Spanish Judicial Decisions in Private International Law, 2005

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I. SOURCES OF PRIVATE INTERNATIONAL LAW

II. INTERNATIONAL JURISDICTION

1. Expressed and tacit referral

– SAP Madrid, Section 18 of 17 May 2005 (Ref. Aranzadi JUR 2005/166439) *International jurisdiction. Expressed referral*

"Legal Grounds:

. . . Two. Given the form in which this appeal has been lodged, reiterating the initial argument against the international jurisdiction of the Court of Alcobendas to hear the litigious issue in the form laid down in Art. 66.2 LEC, an analysis must first be made of the reality expressly admitted and figuring in the case file that in the contract amendment of 30 October 1989 concluded on 10 May 1995 it was specifically established that "Any litigation, difficulties in enforcement or interpretation concerning the leasing contract signed on 30 October 1989, additional agreement No. 1 of 16 January 1992 and the present additional agreement will be the exclusive competence of the commercial courts of Versailles, FRANCE."

Therefore, given the date of the agreement, the dispute settlement should comply with our law currently in force as laid down in Art. 21 LOPJ determining that Spanish civil jurisdiction is determined by the provisions of the said law as well as by the international treaties to which Spain is party. In this connection, of those agreements the one which is directly and especially applicable to the case at hand and which is prior to EC Regulation 44/2001 of 22 December 2000 (although this fact in no way alters the issue) is the 27 September 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters whose Art. 17, in the draft of the Convention held in San Sebastian on 26 May 1989, provides that "when at least one of the parties has its legal domicile in a contracting state and it has been agreed that a court or the courts of one of the contracting States have jurisdiction to hear any litigation arising or which could arise in connection with a

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determined legal relationship, the said court or courts shall be the only competent courts". Thus the Convention, as well as the current Art. 23 of the aforementioned EC Regulation 44/2001 providing for the exclusive competence of the bodies before which the case was filed unless specifically agreed otherwise, set the stage for the principle of admission of forum except in cases involving specific matters and circumstances known as "exclusive competence" which is not the case here. Admission of forum can be done in writing or verbally with written confirmation "in a way which is in line with the working habits established between the parties" or "in the case of international commerce, in a way conforming to the uses which the parties are familiar with or should be familiar with and which, in the said commerce, are well know and regularly observed by the parties in similar contracts in the commercial sector considered", Art. 17 of the Brussels Convention and Art. 23 of the aforementioned EC Regulation.

In the case at hand there is no doubt as to the existence of and the parties' subscription in writing to the said clause in a clear and perfectly comprehensible manner. A simple reading points to the exclusive submission to the Commercial Courts of Versailles (France) in the event of any litigation, difficulty in the execution or interpretation linked to the cited contract and its amendments. There are no doubts nor do any difficulties arise in the interpretation and it is therefore fully valid pursuant to the legal rules cited in both the Convention and the Regulation.

Three. Based on the foregoing, it would be difficult to take any stance short of strict enforcement and would be even more difficult to consider this agreement nothing more than a privilege which could be renounced by either of the parties or specifically by the complainant given that the said consideration does not figure in the agreement nor is it alleged but actually quite the opposite by the party which, in the subjective opinion of the claimant, would benefit by waiving this clause. The agreement, as the rest of the contract, is based on the consent freely given by the contracting parties such that, once mutual acceptance is agreed, the latter binds both parties equally unless it is agreed that a party may unilaterally renounce the agreement and in this case, the said renouncement would also form part of the agreement as an expression of the wills of the parties facilitating future action. Expressed submission was not explicitly expressed, or at least was not agreed in the contract, as a right of the claimant which the latter was free to renounce, but rather as a clause binding both parties, and the claimant is not entitled to interpret the will of the defendant nor act as the protector of the latter's subjective rights. That right could indeed be renounced but by both parties jointly by drawing up a new agreement or successively in the legal proceedings, i.e. the claimant filing suit in Spain and the defendant tacitly subjecting itself to the said submission by simply responding to the complaint without taking any legal action other than the questioning of the jurisdictional issue; in other words, just the opposite of what actually took place. It would not be right to hold that the defendant lacks

defendable legitimate interest in a case such as this where both parties agreed to the exclusive enforcement of French law for the resolution of litigation deriving from the contact. It is therefore obvious that he has the right to defend his legal position through the direct enforcement of French law without having to accredit the reality and applicability of the said law by litigating in Spain which would be tantamount to an added procedural burden which would obviously be imposed upon the claimant as well with the difference that the latter took on this burden freely by filing suit in Spain but the defendant did not take this burden on voluntarily.

In opposing the appeal the claimant states that the agreement does indeed envisage his renouncement as long as the latter is to the benefit of the defendant, an assertion completely void of all legal or conventional grounds. This frequently cited clause actually does not consider the possibility of renouncement and the latter would therefore only be admissible if it were joint, simultaneous or successive but the subjective assertions made by the complainant regarding the benefits that his renouncement has for the defendant cannot be accepted when the alleged beneficiary denies any such benefit.

The fact that there are other legal rules cited in the appeal regarding the possibility of filing suit in another member state where the parties have legal domicile or where the contract is applied does not affect the arguments outlined above given that the said rules would only apply in the absence of submission, i.e. when there is no submission pact or when the jurisdiction in a specific case or matter is not renewable which is obviously not the case here.

– STS. 27 October 2005 (Ref. Aranzadi RJ 2005/8153)
International jurisdiction: tacit submission of the defendant. Declinatory plea filed in response to the complaint and not as an incident concerning a prior decision.

"Legal Grounds:

One. In response to the claim, opposition was expressed in the preliminary comments and in section I of the legal grounds a "Declinatory objection based on lack of jurisdiction" was formulated. In other words, an international jurisdiction declinatory objection was raised. In light of this first ground, the issue which needs to be examined at the appeal stage is whether the latter was formulated properly from a procedural point of view. The procedural treatment of that incidental plea of defence is that of a plea to the jurisdiction of the tribunal due to lack of territorial competence and, pursuant to the Code of Civil Procedure applicable to this case, it should be addressed as a preliminary incident and anything outside of the plea to the jurisdiction of the tribunal is tacit submission. If it is addressed as a peremptory plea, even if it is intended as a plea to the jurisdiction of the tribunal, it implies submission (. . .).

In conclusion, in this case the defendant responded to the claim and listed as the first of the legal grounds the plea to the jurisdiction of the tribunal due to lack of competence with this literal formulation and in so doing filed an international declinatory plea. However, the plea was not filed properly, as a

preliminary incident, which means that tacit submission to Spanish jurisdiction and the competence of the court before which the claim was filed had already taken place".

2. Family

– SAP of Tarragona, Section 1 of 25 April 2005 (EDJ 2005/112819)
International jurisdiction. Separation and divorce. Enforcement of the LOPJ.

"Legal Grounds:

. . . Two. The appeal invokes, introducing it in this instance in light of its default in the previous one, the lack of jurisdiction of the Spanish courts given that both spouses were of Algerian nationality.

It should first of all be pointed out that the claim was filed on 16 May 2003 and therefore prior to the amendment of Civil Code Arts. 9 and 104 brought about by Organic Law 11/2003 of 29 September 2003 and therefore, in accordance with Art. 769.1 of the Code of Civil Procedure and Art. 22.3 of the L.O.P.J., the Spanish courts have jurisdiction to hear this case in the absence of expressed or tacit submission, if the defendant has legal domicile in Spain and, in absence of those criteria in separation matters, when both spouses are habitually residing in Spain at the time the claim is filed. This was the criteria followed by Additional Provision 1 of Law 30/81. Court records show that the spouses are registered in the municipality of Tortosa, that they have been habitually residing in Spain for a number of years and their child was born in Spain in 1997. This ground was thus rejected."

– SAP of Las Palmas, Section 5 of 20 May 2005 (EDJ 2005/88755)
International jurisdiction. Claim for separation. Judgment basing jurisdiction on Civil Code Art. 107. Dissenting opinion invoking Community regulations.

"Legal Grounds:

. . . Two. Concerning the alleged lack of jurisdiction of the Spanish courts to hear the claim filed, reference must be made to Civil Code Article 107 of the version applicable to this case and to the version preceding the one currently in force according to which, having accredited the habitual residence of the spouses in Spain, Spanish judges are competent to hear the case. In respect of the rules applicable to the substantive legal relationship, in light of the provisions of Civil Code Art. 9.2 (also in the version immediately preceding the one in force today), the conflict rule laid down in the legislation which incorporates the place of habitual residence of the spouses subsequent to marriage must be enforced. The merely indicative criteria set forth in documents submitted by Mr. Oscar should not be considered as evidence due to the importance of the documentary evidence submitted by the other party, basically focusing on the location of the marital domicile, the place where the marriage was celebrated, and the place where the couple's child was born, all in Spain.

(. . .)

Dissenting Opinion

Las Palmas de Gran Canaria, on 20.05.05

DISSENTING OPINION FORMULATED BY THE JUDGE Ms. Mónica García de Yzaguirre REGARDING JUDGMENT 000290/2005 ISSUED IN REMEDY OF APPEAL No. 0000836/2004.

The heading and the pleas of fact of the said Judgment are accepted but ground No 2 is not.

The view of the Judge, endorsing the admissible legal basis, is as follows:

Legal Grounds

Sole. Disagreement with the criterion applied in the Court's judgment derives from the rule applicable to the legal jurisdiction of Spanish legal bodies and specifically that of the judge of the municipality of San Bartolomé de Tirajana to hear the separation claim. In this case the criterion should not be Civil Code Article 107 but rather Council Regulation (EC) 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and of parental responsibility for joint children published in OJEC 160/2000 of 30 June 2000 in force in Member States (thus including Spain and Austria) as of 1 March 2001 and therefore in force at the time the original claim was filed on 1 February 2002, even though the said Regulation has been revoked and replaced by EC Regulation 2201/2003 in force as of 1 March 2005.

Although the result is the same with respect to the competence of the judge a quo, this distinction is important in terms of the judgment's compliance with the criteria laid down in the Regulation and therefore in terms of respect for Article 7 regarding the exclusive nature of international legal jurisdiction criteria provided for in Articles 2 to 6 of the Regulation, and likewise the ex officio examination provided for in Article 9 in the event that either of the parties intends a future recognition or declaration of enforceability within the European Union and specifically Austria, the defendant's country of nationality and where he currently resides, especially given that the judgment orders the father to pay child support for his son, still a minor, residing in Spain.

To this end and pursuant to Article 3 of the Regulation, the common child resides with his mother in Spain in the town of San Bartolomé de Tirajana.

The jurisdiction criterion complies with the provisions of Article 1a) of the Regulation because it has been proven that the claimant's domicile was the last habitual residence of the spouses and the claimant continues to reside there. In any case, this situation complies with the requirement of being the habitual residence of the claimant who has resided there since at least 1998 together with their common child, a fact accepted by the defendant himself.

In respect of the rest of the legal basis of the judgment I remit to the judgment delivered by the Court with which I am in agreement."

– AAP of Cadiz of 15 September 2005. (Ref. Aranzadi JUR 2006/30518)
International jurisdiction of Spanish judges in matters involving divorce, child support and precautionary measures. Divorce judgment delivered in England.

Legal Ruling:

. . . Three (. . .) the jurisdiction of the Spanish courts is in line with the provisions of Article 22.3 of the Judiciary Act (Organic Law): Spanish claimant with habitual residence in Spain. The same is true of Regulation 2201/2003 and of Regulation 2000 currently in force. Regulation 44/2001 grants the judge corresponding to the legal domicile of the child support creditor the jurisdiction to hear his appeal or grants the competent body jurisdiction to hear the suit concerning the status of the persons (. . .).

Six. Another reason to dismiss the appeal is that Rubén accepted the jurisdiction of the Spanish courts by filing a counterclaim in the divorce proceedings under way here and which concluded with a judgment delivered on 14 June 2004 and where child support reduction took place which is the objective of this proceeding and whose enforcement is being called for. Article 24 of Regulation 44/2001 states that the court of the Member State before which the defendant appears will have jurisdiction unless the latter is simply contesting the said jurisdiction or there is some other exclusive jurisdiction in accordance with Art. 22 whose section 5) rules, concerning the enforcement of legal judgments, in favour of the courts of the Member State where the judgment is to be enforced.

– AAP of Barcelona of 25 October 2005 (Ref. Aranzadi JUR 2006/43171)
Jurisdiction in legal separation matters concerning spouses who do not have Spanish nationality. Reference to Art. 22.3 LOPJ and Arts. 9.2 and 107 of the Spanish Civil Code.

"Legal Grounds:

One. The court order under appeal fails to admit the claim filed for separation by mutual consent on the grounds that neither of the two litigants have Spanish nationality and therefore ruling that there is a lack of international jurisdiction to hear this claim (. . .).

Two. (. . .) The alleged infraction should be admitted based on Civil Code Art. 107.2.b) invoked, in the wording provided by Organic Law 11/2003 of 29 September regarding specific measures concerning citizen safety, domestic violence and the social integration of foreign aliens. It should, however, be pointed out that Section 2 of Civil Code Art. 9 must first be applied. This is a specific rule in the Spanish private international law system which, in matters concerning legal separation, divorce or annulment (the latter incorporated after the amendment) makes expressed remittal to Art. 107 of the same text (. . .). Here we would add that even in the absence of the said amendment of the Civil Code it should also be admitted based on the Judiciary Act (Organic Law), Art. 22.3 which states that "in civil matters, Spanish courts and tribunals shall have

jurisdiction: . . . in matters concerning the personal and patrimonial relations between spouses, marriage annulment, separation and divorce when both spouses have habitual residence in Spain at the time the claim is filed or the claimant is Spanish with habitual residence in Spain and likewise when both spouses have Spanish nationality regardless of their place of residence providing they are filing the claim by mutual accord or with the consent of the other party". We would likewise highlight, as is the case with this claim, the provisions of section 2 of the said Article which provides that "In general terms, when the parties have expressly or tacitly subjected themselves to the Spanish courts or tribunals . . ."

3. Contractual obligations

– STSJ of Castilla-La Mancha, Social Affairs Court of 18 July 2005 (Ref. Aranzadi AS 2005/2583)

International jurisdiction. Individual labour contract. Professional football players.

"Legal Grounds:

. . . Four. Since the suit is filed against two entities of different nationalities, in virtue of Art. 6.1 of the Brussels Convention the claimant may file the claim before the courts of either of the two States corresponding to the defendants; in this case Spain and Italy. Since the case was filed before the Spanish courts, the latter have jurisdiction to hear this litigation regardless of the subsequent withdrawal at the conclusions stage of the complaint against Albacete Balompié SAD, the fact on which the first instance judge based his ruling regarding the lack of jurisdiction of the Spanish legal bodies.

Will all due respect for the first instance judge, this court does not share his view because it holds that jurisdiction, essential to the orderly and harmonised exercise of the parties' rights in the proceedings, is determined at the moment when the claim is filed, regardless of whether this is analysed ex officio or upon request by the party. This jurisdiction can therefore not be changed even if, during the course of the proceeding, some of the elements which contributed to determining the said jurisdiction have changed (domicile, residence, etc.). In short, *perpetuatio jurisdictionis* is simply a rule by virtue of which the elements determining jurisdiction must be considered just as they are presented at the time the claim is filed, assuming that the latter is admitted, and any change which these elements may undergo during the course of the proceeding will not affect the determination of jurisdiction which must therefore be considered fixed at the moment of lis pendens (Art. 411 of the Code of Civil Procedure), the determination of which does not entail any problems in this case provided that the fact which sparked the hypothetical lack of jurisdiction of the Spanish courts – withdrawal of the claim against the Spanish entity – took place at the end of the conclusions stage, i.e. clearly removed in time from admission of the claim, the citation of the defendant and any other of the key moments described in Art. 30 of the Regulation. In this case, the filing of the claim

against two companies of different nationality one of which was Spanish, Spain has clear jurisdiction which cannot be modified by a subsequent withdrawal, unless it is a case of legal fraud in which the claim is filed against a natural or legal person with the exclusive purpose of establishing the jurisdiction of the judges and courts of the State corresponding to that person's domicile in accordance with Art. 6.1 of the Brussels Convention.

Nine. (. . .) In cases where there are successive labour relations with different entrepreneurs deriving from business contracts or agreements with legitimate vested business interests and whose consequence for the worker is having to deal with different national legislations in accordance with which the worker must assume a series of rights and duties, this is an interpretation which better guarantees those rights given that the latter can be protected by the courts of any of the States in which one of the entrepreneurs involved has legal domicile or concerning which liability may be derived in compliance with acquired rights provided that there is a link between the right exercised and the legal body, as in this appeal. It should not be forgotten that Art. 5 of the Brussels Convention is included among the special forums by reason of the matter addressed or forums protecting the weaker party as is the case with the forum envisaged for consumers or insurees. In consequence and for the reasons set out in the foregoing, this Court holds the view that the Spanish courts have jurisdiction to hear this case in accordance with Art. 5.1 of the Brussels Convention."

– STS. 29 September 2005 (Ref. Aranzadi RJ 2005/7156)
International jurisdiction. Maritime transport and insurance. Expressed submission to the Dutch courts. Plea to the jurisdiction of the tribunal.

"Legal Grounds:

One. Jurisdictional submission to foreign courts was based on the clause included in the bill of lading where it is specifically stated that any differences or disputes will be settled in accordance with Dutch law and before the court of justice (Arrodissementrechtbank) of Amsterdam (legal domicile of the chartering company), carriers and traders being subject to its exclusive jurisdiction. In accordance with the definition laid down in the bill of lading, the term trader includes the charterer, the receiver and the consignee, the holder and owner of the cargo who would be jointly and severally liable. The term carrier refers to the company or line on whose behalf the bill of lading was signed, the existence of which is not a matter of dispute.

Two: Ground three points to the infringement of Articles 5 and 6 of the Brussels Convention of 27 September 1968 (RCL 1991, 217, 1151 and LCEur 1989, 1327) basing its argument on the failure to enforce Art. 17 and eliminating those assumed violated and which refer to the competent body which, if there is no submission agreement, in contract matters is the court of the place where the obligation should be undertaken and when there are several defendants, the competent court can be that of the legal domicile of any one of them."

– AAP of Barcelona. 17 November 2005 (Ref. Aranzadi JUR 2006/49102)
International jurisdiction. Contract matters. Plea to the jurisdiction of the tribunal. Interpretation of Art. 5.1.a) of EC Regulation 44/2001 and of Art. 22.3 of the LOPJ.

"Legal Grounds:

1. Council Regulation (EC) 44/2001 of 22 December 2000:

This Regulation focusing on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters provides in its recital 11 that "The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction" and recital 12 states that: "In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action in order to facilitate the sound administration of justice".

In accordance with these provisions, Art. 2.1 contains the general rule, i.e. that concerning the jurisdiction of the defendant's domicile in stating that: "Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State". The exception invoked by the claimant and the appellant in this case is that contained in Art. 5.1.a) which states: "A person domiciled in a Member State may, in another Member State, be sued:

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question".

Paragraph b of that same article provides that:

"(b) for the purpose of this provision and unless otherwise agreed, said place shall be:

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered;
- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;

3. Interpretation of Article 5.1.a) of the Regulation in Matters Relating to a Contract":

As was already alluded to, the said provision is an exception to the general rule favouring the jurisdiction of the domicile of the defendant allowing the defendant to be sued in another State "in matters relating to a contract, in the courts where the obligation was or should have been performed". The decision being appealed reasons that the SJCE of 05.02.04 supports the thesis of that

under appeal here in declaring that: "article 5(1) of the Convention should be interpreted in the sense that the concept of 'matters relating to a contract' does not include the obligation, compliance with which legally requires a guarantor who has paid customs duties by virtue of a contract drawn up with the carrier company subrogating the duties of the customs administration within the framework of a reimbursement to the owner of the imported goods if the latter, who was not party to the guarantee contract, did not authorise the signing of the said contract". Said interpretation cannot go forward if, in the case under scrutiny, the guarantor undertook to reimburse and subrogated in the customs duties which had not signed a contract with the alleged debtor while the claimant subrogated in the duties of the Spanish contractor and is suing the party deemed non-compliant. In the aforementioned judgment of 13.10.93, the Supreme Court also pointed out that if the insurer was only able to undertake a repetitive action, it would be an independent action for which the insured would be liable but as was stated above the insurer, by virtue of the legal subrogation, is in the same position as the insured and therefore, given that this is a "matter relating to a contract", it should be determined whether the rest of the suppositions apply.

4. Determination of the Place Where the Obligation Was or Should Have Been Undertaken:

. . .

The practical application of the foregoing jurisprudence regulatory context to the case under scrutiny prompts acceptance of the appeal. In the statement of case there is a description of contract violation related to the supply of materials for installation at Montcada i Reixac. Although the contract has been contested by the defendant, this has been done in a very general way without any indication of what would be the proper qualification of the contract. However, the important issue here is that in order to determine jurisdiction, the focus must be on the location where the obligation which is the basis for the legal action was undertaken, i.e. the alleged infringement of a work contract involving the supply of materials; circumstance defining the jurisdiction of the Spanish courts and tribunals in accordance with Art. 22.3 LOPJ.

6. Concerning the Representations of the Appellee Supporting Application of Italian Law:

An allusion is made to this circumstance, holding that this is an additional element linking the case to the Italian courts but the fact is that the Rome Convention open for signature on 19–6–1980 states in Art. 1 that: "The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries", and a plea to the jurisdiction of a tribunal is not the process by which to determine the law applicable to the substance of the issue, especially bearing Art. 3(2) in mind which admits that: "The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under

this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties".

– AAP of La Coruña. 13 December 2005 (Ref. Aranzadi JUR 2006/13046)
International jurisdiction. Loan contract drawn up in Argentina by Argentineans, with an expressed submission clause to the courts of the city of Buenos Aires.

Legal Grounds:

One. (. . .) Expressed submission by the contracting parties to Spanish courts or tribunals is clear and this case therefore addresses whether submission to the jurisdiction of foreign Courts can be accepted once the suit has been filed before Spanish courts when one of the defendants is a foreign national with legal domicile in Spain by means of the plea to the jurisdiction of a tribunal (. . .).

For all of the foregoing, the remedy of appeal lodged by the representative of Mr. Jose Pedro cannot be admitted because this case does not focus on matters under the exclusive jurisdiction of the Spanish courts and the contracting parties of Argentinean nationality freely stipulated in the contract signed in Argentina expressed submission to the courts of the city of Buenos Aires whose validity and efficacy is not under question and therefore the solution handed down in the appealed decision is in accordance with our legal system".

4. Non-contractual obligations

– SAP of Barcelona, Section 11 of 16 June 2005 (Ref. Aranzadi JUR 2005/176231)
International jurisdiction. Traffic accident. Application of the Hague Convention of 4 May 1971.

"Legal Grounds:

. . . One. The appellant bases his appeal on the following representations: – Lack of jurisdiction or international jurisdiction, cause of automatic nullity of the decision delivered in first instance in accordance with the provisions of Art. 225.1 of the LEC. The appellant claims that the Hague Convention provides the general forum to be the domestic law of the place where the accident occurred and that this rule is applicable to the case at hand. A compensation claim was filed for the traffic accident death of Mrs. María Angeles by her husband. It is a proven fact that on 19 August 1994, Mrs. María Angeles died in a traffic accident in Morocco while travelling in the vehicle N-. . . .-NC insured by the defendant. As a general rule concerning civil jurisdiction, Art. 22 of the LOPJ attributes jurisdiction to the Spanish courts when the defendant has his legal domicile in Spain, and in respect of non-contractual obligations when these cannot be determined by application of the general rule, and the incident occurs

outside of Spain, when the perpetrator and the victim have legal domicile in Spain. But concerning traffic accidents occurring outside of Spain, in accordance with the provisions of Art. 36 LEC, in relation with Art. 1.5 of the Civil Code and Art. 96 of the Constitution, in determining whether Spanish courts are competent to hear the claim filed by the claimant, the specific regulation dictating jurisdiction to hear such cases is contained in the Convention of 4 May 1971 on the law applicable to traffic accidents done at The Hague, ratified by Spain and published in the Official State Gazette (Spanish acronym BOE) on 4 November 1987. Art. 3 of the said Convention provides that applicable law be the domestic law of the state in whose territory the accident occurred but with the exceptions described in Art. 4 concerning accidents involving a single vehicle which seems to be the case according to the documentation furnished. In this case, applicable law is the law of the state where the vehicle is registered. The victim who was a passenger in the vehicle was a habitual resident in a state other than the one where the accident occurred. The vehicle involved in the accident was registered in Spain and the victim, the claimant's wife, was a resident of Spain according to the documentation furnished, f 60, social security card, where she figures as a beneficiary. Therefore, Spain has jurisdiction to hear the appeal filed by the claimant meaning that the first of the grounds of the appeal cannot be accepted.

5. Bankruptcy proceedings

– AAP of Las Palmas. 17 November 2005 (Ref. Aranzadi JUR 2006/35343)
International jurisdiction. Bankruptcy law. Location of the debtor's principal interests.

"Legal Ruling:

. . .

Three. . . . In these proceedings and in accordance with documentation furnished, it is perfectly reasonable that the "focal point of the petitioner's main interests", i.e. the place where he habitually and openly (recognised by third parties) manages his interests, be considered Germany or Belgium. This is determined by the fact that all of his creditors are foreign nationals (German and Belgian) domiciled outside of Spain for business reasons and therefore having no Spanish connection. Moreover, in Spain he does not possess any patrimonial asset whatsoever and it is not known whether he has assets in other countries (he claims he does not) and, more relevant still, the petitioning company has its banking activity domiciled in Germany (in Gangelt and Wuppertal). With financial operations established in Germany (it is there that he manages his bank accounts and receives the corresponding information), it must be assumed that that country, considering the rest of the circumstances as well, is where he habitually exercises the administration of his interests (recognisable by third parties). Even if it were not Germany, the focal point of the petitioner's

interests would have to be considered Kinrooi, Belgium because that is where publicity services were engaged and catalogues supplied for the company's activity and it is the current place of residence of the administrator, Ms. Estíbaliz, according to the power of attorney and the report which she submitted".

6. Precautionary measures

– AAP Cadiz. 15.09.05 (Ref. Aranzadi JUR 2006/305180)
International jurisdiction regarding matters of divorce, child support and precautionary measures. British divorce judgment.

"Legal Ruling: . . .

Seven. (. . .) Art. 31 of Regulation 44/2001 provides: "A request for provisional or precautionary measures provided for under the law of a Member State may be filed before the authorities of that State even if, by virtue of this Regulation, the court of another Member State were to have jurisdiction to rule on the substance of the case."

7. International lis pendens

– SAP Barcelona, Section 11 of 16 June 2005 (Ref. Aranzadi JUR 2005\176231)
International lis pendens. Lack thereof.

"Legal Grounds:

. . . One. (. . .) Lis pendens cannot be claimed because, as has frequently been pointed out in jurisprudence, it requires the identification of persons and the object and cause of the petition in the two proceedings in light of the connection between lis pendens and res judicata (Arts. 421 and 222 LEC) but in this case the first requirement, perfect subjective identification in the two proceedings, was not met. Judging from the documentation submitted, this was confirmed by the Moroccan court decisions delivered in first instance and in the appeal which based their dismissal of the claim on the fact that it was impossible to properly identify the insurance company meaning that an element is missing in the determination of subjective identity and therefore res judicata is not concurring because the substance of the claim is not analysed. No formal errors were found which could lead to dismissal and lack of lis pendens and therefore no other resolution was called for. The judge is under no obligation to admit documentation submitted by the claimant subsequent to the hearing (Art. 435 LEC) especially considering that the said documentation failed to determine the existence of lis pendens or res judicata and refusal to admit a final proceeding did not give rise to the defencelessness of the defendant (. . .)."

– SAP of Madrid, Section 19 of 19 July 2005 (EDJ 2005/151410)
International lis pendens. Lack thereof. Lack of identification of object.

"Legal Grounds:

... Four. (...) One cannot speak of lis pendens or res judicata as viable exceptions given that the Monza proceedings being heard by this court do not have the same objective given that in ordinary lawsuit 724/2002 a damages compensation claim was filed for breach of a deposit, storage and physical distribution of goods contract but in Monza a claim was filed by Micys against Comercial Erradue SA for unpaid invoices corresponding to the last phase of the distribution contract of 2–11–1995. That being so, we are in the process of delving into the very characterisation of the lis pendens and res judicata exceptions in the new law, profusely dealt with in scientific doctrine and recently the object of jurisprudence, especially at the provincial court level. One can therefore not speak of international lis pendens forming part of the 27 September 1968 Brussels Convention or the 16 September 1988 Lugano Convention. It is true that the parts of the proceeding done at Monza and at ordinary declaratory action 724/02 are partially identical but the objects, the identity of the object itself are different in the sense that partial breach of the exclusive distribution contract resulting from several pending invoices has nothing to do with the damages claim for breach of the 26.02.01 contract. Now that the exceptions forming part of the appeals have been dismissed, we can turn to the study of the different grounds on which the appellants based their claims but not before highlighting the existence of the exclusive distribution contract and its importance for the parties, and specifically the concept of clientele for the distributor."

III. PROCEEDINGS WITH ELEMENTS INVOLVING ALIENS AND INTERNATIONAL LEGAL COOPERATION

1. Proceedings with elements involving aliens

– STC, Chamber two of 31 January 2005 (EDJ 2005/1013)
Aliens. Right to effective protection of the courts. Access to Spanish courts.

"Legal Grounds:

... Three. ... And lastly, the fact that the appellant is a citizen of Indian nationality in no way relieves this court of its obligation to guarantee the fundamental right invoked here. As already stated in STC 95/2003 of 22 May, "It must be realised that this Court, as of STC 99/1985 of 30 September, echoing STC 115/1987 of 7 July, has acknowledged the right of aliens, regardless of their legal status, to effective protection of the courts".

– STS. of 10 October 2005 (Ref. Aranzadi RJ2005/8768)
Use of foreign documents as evidence. International maritime transport insurance. Lack of validity of a foreign language bill of lading without translation and without the signature of the vessel's master.

"Legal Grounds: . . .

Three . . . Art. 601 is clear and compliance cannot be assumed by submitting, as the claimant did, the translation at the time of appearance at the small claims hearing because the defendant had already responded to the complaint highlighting the infraction and the translation was submitted at the improper time in the proceeding. (. . .)

The bill of lading was submitted in a foreign language without translation and without the signature of the master, legally required by Arts. 706, 707 and 709, and therefore is not valid".

– ATS. 22 November 2005 (Ref. Aranzadi JUR 2006/26613)
Inadmissibility of the suspension of proceedings resulting from the filing of an extraordinary appeal in the State of origin against the judgment in the process of being recognised. Appealability of decisions in connection with recognition and execution. Primacy of conventional and institutional systems.

"Legal Grounds:

. . .

3. The basis for the conclusion reached concerning the appealability of decisions delivered regarding matters of recognition and execution of judgments, in accordance with the Brussels and Lugano Conventions and Community Regulations 1347/2000 (now replaced by 2201/2003) and 44/2001, as expressed in the judgment of this Court dated 12 March 2002 (motion for reconsideration of denied appeal 75/2002) and of 23 November 2004 (appeal 1981/2001), extends beyond the provisions contained in national procedural rules and is rather rooted in the primacy of supranational rules integrated into the community acquis vis-à-vis domestic production which, in the case of international conventions signed to meet Community aims, has a dual basis: on the one hand their very nature and origin (Spanish Constitution Art. 93) and, on the other hand, their conventional nature (Spanish Constitution Art. 96). Together with that primacy, a characteristic of certain Community rules, particularly Community Regulations, is their direct applicability or direct effect. The consequences of the principles of primacy and direct effect of Community rules not only spells the non-enforceability of domestic rules which are incompatible or run contrary to Community rules, but also prevent the valid enactment of subsequent regulations which are incompatible with the latter and oblige law enforcers to guarantee full enforcement of supranational rules, giving rise to an interaction between domestic and Community law translating into, prima facie, the interpretation of domestic legality in accordance with Community law (. . .).

7. The foregoing establishes two conclusions. The first is that the ruling delivered by Section four of the Provincial Court of Malaga is subject to a Supreme Court appeal, regardless of its form, which must be lodged through the channels laid down in section 3 of Art. 477.2 of the LEC with the unavoidable consequence of having to comply with the legal requirements and those established by virtue of jurisprudence determining the propriety of an appeal lodged

through these channels. The second is that no extraordinary appeal based on a procedural infraction may be lodged, regardless of the outcome of the supreme court appeal.

– SAP of the Balearic Islands, Section 5 of 22 February 2005 (EDJ 2005/24749)
Power of attorney granted abroad. Legal regime. Acceptability in Spanish procedure.

"Legal Grounds:

... Two. ... Procedural law is therefore required to determine competence (mandate), the formalities to be followed before the authorising Notary Public and the Spanish courts where in this case the laws are to be enforced. It is also responsible for determining the sufficiency of the power of attorney and its content, who should be granted the faculties of the granters, title and time limit of the grantee's duties, acts authorised, the nature of the issues and for how long and without having to strictly follow that laid down in the Notary Regulation (in this connection Arts. 156 to 169 EDL 1944/33 apply), superseding the doctrine concerning requirements established by this Provincial Court in its Judgment of 7 February 2001, reflecting the related Supreme Court decision of 23.06.77 and 17–6–1983. And we would insist that, despite compliance with applicable provisions for its formalisation in Belgium, it is the responsibility of our Courts to judge the sufficiency of the power of attorney and its content.

Once the power of attorney is presented in Spain, it is Spanish law which governs and decides whether it complies with our procedural rules and this determination is not limited to whether or not it has the apostille required by the Hague Convention of 5 October 1961.

(...)

In accordance with lex fori it must be determined whether representation by Procurator in the proceeding is compulsory, the format of the power of attorney and its very existence, content and effects regarding the proceeding."

– SAP of Madrid, Section 21 of 17 May 2005 (EDJ 2005/87353)
Translation of foreign documents into Spanish.

"Legal Grounds:

... Three. (...) The claim giving rise to this proceeding does not lack clarity or precision in the determination of the parties or petitions and therefore the incidental plea of defence under scrutiny and which is the object of this remedy of appeal was rightly rejected by the "a quo" judge. If the claimant fails to submit the translation of the documents drafted in a foreign language as called for by Art. 144 of the Code of Civil Procedure, the consequence is the lack of probative value of the untranslated documents and not the incidental plea of defence claiming a legal defect in the way the claim was filed".

– AAP. of the Balearic Islands. 11 October 2005. (Ref. Aranzadi JUR 2005/248332)
Acceptability of a foreign public document. Competence of the requested body. Public deed bearing witness to a debt: Debtor subject to immediate settlement, all assets being valid for payment regardless of their location: assets located in Spain.

"Legal Grounds:

. . .

Two. (. . .) The only issue subject to the decision of this court is the determination of the place of execution in order to rule on the territorial jurisdiction of the First Instance Court of Palma, the place of execution which, as pointed out by this court in its decision of the 4th of this month, "is not synonymous with the place of observance of the contract because in the text of the Convention itself (in reference to the Brussels Convention of 27 September 1968 now replaced by Regulation 44/01) these two expressions are used with their own different meanings. Thus, Art 5.2 refers to the place where the obligation is or should be observed (. . .), reaching the conclusion that in the Brussels Convention the 'place of observance of the contract' is different from the 'place of execution'", the latter being the place where the decision is judicially executed which, in light of its material connection with the object of the litigation, leads to the concept of forum conexitatis and brings us to the location of the debtor's assets. Art. 39.2, however, establishes territorial jurisdiction for execution as the legal domicile of the party against whom the suit was filed or the place designated by the parties in the contract, otherwise resorting to the determination of the place of execution in compliance with the rules of private international law of the forum (. . .). Moreover, in the public deed of the debt, the debtor was subject to immediate execution of the debt against all of his assets regardless of their location, the only known assets being those in the judicial circumscription of Palma and therefore there does not appear to be any doubt as to its territorial jurisdiction to enforce the said executive public instrument (. . .)."

– RDGRN 4 July 2005 (EDJ 2005/127271)
Translation of foreign documents into Spanish.

"Legal Grounds:

. . . One. The first issue emerging in this appeal is whether the sworn translator's signature must be validated or not in the case of a document drafted by the said translator and submitted to the registry. Art 37 of the Mortgage Regulation points to the need for translation of documents drafted in a foreign language stipulating that the translation be done by the Office for language interpretation or by competent officials authorised by virtue of law or international convention or, if appropriate, by a Notary Public. The Registrar may, under his responsibility, forego the translation when he knows the language in question. In the case of translators with an official Spanish degree, the

Regulation of the Language Interpretation Office of the Ministry of Foreign Affairs refers to sworn translators. In accordance with Art. 13 of the said Regulation, the translation done by the latter is considered official and stipulates that they must certify the accuracy of their work with their signature and seal.

In this case, the document was signed and sealed and the pertinent administrative resolution bestowing the title of sworn translator on the person signing the document was likewise submitted. Therefore, the official status of the translation and of the translator has been proven. Hence, on this point the appeal must be upheld.

Two. The second of the defects raises the question of whether the signature stamped on a certificate of law issued by the German Consulate must be legalised. The letters P.O. precede the signature on that certificate (it is assumed that they stand for *por orden* in Spanish which means "by order of") and it is followed by the words "the deputy-consul". The document also bears the seal of the Consulate General of Germany in Barcelona. Art. 36 of the Mortgage Regulation refers to other means by which to accredit a foreign regulation, i.e. affirmation and report by a diplomat, consul or competent civil servant of the country of the applicable legislation. In this particular case it must be assumed that the foreign consulate from which the document was issued had applied its own domestic procedural rules regarding the signing by the Deputy-consul. Therefore, assuming that the document was signed by a consular agent, the 7 June 1968 European Convention applies meaning that legalisation is not required of a document issued by a consular agent of Germany given that this formality was eliminated in the case of documents issued in an official capacity by a consular agent of a contracting state competent to do so in another contracting state. Hence, on this point the appeal must be upheld as well.

Three. The third defect addressed in this appeal refers to the possible nonvalidity of the power of attorney conferred by the intervening credit institution in light of its status under German law. The documentation furnished clearly indicates the concession of faculties by the said credit institution to its representative to conduct the act in question. One must bear in mind that in matters of voluntary representation, Art 10.11 of the Civil Code remits to the Law under which the faculties of the represented party are exercised, namely Spanish law, given that this is not a case of organic but rather voluntary representation. Under Spanish law, the representative authority granted by the power of attorney and ratification thereof in the file is clearly sufficient. Hence, on this point the appeal must be upheld as well."

2. International Legal Cooperation

– STC. 12 September 2005 (Ref. Aranzadi RTC 2005/221)

Infringement of the right to effective protection of the courts. Citation by public notice in a civil litigation case without having first made every effort to personally issue the citation at the domicile of the foreign subject (in England).

Legal Grounds:

5 (. . .) it cannot be said that the judicial body acted with due diligence in the proper constitution of the procedural relationship when it decided, upon request by the claimant, to issue a citation by public notice to the party who is now the appellant, considering the latter's whereabouts to be unknown after a single unsuccessful citation at the building giving rise to the litigation, despite statements made by the person serving that citation and the information discovered by the police of Javea, clearly indicating that the appellant resided in England and that the documentation (deeds and mortgage) attached to the complaint, forming part of the case record, featured the appellant's address as 52 New Road, Worthing, West Sussex. Moreover, this was the address appearing on the mortgage deed for the purpose of payment of mortgage instalments and therefore is the address where debt payment notice must be sent pursuant to Art. 1171 of the Civil Code . . . In assessing the degree of diligence employed by the judicial body in the correct formation of the legal-procedural relationship, one must consider the moment of citation.

– STS, Chamber 1, 4 March 2005 (EDJ 2005/23801)
Serving of documents abroad. Citation by public notice. Validity.

"Legal Grounds:

. . . Two. The attitude adopted by Mr. Pedro at the ordinary claim of dominion hearing where he made not the least effort to have the stakeholders personally called to take part in the proceeding comes as quite a surprise when compared with the zeal he exhibited at the time of enforcement of the judgment, even requesting a few days in the month of August to take advantage of the visit in Piñar of the spouses Felipe and María Esther (fs. 77 to 80). This negative behaviour is even more reproachable considering that if the aforementioned spouses could not be summoned because they were abroad, nothing stood in the way of at least trying to determine their place of residence through their daughter Rebeca residing at No. 001 of PLAZA 001 and therefore adjacent to building (No. 1) where the unsuccessful citation was served. Moreover, Rebeca occupied one of the warehouses involved in the litigation thus making it even more surprising that now he is basing rejection of the hearing on the circumstance that the spouses (allegedly) knew (or should have known) from their daughter that the legal proceeding was under way.

And if this were not enough, it could also be pointed out that all possible efforts to contact the spouses personally were not made because the legal domicile of the defendants abroad could have easily been determined by simply going to the Town Hall or the census office where they are registered as absent residents living in Enschede (Netherlands). In light of all of this, the argumentation presented in the appealed decision is flawed when it refers to extra-procedural awareness of the existence of the proceeding, especially considering that this argument is based on conjectures with no solid backing, i.e. no effort was made to corroborate the claimants testimony used to accredit that they had

not visited the village over the previous several years (corroboration which should have been undertaken in line with jurisprudence doctrine set out in the Judgments of 3 October 1988, 18 November 1991, 8 May, 1992 and others). Knowledge that the daughter may have had is insufficient and, in any case, no attempt was made in the proceeding to prove her knowledge of the transmission to her parents.

This reasoning leads us to the overwhelming conclusion that the citation was not properly conducted because citation by public notice is subsidiary in nature and it was not reasonable to assume that it was impossible to locate the specific domicile of the defendants thus resulting in malicious concealment of the proceeding which is fraud as specified in the claim. It is therefore not necessary to examine the first ground of the Supreme Court appeal, its second and third grounds being sufficient to completely annul the appealed judgment and to admit the claim with assignment of court costs to the defendant Peter in light of his reckless opposition given the circumstances and in compliance with Arts. 1.1715.2 and 782, paragraph 2, LEC.

The solution adopted in the appeal proceeding is fully in line with Constitutional Court doctrine and the jurisprudence of this Chamber which can be summarised in the following paragraphs:

1. It has been established time and again by this court that, to initiate and undertake judicial proceedings in full compliance with the right to effective protection of the courts in the absence of defencelessness (Art 24.1 Spanish Constitution), a proper and scrupulous constitution of the legal-procedural relationship must be established and in so doing an instrument of major importance is the procedural regime relating to summons, citations and notifications of the parties taking part in the different actions forming part of legal proceedings because this is the only way by which to guarantee the indispensable principles of contradiction and equality between parties in litigation (SSTC 268/2000 of 13 November; 34/2001 of 12 February; 99/2003 of 3 June);
2. In order to achieve this full effectiveness of the right to defence, Art. 24.1 of the Spanish Constitution specifically refers to preventing situations of defencelessness thus allowing for a hearing in which the parties can defend their legitimate rights and interests. This compels judicial bodies to personally summon, cite and notify defendants, this being the normal means of communication whenever feasible, thus assuring that the parties are given the chance to appear before the court to defend their positions vis-à-vis the claimant (SSTC 216/2002 of 25 November; 99/2003 of 2 June; 19/2004 of 23 February);
3. Special diligence is required when undertaking tasks of procedural communication to assure, as far as possible, that the said communication reaches the addressee giving the latter the opportunity to defend himself and preventing defencelessness (SSTC 18/2002 of 28 January; 6/2003 of 20 January);

4. Citation by public notice (which is strictly subsidiary in nature: SSTC 185/2001 of 17 September; to be used only as a last resort, complementary and extraordinary reserved for extreme cases where it is impossible to locate the defendant: STC 42/2001 of 12 February) requires first having used all other ordinary means of communication offering greater guarantees and security of reception by the addressee, and the conviction, based on reasonable criteria of the judicial body ordering its use due to the fact that the domicile or whereabouts of the interested party are unknown, that other means of procedural communication are futile and useless (SSTC 216/2002 of 25 November; 220/2002 of 25 November; 67/2003 of 9 April; 138/2003 of 14 July; 181/2003 of 20 October; 191/2003 of 27 October; 162/2004 of 4 October and 225/2004 of 29 November);
5. This requirement of trying all other forms of communication set out in the foregoing refers both to the court (judicial bodies must use all other reasonable means by which to inform the defendant of the existence of a proceeding) as well as to the claimant (who has the duty to collaborate with the judicial body by facilitating any data which could help in locating the defendant) (SSTC 134/1995 of 25 September; 268/2000 of 13 October; 42/2001 of 12 February; 87/2002 of 22 April); although an inordinate investigative effort which could cause undue restriction of the rights of defence of those taking part in the proceeding is not called for (SSTC 268/2000 of 13 November; 18/2002 of 28 January);
6. To be able to file a complaint concerning the improper use of citation by public notice, effective or material (not simply formal) defencelessness must have occurred (SSTC 26/1999 of 8 March; 197/1999 of 25 October; 162/2002 of 16 September; 6/2003 of 20 January); and such defencelessness cannot be claimed if, in light of the circumstances surrounding the case the interested party had, or could have had by making a minimum effort, extra-procedural knowledge that there was litigation pending and was privy to this information at a point in time allowing him to appear before the court to defend his rights and interests (SSTC 26/1999 of 8 March; 77/2001 of 26 March). Protection cannot be afforded to those who have not made a diligent effort to protect their rights and interests either by remaining at the margin of the proceeding by taking a passive attitude with a view to gaining an advantage or when it can be concluded that they had extra-procedural knowledge of the existence of the litigation in which they were not personally cited to appear (SSTC 36/2001 of 12 February; 87/2002 of 24 April; 6/2003 of 20 January; 44/2003 of 3 March; 90/2003 of 19 May; 99/2003 of 2 June; 181/2003 of 20 October);
7. The burden of proof concerning extra-procedural knowledge is on the party making that allegation (STC 26/1999 of 8 March) because the person claiming defencelessness cannot be called upon to prove his own diligence because of the principle of presumption of unawareness of litigation (SSTC 161/1998 and 126/1999 of 28 June). Accreditation must be verifiable (SSTC

70/1998 of 30 March; 122/1998 of 15 June; 26/1999 of 8 March) and although the sufficient proof requirement does not exclude the human criteria rules governing proof of presumption (STC 102/2003 of 2 June) and although it is sufficient if, from an examination of the actions, knowledge of the litigation or knowledge by making a minimum effort can be sufficiently and reasonably deduced (SSTC 86/1997; 113/1998; 26/1999), extra-judicial knowledge based on mere conjecture cannot be presumed because the presumption is (as already stated) that the party in question has no knowledge of the litigation if the latter so alleges (SSTC 161/1998 of 14 July; 219/1999 of 29 November; 99/2003 of 2 June; and 102/2003 of 2 June EDJ2003/15670);

8. An interpretation must be made of the rules governing some appeal processes of final judgments in the most favourable sense with a view to permitting, at the jurisdictional stage, protection of fundamental rights (SSTC 185/1990; 289/1993 of 9 October);
9. Case Law issued from this Civil Court (not free of deviation) especially in respect of the rule regarding Art. 24.1 of the Spanish Constitution EDL 1978/3879, rigorously outlawing any form of defencelessness, has consistently conceded hearing in default to defendants cited by public notice when no efforts were undertaken to make personal contact at the latter's' known domicile or when their whereabouts could be discovered by making normal efforts (SS. of 3 October 1990, 17 October 1991, 19 February 1994, 3 October 1995, 15 April 1996, 26 February 2002; and in the same regard SSTC 186/1991 of 3 October; 301/1993 of 21 October; 15/1996 of 30 January; 42/2001 of 12 February).

From the foregoing it can be concluded – ratifying what has already been reasoned – that a thorough effort was not made to issue an ordinary citation and improper use was made of the citation by public notice. The judicial body failed to comply with its investigative duty because since the case file showed that the defendants were working abroad it could and should have gathered information on their place of residence from the census office – where their address was indeed on file. – The claimant likewise failed to fulfil his duty to collaborate in good faith as he is required to do given that it would have been extremely easy for him to have found the exact information allowing for personal citation of the defendants."

– SAP of Las Palmas, Section 4 of 26 May 2005 (EDJ 2005/121605)
Citation abroad. The Hague Convention of 15 November 1965. Need to guarantee the exercise of the right to a hearing.

"Legal Grounds:

... Two. (...) The said citation was conducted in accordance with the Hague Convention of 15 November 1965 on the service abroad of judicial documents which allows, given the lack of specification, the remittal of the documentation

(the citation) to be verified "according to legal procedures" (Art. 5(1)(a)), i.e. "in accordance with the procedures prescribed in the law of the requested State for the notification or service of documents issued in that country and addressed to persons residing within its borders". The request for service of documents was thus executed (page 218) on 25 February 2000 by post to the postal office of Frankfurt in compliance with declaration 17) of the aforementioned Convention made by Germany which states in paragraph one that: "Requests for the service of notification of documents shall be sent to the central authority of the Land in which the request is to be carried out (. . .). The central authorities shall be deemed competent to channel notification requests directly by post if notification conditions are met in accordance with paragraph Art. 5(1)(a) of the Convention. In this case, the competent central authority will deliver the document to the postal authorities for notification or service. In all other cases, the Local Court (Amtsgericht) in whose district the notification or service of documents is to occur, shall be deemed competent to carry out notification requests. Actual notification shall be undertaken by the Secretariat of the Local Court." On 11 April 2000 the defendant appeared before the court claiming to have been cited on 6 March 2000 (page 248) irregardless of which, by order of 16 June 2000 the period for citation was declared closed precluding the reply formality given that, according to the Letter Rogatory, the citation had been served on 25 February. An appeal for reversal was lodged and subsequently dismissed by order of 31 July (page 275) insisting on that argument. A remedy of appeal was then lodged against this latter order.

This Chamber cannot share the reasoning laid down by the a quo Court to deny the defendant the possibility of procedural contradiction due to the passing of the period for citation. As stated in the foregoing, the request for the serving of the citation was indeed executed on 25 February 2000 but not by means of personal delivery but rather by a new remittal to a post office for subsequent delivery to the addressee. This means that the date appearing on the service certification cannot be taken as the effective "notification or service of document" and therefore the a quo judge should have acted in accordance with Art. 16 of the aforementioned Convention which provides: When a writ of summons or an equivalent document has to be transmitted abroad for the purpose of service, under the provision of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant form the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled:

a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and
b) the defendant has disclosed a *prima facie* defence to the action on the merits. An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Since the citation was not actually delivered on the date of execution (25 February) but rather the remittal by post and in light of the plausibility of the defendant having received the notification on 6 March given the time taken for ordinary postal deliveries although there is no documentary evidence proving this date, the judicial body should have protected the defendant's right to reply and defence by admitting the defendant as party and giving her a period of time to formulate a reply. In fact, the evidence submitted clearly shows that remittal by the central competent authority of Germany (Ministry of Justice of Hessen) took place on 25 February 2000 and was collected by the addressee (the defendant) on 6 March 2000 (pages 285–288, copy and translation; pages 380–381 original), meaning that her appearance in the proceeding on 11 April of that year was within the time period established under the citation order.

Depriving the defendant of her right to submit her allegations in rebuttal of the facts put forward by the other party, i.e. deprival of the right of rebuttal-hearing of a party who appeared before the court within the legally stipulated period of time, is a violation of effective protection of the courts giving rise to effective defencelessness (Art. 238.3 L.O.P.J.). Therefore, in accordance with the request formulated, the appeal is admitted due to procedural defect without the need to go into the other issues addressed, this court declaring the nullity of the actions subsequent to the order of 16 June 2000 and returns the proceeding to that point giving the defendant a period of nine days to present her rebuttal. The proceeding will then continue its legal course and, despite the nullification ordered, evidence already submitted which is invariable will not be affected."

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND DECISIONS

1. General principles

– ATS, Civil court, Section 1 of 19 April 2005 (EDJ 2005/63772)
Exequatur of judgment nullifying a Venezuelan marriage. No agreement with Venezuela. Requirements.

"Legal Grounds:

. . . (. . .) Given that there is no treaty with the Republic of Venezuela nor any applicable international rules governing matters of recognition and enforcement of judgments, the general regime of article 954 LEC (of 3 February 1881 should apply – still in force in accordance with the provisions of Sole Repeal Provision, paragraph one, exception three of the LEC 1/2000 of 7 January – since negative reciprocity has not been detected (article 953 of the aforementioned law of 1881) and given that the petitioner filed request for the homologation of the effects of the judgment notwithstanding the provisions of Art. 84.1 of the Civil Registry Regulation.

Two. According to the law of the state of origin applicable to the case, the judgment is final. This finality, the aim of the exequatur, is a prerequisite regardless of the recognition regime, laid down in article 951 (of the aforementioned 1881 law – in this regard it is not solely pertinent to the conventional regime if it is read jointly with the following precepts – and doctrine established by this court.

Three. Requisite No. 1 of article 954 of the aforementioned LEC of 1881 should be considered fulfilled in light of the personal nature of the action taken.

Four. As for requirement No. 2 of the same article 954, it has been accredited that the divorce proceeding was initiated by common accord of the spouses.

Five. As for requisite No. 3 of article 954, there is full conformity with the Spanish legal system in an international sense: article 85 of the Civil Code envisages the possibility of divorce regardless of the nature or duration of the marriage.

Six. The authenticity of the resolution as required by article 954(4) is guaranteed by the apostille with which it has been processed as verified in the court record.

Seven. There is no reason to suspect that the jurisdiction of the Republic of Venezuela was born of the parties' search for a fraudulent forum of convenience. Article 6(4) of the Civil Code and 11.2 LOPJ; Articles 22.2 and 3 of the LOPJ do not establish forums of exclusive jurisdiction the way article 22.1 of the same Organic Law does but in this case there are no circumstances in favour of the jurisdiction of the Spanish courts. Quite to the contrary, there are clear connections which cannot be overlooked such as the Venezuelan nationality of the wife and residence of the spouses in the Republic of Venezuela when the divorce case was filed before the Venezuelan courts and the place where the marriage took place, reasons supporting the competence of the courts of origin and thus excluding fraud in terms of the law applicable to the substance of the case, an issue linked to the former."

– ATS, Court 1 of 17 May 2005 (EDJ 2005/72797)
Recognition and enforcement of foreign judgments. Access to Supreme Court appeal. Convenience of such appeal.

"Legal Grounds:

. . . One. The first comment which must be made has to do with the examination of the appealability of the ruling delivered by the Provincial Court of Malaga settling the remedy of appeal lodged against the ruling by the first instance judge granting the recognition and enforcement requested regarding the foreign judgment delivered on 9 March 1994 by the High Court of Justice Queens Bench Division of the United Kingdom and which must be undertaken from the perspective of the provisions of Art. 477.2 LEC 2000 according to which Supreme Court appeals are limited to judgments delivered in second instance which therefore always excludes *Autos* (initial rulings). This would mean that, in principle, the *auto* which is the object of this appeal would not, in any case,

be a candidate for a Supreme Court appeal. It is also obvious that an extraordinary appeal for reason of procedural infraction would also be out of the question, especially in light of section two of final provision sixteen of LEC 2000 declaring unenforceable, inter alia, Art. 468 of LEC 2000 by virtue of which "The civil and criminal chambers of the High Courts of Justice will act as civil courts in the case of procedural infraction appeals lodged against judgments and rulings delivered by Provincial Courts bringing the second instance to a close".

However, the general conclusion reached must be clarified in line with the ruling of this court delivered on 19 November 2002 in appeal case 539/2002, ratified in subsequent rulings on 21 January 2003, appeal 841/2002 and 25 May 2004, appeal 1456/2001 justifying appealability to the Supreme Court under exceptional circumstances in the case of *Autos* delivered by Provincial Courts, resolving the appeal for reversal lodged against the denial or granting of recognition and enforceability of a foreign judgment in the following terms:

"In general terms and in relation to the appealability of decisions delivered in accordance with the Brussels and Lugano Conventions or EC Regulations 1347/200 and 44/2001, attention must be drawn to an exception to the general rule according to which, pursuant to Art. 477.2 LEC 2000, the Supreme Court appeal – and therefore, in the applicable transitory scheme, the extraordinary appeal for procedural infraction – is limited to judgments delivered in second instance which always exclude *Autos*. This exception derives from the particularity of the recognition and execution proceeding itself laid down in the aforementioned international instruments.

These international instruments regulate an exequatur proceeding whose aim is to provide complete and autonomous regulation applicable to requests for execution and recognition. Now this affirmation, normally applying to the resource system laid down by those instruments, is more of a declaration of principle which should not be interpreted in the literal sense of the word because it is clear that the Brussels Convention as well as Community Regulations leave certain aspects of the proceeding to the regulation of national laws.

In Spain, the legal regime applicable to the exequatur proceeding is found in Arts. 954 et. seq. of the LEC of 1881 which remains current despite the entry into force of LEC 2000 pursuant to the provisions of Sole Repeal Provision 1(3) by virtue of which the International Legal Cooperation Act is not enacted. As it is clear that the said domestic regime is not capable of bridging all of the gaps produced when international instruments are applied, especially at the appeal stage envisaged therein, integration mechanisms in LEC 2000 itself based on international objectives and the system of international instruments themselves must be found.

The exequatur proceeding is divided into two differentiated stages. At the first which is implemented in Spain before a First Instance Judge, there is no contradiction per say: the request is examined by the judge who simply verifies whether recognition conditions are met and then issues a decision either autho-

rising or denying the applicability of the foreign decision. It is, therefore, at the appeal stage provided for against the preceding decision where the contradiction actually occurs between the party seeking a declaration of enforceability and the party requesting the exequatur.

As provided by the foregoing and by analogy with the provision of Art. 956 of the LEC of 1881, the type of decision delivered by the First Instance Judge either in favour or against the requested recognition and execution is that of *Auto*. There is no unanimity, however, regarding the type of decision which should be taken in determining the remedy of appeal – with opposition between the parties – lodged against judgments.

Be this as it may, the particularity of the proceeding itself is what determines whether an exception can be made concerning the rigor of Art. 477.2 LEC. It is possible to lodge an appeal for legal protection from the said precept despite the fact that the appeal was decided by *Auto* rather than by a Judgment, by drawing a comparison between the final judgments referred to in Art. 477.2 LEC 2000 to the decisions – regardless of whether these are in the form of *Auto* or judgment – regarding the appeals lodged on matters of recognition and execution of foreign judgments in accordance with the Brussels Convention of 27 December 1968 and the Lugano Convention of 16 September 1988 (Arts. 36, 37.1 and 40) and with EC Regulations 1347/2001 (Arts. 20.1 and 26) and 44/2000 (Art. 37.1 and 43).

Notwithstanding the above, exceptional appealability in *Autos* delivered by the provincial court as part of an exequatur should be limited exclusively to the *Auto* on the contradictory appeal and may not extend to any other than the one related to the resolution of the contradiction at hand because in the absence of that contradiction between parties, the basis for the exception advocated is missing.

For that reason, the exceptional grounds for supreme court appeal – and for a procedural infraction in the transitory regime – only in the case of judgments delivered by provincial courts, may not be extended to just any type of *Auto* delivered by the provincial courts in exequatur proceedings but rather must be limited to the resolution of the contradictory appeal envisaged in international instruments".

From the foregoing it can therefore be concluded that here we are dealing with a proceeding in which the decision delivered is indeed appealable, the access to the appeal in cassation being ordinal No. 3 of Art. 477.2 LEC 1/2000, bearing in mind the distinctive and exclusionary nature of the three ordinal numbers of Art. 477.2 LEC 2000, calling for accreditation of the existence of reversal interest in line with the repeated criteria of this Chamber in numerous motions for reconsideration of denied appeals in cassation and upheld by the Constitutional Court in Decisions 191/2004 of 26 May, 201/2004 of 27 May and 208/2004 of 2 June and in Judgments 150/2004 of 20 September, 164/2004 of 4 October, 167/2004 of 4 October and 3/2005 of 17 January. These decisions

have established that the said criteria, adopted by the General Assembly of Magistrates on 12 December 2000, does not constitute a violation of Art. 24 of the Spanish Constitution.

The appellant filed a Supreme Court appeal in accordance with ordinal number 2 and 3 of Art. 477.2 of LEC 2000 and, having cited as infringed legal precepts Arts. 46.2, 33.3 and 27.2 with regard to Art. 34.2 of the Brussels Convention, claimed that the proceeding surpassed the twenty-five million peseta level and therefore presented reversal interest for opposition to Supreme Court jurisprudence citing, in this regard, the judgments delivered by this Chamber on 6 and 21 July 2000, 19 September 2000 and 26 February 2001 which rendered null and void the enforcement decreed by the court of first instance due to failure to submit the document accrediting the delivery or service of the citation.

It should be pointed out that the avenue opened by ordinal No. 2 of Art. 477.2 of the LEC was closed as of the moment in the proceeding when it was processed by virtue of the matter and not the amount, improperly using the avenue corresponding to ordinal No. 2 of the aforementioned Art. 477.2 in the preparatory brief. The fact that the economic value of the case, followed by the matter addressed, exceeds the sum of 25 million pesetas in no way means that accreditation of reversal interest can be ignored as a prerequisite for appealability and therefore, in the preparation of the appeal, Art. 477.2–2 LEC 2000 cannot be invoked. Therefore, the determining factor in gaining access to a Supreme Court appeal in these cases is accreditation of the appealability of reversal interest". Despite having also used the avenue of reversal interest in the preparatory brief to gain access to an appeal, this latter avenue is indeed the correct one bearing in mind that the proceeding was substantiated by virtue of the matter.

Two. Notwithstanding the above, the Supreme Court appeal is not admissible due to the provisions of Art. 483.2, 3, indent two of LEC 2000. It would suffice to examine the appealed decision to see that it does not contradict allegedly violated Supreme Court doctrine given that the decision is based on specific circumstances alluded to by the appellant; namely that from the case file documents, specifically the certification issued by the High Court of Justice, Division Queens Bench, it can be deduced that the aforementioned defendant was duly notified on 11 February 1994 of the claim giving rise to the said proceeding via the postal service (substitute notification) and the defendant was also notified in due form of the judgment subsequently delivered which is the object of enforcement in this case in accordance with Order 65, rule 5. Thus, the defendant was aware of the existence of the suit, of the proceeding to which the latter gave rise, of the Court where the case was heard and finally, of the judgment delivered as pointed out in Legal Ground one of the ruling delivered by the first instance judge, to which legal ground five of the decision delivered by the provincial court refers.

Insofar as this is the case, the appealed decision does not contradict the Judgments delivered by this chamber which were cited as examples of infringement in the preparatory brief; judgments which rendered null and void the enforcement decreed by the instance court due to failure to submit the document accrediting the delivery or service of the citation at the request or substantiation stages.

In this respect, we should not lose sight of the fact that reversal interest arises from the legal conflict produced by the infraction of a substantive rule applicable to the object of the proceeding (the ground for the Supreme Court appeal), contradicting the doctrine of this chamber (constituting a supposition of the appeal) making it clear that this conflict must really exist and be accredited by the party; any appeal attempt invoking "reversal interest" appearing as merely nominal, crafty or instrumental being considered inadmissible, the aim of the appeal, namely the upholding or reasoned change of the jurisprudence which was contradicted, being impossible to achieve.

In this case, reversal interest represented by the said contradiction of Supreme Court jurisprudence does not refer to the way the issue was resolved based on elements of fact and judicial assessments forming part of the judgment based on the said elements but rather is projected towards an assumption different from the one envisaged in the judgment, completely divorced from the facts and legal consequences deriving from the latter. This is, therefore, an example of a merely instrumental rule violation and thus a feigned reversal interest, i.e. non-existent, unable to unify the jurisprudence which is one of the characteristics of an appeal as of the moment at which it addresses a situation which is different from the one dealt with in the appealed decision (AATS, inter alia, of 14 September, 26 October and 10 November 2004, in appeal proceedings 2340/2001, 2139/2001 and 2261/2001)."

– ATS, Court 1 of 28 June 2005 (EDJ 2005/117330)
Exequatur. Failure to personally serve notice of the judgment. Denied.

"Legal Grounds:

... One. Given that there is no treaty with the Dominican Republic regarding recognition and enforcement of judgments, the general regime of article 954 LEC (of 3 February 1881 should apply – still in force in accordance with the provisions of the second Transitory Provision of Art. 2 LEC 1/2000 and which remains current in any case following the entry into force of the new procedural law in accordance with its Sole Repeal Provision, paragraph one, exception three since negative reciprocity has not been detected (article 953 of the aforementioned law).

Two. From among the requirements to which an official statement of acknowledgement is subject, article 954–2 of the LEC of 1881 requires that the enforceable judgment "must not have been delivered in default". In light of this requirement, the aim of which is to prevent the enforcement of judgments delivered in proceedings in which the defendant has not appeared before the court

and therefore has been unable to adequately exercise his right to defence, this Court has identified the different possible types of default of appearance based on the different reasons for the latter and has thus distinguished among the cases in which the defendant, duly cited and summoned (i.e. in line with legal proceeding guidelines and allowing time to build a defence) fails to appear before the court: voluntary default of appearance because he does not recognise the authority of the judge, because it is an inconvenience or simply because he lets deadlines pass, and those other cases in which default of appearance of the defendant is due to not knowing that a proceeding is under way, this latter circumstance, due to its repercussions in terms of respect of the right to defence, posing an obstacle to the recognition of the foreign judgment (AATS 28–10–97, 23–12–97, 17–2–98, 7–4–98, 2–2–99, 22–6–99, 7–9–99, 28–9–99, 16–5–2000, 3–10–2000, 23–1–2001, 27–3–2001, 10–4–2001, 24–4–2001, 18–9–2001, 30–10–2001, 6–11–2001, 29–1–2002, 30–4–2002, 14–5–2002, 18–6–2002, 25–6–2002, 2–7–2002, 17–9–2002, 20–10–2002, 5–11–2002, 11–2–2003, 11–3–2003, 20–5–2003, 1/3/2005, and others).

Based on the above it should be indicated that in the case at hand and based on the documentation in the case file and a statement by the clerk of the court of origin to the effect that "having been impossible to verify the domicile, residence or whereabouts of the defendant, given that the latter was not found at his last place of residence, he shall be summoned by the fixing of a copy of this document on the door of the municipal court, leaving it in the hands of the public prosecutor of Espaillat and having failed to appear in person a judgment was delivered in his absence". Thus there was no evidence of any citation or summons at the hearing of origin nor notification of the judgment whose recognition is the object of this discussion. These circumstances indicate this his failure to appear before the court are not due to reasons of personal inconvenience, the only form of the said failure to appear which would not represent an obstacle to the recognition and enforcement of the judgment delivered by the Dominican courts. The request for exequatur must therefore be denied since the claimant failed to accredit that the defendant had knowledge, in time and form, of the legal action taken against him. Nor was there any expressed statement of conformity from the defendant in this exequatur which would have remedied the defencelessness characterising the litigation at origin.

– AAP Madrid, Section 9 of 16 May 2005 (Ref. Aranzadi JUR 2005/156261)
Recognition and execution of foreign decisions. Regulation 44/2001. Extension of enforcement to third parties not included in the corresponding case. Inadmissibility. Territorial competence to enforce decisions.

"Legal Grounds:

. . . Three. Regarding the background issue addressed in the remedy of appeal concerning the decision delivered against the *Banco Nacional de Cuba* on 15 April 2003 by the High Court of Justice calling for extension of the enforcement of the said decision to the Cuban nation, the appealed decision

should be upheld given that the issue addressed in requesting the extension of the enforcement of the decision delivered exclusively against the *Banco Nacional de Cuba* does not deal with whether the said Bank or even the country of Cuba enjoys jurisdictional immunity in the case under scrutiny but rather whether enforcement of a specific decision delivered by a European Community court against a legal person can be extended to another different legal person with ties or relations with the former.

In respect of this issue, Regulation 44/2001 of the European Union, regulating the recognition and enforcement of judicial decisions in Member States different from the ones in which they were delivered, does not regulate the specific rules of enforcement but rather, once enforcement has been agreed, it must be undertaken in accordance with the domestic rules of each country.

Art. 558.2 of the LECiv defines the persons against whom decisions may be enforced and specifically Art. 558.2.1 provides that decisions may be enforced against the party appearing as the debtor in the document serving as the basis for enforcement.

The foregoing indicates that the Spanish court which recognised and enforced the decision delivered by the British court can in no way extend the said enforcement to subjects or persons different from those appearing in the said decision given that this would be an infringement of Art. 38.1 of the Regulation in the sense that enforcement must be undertaken in the terms and against the persons who were convicted in the enforced decision but not in different terms or against different persons regardless of their ties with the person convicted by the court delivering the decision. Moreover, it would be inadmissible to extend enforcement to a third party who was not a party to the proceeding in which the decision was delivered and therefore was not convicted in the decision dated 15 April 2003 delivered by the High Court of Justice.

Four. A remedy of appeal was lodged on behalf of the *Banco Nacional de Cuba* against the decision dated 15 September 2003 claiming lack of territorial competence of Spanish courts and tribunals to rule on the enforcement of decisions against the said entity based on Art. 39.2, 60 of Regulation 44/2001.

As argued in the appeal brief, Art. 39.2 of Regulation 44/2001 provides that competence shall be determined either by the domicile of the party against whom enforcement is undertaken or by the place of enforcement.

As for the determination of domicile for the purpose of establishing the territorial jurisdiction of Member States, Art. 60 of the aforementioned Regulation refers back to the domestic law of each State and includes some special rules relating to legal persons in Art. 60, allowing for litigation against the latter at the location of statuary headquarters, general administrative office or centre of main activity while Art. 51 of LECiv provides, as the general forum of legal persons, their legal domicile but litigation may also be initiated against the latter at the place where the situation or legal relationship arose or should be enforced provided that it has a premises open to the public or an authorised representative to act on behalf of the company.

This case does not meet the requirements laid down in Art. 60 of Regulation 44/2001 or of Art. 51 of the LECiv necessary for Spanish courts to have territorial jurisdiction bearing in mind that the *Banco Nacional de Cuba* does not have its legal domicile in Spain, nor are any of the fora which, by connection, would permit attribution of the said territorial jurisdiction to the Spanish courts applicable.

The second criteria established under Art. 39 of Regulation 44/2001 in the determination of territorial jurisdiction is the place of enforcement. In this connection once again, Spain cannot be considered the place of enforcement of the judgment delivered by the British court given that neither the call for enforcement nor any other document forming part of the case file serves as evidence or points to the existence of any type of assets of the person against whom enforcement in Spanish territory is initiated, the appellant party himself acknowledging the entity's situation of utter insolvency.

And lastly we would point out that, in accordance with the enforcement proceeding envisaged under Regulation 44/2001, the person against whom request was filed for the recognition and enforcement of a judgment or executive order delivered in another Member State of the EU may claim lack of territorial jurisdiction in lodging his remedy of appeal against the ruling calling for recognition and enforcement given that this is the only moment at which the said Regulation allows the enforcee to oppose the enforcement and address all of the issues surrounding the said enforcement.

– SAP Alicante, Section 5 of 25 May 2005 (Ref. Aranzadi JUR 2005/203985)
Enforcement of foreign judgments. Courts costs. Fees not included in the decision. Denial.

"Legal Grounds:

. . . Two. In the appeal proceeding filed before this Court, request was made for the nullification of the court's decision based on the fact that the foreign decision is not enforceable in accordance with the provisions of Art. 38, nor was it completed, ex officio or upon request by the claimant, in accordance with Arts. 54 and 55 of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. It also denounces infringement of Spanish law enforcement based on the ordering of enforcement of non-existent fees.

This challenge should be upheld without getting into the validity and finality of the judgment delivered by the foreign court because the scope of its enforceability does not include the concept of costs with regard to which there is only a generic assignment which is not specified in the decision except for the reference to Art. 700 mentioned above of the New French Civil Code of Civil Procedure but no other reference is made in accordance with the proceeding established in Arts. 701 and 702 (on settlement of costs) and 704 and subsequent of the same provision (on verification and payment of costs). Therefore, the issue is not one of refusing to validate the judgment submitted by the

person requesting its enforcement but rather, in accordance with the provisions of Art. 523.1 of our Code of Civil Procedure, there is a lack of sufficient jurisdiction for enforcement in the terms in which it was drafted according to the Brussels Convention and the broad interpretation given to the latter's enforcement by this Court which has already been expressed in its 24.07.97 judgment (Section 4) stating that all decisions are enforceable, independent of their denomination and finality, although they must be enforceable in the State in which they are delivered, requirements not fulfilled in respect of the fees of the claimant's French lawyer. In this regard it would suffice to recall that Art. 32 of the said Regulation 44/2001 provides that "for the purposes of this Regulation, 'resolution' shall be taken as any decision adopted by a court of a Member State regardless of the term used to describe it, be that ruling, judgment, order or enforcement mandate, and as the act by which the court clerk settles procedural costs"; without the inclusion of fees in any of the said decisions.

Moreover, the subsidiary request formulated by the filing party cannot be admitted in this second instance requesting validation of the fee, given the fact that this is a new issue impossible for this judicial body to rule upon and the enforcement under scrutiny here cannot be extended to a resolution which, where appropriate, should be addressed to and resolved by the foreign court which delivered the judgment and by the procedural rules applicable there.

– AAP Valencia, Section 11 of 27 May 2005 (Ref. Aranzadi AC 2005/1291)
Enforcement of foreign judgments. Criminal prejudiciality. Suspension.

"Legal Grounds:

... Three. (...) It is indeed true, as claimed by the appellant, that Council Regulation 44/2001 does not provide for the suspension of the enforcement of foreign decisions on civil or commercial matters for reason of criminal prejudiciality, but it is equally true, by way of example, that it likewise fails to define the contradictory procedure which should be employed in the case of an appeal before the Provincial Court against a ruling calling for enforcement and in both cases, as in others where a procedural gap exists in the said Regulation, it is obvious that subsidiary application of LECiv is called for, specifically regarding matters covered in the aforementioned Art. 569 of the LECiv, perfectly applicable to the enforcement process".

– SAP Asturias, Section 5 of 29 July 2005 (EDJ 2005/137596)
Exequatur. Acts of voluntary jurisdiction. Lack of necessity.

"Legal Grounds:

... Three. (...) Not requiring the statement of heirs in the exequatur formality as the Supreme Court has had the occasion to declare, inter alia, in its ruling of 29.09.98 where it indicates that "this Court has been denying recognition of acts of this nature through the exequatur procedure regulated in

Arts. 951 and subsequent of the Code of Civil Procedure. For quite some time now (e.g. ATS of 7 February 1955), the unique difference between decision delivered in voluntary jurisdiction cases and judgments issued in contentious litigation have been highlighted (see AATS of 16 July 1996, 16 September 1997, 21 October 1997 and 10 March 1998). These differences are evident both in the cause and the form in which jurisdictional action is taken as well as in the function that the law reserves for the intervention of the jurisdictional body and in the effects that one or the other type of decisions have. These differences preclude any attempt that is even comparable to the proceeding envisaged in articles 951 and subsequent of the LECiv and shift responsibility for the official recognition of acts of voluntary jurisdiction to the body or authority before which the request was filed for the recognition of the particular effects derived from such acts which, in addition to verifying the requirements set out in articles 600 and 601 of LECiv/1881, must also consider those set out in Spanish conflict regulations (article 9.8 CC) including any possible international agreements to which Spain is party and which are applicable based on the subject matter.

– AAP of the Balearic Islands. 4 October 2005 (Ref. Aranzadi JUR 2005/234635) *Acceptability of a foreign public document. Competence of the requested body. Exequatur of a notarised German document with executive power: place of execution of the contract and place of enforcement of the judgment.*

"Legal Grounds: . . .

Four. . . . It is clear that in the Brussels Convention the 'place of fulfilment of the contract' and the 'place of execution' are different concepts, the latter being the place where the resolution in question is enforced judicially.

Having established that, it is difficult to understand how the claimant would be free to file for enforcement in any location when he should file his request before the judge of the place related to the object of the litigation, leading to the concept of forum conexitatis taking us to the location of the assets of the debtor who is trying to block this process.

Five: Arts. 32 and subsequent of the Brussels Convention provide for a specific procedure for the enforcement of decisions with its own system of resources excluding that regulated in domestic law.

Insofar as the court ruling which is the object of this challenge does not dismiss the request for enforcement but rather limits its scope to declaring its lack of objective competence, this decision should likewise be limited to revoking the said ruling denying competence and declare that the instance court is indeed objectively competent to rule on the enforcement and it is incumbent upon the first instance body to examine, ex officio, compliance with the requirements laid down in the Brussels Convention for the enforcement of the communication subject to the proceeding envisaged in that Convention".

– AAP of the Balearic Islands. 24 November 2005 (Ref. Aranzadi AC 2005/2192) *Concession of exequatur of a foreign judgment. Adoption of precautionary measures; seizure order.*

"Legal Grounds:

Two. (. . .) The decision delivered by the instance court is in no way beyond the scope of the enacting terms of the judgment being enforced, limiting the said scope to calling for the enforcement of a final judgment delivered by the Provincial Court of Osnabrück (Germany) in accordance with Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and in the absence of any of the circumstances described in Arts. 34 and 35 of the said Regulation which would preclude recognition in Spain. It also calls for the precautionary measure of a seizure order of the specific assets of the defendant inscribed in the Land Registry of Ibiza which the executive deed itself identifies with a credit in favour of the claimant for a sum of 131,418.82 and therefore it is not clear what the appellant is referring to when he denounces that enforcement extends beyond the scope of the judgment".

2. Family

– ATS, Civil Court, Section 1 of 17 May 2005 (Ref. Aranzadi JUR 2005/150613) *Recognition or enforcement of foreign judgments regarding child support. The Hague Convention of 2 October 1973. Failure to appear in court. Lack of defencelessness. Time bar of the action. Autonomy and independence of the recognition. Concession of exequatur.*

"Legal Grounds:

. . . Five. Focusing on the requirement laid down in Art. 5(2 and 6) of the multilateral Convention, i.e. 'the safeguarding of procedural guarantees in the original proceeding', and in light of the defendant's opposition to recognition claiming lack of notification of the decision and that he was summoned in absence (appearing in the heading of the decision), the said opposition should be dismissed because the defendant failed to point out, as was indicated by the public prosecutor, that the judgment whose exequatur has been requested was delivered in the settlement of a remedy of appeal lodged by the defendant himself represented by a Procurator and assisted by an Attorney. In terms of the appellee's (Sonia) failure to appear before the court, she also appeared along with her representatives and has, in fact, initiated this proceeding concerning which, in accordance with reiterated criteria of this Chamber, all of the guarantees relating to the right to defence and the time bar relating to defencelessness must be satisfied (AATS of 24–3–98, 31–3–98, 7–4–98, 26–1–99, 134–99, 28–3–2000, 4–7–2000, 14–11–2000, 30–1–2001, 20–2–2001, 13–3–2001, 30–10–2001, 6–11–2001, 28–12–2001, 22–01–2002, 16–7–2002, 15–10–2002,

26–11–2002, 29–4–2003, 15–7–2003, 23–9–2003, 25–5–2004, 23–11–2004, 28–12–2004 and 18–1–2005, among others).

For all of the above, ground five of the opposition should likewise be dismissed.

Six. (. . .) The opposing party holds that the time bar had elapsed regarding the enforcement of the foreign judgment based on the time limits laid down in the Spanish legal system. In seeking to reject the exequatur based on the above argument he is confusing this proceeding either with the one undertaken at origin and which ended with the decision for which recognition has now been requested or with the proceeding to achieve the full and definitive enforceability of the provisions of the foreign judgment once recognised. As indicated in the rulings of this Chamber on 23 May and 6 June 2000 and 9 July 2002 settling a comparable claim against recognition, the exequatur proceeding is characterised by its focus on the standardisation of the effects of the foreign decision, especially procedural effects – res judicata, executive, preclusive – seeking a resolution which, without getting into the merits of the case beyond that called for by legislative competence control, where applicable, and by law enforcement of the forum – in the international sense – authorising the enforceability of the decision and making it effective in Spain with the same scope and extension as at origin without any corrective measures other than those deriving from lack of familiarity with the forum or mandatory respect for law enforcement. The decision taken with regard to the exequatur, therefore, is merely constitutive-procedural in nature insofar as its aim is the homologation of the procedural effects of the foreign judgment and the proceeding to which it applies is different from the one at origin and the one which can be instituted in Spain once the foreign decision has been recognised and declared enforceable, to achieve enforcement of the provisions of the sentence. Therefore, the action undertaken to uphold the right to recognition – the action of recognition – is different from and should not be confused with the action taken in the litigation at origin giving rise to the judgment for which recognition is being sought, nor with the action of enforcement of this one, either in the State of origin or the forum once it is recognised. This autonomy and independence of the recognition action compared with others, also highlighted by this Chamber on previous occasions (see AATS of 21–4–98, 5–5–98, 8–9–98, 27–4–99, 23–5–00 and 9–7–2000), is what determines rejection of the argument. The time bar invoked is not the one which, if relevant, could apply to the action of recognition but rather that which is tied to the enforceability of the rights surrounding the pretensions deduced from the proceeding at origin or, to state this in another way, that which determines the enforceability of the rights declared or recognised in the foreign judgment with regard to which the exequatur proceeding is a necessary requirement. A time bar blocking the exequatur would have to be related to, if it were effectively admitted, the right to the recognition of the foreign decision and this is not what the opposing party has done and that is sufficient reason to dismiss this ground for opposition (. . .)."

– ATS, Court 1 of 19 July 2005 (EDJ 2005/145400)

Recognition and enforcement of an Argentinean divorce judgment. Lack of a bilateral convention with Argentina. Conditions regime under the LEC of 1881.

"Legal Grounds:

. . . One. Given that there is no treaty with the Republic of Argentina nor any applicable international rules governing matters of recognition and enforcement of judgments, the general regime of article 954 LECiv (of 3 February 1881) should apply – still in force in accordance with the provisions of Sole Repeal Provision, paragraph one, exception three of the LECiv 1/2000 of 7 January – since negative reciprocity has not been detected (article 953 of the aforementioned law of 1881).

Two. According to the law of the state of origin applicable to the case, the judgment concerning which this exequatur is sought is final. This is a prerequisite, regardless of the recognition regime, laid down in article 951 (of the aforementioned LEC 1881) – in this regard not solely pertinent to the conventional regime if it is read jointly with the following precepts – and doctrine established by this court.

Three. Requisite No 1 of article 954 (of the aforementioned LEC of 1881) should be considered fulfilled in light of the personal nature of the action taken.

Four. Regarding requirement 2 of the same Art. 954, it has been established from information on foreign law obtained in similar past cases, pursuant to Art. 214 of the Argentinean Civil Code, that the only requirement to grant a divorce (arising from a prior mutual accord separation filed before the courts of the State of origin) is the passing of three years from the date of the final separation decision.

Five. As for requisite of article 954, there is full conformity with the Spanish legal system in an international sense: article 85 of the Civil Code envisages the possibility of divorce regardless of the nature or duration of the marriage.

Six. The authenticity of the resolutions as required by article 954(4) is guaranteed by the apostille with which the case has been processed as verified in the court record.

Seven. There is no reason to suspect that the international jurisdictional competence of the Argentinean courts was born of the parties' search for a fraudulent forum of convenience (Article 6.4 of the Civil Code and article 11.2 LOPJ); Arts. 22.2 and 3 of the LOPJ do not establish forums of exclusive jurisdiction as article 22.1 of the same Organic Law does but in this case there are no circumstances favouring the jurisdiction of the Spanish courts. Quite to the contrary, there are clear connections which cannot be ignored such as the Argentinean nationality of the wife and the place where the marriage took place; reasons supporting the competence of the courts of origin and therefore excluding fraud in terms of the law applicable to the substance of the case, an issue linked to the former.

Eight. There are no indications of contradiction or substantive incompatibility with judicial decisions delivered or cases pending in Spain."

3. Successions

– ATS, Civil Court, Section 1 of 14 March 2005 (Ref. Aranzadi JUR 2005/98790)
Exequatur concerning a French succession judgment. Spanish-French Convention of 1969.

"Legal Grounds:

One. The Convention between Spain and France on the recognition and enforcement of judicial and arbitral decisions and authenticated acts in civil and commercial matters of 28 May 1969 ratified on 15 January 1970 and published in the BOE of 14 March 1970 is applicable to this case in accordance with Art. 1 in light of the nature and substance of the act whose exequatur has been requested.

Two. International jurisdiction (Art. 3.1), the definitive nature of decisions (Art. 3.2), the law applied to the merits of the case (Art. 5 enshrining the equivalency of results principle), conformity with the law enforcement measures of the requested State (Art. 4.2), guarantees of hearing and defence in the proceeding at origin (Art. 4.3 and 15), Lis pendens or decisions delivered in the requested State or another (Art. 4.4) and minimum formal requirements (Art. 15) are controlled by the said Convention. All of the requirements laid down in the bilateral treaty have been duly respected."

4. Bankruptcy proceedings

– AJMER of Malaga. 2 September 2005 (Ref. Aranzadi AC 2005/1250)
Recognition and enforcement of judicial decision delivered in England in a Community insolvency proceeding.

"Legal Grounds: . . .

Two. (. . .) Thus, having established the liquidator's power of attorney and proof of appointment (Arts. 18 and 19 of the Regulation) and having submitted the documents referred to in the aforementioned statement, recognition is granted without any further formalities or hearings involving either of the parties. The petitioner has submitted all of the documentation duly legalised and stamped with the apostille (although not required by the Regulation).

The particularity of the English law's Bankruptcy Order On Creditor's petition is the existence of a prior decision acknowledging the debt with opposition of the debtor and subsequent resolution of insolvency. Both form a common block although they are formally separated and should be recognised as indicative of a State of Insolvency".

V. INTERNATIONAL COMMERCIAL ARBITRATION

– ATS, Court 1 of 31 May 2005 (EDJ 2005/101333)
Recognition and enforcement of foreign arbitral awards. Lack of arbitration. Defencelessness deriving from procedural defects. Infringement of law and order.

Nullity of arbitral agreement due to inclusion in general conditions. Dismissal of grounds for opposition. Concession of exequatur.

"Legal Grounds:

. . . Two. In light of the circumstances, it must be assumed that the party requesting the exequatur duly complied with Art. (IV)(2)(b) of the New York Convention as well as with Art. II of that same supranational regulation in analysis of which this Chamber has consistently declared that the determining factor in terms of complying with recognition is the will of the parties to subject disputes surrounding the validity, enforceability or compliance of a given business issue to arbitration and that is the purpose of the burden of attaching to the request for exequatur the documents referred to in section two of Art. II of the Agreement in relation with, if relevant, Art. 1(2)(a) of the European Convention on International Commercial Arbitration of 21 April 1961 which is purely instrumental with respect to the said obligation.

Proof of this will is found here in the documentation furnished which does not prevent it from coming from a *per relationem* stipulation, when the incorporation of the general conditions in the contract, including the arbitration clause, was specifically envisaged and concerning whose content the externalised will of the signers of the contract is projected, relegating the issue of the enforceability of the submission clause agreed as such, to the analysis of the rest of the cases of recognition already subject to the allegation and challenge of the opposing party already verifiable ex officio.

Furthermore, an examination of the difficulties of the arbitration proceeding reflected in the arbitral decision itself, and which the party opposing the exequatur does not challenge, demonstrates that the latter went to arbitration defended by Counsel to request the suspension of the exequatur in light of the imminence of an agreement to bridge the differences between the two parties from which one can also infer this unequivocal will to be subject to arbitral decisions constituting the essence of the proposal for the homologation of the decision under examination which can be deduced from the behaviour exhibited by the defendant during the course of the arbitral proceeding as this Chamber has indicated on preceding occasions (AATS 14–4–2000, in exequatur 3536/99, and 13–3–2001, in exequatur 3625/99, and others).

Three. The company concerning which enforceability of the decision is sought first of all claimed that the said decision was delivered in its absence and without even the knowledge that an arbitration proceeding was under way. This allegation coincides with the ground for opposition to the exequatur contained in Art. V(1)(b) of the New York Convention according to which recognition shall not be granted when the party against whom the arbitral decision is invoked has not been duly notified of the designation of the arbitrator or of the arbitration proceeding or has not been able, for any other reason, to properly defend himself.

Moreover, and from a different standpoint, this links up with the supposition of adapting the arbitral decision – specifically its effects – to domestic law and

order or, more exactly, to law and order in the international sense as this Chamber has been alluding to.

This allegation, however, lacks the consistency needed to prevent recognition of the enforceability of the foreign arbitral resolution. In the procedural background of the decision it was specifically indicated that on 15 January 2003 the defendant was sent, by means of an arbitral agent, "the formal acknowledgement of receipt of the arbitration via fax and courier service" along with the pertinent documentation including a copy of the AFMA international arbitration rules and that on 12 February 2003 the same agent notified the parties of the appointment of the arbitrator who, on 14 March 2003, also via registered post and fax, sent notice of the arbitration hearing adding that the said communication was sent to the defendant on 17 March 2003 and was signed by Mr. Llovera as the receiving party.

It is then indicated that on 10 April 2003, immediately prior to the date set for the arbitration hearing, the defendant sent the arbitrator, via fax and post, a communication in which he requested the indefinite suspension of the arbitration proceeding, affirming that the controversy was being resolved through efforts of a third party intermediary. Along with the request for exequatur, a copy of the communication sent by the arbitral agent to the defendant via fax informing of the initiation of the arbitral proceeding and the list of arbitrators was also furnished. Also included in the case file is the decision delivered by the High Court of the State of California of Los Angeles County dated 8 October 2003 confirming the instance arbitral decision at the request of the filing party with the participation of the latter's attorney and that of the defendant company.

In this context, and considering that the party opposing the exequatur does not deny the circumstances described, the fact that the arbitral resolution was delivered in his absence and without his knowledge is nothing more than a defence allegation which is actually based on the unenforceability included in the submission to arbitration agreement, but this is not grounds to deny the enforceability of the decision based on unawareness of the existence of the arbitral proceeding and, in short, on the lack of due guarantees to fully defend oneself. It is therefore not possible to reject the exequatur on the ground laid down in Art. V(1)(b) of the New York Convention to prevent the enforcement of the arbitral decision nor was there any violation whatsoever of any law and order proceeding which would stand in the way to recognition of its effects and enforceability, the initial absence of the defendant due exclusively to his strategy in the original proceeding motivated by his belief that this would render the arbitral decision unenforceable.

Four. The essence of the opposition to the exequatur derives from the alleged nullity of the arbitration agreement given that it is included in some general conditions which were not negotiated individually by the company now opposing it but were rather imposed unilaterally by the claimant and are considered abusive and damaging in that they subject contract related disputes to institu-

tional arbitration to be held before an association representative of the interests of film producers of which the claimant is one.

In this respect we would mention that the New York Convention has devised an exequatur refusal system which places the burden of establishing the unenforceability of the arbitration agreement on the party opposing the recognition of the foreign decision in accordance with the law to which the parties are subject or, if nothing has been stipulated in this connection, by virtue of the law of the country in which the arbitral judgment was delivered (Art. V(1)(a)).

Thus, this exequatur rule is, by nature, a conflict rule and entails the need to justify the alleged unenforceability in accordance with the law to which the connections envisaged in the precept refer and hence prevents the affirmation of the inadmissibility of recognition by automatic invocation of internal production rules or other supranational rules such as those comprising Community acquis insofar as enforcement is not mandated by the aforementioned conflict rule.

There is no evidence here that the parties had subjected the contract or the arbitral agreement, in its autonomy, to Spanish legislation (whose imperative rules, such as those contained in Law 7/1998 of 13 April are therefore not applicable in light of the provisions of Art. 3.2 of the said Law) and therefore the examination of the issue of recognition now under scrutiny must be undertaken in accordance with the legislation of the State where the decision was delivered and, pursuant to the said legislation, it is not duly established that the arbitral agreement should be deemed inapplicable.

From the perspective of law and order control in the analysis of this ground for opposition to the exequatur, it should also be concluded that there is no reason to prevent the enforceability of the foreign decision. The fact is that the submission to arbitration clause is contained in a stipulation included within a set of general conditions to which the contract concluded by the parties remits as a whole and which was, in turn, included as an annex and the imbalance, along with the need to prevent abuse of dominant position claimed by the petitioner are not enough to render the decision unenforceable. Moreover, it is not at all clear that the defendant is in a situation of inferiority vis-à-vis the claimant given that, on the one hand, he cannot be considered a consumer in the sense attributed by the Community rule and domestic legislation (basically Directive 93/13/EEC of 15 April, the General Consumer (and User Defence) Act and Law 7/1998 of 13 April on General Contract Conditions) whereby protection is by law and order imperative insofar as the interests of the latter have contributed to the concept of law and order in the aforementioned international sense given the existence of two commercial companies concerning which the only imbalance is their position in the market and, as a result, as concerns their contractual position, that deriving from the mere affirmation of the party opposing recognition. On the other hand, it is commonly accepted practice in international commerce to turn to general conditions which facilitate contracts and which embrace habitually used commercial practices.

It should likewise be indicated that there is no real evidence that the agreed institutional arbitration favoured one institution which, in exclusively representing the interests of film producers, rendered abusive the arbitral clause as an impediment to law and order for recognition. But not even from this perspective (or from a procedural standpoint) were the rights of an individual to effective protection of his legitimate interests by means of a decision delivered by an impartial body violated because there is no solid basis on which to reject the presumption of impartiality attributable to an arbitral institution intervening as such in a judicial proceeding. It is likewise difficult to understand the opposition to the arbitral court and the behaviour of the opposing party throughout the arbitration proceeding where at no time did an argument of this nature arise when the claimant appeared before the said court to request suspension of the proceedings or before the State court of origin which confirmed the decision and no doubts whatsoever were even expressed concerning the impartiality of the arbitral court deriving from the affirmed link between the Association and the interests of the claimant.

– ATS. 15 November 2005 (Ref. Aranzadi JUR 2006/26635)
Minimum intervention of judges in arbitration procedure. Non-appealability of a decision concerning the annulment of an arbitral award. New York Convention of 1958. Effective protection of the courts.

"II. Legal Grounds:

A) To begin with, stock must be taken of the special function of the arbitral institution and the negative effect of the arbitral agreement which, in principle, prevents the intervention of the courts in the establishment of an out-of-court dispute settlement scheme within which the action of the courts is circumscribed to support or control actions expressly envisaged in the institution's regulating law (see Art. 7 LA). Minimum intervention of the courts is therefore inherent to arbitration by virtue and in favour of the autonomy of the will of the parties, (. . .) D). In further support of the above we would point out that recognition in Spain of a foreign decision delivered in a proceeding concerning the annulment of a foreign arbitration award, be this incidental or automatic, in the combined application of Art. V(1)(a) of the New York Convention of 10 June 1958 on the recognition and enforcement of foreign arbitral awards and Art. IX of the Geneva Convention of 21 April 1961 on international commercial arbitration, in the examination of the grounds for opposition to the exequatur consisting in the annulment of the arbitral award, either directly or in an "ad hoc" proceeding, is also subject to single hearing rules and thus the inability to lodge an appeal against the decision declaring the foreign judgment enforceable (Art. 956 of the LEC of 1881 whose currency is upheld by virtue of the Single Repeal Provision, exception three of LEC 1/2000).

3. The legal grounds of this decision cannot be concluded without alluding to the right to effective protection of the courts and particularly to the right to gain access to and use the appeal system envisaged in Art. 24 of the Spanish

Constitution. In this regard we would say that no fundamental right has been violated by the fact that the legislator has excluded judgments regarding the annulment of an arbitration award from all appeals insofar as the said exclusion is a legitimate legislative option and insofar as, as the Constitutional Court has stated time and again, outside of the sphere of criminal proceedings, there is no constitutional right to appeal or to a particular type of appeal (. . .)".

VI. CHOICE OF LAW: SOME GENERAL ISSUES

1. Proof of foreign law

– STS, Court 1 of 10 June 2005 (EDJ 2005/103454)

Proof of foreign law. Ex officio enforcement of the dispute rule. Enforcement of "lex fori" in absence of proof of the content and currency of foreign law.

"Legal Grounds:

One. The content and currency of foreign law must be proven in order to permit its enforcement in proceedings (judgments of 11 May 1989, 7 September 1990, 23 March 1994, 25 January 1999, and many others). This is a result of the fact that neither the Court nor the parties can be held liable for knowing foreign law in contrast to what occurs with respect to Spanish law in accordance to the *iura novit curia* rule (Arts. 1.7 and 6.1 of the Civil Code).

And while foreign law is not on a par with lex fori in terms of the knowledge the court is expected to have of it, the same holds true regarding its introduction into the proceeding with the so-called procedural facts, i.e. those underlying the circumstance described in the rule whose enforcement is sought by the parties.

Indeed, facts are governed by the rule concerning the parties furnishing facts (quod non est in actis non est in mundo), while in our legal system, the court has the authority to use whatever means it deems necessary for the enforcement of foreign law (Art. 12.6.2 of the Civil Code, draft previous to the Code of Civil Procedure, Law 1/2000 of 7 January which was in force at the time the claim was filed, and Art. 281.2 of this latter Law), meaning that it should be applied if it is known and, in short, the furnishing of this information by the party is only necessary to supplement that information.

Moreover, the foreign law is designated by the forum dispute rule which belongs to the legal system which the Court must apply ex officio (Art. 12.6 of the Civil Code).

Therefore, foreign law does not have to be claimed in the proceeding by the parties in order that the judge bear in mind the designation made therein regarding the dispute rule regardless of whether the purpose is to afford the proper procedural treatment.

What the parties should claim, however, are the facts that, due to the concurrence of foreign elements, should be considered under the dispute rule. A

claim of this nature would suffice in order that, as an effect of the said rule, it be considered that the litigation should be resolved in accordance with the foreign law designated.

In accordance with this doctrine, the first ground of the Supreme Court appeal lodged by Ms. Flora against the judgment dismissing her claim should not be upheld. In that ground the appellant points to what she considers a defect of incongruence in the judgment delivered by the Provincial Court (Arts. 1692.3 and 359 of the Code of Civil Procedure of 1881) in insisting that one of the factors determining dismissal was the absence of proof of Belgian law regarding the settlement of post-conjugal communities and that that law had not be claimed by either of the parties to the proceeding.

(. . .)

Three. In exercise of the complementary function within the legal system vouchsafed to this court by virtue of Art. 1.6 of the Civil Code, it ruled that when the content and currency of foreign law are not proven by the parties and are not studied by the court to the degree necessary to resolve the conflict of interests addressed and the dispute rule does not stipulate anything different, lex fori is applicable as the subsidiarily competent rule (judgments of 11 May 1989, 7 September 1990, 23 March 1994, 25 January 1999, 5 June 2000, 13 December 2000, and others).

Said doctrine (which Constitutional Court judgment 155/2001 of 2 July, in its examination of the issue within the purview of its competence in the interpretation of Art. 24.1 of the Spanish Constitution, considered to be more respectful of the content of the said precept than the dismissal of the complaint defended by one part of the doctrine) must be considered in examining the third and last of the grounds of the claimant's Supreme Court appeal.

– SAP of the Balearic Islands, Section 5 of 26 April 2005 (Ref. Aranzadi AC 2005/819)
Proof of foreign law in divorce proceedings.

"Legal Grounds:

One. . . . The lack of evidence submitted in relation to applicable law was notorious, limited to the pure and simple transcription of the legal texts deemed applicable and no evidence whatsoever was submitted concerning jurisprudence or the principal criteria followed in their enforcement, especially in terms of the economic regime applicable to the marriage. Moreover, the photocopies submitted do not establish the currency of foreign law."

– SAP of Alicante, Section 4 of 12 May 2005 (EDJ 2005/127792)
Proof of foreign law. Enforcement of "lex fori" in absence of proof of its content and currency.

"Legal Grounds:

. . . Two. . . . even though, in principle, German law was applicable and the latter's content and currency should have been proven by the appellants, jurisprudence states that when there is lack of proof of the content of the for-

eign law invoked by one of the parties, the Spanish courts may not abstain from hearing the issues which are within the scope of their competence and must deliver judgment in accordance with Spanish law (Supreme Court judgments of 5 June and 13 December 2000, 17 July 2001 and 5 March 2002)."

– SAP of Malaga, Melilla, Section 7 of 13 May 2005 (Ref. Aranzadi JUR 2005/163244)
Proof of foreign law. Marriage separation. Application of the law of the common nationality of the spouses. Non-application of Spanish law. Need to apply the legal system designed by the dispute rule.

"Legal Grounds:

One. (. . .) The facts are that the litigants and their children are of Moroccan nationality and are currently residing in Spain, that the litigants were married in their country of origin in accordance with the legislation in force there, and that the litigants reside with their children in Spain in the same domicile.

Having established that, in accordance with Art. 107 of the Civil Code, separation and divorce shall be governed by the national law common to the spouses at the time the claim was submitted. This means that Moroccan legislation is applicable to the marriage separation case of the litigants. The criteria set forth is especially important with respect to the pretension deduced by the claimant regarding the custody of the children and use of the family home and, given that it has been established that the litigants live under the same roof together with their children, the said pretensions can only be envisaged through the corresponding marriage separation proceeding. With respect to the custody of the children and in light of the lack of the basic requirement called for in Art. 159 of the Civil Code, delivery of a judicial decision without the corresponding marriage separation is only possible if the spouses do not live together and the same must be said with regard to the use of the family home which only finds support within the sphere of marriage based on Art. 91 of the Civil Code.

As a result of the foregoing, the request filed regarding custody of the children, granted by the instance judgment based on Spanish legislation regarding marriage separation, violates the provisions of Art. 107 of the Civil Code and therefore must be revoked without prejudice to the claimant's seeking protection under the law applicable by reason of the common nationality of the litigants, i.e. Moroccan law, before Spanish courts as authorised under Arts. 21 and 22 of the LOPJ".

– RDGRN of 1 March 2005 (EDD 2005/23779)
Proof of foreign law in awarding of inheritance proceedings.

"Legal Grounds:

. . . Two. . . . The basic element of any qualification whose purpose is the validation of registry of acts must be applicable law and when the latter is foreign there is an exception to the "iura novit curia" principle thus justifying the need to establish the said validity.

In short, just as foreign law must be proven in the ambit of procedure (see Art. 281.2 of the Code of Civil Procedure), it must also be proven when it comes to the registry (Decision of 17 January 1955, 14 July 1965 and 27 April 1999) unless the Registrar, given his familiarity with the applicable foreign legislation, decides under his own responsibility to forego this proof as allowed by Art. 36 of the Mortgage Regulation but an entry must be made bearing witness to this circumstance.

Three. It should also be mentioned that while the regulatory norm itself refers to the means by which one can accredit the legality of the documents and forms or the capacity of individuals when under the mandate of foreign legislation, its solutions likewise appear to be perfectly applicable to the accreditation of the material validity of the act or business being registered Even, as indicated in the last of the decisions cited, a report tends to be more practical for that purpose than a simple certificate of the literal content of the foreign legislation which is often difficult to decipher and frequently subject to inappropriate interpretation.

And it must not be forgotten that among those means is the assertion or report of the Spanish notary public, and so an action in that sense by the appellant if, as can logically be deduced from the arguments contained in the appeal, he has sufficient knowledge of that applicable legislation, would be sufficient, thus assuming a responsibility which it appears the registrar is undertaking when, as was stated, this is not the case."

2. Public order

– RDGRN of 24 January 2005 (TOL 599872)

Authorisation of civil marriage between a Spanish man and a transsexual foreign national. Enforceability of Spanish law. Public order.

"Legal Grounds:

... III. The legal situation of the transsexual continues to escape consideration, at least in the civil sphere, by the Spanish legislator, although this gap is filled by Supreme Court jurisprudence which, in the judgments cited, admits entry in the Civil Registry of a different sex due to psychological and social considerations in tune with the principle of the free development of one's persona set out in Art. 10.1 of the Constitution.

(...)

There is no doubt that 'sex change' is a basic irrenouncable principle of Spanish civil law and therefore, by virtue of the 1978 Spanish Constitution protecting the 'free development of one's persona' all individuals, whether Spanish or foreign nationals, must have the possibility of changing their sex. When foreign law, (Costa Rican law in this case), does not envisage sex change under any circumstances, the said law should not be enforced by Spanish courts (Art. 12.3 Cc) and Spanish law should be applied in its place."

– RDGRN. 18 November 2005 (Ref. Aranzadi RJ 2006/221)
Marriage between foreign nationals in Spain. Legislation applicable to marital status and consent. Exception to law and order regarding matters of simulated consent. Registry issues. Authorisation on file prior to the marriage.

"Legal Grounds: . . .

Six. The foregoing should not, however, lead to the conclusion that the foreign law comprising the personal statute of the marriage partners should be applied across the board but rather in the execution of the rule of exception of public international order – which operates with greater intensity when the aim is to create or constitute a new legal situation (in this case a marriage yet to be celebrated) in contrast to cases in which what is being assessed is the possible application of the foreign law regarding an already perfected legal relationship in accordance with the said law – the foreign law should not be applied when it can be concluded that the said application would give rise to an infringement of essential, basic and irrenounceable principles of our legal system (. . .).

Seven. In this case the issue concerns a request filed by two Nigerians residing in Spain for authorisation to celebrate a civil marriage ceremony in Spain in accordance with our country's legislation. The order issued by the person responsible for the Civil Register, omitting any mention of the rules of private international law and implementing the so-called "concealed international public order", denied the request based on the assertion, like the public prosecutor, that there was a lack of will to contract a true marriage. This set of facts leads to the conclusion that the marriage sought pursues an aim other than that enshrined in the institution of marriage.

3. Referral

– SAP Asturias 1 September 2005 (Ref. Aranzadi JUR 2005/220269)
Law applicable to inheritance succession. Application of Spanish law. Lack of allegation and proof of foreign law and exclusion of referral.

"Legal Grounds: . . .

Two. (. . .) Three, even from a purely dialectical standpoint, given that we do not know if the deceased in this case had any nationality other than Spanish by right of origin (Art. 17 C.C.), and assuming that they could also have US nationality with last residence registered in the United States (Art. 9.9 C.C.), given the prevalence in countries of Anglo-Saxon law in succession cases of the criteria of diversification of regimes according to whether assets are moveable or fixed subjecting the latter to the succession law of the country in which they are located (in this regard STS 15.11.96 and 23.09.02), given that all of the assets are located in Spain, in accordance with the universalist principle that, in contrast, prevails in our succession law, and the possible referral of the foreign rule to the domestic one (Art. 12.2 C.C.), all successions should be regulated by our national law (STS of 23.09.02)".

VII. NATIONALITY

– STS (C-Admin. Chamber, Sect. 6), of 25 January 2005 (Ref. Aranzadi RJ 2005/1511)
Acquisition of Spanish nationality by virtue of residence.

"Legal Grounds:

. . . Four. In a Judgment delivered on the third of May two thousand and one, this Chamber and Section stated that 'the expression "legal residence" should be used provided that such residence met the requirements laid down by the Law regarding rights and freedoms of aliens in Spain referred to by that Judgment. If the relevant period in the country elapsed before Organic Law 7/1985 came into force, then the concept of 'legal residence' must be interpreted in the terms laid down in Decree 522/1974 of 14 February (arts. 14 et seq.), and if the period elapsed later the relevant provision will be art. 13.2 of Law 7/1985, whereunder: Residence by aliens shall be authorised by the Ministry of the Interior in the light of the individual circumstances of each case, taking into account whether or not the applicant has a criminal record and whether he or she has means enough in Spain to live during the length of time for which application is made. When it is intended to reside in Spain and live by carrying on paid employment or professional or other remunerated activity, the granting of a residence permit shall further be subject to the provisions of Title III.

(. . .)

This Chamber and Section also stated, in a Judgment delivered on the twenty-second of February two thousand and three, that 'the period of twelve years during which the applicant seeking Spanish nationality resided in Spanish territory cannot be ignored simply by virtue of the fact that the term of validity of some residence permits expired before she applied for their renewal when it has been clearly demonstrated – and this is no mere presumption as the State Attorney claims – that during those twelve years she possessed seven consecutive residence permits, of which six were for one year and one for two years while the last one was issued for five years; it is therefore enough to add up the time during which these permits successively warranted the residence of this foreign citizen in Spain to conclude that her residence was legal, continuous and immediately prior to her application for nationality, as required by the cited article 22 of the Civil Code, even although on four occasions the applicant was several months late in applying to renew the previous permit, for as the challenged judgment quite rightly states, her will to regularise her situation is plainly manifested by conclusive facts, and therefore, the court *a quo* taking the view that the requirement of legal residence in Spanish territory is met, she is not in breach of the cited article 22 of the Civil Code or of article 1253 of the same Code'."

– SAN, Contentious-Administrative Chamber, Section 3, of 18 January 2005 (EDJ 2005/150623)
Existence of criminal record. Evaluation for purposes of granting nationality.

"Legal Grounds:

. . . Two. (. . .) On the contrary, police and criminal records, whether cancelled or not, are merely indicative of a citizen's conduct and cannot by themselves constitute a bar to the granting of Spanish nationality (TS Judgment of 5/11/2001 appeal in cassation no. 5912/1997). It is therefore necessary to evaluate the personal history of the applicant as a whole (e.g., facts of allegedly antisocial behaviour, assumption of social values and norms of coexistence, habitual nature of conduct and persistence over time, how far removed in time from the application, positive elements that might offset negative aspects, etc.)."

– SAN, Contentious-Administrative Chamber, Section 3, of 24 June 2005 (EDJ 2005/167891)

Sahara. Whether or not considered Spanish territory.

"Legal Grounds:

. . . Two. (. . .) In light of the foregoing, the core issue is to determine whether the Sahara ought or ought not to be considered Spanish territory for the purposes of article 22.2.a) of the Civil Code, a question already settled by a judgment dated 7/11/1999 in which the Supreme Court said the following (relating to the point here at issue): The conducting thread that will bring us to a proper understanding of the problem concerning us is the fact that the expression 'Spanish territory' is used in a dual sense in positive law: there is a broad sense referring to all those physical areas which are under the authority of the Spanish State and subject to its laws – this meaning includes 'possessions' – and a restrictive meaning which if we wish to be precise we ought strictly speaking to call 'national territory', which does not include colonies, possessions or protectorates. – Guinea, Ifni, and Sahara, then, were Spanish territories which were not part of the national territory. And this is precisely the reason why the integrity of the national territory was not breached by the legal and political acts which produced the independence of Guinea (up to that moment a Spanish dependency), the cession – or if you like the 'return' – of Ifni to Morocco, and the initiation of the self-determination process in the Sahara. The fact is that a territory can only be considered 'national territory' if it is peopled by a group of Spanish citizens in full possession of their rights, constitutes an administrative unit of the Spanish local administration – or of part of such an administration as the case may be – and, however organised, possesses no international personality or other right of self-determination other than that possessed by the nation as a whole. We repeat: despite being called a province, the Spanish Sahara – and the same applies to Ifni and Equatorial Guinea – was a Spanish territory – that is, a territory subject to the authority of the Spanish State – but it was not national territory. D. At this point we come to analyse the case of concern here: that is, the scope that must be attributed to the expression 'Spanish territory' as used in article 22 of the Civil Code in point 1 of the third paragraph. We already noted that the expressions 'Spanish territory' and 'national territory' have tended to be used loosely in Spanish legislation. Where

this occurs in statutes promulgated after Spain ceased to have colonies, possessions or protectorates, there is no great problem. The two terms may be used interchangeably. Take for instance the case of Organic Law 7/1985 of 1 July on Rights and freedoms of Aliens in Spain, article 11 of which uses the term 'Spanish territory' in paragraph 1 and 'national territory' in paragraph 3. Where a problem arises is when, as in the present case, the rules to be applied are coetaneous with the cited situations of territorial heterogeneity (not to be confused with geographic dispersal). The challenged judgment denies the appellant recognition of his right to acquire Spanish nationality by virtue of one year's residence on the ground – lifted from the preamble to the Sahara (Decolonisation) Act, Law 40/1975 of 19 November – that this territory 'was never part of Spanish territory'. Leaving aside the fact that this is an attempt to attribute normative force to the preamble of a law, such an interpretation contradicts something that can be demonstrated – as we have seen – by a careful analysis of the legal situation of the Sahara in the three phases alluded to earlier on. During the three phases (colonisation, 'provincialisation', decolonisation) the Sahara was – as defined by Chapter XI of the United Nations Charter – a 'non-autonomous territory', that is, one of those 'territories whose peoples have not yet attained the fullness of self-government' (art. 73) – i.e., a territory not identical to the 'national territory' in the restricted sense. Bearing this in mind along with all the other points we have considered in this connection, there are more than sufficient grounds to conclude that the interpretation of the court *a quo* should be rejected and, to the extent that the said interpretation caused the appellant to be denied the nationality to which he is entitled –, the second 'subground' that we have examined must be admitted and the judgment must be overturned; and in effect this Chamber hereby annuls that judgment. As a result of the application of the doctrine we have just transcribed, the present appeal is upheld, as this Court has had occasion to do in previous similar cases (e.g., judgment of 11/22002), so that we may further invoke the principle of unity of doctrine (which is additionally supported by the principles of legal security and equality in the application of the law), for the term of one year's residence stipulated in article 22.2.a) of the Civil Code is indeed applicable to the case and the appellant had satisfied that requirement at the time of submitting his application, and he was therefore entitled to be granted Spanish nationality."

– RDGRN, 22 April 2005 (EDD 2005/68142)

Attribution of Spanish nationality by virtue of birth in Spanish territory. Non-attribution of nationality to a child in accordance with the laws of the parents. Retroactive effect.

"Legal Grounds:

... Five. It is indeed the case that attribution *jure soli* of Spanish nationality as a legal instrument to prevent statelessness of children born in Spain to

alien parents if none of the laws of the latter attribute nationality to the child, became part of our legal system through a redrafting of art. 17 of the Civil Code by the Law of 13 July 1982, that is at a date subsequent to the birth of the applicant.

The fact is that according to the doctrine of this Department, the new rule has retroactive effect in respect of births occurring in Spain prior to its entry into force as the purpose of the rule is to avoid situations of statelessness. Such attribution of Spanish nationality was therefore available where applicable to persons born in Spain who lacked a nationality when the 1982 Law came into force. And although such retroactive effect does not apply to cases where at the time Law 51/1982 of 13 July came into force a child born in Spain already possessed its parents' nationality *jure sanguinis*, this exception does not apply in the present case, where if the applicant had acquired Colombian nationality she could not have done so before 1985 when she moved her place of residence to Colombia, that is after the cited legal reform came into force.

– RDGRN, 11 July 2005 (EDD 2005/237181)

Consolidation of Spanish nationality by a native of the Sahara. Failure to satisfy requirements.

"Legal Grounds:

. . . Three. It is the case that in exceptional circumstances concerning a native of the Sahara, the Supreme Court ruled on 28 October 1998 that the appellant had consolidated his Spanish nationality. However, the doctrine contained in that judgment is not applicable to the present case since there are fundamental differences between the facts of the case examined in that judgment and those here at issue.

In effect, unlike the case of the cited judgment, the applicant has not proven that his parents and he resided in the territory of the Sahara at the time the Royal Decree referred to was in force, and therefore they are *de facto* barred from opting for Spanish nationality. On the contrary, the fact is that at the time, the father did not take up the option of Spanish nationality on behalf of his son as permitted by the cited Royal Decree of 1976, and although according to article 18 of the Civil Code "the continuous possession and use of Spanish nationality for ten years, in good faith and on the basis of a right registered in the Civil Register, causes consolidation of nationality even if the right on which such possession is based is annulled", the truth is that this provision is of no use to the applicant since, other reasons apart, he was two years old when Spain abandoned the territory of the Sahara in 1976, and since that date he has never been in possession of documentation showing Spanish nationality; and therefore, the ten-year period required by the cited article 18 for possession and use of Spanish nationality is not satisfied. Indeed, at this time the applicant is domiciled in Spain as an Algerian citizen, with an Algerian passport."

– RDGRN, 31 October 2005 (EDD 2005/206736)
Application of art. 17.1.c) of the Civil Code to extra-marital children of Moroccan parents.

"Legal Grounds:

. . . Five. Until its Decision of 27 October 1998, this Department had maintained that art. 17–1–c of the Civil Code was not applicable to the children of Moroccan fathers because in accordance with Moroccan law the children of Moroccan fathers enjoyed Moroccan nationality by right of birth, and whether or not such filiation was marital was a matter of indifference for purposes of attribution of Spanish nationality *jure soli* (. . .).

Six. The above doctrine underwent a first shift with Decision 15–5 of February 1999, whereby in light of the proof of foreign law furnished by the applicants along with their writ of appeal, the Department reached a different conclusion from that which it had maintained hitherto. According to the evidence of Moroccan law, a child born to Moroccan citizens abroad can only be considered to possess that nationality if it is born within a marital union that is valid under Moroccan law. Hence, a marriage entered into abroad must be contracted in accordance with the rules applying to the personal status of the Moroccan partner.

Consequently, children born of a non-marital or illegitimate relationship cannot be considered Moroccan; this was applicable to a civil marriage celebrated in Spain which, it is stated, was not valid according to the father's personal law, and therefore under that law any children of such a marriage cannot be considered Moroccan, and hence the appeal should be upheld. The evidence adduced in the appeal that prompted Decision 15–5 of February 1999 matched the content of the certificate issued by the Moroccan Consulate-General in Madrid (attached to the present record), namely that according to the Moroccan Civil Code, 'any person born of a Moroccan father, regardless of the mother's nationality or the place of birth, is considered Moroccan if born within wedlock in accordance with the laws in force in Morocco'.

The parallel assumption that for Moroccan nationality to be attributable through non-marital paternal filiation, the event determining such filiation must be valid according to the Moroccan legal system, taken together with the fact that Moroccan law does not apply the *locus regit actum* rule to these matters so that the means of determining paternal filiation in accordance with the laws of Spain has no validity in Morocco, was accepted by this Department, in line with the previous Decisions, as constituting a bar on the acquisition of the father's Moroccan nationality by right of birth, despite the existence of a formal act of recognition in accordance with Spanish law (cf. Decision 16–1 of January 2002). Moreover, the fact that the father was known, albeit the filial tie was not legally established for the purposes of Moroccan law, barred the child from acquiring Moroccan nationality by way of maternal filiation, which is only possible where the father is unknown. As a result, one and the same solution came to be applied to cases of non-marital paternal filiation where the recogni-

tion by the father was not deemed valid by Moroccan law and to cases of marital filiation where it was the marital tie itself that was not recognised by the said law.

Seven. However, in its most recent decision – 5–4 of February 2002 – this Department performed a volte-face and reverted to its pre-1999 doctrine for cases of marital filiation, affirming that despite the cited earlier Decision having reached the opposite conclusion, "in light of the more precise understanding of the Moroccan laws since acquired, the Department's earlier doctrine must be confirmed – namely that a child born to a Moroccan father outside Morocco and related by marital filiation possesses its father's Moroccan nationality *de jure* from birth, regardless of any *de facto* difficulties that the child may encounter at the Moroccan Consulate in obtaining documentary evidence of being a Moroccan national and in having his father's marriage recognised. Also, in this case there are no insurmountable difficulties in the way of a civil marriage celebrated in Spain between a Muslim and a Christian being recognised as valid in Morocco".

But again, this conclusion is qualified as regards cases where the civil marriage was celebrated in Spain between two Moroccans, since it acknowledges that such a marriage is not valid in Morocco (cf. Decision 16–8 of September 2002).

Taking a line from the cited Decision 5–4 of February 2002 and extending its conclusions to take in non-marital paternal filiation, the most recent Decision, 26–1 of January 2004, denies that a child born out of wedlock to a Moroccan father and Colombian mother is Spanish *jure soli*. The same doctrine must now be confirmed in the present case, involving a female child born in Spain, out of wedlock, to a Moroccan father and a Colombian mother, particularly in view of the amendments regarding filiation introduced in the Moroccan Family Code (Mudawana) by Dahir no. 1.04.22 of 3 February 2004, enshrined in Law no. 70.03. This law has to be taken into account by virtue of art. 9 nos. 1 and 4 of the Civil Code, whereby the determination and substance of filiation is a matter for the child's personal law.

However, given that art. 17–1–c of the Civil Code is applicable in situations where Spanish nationality may have to be invoked to avert a condition of statelessness for the minor, the ensuing situation is rendered paradoxical by a "double-mirror" effect between arts. 17(1)c and 9(1) and (4) of the Civil Code, in which the child's nationality and filiation are each prior issues in respect of the other, so that neither can be defined without the other being determined first: the child is a Moroccan national if its filiation can be established in respect of a Moroccan father; but to determine such filiation, the child's personal law must be applied, and that is determined by its nationality, which in turn cannot be determined without the filiation being known first.

Eight. In a first approximation to the subject from the standpoint of Private International Law, we note that art. 9(4) of the Civil Code contains a legal lacuna in that it refers only to the nature and substance of filiation but not to

its "determination". In order to fill this gap, having ruled out *lex fori* as lacking legal foundation, the scientific doctrine at large and the official doctrine of this Department has opted for application by analogy of the same art. 9(4) cited above (cf. Decisions of 29 April 1992 and 18 September 1993, *inter alia*), an approach recently also adopted by the Supreme Court in a judgment of 22 march 2000, which means that the national law of the child is invoked for determination and accreditation of filiation, regulation of the means of proof, and actions to challenge or claim filiation.

Nine. The fact is that, the question being one of determining the validity of transmission of nationality according to whether filiation is marital or non-marital, depending on the substantive differences between the two as defined by Moroccan legislation (according to art. 148 of the Mudawana illegitimate filiation has none of the effects of legitimate filiation as regards the father), and in light of the principle of equality before the law and the prohibition of all discrimination by reason of filiation laid down in arts. 14 and 39 of our Constitution, both principles legally implemented in our system since Law 11/1981 of 13 May, the reference to that legislation made by article 9(4) of the Civil Code may be derogated by applying the constitutional filter through the Spanish international public policy clause, following the example of the Constitutional Court in its Judgment 141/2000 of 29 May, where it states that "the legal status of the minor is undoubtedly a rule of public policy that must be observed by all public authorities" (Legal Ground no. 5).

The Constitutional Court has likewise applied this idea in practice to reject the invocation of a foreign law that prohibits actions for filiation by the child, applying the Spanish law subsidiarily in its place and thus putting into practice the terms of art. 12(3) of the Civil Code (see Judgment 7/1994 of 17 January). Similar effects are produced by the existence of imperative material norms in Spanish law which limit the scope of the rules of conflict mentioned earlier, for instance the Minors (Judicial Protection) Act, Organic Law 1/1996 of 15 January, art. 1 of which states that the Act is applicable to all persons aged under 18 who are in Spain, whether Spanish nationals or aliens.

As the *lex fori*, Spanish law is likewise applicable if we accept the idea that, filiation being a prior issue bearing upon the nationality of the minor, the settlement of the question of establishment of a filial tie must be predicated on the premise that the child's nationality is indeterminate; this means that the nexus must be the latter's habitual place of residence (cf. arts. 9(4) and (10) CC), which in the present case, as we have seen, refers back to Spanish law as that bearing most closely on the matter of fact (*lex fori*, law of the birthplace and habitual place of residence of parents and child).

Finally, in this complex process of interpretation, carrying on with the above-noted solution, it is of decisive importance to weigh up the principle of *favor filiationis*, which likewise favours application of the law that recognises filiation as the legal tie consequent upon the biological fact of procreation (Spanish law) and ignores the law that denies such a tie (Moroccan law).

Ten. The above conclusions would be unaffected even if the foregoing methodological approach to the subject were to be deemed inappropriate where the point is to examine the question of the determination of filiation as a prior issue to application of art. 17(1)c of the Civil Code, for if the result of disqualifying the foreign legislation is admission of the filial tie for purposes of Spanish law and consequently – and logically from the standpoint of our legal system – affirmation of the child's Moroccan nationality, the end result will be to defeat the ultimate purpose of the provision – namely to avoid statelessness – unless the conclusion produced by the Moroccan legislation as to the child's nationality is the same, which will clearly not be the case given that it is founded on the premise of inapplicability.

This would produce precisely the outcome of statelessness that it was sought to avoid. Viewed from this perspective, in order to achieve the end pursued by the rule, it would be necessary to admit an exception to the exception – in other words inapplicability of the public policy clause to the case – and therefore the issue of the minor's filiation must be analysed solely from the standpoint of Moroccan law.

In this connection there is no question but that for Moroccan law the transmission of nationality *jure sanguinis* is the preferential criterion (see art. 6 of Dahir no. 250(58)1 of 6 September 1958), albeit this is founded on a principle basic to Islamic family law, namely that kinship is transmitted via the male line, and hence the transmission of nationality via the female line is only allowable if the identity of the father is unknown. The legitimacy of filiation is consequently contingent upon evidence of the blood tie between father and child.

The Law presumes filiation *juris tantum* where the child is born within wedlock or soon enough after dissolution of the marriage for conception within wedlock to be a reasonable assumption (cf. arts. 152 to 154 of the Mudawana). This is consistent with the substance of the information furnished by the Ministry of Foreign Affairs and Cooperation of the Kingdom of Morocco in a verbal note in 1994, which stated that the proof of paternity was dependent on there being a valid marriage in the eyes of Moroccan law.

However, taken out of its proper legal context, at this point in time such an assertion constitutes a species of 'legal synecdoche' in which a part is taken for the whole, for the legal measures available to determine paternal filiation are not confined solely to the legal presumption deriving from matrimony but also include recognition and cohabitation (cf. art. 152 of the reformed Mudawana), the last of which has the same probative effects as marriage while a legally recognised child has the same rights and duties as a child born within wedlock (cf. art. 157 of the reformed Mudawana). In light of this new legal situation, the solution applied to the case of paternal filiation within wedlock must be extended to cases of civil marriages contracted abroad (which marriages in Spain carry a presumption of cohabitation: art. 68 CC), and to cases of non-marital filiation where recognition valid in Morocco or cohabitation is demonstrated. We must stress regarding marriages contracted by Moroccan citizens outside

Morocco that the new Moroccan Family Code admits marriages celebrated in the local form of the country where both parties are habitually resident, and hence in such matters Moroccan law now accepts the *locus regit actum* rule subject to the obligation of depositing a copy of the marriage certificate with the Moroccan Consulate serving the place of celebration (cf. arts. 14 and 15). Furthermore, art. 157 of the new Code also admits the establishment of filiation in cases of void or contestable marriages, or even in instances of so-called 'erroneous relationship' (see art. 152(3)).

Eleven. Regarding these means of proof of non-marital filiation, we cannot ignore the fact that entry of the birth in the Spanish Civil Registry is itself proof of filiation (cf. arts. 113 CC and 2 and 41 LRC) and is especially important when registration has been sought by the father and the mother together, as in the present case, and has been effected within the legal term (cf. arts. 120 (1) and 124 CC), provided that the father's paternity is not biologically impossible and that no other paternity is accredited (cf. art. 113 *in fine* CC), and also provided that there is no possible doubt as to the authenticity of recognition. The provisions of Spanish law cited on this point are not invoked as regulating the merits of the recognition (in this case there is no question of a need for additional consents or of other possible legal obstacles) – an aspect regarding which there are cases in the jurisprudence of registration where there is some dispute as to their acceptance by the scientific doctrine – but rather as bearing on the *form* of the recognition, and hence they can be defended as pertinent *in casu* pursuant to the rules laid down in art. 11 of the Civil Code (cf. Decision of 25 March 1985).

Finally, in these matters it is important to stress the fact that Moroccan law embraces the principle of *favor filiationis*, establishing a presumption that 'filiation in respect of the father and the mother is legitimate absent evidence to the contrary' (see art. 143). If, then, the filial tie between the Moroccan father and his child is admitted, then the latter acquires his father's Moroccan nationality by right of birth.

Twelve. Therefore, since the purpose of art. 17(1)c of the Civil Code is to avoid situations of statelessness at origin, which is not the case here, the child cannot be attributed Spanish nationality given that the claim and the subsequent appeal are based on a consular certificate which can in no way substantiate such a situation since that certificate only partially conveys Moroccan law on the attribution of nationality; and furthermore, this conclusion is unaffected by the fact that Colombian law does not attribute the mother's nationality to the child, since in this case there is no question of statelessness."

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

1. Aliens regime

– STC, Chamber no. 1, 4 April 2005 (EDJ 2005/20109)
Aliens. Right of entry to Spain. Nature thereof.

"Legal Grounds:

... Eight. (...) It therefore follows that the right of entry to Spain – which is 'only recognised constitutionally for Spanish nationals (STC 53/2002 of 27 February, FJ 4), as this Court has had occasion to state in an incidental assertion – is not a fundamental right available to aliens in pursuance of art. 19 CE, although evidently any person actually in Spain may apply for protection of that right to the courts and judges of Spain, who are bound to safeguard it as required by art. 24 CE, which does enshrine a right that is available to aliens."

– STS, Chamber 3, Section 5, 26 January 2005 (EDJ 2005/5002)
Right of minors to be, grow and be brought up with their mother. Expulsion order on the mother. Alien mother of a Spanish minor.

"Legal Grounds:

... Six. (...) 1. (...) It is therefore fair to say that, although the rules do not so state in so many words (but that is their spirit), the primordial right of a child is to be, grow, be brought up and be educated with its mother. This is a right rooted in nature itself and hence stronger and more elementary than any other right of a legal kind. It is moreover a right that is reflected in concrete legal precepts (e.g., article 110 of the Civil Code, whereby the father and the mother, even if not in a position of parental authority, are obligated to safeguard and maintain their children; article 143(2) of the same Code, whereby ancestors and descendants are mutually bound to maintain one another; article 154, whereby parents are duty bound (and entitled) to safeguard their children, keep them in their company, maintain them, bring them up, provide them with a comprehensive education, etc).

2. The laws of Spain do not permit the expulsion of Spanish citizens from the national territory. (The commission of a criminal or an administrative offence by a Spanish national is subject to certain penalties or sanctions but can never be punished by expulsion from the national territory; except in the event of precautionary measures or penal sanctions, "Spanish nationals are entitled freely to choose their place residence and to move about the national territory" according to article 19 of the Spanish Constitution.)

3. The expulsion order served on the mother, which is here appealed, implies either the expulsion of son, who is Spanish (which is in breach of the cited principle or non-expulsion of nationals), or the certain break-up of the family given that the expulsion as ordered inevitably entails separation of the son from his mother (which is in breach of the precepts we have cited regarding protection of the family and of minors).

Neither the rules governing aliens nor simple common sense can conceive that the mother of a Spanish national is entirely alien and may be treated as such – that the Spanish child may have every right and the mother none whatsoever and that the mother may consequently be expelled from Spain as a mere alien while the child remains in Spain, with all its rights but alone and separated from its mother."

– STSJ, Canary Islands (Las Palmas), Contentious-Administrative Chamber, Section 2, of 20 January 2005 (EDJ 2005/9507)
Visa. Requirement. Cohabitation without marriage. Equal treatment of marriage and de facto union.

"Legal Grounds:

. . . Three. Regarding considerations as to whether cohabitation *more uxorio* is sufficient cause to warrant exemption from the visa requirement, Constitutional Court judgment 222/1992 of 11 December 1992 maintains that . . . it does not necessarily follow from the non-equivalence of marriage and *de facto* cohabitation that any measure solely affecting spouses and excluding persons living together in stable *de facto* unions is always and in every case compatible with equality before the law and the prohibition of discrimination guaranteed by the Constitution in art. 14.".

In line with this principle, the most recent jurisprudence asserts that marriage and *de facto* union may be treated as equivalent where the purpose is to apply rules which deal solely or preponderantly with the situation of cohabitation and emotional life.

In this connection the Supreme Court judgment of 1 June 1999 argues that the distinction between a spouse and a *de facto* cohabitant rests on the determination of their legal treatment, given that from a legal/formal point of view marriage is not equivalent to *de facto* union; however, that does not justify the distinction in cases dealing exclusively with aspects relating to the actual situation of cohabitation and emotional ties of the partners. In accordance with these principles, since the ruling of 7 July 1989, issued in connection with appeal 941/1988, the Supreme Court has been allowing that where there is a stable, continuous *de facto* union similar to a conjugal relationship, irreparable harm may ensue from expulsion given the applicant's roots in Spain, as a consequence of the break-up of the family unit, sufficient according to the jurisprudence to meet the conditions required by article 122 of the Law regulating the Contentious-administrative Jurisdiction of 27 December 1956 (judgment of 11 October 1999 and 15 November 1999).

The cited judgments, then, declare that the break-up of a relationship characterised by the existence of ties of affection and cohabitation within a stable *de facto* union between two persons, even if they have not contracted marriage, produces irreparable harm to those affected (consisting, as the first of the cited judgments says, 'in the break-up of the personal relations maintained by the partners'). For precisely the same reason the Supreme Court admits that the will

to maintain or restore the stable couple's family unit is sufficient cause or exceptional circumstance to warrant exemption from the residence visa requirement for a person demonstrably in such a situation.

The situation of stable cohabitation with a legal resident and a common child is substantiated as claimed. The appeal must therefore be upheld."

– STSJ Madrid, Contentious-Administrative Chamber, Section 1, of 19 February 2005 (EDJ 2005/41699)

Expulsion of alien. Attendant bar on entry to national territory.

"Legal Grounds:

. . . Three. (. . .) It being established that the sanction of expulsion as imposed is in accordance with the law, the fact is that in the challenged judgment the lack of any explanation accompanying the secondary measure prohibiting entry to Spanish territory for five years, to show that there is a reasonable correlation between the seriousness of the administrative offence and the extent of the sanction imposed constitutes a breach of the principle of proportionality in the determination of the sanction of expulsion. Consequently the present appeal is partially upheld; the determination of the duration of the secondary measure prohibiting entry is declared void, and such duration is now set at the minimum term, namely three years."

– STSJ Valencia, Contentious-Administrative Chamber, Section 3, of 30 May 2005 (EDJ 2005/142300)

Aliens. Treaty of Cooperation and Friendship between Spain and Uruguay, 1992. Treaty of Recognition, Peace and Friendship signed between Spain and Uruguay on 19 July 1870. Interconnection.

"Legal Grounds:

. . . Four. In short, what this appeal asks of the Court is that it determine in what form, manner and extent the 1992 General Treaty of Cooperation and friendship between Spain and Uruguay has affected the substance and interpretation of the Treaty of Recognition, Peace and Friendship between Spain and Uruguay of 19 July 1870, which was ratified on 28 January 1883.

Certainly art. 18 of the General Treaty of Cooperation and Friendship between the Kingdom of Spain and the Oriental Republic of Uruguay, with the Annex and Economic Agreement constituting part of it (BOE 131/1994, 2 June 1994), states that prior Treaties and Agreements remain in force insofar as they are compatible, which means that the 1870 Treaty is still valid; in connection with the 1992 Treaty, the Attorney-General's Office states that the law has changed and the only commitment that the Spanish State will make regarding Uruguayans in Spain in art. 14 is '. . . Subject to its own legislation and in accordance with international law, either Party shall provide the nationals of the other with such facilities for the undertaking of professional or other remunerated activities on their own account or as employees, in equal conditions to

nationals of the State where they reside or work as may be necessary for the conduct of such activities.

The issuance of labour or professional work permits for employees shall be free of charge . . .,' – in other words, to provide 'facilities'. On the other hand, to apply the full force of the aliens legislation cannot be described as providing 'facilities' to Uruguayans; providing 'facilities' would mean granting them work and residence permits save in exceptional circumstances such as criminal activities or the like. In other words, if we analyse art. 8 of the 1870 Treaty and article 14 of the 1992 Treaty together, the Government cannot refuse a work and residence permit to a Uruguayan merely on the basis of certification of the existence of demand for work in the domestic employment sector; it must be remembered that art. 14 in relation to art. 8 of the 1870 Treaty says '. . . in equal conditions to nationals of the State where they reside or work as may be necessary for the conduct of such activities . . .'. Moreover, the Court takes the view that the 1992 Treaty goes further than the mere provision of facilities to Uruguayans; in fact if we analyse it as a whole we find that it seeks to afford Uruguayan nationals a legal treatment similar to that afforded to citizens of Member States of the European Union, at least in matters of work and residence permits, and the proof of this can be found in art. 15 of the 1992 Treaty'.

Spanish and Uruguayan nationals may vote in the municipal elections of the State where they reside and of which they are not nationals, subject to the laws of that State . . .'; while this provision requires a supplementary agreement between the two States, we can see that the perspective is more than that of a simple Treaty of Friendship and Cooperation. And likewise in the sense of providing 'facilities' and tending to treat Uruguayan citizens in the same way as other European Union citizens, we would cite the Instrument of Ratification of the Social Security Convention between the Kingdom of Spain and Oriental Republic of Uruguay, done at Montevideo on 1 December 1997 (BOE 47/2000, 24 February 2000), or the provision in art. 13 '. . . in countries where there are no consular offices of one of the Parties, its nationals may go to the other's consular office and request assistance . . .', in connection with mutual consular assistance.

In short, having examined the rules cited by the Attorney-General's Office, this Court takes the view that the challenged judgment must stand despite the 1992 Treaty analysed above."

– STSJ Madrid, Contentious-Administrative Chamber, Section 2, of 8 June 2005 (EDJ 2005/128544)

Aliens. Application for work permit. Spanish nationals seeking employment in domestic service.

"Legal Grounds:

. . . Three. In fact, in the concrete instance under consideration here, the Government has refused an application for a work permit on the ground that there is demand for employment in the activity that the alien worker seeks to

undertake, and this, as expressly stated in the challenged judgment, is in turn based on a report issued by the Employment Office of the Department of Employment of the Madrid Region which, according to the cited judgment, states that there are Spanish nationals seeking employment. However, that report does not specify how many of the persons seeking employment in domestic service have requested employment entailing staying overnight at the employer's domicile, a condition for which the appellant had specifically offered his services, but simply quotes a list of occupations and the number of applicants registered in each category (document 2 in the government file). No real proof has therefore been offered as to the existence of applications for employment registered at the Employment Offices of the Madrid Region for the specific activity and occupation that is offered with the requirements specified in the offer of employment. Therefore, given the special nature of the employment concerned – domestic service – entailing as it does a degree of trust between employer and employee in which the preference for applications of Spanish nationality takes second place to the employer's entitlement to choose the person who will serve in the family home, this appeal is upheld."

2. Right of asylum

– STS, Chamber 3, Section 5, of 3 March 2005 (EDJ 2005/33680)
Asylum. Rules. Burden of proof for purposes of granting.

"Legal Grounds:

... Four. (...) For the rest, the consolidated jurisprudence of this Supreme Court interprets the rules of Asylum and Refuge in such a way as to infer therein a tendency to alleviate the burden of proof but not to remove it entirely. In fact, for asylum to be granted it is enough that there be reasonable indications that the applicant has a well-grounded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinions. Reasonable indications, then, are enough; but they must exist, and the burden of providing them lies with the appellant (...)."

– STS, Chamber 3, Section 5, of 19 April 2005 (EDJ 2005/62664)
Asylum. Grounds for denial.

"Legal Grounds:

... Five. (...) This Chamber has repeatedly stated that an application for asylum must be admitted for consideration when the causes adduced are such as to warrant recognition of refugee status, unless they are manifestly false, implausible or out of date, and in that part of the procedure there is no need to furnish evidence or indications of the existence or reality of such causes, which evidence or indications are only required for the decision on whether or not to grant asylum. Nevertheless, in the resolution denying admission of the asylum application for consideration, the Government claims in a general way and with

no further explanation or clarification that the causes adduced by the asylum applicant are implausible in that the facts as claimed contradict the available information, which information is neither to be found in the file nor argued or justified in any way.

These arguments, which have been repeatedly presented in similar resolutions to the one under consideration here, as we have found in considering numerous appeals in cassation against judgments declaring that administrative resolutions denying admission of asylum applications for consideration are legally sound, demonstrate that the asylum application was not examined individually as required by article 5(6) of the Asylum Act and articles 17(1) and 20(1)c of the Asylum Regulations, which means that these provisions were infringed (. . .)."

– STS, Chamber 3, Section 5, of 6 October 2005 (EDJ 2005/162034)
Right of asylum. Granting. Causes.

"Legal Grounds:

. . . Four. (. . .) From this analytical perspective we must remember that there is consolidated jurisprudence – consolidated to the extent that it is superfluous to cite concrete cases – declaring that refugee status and the attendant right of asylum is properly to be granted to anyone having well-grounded fears of persecution in his or her country for reasons of race, religion, nationality, membership of a particular social group or political opinions, not only when such persecution is exercised by the Authorities of the country of origin, but also when it is exercised by sectors of the population whose conduct is deliberately tolerated by the authorities or the latter prove incapable of affording effective protection.

It follows from this that the reference in the asylum application to a situation of alleged persecution, for reasons warranting protection, by social sectors whose conduct is deliberately tolerated by the country's authorities or against which these authorities take no action, may be considered as coming within the meaning of the legal reasons warranting asylum, and hence it may be sufficient grounds on which to admit the case for consideration if the facts as related in the asylum application make express reference to such passivity on the part of the authority (. . .)."

– STS, Chamber 3, Section 5, of 11 October 2005 (EDJ 2005/171780)
Right of asylum. Granting. Domestic violence.

"Legal Grounds:

. . . Three. (. . .) From the events as related by Amparo (transcribed elsewhere), it is readily deducible that the violence from her husband of which she has been a victim is not merely another instance of domestic violence but had political roots. In her account she stated that her 'husband belongs to the P.D.G. and in 1993 he discovered that the applicant belonged to the P.P. and began to ill-treat her', so there is no doubt that the ill-treatment began as a consequence

of the applicant's political ideas, and that constitutes persecution qualifying for protection in the form of asylum, according to article 3(1) of the Asylum Act, Law 5/84 of 26 March, as it relates to article 1–A-2) of the Geneva Convention Relating to the Status of Refugee of 28 July 1995.

Set against this, the question of whether or not the applicant's husband occupies a senior position in the Guinean Government is unimportant, for even if he does not (and that is the strength of the report from the Spanish Embassy in Malabo, folio 3.8 of the administrative record), he can still subject her to molestation and ill-treatment, against which she will presumably be able to offer little defence given his membership of the party in government (the violence has reached such a pitch that he sent people to stab the applicant's sister, in whose house she had taken refuge, which gives some measure of the extent of the violence and ill-treatment) (. . .)."

– SAN, Contentious-Administrative Chamber, Section 1, of 9 March 2005 (EDJ 2005/159903)

Asylum application. Authorisation to remain in Spain for humanitarian reasons.

"Legal Grounds:

. . . Four. Finally, the request invokes humanitarian reasons as defined in article 17(2) of Law 5/1984, which provides that 'Notwithstanding the terms of the foregoing paragraph, a person whose application has not been admitted for consideration or has been rejected may, for humanitarian reasons or for reasons of public interest, be authorised, within the terms of the general aliens legislation, to remain in Spain, particularly in the case of persons who have been forced to abandon their country as a consequence of serious political, ethnic or religious conflicts or disturbances and do not meet the requirements referred to in article three first paragraph of this Act'.

As noted in a recent judgment handed down by this Chamber and Section on 2 March 2005 (Appeal 862/2001), 'For obvious reasons of material justice (art. 1(1) CE) and protection of the fundamental right to life (which contains an implicit mandate not to return: see *inter alia* ECHR Judgments in Jabari v. Turkey, 11 July 2000; Hilal v. the United Kingdom, 6 March 2001 and Dougoz v. Greece, 6 March 2001 and STC 32/2003), authorisation to remain in Spain for humanitarian reasons must be based upon a 'real risk to the appellant's life and physical integrity' (art. 31(3) of the Asylum Act Regulations as set forth in Royal Decree 3393/2004 of 30 December), which means that the danger effectively existing for Carlos Antonio should he return to his country at the present time must be analysed.

It is common knowledge that the current situation in Iraq is one of absolute insecurity, with frequent attacks – for example, on 1 March 2005 the national dailies reported an attack causing 125 deaths – and hence, as we noted in the above-cited judgment of 2 March 2005, the appellant cannot properly be returned to his country of origin, and therefore he must be authorised to remain in Spain for humanitarian reasons."

3. Nationals of Member States of the European Union

– STSJ, Canary Islands (Santa Cruz), Contentious-Administrative Chamber, Section 2, of 28 February 2005 (EDJ 2005/22158)
Relatives of Community residents. Requirement of residence via.

"Legal Grounds:

. . . Two. This Chamber has repeatedly ruled that applicants for Community resident relative's cards should not be required to produce a residence visa. (. . .) Hence, if the Government did not have the power to decide on exemption from the visa requirement because one of the decisive elements therefor (compulsoriness of a visa) was lacking, then the act is void – not because the visa was refused, but because the Government did not even possess the power to rule on the matter (. . .)."

IX. NATURAL PERSONS: LEGAL INDIVIDUALITY, CAPACITY AND NAME

X. FAMILY

1. Adoption

– SAP Valencia, Section 10, of 14 March 2005 (TOL 644596)
International adoption of Ukrainian child. Suitability to adopt.

"Legal Grounds:

. . . Two. As this Chamber observed in a recent judgment (99–05), 'to resolve the delicate issue of whether or not certain persons are suited to become adoptive parents according to article 176 of the Civil Code, the circumstances of the case must be carefully weighed in order to avoid either admitting persons who do not possess the right qualities for this mode of filiation, or frustrating legitimate aspirations to become a father or mother – which comes within the meaning of the right to free development of the personality enshrined in article 10 of the Constitution – and the prospects of success of an adoption, which could be spoiled by an over-strict judgment of the peculiarities of human beings'.

– SAP Málaga, Section 6, of 6 April 2005 (TOL 691591)
International adoption.

"Legal Grounds:

. . . Two. . . . Following a close analysis of the two reports extant in the record of proceedings, this court of appeal has reached exactly the same conclusion as the original court as to the suitability of the applicants for international adoption of a minor, on the understanding that the minor will be aged over 7. Both reports conclude that neither of the partners suffers from a psychological disorder of any kind. And again from a social standpoint the couple

presents no dysfunction of any kind; furthermore, this Chamber views it as particularly significant and revealing that Fátima has long experience of motherhood, having had two children by a previous marriage, her partner in which died, and indeed that motherhood has proven a success in terms of the children's upbringing and education. Moreover, the testimony of the witnesses extant in the record of proceedings indicates quite clearly that both spouses are well integrated, without problems of any kind, in the social milieu in which they live; both demonstrate a strong desire to adopt, and that, combined with the expert evidence furnished to the effect that they are fully capacitated for that purpose in both psychiatric and psychological and emotional terms, leads this Chamber to conclude that the original court was quite right in upholding the objection and overturning the administrative resolution of unsuitability. The appeal is therefore dismissed and consequently the appealed judgment sustained."

– RDGRN of 4 July 2005 (TOL 702785)
Registration of an Argentine adoption.

"Legal Grounds:

... III. ... In the present case, an examination of the file does not reveal the claimed equivalence of effects. If we consider that the sole category of adoption contemplated by the Spanish Civil Code causes the adoptee to become a full member of the adopter or adopters' family in every way and as a general rule causes the severing of all ties to the previous family (cf. arts. 108, 176 and 178 CC), whereas an Argentine adoption, of the simple kind as in this case, does not create family ties between the adoptee and the adopter's biological family except for certain purposes; the rights and duties attendant on the biological tie are not extinguished by the adoption other than parental authority and usufruct of the minor's goods; and as for rights of succession, there are certain legal limitations or reservations regarding the goods of the adoptee, and also differences as regards succession to the adopter's forebears, such that neither the adoptee nor his or her descendants are heirs by automatic right; and finally, Argentine adoption in its simple form is revocable, albeit a judicial order is required. We must therefore conclude that the Argentine adoption at issue here does not share points of identity with adoption as defined in the Spanish Civil Code and cannot be included in the list of registrable events set forth in art. 1. of the Civil Registry Act without risk of serious confusion as to the efficacy of the adoption as registered."

2. Legal abduction of minors

– AAP Lugo, Section 1, of 18 July 2005 (EDJ 2005/150203)

"Legal Grounds:

One. The appeals formulated by the Public Prosecution Service and the State Attorney were grounded on infringement of art. 12 of the Hague Convention,

infringement of article 13–2 b) of the same Convention, and the impossibility of taking account of the child's views given his age.

As far as the civil aspects of international child abduction are concerned, the intent of the Convention of 25 October 1980, ratified by Spain, and the Instrument of 28 May 1987, is immediate return of children to their prior situation when a right of custody has been violated. The Convention itself interprets this last aspect as arising by operation of law or by reason of a judicial or administrative decision or by reason of 'an agreement having legal force under the law of that State'.

It is not controversial that Luis Miguel and Celestina held what is known in Brazilian law as 'temporary custody' of the child, and that the child's biological mother took advantage of a visiting right granted by the court to take him to Spain.

This occurred before one year had elapsed, and therefore the child should in principle be returned forthwith according to art. 12.

However, article 13 of the Convention also contemplates exceptions, and at the outset, reference was made in the first hearing to a serious risk of the child's being exposed to physical or psychological harm or otherwise being placed in an intolerable situation.

And another exception is if the child itself objects 'and has attained an age and degree of maturity at which it is appropriate to take account of its views' (article 13 section b).

The term used is not serious psychological harm but a serious risk. And this Chamber naturally considers that the harm must indeed be serious.

However, it is not possible to prognosticate loss of psychological stability with absolute certainty on the basis of an expert's report. The expert stated that she could not tell exactly how seriously the child might be affected by a return to his former family and social situation in Brazil; she stressed that the child is emotionally stable in Spain and expressed her suspicion – which is substantiated by the video – that he was always in contact with his biological mother.

In view of this, the court could request new evidence of all kinds (in view of the documentary evidence added after the visits), which would work against the rapidity required by the Convention and might well produce more information on questions not germane to the actual solution of the issue, which should be where the child is best off and under whose custody he would most benefit.

The fact is, however, that in its preamble the Convention states that the interests of children are of paramount importance, as does article 1905 of the LEC [Civil Procedure Act] of 1881 in the version of LO 15/96, while the temporary custody is currently in dispute in Brazil; and what is more, according to the photocopy of a certificate – which was remitted to the parties without eliciting any objection – the foster mother, Rebeca, died on 12/03/2005.

Given the circumstances, one cannot rule out the possibility of psychological harm to the child, who is currently living in Spain with his mother and his two biological siblings (and the mother's present husband), were he return to

Brazil with the foster parent. Note that the biological mother consistently refused to give him in adoption and would only allow the child to stay temporarily in the home of the foster parents (with whose family she had worked as a domestic employee) until she should return from Spain and find work. For the rest, the child's preference also seems clear from the hearing and examination of him. The Convention does not stipulate a specific age for his views to be taken into account, and the psychologist judged that the child was bright and mature despite his tender age.

All of which prompts us to confirm the challenged decision."

– AAP Guipúzcoa. 14 September 2005 (Ref. Aranzadi JUR 2006/3992)
International child abduction. Refusal of return of a wrongfully removed child.

"Legal Grounds: . . .

. . . Four. (. . .) However, as we said, proof of unlawful transfer does not always necessarily cause the return of the child; in the case at issue reasons for refusal of return were identified, albeit we do not share the view of the court *a quo* that the risk to the child's emotional stability inherent in going back to London was sufficient cause to warrant its non-return. The Convention clearly adopts a restrictive approach in this regard, using the terms grave risk of physical or psychological harm. It does not refer merely to any risk or nuisance but to situations which it describes as 'intolerable'; and we cannot ignore the tendency in intra-Community relations to restrict the application of this cause, as exemplified by Council Regulation 2201/2003 of 27 November on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses. The psychosocial report gives no indication of what risk, other than the upset attendant on a change of habits and surroundings, could ensue from his move to London – he had after all suffered the same upset before when we moved here to Tolosa. To say that it is advisable for changes in the situation of children to be kept to a minimum is not at all the same as to say that these entail a grave risk, which is what the Convention refers to. And that certainly does not seem to be the case when the psychologist himself says in point five of the conclusion to his report that he sees no harm in the children living in London, nor is there any reason to believe that the children's relationship with their father is harmful to them or that there is no assurance of its progressing in suitable conditions (. . .).

3. Matrimony

a) Celebration and registration.

– RDGRN of 5 May 2005 (TOL 647878)
Registration of marriage celebrated in Cuba between a Spanish and a Cuban national. Requirement of hearing.

"Legal Grounds:

. . . II. For a marriage – in this case between a Spanish and a Cuban citizen – to be registered with the Spanish Civil Registry, the parties must each separately undergo a confidential examination (cf. art. 246 RRC) to ensure that there are no impediments to the union 'or any other legal obstacle to its celebration'. The importance of this procedure was underlined in the cited Instruction of 9 January 1995, rule 5, where it was defined as 'an essential procedure, which may not be dispensed with nor conducted as a mere matter of form'. It is therefore an indispensable procedure which must be carried out by the examining magistrate with the assistance of the Clerk, for the purposes provided in the Regulations."

– RDGRN of 1 June 2005 (TOL 652835)
Nullity of consular marriage in Spain between a Spanish and an Ecuadoran national at the Consulate of Ecuador in the region of Murcia.

"Legal Grounds:

. . . II. As article 49 of the Civil Code now clearly states, and as the official doctrine of this Department has repeatedly declared, in Spain a Spanish national must contract matrimony either before a Judge, a Mayor or other official as designated in the cited Code, or else through a religious ceremony as prescribed by law. Consular marriage, which may be validly contracted by two aliens in Spain as long as the personal law of either party so allows (cf. art. 50 CC), is not however a valid form if one of the parties is a Spanish national, so that in this second case the marriage is void under article 73(3) of the Civil Code."

– RDGRN of 7 June 2005 (TOL 662871)
Registration of marriage by proxy celebrated in Lima (Peru) between a Peruvian and a Spanish national.

"Legal Grounds:

. . . VII. There does not appear to be any obstacle to the Registrar's assessing the possibility of the power of attorney having been revoked, although the real test of its validity is to determine whether there is true consent to matrimony. In what is known as marriage by proxy, the attorney does not act as a genuine voluntary representative but acts as a mere vehicle to convey the consent to marry – as a simple *nuntius* or bearer of a declaration of another's intent entirely determined beforehand by the principal. That is how the most reliable doctrine interprets the expression 'special power of attorney' in article 55 part one of the Civil Code and the mandate that 'the power of attorney shall specify the person with whom marriage is to be contracted, detailing such personal information as is required to establish their identity' (second paragraph). From this conclusion it follows in turn that it is immaterial whether the proxy or *nuntius* lacks the requisite capacity to contract marriage (cf. art. 46 CC) or is the subject of any bar to contracting marriage (cf. art. 47 CC) or any of the defects

of intent that may cause the nullity of a marriage (cf. art. 73(1)4 and 5 CC). In short, for the purposes of the present case the essential point is that the only capacity and the only consent that matter in marriage by proxy are those of the principal."

– RDGRN of 13 June 2005 (TOL 673635)
Application for registration of marriage between a Spanish and a Moroccan national celebrated in Morocco according to Moslem rite.

"Legal Grounds:

. . . Three. As to the merits, it must be said first of all that any Spanish national may contract matrimony abroad in the form established by the law of the place of celebration (cf. art. 49–II CC); however, while the form may be valid, for the marriage to be registrable a check is necessary to ensure that the legal requirements for validity of the union are met (cf. art. 65 CC). This may be done by examination of the 'certificate issued by an authority or official of the country of celebration' (cf. art. 256(3) RRC) in the conditions laid down in the cited regulation, or else, failing adequate documentary support, through the procedure provided in art 257 of the Civil Registry Regulations.

Four. . . . In short, it is akin to the possibility of registering births and deaths without a record as provided in art 23–II of the Civil Registry Act and art 85 of the Civil Registry Regulations, which allow entry in the Spanish Civil Registry, without a record and accepting certificates of entries in foreign registries as registrable documents 'as long as there is no doubt as to the reality of the event and its legality under Spanish law', which permission is now also extended to marriages celebrated abroad.

That said, in any case art 256 of the Regulations, without going into the question of legality, is careful to exclude certain cases from the mandate for direct registration of certificates issued by a competent authority or official, among them that of article 252 of the Regulations, according to which when a Spanish national wishes to contract marriage abroad in the form established by the law of the place of celebration and that law requires presentation of a certificate of marriageable status, the preliminary procedure prior to the marriage, when one of the parties is domiciled in Spain, must be conducted through the Civil Registry of domicile according to the general rules, and an essential part of that is the confidential examination of each party separately (cf. art. 246 RRC).

Five. What has happened in this case is that the Spanish party – about whose nationality there is no doubt in view of his birth certificate which bears an annotation on the margin attesting to the grant of Spanish nationality by reason of residence by virtue of a Decision of the Department of Registries and Notaries Offices dated 27 March 1998 – has been considered Moroccan and not Spanish by the Moroccan authorities responsible for authorising the marriage, as they do not recognise the party's renunciation of Moroccan nationality which was formalised for purposes of his acquisition of Spanish nationality; however,

that view carries no weight whatsoever with the Spanish authorities, since in such cases of *de facto* dual nationality where a Spanish national also possesses another nationality not recognised as compatible in our laws or in international treaties, the Spanish nationality will prevail in every case (cf. art. 9(9)9 CC).

Hence, as far as the Spanish legal system is concerned, this qualifies as a case of marriage contracted by a Spanish national abroad with a foreign partner, in which case, given that the local – Moroccan – law requires submission of a certificate of marriageable status by the alien, a simple certificate from the foreign authority cannot be accepted as a registrable document, and therefore, assuming that art 256(3) of the Civil Registry Regulations does not exceed the limits set by art 73 second paragraph of the Act, application of that provision collides with the exception recognised in art 252 of the Regulations, which for the cases contemplated therein, in which category the case here at issue is subsumed, requires prior completion of registration procedures to certify the marriageability of the Spanish party; and this holds regardless of whether it is considered that the cited art 252 of the Regulations is a material rule applying inversely or *ad intra* to the international eventualities that it contemplates so that the rules of foreign legal systems requiring certification of marriageability are 'internalised', or whether it is considered that, the party being in possession of Spanish nationality, the requirements for celebration of the marriage in accordance with the *lex loci* have not been satisfied in due form."

– RDGRN of 20 September 2005 (TOL 709788)

Authorisation of civil marriage between a Spanish and Moroccan national united by Moslem marriage celebrated in Morocco.

"Legal Grounds:

... II. Marriage cannot be contracted by persons already united in matrimony (cf. art. 46(2) CC), and if contracted nonetheless, such a marriage would be void under the provisions of article 73(2) CC. Therefore, such marriages must not be authorised, and if they should be authorised unduly, they may not be registered in the Civil Registry.

(...)

III. ... It follows from this that the claimed marriage cannot be authorised owing to failure to demonstrate the absence of an impediment to marriage. This conclusion is unaffected by any doubts that may arise as to the validity or otherwise of the Moroccan marriage under Spanish law, given that, insofar as it is entitled to the presumptions implicit in the principle *favor matrimonii*, that marriage bars proof of the parties' freedom to marry."

– RDGRN of 26 October 2005 (TOL 776068)

Civil marriage between persons of the same sex, of Spanish and Indian nationalities. Law applicable to the personal status of the alien party.

"Legal Grounds:

. . . III. Within the framework of the constitutional principles of equality, non-discrimination and free development of the personality (cf. arts. 9(2), 10(1) and 14 of the Constitution). the recent Act, Law 13/2005 of 1 July, amending the Civil Code as regards the right to contract marriage introduces an innovation in our legal system by allowing marriage to be contracted between persons of the same sex in full equality of requirements and effects. Such is the substance of the second paragraph added to article 44 of the Code, whereunder 'The requirements for and effects of marriage shall be the same whether the parties are of the same sex or different sexes'. However, the cited Law 13/2005 does not introduce any changes in the rules of Spanish Private International Law, and that raises the question of what law will be applicable to mixed marriages between Spaniards and aliens with regard to capacity to marry, particularly in connection with the possibility of identity of sex constituting an impediment – in other words whether the permission that Spanish law vouchsafes to same-sex marriages still applies where alien personal elements are involved, that is where one or both of the parties is a foreign national.

(. . .)

VII. . . . And from the perspective of article 9 paragraph 1 of the Civil Code, it expresses a general principle of Law which as such cannot operate exclusively, but only in conjunction with other legal principles and values, which must be applied together and not in isolation in order to arrive at the solution properly applicable to the case.

The only solution to such a lacuna, as asserted by this Department in a recent Circular/Decision of 29 July 2005, is to admit the applicability of the material Spanish law, in view of the following arguments in that direction: a) analogy with the concept of '*de facto* homosexual couples' as recognised and regulated by numerous Spanish regional laws, which preferentially take the administrative neighbourhood – a concept linked to the habitual place of residence of its members – either as a connecting criterion or as a factor delimiting their scope; b) proximity between *forum* and *jus*; c) the general principle of *favor matrimonii* operating in Spanish Civil Law; d) the status of *jus nubendii* as a fundamental right in the Spanish Constitution (art 32) as it relates to the extension of the prohibition of any form of discrimination to cover instances of discrimination by reason of 'sexual orientation', a novelty introduced by article 21 of the Charter of Fundamental Rights of the European Union of 7 December 2000 as a separate category distinct from the prohibition of discrimination by reason of sex, which the jurisprudence of the European Human Rights Tribunal had traditionally associated with gender discrimination (judgments in Rees v. United Kingdom, 17 October 1986; Cossey v. United Kingdom, 27 September 1990; Smith & Grady v. United Kingdom, 27 September 1999) up until its judgments in Salgueiro Da Silva Mouta v. Portugal, 21 December 1999 and A.D.T. v. United Kingdom, 31 July 2000, which

acknowledged violation of articles 8 and 14 of the Convention in view of discrimination by reason of 'sexual orientation'; e) the link between effective exercise of the right to marry and the principle of free development of the personality recognised in article 10(1) of the Constitution; f) The need to interpret the laws in accordance with the 'social reality of the times in which they must be applied' (art. 3 CC), in recognition of the fact that at the present time Spain is experiencing at once developments in the social recognition of highly diverse forms of family constitution and the absorption of large numbers of immigrants, whose integration demands that the legal scope for recognition of personal status on the basis of the habitual place of residence be broadened, as exemplified in the recent reform of article 107 of the Civil Code introduced by Law 11/2003 of 29 September on the law applicable to separation and divorce; and finally f) this was also the solution arrived at by the jurisprudence of the Spanish Supreme Court during the years when the Divorce Act of 2 March 1932 was in force, to allow divorce by Spanish nationals married to nationals of countries which at that time did not recognise it (cf. judgments of 27 January 1933, 10 July 1934 and 4 December 1935)."

b) Marriages of convenience.

– RDGRN of 13 June 2005 (TOL 673634)

Marriage of convenience. Genuine consent. Importance of the examination procedure for detection of fake consent in international marriages.

"Legal Grounds:

... II. One of the essential procedures in the official preliminaries before the marriage is celebrated is a confidential personal examination of each party separately, to be conducted by the Examining Magistrate with the assistance of the Clerk, to ensure that there are no impediments to the union or any other legal obstacle to its celebration (cf. art. 246 RRC).

III. This procedure has become increasingly important in recent years inasmuch as it can on occasions serve to uncover fraudulent intent in parties who in reality wish not to be joined in matrimony but to avail themselves of the appearance of matrimony to secure the advantages that matrimony brings to the alien. If by means of this procedure or other objective means the Registrar is persuaded of the existence of simulation, he must not authorise such a marriage, which is void due to lack of genuine consent to marry (cf. arts. 45 and 73(1) CC). However, the practical difficulties entailed in proving simulation are perfectly well known. There is normally no direct evidence of this, and therefore it is almost always necessary to resort to a test of probabilities – that is, deduce the absence of consent that it is sought to prove from a demonstrable fact or facts, by showing a precise, direct connection according to the rules of human judgement (cf. art. 386 LEC) – to which end it is extremely important that the aforementioned confidential examinations be conducted with great care.

(...)

VI. . . . Any act by the authorities of the forum where it is proposed to celebrate the union tending to authorise a marriage which is either against the will or without the genuine consent of the parties is therefore inadmissible, which means that the authorisation of a marriage must be rejected if there is simulation, even if the parties' personal status entitle them to laws which allow a species of abstract consent in marriage, rootless or bereft of any link with the institutional purpose of matrimony (cf. art. 12(3) CC), in such a way as to render the institution liable to use as an instrument of legal fraud in connection with the rules governing nationality or aliens or others of various kinds. But important as this last point may be, it is not the decisive consideration determining non-applicability of the foreign law; the decisive consideration is that simulated consent is indicative of absence of the will to marry, inasmuch as the declared will does not match the inner will, and in such cases there is a conscious mismatch whose consequence is the absolute and irremediable nullity *ipso jure* of the marriage that is celebrated (cf. art. 74 CC), irrespective of the *causa simulationis* or practical purpose pursued *in casu*, which is a vehicle of civil unlawfulness not warranting the legal protection that the *jus nubendi* vouchsafes to a genuine will to marry."

– RDGRN of 18 November 2005 (Ref. Aranzadi RJ 2006/221)
Marriage between aliens in Spain. Laws applicable to marital status and consent. Public policy exception in matters of faked consent. Aspects relating to registration. Authorisation in pre-marital procedure.

"Legal Grounds: . . .

Four. However, having regard to instances of marriages celebrated abroad by two non-Spanish nationals where, the marriage subsisting, at least one of the spouses subsequently acquires Spanish nationality, in which case the Spanish Civil Registry becomes the competent authority for registration of the marriage (cf. art. 15 LRC), the official doctrine of this Department has been and continues to be that in such cases it is inappropriate to attempt to apply the Spanish rules on absence of consent to marry, as there are no points of connection to warrant such application given that the capacity of the parties at the time their marriage was celebrated, which is the relevant moment for these purposes, is a matter of their previous personal law (cf. art. 9(1) CC), and therefore the marriage may properly be registered. However, having said that, it is also true – and this has been repeatedly stated in Decisions by the Department on the subject – that the same doctrine requires that there be no doubts that the formal and material requirements laid down by the applicable foreign law have been complied with in the contracting of the marriage, which compliance is in principle assumed to have been accepted by the competent foreign registering authorities who first authorised and then registered the marriage (. . .).

Six. However, it must not be concluded from the foregoing that the foreign law to which the parties' personal status entitles them must necessarily be applied always and in every case. In fact according to the rule of exception in

international public policy – which operates all the more strictly when it comes to creating or constituting a new legal situation (in this case a marriage yet to be celebrated), as opposed to cases in which the object of evaluation is the applicability of the foreign law in respect of a legal relationship formalised under that law – the foreign rule must cease to apply when it becomes clear that such application would cause a violation of essential, basic and inalienable principles of our legal system (. . .).

Seven. The present case concerns an application for authorisation to contract civil marriage in Spain in accordance with Spanish law, submitted by two Nigerian nationals residing in Spain. The order issued by the Registrar, who has omitted any mention of the rules of Private International Law, hence setting in motion what is known as 'latent international public policy', denies the application on the ground, also invoked by the Public Prosecution Service, that there is no intent to contract genuine marriage, a conclusion prompted by the following facts: he does not know when she arrived in Spain; they disagree as to when they first met – he says that it happened in Seville three years ago and she that it was in Nigeria in 1994; she says that neither of the two have relatives in Spain, whereas he says that his fiançée has a cousin living in Mallorca; he does not know the names of her two siblings and gives a different number of siblings from her; she does not know the ages of his siblings or the names of some of them; to all of which we must add the fact that her situation in Spain is irregular. This set of facts lead us to conclude that the object of the marriage it is proposed to contract is not that proper to this institution".

c) Effects.

– SAP, Madrid. 21 October 2005 (Ref. Aranzadi JUR 2005/251861)
Law applicable to the effects of marriage. Public order exception. Preliminary issue: determination of the existence of community of acquisitions for dissolution of the marital regime.

"Legal Grounds: . . .

Four. Citing the common Equatorial Guinean nationality of the litigants at the time of marrying, which according to the rule of conflict in article 9(2) of the Civil Code determines that the effects of the marriage must be governed by the laws of that country, the appellant alleges that there never was a community of acquisitions. (. . .). For the reasons given, in the case at issue there was no requirement to accredit the spouses' non-Catholicism, and therefore, in the hypothetical event that in referring to the Spanish legislation in force on 12 October 1968 the laws of Equatorial Guinea should still have retained the conditions of the former as examined above, this would collide squarely with certain ineluctable constitutional principles, thus rendering it inapplicable to the case as contrary to public policy in pursuance of article 12(3) of the Civil Code.

(. . .) All the foregoing reasons suffice to determine that this marriage was celebrated in compliance with all the legal requirements and hence is absolutely valid. And certain effects thereof must stand despite circumstances, such as

those cited by the appellant, which could neither be duly substantiated by the simple opinion of a jurisconsult without documentary evidence of the interpretative criteria applied by Guinean jurisprudence, nor otherwise cause the legal effects pursued, which conflict with internal public policy in alignment with internationally-accepted principles barring the application of a foreign rule which, if as described by the appellant, would violate basic constitutional rights".

d) Separation.

– SAP Málaga, Section 6, 10 February 2005 (EDJ 2005/74095)
Law applicable to separation of Moroccan spouses.

"Legal Grounds:

... Two. This Chamber is bound to point out first of all that since this case concerns an application for separation between spouses of Moroccan nationality, it is indeed the case that *prima facie* art. 107 CC refers to the laws of the Kingdom of Morocco as the applicable law, and that art. 12 CC requires that the party bringing the action duly accredit the substance and validity of that foreign law, by the means of evidence permitted by Spanish law. Nonetheless, it is appropriate – as the court *a quo* has done – also to consider the circumstance of the conjugal place of domicile, the spouses being habitually resident in the town of Fuengirola, since under art. 769(1) LEC, as it relates to art. 22(3) LOPJ, if the common place of residence of the litigants at the time the application for separation is brought is in Spain, then the Spanish courts have jurisdiction. That said, the interpretation favouring the *lex civilis fori* of the place of domicile over the common national law would not be complete without at the same time determining whether it is reasonable to introduce the exception of art. 12(3) CC if application of the foreign law should prove to violate public policy, to be understood as a set of public and private political, socio-economic, moral and even religious principles which, as parameters of the reality normally experienced and perceived in accordance with current collective criteria, are considered to be absolutely essential for the preservation of a society at a given time. This view is supported by the jurisprudence, for instance STS 5 April 1996, but it must always be resorted to with prudence and restraint, otherwise the application of foreign laws or the enforcement of decisions of foreign courts might eventually become impossible.

e) Divorce.

– RDGRN of 6 May 2005 (TOL 652833)
Registration of Portuguese divorce decree in the Civil Registry.

"Legal Grounds:

... III. This decision to deny is confirmed, but for reasons other than the ones stated in the order here challenged. Marginal annotations concerning divorce are allowable, where applicable, on the basis of a foreign divorce

decree provided that this is first recognised in Spain in accordance with the laws of procedure, by application for *exequatur* to the competent Court of First Instance, after which the judgment takes effect in the Spanish legal system (cf. arts. 76 LRC, 265-II RRC, 955 LEC of 1881 and sole repeal provision, section 1, exception 3 of the Civil Procedure Act of 2000 and Organic Law 19/2003 of 23 December amending the Judiciary Act, Organic Law 6/1985 of 1 July).

IV. Admittedly the cited Regulation of the Council of the European Union, which came into force on 1 March 2001, provides for the abolition of the said *exequatur* formality in connection with judicial decisions in marital matters, but such abolition applies only to 'legal proceedings instituted, to documents formally drawn up or registered as authentic instruments and to settlements which have been approved by a court in the course of proceedings after its entry into force' and to 'judgments given after the date of entry into force of this Regulation in proceedings instituted before that date', which are to be recognised and enforced in accordance with the provisions of chapter III of the Regulation (cf. art. 42(1) and (2) of the Regulation). In this case the dates of both institution of the action and the judgment are prior to the Regulation's entry into force. However, even if this were not so, in this case in addition, at the time the appealed order was issued, the formal requirements laid down by the cited Community Regulation had not been met either, namely that for foreign decisions on matters of separation to be recognised in other States, the documents which were cited in the second of these legal grounds, failure to present which caused the denial by the investigating judge (cf. arts. 32 and 33 EC Regulation) must be presented at the appropriate Registry Office – and that ignoring the question of translations, as these had not been requested. Finally, we would note that the cited Regulation is not retroactive and hence cannot be invoked in support of the appellant's claim in connection with a judgment delivered in 1997, to which it is not applicable for the reasons given, and hence recognition must be via *exequatur*."

4. Maintenance

– SAP Málaga, Melilla, Section 7, 13 May 2005 (Ref. Aranzadi JUR 2005/163244)

Legal regime governing maintenance in Spain. Hague Convention of 2 October 1973.

"Legal Grounds:

... Two. The solution is different as regards the application for maintenance for the children to be provided by the father, inasmuch as there is an appropriate channel independent of the separation proceedings, namely article 143(2) et cetera of the Civil Code, and it is expressly covered in the Hague Convention of 2 October 1973, in force in Spain since 1986 and applicable to the case at issue. According to article 1 of the Convention, then, both the wife and the children are actively entitled to demand the fulfilment of maintenance obligations,

and the defendant and father of the children for whom maintenance is petitioned is passively entitled. On the other hand, according to article 11 of the Convention, the needs of the creditor and the resources of the debtor shall be taken into account in determining the amount of maintenance (. . .)."

XI. SUCCESSION

– STS of 13 October 2005 (Ref. Aranzadi RJ 2005/7233)
Appeal in cassation for infringement of the Codice Civile. Intestate succession of spouse of Italian national: applicability of provisions of the Codice Civile.

"Legal Grounds:

One. (. . .) the deceased being of Italian nationality, the Italian Civil Code of 1942 applies – its applicability is not in doubt according to article 9(1) of the Civil Code, both parties also acquiescing, although it had been disputed at the outset, and its rules are accredited in the original proceedings. (. . .) The issue, then, is one of intestate succession, which both the Spanish and the Italian civil codes call *legitima*; this is not to be confused with *forzosa* – referring to the part of the estate reserved to the compulsory heirs (*rectius legitimarios*) – as it is called in the Spanish *Código Civil*, and *reserva* in the Italian *Códice civile*. The *legítima* (in Spain), or the *reserva* (in Italy) is simply a limitation on the power to will to certain relatives or spouses, who are the heirs at law [Sp. *Legitimarios*] and have a legal claim upon the deceased's estate. Hence, when one of them is the heir *ab intestato*, the *legitima* or *reserva* to which he is entitled is embedded in the estate. This does not mean that the said *legitima* can be ignored, for he can always demand the portion to which he is entitled thereby if the quantum of the intestate inheritance that he receives is less (for instance because of large gifts, which does not apply here), nor can it be dispensed with if there is an assignation (for example a legacy, which does apply) in payment thereof. Therefore articles 536 *et sequitur* (in the chapter *Dei legittimari*), and naturally 540 (*riserva a favore del coniuge*) do not apply, the applicable articles being 565 *et sequitur* (in the title *Delle successioni legittime*, meaning intestate succession) and fundamentally article 582, which provides that the portion of the widowed spouse in intestate succession where there are surviving siblings of the deceased is two-thirds of the estate.

Two. Thus, the present case is one of intestate succession, called *legittime* in the Italian civil code, which allocates to the surviving spouse in any event (article 565) a variable portion depending on the existence of certain relatives (articles 581 *et sequitur*), and if there are siblings of the predeceased spouse, the surviving spouse receives two-thirds and such siblings the remaining third (article 582). (. . .) Regarding the *reserva* as it is called in the Italian civil code, or the *legítima* in Spanish law, which in neither case is to be confused with intestate succession (which they call *legitimate succession*), that is forced succession, there is nothing to say as that portion remains embedded in the inheritance *ab intestato* of the spouse.

The first ground of the appeal in cassation must therefore be admitted. This was formulated under article 1692 paragraph 4 of the Civil Procedure Act, for infringement of article 582 of the Italian *Codice civile*. The judgment *a quo*, handed down by Section 4 of the Provincial High Court of Barcelona, infringes that article in that instead of applying it to the appellant as heir *ab instestato*, it applied article 540, which refers to the *reserva*, that is to forced succession, and wrongly apportioned him half of the estate. The applicable article is 582 on intestate succession; the appellant's spouse having left a surviving sister, he is entitled to two-thirds thereof".

– SAP Las Palmas, Section 4, 22 July 2005 (EDJ 2005/147875)
Succession. Law applicable to the form and substance of a testamentary provision.

"Legal Grounds:

... Two. Having brought the issue submitted to examination in this appeal into proper focus, we note that under article 9(1) of the Civil Code, the personal law attaching to natural persons is determined by their nationality, and that law governs succession *mortis causa*, while section 8 of that article specifies that such matters are to be governed by the national law of the deceased at the time of death. For its part, article 11 of the Civil Code directs that the form and solemnities of wills are to be governed by the law of the country in which they are made. It follows from this that the national law applies in general to all matters attendant on succession such as determination of the moment of death, administration of the estate, rules on reservation of portions or similar institutions designed to protect the family, etc. The medium used to express and exteriorise the will of the deceased, on the other hand, must be that provided in the *lex loci actus*. This can give rise to situations where different laws are applicable to the form and the substance, as in the present case where the testator was a Jordanian national and made his will in Spain."

– SAP Asturias, Section 5, 29 July 2005 (EDJ 2005/137596)
Applicable law. Succession. Dual nationality: art. 9(9) CC. Law applicable to rights of the widowed spouse. Transitional law.

"Legal Grounds:

... Three. ... Having regard to the first argument of the appealed judgment, it is the view of this Chamber that under art. 9 paragraphs 8 and 9 of the Civil Code the succession of the late Gabino must be governed by Venezuelan law, as Gabino possessed dual nationality as contemplated in art. 24 of the Civil Code, given that there is no record of his having renounced his Spanish nationality when he acquired Venezuelan nationality, the latter being the most recently acquired and coinciding with his habitual place of residence – art. 9(9) CC. Consequently, it is to that law that we must turn for testamentary matters, and in the present case the record shows that the deceased's children were declared his successors in accordance with the laws of Venezuela.

(. . .) It is true that art. 9(8) *in fine* provides that 'the rights which the law vouchsafes to the surviving spouse shall be governed by the same Law as regulates the effects of the marriage, other than the portions of the estate reserved to the descendants'; and according to art. 9(2) of the Civil Code, the law regulating the effects of the marriage is Spanish law. However, the fact is that this paragraph was introduced by the Civil Code Reform Act, Law 11/90, and Gabino died in 1988 – that is before the cited reform of the law – and hence this does not apply in the present case. Also in this connection, a decision of the Department of Registries and Notaries Offices of 11/3/03 rules that 'the absence of a transitional rule on this point in Law 11/90 determines . . . . . the subsidiary application of the rules contained in the Civil Code; and as the case concerns rights of succession, specifically Transitional Provision 12 applies, whereby the applicable law is that in force at the time of acceptance of the succession'. In fact the Law in force at the time of such acceptance did not contain the derogation introduced by Law 11/90, and it therefore follows that the succession in its entirety must be governed by the Law of Venezuela; and in that connection the decision of the Department of Registries and Notaries Offices of 11/3/03 states 'in order to resolve the issue, the solution must be based on the principle of unity and universality of succession characterising our system, which is founded on the concept of nationality like the laws of other Southern European countries that have suffered intense emigration, and this is set out in article 9(9) of the Civil Code. The first section of this article establishes that succession *mortis causa* is to be governed by the national law of the deceased at the time of death, regardless of the nature of the goods and the country where they are situate.

The later exception, based on the principle of preservation of business succession – *favor testamenti* – does not affect the imperative nature of the rights of the heirs at law, which are governed by the universal law of succession. (Cf. STS 21 March 1999 confirming the precedence of uniformity of succession, and the precautions applicable to successions – in the present case secondary referral from English to Spanish law.)

It is in this systemic context that we must read paragraph 3, referring to the law applicable to the rights of the widowed spouse in succession, as introduced by Law 11/90. And since the appellant has not proven that she would have been deprived of any right of succession under the Law of Venezuela, her appeal must be dismissed."

– SAP, Asturias. 1 September 2005 (Ref. Aranzadi JUR 2005/220269)
Law applicable to intestate succession. Applicability of Spanish law. Absence of invocation and proof of foreign law and exclusion of referral.

"Legal Grounds:

Two. . . . must be governed by the relevant material rule indicated by the Spanish rule of conflict (STS 29/02/98, 30/11/99 and 24/09/02); secondly, returning to the statement that the appellants based their claim on their condition as heirs,

the rule of conflict applicable to hereditary succession according to our Private International Law is that of the national law of the deceased (art. 98 CC), (. . .) and according to the Law of the State of Pennsylvania, his children have equal shares in the succession, but the invocation and proof of this foreign law cannot be taken into consideration owing to failure to demonstrate the standing of the parties and hence it cannot be applied; and according to the jurisprudential doctrine referred to, that means that this point of conflict must be resolved in accordance with Spanish law . . .;

Three. If purely for the sake of argument, as we do not know whether the deceased persons concerning whom the appellants are acting possessed any nationality other than Spanish, which is attributable to them as their nationality of origin (art. 17 CC), supposing that they might also have possessed US nationality and given that their last place of residence was in the USA (art. 9(9) CC), in countries possessing Anglo-Saxon law the prevailing criterion in succession is the application of diverse rules depending on whether goods are movable or immovable, and in the latter case the law of the country where they are situate is applicable (in this connection see STS 15/11/96 and 23/09/02). And since all the goods in this estate are situated in our country, according to the principle of universality prevailing in our Law of succession, the result of referral of the foreign rule to our national law (art. 12.2 CC) is that the entire succession must be governed by Spanish law (STS 23/09/02 cited above)".

– RDGRN, 5 February 2005 (EDD 2005/16176)
Law applicable to international succession.

"Legal Grounds:

One. The issue raised in the ruling that prompted this appeal is whether or not it is necessary to accredit the conformance of the act which it is proposed to register with the laws applicable to it when these laws – and this is not in question – are foreign.

Admittedly the note is somewhat confused, and a superficial reading of it might give the impression that there are two points of legality to be determined:

One, that the document of succession – the testament drawn up by the deceased, a British national, before a Spanish notary – contains her last will, that is that it is her last testamentary provision.

And two, that the documents referred to in the ruling do not express that will in a manner consonant with the applicable laws, that is the national laws of the deceased. However, a closer reading of the note, and particularly of the substance of the defending report – which adds nothing new but does clarify its scope – confines the issue to the second aspect. Of the reasons listed in support of such determination, neither the one relating to the place of death nor the one relating to the time elapsed since the will was made are relevant. The testator's acknowledgement that she has two children to whom she wills nothing is only relevant if the rules governing her succession constrain her freedom to testate in such circumstances, and therefore the really relevant factor is

assuredly the deceased's nationality, as this determines that the applicable rules of succession are those of her personal law (cf. art. 9(8) of the Civil Code).

XIV. FORM OF ACTS

– RDGRN of 7 February 2005 (TOL 599884)
Legal regime governing the form of acts.

"Legal Grounds:

. . . The core of the DGRN's position is rooted in the fact that in Spain, when a notary authorises a public document, he must verify its legality, as provided in article 17 *bis* of the Notaries Act and implementing provisions, and hence in the obligation of the notary to satisfy the requirements laid down in the law for the drafting and authorisation of public documents. The Spanish notary is required by law to be familiar with and to apply these and a foreign notary is not; furthermore, for administrative purposes a Spanish notary answers to his hierarchical superiors in Spain and a foreign notary will answer to the authorities of his country if appropriate, but not to the Spanish authorities. The issue raised in the appeal very clearly has a bearing on the question of maintenance of public policy.

Therefore, the DGRN, which neither can, should nor does deny validity in Spain to any public document authorised by a foreign notary (for which reason the need to legalise foreign documents was abolished and the Hague Convention of 1961 on the Apostille was signed), is now obliged to distinguish between documents that are fully enforceable as they are and documents in respect of which the application of the *locus regit actum* rule and the rules of referral in the applicable international laws make it necessary not to treat the equivalence of forms as an absolute criterion, since the form may comprise the substance in essence; this applies when it comes to accepting a public document issued in a foreign country and containing a transmission of ownership or of a right *in rem* in immovable property as enforceable in Spain and allowing registration thereof in the Spanish Intellectual Property Registry.

For that reason in the two decisions here examined the DGRN says that 'The problems relating to matters of form in private international situations have prompted a process of normative evolution subject to the precautions necessary in legal life, with particular solutions taking precedence over general ones, and thus substantially relativising the traditional *locus regit actum* rule, as a simple comparison of the first and second sections of article 11 of our Civil Code will show. (. . .) The form may be understood simply as the perceptible means of exteriorising a willingness or consent to do business, so that in principle any form could serve, by reason of the place where the act took place or in consideration of any other connection, as proof for procedural purposes of such willingness or consent in order to safeguard the existence of the business. Spanish law in this respect places spirit above form, so that no one form can be considered exclusive in demonstrating consent. However, the fact that an act is at times

subject to certain formalities can operate as a form of control, imposed for reasons of legislative policy in pursuit of certain ends, and in that case underlying the form, aside from consent, there is also a basic requirement affecting the business: a form of control transcending the scope of private rights, as an unavoidable condition of certain legal effects. This dual scope or meaning of form is perceptible in the current article 323 of the Civil Procedure Act'".

XV. RIGHTS IN *REM*

– RDGRN of 7 February 2005 (TOL 599884)
Registration of public document notarised abroad.

"Legal Grounds:

. . . 1. The appeal raises the question of whether or not it is possible to register in the Spanish Property Registry the sale of a property situate in Spain which was formalised before a German notary by a seller and a buyer both of German nationality and not resident in Spain, upon attachment of the Apostille of the Hague Convention (RCL 1978, 2059).

(. . .)

3. . . . Without prejudice to its value as satisfactory proof of the authenticity of the consent and its contractual value as binding the parties thereto (or their successors), the notarised German document, denial of registration whereof prompted this appeal, does not constitute valid assignment or effective transfer of ownership and hence does not render it registrable under the Spanish legal system, which vouchsafes to notaries a control function, a presumption of legality in their acts and a duty to cooperate with the Public Authorities, which are not extensible to foreign notaries. The validity of conveyance provided in article 1462(2) of the Civil Code and the effect of transferring ownership deriving therefrom is applicable solely to Spanish public documents. A sale recorded in a German notarised document cannot have the same force in Spain. It cannot do so according to Spanish law, and indeed it cannot do so even according to German law. The reference to the German system of transfer of ownership in the note of refusal, criticised by the appellant, is therefore not without relevance. One of the objectives of the protection of international legal business may be to prevent any or excessive loss of the force of documents when they cross frontiers, but it would be absurd to seek to enhance their force and vouchsafe to a transferred document more force abroad than it has in its country of origin."

– RDGRN of 20 May 2005 (Aranzadi Ref. RJ 2005/5645)
Registration in the Property Registry of a contract of sale formalised before a foreign notary.

"Legal Grounds:

One. The appeal first raises the issue – already addressed by this Department in a Decision of 7 February 2005 – of whether or not it is possible to register in the Spanish Property Registry the sale of a property situate in Spain which was formalised before a German notary by a German seller and an Austrian buyer, neither resident in Spain, upon attachment of the Apostille of the Hague Convention . The case is therefore one of intra-Community external sale of a property situate in Spain, which poses a problem in determining whether the form applicable to the substance of the business is appropriate for purposes of producing certain legal effects, in this case particularly recognition of the contract of sale as formalised abroad as sufficient on its own to serve as a certificate of transfer of ownership and be registered as such in the Spanish Property Registry.

The problems relating to matters of form in private international situations have prompted a process of normative evolution subject to the precautions necessary in legal life, with particular solutions taking precedence over general ones and thus substantially relativising the traditional *locus regit actum* rule, as a simple comparison of the first and second sections of article 11 of our Civil Code will show. The dispersal and the special nature of the rules governing form in the sphere of private international law as defining the force or the legal effects of each act or transaction is largely a consequence of the polysemic meaning of the word 'form' when applied to legal relationships, produced by the functional versatility of form as a requirement of legal acts or business.

The form may be understood simply as the perceptible means of exteriorising a willingness or consent to do business, so that in principle any form could serve, by reason of the place where the act took place or in consideration of any other connection, as proof for procedural purposes of such willingness or consent, in order to safeguard the existence of the business. Spanish law in this respect places spirit above form, so that no one form can be considered exclusive in demonstrating consent. However, the fact that an act is at times subject to certain formalities can operate as a form of control, imposed for reasons of legislative policy in pursuit of certain ends, and in that case underlying the form, aside from consent, there is also a basic requirement affecting the business: a form of control transcending the scope of private rights, as an unavoidable condition of certain legal effects. This dual scope or meaning of form is perceptible in the current article 323 of the Civil Procedure Act.

When the question of form is no more than a problem of the dependability of a given form of expression and satisfactory proof of consent, and of the authenticity and capacity of the person giving it, the intervention of a foreign authority certifying this, when the event takes place abroad, must logically merit the same consideration as the form taken by the intervention of an authority of the forum, and so this Department has repeatedly sustained, accepting such an equivalence of forms in matters relating to powers of attorney

formalised before foreign authorities (see Decisions of 1 June 1999 and 21 April 2003).

To determine an equivalence of forms is more problematical, however, when the intervention of a given authority of the forum, such as a notary, is required for the act of be enforceable, in order to protect certain interests of the forum (for instance in cases of transfer of ownership and *in rem* rights in immovable goods), for equivalence will then be determined by the law governing its effects. When the formality required is imposed as a means of control (rather than as a form of consent), such equivalence of forms is debatable given the presumable absence here of equivalence between authorities; the foreign authority is not dependent on or subject to any State other than its own, nor can it be expected to be familiar with or properly apply a foreign legal system which is outside its sphere of competence. The interests of the forum in certain formalities, which are protected by means of a formal control exercised by an official of the State itself who guarantees the full legality of the act for the purposes of that State system, cannot therefore be considered equally assured if the person intervening in the act is a foreign official lacking the necessary training and authority to control a legality outside his sphere of competence and under no obligation to cooperate with a public authority of which he is not a part.

Whereas the authenticity of any notarised document as a form of consent may be recognised across borders, the scope of the control of legality exercised by the notary is restricted to the laws applicable in the State to which he belongs, so that the presumption of the legality of a document authorised by him, which is relativistic by nature, is not a common denominator but a differentiating feature distinguishing it from any other foreign document that is notarised or certified by the authorities of other States with different legal systems.

For that reason, when the Spanish legislator regulates the force and the effects of a public document, meaning a document authorised 'by a notary or competent public official' (art. 1216 of the Civil Code), it has in mind a Spanish notary or public official, just as article 117 of our Constitution, when it embraces the principle of unity of jurisdiction and provides that only Judges and Magistrates are empowered to judge and order the enforcement of judgments, refers exclusively to the courts of Spain. As this Department's Decision of 18 January 2005 (Notary System) puts it, 'when the Law imposes a general requirement for the intervention of a notary, this means a Spanish notary, the only notary qualified to judge legality in terms of our legal system'.

Only documents carrying a presumption of legality may be accepted by the Registry in order to confer the same virtue on the entry, and that is the basis of what is called the principle of 'standing for purposes of registration'. The Spanish notary must certify (pursuant to art. 17 bis of the Notaries Act) that the assent which he authorises is in compliance with the Spanish legal system, a judgement that a foreign notary is not qualified to make.

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Two. (. . .) A foreign notary would lack the same means of exercising control as satisfactorily over all these details, and a general qualification to advise the parties on the legal and fiscal consequences of a property conveyance within the framework of the applicable legal system, in this case the Spanish system (art. 10(1) of the Civil Code), which lies outwith the sphere of his competence and his legal expertise. The vulnerability of the buyer in the foreign notarised document is further aggravated by the fact that unlike a Spanish notary, a foreign notary does not have direct telematic access to the Property Registry to inquire into the history of ownership of and burdens on the property, nor can he take preventive action by ordering a preliminary registration based on his intervention (see this Department's Decision of 15 March 2000). Admittedly the interested party may always excuse the authorising notary from gathering that registration information or from ordering a preliminary registration via telematic media, but a notarial form carrying a waivable right is not the same as a form carrying no right at all. This lack of equivalence is still more pronounced in cases of property agreements, where digital signatures are available for accessing not only the Registry but also the Cadaster and other public offices.

But the notary acts to safeguard not only the interests of the contracting parties but also those of third parties. The drafting of a public document produces effects not only between the parties but also – as article 1218 of the Civil Code says – 'against third parties'. The triple effect of the drafting of a deed of sale of property obliges the Spanish notary to take numerous precautions for the sake of third parties, such as annulment of the titles of the transferor immediately following his intervention (articles 1219 of the Civil Code and 174 of the Notaries Regulation), and many more. Examples include mandatory notification of the lessee if the property is leased, or verification of the administrative authorisation before division or parcelling (it is not so long since the days of clandestine parcelling), or again consideration of the possibility of the property's being included in areas designated for pre-emptive purchase by the Local Authority, and numerous other aspects that the Spanish notary must verify, quite apart from administrative verifications on property matters such as the Architect's or Site Manager's licence, or a ten-year insurance policy in legally satisfactory terms to cover the value of the dwellings when notarising a declaration of new building work, or again in a subsequent property sale drawing up the appropriate caution in case any of these details should not be regularised, not to mention the important subsidised housing market with controlled prices, limitations on utilisation or the possibility of declassification, of which the notary must keep track.

Among the third parties protected by notarial intervention in matters of property are the public authorities themselves, and of these particularly the Treasury. A foreign notary is not bound by the same obligations to cooperate with the

Spanish State as a Spanish notary. Nor does he have the necessary grounding or the means to correctly judge the correlation between prices and values, the danger of fraud, tax evasion or money laundering through real estate. When a property situate in Spain is sold by a non-resident (as in the case giving rise to the present appeal), the Spanish notary must verify whether or not the buyer is required to have withheld five per cent of the price for direct payment of taxes. He must also verify the levy of Value Added Tax on transactions where this is required. In any transfer of real estate it is compulsory (and essential for the operation of the tax system) to enter the technical cadastral reference of the property, for which purpose Spanish notaries can now establish direct telematic communication with public cadastral offices. Spanish notaries are obliged to notify the Inland Revenue, by forwarding periodic indices, of all notarised documents representing taxable events, and to send the notices to Local Authorities for settlement of capital gains tax. This informational cooperation helps prevent tax obligations from lapsing. Consequently, according to the new article 50(4) of the Transfer and Stamp Tax Act, (contained in Law 53/2002 of 30 December), 'in cases of public documents authorised by foreign officials, the limitation period shall be calculated as from the date of its presentation to any Spanish authority'.

At the present stage of evolution of the European States, where there is still considerable heterogeneity of legal systems, a Spanish and a foreign notary are not yet sufficiently comparable in terms of their capacity to act as agents in the control of legal traffic for the safeguarding of the interests of contracting parties and third parties which are at stake in the conveyance of a property situate in Spain. Although the foreign notarial form (subject to certain formalities) may assure the authenticity of consent to do business, it does not guarantee the other controls as satisfactorily as does the intervention of a Spanish notary, absent which the act would lack efficacy in a way not remediable by acceptance for registration, the scope and substance of which are not the same as those of notarial intervention. The dual control exercised by notary and registry over legality in the trade in property in Spain does not allow for discrimination, and there is no cause for any dispensation such that foreign documents should be subject to a less strict control of legality than those of the forum in order to achieve the equivalent legal effect. Even when the business is done outside, with payment in the exterior, the trade in property is always essentially an internal market.

Three. Regardless of the efficacy of a contract as a source of obligations between the parties, its value as a title of transfer of ownership goes beyond the bounds of the law governing contracts, since *in rem* rights are enforceable *erga omnes* and hence are beyond the scope of private autonomy. Every State has its own separate way of regulating the timing or the system of transfer of ownership of goods located in its territory. For that reason article 9(6) of the Rome Convention ('LCEur 1998\\241', F.3) on the law applicable to contractual obligations (ratified by Spain) recognises the *vis attractiva* of the *lex rei sitae*

and provides that a contract whose subject matter is a right in immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated, in a manner similar to article 10(1) of our Civil Code, whereunder ownership and other rights in immovable property, including the publication thereof, are subject to the law of the place where they are situated.

The transfer of ownership in Spanish law is the outcome of the sum of title and mode, whose symbiosis renders the public document valid for purposes of conveyance (art. 1462(2) of the Civil Code), so that upon registration – registration being unsuitable as a mode of transfer – the *in rem* right is already preconstituted in the registrable document as a title which at the same time incorporates the mode – the term 'title' meaning, for the purposes of registration, the public document in which the right is immediately enshrined (article 33 of the Mortgage Regulation).

The public deed of sale formalised before a Spanish notary is the instrument of a contract, but it is also the title representing transfer of ownership and will operate as such in legal business. And it is also the title registrable in the Property Registry. On the other hand, a foreign notarised document of the sale of a property situate in Spain may serve at best as the instrument of a contract, the source of obligations between the parties according to the law governing contracts, but not as a title having immediate efficacy in the transfer of ownership, lacking as it does the equivalent legal force to a Spanish deed, as a title and mode of transfer of ownership; and by the same token it is not a registrable title (art. 4 of the Mortgage Act), as it is insufficient on its own to warrant immediate registration (art 33 of the Mortgage Regulation).

Without prejudice to its value as satisfactory proof of the authenticity of the consent and its contractual value as binding the parties thereto (or their successors), the notarised German document, denial of registration whereof prompted this appeal, does no constitute valid assignment or effective transfer of ownership and hence does not render it registrable under the Spanish legal system, which vouchsafes to notaries a control function, a presumption of legality in their acts and a duty to cooperate with the Public Authorities, which are not extensible to foreign notaries. The validity of conveyance provided in article 1462(2) of the Civil Code and the effect of transferring ownership deriving therefrom is applicable solely to Spanish public documents. A sale recorded in a German notarised document cannot have the same force in Spain. It cannot do so according to Spanish law, and indeed it cannot do so even according to German law. The reference to the German system of transfer of ownership in the note of refusal, criticised by the appellant, is therefore not without relevance. One of the objectives of the protection of international legal business may be to prevent any or excessive loss of the force of documents when they cross frontiers, but it would be absurd to seek to enhance their force and vouchsafe to a transferred document more force abroad than it has in its country of origin.

The sale formalised in the foreign notarised document will enable the contracting parties to compel one another, in performance thereof, to draw up the appropriate public document before a Spanish notary to serve as a title of transfer of ownership susceptible of registration in the Registry, which all the contracting parties must authorise unless the contract includes a clause of power of attorney for that purpose (normally in favour of the buyer). The efficacy of this is beyond doubt, at least *inter vivos*, as it is contained in a foreign notarised document possessing full force as a form of consent.

There is likewise little to be said for the appellant's reference to the rules of foreign investment introduced by Royal Decree 664/1999 of 23 April, in an argument based upon the abolition of the need for a Spanish commissioner of oaths in matters of foreign investments; the fact that such intervention is no longer required merely because a foreign investment is involved does not mean that the obligation to notarise an event, whether it involves a foreign investment or not, cannot be imposed for some other reason."

XVI. INTANGIBLE GOODS

– STS. 17 October 2005 (Ref. Aranzadi RJ 2005/8594)

Industrial property: Establishment sign: denial of registration: features whose phonetic or graphic resemblance to others already registered may lead to error or confusion in the market: different commercial activity.

"Legal Grounds: . . .

Two. (. . .) The question that the Chamber has to judge is whether the contending registrations, establishment sign no. 258,391 'RR REISEN, SL' (mixed) and the opposing R R (graphic) trade marks, are compatible as asserted by the Spanish Patent and Trade Mark Office, or on the contrary they are incompatible as asserted by the appellant in support of its petition for annulment of the challenged decisions. (. . .)

Four. (. . .) In the second legal ground, the Chamber *a quo* set forth a plausible interpretation of the clause contained in article 85 of the Trade Marks Act, Law 32/1988 of 10 November, whereby 'the rules of this Act relating to trade marks shall be applicable to establishment signs insofar as they are not incompatible with the nature thereof', which allows the decision on registration of establishment signs to be submitted preferentially to the evaluation criteria laid down in article 12(1.a) of the Trade Marks Act, for the purpose of preserving the distinctiveness of the establishment sign vis-à-vis others intended for identical or similar activities, and only secondarily and incidentally allows examination of the legality of administrative decisions from the standpoint of infringement of article 13c) of the Trade Marks Act. (. . .)

Six. (. . .) The Chamber must reject the second ground of appeal based on infringement by the court *a quo* of the prohibition laid down in article 13c) of the Trade Marks Act, intended to prevent the registration of establishment signs

which constitute undue appropriation of the reputation of other registered signs or media, there being no record from which it might be inferred, even *prima facie*, that the owner of the candidate establishment sign sought to misappropriate the credit, fame or reputation of the appellant's distinguishing sign in connection with the specific characteristics of the services offered".

– SAP Las Palmas, 25 November 2005, no. 569/2005 (no Aranzadi Ref.)
Industrial property. Trade marks. Infringement of exclusive right to market a product imported from abroad.

"Legal Grounds:

One. (. . .) 5. Question of merits regarding infringement of art. 32(1) of the Trade Marks Act. As regards violation of art. 32 of the Trade Marks Act, there is no legal dispute, as both parties quite naturally accept the interpretation arrived at by the jurisprudence of Spanish and international courts on the scope of trade mark exhaustion – and non-exhaustion – depending on whether the first commercialisation was undertaken by its owner inside the European Economic Area – in which case it is exhausted throughout all the territories comprising the Area and the product incorporating the mark can be used by third parties for second and successive commercialisations by resale – or was undertaken by the owner of the trade mark outside the European Economic Area, in which case the right in the trade mark is not exhausted in the said Area and its owner can oppose the introduction of such products without his consent or authorisation (. . .).

XXII. TRANSPORT LAW

– SAP, Madrid, 13 December 2005 (Ref. Aranzadi JUR 2006/34315)
International transport agreement. Irregular waybills. Contractual title. Mercantile commission.

"Legal Grounds:

. . . Two. (. . .) When the judge *a quo* decided on the object of the suit, he established two factors: that the consigner was Poliseda and the carrier was a different entity other than the plaintiff. Moreover, given that the latter was an intermediary between the consigner and the carrier and that the defendant was not mentioned in the waybills as a contracting party in its own name, the reference to a mercantile commission only concerns one of the possibilities, requirements or details included in these waybills, which incidentally ought to have complied with the terms of article 144(1) of the LEC, without prejudice to what is alleged by the defendant. But what is certain is that the CMR documents numbers SK0943939 and CZ 0897354 constituted the respective contracts for international transport of goods between Spain and Hungary, and they contain no reference to CARGO SERVICES, S.A.".

XXIII. LABOUR AND SOCIAL SECURITY LAW

1. Individual contract of employment

– STS, Social Chamber, 17 January 2005 (TOL 556953)
Law applicable to a contract of employment between a Spanish bank and a Spanish citizen for service in Germany, when the contract predates the Rome Convention and contains no agreement on that point.

"Legal Grounds:

. . . Three. . . . As from the entry into force of the Rome Convention, its terms must take precedence over those of the national rule; however, there are basic principles to the effect that the parties may choose the law that is to apply to all or part of the contract (article 3), and absent such choice, in the case of a contract of employment the applicable law is that of the place where the work is carried out. As the employment relations between the parties were already governed by Spanish law, the entry into force of the Treaty does not entail a change of the applicable law unless the parties should have expressly agreed thereto. It must be borne in mind that according to article 17 of the Convention, it is to apply in a Contracting State to contracts made after its entry into force with respect to that State."

– ATS. 15 September 2005 (Ref. Aranzadi JUR 2005/236044)
Law applicable to individual contract of employment.

"Legal Arguments: . . .

Two. (. . .) At the pleading stage of the proceedings, the debate hinged on the applicable law, which is deemed necessarily to be Spanish law pursuant to art. 7 of Regulation (EEC) No. 1612/1968 of 15 October and art. 6 of the Rome Convention, since the choice of a given law is only allowable in connection with employment contracts when it entails greater benefits for the employee, but never when it is restrictive as it is in the present case, given that the law of the United Kingdom contemplates the renunciation of any claim relating to unfair dismissal and allows a contract to be temporary without good cause. On that basis, the court takes the view that the contract must be governed by the law of the place where the employee has habitually worked, namely Spain, whose law is in any case more favourable, and consequently the dismissal is ruled unfair, with the legal consequences attendant on such a ruling.

(. . .) As stated in the order of 9 June 2005 opening the procedure for non-admission, the cases listed do not share the threefold identity of laws which would warrant a positive judgment of contradiction *ex* art. 217 of the LPL, since the applicable rules of conflict are different, as are the terms of the relationships through which rulings are made on the most favourable law and the minimum guarantees. The case of the judgment here appealed concerns a conflict between English and Spanish law; this is resolved under the rules of

conflict contained in Regulation (EEC) No. 1612/1968 and in the Rome Convention, by means of a ruling on the most favourable law and evaluation of the degree of security thereof, resulting in favour of Spanish law. In the case of the reference judgment, the conflict was between Spanish and Swiss law and was resolved in favour of Swiss law, under the rules of conflict of private international law as set forth in the Spanish Civil Code, and by a ruling on the more favourable law, which was deemed to be the Swiss. And furthermore, in support of this be it noted that the situations thus related are disparate: the reference judgment determines renvoi to Swiss law, which is also more favourable to the employee; where the problem arises is with the effects of absence of proof of the applicable foreign law, which in the view of the Chamber ought to cause dismissal of the defendant's appeal from the original judgment. In the judgment challenged here, there is proof of the foreign (British) law and the issue is whether it ought to be applicable despite the fact that it is more restrictive than that of the country where the employee carried out his duties. In conclusion, it only remains to note that the most recent doctrine of this Chamber amends the earlier position – set forth in the judgment of this Chamber confirming the reference judgment – which had hitherto been maintained in connection with the effects of absence of proof of the applicable foreign law, bringing the criterion for resolution into line with the doctrine of the Constitutional Court".

– STSJ Canary Islands, Social Chamber, 7 March 2005 (EDJ 2005/38880)
Law applicable to contracts of employment. Employment in extra-territorial marine fishing.

"Legal Grounds:

... Three. ... It is clear from the foregoing that these proceedings concern a case of labour leasing, unsanctioned by any internal or international rules and therefore only classifiable as illegal leasing of manpower, in which a company whose principal place of business is in Spain ('IFM, SA') engages Spanish workers in Spain and assigns them to a Moroccan company in the fisheries sector ('MARONA, SA') which employs them abroad (on vessels flying a foreign flag, whose home port is abroad and which fish in international waters and national waters of other countries). In our system of labour law, only temporary employment agencies are allowed to lease manpower, and hence if what the employing company is doing is simply to supply manpower and nothing else, then that activity is illegal.

(...)

It is on that basis that we define the sea fishing employment as extra-territorial, a situation which poses complex problems in the resolution of conflicts arising from what are known as international seafarers' company service contracts, due to the tendency of shipowning companies to adopt complex forms of incorporation (combining factors such as nationality of the enterprise, country of registration of the vessel and the vessel's flag); this is true of joint

ventures, used by Spanish shipowners as a means to get around problems of access to fishing grounds, and in many cases to evade Spanish labour law, which is considerably stricter than that of the third countries with which they enter into fishing agreements and under whose nationality such joint ventures are formally registered.

In view of this, the legislator on the one hand and the doctrine and case-law on the other both seek criteria through which to prevent such evasion of the law affording most protection, and also strive to keep up the social protection of workers through maintenance of the legal system with which there is a genuine connection.

In this respect, to get round the obstacles raised by taxative application of the so-called 'flag principle', which is decisive for deciding on the applicable law, the doctrine postulates application of:

a) the methods habitually devised by the jurisprudence for these purposes (lifting of the veil); these are extremely useful for resolving points of conflict not ordinarily provided for by the legislator and which, along with other specific tools – e.g., the flag of convenience doctrine – are intended to prevent application of the criterion of the law of the flag country working to the detriment of the employee;
b) in this line of social protection, the actual laws concerning joint ventures have tended to establish that, in order to guarantee their Social Security rights, Spanish nationals who go to work for such companies shall do so as employees of one of the Spanish companies participating in the venture (art. 7 Royal Decree 830/85);
c) the jurisprudence generally applies the same criteria, and hence has tended to apply the labour law of the State other than the flag State when most of the elements of the seafarer's company service contract link that employment relationship to the law of that State (see Supreme Court judgments of 9/5/88 and 7/1/99 and High Court of the Canary Islands judgment of 17/7/92).

(. . .)

The Chamber is thus obliged to clarify the normative framework in which we must situate ourselves in order to locate the State laws which will be invoked to regulate the merits of the contract in question. And to that end, what better than to transcribe the precept of Spanish law which has been used to solve such problems since 1993, when Spain ratified the 1980 Rome Convention on the law applicable to contractual obligations. This is article 2 of the Convention, which clearly establishes the *erga omnes* or universal force of its articles, providing that 'Any law specified by this Convention shall be applied whether or not it is the law of a Contracting State'.

(. . .)

In the light of these considerations, it is the Chamber's view that the only possible conclusion is the applicability of the clause established as the princi-

pal right by article 3 of the 1980 Rome Convention, namely freedom of choice, given that at the time of making the two employment contracts connecting them, the parties expressly chose the law of Spain as the law to be applied to the performance thereof."

– STSJ Madrid, Social Chamber, Section 1, 29 June 2005 (Ref. Aranzadi AS 2005/1659)

Applicable law. Individual contract of employment. Rome Convention of 19 June 1980. Applicability of the law of the country where work is carried out, absent express choice.

"Five. Having established the foregoing – that is that the employees were engaged to work abroad and hence are excluded from the Single Convention, we must now stress that their contracts make no provision whatsoever regarding the substantive law applicable to the employment relationship between them and the defendant ministerial department, and therefore we must turn to article 6(2) of the 1980 Rome Convention, according to which: 'Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:

(a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or
(b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated; unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country'. In short, there being no *pactum de lege utenda*, that is no agreement as to the law of which country is to be applicable, the appropriate forum is that of the country where the work is carried out, which is also the forum prescribed by article 10(6) of the Civil Code; the criterion being that of the connection with the *locus laboris*, in the present case that means Italian labour law."

– STSJ Madrid, Social Chamber, Section 1, 18 July 2005 (Ref. Aranzadi JUR 2005/2905)

Applicable law. Individual contract of employment. Rome Convention of 19 June 1980. Choice of law. Partial exclusion of foreign law. Applicability thereof in view of subsidiary point of connection.

"Legal Grounds:

... Three.... The 'Rome Convention' is therefore the rule that determines the law applicable to an employment contract with an alien element; as the Supreme Court stated in a judgment of 29/9/98, that Convention '... universally regulates and determines the law that is to govern a legal relationship in which there

are points of connection with the laws of different States. According to article 2, any law that is specified by it is to be applied preferentially whether or not it is the law of a Contracting State; thus, the rules of private international law contained in chapter IV of the Preliminary Title of the Civil Code are rendered residual and only applicable to contractual modes not included in the Rome Convention (article 1(1)) and contracts made prior to its entry into force". The Constitutional Court mentions the application of the Rome Convention in judgment 172/04. In order to determine which law is to be applied by Spanish courts under the Treaty of Rome, we must look to articles 3 and 6 thereof, which respectively lay down the provisions recounted hereafter. Art. 3 provides 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 of that country which cannot be derogated from by contract, hereinafter called "mandatory rules"'. Art. 6 provides that '1. Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice. 2. Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed: (a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country . . .'. It therefore follows from these rules that for the present purposes, if the contracting parties have expressly or tacitly chosen to apply the law of a given country, the employment contract will be governed by the chosen law provided that this does not imply the renunciation of mandatory rules of the law that would be applicable in the absence of such choice. In the absence of choice, the applicable law is that of the country where the employee normally carries out his work.

Four. The appellant authority, while admitting the applicability of the Italian 'Discipline' referred to, claims not to be bound by the obligation to make an extra payment laid down in art. 25 thereof, asserting that since the contracts of three of its employees establish an annual salary equivalent to thirteen ordinary monthly payments, this decision expresses the will of the contracting parties that this aspect of salaries be regulated by the contract itself and not by Spanish or Italian law, and that decision must be respected under the principle of autonomy of the parties according to a judgment of this Court dated 7/7/03 (appeal 1180/03). It is further asserted that the rule cited applies to employees who have only a verbal and not a written contract since their salary is the same as that

of the others who do possess written contracts. In other words, according to the appellant it is the will of the contracting parties, in obedience to the principle of autonomy enshrined in art. 3 of the Treaty of Rome, to agree to partial exclusion from Italian law, to which they have agreed to submit, in order to obviate the extraordinary June payment laid down in the cited 'Discipline'. How-ever, in the opinion of this Chamber, under the rules indicated, the applicable law is Italian labour law as cited above in cases of employees possessing either a written or a verbal contract; for as we have seen, absent express choice, the general rule is that the applicable law is that of the country where the employee carries out his work."

XXV. INTER-REGIONAL LAW

– STS, First Chamber, 11 February 2005 (TOL 590997)

Inter-regional law. Determination of marital economic regime according to regional citizenship of spouses.

"Legal Grounds:

... Three. ... A judgment of 6 October 1986 stated that prior to the cited reforms the Civil Code provided that, in obedience to the principle of family unity, spouses were subject to the marital economic regime determined by the regional citizenship of the male, and it added that the 1974 reform had maintained the husband's personal law at the time of marrying as the point of connection, to be applied in the absence of a marriage contract and of a common national law during the time of marriage; and it concluded that the male's regional citizenship inviolably determined and fixed forever – absent a marriage contract – the marital economic regime.

(...)

Four. ... After the reform of 1973–1974, art. 9(3) provided that a change of nationality would not alter the martial economic regime unless the spouses so agreed, while art. 16(1) referred to Chapter IV (Rules of Private International Law, arts. 8 to 12) for the settlement of any conflicts of laws that might arise from the coexistence of different civil laws within the national territory.

Since the enactment of Law 11/1990 of 15 October (and likewise since Law 11/2003 of 29 September), art. 9(2) determines what laws are to govern the effects of marriage in each case. Under this article, absent a common law or the choice of another designated by the spouses in a certifiable document prior to the contracting of marriage, the applicable law will be that of the common habitual place of residence immediately following celebration of the marriage, and failing that the law of the place where the marriage was held.

Art. 16(3) provides in turn that the effects of marriage between Spanish nationals are to be regulated by the Spanish law that is applicable according to the terms of art. 9, and failing that by the Civil Code. (...)"

– STSJ Catalonia, Administrative Chamber, Fourth Section, 4 February 2005 (TOL 664026)
Legal regime governing succession. Special regional citizenship of Navarra.

"Legal Grounds:

. . . Three. . . . The will, made on 13 December 1988 (folio 45 et seq.), states that Pedro Antonio was a citizen of Burguete (Navarra) and that he declared himself a native of Barcelona, where he was born, that he was married for the second time, to Silvia, and had no direct descendants from either of his marriages, and that 'before his present marriage he acquired the special regional citizenship of Navarra, whose law is to regulate his succession.'

– SAP Barcelona, Section 16, 3 June 2005 (EDJ 2005/111013)
Rights of surety. Catalan rules on the subject.

"Legal Gounds:

. . . Two. (. . .) But what we cannot agree with is the withholding of the vehicle by the repair shop. A footnote on the repair form mentions withholding of the vehicle as surety for payment and states that this is pursuant to article 1600 of the Civil Code. However, this provision is no longer applicable in Catalonia since there are regional laws applying preferentially to objects situated in that Autonomous Community, pursuant to article 10(1) of the Civil Code. The law referred to is the 'Rights of Surety In Rem Act', Law 10/2002 of 5 July."

– RDGRN 24 January 2005 (EDD 2005/71355)
Declaration of preservation of Catalan regional citizenship.

"Legal Grounds:

. . . Three. The solution to the issue raised lies in the interpretation of section 5 of article 14 of the Civil Code, especially the last paragraph thereof. This section refers to the acquisition of regional citizenship and provides in that respect that there are two possible ways of acquiring regional citizenship: either through continuous residence for two years, provided that the interested party states that such is his will (no. 1), or through continuous residence for ten years without making any declaration to the contrary during that time (no. 2). The section further adds that 'both declarations must be registered in the Civil Registry and do not need to be reiterated'.

The issue, then, lies in the scope we are to attribute to the expression 'both declarations'. In the view of this Department, for the present purposes the cited expression must be taken to include the express declaration needed to acquire regional citizenship through two years' residence, and the declaration, again to be made expressly, of non-acquisition of regional citizenship through ten years' residence – that is, a declaration of the desire to retain an existing regional citizenship, failure to make which will cause the acquisition of the new regional citizenship by reason of ten years' residence, and the consequent loss of the

citizenship held up until then (cf. art. 225 RRC paragraph one). Once such a declaration of preservation of citizenship – in other words a declaration contrary to the acquisition of a new citizenship through continuous residence – is made, there it no need to reiterate it".