, "Enforceable decisions of the judicial and administrative authorities relating to the collection of contributions, interest and any other charges or to the recovery of benefits provided but not due under the legislation of one Member State shall be recognised and enforced at the request of the competent institution in another Member State within the limits and in accordance with the procedures laid down by the legislation and any other procedures applicable to similar decisions of the latter Member State. Such decisions shall be declared enforceable in that Member State insofar as the legislation and any other procedures of that Member State so require". Indeed, according to Implementing Regulation 574/72 of 21/3/71 and Regulation 883/2004, in cases such as the present, the Competent Institution may use the good offices of the competent institution of the country in which the decision must be enforced, so that, by forwarding the necessary authorised documents for enforcement, the competent German institution may seek enforcement of the Labour Court's Decision in the competent German Lower Court on behalf of the competent Spanish institution. In this respect, the decision rendered must be upheld and the appeal before the court disallowed."

* Zaragoza Provincial High Court Order No. 517/2007 (Section 4), of 11 October 2007 (JUR 2007\325031)

Service and delivery of judicial documents abroad. Council Regulation (EC) 1348/2000 of 29 May. Nullity of procedural actions due to lack of service of summons on Defendant, and not due to lack of international judicial jurisdiction. Council Regulation (EC) 44/2001. Challenge of jurisdiction out of time and form.

"Legal Grounds:

(…) EIGHT. – (…) at Article 19 of Regulation 1348/2000 of 29 May whereby, marking a departure from the national rules on preclusion of time limits in cases where the defendant fails to enter an appearance, it is accordingly laid down that, in the event of any summons or notice to appear in court, "judgment shall not be given until it is established that", either "the document was served by a method prescribed by the internal law of the Member State addressed for the service…", or "the document was actually delivered to the defendant or to his residence…". Article 19 subsection 2 of this same provision, overcoming the rigidity of the Brussels Convention, envisages the possibility that judgment may be given even if no certificate of service or delivery has been received, provided that the document was transmitted by one of the methods stipulated by the Regulation, and a period of time "of not less than six months" considered adequate by the court in the particular case, has elapsed since the date of the transmission of the document". Indeed, with respect to appeals, Article 19 subsection 4 goes on to make a further exception to the principle of preclusion,

where the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend himself and he has disclosed a *prima facie* defence to the action on the merits. Now, however, Council Regulation 44/2001, in turn, imposes rules and provisos that cannot be ignored. Hence, Article 60 lays down that "For the purposes of this Regulation, a company . . . is domiciled at the place where it has its: (a) statutory seat, or (b) central administration, or (c) principal place of business". Similarly, mention must perforce be made of Article 26, subsection 1 by virtue of which, "Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation". Moreover, subsection two lays down a rule of procedural prudence, which takes the form of a duty imposed upon the court that hears the case, i.e., "The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end". The sole exception to this stipulation is made by subsection three in favour of Article 19 of the above-mentioned Council Regulation 1348/2000. Indeed a duty is imposed on the national courts seised of the case to exercise due care and ensure that any defendant domiciled in another country has received the judicial document in reasonable time to defend himself (. . .)

NINE. – (. . .) Perhaps the most surprising aspect, apart from the absolute lack of need to have served notice of proceedings in this way, when the domicile of the German company was clearly on record – something that renders it particularly lamentable in view of the sheer dimension and importance of the dispute – is that domiciliary service was ignored for the writ of summons, which is the "principal" procedural step, according to constitutional doctrine, and yet in contrast it was respected for examination purposes. This is a procedural practice which, moreover, raises serious – and, once again, unnecessary – questions as to the judgement's enforceability (Article 34.2 of the Council Regulation 44/2001) (. . .)

TWELVE. – Ignoring the military nature to which the ill-fated carriage is ascribed and to which we shall return further below, all the extensive arguments put forward by the Appellant company overlook the essence of the rules of procedure that determine jurisdiction and competence, namely, that these are determined, not by what it is, but rather by what it is stated to be. In other words, jurisdiction, like competence, results from the action brought, from the action stated in the claim, not from the action that might be allowable or acceptable. If the Appellant is sued in the capacity of an air carrier, whether under contract or by law, then both jurisdiction and competence will flow from these conditions. If it is shown in court that he is not contractually liable, then what is called for is not a dismissal of the case due to lack of jurisdiction of the Spanish courts to be seised of this claim, but rather a dismissal on the merits of the case due to his not being a contractual debtor.

(…)

EIGHTEEN. – (…) Accordingly, though culpability is deemed to be extra-contractual and this, at least in part or cumulatively, is the action brought, the conclusion cannot be otherwise. This is so because, notwithstanding the fact that the special forum envisaged by Council Regulation 44/2001 for this action, is the place "where the harmful event occurred or may occur" (Article 5.3), this provision, aside from the difficulties of definition with respect to the concept of "matters of *delict* or *quasi-delict*", may, according to Community case-law and for the purposes of interest here, be interpreted in the sense that, when such liability is intensely linked to breach of contract, the above-mentioned forum gives way to the forum specific to contractual liability. The reason is that, for such cases, the CJEC has upheld the residual nature of the forum of matters of *delict*, confirming that matters relating to *delict* refer to "all actions which seek to establish the liability of a defendant and which are not related to a "contract" within the meaning of Article 5.1" (CJEC Decision of 27 September 1988). This is tantamount to saying that, if the breach of contract also gives rises to non-contractual liability, the forum envisaged by Article 5.1 absorbs all claims (CJEC Decision of 6 October 1976) (…)"

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENTS AND DECISIONS

1. General principles

* Supreme Court, Chamber for Civil Matters, Section 1, Court Order of 3 May 2007 (JUR 2007\130809)

Enforcement. System of the Civil Procedure Act. Impossibility of review of the merits of the case. Limitation of recognition to rulings having a civil or commercial scope. Judgement issued in insolvency matters. Irrelevance of death of receivers insofar as representation in enforcement procedure and survival of the subject matter of said enforcement are concerned, since the effectiveness of the foreign judgment does not arise at this point in time. Instead, its effects arise at the time and in the form indicated by the legal system of the State of origin. Justification of the final and definitive nature of the judgement. Personal nature of claims. Non-existence, in proceedings conducted in the State of origin, of violation of the procedural rights and guarantees of the party against whom the foreign judgment is sought to be brought. Obtaining a declaratory ruling which undeniably exceeds the scope and purpose of enforcement: not fitting and proper.

"Legal Grounds:

…ONE. – …The claim for recognition must be examined in the light of the provisions comprising the general regime of conditions laid down by the 1881 Civil Procedure Act, even where the judgement that constitutes the subject of such claim is predicated on previous judgements rendered by courts of the same State in which the judgement now under review originates, and notwithstanding

the fact that said foreign judgements may have secured the enforcement order of this Chamber. This is because a series of effects, whether declaratory or constitutive-procedural, flows from the material content of this judgement. These effects go beyond the strict evidentiary effectiveness that extends over the capacity and legitimation of persons appointed members of the body charged with the receivership and liquidation in the insolvency proceedings opened abroad, and render essential a specific ruling to enable said effects to be asserted in Spain, albeit with the content and scope conferred by the legal system under which the corresponding rulings contained in the judgement pending recognition have been issued. Recognition of the latter – or to be more accurate, recognition of its effects – is subordinated to fulfilment of the requirements established under Articles 951 and successive provisions of the 1881 Civil Procedure Act, which remains in force until the promulgation of the International Legal Co-operation Act to which final provision number twenty of the Civil Procedure Act 1/2000 refers, pursuant to its Sole Partial Repeal Provision, subsection one, rule three. Subjection to said internal regime of recognition is imposed by the certified absence of any enactment of a supranational nature which might be applicable, and verification that negative reciprocity has not been shown (Article 953 of the 1881 Civil Procedure Act). It should be added that, in view of the terms of the requests set forth by the party originally opposed to enforcement, by way of subsidiary submissions in his defence plea, to the effect that examination of the requirements for recognition and declaration of enforcement be made via the specific procedural channels envisaged and regulated by Section Two, Title VIII, Book II of the 1881 Civil Procedure Act, which establishes the, undoubtedly special, procedure under which claims for recognition and declaration of enforceability of foreign judgments must be resolved until such a time as it is replaced by another, whether by virtue of the planned international legal co-operation act or any other procedural rule. As a matter of principle, this procedure, in respect of which both this Chamber and the Constitutional Court – each within its respective scope of jurisdiction – have underscored its merely recognitory nature and limited objective scope, circumscribed to authorising the effectiveness of foreign decisions once proof has been furnished of the fulfilment of the requirements to which such declaration is made subject, bars any attempt to review the merits of the case, whether: with reference to the choice of conflict-of-laws rule that was deemed applicable after definition of the event, business or legal status comprising the subject matter of the proceedings pursued abroad; or with reference to the material law applicable to said subject matter as mandated by the conflict-of-laws rule and to the correctness of its application; or, indeed, with reference to the formation of the finding of fact that has determined the factual basis considered by the court of origin in the settlement of the dispute and to the correctness of the finding of law consisting of the subsumption of such facts in the factual requirement envisaged under the law deemed applicable, let alone the legal correctness of the interpretation of the law applied. The procedural formalities are, therefore, in line with the above nature and character of the recognition procedure and its specific goal

and purpose, with written and documentary evidence being imposed as defining features thereof, organised around the petition and plea of defence, as the case may be, with respect to the recognition sought, which are to be accompanied by such documents as may serve to prove the fulfilment of the substantive and formal requirements to which enforcement is made subject, and the facts capable of eroding the effectiveness of the rule that authorises the generation of the effects of the foreign decision in Spain, respectively; this, needless to say, without prejudice to the powers of remedy and rectification that the parties to the suit must be acknowledged as having with respect to compliance with the procedural duties imposed on each.

TWO. – Furthermore, it is necessary to make it clear henceforth that the subject matter of the recognition of the foreign judgment sought here is limited, both materially and subjectively: thus, on the one hand, such recognition cannot extend to the rulings contained therein that display a nature that is other than civil or commercial, as is the case with the ruling that decides on the petition for freedom submitted by Mr. Constantino, no matter how much one might concede that the deprivation of freedom suffered by him stems from his actions as partner, manager or administrator of the bankrupt company, and from the impact of said actions on the situation of insolvency which has given rise to the declaration of bankruptcy; and, on the other hand, the party making the application has restricted the scope of enforcement exclusively to the effects that, once authorised, might be engendered vis-à-vis Mr. Constantino, to the extent to which said effects extend to him, whether directly or indirectly, by connection with those deriving from previous judgements already recognised in the forum.

THREE. – Examination of the fulfilment of the preconditions and requirements for enforcement must be made in step with the various arguments that the party, against whom the effectiveness of the foreign judgment is sought to be asserted, puts forward to contest same. However, no regard should be had to the preliminary submissions referring to breach of faith and contempt for the judicial system pleaded by the party making the application, since these are irrelevant when it comes to verifying the indicated prerequisites and requirements for recognition, once the former party has entered an appearance in the case to contend enforcement, thereby availing himself of his rights of defence. Above all, an analysis must be made of the impact had by the reported death of the receivers whose appointment constitutes the subject matter of one of the decisions contained in the judgement pending recognition. In the opinion of the party against whom the effectiveness of the foreign judgment is sought to be asserted, the alleged circumstance constitutes an obstacle which acts as a bar on two different fronts: first, that of the procedural representation in these proceedings, which, it is argued, has lapsed as a consequence of the death of the grantors of the power; and second, that of the very subject of the enforcement order, which disappears after the demise of the latter, just as one of the prerequisites for recognition is eliminated, namely, the executive effectiveness of the judgement. Regardless of whether or not the fact pleaded by those who

object to recognition has been duly proven, said fact lacks the relevance and barring effect that said parties wish to attribute to it. Insofar as the procedural representation of the applicant in these proceedings is concerned, the alleged death of the receivers and liquidators in bankruptcy is inconsequential, bearing in mind that the representation borne by the latter is of an organic nature, so that the death or replacement of those who enjoy such a status in no way affects the continuance of the powers of attorney and the representative relations established by the deceased or replaced office holders. With regard to the survival of the subject matter of the enforcement order, the selfsame inconsequentiality of the fact pleaded must be proclaimed, because, while the effects of the judgement pending recognition may be asserted from the time it is recognised, this in no way means to say that its effectiveness arises at that precise moment in time. Instead, its effects – in terms of *res judicata*, preclusion, legal definition, registration and, needless to say, the executive effects which the opponents of enforcement confuse with the requirement of the finality of the judgement pending recognition – arise at the time and in the form indicated by the legal system of the State of origin, and hence the permanence of the subject matter of this specific recognition procedure. The nature of the body from which the judgement emanates is likewise irrelevant. This Chamber has had the opportunity of granting enforcement of a number of foreign decisions issued by bodies or authorities which lacked a jurisdictional nature, in the sense that the term "jurisdiction" is construed in our own legal system, and which display the defining features of a nature more properly administrative than jurisdictional. The crucial thing, then, is not the nature or character of the body, but rather its jurisdiction, and the subject matter, character and nature of the decisions pending recognition; and neither the one nor the other is in question here, with no doubt as to the jurisdiction – *rectius*, the attribution of power – of the body from which the judgement emanates, and the commercial nature – and at all events, private law nature – of the subject matter of its rulings. This being so, the court is unable – on the ground of its being unnecessary – to attend to the request of those opposing enforcement targeted at gathering the legal texts with which the absence of the jurisdictional nature of the body that issued the judgement would have to be verified, just as it is unnecessary to examine such texts for said purpose. Having established this, the grant of enforcement must needs verify, above all, the final and definitive nature of the judgement pending recognition, as required by Article 951 of the 1881 Civil Procedure Act, which, as this Chamber is wont to repeat, constitutes an inescapably obligatory requirement whatever the regime to which recognition is subject. Said finality, which must be construed as referring to the unalterable nature of the judgement and the rulings contained therein, is questioned by the party contending the enforcement order, who refutes the effectiveness of the judgement produced by the applicant to prove said point and nature. According to the opposing side, the decision is more akin to a communication addressed by the presiding judge of the court of the State of origin to the trustees in Mr. Constantino's alleged bankruptcy – which, it is added elsewhere, is not shown as having been declared or even less

of having been recognised in Spain – than to a certificate issued with the due guarantees and capable of reliably accrediting the facts referred to therein. Such a submission, however, lacks the necessary consistency to prevent the existence of the requirement now under scrutiny from being discerned. The applicant has produced respective documents signed by the Chairman of the Ninth Commercial Constituency Complaints Board of the Kingdom of Saudi Arabia stating that the ruling handed down in the judgement, whose enforcement is now sought – referred to by means of the identification assigned in the case conducted in the State of origin, recorded in Legal Ground One of the present judgement – is definitive and valid. Such documents must be linked to the effectiveness which, with a view to proving fulfilment of the requirement of the foreign decision's definitive nature, derives from the provisions of Article 323.2 of the Civil Procedure Act 1/2000, to the extent to which it is possible to discern in them the existence of the requirements to which the law of the issuing country subordinates evidentiary effectiveness of documents, bearing in mind that one is dealing here with documents issued by the court that handed down the judgement pending recognition and that are signed by the person of its presiding judge, who it is to be reasonably assumed, pursuant to said Act, must possess the competence to state a fact relating to the judicial proceedings pursued in the State of origin and must know the court over which he presides. Moreover, such documents are found to be furnished with the necessary legally established formalities for their authenticity in Spain, inasmuch as the relevant series of legalisations is shown, effected by the pertinent authority in the Ministry of Foreign Affairs and ending with the signature of the Secretary of the Spanish Embassy in Saudi Arabia. Finally, it must be added that the fact that in such communications reference is made to the bankruptcy of Mr. Constantino and not to that of the company in which he is a partner should not be ascribed the importance which the opposing side would appear to attribute to such circumstance, because, in addition to the impossibility of ignoring the content of the earlier judgements which have already been recognised by this Chamber and in which the bankrupt company's liability vis-à-vis third parties was said to extend to the partners of the company, in accordance with the effects flowing from application of the laws whereby the latter's bankruptcy is regulated, sight should not be lost of the fact that the point at issue here is to verify the unalterable nature of the judgement whose recognition is sought, recourse to which is had, as has been seen, by the documents produced to this end by the applicant, which undeniably refer to the decision pending recognition.

FOUR. – Furthermore, the tangential allusion to the lack of the requirement imposed by Article 954–1 of the 1881 Civil Procedure Act has no relevance whatsoever, because, in view of the content of the judgement pending recognition, the personal nature of the claims that gave rise to the rulings set forth therein is evident. It goes without saying that this nature is not to be queried, not even by virtue of the fact that, as maintained by the opponents of enforcement, the foreign judgment fails to make clear whether it refers to the bankruptcy of Mr. Constantino or of the company of which he is a partner. In addition to the

fact that the suggested doubt is removed if the content of the judgement under consideration is examined along with that of the earlier judgements that were recognised by this Chamber, there are no aspersions cast on the personal nature which, at all events, and for the purposes of complying with the requirement laid down by Article 954–1 of the 1881 Civil Procedure Act, is to be predicated on the rulings that were issued in the context of insolvency proceedings and that affect the capacity to act and the representation of a partner in the bankrupt company, an application for maintenance, and the representation, administration and liquidation of the asset base of the insolvent company, even if only in the determination of the persons who make up the pertinent body of receivers or trustees in bankruptcy.

FIVE. – The remaining defence pleas of the opposing side refer to the breach of the requirements established under subsections two and three of Article 954 of the 1881 Civil Procedure Act. In general, the objection to enforcement on these grounds is confined to claiming the absence of minimum procedural guarantees in the proceedings conducted in the State of origin, an absence caused in great measure by the unjust situation of deprivation of freedom suffered by Mr. Constantino for a number of years. The examination of the effectiveness of such pleadings, which fits in with the requirement of respect for the public policy of the forum, in its procedural facet and in an international sense, must be conducted in the light of the content that should be attributed to the latter, identified with the principles, guarantees and rights of this nature which are constitutionally enshrined and protected. Hence, it may be stated that the content of public policy, as a requirement or prerequisite for recognition, displays a purely constitutional nature, thus setting itself up as an interpretative criterion of the rules which in an enforcement context establish the requirement of the appropriateness and respect for the public policy of the forum, such that the constitutional content of such procedural guarantees and rights in turn form part of the content of this requirement. Having said this, and on perusal of the exhibits produced to these singular proceedings, it must be concluded that in the present case the Court cannot hold that the procedural rights and guarantees of the party against whom the foreign judgment is sought to be brought were violated in the case conducted in the State of origin, on the grounds of his not having had knowledge of the case's existence and consequently not having been duly able to defend himself therein, when said case, and by extension, the judgement pending recognition, are rooted in the application filed by said party, who now opposes the enforcement order, submitting a rejoinder to same, albeit in a negative sense, and to the situation generated by the resignation tendered by the outgoing liquidator, which determined the appointment of those who had to replace him. Neither can it be said that, having due regard to the subject matter and genesis of the procedural course of action pursued in the State of origin, the power to submit pleas and produce evidence in said proceedings by the party vis-à-vis whom the foreign decision is sought to be asserted, has been in any way diminished. Furthermore, the judgement rendered by the court of the State of origin, wherein Mr. Constantino is stated to have had full knowledge

of the content of the judgement whose recognition is now in issue, has been produced to this Court, with the necessary guarantees of authenticity. Hence, given the categorical terms of the confirmation of the action having procedural transcendence consisting of notification of the judgement made by the issuing court and now pending recognition, it follows that, likewise with regard to this point and to the right to such appeals as might possibly be established by the legal system of the State of origin, linked to the above, the requirement of respect for procedural public policy must be held to be fulfilled, on there being no evidence, beyond the simple statements by the parties to the dispute, that said knowledge might have arisen under such conditions as would not have permitted the current opposing party to exercise his right of defence in its broadest sense, and specifically his right to have recourse to the established avenues of appeal....".

* Supreme Court Decision, Chamber 1, of 17 May 2007 (RJ 2007\3178)

Recognition and enforcement of judgements. Brussels Convention. Correctness of summons and notice of proceedings by post, non-existence of defencelessness; enforceability of decision, suitability of postal service for service thereof; non-admission of evidence in ordinary appeal against judgement granting enforcement; impossibility of review of court of origin's decision on assuming its own jurisdiction.

"Legal Grounds:

...THREE. – Having established the above, it now remains to examine the grounds of the appeal, the first of which begins by alleging infringement, under the terms of Article 1692 subsection four of the Civil Procedure Act, by reason of failure to apply Article 27, subsection two, of the Brussels Convention. Said provision lays down that "...". The indicated prerequisite for recognition and enforcement is complemented by the formal requirement imposed by Article 46.2, pursuant to which the party seeking recognition or applying for enforcement of a judgment shall produce, in the case of a judgment given in default, the original or a certified true copy of the document which establishes that the party in default was served with the document instituting the proceedings or its equivalent. The Appellant claims that the rule cited has been infringed, and that, as a result, it is not right and fitting for effectiveness to be granted to the foreign judgment, on the ground that this was rendered in default and he was not served with or notified in due manner of the document instituting the proceedings or its equivalent. In particular, he maintains that the irregularity of the service of notice resides in the fact of the writ of summons and notice of proceedings having been sent by post, when it was not possible to have recourse to such means, since this is not permitted by the international enactment in force and applicable thereto, namely, none other than the Bilateral Convention of 27 May 1973 concluded between Spain and Italy on judicial assistance and the recognition and enforcement of judgments in civil and commercial matters. He likewise asserts that evidence of the lack of legal validity of service is also to be discerned in its content, inasmuch as the notification, rather than coming

from the court having jurisdiction to be seised of the suit, came from a private party, and the writ was not accompanied by a copy of the claim and the documents that accompanied it, so that he was prevented from having knowledge of the points of fact and law pleaded by the Plaintiff company to serve as the basis of its claims, as well as the documents that served to support same. This ground must be dismissed. Indeed, Article 27.2 of the Brussels Convention contains a prerequisite for recognition – and enforceability – which, on the basis of the existence of a procedural situation whereby a defendant is in default in the proceedings conducted in the State of origin, revolves around a standard conflict-of-laws rule, drafted in accordance with the purposes and aims of the Convention, which places within the legal system of the state where the case is conducted – including, obviously, the supranational legal system forming part thereof, where cases of external traffic are involved – the formalities with which service of the initial document instituting proceedings must comply, and according to which the remediable nature of the possible flaw incurred is also to be examined. Hence, the provisions of the Convention do not harmonise the different systems of service abroad of judicial documents, but do have the aim of ensuring that the defendant enjoys effective protection of his rights, by establishing the conflict-of-laws mechanism described, and leaving control of the formal legal validity of service of the writ of summons, not only to the court of the State of origin, but also to the court of the requested State – CJEC Decisions of 15 July 1982, case 228/81, Pendi Plastic, of 3 July 1990, case C–305/88, Lancray, and of 13 October 2005, case C–522/03, Scania Finance France. To the above considerations, the following must be added: firstly, the system relied upon by the Brussels Convention – which is nevertheless mitigated in its rigour by the enactment that replaces it, i.e., Council Regulation EC 44/2001 of 22 December – Article 34.2, *in fine* – inapplicable to the case for reasons of time – Article 66 – shows itself to be deliberately formalist, and, in attention to the function of guaranteeing the defendants' right to effective judicial protection, allows of no reductionism whatsoever. Accordingly, knowledge of the existence of the court case, which has not been furnished in the due manner, does not permit the requirements for recognition to be deemed fulfilled, except, needless to say, where any feasible or possible formal flaws in service under the law applicable have been remedied – CJEC decision of 3 July 1990, case C–305/88, Lancray – just as Article 27 subsection 2 of the Convention bars a judgement given in default in a Contracting State from being recognised in another state where the document instituting proceedings has not been served on the defendant in the due manner, even though the latter may subsequently have had knowledge of the judgement issued and not availed himself of the means of challenge available under the procedural law of the State of origin – CJEC Decisions of November 1992, case C–123/91, Minalmet, and of 23 November 2005, case C–3/05, Gaetano Verdoliva. Secondly, the above-mentioned rule may not be cited where the defendant has entered an appearance in the case and filed pleadings – Decision of the CJEC of 21 April 1993, case C–172/91, Sonntag. Thirdly, for Convention purposes, the concept of a writ of

summons or an equivalent document has an autonomous nature, denoting judicial documents whose delivery to or service on the defendant, effected in the due manner and in sufficient time, places the latter in a position where he can invoke his rights before an enforceable decision can be issued in the State of origin – CJEC Decision of 13 July 1995, case C–474/93, Hengst Import BV. Fourthly, the principle of freedom of choice (*principio dispositivo*) and the principle whereby parties may adduce whatever facts they see fit (*aportación de parte*), which govern enforcement procedure, places on the party vis-à-vis whom recognition and enforcement are sought, the burden of duly justifying the lack of formal legal validity of service of notice under the procedural law applicable, which poses the obstacle to recognition. In addition to the foregoing, it should be noted that, along with the judgement pending recognition, the applicant has produced to the court a document issued with the necessary guarantees of authenticity by the Records Office of the Court of Voguera, which certifies, *inter alia*, that the defendant was duly served with notice in the proceedings conducted in said court, by means of summons served on 24 July 1996 by post, in accordance with Article 10a of the Hague Convention of 15 November 1965, as ratified by the Italian Republic by Act No. 42 of 6 February 1981. Likewise, with the claim for enforcement, he furnished the original of the writ of summons served on the Defendant, which bears the authorisation to undertake service of notice issued by the Judge appointed to deal with this matter. The above-mentioned Article of the XIV Hague Convention of 15 November 1965, on the service abroad of judicial and extrajudicial documents in civil or commercial matters, also in force for Spain – which ratified it on 29 April 1989 – stipulates that, provided that the State of destination does not object, the present Convention shall not interfere with the freedom to send judicial documents, by postal channels, directly to persons abroad. This provision is also contained in Article 6 of the II Hague Convention on civil procedure of 1 March 1954, which was in force at the date of signature of the Convention of 22 May 1973 concluded between Spain and the Republic of Italy on judicial assistance and the recognition and enforcement of judgments in civil and commercial matters, Article three of which contains the rule linking it to the 1954 Convention, by maintaining the latter in force and completing its provisions. Furthermore, under the terms of Article 22 of the XIV Hague Convention, "where Parties to the present Convention are also Parties to one or both of the Conventions on Civil Procedure signed at The Hague on 17th July 1905, and on 1st March 1954, this Convention shall replace as between them Articles 1 to 7 of the earlier Conventions." There is no evidence of the Republic of Italy having made any declaration or reservation whatsoever regarding the application of Article 10 of the XIV Hague Convention; and Article IV of the Protocol annexed to the Brussels Convention of 27 September 1968 indeed provides that judicial and extrajudicial documents drawn up in one Contracting State which have to be served on persons in another Contracting State shall be transmitted in accordance with the procedures laid down in the conventions and agreements concluded between the Contracting States, with the question of whether the document

instituting the proceedings was duly served on a defendant who failed to enter an appearance, for the purposes of the provisions laid down by Article 27.2 of the Brussels Convention, having to be determined in the light of the provisions of that Convention, without prejudice to the use of direct transmission between public officers, where the State in which recognition is sought has not officially objected – SCJEC 13 October 2005, case C–522/03, Scania Finance France.

The conclusion to be drawn from the above is that service by postal channels was possible, given the legal regime applicable to the specific act of service of notice, so that, in this regard, service on the defendant of documents instituting proceedings in the case held in the State of origin must be held to be legally valid. With respect to the point relating to the writ's material content, said writ is observed to contain the points of fact and law on which the claim is based and to express clearly the terms of the petition and requirements for entering an appearance in the proceedings, with the documents justifying the right claimed – specifically, the letter of acknowledgement of debt of 1 February 1994 and the insurance policy in favour of the Defendant – being attached. In the light of the above, the party at whom the enforcement order is targeted must be deemed not to have succeeded in proving that, under Italian procedural law, the writ of summons and notice of proceedings suffered from irremediable formal flaws that rendered it ineffective, whether for objective reasons, pertaining to the content *per se* of service of notice, or whether for reasons of a subjective nature, pertaining to the person from whom it came. On the contrary, submission to the provisions of Article 142, section III of the Italian Code of Civil Procedure can indeed be seen from the tenor of the judgement pending recognition. Moreover, examination of the documents furnished enables one to conclude that the Defendant had the possibility of defending himself in the court of origin, thereby safeguarding the Convention's goals – SCJEC 14 October 2004, case C–39/02, Maersk Olie & Gas A/S. This is borne out by the fact that he lodged a written submission with the Lower Court containing such pleadings as he deemed appropriate, fundamentally referring to the court's lack of jurisdiction due to valid submission to arbitration having been agreed, albeit without the formalities required by the *lex fori*, which in turn led to said submission being deemed ineffective for the purpose of holding him as having entered an appearance in the proceedings, and to the ensuing declaration of default. Accordingly, said default is thereby revealed as being something that was strategic, convenient and, at any event, voluntary, and thus powerless to bar the effectiveness of the foreign judgment.

TWO. – The second ground has been drawn up pursuant to Article 1692–4 of the Civil Procedure Act, and alleges infringement, due to failure to apply Article 47 subsection one of the 1968 Brussels Convention. It thus pleads a breach of the formal requirement imposed by said rule, according to which the party applying for enforcement shall, in all cases, produce documents which establish that, according to the law of the State in which the judgment has been given, it is enforceable and has been served. Specifically, the criticism levelled by the Appellant at the judgment appealed in cassation consists of the fact

that the enforcing court granted the enforcement order notwithstanding the fact that the claim was not accompanied by the document which attests to the service of the foreign judgement whose enforcement is sought. He argues, in this respect, that the rendering court's certificate attached by the party seeking enforcement to the claim, in which it is shown that the decision was served on the Defendant by post, lacks effectiveness, inasmuch as the requirement stipulated in the allegedly infringed Article is held to have been fulfilled, because service of notice in this form is null and void, on not being envisaged by the international enactment deemed applicable. The same reasons that have determined the dismissal of the previous ground also serve to reject this second ground of appeal. It is noteworthy that, along with the claim for enforcement, a document issued by the Records Office of the court of origin was produced. At the same time as this document certifies the legal validity of service of the writ of summons and notice of proceedings on the Defendant, it also certifies service of the decision pending recognition, in respect of which it is stated that it had been served on the defendant, with its corresponding translation, by postal channels, pursuant to Article 10a of the 1965 Hague Convention. If such a document suffices for holding the formal requirement imposed by Article 47 (1) of the 1968 Brussels Convention to have been fulfilled – which, let it not be forgotten, responds to the purpose of advising the defendant of the judgement passed against him and affording him the possibility of executing it voluntarily before enforcement can be sought, as indicated in the Report of the Committee of Experts on the Convention (OJ 1979 C 59/1 at p. 55), and stressed by the European Court of Justice (decision of the CJEC of 14 March 1996, case C–275/95, van der Liden, para. 15) – then, from the stance of the validity and effectiveness of service of notice, and insofar as it might affect fulfilment of the formal requirement, the effectiveness of the certificate furnished must also be upheld, having due regard to the legal regime applicable to service of notice in the case giving rise to this action, as has been explained in the preceding Legal Ground, which, as has been seen, does not exclude service by postal channels.

THREE. – The third ground resides in Article 1692–3 of the Civil Procedure Act, and alleges infringement of Article 863–2 thereof, inasmuch as evidence proposed at the second instance was unduly refused admission. Said evidence consists of a formal written request being made to Zaragoza Court of First Instance No. 1 so that, in relation with the court records of declaratory action for lesser claims number 30/99 heard in said Lower Court at the instance of the current Appellant company against the applicant and others for enforcement, it might issue, for incorporation in these enforcement proceedings, evidence of the building contract which was concluded between the two companies, which underlay the plea submitted by the Plaintiff in the case conducted in the State of origin, and the original of which had been produced in the above-mentioned action for lesser claims. This ground must suffer the same fate and be dismissed as were its predecessors. This then is the position because, despite the fact that the Brussels Convention seeks to shape an autonomous, standard and complete recognition system and regime, on regulating appeals against judgements of courts

of first instance seised of pleas for enforcement, it nevertheless confines itself to indicating that said appeals are to be brought in accordance with the provisions governing rebuttal proceedings – Article 37. The general way in which the law is worded renders it necessary to have recourse to the internal procedural law to complete the regulation in those aspects of procedure not envisaged under the Convention, and, in particular, to have recourse to the principles that govern it, among which are those of freedom of choice, documentary evidence, entitlement of parties to adduce such facts as they see fit, and preclusion, inherent to the vast majority of declaratory proceedings established under Spanish civil procedural law, the nature of which is shared, albeit in part, by enforcement procedure, notwithstanding the latter's undisputed recognitory nature. This being so, it is evident that examination of evidence relating to a document that the party contesting the enforcement possessed or could have possessed at the date of formally filing his appeal, may not be admitted in the rebuttal phase held in the Provincial High Court, since this is barred by the above-mentioned procedural principles. Yet, the fact, moreover, is – and this is truly definitive – that the evidence of which the party to the suit wishes to make use must in all cases be pertinent and useful, and its omission must be relevant in terms of defence in order to enjoy effectiveness for cassation purposes. This makes it necessary to arrive at a decision regarding the effectiveness of the proposal to secure evidence of the fact referred to, and, indeed, regarding the effectiveness of its omission in terms of the proponent's right of defence, in line with the issue that constitutes the specific subject matter of the action, because, should it lack such effectiveness, no defencelessness will have been occasioned to the Appellant by denial of its examination. What has just been stated, a transcription of the doctrine that the Constitutional Court and this very Chamber have laid down within their respective scopes of jurisdiction, when addressing the consequences of denial of a means of proof, condemns the ground reviewed to failure, since the documentary evidence whose examination was proposed and denied was intended to attest to the existence of an agreement of submission to arbitration of disputed issues arising from interpretation and enforcement of the contract, and was consequently geared towards asserting the court of origin's lack of jurisdiction. In line with a certain school of legal scholarship, it is true that one could argue that control reflecting the jurisdiction of the rendering court by virtue of the existence and validity of an arbitration agreement is possible, due to its being outside the prohibition imposed by Article 28 of the Brussels Convention, though arbitration is excluded from its material scope of application, just as it is from the regime established by the decision of a court of a State party on the validity or invalidity of an arbitration clause – decision of the CJEC of 25 July 1991, case C–190/89, Marc Rich, which interprets Article 1.2 of the Brussels Convention. While this criterion shows respect for the autonomy of the arbitration clause in the contract in which it is inserted, for the applicability of the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, and for the nexus to this supranational enactment binding State parties to the Brussels Convention, to the system of which it also

adapts, it is also coherent with the principle whereby a special law is applied in preference to a general law (*principio de especialidad*), which guides relations between treaty laws. It is likewise true that, in accordance with this stance, the court of origin's decision on the validity and effectiveness of the arbitration agreement would not bind the court of the receiving State, which would have to verify the concurrence of the requisites for recognition, and among these, the arbitration agreement's existence and validity for the purpose of excluding the rendering court's jurisdiction, in view of the provisions of the 1958 New York Convention – which are not only recognitory, but also govern choice-of-law and substance – and, in particular, insofar as it is pertinent hereto, the provisions of the European Convention on International Commercial Arbitration, done in Geneva on 21 April 1961, which impose on Contracting States the duty of recognising the written agreement whereby the parties undertake to submit such differences as have arisen or may arise between them to arbitration, and of referring the parties to arbitration – Article II of the New York Convention, read in conjunction with Article 1 of the Geneva Convention. Yet if the foregoing is true, then it is no less true that the judgement pending recognition reproduces the literal wording of the stipulation in the contract to which the existence of the clause containing the commitment is sought to be ascribed, thereby rendering it unnecessary and pointless for the court seised of enforcement to have sight of the document which contained said clause, in order to decide on the validity and effectiveness of the arbitration agreement insofar as this could constitute a bar to recognition of the foreign judgement, with there being no question whatsoever as to the fact that said document, and, by extension, the stipulation in question, was agreed by the parties. Accordingly, on the decision of the Provincial High Court being examined from the stance of the relevance (in terms of defence) of the evidence proposed and omitted, the result could not be more unsatisfactory for the Appellant, because the court was possessed of sufficient data to monitor the requirement addressed by the evidence that was finally rejected.

FOUR. – In the fourth and last ground of appeal the Appellant company alleges, pursuant to Article 1692 subsection four of the Civil Procedure Act, an infringement of Article 27.1 of the Brussels Convention. The Appellant contends that public policy is violated by the decision of the Italian Court being declared enforceable in Spain, since the ordinary Judge predetermined by the Act is divested of jurisdiction, with the ensuing violation of Article 24.2 of the Constitution. The argument expounded by the Appellant company has two aspects that join forces in focusing on the court of origin's alleged lack of jurisdiction and the violation of the above-mentioned constitutional right. On the one hand, the Appellant maintains that the rendering court lacks jurisdiction by virtue of the existence, validity and effectiveness of the clause of submission to arbitration agreed between the parties; and on the other hand, the Appellant contends the competence of Italian jurisdiction stemming from the interpretation and application given by said court to Article 5.1 of the Brussels Convention, bearing in mind that jurisdiction to hear the dispute resides in the Spanish

courts, pursuant to Article 2 of said supranational enactment and according to the interpretation put on Article 5.1 of the Convention, read in conjunction with Article 4, subsection five of the Rome Convention of 19 June 1980, concerning the law applicable to contractual obligations. This ground must also be dismissed. If the plea in cassation is examined from the stance of the first point of view expressed, addressing, therefore, the plea of the existence, validity and effectiveness of an arbitration agreement which excludes the jurisdiction of the state courts whence the judgement pending recognition comes, and, inasmuch as control of jurisdiction is possible in this case, on it being deemed, in line with the above-indicated doctrinal trend, to stand outside the prohibition of Article 28 of Brussels Convention – as outlined in the previous legal ground – then it has to be said that, aside from the fact that the right to the ordinary judge predetermined by the Act, the violation of which essentially forms the basis of the breach of public policy, does not have the same significance and scope when an arbitration agreement is sought to be availed of as when the jurisdiction of state courts is claimed, the response to the question can likewise not be favourable to the Appellant. This is due to the fact that examination of an arbitration agreement's validity and effectiveness must be made, from the standpoint of its autonomy, in view of the provisions of Article 6.2 of the European Convention on International Commercial Arbitration, done in Geneva on 21 April 1961, and the conflict-of-laws rule of which is reproduced, in the context of recognition, in Article VI.1 [*sic: Translator's Note*: this would appear to be an error and should instead read, Article V.1] of the New York Convention of 10 June 1958. Under the terms of this latter Convention, failing any indication of the parties with respect to the law to which the arbitration agreement or undertaking was to have been submitted, it is to be assumed to be under the law of the country where the award is to be made, which in this case was French law, on the matter having been referred by the parties to the Paris Chamber of Commerce, as is clear from the text of the judgement pending recognition. The rendering Italian court, in addition to addressing the lack of presentation in due form and in accordance with Article 6.1 of the Geneva Convention and Article 2.III of the New York Convention, of the plea for lack of jurisdiction based on the arbitration agreement to reject its effectiveness, has had recourse to Italian law and precedent, to conclude that the arbitration agreement concluded by the Plaintiff company *in bonis*, prior to the declaration of bankruptcy, could not be used as a shield against same, once the situation of insolvency had been declared. The jurisdiction of the rendering court must be maintained in this seat, albeit on a different ground. The reason is that, though said jurisdiction cannot be derived from the lack of proper and timely submission of the plea for lack of jurisdiction in the original proceedings, based on the existence of the arbitration agreement and pursuant to Article 6.1 of the European Convention on International Commercial Arbitration of 21 April 1961 and Article 2.III of the New York Convention of 10 June 1958, the automatic consequence of denying the effectiveness of the arbitration clause – on the basis of this fact alone – in the examination made by the court in which enforcement is sought, or even on conducting *ex officio*

control of its own jurisdiction – pursuant to the provisions of Article 20.1 of the Brussels Convention – the Italian court might have complied with Italian law in spite of not being the competent authority to decide on the validity and effectiveness of the arbitration agreement, it was in any event for the party contending recognition and the declaration of enforceability to prove, in accordance with the applicable (in this case, French) law that, due to the fact that the arbitration agreement was valid and effective, the precise conditions were present for the jurisdiction of the state courts to be excluded and, in particular, for the clause of prorogation of the forum in favour of the Voghera courts to be inoperative, none of which has, however, been appropriately substantiated. The other aspect of the plea in cassation is geared to maintaining the Italian courts' lack of jurisdiction to be seised of the case, and the subsequent competence of Spanish jurisdiction, which, according to the Appellant, stems from the correct interpretation and application of Articles 2 and 5.1 of the Brussels Convention, read in conjunction with Article 4, subsection five of the Rome Convention of 10 June 1980, on the law applicable to contractual obligations. The challenging argument, presented under the plea of violation of public policy, as ground for denial of enforcement of the foreign judgement, must be rejected out of hand. Here indeed, the prohibition against the review of international judicial jurisdiction established under Article 28 paragraph three of the Brussels Convention applies to said plea, as this does not constitute any of the cases envisaged in subsection one, or in paragraph two of Article 54 of said supranational enactment. One is therefore not dealing here with a protective or exclusive forum, whether in the case envisaged under Article 59 of the Convention, or, indeed, in a transitional situation that would allow for the control of the jurisdiction of the court of the State of origin pursuant to Article 54 paragraph two. It must be stressed that this prohibition, apart from cases in which control of jurisdiction is permitted, is coherent with the system laid down by the Convention, which shows respect for the examination that the court of origin conducts into its own jurisdiction and the application by said court of the rules laid down in this regard, and it is thus imposed unconditionally, with there being an express prohibition on a review of international judicial jurisdiction being conducted under the pretext of a complaint of breach of public policy – Article 28.3, *in fine*, of the Convention".

* Supreme Court, Chamber for Civil Matters, Section 1, Court Order of 26 June 2007 (JUR 2007\197075)

Enforcement. Council Regulation 44/2001. Access to appeal in cassation against decisions rendered in this context.

"Legal Grounds:

...TWO. – The conclusion reached with respect to the ability to bring appeals in cassation against judgements 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, 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), founded on grounds outside the provisions contained in national procedural laws, because it lies in 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, its treaty nature (Article 96 of the Spanish Constitution). Together with this primacy, their direct applicability or direct effect is a characteristic feature of certain Community laws, and of Community Regulations in particular. The consequences of the principles of primacy and direct effect of Community laws lead, not only to the non-application of internal laws incompatible with or contrary to Community laws, but also to a bar against the valid passing of subsequent enactments incompatible with the latter, and, indeed, to the obligation of the authorities charged with applying the law to guarantee the full effect of such supranational enactments, with an interaction operating between internal and Community legal systems which translates, *prima facie*, into interpretation of internal legality in accordance with Community law. The appeal in cassation established under Articles 41 of the Brussels and Lugano Conventions, 27 of Regulation EC 1347/2000, 44 of Regulation EC 44/2001, and 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 is imbued with a specific subject matter and content, delimited to the points of law raised in the judgement on the enforcement of the foreign decision – and only in it – i.e., delimited to a review of the application of the laws that govern the prerequisites and requirements for the 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 judgements within the space of justice, freedom and security. However, the conditions, prerequisites and requirements of "proceedability" and admissibility are governed by the internal legal system, provided that its laws and any interpretation put thereon guarantee the primacy and direct effect of the Community laws (strictly speaking, the useful effect of said direct effect), and thereby render the appeal based on them, together with its own content matter and purpose, possible, without converting the appeal in cassation established under Community laws into a worthless scrap of paper, a simple legal provision devoid of practical application.

THREE. – 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 interpretation put 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. This fulfilment of the requirements imposed by the reiterated principles of primacy and direct applicability of Community laws is achieved without the need to make any change whatsoever in the interpretation and application of the internal procedural rules, once, as the case may be, the formal bar of the class or type of judgement that decides on the declaration of enforceability has been overcome. This is an assertion that rests alone on the notion that, with enforcement procedure constituting a procedural channel established by reason of the specific issue comprising the subject matter thereof, and, as a consequence, with its access to the appeal in cassation being that which in the internal legal system is provided by Article 477.2 subsection three of the Civil Procedure Act, in accordance with this Chamber's above-described interpretative criteria, 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 the presence of the statutorily appealable interest (*interés casacional*) that justifies such an appeal – 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 there being precedent set by this Chamber relating to previous laws of identical or like content, and to the requirements stipulated for proving the existence of the necessary statutorily appealable interest – together guarantee the appeal's viability, provided that such prerequisites and requirements are met and the content imposed by Community laws is not negated, thus ultimately making the aims of the appeal and the purposes for which these serve, possible.

FOUR. – Following on from the above, consideration should briefly be given to the form of judgements appealed in cassation. The courts have given no settled response to the question of the proper procedure for settling appeals against the judgement of a Court of the First Instance that decides on the enforcement of a foreign decision pursuant to the Community laws continually referred to, 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 a 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, which must be read with Final Provision twenty thereof), due to this being the procedure specifically established by the internal Parliament for processing enforcement, and to the fact that it suffices to meet the requirement of rebuttal imposed by Community law. Yet the processing of such appeals has likewise been made subject to the rules established for pleas and motions, and to provisions that, in general, govern ordinary appeals and the second instance. This varied approach to the matter has inevitably resulted in a

diversity of types of judgement against which appeals in cassation are sought to be brought – Court Order or judgement – despite the fact that the type of judgement rendered by the Court of the 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 this as it may, however, this can in now 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 – are, as has been explained, imposed upon the provisions of the internal legal system, render such circumstance irrelevant as regards the ability to bring an appeal in cassation against the judgement. To this end, a kind of formal comparison operates between such a judgement – whatever its 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 inevitable proviso that the avenue of appeal is solely open to judgements that decide on the specific subject matter of the enforcement proceedings, i.e., on the fulfilment of the prerequisites to which attribution of the foreign decision's effectiveness is in each case subordinated, and not on any others having a different subject matter and content, since this is imposed by the interpretation put on Community laws by the Court of Justice.

FIVE. – Furthermore, in the same Court Orders of 12 March 2002 and 23 November 2003, continually referred to, as well as 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 of procedural content against any judgement that decides on enforcement, and of whether the attainment of the purposes and aims sought allow of such appeal, when in the internal legislation the appeal in cassation has 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 advisable to note the wording of Legal Ground No. seven of said judgement – the criterion of which is contained, moreover, in Court Orders of 19–11–2002, 21–1–2003 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, in all cases with the point of reference provided by the official explanatory reports of these conventions, and the case-law set by the Court of Justice. These reasons are as follows: 1) The international instruments referred to respond to the goal of facilitating free circulation of judgements, a primary goal of which is the simplification of proceedings aimed at securing a declaration of enforceability in the various Member States, within the notion of enforcement

procedure as an autonomous and complete 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 judgements calls for a restrictive interpretation, which would act as bar to undesirable dilatory tactics at variance with the swiftness and effectiveness of recognitory procedure, and irreconcilable with the surprise effect inherent in the recognition system established by the supranational Parliament. 2) The enforcement procedure is designed around an autonomous, complete system, independent of States, which responds, moreover, to postulates of legal certainty and uniformity in the application of the provisions of international instruments. As indicated 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 a uniform application in all Contracting States of the Convention rules and the relevant case-law of the Court"; 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) A result of the foregoing is that the international texts limit the number of possible appeals against an enforcement judgement to two, the first of which is directed against the judgement of the Court of First Instance that authorises or denies enforcement, and which 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 judgement, has a more limited subject matter, restricted to points of law, thus 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, a product of the aims and purposes of international instruments, is imposed on the forum by virtue of the principles of primacy and direct effect of such instrument's provisions. The establishment within the internal legal system of review mechanisms with power to annul, which in general may have the effect of restoring 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 generic goal of enabling the free circulation of judgements in conditions of full effectiveness, and thus constitute enforcement-procedure guidelines which go beyond 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 hermeneutic criterion that would weaken the useful effect of supranational enactments. 5) Sight must be lost of

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, despite their not having a totally or partially substantive content. 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. Delimitation of the content matter of the appeal envisaged under such provisions against the High Court's judgement must therefore act as a bar to any appeal focusing 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, leaving it limited to points of law, and had the supranational Parliament delimited the appeal against the High Court's decision to points of this type, there would be no reason whatsoever for extending the scope of the latter to matters that fell outside its 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, it has to be said, by way of a closing remark that, neither from the stance of the ordinary legislator nor from the stance of the constitutional requirements, is there any need for a mechanism to review the procedural legality that allows for a system of judicial protection situated within the ambit of the appeal in cassation or any other extraordinary appeal; and that the 2000 Civil Procedure Act has definitely leaned towards shaping the procedure by highlighting its instrumental nature with respect to the disputed point that constitutes the subject matter, seeking as far as possible to prevent procedural motions from becoming the subject matter of the action."

SIX. – Based on the above explanation, two conclusions can be drawn at this point: firstly, that the judgement rendered by the Cadiz Provincial High Court is susceptible to being appealed in cassation, regardless of the form it may have taken, with this having to be brought on the basis of a statutorily appealable interest as defined by Article 477.2 subsection 3 of the Civil Procedure Act, with the inevitable consequence of the prerequisites and requirements laid down by law and precedent for duly bringing an appeal via this avenue having to be met; and secondly, that no extraordinary appeal for procedural breach can be brought against said judgement, irrespective of the outcome awaiting an appeal in cassation thus brought.

SEVEN. – Hence, having examined the specific appeal in cassation lodged, the notice of appeal is founded on Article 477.2 subsection 3 of the Civil Procedure Act 2000, pleading the existence of a statutorily appealable interest, citing Article 218 of the Civil Procedure Act, Article 27 of the Brussels Convention, as well as Articles 207.3, 222.1 and 421.1 and 2 of the Civil Procedure Act 2000 as infringed legal provisions. With respect to the issue of incompatibility, the decisions of this Chamber of 10 November 1997, 18 October 1996, 10 March 1995, 1 February 2001 and 21 July 1998 are specifically cited. In the case of *res judicata* and breach of faith, the decisions of 1 December 1997, 1 February

1991 and 6 June 1998 are cited. Insofar as *lis pendens* in the internal context is concerned, this Chamber's decisions of 27 December 1993 and 22 June 1987 are cited, and lastly, in connection with the predicable type and nature of foreign judgments that may be the subject of enforcement procedure, mention is made of the Court Order of 20 June 2000. The avenue of statutorily appealable interest used in the notice of appeal to accede to cassation is fitting and proper, bearing in mind that the proceedings were substantiated by reason of the matter.

EIGHT. – Notwithstanding the above, the appeal in cassation, insofar as the incompatibility and internal *lis pendens* of the judgement appealed are concerned, falls foul of the ground of non-admission envisaged under Article 483.2. 1, subsection two, of the Civil Procedure Act 2000, read in conjunction with Article 477.1 of said Act, inasmuch as such issues are of procedural nature, with the result that the appeal in cassation used is inappropriate, in that it raises issues which exceed the scope of the appeal in cassation and which must be raised by having recourse to the extraordinary appeal for procedural error, where possible. To this end, it should be recalled that the subject matter of the action to which Article 477.1 of the Civil Procedure Act 2000 refers must be construed as referring to material claims submitted by the parties, relating, as the preamble puts it, to "civil or commercial credit and personal or family situations", with the appeal in cassation being limited to the "review of breaches of substantive law", it being expressly stated in subsection XIV of the Preamble that "breaches of procedural laws" are outside the scope of cassation. Procedural issues are to be understood in a broad sense, as not being restricted to those enumerated by Article 416 of the Civil Procedure Act 2000 under this head, but instead as also encompassing infringement of rules relating to evidentiary issues, thereby leaving the appeal in cassation confined to a strict review function of the court hearing, consisting of determining the legal scope and significance of the facts proved. These criteria have already been reflected in numerous Court Orders issued by this Chamber on non-admission of appeals in cassation filed on 11, 18 and 25 May, 1 and 8 June, 28 September, 26 October and 2 November 2004, in appeals 4/2002, 1915/2001, 3122/2002, 1030/2001, 96/2002, 1395/2001, 992/2001 and 1257/2001, among others. On application of these criteria, an appeal in cassation is inappropriate in terms of the breaches examined here, in that appeals in cassation may not be used in order to raise issues lying outside their scope. Furthermore, the point must be made that procedural law is of a merely instrumental nature. Accordingly, it confines itself to establishing the channels for complaints of a breach of substantive law. One such channel is precisely the appeal in cassation, the scope of which, as stated above, is delimited to the control of the interpretation and application of material law, and, hence, the "statutorily appealable interest" may never be based on case-law or rules relating to "procedural matters", as has been repeatedly indicated in Court Orders dated, *inter alia*, 14 September, 2 November and 7 and 28 December 2004, in appeals 569/2004, 608/2004, 1096/2004 and 1206/2004. This is why the new Civil Procedure Act may not be invoked for the purpose of founding the statutorily appealable interest, since the latter, at any event, must refer to substantive rather than procedural issues, such as those raised in this case.

NINE. – In addition, however, the fact is that, with respect to *res judicata* and the predicable type and nature of foreign judgments that may be the subject of enforcement procedure, this also falls foul of the ground of non-admission envisaged under Article 483.2.1, subsection two of the Civil Procedure Act 2000, read in conjunction with Article 479.4 thereof, because of the failure in the notice-of-appeal phase to show evidence of the existence of a statutorily appealable interest, pleaded in line with the criteria of appealability which this Chamber has been advocating pursuant to the provisions of the new Civil Procedure Act 2000, and which are contained in the Resolution adopted by said Chamber at the General Meeting of the Board of Judges held on 12 December 2000, a Resolution that has been included in the Regulation implementing the Civil Procedure Act, so that it forms part of the rules governing appeals in cassation (Constitutional Court Decision 108/2003 of 2 June, in appeal for legal protection No. 82/2002). With regard to case-law relating to the predicable type and nature of foreign judgments that may be the subject of enforcement procedure, the statutorily appealable interest stemming from conflict with the Supreme Court case-law pleaded has not been justified because only Court Order of 20 June 2000 is cited, when it is reiterated doctrine that, where the prerequisite of a statutorily appealable interest is founded on the conflict between the appealed decision and Supreme Court case-law doctrine, two or more decisions of this Chamber must be cited, a requirement not complied with by the Appellant party, inasmuch as said party's mentions only one judgement, which, moreover, takes the form of a Court Order and which, pursuant to Article 1.6 of the Civil Code, does not constitute case-law. With regard to a statutorily appealable interest arising from a conflict with Supreme Court case-law on the issue of *res judicata*, although three decisions of this Chamber are cited, these nevertheless refer to the general doctrine of *res judicata* in the internal sphere, without any of said decisions addressing *res judicata* within the context of Article 27 of the Brussels Convention, an institution that in said context displays certain singularities of its own, with the result that the three decisions cited, on referring to the general doctrine of *res judicata* in the internal sphere, do not allow for a statutorily appealable interest to be justified with respect to *res judicata* in the context of the enforcement proceedings, as sought by the Appellant".

[With reference to this selfsame issue of access to appeals in cassation, but in the context of the 1988 Lugano Convention, note Supreme Court, Chamber for Civil Matters, Section 1, Court Order of 8 May 2007 (Ref. Aranzadi JUR 2007\135892)].

* Supreme Court, Chamber for Civil Matters, Section 1, Court Order of 26 June 2007 (JUR 2007\209570)

Enforcement procedure. Bilateral convention between Spain and France.

"Legal Grounds:

…TWO. – Under the provisions of Article 1 thereof, the Convention concluded between Spain and France on recognition and enforcement of judicial decisions and arbitral awards and authentic instruments in civil and commercial matters of

28 May 1969, ratified on 15 January 1970 and published in the Official Government Gazette on 14 March 1970, is applicable, due to the nature and subject matter of the decision, the enforcement of which (*exequatur*) is sought.

THREE. – Under the terms of this Convention, the following must be ascertained: international judicial jurisdiction (Article 3, 1); finality of the judgement (Article 3, 2); the law applied to the merits of the case (Article 5, which enshrines the principle of equivalence of results); conformity with the public policy of the requested State (Article 4, 2); guarantees of hearing and defence in the original court case (Articles 4, 3 and 15); *lis pendens* or decisions handed down in the requested or another State (Article 4, 4); and, the minimum formal requirements (Article 15). All the requirements stipulated by the bilateral treaty are duly fulfilled. Reference must briefly be made to the requirements of finality and guarantees of hearing and defence in the present proceedings, in view of the fact that the defendant brought no appeal against the judgement of the State of origin, in which the dissolution of the bond was decreed due to apportionment of the blame, both spouses having seriously and repeatedly violated their conjugal duties, all these constituting the types of circumstances from which the concurrence of the grounds of divorce envisaged under Article 86 of the Civil Code may be perfectly inferred".

2. Family

* Supreme Court Decision (Chamber for Civil Matters, Section 1) of 14 March 2007 (RJ 2007\2214)

Partial enforcement of decision on matrimonial separation handed down in Switzerland. Ruling on maintenance. Lugano Convention. International public policy.

"Legal Grounds:

(…) TWO. (…) Having said this, it should be borne in mind that, in developing its case-law the community Court has advocated an autonomous and uniform interpretation of the legal concepts used to define the material scope of application of the Brussels Convention, based on this international instrument's system and goals or on general principles drawn from the national legal systems of the Member States (decisions of: 14 October 1976, case 29/79, LTU v. Eurocontrol; 16 December 1980, case 814/89, Niederlande v. Rüffer; 6 March 1980, case 120/79, De Cavel v. De Cavel; and 22 February 1979, case 133/78, Gourdain v. Nadler, among others), thereby avoiding the drawbacks of a proliferation of interpretative approaches stemming from the coexistence of different systems of legal interpretation or definition "*ex lege fori*" or "*ex lege causae*". Along with this, consideration should also be given to the fact that the European Court of Justice has, in general, imposed a restrictive interpretation of issues excluded from the scope of application of the Brussels Convention. This shows the importance of having regard to Community case-law doctrine to define the objective scope of the Brussels Convention, which is to serve as an interpretation yardstick to delimit the scope of the Lugano Convention, Article one of which reproduces the content of its counterpart in the Community text.

This interpretation yardstick leads to rulings relating to maintenance obligations, and, even, those relating to support payments awarded in separation or divorce decrees, being deemed as coming within the scope of application of the Brussels Convention, and by extension, that of the Lugano Convention. This conclusion is to be drawn from the case-law established by the European Court of Justice (Decision of 6 March 1980, case 120/79, De Cavel v. De Cavel, which took into consideration the fact that a special forum of jurisdiction may have been envisaged for actions relating to maintenance (Article 5.2), as well as the maintenance nature of support payments, and which deemed irrelevant the ancillary nature of rulings on maintenance or support vis-à-vis the main ruling on separation or divorce).

(…)

THREE (…) The concept of public policy, internationally considered, and respect for which constitutes an inescapable prerequisite for the recognition of foreign judgments both in internal Spanish law (Article 954–3 of the 1881 Civil Procedure Act) and the supranational legal system, and more specifically, within the framework of the Brussels and Lugano Conventions (Article 27.1), lacks an autonomous and uniform content. The European Court of Justice has stated that, while it is not for it to define the content of the concept of public policy in a State party, it can indeed control the limits within which national Courts may have recourse to this concept as a ground for denial of recognition (decisions of: 28 March 2000, case C–7/98 Krombach v. Bamberki; and 11 May 2000, case C–38/98, Renault SA v. Maxicar SpA). It is, thus, a strictly national concept, and, at all events, one of exceptional application (decision of 4 February 1988, case 145/86, Horts, v. Krieg), in respect of which the Community Court has only gone as far as to a define what it does not amount to, and to lay down exclusively the limits, the transgression of which permits enforcement of a foreign judgment to be denied, noting that said transgression must amount to a manifest violation of a rule deemed essential or of a right recognised as fundamental by the legal system of the receiving State (decisions in case C–7/98 and C–38/98).

This Chamber, when it comes to examining the enforcement procedure for foreign judgments in the framework of its competencies, has drawn up a concept of public policy, in an international sense and in its procedural aspect, in which stress is laid on its purely constitutional nature, identified with constitutionally enshrined principles, rights and guarantees, in line with the doctrine of our Constitutional Court contained in decisions 52/89 and 132/91. This being so, public policy, in its procedural guise, is identified with the rights and guarantees established under Article 24 of the Constitution, and its content is conditioned by that of said rights, as shaped by constitutional case-law. Hence the right to judicial protection without being left defenceless, the right of defence, and the most specific right to use the means of challenge afforded by the procedural system, are constitutionally relevant to the extent that the defencelessness is real and effective, as opposed to purely nominal or formal, which excludes situations prejudicial to parties' rights from constitutional protection where these

are caused by such parties' own apathy, lack of interest or negligence, and in general, when it is their own behaviour that has placed them in such a situation (decisions of the Constitutional Court 122/98, 26/99 and 1/2000, among many others). Accordingly, it is this content of fundamental rights that informs the content of international public policy, in its procedural aspect, which will thus be seen to be violated when the former are violated, with the material content specific to them."

* Supreme Court, Chamber for Civil Matters, Section 1, Court Order of 4 December 2007 (JUR 2008\2819)

Recognition and enforcement of foreign judgements. Application for enforcement of Haitian divorce decree: grant. Regime of conditions of Article 954 of the 1881 Civil Procedure Act.

"Legal Grounds:

1. – There being no treaty with the Republic of Haiti and no international law in matters of recognition and enforcement of decisions that is applicable, recourse must be had to the general regime established by Article 954 of the Civil Procedure Act (of 3 February 1881) – which is applicable in the light of Article 2 of the Civil Procedure Act 1/2000, read in conjunction with its second Transitional Provision, and which in any case remains in effect following the entry into force of the new procedural law, pursuant to its Sole Partial Repeal Provision, subsection one, exception 3 – on there being no evidence of negative reciprocity (Article 953 of said 1881 Act). 2. – The final nature of the decision has been proved under the law of the State of origin; the finality of the decision, whose enforcement is sought, is required, whatever the recognition regime, by Article 951 of the Civil Procedure Act – which on this point, does not solely pertain to the treaty regime, if read in conjunction with the provisions that follow – and the reiterated doctrine of this Chamber. 3. – Requirement 1 of Article 954 of the Civil Procedure Act must be deemed to be met, bearing in mind the personal nature of the divorce action. 4. – With respect to requirement 2 of said Article 954 of the Civil Procedure Act, it is deemed to be proved that the original court case was held with the knowledge of the defendant spouse, who acknowledged the original action and filed no appeal whatsoever. 5. – Insofar as requirement 3 of the above-mentioned Article 954 of the Civil Procedure Act is concerned, conformity with Spanish public policy – in an international sense – is full: possibility of divorce is established by Article 85 of the Civil Code, whatever the form and time of performance of the marriage act. 6. – The authenticity of the judgement, as required by Article 954.4 of the Civil Procedure Act, is guaranteed by the legalisation effected on its being formally processed, as shown by the record of proceedings. 7. – There is no reason to consider that the international judicial jurisdiction of the Courts of the Republic of Haiti might have derived from the parties' fraudulent search for a forum of convenience (Articles 6.4 of the Civil Code and 11.2 of the Judiciary Act); Articles 22.2 and 3 of the Judiciary Act do not establish fora of exclusive jurisdiction, something that Article 22.1 of the Act does indeed do, but in this case without there being

any of the fora determining such jurisdiction in favour of the Spanish courts. On the contrary, there are connecting factors that cannot be ignored, such as the spouse's Haitian nationality and domicile in the Republic of Haiti at the date when the divorce action was filed in the jurisdiction of the Republic of Haiti, and the place where the marriage was contracted, all of which are reasons that enable fraud to be excluded in respect of the law applied to the merits of the case, an issue linked to the preceding point."

* Madrid Provincial High Court Order No. 217/2007 (Section 22), of 28 September 2007 (JUR 2007\353517).

Marriage contracted outside Spain by foreign nationals and not entered on the Spanish Civil Registry. Effectiveness of a foreign divorce decree in Spain. Registry access without need for enforcement: Article 84 of the Civil Registry Rules & Regulations (*Reglamento de Registro Civil – RRC*).

"Legal Grounds:

…THREE. On the other hand, for the purposes of enforcement, no provision, substantive, procedural or registration-related, requires that there be evidence of the marriage having previously been registered at a Spanish Civil Registry. Were this to be so, however, and the recognition sought be granted, this would determine the consequences envisaged insofar as its entry in the margin is concerned, by Articles 76 of the Civil Registry Act (CRA) (*Ley del Registro Civil*) and 265 of the Civil Registry Rules & Regulations. In all other cases, i.e., in the absence of such registry entry, any favourable judgement that might be rendered will entail the generic consequences contained in the aforesaid Articles 951 and successive provisions of the 1881 and Article 523 of the current Civil Procedure Acts.

The Directorate-General of Registries & Notaries (*Dirección General de Los Registros y del Notariado*) states that, by virtue of the provisions of Article 84–1 of the above-mentioned Civil Registry Rules & Regulations, there is no need for foreign judgements to have direct force in Spain, since, in principle, these have full probative value to attest to the capacity to marry of any person who seeks to contract a subsequent marriage in Spain (see Ruling of 7 June 2006). Yet, the aforesaid rule cannot exclude the procedural action taken in the case, which must be accorded the relevant formalities, in line with the opinion of the Supreme Court (Court Order 19–4–2005).

In the light of the above, the reversal plea submitted must be allowed, in such a manner as will be stated, without prejudice to the judgement which may have to be adopted on enforcement, and which may not, contrary to the view expressed in the Lower Court's practice direction (*providencia*) of 6 June 2007, be negatively influenced by the sole circumstance that the marriage has had no effect in Spain, seeing as its subsequent dissolution may indeed have such an effect, with respect to recognising the full effectiveness of the applicant's civil status in our country for one purpose or another, insofar as said status derives from the divorce decreed by the courts of another state.

Finally, the point should be made that, in contrast to what is stated in the main pleadings governing the proceedings and may have led the Lower Court (*Juzgadora a quo*) to err, the possible grant of enforcement should have no repercussion whatsoever on the Spanish Civil Registry, on there being no entry thereon – at least for the moment and until such a time as the requirements of Article 15 of the Civil Registry Act are met – of the marriage that was contracted by the applicant on the day."

***** Ruling of the Directorate-General of Registries & Notaries (*Resolución Dirección General de Registro y Notariado – RDGRN*) of 4 June 2007 (Official Government Gazette 185/2007 of 3 August 2007)

Registration of marriage performed in Cuba according to the "lex loci". Effectiveness in Spain of a Cuban notarial divorce deed.

"Legal Grounds:

…THREE. – Furthermore, with respect to the document that contains the divorce decree, the form and procedure whereby it may be recognised and have effect in Spain must be decided, as a prerequisite to its registration at the Spanish Civil Registry, which is acknowledged as being competent due to the fact that the divorce affects a Spanish national (cf. Article 15 CRA). Said recognition comes up against an apparent difficulty, since Spain is neither cognisant of nor regulates the forms or modalities of divorce without judicial intervention peculiar to Cuban law, so that the procedure envisaged by Article 107–II of the Civil Code for recognition of the effects of separation and divorce decrees issued by foreign courts by means of "*exequatur*" (enforcement order), previously in the Supreme Court and now in the Spanish Court of the First Instance (cf. Article 107–II of the Civil Code and Article 955 of the 1881 CRA), could be construed as inappropriate for its application to cases of divorce formalised by foreign Notaries pursuant to local legislation. Nonetheless, this difficulty is merely apparent, since both the Supreme Court (cf. Court Orders of 23 February 1999, 5 October 1999, 19 February 2002, etc.) and the Directorate-General of Registries & Notaries have countenanced the applicability of enforcement procedure in such cases by analogy with and identicalness of rationale, bearing in mind its purpose. Hence, the Ruling of this Directorate (*Centro Directivo*) of 14–5 May 2001 states, at legal ground V, that "it is necessary that said divorce agreement – private, subject in this case to the Russian legislation – be declared in accordance with the Spanish legislation by means of the relevant legal procedure, the reason being that, if an enforcement order is necessary in cases where decisions and judgments are involved, then this requirement is even more necessary in a case where no court whatsoever has intervened in the process of dissolution of the matrimonial bond".

…".

4. Contracts

* Madrid Provincial High Court Order No. 194/2007 (Section 14), of 24 October 2007 (JUR 2008\21515)

Recognition and enforcement of foreign judicial decisions. Italian judgement rendered in absentia relating to an international contract for the sale of goods. Control of jurisdiction of court of origin and respect for Defendant's rights of defence. Ordinary appeal dismissed.

"Legal Grounds:

(…) TWO. – The first question is fruitless. Under Article 5.1 A) of Regulation EC 44/01, the jurisdiction of the Court of Florence that issued the payment order is inescapable. Florence is the place of performance of the obligation because, as indicated at the foot of the unpaid invoices, the goods were shipped at the purchaser's risk and peril, or what amounts to the same thing, they had been placed at the purchaser's disposal at the vendor's warehouses, so that legal delivery was effected in Florence even though physical delivery was made in Spain. In addition to the above, we have ascertained that there is a clause of submission in the invoices in favour of the Courts of Florence, that this clause is permissible pursuant to Article 23 of Regulation EC 44/01, and that the matter is not included in Article 22 of said law. In the light of Article 22.1 of the Judiciary Act, the conclusion is that same does not involve exclusive competencies of Spanish jurisdiction, and comes within the competencies which, under Article 22.2 of the Judiciary Act, may be freely disposed of. Lastly, scrutiny of the invoices shows us that the points of connection used to place the matter before the Courts of Florence are neither wilful, extravagant nor fraudulent: the vendor's establishment is in Florence, the goods were delivered legally at the vendor's domicile, and the place of payment is an Italian bank with a branch in Florence at which the vendor has his account.

THREE. – No better fate awaits the second ground. Regulation 44/01 refers to Regulation 1348/2000, which at Article 19 allows for notice by registered letter with acknowledgement of receipt. Well then, in view of the copy of the acknowledgement of receipt, we feel that pursuant to the internal law this notification suffices, and that the default in Article 34 of Regulation 44/01 to which the Appellant refers does not merit protection. (…) The last problem raised is that notice was served, not by the Court of Florence but rather by Plaintiff's legal counsel, who assumed the functions of defence and representation. We do not know whether Italian law bars notice being served in this way, a problem that would fall to the party against whom enforcement is sought, but we *do* know that Regulation EC 44/01 is an enactment of great flexibility, so much so that from subsections 7 to 9 of its Preamble, and from the recital contained in Articles 14, 15, and 23, it could be concluded that, in the form served, the notice was indeed valid. The Regulation permits any party interested in a court case, in this case the party seeking enforcement, to request service of notice through the judicial authorities, public officers or other competent persons of the requested Member State. In this case notice with acknowledgement of

receipt must be assumed to have been served via the Spanish postal services, competent to ensure that the official acknowledgement-of-receipt form reached its intended recipient."

5. Bankruptcy & insolvency proceedings

* Supreme Court, Chamber for Civil Matters, Section 1, Court Order of 4 December 2007 (JUR 2008\2861)

Recognition and enforcement of foreign judicial decisions. Grant of enforcement over an English decision relating to a declaration of insolvency of the deceased's estate and appointment of receiver.

"Legal Grounds:

1. – The Brussels Convention of 27 September 1968, on jurisdiction and recognition and enforcement of judgments in civil and commercial matters, is not applicable, since Article 1 subsection 2 excludes matters of "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings" from the Convention's scope of application. Similarly, Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters *ratio tempore* (cf. Articles 66 and 76) is not applicable because Article 1 subsection 2(b) thereof excludes "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings" from its scope of application. Confronted by the lack of application of "*ad hoc*" law, both international (cf. Council Regulation (EC) No. 1346/2000 of 29 May 2000, on insolvency proceedings, in view of the fact that the bankruptcy proceedings were filed on a date prior to said Regulation's entry into force), and internal, recourse must therefore be had to application of the general regime of Article 954 Civil Procedure Act (of 3 February 1881) – which is applicable in the light of Article 2 of the Civil Procedure Act 1/2000, read in conjunction with its second Transitional Provision, and which, at all events, remains in effect following the entry into force of the new procedural law, pursuant to its Sole Partial Repeal Provision, subsection one, exception 3 – on there being no evidence of negative reciprocity (Article 953 of said 1881 Act). 2. – The decision's finality has been proved under the law of the State of origin; the finality of the decision, whose enforcement is sought, is required, whatever the recognition regime, by Article 951 (of the above-mentioned 1881 Civil Procedure Act) – which on this point, does not solely pertain to the treaty regime, if read in conjunction with the provisions that follow – and by the reiterated doctrine of this Chamber. 3. – The requirements stipulated by Article 954 (of the above-mentioned 1881 Civil Procedure Act) are met: on the one hand, the personal nature of the action brought is evident; and on the other hand, the procedural guarantees have been fulfilled, having regard to the nature and purpose of the original proceedings; and, lastly, there is no public-policy impediment that might bar recognition and declaration of the judgement's enforceability,

specifically referring to violation of principles which in insolvency matters tend to ensure the universality of the proceedings and the equal footing of creditors, with the ensuing prohibition against favouring those of a local nature (see Supreme Court Orders 8/96 of 4–5–99, 2549/95 of 28–12–99 and 147/01 of 17–6–2003). Aside from this, and outside the control of the international jurisdiction of the court which declared the opening of the insolvency proceedings – the examination of which will be addressed forthwith – the fact that there is no evidence of *lis pendens* or the existence of a court judgement which, due to its being incompatible with that sought to be recognised, might bar recognition of the latter's effects, means that there is no call for control of the prerequisites for recognition to be extended to examination of the law materially applied, or, in turn, to ascertainment of the requirements to which the "*lex fori concursus*" subjects the opening of same. Similarly there is no need to authorise the personal effects, with respect to the regime of legal incapacity or disqualification to which the bankrupt is made subject, the organs of representation envisaged, their composition and powers, or, indeed, the effects on personal property and assets deriving from the declaration of bankruptcy, beyond that imposed by respect for the essential principles of the legal system in insolvency matters, which, as has been noted, have not been violated. 4. – There is no reason to think that the international judicial jurisdiction of United Kingdom courts might have stemmed from the parties' fraudulent search for a forum of convenience (Articles 6.4 of the Civil Code and 11.2 of the Judiciary Act); Articles 22.2 and 4 of the Judiciary Act do not establish fora of exclusive jurisdiction; there is a connection that cannot be ignored, namely, the deceased bankrupt's United Kingdom domicile over a period of three years prior to the application to court for a bankruptcy declaration – pursuant to the legislation of origin, i.e., the 1986 Administration of Insolvent Estates of Deceased Persons Order and 1986 Insolvency Act, Section 265 (1) – a reason that permits the jurisdiction of the courts of origin to be deemed well-founded, and, lastly, permits fraud to be excluded in respect of the law applied to the merits of the case, an issue linked to the preceding point."

* Decision of the Catalonian High Court of Justice, Chamber for Social and Labour Matters, Section 1, of 25 April 2007 (El Derecho 2007/137732)

Insolvency. Possibility of enforcing in our country a dismissal decision taken in Spain, notwithstanding the fact that the company's insolvency proceedings are under way in another country.

"Legal Grounds:

…ONE. – …The arguments submitted by the company in the appeal for reversal are a reproduction of those it pleaded in the appeal for reconsideration and must be rejected for the following reasons: a) because advantage is taken of a motion filed in period of execution of the decision concerning a certain disputed loan, to raise a series of points that should have been pleaded at the appropriate procedural moment in time, specifically, either when the Lower Court issued the Court Order ordering execution, which was not appealed and

became final, or when the Court Orders of 16.6.2004 and 26.7.2004 were issued, which are also final and the nullity of which it now seeks; b) on the company requesting that the orders be backdated to the time when the decision was handed down, it is filing a motion of annulment of proceedings, which cannot be subsumed in any of the cases legally envisaged under Articles 238 and subsequent provisions of the Judiciary Act or under the corresponding Articles 225 and successive provisions of the Civil Procedure Act. By virtue of the aforesaid provisions, absolute nullity, in all cases, and flaws of form at any stage of the proceedings which might imply the absence of the essential requirements for attainment of the purpose thereof or lead to effective defencelessness, must be availed of by the legally established appeals against the judgement in question or by such other means as are stipulated in the rules of procedure. Likewise, the requirements for filing a general motion of annulment of proceedings pursuant to Article 241 of the Judiciary Act are not met. c) Even allowing that the complaint here goes to the Spanish courts' lack of jurisdiction or objective or functional competence to enforce the decision of the Plaintiff's dismissal, a matter that constitutes procedural public policy and may thus even be examined *ex officio*, this plea cannot prosper. Regulation 1346/2000 issued by the Council of the European Union, with the aim of ensuring that cross-border insolvency proceedings develop and unfold efficiently and effectively in the best interests of the smooth working of the internal market, does not permit of the view that a decision of dismissal issued on Spanish soil is to be enforced in the country in which the insolvency proceedings are being pursued – in the present case Belgium – which is in essence what the Appellant is seeking. Recital no. 28 of said Regulation, which amounts to the Preamble thereto, states that, insofar as protection of employees is concerned, the effects of insolvency proceedings on the continuation or termination of employment and on the rights and obligations of all parties to such employment must be determined by the law applicable to the agreement in accordance with general conflict-of-law rules. Any other insolvency-law questions, such as whether the employees' claims are protected by preferential rights and what status such preferential rights may have, should be determined by the law of the opening State. Nonetheless, this last provision, which is expressed as a desire or aspiration, has no express reflection in the formal clauses of the enactment. Article 4 of said Regulation lays down as a general rule that the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, but Article 10 relating to contracts of employment, specifies that the effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment. In the present case, the contract of employment was subject to Spanish legislation and this point was not contested in the dismissal proceedings, which were settled by a decision that declared same to be wrongful, with the financial consequences stipulated therein, and is in the process of being executed. On the other hand, the point raised is not properly one of jurisdiction, but rather one of the legislation applicable, which would be Belgian rather than Spanish,

without the company having provided evidence of the content of said legislation, thereby contravening Article 12 of the Civil Code, under which any person who invokes the foreign law, must prove its content and applicability by means of evidence permitted in Spanish law. Bearing in mind the date on which dismissal took place, the terms of Article 246.3 of the Labour Procedure Act (*Ley de Procedimiento Laboral – LPL*), prior to its reform by the Bankruptcy Act (*Ley Concursal*) 22/2003 of 9 July, are applicable to the case. Said provision lays down that such actions as may be brought by employees for payment of any salaries owed to them shall not be placed in abeyance by the holding of insolvency proceedings. Similarly, Article 32.5 of the Workers' Charter (*Estatuto de los Trabajadores*) lays down that such actions as may be brought by employees for payment of the amounts due referred to by this Article (outstanding salaries and compensation for dismissal on the terms established therein), shall not be placed in abeyance by the holding of insolvency proceedings. Based, therefore, on the fact that Council Regulation (EC) 1346/2000 places no obstacle in the way of a decision of dismissal issued in accordance with Spanish legislation being enforced in Spain, despite there being insolvency proceedings open against the company executed in another country, and also bearing in mind that the exercise of jurisdictional power is, pursuant to Article 117.3 of the Spanish Constitution, effected by delivering judgement and causing such judgement to be enforced, the remaining legal issues also raised by the Appellant must likewise be rejected. This is the case, on the one hand, of the infringement of Article 246.3 of the Labour Procedure Act due to the party seeking enforcement having given notice of the sum due to him in the bankruptcy and having acted in the insolvency proceedings, which would bar the possibility of claiming any sums due in a separate suit, a plea that cannot prosper, not only for the above-mentioned reason that procedural flaws must be pleaded by means of the pertinent appeals at the time when they are committed, but also because there is no evidence that the Plaintiff has claimed the sum due to him in Belgium, that he has entered an appearance in the proceedings conducted there, or that he has been acknowledged as having said sum owed to him by the company. He merely advised the Receiver in bankruptcy that the company owed him the sum of 370,088 euros, so that it cannot be said that there is a duplication of claims. Neither is there any basis to sustain an alleged fraud in law by virtue of the employee having concealed the credits held by the company against Sánchez Carbajal Jabugo S.A. and Escorxador de Sabadell, in order to be adjudicated these in improper and erroneous enforcement proceedings, in view of the fact that fraud is something that is not presumed but must be proved and that the attached sums correspond to works of a certain magnitude undertaken by the company in Spain, the details of which could not be unknown to it. Indeed, none of the breaches complained of by the Appellant company has occurred, nor is there deemed to be sufficient legal ground to seek a preliminary ruling in the Court of Justice of the European Communities pursuant to Article 234 of the Treaty Establishing the European Community on the interpretation and application to the present case of Council Regulation (EC) No. 1346/2000, and accordingly the appeal must be dismissed".

VI. DETERMINATION OF APPLICABLE LAW: SOME GENERAL QUESTIONS

1. Proof of foreign law

* Decision of the Madrid High Court of Justice (Chamber for Social and Labour Matters, Section 2) of 14 February 2007 (AS 2007\2702)

The 1980 Rome Convention on the law applicable to contractual obligations. Application of foreign legislation. Lack of proof of foreign law and ensuing supplementary application of Spanish labour legislation.

"LEGAL GROUNDS. (…)

TWO.…The preceding step brings one, without further ado, to proof of the content and legal force of foreign law, with Article 281.2 of the Civil Procedure Act stipulating the following: foreign law must be proved insofar as its content and legal force are concerned, with the court being entitled to avail itself of any means of ascertainment that it deems necessary for application thereof.

As it is the company that is pleading application of English law, it is for it to prove said law's content and legal force (with the decision as to whether or not such law is more favourable being a subsequent step). Having reached this point, it is true to say that the Appellant has produced a report by two legal experts from the country whose law is sought to be proved, along with the enactments that it deems to be in force and interpreted in accordance with common law principles. It must be stressed, however, that the decision of the Lower Court brought on appeal, finds neither the content of the foreign law which would, in the event, be applicable nor its legal force to have been proved, thereby rendering it essential to decide both: 1) said law's more restrictive or favourable nature; and, 2) the final outcome of the suit under English law, should it conclude with direct application of English law.

Yet the Appellant, who expressly cites the expert evidence furnished, has not, as required, had recourse to requesting an express declaration to hold points of such relevance as proved, a declaration which, in our opinion, should form part of the account of the established facts and could simply have been obtained by recourse to Article 191 subsection b) of the Labour Procedure Act, since the Appellant had all the means available, thus affording the other side the possibility of dialectically challenging the argument. If the appealed decision does not find the foreign law to be proved, this could well be for lack or insufficiency of proof, or for holding that, on Spanish law being deemed applicable, proof is not required. At all events, in an appeal as extraordinary and weighted as an appeal for reversal, the party has two avenues to remedy said omission by filing a complaint of the error committed by the court. These are: 1) Article 191 subsection b) of the Labour Procedure Act cited above; and 2) recourse to Article 191 subsection a) of the Labour Procedure Act, by requesting that the decision be voided so that the court proceed to remedy the omission incurred on assessing the evidence.

Neither of these two avenues has been used by the Appellant who should not forget, still referring to foreign law, that we are moving here within the evidentiary field, with rights as well as adverse effects of non-performance of pertinent duties and obligations coming into play, and that this, the evidence, is dealt with in the Lower Court. This Court is confined to perusal of the specific grounds of appeal, legally weighted and jurisprudentially structured, and is unable to remedy the defects or omissions which the parties incur in the drawing up of the appeal, since this task is their exclusive domain, and the challenge should address same as a dialectic response to the contrary position, with the limits of the legal debate thus being strictly delimited.

Hence, it is not possible for the Chamber, in the context of an appeal for reversal, to apply foreign law, if neither the content nor legal force thereof has been held to be proved and if said declaration is not expressly requested by legal means, with the party committing the error of assuming as proven, not the application of foreign law *per se*, but rather its content and legal force, which has not been the subject of such express declaration.

Similarly, the decision cannot be held null and void, whether because the party has failed to request this, or because we lack the powers to resolve this *ex officio* by virtue of Article 240.2 of the Judiciary Act. Finally, even if this Court were held, pursuant to Article 281 of the Civil Procedure Act, to have the necessary powers and means of ascertainment for application of foreign law, such powers are, at all events, discretionary according to the wording of subsection 2 of the aforesaid Article 281, from which an obligation of an imperative nature is not to be deduced.

The above cannot, however, lead to the decision being revoked and English law declared applicable, without ruling on the merits of the case, inasmuch as this would violate Article 24 of the Spanish Constitution. This was clearly established in Supreme Court Decision of 4 November 2004, having recourse, in this respect, to the doctrine of the Constitutional Court laid down in Decisions 10/2000 of 17 January, 155/2001 of 2 July and 33/2002 of 11 February. In accordance with this doctrine, if foreign law is not deemed to be proved, insofar as its legal force and content are concerned, Spanish labour legislation must be applied in its stead".

* Decision of the Castellón Provincial High Court (Section 6) of 11 January 2007 (JUR 2007\239832)

Lack of evidence of foreign law. Supplementary application of Spanish law. Determination of law applicable to separation and divorce.

"Legal Grounds:

(…) TWO. With respect to the first ground of appeal consisting of whether or not Spanish law is applicable, owing to Spain's being the common residence of the spouses who hold Iranian nationality, it must be said that, as stated by Supreme Court Decisions 7/09/1999 and 10/06/2005, among others, in order for foreign law to be applicable in the action, its legal force and content must be proved, since this is a consequence of which the court and the parties

cannot be required to have cognisance, in contrast to what happens in the case of Spanish law by virtue of the principle *jura novit curia* (Article 1.7 and 6.1 of the Civil Code).

As the Toledo Provincial High Court's Decision of 1/09/2006 points out, "According to repeated case-law doctrine, as invocation of foreign law is a mere question of fact, it must be pleaded and proved as such, it being necessary to prove, not only the exact existence of the prevailing law, but also its scope and authorised interpretation, so that its application does not raise the slightest reasonable doubt vis-à-vis the Spanish courts, all this by means of the pertinent certified documentation, with the isolated citation of Articles of foreign codes not being deemed sufficient to justify the obligation determined therein, since the existence and thrust of the law invoked must be proved, normally by means of a legal opinion drawn up by two legal experts TS 1 S.S. of 30 June 1962, 28 October 1968, 4 October 1982, 15 March 1984, 12 January 1989 and 11 May 1989 and 7 September 1990".

The record of proceedings shows that, despite the efforts made by them, given their somewhat dire financial situation, the two litigants of Iranian nationality have been unable to prove the foreign law applicable under their national law, with even the help sought through the relevant embassy proving fruitless. We thus find ourselves faced by the fact that the foreign law has not been proved.

Supreme Court Decisions of 11/05/1989, 21/06/1989 and 23/05/1992 lay down that lack of proof of the law invoked must, in line with consolidated and settled jurisprudential doctrine on the point, lead to application of Spanish law.

Article 107 of the Civil Code establishes that, in the absence of a common national law, (a case that should be likened to that of lack of proof, and production of evidence) the applicable law shall be that of the common habitual residence, i.e., Castellón and, by extension, Spain.

Indeed, in our decision of 7 April 2005 we stated the following: "Article 107 of the Civil Code, as amended and revised by Organic Law 11/2003 of 29 September, lays down at point 2 that, as a general rule and insofar as it is of interest here, separation and divorce shall be governed by the common national law of the spouses at the date of filing the action. Nevertheless, paragraph 2 of said provision stipulates, likewise insofar as it is of interest here, that "at all events, Spanish law shall be applied where one of the spouses habitually resides in Spain: b) if in the action filed in the Spanish court, the application for separation (or divorce) is made by both spouses or by one with the consent of the other". Hence, in accordance with said provision, Spanish law shall be applicable to the separation (which is the case in point) or divorce where two requirements are jointly met: firstly, that one of the spouses habitually resides in Spain; and secondly, that the application for separation (or divorce) is made by both spouses or by one with the consent of the other".

In the case before the court both requirements are met, i.e., both litigant spouses habitually resident in Spain, and both applied for separation and subsequently divorce by virtue of the application of the provisions of Single Transitional Provision One of Act 15/2005 of 8 July, a request that they repeated in their respective applications for appeal.

The issue raised here differs from the case settled in the above-mentioned decision, since the parties endeavoured by all means to prove the foreign law but failed to achieve this owing to reasons beyond their control, and the Lower Court did not proceed, under the provisions of Article 281.2 of the Civil Procedure Act, to ascertain the foreign law applicable by all the means which were at its disposal and which it deemed necessary, so that in this case the right to effective judicial protection would be violated by not applying the *lex fori*.

Substitutive application of Spanish material law flows from the above, due to its being the *lex fori* applicable by the Spanish courts, because this is required by the need to give a response to the issue raised, consubstantial with the principle of effective judicial protection enshrined in Article 24 of the Spanish Constitution, a doctrine in line with that traditionally followed by the Supreme Court, an example of whose judgements can be seen in Decisions of 13 December 2000, 17 July 2001, 5 March 2002 and 2 December 2003, among many others. It should be added that Act 8/2000 of 22 December on the Rights and Freedoms of Foreigners in Spain provides that the rights under Title 1 of the Spanish Constitution are applicable on the terms established under International Treaties, the Act itself, and those that regulate the exercise of each of these, with foreigners to exercise such rights as they are recognised as having under the Act on conditions of equality with the Spaniards, and, since Article 32 of the Spanish Constitution lays down that the Act shall govern the grounds of separation and dissolution and their effects, such rights are exercisable by foreign nationals in Spain on an equal footing with Spanish nationals".

3. *Renvoi*

* Ruling of the Directorate-General of Registries & Notaries, of 24 October 2007 (TOL 1.174.577)

Law applicable to succession of an English national. Renvoi. Validity of the last will and testament, and of testamentary distribution made in Spain. Law applicable to the form of legal wills.

"Legal Grounds:

(…) 2 (…) a) As already indicated in this Directorate's (*Centro Directivo*) Ruling of 5 February 2005, the main question in case-dossiers in which a foreign element is involved is proof of the applicable law. In the present case, in the deed of division of the estate there is no evidence – as would have been right and proper – of any express statement by the notary as to his knowledge of English Law, and the same must be said with regard to the note of assessment, though direct knowledge of this can be deduced from one or the other act, since at no time was proof thereof required. It would be another thing to determine the correct application of the conflict-of-law rules and the legal consequences flowing therefrom, something that this Directorate is perfectly capable of doing (cf. Article 12.6 of the Civil Code). b) Having said this, the subject matter of the dispute raised is not the determination of the testamentary instrument of a British citizen who, possessing assets in Spain, dies under the

terms of will executed before a Spanish notary (and exclusively referring to his estate on Spanish soil), but has an altogether profounder dimension, in view of the fact that the true matter to be decided resides in the determination of the law applicable to the deceased's estate (*lex successionis*), the latter being an expression whose scope will be defined further on.

3. The existence, increasingly more frequent, of foreign nationals owning real estate in Spain, on which they establish, moreover, their second residence, dictates the frequency of international successions in which Spanish legislation is involved, so that it is necessary to provide a response to this phenomenon. The European Union, aware of this reality and desirous of conferring certainty on the movements of persons in the various Member States, is working on a future instrument that will govern certain aspects of the determination of the law applicable to international community successions, with the possible creation of a European Certificate of Inheritance that will facilitate said determination in cases such as that now before the court. However, until such a time as said instrument comes in force, the starting point from which to settle the matter raised here must be the *lex fori* which, pursuant to Article 9.8 of the Civil Code, lays down that the applicable law is the personal law of the decedent, given that Spain is not a signatory to the 1989 Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons which leads to other connecting factors. Hence, the Civil Code has recourse to the principle of universality of succession (with the sole exception envisaged under its last paragraph in favour of the possible application of the law governing the effects of marriage), so that the phenomenon of succession is in all cases made subject to the law of the deceased's nationality, save where the conflict-of-laws rules of same should remit the matter to Spanish law, the only instance of *renvoi* allowed by our rules of Private International Law (cf. Article 12.2 of the Civil Code). However, this *renvoi* of the first grade should not be accepted in matters of succession by reason of death if this leads to the "legal splintering of the succession", which would thus be governed by a number of laws, since Article 9.8 of the Civil Code is presided over by the principles of unity and universality of succession (in this connection see Supreme Court Decisions of 15 November 1996, 21 May 1999 and 23 September 2002). Lastly, under Article 9.8 of the Civil Code, only the personal law is relevant, with this being understood to mean the national law of the deceased at the date of his death (in the case now before the Court, the law deriving from his British nationality, the law of succession of which, in addition to being founded on the principle of freedom of testamentary disposition, is one of the systems that establishes a duality of regime according to whether succession to moveable or immoveable property is involved, with the result that in cases where the latter is situated in a foreign country, it will be governed by the *lex rei sitae*).

4. Consequently, and starting from the applicability of *renvoi* from English succession law to Spanish civil law – common in this case, because the property is situated in the Canary Islands Autonomous Region – two different questions arise: one, the validity of the testamentary instrument, and the other,

the material compliance with the requirements stipulated in the *íter sucesorio*, in which both legislations must be taken into account. With regard to ascertainment of the testamentary instrument, there is a will executed before a Spanish notary with the sole purpose of disposing of the testator's real estate in Spain *mortis causa*, which, pursuant to Articles 9.8 and 11 of the Civil Code, must be deemed valid and sufficient. Moreover, the possibility of executing a will before a Spanish notary to dispose of an estate existing in Spain is an avenue that generates legal certainty for the foreign citizen and which, particularly in cases of duality, such as those under English law, ensures the title to the asset after the death of its owner, thereby extraordinarily facilitating and reducing the cost of formalisation of succession by reason of death. Insofar as material co-ordination of both succession laws is concerned, *renvoi* from English to Spanish law, by reason of a property's situation, implies the application thereof to aspects relating to the validity of the testamentary instrument (cf. the Hague Convention of 5 October 1961, in force in Spain since 10 June 1988), as well as to aspects linked to acquisition of control over real estate on Spanish territory, referring to acceptance, adjudication and, as the case may be, distribution of the estate, with the succession being governed in all other respects by the decedent's personal law, which as far as possible should not be fragmented. In addition to the above and by way of conclusion, it should be said that matters relating to effects of registration of successional rights are governed by the legislation of the Registry concerned, which means that Articles 14 of the Mortgage Act and 80 of the Rules & Regulations are applicable. The conclusion to be drawn from these provisions is that, for the case now under review and by virtue of the reasons outlined above, the testamentary *instrument* executed on the day in Spain suffices for the purposes of carrying out hereditary registration. This issue is linked to one of the flaws noted in the registry's note of assessment, with respect to the lack of production of a true copy of the will, a matter that may not be addressed in this appeal in view of the fact that the Appellant has not challenged this point, but has restricted himself to annexing said instrument to the appeal. Accordingly, it only remains to make the point that documents not presented to the Registrar at the date of the note of assessment cannot be taken into account in this case-dossier – cf. Article 326 of the Mortgage Act. This is without prejudice to the fact that, on said document being resubmitted in the proper form, provided that the content of the duly certified instrument now produced coincides with that which appears recorded on the assessed deed, the registration sought must be effected, without it being for this Directorate to rule on the grounds underlying said requirement (with regard to the comment recorded on the deed of the particulars of the succession), in view of the fact that this point is not raised in the appeal."

4. Remission to multiple legal systems

* Ruling of the Directorate-General of Registries & Notaries, of 1 October 2007 (TOL 1.174.559)

Lack of proof of the law applicable to the deceased's succession in the interests of formal registration of the deed of acceptance and division of the estate. Determination of the surviving spouse.

"Legal Grounds:

(…) 2. The first issue raised refers to proof of law applicable to the decedent's succession where there is a fact, such as the latter's US nationality, that confers an international character upon the succession in question. In such a case, Article 9.8 of the Civil Code calls for the application of the national law of the deceased at the date of his death, inasmuch as this is said person's personal law (Article 9.2), the law that is also applied to the rights attributed by law to the surviving spouse. It may, however, happen that remission refers to the legal system of a State in which different legislative systems coexist, and in such a case one is remitted to the legislation of said State by Article 12.5 of the Civil Code to determine the applicable legislative system within same. Although this point has been specifically addressed in a number of judicial (viz., Supreme Court Decision of 5 November 1971) and administrative decisions (Ruling of this Directorate-General of 5 February 2005), it is nevertheless being increasingly brought up before those appointed to administer the law [*Translator's Note*: literally, *operador jurídico*, i.e., judges, civil servants and the like]. Hence, except where there is specific regulation in international treaties (Articles 96.1 of the Spanish Constitution and 1.5 of the Civil Code), something of which there is no evidence in the present case, recourse must be had to the internal composition of the US regulation. The Appellant argues that application of Connecticut law flows from the decedent's US nationality and that in the Deed of Power of Attorney granted by the widow, his residence is shown as being in Connecticut, it being added in the appeal that this was the place where the deceased lived when he resided in the United States; yet it is true to say that, from the documentation furnished, the legislation applicable to the succession cannot be that of Connecticut. Accordingly, the appealed ruling on this point must be confirmed, since, neither via any of the ways indicated by Article 36 of the Mortgage Regulations nor via any other means of proof (Article 12.6. of the Civil Code then in force) can the application of Connecticut law to the case reviewed be deemed justified."

VII. NATIONALITY

* Supreme Court Decision, Chamber for Administrative Proceedings, Section 6, of 9 April 2007 (RJ 2007\4090)

Denial of application for Spanish nationality on the ground of residence, due to ignorance of Spanish and absence of sufficient integration into Spanish life and customs.

"Legal Grounds:

…THREE. – Prior to deciding on the ground of appeal, it must be pointed out that, in his Court Order of 24 March 1997, the judge appointed to hear

Civil Registry claims did indeed propose the grant of Spanish nationality to the Plaintiff, on finding that all the legally stipulated requirements in this regard had been met, including the requirement relating to integration into Spanish society. The Ministry of Justice decided to return the case-dossier to Civil Registrar, for the sole purpose of a new interview on integration being held in accordance with the provisions of Article 221 of the Civil Registry Rules & Regulations, in view of the fact that, according to other reports she hardly spoke any Spanish, something that would show her lack of integration into Spanish life. On the case-dossier again being received and the interview intended to monitor this requirement being held by the Judge appointed to hear Civil Registry claims, the Judge reported that " the interested party's adaptation to Spanish lifestyle and customs has not been duly accredited or proved, since she can neither read nor write Spanish, though she does understand it and has shown herself willing to learn it". In the processing of the administrative appeal in the evidentiary stage, by way of evidence the Plaintiff solely adduced documentary exhibits consisting of the entry into the court record of the particulars of the administrative dossier, relating to appearances entered before the Civil Registry Judge for the purpose of accrediting her integration into Spanish society and the latter's judgements, particularly the first of these. On assessing said documentary evidence with the reasoning transcribed above, the Lower Court held it to be proved that Ana María was not duly integrated into Spanish society at the date of applying for the grant of nationality, detailing for the purpose thereof the relevant circumstances of her life in Spain since 1974, among which the Lower Court did not overlook the fact that her husband and children possess Spanish nationality. In our Decision of 29 October 2004, (Cassation appeal 7900/2000), precisely referring to a case similar to that which is now under review, with regard to the requirement of necessary integration into Spanish society for securing nationality, we said: "Two. – The Appellant submits a sole ground of appeal pursuant to Article 88.1.d) of the jurisdictional law, on holding that there has been a breach of Article 22 of the Civil Code and Article 221, final paragraph, of the Civil Registry Rules & Regulations, pleading that, in the case before the court, the Civil Registry Judge reported favourably on the Appellant's degree of integration into Spanish society and that, in the Plaintiff's opinion, this report is what ought to have prevailed. Moreover, it is contended that no value has been attached to the fact that Mrs. Ana María has lived in Melilla since 8 August 1989 and that she has five children all born on Spanish soil and possessing Spanish nationality. The Plaintiff sought acquisition of Spanish nationality by marriage – due to being married to a Spanish national, and subsequently being widowed. The Lower Court's decision rests on the fact that, while it is true that, as stated by the Plaintiff, she is shown in the Civil Registry certificate of 31 January 1996, issued in Melilla and recorded at page 38 of the case-dossier, to have spoken Spanish, she is nonetheless shown in the subsequent Civil Registry certificate of 29 October 1997 to have hardly spoken the language at all, though she did understood it, with it also being stated in the Reports issued by the Defence Higher Education Institute (*Centro Superior*

de la Defensa) of 23 April 1996 and the Directorate-General of Police of 30 October 1996, that she spoke no Spanish. From its weighing of said evidence, the Lower Court concludes that there is no justification of a sufficient degree of integration into Spanish society, of which knowledge of the language, or at least a certain effort to learn it by receiving classes, is assumed to constitute a relevant factor, with the result that it dismisses the Administrative appeal brought. Three. – The Appellant seeks that the assessment with respect to the "sufficient degree of integration into Spanish society" required by Article 22.4 of the Civil Code which the Lower Court made on examining the evidence and which led it to deny Spanish nationality, be replaced. However, it is well known that an appeal in cassation, being the extraordinary appeal that it is, does not allow the higher court (*tribunal "ad quem"*) to alter the facts which the Lower Court states to be proved, or to replace the Lower Court's findings as to the evidence examined, save where said court's assessment is arbitrary, illogical or contrary to the general principles of law, which is not so in the case before the court, in which the practical ignorance of the Spanish language, perfectly proven, translates as an evident lack of integration into Spanish society. The point in the case before the court is not that the Plaintiff may live in accordance with the religious customs and traditions of her country of origin, to which this Chamber's Decision of 18 May 2004 referred and which would be the logical consequence of the fundamental right of religious freedom recognised under Article 16 of the Constitution and thus, perfectly admissible. Rather, it is to decide whether, despite such beliefs and practices peculiar to the Moslem population, there has been the sufficient degree of integration into Spanish society required by Article 22.4 of the Civil Code for the acquisition of Spanish nationality. The truth is that in the case before the court, the assessment of the evidence made by the Lower Court leads one to conclude that, even when, as she herself stated before the Civil Registrar on 29 October 1997, her customs are Moslem, which, as indicated above, is totally incorporated into our Constitutional system, her integration into Spanish society has nevertheless not been proved; a circumstance which, without any doubt whatsoever, stems from her absolute ignorance of Spanish, which translates into the impossibility of having the slightest relationship with this society. Lastly, it should be noted that there has been no breach of Article 221 of the Civil Registry Rules & Regulations, inasmuch as, in his Court Order of 31 January 2004, the judge appointed to hear Melilla Civil Registry claims only ruled, as could not be otherwise, that examination of the case-dossier should proceed for its eventual resolution and the ensuing decision on the grant of nationality by the Ministry of Justice, an act that constitutes one of the fullest manifestations of state sovereignty and which involves the grant of a status which implicitly entails a series of rights and obligations." The reasoning contained in said decision relating to a person with children likewise possessing Spanish nationality is basically applicable to the case before the court, (leaving aside customs and religious beliefs) in which, at bottom, the Appellant is seeking that the assessment which the Lower Court made on examining the evidence and on the basis of which it concludes that a

sufficient degree of integration into Spanish society has not been proved, be replaced by her own assessment of the evidence, which would be circumscribed to taking account of the first ruling of the judge appointed to hear Civil Registry claims. Nevertheless, it is true to say that the assessment, made by the Court of First Instance, of all the evidence examined may in no way be judged arbitrary, illogical or in breach of the rules that govern weighted evidence, since her ignorance of the Spanish tongue, and not the fact that she can neither read nor write, taken together with the failure to plead and furnish evidence of other circumstances from which her integration into Spanish life and customs might be deduced, mean that integration at the date of applying for the grant of Spanish nationality has not been proved. This is without prejudice to the fact that if, as the Lower Court itself indicates, real integration into Spanish life subsequent to said date were to be proved, she could then proceed to make a new application for the grant of Spanish nationality. In the light of the above, and there being no violation of Article 22.4 of the Civil Code discernable in the decision appealed, the ground of appeal must be dismissed".

* Supreme Court Decision, Chamber 3, Section 6, of 18 May 2007 (RJ 2007\5858)

Denial of application for Spanish nationality. Lack of real and effective residence in Spain.

"Legal Grounds:

…FIVE. – The assessment of this documentary evidence made by the Court of First Instance which leads it to find that the requirement of effective, real and continuous residence has not been met, violates none of the rules cited in the ground of appeal, and must be accepted by this Chamber, with the ensuing dismissal of said ground, as well as the second of the grounds pleaded, since no breach of Article 22.3 of the Civil Code is to be discerned. Indeed, in contrast to what is upheld in this Chamber's above-cited decision and to what the Plaintiff refers as having been violated, we find that, rather than being in the presence of someone who has his effective residence in Spain and who for professional reasons has to leave this country justifiably and occasionally, instead the Appellant voluntarily carries on a proprietary business activity outside Spanish territory, in a place close to the border yet nevertheless outside Spain, and it is in Morocco where the Appellant, as can be clearly seen from the documentary evidence adduced, has voluntarily decided to locate his professional activities, notwithstanding the fact that he could have done so in Spain. It is the Appellant who has voluntarily decided to site his professional activity outside Spanish territory, undertaking said activity on self-owned premises with a large turnover, which requires a physical presence that is incompatible with permanence in Spain, and which translates as his real and effective residence for the purposes of the grant of Spanish nationality. The fact that his family resides in an apartment owned by him in Ceuta does not imply that their residence extends to the Appellant, since he has voluntarily chosen to locate the activities that he undertakes in Morocco, only coming to Spain for the purpose of being

with his family. Hence, the constant entries and exits reflected in his passport are a clear indication that the Plaintiff cannot be deemed to possess the effective residence required under Article 22.3 of the Civil Code: accordingly, neither the rule itself nor the case-law that develops it can be said to be violated, and the second ground of appeal submitted must therefore also be dismissed".

* Supreme Court Decision, Chamber for Administrative Proceedings, Section 6, of 16 October 2007 (RJ 2007\7229)

Denial of Spanish nationality. lack of proof of sufficient degree of integration into Spanish society despite over 40 years of residence.

"Legal Grounds:

(…) TWO. The Appellant, though not specifying it, submits a single ground of appeal, deeming there to be a breach of Article 22.4 of the Civil Code. He pleads that, in contrast to the position maintained by the decision of the Lower Court, his integration into Spanish society should be deemed sufficiently proved, and is to be concluded from circumstances such as his continuous legal residence in Spain since 1965 and his marriage to a Spanish citizen. He likewise pleads that he possesses a level of knowledge of Spanish sufficient for the purpose of deducing said social integration, which is also clearly evident from circumstances such as the application made by him requesting free legal aid and his job application at the National Employment Centre (*Instituto de Empleo-INEM*). The Lower Court, when it came to issuing its ruling, ascribed special relevance to the Civil Registrar's Report, which on 8 October 1997 in the processing of the case-dossier states: "His adaptation to life and customs in Spain has not been proved, though he speaks Spanish regularly, makes himself understood easily and has been in Spain since 1956 (sic)", with the Public Prosecutor's Office also showing itself to be against the grant due to lack of integration. In his claim, the Plaintiff requested documentary evidence, consisting of the actions recorded in the case-dossier being joined to the court record of proceedings. Leave for this was granted by the Chamber in its Court Order of 20 February 2003, and it is from weighing this evidence that it concludes that the Appellant is not duly integrated into Spain, despite due regard being had to circumstances, such as his prolonged stay in this country for almost forty years. In its decisions of 9 April 2007 and 29 October 2004, this Chamber has ruled on cases very similar to that now under review, with respect to lack of proof of integration into Spanish society being concluded from a deficient knowledge of the language. Such knowledge is assessed, not as the definitive sign of integration into society, but rather as a relevant element for the purpose thereof, since it is difficult for a person who is ignorant of the language or speaks it haltingly to integrate himself into society, inasmuch as language is an instrument of social relationship, if moreover he provides no evidence of other circumstances indicating his integration, or at least his evident willingness in this regard."

* Decision of the National High Court (*Sentencia Audiencia Nacional – SAN*) (Chamber for Administrative Proceedings, Section 3) of 29 March 2007 (JUR 2007\104575)

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

"Legal Grounds:

(…) FIVE. – To decide whether or not good civic conduct exists, it is not enough to verify that there is no evidence on public record of activities meriting criminal or administrative punitive consequences, which in themselves imply bad conduct. What Article 22 of the Civil Code requires is that the applicant positively justify that, during his time of residence in Spain and even beforehand, his conduct has been in accordance with the norms of civic coexistence, not only by not transgressing the prohibitions imposed by the criminal or administrative legal system, but also by fulfilling such civic duties as may reasonably be required of him.

As the Supreme Court (Supreme Court Decision of 11 October 2005, Appeal 4411/2002) and the Constitutional Court (Constitutional Court Decision 114/1987) state, the undefined legal concept of "good civic conduct" referred to by Article 22–4 of the Civil Code has nothing to do with the lack of a criminal record ultimately referred to by the provision cited. In the case of the grant of nationality by virtue of residence, Supreme Court (Chamber Three) Decision of 16 March 1999 stated that the requirement of "justifying good civic conduct in the case-dossier governed by Civil Registry legislation" (in addition to a sufficient degree of integration into Spanish society) (Article 22.4 of the Civil Code), constitutes an additional requirement over and above the mere observance of a conduct of non-transgression of criminal or administrative punitive laws, imposed by the legal system due to the exceptional nature of recognition of nationality by virtue of residence and, ultimately encompasses aspects that transcend those of a criminal nature, and must be weighed by having regard to the applicant's conduct over a long period of time and permanence in Spain, and cannot be merely equated to the absence of a criminal or police record.

On the contrary, criminal or police records, regardless of their cancellation, are merely a qualified indicator of a citizen's conduct, without in themselves constituting a bar to the grant of Spanish nationality (Supreme Court Decision of 5–11–2001 cassation appeal No. 5912/1997).

Hence, the simple existence or non-existence of a criminal record cannot suffice to hold that this requirement has or has not been met, save where said record should refer to offences that reveal the existence of bad conduct *per se*. One would have to assess the distance or proximity in time of such a record in terms of a reasonable process of integration into Spanish society, along with the nature and circumstances of the conduct that led to the criminal sentence, as revealing factors not only as regards the infringement of law, but also as regards the lack, to a lesser or greater degree, of legally required integration into Spanish society.

SIX. – With regard to the difficulty of defining what is to be understood by good civic conduct, the Supreme Court (Chamber for Administrative Proceedings, Section 6), in its decision of 12 November 2002 (Appeal in cassation No. 4857/1998.) states that: '"And this is why it is important to make it clear that this term [*Translator's Note*: literally, '*sintagma*', syntactic unit] used by Article 22.4 of the Civil Code refers to an average standard of conduct capable of being assumed by any culture and any individual. A standard that is good for all and every one of us. In the clear understanding that this is not a matter of imposing a uniform way of life on the national community, or of any person who uses this avenue of acquisition of nationality having to show that he has displayed irreproachable conduct throughout his life, but rather of proclaiming that, with every human subject being free to organise his life as he sees fit – life alone is bestowed upon us, not how we live it: each has to lead his own life ['*la vida se nos da, pero no se nos da hecha: tenemos que hacérnosla*'] – anyone who, not being Spanish, wishes to obtain Spanish nationality, must have led and continue to lead a life in accordance with this average standard of conduct to which we have just referred."'

It is thus a matter of assessing the entire life led by the applicant in our country, particularly in the years preceding the application, to reach a conviction about his personal track record (e.g., content of behaviour judged to be uncivic, degree to which social values and norms of co-existence affected, habitual nature and maintenance over time, length of time preceding the date of application, positive elements that might counteract negative aspects, etc.) on the basis of an average standard of conduct capable of being assumed by any culture and by any individual, a standard that is good for all and every one of us".

* Decision of the National High Court, Chamber for Administrative Proceedings, Section 3, of 17 April 2007 (JUR 2007\112289)

Spanish nationality. Temporary lapse without residence permit. Grant.

"Legal Grounds:

...THREE. – The Appellant – a Peruvian national – born on 15–8–1987, having been represented in the administrative case-dossier and in this action by his mother on his being below the age of legal majority. The nationality application was submitted on 3–7–2003. The official ruling brought on appeal denied the grant of nationality on the ground that the interested party was without documentation, i.e., a residence permit, from 1–6–2001 to 14–8–2002. It should be noted that – according to the facts stated in the administrative dossier – the Appellant applied for an initial residence permit on 27–4–2000, which was granted to him on 2–6–2000, with its period of validity expiring on 1–6–2001. The following temporary residence permit was applied for on 14–8–2002, was granted on 19–11–2002 and was expressed to be valid until 18–9–2004. The main pleadings do not deny the facts on which the contended ruling is based. Indeed, it is argued in same that the temporary hiatus without a residence permit was caused by the circumstance that the Plaintiff's mother was processing the renewal of her work permit and residence, on which the

Appellant's permit depended. It is alleged in the claim that, according to the information received, both from the Provincial Directorate for Labour & Social Affairs and from the Madrid Provincial Immigration Authority (*Brigada Provincial de Immigration and Documentation de Madrid*), the Plaintiff's mother had to renew her work and residence permit first and only then that of her son. Accordingly, the mother received her residence permit in January 2002, and then endeavoured to renew the permit of the now Plaintiff. However, on attempting to do so she was told that this was not possible because the time limit had expired on 1–9–2001, and that she should therefore apply for a visa exemption and thereafter the residence permit. Following these instruction – it is contended in the claim – she applied for the visa exemption on 16–1–2002, which was granted on 25–4–2002. Subsequently – it is further contended in the claim – the Madrid Provincial Immigration Authority gave the interested party an appointment for 18–8–2002 for the purpose of being able to apply for the residence permit. The appeal submission concludes that the above-mentioned temporary lapse during which the Appellant was not documented in the due manner was not attributable to the Appellant's lack of interest but rather to his following the administrative formalities that the Authorities themselves had indicated in the information furnished to his mother. He highlights the fact that he has been living in Spain with his parents since 2000, has been receiving formal schooling throughout, and is integrated into Spanish society. He concludes, by requesting recognition of the right to the grant of nationality, citing Supreme Court Decision of 25–1–2005.

FOUR. – Among the exhibits attached to the claim is an official order from the Madrid Provincial Immigration Authority dated 19–9–2001 summoning the mother of the now Appellant "for [*imprinting*] her fingerprints on the documentation requested" (namely, the work and residence permit), as well as the application for the Plaintiff's visa exemption submitted on 16–1–2002. In contrast, the corresponding documentation in proof of the renewal of the mother's permit (which, it is stated, was received in January 2002) and the grant of the above-mentioned visa exemption (which, it is stated, was granted on 25–4–2002) has not been produced to the court. Although its production would not have been out of place, the Chamber nevertheless finds – as will be seen – that the evidentiary formalities completed by the Plaintiff suffice to render the reasonable version of the facts presented in the claim, reliable, a claim which we can already state will be allowed. Successive rules and regulations (Royal Decrees 864/2001 and 2393/2004) promulgated on this matter have linked the residence permit of foreign nationals below the legal age of majority to the legal force of the residence permit of their parents or guardians, with the former permit being made dependent on the latter. Leaving aside the fact that the mother of the now Plaintiff may or may not have acted in accordance with the official regulations when it came to renewing the Plaintiff's residence permit, and regardless of the fact that she may or may not have been led into error in this respect by the information that she alleges was given her by the Authorities, the truth is that the version of the facts on which the written submission rests is reasonable and

enjoys sufficient evidentiary support. Accordingly, it has to be acknowledged that, as contended in the claim, the lack of documentation showing legal residence during the period of time to which the appealed ruling refers was in no way due to lack of due diligence on the part of the interested party, but was instead due to the carrying out of a series of administrative formalities which the representative of the now Plaintiff viewed as being necessary for the renewal of her son's residence permit. Bearing in mind the above and the circumstances of the case – to say nothing of the grant to the interested party of the temporary permit on 19–11–2002, the validity of which was extended to 18–9–2004 – we arrive at the conclusion that said party's residence was lawful, continuous and immediately preceding the application, so that the requirement held by the appealed ruling to be lacking was indeed met, and, as we had intimated in advance, the present appeal must therefore be allowed".

* Decision of the National High Court, Chamber for Administrative Proceedings, Section 3, of 20 November 2007 (JUR 2007\352500)

Grant of Spanish nationality by virtue of residence. Administrative appeal upheld. Denial of nationality for reasons of "public policy and national interest" improper without further specification. Not a discretionary power, but rather verification of fulfilment of the stipulated requirements.

"Legal Grounds:

ONE. – …TWO. – Articles 21 and 22 of the Civil Code render the grant of Spanish nationality by virtue of residence subject to two types of requirements, namely: some of a defined nature, such as the filing of the necessary application and lawful, continuous residence immediately preceding the application during the period of one, two, five or ten years, which, depending on the case, is stipulated; and others drawn up as undefined legal concepts, either of a positive nature, as in the case of justification of good civic conduct and a sufficient degree of integration into Spanish society, or alternatively of a negative nature, as in the case of the grounds of public policy or national interest which can justify denial of the grant. Whereas the former pose no problems to discernment, the latter, by virtue of the very nature of the undefined legal concepts, call for appropriate concrete adaptation to the surrounding circumstances in each case, the assessment of which leads to a sole, just and jurisdictionally controllable solution, which must be adopted by the Authorities (Article 103 of the Constitution), without allowing for the alternative solutions characteristic of administrative discretion. This was laid down by the decision of 24 April 1999, citing many others, such as those of 22–6–1982, 13–7–1984, 9–12–1986, 24–4–, 18–5–, 10–7 – and 8–11–1993, 19–12–1995, 2–1–1996, 14–4–, 12–5 – and 21–12–1998 and 24–4–1999, in that, on appraising undefined legal concepts, such as public policy and national interest, the discretion of the Authorities is excluded, because the inclusion of an undefined legal concept in the enactment to be applied does not, *per se*, mean that the Authorities have been vested with capacity to decide freely and forgo the just solution to the case, but that they are forced to take the only correct decision in view of the proven facts, adding that,

rather than a discretionary power, recognition of Spanish nationality is instead a duty in those instances in which the legally stipulated requirements are met. Hence, the decision itself indicates that nationality has the genuine legal nature of a person's civil status, so that its acquisition by virtue of residence is not to be confused with that conferred by a certificate of naturalisation. Whereas the latter constitutes a genuine right of grace, in which the requirement for formal application has the significance of the occasion or reason but not the legal cause thereof, acquisition by virtue of residence, on the other hand, may neither be granted nor denied except where the legally stipulated circumstances are present, meaning that it is not a grant "*stricto sensu*" but rather recognition in the face of the requirements stipulated for that express purpose."

* Extremaduran High Court of Justice (*Tribunal Superior de Justicia*) Decision No. 179/2007 (Chamber for Administrative Proceedings, Section 1), of 12 July 2007 (JUR 2007\307546)

FOREIGN NATIONALS: Stay within national territory: residence permit; denial: authorisation of permanent residence; denial due to lack of proof of status as Spanish national by origin; improper: Western Sahara: sufficient proof on production of Family Record Book in which he is shown as son of two Spanish nationals; improper denial: grant fitting and proper.

"Legal Grounds:

FIVE. – [...] In the present case, we hold that we are faced with the type of case firstly mentioned, in view of the fact that the Plaintiff has provided evidence of his status as a Spanish national by origin. The Appellant, Mr. Jorge, is shown in the Family Record Book (*Libro de Familia*) issued by the General Government of the Sahara, as the son of two persons who possessed a national identity card issued by the Spanish administrative authorities when the Sahara was a Spanish province, with the national identity card of the father of the now Appellant being produced. The Plaintiff has produced two certificates from the Ministry of Justice of the Islamic Republic of Mauritania which bear legalisation seals of the Ministry of Foreign Affairs & Aid of the Kingdom of Spain, as well as seals of the Spanish consular and diplomatic organs, which underscore the fact that, though there are some differences among the various documents as to the mention of the name and date of birth, it is nonetheless the same person. The discrepancies among the different documents with respect to the date and place of birth may well be due to ignorance on the part of the Plaintiff himself as regards his exact data of birth, but this in no way detracts from the essential fact of his being of Spanish origin, which has been proved by means of the Family Record Book on being the son of Spanish nationals.

All the above is proof of the Plaintiff's Spanish status, given that the documentation presented by the Plaintiff based on his father's national identity card and the Family Record Book cannot be construed in any other way, in the light of the process of provincialisation of the territory of the Sahara analysed above. To the above we should add that the facts of the case analysed here are similar to administrative dossier 03/498, a ruling rendered in favour of Mr. Jorge, of

Algerian nationality, furnished as evidence in ordinary appeal number 134/04, in which the Government Authorities (*Subdelegación del Gobierno*) in Badajoz took into consideration the Family Record Book issued by the Spanish Authorities, the applicant's national identity card, the parents' marriage certificate and the father's status as a retired member of the Spanish armed forces, for the purpose of deciding on the applicant's Spanish status; accordingly, this is documentation similar to that deemed sufficient by the Defendant Authorities for the purposes of granting a visa exemption and residence permit, so that there is no ground for applying a different solution to the case now before the court".

* Decision of the Asturian Provincial High Court (Section 5) of 22 January 2007 (JUR 2007\59728)

Acquisition of Spanish nationality by choice.

"Legal Grounds:

(…) THREE. (…) The above having been settled, the next issue to be examined is whether or not evidence has been furnished in the present case of the nationality of origin or *jus sanguinis* envisaged under Article 17.1 a) of the Spanish Civil Code, whereby persons born of Spanish fathers or mothers are Spanish nationals. On this point, we find that the inference to be drawn from the court record of proceedings, and specifically from the documents furnished, is that both father and mother are shown at the Villaviciosa and Cacabelos Civil Registries respectively, as Spaniards born in Spain, though against both entries there is a note in the margin attesting to recovery in 1976 and 1981 respectively, by both parents of Spanish nationality, renouncing the Cuban nationality which they had possessed until then. What the Plaintiff has, however, not proved is that on the date of his birth, 29–06–55, the father or mother were Spanish, this point being substantial, because, as Del Corral Rivas states, in the application of Article 17.1 a) to persons born before the entry into force of Act 51/82, the most authoritative opinion – De Castro, González Compos, etc. – is to deem that, under the pre-1982 law, Spaniards of origin were and continue to be those who had Spanish nationality at the date of their birth. In contrast, the documentary evidence shown on the record of proceedings, specifically in the document signed by the Plaintiff entered on pages 117 and 118, shows that at the date of his birth the nationality of both parents was Cuban. However, on the father being of Spanish origin, the case before the court is not affected by the fact that the Plaintiff's birth occurred prior to the above-mentioned Act 51/82 because, while it is true that in a number of rulings the Directorate-General of Registries & Notaries held that "Article 17.1 of the Civil Code as amended and revised by Act 51/82 of 13 July established the full equivalence between paternal and maternal filiation as grounds for attribution of Spanish nationality, on stipulating that children of a Spanish father or mother are of Spanish origin; and that there is no ground to hold that this new law may have retroactive effect with respect to births which occurred before the entry into force of Act 51/1982 and, less still, with respect to those which occurred before the publication of the Spanish Constitution", in the case in dispute there is evidence, as has been explained, that

the Plaintiff's father was originally Spanish, with the above-mentioned obstacle of the nationality of his parents at the date of his birth constituting the bar that prevents his claim from being upheld. Thus, it is to be noted that in the Act of 15–07–54, in force when the Plaintiff was born, Article 17 of the Civil Code defined the following as being Spanish: 1) children of a Spanish father; and 2) children of a Spanish mother, though the father be foreign, where such children do not follow the father's nationality. (…)".

* Ruling of the Directorate-General of Registries & Notaries, of 11 January 2007 (TOL 1.033.983)

Spanish nationality of person born in Spain of Chilean parents to avoid statelessness.

"Legal Grounds:

(…) II. This case-dossier seeks a declaration having the value of a simple presumption (cf. Article 96–2. CRA) to the effect that a person born in Spain in 1977, the son of Chileans born in Chile, has Spanish nationality. The interested party bases his application on the current Article 17.1c) of the Civil Code, because the laws of his country do not attribute Chilean nationality "*jure sanguinis*" to persons born outside Chile but instead require residence in said country for more than one year for acquisition of nationality. The judge appointed to hear Civil Registry claims, applying Article 17.1c) of the Civil Code retroactively, has issued a Court Order in which he holds that, on being born stateless, the interested party is entitled to Spanish nationality of origin. This Court Order has now been brought on appeal by the Public Prosecutor's Office.

III. At the interested party's date of birth, Article 17, as amended and revised by the Act of 15 July 1954, was in force. This provision did not envisage the situation of statelessness as a ground for acquisition of Spanish nationality, and at subsection 3 defined Spanish nationals as "persons born in Spain of foreign parents, if the latter had been born in Spain – which is not the case – and were domiciled in Spain at the date of birth", thus meaning that it is not applicable to the present case. The Act of 13 July 1982, introduced a rule into Article 17 of the Civil Code whereby Spanish nationals of origin were defined as "persons born in Spain of foreign parents, if both parents had no nationality or if the legislation of neither parent attributed nationality to the child", a form of wording that was retained in the amendment made by the Act of 17 December 1990 and is currently in force. Insofar as births that occurred before the entry into force of the Act of 13 July 1982 are concerned, the tacit retroactivity of the transcribed rule has been maintained by this Directorate (*Centro Directivo*) ever since its Ruling of 7 December 1988, in view of the rule's aim of preventing situations of statelessness. The principle of "*favor nationalitatis*" suffices to underpin this outcome, without any need to have recourse to the application of the terms of Transitional Provision 1. of the original provisions of the Civil Code, which would, moreover, lead to the identical conclusion, involving, as it does, a right that was declared for the first time in the new legislation and, provided that the interested party has no nationality, does not prejudice another right acquired

from the same source. What happens in the present case is that the interested party's Chilean nationality is referred to in a number of documents in the case-dossier, so that, in principle, one cannot speak of a situation of statelessness. It is true, however, that there is also a certificate from the Chilean Consulate in Las Palmas, stating that Appellant does not hold Chilean nationality, since for that purpose he would have had to reside in Chile for the legally required time. Yet this point of residence must be assumed to exist, because if this were not so there would be no explanation for the nationality of said country having been assigned to the interested party.

Indeed, the indicated form of attribution "*jure soli*" of Spanish nationality does not appear in our law until the above-mentioned reform of the 1982 Civil Code, and if, in accordance with this Directorate's aforesaid doctrine, the new law can be construed as having retroactive effect with respect to births which occurred in Spain prior to its entry into force, then it is clear, bearing in mind the rule's purpose of preventing situations of statelessness, that whereas said attribution of Spanish nationality could, where applicable, benefit Spanish-born persons who, at the date of the entry into force of the 1982 Act, had no nationality, it would, to all intents and purposes, be excessive to force this retroactive effectiveness in cases such as the present, in which, at the date of the entry into force of Act 51/1982 of 13 July, the Spanish-born person already had his parents' nationality – to wit, Chilean – "*jure sanguinis*".

IV. Furthermore, as stated in the appeal, Spanish legislation in force at the date of birth did not attribute nationality *jure soli* in cases such as that of the interested party. It did, however, confer the possibility of opting for Spanish nationality to those born on Spanish territory of foreign parents who did not come within the provisions of Article 17 subsection 3 (cf. Article 18.1. of the Civil Code, as amended and revised by Act of 15 July 1954), and there is no evidence to show that the interested party exercised this option to which he is entitled. Neither is there evidence that he exercised the option envisaged under Act 18/1990 of 17 December (first and second transitional provisions)".

* Ruling of the Directorate-General of Registries & Notaries, of 13 March 2007 (TOL 1.044.496)

Preservation of Spanish nationality by nationalised United States citizen.

"Legal Grounds:

(…) III. Among the amendments introduced by the regulation of nationality under the Civil Code, Act 36/2002 of 8 October, special attention must be drawn to those relating to the matter of loss (cf. Article 24 and 25 of the Civil Code) for the purposes of deciding this appeal. Hence, if Spanish nationality continues to be lost by emancipated persons who, on habitually residing abroad, voluntarily acquire another nationality or exclusively use such foreign nationality as might have been attributed to them prior to emancipation, with loss arising after the elapse of three years from the date of acquisition of foreign nationality or emancipation respectively, then the novelty is nevertheless introduced whereby interested parties can prevent loss if, within the stipulated time limit

they declare their desire to preserve their Spanish nationality before the Civil Registrar. In certain measure, this amounts to rehabilitating the preservation of Spanish nationality for emigrants that Act 51/1982 of 13 July had introduced and that, as was noted in the doctrine, had been abolished, without any clear explanation as to the reason why, by Act 18/1990 of 17 December. At all events, however, it is evident that preservation of nationality necessarily presupposes its previous possession, and this is the issue debated in the case-dossier. In order to contend the existence of such possession, the claimant bases herself on the fact that, at the date of his death, the father was of Spanish origin due to his being, in turn, the child of Spanish parents. Yet it appears from the case-dossier that the father, born in France, acquired Nicaraguan nationality, and it was this nationality that he bore at the daughter's date of birth, according to the registration of the latter's birth. The mother's nationality was also Nicaraguan, which is why it was this nationality that the parents transmitted "*jure sanguinis*" to their daughter. In order for the interested party to have been able to obtain a favourable ruling, she would have had to adduce sufficient evidence to show that her father bore Spanish nationality at the date of her birth. Not only has this fundamental fact not been proved in the pleadings filed, but, as we have seen, what is to be deduced from the case-dossier is precisely the contrary, namely, that the father, rather than possessing Spanish, did in fact possess Nicaraguan nationality. Consequently, there can be no declaration of Spanish nationality of origin. Nor does she have the right of choice envisaged under Article 20 of the Civil Code, because her father was not born in Spain and because, on there being no evidence of the latter's Spanish nationality there is no proof that she might at any time have been subject to the *patria potestad* of a Spanish national. The fact that he may have had Spanish identity documentation in no way detracts from the foregoing. All this is understood to be the case, without prejudice to the fact that the interested party may benefit, as the granddaughter of Spaniards, from the reduced time limit of legal residence in Spain envisaged under Article 22.2 f) of the Civil Code for acquisition of Spanish nationality".

* Ruling of the Directorate-General of Registries & Notaries, of 22 March 2007 (TOL 1.049.785)

Recovery of Spanish nationality.

"Legal Grounds:

(…) III. In order to be able to register the recovery of Spanish nationality, it is, needless to say, essential that sufficient evidence be shown to prove that the interested party has possessed Spanish nationality "*de jure*" at a previous point in time. The Registrar is correct in her assessment on holding that at the date of her birth the interested party had no attributive right whatsoever to Spanish nationality by virtue of "*jure sanguinis*". Indeed, Article 17 of the Civil Code, as amended and revised by Act of 15 July 1954, and in force at the claimant's date of birth, laid down that, among others, the following were Spanish, namely, the children of a Spanish father – in this case the father had US nationality – and the children of a Spanish mother, though the father be a foreigner, where such

children do not follow the father's nationality. In this second case, however, the interested party would have had to prove: that when she was born her mother possessed Spanish nationality because she had not followed her husband's US nationality when she contracted marriage (cf. Article 23 of the Civil Code, as amended and revised by Act of 15 July 1954); and, in addition, that at birth she did not follow her father's nationality, and this last point has likewise not been proved. These are the reasons that have led the Civil Registrar of R. to issue the Court Order brought on appeal. Notwithstanding the fact that this is right and proper in every respect, the decision rejecting the claim cannot be confirmed, because, as we shall see, the Appellant's claim finds legal protection in the fact that, even if she failed to acquire Spanish nationality by the indicated route, she nevertheless acquired it by virtue of "*jure soli*".

IV. Indeed, as intimated above, the following circumstances pertaining to the Appellant are to be found in the factual grounds underlying the present case: 1.) she was born on Spanish territory in 1966; 2.) her Spanish mother was also born in Spain and was domiciled in Spain at the date of her daughter's birth; and 3.) her father was domiciled in Spain at that same date, was born in the United States and has US nationality, as does the daughter. Accordingly, the point must be resolved, by reference to the date of birth, in the light of the provisions laid down by the law in force at that date, and in particular, by Article 17–3. of the Civil Code as amended and revised by Act of 15 July 1954, according to which Spanish nationals were: "persons born in Spain of foreign parents, if the latter had been born in Spain and were domiciled in Spain at the date of birth". As will be observed, this dual condition for deeming Spanish nationality to be attributed to the newborn girl was solely met in the case of the mother, who, moreover was Spanish, but not in the case of the father. Now, it has been reiterated doctrine of this Directorate (*Centro Directivo*) to construe said rule in the sense of deeming that it would suffice for these two circumstances of birth and domicile in Spain to be met by only one of the parents, based on the following arguments: 1) the use of the plural "parents" was not a decisive reason for deeming it necessary for both parents to have been born and domiciled in Spain, since such use, which was in line with the plural "born" (*nacidos*), could also obey the need to use a generic term that embraced cases in which there might be only one legally known parent; 2) the comparison with the singular "father" and "mother" employed by subsections 1. and 2. of the same Article was of no importance, because in those subsections it was Parliament's manifest intention to circumscribe one or the other case to only one or other parent; and, 3) as the letter of the rule is not an insurmountable obstacle for excluding any other possible interpretation, the interpretation that best responded to the "*ratio*" of the rule was to be preferred, which obeyed the purpose, clearly outlined in the Preamble to the Act of 15 July 1954, of preventing "the descendants of foreign nationals from being indefinitely perpetuated in the national territory".

V. To these arguments it must be added that, dating from Act 51/1982 of 13 July, the current wording of said Article 17 decides clearly in favour of requiring the status of also having been born in Spain to be met by only one

of the parents in order for a child born in Spain to be Spanish "*jure soli*". As indicated in this Directorate's Ruling of 25 April 1988, this law, inasmuch as it is merely explanatory or interpretative of another previous law, must be deemed to be tacitly imbued with retroactive effect with respect to the specific correlative point it sets out to clarify, in line with the most authoritative legal scholarship".

* Ruling of the Directorate-General of Registries & Notaries, of 29 March 2007 (TOL 1.049.790)

Application for Spanish nationality by a Guatemalan. Dual Nationality Convention between Spain and Guatemala of 28 July 1961.

"Legal Grounds:

(…) II. The problem that this appeal poses is whether a Guatemalan by birth who is in Spain as a pupil training to become a professional member of the naval marine corps is entitled to acquire Spanish nationality, under the terms of the prevailing Dual Nationality Convention, on his having undertaken a three-year training commitment for this precise purpose. Faced with the interested party's application, the judge appointed to hear Central Civil Registry claims issued a practice direction ordering the case-dossier to be shelved, holding that the former's residence in Spain was not of a nature envisaged under said Convention.

III. For the purposes of acquisition of Spanish nationality, this Directorate (*Centro Directivo*) has come to hold that it suffices for Guatemalans by birth to declare their desire to acquire said nationality and establish their domicile in Spain, with this being constituted simply by registration of acquisition at the Civil Registry. In other words, the need for being entered on such registries as might be designated by the laws or governmental orders of the country (cf. Articles 1. and 3. of the Convention), was construed as being met by registration at the Spanish Civil Registry, to which Article 66 of the Civil Registry Act already alluded before the Convention came into force.

IV. However, another possible interpretation of said Articles 1. and 3. of the Convention was that prior registration at registries designated by the laws or governmental orders of one country or another could be deemed to refer to the administrative registries that monitor the status of foreign nationals in Spain or Guatemala.

V. This interpretation, whereby acquisition of nationality is subordinated to legal residence in the respective country, is, according to the official information obtained, what the Guatemalan authorities apply with respect to Spanish nationals wishing to acquire Guatemalan nationality, inasmuch as the latter are required to have obtained residence at the Directorate-General for Immigration. Consequently, the need to arrive at a uniform interpretation of the international convention in the application thereof (cf. Article 12 thereof) meant that, having due regard to reasons of reciprocity as well, as its Ruling of 23 November 1994, this Directorate came to construe said Convention in the sense that the requirement of a prior residence permit in Spain is necessary for Guatemalans

to be able to acquire Spanish nationality under the terms of the above-mentioned Convention.

VI. This interpretation was finally included in the Protocol of Amendment of the above Convention of 10 February 1995, whereby "for the purposes of this Convention, domicile is deemed to be acquired in the country in which legal, permanent and continuous residence has been obtained, in accordance with the conditions and manner envisaged by the emigration legislation in force in each of the Contracting States". Likewise, the Second Additional Protocol of the Convention lays down that Guatemalans and Spaniards of origin shall be entitled to acquire Guatemalan and Spanish nationality, respectively, by virtue of the sole fact of establishing domicile in Spain or in Guatemala, as the case may be, in accordance with the internal legislation of each of the parties. The question that arises in the present case is whether the above requirement of "legal, permanent and continuous residence" or the requirement of domicile – something that presupposes the habitual nature of the latter (cf. Article 40 of the Civil Code) – can be deemed to be met by the Appellant obtaining a visa for the purposes of study or, as in this case, instruction for military training.

VII. The concept of "permanent residence" is defined by Spanish immigration legislation as "the situation that authorises a person to reside in Spain indefinitely and work on equal terms with Spanish nationals" (cf. Article 32 of General Public Act (*Ley Orgánica*) 4/2000 of 11 January). In this case, the contractual relationship between the interested party and the Naval Marine Corps Academy (*Escuela de Infantería de Marina*) has a duration of three years, in accordance with the provisions of Article 68 b of Act 17/1999, which regulates the Armed Forces staff regime, i.e., he is subject to a time limit that is in breach of the requirement of permanence and indefinite duration which residence must fulfil for interested parties to benefit under the Dual Nationality Convention. In this case, therefore, rather than being permanent, residence, for the legally envisaged time of three years, is temporary. Consequently, it must be concluded that, as the Appellant is in this country under conditions of temporary residence, he does not fulfil the necessary prerequisite of permanent residence in Spain, envisaged under the Convention for the purpose of obtaining Spanish nationality."

VIII. FOREIGN NATIONALS, REFUGEES AND NATIONALS OF EUROPEAN UNION MEMBER STATES

1. Legal regime governing foreign nationals

a) General situation

* Constitutional Court Decision, No. 236/2007, of 7 November 2007 (RTC 2007\236)

Rights and freedoms of foreign nationals in Spain. Appeal of unconstitutionality relating to certain provisions of the General Public Act 4/2000 of 11 January on

the rights and freedoms of foreign nationals in Spain and their social integration: violation of rights of meeting, demonstration, association, education, trade-union membership and effective judicial protection: partially upheld: unconstitutionality of Articles 7.1, 8 and 11.1, unconstitutionality and no inclusion of the term "residents" in Articles 9.3 and 22.2, declaration of the constitutionality of Article 60.1.

"Legal Grounds:

(…) 2. The Parliament of Navarre's right to bring this action having been duly declared, the merits of the case must now be examined. In addition to the specific grounds of unconstitutionality pleaded with respect to each rule challenged, which will be the subject of study in the following legal grounds, the appeal as a whole rests on two arguments of a general nature which must previously be addressed. The first refers to the freedom that Article 13.1 of the Spanish Constitution bestows upon Parliament to regulate the exercise of public freedoms guaranteed to foreign nationals in Spain under Title I, and the limits to which it is subjected in the establishment of differences with respect to nationals. As stated by State Counsel (*Abogado del Estado*), this appeal questions the constitutional legitimacy of some of the rules challenged because they make the exercise of certain constitutional rights on the part of foreign nationals conditional upon obtaining authorisation to stay or reside in Spain and, thus, circumscribe enjoyment of such rights exclusively to persons whose situation in the country is legally valid. According to the Appellant company, Parliament establishes a difference in treatment based on said legal status which is outside the bounds of the constitution. For the first time, therefore, this Court has been asked to decide on the possible unconstitutionality of an Act that denies the exercise of certain rights, not to foreign nationals in general, but rather to those who do no possess the relevant permit to stay or reside in Spain. This fact is necessarily pivotal for the decision that we must make because, while the Constitution draws no distinction among foreign nationals in terms of the legal validity of their stay or residence in Spain, it may nevertheless be constitutional for Parliament to take this difference into account in order to define the legal status of foreign nationals, provided that in so doing it does not violate constitutional rules or principles. The second general argument on which the appeal rests, albeit not explicitly pleaded, maintains that most of the rules challenged are unconstitutional, on account of their alleged contradiction with international treaties ratified by Spain in matters of rights and freedoms, thereby attributing to the latter the status of parameter of the constitutionality of Spanish Laws based on the provision laid down by Article 10.2 of the Spanish Constitution, which is rejected by the State Counsel. (…)

3. With respect to the first point, we should start from the fact that our legal system does not "deconstitutionalise" the legal regime of foreign nationals, which regime looks to the constitutional text as a whole for its prime source. Specifically, possession and exercise of fundamental rights by foreign nationals in Spain must be deduced from the provisions that comprise Title I, interpreted systematically. To ascertain these, recourse must be had: firstly, to each of the provisions that recognise rights included under said Title, given that the problem

of their possession and exercise "depends on the right affected" (Constitutional Court Decision 107/1984 of 23 November, Ground 4); and secondly, to the rule contained in Article 13 of the Spanish Constitution (…) From what has been said thus far, it can be concluded that the dignity of the person, which is at the head of Title I of the Constitution (Article 10.1 of the Spanish Constitution), constitutes an initial restraint on Parliament's freedom when it comes to regulating the rights and freedoms of foreign nationals in Spain under Article 13 of the Spanish Constitution. The degree of connection between a specific right and said dignity must be determined on the basis of such right's content and nature, which will in turn make it possible to specify to what extent it is indispensable for the dignity of the person, conceived as an individual subject of the law, having due regard, for this purpose, to the Universal Declaration of Human Rights and international treaties and agreements referred to by Article 10.2 of the Spanish Constitution.

4. The Parliament envisaged under Article 13 of the Spanish Constitution is likewise limited to regulating those rights which, as has been stated, "the Constitution directly recognises foreign nationals as possessing" (Constitutional Court Decision 115/1987, of 7 July, Ground 2), with the rights of meeting and association being specifically referred to here. This at once implies that Parliament may not deny such rights to foreign nationals, though it may indeed establish "additional conditions" with respect to their exercise on the part of such nationals. However, "it must, in all cases, respect the constitutional prescripts, since said provision [Article 13.1 of the Spanish Constitution] cannot be upheld by allowing Parliament to configure the very content of the right freely, when this has been directly recognised by the Constitution as being possessed by foreign nationals (…). Indeed, it is one thing to authorise differences of treatment between Spanish and foreign nationals, and quite another to view such authorisation as a possibility of legislating in this regard without taking the constitutional mandates into account" (Constitutional Court Decision 115/1987, Ground 3). In such cases, as was stated in said judgement, the mandate contained in the constitutional rule "clearly constitutes a mandatory content of the right [of association] which is imposed on Parliament when it regulates the exercise thereof" by foreign nationals. (…) Hence, with respect to the first general argument raised in this appeal, we must state that Article 13.1 of the Spanish Constitution grants Parliament a notable degree of freedom to regulate the rights of foreign nationals in Spain, with it being possible for certain conditions to be laid down for the exercise thereof. Nevertheless, a regulation of this nature must bear in mind: firstly, the degree of connection between the specific rights and the guarantee of human dignity, in accordance with the criteria described; secondly, the mandatory content of the right, when this has been directly recognised by the Constitution as being possessed by foreign nationals; and thirdly, in all cases, the content delimited for the right by the Constitution and international treaties. Lastly, the conditions of exercise stipulated by the Act must be targeted at safeguarding other constitutionally protected rights, assets or interests, and ensuring adequate proportionality vis-à-vis the ends pursued.

5. Linked to the above, the second general argument on which the appeal of unconstitutionality brought by the Parliament of Navarre is based, contends that most of the challenged legal provisions are unconstitutional because they fly in the face of international treaties ratified by Spain in matters of rights and freedoms, which by virtue of Article 10.2 of the Spanish Constitution would thus become the canon of constitutionality of Spanish laws. (…) It cannot be concluded from earlier rulings that the Spanish Parliament, on regulating the rights of foreign nationals, was not limited under Article 10.2 of the Spanish Constitution by international treaties ratified by Spain. As stated, Article 13 of the Spanish Constitution authorises Parliament to lay down restrictions and limitations on the rights of foreign nationals in Spain, but without affecting "the content delimited for the right by… international treaties" (Constitutional Court Decision 242/1994 of 20 July, Ground 4), which must be observed in order to lend shape to the sense and scope of fundamental rights. As with any other public power, Parliament too is obliged to interpret the relevant constitutional rules in accordance with the content of said treaties or conventions, which thus becomes the "constitutionally declared content" of the rights and freedoms set forth under Title I, Chapter two of our Constitution. This has been recognised by the Court, specifically with respect to the right of entry and permanence in Spain, on declaring that Parliamentary freedom on drawing up these rights "is in no way absolute" (Constitutional Court Decision 94/1993 of 22 March, Ground 3), because "limits on the possibilities open to Parliament stem from" the 1966 International Covenant on Civil and Political Rights (Supreme Court Decisions 242/1994 of 20 July, Ground 5; 24/2000 of 31 January, Ground 4). To sum up, on reviewing and assessing the Act challenged in these proceedings, it is for us to decide whether Parliament has respected the limits imposed under Article 10.2 of the Spanish Constitution, by international laws, which oblige it to interpret the rights and freedoms enshrined in our Constitution in accordance with them. Yet the international treaties or conventions invoked do not in themselves become the canon of the constitutionality of the specific provision appealed, as the Appellant Parliament would have the Court believe. The legal rules challenged must be compared against the corresponding constitutional rules that proclaim the rights and freedoms of foreign nationals in Spain, construed in accordance with the content of said treaties or conventions. Consequently, their unconstitutionality can only be declared if the former enactments having the rank of an Act of Parliament violate the constitutionally declared content of such rights and freedoms.

6. (…) As is reflected in the Introduction and Background, the first rule appealed is the one contained in Article one subsection 5, which rewords Article 7 subsection 1 of General Public Act 4/2000, (…) In brief, the constitutional definition of the right of meeting drawn up by our case-law, and its link with the dignity of the person, deriving from international texts, imposes the duty upon Parliament to extend the recognition of a minimum content of said right to all persons *per se*, regardless of the situation in which they may find themselves. In this regard, we have stated that, "the exercise of the right of meeting and

demonstration form part of such rights as, pursuant to Article 10 of the fundamental law, are the foundation of political order and social peace", so that "the principle of freedom of which it is a manifestation demands that such limitations as may be placed upon it, respond to cases deriving from the Constitution, and that in each case it be proved beyond doubt that the established scope of constitutional freedom has indeed been exceeded" (Constitutional Court Decision 101/1985)" (Constitutional Court Decision 59/1990 of 29 March, Ground 4). Parliament can lay down specific conditions for the exercise of the right of meeting by foreign nationals who are in our country without the corresponding stay or residence permit, provided that it respect a content of said right which the Constitution safeguards as belonging to any person, regardless of the situation in which he may find himself. The new wording given by the challenged provision to Article 7.1 of General Public Act 4/2000 does not amend the right of meeting by establishing conditions for its exercise, but instead denies this right to foreign nationals who do not possess a permit to stay or reside in Spain. In accordance with the criteria set out in the previous legal grounds, this legal regulation violates Article 21 of the Spanish Constitution in its content constitutionally declared by the texts to which Article 10.2 of the Spanish Constitution refers. Accordingly, Article 7.1 of General Public Act 4/2000 of 11 January, as amended and revised by Article 1 subsection 5 of General Public Act 8/2000 of 22 December, must be declared unconstitutional, with the effects that are set forth under Ground 17 below.

7. The Parliament of Navarre challenges the wording given to Article 8 of General Public Act 4/2000, by Article one subsection 6 of the Act challenged in these proceedings (...) The right of association is thus linked to human dignity and the free development of personality, in that it protects the value of sociability as an essential dimension of the person and is an essential element for public communication in a democratic society. In view of the fact that it is a right whose content is tied to this essential dimension, the Constitution and international treaties "extend it universally", and hence denial of its exercise to foreign nationals who lack the pertinent stay or residence permit in Spain is not constitutionally admissible. This does not mean, as has already been pointed out with respect to the right of meeting, that it is an absolute right, and Parliament may therefore set limits on its exercise by any person, provided that its constitutionally declared content is respected. As in the previous legal ground, the points considered thus far lead to the conclusion that the new wording afforded to Article 8 of General Public Act 4/2000 by Article 1 subsection 6 of the Act challenged, on excluding any exercise of this right by foreign nationals who lack a stay or residence permit in Spain, has violated Article 22 of the Spanish Constitution in its content constitutionally declared by the texts to which Article 10.2 of the Spanish Constitution refers. Accordingly, Article 8 of General Public Act 4/2000 of 11 January, as amended and revised by Article 1 subsection 6 of General Public Act 8/2000 of 22 December, must be declared unconstitutional, with the effects that are set forth under Ground 17 below.

8. The Parliament of Navarre challenges subsection 7 of Article one of the Act brought on appeal in these proceedings, which rewords Article 9 subsection 3 of General Public Act 4/2000 (…) In conclusion, the content, constitutionally declared by the texts to which Article 10.1 of the Spanish Constitution refers, of the right to education guaranteed under Article 27.1 of the Spanish Constitution includes access, not only to basic education, but also to non-compulsory education, of which foreign nationals who are in Spain and are not holders of a residence permit may not be deprived. The provision challenged bars foreign nationals under the age of eighteen years without a stay or residence permit from access to post-compulsory secondary education, to which, under the terms of the prevailing education legislation, any person who has obtained a School Leaving Certificate (*Graduado en Educación Secundaria Obligatoria*), normally at the age of sixteen years, is nevertheless entitled. This right of access to non-compulsory education of foreign nationals under the age of legal majority forms part of the content of the right to education, and its exercise may be made subject to requirements of merit and ability but to no other circumstance, such as the administrative status of the minor. Accordingly, the inclusion of the word "residents" in Article 9.3 of General Public Act 4/2000 of 11 January, as amended and revised by Article 1 subsection 7 of General Public Act 8/2000 of 22 December, must be declared unconstitutional.

9. The Parliament of Navarre challenges Article one subsection 9 of the Act brought on appeal (RCL 2000, 2963 and RCL 2001, 488) in these proceedings, which rewords Article 11.1 of General Public Act 4/2000 (RCL 2000, 72, 209). (…) The concept according to which the right of trade-union membership would be exclusively exercised by those who enjoy worker status in the legal sense, i.e., by those who "are subject to a employment relationship" (under the terms of Article 1.2 of the Trade Union Act [*Ley Orgánica de libertad sindical – LOLS*]), does not correspond to possession of the fundamental right, which may, among other possible goals, be exercised in defence of workers' interests, for the purpose of enjoying said legal-formal status. Hence it is not absurd, as contended by State Counsel, to recognise this specific right as being held by foreign nationals without authorisation to stay or reside in Spain, who may join Spanish trade-unions for the defence of their interests, including that of the legal validity of their situation, notwithstanding the irregularity thereof. Here too, the point should be made that the Parliament can lay down specific conditions for the exercise of the right of trade-union membership by foreign nationals who are in our country without the corresponding stay or residence permit, provided that it respect a content of said right which the Constitution safeguards as belonging to any person, regardless of the situation in which he may find himself. Consequently, the above line of reasoning leads to the unconstitutionality of Article 11.1 of General Public Act 4/2000 of 11 January, as amended and revised by Article 1 subsection 9 of General Public Act 8/2000 of 22 December, for being contrary to Article 28.1 of the Spanish Constitution. As noted above, the unconstitutionality of this phrase refers exclusively to

the right to join trade unions freely, but not to the right to join a professional organisation, with the effects that are set forth under Ground 17 below.
(…)

13. Article one subsection 16 of General Public Act 8/2000 which rewords subsection 2 of Article 22 (formerly 20) of General Public Act 4/2000, is challenged (…) The provision is deemed to be contrary to Article 119 of the Spanish Constitution read in conjunction with Article 24.1 of the Spanish Constitution, and contrary to Articles 2 and 10.1 of the Spanish Constitution, Article 10 of the Universal Declaration of Human Rights, Article 14.1 of the International Covenant on Civil and Political Rights, and Article 6.1 of the European Convention on Human Rights. This is because it introduces a limitation on a legally defined positive obligation (*derecho prestacional*) that forms part of the essential content of the right to judicial protection (Article 24 of the Spanish Constitution), and amounts, *de facto*, to barring non-resident foreign nationals who lack resources to litigate from access to jurisdiction and the right to effective judicial protection (…) Accordingly, Constitutional Court Decision 95/2003 of 22 May, basing itself on "the instrumental connection between the right to free legal aid and the right to effective judicial protection" (Ground 3), and reiterating the possession by foreign nationals, "regardless of their legal status" of the right to effective judicial protection (Ground 5), concludes that the challenged law is flawed by unconstitutionality, due to the fact that it entails "a violation of the right to effective judicial protection enshrined in Article 24.1 of the Spanish Constitution, possessed, as has been stated, by all persons (including foreign nationals not legally resident in Spain)" (Ground 6). Indeed, on defining the scope of the declaration of unconstitutionality of Article 2 of the Legal Aid Act (*Ley de Asistencia Jurídica Gratuita – LAJG*), the Decision makes the point that: "On the need for the requirement of legality of residence being deemed unconstitutional, foreign nationals who are in Spain and meet the legally required conditions therefor are entitled to access to free legal aid in connection with any type of court proceedings for the purpose of which they enjoy the necessary legitimation" (Ground 8). Application of this case-law to assessment of Article 22.2 of General Public Act 4/2000, as amended by the Act challenged in these proceedings, leads directly to its being deemed unconstitutional. Indeed, subsection 1 of Article 22 confers on "foreign nationals who are in Spain and lack sufficient financial resources (…)" the right to free legal aid "in such administrative or judicial proceedings as may lead to the denial of their entry, to their repatriation or expulsion from Spanish soil, and all proceedings in matters of asylum". For its part, subsection 2 of Article 22, here challenged, reserves to "foreign national residents" the right to free legal aid "on the same conditions as Spanish nationals in any court proceedings in which they may be a party, whatever the jurisdiction in which these are pursued". This amounts to the need for the requirement of legality of residence in order for foreign nationals to be able to have access to free legal aid in connection with any type of court proceedings for the purpose of which they enjoy the necessary legitimation, which is unconstitutional for the reasons outlined above.

Consequently, subsection 2 of Article 22 (previously 20) of General Public Act 4/2000, as amended and revised by Article one subsection 16 of General Public Act 8/2000, must be declared unconstitutional, for running counter to Article 24 of the Spanish Constitution.

(…)

17. (…) In the present case, it would not be right and proper for this Court to declare articles of General Public Act 8/2000 that guarantee the rights of meeting, association and trade-union membership to foreign nationals who have obtained Spanish stay or residence permits, null and void, as this would produce a legal vacuum which would not be in accordance with the Constitution, since it would lead to denial of such rights to all foreign nationals in Spain, regardless of their status. Neither would it be right and proper to declare only the phrase, "and which they shall be entitled to exercise when they obtain authorisation to stay or reside in Spain", which is featured in each of these Articles, null and void, as this would entail a clear alteration of Parliament's will, inasmuch as all foreign nationals – regardless of their administrative status – would thereby be rendered fully equal in the exercise of the above-mentioned rights. As reasoned above, it is not for this Court to decide upon a certain option in matters of immigration, since its ruling must be limited, in all cases, to declaring whether or not there is place in our Constitution for a matter submitted to its judgement. Hence the fact that the adjudged unconstitutionality requires that it be Parliament, within the freedom of law-making (Constitutional Court Decision 96/1996 of 30 May, Ground 23), deriving from its constitutional position and, ultimately, from its specific democratic freedom (Constitutional Court Decision 55/1996 of 28 March, Ground 6), that should, within a reasonable period of time, lay down the conditions for exercising the rights of meeting, association and trade-union membership on the part of foreign nationals who lack the relevant permit to stay or reside in Spain. This is without prejudice to the possible control of constitutionality of such conditions, a task which falls to this Constitutional Court. An altogether different case is the scope of the judgement pertaining to the provisions of General Public Act 8/2000 that relate to foreign nationals' rights to non-compulsory education and free legal aid, the unconstitutionality of which must entail the nullity of the term "residents", contained in each, since, as explained under the pertinent legal grounds, such rights are constitutionally recognised as being possessed by all foreign nationals alike, regardless of their administrative status.

DECISION (…) 1) To declare the unconstitutionality, with the effects indicated in legal ground 17, of Articles 7.1, 8 and 11.1 (exclusively with respect to the right to join a trade union freely) of General Public Act 4/2000 of 11 January, as amended and revised by General Public Act 8/2000 of 22 December. 2) To declare the inclusion of the term "residents" in Articles 9.3 and 22.2 of General Public Act 4/2000 of 11 January, as amended and revised by General Public Act 8/2000 of 22 December, unconstitutional, and null and void. 3) To declare that Article 60.1 of General Public Act 4/2000 of 11 January, as amended and revised by General Public Act 8/2000 of 22 December, and construed in the terms expressed in legal ground 15 hereof, is not unconstitutional."

* Constitutional Court Decision, No. 259/2007, of 19 December 2007 (RTC 2007\259)

"Legal Grounds:

…7. The work permit referred to by the disputed provision is governed by Article 36.1 of General Public Act 4/2000, which, as amended and revised by the General Public Act 14/2003 of 20 November, provides that, in order for a foreign national over the age of 16 years to exercise any gainful work or professional activity, he requires the relevant previous administrative work permit. This permit will enable such a foreign national to reside for the period during which it is in force and must be applied for by the employer who is seeking to engage the foreign worker. Having said this, any scrutiny of the ground of unconstitutionality pleaded must begin by conducting an in-depth examination into the constitutionally declared content of the right to strike, in order, then, to assess whether the limitation imposed by Parliament is constitutionally lawful in the light of the essential content of the right, taking into account the interpretative criterion derived from Article 10.2 of the Spanish Constitution, which makes it necessary for rights and freedoms enshrined in our Constitution to be construed in accordance with international treaties and agreements ratified by Spain. Article 28.2 of the Spanish Constitution lays down that, "workers' right to strike in defence of their interests is recognised. The Act that regulates the exercise of this right shall lay down the necessary guarantees to ensure maintenance of essential community services". Similarly, in connection with this right, Article 8.1 d) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 16 December 1966 recognises the right to strike, exercised in accordance with the laws of each country, and Article 6 of the European Social Charter recognises the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike. Dating from the initial Constitutional Court Decision 11/1981 of 8 April, we have stated in our case-law that a strike, "which in real terms consists of the cessation or stoppage in the workplace, is a subjective right of the worker, that simultaneously assumes the form of a fundamental constitutionally enshrined right, in coherence with the idea of social and democratic rule of law. Among other meanings, it has that of legitimating the means of defence of the interests of socially dependent population groups and strata, as a constitutionally recognised instrument of pressure, which long-standing experience has shown to be necessary for asserting the interests of workers in socio-economic conflicts, conflicts that the social state cannot exclude, but for which it can and must provide the appropriate institutional channels" (Constitutional Court Decision 123/1992, de 28 September, Ground 4). With respect to this same Constitutional Court Decision and legal ground, we also stated that, "As with any other right, the right to strike must move within a perimeter defined, on the one hand, by its connection with or opposition to other rights ensconced in the Constitution, protected to a greater or lesser degree, and, on the other, by the limits which are left to the Act to lay down, provided that the essential content of said right is in no case denied or diminished. This, in principle, consists of cessation of work in

any of its forms, a core element which in turn implies the power of declaring oneself to be on strike, defining the strike's cause, reason and aim, and that of choosing the form deemed most suitable for the purpose, within the legally accepted types". As its goal, the strike may be aimed at claiming improvements in financial conditions, or work conditions in general, and may also amount to a protest with repercussion on other spheres or settings. In its exercise, this right is directly related to the right of trade-union membership enshrined in Article 28.1 of the Spanish Constitution, since, as the above-mentioned Constitutional Court Decision 11/1981 (Ground 11) states, "the right to strike is defined as being a right attributed to workers "*uti singuli*", though it must be exercised collectively through working in concert or agreement among them. To clarify what is understood by collective exercise, it should be pointed out that the powers of the right to strike are those of convocation or call, the drawing-up of claims, publicising or dissemination, negotiation and, finally, the decision to bring the action to a halt. It can therefore be said that, while the possession of the right to strike belongs to workers, and that each of them has the right to join or not join declared strikes, the powers that make up the exercise of the right to strike, in terms of collective and concerted action, correspond both to workers and to their representatives and trade-union organisations". The consequence of this is that, while possession of the right to strike belongs to the workers, this right may also be exercised by trade unions established in the work setting in which the strike takes place, as an essential content of the right of trade-union membership. Having thus defined the essential content of the right to strike rooted in our doctrine, namely, that part of the content which is indispensably necessary for the right-holder to be able to satisfy the interests for whose attainment said right is conferred, it must be noted that neither the literal wording of Article 28.2 of the Spanish Constitution nor Royal Decree-Law (*Real Decreto Ley*) 17/1997 of 4 March (*sic*) on labour relations draws any distinction among the holders of the right, but that, in line with the right's consideration as a legitimate means of defence of workers' interests, it is recognised as being applicable to all such holders in general. This concept of "worker", relevant for the determination of the subjective scope of the right to strike, must, in line with what has already been stated in Constitutional Court Decision 236/2007 (Ground 9) with respect to the foreign worker's right of trade-union membership, in its material form, regardless of the legality or illegality of his status, be construed in such a way that it encompasses any gainfully employed person who provides his services within the scope of another person's organisation and management. This being so, the requirement of the situation of legality in Spain for the exercise of the right to strike by foreign workers is not constitutionally admissible, though the aforesaid situation may be required for the valid execution of their contracts of employment [Article 38 of General Public Act 4/2000, and Articles 1.1 and 7 c) of the Consolidated Text of the Workers' Charter, approved by Order in Council (*Real Decreto Legislativo*) 1/1995 of 24 March]. Moreover, it must be recalled that Article 36 subsection 3 paragraph two of General Public Act 4/2000, as amended and revised by

Article 1.29 of General Public Act 8/2000, itself lays down the criterion whereby the lack of a pertinent work permit does not invalidate the contract of employment with respect to the rights of the foreign worker. In this way, Parliament itself, through such a declaration of equivalence, seeks to protect the rights of the foreign worker who, albeit lacking the administrative work permit, is effectively working in our country. Such rights vest in a person, not by reason of his nationality or the administrative status in which he may find himself at any given moment, but solely by reason of the fact of his being a worker. Numbered among these basic rights is [Article 4.1.e) of the Workers' Charter] the right to strike. Accordingly, with respect to said right, there can be no doubt as to the fact that a right of this nature, individually held and collectively exercised, comes within the legitimate means for defence of workers' interests – this latter concept being far wider than that of "rights" – so that it is not constitutionally admissible for a worker to be deprived of a protection, the very *raison d'être* of which is the defence of his interests. Hence, the total exclusion of the right to strike from foreign nationals who are working, despite lacking the pertinent administrative permit for the purpose (and which, moreover, they are not personally obliged to request), is not reconcilable with the recognition of the right to strike proclaimed by Article 28.2 of the Spanish Constitution, construed in accordance with the international laws on this right, ratified by Spain, and in particular with Article 8.1.d) of the ICESCR, whereby the signatory States to the Covenant are required to guarantee the exercise of the right to strike, such that the aim of any regulation laid down must be to ensure and not prevent the exercise of the right by workers who provide their services in gainful employment without having the requisite legal permits. The concept criticised is not analogous to possession of the fundamental right, which may be exercised in defence of workers' interests, including, among others, that of obtaining the full legal validity of their administrative status. Hence it is not absurd, as argued by State Counsel, to recognise this specific right as being held by foreign nationals without authorisation to stay or reside in Spain, who may exercise it in the defence of their interests, including that of the legal validity of their situation, notwithstanding the irregularity thereof. Thus, the law disputed here does not guarantee the due protection of interests which, through constitutional recognition of the right to strike, are sought to be satisfied. Accordingly, the phrase, "where they are authorised to work", of Article 11.2 of General Public Act 4/2000 of 11 January, as amended and revised by Article 1 subsection 9 of General Public Act 8/2000 of 22 December, must be declared unconstitutional for being contrary to Article 28.2 of the Spanish Constitution.

(…)

DECISION: In view of the above, the Constitutional Court, BY THE AUTHORITY VESTED IN IT BY THE SPANISH CONSTITUTION, has decided to uphold in part the appeal of unconstitutionality No. 1640–2001 brought by the Andalusian Regional Authority (*Consejo de Gobierno de la Junta de Andalucía*) against General Public Act 8/2000 of 22 December, on revising and amending General Public Act 4/2000 of 11 January, on the rights and freedoms of for-

eign nationals in Spain and their social integration, and consequently holds and declares: 1) the appeal to have lapsed, due to the *ex post facto* disappearance of the subject matter with respect to the challenge of Article 22.2 of General Public Act 4/2000 of 11 January, as amended and revised by General Public Act 8/2000 of 22 December; 2) Articles 7.1, 8 and 11.1 (exclusively with the right to join a trade union freely) of General Public Act 4/2000 of 11 January, as amended and revised by General Public Act 8/2000 of 22 December, to be unconstitutional, with the effects set forth under legal ground 9 above; and, 3) the phrase, "where they are authorised to work" in Article 11.2 of General Public Act 4/2000 of 11 January, as amended and revised by General Public Act 8/2000 of 22 December, to be unconstitutional and null and void."

[In connection with the previous two decisions, also note Supreme Court Decisions No. 260/2007 (Full Session) of 20 December 2007 (RTC 2007\ 260); No. 261/2007 (Full Session) of 20 December 2007 (RTC 2007\261); No. 262/2007 (Full Session) of 20 December 2007 (RTC 2007\262); No. 263/2007 (Full Session) of 20 December 2007 (RTC 2007\263); No. 264/2007 (Full Session) of 20 December 2007 (RTC 2007\264); and No. 265/2007 (Full Session) of 20 December 2007 (RTC 2007\265)]

* Supreme Court Decision (Chamber for Administrative Proceedings, Section 2) of 31 January 2007 (RJ 2007\1357)

Immigration. Expulsion improper in law while Government Authorities have a permit application pending.

"Legal Grounds:

(…) SIX.… Accordingly, the order of expulsion and entry ban issued by the Government Authorities and challenged here was improper in law, since it is reiterated case-law doctrine that such measures cannot be adopted while the Government Authorities have a permit application pending decision, as they must be deemed to have had in this case vis-à-vis that made in Almería on 23 November 2000."

* Supreme Court Decision (Chamber for Administrative Proceedings, Section 5) of 18 January 2007 (JUR 2007\285)

Immigration. Proportionality of sanction imposed.

"Legal Grounds:

(…) FIVE. The Appellant pleads that the punishment of expulsion is disproportionate due to a fine being the consequence generally envisaged for the adjudged infringement, pursuant to Articles 55 and 57 of General Public Act 8/2000.

This ground must be allowed.

In General Public Act 7/85 of 1 July, expulsion from national territory was not deemed a sanction, and this is to be concluded from a joint interpretation of Articles 26 and 27 of the Act, with a fine being stipulated as the penalty

for the infringements of the provisions of the Act, and it being laid down that infringements which led to expulsion could not be made subject to monetary sanctions. It was thus made clear in said enactment that those cases in which a fine was levied could not be punished by expulsion.

General Public Act 4/2000 of 11 January (Articles 49–a), 51–1–b) and 53–1)), as amended and revised by General Public Act 8/2000 of 22 December (Articles 53–a), 55–1–b) and 57–1)), changes this concept of expulsion, and lays down that in the case of serious and very serious infringements of Article 53 subsections a), b), c), d) and f), "expulsion from Spanish territory may be applied in lieu of the penalty of a fine", and introduces provisions, in the light of which "for purposes of ranking penalties, on imposing them (sic) the competent organ shall adjust these to criteria of proportionality, assessing the degree of blame, and, where applicable, the harm caused or risk posed by the infringement and the importance thereof".

* Supreme Court Decision (Chamber for Administrative Proceedings, Section 5) of 21 March 2007 (RJ 2007\1936)

Immigration. Work permit. National employment situation. Definition by the company of "position of trust".

"Legal Grounds:

(...) THREE. (...) Article 40 of Organic Law 4/2000, as amended and revised by Organic Law 8/2000, lays down that, "No account shall be taken of the national employment situation when a contract of employment or job offer is targeted at: a) Covering posts of trust on statutorily set conditions". This statutory provision was further elaborated by Article 71.2.a) of the Implementing Regulation of the Act, approved by Royal Decree 864/2001, in which the following was provided:

"2. The national employment situation shall likewise not be applicable in the following cases:

a) workers who have been appointed to cover positions of trust. In this respect, those holding positions of trust are deemed to be any employees who solely perform activities specific to senior management on behalf of the enterprise that engages them, based on reciprocal trust, and who legally enjoy the enterprise's representation or have a general power of attorney conferred upon them.

Highly qualified workers who, possessing essential expertise for implementing the investment, are specialists or perform functions relating to the necessary supervision, management and administration for the establishment, development or liquidation of the aforesaid investment, shall be viewed in the same light. These workers must have proven experience in the performance of said functions or have undertaken work in similar posts in the investing enterprise or in the group of enterprises of which the former may form part.

In view of this statutory framework, it is evident that this undefined legal concept of "position of trust", to which the Appellant's representative in court alludes for the purpose of excluding the initial work permit from the need to

have regard to the national employment situation, cannot encompass a work post such as that in question, namely, that of warehouse clerk; it being impossible to accept his submission that it is only the enterprise offering the job that is competent to decide which work posts are and which are not describable as being "of trust", because the concept is delimited in the Implementing Regulation itself in accordance with objective parameters, which can neither be ignored nor set aside by the mere subjective opinion of the party offering the work post, and no major dialectic efforts are called for to reason that the post of warehouse clerk does not fall within those envisaged under the aforesaid Article 71.2.a)".

* Supreme Court Decision (Chamber for Administrative Proceedings, Section 5), of 27 April 2007 (RJ 2007\2144)

Denial of entry into Spain. Improper, due to the fact that suspicions with respect to failure to meet the necessary requirements lack sufficient weight.

"Legal Grounds:

…FOUR. – (…) The rules and regulations just transcribed show that presiding public officials are empowered to demand the production of these documents evidencing the purpose and conditions of the planned stay, though, it must be noted, not in every case, nor indiscriminately and unconditionally, but only: a) where there are data or circumstances – and this is duly set forth in a reasoned fashion in the decision – which raise the suspicion that the stated purpose and/or the conditions of the stay do not correspond to reality; b) where, due to its nature or singularity, it would be usual for the traveller to be in possession of documents that justify said purpose and/or conditions. Thus, the case under review does not come within these cases. Neither of the administrative rulings challenged in the Lower Court, the original ruling and the judgement dismissing the administrative appeal, make any mention of what the specific documents were that were lacking and that gave rise to the doubt about the truth of the reason cited for entry and the ensuing denial of entry onto national soil. Similarly, these documents were not identified in the "proposed report of the presiding public official". In view of the former and the latter, it must be concluded that these documents would, perhaps, be those relating to payment of travel expenses, hotel reservations for the totality of the planned stay and the tour programme or plan, indicating the tourist sites to be visited. Hence: firstly, starting from the fact that the interested party carried with him a sum of money adequate to defray the cost of his stay in Spain and had booked a return ticket to his country, the doubts evinced by the Investigating Official in charge of the case-dossier as to whether the airline ticket had been paid by the interested party himself or by his parents are not of a weight or importance that would suffice to justify denial of entry onto national territory; secondly, it is not at all infrequent for a tourist trip to be without a planned itinerary, in which the successive places to be visited and the matter of lodging are left to be randomly decided by such information as may be obtained once the traveller is already in the country, or to such whims as may at any given time may take

the traveller's fancy when faced with the various options that arise, or, indeed, to the chance events thrown up by the journey itself. As is only understandable, the traveller's age, knowledge of the language of the country of destination, financial means, etc., etc., are circumstances that can inspire a decision of this nature; and thirdly, the suspicion based on the lack of a hotel reservation cannot be accepted as well-founded because the interested party stated that he would initially be staying at the home of some relatives, with the police officers going so far as to make a telephone call to a cousin of the Appellant, who indeed resides in Spain and stated that he was expecting the interested party to come to his home. The above leads the Court to uphold the ground of cassation along with the claim submitted in the administrative appeal to have the decision set aside. (This, the conclusion at which we have arrived in this suit, does not contradict the conclusion reached in Appeal in Cassation No. 9415/03, (in which we stated there was no case to answer in said appeal in cassation), because in those proceedings there were circumstances that rendered the suspicion about the real intention of the journey well-founded and so entitled the Authorities to require the traveller to produce the documents specified; a well-founded doubt that does not exist in the present case)….".

* Supreme Court Decision (Chamber for Administrative Proceedings, Section 5) of 24 May 2007 (RJ 2007\5898)

Expulsion. Previous criminal sentence: purely by virtue of its existence, there cannot be deemed to have been a real, present and sufficiently serious threat that would affect a fundamental interest of society.

"Legal Grounds:

…FIVE. – (…) To wit; it must be asked whether at the date on which the expulsion order was issued (6 August 2002), the permanence of the interested party on Spanish territory constituted a "real, present and sufficiently serious threat that might affect a fundamental interest of society". The answer (which in other cases could be affirmative in view of the seriousness of the offence for which the Plaintiff was sentenced), must be negative in this case, because the following circumstances are present: 1). – Mr. Donato resided in Spain since 1988. 2). – The events constituting the offence were committed in 1992, i.e., ten years before the administrative expulsion dossier was opened. 3). – The sentence in respect of those events was passed by the National High Court on 9 October 1995 and on cassation by the Supreme Court on 16 December 1996. In other words, based on this latter date, six years before the administrative expulsion dossier was opened. 4). – In 2001, (that is to say, five years after the final sentence was passed by the Supreme Court and six months prior to the administrative expulsion dossier being opened), the Authorities granted the interested party a temporary residence permit by reason of long-established residence (*arraigo*) (4 December 2001) and then a work permit as an employed worker (14 March 2002), the latter just two months before said opening of the dossier. We are not unaware that Article 57–4 of the General Public Act 4/00 provides that expulsion shall in all cases entail the cancellation of any permit to

stay in Spain held by the foreign national expelled; but what is of importance here is not this effect but rather the fact of the grant of residence permit, and, moreover, that this was by reason of long-established residence, when the ground of expulsion which was subsequently applied by the Authorities without any explanation that would justify the contradiction, was already present. What is important is this: that, on said date, the Authorities found no ground, apart from the previous criminal sentence, for denying these permits. 5). – If this were not enough, the following circumstances are also applicable to Mr. Donato: a) he owns a property in the town of Orusco de Tajuña, where he lives with his two children; b) he has been entered on the municipal electoral roll; c) he is working for "Rodes y Construcciones, SL", a company whose manager has placed on record (exhibit No. 10 of those annexed to the claim) that Mr. Donato's professional conduct is highly positive, that his integration as an employee is irreproachable and that he is a worker worthy of the company's greatest trust; d) he is registered with the Social Security. Consequently, despite the criminal sentence, it cannot be said that the interested party's permanence on Spanish soil now constitutes a real, present and sufficiently serious threat that might affect a fundamental interest of society; and, apart from the criminal sentence, the Authorities have mentioned no circumstance from which a threat of this nature might be deduced".

* Decision of the Extremaduran High Court of Justice (Chamber for Administrative Proceedings, Section 1) of 31 January 2007 (RJ 2007\2801)

Hiring of foreign workers without a work permit. Offences and penalties under labour law.

"Legal Grounds:

(…) SEVEN. – Insofar as definition is concerned, the type of offence consists of "Businessmen who use foreign workers without having previously obtained the requisite work permit, committing one offence per each foreign worker employed", with this being punished pursuant to Article 55 1 c) with a fine of 1,000,001 pesetas for each foreign worker employed." "Requisite" must be construed as appropriate for the activity to be undertaken, from which it must be concluded that such permits as may be held to perform other activities or for other places in the national territory, are not appropriate and hence not "requisite", since each type of permit is subject to different legal requirements. Workers that the Plaintiff acknowledges to be working for it held work permits in some cases as employed persons, in others for activity as domestic servants or for other provinces, and hence these were not the pertinent permits. However, inasmuch as the facts fit the legal definition, this leads us to examine the Plaintiff's culpability, in that we are involved in punitive proceedings in which the application of the principles of criminal law, with slight nuances, is reiterated doctrine. The principle of culpability envisaged under Article 130.1 of Act 30/1992 means that only those liable, even by virtue of simple omission, may be punished for acts constituting an administrative infringement. Such simple omission cannot be construed as inclusion of objective liability in punitive administrative law.

Culpability is an irreplaceable element of all administrative infringements, so that intentionality or error is relevant, to the extent to which evidence thereof may be indicative of the accused's good faith, which in this case has been shown by the Appellant enterprise, as will be explained below.

EIGHT. – It is a fact proved by the Appellant that, with respect to workers who held an inappropriate work permit, it complied with the legal requirements. They were duly registered with the Social Security, entered on the Registration Book (*Libro de Matrícula*) and had their contributions paid to the Social Security Treasury Department. It is also a proven fact that the Plaintiff submitted the Job Offer to the Extremaduran Employment Office (*Servicio Extremeño Público de Empleo – Sexpe*) specifying one hundred vacancies. It appears that, to cover the offer, a total of 89 workers had been designated, 47 of whom provided evidence of their occupation with another company, and 42 of whom had not performed this special skill or [*gave*] other reasons. The Plaintiff even explained the problem at meetings held with Government bodies. Furthermore, it appears that, in its Ruling of 23 April 2002, the Directorate-General of Immigration, prior to the punitive Ruling itself and subsequent to the Official Report, agreed "to grant work-permit validity for the entire national territory and all sectors of activity to all work permits which, as a consequence of the applications submitted prior to the entry into force of the Implementing Regulation of the Act, had been or might be granted with the framework of the accreditation procedure by reason of long-established residence under Article 31,4 of General Public Act 4/2001…". The State Government Authorities view this Ruling as not being applicable to the case under review, solely on account of the fact of its being subsequent to the Official Inspection Report, which, even if it were true, would patently highlight the Authorities flexible attitude in the matter before us, a flexibility operating with greater justification still, when, at the date on which it was issued, the punitive proceedings had not yet been decided. Taking all these proven facts together, while a state of necessity is not to be deemed applicable as an exculpatory ground, the Plaintiff may nevertheless be deemed not to have acted in a manner so reproachable as to warrant punishment. On the contrary, it acted in good faith at all times, in view of the difficult circumstances in the sector, and in no case was it in breach of its duties as an employer with respect to the foreign worker, as intended by the statutory provision applied. Accordingly, with respect to foreign workers who held inappropriate work permits, the Court sees it proper and fitting to hold that there was no culpability, uphold the appeal, and declare the sanction imposed to be without effect….".

* Decision of the Andalusian High Court of Justice (Chamber for Administrative Proceedings, Section 4) of 23 March 2007 (RJCA 2007\704)

Immigration. Improper denial of work permit for strawberry picking. Reasoning underlying the Authorities' decisions.

"Legal Grounds:

(…) THREE. And, looking into the merits of decision, in order to arrive at a decision, it would be essential, in the first place, to examine Supreme Court doctrine as to the reasons given for the denial, the discretionary or non-discretionary nature of the denial, and the possibility of deciding here on the grant of the permit. This doctrine is summarised in the Decision of 10 June 2002 and, though it refers to the preceding Immigration Act, denial for reasons of employment is couched in the same terms, thereby rendering it applicable to the prevailing legislation. Thus, at legal ground three it states:

This Chamber has stated (decisions, among others, of 5 December 1989, 30 July 1995 and 15 April and 27 June 1997), in connection with the issue now addressed, albeit with reference to Article 18 of General Public Act 7/1985, which governed the rights and freedoms of foreign nationals in Spain, and Article 51 of the Implementing Regulation of the above Act approved by Royal Decree 1119/1986 of 26 May, that the competent Authorities do not enjoy absolute and total discretion in their power to decide. Instead, the public and private interests in play and the other legally regulated items of evidence must be considered in the weighing and analysis of the case, giving a reasoned account of the grounds that determine whether or not a work permit is granted, particularly in the case of denial. Only in this way, on dealing with a power of intervention of a fundamental right of the person protected by the Spanish Constitution, the 1966 New York International Covenant on Civil and Political Rights, and the 1948 Declaration of Human Rights, such as the right to work, is it subsequently possible to ascertain and verify in the courts whether the official decision issued is in keeping with the legal rules and regulations applicable, and draws its inspiration from the limits and purposes that objectively justify it. Having had due regard to the doctrine outlined above, the lack of the requisite report from the National Employment Centre cannot be deemed to be remedied by alleged evidence that the administrative body deciding the matter has the necessary data to render said report unnecessary. Accordingly, in line with this Chamber's reiterated doctrine, the ground of cassation must be allowed, the decision of the Lower Court rendered null and void, and, pursuant to the provisions of Article 102. 3 of the Administrative Appeals Act (*Ley de la Jurisdicción Contencioso-administrativa – LJCA*), what is fitting and proper must be decided within the terms in which the debate has been couched.

A decision that, in accordance with our case-law (cf. Decisions, among others, of 15 April and 15 July 1997), can be none other but to hold: firstly, that the administrative ruling originally challenged lacks the appropriate reasoning; and, secondly, that retroaction of proceedings is not fitting and proper, in keeping with this Chamber's reiterated doctrine (Decisions, among others, of 16 May 1995, 20 and 27 June 1997) which has laid down that the absence from the case-dossier of the report in question, a report that the Authorities were entitled to request, does not bring about the nullity of the proceedings due to the absence of said formality, since it is attributable to the Authorities themselves. Accordingly, the claim filed by the Plaintiff in the Lower Court must be allowed, consisting, not

only of the nullity of the administrative ruling, but also of the recognition of the right to have the job application registered in his name viewed favourably, by means of the grant of the pertinent permit for the said employment.

In our case, the case-dossier contains a report from the Provincial Deputy Director of Employment at the National Employment Centre, in the light of which there were 14,761 job applicants for the position of farm worker in the Province of Huelva, in the second fortnight of May 2001.

There can be no doubt that, as this involves non-skilled work, the number must be deemed high and highlights a situation of unemployment in the province. For the purposes of providing evidence, however, a certificate from the employment services has been produced, which shows that, at the National Employment Centre for Moguer, which covers Moguer, Palos, San Juan del Puerto, Bonares and Trigueros, there were 331 job applicants seeking work as farm workers. This, assessed in relation with the universally known fact of the great demand for labour for strawberry picking existing in the area, which constantly requires the hiring of foreign workers, something that the applicant for the Plaintiff's permit is indeed doing in this case, as is to be seen from the TC2 attached to the case-dossier, enables us to conclude that the employment situation in the area cannot justify the denial of the permit sought. Indeed, the report contained in the case-dossier tells us absolutely nothing about the national employment situation vis-à-vis the specific job for which the offer is made. Consequently, the report issued is as if it did not exist, with the result that, it behoves the Court to uphold the appeal and declare the Plaintiff's right to obtain the permit as sought".

b) Family reunification

* Decision of the Madrid High Court of Justice (Chamber for Administrative Proceedings, Section 2) of 11 January 2007 (JUR 2007\178767)

Denial of family reunification. Lack of documentary evidence of the requisite financial solvency.

"Legal Grounds:

(…) THREE. – The specific rules and regulations governing the procedure for the grant and issue of visas are to be laid down by statute, pursuant to additional provision eleven of Act 30/1992 of 26 November. In said procedure, the applicant may be required to appear in person. The exercise of the power to grant or deny visas is to be subject to prevailing international commitments on the matter, and be geared to attaining the Kingdom of Spain's foreign policy and other Spanish or European Union public policy goals, such as those of immigration, economic and citizen security.

In exceptional cases, other criteria to which the grant and denial of visas are to be subjected may be laid down by statute. The denial of a visa must be reasoned where this involves residence visas for family reunification or for work as an employed person, and, insofar as it is of interest to us here, Article 17 states that "1. A foreign resident has the right to be reunified in Spain with the

following family members: d) The parents or grandparents [*Translator's note*: literally, "ascendants"] of the "reunifier" or his spouse, where these are under his charge and there are reasons that justify the need to authorise their residence in Spain. 2. The conditions for the exercise of the right of reunification and, in particular, such right as may correspond to those who have acquired residence by virtue of a previous reunification shall be laid down by statute.["]

Article 18 of the Act regulates the procedure for family reunification as follows: 1. Foreign nationals wishing to exercise this right must apply for a residence permit for family reunification in favour of the members of their family with whom they wish to be reunified. At the same time they must provide evidence that they have suitable accommodation and the means of subsistence sufficient to attend to the needs of their family once reunified; 2. They shall be entitled to exercise the right to be reunified with their family members in Spain, when they have legally resided here for one year and have authorisation to stay a minimum of one year more; 3. When the application for family reunification is accepted, the competent authority shall issue a residence permit in favour of the family members who are going to be reunified, for a duration equal to the period of validity of the residence permit of the person seeking reunification; and, 4. The conditions for the exercise of the right of reunification by those who have acquired residence by virtue of a previous reunification shall be laid down by statute.

For its part, Article 8 of Royal Decree 864/2001 on residence visas lays down the following regulations: 1. Residence visas may be granted to foreign nationals wishing to move their residence to Spain. Subject to a previous favourable report by the competent government authority, residence visas for family reunification may be granted to foreign nationals who come within one of the cases envisaged under Article 17 of General Public Act 4/2000, as amended and revised by General Public Act 8/2000, and who apply for such a visa in order to be reunified with a relative resident in Spain. Said report shall have binding value with respect to the conditions that must be accredited vis-à-vis the "reunifier", pursuant to Article 18 of General Public Act 4/2000, as amended and revised by General Public Act 8/2000.

Where a residence visa is sought for family reunification, the "reunifier" resident in Spain must, prior to submission of the application, request a report from the government authority of the province where he resides, certifying that he fulfils the conditions envisaged under Article 18 subsections 11 and 21 of the General Public, as amended and revised by General Public Act 8/2000. The relative included in any of the cases of reunification envisaged under Article 17 of General Public Act 4/2000, as amended and revised by General Public Act 8/2000, must submit, along with the visa application, a copy, within the designated time limit, of the request for the report with the visa reference number incorporated and registered by the pertinent government office, as well as the documentation that attests to the family relationship and, where applicable, legal and financial dependency; in the case of a parent or grandparent of the "reunifier" or his spouse, he must submit documentation that attests to

the fact that said parent or grandparent is under the charge of the "reunifier" or his spouse and that there are reasons that justify the need to authorise his residence in Spain.

Where a residence visa is sought for family reunification, the Ministry of Foreign Affairs, pursuant to Article 8.2 of this Regulation, shall notify the government authority that the visa application has been duly submitted and shall request said authority to send it the pertinent report.

Thereafter, if the applicant, at the date when the decision is to be made, does not appear in the list of non-admissible persons, the Diplomatic Mission or Consular Office will assess the documentation and the reports attached thereto for the purpose, and decide on the visa application.

Denial of a residence visa for family reunification or residence with a work permit as an employed person must be reasoned, informing the interested party of the established facts and circumstances and, where applicable, of the witness statements received and the documents and reports, whether or not mandatory, incorporated, which, in accordance with the legal provisions applicable, have led to the decision to reject the application.

Save in cases in which the urgency of their resolution does not allow for a report, or the request for a report is superfluous due to the statutory requirements enunciated by Articles 14.5, 17.7, 41 and related provisions of the current Regulation being seen as having been reasonably accredited in the case-dossier, these visa applications may be made subject, by the Consular Office processing the application, to the report by the provincial government authority, which may issue this within the time limit of one month. Failure to issue a report within the designated time limit shall be construed as an absence of impediments to the application being decided. An unfavourable report is binding if the applicant is deemed to come within any of the causes for prohibition of entry.

Hence, we see that, notwithstanding the fact that Article 19 of Regulation states that in deciding upon visas regard shall be had to the interest of the State and the application of international commitments assumed by Spain on the matter, and that the visa shall be used as an instrument geared to attaining the Kingdom of Spain's foreign policy and other Spanish or European Union public policy goals – immigration, economic and citizen security policies in particular – under the rules and regulations outlined above, the courts are able to exert the pertinent control by having recourse to statutorily regulated items of evidence, salient facts, general principles of law and, in particular, to constitutional principles. Indeed, this is what this Chamber is seeking to do".

2. Right of asylum

* Supreme Court Decision (Chamber for Administrative Proceedings, Section 5) of 15 February 2007 (RJ 2007\2801)

Immigration. Asylum. Persecution by reason of sex, in order to enter into an unwanted marriage of a nature warranting statutory protection.

"Legal Grounds:

(…) THREE.… The ground will be upheld.

In effect, a review of the account of the facts by the asylum-seeker will suffice to show that it indicates persecution by reason of sex, in the form of family harassment to enter into an unwanted marriage, something that, in principle, is of a nature warranting statutory protection (due to the fact that it undeniably falls within the ambit of social persecutions). Indeed, this Third Chamber has already had occasion to declare in a number of decisions: that a situation of social, political and legal vulnerability and marginalisation of women in their country of origin, which evidently and seriously violates their human rights, is ground of asylum (Supreme Court Decision of 7 July 2005, Appeal No. 2107/2002); that persecution by reason of sex doubtless comes within the ambit of social persecutions (Supreme Court Decisions of 31 May 2005 (Appeal No. 1836/2002), 9 September 2005 (Appeal No. 3428/2002) and 10 November 2005 (Appeal No. 3930/2002)); and more specifically, that a situation of harassment of and threats against a woman to force her into a marriage is of a nature warranting statutory protection since it undeniably falls within the ambit of social persecutions (Supreme Court Decisions of 28 February and 23 June 2006, recs. No. 735/2003y 4881/2003). In these latter decisions, we transcribed a report from the Office of the United Nations High Commissioner for Refugees (UNHCR) which is highly eloquent of the situation of women in Nigeria and which it would be likewise appropriate to transcribe here. This report states that, "according to the NGO, Human Rights Watch, the rights of women in Nigeria were routinely violated. The Penal Code (RCL 1995, 3170 and RCL 1996, 777) explicitly stated that assaults committed by a man on his wife were not an offence, if permitted by customary law and if 'grievous hurt' was not inflicted. Marital rape was not a crime. Child marriages remained common, especially in northern Nigeria. Women were denied equal rights in the inheritance of property. It was estimated that about 60 percent of Nigerian women were subjected to female genital cutting". These assertions are to be found, listed in even greater detail, in a report of the UNHCR itself, which was entered into the proceedings of the Lower Court during the evidentiary period and is headed by a communication from this body indicating that "this Office wishes to place on record that forced marriage is a practice that could constitute gender-related persecution if the requirements of the definition of Article 1 of the 1951 Geneva Convention (RCL 1978, 2290, 2464) are met, bearing in mind that forced marriage constitutes a practice in violation of Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Article 23.3 of the International Covenant of Civil and Political Rights (RCL 1977, 893), among others".

* Decision of the National High Court (Chamber for Administrative Proceedings, Section 4) of 21 March 2007 (JUR 2007\98579)

Immigration. Asylum. Reasoning behind and stay of the enforceability of administrative rulings.

"Legal Grounds:

(…) THREE. – As is brought out in sharp relief by the Court Order challenged, precautionary justice forms part of the right to effective judicial protection, which includes the right to obtain a judgement founded on law, as the maximum guarantee against arbitrariness and unreasonableness in the exercise of public powers. Hence, this is a requirement linked, not only to Article 24 of the Spanish Constitution, but also to the primacy of the law (Article 117.1 of the Spanish Constitution), as a decisive factor in the legitimate exercise of the jurisdictional function (Constitutional Court Decision 55/1987, 131/1990). This does not give blanket authorisation to demand comprehensive and detailed judicial reasoning of every single aspect and point of view which the parties may have in respect of the issue decided, but instead that judgments resting on reasons which enable one to know the essential legal criteria that underpinned the decision, should be deemed to be sufficiently reasoned (Constitutional Court Decision 14/1991).

In accordance with constitutional case-law, the right to judicial protection is met by making it possible for the enforceability of an administrative act to be submitted to the decision of a court, and for the latter, with such information and rebuttal as may necessary, to decide on the stay thereof (Constitutional Court Decision 66/1984). In the motion brought to this end, within the limited scope in which it is possible for this to be done in motions of this nature (*sumaria cognitio*) [*Translator's Note*: i.e., preliminary inquiries roughly equivalent to committal proceedings], and without prejudging what might be declared on the day in the final decision, the positions of the parties and the legal grounds of their claim should be assessed (principle of appearance of good law; Court Order of the Supreme Court de 17 March 1992).

Having said this, the point must be made that the materialisation of the above-mentioned constitutional principle in the matter of the right of asylum, takes concrete form in the existence of well-founded fears of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion; there being no evidence of said risk being resuscitated through enforcement of the challenged administrative ruling".

* Decision of the National High Court (Chamber for Administrative Proceedings, Section 4) of 28 March 2007 (JUR 2007\104599)

Immigration. Asylum. Principle of international solidarity superimposed upon the value of human dignity. Contemplation of humanitarian reasons.

"Legal Grounds:

…THREE. (…) 3. – Concerning the application of the rules and regulations outlined in Decisions, among others, of 12 May and 20 October 2004, this Chamber has stated the following:

"The Chamber has lately been outlining the doctrine relating to the application of Article 17.2. Hence, since its Decision of 12 November 19l9 [*sic: Translator's Note*: this would appear to be an error and should instead read 1999], it has made the point that this provision of Act 5/84 as amended by Act 9/94, after

having established in the preceding subsection that refusal of leave for or denial of an application for asylum would, in line with the specifics of the case, lead to refusal of entry at the border, compulsory exit or expulsion from Spanish territory of the foreign national, if any of the requirements for entering or staying in Spain under the general immigration legislation were lacking, provides that, "Notwithstanding the provisions of the preceding subsection, the permanence in Spain of an interested party who has been refused leave to make an application or had his application denied, may, within the framework of general immigration legislation, be authorised for humanitarian reasons or reasons of public interest, particularly where persons are involved who, as a consequence of conflicts or serious disturbances of a political, ethnic or religious nature, have been forced to leave their country and do not meet the requirements referred to by Article three subsection 1 hereof."

We find ourselves, in this rule, with an eventuality allowed for by Parliament, to enable the Authorities to authorise a foreign national, who does not meet the requirements of Article 3.1 of the Act, to stay in Spain, thereby conferring upon the Authorities the possibility of assessing the specific situation of the asylum-seeker, with a margin of discretion for decision-making.

As is likewise recalled in said decision, this Chamber has, in essence, declared, Decision of 18 June 1999, that in line with Supreme Court case-law, for this avenue [*of asylum*] to be recognised, the foreign national's situation must be assessed in accordance with the principle of international solidarity superimposed upon the value of human dignity, so that only when these two values enter into play can one justifiably talk of this avenue. In this respect, the Council of State [*Translator's Note*: i.e., roughly equivalent to the Privy Council] (Legal opinions 53.039 and 53.677) considers that for the contemplation of humanitarian reasons, regard must be had to the anomalous situation of the country of origin in juxtaposition to the preservation or dignity of the person, rather than to a man's mere development or the improvement in personal situations in which a man may find himself, without its grant being fitting and proper where there is room for other possibilities pursuant to both Act 5/84 itself and, as the case may be, general immigration law".

* Decision of the National High Court (Chamber for Administrative Proceedings, Section 8) of 29 March 2007 (JUR 2007\120385)

Immigration. Asylum. Burden of proof as regards sufficient evidence for grant of asylum.

"Legal Grounds:

…TWO (…) Furthermore, in matters of denial of asylum, it is necessary to take into consideration the reiterated doctrine of the Supreme Court laid down, *inter alia*, in the decision rendered in Appeal in Cassation number 5091/2002 by Section Five, on 28 October 2005. At ground five of this decision, the following is said:

"It is essential to bear in mind that consolidated case-law of the Supreme Court interprets the regulations governing asylum and refuge in the sense that

a criterion of attenuation, though not total exoneration, of the burden of proof, is to be inferred from same (thus, for example, Decision of 1 June 2000, Cassation 4997/1996 and more recently Decisions of 6 April 2005, Cassation No. 6306/2000 and 30 May 2005, Cassation No. 1346/2002). It is true that for asylum to be granted, it is enough that there be sufficient evidence to show that the asylum-seeker harbours a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Sufficient evidence is thus enough; but this has to exist and the burden is on the Appellant to produce it".

* Decision of the National High Court, Chamber for Administrative Proceedings, Section 8, of 4 June 2007 (JUR 2007\199323)

Asylum. Grounds for grant of asylum non-existent, but existence of grounds to authorise asylum-seeker's permanence in Spain for humanitarian reasons.

"Legal Grounds:

...FOUR. – Based on the documentary exhibits annexed to the case-dossier, the asylum-seeker's account of the facts, the report of the Investigating Official to whom the challenged ruling is remitted, and the pleadings submitted in the claim, it must be concluded that evidence of the existence of persecution against the Appellant, in the sense described by the Geneva Convention, is not sufficiently well-founded. It is true, as reflected in the UNHCR report shown at page 7.1 and succeeding pages of the administrative dossier, that the events pleaded by the asylum-seeker are credible and coherent, occur progressively over the course of time, correspond to the reality experienced in the jails of Colombia, and the asylum-seeker's attitude, when the events described occur, correspond to what would be expected of a public officer threatened in the exercise of his post. Nevertheless, it is difficult to account for the fact that the Appellant stayed in Israel for 1197 days, from 14 June 2000 to 24 September 2003, without seeking asylum. The UNHCR report mentions that the formalities for seeking asylum in Israel tend to be rather difficult and "...it would be no surprise if the asylum-seeker had been given an appointment for one year's time, which might have dissuaded him from submitting his application". Even so, it must be borne in mind that the Appellant remained in Israel for three years and three months, i.e., more than enough time to have obtained an appointment and sought asylum, as is logically to be expected of a person who finds himself in an illegal situation and can be returned to his country of origin where, according to his declarations, he could be the subject of persecution.

This being so, it is logical to presume, as indicated in the Supreme Court Decision of 23 June 2004, that he was not frightened by the risk of bring expelled from Israel or that there was no fear of being persecuted or an imperious need to be protected, to seek refuge. However, such a presumption does not mean that the events, data or pleadings on which his application is based are manifestly false or improbable, with it being necessary for such events, data or pleadings to be specified in order to decide whether or not they are of sufficient weight and soundness to negate this presumption. In this case, with even greater need,

the burden of destroying the presumption falls on the asylum-seeker, either by justifying the impossibility of submitting his application in Israel, or by allaying the doubts about the well-founded fear of persecution he says that he experiences. Hence, from the perusal of the administrative dossier, the asylum-seeker's statements and the content of the claim, we must conclude that the presumption of the lack of a semblance of truth, deriving from the fact of his not having sought asylum until three years and three months had elapsed from the time of his exit from Colombia, has not been negated. According to reiterated Supreme Court case-law, for the grant of the right of asylum, full-blown proof is not needed of the fact that in his country of origin the asylum-seeker has suffered the persecution cited in the aforesaid provision, Article 3 of Act 5/84; it is enough that there is sufficient evidence in accordance with the nature of the case. Nevertheless, this type of inference or conjecture is indispensable to assess the probability, at least, of the alleged persecution, with the burden of proof falling upon the asylum-seeker, unlike the cases where leave is not given, as stated in Supreme Court Decision of 5 January 2005, reiterating the doctrine uttered on innumerable earlier decisions. In the present case, there was not sufficient evidence to prove, in the face of the presumption of lack of veracity stemming from the tardiness in requesting asylum, the existence of threats contended by the Appellant.

FIVE. – By way of an alternative plea, Counsel for the Plaintiff submits that authorisation be granted for the Plaintiff, his cohabiting partner and his daughter to remain in Spain for humanitarian reasons. Although the prerequisites of fact analysed above are insufficient for granting the Appellant the right of asylum, a possible situation of risk is nonetheless to be deduced from the facts which would justify the Appellants' permanence in Spain being authorised for "humanitarian reasons". It thus behoves the Court to uphold the appeal in part, without the need to take cognisance of any other grounds of challenge submitted in the claim".

* Decision of the National High Court, Chamber for Administrative Proceedings, Section 4, of 13 June 2007 (JUR 2007\199115)

Asylum. Application which in reality is ascribable to purely work-related and socio-economic reasons. The situation of generalised conflict in the country of origin insufficient. Non-existence of humanitarian reasons.

"Legal Grounds:

…SIX. – Assessment of the above leads us to regard as right in law the challenged ruling, affixed to the report drawn up by the Investigating Official reviewing the case-dossier, stating that the reasons pleaded by the asylum-seeker refer to purely work-related and socio-economic reasons which, in the absence of submission of documentation that would attest to the asylum-seeker's personal circumstances, do not justify the protection sought. The aforesaid highlights the fact that the administrative ruling challenged is indeed reasoned, because, though a generalised form of words is used, the ruling's annexation to the Investigating Official's report leaves no doubt as to the ground of refusal of leave and to

the possibility of contesting it without the slightest hint of defencelessness. It is true that, as maintained by the Plaintiff, it is not necessary for the asylum-seeker to provide evidence of individualised persecution, not even by inference or conjecture; and in this regard, the expressions contained in the challenged decision and transcribed in the preceding legal ground, which, taken out of context, appear to advocate undue evidentiary requirements, are not admitted. What is happening here, and gives rise to refusal of leave, as the Investigating Official's report and, with it, the administrative ruling, express with the utmost clarity, is that no account of the facts has been furnished that can come within any of the grounds covered by the institution of asylum, an irrefutable assertion in the case before the court. Mr. Ildefonso's problem stems from a complex family situation, which, in tandem with other factors, leads to an unsustainable financial situation, and which he seeks to avoid by coming to Spain, a praise-worthy aim but not one that is covered by the institution of asylum.

SEVEN. – The attention drawn by the Appellant to the situation in Mali is similarly not valid. In this respect, the Supreme Court's doctrine on dealing with requests for asylum based on conflicts taking place in the asylum-seeker's country of origin should be borne in mind. The High Court has stated (in essence, Decision of the Third Chamber, Section 6, of 4 April 2000 which, in turn, cites others of 30 May 1993, 23 June 1994 and 19 June 1998) that such a situation of generalised conflict does not suffice for the purpose of recognising asylum, since it does not evidence the personal, direct persecution that calls for the application of the former institution. The contrary would mean that any or all the citizens of a country in a situation or armed conflict, could have access to the protection afforded by the right of asylum, by virtue of pleading that they were nationals of said country, which would fly in the face of this institution and so distort its sense and meaning. Although this doctrine has been applied by the Supreme Court in cases of denial of right of asylum, what it means to say is that such a situation of generalised conflict does not constitute a ground of asylum if it does not take concrete form in the shape of personal persecution, and that the Authorities are thereby empowered to refuse leave for applications in such instances, as they have done in the case being judged here.

EIGHT. – In brief, and summarising the response to the party's submissions, the denial derives, not from the fact of evidence not having been produced, but instead from the fact that the account of the situation remains outside the institution of asylum, meaning that the ground to which recourse was had for refusal of leave, namely b), is fully applicable. There is no lack of reasoning in the court's judgement as alleged, and lastly, while mention is made in the text of the decision, as indicated, of a reference to evidentiary requirements, which has no bearing on the stage of granting leave for applications for asylum, no consequence whatsoever flows from this.

NINE. – We shall now proceed to analyse the Authorities' refusal to apply Article 17.2 of the Asylum Act (*Ley de Asilo – LDA*). Insofar as the humanitarian reasons invoked are concerned, it must be remembered that said Article 17.2 provides that, "Notwithstanding the provisions of the preceding subsection (in

which the effects both of not granting leave for and of denying an application for asylum are specified), the permanence in Spain of an interested party who has been refused leave to make an application or had his application denied, may, within the framework of general immigration legislation, be authorised for humanitarian reasons or reasons of public interest, particularly where persons are involved who, as a consequence of conflicts or serious disturbances of a political, ethnic or religious nature, have been forced to leave their country and do not meet the requirements enunciated by Article three subsection 1 hereof". The legal provision cited above is implemented by 23.2, 31.3 and Additional Provision 1 of the Regulation approved by Royal Decree 203/1995 of 10 February. As the Decision of 3 November 2004 highlights, the Supreme Court has stated that "this Court has untiringly repeated that the expression "may be" (*podrá*), used in certain legal texts, must be construed with the meaning of "must be" (*deberá*), provided that the conditions or circumstances stipulated in the legal system to decide in the sense envisaged by the law, are present (…)". In the case before the court, the decision of the Lower Court indicates, at its final legal ground: "All said, regardless of the fact that, in accordance with Supreme Court Decision of 13 May 2005, Appeal 1336/2002, in cases in which an alternative plea is submitted to obtain authorisation to stay in Spain for humanitarian reasons pursuant to the possibility envisaged under Article 17.2 of the Asylum Act, or in those cases where this is not requested but the Investigating Official reviewing the case-dossier makes a ruling in this respect, evidence is indeed relevant for the purpose of assessing whether said alternative plea is right and proper, evidence that is non-existent in the case before the court; an alternative plea that the Authorities sued here have taken into account in the administrative dossier, in order for it to be weighed, should no sound and well-founded reasons be deemed to exist for deciding that the return to the country of origin would pose a real risk to the interested party's life or physical integrity". Hence, such rejection is right in law. It should be added that, in order for the asylum-seeker to be able to remain in Spain for humanitarian reasons, it is essential that the above-mentioned reasons are found to be "linked to the very purpose of the right of asylum, which seeks the protection of persons who suffer persecution for reasons of race, religion, nationality, political opinions, or membership of persecuted social groups (Supreme Court Decisions of 20 December 2000, 3 October and 18 December 1997)". Yet, in the case before the court, the petition submitted by way of an alternative plea is drawn up by reference to the same prerequisites that have not been deemed to justify the grant of asylum, as explained under the preceding legal grounds, so that no reasons are deemed to exist for holding that the asylum-seekers might be in a situation that calls for their protection outside their country of origin due to the circumstances envisaged under Article 17.2 of the Asylum Act, without the denunciation of a situation of generalised violence being deemed sufficient in this regard, a situation which, by definition, would affect all the citizens of that country and not just the Appellant alone. Neither are there humanitarian reasons (Article 17.2 of Act 5/84) that would allow of a stay in Spain other than that

afforded by the right of asylum, because, as has been stated by the Supreme Court (Decision of 3 November 2004, among others), this provision refers in particular (there are no other reasons that might be applicable here) to "persons who, as a consequence of conflicts or serious disturbances of a political, ethnic or religious nature, have been forced to leave their country and do not meet the requirements enunciated by Article three subsection 1 hereof"".

* Decision of the National High Court, Chamber for Administrative Proceedings, Section 8, of 26 October 2007 (JUR 2008\3660)

Right to representation by legal counsel. Administrative appeal: partially upheld. Annulment of procedural proceedings in the case of a request for asylum, by reason of the asylum-seeker's defencelessness.

"Legal Grounds:

(…) TWO. – …In this case, despite having fulfilled the duty of furnishing information about legal assistance, it is true to say that the Authorities sued were in breach of the duties owed by them under the legal and statutory regulation applicable in view of the fact that, in effect, the request for assistance made by the Plaintiff was neither implemented nor did it materialise. It is plain from the literal wording of the provisions examined that there is a duty of information as to what constitutes the content of his right recognised by Article 119 of the Spanish Constitution and this, evidently, included the obligation of undertaking service-based and material activity aimed at ensuring that the right was real and effective. In essence, it seems clear that the Appellant lacked legal counsel and that the latter could have had an influence on the explanation of his version of the facts and the possible indication of suitable evidentiary material. If he had had legal counsel, the Plaintiff could hypothetically have submitted his application in a more solidly argued way and put forward the relevant evidence, which leads to the conclusion that there has been a substantial erosion of the specific possibilities of defence of the Plaintiff's interests in the administrative dossier in which the account of the facts assumed relevance. This criterion coincides with that maintained by the Supreme Court in its Decision of 9 September 2005, rendered in a case of refusal of leave in which it stated that, "The lack of legal counsel in case-dossiers such as that in question is not legally irrelevant, as the Lower Court would appear to state. On the contrary, we have stated in numerous decisions, e.g., in Decision of 5 July 2004 (Appeal in Cassation No. 4298/2000), that "this Chamber, in Decisions of 10 November 2003 and 1 June of the year in course, has caused respective rulings refusing leave to make applications for asylum to be rendered null and void because the asylum-seeker was assigned no lawyer to assist him in the administrative proceedings despite having requested the latter's assistance. The need for the right of technical defence, which asylum-seekers are recognised as having under Article 5.4 of Act 5/1984 of 16 March governing the Right of Asylum and Condition of Refugee (Asylum Act), is made manifest from the very opening of the case-dossier. As the last Decision cited states, bearing in mind that, as in this case, refusal of leave to make an application for asylum is based on the absence of

any of the grounds envisaged as determinants of recognition of the protection sought, "the very reply given by the Authorities and the ground on which it is based highlight the fact that one is in the presence of an application with technical connotations, inasmuch as, among other circumstances, it calls for legal knowledge of the grounds determining the right to asylum or refugee status. When Article 5.2 of the Regulation implementing the Asylum Act, approved by Royal Decree 203/1995 of 10 February, lays down that asylum-seekers are to be informed by the Authorities to which they have recourse, of the need to furnish the proof or evidence on which they base their application, as well as the rights corresponding to them under the Asylum Act, and in particular of the right to an interpreter and legal counsel, this refers to technical legal counselling prior to the application, not only for the purpose of answering the police questionnaire appropriately, but also, along with same, for the purpose of being able to furnish the proof or evidence on which the application is based. It is to be noted, however, that the narration of the facts in turn requires a transformation or, at least an attempt to bring it within one of the statutorily envisaged grounds for obtaining the right sought, based on such proof or evidence as may be produced. This implies that depriving the Appellant of this legal representation has prevented him from having particularly relevant technical counselling, and that, as a consequence, he can indeed be said to have been left defenceless. Accordingly, this leads to the present appeal in cassation being upheld, and the ruling that gave rise to these proceedings being rendered null and void, thereby carrying the administrative steps back in time so that Appellant's right to legal counsel can be honoured."

3. Nationals of European Union Member States

* Decision of the Valencian High Court of Justice No. 896/2007 (Chamber for Administrative Proceedings, Section 1), of 30 July 2007 (JUR 2007\340880).

FOREIGN NATIONALS: Exits from national territory: expulsions: improper: illegal stay: specific cases: Romanian citizens: effects of Romania's incorporation into the European Union: change in the law: not a matter of the sanction imposed (which, when levied, was right in law) having to be rendered void, but rather of same having to be deemed as having lost its enforceability, inasmuch as the most favourable law currently governing the permanence of Romanian citizens has to be applied.

"Legal Grounds:

…THREE. – The decision appealed, insofar as the date on which it was rendered is concerned, applies the doctrine laid down by the Decision of 30 June 2006 of Chamber 3, Section 5 of the Supreme Court, and by this Chamber as to the penalty of expulsion of foreign nationals from Spanish territory, and conducts a suitable analysis of the Appellant's factual and legal situation, concluding, correctly, that the administrative ruling ordering the expulsion was lawful. However, at the date of issuing this present decision, the Appellant, of

Romanian nationality, is a citizen of the European Community, and this must be taken into consideration.

The instrument of ratification of the Treaty of Accession of the Republics of Romania and Bulgaria to the European Union appears in the Official Government Gazette of 19 January 2007; this Treaty came into force on 1 January 2007.

Moreover, the ruling of the Ministry of Labour & Social Affairs of 26 December 2006 states that "7. As from 1 January 2007, no visa shall be required in the case of workers who are nationals of Bulgaria and Romania, where these are engaged for temporary work for periods not exceeding 180 days. In this case, the employment contracts, once signed in the country of origin by both parties, shall be submitted prior to the start of the employment relationship, accompanied by a copy of the official grant of the temporary residence and work permit, by the applicant company in the competent Labour & Social Affairs District or Branch, which shall process same."

Article 3 of the Additional Protocol stipulates that the Schengen provisions shall not be applicable, with respect to Bulgaria and Romania, in the remaining Member States, until this is agreed by the Council, subject to verification that the necessary conditions are met for applying the community patrimony in question.

The Additional Protocol to the Treaty of Accession envisages the possibility that Member States may adopt different transitional measures, which will entail, in the event of being applied, restrictions on the free movement and stay of Bulgarian and Romanian citizens; and this with certain limits. Thus, for example, conditions more restrictive than those existing at the date of signature of the Treaty of Accession may not be applied to Romanian nationals; and neither may Romanians who reside and work legally in another Member State be made subject to less favourable conditions than those applicable to other citizens of third countries. It is likewise envisaged that Member States which decide to apply transitional measures relating to this matter, may replace them by direct application of Articles 1 to 6 of Regulation 68/1612. However, while these provisions are suspended, measures are established in favour of the spouse and children under the age of 21 years who reside lawfully with the worker residing in a Member State.

In addition, measures are established in favour of Bulgarian and Romanian citizens who reside and work legally in another Member State at the date of accession and are admitted to that job market for a period of six months or more.

The transitional [*sic*] period set is two years for the approval of these transitional measures, which may be unilateral or bilateral, and a maximum period of five years for maintenance thereof. In the event of serious turbulence in the job market, the transitional period may be extended.

From the above it can be concluded that pre-existing Member States may establish transitional measures with respect to Romanian or Bulgarian citizens, transitional measures that could legitimate the continued existence of the penalty of expulsion. The question is whether such measures have been adopted in

Spain. Recently, therefore, Royal Decree 240/2007, which governs the regime of free residence and movement of Community citizens, first lays down the very exceptional cases in which any Community citizen may be expelled; these are only cases in which there are serious threats to public order or public security, Article 15. Article 15–7 adds that breach of the obligation to apply for a residence card or registry certificate can entail monetary penalties, but the expiration of a passport or identity document may not give rise to expulsion.

Accordingly, Transitional Provision three of this Royal Decree lays down that employed workers who are nationals of Member States that join the European Union may be made subject to certain limitations of access to the Spanish job market, by virtue of such Acts of Accession and in accordance with the decisions adopted by the Government in each case regarding the application of a transitional period in respect of this matter; in no case, however, may such transitional measures amount to a reduction or diminution of any of their rights as European Union citizens. These measures mean that such workers must obtain the pertinent work permit as an employed person, pursuant to Organic Act 4/2000.

The conclusion to be drawn from this is that the Government has not passed specific transitional measures governing the regime of stay and residence of Romanian citizens; and that, at all events, these transitional measures may in no way imply any reduction or diminution of their rights as Community citizens, but only the need for a work permit pursuant to Organic Act 4/2000. From this standpoint, it would appear that such citizens cannot be punished by expulsion simply on the basis of not having their documentation in order.

This leads to the conclusion that, by application of Article 128 of Act 30/92, which, according to Constitutional Court Decision 99/2000, is a derivation of the constitutional principle of legal certainty, notice to leave Spanish territory cannot be deemed fitting and proper.

Alternatively, it could be thought that, as the instructions of the Ministry of Labour of 26 December 2006, which refer to the impossibility of expelling Bulgarian and Romanian citizens save for reasons of public order and security, restrict their scope of application to those coming within the cases encompassed by such instructions (included among which are persons who were legal residents in Spain holding a work permit and persons who seek to work in Spain as from January 2007), it would be necessary for the Appellant to provide evidence to show that, as from January 2007, he sought to undertake work activity legally in Spain. However, irrespective of whether compliance in such a case with the penalty of expulsion would exclusively depend on the wishes of the interested party (in the event that he should decide to show willing to work in Spain, the sanction could not be enforced), the truth of the matter is that the instructions, as can be seen from Article 21 of Act 30/92, neither have the status of law nor bind the courts. From the transitional regime envisaged under the new regulation governing Community citizens resident in Spain it is to be concluded that this transitional regime only affects their work conditions and not the regime of expulsion."

IX. NATURAL PERSONS: LEGAL PERSONALITY, CAPACITY AND NAME

2. Protection of subjects lacking legal capacity

b) Minors lacking legal capacity

* Decision of the Madrid Provincial High Court, No. 66/2007 (Section 22) of 30 January 2007 (JUR 2007\155965)

Return of foreign minor in an irregular situation in Spain to his family of origin in Morocco. Guardianship of the Madrid Region.

"Legal Grounds:

(…) THREE. With the issue in question laid before the court on such terms, it seems necessary to recall that General Public Act 4/2000 on the rights and freedoms of foreign nationals in Spain and their social integration, provides that when State police and security forces locate a foreign national who has no travel documents and/or identity papers, and whose status of being below the age of legal majority cannot be established with certainty, he is to be given such immediate attention as he may need by the competent Juvenile Protection Services (*Servicios de Protection de Menores*), with the Public Prosecutor's Office to be notified thereof. The latter, on ascertaining that a minor is involved, shall place him in the charge of the competent juvenile protection services. At subsection 3, said provision [*Translator's note*: presumably this refers to Article 35] adds that the Central Government, in accordance with the principle of family reunification of the minor and subject to a prior report from the Juvenile Protection Services, shall decide what is right and proper as regards his return to his country of origin or to any country in which his relatives are to be found or, in default thereof, his permanence in Spain.

For its part, Royal Decree 864/20001, which approved the Regulation implementing the above Act, and which was in force on the date when said ruling on administrative guardianship was adopted, reiterates that is for the Central Government, in accordance with the principle of family reunification of the minor, after having heard what the latter has to say and subject to a prior report from the Juvenile Protection Service, to decide what is right and proper.… In principle, as the Appellant rightly states, the assumption, on the day, of administrative guardianship entailed the suspension, though not the deprivation, of the minor's parents' *patria potestad*, which did not exclude his subsequent reinsertion in the family itself, pursuant to the provisions of Article 172 of the Civil Code. Since this was resolved by the Central Government rather than by the Madrid Region, it is obvious – in line with the provisions analysed regarding foreign nationals below the age of majority – that guardianship could not be maintained, at least while José Francisco remained with his family of origin and did not return to Spain. Otherwise this would amount to a violation of the requirements of Article 277–1 of the Civil Code, which is undeniably applicable

to the case, whereby guardianship, which originated by virtue of suspension of *patria potestad*, is extinguished when such *patria potestad* is recovered by the holder thereof….".

3. Name

* Ruling of the Directorate-General of Registries & Notaries, of 23 May 2007 (Official Government Gazette 143/2007, of 15 June 2007)

Surnames. Application of Spanish law to nationalised foreigner. "Moving conflict": thesis of retroactivity, though, pursuant to Article 199 of the Civil Registry Rules & Regulations, there is an expiration period of two months following acquisition of Spanish nationality to make a declaration of intent to preserve surnames. Impossibility of preservation in the case examined, due to its being contrary to public policy.

"Legal Grounds:

…THREE. – It is true, nevertheless, that the legal solution, based on the criterion of application of Spanish law as governing the new personal status of nationalised persons (cf. Article 9 No. 1 of the Civil Code and Article 1 of the Munich Convention No. 19 of the International Commission on Civil Status done on 5 September 1980) does nothing but pose problems in these situations due to the so-called "moving conflict" between the previous personal legislation and the new, since it raises the problem of the same person being successively identified with two different surnames. To resolve this conflict, two possible solutions have been put forward. The first, based on the co-called "thesis of non-retroactivity", is based on the idea that the surname remains as it was established under the preceding national law and should not be changed even though the subject acquires a new nationality, a thesis that has the advantage of continuity of the subject's name. The second solution, or "thesis of retroactivity", starts from the contrary premiss, i.e., from the idea that the subject who changes his nationality ought to change his surname to adapt it to his new national law. This is the thesis followed by this Directorate-General of Registries & Notaries, among others, in the Rulings cited in these hearings. It poses the problem that it constitutes a forced change in forename and surnames. Accordingly, to avoid this inconvenience, the new national law can establish mechanisms to preserve the surnames borne under the terms of the previous national law, in order to prevent the prejudicial effects of a forced change in surnames. This is precisely what Article 199 of the Civil Registry Rules & Regulations does in our law, by allowing a two-month time limit of expiration following acquisition of Spanish nationality to make a declaration of intent to preserve surnames. As legal scholarship has pointed out, this is a case of "ultra-application" of the previous national law which prolongs its application in time with respect to subject who loses his previous nationality on acquiring Spanish nationality.

FOUR. – In point of fact, Article 199 of the Civil Registry Rules & Regulations provides that, "Any person who acquires Spanish nationality shall preserve his surnames in a form other than the legal form, provided that he declare this

in the act of acquiring said nationality, or within the two months immediately following the acquisition thereof, or on reaching the age of legal majority". There are two requirements that must be examined in order to judge whether the application of the option of preservation envisaged by this provision is fitting and proper, namely: the timeliness of the exercise thereof, i.e., compliance with the set time limit; and the absence of contradiction between the result of said declaration of preservation and public policy.

FIVE. – Insofar as the former aspect mentioned is concerned, the point should be made that in the present case, the grant in favour of the interested party of Spanish nationality by virtue of residence was effected by the Ruling issued by this Directorate-General, by delegation from the Minister (Ministerial Order of 26 June 2003), and the express declaration by the interested party relating to the preservation of his previous surnames was effected by written submission dated 13 October 2004. At first sight, the conclusion to be drawn from this is that it was contrary to compliance with the time limit of expiration of two months set by Article 199 of the Civil Registry Rules & Regulations. This first impression is dispelled, however, by a more in-depth perusal of the matter. In effect, the issue raised comes within the general matter of determining the moment in time when the process of acquisition of Spanish nationality is complete and of the possible retroactivity of the effects thereof, since the statutory enactment interpreted sets a time limit, establishing as "*dies a quo*" the date on which acquisition of Spanish takes place. There is no doubt, and this emerges from the unanimous position of doctrine on this point, that registration at the Civil Registry is an indispensable requirement for *ex post facto* or derivative acquisition of Spanish nationality (cases of residence, certificate of naturalisation, option and recovery), and in particular from the provisions laid down in Article 330 of the Civil Code, which clearly make such registration constitutive of the phenomenon of acquisition, on providing that, "Naturalisations shall have no legal effect until such a time as they are entered on the Register, regardless of the proof in evidence of said naturalisations and the date on which they were granted". This rule amounts to raising registry registration to the category of a requirement "*sine qua non*" for the new legal status deriving from the change in civil status brought about by acquisition of Spanish nationality. This same conclusion is reached, ratifying the previous line of argument, based on the provision contained in Article 23 of the Civil Code, which subordinated "the validity of acquisition of Spanish nationality" by virtue of option, certificate of naturalisation and residence, among others, to the requirement of its registration at the Spanish Civil Registry. Consequently, until such registration is made, the interested parties have not come to acquire Spanish nationality validly and effectively. A matter distinct from the previous one is that relating to the possibility of deeming the effectiveness of registration, once made, to be backdated to the date of the formal declaration of intent to opt for or recover nationality or that of the formalisation of the oath or pledge, due to the fact that this is the point in time when the subject acquiring nationality has done all the fundamental activity demanded of him, as one school of legal scholarship has argued. This is

the criterion which is indisputable for cases of option and recovery, and which this Directorate has also extended with respect to cases of acquisition of Spanish nationality by virtue of residence, a route of acquisition used by the now Appellant, based on analogous application of Article 64 of the Civil Registry Act, pursuant to which, "The date of registration, from which such declarations have effect, shall be deemed to be that of the formal declaration shown in said entry" (see Ruling of 19–1 January 2007), giving rise to the backdating of effects to the date on which the interested party has formally made the pledge or oath referred to by Article 23 of the Civil Code, the point in time when he has completed all the activity legally demanded of him for acquiring Spanish nationality. Such retroactivity of effects must, however be deemed without prejudice to the necessary respect to be had for the limits that our legal and constitutional system currently imposes in matters of retroactivity of administrative acts. In this regard, it must be acknowledged that, pursuant to Article 57 subsection 3 of the Legal Regime and Common Administrative Proceedings Act 30/1992 of 26 November (*Ley de Régimen Jurídico y Procedimiento Administrativo Común*), it is only "exceptionally" accepted that retroactive effectiveness may be given to administrative acts which, as a general rule, "shall take effect as from the date on which they are issued", i.e., non-retroactively, a rule which, while not directly applicable in the context of the Civil Registry (see Article 16 of the Civil Registry Rules & Regulations), must be taken into account as an interpretative element in considering the matter debated here (Article 3 subsection 1 of the Civil Code) in the context of principles of legal certainty and proscription of the retroactivity of punitive provisions, not favourable to or restrictive of individual rights guaranteed by the Constitution at Article 9. Nonetheless, it is equally true that, among the cases in which this exceptional nature of retroactive effectiveness is rendered permissible, is that of acts "*in bonus*", namely, acts which can be deemed to result in favourable effects for the interested parties. Hence, the retroactivity of the effectiveness of registration announced by paragraph three of Article 64 of the Civil Registry Act is subject to the condition of acting "*in bonus*", meaning that cases in which the effects can be deemed to operate "*in peius*" are excluded, i.e., those with effects that are prejudicial or restrictive in terms of the interested or a third party's rights, as happened in the case settled by this Directorate's Ruling of 14–2 June 2005, which, on the basis of the existence of effects prejudicial to the interested party, denied recognition of the retroactive effectiveness of registration, in which sense it is to be construed. Retroactivity in the case now before us must be rejected on exactly the same grounds, so that for the purpose of calculating the time limit established by Article 199 of the Civil Registry Rules & Regulations for making a declaration of intent to preserve surnames which corresponded to the interested party by virtue of his former personal status, the date of acquisition of Spanish nationality must be deemed to be that of its registration at the Civil Registry, in this case 17 September 2004, which means that the declaration filed on 13 October of the same year comes within the time limit of two months designated by said statutory rule.

SIX. – With this first obstacle cleared out of the way, it now falls to us to analyse the possible existence or lack of existence [*of an obstacle*] resulting from the surnames determined by the Appellant's former personal status proving contrary to our international public policy. It is therefore now in order for us to recall here our doctrine relating to the nature of public policy towards the double surname, paternal and maternal, of Spanish nationals. We have thus stated on other occasions (see Rulings of 7 October 1991, 29–1 November 1995 and 4 May 2002) that the principle whereby all Spanish nationals must be legally designated by two surnames must be deemed to be a principle of public policy that directly affects the organisation of society and is not susceptible to any variation whatsoever – save for that which results from Community law for Spanish-Community binationals – on pain of enshrining a privilege for a certain category of Spaniard, and which, on lacking sufficient objective justification, would fly in the face of the constitutional principle of equality of all Spaniards before the law. Although Article 199 of the Civil Registry Rules & Regulations is intended to prevent those who acquire Spanish nationality from possible prejudices in their identification on becoming subject to the Spanish surname regime, it cannot be construed in the sense of permitting the preservation of a single surname. Hence, the Appellant's claim cannot be countenanced for exactly this same reason, since it consists of preserving his former surnames. It so happens that both proceed from the paternal line, in clear contradiction with those that, in the case of Spanish nationals, result from our surname legislation, which is based on the idea of the double surname and the double line, in accordance with the so-called principle of imperishability of paternal and maternal lines, in the event of bilateral determination of filiation by both lines, a principle to which there is no exception, not even in the context of registry change-of-surname dossiers coming within the purview of this Ministry of Justice (see Article 59 No. 3 CRA)".

* Ruling of the Directorate-General of Registries & Notaries, of 1 October 2007 (TOL1.174.563)

Registry entry of change of name of adopted child who acquired Spanish nationality. Law applicable to names. Evidence against [a change of name] and defence of the child's best interests.

"Legal Grounds:

(…) IV. With respect to the first point, it must be borne in mind that, when the birth of someone who has acquired Spanish nationality is entered onto the Spanish Civil Register, the forename attributed to this person according to his previous personal law must be registered in the entry, unless evidence is shown to indicate that, in fact, he may use a different forename (cf. Articles 23 of the CRA and 85 and 213 of the Civil Registry Rules & Regulations). In this case, the name "S." under which the Appellants' child was registered by the Central Registry, is that which corresponded to the child in the light of the foreign birth certificate and the remaining documents relating to his/her adoption, so that the assessment made by the Central Registry must be deemed correct. Nevertheless,

in these cases of adoptions it is advisable to bear the best interests of the child in mind and ascertain if the initial change of name proposed for him/her by the adoptive parents will not favour said interest. The answer must be affirmative and, as this Directorate-General has already stated (see Ruling of 14 June 2006, 6.), this being a case of adoption, the proposed change may be allowed in the child's best interests, without in any way straining the interpretation of the statutory provision contained in the said Article 213 of the Civil Registry Rules & Regulations, which gives preference, with respect to a foreigner who acquires Spanish nationality, to any name that he himself may have been using. In all other cases, parents have full freedom to choose a name for their children, save where the designated name is affected by some legal prohibition (cf. Article 54 CRA), and finally, adoption constitutes a patently just cause for change of name, inasmuch as it contributes to breaking with the previous family and making for better integration by the adopted child in his/her new family."

X. FAMILY

1. Filiation and paternal-filial relations

a) Natural filiation

Decision of the Madrid Provincial High Court (Section 24) of 2 February 2007 (JUR 2007\314310)

Paternal-filial relations. Rights of custody and access. International abduction of minors.

"Legal Grounds:

… THREE. – Article 12.1 of the Spanish Civil Code provides that "Classification to decide on the conflict-of-laws rule applicable shall always be made in accordance with Spanish law": in the light of this Article there is no doubt that the issues arising in this dispute properly pertain to paternal-filial relations.

Article 9.4 of the Spanish Civil Code states that, "Paternal-filial relations, shall be governed by the personal law of the child,…". The child, Paloma, has Argentine nationality, so that paternal-filial relations are to be governed by her personal law, i.e., that determined by her nationality (as stated by Article 9.1 of our Civil Code). Thus, Article 264 of the Argentine Civil Code (pages 57 and 58) lays down that "*Patria potestad* is the set of duties and rights that correspond to the parents vis-à-vis the person and assets of their children for their all-round protection and upbringing, from the latter's conception and while they are below the age of legal majority and have not become emancipated. Having regard to the fact that the parents are separated, the *de facto* exercise of these rights corresponds to the mother who legally enjoys their custody, without prejudice to the father's right to have adequate communication with his child and supervise their education, as is to be inferred from Article 264.2 of the aforesaid enactment.

Insofar as the so-called access rights are concerned, it is common knowledge that, in the absence of an agreement by the parents, the court order must endeavour to ensure that the child's contacts and stays with the non-custodian parent are as wide-ranging and flexible as the circumstances of each case permit or render advisable, since such relations come to constitute a factor of decisive importance with respect to the child subject's balanced development and upbringing, in its various aspects. The principle of the child's best interests being the paramount consideration, reflected, *inter alia*, in the Universal Declaration of Human Rights of 10 December 1948, Article 9 of the Convention on the Rights of the Child of 20 October 1989 as ratified by the United Nations General Assembly of 20 November 1989 (Official Government Gazette of 31 December 1990) and the Hague Convention of 25 October 1980, should inspire all these matters and place an obligation on public powers, such that their rulings should respond first and foremost to this crucial interest. Hence, Article 10.2 of the Convention on the Rights of the Child states that, "A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents".

In its Preamble, the Hague Convention of 25 October 1980 states that it seeks to protect children internationally and to secure protection for rights of access, a desire that is reflected in Article 1, which states that "The objects of the present Convention are: b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States", with Article 21 of said Convention precisely regulating the procedural channels for ensuring effective exercise of such access rights and imposing upon the authorities the duty to ensure the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. In this respect, Article 7 establishes the duty of the authorities to initiate or facilitate the institution of judicial or administrative proceedings with a view to making arrangements for organising or securing the effective exercise of rights of access. Article 8 [*sic*: *Translator's Note*: this would appear to be an error and should instead refer to Article 5] states that rights of access "shall include the right to take a child for a limited period of time to a place other than the child's habitual residence"

FOUR. – …The decision of the Lower Court (appealed here) recognises and regulates a wide-ranging, flexible regime of visits by father to his daughter in Spain for a period of three years, without prejudice to the fact that, in accordance with the way in which the regulated visiting regime develops, the possibility is envisaged, by mutual agreement between both parents, in the child's best interests and with the possibility of her being heard, of establishing an extension thereof with the possibility of the child travelling to Argentina.…Applying the prevailing doctrine and law noted at legal ground three to the case before the court and taking the special circumstances surrounding the case into account, the solution adopted by the Lower Court, whose line of reasoning is shared by the Chamber, is correct, namely, to regulate such visits as will have to be made – for the time being – in Spain, without prejudice to the subsequent extension thereof. The point should however be made that, in the absence of agreement between the parents,

the judicial avenue would always remain open for the courts of justice to take an interest in and ultimately decide upon any matter they deemed appropriate. Insofar as travel and transport expenses are concerned, each parent shall defray the travel costs while things remain as they are at present, in accordance with the terms of the decision. . . .".

* Ruling of the Directorate-General of Registries & Notaries, of 30 April 2007 (Official Government Gazette 146/2007 of 19 June 2007)

Registration of paternal filiation based on registration at a foreign Registry. Denial due to doubts as to the reality of the facts registered and their legality under Spanish law.

"Legal Grounds:

. . . FIVE. – On this point, account must be taken of the fact that for a birth occurring abroad to be eligible for registration at the Spanish Civil Registry, some Spanish citizen must be affected by said birth (cf. Article 15 of the CRA and 66 of the Civil Registry Rules & Regulations), with it being possible to dispense with formalities for registering the dossier outside the time limit where a certificate of the entry made at a foreign Registry is presented, "provided that there is no doubt as to the reality of the facts registered and their legality under Spanish law" (Article 23, II, CRA) and provided that the foreign Registry "is lawful and genuine, such that the entry which it certifies, insofar as the facts attested to are concerned, bears guarantees comparable to those required for registration under Spanish law" (Article 85, I, of the Civil Registry Rules & Regulations), and this circumstance is not in evidence in the present case".

b) Adoptive filiation

* Madrid Provincial High Court Order No. 227/2007 (Section 22) of 9 October 2007 (JUR 2007\1461)

International adoption. Article 9.5 of the Civil Code. Adoption constituted abroad – Guatemala – by Spanish adoptive parent with domicile in Spain at the time of its constitution. Refusal of leave for an application of adoption due to non-existence of a previous proposal by the public body, by reason of the situation being akin to that of foster care. Need for declaration of suitability for recognition in Spain of adoption constituted abroad. No possibility of exemption since there was no preadoptive fostering.

"II. Legal Grounds:

ONE. By Court Order of 23 March 2007, the Lower Court refuses leave for the application of adoption in respect of the child, Julián, in that, in line with the reasoning pursued by said ruling, the case contains no previous proposal by the public body, nor does it fit any of the types of case which, by law, exclude same. The claimants in this case-dossier have brought an appeal against this criterion of judgement, requesting the Chamber to revoke same and, in its stead, grant leave to bring the claim filed, with remission of the proceedings to the Lower Court, so that the conduct of the case may continue. In support of said

petitum revocatorio, the Appellants' legal counsel pleads, under the terms of Article 458 of the Civil Procedure Act, that on the child having been adopted in Guatemala, such legal status should be likened to that of fostering or child-care, which excludes the above-mentioned previous proposal by the public body.

TWO. In accordance with the principle, proclaimed by way of a general rule by Articles 39 of the Constitution and 2 and 11–2 of General Public Act 1/1996 of 15 January, of the child subject's protection being accorded priority, Article 176 of the Civil Code, as amended and revised by the latter Act, provides that adoption is constituted by a court ruling that must always have regard to the best interests of the adopted child and the suitability of the adoptive parent or parents to exercise *patria potestad*. At subsection 2, this provision adds that, to open an adoption dossier it is necessary for there to be a previous proposal by the public body in favour of the adoptive parent or parents whom said public body has declared suitable for the exercise of *patria potestad*. Prior to this requirement's introduction in the Civil Code, it had already been made mandatory, at an international level, by the United Nations Convention on the Rights of the Child of 20 November 1989 (Article 21), and by the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, ratified by Spain by Instrument of 30 June 1995. This sought to endow adoption with the maximum guarantees possible, in order to protect the child's best interests as a priority, inasmuch as a public and, by extension, impartial body has to assess the adoption applicant's aptitudes so as to integrate the child into as suitable a setting as possible for his/her proper care, development and upbringing. It is true to say that, under the terms of said Article 176 and by way of an exception, this control can be dispensed with, on the need for a previous proposal by a public body being excluded where, among other cases and insofar as this particular case is concerned, the adopted child has legally been in foster care for over one year under a pre-adoptive fostering measure or has been under the guardianship of the adoptive parent for the same time. It is this provision that the Appellants cite in support of their plea for reversal, in that, according to their legal counsel, the simple adoption which was constituted in Guatemala in respect of the child and in favour of the former, can be likened to fostering of one type or another. It should, however, be noted that the situations referred to by subsection 2–3 of the Article reviewed imply, either the prior intervention of the Authorities, which have already assessed the suitability of the foster parents with a view to a future adoption, or alternatively, the constitution of guardianship, with the ensuing intervention of the law courts, which, in the relevant proceedings, must assess both the ward's benefit and the guardian's suitability (Articles 216 and 235 Civil Code). Neither of these legal situations is present in the case under review, in which the requirements stipulated by the prevailing statutory regulation have been entirely dispensed with, because, assuming both applicants' Spanish nationality and their residence in our country, there has been no constitution of preadoptive foster care, which equally requires the public body's consent or, where applicable, a proposal addressed to court, nor has evidence been shown

of a legal status of guardianship constituted pursuant to Spanish law. It should further be noted that the rulings of the Directorate-General of Registries & Notaries pleaded by the Appellant do not liken a simple adoption constituted abroad to the situation of legal foster care referred to by Article 176–2, limiting themselves to holding that it is for the Court to assess whether in such circumstances a previous proposal by the public body may be dispensed with. Hence, the simple adoption which has been constituted in Guatemala in the case in point does not amount to exclusion of the prior administrative case-dossier and the proposal thereof to the Court, more so when, in the light of said country's not being a signatory to the above-mentioned Hague Convention, the adoption of children from it was barred, in the Madrid Region, on 10 July 2000, owing to the warnings sounded and reports made by the International Social Service with respect to possible frauds which were taking place vis-à-vis the provisions of the Guatemalan Civil Adoption Act, according to the submission made to said Region's Child Protection Committee (*Comisión de Tutela del Menor*) and shown at page 92. Consequently, the documentation submitted by the Appellants regarding the simple adoption constituted in Guatemala, including the reports issued by that country's social services, and the study made by the Adoption Counsellor of the State of Indiana, which could even give rise to the suspicion of a failed attempt to adopt in the United States, can in no way justify a legal status comparable to that envisaged under Article 176–2–3 of the Civil Code, which allows, in a general way, for the provision made under said Article for a declaration of suitability and proposal on the part of the public body to be dispensed with. To this extent there is a need for the above-mentioned control, which, as a general rule and with a view to recognition in our country of an adoption constituted abroad by a Spanish adoptive parent domiciled in Spain at the date of the adoption, requires the public body to have declared the suitability of said adoptive parent, under the terms of Article 9–5 of the Civil Code, applicable, generically, to adoptions constituted in States that are not parties to the Hague Convention. Accordingly, it is even more difficult for said administrative intervention to be dispensed with where, as in the case in question, the adoption constituted abroad is not even eligible for being recognised in Spain. For all the above reasons, we fully agree, from the standpoint of this administrative appeal, with the criterion of decision set forth in the judgement challenged, and this without prejudice to whatever might, in future, be decided with respect to the adoption sought, once this is pursued in accordance with the procedure and guarantees stipulated by the prevailing law governing the matter."

* Ruling of the Directorate-General of Registries & Notaries, of 14 March 2007 (TOL 1.049.784)

Registration of international adoption at the Civil Registry.

"Legal Grounds:

(…) II. At the Spanish Civil Registry, adoption leads to a note in the margin in the registration of the adopted child's birth, or to an annotation pursuant to Article 154–1 of the Regulation in cases where the foreign institution can be

defined, not as adoption, but rather fostering of one type or another (cf. Article 46 de la Civil Registry Act)....

V. All of which renders it possible to state, based on a joint interpretation of Articles 16 subsection 3 of the Civil Registry Act, as amended and revised by Act 24/2005, 68–II of the Civil Registry Rules & Regulations and the case review of 28 February 2006, that there is a "preferential registration domain" in favour of the municipal civil registry of domicile for undertaking registrations of international adoptions constituted by Spanish adoptive parent/s domiciled in Spain. This is nothing more than a manifestation of the purpose underlying the above legal reform, namely, that of achieving a fuller equivalence between adopted and natural children (cf. Articles 14 and 39 of the Constitution and 108 of the Civil Code), by bringing the registration regime of international adoptions closer to that envisaged for the registration of the birth of natural offspring under Article 16 subsection 1 of the Civil Registry Act, inasmuch as the above-mentioned registration domain in favour of municipal registries of domicile of the adoptive parent/s, rather than being exclusive, is, according to the line of reasoning followed, concurrent, at least under the current stage of legislation, with that of Consular Registers.

It is this aspect of finalism in the change in the law that establishes the guideline for deciding the issue debated here concerning whether the above-described legal situation is or is not applicable to the specific case set forth in the present appeal, centred on whether or not the adoption constituted before a Spanish court by Spanish adoptive parents in respect of a child of Indian nationality, whom they had previously had under a regime of foster care, should be defined as an international adoption, a definition that is rejected by the Civil Registrar of the adoptive parents' domicile, and that leads it "*a coherentia*" to renounce its own jurisdiction for the purpose of registration. While it is true that most international adoptions are also "transnational", in the sense of involving the transfer or movement of the adopted child from his country of origin to the receiving country of the adoptive parents, it is also true that not all international adoptions entail such movement, provided that some other element of internationality or immigration is present in the case; and, not in all transnational adoptions in which there is movement is the adoption constituted "*a fortiori*" before a court or other authority of the child's country of origin, with it being possible for formal constitution of adoption "*stricto sensu*" to take place before a court or authority of the country receiving the child, in this case, Spain. Hence, it is to be clearly seen from the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, done in The Hague on 29 May 1993, Article two of which, on defining the scope of application of the Convention (it should be noted that the purpose of same is that of "international adoptions"), lays down that the Convention shall apply "where a child habitually resident in one Contracting State ("the State of origin") has been, is being, or is to be moved to another Contracting State ("the receiving State") either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiv-

ing State or in the State of origin". The last part of the transcribed proposition clearly attests to the fact that the definition of an adoption as international is not incompatible with the fact that the constitution of the adoption may take place in the child's receiving State before its own local authorities.
…".

2. International abduction of minors

* Decision of the Asturian Provincial High Court, Section 7, of 30 April 2007 (JUR 2007\296503)

International abduction of minors. The Hague Convention of 25 October 1980. Application for return dismissed, due to non-existence of wrongful removal or retention.

"Legal Grounds:

…FOUR. – The conclusion to be drawn from the foregoing recital of the proven facts is that in this case there has been no wrongful removal or retention in the terms envisaged under Article 3 of the Hague Convention, since the removal was effected with the father's express consent. Moreover, for the retention to be deemed wrongful, it would have had to have taken place with infringement of a right of custody awarded to the father pursuant to the law currently prevailing in Argentina, resulting either: from award by law; from a judicial or administrative decision; from an agreement in force under the law of said State; from the father effectively exercising the right of custody, separately or jointly, at the date of such retention; or from the fact that he would have exercised said right, had such retention not taken place. The fact is that the father did not have the right of custody of the daughters legally awarded to him, since the mother had it exclusively awarded to her under the divorce decree issued by the Argentine court (the term "*tenencia*" used in the judicially recognised convention is synonymous with custody). Neither was the father effectively exercising custody, exclusively or jointly, because, while the mother was in Spain, the daughters were living with their maternal grandmother, and he only continued exercising access rights. At no time, however, did he assume custody, nor is there any evidence to show that he would have applied for it prior to the daughters travelling to Spain on 31 January 2006.

FIVE. – With respect to the award of the right of custody at the date on which the mother decided not to return her daughters to Argentina, regard must be had to the Argentine legal system invoked by State Counsel, since this is required under Article 3 of the Convention, while also taking into consideration the fact that Article 5 stipulates that: "For the purposes of this Convention: *a)* "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence; *b)* "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence". It should also be noted that, in order to facilitate the application of the foreign law, to this end Article 14 of the Convention lays down that, "In ascertaining whether there has been

a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable".

SIX. – In accordance with the provisions laid down by Article 1 of the Hague Convention, the purpose of this is, on the one hand, to ensure the prompt return of children wrongfully removed to or retained in any Contracting State (subsection a/), and on the other hand, to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States (subsection b/), but protection of the rights of custody and visiting take place on different planes: whereas infringement of the right of custody, albeit *de facto* or effective custody, can give rise to the immediate return of the child to his/her country of habitual residence (Articles 3 and 12 del Convention), the right of access is afforded a lower level of protection, since it can only give rise to a claim aimed at organising or guaranteeing effective exercise of the right of access, under the terms envisaged in Article 21 of the Convention. It is likewise essential to bear in mind that the purpose of the Convention and of these proceedings is not to regulate the right of custody, but only to decide, whether or not at the date on which the mother notified the father of not returning the daughters to their country of origin, there was an unlawful retention of the children, and, where applicable, to order the return of the children to that country. This, therefore, is to be clearly concluded from the provisions of Article 16 of the Hague Convention, which establishes that, "After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice"; and Article 19, which lays down that, "A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue".

...

NINE. – There having been no wrongful removal or retention, it would be neither fitting nor proper for the return sought to be granted, without the need to enter into an analysis of possible objections, though, moreover, sight should not be lost of the children's refusal to return to Argentina, their attachment to their mother, their perfect integration into their new environment, and the fact that, according to what is to be gathered from the opinion given at this upper instance by the psycho-social team attached to the Lower Courts of Gijón, the return of the children to Argentina would entail an element of uncertain prognosis, which could have a negative impact on their appropriate progress thus far, with the result that it behoves the Court to dismiss the appeal filed and confirm the Decision brought on appeal in its entirety".

3. Marriage

a) Capacity to marry

* Ruling of the Directorate-General of Registries & Notaries, of 12 January 2007 (TOL 1.033.985)

Permit to contract marriage between a Spanish and a Moroccan previously married by Koranic rite. Bar to marriage due to a previous union, the existence of which is decided in accordance with the personal law of the contracting party. Law applicable to civil status. Article 9.1 of the Civil Code.

"Legal Grounds:

(…) II. A marriage contracted by Spanish nationals abroad in accordance with the "*lex loci*" is registrable provided that no doubts exist as to the reality of the event and its legality under Spanish law. This legality, which constitutes a basic Civil Registry principle, is not in evidence in the case of the marriage contracted between the parties by Koranic rite on 26 January 2002, at which date the female contracting party was tied by a civil marriage performed in Spain on 8 July 1994, the dissolution of which did not take place until 9 September 2004, when the divorce decree was issued. In other words, at the time she entered into the marriage performed on 26 January 2002, her previous union had not been dissolved, thus constituting a bar to marriage which impeded its performance (cf. Article 46.2. and 73.2. of the Civil Code) and which, consequently, brought about the nullity of the marriage performed, with the result that it could not be registered.

III. Arising from said nullity, the selfsame bride and groom seek to contract a new marriage, this time in civil form, with the judge appointed to hear said claim raising the matter of the impediment posed by the existence of a previous Koranic marriage between the same parties generating a bar to the marriage. An apparently paradoxical situation is thus produced, in which, on the one hand, the Koranic marriage performed in 2002 is deemed neither valid nor registrable for the purposes of the Spanish legal system, due to the previous civil marriage of one of the contracting parties not having been dissolved prior to its performance, and yet, on the other hand, this same marriage, the effectiveness of which is denied by Spanish law would, nevertheless have the effect of generating a bar to contracting a new union between the same interested parties.

IV. This apparent contradiction is explained, however, by reason of the fact that the second marriage performed in 2002 is valid in the eyes of the Moroccan legal system of the nationality of the foreign contracting party, in view of the fact that polygamous marriages are admitted under that country's legislation, since in matters of civil status the personal law of the interested parties must be applied under our conflict-of-laws rules (cf. Article 9 (1) of the Civil Code). Hence, under said legislation, the Moroccan contracting party civil status is that of being married, though for reasons of public policy no exception can be made to the specific limiting effect of a bar to marriage deriving from said civil status, given the restrictive nature whereby intervention into this

institution is allowed. This is unlike the situation that arises when it comes to recognising the validity of a polygamous marriage *per se*, deemed, as such, to fly in the face of the Spanish concept of marriage and the constitutional dignity of women. In this case, therefore, the appropriate course would be for the nullity of the disputed marriage to be sought in the courts, thereby removing the bar referred to when defining the issue, and preventing the creation of the undesirable situation of legal uncertainty which would be generated, if it were permissible, when a marriage was registered at the Spanish Civil Registry, to show that one of the contracting parties was already married when the marriage took place. It should be recalled here that each contracting party's civil status on the date is a compulsory item of information when it comes to registering a marriage (cf. Articles 35 of the CRA and 12 and 258 of the Civil Registry Rules & Regulations)".

* Ruling of the Directorate-General of Registries & Notaries, of 27 March 2007 (TOL 1.049.787)

Licence to contract marriage between a Spanish and a Moroccan national. Specification of the personal law of the Moroccan party to the marriage to decide her capacity to marry, due to her being under the legal age of majority. Article 9.1 of the Civil Code

"Legal Grounds:

(…) II. This case involves the application for a license by a Spanish man and a Moroccan woman to contract civil marriage in Spain (cf. Article 49.1 Cc). The case-dossier opened prior to the performance of the marriage must be examined in accordance with the general rules (cf. case review of 9 January 1995, regulation 5. and case review of 31 January 2006, regulation VII), it being an indispensable formality for each contracting party to be given a separate, confidential, personal hearing, which the Investigating Official reviewing said case-dossier must conduct, assisted by the secretary, so as to ensure that there is neither any bar to the marriage or any other legal impediment to its performance (cf. Article 246 of the Civil Registry Rules & Regulations).

III. In this case, the female interested party was below the age of legal majority at the time when the licence application for the intended marriage was being processed, and for this reason had furnished permission from her parents as well as that decreed by the Court of the First Instance of N to contract it. The judge appointed to hear the claim, without reaching the hearing stage of the proceedings which the Public Prosecutor's Office had requested, denied the grant of the licence, holding that the female applicant was below the age of legal majority and had neither produced evidence of a dispensation from this impediment nor pleaded the grounds stipulated under Article 260 of the Civil Registry Rules & Regulations, i.e., he applied Spanish law to decide upon the female applicant's capacity to marry.

IV. Article 9 subsection 1 of the Civil Code provides that, "the personal law corresponding to natural persons is that which is determined by their nationality. Said law shall govern capacity and civil status, family rights and duties,

and succession by reason of death". Given that the interested party's Moroccan nationality, the application of Spanish law is not possible for the purposes of determining her capacity to marry, because by virtue of the rule transcribed above said capacity must be determined by the provisions of the former's personal law, without prejudice to the intervention of special international public policy in cases where this might be appropriate (cf. Article 12.3 of the Civil Code), without the present case being one of these, since under Spanish law the natural capacity to contract marriage is recognised from the age of 14 years onwards (cf. Article 48 III of the Civil Code) and since provision is made for the validation of a minor's marriage "*ex lege*" (cf. Article 75 of the Civil Code)".

* Ruling of the Directorate-General of Registries & Notaries, of 23 May 2007 (Official Government Gazette 144/2007 of 16 June 2007)

Registration of marriage contracted by Spanish nationals abroad. Application of the "lex loci". Denial on the grounds of the existence of a previous union. Lack of enforcement of the previous divorce decree.

"Legal Grounds:

…TWO. – A marriage contracted by Spanish nationals abroad in accordance with the "*lex loci*" is registrable provided that no doubts exist as to the reality of the event and its legality under Spanish law. This legality, which constitutes a basic Civil Registry principle, is not in evidence in the present case, in view of the fact that the interested party, a subject possessing Spanish nationality, contracted civil marriage in Venezuela on 24 October 1969, a date on which he was still bound by a previous canonical marriage performed in Spain on 25 October 1956, the dissolution of which took place by divorce decree issued by the Corunna (*La Coruña*) Territorial High Court of 4 April 1987, rendered on appeal. In other words, when he contracted the marriage that is sought to be registered, the previous marriage had not been dissolved. Hence, there was a bar to marriage which rendered its performance impossible (cf. Article 46.2 C.C) and which, consequently, caused the marriage performed to be null and void, which is why it cannot be registered.

THREE. – The Appellant pleads that his first marriage had been dissolved by decree issued by a Venezuelan court, specifically the High Court in Civil and Commercial Matters (*Corte Superior Primera en lo Civil y Mercantil de la Circunscripción Judicial del Distrito Federal Fdo. M*) on 12 November 1968, as indeed appears from the marriage certificate itself that is sought to be registered, prior therefore to the performance of the second marital union. Nevertheless, while this account is accurate as regards the underlying facts, it is not accurate insofar as its legal consequences are concerned. Indeed, though the first Spanish marriage was dissolved by a Venezuelan divorce decree of November 1968, the truth is that the necessary enforcement of this decision had not been obtained in the Spanish Supreme Court or the Court of the First Instance (cf. Articles 107 II, of the Civil Code and 955 of the 1881 CRA, as amended and revised by Act 62/2003 of 30 December, and 83 and 265 II of the Civil Registry Rules & Regulations), which is indispensable in order for such a foreign divorce to give

rise to effects in the Spanish legal system. At present, the need for enforcement is still in force (cf. Sole Partial Repeal Provision, subsection 1, exception 3, of the prevailing Civil Procedure Act) and the registration of the new marriage is thus not possible due to the formal existence of a bar to marriage (cf. Article 46–2 of the Civil Code)".

b) Marriage act and registration

* Ruling of the Directorate-General of Registries & Notaries, of 20 March 2007 (TOL 1.038.262)

Registration of marriage between a Moroccan man and a Spanish woman performed according to the Koranic rite. Form of marriage performed in Morocco.

"Legal Grounds:

(…) III. From the outset, the point must be made that any Spanish national may contract marriage abroad "in accordance with the form established by the law of the place where the marriage is to be performed" (cf. Article 49–II of the Civil Code). However, even though the form might be valid, it is nonetheless necessary, in order for the registration process to be completed, to verify that the fundamental legal requirements stipulated for the validity of the union have been met (cf. Article 65 of the Civil Code), whether such verification is made by assessing the "certificate issued by the authority or public officer of the country where the marriage is performed" (cf. Article 256 subsection 3 of the Civil Registry Rules & Regulations) on the conditions established by said statutory provision, or whether, in the absence of sufficient documentary certification, such verification is made on the basis of the dossier envisaged under Article 257 of the Civil Registry Rules & Regulations.

IV. What has occurred in this case is that the Spanish contracting party has entered into a religious marriage abroad with the foreign contracting party and, given that for such a case a document certifying the foreigner's capacity to marry is required by local Moroccan law, the mere certificate issued by the foreign authority cannot be recognised as a registrable document. Accordingly, leaving aside the fact that Article 256 (3) of the Civil Registry Rules & Regulations may possibly exceed its statutory scope with respect to Article 73 paragraph two of the Act, the application of said provision clashes with the exception recognised by Article 252 of the Rules & Regulations. For the cases envisaged thereunder – the statutory type of which subsumes that of the subject matter of the present appeal – this Article imposes the need for the registry case-dossier to be previously processed in order to ensure certainty as regards the Spanish contracting party's capacity to marry; and this must be maintained, whether Article 252 of the Regulation is deemed to constitute a material rule of inverse extension or "*ad intra*" for the international cases envisaged therein, whereby the laws of foreign legal systems that require a certificate of capacity to marry are "interiorised", or, based on the Spanish status of the contracting party, the requirements of form stipulated for performance of the marriage by the "*lex loci*"" are deemed not to have been met.

* Ruling of the Directorate-General of Registries & Notaries, of 29 March 2007 (TOL 1.067.703)

Registration at the Civil Registry of a consular marriage performed at the Moroccan Consulate in Madrid. Consular marriage in Spain of Spanish national. Retroactive effectiveness of administrative acts.

"II. In accordance with the provisions clearly laid down by Article 49 of the Civil Code, a Spanish national must contract marriage in Spain, either before a judge, mayor or public officer designated by said Code, or in the legally envisaged religious form. A consular marriage which two foreign nationals may validly enter into in Spain, if so permitted by the personal law of either (cf. Article 50 of the Civil Code), is not, in contrast, a valid form if either the bride or the groom is Spanish, so that in this latter case the marriage is null and void by application of Article 73–3 of the Civil Code.

III. Accordingly, due to the requirements of the principle of legality, a fundamental Civil Registry norm (cf. Articles 23 of the CRA and 85 of the Civil Registry Rules & Regulations), the registration of a marriage performed on 29 September 1999 between a Spanish woman and a Moroccan man at the Moroccan Consulate in Madrid must be refused. There can be no doubt that Registrar's assessment extended to verifying the existence of the legal requirement vis-à-vis the valid form of the performance of the marriage act (cf. Articles 65 of the of the Civil Code and 256 of the Civil Registry Rules & Regulations). This conclusion cannot be challenged by the argument that foreign embassies and consulates in Spain enjoy the privilege of extraterritoriality. Such embassies and consulates have formed an integral part of Spanish territory, ever since this erstwhile fiction of extraterritoriality was replaced in Public International Law by the concepts of inviolability and immunity.

…"

* Ruling of the Directorate-General of Registries & Notaries, of 29 March 2007 (TOL 1.049.789)

Registration at the Civil Registry of a marriage performed in the Western Sahara between a Spanish and a Saharaui citizen.

"Legal Grounds:

(…) II. In the present case, the interested party, possessing Spanish nationality acquired in 2004, seeks registration at the Spanish Civil Registry of his marriage entered into in the Western Sahara in 1970, a registration that is denied by the Central Civil Registry because the documentation furnished does not meet the requirements needed for registration.

III. Events that affect Spanish nationals, albeit occurring before acquisition of Spanish nationality, are registrable at the competent Spanish Civil Registry (cf. Articles 15 CRA and 66 of the Civil Registry Rules & Regulations), provided, obviously, that the requirements stipulated in each case are met. This is why it is necessary to ascertain whether such compliance is present in this case.

IV. Competence to decide on registration corresponds to the Central Civil Registry, due to the fact that the claimant is domiciled in Spain (cf. Article 68,II of the Civil Registry Rules & Regulations) and the registration route to obtaining the entry must consist, either of the foreign registry certificate issued by the authority or public officer of the country where the marriage took place (cf. Articles 23 of the CRA and 85 and 256–3 of the Civil Registry Rules & Regulations), or of the case-dossier referred to by Article 257 of the Regulation "in which the performance in [*due*] form of the marriage and the non-existence of impediments or bars are duly evidenced".

V. In the present case, registration is sought on the basis of a foreign registry certificate. Article 85 of the Civil Registry Rules & Regulations provides, in this respect, that, "to make an entry on the register without a case-dossier, by virtue of a foreign registry certificate, the latter must be lawful and genuine, so that the entry certified, insofar as the facts to which it attests are concerned, enjoys guarantees akin to those required for registration by the Spanish Act".

The Registrar's competencies of assessment with respect to the foreign certificate extends to examining the competence and authority of the issuing body, which must act in the exercise of the office that capacitates it for such issue with a legal basis adequate therefor, a basis which, in this case, does not exist, inasmuch as the organs of the Civil Registry are not set up pursuant to statutory provisions forming part of an internationally recognised state legal system. Accordingly, the certificate furnished, issued by a Registry of the so-called Saharaui Democratic Arab Republic, does not meet the requirements stipulated by the above-transcribed statutory Article for the registration to be effected. However, even if it were to be allowed, which is not the case, the certificate produced fails to include events or data required for and evidenced by registration, i.e., it specifies neither the place where the marriage took place, which is indicated by reference to a territory – Western Sahara – nor the time of day, nor even by whom it was authorised".

* Ruling of the Directorate-General of Registries & Notaries, of 31 May 2007 (Official Government Gazette 185/2007 of 3 August 2007)

Registration of marriage performed at the Moroccan Consulate between two subjects of said country. Marriage act performed in a form authorised by the personal law of the contracting party.

"Legal Grounds:

…TWO. – In accordance with the provisions clearly laid down by Article 49 of the Civil Code, a Spanish national must contract marriage in Spain, either before a judge, mayor or public officer designated by said Code, or in the legally envisaged religious form. A consular marriage, which is not a valid form if either the bride or the groom is Spanish, with the result that in such a case the marriage is null and void by application of Article 73–3 of the Civil Code, may in contrast be validly entered into by two foreign nationals in Spain, if so permitted by the personal law of either party (cf. Article 50 of the Civil Code).

THREE. – Indeed, Article 50 of the Civil Code lays down a conflict-of-laws rule with alternative points of connection, with respect to marriages performed in Spain between a foreign bride and groom, favouring the formal validity of the marriage, whereby the marriage is to be valid if it has been contracted "in accordance with the form prescribed for Spanish nationals or by meeting the requirements established by the personal law of either party".

FOUR. – In the present case, the Civil Registrar has denied registration of the marriage performed on 7 January 1994 at the Moroccan Consulate in Madrid between a Moroccan man and a female citizen who possessed the same nationality at the date when the marriage took place but who subsequently acquired Spanish nationality in 2003. The Registrar's assessment, which without doubt extended to verifying the existence of the legal requirement vis-à-vis the valid form of the performance of the marriage act (cf. Articles 65 of the Civil Code and 256 of the Civil Registry Rules & Regulations), was based on the fact that, on the marriage having been performed according to Islamic rite, no Islamic religious leader belonging to a registered Islamic community that forms part of the Islamic Committee of Spain or any of the registered Islamic Federations represented on this Committee took part in the performance thereof, deeming that recognition of the civil effects of Islamic marriage performed in Spain is subject to this requirement, pursuant to Articles Nos. 1 and 7 of Act 26/1992 of 10 November governing religious marriage according to Islamic rite. Moreover, it should be recalled here that the preceding conclusion cannot be challenged by the fact of the marriage having been performed at the Moroccan Consulate in Madrid on the basis of the contention that foreign embassies and consulates in Spain enjoy the privilege of extraterritoriality. Such embassies and consulates have formed an integral part of Spanish territory ever since this erstwhile fiction of extraterritoriality was replaced in Public International Law by the concepts of inviolability and immunity.

FIVE. – Nevertheless, careful analysis of the situation leads to the conclusion that the above assessment cannot be sustained. Indeed, while there is no doubt that the new regulation introduced by Act 26/1992 of 10 November is applicable to marriages in the Islamic religious form performed in Spain in cases where either or both contracting parties have Spanish nationality, there has, in contrast, been discussion about what ought to happen if both bride and groom are foreign nationals, since it might be thought that Article 50 of the Civil Code, inasmuch as it authorises foreign nationals to avail themselves of the matrimonial forms envisaged by the personal law of either of them, has not been affected by said Act 26/1992. This is precisely the interpretation to be drawn from the case review issued by this Directorate-General on 10 February 1993. Consequently, if account is taken of the fact that the above Article grants foreign nationals the option of entering into marriage in Spain "in accordance with the form prescribed for Spanish nationals or by meeting the requirements established by the personal law of either party", this option must be deemed to persist and even be expanded because the form prescribed for Spanish nationals today embraces, not only the civil or religious canonical form, but also the

religious forms envisaged under the Accords with religious confessions (what has been stated here also holds good for cases of religious marriages according to the evangelical rite and Jewish law: see Acts 24/1992 and 25/1992 of 10 November). Thus, foreign contracting parties have two options: either, as until now, they may enter into marriage in Spain in the religious form permitted by the personal law of one of them (in which a case, registration at the Civil Registry will require verification of the substantive requirements stipulated by Article 65 of the Code, through the means specified under Articles 256 and 257 of the Civil Registry Rules & Regulations); or alternatively, even though said religious form may not be permitted by the personal law of either bride or groom, they will be entitled to avail themselves of the system, permitted to Spanish nationals, under the respective Article 7 of the above-mentioned Accords. In the case of the former option, the situation is the same as that which existed before the entry into force of Act 26/1992, a period during which religious marriages by Islamic rite already constituted valid forms of performing the marriage act under the earlier legislation. Hence, this would occur if the marriages had been held abroad in accordance with the *lex loci* (cf. Articles 49 *in fine* of the Civil Code and 256.3 of the Civil Registry Rules & Regulations, as well as the Ruling of 25 November 1978) or if they had been held in Spain, with both bride and groom being foreign nationals, provided that this form was one of those countenanced by the personal law of either party (cf. Articles 50 of the Civil Code and 256.4 of the Civil Registry Rules & Regulations and Rulings of 18 September 1981 and 6 May 1982). However, such marriages performed on Spanish soil, with either or both contracting parties being Spanish nationals, did not go so far as to have civil effects, nor have they managed to do so now under the new laws. This then was the conclusion drawn from Article 59 of the Civil Code and underscored, from time to time, by this Directorate's reiterated doctrine (cf. Rulings of 17 June, 20 August and 27 September 1991 and 24 June and 24 September 1992). In the present case, however, it so happens that both bride and groom were foreign nationals at the date when the marriage took place. Accordingly, accepting the lack of compliance with the form prescribed by Article 7 of Act 26/1992 on the part of the marriage discussed here, its denial cannot be sustained unless one concurrently reaches the conclusion that said marriage likewise failed to fulfil the formal requirements envisaged by the personal law of either the bride or groom, with the doubts focusing here on the requirements of Moroccan legislation.

SIX. – With the debate thus centred, the problem resides in deciding whether the marriage contracted was done so in accordance with the religious form prescribed by Moroccan legislation, which must be applied pursuant to the personal status of the contracting party. In the present case, it appears from the attached deed of marriage that there were: two "*adules*", in the capacity of legally qualified witnesses, attesting to the giving of consent by both bride and groom; the mandatory intervention of the "*wali*" or matrimonial guardian of the wife; and the payment of a dowry. In addition, there is evidence to indicate: that the deed of marriage was registered at the relevant local registry (Consular

Marriage Register), proof in this case that the marriage took place in a form authorised by the personal law of the Moroccan contracting party, a conclusion which coincides with that drawn from official knowledge of such legislation acquired by this Directorate; and that, as a result, the marriage has produced effects since the date on which it took place (see Ruling of 16–3 June 1997). It must be recalled that the Moroccan Family Code ("*Mudawana*") does not impose the mandatory intervention "*ad solemnitatem*" of the *cadí* or religious minister, and that in the present case evidence of the presence of the Commissioner for Oaths ("*adul*") tasked with issuing the official act or document for subsequent annotation of the marriage at the competent public registry, by way of "*ad validitatem*", has, as seen, been shown".

* Ruling of the Directorate-General of Registries & Notaries, of 7 June 2007 (Official Government Gazette 185/2007 of 3 August 2007)

Law applicable to the form of the marriage act in Spain between a foreign bride and groom. Publication of marriage banns.

"Legal Grounds:

…TWO. – The marriage act is generally solemnly performed by carrying out certain formalities before a public authority (albeit with important exceptions in this respect) and in the presence of witnesses. Yet different State laws regulate this matter differently in terms of the specific content of these formalities, which makes it necessary to determine the specific law that must be applied to ascertain the formalities required of marriages that evince any element of immigration. With the aim of establishing the law applicable to the form of marriage, our modern internationalist doctrine has come to distinguish three groups of cases, in an attempt to systematise the matter. These are: 1. marriages performed in Spain between a Spanish and a foreign national; 2. marriages performed en Spain between foreign nationals; 3. marriages performed abroad between Spanish nationals, or between a Spanish and a foreign national; and, 4. marriages performed between foreign nationals abroad. The concrete issue arising in this appeal involves the case of a marriage performed in Spain between foreign nationals. The fact is that there is no single conflict-of-laws rule in Spanish Private International Law which resolves all the conflicts of laws in this field by way of a general "*lex matrimonii*". Instead, the solution must be sought by breaking down the different requirements which have to be met in a marriage to render it valid, basically consisting of the capacity to marry on the part of both bride and groom, the validity of matrimonial consent, and the validity of the form of entering into the marriage. In order to decide this appeal it is fundamental to determine the validity of the form of performance of the marriage act, insofar as the requirement of capacity to marry is concerned.

THREE. – As regards form, the marriage performed in Spain between foreign contracting parties is governed by the provisions of Article 50 of the Civil Code which contains a conflict-of-laws rule with alternative points of connection, favouring the formal validity of the marriage, on stipulating that, "If both bride and groom are foreign nationals, the marriage may be contracted in Spain in

accordance with the form prescribed for Spanish nationals or by meeting the requirements established by the personal law of either party", which implies that foreign contracting parties may perform their marriage in any form envisaged under Spanish law, be it civil, before a competent Spanish public officer, or be it in any of the legally envisaged religious forms in Spain. In the present case, the contracting parties have availed themselves of the civil form envisaged under Spanish law.

FOUR. – Accordingly, based on the above, it must be recalled that paragraph one of Article 56 of the Civil Code requires parties wishing to contract marriage to furnish evidence beforehand to show, "in the form of a case-dossier processed pursuant to the Civil Registry legislation, that they meet the requirements as to capacity established hereunder". Hence, the provision refers all matters relating to the processing of the matrimonial dossier to the Civil Registry legislation, which, via its Rules & Regulations, governs all matters relating to competence for examining and deciding upon the dossier, legitimation to set it in motion, open proceedings and subsequent formalities, through to its conclusion, which is to take the form of a Court Order granting or denying permission to perform the marriage (cf. Articles 238 to 254 of the Civil Registry Rules & Regulations). Among the envisaged formalities is that of publication of marriage banns provided for by Article 243 of the above Regulation, pursuant to which, "Marriage banns or notices shall be published for the space of fifteen days exclusively in towns within the boundaries of which the interested parties have resided or been domiciled during the previous two years and which have fewer than 25,000 inhabitants *de jure*, according to the latest official census, or alternatively in towns corresponding to the designated district of a Spanish Consulate with fewer than 25,000 persons on the Official Roll (*Registro de Matrícula*)". The interpretation of this statutory rule, as regards the publication of the marriage banns envisaged thereunder as a formality prior to authorisation of a marriage where the applicant is a foreign national and has resided in the preceding two years in a foreign town of fewer than 25,000 inhabitants, has already been addressed by this Directorate in its opinion of 22 March 2004, which clarified the fact that, when the cited rule talks of "interested parties" in connection with the future parties to the marriage, it draws no distinctions in terms of the Spanish or foreign nationality of said parties. Consequently, in these latter cases too, in line with the requirement that residence or domicile during the preceding two years must have been established in a foreign town coinciding with a Spanish consular district having fewer than 25,000 persons on the pertinent Official Consular Roll, marriage banns must be published. In the event of its being unknown, the numerical item of information cited must be queried with the respective Spanish Consulate, whether directly (cf. Article 1 of the Civil Registry Rules & Regulations) or via this Directorate (cf. Article 9 CRA). In this respect, it must be deemed that, following the amendment of the Civil Code by Act 30/1981 of 7 July, the doctrine contained in subsection 9 of the case review of 22 March 1974 on dossiers prior to marriage civil has been superseded. Pursuant to this doctrine, and on the basis of the then

prevailing wording of Articles 91 and 92 of the Civil Code, it was stated that prior notification of civil marriage in a foreign country would not be required if the Consul or competent public officer certified that previous notification of marriage was not envisaged under said country's legislation official, without prejudice to the fact that in such a case, the judge appointed to deal with the matter had to request a certificate from the Consul or competent public officer as to the foreign contracting party's capacity and freedom to marry, a doctrine that is no longer in keeping with the current wording of the legal provisions examined above".

c) Marriages of convenience

* Decision of the Valencian Provincial High Court (Section 10) of 15 January 2007 (JUR 2007\235242)

Marriages of convenience. No evidence of flaw in consent to the marriage.

"Legal Grounds:

(…) TWO. – The lack of consent cited by Article 73.1 as a ground of nullity of marriage, or rather non-existence in the words of Article 45, embraces marriages performed with reservations as to the expressed intent, as well as the so-called "marriages of convenience". This is a very common phenomenon in countries subjected to heavy immigration, which amounts to a fictitious or simulated marriage, so that, though the external formalities have been complied with, neither or only one of the contracting parties has the real intention of taking the other as his/her spouse, with the subsequent conduct of both not being carnal consummation and a shared life, evident proof that, by steering the institution away from its inherent purpose, a secondary or accessory consequence of said institution is exclusively pursued; a characteristic case is thus a marriage with a foreign citizen to facilitate access to or settlement in a country or the acquisition of nationality by the apparent spouse. All this means that, under our law, a union of this type would have to be deemed null and void due to the lack of genuine matrimonial consent, pursuant to Articles 45.1 and 73.1 of the Civil Code. However, such a circumstance must refer to the initial moment of the marriage, with conclusive proof of such simulation or reservation being required. The loss of *affectio maritalis* shortly after contracting the marriage will not suffice. Moreover, restrictive interpretation is called for, so that the grounds of nullity of marriage may not be made dependent on the subjective criterion of the contracting parties, but must be proved objectively. Lastly, bearing in mind that financial circumstances and the desire to acquire Spanish nationality are not in themselves determinants of nullity, the relations between the spouses – inasmuch as the prerequisites of cohabitation and mutual succour have indeed been met – amount to fulfilment of the purposes of marriage, and that, while lack of consent to future cohabitation is one thing, the failure of such cohabitation is quite another. For this latter eventuality the grounds of separation or divorce regulated by the Civil Code, but in no case the grounds of nullity of marriage, are to be found under our law.

THREE. – In the case before the court, evidence has been shown of: the existence of a relationship of betrothal for at least ten months preceding the marriage the nullity of which is sought; the processing of the marriage dossier at least six months prior to the date on which the claimant [*Translator's note*: there would seem to be an error in the text here, with the word "*demanda*", i.e., claim, appearing instead of the more logical "*demandante*", claimant] was detained by virtue of her lack of legal residence in Spain; the obtaining of a job at a restaurant in the town from the very day she arrived in Spain; the existence of a file to legalise her residence at a local *gestoría* [*Translator's Note*: i.e., agency for processing administrative and government paperwork], which charged her approximately eight hundred euros, and which, in the Plaintiff's words, was swindling her; the execution of a pre-nuptial agreement to govern the regime of separation of property as the prevailing constant of the marriage – as stated by the Appellant on being examined; the affection professed by the Appellant for the Defendant's daughter, as stated by the Defendant when examined; the departure by both to Romania, on one or two occasions after becoming married to meet the wife's family, as well as the trip to Onteniente to meet the Plaintiff's family. Finally the certainty of cohabitation for over one and a half years, in view of the fact that, after entering into the marriage in July 2003, it was only at the end of December 2004 that the crisis began, though the parties place the *de facto* separation one year later, namely, at the end of 2005.

In the face of these facts, it is evident that the petition of nullity of marriage due to lack of consent cannot be upheld,…".

[Along these same lines note may be had, *inter alia*, of the Decision of the Pontevedra Provincial High Court (Section 6) of 15 February 2007 (JUR 2007\80703) or the Decision of the Cordoba Provincial High Court (Section 3) of 9 March 2007 (JUR 2007\203747)]

d) Effects

* Ruling of the Directorate-General of Registries & Notaries, of 19 January 2007 (RJ 2007\412)

Law applicable to the effects of marriage. Caveat of attachment of property registered in favour of Dutch spouses, subject to their matrimonial property regime. Mistake in determination of the law applicable to the effects of the marriage (Dutch law as the spouses' joint national law at the date of contracting marriage, Article 9.2 of the Civil Code).

"Legal Grounds:

(…) THREE. No matter how well-founded the assertions of the inaccuracy of the registration might be, it is true to say that this is immaterial for the purposes of clarifying whether it is registered as joint property held in indivisible halves or in Germanic community [*Translator's Note*: i.e., indivisibly], because, even if it had been registered as indivisible halves, each half would nonetheless be registered under said regime of community of property, which

is the matrimonial regime shown in the registration. Consequently, the rules laid down by French law for jointly owned matrimonial property would have to be applied (cf. Article 9, 2 and 3 of the Civil Code). Should no evidence of the applicable rules of French law be forthcoming, as occurs in this case, the problem can be resolved by bringing the claim against both spouses. If the caveat were to conclude with the forced sale of the property, this is the only case in which the pertinent public officer could act on behalf of both owners in the event of default of appearance. In such a case, moreover, the body responsible for the attachment would benefit because the attachment could be extended to the entire property".

f) Divorce

* Decision of the Madrid Provincial High Court, No. 587/2007 (Section 22), of 2 October 2007 (JUR 2007\353251)

Law applicable to divorce. Articles 107 and 9 of the Spanish Civil Code. Application of Romanian Law: divorce decree denied. Appeal dismissed.

"II. – Legal Grounds:

… TWO: The petition submitted by the Appellant can in no way be countenanced, in that: neither the legal nor the procedural prerequisites have been met with regard to the possibility of applying Spanish law for the issue of a divorce decree in respect of citizens of Romanian nationality, notwithstanding their residence in Spain; in point of fact, the requirements envisaged under Article 107 of the Civil Code, and Article 9 of said legal text have not been met; and, as is well observed in the judgement brought on appeal, rather than a mutually agreed action, there has, in contrast, been a contested action, without it being possible to say, therefore, that in this procedural avenue there has been mutual agreement, either as to the principal decree of dissolution of the bond, or as to the measures to be adopted. In this respect, the application for a divorce decree on the basis of Spanish law is unviable, inasmuch as Romanian legislation is applicable, and, aside from the possibilities offered by the current Civil Procedure Act relating to collaboration with respect to proof of foreign law, provided always that this is invoked by the parties, the truth of the matter is that the divorce application was filed on the basis of Spanish legislation, so that, in the absence of a mutually agreed procedure – since at no stage of the proceedings was the contested action transformed into a mutually agreed action – the decision brought on appeal is lawful, with the legal reference contained in said judgement being valid. The foregoing leads to the appeal being dismissed, insofar as this entails confirmation of the ruling whereby the divorce decree is denied."

* Decision of the Barcelona Provincial High Court, No. 682/2007 (Section 12) of 7 November 2007 (JUR 2008\31463)

Dismissal of appeal. Divorce decree of marriage performed in Morocco: fitting and proper. Lack of translation and legalisation of documents. Correct procedural

time for pleading procedural flaw. Annulment of proceedings in cases of defencelessness: not fitting and proper. 1997 Spanish-Moroccan Convention. Existence of other matrimonial ties: polygamous marriage. Need for counterclaim to seek compensation on application of the Moroccan Mudawanaí.

"Legal Grounds:

(…) THREE. – The second of the grounds of appeal refers to the infringement of Article 7 of the Civil Code, considering that the Plaintiff has sought dissolution by divorce of the marriage entered into with the Defendant before a Moroccan Court, with said petition being denied, and that Spanish jurisdiction may not serve to evade Moroccan law, which should lead, according to his understanding of the matter, to the divorce application being dismissed, alluding also to the fact that he would be denied enforcement of the Moroccan decision, because one of the legal requirements needed for the grant thereof has not been met, i.e., said decision was rendered *in absentia*. In this regard, note should be taken, firstly, of the Appellant's own admission that enforcement of the Moroccan decision has not been obtained. Furthermore, from the court records there appears to be no evidence of compliance with the requirements referred to by the Convention concluded between Spain and Morocco for Judicial Co-operation in Civil, Commercial and Administrative matters, signed in Madrid on 30 May 1997, which at Article 22 lays down that judgments in civil, commercial and administrative matters rendered by courts of either Contracting State are to have the authority of *res judicata* and executive force in the other State, under the conditions and in the manner stipulated in Title three thereof. Consequently, this means that there is no Moroccan divorce decree between the litigants which can exert its effects on these proceedings and in the Spanish courts, assuming, as the Appellant herself has stated, the impossibility of obtaining the enforcement order, on judgement having been rendered *in absentia* of one of the parties. This in turn determines the impossibility of finding any abuse of law by the Plaintiff, bearing in mind that both parties reside in Spain and the Spanish courts' jurisdiction to decide on the divorce application filed, there being no divorce decree with legal effectiveness in this country.

FOUR. – In her brief, the Appellant also pleads the impossibility of divorce being decreed in a case of polygamy, on pointing out that the Plaintiff contracted two marriages, subsequent to that entered into with her in Morocco, which, according to the document referred to, is evidenced in exhibits Nos. 3 and 4 of those adduced in the answer to the complaint. Accordingly, though said documents have not been translated and there is no evidence of their having been duly legalised pursuant to Article 323 of the Civil Procedure Act, as the Respondent contends, which bars them from being good in law or having effect in these proceedings, it should nonetheless be noted that the fact as pleaded, would not bar the dissolution by divorce of the marriage between the litigants. In line with the Appellant's own position, this marriage was not flawed, with the existence of Mr. Federico's earlier valid marriage not being pleaded, regardless of any liability which the above-mentioned party might have incurred on allegedly contracting the subsequent marriages, a separate matter, independent

of the possibility of a valid marriage between the litigants being dissolved by divorce."

XIV. FORM OF LEGAL DEEDS AND INSTRUMENTS

* Ruling of the Directorate-General of Registries & Notaries, No. 5/2007, of 25 September 2007 (JUR 2007\315032).

Civil Registry: marriage: nuptial agreements: registration: fitting and proper: executed by spouses, the husband of Italian nationality, and the wife of Spanish nationality, both with habitual residence in Italy: Italian public deed, compliance with the legal requirements: compliance with the requisites of authenticity vis-à-vis the factual reality narrated by the deed, and with Italian law as regards the form of its execution: intervention of Italian notary equivalent to that of Spanish notary for the purpose of reliably certifying consent given by spouses.

"Legal Grounds:

…FIVE. – In our legal system, Article 11 of the Civil Code favours the formal validity of nuptial agreements, by adopting a system of alternative points of connection, so that lack of recognition of the formal validity of the legal deed or instrument will not occur unless said validity is jointly rejected by all the laws elicited by the above-mentioned alternative points of connection, namely, the law of the place where the deeds are executed, the law applicable to the content, the personal law of the settlor or testator, or the common law of the parties to the deed. It suffices for the formal validity of the deed or contract to be acknowledged by just one of these, for such validity to be recognised for the purposes of our legal system.

Notwithstanding this, where the law applicable to the merits of nuptial agreements, determined pursuant to the provisions of Article 9 subsection 3 of the Civil Code, mandates a legal form *ad solemnitatem*, as happens with Spanish law, which requires a public deed for such marriage settlements under pain of nullity (cf. Articles 1327 and 1280 subsection 3 of the Civil Code), Article 11 subsection two of the Code lays down that said form must be observed, so that in such cases the so-called *lex causae* imposes a unity of regime between form and substance, as has been stressed by our most authoritative internationalist doctrine (also see Supreme Court Decision of 23 June 1977). The above approach leads, by way of a preliminary issue, to the need to resolve the matter of determining which law is to be applied to governing the content or substance of the deed or contract, because, depending upon whether it is one or the other, application of the *lex causae* to the formal validity thereof could also be predetermined pursuant to subsection two of said Article 11 of the Civil Code.

SIX. Thus, the singular approach to the matter taken by Article 9 (3) of the Civil Code in respect of nuptial agreements, targeted, not at determining an applicable law, but rather at indicating the different laws that may be used as parameters of validity of nuptial agreements, means that, for the purposes of Article 11 (2), there may be a number of laws that recognise said validity of

substance, whose regimes in terms of the imposition or lack of imposition of given formalities may diverge. In such a case, it becomes essential to decide selectively which of the concurrent laws claimed on the basis of any of said provision's alternative points of connection governs the substance of nuptial agreements for the purposes of determining the need or lack of need for formalities imposed *ad solemnitatem*.

The most authoritative doctrine points to the criterion *favor validitatis*, which impregnates Article 11 of the Civil Code insofar as the form of deeds and contracts is concerned, as the guideline to the solution. This would lean towards adopting, as the principle of elucidation of the topic, the principle of deeming that the law governing the substance of nuptial agreements ought to be the least stringent in terms of the extrinsic formalities of such agreements, in this case the less formalistic of the two, Spanish or Italian law. In this case, however, neither the Civil Registrar, nor the Appellant (nor the Public Prosecutor's Office which has joined the appeal) has questioned the need for a public deed as a condition of the validity of nuptial agreements and capacity to have access to the publicity afforded by registration, or the status of the assessed document *per se*. Instead the question posed is whether this requirement has been met by means of the document presented for registration, in view of the fact that it was executed before an Italian notary. The question thus continues to pivot on the scope of protection of external legal dealings and on the effectiveness of foreign documents for registration purposes.

SEVEN. To analyse the matter from the above stance, one has to depart from the principle of legality, a basic principle of our civil registry system, due to the special importance of the effects deriving from entries on the register (which enjoy the presumption of accuracy and validity and are under the jurisdictional safeguard of Articles 2, 3 and 4 of the Civil Registry Act), founded, among other points, on a rigorous selection of registrable documents submitted for the Registrar's assessment (cf. Article 27 of the Civil Registry Act), which in certain matters, such as the case of nuptial agreements, translates as the requirement of a public deed or authentic instrument in order for registration to be effected in the registry books (cf. Articles 1327 of the Civil Code and 77 of the Civil Registry Act).

Thus, while the decision as to when a Spanish document meets the conditions necessary for being classed as public or authentic, presents no difficulties in view of the definition contained in Article 1216 of the Civil Code, the matter becomes complicated when a foreign document is involved. Naturally, such a document would have to have force in Spain under the law (cf. Articles 81 of the Civil Registry Rules & Regulations, 4 of the Mortgage Act, and 36 of the Mortgage Rules & Regulations), by virtue of its execution having complied with the forms and formalities stipulated in the pertinent country, but this first approximation does not entirely resolve the problem posed because the issue here is to determine, by reference to the requirements of public documentation for registration of nuptial agreements at the Spanish Civil Registry, when a

foreign document may be classed as a public deed and may thus enjoy access to the Civil Registry.

From this standpoint, it is not enough to attempt to resolve the problem by application of the rules contained in Article 11 of the Civil Code with respect to the form of deeds and contracts, since this Article solely resolves questions concerning the validity of the various forms in the context of Private International Law, in harmony, it should be said, with the general principle of freedom of form for contract in our internal law (cf. Article 1278 and successive sections of the Civil Code), while here, as stated above, it is not merely a question of the validity of nuptial agreements. Concurrently there is another additional question, namely, that relating to a foreign document's eligibility for access to the Spanish Civil Registry. To resolve this latter problem, recourse must be had to Article 12.1 of the Civil Code, pursuant to which, "classification to determine the conflict-of-laws rule applicable must always be made in accordance with Spanish law". Indeed, if the Spanish public deed, by virtue of fulfilling certain special characteristics, is the appropriate formal vehicle for registering nuptial agreements at the Civil Registry, this makes it necessary to perform a preliminary task of classification of, or in other words, comparison between the basic requirements demanded of foreign documents for them to enjoy this same public status in their own legal system. Only where foreign documents meet the minimum indispensable requirements or prerequisites that characterise Spanish public deeds, can it be held appropriate for a marriage settlement contained therein to be permitted registration at the Civil Registry, in accordance with what has come to be called, in the doctrine, "equivalence of forms".

From this point of view, it must be said that the Spanish public deed attains this status when it meets the following basic requirements: a) it has been authorised "by a notary or competent public officer" (Article 1216 of the Civil Code, i.e., the authorising public officer is the bearer of the public function of witnessing and attesting, whether in the judicial or the extrajudicial sphere; and, b) "the formalities required by law" (Article 1216 of the Civil Code) have been observed. This translates as compliance with the formalities required for each category of public deed, which, where public documentation of an extrajudicial deed is involved, essentially comprise the need for adequate identification of the party executing the deed or contract (attestation of known or adjudged identity) and the authorising officer's considered opinion as to the capacity of the party executing the deed or contract (adjudged capacity).

If the above-indicated basic requirements of the foreign assessed document are compared, it will be seen that the latter must not be rejected by the Spanish Civil Registry, inasmuch as the Italian public deed submitted for classification fulfils the above-mentioned requirements.

EIGHT. However, one more step has still to be taken in the current interpretative process, since the problem linked to formal status in private international situations has imposed a trend in law towards the primacy of specific over general solutions, thereby bringing about a more relative approach to the traditional *regla locus regir actum*, which, in Spanish law, is to be seen in the

confrontation of the solutions contained in subsections one and two of Article 11 of our Civil Code. This dispersion and specialisation of the guidelines governing formal status in the context of Private International Law to determine the validity or the legal effectiveness of each category of legal deed or instrument is explained, in good measure, by the polysemous meaning of the word "form" when applied to legal relations, given the functional polyvalence of form as a requirement of legal deeds and instruments.

Form can be construed, simply, as the way of externalising a transactional desire or consent, and thus, in principle, any form, by reason of the place where the deed is executed or by virtue of any other alternative connection, could serve as evidence – albeit only procedural – of such desire or consent, in order to safeguard the existence of the transaction. In this regard, our law is imbued with a spiritualism or antiformalism that serves to strip any form of exclusive ability to evaluate the presence of consent. Yet the legal subjection of a deed to certain formalities may, at times, operate with an *ad solemnitatem* value, namely, as a constitutive element *sine qua non* of the deed itself or documented legal relationship, or alternatively as an indispensable condition of certain legal effects (conveyance or assignment, executive, eligibility for registration, etc.). This double scope or significance of form is to be noted in the current Article 323 of the Civil Procedure Act.

When the matter of form is reduced purely to a problem of the reliability of a given form as the expression and reliable evidence of consent, and of the authenticity and capacity of the party giving it, the intervention of a foreign authority that thus certifies it when the execution of the deed takes place abroad, should, logically, warrant consideration equivalent to the form intervened by an authority of the forum, and this has repeatedly been held to be the case by this Directorate-General, accepting this possible equivalence of forms in matter of powers of attorney formalised before foreign authorities (see Rulings of 11 June 1999 and 21 April 2003). Hence, there can be no doubt that the authenticity of any notarial document as a form of consent may be recognised with a cross-border nature.

In contrast, it would seem more problematic for possible equivalence of forms to be sought where the intervention of a given authority of the forum, such as a notary, is stipulated as a requirement of the deed's effectiveness, in order to protect certain interests of the forum, because then the law that governs the effects will be that which monitors the equivalence of form. Such monitoring may be compromised in such cases by a lack of equivalence of the authorities, on the foreign authority not being dependent upon or subject to any State other than its own, and on it being impossible for it to be required to have knowledge or proper application of a foreign legal system outside its jurisdiction and jurisprudence. Yet this problem only arises where there is a lack of coincidence between *jus* and *forum*, i.e., where the law that governs the substance of the deed or documented transaction is not concomitant with that governing the nationality of the authority of the forum.

NINE. This is precisely the problem that would seem to underlie the line of reasoning followed by the Civil Registrar as the ground for not allowing the entry to be made on the register, in view of the fact that the assessed document did not come from the authority of the forum, since, according to the ruling of dismissal, the judge deems the intervention of the Spanish notary to be necessary, due to the fact that the nuptial agreement is subject to Spanish law by virtue of one of the spouses possessing said nationality.

Nevertheless, this last argument can find no support in this appeal. Indeed, the intervention of the Spanish notary could be defended as necessary in terms of the above-described theory, given the need for a public deed established under Article 1327 of the Civil Code were Spanish law to be the *lex causae*. However, notwithstanding the bride's or the groom's Spanish nationality, there is no bar to Italian law being competent to govern the substance of the deed (pursuant to the above-mentioned Article 9.3, and from what is to be gathered from the content itself of the document presented for registration), and hence the document authorised by the Italian notary is to be deemed to meet the requirements of authenticity with regard to the factual reality narrated therein, as well as the compliance of its execution with said legislation, which in this case is the law applicable.

Accordingly, bearing in mind that, among other reasons: a) Articles 27 of the Civil Registry Act and 81 of its Rules & Regulations acknowledge the effectiveness for registration purposes of genuine foreign documents, be they judicial, administrative or notarial, with force in Spain under the terms of International Laws and Treaties; b) the assessed document had had an apostille affixed pursuant to the Hague Convention, thereby fulfilling the supplementary requirement for legalisation of documents authorised by a foreign public officer, required as a guarantee of their authenticity by Articles 88 and 90 of the Civil Registry Rules & Regulations, on ensuring the legitimacy of the signature and the office of the authorising notary; c) the Italian notary's intervention may be equivalent to that of a Spanish notary for the purposes of reliably certifying the consent given by the spouses to the content of the nuptial agreement and attesting to the capacity of same; d) Italian law is competent to govern the substance of the marriage settlement (Article 9.3), in view of the parties habitual residence in that country, and that, insofar as nuptial agreements executed abroad are concerned, Spanish law is only imperatively imposed upon form in those cases where such agreements are executed before a Spanish diplomatic or consular authority, by dictate of the principle *auctor regit actum* (cf. Article 11 no. 3 of the Civil Code); and, e) nothing is observed that may be contrary to public policy, it is to be concluded that the notarial document submitted is eligible for being registered at the Spanish Civil Registry, in accordance with the Act governing the latter."

XII. CONTRACTS

* Decision of the Pontevedra Provincial High Court, No. 80/2007 (Section 1) of 8 February 2007 (JUR 2007\88277)

Article 39 of the United Nations Convention on Contracts for the International Sale of Goods. "Reasonable" time to show lack of conformity with goods.

"Legal Grounds:

(…) FOUR. – …But in the case, we find ourselves faced with an international sale of goods, to which the United Nations Convention of 11 April 1980, done in Vienna and acceded to by both Italy and Spain, is applicable. Article 39 of the Convention lays down that:

1) 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.

2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest 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.

A logical and systematic interpretation of both subsections leads to the conclusion that the maximum time limit of two years applies where any other shorter period is not the reasonable time referred to by subsection one. In this case, having regard to the circumstances described, the time of almost one year that the Appellant delayed in giving notice of his lack of conformity with the machinery, is to be deemed excessive".

* Decision of the Madrid Provincial High Court, No. 92/2007 (Section 14) of 20 February 2007 (JUR 2007\152319)

United Nations Convention on Contracts for the International Sale of Goods. Article 8: Interpretation of the conduct of the parties.

"Legal Grounds:

(…) THREE. (…) In view of the object of the contract and purpose designated therein (delivery/sale of pressed olive pits for the generation of power), delivery by the vendor of the agreed quality as per the technical specifications in the annexe to the contract, was an essential obligation. Moreover, the merchandise delivered was required to have a maximum percentage humidity of 14% and, in addition, under clause 4, could not contain the flesh of the fruit, pulp or any other impurities. Not only did the merchandise corresponding to the third shipment have a disproportionate humidity, but it also contained pulp, so that the Plaintiff-purchaser was entitled to terminate the contract and claim compensation from the Defendant-vendor for damages, owing to the need to buy alternative goods, by virtue of the terms laid down both in the contract (clauses 13 and 12) and under Articles 45, 49, 74 and 75 of the United Nations Convention

on Contracts for the International Sale of Goods, done in Vienna on 11 April 1980, due to Denmark and Spain being contracting parties thereto.

It should be noted that Article 8 of the 1980 United Nations Convention, lays down that, for the purposes of the Convention, statements made by and other conduct of a party are to be interpreted according to his intent, where the other party knew or could not have been unaware what that intent was, and the Defendant could not be ignorant of the Plaintiff's intent in view of the fact that he entered into the contract under which the quality conditions were stipulated and in which the purpose thereof was expressly stated".

XV. REAL RIGHTS

* Decision of the Las Palmas Provincial High Court, No. 95/2007 (Section 5), of 23 March 2007 (JUR 2007\148291)

1926 Brussels Convention relating to maritime liens and mortgages.

"Legal Grounds:

(…) TWO. It is clear that the action is brought pursuant to Brussels Convention of 10 April 1926, since a specific declaration is sought as to the real mortgage attaching to the vessel arrested to secure payment of the debt claimed, so that, notwithstanding the initial privileged nature of the credit, the truth is that the defendant company would respond, not so much as a debtor, but rather as the party liable for the security embodied by vessel under the terms of the above-mentioned 1926 Convention, and hence, what must be decided is whether, as held by the decision brought on appeal, the security embodied in the lien has prescribed.

As the decision challenged indicates, Article 9 (Extinguishing of maritime liens) of the Convention provides that: "…"

As stated, the maritime credit claimed by the Plaintiff in his application for the arrest of a vessel may enjoy priority, with said status determining the charge attaching to the asset (the vessel) vis-à-vis payment of the credit, the origin of which derives precisely from the very ship. This is regardless of the fact that the vessel's owner at the date of the attachment might not be the person or company that contracted the debt, which is claimed by virtue of the rights of realisation and prosecution that characterise maritime liens, recognised under Articles 580 and 584 of the Commercial Code and Article 2 of the International Brussels Convention of 10 April 1926 for the Unification of Certain Rules relating to Maritime Liens and Mortgages in force in our country on the date when the suit was filed (the Convention has been denounced by Spain by verbal note of 25 May 2004 (Official Government Gazette 7 October 2004). In view of the real security that, in these cases, the creditor-plaintiff has over the vessel for the collection of a credit, any ship-owner, irrespective of the fact that he may not be the true debtor, must accept that the credit may be executed on the vessel owned by him, with his position indeed being akin to that of a debtor, even where this is due to obligations contracted by another. Furthermore, Article 3, subsection 1),

of the International Brussels Convention of 10 May 1952, on stating that, "… a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship", reflects the possibility of the vessel from which the credit stems being arrested, even where the current owner is not the original debtor, though for this to apply it has to be a credit secured by a maritime lien in accordance with the provisions of Article 9, paragraph 20, of the above Convention…".

Having regard to the wording of the provision, and given that the calculation made by the decision of the Lower Court is correct and has not been challenged by the Appellant, the truth is that the maritime lien has expired, due to the action being brought after the elapse of more than one year since the creation of the credit…."

XVII. INTANGIBLE PROPERTY

1. Intellectual property

* Decision of Madrid Commercial Court of 19 October 2007 (JUR 2007\ 334130)

Industrial Property. Infringement of exclusive licence of patent of pharmaceutical product. Actions for cessation and compensation for damages. Pleading of decision of the CJEC and evidentiary effects. Entry into force and direct application of TRIPS agreements. Effectiveness in Spain of European patents. Translation and revision [correction] of patent: declaration of nullity by the Spanish Patent and Trade Marks Office (Oficina Española de Patentes y Marcas – OEPM). Compatibility of treaty laws.

"Legal Grounds:

TWO (…) Hence, as will be seen below, the Agreement on TRIPS [*Translator's note*: i.e., Trade-Related Aspects of Intellectual Property Rights] must be deemed as forming part of our legal system; and, secondly, pursuant to Article 27 of the Agreement, protection must be deemed to be accorded to all types of inventions, including those of pharmaceutical products, with Article 70 governing the extent of the duration of protection, so that, from the entry into force in our country of the TRIPS, protection is accorded to all patents of pharmaceutical products to which a European patent lays claim – even prior to 7 October 1992 – and which are still in force. Moreover, it should be noted that the TRIPS Agreement may be invoked by private parties. Accordingly, in respect of European patents that protect claims to pharmaceutical products, since the entry into force of the TRIPS Agreement Spain is obliged to recognise them provided that they have not expired. This means that the conflict between the TRIPS Agreement and the reservation made with respect to the European Patent Convention (EPC) accepted by Spain is resolved by applying the TRIPS Agreement (…) (…)

THREE: It therefore falls to us to analyse whether the TRIPS Agreements are directly applicable under Spanish law. To this end, we must examine, firstly, if this enactment forms part of our law. In this regard, Article 96 of the Spanish Constitution establishes that, "Validly executed international treaties, once officially published in Spain, shall form part of the internal legal system. Their provisions may only be repealed, amended or suspended in the manner envisaged in such treaties themselves or in accordance with the general rules of international law." For its part, Article 1.5 of the Civil Code lays down that the legal provisions contained in international treaties shall not be directly applicable in Spain until such a time as they have come to form part of the internal legal system, by publication, in their entirety, in the Official Government Gazette. From the interplay of these two provisions, it is to be concluded that, for the integration of international treaties in our legal system, it is only necessary that they be published in the Official Government Gazette. This means that our law has adhered to the monistic position, meaning that, for the effectiveness of treaty provisions, no prior transformation is required. There is no need for them to be formally received in the form of an enactment: their publication alone will suffice (in this regard see Supreme Court Chamber 3 Decision of 10–03–98; Supreme Court Chamber 1 Decision of 22–05–89; and Constitutional Court Decision 29–06–98). This has been held to be so by the Supreme Court (Chamber 1) in its decision of 28 July 2000, Appeal 2751/1995, on stating that, "…this special Act, which assimilates the content of said Convention and its subsequent amendments, renders the whole thereof part of the Spanish legal system, as provided for by Article 96.1 of our Constitution and Article 1.5 of the Civil Code (…) once, as occurs in the case under review, the need for publication in the Official Government Gazette indicated by the Decisions of 3 May 1980 and 30 June 1982 and the Court Order, also of this Chamber, of 13 January 1983, has been met, thereby integrating these provisions into the Spanish internal legal system, in which they have long been deemed to be so for the purposes of cassation appeals, as held by Decisions of 26 June 1901, 16 April 1902 and 9 January 1911." Accordingly, inasmuch as the TRIPS Agreement was published in the Official Government Gazette on 24 January 1995, it must be concluded that it forms part of our legal system. However, the fact that the TRIPS Agreement forms part of our legal system, is not enough for its direct application to be invocable, though in reality, what is relevant is not whether the agreement as a whole is directly applicable but rather whether certain provisions thereof are applicable, with the result that their applicability may be invoked by private parties in the courts of justice. In this regard, it has been stated that it is necessary for 3 requirements to be met, namely: the agreement must contain provisions capable of directly affecting the sphere of the private parties, on acknowledging rights to which they are entitled or imposing obligations on them; the provisions must be self-enforcing, meaning that their wording is to be clear and precise and allow for direct application, without recourse having to be had to any subsequent legal or statutory implementation that the State may see fit to establish; the internal legal system must recognise the international rules

of law as enjoying direct applicability, so that there is no need for any formal enactment of acceptance of treaties to be promulgated. (…)

SIX: What has been analysed thus far allows us to hold: that direct application of Articles 27 and 70 of the TRIPS Agreement is possible; that these provisions have rendered the reservation made by Spain in respect of the EPC without effect; and, thirdly, that in Spain effects may be granted to European patents that lay claim to pharmaceutical products, even though these may have been applied for prior to 7 October 1992. However, in order for the TRIPS Agreement to be applicable to the European patent of which the Plaintiff is licensee, and for said party to be able to plead that its patent is of a pharmaceutical product, it is essential that: the specification of the protected invention should coincide and merge with the description of the patent exactly as it was granted; the patent should be in force at the date of application of the Agreement; the holders should be nationals of other Member States of the Agreement; and the subject of the patent should meet the requirements of patentability (novelty, inventive step and industrial application).… Accordingly, the invention that is the subject of DUPONT's European patent is one and the same as the Spanish patent, though in the translation of the latter no product claims are included; hence, we are in the presence, not of two different patents, but rather of a single patent, and consequently the claims must be deemed to be identical. In addition, it has been shown that the European patent was in force at the date when the TRIPS Agreement entered into force; and that the application for the European patent was verified on 9 July 1987 and expired on 8 July 2007. The owner of the patent is a national of a Member State of the TRIPS Agreement (USA), and lastly, the requirements of patentability have also been met, since these have not been questioned by the Defendants. This means that there is no impediment whatsoever to the TRIPS Agreement being applicable to DUPONT's European patent. In conclusion, Article 27 of the Agreement means that patents of pharmaceutical products must also be the subject matter of protection, and that such protection must be extended to patents granted prior to the entry into force of the Agreement, provided that they are currently still in force, pursuant to Article 70.2 of the Agreement, and do not constitute new matter, as laid down by Article 70.7.

SEVEN: As has been indicated above, by virtue of Articles 27 and 70 of the TRIPS Agreement, the claims in respect of pharmaceutical products included in DUPONT's European patent must be deemed to have effects in Spain. The problem posed is to define the way in which the European patent acquires effectiveness in Spain. Under the terms of Articles 8 and 9 of Royal Decree 2424/1986, the Spanish translation of the text of the European patent must be submitted within a period of no later than 3 months from notice of the grant of the patent being published in the European Patent Bulletin, and must be published in the Official Industrial Property Bulletin (*Boletín Oficial de la Propiedad Industrial/BOPI*) by the Spanish Patent and Trade Marks Office within a period of no later than one month. In principle, it might be thought that, on the above-mentioned time limits having long elapsed, in view of the fact that publication of the grant of

the European patent took place on 26 October 1994, it would not be possible for the pharmaceutical product claims of the European patent to enjoy effectiveness in Spain. However, such a conclusion would flagrantly contravene the provisions of Articles 27 and 70 of the TRIPS Agreement, which, it should not be forgotten, are provisions of an international convention. The principle of primacy of international over domestic laws prevails, so that the provisions of national law may not contravene what is stipulated in international treaties. This means that the above-mentioned provisions cannot bar the effectiveness of the pharmaceutical products claims of DUPONT's European patent, which is recognised by the TRIPS Agreement. In this respect, the Constitutional Court Decision of 14 February 1991 lays down that, "Under Article 96.1 of the Spanish Constitution, no international treaty receives more than the status of a law which, endowed with the passive force granted it by this provision, forms part of the internal legal system. Hence, an alleged contradiction between treaties and Acts or other subsequent statutory provisions is not an issue which affects the constitutionality of the latter and must, as a result, be settled by the Constitutional Court (Constitutional Court Decision 49/1988, Legal Ground 14 "*in fine*"): instead, as a pure problem of selection of the law applicable to the specific case, resolving any such contradiction corresponds to the courts in the disputes of which they are seised. In brief, possible infringement of European Community law by subsequent State or regional laws or provisions does not make a constitutional issue of what is only a conflict of sub-constitutional provisions, which has to be resolved in the context of ordinary jurisdiction." The Decision of the Supreme Court Chamber 1 of 28–7–2000, Appeal 2751/1995, is particularly enlightening, on stating that, "This special Act, which assimilates the content of said Convention and its subsequent amendments, renders the whole thereof part of the Spanish legal system, as provided for by Article 96.1 of our Constitution and Article 1.5 of the Civil Code, with preference being accorded to the application of said Convention, as held by Decisions of 27 January 1970, 17 July 1971 and 17 June 1974 – on declaring that international commitments of an expressly agreed instrument have primacy in the event of dispute or contradiction with any sources of domestic law that differ with respect to the provisions thereof – once, as occurs in the case under review, the need for publication in the Official Government Gazette indicated by the Decisions of 3 May 1980 and 30 June 1982 and the Court Order, also of this Chamber, of 13 January 1983, has been met, thereby integrating these provisions into the Spanish internal legal system, in which they have long been deemed to be so for the purposes of cassation appeals, as held by Decisions of 26 June 1901, 16 April 1902 and 9 January 1911." Furthermore, pursuant to Article 27 of the Vienna Convention, provisions of internal law may not justify the breach of a treaty. To publish its product claim in respect of Losartán in Spain, the Plaintiff company has had recourse to Article 12 of Royal Decree 2424/1986, on contending that this provision enables a proprietor of a patent to revise the translation without there being any limitation as regards verification thereof. It further contends that the ultimate purpose of this provision and of Article 70

of the EPC is to enable the remedying of situations in which the protection granted by the Spanish translation of a patent might be less than that envisaged under the one authentic text. Article 12 of the Royal Decree 2424/1986 states: "A revision of the translation may at any time may be made by the proprietor of the application or patent, which revision shall not have effect until it is published by entry on the Industrial Property Registry. Said publication shall in no case be made unless evidence has been shown of payment of the pertinent fee." In principle, it might be thought that that the avenue afforded by Article 12 is envisaged for cases of revision of the patent translation, i.e., for the correction of any errors detected; yet, it should be borne in mind, on the one hand, that Article 70.3 of the EPC permits the European patent in the language of the translation (in our case Spanish) to confer protection which is narrower than that conferred by the European patent in the language of the proceedings, and on the other hand, that in such cases, Article 70.4 of the EPC obliges the Spanish State to allow the proprietor of the patent to file a corrected translation. This means that, as the initial translation of the European patent filed by DUPONT for Spain, had less extensive protection, since it solely contained process and not product claims as occurred with the European patent, the proprietor of the patent must be allowed to file an amended revision of the patent with the inclusion of product claims that were indeed protected under the European patent. Evidently, in no case may claims be included via this avenue which were not contained in the language of the proceedings, i.e., the limit on the avenue of revision is to be found in the text of the European patent, so that, within this framework, all the claims that were not contained in the original text of the Spanish translation may be included in the correction. At all events, account must be taken of the fact that the legal force of the TRIPS Agreement and the ensuing recognition in Spain of product (Losartán) claims protected by the European patent imposes, by way of an obligation on our country, the recognition of this product patent, and to this end, some avenue must be made available for the publicity of the patent, there being no bar whatsoever to recourse being had to revision of the translation under Article 12 of the Royal Decree. Any other solution would prevent the proprietor of the European patent from enjoying absolute protection in Spain of his European patent, as well as any product claims, and would amount to a contravention of the TRIPS Agreements. Moreover, the existence of this international law (TRIPS Agreement), the ultimate purpose of which is the desire to standardise and ensure uniform legal protection of patents, to the extent that it forms part of our legal system, imposes the obligation of interpretation of the provisions of our national law in line with the goals pursued by the Agreement, so that the rights recognised by it can be met. This, in turn, means that interpretation of Article 12 of Royal Decree 2424/1986 cannot pose a bar to recognition of the protection afforded by the TRIPS Agreement. In conclusion, the avenue of Article 12 of the Royal Decree, consisting of the filing of an amended revision of the patent with the inclusion of product claims that were in fact protected under the European patent, must be deemed entirely appropriate....

NINE (…) However, the Defendants, rather than invoking the right of pre-use pursuant to the Patent Act, instead invoked Royal Decree 2424/1986 relating to the application of the EPC, which establishes a different regime. Pre-use is governed by Article 12.3. Said provision lays down that, "any person who, in good faith, begins to exploit an invention or makes effective and serious preparations to this end, without such exploitation constituting an infringement of the patent application or of the patent in accordance with the text of the initial translation, may continue with the exploitation in his enterprise or for the needs thereof without any compensation whatsoever." Good faith, in this provision, means that the third party who undertakes the exploitation or makes effective and serious preparations, does so in the belief of lawfully exercising a freely disposable right. Secondly, neither the exploitation nor the preparations may constitute an infringement of the patent in terms of the text of the initial translation. The fulfilment of these two requirements permits a third party to exploit the part of the patent which, while not being included in the initial text of the translation, has subsequently been protected by the correction of the translation. In all cases, however, such exploitation must be undertaken in the same manner as it was effected prior to the date of priority, with the exploitation continuing in the Defendants' enterprise or for the needs thereof. This could mean, in the case of the DUPONT patent, that if the two requirements are met, there would be no bar to the Defendants continuing the exploitation, not of the process patents (included in the initial translation), but rather of the pharmaceutical product patents, and specifically that of Losartán, the protection of which was included in our country by means of the correction of the translation. Thus, since at least 2005, the Defendant companies have been manufacturing and marketing Losartán. This is stated in the Court Order of 28 February 2005 issued by Madrid Commercial Court No. 1 in Action for Interim Measures 529/05, involving the same parties as those in the present proceedings (Exhibit No. 2 of the Answer to the Complaint). What is more, in its submission of Complaint (page 44), the Plaintiff company, MSD, itself acknowledges that the Defendants exploit and/or make serious preparations of Losartán. The requirement of exploitation of the invention is thus met; it should not be overlooked, however, that such exploitation may not constitute an infringement of the patent application or of the patent under the initial text, and, moreover, that it must be in good faith. It is true that product patents were introduced with the revision of the translation – claims that were not in the initial text of the translation – by application of the reservation made by Spain under Article 167 of the EPC. Consequently, it might be thought that if the Defendants exploited Losartán previously, they could then continue to do so, provided, obviously, that these two requirements were met. Nevertheless, sight should not be lost of the fact that we are dealing here with a European patent and, as has already been stated in this decision, the patent is unique, that is to say, there are not as many patents as there are nations in which it has been validated. Instead there is only the one European patent. This is to be deduced from Articles 2.2 and 64 of the EPC which refer to the fact that the European patent is like or has the same

effects as the national patent. The existence of a single patent, which includes product and process claims, means that it cannot be argued that, on product claims being introduced in Spain with the revision of the translation, the Defendants have engaged in exploitation of the patent in good faith prior to the revision. In reality, on DUPONT's patent being a European patent, which protects both pharmaceutical process and product claims, regardless of the fact that the product claims for Spain were introduced with the revision, the Defendants exploitation of Losartán constitutes an infringement of the patent. However, if the exploitation were to be deemed to precede priority, on not being included in the initial translation, the Defendants' conduct would have to be in good faith. Chamber 1 of the Supreme Court's Decision of 17 January 2001, Appeal 2256/1995, has laid down "that good or bad faith is a concept which, as has been stated, *inter alia*, by Decisions of 29 November 1985, 7 May 1993 and 8 June 1994, rests on the evaluation of conduct drawn from certain facts. It is a legal concept freely interpretable by Courts on the basis of proven facts and circumstances – Decisions of 5 July 1985 and 12 March 1992 – and good faith must be presumed as long as bad faith has not been held to have existed by the Courts – Decision of 15 February 1991. Finally, good faith is presumed, while bad faith must be proved and requires an express declaration by the Courts." For the purpose of proving the existence of bad faith, since it must not be forgotten that good faith is presumed, while evidence against its existence is admitted, it should be borne in mind that the Defendants form part of a multinational group (CHEMO Group) engaged in the manufacturing and marketing of active ingredients and pharmaceutical specialties, a factor that should be taken into account to put the presumption of good faith into context. Exhibit No. 2 of the Complaint shows that the Defendants form part of the Chemo Group, and have offices in Europe, Asia and America and sales branches in a multitude of countries across 5 continents. Moreover, these are companies that have previously been sued and held liable for pharmaceutical patent infringement, as can be seen from the Judgements adduced by the Plaintiff (Exhibits 16, 17, 21 and 22). These are companies which, owing to their multinational nature and precisely to being engaged in the production of generic pharmaceutical products, can scarcely be credited with being ignorant of the scope of European patents, since they specifically rely on the fact that, in Spain, patents of pharmaceutical products do not give rise to effects insofar as the production of generics is concerned. This leads us to hold that the requirement of good faith has not been met. Lastly, though the prerequisites of Article 12 of the Royal Decree may be regarded as having been fulfilled, the Plaintiff must deemed to have the right to compensation. It is true that the above-mentioned provision, in a case where the stipulated requirements are met, does not entitle the proprietor of a patent to any compensation whatsoever. Nonetheless, this regime is amended by Article 70.4 of the TRIPS Agreement, which *does* make provision for remuneration. Said provision lays down that, "In respect of any acts in respect of specific objects embodying protected subject matter which become infringing under the terms of legislation in conformity with this Agreement, and

which were commenced, or in respect of which a significant investment was made, before the date of acceptance of the WTO Agreement by that Member, any Member may provide for a limitation of the remedies available to the right holder as to the continued performance of such acts after the date of application of this Agreement for that Member. In such cases the Member shall, however, at least provide for the payment of equitable remuneration." This is a self-enforcing provision (the 3 requirements are met), namely: it is a provision that entitles private parties to the right (payment of equitable remuneration by third parties); it has clear and precise wording, without any subsequent implementation being required; there is no need for incorporation into the national law by means of a formal enactment of acceptance. This means that the existing contradiction between Article 12 of the Royal Decree and Article 70.4 of the TRIPS Agreement must be resolved in favour of the latter, on its being a law of superior hierarchical rank and, in addition, later in time, as stated above (in this connection Supreme Court Decision Chamber 1 of 28–7–2000; and Constitutional Court Decision 14 February 1991). Furthermore, the possible incompatibility between Article 70.4 b) of the EPC and the TRIPS Agreement must be settled by applying the TRIPS Agreement, pursuant to Article 30.3 of the Vienna Convention referred to above. Hence, even though the Defendants' conduct were to find support in the case envisaged by Article 12.3 of Royal Decree 2424/1986 – which, as already stated above, it does not find – the application of Article 70.4 of the TRIPS Agreement (referring, insofar as its direct application and preference are concerned, to what has been stated hereinabove) would, in any event, entail an obligation on the part of the third party (the Defendants) to pay equitable remuneration (…)

TEN (…) For the purposes of determining whether or not compensation by way of damages is due, regard must be had to the fact that the Defendants manufacture and market the product subject to the patent, a conduct that, as has been pointed out above, constitutes an infringement of the exclusive right. This conduct, therefore, falls within the case of objective and automatic liability of Article 64 of the Act, so that damages are payable, without any need for these to be to accredited. It is true to say that recourse has not generally been had to the doctrine *in re ipsa* in case-law. Instead, it tends to operate in exceptional cases, as reflected by Supreme Court Decision of 3 March 2004, which states that this doctrine has not generally been relied upon in matters of industrial property. However, among the exceptions, the Court expressly cites its application to the case provided for by Article 64 subsection one of the Patents Act, as envisaged by Supreme Court Decision of 27 July 1998, cited in the above judgement. What this doctrine seeks to prevent, according to Supreme Court Decision of 7 December 2001, is that, if compensation were not held to be payable, the unlawful activity would "supported by a licence granted *de ipso*, be stripped of all manner of consideration" (…)"

[Note should likewise be taken of the decision of the Barcelona Commercial Court of 22 October 2007 (JUR 2008\33190)]

XX. FOREIGN TRADE

* Decision of the Las Palmas Provincial High Court, No. 153/2007 (Section 4) of 20 March 2007 (JUR 2007\148767)

International contract of sale. Incoterm FOB. International Chamber of Commerce Uniform Rules for Collections.

"Legal Grounds:

(…) FOUR. – In order to decide the appeal, account should be taken of the fact, firstly, that the legal relationship which binds the Plaintiff and Defendant was not a commercial commission, but rather that deriving from the comprehensive policy covering risks arising from foreign trade and other transactions. Clause one of said policy, produced to the court, states: "the object of which shall be to enable the authorised party to engage in foreign trade and other transactions, and, in turn, insure the Bank, with respect to such risks as may stem therefrom, irrespective of the reason therefor, and the total refund of said operations".

At clause seven, it states that "the Bank shall be under no obligation to justify, prior to debiting the account, the presentation of these transactions for collection (…) for which the authorised party stands liable without any time limit, likewise accepting any expense, levy or liability of any type that the Bank might be obliged to assume as a consequence of the transactions referred to herein."

Placed on the court record of proceedings by the Defendant is the Collection Order with the CAD ("cash against documents") procedure, payable at sight, and expressly subject to International Chamber of Commerce publication No. 522 "Uniform Rules for Collections", whereby the presenting bank (BSCH) is to pay the price of the goods in accordance with the Collection Order forwarded to it by the remitting bank, and not by order of the importer.

In this regard, Article 4 of the said Uniform Rules lays down that, unless otherwise authorised in the collection instruction, banks will disregard any instruction received from any party/bank other than the party/bank from whom they received the collection.

Accordingly, the Defendant ought to have followed the instructions of the bank that remitted the Collection Order. Yet, once the Plaintiff gave notice to the Defendant of the rejection of the goods, the BSCH delayed payment, as reflected by Exhibit No. 14 of the Complaint, for a certain period to favour the Plaintiff so that it could resolve the problem with the exporter, a delay that could have occasioned a claim by the remitting bank, for contravening the Collection Order, under the international regulations cited.

With respect to Article 26 of the Uniform Rules pleaded by the Appellant, what this establishes is a procedure for notice of non-payment and not a procedure for refund of remittances, which neither applies to the issue in dispute nor establishes the possibility of the presenting bank not complying with the "payment against documents" Collection Order with payment on sight, on instructions or orders received from the drawee (the Plaintiff)".

XXI. COMMERCIAL COMPANIES/CORPORATIONS

* Ruling of the Directorate-General of Registries & Notaries, of 24 May 2007 (Official Government Gazette 159/2007 of 4 July 2007)

Companies. Registration in Spain of the branch of a foreign company. Lack of need to present the certificate showing that there is no reservation of company name.

"Legal Grounds:

...TWO. – The Appellant contends that, since a branch is a secondary establishment rather than an independent legal person, confusion would be caused in legal dealings if the branch were not required to bear the same name as the parent company. This assertion is inaccurate and is refuted by Eleventh Council Directive of 31 December 1989 [*Translator's Note*: this would appear to be an error as this Directive is officially shown as being dated 21 December 1989] which at Article 2.1.c) [*Translator's Note*: this would also appear to be an error as the subsection cited corresponds to 2.1.d)] mentions, among the elements subjected to publicity in the State where the branch is located, "the name and legal form of the company and the name of the branch if that is different from the name of the company", so that this divergence with regard to name is envisaged as being possible. Hence, to understand this problem properly, it is essential to bear in mind a branch's legal nature (a secondary establishment of a pre-existing company, lacking legal personality), as well as the subject of registration at the Registry (i.e., not the principal legal person, but rather the secondary establishment), and, moreover, to recall the meaning of the requirement for a negative certificate issued by the Central Mercantile Registry in our legal system. In fact, what is sought by means of such a certificate is to ensure that the principle of unity of corporate name is not violated, with the latter being construed, both as the need for companies to establish a single or sole given corporate name vis-à-vis their functioning in legal registry-related and non-registry-related life, and as the fact that no two companies or legal persons having Spanish nationality may be incorporated with the same name, two identical names or names so similar as to induce confusion. As stated by the aforesaid Ruling of 11 September 1990, the regulations governing names can have no purpose other than that of duly identifying the subject liable for legal relations. Accordingly, inasmuch as this concerns foreign companies that set up branches in Spain, legal certainty is not reinforced by applying the requirements of our Mercantile Registry Rules & Regulations governing the composition of the name in its subjective, objective and graphic aspects, to legal persons in their own right, previously formed pursuant to the prevailing legal requisites of their national law, since, as stated, the relevant thing in such cases is to ascertain, by the appropriate legal means, the existence of the company (which must be assumed to have adopted the name it has chosen in accordance with the law applicable thereto), its corporate byelaws (which must be assumed to have been reviewed in the pertinent context) and the identity of the organs that represent it. To require the branch, in addition to these points, to show that the name of the

company which establishes it, does not coincide with that of any other Spanish company and to subject it to the same control to which Spanish companies are subject, would be to exceed our remit and lead to the absurdity of barring the establishment of a branch of a foreign company in the not improbable event that its name coincided with that of a pre-existing national company.

THREE. – In the case in point, the branch is identified by the addition of the expression "Branch in Spain" to the corporate name of the principal company. Hence, to require a certificate showing that there is no reservation of company name would have no sense, since there is no risk of confusion with respect to other pre-existing national entities, due to it being patently evident from its designation that, rather than a legal person of Spanish nationality, it is instead a secondary establishment of another legal person of foreign nationality. Consequently, this complies with the requirements of Article 297 of the Mercantile Registry Rules & Regulations, which, among the circumstances of registration, requires no more, insofar as names are concerned, than an indication of "any mention that identifies the branch".

FOUR. – Lastly, it should be recalled that Chapter III Article 396 of the Mercantile Registry Rules & Regulations relating to reservation of company names does nothing but corroborate the above comments, by allowing, though not requiring, other entities, whose constitution is registered at other Public Registries (as would be the foreign company), to be included under the names section, where so requested by the company's lawful representatives".

XXII. BANKRUPTCY

* Supreme Court, Chamber for Civil Matters, Section 1, Court Order of 3 May 2007 (JUR 2007\130809)

Enforcement. System of the Civil Procedure Act. Impossibility of review of merits of the case. Limitation of recognition to rulings having a civil or commercial scope. Judgement issued in insolvency matters. Irrelevance of death of receivers insofar as representation in enforcement procedure and survival of the subject matter of said enforcement are concerned, since the effectiveness of the foreign judgment does not arise at this point in time. Instead, its effects arise at the time and in the form indicated by the legal system of the State of origin. Justification of the final and definitive nature of the judgement. Personal nature of claims. Non-existence, in proceedings conducted in the State of origin, of violation of the procedural rights and guarantees of the party against whom the foreign judgment is sought to be brought. Obtaining a declaratory ruling which undeniably exceeds the scope and purpose of enforcement: not fitting and proper.

"Legal Grounds:

…ONE. – The claim for recognition under review is brought in respect of the ruling issued by the Ninth Commercial Constituency Complaints Board of the Kingdom of Saudi Arabia, identified as Decision number 155/18/1/2//2/D/T G/9 1415 *anno Hegirae* [*Translator's Note*: year of the Hijra – A.H.], and dated

Saturday, 15–3–1415 A.H. This ruling: decides on the pleas submitted by Mr. Constantino relating to his release, and the revocation of limitations placed on his capacity to act and the injunction against powers of disposal of his assets that hang over him as a result of the insolvency proceedings in which the company of which he is a partner is involved, and to the allocation of a certain sum of money by way of a maintenance payment to subsidise his needs and those of his family; and at the same time, orders the dismissal of the receiver-liquidator appointed on the day and designates two new receiver-liquidators to attend to the liquidation of the property and rights making up the net worth of the bankrupt company, as well as the property and rights comprising the net worth of said partner, to whom liability against third parties generated by the actions and omissions of the insolvent concern is extended, all this being in conformity with the effects, both personal and capital-related, flowing from the declaration of insolvency under the law that materially regulates said declaration and its ensuing effects. The claim for recognition must be examined in the light of the provisions comprising the general regime of conditions laid down by the 1881 Civil Procedure Act, even where the judgement that constitutes the subject of such claim is predicated on previous judgements rendered by courts of the same State in which the judgement now under review originates, and notwithstanding the fact that said foreign judgements may have secured the enforcement order of this Chamber. This is because a series of effects, whether declaratory or constitutive-procedural, flows from the material content of this judgement. These effects go beyond the strict evidentiary effectiveness that extends over the capacity and legitimation of persons appointed members of the body charged with the receivership and liquidation in the insolvency proceedings opened abroad, and render essential a specific ruling to enable said effects to be asserted in Spain, albeit with the content and scope conferred by the legal system under which the corresponding rulings contained in the judgement pending recognition have been issued. Recognition of the latter – or to be more accurate, recognition of its effects – is subordinated to fulfilment of the requirements established under Articles 951 and successive provisions of the 1881 Civil Procedure Act, which remains in force until the promulgation of the International Legal Co-operation Act to which final provision number twenty of the Civil Procedure Act 1/2000 refers, pursuant to its Sole Partial Repeal Provision, subsection one, rule three. Subjection to said internal regime of recognition is imposed by the certified absence of any enactment of a supranational nature which might be applicable, and verification that negative reciprocity has not been shown (Article 953 of the 1881 Civil Procedure Act). It should be added that, in view of the terms of the requests set forth by the party originally opposed to enforcement, by way of subsidiary submissions in his defence plea, to the effect that examination of the requirements for recognition and declaration of enforcement be made via the specific procedural channels envisaged and regulated by Section Two, Title VIII, Book II of the 1881 Civil Procedure Act, which establishes the, undoubtedly special, procedure under which claims for recognition and declaration of enforceability of foreign judgments must be resolved until such a time as it

is replaced by another, whether by virtue of the planned international legal co-operation act or any other procedural rule. As a matter of principle, this procedure, in respect of which both this Chamber and the Constitutional Court – each within its respective scope of jurisdiction – have underscored its merely recognitory nature and limited objective scope, circumscribed to authorising the effectiveness of foreign decisions once proof has been furnished of the fulfilment of the requirements to which such declaration is made subject, bars any attempt to review the merits of the case, whether: with reference to the choice of conflict-of-laws rule that was deemed applicable after definition of the event, business or legal status comprising the subject matter of the proceedings pursued abroad; or with reference to the material law applicable to said subject matter as mandated by the conflict-of-laws rule and to the correctness of its application; or, indeed, with reference to the formation of the finding of fact that has determined the factual basis considered by the court of origin in the settlement of the dispute and to the correctness of the finding of law consisting of the subsumption of such facts in the factual requirement envisaged under the law deemed applicable, let alone the legal correctness of the interpretation of the law applied. The procedural formalities are, therefore, in line with the above nature and character of the recognition procedure and its specific goal and purpose, with written and documentary evidence being imposed as defining features thereof, organised around the petition and plea of defence, as the case may be, with respect to the recognition sought, which are to be accompanied by such documents as may serve to prove the fulfilment of the substantive and formal requirements to which enforcement is made subject, and the facts capable of eroding the effectiveness of the rule that authorises the generation of the effects of the foreign decision in Spain, respectively; this, needless to say, without prejudice to the powers of remedy and rectification that the parties to the suit must be acknowledged as having with respect to compliance with the procedural duties imposed on each.

TWO. – Furthermore, it is necessary to make it clear henceforth that the subject matter of the recognition of the foreign judgment sought here is limited, both materially and subjectively: thus, on the one hand, such recognition cannot extend to the rulings contained therein that display a nature that is other than civil or commercial, as is the case with the ruling that decides on the petition for freedom submitted by Mr. Constantino, no matter how much one might concede that the deprivation of freedom suffered by him stems from his actions as partner, manager or administrator of the bankrupt company, and from the impact of said actions on the situation of insolvency which has given rise to the declaration of bankruptcy; and, on the other hand, the party making the application has restricted the scope of enforcement exclusively to the effects that, once authorised, might be engendered vis-à-vis Mr. Constantino, to the extent to which said effects extend to him, whether directly or indirectly, by connection with those deriving from previous judgements already recognised in the forum.

THREE. – Examination of the fulfilment of the preconditions and requirements for enforcement must be made in step with the various arguments that the party, against whom the effectiveness of the foreign judgment is sought to be asserted, puts forward to contest same. However, no regard should be had to the preliminary submissions referring to breach of faith and contempt for the judicial system pleaded by the party making the application, since these are irrelevant when it comes to verifying the indicated prerequisites and requirements for recognition, once the former party has entered an appearance in the case to contend enforcement, thereby availing himself of his rights of defence. Above all, an analysis must be made of the impact had by the reported death of the receivers whose appointment constitutes the subject matter of one of the decisions contained in the judgement pending recognition. In the opinion of the party against whom the effectiveness of the foreign judgment is sought to be asserted, the alleged circumstance constitutes an obstacle which acts as a bar on two different fronts: first, that of the procedural representation in these proceedings, which, it is argued, has lapsed as a consequence of the death of the grantors of the power; and second, that of the very subject of the enforcement order, which disappears after the demise of the latter, just as one of the prerequisites for recognition is eliminated, namely, the executive effectiveness of the judgement. Regardless of whether or not the fact pleaded by those who object to recognition has been duly proven, said fact lacks the relevance and barring effect that said parties wish to attribute to it. Insofar as the procedural representation of the applicant in these proceedings is concerned, the alleged death of the receivers and liquidators in bankruptcy is inconsequential, bearing in mind that the representation borne by the latter is of an organic nature, so that the death or replacement of those who enjoy such a status in no way affects the continuance of the powers of attorney and the representative relations established by the deceased or replaced office holders. With regard to the survival of the subject matter of the enforcement order, the selfsame inconsequentiality of the fact pleaded must be proclaimed, because, while the effects of the judgement pending recognition may be asserted from the time it is recognised, this in no way means to say that its effectiveness arises at that precise moment in time. Instead, its effects –in terms of *res judicata*, preclusion, legal definition, registration and, needless to say, the executive effects which the opponents of enforcement confuse with the requirement of the finality of the judgement pending recognition – arise at the time and in the form indicated by the legal system of the State of origin, and hence the permanence of the subject matter of this specific recognition procedure. The nature of the body from which the judgement emanates is likewise irrelevant. This Chamber has had the opportunity of granting enforcement of a number of foreign decisions issued by bodies or authorities which lacked a jurisdictional nature, in the sense that the term "jurisdiction" is construed in our own legal system, and which display the defining features of a nature more properly administrative than jurisdictional. The crucial thing, then, is not the nature or character of the body, but rather its jurisdiction, and the subject matter, character and nature of the decisions pending recognition;

and neither the one nor the other is in question here, with no doubt as to the jurisdiction – *rectius*, the attribution of power – of the body from which the judgement emanates, and the commercial nature – and at all events, private law nature – of the subject matter of its rulings.... Having established this, the grant of enforcement must needs verify, above all, the final and definitive nature of the judgement pending recognition, as required by Article 951 of the 1881 Civil Procedure Act, which, as this Chamber is wont to repeat, constitutes an inescapably obligatory requirement whatever the regime to which recognition is subject. Said finality, which must be construed as referring to the unalterable nature of the judgement and the rulings contained therein,...

FOUR. – Furthermore, the tangential allusion to the lack of the requirement imposed by Article 954–1 of the 1881 Civil Procedure Act has no relevance whatsoever, because, in view of the content of the judgement pending recognition, the personal nature of the claims that gave rise to the rulings set forth therein is evident.... there are no aspersions cast on the personal nature which, at all events, and for the purposes of complying with the requirement laid down by Article 954–1 of the 1881 Civil Procedure Act, is to be predicated on the rulings that were issued in the context of insolvency proceedings and that affect the capacity to act and the representation of a partner in the bankrupt company, an application for maintenance, and the representation, administration and liquidation of the asset base of the insolvent company, even if only in the determination of the persons who make up the pertinent body of receivers or trustees in bankruptcy.

FIVE. – The remaining defence pleas of the opposing side refer to the breach of the requirements established under subsections two and three of Article 954 of the 1881 Civil Procedure Act. In general, the objection to enforcement on these grounds is confined to claiming the absence of minimum procedural guarantees in the proceedings conducted in the State of origin, an absence caused in great measure by the unjust situation of deprivation of freedom suffered by Mr. Constantino for a number of years. The examination of the effectiveness of such pleadings, which fits in with the requirement of respect for the public policy of the forum, in its procedural facet and in an international sense, must be conducted in the light of the content that should be attributed to the latter, identified with the principles, guarantees and rights of this nature which are constitutionally enshrined and protected. Hence, it may be stated that the content of public policy, as a requirement or prerequisite for recognition, displays a purely constitutional nature, thus setting itself up as an interpretative criterion of the rules which in an enforcement context establish the requirement of the appropriateness and respect for the public policy of the forum, such that the constitutional content of such procedural guarantees and rights in turn form part of the content of this requirement. Having said this, and on perusal of the exhibits produced to these singular proceedings, it must be concluded that in the present case the Court cannot hold that the procedural rights and guarantees of the party against whom the foreign judgment is sought to be brought were violated in the case conducted in the State of origin, on the grounds of his

not having had knowledge of the case's existence and consequently not having been duly able to defend himself therein, when said case, and by extension, the judgement pending recognition, are rooted in the application filed by said party, who now opposes the enforcement order, submitting a rejoinder to same, albeit in a negative sense, and to the situation generated by the resignation tendered by the outgoing liquidator, which determined the appointment of those who had to replace him. Neither can it be said that, having due regard to the subject matter and genesis of the procedural course of action pursued in the State of origin, the power to submit pleas and produce evidence in said proceedings by the party vis-à-vis whom the foreign decision is sought to be asserted, has been in any way diminished. Furthermore, the judgement rendered by the court of the State of origin, wherein Mr. Constantino is stated to have had full knowledge of the content of the judgement whose recognition is now in issue, has been produced to this Court, with the necessary guarantees of authenticity. Hence, given the categorical terms of the confirmation of the action having procedural transcendence consisting of notification of the judgement made by the issuing court and now pending recognition, it follows that, likewise with regard to this point and to the right to such appeals as might possibly be established by the legal system of the State of origin, linked to the above, the requirement of respect for procedural public policy must be held to be fulfilled, on there being no evidence, beyond the simple statements by the parties to the dispute, that said knowledge might have arisen under such conditions as would not have permitted the current opposing party to exercise his right of defence in its broadest sense, and specifically his right to have recourse to the established avenues of appeal.

(…)".

XXIII. TRANSPORT LAW

1. International carriage of goods by sea

* Supreme Court Decision (Chamber for Civil Matters, Section 1) of 7 March 2007 (RJ 2007\1825)

Maritime transport. Insurance. CIF Clause.

"Legal Grounds:

(…) THREE. A number of sub-grounds of the appeal refer to the point that constitutes the *ratio decidendi* of the decision brought on appeal, namely, the repercussion of the CIF clause on the insurer's power to subrogate himself to and put himself in the place of the insured to bring actions against the party liable for the loss. Of all these, however, it is the first in which the substantial aspects of the issue are posed.

(…)

FOUR. (…) Having said this, the CIF clause regulates, *inter alia*, attribution of risk as between vendor and purchaser in sales with shipping and, consequently,

determines who is entitled to take action against the liable party if the object sold disappears.

For its part, Article 780 of the Commercial Code, supplemented and completed by Article 43 of Act 50/1980 (pursuant to Article 2 thereof), empowers the insurer to subrogate himself to the insured for all such rights and actions as pertain to the latter vis-à-vis those who caused the loss of the insured goods.

Accordingly, if the insured party has no action against the party liable for the damage, due to aggrieved status having been attributed to the purchaser *ex voluntate*, payment of compensation by the insurer will not suffice to bar the Defendant, as the party liable for the damage, from refusing to be bound to remedy it as against the party that acts as the subrogee of the person who, as vendor, is not shown to have suffered direct damage as a result of the disappearance of the object.

In this respect, the Decisions of 2 June 1984 and 31 March 1997 denied subrogatory effectiveness to the payment made by the insurer to the vendor, instead of to the purchaser as is to be assumed in a CIF-type sale; and the Decision of 20 March 2006 cited this precedent.

It is true that the rule, rather than being absolute, allows for nuances, as the aforesaid Decision of 30 March 2006 made a point of recalling. Yet none of the facts that would otherwise permit an exception to be made to the rule has been proved in the proceedings, as has been pointed out on rejecting the grounds analysed above".

2. International carriage of goods by road

* Decision of the Barcelona Provincial High Court, No. 33/2007 (Section 15) of 11 January 2007 (JUR 2007\122444)

International overland transport. Convention on the Contract for the International Carriage of Goods by Road (CMR) of 19 May 1956. Evidence of the existence of the transport.

"Legal Grounds:

(…) TWO. While it is proper for the CMR, like the consignment note, to be acknowledged as the main evidence of the existence of the carriage of goods and the circumstances thereof, to deem that it is impossible for the existence of a contractual freight relationship to be shown without these, is to argue one step too far. As was recalled by the Madrid Provincial High Court Decision of 6 July 2005, citing in support the Supreme Court Decision of 15 May 1993, the consignment note does not constitute an obligatory and indispensable requirement of the transport contract, since its absence may be replaced by the sum of other items of evidence, pursuant to the provisions of Articles 353 and 354 of the Commercial Code. This latter Article provides that "in default of a consignment note, regard shall be had to the sum of the legal evidence adduced by each party in support of his/her respective claims", which the Plaintiff has effectively done. In a commercial relationship, such as those now before the Court, with a great number of shipments made – over 2000 – it is normal for there to be

delivery notes which lack an authorised signature or which record some type of incident (e.g., that some package has arrived open). Yet it is for the Defendant to specify in which cases this has occurred and, above all, to what extent such an incident prejudices him with respect to the recipient, the shipper or the insurer himself. In contrast, the Respondent makes generic statements about the Plaintiff's defective performance, without ever being specific, dating precisely from the time when the first non-judicial demand was made, and never before that. Putting this together, the Judge's decision to deem the debt duly proven and the Plaintiff's breach not proven is correct and in accordance with Article 217 of the Civil Procedure Act, so that it must be confirmed".

* Decision of the Barcelona Provincial High Court, No. 29/2007, (Section 16) of 18 January 2007 (JUR 2007\192772)

Carriage by road of a carpet purchased in Turkey. Non-contractual liability of carrier. Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road.

"Legal Grounds:

(…) THREE. – The Defendant had the merchandise in his power because he intervened in the contract for the carriage of the goods. The Plaintiff, rather than being a party to the contract *per se*, was the recipient of the object shipped. This may frequently occur in such cases, namely, someone sells something and commissions another to transport and deliver it to the buyer. The latter does not therefore enter into the contract as party thereto but is nonetheless the recipient of the goods and obviously interested in this contractual relationship. Indeed, it could be said that he is a party, albeit indirectly, in that, if he purchases something and orders the vendor thereof to dispatch it to him by contracting its shipment, he cannot be said to be extraneous to the freight contract itself, the execution of which he requested and consented to.

The shipper is only bound within the scope of the freight contract. It does not have possession of the object shipped other than by reason of the contract, and what cannot be sought is that it be placed under any obligation falling outside the provisions governing the contract simply because the recipient did not enter into the contract. The Defendant was a carrier and had to deliver an item of merchandise under a contract for carriage of goods, concluded in the interest and with the consent of Mr. Luis Miguel. It is thus obvious that the latter may not make any claim outside the provisions pertaining to said contract.

What has just been stated in the preceding paragraph is not the result of this Court's criterion or of a more or less complex or involved line of reasoning. It is expressly stated by an international treaty which governs the matter and to which Spain is a party. It is thus stated by an enactment with the range and force of law. Article 28 of the Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road, states that in cases where, under the law applicable, loss arising out of carriage under the Convention gives rise to an non-contractual claim (i.e., which here is the claim brought by the Plaintiff), the carrier may avail himself of the provisions of this Convention which

exclude his liability. This is what the Defendant is doing, namely, invoking the provisions regulating the carriage and its limitations of liability.

Accordingly, though it might be deemed that he may be sued on the grounds of non-contractual liability, pursuant to Article 1902 of the Civil Code, the carrier is nonetheless entitled to the limitation of liability established under the Convention. More so still, if one deems, as one must, that the Plaintiff could only bring a claim under the terms of the transport contract, which is the sole legal document by virtue of which the Defendant intervened and which was executed at the request and with the consent of the Plaintiff, in whose interest and on whose behalf the Turkish entrepreneur acted when he arranged for the freight. It is not right that each side should choose the provisions that most interest it: the right and proper thing to do is to invoke and apply the provisions that govern any given legal situation, and in the case before us we are faced with a contract for carriage of goods.

To allow parties to act in the manner sought by the Plaintiff could simply lead to repealing the provisions of the convention. Any recipient of goods, by showing that he was not a party to the contract, could invoke provisions outside said contract and, as a result, the system of limitation of liability pertaining to contracts for the international carriage of goods would, in practice, be abolished; a system which, moreover, has a major degree of flexibility, inasmuch as it allows for dispatches with the value of the goods shipped shown in the contractual document, in which case liability for the loss equals the declared value".

* Decision of the Barcelona Provincial High Court, No. 490/2007 (Section 15), of 18 October 2007 (JUR 2008\33478)

Contract for the International Carriage of Goods by Road. Geneva Convention of 19 May 1956. Carrier's liability in cases of loss of goods. Carrier's failure to comply with the burden of proof to relieve him of liability.

"Legal Grounds:

(…) THREE. – We are dealing here with a contract subject to legislation governing international carriage of goods by road, a law that is none other than the Convention on the Contract for the International Carriage of Goods by Road (CMR) done in Geneva on 19 May 1956, to which Spain acceded by instrument dated 12 September 1973, and the Protocol of 5 July 1978, to which Spain likewise acceded on 23 September 1982. These enactments are, in certain aspects, complemented: by national law, i.e., Articles 349 to 379 of the Commercial Code, though on involving international travel, as in this case, the Supreme Court (Supreme Court Decisions of 20–12–85, 18–6–91 and 15–11–93) has repeatedly declared the Convention's absolute priority over the Code; and also by the provisions contained in Articles 106 to 109 and 147 of the Carriage of Goods by Road Act 16/1987 of 30 July 1987 (*Ley de Ordenación de los Transportes Terrestres – LOTT*) and its Implementing Regulation approved by Royal Decree 1211/1990 of 28 September. Indeed, Article 1/1 of the CMR Convention states that the Convention shall apply to every contract for the carriage of goods by road in vehicles for reward, when the place of

taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a contracting country, irrespective of the place of residence and the nationality of the parties. On the CMR Convention being applicable, the carrier, and with it, the forwarding agent (Articles 1 and 126 of the Carriage of Goods by Road Act and 167 of the Implementing Regulation; possibly liable according to the opinions expressed in decisions, such as Supreme Court Decisions of 7–6–1991 or 14–12–99) and the collaborators of either, shall be responsible for the acts or omissions not only of their agents and servants but also of any other persons of whose services they make use for the performance of the carriage, assuming the obligation resulting therefrom, which is the delivery of the goods in the condition in which they were received and within the stipulated or a reasonable period of time. This is indicated with perfect clarity by Article 3, in a manner similar to that already established by Article 379 of our Commercial Code. This liability due to events beyond the carrier's control vis-à-vis the shipper is specified in Article 17, pursuant to which the carrier is liable for the goods not being delivered or being delivered damaged, wholly or in part, or outside the period of time expressly stipulated or, in default thereof, one that is reasonable and appropriate to the particular circumstances of the dispatch. Nevertheless, this system of liability is not absolute, because on the one hand, causes giving rise to relief of liability are expressly established, and on the other, even where liability is present, it is limited. With respect to the former, the system designed by the CMR Convention at Articles 17/2 and 18, in a manner akin to that established by Article 361 of the Spanish Code, is based on the carrier's liability and shifts the burden of proof with respect to causes giving rise to relief of liability: liability is excluded in cases of wrongful act or neglect of the claimant or user, inherent vice of the goods, and (leaving aside doctrinal discussions about the distinction between it and unforeseen contingencies) *force majeur*, namely, "circumstances which the carrier could not avoid and the consequences of which he was unable to prevent", but it is the carrier that must prove the existence of such causes. Nevertheless, along with the above, at Article 17.4 the Convention includes other causes giving rise to relief of liability, which pertain only to loss or damage and not to delays in delivery, and which the doctrine has been given to calling privileged, since they are subject to a less stringent evidentiary regime. Whereas in cases under Article 17.2, the carrier must prove the reality of the extraordinary events which have impinged upon the causal relationship with the loss that is attributed to him, in cases under Article 17.4, the burden of proof continues to lie with the carrier who pleads relief from liability but, under the terms of Article 18, it suffices for him to show that "in the circumstances of the case, the loss or damage could be attributed to one or more of the special risks" described by Article 17.4, because then it shall be presumed that it was so caused. Among such events, Article 17.4.b) includes, "The lack of, or defective condition of packing in the case of goods which, by their nature, are liable to wastage or to be damaged when not packed or when not properly packed", and at c), "Handling, loading,

stowage or unloading of the goods by the sender, the consignee or person acting on behalf of the sender or the consignee", a subsection that includes inadequate stowage or lashing, or overloading the goods without the necessary weighing, all of which renders the consignment note particularly relevant when it comes to ascertaining to whom the job of performing these tasks fell (Decisions of the Supreme Court of 23 May 1997, of the Provincial High Courts of Burgos of 8 September 1998, Zaragoza of 29 June 1998, Guipúzcoa of 14 July 1998, Murcia of 24 May 1999, or this very Chamber in Decision of 16 October 2003, No. 639/2003). It should be recalled that, in the absence of annotation of the carrier's reservations on the consignment note, it is presumed that the goods and their packaging are in good "apparent" state when the carrier takes charge of them, a presumption that the latter can weaken by showing evidence to the contrary. With respect to the limitations on liability, Article 23 of the CMR Convention, a controversial provision in its opportuneness in contradicting the general principle in the case of obligations as to the need to pay compensation in the event of wilful misconduct, negligence or default in payment (Article 1101 of the Spanish Civil Code), establishes the limitation of liability for the carrier in cases of total or partial loss of the goods shipped, since he is solely liable for damage arising from loss, damage or delay calculated by reference to the value of the goods (not including loss of profits) and not for the goods as a whole, save where the sender, against payment of the surcharge referred to in Article 24, has declared a higher value for the goods in the consignment note, in which case, this sum will replace the aforesaid limit, or where a special interest has been declared in accordance with Article 26, something that in our case does not occur. In turn however, Article 29 of the above-mentioned Convention lays down that, "The carrier shall not be entitled to avail himself of the provisions of this chapter which exclude or limit his liability or which shift the burden of proof if the damage was caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court or tribunal seised of the case, is considered as equivalent to wilful misconduct", a provision that is applicable to the agents or servants of the carrier or any other persons of whose services he makes use for the performance of the carriage.

FOUR. – Accordingly, in this statutory and case-law context, the Appellant's claim cannot be upheld. Its evidentiary diligence has, in effect, been confined to accepting that the cargo was destroyed, and on pointing to a cause for this total loss, namely, that the goods fell when being loaded or unloaded by the carrier. No more. No additional explanation whatsoever is furnished that might illustrate, let alone show, exactly what the forwarding agent's opinion is about the origin of the fall. The carrier has thus failed entirely to fulfil the burden of proof that, as has been seen, is imposed upon it by Article 17 of the CMR to relieve itself of liability or at least mitigate its consequences due to possible joint liability. This is perhaps why the Appellant LKW, rather than contend its liability, seeks purely that Article 23 of the CMR be applied, and that its obligation to pay compensation be reduced to the legal limits. To this end: on the one hand it denies the existence in our legal system of liability comparable

to the kind of wilful misconduct that would bar application of the legal limit; and on the other hand, it deems that lack of wilful misconduct has been proved. Both contentions are erroneous. We have made it clear, on previous occasions, that in our legal system the idea of equivalence between wilful misconduct and gross negligence appears to be reinstated (*magna negligentia culpa est*, *magna culpa dolus est*: Digest 50.16,226), as is reflected by Articles 168.2, 1.366 and 1904.2 of the Civil Code (Decisions of Barcelona Provincial High Court Section 15 of 11 December 2006, 26 March 2007, 18 April 2007 and 2 July 2007). Furthermore, in an matter such as the one now before the court, in which the only party who is normally in a position to furnish a version of what happened is the one who is professionally engaged in the activity of transporting goods, this Chamber's doctrine (Decisions 10–2 and 15–5–1988, 5–7–1999 and 29–11–2004) is likewise constant on stating that proof of the facts on which the appraisal of this concept is to be based, corresponds to the litigant who claims it – though, in most cases the evidence that contributes to said purpose would not be of a direct nature, but rather in the form of *praesuntio hominis* referred to by Article 1253 of the Civil Code, as held by Supreme Court Decisions of January 1949 and 24 February 1995, which echo said doctrine – though never forgetting the principles of ease of proof, proximity to the source of evidence and procedural good faith. Accordingly, the shipper cannot be required to show and justify what has happened or what the reasons were for the loss or deterioration which led to the damage that is the source of the claim, since this would mean requiring an impossible standard of proof, though without in any way being equivalent to excluding limitation of liability systematically or allowing an entire shift in the burden of proof on this point as well. Instead it is a matter of weighing the facts of the specific case, by evaluating the circumstances relating to the time, manner and place in which the reported loss or damage took place. In our case, the plea of the non-existence of wilful misconduct submitted by the forwarding agent is based upon an absolute lack of evidence of what happened, evidence that was entirely at its disposal and that it, nevertheless, preferred not to adduce despite the opportunities given. In the face of the simple and, moreover, obvious explanation that the electrical cabinet purchased by ROSSIGNOL fell and was destroyed, the Plaintiff cannot be required to show exactly what it was that happened, why the fall occurred, in what conditions, and by which persons and in what circumstances the operations of loading and unloading were performed. It was for the forwarding agent, who seeks to avail itself of the limitation of liability, to show that there was neither wilful misconduct nor any negligence which, by reason of its seriousness, could be likened to wilful misconduct. Hence, by remaining totally passive in this respect, the legal limit is not applicable, as was decided and reasoned by the decision brought on appeal, which is accordingly upheld."

3. International carriage of goods by air

* Decision of the Valencia Provincial High Court No. 13/2007 (Section 9), of 17 January 2007 (AC 2007\1257)

International carriage by air. Warsaw Convention on International Carriage by Air of 12 October 1929. Damages during carriage by air.

"Legal Grounds:

(…) TWO.… Indeed, as the Appellant has stated and this Chamber has already ruled in Decision No. 323/06 of 20 September 2006 (Roll 535/06), on the same basis as that set in the precedent cited by the Appellant, claims for damage caused by international air transport, in the case of goods, through destruction or loss thereof or damage thereto, come within the regulatory scope and statutory application of the 1929 Warsaw Convention and its subsequent amendments. Accordingly, it is not possible for a double claim for such damage to be brought under the application of both the Convention and the Civil Code, in view of the ratification of said Convention and its amendments by the Spanish State, inasmuch as they naturally form part of the domestic legal system pursuant to Article 96 of the Spanish Constitution and Article 1–5 of the Civil Code, and are thus directly applicable. Moreover, recourse to general norms of the Civil Code is unviable, since international law enjoys preference and is of an exclusive nature, inasmuch as it goes to form part of the domestic legal system. This then is the unconditional result of Article 24 1, read in conjunction with Article 18 of the Convention, whereby the action of liability for loss of goods caused by international carriage by air may be brought within the conditions and limits stipulated under the aforesaid Convention. In conclusion, simultaneous and joint application of said Convention in tandem with the Civil Code to compensate damage caused by international carriage by air is unviable, with the criterion adopted in this respect by the Lower Court thus not being correct.

However, the liability imposed by said Convention on the carrier clearly and evidently refers to the fact that the damage so sustained took place during the carriage by air, as is clearly stipulated in the wording of Articles 17 and 18 of the Convention. Specifically, and because it affects the case, the latter provision indicates: "The carrier is liable for damage sustained in the event of the destruction or loss of or damage to any registered baggage, if the occurrence which caused the damage so sustained took place during the carriage by air" (the underlining is ours) [*sic*: *Translator's note*: no text appears to be underlined here]. Consequently, when the events causing the damage do not occur during such carriage by air, both the limitation of the carrier's liability established under said Convention and the Convention itself are evidently inapplicable, and such liability (outside the carriage by air) must be governed by such civil rules as are laid down in the case insofar as matters of transport are concerned, and those of the Civil Code. (…)".

XXIV. LABOUR AND SOCIAL SECURITY LAW

1. International judicial jurisdiction

* Decision of the Catalonian High Court of Justice (Chamber for Social and Labour Matters, Section 1) of 3 January 2007 (JUR 2007\221371)

Determination of international judicial jurisdiction of Spanish courts in a decision on "mobbing" in the workplace which took place in California (USA).

"Legal Grounds:

ONE. – …It should be noted that, while: 1) notwithstanding the fact that such a rule is not expressly provided for by Article 9, six, of the Judiciary Act, the issue of international jurisdiction raised could in principle be deemed to be examinable *ex officio*; 2) this would be supported by the imperative terms of Articles 21 and subsequent provisions – as to the extent and limits of jurisdiction – of the aforesaid Judiciary Act; and 3) the Chamber would arrive at the same conclusion to which the Lower Court arrived in this regard, in view of the provisions of Article 2 of the 1968 Brussels Convention and, today, of those of the doubtless currently applicable (in all aspects, even in the labour sphere of the law) Council Regulation (EC) No. 44/2001 of 22 December 2000, on "jurisdiction and the enforcement of judgments in civil and commercial matters"; nevertheless, 4) keen attention must be paid to the fact that: a) said issue of international jurisdiction is no longer raised by either of the parties in this administrative appeal; b) it was precisely the Plaintiff (Appellant) who had recourse to the Courts of Spain – and not of the State of California (USA) for his case – by filing his action; so that it would be really problematic if this Chamber were not to countenance a certain general criterion of effectiveness of "express submission"; and c) should there be any doubt in this regard, this would be overcome by consideration of the interpretative rigour of the grounds of appeal for reversal, which as is known, possesses the nature of an extraordinary means of challenging the judgements of single instance Courts (first "degree" of jurisdiction)."

* Decision of the Madrid High Court of Justice (Chamber for Social and Labour Matters, Section 2) of 28 March 2007 (JUR 2007\172321)

Absence of international legal jurisdiction of Spanish courts. Labour Division.

"Legal Grounds:

SINGLE. – …It is thus necessary for jurisdiction to be examined previously, with a distinction having to be drawn between the concepts of the competence of Spanish courts and the jurisdiction of the labour division to be seised of the matter, with the former being governed by Article 117 of the Spanish Constitution, read in conjunction with Article 21 of the Judiciary Act, which at subsection one provides that Spanish courts may not be seised of suits that arise outside Spanish territory, and at subsection two makes an exception in the case of immunity from jurisdiction and enforcement established by the rules of

Public International Law. It is evident that in the case of disputes which arise within the context of administrative relations between a public body of a foreign State and any person who, in such a capacity, provides services therefor, these may not be brought before the Spanish courts, in view of the fact that Courts of the Civil, Criminal or Labour Divisions may not be seised of cases of such a nature, pursuant to the provisions of Articles 22, 23 and 25 of the aforementioned Act. The Courts of the Administrative Division are similarly not competent since they are restricted to being seised of the actions of Spanish Public Authorities, with their jurisdiction in no case being extendable to foreign authorities, in the light of Article 24 of said Act.

Accordingly, in order to decide upon our Courts' jurisdiction the following are of the essence: the nature of the relationship that linked the parties to this law suit; the parties' nationality; and the place where the services were performed. To this end, and in view of the evidence examined, this Court accepts the facts proven in the decision brought on appeal, facts which have not been contended and from which it ensues that the Plaintiff, possessing foreign nationality, has rendered services for a foreign country, his own, within the territory thereof, namely, the Bolivian Embassy in Spain, at all times appearing on the staff of the Bolivian Ministry of Foreign Affairs as a Civil Attaché, a public administrative officer of the Bolivian Government, registered with the Bolivian Social Security. Hence, the relationship that existed between the parties is clearly administrative, namely, between a foreigner and the State of his country, and was undertaken for the legation deemed to be said country's territory, with the Spanish courts not having jurisdiction to settle issues which may arise in this respect and which, in the event of their arising, must be brought before the Bolivian Courts. Accordingly, the appeal is dismissed".

* Decision of Madrid Labour Court No. 32 of 21 May 2007 (AS 2007\1763)

International judicial jurisdiction. Labour Division. Need to enter an appearance at the hearing to plead lack of jurisdiction.

"Legal Grounds:…

EIGHT. – This having been established, it must be said that: the Plaintiff company is Spanish; the nationality of the cyclists is Kazakh; the contracts with same were concluded in Monaco, in the case of Mr. Matías and Mr. KASHESKIN, and in Nice, (France) in the case of Mr. Carlos; the designated object of the contracts was participation in the Tour de France; the company ZEUS SARL is incorporated under Swiss law (a fact that is uncontested); and the domicile placed on the record of these proceedings is Monaco for Messrs. Matías and Ricardo, and Nice (France) for Mr. Carlos.

NINE. – Under the terms of Article 1 of the Workers' Charter, the nationality of the worker is irrelevant for the existence of a contract of employment. The place where contract is signed is no bar to application of Spanish legislation in itself, regardless of the fact that, depending upon circumstances of the case, the application of the Collective Wage Agreement might be the subject of analysis, something that is not the subject matter of these proceedings. With respect to

Clauses 19 and 21 which ZEUS pleaded as being clauses of submission, it must be said that these are contained in the contracts concluded between the natural persons appearing as co-Defendants and the aforesaid company ZEUS SARL, because in the contracts concluded between the now Plaintiff company and the cyclists, there are only eleven clauses, and three annexes, without any allusion to submission being made therein. The decisive factor insofar as lack of jurisdiction is concerned would be any submission that might be recorded in the contracts of employment entered into by ACTIVE BAY, but not that which might be mentioned in Clause 21 of the contract concluded between the cyclists and ZEUS SARL. Although, initially, the agreed service to be performed was to race in the 2006 Tour de France, due to the detentions made by the security forces and the police in the so-called "*Operación Puerto*", and the fact that the now Plaintiff company had formally accepted the Ethics Code, finally the co-Defendants did not participate in said bicycle race but instead took part in the Round-Spain Cycle Road Race, known as the "*Vuelta Ciclista*", i.e., the services were provided in Spain. Article 20 of Regulation 44/01 of 22 December was pleaded, which lays down (at subsection 1) that employers may bring proceedings only in the courts of the Member State in which the employee is domiciled. The above means that said Article would in no case be applicable to Messrs. Matías and Ricardo, because the domicile placed on record in these proceedings is Monaco, a country that does not belong to the European Union. Article 24 of the above-mentioned Regulation was pleaded by the Plaintiff: this provision states that, apart from jurisdiction deriving from other provisions of said Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance is entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22. In these proceedings, Mr. Carlos was represented at the hearing, and the appropriate procedural time for pleading lack of jurisdiction is that of the oral answer to the complaint. Accordingly, in view of the fact that the Labour Procedure Act envisages no prior appearance at the party's instance to decide on the competence of jurisdiction (Article 5 of the Labour Procedure Act only envisages the possible *ex officio* declaration of lack of jurisdiction prior to the parties and Public Prosecutor's Office being heard), if the Defendant, on being duly issued with a summons, then fails to enter an appearance at the hearing, he is deemed not to have entered an appearance, and in such a case could not submit pleadings addressing lack of jurisdiction. The aforesaid means that the fact of appearing at the hearing is an essential action for being able to plead lack of jurisdiction, since the above-mentioned Labour Procedure Act envisages no action on the part of the Defendant, such as that established under Article 24 of Council Regulation 44/01 "*in fine*". What this, in turn, means is that appearance at the hearing cannot entail application of Article 24 of said Regulation. Instead, Article 20 must be deemed applicable: this is incorporated under Section 5, which expressly regulates jurisdiction over individual contracts of employment. Accordingly, with respect to Mr. Carlos, the Court must deem that there is a lack of jurisdiction. With respect to

co-Defendants, Messrs. Matías and Ricardo, the point must be made that Article 4.1 of Council Regulation 44/01 lays down that, if the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State. Article 22 regulates exclusive jurisdiction in matters completely extraneous to the subject matter of these proceedings, and Article 24 envisages appearance before a court of a Member State as described above. The content of Article 25 of the Judiciary Act is applicable: this lays down that, in the Labour Division, Spanish courts are to have jurisdiction in matters of rights and obligations arising from contracts of employment where such services have been provided in Spain; and, as has already been explained, Messrs. Matías and Ricardo finally competed in the *Vuelta Ciclista*, which leads the Court to deem that there is competence to exercise jurisdiction over same. Insofar as ZEUS SARL is concerned, a company governed by Swiss law and domiciled in Switzerland (Neuchatel), it should be noted that the action would be brought against it in its capacity as having subsidiary liability for the sums claimed from the co-Defendants by the Plaintiff, and that, inasmuch as such liability arises from a claim under a contract of employment, Spanish jurisdiction must also be deemed competent, on said Article 25 of the Judiciary Act being applicable, since the "force of attraction" of labour jurisdiction is in operation".

2. Individual employment contracts

* Decision of the Madrid High Court of Justice (Chamber for Social and Labour Matters, Section 2) of 14 February 2007 (Referencia Aranzadi AS 2007\2702)

1980 Rome Convention on the Law applicable to Contractual Obligations. Application of foreign legislation. Lack of proof of foreign law and consequent supplementary application of Spanish labour legislation.

"Legal Grounds:

(…) TWO.… Furthermore, it is true to say that in the former employment relationship, the following transnational components are in evidence: 1) the Plaintiff accepted submission to English Law, in view of the social benefit contributions paid at the time by FERMEC; and, 2) the Plaintiff is registered with the United Kingdom Social Security system and has never made any Spanish Social Security contributions.

It is thus necessary for recourse to be had to Article 6 of the Rome Convention, applicable to contractual obligations, for the conflict-of-laws rule relating to the individual employment contract, which lays down that:

1. Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice.

2. 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.

In line with the above law, it is to be concluded that, in default of choice by the parties, the law applicable would be Spanish, in that, in the light of the proven facts: 1) when performing his contract, the employee habitually carries out his work in Spain; 2) the establishment which has engaged the employee is located in Spain; and, 3) the contract of employment has close ties with our country (proven fact no. eleven).

Nevertheless, in accordance with the contract and the content of proven fact no. five, the Plaintiff accepted submission to English Law. Against this, it is pleaded in the brief that this choice can, however, only be countenanced in matters pertaining to contracts of employment if it results in greater benefits for the worker, but never when it is restrictive. The Appellant cites our decisions of 28 July 2004 and 3 June 1999, concluding that in the case under review the relevant Act must be applied in default of such choice, which is Spanish law by reason of its being less restrictive and more favourable in its mandatory provisions. This conclusion is reached in the light of Article 6 subsection 1 of the Rome Convention and the content of Article 7 of Regulation (EEC) 1612/1968 of 15 October, which reads as follows:

1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment;

2. He shall enjoy the same social and tax advantages as national workers.

Consequently, it is essential to decide whether the choice of English Law is more favourable or more restrictive for the worker because: a) if it is more restrictive, Spanish law shall be applied, along with the minimum necessary legal regulation established as mandatory by the Workers' Charter; or, b) if it is more favourable, the law of choice, namely, English law, shall be applied."

XXV. INTERNATIONAL CRIMINAL LAW

* Constitutional Court Decision, No. 227/2007, of 22 October 2007 (RTC 227/2007)

International judicial jurisdiction of Spanish courts: Article 23.4 of the Judiciary Act: universal jurisdiction: competence to be seised of and settle cases defined as genocide, terrorism and torture: universalisation of jurisdictional competence of States and their organs to be seised of certain cases. Appeal for legal protection: fitting and proper. Violation of effective judicial protection inasmuch as it pertains to access to jurisdiction. Non-admission of action against citizens of

Chinese nationality for the crimes of genocide and torture committed in China by persecution of persons belonging to or sympathising with the Falun Gong group: the principle of subsidiarity should not be deemed to be a rule opposed to or diverging from that introduced by the principle of concurrence: rigorist restriction of universal jurisdiction in frank contradiction with the hermeneutic rule of "pro actione": existence of violation. Nullity of preceding decisions and retroaction of procedural actions.

"Legal Grounds:

(…) 2 (…) In effect, the right to effective judicial protection, inasmuch as it pertains to access to jurisdiction, has been eroded in this case because an interpretation in accordance with the *telos* (purpose) of the rule would lead to the exercise of a fundamental right of access to due process being met and would thus be fully in accordance with the principle *pro actione*, and because the literal meaning of the provision analysed leads, without interpretative coercion of any kind whatsoever, to the fulfilment of said purpose and, by extension, to safeguarding the right enshrined in Article 24.1 of the Spanish Constitution. Hence, the forced and unfounded gloss put on the provision by the Supreme Court amounts to an unlawful restriction on said fundamental right, inasmuch as it violates the requirement that "the courts of law, on interpreting legally envisaged procedural requirements, are to have regard to the *ratio* of the rule in order to prevent mere formalisms or unreasonable interpretations of procedural rules from impeding judgement of the merits of the case, thereby violating the requirements of the principle of proportionality" (Constitutional Court Decision 220/2003 of 15 December, Ground 3), on constituting a "denial of access to jurisdiction based on an excessively rigorous consideration of the rules and regulations applicable" (Constitutional Court Decision 157/1999 of 14 September, Ground 4)" (Ground 8. d). Added to the preceding considerations common to both elements, is the fact that: "Restriction based on the nationality of the victims incorporates an added requirement not envisaged under the Act, which may likewise not be teleologically founded, inasmuch as, particularly with respect to genocide, it contradicts the very nature of the offence and the shared aspiration for its universal prosecution, which is practically severed at the root… The interpretation relied upon by the Supreme Court would consequently imply that said crime of genocide would only be relevant for Spanish courts where the victim possessed Spanish nationality and, moreover, where the conduct was motivated by the goal of destroying the Spanish national group. The unlikelihood of such a possibility must be sufficient indication that this was not the purpose pursued by Parliament with the introduction of universal jurisdiction at Article 23.4 of the Judiciary Act, and that it cannot be an interpretation in keeping with the objective basis of the institution. The same must be concluded with respect to the criterion of national interest… by its inclusion, Article 23 subsection 4 of the Judiciary Act is left practically bereft of content, on being directed back to the rule of jurisdictional competence envisaged under the previous subsection. As has already been pointed out, the decisive issue is that subjection of jurisdiction to try international crimes, such as genocide or terrorism, to the simultaneous

coexistence of national interests, in the manner expressed in the Decision, is not reconcilable with the foundation of universal jurisdiction. International and cross-border prosecution which seeks to impose the principle of universal justice is exclusively based on the characteristic particulars of the crimes subject to it, the harmfulness of which (paradigmatically in the case of genocide) goes beyond the specific victims and extends to the international community as a whole. Consequently the prosecution and punishment of such crimes constitute, not merely a commitment, but also an interest shared by all States (as we had occasion to state in Constitutional Court Decision 87/2000 of 27 March [RTC 2000\87], Ground 4), the lawfulness of which does not, therefore, depend on the particular ulterior interests of each"...."

* Supreme Court Decision, Chamber 2, of 26 June 2007 (RJ 2007\3730)

International judicial jurisdiction. Crime against the rights of foreign citizens. Conduct discovered and halted in international waters: within the purview of Spanish jurisdiction.

"Legal Grounds:

...THREE. – Offence against the rights of foreign citizens, under Article 318 b, subsections 1 and 3 of the Criminal Code, of which the Public Prosecutor's Office charges the accused in this case and for which it seeks the imposition of a prison sentence of seven years, is a crime of mere activity consummated by engaging in the acts of fostering, favouring or facilitating the illegal trafficking or clandestine immigration of persons "travelling from, in transit or to Spain". The conduct is thus progressively described: fostering, which amounts to provoking, inciting or procuring its achievement; favouring, comprising any action of aid or support for illegal trafficking; and facilitating, which comprises removing obstacles or furnishing means to render trafficking possible and which, at bottom, is no more than a method of favouring. One could say that any action performed at the beginning or during the course of the emigratory or immigratory cycle which serves to aid its implementation under conditions of illegality, comes within the type of conduct defined. However, as a consequence of the range of activities embraced by the criminal conduct, it is enough that the clandestine immigration be fostered, favoured or facilitated by any means in order for the crime to be committed; which means that participation by the offender in any of the multiple tasks that converge to effect the action will suffice for the statutory provision to be met, thereby including conduct such as funding the operation, acting as an intermediary, carrier, harbour pilot, or furnishing any of the latter, etc. This implies that it is irrelevant whether the immigrants manage to reach the Spanish mainland or islands or whether the operation does not conclude successfully due to the intervention of the judicial police or by reason of shipwreck, inasmuch as the offence is committed through undertaking the acts of fostering, favouring or facilitating, without it being necessary for Spanish territory to be clandestinely reached (v. Decisions of the Supreme Court of 5 February 1998 and 16 July 2002). It is also important to note that the legal right protected by Article 318 (b) of the Criminal Code is

made up of two types of interests, namely: a general interest in controlling migratory flows, by preventing advantage from being taken of such movements by Mafia-led organised criminal groups; and the immediate interest of protecting the liberty, security, dignity and rights of emigrants. Having arrived at this juncture, our attention should be directed at the problem relating to the jurisdiction which ought to be seised of this type of conduct discovered and interrupted in international waters. In this respect, we have to say that in our opinion the reasons put forward by the Court of First Instance to deem Spanish jurisdiction as lacking legitimacy for this purpose, do not seem sufficiently well-founded. Indeed, if the exercise of criminal jurisdiction is a manifestation of State sovereignty, then, in accordance with the principle of territoriality, each State is, in principle, entitled to be seised of all the criminal offences committed on its territory, whatever the nationality of the perpetrator and the legally protected right (v. Article 23.1 the Judiciary Act and Articles 14 and 15 of the Criminal Procedure Act). However, the principle of territoriality coexists with other principles that enable the extent and limits of Spanish jurisdiction to be defined, namely: a) the principle of registration or flag, complementary to the principle of territoriality in terms of its extension to vessels and aircraft; and b) the principle of protection of interests (*principio real*), which seeks to afford protection to legally protected interests of the State, regardless of the place in which the attack is committed. These principles are based on the national interest in the legally protected asset arising from the crime, whether the latter be perpetrated on national soil or beyond the nation's borders. In accordance with this principle, Article 23.3 of the Judiciary Act provides that Spanish jurisdiction shall be seised of acts committed by Spanish or foreign nationals outside Spanish territory, where such acts are eligible to be classed in accordance with any of the crimes enumerated in said Article (among which the offence against the rights of foreign citizens is not listed). Along with the principles of territoriality and protection of Spanish interests, the scope of jurisdiction of the Spanish courts is also moulded by the principle of personality or nationality, since, in keeping with this, every citizen is always subject to his country's jurisdiction. Thus, Spanish criminal jurisdiction is to be seised of acts envisaged under Spanish criminal law as criminal offences, even though they may have been committed outside the national territory, provided that the criminally liable parties are Spaniards or foreign nationals who have acquired Spanish nationality subsequent to the perpetration of the act, provided that the following requirements are met: 1) the act is punishable in the place where it is committed, save where, pursuant to an international treaty or a statutory enactment of an international organisation to which Spain is a party, said requirement is not necessary; 2) the aggrieved party or Public Prosecutor's Office reports the crime or brings an action in the Spanish courts; 3) the delinquent has not been acquitted, pardoned or sentenced abroad, or, in the last-mentioned case, has not served his sentence. Should he have only served his sentence in part, this will be taken into account to reduce proportionally whatever sentence might correspond to him (see Article 23.2 of the Judiciary Act, as amended by Organic Act 11/1999

of 30 April). The principle of universality or of world-wide justice also widens the scope of Spanish jurisdiction, inasmuch as it serves to protect assets essential for mankind, recognised by all civilised nations, regardless of the nationality of the guilty parties and the place of perpetration, to the extent that, in essence, it involves cognisance of inherently international offences. Article 23.4 of the Judiciary Act responds to this principle, in that it determines the competence of Spanish jurisdiction to be seised of acts committed by Spanish or foreign nationals, outside the confines of Spanish national territory, where such acts are eligible to be defined, under Spanish law, as any of the following crimes: a) genocide; b) terrorism; c) piracy and unlawful commandeering of aircraft; d) forgery of foreign currency; e) crimes relating to prostitution and abuse of minors or persons lacking legal capacity (amended by Act 11/1999 of 30 April, pursuant to which the offences of corruption of minors and persons lacking legal capacity were included); f) illegal trafficking in psychotropic, toxic and narcotic drugs; g) crimes of female mutilation (pursuant to Act 3/2005, in force since 10 July 2005); h) any other offences which, under international treaties or conventions, are to be prosecuted in Spain. The scope of Spanish jurisdiction would not be duly defined without reference to the so-called principle of "substitute justice" (*justicia supletoria*), also known as the criminal law of representation, which operates in the event of there being no request for or no grant of extradition, on permitting the State in which the perpetrator is found, with due application of the criminal law, to try him. The basis of this principle is none other than that of progressive harmonisation of the different legislations as a consequence of the similar structure of international treaties, inasmuch as these tend to draw up punishable classes of offence and normally impose the obligation on States to introduce such offences into their legal systems. Hence, the incorporation of such criminal offences into the internal law enables application, where called for, of the rule "*aut dedere aut judicare*", if extradition is not forthcoming. Consequently, though it is true that, in congruence with its correlation with sovereignty, the principle of territoriality is the main criterion, this principle is not an absolute principle, and there is consensus as to the acceptance of the principle of protection of the interests of the State and of nationality; in contrast, the principle of universality would be justified insofar as it relied on a pre-existing international legality, based on treaty or usage. Lastly, among the principles that define the scope of State jurisdiction, the residual criterion of the principle of "substitute justice" seeks to prevent an act held to be criminal from going unpunished, bearing in mind – as has already been pointed out – that, in the context of given spheres of general interest, the community tends to deem the same classes of acts as being criminal.

FOUR. – Turning now to the subject matter of the case under review, regard must be had to the fact: 1/ that immigration currently constitutes one of the international community's most pressing problems, one that is often closely related to so-called Transnational Organised Crime. As a result, it has been the subject of international agreements and conventions, such as the Convention of 15 November 2000 (ratified by Spain via Instrument of 21 February 2002),

Official Government Gazette. 29.9.2003 (ratified via instrument of 21.2.2002, Official Government Gazette. 10.12.2003), along with the "Protocol against the Smuggling of Migrants by Land, Air and Sea" that supplemented said Convention, the stated purpose of which is none other than "to promote co-operation to prevent and combat transnational organised crime more effectively" (see Article 1 of the Convention); 2/ that said Protocol establishes that, "States Parties shall co-operate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea" (see Article 7) and provides that, "A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law" (see Article 8.7); 3/ that the United Nations Convention on the Law of the Sea, done at Montego Bay on 10 December 1982 (Official Government Gazette, 14 February 1997, No. 39/1997), lays down that, "The high seas are open to all States, whether coastal or land locked", and that, "Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law" (see Article 87.1), specifying that, "Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship" (see Article 91.1); 4/ that the Geneva Convention of 29 April 1958 (Official Government Gazette of 27 December 1971, No. 309/1971), states that, "The term "high seas" means all parts of the sea that are not included in the territorial sea or in the internal waters of a State" (see Article 1), and declares that, "The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty" (see Article 2). "Every State, whether coastal or not, has the right to sail ships under its flag on the high seas" (see Article 4). Furthermore, it 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" (v. Article 12.2). From what has been outlined above, it is to be concluded that: a) States are recognised as having the right of free navigation on the high seas and that this right is to be exercised on the conditions laid down by international conventions and other international rules of law; b) among these conditions or requirements is the rule that ships shall have the nationality of the flag which they are authorised to fly, and shall, in principle, be subject, on the high seas, to the exclusive jurisdiction of said State ("A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality": see Article 92.2 of the United Nations Convention on the Law of the Sea, done at Montego Bay on 10 December 1982). In the case before the court, we are faced with a vessel without nationality (as are often the *pateras* and *cayucos* that are used for these types of unlawful

activities) [*Translator's Note*: i.e., *pateras* and *cayucos* are rudimentary open boats]. Sailing in this type of vessel is really perilous for the persons that use them. In the case before the court, the Public Prosecutor's Office accused those allegedly responsible for the aborted operation of an offence under Article 318 (b), subsections 1 and 3 of the Criminal Code, on deeming that the occupants of the *cayuco* ran a serious risk to their lives, since they lacked both means of communication with the exterior and life jackets (reports of persons who lose their lives in these types of operations are not infrequently carried in the media). Indeed, this necessitated the intervention of a vessel belonging to the Spanish Lifeboat & Rescue Service (*Servicio de Salvamento Marítimo*), which rescued the immigrants and transferred them to the Spanish coast. Consequently, those allegedly responsible for the illegal immigration operation were left on Spanish territory, towards which the intercepted *cayuco* was undoubtedly heading. The fact of the illegal immigration operation organised to enter Spanish territory clandestinely is patent. Such conduct constitutes a serious offence, on being punished by a prison sentence of six to eight years (see Article 318 (b) 1 and 3 of the Criminal Code and Article 2 b) of the United Nations Convention against Organised Transnational Crime, of 15 November 2000). The vessel used had no nationality. There is no evidence that any State has claimed cognisance of this act. Those allegedly responsible – at least part of them (those who travelled in the *cayuco*) – were on national soil. There is, at all events, an evident nexus between the act forming the subject matter of this case and national interests. In the present case, there is a set of circumstances which, in accordance with the norms and principles of international law outlined above, particularly Article 23.4 h) of the Judiciary Act read in conjunction with the above-transcribed Article 8.7 of the Protocol against the Smuggling of Migrants by Land, Air and Sea, lends support to this attribution of jurisdiction, enables the adoption of measures pursuant to internal law, including *inter alia* the opening of the necessary report by the Security Forces, and more than justifies Spanish courts being seised of this case. In conclusion, it thus behoves the Court to uphold the ground of cassation pleaded by the Public Prosecutor's Office, with the logical consequence of quashing the decision brought on appeal and remitting the proceedings to the court from which they came, so that said court may hand down the appropriate decision on the criminal actions alleged in this case by the Public Prosecutor's Office".

* Decision of the Madrid Provincial High Court, Section 16, of 26 June 2007 (JUR 2007\258120)

International judicial jurisdiction. Offence of forgery of residence and work permit perpetrated abroad. Spanish jurisdiction entitled to be seised of the case due to the importance of identifying foreign citizens for reasons of security and control of immigration, and the broad interpretation of the concept of production of false documents in court.

"Legal Grounds:

...ONE. – ...The new judgements open a clear path to the punishment of forgery of official identity documents perpetrated abroad. To this end, the Supreme Court has recourse to two arguments: the first and fundamental argument is based on the relevance of identifying of foreign citizens in our country for the purpose of monitoring the security, immigration and movement of citizens belonging to European Union (Supreme Court Decisions of 7–10–03, 10–11–04, 26–1 and 14–9–05, 11–4–06 and 25–1–07). In these judgements, the Supreme Court holds that it is no longer appropriate to maintain the line marked by precedent and set at the jurisdictional plenum held on 27–3–1998, because forgery of identity documents always affects the interests of the State, in view of the requirements stemming from Article 6 of the 1985 Schengen Convention, to which Spain acceded by virtue of the Protocol of 25–6–1991. In this regard, it is stressed that no country may remain indifferent to the identification of persons within the national territory, given its repercussion on matters of security, immigration, visas, movement of persons, etc. Accordingly, certain interests of the State as well as its own credit in international relations are at stake in pursuance of the various commitments acquired. Furthermore, a second interpretative line of an incriminatory nature has also been opened. This comes down to deeming that the mere identification of foreign citizens to the police by means of false identity documents can be subsumed under Article 393 of the Criminal Code, on holding that this generally involves identifications which have to be undertaken at the beginning of court proceedings, due to the fact that they tend to be made as a result of investigation into some criminal activity (Supreme Court Decisions of 7–10–03 and 11–11–96). The expression, "production in court" is thus construed broadly, encompassing even the pre-procedural stage of examination, i.e., the police report that opens the formalities for a trial. This is a condemnatory criterion, which was adopted by resolution three of the Meeting of the Board of Judges of the Criminal Sections of this Madrid Provincial High Court held on 25–5–07, with regard to the falsification of identity documents, passports and permits which, though forged abroad, have nevertheless been used in Spain for identification purposes or as evidence of a legal status in our country that does not correspond to reality. In brief, on evidence having been produced showing the bogus nature of the residence and work permit taken from the accused, which constitutes the document that attests to the identity and the legal status in Spain of foreign residents in our country, and which was used by the accused for identification purposes in our country, the facts are constitutive of an offence of forgery, the judgement of which, pursuant to Article 23.3.f), falls to Spanish jurisdiction, since it directly harms the interests of the State insofar as identification of foreign nationals and control of immigration are concerned".

XXVI. INTERNATIONAL TAXATION LAW

* Supreme Court Decision, Chamber 3, Section 2, of 4 June 2007 (RJ 2007\4574)

Tax treatment of profits obtained by residents in Spain through the purchase and subsequent sale of public debt securities issued by the Republic of Austria ("Austrian bonds").

"Legal Grounds:

...FOUR. – The present point has been decided on numerous occasions by this Chamber, consolidating a repeated doctrine relating to the purchase and subsequent sale of public debt securities issued by the Republic of Austria ("Austrian bonds"), where said securities are purchased shortly before the maturity date of the current interest coupon, the interest is received, and the bonds are sold immediately afterwards, with the debate turning on whether or not – such interest being exempt, not only from deduction, but also from assessment – the sale of the securities, with the ensuing loss of value stemming from collection of the interest coupon, is to be deemed a deductible capital loss for the purposes of Personal Income Tax. The core issue of the appeal to be examined thus consists of deciding whether the negative difference between the purchase value of the bonds issued by the Austrian State and the sale value, after the interest coupons have fallen due, constitutes a net worth decrease of which the tax payer may avail himself in order to offset net worth increases obtained on disposing of other assets. The purchase and sale transactions in respect of Austrian bonds, under the conditions prevailing in this case, respond to the aim of using a stratagem to create a capital loss for taxation purposes, which arises as a consequence of the different treatment sought to be given to the sum received from the coupons, i.e., said sum is initially merged with the purchase value, but on being received on the coupon maturity date, it parts company with the value of the assets acquired and pursues the course of revenues, which are not taxed. Once the value of the bonds has been stripped of the value of the coupons received, their selling value becomes lower than their purchase value, and the desired decrease in net worth thus arises. Before turning to study the core issue posed, it would seem appropriate to establish the following points: a) an interpretation of the taxation rules based on the financial nature of the taxable act must be avoided. Article 25.3 of the General Taxation Act, as amended and revised by Act 25/1995 of 20 July, abolished financial interpretation of taxation rules in order, among other reasons, to prevent the principle of legal certainty from being eroded; the point here is to ascertain the true legal significance of the institutions in play (to the extent that it is of interest here, change in net worth through purchase and sale of "Austrian bonds") in the light of criteria drawn from Article 3.1 of the Civil Code and precedent set by this Supreme Court on interpretation of the statutory provisions; b) as highlighted by our decision of 30 June 2000 (Appeal No. 225/1998), the admissibility or inadmissibility in Spain of either the offset of the net worth decrease or the tax refund which the Appellant seeks to obtain in his 1993 Income Tax Return as a consequence of

the transactions effected with "Austrian bonds", must be elucidated in accordance with internal Spanish law; it is not a question of interpretation of the Convention signed between Spain and Austria on 20 December 1966; c) it must be made clear that there has been no dispute as to the point relating to the exemption applicable to interest on the "Austrian bonds" as return on capital, because the only point queried in connection with interest has been its influence on the quantification of change in net worth; d) the admissibility of the choice of the most advantageous tax avenue (*economía de opción*) or strategy of reducing fiscal cost, which affects neither the ability-to-pay principle nor the principle of tax being borne proportionally (*justicia tributaria*), is beyond doubt: however, whether one may then engage in any type of anomalous legal transaction under the appearance of choosing the most advantageous tax avenue is quite another matter. Yet this is not the case now brought before us, in which the Appellant could validly invest in "Austrian bonds" with the intention, duly availing himself of the Double Taxation Convention, of obtaining the interest exemption in addition to any other type of taxation benefits that might lawfully be obtained from the Convention's application, using the instruments put at the disposal of participants in legal dealings by the legal system with the aim of optimising tax treatment and financial profitability. It should nonetheless be clearly understood that, when it comes to deeming whether the change in net worth constituted a genuine decrease in net worth, ascertainment of the purchase value must necessarily be in accordance with the internal taxation law; and, e), given the date on which the taxable act took place and the tax period of reference (1993), the change in net worth was governed by the terms of the Personal Income Tax Act 18/1991 of 6 June and, specifically, by Articles 44 and successive provisions, with Article 46 stipulating, for both purchase and sale values in onerous transfers of net worth (such as that which is inherent in "Austrian bonds"), the "real sum" for which said purchase and sale were effected".

* Decision of the National High Court, Chamber for Administrative Proceedings, Section 7, of 19 April 2007 (JUR 2007\112259)

Taxation of earnings obtained by assignment of image rights by a sportsman belonging to a company resident in Spain. Payments made under the terms of a contract whereby Real Madrid assigns the commercial exploitation of a football player's image to the Austrian enterprise. Convention between the Spanish and Austrian Governments for the avoidance of double taxation.

"Legal Grounds:

…TEN:…Hence, the issue debated is reduced to ascertaining whether or not revenues paid by an enterprise resident in Spanish territory to another enterprise not resident in Spain, by way of footballers' image rights are royalties, for the purposes of and under the terms established by the Convention signed between Spain and Austria for the avoidance of double taxation and, by extension, whether they constitute one of the taxable forms of income under the statutory provisions cited. Article 12 of said Convention provides that: "…". The foregoing provisions, contained in said Article 12, come to constitute a special departure from

the general rule, established under Article 7 of the OECD Model Convention with respect to Taxes on Income and on Capital which, insofar as the business profits of an enterprise are concerned, provides that, as a general rule, these shall be taxable only in said enterprise's country of residence. Nevertheless, if the latter has a permanent establishment in the other country, said State shall be entitled to levy tax on any revenues attributable to said company.

ELEVEN: Article 1 of the Civil Protection Act 1/1982 of 5 May governing the Right to Good Name, Personal and Familial Privacy, and Personal Image, (*Ley Orgánica de Protection Civil del Derecho al Honor, a la Intimidad Personal and Familiar and a la Propia Imagen*) defines this right as unrenunciable, inalienable and imprescriptible. It is thus, by definition, a right of a personal nature, yet because it is capable of generating financial profits through its exploitation for commercial purposes, fundamentally advertising, it nevertheless displays an evident property-like aspect. In this respect, the Decision of Chamber 3 of the Supreme Court of 25/1/99 is a reminder that, while personal image is a right of a personal nature, it also has an asset content, particularly in the case of famous entertainers and athletes, due to its possible use in the media, advertising, marketing, etc. The Decision of the Constitutional Court 107/87 specifies that, "the right to personal image forms part of the personality assets belonging to the scope of personal and family life, which is removed from extraneous intrusions. Such intrusions have singular importance, owing to the growing development of the media and procedures for capturing, broadcasting and disseminating said image, data and circumstances pertaining to privacy guaranteed under Article 18 of the Constitution". This Chamber, in a decision of Section 6 of 20/1/05, analyses this property-like aspect of image rights, from the stance of their tax treatment, though the case examined here is approached from the standpoint of the yield obtained by the right holder, insofar as Personal Income Tax is concerned. This decision states that,…legal transactions may be concluded entailing the disposal of given aspects of fundamental rights, such as "image rights", construed as an exercise of a proprietary right over one's personal image, without this in any way meaning that this would clash or constitute an exception to the general regime of the inalienability and unrenunciability of such rights, or permission for unlawful intrusion. It would be the creation or implementation of a financial right over the image or the "property-like aspect" of image exploitation, which, rather than a waiver of the fundamental right, amounts to marketing of one of its aspects, namely, the material aspect. The possibility of exploiting the material aspect of this right was already recognised under Article 7.6 of the Civil Protection Act 1/82 of 5 May, on deeming the "use of a person's name, voice or image for publicity or commercial purposes or the like" not to be "unlawful intrusion". The exploitation of personal image is likewise recognised in the professional sphere or ambit, with it being capable of forming the subject of a legal transaction; hence, "profession" and "image" may be seen as being closely interrelated. This circumstance allows for the exploitation of image to follow a parallel course (profession-image), with the financial right being exercisable "per se" or "by a third party", or to follow different paths, such that exploitation

of the image is secondary, on being used outside the professional sphere. Contractual instrumentalisation may take various forms, including that of an "assignment of rights"... From the tax standpoint,... Article 76 of the prevailing Personal Income Tax Act 40/1998 of 9 December and other taxation provisions, in referring to "attribution of income due to assignment of rights of image" contains this same fiscal treatment of revenues obtained under this head, with "return on capital" being defined at Article 23.4.e) as, "revenues from assignment of the right to the exploitation of the image, or consent or authorisation for the use thereof, save where said assignment takes place in the context of a financial activity".

TWELVE: This being so, the analysis of the issue from the point of view of Corporation Tax, which is now before us, renders it necessary to ascertain whether revenues obtained by a non-resident enterprise in Spain from an enterprise resident within Spanish territory, by virtue of an assignment of the use of a sportsman's image rights, fall within the item of royalties, under the provisions of Article 12.3 of the above-mentioned Spanish-Austrian Convention for the avoidance of double taxation. Against the position maintained by the Appellant company, the Department of Inland Revenue holds that the definition of "royalties" contained in the double taxation conventions pools together a series of assorted categories, the common denominator of which is that of being sums paid in consideration for the right to use images, texts, names, knowledge, etc., for commercial purposes, the right of reproduction and use of which is exclusive to the person to whom said sums are paid, thereby establishing a flexible definition within which new realities may be included that respond to the nature of those expressly envisaged by the definition. The flexible nature of the definition of royalties has been recognised on a number of occasions by this Chamber (Decision of the National High Court, 27/4/97, among others), and we have examples in case-law that support this conclusion (Supreme Court Decisions of May, 9 June, 11 June, 26 June 2001, 14 March 2002 and 20 July 2002). On reviewing an appeal in cassation against a ruling of the National High Court which defined computer programmes as a literary work, for the purposes of the copyright in them being taxed as royalties under Article 12 of the Double Taxation Convention concluded between Spain and the United States of America of 22 February 1990, the latest of the above decisions stated, "The decision of the Lower Court was based on the non-existence in our positive law of a legal definition of computer programmes as literary works or scientific works and after, likewise, holding that, in principle, a computer programme is the result of a scientific work and, thus, something more akin to a scientific than a literary work, it arrived at the conclusion, using interpretative "but not statutory" criteria derived from Act 16/1993 of 23 December governing the incorporation into Spanish law of Community Directive EEC 91/250 of 14 May, on the legal protection of computer programmes, that such programmes constituted literary rather than scientific works; fundamentally, because this is to be concluded from the Preamble to this law, which expressly alluded to the fact that, "in the description of the object, the protection accorded to computer programmes is

identified with that offered to literary works", and from the content of Article 1.1 which, under the heading of, "Object of protection", laid down that, "In accordance with the provisions of this Directive, Member States shall protect computer programs, by copyright, as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works". Moreover, this can be concluded, not only from these provisions, but also from the Single Transitional Provision of the Act, "taken to mean Act 16/1993", which stipulated that the provisions of same were applicable to programmes created prior to the entry into force thereof, "without prejudice to acts concluded and rights acquired before that date". Indeed, as the Decision of 26 June 2001 points out, Counsel for the State warns in his brief that the definition given by the oft-cited Act 16/1993 of computer software programmes as "literary works" is for the sole purposes of their protection "and not, therefore, for the purposes of their definition as literary products as such". Nevertheless, the Chamber is in agreement with all the decisions cited in the correct conclusion reached by the decision brought on appeal, with this being based above all on three arguments:

firstly, because neither the former Intellectual Property Act of 10 January 1879, nor the subsequent Act 22/1987 of 11 November – today the Consolidated Text approved by Royal Decree-Law 1/1996 of 12 April, as amended by Act 5/1998 of 6 March – contained or contains a specific delimitation between "literary" and "scientific" works that would permit computer programmes to be brought under one or another head. It only referred, and refers: to the fact that ownership of a literary, artistic or scientific work corresponds to the author by the mere fact of its creation; to determination of the rights of a personal and proprietary nature which comprise its content (that of the property) – Articles 1 and 2 of the Text in force – along with the incomplete list of the original works and titles that are the object of such ownership – listed among which are computer programmes, but without these (or any of the remaining works) being allocated by the Act to any of the above specific categories; and to specification of the works deriving and intellectual productions excluded from intellectual ownership. Accordingly, the only statutory criterion that exists, albeit solely for purposes of "protection" of copyright relating to the above-mentioned programmes, is that which is provided by the oft-cited Act 16/1993, namely, that of assimilating them, specifically, to "literary works";

secondly, because a computer programme, regardless of its content (which, in point of fact, has not been shown), in addition to being an eminently practical work, is also an intellectual creation that uses the written language as a means of communication. If one thus departs from the position that the programmes referred to constitute language works and that the latter, as has been seen from the conclusions to be drawn from the Spanish Act 16/1993 and even from the Berne Convention, are equivalent to the concept of literary work, then, from a logical point of view and based on the only legislative criteria that can be used as an element of interpretation, the conclusion accepted by the decision brought on appeal must be deemed correct; and,

thirdly, because, when the Intellectual Property Act refers to literary, artistic and scientific works as an object of intellectual property law, as does the Civil Code at Article 428, it is referring to forms of expression, not to content, for the elementary reason that it is not scientific, literary or artistic ideas that constitute said object, but instead their "expression" in the pertinent "works". If by "scientific work", one is to understand that which develops theories, principles, theorems, axioms or postulates, because, indeed, science must be construed as encompassing all manner of bodies of doctrine methodically ordered and constitutive of a particular branch of human knowledge, it is clear that a computer application programme *per se* does not meet any of these requirements. Furthermore, to render the rigour of tax definitions absolutely dependent on what, in each case, ought properly to be attributed to the content of any expression of the language, would be tantamount to introducing uncertainty into the matter and fly in the face of the very interpretative criteria advocated by Article 23 of the General Taxation Act with respect to the guidelines contained in Article 3.1 of the Civil Code." As stated above, assignment of image rights logically has the aim of commercial exploitation, which may be achieved in many ways, all of which involve the image's incorporation into some material, radiophonic or audiovisual format, and its reproduction for dissemination thereof, since what is assigned is precisely the right of exploiting the image by copyright-generating methods, mechanisms and instruments. Accordingly, the position maintained by the Authorities puts an interpretation on the provision's own scope and the inclusion within its ambit of a phenomenon which, while usual nowadays, was not so at the date when the Convention was signed, and which, nonetheless, is fully subsumable in said enactment, due to its being an act, not essentially different from any of those described therein, but rather a modern manifestation of assignment of the use of copyright".

XXVII. INTERREGIONAL LAW

* Supreme Court Decision, Chamber 1, Section 1, of 7 June 2007 (RJ 2007\3420)

Liquidation of community of property. Application of the common legal system, on Catalonian "vecindad civil" not having been attained.*

* [*Translator's Note:* "*vecindad civil*" is residence in a certain neighbourhood or vicinage which acts as the specific personal connecting factor for interregional conflict of laws in cases where a special local civil law regime applies to residents of certain Spanish Autonomous Regions]

"Legal Grounds:

…THREE. – Following the above explanation, it is clear that the Court cannot uphold the appeal in cassation, brought on three grounds, all pursuant to Article 1692 subsection 4 of the Civil Procedure Act, which maintain the Defendant's original position, by holding that on entering into the marriage he had already acquired the *vecindad civil* of Catalonian civil law and, consequently,

that the regime was one of separation of property. The first of the grounds pleads infringement of Article 15.3 of the Civil Code as originally worded, which has been transcribed. There is no such infringement. This provision has been complied with, but the Civil Registry rule which is also pleaded under this ground, completes it on establishing, not only the declaration, but also the calculation of the period of residence for acquisition, and lays down that the calculation does not encompass the time of legal minority or lack of emancipation and that, in that period, tacit emancipation extended not to the personal sphere but only to a very specific part of the property sphere. The latter forms the content of the second ground, which pleads infringement of Articles 160 and 317 of the Civil Code as originally worded. The former Article has been transcribed; the second refers to the effectiveness of emancipation, without including tacit emancipation. The former provision may be applied to the present case and, as has been stated, this species of so-called tacit emancipation envisaged by the former Article 160 of the Civil Code only encompassed a limited part of the property content: which could correspond to a person below the age of legal majority that lived independently of his parents, who did not lose their *patria potestad*; but which, in no way whatsoever, extended to the personal sphere, nor allowed such a person to be assumed capable of acting in the full sense. Indeed, in contrast to this provision, not as a continuation but rather as a change in direction, the Act of 13 May 1981 drew up the new Article 319, and this *did* make tacit emancipation equivalent to express emancipation. Accordingly, rather than there being any infringement, there is in fact strict and correct application of the erstwhile Article 160. Likewise there is no infringement of new Article 319: instead, its content has – rightly – not been applied in the name of the principle of non-retroactivity of laws. The third of the grounds of the appeal in cassation is founded on infringement of case-law doctrine as to the starting point for the calculation of the ten-year period for acquisition of *vecindad civil*. There is no such infringement. There is no doubt, as pleaded in the ground, that acquisition of *vecindad civil* by residence takes place *ipso jure*, automatically on completion of the designated period, in accordance with settled case-law doctrine. However, this is not the problem, something that is indisputable. The problem, in the present case and in countless others, lies in the calculation, and more specifically, whether the time during which the party seeking acquisition lacks legal capacity to act is to be computed. Case-law doctrine is in line, as could not be otherwise, with the position as expounded thus far. Citing numerous earlier decisions, this is ratified by decisions of 23 March 1992 and 20 February 1995, in the sense that the time of legal minority without emancipation is not included in the calculation. The first of these decisions states: it is evident that when Mr. Víctor Manuel reached the age of legal majority, which took place on 30 May 1975, on reaching his twenty-first birthday (wording of Article 320 of the Civil Code in force on that date), he had common *vecindad civil*. Accordingly, from then onwards and until he moved to take up residence in Palma de Mallorca (1981), the ten years required for him to have been able to acquire Catalonian *vecindad civil* had not elapsed, on it not being possible to compute

(as is erroneously done by the decision brought on appeal, without the issue even having been raised) the years since 1966 when, during his legal minority, he had resided in Barcelona together with and under the *patria potestad* of his parents. This is because Article 225 of the Civil Registry Rules & Regulations, after laying down at paragraph 1, in full concordance with Article 14.3–2 of the Civil Code, that, "Change in *vecindad civil* occurs '*ipso jure*' by habitual residence for an uninterrupted period of ten years in the province or territory of different civil legislation, unless the interested party makes a declaration to the contrary before the conclusion of the designated period", at paragraph 2 adds that, "The time during which interested parties may not legally govern their own person is not to be computed in the period of ten years". It was in this situation that Mr. Víctor Manuel found himself during his legal minority (from 1966 to 1975), which period of time may thus not be calculated for the purpose expressed. In view of the fact that, as explained above, the Defendant, Mr. Víctor Manuel, had common *vecindad civil* when he contracted marriage in 1983 in Palma de Mallorca with the Plaintiff and here Appellant, Montserrat, without having executed a pre-nuptial agreement, it must be concluded that their said marriage was subject to the legal regime of community of property. The second decision, of 20 February 1993, reiterated the case-law doctrine of the earlier decision in a case extraordinarily similar to that now brought on cassation, and rendered judgement akin to the decision to be handed down here. Accordingly, the three grounds of the appeal in cassation are thus overruled, the case is dismissed, and the Appellant is ordered to pay legal costs, all on application of Article 1715 of the Civil Procedure Act".

* Decision of the Gerona Provincial High Court (Section 2) of 5 March 2007 (JUR 2007\244601)

Interregional law. Application of Catalonian civil law. Law applicable to non-contractual obligations.

"Legal Grounds:

(…) THREE. – The Chamber does not share the Appellant's criterion, because, pursuant to the provisions of the Civil Code on Private International Law, which are also applicable in cases of determination of applicable law as between the special civil legal systems of Autonomous Regions (where such systems exist) and common civil law, Article 10.9 lays down that non-contractual obligations shall be governed by the law of the place where the event giving rise to such obligations occurred. This is a criterion of territoriality that is beyond discussion and settles the disputed point raised in the appeal, since, on the accident having happened in Catalonia, the special Catalonian law, and specifically the Article applied by the Lower Court (*órgano "a quo"*), should be the law applicable for the purpose of resolving the dispute. (…)".

* Decision of the Barcelona Provincial High Court, Section 12, of 11 May 2007 (EDJ 2007/119998)

Matrimonial property regime. Applicability of the Catalonian in lieu of the Aragonese special local civil law regime.

[*Translator's Note*: The so-called *derechos forales* are special local civil laws in force in some of Spain's Autonomous Regions, e.g., Aragon, Navarre and Catalonia]

"Legal Grounds:

…THREE. – The conclusion expressed cannot be upheld. It is true that Article 225 of the Civil Registry Rules & Regulations does have this content and also that, on this basis, judgments have been handed down that observe its criterion, namely that the period of ten years must elapse while the subject's status is one of full legal capacity, and in particular a decision given by this very Court on 18 March 1996, which was cited by Plaintiff's counsel and was rendered in line with the position espoused by Supreme Court Decision of 23 March 1992. It is no less true, however, that the trend in case-law set by the High Court, represented by decisions of 20 February 1995, 28 January 2000 and 21 September of that same year (precisely the one that set aside this Chamber's decision), has openly leaned towards deeming that provisions established by rules and regulations can in no way place conditions upon, limit or erode those established by an Act of law, namely the Civil Code at Article 14, now Article 15, inasmuch as, save declaration to the contrary, pursuant to said Article the elapse of ten years confers acquisition of *vecindad* [*Translator's Note*: i.e., residence entitling the holder to a special local civil law regime] "*ope legis*". Indeed, as is likewise laid down by the last-mentioned of the expressly cited decisions, the imperative content of the above-mentioned legal provision cannot be limited by a regulatory rule that, in manner of speaking, curtails a possibility of action, such as access to *vecindad*. From this standpoint, in view of the fact that Mr. Ángel Daniel had been residing in Catalonia since 1956, when he contracted marriage in 1967 he had already acquired Catalonian *vecindad civil*, which should be a decisive element in the resolution of this suit".

* Decision of the Vizcaya (Biscay) Provincial High Court, Section 4, of 31 May 2007 (Ref. Aranzadi JUR 2007\349744)

Successions. Last will and testament made in accordance with the special local civil law of Biscay. Fraud in law.

"Legal Grounds:

…TWO. – …and, in the present case, considering all the points commented upon above, particularly the deceased, Mr. Rodrigo's "personal deed" governing his residence in the last will and testament of 1990, the Defendant has failed to show conclusively that on 25 February 1999 said person had obtained *vecindad civil* [*Translator's Note*: i.e., residence entitling the holder to a special local civil law regime] in Bilbao by virtue of having resided in said city for over 10 years.

THREE. – This having been established, what remains to be decided is whether the last will and testament executed, under common civil law, on said

date is utterly null and void, thereby reviving the disposition previously made in 1990 or, on the contrary, it is fitting that Aurora be reserved at least a one-fifth share in the estate (i.e., which exceeds the strictly lawful share under the special local law regime) out of respect for the deceased's wishes, as expressed in the challenged will, to the effect that Aurora should also succeed him in part of his assets. There is no doubt as to the decision, in view of existing case-law doctrine on the point, which leans towards the total nullity of the last will and testament executed under a legal regime other than that pertaining to the deceased if the interests of third parties are harmed thereby, with the effectiveness of any earlier will being revived, where applicable. Hence, in the decision handed down by this very Court on 19 February 2001, we stated the following, "The testatrix contravenes the stipulation made by the aforesaid Article 14.1 of the Civil Code, (Article 6.3 of the Civil Code); she voluntarily excludes the law applicable, in prejudice to third parties (Article 6.2 of the Civil Code); and fraud in law might even be alluded to (Article 6.4) since, in contradiction to the provision made by the earlier wills, the sudden submission to the local special civil law regime would appear to have no purpose other than to deprive her two children from their inheritance, without any need for justification, (in this regard see Supreme Court decision of 5–4–94). Accordingly, the last will and testament dated 4–4–1990, executed in accordance with the special local civil law of Biscay is entirely devoid of value and effect. Moreover, in the case before the court it would be irrelevant to hold said will partially valid once the legitimate shares were respected, since the truth of the matter is that it is not a perfect will for the purposes of Article 739 of the Civil Code, lacking revocatory effectiveness in respect of the earlier open will executed in Durango on 30.03.1976, a will that must be declared valid and having effect in every respect, inasmuch as it was executed in accordance both with the testatrix's *vecindad* and with law……." In this same respect, in its Decision of 5 April 1994, the Supreme Court states at Legal Ground Nine that, "……it must be concluded, without any doubt whatsoever, that residence entitling application of the special Biscay local law regime which they claimed to have acquired in the untoward form described above, at the advanced ages of 76 and 75 years respectively, lacking any rural property (farmstead and appurtenances thereto) that they might wish to concentrate in one of their heirs alone, had no purpose, by availing themselves of said apparent special Biscay local law regime (ostensible law), other than to elude the application of the law of succession under common civil law (Civil Code) to which they had always said they were subject (recalling the three testaments that had previously been executed) and, in this way, practically disinherit their two sons Felipe and Jesús María, without any cause whatsoever that might justify said disinheritance. This is something that evidently comprises a clear case of fraud in law, as defined under the terms outlined above, so that, while upholding the second ground which we have been examining, the Court must declare that some of the wills (testamentary Powers of Attorney) which the above-mentioned spouses, availing themselves of the special Biscay local law regime, executed on 4 February 1976, are devoid of all value and effect".

* Decision of the Barcelona Provincial High Court, No. 641/2007 (Section 12) of 24 October 2007 (JUR 2008\12020)

Law applicable to matrimonial property regime. Marriage act and nuptial agreements. Application of German Law. Improper nature of monetary compensation under the special Catalonian civil laws (Derecho foral). Article 107 of the Civil Code.*

*[*Translator's Note*: The so-called *derechos forales* are special local civil laws in force in some of Spain's Autonomous Regions, e.g., Aragon, Navarre and Catalonia]

"Legal Grounds:

(…)…FIVE. – The prevailing scholarly doctrine has come to deem that the right deriving from Article 41 of the Catalonian Family Code, the predecessor of which was Article 23 of the Catalonian Civil Law Compilation, is exclusive and particular to the first-degree substitute matrimonial property regime that is in force in Catalonia and is covered by the Catalonian Family Code. As a result, monetary compensation may not be claimed under Article 41 of the Catalonian Family Code, in cases in which another legal regime is in force between spouses, whether such cases are included in said legal text or in any other law of a national or foreign nature. Consequently, Article 41 of the Catalonian Family Code involves a typical right of Catalonian division of property regulated in said legal text, given that the Civil Code has its own regulation at Article 1.438, in the chapter specifically pertaining to the common law regime of separation of property. This has a substantial likeness to the Catalonian regime, albeit in a more restricted scope, since it only envisages monetary compensation for housework, omitting any reference to work vis-à-vis the other spouse, though it is broader as regards its requirements, since it does not make recognition of the compensatory right conditional upon the existence of an effective inequality in terms of net worth between the property of the two spouses. Systematic insertion of Article 41 of the Catalonian Family Code, in Chapter I of Title II, excluded its transfer by application of the principle of analogy, to legal systems other than that of the Catalonian separation of property. This is unlike other legal institutions, such as compensatory spousal support for financial inequality under Article 84 of the Catalonian Family Code, to which reference will subsequently be made in the following legal ground of this decision of ours, since this facility is doubtless applicable whatever the matrimonial property regime, it being systematically inserted in Title IV on regulating the effects of conjugal crises, subject to the proviso that the provisions of the Catalonian Family Code are applicable in accordance with the principles contained in Article 107 of the Civil Code. For the reasons outlined above, this Court must dismiss the party's claim, referring to the recognition of the right to monetary compensation under Article 41 of the Catalonian Family Code, in favour of the wife, on the spouses being governed, not by the matrimonial property regime of absolute separation of property under Catalonian law, but rather by that applicable under German law."

* Ruling of the Directorate-General of Registries & Notaries of 1 October 2007 (TOL1.155.080)

Proof of Catalonian "vecindad civil" in the interests of determining the law applicable to succession. Matrimonial property regime.*

* [*Translator's Note:* "*vecindad civil*" is residence in a certain neighbourhood or vicinage which acts as the specific personal connecting factor for interregional conflict of laws in cases where a special local civil law regime applies to residents of certain Spanish Autonomous Regions]

"Legal Grounds:

(…) 2. Moreover, in the case under appeal, the deed of acceptance and declaration of inheritance whose registration is sought, is accompanied by a deed attesting to the public nature of the declaration of intestate succession, in which the Notary, when it comes to giving his opinion as to publicly attested facts, declares as being public knowledge the fact that, *inter alia*, the deceased had acquired Catalonian *vecindad civil* after more than ten years of uninterrupted residence in Catalonia (a circumstance, namely, that of *vecindad civil*, which must necessarily be proven in the official record, in order to determine the law applicable to succession – cf. Articles 9.8 and 16.1 of the Civil Code). He likewise deemed to be public knowledge the fact that the deceased's marriage was "subject to the legal regime of division of property", an opinion of the Notary, which, in addition to coming from application by him of the law locally and temporarily applicable to the widely-known fact of the husband's Catalonian *vecindad civil* at the date of contracting marriage, constitutes – as do the remaining opinions contained in the public deed – a notarial opinion protected by the principles of veracity, integrity and legality that derive from the notarisation enjoyed by public notarial instruments and that, insofar as these are drawn up under his responsibility, fall outside the purview of the Registry and may only be reviewed in the pertinent judicial proceedings (cf. Articles 17 b of the Notaries Act/*Ley del Notariado*, 143 and 209 of the Notarial Rules & Regulations, and Ruling of this Directorate of 11 March 2003).