Spanish Judicial Decisions in Private International Law, 2006

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II. INTERNATIONAL CIVIL JURISDICTION

1. General Principles

* Decision by the Superior Court of Justice of Madrid, Labour Division, 2nd Section, of 9 May 2006 (Ref. Aranzadi JUR 2006\186143)

Immunity from execution. Embargo of funds held in Embassy current accounts.

"Legal Grounds:

...Single. – An Appeal for Reversal was entered by the legal representative of the executant against the Decision of 12/02/05 on the Appeal for Reversal entered by said legal representative against the Ruling of 10/24/05 by Labour Court No. 7 of Madrid against the embargo of the Embassy of Greece's current accounts in the amount claimed by the complainant in relation to the assessment of court costs and interest.

In the Appeal for Reversal entered by the legal representative of the executant, two grounds are set forth for the appeal, pursuant to Article 191, paragraph c) of Royal Decree Law (RDL) 2/1995, of 7 April.

The first ground, infringement of Article 24 of the Constitution, of Article 207 of the Law of Criminal Procedure, and Articles 235 and 237 of the Law on Labour Procedure, (LPL, acronym after the Spanish) is that the appellant considers in summary, and a literal transcription is provided thereof, that "the refusal of the court to take an absolutely necessary execution measure based on an already resolved issue, is not pursuant to law, as it violates the validity of *res judicata* and is a clear violation of the obligation to carry out the execution of the decision on its own terms (Art. 235 LPL) and for the court to issue all resolutions and orders necessary to achieve execution (Art. 237.2). As stated previously, this violation directly affects the protection by the courts that is guaranteed by Article 24 of the Spanish Constitution."

The second ground, violation of Article 24.1 of the Spanish Constitution, of Articles 235 and 237 of the Law on Labour Procedure, and Article 22.3 of the Vienna Convention on Diplomatic Relations, is that the appellant understands in summary, and a literal transcription is provided thereof, that "the current accounts of foreign missions are not protected by Article 22.3 of the Vienna Convention of 1961 and can, therefore, be embargoed."

The Court has had the opportunity to rule on the issue brought for its consideration in these proceedings, by issuing Decision No. 661/04, of 06/29/04 in the execution phase, which is at present final, and which, in summary, concludes that funds in current accounts may be embargoed because they are used in the management of the Embassy, thus depriving them of the privilege of immunity, permitting them to be blocked, and subsequently executed by the court, as they are not protected, it reiterates, by International Law, as alleged by the appellants in this Appeal.

Furthermore, in these proceedings, the positive effect of *res judicata* must be taken into account, which operates on the basis of a legal situation that already exists in historical reality – and cannot be unknown – by virtue of a Final Decision by this Division and Section, the operative part of which accedes to making available to the complainant the amount deposited of €23,401.68 in compliance with the firm Decision issued in this case on dismissal."

* Court Order by the Provincial Court of Barcelona, 16th Section, of 5 April 2006 (JUR 2006\236937)

International jurisdiction of Spanish courts. Action brought against the administrator of the estate ab intestato *for the transmission of shares of an entity of Argentine nationality whose parent company has its headquarters in Spain. Plurality of respondents, only one of which is a resident of Spain.*

"Legal Grounds:

…Second The appealed decision bases its ruling on the third paragraph of Article 22 of the Organic Law on the Judiciary (RCL 1985\1578, 2635), in regard to contractual obligations, according to which, when such obligations arise or are to be complied with in Spain, the Spanish courts have jurisdiction. This is not the situation in this case, in which the contract on which the claim is based was signed in Buenos Aires and furthermore did not have to be complied with here either, as it was a matter of transmitting shares from an Argentine company held by another company of the same nationality, to persons who were also Argentines. The Judge adds that in this issue it does not matter who actually controls the companies, since this cannot be a basis for not applying the rules of international procedural law.

The first aspect to note is the fact that the Court does not explain why it rules out applying the criterion of preference, relating to the residence in Spain of one or more respondent, because the criteria established in the third paragraph of Article 22 are subsidiary to the content of the two previous paragraphs. The legal provision states: "In the absence of the preceding criteria…" It is therefore necessary to specify why the criteria of the second paragraph cannot be applied. The Judge should have set that reasoning and, clearly, this Court clearly must consider it now.

The issue must be resolved in accordance with the Organic Law, because there is no applicable international treaty. There are several multilateral treaties signed by Spain that refer to the issue of judicial jurisdiction. Within the European Union there Regulation 44/2001, of 22 December 2000 (LCEur 2001\84) is in force, having replaced the Brussels Convention of 1968 (LCEur 1990\2762), and

which is parallel to the Lugano Convention (LCEur 1988\1544), applicable to non-member States of the Union. These are texts that are evidently not directly binding in situations involving third countries, or relations linked to third countries. However, the Regulation is a legal text that is in force in Spain and the first of the criteria it sets forth for establishing jurisdiction is none other than the place of residence of the respondent(s). This is therefore a significant point of juncture with national jurisdiction, and is consecrated in two legal texts in force in Spain and must therefore be given due attention. Specifically, what has to be considered is what happens when there are several respondents and some reside in Spain and others do not.

Third The reason that jurisdiction is attributed to the Spanish courts when the respondents reside in our country is because of the ease and facility of the respondent's defence. It is evident that for any natural or corporate person to litigate in a country in which he/she/it does not reside has a number of drawbacks. The respondent in a case must bear certain burdens: he/she/it needs to engage an attorney, obtain evidence, and devote time and money to the proceedings. These burdens are greater if one has to litigate outside one's own country and, therefore, the situation is much more comfortable when the case is heard in the place of domicile of the person or corporation who, not through his/her/its own volition but through that of others, is obligated to litigate. This is why jurisdiction is attributed to the courts of the country of residence of the respondent: because it is more comfortable for the person/entity forced to litigate. There is, therefore, a greater guarantee against default on the part of the respondents and that all the parties will be able to be duly heard; the claimant brings the case before the courts of a state in which he/she/it does not reside and the respondent appears in those of his/her/its own country. It is situation of full guarantees for all, in which the risk of lack of defence is minimised. The Law, therefore, considers this criteria preferable to others, except for those in which the point of juncture is through the very special nature of the matter at hand, which are those set forth in paragraph 1 of the above mentioned Article 22. The reasons therefore are greater ease for persons involved in litigation brought wilfully by another and a greater guarantee of all being heard. The problem, as we have indicated, is that the Law does not specify what should be done when there are more than one respondent and not all reside in Spain.

Fourth. Therefore, it is in no way irrational to apply the rule that when there are a number of respondents and one or more reside in Spain, the Spanish courts have jurisdiction to try the case (…).

The issue is whether this general principle can be applied when the respondents who reside in Spain are the sole partners of companies that are domiciled abroad, in other words, when the parent company has its headquarters in Spain.

In cases such as this we firmly find that Spanish courts have jurisdiction. (…) This principle may and should be applied when one of the respondents is the parent of another or of others and resides in Spain. The majority partner of a company undoubtedly defines the strategy, takes the decisions, and is therefore the one that determines or can determine the line of defence of a partly-owned company against which a lawsuit is brought.

Therefore, the company that has the complete command of the also-respondent Hera Argentina and, thereby, of Hera Zárate y Campana, SA, has its residence in Spain, was the signatory of the contract on which the lawsuit is based, was obligated through said contract, and was sued in this case. In this situation the principle that when there are a number of respondents and one resides in Spain the Spanish courts have jurisdiction must be applied.

It is stated that any court decision would not be able to be enforced in Argentina. First, this is the risk that the claimant runs, a risk that to a certain extent may also affect the respondents, because of course the suit may be dismissed and the claimant be ordered to pay court costs. There is, therefore, risk that is shared, but no more so than in any other "transnational" case. There is always the risk that the decision may not be enforceable in the other country involved for reasons of domestic law (…)."

* AJM of Barcelona, 11 October 2006 (JUR 2007\38853).

Declination of jurisdiction. Legal system. Analogical application of community rules on international jurisdiction.

"Legal Reasoning.

…19. Furthermore, if the respondent is not a member of the EU, the Brussels I Regulation is not directly applicable and much less so by analogy, since this would amount to extending EU regulations to a non-EU member country and acknowledging situations that cannot be resolved by the Turkish courts to which the analogically applied rule does not belong. For an analogical application of a rule regulating the jurisdiction of the courts of two States, both States must have accepted the rule, anything else being absurd. In the absence of an international treaty, the issue must be resolved by application of the Spanish rules to which reference has been made.

Operative Part. –

The declination entered by Mr. Ramón Feixó, attorney in representation, is dismissed, with no special imposition of costs."

* AJM of Barcelona, of 25 October 2006 (s/r)

International jurisdiction. Unfair competition action

"FJ 2.2 – Territorial jurisdiction:

There are four respondents against whom future unfair competition action was announced: Endesa, whose corporate headquarters is in Madrid; EON, domiciled in Germany; Deutsche Bank, also domiciled in Germany; and the Spanish subsidiary of Deutsche Bank in Spain.

Two issues are posed herein. First, the Prosecutor alleged that the Courts of Barcelona were not competent because the applicable article is not Article 52, but rather Article 51, that regulates general jurisdiction for corporate entities, stating it to be the jurisdiction corresponding to its corporate domicile, an unsuccessful argument in view of the fact that, aside from the fact that the article referred to is not applicable owing to the special principle under Article 52 of the Civil Code, Article 51 of the Civil Code itself provides that the concurrent

jurisdiction is the jurisdiction of the place in which the legal relationship was or is to be established, a principle that enables the jurisdiction to be that of the Courts of Barcelona, if it is taken into account that there is a stock exchange there and the matter under judgement is the use of privileged information in a public acquisition offer.

The Prosecutor also alleges that when Article 52 of the Civil Code refers to the respondent's establishment it uses the expression "his/her/its establishment," which limits its application to individual entities and excludes corporate entities with a plurality of establishments by using the singular. In my judgment, the above consideration does not rule out the jurisdiction of this Court because, in establishing jurisdiction, Article 52.12 does not differentiate between individuals and corporate entities and where the Law does not differentiate it is not legal to do so and even less to limit the taking of an action.

To the extent that the respondent has an establishment open to the public in Barcelona, Barcelona would be competent to try this suit involving Endesa.

Joint interpretation of Article 5.3), 6.1) of the Brussels I Regulation (EC Regulation 44/2001, of 22 December, of the Council, on Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) together with Article 53.2 of the Civil Code also would permit a ruling that this Court has jurisdiction over the other co-respondents too, since if the cases were judged separately there would be a risk of contradictory resolutions, as all are linked to the same matter at issue under the terms required by the aforementioned Regulation. Application of this Regulation to the preliminary proceedings was accepted both by the Supreme Court and by Chamber 15 of the Provincial Court of Barcelona, in the rulings of 9.20.2004 and 3.19.2004, respectively. The first paragraph of Article Six of said Regulation is applicable insofar as it is considered a non-contractual liability action (Article 5.3 of the Regulation and jurisprudence of the Court of Justice of the European Community that interprets it by considering as such both the place where the harmful act took place and where it came to light), although it is considered contractual owing to the offer that preceded it and the framework of the contract under which the alleged infraction took place."

3. Family

* Decision by the Superior Court of Justice of Catalonia, Civil and Penal Division, 1st Section, of 9 January 2006 (RJ 2006\3878).

International court jurisdiction. Model Organic Law on the Judiciary. Precedence of the different jurisdictions covered under Article 22 of the Organic Law on the Judiciary. Tacit submission by Spanish courts.

"Legal Grounds.

Second (…) The appellant charges that the decision in the second instance violates Articles 21 and 22 of the Organic Law on the Judiciary (RCL 1985\1578, 2635) in relation to Articles 769, 770 and 54 of the Civil Code (RCL 2000\34, 962 and RCL 2001, 1892), as it does not rule a lack of jurisdiction by the Spanish Courts to judge this marital suit owing to the jurisdiction held by the

Courts of Lebanon, as both litigants are nationals of that country and also have their customary residence therein.

It must first be pointed out that that the appellant confuses three different legal issues in his extensive pleadings, i.e. the jurisdiction of Spanish courts to judge the suit, the issue relating to territorial jurisdiction, and lastly, the laws or law that is applicable to the case under discussion.

In relation to the first issue, as there is no interference by nationals or residents of other community countries, the rules that are applicable to the case are those contained in Arts. 21 and 22 of the Organic Law on the Judiciary, the rules that govern international judicial jurisdiction that correspond to two constitutional criteria, namely; that no one can demand an unreasonable proceeding or excessive burdens in order to be able to exercise his/her right to a defence at trial on the passive side of the relationship, and from the perspective of the active relationship it is necessary to ensure a reasonable possibility, in accordance with circumstances, of acting in the court (Decision by the Constitutional Court of 3–13–2000).

In this case the jurisdiction of the Spanish Courts is clear.

First, as both decisions show as proven that the litigants have Spanish nationality and second and more importantly, as both parties submitted tacitly to the Spanish Courts when the now appellant entered the suit for marital separation on 10–7–2003 to the Family Court of the City of Barcelona, Ms. Virginia having done so earlier on 9–18–2003 to the same courts.

Furthermore, the Court was aware of the existence of two cross suits and ordered the litigants to make the allegations they deemed appropriate in order to proceed to join them, which was done by Mr. Humberto's defence in a motion of 10–28–2003 seeking the two suits to be joined.

Once the two suits were joined, Mr. Humberto, by appearing in the suit first brought by Ms. Virginia, sought to have jurisdiction declined as he alleged that the Spanish Courts did not have jurisdiction, a position that was not accepted by the Court.

It should not be overlooked that Article 21 of the Organic Law on the Judiciary regulates the scope and limits of Spanish jurisdictional bodies, affecting relations and proceedings among Spanish nationals, foreign nationals and Spanish and foreign nationals, as determined by Article 22.

This article imposes imperative Spanish jurisdiction under the circumstances set forth in paragraph 1 – not present in the case in question. Under paragraph 2, it generally regulates the jurisdiction of Spanish courts when there is express or tacit submission by the parties. Tacit submission is procedurally dealt with in declinatory proceedings as established by the Supreme Court under the above procedural legislation and expressly set forth in Arts. 39 and 63 of Civil Code 1/2000.

As the Supreme Court rulings of 4–1–2003 (RJ 2003\2979) and 11–10–2003 (RJ 2003\8281) state, the criteria of paragraphs 1 and 2 of Art. 22 of the Organic Law on the Judiciary take precedence over those of paragraph 3, which establish the courts of the first and the second instance – such as could be no

other way under "ex" Art. 56.1 of the Law on Civil Procedure. The appellant in this case submitted to the Spanish Courts by applying for separation from his wife to the Courts of Barcelona. It is therefore obvious that Art. 22.3 was not breached. To seek for Spanish Courts to be competent to hear his lawsuit but not that of his wife is inadmissible owing to division of the consistency of the case (…).

When jurisdiction pertains to the courts of Spain, territorial jurisdiction determines the judicial district within the territory of Spain that should try the case. Art. 769 of the Civil Code gives jurisdiction to the courts of the last conjugal domicile (in Spain, logically), which in this case was in Barcelona, or the place where the respondent is, in this case also the city of Barcelona as the now appellant understood when he applied for separation to the Family Courts of this city, the objective jurisdiction of which is not a matter of discussion.

Tercero Appeal for cassation.

As his first ground for cassation, the appellant alleges violation of rules on jurisdiction and territorial jurisdiction already resolved on examining the special appeal for procedural violation.

In the second, violation of Arts. 9.2, 12.1 and 107 of the Civil Code is denounced (LEG 1889\27). These were not cited as having been violated when preparing the appeal for cassation.

(…) the effects of marital separation of the litigants should be governed by Lebanese law, in accordance to what is considered the common nationality of the two spouses when the suit was brought. It is in order to point out once again that neither the decision from the first instance nor the decision from the second instance are based on the spouses having lost their Spanish nationality but rather, to the contrary, both decisions maintain that they were Spanish nationals when the suit was entered, which validates the applicability of Art. 107 of the Civil Code in it stood prior to Organic Law 11/2003 (RCL 2003\2332) that established that separation and divorce would follow the common national law of the two spouses at the time the suit is brought, such as the now appellant understood when, in the application for separation he entered against his wife, he cited Arts. 81 and 82 of the Civil Code, and only involved Lebanese law in regard to the matrimonial property system whose dissolution was sought."

* Decision, Provincial Court of Madrid, 22nd Section, of 25 April 2006 (AC 2006\1027).

International jurisdiction. Parent-child relationship. Amendment of measures set forth in a divorce decree issued in Morocco. Law on Judicial Procedure.

"Legal Grounds:

…First. The original decision (…) rejects ruling on the claims made in the proceedings document regarding custody of the parties' common children and the other remaining measures inherent in the situation, considering that, as the litigants obtained their decree of divorce from the Kingdom of Morocco which granted custody of the children to the father, in order for the Spanish courts

to be able to modify the custody arrangements the above mentioned divorce decree must be recognized in Spain.

Second (…) Concluded by stating that the international judicial jurisdiction of the Spanish Courts in civil matters is determined by Article 22 of the Organic Law on the Judiciary and that only the rules contained therein should be used as the grounds for responding to the issue of whether it is possible for our Courts to hear a specific claim, as only these rules meet the requirements which, in some cases, can lead to the transcendent result that the Spanish State may waive judicial protection in a specific case.

Third. Based on the above doctrine, we do not share the ruling criteria set forth in the appealed decision, since because the respondent lives in Spain, the jurisdiction of Spanish Courts is undeniable under Article 22, paragraph 2 of the above mentioned Organic Law. Given the nature of the actions, this is reinforced by the provisions of paragraph 3 of that same article which, in regard to parent-child relations, assigns jurisdiction to the Spanish Courts when the child's customary domicile is in Spain at the time the case is brought, as in the case at hand."

* Order by the Provincial Court of the Balearic Islands, 3rd Section, of 25 April 2006 (JUR 2006\163514).

International jurisdiction. Type of Law on the Judiciary Model. International vudicial Venues.

"Legal Reasoning.

First. – (…) Patricia was a party to the case and entered an appeal regarding rejection of jurisdiction, on the lack of jurisdiction of the Spanish Courts, since there was express submission by José Ignacio to the Courts of Puerto Rico.

On 18 November 2005 a ruling was handed down that supported the rejection of jurisdiction owing to lack of international jurisdiction.

This decision is the subject of this appeal, as it was challenged by José Ignacio.

Tercero. – Article 36 of the Law on Criminal Procedure determines the scope and limits of the jurisdiction of the Spanish Courts under the terms of the Organic Law on the Judiciary and the international treaties and agreements to which Spain is a party, and points out that there is mandatory abstention on the part of the Spanish Courts when the case involves nationals or assets with immunity under the rules of International Public Law, when under treaty a matter is set to be heard by the jurisdiction of another State, when the respondent does not appear if the jurisdiction is only acknowledged for the Spanish Courts in the case of the tacit submission by the parties. Articles 37 and 38 of the Law on procedure regulate both the court's own assessment of this as being the way, by means of declination, by which the respondent may denounce this lack of international jurisdiction or the lack of jurisdiction to hear the case at hand.

Article 9.1 of the Organic law of the Judiciary provides that the Courts shall exercise their jurisdiction exclusively in such cases as so attributed by one or another Law, and Article 22 of the same Law sets forth the rules that determine the imperative, not optional jurisdiction of Spanish Courts, whereby the exercise

thereof by the court is mandatory, and the parties have no autonomy to be able to alter its application if they do not submit to same.

Therefore, after a detailed expression of the exclusive jurisdiction that exists in regard to property rights and the lease of real estate located in Spain, in regard to the establishment, validity, nullification or dissolution of companies or legal entities domiciled in Spanish territory, as well as regarding agreements and decisions by their bodies; in regard to the validity or nullification of entries in a Spanish Register; in regard to registrations or validity of patents and other rights subject to deposit or registration when such deposit or registration is applied for or done in Spain. In regard to the recognition and execution in Spanish territory of judicial and arbitration decisions issued abroad there is another attribution, this time general in nature, when the parties have expressly or tacitly submitted to the Spanish Courts, as well as when the domicile of the respondent is in Spain.

Therefore, it is in the absence of the above criteria that Article 22.3 of the Organic Law on the Judiciary sets forth other criteria for linkage to courts of Spain which, in the matter at hand, involves the matter of incapacitation and measures to protect the person or the assets of minors or incompetents, when their customary residence is in Spain, in matters of personal and property relations between spouses, nullification of marriage, separation and divorce, when both spouses have their customary residence in Spain, as well as when both spouses are Spanish nationals, whatever their place of residence may be, provided they are seeking the action of mutual consent or one with the consent of the other; as regarding children and parent-child relations, when the child's customary residence is in Spain at the time the suit is brought or the claimant is a Spanish national or resides customarily in Spain; in matters of alimony, when the creditor's customary residence is in Spanish territory. Lastly, paragraph 5 of the same article also sets forth such jurisdiction when it involves adopting provisional or ensuring measures regarding persons or assets in Spanish territory and to be complied with in Spain.

Fourth. – In its decision of 16 May 2000, the Supreme Court pointed out how the verification of the concurrence of international court jurisdictions underlies the purpose of accepting said jurisdiction, when what is sought is the homologation of a resolution, since it is our understanding that a general doctrine is applicable depending on a criteria of proximity to the object of the proceedings, which provides for guaranteeing rights and for due process, avoiding suits before jurisdictional bodies which, owing to their disconnection with the matter of judgment, would place the respondent in a situation of lack of defence, as well as impede the success of fraudulent actions by the parties who would in self-interest seek favourable or convenience venues that would ensure the most favourable or advantageous application of actual rules.

In the case examined by our highest court, the Court expressed its confusion regarding the situation created by the parties, who, having their domicile in Spain and having initiated separation proceedings in Spain, brought a similar case before the authorities of another country, basing their jurisdiction on incidental domicile or residence. The Supreme Court understands that to show

choice of a venue of convenience that would avoid the strictures imposed by the applicable law on divorce through submitting to a foreign court because of the more beneficial treatment under applicable law in said State. As a result of said conclusion, the Court concludes that there is no accreditation of the existence of any points of connection that would justify the foreign jurisdiction, and it supports the pre-eminence in this case of the Spanish separation decision, and its effects as *res judicata* over the intent to have the foreign resolution recognised, owing to the need for consistency, harmony and legal security to prevail in the internal system.

Fifth. – (…) In view of the doctrine of the Supreme Court referred to above, it would have to be determined if Ms. Patricia and her son travelled to Puerto Rico voluntarily in order to falsify a prior *de facto* situation or as a way to elude the guarantees and rights recognised under Spanish law in such cases.

(…) This Court understands, in accordance with the doctrine expressed above, that the behaviour of the appellant determined the jurisdiction of the American Courts, in light of her free and voluntary action before same, and considers that quite to the contrary of what she stated, that it is the case brought before the Spanish Courts that seeks to de-neutralise and alter a venue recognised by the appellant herself, by seeking another of convenience.

Nor can now appellant's protestations be heeded that allege lack of defence caused by the case being tried by the courts of Puerto Rico, taking into account the various procedural principles in force in the two countries, since there is no objective cause to question the existence of due process in that Nation in this case and to which she submitted."

* Decision by the Provincial Court of Barcelona, 12th Section, of 16 May 2006 (Ref. Aranzadi JUR 2006\271367).

Jurisdiction of the Spanish courts. Claim for divorce. Spouses with customary residence in Spain at the time the claim was submitted.

"Legal Grounds:

…Second. – The court of first instance did not accept the claim for divorce because both the claimant and the respondent are Chilean nationals. The decision argues, and the position is supported by the Public Prosecutor, that Article 107 of the Civil Code provides that separation and divorce are governed by the national common law of the spouses at the time the claim is submitted, and "since both litigants are Chilean nationals, and not Spaniards, it is in order not to admit the claim owing to the lack of jurisdiction of this Court to judge the case."

This position is not shared herein, insomuch as it would involve absolute denial of access to justice, and overlooks the fundamental right to effective judicial protection enshrined by Article 24 of the Spanish Constitution.

Article 107 of the Civil Code is a matter of international private law, which serves to determine the actual law that is applicable in the event of contested law and, in fact, unless it contains violations of principles of Spanish public order, means that in the case at hand, the law that the court should apply to resolve the claim is the law in force in the Republic of Chile. The jurisdiction

of the courts is a different matter, as established by Article 4 of the Organic Law on the Judiciary, whereby in establishing that jurisdiction (of the Spanish courts) extends to all persons, all matters and all Spanish territory, without distinction as to whether Spanish nationals or aliens require the protection of the courts. Article 21 of the Organic Law on the Judiciary, adds, "The Spanish Courts shall hold such trials as arise in Spanish territory between Spanish nationals, between aliens and between Spanish nationals and aliens, pursuant to the provisions of this law and the international treaties and agreements to which Spain is a party."

As regards divorce, Article 22.2 of the Organic Law on the Judiciary generally provides for the jurisdiction of the Spanish courts when the respondent's domicile is in Spain, and paragraph 3 thereof specifies that it applies "in regard to personal and property relations among spouses, nullification of marriage, separation and divorce, when the two spouses have their customary residence in Spain at the time the suit is filed."

Article 769 of the Law on Civil Procedure, regarding special family court proceedings, includes the territorial jurisdiction from Article 54 of the Law on Civil Procedure and links it to the place of the couple's residence, and in the event the place of residence is in different judicial districts, that of the last domicile of the married couple or of the residence of the respondent.

Specifically, when the premises as set forth in the Law on Violence against Women are present, as established by Article 49.bis.5 of the Law on Criminal Procedure, the competent jurisdiction is the victim's, as established by Article 15.bis of the Law on Criminal Procedure.

In the case at hand, in the criminal decision handed down by the Examining Court No. 4, and the decision on gratuitous justice, the record shows that the wife's residence was in Sabadell, as was that of the husband and the children, whereby the that the Court on Violence (against women) of that city has trial jurisdiction, notwithstanding that regarding any civil matters that may arise, Chilean civil law is to be applied, as stated in Article 107, in relation to Article 12.2 of the Civil Code, together with the public order safeguard in Article 12.3.

As regards the test of the applicable material law, Article 281.2 of the Law on Civil Procedure, which includes the principle established in the abolished second paragraph of Article 12.6 of the Civil Code, that mandates that the party that invokes foreign law must prove it, and therefore the legal and technical representative of the complainant is the one that must provide the Court with a consular certification of the text in force, notwithstanding the ability of the judge to resort to any such means of verification he/she may deem appropriate. The issuance of a resolution cannot be denied for this reason, as stated in Constitutional Court Decision no. 10/2000, of 17 January, that nullified the decisions of the first instance that abstained from judgment for this reason."

* Decision by 1st Section of the Provincial Court of Guadalajara of 6 September 2006 (JUR 2006\239638).

International judicial jurisdiction. Divorce. Amendment of measures. Firm foreign decision. Jurisdiction of Spanish courts.

"Legal Grounds

Single Paragraph. – An appeal was entered of the decision declaring the lack of jurisdiction of Spanish courts to judge the application for amendment of divorce measures, whereby adjustment of the child support was sought by the complainant in view of new circumstances of the parents and the child, based on the consideration that the Spanish civil jurisdiction is not competent to amend a firm decision issued in the litigants' country, in application of Article 36 of the Law on Civil Procedure. The appellant alleged that the complainant, the respondent and the descendent of both reside in Spain; an action was entered to raise the support amount; whereby paragraph 3 of Article. 22 of the Law on the Judiciary states that the Spanish Courts have jurisdiction in matters of support, when the person to whom such support is due has his/her customary residence in Spain, adding that, in any case, Article 36 of the Law on Civil Procedure states that the Spanish courts should abstain from trying matters brought to them when the notified respondent does not duly appear, in cases in which the international jurisdiction of Spanish courts can only be based on tacit submission by the parties, whereby, in any case, before the Court abstains it must have summoned the respondent. Abstention is not in order if the respondent duly appears; expressly or tacitly subjecting him/herself to Spanish jurisdiction, and that such pleas must be received, since in fact, besides the possibility of the respondent submitting expressly or tacitly, when both the respondent father and the mother and the child minor are in Spain, the matter of jurisdiction for matters of child support is determined by the customary residence of the person to whom the support is due, as also contemplated by Art. 22.3, which states that Spanish judicial bodies have jurisdiction in matters of measures protecting the person or assets of minors when such minors customarily reside in Spain and in proceedings relating to parent-child relations, when the child's customary residence is in Spain. Notwithstanding this conclusion, the contents of Art. 36 of the Law on Civil Procedure, whose paragraph 1 begins by setting forth that the scope and limits of the jurisdiction of Spanish civil courts shall be determined by the provisions of the Organic Law on the Judiciary and the international treaties and agreements to which Spain is a party; the appealed decision did not specify which of the premises under paragraph 2 of aforementioned Art. 36 of the Law on Civil Procedure gave rise to the abstention; and provides that the respondent does not enjoy immunity from jurisdiction under International Public Law, nor is it argued that under any international treaty or agreement to which Spain is a party is the matter attributed to the exclusive jurisdiction of another State. The possibility of appearing was provided and tacit submission of the respondent is allowed, whereby the 3rd rule of Art. 36 would not be applicable, since it would only come into play when the international jurisdiction of Spanish courts can be based on the tacit submission to same by the parties, which does not keep the special preventions mentioned from coming into play, as contained in 22.3 of the Organic Law on the Judiciary. Furthermore, it must be pointed out that the jurisdiction of the ruling Court to judge the matter in view of the fact that the divorce decree in which the sup-

port was set forth and whose amendment is sought was issued by a foreign Court, and there is no record that the exequatur for its recognition or execution was entered or even applied for, whereby, if said exequatur is established in the future, as set forth in the Supreme Court decision of 4–20–2004, the effectiveness as *res judicata* of the foreign decision that would be achieved once such recognition were obtained, once the concurrence of the requirements set forth for such purposes is established, would be limited, especially in the temporal aspect, by what was already determined in the decision issued under the Spanish procedure for amendment of measures, in view of the alteration of the factual circumstances that gave rise to their establishment. From another perspective, the conclusion set forth is supported by the need to adequately protect the interests of the minor residing in Spain, along the lines of Art. 158 of the Civil Code that provides that the Judge, acting *ex oficio* or at the request of the minor him/herself, of any relative or the Public Prosecutor, shall establish the appropriate measures to ensure the provision of support and provide for the future needs of the child in the event of lack of compliance by the parents with this duty and in general with the other provisions, as deemed appropriate, so as to safeguard the minor from danger and prevent any harm to him/her; establishing that all such measures may be adopted within any civil or criminal proceeding or in a voluntary jurisdictional proceeding. The criteria set forth has been followed by most of the different Provincial Courts what have resolved on the issue of the jurisdiction of the Spanish Courts to resolve applications to amend separation or divorce measures issued in the respective countries of origin of the litigants when the beneficiaries have their customary residence in Spain, in application of the above mentioned Art. 22 of the Organic Law on the Judiciary, including the Provincial Court of Castellón (2nd Section), in its Decision 184/2005 of 13 September, that adds that in matters of minors and child support, Art. 4 if The Hague Convention of 2 October 1973 states that "the first criteria or point of connection determined by the Law is the customary residence of the person to whom the child support is due, or, in other words, the country where his/her social centre of life (de facto situation) is", along similar lines, the Decision of the Provincial Court of Barcelona (12th Section), of 11 February 1997, reiterates that the universal principles governing the issue proclaim that the child must enjoy the individual rights set forth in the United Nations Convention of 1989 and the international agreements and treaties, especially the European Convention on Custody of Luxembourg, 20 May 1980, ratified by Spain on 9 May 1984, the New York Convention of 20 June 1956, The Hague Agreement of 24 October 1956 and the Convention of 15 April 1958 on the Recognition and Execution of Decisions relating to Child Support, followed by the Convention of 2 October 1973, all ratified by Spain, which proclaim the "defence at all costs of the *"favor filii"* principle; giving validity to the regulation of rights made and proclaiming the primacy of the Law of the place of residence of the claimant or that of the forum, consistent with the provisions of the above mentioned Article 158 of the Civil Code, based on which the jurisdiction of the Spanish courts is to be maintained when the child

resides in Spain. Decision 270/2004 by the Provincial Court of La Rioja (1st Section), of 7 October, also states that even when the divorce decree has been issued by a foreign court setting obligations inherent therein, including child support, this does not prevent the Spanish court from issuing a second decision amending this decree that is more in line with the socio-economic realities of the place of residence of the litigants and their children. Along these same lines is Decision 384/2004, of 31 March, by the Provincial Court of Malaga (5th Section) which clarified that a divorce decree issued by a foreign Court cannot serve as a basis for a *res judicata* exception without having an *"exequatur"*, since until such time as the execution of the decision by the foreign Court it has no effect in Spain, whereby the prior existence of a decision that is not recognised in Spain does not exclude the jurisdiction of the Spanish courts in cases that arise in Spanish territory between aliens, as set forth under the Organic Law in the Judiciary and in the International Treaties and Agreements to which Spain is a party. Paragraph 3 of Article 22 of said Law is applicable to cases in which both the litigants and their common children reside in Spain. Furthermore, the Decision of 18 September 2003 by the Provincial Court of Barcelona (18th Section) sets forth in reasoning that when it is an issue of protecting the interests of a minor resident of Spain, Article 158 of the Civil Code should be applied, pursuant to which the prior existence of a foreign divorce decree is no obstacle, not only because an exequatur has not been obtained, but also because the claimant cannot be denied the right to effective judicial protection in this specific case, when as the Constitutional Court expressly stated "Everyone has a right to have a Court resolve on the matters of conflicts of law or of legitimate interests brought before it, except when prevented from doing so by an express provision of a Law, that in turn is respectful of the essential content of fundamental law". It adds that the judicial interpretation of the potential procedural obstacle must be guided by *pro actione* criteria that always takes into account the rationality of the rule and a criteria of proportionality between the advised defect and the sanction derived there from, and does not prevent the knowledge of the basis of a matter on the basis of mere formalism or non-reasoned understandings of the procedural rules, "since when non-admission prevents access to process, or in other words, prevents a decision on the basis of the legitimate rights and interests subject to protection by the courts, jurisdictional control must be carried out more rigorously, since we are dealing with a right that constitutes the core of due process" (Constitutional Court decisions 13/1981, of 22 April, 126/1984 of 26 December, 120/1993 of 19 April, 115/1999, of 14 June, 112/1997, of 3 June and the most recently, Constitutional Court Decision 61/2000, of 13 March). Therefore, it is in order to accept the appeal and revoke the appealed decision, and therefore nullify the abstention set forth in the appealed decision and order admission of the complaint submitted, without imposition of the costs of the appeal."

* Decision by 4th Section of the Provincial Court of Santa Cruz de Tenerife, of 13 September 2006 (JUR 2007\2335).

International judicial jurisdiction. Jurisdiction of Spanish courts to hear a divorce application. Regulation 2201/2003.

"Legal Grounds.

...Third. – Having given the above warning, it is in order to revoke the Decision appealed and declare Spanish jurisdiction valid to hear the divorce suit, both because Spain is the member state of the common nationality of both spouses (Art. 3 b) Regulation 2201/2003), and because the Spanish nationality of the complainant coincides with residence in Spain for at least six months prior to the presentation of the suit (Art. 3.1.a) Regulation 2201/2003), and because the complainant spouse was a Spanish national and customary resident in Spain at the time the suit was brought (Art. 22.3º Law on the Judiciary), and there is no evidence that a divorce suit was brought before the jurisdiction of any other member State previously (Art. 19.1 Regulation 2201/2003), nor in the strict sense is the current suit a suit relating to parental responsibility with the same purpose and cause as that which is being brought before British justice (Art. 19.2 Regulation 2201/2003), since this is to decide exclusively on the restitution of the child and not on the holding or exercise of parental responsibilities."

4. Contractual Obligations

* Decision by 11th Section of the Provincial Court of Madrid, of 16 May 2006 (JUR 2006\192444)

Spanish jurisdiction. Lack of concurrence of fora set forth in Art. 22, paragraphs 2 and 3, Law no the Judiciary.

"Legal Grounds:

...Third. – Another aspect to specify in analysing any matter of international jurisdiction is the distinction between the rule on jurisdiction, by which jurisdiction is either attributed to the Spanish Courts or denied, and the conflict rule, which determines the material Law – domestic or foreign – to be applied to resolve the substance of the matter.

The Spanish system of international judicial jurisdiction starts with general remission to "the international treaties and conventions to which Spain is a party" (Art. 21.1 Law on the Judiciary), which in the case at hand is irrelevant, in view of the fact that the parties acknowledge that there are no applicable international agreements or treaties, not even indirectly the Brussels Agreement of 27 September 1968 on judicial jurisdiction and the recognition and execution of civil and commercial, nor is Council (EC) Regulation no. 44/2001 of 22 December 2.000, relating to court jurisdiction, and the recognition and execution of civil and commercial court decisions, since it is evident that the Bolivarian Republic of Venezuela falls outside such rules. Therefore, the rules to be considered are those established in Art. 22 of the Organic Law of the Judiciary, and, as appropriate, those contained in the Law on Civil Procedure.

Fourth. – Having established the criteria to follow and the applicable regulations, we are in a position to resolve the issue under discussion and to confirm the appealed decision, since owing to the content and the nature of the action taken, it corresponds to the Venezuelan Courts to hear the matter, since the jurisdiction established under in Art. 22.2 of the Organic Law on the Judiciary is not applicable, since the Spanish Courts are considered competent when the respondent has his/her domicile in Spain, and the HISPANO VENEZOLANA DE PERFORACIONES CA company, of Venezuelan nationality and domiciled in that country, is the one that would solely sustain any action taken in this case. The other respondents were brought into the proceedings in order to serve to cover the jurisdictional position maintained by the complainant.

After excluding the applicability of the above mentioned general jurisdiction, we refer to the rules that the parties invoke, both of which are contained in aforementioned Art. 22.3 of the Organic Law on the Judiciary. These are none other than those establishing, in the absence of the above criteria, that the Spanish courts have jurisdiction. Regarding contract obligations, when such obligations arise or are to be complied with in Spain and in actions regarding movable goods, if such goods are in Spanish territory at the time the suit is brought, it is understood that this second jurisdiction must be taken into account, since the main action brought is not obligatory, but rather real as it is a claim for turnover of drilling equipment, alleging contractual nullification, with little basis in the terms in which it has been invoked. This situation is one in which, as the Supreme Court Decision of 24 January of 2006 states: "There is no 'mixed action' here, since, as the Decision of 15 December 1999 states, although some decisions admitted the application of jurisdiction over the mixed actions to the premises of concurrence of personal and property actions (Decisions of 24 December 1934, cited above, of 4 August 1935, of 3 May 1949), this doctrine has been rejected by other decisions (7 December 1940, 2 July 1941, 8 July 1942) that consider concurrence not to be sufficient because it governs basic or principle action, on which jurisdiction is determined. It is not necessary, therefore, to find that there is "mixed action" when real and personal actions are being taken, since that category is reserved for old "mixed actions" (divisive) and for complex actions, such as inheritance claims (Decisions of 26 October 1951, 4 April and 5 December 1961, *inter alia*)".

In conclusion, since HISPANO VENEZOLANA DE PERFORACIONES CA, the true respondent, is a company of Venezuelan nationality that is domiciled in that country, and the drilling equipment claimed is in the Bolivarian Republic of Venezuela, we must maintain, in agreement with the appealed decision, that the Courts of that nation have jurisdiction to hear the proceedings, and we therefore reject this appeal and confirm the appealed decision."

7. Precautionary measures

* Supreme Court Decision, Civil Division, Section, of 19 April 2006 (RJ 2006\5120)

Preventive embargo of ships. Foreign ship. System in the event of lack of jurisdiction to try the principal case. Jurisdiction to resolve on damages caused by the embargo in the event of removal.

"Legal Grounds.

…Third. System of preventive embargo of foreign ships in the event of lack of jurisdiction to try the principal case.

(…) the precautionary measure of preventive embargo does not determine in and of itself the body with jurisdiction to try and resolve on the substance of the case, nor is this contemplated in any Spanish convention or law, nor is it inferred from the provisions of Art. 7 of the 1952 Agreement (RCL 1954\23) or the 1999 Agreement. According to this decision, "the presumption of jurisdiction is sufficient for the courts to set the international convention deadline without submitting to any other requirement the exercise of such power granted by law, which does not involve any abuse or infringement of rule".

(…) the finding of lack of jurisdiction to try the principal case does not eliminate the jurisdiction of the court to take precautionary measures ordered *ante causam* [prior to the proceedings] nor its consequences if such jurisdiction is in order under applicable law, which, as was established, in the case of a foreign ship, is the Convention, which defers in regard to procedural matters to national legislation.

…

Fifth. Special premise of submission to an arbitrage agreement

As already stated, in the event the main issue is subject to foreign arbitrage, the precautionary measure retains effectiveness during the period of time the judge freely determines appropriate, and any duly justified commencement of arbitration during that period of time enables the embargo to be considered as ratified.

The existence of an arbitration agreement that was not brought to light at the precautionary venue is not an obstacle to reaching this conclusion, since the time of embargo is not the best time in which to oppose the substance of the matter nor to formulate exceptions that are reserved for countering the action, as in the case at hand. Therefore, the request of precautionary measures, in this case the preventive embargo of a ship, when an arbitrage agreement exists, does not imply waiving the agreed arbitrage, nor does the fact of bringing forth the arbitration clause in the main procedure pursued later.

The jurisdiction for adopting preventive embargo also involves, therefore, pursuant to internal procedural rules to which the Agreement refers, the jurisdiction to determine damages resulting from same at the time of removal in a request is made, as in the case in question.

(…) the adoption of the preventive embargo of a ship under arbitration, whether domestic or foreign, the granting of a precautionary measure, and the determination of its effect, do not imply an assessment of the substance of the matter, but rather an assessment of the appearance of proper legality (…) "prior to or during arbitration, the arbitration agreement shall not prevent either of the

parties from requesting the court to adopt precautionary measures or the court from granting them."

This procedural autonomy to adopt precautionary measures regarding the main issue acquires special importance when dealing with an arbitration proceeding, since the adoption of precautionary measures is part of the arbitration support and control functions covered currently by Article 8 of the Law on Arbitration, which provides expressly (notwithstanding the power of arbitrators to adopt precautionary measures under Article 23 of the Law on Arbitration, subject to rules on obligatory execution, that pertains to ordinary courts under Art. 8.4 of the same Law) for the adoption of precautionary measures by the court of jurisdiction in the place in which the decision is to be executed, or the absence thereof, in the place where the measures should take effect. This same principle arises from Art. 50 of the Law on Arbitration of 1988, which is applicable to these proceedings owing to reasons of time."

8. Lis pendens

* Order by the Provincial Court of Tarragona, 3rd Section, of 9 March 2006 (JUR 2006\221408)

Proceedings pending in foreign courts. Proceedings initiated in Spain. Procedural measures amounting to procedural abuse.

"Legal grounds.

First. – (…) "having had knowledge of the existence of a previous divorce decree issued under Swiss law, the bringing in Spain, such as is the case at hand, of new proceedings with the same parties and for the same purpose would be a procedural fraud, to which Art. 247.2 of the Law on Criminal Procedure is applicable insofar as it establishes that the courts have grounds to reject cases formulated showing manifest abuse of law or involving legal or procedural fraud," and the appeal by the legal representative of claimant Mr. Antonio, who alleges with grounds that his application for revocation "of said foreign decision, which should be declared null and void since the document he received was in German, and that prevented him from defending himself, can only have merit as evidence, and in no case as a firm fact, since it was not entered in accordance with the provisions of Art. 523 of the Law on Criminal Procedure. Therefore the proceedings should continue, considering the respondent as not present." The resolution of this case requires an examination of the actions that gives rise to the following: a) the order of 9–9–04 was issued, admitting the now appellant's filing for divorce by, and ordering the respondent Mrs. Ana and the Public Prosecutor to be summoned, and the appropriate request for international judicial cooperation to Switzerland to be send, b) a copy of the divorce decree issued by the Swiss judicial court, and a certified translation from German to Spanish thereof was received by international post, in addition to the summons, c) it was ordered to be provided to the plaintiff so that in a period of five days he would be able to take any legal actions in his favour, the plaintiff let the time period lapse without presenting any motion,

and on 5–24–05 the order under appeal was issued, and d) after entering the appeal on 7–15–04, a new motion was submitted by the appellant on 7–29–04, in which he literally requested "the Civil Registry be ordered to duly register his divorce, existent in Switzerland," giving rise to the order in which, in view of said motion, to require the complainant to state within a three days if he wished to proceed with the processing of the appeal, or whether he desisted; the motion was presented on 10–3–05 in which he stated "this representation does not desist the appeal entered in this case."

On the basis of the above, it is obvious that the appeal entered on the basis of how the proceedings were going along and seeking at all costs to keep the proceedings alive, involves manifest procedural abuse which this Court must automatically reject in application of Art. 11.2 of the Organic Law on the Judiciary and, therefore, it shares the decision of the original Judge; because the behaviour of the appellant must be considered as totally contradictory in stating he wishes to maintain his motion advocating nullification of the divorce decree issued in Switzerland, – and for that reason is inadmissible –, together with seeking its registration in the Civil Registry, as gathered from his motion of 7–29–04, overlooking that it is reiterated doctrine, set forth, among others, in the Supreme Court Decision of 7–2–02, that "The general principle of Law stating the inadmissibility of acting against one's own acts constitutes a limit of subjective law or of a faculty of law, arising from the principle of good faith and the required observation of consistent behaviour in legal terms, as provided by the requirements or premises that must exist for the doctrine to be applied: that the acts be unequivocal, in the sense of creating, defining, setting forth, modifying, doing away with or clarifying with no doubt whatsoever a specific legal situation that affects their author and also, that there be incompatibility or contradiction as regards the good faith sense that should be attributed to the preceding behaviour (…)."

III. PROCEEDINGS WITH ELEMENTS INVOLVING ALIENS AND INTERNATIONAL LEGAL COOPERATION

1. Proceedings with elements involving aliens

* Constitutional Court Decision 124/2006, of 24 April 2006 (http://www.tribunal-constitucional.es/jurisprudencia/Stc2006/STC2006–124.html)

Administrative-Contentious Order. Proceedings with elements regarding aliens. Notification. Requirements. Legitimacy. Apparent violation of the Right to effective judicial protection.

"Legal Grounds.

…2. It is evident that in the case at hand the issue is whether there was a violation of right to be notified in judicial proceedings (specifically in this case, of administrative-contentious proceedings), when there is allegation of a

legitimate right or interest, in order to be able to participate as a co-respondent or contributor and, therefore, have the possibility of defending the right. This Court's doctrine on the matter, as the Public Prosecutor recalls, was explicitly set forth in the recent Constitutional Court Decision 207/2005, of 18 July. In summary, this doctrine is based on the premise that the effectiveness of the communication of procedural actions to those having a right or stake in the very existence of the proceedings is transcendental in order to ensure the right recognized in Art. 24.1 of the Spanish Constitution, and it therefore is the job of the judicial bodies to enforce the legal-procedural relationship, and there are three cumulative requirements for lack of notice to be constitutionally relevant and conclude by granting protection, namely: possession of the appellant, at al time the action is initiated, of a right or legitimate self-interest (these are understood to be any legal advantage or utility) that may be affected by the contentious-administrative proceeding in question; the possibility of identifying the interested party by the jurisdictional body, essentially by using the information contained in the appeal submission, in the administrative file or in the action-at-law; and that the appellant has suffered as a result of the omission of notification, a real and effective situation of lack of protection, which is not present when the interested party has out-of-court knowledge of the matter and, through his/her own lack of diligence does not appear in the case, understanding that out-of-court knowledge must be verified by sufficient evidence, which does not exclude the rules of human criteria which govern presumptive evidence (Constitutional Court Decision 207/2005, FJ 2, with review of numerous prior decisions on the different aspects set forth).

...

4. ...In summary, therefore, on the basis of all the facts set forth above, according to which neither in the administrative case nor in the judicial proceeding was the appellant identified as the owner of the building, the inexcusable requirement under our jurisprudence of the judicial body being able to identify the interested party must be considered as not being complied with, wherefore it must be concluded that the charge lack of protection by the judicial body alleged by the appellant is groundless."

* Decision by the Supreme Court of Justice of the Basque Country, Administrative-Contentious Division, 1st Section, of 10 April 2006 (JUR 2006\196064).

Proceedings with elements on aliens. Regulation of proceedings. Nature of said law. Ability to be a party to and to take part in proceedings.

"Legal Grounds.

First. – (...) A) The Court required the documentation referred to in Art. 45.2.d) of the Law on Administrative-Contentious Procedure. – In the view of the appellant, the Court seeks for there to be a mandate to act and considers mere representation as not sufficient, seriously confusing not only what is referred to in the article but also continued procedural practise. Furthermore, it overlooks the main elements of International Private Law in two ways, since the

law governing the appellant corporation is U.S. law, and the appropriateness of the act, in this case, the power of attorney, is also American. (…).

Second. – Issue of International Private Law

The position maintained by the appellant in this instance and before this Court is based to a large extent on alleging that the appealed decision overlooks elementary principles of International Private Law, insisting that the expression of the intent of ABSG CONSULTING INC and its notarial formalization must be subject to U.S. Law, under the rules according to which *locus regit actum* and the national law, which is the law of domicile, governs that capacity.

Nonetheless, the Court has in no case required any action contrary to such principles, as recognised in Arts. 9.1 and 11.1 of the Civil Code. On the contrary, what the Court has done is to state that it is bound in its procedural actions by the Law of the location, also not available to the parties. Therefore, when demanding compliance with Art. 45.2.d) of the Law on Contentious-Administrative Procedure it is applying Spanish procedural law, which is the only law that is applicable to proceedings in Spanish courts (Art. 3 Law on Civil Procedure and 10.10 Civil Code). The legal requirements exist under this Law for considering the legal-procedural relationship as validly established, requirements to which all those who litigate in Spanish Courts are subject, independent of their nationality or domicile.

Therefore, by demanding the presentation of the document or documents accrediting compliance with the requirements in force for legal entities to bring suit in accordance with applicable rules and statutes, the Court is not imposing Spanish substantive law, but only requiring compliance with Spanish procedural law. Such document may be constituted in accordance with the rules of International Private Law that are applicable to legal entities bringing suit in Spain, an issue not dealt with by the decisions of the Court. (…)."

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN DECISIONS

1. General Principles

* Order by the Supreme Court, Civil Division, 1st Section, 21 February 2006 (JUR 2006/146212).

Foreign decision. Non-applicability of the Brazil Convention owing to exclusion from its scope of application. Conditions under the Law of Civil Procedure of 1881.

"Legal Grounds.

1. – The Cooperation Agreement between the Kingdom of Spain and the Federative Republic of Brazil, done in Madrid on 13 April 1989, which was ratified on 29 November 1990 and entered into force on 10 July 1991, whose Chapter III regulates the recognition and execution of court decisions, transactions, arbitration decisions and execution documents, depending on the matters dealt

with therein, that are expressly excluded from applicability under the Agreement, pursuant to Art. 16 a) of said bilateral Agreement. The general conditions therefore must be regulated under Art. 954 of the Law on Civil Procedure (of 3 February 1881) – which continues to be in effect as set forth by the Single Repeal Provision, in its first paragraph, third exception, of the Law on Civil Procedure 1/2000 of 7 January –, as negative reciprocity has not been accredited (Art. 953 of the aforementioned Law on Civil Procedures)."

* Order by the Supreme Court, Civil Division, 1st Section, of 14 March 2006 (RJ 2006\1939).

Cassation appeal. Resolutions that may be appealed. Orders issued in proceedings on recognition and execution of foreign decisions under the Brussels and Lugano Conventions, and Regulations 1347/2000 and 44/2001. Nature and object.

"Legal Grounds.

Second. The conclusion reached regarding the possibility of a cassation appeal of the decisions issued regarding recognition and execution of decisions under the Brussels Conventions (…) is based, (…), beyond the provisions contained in national procedural rules, on the primacy of supranational rules that are part of the community "acquis" over those produced internally, a feature that in the case of the international conventions entered into to comply with community objectives has a double foundation: on the one hand, its own nature and origin (Art. 93 EC [RCL 1978\2836]), and the other, its nature as a convention (Art. 96 EC). Alongside with this priority, certain community rules, especially community regulations, also have the property of being directly applicable o effective. The results of the principles of primacy and the direct effectiveness of community rules leads to the non-applicability of internal rules that are incompatible with or contrary to the community rules, to the extent that they prevent the valid formation of subsequent regulatory actions that are incompatible with same, such as, ultimately, the obligation of the applier of Law to guarantee the full effect of such supranational rules. The internal and community system is thereby integrated, resulting, *prima facie*, in the interpretation of internal legality in conformance with community law.

The appeal for cassation as set forth in Articles 41 of the Brussels and Lugano Conventions, 27 of the EC Regulation, and 44 of EC Regulation 44/2001, is a means of appeal specifically set forth in community rules, within a procedural channel that is also set forth and regulated by them, and considered as closed, complete and uniform (…)

(…) Therefore, the establishment of the appeal and its content prevails over international rules by virtue of the primacy and applicability of community rules in pursuance of their objectives, that is, to achieve the free circulation of decisions within a space of freedom, security and justice. However, conditions, premises and requirements for procedure and admission are governed by internal law, provided such norms and their interpretation ensure the primacy and direct effect of community rules (…), and therefore make possible the appeal established therein, with its own content and aim, so that the appeal for cassation

established under community does not end up as meaningless piece of paper, in a simple regulatory provision lacking any practical applicability.

...

Fourth. The conclusion that must be reached from everything that has been set forth above can be none other than the inescapable inadmissibility of the appeal for cassation. The appealed resolution that partially admitted the appeal brought under Art. 36 of the Brussels Convention (RCL 1991\217, 1151 and European Community Law 1972\178) against the decision of the Court of First Instance declaring the effectiveness in Spain of decisions by French judicial bodies, in whatever form they were adopted, that is, whether they be a court order, as in the present case, and whatever procedural channel may be used to process the opposing appeal as set forth in the cited supranational rule, can only be appealed in cassation, under the provision relating to recognition and executability of foreign decisions, through cassational interest which is offered in the third paragraph of Art. 477.2 of the Law on Civil Procedure (RCL 2000\34, 962 and RCL 2001, 1892), and with the concurrence of the premises set forth by this provision for determining the presence of cassational interest, that transcends the interest of the parties and requires observance of the requirements for justification established in Arts. 479.4 and 481.1 and 3, regarding the preparatory and lodging documents of the appeal, respectively."

* Supreme Court Decision, Civil Division, 1st Section, of 4 April 2006 (RJ 2006\1917).

German decision. Recognition and execution. Procedure. Brussels Convention. Unnecessary involvement of the Public Prosecutor. Final Decision.

"Legal Grounds.

...Second (...) the censure alleging a supposed lack of status on the part of the executant's Attorney because she did not set submit to the German authority her accreditation as a representative of the principals or the authorization to grant a power of attorney, when this is the same entity that appeared as the claimant in trial and obtained an executional judgment, and at that time no adverse obstacle was alleged regarding her representational powers, which should be considered to exist owing to the fact that the respondent did not justify anything to the contrary, or that the power of attorney was not granted in conformance with the formalities of the country of origin. Nor can the importance assigned as "sufficient" be attributed, since, as well known, jurisprudence has eased compliance with this requirement, converting it into a formality of economic significance, which, in no case, should hamper the right to the protection of the courts (...).

A result of all this is the fact that the involvement of the Public Prosecutor is not required in the procedure for the execution of foreign decisions when the Brussels Convention is applicable.

Third (...). Article 47–1 of the Brussels Convention (Law of the European Community 1972\178), establishes that "the party that applies for execution must also submit any document that accredits, according to the Law of the

State of origin, that the resolution is in execution and has been notified", not requiring, therefore, that the decision whose execution is sought must be firm, but merely in execution under the laws of the requesting State. In this regard, Supreme Court Decision of 12 November 1999 (RJ 1999\8864), "Article 31 of the Convention establishes that "the decisions issued in one contracting State that are executory, shall be implemented in the other contracting state when, at the request of any interested party, they are given executory status by the latter State"."

voluntarily, to present the allegations deemed appropriate. (sic)

* Supreme Court Decision, Civil Division, 1st Section, of 5 September 2006 (RJ 2006\6375).

Foreign Decision. Execution of a decision issued in default. Brussels Convention of 1968. Formalization of summons. The Hague Convention of 1965 on notification of documents. Adoption of preventive measures.

"Legal Grounds.

First [...]. The Court considers, as set forth by the Public Prosecutor, that the text of Article 39 of the Brussels Convention, which must be considered in conjunction with Spanish Law, empowers the Judge to take preventive measures, without evidence or allegation of *fumus boni iuris*, when the premises of *periculum in mora* as set forth by the Law of the land are present, but above all sustains its reiterated doctrine (Decisions of 18 May and 13 December 1993, 12 April and 7 November 1995 and 5 February 1996, *inter alia*) regarding the fact that there can be no cassational appeal of preventive measures.

Second [...] The motive is not admitted. The confusing allegations of the appellant seem to be denouncing here a matter of lack of *exequatur*, which is manifestly not required for recognition between two countries that are signatories of the Brussels Convention, as can be seen in Article 26 of said Agreement. It is sufficient to read Article 10 of the Hague Convention of 15 November 1954, to see that the Convention does not rule out other channels of notification other than through the Central Authority, adding the basic fact that the record shows that the company's Administrator was notified at his domicile of the claim, the summons and the decision, which underscores the motion's lack of viability.

Third. The appeal must not be granted. First, the appellant him/her/itself acknowledges that he/she/it received notification of the lawsuit by notarial means, to which he/she/it objected through the same channel that it was not notified in a regular manner. However, he/she/it states awareness of the claims against same by the claimant. Furthermore, he/she/it acknowledges that the Hague Convention of 1954 refers to other forms of notification, but considers them subordinate to the provisions of Articles 2 to 5 of said Convention.

Second, citing of Art. 954.2 and 3 of the Law on Civil Procedure of 1881 is ineffectual, since the application of such rules defers to International Treaties, as set forth in the first paragraph of Article 954 regarding prior Articles 951 to 953, and establish a supplemental legal procedure for execution in the absence of an International Treaty.

Third, the interpretation offered by the appellant of Articles 8 and 10 of the Hague Convention of 1954 is not correct. It is sufficient to look at Articles 10 a) and 10 c) of said Convention (This Court's Decisions of 28 March and 23 May (sic) 1994, 31 December 1999, *inter alia*) to see that the channel chosen in the case as an alternative is valid.

Therefore, there is no lack of defence nor violation of Article 27.2 of the Brussels Convention, since the summons document was delivered in a regular way (Article 15 b of the Hague Convention of 1954) and in sufficient time for knowledge by the respondent and now appellant, and it cannot be considered therefore that recognition would be contrary to public order (Article 27.1 of the same Convention, invoked by the appellant).

The Decision was issued in default, but the absence of the respondent, after being notified, was at his/her/its own convenience and cannot in any case be the basis of any premise of lack of defence, which, according to constitutional jurisprudence, consists of deprivation or limitation not attributable to the subject of the suit of any legitimate means of defence of his/her/its own position within the process (*inter alia*, Constitutional Court Decisions 101/2001 and 143/2001)."

* Supreme Court Order, Civil Division, 1st Section, of 10 October 2006 (JUR 2006\244609).

French divorce decree. Application of the Spanish-French Agreement of 1969.

"1. – The Agreement between Spain and France on the recognition and execution of judicial and arbitration decisions and true civil and commercial actions of 28 May 1969, ratified on 15 January 1970 and published in the Official State Gazette on 14 March 1970, should be applied, in compliance with its Article 1, owing to the nature and matter of the action whose execution is sought.

2. – Pursuant to said Agreement, international judicial jurisdiction (Article 3.1), the firmness of the decision (Article 3.2), the law to be applied to the substance of the matter (Article 5, which consecrates the principle of equivalent result), conformity with the requested State public order (Article 4.2), guarantees of trial and defence in the proceedings of origin (Articles 4.3 and 15); litispendence, or decisions handed down in the requested or other State (Article 4.4) and minimal formal requirements (Article 15) all must be verified. All the requirements established by the bilateral treaty are found to be duly complied with."

* Order by the Supreme Court, Civil Division, 1st Section, of 17 October 2006 (JUR 2006\250671).

Execution. Legitimacy. Voluntary intervention. Settlement trustees designated by foreign decision. Admission.

"Legal Grounds.

…Second. – In this case the petitioners justify their request on the existence of a direct, legitimate interest in resolving the execution derived from being the claimant in one case, and the respondent and counterclaimant in another,

in ordinary trial no. 386/2001, held at the Court of the First Instance No. 1 of Barcelona, whose principal purpose is the nullification of the sales contract entered into by the person representing the bankruptcy settlement trustees designated by the decision whose execution is sought. The nullification action is based on the lack of capacity, specifically of the powers of representation of the sellers, since the decision lacks validity in Spain, and is brought, in any event, regarding the overstepping of powers as conferred by same and of previous shortfalls in the bankruptcy case judged in the State of origin for the liquidation of the assets of the bankrupted party. Among other respondents, the Nargam, SA company opposed the decision and is now requesting voluntary involvement in the present execution proceedings, alleging in said trial among other arguments the existence of civil damages derived from these proceedings. It is considered that the decision by said entity depended on this one, since granting of execution should make the foreign decision effective from the moment it was issued, which should determine the recognition of the powers of representation and ability to enter into the sales contract whose validity is questioned.

Thus, it must be admitted that both entities requesting intervention have a direct and legitimate interest in resolving this execution, stemming from the possibility of bringing to light in that trial the effects derived from the foreign decision by recognising the representational powers of the liquidating trustees designated therein in order, for the purpose of complying with the requirement of necessary capacity in order for the sales contract questioned in the suit pending before the Barcelona Court to be valid.

Third. The intervention is admitted, and therefore it is in order to hear the parties within nine days on the validity or lack thereof of the execution, pursuant to the provisions of Article 13.3 of the Law on Civil Procedure 1/2000 (RCL 2000\34, 962 y RCL 2001, 1892), in relation to Article 956 of the Law on Civil Procedure of 1881 (LEG 1881\1).

As set forth,

The Court hereby agrees

1. To admit the voluntary intervention in these execution proceedings of the Nargam, SA company and the foreign company Ajhoury for Turismo e Inversiones, SA, to be considered the requesting and the respondent parties, respectively, for all the purposes of these proceedings."

* Order by the Supreme Court Order, Civil Division, 1st Section, of 5 December 2006 (JUR 2006\291937).

Foreign Decision. Execution. Jurisdictional body to hear the suit. Lack of jurisdiction of the Supreme Court.

"Legal Grounds.

First Pursuant to the provisions of Article 11 of Organic Law 19/2003 of 23 December amending Organic Law 6/1985 of 1 July, on the Judiciary (Official State Gazette of 26 December 2003), in force since 15 January 2004 and according to which "The Courts of the First Instance shall have jurisdiction in the

civil order: 5.? regarding applications for recognition and execution of decisions and other foreign judicial and arbitral decision, unless, pursuant to treaties and other international agreements, they correspond to another court". Therefore, and taking into account that the request for the execution of the decision whose recognition is sought was submitted to this Court on 6 September 2006, while said Organic Law was still in force, I hereby rule the lack of jurisdiction by this Division to deal with the execution sought.

Second. The "*ius cogens*" nature of the regulations on objective jurisdiction requires an examination of the jurisdictional body to judge the case, for which reason, under Art. 48.1 of the Law on Civil Procedure 1/2000 (which provides that "the lack of objective jurisdiction shall be found *ex oficio* as soon as it is found, by the court judging the case"), which at that point must be taken in relation to Art. 56.4 of the Organic Law on the Judiciary, and the Court must abstain from judging if, after hearing the Public Prosecutor and the parties in the case, it finds itself incompetent "*ratio material*", and it must advise the parties to exercise their rights in the proper venue.

Third. Under Art. 955 of the Law on Civil Procedure of 1881, amended by Art. 136 of Law 62/2003, of 30 December, on fiscal, administrative and social measures, notwithstanding the provisions of treaties and other international agreements, the jurisdiction to judge applications for recognition and execution of foreign court decisions and other foreign judicial or arbitral resolutions pertains to the Courts of the First Instance of the domicile or place of residence of the party against which the recognition or execution is sought, or the domicile or place of residence of the person to whom the effects of same refer; subsidiarily, the territorial jurisdiction shall be determined by the place of execution or where such decisions and resolutions take effect."

* Order by the Supreme Court, Civil Division, 1st Section, of 12 December 2006 (JUR 2007\126).

Ecuadorian Decision. Lack of Agreement with Ecuador. As established under Law on Civil Procedure of 1881.

"Legal Grounds.

1. – There being no treaty with the Republic of Ecuador nor applicable international rule regarding the recognition and execution of decisions, the general system as established by Article 954 of the La won Civil Procedure (of 3 February 1881) – in effect as provided by the Single Repeal Provision, paragraph one, third exception, of the Law on Civil Procedure 1/2000, of 7 January – should be followed, as there is no negative reciprocity accredited (Art. 953 of the aforementioned Law of 1881).

2. – The firmness of the decision in accordance with the law of the State of origin; the firmness of the decision whose execution is sought, is required whatever the system of recognition may be, by Article 951 (of the cited Law of 1881) – which on this matter does not only refer to the existence of agreement, if it is read together with the following texts – and is the reiterated doctrine of this Court.

3. – Requirement 1 of Art. 954 (of the cited Law on Civil Procedure of 1881) must be understood as being complied with, given the personal nature of a divorce action.

4. – As regards Requirement 2 of the same Article, it is accredited that the divorce was sought by mutual consent by the spouses involved.

5. – As regards Requirement 3 of the cited Article 954, there is full conformity with Spanish public order – in the international sense, Article 85 of the Civil code establishes the possibility of divorce no matter what the form or length of the marriage.

6. – The authenticity of the decision, as required by Article 954.4º, is ensured by the legalisation of the text as submitted to the case file.

7. – There is no reason to consider that the international jurisdiction of the Courts of the Republic of Ecuador has arisen through parties' fraudulently seeking a forum of convenience (Articles 6.4 Civil Code and 11.2 Organic Law on the Judiciary); Article 22.2 and 3 of the Organic Law on the Judiciary do not establish fora of exclusive jurisdiction, which is done by Article 22.1 of the same Organic Law, but in this case none of the for a concur that would so determine in favour of the Spanish courts; on the contrary, there are connections that cannot be overlooked, such as the Ecuadorian citizenship of the wife and the place the marriage was held, which are reasons that would give foundation to the jurisdiction of the Courts of origin and, therefore exclude fraud as regards the law applied to the substance of the matter, which is linked to the above.

8. – There is no contradiction or incompatibility with any judicial decision issued or any case pending in Spain."

* Decision of the High Court of Justice of Catalonia, Labour Division, 1st Section, of 25 April 2006 (AS 2006\2600).

Execution of foreign decisions. Procedure. Spanish decision on Social Security. Applicable system. Relationship between bilateral agreements concluded by Spain and the community regime.

"Legal Grounds.

…Second (…) this matter must be considered as covered under the Brussels Convention, as it is not Social Security in the sense excluded by the Convention, to the extent that it is not a matter of execution against management entities as entities of public law, but rather against individuals as a matter equivalent to labour law and civil law, as it deals with the obligation to return cash amounts unlawfully received.

Third. on the occasion of the successive accession by member states, Art. 18 of the Convention of 5/26/1989 on the accession of Spain and Portugal to the aforementioned convention established that Article 55 of the 1968 Convention, that established the abolishment of the special agreements that the different member states had among themselves. (…) As from that date, the Convention between Spain and France is therefore abolished, and that implies that the appellant's principle request cannot be admitted.

Fourth. It is therefore established that the agreement of 1/26/1998 is the applicable agreement. It must therefore be concluded that this agreement does not permit direct communication between the judicial bodies of the different countries, but rather requires that the interested party present the execution order of the member state to the court of the country in which he/she seeks to have the firm resolution executed. Thus, in accordance with Art. 31. according to which "execution decrees issued in a contracting State to be carried out in that state shall be executed in another contracting State when at the request of any interested party, its execution is granted by such State"."

* Order by the Provincial Court of Alicante, 5th Section, of 23 February 2006 (JUR 2006/130727)

Recognition and execution. Concept of foreign resolution. Type. Regulation 44/2001.

"Legal Grounds.

...Second. In the appeal entered before this Court nullification is sought of the Court Order, alleging that the foreign decision is not executive, pursuant to the provisions of Art. 38, nor has it been completed *ex oficio* or *ex parte*, pursuant to Arts. 54 and 55 of Implementing Regulation (EC) No. 44/2001 of 22 December 2000 (LCEur 2001\84), relating to judicial competence, recognition and execution of civil and commercial court decisions; it further charges that the Spanish public order is violated by ordering execution of an inexistent assessment of costs.

The appeal is successful because although the validity and firmness of the decision issued by the foreign court is not contested, its effects do not cover costs, regarding which it only contains a generic sentence and there is nothing set forth concretely in the decision (...). Therefore, it is not a question of granting validity to the decision presented by the person seeking the execution, but rather of considering, under Art. 523.1 of our Law on Civil Procedure (RCL 2000\34, 962 and RCL 2001, 1892), that there is no appropriate title to justify such execution as set forth, pursuant to the Brussels Convention (RCL 1991\217, 1151 and LCEur 1989\1327) and the broad interpretation given to its application by this Court, which has even stated in its decision of 07.24.1997 (AC 1997\1467) (Section 4) that any decision may be subject to execution, independent of its denomination and, .although it is necessary, and furthermore sufficient, for it to be executory in the State in which it was issued, and such requirements are not met by the appellant's French lawyer's notice of fees. In this regard, it is sufficient to recall that Art. 32 of aforementioned Regulation 44/2001 provides that "a 'resolution' for the purposes of this Regulation shall be understood as any decision taken by a court of a Member State whatever its denomination, such as order, decision, sentence or execution mandate, as well as the act by which the court clerk settles the court costs"; the note of honoraria attached by the executant cannot be included in any such decision."

* Order by the Provincial Court of Barcelona, 12th Section, of 28 February 2006 (JUR 2006\232193)

Venezuelan divorce decree. Application for recognition. Legitimisation of the applicant.

"Legal Reasoning.

...Fourth. – (...) It is evident that Ms. Juana has a legitimate interest in having the decision decreeing her husband's divorce from his previous spouse made effective, so that she can then register his subsequent marriage to her, which she cannot do until the divorce decree is registered. It can therefore be concluded that the claimant has a legitimate interest in these proceedings."

* Order by the Provincial Court of Madrid, 21st Section, of 28 April 2006 (AC 2006\1028).

Execution. Decision issued in Germany in absentia *of the respondent entity. Regulation 44/2001.*

"Legal Grounds.

...Second (...) there was a discrepancy between the parties to the suit during the original proceedings and the differences are reiterated in this appeal, regarding the rules to be followed for the execution of court decision in civil and mercantile matters issued by a German court. The appellant does not agree with the rules followed by the original judge in issuing the decision subject to the appeal, which we should resolve first and since there is no argument regarding the non-applicability of the provisions of Art. 952 of the Law on Civil Procedure of 1881 in this appeal, the rules to be followed are those that are applicable in the execution of a court decision issued by a German Court.

...

We do not share the arguments of the original judge in regard to the non-applicability of Council Regulation 44/2001 of 22 December 2000, said Judge considering that the applicability of the Regulation was subject to the Members States transposing it into their own law, whereas in accordance with Art. 249 of the Treaty Establishing the European Union, Regulations are general in scope, their elements are mandatory and they are directly applicable in the Member States, and it is not necessary for them to be adapted or transposed into domestic law in each State.

As expressly provided in its Art. 68, Regulation 44/2001 itself replaces in the Member States of the European Union, the provisions contained in the Brussels Convention of 1968, except as regards the territories of the member States that are within the scope of the territorial application of said Convention excluded from the Regulation by virtue of the provisions contained in Art. 299 of the Treaty Establishing the European Union. The Kingdom of Spain is not included in that exception and, in accordance with Article 69, expressly substitutes this Regulation for the purposes we are now dealing with, for the Agreement between Spain and Germany on the recognition and execution of judicial decisions, judicial transactions and public documents with executory force in civil and commercial matters, signed in Bon on 14 November 1983.

Therefore, none of the Conventions cited by the entity that sought the execution of the decision issued by the Provincial Court of Friburg, are applicable in determining the potential execution of such a court decision in Spain, but rather the rules that we must take into consideration are those set forth, as indicated in Council Regulation 44/2001 of 22 December 2000.

Third (…) the decision that resolves on the application for execution may be appealed by any of the parties, and in this case the court that resolves on the appeal "may only dismiss or revoke the granting of the execution for one of the reasons set forth in Arts. 34 and 35, referring precisely to Art. 34.2), which is the one that interests us, to decisions by a Court "when issued *in absentia* of the respondent, if the summons or equivalent document was not delivered in proper form and with sufficient time to permit defence, unless the decision was not appealed when it was possible to so."

Fourth (…) As regards the rest, all necessary documentation was sent to make the notification valid. Therefore, the notification is valid with the result that in the meantime a decision was issued *in absentia*, as requested in the claim".

So, what is certain is that Atmos Medimatec, SA, had knowledge of the decision issued against it in the claim brought by Atmos Medizintechnik Gmbh & Cokg, and that it had been sentenced in said decision to pay a certain amount, but we have no evidence that it appealed said decision or made, when notified, any type of challenge or statement against it (…)."

* Order by the Provincial Court of Madrid, 22nd Section, 31 March 2006 (JUR 2006\159936)

Foreign Decision. Denial of execution. Decision issued in absentia*. Concept.*

"Legal Grounds.

…Second Article 951 of the Law on Civil Procedure of 1881 (LEG 1881\1) that, just as the subsequent laws, remained effective after the entry into force of Law 1/2000 (RCL 2000\34, 962 and RCL 2001, 1892), states that the firm decisions issued in foreign countries shall have be as valid in Spain as established by respective Treaties. There is no treaty with the Dominican Republic, so the general system established in Article 954 shall be applicable, since there is no negative reciprocity accredited (Article 953).

For granting of execution, Article 954 requires the concurrence of the following requirements:

"1. That the execution decision was issued as a result of the filing of a personal action.
2. That is was not issued *in absentia*.
3. That the obligation it seeks to execute be legal in Spain.
4. That the execution order fulfils the requirements necessary in the nation in which it was issued to make it authentic and those that Spanish Law require in order for it to be valid in Spain".

Third. Under the premise that in this appeal the documents presented by the promoter of the case are presented for our consideration and they meet the formal

requirements set forth in number 4 of the aforementioned Article, affecting the proposed execution of a decree of dissolution by means of divorce, whereby it also fulfils the requirements of numbers 1 and 3 of same (…).

Nonetheless, in regard to not having duly justified the firmness of the decision whose execution is sought, such requirement is obviously inescapable in accordance with Article 951 of the Law on Civil Procedure (…).

It is true, as the Supreme Court maintains, that the absence of the respondent in the proceedings does not always exclude execution, whereby there is a need to differentiate between different types of absence based on the different causes of non-appearance. Thus, distinction is made between cases in which the respondent, having been duly notified and summoned, does not appear voluntarily, whether it be because the respondent he/she does not recognise the jurisdiction of the Judge of origin, or because he/she does not want to, or simply lets the time period elapse without appearing, and other cases in which the lack of presence is due to lack of knowledge of the existence of proceedings, a type of *absentia* in which, owing to its significance in regard to proper respect for the right of defence, becomes an obstacle for the recognition of the foreign decision (…).

Also, in regard to this case, since there is no evidence of personal notification of the proceedings, it cannot be stated that the respondent's absence from same was a matter of convenience or voluntary abstention from rights, appearing to the contrary, to have been caused by a lack of knowledge of the proceedings, something that cannot be resolved extemporaneously by means of personal summoning in this homologation proceeding, and it must be concluded that the inescapable condition required in order to be able to accept the premise stated in Article 954–2 is not present."

2. Family

* Order by the Supreme Court, Civil Division, 1st Section, of 21 February 2006 (JUR 2006\94102)

Recognition and execution. English divorce decree. System under Law on Civil Procedure.

"Legal Grounds.

1. – There being no treaty with the United Kingdom nor any applicable international agreement on the recognition and execution of decisions, the general system as set forth in Article 954 of the Law on Civil Procedure (3 February 1881) – still in effect as established by the single Repeal Provision, first paragraph, third exception of the Law on Civil Procedure 1/2000, of 7 January – is applicable, since negative reciprocity is not accredited (Art. 953 of the aforementioned Law of 1881).

2. – The firmness of the decision under the law of the State of origin is proven; the firmness of the sentence whose exequatur is sought is required, whatever the rules may be for recognition, by Article 951 (of said Law of

1881) – that on this matter does not solely depend on agreements in force, if read together with the subsequent provisions – and this is the reiterative doctrine of this Court.

3. – Requirement 1 of Art. 954 (of the cited Law on Civil Procedure of 1881) must be understood as complied with due to the personal nature of a divorce action.

4. – Regarding the second requirement of Article 954, it is considered proven that the seeker of the exequatur was the respondent in the case of origin, whereby, in accordance with the reiterated criteria of this Court, the guarantees imposed by the right to a defence and the proscription of lack of defence must be considered as fulfilled.

5. – As regards requirement 3 of said Article 954, conformity with Spanish public order – in the international sense – is fulfilled: Article 85 of the Civil Code establishes the possibility of divorce regardless of the form of marriage and the time elapsed.

6. – The authenticity of the decision, as required by Article 954.4 is guaranteed by the apostille it carries and its admission into the proceedings.

7. – There is no reason to consider that the international jurisdiction of the Court of the United Kingdom arose from parties fraudulently seeking a forum of convenience (Articles 6.4 Civil Code and 11.2 Organic Law on the Judiciary); Article 22.2 and 3 of the Organic Law on the Judiciary do not establish fora of exclusive jurisdiction, which is done however under Article 22.1 of the same Organic Law, however, in the present case there is no concurrence of any of the fora that would determine such a situation in favour of Spanish courts; to the contrary, there are connections that cannot be overlooked, such as the place the marriage was held, the domicile of the spouses in the United Kingdom during same and, keeping in mind, in any case, the acceptance by the wife (claimant in this exequatur proceeding) of the jurisdiction of the British Courts, whereby there is no information showing a fraudulent search for a forum of favour or convenience, reasons that enable the jurisdiction of said Courts to be considered as well-founded, and, lastly, that exclude fraud insofar as the law applied to the substance of the matter, which is an issue linked to the above.

8. – There is no evidence of contradiction or material incompatibility with a court decision handed down or any proceedings pending in Spain."

* Order by the Supreme Court, Civil Division, 1st Section, of 28 February 2006 (JUR 2006\146092)

French divorce decree. Recognition and execution. 1969 Bilateral Agreement with France.

"Legal Grounds.

1. – The Agreement between Spain and France on the recognition and execution of judicial and arbitral decisions on civil and commercial matters of 28 mayo 1969, ratified on 15 January 1970 and published in the Official State Gazette on 14 March 1970, is applicable, pursuant to its Article 1, owing to the nature and substance of the action for which exequatur is sought.

2. – In accordance with said Convention, international jurisdiction (Article 3.1), the firmness of the decision (Article 3.2), the law applicable to the substance of the case (Article 5, which consecrates the principle of equivalent result), conformity with the public order of the Requested State (Article 4.2), the guarantees of trial and defence in the proceedings of origin (Articles 4.3 and 15); the decisions pending or handed down in the Requested or other State (Article 4.4) and the minimal formal requirements (Article 15) must be monitored. All the requirements established by the bilateral treaty are duly complied with; special reference is made to the provisions of Art. 107 of the Civil Code and as a result of the spouses' being Spanish nationals, to monitoring of legislative competence, which must be determined from the perspective of the aforementioned principle of equivalent result, there existing no objection to application of the French law in the decision subject to exequatur."

* Order by the Provincial Court of Toledo, 2nd Section, of 1 March 2006 (JUR 2006\127284).

Moroccan consensual retributed repudiation. Denial. Attribution of custody, visits and stays. Absence of provisions of a personal nature on this.

"Legal Grounds:

First: Having denied the exequatur of the retributed consensual repudiation, registered in Book of Marriages-Divorces No. 233 of Mohammedia, Kingdom of Morocco, requested by the husband, a Spanish citizen since 22 November 1999, and entered in the Central Civil Register, the appellant seeks to, provide in second instance the document he did not produce in the Court, consisting of the child allowance agreement for the minor children from his marriage to Gema, a Moroccan national, and the essential reason the exequatur sought was denied by the Court, under the provisions of Art. 23.4 of the Convention on Judicial Cooperation in civil, commercial and administrative matters signed between the Kingdoms of Spain and Morocco on 30 May 1997 (RCL 1997\1607) (Official State Gazette of 25 June 1997) as the initial Judge found that the decision whose exequatur was sought was lacking of any provision regarding the minor children (…), going against the legal principle of public order, set forth in Art. 90 of the Civil Coded (LEG 1889\27) which imperatively requires separation or divorce agreements to refer to: A) The care of the children subject to the *patria potestas* of both spouses, the exercise of same, and where appropriate, the communication and stays of the children with the parent that does not habitually live with them and B) Contribution to the marriage encumbrances and allowances, and bases for updating and guarantee where appropriate.

Under Spanish Law, the aspects of the Regulating Agreement that affect minor children require a report by the Public Prosecutor and the prior approval of the Court, because the issue is one of public order, outside the realm of the autonomy of the spouses if they do not respect the basic physical and personal minimums amounts (Supreme Court Decision 21 December 1998 [RJ 1998\9649].

In this regard, the Plenary of the European Parliament made a pronouncement on 17 November 1992 referring to cases of divorce of European couples not

of the same nationality. According to the Parliament, the suspension of visitation rights must only be applied if there is a high, direct or serious probability of endangering the physical or mental health of the child, or if there exists an already executable incompatible decision on the matter".

* Order by the Provincial Court of Madrid, 22nd Section, 7 March 2006 (JUR 2006\118356)

Foreign divorce decree. Execution brought by the heir of the deceased spouse after the divorce decree. Origin.

"Legal Grounds.

...Second – The theory of the initial Judge, even without mentioning it expressly, seems to stem from Article 88 of the Civil Code, under which the divorce action is extinguished upon the death of either of the spouses; which makes it unviable to commence or continue a proceeding seeking to dissolve the conjugal bond when this effect was already caused by the death of one of the spouses, as set forth in Art. 85 of the same legal text.

But it is true that the claim presented by the now appellant does not involve an ex novo exercise of a divorce action which, being very personal, would be exclusively a matter for the spouses themselves to determine, but rather only a request for recognition in Spain of a decision issued by the Swiss courts prior to the death of the spouse, and which declared the marriage entered into previously by her as dissolved by divorce.

The above brings us to conclude, in contrary to the erroneous theory sustained by the initial Judge, that the death of one of the spouses after the divorce decree is issued cannot exclude in any way the legal consequences that flow from said dissolution of bond, which takes effect when the decision is firm, notwithstanding the rights of third parties in good faith, who will only be harmed by registration in the Civil Register. From such a system the separation, divorce or nullity decisions issued by foreign courts, once they are recognised in Spain, as provided by Article 265 of the reiterated Regulation.

In conclusion, the exequatur sought cannot be denied owing to the sole circumstance of the death of one of the spouses that occurred after the decision for which execution is sought, as understood by the Supreme Court in numerous decisions in which the proceedings were brought by the heir of the deceased spouse."

* Decision by the Provincial Court of Ourense, 1st Section, of 7 March 2006 (AC 2006\1548).

Recognition and execution. Illegality. Decision on declaration of paternity. Decision issued in absentia*. Public summons.*

"Legal Grounds.

First recognition and execution of the decision issued by the Uster District Court of the Helvetic Confederation on 31 May 2001, in Proceedings no. U01/I/CF000032, declaring the paternity of the respondent and at the same time

sentencing him to pay 30,139.90 Swiss francs as child allowance. The motion, following the procedure set forth in Arts. 951 to 955 of the Law on Civil Procedure of 1881, was admitted by the court and the respondent appealed to oppose it, alleging as first ground of the appeal, his lack of knowledge of the proceedings giving rise to the decision whose execution was sought, in violation of Art. 954.2 of the Law on Civil Procedure and Art. 27 paragraph 2 of the Lugano Convention of 16 September 1968.

Second (…) in the "exequatur" proceedings, it was set forth that the respondent was summoned to appear in the paternity proceedings of reference by means of publication in the Official Gazette of the Canton of Zurich, since at that time his location was unknown, and that the decisions were notified by the same public procedure. And, while one of the requirements for recognition of an execution order issued by a foreign Court is that "it not be issued *in absentia*" (Art. 959.2 Law of Civil Procedure) it is in order to analyse the scope of said rule, which was omitted in the decision appealed. The Supreme Court, in its orders of 26 October 1999, and 27 July 2004 (*inter alia*) maintain the same differentiating criteria, and subordinates the effectiveness of foreign decisions to compliance with the rules of procedural public order (also paragraph 1, Art. 27 of the Lugano Convention) among which, quite specially, are those relating to procedural guarantees to be observed in acts of notification, and of constitutional content (Art. 24 Spanish Constitution), which must be abided by, such as the need for exhausting all means needed to perform personal notification of the respondent before resorting to subsidiary means, such as public summons.

Third (…) Whereby, prior personal notification was not attempted, nor were all means exhausted to carry it out effectively. It is concluded straight away that this is a case of "forced *absentia*", owing to lack of best notification and lack of knowledge regarding the existence of the proceedings by the respondent that prevent the foreign decision from being recognised as firm, in application of the provisions of Art. 954.2 of the Law on Civil Procedure of 1881 and Art. 27, paragraphs 1 and 2, of the Lugano Convention of 16 September 1968."

* Order by the Provincial Court of Valladolid, 1st Section, of 12 June 2006 (EDJ 2006/97125)

Unrecognised foreign divorce decree. Lack of effect.

"Legal Grounds:

…Second. – (…) As determined in Arts. 9 and 107 of the Civil Code, civil status, separation and divorce shall be governed by the law of the person as determined by a person's nationality, the national common law of the spouses at the time of the presentation of the suit (in absence thereof, the customary residence of the married couple). Wherefore in order for a divorce action taken to be virtual, it is obviously necessary for there to have been a subsistent bond of marriage, and to accredit the dissolution for the record, also through divorce, prior to the presentation of the claim of said bond, under a Decision handed down in the country of origin, the country of common nationality, which determines the Law of the person, the accreditation of the above dissolution of bond is

brought to the case through documentary evidence: foreign Bulgarian document duly translated into Spanish, together with a copy of the original and certification of it being a firm decision (with its legalisation, or apostille). The Decision decreeing the divorce of said marriage was dated 10–2–05, to take effect on 2–3–05, has the effect as set forth in Art. 323 of the Law on Civil Procedure. Now, the issue in the case, notwithstanding reference on the one hand to a supposed virtuality or validity of the document provided by the respondent; on the a document of foreign origin (Bulgarian) brought to the proceedings, as regards documentary value subject to presentation to the court, for this to be effective in these proceedings (in reality as prior *res judicata*), it must be recognised in the country where it needs to be taken into account (Spain), as concluded also from the provisions of the applicable Treaty: in the case at hand, the Judicial Cooperation Agreement of 23–5–93 between the Kingdom of Spain and the Republic of Bulgaria, done in Sofia. (Official State Gazette 155/94 of 30 June 1994), in its Arts. 19 and 20 as would also be concluded from the European Community (EC) Regulation no. 2.201/2003, of the Council of 27–11–03, relating to the jurisdiction, recognition and execution of Judicial Decisions regarding marriage and parental responsibility (abolishing prior Regulation no. 1347/2000), which becomes applicable to the country of reference in the proceedings as soon as they complete their integration into the European Community. Therefore, this involving not foreign administrative documents (those presented with the case) that are effective in Spain in accordance with the reasoning above, with nothing more than the apostille and a translation (The Hague Convention of 1961), but rather foreign Decisions that continue to require (except for exceptions regulated by Community Agreements and Regulations) for recognition (exequatur) by the State in which they are to take effect, whereby the circumstance of a prior dissolution of marriage, in order to be taken as such through documentary submission of Decisions by of foreign judicial bodies, in order to be fully effective as evidence, must be recognised in Spain, which is not achieved by mere provision, whereby the documents presented are fully lacking in effect and the circumstance therefore cannot be considered as being accredited."

V. INTERNATIONAL COMMERCIAL ARBITRATION

* Order by the Supreme Court, Civil Division, 1st Section, of 21 February 2006 (RJ 2006\1881)

Cassation appeal. Scope of application. Non-appealable decisions on actions to annul arbitration decisions. Constitutional right to appeal only in criminal matters.

"Legal Grounds.

…Second (…) Arbitrage implies, therefore, minimal involvement of jurisdictional bodies by virtue and in favour of the autonomy of the will of the parties. When a matter of monitoring, such minimal involvement can be summarised by consisting of monitoring the legality of the arbitration agreement, understood in terms of arbitrability, as set forth in the preamble of Law 60/2003 – on the

matters involved and the regularity of the arbitration procedure. (…). B) This minimal jurisdictional intervention explains the fact that in Article 42.2 of the Law on Arbitration in force, as is also done in Art. 49.2 (RCL 1988\2430 y RCL 1989, 1783) of the preceding law, provides that there is no appeal at all of any decision issued in the process of annulment of an arbitration decision. The legislator understood that a single forum and one single procedural phase was sufficient to meet the need of jurisdictional control of the arbitration resolution, which evidently does not deal with the substance of the controversy but only the premises of arbitration and its implementation. C) Parallel to the above, it must be taken into account that the Law on Civil Procedure limits cassation appeal to decisions issued in the second instance by Provincial Courts (Art. 477.2 Law on Civil Procedure), which excludes from appeal decisions such as those handed down in hearings on annulment of arbitration decision, were issued by one instance, wherein the intervention of the Provincial Court is not limited to reviewing the decision of a prior instance, but rather to carrying out a one and only review of the annulment claim, whereby it is not a second judicial forum. (…).

D) In addition to the above, it is important to add that currently recognition in Spain of a foreign decision handed down in proceedings on annulment of a foreign decision, whether incidental or automatic in nature, is governed by the combined application of Art. V.1-a) of the New York Convention of 10 June 1958 (RCL 1977\1575), on recognition and execution of foreign arbitration decision, and Art. IX of the Geneva Convention of 21 April 1961 (RCL 1975\1941) on international commercial arbitration, by examining the reason for opposition to the exequatur consisting in the annulment of the arbitration decision, or directly in *ad hoc* proceedings, is also subject to the rules of single instance and non-appealable nature of the decision which attributes effect to the foreign decision (Art. 956 of the Law on Civil Procedyure/1881 [LEG 1881\1], which remains in effect by virtue of the Single Repeal Provision, third exception, of the Law on Civil Procedure 1/2000).

Tercero (…) The grounds of this Decision are not complete without referring to the right to effective judicial protection, and in particular, the right to have access to and to use the system of appeal, as set forth in Art. 24 of the Spanish Constitution (RCL 1978\2836). In this regard, it must be stated that the fact that the legislator excluded decisions resolving on the application for annulment of an arbitration decision from appeal should not be seen as a violation of any fundamental right, since such exclusion arises from a legitimate legislative option, and as stated insistently by the Constitutional Court, there is not, outside the criminal venue, any right under the Constitution to appeal or to a specific type of appeal, and that it is foreseeable and possible that the legislator not set forth any legally against a specific decision, or that it be subordinated to concurrence of certain conditions (…)."

* Order by the Supreme Court, Civil Division, 1st Section, of 26 September 2006 (JUR 2006\238962).

Foreign arbitration decision. System applicable for recognition and execution. New York Convention of de 1958.

"Legal Grounds.

1. – The resolution of this exequatur must comply with the terms of the New York Convention on recognition and execution of arbitration decisions of 10 June 1958, which is applicable both materially and because of the date of the decision, and which for Spain is universal in nature, as it did not make any reservation to the provisions of Article 1 when it became a party to the Convention, which was done by instrument of 12 May 1977 (Official State Gazette 12 July of the same year).

2. – The purpose giving rise to the arbitration is subject in Spain to judgment by arbitrators and a repeated arbitration decision is not contrary to the Spanish public order (Article V.2).

3. – There having been no appearance made by the party against which the exequatur in these proceedings is directed, and, therefore, no allegation of opposition to its recognition, the Court's monitoring must be limited to ensuring compliance with the requirements referred to in Article IV of the Convention, and cannot extend to an *ex oficio* verification of the causes of opposition set forth in Article V.1, which require prior denunciation and proof of concurrence. Furthermore, there is no finding of any reason, pursuant to Article V.2 of the Convention that would prevent recognition.

4. – The requirements of Articles 951 and successive articles of the Law on Civil Procedure of 1881, that are applicable under Article III of the Convention, are considered as complied with.

5. – The exequatur procedure is essentially one of homologation and is not contentious in nature, although the party against which recognition is sought may oppose it, which modulates this negation. The case resolved here cannot be considered as having defeated the respondent, who did not oppose the recognition sought; therefore, and following the rules and principles governing the imposition of costs, and in conformance with the criteria the Court follows in these matters within exequatur proceedings, it is not in order to issue any special pronouncement regarding court costs."

VI. DETERMINATION OF APPLICABLE LAW: SOME GENERAL ISSUES

1. Proof of Foreign Law

* Order of the Supreme Court, Civil Division, 1st Section, of 31 January 2006 (JUR 2006\220010)

Appeal for cassation. Purpose and scope.

"Legal Grounds.

...Fourth. – (...) regarding non-admission of the appeal for cassation, it should be pointed out that also present are the causes of non-admission owing to defective preparation and filing through proposal of issues falling outside the scope of the appeal for cassation (Arts. 483.2, 1, second paragraph, and 483.2.2, both in relation to Art. 477.1 of the Law on Civil Procedure of 2000), since the procedural nature of the denounced infraction is obvious, and the cassation interest would not be able to deal with matters that are adjective in, such as the lack of international judicial jurisdiction of the original Court, which is countered through the alleged incorrect application of the submission of the parties to foreign Courts as a criteria of jurisdiction, whereby the quite reiterated doctrine of this Court, as set forth in numerous resolutions of appeals of complaint and of non-admission of appeals for cassation, states that in accordance with the new legal system affecting special appeals designed by the Law on Civil Procedure of 2000, the cassation appeal is limited to performing a strict revisory function of the norms pertaining to the object of the proceedings referred to in Art. 477.1 of the Law on Civil Procedure of 2000, and should be understood to refer to the material objectives of the parties, relating to "civil or mercantile credit and to personal or family situations", as set forth in the Law on Civil Procedure of 2000 Statement of Motives, that directly refers to "infringement of procedural law" as falling outside cassation."

* Supreme Court Decision, Chamber 1, 1st Section, of 4 July 2006 (Ref. Aranzadi JUR 2006\6080)

Foreign law. Need for and means of proof.

"Legal Grounds:

...Second. – Before examining the specific motives of the appeal for cassation entered by "D.", a ruling must be made on the prior issue posed by the appellant that refers to the application of German law and the possibility of cassation in application of foreign law. The appellant considers that German law was not sufficiently proven throughout the proceedings and that is doubtful that cassation would be admissible under paragraph 4 of Article 1692 of the Law on Civil Procedure, and therefore considers the doctrine of the Supreme Court that national law should be applied when foreign law has not been proven as applicable to the appeal, to avoid a legal void and prevent lack of defence. (Decisions of 17 July 2001 and 5 March 2002). The appellant advised us that she was going to formulate her allegations on the basis of Spanish law, which is similar in her judgment to German law, which she herself acknowledges should be applied to the contract between "D." and "M., S.L.".

The following considerations must therefore be reflected:

1. Clause 14 of the contract between "M., S.L." and "D." in 1987 established that the contractual relations between the parties would be governed by German law ("The proper law applicable is that of the German Democratic Republic"). This clause does not in any way contradict what is set forth in

Article 10.5 of the Civil Code that states that "contractual obligations shall be subject to the law to which the parties expressly submit, provided there is some connection to the business involved." And in this case, the application of German law was correct because it was tied to two elements of the contract: one of the parties was a German national ("D.") and the contract was entered into in Rostock, Germany; taking into account, however, that with the disappearance of the GDR, the law of the Federal Republic of Germany is the law to be applied. Furthermore, the application of German law was not subject to discussion throughout the proceedings, and the complainant herself, in her complaint recognises that it was the applicable law.

Therefore, pursuant to Article 12.6, 1 Civil Code, "the Courts and authorities shall apply *ex oficio* the rules of conflict under Spanish law" and this is what happened throughout these proceedings, because it is not that German law is not applicable because one party so alleged, but rather "because it is so required by the rules governing conflict."

2. Another issue that was posed outside the specific motives for the appeal for cassation but that should be responded to here in order to be able to study the specific motives, is whether in this case the German law that should be applied to the maritime agency contract between the complainant/appellant "D." and the respondent "M., S.L." Article 12.6, 2 Civil Code, in force at the time the complaint and the appeal for cassation were entered, establishes that "the person who invokes foreign law must accredit the content of such law and its validity through evidence admitted under Spanish law. Nonetheless, in its application, the court can also use any validation instruments it considers necessary and issue the orders it sees fit." This provision, similar to Article 281.2 of the procedural law currently in force, led this Court, and the doctrine that has commented on same, to the traditional consideration that foreign law be treated as a fact and therefore be subject to allegation and evidence, making it necessary to accredit not only the exact existence of the law in force, but also its authorised scope and interpretation, and if this is not done, Spanish law is to be applied (Constitutional Court Decisions 10/2000; 155/2001 and 33/2002 and decisions of this Court of 11 May 1989, 7 September 1990, 16 July 1991, 23 October 1992, 31 December 1994, 9 February 1999, in addition to those cited above).
3. This doctrine requires determination of the means of proof available to the party alleging the application of foreign law, a matter to which the appellant also refers to justify his appeal being based on Spanish law. Both the repealed Article 12.6.2 of the Civil Code and the doctrine of this Court allows whoever needs to prove the existence and validity of law to be applied to the legality of the substance of the matter, to use all the means of proof at his/her disposal; namely:

   a) Public documents or documents scrutinised by public notaries that they may include in the proceedings through appropriate certification, although

this evidence is limited to the text of the law in force, but does not apply to its interpretation, that is so very necessary in any lawsuit.

b) "Through testimony thereon by two legal experts of the corresponding country provided through the proceedings" (Decision of 3 February 1975, although the Decision of 9 November 1984 found that the conclusions of legal experts are not binding), which is perfectly admissible under Article 12, 6 of the Civil Code itself. But on this point, Article 12.6.2 of the Civil Code allows the Judge to employ his/her own knowledge, but never over the evidence of foreign law, but rather may require the parties to provide the corresponding documents. Thus, the Decision of 17 March 1992 states that "notwithstanding the advisability of engaging in this for the greater illumination of the jurisdictional body, it may be known and applied *ex oficio* by the jurisdictional body or simply accredited by means of provision of photocopies of the "G.", as occurred in this case."

In this case, the evidence of foreign law was provided by both parties by recurring to the testimony by different legal experts, as shown in the proceedings, quoting the applicable laws, whereby German law was amply proven. It is true that the appealed decision does make references, in some of the grounds, to Spanish law governing the agency contract; but that does not prevent the affirmation that it is applying German law to the disputed legal relationship, since ultimately both systems regulate this contract under Directive 86/653/EC, whereby the evident uniformity of treatment cannot but be observed, since that is precisely the purpose of the European Directives.

4. This takes us to the most complex of the problems posed by the appellant in the issue preliminary to the motives: if an appeal for cassation is admissible or not regarding foreign law. The appellant sets forth a series of arguments in favour of and in opposition to the potential appeal, leading her to consider that, when in doubt, it is better to use Spanish law, given its similarity to applicable German law, an issue to be argued in the study of each of the motives of the appeal.

The issue is certainly a complex one, because the doctrine of foreign law requiring evidence by whosever invokes it is unanimous, which, to a certain extent converts it into a fact, and it will subsequently be difficult to argue that an appeal for cassation is admissible for violation of applicable foreign law, given the limitations of this appeal as set forth in Article 1692 of the Law on Civil Procedure. The solution adopted by old decisions by this Court such as those of 20 March and 20 May 1877; 13 January 1885; 9 January 1911; 30 June 1962; 10 December 1965 and others, was to allow cassation under the old paragraph of Article 1692 of the Law on Civil Procedure, which admitted cassation "when in the assessment of the evidence there has been an error of law, if this arises from authentic documents or records, or error in fact, if this arises from authentic documents or records that demonstrate evident error on the part of the judge." Nonetheless, the decision of 15 July 1983 found that "infractions of foreign laws not affecting the uniformity of our jurisprudence cannot

be motives of cassation." In our view two aspects need to be distinguished in regard to the application of foreign law:

a) The first consists of the determination of the content of the law to be applied in accordance with the corresponding rules of conflict; at this stage, all means of proof should be used to prove to the judge the validity, the content and the interpretation of the law stated as applicable, for which Article 12.6 of the Civil Code should be used.
b) When the Judge has been shown what law is applicable, this should not be treated as if it were a mere fact, because it is a corpus of law and the Judge is obligated to use the appropriate juridical techniques to interpret and apply it and this brings us to the contents of Article 1692.4 of the Law on Civil Procedure of 1881, that established that the cassation appeal should be based on the "the infringement of rules of legal order or jurisprudence that are applicable to resolving the issues in question" and in this case, the applicable law is German law. Applicable law may be violated, not applied, etc. and differences should not be established between foreign law and domestic law once it has been shown that the former is applicable to the case subject to judgment, because any other result would be tantamount to preventing access to the resources set forth by law (Article 24 Spanish Constitution), in addition to an infringement of the Spanish law on conflict. Nonetheless, the doctrine established in an appeal for cassation over infringement of foreign law should not be taken as legal doctrine under Article 6.1 of the Civil Code, notwithstanding that it may be used as a basis in subsequent conflicts before Spanish Courts that deal with similar problems in which the same law should be applied."

* Decision of the Superior Court of Justice of the Community of Madrid, Labour Division, 1st Section, of 13 February 2006 (AS 2006\859).

Individual employment contract. Public administrations and their personnel. Applicable law. Italian Law. Proof of foreign law.

"Legal Grounds.

…Fourth (…) The "Rome Convention" determines the Law that is applicable to employment contracts with an alien, (…). It "…regulates with universal scope and sets forth the Law that is to govern a legal relationship in which there are points of connection to the laws of different states. Such regulation, under Article 2, is preferentially applicable, even if the Law designated thereby is that of a non-party State. Thus, the rules of international private law contained in Chapter IV of the Preliminary Title of the Civil Code, are residual in nature and only applicable to the contract types not covered in the Rome Convention (Article 1.1) and contracts in force prior to its entry into force".

(…) Art. 3 states that "1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of

the contract 3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law at the country which cannot be derogated from by contract, hereinafter called 'mandatory rules'. Art. 6 states that "1. Not withstanding 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."

(…) in the event of express or tacit selection by the parties of the application of the Law of a specific country, the employment contract is governed by such legislation, provided this does not involve a renunciation of provisions that would be mandatory if the Law that should have been applied if the selection had not been made were applied. In the absence of choice, the Law of the country where the employee is employed on a stable basis is applicable.

Fifth (…) whosoever claims that law to which the parties have subjected themselves is not mandatory, but may be displaced in regard to compensation by other rules that allow wage absorption and compensation, is also the person that should accredit the non-mandatory nature of the law (Art. 217 Law on Civil Procedure (…)

(…) it is not considered constitutionally acceptable that a Labour Court not issue a pronouncement on substance when foreign law is not accredited, in the event that – as is the case here – the law on conflict is stated as applicable, since in such a case the law of the *lex fori*, Spanish labour law, is to be applied subsidiarily. This is the real reason for the constitutional decision, aside from the complementary allegations that are set forth in the decision regarding the specific circumstance that in this case the denial of the premise owing to the lack of accreditation of the existence and scope of foreign law, whose application was not even invoked**,** but rather such adverse effects should fall on the party who invoked the applicability, the respondent employer. Nonetheless, as has been said, the problem was not resolved by the Constitutional Court by applying the principles of the burden of proof and how it affects the claim**,** but rather that the violation of the right to effective judicial protection is found as the Labour Division of the Superior Court of Justice did not compensate the lack of proof of foreign Law with Spanish Law to resolve the conflict". That is, the Supreme Court maintains that in the event it is understood that an employer-employee relationship is governed by foreign Law whose content is not accredited in the proceedings, the decision of the court shall be taken in application of Spanish law, regardless of who bore the burden of proof of such foreign Law. (…)."

* Decision by the Superior Court of Justice of the Community of Madrid, Labour Division, 6th Section, of 24 April 2006 (AS 2006\1902).

Individual employment contract. Applicable law. Regulations. Proof of foreign Law.

"Legal Grounds.

First. There was express agreement in the contract that the jurisdiction for its interpretation and compliance would be the courts in Bonn, as well as the fact that the Law applicable to the contract would be German Law.

As this Court has stated in its Decision of 15–04–99 (AS 1999\1075), the attribution of jurisdiction to the Spanish courts is not at the disposal of the parties, but subject to the application of the regulation contained in Title I of Book I of the Law on Judicial Procedure (RCL 1985\1578 y 2635) on the extent and limits of jurisdiction.

Specifically, Article 25 of said Organic Law provides: "In labour matters, Spanish Courts shall be competent: 1) In regard to rights and obligations under labour contracts, when the services are rendered in Spain…". As stated in the Supreme Court doctrine cited in the Fifth Foundation of Law of the decision subject to appeal, Articles 3.3 y 6.2 of the Rome Convention (RCL 1993\2205 and 2400) do not abolish Articles 21 and 25 of the Law on Judicial Procedure nor do they allow a clause of express submission to foreign courts.

The Brussels Convention of 1968 (RCL 1991\217, 1151) establishes in its Article 5.12 that persons whose domicile is in a contracting State may be sued in another contracting state, therefore the German employer can be sued in Spain, which is also the place where the complainant customarily performs his/her work. This is set forth in Community Regulation 44/01 of 22 December of 2000 (European Community Legislation 2001\84) (…).

It must be understood, therefore, that the Spanish State has jurisdiction to try this case (…).

Second (…) the appellant denounces an infringement of Articles 10.6 and 12.6 of the Civil Code (LEG 1889\27), in relation to Article 6 of the Rome Convention of 1980 (RCL 1993\2205 and 2400), alleging that German Law should be applied because that was what was agreed in the document regulating the employer-employee relationship between the parties. (…).

(…) This position cannot be favourably decided because whosoever alleges the application of foreign Law must accredit its content, as reasoned by the original judge; and furthermore, Article 10.6 of the Civil Code sets forth that the obligations derived from an employment contract are subject to the application of the Law of the place where the services are rendered, as a general rule and in the absence of any express submission of the parties, and that any such submission must be fully validated.

Specifically, the employer alleging the application of German Law did not accredit the content of same. It is not the complainant who must accredit the content of foreign Law, whose application he/she at no time calls for, but rather it is the obligation of the employer to do so, since Article 281.2 of the Law on Civil Procedure provides that foreign Law must be proven in respect of its

content and validity, and that this should be done by the party calling for its application, not the other party."

* Decision of the Provincial Court of the Balearic Islands, 1st Section, of 27 April 2006 (JUR 2006\166783).

Non-contractual obligations. Traffic accident. Applicable German Law. Proof of German Law. Non-application.

"Legal Grounds.

First. – The first point of discrepancy in the appeal now being judged, and at the request of same, is the application of German Law to non-contractual civil liability derived from the punishable fact addressed by the summary trial in question, by application of Article 4 paragraph a) of the Hague Convention on the Law Applicable to Traffic Accidents, of 4 May 1971 and ratified by Spain by Instrument dated 21 August 1986, published in the Official State Gazette on 4 November 1987.

(…) German Law is not applicable to calculating the compensation for the injured party who was riding on the German registered motorcycle driven by the convicted party, since Ms. Lourdes is a resident of Spain, specifically of the municipality of Marratxí, and holds a residence card as a Community resident in Spain.

(…) the foreign Law whose application is sought must be proven as regards its content and validity (Article 281.2 of the Law on Civil Procedure) because logically the Spanish Courts do not have automatic knowledge of it. The burden of proof therefore lies on the appellant to provide the judge with a certificate issued by a German diplomatic authority accrediting the applicable law in force in said State in that case, together with a translation thereof. None of this was offered by the appellant, who in her appeal merely set forth succinctly the compensation criteria under German Law, but did not cite or prove applicable German law, nor did she present the amount that the injured passenger would receive under German Law."

VII. NATIONALITY

* Decision by the National Court, Administrative-Contentious Division, 3rd Section, of 23 February 2006 (JUR 2006\118995).

Spanish citizenship. Acquisition. Child of Spanish national. Doubt regarding paternity.

"Legal Grounds.

…Second: (…) recognition of Spanish citizenship is not discretional, but mandatory when the legal requirements are met.

Third. – The claimant was born in Sierra Leone on 12–20–1978 and requested Spanish citizenship on 3–23–2001. It is of note that the applicant had applied for the "T.F.R.C." on 1–18–2000, that was granted on 4–7–2000, and valid until 1–17–2005. In the record of appearance before the Judge in Charge of the

Civil Registry on 4–5–2001 as provided under Article 221 of the Regulation on the Civil Registry, the following was recorded: "it is found that the applicant is perfectly adapted to the way of life and customs of Spain in general and of Galicia in particular, and speaks both Spanish and Galician, which corresponds to the autonomous community in which he currently resides." Furthermore, the alleged father of the claimant in this case – Mr. Imanol – obtained Spanish citizenship by resolution of 2–23–1994, whereby, as we can see above, the denial of Spanish citizenship to the claimant in this case was based on the absence of sufficient proof of being the descendent of the same, which prevented application of the shorter, one-year residence requirement available for those who did not exercise the possibility of choice in due time, which include those to are or have been subject to the *patria potestas* of a Spanish national.

The main claim presents different arguments to refute that of the *ratio decidendi* of the contested acts, while, and apart from the other legal motives the claimant sets forth, what is truly decisive is the result of the biological evidence from the paternity investigation provided by such party, which was ratified by the court, that shows "a probability of paternity of 99.99999%, which corresponds to virtually proven paternity." (…)."

* Decision by the National Court, Administrative-Contentious Division, 3rd Section, of 7 April 2006 (EDJ 2006/55646)

Spanish citizenship through residence. Good civic conduct. Concept. Irrelevance of criminal record for actions in distant past.

"Legal Grounds:

…Third. – As regards the assessment of good civic conduct as a prerequisite for recognition of Spanish citizenship, our Supreme Court has set forth reiterated doctrine that we can summarize as follows:

a) The granting of Spanish citizenship owing to residency is one of the fullest manifestations of the sovereignty of the State. It involves granting a status that carries with it a series of rights and obligations and is dependent upon the applicant having met certain requirements. These requirements include, under Article 22 of the Civil Code accreditation by the applicant of positive observance of good civic conduct (Supreme Court Decisions of 13 and 20 April, 9 and 23 September, 6 November and 25 December 2004, and 11 October and 25 September 2005).
b) For recognition of good civic conduct, it is not sufficient to show the lack of a public record of activities subject to criminal or administrative sanction that would imply "per se" poor conduct. What is required under Article 22 of the Civil Code is for the applicant to positively justify that his/her conduct during his/her time of residence in Spain, and even prior to such time, has been in conformity with the rules of civic co-existence, not only through not having engagied in what is prohibited by criminal or administrative law, but also by complying reasonably with civic duties. Therefore, non-existence of criminal record is not sufficient proof to consider good civic conduct to be

proven, as established by Constitutional Court Decision 114/87 (Supreme Court Decisions 13, 20, 22 and 23 April, 8 and 15 July, 9 and 23 September, 11 October, 6 November and 25 December 2004, and 11 October and 25 September 2005).

c) Therefore, the legally indeterminate concept of good civic conduct as referred to in Article 22.4 of the Civil Code has nothing to do with the lack of a criminal record, since good civic conduct, in addition to a sufficient degree of integration into Spanish society (Article 22.4 of the Civil Code), is an additional requirement over and above the conduct of not transgressing criminal or administrative rules giving rise to sanction, as is imposed by law owing to the exceptional nature of recognition of citizenship on the basis of residence. It therefore involves aspects that go beyond the criminal sphere and cannot be identified with the mere absence of a criminal or police record (Supreme Court Decisions of 6 March 1999, 23 April, 8 November and 15 December 2004, and 28 September and 11 October 2005).

d) "Good civic conduct "consists of a particular finding of public interest in conformance with certain criteria, mostly political in nature, that are set forth explicitly or implicitly by the legislator, and can be demanded of the applicant for citizenship as a result of the "extra" quality of the granting of same, within a framework of "acts favourable to administrated subjects", behaviour or conduct that not even indicatively could bring the concept of goodness that the provision safeguards into question, as a specific and determinant requirement for granting Spanish citizenship (Supreme Court Sentences 13, 20, 22 and 23 April, 9 and 23 September, 6 November and 25 December 2004, and 11 October and 25 September 2005).

e) Changes in value judgments – that are inevitable in that they are intrinsically natural – introduce a factor of difficulty for the Judge who has to define what should be considered as being good civic conduct at a specific time in history. It is therefore important to make it clear that the phrase used in Article 22.4 of the Civil Code refers to an average standard of conduct as shown by any culture or any individual; a standard that applies to each and every one. With the understanding that it is not a question of trying to impose a uniform lifestyle in the national community, nor that whosoever uses this means to acquire citizenship has to prove having observed irreproachable conduct through his/her entire lifetime, it is, however, a proclamation that each human subject is free to organise his/her life as he/she so pleases – we are given life, but our life is not a given: we have to make it ours –, such persons who are not Spanish citizens and who aspire to obtain Spanish citizenship, must have lived and continue to live a life in line with the average standard of conduct to which we have just referred (Supreme Court Decisions of 12 November 2002, 22 April and 15 November 2004, and 20 September 2005).

f) When the Civil Code refers the interpreter to good civic conduct as a parameter for resolving whether or not to grant Spanish citizenship to an alien by reason of residence, it puts the burden on the applicant to prove

that he/she has observed such conduct, while at the same time imposing on the Judge the duty of determining whether, in view of the evidence the applicant is required to provide, there is sufficient reason to find that he/she has been observing good civic conduct, the absence of which is an obstacle that would prevent the granting of citizenship (Supreme Court Decision of 15 December 2004). Ultimately, the burden of proof of good civic conduct is on the applicant for citizenship (Supreme Court Decision of 8 November 2004).

g) The indeterminate legal concept of "good civic conduct" should be assessed by the Administration or, if appropriate, the jurisdictional body hearing the case in contentious appeal, as a requirement for granting Spanish citizenship, which should be determined by review of the personal background of the applicant for citizenship, considered as a whole and in no way in relation to a set period of time (Supreme Court Decisions of 16 March 1999, and 22 April, 8 and 30 November 2004), by evaluating the applicant's conduct during a long period of presence in Spain (Supreme Court Decisions of 6 March 1999, 23 and 23 April, 8 November and 15 December 2004, and 28 September and 11 October 2005).

h) Violation of the presumption of innocence principle cannot be claimed if Spanish citizenship is denied owing to lack of good civic conduct, since the Constitutional Court has set forth, generally, in Decision 76/1990, and ratified in Decision 14/1997, among many others, that "there can be no doubt that the presumption of innocence is in force without exception in the system of sanctions and must be respected when imposing any sanction", and as stated in the Supreme Court Decision of 12 November 2002, in the case of denial of Spanish citizenship "it is clear that we are not dealing with a sanction here "but rather a "denial that corresponds to…the fact that one of the requirements demanded by law, good civic conduct, is not present" (Supreme Court Decision of 23 April 2004).

i) It is necessary to distinguish granting of citizenship from cases in which the recognition of a subjective right is sought, since the granting of citizenship is an area of manifestation of State sovereignty, and quite different from the mere recognition of a right (Supreme Court Decisions of 16 March 1999, 30 November 2000 and 22 April 2004).

Fourth. – On the basis of what is set forth in the preceding legal grounds, and taking into account the special circumstances in the case under judgment, we must conclude that the appellant showed good civic conduct during his/her presence in Spain.

(…)

Regarding the circumstances described that determine the integration and good civic conduct of the appellant during his presence in Spain, the only negative information on his conduct is the decision issued by Criminal Court No. 7 of Madrid, dated 22 November 1993, which found him guilty of resisting arrest and three misdemeanours of recklessness leading to injury, for which the applicant was sentenced to one month and one day of imprisonment, accessory penalties,

and a fine of 100,000 pesetas, with the alternatives of sixteen days' imprisonment in the event of non-payment, and to a sentence of five days' imprisonment for each of the three misdemeanours.

(...)

Obviously, the facts referred to above cannot be considered as determining good civic conduct, but it should not be overlooked that they occurred a long time prior to the application for citizenship and, except for the incident referred to, the appellant has shown good conduct during the rest of his time of residence in Spain. We therefore consider that he complies with the premise of good civic conduct for the purposes of granting Spanish citizenship.

And, as the absence of good civic conduct is the only basis on which the Administration has denied the appellant Spanish citizenship, it is in order to accept this appeal and grant the Spanish citizenship requested."

* National Court Decision, Administrative-Contentious Division, 3rd Section, of 10 May 2006 (EDJ 2006/111136)

Term of residency needed to obtain Spanish citizenship. Stateless persons. Reduction to five years.

"Legal Grounds:

...Fifth. The Convention relating to the Status of Stateless Persons, signed in New York on 28 September 1954, to which Spain acceded on 24 April 1997, states in its Art. 32 that "Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons." This international convention was created under the Universal Declaration of Human Rights of 10 December 1948 and in consideration of the fact that the Convention Relating to the Status of Refugees of 28 July 1951 (Geneva Convention of 1951) only covered stateless persons who were also refugees, as stated in the Preamble of the Convention on Stateless Persons whose provision regarding assimilation and integration as set forth above is identical to that of Art. 32 of the Geneva Convention. For the international legislator, this means that the treatment to be dispensed to refugees and stateless persons is similar in everything relating to their "assimilation and naturalization," as shown clearly in the structure and content of the two Conventions.

Despite being in force in Spain since 10 August 1997, no internal regulations were issued on the matter until Royal Decree 865/2001, of 20 July, which approved the Regulation recognising the status of stateless person, and which, like Organic Law 4/2000, of 11 January, on the Rights and freedoms of aliens in Spain, does not contain provisions on assimilation and integration *per se* but rather sets forth others, such as those regarding the residence permit with which they can be documented (Art. 34 of Organic Law 4/2000) or their registry in the Central Alien Register (Art. 17 of the Regulation on Stateless Persons). However, regarding the matter at hand, Art. 34 of the Law deals jointly with the residence of stateless and undocumented persons and refugees, to whom it provides the documentation set forth in Art. 27 of the New York Convention, written in identical terms as the Geneva Convention on Refugees. Furthermore,

consideration of the national Regulations shows the similarity of the two statuses that can be granted the applicant after following the procedure set forth by Royal Decree 203/1995, of 10 February, for refugees, and in Royal Decree 865/2001, of 20 July, for stateless persons, the contents of both being very similar (Chapter IV of the Regulation on Asylum, Arts. 32 and successive, and III of the Regulation on Stateless Persons, Arts. 12 and successive) and having in both cases the same goal of integration. In addition, the same body (Office of Asylum and Refugee Status, *Oficina de Asilo y Refugio*), is in charge of processing the applications (Arts. 3a) and i) of Royal Decree 203/1995).

The above considerations allow for the interpretation whereby, when Art. 21 of the Civil Code reduces the residency requirement for obtaining Spanish citizenship by half for those having been granted refugee states, stateless persons can be included therein, as this is provided for both under International Conventions and Spanish Law because their are similar situations and, above all, seek the integration and assimilation of the persons involved."

* Supreme Court Decision, Division 3, 6th Section, of 5 July 2006 (EDJ 2006/103039)

Good civic conduct. Non-existence. Denial of application for Spanish citizenship based on residency.

"Legal Grounds:

…Second. – This appeal is based on the first and only ground for cassation where, based on the provisions of Article 88.1.d) of the Law on Jurisdiction, violation is charged of Article 22 of the Civil Code is made, affirming that there is a lack of proof of the grounds for not granting the appeal and these are based on suspicion and doubt. It affirms thereby that there is a presumption that the marriage is civilly illegal, which violates effective judicial protection and causes lack of defence, and even if the marriage was flawed by civil nullity, neither the spouses nor the Public Prosecutor's Office, *ex officio* or at the request of a party, sought a declaration of nullity of the marriage, whereby having exceeded the four-year deadline for exercising the nullity action under Article 1301 of the Civil Code such action was expired, counting from the discharge decision of the Supreme Court of 9 July 1997. The appeal cannot be accepted since the 16 March 1999 Decision by this Court found that to grant citizenship based on residency it is necessary to show good civic conduct in the file regulated by the law on Civil Registry, in addition to a sufficient degree of integration in the Spanish society, an additional requirement over and above mere observance of conduct that does not break any criminal or administrative laws or sanctions, which is imposed by law due to the exceptional nature of the granting of citizenship based on residency and involves aspects that transcend the penal sphere and must be evaluated by taking into account the applicant's conduct during his/her time of residence in Spain, which cannot be identified as being the mere absence of a criminal or police record. This is due to the fact, as we stated in our Decision of 15 December 2004, that Spanish citizenship is the substrate and base required for full exercise of political rights and an applicant can be

required, as a result of the added factor involved in the granting of citizenship, in the context of acts that favour the administrated subject, to present behaviour or conduct that from not even an indirect point of view would bring into question the issue of good conduct that the provisions safeguard as a prerequisite for the granting of Spanish citizenship, since the granting of same in no way should be considered an individual right, since, as we have said, the granting of the status as a citizen constitutes one of the fullest manifestations of the sovereignty of a State. It is not in vain, therefore, that citizenship is the basis of a series of rights and obligations and in any case can be denied for reasons of public or national interest.

To judge the conduct of the appellant, taking into consideration the decision by the court to deny the administrative-contentious appeal, it is necessary to start with the fact that, under the Decision by the Second Chamber of this Court of 9 July 1997, the marriage was entered into for the sole purpose of serving as a means to obtain Spanish citizenship or a Spanish residence permit. That is why the appellant, after entering into the marriage, returned to Las Palmas without having cohabitating then or later, since as stated, the purpose of both, and this is what the abovementioned civil servant also knew, was only for them to be recorded as being married, without engaging in any of the effects of said marital status. Their acts thereby acknowledged the fiction and expressed a desire for the marriage to be annulled.

The decision acquits the appellant from the criminal sphere in accordance with the considerations contained in the fifth legal ground of same, stating that marriages of convenience do not give rise to any falsehood for either the celebrant or the contracting parties, even if one or the other are aware and allow the particularities of the agreement, interest or advantage that is sought through such a marriage. It may be a civil illegality with civil and marital consequences, but such conduct can never be a crime in the context of the Penal Code.

In the light of Court jurisprudence, the considerations expressed make it necessary to confirm the denial of Spanish citizenship based on residence of the appellant, because good civil conduct does not reconcile with participating as a contracting party in a marriage for the sole purpose of obtaining citizenship, and when such purpose is stated to be a proven fact by criminal court decision, together with the absence of cohabitation, which necessarily has consequences in the administrative sphere in judging the good civic conduct requirement that must be justified and provided by the applicant for citizenship and cannot be alleged by anyone who, exceeding the normal standards of social conduct adapted thereto, has tried to violate Spanish law by entering into a marriage of convenience for precisely the purpose of obtaining citizenship."

* Supreme Court Decision, Division 3, 6th Section, of 7 September 2006 (EDJ 2006/269994)

Continued residency. Spanish citizenship based on residency.

"Legal Grounds:

…Third. – Acceptance of this first motive makes it necessary to rule on the substance of the issue discussed in the terms as set forth in the discussion,

which exempts us from examining the other motives for appeal set forth and which is none other than determining whether the appellant complied with the continued legal residency requirement to acquire Spanish citizenship.

Article 22 of the Civil Code sets forth that for Spanish citizenship to be granted based on residency, such residency has to have lasted ten years, with five years being sufficient for those who have obtained asylum or refugee status and two years in the case of national of Ibero-American countries, Andorra, the Philippines, Equatorial Guinea or Sephardim, whereby paragraph number 3 of this provision sets forth that in all cases residency must be legal, continued and immediately prior to the application for citizenship.

Ms. Almudena married Spanish citizen Mr. Juan Alberto on 22 September 1988. Following the marriage she obtained two EU family member residence cards valid from 5 June 1989 to 4 June 1994 and from 12 July 1994 to 11 July 1999. On 3 March 1990 the couple's Spanish national daughter was born with an 86% discapacity. She has always lived with her mother, the appellant in this case, as shown in the certificate issued by the Statistics Section of the city government of Alcalá de Henares.

On 23 July 1998, she (Ms. Almudena) was legally separated from husband Mr. Juan Alberto by firm court decision, and given custody of the child. The application for Spanish citizenship was made on 11 February 1999. In denying her Spanish citizenship, and as confirmed by the appealed decision, the Ministry of Justice considered that since the family circumstances changed on 23 July 1998 owing to the separation decree, the appellant was no longer covered under the scope of application of Royal Decree 766/1992, and should have informed the authorities thereof, in order for a new permit to be issued to correspond to the new situation. Because she did not do so, the Court concluded that her status as from the date of the firm separation decree could not be alleged as being legal residence, and that she therefore was not in compliance with the requirements under Art. 22.3 of the Civil Code, for being granted Spanish citizenship.

Nonetheless, such arguments cannot be accepted. Both the original Court and the Administration recognise that the appellant was the holder of a valid EU family member residence permit under Royal Decree 766/1992, of 26 June, that was also valid when the appealed administrative decision was issued. Said Royal Decree, that regulates the entry and stay in Spain of nationals of the Member States of the European Union and of other States Parties to the European Economic Space, in setting forth its scope of application in its Article 2, refers in paragraph a) to spouses of Spanish nationals provided they are not separated *de facto* or *de jure*, and also in paragraph c) to parents of Spanish citizens, albeit requiring that they live at their expense. It is true that Ms. Andrea (sic) is the mother of a Spanish citizen who is a legal minor affected by a very severe incapacity that keeps her from being able to move about on her own, who has been granted certain benefits under current legislation has to live with her mother, who is the person who has been granted her legal custody.

Therefore, the appellant continued under the scope of Article 2 of Royal Decree 766/1992 and with the coverage of the EU family member residence card granted her and valid until 11 July 1999, whereby she did not need to

report her separation, since she continued to be within the scope of Article 2 of said Royal Decree.

It is also necessary to add to what has already been set forth, and fundamental for the purpose of determining whether the appellant complied with the continued legal residence requirement for acquiring Spanish citizenship, that on 5 July 1999, before the expiration of the EU family member residence card, she applied for a work/residence permit, and both were granted on 17 November 2000. The resolution granting this permit stated that the terms set forth in Arts. 94, 96, 56 and 57 of the Regulation on Aliens were complied with, adding expressly that on that date "there is no cause for prohibition or deportation from national territory."

It is clear from the pronouncement by the Administration in these terms, that said Administration is accepting that Ms. Almudena had legal status in Spain, since if that were not the case deportation would have been in order, which the Administration itself rejected on 17 November 2000 by granting the work/residence permits requested, and it is therefore not in order that the same Administration in a resolution prior to 13 June 2000, should deny her Spanish citizenship based on the lack of continued legal residence after the date of the legal separation.

It must therefore be concluded that the appellant does comply with the continued legal residence requirement required by Art. 22 of the Civil Code, and it is therefore in order to grant her Spanish citizenship."

* Supreme Court Decision, Division 3, 6th Section, of 13 September 2006 (EDJ 2006/278485)

Good civic conduct. Evaluation for purposes of granting Spanish citizenship based on residence.

"Legal Grounds:

…Third. – We have repeatedly stated (*inter alia*, in a Decision on 23 September 2004 and 8 February 2006) that it is not enough for there to be no public record of penally or administratively sanctioned activities involving poor conduct, "*per se*," since it is necessary to positively justify that the conduct of the applicant for citizenship was in accordance to civic rules of conduct, just as the lack of a criminal record is not sufficient to justify such good conduct, as set forth in Constitutional Court Decision 141/1987.

The application of this jurisprudence to this specific case requires consideration of the particular concurring circumstances that arise in this case from the fact that the denial of the citizenship was based on the existence of criminal proceedings that were later dismissed, without any punishment of the appellant, along with the fact that in the appearance before the Judge in charge of the Civil Register, said Judge found that his being "sufficiently integrated into Spanish society and fluent in Spanish justifies good civic conduct," having accredited a job, which undoubtedly was a key factor in the renewal of the residence permit later granted by the administrative authority, and having been

married in Spain to a person, also of Indian origin, to whom the Ministry of Justice granted Spanish citizenship.

In conclusion, therefore, the judicial proceedings that were dismissed lack any relevance in accrediting the good civic conduct requirement and have not been considered in the subsequent renewal of the residence permit by the administrative authority. This, together with the firm statements made by the Judge in charge of the Civil Register, which can literally be taken as a justification of good civic conduct and must be taken into account, mean that, in counter to what was resolved by the original Court, it must be recognised that the appellant has justified in reasonably sufficient terms the existence of good civic conduct and that makes her worthy of being granted Spanish citizenship, the original Court having infringed the principles as charged by the appellant, which determines the acceptance of this appeal, by resolving on the substance of the matter subject to discussion, and that the granting of Spanish citizenship to the appellant is in order."

* National Court Decision, Administrative-Contentious Division, 3rd Section, of 14 September 2006 (JUR 2006\245537)

Spanish citizenship. Acquisition on the basis of residence. Denial. Level of integration in the Spanish society. Family situation not corresponding to a monogamous structure.

"Legal Grounds

2. – [...] as has already been set forth in prior decisions, in our country, the legal structure of marriage, and the one that sociologically represents the majority, is monogamy and it must not be overlooked that the fact of having a number of wives (polygyny) or a number of husbands (polyandry) at the same time is a relevant fact in determining the degree of adaptation to or integration into Spanish society without there being any negative connotation made regarding the morality or religious principles under which this custom is accepted in other geographical and cultural contexts. Therefore, there cannot be considered to be any factor of discrimination present in denying citizenship to persons who engage in these practices, but rather that consideration of this factor is simply a matter of taking into account the legal requirement of adaptation to Spanish customs as the evidence of integration as required by Article 22–4 of the Civil Code.

[...] In this extreme of marriage ties there must be full clarity in order find that the appellant accepts Spanish customs as regards the structure of family relations, something that is not present in the case at hand.

It is therefore concluded that such integration is not sufficiently consolidated to be able to consider that the requirement is legally met. This all leads to the conclusion that the Administration has performed a well thought-out and balanced evaluation of the circumstances present in this case to deny Spanish citizenship, whereby the appealed decision must be confirmed and this contentious appeal denied."

* Decision by the National Court, Administrative Contentious Division, 3rd Section, of 25 October 2006 (EDJ 2006/302320)

Insufficient integration in the Spanish society. Denial of application for Spanish citizenship based on residence.

"Legal Grounds:

...Third. – In this case, as seen from the case file, the application was turned down because a sufficient degree of integration into the Spanish society was not justified, through the finding that "she does not sufficiently know the Spanish language."

As set forth in prior legal grounds, the appellant has resided in Melilla since 1986 and despite that continues to have difficulties in expressing herself in our language, which she neither knows how to read or write, since in her family they continue to speak "Cherja."

On this matter, this Court has repeatedly stated (including decisions of 9 December 2005, rec. 985/2004, 25 May 2006, rec. 627/2004, *inter alia*) that knowledge of the official language, configured as an obligation for all Spanish nationals under Art. 3.1 of the Constitution, is an element of prime importance in determining the degree of integration and adaptation to the Spanish culture and way of life as required by Art. 2.4 of the Civil Code and must be shown by the applicant through any means of proof, as this knowledge is required under Art. 220 of the Regulation implementing the Law on the Civil Register, which sets forth that the application must specifically set forth: "5. whether he/she speaks Castilian or any other Spanish language; any circumstance of adaptation to the Spanish culture and way of life, such as schooling, charity or social activities and others that are considered appropriate "and in Art. 221 of the same text it states that compliance with such requirements can be accredited by any legally admissible means of proof, the last paragraph emphasizing the importance of the hearing before the Chief of the Register"...especially for determining the degree of adaptation to the Spanish culture and way of life." So, knowledge of the language is a preferential means of finding the existence of real integration into the Spanish society that does not seem to be achieved satisfactorily by someone who is unable to communicate in the common mandatory language, and this further would bring to light a desire on the part of whosoever seeks to acquire citizenship to seek the best way to achieve such integration, since it is not inferred through a relatively lengthy residence in Spain, but rather whether during that time the attitude of the resident has truly aimed at becoming part of the society in which he/she is living his/her life, which can hardly be achieved if one does not know the means of expression used by the members of such society.

Furthermore, it must be pointed out that social integration is not derived exclusively from knowledge of the language, but rather from the harmonisation of the applicant's lifestyle with the principles and social values which to a large extent are reflected in the Constitution, the degree of involvement in economic, social and cultural relations, as well as family rootedness, all of which must be proven by the applicant or be obvious from the activities set forth in the case

file and in the case at hand, the reports and the interview carried out by the Chief of the Register show her lack of integration in the Spanish society and that she is "very tied to her country of origin" and lacks knowledge of basic aspects of our institutions. All of this shows, in the judgment of this Court, the lack of integration by the appellant in the Spanish society whose citizenship she seeks and it is not sufficient to have resided in our territory, but to show positive behaviours towards such integration which is not found in the case at hand."

* Decision by the Supreme Court, Administrative-Contentious Division, 6th Section, of 22 December 2006.

Granting of Spanish citizenship based on residence.

"Legal Grounds.

First. Through representation of Mr. Miguel Angel an appeal for cassation was entered against the Decision handed down on 28 May 2002 (PROV 2003\58391), by the Administrative-Contentious Section of the National Court (Section 3), which denied the Administrative-Contentious appeal entered against the Ministry of Justice Decision of 21 December 1999, denying Spanish citizenship based on residence through marriage to a Spanish national.

The original Court denied the appeal on the following grounds:

> "Third. Articles 21 and 22 of the Civil Code (LEG 1889\27) subject granting of Spanish citizenship based on residence to two types of requirements: one that is definite in nature such having submitted the appropriate application and having continued legal residence immediately prior to the application for the periods of ten years, five years, two years or one year, according to the cases as established, and other that are configured as legal, indeterminate concepts, either positive in nature, such as justification of good civic conduct and sufficient degree of integration into Spanish society, or negative, such as the case of reasons of public order or national interest which can justify denial.

The former pose nor problem as to their evidence, but the second, owing to their very nature as indeterminate legal concepts, require adequate specificity in each case whose evaluation must lead to a fair, jurisdictionally controllable evaluation that must be adopted by the Administration (Art. 103 of the Constitution), without fostering alternative solutions proper to administrative discretion.

This was set forth by the Decision of 24 April 1999 (RJ 1999\4597), citing many other Decisions such as those of 6–22–82 (RJ 1982\4829), 7–13–84 (RJ 1984\4673), 12–9–86 (RJ 1987\1023), 2–24, 5–18, 7–10 and 11–8 of 1993, 12–19–95, 1–2–96 (RJ 1996\252), 14–4, 5–12–? (RJ 1998\4958) and 12–21 1998 (RJ 1998\10312) and 4–24–99 (RJ 1999\4597), where, in its assessment of the indeterminate legal concepts, excludes Administration discretion, because the inclusion of an indeterminate legal concept in the rule to be applied does not mean that the Administration is given the ability to decide freely and waive a fair resolution of the case, without being obligated to a single correct decision in view of the accredited facts, adding that the recognition of Spanish citizenship

is not a discretional power but rather obligatory when the legally provided requirements are present. Therefore, the decision itself states that citizenship holds the real legal nature of the civil status of the person, whereby its acquisition through residence must not be confused with that which is done through naturalisation papers, since while this is a genuine right of clemency, in which the requirement of the application has a meaning of occasion or motive but is not the legal cause of same, acquisition of citizenship through residence cannot be granted or denied except when the legally provided circumstances concur, so it is therefore not a grant in the strictest sense, but rather a recognition that the required requirements are present.

In this case, it is clear that the requirement of marriage cohabitation was not duly accredited, since, although the documentation that is part of the proceedings shows that civil marriage was entered into on 25 January 1995 and the domicile was established at Street 000, no. 000 in Zaragoza, nonetheless, the Certificate of the "La Asunción" parish of Longares (page 27), provided by the now appellant, shows that on 7 July 1998, he had lived in town since 15 February 1990 and consistently received charity aid from the parish Caritas organization, which is a fact that contradicts the municipal certificate of residence dated 11 July 1996, on page 13 and another municipal registration document, accredited on 1 May 1996 (page 12); and the loss of cohabitation which, in any case ended on 25 February 1997, during the initial processing of this Claim. The lack of due accreditation of the circumstances of cohabitation lead to considering the appealed decision as totally pursuant to Law, whereby it is found that they should be maintained".

Second. Two motivations for the appeal are set forth by the appellant. The first is under Art. 88.1.d) of the Jurisdictional Law, alleging violation of Art. 22.2.d) of the Civil Code. The appellant alleges that he accredited before the Administration the concurrence of the conditions required for requesting Spanish citizenship and it was denied on the basis of a Police report that alluded to marital separation. It adds that the original Court, on the other hand, would have based its decision and the ensuing denial of citizenship not on the separation referred to by the police, but rather on the fact of not having accredited marital cohabitation, an assessment of the evidence that cannot be considered adequate, since it would have given priority to a private document, as is the certificate by the Parish of Longares, over a public document such as is the certificate issued by the City of Zaragoza, which, according to Art. 319 of the Law on Civil Procedure, would substantiate full proof.

In the second motive under Article 88.1d) of the Jurisdictional Law, it sustains in essence the same argumentation contained in the First motive of appeal, stating that the original Court unduly interpreted the very jurisprudence that it cited in its legal grounds.

Third. It is documentarily accredited by certificate of the Civil Register of Zaragoza that the appellant, Mr. Miguel Angel was married to Ms. Aurora, a Spanish national, on 25 January 1995, having presented his application for Spanish citizenship to the Ministry of Justice on 4 October 1996, accompanied

by a certificate from the Office of Municipal Registration dated 3 October 1996 referring solely to him, another certificate by the City Clerk of the City of Zaragoza, in which it sets forth that according to the reports held by said municipal office, the appellant has been in the company of his wife Ms. Aurora and his son since the date on which he was married, residing in the Zaragoza residence from 1991, that is, four years prior to being married. This is also stated by two witnesses before the Court of the Civil Register who state that the appellant resided in the City of Zaragoza in October, having lived previously in the town of Longares (Zaragoza). The appellant himself acknowledged having lived previously in Longares while working in the fields and that at the time of the application he was working in the "Mateados del Vidrio, S.L" company in Zaragoza, and provided certification accrediting to such fact from the Manager of said company. The appellant separated legally from his wife on 25 February 1997.

It is a matter, therefore, of determining whether on the date of the application for citizenship there was a *de facto* separation, also set forth in Article 22 d) of the Civil Code (LEG 1889\27) as an impediment to considering one year of marriage as having been complied with.

The original Court, despite the presumption of cohabitation set forth in Art. 69 of the Civil Code and the certificate by the City Clerk of Zaragoza, that did not just reflect the registry data but also included the residence at the same domicile of the appellant of the person who was then his wife and her son in the city of Zaragoza, bases the dismissal of the case on the fact that the cohabitation of the spouses was not accredited, a conclusion arrived at through the so-called certificate of the "La Asunción" Parish in Longares, in which it states that the now appellant lived in the town from 15 February 1990 and assiduously received aid from the parish Caritas organization, which, it states, contradicts the residence and registration certifications provided in the case file.

On this point it is necessary to underline two issues:

First, although it may be true, in counter to what the appellant maintains, that while the certificate issued by the Clerk of the City of Zaragoza, lacks status as a public document as it does not meet the requirements set forth in Article 317.5 of the Law on Civil Procedure as regards the residence of the spouses, since such an issue is completely outside the functions of a Clerk of a Local Administration, it is no less so than the so-called "certificate" by the Parish of Longares, which is even questionable as to whether it can be considered as private documentary evidence since it is the statement of a private individual at the behest of a party in the case and its content is closer to being that of an anticipatory testimony without the guarantees required under procedural law. It is also important to point out that in neither of the documents issued by the Clerk of Zaragoza or the Parish of Longares was any reference made to effective marital cohabitation nor to a hypothesis of *de facto* separation, and such were also not set forth as proven facts in the appealed decision. The municipal certificates refer to "residence in the domicile" and the document issued by the *La Asunción* Parish on page 27 of the case file, only refers to the fact that the appellant "is living in the town of Longares."

Furthermore, the documentation from the La Asunción Parish in Longares, without purporting to review the evaluation of the evidence made in the original court, is not limited to what appears as page 27 of the administrative case file alluded to by the original Court, but rather consists of two more pages, pages 28 and 29, and in this last page the Parish includes what it calls Mr. Miguel Angel's "personal immigrant file," where under his personal data, under the heading "entry control", it says that he arrived in Longares on 22 March 1990; in the "notes" section it states that he did not live in Longares but rather at Street 000 No. 001, No. 002 in Zaragoza, and it expressly says that he was married to the Spanish national Ms. Aurora, without any reference to any *de facto* or *de jure* separation.

In conclusion, it seems clear that the three pages issued by the La Asunción Parish in Longares, in addition to incurring in certain contradictions relating to the place of residence of the appellant, evidence of his immigrant origin and his rootedness in Spain, as well as the fact of receiving specific aid from the parish, located in a town near Zaragoza. It also expressly includes his marriage to a Spanish national and there is no reference to marital cohabitation or that the appellant were *de facto* separated from his wife at the time he applied for Spanish citizenship.

Secondly, it must not be overlooked that the legal concept of "cohabitation", "living together" as stated in Article 69 of the Civil Code (LEG 1889\27), by establishing the legal presumption of cohabitation in reference to marriage, it is not in any way equatable with common residence, whereby marital cohabitation can exist even when circumstantially the place of residence of the two spouses may not be the same and there may not exist cohabitation despite a common residence.

Also, the legal concept of "*de facto* separation" involves effective cessation of cohabitation and also cannot be equated with that of non-common "residence".

Having set forth the above and accepting, as is only natural, the assessment of the evidence by the Court, assessment which cannot be countered in cassation except over infringement of Art. 9.3 of the Constitution (RCL 1978\2836) of the laws on evaluating different means of proof, which is not involved here since we have stated that there is no public document and, therefore, this cannot involve infringement of Article 319 of the Law on Civil Procedure, considering that the certification by the City Clerk of Zaragoza is provided in regard to content and we must point out that the sole fact that the Court of instance considered proven could not be otherwise since it is only with this matter that the evidence has dealt, is that the appellant and his wife do not have the same residence, at the same time it is stated that the requirement of cohabitation has not been complied with. Therefore, the original Court stated that: "in this case the requirement of marital cohabitation is clearly not duly accredited, since while the documentation in the case file shows that civil marriage was entered into on 25 January 1995 and the domicile was fixed at STREET000 Number NUM000 in Zaragoza, however, by certificate signed by the Parish Priest of "La Asunción" de Longares (page 27), a document that was provided by the

now appellant, it turns out that on 7 July 1998 he had been living in the town since 15 February 1990 and regularly receive assistance from the parish Caritas organization, a factual circumstance that contradicts the municipal residence certificate dated 11 July 1996 on page 13 and the registration certification, accredited on 1 May 1996 (page 12); and the claimed cohabitation which, in any case terminated on 25 February 1997 during the initial processing of the case. The cohabitational circumstances are not duly accredited and this leads to the conclusion that the appealed decisions are completely pursuant to law and therefore should be maintained."

The above clearly shows that the Court of instance considers as proven that the now appellant lived in Longares and further states that the marital cohabitation of the appellant and his wife is not proven, but such affirmation is not equatable with a statement of having proof of non-cohabitation, as shown in the statement contained in the paragraph cited above in which it states "and the claimed cohabitation which, in any case, terminated on 25 February 1997," a date over four months after the application for citizenship.

The reasoning of the Court of instance that led it to dismissed the Administrative-Contentious appeal, equated the legal concepts of residence and cohabitation, leading to the conclusion that it was not possible to grant Spanish citizenship to the appellant under Article 22d) of the Civil Code (LEG 1889\27) owing to the sole circumstance that the spouses did not have the same place of residence, implies an infraction of the invoked Article 22d) of the Civil Code. What is necessary for such a denial is, in the case at hand, that the Administration subject to the appeal to have already approved the legal or *de facto* separation of the appellant, whereby both concepts are different in content from that of residence, which did not happen, as has also not been proven. The non-cohabitation of the appellant and his wife is accepted by the Court, since what the decision by the original Court states, as we have reiterated, is that the cohabitation was not proven. This does not require proof since it is considered presumed under Article 69 of the Civil Code; or the Court of instance having stated, on the basis of presumed evidence based on admitted or proven facts, that we are in the presence of a marriage of convenience, which is also not the case.

The fact that on 25 February 1997, four months and one day after the application for citizenship, there was legal separation of the spouses is irrelevant, since Article 22d) of the Civil Code provides that they are *dies a quo* in the calculation of the year referred to for the citizenship application, and at no time in the case at hand was it proven in the original decision, as we have stated before, nor was it alleged by the Administration, that this was a marriage of convenience and much less was any evidence gathered to accredit such a position nor a *de facto* separation. In the statements by the parish priest of Longares, on which the court decision is based, there is no reference, not even an indirect reference, to any hypothetical *de facto* separation.

For all of these reasons the two grounds for the appeal should be accepted.

Fourth. The acceptance of the two grounds for appeal require delving into the substance of the issue under discussion in the terms as posed, which are none other than those which determine whether the time requirement for the granting of Spanish citizenship is complied with as set forth in Art. 22.2.d) of the Civil Code (LEG 1889\27), and, since, as we have reasons, at the time of the application, en 4 October 1996, the now appellant was married to a Spanish national without being legally or *de facto* separated, whom he had married on 25 January 1995, and not have accredited that it was a marriage of convenience, the requisites set forth in said article are complied with and it is pursuant to law to grant the Spanish citizenship applied for by Mr. Miguel Ángel.

Fifth. The acceptance of the cassation appeal determines, in application of Art. 139 of the Jurisdictional Law (RCL 1998\1741), that there should be not special pronouncement regarding either the original Court costs nor those of this appeal.

VIII. ALIENS, REFUGEES AND EUROPEAN UNION MEMBER COUNTRY NATIONALS.

1. Aliens

a) General system

* Supreme Court Decision, Administrative-Contentious Division, 5th Section, of 7 April 2006 (EDJ 2006/48847)

Improper deportation, as the interested party was pending a decision on his residence permit

"Legal Grounds:

…Third. – (…) This means that three days before the sanction file was begun, the interested party had applied for a work/residence permit, and that on the date his deportation was ordered (7 September 2001) and even later (31 May 2002), this work/residency application was still pending resolution.

Therefore, there has been an infringement of Article E 53–a) of Organic Law 4/2000, amended by Law 8/2000, since the infraction set forth in this law is not incurred if a prior application for a work/residence permit is pending, as the aforementioned article itself states in speaking about renewals This is logical, since it would make no sense for the Administration to deport a person from national territory who had begun the regularisation process before the Administration itself has decided whether to grant the previously submitted application or not."

* Supreme Court Decision, Administrative-Contentious Division, 5th Section, of 18 July 2006 (Aranzadi Reference RJ 2006/6336)

Deportation of aliens from national territory. Prevalence of fine penalty over deportation.

"Legal Grounds:

…Fifth. – We also accept that, in accordance with subparagraph d) of Article 77.2 of said Regulation, the national employment situation should not be taken into account in the case of a position of confidence, but only in the cases covered by Article 18.3.i) of Organic Law 7/1985, which are those that legally represent a company and those who have been given a general power of attorney, and furthermore, in any case, it would be the Directorate General for Migrations that should specify the cases in which such exclusion is in order.

Domestic service, although it may legally constitute a special employment status in application of the provisions invoked in the appeal for cassation at hand, is not considered a position of confidence that would require excluding it from the national employment situation, as required by Article 77.2e) of the Regulation approved by Royal Decree 155/1996, of 2 February."

* Supreme Court Decision, Administrative-Contentious Division, 5th Section, of 26 September 2006 (RJ 2006/7693)

Aliens. Work permit. Uruguayan nationals. Legal system. General Treaty of Cooperation and Friendship between the Eastern Republic of Uruguay and the Kingdom of Spain, Article 14: Meaning, scope and effect.

"Legal Grounds.

First. The State Administration entered an appeal for to the Court of cassation in the interest of uniform application of the Law against the Decision of 28 October 2004 by the Third Section of the Administrative-Contentious Division of the Superior Court of Justice of the Valencian Community in Appeal no. 176/04, brought against the decision by Court no. 1 of Alicante on 29 December 2003 in Administrative-Contentious Appeal No. 120/03.

The Decision by the Administrative-Contentious Division, just like the Decision by the Court, issued on the occasion of judging a resolution by the Deputy Delegate of the Government in Alicante, of 17 December 2002, that denied a work permit requested by a Uruguayan national, reach the conclusion that the citizens of that nationality enjoy a legal status that enables them to imperatively (in the words of the Decision) obtain work and residence permits, or in a way similar to that of citizens of the States of the European Union (in the words of the Administrative-Contentious Court), without being subject to the provisions set forth in Organic Law 4/2000, of 11 January, on the Rights and Freedoms of Aliens in Spain and their Social Integration and its implementing regulations. Such conclusion arises from interpretation of the Treaty of Peace and Friendship between Spain and the Eastern Republic of Uruguay of 19 July 1870 (published in the Gazette of Madrid on 28 January 1883) and the subsequent General Treaty of Cooperation and Friendship between the Eastern Republic of Uruguay and the Kingdom of Spain of 23 July 1992 (published in the Official State Gazette on 2 June 1994).

Second. The Decision of 10 October 2002 by the Fourth Section of the Third Chamber of this Supreme Court, issued in appeal Nº 2806 of 1998 to the Court of cassation number, analysed the 1870 Treaty cited above and confirmed

the conclusion set forth in the appealed Decision that Uruguayan nationals were in the same situation as Spanish citizens in regard to obtaining work permits. The legal ground of said Decision that sets forth such doctrine of this Supreme Court is the second one, which reads:

> "In the single motive for cassation, the State Attorney, under subparagraph 4 of Article 95.1 of the Law on Jurisdiction, denounces infringement of Article 18.1.a) of Organic Law 7/1985 of 1 July, in relation to Article 37.4.a) of the Implementing Regulation of Organic Law 7/1985, approved by Royal Decree 1119/1986 of 26 May. It alleges in summary that the 1870 Agreement between Spain and Uruguay is different than those Spain's agreements with Chile and Peru of 24 May 1958 and 16 May 1959, since, it says, there is a remission to Spanish legislation, and when such legislation changes it can change the rights of the aliens covered by the Agreement.
>
> It goes on to reject the motive for the appeal to the court of cassation, since as was made clear in the appealed Decision, the terms of the 1870 Agreement between Spain and Uruguay are substantially the same as those expressed in the Agreements with Chile and Peru, and the difference pointed to by the State Attorney was not seen, owing to the fact that the former makes no reference at all to labour and Social Security law and remits to Spanish law, because, as the appealed party states, in 1870 there was no Spanish Social Security system, and therefore there could be no reference to same, and on the other hand, in both the Agreement with Uruguay and the Agreements with Chile and Peru, the same remission is made to Spanish legislation, as is proper be, since rights, regarding buying, selling, inheritances and engaging in activities must obviously be subject to the provisions of the Law in force where such activities are carried out. This does not mean, however, that the right to obtain a work or residence permit is excluded from the terms of the Agreement, as concluded by this Court, for the Agreements with Chile and Peru, with similar texts, the decisions of 22 December 1995, containing doctrine from the prior decision of 21 May 1990, 23 February 1991 and 25 February 1992, and along with the decision of 15 September 1998, that states that the remission to Spanish legislation affects the exercise of activity, but not the right to work in Spain, which is broadly and sufficiently set forth in the Agreements with Chile and Peru and also in similar terms by the Agreement with Uruguay, as found in his (sic) its own handwriting and as adequately expressed in the appealed decision."

The first paragraph of Article VIII of the 1870 Treaty, provides that "Spanish subjects in the Eastern Republic of Uruguay and the citizens of the Republic in Spain may freely exercise their trades and holdings [...] under the laws of the land, in the same terms and under the same conditions and charges as those used or to be used by those pertaining to the most favoured nation".

However, the Decision did not analyse how such doctrine affected the previous Treaty of 23 July 1992, which is the reason why this issue needed to be dealt with in this appeal to the court of cassation in the interest of a uniform application of the law, and we therefore reject the allegation by the Public

Prosecutor in the sense that the appeal is lacking in purpose since doctrine was already set forth on this issue.

Third. The 1992 Treaty contains two articles that need to be taken into consideration.

The first, is Article 18, in its first paragraph, which sets forth:

> "Notwithstanding the provisions established in this Treaty, the Parties agree, providing it is not incompatible with same, to maintain the agreements previously entered into that are in force."

And the second is Article 14, as follows:

> "Subject to its legislation and in accordance with International Law, each Party shall grant the other party's nationals facilities to be able to carry out profitable, employment and professional activities on their own account or as employees, on equal footing with the nationals of the State of residence or work as necessary for the exercise of said activities. The issuing of work permits as employees shall be free of charge.
>
> The respective authorities shall ensure the effective enjoyment of the above mentioned facilities subject to the criteria of reciprocity."

It is a matter, therefore, of finding whether the first paragraph of Article VIII of the 1870 Treaty referred to above is incompatible or not with Article 14 of the 1992 Treaty.

Fourth. We find the answer to be affirmative, that there is incompatibility between one provision and the other, and the second replaces the first regarding the system for gainful, employment or professional activities whether self-employed or as an employee. This is because the two provisions regulate the same matter, but do so in terms whose legal meaning is not the same. The commitment of the signatories of the Treaty is not that their nationals may freely exercise their occupational trades in the other's country under the same terms and conditions as the citizens of the most favoured nation, but merely that they receive the facilities necessary to be able to engage in such activities on equal footing with the nationals of the State of residence or work, subject to its legislation. Now it is a matter of the facilities to be able to engage in activities and not the right to engage in activities which is agreed under the Treaty. The equal standing is in the former and not the latter.

As a result, and notwithstanding the facilities that must be granted under Article 14 of the Treat, whose specification is the purpose of the appeal we are now resolving, Uruguayan nationals do not stop being subject to the system established in Organic Law 4/2000 and its implementing rules, nor are they exempt from the application, therefore, of the rule contained in Article 38.1 of same, according to which: for the initial work permit as an employee to be granted, the national employment situation must be taken into account.

Furthermore, it does not follow from said Article 14, or from Art. VIII of the 1870 Treaty, that Uruguayan nationals are equated with citizens of European Union Member States as regards residence and work permits, since these

States are not most favoured nations, but rather States governed by common regulations.

It is therefore in order to accept this appeal to the Court of in the interest of a uniform application of the law, and to set forth the legal doctrine as stated in the preceding paragraphs.

On the basis of the above, on behalf of His Majesty the King, and in exercise of the power emanating from the Spanish people, as conferred upon us by the Constitution,

WE HEREBY RULE. WE ACCEPT the appeal to the Court of cassation in the interest of a uniform application of the law entered by the legal representation of the Administration of the State against the Decision dated 28 October 2004 by the Third Section of the Administrative-Contentious Court of the Superior Court of Justice of the Valencian Community of Appeal number 176 of 2004. and we set forth as legal doctrine the following:

> Notwithstanding the facilities that are to be granted, derived from the provision of Article 14 of the General Treaty on Cooperation and Friendship between the Eastern Republic of Uruguay and the Kingdom of Spain, signed on 23 July 1992, Uruguayan nationals are not equal to the citizens of the Member States of the European Union in regard to regulation of the right to residence and work on Spain, nor do they cease to be subject to the system established by Organic Law 4/2000, of 11 January (RCL 2000\72, 209), on the Rights and Freedoms of Aliens in Spain and their Social Integration, and in its implementing regulations, and the provision contained in Article 38.1 of said Law is applicable to them, according to which: in order to be granted the initial work permit, in the case of employees, the national employment situation must be taken into account."

* Supreme Court Decision, Administrative-Contentious Division, 5th Section, of 29 September 2006 (Aranzadi Reference RJ 2006/6461)

Deportation of aliens from national territory. Prevalence of fine over deportation.

"Legal Grounds:

...Sixth. – (...) In conclusion, the appellant, alleges that the sanction of deportation is disproportionate owing to a fine being the sanction general provided for the infraction found, according to Articles 55 and 57 of Organic Law 8/2000.

This motive must be accepted.

Under Organic Law 7/85, of 1 July, deportation from national territory was not considered a sanction, and this is inferred from a joint interpretation of its Articles 26 and 27, which establish a fine as the sanction for the infractions set forth in the Law and order that infractions that give rise to deportation may not be subject to pecuniary sanctions. It is therefore clear in that law that the cases in which a fine is levied there can be no punishment by deportation.

Organic Law 4/2000, of 11 January [Articles 49.a), 51.1.b) and 53.1], in a regulation maintained under the reform carried out by Organic Law 8/2000, of

22 December [Articles 53.a), 55–1.b) and 57.1], changes this view of deportation, and orders that in the event of the very serious and serious infractions set forth in letters a), b), c), d) and f) of Article 53 "deportation may be applied instead of a fine", and it adds some conditions "to adjust the sanctions, the competent body to impose them (sic) shall abide by criteria of proportionality, assessing the degree of guilt, and if appropriate, the damage or risk caused by the infraction and its effect".
From this regulation it is found that:

1. Being illegally present in Spain (after the ninety-day period set forth in Article 30.1 and 2 of Law 4/2000, amended by Law 8/2000 elapsed, since during the first ninety days deportation is not in order, but rather return), we repeat, being illegally present in Spain, in accordance with Article 53.a) can be sanctioned by either a fine or by deportation. Not only is this gathered from Article 53.a) but also from Article 63.2 and 3, that expressly admits that deportation may not be advisable (Article 63.2) or may not be in order (Article 63.3), in the case of Article 53.a), such as is the case at hand, namely, of illegal presence.

For its part, Regulation 864/2001, of 20 July, speaks expressly of the choice between a fine and deportation, and prescribes in Article 115 that "deportation from national territory may be ordered, except when the competent body to resolve on the matter determines the applicability of a fine as a sanction", (Allow us to aside for now the potential excess on the part of the Regulation, which in this provision and against what is set forth in the law, seems to impose deportation as a general rule and a fine as an exception). What is important here is to keep in mind that in cases of illegal presence the Administration, on a case-by-case basis, may either impose a fine or deportation as a sanction.

2. Under the system set forth by the Law, the principal sanction is a fine, as gathered from its Article 55.1 and from the literal interpretation of Article 57.1, under which, and in cases (*inter alia*) of illegal presence, "instead of a fine the sanction of deportation from national territory can be applied".
3. As regards the more serious, second sanction, deportation requires specific grounds that are either distinct from or complimentary to that of pure illegal presence, since this is simply sanctioned, as seen above, by a fine. According to Article 55.3, (which alludes to adjustment of sanctions, but which should be understood as applicable also to choosing between a fine and deportation), the Administration must specify, if it imposes deportation, the proportional reasons for, the degree of subjectivity, the harm or risk caused by the infraction, and in general, we ourselves add, the *de jure* or *de facto* circumstances that exist for deportation and prohibition of entry, which is a more serious sanction than that of a fine.
4. Nonetheless, it would excessively formalistic to deny this motivation as it does not appear in the decision itself, as long as it is in the administrative records.

   Therefore:

A) Since this is a case in which the cause of deportation is purely and simply illegal presence, with no other negative facts involved, it is clear that the Administration must set forth clear motives as to why it decided to impose the sanction of deportation, since illegal presence, in principle, as we have seen, is sanctioned by a fine.
B) However, if in the circumstances set forth in the Administrative case record, in addition to illegal presence, there are other negative facts regarding the conduct of the appellant or his/her circumstances, and these data are of such magnitude, taken together with illegal presence, so as to justify deportation, such deportation is not out of order owing to no mention being made of such circumstances in the sanction decision itself.

* Supreme Court Decision, Administrative-Contentious Division, 5th Section, of 6 November 2006 (Aranzadi Reference RJ 2006/7126)

Non-admission of application for asylum. Delay in submission of application.

"Legal Ground:

…Third. – (…) Furthermore, the applicant for asylum, having entered into Spain as set forth in the case file on 20 July 2000, did not submit his application for asylum until 31 January of the following year, thus making very clear the concurrence of the other cause for non-admission for processing found by the Administration. The appellant for cassation now states, for the first time (as he did not allege anything in the previous complaint on this matter), that said delay was due to his ignorance or lack of counsel regarding the right to asylum. The allegation can be rejected, first, because with this reasoning the complainant introduces into this special appeal for cassation data that were not set forth in the initial complaint, regarding which the other side was not able to argue before the original Court; second, because the complainant is not illiterate, as is the case with other applicants from Africa, but rather has a primary education and acknowledges that he speaks "average" level English. He therefore can be considered to have an adequate educational level to be able to at least understand his situation in Spain and seek out information regarding the best way to legalise his status, especially taking into account that he is able to speak English at a sufficient level and that this is not a minority language, but rather on that is widely spoken, and which would undoubtedly enable him to be able to have sufficient contacts in order to take action (in this regard, Supreme Court Decisions of 7 July and 28 October 2005 appeals to the court of cassation nos. 2935/2002 and 4798/2002). The third reason is that, even accepting these allegations dialectically, such circumstances may justify cases of short delay regarding the established deadline, but not a lack of activity during half a year (on this matter, Supreme Court Decisions of 28 October 2005 and 27 January 2006)."

* Supreme Court Decision, Administrative-Contentious Division, 5th Section, of 13 December 2006 (Aranzadi Reference RJ 2006/8380)

Lack of influence of the pendency of criminal proceedings on the application for a temporary residence permit.

"Legal Grounds:

...Sixth. – (...) As a result, the legal provision would only prevent granting a temporary residence permit from the perspective of the case at hand to an applicant that has a criminal record in Spain or in previous countries of residence, as well as an applicant who is listed as a person to turned away in countries with which Spain has an agreement on this matter. Even so, under the first premise, a conviction would not always prevent renewal of a permit, since the provision calls for the specific situation to be taken into account of those who, even though they committed an offence, have served the sentence, were pardoned or even those in a situation of conditional lifting of sentence.

So, in view of this legal criteria, the Administrative Instructions that serve as the basis for the Decision, which, in turn, declares the Decision by the Court of instance legal, denies the temporary residence permit simply owing to having a criminal proceeding pending; this criteria is transitory and set forth in a simple Administrative Instruction, that is not even confirmed by subsequent regulatory provisions, obviously in the specific scope established for criminal aspects under Article 31.5 of the Law on Procedure 4/00, after reform by the Law on Procedure 8/00."

* Supreme Court Decision, Administrative-Contentious Division, 5th Section, 14 December 2006 (Aranzadi Reference RJ 2006/8272)

Denial of entry into Spain. Insufficient justification of purpose of trip.

"Legal Grounds:

...Fifth. – (...) In summary, the regulations in force at the time of the facts of the case empowered the officials to require the provision of documents justifying the purpose and conditions of the stay, although, we must also set forth, not in every case or in an acritical or unconditional way, but rather, as we have pointed out in many decisions, "where appropriate", an expression that should be understood in the sense that the non-presentation of such justifying documents may not always support a decision to deny entry, but only: a) when there are facts or circumstances, and this is set forth in the Decision, that raise a suspicion that the purpose and/or the conditions of the stay as declared are not the actual ones; and b) when by its nature or special features, it would be normal for the traveller to be in possession of documents justifying such purpose and/or conditions.

This is what occurred in this case, which fits very easily under the letter a) that we just referred to, since the Administration explained why it did not find credible that the trip was for reasons of tourism, namely because the interested party said he was travelling on the invitation of a Colombian national whom he said he did not know personally but who was the friend of his sister's who was

in Spain five years ago, and did not return subsequently. But when the Police contacted the purported hostess, she recognised that she knew the passenger's sister, but added that said sister was living in Bilbao, and furthermore, that she knew the passenger personally. Additionally, it was found that the passenger's sister was not registered in any capacity under the program for aliens. As the Administration already set forth and underlined in the original Decision, there exist clear inconsistencies and contradictions between what was stated by the passenger and the supposed hostess.

Under such circumstances, it is reasonable, first, that, the Administration and then the Court of instance did not believe that tourism was the purpose of travel of a person who commences by presenting documents and talking contacts that are untrue. It was up to the interested party to overcome that evaluation and accredit the purpose of tourism that he alleged for his trip, but he did not do so, and therefore the decision by the Court of instance concluded by assessing that tourism was not the purpose of the trip, after an evaluation of the concurring facts which, barring exceptions (not found in this case), it is not in order to review in the framework of this special appeal to the Court of cassation.

In fact, the appellant did not provide in the appeal document any effective argument to clarify the inconsistencies and contradictions that were found determinant by the Administration and the Court of instance did not believe tourism was the purpose of the trip. Therefore, the reasons set forth by the Court of instance for reaching the conclusion that the supposed purpose of tourism was not true remain unrefuted."

* Supreme Court Decision, Administrative-Contentious Division, 5th Section, of 22 December 2006 (Aranzadi Reference RJ 2006/8186)

Non-admission for processing of a request for asylum based on persecution suffered owing to sexual orientation of applicant.

"Legal Grounds:

...Fourth. – (...) The rule contained in this Article 5.6.b) allows for an asylum request not to be admitted for processing when the application does not allege any of the causes that would give rise to refugee status. This is not the case here, because the interested party alleged persecution for reason of sexual orientation, which is one of the reasons that can lead to recognition of such status (Articles 1 to 2 of the Geneva Convention of 1951, 1 of the New York Protocol of 1967 and 3.1 of Law 5/1984). This is even true in this case when we consider that such circumstances transcended the political, educational and labour union spheres (loss of office of university class delegate, harassment by the Secretary of the area labour union).

Based on the above, the lack of precision of the application and the questions that may arise regarding whether persecution actually took place or not cannot be dealt with by a decision not to admit the asylum application for processing, but rather should be dealt with by admitting the application and ultimately deciding whether to grant asylum or not. This is concluded very clearly from the provisions of Articles 17 and 18 of the Regulation implementing Law

5/1984, approved by Royal Decree 203/1995, which require that the causes for non-admission for processing be manifestly present (such as in the first of these precepts, referring to applications for asylum not made at a border, such as in the case at hand), or that are manifest and conclusive (in the second, referring to cases of non-admission at a border)."

* Decision by the JCA of Melilla, Andalusia, of 24 February 2006 (RJCA 2006/245)

Return of immigrants to Morocco.

"Legal Grounds:

…Third. – The first reason alleged by the complainant refers to violation by the appealed administrative Decision of Article 15 which establishes the right to life and to physical and moral integrity, and under no circumstances to be subject to inhuman or degrading treatment.

In the opinion of the complainants, such violation of Article 15 of the Spanish Constitution is incurred in by sending seventy-three immigrants from Sub-Saharan Africa to the Moroccan authorities, thereby endangering their lives and physical integrity. The appellants based their appeal on what they consider to be an undeniable fact: that in Morocco such rights are not respected, and therefore turning such persons over to this country endangers their lives and physical integrity.

To analyse this controversial issue, that has been opposed by the Representative of the Public Prosecutor and State Attorney, one must begin with Spanish law as regards aliens, made up of Organic Law 4/2000, of 11 January, on the Rights and Freedoms of Aliens in Spain and their Social Integration (hereinafter LOEX), as amended by Organic Laws 8/2000, of 22 December; 11/2003, of 29 September; and Law 14/2003, of 20 November, which provides in its Article 58.2 for the return of aliens, not requiring any deportation order in two cases: a) those having been deported violate the prohibition from entry into Spain; and b) those attempting to illegally enter the country.

In the appealed cases of return, reference is made to the massive entry of immigrants to Melilla by forcing their way through the fence forming the border with Morocco, which they did in the early morning of 03 October 2005. Therefore, the adoption of the administrative decision to return them is a measure pursuant to the Law on Aliens and its implementing regulations in Art. 157 of Royal Decree 2393/2004, of 30 December, that approves the Executive Regulations of the Law on Aliens.

The return of the immigrants to Morocco is provided for in Art. 1 of the Agreement of 13 February 1992, between the Kingdoms of Spain and Morocco (Official State Gazette of 25/04/1992) whose Article 1 establishes that "the border authorities of the requested State shall readmit into their territory, upon formal request by the border authorities of the requesting State, third-country nationals that illegally entered the territory of the latter from the requested State."

Therefore, due to the fact that said treaty is part of the internal legal order (per Art. 96.1 of the Spanish Constitution), it can be said that the return to Morocco is in order under said agreement.

Furthermore, it must be taken into account that the Implementation Agreement of the Schengen Agreement of 19 January 1990, ratified in our country by Instrument of 23 July 1993 (Official State Gazette 05/04/1994), eliminated the internal boundaries between the signatory states, creating a single external border, along which control of entry into Schengen space is to be carried out in accordance with standard criteria and procedures for all the States Parties.

In fact, Art. 5.1 of the Agreement establishes a series of documentation, visa, and etc. requirements for aliens that were not met by the seventy-three immigrants that were returned. Art. 23.1 of said Agreement, requires that "Any alien that does not meet…the criteria for a short stay applicable in the territory of the Contracting States must, in principle, leave the territory of the Contracting Parties without delay."

Therefore, the return of persons who do not meet such criteria is required not only of the border police performing the services of the State Administration, but also as compliance with international commitments, such as the Schengen Agreement, which is part of the European Union framework through the Treaty of Amsterdam.

All the above leads to the conclusion that the Delegation of the Government acted legally in ordering the returns."

* Decision of the Superior Court of Justice of Madrid, Administrative-Contentious Division, 6th Section, of 21 March 2006 (EDJ 2006/111289)

Residence and work permit. National employment situation.

"Legal Grounds:

…Fourth. – (…) In fact, the conclusion is that a certain number of job offers remained unfilled, wherefore at the time when the appellant applied for a work permit there continued to exist vacant jobs in the specific sector, and with the evaluation offered by the cited Decision, we find that at the time of the appealed Decision there existed a number of job offers for building construction workers, with a coverage rate of 65.7%, or just over half, for the quarterly period considered. It therefore is in order to accept the appeal since there were a high percentage of job offers unfilled.

It would be possible to deny the work permit if there were a sufficient number of workers qualified for the type of work offered, or if a number of workers had been dismissed in the type of work involved. It is necessary to certify that there are not enough workers available to meet the demand, which is where the problem lies. In this case, with a coverage rate of 65.7%, the conclusion reached is not in order."

* Decision by the Superior Court of Justice of Extremadura, Administrative-Contentious Division, 1st Section, of 20 November 2006 (JUR 2006/293086).

Registration of aliens in the municipal census. Accreditation of residence in Spain. Requirement.

"Legal Grounds.

…Second. – […] In summary, the prerequisite for being able to apply for a residence and work permit as an employee is that the employee be registered in a Spanish municipality at least six months prior to the entry into force of the Regulation. The certificate of municipal registration is, therefore, an essential requirement and the only means of proof required in the normalisation process to accredit that a person was registered in the census of a Spanish municipality six months prior to the entry into force of the Regulation. In accordance with the legal provisions that empower the Government to establish the regulations to implement the Law, it cannot be substituted by any other document under this special procedure. The Resolution of 14 April 2005, issued by the Office of the President of the National Statistics Institute and the Directorate General for Local Cooperation introduced a flexible mechanism in order to provide for what is known under the Resolution as registration by omission, but it does not alter the obligation to present the registration certificate as a prerequisite for an alien to be regularised."

b) Family reunion

* Decision by the Superior Court of Justice of the Community of Madrid, Administrative-Contentious Division, 5th Section, of 25 January 2006 (RJ 2006/4338).

Aliens. Residence visa. Denial. Family reunion. Second marriage after repudiation by first spouse. Sufficiency.

"Legal Grounds:

…Fourth (…) Article 17 of the Law on Aliens 4/00 (…) states that: "The alien resident who is separated from his/her spouse and is married for the second or more time shall only be able to regroup with him the new spouse and his/her family members if he/she accredits that the separation from his/her previous marriage(s) took place through a legal procedure that determined the situation of the former spouse and his/her family members regarding the common home, the allowance for the spouse and the allowances for the dependent minors".

(…) it should be added immediately that not just any legal procedure can be considered to meet the requirement set forth here, in order to prevent legal fraud and protection of the rights of the ex-spouse and offspring since, on the one hand, such legal procedure must precisely meet the requirement of compliance with such guarantees and also be recognisable as an effective cancellation of the marriage bond, since said cancellation is the premise set forth in the rule in order to have a right to a second reunion.

…

Sixth (…) Marriage separation – as set forth previously – is an unknown institution under Moroccan and Hebrew law, (…) this is a case of a "*kohl*", or

repudiation – or divorce – by economically compensating the wife", which is irrevocable – since the divorced husband cannot reconcile with his wife without her consent and without establishing a new marriage record, as this type of divorce (in contrast to a revocable divorce) is initiated at the request of the wife, and definitively breaks the marriage bond without any need for further reiteration.

- Therefore, it is undoubtedly a legal procedure which meets the requirement set forth in Article 17.1.a) of Law 4/00 on Aliens.

Seventh (…) the definitive nature of the dissolution of the link is accredited and, on the other hand, the fact of specific breakage of said marriage is not a hindrance to recognition of the fact that the specific breaking of the bond involves as an effect the impossibility of the ex-spouses to remarry among themselves, in accordance with applicable Law. Such an impediment that arises as a result of the divorce cannot be considered contrary to the Spanish order which, in this field, is intimately tied to constitutional principles and rights".

(…) the conflict arises when this act, – reflected as we have seen in records or documents granted by non-Spanish authorities – is submitted for recognition by the Spanish authorities for inclusion in the Civil Registry or to cause effect in other administrative or judicial venues, under Spanish Law and International Treaties, which in such cases would require the appropriate exequatur, and which in principle would not be necessary for the Civil Registry, wherein the rule of the extraterritorial effectiveness of such documents is applies – and justly so – when seeking access to the Registry of a State other than the one pertaining to the authority under which it was granted. The person in charge of the Registry is therefore the one who must verify whether the foreign resolution in question – in this case, issued by a Moroccan judge before two official witnesses (adults) – meets the requirements for validity in the State where access to the Registry is sought (in this case, ultimately Spain)."

* Decision by the Superior Court of Justice of the Community of Madrid, Administrative-Contentious Division, 7th Section, of 16 March 2007. (JUR 2006/207572)

Aliens. Stay in Spain. Residence visa. Inappropriate family reunion. Marriage of convenience.

"Legal Grounds.

First. – (…) the appellant's application for a residence visa based on marriage was denied.

The appellant made the following allegations, in essence: that she provided all the documents required under existing regulations to be granted a visa as requested; that the Consulate denied the visa for reasons not provided for under the Law, as it seems the denial was based on the consideration that"the marriage entered into by the applicant is not valid," when there exists no statement in this regard, whereby the decision denying the visa is therefore lacking of any legal support, bringing us to this appeal.

Second. – The appealed decision resolved to deny the visa application owing to "the husband's having obtained residence in Spain by fraudulent means, a marriage of convenience denounced by the wife with a fault of consent, and by marriage to the applicant while still being married to his first wife."

To correctly resolve the matter brought to our attention it is important to take into account Organic Law 4/2000, of 11 January, that establishes the need for a visa as a normal requirement for access to national territory, (…) and that denial of same must be express and with cause in the case of residence visas for family regrouping or for a work visa as an employee, in addition to being necessary that the appeals that can be made against the corresponding decision be indicated.

In the case at hand, the complainant is the wife of a legal resident who is seeking a residence visa to reunite with her husband in Spain. The Administration denied the visa because it considered that the first marriage of the complainant's husband was a marriage of convenience and for having married the complainant when he was not yet divorced."

3. Nationals of European Union Member States

* Decision by the Superior Court of Justice of the Basque Country, Administrative-Contentious Division, 3rd Section, of 10 March 2006 (RJCA 2006/303).

Aliens. Citizens of E.U. Member States. Spanish law. Application to family members. Exit from Spanish territory. Against Community law.

"Legal Grounds.

…Second…Article 8 of the European Union Treaty recognises the right of every citizen of the Union to move and reside freely within the territory of the Member States, subject to the limitations and conditions set forth in the Treaty and its implementing measures. Thus, the limits imposed on the movement and residence of European nationals are those that are established by Community law (…).

(…) the right to live in another State with the holder of the right of residence, whatever his/her nationality, of both the spouse and dependent children and the dependent parents of the holder of the right of residence and of his/her spouse.

(…) the right of the family of the immigrant worker to live with the worker does not require that the family member must live with him/her permanently (…).

(…) "married couples who are separated but not yet divorced continue to enjoy their rights as family members of an immigrant worker"; and this is based, as expressed by said Communiqué, on "the free movement of persons is one of the fundamental freedoms guaranteed by Community Law and includes the right to live and work in another Member State. This freedom was initially aimed at economically active persons and their families. At present, the right to move freely within the Community also extends to other categories, such as students, pensioners and European Union nationals in general.

46. Article 18 of the Spanish Constitution and Directive 90/364 grants the right to reside for an indefinite period of time in a Member State of admittance to minors who are nationals of another Member State, and these same provisions allow for the parent who is responsible for the effective care of such national to be able to reside with him/her in the Member State of admittance.

(…) European Parliament and Council Directive 2004/3810E of 29 April 2004, on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States, modifying Regulation (EEC) No. 1612/68 and abolishing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Official Journal of the European Union of 30.4.2004 L 158/77).

(…) Article 2.2 of the new Directive modifies the notion of "family member" beneficiaries of Community law to now include:

"a) the spouse;
b) the partner with whom the citizen of the Union has a registered union, under the legislation of a Member State, if the legislation of the receiving Member State grants treatment to registered union that is equivalent to that of marriages and in conformance with the conditions established in the applicable legislation of the receiving Member State;
c) direct descendents under 21 years of age and dependents and those of the spouse or partner as defined in letter b);
d) direct dependent ascendants and those of the spouse or the partner as defined in letter b)".

"2. Notwithstanding the personal right of interested parties to move and reside freely, the receiving Member State shall facilitate, in accordance with national legislation, the entry and residence of the following persons:

a) any other member of the family, of any nationality who is not included in the definition set forth in paragraph 2 of Article 2, and who, in his/her country of origin, is a dependent of or lives with the citizen of the Union who is the beneficiary of the principle right of residence, or in the event that, for serious health reasons, it is strictly necessary that the citizen of the Union take responsibility for the personal care of the family member;
b) the partner with whom the citizen of the Union has a stable, duly accredited relationship."

* Decision of the Superior Court of Justice of Castilla Leon, Administrative-Contentious Division, 1st Section, of 24 February 2006 (JUR 2006\149797).

Aliens. Legal regime applicable to nationals of E.U. Member States. Greek national. Denial of residence and work permit.

"Legal Grounds

First. (…) the appellant's special family situation and his establishment in Spain are accredited: his wife legally resides and works in Spain, his children are in school in Spain and the appellant has an offer of employment. The denial of the work and residence permit will force him to have to leave Spain,

leaving his family here and thereby violating the principle of protection of the family set forth in Art. 39.1 of the Constitution and in Art. 8 of the European Convention on Human Rights.

...

Third. – (...) "any decision made in accordance with paragraph 1 shall be implemented in accordance with the legislation in force in the Member State of implementation." Paragraph 1 states that the Directive is aimed at recognising an expulsion decision adopted by a competent authority of a Member State against a third country national who is in the territory of another Member State. Art. 3.2 indicates that the Member States shall apply the Directive in full respect of fundamental human rights and freedoms; and Art. 4 states that the Member States must ensure that the third country national may appeal any measure set forth under paragraph 2 of Art. 1, in accordance with the legislation of the Member State of implementation.

(...). The appellant in this case is unable to properly enter an appeal in compliance with the essential content of said form, since it is in the form that contains the circumstances of the "illegal stay and lack of legal means of making a living, having been sentenced to seven month's in jail and having carried out the deportation on 27/05/1996 for reasons of public order, by court order," to which the governmental report refers, and that serves as the basis for denial of the initial residence and work permit applied for. It is in order to take into consideration that Article 9 of the Constitution, in its paragraph 3, guarantees the Principle of the rule of law, accountability, and the prohibition against arbitrary action on the part of public authorities; and if the appellant in this case does not have knowledge of the content of the administrative resolution on which the appealed decision is based, which in summary involves the execution of the first decision issued by the Greek State, he/she cannot in any way be subject to the rule of law nor aware of the reasons or causes that rule out arbitrary action. Furthermore, being unaware of these circumstances prevents effective protection from the judges and the courts provided under Article 24 of the Constitution, as the appellant is unable to know the circumstances which would allow him/her to seek protection of his/her rights from the justice system. Issuing an administrative resolution based on a situation of which the appellant is unaware amounts to a lack of motivation of same, in addition to an application of administrative arbitrarity, since it prevents it from being judged in a Court of law, since they cannot become aware of whether there are really circumstances present that would give rise to a negative report, such as in this case. The form from SIRENE-GRECIA should at least be included in the administrative case file for the purpose of seeing whether the decision is executed in accordance with the legislation in force in the Member State of execution (according to Article 1.2 of the Directive). It is true that Article 126.2.c) of the Agreement of 19 June 1990 on Application of the Schengen Agreement of 14 June 1985, provides that "the contracting Party transmitting the data shall be obligated to make sure it is accurate; if, on its own initiative or at the request of an interested party, it finds that incorrect data has been provided or should not have been transmitted, the Contracting party or parties must be informed immediately; the

latter shall be obligated to correct or destroy the data or to indicate that the data is incorrect because it should not have been transmitted." The case here is that the interested party, who is the appellant in this case, has alleged that the data are not accurate, but did not have the possibility of actually checking the report made by Greece, which makes it impossible, on the one hand, to indicate what data is involved and to what extent the data are incorrect, and on the other, to indicate what the correct data would be, urge that it be corrected and defend himself regarding the content of such data by means of the exercise of appropriate action, (…).

(…) Such facts mean on the one hand that the real and effective basis of the potential application is unknown, as well as its term of validity and the fairness under Spanish legislation of the Greek resolution, which purports to execute, and on the other hand causes lack of defence of the appellant since it prevents him from knowing the precise reason for the denial of the application for a work and residence permit, since the denial is due to the unfavourable report based on the expulsion from Greece. (…).

(…) this Greek decision would be or is the cause of the denial of the residence and work permit to the appellant, and therefore the appellant's knowledge of its content and validity is essential."

* Decision, Superior Court of Justice of the Basque Country, Administrative-contentious division, 3rd Section, of 10 March 2006 (RJCA 2006\366).

Aliens. E.U. Member state nationals. Right of residence. Community Law. Couple made up of citizens of Member States with a proven stable relationship. Applicable rules.

"Legal Grounds.

…Second (…) "Article 8 of the Treaty of the European Union (LCEur 1986\8) recognises the right of every citizen of the Union to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and the measures adopted to implement it. It therefore provides that any limits imposed on the movement and residence of citizens shall be as provided under Community Regulations, or, stated in other words, that the regulations of the Member State cannot impose limits or conditions not provided under the Treaty or in such provisions (…).

(…) Among the provisions of Community Law it is appropriate to cite Articles 10 to 12 of Regulation 1612/68 (LCEur 1968\84) that regulates the right of certain family members, irrespective of their nationality, to live with a worker who is a citizen of a Member State employed in the territory of another State, by extending this status to the spouse and dependent children up to 21 years of age, as well as to the dependent parents of the worker and his/her spouse that. Paragraph 2 of said law provides that "the Member States shall favour the admission of any member of the family that does not benefit from the provisions of Paragraph 1 if they are dependent upon or lived in the country of origin with the aforementioned worker." It adds in Paragraph 3 that "for the purposes of Paragraphs 1 and 2, the worker should have housing for

his family considered normal for the citizen workers in the region where he/she is employed, but such provision must not cause discrimination between national workers and workers from other Member States" (…).

(…) Furthermore, Council Directive no. 180/1990 of 28 June 1990, on regulating the right of residence of nationals of Member States who do not enjoy that right under other provisions of Community Law, as well as their family members as defined in Paragraph 2, determines the right to live in another State with the holder of the right to residence, whatever his/her nationality, of both the spouse and the dependent children and dependent parents of the holder of the right to residence and of his/her dependent spouse (…).

(…) The Commission of the European Communities, in its Communiqué of 11 December 2002 reiterating the jurisprudence of the European Court of Justice, states that "married couples who are separated but still not divorced, continue to maintain their rights as family members of an immigrant worker," based on, as set forth by said Communiqué, "free movement of persons is one of the fundamental freedoms guaranteed by Community Law and includes the right to live and work in another Member State." In principle this freedom was aimed basically at economically active persons and their families. At present, the right to move freely within the Community also applies to other categories such as students, pensioners, and European Union citizens in general. It may be, in the words of the Commission, the most important right that is conferred upon individuals by virtue of Community Law and is an essential element of European citizenship" (…)."

IX. PERSONAL STATUS: LEGAL STATUS, CAPACITY AND NAME

* Order, Provincial Court of Cadiz (Ceuta), 6th Section, of 27 January 2006 (JUR 2006\203663).

Guardianship, curatorship and judicial defender.

"Legal Reasoning.

Single. – (…) both in the appeal and in the decision there is a lack of application of, or at least reference to, the applicable rules of International Private Law. Salma Benmoghty is not a Spanish national under same or in accordance with Article 17 of the Civil Code. We find ourselves with a foreign element imposing the application of the rule on conflict of law found in Article 9.6 of the Civil Code, which, under the provisions of the Hague Convention of 1961, ratified by Instrument dated 07–10–1986, establishes that the guardianship and other protective institutions of minors shall be governed by national Law. This does not lead us again to Moroccan Law, which is what would be applicable on a theoretical plane."

* *Decision by the Directorate General on Registers and the Notarial Corps*, of 24 May 2006 (EDD 2006/112712)

First name and surnames of physical persons. Registration of birth of alien who is acquiring Spanish citizenship.

"Legal Grounds:

…Second. – In principle, for the alien with specific filiation who is acquiring Spanish citizenship the surnames as set forth by said filiation must be provided according to Spanish law, which takes precedence over those merely used *de facto* (cfr. art. 213, rule 1ª, R.R.C). However, to avoid problems as regards the identification of the interested party, Art. 199 of the Regulation permits the naturalised Spanish citizen to retain the surnames with which she was identified previously in application of her personal law, provided this is requested in the act of acquiring Spanish citizenship or within the following two months.

But this article does not benefit the interested party here because the surnames she proposes are not the ones used to identify her up to now, based on the case file, since in the birth certificate issued by the local Civil Register the name is identified as that of "E. l" and the surnames as "V. R.", which are the names set forth in the appealed registration. The surnames that the interested party held previously are not clearly accredited and, in view of the surnames used in processing the acquisition of Spanish citizenship based on residence, they could just as well be "R. E." as "V. R.," since both are recorded in administrative records."

* Decision by the Directorate General for Registers and the Notarial Corps, of 30 May 2006 (EDD 2006/112703)

First name and surnames of physical individuals.

"Legal Grounds:

…Second. – The interested party is seeking elimination of the word "de" in the second surname, "de C.", of the minor registered, because, being Portuguese, the mother alleges that the article is not part of the surname, but rather used as a conjunction between the two surnames. But the Public Prosecutor's Office, in its report, posed a different issue, which was regarding the surname with which the minor should be registered. The surname that would be appropriate as the second surname, according to same, was the mother's, a Portuguese national, first surname, "M. dos S.," instead of the second surname "de C." and therefore, the report maintains that since the father and the registered minor are Spanish nationals, the attribution of surnames thereto should be in accordance with the Spanish system (Art. 194 Regulations on the Civil Registry). Therefore, the case was dismissed and another was opened for registration error. The Judge-in-charge dismissed the request by the Public Prosecutor's Office and ordered that the request be complied with, which is the elimination of the article "de" from the surname "C.," which was maintained. Despite the fact that the case dealt with surnames, the Judge-in-charge heard the case because he understood that the attribution of the surname to the minor had been done in violation of the established rules (cfr. art. 59.2 LRC and 209.2 Regulation Civil Register).

Third. – The criteria of the Judge-in-charge were based on a finalist interpretation of Art. 194 of the Regulation of the Civil Registry, according to which the expression "first "used in said article refers to the surname from the paternal line, or patronymic, which under our legal system traditionally is placed first, but in Portugal is second. Therefore, when the minor is registered with the Mother's second surname it is transmitting her paternal surname, which is what, with the exception of inverting surname order, is what our legislation sets forth. The Public Prosecutor's Office entering the appropriate appeal against the Judge-in-charge's order does not agree with this.

Fourth. – The first name and the surnames of a physical individual have historically been used for the public control of a person's identity. Under International Private Law there are authors who maintain the applicability of *lex fori* to the name of physical individuals, since it is a matter that is very linked to Public Law and "regulated by police or security laws "by reason of its aforementioned use.

Without needing to negate the identification or individualization role of the first name and surnames, a function that is now maintained (see Art. 12 R.R.C.) concurrently with other elements of identification such as the National Identity Document for nationals or the passport or residence permit for aliens (or even with the mathematic algorithm of the electronic signature or current means of biometric identification), the consideration of the first name and surnames is now clearly based on doctrine and considered as a subjective private right that every person has. This position is followed in Art. 7 of the Convention on the Rights of the Child: "the child shall have the right from birth to a name;" in the same sense as set forth by Art. 24.2 of the International Covenant on Civil and Political Rights of 16 December 1966.

In turn, under the category of subjective rights, the position that qualifies such a right as a right of the person, upheld even in the 19th Century by classic authors, is non-conflictive, and as having been definitively equated to family or property rights. reservations regarding acceptance of individual rights have now been overcome, and therefore the right to a first name and surnames that German dogmatics in the 19th C. denied by arguing the impossibility of converting a person into a subject and object of the same right.

Fifth. – On the basis of this legal characterisation, the right to a first name and surnames are given treatment in common with the rights linked to individual status in most of the countries in our European context, and in specifically, under Spanish Law they are subject to national law on the individual, under Art. 9 no. 1 of the Civil Code. Therefore, the first name and surnames of Spanish nationals are regulated by Spanish law on the subject, basically consisting of Arts. 109 of the Civil Code and 55 of the Law on the Civil Register and appropriate provisions in the Regulation of the Civil Register.

However, not only the first names and surnames of Spanish nationals are recorded in the Civil Register. On occasion, the first name and the surnames of an alien may also be registered in the Spanish Civil Register, for example, in the case of an alien born in Spain or a dual-national. In such cases, the jurisdiction of the Spanish registration authorities arises from Art. 15 of the

Law on the Civil Register. This is why such authorities, in other words, the Judges-in-Charge of the municipal and consular Registers and also the Directorate General of Registers and the Notary Corps may need to be cognizant of applicable law in such international cases.

Sixth. – As regards the first name and surnames of individuals, the International Commission on Civil Status has undertaken major international regulatory work through different Conventions, some of which go beyond the scope of application defined by Member States as a whole, either through being open to third States, or because they are *erga omnes* in nature.

The first step in this process was taken by Agreement No. 4 (done in Istanbul on 4 September 1958), on changes in surnames and first names, that binds each contracting State to "not grant changes in surnames or first names to nationals of another contracting State, except if they are also its own nationals."

Later, Agreement no. 19 (done in Munich, on 5 September 1980, in force in Spain as of 1 January 1990) on the law applicable to surnames and first names, sought to establish common rules of International Private Law on the matter and subjected the designation of the surnames and the first names of a person to the law (including to International Private Law), of the State of which he/she is a national.

This Agreement, however, only regulates conflict of law and contains no rule on the recognition of surnames; it does not provide a solution in increasingly more common situations of plurinationality. When the national laws of an individual contain different solutions or, under the also common hypothesis of spouses of different nationalities, when the national law of each regulates the effects of marriage or divorce on the surnames of the spouses or ex-spouses differently, the persons concerned have difficulties in proving their identity, for example, if the passport and the drivers license do not show the same surname.

For its part, Agreement No. 21 (The Hague, 8 September 1982, in force in Spain since 1 July 1988), relating to the issuance of a certificate of surname diversity sought to facilitate for such persons the proof of their identity, but it let the causes of these divergences remain.

In fact, the Agreement is does not mandate changing a person's surname that appears in a public Register nor does it regulate the Law applicable to changing surnames. The abovementioned certificate of surnames diversity "shall only be for the purpose of showing that the different surnames recorded therein designate the same person under different legal systems." (Art. 1.2 Agreement).

Both the authorities of the State party of which the subject is a national and the authorities of the State party by whose laws a surname is attributed to said subject that is different than the one that results from the application of his/her national law may issue the certificate.

Seventh. – The Munich Agreement establishes the Law applicable to the first name and surnames of individuals, including all natural persons, whether "legitimate" children or not, born in or out of wedlock, or adopted or natural.

Art. 1 of the Munich Agreement establishes in this regard that the first name and surname of a person be governed by the person's national Law. Thus, for

example, if the national Law of a subject allows him/her to carry only one surname, as is the case under Moroccan or Chinese Law, it will be set forth as such in the Spanish Civil Register if it is competent to make such a registration, there being no obstacle whatsoever under Spanish legislation (see Resolution of 16–7ª September 2002).

The solution regarding the point of connection under the Munich Agreement poses no problem under Spanish Law, since our rules on conflict arise from the same criteria based on the individual's personal law. In fact, before the entry into force of the Agreement for Spain, jurisprudence and especially the Directorate General for Registers and the Notary Corps had already established that criteria, based on Art. 9, no. 1 of the Civil Code and Art. 219 of the Regulation of the Civil Registry: see Resolutions of 7 April 1952, 6 June 1991, 27 November 1990, etc.

From a critical point of view, it has been stated that the point of connection retained by Art. 1 of the Munich Agreement, the individual's citizenship, can be criticised because it overlooks the application of Law corresponding to countries that may have more of a connection to the situation, but as will be indicated later on, neither does the solution reached by the Court of Justice of the European Communities in the "García Avello" case involve the application of the law most closely linked to the case, since in the case of dual nationality, it makes the law less connected to the *de facto* situation prevail, in other words, the law of the person's country of nationality that does not coincide with the country of customary residence. In fact, the Court's decision is not in line with the Law that ensures the so-called principle of conflict autonomy, allowing the interested party to choose between the Law of citizenship and the Law of customary residence (cfr. Art. 37 of the Law on International Private Law of Switzerland of 1987).

Eighth. – It is important to point out the fact that the Munich Agreement of 1980 is one of the so-called "*erga omnes*" Agreements, meaning that it is applied in relation to all subjects, whatever their nationality and domicile may be, since under Art. 2 of same, the abovementioned national law shall be applied even when it is a matter of the law of a non-contracting State. In this regard it is inconsequential for the purposes of Spanish law that the only countries to have ratified the Agreement are, in addition to Spain, Italy, the Netherlands and Portugal.

The Law designated by the Munich Agreement can only not be applied in two cases:

1. When the law of the State designated is manifestly incompatible with public order (Art. 4 Agreement).
2. When it is impossible to know the applicable foreign Law (Art. 5 Agreement).

Ninth. – The Munich Agreement does not directly contemplate the increasingly more common case of multi-national persons, which poses the question: what nationality prevails in the case of a subject with multiple nationalities for the purposes of determining first name and surnames?

In this regard, and given the absence to date of any International Treaty on the matter, different solutions have been offered:

The first is based on the application of Art. 9.9, second paragraph of the Civil Code. This position is the one followed traditionally by the Directorate General of Registries and the Notarial Corps, that was already following this principle before the entry into force of the Munich Agreement. Art. 9.9 of the Civil Code calls for preference being given to Spanish citizenship when the subject has several nationalities and one of them is Spanish: 15 February1988, RDGRN 19 November 2002 and RDGRN (1ª) 27 February 2003, among many others, which often refer to Spanish-Portuguese dual nationals. The Directorate General confirms in its decisions that:

> II. For some Spanish nationals with specific filiation who register within the deadline or outside same, in principle the paternal and material surnames must be set forth (cfr. Art. 109 Civil Code; 55 L.R.C. and 194 and 213, 1st Rule, R.R.C), the first surname being, therefore, the first surname of the father even though he may be an alien. It should not be important that the child, in addition to Spanish citizenship by maternal filiation, may also have Portuguese nationality by paternal filiation and that this legislation establishes another order of the surnames, because in these situations of *de facto* dual nationality, not provided for under Spanish law, Spanish citizenship always prevails (cfr. Art. 9–9 C.c.).

This is therefore a solution that coincides with the Art. 3 of the Hague Convention of 12 April 1930, on Certain Questions relating to the Conflict of Nationality Laws, according to which "a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses."

This position presents, nonetheless, the problem that the interested party is led into a situation in which he may be identified with different surnames depending on which State is involved. The problems derived from such a situation hamper the freedom of movement of individuals who hold European Union citizenship as nationals of a Member State.

This discussion of the issue, however, was contrasted by the Decision of the Court of Justice of the European Union of 2 October 2003, in the García Avello case, whereby the Court ruled that the laws of the Belgian State establishing that in the case of a Belgian with dual nationality the subject's Belgian nationality should always prevail for the purpose of imposing surnames (that coincides on this point with Spanish law) were contrary to Community Law (Arts. 17 and 18 of the Treaty on the European Community).

In the case of the above decision, two Spanish-Belgian minors were obligated to register in the Belgian Civil Registry with the surnames as established under Belgian Law (García Avello, father's surname), dismissing the request by the Spanish father to register the children with the surnames as per Spanish law (García as the first paternal, surname and Weber, as the first maternal surname).

This jurisprudence prevents systematic application of Art. 9.9 of the Civil Code, and the imposition, for example, on the Spanish-Portuguese dual national of the surnames as corresponds under Spanish law. Subjects should be given the "freedom" to choose the Law of the State they wish to govern the first names and surnames of community dual nationals. This is a solution that has already been proposed by modern doctrine in favour of the so-called "autonomy of will in conflict," whereby multiple-nationals or their legal representatives would have the right to freely choose any one of the concurrent national laws as their chosen jurisdiction, without requiring that the selected law be the same as the most effective nationality (in fact, in the García Avello case the jurisdiction chosen was the nationality that did not coincide with that of customary residence).

All the above does not imply, however, in the view of this Directive Centre, that the above mentioned jurisprudence regarding registry is affected by the Court of Justice decision, since, in contrast with Belgian Law that impeded the change of surname requested from "García Avello" to "García Weber," this change in Spain would have been possible since both surnames legitimately belong to the child of the couple in question. In fact, faced with the refusal of the Belgian authorities to accept a modification of the surnames as requested, in Spain, when the interested party is registered in another foreign Civil Registry of his birth with other surnames, it is accepted that this fact, which affects the civil status of a Spanish citizen subject to foreign law, can be subject to registry annotation under Art. 38–3º of the Law on the Civil Registry. This annotation serves to relate the content of the Spanish and foreign Registries and to dissipate doubts regarding the identify of the party, especially if as a result of the annotation the multi-lingual certificate of surname diversity provided for in Agreement no. 21 of the C.I.E.C. done in The Hague in 1982 is issued.

It also serves to safeguard the possibility, which is fundamental, that the interested parties may promote the appropriate process to change surnames which is the jurisdiction of the Ministry of Justice. Thereby the problems that the rigidity of the Belgian system leads to are overcome, as sought by the cited Decision by the Court of Justice of the European Community. All this is notwithstanding the need to interpret the rules governing the registry processing of changes of surnames in Spain (Arts. 57 and following of the Law on the Civil Registry) so that in no case could a sought-after change be denied when opposed to the doctrine established by the cited Decision of the Court of Justice of the European Community.

This, in fact, is the official interpretation of the Directorate General of Registries and the Notarial Corps as set forth in the answer dated 22 April 2004 to the query formulated by the Ministry of Justice's own Directorate General of Legislative Policy and International Legal Cooperation, and which in fact has generated new administrative practice whereby authorizations are granted without difficulty to modify surnames in the cited cases of dual nationality (provided they are persons with European Union citizenship), in application of the above criteria. To date, a number of different cases of changes of surname involving children with dual, Spanish and Portuguese nationality have been resolved.

Tenth. – The discussion of this appeal dealing with the specific interpretation of Art. 194 of the Regulation of the Civil Registry should take place in this context, which, while specifying the determination of the surnames of Spanish citizens establishes that the "maternal surname is the first of the mother's personal surnames."

It has been incorrectly stated that Art. 194 of the Regulation of the Civil Registry is a conflict rule that provides an exception from that provided in Art. 9 no. 1 of the Civil Code by subjecting the civil status of persons to their personal law and their repercussion on the registration of surnames found in Art. 219 of the Regulation of the Civil Registry which, consistent with the principle set forth in the Civil Code, provides that "The first name and surnames of an alien are governed by his/her personal law." We say that this has been incorrectly stated because Art. 194 of the Regulation on the Registry is a regulation under domestic law whose implementation is aimed exclusively at Spanish nationals, whereby the determination that the first maternal surname is the first of the mother's personal surnames must be understood in relation to the composition of the surnames of the Spanish child of a foreign mother, provision which refers to cases in which the surnames of the mother are in accordance with her personal law, and may have been lost or altered by reason of marriage (cfr. Art. 137.2 R.R.C.).

Furthermore, the clarity of the meaning of the rule included in Art. 194 of the Regulation on the Civil Registry, while it is not altered by the fact that the rules governing the retention or alteration of the woman's surname by reason of marriage are different from the Spanish rules, it is also not affected by the circumstance that the legal rules relating to the transmission of surnames under the foreign law pertaining to the mother's nationality may differ from Spanish rules. This was indicated previously by this Directorate General in the first case referred to in its Decision of 31 March 1995, which considers the assignment of surnames corresponding to the specific filiation under Spanish law as mandatory (Art. 213, 1ª, R.R.C.), and we must confirm this now for the case in question in which there is a divergence between foreign and domestic law regarding the order of transmission of the respective paternal and maternal surnames."

* Decision by the Directorate General on Registries and the Notarial Corps, 14 June 2006 (EDD 2006/112707)

Firs name and surname of physical individuals. Adoption

"Legal Grounds:

…Third. – When a birth is registered in the Spanish Civil Registry of someone who has acquired Spanish citizenship, the name attributed to this person in accordance with his/her previous personal law should be entered in the record, unless proof is provided that the person used a different name *de facto* (cfr. Arts. 23 L.R.C. and 85 and 213 R.R.C.).

In this case, the name "R." with which the appellants' daughter was registered by the Central Civil Register is the name that corresponded to the local Registry certificate and the court order by the aforementioned Court of Bombay,

which served as the basis for the registry and in which that was the name given. As a result, the registration made has to be considered correct. However, in adoption cases it is a good idea to take into account the interest of the child and consider whether the change of the original name at the proposal of the adoptive parents would be in said interest. The answer should be affirmative and, as already stated by this Directorate General (see Dec. 25–11–2005 4th), in the case of an adoption, the proposed changed can be admitted in the interest of the child without forcing the interpretation of the Regulation cited above, Art. 213 no. 1 of the Regulation of the Civil Registry, which gives preference in the case of an alien acquiring Spanish citizenship, to the name he/she was using up to then.

In regard to all else, the concurrence of just cause is evident in the change of name based on an adoption, since it is a means of achieving greater integration by the child into the new family and more of a break from the previous situation."

X. FAMILY

1. Filiation and parent-child relations

a) Natural filiation

* Decision, Provincial Court of Barcelona, 18th Section, of 8 February 2006 (JUR 2006\111995).

Divorce. Parent-child relations. Child custody. Obligation to notify movements with child. French Law.

"Legal Grounds.

…Third. – (…) the obligation to obtain the consent of the other party to move or travel with the child. This provision goes beyond the content of Article 373 – 2 of the French Code that requires notification of the other parent and provides for the intervention of the Judge in any change of residence by one of the parents, to the extent that there is an alteration of modalities of exercise." After having adopted the measures regarding custody and visitation of the minor child, the circumstances of this case do not make it necessary to adopt as restrictive a measure regarding the mobility of the parents with the child, especially that of the father having the custody, who is obligated to obtain the consent of the mother or court authorisation every time he wants to travel or move about with the child. It is obvious that both French and Spanish Law do not allow changes of residence of a minor child to be decided unilaterally without the consent of the other parent or the court, but it does not make any sense for every movement that is not for the purpose of changing residence to have to be explicitly consented to, since it would disturb the life of the child. It therefore lacks justification in this case since it does not protect any interest.

In this case there is no specific risk of abduction and the generic risk that may arise in general is fully protected by the legal provisions in force, regarding the need to obtain the consent of the other parent and by The Hague Convention provisions on child abduction. On the basis of all the above, the measure adopted by the appealed decision should be invalidated."

b) Adoptive filiation

* Order by the Provincial Court of Cadiz (Ceuta), 6th Section, of 3 March 2006 (JUR 2006\241802)

Adoption and foster parenting of minors. Adoption of adult or emancipated alien who even though he/she is living in Spanish territory has not acquired Spanish citizenship. Application of Moroccan Law. Equivalence of institutions.

"Legal Reasoning.

…Second. – Notwithstanding the correct assessment of the probatory acts, a matter of crucial importance has been overlooked. In view of the documents provided along with the application it is seen that the adopted person, just as are his biological parents, is a subject of the Kingdom of Morocco. This is therefore an alien element that requires the application of the rule of conflict established by Art 9.5 of the Civil Code. Although this provision states as a general rule that adoption recognised by the Spanish Courts shall be governed by our legal system, an exception is made when, even while residing in Spanish territory, the adopted person does not acquire Spanish citizenship through the adoption, in which case everything relating to capacity and consent shall be governed by his/her domestic Law. In accordance with Article 19.1 of this same body of Law, Mr. Gabino does not acquire citizenship owing to being of legal age, although the second paragraph allows him to choose it, which is the reason that makes the above applicable.

In this case, the Moroccan rules governing this matter have not been accredited and the burden of proof falls on the claimants under Article 281.2 of the Law on Civil Procedure, to which Article 1824 of the above Civil Procedural Law refers and is in force on this matter, which would prevent the adoption to be recorded, but additionally, through the knowledge of the Court itself, set forth in many Private International Law treaties, in the Kingdom of Morocco adoption does not exist, although protective institutions do exist, such as the "kafala," which prevents this from being recognised by Spanish judicial bodies not from being counter to the Spanish public order, especially in the case of a person of legal age. Any other solution would, as held by Calvo Caravaca, be unjustifiedly counter to the legal models of social organisation of such states."

2. Legal child abduction

* Decision, Provincial Court of Murcia, 1st Section, of 8 February 2006 (JUR 2006\161424).

Marital crisis. Effects common to annulment, separation and divorce. Visitation. Travel authorisation. Legal child abduction

"Legal Grounds.

First. – (…) The respondent appeared, and initially posed an matter of international jurisdiction, by considering that the Courts with jurisdiction to try the case were the Courts of Lebanon, but he subsequently desisted and submitted to the Courts of Spain.

He responded to the action by stating his agreement with the separation and the granting to his wife of the custody of their daughter and even with the amount of the child allowance to be paid, but he differed regarding the proposed visitation measures, as he wanted to be allowed to take his daughter to Lebanon during her school vacation to spend time there with him and his family.

(…) the mother, stressed the risk this would involve for the child owing to the probability that she would not be allowed to return to Spain once there.

Fourth. – As a conclusion to everything stated, the child must under no circumstance be taken to her country of origin (Lebanon).

This is not only because the intentions of the father lack credibility, in view of the results of tests performed (…) but also because it is a situation of serious risk which would seriously compromise the daughter's most elementary rights.

In conclusion, the social and political situation of the country was taken into account, as it is undergoing a situation of crisis that has not yet been overcome since the civil war of the Nineties. It is a situation in which there is no firm social structure, the country is divided into clans and the community to which the father belongs does not recognise fundamental rights of women. They are discriminated against legally regarding such issues as inheritance, personal independence and employment. Additionally, it must be taken into account that no bilateral agreement exists between Spain and Lebanon on the illicit travel and holding of minors, nor on the imposition of judicial Decisions issued in the other country, and that Lebanon has not signed or acceded to the Hague Convention of 1980 on the civil effects of illicit travel or retention of minors, along with the fact that exequatur is not effective, since, specifically a minor cannot leave the country if not authorised to do so by the father.

This gives rise to the need, in the event any future non-protected contact takes place between the father and the daughter, for the Court to establish the necessary measures to prevent her from being taken outside Spain without the mother's authorisation."

* Decision, Provincial Court of Leon, 1st Section, of 22 June 2006 (JUR 2006\ 225851)

International child abduction. Children's desire against restitution

"Legal Grounds:

…First. – (…) In his appeal, the father denounces, first, violation of the fourth paragraph of Article 13 of the Agreement of 25 October 1980 and, in this regard, seeks to point out the silence in regard to the appealed Decision

regarding the evaluation to be performed by the Judge of the degree of maturity of the minors in relation to their expression of their desire to continue to live with their father in Spain, contained in the examinations to which they were subject.

In this regard, and contrary to the seeming automatic nature of the return order, according to the imperative terms contained in Article 12 of the Agreement, judging from the expression "may order" which is repeated in said Article. In the text of the Agreement there are exceptions nonetheless, one of which is contained in Article 13, under which the judicial or administrative authority may also refuse to order restitution if it finds that the minor has reached an age and degree of maturity at which it is appropriate to take into account cent his/her opinions."

3. Marriage

a) Celebration and record

* Decision by the Directorate General for Registries and the Notarial Corps, of 7 June 2006 (EDD 2006/112686)

Registration of marriage entered into abroad. No need for the "exequatur" when one of the spouses is divorced.

"Legal Grounds:

…Third. – On this basis this appeal discusses whether, under the circumstance of the interested party having acquired Spanish citizenship by choice in 2003, her marriage entered into in Mexico to a Mexican national in 1992 can be registered, given the circumstance that the marriage was dissolved by divorce Decree issued by a Mexican Court in 1996. The request of the interested party does not refer to this first marriage, but rather to a later one also entered into in Mexico in 1999, and such request was denied by the person-in-charge of the Civil Registry because the exequatur of the previous divorce Decree was not accredited. This exequatur requirement would only be necessary if the registration of the second marriage, valid at the time the interested party acquired Spanish nationality, required as a prerequisite registration of the first marriage and the prior divorce.

Fourth. – So, for these purposes, it is already the doctrine of this Directive Centre that the previous marriage entered into abroad of a person who acquires Spanish citizenship only needs to be registered if it still exists. Both Art. 15 of the Law and Art. 66 of the Regulation refer to registrable facts that continue to affect persons who become Spanish citizens.

Note that the verbs tenses "affect" y "may affect" are used, and that they pertain to the present and not to the past, which would be "affected "or "may have affected." This grammatical interpretation is in line with the following: the public interest of the Registry is met when the facts that make up the current status of aliens who become naturalised Spanish citizens are entered, while it would be in all respects excessive to reconstruct the entire legal-civil history of each new Spanish citizen. Therefore, since the second marriage and not the first

marriage is the only one subject to registry it makes no sense to subordinate the registration of same to prior justification of the effectiveness in Spain of the divorce from a marriage not recorded in the Spanish Civil Registry.

Quinto. – The above ratifies the fact that an alien's ability to enter into marriage abroad – note here that the appellant was an alien at the time of entering into marriage – is governed by the personal status of the alien as determined by his/her domestic law (Art. 9–1 Civil Code) and in this case it is accredited by the documentation presented that the interested party, a Mexican national at the time the marriage was entered into, was divorced by firm divorce decree in Mexico, whereby in principle there is no difficulty in accepting the validity of the second marriage for the purposes of the Spanish legal system.

There should be no confusion over the fact that Art. 107.II, of the Civil Code establishes that divorce decrees issued by foreign Courts are effective in Spain from the date of their recognition under the provisions of the Law on Civil Procedure, because the requirement of the "exequatur" of the foreign divorce decree must be understood to be limited to foreign decisions affecting Spanish citizens – as was the understanding when they were established – or marriages previously registered in the Spanish Civil Register, which is not the situation in this case.

As set forth in Art. 84–1 of the Regulation, it is not necessary for foreign decisions that determine or compliment the ability of the registrable act to be directly effective in Spain. The Mexican divorce decree has full value as proof to accredit the ability of the Mexican citizen to be able to enter into her second marriage and, since the decision lacks any constituent or executive effects in Spain in the context of registration, the marriage dissolved by said decision is neither registered nor able to be registered in the Spanish Civil Registry owing to the lack of jurisdiction of said Registry to record a marriage lacking any link to our legal system (cfr. Art. 15 L.R.C.). As set forth above, its recognition through the "exequatur" provided under Art. 107 of the Civil Code (see Resolutions of 10 June 1989, 4 December 1991 and 6–1st November 2000) is unnecessary in Spain."

* Decision, Directorate General for Registers and the Notarial Corps, of 8 June 2006 (EDJ 2006/112706)

Registration of marriage entered into abroad. Denial owing to lack of proper certification.

"Legal Grounds:

…Third. – Facts affecting Spanish nationals, even though they take place before acquiring Spanish citizenship, can be registered in the appropriate Spanish Civil Registry (cfr. Arts. 15 L.R.C. and 66 R.C.C.), provided, of course, that they comply with the requirements for each case. For this reason, the issue of whether the marriage of the appellants, reportedly entered into in India in 1984, complies with these requirements must be examined.

Fourth. – The jurisdiction to determine registration is held by the Central Civil Registry because the appellant is domiciled in Spain (cfr. Art. 68, II R.R.C.) and the registration process to obtain the record must either be the certification

from the foreign Registry, issued by an authority or public official of the country in which the marriage took place (cfr. Arts. 23 L.R.C. and 85 and 256–3º R.R.C.), or in the case file referred to in Art. 257 of the Regulation "in which the holding of the marriage in due form and the non-existence of impediments thereto is duly accredited."

Fifth. – In the this case, there is no certificate from the Civil Registry of India, but rather the mere statement by one of the contracting parties under oath that the marriage was entered into "in 1984 in J. (India)." But this statement, which does not even contain the data to which the registration attests, is not considered from the point of view of Spanish legislation as a valid basis on which to carry out the registration, or the annotation set forth in Art. 271 of the Regulation or by means of a presumption procedure (cfr. Art. 38–2º L.R.C.)."

* Decision by the Directorate General on Registers and the Notarial Corps, of 28 June 2006 (EDD 2006/251302)

Registration of Koranic marriage entered into in Morocco. "Exequatur" not necessary when one of the spouses is divorced.

"Legal Grounds:

...Second. – In this case, the interested party, a Spanish national who acquired citizenship by choice in 1998, requests registration in the Spanish Civil Registry of his Koranic marriage entered into in Morocco in 1985, which was denied by the Central Registry because the record of the marriage was not submitted, only a so-called marriage record in which two "notarial witnesses" attest to the statement of certain witnesses who state that "they have complete legal knowledge of both parties, and attest to the existence of the marriage and the relationship between the two for a period exceeding sixteen years...," without setting forth the date or place the marriage was entered into, nor any other required data. The Judge-in-Charge denied the registration of the marriage because he considered that the act whose registration was being sought was not accredited as having been held.

Third. – Facts affecting Spanish nationals, even if they take place before acquiring Spanish citizenship, can be registered in the appropriate Spanish Civil Registry (cfr. Arts. 15 L.R.C. and 66 R.C.C.), provided, of course, that they comply with the requirements in each case. For this reason, the issue of whether the marriage of the appellants, reportedly entered into in Morocco in 1985, complies with these requirements must be examined.

Fourth. – The jurisdiction to determine registration is held by the Central Civil Registry because the appellant is domiciled in Spain (cfr. Art. 68, II R.R.C.) and the registration process to obtain the record must either be the certification from the foreign registry, issued by an authority or public official of the country in which the marriage was entered into (cfr. Arts. 23 L.R.C. and 85 and 256–3º R.R.C.), or in the case file referred to in Art. 257 of the Regulation "in which the holding of the marriage in due form and the non-existence of impediments thereto is duly accredited."

Fifth. – In this case, the document submitted to accredit the existence of the marriage cannot be considered valid for purposes of registration in the Spanish register for the reasons set forth in the second of the legal grounds, whereby the Decision to deny by the Central Civil Registry is correct. However, the marriage document accrediting the fact that the marriage was held and containing the data required for registration was submitted subsequently. This document, perhaps could have been submitted previously, but despite that should not be rejected in this phase of the process, because its admission is of public interest (cfr. Art. 358–II, RRC) as it affects the Principle of conformance of the Register to reality (cfr. Art. 26 LRC.)."

b) Marriages of convenience

* RDGRN of 31 January 2006 (JUR 2006\53392).

Marriages of convenience. Right to marry. Simulation. Effects. International Private Law.

"The Judge-in-Charge of the Civil Registry should verify the legality and authenticity of the "marriage consent" in accordance with Spanish Law when one of the contracting parties is a Spanish national or, in the case of two aliens, in application of the public order clause, when the foreign Law allows for simulated marriages.

The Spanish legal system is silent on the matter. In fact, in relation to such cases of potential marriages held without true marriage consent, there exists no "direct proof of simulated will" on the part of the contracting parties.

The basic data on which simulation of marriage consent can be inferred are two: a) lack of knowledge by one or both contracting parties of the "basic personal and/or family data" of the other contracting party and b) the non-existence of prior contact between the contracting parties.

The Judge-in-Charge has the necessary judgmental leeway to adapt the legal rules to the individuals, circumstances and features in each specific case. There can be no "closed list" of basic personal and family data that one must know, as this can depend on the circumstances in each specific case.

Contact between the contracting parties before and after the marriage is entered into. The contacts between the contracting parties may be personal contacts (visits to Spain or to the foreign country of the other contracting party), or letters or telephone calls or contact by other means of communication, such as the internet.

In addition to the above, it must be pointed out that the data or facts relating to the marriage that do not affect the mutual personal knowledge of the contracting parties or the existence of prior contact between the contracting parties, are not relevant to infer from same, in isolation, the existence of a simulated marriage, notwithstanding that the concurrence of the circumstances set forth above being able together may cause the Judge-in-Charge to conclude either positively or negatively regarding the existence of true marriage consent."

* Decision by the Directorate General for Registers and the Notarial Corps, of 3 January 2006 (RJ 2006\6691).

Certificate of marriagibility. Future marriage between a Moroccan and a Spanish national. Non-existence of true will to enter into marriage. Denial.

"Legal Grounds.

…Second When a Spanish national seeks to be married abroad under the Law of the place where the marriage is to be entered into and such Law requires the presentation of a certificate of marriagibility (cfr. Art. 252 RRC [RCL 1958\1957, 2122 and RCL 1959, 104]), the case file prior to the holding of the marriage must be constituted in accordance with the general rules (cfr. Instruction of 9 January 1995 [RCL 1995\210], Rule 5ª), in which an individual, separate personal interview of each contracting party is essential and should be carried out by the investigator to be sure of the non-existence of any impediment or legal obstacle to the holding of such marriage (cfr. Art. 246 RRC).

Third. The importance of the interview has grown of late, as it is, on occasion, a way to be able to discover the true intent of parties who in reality are not seeking to form the bond of marriage but rather to use the appearance of a marriage in order to obtain the advantages of marriage for the alien.

…

Fifth. In the present case of a projected marriage between a Spanish and a Moroccan national, certain objective facts were gathered from the individual interviews held with them, from which it can be concluded that the intent of the interested parties in entering into marriage was to pursue goals other than those proper to the institution of marriage: The first relevant fact is regarding the future contracting parties' lack of a common language with which to communicate, made clear during their respective interviews.

The Resolution of the Council of the European Union (LCEur 1997\4201), (…) sets forth precisely as one of the factors allowing for the conclusion of the existence of a marriage of convenience, the lack of a common language with which to communicate. Secondly, it was found they had known each other for a very short time and there were a series of contradictory responses between the interested parties, such as regarding the date on which they met each other and the number of trips made by the appellant to Morocco."

* Decision by the Directorate General for Registers and the Notarial Corps of 17 January 2006 (JUR 2006\281723).

Marriage entered into abroad. Registration not in order. Marriage nullified owing to simulation. Marriage of convenience.

"Legal Grounds.

…Second (…) It is the duty of the Judge in Charge to ensure the non-existence of impediments or other obstacles which nullify marriage, especially to prevent the registration of so-called marriages of convenience in which the real purpose of the parties is not to form a marriage bond, but rather to take advantage of the appearance of marriage to facilitate the status of a foreign in relation to entry and stay requirements in…,

Third The so-called marriage of convenience is undoubtedly null under our Legal System owing to the lack of true marriage consent (…).

Fourth The investigation cited seeks to prevent fraudulent marriages from being entered into on Spanish territory, reiterating the importance in the proceedings prior to the holding of the marriage of the individual, personal, separate interview of each contracting party (…).

Sixth. This specific case deals with a marriage held in…on 10 December 2004 between a Spanish national and a Cuban national in which there is a finding of the concurrence of objective facts considered determinant in concluding that the marriage was entered into in pursuit of a purpose other than that of marriage and, for this reason, that it cannot therefore be registered: she stated that she had not worked for a year and that before that was employed as an accountant in a teacher-training school, whereas he contradictorily stated that she had not worked for many years and that her last employment was as a nurse; she said that they had been living together for seven months, whereas the private interview was held on 16 March 2005 and she said that they had been living together since mid-2002.

Seventh. From these proven facts a reasonable and not in any way arbitrary conclusion is to consider that the marriage is null and void owing to simulation. It was thus determined by the person-in-charge of the Consular Civil Register (…)."

* Decision by the Directorate General of Registers and the Notarial Corps, of 31 May 2006 (EDD 2006/112704)

Lack of authorisation for aliens to marry owing to simulation of consent.

"Legal Grounds:

…Second. – In the processing of the case file prior to entering into a civil marriage there is an essential, unavoidable step (cfr. Instruction of 9 January 1995, Rule 3rd), that consists of the personal, individual, separate interview of each contracting party, which must be carried out by an investigator assisted by the Clerk, to make sure there is no impediment to marriage or any other legal obstacle. (cfr. Art. 246 R.R.C.).

Third. – The importance of this procedure has grown in recent times since it is a way to discover, on occasion, the true fraudulent purpose of the parties, who are not seeking to form the marriage bond but rather to take advantage of the appearance of marriage in order to enjoy the benefits of marriage for the alien. If, through this or other means, the person-in-charge of the register reaches the conclusion that simulation exists, he/she must not authorise a marriage that is null through lack of true matrimonial consent (cfr. Arts. 45 and 73–1º C.c.). Nonetheless, the practical difficulties in proving simulation are well known.

There existing no direct proof of same, it is almost always necessary to prove presumptions, namely concluding from demonstrated fact or facts, by means of a precise, direct link according to the rules of human criteria, the absence of consent that is attempted to be proven (cfr. Art. 386 Law on Criminal Procedure),

for which purpose it is very important to undertake with care the individual interviews referred to above.

Fourth. – So, in regard to marriages entered into abroad by two foreign nationals, and in the event that during the existence of such marriage at least one of the spouses later acquired Spanish citizenship, wherein the Spanish Civil Register becomes the appropriate place for registration (cfr. Art. 15 L.R.C.), the final doctrine of this Directive Centre maintains that in such cases it is not in order to attempt to apply Spanish rules on the lack of marriage consent, since there are no points of connection that would warrant such application, since the capacity of the contracting parties on the date the marriage was entered into, which is the time at which it has to be assessed, is governed by the previous personal law (cfr. Art. 9 no. 1 Civil Code), which justifies registration. However, the above being true, it is also true that said doctrine requires, as stated repeatedly in the Decisions by this Directorate General on the subject, that there be no doubts over whether the marriage complies with the formal and substantive requirements of the applicable foreign law, requirements in principle that have been judged favourable on the part of the appropriate foreign registration bodies that first authorised and then registered the marriage.

Fifth. – The issue posed now is whether such doctrine should also be applied not only in the case of marriages entered into abroad among aliens, but also for the different case of authorisations sought by foreign nationals to be married in Spain to other aliens. In principle the rule on the applicable law regarding marriagibility and marriage consent, determined by the personal law of the contracting parties, is the same in one or the other case (cfr. Art. 9 no. 1 Civil Code), and we must now ratify that in view of the fact that while our positive Law lacks any specific autonomous conflict rule regarding "marriage consent," it must not escape the consideration of the interpreter that such marriage consent, as an essential element in entering into marriage (cfr. Art. 45 Civil Code), is a matter that is directly linked to "civil status" and as such subject to the same personal status of the contracting parties.

Sixth. – The above must not, however, lead to the conclusion that the foreign law that deals with the personal status of the contracting parties must always be applied in every case, but rather that in implementing the rule of exception of international public order – which is more intensively active when the matter is to create or constitute a new legal situation (in this case a marriage not yet entered into) vis-à-vis cases in which what is assessed is potential application of the foreign law for the purposes of an already perfected legal relationship under said law – the foreign rule should abstain from being applied when it should be concluded that such application would end up by violating principal essential rights that are part of our legal system.

For this purpose it is not in vain to recall the doctrine of this Directive Centre that true, free marriage consent is an issue that, owing to its essential nature in our Law and in International Conventional Law and, in particular, the Convention on Consent to Marriage, done in New York on 10 December 1962 (Official State Gazette of 29 May 1969), whose first article requires, for

the marriage to be valid, that there be full and free consent by both parties, should be considered as public order.

Therefore, there can be no admission of any authorising intervention of a marriage by the authorities of the location in which the projected marriage is scheduled to take place either against the will, or without the true consent of the contracting parties, and this should lead to rejection of the proposed marriage for reason of simulation, even if the interested parties are subject by personal status to legislation that would admit a type of abstract marriage consent, removed from the institutional purpose of marriage (cfr. Art. 12 no. 3 of the Civil Code) and thereby facilitating that this institution be used as an instrument in legal fraud contravening the legal rules governing citizenship or alien provisions or others of a diverse nature.

However, while the latter is important, it is not determinant in being able to except foreign law from being applicable, but rather the fact that a simulated consent involves a non-existent marriage intent, to the extent that the declared intent does not correspond to the internal intent, thereby causing in such cases a purposeful discordance whose effect is the absolute "*ipso iure*" and irremediable nullification of the marriage entered into (cfr. Art. 74 Civil Code). This is the case whatever the "*causa simulationis*," or practical purpose prevented "*in casu*," may be that acts as an agent of an illicit situation that is incompatible with the legal protection under "*ius nubendi*" that is deployed in protection of true marriage will.

Therefore, it is not possible to dispense with the practice of the individual interview of the contracting parties (cfr. Art. 246 R.R.C), nor to negate the potential consequence of rejection of the request for authorisation of marriage, for the purpose of preventing the holding of a non-compliant marriage, that would be blemished by full legal nullity, as indicated above, if the existence of simulated consent is found, whereby it is in order in any case to verify the latter.

Seventh. – This is a case of request for authorisation to enter into civil marriage in Spain under our country's legislation by an Algerian and a French national. The decision issued by the person-in-charge of the Civil Registry, who by omitting all mention of the rules of International Private Law, put into operation the so-called "hidden international public order" denying the request because he/she concluded, as did the Public Prosecutor, that there was no desire to enter into a true marriage, based on the following facts: they differed regarding the place and dates on which they met, since he said it took place in V., in May or June of 2004 while she was there on vacation visiting the city, and she states that it was in B. in the summer of 2003, and they lived together for nine months; they also differ regarding the number of times she returned to V., he stating it was four or five times and she that is was two times.

These facts lead to the conclusion that the intended marriage pursued a different intent than that proper to the institution."

* Decision, Provincial Court of Murcia, 1st Section, of 7 November 2006 (JUR 2006\284904).

Marriage. Marriage consent. Lack of valid consent. Marriage of convenience.

"Legal Grounds.

First. – [...] The State Attorney, in representation of the respondent, opposed the Orders issued by the Consular Civil Registry and the Directorate General that denied registration on the basis of consideration that the marriage was not valid owing to the absence of true marriage consent and understanding it to be a marriage of convenience.

Second. – The appellant considers that, through the documents presented and the witnesses provided she accredited the truth, seriousness and authenticity of her marriage consent. There is no record in the Consular Civil Register files of the individual interviews of the contracting parties, which was the only evidence taken into account by the original Judge. She also charges violation of the presumption of good faith and "*ius nubendi*," and seeks authorisation for registration in the Civil Register of the marriage she entered into in Havana (Cuba) on 6 February 2003 with Cuban national Mr. Romeo.

This premise of appeal cannot be successful. In the first place there is no proof that in the Consular Civil Registry record the interview of the contracting parties was not documented. Its not being included in the testimony provided in the case is because it is on record that the document was among those the now-appellant requested to be provided to her. The list of documents provided by the Consulate General of Spain in Havana (Pages 87 and 88) includes a note stating that was sent was what was requested and that page 22 shows that what was requested was the testimony of the resolutions and the original documents provided by her, with no reference to the record of the individual interview. Therefore it is not admissible to invoke the lack of a document that she herself did not request to be included and to which sufficient reference is made in the decision issued.

As regards the documentary evident sought to support her position, it has to be taken into account that they all refer to events occurring after the marriage was entered into, even after the date of the denial of registration, and they therefore lack all importance in accrediting the authenticity of the marriage consent.

Also the witnesses (two of which are direct family members of the appellant) refer to facts subsequent in time and, in any case, speaking of previous events they only refer to telephone or written contacts, since there is no doubt regarding the fact that the contracting parties did not know each other until two days prior to the marriage. The now-appellant went to Havana to be married to a person whom she had never seen before, and three months later, when she went to the Spanish Consulate to register the marriage, she still did not know his first surname, his mother's name, or his exact age."

c) Effects

* Decision, Provincial Court of Barcelona, 12th Section, of 24 January 2006 (JUR 2006\112707).

Property rules in marriage. Marriage. Internal (sic) or international nature.

"Legal Grounds.

First. – (…) The constant statements by the spouses according to which their marriage was governed by French property rules, also demonstrated that this was the applicable Law…"

Second. – (…) the litigants entered their first marriage in 1959, under which the wife Lorenza (Italian by birth) acquired French citizenship.

(…) Mariano and Lorenza entered their second marriage on 5 September 1979 in France, (specifically in Cannes), both being undisputed French nationals, an undisputed fact.

(…) since it was a marriage entered into in France between two French nationals, without the concurrence of any alien element therefore, the only Law applicable is French Law, irrespective of where the couple may later established their residence. It is therefore not possible to consider that the marriage arrangement be the separate property arrangement that is the default marriage property arrangement in Catalonia."

* Decision, Provincial Court of Zaragoza, 5th Section, of 20 March 2006 (JUR 2006\126789).

Community property. Settlement. Aragonese community property basis.

"Legal Grounds.

Third. – (…), the complainant is an Argentine national who was married in her country to the respondent on 12–11–1989. She resided and had their first child, Rocío, there. It was not until December 1990 that they established their residence in Spain, and there is no confirmation of the existence of any marriage property settlement arrangement.

In this situation, it can hardly be found that the Aragonese joint property arrangement under the 1967 Compilation should be applicable to the spouses' matrimonial property system, since according to the rules of Art. 9.2 CC:

> The effects of marriage shall be governed by the common personal Law of the spouses at the time of marriage; in the absence of such Law, by the personal law or the law of customary residence of either of the spouses, as chosen by both in an authentic record created before the celebration of the marriage; in the absence of such choice, by the Law of the place of common customary residence immediately prior to the celebration of the marriage, and in the absence of such residence, by the Law of the place where the marriage was celebrated."

d) Separation

* Decision, Provincial Court of Asturias, 4th Section, of 2 September 2006 (AC 2006\1814).

Marriage. Separation. Romanian Law. Lack of definition in the Romanian Legislation. Application of Spanish Law as the law of customary residence of the two spouses.

"Legal Grounds.

Second. – […] As provided by Article 107, second paragraph, of the Civil Code (LEG 1889\27), drafted in accordance with Organic Law 11/2003 of 29 September (RCL 2003\2332) "separation and divorce shall be governed by the common national Law of the spouses at the time the action is brought." The Law common to both litigants at the time of the presentation of the action is Romanian Law, which does not effectively regulate marriage separation, an omission which refers us to the second paragraph of said provision where it is provided that in any case Spanish Law is applicable when one of the spouses is a Spanish national or customarily resides in Spain, among other cases, sub-paragraph c) "if the Laws indicated in the first paragraph of this section do not recognise separation or divorce or do so in a discriminatory way or contrary to public order." Therefore, given the silence of Romanian Law on separation, which should be understood to mean that this option is not compatible with said Legislation, we must abide by Spanish Legislation where it is regulated. It is accredited in the proceedings that both litigants at the time of submitting the action had their customary residence in Spain.

Finally, as regards the allegation by the appellant to the effect that some of the pronouncements of the Court Decision are impossible to execute such as that relating to the annotation of the separation in the Civil Registry where the marriage was registered. This cannot be performed for two reasons: one, because the common national Law does not recognise separation; and second, because as accredited on this page where the divorce decree was annotated, where that on said entry the divorce decree was noted, being a mere manifestation that is not accredited, and in any case it will affect the execution of the decision, but is irrelevant at this time in the proceedings.

Based on the above, it is in order to dismiss the appeal, confirming the Courts decision…."

4. Maintenance

* Decision, Provincial Court of Madrid, 22nd Section, of 26 January 2006 (JUR 2006\89793)

Maintenance. Family members. Applicable Law. Proof of foreign Law.

"II. Legal Grounds.

…Second. – (…) the action before the Court of Larache ended in abandonment by both parties, as set forth in the Decision of 23 January 2001 (…), such abandonment leaving the action unjudged and, therefore, in no case is

there any real "*res judicata*" that would exclude any future proceedings for identical purpose, nor is the Spanish Court prevented from issuing the Decision in this matter.

Third. – (…) the Moroccan Legislation was not provided, which, as foreign Law, must be proven under Article 281–2 of the Law on Civil Procedure. Furthermore, as regards the child allowance for the minor children there are implications of public order, as the object is to attend to their basic needs, making this allowance preferential and unconditional in nature, wherein the proportionality between the economic capacity of the obligor and children's' needs cannot be overlooked."

* Decision, Provincial Court of Asturias, 4th Section, of 2 September 2006 (AC 2006\1814).

Marriage. Separation. Law applicable to maintenance. Article 9.7 Civil Code.

"Third.

– […] The material Law applicable to the case at hand is in principle the common national Law of the allowance payer and the allowance receiver, as per Article 9.7 of the Civil Code (LEG 1889\27), which contemplates certain exceptions to this general rule such as the case in which the common national Law does not recognise the right to receive support, in which case the Law of customary residence shall be applied, and if this does not recognise such right either, the applicable Law is that of the place where the proceedings are substantiated. In the case at hand, Romanian Law only contemplates the provision of support to minors, whereby we must therefore refer to Spanish Legislation which pertains to the current place of residence of the litigants, which does recognise this right for older children, under which the Decision whereby the appellant must pay such support must be maintained."

XI. SUCCESSIONS

* Decision by the Directorate General for Registers and the Notarial Corps, of 22 November 2006 (JUR 2006\291878).

Distribution of estate. Estate of Dominican decedent owner of real estate in Spain. Designation of beneficiary of aliquot part. Registration in Property Register. Denial not possible. Foreign Law: evidence and application.

"Legal Grounds.

Second […] The subjection of the inheritance to the decedent's National Law at the time of his/her death (cfr. Article 9.8 of the Civil Code [LEG 1889\27]), together with the limitation of resubjection to Spanish Law (Article 12.2 of the Civil Code), determines that even though the decedent is a Dominican national, there can be no denial of access to the Property Register of the instrument documenting the distribution of his/her estate, based on grounds arising from the application of Spanish inheritance Law.

A different matter would be the allegation by the Registrar in the exercise of the qualifying function set forth in Article 18 of the Mortgage Law (RCL 1946\886) of insufficient proof of foreign law, since in relation to foreign law the principle of "*iura novit curia*" (cfr. Articles 12.6 of the Civil Code, 281 of the Law on Civil Procedure, 36.2 of the Mortgage Regulations and Decisions of 27 April 1999, 5 February and 1 March 2005) is not valid, nor is the principle of the invalidity of foreign notarial documents as deeds of conveyance of property that is registrable in the Spanish property Register (cfr. Decisions by this Directive Centre of 7 February 2005 and 20 Mary 2005), but since there is a limitation to administrative appeal of direct issues that are immediately related to the title verification (cfr. Articles 326 of the Mortgage Law and 117 of the Mortgage Regulation), they cannot be dealt with in the context of this decision."

XII. CONTRACTS

* Decision, Supreme Court, 1st Chamber, of 8 June 2006 (JUR 2006\3355)

Sales contracts. Non-application of the Vienna Convention of 11 April 1980. Applicable legal ordinance.

"Legal Grounds:

...Sixth. – (...) The appellant maintains that the matter is an international sales contract subject to the Vienna Convention of 11 April 1980, to which Spain acceded on 17 July 1990 (published in the Official State Gazette of 30 January 1991), which, in accordance with Article l–5 of the Civil Code, has become part of the Spanish system of law. On this basis, the supplier was called upon to make the corresponding amends due to the poor condition of the items sold, wherefore it was in order to apply Article 39 of the Convention that establishes that the buyer shall loose the right to invoke nonconformity with the goods if he does not report same to the seller, specifying the cause, within a reasonable period of time from when it was or should have been discovered and, in any case, shall lose such right to make a claim after a maximum period of two years has transpired from the date the merchandise is effectively in the possession of the buyer, unless such period of time is incompatible with the contractual guarantees. The appellant maintains that this international time period has not transpired, and in that regard it was set forth as proven that he did not enter any complaint whatsoever until 30 March 1998, when he received a fax from the receiving company "E." and it was in the month of April 1998 when the circumstance was communicated to the seller. The first article of the Convention set forth that it shall be applied to sales contracts between parties with establishments in different States having ratified the Convention, and here it turns out that the suit was between Spanish companies, since the appellant, as set forth in the power of attorney provided with the appeal, was constituted by deed of incorporation authorised by a Notary of Barcelona on 28 February 1986 and appears as domiciled and therefore established in said city at Avda. D....3–5th 2nd.

In accordance with Article 10–5 of the Civil Code, the domestic law that is common to the parties must be applied, and the Code of Commerce is therefore applicable, specifically its Article 342 that establishes 30–day period for the buyer to make a claim to the seller regarding any internal defects of an item received (Decision of 21–10–2005). This is, independent of the ultimate recipient of the goods being a company domiciled in Germany, whereby the international relations between such company and the claimant fall outside the contractual relations between the parties."

* Decision, Provincial Court of Madrid, 14th Section, of 3 May 2006 (AC 2006\923)

International contract. Choice of applicable law.

"Legal Grounds:

…First. – (…) The submission clause is possible and valid in accordance with Art.10.5 of the Civil Code, to the extent that it is not abolished by the Rome Convention on the Law Applicable to Contractual Obligations of 19–6–1980 or simply because the points of connection to determine the applicable law lead us to English Law: it was a contract signed in London, the entity granting the credit, MERRILL BANK, is a company under English Law resident in London, and the credit amount was deposited in an account in London.

Since it is subject to English Law, this is the law that must govern all the stages of its life; conclusion, completion, compliance, non-compliance, and the consequences of non-compliance, except for any issue pertaining to public order."

XIII. NON-CONTRACTUAL OBLIGATIONS

* Decision, Provincial Court of the Balearic Islands, 3rd Section, of 3 February 2006 (JUR 2006\73261).

Extra-contractual obligations. Claim regarding medical care provided to an injured party in an accident subject to claim. Regulatory law. Compensation for damages.

"Legal Grounds.

…Second. – (…) a claim was entered for the amount corresponding to the medical care and hospitalisation provided by the complainant, part of the German public social security system (…).

Fourth. – (…) 1. – If a person is receiving benefits under the legislation of a Member State for injuries subsequent to facts that took place in the territory of another Member State, the potential rights of the obligor institution as regards the third party to whom the obligation to repair damages falls, is regulated as follows:

A. when, under applicable legislation, the obligor institution subrogates the rights held by the beneficiary vis-à-vis third parties, such subrogation shall be acknowledged by each and every Member State.

B. As regards the rights of the victim or the victim's rightful claimants vis-à-vis the causer of the damage, Article 93, paragraph 1, letter a), of the Regulation is only for the purpose of recognition by the other Member States of the right to exercise an action, which can be enjoyed by the obligor institution depending on the legislation it applies. The purpose of such provision is not to modify the applicable rules to determine whether and to what extent an extra-contractual liability has been generated on the part of the third party causer of the damages. The responsibility of the third party continues to be governed by the material Law that the national jurisdictional body would normally apply, whereby the obligor institution or, where appropriate, the victim, have brought the action, in principle, under the Legislation of the Member State in whose territory the damage occurred.

From the above it turns out that the rights of the victim or his rightful claimants vis-à-vis the causer of the damages, as well as the requirements to exercise the actions for damages before the jurisdictional bodies of the Member State in whose territory the damage occurred, are determined in accordance with the Law of said State, including the applicable rules of International Private Law.

C. As set forth in the Decision by the Court of Justice of the European Community of 21 September 1999, Article 93, paragraph 1, letter a), the Regulation should be interpreted in the sense that, under such Regulation, the subrogation by a Social Security institution of the rights of the victim or his rightful claimants vis-à-vis the causer of the damage that occurred in the territory of another Member State and gave rise to the payment of Social Security benefits by said institution, are determined in accordance with the Law of the Member State to which this institution belongs, provided such right goes no further than the rights the victim or his/her rightful claimants have vis-à-vis the causer of the damage under the Law of the Member State in whose territory such damage occurred." (…).

E. It corresponds to the jurisdictional body that judges the matter to determine and apply the appropriate provisions of the legislation of the Member State to which the obligor institution belongs, even when such provisions exclude or limit the subrogation by such institution of the rights the beneficiary as to the benefits vis-à-vis the causer of the damage or the exercise of such rights by the institution to which they are subrogated."

* Decision, Provincial Court of Malaga, 5th Section, of 3 March 2006 (JUR 2006\189905).

Extra-contractual obligations. Traffic accident. Accident occurring in Morocco. Applicable Law. Evidence of foreign Law.

"Legal Grounds.

Second: There is a legal principle that must be dealt regarding the Law applicable to this claim, whereby as both parties admit it arises from a traffic accident that occurred in Morocco in which the claimants were using a Spanish registered with licence plates LI-….-K, driven by Mr. Santiago and insured by Catalana

Occidente; there is no question that in accordance with Art. 22–2 of the Law on Judicial Procedure the Spanish courts are competent to resolve this claim since the respondents are domiciled in Spain and have subjected themselves to Spanish jurisdiction and not entered an objection alleging lack of jurisdiction, as permitted under Art. 3 of the Law on Civil Procedure, this is the applicable law as regards the procedural rules that should govern the claim. However, as regards the material law to be applied by the judge, it must be taken into account that according to Art. 10–9 of the Civil Code "Non-contractual obligations shall be governed by the law of the place there the fact occurs that gives rise to same." Art. 12–6 of the same body of law requires that whosoever invokes foreign law has to accredit its content and validity. The court Decision taking into account the Supreme Court Decision of 25–I-1999 reaches the conclusion that, lacking such accreditation, Spanish law is applicable subsidiarily, and in this regard, such doctrine is maintained by other earlier Decisions, including the decision of 10–VI-2.005, stating "For foreign law to be applied in the proceedings, its validity and content must be proven (decisions of 11 May 1989, 7 September 1990, 23 March 1994, 25 January 1999, *inter alia*). This is a result of the fact that the Court and the parties cannot be required to be knowledgeable of such law, in contrary to the case as regards Spanish law, in accordance with the *iura novit curia* rule (articles 1.7 and 6.1 of the Civil Code). And, if foreign law is not equated to the *lex fori* as regards the knowledge the Court should have of it, the same is true regarding the introduction into the proceedings as a matter therein with the so-called procedural facts, that is, the elements of the premise described in the rule whose application is sought by the parties. In fact, the facts are governed by the rule requiring the interested party to provide (*quod non est in actis non est in mundo*), while, under our legal system, the Court is empowered to use whatever means of verification it deems necessary in order to apply foreign law (Article 12.6.2 of the Civil Code, text prior to Law 1/2000, of 7 January, on Civil Procedure, which was in force when the claim was entered, and Article 281.2 of the latter Law), which means both that it should be applied if it is known, and ultimately, in fact, provision by a party is only necessary in order to provide such information. Furthermore, the foreign law is designated by the law on conflict of jurisdiction, which is among those the Court must apply *ex officio* (Article 12.6 of the Civil Code). As a result, foreign law does not have to be alleged in the process by the parties for the Judge to have to take into account the designation thereof through the rule of conflict, however much it may be to give it the appropriate procedural treatment. What the parties should allege are facts which, through the concurrence of foreign elements, are included under the provided rule of conflict. Such allegation is sufficient, as an effect of such rule, for consideration to be reached that the case be resolved in accordance with foreign law by designating therein.....This Chamber, in the exercise of the its complementary function in the legal system attributed to it under Article 1.6 of the Civil Code, has declared that, when the content and validity of foreign law is not proven by the parties nor verified by the Court to the extent necessary to resolve the conflict of interest posed and the rule of

conflict does not impose anything else, *lex fori* is applicable as a subsidiary rule (decisions of 11 May 1989, 7 September 1990, 23 March 1994, 25 January 1999, 5 June 2000, 13 December 2000, *inter alia*). Such doctrine, (that Constitution Court Decision 155/2001 of 2 July, examining the issue from the point of view under the interpretation of Article 24.1 of the Spanish Constitution that it is under its jurisdiction, considered this more respectful of the content of such provision than the solution supported by a sector of the doctrine consisting of dismissing the case) must be considered in examining the third and last of the grounds of the appeal for to the court of cassation entered by the claimant. It is evident therefore that in view of the referred-to decision that the application of Spanish legislation to this claim as agreed by the Court of instance is correct, and that if the insurance company were interested in the application of Moroccan law what it should have done is to have accredited it and its validity, whereby in view of that possibility, it is in order to apply Spanish law.".

* Decision, Provincial Court of Zaragoza, 5th Section, of 28 April 2006 (JUR 2006\147133).

Traffic accident that occurred in Spain. Romanian vehicle. Legislation applicable to compensation. Insurance law.

"Legal Grounds.

First. – There is discussion (…) of the legislation applicable to compensation for damages suffered by the claimants as a result of the death of their family members in a traffic accident in Spain. (…) All the occupants were Romanian nationals, as was the license plate and insurance of the damaged vehicle.

Third. – (…) "Ofesauto", constituted on 7 May 1953, as an Association of Insurance Entities is authorised to operate in the area of automobile insurance, for the purpose of facilitating the issuance of "Green Cards" to their associates, the appropriate information on the civil liability of automobile drivers outside Spain and processing and settlement of damages caused by foreign vehicles in Spain.

On the date of the accident (5 July 2003), the State of Romania was not a member of the European Union, as accession took place in Luxembourg on 25 April 2005. Therefore, at the time of the tragic event, relations between Spain and Romania regarding this type of legalities relationships (traffic accidents) was through the "Green Card" system. Under Article 13 of Royal Decree 7/2001 of 12 January, this gave "Ofesauto" the capacity to process the loss. (…).

Fourth. – (…) ¿What legislation should be applied? This leads us to the aforementioned Hague Convention of 4 May 1971, whose application was not disputed by the parties, although its interpretation was. Article 11 of same underlines its applicability in this case.

(…) Article 3 sets forth a clear rule: "The applicable law is the domestic law of the State where the accident occurred." Nonetheless, "Ofesauto" bases its position on the exception set forth in Article 4. "Where only one vehicle is involved in the accident and it is registered in a State other than that where

the accident occurred, the internal law of the state of registration is applicable to determine liability.....”

However, the claimants base their claim on the exclusion set forth in Article 2 of the Convention. “The present Convention shall not apply: 5. to recourse actions and to subrogation in so far as insurance companies are concerned; 6. to actions and recourse actions by or against social insurance institutions, other similar institutions and public automobile guarantee funds...” Therefore, if it were not for the application of said Convention, Spanish law would be applicable, under the rule of conflict set forth in Article 10–9 of the Civil Code.

Fifth. – We find two at least apparently contradictory rules. Article 4, remits the case to Romanian law, refers to its applicability to determine liability regarding the driver, owner...of the single vehicle involved. However, Articles 2–5 and 2–6 seem more specific as regards the liability of insurance companies. Therefore, the special rule would cancel the general rule. But, Article 9 of the Convention once against introduces doubt: “Persons who have suffered injury or damage shall have a right of direct action against the insurer of the person liable if they have such a right under the law applicable according to Articles 3, 4, or 5.” It seems, therefore, that the direct action by the party that suffered damage against the insurer of the vehicle would be within the scope of the Convention, which would make the text of Article 2, subparagraphs 5 and 6 practically invalid, unless it was understood to refer to claims “between” insurers.

The problem is therefore how to integrate these provisions harmoniously. There is little jurisprudence in this area. Decisions by the Provincial Court of Guipuzcoa, Third Section, of 31 December 2002 and by the Provincial Court Zaragoza, Fifth Section, of 12 March 2002, found that Article 2–5th of said Convention excludes from the Convention claims to insurers (in this case Ofesauto). This is not the case in the Decision by the Provincial Court of Madrid (Second Section) of 4 January 1994, that applied the law of the country of the vehicle that was involved in a one-car accident abroad.

Sixth. – (...) this would conflict with Article 9 of the Convention as cited, that seems to assume that claims by the injured party to the insurer of the causer of the accident should follow the same process as Articles 3, 4 and 5, which means, in principle, that the Convention would be applicable to relations between injured parties and the insurers of the causing party, which would lead us to Article 4–a), in this specific case. This means Romanian law would be applicable, since in this case there is only one vehicle of that nationality involved in the accident. And this is the principle subscribed to by this Chamber, since if it did not it would void the Hague Convention.

Seventh. – (...) the liable party therefore is the Romanian insurer, that obviously will respond under the economic parameters established for insurance in that country.”

XV. RIGHTS IN REM

* Decision by the Superior Court of Justice of the Canary Islands, Las Palmas, Administrative-Contentious Division, 1st Section, of 15 September 2006 (JUR 2007\2275).

Rights in rem. Article 10.1 Civil Code. Right to rotational use of real estate. Regulation.

"Legal Grounds.

...Second. – [...] The resolution of the issue, which is ultimately whether title of the real estate is sufficiently justified – in other words ownership that is either direct or integrated in a broader legal trust arrangement – requires in order to considered as ownership, that it must be assessed in accordance with Spanish Law, regardless therefore of the internal relations among the members, which in this case could well be governed by the Laws of the Isle of Man. For this reason it must be ratified now that Art. 10 of the Civil Code provides that "possession, ownership and other rights over real estate, as well as its publicity, shall be governed by the Law of the place where it is located." If the members of a club of rotational use of real estate have ownership, it should therefore be assessed under Spanish Law. So, it must be concluded that no such a thing actually occurs, since Law 42/98, of 15 December on rights of rotational, vacational use and tax Laws determine this right as a limited property right, and not as ownership. It is sufficient in this regard, without needing to cite complementary references that certainly abound, to refer to paragraph 4 of Art. 1 of this Law, in which it says that "the right to rotational use or real estate shall in no case be linked to ownership of a share of the property, nor be called property-sharing, nor referred to in any other way using the word 'property'." Therefore, if the holders of this right are not owners, they are not either directly nor obviously as trustees, owners of the place where ownership is not duly justified. In conclusion, one of the basic requirements is lacking to be able to enjoy the exemption from the tax at issue, namely, that the direct or indirect holders of the share capital of the non-resident entity are sufficiently accredited, and therefore the appeal is dismissed and the appealed decision confirmed."

XVI. REGISTRY LAW

* Decision by the Provincial Court of Santa Cruz de Tenerife, of 22 November 2006 (EDJ 2006/368902).

Ability to register ownership of a German public deed. Denial owing to the consideration that it lacks full legal force in Spain.

"Legal Grounds.

...Second. – Before analysing the material reason for the appeal, mention must be made of the timely statement by the Court of the first instance regarding the second legal ground of the appealed Decision on the fact that it should not be overlooked that the purpose of the discussion is determined by

the content of the assessment made by the Property Registrar of Puerto de la Cruz, whereby, as is stated, the resolution is appealed but the only thing at issue is the qualification. On this matter, reference must be made to the decision by the Directorate General for Registries and the Notarial Corps of 22 October 2004, that was judicially challenged and appealed the decision of the first instance before this Court – Decision no. 423 of 2005, of 19 December—, the fifth legal ground of which stated that the court agreed with the criteria set forth in the appealed decision in the sense that the registrar's report is not the best time to introduce new arguments or to broaden those already set forth in defence of the note of assessment, since the application of a minimal principle of legal protection obliges the qualifying official to set forth in his/her note of assessment all of the legal grounds which, in his/her judgment, prevent the entry from being made, as it is an essential requirement in order for the interested or legitimate party to enter an appeal (Article 325 of the Law on Mortgages) to be able to know all of the registrar's arguments, enabling him/her to be able to react to his/her decision.

This observation is appropriate, first, because both the Directorate General for Registers and the Notarial Corps in the appealed decision, and the State Attorney in the appeal, reiterate the special features assigned by Spanish legislation to the notarial function. However, the issue was not mentioned expressly in the note of the Registrar of the Puerto de la Cruz, who did not set forth the specific aspects where the deed presented was not in accordance with Spanish law (except that the Spanish system for transmission of property by contract and other rights over real estate are very different from the German system), nor the generic terms in which the decision was written – lack full legal force in Spain – allowing for an implicit allusion to the regulation of the notarial function to be understood (except where this would be understood to be part of the Spanish legal system), a regulation which, furthermore, does not refer to Spanish law (either civil, registrational or procedural) when accepting and granting full effects to the document authorised by a foreign notary, and not exacting any requirement or formality specific to Spanish notarial legislation.

Secondly, as specifically regards the purpose of the appeal, it is necessary to state also that the appealed decision, despite the fact it refers to it in its title, dispenses with any analysis or consideration regarding the rules of mortgage law – that refers to the rules of international private law to determine the form and manner for foreign documents to have access to the Register – on the matter, which, from our point of view, contributes to distort the treatment of the issue. It is true there is an attempt to correct such omission in the appeal by seeking to match the analysis in the appealed decision with such rules, but of course, although the appeal was entered against the decision, which does analyse mortgage law, the issue continues to be a new one from the point of view of the Decision by the Directorate General for Registers and the Notarial Corps.

Third. – Therefore, the first ground of the appeal refers to the issue: regulation under mortgage law of access to the Property Register of deeds issued in a foreign country.

First, it must be observed that the omission is to a certain extent surprising, because the ground set forth in the Registrar's qualification note denying registration was specifically based on Article 4 of the Law on Mortgages; however, the surprise may be less if we consider, as stated by the court of the first instance, that in practice the position of the Directorate General for Registries and the Notarial Corps would lead to the absolute unfeasibility of foreign deeds being able to accede to the Property Register, a conclusion that can only be reached by lack of knowledge of the law on registers. Therefore, while the "reinterpretation," or "accommodation" in the second paragraph of the appeal document may be understandable, relating the appealed Decision by the Directorate General for Registers and the Notarial Corps to said legal provision, and with Article 36 and successive articles of the Mortgage Regulation, and more specifically, with the expression contained in the first regulation referring to the possibility of deeds issued abroad that are legally valid in Spain, being registered, it must also be stated, once again, that the argumentation maintained by the note on assessment, the appealed decision and the appeal itself is somewhat forced.

In this regard, the Directorate General for Registers and the Notarial Corps seems to circumscribe its arguments to certain aspects of notarial function relating to protecting or safeguarding the interest of the contracting parties and third parties. While the issue was posed as a matter of "the dispersion and specialization of the guidelines of the formal statute in the context of private international Law," "the polysemic meaning of the word form" and "the functional polyvalence of form as a requirement of legal acts or business," which, according to said body, is derived from Article 11 of our Civil Code, is set forth in argumentation – constituting the central core of the position – regarding "form" when applied to legal relations under international private law. No problem is found when the formal issue is reduced to the reliability of a specific form as an expression and reliable proof of consent and of the authenticity and capacity of the person providing same, considering that, when the act takes place abroad, in such aspects the intervention of a foreign authority that certifies it should logically be given consideration equivalent to that given an authority of the place, but when the intervention of the foreign authority is mandatory for the act to be effective, for the purpose of protecting certain interests (as occurs in dealing with the transmission of real estate and tax on real estate), the law that governs the effects shall be that which controls equivalence. The interests of the place are linked to certain formalities that are protected by means of the formal control exercised by the public official of the State who is the guarantor of the full legality of the act under the state regulations, cannot, and they cannot therefore, be considered to be equivalent if the person intervening in the act is a foreign official lacking training and authority to control a legality alien to his/her competence and exempt a Public Administration to which he/she does not belong from the duty to cooperate. This introduces a concept of "form of control," concluding that although the authenticity of any notarial document as a form of consent can be recognised across borders, the control of the legality that is exercised by the notary is of a scope that is limited to the applicable

Legislation of the State to which the Notary belongs, whereby the presumption of legality of a document legalised by same, defined by its relativism, does not constitute a common denominator but rather a differential feature *vis-à-vis* any other foreign notarial document or document intervened by the authorities of other states with different legal systems.

Although the reason is not analysed as refers to capacity or the provision of consent, there can be an equivalence of form, and therefore, in the so-called "control of the legality of the act" there is not, nor is the possibility admitted of studying the equivalence in relation to the Legislation of a specific State. The point of view maintained by the Directorate General for Registers and the Notarial Corps may be correct (and even convenient) if we consider that from the perspective from which it is dealt with by said body: "…the legal submission of an act, at times, to specific formalities may be a form of control imposed by reason of legislative policy at the service of certain interests," and "the subjection of real estate operations to double notarial and registrational control constitutes a measure of legislative policy that seeks to promote efficacy in a market and to minimise the risk of conflict or legal claims in the context of the social and economic scourge of real estate fraud."

Throughout the second legal ground of the appealed Decision this is the position set forth, while analysing the multiple function played by the Spanish Notary when authorising the public deed of a real estate purchase, the lack of means of control on the part of the foreign Notary, the safeguard of interests not only of the contracting parties but also third party interests, including those of the Public Administrations and in particular the Tax authorities, to conclude, first that in the current state of development of European States, with a high degree of heterogeneity among their different legal systems, there is still not sufficient equivalence between the Spanish Notary and a foreign Notary as legal agents of control of real estate traffic and, secondly, that the absence of a guarantee of the foreign Notary cannot be offset by a simple registration assessment, the scope and content of which do not coincide with those of the notarial act. Therefore, the Directorate General for Registers and the Notarial Corps considers that "the dual notarial and registration control that characterises the legality of Spanish real estate traffic does not discriminate nor is there any means of dispensation that warrants that, to achieve the legal transfer, foreign documents need to be subject to a legal control that is less intense than documents of Spain."

Fourth. – We had previously set forth the tying of the position maintained by the Directorate General for Registers and the Notarial Corps in the appealed Decision to a specific legislative policy in defence of the legal security of real estate operations, and even from a necessary vision of the Spanish legal system as a whole, but we also find some distortion in the position which, intentionally or not, overlooks certain elements of registration Law and International Private Law. Therefore, in defence of the integrity of the legal order, an attempt is made in the following grounds to align the possibility of access to the Property Register of records issued in a foreign country (set forth clearly and quite openly in registration legislation) with compliance of certain guarantees that notarial

legislation and certain sectorial legislation assign to the Spanish Notary, without losing sight, however, that on the issue subject to decision by this court what is sought is access to the Spanish Property Register by a record issued before a foreign Notary, whereby the legislation of primary application is that on registration, and also as it is a matter of international private law, which is derived from the rules of connection established in our Civil Code and in the treaties signed by our country that are applicable in this case, fundamentally the Rome Convention.

In any analysis of this are of law, we must first refer to Mortgage Law, within which special mention must be made of Article 36 of the Mortgage Regulation, which implements Article 4 of the Mortgage Law. Since it is basic in resolving this case we transcribe it as follows: "Documents executed in foreign territory may be registered if they comply with the requirements of International Private Law, providing they contain the legalisation and other requirements necessary to be authentic in Spain. Observance of foreign form and formalities and the legal qualification and capacity necessary for accreditation, among other means, may be accredited by statement or report by a Spanish notary or consul, or by a diplomatic, consular or appropriate official of the country of applicable legislation. (…) The registrar shall, under his/her responsibility, do without such means if he/she is sufficiently cognizant of the legislation in question, and shall set forth such fact for the record in the appropriate notation."

If there is no question regarding legalisation and other requirements for document to be to which this case refers to be considered authentic, the only thing that needs to be done is an analysis of the applicable rules of International private law.

To enter this area, we must begin by pointing out that from the perspective of legislation in force in the area of the acquisition of title and property tax, the Civil Code provides different treatment to registration and notarial legislation, since, while on the one hand it attributes exclusive competence for regulation and determination of deeds that are registrable, as well as the formal requirements for same and their effects, to the Mortgage Law (Article 608), naturally, Spanish Mortgage law, since the registration publicity of the real estate located in Spain is governed by the Spanish Mortgage Law under Article 10 of the Civil code, on the other hand, the Code does not make a similar reference for notarial legislation. Solely in the area of "proof of obligations" is there a reference to notarial legislation in Article 1217 of the Civil Code, on regulating public documents for the purposes of this proof, stating that "documents in which a Notary Public intervenes shall be governed by notarial legislation." It does not say that it is Spanish notarial legislation, but rather that logically it must be the notarial legislation corresponding to the law that regulates the "form and formalities of contracts," under Article 11 of the Civil Code. Aguilar y Navarro follows this same line of reasoning in pointing out that in regard to property, publicity (and consequently the function assigned to the Property Registrar) is the essential element of the system, whereby it is in respect thereto (and not in respect of legislation or notarial function) that determines whether it is a

matter of substance, or a police or public order matter, for which reasons it is understood that doctrine and practice unanimously recognise that the forms of publicity, in reference to registration, are subject to the law where the property is located.

The expression "valid in Spain pursuant to law" in Article 4 of the Mortgage Law cannot be interpreted as a synonym of the formal requirements of a Spanish notarial document, since Article 4 is different from Article 3 (and Article 2 of the Mortgage Law and Article 33 of the Mortgage Regulation) of the Mortgage Law itself, that refers exclusively to documents executed in Spain. If Article 4 has any meaning whatsoever it is because of its difference from Article 3, since in any other case it would be completely useless, since the notarial legislation of each respective country establishes the requirements and guarantees of the notarial act. It is logical, furthermore, that by the expression "valid in Spain pursuant to law" we refer exclusively to the scope of International private law (as fully confirmed also by Article 323 of the Law on Civil Procedure), because it is a provision regulating a document executed in a foreign country, a special case under International private law, and furthermore it refers to the validity of said foreign document in Spain, which is why the validity must be provided by the Law which governs the requirements of such documents in Spain, which are precisely Articles 8 to 12 of the Civil Code and the Rome Convention.

Thus, in respect of capacity, the law on nationality is applicable, which in the case of the executors of the documents in this case is German legislation and not Spanish legislation, and regarding this, the German Notary is more knowledgeable than the Spanish Notary. The form and formality of the document is an aspect that is governed by the provisions of Article 11 of the Civil Code, whereby it is not an essential requirement in order for it to comply with form and formality under Spanish legislation, since such provision enables the law of the place where the act was entered into to be followed, except in cases of formal business such as, for example, the donation of real estate. Regarding the tax statute, it is the one in force in the place the property is located, namely, Spanish law. And it is Spanish law that governs publicity.

Furthermore, the foreign document authorised by a German Notary complies with the requirements of Article 4 of the Mortgage Law, namely, it complies with the requirement of "being valid in Spain pursuant to law" when adapted to the rules of International private law, since these are the ones that regulate the requirements of the document and the act in accordance with the points of connection established in Articles 8 to 12 of the Civil Code and the Rome Convention without demanding other requirements or formalities, such as those derived from Spanish notarial law, which by definition are not applicable to such documents, because foreign notaries are not subject to Spanish notarial law, nor is the Spanish Mortgage Law limited to Spanish notarial documents, given the openness of its Article 4. This can all be seen even more clearly in Article 36 of the Mortgage Regulation, the last paragraph m of which establishes the Registrar as entity that is to control the access of document to the Register, and is charged with "assessing" the requirements of foreign legislation regarding

form and formalities and the legal suitability and capacity necessary for registration, distinguishing between registration qualification of foreign documents for purposes of registration and determinations or means of proof of foreign law. Therefore, recognising that Spanish public officials are not obligated to be knowledgeable of all foreign laws, but that they do have to demand that such law be applied in order for the document to be valid in Spain, it provides that through a series of reports from other Spanish officials or officials of the country where the legislation is applicable, the foreign law may be accredited and proven for the purposes of registering the foreign document in the Spanish Property Register.

Goldschmidt and Castán state this in similar terms when, after pointing out that it must not be thought that the "real statute" (set of rules pertaining to property rights) can be applied to all the legal relations having to do with a real asset (far from which, Article 10.1 of the Civil Code EDL1889/1 does not refer to the capacity of persons in contracts relating to real estate, to the extrinsic forms of such contracts, nor to the contract itself, even when from such contract there may arise the obligation to transmit ownership or establish a right to real estate property) and set forth that, nonetheless, it all enters into the sphere of registration assessment. This leads Lacruz Berdejo to conclude that the sphere of assessment of foreign deeds is the same as that of Spanish deeds: regarding the "legality of the extrinsic forms of the document "(Article 18 Mortgage Law) the rule "*locus regit actum*" (Articles 11.1 of the Civil Code and 36.3rd of the Mortgage Regulation) is in force, but the Registrar is dispensed from assessing them if he/she reaccredits observance by certification of the Spanish Consul; the capacity of the grantors (Article 18 Mortgage Law) is governed by their national law (Article 9 of the Civil Code), but this requirement can also be accredited by means of certification by the Spanish Consul (Article 36.2nd Mortgage Regulation); finally, there is the aspect referring to the validity of the operational provisions contained in public deeds" (Article 18 Mortgage Law), that should be classified in accordance with Article 4 of the Mortgage Law as regards the real importance of the transaction, and 36.1 of the Mortgage Regulation related to Article 11.3rd of the Civil Code as regards legality and permission under Spanish law.

As a complement to these attributions, the possibility, or power to overlook the omission of certain formal requirements for entry into the Register and what cases can be overlooked or not, is posed. If they can be overlooked, it will not be necessary to have a new grant, and the date of the action can be maintained as duly fulfilled by later compliance with the omitted requirement. If they cannot be overlooked, it is an issue of defect and absolute nullification, and it will then be necessary to have a new grant. In this regard, Article 85 of the Mortgage Law, in relation to Article 21 of same and Article 33 of the Mortgage Regulation, distinguishes between one and the other, whereupon all defects can be absolutely resolved by adding the missing document to the notarial document, except if they affect the solemn form of the legal transaction, which is always an exceptional case where the contractual principle of freedom of form prevails.

Furthermore, the Mortgage Law not only accepts a notarial deed as a registrable document, but also admits judicial and administrative documents, even private documents, in a series of cases specifically set forth. Furthermore, Article 103 of the Mortgage Law provides "a certificate of knowledge" that the Registrar can issue in the case of a private document. Thus, for example, when the appropriate municipal subdivision license or municipal new building license is not provided in a judicial document, it can be resolved by presenting a complementary document. The same is true with regard to foreign documents; the lack of a specific requirement for registration does not determine that such lack needs to be offset by a Spanish notary or even by a document in accordance with Spanish notarial legislation, but rather it can be remedied by provision of the missing license or requirement.

Finally, it must also be stated that while regulation of the formal aspects of registration in mortgage legislation involves, *inter alia*, classification as under Article 18 of the Mortgage Law, nothing is said on the other hand regarding notarial classification, nor is there any allusion to any notarial control of legality as a requisite for registration, or even in the regulation of the effects of the registration, which are related exclusively to the registration assessment of legality, but not with a presumption of notarial truth or integrity, which refers exclusively to the facts.

Fifth. – Article 11 of the Civil Code merits separate analysis. Paragraph 1 of this Article establishes that the form and formalities of contracts, testaments and other legal acts shall be regulated by the law of the country in which they are executed (and therefore refers the issue to the civil and notarial legislation of respective countries), admitting thereafter other possibilities, which demonstrates the flexible criteria of the legislator as regards form and formalities, in contrast to the more rigid criteria set forth regarding registration publicity in Article 10 of the Civil Code.

It is not that the traditional rule of "*locus regit actum*", has been relativised by paragraph 2 of Article 11, but rather that this Article confirms it by admitting a plurality of criteria and the law regulating the content is only applied when the forms and formalities are complied with "for the validity of the act," and even then, the only thing required is that the act in this case be granted in a public way as provided under the legislation of the content, but not that the formalities of Spanish notarial legislation be applied, since they never constitute a requirement for the act to be valid. Thus, for example, in a donation of real estate if the legislation of the content is Spanish legislation, it requires a public deed to be granted, but does not state that it has to be a public deed before a Spanish notary.

What also is not in line with this is the item "form of control," which does not appear in any legal or regulatory provision, and unable to replace the "*locus regit actum*" rule (applicable to the case by remission to the provisions of Articles 11.1 and 2 of the Civil Code, in relation to Articles 4 of the Mortgage Law, 36 of the Mortgage Regulation, 323 of the Law on Civil Procedure and Article 9.1 of the Rome Convention) with the "*auctor regit actum*" rule, that as interpreted by the Directorate General for Registers and the Notarial Corps is not provided

in Article 11, nor in any other provision. This rule signifying the subjection of the official to the formalities of the law of the court (Article 11.3 of the Civil Code), namely, that the German notary – *auctor* –, as an official would apply the formalities of German and not Spanish notarial legislation, in no way assumes the absolute prevalence of same in the erroneous sense of considering that although it may be appropriate to apply the form of foreign legislation, the application of Spanish notarial legislation would prevail in regard to form requirements. This defective understanding of the "*auctor regit actum*" principle (in the words of International Private Law Professor Sixto Sánchez Lorenzo) would void the content of the "*locus regit actum*" principle which would empower holding the act in the country of its celebration before a foreign notary provided the form of the public document is respected (equivalence of form) as demanded by the law on contracts (Art. 11.2 of the Civil Code and 9.1 of the Rome Convention) or in an internationally imperative manner, the law of the place where the property is located (Article 9.6 of the Rome Convention).

To recapitulate, the form of the business should not be confused with the requirements of the respective notarial legislation. It is one thing to require in a certain case the notarial form (for example, for registration in Spain), and quite another for this notarial form to have to be precisely the notarial form as under Spanish legislation. The form is simply the means by which the statement of the will of the parties is manifested, and it should not be overlooked that in dealing with the most frequent transaction regarding real estate, which is purchase-sale, the form under the Spanish system is "*ad probationem*" (Articles 1278, 1279 and 1280 of the Civil Code), and cannot be converted into "*ad solemnitatem*" (which rules out the application of paragraph 6 of Article 9 of the Rome Convention), but even so, the "public" form of grant before notary in any country in an equivalency relationship would be sufficient; in this regard, it cannot be interpreted that Article 1216 of the Civil Code refers to a Spanish notary.

Sixth. – With reference to the second ground of the appeal, it must be pointed out that all the arguments by the Directorate General for Registers and the Notarial Corps regarding the imperative nature of intervention by the Spanish notary are focused more on guaranteeing or controlling the transfer of the property and the real estate aspects than on the form of the contract. It is clear, however, that both aspects converge and are linked as justification of its position. Even so, the point of view held in the appealed decision can be summarised as follows: notwithstanding the value of the Germany notarial document as reliable proof of authenticity of consent and its mandatory contractual effect between the parties entering into same (or their heirs), it does not have value in a property transfer nor, therefore, is it registrable under the Spanish legal system.

In counter to this reasoning, we must start with the fact that Article 609 of the Civil Code contemplates the so-called theory of title and mode. This theory implies the requirement that, generally, the contract (deed) follows delivery (mode) so as to carry out the purchase or transmission of property. According to the Article 1462.1 of the Code, the tradition lies in the delivery of the thing, which is understood to take place when it is received by and place in the buyer's

possession. The physical delivery of the thing is the so-called tradition, but this effective or physical delivery of the thing can be substituted by diverse legal acts in which the traditional physical delivery or transfer is fictitious; hence, the granting of a public deed (Arts. 1462.2 and 1464), the mere agreement or conformity of the contracting parties, if the thing sold cannot be transferred physically to the possession of the buyer in the instant of the sale, or if the latter already has it in his/her possession for some reason (Article 1463, whereby this is the context of the case giving rise to this controversy). The admission of these different modalities for physical delivery are due, on the one hand, to the need to streamline the external formalities and reduce them to conventional symbols, responding to the needs of business, and on the other, to the difficulties caused by the transfer of immediate ownership given its intangible nature.

It can be concluded therefore that Article 1462.2 of the Civil Code cannot be internationally binding because it is not even internally binding, since the tradition it invokes only operates in the absence of the express or tacit provision by the parties ("if not otherwise resulting or clearly deduced from said deed"), namely, that even in the event that the parties had to resort, or were unable to avoid, the form of public document to safeguard the validity of the transaction, they can freely choose the moment the property is transferred, and defer it in the deed itself to a time subsequent to the formalisation of same. This mere possibility (as held by International Private Law Professor Sixto Sánchez Lorenzo) shows that whether the public document is or is not an essential form of the real estate purchase contract (in application of German, Spanish or any other law), it is not tantamount to the transmission of ownership of real estate located in Spain, but represents only a facilitation, whereby the Notary cannot oppose the procedure, even if document is not a transfer of ownership. It is a different matter whether the public deed serves or not as a deed to carry out a registration, but it should not be overlooked that article 33 of the Mortgage Regulation does not contemplate the public deed as necessarily separate, but rather, where appropriate, "with other complementary documents or through formalities whose compliance is accredited," and that it corresponds to the registration function itself to determine whether the set of deeds presented and their content amount to the existence of an act of transmission of ownership.

Therefore, the rationale of Article 1462.2 of the Civil Code is to infuse the physical possession tradition with spirituality, in the understanding that the "formality" of an act, when not other expressed, is equivalent to the transfer of ownership, without requiring physical turnover or possession. Therefore, if this is the underlying rationale of the provision and what matters is the formality of the intervention of the public official and the spirit of the possessive or physical tradition, it does not matter whether the public official is Spanish or foreign, since the formality for such purposes is the same. The mode or tradition is not a legal transaction but rather a necessary step, which does not require any legality, in contrast to the contract. It is sufficient for the contract to be valid for the mode to automatically take place through the formal valid title. Therefore, the specific formalities of the notarial legislation of a specific country are

totally unimportant for purposes of the mode or tradition, since the important thing is the effect of the formal statement before the public official, Spanish or foreign notary. This is confirmed by Supreme Court jurisprudence which assigns a function of instrumental tradition to public transmission documents even if they have not been authorised by a notary. So, the Spanish notary is not validating the tradition, but rather this takes place through the fact of being granted in a public deed with the formalities required before a public official, which complies with the requirements for acquisition of rights to real estate located in Spain (Article 10.1 of the Civil Code); and, although it is true that the tradition is not produced under German law through public deed granted by a notary, requiring entry in the register, it is in accordance with Spanish law, which is applicable provided that the deed "is valid in Spain under law", namely, that it is granted in accordance with the rules of International private law. Interestingly, if German law on the acquisition of real estate rights were applicable through the application of Spanish International private law, the public deed issued by the German notary would not be sufficient for entry into the Spanish Register.

Furthermore, in view of the doctrinal and jurisprudential treatment of the *constitutum possessorium* (Supreme Court Decisions of 17–12–84, 10–07–97, 03–12–99 and 17–11–03) it should be pointed out that in the case set forth in the Decision by the Directorate General for Registries and the Notarial Corps of 7 February 2005 it complies doubly with the theory of title and mode required under our laws for the transmission of ownership and other rights over real estate to be valid. The Directorate General for Registries and the Notarial Corps recognises the existence of the title and its validity in underlining its value as valid proof of the authenticity of consent and its mandatory contractual effect between the parties thereto. It also complies with the requirement of mode, which is precisely in the reservation of the right of usufruct by the transmitter where it can historically and currently say that the most practical application of the figure of the *constitutum* is found, by carrying out the transfer of ownership because, in the first place there is a legal relationship that authorises immediate possession of the property by the transmitter because a right of usufruct is constituted, which, as is well known, places the usufructor in a situation of material influence over the property (right of enjoyment of the property under Article 467 pf the Civil Code); secondly, there exists a transmission transaction between living persons of an onerous nature, which is the sale of the bare property, which the Directorate General for Registries and the Notarial Corps considers valid and effective, by virtue of which the mediate ownership is transmitted to the purchaser. There is, therefore, a transfer of ownership which, albeit intangible, is valid for complying with the mode required by the Civil Code for the property and other real estate property rights to be considered acquired.

Seventh. – Insofar as the Directorate General for Registries and the Notarial Corps stresses, in this area also as we discussed, the control function that notarial legislation gives to Spanish notaries, in the presumption of legality in their intervention and obligation to cooperate with the Public Administration that does not extent to foreign notaries, it advisable to make further comments.

First, it must be pointed out that the presumptions set forth under Spanish notarial legislation are those of veracity and integrity under Article 17 bis of the Law on the Notarial Corps, which are also bound to the provisions in the Law of Civil Procedure and the Mortgage Law. Such presumptions are exclusively as cited, and no others can be validly added, such as the presumptions of legality and accuracy. Additionally, pursuant to overwhelming logic, it could not be otherwise, as only the presumptions of veracity and accuracy (sic) refer to facts (that can be true or false), while the judgments by a notary (legality and accuracy) are the mere opinion of the notary.

Secondly, there is a clear distinction between the effects between the parties of the notarial form and the *erga omnes* effect of opposition regarding third parties and the presumption of accuracy of the register entry. The effect of the deed vis-à-vis third parties is only in regard to the fact of the grant and the date, in accordance with Article of the Civil Code, a provision that is also applicable to the foreign notarial document, whereby the potential opposition to rights over real estate is constituted vis-à-vis third parties as from the registration and not the grant, which is confirmed by Article 1257 of the Civil Code, which states very clearly that the effects of contracts, whether they are formalised by Spanish or foreign publicly notarised deed or in a private document – are only between the contracting parties and their heirs, not with regard to third parties. Also, the presumption of accuracy and the existence and alignment with the law, as well as the judicial safeguard of the entries, comes about as a result of entry in the Registry under Articles 38, 34 and 1.3 of the Mortgage Law.

The preamble of Royal Decree 1039/2.003 of 1 August (along the same lines as the preamble of the Mortgage Law of 1881) distinguishes perfectly between the notarial function, which refers to the interests of the parties, and the registration function, which protects and refers to the interests of third parties, whereby it is perfectly possible that a citizen could enter into a contract before a notary of his/her choice, whether Spanish or foreign, and later the Registrar or other registration control bodies such as the Directorate General for Registries and the Notarial Corps and the Judge of the First Instance, would exercise the appropriate monitoring of the legality of registration publicity.

In summary, the respective notarial legislation of each State can require that the notarial document be subject to the form and the formalities it sees fit to require; thus, as regards Spanish notarial legislation such requirements always refer to the authorisation of the document by a Spanish Notary and require that they abide by documentary form and formalities, but does not subject documents by foreign Notaries to the same requirements. As based on the provisions of Article 4 of the Mortgage Law, these must abide by the notarial legislation of the respective state, and the legality of form extrinsic to the document is one of the elements the Registrar may assess under Article 18 of the Mortgage Law. Therefore, in cases in which Spanish notarial legislation requires a judgment of legality by a Spanish Notary, the lack of such judgment affects the authorisation of the document, but not its entry (for example, the municipal works license and insurance accreditation required by the Law on Land and the legislation on urban planning, respectively). If the notary authorises the document

without such requirements, he/she will have committed an irregularity, but if the notarial document is presented to the Register together with the license and the insurance accreditation, there are no valid ways for the Registrar to reject the entry. It is furthermore obvious that foreign notarial legislation does not provide for the notary to demand a specific legal requirement set forth under Spanish legislation (although nothing prevents the foreign notary knowledgeable of Spanish legislation from requesting is when it could be required for the document he/she is authorising to have access to the Spanish register), and since Spanish mortgage legislation provides that the Registrar is to monitor legality by means of registration assessment, it will not be possible to register the foreign notarial document unless meets the necessary requirements, but not because they are requirements for notarial authorisation, if the foreign legislation does not provide therefore, but rather because they are requirements under registration legislation relating to the access of the document to the Spanish Property Register. This is because, among other things, the territorial application of Spanish police law prevents its application to authorities outside its jurisdiction.

It is true that Spanish sectorial legislation (in consonance with notarial legislation) requires that for certain real estate transactions the public document must include other documents or data that protect general or third party interests, or impose on notaries certain notification obligations of the public authorities, or the performance of transparency functions in this type of transactions in favour of the buyer – almost always waivable –, but from this it can only be inferred that the notarial document that does not meet such requirements would not be registrable, but not that the notarial documents formalised abroad regarding real estate would not be registrable deeds on principle. On the contrary, there are many legal rules (all those analysed) from which it can be inferred and which provide broad access to the Spanish Property Register of foreign deeds, providing that there is compliance with the same requirements and formalities as required of the Spanish deed (we agree with the Directorate General for Registries and the Notarial Corps in that discrimination in favour of the foreign deed would not be admissible), but this control is not up to the Spanish Notary to exert since Spanish notarial legislation is not applicable to deeds granted abroad, but this must be done by the Registrar under Spanish mortgage legislation, since, what is sought is access by the deed to the Property Register. It is not that we do not agree with the affirmation by the Directorate General for Registries and the Notarial Corps regarding the fact that the scope and content of registration assessment should not be confused with those of notarial action, but there does need to be recognition that the collision between the two functions is constant and permanent.

Definitively, the two alternative positions seem to be clear: either Spanish notarial legislation is applied, placing it in the category of imperative rule, leaving aside what is deducted from the registry legislation and the rules of International private law, an option that while it may offer greater guarantees for the de facto security of real estate closes off entry to the Spanish Property Register by foreign notarial deeds; or facilitating access to same of such public documents whereby

the Registrar assumes a function which, while not totally alien because they are set forth in the legislation on registration – must be exercised with greater intensity than normally required for deeds granted before a Spanish Notary. It is true that for either position they must be required to be anchored in some way in the framework of a specific legislative policy, but from the point of view of interpretation and application of law, the second seems to us, in general, to be more in accordance with the Spanish legal system and with the more open and European-oriented positions underlying more recent legislation, without causing excessive deterioration to legal real estate dealings and the supervision of compliance with certain sectorial rules that is assigned to Spanish Notaries. However, this does not seem to be the point of view of the legislator who, in the same lines as followed in the appealed Decision, deals in a recent Bill with measures to prevent fiscal fraud, a reform of the Law on the Notarial Corps, by broadening the powers of collaboration with judicial and administrative officials to which they are obligated as public officials and, specifically, in Article 24, by referring to the contracts which in which real estate ownership and other rights are acquired, declared, constituted, transmitted, taxed, modified, or eliminated and which requires them to identify when payment is totally or partially monetary or where there are signs of same, the means of payment used by the parties, whether the price was received in cash or bank check, and if so, made out to a person or just to cash, other means of payment or by bank transfer, at the same time promoting the modification of Articles 21 and 254 of the Mortgage Law in the same way, to coincide with the reform of the Law on the Notarial Corps, whereby no entry can be made in the Property Register referring to this type of title if the public notary records in the deed the refusal of the parties to identify fully or in partially, the data or documents relating to the means of payment used, in which case, these deeds are considered to have a remediable defect, but only be considered to have been remedied when a deed is presented to the Property Register in which all the tax identification numbers and all the means of payment used are recorded."

* Decision by the Directorate General for Registers and the Notarial Corps, of 23 May 2006 (EDD 2006/80554)

Entry of purchase contract on the Property Register. Denial owing to power of attorney granted abroad not complying with requirements for consideration as a public document.

"Legal Grounds:

…First. – The purpose of this Decision is to resolve the appeal brought by Mr. José and Ms. María de las Nieves against the refusal of the Property Registrar No. 10 of Malaga, Mr. Juan Francisco Ruiz-Rico Márquez, to enter a purchase deed.

From the assessment note three faults were found:

First. – Lack of accreditation of validation of the position held by the President – Managing Director of "R Airline," who is the person who certified

the meeting of the Board of Directors of said Company held on the thirtieth of November 1998, as well as the power of attorney under Moroccan legislation.

Second. – A power of attorney was granted to Mr. Houcine, regional representative of "R. Airline," on the Iberian Peninsula, that was accredited by means of a private delegation document, when Spanish legislation requires that such a power of attorney be granted in a public document.

Third. – The description of the properties recorded in said purchase agreement as Pasaje J., no…., Torremolinos, Málaga, does not coincide with the description contained on the certificate.

Second. – Beginning with the second fault, the discussion in this appeal regards the registration of the purchase contract of a building in the Property Register, in view of the fact that a person with a power of attorney is acting on behalf of the seller, and such person justifies his/her representational powers by means of typed, signed documents signed by someone purporting to be President-Managing Director, who states that he/she is granting the power of attorney on behalf of the President-Managing Director with delegated powers, to sell a specific commercial property. There is a seal that states:

"Seal of Territorial Administration, department of signature authentication, authenticating the signature of Mohamed, dated 22 April."

A delegation document is included and made out to Houcine. There is a seal that reads: "Seal of Territorial Administration, department of authentication of signatures, authenticating the signature of Mohamed, dated 11 May 2000."

A written document by Mohamed, President-Managing Director accompanies, confirming the above statements. There is a seal that reads:

"To authenticate the signature by Mohamed, who is known to me and I identify his signature. Casablanca, 12 May 2005. Signed Fatima Abid. Authentication, Hay Hassani District".

All contain Consular authentication.

The Registrar suspended the registration because the documents provided are not a power of attorney under the requirements of Art. 1280 of the Civil Code, but rather a simple authorisation with an authentic signature.

As this Directorate General already states in its Decision of 11 June 1999, the principle of legality, which is basic to our registration system owing to the special importance of the effects derived from entries in the Register (which enjoy, "*erga omnes*", the presumption of accuracy and validity and are under jurisdictional safeguard – Articles 1 and 38 of the Mortgage Law), is based on a strict selection of the deeds that are registrable, subject to the Registrar's assessment, and, among other requirements, that of having to be a public or authentic document in order to be entered into the registration books (cfr. Articles 3 of the Mortgage Law, 33 and 34 of the Mortgage Regulation and 1216 of the Civil Code).

Now, while determining whether a Spanish document complies with the conditions necessary to be considered a public or authentic document presents no difficulty in view of the definition contained in Art. 1216 of the Civil Code, the issue becomes extraordinarily complicated when dealing with a foreign document. Of course, this document must be effective in Spain in accordance with the Laws (cfr. Articles 4 of the Mortgage Law and 36 of the Mortgage Regulation), by being formalized in consonance with the form and formalities established in the respective country, but this first approximation does not totally resolve the problem posed because it is a matter here of determining when a foreign document may be classified as a public deed, and thus have access to the Property Register on the basis of the requirement that need to be met by public documentation for registration in the Spanish Property Register.

It would be inappropriate to try to resolve the problem by applying the rules contained in Art. 11 of the Civil Code regarding the form of records and contracts, because this article only resolves issues regarding the validity of different forms in the sphere of International Private Law, in harmony, of course, with the general principle of freedom of form for contracts under our domestic Law (cfr. Articles 1278 and subsequent articles of the Civil Code), while here, as indicated previously, it is a matter of dealing with a specific problem: the suitability of a foreign document to have access to the Spanish Registry. On the contrary, Article 12.1 of the Civil Code is what needs to be present to deal with the issue: in fact, if the Spanish public document is able to be registered in the Property Register because it meets certain requirements – not the case, as a rule, with regard to private documents – a prior assessment must be performed, or in other words, a comparison must be made with regard to the basic conditions required of the foreign document to have the same public value under its own legal system.

Only when the foreign document meets the requirements or *de minima* conditions that characterise the Spanish public document is when it can be held that such documents are suitable for registration in the Property Register, in accordance with what has come to be the doctrine regarding form.

From this point of view it must be stated that the Spanish public document reaches this value when it meets the following basic requirements:

a) it has been notarised "by a Notary or competent public employee" (Art. 1216 of the Civil Code), in other words, that the authorising official be the holder of the public authority to legalise, both in the judicial sphere and in the extra-juridical sphere;
b) the "formalities required by Law "(Art. 1216 if the Civil Code) have been observed, which translates into compliance with the formalities required for each category of public document, which, when a matter of publicly documenting an extra-judicial act, are substantially the need for sufficient identification of the grantor of the act or contract (certificate of knowledge or judgement of identity) and the consideration by the authorising official of the capacity of the grantor (judgement of capacity). Regarding the latter requirement it must be stated that the lack of documentary record of the

judgement of capacity does not imply that it did not exist, but rather that it can be considered implicit in the authorisation of the document, as proven by the fact that the lack of an express record of same in the notarial document does not cause the nullification of the public instrument (cfr. Art. 27 of the Law on the Notarial Corps), and the fact that there are judicial documents that record agreement between private parties in which there is no expression of any judgement of capacity.

If a comparison is made, therefore, of the basic requirements indicated of the foreign document, it can be seen such document would have to be rejected, as stated appropriately by the Registrar, when it consists of a simple authorisation with an authenticated signature, as it does not prove to the classifying official that the documents provided are equivalent to a Deed under a Spanish notarial power of attorney (Cfr. Resolution of 19 February 2004)."

* Decision, Directorate General for Registries and the Notarial Corps, of 9 August 2006 (RJ 2006\6068)

Registration of notation of embargo in the Property Registry. Consequences of the lack of accreditation of the law applicable to the marital economic arrangement of the spouses who own the property.

"Legal Grounds:

…First. – A property appeared registered under the name of one of the spouses of French nationality, without any determination of a share or undivided part and subject to their marital economic arrangement.

Submission was made to the Registry of the order issued by the Municipal Tax Collector ordering the embargo of the property set forth above. The Registrar denied the annotation, considering that the proceedings should be brought not only against the husband, but also against the wife, and that mere notification, the sole proceeding carried out, was not sufficient.

The Municipal Government appealed, alleging that the property has to be considered to be registered as undivided property equally shared between the two spouses, wherefore the embargo should be annotated.

Second. – No matter how well-grounded the statements regarding the lack of precision of the registration are, the truth is that it is not important to determine whether the property is registered as co-owned with undivided shares or not. Therefore, the rules under the legislation applicable to common property in marriage must be applied (cfr. Art. 9, 2 and 3 of the Civil Code). If the applicable rules of the applicable law are not accredited, as in this case, the problem can be resolved by suing the two spouses, which is the only case in which, if the annotation were to conclude in the forced sale of the property, the corresponding official could act in representation of both owners in the event of absentia."

* Decision by the Directorate General for Registries and the Notarial Corps of 24 November 2006 (RJ 2006\8194)

Property Register. Preventive annotation of embargo. Property registered to spouses of Moroccan nationality with no determination of shares or undivided parts and subject to their marital regime. Tax collection proceedings directed only against one spouse.

"Legal Grounds.

First. A property appears in the Register under the names of the spouses, Moroccan nationals, with no determination of shares or undivided parts, and subject to the marital regime.

An order issued by the Municipal Tax Collector ordering the embargo of the above mentioned property is presented to the Register. The Registrar denies the annotation because the proceedings should be brought not only against the husband but also against the wife, and that notification, the sole proceeding carried out, was not sufficient.

The Municipal Government appealed, alleging that the property has to be considered to be registered as undivided property equally shared between the two spouses, wherefore the embargo should be annotated.

Second. No matter how well-grounded the statements regarding the lack of precision of the registration are, the truth is that it is not important to determine whether the property is registered as co-owned with undivided shares or not. Therefore, the rules under the legislation applicable to common property in marriage must be applied (cfr. Art. 9, 2 and 3 of the Civil Code [LEG 1889\27]). If the applicable rules of the applicable Law are not accredited, as in this case, the problem can be resolved by suing the two spouses, which is the only case in which, if the annotation were to conclude in the forced sale of the property, the corresponding official could act in representation of both owners in the event of absentia."

This Directorate General has resolved to dismiss the appeal."

XVII. INTANGIBLE ASSETS

* Decision by the Provincial Court of Madrid, 9th Section, of 2 November 2006 (JUR 2007\53358).

"Legal Grounds.

First. – Background. 1) Polygram Ibérica, S.A., Dro East West, S.A., Warner Music Spain, S.A. and BMG Entertainment Spain, S.A. brings an action to cease distribution and marketing of phonograms, set forth in Article 139 of the Consolidated Text of the Law on Intellectual Property [LPI] against DIENC, S.L., invoking their status as the legitimate owners of the exclusive rights and licenses for the distribution of phonograms produced by their parent companies (Polygram International Music B.V., Wea International INC., and BMG Music International Service), under the exclusive licensing contracts and distribution licenses entered into between them and their parent companies, that were violated by the company denounced by selling music cassettes and compact discs (CDs) from countries not pertaining to the European Union throughout 1996 in

the "El Soto" bookstore at the Continente Shopping Centre in Móstoles, without the complainants' express or tacit authorisation.

2) The Court admitted the complaint, considering as accredited the fact that the complainants are the exclusive holders in Spain of the right to distribute the phonograms produced by their parent companies (as a result of the exclusive contracts granting such rights and the use of the mark, or symbol, 'p'), while the sales referred to in Article 117, paragraph 2nd, Law on Intellectual Property, that would give rise to exhaustion of the right *vis-à-vis* future transmissions are the sales within national territory, in accordance with the territorial nature of the right to intellectual property (Article 10.4 of the Civil Code [CC]) and in accordance with the interpretation by Directive 92/100CEE, and does not include parallel imports from third countries (outside the Community) of products over which there are intellectual property rights.

3) The Provincial Court admitted the appeal and dismissed the complaint, because it understood, in substance, that having circumscribed the *thema decidendi* [issue to be resolved] to the determination of whether or not there has been a so-called exhaustion of the right of exclusive distribution as provided under Articles 19, paragraph 2nd, and 117.2 of the Law on Intellectual Property. It discussed whether, given the terms of Articles 19.2 and 117.2 of the Law on Intellectual Property there is an exhaustion of the right to distribute in the event that phonograms are acquired in a country outside the community, and found that the response should be in favour of agreement with the Decision by the Supreme Court of 9 June 1998, given that rights granted in contracts granting rights of use do not grant rights that are exercisable *erga omnes* [before all] and that limitations were not established regarding the acquisition of phonograms by the respondent company, whereby the right of exclusive distribution alleged by the appellants must be considered to have been exhausted.

Second. – Grounds for appeal. 1) The first ground is submitted as follows:

> "Under Article 1692.4 of the Law on Civil Procedure [LEC 1881], for infringement of the legal rules or jurisprudence applicable to resolving the issues under discussion.
>
> "Specific complaint is made of infringement of Article 117.1 and 3 of the Consolidated Text of the Law on Intellectual Property [...], approved by Legislative Royal Decree 1/1996, of 12 April (Official State Gazette no. 97, of 22 April), in the text provided in Law 5/1998, of 6 March."

The ground is based, in summary, on the fact of an error being made in the appealed Decision and also in the Supreme Court Decision of 9 July of 1998, by referring to the purely personal and not the actual scope, and the subsequent non-opposability *erga omnes* of the rights of exclusive use, since no one argues in our positive Law the real and *erga omnes* nature of the rights of use applicable to intellectual property (Arts. 428 and 429 of the Civil Code [CC] and Art. 2, 17, 42 and successive and 115 to 118 of the Law on Intellectual Property).

2) The second ground is presented as follows:

"Under Article 1692.4 of the Law on Civil Procedure, for infringement of the rules of the legal system or jurisprudence applicable to resolving the issues under discussion."

The complaint specifically denounces infringement of Article 117.2 in relation to Article 19.2 of the TRLPI."

The ground is based, in synthesis, on the fact that the appealed decision dismisses the complaint on that basis that, in line with the criteria established by the Supreme Court Decision of 9 June 1998, according to Articles 19.2 and 117.2 of the Law on Intellectual Property, the first sale of a phonogram exhausts the producer's and his/her/its licensees' right to authorise the distribution of the producer and its licenses, independently of whether they are community or extra-community phonograms and of the place where this first sale is verified. However, this interpretation violates Article 117.2 of the Law on Intellectual Property (in accordance with the restrictive interpretation that should be given to this provision, in accordance with its historical background: Directive 92/100 EEC and Law 43/1994; and with the teleological interpretation based on the principle of free circulation of goods in the community scope) and contradicts community jurisprudence, which has set forth that the exhaustion of the right to authorise distribution only occurs in the case of a first sale made or consented to by the producer in the European Union and of a phonogram produced in said community scope, and not in the case of the sale of a non-community phonogram outside the European Union which entered said territory without the consent of the holder or exclusive licensee of the right in the affected community territory.

3) The first and second grounds for cassation should be studied together, since they are closely related.

4) The first and second grounds for cassation should be admitted.

Third. – The community exhaustion of the distribution right for intellectual property. A) The boundaries of the issue dealt with in this appeal for cassation on which the resolution of the complaint entered in the first instance depends, were established in the appeal and, as the appealed decision states, stem from whether or not there is a so-called exhaustion of the exclusive distribution right set forth in Articles 19, paragraph 2nd and 117.2 of the Law on Intellectual Property regarding phonograms when the first sale takes place in a non-community country.

B) In relation to trademark law, this issue was recently dealt with by the Supreme Court Decision of 22 December 2005, which interpreted the ambiguous terms of Article 32.1 of Law 32/1988 on Trademarks, and following the lines of the Supreme Court Decision of 28 September 2001, in appeal for cassation no. 1881/1996, decided, in the face of certain precedents (followed more recently by the Supreme Court Decision of 12 December 2001, appeal no. 2427/1996), to find that this provision must be interpreted in accordance with Community Law and, particularly, pursuant to Articles 7.1 and 5.1 of Directive 89/104/EEC. In citing these measures, it underlines the interpretation of the Court of Justice

of the European Communities, which has established a doctrine in favour of understanding that the exhaustion of trademark only occurs when sold in community countries, but the exclusive right to use it does not subside when the first sale takes place in third countries, stating that:

a) Directive 89/104/EEC contains, in Articles 5 to 7, a harmonisation of the rules relating to trademark rights (decision of 16 July 1998, Silhouette International Schmied GmbH & Co. KG, C-355/96, 25);
b) The holder of the trademark has the exclusive right to use it in the first sale (decision of 12 October 1999, Pharmacia&Upjohn, S.A., C-379/97, 15);
c) The provisions of the Directive on exhaustion should not be interpreted in the sense that the Members States can provide for exhaustion in their national laws for products sold in third countries (decision of 16 July 1998, Silhouette International Schmied GmbH & Co. KG, C-355/96, 26);
d) The above interpretation is the only one that allows for full achievement of the purposes of the Directive, consisting of safeguarding the functioning of the internal market. Regulatory disparity on exhaustion would give rise to unbreachable obstacles to the free circulation of goods and the free provision of services (decision of 16 July 1998, Silhouette International Schmied GmbH & Co. KG, C-355/96, 27);
e) Since Article 7.1 of the Directive circumscribes the exhaustion of the right to a trademark to cases in which the products were sold first in the European Economic Space [EES], the holder is allowed to monitor the first sale therein of the products using the trademark, but this right is not exhausted within said Space by a sale of products outside said territory (decisions of 20 November 2001, Zino Davidoff, S.A. and others, accumulated matters C-414 to 416/99, 33; 8 April 2003, Van Doren+Q.GmbH, C-244/00, 26; and 26 May 2005, Class International BV, C-405/03, 33); and
f) For this reason, the right holder may prohibit the use of the trademark under the right granted by the Directive, independently of whether he/she would have provided his/her consent to the sale in the national market of other equal or similar products to those over which exhaustion is invoked (decision of 1 July 1999, Sebago Inc., C-173/98, 19 y 21).

It should be added that with regard to the form of the provision of consent by the trademark holder, in accordance with the decisions issued in Zino Davidoff, S.A., and others, that: a) The consent of the holder of the trademark for marketing in the European Economic Space of products using said trademark that have been previously marketed outside the EES by the holder or with his/her consent may be tacit, when it arises from prior, concomitant or subsequent elements or circumstances to the marketing outside the EES that, judged by the national judge, show clearly the renunciation of the holder to his/her right to oppose marketing in the EES; b) Consent should be expressed positively; the elements that must be taken into account to infer the existence of tacit consent should show with clarity the renunciation of the trademark holder to oppose his/her exclusive right; and consent cannot arise out of the circumstance that the

owner of the trademark has transferred the ownership of the products using the trademark without imposing contractual reservations; c) It is up to the operator that invokes the existence of consent to provide appropriate proof of same and not to the trademark owner to accredit the lack of consent.

C) In the case examined, the solution should be analogous, for the following reasons:

a) The jurisprudence of this Court, given that the copyright is on an intangible asset, recognises that the powers making it up are independent and compatible with ownership and other rights over the tangible object or which befall same (Supreme Court Decision of 20 February 1998). This is not an obstacle for the configuration of the copyright as an absolute subjective right, although temporarily limited, which is not an exclusively proprietary or economic in nature (Supreme Court Decision of 2 March 1992), and includes the statements set forth in the Law on Intellectual Property (to which Article 429 of the Civil Code refers), including the exclusive exercise of the right to exploit the work, and especially, the reproduction, distribution and public communication and transformation rights (Article 17 Law on Intellectual Property).
b) The doctrine mostly tends at present to consider that industrial and intellectual property rights confer overall protection to all facets of creation. They maintain their independence and are cumulative and complimentary in the granting of a right and an integral protection to the right holder. This orientation is followed today by Community Law and by international instruments.
c) Based on such premises, it is undeniable that the interpretation regarding the incompatibility of international exhaustion with community exhaustion of the right to a trademark is also applicable to the exhaustion of the right to distribute works protected by intellectual property rules. There are concurrent reasons that are analogous to those expressed regarding Trademark Law to abandon an interpretation of Arts. 19.1 and 177.2 of the Law on Intellectual Property which are also favourable to considering that the exhaustion of the distribution rights of the work of creation only occurs when the distribution rights are granted by means of sale or transmission of ownership of the property that takes place in a European Union country.

Directive 92/100EEC, in relation to the exclusive right to authorise or prohibit the lease or loan of originals and works protected by copyright, establishes the principle with the scope that has just been set forth ("the distribution right [...] shall not be exhausted in the Community except in the event of the first sale in the Community of said object by the holder or with his/her consent": Article 9.2).

This same principle is set forth specifically regarding the right to distribute an original or copies of a work, in Art. 4.2 of Directive 2001/29/EC of the European Parliament and the Council, of 22 May 2001, relating to the harmonisation of certain aspects of copyrights and rights similar to copyrights in the information society.

Previously the same principle was consecrated with regard to the protection of computer programs and data bases (Art. 4. c] of Directive 91/250, and Arts. 5. c] and 7.2 b] of Directive 96/9).

d) There is also jurisprudence from the Court of Justice of the European Communities which, before these directives were approved, set forth this principle, and once approved, interprets them as indicated (Decision of 2 February 1982, Polydor vs. Arlequín and Simons Record, R. 270/80; Decision of 28 April 1998, C-200/96, Rep. p 1–1953, Metronome vs. Music GmbH; Decision of 27 September 1998, C-61/97, Foreningen vs. Laserdisken).
e) In the case examined, additionally, while the text of the Trademark Law applied by the Supreme Court Decision of 22 December 2005 says nothing regarding the European Space as the place in which the marketing of the trademark needs to take place for exhaustion to occur (despite which, even with this provision in force some decisions of this Court, as already seen, have determined that this territorial requirement needs to be complied with, today set forth expressly in Art. 36.1 of Law 17/2001), the Law on Intellectual Property in the text applicable to the subject of this process (consolidated text approved by Legislative Royal Decree 1/1996), refers to the "scope of the European Union" as the space in which the sale giving rise to exhaustion must take place (Arts. 19.2 and 117.2 Law on Intellectual Property). It is therefore not too difficult to specify the scope of the confusing text ("when distribution is carried out by means of sale, in the scope of the European Union, this right subsides with the first, and only regarding successive sales taking place in said context by the holder of same or with his/her/its consent"), the meaning of which offers no doubt since it is a consolidated text whose regulatory antecedent is based on Law 43/1994, of 30 December 1994, on the incorporation into Spanish Law of the Directive, whose Art. 8.2 states that "[such right of distribution shall only extinguish when the distribution is by means of sale in the European Union". Law 23/2006, of 7 July, has introduced more clarity into the text, because both provisions of the Law on Intellectual Property not set forth now that "when the distribution is carried out by means of sale or other type of transmission of property, in the scope of the European Union, by the owner of the right or with his/her/its consent, such right shall be exhausted with the first of same, but only for the sale or transmission of successive property carried out within said territorial scope."
f) The Supreme Court Decision of 9 June 1998 cannot be invoked as a precedent in counter to this interpretation, since it applies Art. 19 II of Law 22/1987 on Intellectual Property, which, prior to the European Directives and jurisprudence cited, does not make any reference to the requirement that the sale take place in the European Union for exhaustion to be considered to have taken place: "[when distribution is by means of sale, this right is extinguished after the first instance."

D) The right of the claimants did not extinguish, therefore, as the appellants claim, with the licensing of the distribution of the phonograms in a non-community country, as it took place outside the European Union. Therefore, they can oppose distribution in that territory and take action to cease under the *ius prohibendi* [right to prohibit] that is inherent in the right to exclusive distribution of works of intellectual creation. As it did not rule as such, the appealed decision infringes law as claimed.

Fourth. – Examination of the arguments of the party against whom the appeal was made.

The above conclusion is corroborated by the following reasoning, formulated for the purpose of responding to the main arguments contained in the appeal for cassation, for purposes of ensuring the right to effective judicial protection:

a) The justification by the claimant companies of the acquisition by its owners of the exclusive distribution rights was considered sufficient in both instances and there were no reasons de deny it, in view of the fact that the documentation provided and the correct considerations set forth in the decision from the first instance and ratified by the appealed on the value of the private translations, the evidential value of the private documents in regard to the consideration of the other evidential means (especially in relation to the constancy of the mark, or symbol "p", accrediting the reservation of the rights of the producer of a phonogram or his/her/its licensees) and the non-constitution of register entry.
b) Additionally, European jurisprudence considers that the rules on the burden of proof be adapted to the requirements of Community Law regarding international exhaustion of trademark, and particularly, the decisions issued in Zino Davidoff, S.A., and others, establish that proof must be provided of consent to the transmission of ownership in the EES to the operator invoking the existence of such consent and not the trademark owner, whereby to fight exclusivity of the right of distribution in the EES emerging from the granting of such right by the holder to its subsidiaries, it is not sufficient to allege there is no formal record of such exclusivity.
c) The statement in the Supreme Court Decision of 9 June 1998, in which the appeal was upheld, according to which the attribution to assignees of exclusive distribution in Spain "does not give them rights *erga omnes* [before all], because the link is the one that was entered into with the grantors and the content of, effects of and compliance with contracts has to be dealt with them" and cannot be absolute in nature, but rather must depend on the scope that the decision acknowledges for the granting of the distribution right in the specific case considered, and interpret the Law on Intellectual Property in force at the time, as we have seen, that was a text not applicable to the subject of this proceeding. In summary, the decision referred to attributes a certain effect of the consent of the transmitter, but does not establish doctrine on the nature of the copyright that makes it impossible to gauge the incompatibility of international exhaustion with community exhaustion when

the law links exhaustion in the community sphere to specific consent by the right-holder for the sale of such right in the EES.

d) The allegation is formulated in relation to the way the corporate veil is lifted, insofar as the parent company or licensor of the rights in question effected a sale of legal phonograms outside the market of the European Union and charged its economic rights without imposing any export limitation on the buyer, or at least there is no record of any. It therefore cannot go against its own acts and maintain that its subsidiaries are the only ones authorised to permit import. This allegation is not compatible with the principle established by community jurisprudence on the requirement of clear consent – in this case nonexistent – of the holder of the right specifically aimed at the sale or marketing in the EES by the buyer on whom the principle of exhaustion can be applied.

e) The decision of 28 September 2001 does not oppose the conclusions set forth, since the considerations on the impossibility of permitting market fragmentation are formulated in a context of study and application of community jurisprudence on the community exhaustion of a right.

f) As the decision from the first instance explains, the granting of rights by a part of one of the parent companies to two subsidiaries does not affect the exclusivity of the right granted to such subsidiaries, given the nature of the licenses and exclusive distributors in Spanish territory of said company, which is the sole and exclusive owner of both subsidiaries."

XXI. COMMERCIAL ENTERPRISES / CORPORATIONS

* Decision by the Provincial Court of Las Palmas, 4th Section, of 22 June 2006 (EDJ 2006/259708)

Legal entities. Applicable Law.

"Legal Grounds:

...Third. – (...) It is true that under Art. 6 of the Law on Civil Procedure legal entities can be parties in proceedings brought in the civil courts and they appear in trial through such persons as legally represent them. Dealing with a foreign company, of Indian nationality in this case, the claimants need to prove (Art. 281.2 Law on Civil Procedure) their capacity, constitution and representation in accordance with their national law (Art. 9.11 Civil Code). They must prove that Rishabn Impex has its own legal identity, different from that of its partners or the members that make it up, and that they are its legal representatives in accordance with law, since neither have they accredited their voluntary representation, by means of showing and providing the appropriate powers of attorney. Specifically, Mssrs. Champakal Jain have not accredited being able to validly act on behalf and in representation of the legal entity Rishabimpex, as the power of attorney for representation granted by them, on behalf of said entity, is insufficient, owing to their not accrediting their legal or voluntary representation. The claimant's position of proclaiming the Ribaz Impex as a legal entity in and of itself is sufficient to put an end to the process to dismiss the

suit without entering into the substance of the matter pursuant to Arts. 416 and 418. 2 of the Law on Civil Procedure, since the claimants have not accredited the representation they claim to hold. In this context there can be no allegation by the claimant of vacillating positions that would generate legal insecurity because *ab initio* there must be full and clear knowledge from the start of who the subjects of the legal proceedings are and there can be no alternative regarding such matters if it is considered that the legal capacity is not held.

Nonetheless, the Judge of the First Instance both in the preliminary hearing of the ordinary trial and in the appealed Decision maintains that Mr. Javier and Mr. Cesar are acting in their own benefit and that of the other persons making up the entity, Rishabimpex that has no legal identity.

The current Law on Civil Procedure of 2000 recognises the ability to be a party in proceedings before the Civil Courts of entities without legal identity that are recognised by Law as having the capacity to be a party (Art. 6.1. 5th Law on Civil Procedure). But it does not however, accredit that, under its national Law, the national Law of India, such an entity has a recognized capacity to be a party in a legal proceeding.

On the other hand, Art. 7.7 of the Law on Civil Procedure states that entities without legal identity that are made up of a plurality of persons and properties serving the common goal to which Art. 6.2 of the Law on Civil Procedure refers, may be sued – passive, not active legitimisation – and their appearance at trial shall be by means of the physical individuals who *de facto*, or through the entity's agreements, act in its name *vis-à-vis* third parties. And it is true that it is also not accredited with sufficient certainty that Mssrs? Javier and Cesar are the same people whose surname is Champalal as set forth on the deed of constitution of the company Rishabimpex. There is no other identifying data on the constitution document attesting to the fact that they are the same people who are named in the lawsuit and who granted the Power of Attorney.

It is true, regarding active legitimisation, that the claimants categorically and without any contradiction state that Rishab Impex lacks legal status, the capacity to be a party to and to appeal in a trial could be acknowledged for any of the co-participants in extrapolation of the Law of the Land, specifically the doctrine of our Supreme Court on community property, considering that any of them (joint partners, joint-owners or joint participants) may act in benefit of the others. Nevertheless, on the one hand, it must be taken into account that constitutional document no. 2 that accompanies the action, from which it is not deduced that such persons, if they are the same as the claimants, hold representational powers for said Rishabimpex Company, was challenged by the respondents because it was a mere authenticated photocopy compared by a public Notary but not reflecting notarial intervention in the granting of the constitutional document, which would verify the intervention and capacity of the persons referred to therein.

Such foreign document does not meet the requirements in order to be considered a public document in Spain with the probatory force granted under Art. 319 of the Law on Civil Procedure to Spanish public documents, which constitute proof of the fact, act or state of the matters they document, of the

date the documentation is produced and the identity of the Notaries and other persons intervening there in, as there is no evidence of observance of the provisions of Art. 323 of the Law on Civil Procedure, namely that in its granting or preparation the requirements of the country in which it was granted were complied with for it to be full proof in a Court proceeding. It does not contain or lacks the apostille or legalisation necessary to be authentic in Spain. The seal of the Embassy of Spain in New Delhi is only on the translation (document 3 of the claim), not on the document to be translated (document 2 of the claim), for the purposes of authentication of signatures without prejudging the substance of the document."

XXIII. TRANSPORT LAW

* Decision by the Provincial Court of Guadalajara, 1st Section, of 2 November 2006 (AC 2006\2233).

Transport of goods by land. Damage suffered by goods during handling. Carrier liability.

"Legal Grounds.

First. The appellant respondent alleges, as her first ground for appeal, infringement of procedural rules and/or guarantees as regards the notification, alleging that the documents accompanying the Letters Rogatory sent by the Court for the purpose of notifying the action were not translated; and adds that said Letters Rogatory were left in her mailbox with no external indication of the source of the documentation and no instruction in any comprehensible language relating to the possibility of appearing in the Court record and responding to the action, nor of any deadline for doing so; she therefore seeks nullification owing to not being notified in due form. This position makes it necessary to recall that the jurisprudence that states that not every procedural transgression allows for resorting to the extraordinary remedy stated. It requires the fault denounced to have caused the person invoking it an inability to defend him/herself, a premise of total nullification of the proceedings in accordance with Article 238.3 of the Law on Judicial Procedure, as stated, among many others, Supreme Court Decisions 1–3–1997, 20–2–1997, 5–12–1996 and 9–4–1996; in a similar sense, Constitutional Court Decision 22–4–1997 which, referring to the Constitutional Court Decisions 43/1989, 101/1990, 6/1992, and 105/95, clarifies that for a potential inability to defend oneself that is contrary to Article 24.1 of the Spanish Constitution to be found, it must be substantive in nature and not merely formal, which implies that the supposed fault must have caused real and effective harm to the respondent in his/her possibilities of defence and that the lack of defence suffered is not attributable to the will or lack of diligence of the interested party. Supreme Court Decision 11–11–2000, states in similar terms that to give rise to the nullification of proceedings it is necessary for there to be on the one hand clear and manifest defects of form

and, on the other, that such defects have caused lack of defence to the person enouncing the defect. There is also abundant jurisprudence which states that the lack of defence that is proscribed by Article 24.1 of the Spanish Constitution is such as is attributable to the Court that should protect the rights and interests of persons in litigation, but not that which arises from the conduct of an interested party him/herself. Constitutional Court Decision 3–5–1993, referring to Constitutional Court Decisions 109/1985, 64/1986, 102/1987, 205/1988 and 48/1990, adds, citing Constitutional Court Decision 155/1988, that lack of ability to defend oneself is any harm that is caused solely when the interested party, unjustifiedly, finds the possibility of seeking judicial protection of his/her legitimate rights and interests closed, or when the violation of the procedural rules involves deprivation of the right to a defence, inflicting real and effective harm to the interests of the affected party, a situation which does not occur if the fault is due to the passivity, disinterest, negligence, technical error, or lack of expertise of the professionals that represent or defend the affected party. This is similarly set forth in Constitutional Court Decisions of 29–3–1993 and 30–6–1993, stating it is necessary to weigh the right to effective judicial protection without lack of defence against the rights of the other parties to have the suit resolved without undue delay, whereby this latter right must give way to the former if the appellant has been placed in a situation of lack of defence from which he/she cannot escape by acting with the diligence his/her means permit, but this is not the case when, to the contrary, the party had reasonable opportunities to determine what the situation she was in was and to act accordingly, since in this case the recognition of the absolute primacy of her right would be tantamount to making the holders of that right pay the consequence of the conduct of another (comment on this point, Constitutional Court Decision 8/1991). Along similar lines there is Supreme Court Decision 18–7–2002, that cites Constitutional Court Decisions 105/1995, of 3 July, 122/1998 of 15 June, 26/1999 of 8 March, 1/2000 of 17 January, 74/2001 and 77/2001, both of 26 March, 113/2001, of 7 May and 184/2001, of 17 September, *inter alia*. Applying the above doctrine to the hypothesis at hand, it must be concluded that there has been no lack of defence that would give rise to retraction of the proceedings since the case file contains the Letters Rogatory sent by the Court of origin and duly executed by the Court of the First Instance of de Kassel (Germany), despite the possibility of there having been returned if it was considered that the provisions of the Agreement of 15 November 1965 (Article 4) were not complied with. It was shown that the court official, in compliance with the law of the receiving State, proceeded to deliver the documentation to Sr. Boxan at the appellant's domicile. There was no evidence of it being rejected by the addressee, as it could have been owing to its not being written in the official language of the place of notification or in a language he/she understood. Therefore, it must be concluded that the appellant duly received the documentation sent by the Court to his/her corporate headquarters, and therefore, from this perspective it must be confirmed that the procedural notification fulfilled its purpose and effected notification. Even though notification is carried out with

certain irregularity, it is fully effective, as stated by Supreme Court Decision 698/1995, of 13 July. Therefore, in view of the proceedings as set forth, it is not in order to find that there was any lack of defence on the part of the respondent, whose *in absentia* status, was due to his/her own voluntary passivity; neither can the allegation that the decision is not executable in Germany by infringing Article 34.2 of Regulation (EC) no. 44/2001, of 22 December 2000 be attended to, because even having declared the appellant respondent as *in absentia*, it is true that he/she was notified in due form and with sufficient time to be able to defend him/herself, and therefore the *de facto* case invoked by such allegation is not present. In respect of this matter, it must be added, as set forth in the Supreme Court Decision of 31 December 1999, a peaceful, constant doctrine has been constructed that is derived from European Court of Justice Decisions in the sense of making it possible to execute a foreign decision issued with the respondent *in absentia*, when such respondent was notified in due form and with sufficient time. Therefore, the nullification sought is not in order, whereby this first ground for appeal must be…(sic)

Second. Subsidiarily, the appellant sought the revocation of the appealed decision and the consequent dismissal of the case against him/her, based on the allegation that he/she only acted as the seller of the machinery that was damaged in transport, and did not participate in its loading or stowing. The appellant sets forth the lack of passive legitimisation owing to not having been a party in the transport contract, while at the same time denouncing the infringement of Article 10 of the CMR Agreement and violation of Articles 24 of the Spanish Constitution and 222 of the Law on Civil Procedure on matters of *res judicata*. In responding to these allegations, it must be pointed out that this case was concerned with the potential liability of the respondents for the damages suffered by the graphic arts machine that the now appellant sold to IMAG as a result of the traffic accident that occurred on 6–2–1999 when it was being transported from Germany to Spain. The complainant, with whom the buyer arranged the transport, is now claiming the amount it had to pay to Zurich, IMAG's insurer, as a result of being condemned to pay by Court of the First Instance No. 50 of Madrid in Small Claim proceeding 64/2000. The decision now under appeal, sets forth as a proven fact that the damages suffered by the machine were due to its not being properly tied down to the lorry in which it was transported. This liability is attributed to the appellant, after considering it proven that he/she was a party to the transport as the sender, based on Article 10 of the CMR and by supplementary application of Law 16/1987 of the Regulation on Land Transport, of Royal Decree RD 1211/1990 which approved the Regulation, and the Order of 25 April 1997 on General Conditions for Contracting Road Transport, states as regards the loading and stowing of goods that it is on the account of the loader or sender and it was not shown that the complainant had sent its technicians to Germany nor that there was any agreement with Boxan that would alter the above. This absolves from such liability, on the other hand, the co-respondent hauliers under the consideration that they did not perform the loading and stowing operations. This last pronouncement cannot be reviewed

in this appeal as it has become firm owing to its not having been appealed by the complainant.

Third: After determining the above, this Court differs from the criteria of the original judgment regarding the liability attributed to the appellant respondent, owing to the total absence of any accreditation of the fact that same was the party that carried out the loading and stowing operations that determined liability, as shall be set forth. For such purpose we must commence an examination of the controversy by pointing out as a relevant fact that in the proceedings before the Court of the First Instance No. 50 of Madrid, the complainant, Geologistics, SA, was considered liable for the damages suffered by the load whose haulage was contracted by IMAG (buyer of the machinery). It is considered to have been proven in the decision by said Court (confirmed by the Provincial Court of Madrid) that the loading and stowing of the goods was performed by the complainant, as gleaned from the documentation provided in said case and not countered by Geologistics, SA. It was argued that its liability arose from its role as agent and, therefore, that it subrogated the position of carrier after excluding the possibility of attributing the defects in the goods transported to *force majeure* and rejecting as highly unlikely the version that the lorry driver gave of the accident, adding that, in any case, because of the characteristics of this type of haulage and the possibility that certain manoeuvres could cause the goods to fall off, it was necessary to exercise great caution regarding the tying down of the goods or the use of a proper vehicle to increase the space and the load capacity of the lorry to be able to fully guarantee the haulage (see Decision of the Provincial Court of Madrid provided as document no. 7 in the case file). Therefore, on the basis of the facts themselves as proven in the prior proceedings, we must confirm that it was the complainant him/herself who assumed responsibility for loading the machinery that was to be carried. This is also inferred from document no. 1 in the case file, consistent with the offer that was provided to IMAG, from which it is seen that in addition to the transport (whereby reference is made to delivery as the full, packed load of a lorry), it included extras, including handling, cranes, accessories, etc., which clearly refer to loading operations; without it being uncommon for the complainant to assume such tasks in the light of its corporate activity, which is accredited in the case file (f. 138 and successive). It was proven, furthermore, that Geologistics, SA only contracted the transport with Juan Argos, SL (who in turn subcontracted it to Transportes Sedano, SA), as a result of documents nos. 2 and 3 from the case file, whereby it does not show that such co-respondents were responsible for loading and stowing the goods. A letter was provided as document no. 13 in the case file, sent by Transportes Sedano, SA which states that the referred-to operations were carried out by Geologistics, SA. This allows for the finding that it was the complainant that the buyer of the machine engaged not only to perform the transport but also to handle the loading and stowing of the machinery to be transported. Under such circumstances, there is sense in the appellant's allegation that a team of technicians sent by the buyer travelled to Germany to disassemble the machine and put it in the lorry, without there being any

record or any other intervention on the part of the appellant other than he/she/it recognising in the appeal that it engaged a forklift at the request and on the account of IMAG. It is also true that the only thing that is demonstrable in the case is the interpellant's status as remittent, as forth on the consignment note, whereby this should be understood in the sense that it was the entity that was sending the goods as the seller of same, without there being a record of any other intervention in the transport, since the entity that did the contracting was the complainant at the request of the purchaser, and involved also the loading and stowing, as stated to have been proven in the firm Decision by Court of the First Instance No. 50 of Madrid (document no. 5 of the complaint). Therefore, it cannot be considered to have been accredited that Boxan intervened in the operations mentioned above, which the complainant needed to show as the basis of the deductive claim. The appellant's default does not justify the total absence of proof that is found in the record, and there is reiterative jurisprudential doctrine that recalls that such a procedural situation is not a submission to nor even admission of facts, nor does it free the complainant from proving the constituent facts in his/her complaint (Supreme Court Decision no. 491/2004, of 3 June and those cited therein).

Fourth. Having said all the above, it must be concluded that it is not fitting to place any liability on the appellant for the damages suffered by the machine it sold to IMAG as a result of its transport. It should be pointed out for this purpose that although it is considered that the appellant intervened as sender, in the sense that such has in the consignment note, it would not be appropriate to assign liability thereto under the provisions of Article 10 of the CMR, since this provision refers to damage in goods owing to defective packaging, which in the case at hand was not what caused the damage. It was caused rather by the defective stowing or tying down of the machine, added to which is the fact that in the consignment note there is no reservation whatsoever on the part of the haulier when it received the pieces without packaging (Article 8 CMR). Having determined what the specific intervention of the appellant in the transport could be in this case and having established that the loading and stowing of the machine was done on the account of Geologistics, SA, it does not make sense to assigned liability by the supplementary application of the Regulations regarding Land Transport that is cited in the appealed Decision since, in line with such provisions, it would be not in order to attribute such liability to the haulage companies with which the full load haulage was contracted, but neither does it make sense to direct it towards the person who has not been shown to have intervened in any other way than as set forth above and who does not have status as loader, position that is considered to be held by whosoever engages the transport with the haulier. As set forth in the Decision of the Provincial Court of Burgos (2nd Section), of 15 July 2002, this does not have to be the same person/entity as that of the sender since this refers basically to the entity that is sending the goods while the concept of loader refers essentially to whosoever engages the transport, and this can also be done by whosoever sends the goods, by instructing it to be delivered to a certain destination, or

by the recipient who orders the goods to be delivered to his domicile. These considerations lead to the appropriate dismissal of the suit brought against the appellant, with imposition on the complainant of the Court costs and without verifying express pronouncement regarding those of the appeal."

XXIV. LABOUR AND SOCIAL SECURITY LAW

1. International jurisdiction

* Constitutional Court Decision 140/2006, of 8 May 2006 (http://www.tribunal-constitucional.es/jurisprudencia/Stc2006/STC2006–140.html)

International jurisdiction of Spanish courts in labour matters. Absence of jurisdiction.

"Legal Grounds.

5. In the case submitted for our consideration, the examination of the actions show that the complainants entered a claim for an amount against Prosport, S.A., and Festina, S.A., (subsequently, Festina-Lotus, S.A., as provided by the Clarification Order issued by Labour Court No. 28 of Barcelona, of 4 December 2000).

Festina Lotus, S.A., has its headquarters in Spain, in the city of Barcelona, on Vía Layetana no. 20, as shown in the sixth proven fact of the judicial Decision. This fact is also confirmed in the legal grounds of the Decision of origin (Third Legal Ground), through the resolution of the exception to lack of jurisdiction by Spanish Courts. It would be, therefore, obligatory for us to base ourselves on that fact, as provided under 44.1b) of the Law on the Constitutional Court.

Nonetheless, as this case involves a matter of procedural public order, in which the judicial body of the appeal – in accordance with constant jurisprudence – is not subject to the limits of the statement of proven facts of the original claim, it may be of interest to state that the unequivocal accreditation of such fact, relating to the domicile of Festina Lotus, S.A., is also gleaned from different documents that form part of the case file. For example, in the sponsorship contract that is included as page no. 734 of proceedings no. 146–2000, of the notarial document included in pages 746 and subsequent pages in the same case file pertaining to Labour Court No. 28 of Barcelona. On the other hand, the respondent, Festina Lotus, S.A., itself recognised (and invoked) this fact, as can be verified on page 728 of the above case file (motion of opposition to the claim), or in the appeal for reversal that was entered against the Decision by the Court of origin (for example, pages 58 and 59 of roll no. 4063–2001). It is a factual premise, therefore, that was not a matter of controversy in the proceedings and was not countered by Festina Lotus, S.A., or even Prosport, S.A. It is therefore gathered from a reading of the opposition to the claim (page 728, cited above), from the record of the hearing (pages 89 and successive pages of proceedings no. 146–2000), from documents from both companies in opposition to the appeal for reversal entered by the appellants (pages 98 to 111 of roll

4063–2001) and of the appeals for reversal entered by parties who made no reference to this circumstance, nor did they request review of the sixth proven fact through the Art. 191 of the Law on Labour Procedure, denouncing on the contrary that action was taken against Festina Lotus S.A., as a legal tactic, specifically because they are headquartered in Spain, to lead to jurisdiction there (particularly, pages 17 and 19 of roll no. 4063–2001). This is not even opposed by the companies cited in the allegations made in the constitutional procedure, whereby reasoning is offered regarding the application of Art. 25.1 of the Law on the Judiciary in relation to the case, without however disputing such fact, which in reality they admit and which is, therefore, beyond any doubt in view of the elements set forth.

It is also without doubt that neither the action leading the judicial proceedings, nor the parties in the different phases and processing of same, never connected Societat Sportiva Festina-Lotus, domiciled in Andorra according to the appealed Decision (Second Legal Ground) to the case. There is, therefore, no reason to link such entity to the case, or with the professional cycling contracts signed for 1998 by Mr. Alex Zülle and Mr. Laurent Dufaux. Despite this, the decision issued by the Superior Court of Justice of Catalonia considers that Societat Sportiva Festina-Lotus is involved in the case, as shown in its legal grounds, according to which "The Spanish courts lack jurisdiction to try this case; since neither the claimants (Mr. Alex Zülle and Mr. Laurent Dufaux), nor the company for whom they worked (PROSPORT, S.A.), or Societat Sportiva Festina-Lotus (pages 736 to 742 – Team Festina-Lotus), are headquartered in Spain."

As shown by the appellants, there is confusion between the two companies, as well as among the actual elements of the case proceedings, which gave rise to a Decision that is alien to such proceedings that was quoted and transcribed in the appeal (Decision by the Labour Court of the Superior Court of Justice of Catalonia of 12 November 1998).

The error set forth is in addition to another one which is shown in the same Legal Ground regarding the Festina Lotus, S.A. domicile. Taking stock of the facts considered proven, the Labour Court of the Superior Court of Justice says that the Festina company "had" its domicile in Barcelona, at Vía Layetana, no. 20. This is stated, in opposition to the facts declared as proven in the original Decision (sixth), and does so without any grounding in the evidence gathered or in the reasons set forth therein, contradicting all the evidence that appears in the proceedings. It is true that the setting of jurisdiction is a matter of procedural public order that the judicial body should resolve in full freedom, without being subject to the specific premises or grounds of the appeal and without subjecting itself to the limits of the statement of proven facts by the original court, in which it therefore is able to examine all the evidence gathered, but such freedom of decision on a matter which by it nature removes it from the operational power of the parties, does not excuse, clearly, any clear or evident error when it occurs, as is the case here.

The only reason that could be given to explain such a statement (that Festina "had" its domicile in Barcelona) would be in the link made by the Court with

the case resolved by its Decision of 12 November 1998, in which it found that Societat Sportiva Festina Lotus – domiciled in Andorra and the respondent in that matter – changed its domicile (seemingly from Spain to Andorra, as the Decision says that "the Spanish legal system lacks jurisdiction for judging the case; independent of the causes of the change in domicile by the respondent company, since such choice is up to same, even if by doing so it seeks to obtain greater fiscal and Social Security benefits from – in this case – Andorran legislation, since there is no evidence that this change of domicile violated any rules in force in Spain"). However, this circumstance taken by itself does not identify the company as being the same as the respondent in this case; it does not rule out, even if there is a link, that the domicile was not changed again back to Spain; nor does it explain, if otherwise, that none of the parties made any reference to this fact, whereby they all confirmed (and even she herself) that Festina Lotus, S.A., is located in Barcelona, as furthermore the proceedings unequivocally accredit.

The evidence of error in this twofold premise (in the implication of the proceedings of the foreign company Societat Sportiva Festina Lotus and its confusion with Festina Lotus, S.A., as well as in the determination of the domicile of the Festina Lotus, S.A. company) cannot be offset by the content of pages nos. 736 to 742, which cite the appealed judicial decision itself. First, on these pages there is the sponsorship contract signed between Festina, S.A. and Prosport, S.A., and the Festina Lotus cycling team organizational chart. In the contract, unequivocal reference is made to the two companies, of which the first of the two, whose domicile is located in Spain (page no. 734), sponsors the second, without, according to the terms of the contract, their being the same in any way. Secondly, on the pages mentioned, in Prosport, S.A.'s formal title a seal was stamped with its domicile in Andorra and with the reference "team Festina lotus". But this indication of the name of the sports team does not allow us to question the factual evidence found – regarding the domicile of the respondent Festina Lotus, S.A., and regarding the non-implication in the proceedings of Societat Sportiva Festina Lotus –, neither would it make possible, as stated aptly by the Public Prosecutor, the identification of the two co-respondents in the proceedings as if they were just one, to conclude that by locating the domicile of Prosport, S.A. in Andorra, Spanish courts do not have jurisdiction to hear the case (an subjective conclusion that in any case is not formulated in the appealed decision). In reality, as Festina Lotus, S.A. alleges, the naming of the cycling team with the name of its main sponsors seems to respond to the Regulation on sports groups for 1998 of the International Cycling Union (page 756 of proceedings no. 146–2000, paragraph 1.1.045).

6. The above clearly sets forth the existence of the error denounced in the decision by the Superior Court of Justice of Catalonia. The Court confuses Festina Lotus, S.A., with a foreign company and, in any case, locates its domicile outside Spain, saying that it "had" it in Barcelona, in counter to what is seen from the evidence gathered and the motions and allegations of the parties. Now, the verification of the existence of the error does not automatically determine

a finding of violation of the right to due process held by the appellants. It is necessary to verify that additionally there was a concurrence of the premises set forth in the fourth legal ground for the error of the judicial body to acquire constitutional relevance:

a) In the first place, it is found that it is an error of fact that is clear, manifest and notorious, as its existence is immediately verifiable by judicial action (for all, Constitutional Court Decision 6/2006, of 16 January LG 5).
b) Second, the error was determinant in the Decision on the appeal. In effect, the Decision of the Court of Instance rejected the exception of lack of jurisdiction of the Spanish Courts precisely because, in accordance with the interpretation of the Law to which it alluded, it was in order to act as the complainants did because one of the respondents (Festina, S.A.) was domiciled in Spain. The appeal Decision states the contrary. However, all the argumentation relating to this aspect lies expressly and conclusively, as has just been set forth, on the erroneous consideration of the domicile of Festina Lotus, S.A., apparently brought about by confusion between this company and another one that was not a party in the proceedings, but to which a previous Decision by the same Court referred. Thus the legal grounds of the Decision lack any sense, and it is not possible to know what the judicial Decision would have been if this error had not been made (for example, Constitutional Court Decisions SSTC 124/1993, of 19 April, LG 3; 206/1999, of 8 November, LG 4; and 201/2004, of 15 November, LG 3).
c) Thirdly, the mistake is attributable to the jurisdictional body that committed it, and not to the negligence or bad faith of the claimants, who in this case would not strictly be able to complain of having suffered injury under fundamental Law (Constitutional Court Decision 150/2000, of 12 June, LG 2). The mistake was not caused by any action or omission on the part of the complainants. Nothing indicated furthermore, that it could happen nor was there any specific behaviour imaginable to be able to avoid it, except to ask the parties in the proceedings for extreme diligence and foresight, which would be unjustifiable and disproportionate, moreover when it is not up to them to ensure the correct exercise of the functions that are under exclusive judicial responsibility.

- d) Lastly, the error produced negative effects in the legal interests of the appellants, as it prevented them from obtaining a response based on Law to their claim for an amount – since the action was left without Judgment –, be it a pronouncement of substance, or one of procedure, even of lack of jurisdiction by the Spanish Courts.

Therefore, the premises are complied with that as stated earlier, require constitutional jurisprudence to find judicial error in fact of constitutional relevance with an accompanying violation of the right to effective judicial protection without lack of defence of the appellants of the Decision issued by the Labour Court of the Superior Court of Justice of Catalonia, of 11 December 2001."

2. Individual labour contract

* Decision, Superior Court of Justice of the Community of Madrid, Labour Division, 2nd Section, of 28 February 2006.

Individual labour contract. Applicable law. Regulations. Dismissal. Subjects of the work contract.

"Legal Grounds.

First. – (…)" The Rome Convention – in force in Spain as from its publication in the Official State Gazette of 19 July 1993 – universally regulates and determines Law to govern legal relationships with points of connection with legislations of different States. In accordance with its Article 2, application of this takes precedence, even if the Law designated therein is that of a non-contracting State, and the rules of International Law contained in Chapter IV of the Preliminary title of the Civil Code acquire residual status and are only applicable to the types of contracts not contemplated in the Rome Convention (Article 1.1) and contracts entered into prior to its entry into force. Therefore, the contract establishes, *inter alia*, general rules regarding the Law applicable to the substance of the contract – Law chosen by the parties or in its absence the Law of the country to which it has the closest ties (Articles 3 and 4). Regarding form, a specific rule relating to labour contracts (Article 9), – Law of choice, and in its absence, the law of the country in which the work is customarily performed or, subsidiarily, the Law of the country where the establishment that contracted the workers is located (Article 6). (…).

In the case at hand, the labour contract is prior to the entry into force in Spain of the Rome Convention, whereby the provisions set forth in the Preliminary Title of the Civil Code are applicable. The appellant considers that the Decision by the Court of origin erroneously interprets Article 10.6 of the Civil Code that establishes: "Regarding the obligations derived from the labour contract, in the absence of express subjection by the parties and notwithstanding the provisions of Article 8, paragraph 1, the Law of the place where the services are performed shall be applicable." This Article does not support an abuse of dominant position by the employer and must be interpreted while keeping in mind its systematic position within the Civil Code, placing it in relation to Article 10.5 of same. Article 10.6 of the Civil Code permits a choice notwithstanding the provisions of Article 8, paragraph 1 of the Civil Code. These are rules that jurisprudence has called "policing" or "public order" rules owing to their special relevance within the system. When the work is performed in a foreign country, the autonomy of choice is reciprocally limited by the rules of said country. Article 8.1 of the Civil Code functions directly not only in relation to Article 10.6 of the Civil Code, but also regarding all others, including Article 10.5 of the Civil Code, even if nothing had been said, and therefore the "policing," "public order" rules, or the "necessary law" of the "*locus laboris*" amounts to a general limitation of autonomy. The applicable Law is Spanish Law, since it represents the contract's centre of gravity and is under the control that the State exerts over work carried out in its territory, even though a foreign Law may rule to the contrary.

The territoriality of certain Spanish Laws imposes their applicability in Spain to both nationals and aliens.

In the case at hand we are dealing with an employee who is a national of the European Community, a Portuguese national, who has the same legal status as any Spanish employee employed in Spanish territory, since the contractual relationship with the Embassy of Colombia in Spain commenced and continued without interruption, in Spain, wherefore Spanish legislation is applicable, and which brings the Court to rule in favour of the appeal. (…)."

XXV. INTERNATIONAL CRIMINAL LAW

* Decision, Supreme Court, Criminal Division, 1st Section, of 11 December 2006 (RJ 2006\8241).

Crimes against persons. Goods protected in the event of armed conflict. Death of Spanish cameraman in Baghdad (Iraq) from foreign army fire.

"Legal Grounds.

…Tenth. – […] the Court of Instance ruled on the classification of the facts denounced before defining the scope of jurisdiction of Spanish Courts to judge them, which constitutes a logical and legal "*prius*". […] On the contrary, the Court of Instance ruled, first on the atypical nature of the facts, then declared the lack of jurisdiction of the Spanish Courts to judge them, "making a restrictive and erroneous interpretation of Art. 23.4.h) of the Organic Law of the Judiciary (RCL 1985\1578, 2635)", lacking the knowledge of what is set forth on this matter in the IVth Geneva Convention and its Additional Protocol, taking therefore "a dialectical leap into a vacuum" "without sufficient grounds".

In fact, although it is true that the Court of Instance has explained the reason it ruled that the Spanish Courts did not have jurisdiction to judge the facts denounced in the case, considering them penally atypical owing to the absence of bad faith (affirming that it was a "notorious fact disseminated by all types of media" that the shot fired from a U.S. tank at the Palestine Hotel was "an act of war against an apparent enemy, erroneously identified" (since interception of Iraqi communications had alerted the American army that "there was an Iraqi unit directing artillery fire against U.S. units from the Palestine Hotel (…)") [see LLGG 6, 7 and 9 of the appealed case file], it is evident that such statement could not have been made without having previously defined the scope of Spanish jurisdiction and attributing judgment of these facts to the Spanish Courts.

…

Twelfth – In a specific reference to the interpretation of the rule on attribution of jurisdiction pursuant to Art. 23.4 of the Law on the Judiciary (RCL 1985\1578, 2635), the Constitutional Court states that "last ground of this rule attributing jurisdiction is based on the universalisation of the jurisdiction of the States and its constituent bodies to judge certain facts whose prosecution and judgement is in the interest of all States,…". And, in this regard, it has stated that "in principle, Art. 23.4 of the Law on Judicial Procedure provides a

very broad scope to the Principle of universal justice, since the sole limitation established thereto is that of *res judicata*". The Constitutional Court, which has the last word in relation to constitutional guarantees, (see Art. 123 Spanish Constitution) concluded that "the Law on the Judiciary establishes a Principle of absolute universal jurisdiction" (see STC 237/2005; LG 3).

The strength of the above conclusion reached by the Constitutional Court and the irregular legal grounds of the appealed Decision regarding the specific problem of the scope of Spanish jurisdiction in the matter fully justify the allegation of infringement of Law in the cited legal grounds as denounced, despite the observations made in the first Legal Grounds of this Decision.

Regarding other aspects, it must be recognised that, in this case, there is a point of legitimate connection that would also justify the extraterritorial extension of Spanish jurisdiction, in accordance with the doctrine set forth in the Supreme Court Decision of 25 February 2003 (RJ 2003\2147) [(LG 8), Guatemala Case], taking into account that one of the victims, the journalist Rogelio, was a Spanish citizen."

* Decision by the Provincial Court of Las Palmas, 6th Section, of 26 October 2006 (JUR 2007\8036)

International jurisdiction. Penal order. Criteria. Crimes committed outside Spanish territory covered by International Treaties or Agreements. Crimes committed by Spanish or foreign nationals that affect the interests of the International Community. Illegal immigration.

"Legal Grounds

…Fourth. On the other hand, the Court does not share the arguments on this point that while the initial illegal status of the *cayuco* (traditional wooden boat), which would be indifferent to Spanish Courts, the situation changes once our institutions take action regarding the boat since it is placed under the control of our authorities, and it is clear that, on the one hand, the deployment of humanitarian action is not a criteria for attributing jurisdiction in any way, or in other words, the fact that Spanish ships provide assistance in the high seas to other sea-going craft that need it does not enable a finding that any potential crimes committed therein were committed on national territory, nor much less, that they were committed by Spanish nationals. Therefore the general criteria of jurisdiction are not applicable, nor can it be considered thereupon that this is a crime that Spain should prosecute in accordance with any International Agreement, since, as we have seen, according to the Convention of 15 November of 2000, such an obligation only exists if the crime is committed in our territory or on a ship under Spanish flag or an aircraft registered in Spain. Furthermore, what is truly impossible is to consider that such extension of our jurisdiction beyond our territory, airspace or territorial sea, is established by the text in force of Art. 318bis which sanctions, *inter alia*, the promotion, facilitation, or favouring of illegal trafficking in persons from, in transit in, or bound for Spain, as it would be surprising for such an important Principle in penal jurisdiction as that of universality to be broadened by a clearly substantive rule to the point of

permitting Spain total jurisdiction outside the country with no limit whatsoever beyond that of requiring the final destination of the immigrant to be its national territory, and because it is evident that judgment of such a crime, as with all those typified in our Penal Code, is only attributed to our Courts insofar as they have jurisdiction to judge them, or rather, when they meet the criteria of any of the cases set forth in Art. 23 of the Law on the Judiciary. Outside that, even when facts that are typifiable as crimes under our legislation, and here we are thinking of homicide on the high seas between persons who do not hold Spanish citizenship and in ships not flying our flag, even when our administrative authorities intervene in a rescue mission, our criminal Courts would lack jurisdiction and should therefore abstain from any investigation or trial.

Nor can we consider that our jurisdiction should be sustained because the *cayuco* lacks a flag, and therefore nationality, and the enforcement of crimes committed cannot be attributed to another State, because this would be tantamount to stating that only Spain has a rule of attribution of jurisdiction such as that which is contemplated in Art. 23.2 of the Law on Judicial Procedure which enables it to judge crimes committed by Spanish nationals outside national territory and that only Spain typifies as such the phenomenon of organised illegal immigration, and it would be tantamount to extending the Principle of universal jurisdiction to a situation that is not contemplated in paragraphs 3 and 4 of Art. 23 of the Law on the Judiciary.

Lastly, we would not be dealing here with a structured criminal organization, seeing that all the occupants of the *cayuco* were making the voyage to settle in our Country, and the masters of the sea craft received the sole benefit of not having to pay the price of the voyage, and therefore the United Nations Conventions on organised crime, such as those signed in Palermo on 12 to 15 December 2000, against transnational organised crime would also not be applicable.

Owing to all the above, it is in order to rule that there is a lack of Jurisdiction on the part of this Court to judge the facts charged, and to declare costs *ex oficio* pursuant to Articles 239 and 240 of the Law on Criminal Procedure."

XXVI. INTERNATIONAL TAX LAW

***Decision, National Court, Administrative-Contentious Division, 2nd Section, of 15 June 2006 (JT 2006\1085)

Agreement to avoid double taxation between Spain and Austria.

"Legal Grounds:

…Fifth. – The central issue of this appeal is to determine whether the tax residence of the lawyer receiving the income is properly accredited as being in Austria, a country with which Spain has signed an Agreement to avoid double taxation of income, since if such fact is properly accredited with the new certificate provided by the party along with the complaint document – document number 1 – Article 14 of the Agreement would be applicable, which deals with the taxation of income subject to examination in the country of residence of

the receiver and, therefore, the non-taxation in Spain of the income received by the non-resident.

In the execution document dated 11 May 2001 which constitutes the origin of this appeal, it states that "the disagreement of the entity with the regularisation undertaken has consisted exclusively in seeking non-taxation in Spain of the income received by the non-resident under the consideration that the rules of the Agreement to avoid double taxation signed between Spain and Austria are applicable" whereby "the only document provided in this regard was the one received by this Office on 18 April 1997" which "is a document issued by the Austrian Administration which states: "Dr. Inocencio is registered as a businessman under the Law on Value Added Tax of 1994 with fiscal identification number 842/8914", stating that "the only document included in the case file and that the entity presented as a certificate of residence cannot be admitted as such. It only shows that said person is entered on the country's business registry for purposes of VAT, which does not accredit that he has status as a resident for tax purposes in said country and is subject to income tax which is the essential requirement for the applicability of the Austrian-Spanish Agreement to avoid double taxation."

Generally speaking, the Agreements to avoid double taxation signed by Spain in the framework of the OCDE Model Agreement in the area of professional services attribute taxation authority to the country of residence of the receiver, so that in a case such as this the income received by the non-resident would not be taxable by the Spanish State. In order to apply such an Agreement it is necessary for residence to be duly accredited, for which purpose it is essential to furnish the appropriate document issued by the tax authorities of the country in question that states that the interested party is a resident for the purposes of the application of the Agreement. It is up to the domestic legislation of each country to establish the conditions that physical or legal persons must comply with in order to have status as residents in that country, whereby Article 4 point 1 of the Model Convention provides "For the purposes of this Convention, the term 'resident of a Contracting State' means any person who, under the laws of that State, is subject to tax therein by reason of his domicile, residence, place of management or any other criteria of a similar nature."

In the case under judgment the appellant provided together with his formal complaint a new certificate issued on 6 May 2003 by the Austrian Tax Delegation, corresponding to the domicile of the receiver of the income, which sets forth:

> "Dr. Inocencio – lawyer, Address Wyrgasse 8, Mezzanin 1030 Viena –, is a resident of Austria and was a resident in 1994–1999, during which period of time he was classified as an individual company (law firm) for the purposes of VAT and personal Income Tax.

This certificate was issued for presentation to the Spanish tax authorities as established in the Agreement on double taxation between Austria and Spain."

The Court considers that with the new certificate provided by the appellant and which was previously transcribed, the tax residence of said lawyer in Austria

has been demonstrated, whereby the application of Article 14 of the Agreement on Double Taxation between Austria and Spain is in order, and determines that the income examined is not subject to taxation in Spain."

XXVII. INTERREGIONAL LAW

* Decision by the Supreme Court, Civil Division, 1st Section, of 13 November 2006 (JUR 2006\276378).

Successions Code of Catalonia. Procedural legitimation of the executor.

"Legal Grounds.

...Second. – [...] For these purposes, in is necessary to start with the fact that the Successions Code of Catalonia approved by Law of the Catalonian Parliament 40/1991, of 30 December – applicable owing to the civil Catalonian residence status of the deceased at the time of death, a point that was not questioned by the parties – confers, in Article 316.1, procedural legitimisation to the universal executor for "any suits or issues as may arise regarding the estate....". This procedural legitimisation is in accordance with the provisions of Article 308 of the same Law which defines the exercise of the office of executor as acting "on his own behalf and on behalf of others" and is also in line with what is established in Article 10 of the Law on Civil Procedure of 2000 which confers legitimacy on persons other than the title-holder in cases in which the Law so establishes. It is therefore clear that only executors having such status as universal executors can appeal for the purpose of procedurally defending rights derived from an estate, or, from a negative perspective, that private executors lack such procedural legitimisation.

* Decision by the Provincial Court of Zaragoza, 5th Section, of 27 March 2006 (JUR 2006\131876).

Marital economic arrangement.

"Legal Grounds.

First. – The first issue posed in the appeal by Mr. Cesar is regard to applicable legislation. It is true that the appealed Decision does not indicate precisely what Law it is applying, whether the Civil Code or Aragonese Law 2/03, on the marital economic arrangement, since it refers without distinction to both. The rule on conflict is set forth in Art. 9–2 of the Civil Code: "The effects of marriage shall be governed by the common personal Law of the spouses at the time they enter into marriage; in the absence of such Law, by the personal Law or the Law of the customary residence of either of the spouses, chosen by both in an authenticated document entered into before the marriage is entered into; in the absence of such choice, by the Law of the common customary residence immediately prior to entering into the marriage, and, in the absence of such residence, by the Law of the place the marriage is entered into."

Therefore, the first issue to be resolved is with regard to the Law of the place of residence of the husband at the time the marriage was entered into.

It was entered into in Madrid on 27 July 2002. Mr. Cesar had been assigned uninterruptedly to Aragon (as certified by the Ministry of Defence) as from 31 July 1991 (f. 271). (…) and the assignment exceeded 10 years on the date of the marriage. Therefore, in application of Art. 14 of the Civil Code, at that time he was a resident of Aragon. As a result, it was not the same location as the wife's, which was the place of common residence. It will therefore be the law of the place of residence immediately following the marriage that will govern for the purposes of this decision (Art. 9–2 Civil. Code). And on this point there is no argument that Zaragoza was where they continued to reside after the marriage was entered into. Therefore, Aragonese law is the applicable law to determine the rights and obligations of the two spouses as regards the marital economic arrangement."