Spanish Judicial Decisions in Private International Law, 2004

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I. SOURCES OF PRIVATE INTERNATIONAL LAW

– *STS*, 18 November 2004. *Web Westlaw* JUR 2004/300854.

Transport by sea. Arrest of sea-going ships. Brussels Convention of 10 April 1926. Incorporation into domestic law. Scope. Spanish law.

"Legal Grounds:

In the first of its three grounds . . . a claim is filed for infraction of article 14 of the Brussels Convention of 10 April 1926 in relation with article 12.6 and 10.2 of the Civil Code and 96 of the Spanish Constitution.

The Provincial Court, erroneously basing its judgement on article 14 of the aforementioned Convention and on the judgement of this Chamber delivered on 18 June 1990 (RJ 1990/4791), is reproached for having come to the conclusion that there was no maritime lien in terms of encumbrance of the ship against the amount claimed despite the fact that the ship-owner is sentenced to pay the said sum.

It is argued that although the only requirement for application of article 14 of the Convention is that the ship be from a contracting country, it should actually be applied to all international instances just as Spanish national law drafted externally to avoid fraud, which could be the case of the sale of the ship to another ship-owner.

In order to determine whether this thesis is applicable . . . it suffices to bear in mind that the judgements delivered by this Chamber on 22 May 1989 (RJ 1989/3877) and 18 June 1990 (RJ 1990/4791) coincide in affirming that the 1926 Brussels Convention is only applicable when the ship "liable for payment" belongs to a contracting state pursuant to the spirit of article 14 of the said Convention.

Given that both parties acknowledge that the ship transporting the goods being contested was registered in Cyprus and the claimant has not proven that Cyprus had signed the said Convention, this ground must be dismissed.

The second ground alleges infraction of article 12.6 in relation to article 10.2, both of the Civil Code (LEG 1889/27) and article 96 of the Spanish Constitution (RCL 1978/2836), arguing that although the second of the said precepts establishes that the law applicable to ships is that of the country of its registration, article 12.6 requires the person who invokes foreign law to accredit its content and applicability.

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As a result, it is held that in the absence of proof of the national law of the country of the ship's registration, the Brussels 1926 Convention (RCL 1930/1104) is the only law in force, given that it is Spanish law, pursuant to article 96 of the Constitution.

This ground should also be dismissed for it must be assumed that the said Convention has been incorporated in its entirety into Spanish law by virtue of Spain being a party thereto and its publication in the Official State Gazette. In other words, each and every one of its precepts form part of Spanish law including article 14 defining the scope of the rules contained therein. This scope has been defined in such a way that the ship which is the object of the dispute – in this case the maritime lien – must belong to one of the contracting states which is not the case here.

The intended enforcement of the precepts allegedly violated means that the objective pursued by Spain when it signed the Convention (the establishment of a framework for reciprocity with the rest of the signatory countries) would be completely distorted and this is absolutely inadmissible.

The last ground of the appeal charges . . . violation of article 580(10) in relation with article 584, both of the commercial code (LEG 1885/21) and article 12(6) of the Civil Code (LEG 1889/27).

It is pointed out that in the claim the content of the commercial code was specifically cited as subsidiary law of the convention.

It was therefore added that if the said Convention were not be considered applicable, the provisions of the aforementioned Code would apply. Article 580(10) of the said Code provides for a lien covering the shipper's liability for the value of the goods on board which were not delivered to the consignees or for damages suffered for which the ship was responsible.

This ground should likewise be dismissed given that it is precisely article 12(6) of the Civil Code that orders the Courts to apply the conflict rules of Spanish law one of which – article 10(2) of that same Code – clearly establishes that the rights constituted in respect of ships shall be subject to the law of their country of license or registration. Adherence to this latter rule makes it impossible to apply the provisions of the Spanish commercial code to this debate given that, as the Provincial Court has affirmed, the claimant has proven that the ship, in respect of which the encumbrance was requested as collateral for the claim, is of Cypriot nationality".

– *STC*, 8 March 2004. *Web Westlaw*. RTC 2004/34

Article 14 of the Spanish Constitution. Right to equality before the law. Salary inequality. Being subject to different national laws in force.

"Legal Grounds:

As set out in the pleas of fact, the person filing the appeal for protection, of Spanish nationality, has been working since 1996 as an administrative assistant at the Spanish trade office in Belgrade. The salary paid to this worker, for the same work done by two other administrative assistants of Yugoslavian nationality

hired in 1984 and working in this same trade office, is substantially lower that that paid to the latter workers. This difference in the pay scale was justified by the contracting Administration first of all on the basis of the conditions and tax system of the Yugoslavian regime and the labour conditions at the time when those two workers were engaged and secondly on the diversity of the law applicable to each of the two cases.

The appellant asserts that two fundamental rights have been violated here: on the one hand, the right to effective protection of the courts (art. 24.1 *CE* [RCL 1978/2836]), holding the view that the judgment under appeal is incongruent in that it is not based on the contentions of the parties (sic) because it ruled on a new issue not addressed by the parties (legislation applicable to the labour relation of the claimant) and, on the other hand, the right to equality (article 14 Spanish Constitution) alleging that salary discrimination has no reasonable justification but is rather solely based on the nationality of the appellant.

. . .

Secondly, the appellant charges violation of the right to equality (art. 14 Spanish Constitution [RCL 1978/2836]), holding the view that he was the victim of unjustified salary discrimination based solely on the fact that he was not of Yugoslavian nationality. In this respect one must begin by noting that, as this court has pointed out on many occasions, not all unequal treatment denotes a violation of article 14 of the Spanish Constitution but rather such violation only occurs when the inequality in question differentiates between situations that can be considered on a par and lacks objective and reasonable justification. In other words, the principle of equality requires that the same legal consequences apply to the same de facto assumptions and two de facto assumptions should be considered equal when the use or introduction of differentiating factors is either arbitrary or lacks rational grounds.

Specifically, and in respect of the equality principle in remuneration matters, we have confirmed that article 14 of the Spanish Constitution, within the scope of labour relations, does not impose equal treatment in the strictest sense given that the efficacy of the autonomy of will principle in this regard foresees a margin of manoeuvrability by which a private agreement or unilateral decision taken by an entrepreneur in exercise of his organisational authority in the company, may freely remunerate workers while respecting legal minimums or conventions. In so far as the salary difference does not have discriminatory undertones, falling under one of the categories prohibited by the Constitution or the Workers Statute (RCL 1995/997), it cannot be considered a violation of the equality principle. Now, we have likewise said that when the employer is the public administration, the latter is not governed by the autonomy of will principle in its legal relationships but should rather act in full compliance with Law and Legality (article 103.1 Spanish Constitution), with expressed prohibition of arbitrariness (article 9.3 of the Spanish Constitution). As the public authority that it is, it is subject to the principle of equality under the law which provides individuals with the subjective right to receive equal treatment under equal circumstances from public authorities.

. . .

Applying this doctrine to the case at hand, we find that the complainant filing appeal, carrying out the functions of an administrative assistant at the Spanish trade office in Belgrade, receives a salary which is significantly lower than that paid to two other administrative assistants of Yugoslavian nationality performing similar duties and whose earnings, in contrast to those of the complainant, have been steadily increasing although it is also true that this has been taking place for longer than the time the petitioner has been working there. The functions and responsibilities of the aforementioned workers have not, at any point, been challenged by the defendant Ministry either at the first instance stage or during the appeal process. In justifying the salary difference the administration has employed two arguments:

a) In first instance the administration argued that the other two assistants of Yugoslavian nationality had been engaged at an earlier date in accordance with the rules of the corresponding Bureau and earnings were governed by the conditions laid down by the Yugoslavian regime while the petitioner's contract was signed after the social, political and labour characteristics in Yugoslavia had changed.

. . .

b) At the appeal for reversal stage the Administration, modifying the initial explanation offered regarding the difference in earnings, argued that the labour relations pertaining to the petitioner, on the one hand, and to the two Yugoslavian assistants on the other, were subject to different laws (Spanish and Yugoslavian, respectively) concluding that there was no standard term of comparison.

This was the view taken by the Social Affairs Court which declared that in light of the two legal systems – that of the complainant and that of the Yugoslavian workers – completely different in terms of the legislation applicable to each one, there are no identical terms of comparison meaning that the different applicable legislation justifies different salary scales introducing an objective, non-discriminatory difference.

Thus the contested Judgement (PROV 2001/96608) is based on the fact that the legal relationships being compared are subject to different legislations and this fact justifies the different wage scales.

It should first of all be stated that such an affirmation should have been properly reasoned given the tenor of the rules of the Agreement regarding the law applicable to contractual obligations done at Rome on 19 June 1980 (RCL 1993/2205, 2400) – article 6 – in force in Spain since 1 September 1993 especially considering that the labour contract of the petitioner is subject to the law and customs of the country and to a number of clauses of Yugoslavian labour law, adding in clause eight that the remaining labour conditions shall be governed by the labour legislation of the country or, failing that, by Spanish legislation.

Notwithstanding the above and delving into substantive terrain and in light

of the claim of alleged violation of Spanish Constitution article 14 (RCL 1978/2836), it must be mentioned that the public prosecutor correctly pointed out that the allegations put forth by the defendant Administration – different legislations applicable to the legal relations at stake – to justify salary differences, appearing in the same terms in the challenged judgement, were merely of a formal nature because they were not accompanied by any analysis of the Yugoslavian labour regime, of its concrete regulation or of the consequences that a different and unknown legal system could have on this case. No allegations whatsoever were made in respect of its content or applicability. This is despite the fact that the burden of proof, as has already been pointed out by this court (*STC* 33/2002, of 11 February [RTC 2002/33], F. 6) lies with the defendant which had invoked foreign law. Thus, it is up to the defendant and not the complainant to accredit the content and applicability of the law invoked pursuant to the then applicable article 12.6 of the Civil Code (LEG 1889/27) (today replaced by the rule laid down in article 281 of Law 1/2000, of 7 January [RCL 2000/34, 962 and RCL 2001, 1892], of civil procedure) – along the same lines, *STC* 155/2001, of 2 July (RTC 2001/155), F. 4–, a solution backed by the demands of the facility criteria. It was much easier for the Administration to claim Yugoslavian law because, according to its allegations, it was applying said law to the two workers of this nationality.

In summary, the salary difference claimed by the petitioner with respect to the other workers at the same public administration, of the same category and performing the exact same services, lacks objective and reasonable justification and therefore represents a violation of Spanish Constitution article 14 thus determining the appropriateness of the pronouncement foreseen in article 53 a) *LOTC* (RCL 1979/2383)".

II. INTERNATIONAL JURISDICTION

1. Family

– *SAP* Malaga, 31 March 2004. *Web Westlaw* JUR 2004/128865

Jurisdiction of the Spanish courts in separation matters.

See also, in the same sense, *AAP* Malaga, 10 March 2004. *Web Westlaw* Jur 2004/142502; *SAP* Malaga, 31 March 2004. *Web Westlaw* JUR 2004/128865.

"Legal Grounds:

(. . .) The claim filed by the appellant cannot be upheld. In view of the foregoing, it should first of all be pointed out that the Code of Civil Procedure regulates recognition of foreign judgements by virtue of which material *res judicata* may be invoked and based on this the corresponding exception, the Supreme Court having already declared that the divorce judgement delivered by the foreign court cannot serve as the basis for the *res judicata* exception without having obtained the *exequatur* which was not requested as was acknowledged by the petitioner himself when addressing the civil prejudiciality issue textually

affirming "this party hereby announces that it is studying the initiation of recognition proceedings of the divorce judgement in order to be able to enforce the decision taken in respect of visitation rights". Until which time the enforcement of the judgement delivered by the foreign court is ordered, it does not apply in Spain and therefore the exception requested cannot be upheld given that the divorce judgement delivered by the First Instance Court of Nador does not have the character of *res judicata.*

It should therefore be verified whether the Spanish courts have jurisdiction to hear the separation judgement initiated by Ms. Virginia and in this sense it must be stated that there is no doubt that jurisdiction constitutes an issue of sovereignty. The Spanish courts have jurisdiction over litigation arising in Spanish territory even between foreigners in accordance with the Organic Law of the Judiciary and international treaties and conventions to which Spain is party as laid down in the aforementioned law article 22, specifically paragraph 3, establishing the jurisdiction in civil matters of the Spanish courts and tribunals in matters of annulment, separation and divorce when both spouses habitually reside in Spain at the time the suit is filed; identical to the terms laid down in the First Additional Provision of Law 30/81. In this case it is clear that both spouses are residents, or at least were at the time the suit was filed, the place where the defendant was summoned".

- *AAP* Lerida, 20 May 2004. *Web Westlaw* JUR 2004/180706.
Jurisdiction of the Spanish courts in divorce matters. Regulation 1347/2000.

"Legal Grounds

(. . .) In these divorce proceedings both litigants are of Spanish nationality and are residents abroad in Andorra and despite having contracted matrimony in Cerdanyola del Vallés, the couple never resided in Spain. The defendant's last residence in Spain before her marriage was in Bellaterra, Municipality of Cerdanyola del Vallés, according to the information gathered from the marriage certificate and the Spanish family record book. Subsequent to the filing of the suit, the Judge a quo declared lack of jurisdiction of the said court and the defendant presented a writ of appearance after delivery of the decision declaring lack of jurisdiction of the court simply requesting to be notified of successive actions and subsequently when she was served notice of the remedy of appeal she challenged it. Clearly this case does not correspond to any of the conditions laid down in article 22.3 of the LOPJ as the Judge a quo argued in the challenged decision. This article only envisages the jurisdiction of the Spanish courts in marriage proceedings between Spaniards residing abroad when the request is filed by mutual accord or with the consent of the other party However, subsequent to the entry into force of Regulation EC No 1347/2000 of 29 May, the forum of international judicial jurisdiction of the *LOPJ* in matrimonial matters may only be applied in accordance with article 8.1 of said Regulation when in light of articles 2 to 6 thereof the jurisdiction of another jurisdictional body of a member state cannot be deduced. This is not

the case here given that article 1(b) of the aforementioned Regulation attributes jurisdiction for the resolution of divorce issues to the judicial bodies of the member state of the nationality of the two spouses. As a result, given that Spain is the member state of the nationality of the two litigating spouses, the Spanish judicial bodies have jurisdiction to hear the case".

- *SAP* Cuenca, 10 June 2004. *Web Westlaw* JUR 2004/179694.

Lack of jurisdiction of the Spanish courts in matters concerning the abduction of minors.

"Legal Grounds:

(. . .) Given that it has been established that the person whose restitution is requested by the petitioners is of legal age pursuant to article 315 of the Civil Code, action taken has no legal object. Allusions to the Minor Protection Law and to the United Nations Convention on the Rights of the Child are also without consequence and therefore the appeal process cannot go forward. (. . .) It should be pointed out that Spanish Courts and Tribunals do not have jurisdiction to hear issues such as the one submitted to this court based on the reasons serving as the basis for the claim".

- *SAP* Balearic Islands, 5 March 2004. *Web Westlaw* 2004/126300.

Lack of competence of the Spanish courts in custody and child support matters.

"Legal Grounds

(. . .) It has been established that the defendant, Ms. Esperanza, is of Dutch nationality and both she and the daughter of the litigants are officially registered and living in Holland. The daughter María Milagraos, born on 15 March 1966 in Algaida, is also of Dutch nationality and has been living in Holland since 1986. The request for nullity of proceedings filed by the legal representative of the appellant of the jurisdiction issue, Ms. María Milagros, cannot be interpreted as tacit submission to the Spanish courts. This is because Ms. María Milagros was summoned by means of a public notice in violation of due process and subsequently was not present at the small claims proceeding filed before Court of First Instance No 9. Her appearance before the said Court was for the purpose of defending herself from a judgement delivered *inaudita parte*. The proper time for the defendant to defend herself is at the beginning of the proceedings. The possibility of after the fact defence in respect of a resolution delivered in the defendant's absence and which has already become enforceable cannot be comparable to defending oneself prior to the delivery of the decision. In other words, tacit submission implies appearing before the competent judge and responding to the claim formulated or acceptance of the claim or even the filing of a counter-claim against the complainant. (. . .) The appeal should be admitted as should the declinatory plea declaring the lack of jurisdiction of the Spanish courts to hear the claim filed by Cesar against Esperanza. The parties are to be informed that the Dutch courts have jurisdiction to hear this claim given that Holland is the habitual place of residence of the minor and also in

accordance with article 1 of the Hague Agreement of 5 October 1961 on the protection of minors and article 1 of the Hague Convention of 2 October 1976 on alimony payments".

- *SAP* Santa Cruz de Tenerife, 14 May 2004. *Web Westlaw* JUR 2004/185790
Lack of jurisdiction of the Spanish courts in measures concerning minors.

"Legal Grounds:

(. . .) Considering that it was in 1998 that the mother moved to Italy with the children and that the father is aware of the legal proceeding taking place in Italy as of the year 2000 and the fact that the claim which led to these proceedings was filed in the month of November of the year 2001, it should be recognised that the claimant accepted the forum established by virtue of the residence of the mother and the children. This forum must be acknowledged by the Spanish courts not only because the Italian courts began to hear the case prior to the emergence of the litigious issues but also because this is the legal domicile of the minors and was not intentionally sought by the mother. It is also the most suitable forum for the resolution of disputes concerning minors because their proximity to the court is in their best interest, not only in terms of expenses but more importantly in terms of knowing the real situation of the minors which can be directly examined by the judges of that country. Given that the resolutions delivered in these matters should be guided by the best interests of the children, it should clearly be determined that the Spanish courts do not have jurisdiction to deliver judgements in respect of the measures requested by the father".

2. Contracts

- *AAP* Tarragona, 10 June 2004. *Web Westlaw* Jur 2004/204232.

Expressed submission to a foreign court under general purchasing conditions. Conditions unilaterally drafted by one of the co-defendants liable to go unnoticed due to their location in the contract. Execution of the contract in Spain.

"Legal Grounds:

(. . .) In the case under examination and in respect of determining whether conditions exist for the application of article 23 of Regulation EC 44/2001 and case law regarding article 17 of the Brussels Convention of 27 September 1968, the following observation need to be made: 1) all of the signers of the contract who figure as parties to this lawsuit have legal domicile in a European Union member country – Spain, and 2) the expressed submission clause is in favour of the courts of another member country – Germany. Having regard to the existence of an international situation in the litigious legal relationship, despite the fact that it is initially observed that all of the elements of the litigious legal situation are found in the same contracting state, Spain, the fact that one of the contracting parties (Lurgi) is an affiliate of a German company, has given rise to the incorporation of a number of clauses into the contract introducing foreign

elements and giving it international character (. . .) This court is unable to validate the expressed submission clause contained in clause 15.4 of the general purchase conditions because the said conditions were unilaterally drafted by one of the co-defendants and are included by way of an annex to a purchase order signed exclusively by Lurgi Española. This is despite the fact that the confirmation of the purchase order (where we do find the signature of Wanner y Vinyas S.A.) contains the words 'we acknowledge receipt of your purchase order and all of its annexes and we hereby accept the content thereof' because this does not imply that the expressed submission clause has been established in a clear, precise and explicit way by both parties or that it has been subscribed to by the party renouncing his own forum and designating the judge to hear the case (. . .) And lastly, it should be pointed out that the claimant as well as the defendants have their registered offices in Spain and that the contract giving rise to this litigation was executed exclusively in Tarragona (Spain). This leads us to consider that a hearing in a foreign court where there is a clear separation vis-à-vis the contract and the parties (despite the fact that one of the defendant companies is an affiliate of a German company) would make the practical defence of interests difficult which in turn would imply denial of their right to defence (. . .) Therefore the lack of international jurisdiction of the Spanish Courts and Tribunals filed by declinatory plea by both of the defendants is dismissed".

3. Non contractual obligations

– *AAP* Almeria, 31 May 2004. *Web Westlaw* JUR 2004/192811.

Brussels Convention of 10 May 1952 on the arrest of seagoing ships. Possibility for parties to come to a mutual accord agreement on the competent court to settle disputes. Article 58 *LECiv*/2000 not applicable. The court may not, *ex officio*, reject the claim based on an alleged lack of territorial jurisdiction.

"Legal Grounds

(. . .) An analysis should first of all be carried out in respect of the grounds for the appeal challenging the first instance resolution taking the view that the Court should not have questioned ex officio its own territorial jurisdiction given that the rules governing the designation of jurisdiction in accordance to the international treaty on the arrest of seagoing ships of 1952 are not imperative. The ground should be accepted although it is true, as indicated in the appealed resolution, that in principle the Brussels Convention provided for a series of alternative forums and it is up to the complainant to select one of them: a) the habitual place of residence of the defendant or the location of one his establishments; b) the place where the seizure of the accused ship took place or of another ship belonging to the same defendant or the place at which the seizure would have taken place if bail or some other form of guarantee had not been pledged and c) the place of arrest when the latter takes place at port, networks or internal waters. However, the establishment of such alternative elective

forums does not preclude the submission of the parties, either expressed or tacit, to a specific court in light of the fact that article 2 of the Convention specifically states that 'the provisions of article one shall not in any way prejudice the right of the parties to submit an action for reason of arrest to the jurisdiction agreed to by common accord nor shall they prejudice its submission to arbitration'.

Thus, the Convention expressly recognises the parties' right to, by mutual accord, to agree upon the competent court to resolve conflicts. This pact does not necessarily have to be made prior to the dispute (expressed submission) but can also be established following the filing of the claim given that the regulation does not foresee any restriction in that regard. The accused then submits to the forum designated by the complainant unless the latter, by means of a declinatory plea, prevents the Judge from performing an ex officio assessment of the lack of territorial jurisdiction, a faculty that may only be invoked in cases in which, by legal provision (or international treaty) expressed or tacit submission of the parties to a freely agreed forum or one selected by the complainant and accepted by the defendant is strictly prohibited. Thus article 58 of the *LECiv* is not applicable to the case at hand in which the Judge a quo inappropriately maintained her decision to declare the claim inadmissible due to lack of territorial jurisdiction given that the harmonic interpretation of articles 1 and 2 of the Brussels Convention of 10 May 1952 does not admit any other conclusion than that of considering that the elective forums enumerated in article 1.1 are subsidiary or additional and therefore only apply in the absence of expressed or tacit submission by the parties. This implies that the Court cannot ex officio reject the claim based on an alleged lack of territorial jurisdiction which, in the event of tacit submission (article 2 of the Convention considered jointly with article 56 of the Code of Civil Procedure), can only be agreed to upon request by either of the defendants once they have been summoned to respond to the claim (article 404 *LECiv*) by means of filing the requisite declinatory plea in accordance with article 59 considered jointly with articles 63, 64 and subsequent of the *LECiv*.

It is therefore not necessary to examine the remaining grounds put forth by the appellant in respect of the concurrence of one or several of the titles attributing jurisdiction laid down in article 1.1 of the Convention, an issue that must remain free of pre-judgement until a stand is taken by the defendant, the Order should be contested and the court should admit the claim and proceed in compliance with articles 404 *et. seq.* of the *LECiv* without prejudice to the pronouncement which could be made on its territorial competence if questioned by either of the defendants by means of a declinatory plea".

4. Lis pendens-related actions

– *AAP* Balearic Islands, 9 March 2004. *Web Westlaw* AC 2004/608.
Divorce case submitted to the German courts. Admission of the claim by the

Spanish court could give rise to contradictory resolutions in two lawsuits between the same parties and with the same purpose.

"Legal Grounds:

(. . .) According to the circumstances of this case, the Spanish courts should refrain from hearing this case due to lack of international jurisdiction. First of all, it must be reiterated that Council Regulation 1347/2000 of the Council of the European Union is not applicable to the case at hand because when the case was submitted to the German courts on 28 November 2000 the said Regulation was not yet in force bearing in mind that it envisages a period of *vacatio legis* until 28 February 2001 and article 42 thereof provides that it shall only be applicable to cases presented subsequent to its entry into force. Second of all, it must be acknowledged that the German court has jurisdiction to hear the divorce case submitted by Ms. María Inmaculada because the complainant has German nationality, resided there at the time that the claim was filed and lives with her son who has his habitual residence in that country. In this context, with the case having been declared admissible in Germany, a problem of international lis pendens arose because if the claim were declared admissible for hearing before a Spanish court, contradictory resolutions could be delivered in the two litigations between the same parties and focusing on the same issue. Quite clearly if the claim had not been filed in Germany (Mr. Cornelio being notified on 28 April 2003) a month before the claim was filed in Inca, the Spanish court would have had jurisdiction given that the party initiating the claim is of Spanish nationality and resides in Spain. Therefore there should be no doubt in the mind of the appellant: It is not that the Spanish court in and of itself lacks jurisdiction. It could have initially admitted the claim and been declared competent. The fact is that another element which was initially ignored has come into play and jurisdiction was therefore handed over to the German court given that the same claim was filed there at an earlier date. Therefore, when this circumstance became known, lack of international jurisdiction was acknowledged and the court refrained from hearing the claim".

III. PROCEDURE AND JUDICIAL ASSISTANCE

– *AAP* Barcelona, 16 July 2004. Web Westlaw JUR 2004/224117.

Bilateral agreement between Spain and the Union of Soviet Socialist Republics. Application of Spanish law to acts of procedural communication. Defencelessness.

"Legal Grounds:

Ms. Rocio and Ms. Carmen filed a claim before the Court a quo against Ms. Milagros calling for recognition and enforcement of a judgement delivered on 19 April 2002 by the Oktiabrski regional court (. . .) in request of compensation for material and moral damages in the amount of $US 635,937 for Ms. Rocio and $US 30,000 for Ms. Carmen.

(. . .) In dismissing the appeal for reversal the disputed ruling alluded to (in respect of notifications) the International Convention on the service abroad of

judicial and extrajudicial documents in civil or commercial matters concluded at the Hague on 15 November 1965. However, the rule of specification calls for compulsory application first of the bilateral agreement concluded between the Kingdom of Spain and the Union of Soviet Socialist Republics regarding judicial assistance in Civil matters signed on 26 October 1990. Article 27.4 of the said agreement indicates that the enforcement proceeding shall be governed by the law of the Contracting Party in whose territory said resolution shall be enforced. This implies the application of article 161.2 of Law 1/2000 of 7 January in conjunction with article 553.2 of that same law. From the first precept and the content of the proceeding dated 23 April 2003 the notification can be assumed as having been carried out. It should also be added that the documentation attached to the first Letter Rogatory shows no indication whatsoever that the defendant is unaware of this enforcement procedure".

– *AJ* 1ª I. Vizcaya, 5/2004, of 14 February. *Web Westlaw* AC 2004/823.

Acts of procedural communication. The need for international notification. Notification may not be made to the co-signer.

"Legal Grounds:

Article 155 of Law 1/2000 (RCL 2000, 34, 962 and RCL 2001, 1892) of the Code of Civil Procedure (*LECiv*) states that in the case of the first summons or citation, acts of communication shall be undertaken by means of delivery to the domicile of the litigants. Consequently, citation in the case of oral proceedings must be verified, an attempt being made to deliver the citation at the domicile of the defendant, the London Steam-Ship Owners Mutual Insurance Association Limited. In the case of oral proceedings the domicile should be provided by the claimant in the abbreviated claim (article 437.1 *LECiv*) or, if appropriate, in the ordinary claim (article 399.1)

This is the preferred legal formula for the delivery of a hearing citation. The other channels, i.e. delivery to a third party which was the intention of the claimant, consultation of the Civil Default Register or public notice, are clearly subsidiary from a legal standpoint, fruit of constitutional doctrine on judicial protection guaranteed under article 24 of the Constitution (RCL 1978, 2836), implying the responsibility of the court to see that acts of communication, especially those involving the possibility of taking part in the hearing, reach the addressee.

The interpretation made by the appellant that article 51.1 of the *LECiv* allows for the summons to oral proceedings to be served through the consignee entity in Bilbao is not valid because the said rule refers to an establishment open to the public, an establishment that does not exist, or an authorised representative in the place where the legal situation or relationship is to take effect.

We shall put aside the thorny subject of territorial jurisdiction for although the event took place at the Sopelana beach, judicial circumscription of Getxo, this court accepts jurisdiction in order to avoid the filing of a negative juris-

dictional conflict (article 60 *LECiv*) before our provincial court which is notorious for taking several years to sort out.

The fact is that the defendant, the London Steam-Ship Owners Mutual Insurance Association Limited, has a consignee agent in Bilbao by the name of Bereincua Hermanos, SA that the claimant considers an 'authorised representative' for the purpose of receiving a hearing citation. Something therefore needs to be said about the characteristic representation of consignees.

(. . .) Therefore, from a legal standpoint, the consignee represents the ship-owner but does so in the strict terms of article 73.2, i.e. for the purpose of the aforementioned Ports Law in dealing with claims from the port authority regarding tariffs or services generated by its ships.

(. . .) Indeed the claim here is based on article 1902 *CC* regarding charges filed by a surfer against the ship-owner and the ship *Prestige* for negligence for the oil stains sustained by his surfboard during the days that Cantabrian Sea was affected by an oil spill from that ship. In other words, no claim is being made for maritime transport or damaged goods. The ship in question does not have a Spanish owner, is not insured by a Spanish company, did not set sail from a Spanish port and did not dock in national territory. Moreover, the aforementioned consignee, Bereincua Hermanos, SA did not take part in the transport contract which could, in a certain sense, have justified its association with the ship-owner.

Having established that there are no grounds for serving the summons to a third party, when the complainant has the means to identify the registered office of the defendant, as was stated in the appealed decision, that does not mean that the defendant may not be summoned to take part in the oral proceedings. In light of the company name the defendant seems to be British and is therefore from a country forming part of the European Union thus making postal communication quite simple.

This means that the London Steam-Ship Owners Mutual Insurance Association Limited can be summoned at its registered office in Great Britain since on 10 December 1965 that country signed the 15 November 1965 Convention on the service abroad of judicial and extrajudicial documents on civil matters subscribed to by Spain as well as published in the Official State Gazette on 25 August 1987.

In light of all of this data the only conclusion that can be reached is that the defendant may not be summoned to take part in oral proceedings through the consignee company Bereincua Hermanos SA with registered office in this city of Bilbao. An attempt must be made to serve the summons at the defendant's registered office in the United Kingdom the address of which should be provided by the claimant and if the latter was able to consult the web page to show that the Bilbao company was the consignee, he should also be able to accomplish the simple task of identifying the company's registered office in Great Britain".

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENTS AND DECISIONS

1. Family

– *ATS*, 8 June 2004. *Web Westlaw* RJ 2004/3820.

Request for recognition of a foreign divorce judgement. Lack of jurisdiction of the Supreme Court. LO 19/2003. Jurisdiction of the first instance courts.

See also, in the same sense, *ATS*, 20 April 2004, RJ 2004/3449; *ATS*, 11 May 2004, RJ 2004/4715.

"Legal Grounds:

(. . .) In compliance with the provisions of sole article, paragraph eleven of Organic Law 19/2003 of 23 December (RCL 2003, 3008), amending Organic Law 6/1985, of 1 July (RCL 1985, 1578, 2635) of the Judiciary (Official State Gazette of 26 December 2003) in force as of 15 January 2004 and according to which 'in civil matters the first instance courts shall hear: 5. Request for recognition and enforcement of foreign judgements and other judicial and arbitration resolutions unless, in accordance with treaties and other international rules, these cases must be heard by another court or tribunal'. Therefore, it must be affirmed that this Court lacks jurisdiction to hear the request for *exequatur* of the judgement whose recognition is sought which was submitted to this Court on 19 February 2004 when the said Organic Law was in force".

– *ATS*, 2 March 2004. *Web Westlaw* RJ 2004/1321.

Exequatur of a divorce judgement delivered in Morocco. Objective lack of jurisdiction of the Supreme Court. Cooperation Agreement between Spain and Morocco signed in 1997. Jurisdiction of the Court of First Instance ex article 955 *LECiv*/1881.

"Legal Grounds:

(. . .) Article 25 of the Judicial Cooperation Agreement on Civil, Trade and Administrative Matters between the Kingdom of Spain and the Kingdom of Morocco signed at Madrid on 30 May 1997 (Official State Gazette issue 151 of 25 June) provisionally entering into force on 30 May 1997, the date of its signing, and definitively on 1 July 1999 (Official State Gazette 151 of 25 June 1999), establishes as the competent authority 'the court of first instance – sic – of each of the contracting states' thus granting the right of enforcement of the resolution, upon request of the interested party, in accordance with the law of the State in which the said enforcement is requested. Therefore, it must be affirmed that this Court lacks jurisdiction to hear the request for exequatur of the judgement whose recognition is sought which was submitted to this Court on 21 July 2003 when the Agreement was in force".

– *ATS*, 17 February 2004. *Web Westlaw* RJ 2004/1421.

Denial of *exequatur*. Divorce by mutual agreement. Notary writ issued in Cuba. Domicile of the spouses in Spain at the time the divorce was processed before the Cuban authorities.

"Legal Grounds:

(. . .) Given that there are no international instruments applicable to the case at hand, this request for recognition must be examined in light of the conditions laid down in *LECiv*/1881 (articles 951 and *et. seq.*) (. . .). The request for recognition cannot go forward due to an insurmountable obstacle standing in the way of the homologation pursued, i.e. the fact that both parties were officially residing in Spain at the time the divorce request was being processed in the State of origin. It should not be forgotten, for recognition purposes, that in verifying the concurrence of forums of international judicial jurisdiction the underlying purpose is to admit the said jurisdiction – always for the purpose of the homologation sought – based on a criteria of proximity to the object of the process allowing for the guarantee of procedural rights and guarantees, avoiding litigation before jurisdictional bodies that, due to their disconnection from the subject of the litigation, put the defendant in a position of defencelessness and preventing fraudulent behaviour by the parties who may be seeking forums of convenience which assure application of more favourable or advantageous material rules. In this *exequatur* proceeding the resolution whose recognition is sought shows that both spouses had domicile in Spain at the time their divorce was being processed by the Cuban authorities. In this context it is difficult to understand why the parties would turn to the Cuban authorities to request their divorce unless their real intention was to consciously and deliberately seek a forum of convenience allowing them to avoid the rigours imposed by applicable substantive law, subjecting the issue to the foreign forum in order to receive more favourable treatment than would have been received vis-à-vis the substantive law applicable in the said State in accordance with its laws. In light of these circumstances, any other links to Cuban jurisdiction such as the place where the marriage ceremony took place or the fact that the wife has Cuban nationality, which in principle are valid even when removed from the criteria of Spanish law, should be foregone given the facts of this case. In summary, the concurrence of circumstances justifying the jurisdiction of the foreign authority cannot be confirmed nor can the suspicion of fraudulently seeking a forum of convenience be reasonably excluded. Actually, it appears that submission to Cuban authorities is precisely due to reasons of this nature and this is even more evident when considering the short lapse of time between the date of the marriage and that of the divorce whose recognition is sought".

– *ATS*, 20 January 2004. *Web Westlaw* JUR 2004/54332.

Concession of *exequatur*. Danish judgment regarding the marriage separation between a Spanish woman and a Danish man recognised in Zaragoza. Articles 954 and et. seq. *LEC* 1881.

See also, in the same sense, *ATS*, 20 April 2004, RJ 2004/3450.

"Legal Grounds:

(. . .) Given that there is no treaty with Denmark nor any applicable international rules governing matters of recognition and enforcement of judgements,

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). According to the law of the state of origin applicable to the case, resolutions are final. This is a prerequisite, regardless of the recognition regime, laid down in article 951 (of the aforementioned *LECiv*/1881 – 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 . . . Requisite No 1 of article 954 of the aforementioned Law of 1881 should be considered fulfilled in light of the personal nature of the action taken. As for requirement No 2 of the same article 954, it has been accredited that the proceeding was initiated by common accord of the spouses. As for requisite No 3 of article 954, there is full conformity with the Spanish legal system in an international sense: article 81 of the Civil Code envisages the possibility of separation regardless of the nature or duration of the marriage. As for the rest, the fact that a basically administrative and therefore not strictly jurisdictional character is attributable to the resolutions pending recognition (they are issued by an authority of that order) is not contrary to the Spanish legal system. The authority before which the petition was submitted acted with full "imperium" and was the competent body to authorise separations by mutual accord and other measures in respect of the children born of the couple in accordance with "lex fori". These circumstances lead this court to consider the case within the limits of the legal system in an international sense as has been done previously in similar cases. The authenticity of the resolutions as required by article 954(4) is guaranteed by the legalisation with which the case has been processed as verified in the court record. There is no reason to suspect that the jurisdiction of the Danish authorities was born of the parties' search for a fraudulent forum of convenience. Article 6(4) of the Civil Code and articles 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 circumstances in favour of the jurisdiction of the Spanish courts do not concur. Quite to the contrary, there are clear connections such as the Danish nationality of the husband and residence of the spouses in Denmark when the case was filed before the Danish authorities, reasons allowing for the exclusion of fraud in terms of the law applicable to the substance of the case, an issue linked to the former. There are no indications of contradiction or substantive incompatibility with judicial decisions delivered or cases pending in Spain".

– *ATS*, 15 de June 2004. *Web Westlaw* JUR 2004/207253.

Denial of *exequatur*. Article 954.3 *LEC*. Not reconcilable with due process in Spain.

"Legal Grounds:

(. . .) Given that there is no treaty with the Republic of Argentina nor any applicable international rules governing matters of recognition and enforcement

of judgements, 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). In light of the grounds for opposition articulated by the party against which the *exequatur* is aimed, examination of the concurrence of conditions for recognition, in accordance with the general regime of conditions of the *LECiv* of 1881, requires control of requirement 3 of article 954 (of the aforementioned *LECiv* of 1881) – conformity with the Spanish legal system in an international sense.

This Court, regardless of whether the different conventional rules regulating the conditions for the recognition of the effects of foreign decisions so require, has established as an essential condition for the *exequatur* of a foreign judgement (and which may form part of the concept of the legal system in an international sense) the fact that the said judgement must be reconcilable with a previous judgement delivered or recognised in Spain and that there be no case pending in Spain which could give rise to a judgement that is incompatible with the foreign judgement. In principle, the parties need not be identical nor must there be absolute coincidence between object and cause, nor is it a requirement that the proceeding taking place in Spain be initiated subsequent to the one carried out abroad. It should be recognised, however, that the concurrence of these circumstances would make an "a postiori" argument for denial of *exequatur*. Under these conditions, it must be recognised that Spanish proceeding No 792/02 of First Instance Court No 3 of San Sebastian delivered an order (confirmed by a superior court) which "denied the request for restitution to the Republic of Argentina of the minors Penelope and Eugenio". This constitutes a clear obstacle for the recognition sought in this case.

In this context, recognition in Spain of a foreign judgement in such a way that its effects under the legal system of origin can be implemented in our country, is in unavoidable conflict with the very efficacy of the national resolution and especially, with the res judicata produced, preventing the possibility of another pronouncement regarding the same issue between the same parties which eventually could be different, with the resulting risk of subverting the harmony that is an essential element between judicial decisions forming part of states' domestic legal systems, running the risk of causing irreparable damage to the legal security in relations between parties".

3. Contracts

– *AAP* Balearic Islands, 14 October 2004. *Web Westlaw* JUR 2004/285896.
Concession of *exequatur*. Article 27 of the Brussels Convention.

See also, in the same sense (articles 27 and 28 of the Lugano Convention), *AAP* Zaragoza, 30 March 2004, *Web Westlaw* JUR 2004/137114.

"Legal Grounds:

(. . .) In this context, upon examination of the documents attached to the

request for recognition including the enforcement order whose *exequatur* is requested and in light of the grounds for appeal against the ruling in favour of the said *exequatur*, it should be concluded that there is no reason whatsoever to believe that the circumstances of this case coincide with conditions laid down in article 27 of the Brussels Convention which would call for refusal of the *exequatur*. Therefore, the appeal should be dismissed regardless of the fact that the appellant, at the proper procedural moment, i.e. upon filing request for the enforcement of the resolution of 29 October 1993, made the corresponding allegations in that respect within the time frame afforded to oppose enforcement".

– *AAP* Las Palmas, 26 April 2004. *Web Westlaw* JUR 2004/150691.

Concession of *exequatur*. Article 27 of the Brussels Convention, defencelessness attributable to the defendant.

"Legal Grounds:

(. . .) The grounds for appeal alleged by Mr. German are based on article 27.2 taken in conjunction with article 46.2 both of the Brussels Convention of 27 September 1968 which is applicable to this case. In accordance with these precepts, the foreign resolution shall not be recognised when it is delivered in default and the defendant had not received the summons or some equivalent document in standard fashion and with sufficient time to defend himself (. . .). In light of the foregoing doctrine, this appeal focuses on determining whether the appellant, in the claim filed against him in an English court of law, had or did not have the same opportunities to defend himself afforded to all citizens by our Law (. . .). From this perspective it is obvious that the appellant's pretensions do not merit favourable treatment in this appeal. First of all, and as the appellant himself states, the attached documentation makes no mention of Mr. German being declared in contempt of court and that is because he never was, not in the strict formal or procedural sense and less still in the sense he is seeking. The certification attached to the request in this proceeding clearly shows that Mr. German was properly summoned by being served notice of the claim and the defendant himself actually signed the acknowledgement of receipt on 23 June 1998 and was informed in compliance at all times with English procedural rules. Annex 3 shows that Mr. German made two sworn statements before the English court in June of 1998. It is likewise clear that the appellant employed the assistance of a lawyer and once the condemnatory judgement was delivered he filed an appeal which was heard by the English appeals court. Under these circumstances, the only documents required are the authenticated copy of the resolution and any document accrediting that under the law of the State of origin the said resolution has been notified and is enforceable and this has been complied with here. It should be mentioned that in this case the documentation also indicates that the defendant was provided with the time and the means by which to defend himself and any defencelessness that could be contrived from his failure to attend the hearing held on 30 January 2002 is only attributable to the defendant himself. The situation on which the appellant bases

his argument is an individual sort of default devised for the convenience of the said appellant and has no constitutional ramification whatsoever. Despite having been properly summoned and cognoscente that the case was being heard, the appellant heeded the call of the court only when he saw fit to do so. Note that he did not even appear before the Court a quo when he was served notice at the first instance stage with regard to the request for recognition and enforcement".

– *ATS*, 20 January 2004. *Web Westlaw* JUR 2004/54318.

Denial of *exequatur*. Failure to personally notify defendants of the judgement: constituting the only means by which the said defendants could have filed appeal through ordinary channels against such judgement. Judgement lacking sufficient grounds: impossible to determine the legal reasons justifying the conviction.

"Legal Grounds:

(. . .) Having regard to the compulsory notification of judgements it should not be forgotten that the personal communication to the defendants of the results of the lawsuit is the only means by which the said defendants can file an appeal through ordinary channels against such judgement. This issue is clearly important with regard to procedural guarantees which undoubtedly inform the concept of public order in an international sense. Based on this premise, the requirement of personal notification of the judgement was clearly not complied with. Nothing is mentioned in this respect on the 'incidence list' attached and the expression contained on foreign resolutions 'With copy sent to:' followed by the name of the defendants and their address in the United States. Even if the hypothetical delivery could be accredited, this in no way proves the defendants' effective reception of the said judgements. The aforementioned lack of notification cannot be justified by the fact that the defendants were declared in default and that the said default was considered voluntary because, on the one hand, it has not been shown that in accordance with this foreign law the fact that the defendants were declared in default releases the courts from the responsibility of all subsequent notification including the judgement itself. And, on the other hand, even if the latter circumstance had been proven in light of the foreign law governing the proceeding of origin, the fact is that it would not have been accepted under domestic law. In light of the above, the appeal should be admitted and the *exequatur* requested declared inadmissible given that the requesting party failed to show that the defendants had personal knowledge of the results of the litigation".

V. INTERNATIONAL COMMERCIAL ARBITRATION

– *ATS*, 27 January 2004. *Web Westlaw* RJ 2004/1572.

Concession of *exequatur* regarding a resolution delivered by a German court. Defencelessness on the grounds of not knowing the language non-existent.

"Legal Grounds

(. . .) The party against whom recognition and enforcement of the foreign

decision is sought opposes the concession of the *exequatur* claiming, first of all, what he refers to as "language problems" in reference to the fact that both the introductory writ of the arbitration as well as the arbitral award and the acts of communication between one and the other were drafted in English or German and using technical language which is difficult for a person without a good command of those languages to understand. He claimed that this precluded his understanding and led to his rejection of those texts. The argument is in line either with violation of the regulatory rules of notarial legislation – an attempt was made to deliver notification of the arbitral award through this channel – due to the fact that the summons was not accompanied by a translation into Spanish of the act whose notification was intended or with violation of constitutionally recognised procedural guarantees given that the defendant was left defenceless because of the language used during the arbitration proceeding and for acts of communication between the parties.

The allegations made by the party opposing the *exequatur* should be examined from the perspective of the grounds for denial of recognition laid down in article V of the New York Convention paragraph one letter d) and paragraph two letter b). Neither of these two perspectives provides sufficient grounds for preventing the homologation sought. First of all, it has not been established by means of the facts alleged that what was agreed between the parties in respect of the arbitration proceeding was not upheld or that such facts represent a violation of the law of the country in which arbitration has taken place. Indeed the action of the arbitration court is in full compliance with the Arbitration Court Regulation Waren-Verein der Hamburger Börse e.V., regulating the proceeding at that arbitration institution to which the litigants were subject and article 12 of which (focusing on the language to be used by the arbitration court) states that the court shall determine the language to be employed throughout the arbitration proceedings. As a general rule, the German language should be used although the court could order or permit the use of a foreign language for specific actions during the proceeding especially for the testimony of a witness who does not speak German and likewise for the drafting of a claim, for other documents and for the submission of any document drafted in a foreign language. Second of all, in respect of notification of the arbitral award, the case file shows a summons issued to a Spanish notary public who bears witness to the fact that the aforementioned arbitration resolution was accompanied by the corresponding Spanish translation which would have permitted the opposing party to take full stock of its content if its delivery had not been rejected for no apparent reason. And third of all because in any case, from the perspective of respect for constitutionally recognised procedural rights and guarantees, the content of which is recognised by the procedural branch of the legal system, and especially upon examination of the allegation from the point of view of defencelessness prohibited by article 24.1 of the Spanish Constitution, it must be recognised that for the said allegation to be considered constitutionally relevant, it must be substantive and effective and not purely nominal formal or apparent. And it is not

easy to recognise the defencelessness of a person in these circumstances, taking part in international trade and voluntarily entering into a contract with a foreign company and voluntarily availing oneself to foreign law and a foreign arbitration institution; valid submission which envisaged being subject to the regulatory rules of the proceeding including, as mentioned above, rules regarding the language used by and before the arbitration court. It should also be added that language differences per say cannot be used to claim supposed defencelessness capable of undermining recognition of a foreign resolution. This is even more true when the language used throughout the arbitration proceeding is the same as the one used in drawing up the contract. And in this case the language used is that of the purchasing party and was not an impediment for the selling party's (the complainant in this case) comprehension of the content of that contract. In short, this cannot be grounds for a party involved in international trade where language differences are commonplace. Thus, traders involved in this market should favour the adoption – or at least envisage the adoption – of specific measures for the proper undertaking of business relations including cases which could turn litigious".

– *ATS*, 3 February 2004. Web Westlaw RJ 2004/3112.

Concession of *exequatur* of arbitral award delivered in London. Application of the New York Convention.

"Legal Grounds

(. . .) In accordance with the rules laid down in the New York Convention on the recognition and enforcement of foreign arbitral awards of 10 June 1958 applicable to this case, given that the resolution whose recognition is sought is covered in article I of the Convention, the requesting party furnished the documents referred to in article IV, duly translated into Spanish, and also confirmed the enforceability of the arbitral judgement. The circumstances giving rise to the arbitral proceeding are liable for submission in Spain to an arbitration hearing and the repeated arbitral judgement is not in conflict with the Spanish legal system (article V.2). Before analysing the causes for opposition alleged by the company against the other seeking the *exequatur* of the arbitral award, it should be pointed out that the allegation system and the requisite distribution of burden of proof laid down in the New York Convention, on the one hand, and respect of the adversarial system and equality of arms in the proceeding forming part of the constitutionally recognised procedural guarantees, on the other, point to the need of the party requesting recognition, the party solely responsible, in principle, for alleging and confirming the concurrence of circumstances calling for homologation laid down in article IV taken in conjunction with article II of the Convention, to be served notice of the causes for opposition to the *exequatur* submitted by the other party against the said homologation in order that such requesting party may have the opportunity to formulate arguments against these causes and confirm circumstances that would disprove them. But this does not open a successive, reciprocal and unending process of allegations and evidence

between the parties because in the procedural acts the opportunities for defence of one or the other parties is not envisaged. The party opposing the *exequatur* is therefore not entitled to take advantage of compliance with the order issued to by this court calling on the said party to furnish the requisite translation of those documents supporting defence allegations presented in compliance with article 956 of *LECiv*/1881, to add new allegations and submit new documents in light of the terms of the writ responding to the questions formulated and the documentation attached to the said writ. These new allegations and documents should therefore not be taken into consideration in the resolution of this recognition issue. Further expounding upon the foregoing, the conditions are set to analyse the causes that, in the view of the party concerning which enforcement of the foreign decision is sought, prevent the homologation of the latter. The *exequatur* is opposed affirming the concurrence of the causes for denial of recognition laid down in article V(1)(b) and V(2)(b) of the New York Convention. Opposition is based on the same facts viewed from a different perspective; i.e. the arbitral institution failed to furnish proper notification of the arbitral resolution. The opposing party only received a copy from the claimant and therefore, given that the said party was unable to confirm the authenticity of the resolution received, he could not properly exercise his right to defence, filing within the deadline an appeal or other means of challenge envisaged in the rules governing the arbitration proceeding. This is the basis of the claim of defencelessness affirming the arbitral decision's violation of legal procedure.

However, these allegations do not justify the objective sought. First of all, in respect of notification of the decision, the requesting party furnished a certificate issued by Mr. Alvaro to the Federation for Oils, Seeds and Fats Association Ltd. – the arbitral institution- which indicated that the decision was final and binding and that the party now opposing its recognition was late in filing his appeal against the arbitral decision meaning that the said appeal was received past the deadline date. The said certificate goes on to confirm that the attached documents are authenticated copies of the originals which were sent to the *Sociedad Ibérica de Molturación, S.A.*, and include the certified letter sent by the aforementioned arbitral institution dated 12 December 2000 to the aforementioned entity to which a photocopy of the decision was attached in accordance with regulatory rules governing arbitration proceedings. A copy of the said letter has likewise been included in the case file together with the photocopy (which has not been challenged) of the postal service remittal document. Reception of this delivery has not been verified, only its remittal, but the opposing company does not deny having received this delivery but simply alleges that the photocopy of the arbitral award was not included. This does not, however, coincide with the content of the aforementioned certification of the arbitral institution. However, if despite the actions described above there still were doubts surrounding the effective reception by the opposing company of the arbitral resolution whose recognition is sought, these doubts would be cleared up once and for all upon examination of the content of the fax furnished by the requesting party con-

taining the letter sent by SIMSA on its own letterhead paper. This letter was sent to the arbitral institution as well as to the requesting party as acknowledgement of receipt of the decision whose recognition is sought and indicated the company's intention of studying the content of that decision and the possibility of filing a challenge.

It is at this point that the case surrounding the causes for denial of *exequatur* proposed by the opposing party begins to crumble. Whether examined from the perspective of article V(b) of the Convention or in accordance with the requirements of the international legal system, in light of the fact that the arbitral award was indeed received, the opposing party failed to prove, as was its obligation, that the said notification was contrary to the rules governing the arbitration proceedings or that the inadmission of the appeal against the ruling which was filed late was incorrect or in violation of procedural rules. And from the perspective of legal procedure, of constitutional content as is well known, the irrelevance of the opposing party's allegation becomes clear when the latter fails to establish that its right to defence has been violated for having been unduly deprived of the means and channels of appeal whether through an arbitrary decision with no legal base or grounds, or through a decision based on a clearly irrational interpretation of legality or based on a proven error, or through a resolution based on excessive and disproportionate formalities vis-à-vis the aims guaranteed by regulatory norms regarding access to appeal procedures laid down in the applicable procedural guidelines. In light of the foregoing, the grounds for opposition to the *exequatur* proposed by the defendant company should be dismissed and the decision should be declared enforceable".

– *ATS*, 20 July 2004. *Web Westlaw* RJ 2004/5817

Application of the 1969 Agreement signed between Spain and France or of the 1958 New York Convention to the *exequatur* of the ruling delivered by the Paris International Chamber of Commerce.

"Legal Grounds:

This sort of concurrence of regulations should be resolved, first of all, by attending to the rules regarding relations contained in each one of the aforementioned international instruments and then (and mainly) by attending to the principles that underlie the regulation of the recognition of decisions and the extra-territorial efficacy of resolutions (. . .).

This conflict of rules must then be resolved in accordance with the rule of specification which entails a preference for the supra-national rule (in light of its content) over the general rule and in accordance with the principle of maximum efficacy or a preference for the recognition of foreign decisions. Both of these principles displace the application of the bilateral agreement in favour of the multilateral one whose rules are rooted in the assumption of the validity and efficacy of the agreement to submit disputes to arbitration as well as the arbitral ruling or resolution resolving the said disputes (cfr. article II.1 and III.1 of the New York Convention). The said rules also envisage the transfer of burden

of proof to the party reluctant to accept the efficacy of the arbitral resolution (article V.1 considered jointly with articles IV.1 and V.2 of the Convention) thus establishing a more favourable recognition regime than that provided for in the aforementioned bilateral agreement".

VI. CHOICE OF LAW: SOME GENERAL PROBLEMS

1. Classification

- *SAP* Castellón, 21 January 2004. *Web Westlaw* AC 2004/452.
See X.4. Marriage

a) Proof of foreign law

- *STC*, 4 March 2004. *Web Westlaw* RTC 2004/29

Labour contract between a worker of Guatemalan nationality, resident in the US and the Spanish Consulate in Los Angeles. Proof of foreign law.

"Legal Grounds:

As is explained in detail in the background information, although the *petitum* of the petition for protection of the court is directed exclusively against the judgement handed down by the Social Affairs Division of the Supreme Court on 22 May 2001 (RJ 2001/6477), in this constitutional proceeding the petitioner claims that the judgement delivered by the Madrid High Court of Justice on 4 May 2000 rejecting his claim for dismissal, filed in response to dismissal by the Spanish Consul in Los Angeles (California, United States of America) in application of the California Labour Code (article 2922), violated his fundamental right to effective protection of the courts (Spanish Constitution article 24.1 [RCL 1978/2836]).

Following the order of violations put forward by the appellant, the first claim regards violation of the right to effective protection of the courts (Spanish Constitution article 24.1) in relation with articles 9.3, 117.3, and 118 of the same legal text claiming that the allegation, burden of proof and application of foreign law criteria followed in the appealed judgements contradicts case law on this point established by the Constitutional Court, the Supreme Court itself and likewise other lower courts. As a consequence of this resolution the burden of proof was inverted, becoming the responsibility of the complainant and thus causing his defencelessness.

In the view of the Counsel for the State, the request filed for protection should be denied because it does not comply with the requirement laid down in article 44.1 c) *LOTC* (RCL 1979/2383) because in the appeal for unification of doctrine the complainant failed to claim any violation of a fundamental right and simply claimed that the burden of proof in foreign law was the responsibility of the defendant, that the latter had not furnished such proof and that

therefore the case should be resolved applying Spanish labour law, lex fori, an argument of mere ordinary legality. He goes on to state that in this case there is no problem in the allegation and burden of proof of foreign law but there is rather a defect in the construction of the claim by the party who is now the appellant given that the latter, unaware of the conflict rule laid down in article 12.6 of the Civil Code (LEG 1889/27) (*CC*) which refers the case in an easily intelligible fashion to foreign law, bases his claim exclusively on Spanish law.

. . .

Before determining whether the right to effective protection of the courts has actually been violated as the appellant claims, an analysis of the procedural objection raised by the Counsel for the State must be analysed. As was indicated, in his writ the latter made a reference, as has already been mentioned, to the cause of inadmissibility as the lack of formal invocation of a violation of constitutional law in the proceeding and in the event that such a violation were proven, the claim would be admissible. If this circumstance actually were to arise, that would be grounds for non-admission envisaged in article 50.1 a) *LOTC* (RCL 1979/2383), in relation with article 44.1 c).

. . .

The prior invocation requirement has a dual purpose: on the one hand, to give judicial bodies the opportunity to rule on possible violation and re-establish, as needed, constitutional law in ordinary jurisdictional terms and, on the other hand, to preserve the subsidiary nature of the constitutional jurisdiction of protection . . .

As the Counsel for the State points out in this case, the judgement delivered in first instance dismissed the claim because it was proven that foreign law was applicable by means of a certificate submitted by the Spanish administration.

An appeal for reversal was filed by the claimant's legal representative and the first three grounds of that appeal requested a review of proven facts No 4 to 6. Ground four was based on violation of article 12.6 *CC* (LEG 1889/27) and case law interpreting the latter. The fifth and last ground for reversal claimed non-application of article 12.3 *CC* (public order). None of these grounds would even suggest infraction of fundamental law as now invoked.

The judgment handed down by the Social Affairs Division of the Madrid High Court of Justice on 4 May 2000 rejected the first three grounds for reversal. In addressing the other two the Court seemed to accept that the defendant (the General State Administration, Ministry of Foreign Affairs) failed to establish the law in force in California on the date that the worker was dismissed although this is not grounds for the application of Spanish law as the appellant holds. Quite the opposite is actually true. Once confirming that foreign labour law governs the employment contract, it was actually the complainant – according to the court – who should have proven it and he failed to do so.

The claimant filed a Supreme Court appeal for the unification of doctrine on 2 June 2000 clearly stating that the litigious issue focused on which party to the litigation, pursuant to article 12.6 of the Civil Code, has the burden of

proof, an issue of ordinary legality without any constitutional repercussions whatsoever. Logically, upon filing the Supreme Court appeal for the unification of doctrine on 5 July 2000, the only ground was that based on infraction of articles 1214, 12.6 and 6.4 *CC* and likewise article 12.3 *CC* in relation with different precepts of the workers' statute and article 10.6 *CC* and therefore no constitutional problem or issue was either directly or implicitly addressed. The arguments made were of simple legality and were limited to pointing out that proof of foreign law was the responsibility of the defendant, that the latter failed to furnish such proof and that therefore the issue should be resolved by applying Spanish labour law, *lex fori.*

In short, the party requesting protection failed to invoke alleged violation of fundamental rights at the proper moment and thus failed to comply with the requirement set out in article 44.1 c) *LOTC* (RCL 1979/2383); the two grounds for protection could have been valid at the Supreme Court Appeal".

– *STC*, 18 October 2004. *Web Westlaw*. RTC 2004/172.

Labour contract between a Spanish national and the Spanish Consulate in Montevideo (Uruguay). Proof of foreign law.

"Legal Grounds

This petition for protection of the court is aimed against the Judgements . . . determining that the dismissal was legitimate in accordance with Uruguayan law declared applicable to the case.

In the view of the petitioner for protection, the said judicial resolution is in violation of his fundamental right to effective protection of the courts (Spanish Constitution article 24.1 [RCL 1978/2836]) and of the criteria followed in this regard by this Constitutional Court in several different judgements, . . . on three accounts: for having applied Uruguayan law to the labour relationship when the criteria established by case law of the Supreme Court and of the very High Court of Justice given identical case facts is to apply Spanish legislation; for failing to accredit the said Uruguayan law in the case file which should have led to the application of Spanish law in light of the lack of proof of foreign law; and for failing to make mention of the law applied in the judgement so that this could be contested in the appeal for reversal thus causing a situation of defencelessness of the complainant due to lack of sufficient grounds. Indeed, the lack of sufficient grounds of the appealed judgements is the complaint which sets the stage for the classification of the three dimensions alluded to in the claim within the framework of the fundamental right to effective protection of the courts; the last of these directly given that the appealed resolutions failed to make mention of the Uruguayan law applied. As regards to the criteria adopted in the case of the first two according to which, in the view of the complainant, the judicial bodies diverged from proven case-law criteria, they should have been backed by further grounds in the absence of which it must be considered that the said resolutions are the fruit of a whimsical and irrational approach leading to the defencelessness of the complainant.

In contrast, the Counsel for the State denies that the alleged violations actually took place. Rather than a violation he points to the existence of a procedural obstacle standing in the way of admission of this appeal for protection consisting of failure to invoke, at the preliminary judicial stage, the fundamental right deemed violated in relation with two of the three alleged violations. Indeed, the appeal for reversal lodged against the first instance judgement only invoked the right to effective protection of the courts regarding the third of the three violations concerning the judgement's lack of sufficient grounds due to failure to cite the Uruguayan law applied. Independent of that fact, however, the Counsel for the State goes on to indicate that none of the three alleged violations exhibits even the most minimum consistency which would warrant granting protection of the court: the first because the list of case-law criteria do not actually exist and not even the Supreme Court judgement cited in the appeal or the STC 10/2000 of 17 January (RTC 2000/10), refer to litigation resembling that under analysis here; the second because there was no lack of proof of Uruguayan law as alleged by the complainant; and the third because the Uruguayan law applied, although not explicitly cited in the judgement, is sufficiently identified and was, in any case, subsequently made explicit in the reversal judgement.

. . .

However, the Counsel for the State's argument must be dismissed in light of the fact that in his appeal the complainant invokes, not so much three independent violations of the fundamental right to effective protection of the courts, but rather three facets, a three-pronged dimension in the words of the request for protection, which are intimately linked around the same violation of his fundamental right caused by the decision, described as ungrounded, whimsical and irrational, to apply Uruguayan law to the case and, in his view, the said law was not applicable, was not proven, nor was it sufficiently identified by means of a citation of the specific rule applied. It is from this global perspective that an assessment should be made of the invocation of the fundamental right made by the complainant in his appeal for reversal against the judgement of 11 July 2000 where he points out that the right to effective protection of the courts is satisfied with a legally grounded and reasoned response and is violated when the holder of that right is not granted access to the jurisdiction, receiving a response from the latter which lacks legal grounds and when the alleged violator of the said right is the appealed resolution delivered by a judge who saw it fit to apply Uruguayan law ex officio but failing to stipulate in any way whatsoever the law, article or any other reference to the aforementioned law thus giving rise to a violation of the constitution in the event that the latter were the applicable legislation. As can be deduced by the foregoing, in his appeal for reversal the complainant questioned the compatibility of the right to effective protection of the courts with the judicial decision as a whole which deemed Uruguayan law applicable and the way in which the said law was applied, regardless of the fact that in the structure used in the formulation of the appeal the complainant developed, in the section immediately following, the supposed

violation of articles 10.6 of the Civil Code (LEG 1889/27) and 1.4 of the Workers' Statute Law, merged text approved by Royal Legislative Decree 1/1995, of 24 March (RCL 1995/997) (hereafter, *LET*) in the selection of applicable law. This was the understanding of the court hearing the appeal for reversal which, upon analysing this ground for appeal, adopted the view that the appellant was denouncing the violation of Spanish Constitution article 24 by the judgement which admitted the applicability of Uruguayan law and which, ex officio, took the said decision while failing to cite any law in this regard. The conclusion which can be reached from the foregoing, with a greater or lesser degree of precision or technical rigour, is that the constitutional facet of the problem was revealed before the judicial body in terms that the latter was able to recognise.

. . .

A second general consideration needs to be made before delving into a detailed analysis of the appealed judicial resolution. As has just been pointed out, the petitioner for protection links the violation of his right to effective protection of the courts to the decision taken by the judicial body which the said petitioner describes as ungrounded, whimsical and irrational for applying Uruguayan law to this case and in his view the aforementioned law was not applicable, was not proven, nor was it sufficiently identified by means of a citation of the specific rule applied. Before analysing these issues it should be pointed out that on four occasions over the last several years this court has had to deal with different problems arising from the relationship existing between the fundamental right to effective protection of the courts and the allegation and proof of foreign law: SSTC 10/2000 of 17 January (RTC 2000/10); 155/2001 of 2 July (RTC 2001/155); 33/2002 of 11 February (RTC 2002/33); and 29/2004 of 4 March (RTC 2004/29). The issues addressed in the aforementioned judgements, while sharing a common legal problem, are all significantly different from one another and are also clearly different from the case now under scrutiny.

It should be made clear from the very outset that the issue which needs to be resolved in this appeal for protection is hardly comparable to any of the cases mentioned above. Indeed, although the appellant seeks support in case-law doctrine as has already been mentioned, it is also true that in this appeal, in contrast with that analysed in the other four, the complaint has not been dismissed due to lack of allegation or proof of foreign law. Quite to the contrary, both the Social Affairs Court as well as the Social Division of the High Court of Justice, without prejudice to certain ambiguities, have determined as proven the foreign law alleged by the accused administration and, based on the said allegation and proof, they have considered the dismissal of the complainant to be legitimate and have therefore dismissed his claim.

It is, therefore, from this perspective that we should analyse the three violations of the right to effective protection of the courts denounced by the complainant in his appeal.

The appellant has first of all denounced the decision taken by judicial resolution to apply Uruguayan law to his labour relationship when case-law criteria

of the Supreme Court and of the very High Court of Justice, when faced with identical case facts, applied Spanish law. Therefore, in the words of the appellant, in straying from established case-law, the judicial resolutions should have provided further grounds justifying this change in criteria and for not recognising a constitutional right and failing such grounds the conclusion is that the court is simply being whimsical.

This ground, however, cannot be admitted. First of all, no case-law has been identified featuring facts identical to the ones featured by the case at hand and the complainant has only identified a judgement delivered on 18 May 1999 (RJ 1999/4833) by the Social Division of the Supreme Court but regarding a case which is not at all identical to the case at hand. In this latter case it was proven that the labour contract had been signed in Spain which led to the ruling that Spanish law was applicable in accordance with article 1.4 *LET* (RCL 1995/997), in contrast to this case in which it is an equally verified fact that the labour contract was signed in Uruguay, the place of residence of the worker and the place where services were rendered.

This circumstance, i.e. the place of residence of the worker and the place where services are rendered, and which likewise coincides with the place where the contract was signed, supports the argument in favour of applying Uruguayan law in accordance with article 6 of the Rome Convention of 19 June 1980 (RCL 1993/2205, 2400) on the law applicable to contractual obligations.

Second of all, it must be verified whether the appealed judicial resolutions are supported by specific and detailed grounds in respect of this point, with a clear expression of the legal reasons justifying the said consideration thus excluding any suspicion of whimsical or arbitrary decision-taking. In this respect the first instance judgement points out that given that the labour contract took place between the parties verbally in Uruguay, Spanish labour law is not applicable to the case in accordance with article 1.4 of the Workers' Statute as well as with trade union considerations as pointed out in the Supreme Court judgement of 10 December 1996 (RJ 1996/9140), criteria and grounds which are reiterated in the reversal judgement.

Consequently, from the perspective of the requirement for reasoned judicial resolutions, it must be concluded that the appealed resolutions are in compliance with the right to effective protection of the courts in accordance with our doctrine. Indeed, the appealed judicial resolutions reveal the reasons on which their decision was based, the legal grounds of which are the rational, non-arbitrary and proper application of legality (applicable to all, SSTC 221/2001 of 31 October [RTC 2001/221], F. 6; 20/2003 of 1 February [RTC 2003/20], F. 5; and 136/2003 of 30 June [RTC 2003/136], F. 3), thus illustrating the *ratio decidendi* of the judicial decision and revealing the essential legal criteria underlying the decision regarding jurisdiction (SSTC 196/1988 of 24 October [RTC 1988/196], F. 2; 215/1998 of 11 November [RTC 1998/215], F. 3; 170/2000 26 June [RTC 2000/170], F. 5; 68/2002 of 21 March [RTC 2002/68], F. 4; 128/2002 of 3 June [RTC 2002/128], F. 4; 119/2003 of 16 June [RTC 2003/119], F. 3).

Second of all, the complainant claims grave defencelessness given that the appealed resolutions have intentionally and unreasonably strayed from case-law criteria and rules regarding the need to judge and deliver decisions in accordance with the law of the country when the application of foreign law has not been sufficiently proven.

In order to rule out any constitutional violation on this point without delving into an analysis of the substance underlying the claim (on which analysis was focused in the previous pronouncements made by this Court referred to above) it suffices to indicate that the two appealed judicial resolutions have deemed Uruguayan law proven and declared it applicable and this has not been a motive for dismissal of the claim for lack of proof of foreign law nor for subsidiary application of *lex fori*. They have simply applied the law designated by the conflict rule (art. 10.6 *CC* [LEG 1889/27] to govern the contract and, based on that, have ruled the dismissal legitimate.

In this respect it must be borne in mind that the accused administration dismissed the worker based on circumstances that it considered warranted dismissal and based on law (Uruguayan law) which, in its view, governed the contract. Having confirmed this latter point, the judicial bodies analysed the alleged causes for dismissal and assessed them as indeed warranting dismissal while expressing their approval of applicable legislation. It was the complainant who, as stated in the request for protection, invoked Spanish legislation in the proceeding with a view to defending the inadmissibility of the dismissal for failing to follow the formal channels established in the said legislation in the case of dismissal of legal representatives of workers, post that the complainant claimed to hold. However, that pretension was rejected by the legal bodies for lack of grounds given that it was based on Spanish legislation which was not applicable to the case.

The foregoing consideration is not overshadowed by the existence of certain ambiguities in the first instance and appeal for reversal judgements the aim of which seem to be, in response to the claims made by the complainant regarding the application of Spanish law to the case (in the case of the first instance judgement), to clarify that even in the hypothetical case that Spanish law had been applicable the proven conduct of the complainant would continue to warrant dismissal, and in the case of the judgement delivered in the appeal for reversal, to state the different alternatives arising from the hypothesis of lack of accreditation of foreign law (hypothesis rejected by the court) because, as pointed out by the public prosecutor in his report, these considerations should be considered carried out under *obiter dicta*, lacking relevance in terms of the grounds of the decision.

Consequently, application of Uruguayan law deemed proven, the judicial bodies considered the dismissal lawful and rejected the existence of a procedural defect claimed by the complainant. The judicial bodies made a reasonable assessment of the evidence presented and based on the latter adopted a decision regarding the substance, reasoned and suited to the system of sources and sat-

isfying the complainant's fundamental right to effective protection of the courts despite the fact that this was a far cry from his pretensions given that, as we have pointed out time and again, this fundamental right does not guarantee a pronouncement in harmony with the pretensions of the party but rather a resolution based on law (SSTC 10/2000 of 17 January [RTC 2000/ 10], F. 2; and 88/2004 of 10 May [RTC 2004/88], F. 5, for all). In adopting the said decision, they exercised the jurisdictional authority specifically attributed to them by article 117.3 of the Spanish Constitution (RCL 1978/ 2836). It is not, however, the duty of this court to assess the latter given that, as we have pointed out on numerous occasions, this is not a third instance revision or Supreme Court appeal that should or may indicate the degree of wisdom of the judicial resolutions nor indicate the interpretation that should be made of ordinary legality. This is the exclusive responsibility of the corresponding jurisdictional order unless the said resolutions are unreasonable, arbitrary or show evidence of clear errors (for all, SSTC 165/1999, of 27 September [RTC 1999/165], F. 6; 198/2000 of 24 July [RTC 2000/198], F. 2; and 170/2002 of 30 September [RTC 2002/170], F. 17) which, as has already been discussed, is not the case here.

Once again within the scope of the requirement of a reasoned judicial resolution, the complainant finally claims failure to mention in the judgement the rule (of Uruguayan law) applied so as to be able to challenge it in the appeal for reversal. However, as the public prosecutor pointed out, this claim is unfounded in light of the fact that in legal ground four of the first instance judgement, specific mention is made with regard to evidence of the accused party indicating that some documents have been furnished by the Uruguayan law and, although it is true that no specific precept is cited in the judgement, it is equally true, as pointed out in the appeal for reversal judgement, that the law and case-law applied have been sufficiently identified in the proceedings. The judicial resolutions also make mention of the elements upon which they based their decision which, as has already been mentioned, satisfies, from the perspective of the requirement of reasoned judicial resolutions, the complainant's right to effective protection of the courts in accordance with our doctrine. It is clear that the complainant was able to challenge the first instance judgement in his appeal for reversal with full knowledge of the reasons for which his claim had been dismissed".

– *SAP* Guadalajara, 14 January 2004. *Web Westlaw* AC 2004/371

Accreditation of Ecuadorian law. Law applicable to divorce proceeding involving Ecuadorians and taking place in Ecuador.

"Legal Grounds:

The accused party challenges the divorce judgment handed down in first instance claiming that, given that Ecuadorian law is applicable and that the latter had not been sufficiently proven by the party invoking it as was acknowledged in the appealed resolution itself, the judge should dismiss the case under way

without delivering a resolution applying Spanish law. This petition was opposed by the representation of the plaintiff who, however, expressed disagreement with the legal grounds of the judgement (but not with the ruling) holding that, despite the applicability of the Ecuadorian *CC*, this was duly proven by means of photocopies of the aforementioned law sealed by the Ecuadorian Consulate in Madrid. If the judge a quo did not deem himself sufficiently instructed in respect of the content of the said foreign law, he could have implemented whatever means were necessary for said accreditation. Here it should be pointed out that, although it is true that article 107.2 *CC* (LEG 1889/27) establishes that separation and divorce shall be governed by the domestic law common to the spouses at the time the suit is lodged, it is equally true that article 12.2 *CC* envisages that remission to foreign law means substantive law without consideration of the referral that conflict rules can make to another law other than the Spanish; pointing to paragraph 6 of the said article 12 that the courts and authorities shall apply the conflict rules of Spanish law ex officio; articles 21 and 22.3 *LOPJ* (RCL 1985/1578 and 2635) establishing that the application of Spanish jurisdiction to proceedings such as these remains in force; article 3 *LECiv* (RCL 2000/34, 962 and RCL 2001, 1892) focusing on the territorial scope of the rules of civil procedure pointing out that with the sole exceptions envisaged in international treaties and conventions, civil proceedings taking place in national territory shall be governed exclusively by Spanish procedural rules based on which the 752 *LECiv* is fully applicable and which, in regulating proof in separation or divorce proceedings provides that, inter alia, the aforementioned proceedings shall be decided in accordance with the facts that have been the object of debate and have been verified regardless of the moment in time when they have been alleged or introduced in some other way in the proceeding; adding that without prejudice to the evidence collected on the order of the public prosecutor and the other parties, the court shall be free to decree, ex officio, the gathering of all evidence deemed pertinent and also that such arrangement shall be likewise applicable in second instance; also considering article 770. 4 of the Procedural Law providing that the court may agree ex officio on the collection of evidence deemed necessary for the verification of the concurrence of circumstances required in each case by the Civil Code to declare nullification, separation or divorce and likewise evidence related to facts underlying pronouncements affecting children who are minors or are handicapped in accordance with applicable civil law based on which the appeal took interest in the Ecuadorian Consulate in Madrid certifying the regulatory rules pertaining to the causes of divorce and the measures inherent to cessation of life together, evidence which was collected. The said consulate delivered a copy of the Ecuadorian *CC* in force although pointed out that, in accordance with Ecuadorian law, the diplomatic missions and consular offices of that country are not authorised to make certifications such as the one requested with respect to the enforceability and content of the law of the said State whose jurisdiction lies in the legislative and judicial spheres based on which the appellant insists that, given that a

verifiable certification was not procured, applicable law was not proven and therefore the divorce claim should be dismissed. These arguments do not stand up however because, although official certification was not provided given that such duties are beyond the scope of the consulate called on to do so, bearing in mind that the copy of the Ecuadorian *CC* figuring in the case file was delivered by the said Consulate thus eliminating doubt regarding its authenticity. Attention should be paid to the doctrine contained, inter alia, in *STS* 3–3–1997 (RJ 1997/1638), establishing that the iura novit curia, while extenuating the scope of foreign law, is not excluded as a principle as concerns awareness of non-national rules, although the parties should cooperate with the judge in searching for the foreign rule providing him with the means by which to gain such awareness. Thus, more than the gathering of evidence in a strict sense, it is more of a collaboration process between the parties and the legal body, resolution adding that article 12.6 in the draft provided for Title one of the Civil Code by Decree 1836/1974 of 31 May (RCL 1974/1385) made clear: a) the foreign rule must be accredited; b) in applying the rule, the judge may employ all information gathering instruments deemed necessary, adding that the term accreditation is not used in a generic sense but rather in a technical sense meaning that it is not necessary for the verification, content and applicability of the foreign rule to meticulously conform to the rules of proof but rather should conform to more open approaches to proof referred to in doctrine as "free"; in other words, evidence that envisages freedom in terms of the means employed in the gathering of evidence (provided they are legal and are obtained by means which are not prohibited) and freedom of assessment or evaluation, the judgement concluding in stating that if the judge, with the contributions made by the parties, does not deem himself sufficiently illustrated, should and is free to act ex-officio and investigate the applicable rule. The copies of the Ecuadorian *CC* delivered by the Consulate envisage in article 108.3 grave slander or a hostile attitude clearly indicating a habitual lack of harmony between the two spouses as a cause of divorce. There is no doubt that the facts of the case described in the case record concerning provisional measures taken based on evidence gathered fit the description of this precept. Both the psychological and social reports issued by impartial professionals at the Social Welfare Department describe a situation of domestic abuse at the hands of the appellant towards his wife and child that ended up with the latter two fleeing to a shelter. Tests also showed that the wife suffered from depression and currently suffers from anxiety. The child is reported to be fearful, losses control of his bowels, does not adapt well to school nor does he get on well with the other children. Based on these circumstances the specialists advised that, for the time being, the father should not be granted visiting privileges with a view to allowing both the mother and the child to establish emotional and social stability outside of this context of violence in which they lived prior to the separation, the view being that if these measures are not taken the effect would be destabilising and would endanger the proper psycho-emotional development of the child. It should also be pointed

out that, even in the event that Ecuadorian law had not been proven applicable by the complainant, this would not automatically imply the dismissal of the case given that the Supreme Court has repeatedly pointed out that when the court considers that it has not been sufficiently instructed in respect of the content of the foreign law applicable, it shall resolve the issue in accordance with the rules of our own legal system, *STS* 5–3–2002 (RJ 2002/4085) citing those of 7–9–1990 (RJ 1990/6855), 11–5–1989 (RJ 1989/3758), in the same sense *SSTS* 25–1–1999 and 13–12–2000 (RJ 2000/10439), encompassing those of 16–7–1991 (RJ 1991/5389) and 23–3–1994 (RJ 1994/2167), without losing sight of reiterated doctrine declaring that, by virtue of article 12.3 of the Civil Code (LEG 1889/27), supporting the principle that under no circumstances shall foreign law apply when it runs contrary to the legal system and it is the responsibility of the Spanish courts to underscore and establish for each case what constitutes the legal system of the forum which should be safeguarded against the possible application of antagonistic or incompatible foreign law, *STS* 23–10–1992 (RJ 1992/8280). It is obvious that the party cannot base his case on the lack of accreditation of foreign law invoked as applicable if that course of action is contrary to the cessation of a marriage bond when a legal cause for such cessation exists in accordance with Spanish law and when the decision dismissing this pretension would put an end to the provisional measure taken to protect the spouse and child, both of whom were victims of domestic violence, especially taking into consideration the unique nature of proceedings of this sort, beyond the reach of the provisional authority of the parties as laid down in article 751 *LECiv* (RCL 2000/34, 962 and RCL 2001, 1892), and bearing in mind the favor filii principle governing these matters even when the latter are not specifically requested by the parties in accordance with, inter alia, *SSTS* 27–1–1998 (RJ 1998/125) and 2–5–1983 (RJ 1983/2619), and along the same lines *STS* 17–9–1996 (RJ 1996/8205), which declares that the higher interest of the child is the overarching principle in such matters linking the judge to all public authorities and even to parents and citizens meaning that the latter must adopt the most suitable measures in accordance with the circumstances as can be interpreted from LO 1/1996 (RCL 1996/145) containing the spirit of the international conventions to which Spain is party (United Nations Convention of 20 November 1989 [RCL 1990/2717], ratified by instruments on 30 November 1990), the best interest of the child which should prevail over the exercise a fortiori of the authority of the parents as pointed out in *STS* 23–2–1999 (RJ 1999/1130) and likewise in *STS* 2–7–2001, reiterating the consideration that the best interest of the child must take precedence. Similarly, *STS* 17–7–1995 (RJ 1995/5591) which, interpreting article 92 and 94 *CC* (LEG 1889/27), points out that these precepts establish the judge's discretional authority to declare the measures deemed most suitable in benefit of the child. This authority is only limited by those circumstances which indicate clear and serious prejudice in respect of education, care, physical and mental development and the emotional stability of the child. From a different point of view it should like-

wise be pointed out that the appellant focuses his appeal exclusively on the inadmissibility of applying the Spanish legal system and the inviability of the divorce due to lack of proof of Ecuadorian law but does not deny that the appellant, after moving out, was undergoing separation proceedings nor did he dispute the lapse of time required under Spanish law and applied by the judge a quo to give rise to the divorce. Nor did he challenge any of the specific measures agreed to in the judgement, coinciding with those which were formerly provisional and which were deemed suitable in light of the situation described in the case file on provisional measures, the arguments of which have been reproduced verbatim, considerations that dismiss the appeal and confirm the appealed ruling".

3. Renvoi

– *SAP* Granada, 19 July 2004. *Web Westlaw* AC 2004/1527

Succession of an Irish national with habitual residence in Spain. Applicable law. Referral. Limits to referral.

"Legal Grounds:

Article 9.8 of the *CC* (LEG 1889/27) establishes that succession due to death shall be governed by the national law of the testator at the time of death regardless of the nature of the property or the country in which they are located. Thus, the first issue which needs to be addressed is that of determining the specific nationality of the testator of the inheritance, Ms. Aurora in this case, and whether she has double nationality or undetermined nationality with a view to establishing the personal law of succession or the application of the law of the country based on article 9.9 and 9.10 of the Civil Code.

In this matter we are not able to express our agreement with the appealed judgement which holds that the cuius was of English nationality (actually British). From the evidence collected through the proceedings it can be determined beyond all doubt that the Mrs. María Dolores was of Irish nationality. This is the nationality that figures in all of the documents included in the case file such as her Irish passport and her residence permit issued by the Spanish authorities, documents subscribing to and confirming the said nationality. Similarly we have the statement which she made before a notary public in the will of 15 July 1997 in which she mentions her Irish nationality. And lastly, especially significant is the certification from the Irish Embassy in our country which considers her a full-fledged Irish citizen.

Consequence of the foregoing is the application of the conflict rule laid down in article 9.8 of the *CC* (LEG 1889/27) in lieu of the aforementioned paragraphs 9 and 10 of the cited precept. Mention must also be made of the substantial change in the arguments of the appellant with respect to the assumptions of the formal action of the complaint from basing the application of Spanish law on the so-called return referral envisaged under article 12.2 of the *CC* to basing it on the direct application of our legal system in light of the fact

that this is a case of double nationality or undetermined nationality, contradicting the basic fact underlying his pretension. A modification of this nature means a veritable mutatio libelli which is not allowed in our procedural law.

Having established the national law of the deceased, the complainant alleged in his claim that the Irish succession law of 1965 remitted all succession issues to the law of the place of habitual residence of the deceased for both moveable property and real estate if the latter died outside of Ireland without a will. However, this alleged conflict rule was not proven given that the simple report issued by an Irish lawyer was insufficient to that end (*SSTS* 23–10–92 [RJ 1992/8280] and 4–5–95 [RJ 1995/ 3893]). While this refers to a case of succession without a will this is not the case here for the will in force was issued on 15 September 1993 with the confirming codicil 24–2–98.

To the contrary, the defendant furnished a report also drafted by the lawyer John H. Hicksan which states that Irish private international law rules are governed by old traditional legal principles and that succession of moveable property is governed by the law of domicile at the moment of death while in the case real estate by the law of the place of their location (*lex rei sitae*). The counterpart appears to agree with this criteria judging from statements made in the conclusions document which are similar.

Now, in light of the fact that the testator's habitual residence was in Spain (Lentengi) and that she possessed real estate both in Spain as well as in England, the referral rule would lead to the regulatory division or fragmentation of inheritance. On the one hand, Irish and not English law would be applicable to the properties located in England given that article 12.2 of the *CC* (LEG 1889/27) prevents the referral that Irish rules can make to another law given that remittal to foreign law would be assumed as made to its substantive law without bearing in mind the country where the assets are found (article 9.8 of the *CC*).

On the other hand, Spanish law would be applicable to the moveable property and real estate found in Spain given that the aforementioned article 12.2 recognises return referral to the succession rules of our legal system. We therefore find ourselves in a situation similar to the one considered in the first instance judgement and similar to the case-law cited but referring to Irish (not English) and Spanish law.

In these cases case-law tends to seriously restrict the possibility of return referral in order to prevent succession fragmentation in light of the general principle of unity of the succession regime and its universal character by applying the predominant character of the national law of ownership. This is the sense of the well known *SSTS* of 15–11–96 (RJ 1996/8212), 21–5–96 and the more recent one of 23–9–2002 (RJ 2002/8029).

In light of the foregoing, Irish law is applicable to the succession of Ms. Aurora without distinction as to the nature of the assets or where they happen to be located. In this sense the ground of the appeal is lack of accreditation of foreign law. Case law holds that proof of foreign law is an issue which must be alleged and proven by the party invoking it (*SSTS* of 11–5–89 [RJ 1989/

3758], 3–3–97 [RJ 1997/1638] and 13–12–00 [RJ 2000/10439]), while the *STS* of 25–1–99 (RJ 1999/321) adds that it is necessary to accredit the exact identity of the law in force as well as its scope and authorised interpretation in order that its application not lead to even the slightest doubt on the part of the Spanish courts.

In this case the Irish Succession Law of 1965, in force and duly translated, was furnished, updated to May 1999 and remitted by the Government Publications-Sur Allianz House. The document has sufficiently enlightened this Court regarding the debated issue of the lawful share to which children are entitled and disinheritance and no further evidence was required in light of the *STS* of 9–11–84 (RJ 1984/5372) and 10–3–93 (RJ 1993/1834) stating that the judicial bodies have the authority but not the obligation to collaborate in the understanding of foreign law.

Part IX of this succession rule contains the regulation regarding the lawful share to which the spouse of the testator is entitled and measures for addressing issues concerning the children. A close look at this regulation shows that inheritance rights are only established for the surviving spouse. As concerns the children, article 117 states that when upon request from the child of a testator or on the former's behalf the court considers that the testator has not met his moral obligation of properly meeting the needs of his child commensurate with his means, either through his will or in any other way, the court may order these needs to be met using the inheritance as considered right and proper. As can be observed, and in accordance with the judge a quo, no right regarding lawful share is envisaged in this rule which limits one's power to draw up a will and freely dispose of one's assets (article 76 of the 1965 Act). The only limit is comparable to child support payment drawn from the inheritance in cases of need. As a result, the interpretation that needs to be made from our perspective is clear and does not require any further proof.

In conclusion, the nullification of the will sought must be dismissed in light of the fact that the claimant's are not compulsory heirs and the great degree of freedom on the part of the testator vis-à-vis her children. Therefore, we must ratify the appealed judgement although for different reasons.

The same stand must be taken in respect of the request for nullification of the will based on the lack of capacity of the testator".

VII. NATIONALITY

– *RDGRN* No 5/2004 of 30 January 2004 *Web Westlaw* JUR 2004/142404.

Birth registration in a foreign country and the option of Spanish nationality of a Belgian citizen born in France and adopted under Belgian law in 1945 by an adopting parent of Spanish origin. Not admissible: in accordance with the situation resulting from the original drafting of the *CC*, the adopted person kept the nationality to which he was entitled by virtue of filiation and the adoption did not communicate the nationality of the adopting parent.

"Legal Grounds:

(. . .) The purpose of these proceedings was to register the birth and opt for Spanish nationality in the case of a Belgian citizen born in France in 1936 and adopted under Belgian law in 1945 by an adopting parent of Spanish origin.

. . . Given the date on which the adoption was constituted in Belgium, the draft of the Civil Code in force at that time (LEG 1889, 27) must be applied and, in principle, subsequent reforms regarding domestic and international adoption in our legal system may not be considered (. . .). Regardless of whether the adoption constituted under Belgian law is valid or not, the fact is that the original drafting of the Civil Code does not, in any way, attribute the nationality of the adopting parent to the adopted child. Indeed, the adopted child retained the rights to which she was entitled in her natural family with the exception of those concerning authority of the parents (article 177 of the original version of the *CC*). Therefore, the adopted child retained the nationality to which she was entitled by virtue of filiation and the adoption made no communication of the nationality of the adopting parent given that the change in the legal situation was limited to the authority of the parents and consequences of the latter (Article 46, 111, 166, 175, and 177 of the original draft of the *CC*).

IV. Under these conditions and in light of the limited value that our Code (LEG 1889, 27) placed on adoption with respect to natural filiation, it must be concluded that there was no real filiation which permitted the interested party to opt for Spanish nationality as the daughter of an originally Spanish father born in Spain in accordance with the new version of article 20 of the Civil Code laid down in Law 36/2002 of 8 October (RCL 2002, 2346). Moreover, the interested party could have taken advantage of the reduced period of two years of effective residence laid down in article 20 of the Civil Code, version in accordance with the 1954 Law (RCL 1954, 1084) favouring foreigners adopted as minors by Spanish parents. As for the rest, the registration certificate furnished has not been legalised and the Belgian judicial resolution which constituted the adoption is not enforceable in Spain because the compulsory *exequatur* was not obtained".

VIII. ALIENS, REFUGEES AND EUROPEAN COMMUNITY CITIZENS

– *STSJ* Madrid, 2 June 2004. *Web Westlaw* JUR 2004/299618.

Residence by virtue of family reunification. Adopted child. Efficacy of foreign adoption in Spain. Not admissible.

"Legal Grounds:

(. . .) Refusal of the request was based on the fact that the adoption of the minor Chen Linglin had no point of contact with the form of adoption recognised by the Spanish legal system and the resolution, although brief, is reasoned in that it incorporates the basic grounds on which the decision is based and

therefore the appellant was not in a situation of defencelessness given that he was able to appeal the dismissal based on the entire content of the case file and with full cognizance of the grounds for the administrative decision.

. . .

Article 17 of Law 4/2000 of 11 January, amended by Law 8/2000, states that in the case of adopted children, it must be verified that the resolution giving rise to the adoption has the elements needed to take effect in Spain (similarly article 54 R.D. 155/96).

Surely, as pointed out by the Counsel for the State, the appellant did not furnish any document showing that the adoption was effective in Spain. The case file contains a notarial act dated 19 March 2001 bearing witness to an adoption agreement but there is no other evidence of the legality of the said adoption. It should not be forgotten that in Spain adoption is constituted by judicial resolution and, in most circumstances, subsequent to a proposal by a public entity (article 176 *CC*). There is no proof of foreign law with reference to this matter nor accreditation of any sort that the adoption can take effect in Spain either by reciprocity, legalisation with recognition of effects, etc. meaning that, based on the foregoing, the administrative decision cannot be described as being arbitrary in light of the requirement laid down in article 17 of law 4/2000 nor can this be considered a violation of the constitutional and conventional precepts invoked and therefore the claim must be dismissed".

IX. NATURAL PERSONS: LEGAL INDIVIDUALITY, CAPACITY AND NAME

X. FAMILY

1. Filiation

- *SAP* Guipúzcoa, 28 September 2004. Web Westlaw JUR 2004/308640
  International judicial competence in matters of filiation. Applicable law.

  Legal Grounds:

  "(. . .) Infringement of art. 22.3 of the *LOPJ* (RCL 1985/1578, 2635) Appellant takes the view that according to the cited rule, in the case in point here, concerning filiation, the Spanish jurisdiction is only competent where the child's habitual place of residence at the time of the action is in Spain or the plaintiff is Spanish or habitually resident in Spain; and therefore, given that the plaintiff has her habitual place of residence in Germany and is German, jurisdiction lies with the German courts.

  The Court does not accept this criterion for the following reasons:

  – The criterion laid down in art. 22.3 of the *LOPJ* is applicable in the absence of precedent criteria – in other words it is subsidiary by nature.

According to art. 22.2 of the cited statute, at civil law the Spanish law Courts enjoy general competence where the parties have expressly or tacitly submitted to the jurisdiction of the Spanish Courts or where the defendant is domiciled in Spain.

- In the present case, the two circumstances provided for in art. 22.2 are given, in that the defendant is domiciled in Spain, and furthermore there is tacit submission, the defendant having tacitly submitted by dint of failure to enter a declinatory plea in form as required under art. 56 of Law 1/2000 of 7 January (RCL 2000/ 34, 962 and RCL 2001, 1892), which provides that the defendant shall be understood to have tacitly submitted by the fact of having, after appearing in the proceedings following initiation of the action, taken any step other than to enter a declinatory plea in due form, and in relation to art. 39 of the said Law which provides that the defendant may by declinatory plea claim lack of international competence or lack of jurisdiction on the ground that the matter appertains to a different jurisdictional order or because the dispute has been put to arbitration – *STS* of 11/2/2002 (RJ 2002/3107) and 10/11/2003 (RJ 2003/ 8281) – the ground cannot be entertained.

. . .

Having regard to the applicability of the German Civil Code, under art. 281.2 of the *LECiv* it is up to the party invoking the foreign law to accredit both its content and its validity by any means recognised in Law; the party cannot be excused from this burden by the fact that the Court has means of ascertainment at its disposal, since it is not part of the court's function to fill the gaps in the parties' evidence, as the jurisprudence of the Supreme Court has repeatedly established (*STS* 15/3/1984, 12 January 1989 [RJ 1989/100], 7 Sept 1990 [RJ 1990/6855]).

In the present case, the defendant has not proved the existence of the precept invoked, its validity or its applicability to the case at issue, documentary evidence which is deemed essential to the end pursued; therefore, where the foreign law has not been proved or has not been adequately proved, the case must be resolved in accordance with Spanish law (*STS* 7 September 1990).

– Having regard to the precepts of the Civil Code, arts. 110.2, 120.1 and 121, which were in force at the time the appellant was born, be it noted that the applicable legislation is that in force at the time of the action – i.e., the present Civil Code – and as to the legitimation of the children through marriage, in order for filiation to be accepted as matrimonial through the subsequent marriage of the progenitors, the present art. 119 of the Civil Code requires that the fact of filiation have been legally determined, either by acknowledgement before the Civil Registrar, by testament or other public document, by resolution of proceedings through the Civil register or by final court decision.

In the present case, the consequences deriving from art. 119 of the Civil Code are by no means applicable in respect of the appellant and her mother's husband, since her paternal filiation had not been legally determined either

before or after the marriage between the two, given that after the marriage there was no more than the passing on of surnames, which does not imply any acknowledgement or legitimation of paternity.

Art. 9 of the Civil Code, as it relates to the content and nature of filiation, states that these shall be governed by the personal law of the child, which according to paragraph one is determined by its nationality, and in this case the appellant is German.

Viewed from this perspective, as the Supreme Court established in its decision of 22/3/2000 (RJ 2000/2485), the establishment of filiation as sought here would render the German Civil Code applicable as the national law of the plaintiff. However, under the material Spanish law, the national statute can be applied and the foreign one dispensed with, since German nationality is not a closed and exclusive condition but is rather a first or provisional nationality, as under art. 17.1) of the Civil Code, all persons born of a Spanish mother or father are Spaniards . . . hence, the applicability of the material Spanish statute in this circumstance is imposed as immediate and imperative by the public policy of the forum in order to afford adequate protection . . . On the basis of the foregoing doctrine of the Supreme Court, it follows that the Spanish Law is applicable."

2. Marriage

a) Celebration and registration

– *SAP* Barcelona, 10 May 2004. Web Westlaw JUR 2004/181213

Marriage celebrated in Morocco. Annulment. Applicable law to celebration. Lack of proof of the foreign law. Dismissal.

"Legal Grounds:

(. . .) In this second instance the original plaintiff, Carlos María, again seeks acceptance of his request for a declaration of annulment of his marriage to Maribel, celebrated on June thirtieth of the year two thousand, which the Court rejected on the grounds that it considered the alleged causes to be not proven.

But the first problem that arises when considering the question of annulment is that of the applicable law, since the marriage was celebrated according to Islamic rite in the Moroccan locality of Safi, as stated in the application and as accredited (the latter part) by a certificate of registration of the marriage with the Central Civil Register. This issue has not been addressed by the parties or by the Court, but this bench must consider it in first place, since courts are bound to apply the legal rules that are appropriate for the resolution of lawsuits even if these rules have not been invoked by the parties, and therefore the first thing they have to do is choose these rules – that is to say determine which are applicable.

. . . Certainly, the current state of Spanish legislation in this respect is quite clear. Article 107.1 of the Civil Code, introduced by Organic Law 11/2003 of

29 September, declares that the nullity of marriage and its effects are to be determined in accordance with the law applicable to its celebration, and hence, going by this rule, the question of nullity as requested here must be regulated by the law of Morocco.

The cited legal norm was published on 30 September 2003, when the judgment here appealed had already been delivered; the fact is, however, that now, when it comes to reaching a definitive resolution of the matter, it is in force. The law of 29 September does not contain transitional norms governing proceedings pending at the time the law came into force. But that is neither here nor there given that, according to the principles of the legislation in force prior to the cited law of 29 September, the conclusion is necessarily the same, that is that the annulment sought here must be regulated by the law of Morocco.

Prior to the cited law of 2003, there was no legal precept that referred specifically to this question, and to this bench's knowledge there was no jurisprudence in that respect. The doctrine held that nullity ought to be governed by the laws of the country in which the marriage took place, and that certainly is what follows from article 11 of the Civil Code. According to the latter, the manners and formalities of contracts, testaments and other legal acts are to be governed by the law of the country in which they are formalised. Article 49 of the same Code clearly ordains that Spaniards may marry abroad in the manner laid down by the law of the country where the marriage takes place. This is what happened in the present case, in which Carlos María, a Spanish national, married in Morocco in accordance with the law of Morocco, to which he submitted by virtue of contracting marriage there.

The marriage having been celebrated under the cited foreign law, it would make no sense whatever if the nullity of the marriage were to be governed by Spanish law, even with regard to what we might call substantive aspects of the celebration of the marriage, such as the free giving of consent. It can be argued that the celebration of marriage by free and duly informed consent is a universal and indispensable requirement such that when the lack of such consent is alleged in Spain, the matter must be examined and a resolution delivered as to the validity or otherwise of a marriage celebrated in Morocco. But the matter is not as simple as that: what we have here is not a problem of violence or intimidation or of complete absence of consent, which may be considered the object of that universal principle of freedom to marry, but a twofold problem involving mental reservations and personal qualities of one of the partners; in such cases the norm may well differ from one country to another, to the extent that a mental reservation of one of the partners may not be admissible as a cause of nullity of marriage. Then again, under Moroccan law the possibility of a decree of annulment in such cases may be subject to terms or forms of which we know nothing.

In short, the validity or otherwise of a marriage celebrated in Morocco in accordance with the laws of that country and within the ambit of the Islamic faith must be judged in accordance with the law of that State, and it makes no

sense whatever to judge the substance of the matter according to Spanish law, which did not govern the celebration of the that marriage.

. . . It is true that the effects in Spain of marriages celebrated abroad are subject to the public policy exception. The Spanish State can deny legal effects in this country to marriages celebrated abroad and valid (at least formally) in the terms of the laws in force at the place of celebration. Such denial of effects arises in cases where the marriage conflicts with norms regarding the celebration of marriage that are imperative in Spain. Specifically, where it is evident from the circumstances of the case that the marriage was celebrated without proper consent to marry, the State refuses to recognise the bond thus established and prohibits its entry in the Spanish Civil Register. The most common and best known such cases are marriages of convenience between Spaniards and aliens, in which registration of the marriage is frequently refused on the presumption that there has been no true consent to marry.

Conceivably, if it is in the form described, it should also be possible here to annul a marriage celebrated abroad if it appears, as Carlos María sustains, that there was no matrimonial consent on the part of Maribel, who did not really wish to enter into a marriage contract but some other kind of arrangement, and that furthermore, according to the said gentleman, she had in the past engaged in conduct of which he was quite unaware. However, it seems clear to us that the issue here is quite different. It is one thing for the State to deny recognition to a marriage if it reaches the conclusion that there was no genuine matrimonial consent, and it is quite another for it to intervene and annul a marriage celebrated in a foreign country. What is sought here is not to divest the marriage celebrated by the litigants in Morocco of effects in Spain but purely and simply to have it annulled as contravening Spanish law, which was not the law governing the celebration thereof. We reiterate that it is one thing to deny effects to a marriage for contravening norms of the State in which it is intended that these effects should materialise, and it is quite another to declare a marriage null without distinguishing the effects of that nullity – that is, to divorce the issue from the world of the law. The denial of effects which is so often observed obviously never goes as far as that.

. . . If, then, the laws of Morocco are applicable for the resolution of the dispute, there is no alternative but to reject the petition of annulment, for the simple reason that the content of the cited foreign law is not known to the court and has not been invoked or accredited by the litigants. This being so, we are clearly not in a position in any event to tell whether the marriage is valid or void according to a set of laws of which we are ignorant and must therefore dismiss the petition of Carlos María, confirming the decision appealed from inasmuch as it declares that there is no case for annulment.

Article 281.2 of the Civil Procedure Act ordains that the content and validity of the foreign law must be proven. It adds that the courts may use whatever means of inquiry that they deem necessary for its application. This last point raises a doubt as to whether the guiding principle in this matter is that the

burden of proof lies with the party. Certainly the law does not contradict that principle inasmuch as it does not say that the courts may use whatever means of inquiry they deem appropriate *ex officio*, as it does in other cases (e.g., in the instance cited in article 752 of the Act) where it states unequivocally that the judges may proceed *ex officio*. The said possibility may also be interpreted as meaning the possibility of using means of inquiry other than those defined in the law.

But even if we interpret the legal peculiarity here considered to mean that the judges are empowered to proceed *ex officio* to inquire into the foreign law, we cannot conceive that such power extends to entirely making up for the failure of the parties to act in this respect, and further to initiating, on appeal, an inquiry into the foreign law that has not in any way been raised by the litigants".

– *SAP* Castellón, 21 January 2004. Web Westlaw AC 2004/452.

Islamic marriage celebrated at the Iranian embassy in Spain. Claim of dowry. Applicable law to effects of marriage. Consideration of the dowry.

"Legal Grounds

(. . .) With the object of the appeal, and hence of the present decision, thus delimited, we find that it consists in an examination of the pertinence of the plaintiff's claim in this appeal, namely that Antonio should be ordered to pay the 3,000,000 pesetas (or 18,000 euros) which she says is the dowry it was agreed that the husband should provide when the couple contracted Islamic marriage on 2 February 1999 at the Spanish Embassy in the Republic of Iran (folio 44).

This claim cannot be entertained, for the same good reasons as were put forward in the original judgment. Each of the reasons set forth hereafter is of itself sufficient to rebut the appellant's claim.

1. Given that these are marital proceedings, the petition of reference must be addressed from the standpoint imposed by the class of proceedings in which it is to be heard, and therefore we must rule on whether it can properly be upheld as a measure supplementary to the basic decision on the dissolution of the marriage tie (article 91 *CC* [LEG 1889/27]).

From this point of view, a so-called commitment acquired upon contracting a marriage which is entirely without effect under Spanish law cannot be admitted as binding.

Firstly, since the partners were of different nationalities at the time of marrying (the groom Spanish and the bride Iranian), and since the marriage was celebrated in Spain by persons who then resided in this country and continued to do so thereafter, the effects of the marriage must be governed by Spanish law, in pursuance of article 9 sections 2 and 3 of the Civil Code. And it is well known that at this time our laws do not regulate the institution of the dowry.

Secondly, a marriage cannot be effective under Spanish law which was not contracted in accordance with that law (arts. 49 *et seq.* of the Civil Code) and which, assuming that it was celebrated according to the Islamic rite and was

hence a religious wedding (art. 49.2 *CC*), was not entered in the Civil Register as expressly provided in articles 59 to 61 of the Civil Code, as it relates for purposes of this case to the terms of Law 26/1992 (RCL 1992/2421) on reception in Parliament of the Agreement between the State and the Islamic Commission of Spain.

2. Viewed from a different standpoint, the articles of the Civil Code (*CC*) of the Republic of Iran relating to the dowry as invoked by the appellant are without effect inasmuch as the jurisprudential criteria regarding the applicability of article 12.6 of the Civil Code (LEG 1889/27) have not been fulfilled.

. . .

And it is clear that in the present case these requirements have not been met, given that all that has been presented in evidence of the validity, scope and content of the foreign law invoked is a communication from the Iranian Embassy regarding the validity of marriages celebrated at that embassy and a brief reference to the precepts regulating dowries, accompanied by respective translations (folios 44 to 52). The Iranian Authority may well have the power to declare such marriages valid in terms of its own laws, but it does not have the power to declare as to their validity in Spain.

Therefore, the Iranian Civil Law invoked cannot be applied by this court.

3. Finally, as if the foregoing were not already enough, it must be remembered that, as the appealed decision said, it is our duty in these proceedings to rule on the propriety of measures which, if requested, are supplementary to the judicial decree of divorce. The request for payment of the dowry is clearly not proper, not only because, as already noted, it was agreed in connection with a marriage that is without civil-law effects in Spain, but also because it was agreed as a consequence of the same marriage and hence has nothing to do with the dissolution thereof; thus, it cannot be a consequence of these proceedings, nor therefore has it a place herein".

b) Matrimonial property

– *RDGRN*, 1 February 2004. Web Westlaw RJ 2004/2000.

Entry of real estate in the Register of Property. Alien spouses. Determination of marital regime.

On 4 April 2003, by virtue of a public document authorised by the Notary Public of Torrevieja, . . . the spouses, under the regime of their national law, . . . of British nationality, purchased an urban property under their marital regime.

The Registrar of Property reported: therefore, following accreditation of the foreign law to which the purchasing spouses declare themselves subject as regards their marital economic regime, according to which they have separation of estates, it is proper to determine the quotas referred to in article 54 of the Mortgage Regulation. 5.8 It should further be noted that the rules have to be interpreted in accordance with the reality of the times in which they are applied – article 3 of the Civil Code – and one cannot be unaware of the massive movements of immigrants and tourists in present-day society or the new attitude

adopted by article 281 of the Civil Procedure Act towards foreign law, which is no longer treated as a procedural fact requiring allegation and proof by the parties before it can be applied and has begun to be treated as actual law which the Judge, if he is cognisant of it (and such cognisance ought reasonably to be promoted), can apply directly, thus accepting a criterion already established for some time in the sphere of registration by article 36 of the Mortgage Regulation and moving towards the new systems of Private International Law (the Swiss of 1997, the Italian of 1995) whereunder the courts are obliged to apply the foreign law *ex officio*.

"Legal Grounds

(. . .) The facts germane to the resolution of the present appeal are as follows: A public document was presented at the Register, by virtue whereof a married couple of British nationality acquired a certain urban property in accordance with their marital regime. The Registrar suspended entry for lack of an indication of the proportion acquired by each of the purchasers as required under article 54 of the Mortgage Regulation (RCL 1947/476, 642). The Notary appealed against this decision.

The appeal failed. The acquiring spouses declared themselves subject to the legal regime of their own country. Consequently, the Registrar having stated that the concept of a marital economic regime is unknown to British law and hence that the acquisition is akin to one conducted under a system of separation, and that statement not having been rebutted, article 54 of the Mortgage Regulation (RCL 1947/476, 642) requires that the quota of the undivided good appertaining to each of the purchasers be set.

This Directorate-General has resolved to dismiss the appeal".

c) Divorce

– *SAP* Almería, 28 June 2004. Web Westlaw AC 2004/1440.

Spouses of Moroccan nationality. Applicability of Spanish law owing to lack of proof of foreign law. Direct applicability of Spanish law according to the current wording of article 107.2 of the *CC*.

"Legal Grounds

In response to the original decision dismissing the suit for divorce filed by the wife with the consent of her husband on the ground that since both possess Moroccan nationality, the divorce must be governed by their common national law as provided by art. 107 of the Civil Code (LEG 1889/27), it not having been accredited that the laws of their country contemplate the legal ground for divorce cited in the action, the plaintiff has lodged an appeal petitioning the court to quash the said decision and instead declare that the Spanish courts are competent to hear the case and in consequence grant all the terms of the suit.

. . .

In this connection, from the record of proceedings it appears that both marriage partners possess Moroccan nationality and that they celebrated a religious marriage according to Islamic rite in Almeria on 1 November 1995.

Hence, according to article 107 of the Civil Code (LEG 1889/27), in the wording current at the time of the previous phase of these proceedings – which wording has since been substantially modified, as we shall see – the substantive rules applicable to regulation of their marital separation would be those of Morocco, since both are nationals of that country. Nevertheless, as the appealed decision points out, no evidence has been offered to demonstrate the content and the currency of the Moroccan law as required under art. 281.2 of *LECiv* (RCL 2000/34, 962 y RCL 2001, 1892). But the proper legal solution to this absence of proof of the foreign spouses' common national law cannot be the one adopted by the Court *a quo*, with whose judgment this Bench disagrees, given that in cases like the present one in which the content of the foreign law whose applicability is moved is not known, the jurisprudence of the Supreme Court is unequivocal as to the applicability of Spanish law, stating that the applicability of a foreign law is a matter of fact and as such must be proven by the party invoking it so that its applicability does not raise the slightest reasonable doubt in the minds of Spanish courts. Where these courts cannot be absolutely certain as to the applicability of the foreign law, they must judge in accordance with Spanish law (*SSTS* of 31 December 1994 [RJ 1994/10245], 25 January 1999 [RJ 1999/321], 5 June 2000 [RJ 2000/5094] and 17 July 2001 [RJ 2001/5433]). Although this approach entails the risk of leaving the issue of the applicable law up to the parties (it may not be in their interests to plead the foreign law applicable under the rules of conflict, and they may prefer the *lex fori*), according to the Constitutional Court the jurisprudential doctrine whereby recourse must be had to Spanish law in the absence of proof of the foreign law is closer to the spirit of art. 24.1 of the Spanish Constitution (RCL 1978/ 2836) than the solution of dismissing the suit as adopted in the decision here appealed, given that in a situation of external intercourse Spanish law may, in substitution of the law that is applicable, also offer the solution founded in Law that the cited article of the Constitution requires (*STC* 155/2001 of 2 July [RTC 2001/155]).

For all the above reasons, in order to ensure effective guardianship of the interests at stake (art. 24 Spanish Constitution [RCL 1978/ 2836]), avoiding defencelessness and seeking to protect the higher, fundamental and basic interest of the minor and a solution to this specific case, it falls to us to uphold the appeal and, setting aside the original decision, to accept in its stead the petition raised by the two spouses, who are agreed in seeking a divorce, and to approve the regulating agreement proposed with the action, since this adequately guarantees the higher interests of the child of the marriage, a minor, the Public Prosecution having expressed its assent to approval thereof.

Moreover, independently of the foregoing, the reform of the Civil Code (LEG 1889/27) introduced by Organic Law 11/2003 of 29 September (RCL 2003/2332) leads to the same conclusion in that under the new drafting of art. 107, section 2) point b) provides that Spanish law is to be applied in any case where one of the spouses . . . is habitually resident in Spain if in an action

brought before a Spanish court both spouses ask for separation or divorce, or one does so with the consent of the other, which requirements are fully met in the present case, since both spouses have their habitual domicile in this country and the suit for divorce was brought by the wife with her husband's consent, both having ratified their positions in the presence of the court both in the filing of the suit and in the proposal for a separation agreement accompanying it; and while it is true that the said rule was introduced in our legal system at a later date than the decision given at first instance, it makes no sense from the standpoint of procedural economy and of actual material justice – especially where there is a young child whose higher interests merit rapid and effective protection – to remit the parties to new civil proceedings in which the outcome would be exactly the same as is sought here and in which there would no longer be any need to prove the common national law of the spouses, since divorce by mutual accord is governed by Spanish law as provided in art. 107.2.b) of the *CC* (LEG 1889/27), currently in force".

– *SAP* Vizcaya, 6 April 2004. Web Westlaw JUR 2004/296271.

Spouses having Colombian nationality. Divorce. Applicable law. Failure to plead and prove. Dismissal

"Legal Grounds

(. . .) Two. The decision here appealed applies the material Spanish law to decree the dissolution of a marriage celebrated in Colombia between two persons both possessing Colombian nationality who ceased to live together in this country years ago and who have recently, each separately, established their residence in Bilbao.

In this matter of private international law, as regards the procedural side of the rule of conflict or international connection, it is clear that the Spanish laws of procedure are the only ones applicable to actions materialising in Spanish territory (art. 3 of the *LEC*), that in all cases they are to be classified according to Spanish law (art. 12.1 *CC*), and that in matters of personal and property claims between spouses, annulment of matrimony, separation and divorce, where both spouses are habitually resident in Spain at the time of the suit, the Spanish civil courts are competent (art. 22 third rule *LOPJ*).

In substantive terms, the applicable precept is art. 107 paragraph one of the Civil Code, which lays down the rules of connexion of the applicable substantive law, favouring the spouses' common national law and subsidiarily favouring the laws of the spouses' habitual place of residence, and as a last resort whichever Spanish courts are competent. Paragraph 1 of art. 12.6 of the Civil Code provides that the Courts are to apply *ex officio* the rules of conflict of Spanish Law, whereas paragraph 2 has been set aside by Repeal Provision 2.1 of the *LEC* and substituted by art. 281.2 of the *LEC*, whereunder proof of the foreign law is also required as regards content and validity, and the Court may use whatever means of inquiry that it deems necessary for the application thereof. In this connection the jurisprudence of the Supreme Court has

established that the foreign law cannot be applied *ex officio* if it is not adequately pleaded and if no-one invokes it; nor does a simple report at the instance of the appealing party suffice: express reference must be made to the case at issue . . ., and the literal text of the applicable precepts must be reproduced (decisions of the *TS* 17 March, 23 October 1992, and 4 May 1995), which criteria are reiterated in the Supreme Court Decision of 13 December 2000, which explains that it is the doctrine of the First Bench to treat the foreign law as a matter of fact which must therefore be pleaded and proven by the party invoking it, that the courts have the power but not the obligation to assist with whatever means of inquiry they deem necessary, and that in Spain the foreign law cannot be applied *ex officio* where it has not been adequately pleaded.

In short, art. 107 of the Civil Code is clearly applicable to this case, which must therefore be resolved in accordance with the law of Colombia as the common national law of the spouses. Furthermore, it raises a question of public policy which the parties cannot elude and which it is the duty of this court to judge *ex officio*".

XI. SUCCESSION

– *SAP* Baleares, 31 March 2004. Web Westlaw AC 2004/861.

Joint will made in Germany. Subsequent holograph will legalised in Spain. Applicability of German law.

"Legal Grounds

(. . .) The first ground of appeal adduced by the appellant is the exception of *res judicata*, which was disallowed, under protest by the appellee, in the preliminary hearing.

This court does not admit the exception adduced, which is based on the claim that the German courts had already ruled on the point at issue in the manner already explained. Firstly, it must be considered that the sense of the decisions handed down by the German courts was other than is claimed by the appellant, in that they denied the certificate of succession in his favour and granted it to the plaintiff/appellee as sole heir, so that one is at a loss to understand the purpose of acknowledging a foreign decision which according to the record of proceedings is of no benefit to the party invoking it, unless the aim is to delay the present proceedings. Furthermore, and most importantly, the proceedings held up for comparison do not match in either object or reason for pleading. What is sought in the present case is annulment of a holograph will legalised with the Spanish authorities by judicial decision, so that whatever the content of the petitions filed with the German authorities, clearly such a decision can only be sought by way of independent proceedings such as those now brought, whose substance is different from that resolved by the judicial decision founding the claim of *res judicata*, and therefore the exception claimed must be disallowed.

It is agreed that the law applicable to the case at issue is the German civil law, as codified in the *BGB*, that being the nationality of the testator at the time of his decease (art. 9.8 of the Civil Code [LEG 1889/27]), regardless of the nature of the goods and the country in which they are situate.

With his writ of action the plaintiff submitted a translation by sworn interpreter of arts. 2270, 2271 and 2296 of the *BGB* (folios 38 and 39), the accuracy and validity of which were not initially disputed in the plea in defence, which were in fact the articles referred to in the above-cited decisions of the German courts. It transpires from the said articles that the joint will is valid in Germany, that the relationship between the reciprocal provisions is such that the annulment or revocation of one provision results in the annulment of the other and that in case of doubt, a reciprocal relationship is presumed to exist where the spouses make reciprocal wills (art. 2270). For rescission of the succession agreement, the other contracting party must be notified by notarised certificate (art. 2296), albeit art. 2271 provides that one spouse cannot during the lifetime of the other unilaterally annul his or her disposal with a new disposal mortis causa. The normative spectrum is perhaps best closed by citing the third and last paragraph of art. 2270, whereunder the correspondence between joint disposals and their consequences of reciprocal annulment does not apply to other disposals which are not appointment of heirs, legacies or taxes, which means that in the cases indicated it is applicable.

At this point it is appropriate to analyse the second ground of appeal, under the heading of compatibility of a joint will with a prior disposal, in which it is asserted that the plaintiff has not accredited the existence of the German law that it is sought to apply and that the latter's interpretation of that law has not been followed by the German courts, so that, the burden of proof of the law lying with the plaintiff, it has not been adequately proven since the mere invocation of laws cannot suffice if the requirements alluded to are not met.

. . .

While aware of these limitations, this court considers that the plaintiff has successfully discharged the burden of proof imposed by the law and the jurisprudence. As to accreditation of the articles of reference, as already noted no objection has been raised as to its accuracy or correctness. The appellant argues that there are other precepts which could constitute legal exceptions to the provisions accredited, but there can be no doubt that if such a precept were submitted as an exception, the burden of proof would lie with the defendant/appellant, who has not taken the trouble to produce such proof. Having regard to the authorised interpretation of the applicable rules according to the national jurisprudence from which these derive, in the case here at issue there are actual interpretations referring particularly to the circumstance in point, encapsulated in decisions of the German courts of August and 21 September 2000, while none has been submitted in rebuttal. Both agree that this is a joint will, that the reciprocal appointment of heirs is effective, that the possible testamentary disposal of 27 October 1999 was not formally notified and that the joint disposal

cannot therefore be modified, by virtue basically of the provisions of the *BGB* transcribed above, which award precedence to the joint will over the holograph will legalised in Spain.

Finally, we would point out that in the common Spanish law the appointment of heirs may coexist with the figure of the legatee, as stated in the appeal, and that they are likewise compatible in German law as noted in the expert opinions annexed to the proceedings on folio 105, which is not a decisive argument since it is not the foundation of the decision here confirmed; therefore, a succession agreement or joint will cannot subsequently be modified – especially where the appointment of heirs is reciprocal with no further qualifications – unless the legal formalities laid down in the *BGB* are fulfilled and subject to the consequences established therein, and such modification cannot be made by way of legacies to third parties, which, as the decision *a quo* argues, would raise the possibility of rendering the contractual part without substance, an eventuality which the above-transcribed third paragraph of article 2270 of the *BGB* is intended to preclude.

For all the foregoing reasons, this court dismisses the appeal as filed and confirms all points and arguments of the opposed decision".

XII. CONTRACTS

– *STSJ* Madrid, 5 October 2004. Web Westlaw AS 2004/2960.

Contract of employment: submission to the Laws of the State of Illinois. No proof of the foreign law is required, it being common knowledge that US regulations allow free dismissal.

"Legal Grounds.

Under article 191 section c) of the Labour Procedure Act, both appellants allege infringement of articles 1.4 of the Workers' Statute and 10.6 of the Civil Code on the ground that Spanish laws are not applicable to the work of Spanish employees not hired in Spain in the service of Spanish companies abroad, and therefore, the contract having been concluded in Chicago with an entity domiciled in the USA with express submission to US law, the second of the cited norms is applicable and the law of the place where the services are rendered must preside.

(. . .) It having been established that the law of Illinois is applicable to the employment relationship between the parties, we must dismiss the appeal, not for lack of proof of the said law but because it is common knowledge that US regulations allow free termination of a contract of employment – in other words free dismissal with no right to compensation – and therefore the plaintiff's claims could not be entertained under any circumstances".

– *STSJ* Madrid, 21 September 2004. Web Westlaw AS 2004/2756.Contract of employment. Validity of the clause of submission to Portuguese courts and law.

"Legal Grounds.

Action in which a Spaniard concluded an indefinite contract of employment on 02/12/02 with the mercantile company Iberrail Portugal Viagens LDA, domiciled in Lisbon (Portugal), where the plaintiff served and had his residence up until the time of his dismissal, which occurred on 04/07/03 by virtue of notice of termination signed by the Chairman of the Board of Directors of Iberrail, SA as majority shareholder in the mercantile company Iberrail Portugal Viagens LDA.

(. . .) The clause of express submission contained in the contract drawn up between the parties in litigation on 02/12/02 must be deemed valid as a criterion for attribution of international judicial competence, since it meets the legal criterion for attribution of competence, which in this case is the forum of the place of domicile of the parties, that is Lisbon.

(. . .) It cannot be accepted that, as the appellant claims, the mention of Spanish law made in the contract dated 02/12/02 and concluded with the mercantile company IBERRAIL, SA whereby the parties agree to the suspension of the contract of employment subscribed by the parties on 01/12/80 literally constitutes a clause of express submission to the Spanish courts or to Spanish law, and much less that such mention nullifies the clause of express submission to Portuguese law and the jurisdiction of the Courts of Lisbon in the contract dated 02/12/02 between the employee and the mercantile company Iberrail Portugal Viagens LDA, the extinction whereof gave rise to these actions".

– *STSJ* Madrid, 28 July 2004. Web Westlaw JUR 2004/271378.
Applicable law to contract of employment. Imperative material norms.

"Legal Grounds.

The second and last of the grounds of appeal, citing article 191 section c) of the Labour Procedure Act, is alleged infringement of article 6.1 of the Rome Convention for failure to apply the rules of Spanish law concerning the term and extinction of the contract of employment, claiming that since all the plaintiff's activity was permanently carried on in Spain, the Law applicable in the absence of choice would be Spanish; it is argued that a different law cannot be applied unless it is more favourable, and that clauses establishing a term of four years for a contract of employment and the employee's waiver of any action or claim arising from termination of the contract are contrary to this law.

In the first place we must mention Regulation (EEC) No. 1612/1968 of 15 October, article 7 of which provides as follows: (. . .).

This is an imperative norm which denies that any national of a Member State of the European Union who lends his services in another State can have less rights than the nationals of the latter State as regards his conditions of employment and particularly, among others, in matters of dismissal, so that mere observance of the norm would render the Spanish rules applicable; but in addition, article 6 of the Rome Convention concerning individual contracts of employment establishes the following: (. . .).

And hence, as this Court had occasion to note in its decision of 3 June 1999, the choice of a given set of rules is only possible in matters of contracts of employment where these rules result in greater benefit to the employee, and never where they are restrictive, in which case the Law applicable in absence of such choice must be applied; and in this case it is clear that the rules of the United Kingdom, to which the contract signed by the parties remits, are unfavourable in that, as stated in the unaltered roll of evidence, they contemplate the waiving of any claim in connection with unfair dismissal and further permit the conclusion of temporary contracts of employment for no good reason, and these rules inform the clauses transcribed in exhibit seven, which clearly restrict the rights enjoyed by Spanish employees and are contrary to our Law, which forbids such pacts that fail to respect the minimum level of necessary rights laid down as an imperative in the Workers' Statute, which must consequently be applied to the case here at issue, considering that, the law of the United Kingdom not having been chosen, the contract must be governed by the labour law of the place where the employee habitually served – that is Spain – given that the statutory regulation of the extinction of employment relations cannot be "in pejorem partem", which is unaffected by the existence of a number of improvements in Social Security matters in the United Kingdom or by the fact that he is paid in Sterling, or naturally by the fact that he is provided with accommodation in Spain or that he pays taxes in the former country, because the decisive factor is that the contract has been performed at all times in this country and therefore our more benign law is indubitably applicable. As a consequence, we uphold the appeal and declare that the dismissal was unfair in the terms of article 55.4 of the Workers' Statute, there being no cause to warrant the temporary nature of the contract nor therefore its extinction through the passage of time, and the employer further having failed to meet the formal requirements for notification of such extinction pursuant to section 1 of the cited article of the Statute".

– *STSJ* Madrid, 15 June 2004. Web Westlaw AS 2004/2933.

Foreign law applicable to contract of employment. Applicability of art. 10.6 *CC*. Characterisation of the contract as an ordinary contract of employment. Fair dismissal for breach of contractual good faith.

"Legal Grounds.

The applicants lived in the city of Rome before being engaged in the same city to provide their services. It is the unified doctrine of the Supreme Court, (. . .) that the general principle laid down in article 10.6 of the Civil Code which considers the place where the service is rendered in determining the Law applicable to a contract of employment must be obeyed, especially if we consider that the services are always rendered in the place where the contract was concluded – that is, abroad – no doubt because this was the place where the employees had their habitual residence; and this being so, article 1.4 of the Workers' Statute, which implements the cited article 10.6, establishes as requirements for applicability

of Spanish labour law to the work performed by employees abroad, that the latter be Spaniards, that they work in the service of Spanish companies abroad and that such Spanish employees have been engaged in Spain. As we have seen, this last condition is not met in the present case, which means that the Spanish labour regulations are not applicable to the plaintiffs, since their contract is subject to Italian law as the plaintiffs themselves stated in the proceedings to which the third item of evidence refers, in which the cited foreign law was applied.

(. . .) We cannot accept that the relationship of the applicants with the Embassy – which, as the State Attorney says, is an integral part of the State Administration – may be considered domestic work, since an Embassy is obviously not a family employer, even although the Ambassador and his family dwell there, and therefore this contract is clearly not concluded personally by the Ambassador nor is it extinguished by the transfer of this Ambassador and the arrival of another, but by the Embassy, and the services are rendered to the Embassy even if they also include cleaning or attending to the Ambassador's apartments, and his family where applicable; and they are not confined to these but obviously extend to the needs of the Embassy; in other words these functions are not proper to a family home, and hence the applicable precepts are not those referred to by the applicant but those governing ordinary labour relations as collected in the "Discipline for labour relations of employees of Embassies, Consulates, Legations, Cultural Institutes and International Organisations in Italy" done at Rome on 14 May de 2003, submitted by the State Attorney and, in the version of 26 January 2000, by the applicants, under article 28 of which, reiterating Law n. 300 of 20/5/1970, dismissal is fair where there is a misdemeanour serious enough to warrant it. That is clearly so in the present case, it having been demonstrated that having opted voluntarily on 4 April 2002 to abandon the apartment that they occupied at the Embassy in view of the peculiar nature of their services and to dwell outside it, the applicants made themselves secure in the said dwelling and refused to leave unless they were granted certain working hours which they sought unilaterally to impose; such conduct was clearly in breach of contractual good faith inasmuch as they sought to bend the Ambassador's will to their own, sustaining their position for more than one year and taking advantage of the magnanimity of the latter, who graciously assented to successive extensions of their occupancy.

Whether or not the apartment is the domicile of the employees is neither here nor there; the important thing is that it is an integral part of the Embassy buildings, which they were allowed to occupy free of charge and which they themselves chose to leave and go to live outside the Embassy, and that they went on to hinder the works that had to be carried out in these rooms with the sole intent of unilaterally imposing their will on their employer. Such conduct warrants dismissal, which we hereby declare to be proper, with no entitlement to compensation, and we uphold the State Attorney's appeal, which would equally be successful were the relationship to be considered one of domestic service or were Spanish law to be applied, in light of the terms of articles 54 and 55 of the Workers' Statute".

– *STSJ* Galicia, 26 April 2004. Web Westlaw AS 2004/3077.

Contract of employment subject to foreign law. Closer links. Public policy exception. Imperative material norms.

"Legal Grounds.

a) "Carlos Antonio entered service with Empresa Nacional Elcano de la Marina Mercante SA. on 5 June 1978 (and) his professional category was that of fireman".

b) "On 15/11/1993 Empresa Nacional Elcano . . . and the Members of the Fleet Committee of the cited company agreed (the conditions of engagement with Lauria Shipping Co.)".

Among these conditions it is established that "these articles shall be the norm governing relations between the parties, and its clauses constitute an indivisible whole which cannot be amended, expanded or annulled without the consent of both parties, even through the application of rules of necessary right", that "where these articles do not provide, the international conventions ratified by Spain and applying to the Merchant Marine shall be applicable provided that they do not prejudice or alter the substance of these articles", that "any disagreements that may arise in connection with the application of the cited conventions shall be resolved by three arbiters, one to be appointed by either party and a third appointed by the first two", and that "the parties agree to be bound by Spanish law and jurisdiction solely in matters of discipline (sanctions, dismissals, etc.) and in connection with amendment of the conditions agreed in the articles" – Clause 26 of Annex I.

c) "On 22/11/2003 (sic, 1993) . . . they reached . . . (another) agreement whereby all employees whose employment relationship terminated – numbering 152 – signed new shipping articles with Lauria Shipping Co. and agreed that the latter would guarantee the continuity of the jobs (and) the individual shipping articles would consist of the rules set forth in the clauses agreed by the parties".

d) "On 2/12/1999 (sic, 1993) the Ministry of Labour and Social Security authorised termination of the contracts of employment of 287 employees of Empresa Nacional Elcano de la Marina Mercante . . . and declared the affected workers to be legally unemployed".

h) "The company Lauria Shipping Corporation Limited was incorporated on 9/11/1989 (and) its corporate domicile was initially in the Bahamas and is now . . . (in) Madeira, Portugal".

k) "Since 26/12/2002, the company Preston Marine . . . and following the conclusion of an agreement with Lauria Shipping, SA, it handles the management of the crew and the paperwork relating to shipping and unshipping . . . has its domicile in Lisbon, Portugal".

l) "On 25/2/2003, the company Lauria Shipping SA. and the Maritime Sector of the State Federation of Transport, Communications and the Sea, affiliated to the General Workers' Union (as a member Union of the International Transport Federation) concluded what was called (a) Framework Agreement, applicable solely to crew members who had been serving on Lauria vessels of Spanish

nationality who joined Lauria immediately after the lay-offs of 22/11/1993, recognised by the Spanish authorities as terminating their employment relations with Empresa Nacional Elcano de la Marina Mercante SA (and) the parties declare that they consider that the individual contracts of the above-cited crew members, incorporating the conditions of the Agreement of 15/11/1993, terminate at the end of 9 years, counting from their commencement, and they also cease to be valid at the end of that period . . . (and) that in light of the termination of the said contracts the parties deem it necessary to agree the conditions to govern the shipping articles of the said crew members hereafter" – Exhibit Thirteen.

m) "On 24/3/2003 Preston Maritime (as crew manager of Lauria Shipping SA) sent the plaintiff a letter, which the latter received at his domicile . . . (in) Riveira (A Coruña) and which indicated (that) . . . in order to offer you a place on a ship and give you the papers and instructions for embarkation, in the next few days we will invite you to come to our offices located . . . (in) Lisbon, Portugal . . . (and) we ask you to confirm your availability as soon as possible (and) we would stress the need to bring vouchers showing that you are up to date with your contributions to the Special Social Security Scheme for Emigrant Seamen (REM), or failing that and exceptionally for this sailing, that you are registered or have applied for registration in the said Special Scheme (and) you must also present the following papers . . . enlistment book".

n) "The plaintiff answered the above letter . . . by sending a facsimile on 9 April with the following text . . . as Lauria Shipping SA are well aware, I have been sailing for years without having to contribute to the Special Scheme, since for some time I have been registered as retired without this preventing me from sailing . . . my enlistment book is not necessary either since the vessel does not sail under the Spanish flag . . . I meet all the other requirements and confirm my availability to sail as soon as I finish my vacation"

o) "On 7/8/2003 the ISM (replied to the plaintiff that) . . . the work that you do on board vessels flying flags of convenience does not qualify for inclusion (in the Special Seamen's Scheme) and is therefore compatible with the retirement pension".

p) "Before the Framework Agreement of 25/2/2003 came into force, the company Lauria Shipping habitually engaged employees who were receiving a retirement pension".

(. . .) With the debate couched in the above terms, in light of the facts declared proven we must first determine what law is applicable to the employment relationship between the plaintiff and Lauria Shipping Sociedad Anónima, an employment relationship with a foreign element, which causes us perforce to apply the terms of the Rome Convention of 19 June 1980.

In the case here at issue there is no doubt as to the Law of the vessel's flag, namely that of the Bahamas, nor have the litigants disputed the validity under Bahamanian law of the collective agreements adopted on 15/11/1993 and 25/2/2003, which agreements remit by default to "the international conventions ratified by

Spain", and in specific matters to "the laws . . . of Spain", which fragmentation is feasible according to article 3 of the Rome Convention.

Such reference to "the international conventions ratified by Spain" fits perfectly with Spain's ratification of International Labour Organisation Convention number 147 on minimum standards in merchant ships, approved at the 62nd Meeting (Geneva 1976) on "substandard vessels, particularly those registered under flags of convenience".

(. . .) However, the imperative Spanish provisions are applicable in the case at issue, (i) because if we consider the circumstances of the employment relationship, there is ample reason to believe that there are closer links to Spanish law, and (ii) because in any case Spanish police laws are applicable since the Spanish courts are competent.

On the one hand there is ample reason to believe that there are closer links with Spanish law: the employee is Spanish and resides in Spain, his engagement by a company domiciled in the Bahamas is a consequence of a prior engagement by a Spanish company, the offers of employment were received in Spain, and also in establishing the laws applicable by default to the employment relationship, reference is made to the international conventions ratified by Spain, and in part to the laws of Spain.

Furthermore, it is not proven that Lauria Shipping Sociedad Anónima has a "genuine link" – in the terms of the International Convention on the High Seas (Geneva, 29 April 1958), likewise ratified by Spain (BOE 27/12/1971) – with the Bahamas other than its domicile; indeed, the crew manager of Lauria Shipping Sociedad Anónima is not Bahamanian but Portuguese.

(. . .). In conclusion, without prejudice to the validity and the enforceability under Bahamanian law of the Agreements of 22/11/1993 and 25/2/2003, they cannot in any case contravene imperative provisions of Spanish law; which conclusion does not gainsay the existence of a compromissory clause referring to the totality – the Agreement of 15/11/1993 states that "these articles shall be the norm governing relations between the parties, and its clauses constitute an indivisible whole which cannot be amended, expanded or annulled without the consent of both parties, even through the application of rules of necessary right" – since, regardless of the consequences of breach of that clause under Bahamanian law, even if these entail annulment of the contract of employment (which is not proven, and be it remembered that the foreign law must be proven under article 281.2 of the Civil Procedure Act), this would not preclude the application of the imperative Spanish provisions; indeed, the way would be clear for the application not only of the imperative Spanish provisions but of Spanish law in general, since the *pactum de lege utenda* being without effect, it would only remain to apply article 6.2 of the Rome Convention.

The law applicable to the contract of employment having been determined as noted, we must examine, from that perspective, the legal allegations made in the formalisation of the appeal and, with regard to the infringement of articles 82, 83, 85, 87, 88, 89 and 90 of the Workers' Statute, as they relate to points

54 and 55 of the legal allegations, tending to show unfair dismissal, the appellant argues that the Agreement of 25 February 2003 – whereby workers over a certain age were prohibited from sailing – is not applicable and the Agreement of 15 November de 1993 – whereby workers over a certain age are allowed to sail – is applicable to the plaintiff; whereas in its writ of objection to the appeal the company Lauria Shipping Sociedad Anónima supports the substance of the decision *a quo* which, to the contrary, considers the refusal to allow the plaintiff to sail warranted. For the rest, Empresa Nacional Elcano de la Marina Mercante Sociedad Anónima has made no objection to this ground of appeal. (. . .).

The question at issue – which in light of the arguments put forward by the parties may be summarised as whether the failure to call up the employee constitutes extinction of the contract of employment for just cause or whether, that not being so, the situation qualifies as unfair dismissal – must be settled, as explained above, in accordance with the imperative provisions of Spanish law or, failing that, in accordance with the Agreements of 15/11/1993 and 25/2/2003, insofar as Bahamanian law admits the validity and enforceability of such provisions.

(. . .) We should note first of all that the Agreements of 15/11/1993 and 25/2/2003 cannot be described as agreements on concrete matters, and that whether or not they are covered by the Statute does not affect their validity and enforceability, for the simple reason that such classifications belong to Spanish law, which is not applicable to this aspect – if it were, we would be in the absurd situation where any foreign collective agreement that was valid and enforceable according to the foreign law would be treated as not covered by the Statute in Spain.

We must further consider that the employer and defendant has furnished two legal reports, appended to the record as folios 613 to 618 and 746 to 748, which support the validity and enforceability of those Agreements under Bahamanian law, and that, to the contrary, no reason has been given to support the invalidity or unenforceability of the said Agreements under Bahamanian law – and be it recalled once again that the interested party must prove the foreign law according to article 281.2 of the Civil Procedure Act.

All this would lead us – albeit on a different legal foundation – to confirm the decision *a quo*; however, the solution will be quite different if we go by the Spanish imperatives, and specifically those relating to discrimination by reason of age – with the attendant judicial interpretation – which, fundamental rights being an integral part of Spanish public policy, this Court cannot under any circumstances refrain from applying, and this in turn, as we shall argue hereafter, must cause us to overturn the original decision.

Moreover, the inability of the competent Spanish courts to apply a foreign law – such as Bahamanian law, which apparently allows forcible retirement clauses – that is contrary to Spanish public policy finds normative endorsement not only in article 7 of the Brussels Convention, but also in article 12 section 3 of the Civil Code, which expressly provides that "under no circumstances shall a foreign law be deemed applicable if it is contrary to public policy".

4. If we reread the statement of proven facts we must conclude that in failing to call up the employee, the employer has applied a forcible retirement clause as established in Clause 7 of the Agreement of 25/2/2003(. . .).

To recapitulate, Clause 7 of the Agreement of 25/2/2003 is void under the current Spanish law in that it breaches the bar on discrimination by reason of age, and consequently the failure to call up the plaintiff, which is founded on that Clause, cannot be considered extinction of a contract of employment for just cause, which means – given that the plea in appeal is confined to this point – that the allegation of unfair dismissal must be upheld in accordance with articles 55 and 56 of the Workers' Statute.

(. . .) the reservation of the Spanish imperative provisions obliges us to determine whether according to these provisions any liability attaches to Empresa Nacional Elcano de la Marina Mercante Sociedad Anónima; and in this connection, weight must be attached to the allegations expounded in the legal objection raised in the appeal, to the effect that when the contract with Empresa Nacional Elcano de la Marina Mercante Sociedad Anónima was terminated, the employee and plaintiff was not paid the compensation – his legal right – due in respect of a lay-off instituted under Spanish law (article 51 of the Workers' Statute) but settlement of a pension scheme, so that, since he was never paid the said compensation – a necessary right – then the party who was obligated to pay it – Empresa Nacional Elcano de la Marina Mercante Sociedad Anónima – and did not ought now to be ordered to do so.

However, these arguments do not find the necessary substantiation in the declaration of proven facts – which do not show beyond doubt the correspondence between the agreed compensation and the settlement of the retirement scheme, nor the correspondence between the legal minimum compensation, which would be 20 days' pay per year of service under article 51 section 8 of the Workers' Statute, and the amount vouched for by the bank.

In any event the Spanish jurisprudence has admitted the availability of the compensation laid down in article 51 section 8 of the Workers' Statute in cases of voluntary acceptance of a retirement scheme prior to the authorisation of layoffs.

The peculiarities of the engagement of the plaintiff on a vessel flying a flag of convenience clearly place him in a more favourable situation than those contemplated in the jurisprudence of cassation in that his legal situation was that of unemployed, as if he had taken early retirement, and he was in receipt of a retirement pension, while at the same time he enjoyed a guarantee of relocation which was effectively honoured. Apart from this he received a substantial sum in compensation, so that when he signed the contract with Lauria Shipping Sociedad Anónima, there was absolutely no violation of the imperative rights of the plaintiff as a worker under Spanish law arising from his previous employment relationship with Elcano de la Marina Mercante Sociedad Anónima.

Briefly, then, given that the Agreement of 25/2/2003 is valid and enforceable under Bahamanian law, we must conclude that, absent any violation of the necessary

Spanish law, there is no ground on which to claim the compensation established in the Agreement of 15/11/1993 – which be it said is claimed in a dubious joinder with the action for dismissal (see article 27 of the LPL) as a subsidiary claim to that of unfair dismissal, albeit were the principal claim to be upheld then there would be no need to reject the subsidiary claim were it not for its significance as regards the resolution of this other legal allegation – and consequently no liability attaches to Empresa Nacional Elcano de la Marina Mercante Sociedad Anónima as regards the consequences of an unfair dismissal which are imputable solely to Lauria Shipping Sociedad Anónima.

The same arguments clearly also apply to the issue of the employee's seniority for the purposes of article 56 of the Workers' Statute".

XIII. TORTS

XIV. PROPERTY

– Decision of the Provincial High Court of Granada no. 383/2004 (Section 3), of 26 May. Web Westlaw AC 2004/970.

Industrial Property. Paris Union Convention. Annulment of trade mark registered in Spain by the defendant infringing a foreign trade name.

"Legal Grounds.

(. . .) While one might be hard put to understand why Holiday Autos should be considered a "well-known trade mark", nonetheless from the evidence as a whole this Court is bound to conclude that the trade marks registered in Spain by the defendant clearly infringe a foreign trade name used by the plaintiffs for many years before application was made to register the former and could give rise to confusion, and this alone would be sufficient to ensure success of the actions brought for annulment.

In this connection it behoves us to highlight some of the facts confirmed by the documentary evidence as it relates to the witness evidence:

- Holiday Autos ("partnership"), now "Holiday Autos International Ltd.", was incorporated in London in 1987 and then in Munich in 1988 as "Holiday Autos GmbH" and among the objects listed in the complaint is that of car hire. The company applied for the Holiday Autos trade mark in Germany and in Austria in 1988 and in 1990 applied for recognised international trade mark status in the terms noted elsewhere.
- Since then, under the trade name "Holiday Autos", they have carried on their activity, offering self-drive car hire services at various tourist resorts, some of them in Spain, particularly on the Costa del Sol and the Balearic Islands, in collaboration with Spanish firms in the sector.
- The defendant, Holiday Car Hire, SA, a firm engaging in car hire with an establishment in Málaga, applied to register "Holiday Autos Spain" as a Spanish trade mark on 15/6/93, and this was granted for self-drive car hire

services, with the number 1767376, on 28/6/95, published in the *BOPI* [Official Industrial Property Gazette] on 16/8/95. Subsequently, the defendant applied for and was granted Spanish trade marks 2035.083 and 2035.084 "Holiday Autos", the first for class 12 and the second for class 39. The grants were published in the *BOPI* of 16 May and 1 November 1997.

The foregoing demonstrates at the least that the trade marks whose annulment is sought undoubtedly infringe the trade name, which is moreover the plaintiffs' company name in their countries of origin with which they have been working continually since they began operating in the tourist services sector, and particularly self-drive car hire, in the way that they do. In our view this must evidently give rise to a risk of confusion for the consumer. A foreign tourist in Spain who has initially rejected the idea of hiring a vehicle in his country of origin may later decide to do so once at his destination, and he may notice the name "Holiday Autos"; even if it appears as it has until now along with the name of the defendant, given that the latter holds title in the trade mark, there is nothing to prevent him from using it on its own, and more widely".

– *SAP* Barcelona, 30 January 2004. Web Westlaw AC 2004/ 506.

Industrial Property. Exhaustion (international) of Right to the trade mark. Free Trade Treaty between the United States of Mexico and the European Community.

"Legal Grounds.

The essential question in the present proceedings is the exhaustion of the right to the trade mark and how this relates to parallel importations of products from a country outside the European Economic Area (Mexico). What is at issue is whether the proprietor of a trade mark registered in an EC country can lawfully prevent an authentic product identified by the same trade mark and placed on the market by him or with his consent outside the European Economic Area from being imported to the EEA by a parallel importer.

Although the issue has been and continues to be an object of controversy in our jurisprudence, there is much less of a basis for such controversy since the reiterated and clear judgments that have been issued on it by the Court of Justice of the European Communities, whose doctrine is binding on domestic judges even more, if possible, than that our own domestic courts.

The two fundamental rulings in this respect are duly recorded in the judgment *a quo* – that is, the Silhouette and Sebago cases. The CJEC later ratified and elaborated its criterion in the matter of Davidoff-Levi Strauss (JCJEC of 20 November 2001), containing a reference for a preliminary ruling by the English courts, in proceedings which addressed virtually the same issue as the present ones, in connection with a case in which Levi Strauss & Co. was a party, as it is in the present proceedings.

The question here raised relates to the interpretation of article 7.1 of Directive 89/104 regarding the approximation of the laws of the Member States in matters of trade marks. In point 32 of its judgment of 20 November 2001,

the CJEC noted that from articles 5 and 7 of the Directive of reference it follows that the Community legislator enshrined the rule of exhaustion of the trade mark in the Community – that is, the rule whereby the right conferred by the trade mark does not allow its proprietor to prohibit its use for products placed on the market in the EEA with that trade mark by him or with his consent. In adopting such rules, the CJEC asserted, the Community legislator has deprived the Member States of the possibility of making provision in their domestic law for exhaustion of the rights conferred by a trade mark in respect of products placed on the market in third countries (judgment of 16 July 1998, Silhouette International Schmied, section 26).

The effect of the Directive is, then – as the CJEC continues to sustain – to limit exhaustion of the right conferred on the proprietor of a trade mark strictly to cases where the products are placed on the market in EEA and to allow the proprietor to place his products on the market outside the Area without such marketing exhausting his rights within the EEA. In determining that marketing outside the EEA does not exhaust the proprietor's right to oppose importations of such products without his consent, the Community legislator has enabled the proprietor of the trade mark to control initial marketing in the EEA of products bearing the trade mark.

The judgment of 20 November 2001 states that consent to marketing in the EEA of products imported from third countries must be so expressed that an intention to renounce the right to control initial marketing in the EEA is unequivocally demonstrated (section 45), albeit consent may be implied where it is to be inferred from facts and circumstances prior to, simultaneous with or subsequent to the placing of the goods on the market outside the EEA which, in the view of the national court, unequivocally demonstrate that the proprietor has renounced his right to oppose placing of the goods on the market within the EEA. (section 47).

With so definitive and precise a doctrine the CJEC has sought to remove the possibility of different criteria prevailing in different member States regarding the exhaustion of trade marks and thus preclude any possibility that the notion of international exhaustion of trade marks, upheld in some States (including our own), might survive in the EEA. And so resolute is it in the will to impose that idea that it has not hesitated to homogenise interpretations such as that relating to what is to be understood by consent of the proprietor of the trade mark to marketing in the EEA.

The appellant claims that his circumstances are not the same as in the Silhouette, Sebago and Davidoff-Levi Strauss judgments because his concerns a Mexican company domiciled in Mexico, a country which has concluded a Free Trade Treaty with the European Union, in force since the year 2000, and therefore the applicable principles are those of "domestic" and "most favoured nation" status, enshrined in Decision no. 2/2000 of the EC-Mexico Joint Council of 23 March 2000 (2000/415/EC).

We cannot entertain such a construction. The matter of fact dealt with in the CJEC judgment of 20 November 2001 is identical with that addressed in this case. Section 22 of the decision indicates that the articles of clothing from which the litigation arose in the United Kingdom were manufactured in Mexico, as well as in Canada and the USA.

The Free Trade Treaty between the United States of Mexico and the European Community cannot be said to have altered the rules of exhaustion of trade marks referred to in the previous ground".

XV. COMPETITION LAW

XVI. INVESTMENTS AND FOREIGN EXCHANGE

– *STS*, 73/2004, 4 February. Web Westlaw JUR 2004/95512

Foreign investments. Prior verification. Retroactivity of most favourable sanctioning rule

"Legal Grounds.

The object of this appeal is to determine whether or not the challenged decision to impose a fine on the appellant, a Luxembourg company, for a minor administrative infraction consisting in having made an investment in Spain and set up a permanent establishment here without first requesting verification as required by art. 7.2.a) and d) of Royal Decree 671/1992 on Foreign Investments in Spain, is in accordance with the legal rules.

In light of the foregoing, there can be no doubt that at the time, the action of the appellant, a Luxembourg company, in reporting both its investment in a Spanish company Mosel Ibérica, SA and the constitution of a permanent establishment in Spain after rather than before the fact was classified and hence sanctionable. This is moreover quite aside from the possibility that the Spanish investors may have committed an infraction in acquiring stock in the Luxembourg company, which is separate from the conduct being judged here and would be susceptible of analysis under the rules on Spanish investment abroad (RD 671/1992 of 2 July).

However, subsequently to the facts and to the judgment imposing the sanction, while this was still in the process of application, the obligation of prior verification ceased to be – except in respect of some investments originating in territories or countries that are considered tax havens, meaning territories or countries referred to in Royal Decree 1080/1991 of 5 July and art. 4.2.a) of Royal Decree 664/99 – since the entry into force of the said Royal Decree 664/1999 of 23 April on foreign investments, which repealed the decree applied in the challenged judgment, namely RD 671/1992.

In accordance with the said jurisprudence, the principle of retroactivity of the most favourable subsequent sanctioning rule is applicable – even where, as in the present case, the most favourable sanctioning rule is introduced at a later

date than the sanctioning decision and while the jurisdictional appeal lodged against it is still being heard".

XVII. FOREIGN TRADE LAW

XVIII. BUSINESS ASSOCIATION/ CORPORATIONS

XIX. BANKRUPTCY

XX. TRANSPORT LAW

- *AAP* Huelva, 29 March 2004. Web Westlaw. JUR 2004/154823

  Preventive attachment of vessel. Brussels Convention of 10 April 1926 not applicable. Applicability of *Lex fori.*

  "Legal Grounds.

  The applicant seeks revocation of the lifting of the attachment ordered in the contested judgment and insists that preventive attachment is proper in that it entails a maritime lien in accordance with the Brussels Convention which entitles it to be granted the said attachment, and furthermore this has been judicially acknowledged and declared in a firm Judgment of the New York District Court and an affidavit has been signed by two Attorneys of the said city.

  However, in the present case the appellant itself acknowledges that there exists a genuine, and possibly an insurmountable obstacle in that the port of registration and the flag of the vessel, "Anax Puma", are Panamanian, and Panama is not a signatory of the Brussels Convention of 10 April 1926, which is therefore not applicable to it. It would of course be desirable that the rule be universal, particularly in a truly international sector like shipping, so that vessels flying the flags of non-signatory States could not be used as a fraudulent means of sidestepping international Maritime Law.

  This Court likewise concludes in favour of the possibility of preventive attachment in application exclusively of domestic Law – specifically the procedural rules laid down in arts. 728 *et cetera* of *LECiv*; in this way the requirements of *fumus boni juris* or the appearance of a sound claim and *periculum in mora* or the danger in delay or in procedural delay are met by adopting the criteria of the Brussels Convention and reinforcing them with legal grounds from our own Civil Law, as we shall see.

  We find yet another legal argument – one of material justice perhaps – favourable to preventive attachment as ordered: namely, the power to hold the good vouchsafed by arts. 1600, 1730 *et cetera* of our Civil Code to persons undertaking works or fulfilling an order in it, such as repairs, until they are paid their due. In this case we must consider that the claim of the New York repairer to hold on to the vessel it has repaired until it is paid its due has the appearance of

being a sound one, and for someone to receive the vessel once repaired without paying for that repair would constitute unwarranted enrichment, in which case the repairer would be entitled as a service provider to recover its losses in the same way as the creditors who exercised their right by disposing of the vessel to a party who must also pay this prior debt for repair, for a service from which they indubitably benefited.

The very fact of the disposal of the vessel to a third party and the flag of a non-signatory State warrant the claim of danger in delay or *periculum in mora*, given that its final destination is unknown and the possibility that the vessel may disappear or be removed to country not bound by international regulations".

– *SAP* Girona, 229/2004, 8 July. Web Westlaw. AC 2004/1511.

International road transport of goods. Action for recovery brought by the principal carrier against the party who performed the carriage. Lack of evidence.

"Legal Grounds.

The mercantile entity Doux Ibérica, SA commissioned Transportes Frigoríficos del Segre, SL to carry goods, to be uplifted on 19 April 2002 before 1 p.m. at the locality of Le Chatelet (France) and delivered at 6 a.m. on 22 April following at the locality of Els Alamus-Lleida. The load consisted of 600 boxes of fresh chicken carcasses which were to be delivered for preparation, packaging and distribution to Spanish superstores.

As the carrier had no vehicles available, it contracted the firm Manel Prades, SL to carry the said goods; it sent instructions to the latter by facsimile indicating the points of uplift and delivery (doc. 1 of the complaint on folio 4).

The lorry arrived late, and a claim was duly filed by Doux Ibérica, SA against Transportes del Segre, for the sum of 7,890.01, which sum the latter is now claiming from the actual carrier.

(. . .) It must be remembered that a peculiar feature of the international regulation mentioned (Geneva Convention of 19 May 1956) is that it established its own system of liability. Thus, art. 17 provides that the carrier is liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery, with a number of exceptions. Additionally, article 9 provides that the goods and their packaging must be presumed to be in good condition when the carrier takes them over unless the consignment note contains a specific reservation by the carrier (art. 9), and art. 18 places the burden of proving that loss, damage or delay was due to one of the grounds for exemption from liability specified in the preceding article fell upon the carrier. According to art. 3, the carrier is responsible not only for his own actions but for the acts of his agents and servants and of any other persons of whose services he makes use for the performance of the carriage. In other words, it lay with the principal carrier now claiming as plaintiff to prove that a reservation was made in

due time and manner by the entity DOUX to whom the goods were delivered; as he failed to do so, his claim ought to have been dismissed instead of a species of simple subrogation being applied in respect of the sum paid by the applicant, thus failing in the strict application which, contrary to the assertion of the judge *a quo*, the referred Convention demands".

– *SJ1ª* Palma de Mallorca, 147/2004, 30 June. Web Westlaw, AC 2004/1811

International air transport. Joint and several liability of the company organising the journey and the company in charge of transport

"Legal Grounds.

Actions are brought by the plaintiff for extra-contractual and contractual liability respectively against Travel Plan as the wholesaler and against Air Europa as the air navigation company in charge of the transport, in connection with events that occurred during a Madrid/Punta Cana, Punta Cana/Madrid package contracted with the first of the two, scheduled to depart on 22 August 2003 and return on 31 August. On the said journey, a leisure trip, the plaintiffs' luggage was mislaid and has not appeared to this day.

The foregoing having been established, we may say that this case undoubtedly comes within the terms of the Package Travel Act of 6 July 1995 (RCL 1995/1978). (. . .) This is the spirit of the same Law which seeks to afford broad protection to the consumer, and so, since Travel Plan was the organiser of the trip and it has been demonstrated and admitted that the contract was not properly performed from the moment at which the plaintiffs' luggage went astray for the duration of the trip and until now, it is jointly and severally liable for the damages sustained, the nature and extent of which are determined in the following grounds.

Having regard to the airline company, as it sustains, air transport is subject to specific legislation (. . .) in the case of international transport as is the case here, the Warsaw Convention of 12 October 1929 (. . .) limits the carrier's liability to very specific sums in the event of loss of, damage to or delay of checked-in baggage in the absence of a special declaration of value, unless the carrier has acted maliciously or with culpable negligence – art. 25.

(. . .) In the present case, the company Air Europa has apologised for the fact that the luggage has failed to appear after a year but has not explained its disappearance – what is more, it has not even attempted to produce a satisfactory explanation, or at least to give an account of the inquiries it has made to determine whether the luggage was actually loaded on board, was stolen, and so on. In light of the foregoing, this demonstrates at the very least a serious failure of due diligence in the care, carriage and management of lost luggage, even although the company itself classifies it as an "incident". And this being so, the limit proposed by the defendant evidently cannot be entertained and it must be held liable for full compensation of the damage sustained by the plaintiffs. This is so whether we take such liability to derive from article 1902 of the Civil

Code – which would entail exclusion of the terms of article 22 of the Warsaw Convention – or we take there to be contractual liability under the principle of unity of civil culpability, since it is clear from the context that there were foreseeable possibilities of damages at the time the obligation materialised and that these were the necessary consequence of the carrier's failure to perform as required by article 1107 as it relates to article 1103 of the Civil Code, in that the company Air Europa did not take the trouble to demonstrate or even allege the causes of the loss".

- *STS* 1121/2004, 18 November. Web Westlaw RJ 2004/7653
  Maritime transport insurance. Preventive attachment of vessel.

  "Legal Grounds.

  As a consequence of a maritime transport insurance policy, "Cigna Insurance" was obliged to pay 22,633,610 pesetas to "Sociedad Ibérica de Molturación, SA" (Simsa) for damages sustained by the latter in certain consignments of soy beans carried by the vessel "Eve Trader" from San Lorenzo (Argentina) and Río Grande (Brazil) to Santander and therefore brought an action against "Oceanalpha Shipping" as carrier and against "Stamina Shipping" as the current proprietor of the vessel, for recovery of the sum indicated.Appeal by "Oceanalpha Shipping Limited". Two (. . .) the fact that "Simsa" received the goods upon discharge does not give the latter title therein, since the regular holder of the bills of lading is another entity which has not endorsed them.With regard to the argument summarised above, it should be remembered that the challenged judgment does not found the decision on a claim that "Simsa"'s ownership of the goods derives from the bills of lading submitted with the action, but on the fact – which it considers to have been amply demonstrated – of the existence of a contract of sale in which Simsa appears as the purchaser, and that Simsa was the entity that had taken out the policy for damage to the goods being carried and to which these were delivered when the vessel reached its port of destination. On the basis of these facts, which indicate the existence of title and means adequate under our law for the transmission of ownership, the High Court has taken the view that title in the goods belonged to Simsa, and that since the insurer bringing the action had compensated Simsa for the damages sustained in the carriage, it was legitimately entitled to recover the sum disbursed for the said damages. Appeal by "Cigna Insurance Company of Europe, SA-N.V." Five. The first of the three grounds – all founded on point 4 of article 1692 of the Civil Procedure Act – alleges infringement of article 14 of the Brussels Convention of 10 April 1926 as it relates to articles 12.6 and 10.2 of the Civil Code and 96 of the Spanish Constitution. (. . .) It is argued that although to be applicable, article 14 of the Convention only requires that the vessel be from a signatory country, in reality it is applicable to all international circumstances as domestic Spanish law with external effects for purposes of preventing fraud such as sale of the vessel to another shipowner.(. . .) Since both parties acknowledge that the vessel carrying the goods at issue flew the

Cypriot flag and it has not been shown that Cyprus is a signatory of the said Convention, this ground must be dismissed. Six. The second ground alleges infringement of article 12.6 as it relates to article 10.2, both of the Civil Code, and article 96 of the Spanish Constitution, asserting that while according to article 10.2 the law applicable to ships is that of their flag, article 12.6 requires that the person invoking a foreign law must accredit the substance and validity of that law. Therefore, it is argued, absent proof of the domestic law of the country under whose flag the vessel sails, the Brussels Convention of 1926 (RCL 1930, 1104) must be taken to be sole valid law, as Spanish law by virtue of article 96 of the Constitution. This ground must likewise be dismissed since the incorporation of the said Convention to Spanish law, consequent upon its signing by Spain and publication in the Official State Gazette, is necessarily *en bloc* – that is to say, including each and every one of its articles, and hence also article 14, which defines the scope of application of the rules it contains. This scope is founded on the premise that the vessel affected by the legal relationship – in this case maritime privilege – at issue belongs to one of the signatory States, which is not the case here (. . .) it is precisely article 12.6 of the Civil Code that commands the courts to apply the rules of conflict of Spanish law, one of which – article 10.2 of the Civil Code – clearly establishes that any rights in vessels shall be subject to the law of the place of their flag or registration. The immediate consequence of obedience to this last rule is that the rules of the Spanish Code of Commerce cannot be applied to the present debate, since – as the Provincial High Court has stated – the applicant has demonstrated that the vessel whose attachment is sought as security for the debt claimed is of Cypriot nationality".

– *SAP* Barcelona no. 247/2004, 16 April 2004. Web Westlaw JUR 2004/186078

International multimodal transport. Applicable legal regime.

"Legal Grounds.

The defendant is certainly right in asserting that in cases of international transport of goods the commission agent and the carrier are treated as the same, even where the latter does not undertake the carriage on its own account but takes all the necessary steps for effective carriage in its own name at the behest of the principal/purchaser of the goods to be carried.

When the matter is addressed thus, the first step is to inquire whether the defendant comes under the rules of the Code of Commerce (LEG 1885, 21) regulating overland carriage of goods (article 349 *et seq.*), which places no limits on the liability of carriers for loss of or damage to the goods carried as asserted in the judgment here appealed, with which this court does not concur.

That being so, there is no doubt that the defendant made out the bill of lading in its own name with the shipping company engaged to carry the goods by sea, and therefore according to the above doctrine, the special rules regulating international transport of goods must be applied, as discussed further below.

(. . .) Having established the foregoing considerations, we now turn to examine the rules applicable to the case, bearing in mind that the appellant in these

proceedings admits objective liability for the loss (and has offered no exonerating consideration) and now asks that the *quantum* be determined in accordance with those rules that may apply to the case here at issue in ascending order of value.

Therefore, applying first the principle *iura novit curia*, it is concluded that the defendant, as the party responsible for performing the carriage "door-to-door" – that is, from Los Angeles to Barcelona – used various different means of transport, so that the case may be treated *prima facie* as one of what is known as "multimodal" international transport. Hence, as noted earlier, the most likely theory is that the goods were lost during the overland part of the journey.

However, given that there is no uniform regulation of international multimodal transport, which entails at least two different systems of transport (rail and ship), and the UN Convention of 24 May 1980 on international multimodal transport is not applicable, we must look by analogy to the carriage contract corresponding to each case according to the site of the loss or damage.

This lack of normative force has caused the doctrine to seek the Law applicable to transport of this kind, the main positions centring either on the fragmentation of the regulations along the lines of the particular mode of transport involved, or else on integration of the plurality of stages and modes of transport in a single contract which determines a single legal regime. The latter is the posture with the most adherents (*STS* of 17 December 1990), who debate between the desirability of looking to the principle of absorption (and applying the regulations for the principal mode to the whole), resorting to the general rules governing carriage contracts or, as a last resort, adopting a uniform interpretation of the existing international Conventions on transport (until such time as one proper to the case is ratified and becomes effective).

The first of these options has the drawback of attributing primacy to one mode over others and extending the regulation of a unimodal carriage contract beyond its natural scope, while the second (which has nonetheless received a more favourable critique thanks to the subsidiarity that it espouses and has been the choice of the Jurisprudence on some occasions by all – *STS* of 31 January 1984) has the disadvantage of entailing a variety of regulations (arts. 1601 *et seq.* of the Civil Code, arts. 349 *et seq.* of the Code of Commerce or arts 652 *et seq.* of the same), all dating back to the last century, in an area in constant evolution, and hence all presumably rendered obsolete by the new technologies and unequipped to deal properly with these matters.

From this we infer: One. That the US rules cited by the party are not applicable to the case in point.

These internal US regulations place limitations on liability for the carriage of goods by sea from ports in that country for foreign trade.

They are confined to carriage "by sea" and are internal US regulations, and finally, for the foreign law to be applicable its scope and interpretation and whether it is in force must be reliably accredited in accordance with article 9 *et seq.* of the Civil Code, and therefore this petition must be refused.

The petition for application of the limits provided in the law of 22 December 1949 (RCL 1949, 1497) must be rejected since it has been established that the loss occurred before the vessel was "loaded". This rule and successive amendments cannot be applicable as they refer to damage at sea. Neither the 1968 nor the 1979 rules provide for damage occurring other than on journeys by sea or on boats or ships. This limitation is established in article 1 of the Maritime Transport Act.

Three. All that remains, then, is the Overland Carriage (Regulation) Act, Law 16/87 of 30 July and the regulating legislation of 28 September, which regulates the monetary limits on liability. These regulations are applicable not only as the rules most favourable to the plaintiff but also because the other regulations invoked by the defendant are not applicable. As noted earlier, we must look by analogy to the corresponding carriage regulations as supplementary and complementary rules (articles 65 and 106). It must be stressed, however, that unlike the judgments cited, in the present case the legislation governing international carriage by rail cannot be applied since these goods were carried by rail from Los Angeles to New York, and the USA is not a signatory of the Convention of 9 May 1980 regulating such carriage, which was ratified on 16 December 1981 and published on 18 January 1986. And finally, this not having been invoked by the parties, as already noted, we must have recourse to the applicable rules of Overland Carriage, which are more favourable to the party".

XXI. LABOUR LAW AND SOCIAL SECURITY

XXII. CRIMINAL LAW

XXIII. TAX LAW

– *STS*, 16 January 2004 Web Westlaw RJ 2004/939

Company Tax. Deductible expenses: differences in exchange rates in international movements of money

"Legal Grounds.

Having regard to the reimbursable advances from the parent company, effected by remitting currencies to a current account in the name of the Spanish branch and made in pesetas but invoiced in dollars, in which the conversion was done on the date of reimbursement to the parent company, generating differences in exchange rates, the court *a quo* took the view that these were not deductible expenses since the parties involved were not distinct legal persons, notwithstanding the "subjectivity" that the doctrine attributes to permanent establishments, since under the Company Tax Act, Law 61/1978 of 27 December, the concept of the taxable person is founded on the concept of legal personality.

As we saw when summarising the basis of the judgment *a quo* on this specific question of reimbursable advances effected by remitting currencies from the parent company to a current account, the entire argumentation rested on the assertion that the appellant lacked a legal personality distinct from that of the parent company in San Francisco and on the inapplicability of Ministry of Trade Instruction 20.2 for application of the Hydrocarbons Act. However, the existence of a legal personality is not a matter of fact but a matter of law; and from the powers vouchsafed by Locs Oil Company of Spain, SA and from its very denomination as a *Sociedad Anónima*, it is evidently a Spanish company with a legal personality of its own, despite its economic links with the US company.

Also, leaving aside the applicability of the Hydrocarbons Act (RCL 1958/2080), it is fair to say that differences in exchange rates resulting from international movements of money are deductible expenses for the purposes of Company Tax, since this is an aspect removed from the will of the parties which bears inexcusably on their profits".

– *SAN*, 4 October 2004. Web Westlaw JUR 2004/281549

International legal cooperation in matters of tax recovery. Absence of the guarantee on which liability is founded

"Legal Grounds.

1. On 8 March 2000, the Recovery Department of the *AEAT* (Inland Revenue) issued a payment form to the applicant entity in respect of tax settlement Code E0500000280000023 for the amount of 60,193,881 pesetas, indicating that this constituted notice, in pursuance of art. 103 of RD 1.684/90 of 20 December (RCL 1991/6, 284), of the debt owed to the State of Belgium, requiring that it effect payment and explaining that an appeal could be brought against the enforcement order with the authority of the demanding State and against the enforcement measures taken by the Spanish recovery machinery, a motion to set aside or an administrative economic complaint could be filed.

2. This injunction was accompanied by another document in which the Recovery Department stated that Banco Natwest España, SA, at that time Solbank, SBD, SA, appears as guarantor of the intra-Community carriage undertaken by Danzas Málaga, SL, and in the period running from 24 November 1995 to 12 January 1996 a total of 29 T1 customs documents in which the said company appeared as the declarant, and the said company having failed to present the goods at the office of destination, it was proceeding to recover the taxes owed. It added that it had not been possible to inform Danzas Málaga, SL of the debts, and that the guarantors were notified within the space of one year, that they had not been released from their obligations and that they were obligated to pay those amounts for which they were liable in respect of EC customs transit. They have not paid these sums.

In respect of a request for collection presented by the competent authority of a Member State, art. 19 of Royal Decree 1068/1988 of 16 September (RCL

1988/1930) implementing certain Community Directives on mutual assistance for the recovery of tax claims provides as follows: "1. Requests for collection must be made in writing and must be accompanied by an official original or a certified copy of the document authorising enforcement, issued in the Member State where the requesting authority has its headquarters. It must further contain a declaration stating that the requirements set forth in the subsequent art. 21 have been met, it must bear the official stamp of the requesting authority and must be signed by a functionary duly authorised to make the request . . .".

Having examined the actions, then, in relation to the arguments put forward by the appellant and to the documents in the administrative record appended to the proceedings – in which there is effectively no sign of the guarantee allegedly given by the appellant, be it said that on 2 April 2004 this Court ordered the suspension of the term for pronouncing judgment and issued a request to the Customs Office at Antwerp (Belgium) to remit to these proceedings accreditation of the requirements made to Natwest España, SA and the notices sent to the latter as guarantor in connection with payment of the duties owed due to failure to release the T1 documents of the company Danzas Málaga, SL, and also to remit the guarantee document furnished by the appellant, now Banco de Sabadell, SA and at the time Natwest España, SA; it also requested the National Recovery Office of the AEAT to remit to the proceedings the guarantee or surety signed by the alleged guarantor and debtor in connection with the intra-Community carriage undertaken by the company Danzas Málaga, SL, the subject of the present actions and whose existence the appellant denies.

The Customs Office at Antwerp has not replied to these requests despite the time that has elapsed to date; on the other hand the Head of the National Recovery Office of the Inland Revenue reported in an official communication of 26 May instant that she requested information from the Provincial Customs and Special Taxes Annex in Madrid regarding the said guarantee and was told that the guarantee had been returned by the functionary responsible for such procedures, but that in the return of the guarantee there was no mention of the date on which it was formalised or the identity of the person withdrawing it".

XXIV. INTERLOCAL CONFLICT OF LAWS

– *SAP* Barcelona, 9 September 2004. Web Westlaw Jur 2004/293050

Marital economic regime of community of acquisitions: private goods: inadmissible claim: dwelling acquired during marriage: Catalan separation regime not applicable: Catalan regional citizenship ("vecindad civil") not acquired, no marriage contract.

"Legal Grounds

(. . .) The assertion in the challenged judgment that neither spouse had acquired Catalan regional citizenship at the time of marrying on 7 April 1959 is correct and is founded on the balance of the evidence examined in the proceedings. This is a preliminary issue and is essential for determining whether title is held in private or in common in the dwelling transferred by the Ministry

of Housing under a private contract dated 7 April 1975 as the habitual and permanent home of the family . . . in the town of Manresa, finally paid off by instalments on 20 September 2000 and formalised in a public document on 18 October of the same year. And they had not acquired Catalan regional citizenship because Tomás was born in Madrid and Lourdes in Almería, and hence, sharing the same citizenship of origin they were subject to the common Civil Law, as provided in art. 14 of the Civil Code. Before marrying they had not opted to acquire Catalan regional citizenship, nor had they acquired it through ten years' continuous residence in Catalonia. They had not drawn up a marriage contract altering the marital economic regime, and therefore the regime was that of community of acquisitions as provided by default in art. 131 of the Civil Code as it relates to art. 1.345, art. 9–2 and article 1.315 of the same Code, at the time of marrying".

- *SAP* Barcelona, 23 July 2004. Web Westlaw Jur 2004/217442

  Marital economic regime of community of acquisitions versus separation of estates: common regional citizenship at the time of marrying; no marriage contract.

  "Legal Grounds

  One. The appeal centres on a challenge of the declaration contained in the judgment *a quo* to the effect that the marital economic regime was that of community of acquisitions and the assertion that it is that of separation of estates. However, other than the remarks that the appellant makes regarding acquisitions of goods by both litigants after the separation, the plea in appeal raises no argument of substance from which one might effectively conclude that the marital economic regime was indeed that of separation of estates . . .

  . . . Leaving aside the statements made by the parties in public or private documents declaring what their marital economic regime is, the aphorism that things are as they are and not as the parties would have them be is applicable in this case. The deed, as provided in article 319 of the Civil Procedure Act (RCL 2000, 34, 962 and RCL 2001, 1892) in force at the time, only records the fact or event giving rise to its making, and the date, but not the truth or otherwise of the statements made by the parties.

  When the litigants married, both possessed the common citizenship; they had not acquired the Catalan foral citizenship because ten years had not elapsed since their arrival in Catalonia from Andalusia, and consequently the applicable norms were those of the Civil Code, as provided in article 15 of the Civil Code (LEG 1889, 27) in force at the time of their marriage, and, absent a marriage contract, the legal marital economic regime had necessarily to be that of community of acquisitions, as was correctly construed by the challenged judgment, which must therefore be confirmed".

- *SAP* Valencia, 28 June 2004. Web Westlaw Jur 2005/1810

  Marital economic regime of separation of estates: husband with Catalan regional citizenship ("vecindad civil"): couple married and resident in Catalonia:

statement in separation agreement that the regime was community of acquisitions without effect; marriage contract required to change regime.

"Legal Grounds

One. The nexus of all the appellant's arguments is that in their separation agreement the parties stated that their marital economic regime was that of community of acquisitions; nevertheless, it must be borne in mind that since the husband possessed Catalan regional citizenship and the couple were married and lived in Tortosa, under the former and the present legislation alike the regime applicable to the spouses was that of separation of estates, as the judgment *a quo* very rightly and soundly asserts, given the impossibility of accepting a simple statement on a separation agreement as a valid basis for altering the marital economic regime – that can only be done through the appropriate marriage contract, and hence a simple separation agreement will not do, as this would be mean acknowledging as valid a change which our legal system requires to be made in a given specific form, namely in a marriage contract. To accept the appellant's thesis would be to accept as valid for a given act a formality other than that formally required. This cannot be entertained in our legal system, and therefore the judgment *a quo* is confirmed *in toto*, without indication as to the costs of this appeal".

– *SAP* Madrid, 25 March 2004. Web Westlaw Jur 2004/248602

Navarrese regional citizenship preserved by deceased on making will: appellant cognisant of acts made by her mother and recorded in public documents, of which she was a beneficiary.

"Legal Grounds

(. . .) As to the substance of the case here under review, it must be accepted, as accredited in the proceedings, that the deceased, Cecilia, possessed Navarrese foral citizenship by right of birth and by marriage to Jon, who died in 1973 leaving a Naverrese foral will, which was respected by all his children, including the applicant, even although it was because of his residing in Madrid for the sake of his work that Cecilia lived in Madrid from 1958 on. We must therefore stress that while it has been accredited that Jon never made the requisite declaration at the Civil Register to preserve his Navarrese citizenship, at the time of his death his daughter Sonia accepted the Navarrese foral will which he had drawn up, and the attendant notarised declaration of acceptance and statement of inheritance and donation of 1983 made by Cecilia as sole heir of her predeceased husband, in which she unequivocally claimed Navarrese foral citizenship, and in which declaration she gifted to her children various properties inherited from her husband – all facts accepted by all the children without demur.

It is also important to note that Cecilia was registered as resident in Tafalla from 1975 to 1958, and as late as 1982 she had a National Identity Document issued in Pamplona in which Tafalla appeared as her place of residence. The record also shows that she lived in Guipúzcoa and was resident in San

Sebastián at the time of her death, which occurred in the city of Madrid, fortuitously as she had travelled there on a family matter.

While Cecilia clearly did not make the requisite declaration at the Civil Register to preserve her Navarrese foral citizenship, the evidence shows that repeatedly, in all acts of significance – for instance the wills drawn up in 1974, 1976, 1982, 1993, 1996 and 1997, agreements and acts recorded in public documents, the acceptance and statement of inheritance and donation of 1983, the deed of renunciation of usufruct of 1984 and the agreement of 1986 – Cecilia reiterated, consistently and without change over time, that she possessed Navarrese foral citizenship, which assertion is reinforced by acts thus instrumented, which would not have been valid had she not possessed the said Navarrese foral citizenship. Having established the foregoing, we must now consider that, as the Provincial High Court of Valencia stated in its Judgment of 30 July 1999, "the jurisprudence of the Supreme Court has consistently taken the view that the acquisition of regional citizenship upon the elapse of ten years is equivalent to voluntary acquisition, so that any conduct that shows an attitude contrary to a change thereof must suffice to prevent such change". Therefore, the acquisition of regional citizenship willy-nilly cannot take place where there are acts demonstrating the person's will to preserve their citizenship, as is the case here; and we must further consider that article 14 of the *CC* (LEG 1889, 27) provides that the citizenship corresponding to the place of birth takes precedence over the common law citizenship and further establishes a presumption *juris tantum* of attribution of regional citizenship to the place of birth in case of doubt; thus, given the registered place of residence of Cecilia noted above, it may be inferred that it was not her will to establish her effective and permanent residence there with sufficient continuity – especially after the death of her husband – to warrant a change. And since that residence did not in the course of time come to be continuous and "legal" in the manner interpreted by the jurisprudence, it would be contrary to the acquisition of common law citizenship *ipso jure* as claimed by the applicant.

An essential element in support of the foregoing is the fact that the registration or lack of registration of the declaration of preservation of foral citizenship at the Civil Register can only be admitted as a constituent fact vis-à-vis third parties, a category into which the applicant does not fall since, as daughter of the deceased Cecilia, she was fully cognisant of the acts formalised in public documents by her mother, from which she benefited – and moreover she also represented her mother in publicly documented acts in which her mother's Navarrese citizenship was maintained.

For all those reasons, we must accept that Cecilia still preserved her Navarrese foral citizenship at the time of making a will subject to the said foral laws and hence we must dismiss the appeal brought by the applicant".

– *SAP* Gerona, 15 March 2004. Web Westlaw AC 2004/617

Declaratory action on title: inadmissible: property relations between spouses

with Catalan regional citizenship and marital economic regime of separation of estates: good in dispute belonging to the private estate of the wife: public deed of sale: principle of formal acquisition and not actual subrogation.

"Legal Grounds

(. . .) In other words, although a declaration of ownership is sought without reference to who paid the purchase price and in what proportion, the fact is that in the end frequent reference is made to this detail which, like it or not, is all that enables the appellant to sustain that he is entitled to one undivided half of the said property.

The appellant has not realised that even if we were to accept his line of argument, given the nature of the action he has brought, in order for his declaration of title in an undivided half of the property to succeed, it would be necessary to determine whether it has been demonstrated that he is the owner of that half, to which end it is essential to apply the legal rules regulating title in goods between spouses subject to the Catalan marital economic regime of separation of estates. And that is precisely what the Judge at first instance has done, absolutely correctly.

The problem here raised is, in short, that of property relations between spouses possessing Catalan regional citizenship and subject to the regime of separation of estates. The rules applicable for resolution of the case are the very ones followed in the challenged judgment in dismissing the claim, and the aspect of the problem relating to registration, which it is sought in this second instance to place at the core of the debate regardless of whether a right of ownership exists, is merely a consequence of the foregoing. One cannot expect to judge whether title published by the Register of Property is exact without inquiring whether the claim to title is lawful.

(. . .) On the basis of the foregoing, the parties do not dispute the fact that the good an undivided half of which is claimed belongs to the wife against whom the appeal is brought. Title in the disputed good is therefore not at issue here; the good belongs to the private estate of the wife, as recorded in the deed of sale.

This contract was formalised in 1981, which means that first of all we must determine which of the various norms successively regulating these matters is the applicable one. The provision in force at the time was article 23 of the Compilation of 1960 (RCL 1960, 1034). However, that provision, which contained the so-called Mucian presumption, was declared unconstitutional in judgments of the High Court of Justice of Catalonia of 10 May 1993 (RJ 1993, 6323), 31 January 1994 (RJ 1994, 4587) and 5 March 1998 (RJ 1998, 10049), and cannot therefore be applied. Equally inapplicable are article 49.3 of the version of the Compilation introduced by the Catalan Law of 20 March 1984 (RCL 1984, 1199, 1845, 2377 and LCAT 1984, 828), the Catalan Law of 30 September 1993 (RCL 1993, 2958 and LCAT 1993, 467) (article 21) on property relations between spouses, and the current article 39 of the Catalan Family Code, approved by Catalan Law 9/1998 of 15 July (RCL 1998, 2135; LCAT

1998, 422 and 521), since all these reforms were subsequent to the date of acquisition.

According to the judgment of said Court of 5 March 1998, given this legislative lacuna, the applicable precept must be article 7 of the original version of the Compilation (drafted in 1960), according to which in the regime of separation of estates either spouse is vouchsafed the ownership, enjoyment and disposal of his or her own goods. This means that under the regime of separation of estates in Catalan law, the principle of real subrogation of the spouse, who although having title in all or part of the consideration used in acquisition of the good is not registered as owner thereof, does not apply. This exclusion occurs both in the former article 23 and in the later article 49.3 of the Compilation. Consequently, the Supreme Court judgments of 10 May (RJ 1993, 6323) and 19 October 1993 (RJ 1993, 10181), 31 January 1994 (RJ 1994, 4587), 5 March 1998 (RJ 1998, 10049) and 27 June 2002 (RJ 2002, 10438) establish that in the Catalan regime of separation of estates the guiding principle is that of formal acquisition and not real subrogation.

The challenged judgment is correct in its application of the law, in the interpretation of the law by the Catalan court of appeal and in the legal consequences flowing from the facts of the case. . .

For all the above reasons, the appellant's petition to have himself declared owner of an undivided half of the property in dispute is not admissible in Catalan law and must therefore be dismissed. For reasons of consistency as explained in the first legal ground of the challenged judgment, as the issue was not raised in the application we are unable to consider the question of whether in the event that the appellant did indeed contribute to the acquisition of the property in which his wife holds title he would enjoy some right of credit over her for the monies invested therein".