Spanish Judicial Decisions in Private International Law, 2001 and 2002

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I. SOURCES OF PRIVATE INTERNATIONAL LAW

– *STC*, 14 February 2002. *RTC* 2002/39.

Constitutional principle of non-discrimination by reason of sex and equality of spouses in matrimony. Law applicable to the effects of matrimony. Unconstitutionality of article 9.2 of the *CC* in the previous drafting contained in the articled text approved by Decree 1836/1974 of 31 May.

"Legal Grounds:

(. . .)

Fourth: In light of the foregoing arguments, we must now address the issue of whether art. 9.2 *CC*, in providing that the nationality of the husband at the time of marriage is the nexus determining the law applicable to relations between man and wife and to property relations between the spouses by referral to point 3 of the said article absent or inadequate any marriage settlement, infringes art. 14 *CE* and art. 32 *CE*, . . .

Fifth: . . . In judging infringement of the principle of equality, we have consistently required (a) that the contested regulation entail, either directly or indirectly, differentiated treatment of groups or categories of persons (*STC* 181/2000, 29 June [*RTC* 2000, 181], F. 10), and (b) that the subjective situations as compared be genuinely alike or equivalent – in other words, that the choice of points of comparison be neither arbitrary nor capricious (*SSTC* 148/1986, 25 November [*RTC* 1986, 148], F. 6; 29/1987, 6 March [*RTC* 1987, 29], F. 5 and 1/2001, 15 January [*RTC* 2001, 1], F. 3). And having verified that both conditions are met, we must determine whether or not the difference contained in the regulation is lawful under the Constitution. In these respects, there can be no doubt that in establishing the national law of the husband at the time of marriage as the nexus, residual though it may be, for determining the applicable law, art. 9.2 *CC* entails differentiated treatment of the man and the woman despite the fact that their legal positions in respect of the marriage are the same. The contested article is therefore contrary not only to art. 14 *CE*, but also to art. 32 *CE*, which most specifically declares that men and women have the right to enter into matrimony in terms of absolute legal equality, there being no constitutionally acceptable justification for a rule favouring the man. In light of the Constitution and other Community and

international documents dealing with equality, the reaction of this Court to any norm or executive act entailing discrimination against women has consistently been in line with the doctrine of the European Court of Human Rights (Decision of 22 February 1994 [ECHR 1994, 9], Burghartz, on determination of the family name) and of the Court of Justice of the European Communities and other Constitutional Courts. Likewise, in a case very similar to the one discussed here, in a decision of 22 February 1983, the German Federal Constitutional Court declared that art. 15 section 1 and 2 first paragraph of the Law Introducing the Federal Civil Code was unconstitutional in that it established the personal law of the husband as the nexus for determining the law applicable to the economic effects of matrimony; it ruled that such preference was contrary to the principle of equality regardless of whether its application was or was not beneficial to the woman – the mere preterition of the wife infringes art. 3.2 of the Constitution – and that the greater certainty in determining the law applicable to the economic effects of matrimony for the given purpose was not sufficient justification under the Constitution to warrant preference for the personal law of the husband.

In a decision of 26 February 1987, the Italian Constitutional Court ruled that preference for the husband's national law in a norm of private international law similar to the one here considered is contrary to the principle of non-discrimination by reason of sex, and contrary specifically to the right of men and women to enjoy full equality before the law when they marry.

As already noted, the contested rule is unconstitutional regardless of whether its application in a specific case is more or less favourable to the woman. That will depend on the rules governing the applicable regime of matrimonial property. However, what the Constitution forbids is the application to the rule of conflict of a nexus that is not formally neutral. Leaving aside the so-called formal neutrality of the rules of conflict, the very use of a nexus awarding preference to the male constitutes an infringement of the right to equality.

In consideration of all the foregoing, the appeal is allowed. It only remains to say that it is not up to this Court but to the judicial authorities, with the means vouchsafed them by law, to determine what the lacuna that annulment of the precept in question might cause in the determination of subsidiary nexus.

(. . .)

It is decided

To accept the instant claim of unconstitutionality, and therefore to declare unconstitutional and repealed by the Constitution, the words "by the national law of the husband at the time of marriage" contained in art. 9.2 of the Civil Code, as set forth in the articled text approved by Decree 1836/1974 of 31 May (*RCL* 1974, 1385 and *NDL* 18760)".

II. INTERNATIONAL JURISDICTION

1. *Family*

– *AAP* Balearic Islands, 6 April 2001. *Web Aranzadi JUR* 2001\180232.

Competence of Spanish courts to hear divorce proceedings brought by a Spanish national resident in Spain.

"Legal Grounds:

(. . .)

In the present case there is no doubt as to the jurisdiction of the Spanish courts as provided in article 22 of the *LOPJ* and the First Additional provision of the Law of 7 July 1981, inasmuch as the plaintiff appears currently to possess Spanish nationality and to be resident in Spain, given which the nationality and residence of the defendant is irrelevant.

The court of instance examines *ex officio* its own territorial jurisdiction and appears to conclude that jurisdiction should lie with a court of Buenos Aires (Argentina). This Court accepts the view sustained by the Counsel for the appellant and by the Public Prosecutor that, in accordance with the general principles set forth in articles 72 to 74 of the *LECiv.*, in divorce proceedings the trial court cannot *ex officio* examine its own lack of jurisdiction. We note that this is the general principle, applicable other than in circumstances where the court is expressly authorised to examine its own jurisdiction; however, the Additional Provisions of Law 30/1981 contain no such reference, merely limiting the possibility of choice of law. Therefore, the question of declination or restraint of jurisdiction may be raised by the other party, or by the Public Prosecutor as the case may be, but never by the court *ex officio*".

– *SAP* Madrid, 5 July 2002. *Web Aranzadi JUR* 2002\227228.

Lack of jurisdiction of Spanish courts in respect of separation. Failure to accredit effective residence of spouses in Spain.

"Legal Grounds:

(. . .)

The evidence submitted in the proceedings must be properly analysed, bearing in mind that the parties are foreigners, in order to determine whether they were in fact domiciled in Madrid as husband and wife. To begin with, the appellant's claim cannot be accepted on the basis of purely formal circumstances and details, namely certification from Madrid City Council of entry in the voters' roll or certification from the Police Department of the spouses' resident's permits, since these do not constitute automatic proof of the effective residence or the real domicile of the litigants as a married couple.

It must be said in this connection that there is no convincing proof that the spouses really occupied the domicile situate at calle . . . no. 1 in Madrid – even allowing that this domicile was used as a professional and banking address – or

that the wife ever lived there; and in fact the wife contradicted herself in the reply to interrogatories, stating that she lived in an apartment at calle . . . in Madrid. In short, there is no evidence of long-term, stable occupation of this domicile as reflected in consumption (water, telephone, electricity, etc.), nor is there any other evidence to support the presumption of real and continuous residence in that domicile.

In fact the wife resides in Paris, at rue . . . number two, as accredited by judicial enquiries undertaken by a Paris court in connection with measures arising from disagreement between the spouses. On 23 January 2001, the court ordered provisional separation. Also, an inventory of goods was carried out by order of the same court dated 10 November 2000; the official report stated that the wife was not initially present in the above-mentioned domicile, that the inventory was made in the presence of a person having a personal relationship with the appellant, whose sole statement to the court officers was that the latter was travelling, and that before the conclusion of the inventory the appellant appeared and was advised of the action there in progress by court order, and that she then stayed in the above-mentioned domicile.

Furthermore, the appellant having made several pleas to the French court, there has been a recent decision, as accredited in court by the appellee, denying those pleas and rejecting the annulment of the decision admitting the absence of conciliation. The court also dismisses the exception of lack of jurisdiction and upholds the competence of the French court to judge the divorce action brought by the appellee. This action was brought on 30 October 2001, and it is surely significant that the present appellant filed for divorce in the Spanish courts in December of the same year.

Having regard to the domicile of the husband, there is no record of his ever having resided at calle . . ., number 1; indeed, there is sufficient evidence to show that he resides at . . ., the place where he carries on his business, his personal life and other related activities, there being documentary proof of his domicile there in the form of utility invoices for the dwelling and a lease. There is nothing to connect the appellee with the above-mentioned Madrid domicile other than business; the address of his bank account, which is in the name of his company is calle . . . number 1. The appellant further contradicts herself by stating in her writ that there was no relationship between the spouses as from 1995, whereas on interrogation she stated that the separation took place in 1998.

The foregoing suffices to conclude that the Spanish courts are to competent to judge the action brought by the appellant, and therefore the appeal is dismissed".

2. *Contracts*

– *STS*, 11 February 2002. *Web Aranzadi JUR* 2002\3107.

Nullity of express submission to German courts in re rental of a property situate in Spain.

"Legal Grounds:

... the Spanish translation of clause X of the rental agreement subscribed by the parties, accompanying the German original and the complaint and not brought into question by either party, states literally: *'The parties hereby waive all exceptions in respect of the applicability of International Law and agree that only German Law shall apply. Jurisdiction and place of performance: Munich (Germany)'*. Art. 22,1 of the *LOPJ* provides that Spanish courts and tribunals possess *'exclusive'* competence in respect of real property rights and rentals of properties situate in Spain.... It is therefore inexphcable that a party should seek to uphold a clause in an agreement when that clause arbitrarily enters into conflict with a domestic provisions of this rank, which provision is rooted in the Brussels Convention and sets forth the criteria determining judicial competence in civil matters with reference to the nexus between the claim of jurisdiction and, in this case, the territory".

– *SAP* Guipuzcoa. 25 March 2002. *Web Aranzadi JUR* 2002\228306.

Competence of Spanish courts in respect of cheques drawn by a company domiciled in Spain but issued in France and payable through a current account in France. Article 2 Brussels Convention.

"Legal Grounds:

... Having regard to the challenge based on lack of jurisdiction, it was claimed that Spanish law was not applicable, since the action arose in connection with a number of cheques drawn by a company domiciled in Spain but issued in France and payable through a current account in France, and hence under Spanish law, the applicable law ought to be French regardless of the domicile of the drawer of the cheques.

The original court declared itself competent in pursuance of article 2 of the Brussels Convention, of which France and Spain are signatories. This Convention, which is the general norm of reference, provides that persons domiciled in the territory of a signatory State are subject to the jurisdiction of that State irrespective of their nationality. This is consistent with the general rule laid down in article 22.2 *LOPJ*, which provides that Spanish courts have jurisdiction when the defendant is domiciled in Spain. Therefore, the Spanish courts are perfectly competent to deal with the present executive proceedings given that the defendants are domiciled in San Sebastian".

– *STSJ* Madrid. 18 July 2001. *AS* 2001\3695.

Incompetence of Spanish courts in respect of dismissal of an Argentine national having rendered services in Argentina for a company domiciled there.

"Legal Grounds:

... we accept the facts as proven in the contested decision, to the effect that the plaintiff, an Argentine national, rendered services to a company incorporated and domiciled in Argentina at a work centre in Buenos Aires under a contract of

employment referred to in the fifth proven fact, received payment in US dollars and was dismissed by notarised writ issued at the behest of his employer *Cia. General de Fosforos Sudamericana, SA*. The case does not meet any of the requirements for jurisdiction of the Spanish courts established in article 25 of the *LOPJ*, and therefore the Spanish courts must be declared incompetent in respect of the dismissal challenged by the plaintiff".

– *STSJ* Basque Country. 20 February 2001. *AS* 2001\1277.

Submission of a contract of employment to "*the law applicable in the courts of Bayonne (France)*". Jurisdiction of Spanish courts.

"Legal Grounds:

. . . Art. 3.1 of the Convention on the law applicable to contractual obligations, opened for signature at Rome on 19 June 1980, provides that contracts are to be governed by the law chosen by the parties. This rule applies to the regulation of such contracts but not to lawsuits arising therefrom: art. 1–1 restricts the scope of application to contractual obligations, and art. 1–2–h excludes procedure.

Art. 3.1 does not then contain any rule for determining the country whose courts have jurisdiction in any action arising in connection with a contract, nor is it sufficient reason to deny that it is infringed by the decision rejecting the claim that the Spanish courts could not hear the action brought by Don Marcel.

A second reason for such rejection, equal in weight to the first, is that what Don Marcel and "Pimiento Perfecto, SL" agreed in the contract signed on 1 December 1998 was that the contract be governed by the law applicable in the courts of Bayonne (France), . . . and the terms of that contract strictly speaking confine that stipulation to the obligations arising out of the contract, but not to the issue of what courts are competent to judge disputes between the parties, as the appealed decision rightly sustains. Hence, given that the contract does not expressly stipulate the jurisdiction of the French courts, there can have been no infringement of a rule such as that established in art. 56 *LECiv.*

At all events, this last rule does not apply to cases of submission to the courts of other countries, and indeed, as regards litigation arising out of individual contracts of employment where the obligations under the contract have been performed in a single country, it expressly prohibits choice of another jurisdiction, unless the agreement on such choice is subsequent to the initiation of the dispute or the employee (not the employer) invokes such jurisdiction (art. 17 as it relates to art. 5.1 of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters) (. . .).

In short, the Court is absolutely right in upholding the jurisdiction of the Spanish courts in the instant case, given the place where Don Marcel performed his contractual obligations, as provided in art. 25.1 *LOPJ*."

– *STSJ* Madrid. 10 July 2002. AS 2002\3151.

Incompetence of Spanish courts regarding a contract of employment given the existence of a clause of choice of Colombian law.

"Legal Grounds:

... Briefly, given the existence of an agreement to be bound by Colombian labour regulations and a specific choice of jurisdiction of the courts of Colombia, articles 57 and 58 of the *LECiv.* (Law 1/2000) as they relate to article 55 thereof supported the exception upheld by the State Legal Service to the effect that jurisdiction lies with the courts of Colombia, such having been the intention and agreement of the contracting parties. The appeal is therefore upheld".

– *SAP* Valencia. 11 May 2001. *Web Aranzadi JUR* 2001\198261.

Incompetence of the Spanish courts in respect of international maritime transport. Clause choosing jurisdiction of a London court.

"Legal Grounds:

... The defendant entered a declinatory plea under international law contesting jurisdiction on the grounds that the claim for payment arose from the shipment of containers MSCU 5502625, MSCU 4127319 and MSCU 4043054 from the port of Jakarta (Singapore) to the port of Valencia under a shipping agreement, and that the bills of lading normally issued by Mediterranean Shipping Company S.A. contain a clause 2, Law and Jurisdiction which states: "*Law and Jurisdiction. Any complaints or disputes arising from or in connection with this bill of lading shall be submitted to the High Court of Justice in London. Unless another law be necessarily applicable, English law shall be applicable except in respect of claims relating to cargo shipped to or from the United States* ...". Since this clause expressly remits to the High Court of Justice of London, the Court of First Instance of Valencia is not competent to judge the matter and must therefore shelve the proceedings and refer the litigants to the competent court.

This Bench bas ruled on several occasions on the validity of clauses in bills of lading stipulating arbitration in other countries and on the validity of the choice of foreign jurisdictions in such bills, in addition to the ruling of 6 May 2000. In light of the provisions of art. 17 of the Brussels Convention and the San Sebastian Convention of 26/5/89 (art. 7), although clauses choosing foreign courts are exceptional, these conventions do allow express submission to the courts of third States, and therefore International Law applies here. The bill of lading contains a clause of submission to the London court, in boldface, and there is no evidence to suggest that the plaintiffs/appellees were unaware of it. There was a contractual undertaking by both parties (art. 1255, 1256 *CC*), and the contract left neither party at the mercy of the other. Given this clause, neither party can claim prejudice, wilful dilatoriness or renunciation of rights.

... We revoke the original decision and uphold the decision of international jurisdiction, to wit that judgment of the principal issue is the province of the High Court of London".

– *SAP* Badajoz. 23 March 2001. *AC* 2001\2243.

Manner of contesting international jurisdiction at the instance of a party. Express submission to the courts of Argentina in a sporting contract.

"Legal Grounds:

. . . while the challenge of jurisdiction by a party must be made through the proper channel, which according to the Supreme Court is a declinatory plea, although the outcome of that plea, if successful, will be not the referral of the proceedings to the competent foreign court, which is obviously not bound by them, but notice to the parties of which country in the opinion of the Spanish court is competent to judge the matter; therefore, the challenge to competence lodged by the defendant by way of a plea of exception accompanying the writ of defence rather than by way of international declinatory plea, must be deemed improper (. . .) as stated by the court of instance; and moreover, it is possible (or at least arguable) that by proceeding in this manner the defendant tacitly submits to the jurisdiction of the court issuing the original summons, pursuant to art. 58 of the *LECiv.*, albeit this view is not established and is rejected by the most generally accepted doctrine, which considers that the scope of international jurisdiction is determined by the system of competences of this kind and by international Conventions, basically, and it is erroneous in this respect to invoke legal regulations on territorial competence.

. . . having examined the contract between the parties, . . . we find that under clause nine thereof they expressly agree to be bound by the jurisdiction of the ordinary courts of Rosario (Argentina), which choice of foreign jurisdiction may in principle be held to bind the parties in consideration of the principle of free will and of art. 22 of the *LOPJ* (. . .). It therefore follows by reverse logic that the parties may choose the law of another country even if one of them, in this case the defendant, is domiciled in Spain; moreover, the validity and efficacy of such express choice cannot be denied by invocation of art. 21 of the *LOPJ*, nor again by application of the Brussels Convention, since although domiciled in Spain, the defendant's country is not a signatory of this Convention and hence is not covered by its terms given the personal limitations in the clauses relating to jurisdiction. Furthermore, the problem raised as regards the applicable scope of the said Convention is irrelevant given that – as the court of instance has rightly pointed out – the defendant was domiciled in Spain at the time the action was brought against him; in such cases the Supreme Court has repeatedly and unhesitatingly ruled, in connection with the abuse of law (art. 11 of the *LOPJ*), that contractual clauses of choice of law may be ignored, declaring that if the sole purpose of a challenge to jurisdiction is to delay the outcome of the action, such conduct borders on procedural fraud and as such cannot be entertained, for a defendant summoned by the courts of his place of domicile can clearly avail himself of the right of defence and of the forum most favourable to him. In conclusion, therefore, in the specific case here considered, given that the defendant (a football player) was summoned in his place of residence and no reason having been given (or even mentioned) to justify his preference for the courts of Argentina – from which it may be inferred that the whole point of the exception claimed was to delay the proceedings, considering that the bringing of the action in his place of domicile can only be to his advantage – we find that the said exception must be rejected, as did the court *a quo* in the original decision.

– *AAP* Zaragoza. 3 April 2001. *AC* 2001\1067.
Nullity of clause of express choice of English courts. Competence of Spanish courts.

"Legal Grounds:

. . . the contested decision found that the English courts were competent to hear the complaint in consideration of a clause of choice of law agreed by the parties and in pursuance of art. 10.5 *CC*, art. 22.3 of the *LOPJ* and the Brussels Convention, while the plaintiff here appealing sustains that jurisdiction in the case lies with the courts of Zaragoza in pursuance of art. 62 point 1 of the *LECiv.*

According to the Supreme Court, the courts of a foreign State may in principle be expressly cbosen as an extension of the jurisdiction designated by international treaties, provided that one of the parties in litigation is domiciled in a Signatory State and the chosen court is in another Signatory State, as in the present case; however, it also adds that the court must be able to apply a given law and that art. 10.5 *CC* requires that there be a connection with the business concerned, which is clearly not the case here.

Therefore, given that neither the object or matter of the contract (trade in bagged pearled urea) nor the parties (purchaser domiciled in Bilbao and seller domiciled in) has any connection wbatsoever with English law, that, as repeatedly ruled by the Supreme Court, clauses of choice of foreign law are highly exceptional in nature, and that the defendant domiciled in Zaragoza can have no good reason for defending his rights in the English courts, we find that the clause is null, and in pursuance of art. 22.2 of the *LOPJ* and art. 62.1 of the *LECiv.*, that the courts of Zaragoza are competent to judge the present case".

– *SAP* Valencia. 17 July 2001. *Web Aranzadi JUR* 2002\2820.
Tacit submission to the Spanish courts.

"Legal Grounds:

. . . In the case at issue, the defendant/appellant Cho Yang Shipping Co. Ltd. – and likewise the co-defendant/appellant Vapores Suardíaz Valencia, S.a., which also claimed exception for lack of jurisdiction – entered an appearance in the proceedings and submitted a plea in defence which included, among other things, the exception here at issue, at the same time contesting the basis of the plaintiff's action. For good measure, the defendants accepted the order of 24 October 1994 whereby they were held to have appeared in due time and manner and to have answered the suit, wherefore, in pursuance of article 58, point 2 of the *LECiv.* of 1881, they may be presumed to have tacitly accepted the jurisdiction of the Spanish courts, specifically the courts of Valencia, and it is therefore the duty of this court to set aside the appellate decision whereby the said exception was upheld and the defendants were absolved of the charges brought against them by the plaintiff".

– *SAP* Balearics. 6 March 2001. *Web Aranzadi JUR* 2001\139841.
Tacit submission to the Spanish courts.

"Legal Grounds:

Procedurally, the issue of lack of jurisdiction must be addressed through the established channel for declinatory exceptions . . ., and therefore the defendant's use of lack of jurisdiction as a delaying exception is baseless, given that the writ of defence and the accompanying petition refer to the substance of the matter, and again, at the evidence stage, the defendant, here the appellant, referred to the substance of the case. In short, in his writ of defence the defendant/appellant did not confine himself to raising the appropriate declinatory exception, and this brings the matter within the scope of art. 58.2 of the *LECiv.*, whereunder if after appearing in the proceedings a defendant makes any representation other than to raise a declinatory exception in due form, such representation will be understood as tacit acceptance of jurisdiction".

3. *Lis pendens – related actions*

– *STSJ* Catalonia. 23 July 2001. *AS* 2001\3646.

Dismissal of a person employed in Spain. Jurisdiction of Spanish courts. No *litis pendens* given different objects of actions in Germany and Spain.

"Legal Grounds:

. . . The appeal by the co-defendants claims undue application of article 10 of the Labour Procedure Law in that judgment of the facts referred to in the suit lies with the German court in which the plaintiff has initiated an action.

. . . In thus claiming that jurisdiction lies with the German courts, the employers invoke the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters . . . The defendants take the view that *litis pendens* would bar the Spanish court in favour of the German court.

. . . Our source of law must be article 25.1 of the *LOPJ*, whereunder in social matters, the Spanish courts have jurisdiction where services are rendered in Spain or the contract was made in Spanish territory and the defendant is domiciled in Spanish territory or possesses an agency, branch, regional office or other representation in Spain.

From this standpoint there is no doubt that, the employee's duties having been performed in Spain and the employer having subsidiaries in Spanish territory, the Spanish courts are competent to judge the issue arising from termination of the plaintiff's contract of employment.

. . . The object of the defendants' appeal is, then, to raise a declinatory exception based on the Brussels Convention, given that what we know of the German proceedings indicates that the German court has accepted jurisdiction.

. . . If one were to accept the appellants' argument that these are identical suits, the terms of the Convention would oblige the Spanish courts to waive jurisdiction; however, we have already seen that this is not the case given the difference in approach to either suit – that is, the lack of possible points of comparison

between the object of the action for dismissal here considered and the action brought before the German court. The object of the present action is to secure a ruling of unfair dismissal and joint liability of the defendants in respect of the legally established consequences thereof – that is, either readmission or compensation. There is no reason to believe that German proceedings would produce any other legal outcome".

III. PROCEDURE AND JUDICIAL ASSISTANCE

– *STC* 16 September 2002. *RTC* 2002\162.
Personal notification. Extraprocedural notice of action.

"Legal Grounds:

. . . The application for judicial protection alleges various infringements of the right to effective judicial protection and to defence (art. 24.1 *CE* [*RCL* 1978, 2836 and *ApNDL* 2875]) arising from the cited court decisions, the principal of which lies in defects in the summons issued in respect of small claims case 332/1995 by Court of First Instance No. 2 of Denia. Service having been unsuccessfully attempted in Calpe – the applicant is domiciled in the United Kingdom – the summons was issued directly without any attempt to locate the person, which would not have been difficult given that the domicile was recorded in the Registry of Property. In consequence, proceedings were continued, resulting in a conviction by the Provincial High Court of Alicante in absence of the appellant.

. . . from our examination of the record of proceedings, we find that it was neither unreasonable nor inappropriate for the summons to be served where it was, given the applicant's links with that place and the relationship existing between the applicant and 'Interesmeralda, SL', on whom summons was served at the same address and who subsequently acknowledged service and appeared in the proceedings. We conclude from the same records – and this is the crucial point as regards art. 24.1 *CE* – that Imperial Park Country Club Properties Ltd. had extraprocedural notice of the institution of proceedings in which it and 'Interesmeralda, SL', among others, was co-defendant.

. . . the remitted inquiries have shown that: 1) The applicant Imperial Park Country Club Properties Ltd., domiciled in the United Kingdom, owns properties in Spain, registered with the Registry of Property of Calpe, specifically apartment no. 605 in the "Imperial Park" complex, in which the defendants had acquired certain time-sharing rights under the contract at issue; 2) the forms issued by 'Imperial Park Country Club' tourist complex, which is at least partly owned by Imperial Park Country Club Properties Ltd., give as its address Calle Ponent, no. . . ., Edificio 'Esmeralda', Apartamento . . ., 03710, Calpe, Alicante; 3) The administrator of the 'Imperial Park Country Club' complex is 'Interesmeralda, SL', whose forms give as its address Calle Ponent, no. . . ., Edificio 'Esmeralda', Apartamento . . ., 03710, Calpe, Alicante – that is, the same address as the tourist complex referred to.

In conclusion, an attempt was made to serve the summons at the common domicile of the entity administering the 'Imperial Park' and the complex itself, where the administrator is the owner, among others, of apartment 605, the ultimate object of the contract in litigation.

This being so, given the function discharged by 'Interesmeralda, SL' and the properties owned by Imperial Park Country Club Properties Ltd. in the complex – whose name, incidentally, is the same – it is hard to see the lack of connection between the two companies as alleged.

. . . Finally, we must consider the precise moment at which the applicant claims to have become cognizant of the action – namely, after a date had been set for auction of the attached goods and before the auction took place, and hence in time to pay the sums demanded and prevent forfeiture of the goods. It so happens that at the same point in the proceedings in another action similar to the one prompting the present application for protection, Imperial Park Country Club Properties Ltd. likewise entered an appearance at the executive stage of another adverse decision handed down by Court of First Instance No. 1 of Denia in a declaratory small claims action, no. 284/1996, against which the defendant likewise lodged an application for protection (no. 1061/2000), upon which this Court has yet to rule. Such consistent timing indicates sufficient grasp of the situation to be able to avert prejudicial actions, which does not sit easily with the alleged unawareness of the proceedings.

Taken as a whole, all the foregoing constitutes an adequate basis, given a precise and direct connection according to the rules of human interchange, to presume extraprocedural knowledge of the pending proceedings on the part of the applicant for protection as of the time of service at the Hotel Esmeralda, calle Ponent, no. . . ., in Calpe, despite which the applicant voluntarily refrained from appearing in the proceedings".

– *ATSJ* Community of Valencia, 14 May 2002. *Web Aranzadi JUR* 2002\198874.

Lex fori regit procesum. Language of the defendant and representation in proceedings.

On 29 April of the instant year, this Bench received, by registered mail, a writ from Mr. Michael John H., the heading and the petition in Spanish and the rest in English, requesting the institution of large claim proceedings for civil liability against the Magistrates of the Third Bench of the Provincial High Court of Valencia, Messrs. José Luis P.H., D. Mariano F.M. and D. Francisco H.V.

"Legal Grounds:

. . . all suits brought in Spain, including those brought by Community citizens, are subject to the procedural rules of this country, which rules Mr. H. fails to observe in this second writ despite his having been duly advised thereof.

. . . Hence, given that languages other than that of the addressee are not admissible even for purposes of communication, notification or judicial cooperation between the various member States of the EU except in the case of standardized forms, still less is it admissible for a Community citizen to address a court of

another Member State in a language other than the official language or one of the official languages of the latter, and therefore the writ submitted by Michael John H. is not admissible.

... under the provisions of article 399.2, the writ of action must include the appointment of Counsel, attorney and the signature of the Solicitor, which requirements Mr. H. has not met; for this reason also the writ is inadmissible and cannot be accepted as a writ of action in the terms required by our procedural law".

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENTS AND DECISIONS

1. *Family*

– *STS.* 14 May 2001. *RJA* 2001\6203.
Probative value in Spain of a Venezuelan decision on extra-marital filiation.

"Legal Grounds:
... the real issue raised by this ground is the status of the test of documentation issued abroad as conducted by the court of instance. It also seeks to establish that since the documentation relating to the filiation of the plaintiff refers to a decision by the courts of Venezuela, enforcement ought to have been sought by way of *exequatur*; however, as noted in the original decision, this argument is groundless in that the Venezuelan decision was executed in that country and an order of enforcement of that decision on the basis of the initial claim. We would highlight that the decision here contested has never been the basis for enforcement of a prior decision by the courts of Venezuela; however, if we examine the decision of the court *a quo*, it is plain that in judging the question of whether the plaintiff was or was not an illegitimate child of the decedent of the defendants, the court took due account of the documentary evidence presented in the proceedings, and that, as stated by the Public Prosecutor, in no way entails enforcement of the decision of a foreign court without due performance of the formal requirements of an *exequatur*".

– *ATS*, 6 February 2001. *RJA* 2001\1510.
Denial of *exequatur* of a French divorce decree. Non-compliance with article 15.3 of the 1969 Hispano-French Convention.

"Legal Grounds:
... Art. 4.3 of the 1969 Hispano-French Convention, the reference for this *exequatur*, provides that the recognition and enforceability of a foreign judgment, by remittal to art. 11 as regards the conditions for recognition, must be denied where the defendant has not been advised of the initiation of proceedings in due manner and with sufficient time to prepare a defence. According to art. 15.3, the party seeking recognition or requesting enforcement must submit a true copy of

the citation of the party that failed to appear, and any documents necessary to prove that such citation was received in due time.

In formal terms, the applicant has not met the requirements, merely stating the impossibility of furnishing such documents accompanied by a document from the Office of the Prosecutor of the Republic purporting to accredit that statement. However, this document does not serve the purpose intended: Firstly, it does not show that the documents referred to are relevant to the citation of the defendant in the original action here appealed. Secondly, it merely states that the Court does not keep files of documents notified abroad, adding that the document concerned was registered under no. 168C/9 and returned to the bailiff by the Court on 8 August 1993 following formalization by the Spanish authorities. Its terms are therefore far from substantiating the impossibility of accrediting the existence of a case for *exequatur* consisting in service of notice to the defendant of the initiation of proceedings in due manner and in good time. And again such a requirement cannot be said to place the applicant in a position of defencelessness or to violate his right to effective judicial protection, since he does not appear to have exhausted all the means available to him to secure accreditation of the said requirement when he has on the other hand furnished the documents of the rogatory commission issued by the French authority to notify the defendant of the decision handed down in the original proceedings – which notice was in fact successfully served – and when, even if the foreign court or prosecutor's office did not keep files of documents notified abroad, there is no record of the plaintiff having attempted to secure them either from the French authorities in charge of processing rogatory commissions or notifications or referrals abroad, or from the Spanish authorities competent in such matters, if in fact the service of notice was channelled through them as stated. In short, the alleged impossibility is not duly substantiated and sits ill with the fact that the applicant did furnish documentation accrediting service of notice of the foreign decision to the defendant. Therefore, given failure to meet the formal requirement established in art. 15.3 of the Convention and the failure to accredit that the defendant's absence in the proceedings was due entirely to his own will or prompted by his own interest or convenience rather than to his not having received due and timely notice of the action brought against him, following this Bench's established principle, he has failed to overcome the obstacle to *exequatur* consisting in proof of contempt on the part of the defendant, and there is therefore no need to go into the other grounds of opposition raised".

– *ATS*, 3 July 2001. *RJA* 2001\6521.

Applicability of the Convention between Spain and the Union of Soviet Socialist Republics of 26/10/1990 to recognition in Spain of a Russian divorce decree. Incompetence of the Supreme Court to consider the case.

"Legal Grounds:

(. . .)

There being in existence a Convention between the Kingdom of Spain and the Union of Soviet Socialist Republics on judicial assistance in civil matters, signed

at Madrid on 26 October 1990, which came into force on 22 July 1997; the Union of Soviet Socialist Republics having ceased to exist – and having given rise to the appearance of various new States, including the Russian Federation – and the defendant in the *exequatur* being a national of the said Federation, this Bench must rule on the applicability of the of the said Convention to the Russian Federation.

Having examined the Vienna Convention on the Law of Treaties of 23 May 1969, and essentially the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978, we conclude that in the event that parts of a State separate to form one or more States, whether or not the predecessor State continues to exist, the predominant principle is the continuity of treaties.

This is the thrust of article 34 of the 1978 Vienna Convention, which establishes that in the event of succession of States as described, any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed; the second part of the article introduces an exception to the applicability of such a treaty where the States concerned otherwise agree or it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation. It is concluded that none of the mentioned exceptions apply in the present case, and therefore the Convention between the Kingdom of Spain and the Union of Soviet Socialist Republics on judicial assistance in civil matters, signed at Madrid on 26 October 1990, is applicable.

Under article 21 of that Convention, *'decisions shall be recognized and enforced when they were delivered subsequent to the entry into force of this Convention. Non-enforceable decisions, according to their nature, shall be recognized even if they were delivered prior to the entry into force of this Convention, provided that they were founded upon a rule of competence recognized in the said Convention'*. In light of this provision and of the nature of the conclusions of the decision whose recognition is sought, which do not require enforcement strictly speaking, recognition as requested will be subject to the conditions laid down in the convention, examination of which will be the province of the jurisdictional body indicated in art. 24.3 thereof . . . Absent other forum, territorial jurisdiction lies with the court of the defendant's place of domicile, provided that such domicile is in Spain; in any event, the Court of First Instance corresponding to the Civil Registry where the marriage was registered retains full competence for enforcement as such, absent any other applicable forum".

– *AAP* Balearics, 23 March 2001. *Web Aranzadi JUR* 2001\141077.

Brussels Convention not appropriate for enforcement of a divorce settlement signed in Germany.

"Legal Grounds:

. . . In these proceedings, the counsel for Mrs. H.G. has requested enforcement of a divorce settlement made in Essen (Germany) on 31 October 1978 by

the applicant and her former husband, Hans J. G. (the marriage was terminated by divorce decree of 23 October 1979) . . . Since the request for enforcement of that settlement is based on the provisions of the Brussels Convention, it must be remembered that according to article 54 of the Convention, in the case of applications for *exequatur* in respect of enforceable public documents, its provisions are only applicable to documents formalized after the entry into force of the Convention in the State of origin. In pursuance of this rule, given that the Brussels Convention came into force in Spain on 1 February 1991 and in Germany on December 1994, it follows that the public document whose enforcement is requested by counsel for Mrs. H.G. was formalized before the Convention came into force in Germany. Therefore, the procedure followed by the appellant must be deemed inappropriate – and this ought to have been observed *ex officio* – and the application for enforcement denied. There is no need to examine whether the requirements for such an application are met, since the stated procedural defect precludes such examination and could arguably affect determination of the court competent to consider the *exequatur*".

– *ATS*, 31 July 2002. *Web Aranzadi JUR* 2002\216451.

Grant of *exequatur* in respect of a decree of divorce by mutual consent issued by Argentine courts. Applicability of the general conditions set forth in *LECiv.*/1881. Lack of an agreed judicial forum.

"Legal Grounds:

. . . There being no treaty with the Argentine Republic or any international regulation applicable in respect of recognition and enforcement of decisions, the only possible recourse is to the general provisions set forth in article 954 *LECiv.* – which remain in force pursuant to the third exception in section one of the Sole Repeal Provision of *LECiv.*/2000, 7 January (*RCL* 2000, 34, 962 and *RCL* 2001, 1892) – absent accreditation of negative reciprocity (art. 953 of the Law of 1881 as cited). The finality of the decision under the law of the State of origin is proven. Article 951 – which in this respect does not apply only to conventional law when taken in conjunction with the succeeding provisions – and repeated rulings of this Bench require that for granting of *exequatur* the decision be final irrespective of the rules of recognition. The first requirement in art. 954 (*LECiv.*/1881) is that the divorce action be personal in nature. As to the second requirement in the same article, it has been accredited that the divorce took place by mutual agreement of the spouses. As to the third requirement of the said article, this is fully in compliance with Spanish public policy (in its international dimension), in that article 85 of the Civil Code allows the possibility of divorce whenever and however the marriage took place. As required under art. 954.4, the authenticity of the decree is guaranteed by the accompanying Apostille as stated in the record of proceedings. There is no reason to believe that the parties have invoked the international jurisdiction of the courts of the Argentine Republic as a fornm of convenience for fraudulent purposes (articles 6.4 Civil Code and 11.2 *LOPJ*); article 22.2/3 *LOPJ* does not establish exclusive jurisdictions as does article 22.1, but in the present

case there is nothing to favour the jurisdiction of the Spanish courts. To the contrary, the fact that the husband is Argentinian and that the marriage took place in Argentina lends credence to the competence of the courts of origin and hence excludes the possibility of fraudulent intent in respect of the law applying to the substance of the matter, an issue bearing on the previous ground. There is no appreciable contradiction of or material incompatibility with any decision delivered or proceedings pending in Spain. The decision of the Bench is therefore to grant *exequatur* of the decision . . .".

– *AAP* Malaga, 31 January 2001. *AC* 2001/1836.

Decree of maintenance delivered by a Swiss court absent the defendant for reasons beyond his control. Denial of *exequatur* under article 27.2 Lugano Convention.

"Legal Grounds:

. . . The basic and essential arguments of Mr. B. . . . for revocation are that the appealed decision is contrary to law in that the foreign decision was delivered in his absence, which absence was for reasons beyond his control, namely the fact that he was notified almost two months after the trial had taken place . . . This brings into play one of the conditions barring recognition and enforcement set forth in the second subsection of article 27 of the Convention, namely that the foreign decision was delivered while the defendant was in default. The fact that the defendant failed to appear because he was unaware of the existence of the proceedings constitutes an obstacle to recognition of the foreign decision.

This means that one of the circumstances cited in article 27 of the Convention as barring enforcement is given – namely, the provision of point two – since the foreign decision whose recognition and enforcement is sought was delivered while the defendant was in default. The reason for this default was ignorance of the existence of the proceedings, which in the interests of due respect for rights of defence bars recognition of the foreign decision whose enforcement is sought".

2. *Succession*

– *ATS*, 6 November 2001. *RJA* 2001\9521.

Denial of *exequatur* in respect of a Puerto Rican decision containing no element susceptible of enforcement in Spain.

"Legal Grounds:

. . . Application is made for *exequatur* in respect of a decision of the High Court of the Associate Free State of Puerto Rico (Mayagüez Chamber), which application must be examined in light of the conditions required for recognition and enforceability of foreign decisions under arts. 951 *et seq.* of the *LECiv.* of 1881, this being the applicable statute absent any applicable *ad hoc* conventional rule and absent accreditation of negative reciprocity.

It is the object of the *exequatur* that this Bench must examine to determine whether it is allowable or should be denied. The applicants seek recognition of a

foreign decision ordering the Property Registrar concerned to register certain properties in the name of persons possessing rights of inheritance therein, these persons having been declared heirs in a prior decision. This claim is not allowable since *exequatur* is not possible in respect of a foreign decision confined to determining the acts of enforcement necessary to carry out a prior – likewise foreign – decision and to secure effective legal title by allowing registration of the properties comprising the estate in the names of the appointed heirs and issuing an order to that effect to the Property Registrar. This is in fact the sole and specific substance of the decision whose recognition is sought, which contains no other pronouncement susceptible *per se* of producing any kind of effect, be it constitutive, *res judicata*, classificatory, preclusive or of any other nature susceptible of recognition, since such effects relate to judicial decisions issued prior to the act whose recognition is sought in the course of the testamentary proceedings in the courts of the State of origin. The object and purpose of the *exequatur* procedure, which is specifically to render foreign decisions enforceable in Spain, including as regards registration, necessarily excludes concrete acts of enforcement ordered by courts of other countries in respect of other prior decisions, also delivered by these courts, containing an enforceable pronouncement, since otherwise the principle of jurisdictional sovereignty of our courts in the enforcement of judgments, as enshrined in art. 117 of the Spanish Constitution, would be weakened and constrained to some extent by the jurisdictional activity of foreign courts. Be it said, furthermore, that in Spain it is more difficult to secure recognition of enforceability – particularly in the case of registrability, as in the present case – of a judicial decision where, despite the affirmation of the applicant, it is not duly accredited that none of the properties comprising the estate is situated in Spain".

3. *Contracts*

– *AAP* Balearics, 29 May 2001. *Web Aranzadi JUR* 2001\258831.

Lack of jurisdiction of court of first instance in respect of opposition to the enforcement of a foreign judgment.

"Legal Grounds:

. . . Beginning with the issue of functional competence of the Court of First Instance to hear the appeal from a judgment of the same Court of First Instance granting *exequatur* in respect of a foreign decision and hence rendering this enforceable in Spain, it must be said that, as the plaintiff/appellant alleges, and as provided in article 37 of the Brussels Convention, an appeal from the judgment at first instance granting *exequatur* must be brought before the relevant High Court in the form of an incidental action in opposition to enforcement of the foreign judgment, whereupon it is up to the enforcing party to challenge the opposition to the *exequatur* within the term allowed by incidental procedures.

. . . Therefore, although the defendant has withdrawn the irregular appeal lodged with the Court of Instance, it is this Bench's duty to rule on the matter and to uphold the appeal by the plaintiff against the decision sustaining the competence

of the Court of First Instance to admit and consider the appeal as an ordinary appeal, despite the fact that this ruling is without practical effect given the defendant's withdrawal from the appeal against the judgment of 29 March 2000 granting *exequatur*".

– *ATS*, 20 February 2001. *RJA* 2001\3968.

Inapplicability of the regime of recognition and enforcement of the Brussels Convention to a judgment delivered by the Supreme Court of Gibraltar. Decision regarding termination of an agreement for the sale of shares.

"Legal Grounds:

. . . *exequatur* is not allowable in respect of decisions by the courts of Gibraltar. There are sufficient factors at least to tarnish the legitimacy of the claim of territorial sovereignty underpinning the exercise of jurisdiction by these courts: either the cession of territory of 1713 excluded the cession of sovereignty, and hence of jurisdiction, or, if territorial sovereignty was ceded, its current legitimacy is questionable in light of the regulations governing the law of treaties, in light of the current law of decolonization, and in light of the fact that the present status of Gibraltar is founded on the use of force and that the effects and consequences thereof are at odds with the principles of territorial integrity and free determination informing the decolonization process.

(. . .)

Given the requirements of *exequatur*, all these factors lead to the conclusion that the most basic of these requirements is lacking, namely the existence of a judgment delivered by courts in a foreign country – that is, foreign courts – in the exercise of jurisdiction founded upon unquestioned sovereignty over a given territory".

– *AAP* Balearics, 22 March 2001. *RJA* 2001\I94928.

Denial of *exequatur* in respect of a German conviction on the ground that the Spanish court did not receive the documents required under art. 46.2 Brussels Convention.

"Legal Grounds:

. . . in the present case, the last paragraph of the judgment for which *exequatur* is sought, contains the following assertions: that the foreign decision was delivered in default, the defendants having been duly summoned but having failed to enter an appearance or to have appointed legal representation, and the action is conclusive; that according to the record of service, the summons was served upon the defendants' attorney on 27 May 1997; that in pursuance of art. 87 paragraph 1 of the German Civil Procedure regulations, the latter was still empowered to receive the summons despite having renounced his attorneyship, since no other attorney had yet been appointed; and that a copy of the decision delivered in default, dated 27 June 1997, was served *ex officio* on the defendant/attorney on 11 August 1997.

Nevertheless, the party applying for *exequatur* has furnished no documents, other than the decision of which enforcement is sought, to accredit compliance with the formal conditions set forth in article 46.2 of the said Brussels Convention; having examined the record of proceedings in detail, this Bench has not found the documents required under the said provision. In the case of a judgment delivered in default, there ought to be the original or an authentic copy of the document accrediting service or notification of the action, or an equivalent document, to the party declared in default, and there being no record of such a document, it must be considered that the provisions of the said article of the Brussels Convention have not been complied with".

– *AAP* Málaga, 19 February 2001. *AC* 2001\1424.

Denial of *exequatur* for lack of accreditation that the entity convicted by the foreign judgment and the entity against which enforcement thereof is sought in Spain are one and the same.

"Legal Grounds:

. . . to seek to identify the words 'Club La Costa Limited' as meaning 'Club La Costa Sociedad Limitada' is not legally tenable . . .; given the difference between the two trade names, there is insufficient proof that the entity convicted in the foreign judgments is the same as the entity against which enforcement is sought in Spain. In light of the jurisprudential doctrine referred to above, the nature of this procedure is not such as to allow declaratory judgments other than or exceeding the bounds of judgments strictly confined to enforcement of a foreign judgment, which purpose is deducible from the argument of the enforcing party here appealed against, which essentially seeks to apply the doctrine of removal of judicial protection to allow enforcement of the judgment delivered in Germany against the goods of a Spanish trading company. The appeal is therefore upheld, since it is not proven that 'Club La Costa Sociedad Limitada', which is not named as a party in the German proceedings, is the same as the entity convicted in the judgments on the same proceedings, in which case article 27.2 of the Brussels Convention applies, which provides that foreign judgments cannot be recognized 'when they have been delivered in default of the defendant, unless the defendant has been served with or notified of the summons or equivalent document in due form and in good time'".

– *SAP* Madrid, 22 January 2001. Web Colex-Data.

Denial of *exequatur* in respect of a Portuguese judgment on a matter of insurance. Procedure to be followed. Control over jurisdiction court of origin.

"Legal Grounds:

. . . In the proceedings at first instance, the court wrongly followed the procedure provided in the *LECiv.* for enforcement of judgments delivered by foreign courts, when the proper procedure was that provided in the Brussels Convention of reference, in consideration both of its time in force and its seniority over national

laws, making it obligatory to proceed as regulated in Sec. 2 of Title III *et cetera* of the Convention, which lays down a uniform, equal, rapid, simple and autonomous procedure that the courts of Contracting States are obliged to observe, and in this case that procedure bars the admission of any kind of opposition other than an appeal to the Provincial High Court, as authorized in art. 40 of the Convention, against the judgement of the court of first instance which denied the application. These express, specific provisions of the Convention are part of the legal system according to art. 96 of the Spanish Constitution, and they take precedence over ordinary laws in the matters to which they relate.

(. . .)

The rules laid down in arts. 31 *et seq.* constitute a procedure regulated in Sec. 2 Title III of the Convention and differ from that established in respect of Jurisdiction in Title II, in that one of its peculiarities is the absence of the party against which enforcement is sought, which party cannot even make any observations until the submission of its appeal. It is therefore not possible to invoke the forum of its place of domicile or of the place of performance, which in other circumstances is essential in determining jurisdictional competence.

As to the representations of the appealing party regarding failure to comply with the procedural formalities essential to the validity of the judgment to be enforced, the Court is bound by the provisions of arts. 29 and 48 of the Convention on the formal characteristics of the documents submitted and by strict respect for the considerations of fact upon which the court of the State of origin has based its jurisdiction.

Under art. 5.1 of the Convention, in contractual matters persons domiciled in a Contracting State may be sued in another Contracting State if that is where the obligation was or ought to have been performed. This notwithstanding, art. 17 of the Convention allows express submission, in writing or verbal, to a court or the courts of a Contracting State. Such submission is by no means deducible from a situation of default as claimed by the appellant, since default is merely indicative in procedural terms of outright opposition to the action.

In none of the circumstances contemplated in the Convention is the party initiating the action authorized unilaterally to determine the choice of jurisdiction; the proper forum in all cases is that of the defendant or of the locus of performance, unless another forum has been agreed or is implicit in the case concerned.

Art. 52.3 of the Convention provides that in determining a person's domicile, the applicable law shall be the national law of that person. The following article provides that the registered offices of companies and other legal persons shall be considered their domicile, and that their determination by the courts shall be governed by the rules of Private International Law. Under these rules, art. 9.11 *CC* provides that the personal law applying to legal persons is determined by their nationality and is applicable in all matter relating to capacity, incorporation, representation, operation, conversion, dissolution and extinction.

The place of enforcement indicated in the Convention, which is referred to in determining a court's competence to render enforceable judgments delivered in a

Contracting State, as referred to in art. 32 *in fine* as it relates to art. 16.5, is that place in which the judgment will be enforced in accordance with the objective content thereof.

In insurance matters, under art. 34 as it relates to arts. 28 and 11 of the Convention, an application for enforceability of judgments delivered in another Contracting State may be denied without any submission from the party prejudiced thereby if the action was not brought before the courts of the Contracting State in whose territory the defendant, whether insured or beneficiary, is domiciled.

In the present case, the court of origin was apprised, as noted in its judgment, of the fact that the defendant was domiciled in Madrid. In admitting the action against the defendant for trial, it was in breach of article 2 of the Convention and of all the provisions thereof regarding territorial jurisdiction, and therefore, without going into the material grounds, which although not recorded there are more than enough to justify competence, the judgment cannot be admitted as susceptible of enforcement in Spain.

This court therefore rejects the appeal brought by the entity seeking enforcement and upholds in part the appeal brought by the opposing party, thus confirming the original court's denial of enforceability of the foreign judgment".

– *AAP* Valencia, 13 June 2002. *Web Aranzadi JUR* 2002\1371.

Enforcement of an Italian judgment ordering payment of commissions accruing to the plaintiff for agency services rendered to the defendant in Italy. No control over jurisdiction of court of origin.

"Legal Grounds:

. . . Therefore, as the matter at issue does not come under Title II Sections 3 (Jurisdiction in matters of insurance), 4 (Jurisdiction over consumer contracts) and 5 (Exclusive jurisdiction) or article 59 of the Convention, the jurisdiction of the original Italian court does not arise. But even if that jurisdiction were an issue, the appellant's claim would still be inadmissible, since, this being a claim for commissions accrued by the plaintiff for services rendered as agent of the defendants in Italy, it would come under Section 2 on 'Special jurisdiction', article 5 of which provides that *'A person domiciled in a Contracting State may, in another Contracting State, be sued: 1. in matters relating to a contract, in the courts for the place of performance of the obligation in question; in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, this place shall be the place of business through which he was engaged'.*

(. . .)".

– *ATS*, 11 Junc 2002. *Web Aranzadi JUR* 2002\7802.

Incompetence of Social Bench of the Supreme Court to grant *exequatur* in respect of a Portuguese judgment. Applicability of Brussels Convention.

"Legal Grounds:

. . . The Brussels Convention is extremely explicit and precise as to the competence of courts to order the enforcement of judgments delivered in States belonging to the European Union, and therefore we are strictly bound by the terms of that Convention as reproduced in Regulation 44/2001, to which reference is made here. . . . There is therefore no alternative to the jurisdiction of the Court of First Instance, and where applicable the Provincial High Court, in respect of enforcement of judgments delivered by other courts in the EU, and for the same reason such jurisdiction is barred to the Social Courts in Spain, given that when these Conventions were signed, the Social Courts had existed in Spain for some time and yet jurisdiction in respect of enforcement of judgments by EU courts lies with the Courts of First Instance and Provincial High Courts, with the possibility of appeal for review of the latter's decisions by the Supreme Court.

From the foregoing it is readily concluded that the application for *exequatur* submitted to this Fourth Bench of the Supreme Court furnishes no legal justification for the assumption of jurisdiction sought thereby. The only Bench of the Supreme Court with competence in matters of *exequatur* is the First Bench in civil matters . . . this application for *exequatur* is denied by reason of lack of jurisdiction of this Fourth Bench of the Supreme Court (Social). Competence in this case lies with the Court of First Instance of Madrid, the place of domicile of the defendant, and it is there that the plaintiff must claim whatever rights he feels are due him".

V. INTERNATIONAL COMMERCIAL ARBITRATION

– *STS*, 23 July 2001. *RJ* 2001\7526.

International commercial arbitration. Law applicable to determine the existence and validity of an arbitration agreement.

"Legal Grounds:

. . . This is indeed a case of genuine international arbitration, agreed by a Spanish entity, . . . and a company from the Republic of Korea, domiciled in Seoul, . . . and art. 18,1 of the agreement signed by the parties contains an undertaking, accepted by both parties, that 'any dispute or claim arising from or in connection with this agreement shall be settled by arbitration in the city of New York, in accordance with the rules and procedures of the American Arbitration Association (AAA)'. This clause is included in the agreement whereby 'Goldstar' granted Kern exclusive distribution and commercialization rights in respect of television sets and other kinds of apparatus in Spanish territory.

. . . Before the issue of the existence and validity of the arbitration agreement is addressed it must first be determined who is to judge it – that is, the applicable law. The question is a complex one in that the applicable law is divided, so that specific laws are applicable depending on certain connection, capacity, effects and so forth. The Spanish system for its part is set forth in article 61 of Law 36/1988, 5 December, on Arbitration, within Title X, 'On the rules of Private

International Law', which provides thus: 'The validity of the arbitral clause and its effects are governed by the law expressly chosen by the parties, provided that it has some connection with the principal legal business, or alternatively, absent such choice, by the law of the place where judgment is to be delivered, and if the latter is not determined, by the law of the place where the arbitral clause was made'. The ground sustains that the appealed decision acknowledges that this is an agreement made in Spain between a Spanish company and a Korean company having a domicile – branch – in Spain; however, the decision *a quo*, in its first legal ground, does not cite this as an accredited fact but as having been alleged by the appellant in the appeal. Furthermore, the Korean company is domiciled in Seoul, Republic of Korea, and there is no record of a branch constituting a domicile as claimed in the ground of appeal, but only of an office in Spain. The contested decision rightly avers that this is a standard agreement or regulation that Goldstar uses throughout the world. Both the 1958 New York Convention and the 1961 European Convention of Geneva enshrined the principle of free will, and it should not be forgotten that the current Spanish law of arbitration was inspired by Recommendation 12/1986 of the Council of Ministers of the Council of Europe.

The decision *a quo* rightly states that the arbitral clause is authorized by art. 22.2, *a sensu contrario*, of the Organic Law of the Judiciary, in tbat the parties expressly submitted to a non-Spanish body and the defendant in the action giving rise to this appeal for cassation, "Goldstar Company Limited", is not domiciled in Spain; be it said, moreover, that international arbitration is not contrary to the public interest or public policy, nor can it be said to prejudice a third party (art. 6.2 of the Civil Code). There is, then, a clear choice of substantive Law, specifically the rules of the American Arbitration Association and the laws of the State of New York, and furthermore, the lack of a connection with the place of residence of one of the parties and with the performance of the obligations arising out of an agreement does not bar international commercial arbitration as agreed, by a body having no connection with the agreement or with the parties thereto, its sole function being to settle a dispute in the fast-moving world of international trade and so avoid the slow and lengthy deliberations of the jurisdiction of the States of either party".

– *ATS*, 20 March 2001. *RJ* 2001\5520.

Recognition of arbitral award. Proceedings pending in Spain.

"Legal Grounds:

. . . According to the rules of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, to which Spain acceded on 12 May 1977 and which came into force in Spain on 10 August of that year, the Convention is applicable to this case given that the award whose recognition is sought comes under the terms of article I of the Convention and the applicant has submitted the documents cited in article IV, duly translated into Spanish.

(. . .)

. . . as part of this recognition procedure and subject in any case to the dictates of internal public policy, this Bench must inquire whether the existence of pending proceedings in Spain constitutes an obstacle to recognition as here sought . . . This being the case, contrary to tlie claim of the defendant company, it is evident that at the time the foreign arbitration was moved no proceedings were pending in Spain which might bar recognition of the award. The action instituted in the Spanish courts has no relevance for the purposes of tlie present proceedings given the circumstances referred to, especially the fact that the company here opposing *exequatur* waited for notification of the initiation of arbitration, then only a few days later brought an action in the Spanish courts. To allow proceedings pending in the forum to affect recognition of the enforceability of a foreign award in respect of arbitration initiated prior to tliese proceedings – even although the object of these proceedings is to annul tlie agreement or clause of submission to arbitration, as in the present case – is tantamount to a definitive bar on any foreign award, since it would be sufficient, upon notification of the commencement of foreign arbitration, to institute an action in the Spanish courts and claim pending proceedings to bar recognition of the enforceability of such an award. Therefore, *exequatur* proceedings cannot wait npon other domestic proceedings: to hold otherwise would be to license fraud and to encourage tlie flouting of freely accepted undertakings. To the contrary, the arbitral award, once its enforceability is recognized, will if appropriate affect the other proceedings, to which end testimony of the present judgment must be remitted to Court of First Instance No. 2 of Vigo".

– *ATS*, 13 November 2001. *RJA* 2002\1513.

Grant of *exequatur* in respect of an arbitral award delivered in the Czech Republic. Applicability of the New York Convention. Dismissal of all the grounds of opposition raised by the party against which *exequatur* is sought.

"Legal Grounds:

. . . The applicable law in the present case is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, by reason of both the matter and the date of the award, whose effects in the case of Spain are universal, since Spain entered no reservations to the provisions of article 1 upon its accession to the Convention, which took place by Instrument dated 12 May 1977. Spain is also signatory to a Convention with the Czechoslovak Socialist Republic on legal assistance, recognition and enforcement of judgments in civil matters, dated 4 May 1987, which would also apply to the point at issue under articles 2, 16–c), 18, 19–e) and 21 tliereof. With the disappearance of the Czechoslovak Socialist Republic, the two Conventions are binding on the Czech Republic in accordance with the Vienna Convention on the Law of Treaties of 23 May 1969, and more importantly the Vienna Convention of 23 August 1978 on Succession of States in respect of Treaties. As regards the New York Convention, this is further supported by the communiqué issued by the Czech Republic (published in the *BOE*, 14 October 1994) declaring itself the successor of the Czech

and Slovak Federal Republic, effective as of 1 January 1993; and as regards the Bilateral Convention, by the exchange of letters of 21 March 1994 and 2 February 1995 (*BOE*, 15 June 1995). Of the Conventions above cited, we prefer the New York Convention, for although the Bilateral Convention is of a later date, in cases like the present one, the multilateral convention is preferred on the principle of maximum efficacy and favour of *exequatur*, as this Bench has noted in other cases where it has ruled in favour of these criteria.

. . . the appeal cannot be entertained, first and foremost because the New York Convention takes precedence over the Bilateral Convention as explained in the previous ground. Thus, in light of the referral in art. III of the multilateral convention to 'the rules of procedure of the territory where the award is relied upon' for recognition and enforcement of arbitral awards, it necessarily follows that under the provisions of art. 57 of Law 36/1988 on Arbitration, art. 955 of the *LECiv.* of 1881 and art. 56.4 of the *LOPJ*, jurisdiction in respect of the present application lies with this Bench, and the issue must be resolved in accordance with the procedures provided in Section Two, Title VIII, Book II of the Law of 1881, as it relates to art. 2 and the Sole Repeal provision, 1–3, of *LECiv.* 1/2000, 7 January. Moreover, the conclusion would be the same if we were to apply the article of the Bilateral Convention invoked by the defendant. A simple reading of the article as it relates to art. 18 of the same Convention reveals a glaring inconsistency in its terms which makes it difficult to determine the body to which application for recognition and enforcement can be made: the initial reference to the 'competent requested tribunal or judicial authority' does not sit well with the rest of the sentence, to wit 'that delivered the judgment as the Authority of first instance'. Whatever the deficiencies of the drafting or the translation, the only possible interpretation of this provision, as it necessarily relates to arts. 3 and 18, is that application for the recognition and enforcement of the award may be made either to the court that issued the decision in first instance for remittal to the court of the other competent party, or else to the court in the receiving State that has jurisdiction in these matters according to the rules of competence in that State. The view that the first sentence of art. 24 of the Bilateral Convention is disjunctive is further supported by the translation made by a sworn translator/interpreter of art. 24.1 of the Czech version of the Convention, which reads: 'application for recognition or enforcement of the decision may be made directly to the requisite court or to the judicial authority that judged the matter at first instance; in this case the application shall be remitted to the judicial authority of the other signatory of the Convention, as provided in article 3 of the Convention'. We would note here that in any case, had the applicant exercised the option of applying through the court of origin rather than the court of the requested State, the authority of the State of origin would simply have referred the case to the central Spanish authority; in accordance with the internal rules already cited, the latter would have remitted it to this Bench, which would institute proceedings in accordance with arts. 951 *et seq.* of the *LECiv.* of 1881, as has in fact been the case.

. . . The ground of appeal as formulated – which comes under the provisions

of art. V, 1–c) of the New York Convention – cannot be entertained for two reasons: firstly, the text of the award itself indicates that it was instigated at the request of the applicant for arbitration; and secondly, the ground for opposition to *exequatur*, as provided in art. V, 1–c) of the New York Convention, entails absence of any connection between the arbitral clause and the arbitral award in that the award addresses issues unconnected with the arbitral clause or aspects outwith its material scope. The position of the party opposing recognition is quite different: the claim does not concern breach of the agreed bounds in the arbitral award but the specific demands of the plaintiff in the arbitration proceedings. The issue is therefore whether the arbitral award is *ultra petita* in respect of the terms framing the dispute rather than whether the bounds of the arbitral clause as agreed by the parties were overstepped. A literal reading of the clause gives a generous scope, which certainly does not exclude a claim for late payment interest on the unpaid price. Whether or not such payment is appropriate is a separate issue, quite beyond the duty of this Bench to decide on *exequatur*, given that this procedure is purely one of recognition and as such cannot examine the facts of the matter.

. . The position of the party opposing *exequatur* allows this Bench to examine the issue of compliance with the formal requirements of art. IV, 1–b) of the NYC as it relates to art. II, 2 thereof, and likewise the question whether the arbitral award is valid and effective under the material law indicated by art. V, 1–a), in respect of which the burden of proof of applicahility lies with the party against which recognition is sought.

Firstly, as regards the precise scope of the conditions laid down in Art. IV as it relates to art. II of the Convention, given the absence of an arbitral clause signed by the parties, this Bench has not only adopted a systematic and integrative approach, including reference to other conventional norms where appropriate, such as the European Convention on International Commercial Arbitration (Geneva 21, 1961), but it has paid particular attention to the purpose of the clause. In our view, the object is to ascertain whether it was the intention of both parties to include in their business agreement a clause, constituting an undertaking or conveying the general intention to submit to arbitration any disputes arising from the performance of a certain legal business relationship between them; which common intent is reflected in the communications maintained and the actions taken by either party in the business relationship, but necessarily in the understanding that such intent is not fulfilled when one of the parties ignores or does not act upon an offer coming directly or indirectly under a binding clause.

. . . The arbitral clause, specifically clause 14, is reproduced on the back of the two confirmations submitted with the application for *exequatur*. This clause refers in turn to the front of the same confirmations, which set forth the terms of submission and specify both the competent body and the applicable law. The first of these confirmations, dated 7 May 1993, is signed by the defendant company, but the second, dated 11 June 1993, is not.

With respect to the requirements of the *exequatur* at issue here, the source of doubt is therefore this second document. Taken as a whole, from the documents

submitted to the proceedings, which testify to an exchange of communications between the parties – in some case through intermediaries – with regard to the making and performance of the successive agreements on the supply of goods, it may reasonably be inferred that their intent was to submit any disputes arising in connection with the supply of goods to arbitration. It is important to note that, as stated by the opposing party, the various supplies of goods took place within the framework of a broader agreement, whereunder the latter was granted the exclusive right to commercialize, in the market of Taiwan, the products that the applicant had undertaken to distribute. It was within the framework of this agreement that successive contracts were made in which the opponent placed orders for goods with the applicant. The documentation submitted is sufficient evidence that the successive supplies were all subject to the same general conditions, whose terms included a clause on choice of law and submission to arbitration. This arbitral clause, as noted, appeared in stipulation 14 of the general conditions of contracting, with reference to the 1980 Incoterms rules, which were set forth on the back of the order confirmations sent by the applicant to the opponent through an intermediary, and this fact was noted, in red lettering, in the lower part of the front of the order confirmation, above the space designated for the signature of the contracting parties. This was also included in the general contracting conditions displayed on the back of the various invoices issued upon each delivery of goods, which invoices the applicant duly delivered to the opponent and which the latter did not refuse. Therefore, as required by art. IV, 1–b) of the general norm, it is established with reasonable certainty that the parties agreed to submit disputes arising from their business relationship to arbitration, and that that agreement – for which there was no particular formality as provided in art. II, 2 of the Convention – was valid and binding upon the parties in the various supplies of goods giving rise to the dispute. The party against which *exequatur* is requested simply claims that it did not accept order number 7005/1993/7686 – the one whose confirmation is not signed by the opponent – and hence did not accept either the contract or the arbitral clause; however, there is no documentary evidence of such refusal. Indeed, the documentation submitted suggests otherwise – that it consented to the contract, and therewith the arbitral clause, and that it subsequently sought to extricate itself from it in light of what it claims was a clear breach by the applicant of its undertakings in respect of their agreement on exclusive commercialization or distribution.

. . . On the foregoing basis we may now address the validity and force of the arbitration agreement in light of the ground for denial of *exequatur* provided in art. V, 1–a) of the NYC. The arguments put forward by the company opposing *exequatur* seek to negate the validity of the arbitration agreement by appeal to art. 4.2 of Law 98/1963, 4 December, on international arbitration and trade and enforcement of awards in the Republic of Czechoslovakia, subsequently replaced by Law 216/1994, currently in force. Along with a copy of the said Law 98/1963 and a sworn translation thereof, the opponent of *exequatur* has submitted an opinion by two legal experts from the State of origin, also duly certified, on these points.

Czech law is clearly applicable as regards verification of the validity and force of the arbitration agreement for the purposes of *exequatur* of a foreign judgment, this being the law chosen by the parties and also the law applicable in the case of subsidiary connections as provided in art. V, 1–a) of the NYC. However, this article is not applicable as sustained by the party opposing *exequatur*. Where, as in the present case, the arbitral clause is part of a set of general conditions regulating the principal agreement to which the arbitral clause applies, that clause is deemed valid if the other party accepts, by a means other than in writing, a written proposal to formalise the principal agreement. To be accepted as an express acceptance, such acceptance need not be rendered in writing or subject to any other formality, and it need not make specific reference to the arbitral clause; it is sufficient that it make reference to the agreement as a whole.

But above all, art. II of the NYC contains a provision referring to the material form of the arbitral agreement which excludes it from the provisions of art. V, I–a). This article is predicated on the existence of a written agreement in one of the forms stipulated in art. II, which agreement will be recognized in Contracting States if it complies with certain formal requirements. Hence, the award delivered in respect of such an arbitration agreement must also be recognized if it complies with the said formal requirement, which is the case here as noted above.

Finally, the defendant alleges lack of due citation in the arbitral proceedings and lack of notification of the award therefrom. In respect of the ground for opposition to *exequatur* contemplated in art. V, 1.b) of the Convention and the cause of denial provided in section two, point b), the plea in opposition must be dismissed. In relation to both points, the applicant submitted a certificate from the Court of Arbitration confirming due summons of the defendant in accordance with Czech law, the Regulations of the Court of Arbitration, and notification of the award".

– *ATS*, 9 October 2001. *RJA* 2001\9419.

Competence to order precautionary measures in process of *exequatur* of an arbitral award lies with the courts of the place where the foreign award for which *exequatur* is requested has to be enforced.

"Legal Grounds:

. . . Exception three in point 1 of the Sole Repeal Provision of *LECiv.* 1/2000, 7 January, maintains in force articles 951 *et seq.* of *LECiv.*/1881 (*LEG* 1881, 1) pending the entry into force of the forthcoming Law on International Judicial Cooperation, which will be the internal norm regulating procedure for recognition and enforceability of foreign judgments and other decisions, as stated in art. 523 of the new Law of Procedure. Obviously, the continuance of this aspect of the 19th-century procedural law does not mean that it remains entirely in force in respect of applications for *exequatur* that come under the autonomous regulations contained therein. To the contrary, the maintenance of such precepts necessitates adaptation of the procedural steps there established to the regulatory provisions of the new Law, which came into force on 8 January 2001. The adoption of

precautionary measures in *exequatur* proceedings initiated subsequent to the entry into force of *LECiv.* 1/2000 and coming under the autonomous regime of *LECiv.*/1881, will therefore be subject to the provisions of articles 721 *et seq.* of the new procedural law, which will likewise be applicable to measures requested after its entry into force in proceedings initiated before then, as provided in the Seventh Transitional Provision of *LECiv.* 1/2000. In this respect the need to establish linkages between the two sets of rules – those of *LECiv.*/1881 and those of *LECiv.*/2000 – is even more evident if possible, since as regards the system of recognition of foreign decisions, the new Law looks to the future when the Law on International Judicial Cooperation comes into force, for this will undoubtedly subscribe to the current conceptions of the subject prevailing in the integrated legal and judicial space that constitutes one of the fundamental pillars of the European Union and to achieving which the efforts of the various national and Community public powers and institutions are directed; these are modern conceptions enshrined in the Community Regulations Nos. 1347/2000 and 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Articles 723 and 724 of *LECiv.* 1/2000 contemplate the rules of objective and territorial competence for the adoption of precautionary measures. Generally, competence therefor lies with the court judging the matter at first instance, or, if proceedings have not been initiated, the court having jurisdiction in respect of the principal action. For its part, article 724 determines jurisdiction in cases where arbitration or the formal judicial award from arbitration is pending, and where the proceedings are held before a foreign court, subject in this last case to the terms of International Treaties. In all such cases jurisdiction to decide on precautionary measures will lie with the court of the place where the foreign award or judgment has to be enforced, or failing that, of the place where such measures would take effect. *Exequatur* proceedings do not readily fit into any of the cases contemplated by either set of rules. On the one hand we have rules assigning jurisdiction according to the different procedural instances and stages, including extraordinary appeals, which cannot be readily applied to a procedure such as that regulated in arts. 951 *et seq.* of the *LECiv.*, in respect of which it has been repeatedly stressed that it is special, merely for purposes of recognition and not entirely contentious, and that despite being declaratory or declaratory and constituent, it stands mid-way between procedures of that nature and enforcement procedures strictly speaking. In the structure of the *LECiv.* of 1881, the *exequatur* procedure, with that configuration, has only one instance, namely this Court – with ever more numerous exceptions introduced by International Conventions – for reasons only understandable from a historical perspective and based in the final analysis on arguments having to do with the exercise of the sovereign power of the State as incarnate in the highest judicial body in the Nation. In fact not even in the most modern forms of *exequatur* procedure, instituted through recent international instruments on the subject and through Community regulations, can one talk strictly speaking of procedural instances, in the exact sense of the successive stages in a procedure whereby the matter can be examined, with full jurisdiction, again successively and where applic-

able by different courts. Nor is application for precautionary measures in the *exequatur* procedure the same as application made while foreign arbitral or judicial proceedings are pending or after a decision has issued therein but no motion has been made to secure its recognition or enforceability, given that, as has also been repeatedly ruled, the formality of recognition is independent of the proceedings giving rise to the decision whose recognition is sought.

It therefore falls to us to fill a gap in the regulations by arriving at an interpretation of the rules by way of an analogical, teleological and even goal-oriented approach, without losing sight of the setting in which they reside and the reality with which they are intended to deal; an interpretation that will moreover be as efficacious as possible not only in protecting the credit as precautionary measures are intended to do, but also in guaranteeing the effectiveness of the judicial protection that is sought. Having weighed the different possibilities, it is this Court's opinion that the surest approach to achieve these ends is to attribute competence to adopt precautionary measures in *exequatur* proceedings under the rules of the *LECiv.* of 1881 to the judicial bodies of the place where the foreign decision would be enforced or, failing that, the place where the requested measures would take effect. There are obvious drawbacks in the dissociation of competence to decide on *exequatur* and precautionary measures, particularly in terms of the law being seen to be good – and this applies to the decision on recognition – and bearing in mind that the same problems arise in a decision on precautionary measures when proceedings are pending abroad; however, these must take second place to the considerations favouring the proposed solution, which is better adapted to the special nature and the specific purpose of the recognition procedure, and for several other reasons: firstly, it is also better adapted to the nature and essence of the functions attributed to this Court, and to the nature of the Court itself, which in the present scheme of jurisdiction is not intended to be a court of ordinary appeal; secondly, it anticipates the forthcoming legal situation and the procedural system that will in future govern *exequatur*; thirdly, it attributes jurisdiction to the body that will ultimately rule on the enforcement of the foreign decision (*cf.* art. 958 *LECiv.* 1881), thus promoting greater efficacy and economy of procedure; fourthly, it ensures that the applicant has means of appeal from whatever decision is delivered on the measures requested (arts. 735 and 736 *LECiv.* 1/2000), thus favouring more effective judicial protection, and particularly the right of access to the legally established system of appeals, and hence more suitable in terms of constitutional guarantees; fifthly, it obviates the possibility of adopting a solution different from that which would be appropriate where foreign proceedings are pending or where a decision has issued therein but no motion has been made to secure its recognition in Spain, cases clearly similar to the application for precautionary measures in *exequatur* proceedings; and sixthly, it is the logical solution by analogy with other rules, such as art. 50 of Law 36/1988 on Arbitration, which regulates appeal for annulment – a procedure sharing aspects of its object and purpose with a recognition procedure – establishing that a party so wishing may apply to the Court of First Instance having jurisdiction in respect of enforcement to order

precautionary measures such as will ensure that the award is effective, notwithstanding that competence in respect of the appeal lies with the Provincial High Court".

– *STS* 29 November 2002. *RJ* 2002\10403.
Non-effect of international arbitration clause.

"Legal Grounds:

... What must be examined is the scope of the clause of submission to international arbitration, which states: 'Arbitration: Arbitration, as applicable, or general average, as applicable, shall take place in London under English Law'. This is plainly a generic clause in which the only matter clearly identified as being subject to international arbitration is the general average – which is not the concern here – but it fails to state which of the possible differences arising between the parties would be settled by arbitration, as required under article II–1 of the New York Convention on Recognition and Enforcement of Arbitral Awards of 10 June 1958, to which Spain acceded on 29 April 1977. For the national court to recognize it, the arbitral clause must not be null or inapplicable and must at all events be effective; that is not the case here, since the clause is clearly unsatisfactory and is too imprecise and vague to meet the basic requirements for it to be admissible and applicable.

... The scope of the arbitral clause here at issue is not such as to accredit a formal and express commitment to arbitration, including a clear choice of law, since this is not mentioned in the clause, whereas article 61 of the Law of Arbitration (*RCL* 1998, 2430 and *RCL* 1989, 1783) refers to the law expressly designated by the parties, which law must be connected in some way with the principal legal business or with the dispute in a given order of priority. However, the clause is too imprecise in this respect to be applicable".

VI. CHOICE OF LAW: SOME GENERAL PROBLEMS

1. *Proof of foreign law*

– *STC* 2 July 2001. *RTC* 2001\155.
Work performed abroad. Spanish personnel in the service of the Commercial Office of the Spanish Ministry of Trade and Tourism in Beijing. Proof of applicable foreign law.

"Legal Grounds:

... the crux of the matter is whether in the present case the judgment delivered by the Social Division of the High Court of Justice of Madrid on 9 May 1997 has infringed the plaintiffs' right to effective judicial protection (art. 24.1 *CE*) by revoking the original decision on the grounds of "lack of proof of the 'content and validity' of the foreign law applicable". On this point, the first step must be

to determine whether, as the Public Prosecutor avers, the appealed decision is guilty of "undue omission" in failing to address the sole claim of the appellants, namely their right to receive payment of certain sums of money.

Fourth: . . . it should be remembered that in the original decision, having stated that according to art. 10.6 of the Civil Code the law applicable to the case was Chinese labour law, and that according to art. 12.6 *CC* the burden of proof of the said law lay with the plaintiffs, the court concluded . . . that, there being insufficient proof of the foreign law, Spanish labour law must be applied. And in application of the latter [specifically art. 4.2.f) *ET* (*RCL* 1995, 997)], bearing in mind that the existence of the pay differentials claimed had been accepted, upheld the employees' case and recognized their entitlement to the amounts claimed but not the interest also claimed for late payment. Upon appeal against this decision raised by the State Attorney, the Social Division of the High Court of Justice of Madrid concurred with the court of instance as to the applicability of Chinese law to the case at issue, and as to the burden of proof falling upon the plaintiff (arts. 10.6 and 12.6 *CC*); however, it then concluded, without any detailed explanation, by revoking the original decision by reason of absence of proof of the content and validity of the foreign law by the means established therefor in Spanish law.

Regarding the foregoing, there are reservations: firstly, whether art. 10.6 *CC* was or was not applicable given that the Convention on the law applicable to contractual obligations (Rome, 19 June 1980) has been in force in Spanish law since 1 September 1993 . . ., and whether art. 6 of the Rome Convention should be applicable. Secondly, according to paragraph two of art. 12.6 *CC* – which was in force at the time and has since been replaced by art. 281 of the Civil Procedure Law 1/2000, 7 January (*RCL* 2000, 34 and 962) – the burden of proof of the content and validity of a foreign law lies with the person invoking that law, while in the original proceedings it was the State Attorney, in opposition, who claimed that Chinese law was the applicable law. The foregoing notwithstanding, however, the constitutional issue concerning us here is whether, in light of art. 24.1 of the Spanish Constitution, the grounds stated in the decision delivered on appeal are sufficient, given that the appellate court confined itself to upholding the applicability of Chinese law and the burden of proof thereof lying with the plaintiffs, without any argument, citation of sources or other justification in support of the decision to revoke the original judgment (which in light of the circumstances applied Spanish labour law in default, citing the Supreme Court's own doctrine).

Fifth: . . . the fact is that the appellate court failed to apprise the plaintiffs of the *ratio decidendi* of its decision – that is, the reasons for which the original judgment was set aside and their right to the claimed pay differentials denied – thus denying not only recognition of the right upheld by the court *a quo* but also the very recognition by the defendant of existence of the debt owing to the plaintiffs, all of which, as regards the application of the law in force, is contrary to the doctrine laid down in this connection by the Supreme Court whereby in the absence of proof of the foreign law invoked in the proceedings, Spanish law must apply, as repeatedly confirmed by the jurisprudence. Be it said that this doctrine is more

faithful to the intent of art. 24.1 *CE* than the appellate decision to dismiss the appeal, given that in connection with overseas transactions Spanish law is perfectly equipped to provide the protection vouchsafed by the cited article of the Constitution. Therefore, insofar as the decision here challenged diverges from that jurisprudence and from the foregoing consideration, it is not unreasonable to demand more explicit justification for the change of approach and the denial of a universally recognized right; in other words, since no grounds are adduced for the given interpretation, it follows that the appellate decision was merely arbitrary.

We therefore find that the fundamental right of the plaintiffs to effective judicial protection and to the means of defence (art. 24.1 *CE*) has been infringed, and we consequently uphold the present appeal for protection".

– *STS*, 22 May 2001. *RJA* 2001/6477.

Contract of employment between a non-national and the Spanish Consulate in Los Angeles (USA) for services in the USA. Applicable law. Consequences and evaluation of the burden of proof of foreign law.

"Legal Grounds:

... The plaintiff, a Guatemalan national domiciled in the city of Los Angeles (California, USA), there being no record of her ever having resided or been in Spain, entered into a contract of employment with the Spanish Consulate General in Los Angeles on 15 July 1987, whereunder she worked as a cleaner for the Consulate.

On 14 August 1997 the Spanish Consul General in Los Angeles informed the plaintiff by letter that her employment with the said Consulate General was terminated as of that date. ... The second of the working hypotheses referred to analyses the consequences of lack of proof of foreign law where that is the applicable law according to the relevant rules of conflict. This second hypothesis clearly holds water only if we obviate the conclusion of the first legal ground of the present judgment regarding the absence of contradiction between the decisions compared, and likewise the position sustained in the fourth legal argument as it relates to the first of the hypotheses considered. Even so, under this new or alternative analysis the appeal here considered must still be dismissed, for the following reasons.

First: Art. 12.6 *CC* – which is applicable in the case at issue despite having been repealed by the new Law of Civil Procedure (*RCL* 2000, 34 and 962) – provides that 'courts and authorities shall, *ex officio*, apply the rules of conflict of Spanish law' and adds that 'the person invoking foreign law must furnish proof of its content and validity by the means provided in Spanish law'; at the same time it provides that for the application of foreign law 'the court may further avail itself of whatever means of ascertainment it deems necessary and may issue appropriate orders to that effect'. The article contains no specific provision for the event that the person having the burden of proving the applicable foreign law fails to do so. In principle, a number of solutions are possible, particularly the following two. The first is to dismiss the suit because the person having the burden of prov-

ing the law supporting his claim has not done so and must therefore bear the consequences of failure to prove the law supporting that claim. The second solution is to apply the national law. This Bench is not unaware of the fact that a recent decision of 16/3/1999 opted for the second solution, citing repeated doctrine of the First bench of this Court to the effect that when Spanish courts are unable to apply a foreign law with absolute certainty, they should then judge according to Spanish law. However, given the specialized nature of the labour law system, this Bench adopted a different position as long ago as 19/2/1990 in a case where a foreign law was applicable under the Spanish rule of conflict and the plaintiff – as in the present case – merely cited certain Spanish rules but neither invoked nor accredited the applicable foreign law. The decision argued that 'failure to so invoke and prove cannot, as the appellant claims in the seventh ground, determine the application of Spanish law, since this would leave us in the absurd position of sanctioning the deliberate omission of proof of the foreign law and the application of Spanish law whenever the latter was felt to be more beneficial'.

Second: This is the proper solution in the present case; the plaintiff having based his claim on Spanish law and that law having been found not applicable, the claim must be dismissed as lacking in grounds. This conclusion cannot be evaded by indirect application of Spanish law as a consequence of failure to prove the foreign law. This is so firstly because, as noted, the party made no effort to prove the foreign law, seeking simply to have that law excluded in favour of Spanish law, and on that basis the claim must be dismissed. Secondly, the rules governing the burden of proof do not operate in the same way as rules whose application is mandatory. The issue here is not that lack of proof of a fact prejudices the party basing its position on that fact, but that there is a rule or set of rules applicable to the case by virtue of a mandatory rule. In other words, Spanish law cannot be deemed applicable if the party seeking such application does not prove the foreign law. To the contrary, if the applicable law is the foreign law, then the party invoking it must prove that law in support of its claim. This is not made sufficiently clear in art. 12.6.2 *CC*, which provides that it is up to 'the person invoking the foreign law' to prove it; however, the proper meaning of the provision is that a person basing his claim on the mandatory applicability of the foreign law is obliged to prove that law. A third foundation for this conclusion is that, as the scientific doctrine points out, the rule set forth in art. 12. 6 paragraph 1 of the Civil Code is mandatory and clearly provides that the Spanish courts must apply *ex officio* the rules of conflict of Spanish law. If, then, the Spanish rule of conflict determines that the foreign law is applicable, this conclusion, being mandatory, cannot be altered in light of the degree of effort made by the parties in the suit to prove the law invoked; such would be tantamount to allowing discretion in a matter where no discretion is allowable and would further encourage strategies such as the institution of actions based on a law known to be inapplicable in the expectation that if the plaintiff refrains from furnishing proof and the defendant fails to do so, the courts will apply a law that is more conducive to the plaintiff's interests. That is clearly the intent in the present case, where the party obliged to prove

the applicable law in support of its claim has not only failed to do so but has sought throughout to throw doubt on the proof offered by the opposing party. Furthermore, the claim on Spanish law in the absence of proof of the foreign law is inimical to judicial safety in that the question of which law is applicable law depends on the proof presented in the proceedings. Finally, this argument contravenes the logic of the rules of conflict in that – obviously depending on the outcome of the proof – as in the present case, the applicable law has nothing to do with the criteria cited in the rules of conflict for establishing the rule that actually applies.

For the rest, this conclusion cannot be considered as contravening the right to effective judicial protection, given that in the course of the proceedings the party has had the opportunity to prove the applicable law, and any difficulties that such proof may entail do not in any case warrant denial of the law applicable under the rules of conflict. This conclusion is not opposed but rather confirmed by a recent ruling of the Constitutional Court (*RTC* 2000, 10), in that any violation of the right to effective judicial protection therein derives not from failure to apply Spanish law but from not having permitted the party to prove the foreign law".

– *STC*, 11 February 2002. *RTC* 33/2002.

Lack of proof of foreign law. Burden of proof on the invoking party. Dismissal of action. Violation of the right to effective judicial protection

"Legal Grounds:

(. . .)

Sixth: Insofar as the aforementioned doctrine applies to the case here at issue, we find that the right to effective judicial protection (art. 24.1 *CE*) has been violated as regards the right to a judicial ruling on the merits of the case, inasmuch as the Social Court and the High Court raised an unfounded objection, thereby unreasonably barring a decision on the facts of the matter. That is, absent proof of the foreign law (which both courts deemed applicable to the case), they declined to pronounce on the suit brought by the plaintiff (the terms of dismissal), moreover declining to do so by subsidiary application of the *lex fori*, in this case Spanish labour law. The said objection (absence of proof of foreign law) was in fact groundless given that the burden of proof of the content and validity of English law lay with the defendant who had invoked it and not the with the plaintiff under art. 12.6 of the Civil Code as it then was (since replaced by art. 281 of the Civil Procedure Law 1/2000, 7 January [*RCL* 2000, 34 and 962 and *RCL* 2001, 1892]).

Despite this, the plaintiff was required to submit proof but was not at any time given the opportunity to do so through the appropriate procedural channels; moreover, the failure to prove the content and validity of the English law caused the denial of the claim (in the case of the original court) and the dismissal of the appeal (in the case of the High Court). It is therefore clear that the plaintiff was unreasonably denied a judgement on the facts underlying his case (as in the case of *STC* 10/2000, 31 January, F. 2).

It therefore remains only to conclude that the two decisions here challenged violated the appellant's right to effective judicial protection (art. 24.1 *CE*)".

2. *Public policy*

– *SAP* Granada, 23 April 2001. *See* Section X.5. Maintenance.

– *SJPI* Navarra, Pamplona, 26 October 2001. *See* Section X.1. Filiation.

– *RDGRN*, 14 May 2001. *RJA* 2002\1728.

Denial of registration of marriage celebrated abroad. Polygamy: International public policy. Intent inimical to the Spanish concept of matrimony and to the dignity of women as enshrined in the Constitution.

... In the present case, at the time of contracting matrimony in 1972, the applicant was already married; the bride was aware of this fact and consented to be married. While it is true that polygamy is allowed in Morocco and that the husband was a Moroccan national at the time of the marriage, the registration of a polygamous marriage is not allowable in that it would be contrary to personal dignity as established in the Constitution, it would be contrary to the Spanish concept of marriage and would be contrary to public policy (art. 12–3 CC).

"Legal Grounds:

... When a person acquires Spanish nationality, any previous marriage contracted abroad and still in force must in principle be registered with the Spanish Civil Registry (*cf.* art. 66, 1, *RRC*). It is a requirement for registration, besides the appropriate certificate or a voucher (*cf.* arts. 256 and 257 *RRC*), that the marriage be valid for the purposes of Spanish law.

... The polygamous marriage whose registration is sought took place in 1972, it being also accredited by certificate issued by the Moroccan authority and by admission of the applicant in his writ of appeal that the Moroccan party had previously contracted a marriage which must be presumed to be valid and current. Although the second marriage may be valid under Moroccan law and in that connection the personal status of the parties should in principle apply, it is clear that while the foreign law is generally applicable under our rules of conflict, it must be barred in this case by reason of an exception in respect of international public policy (*cf.* art. 12–3 *CC*), which cannot allow registration of a polygamous marriage that would be contrary to the Spanish concept of matrimony and to the constitutional dignity of women.

... We do not intend here to go into the issues of various kinds that this may raise for the Spanish legal system. What is clear is the inadmissibility of an entry of marriage in the Spanish Registry where it is stated that one of the parties was already married at the time of the wedding. It must be borne in mind that one of the details required by law in the registration of a marriage is the marital status of each of the parties at the time of marrying (*cf.* arts. 35 *LRC* and 12, and 258 *RRC*)".

– *STSJ* Galicia, 2 April 2002. *AS* 2002/899.

Flexibility of effects of public policy. Award of widow's pension to two spouses. Condition of spouse in case of polygamous marriage. Division of pension.

"Legal Grounds:

(. . .)

The object of the plaintiffs' appeal is . . . that, as wives of the deceased, each one be awarded the full widow's pension rather than that the pension be divided between the two as ordained in the original judgment. As noted earlier, the deceased had married the plaintiffs in accordance with the law of his country, Senegal, thus having two wives, a situation permitted by the system of polygamy legally existing in that country. Such a situation is prohibited by our legal system, under which polygamy is considered an offence . . . The fact is that the deceased's matrimonial ties with the plaintiffs were legally constituted under the laws of their country, in accordance with the personal laws of the parties and the laws of the place where the marriages were entered into. Art. 49.2 of the Civil Code sets forth the basic rules of the system for recognition of foreign marriages, in conjunction with art. 50. However, there is no express provision regarding marriage between foreigners and under foreign authorities outside Spanish territory; this lacuna must therefore be covered by analogy to the provisions of art. 49.2 of tbe Civil Code (or of art. 50 of the same Code), so that such a marriage may be recognized for the purposes of Spanish law if it was in accordance with the laws of the place where it was contracted. In this way it is allowable to recognize marriages between foreigners in a foreign State that are valid according to the personal law of the foreign parties. Within the meaning of arts. 49 and 50 of the Civil Code, it is allowable to recognize marriages contracted in accordance with foreign laws if they were in compliance with the laws of the place where they were contracted – that is, to recognize them if they were formalized in accordance with the foreign law in force at the time. That said, although bigamy is prohibited in this country and is contrary to public policy (art. 12.3 of the Civil Code provides that under no circumstances can a foreign law be applicable 'when it is contrary to public policy') and despite the incompatibility of the foreign marriage system with our own system – which incompatibility is of course sustained – it is allowable to recognize the legal effects of the marriage contract entered into by the deceased with the plaintiffs under the foreign system as they relate to the present context of Social Security benefits in this country; in other words, it should be recognized that the plaintiffs are entitled to a pension as a consequence of their marriage to the deceased under their national law – a fact recognized in the original judgment and not challenged by the National Institute of Social Security in its appeal. This is consistent with the fact that the concept of public policy, while comprising norms of internal law that are mandatory irrespective of whatever foreign elements are involved and in any case imply that the foreign law is manifestly contrary to fundamental national legal principles, does admit of qualification or flexibility; as the Supreme Court observed in a decision of 22/11/1977 (*RJ* 1977, 4284), the public policy exception is not an absolutely immutable rule but admits of 'inflexions'. Nonetheless,

the plaintiffs' claim for recognition of the full pension for each one cannot be entertained. The marriages contracted by the deceased in his country of origin are legally binding for the purposes of recognition, as noted; however, they cannot justify the award of a full widow's pension separately for each of the survivors. Public policy, specifically as regards our Social Security system, also applies in this respect (as a limiting or delimiting factor).

(. . .)".

3. *Renvoi*

– *STS*, 23 September 2002. *RJ* 2002/8029.

Succession of a British national domiciled in Spain. Inheritance of immovable property situated in Spain. Will in favour of the spouse. Applicability of Spanish law. Acceptance of *renvoi*. Unity of succession.

"Legal Grounds:

. . . in respect of the properties situate in Spain, the application of Spanish law, to which English law, as the personal law of the deceased, refers back, does not violate the principles of singularity and universality of succession as enshrined in art. 9.1 *CC*. The decision here challenged accepts as proven that the sole goods of the deceased are the immovable properties situate in Spain as provided in the will, and therefore there can be no question of fragmentation in the regulation of the estate. In the event of such fragmentation the general rule (not specific to succession *mortis causa*) in art. 12.2 *CC* would cause rejection of *renvoi* to English law as being contrary to these principles. This Court takes the same view, as set forth in parts of a decision of 15 Novemher 1996, rejecting *renvoi* from the deceased's national law to the law of Spain in respect of properties situate in Spain, and likewise in a decision of 21 March 1999. Therefore, if, as in the present case, the deceased's estate is comprised solely of immovable properties situate in Spain, there can be no objection to *renvoi* from English law, Spanish law being the only law applicable to the universal succession of the deceased".

– *SAP*, Malaga 13 March 2002. AC 2002/1287.

Succession of British national. Will made before Danish consul under English law. Unity of Succession. Interpretation regarding *renvoi*. Claim of *legitima*. Testamentary freedom in English law.

"Legal Grounds:

. . . a Declaratory Judgment on Small Claims was sought in respect of the third of the estate of which the plaintiff considered himself to have been deprived through an erroneous interpretation of the law applicable to the succession of the deceased.

. . . In the view of this Court, the aforementioned art. 12.2 *CC* cannot be simply and literally interpreted in isolation from the rules of succession set forth in art. 9.8 *CC*, which provide that the right of inheritance is personal regardless of where the goods are situated, and that the testator has the right to make his will

subject to the terms of his national law. In fact the Supreme Court, in the decision of 15 November referred to above (*RJ* 1996, 8212) has addressed the semantic scope of the wording 'without taking into account' which appears in art. 12.2 *CC* in connection with the non-allowability of *renvoi*, taking the view, however, that the law 'to be taken into account' is 'not necessarily the law of Spain'. This jurisprudential interpretation, in conjunction with another Supreme Court ruling of 21 May 1999 (*RJ* 1999, 4580), offers a means of interpreting the institution of *renvoi* in a way that is neither mechanical nor automatic, whereby the Courts are authorized to interpret issues according to a procedure which, in the understanding of this Court, operates as follows: 1) judgment of legal relevance, identifying a conflict in the rules of succession of different countries; 2) subsumptive judgment, on whether the case at issue is covered by domestic law, *vid.* art. 12.2 *CC*; 3) evaluative judgment on how the provisions of domestic law correlate with the national law of the deceased, *vid.* art. 9.8 *CC*; and 4) identification of the rule of interpretation on which the case hinges.

. . . Steps 1 and 2 lay down the legal grounds adduced by the plaintiff, while step 3 represents the legal grounds of the opponent, on which basis the court concerned weighs the directly proven or deducible consequences of the will of the deceased.

. . . In this connection, before proceeding to step 4 the Court must needs address the following issues: a) The deceased, a British national resident in Spain, made a will which was notarized by the Danish Consul in Malaga, despite the fact that it could have been notarized by any Spanish commissioner for oaths without this affecting the force or terms of his will, which circumstance supports a reasonable presumption of intention to evade any kind of intervention by a Spanish judicial authority; b) clauses 2 and 3, which in themselves clearly convey his intent, are reinforced in clause 6 by specific reference to Englisb law in all matters relating to interpretation of the will, and which, in exercise of his right to testamentary freedom makes only the minimum legal provision for certain relatives or the surviving spouse lacking any means (Administration of States Act 1925, Inheritance Act 1983 and Provision for Family and Dependants Act 1975); c) given the intended outcome, namely the absence of any provision in favour of his children – that is, the plaintiff Marianne E. G. and one of the co-defendants Niels V. W. – were the will to be judged under Spanish law, this would evidently give rise to situations that the testator had not intended or had deliberately sought to prevent. In such an event foreign nationals would be unjustly subject to rules of disinheritance applying under Spanish law that would not apply under their own law, given that, there being no rule of mandatory succession there, they are not mentioned or included in the will. Consequently, counter to the purpose of *renvoi*, which is to regulate inter-State differences in legal outcomes, one person, in this case Marianne E. G., might claim to have been unduly disinherited under a law other than her own (Spanish law) but could not so claim under her own (English) law, and another, in this case Niels V. W., while unable to claim pretermission or discrimination under his own (English) law, might be forced to decline or even renounce a right

of inheritance which, being neither to his advantage or his detriment, he has not challenged.

. . . Having disposed of the last and the two preceding steps, we come to step 4, and here our interpretation of the rules dictates that *renvoi* cannot be recommended".

4. *Preliminary question*

– *SAP*, Granada. 23 April 2001. *See* Section X.5. Maintenance.

VII. NATIONALITY

– *SAN* (Contentious-Administrative Division), 12 June 2001. *Web Aranzadi JUR*, 2001\294445.

Application for naturalization of Moroccan citizen by reason of residence. Marriage to a Spanish national. Degree of integration in Spanish society. Polygamy. Denial.

"Legal Grounds:

. . . Under art. 21.2. of the Civil Code, Spanish nationality may be granted on the basis of length of residence, subject to the conditions set forth in art. 22, the second paragraph of which provides that one year's residence is sufficient for a subject who has been legally married to a Spanish national for one year and is not legally or *de facto* separated, with the proviso that such period of residence have been legal and continuous up to the time of application; . . .

Art. 22.4 of the Civil Code establishes that persons wishing to obtain Spanish nationality must furnish evidence of good civic conduct and adequate integration in Spanish society, in a process governed by the regulations of the Civil Registry.

. . . In the present case, the grounds for denial were firstly that the wife lost her Spanish nationality because the marriage took place before 1975 and the Spanish law then in force so provided; and secondly that there was no proof of integration in Spanish society given that she contracted a second marriage under Moroccan law and according to the Muslim rite on 28 January 1991.

The first argument cannot be entertained, since the administrative record shows that the wife of Telaitmas Mohamed Ahmed is a Spaniard and is the daughter of a parent who acquired Spanish nationality in 1953 under the Decree of 18 May 1951; her nationality is given as Spanish in her marriage certificate, and moreover, she was issued with a Spanish Identity Card, valid for 10 years, on 3 November 1987. In light of this the wife cannot be assumed, as in the administrative decision, to have lost her Spanish nationality by reason of the marriage of 22 November de 1970, registered with the Central Civil Registry Office on 26 November de 1990 in application of art. 23.3 of the Civil Code in force at the time. This rule was amended upon the entry into force of Law 14/75, whereunder such marriage does not cause the loss of nationality, particularly where this is gainsaid by much later events, such as the issue of a Spanish Identity Card.

As to the evidence of adequate integration in Spanish society, the appellant himself admitted in his appearance before the Registrar that he lives with two wives, with both of whom there is issue, in complete harmony, but in the complaint this fact is not deemed significant for the purposes of demonstrating integration in Spanish society. Such a view cannot be entertained, firstly because it is highly doubtful that polygamy is not a significant differentiating factor in a society which, although open and tolerant of different practices and customs, only recognizes monogamous marriage; and secondly, because Spanish law so provides. It would therefore be inconsistent to acknowledge the legality of a different family arrangement constituted in accordance with laws or customs differing from Spanish laws or customs in so important an aspect as social organization while declaring obedience to the Spanish Constitution and Spanish law, which forbid a person to marry while already married to someone else (art. 46.2. *CC*). Therefore, the appellant having admitted this fact, as recorded in the challenged judgment in evidence of failure to meet the cited requirement, the judgment must stand inasmuch as it is a reasonable interpretation of the rule on which the judgment is based".

VIII. ALIENS, REFUGEES AND EUROPEAN COMMUNITY CITIZENS

– *STC*, 29 January 2001, *RTC* 2001/13.

Principle of non-discrimination by reason of race. Control of foreigners. Racial appearance as basis for presumption of foreignness. Dissenting vote. Fundamental rights. Community Law and free movement of persons.

Eighth: . . . Police requests for identification in order to ascertain compliance with the laws on aliens are authorized by art. 72.1 of Royal Decree 1119/1986, 26 May (*RCL* 1986, 1899 and 2401), . . ., whereby aliens are obliged to carry with them the passport or other document by virtue of which they entered Spain, and their resident's permit if applicable, and to show these when so required by the authorities or their agents, although they may confirm their identity by other means if they are not carrying the said documents. Likewise, art. 11 of Organic Law 1/1992, 21 February (*RCL* 1992, 421), on the protection of citizen security provides that 'aliens in Spanish territory are obliged to hold available documentation attesting to their identity and to their legal presence in Spain, in accordance with the regulations currently in force', and that they may be required to identify themselves in pursuance of art. 20.1 of that law. The issue therefore lies in whether the exercise of this power, which is lawful as long as it adheres to the purpose for which it was vouchsafed, was covertly motivated by racial discrimination. In this connection it must be acknowledged that in police controls for that purpose, persons having certain physical or ethnic characteristics may reasonably be assumed not to be of Spanish origin.

We would add that given the place and the time of such requirements, when they can normally be expected to carry identification, such controls are not illogical and, for the reason just stated, are less burdensome to the person required to

identify him/herself. Given the range of possible circumstances of this kind (travel centres, paying accommodation, areas with high affluence of immigrants, etc.), assessment is largely on a case-by-case basis. We should add again that, however lawful such operations may be and even if identification is required strictly for the purposes set forth in the regulations, the power to require identification must be exercised in due proportion, respectfully and courteously – in short, in a manner that impinges as little as possible on the sphere of the individual. Where this condition is not met, the exercise of this power not only violates the law but suggests that what might in principle seem to be a reasonable selection of persons for identification in the exercise of police functions may in fact have been deliberately chosen in order to cause special or additional harm to persons belonging to a given racial or ethnic group – that is, that beneath the cloak of the performance of proper legal functions, there may be a racist or xenophobic motive in the very decision to exercise these functions or in the manner in which they are exercised in the given circumstances.

Ninth: In the present case, we cannot entertain the claim that the requirement of identification to Mrs. W.L. was patently discriminatory. . .

. . . That said, it appears from the facts as related in the challenged administrative decision – which were not rebutted in the trial prior to this appeal for protection – that for the police the person's race simply indicated a greater probability that that person was not Spanish. There is nothing in the account of the intervention to suggest that the National Police, in acting, were motivated by racial prejudice or a particular animadversion towards a given ethnic group, as is adduced in the complaint.

(. . .)

. . . Discrimination could be presumed had the action been based on a criterion (in this case, racial) totally irrelevant as regards the individual treatment of persons to whom the regulations apply, in this case foreign citizens. As noted, foreign citizens are obliged to show documentary evidence that they are in Spain legally, and in any case all citizens are obliged to produce identification, as provided in art. 20.1 of Organic Law 1/1992, 21 February, on protection of citizen security as it relates to art. 9 of the same law and to art. 12 of Decree No. 196/1976, 6 February (*RCL* 1976, 291 and *ApNDL* 3964), regulating the National Identity Card, as implemented by Royal Decree 1245/1985, 17 July (*RCL* 1985, 1849 and *ApNDL* 3969)".

Dissenting Vote.

Entered by Judge Julio Diego González Campos in respect of the Decision of the Second Bench of 29 January 2001 on appeal for judicial protection 490/1997.

"(. . .)

Third: There is no doubt that the plural reality, here very briefly described, raises contradictions as regards the goals of legislative policy in this matter. And in this light, there are certain question that we ought to have posed: e.g., Is universal monitoring of foreigners constitutional? Is non-discriminatory control of foreigners admissible in light of the given diversity of situations? How can such control be maintained without prejudice to personal dignity (art. 10.1 *CE*)?

Fourth: As regards the first point, we should note that, from Organic Law 7/1985, 1 July (*RCL* 1985, 1591 and *ApNDL* 5093) to Law 4/2000, 11 January (*RCL* 2000, 72 and 209), changes in the Spanish law on aliens have increasingly stressed the goal of 'controlling aliens', as in other European Community States.

For this reason I feel that the Decision from which I dissent ought to have considered this objective in light of the 'social and democratic state of law' propounded in art. 1.1 *CE*. It would then have highlighted a significant fact – namely, that such control is a hangover from the times of the 'police state', and an 'aliens police' with sweeping powers – that does not in principle sit well with the values of a social and democratic state of law. The decision of the Court, to which I dissent, ought therefore have been to exclude, or at least restrict and subject to strict conditions, general control of foreigners anywhere in the national territory.

I would further add that if they are to be justified by recourse to other relevant constitutional rights, such as citizen security or protection of the national labour market, measures for general control of aliens must in my opinion be subject to the principle of proportionality if their purposes are not to be distorted, and in particular to ensure that such measures, even if conducive to that end, are in fact proportionate. The Decision from which I dissent fails to do, despite the fact that to understand the need for such a sense of proportion it is sufficient to note that the consequences, as seen from these standpoints, are not at all desirable. In the first case, it is conducive not only to more intensive control, but also to a negative social image of foreigners which can, as it has done in several European countries, encourage xenophobic reactions. At the same time, in terms of the labour market it can, paradoxically, encourage lack of police control and tolerance as regards the working and living conditions of immigrants in parts of the national territory where there is demand for foreign labour. Therefore, while it will not do to seek equality in illegality, it is unfortunate to allude, as does the Decision from which I dissent, to the location of 126 illegal foreigners in Valladolid in 1992 when there are many thousands completely uncontrolled in other parts of the country.

Fifth: In connection with the last two issues, it should be remembered that the general control of foreigners has been tightened in Spain since 1994, following accession to the Convention on application (*RCL* 1994, 1000) of the Schengen Agreement of 14 June 1985 (*RCL* 1991, 1911), although such control, exercised in a general way as regards persons and in any part of the national territory, cannot be said to have been imposed by Community law.

In effect, one of the basic objectives of the European Union according to the Treaty of Amsterdam of 2 October 1997 (*RCL* 1999, 1205, 2084 and *LCEur* 1997, 3620) is to 'to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured . . .'. True, it further adds: '. . . in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime' (art. 2). However, that does not mean that these measures are intended to restrict freedom of movement, but that their purpose is a different one – namely, to control access by nationals of third States to the Community area. This is borne out

by the new Title IV of the constituent Treaty of the European Community (*RCL* 1999, 1205ter and *LCEur* 1997, 3695) as reformed by the Amsterdam Treaty above cited, art. 62 whereof clearly distinguishes between, on the one hand, 'the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders' (section 1), and on the other hand 'measures on the crossing of the external borders of the Member States', which place a number of conditions on the access of foreigners to the European Community area (section 2).

I believe that this point bears upon the Decision from which I dissent, in that the control of aliens has been displaced from its proper sphere – that is, at authorized points of entry on the borders of the Member States – to the interior of the country, far from these borders, and it is therefore doubtful that this measure is in proportion with its stated object. This doubt is reinforced if we consider the above-cited objective of Community Law – that is, the free movement of persons – which does not sit well with a generalized system of control imposed anywhere in Spanish territory.

Sixth: Finally, in my opinion the introduction of a criterion based on the fact that a person belongs to a given racial group violates art. 14 of the Spanish Constitution in that it constitutes discrimination which the said article expressly prohibits, be it direct or indirect; and that would appear to be criteria followed by the Decision from which I dissent in admitting indirect discrimination where the control of aliens is concerned. I find it hard to accept – and this is the fundamental reason for my dissent from the Decision – that 'certain physical or ethnic characteristics may reasonably be assumed to indicate that they are not of Spanish origin', as stated in Ground 7.

The majority opinion of the Court leads to the assumption that the general concept of control of aliens and its implementation anywhere in the national territory may be additionally based on a personal trait – that is, race – which is expressly prohibited by art. 14 of the Spanish Constitution. This notion is reiterated further on in a warning (largely rhetorical in my opinion) against excesses in the implementation of the measure, to the effect that there must be a 'reasonable selection of persons for identification in the exercise of police functions', which must not be abused in order to inflict 'special or additional harm to persons belonging to a given racial or ethnic group'.

Here again, such measures ought to have been weighed against the general clause of art. 10.1 of the Spanish Constitution, particularly as it relates to 'the dignity of persons' as the supreme value in all our legal system. Unfortunately, this was not done in the Decision from which I dissent: suffice it to point out firstly that the harm referred to in the Decision does not ensue only in cases of direct discrimination like those cited but may also be expected to ensue if it is accepted, in accordance with the majority view, that racial traits constitute a proper criterion for 'reasonable selection' of persons for screening as aliens. Moreover, to accept such a criterion is to ignore another important social consideration for the application of aliens regulations – namely that like many other European States,

Spain is now a 'multiracial society' that includes a not inconsiderable number of persons of other races. And the category of other races includes both legally resident aliens and Spanish nationals.

This fact alone should suffice to bar race as a criterion of selection in the control of aliens, as foreseeably prejudicial to the dignity of persons; suffice it to say that, as regards aliens of the first group, if they may be subject to repeated controls by reason of their race, this will not only affect an element of their identity which ought to be respected for the sake of their dignity as persons, but it will also run counter to the goal of integrating aliens in Spanish society. And as regards the second group, it may lead to a no less serious consequence in the form of discrimination between nationals by reason of race – likewise offensive to personal dignity – as I believe has occurred in the present case".

IX. NATURAL PERSONS: LEGAL INDIVIDUALITY, CAPACITY AND NAME

X. FAMILY

1. *Filiation*

– *SJPI* Navarra, Pamplona, 26 October 2001. *AC* 2001\2126.

Law of filiation. Child of French nationality. *Favor filii*. Public policy. Applicability of Spanish Law.

"Legal Grounds:

. . . We should note first, however, that the applicant cites the Spanish nationality of Maria Soledad D. as determining the applicable personal law in pursuance of article 9.4 of the Civil Code; in this respect it must be said that there ought in principle to be no doubt as to the Spanish nationality of the applicant given that even had she not possessed such nationality by birth, her mother being French, she would certainly have acquired it by marriage, it having been established that she married a Spanish citizen in 1969; this brings into operation article 21 under the Law of 1954 (*RCL* 1954, 1084; *NDL* 5658, 22144), whereby any foreigner marrying a Spanish citizen automatically acquires Spanish nationality; this would be open to question only if the applicant had undertaken acts from which it transpired that she possessed Spanish nationality, there being several rulings by the *DGRN* indicating that nationality is not lost if the person concerned can show that he or she has undertaken acts entailing the use thereof. In the present case we consider that such is not proven; indeed, quite the contrary, given that the plaintiff possesses and is in use of French rather than Spanish nationality, as witness the power of attorney in the record of proceedings. However, in a similar case, a ruling of 22 March 2000 (*RJ* 2000, 2485) interpreting article 9 of the Civil Code found that 'article 9 of the Civil Code in fact states that both the nature and the sub-

stance of filiation (meaning filiation by marriage or by other means) are to be governed by the personal law of the child, which according to paragraph one is determined by nationality, and in this case both mother and daughter possess French nationality, it being understood in principle that the daughter's birth was registered with the municipal registry of the twentieth district of Paris. From a literal standpoint, the French Civil Code, as the national law of the child (art. 12.1 of the Civil Code) would appear to be applicable in establishment of the filiation here at issue. However, the circumstances of the action demand a proper practical interpretation of the precept, which it must be remembered cannot ignore the interests of the child; these interests are assumed to be an essential and basic part of the rule, and therefore tbat rule must necessarily be applied in *favor filii*. Under the material law of the forum, in certain cases the national law may be applied at the expense of the foreign law. Such is tbe case here, since the daughter's French nationality is neither final nor necessarily exclusive but is a first or provisional nationality, given that under article 17.1.a), the child of a Spanisli father or mother is Spanish. To adliere solely to the nationality at the time the action was brought and ignore the rule cited above would lead into a labyrinth with no hope of a satisfactory legal outcome. The basic requirement for recognition of Spanish nationality is tlie declaration that the child is the biological daughter of a Spanish citizen; in otlier words, this judicial decision predates and determines the issue, so that nationality is both an effect and a consequence given compliance with the requirement, wliich is first and foremost that she be the daughter of a Spanish citizen. The consequence of the foregoing argument is that article 9.4 applies where the person possesses the attributed nationality to the exclusion of any other. In the present case, the nationality is not definitive nor does it inevitably lead to automatic application of the foreign law regardless of the father's nationality, wliich does not conform to our own law and would be a barrier to the filiation here sought. Tlie material Spanisli law in this case therefore has an immediate and imperative bearing on the public policy of the forum as regards the duty of the Spanish courts to provide proper protection for a minor and safeguard her rights. And so we have decided, in order to furnish the legal protection asked of us and not to leave tlie minor in a position of absolute defencelessness. Although in the present case the person claiming paternity is not a minor, the circumstances are the same, and we therefore consider that regardless of the plaintiff's nationality, which in principle must be assumed to be French, the fact that she claims the paternity of a Spanish citizen is sufficient cause to render Spanish law applicable".

2. *Adoption*

– *SAP* Asturias, 30 March 2001, *AC* 2001\2236.

Simple adoption by Spaniards of a Guatemalan child in Guatemala. Conversion to full adoption. Requirement of adoption *ex novo* before a Spanish court. Consent of the biological mother to conversion. Fulfilment of requirements.

"Legal grounds:

(. . .)

According to art. 9.5 *CC*, 'an adoption abroad by a Spanish adoptive parent shall not be recognized in Spain if the effects of such adoption are not the same as provided in Spanish law'. This applies to the present case, as will be shown hereafter, and hence Spanish Law cannot ever recognize as fully effective an adoption constituted in Guatemala . . ., which incidentally is not a signatory of the Hague Convention on the protection of children and cooperation in respect of intercountry adoption (The Hague 29/5/1993) . . . arts. 26 and 27 of which regulate the effects of conversion of an adoption. As regards adoptions made in States not signatories of the Hague Convention, art. 9.5 of the Civil Code will apply; furthermore, art. 9.4 addresses problems regarding the 'nature and substance' of 'completed' intercountry adoptions while point 5 lists the requirements for 'proposed' intercountry adoptions. In general, Spanish Law is applicable to intercountry adoptions finalized in Spain or its consular territory, unless the adoptee resides outside Spain or does not acquire Spanish nationality upon adoption, in which case the adoptee's national law will apply as regards requirements of capacity and consent.

(. . .)

It should be remembered that adoption in Spain has three essential effects or characteristics: it is irrevocable, all legal ties between the adoptee and his/her biological family are sundered, and the adoptee becomes for all purposes a member of the adoptive family. . . . under Guatemalan law, adoption only affects the adoptive parent and the adoptee: the former is not the legal heir of the latter; the adoptee and his/her biological family retain their mutual rights of inheritance; and if the adoptive parent dies while the adoptee is a minor, the latter returns to the authority of his/her natural parents. It must be concluded that the process of adoption of a Guatemalan minor by Spanish parents bears no relation to adoption as defined by the Spanish Civil Code and cannot be considered registrable . . . at grave risk to the legal enforceability of an adoption so registered. The adoption in Guatemala confers parental authority upon the Spanish parents. This adoption cannot be recognized as such in Spain, but its effects as defined by Guatemalan law can be recognized (art. 9.4 *CC*), and in this case, under Guatemalan Law, the possessors of parental authority are Spanish citizens.

(. . .)

Simple adoptions formalized by foreign authorities cannot be registered. In such cases, for the reasons above noted, the *DGRN* has ruled that such adoptions can be recognized on the basis of new consents in a voluntary application for adoption *ex novo*, in which case the competent court will be bound only by the *lex fori* – that is, Spanish law since the adoptee resides in Spain.

(. . .)

Under art. 22.3 of the *LOPJ* . . . Spanish courts are competent to examine cases of adoption where the adoptive parents and the adoptee are Spanish and both parties habitually reside in Spanish territory.

Given that the situation of the minor is similar to a fostering arrangement, . . . there is no reason why the adoptive parents should not file anew for adoption under voluntary jurisdiction . . . As noted, the record in this case shows that they have presented a certificate of suitability and the requisite social reports from Guatemala.

Art. 25 of the *LOPJ* introduced a new element in connection with international adoptions, consisting in the issue of a certificate of suitability and, when so requested by the country, a commitment to follow up; the public authority thus has a key role in the reception and processing of international adoption applications in that it guarantees that the process commences with an examination and assessment of the applicants. The certificate of suitability with which procedures for adoption began in the child's country of origin can be found in folio 14 of the records of these proceedings. The fact that the adoption was constituted before the competent Guatemalan authorities as required by the *lex loci* is not disputed.

The report of the Office of the Solicitor General approved the adoption application by the appellants and ordered the issue of a public document enabling the child to be adopted by the appellants, who from that moment acquired legal guardianship of the child. On folio 34 is the declaration of the biological mother consenting to have the simple adoption converted to a full adoption in Spain without the need of a further consent in the conversion dossier; and in the relevant public document she accepted the adoption on the understanding that it is final and irrevocable, and likewise that her rights of consanguinity, legal guardianship and inheritance are entirely terminated by the adoption, such rights being transferred to the adoptive parents, whom she expressly authorizes to readopt her child in Spain without the need of a further consent in the adoption dossier, and she definitively delivered her child into the guardianship of the adoptive parents . . .

(. . .)

Notwithstanding the foregoing, despite the fact that the situation is comparable to that of fostering or adoption, with regard to the adoption it is proposed to carry out in Spain, this Court finds itself faced with the following difficulties:

a) If under art. 600 of the cited Law, which was in force at the time of initiation of voluntary jurisdiction procedures, the biological mother was legally capacitated to give her consent in accordance with the laws of her country in the manner in which she so did, given the lack of accreditation of the currency and substance of the Guatemalan law, the Decisions of the *DGRN* may be open to suspicion of having infringed its own internal public policy, considering the practical effects of adoption in that country; at all events, more than six months elapsed between the last consent of the biological mother recorded in the Guatemalan record and the initiation of adoption procedures before a Spanish judge as this relates to the provision of art. 1830 of the former *LECiv.*, so that in any case the consent would have to be renewed to conform to the Spanish legislation on the matter.
b) The opinion of the 12-year-old adoptee has not been heard, although there is no allegation that he lacks sufficient powers of judgement as provided in art.

177.3 *LECiv*. Any doubt as to whether or not the child has sufficient powers of judgement must be resolved by a hearing as provided in art. 9 *LPJM*, and no reason has been given to justify the authority's failure to act.

c) Strictly speaking, the opinion of the public authority has been dispensed with; nonetheless, art. 177 section 4 of the Civil Code requires that the opinion of the public authority be heard in order to assess the suitability of the adopter (in this case to confirm it) when the adoptee has been legally fostered by the former for more than one year. In other words, while the procedure may be initiated by the adopter or adopters, the intention is that the public authority, which acted at an earlier stage, should now give an opinion on the developments prior to the adoption.

Consequently, the Magistrate *a quo* must remedy the omissions referred to and then, on an ethical basis and in the interests of the child, freely decide on the adoption whose constitution is at issue. The appealed decision is therefore annulled for reasons of public policy as explained above".

3. *Legal kidnapping*

– *STC*, 20 May 2002. *RTC* 120/2002.

International kidnapping of minors. Hague Convention of 1980. Restitution of a child taken to Spain by her mother. Nature of the transfer. Effective legal guardianship.

"Legal Grounds:

First: Given the terms in which the original suit was filed, the object of this appeal for judicial protection is to determine whether or not the Decision (*AC* 1998, 2474) of the High Court, namely that there was no reason to examine the issue of substance raised in the appeal lodged by the present plaintiff against the Judgment of the Court ruling that it was unlawful for her to bring her child to Spain and the child should therefore be returned to Poland under the custody of her father on the grounds that the appeal was void since the appealed decision had already been executed, violated her right to effective legal protection as vouchsafed by art. 24.1 *CE* (*RCL* 1978, 2836 and *ApNDL* 2875).

(...)

Third: In the present case, the High Court decided not to address the substance of the issue raised in the proceedings and therefore did not rule on the challenge presented in the appeal from the judgment at first instance, taking the view that the appeal was void since the appealed decision had already been executed.

(...)

Fourth: None of these grounds are acceptable to this Court from the standpoint of the right to a judgment based in Law on the substance of the challenge brought, which is part of the fundamental right to effective judicial protection as recognized in art. 24.1 *CE*.

Be it said that the purpose of the Hague Convention of 25 October 1980 is 'to

secure the prompt return of children wrongfully removed to or retained in any Contracting State' [art. 1.a)], and for that purpose it provides a procedure, with a six-week time limit (art. 11), aimed simply at the return of unlawfully removed children without the decision adopted in this procedure affecting the merits of any custody issue (art. 19). This is, then, a summary or provisional emergency procedure, since the decision does not prejudge issues of custody, which must be resolved in different proceedings by whatever Court is competent in each case.

The Spanish legislator, aware of the end pursued by the said Convention and of the urgency of the procedure that it introduces for its implementation (see art. 1902 *LECiv.*, which provides that implementation of the procedure 'shall be preferential and must be completed within six weeks as from the date on which the request for return of the child was lodged with the Court'), has nevertheless determined that the decision be a two-tier one, meaning that the court's decision may be appealed without stay of execution, but that such appeal must be 'resolved within a maximum of twenty days' (art. 1908 *LECiv.*).

This special treatment of the second instance, whereby appeal is allowed against the decision of the Court originally judging a case of international abduction of children but lodging of the appeal does not produce a stay of execution, leads us to suppose that one of the possible consequences of the procedural regulation contemplated by the legislator is the hypothesis that the appealed decision may be enforced at the same time as the Court *ad quem* considers the appeal; nonetheless, the legislator does not view such an eventuality as grounds for the appeal court to refrain from ruling on the substance of the issue put to it. The High Court ought therefore to have addressed the substance of the issue raised by the applicant for judicial protection, there being no reason in law to excuse the court *ad quem* from that obligation, . . .

Fifth: Again, we cannot entertain the contention in the appealed decision that since the original decision had already been executed, the grounds of the decision on appeal were of no legal import. As the Public Prosecutor noted when deciding a case under the Hague Convention of 25 October 1980, the court must make two pronouncements: it must rule on the lawfulness or unlawfulness of the removal of the child to Spain from her country of origin; and it must order – that is, having determined that the removal of the child to Spain was unlawful, under art. 3 of the said Convention – the immediate return of the child to her country of origin, provided that none of the circumstances excusing the obligation of returu, as regulated in art. 3 of the Convention, arise. Viewed in these terms, despite that fact that the child had been returned to its country of origin, the issue of whether or not the appellant had unlawfully removed the child from Poland to Spain is not irrelevant, especially given that throughout the proceedings the appellant maintained that the child had always been in the care and the company of her maternal grandparents. A ruling on this issue, regardless of its efficacy in Spanish procedure once the child had been returned as a consequence of the appealed decision, could be of considerable value to the applicant for judicial protection since, as argued in the complaint, a decision favourable to the appellant could be invoked

in the Polish courts judging the marital suit between the parents, to support or reinforce her rights as regards custody of the common child.

(. . .)

Seventh: It transpires from the foregoing that by failing to rule on the substance of the issue raised in the appeal when there was no legal cause not to do so, the appealed decision infringes the appellant's right to judicial protection, and therefore such protection must be granted".

4. *Marriage*

a) *Celebration and register*

– *RDGRN*, 14 May 2001. *RJA* 2002/1728 (Public policy). *RDGRN*, 23 January 2002. *JUR* 2002/120565.

Marriage of convenience. Absence of consent to matrimony. Celebration abroad. Denial of registration.

"Legal Grounds:

(. . .)

Second: Marriages of convenience are undoubtedly void in Spanish law as due to the absence of true consent to matrimony (*cf.* arts. 45 and 73.1 *CC*). To prevent as far as possible the occurrence of such marriages and their registration in the Civil Registry, this Department issued an Instruction dated 9 January 1995 intended to prevent foreigners from obtaining entry to Spain or regularizing their presence here by means of simulated marriages with Spanish citizens.

Third: The cited Instruction seeks to prevent fraudulent marriages being held in Spanish territory, stressing the importance, in the procedures prior to celebration of the marriage, of a confidential personal interview with each of the parties separately (*cf.* art. 246 *RRC*) as a means of identifying any obstacle or impediment to the marriage (*cf.* arts. 56, 1, *CC* and 245 and 247 *RRC*), including the absence of consent to matrimony. Likewise, similar measures must be adopted when it comes to registering, either in the Consular Registry or the Central Registry, a marriage already concluded in the foreign form permitted by the *lex loci*. The Registrar must ascertain whether the legal requirements for celebration of the marriage – without exception – have been complied with (*cf.* art. 65 *CC*) and this check, if the marriage is vouched for by a 'certificate issued by an authority or functionary of the country in which it is held' (art. 256.31 *RRC*), requires that the Registrar be persuaded, by verification of that certificate and 'of the appropriate supplementary declarations', that there is no doubt as to 'the reality of the marriage and its legality under Spanish law'. Such is the provision in article 256 of the Regulations, following the same criterion as laid down in article 23, II, of the Law and article 85 of its Regulations for the admission of other entries lacking full documentation on the strength of a certificate from a foreign Registry.

Fourth: Such an extension of the measures intended to prevent registration of simulated marriages, including those celebrated abroad, has been an object of this

Department's doctrine since the Decision of 30 May 1995, as a result of which registration is to be denied where a number of objective facts are given, as verified by the declarations of the parties and by other evidence, from which it can reasonably be deduced in accordance with the rules of human conduct (*cf.* art. 1.253 *CC*) that the marriage is void by reason of simulation.

Fifth: In this specific case, the issue is the registration of a marriage celebrated in the Dominican Republic on 13 December 1999, between a Dominican and a Spaniard, in connection with which the following objective facts have been established: the bride did not know the address of the groom or the names of his children; the groom was unable to state the correct age of the bride and did not know her address, telephone number, income, date of birth or the names and ages of her children.

Sixth: It is reasonable and in no way arbitrary to deduce from these verified facts that the marriage is void by reason of simulation.

(. . .)".

b) *Matrimonial property*

– *SAP* Barcelona, 3 July 2001. *Web Aranzadi JUR* 2001/287086.

Law applicable to family economic regime. Marriage between a Spaniard possessing Catalan *vecindad civil* [regional citizenship] and a stateless person, celebrated in Catalonia where both reside. Non loss of Spanish nationality or of citizenship under previous legislation through marriage to a person having no nationality. Application of Catalan legislation.

"Legal Grounds:

. . . Given, then, that when they married, the plaintiff possessed Spanish nationality and Catalan *vecindad civil* and Alejandro D. G. was a stateless person, the crux of the issue is to determine under what economic regime the marriage between them was constituted.

. . . we must first note that as regards nationality, the Law of 15 July 1954, which amended articles 17 to 27 of the Civil Code and was in force at the time the marriage took place, stated in its Preamble that 'The principle of family unity holds in both the system of acquisition and loss of nationality . . . However, the excessive strictness of the Civil Code, which tended to facilitate statelessness, has been moderated; the law now provides that a Spanish spouse will only lose her nationality of origin where the laws of the country of which her husband is a national require that she acquire her husband's nationality', in which case article 23 provides that she will lose her Spanish nationality '3. Any Spanish woman marrying a foreigner does acquire the nationality of her husband.

Therefore, given that in the present case the husband was stateless, the plaintiff did not lose her nationality since the husband had no specific nationality. Moreover, she continued to possess Spanish nationality, and for the same reasons she maintained her Catalan citizenship; for although according to article 14 of the Civil Code the wife had the same condition as the husband, since the husband had

no nationality, there was no condition for her to adopt – not even that of the Spanish common law, for which the husband would have to be Spanish national. In this respect the only provision of the Civil Code was in article 8, whereby 'Criminal, police and public security laws are binding upon all persons living on Spanish territory'. The laws here examined, which determine family economic regime, are not among those cited, and therefore it does not follow that a stateless person residing in Spain before acquiring Spanish nationality is bound by, or his personal status for the present purposes is, that of Spanish common law.

Turning to the Supreme Court decision of 14 December 1967 as invoked by the plaintiff, this does not say what the plaintiff claims that is says. That decision establishes first of all that the third provision of article 15 of the Civil Code 'is predicated upon the assumption of a legal status – that of being a Spanish national – which in legal terms accords common or foral civil status depending on a number of circumstances, but absent the former status, the latter cannot of themselves produce the same effect.' In other words, common or foral citizenship is not acquired by anyone simply residing in a place but only by Spanish nationals, from which it follows that on marrying, the plaintiff's husband acquired neither Catalan nor common civil citizenship.

Secondly, the ruling establishes that 'When a foreigner acquires Spanish citizenship and thereby the same personal status as Spanish nationals, it is understood that he is subject to that civil law known as common law because it is applicable in its entirety to most Spaniards and in part to all Spaniards (preliminary title, title IV, Special laws, Mortgage Law, etc.); however, having once acquired Spanish nationality, he may, under art. 15, acquire foral status'. In short, foral status can be acquired only after acquiring Spanish nationality, and the common Spanish law is applicable at the time of acquiring Spanish citizenship.

This conclusion diverges from that presented by tbe appellant, who claims that non-Spaniards residing in foral territory are personally subject to the common law, which does not necessarily follow from the decision discussed.

Having regard to the point raised that the stateless person may decide his own matrimonial economic regime, we would note that under the Spanish legislation applying to the present case, both in the common civil law and in the Catalan law, which is relevant here, those engaging in matrimony were entitled to decide the economic conditions of their association, as provided in article 1315 of the Civil Code and article 7 of the Special Compilation of Civil Law of Catalonia, both of which provide that the family economic regime shall be as stipulated or agreed in their marriage articles – and this Court does not deny that the stateless person may also have that right.

However, in this particular case the spouses did not make use of that entitlement; they drew up no marriage articles and hence, since the marriage had to be subject to some regime, recourse must be had to the regime that the law establishes by default.

Absent marriage agreements or articles, that regime is separation of estates, as provided at that time in article 7 of the Catalan Compilation, and in that case

article 12 of the Civil Code, after stating what provisions were mandatory in 'all provinces of the Kingdom' – which did not include those at issue here – established that 'For the rest, those provinces and territories in which foral law subsists shall retain these intact for the time being, and their present legal regime, whether written or customary, shall be in no way altered by publication of this Code, which shall have the status of supplementary law where the special laws of such provinces or territories do not provide.'

Hence, if the common law is supplementary in this matter, with the scope provided in the article referred to, we must conclude that in the present case the applicable law was the Compilation then in force in Catalonia, and as this expressly regulated the marital economic regime differently from the common law, there is no need of recourse to the latter.

On this question it is likewise necessary to consider that, setting aside the fact that marriage was celebrated in Catalonia where both resided, the wife possessed Catalan citizenship, which she did not forfeit upon marrying, given that she did not assume that of her husband or exchange it for the common citizenship; and for this reason, under the provisions of article 12, as it relates to article 15, of the Civil Code, the applicable law was the foral law since the latter of the two articles establishes in what circumstances 'family rights and duties, rights and duties relating to the status, condition and legal capacity of persons, and those of testate or intestate succession as stipulated in this Code are applicable'. The circumstances enumerated do not include the present one, which, given the breadth and scope of those included, must therefore be deemed to be expressly excluded.

The argument against this, that the husband by reason of being stateless did not acquire his wife's Catalan citizenship upon marrying, cannot be entertained; the issue here is not whether the husband assumed the wife's citizenship, but strictly to determine the economic regime applicable to the marriage. As noted above, some economic regime had to be applicable, and the appropriate regime under Spanish law is the foral law, given that there is no applicable foreign law since the husband is stateless, and the rules applicable to the wife were those of the foral law of Catalonia, which is where the marriage took place. There is therefore no common nexus or other reason to apply the common law, as this was not applicable either to the husband or the wife.

The Supreme Court took a similar view in a sentence of 30 June 1962 determining the economic regime applicable to a marriage celebrated in Bilbao between an Italian, who retained his Italian nationality for twenty years before acquiring Spanish nationality, and a Spaniard born in Burgos.

In that case, where the husband did possess a nationality, the Supreme Court ruled that absent marriage articles and evidence as to the existence, content and scope of Italian law on the economic regime of married couples, which the appellant claimed should be separation of estates, the applicable system was common property. Applying the same logic to the case at hand, we consider that the applicable regime is separation of estates, this being the appropriate system under the supplementing law.

Be it said that the fact that the husband acquired Spanish nationality the following year, at which time he would be a subject of the common law, does not affect the issue here in that a Supreme Court decision of 20 March 2000 ruled, among other things, that 'marital conditions are not altered by acquisition of civil citizenship".

c) *Divorce*

– *SAP* Palma de Mallorca, 25 October 2001. *Web Aranzadi JUR* 2002/39779.

Law applicable to separation and divorce. Spouses possessing British nationality. Applicable law. Absence of allegation and proof of foreign law. Denial.

"Legal Grounds:

(. . .)

Article 9.2 of the Civil Code provides that 'the effects of marriage shall be governed by the common personal law of the spouses at the time of marrying'; then, after establishing the law applicable absent a common personal law, it provides that 'separation and divorce shall be governed by the law determined in article 107'. Article 107 provides that 'separation and divorce shall be governed hy the common national law of the spouses at the time suit is brought; absent a common nationality, they shall be governed by the law of the spouses' habitual place of residence; and if the spouses have their habitual places of residence in different states, they shall be governed by the law of Spain, provided that the Spanish courts are competent'

(. . .)

. . . For the material foreign law to be applicable, it must therefore be invoked and proved by the party seeking recognition of the legal consequences of that law. . . . Such has been the ruling of this Court regarding the invocation of foreign law where, as in the present case, the foreign law is insufficiently proven; according to a decision of 23 October 1992 and others, the report compiled at the behest of the appellants and referring specifically to the litigation at issue is not sufficient to accredit the foreign regulation unless it literally transcribes the provisions referred to, and it does not, as required, accredit the currency of the applicable foreign law' (decision of 4 May 1995).

In light of the foregoing, it being established that the spouses at litigation in the present case possess British nationality and did so at the time of bringing suit, there can be no doubt that this action for separation must be settled by application of the material Law, that is the law of the United Kingdom, which was not invoked by the parties at the appropriate point in the proceedings, nor was its substance and validity accredited in the course of litigation through the means of proof accepted in Spanish law as provided in article 12.6 of the Civil Code (in force at the time this action was initiated and subsequently repealed by Law 1/2000, article 281.2 of which contains a provision similar to the cited article of the Civil Code). Moreover, the applicable British regulation could not be verified *ex officio* by the court *a quo*, despite the fact that the latter, in exercise of its powers under

article 12.6 of the Civil Code *in fine*, reserving its judgment pending the production of more particular evidence, issued an order dated 9 November 2000 whereby information was requested from the General Technical Secretariat of the Ministry of Justice regarding the issues, itemized in 25 detailed sections, which petition was fruitless. Given the circumstances, the court of first instance was absolutely right to dismiss the complaint.

In challenging that decision the appellant invoked the jurisprudential doctrine whereby in certain cases tbe issue has been resolved in accordance with the rules of substantive Law of our own legal system when the exact nature or the true scope of interpretation of the foreign statutes that ought in principle to apply are not accredited. This Court takes the view that that line of jurisprudence – which has indeed been adopted in certain cases submitted to the Supreme Court, although there is no record of its having been considered for the resolution of any marital proceedings – cannot be applied to the decision on the issue considered here, since the parties took the wrong line from the outset of the proceedings by invoking Spanish legal provisions in their initial writs, taking it for granted that Spanish law would be applicable, whereas in this case all the issues at debate, and not simply odd aspects, are subject to British law; moreover, this action does not concern matters of property law in which the parties may freely dispose, but rather the matter concerns issues regulated by mandatory norms regarding which public policy is paramount – as article 9.1 of the Civil Code clearly establishes, 'the personal law attaching to natural persons is determined by their nationality. That law shall determine capacity and civil status, family rights and duties, and succession by reason of death'; then again, articles 9.2 and 107 of the Civil Code provide that separation and divorce shall be governed preferentially by the common national law of the spouses at the time of bringing the action, and the litigants may not elude these imperative norms through incorrect allegations and omission of proofs, since otherwise the applicable substantive law would be subject to the caprice of the litigants. In any event, we should also note that were this action to be tried under Spanish law, such decision might well be unenforceable in the United Kingdom, precisely because the material law of that State, of which both spouses are nationals and where the marriage from which separation is sought was celebrated, was not duly applied".

– *SAP* Barcelona 18 June 2002. *AC* 2002/2176.

Marital separation. Foreign law that does not admit separation. Application of Spanish law. Equivalence of institutions.

"Legal Grounds:

(. . .)

This Court has in the past pronounced, in a similar marital case between foreign subjects having their habitual residence in Spain, that in pursuance of article 769.1 of the *LECiv.* (*RCL* 2000, 34, 962 and *RCL* 2001, 1892) as it relates to article 22.3 *LOPJ* (*RCL* 1985, 1578 and 2635), the Spanish courts are competent where both litigants are resident in Spain at the time of applying for a separation. . . .

The question at issue was not strictly speaking that of the judicial forum but whether habitual residence meant that special law was applicable for substantive purposes when the resident spouses retained their common foreign nationality, the ruling being that the *lex civilis fori* of the place of domicile was applicable rather than the national common law. In this connection, it is fair to say that in their *praxis*, the Spanish courts have consistently striven through jurisprudential doctrine to apply Spanish constitutional principles to marital crises among foreign subjects who are resident in Spain, where they have built their family life and where they may be said to have laid down family, economic and working roots over the years even if they preserve the cultural customs of their country of origin; . . .

What was originally a nuanced jurisprudential tendency became official policy with the promulgation of Organic Law 4/2000, 11 January (*RCL* 2000, 72 and 209) and Organic Law 8/2000, 22 December (*RCL* 2000, 2963 and *RCL* 2001, 488) on Rights and Freedoms of Foreigners in Spain, whereunder foreigners come within the scope of Title 1 of the Constitution (*RCL* 1978, 2836) in the terms set forth in International Treaties, in the cited Laws and in the Laws regulating the exercise of each one; moreover, they provide in a general way that foreigners may exercise the rights attributed to them by this Law in conditions of equality with Spaniards. The solutions that the Law envisages for the domicile of a married couple (in both procedural and substantive terms, as interpreted to be the meaning of article 107 *CC* [*LEG* 1889, 27]), can be found in decisions of the Supreme Court relating to recognition of *exequatur* (Orders of 27 October 1998 [*RJ* 1998, 9009] and 11 January 2000 [*RJ* 2000, 359]). From all this it may be inferred that while the laws of the Kingdom of Morocco do not specifically contemplate the situation of legal separation as defined in articles 53, 54, 56, 57 and 58 regarding Divorce, it does contemplate the wife's right to maintenance if the husband has sufficient assets; in the event of the husband's unwarranted absence, she retains this right for one year, and even if she is repudiated, the wife is entitled to a sum in consolation, proportionate to the husband's means. This regulation comes within the meaning of maintenance as set forth in the New York Convention of 20 June 1956 (*RCL* 1966, 2107 and *RCL* 1971, 2055) and the Hague Convention of 2 October 1973 (*RCL* 1987, 1891, 2492) (both recognized by Spain, in 1986 and 1987), which regulate international norms regarding maintenance in connection with family relationships, parentage, marriage or affinity irrespective of any condition of reciprocity, even with respect to the law of a non-contracting State, so that obligations of maintenance are to be governed by the internal law of the place of residence of the debtor of maintenance. This was enshrined, by virtue of reforms in Law 11/1990, 15 October (*RCL* 1990, 2139) and Law 1/1996, 15 January (*RCL* 1996, 145), in article 9.7 of the Civil Code (*LEG* 1889, 27), which provides that the Law of the habitual place of residence of the person claiming maintenance shall apply where maintenance cannot be claimed under the Common National Law.

This being established, it must be said that the Moroccan legislation having been duly submitted in the proceedings as required by article 12.6 *CC*, it has been accredited that the defendant, Abdelhalaik A., came to reside in Spain with his

wife Ayadi R. in 1988, . . . leaving the wife without sufficient financial means and without having paid the Property Tax on the family dwelling or the electricity bill. This is accredited by the defendant's own declaration.

There is, then, a clear case for application of the principle of equivalence of institutions that holds in private international law, or the principle of equivalence of outcomes referred to in an Order of the Supreme Court of 11 January 2000 (*RJ* 2000, 359), followed by the decision of this Section 12 of 13 February 2002 (roll 742/2001 [*JUR* 2002, 135624]), and for assimilation of the present case to 82.1 *CC* (*LEG* 1889, 27), allowing the separation as petitioned".

5. *Maintenance*

– *SAP* Granada 23 April 2001. *AC* 2001\1620.

Claim for maintenance by wife and children of Iraqi nationality. Hague Convention of 1973. Condition of spouse. Repudiation. Public policy.

"Legal Grounds:

(. . .)

It must first be noted that the central norm in Spanish private international law as regards determining the law applicable to maintenance in international cases is the Hague Convention of 2 October 1973 . . . on the law applicable to maintenance obligations, which has been in force in Spain since 1 October 1986. Neither the original decision nor the parties at litigation take into account the fact that by virtue of incorporation of the Convention into Spanish law, article 9.7 of the Civil Code has been replaced in obedience to the *erga omnes* scope of the Convention, article 4 of which establishes that for the purpose of applying the appropriate regulations, the principal nexus is the habitual residence of the maintenance creditor. The actors in the suit for provisional maintenance – the wife and children – are Iraqis having their habitual residence in Granada. They expressly invoke the internal law, that is, articles 142 *et seq.* of the *CC*, albeit under article 9.7 of the *CC*, when the appropriate norm is the Hague Convention on the law applicable to maintenance obligations. As article 1 states, this Convention applies to maintenance obligations arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child who is not legitimate.

Since the fact of being married constitutes a civil status, under article 9.1 of the *CC*, the actors' personal law ought to apply – in this case the law of Iraq; similarly, under article 50 of the *CC*, Iraqi law is likewise applicable in respect of the form of marriage where both spouses possessed the same nationality at least at the time they married. The point of these remarks is that the claim for maintenance brought by Ms. Muna S. is based on her condition as wife of the defendant, for which purpose she has submitted the requisite official marriage certificate, duly translated, which expressly states that the marriage was conducted according to Moslem rites. The defendant, for his part, denies the existence at present of any marital tie, claiming that this was dissolved in 1981. The defendant has failed to corroborate this at any point in the present proceedings. Nonetheless, we

would note that according to one sector of private international law doctrine, a unilateral repudiation is contrary to Spanish international public policy if, with due consideration of the specific circumstances, it violates the principle of equality between spouses, giving rise to a situation in which there is lack of legal protection (see Carrascosa González in *Jurisprudencia civil comentada*, t. I, p. 617). Another author has similarly pointed out that repudiation as a means of dissolution of marriage violates basic principles of the laws of the forum, such as the prohibition of any kind of discrimination by reason of sex and respect for human dignity. The requirement of protection of the cultural identity of minorities in a country does not prevent societies from laying down certain minimum mandatory standards (Palao Moreno, *Actualidad Civil*, no. 15, April 2001, p. 566). Besides the strictly personal consequences that repudiation may have, there are other consequences that deserve protection on general legal principles (see *STS* 10 March 1998 [*RJ* 1998, 1272]), especially those concerning assistance and financial aid".

6. *Non-marital unions*

– *SAP* Navarra 12 June 2002. *Web Aranzadi*, *JUR* 2002/201896.

Law applicable to the condition of stable or *de facto* couple. Rules for solution of conflicts of law; competence of the State. Application by analogy of article 9.2 of the Civil Code.

"Legal Grounds:

. . . In dealing with this appeal, we must first address a prior issue, namely the petition received by this Court for a ruling by the Constitutional Court on the constitutionality of art. 2.3 of *LF* (Foral Law) 6/2000 of 3 July.

(. . .)

This action presumably seeks a declaratory judgment on the condition of 'stable or *de facto* couple', based, as noted by the court *a quo* (*F.D.* 1), on Foral Law 6/2000. The reference to this Law means that what is sought is a ruling to the effect that in institutional terms the parties constituted a 'stable Navarran couple' and are hence subject to the provisions of Navarran law. Assuming that *LF* 6/2000 is applicable, article 2.3 thereof must likewise be applicable according to the letter of that Law.

It therefore follows that the crux of the present appeal is the validity of art. 2.3 of *LF* 6/2000.

Having said this, there is clearly some doubt as to the constitutionality of article 2.3 of Law 6/2000 in that a) this is evidently a provision intended to resolve a conflict of territorial laws – that is, to determine whether one of a number of conflicting specific legal systems is applicable (in this case, Navarran law and the common civil law applying to either member of the 'stable couple' by reason of their regional citizenship [*vecindad civil*]; b) under the Constitution, the establishment of rules for the 'resolution of territorial conflicts of laws' is the exclusive province of the State (art. 149.1.8 *CE*). The 'rules for resolution of conflicts of laws' are the competence of the State 'in any case', which constitutes an excep-

tion to the general rule whereby those Autonomous Communities that possessed a prior foral civil law can legislate on their 'conservation, amendment and implementation'. The reservation of exclusive competence to the State applies to both 'private international law' and 'inter-regional law'...

Nevertheless, despite the fact that a question of constitutionality could or should be raised on the basis of such considerations, this Court, while cognizant of the fact that an appeal has been lodged with the Constitutional Court alleging unconstitutionality of the cited Law in its entirety, deems it proper in the present case, even at the risk of anticipating, to remit to art. 5.3 *LOPJ*, which provides that issues of unconstitutionality are only allowable 'when a statute cannot be interpreted as conforming to the constitutional system'. Under this provision, the issue can be sidestepped by interpreting art. 2.3 as a material norm of Navarran law that would be operative 'after' the appropriate State-wide rule of conflict has been applied. To determine which law code is applicable to the case, one must remit to the rules of conflict in the Civil Code, the State legislator being the only authority competent to regulate such matters (art. 149.8 *CE*). Viewed in this way, the applicable rule of conflict, by obvious analogy, is art. 9.2 *CC*, as the only rule of conflict in the Code that fits the situation of a 'stable couple', which the legislator moreover considers analogous to marriage (art. 1 *LF* 6/2000 'affective relationship analogous' to that of marriage).

In the present case, under article 9.2 *CC*, the law applicable to a stable union is that of the 'habitual common residence', which was Agreda (Soria). Hence, this stable couple cannot be governed by the law of Navarra but must be governed by what is known as the common or general civil law.

Had the 'habitual common residence' of the couple been in Navarra, under article 9.2 *CC* the applicable law would be that of Navarra, specifically article 2.3 of *LF* 6/2000.

In this case, there are two possible situations as regards 'common habitual residence' in the foral territory:

a) one or both of the cohabitants may possess Navarran regional citizenship, in which case they would legally and institutionally constitute a 'Navarran stable couple' and hence come under the provisions of *LF* 6/2000.
b) neither possesses Navarran regional citizenship, in which case for the purposes of *LF* 6/2000 they cannot be considered a 'stable couple'.

Therefore, in consideration of the foregoing, the former relationship between Miguel Julián C. M. and Teresa S. M. cannot be considered a 'stable couple' for the purposes of *LF* 6/2000".

– *SAP* Gerona 2 October 2002. *AC* 2002/1493.

Break-up of a *de facto* couple. Determination of the law applicable to their estates upon separation. Applicability by analogy of the rules of conflict relating to marriage and the dissolution thereof. Applicability of Catalan civil law absent invocation and proof of applicable foreign law.

"Legal Grounds:

(. . .)

. . . the patrimonial relations at issue between two persons who have constituted a *de facto* couple for a number of years, at least by analogy with points 1 and 2 of article 9 of the Civil Code given the lack of any specific regulation of *de facto* couples, must be governed by their personal law. This, again by analogy, is the thrust of article 107 of the Civil Code.

Therefore, given that the litigants are Swiss nationals and as non-Spaniards do not possess Catalan regional citizenship, the matter ought to be resolved in accordance with Swiss law. This would exclude what we might call immediate or direct applicability of Catalan law, which both litigants presumably consider applicable since they invoked it both in the complaint and in the answer thereto.

So far, then, the reasoning and the arguments put forward in the appealed decision may be considered correct.

. . . However, this Court dissents from the solution adopted by the original court on the basis of the premises described. The latter argued that the litigants having failed to accredit the substance of their personal law in this matter, the action could not be admitted for trial and therefore it dismissed the complaint.

. . . In other words, in the present case Swiss law was not even invoked as applicable. The writ of opposition to the appeal here considered states, without offering proof, that there is no regulation of *de facto* couples in Swiss law. Be that as it may, this Court has received no allegation and has no cognizance of what Swiss law may provide in this respect. There is therefore no accreditation of the existence, the substance or the currency of such law. Here, *de facto* couples, although not expressly regulated in the common Spanish civil law, are certainly not prohibited, and therefore cohabitation of this kind cannot be said to be contrary to Spanish public policy.

Indeed, the personal and patrimonial situation of couples upon breaking up has given rise to a great deal of jurisprudence. And furthermore, there has been regulation of *de facto* couples in Catalonia since 1998. Given that the litigants are resident here, then, the issue must be resolved by what we might call indirect application of the laws of Catalonia".

XI. SUCCESSION

– *SAP* Alicante 28 December 2001. *Web Aranzadi, JUR* 2002/69600.

Will made in Spain. Joint will previously made in Berlin according to German law. Proof of foreign law.

"Legal Grounds:

The original plaintiff seeks to base the present appeal on the fact, unchallenged by the opposing party in this suit and further officially documented, that in accordance with the private law then in force in their country, Mr. T. and his first wife, their marriage being officially confirmed, made a joint 'Berlin' will on 18 September

1973; this will, which was allegedly never impugned, barred him from making any subsequent testamentary provision even after the decease of his first wife, under the relevant provisions of German law.

In support of her allegations and petitions in this case, the appellant invokes certain articles (I.944, 2.267, 2.269, 2.271, 2.280, 2.281 and 2.283 of the *BGB* [German Civil Code]). These, duly translated into Spanish, were submitted along with the writ of complaint and certified as being currently in force by a certificate from the Embassy of the German Federal Republic. These regulations are, then, part of German law, which this Court – like the court of first instance – is bound to consider and, if appropriate, apply in pursuance of article 9 of the Spanish Civil Code, sections 1 and 8.

To that end – that is, the application of such foreign norms – it seems appropriate to start from the jurisprudential guidelines contained in decisions of the Supreme Court, among other authorities . . .

In this case it is true that the original plaintiff, now the appellant, as noted, filed with her appeal evidence of the German law invoked in favour and as the basis of her case, which she maintained was applicable and enforceable for the settlement of this litigation; however, the evidence furnished was in fact scant, providing only a literal transcript of the two articles of the *BGB* mentioned above but omitting transcripts of others alluded or remitted to – arts. 2270, 2278, 2279 or 2296 – which are doubtless concordant, complementary or related to the first two and might have served to establish the scope and provide an understanding of their terms through systematic interpretation; and more importantly, she furnished no discussion or opinion by German legal experts, the documents submitted with the complaint, besides being brief and succinct, giving an inadequate account of the qualifications in German law of the signatories of the document. Had such an opinion been furnished, it might have been sufficient to determine the doctrinal and jurisprudential guidelines necessary to establish the true scope of the provisions contained in the cited article, the consequences, effects or scope of a joint 'Berlin' will, particularly after the death of one of the testators, and to determine whether, as the trial court wondered, the will would, as appears logical, affect only the conjugal estate – that is, the goods of the spouses at the time of death of one of them – or, as does not appear reasonable – would extend to any goods or assets that the surviving spouse might acquire subsequently throughout his or her lifetime. Thus, the first marriage having been dissolved by the death of one of the spouses, for example and particularly in the event of a further marriage by the survivor, the latter's capacity to make a new will would be absolutely confined, limited or even annulled, and he or she would be unable to appoint the later spouse or new children or descendants of the second marriage as heirs.

It is the lack of proof and, to the say the least, serious deficiencies in accreditation of the foreign law invoked by the plaintiff in her action, particularly having regard to the scope and meaning of the articles of German law specifically referred to by the plaintiff – and that lack of proof must be laid at the door of the plaintiff, since, as already noted, the burden of proof as a matter of fact rested

with her – that prompted the original court, and now also this appellate Court, on the basis of the relevant jurisprudential doctrine as cited, to resort to Spanish law in order to apply the foreign norms, interpret them properly and particularly to compensate for the stated omissions of proof, for the purpose of resolving the questions at issue in this case. Thus, in support of the view that the father of the plaintiff and husband of the defendant, his first marriage being extinguished and his second and subsequent marriage to the defendant being current, could make a nuncupative will in accordance with Spanish law, freely disposing of his future goods and assets while respecting the legitimate portion of his daughters by this first marriage, it seems proper, possible and pertinent to cite and invoke arts. 668 and 737 of the Spanish Civil Code and the principles informing them, art. 668 enshrining the principle of the testator's freedom to dispose of his goods for purposes of inheritance or legacy, and art. 737 providing in a general way that all testamentary provisions are essentially revocable even if the testator 'in the will expresses his wish or resolve not to revoke them'.

Furthermore, the efficacy, as claimed by the plaintiff, of the decree of succession apparently issued in her favour by the Municipal Court of Tierganten (Berlin) cannot be upheld inasmuch as a) as noted above, that decision took no account of the will made by Mr. T. In Spain in 1981, and the Berlin court was unaware of it, and b) there is no record of what were or what ought to have been the circumstances taken into account by the said court in accordance with the German material and procedural rules, in issuing a decree of succession contradictory to, and at all events ignoring the wishes of the deceased to dispose of his goods *mortis causa* as validly stated and manifested in the manner required for that purpose by Spanish law.

Finally, we must say that even were we to admit the full efficacy of the joint will made by Mr. T. in 1973 and invoked for her sole benefit by the plaintiff, that will would not warrant – or at least there is serious doubt that it would warrant – the intent of this suit to annul the deed of succession dated 18/09/1997 whereunder, as this Court understands it, the only right vouchsafed to her by that writ was to inherit the goods described and identified in section a) subsections aa), ab) and ac) thereof upon the decease of the testator in that first will, which goods are evidently not the same as listed in the above-mentioned deed of succession signed by the defendant, specifically registered property number 7.933, located in Spain and acquired by the deceased Mr. T. after the dissolution of his first marriage upon the death of his spouse Gerda-Else-R. T. née Orkanov, to whom Mr. T. succeeded as holder of title by inheritance, as recorded in the deed here iinpugned. We would further note that in the joint will referred to, the testators included no clause to the effect that upon the decease of the surviving spouse their daughters should be entitled to inherit any goods that the latter may in turn have inherited from his spouse".

XII. CONTRACTS

– *SAP* Badajoz, 23 March 2001. *AC* 2001\2243.

Atypical contract. Inadmissibility of *derogatio fori*. Applicable law absent proof of foreign law.

"Legal Grounds:

. . . the plaintiff, a company, brought an action for petty debt against the defendant, a professional footballer, in respect of compensation for unilateral and unfair termination of a contract between the two, dated 8 March 1996 (doc. no. 2), whereby the former was granted full, exclusive and irrevocable power, for a term of two years, to make representations and negotiate contracts in the name and on behalf of the defendant in connection with his activity as a footballer. In view of breach of contract by the latter, the said company sought enforcement of the penalty clause set forth in clause eight of the said contract, alleging that the said provision specifies a fine or sanction equivalent to 20% of all contracts or other business entered into by the footballer during the lifetime of the contract.

(. . .)

. . . no judge or court may try any matter in which he or it is not jurisdictionally competent. Such judge or court must therefore determine whether such jurisdiction exists, including jurisdiction *ex officio*. This is an issue of public policy in which the free will of the parties has no part, for as the appellant rightly states, no court may try an issue for which it lacks international judicial competence. As the Supreme Court ruled in a decision of 10 November 1993, 'jurisdiction has limits beyond which a court may not try a case; it is therefore a *prius* for the action of a court that there be law sufficient to allow – or in some cases, oblige – the court to act *ex officio* if it has such jurisdiction'. Any challenge by a party to the competence of the court of instance must be made through the proper channels, which according to Supreme Court doctrine is by way of declinatory exception, although the outcome of such an exception, if admissible, is not remittal to the actions of the competent foreign court, which would obviously not be bound by it, but advice to the parties as to which country, in the view of the Spanish court, ought to judge the matter. Therefore, the defendant's allegation of incompetence by way of exception accompanying his plea in defence rather than by an international declinatory exception cannot be entertained; moreover, such an exception was absent from the *petitum* in his original writ, as noted by the court of instance. And again, the fact of his having proceeded in this manner may possibly (at least arguably) be deduced as tacit submission to the jurisdiction of the court of instance that summoned him as provided in art. 58 of the *LECiv*. This occurred in a similar case in a decision of the Territorial High Court of Barcelona of 24 March 1987 and a decision of the Supreme Court of 12 January 1989, although the criterion is not settled and is rejected by the majority doctrine, which considers that the scope of international judicial competence is defined by a specific international system (*LOPJ* and international conventions) and it is wrong in this connection to remit to legal provisions on territorial competence.

Furthermore, leaving aside the provisions of art. 58 referred to above and examining the contract binding the parties (arbitrary, unilateral and unfair termination of which is alleged as the basis of the plaintiff's action for debt), we see that under clause nine of the contract the parties expressly agree to be bound by the jurisdiction of the ordinary courts of Rosario (Argentina). Such an agreement to submit to a foreign court can in principle be accepted as binding on the parties in deference to the principle of free will and pursuant to art. 22 of the *LOPJ*, paragraph 2 of which establishes that Spanish tribunals and courts have jurisdiction in a general way 'when the parties have tacitly or explicitly agreed to submit to the Spanish tribunals or courts'. Therefore, *mutatis mutandis*, submission by the parties to the courts of another country is in principle admissible even although one of the parties, to wit the defendant, is domiciled in Spain as in the present case; art. 21 of the *LOPJ* as cited does not negate the validity and efficacy of such express submission, and the same is true of the Brussels Convention although the defendant resides in Spain, since the defendant is not a party to that Convention and hence cannot be bound by the personal limits in the clauses attributing jurisdiction. Furthermore, the problem of the scope of application raised by the said Convention is immaterial in light of a circumstance that cannot be ignored and was rightly stressed by the original court, namely that the defendant's place of domicile at the time the action was brought against him was Spain; in such a circumstance the Supreme Court has repeatedly and unhesitatingly ruled that jurisdiction clauses in a contract can be legitimately ignored, basing its argument on the notion of abuse of law (art. 11 of the *LOPJ*), sustaining that if the sole object of a challenge of competence is to delay resolution of the action, such conduct merits no protection, bordering as it is on procedural fraud; in short, a defendant summoned by the courts of his country of domicile enjoys the full right of defence and access to the jurisdiction most favourable for him. And therefore, turning to the case at issue, the footballer having been sued in his place of residence and there being no record of any reason to justify his preference for the courts of Argentina (none having been submitted), it may reasonably be inferred that his sole interest in claiming the said exception was to delay the proceedings, and given that the fact of the plaintiff bringing the action in his place of domicile is actually favourable to him, this court deems it proper to deny the exception claimed, as did the court *a quo* in the original decision.

Having settled the foregoing, we must now examine the law that is applicable to the case at issue, given that appellant has objected to the law applied (Spanish law) by the original court, since the resolution of this issue may indubitably affect the outcome of the action and cannot therefore be dismissed *a priori* as immaterial. In this respect it must be said that the jurisprudence, in interpreting art. 12.6 of the *CC*, is practically unanimous in sustaining that the application of foreign law, where admissible, is a matter of fact and as such must be alleged and proven by the invoking party, to which end the said party must not only accredit the exact nature of the law in force in the foreign country, with certification legalized by the Consulate and an explanation of its substance by two jurists of that nationality, but must also accredit its scope and the manner of its interpretation by the

courts there, in such a way that the Spanish courts are left in no reasonable doubt as to its applicability. Therefore, when the Spanish courts are unable to determine with absolute certainty that the foreign law is applicable, they are bound to judge and decide in accordance with domestic law. The view of the jurisprudence is that it is no business of the Spanish courts to interpret foreign precepts (in this connection see *STS* 28–10–1968; 7–9–1990; 16–7–1991; 31–12–1994 among others); hence, absent accreditation in the present case of the meaning or interpretation given by the courts of Argentina to the rules applicable there to actions of this kind, the proper course is to proceed in accordance with Spanish law, as the original court rightly did".

– *SAP* Madrid, 4 April 2001. *Web Aranzadi JUR* 2001\187069.
Insurance contract. Applicable law.

"Legal Grounds:

. . . The plaintiff brought an action for debt based on an insurance policy subscribed with the defendant covering damage to a leisure yacht. On 8 August 1996 the craft suffered an engine breakdown the repair of which cost 2,198,318 pesetas. The plaintiff submitted a claim for this amount to the insurer, but the monies were not paid.

The insurer opposed the suit claiming an exception of lack of legitimate title to act, as according to the insurer, the person who subscribed the policy was M.C. Herrero and not the plaintiff, a legal person. Secondly, the insurer sustains that English law is applicable since the defendant is domiciled there. On the facts of the matter, it sustains that the damage to the engine was caused by failure to change the oil and not by external factors as alleged by the plaintiff.

As to whether English law ought to be applied, the relevant provision is art. 109 of Law 30/1995, 8 November, on Regulation and Supervision of Private Insurance, which states: 'Insurance contracts shall be governed by the general norms of Private International Law with regard to contractual obligations where arts. 107 and 108 do not provide.' In turn, art. 107 establishes . . .

In other words, art. 109 remits to art. 107, and art. 107 establishes that Spanish law shall apply to damage insurance when the risk is located on Spanish territory (the yacht in point is registered at Barcelona) and the policyholder is domiciled in Spain: the charter company has its registered offices in Madrid, and hence these rules would appear to apply. However, under paragraph 2, in the case of major risks the parties may freely choose the applicable law, and seagoing craft like the one concerned here are listed among the major risks. In other words, the applicable law would be that stipulated by the parties. The parties made no such stipulation in the insurance contract. It therefore appears that we must revert to the aforementioned norm and apply Spanish law, Spain being the country where the risk is located and the country of domicile of the policyholder.

Then again, the provisions of art. 10.5 of the Civil Code do not apply as supplementary law since the parties have not made any express choice of law, they do not have a common national law or country of residence and we do not know

where the contract was formalized; the place of signing does not appear on the policy and, just as the premium is paid through an insurance agent, the policy may well have been signed in the same way.

We therefore conclude, on the foregoing grounds, that the applicable law must be Spanish law".

– *STS* of 28 September 2001. *RJ* 2001\8718.

Exclusive trade mark licensing agreement. Repercussions of free movement of goods.

"Legal Grounds:

. . As regards the facts, we would note the following:

A) The agreement on which the appellant bases its claim was formalized on 25 April 1978, several years prior to the accession of Spain and Portugal to the European Communities, and was entered in the Spanish Registry of Industrial Property on 28 February 1991, that is several years after the said accession.

B) The agreement, called a 'licensing agreement' is subscribed by the companies Bacardi & Company Limited, domiciled at Vaduz (Liechtenstein) and having offices in the Bahamas Islands (hereinafter Bacardi), Bacardi International Limited, having an office in Hamilton, Bermuda (hereinafter International), and Bacardí y Compañía, Sociedad Anónima, España, domiciled at Madrid (hereinafter Bacardí España).

C) The recitals of the agreement state: a) that Bacardi is the owner of the manufacturer's 'Bacardi' trade marks registered in most of the world to distinguish rum and other products (hereinafter 'Bacardi products') made in accordance with its own exclusive inventions, formulas, secrets and manufacturing processes; b) that 'although Bacardi has granted International an exclusive license to manufacture and sell Bacardi products in various parts of the world, including Spain, International wishes to give up the said rights in Spain and its territories to Bacardi. Bacardi in turn wishes to grant to Bacardí España the rights specified in this agreement'.

D) In the clauses of the agreement, Bacardi authorizes Bacardí España to manufacture several varieties of Bacardi rum and anisette in Spain, to sell these Spanish-made products both in Spain and 'in all countries where and as it shall agree with International' and to use the name 'Bacardi' in such products and in its trade name; Bacardí España undertakes to cooperate with Bacardi in any litigation that the latter may decide to initiate in defence of its brands, while the former may not initiate any proceedings on its own without the prior consent of the latter, and to submit advertising of Bacardi products to the judgment of Bacardi; Bacardí España undertakes to pay Bacardi '200 US dollars per year' 'for all the rights assigned in this agreement'; Bacardi declares that by virtue of International's renunciation of its rights in Spain and territories, it guarantees to Bacardí España the rights, privileges and licences mentioned; and it is provided that the agreement is to be terminated, among other causes,

in the event that 'Bacardi International's interest in Bacardí España should become a minority interest for whatever reason'.

E) On the same date the three companies referred to subscribed a 'Framework Agreement on Performance and Services and Technical Assistance', stating that the sole parties were Bacardi and Bacardí España, in which allusion was made to the simultaneous trade mark licensing agreement and which specified that the assignment to the latter was exclusive for 'Spain and its territories'; the stated object was to ensure that Bacardi products manufactured by Bacardí España should always maintain the same excellent level of quality as all Bacardi products; the annual amount payable to Bacardi for analysis and quality control of the products was limited to 20,000 US dollars; and again it stipulated termination of the agreement in the event that Bacardi International's interest in Bacardí España should become a minority interest.

F) Bacardi & Company Limited ratified the exclusive licence in favour of Bacardí España for 'all Spanish territory' in a document signed at Nassau (Bahamas Islands) on 28 March 1991.

G) The company Bacardí & Company Limited had been incorporated in Vaduz (Liechtenstein) in 1969 and retained its registered offices there until 12 May 1992, when it decided to move them to Tortola (British Virgin Islands) 'without liquidating the company, to reorganize', but on I9 June the following year it once more established itself in Vaduz, again without liquidating the company.

H) The plaintiff and appellant Bacardí España has 'occasionally' imported Bacardi Rum from Brazil (folio 394 of the record).

I) The same plaintiff has never claimed that genuine Bacardi Rum could not be commercialized in the territories of other Member States of what was then the European Economic Community, although it has claimed that product from Mexico could not be commercialized in 'most' EEC countries given the capacity of the bottles, which contain just under a litre.

... As regards EC Law, the main relevant provisions of the Treaty of Rome, as it was at the time of the facts at issue, are: articles 9 and I9 insofar as they establish the principle of free movement of goods between Member States and consider products from third countries to be in free circulation if the import formalities have been complied with and any customs duties or charges have been levied; article 30, which prohibits quantitative restrictions on imports and all measures having equivalent effect; article 36, which authorises quantitative restrictions on imports justified, among others, on grounds of the protection of industrial and commercial property, with the proviso that 'Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'; article 85, which prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which, among others, consist in sharing

markets or sources of supply; article 86, in as much as it declares incompatible with the Common Market any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it (the last two provisions could be applicable if, as the appellant appears to claim on occasion, it has no relation of dependency with Bacardi and Bacardí International); article 110, on establishing a customs union with the progressive abolition of restrictions on international trade and the lowering of customs barriers; and article 222 in as much as it provides that the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.

For its part, art. 7 of the First Council Directive 1989/104/EEC, of 21 December 1988, refers to the expiration of the right conferred by the trade mark and provides that this right does not entitle the holder to prohibit use of the trade mark for products commercialized thereunder in the Community by or with the consent of the holder.

As to free circulation, EEC Council Regulation no. 3842/1986 of 1 December 1986, whose primary aim was to prevent the release for commercialization of counterfeit or 'pirate' goods, as was that of the Regulation that replaced it (no. 3295/1994), provided in art. 1.3 that such a prohibition would not apply to 'goods which bear a trade mark with the consent of the owner of that trade mark but which are entered for free circulation without the owner's consent. Nor shall it apply to goods entered for free circulation which bear a trade mark under conditions other than those agreed with the owner of that trade mark'.

... That said, in light of the EC Law and the jurisprudence of the Court of Justice cited, we may say at this point that the third to sixth grounds of the appeal fail in that they proffer an interpretation of the of the Spanish regulations on competition and trade marks that is contrary to the said Law and which therefore also diverges from the criterion adopted by this Bench in a decision of 15 May 1985, in which, although admittedly in application of the former Statute of Industrial Property rather than the regulations cited heretofore, it declared as follows: 'Firstly: If, as the appellants acknowledge, 'the point at issue is the possibility of movement of goods lawfully branded in the country of origin even where the trade mark in the country of destination belongs to a different person', the statutory regulations on the matter clearly do not specifically prohibit an activity such as that whose prevention is sought, and article ten of the statute cannot be invoked as sustained in the appeal, since that provision, which is couched in very general terms, simply states that protection will be available, 'in such manner and conditions as shall be determined', to patents, trade marks, models and drawings of all classes, trade names, establishment signs and motion pictures, where registration has been granted.

Second: The right to exclusive use which the trade mark affords its holder by distinguishing the product concerned from similar products on the market (article one of the Statute) bears no relationship to the situation arising in connection with the resale, in the geographical area covered by the licence, of products legitimately distinguished by the trade mark and acquired by means of proper commercial activity, albeit through channels other than those controlled by the assignee.

Third: Article thirty-one of the Statute, the only regulation of which violation is alleged, simply provides, in concordance with article thirty-two, that the transfer of items of industrial property is not prejudicial to third parties until such time as such transfer is accredited by entry of a duly certified document in the registry (decision of sixth of October nineteen seventy-two and others cited therein), a description which evidently does not fit a situation like the one at issue here and raised in the appeal; moreover, the categories of registrable items in which industrial property rights may be constituted do not include agreements for 'licensing and sublicensing of use' of a trade mark (articles two and three of the Statute and article two of the Paris Convention of twentieth January nineteen eighty-three, and subsequent revisions up to fourteenth July nineteen sixty-seven), which means that such transactions, while binding where they are interconnected, can in no way constrain imports of the product manufactured by the original owner of the trade mark for sale on the domestic market, as is the case, *mutatis mutandis*, with introduction patents . . .'.

. . . What is really important for the resolution of this appeal is, in short, that the plaintiff and appellant sought to prevent the importation to Spain of legitimate and genuine Bacardi Rum, identified as such with details of the place of manufacture and bottling, despite the plaintiff's own acknowledgment that Bacardi Rum was indeed commercialized in Europe, albeit denying that such commercialization, in the very restricted sense of retail, was in fact rum manufactured and bottled in Mexico, and albeit likewise denying that it (not the owner of the brand) had consented to commercialization of rum of such origin in the European Communities (folios 223 and 224).

Given that the appellant at one point admitted that it had itself 'occasionally' imported Bacardi Rum from Brazil (response to one of the reconventional demands, folio 394), and that the agreements on which the appellant bases its claim themselves accredit the undeniable links between the holder of the registered trade mark 'in most of the world' (Bacardi & Company Limited), the exclusive licensee of the trade mark for the manufacture and sale of Bacardi products 'in various parts of the world' (Bacardi International Limited) and the Spanish licensee for the manufacture of Bacardi products in Spain and their sale in Spain and 'in all countries where such sale is agreed with International' (Bacardí y Compañía, Sociedad Anónima España), to the extent that the other two parties exercise real control over the plaintiff, loss of which control through changes in the shareholdings is identified in the agreements as a cause of termination thereof, it is hardly reasonable to minimise the scope of the Community regulations on free circulation of goods by claiming, as the plaintiff does, that they are merely administrative, while treating the Community regulations on homogeneity of bottle sizes as essential, since in fact Spanish Royal Decree 1472/1989, 1 December, always subject to strictures not to confuse the consumer, at that time permitted the importation and commercialization in Spain of bottles slightly smaller than a litre; and we would additionally point, firstly, to the narrow definition of commercialization sustained in the appeal, as referring solely to the sale of rum to end consumers, and secondly, to the fact that the importations challenged were not in any case prejudicial

to the interests of the Spanish State, as confirmed by the actions undertaken in respect of precautionary measures.

On the other hand, it is plain that the effect of prohibition of the importations on the basis of the said agreements was to isolate or compartmentalize the market in 'Spain and its territories', a significant part of the Community area, obviously with no benefit to consumers given that, as the appellant admits, the imported Bacardi Rum was genuine and fully authorized by the owner of the brand, that it did not differ in quality from the rum made by the appellant and that it could nonetheless be sold at a lower price.

In short, had the appellant not been a subsidiary of the parent company and had the proceedings not consequently centred on agreements between independent companies to divide up the Community market, the matter would probably have had to be examined from the standpoint of arts. 85 and 86 of the Treaty.

(. . .)

In light of all the foregoing, each of the grounds of appeal may readily be dismissed for the following reasons:

A) As regards the third ground, alleging infringement of arts. 2, 5 and 12 of the Unfair Competition Law, even granting, in line with a large part of the doctrine, that under art. 5 types of conduct not coming exactly within the meanings of arts. 7 to 17 may be considered to be prohibited, in no circumstances can conduct such as the subject of the complaint be considered 'objectively contrary to the requirements of good faith', given the new conception of the Law on unfair competition, which 'has ceased to be conceived as a body of regulations primarily intended to settle conflicts between competitors and has become an instrument to regulate and control conduct in the market place', and as such the new Law 'is a vehicle not only for the private interests of entrepreneurs in conflict, but also for the collective interests of consumers' (Preamble Law 3/1991); and again, it suffices to link the second paragraph of art. 12 with the first paragraph thereof to deduce that the parallel importations at issue do not come within their meaning, since the Bacardi Rum imported from other Member States was absolutely genuine or legitimate, having been manufactured and commercialized under the control of the owner of the trade mark.

B) As to the fourth ground, alleging infringement of arts. 30 and 36 of the Treaty of Rome, the appellant attributes to the 'Hague II decision' a scope that it does not possess and further treats its position as exclusive licensee for Spain as equivalent to that of the brand owner, at some points going so far as to present itself almost as the exclusive licensee for the entire Community space.

C) As to the fifth ground, alleging infringement of art. 32 of the Trade Mark Law, the appeal appears in some way to claim that the principle of trade mark exhaustion is limited to Spain; here, the appellant again identifies itself with the owner and licensor of the trade mark and further appeals to section 2 of the said article, which is most surprising given that the defending importers

have in no way modified or altered the characteristics of the product, which throughout the appeal the appellant has admitted to be genuine, manufactured by the licensor and marketed with the latter's consent.

D) As to the sixth ground, alleging infringement of art. 31.2 c) of the Trade Mark Law, the appellant again identifies itself with the licensor and appears to suggest that the importation of Bacardi Rum to any place in the European Community would require its consent as exclusive licensee for Spain, thus ignoring the interdependency of sections 1 and 2 of the said article, which is clearly set forth in the general condition with which the cited section commences".

– *SAP* Madrid, 15 January 2002. *Web Aranzadi JUR* 2002\105765.
Consumers and users. Abusive clause in an air transport contract.

"Legal Grounds:

. . . incidents occurring in a flight of the defendant, Swissair S. A., from Madrid to Prague on 8/10/1999 . . . the appellees' holiday plans were upset in that they were forced to spend the first day of their vacation in an undesired location (Zurich) and to delay their arrival at their chosen destination.

. . . As regards the nullity of general clause 9 of the passenger transport contract between the parties, as printed on the ticket here at issue, we would note that while it may be true that failure to guarantee timetables may be justified on grounds of safety or air traffic control for which other agents of air traffic are responsible, it cannot be deduced, as the said general condition provides, that the timetable is not guaranteed in any event or that it is subject to indiscriminate alterations without prior notice to the passengers or that connections are not guaranteed, with no justification of the cause. Such conditions, unwarranted or insufficiently justified to the consumer of air transport depending on the case and on proof in or out of court, would be absolutely contrary to the guarantees established in this respect for consumers or passengers in the sections exemplifying abusive contractual clauses set forth in Additional Provision 1, stipulations 2, 3, 4 and 15 of the General Law for the Protection of Consumers and Users, the applicable regulations in respect of limitations on the liability of the air carrier being the international regime as set forth in arts. 22 and 25 of the Warsaw Convention cited above. Therefore, without prejudice to further analysis of the said limitation, also cited by the airline as defendant and principal appellant, the above-mentioned clause must be deemed abusive in the terms just stated, in consequence whereof, pursuant to the provisions of arts. 10 and 10-bis of the General Law applicable to the case, and also the international regulations governing private air transport, the said clause, whereby the defendant is free to fulfil the contract of air transport or not at its own discretion without good reason, must be held to be null and excised from the contract, as provided in the correlative art. 1256 of the Civil Code, the contract itself remaining otherwise in force subject to the legitimate will of the contracting parties. In conclusion, while the appealed decision is amended in respect of the invalidity of the clause as claimed by the plaintiffs in the original proceedings,

the consequent terms of compensation set forth thereafter in consideration of the appeal by the defendant must stand".

XIII. TORTS

– *SJ1* I Oviedo, 6 February 2001. *Web Aranzadi JUR* 200I\I42765.
Hague Convention of 4 May 1971. Proof of foreign law.

"Legal Grounds:

. . . on 23 April 2000, he was driving his Suzuki 600 motorcycle along a road in Portugal in a line of traffic; he had just overtaken one vehicle, and when he attempted in turn to overtake the van driven by the defendant, the latter pulled out suddenly into the left-hand lane with the same intention, leaving him no alternative but to swerve to the left. As a result, he ran off the road and suffered a fall, causing serious damage to the motorcycle and a comminuted fracture to his right knee-cap, for which he was treated at the site of the accident, and again months later at the Central Hospital in Asturias for removal of the implanted osteosynthetic material, having developed intolerance thereto, leaving long-term effects of diminished flexibility of the knee, atrophy of the quadriceps and slight disfiguration.

. . . Having established that the Spanish courts are competent to examine the case, the next step is to determine what law they are to apply, to which end we must return to international law, specifically the Hague Convention of 4 May 1971, ratified by Spain on 4 September 1987 and published in the *BOE* of 4 November of the same year.

The basic provision is article 3, whereby any conflict is to be judged by the internal law of the State where the accident occurred; however, there is an exception to this general principle, namely that if all the vehicles involved in the accident are registered in another State (as in the present case, both being registered in Spain), the applicable law is the internal law of the State of registration.

The relevant internal law in this case is therefore article 12 of the Civil Code, according to which the applicable rule of conflict must in all cases be as determined by Spanish law; the pertinent provision in such cases is article 10, section 9 of the *CC*, which stipulates that non-contractual obligations are to be governed by the law of the place where these obligations arose. In the case to hand, the basis of the action is a traffic accident in Portugal, and therefore under the cited provision, the applicable substantive law is Portuguese law. Moreover, the substance and validity of that law would have had to have been accredited, by any of the means of proof allowed by Spanish law, by the person obliged to do so, given that in this case the principle of *iura novit curia* does not apply. The foregoing is not affected by the final point in section six of the said article 12, which allows that in application thereof the court may use whatever means of verification that it sees fit, since this presupposes that the party alleged and proved foreign law, and the purpose of such verification is to determine whether such allegation is correct . . .

In examining the consequences of this omission, it must be remembered that the invocation of foreign law is properly treated . . . as a fact requiring proof, and not, as formerly, contrary to the law . . . In conclusion, given the facts of the case, we dismiss the appeal, not because the insurer's appeal was formally defective but because it failed to prove a fact that was essential to its success and could not therefore be accepted by the court".

– *SAP* Badajoz, 19 July 2001. *ARP* 2001\798.
Traffic accident. Law applicable in determining liability.

"Legal Grounds:

. . . Lastly, the appeal is based on the fifth ground, which states: 'Finally, the decision infringes the Hague Convention of 1971, ratified by Spain on 4 September 1987 (*RCL* 1987, 2379, 2661). According to article 3 of the said Convention, the applicable law is the internal law of the State in whose territory the accident occurred. However, article 4 establishes (among others) the following exceptions: a) Where only one vehicle is involved in the accident and it is registered in a State other than that where the accident occurred, the internal law of the State of registration is applicable to determine liability 'towards a victim who is a passenger and whose habitual residence is in a State other than that where the accident occurred' Article 8 provides that the applicable law will determine, in particular:

1. The basis and extent of liability;
4. The kinds and extent of the damages;
5. The question whether a right to damages may be assigned or inherited.

Therefore, although we concur with the decision in that the proper forum for judgment of the matter is the locus of the accident, the applicable law as regards third-party liability is that of Luxemburg. Moreover, both Law 30/1995 and the Insurance Contracts Law (applied by the judge in establishing civil liabilities) expressly deny applicability to the case in question, in the following terms: art. 4 of the Law on Use and Circulation of Motor Vehicles, as amended hy Law 30/1995, states: 'Compulsory insurance as provided in this Law shall guarantee coverage of third-party liability in respect of terrestrial motor vehicles habitually kept in Spain'. Art 4 of Law 30/1995 denies the applicability of the same Law to the case in question. This ground, subject to the qualifications set forth hereafter, must he admitted:

5.1. In dealing with the issue raised by the present appellant regarding the plea of non-applicability of Spanish law on third-party liability, the appealed decision stated as follows: . . . And as to the non-applicability of Spanish law in the present case, suffice it to point out that articles 8 and 12.3 of the *CC* enshrine the notion of public policy as being based upon the territoriality of the laws affecting such policy. Therefore, the civil obligations 'arising from offences or misdemeanours committed by Spaniards or foreigners on Spanish territory, shall be governed by the provisions of the Criminal Code'; hence, any third-party liability in connection with an offence or misdemeanour must be ruled by the *lex loci delicti commissi*, and this without exception given that the Criminal Jurisdiction attracts the

civil action, a principle that must be applied in the present case. However, the original court took no account of, and there is no record of the appellant having invoked, the Hague Convention on the Law Applicable to Road Traffic Accidents concluded on 4 May 1971 at the Hague, Kingdom of the Netherlands, as ratified by Spain by Instrument of 4 September 1987.

. . . It being established, then, that the Convention determines solely and exclusively the law applicable to extra-contractual third-party liability arising out of road traffic accidents, we must now consider whether the case at issue here comes under any of the exceptions contemplated in article 4 of the said Convention, to wit: Subject to Article 5, the following exceptions are made to the provision of Article 3 (article 3: The applicable law is the internal law of the State where the accident occurred).

a) Where only one vehicle is involved in the accident and it is registered in a State other than that where the accident occurred, the internal law of the State of registration is applicable to determine liability 'towards a victim who is a passenger and whose habitual residence is in a State other than that where the accident occurred . . .'. In the present case, there is obviously only one vehicle involved, namely the Suzuki Vitara convertible, Luxemburg registration CL- . . .; the victim Lilianne M. A., user in the capacity of passenger and sister of the driver, was domiciled in Luxemburg, L- . . . -Bettembourg, . . ., Rue Vieille; hence, all the conditions therefor being met, the law applicable by the trial court is that of the State of Luxemburg and not that of Spain".

– *SAP* Alicante, 20 September 2002. *Web Aranzadi JUR* 2002\273185.

Extra-contractual liability. Compensation in accordance with the prices in the plaintiff's country of domicile.

"Legal Grounds:

. . . in reviewing the evidence presented in the proceedings, it is noted that in the view of the judicial appraiser, the damage whose repair is reflected in the invoice submitted as document 5 of the action arose out of an accident similar to the one here at issue and that the prices set forth in the said document are the normal prices for this type of repair and for the jobs done in the country of origin (Belgium). On this basis, the judicial appraiser not having recommended the exclusion of items from the list given by the plaintiff, in obedience to the principle of *restitutio in integrum* which must inform the quantification of compensatory obligations and by virtue of which consideration must be given to the real damage sustained in order to seek to restore the situation of the injured party's assets to what it was before the event that caused the damage, this court deems it proper to uphold in its entirety the complaint demanding compensation for the real financial expense that the repair of the damaged vehicle has entailed to the owner as accredited by the invoice submitted with the complaint and the conclusions of the appraisal; we differ from the court *a quo* where the latter describes compensation in accordance with the prices in the plaintiff's country of origin as undue enrichment, in that the

owner of a foreign vehicle is entitled to have it repaired in his own country and to be reimbursed for the cost of that repair even if it is greater than it would have been in Spain, considering that the injured party must be compensated for all the damages sustained and all of these must be included in the compensation provided by art. 1902 *CC*; nor can the foreigner be obliged to have the vehicle repaired in Spain given the inconvenience and added expense that would be attendant upon staying longer here or in dispensing with the vehicle while it is being repaired and having to return from his own country to collect it, with all the inconvenience that this would entail in terms of lost days of work, travel expenses and, if necessary, lodging".

XIV. PROPERTY

XV. COMPETITION LAW

XVI. INVESTMENTS AND FOREIGN EXCHANGE

– *STSJ* Madrid. 30 January 2002. *RJ CA* 2001\1045.
Investment in a foreign company absent prior verification procedure.

"Legal Grounds:

... The appellant has been sanctioned for having subscribed – on 24 September 1997 – a capital increase of the Luxemburg company 'G. Investiments, SA', for a declared amount of 7,500,000 pesetas and with a holding of 99.66%, without having first applied for administrative verification as required by art. 5.2 of Royal Decree 672/1992.

... at the time of the investment – September of 1997 – the regulations in force required such prior verification, which requirement in the view of this Bench and Section does not constitute a restriction on the principle of free movement of capital, given that absence of such prior verification was not a bar in the case of investment in Community countries.

... the removal of the verification requirement since the entry into force of Royal Decree 664/1999 vacates the imputed violation; so-called blank provisions like the one here at issue are considered sanctioning regulations – as the jurisprudence of the Second Bench of the Supreme Court has consistently recognized in respect of extra-penal provisions in what are known as blank criminal laws – and the applicable principle is that of retroactivity of the most favourable sanctioning regulation".

XVII. FOREIGN TRADE LAW

XVIII. BUSINESS ASSOCIATION/CORPORATIONS

XIX. BANKRUPTCY

XX. TRANSPORT LAW

– *SAP* Madrid, 16 July 2001. *Web Aranzadi JUR* 2001\252241.
Air transport contract. Warsaw Convention. Compensation for moral prejudice.

"Legal Grounds:

... Both the company Iberia Líneas Aéreas de España, S.A. and Mr. Emilio J. R. P. challenge the original decision on the same point, namely the compensation to be paid to the plaintiff as a consequence of late delivery of the passenger's baggage by the defendant airline, although obviously each party takes a different position; whereas the original court awarded the sum of 20,000 pesetas on this point, the appellant Iberia sustains that no payment should be required, and the other party sustains that he ought to be paid the full amount claimed in this respect, namely 100,000 pesetas. As to the allegations of the airline company, Iberia as appellant sustains that there is no liability in respect of compensation for moral prejudice since neither the Warsaw Convention nor the Hague Protocol make provision for such compensation, and that as a special norm, it is preferentially applicable to the Civil Code; however, it must be borne in mind that merely because the Warsaw Convention does not name this concept, it cannot be assumed that the concept is excluded – the Warsaw Convention makes no provision for compensation in respect of the need to acquire new clothes as a result of the misplacement and late delivery of baggage, and yet the appellant accepts the original decision and does not question that compensation, which is set at the sum of 68,314 pesetas. It is therefore our view that the absence of express provision in the Warsaw Convention does not exclude the possibility of applying the general norms of the Civil Code and compensation where one party has prejudiced another through failure to fulfil its own obligations as freely assumed in the contract of transportation. The appeal by the party referred to must therefore be dismissed".

– *SAP* Madrid, 4 April 2001. *Web Aranzadi JUR* 2001\187014.
International maritime transport. Interpretation of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading. Delay in the delivery of goods. Failure to claim default.

"Legal Grounds:

... Briefly, the plaintiff sued the cited company, an enterprise engaged in maritime transport of goods between Spain and Guinea, for five million pesetas in respect of damages occasioned to the plaintiff by delay in the delivery of goods

that the plaintiff had sent to Bata for resale there. . . . The defendant opposed this claim, essentially on the grounds that the freight contract was governed by the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 25 August 1924), as ratified by Spain and included in the amending Protocol of 23 February 1968 by Instrument of 16 November 1981 and published in the *BOE* of 11 February 1984. A reading of the relevant clauses of the said convention shows that they refer not to the late arrival of goods but only to the loss or destruction thereof and establish rates of compensation on a lump sum basis unless the value of the goods has been declared. The claim in the present case of compensation for delay in delivery of the goods is tantamount to claiming that the defendant failed to fulfil his obligation. Default as delay imputable to the debtor does not imply total or absolute non-fulfilment unless it is so defined by the parties or is a consequence of fulfilment of the obligation. In the present case, the shipper advised the plaintiff of the approximate date of arrival of the ships at Bata in the form of a schedule, in maritime terms, estimating arrival between the 1st and the 5th of December 1997; it has also been accredited that the shipping company notified the plaintiff by facsimile that the vessel would be unable to reach its destination on the planned dates because it had had a breakdown and had put into Las Palmas for repairs. This communication was sent to the plaintiff's office, and if the latter failed to receive it because he was in Bata at the time, this cannot be blamed on the shipper, considering that if the plaintiff was in Bata, the agents at his office could presumably have informed him of the vessel's delay. In any event, pursuant to art. 1.100 he could have accused the shipper of default as from that date, but this he failed to do, and therefore he cannot claim compensation for delay in the vessel's arrival given that the parties do note state in the charter documents or the bills of lading that the date of arrival of the goods was an essential element of the obligation, nor could such be inferred from their nature".

– *STS*, 16 June 2001. *RJ* 2001\4341.

Territorial application of the Geneva Convention of 16 May 1956 on the Contract for the International Carriage of Goods by Road.

"Legal Grounds:

. . . It is proven in the proceedings that, as a consequence of an offer by Lep Internacional, SA to Fagor Arrasate, SCL, both parties entered into a contract for transportation of machine tools sold by Fagor Arrasate, SCL to North American Stainless (NAS), from the port of Bilbao to the city of Ghent (United States), the offer by Lep Internacional, SA giving 14 February 1994 as the approximate date of departure. The goods were loaded aboard ship on 28 February 1994, the conventional goods arriving at the port of Philadelphia on 14 March 1994 and those in containers at the port of Norfolk on 19 March 1994; all the agreed goods arrived at Ghent on 31 March 1994. Container TOLU 456063 was not delivered at the NAS headquarters in Ghent until 07.30 hours on 8 April 1994. The goods were carried from Norfolk to Ghent by road.

Because container TOLU 456063 was delivered later than 7 April 1994, North American Stainless, in accordance with the agreement with Fagor Arrasate, SCL, paid a premium of 10% of the purchase price on the said container rather than 15%, which they would have paid had the container arrived on 7 April 1994.

... Under art. 1 of the Convention of 19 May 1956, to which Spain acceded by Instrument dated 12 September 1973 and published in the *BOE* of 7 May 1974, carriage of goods by road is subject to the Convention, irrespective of the place of domicile and nationality of the contracting parties and with the exceptions set forth in paragraph four, whenever the following requirements are met: that the contract be for good consideration, that carriage be effected by automobiles, articulated vehicles, trailers or semi-trailers, and finally that the ports of origin or uplift of the goods and the place of destination are located in two different countries, at least one of which must be a signatory of the convention.

The transportation giving rise to this case was a combination of sea and land shipment. Land shipment was by road from the port of Norfolk, where the goods were transferred to a road vehicle, to the destination at Ghent, all the road transport therefore being undertaken in the same country. The requirement of applicability of art. 1 of the Geneva Convention whereby 'the points of origin or uplift of the goods and the place of destination be located in two different countries' is not applicable to contracts like the one at issue here in which the terrestrial part of the transportation takes place in a single country, although the goods have been brought from another country by other than terrestrial transport – in this case by sea. In such cases of transport by different means, where it is not accredited that the maritime carrier has contracted the onward terrestrial carriage in its own name, each stage of such transport must – as the decision *a quo* provides – be subject to the regulations applying to the mode or segment of transport in which the event giving rise to the complaint occurred. The fact that the starting and end points of the transport of the goods were in different countries does not mean that the whole is subject to the regulations of the Geneva Convention when the road transport took place entirely within one country".

– *SAP* Castellón, 22 March 2001. *Web Aranzadi JUR* 2001\185860.

Contract for international carriage of goods by road. Interpretation of the CMR Convention: sub-contracting of transport and value of goods.

"Legal Grounds:

... The source of the action was the performance of a contract for international carriage of goods by road. A Dutch company J. B. Van den Brick, engaged in the importation and sale of fruit, contracted Betrex España, S.A., a company domiciled in Gandía (Valencia), to carry oranges from the facilities of Cooperativa Agrícola El Pényó in Vallada (Valencia) to the facilities of Impex Fruit-Grubbenvorst GV in Grubbenvorst (Netherlands), as set forth in a CMR international freight charter issued on 4 March 1998 (doc. 1). The carrier Betrex España, S.A. subcontracted the said carriage to David España, S.L., which company in turn subcontracted it to Transcolibrí, S.L.; the latter subcontracted it to Distribuciones

Ambort Aremany, S.L., which last carrier actually transported the goods in refrigerated truck, registration number AL 2716 R, as recorded in the waybill.

. . . J. B. Van den Brink invoiced Betrex España, S.A. for the damage to the shipment to Impex Grubbenvorst for a total of 12,405 Florins (doc. 6 bis). Betrex España, S.A. had insured the shipment with Victoria Meridional, Cía Anónima de Seguros y Reaseguros, S.A., and the latter, through Oscar Schrunk España, Correduría de Seguros, S.A., paid the compensation due (1,013,839 pesetas) to Betrex España, S.A. (doc. 7). As subrogee in all the rights of David España. S.A. in connection with the said contract of carriage by virtue of the insurance contract signed with Betrex España, S.A. (doc. 5), the insurer Oscar Schrunk España demanded payment of the compensation from Transcolibrí, S.L., the firm to which Betrex España, S.A. had contracted the carriage.

Transcolibrí, S.L. refused payment and Victoria Meridional, Cía Anónima de Seguros y Reaseguros, S.A. sued . . .

. . . In fact, the present case is an action for recovery brought by a contracted carrier (through the insurer) against one of the subcontracted carriers, but not against the carrier in whose hands the damage occurred – that is, not against the firm which actually carried the goods. Such recovery action is not expressly regulated in the CMR Convention, but it comes within the meaning of arts 37 *et seq* CMR (Sánchez Gamborino), whose substantive regime – this being a case of international carriage by road – is governed by the CMR Convention itself. In effect, as the cited author states, although there is a legal vacuum in the CMR Convention as regards regulation of the legal relationship between carriage contractors and carriage subcontractors, that relationship is legally the same as the relationship between the consigner and the carriage contractor (art. 3 CMR) and is subject to the same rules although different persons are involved. In this connection art. 17.1 states that 'The carrier shall be 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 . . .'. Hence, the liability of Transcolibrí, S.L. upon execution of the contract of carriage lies in blameworthy supervision or choice, given that it undertook to carry the goods either itself or through a third party, and the carrier is not only he who actually does the carrying but all persons who undertake and guarantee the outcome thereof, as confirmed by the jurisprudence (*STS* 14/7/1987) and the doctrine (Gomez Calero/Sánchez Gamborino).

. . . The evidence presented confirmed the reality of the damage and the fault of the carrier. This is clear from the expert report compiled by Harmsen De Groot, the basis of the carrier's liability, and the report was in no way detracted from by the appellant carrier, on whom the burden of proof falls as provided by art. 18.1 as it relates to art. 17.2. Moreover, in controlled-temperature transport, in order to be excused of liability, the carrier must also demonstrate that he has taken all the necessary steps as regards choice of vehicle, maintenance, functioning of temperature control devices and compliance with any specific instructions given him (art. 18.4). In the present case it has not been demonstrated – as the appellant alleges – that the spoilage of the oranges occurred through the fault of the user or

holder of title in failing to chill them properly prior to transportation, or that there were no instructions. Indeed, although not entered in the waybill, the truck driver has acknowledged tbat he was given instructions regarding the temperature at which the goods should be kept in transit (folio 180). Furthermore, the carrier entered no reservations on the waybill, it has not been demonstrated that the truck's refrigeration system was in perfect working order, nor has a contrasting expert opinion been sought to demonstrate that if the truck's refrigeration system was working perfectly the higb temperatures attained could only have been due to inadequate chilling of the oranges prior to transportation.

. . . Finally, the appellant invokes art. 23.1 CMR, which provides that 'When, under the provisions of this Convention, a carrier is liable for compensation in respect of total or partial loss of goods, sucb compensation shall be calculated by reference to the value of the goods at the place and time at which they were accepted for carriage'. This provision is applicable wbere, as in the present case, the consigner has not declared the value of the goods (not shown on the waybill), and therefore if there is damage to the goods, the carrier only has to pay the user their actual value in their place of origin or at the place and time at which they were accepted for carriage.

The report issued by Harmsen De Groot also establishes that the extent of spoilage of the oranges at the time of inspection was 13 3% (folio 19), although it was to be expected that the rot would spread rapidly because of the high temperature, affecting 50% of the value of the goods. The valuation of the damage must therefore be set at 50% of the value of the oranges, but basing the calculation, pursuant to art. 23 CMR, on the value of the goods carried at source, that is at the place and time they were accepted for carriage, and on the nature of the goods (Navelina oranges). As it does not appear in the record of proceedings, this value will have to be determined upon execution of the decision and in no case may it exceed the amount claimed by the appellant insurer. Consequently, since the amount of the principal is unadjusted, the appellant carrier cannot be ordered to pay interest on arrears. As the well-known aphorism states: *iniliquidis non fit mora*".

– *SAP* La Coruña, 16 November 2002. *AC* 2002\300.

Convention on the Contract for the International Carriage of Goods by Road (CMR). Submission to arbitration.

"Legal Grounds:

. . . Irrespective of whether an intermediary or agency relationship existed, the fact is that the goods were transported by a road vehicle from the point of origin in Italy to the destination in Spain, and the operation tberefore constituted international carriage as governed by art. 1 of the Convention of 19/5/96 on the Contract for the International Carriage of Goods by Road (CMR), section 1 of which specifies or adds the words: 'irrespective of the place of residence and the nationality of the parties' (provided that at least one of the parties is domiciled in the country

of destination or acceptance of the goods and that the country be a signatory State). Consequently, submission to arbitration must be under the Convention or by agreement (art. 33 of the Convention), which was not the case in the contract at issue".

– *SAP* Murcia. 14 September 2002.*Web Aranzadi JUR* 2003\7562.
Existence of a contract for the international carriage of goods by road. *Lex Mercatoria.*

"Legal Grounds:

... The original action claiming 46,000 pesetas for carriage costs in a transport service having failed, the plaintiff appealed against the court's decision on the ground that it failed to acknowledge that where there is a waybill, there must logically be a contact of carriage, meanwhile ignoring the fact that the appellant has no claim on a contract that he has neither formalized nor signed, being quite unconnected with the conditions under which the parties agreed sale of the goods.

... leaving aside for the moment the fact that in the waybill submitted by the appellant the box for carriage costs has not been completed although it is obligatory to do so, and the fact that a mercantile sale cannot cause any obligation upon a third party, the fact is that the goods were delivered to a firm and a location other than those stated by the consignor, and in view of the defects noted in the waybill, the clause 'ex factory' or 'ex work' constitutes *prima facie* evidence that the carriage was not arranged by the defending company.

The lack of reference in the waybill to the expenses payable by the consignor does not appear to be the fault of the defendant, given that, as stated in the CMR charter, 'bold-outlined boxes are to be completed by the carrier' and the omission cannot be taken as acceptance of these expenses, but rather the contrary.

Finally, from the documentation submitted it transpires that the purchaser, the firm 'The Traditional Slipper', arranged the carriage with a different firm, the British carrier 'Transmec Group', which subcontracted the carriage on part of the route to the appellant, so that the obligation is unconnected with the defendant".

XXI. LABOUR LAW AND SOCIAL SECURITY

– *TSJ* Madrid, 26 June 2001. *AS* 2001\2944.
Contract of employment. Determination of closest ties.

"Legal Grounds:

... First: The plaintiff's original contract of employment began on 1 January 1968 with a Spanish company; as from 1 November 1975, the Spanish company was acquired by Alfa Laval, S.A., which was subrogated to the said contract of employment.

Second: The firm Alfa Laval, S.A. is part of the Alfa Laval group of companies, which in turn belongs to a larger group called Tetra Laval Group, whose Presidency and General Management are domiciled in Sweden, the said group

having branches in numerous countries in the form of subsidiaries duly incorporated as companies in accordance with the relevant national laws in each case, while the group as such has no independent legal personality.

Third: The plaintiff, then, as set forth in his writ of complaint and in his writs of exception in the appeals here considered, has always had the same labour relationship with the cited group of companies, in the material form of various contracts of employment with the subsidiary companies; he has always been registered with Social Security through the Spanish branch, Alfa Laval, Sociedad Anonima, he has always been domiciled in Spain and has served on successive occasions with the Spanish subsidiary, the Greek subsidiary, the Spanish subsidiary again, then the Italian and the British subsidiaries.

Fourth: The plaintiff reported directly to the President of the Alfa Laval Group, Mr. S. H.

Fifth: In his last period of office as Executive President of Alfa Laval and President of the Alfa Laval Flow commercial area, he serviced all the group companies. including the Spanish company; his registration as an employee of the British company was purely instrumental, as declared in his proven statement in the first legal ground of the decision here challenged.

. . . As stated in point one above, the plaintiff clearly served a group of companies consisting of a set of subsidiaries located in various European countries, and while the last contract articulating the relationship existing between the parties was indeed signed in the United Kingdom, this does not alter the fact that the services were rendered to all the companies in the group; consequently, in order to determine what Law is applicable to the ties linking the employee with the countries of domicile of the firms for which he has worked, and specifically – as provided in the article of the Treaty of Rome referred to by the appellants – it is necessary to determine with which country the contract of employment had the closest ties. The answer is undoubtedly Spain, this being the country where the labour relationship at issue was initiated and where the employee has always maintained his residence. He has received expenses for weekly journeys to his home in Spain and maintenance in the place where he was serving at any time, which was not always the United Kingdom as acknowledged by the appellants. He has travelled repeatedly to other countries, and finally, he has been continuously registered with Social Security here, which clearly demonstrates the intention of the parties to establish a labour relationship in Spain, regardless of the subsidiaries with which the employee may have had to work on instructions from his employer. We should stress that the plaintiff's services were lent not only to the British subsidiary but to all the group companies, including the Spanish subsidiary. Therefore, given that the Alfa Laval Group has no independent legal personality, the most consistent contractual ties have been maintained through the Spanish company. Tbe details that the appellants sought to include in the roll of proven facts are irrelevant in that such ties are not affected by improvements in Social Security in the United Kingdom or by the fact that the currency of payment was Sterling, and certainly not by the fact that he enjoyed the official public holidays of that

country when there, that he was provided with lodging and a vehicle while in the United Kingdom, as was natural, or that he paid part of his taxes there, given that the same circumstances would undoubtedly have arisen had he stayed in any other country, which circumstances do not define a particular tie thereto but are the natural consequences of a temporary posting with a given subsidiary of the group for which he worked. Spanish law is therefore clearly applicable and the cited ground is dismissed".

– *STSJ* Basque Country, 13 February 2001. *AS* 2001\4333.
Ministry of Foreign Affairs. Unemployment benefit for personnel serving abroad.

Matters of Fact:

. . . The sole instance of the current proceedings was initiated by an action and completed by a decision, regarding which the proven facts are as follows:

'I. The plaintiff, Mr. José Ramón A., has been working for the Ministry of Foreign Affairs since 1 April 1977, first as Official of the Spanish Embassy in Warsaw, then as Chancellor at the Consulate General in Munich and lastly as Chancellor in Belgrade until 31/8/1999. He has been continuously employed in the said posts under contract of employment, at a gross monthly salary of 914,864 pesetas.

II. On 31 August 1999, the Ministry of Foreign Affairs terminated his contract of employment on the grounds of 'failure to adapt to the new post'.

III. On 24/11/1999 he applied for unemployment benefit. This was denied him by decision of 3/1/2000 on the basis of an order of 8 June 1982 in implementation of Royal Decree 2234/1981, 20 August, art. 5 of which denies protection of the right to unemployment benefit to Spanish contract personnel employed by the Spanish Administration abroad.

"Legal Grounds:

. . . The first sustains that the original decision is in violation of arts. 19 to 24 of ILO (International Labour Organisation) Convention 102; according to the appellant, since this provision was ratified by Spain in 1952 and came into force in 1955, as from that year it 'clearly determines that the State has an obligation to protect all employees in the event of unemployment or loss of employment and income', and internal Spanish regulations implementing the Convention cannot set aside its provisions, since the Convention is paramount.

Validly formalized and ratified international treaties that comply with all the other requirements in each case are part and parcel of Spanish law (arts. 96.2 and 5.1 *CC*); however, this does not mean that subjective rights under their provisions are automatically recognized, since this depends on their efficacy in each case. In fact the efficacy of international norms varies; some (e.g., Community Regulations) are automatically recognized and others are not. ILO Conventions fall into the latter category since they are rules for harmonization of legislation between the different ratifying countries, so that States are obliged only to adapt their interual regulations to the provisions of the Treaty.

Spain ratified ILO Convention 102 on 17/5/1988, but only in respect of parts II to IV (regulating unemployment) and VI, which came into force as part of Spanish law as from 20/6/1989. Article 19 of the Convention specifies that each Member for which this part of the Convention is in force must secure to the persons protected the provision of unemployment benefit 'in accordance with the following Articles of this Part' (referring to the regulatory part of the Convention), and in this Part – arts. 19 to 24 – article 21 provides that the Member States may establish criteria for protection against unemployment with reference to one of two categories: salaried employees (in which case it is determined that there should be at least 50% protection) or resident persons. Art. 205 *LGSS* shows that the internal regulations on unemployment in force in Spain follow the first of the two criterion; under the rules, unemployment protection would potentially be available to over 50% of the salaried population, since it covers employees in industry, services and agriculture, workers contracted under administrative law and functionaries in the service of the public administrations. The internal Spanish regulations on unemployment, then, observe the guidelines laid down therefor in ILO Convention 102. Nevertheless, even were this not so, the appellant would be unable to base his claim directly on this Convention, it being a mere harmonizing norm as already noted.

. . . The appellant sustains that the regulation on which the original court based its dismissal of the action, *RD* 2234/1981, of 20 August, 'is discriminatory inasmuch as the present appellant or others might be situated in countries where there is no coverage of unemployment or of any other kind'.

Arts. 41 and 42 of the Spanish Constitution are part of the regulation of the 'Guiding principles of social and economic policy' (Title I Chapter III of the Constitution), and hence 'They may only be invoked before the ordinary jurisdiction in accordance with the laws implementing them' (art. 53.3 *CE*). The implementing legislation in the present case is the General Social Security Law and *RD* 2234/1981 (to which the applicant makes no objection from the standpoint of the possibility of an act *ultra vires*), and therefore it is to the provisions of the latter that we must have recourse.

Art. 2 of the said Royal Decree, which includes contract personnel at the service of the Spanish administration abroad in the general regime, provides that 'Protection, affiliation and contribution as regards the personnel referred to in this Royal Decree who are affiliated to the Spanish Social Security shall be as provided in the General Regime of the Social Security, with the sole exception of unemployment benefit'. This provision is reiterated in a Ministerial Order of 8/6/1982, issued in implementation of the said Royal Decree. These legal provisions were analysed in Supreme Court decisions of 12/12/1996 and 7/2/1997. . . .

In short, the Supreme Court's opinion is based on the fact that the scope of application of the Social Security regulations in force at the time the General Social Security Law of 1974 was approved did not extend to Spaniards serving abroad, and that under article 7, sections 1 and 3 of that Law, the inclusion of such workers was contingent on the enactment of special regulations for that purpose, in this

case *RD* 2234/1981; the difference that it established in the regulation of protection vis-à-vis other workers included in the system was deemed justified by the economic interests of the system and the protection afforded through regulations extraneous to the internal organisation of the Spanish Social Security. That, then, is the interpretation that this High Court is bound to follow, in pursuance of art. 123 *CE*, inasmuch as the regulation of Social Security subsequent to the said Royal Decree 2234/1981 has not altered the regulation set forth there.

We should add that were we to accept the appellant's argument to the effect that his case ought to be treated differently from the subjects of the aforementioned Supreme Court decisions in that he had no access to unemployment protection in the foreign countries where he served, he would be bound at the very least to comply with the requirement set forth in arts. 208.5 *LGSS* and 11 of *RD* 625/1985 regarding workers returning to Spain upon severance of their contracts of employment abroad, namely to accredit through the 'Spanish Institute of Emigration' that he has no right to unemployment benefit in the country where he has ceased to work. The appellant has not accredited this and hence offers no good reason to justify our diverging from the criterion upheld by the Supreme Court in the cited jurisprudence".

– *STSJ* Galicia, 14 July 2001. *AS* 2001\1950.
Social Security. Territorial scope of application.

"Legal Grounds:

. . . In the section on 'Legal Grounds:, the appellant cites art. 191.c *LPL* as negating the applicability of arts. 1.4 *ET*, 124 *LGSS*, and 94, 95 and 96 *LASS*.

First: The facts are: (a) the worker was contracted in Spain by *Corporación Ibérica*, SA, acting on behalf of its principal, FTF Offshore Bahamas Corporation, domiciled at Nassau, to work on Drillmar-1, a platform under the flag of the Bahamas and situated outside Spanish jurisdictional waters; (b) the contract of employment provided for medical/health care at the expense of the Company and insurance of up to $US 100,000 in the event of accidental death or permanent disability; (c) the appellant suffered an industrial accident – inguinal hernia – on 8 September 1995 and was on sick leave until 27 December 1995, the object of the present action being a claim for Temporary Disability benefit at a rate of 10,000 pesetas per diem.

Second: The Court rightly denied the competence of the Spanish courts even although the employment abroad by a foreign company was consequent upon a contract or the offer of a contract received in Spain (art. 25 *LOPJ*). Our competence to judge is one thing, but whether such competence compels us to apply our regulations on matters of Social Security is quite another. As in a previous decision – *TSJ* Galicia 18 December 2000 *R.* 2917/1997 – we would point out that according to Supreme Court decisions of 19 February 1990 and 9 May 1988, the basic principle underlying our Social Security system is that of territoriality. By reverse interpretation, art. 1.4 *ET* excludes from its scope of application contracts entered into by Spaniards with foreign enterprises that entail service abroad, and

in any case the situation comes under art. 10.6 *CC*, whereby 'the obligations deriving from a contract of employment, absent express choice of law by the parties and without prejudice to the provisions of article 8 section 1 – mandatory applicability of criminal, police and public safety laws – shall be governed by the law of the place where the services are rendered', which in the case of ships must be the law of their flag or place of registration (art. 10.2 *CC*), and in the present case that is clearly the United Kingdom of Great Britain. This provision is consistent, for the purposes of internal Spanish law, with art. 1.5 *ET*.

According to the cited jurisprudence, the same principle of territoriality also applies in matters of Social Security. Art. 7.1 *LGSS*/1994 (in force at the time the contract was signed) provides that 'Spaniards residing in Spain [. . .] shall be included in the Social Security system [. . .] provided that [. . .] they undertake their activity in the national territory'. From this regulation – referred to by art. 2 of Decree 2864/1974, 30 August – it is equally clear that the protection of Spanish workers employed abroad is in principle a matter for the Social Security of the country concerned, given that the matter under discussion – Social Security – is an imperative not subject to the will of the parties and that agreements in breach of the legal norms are void and without effect (art. 1255 *CC*).

Third: Therefore, Spanish workers employed abroad – that is, emigrants and not persons on temporary assignment abroad – in non-Community countries are generally excluded from the Spanish Social Security and may only be included when there is specific provision to that effect; this norm is justified by consideration of the economic limitations of the system and the fact that in most cases protection is afforded by the Social Security of the country in which the person works, as guaranteed by Community regulations or other international instruments (*STS* 7 February 1997 and 12 December 1996). What the foregoing amounts to is that the appellant cannot allege breach of any Spanish regulation on the coverage of Temporary Disability considering that in the circumstances in which the services were rendered – abroad and to a foreign company – such coverage is not possible in the Spanish system, which leaves protection to international conventions (*LGSS*, First Additional Provision) or would at best admit coverage by Special Convention (*RD* 996/1986, 25 April and *OM* 14 January 2000), which regulations were introduced in compliance with art. 42 *CE*, and art. 14 *CE* (*STC* 77/1995, 2 May) and cannot be invoked against this limitation on protection".

– *STSJ* La Rioja, 30 January 2001. *AS* 2001\1090.

Retirement pension. Recognition of missionary work abroad for purposes of contribution

"Legal Grounds:

. . . The first of the problems raised in the original decision is to determine whether the religious activities undertaken by the defendant and now appellant outside the national territory count, given that, as argued by the court *a quo* – and in the appeal by the Management Entity – 'under the provisions of art. 7 of the Merged Text of 1994, to qualify for inclusion in the Social Security system, the

person must have undertaken his work, whether self-employed or in the employment of others, in Spanish territory'.

The defendant, 'as certified by tbe religious congregation of the Slaves of Mary, lived in Spain until 7 July 1966, on which date she went to Bolivia as a missionary and left there on 21 November 1970 without ceasing her activity'.

This part of the grounds is also upheld, it being the view of this Court that:

A) As noted in the previous ground, the tenth Additional Provision of Law 13/1996, 30 December, (*MFAOS*), as implemented by *RD* 487/1998, refers to computation of 'the time during which priests, monks, nuns and secularised religious personnel exercised their ministry or religion within the 'Social Security System', regardless of which of the various existing regimes specifically applied'. And again, the preamble to *RD* 487/1998 states that 'implementation of the tenth additional provision of Law 13/1996 does not end with the situation cited in this *RD*, but . . . the latter is a first step, to be completed at a later date by a second Royal Decree which will allow the computation of all periods of ministerial or religious work in the terms set forth in the last point of the cited additional provision'. Therefore, the intention of the legislator as regards the recognition of periods of priestly or religious activity by priests, monks, nuns or secularised personnel of the Catholic Church for purposes of contribution is to include such persons in the Social Security system – which it does – regardless of the specific regime applying to them, and to count all periods of priestly or religious activity, although the regulation remains to be completed at a later date.

Absent such regulation, the Social Security system is based upon the principle of territoriality; however, art. 7 *LGSS*, where the principle is enshrined, contemplates exceptions, allowing that 'the Government may institute means of protection for Spaniards not resident in Spain' (art. 7.4); this the government has done in several instances, including *RD* 728/1993, 14 May, which introduces old-age pensions for Spanish emigrants.

At the same time, *RD* 84/1996, 26 January, approving the General Regulations on registration of companies and affiliation, registration, deregistration and modification of data with the Social Security, is applicable to 'the registration of companies, to the opening of contribution accounts and to the affiliation, registration, deregistration and modification of data of persons covered by the Social Security, as regards contribution'. This is therefore applicable to priests, monks, nuns or secularised personnel of the Catholic Church, in that according to the sole additional provision of *RD* 487/1998, 'cases where this *RD* does not provide shall be regulated by the common provisions governing the relevant Social Security regimes to which the pensions correspond', and also in that *RD* 84/1996, para 2 art. 1 specifically excludes certain Social Security regimes – civilian State functionaries, the Armed Forces and functionaries serving in the Administration of Justice – which do not include self-employed workers or the general regime.

The relevant statute then being *RD* 84/1996, art. 36.1.5 lists a number of situations in which registration is allowed, including transfer by the employer to a place outside the national territory. There can therefore he no objection to the

territorial and temporal applicability of the precept to the present case, which is further recommended by considerations of material justice.

B) Here again, absent the proposed regulation, where there is doubt as to the applicable legislation, this must be resolved in the manner most favourable to the beneficiary, in obedience to the principle *in dubio pro operario o beneficiario* applicable to the sphere of Labour Law and Social Security, in accordance with the terms of the jurisprudence cited in the previous ground.

. . . Given admission of the foregoing ground, the defendant must clearly be credited with both the period of contribution prior to 1 January 1962 and that of work in Bolivia. In conclusion, the decision by the Provincial Office of the *INSS* of La Rioja of 8 October 1998 granting a retirement pension to the defendant is lawful and therefore there can be no demand for repayment of monies unduly received".

– *STSJ* Madrid. 31 May 2002.*Web Aranzadi JUR* 2002\209486.

Contract of employment. Workers in the service of the Spanish administration contracted in Spain for service abroad. Scope of application of the Unified Collective Agreement for Contract Personnel of the State Administration.

"Legal Grounds:

. . . if the contracting as such . . . took place at the headquarters of the Spanish Ministry of Defence – undoubtedly situated on Spanish territory and of Spanish nationality both as a Department and as an employer – and involved a Spanish citizen, then clearly, under article 1.4 of the Workers' Statute (*ET*) of 24 March 1995 and likewise of the previous Statute of 10 March 1980 – the labour relationship between the parties must be governed in its entirety by Spanish labour law, which for the purposes of this case particularly includes the said Unified Collective Agreement. Article 1.4.1 of this Agreement excludes persons 'contracted abroad', but article 1.1 provides for the inclusion of persons – as in the present case – who are Spanish nationals contracted in Spain by a Spanish Administration. This sets aside article 10.6 of the Civil Code of 24 July 1889, as drafted in the Decree of 31 May 1974, given that the said article 1.4 of the Statute constitutes a special regulation which overrides the general provision contained in the said article 10.6 of the Civil Code.

The foregoing – and this Section of the Court has also had occasion so to rule more recently without in any way contradicting itself . . . – means that the said Unified Collective Agreement is not applicable by reverse interpretation in cases where: a) the Spanish national was contracted abroad – with the obvious proviso that the contract contains no clause of express choice of Spanish law, in which case the said Unified Collective Agreement would be applicable; b) the Spanish national was contracted, in Spain or abroad, with express choice of a foreign law; or c) the Spanish national was contracted, in Spain or abroad, with or without express choice of Spanish law; but in pursuance of article 1.4.6 of the Unified Collective Agreement, Spanish conventional norms are specifically excluded.

In the present case, the facts remaining unaltered, we find that the contract was concluded in Madrid; however, according to the invitation for applications, contracting was subject to the local law – that is, the law of the United States where the plaintiff worked – and under article 1.4.6 of the Unified Agreement, it is not applicable to personnel expressly subject to the foreign law, as is the case here.

Also, for determination of the applicable law, the Rome Convention acknowledges the free will of the parties, so that the applicability of any provision is contingent on the parties not having expressly agreed on that point. Article 1.4 of the Workers' Statute is only applicable absent express choice of another law".

XXII. CRIMINAL LAW

– *SJP* Madrid, 29 January 2001. *RJA* 2001\10.

Industrial property offence. Domain names. Legitimacy of a branch of a foreign company.

"Proven Facts: That. . . ., in his majority and having no criminal record, engages in the commercialization of financial market services in connection with the creation of tax-free companies, investment companies, re-invoicing of imports, bank accounts, etc. These services are offered by Amerinvest Spain, as associates of the Chase-Manhattan Group, by way of electronic mail or a web page clearly associated with the said group, or again directly claiming, in collaboration with other enterprises, membership of that group. The activity is advertised not only on the Internet but also in announcements placed in financial newspapers and gazettes, giving the impression that the entity offering these products is backed by Chase-Manhattan Corporation and thus causing confusion and leading to error of consumers, there being no relationship of any kind between the said corporation and the accused or any of the enterprises that he manages. Chase-Manhattan Bank, Chase-Manhattan Corporation and Chase-Manhattan are the owners of various trade marks registered in Spain in classes 16, 36, 35, 38, 39 and 41 of the international nomenclator".

"Legal Grounds:

First: . . . Art. 274 para 1) *CP* (Criminal Code) provides for the sanctioning of persons who, knowing of the existence of a Registered Trade Mark, infringe the exclusive rigbts of the owner of that Trade Mark for industrial or commercial purposes.

. . . The documentation submitted by the plaintiff demonstrates that Chase Manhattan Corporation is the holder of title in the trade marks Chase Manhattan Bank, Chase Manhattan, Chemical, Chase and Chase Investment Bank and can therefore legitimately bring the criminal action. Such legitimacy is questioned by the defendant's defence in the first point of its writ of provisional conclusions but it does not raise it as a prior issue or even mention it in the course of its statement. The basis for the claim of lack of legitimacy is that the plaintiff, *Chase Manhattan Bank Sucursal en España*, is not the holder of title in the above-named

trade marks, the holder of title being Chase Manhattan Corporation, a foreign financial holding company.

The ground posited by the defence must be dismissed, given that regardless of the nationality of the company, which under Spanish law is determined by incorporation and domicile as provided in art. 28 of the *CC* and in art. 5 of the *LSA*, its operations and jurisdiction are governed by the laws of the country where it is incorporated (as in the case of capacity) and by Spanish law as regards creation of an establishment. However, in all cases a branch is an extension of the principal, as defined in the Regulations of the Mercantile Registry (art. 295), being a secondary establishment having the status of permanent representative with some autonomy of management, through which the company undertakes all or some of its activities. Thus, the Spanish branch does hold title in the registered trade mark and can legitimately bring the action. Its legitimacy is further guaranteed under article 6 bis of the Paris Union Convention.

On behalf of Amerinvest, a company apparently incorporated in and under the laws of the State of Delaware (as documented in the writ of defence) and having no establishment in Spain, the defendant has been offering financial products of all kinds, ranging from high-income, risk-free investments to the incorporation of offshore companies, development of business strategies and international tax structures. Such offers are announced in financial newspapers or gazettes, associating Amerinvest with the Chase Manhattan Group (folios 7 to I0 of the proceedings). The weekly magazine *Interviú* (I6 to 22 November 1998) contains an extensive publicity article in which Amerinvest brazenly advertises ways of opening secret bank accounts, setting up tax-free companies in Europe and the USA or in tax havens in a context of tax evasion, linked to persons of public importance who have engaged in capital flight; moreover, the article associates Amerinvest with the Chase Manhattan Group, stating that it belongs to the same financial/business family without claiming membership of the group. Such claimed associations are repeated elsewhere, for example in the newspaper *Expansión* on 17/I1/1998, 18/1I/1998, 24/I1/1998 and 16/12/1998.

Alongside the above-mentioned advertising channels, the defendant uses other, more modern media, placing publicity associated with Chase Manhattan on the Internet. The web page http://www.chase-manhattan-group.com (folio 83) begins with a message of welcome to the Chase Manhattan group and there lists, among others, the company Amerinvest with links to Chase Manhattan Corporation, Chase Bank, Chase Manhattan Mortgage Corporation and others (folio 84). Among the pages in the domain http://www.chase-manhattan-group.com, we would cite http://www.chase-manhattan-group.com/amerinvest% 20sp/entertosp.htm, referred to in folios 108 *et seq.* of the proceedings, accessed by way of a Spanish flag (enter here) as cited in folio 83, from which – again associated with the Chase group in the welcome to the page or the same group's copyrighted sign – access is provided to the offers listed in the page; users clicking on 'tax-free companies' access the page taxfreesp.htm (folios 110 to 113); users clicking on 'off-shore companies' are led to the file offshoresp.htm (folio 114), in which the user can select

from a list of countries to obtain information about their tax benefits and other advantages. The page entertosp.htm affords access to 'secret bank accounts' at banksecretsp.htm – in construction – (folio 117) and 'addresses' at addressesp.htm, all of which are in Spanish and target potential Spanish-speaking customers.

The use of the name Chase Manhattan in the electronic mail address, in an Internet domain or in any other conventional advertising medium infringes the rights of the holder of title in the registered trade mark Chase Manhattan.

The defendant objects in defence that he is not a legal representative of Amerinvest; that this company is duly incorporated in and under the laws of the State of Delaware; that Chase Manhattan-Group Corporation is a company duly incorporated under the laws of the State of Delaware and that the Chase-Manhattan-Group domain is registered in the Network Solutions Inc. registry with the Name Servers NS1.DNS-HOST.COM (209.235.102.13) and NS2.DNS-HOST.COM (209.235.102.12), as accredited by the documents accompanying the writ of defence (folios 385 to 393 of the proceedings).

As to the first of the issues raised, given that Amerinvest has no branch in Spanish territory, is not registered with the Mercantile Registry and hence has appointed no administrators, renders no annual accounts, etc. – in other words, complies with none of the obligations of a company under the laws of the country where it carries out its registered activities – the defendant evidently cannot legally represent the said company, for the simple reason that it does not exist in Spanish territory.

The defendant states that his relationship with the company (presumably the company incorporated in the State of Delaware) was simply that of Commercial Agent; however, there is no sign of the normal status of an agent on commission as regards representation and action on behalf of the principal, rendering of accounts or any other such evidence. From the abundant documents on record – both those submitted and those seized in the search – it is plain that the defendant represents Amerinvest; witness the visiting card bearing the words . . ., Amerinvest Spain. The accounts, which were also seized, contain no entry relating to payment of an agent's commission. The defendant was unable to name any other commercial agent acting on behalf of Amerinvest when required to do so by writ of 21 October 1998 (folio 153).

Aside from the non-existence of Amerinvest Spain as argued above, for which he would be solely culpable under art. 28 *CP*, criminal charges can also be brought against the defendant under art. 31 *CP*, insofar as it can be established that the defendant at least acted voluntarily on behalf of Amerinvest.

The conflict between the name of the Interuet domain and the registered trade mark must be resolved in favour of the latter; the trade mark is the principal distinguishing sign of the enterprise in its commercial dealings and an essential element of consumer protection, hence the principle of protection of the trade mark, as a type of industrial property, of the accredited holder of title against anyone using another that is liable to confuse the consumer. The solution is analogous to that of a conflict between a registered trade mark and a trade name, which are

deemed identical where the same words are used but in a different order, gender or number, or when words are used with the addition or deletion of generic or accessory terms, articles, adverbs, conjunctions and so forth, the reason being that trade marks, and distinguishing signs in general, are essential to transparency in the marketplace in that they permit identification of the company providing a product or service.

Given the function of such distinguishing signs as both identifying and differentiating an enterprise, its products or services or its establishments, the competitive effort made by the owner of such signs neither can nor should be usurped by a third party. The owner of the trade mark enjoys the exclusive right to use it, and this right is violated when third parties use it to identify themselves with the former's establishment, good name, reputation, etc.

Whether the conflict between the Internet domain and the registered trade mark is a matter of criminal law is a separate issue. This will depend on whether the dominion name conflicting with the trade mark has been used for commercial purposes with criminal intent.

To resolve this issue, we must first determine what regulations are applicable in respect of registration of the domain name.

Registration of a domain name is contingent on good faith in the applicant, as stated in the Uniform Domain Name Dispute Resolution Policy (UDRP) adopted by the ICANN (Internet Corporation for Assigned Names and Numbers), which specifies that '. . . by asking us to maintain or renew a domain name registration, you hereby represent and warrant to us that (a) the statements that you made in your Registration Agreement are complete and accurate; (b) to your knowledge, the registration of the domain name will not infringe upon or otherwise violate the rights of any third party; (c) you are not registering the domain name for an unlawful purpose; and (d) you will not knowingly use the domain name in violation of any applicable laws or regulations. It is your responsibility to determine whether your domain name registration infringes or violates someone else's rights'.

The domain www.chase-manhattan-group.com was registered on 28 April 1998 in the name of Chase Manhattan Group Corporation, with Network Solutions Inc., an entity accredited by the ICANN and hence bound by the Uniform Domain Name Dispute Resolution Policy (UDRP). Under the UDRP there are arbitration services provided by entities recognized by the ICANN, which settle disputes over domain names that infringe an industrial property right; thus, in case no. D2000–0388 (http://arbiter.wipo.int/domains/decisions/html/d2000–0388.html) the WIPO Arbitration and Mediation Center examined the registration of the domain www.chasemanhattancorp.com and found in favour of Chase Manhattan Corporation; the factual background stated, among other things, that [the complainant] 'is a holding corporation whose subsidiaries are engaged in financial services. Chase National Bank . . . was founded in 1877. On March 31, 1955, the acquisition of Chase National Bank was effected by The Bank of the Manhattan Company and the resulting corporation was known as The Chase Manhattan Bank. In 1969, The Chase Manhattan Bank formed a one-bank holding company *viz.* the Complainant.

In the same year the shares of the Complainant corporation were listed on the New York Stock Exchange. On March 31, 1996, the Complainant merged with the Chemical Banking Corporation and the Complainant became what was then the largest bank holding company in the USA. Since 1877, the Complainant, its predecessors and subsidiaries, have used the words 'Chase' and subsequently 'Chase Manhattan' as part of their trade name. . . . The Complainant is owner of the . . . trade mark . . .'.

In light of the foregoing, there can be no doubt as to the bad faith of the defendant in bringing the action, since regardless of who owns the Internet domain, the name is an internationally-recognized trade mark, a fact of which the defendant must have been cognizant for the reasons stated. The latter cannot be recognized as holder of title in the domain, given that, among other things, he has no known relationship with the Chase Manhattan Group Corporation. What can be recognized is that he took advantage of it, undoubtedly in full awareness of who was the legitimate owner, to advertise financial services of all kinds in conventional media, including in the publicity the electronic mail address and the web page denominated Amerinvest@Chase-Manhattan-Group.com and http://www.Chase-Manhattan-Group.com, and for inquiries in Spanish AmerinvestSp@Chase-Manhattan-Group.com; this indicates an intent to attract customers in Spain and other countries, in violation of trade mark law in that he used a denomination corresponding to a trade mark duly registered by someone else since 1967 and internationally known, with intent to take advantage of the other's reputation for the purpose of attracting customers, who, trusting in the back-up of a major bank, might be persuaded to enter with the defendant into financial transactions which they would otherwise not agree to. . . .

Despite the demand by the owner of the trade mark and the injunction issued by tbe court that he cease to use an identical or confusingly similar name – issued on 21/10/1998 (folio 153) – the defendant did not cease such use. This was confirmed by the entry and search of the office located at c/ Francisco Giralde no. . . . and c/ Núñez de Balboa no. . . ., authorized by court order of 2/7/1999 (folios 277 to 284), which turned up orders for insertion of advertisements in the *Boletín de Bolsa, Economía y Finanzas* to appear on 26/2/1999 (that is subsequent to the injunction) in which financial products of the kind noted above were again offered as in association with the Chase Manhattan Group. Such association was also evident in the visiting cards likewise found in the search, and in the fact that he still had the web page associated with the lawful owner of the trade mark, with the aggravating circumstance that the resemblance was now not merely phonetic. On the web page http://www.chase-manhattan-group.com/bank/chaseoffice.html there is an image of the Chase Manhattan bank – as substantiated by a notarized statement submitted to the proceedings in response to the inquiry made on 11/1/2001 – which furthermore is the only 'active' link on that page and gives access to the official web page of the plaintiff (http://www.chase.com). The other link on the said page, a photograph referring to the CMG Group, has no content and simply returns the user to the main page. It should be noted that the page

http://www.chase-manhattan-group.com/bank/chaseoffice.html is not active in the English version but is active in the Spanish version.

The association of the activity with the Chase Manhattan trade mark, including the link to its official web page, is confusing to the consumer in that anyone engaging such services will undoubtedly be led to believe that they are guaranteed by a bank of acknowledged prestige".

XXIII. TAX LAW

– *STSJ* Basque Country, 26 February 2001. *JT* 2001\1702.

Personal Income Tax. Hispano-French Convention of 27 July 1973. Accreditation of the condition of cross-border worker.

"Legal Grounds:

. . . This administrative appeal has been brought against a decision of the Foral Economic-Administrative Tribunal of Gipuzkoa of 11 December dismissing claim no. 1177/1995, submitted in objection to a Personal Income Tax withholding effected in August 1995 by the appellant's employer.

The appellant's object in this action is the annulment of the said withholding, dated 31 August 1995, and subsequent withholdings effected by 'Euskal Kulturgintza, SA' during the years 1995 and 1996, and repayment of the monies withheld. The basis of the appellant's claim is that in respect of the said tax year the Foral Tax Office ought to have taken into account that the appellant was a cross-border worker and that under article 15.4 of the Hispano-Frencb Convention of 27 June 1973 (*BOE*, 7 May 1975) on avoidance of double taxation, he should pay tax only in his State of residence and hence should be repaid the monies withheld.

. . . As regards the principal ground of the appeal, this Court considers that the plaintiff's claim is justified.

As we ruled in decision 118/I999 (proceedings 2843/1996), 'In effect, as the State Central Office for Taxation has pointed out . . ., given the disappearance of border documentary formalities as specific and required evidence that the plaintiff is a cross-border worker, there can be no objection to the use of other general means of proof if they are sufficiently reliable. This is indubitably true of the set of documents appended to the administrative record . . . and referred to by the appellant, which bear witness to the fact that his place of residence was in the bordering French Department of *Pyrenées Atlantiques* and was demonstrably such as early as 1992 and 1993. Although the document specifically required under the bilateral Convention no longer exists, the circumstances that prompted the Convention of 1973 remain. Given that Member States of the European Community are free to regulate direct taxation, the Spanish and French States are fully entitled to demand personal taxes based on different criteria, hence giving rise to double taxation. For the same reason, the disappearance of the requirement of authorization for intra-Community emigration, which persisted until free movement of workers was introduced by Regulation 2194/91/EEC of 25 June, does not negate the underlying principles of the Convention, and therefore the definitions regarding cross-

border workers as set forth in the EEC Regulation of 1971 still apply. Therefore again, and finally, the Foral institutions of Gipuzkoa recognized a need to create a Registry of workers in such a situation, as enshrined in the provision referred to above. The added circumstance that the appellant is registered with the said Registry of Cross-Border Workers, as accredited by a certificate from the Direct Tax Management Service of the Revenue Department of Gipuzkoa . . ., would tend to confirm the applicability of the provisions of the Convention to the present case having regard to past tax years, inasmuch as the appellant's place of residence is not challenged as a fact but purely as a matter of documentary formalities, which obstacle, as we have seen, is readily overcome by consideration of other evidence supporting the actual facts'.

The foregoing is essentially applicable to the case here at issue, in that not only has the appellant been finally registered in the registry replacing that of the Convention, instituted by Foral Decree 90/1996 of 10 December (*LPV* 1998, 75) (*BOG* no. 241, 16 December) although not in existence in the 1995 tax year, of interest here (as certified on folio 24 of the plaintiff's evidence), but reliable documentary proof has been offered that in 1995 the appellant was taxed by the other State party to the Convention – especially folio 57 and documents contained in folios 26 to 38 of the record – thus constituting a case in which double taxation is not allowed".

– *STS* 18 September 2002. *RJ* 2002\8347.

Double taxation convention with Brazil. Tax base applicable to profits of an overseas branch of a Spanish company.

"Legal Grounds:

. . . In its Balance Sheets and Profit and Loss Accounts, the Sao Paolo (Brazil) branch of the *Banco Central Hispanoamericano*, SA (*BCH*) applied the rules of 'Monetary Correction' laid down in the Brazilian Corporations Act 6404/1976, which require that the historical vale of stable elements of the firm's assets – that is, fixed assets and liquid assets (capital and reserves) – be adjusted in accordance with a set of indices.

. . . art. 7.1 of the Convention provides: 'The profits of an enterprise in a Contracting State may be taxed in that State only unless the enterprise effects transactions in the other State by way of a permanent establishment there. In the latter case, the profits of the enterprise may be taxed in the other State, but only to the extent that such profits can be attributed to the permanent establishment'. The meaning of the provision is clear: having established the principle that a company's profits are to be taxed in the country of which it is a national, it makes an exception in the case of profits earned by a Spanish company's permanent establishment in Brazil (or vice versa), which 'may' be taxed in Brazil to the extent that they are imputable to that permanent establishment.

Section 2 of the same article 7 provides, as noted earlier, that 'When an enterprise from a Contracting State carries on (its activity) in the other Contracting State through a permanent establishment situated there, the profits attributed to it

in either Contracting State shall be the same as if it were a distinct and separate enterprise, carrying on the same or similar activities in the same or similar conditions and dealt with the enterprise of which it is a permanent establishment on an independent footing', which means that the branch opened by *Banco Central Hispanoamericano*, SA as a permanent establishment in Sao Paolo (Brazil) must be considered for tax purposes as if it were a different company, quite separate from the parent firm, whose profits must be imputed to it quite independently; and, if it is considered as a Brazilian enterprise, these must be determined in accordance with the laws of Brazil.

The foregoing does not imply that the Spanish Revenue Department must apply Brazilian law on monetary correction (as the appellant appears to suggest) but that the profit imputable to that branch of the bank for the purposes of the Spanish Company Tax must be as determined in Brazil in accordance with Brazilian laws. The amount so calculated must constitute the tax base both in Spain and Brazil, but in the former case (Spain), under art. 23 of the Convention, to avoid double taxation the amount paid in the equivalent tax in the latter (Brazil) must be deducted from the resulting quota.

Therefore, it is not lawful for the Spanish Revenue Department to determine the tax base of the said branch unilaterally and according to its own rules; the tax base must be determined according to the Brazilian rules, and the result must likewise be accepted as the tax base in Spain.

In conclusion, the net profit or tax base of the Sao Paulo (Brazil) branch of the *Banco Central Hispanoamericano*, SA for the purposes of Spanish Company Tax must be the same as is determined in accordance with the laws of the other country and must be accepted by the tax authority. The Spanish Revenue Department may not make further imputations or adjustments to that tax base, on which Spanish Company Tax must be paid net of the equivalent tax paid in Brazil".

XXIV. INTERLOCAL CONFLICT OF LAWS

– *SAP* Vizcaya, 15 June 2001. *AC* 2001\1587.

Consequences of a will made according to the Civil Law of the Basque Country by a person not possessing regional citizenship. Applicability of the Civil Code. Non-nullity.

"Legal Grounds:

. . . the object of the appeal is to determine specifically: 1) the legal consequences ensuing from the fact that Mr. . . . made a will dated 12 July 1989 in accordance with the Law of 30 July 1959 on Compilation of the Foral Civil Law of Vizcaya and Alava, when at the time of making the will he did not in fact hold regional citizenship of Vizcaya . . .

. . . With regard to the first issue, according to the plaintiff the fact that the will was made in accordance with regional civil law even although at that time the testator did not possess regional citizenship and hence the applicable law was not that regional law but the common law, specifically the Civil Code (*CC*), does not

render the will totally void but only annuls the appointment of heirs in so far as it prejudices the disinherited, which under article 851 *CC* would mean that the defendant is entitled only to the part due her of the first third portion. For her part, the defendant argues that the will is totally void and without effect, having been made by fraud in law, and that the applicable doctrine is that established by Supreme Court decision of 5 April 1994.

We neither share the view of the defendant and appellee nor feel bound by the doctrine set forth in the cited decision – which as a single decision does not constitute jurisprudence and which besides deals with a case not exactly the same as the present one – in that in the former the testators made the will after having gained civil citizenship of Vizcaya and so registered with the Civil Registry, whereas in the latter this was not so.

In the present case the purport of the will was to appoint the plaintiff sole and universal heir to all the testator's goods, rights and shares, to the exclusion of all other descendants, and hence the defendant, the testator having declared that he possessed civil citizenship of Vizcaya and was thus subject to the provisions of the Compilation of Civil Law of Vizcaya, in force at that time.

The key issue in the case, above all from the defendant's point of view, is the consideration that Mr. Domingo R. made a will in accordance with foral law, constituting fraud in law, plainly with the intention of disinheriting her, which he could not have done without just cause had the will been made in accordance with the common law, which was the duly applicable law.

That said, however, absolute nullity (article 6.3 *CC*) is not the same as fraud in law (article 6.4 *CC*). Fraud in law does not necessarily entail the nullity of a legal act but simply causes the due application of the regulation the fraud was intended to evade, and the existence of such fraud may cause total nullity or some other effect. It is neither an imperative nor still less a categorical consequence of fraud in law that a false claim of civil citizenship, whether in error or with malicious intent, must inevitably cause the absolute nullity of the will.

In our view, given that the testator claimed civil citizenship that he did not possess at the time of making the will, especially considering that this constitutes fraud in law, and given that the object is due application of the regulation that the testator sought to evade, we are bound to inquire what the applicable regulations are in accordance with the negated civil citizenship, which of these are essential or dispensable, which are imperative or prohibitive and what is the effect of the latter in the event of contravention, given that such effect may not be nullity in law.

The law states that where there are forced heirs the testator may only dispose of his goods in the manner and subject to the limits established in articles 806 *et seq. CC* . . ., that the *legitime* is that portion of the estate reserved by law to certain heirs – hence the term 'forced heirs' – (article 806 *CC*), and that the testator may not deprive his heirs of the *legitime* other than in cases specifically defined by the law (article 813 *CC*, as it relates to articles 848 *et seq.* regulating disinheritance). It follows from this that the *legitime* system is imperative in the sense

that it cannot be set aside by voluntary decision of the testator. Nevertheless, if the *legitime* system is imperative in that it cannot be set aside, this does not mean that infractions of the system necessarily cause total nullity of the provisions of the will. The legal attribution of civil citizenship as such is binding and cannot be ignored, but testamentary provisions conflicting therewith are not automatically void; rather, as a safeguard to the system of legal attribution, there are compensatory legal mechanisms whereby the provisions of the will can be adjusted to the rules of inheritance appropriate to the testator's actual civil citizenship.

The will at issue contains an unjustified clause which *de facto* constitutes unwarranted disinheritance not authorised by the Civil Code (articles 813 and 848 *et seq. CC*). However, unwarranted disinheritance does not cause nullity of the will but, as provided in article 851 *CC*, annulment of the appointment of heirs in so far as this prejudices the disinherited; and this is precisely the effect that the testator sought to evade by claiming the foral law.

Therefore, the only question arising from article 851 *CC* is how to determine the extent of the rights of the disinherited heir, that is whether these entitle her to her portion of the whole *legitime*, to the basic third and the undisposed part of the second third, or whether she is only entitled to her portion of the first third of the *legitime*. . . .".

– *SAP* Navarra, 16 November 2001. *AC* 2001\2388.

Determination of the law applicable to an advertising contract. Applicability *ex officio* of the rules of inter-regional law.

"Legal Grounds:

This action was brought in connection with an advertising contract concluded between the parties, . . .

. . . The default is a matter of record, but the extent to which this prejudiced the plaintiff is quite another matter. Nevertheless, the extent of that prejudice does not affect the fact that there has been default. . . .

There is a subsidiary claim that Law 518 of the New Fuero is not applicable because the contract was not made in Navarra. This issue was addressed and debated in depth in the original proceedings, as witness the fact that the sentence here challenged clearly expresses the view that the amount of the compensation is excessive, but that no other solution is possible under the provisions of the said Law. This is therefore not a 'new issue' as claimed by the appellee . . . and moreover, it is an issue to be judged *ex officio* by the Court (art. 12.6 *CC* as it relates to art. 16.1 *CC*; this was further affirmed by decision of the High Court of Navarra of 8 March 2000 [*RJ* 2000, 6112] in an *ex officio* ruling on a question of inter-regional law, which was in fact cited by the appellee although in connection with a different matter).

To determine whether the contract was subject to foral law, art. 16.1 of the Civil Code directs us to the criteria set forth in Chapter IV of the Preliminary Title of that Code. Specifically, art. 10.5 provides that 'Contractual obligations shall be

subject to the law specifically cited by the parties, provided that this has some connection with the business concerned; failing that, the common national law of the parties; failing that, the law of their common place of residence; and in the final resort, the law of the place where the contract was formalized'. Clearly, there is no submission to the foral law of Navarra, submission to the courts of Pamplona being purely procedural rather than an acceptance of the applicable substantive law. There is no law in common, as the two parties possess different civil citizenships. Again, the habitual places of residence – Vitoria and Pamplona – are different; and finally, the contract was not formalized in Navarra. Crucial in this respect is the statement by Mr. L., a member of *Aspe's* advertising department until October 1999, who stated that the contract was signed by the plaintiff in Pamplona, and as he had no power of attorney from 'Aspe', it was later signed by the defendant in Vitoria (response to question five and to cross-question five, at folio 303). The appellee cited this response to claim that the contract was formalized in Navarra, but in fact it signifies the opposite: it was signed in Pamplona and in Vitoria, or, if it is assumed that the agreement comes into force with the consent of the last party to sign, then in Vitoria. But by no means in Navarra. For it is also clear that although the negotiation was undertaken by a member of *Aspe's* sales department, he lacked real power of consent, and therefore the contract became valid only when signed by *Aspe* in Vitoria. It is also irrelevant whether the contract was printed at the plaintiff's offices in Pamplona or whether the negotiations took place in Pamplona (the latter point being unsubstantiated), since the 'place of formalization' obviously means the place where the contract was validated by the consent of both parties – and the final consent, that of the second party who signed in acceptance of the will of the first party, was not given in Navarra.

The appellee's argument is based on a decision of the High Court of Navarra of 8 March 2000. However, this simply rules that if a contract containing a penalty clause is formalized in Navarra, it comes under Law Ley 518 of the New Fuero, and that is not the issue here. The question is whether or not the contract was in fact formalized in the Region of Navarra. The cited decision ruled that the foral law was applicable because the contract concerned a property situate in Tudela (Navarra), and because the penalty clause was added to the verbal agreement in Tudela; the cited decision does not therefore assist the appellee's argument but deals with a separate issue.

In light of the foregoing, we cannot accept the view taken by the court at first instance. The applicable law is not Law 518 of the New Fuero but the common law enshrined in the Civil Code, which in this respect provides that the courts may in equity modify the penalty when the principal obligation has been partially fulfilled by the debtor (art. 1154 *CC*)".

– *SAP* Navarra, 1 October 2001. *AC* 2002\582.

Succession. Law applicable to validity of will. Determination of regional citizenship.

"Legal Grounds:

The issue in this case is whether the mother of both litigants, Ms. Bienvenida G., possessed regional citizenship of Navarra entitling her to make a will in accordance with the special rules of the foral law of Navarra. If she was so entitled, the nuncupative will made in 1993 before the Notary of Bera de Bidasoa would be valid; otherwise, this will would be void, and the valid will would be that made before the Notary of Vitigudino in 1983. The crux of the matter, then, is whether the testatrix lived for ten consecutive years in Navarra; given that she made no attempt to acquire such regional citizenship by application to the Civil Registry after two years' residence, her acquisition of such citizenship would have been subject, by default, to art. 14.5.2 *CC*. . . .

The only relevant issue in the case is therefore to determine whether it is substantiated that she lived for ten consecutive years in Navarra and to assess the various items of evidence submitted in the proceedings. Other considerations raised in the appeal, essentially in grounds One and Two, as to whether the testatrix believed that she possessed regional citizenship of Navarra or her personal intention and desire was to dispose of her estate in accordance with Navarrese custom, are irrelevant. In order to make a will 'according to the custom of Navarre', the testator must possess regional citizenship of Navarre, acquired by one of the means set forth in art. 14.5 *CC*; the desire, the conviction or the will of the testator to feel Navarrese or to make a will as such is not sufficient.

The evidence in the record of proceedings as to the place of residence of the litigants' mother since 1975 is profuse and at times contradictory. . . . In this respect, the jurisprudence has it that registration in the voting list may be indicative but is not in itself proof of actual residence . . .

What is really important is that all those indications of the mother's residence in Bera, which as noted are not entirely convincing, are contradicted by a number of indications to the contrary. In short, we cannot consider proven the claim that the mother lived in the Region of Navarra long enough to qualify for Navarrese regional citizenship, that is for ten consecutive years".

– *SAP* Lérida, 17 December 2001. *JUR* 2002/47611.

Law applicable to the rights of the surviving spouse. Law governing the effects of marriage.

"Legal Grounds:

The original decision dismissed the action brought by the plaintiffs to be declared heirs *ab intestato* of their late son Fernando, concluding that under Art. 9.8 of the *CC* as it relates to art. 9.2 of the same statute, and likewise under art. 333 of the *Codi de Successions*, the Catalan law is applicable and hence the declaration of succession in favour of the defendant, wife of the deceased, is correct.

In support of their appeal, the appellants repeat that their son possessed Aragonese regional citizenship from the time of his birth, that this status was unaffected by his marriage and that it has not been substantiated that he lived for ten years in

the city of Lleida or that he expressed a desire to acquire regional citizenship of Catalonia, . . .

. . . In light of the foregoing, the Court, having re-examined the evidence submitted by each party and assessed it as a whole, is in accord with the conclusions of the court *a quo* as regards the Catalan regional citizenship of Fernando Fernández Pisa at the time of his death, the abundant documentary evidence accompanying the writ of response being sufficient to establish continuous residence in the city of Lleida for more than ten years . . .

. . . The appellants challenge the original court's interpretation in respect of art. 9.8 of the *CC*. This article provides that succession *mortis causa* is to be governed by the national law of the deceased at the time of death, further providing that the rights vouchsafed by law to the surviving spouse are to be governed by the law regulating the effects of matrimony, always without prejudice to the portions legally reserved to descendants. According to art. 9.2 *CC*, the effects of matrimony are to be governed by the common personal law of the spouses at the time the marriage took place; failing a common law, by the personal law or law of the common place of residence immediately following the marriage; and failing such residence, by the law of the place where the marriage was celebrated. In the present case, the effects of the matrimony between the plaintiffs' son and the defendant are governed by the law of Catalonia, this being applicable as the personal law of both spouses in consideration of their regional citizenship (art. 16.1 *CC*); moreover, even supposing that Aragonese regional citizenship were accepted as valid (which it is not, as noted), the same regulations would still apply to the marriage, given that absent a common personal law and the spouses not having expressly chosen one as set forth in the said provision, the applicable criterion is the habitual place of common residence immediately following the marriage, and it has not been disputed that after marrying in the city of Lleida, the spouses were habitually resident there until their deaths. Therefore, the rights of succession pertaining to the surviving spouse must be governed by the law of Catalonia, in which respect this Court is in full accord with the arguments set forth in the original decision, which are entirely consistent with the provisions cited above; we cannot accept the interpretation put forward by the appellants to the effect that the expression 'the rights vouchsafed by law . . .' refers to the law of the deceased's regional citizenship – that is, the law governing succession – which they allege is the law of Aragon. Were this interpretation to be entertained, the referral to the law regulating the effects of matrimony would be unnecessary and void of meaning, since the personal law of the deceased, whatever it was, would apply unless both laws vouchsafed the same rights of succession. But the object of the provision is precisely to deal with any clashes between two sets of regulations, to which end it stipulates the law governing the effects of matrimony, without prejudice to the portions legally reserved to descendants; in this respect it expressly provides that such portions are to be determined by the law governing the succession, but the same is not true of the rights of succession of the widowed spouse. Furthermore, it having been established that the deceased acquired Catalan regional citizenship, his succession

is subject to the civil law of Catalonia and hence the applicable statute is the *Codi de successions per causa de mort en el dret civil de Catalunya*, Law 40/1991 of 30 December, arts. 323 and 333 of which provide that in the event of succession *ab intestato*, the deceased having no children or descendants, the surviving spouse must succeed. The appeal is therefore dismissed and the decision here contested is confirmed in its entirety".

– *SAP* Balearic Islands, 10 September 2002. *JUR* 2002/272157.

Law applicable to determination of the regime of matrimonial property. Marriage contracted before the entry into force of the Constitution. Applicability of the national law of the husband.

"Legal Grounds:

. . . In opposition to the appeal and in defence of the terms of the original decision, the defendant and appellee alleges that article 14 of the Civil Code prior to the reform of 17/3/73, which provided that 'the wife shall have the same condition as her husband', and likewise article 9.2 of the Civil Code after the said reform, which takes as binding 'the national law of the husband at the time of marrying', are incompatible with the Constitution of 1978, and specifically with articles 14 and 32.1 thereof, concluding therefore that the original decision correctly cited section three of the repeal provision in the Constitution, whereby the foregoing regulations were without effect, and that the applicable criterion was therefore the habitual residence of the spouses at the time of marrying – a neutral criterion concordant with article 107 of the Civil Code and with article 9.2 thereof as established by Law 11/90, 15 October.

This Court cannot entertain such an interpretation, as set forth in the original decision and defended by the defendant and appellee in that while as from the approval of the Spanish Constitution of 1978, by virtue of the third repeal provision it could be concluded – as recently confirmed by Constitutional Court decision of 14/2/2002 (*RTC* 2002, 39) declaring unconstitutional article 9.2 of the Civil Code as contained in the Articles approved by Decree no. 1836/1974, 31 May, in the point that specifies as applicable 'the national law of the husband at the time of marriage' – that such imposition of the law of the husband at the time of marriage, although a residual nexus for determination of the law applicable to their personal and patrimonial relations, entails differential treatment of men and women despite the fact that their positions as regards the marriage are equal, and conflicts with articles 14 and 32 of the Spanish Constitution, the first of which guarantees equality without discrimination by reason of sex and the second the right of men and women to enter into matrimony in full equality before the law. Nonetheless, however right the implied reproach of former provisions may be, it is still true, as argued in the decision of Bench 1 of the Supreme Court of 6/10/86 (*RJ* 1986, 5327), that in the case of matrimony contracted prior to the Constitution, the principle of judicial protection is better served by upholding the inviolability of marital financial arrangements made before the present Constitution came into force, given that marriage articles are legal contracts immediately enforceable upon mat-

rimony and are drawn up in accordance with the law in force at the time of marriage. Thus, as is stressed in the best doctrine following in the steps of European systems, this conclusion is consonant with the general legal principles of unity and immutability, which apply mainly in terms of acquired rights, except where the spouses have drawn up marriage articles. This was not the case in the proceedings analysed by the Supreme Court or in the case here at issue, in both of which the marriage took place long before the promulgation of the Constitution.

Briefly, then, article 14 of the Constitution, which establishes the equality of Spaniards of either sex before the law and forbids any discrimination by reason of birth, race, sex, religion, opinion or any other personal or social condition or circumstance, raises the problem of whether or not, given the direct applicability of the principle of non-discrimination by reason of sex, the personal law of the male spouse ought to prevail in determining the regime of matrimonial property of the spouses in the event referred to in points 2 and 3 of article 9, which is extensible to inter-local law under the first rule of article 13. In answer to this problem, the original decision proposed as an alternative criterion for determining the regime of matrimonial property of the spouses where they possess different regional citizenships, that the personal law of the husband be substituted by a different nexus such as the habitual place of residence of the spouses at the time of marrying, citing as authority article 107 paragraph 1 of Law 30/1981, 7 July (*RCL* 1981, 1700; *ApNDL* 2355). The court of instance explained that this would constitute an objective nexus common to both spouses, fully compatible with the new principle of equality of treatment in their interpersonal relations, which in the absence of marriage articles would be applicable in cases where the spouses possessed different regional citizenships. In such a situation, under this approach the lack of a common regional citizenship would prompt the applicability of this other nexus by analogy with article 4 point 1, and also arguably with article 3 point 1 of the Civil Code, which nexus would be made possible by the third repeal provision of the Constitution.

Nevertheless, this Court takes the view that the doctrine referred to is not applicable to the case here at issue and therefore upholds the present appeal. The new constitutional principle of equality of the sexes cannot be held to cause review of a regime of matrimonial property constituted specifically on 15/1/66, the date on which the spouses were married in the church of San Miguel in the town of Felanitx without making a marriage settlement, and therefore the regime of matrimonial property must stand as it was under the law that was then in force and remained applicable until the personal separation of the spouses in July 1997, before which time they made no marriage settlement to modify the conditions holding under the law in force at the time of the marriage, that is, prior to the Constitution.

It must be said in this respect that with the regard to the present case, the conclusion set forth in the foregoing paragraph is supported by the prohibition of retroactivity as set forth in article 9 of the Constitution. The original decision is clearly retroactive in that the application thereto of the new regulations would affect the legality of situations existing prior to their enactment. The regime of

matrimonial property comes into being with the act of marriage and continues in effect thereafter; it cannot be modified by a statute which, although enshrined in the Constitution, was not promulgated until more than ten years after the marriage in question.

In effect, although the jurisprudence holds that preferential treatment of the man over the woman is both discriminatory and unconstitutional, a doctrine consolidated by rulings of the Constitutional Court, this is to be understood as referring to situations arising after the promulgation of the Constitution, which means that the repeal is not fully retroactive and situations of matrimonial property constituted long before the Constitution cannot be reviewed in the light of the regulations in force today. Indeed, were we to allow full retroactivity as the appealed judgment in essence propounds, innumerable presently stable family situations would have to be reviewed, to the detriment of the principle of legal security, likewise enshrined in article 9 of the Constitution. The first concern must therefore be to preserve legal security, especially in a case like the present one in which the nexus judged discriminatory by the Constitution of 1978 was supplementary in default of a specific expression of will by either spouse and could moreover have been changed at any time by means of a marriage settlement, which according to the record neither spouse ever proposed.

This Court therefore upholds the appeal to the effect that, given the regional citizenship of the husband at the time of marriage, the regime applicable to the spouses is that of community of acquisitions.

. . . It is therefore concluded that the spouses were subject to the legal regime of community of acquisitions provided by the Civil Code in article 1316 as it relates to article 9 sections 2 and 3 in the version in force at the time of marriage, and to article 16".