Spanish Judicial Decisions in Private International Law, 1999 and 2000

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I. SOURCES OF PRIVATE INTERNATIONAL LAW

II INTERNATIONAL JURISDICTION

1. Family

– STC 13 March 2000 (*BOE* 90 (supplement), 14.4.2000)

Modification of measures imposed under a foreign decree of divorce. Maintenance and visits. International judicial competence and functional competence. Article 24 *CE*.

"Legal Grounds:

...

Second: ... Absent any problem as to objective competence, despite the fact that the Provincial High Court (AP) decision is grounded basically in art. 55 *LECiv.*, there is at least one basic consideration which leads to the conclusion that the issue resolved in the contested decisions is one of international judicial competence – namely the meaning and the scope of the actual decision.

In the resolution of any other issue, if one court declares itself incompetent, the question necessarily arises of what other court is competent (arts. 51 and 52 *LOPJ*) in pursuance of art. 24.1 *CE* as interpreted by Constitutional Court decisions 49/1983 of 1 June and 43/1984 of 26 March, given that there must be some Spanish court which is competent in objective, functional and territorial terms. However, when a court rules that there is no international competence or 'jurisdiction' (according to the terminology used in the second point of law cited by the AP and in the heading of Title I, Book I of the *LOPJ*, which sets forth the specific rules governing such competence), there is no point in declaring another court competent, as this would be tantamount to ordering the courts of another sovereign State to decide on the matter.

This applies to the decision contested in these proceedings, which must therefore be considered as resolving a question of international judicial

competence. Moreover, there can be no doubt that this was the material issue concerned, given that neither the Court of First Instance nor the Provincial High Court raised the question of what Spanish court was competent to judge the appellant's case. The only issue resolved by both courts was that they were not competent to judge an action for visiting and maintenance rights entailing modification of the terms of a divorce decree issued by a foreign court.

It follows from the foregoing that by acting in this way the civil courts declined to pronounce on the legal basis for the claims brought by the appellant as regards his legitimate rights and interests. Thus, this appeal for constitutional protection concerns the fundamental right established in art. 24.1 *CE*, specifically as it relates to the availability of justice.

Third: This court has repeatedly declared that the core of the fundamental right to judicial protection as established in art. 24.1 *CE* is access to jurisdiction. Everyone has the right to have matters of dispute regarding rights and legitimate interests resolved by a court unless there is some reason preventing this, enshrined in a specific legal provision which at the same time respects the essence of that fundamental right (SSTC 13/1981 of 22 April, F. 1; 21/1981 of 15 June, F. 15; 119/1983 of 14 December, F. 1; 93/1984 of 16 October, F. 5 a, and 36/1997 of 25 February, F. 3). A judicial interpretation of the corresponding procedural obstacle must be guided by the criterion of *pro actione* which, while keeping in sight the *ratio* of the rule and a sense of proportionality between the magnitude of the defect detected and the sanction attaching thereto, will not prevent consideration of the crux of the issue through mere formalisms or unreasonable interpretations of the rules of procedure (SSTC 126/1984 of 26 December, F. 3 c; 164/1986 of December, F. 2; 120/1993 of 19 April, F. 5, and 115/1999 of 14 June, F. 2); for when non-admittance closes the door to procedure – that is, when it prevents judgment on the substance of rights and legitimate interests put to the protection of the courts – then 'the exercise of constitutional control must be all the more rigorous, since what is involved is the right that lies at the heart of effective judicial protection' (STC 16/1999 of 22 February, F. 2, following SSTC 13/1981 of 22 April, F. 1; 115/1984 of 3 December, F. 1; 154/1992 of 19 October, F. 2, and 112/1997 of 3 June, F. 3).

Fourth: The answer to this plea for protection will therefore be determined by a comparison of the contested decision and the ends that the rules governing international judicial competence are intended to preserve, in order to ensure that the relationship between the two is not clearly disproportionate while giving due consideration to the interests of the parties present and the relative hardship caused them by non-admittance and also to the specific circumstances of the case. To that end it will be well to briefly summarize the rationale behind the rules that may have led to the decision here considered, strictly within the context of civil proceedings to which this case is necessarily confined.

In this connection it should be said that all the rules governing international judicial competence (that is, the situations in which the laws

of a State consider its own courts competent to judge a suit, strictly within the limits imposed by International Law as regards a State's jurisdiction) must first and foremost meet two criteria which may not be readily reconciled. In the first place, no-one may be required to exercise unreasonable diligence or accept excessive burdens in order to exercise his right of legal defence; this means that the defendant in civil proceedings may only be subjected to a given jurisdiction if the circumstances of the case are such as to indicate that the cost of exercising the right of defence will not be disproportionate. In the second place, there must be a reasonable expectation of success for an action in justice to be brought.

For the purposes of the present case, that is in essence the rationale behind our rules of international judicial competence in civil matters, and the rules specifically governing cases like the one brought before the Spanish courts are a concrete manifestation of that rationale. It is not the task of this Constitutional Court to judge the matter at issue. Whether the actual subject be conjugal relations, parent-child relations or maintenance, the applicable rules are those set forth in art. 22 *LOPJ*, which in turn constitute the simple practical application of the constitutional requirements and principles referred to above.

Fifth: In light of the foregoing, having set these rules and the reasoning behind them against the specific decisions at issue here, amounting to a declaration that the Spanish courts were not competent to judge the matter, we find that the said declaration infringed the fundamental right to effective judicial protection.

In fact the 'lack of competence' adduced in the decisions of the Court of First Instance and the Provincial High Court is based not on any rule of international judicial competence but on a simple rule regarding functional competence. Under art. 55 of the *LECiv.*, it can undoubtedly be argued, as did the contested decisions, that the power to modify the measures decreed in a suit for separation or divorce lies with the court that issued such decrees. However, this rule in fact applies to the Spanish courts, the only courts subject to Spanish Law, whose various powers are demarcated and organized by this rule in order to prevent chaos in their execution, as the Provincial High Court writ graphically states.

Hence, in refusing to consider the complaint brought by the father of the children, the contested decisions effectively denied that any Spanish court was competent to judge his claim. Moreover, in citing a functional rule designed to apportion competence among the various Spanish courts, these courts denied access to jurisdiction on the basis of a rule unrelated to the decision concerned – a rule rooted in principles and requirements quite different from those that demarcate the jurisdiction exercised by the Spanish courts and the jurisdiction exercised by the courts of other countries. In the present case, these competences are specifically those established by the current *LOPJ* of 1985, and particularly by article 2 as regards civil matters.

Given that the rejection of the suit, and hence the refusal to decide on the substance of the claim, is based on a rule not applicable to the declaration of lack of international competence, we find that the right to effective judicial protection has been infringed. To deny the possibility of a decision by the Spanish courts on the substance of the claim, whatever that decision may be, on the basis of rules other than those that embody the delicate balance required by the Constitution in determining the international judicial competence of our courts, is not only disproportionate in respect of the purposes of legal provisions barring examination of the case but is to deny any importance to such purposes and to the specific rules that implement them. The international judicial competence of the Spanish courts in civil matters is determined by their legal regulation – that is, art. 22 *LOPJ* – irrespective of the various international conventions which are not applicable here. It is to these regulations alone that we must look for a basis on which to tackle the issue of whether our courts can judge a given claim, for only these regulations meet the set of requirements that may in some exceptional cases cause the Spanish State to decline judicial protection in a specific case.

It is therefore not the task of this Constitutional Court to determine where the defendant and the children of Mr. I. are domiciled, nor in short to determine whether or not our civil courts possess jurisdiction in the case concerned. They may be judged competent under the general rule whereby our courts are competent when the defendant is domiciled in Spain (art. 22.2 *LOPJ*), or the same conclusion may be reached on the basis of the special rules as applied to the various criteria listed in section 3 of the said article. However, it is not the object of these constitutional proceedings to resolve the debate between the parties on these points. Art. 24.1 *CE* guarantees that citizens seeking justice will have a decision on their claims founded in Law and where applicable substantiated in proceedings where they are allowed to make and prove their allegations with all due guarantees. It is in such proceedings, before the civil courts, that the various points in the dispute brought to this court by the parties must be resolved. The function of this court is confined to guaranteeing that the courts specializing in family law provide judicial protection as required by the Constitution.

This court therefore sets aside the declaration of non-competence of the Spanish jurisdiction, so that the civil courts may pronounce anew on the procedural issue of jurisdiction in accordance with the criteria listed in the current Law on the matter, in strict observance of the principle of *pro actione* and having due regard to all the facts of the case, including the attempt by the appellant to bring his claim before the courts of the State of Florida".

– STS 15 December 1999 (*RJA* 1999\8229)

Recognition of Spanish daughter by unmarried Argentinian couple. Competence of the Spanish authorities. Art. 22-3 *LOPJ* considered as exclusive jurisdiction.

"Legal Grounds:

First: The appellant defendants allege in the first place infringement of art. 63 as it relates to art. 51 *LECiv.*, as a ground for denial of the competence of Spanish courts to judge the case and hence to resolve the claim for recognition of descent out of wedlock brought by the plaintiff, ... the defendants possess Argentine nationality and are resident in the city of Buenos Aires ... This allegation is also rejected on material and procedural grounds – that is, art. 51 *LECiv.*, with which art. 117 *CE* concords, provides that the ordinary jurisdiction is the only jurisdiction competent to judge civil matters arising in the Spanish national territory between Spanish nationals, foreign nationals or Spanish and foreign nationals, while under art. 533-1 a dilatory defence may be entered adducing lack of jurisdiction, an issue which has already been decided. Art. 51 obeys the criterion of territoriality followed by most States, without prejudice to the terms of international conventions and agreements entered into by Spain. The jurisprudence of this court has tended to apply that precept regardless of whether a specific case conforms to the law of Spain or of the foreign country, which is a separate issue (*Inter alia* Decisions of 17 Oct. 1901, 17 Jan. 1912, 30 May 1961, 16 Jul. 1983 and 9 Apr. 1991). The claim having been brought in Spanish territory (Decision of 20 Jul. 1992) and the plaintiff claiming descent being Spanish, competence is inherent to the national sovereignty. Competence is the delegation of that sovereignty and cannot be assigned or declined in favour of another State except by express provision under a Treaty. Given that the defendants are subject to the jurisdiction of our courts, they are likewise subject to the regulations governing competence contained in arts. 62 *et seq* of the *LECiv.*, as provided in art. 70 thereof, and while art. 63-1 of the said Law provides that the appropriate jurisdiction for the determination of competence in respect of claims regarding civil status is that of the place of domicile of the defendants, it must be determined whether the defendants are domiciled or resident in Spanish territory; if that is not the case, they must be summoned in the place where they are at the time (art. 69 *LECiv.*). Prior to the publication of the *LOPJ*, the sweeping nature of art. 51 allowed the extension of the national jurisdiction to all kinds of matters (Decision of 10 Nov. 1993). Since the publication of this Law, the limits of competence of our courts are more precise and more imperative. Thus, art. 22-3 provides that Spanish courts have exclusive jurisdiction over civil suits concerning descent where the child is habitually resident in Spain when the suit is brought or where the plaintiff is Spanish. That this condition is met by the plaintiff in this case has been sufficiently proven and has not been expressly contested.

...".

2. Contracts

– STS 24 April 2000 (*RJA* 2000\5504)
Contract of employment. Services rendered abroad. Subjection

"Legal Grounds:

...

Third: The rationale behind the conclusion that the Spanish social jurisdiction is competent to judge the case may be summarized as follows: 1) under art. 25 of the *LOPJ* there are various points at which the competence of the Spanish labour courts connects with some foreign element, several of which arise in this case (the contract of employment was concluded in Spain, the defendant is domiciled in Spain, and both employer and employee possess Spanish nationality; 2) as we shall see shortly, this precept of internal law is not only compatible but entirely in agreement with the provisions of the international treaties and conventions on the subject to which Spain is a party, which treaties and conventions apply to litigation in connection with contracts of employment; 3) art. 2 of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters in general provides that the jurisdiction 'in civil and commercial matters' (for the purposes of the Convention 'labour' matters clearly come under the heading of 'civil matters') is the domicile of the defendant, which in this case is the Ministry of Education and Science of Spain; 4) under art. 5.1 of the Brussels Convention, the plaintiff may but need not take action in the courts of the country 'in which the employee habitually works', which option the plaintiff in this case declined to exercise; 5) art. 5.1. of the Brussels Convention further entitles employees to sue their employers 'in the court of the place where the establishment that contracted the employee is or once was situated', which is evidently a court or other organ of social jurisdiction in Spain; 6) art. 17 of the Brussels Convention restricts jurisdictional pacts or conventions attributing jurisdictional competence 'in respect of individual contracts of employment', requiring that to be valid such pacts or conventions must either be 'subsequent to the commencement of litigation' or be invoked 'in courts other than the court of domicile of the defendant or of the court indicated in point 1 of art. 5' (recently reproduced), which requirements are clearly not met by the jurisdictional pact in the contract of employment entered into by the plaintiff and the Ministry of Education and Science; 7) complaints arising in connection with contracts of employment are not mentioned in art. 16 of the Brussels Convention, which determines 'exclusive jurisdiction' in respect of different types of proceedings 'regardless of domicile'; and finally, 8) as explained in detail in the above-mentioned Decisions of this court of 17 Jul., 29 Sept. and 20 Nov. 1998, it is one thing to determine the legal/labour regime or set of substantive rules applying to contracts of employment in which there is a foreign element, an issue regulated in the 1980 Rome Convention and in various internal statutes (art. 10.6 of the *Cc.*, art. 1.4 of the *ET*, L 45/1999 of 19 Nov. on trans-national movements of workers), and it is quite another thing to determine what jurisdictional organs are competent to resolve cases relating to the fulfilment or performance of contracts of employment.

The decision here under appeal was incorrect due to confusion of the substantive and the procedural aspects of the case and failure to take into account the restriction in the Brussels Convention regarding jurisdictional pacts in contracts of employment and must therefore be amended in the terms set forth in this decision on unification of doctrine".

3. Non contractual obligations

– SAP Valladolid 22 September 2000 (*Colex Data*)

Traffic accident in Portugal. Portuguese vehicle. Lack of competence. Hague Convention on the Law Applicable to Traffic Accidents (1971).

"Legal Grounds:

...

Second: ... And while the court *a quo* is aware that art. 22.3 of the *LOPJ* extends the competence of the Spanish courts to take in cases concerning the performance of extra-contractual obligations when the author and the victim of the damage are habitually resident in Spain, it is equally aware that in this case it has been accredited that a vehicle of Portuguese nationality was involved in the accident, which fact the appellant admits. This being the case ... the competent jurisdiction is that of Portugal, given that a Portuguese vehicle was involved, as follows from art. 22.3 of the *LOPJ* which requires that all those involved be Spanish citizens, and from the Hague Convention on the Law Applicable to Traffic Accidents of 14 May 1971, which was ratified by an instrument dated 4 September 1987 and currently in force. This legislation, which is fully applicable in the present instance, determines that the competent courts are those of the country in which the accident took place if vehicles of differing nationality are involved".

4. Provisional Measures

– AAP Barcelona 16 January 1999 (*RJA* 1999\142)

Request for protective measure not contemplated in Spanish Law. Property in France. *Lex fori.*

"Legal Grounds:

First: ...When protective measures apply to property situate in a State other than the State in which they are adopted, there is a risk of excessive delay in enforcement, despite the *exequatur* provided by the Brussels Convention (arts. 25 *et seq.*). An attempt is made to address this problem in art. 24, invoked by the actors, whereby 'Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter'. This means that protective measures can be

instituted directly in the State where they are required in order to render fully effective decisions issued in another State.

In the case in point here, the action is being pursued in Spain and the protective measure has been requested from and granted by the court judging the action, and therefore the clause invoked is clearly not applicable.

Second: The measure requested, a 'judicial provisional mortgage', does not exist in our legal system, and Spanish procedural laws are the only laws applicable to actions pursued in Spanish territory, without prejudice to any remittals that these may make to foreign laws in respect of procedural acts to be implemented outside Spain in accordance with art. 8.2 *Cc.* As the doctrine has made clear, the exception contemplated in the final point is intended for international judicial assistance; hence, if a Spanish court or tribunal requests the implementation of a procedural act outside Spain, this will be executed by a jurisdictional organ of the other State in accordance with the foreign procedural law.

The clause at issue is therefore complementary, as regards the applicable law, to the terms of arts. 300 *LECiv.* and 276 to 278 *LOPJ*, but it does not allow for legal institutions not existing in Spanish Law.

Third: The difficulties that may arise in connection with the *exequatur* of a protective measure in a State other than that which orders it is a separate issue, given that protective measures differ from one legal system to another. This would appear to be precisely the problem underlying the allegation of the appellants that 'the land concerned in these proceedings is situated in French territory, and hence we must have recourse to the laws in force in that country (folio 161 of the writ)', and likewise in the appealed decision inasmuch as it grants the protective measure requested on the grounds that it is 'equivalent' to preventive registration of a complaint as defined in art. 42.1 of the Mortgage Act.

We should say in the first place that registration of a 'judicial provisional mortgage' as defined in French law is equivalent not to preventive registration of a complaint but to restraint of assets guaranteed by preventive registration. We should also say, however, that in the case in point preventive registration of a complaint would not be allowable in any event, given that although the registration sought by the applicants is based on private contracts of sale in respect of land situated in France, any eventual decision will have no practical effect since termination of these contracts would entail reimbursement of the monies deposited plus compensation for damages. The purpose of the protective measure is therefore purely economic, and the proper measure if applicable would be restraint of assets, which also exists in French law according to the documentation furnished by the applicants, so that there would be no problem as regards the burdening of assets situated in French territory. These considerations are merely hypothetical in the present case, given that restraint of assets has not been requested and this court can only examine a measure that is specifically requested".

5. Lis pendens-related actions

– SAP Barcelona. 1 February 2000 (*RJA* 2000\142)

Lis pedens in matters of divorce. Dismissal. Lugano Convention: scope. Brussels Convention II: not in force.

"Legal Grounds:

...

Second: ... The contestation here considered must be dismissed given that such a legal institution is not contemplated in any applicable international regulation between Spain and Switzerland; the bilateral convention of 19/11/1986 (NDL 27783) refers only to *exequatur* in respect of definitive judicial decisions, and although such an institution is mentioned in article 21 of the multilateral Lugano Convention of 1988, also ratified by Switzerland and following on from the Brussels Convention, its scope does not include matters concerning marital status.

The contested decision further addresses the fact that the Brussels Convention II on matters of competence in the law of family, marital status and minors has not yet come into force; moreover, even were it applicable, article 11 in this respect requires an unequivocal declaration of the competence of the former Court. In the present case no such declaration is forthcoming and in any event would not sit well with the international agreement given that the previous judicial order of separation by mutual agreement whose terms it is here sought to amend was handed down by the court whose competence is now at issue and the last family domicile was in the city of Barcelona. Questions regarding judicial competence in conflicts of private international law must be addressed on the understanding that jurisdiction is a manifestation of the sovereignty of each State and that at the same time the actor, in this case a Spanish citizen, enjoys a fundamental right of access to justice in the courts of his own country (article 22.3 of the *LOPJ*). The guiding principles of international public policy in matters of *lis pendens* are moreover extremely particular as regards the right to and the duty of judicial process, as witness the safeguards incorporated in the bilateral conventions signed by Spain regarding the duplication of process on the same object or between the same people in two different countries, which conventions attach considerable importance to the discretion of the courts in any particular case and compel these courts to examine their own rules of competence. This regulatory approach is exemplified by the convention with Austria (article 18) and France (article 10), but these are exceptional. In most of the treaties signed by Spain, the existence of proceedings in any of the contracting States has an effect opposite to that sought by the appellant, constituting grounds for denial of the *exequatur* even in respect of definitive judicial decisions.

We would note that application of the safeguards referred to above must be especially strict in divorce cases. The existence of prior judicial decisions on

separation, maintenance or custody and the possibility of revision or amendment of such decisions, given the importance of provisional measures, can leave room for fraudulent use of this procedural exception, especially where *ex officio* restraint is allowed, as would be the case if the Brussels Convention II were in force, for in cases like the one here at issue in which the defendant does not contest the competence of the Spanish court to which she herself applied for separation and the more recent action for amendment of the conditions of separation, the decision by one of the parties to seek a forum of convenience could violate the fundamental right to a natural judge as provided in article 24 of the Spanish Constitution and may have been made with intent to defraud in view of the interests at stake in suits of this kind. For the foregoing reasons, this court cannot countenance the grounds of appeal".

III. PROCEDURE AND JUDICIAL ASSISTANCE

1. Notification

– STC 13 November 2000 (*La Ley*, 2001)

Concealment of the international element in a notification. Failure of effective judicial protection.

"Legal Grounds:

First: ...The appellant complains that the court of instance neither pursued all the other means of summons available to it under *LECiv.* before issuing a decision, as the jurisprudence of this Court has repeatedly demanded, nor acted with due diligence in that, the defendant being evidently of foreign nationality and the civil plaintiff having expressed ignorance as to the identity of the defendant, it did not carefully examine the records at its disposal, where it was recorded that the defendant was domiciled in the German Federal Republic.

...

Fifth: In view, then, of those facts clearly established in the civil proceedings in the present case, and of the doctrine of this Court referred to above, this action for infringement of fundamental rights and freedoms must be upheld. Indeed, there can be no doubt that the appellant ought to have been duly summoned as a defendant in the declaratory judgment on which the present action is based. There likewise appears to be no doubt that the court concerned could in practice have issued a summons given that even before the matter was admitted for trial, it was in possession of the registry certificate containing an address for the appellant in a foreign country.

The court at first instance nonetheless failed to act with due diligence in that having failed in a single attempt to summon the appellant at the address of the property cited in the civil suit for damages brought by the plaintiff, it did not attempt to issue a writ of summons to third parties at the same address

in Ibiza or to issue a personal summons to the domicile in the German Federal Republic recorded in the registry certificate for the property, which certificate was on record from the very outset of the civil proceedings. The only personal summons issued was concluded by a negative search note recording failure to find the person or a neighbour willing to deliver. ...

The court attempted neither a fresh summons at the address of the apartment in Ibiza nor a writ of summons in a building where there could have been more neighbours and there was moreover a building attendance service, and it further ignored the foreign address which was recorded with the Registry of Property and which was available to it in the registry certificate appended to the civil law claim. Indeed, it issued a judgment without even verifying whether other possible means of service on the defendant in the case would be vain, which means were not in fact vain given that the building attendance service was in contact with the attorney in the appellant's place of domicile (in fact the present appellant was apprised of the action by a telephone call from the building attendance service to the said attorney). By this lack of diligence on the part of the court the appellant was effectively deprived of the opportunity of defence; the apartment was attached and awarded to a third person and subsequently sold to other persons, while the appellant had no knowledge of these events.

Finally, there is nothing in the record of proceedings or in the statements of the parties therein to suggest that the appellant was passive, negligent or careless in the conduct of his affairs; indeed quite the contrary, as witness the retaining of an attorney for the management of his affairs in Spain as from June 1992, with which attorney he was acquainted and who was in contact with the attendance service of the building in which the distrained apartment is situated. Nor is there any proven fact to contradict the presumption that the appellant was unaware of the civil action brought".

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENTS AND DECISIONS

1. Family

– STS 21 July 2000 (*La Ley*, 2000, 9915).

Recognition and partial enforcement. Maintenance obligations. Rights of defence. Control of applicable law. Applicability of the 1968 Brussels Convention.

"Legal Grounds:

First: The origin of this appeal in cassation is an application for recognition and partial enforcement (as to maintenance obligations), under the 1968 Brussels Convention, of a decision delivered by the Court of First Instance of Rotterdam ...

Second: The first ground of the appeal, citing subparagraph 3 of art. 1692 *LECiv.* relating to breach of the essential judicial forms governing procedural acts and guarantees, alleges infringement of art. 895 paragraph two of the same *LECiv.* in that the substantiation of the appeal brought before the High Court omitted the hearing stage, which in the opinion of the appellant was mandatory ...

This claim is unacceptable. Art. 1693 *LECiv.* provides that grounds for appeal in cassation for breach of the regulations governing procedural acts and guarantees are only viable if the appellant has applied for remedy of the fault or transgression to the court in which it was committed. The details recorded in the foregoing statement of grounds show quite clearly that the appellant failed to meet this essential requirement, having neither requested a hearing after service of the writ requiring that the evidence given by the parties on summons be appended to the record of proceedings, as required under art. 755 *LECiv.* on the processing of pleas – not the appeal from pleas – by the High Court; and more importantly, the appellant was silent after the High Court twice ordered enquiries for further evidence, which enquiries, as is well known, may only be ordered and carried out, whether at first or second instance (arts. 340 and 874 *LECiv.*), within the term allowed for the delivery of judgment.

The inadmissibility of this ground is further confirmed by the fact that the appellant was deprived of no material opportunity of defence, given that his writ of appeal to the High Court amply set forth the grounds of his opposition to the Court's decision.

Third: A methodical approach requires us here to examine the fourth ground, which in effect claims breach of art. 1 of the 1968 Brussels Convention in the recognition and enforcement of a Dutch decision when the matter there resolved was not within the scope of that court...

... in short, the court of instance did deliver an express finding on the applicability of the Brussels Convention, precisely because the Dutch decision contained a ruling on maintenance. Moreover, the matter of maintenance, to which the request for enforcement was specifically confined, being clearly described as 'partial', does come within the scope of the Brussels Convention ...

Clearly therefore, in light of the jurisprudence of the Court of Justice, the ruling whose enforcement was requested under the Brussels Convention was, as a civil matter, within the terms of the first paragraph of art. 1 of the Convention and could not be deemed to be excluded by section 1 of the second paragraph of that article in that although the said ruling was handed down in a divorce suit and the decision contained both a decree of divorce and a settlement and division of the matrimonial assets, it was of itself autonomous by reason of its object, namely the monthly maintenance payments awarded to the plaintiff, who applied to the Spanish courts for enforcement solely in respect of that ruling. Therefore, this ground also cannot be entertained.

Fourth: The second and third grounds may be considered together since both cite point three of art. 1692 *LECiv.*, alleging breach of art. 27.2 of the Brussels Convention in that this bars the recognition of judgments issued in default, as is the case of the appellant in respect of the original proceedings, in the event of summons in irregular form and without sufficient time to arrange a defence. The second ground refers particularly to irregularity in the summons; the third, on the other hand, particularly concerns an alleged failure to meet the 'good time' requirement...

As regards the actions taken in the present case, in the original proceedings, once it was established that the defendant did not reside in the Netherlands, writ of summons was served by sending two copies of the writ, one to the Prosecutor's Office at the Ministry of Justice and the other to his address at Moraira (Alicante), by registered mail dated 25 Oct. 1990. The record shows that service was also attempted by letters rogatory duly issued as required under the 14th Hague Convention.

Albeit this second means of service did not comply with the good time requirement (the letters rogatory were executed on 26 Feb. 1991, the deadline being 26 Nov. 1990), we find that the two requirements cited were met by the summonses issued by registered mail. Although there is no record of acknowledgement of receipt of the postal dispatch, with her initial writ the plaintiff attached a letter, whose authenticity has not been questioned, from the appellant's Swiss lawyer to the plaintiff's lawyer and counsel in Rotterdam, dated 31 Oct. 1990, which, referring to the writ of 23 Oct. (the date of the order of summons in the original proceedings), says: 'My client, Mr. René P., hereby requests a declaration of *litis pendens* against your writ of 23 Oct. 1990. The divorce suit took place in Switzerland, and hence the Dutch jurisdiction is not applicable.'

Clearly, then, the deadline for service of summons being 26 Nov. 1990, the party here appealing, as defendant in the original proceedings, had notice of the suit by 31 Oct. at the latest, that is in ample time to enter a defence in the terms of art. 27.2 of the Brussels Convention. It is true that the arguments set forth in that letter were not passed on to the Rotterdam Court, but that does not detract from the evidence that the appellant was summoned in due time by registered mail and was made aware of the complaint in sufficient time, the view also taken by the Court of First Instance of The Hague, in its decision of 21 Abr. 1994, on examining the objection brought to the terms of maintenance on the grounds of a change in circumstances.

The two grounds here considered must therefore also be dismissed.

Fifth: It remains only to examine the fifth and last ground of appeal, brought under point 3 of art. 1692 *LECiv.* and founded on an alleged breach of art. 27.4 of the Brussels Convention. In the appellant's opinion the Dutch court applied 'the Law of its own jurisdiction despite the absence of any objective connection with that jurisdiction'; this constitutes 'an overbearing attitude in the application of the law by the applicant State totally at odds with the rules of

private international law as regards the requested State'. The appellant further alleges that the contested decision acknowledges the existence of divorce proceedings in Switzerland, in which both spouses were parties and in which the record shows that the last common domicile was in Spain, despite which 'the plaintiff abandoned the jurisdiction in which she had brought suit and immediately filed a complaint in her own country (although she also possessed Swiss citizenship) under Dutch law'. The appellant therefore argues in conclusion that 'it is not possible to apply the principle of equivalence (which applies not only to the form or homonymity of institutions but also to the substance of their material economic effects). A decree of maintenance in the sum of 2500 florins per month ... under Swiss or Spanish law.'

Art. 27. 4 of the Brussels Convention establishes that recognition is contingent on the control of legislative competence, corrected or attenuated by the principle of equivalence of results and can by no means be considered to have been infringed by the decision here appealed.

In the first place, the Dutch court did have a connection with the matter at issue in that the plaintiff in the original proceedings, against whom appeal is here brought, possessed dual Swiss and Dutch nationality but became resident in the Netherlands before filing for divorce, as is acknowledged in the decision of the Swiss Cantonal Court of 13 April 1993, which annulled the divorce decree issued at first instance precisely because the court was not competent to judge the matter.

In the second place, as regards the principle of equivalence of results, there is nothing to support the assumption that whatever the applicable law (Dutch law given the nationality and residence of the plaintiff in the original proceedings; Swiss law given the common nationality of the parties; or indeed Spanish law given that the parties are resident in different States and the defendant is resident in Spain, arts. 107 *Cc* and 22.2 *LOPJ*), the end result would not have been the same. The said principle applies to the legal consequences of the application of the rule invoked under the rules of internal conflict and not to the material outcome of the application of such legal consequences to the case in point, which outcome is in fact the decision of the court on the case. That decision affects the substance of the case and hence, under art. 29 of the Brussels Convention, cannot be reviewed by the court of the requested State.

In other words, the point here is to determine whether the legal consequences provided by the law applicable to the substance of the matter according to Spanish rules of conflict and those provided by the rules applied in the decision whose recognition is sought are the same. The answer to that question is that under both Spanish and Swiss law the consequences of divorce are the dissolution of the marriage and the provision of maintenance.

What is evidently not possible – and this would appear in the final analysis to be the ultimate aim of this ground to judge by the closing paragraph of the argument – is to review the amount of maintenance set in the decision; the

setting of that amount is entirely a matter for the deciding court and hence, under art. 29 of the Brussels Convention, cannot be examined by the court of *exequatur*, which under no circumstances can open new proceedings on the pretext of verifying the requirements for recognition (STS 132/92 and AATS 5 May 1998 in *exequatur* 3126/97, 8 Sept. 1998 in *exequatur* 1002/97, 27 Apr. 1999 in *exequatur* 1821/98 and 4 Jul. 2000 in *exequatur* 2334/97)".

– ATS 16 November 1999 (*RJA* 1999\9910)

Divorce decree in the Dominican Republic. Default of defendant. Public notice. Public policy in respect of process.

"Legal Grounds:

...

Second: On this basis, the terms of the writ of enforcement itself show that the original proceedings took place absent the defendant, who failed to appear in the suit despite having been summoned in accordance with the law of the State of origin by the Court bailiff of the Second Criminal Chamber of the District of San Cristóbal. However, in respect of the default as stated, 'the applicant has failed, despite having been so required by the Court, to establish that the defendant was notified individually' or in any event through some means whereby he would have been sure to receive notice of the complaint brought against him and would thus have been able to take appropriate action in his own defence; to the contrary, 'all that the appellant has been able to show is published notice of the court decision whose recognition is here sought' in a newspaper of the country of origin. Therefore, as the defendant's default has been established but it has not been proven that this was for reasons of simple self-interest, convenience or even conviction, this court must deny the recognition sought, due to the absence of the condition set forth in the above-cited art. 954.2 *LECiv.*, which in this point bears on due respect for internal public policy in respect of process, a clear constitutional mandate, and which requires the safeguarding of the procedural guarantees enshrined in art. 24 of the Spanish Constitution".

– ATS 15 February 2000 (*RJA* 2000\1773)

Decree of divorce issued by a Court of the Republic of Cuba. Public notice (by placard). Public policy in respect of process.

"Legal Grounds:

First: Application is made for *exequatur* in respect of the divorce decree granted on 31 March 1997 by the Popular Municipal Court of Plaza de la Revolución, Republic of Cuba. This application needs to be examined in light of the conditions required for recognition and declaration of enforceability of foreign decisions in arts. 951 *et seq.* of *LECiv.*, the terms of which are applicable given the lack of any *ad hoc* conventional rule in this respect, and given that negative reciprocity has not been established.

Second: ... In the present case, the enforcement order shows that the defending spouse was summoned to appear in the original proceedings by publication ['carteles']. This mode of procedure, even if allowable under the *lex fori*, cannot be properly considered sufficient to safeguard the defendant's rights of defence from the standpoint of public policy in respect of process, which necessarily relates to control of the condition set forth in art. 954-2 *LECiv.*, and which in its present form within the process of recognition of foreign judgments clearly raises a constitutional issue relating to the procedural rights and guarantees enshrined in art. 24 of the Spanish Constitution. The Constitutional Court has repeatedly drawn attention to the fact that notification by publication is a subsidiary, supplementary and exceptional remedy in the Spanish internal system and hence cannot be argued against a claim of infringement of the right to judicial protection, beginning with the right to be informed of proceedings and the attendant proscription of defencelessness. In the present case, the applicant has failed to establish, as he was bound to do, that any attempt was made to serve individual notice of summons on the defendant before summons was made by publication. It cannot therefore be said categorically that the defendant failed to appear in the proceedings for reasons of convenience, conviction or mere choice; to the contrary, her default appears to have been due to ignorance of the proceedings, and therefore, in accordance with the Court's doctrine mentioned above, the condition required by art. 954.2 *LECiv.* is not met".

2. Succession

– ATS 30 November 1999 (*RJA* 1999\9912)

Declaratory judgment of succession by an Argentinian Court. Voluntary jurisdiction. Conformance with applicable law.

"Legal Grounds:

...

Second: The decisions whose recognition is sought contain a declaration of succession and are therefore of the nature of acts of voluntary jurisdiction, in which the jurisdictional authority does not intervene in response to a suit or dispute between parties but its intervention is required under the relevant regulation, whether for the purpose of receiving the relevant private declarations of will, in which case it is a formal requirement for the act to take effect, or for the purpose of interpreting and applying the law to the case so submitted in order to constitute or attribute rights of the parties or simply recognize existing rights. In the Spanish procedural system, moreover, acts of voluntary jurisdiction are not considered enforceable – at least as such – or *res judicata*, and the issue may be put to the judgment of courts or tribunals by way of the appropriate avenue of dispute.

Third: ... These differences bar any attempt to apply the procedure established in arts. 951 *et seq.* of *LECiv.* even by analogy, and the issue of

recognition of acts of voluntary jurisdiction must be resolved on an ad hoc basis by the body or authority whose approval is required for enforcement of these particular acts, which body or authority must not only verify the requirements set forth in arts. 600 and 601 *LECiv.* but must also take into account the requirements of the relevant material regulation identified by the Spanish rule of conflict (art. 9.8 *Cc*), including where applicable any International Conventions of which Spain is a signatory and which may be applicable to the particular matter".

3. Contracts

– STS 22 July 1999 (*RJA* 1999\6774)

German decision on a supply and assembly agreement. Control of international judicial competence.

"Legal Grounds:

...

Third: The proven facts (that is, the enlargement of the facts noted earlier) are as follows. In response to an order, on 9 Nov. 1988 the Spanish company I., domiciled at Tordesillas (Valladolid), made an undertaking to the German company 'H.S.,S.L.' to supply and assemble refrigerator units ... On 17 Nov. 1988 the German company 'H.S.,S.L.' picked up all the said refrigerator units in Tordesillas (the registered domicile of the Spanish company) in a German-registered truck. The foreign decision (which the plaintiff seeks to enforce in Spain) was apparently delivered in an action for termination of a contract, albeit the order requiring the Spanish defendant to pay the German company the mentioned amount was contingent on the delivery or return by the former to the latter of the refrigerator or dryer units supplied.

Fourth: The Spanish defendant I contested the granting of enforcement of the foreign decision in Spain '... on the grounds, here summarized, that the said foreign decision having been delivered in proceedings regarding termination of a contract of sale ...' the competence to judge the matter lies with the courts of the place where the contract was held and performed – that is, Spain – and concluded that the German courts were not competent to judge the said proceedings on termination of the said contract of sale.

...

Seventh: ... The said ground cannot be entertained in that the appellant's claim that the contract on which the foreign decision was based was performed in Spain is a mere supposition, it having been demonstrated, as noted in the examination and dismissal of the fourth ground, that the said contract was performed in Germany.

...

Ninth: ... Under the said second paragraph of article 54 ... judgments given after the date of entry into force in a State (Spain in this case) may also be recognized and enforced even in respect of proceedings instituted before

that date (again as in the present case) if such judgment was given on matters coming under the rules of competition provided for in Title II of the 1968 Convention or in a convention concluded between the State of origin and the State addressed which was in force when the proceedings were instituted.

The matter ... plainly comes under the rules of competition provided for in Title II of the 1968 Brussels Convention, specifically in article 5.1, in Title II, which provides thus: '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.'

The foregoing is sufficient to dismiss this ground; we might add, however, that the matter at issue ... also comes under the rules of competition of the Convention of 14 November 1983 between Spain and the Federal Republic of Germany, specifically in article 7.7, which recognizes the jurisdiction of the State of origin where an action is brought in respect of a contract or an action deriving from a contract and proceedings have been or are to be instituted in the State of origin, provided that the said contract determines jurisdiction".

4. Bankrnptcy

– ATS 4 May 1999 (*RJ* 1999\2882)

Exequatur in respect of a German decree of bankruptcy. Schedule of conditions.

"Legal Grounds:

First: The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 (RCL 1991\217 and 1151) is not applicable in that article 1 point 2 excludes matters relating to 'bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'. The Convention between Spain and the Federal Republic of Germany on recognition and enforcement of judicial decisions and transactions and enforceable public documents in civil and commercial matters of 14 November 1983, ratified on 18 January 1988 and published in the *BOE* of 6 February 1988, is likewise inapplicable given that article 3 point 1 excludes 'judgments given in bankruptcy or winding-up proceedings, in a prior reconciliation procedure or in any other analogous procedure, including judgments in such procedures as to the validity of acts affecting the creditors'. The matter therefore comes under the general provisions of article 954 *LECiv.*, since negative reciprocity is not established (art. 953 *LECiv.*).

Second: It is established that the judgment is definitive according to the law of the State of origin; the judgment whose enforcement is requested must be definitive regardless of the rules of recognition, as required by article 951 *LECiv.* – which does not apply solely to conventional law when read along with the precepts following it – as this court has repeatedly established.

Third: The four requirements of article 954 *LECiv.* are met: the action is

evidently of a personal nature; procedural guarantees have been complied with taking account of the nature and purpose of the original proceedings (the order to notify the debtor of the decision is on record) and there is no consideration of public policy to prevent the recognition and enforcement of the judgment, specifically as regards violation of the principles designed to ensure equal and balanced treatment of debtors and prevent bias towards local creditors in winding-up procedures.

Fourth: There is no reason to believe that the parties have fraudulently applied to the international jurisdiction of the German courts as a forum of favour and convenience (articles 6.4 *Cc* and 11.2 *LOPJ*); articles 22.2 and 4 *LOPJ* do not establish forums of exclusive jurisdiction. There are evident connections in the application for bankruptcy proceedings, such as the fact that the debtor's business domicile is in Germany and that he possesses German nationality. These are sufficient to warrant the jurisdiction of the courts of origin and to rule out fraud as regards the law applicable to the substance of the matter, which relates to the foregoing issue.

Fifth: There is nothing on record that is materially contradictory to or incompatible with any past judgment or present proceedings in Spain".

5. Maritime Law

– STS 3 May 1999 (*RJA* 2001\414)

Exequatur. Brussels Convention of 10 May 1952 relating to the arrest of seagoing ships. Reciprocity.

"Legal Grounds:

... the court finds that in its ruling of 19 Jan 1995, the First Chamber of the Supreme Court did not commit such an obvious, crass and unwarranted error, nor did that ruling come to illogical and irrational conclusions leading to an absurd decision disruptive of the legal system.

The reasons for this conclusion are as follows:

...

B) But even assuming that the United States of America was not a party to the Convention, the issue here is whether the said ruling may be described as 'absurd and disruptive of the legal system', and in that connection we would observe:

a) According to art. 952 *LECiv.*, 'absent special treaties with the nation in which they are delivered', definitive judgments given in foreign countries 'shall have the same effect as judgments enforceable in Spain'. Ground number 4 of the decision held to be erroneous fully sets out the reasons for which reciprocity is considered to exist in the case at issue; these reasons are founded firstly on the two affidavits issued by two lawyers belonging to the bar associations of the localities of the US courts for enforcement of whose judgments in Spain application was made to the said Chamber – moreover these affidavits have not been shown to be inexact – and secondly on the fact

that because of the growing interdependence of international relations, particularly in Maritime Law, absent special treaties it must be presumed – as is the practice of the First Chamber – that judgments given by Spanish courts are enforceable in foreign States, and hence the burden of proof is reversed in the sense that anyone claiming the contrary must so demonstrate, and that was not done in the case at issue.

What all this amounts to is that the decision given in the judgment of 19 Jan. 1995 was not based exclusively on the content of the Geneva Convention of 10 May 1952 but also took into account the principle of reciprocity, which inevitably led to the same conclusion as application of the Convention, and hence there is no need of recourse to art. 954 *LECiv.*, which is only applicable – as stated in the same provision – when the conditions set forth in 951, 952 and 953 of the same Law are not given, which is not the case here".

– STS 12 November 1999 *(RJA* 1999\8864)

English judgment. Interpretation of the term 'enforceable'. Control of jurisdiction of the court of origin. Notification. 1968 Brussels Convention.

"Legal Grounds:

...

Third: ... the initial application from the entity H. A., S.A. was accompanied by documents, whose authenticity is in no doubt (no legalization or other such formality is required under art. 49), which constitute sufficient evidence of compliance with the requirement in art. 46.2 of the Convention (service or notification of the action or an equivalent document to the party in default, folios 34 and 35 of the Record of Proceedings) and of enforceability under the laws of the applicant State (folios 25, 26, 32 and 33 of the Record); in which connection it is noted that according to a Decision of the CJEC of 29 Apr. 1999 (C-267/1997), the term 'enforceable' in art. 31 para 1. of the Convention is to be interpreted as referring solely to the enforceability of foreign judgments in a formal sense, and not to the conditions in which such judgments may be enforced in the State in which the judgment was given. Moreover, the Spanish legislation does not stipulate any specific formula for enforcement or any other *ad hoc* requirement for that purpose ...

Fourth: However, art. 28.(3) of the Convention ... States that the jurisdiction of the court of the State in which the judgment was given may not be reviewed and adds that the test of public policy referred to in Article 27 (1) may not be applied to the rules relating to jurisdiction; and even in certain cases where a judgment may be reviewed ('subject to the provisions of the first paragraph' as provided in the said third paragraph), such cases are confined to those listed in art. 28 (1) (that is, Section 3, 4 or 5 of Title II, or a case provided for in Article 59), and the fact is that art. 5 (1) cited in the appeal does not come under this provision given that it occurs in Section 2 of Title II and not in any of the Sections stipulated.

Fifth: ... Notification of proceedings – leaving aside the means thereof for the moment – was served upon Ms. Rita B., manager of M. R., S.A., at the Centro Comercial M., Urbanización El Pilar, Carretera de Cádiz, in Estepona (Málaga), a fact that stood on review. This is sufficient to exclude the alleged breach of the constitutional doctrine on acts of communication, since awareness of the existence of the proceedings precludes defencelessness, meaning effective defencelessness, on which the doctrine is founded. In the second place, the ordinary Spanish law (*LECiv.*) is not applicable to the matter because the summons was not made under that law. In the third place, the summons was verified through consular channels and is entirely valid, as the Provincial Court ruled, but for the following reasons. Under art. 20 (3) of the Convention, art. 15 of the Hague Convention of 15 Nov. 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters is applicable if the document instituting the proceedings or notice thereof had to be transmitted abroad in accordance with that Convention. There, art. 15 (b) provides for the event that a writ of summons or an equivalent document had to be transferred abroad by 'another method' – referring to a method other than that provided in (a), that is a method prescribed by the internal law of the requested State – 'provided for by this Convention'. Art. 8 provides that 'Each Contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents' unless any State declares 'that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate'. There is no record of such opposition by Spain. This legal regime is plainly applicable to the case at issue. Furthermore, we do not find that the notification made on 15 Oct. 1992 (doc. folios 34 and 35 of the Record of Proceedings) was irregular, nor is there any reason to warrant the denial of enforcement contrary to the acceptance of the summons by the English court, for clearly the defaulting defendant received service of the original notice in sufficient time to arrange a defence›...

Sixth: ... there has been no breach of any rule of Spanish public policy or any constitutional guarantee, and therefore the doctrine established by the Constitutional Court ruling of 23 Feb. 1989 does not apply. As to the matter of competence, we have already referred to the exclusive provision of art. 28 (3) para 2 of the Convention; as to the summons, this was issued in due form and did not prevent the arrangement of a defence; which point is covered in the examination of the previous ground and need not therefore be gone over again".

– AAP Alicante 23 April 1999 (*RJA* 1999\799)

Enforcement. Respect for the defendant's rights in the case of notification by mail. Restrictive interpretation of Public Policy.

"Legal Grounds:

First: Art. 27 (2) of the Brussels Convention of 27 September 1968 on

Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters provides that a judgment will not be recognized 'where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence'. The court denied enforcement of a judgment given by the Tribunal de Grande Instance of Strasbourg (France) on the grounds that the defendant, 'JC Export, SL', a company domiciled in Elche, which effectively failed to enter an appearance throughout the proceedings, was not summoned in due form, service being by way of notice of proceedings by registered mail with prepaid acknowledgement. The court ruled that such a method was irregular in that it is not admissible according to *LECiv.* in cases where the appearance of the interested party in the proceedings depends on a communication (art. 261.4 *LECiv.*), which rule the court decreed applicable in the absence of specific regulation in the Convention.

Second: On this point we depart from the reasoning of the court. The absence of provision in the Brussels Convention does not mean that the general rules of international civil law of procedure do not apply, and one of the basic international rules is that the court or tribunal before which an action is brought must apply the procedural rules of its own national legal system. This rule (known as *lex fori regit processum*) is generally recognized and is specifically recognized in Spanish law by art. 8.2 *Cc*, whereunder 'Spanish laws of procedure shall be the only laws applicable to actions undertaken in Spanish territory, without prejudice to any remittals that these may make to foreign laws in respect of procedural acts to be implemented outside Spain'. Reciprocal application of the same principles to proceedings in France simply means that the various procedural acts, including the summons, are to be regulated by the French law of procedure, and the fact that such an act is executed in Spain does not in itself determine the applicability of Spanish law, which will only be the case if so provided by the French law or by convention.

Third: In this case it has not been alleged – and certainly not proven – that the French law of procedure does not recognize summons or notification of proceedings by registered mail with prepaid acknowledgement; to the contrary, it must be assumed that it is admissible given that it was the method used by the Tribunal de Grande Instance of Strasbourg to summon the Spanish defendant. The fact that the summons was served in Spain brings it not under *LECiv.* but under the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters, which was ratified by both States. Art. 10 a) provides that the Convention shall not interfere with the freedom to send judicial documents, by postal channels, directly to persons abroad provided the State of destination does not object, which, unlike other States, neither France (which ratified the Convention on 3/7/1972) nor Spain (instrument of 29 April

1987, published in the *BOE* of 25 August) has done. The writ of summons must therefore be considered to have been sent in due form. We would further note that it would be inadmissible, as being contrary to the principle of good faith that ought to govern international relations, for the Kingdom of Spain, through the organs representing it in these relations, to agree with other States on the validity of a given form of procedure and for other public authorities then to declare it irregular when it comes to complying with the obligations acquired in that or any other Convention.

Fourth: The appellant has cited art. 15 of the Hague Convention, alleging that in giving judgment the French court did not allow enough time to be sure that the summons had been served in due form and time, in reference to the guarantee provided in the cited art. 27 (2) of the Brussels Convention, whereby recognition of a judgment given in default may be withheld if the defendant was not duly served with the document which instituted the proceedings in sufficient time to enable him to arrange for his defence. These arguments cannot be entertained for the following reasons: a) The defendant was allowed two and a half months as from the date of the summons (folio 15 of the record of proceedings), which is undoubtedly enough both in absolute terms and in terms of the time allowed by Spanish law for similar cases (arts. 526 et cetera *LECiv.*). b) It is also on record (folio 14) that the court received the acknowledgement with the stamp of the Spanish postal service and a signature in the box reserved for the addressee, certifying that the notice of proceedings sent on 19 April 1995 had been delivered on 28 April of the same year. c) Furthermore, the Post Office Manager in the town of destination certifies that the document was delivered to a duly identified person who presented documentary evidence of authorization by the company manager, a copy of which is on file (folio 37). This document – particularly in absence of any other evidence to support the appellant's claim not to have received any communication – is sufficient to classify the defendant's failure to appear in the proceedings as voluntary default, a situation classified in the jurisprudence as not protected by the second condition of the *exequatur* rules regulated in art. 954 *LECiv.* (see also ATS of 25/2/1985, 13/6/1988 and 1/6/1993 and many others).

Fifth: As to the defendant's allegations that admission of the recognition applied for would constitute breach of certain constitutional precepts, there is indeed a connection between due form in the communication of proceedings and the right to arrange a defence in terms of the constitutional right to effective judicial protection, which in this context means that 'the concept of public policy of the forum as the limit of recognition and enforcement of foreign judgments has taken on a new dimension since the Constitution came into force, in which there is indubitably a place for the set of principles inspiring our constitutional system, specifically including fundamental rights and public freedoms' (AATS of 9/6/1998, which cites numerous rulings of the Constitutional Court). However, along with these considerations one must

take into account the doctrine of the CJEC, according to which the public policy clause in article 27 (1) of the Brussels Convention is only applicable in exceptional cases and can only be invoked where the issue is to be resolved in pursuance of a specific provision; such as the grounds for non-recognition provided in any of the other paragraphs of that article (Decisions of the CJEC of 4/2/1988, Hoffmann, and 10/10/1996, Hendrikman and Feyen), the provision preferentially applicable in this case being number 2, which must be applied in the manner determined in previous legal grounds. Furthermore, while *LECiv.* does not admit the validity of postal communications for the service of notification or summons, such a bar can hardly be considered a matter of public policy when it did not cause a negative declaration for the purposes of art. 10 a) of the Hague Convention of 15 November 1965 referred to previously and when such a form is considered regular by our own legal system in other than civil proceedings (art. 56 *LPL*, art. 49.1 *LJCA*, etc.)".

V. INTERNATIONAL COMMERCIAL ARBITRATION

– ATS 8 February 2000 (*RJA* 2000\766)
Exequatur. Foreign arbitration award. Language of notification.

"Legal Grounds:

...

Third: The trading company 'Gaspar Peral y Cía., SL' firstly contests an alleged situation of defencelessness in the formalities of the arbitration proceedings held in the Court of London. The first ground for its objection is that all communications relating to the arbitration were notified in English and in no case were the documents served accompanied by a Spanish translation, and also that despite having answered the claim in due time and manner and having furnished the requisite evidence, it was not accepted as a party in the proceedings because its writ of defence was not in English, and therefore, given the invocation of procedural guarantees, the contestation against recognition of the award must be dealt with as a matter of public policy as it relates to procedure. Thus, the defendant does not dispute that in the charter agreement dated 29 October 1993 the parties agreed to arbitration subject to the York-Antwerp Rules, modified version of 1990, under English law. Given the foregoing, it should be noted in the first place that the defencelessness allegedly suffered through having received the various notifications and other communications relating to the arbitration proceedings in English does not relate to any alleged breach of the rules of procedure, which the contestant would have to allege and prove under the provisions of art. V.1 d) of the Convention. The argument therefore rests solely on the detriment to its rights to a defence which the contestant claims to have suffered by reason of the language used in the communications, which – it is inferred – prevented it from gaining a full understanding of their content and hence from arranging a full and effective defence. Since public policy today –

in its international dimension – is considered a constitutional issue and is substantially identified with the essential principles enshrined in the Constitution (specifically art. 24 *CE* as regards the procedural side of public policy), it will be well to bear in mind the way in which the Constitutional Court has defined the right not to be deprived of a means of defence; to be considered as such, defencelessness must be material, real and effective and hence not merely nominal or formal, and it is therefore clearly excluded where there is carelessness, passivity, disinterest or negligence on the part of the person so claiming. This being so, given the facts in the present case it is extremely hard to see where the alleged defencelessness lies, when the record of proceedings shows that the defendant was notified of the initiation of arbitration by the Office of the Justice of the Peace of Massanassa, and according to the record of service of summons, which accredits the reception of the documents and bears the signature of an employee of the appellant, copies and documents were delivered along with their respective translations. Moreover, the appellant replied to the claim filed against it, from which it follows that the claim was understood, and when notification of the final award was served through the Notary of Catarroja, a Spanish translation of the document was also delivered. Furthermore, the defendant showed patent disinterest given that, if as it claims the documents were received without a translation, it failed to request a translation from the arbiter, assuming that this was due – which has not been demonstrated – nor did it advise the arbiter of the difficulties encountered in translating the document and hence understanding its content. For the same reasons we cannot entertain the claim of defencelessness on the grounds that the court did not admit the writ of defence because it was written in Spanish; in the first place, the appellant has not shown that the court's decision was in breach of any of the rules governing arbitration [art. V.1 d)], and in the second place, as regards the defencelessness that the decision, correct or otherwise, may have produced, there is no escaping the fact that the arbiter twice requested the appellant to furnish the said writ in English translation without the appellant then pointing out that the decision was in breach of procedure – if again that were the case – or that it left it defenceless and proposing adequate or appropriate solutions to deal with that situation. It was therefore the passivity of the defendant alone that caused the proceedings to be continued in its absence.

Fourth: This court does not wish to pass up the opportunity of addressing the argument proffered by the appellant in a writ of 22 July 1999, which among other things categorized as abusive the arbitration clause imposed in a standard-form contract, which in its view is in breach of Directive 93/13/EEC of 5 April and of the General Consumers and Users Act. This court can only consider such an argument from the standpoint of internal public policy, since the applicant has failed to demonstrate, as it would have to do, that the arbitration agreement is not valid according to the law indicated in art. V.1 a) of the New York Convention – the real rule of conflict here – which is

certainly not Spanish law. However, the argument in this case does not stand even in that respect, since it is extremely hard to see how the clause at issue can be abusive in respect of a person who is not a consumer within the meaning of either the Community regulation or the internal law cited".

– ATS 18 April 2000 (*RJA* 2000\3239)
Recognition of a French arbitral award. New York Convention.

"Legal Grounds:

...

Fourth: In this line of interpretation, we need therefore to examine the question of compliance with the requirement set forth in art. IV.1 b) of the Convention. It is certainly the case that the contract ME 9641117 submitted along with the application for *exequatur*, which contains the arbitration clause, is not signed by the purchasing company, the contestant in these proceedings. What the applicant actually submitted was a contract proposal – or perhaps a confirmation, according to general commercial practice – issued by a broker, the company 'Consorcio Café, SA', in which the Conditions section contained the words 'Those applying to FCC contracts', and then 'Any disagreement shall be submitted to arbitration at The Hague'. Moreover, only a simple copy of this document was presented, without any guarantee of authenticity. However, in response to this court's requirements to meet the condition examined here, the applicant subsequently furnished other documents including a facsimile sent by the above-mentioned broker to the defendant 'Medicafé, SA' on 27 June 1996, in which, referring to another earlier facsimile – M552/199 of 11 June – and referring also to the contract ME 9641117 – further indicating its subject, namely '260 sacks of Méjico Natural' – it stated literally, 'Please amend our fax of reference, as it contains an error: conditions: EEC with arbitration at Le Havre'. The relevant activity report records this facsimile as having been successfully sent. Now, while the document referred to is not in itself entirely conclusive for the present purposes, it is conclusive when examined in conjunction with the document submitted by the defendant to the Court of Arbitration and annexed to the record of proceedings, in which the defendant, to protect itself against the arbitration claim, stated that the coffee had been placed on board later than the agreed date and therefore, given that it would not receive it in good time, it advised the broker of its intention not to accept the coffee, concluding the communication with the following revealing sentence: 'Confident of arbitration on your part, yours faithfully'. This missive – signed by the General Administrator of the company – was further accompanied by two appendices, one containing a declaration by the Captain from the Port of Veracruz regarding the date of arrival and departure of the vessel in which the goods were shipped, and the other containing the message to the broker, 'Consorcio del Café, SA', of non-acceptance of the said goods by reason of the delay in loading, which message was later reiterated – with reference at all times to

contract ME-9641117 – in the letter of 10 September 1996, which the defendant also submitted to the court of arbitration.

...

Eighth: ... the *prima facie* analysis moves on to the manner in which notification was effected by the court of arbitration in performance of the presentation of its definitive findings. The documents submitted show that the notice and summons to appear in the arbitral proceedings was served by registered mail with prepaid acknowledgement, sent to the following address: 'Perpendicular Uno, ..., Guaza, 38630 Arona, Santa Cruz de Tenerife'.

... In the first place there is nothing to show that the acts of communication were in breach of the regulations governing the arbitral proceedings – bearing in mind that these are institutional – for the former has proven nothing in that respect as it would have had to do [art. V.1 d) of the New York Convention]; and in the second place, the argument does not stand either from the viewpoint of public policy, given that the notifications having been served at the registered address of the defendant and having *ipso facto* served their purpose both those intended to notify of the arbitral proceedings and enable it to enter an appearance at the court of arbitration – which, we repeat, it did – and those intended to comply with procedure regarding the composition of the arbitral authority that was to judge the case, the non-reception of the document whose purpose was the presentation of a writ of final conclusions can only be put down to the conduct of the defendant, who voluntarily absented himself from the company domicile without giving notice of his whereabouts, so that if the said documents could not be served it was due to his own attitude in ignoring the proceedings while yet being aware that they were in progress. He can hardly therefore claim defencelessness in not having had the opportunity to submit his final arguments given that the alleged defencelessness was brought about by his own actions, there being no onus on the plaintiff to do more to furnish the court of arbitration with the new address of the defendant, given that the communications were addressed to the company domicile – which has not changed – and that notice of the arbitral award, whose reception by the contestant is accredited by acknowledgement of receipt, was served at that domicile".

VI. CHOICE OF LAW. SOME GENERAL PROBLEMS

1. Proof of Foreign Law

– STC 17 January 2000 (*BOE* 42 (supplement), 18.2.2000)

Appeal for individual protection. Test of foreign law and effective judicial protection. Art. 24 *CE*. Completion of the preparatory inquiry by letters rogatory.

"The appellant sought legal separation under the laws of Armenia, both

spouses being of that nationality. The court deemed that the test of foreign law furnished by the plaintiff was insufficient, and at the appeal stage that test was applied through letters rogatory. For various reasons this test was inconclusive and the appeal was dismissed because 'this court is not cognizant of the rules of the applicable foreign law".

"Legal Grounds:

...

Third: ... Furthermore, while it is true that ordinary courts commonly hold to the doctrine that foreign law is a 'fact' that must be proven by whoever presents it in evidence, under the terms of the second paragraph of art. 12.6 of the *Cc* (albeit such an interpretation and application of the said civil law provision is merely a question of ordinary legality unrelated in principle to the jurisdiction of protection), it is equally true that the last paragraph of the same article 12.6 provides that in applying that law, 'the court may use whatever means of verification it considers necessary and shall issue the appropriate writs for that purpose'. In cases like the present one, the issue may transcend the limits of ordinary legality that would ordinarily apply, raising the decision of the court on the use of its power under the civil statute to the constitutional plane in connection with art. 24 *CE*, given that such a decision must always be made in light of the court's obligation to provide effective protection of the rights and the legitimate interests of the parties in litigation, particularly where the application of foreign law is required in light of Spanish law and the allegations of the parties in litigation. In fact, in cases of this kind, especially given the unusual circumstances, the test of foreign law and the role of the court in its verification may entail more than a simple evaluation of evidence presented by a party in support of its claims, which is undoubtedly the exclusive province of the ordinary courts.

Fourth: In light of this set of circumstances, one must conclude that the failure of the test of foreign law was due to the attitude of the Provincial High Court, which gave no reason for holding the hearing and delivering judgment before the response to the second letters rogatory; evidently, it is no good reason that the hearing of evidence could not take place because the above-mentioned letters rogatory had not been returned. In this case there was no threat to the fundamental rights of other parties in the proceedings or the rights of third parties – as we know these may constrain a party's rights of defence – which might have been considered in the grounds for the court's decision (SSTC 130/1986 of 29 October, 237/1988 of 13 December, 21/1989 of 31 January, 9/1993 of 18 January, 86/1994 of 14 March, 196/1994 of 4 July; and more recently 62/1999 of 26 April, 162/1999 of 27 September, and 165/1999 of 27 September; ATC 14/1999 of 25 January). Furthermore, this court has declared in the past that the performance of a test cannot be barred by reason of 'interests worthy of protection but of subordinate rank', such as the prompt and efficacious resolution of judicial proceedings' (SSTC 51/1985 of

10 April, FJ 9; 158/1989 of 5 October, FJ 4; 33/1992 of 18 March, FJ 5), which would appear to have been the purpose of the Provincial High Court's decree of 21 February 1997 ordering the repetition of the letters rogatory misplaced in the Ministry of Justice while leaving the appeal ready for judgment 'in view of the time that has elapsed'.

At the same time there is no doubt as to the diligence shown by the appellant in her efforts to prove the applicable Armenian law as required under art. 107 of the *Cc* (as it relates to art. 9.2 of the same), she having furnished the beginnings of a proof of that law which was borne out by the results of the successive inquiries made; be it said moreover that the letters rogatory were issued by the Provincial High Court at the instance of Mrs. Charlouian, who applied for suspension of the appeal hearing pending the return of the second letters rogatory. Furthermore, the test which in this case could not be completed owing to the lack of a translation of the applicable foreign law is not strictly speaking a test of facts but of legal rules; and also, the applicability to the case of that particular 'fact' as foreign law is treated in the *Cc* does not derive from the argument of Mrs. Charlouian but from the remittal in art. 107 of the *Cc* (as it relates to art. 9.2), and hence in the case in point it was not strictly speaking a matter of the appellant proving her allegation (the applicability of Armenian law to the case) but of demonstrating the law applicable to the case in pursuance of the said art. 107 of the *Cc*, which in light of the guarantees contained in art. 24.1 *CE* and given the peculiar features of the case, should have prompted the courts to take a more active part in securing that evidence once the party had furnished the beginnings of a proof, and yet at no point in the proceedings was any reason given for not instituting other supplementary measures under the powers vouchsafed to the courts by art. 12.6 in fine of the *Cc*.

It is equally obvious that the failure of the test of Armenian law prejudiced the appellant in that her appeal was dismissed due to the failure to verify the said law, which failure was caused by the unfounded decision of the Provincial High Court not to await the outcome of the second letters rogatory before announcing the conclusion of proceedings.

It is therefore our conclusion that the Provincial High Court not only thwarted a decisive test of the grounds of the appellant's claim (in which test it had agreed to collaborate at the instance of the appellant), which in itself infringes the right of Mrs. Charlouian to all pertinent means of proof (art. 24.2 *CE*), but also left her defenceless (art. 24.1 *CE*) in dismissing her application for separation specifically on the basis of the failure of the said test, for which the court alone was responsible. This court therefore upholds the appeal for protection and quashes the decision of the appeal court, thus setting the proceedings back to the situation as it was prior to the order of 21 February 1997 to repeat the letters rogatory and leave the date of trial pending; however, it is not the business of this court to dictate to the Provincial High Court what action it should take to complete the

unconcluded test of foreign law as requested by the applicant in her appeal for protection".

– STS, 5 June 2000 (*RJA* 2000\5094)

Donation of real property in a marriage contract. Application of the law of the foreign country of which the donor is a national. The party invoking that law must prove it. Application of Spanish law for lack of proof.

"Legal Grounds:

...

Second: The first ground of the appeal cannot be entertained in that while the act of disposal in question is indubitably a donation and the applicable law is Danish as provided in art. 10 section seven of the *Cc*, whereunder donations are to be governed in all cases by the national law of the donor, given the absence of adequate evidence or information as to the requirements in such matters under Danish law, the proper legal solution is to apply Spanish rules ... as was done in the judgment here appealed. The burden of proof the foreign law lay with the party invoking it and seeking its enforcement ... [which] did not take the requisite action to that purpose, in that although on appeal a document from the Danish Consulate in Barcelona was presented in evidence, on 4 May 1995 the Provincial High Court refused to admit it as out of time and ordered that it be returned to the party; for that reason it is not appended to the bill of pleadings, and no value can be attached to the fact that a copy for information accompanied the appeal in cassation, especially bearing in mind that no challenge or protest was made against the order referred to above. At the same time it should be noted that admission by the court of instance of the validity of a marriage contract entered into under foreign law for the purposes of the conjugal economic regime does not automatically extend to donations made in or at the time of the contract.

Therefore, the first ground must be dismissed, and likewise the second ground, namely undue application of art. 633 *Cc*, for the same reasons".

– STS, 13 December 2000 (*RJA* 2000\10439)

Loan agreement. Invocation and proof of foreign law. Subsidiary application of Spanish law.

"Legal Grounds:

First: Norbanken Luxembourg, S.A. had instituted an action for debt against Mr. Arild S., for failure to make payments on a loan granted to the defendant, the loan agreement expressly stating that the agreement was considered to be final and was to be interpreted according to the laws of the Grand Duchy of Luxembourg ...

Second: ... It must be admitted that this Court substantially agrees with the statements of the appellant. Thus, the Decisions of 11 May 1989 and 3 Mar. 1997 consider foreign law to be a matter of fact, which must therefore be

presented and proven by the party invoking it. For their part, the Decisions of 9 Nov. 1984 and 10 Mar. 1993 allude to the fact that the courts have the power but not the obligation to provide such means of verification as they deem necessary. Also, the Decision of 23 Oct. 1992 recalls that foreign law cannot be applied *ex officio* in Spain if it has not been properly presented.

Third: Finally, the Decision of 31 Dec. 1994 points out the differences between the rules of conflict, which must be observed *ex officio* inasmuch as they simply indicate what material law is applicable to the legal relationship at issue, and the material law as such, which is not referred to by art. 12.6 of the *Cc* and cannot in any event be determined by the court.

Fourth: According to the doctrine as discussed above, the rule of conflict applying in the case at issue is set forth in art. 10.5 of the Spanish *Cc*; this means that the applicable law is that to which the parties have expressly agreed, namely the law of the Grand Duchy of Luxembourg as provided in clause 19 of the loan agreement formalized by the parties in litigation.

However, the appellant admits that it did not take steps to demonstrate the substance, validity and interpretation of the law mentioned, which failure the Provincial Court was not bound to – and in fact did not - remedy.

This is a situation, on which this Court has issued various rulings, where courts are unable to admit the applicability of the foreign law either because its precise substance or its actual scope or interpretation have not been adequately established, or because – as in the present case – the party invoking that law, with whom the burden of proof lies, has done nothing to furnish such proof.

The solution arrived at in the jurisprudential doctrine referred to (Decisions of 7 Sept. 1990 and 11 May 1989 and many more) is that the issue must be decided under the rules of substantive law of Spain.

Fifth: In this case the appeal court rightly decided that it was not its task to verify *ex officio* the rules of foreign law applicable to the resolution of the dispute, since that would be tantamount to taking for the plaintiff the action that the latter had failed to take.

However, the appeal court failed to take the necessary second step following on such a decision, namely to apply the relevant rules of Spanish law so as to avoid the absence of a preliminary ruling on the object of the action".

– STS, 25 January 1999 (*RJA* 1999\321)
Action for debt. Unproven foreign law: application of the *lex fori*.

"Legal Grounds:

...

Second: ... Firstly, the judicial rule set forth in art. 12.6 requires that whoever invokes foreign law must demonstrate in court: a) the existence of the law concerned; b) that such law is in force; and c) that it is applicable to the matter at issue. Secondly, the jurisprudence in this respect has established that

the use of foreign law is a matter of fact and as such must be presented by the party invoking it, who must furnish evidence of the substance of the law currently in force and of its scope and authorized interpretation, in such a way that Spanish courts are left in no reasonable doubt as to its applicability (see SSTS of 7 September 1990).

In this case the original judgment adhered to the accepted interpretation of the above rule and to the line of the jurisprudence and, following the accepted line that in circumstances like the present where Spanish courts are unable to establish the applicability of the foreign law with absolute certainty they must make judgment in the light of Spanish law, judged the substance of the matter on the basis of the evidence duly submitted, and particularly the fact that on examination the defendant admitted to the authenticity of the private document, of the acknowledgement of the debt contained therein and of the obligation to pay the principal and interest.

The appellant wrongly alleges infringement of the cited articles, seeking in fact to persuade this Court that the judgment of the evidence by the court of appeal was erroneous and failing to take into account that, as this Court has repeatedly stated, for instance in decisions of 18 April 1992, 15 November 1997, 15 April and 30 December 1998, the judgment of the court of appeal in that respect is unappealable unless it is illogical and contrary to the dictates of experience or the rules of reasonable criticism, which conditions do not apply in this case, otherwise cassation would simply be a third level of appeal".

– STS, 16 March 1999 (*RJA* 1999\4411)

Contract of employment concluded and executed abroad. Failure to prove foreign law. Application of the *lex fori.*

"Legal Grounds:

First: Briefly, the record shows that the two parties, both Spanish nationals, had been serving in the commercial office of the Spanish Ministry of Economy and Inland Revenue in Beijing, under contract concluded in that city.

Second: ... The judgment appealed and the judgment of reference concur in that the applicable law is Chinese law; however, if that law is not fully proven as required by art. 12.6 *Cc* the issue here is whether Spanish law should be applied, as it was in the judgment here appealed upholding the action, or whether the action should be dismissed through lack of evidence.

...

Fourth: As to the substance of the matter, there is no question as to the competence of the Spanish courts; as already noted, both the contested judgment and the judgment of reference concur (under the relevant rules of conflict, essentially art. 10.6 *Cc*) that the applicable law in this case is Chinese law but that sufficient evidence has not been furnished as to its substance and whether it is currently in force. The difference lies in the consequences of such lack of evidence. According to the judgment at issue this means that Spanish

law should be applied, whereas according to the judgment of reference the action cannot stand and must be dismissed.

The question is answered by the jurisprudential doctrine repeatedly applied by the Civil Chamber of this Court and followed in the judgment at issue, to wit that where the applicable foreign law is not proven beyond doubt, the case must be judged by internal law".

– STS, 9 February 1999 (*RJA* 1999\1054)
See Section XX (Transport)

– STSJ Madrid 11 January 1999 (*La ley*, 1999, 8566)
Contract of employment. 1980 Rome Convention. Proof of foreign law. Application of the *lex fori*.

"Legal Grounds:

...

Third: Under art. 191 c) of the *LPL*, the writ of pleading alleges infringement of the 1980 Convention on the Law Applicable to Contractual Obligations (Treaty of Rome) and arts. 1.4 of the *ET*, 10.6 and 11.3 *Cc* and jurisprudence of the TS listed in the third ground, and arts. 156.2 *LSS*, art. 52 L 44/1983 of 28 Dec. and art. 2.2 L 53/1984 of 26 Dec. in ground four. Briefly, the principal argument of the writ concerns the applicable law, which it claims is that of Argentina. This is correct as far as it goes; however, it is not so in terms of subordinate legislation and its consequences in light of the doctrine laid down by this Chamber for Social and Labour Matters. As indicated in the foregoing judgment, the applicable law under art. 6 of the Treaty of Rome as invoked is the *Lex Loci Laboris*, given that the contract of employment made no stipulation as to the applicable rule, so that the contract is governed 'by the law of the country in which the employee habitually carries out his work in performance of the contract'. However, the judgment does not mean the action is dismissed for lack of evidence of the substance of the Argentinian law referred to by the appellant but that the procedure must be as provided in art. 12.6 *Cc*, whereby 'Any person invoking foreign law must furnish proof of its substance and current validity by the means of evidence allowed in Spanish law; however, for the application of the foreign law the court may also make use of whatever means of verification it considers necessary and may issue the appropriate orders to that effect'. The jurisprudence has established the following interpretation of this provision: ...

2. The law and the jurisprudence vouchsafes the trial judge broad powers of investigation for the determination of applicable foreign law without reference to the pleadings of the parties.

3. The Court wishes to draw attention to the atypical expert's report as a means of investigation regulated by the European Convention on Information on Foreign Law of 7 June 1968, to which Spain acceded on 19 Nov. 1973.

4. It is possible to postpone judgment pending further inquiry in order to

gain adequate information on the applicable foreign law, especially where foreign rules are invoked and substantiated in an improper or contradictory manner – see Decision of the TS (Civil) of 15 Nov. 1996.

5. When the foreign law has not been proven either at all or with sufficient clarity or certainty, the proper procedure is not to dismiss the action but to apply Spanish law – see Decision of the TS (Civil) of 11 May and 21 June 1989 and 22 March 1994.

Thus, where there is inadequate proof of the foreign law, Spanish law is to be applied as stated in the original judgment, which in line with the doctrine established by the Decision of the TS of 17 March 1995 (which reiterates that of 17 June 1994) points out that the Collective Agreement of the Ministry of Labour and Social Security does not apply to persons who carry out their work abroad, and hence compulsory retirement on the basis of a non-applicable Agreement constitutes unfair dismissal. The action by the plaintiff is therefore upheld".

2. Public policy

– STS, 22 March 2000. (*RJA* 2000\2485)

Law applicable to descent. Exclusion of foreign law. Public policy. Interests of the minor. Nationality. Application of Spanish law.

"Legal Grounds:

...

Second: ... Art. 9 of the *Cc* indeed provides that both the nature and the substance of descent (which may be understood as both within and without matrimony) are to be governed by the personal law of the child, which according to the first paragraph is determined by nationality, and in this case both mother and daughter possess French nationality, it being understood that the latter's birth was recorded in the Civil Registry of the twentieth Arondissement of Paris. If taken from such a literal viewpoint, the descent at issue would come under the French Civil Code as the national law of the daughter (art. 12.1 of the *Cc*). However, the circumstances of the action demand that the law be interpreted effectively in the proper way, bearing in mind that it cannot ignore the interests of the child; these interests must be taken as an essential and basic principle of the law, which means that its application must come down on the side of *favor filii.*

The material law of the forum contemplates specific cases in which the national law may be applied and the foreign law dispensed with. This is so in the case in question, for the daughter's French nationality is not final and exclusive but is only a preliminary or provisional nationality given that under 17-1-a) anyone born to a Spanish father or mother is Spanish.

To consider solely the nationality at the time of initiation of the action, ignoring the rule cited above, would be to venture into a labyrinth from which there is no satisfactory legal escape, since the necessary condition for the

attribution of Spanish nationality is to be declared the biological issue of a Spanish progenitor – in other words, such a legal decision precedes and determines it, so that nationality functions as an effect and consequence, the condition being first met, of being the daughter of a Spanish national. Art. 9.4, as it relates to the foregoing, is to be applied where nationality has been legally attributed to the exclusion of any other. In the present case, there has been no definitive imposition of nationality compelling automatic application of the foreign law and precluding consideration of the father's nationality, a situation at odds with our own law, particularly given that the French laws work against rather than in favour of claims of descent.

Thus, the material Spanish law in this case is immediately and necessarily applicable as a matter of the public policy of the forum so as to afford the minor proper protection and safeguard her rights, which is the duty of the Spanish courts and which we hereby resolve in order to provide the judicial protection asked of us and not to leave the minor utterly defenceless.

Judicial logic must prevail when judgment has been given definitively declaring the appellant's paternity in respect of the daughter born of his extra-marital relations with the plaintiff; to take any other view would be vain in the presence of a definitive decision.

Aside from the foregoing, there are other cogent arguments in favour of the ruling referred to. For instance, to accept the applicability of the French regulations would be quite detrimental to the interests of the minor, given that under the relevant provision of the French Civil Code, which is art. 340.4 (prior to the reform introduced by L 8 Jan. 1993-L 93-22) such action must be brought within two years of birth 'on pain of prescription', which time is long past. According to art. 11.2 of the Organic Law of 15 Jan. 1996, which although posterior is nevertheless orientative, one of the guiding principles in the action of the public powers must be 'the prevalence of the interests of the minor'.

Other relevant considerations include the fact that the applicability of foreign law is not treated as inevitable; the exception is clearly and forcefully stated in art. 12.3 of the *Cc*, to the effect that in no event will foreign law be applied where this is contrary to public policy, which, as stated in a Decision of 23 Nov. 1995, is by its very nature flexible and variable as regards social circumstances and realities (Decisions of 5 Apr. 1966 and 31 Dec. 1979) in that it is based essentially on legal principles of public and private law while taking account of economic, political, moral and even supra-national principles whose safeguarding is necessary for the maintenance of the social order and peace in every respect.

It is the duty of the Spanish courts to observe and protect the public policy of the forum. Were Spanish law to be set aside and French law imposed as the appellant seeks, to begin with the judicial recognition of paternity as claimed would not stand in light of the conditions established in art. 340 of the applicable French Civil Code, and this in turn would preclude the possibility

of examining and deciding whether the daughter of the parties possesses and has from birth possessed Spanish nationality, in violation of art. 11 of the Spanish Constitution which classifies nationality as a fundamental right in that no person of Spanish origin may be deprived of his or her nationality. Art. 15 of the Universal Declaration of Human Rights (General Assembly of the United Nations of 16 Dec. 1948) declares that no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality, and that in the final analysis would be the outcome of denying the applicability of Spanish law and hence the entitlement to nationality under art. 17 of the *Cc*.

The grounds are dismissed. Be it noted that the investigation of paternity under the French law claimed by the appellant was restricted at the time of the facts and conflicts with art. 34.1 of the Spanish Constitution".

– SAP Barcelona 6 April 2000 (*RJA* 2000\1088)

Moroccan law on dissolution of marriage, applicable under art. 107 of the *Cc*, is not contrary to public policy. Legal separation is not a recognized institution in Moroccan law.

"Legal Grounds:

First: ... Therefore, in light of the facts set forth in the action on repudiation of his wife Nadia E. K. by the defendant Mr. Abdellah E. K. and the expulsion of her and their daughter Miriam from the family home, the appellant alleged cause under art. 82.1 *Cc* for a declaration of legal separation and other measures set forth in the original writ of process. The Public Prosecutor did not oppose the petition and the defendant applied for confirmation of judgment.

Second: The appellant is mistaken as to the essence of the rules of international conflict of private law as set forth in arts. 107 and 12.3 of the *Cc* as regards exceptions to public policy, assuming that the regulation and effects of the law on marriage in the Kingdom of Morocco are contrary to public policy as it exists in Spanish territory and on that basis pleads for the application of the *Cc*.

Third: The argument cannot be entertained in that the appellant mistakenly identifies the conduct of the defendant Abdellah as conforming with the laws on marriage in force in the Kingdom of Morocco, when this is obviously not the case to judge from the letter of the law furnished by the Moroccan Consulate General in Barcelona (translation duly included in folios 155 to 230); in fact the conduct of the defendant is contrary to the provisions of Book II, all seven chapters, of the Moroccan law on marriage (Dissolution of marriage and its effects), and particularly to its provisions on Repudiation and Divorce, including institutional and means of defence open to the spouses, establishing foral requirements, guarantees and recognition of rights for either spouse seeking dissolution of a marriage (arts. 44 to 52 bis and 61 to 71 *Cc*.). While this regulation differs from that of the Spanish *Cc* and Law 30/1981 of 7 Jul., it cannot be considered *ipso facto* contrary to public policy

under the Constitution nor to public policy under art. 12.3 *Cc*, defined by the Supreme Court in a Decision of 5 Apr. 1996 as legal principles, public or private, or political, economic, moral or even religious principles, which are absolutely essential to the maintenance of the social order of a people at a given time – which principle, in the words of the Provincial High Court of Madrid in a Decision of 1 Jul. 1994, must be applied restrictively and with great caution, for if taken to extremes it would make it impossible to apply laws promulgated by other States or enforce judgments not delivered by our courts, thus clearly violating art. 107 *Cc*, which vouchsafes precedence to the material law of foreign spouses having the same nationality. Therefore, as Moroccan law has not been appealed to in the present case, as it should have been according to the law of conflict or connection, it is clear that Spanish law (under the subsidiary rule in art. 107 *Cc*) cannot be applied to impose legal separation on Moroccan subjects when such does not exist in their own country. That being so, we confirm the dismissal of the appeal while confirming the right of Nadia and Abdellah to have the law to which they are entitled by common nationality enforced by the Spanish courts, as provided in arts 21.3 and 22 of the *LOPJ*".

3. Renvoi

– STS, 21 May 1999 (*RJA* 1999\4580)

Law applicable to succession of an English national domiciled in Spain. Property in Spain. Renvoi. Flexible interpretation.

"Legal Grounds:

...

Fourth: ... The definitive issue at the heart of this action is the material law applicable to the estate of the father of the plaintiffs, a British national who died at Salvatierra de los Barros, where he had resided for several years, leaving a nuncupative will mentioned in the first ground of this judgment; the deceased was the owner of the real property mentioned above, and according to the plaintiffs the estate comprised the movable property listed in the fourth statement of fact in the petition, some being located in the said real property and another in the Museum of Toulouse (France). The plaintiffs argue that the estate of their late father must be governed by Spanish law in view of the fact that the English courts, on the basis of the report on English law accompanying the petition, applied the renvoi principle remitting to the law of the country in which the goods are situated as the applicable law in regulation of the deceased's estate. The plaintiffs argue that such remittal is contemplated in art. 12.2 *Cc*, whereby 'remittal to foreign law shall be understood as referring to the material law of that country and not to any remittal under its rules of conflict to other than Spanish law'.

Notwithstanding the report on the jurisprudence of the English courts on the applicability of remittal which accompanies the petition, the fact is that, as

both Spanish and British authors point out, English jurisprudence is lately reluctant to apply the renvoi principle in matters of succession. That approach is consistent with the most recent Spanish international law doctrine regarding renvoi as established in art. 12.2 *Cc* in connection with the English rule of conflict on matters of property inheritance. In Adams, for example, the English court rejected renvoi on the understanding that the Spanish courts would only apply the principle in certain cases and under certain conditions, that is, it would only be applied where the courts deem it appropriate – in other words, the Spanish courts will only accept renvoi when this will lead to an outcome in accordance with the general principles of Spanish law.

While a literal reading of art. 12.2 *Cc* would indeed point to the solution sought by the petition, the latest developments in Private International Law – as manifested in Comparative Law and particularly in International Conventional Law – demand more subtle treatment of renvoi, eschewing indiscriminate acceptance or rejection of the principle in favour of a flexible criterion, to be applied in a restrictive and highly circumscribed manner. Renvoi as sought in the petition is contrary to the principle of universal heritability inherent in our law of succession, which prohibits the application of different legal procedures to the inheritance of movable and real property; it further contradicts and negates one of the guiding principle of English law on succession, that is freedom of testament as a manifestation of free will. Moreover, as noted by this Court in a Decision of 15 Nov. 1996 on a similar case, application of the renvoi principle would not achieve the purpose of that principle, which is harmonization of the legal systems of different States – and furthermore, in this case the solution that would be arrived at thereby cannot be said to be fairer as regards the interests concerned. It is therefore concluded that the law applicable to the succession of the deceased John A. D. is that of his nationality – that is, English law whereunder its nationals possess testamentary freedom – and hence the action must be dismissed and the original judgment revoked".

VII. NATIONALITY

– STS, 18 May 1999 (*RJA* 1999\4920)

Acquisition of Spanish nationality by native of Sahara by reason of residence. The one-year qualification is not applicable to persons who failed to take the option in due time.

"Legal Grounds:

...

Third: A right and proper interpretation of the law here at issue – that is a strictly declaratory interpretation truly expressing the *mens legis* – leads inexorably to the conclusion arrived at in the judgment here appealed; for while art. 22.2.b) of the *Cc* provides for acquisition of nationality after only one year's residence by persons not having exercised the power to choose,

given that arts. 19 and 20 establish and regulate the option of foreigners to acquire Spanish nationality, clearly the general power to opt set forth in art. 22 is to be understood in relation to the specific terms of the said arts. 19 and 20, for the provisions of one and the same statute must be interpreted in light of one another if they are to have the true, unambiguous meaning intended for each one. Moreover, as we shall see below, the result of such interpretation cannot be altered by the terms of Decree 2258/1976 of 10 Aug. on the option of Spanish nationality for natives of Sahara.

Fourth: The Decree referred to indeed recognizes the right of Saharan natives meeting the conditions set forth in art. 1 to opt for Spanish nationality; however, there can be no getting round the terms of the second article which provides that those seeking to avail themselves of the terms of the preceding article 'must so represent within a maximum of 1 year as from the date on which this Decree comes into force [this happened on 29 Sept. 1976], by appearing ...'. In other words, a specific deadline was set for exercising the right of option, specifically recognized in view of the particular ties between Sahara and Spain, but that right could no longer be exercised once the deadline was past, and it cannot therefore be said, as the appellant does, that this means the inhabitants of Sahara under Spanish protection were not included in the list of peoples entitled to the short residence requirement for Spanish naturalization in art. 22 *Cc* because it was unnecessary. We repeat that the option vouchsafed in the said Decree 2258/1976 could only be exercised within one year of its publication in the *BOE*, so that the option lapsed if not taken up within the stipulated time; moreover, for the same reasons the inhabitants of Sahara cannot avail themselves of the provision of art. 22 as invoked, since this is restricted to the options recognized in art. 19, which do not cover the particular situation of the appellant.

Fifth: The foregoing argument, which is in no way weakened by subsequent legislation based on a declaratory interpretation of the provision at issue, ratifies the criterion applied in the contested judgment inasmuch as art. 22 *Cc* cannot be said to have been infringed, and since on the other hand such an interpretation is clearly not in breach of arts. 10 and 11 *CE*, the second of which expressly authorizes the interpretation of rules relating to fundamental rights in accordance with the Universal Declaration of Human Rights and international treaties in that Spanish nationality is acquired in accordance with provisions established by law and what the law establishes does not violate the fundamental rights and freedoms. The present appeal in cassation is therefore dismissed".

– STS, 5 June 1999 (*RJA* 1999\7279*)*

Acquisition of Spanish nationality by reason of residence. Compliance with legal requirements. Good civic conduct: interpretation

"Legal Grounds:

First: The sole ground of judicial review ... claims infringement of the

fourth paragraph of art. 22 *Cc* by the original court in its interpretation of the indeterminate judicial concept of good civic conduct as a requirement for the granting of Spanish nationality under the said provision of the *Cc*, in that the court *a quo* discounted the report of the Spanish Intelligence Service (CESID) on the grounds that the facts stated in that report were negated by a certificate issued by the Spanish Ambassador in Jordan and presented by the defendant

...

Second: In accordance with the jurisprudential doctrine as established in judgments including those of this court of 26 Jul. 1997 (appeal in cassation 5892/1994) and 24 Apr. 1999 (appeal in cassation 8455/1994), the original court declared that, as an indeterminate legal concept, the requirement of good civic conduct does not vouchsafe discretionary powers to the Administration, since in its decisions it must seek a just solution, and that solution can therefore be controlled and reviewed by the courts. On that basic premise, the court of origin declared that if the facts alleged by the Administration in deciding that the applicant did not fulfil the good civic conduct requirement for acquisition of Spanish nationality by reason of residence were true, the Admimistration was legally entitled to reject the application; however, the truth of these facts, adduced by the Administration on the basis of a confidential report from the Spanish Intelligence Service (CESID), is belied by the certificate issued by the Spanish Ambassador in Jordan ...

Third: It must be remembered that, as we pointed out in STS 24 Apr. 1999 (appeal in cassation 8455/1994, FJ 5.), the inclusion of nationality in the Civil Code is not arbitrary, as this is a genuine civil status essential to the legal position of the individual; but at the same time it operates in two dimensions, the first public and the second private – that is, as a qualification of inclusion in the organization of the State and as a personal token of belonging to the community. Nevertheless, there can be no ignoring its true legal nature as defining a person's civil status, and therefore one must not confuse acquisition of nationality by reason of residence with naturalization, for while the latter is a right vouchsafed by grace for which the application embodies an occasion or reason but not a legal ground, acquisition by reason of residence can only be granted or denied on the basis of conditions established by law; it is therefore not a concession strictly speaking but an act of recognition of compliance with the requirements. In the present case, compliance with these requirements is accepted by the original court, since the only requirement deemed absent by the Administration – that is, civic good conduct – is in fact met, it having been demonstrated to the satisfaction of the said court by documentary evidence that the allegations of the Administration in objection are not true and the person applying for nationality by reason of residence having for that purpose submitted the documents required by Law 68/1980 of I December".

VIII. ALIENS, REFUGEES AND CITIZENS OF THE EUROPEAN UNION

– STC, 31 January 2000 (*BJC*, 2000, n. 227)

Expulsion of a foreign citizen from Spanish territory for involvement in activities contrary to public policy. Legal conditions for authorization of residence.

"Legal Grounds:

First: ... In appealing for protection, the appellant alleges infringement of art. 24.2 *CE* as it relates: to the principle of accusation in that his expulsion was ordered without there being an indictment in the proceedings initiated against him; to the right to a trial with all guarantees, in that – according to the appellant – his expulsion was ordered at a stage in the proceedings where no limits had been set on his capacity to be made a defendant; the right to presumption of innocence, in that he was expelled in the absence of sufficient factual evidence to relate him to the offences of which he was accused; the right to utilize the appropriate means of proof, in which connection he alleges that a proof admitted by the court was not brought; and finally, he alleges infringement of the right to effective judicial protection (art. 24.1 *CE*) in that the original court rejected a motion for amendment based on a legalistic interpretation contrary to that fundamental right.

Third: Having disposed of the procedural objections, we must now turn to the complaints brought by the appellant, in which connection it must be said that the action is based on a false premise, namely that it describes the contested judgment authorizing the expulsion of the appellant from Spanish territory as a sanction. The authorization of the court of instance does not stand in place of the administrative decision; that is, the expulsion order is still a decision of the Administration and is an administrative sanction subject to judicial control.

Indeed, this Court has established that an expulsion order issued by the competent government authority is not a penalty but an administrative sanction and as such must be sanctioned by the law on aliens, ...

However, in the present case there is not yet an expulsion order but a judicial decision which is required before the Administration can carry out the expulsion of an 'indicted' foreigner under the first paragraph of art. 21.2 LO 7/1985 of 1 July on rights and freedoms of foreigners in Spain; thus, if the Administration finally decides on expulsion, this will be effective immediately since it is not necessary to await criminal judicial proceedings. Such authorization of expulsion cannot therefore be classified as a 'sanction' in lieu of a criminal sanction, unlike expulsion of a 'convicted' foreigner ... which again is not a penalty but 'a possibility of suspending the power of the State to enforce the judgment, which is applied to the foreigner to safeguard the legitimate purposes pursued by the State thereby', nor does the foreigner possess any right to have a prison sentence substituted by expulsion as

provided in art. 21.2 para 2 LO 7/1985, or vice versa; in other words, he also does not have the right to insist on the judicial proceedings being pursued to their conclusion by a judgment in lieu of an expulsion order ....

Fourth: Finally, it must be remembered that foreigners only have the right to reside in Spain subject to due authorization by a competent authority in pursuance of international treaties and the law (arts. 13 and 19 *CE*, SSTC 99/1985 of 30 Sept., FJ 2., and 94/1993 of 22 Mar., FJ 3.; and Declaration of 1 June 1992 regarding the Treaty of European Union). It is therefore perfectly legitimate for the Aliens Act to make the right of foreigners to reside in Spain subject to the fulfilment of certain conditions, among them that they not be involved in activities contrary to public policy or that they do not commit offences of a given level of seriousness. This conclusion is underwritten by the jurisprudence of the European Court of Human Rights which, while recalling that the European States must respect the human rights guaranteed by the Treaty of Rome, has consistently stressed the broad discretion available to the public authorities as regards controlling the entry, residence and expulsion of foreigners from their territory ...

The cited provision of the International Pact on Civil and Political Rights places constraints on the freedom of the legislator to determine the grounds for expulsion of a foreigner legally resident in a country: firstly, there must be a rule setting forth the conditions in which expulsion is allowable; and secondly, the foreigner concerned must have the opportunity to defend himself by setting forth 'the reasons why he should not be expelled'.

If these guarantees are fulfilled, any foreigner qualifying for expulsion for any of the reasons set forth in art. 26.1 of the Aliens Act may be expelled from Spanish territory by the governmental authority (STC 94/1993 of 22 Mar., FJ 4.), subject to the possibility of authorization by a criminal court when the act prompting expulsion may constitute a criminal offence (art. 21.2 para 1. Aliens Act). Such judicial intervention gives the foreigner concerned greater guarantees than are vouchsafed to foreigners under a plain expulsion order. In such cases the foreigner has not only a guarantee of defence in the administrative procedure and supervision of any expulsion order by the administrative jurisdiction, but also prior judicial proceedings in the criminal courts. The competent criminal court must examine the administrative expulsion proposal, and the Administration can only order expulsion if the court so authorizes after verifying that a foreigner accused of less serious offences meets any of the criteria for expulsion and considering the circumstances of the case (arts. 21.2, paras 1 and 26.1 and 3 Aliens Act). The role of the criminal court in this case is therefore to some extent analogous to that of a court considering a plea of habeas corpus by a foreigner under order of expulsion. The doctrine of the Court has it that in such cases overall supervision of the legality of an expulsion order lies with the administrative courts, but the criminal court must prima facie protect the rights of the foreigner by reviewing, if only provisionally, the material

grounds of the administrative action in respect of which it is called upon to intervene (SSTC12/1994 of 17 Jan., 21/1996 of 12 Feb., 66/1996, of 16 Apr. and 174/1999 of 27 Sep.)".

– STS, 20 June 2000 (*RJA* 2000\6000)

Application for visa extension. Right of residence by reason of familial relationship with a Spanish citizen. Marriage of convenience. Non-cohabitation.

"Legal Grounds:

. . .

Third: The specific regulations, quoted literally in the foregoing ground in order properly to address the legal issue, are sufficient proof that the specific safeguards laid down in the Royal Decree are in principle applicable to foreigners having family ties with Spanish nationals, and specifically to the spouses of Spanish nationals 'provided that there is no *de facto* or *de iure* separation', and this constitutes a genuine limitation that must certainly be taken into account. Turning now to the specific judgment here contested, in setting this against the cited regulation, it must be said in the first place that exemption from the visa requirement, despite what is said in the contested judgment, does not require that there be a 'family tie prior to entry to Spain', not only because the cited provision contemplates and regulates both entry to and residence in Spain, but also because a proper interpretation of the provision inevitably leads to the conclusion that the subsequent regular marriage of the foreigner with a Spanish citizen, even after more than a month in Spanish territory, all things being equal, can and should exempt from the visa requirement, given that this circumstance is considered exceptional; in this connection the determining consideration is the union of family members, clearly a humanitarian criterion of public interest.

However, in the case here at issue, the court of instance dismissed the appeal on the grounds that, in light of the evidence, there does not appear to be a normal and effective family tie (meaning that the marriage was not for the sole purpose of regularizing the appellant's situation) or actual cohabitation, and therefore, given that the facts are not even disputed in cassation, within the narrow limits applying as repeatedly noted, this Court must proceed on the basis of the facts as stated, although it must be said that while there is a case for our examining the vague legal concept of 'exceptional reasons', which is certainly open to review in these administrative proceedings, here we are proceeding on the basis of the specific appraisal made by the court of instance regarding the marriage concluded and the issue of cohabitation of the spouses.

Third: (sic) The conclusion deriving from the foregoing ground, namely that the purpose of the marriage appears to have been to regularize the appellant's situation and there has been no effective cohabitation – and we repeat that we must accept this as a factual basis as established in the contested judgment – means that the grounds of appeal are baseless, for the

prescriptions established in the said Royal Decree 766/1992 are applicable to the spouse of a Spanish citizen provided that there is no *de facto* or *de iure* separation and yet it is averred that there has been no effective cohabitation and that the purpose of the marriage was to regularize the appellant's situation, indeed for a price, then the judgment is plainly free of the irregularities claimed in that it does not meet the requirement set forth in art. 2. a) as invoked, and nor are exceptional circumstances given that would warrant exemption from the visa requirement ..."

IX. NATURAL PERSONS: LEGAL INDIVIDUALITY, CAPACITY AND NAME

1. Name and Last Name

– RDGRN 4 March 1999 (*BIMJ*,1856)

Spanish nationality acquired by adoption. Application of Spanish law to the adoptee's surnames.

"Legal Grounds:

...

Second: In the case of Spanish nationals not registered in due time and foreigners acquiring Spanish nationality, when their births are entered in the Spanish Civil Registry and their descent is given, such persons must be assigned the surnames corresponding to their descent, and these take precedence over the surnames actually used (*cf.* art. 213, rule 1. *RRC*). The Registrar was therefore correct in assigning the new surnames of the adoptive mother to the child.

Third: The court cannot admit the intent of the adoptive mother, namely to give the child as first surname that of her deceased husband and as second surname her own first surname, since the order of surnames was established, irrespective of Spanish Law, at the time the child acquired Spanish nationality as a consequence of foreign adoption and hence these are not surnames corresponding to a foreigner under his former national law (*cf.* art. 199 *RRC*)".

X. FAMILY

1. Descent

– STS 22 March 2000

Note: See Section VI, 2

2. Adoption

– AAP Barcelona 22 October 1999 (*RJA* 1999\7982)

Simple adoption undertaken by Spanish nationals in Mexico. Non applicability of the 1993 Hague Convention. Conversion of foreign adoption: constitution of a Spanish adoption on the basis of a foreign adoption.

"Legal Grounds:

...

Third: The Court has no doubt, in light of the decision of the Central Civil Registry and the documents from the Mexican State of origin, that this is a simple or non-absolute adoption, an arrangement still common in several Mexican States, including Veracruz, whereas in others (e.g., Oaxaca and Potosí) adoption is absolute. This does not prevent the United States of Mexico from being party to a Convention like that of the Hague which only entails full recognition of a foreign adoption (formalized in the State of origin) in the State of destination (where recognition is required) if both States are parties to the Convention and the adoption effectively has the characteristics of an absolute adoption (arts. 23 *et seq.*, especially 26, of the Convention), namely: termination of the parent-child relationship with the biological family of origin, constitution of a genuine parent-child relationship between adopters and adoptee and acceptance by the adopters of the responsibilities proper to natural descent.

There is now no equivalent to simple adoption in our State, where both the common Civil Code and the Catalan Protection of Minors and Adoption Act 37/1991 at the time, and now also the Family Code, regulate only one form of adoption, equivalent to the historical form of absolute adoption.

At the time of formalization of the simple adoption here concerned in Guanajuato (Mexico), the United States of Mexico and the Kingdom of Spain had formally signed and ratified the Hague Convention on international adoption procedures, but the Convention had not yet come into force as provided in art. 46 thereof ... and had therefore not been incorporated in our domestic law despite having been published in the *BOE*. Consequently, at that time the Mexican central authorities ... could not apply the provisions of the Convention to this adoption, particularly those regarding verification of the capacity and suitability of the adopters as referred to in arts. 4 and 5 of the Convention, and there was not time – even supposing that the Convention had actually been in force for the two parties – to gather information from the Spanish central authority, which according to the ratification instrument of 30/06/1995 for Catalonia is the DGAI in this particular case.

The adoption was thus formalized under the rules of the State of origin, to all intents and purposes a non-signatory of the Convention, which does not mean to say that the authorities of the State of origin did not adopt measures under its internal law identical to those provided in a general way in art. 4 of the Convention ... the only area of doubt being whether the biological

parents and the child could have been advised that the effect of the adoption would be different in Spain from what it would be in the country or territory of origin – that is, that relations between the child and its biological family would be definitively severed [art. 4, 1 c) and d)].

Fourth: It therefore becomes necessary to determine what the possibilities are for recognition of this adoption in Spain. Direct recognition, setting aside the Convention to which both States are now full parties, is barred by art. 9.5 of the Civil Code, as manifested by the Decision of the Civil Registry, and we shall leave it at that. Moreover, there is little probability of ordinary *exequatur* proceedings succeeding under the general terms of arts. 951 *et seq.* of the *LECiv.* in light of art. 9.5 of the Civil Code, which would bar even the Supreme Court from granting an *exequatur* which applied that precept before consideration by the Central Civil Registry.

As matters stand now, subsequent to the formalization of the adoption in the country of origin, and assuming that the terms of the Convention have been met as far as possible, even the conversion procedure provided in art. 27 of the Convention is barred by the power that additional provision 2 of Organic Law 1/1996 (RCL 1996\145) confers on the Central Civil Registrar for that purpose under art. 9.5 of the Civil Code, whereby the matter is left entirely in the hands of the Registrar and the furnishing of consents referred to in art. 9.5 in connection with paragraphs c) and d) of art. 4 of the Civil Code cannot be incorporated because in all cases consents must be furnished by the interested party.

The scientific doctrine on this issue (Proceedings of the 1999 Barcelona Congress on International Adoption) holds that such a simple adoption can be converted to an absolute adoption under art. 27 section b) of the Convention as it relates to art. 4 c) and d), and section 4 of art. 9.5 of the Civil Code, which means that the original consents of the biological parents and the minor must be given subject first to advice as to the effects of the adoption in Spain if this was not already given, through consular channels or the central authorities designated by either party for that purpose under the terms of the Convention, or else through the Registrar if the biological parents are in Spain and so consent.

It does not seem beyond the bounds of possibility that the recording of consents might be pursued in the ordinary courts through voluntary jurisdiction and international cooperation (which would undoubtedly be complex) or else by presenting the documents to the Central Registrar once these have been obtained from the country of origin, from the appropriate Spanish public bodies or by official remittal through the latter. That is the meaning of art. 9.5 s. 4 of the Civil Code.

The new drafting of art. 9.5 in Act 18/1999 of 18 May (RCL 1999\1334) does not provide – but does not bar – a procedure identical to that designed for renouncement of the revocability of an adoption (by the adopters) in countries where adoption is revocable in the law of the State of origin. This is

practically limited to adoptions formalized in the Kingdom of Nepal and some Latin American States, including the one concerned here given that under arts. 405 and 406 of the Mexican Federal Civil Code, adoptions are revocable by mutual agreement and on grounds of incompatibility, but it is sanctioned by section 4.

Another option, which is in fact put into practice in the family Courts of this City, is conversion as part of the ordinary adoption procedure; all the interested parties, including the DGAI, are summoned and the consents are processed either through the central authorities of each State or via consular channels, and the records are finally sent to the Central Civil Registry. In the case of Catalonia, this is authorized by arts. 87 *et seq.* of Decree 2/1997 of 7-1 as amended by Decree 127/1997 of 27-5 approving the Regulation of the Protection of Minors and Adoption Act as it relates to points 1 to 3 of the first additional provision, especially point 3.

Finally, there is always the possibility of seeking a new adoption in Spain, under Catalan law (as in this case) or under the common law.

Fifth: The law applicable to the formalization of the adoption in this case is Spanish law, and by remission Catalan Act 37/1991 (art. 9.5 s. 1 *Cc* and art. 16.1 *Cc*).

In any event, the sole end in this case is a Spanish adoption having the same effects as the foreign adoption as regards the situation of the minor, who is in any case under the parental authority of the simple adopters.

At the time of the Mexican adoption at issue, there was no regulation of international adoption at a national or regional level, and Spaniards adopting children abroad were not required by Spanish law to demonstrate their suitability to any body in Spain or in the place of adoption.

It must be remembered that the suitability requirement was introduced, with a view to the future, by Organic Law 1/1996 in compliance with the Hague Convention, with retroactive effect as regards international adoptions. Art. 25 b) clearly establishes the functions of public bodies as regards the issue of certificates of suitability for adoptions in the country of origin, and the second final provision makes it quite clear that the suitability requirement for an international adoption (even *post facto*) applies in all cases.

In Catalonia, the Care and Protection of Infants and Adolescents Act 8/1995 of 27-7 failed to address and regulate this issue. The insistence on suitability for all adoptions came with the Regulation of the Protection of Minors and Adoption Act in Decree 2/1997 of 7 January as amended by Decree 127/1997 of 27 May, where suitability became a requirement for all adoptions under arts. 68 *et seq.* and 77 *et seq.* Arts. 87 *et seq.* regulated the procedures for international adoption, clearly with a view to the future, although the first additional provision laid down rules for recognition of the effects of foreign adoptions.

What all these provisions amount to is that suitability is an absolute requirement, even *a posteriori*, for recognition of a foreign adoption or of any

arrangement in a foreign country equivalent to pre-adoptive fostering (First Additional Provision, sec. 2).

Hence, in the present case there is no need of a declaration of abandonment or a motion from the public body responsible for child protection for a Spanish adoption to be valid on the basis of a foreign arrangement constituting more than pre-adoptive fostering. Thus, the simple adoption here considered *lege causae*, definitively confers parental authority on the adopters (which in the case of preadoptive fostering – even though the obligations of foster parents under art. 15 of Act 37/1991 are the same as those typically deriving from parental authority – would not be granted under either Catalan Law or the Civil Code). It is evident that the powers of the holder of parental authority and of the holder of guardianship are essentially the same, with the difference that the duties of the guardian lack the intensity of those of a progenitor in possession of parental authority – art. 48 Act 39/1991 of 30/12 (RCL 1992\434 and LCAT 1992\36) as compared with arts. 13 *et seq.* of the Parents (Power) Act 12/1996 of 29/7 (RCL 1996\2316 and LCAT 1996\442). Given that the law applicable to this adoption is Act 37/1991 of the Catalan Parliament of 30/12/1991 and given that the case was initiated prior to the approval of the current Family Code by Act 9/1998 of 15 July, it follows that the situation of this child is exactly analogous to that of preadoptive fostering or guardianship [art. 19.1, without any need of reference to sec. c)] in that a foreign simple adoption entails a higher protective status than mere guardianship and indeed confers parental authority.

Secondly, therefore, there is no need of a prior proposal from the Public Body referred to in art. 22, sec. 1 of Act 37/1991, given that under sec. 2 thereof, the adoption has been in a situation fully equivalent to preadoptive fostering for more than one year. Thirdly, the consent of the biological parents is unnecessary since they were deprived of parental authority by the simple adoption in Mexico [art. 24.1 b) of Act 37/1991] – albeit the procedure could provide the opportunity to record their consent for the purpose of conversion of the adoption as noted above – but the DGAI must be summoned by the competent authority (given that it cannot technically be a party in the proceedings as a defendant) to certify the suitability of the adoptive parents (first additional provision, sec. 2 of the Regulation of the Act).

A petition for absolute adoption might be based on the principles of the third transitional provision of Act 37/1991, according to which simple adoptions under the Spanish laws extant at the time remain effective, but if the requirements of the present Act are met, absolute adoption may be sought under the new law without the need of preadoptive fostering.

In short, justice and teleological consistency with the principle of *favor filii* require that the effects of this rule of conversion, originally conceived for domestic adoptions, be extended to foreign adoptions where conversion is not possible under the Hague Convention but entail absolutely no violation of the

most elementary international and domestic principles designed to ensure that an adoption is always freely and gratuitously entered into and is a genuine means of protection of the minor, constituted solely for the benefit and the interests of the latter, and to safeguard international and domestic public policy. At all events, in the present case this Court harbours no reasonable doubt that – unless the DGAI raises very serious objections as to the suitability of the adopters, which in any case will no doubt be appraised with due sensitivity and due heed to the negative consequences to the minor that would attend denial, given that the original adoption could not be revoked, a domestic adoption could not be formalized and under the aliens laws the minor in question, who is now well settled into his new family and environment after four years as of today, remains a foreign national and lacks any entitlement under rules of length of stay or family regrouping – all legal requirements have been complied with in the country of origin, albeit such compliance must be verified for the purpose of granting of preadoptive fostering and a preliminary proposal of adoption under domestic law".

– RDGRN 1 June 1999(*BIMJ*, 1857)

Vietnamese adoption. Effects equivalent to Spanish adoption despite differences regarding revocation.

"Legal Grounds:

...

Second: The subject of this appeal is the possibility of entering in the Central Civil Registry an adoption, formalized in Vietnam on 14 Oct. 1998 by a Spanish couple, in respect of a minor of Vietnamese nationality born on 12 Jul. 1998...

Third: There is no doubt that this adoption was formalized through the competent Vietnamese authority in the manner prescribed by the *lex loci*, and that Vietnamese law on adopters as it relates to the capacity and the requisite consents has been complied with (*cf.* arts. 9.5 and 11 *Cc*). The crux of the matter is whether this case comes within the meaning of art. 9.5 *Cc*, introduced by LO 1/1996 of 15 Jan., whereby 'an adoption formalized abroad by a Spanish adopter shall not be recognized in Spain if the effects of such adoption are other than as provided in Spanish law'.

Fourth: The mere application of foreign law is difficult enough when it comes to verifying the content and currency of that law (*cf.* art. 12.6 *Cc*); the task is therefore all the more delicate when it entails not only deciphering the scope of a foreign institution but also establishing a comparison between a given foreign institution and the corresponding Spanish institution. In the present case we are required to determine whether the effects of the Vietnamese adoption 'correspond' to a Spanish adoption as regulated by the Civil Code.

Fifth: From what this Department knows of the laws of the Socialist Republic of Vietnam, the essential features of these Spanish and Vietnamese

adoptions are the same. In both cases adoption is conceived in the interests of the minor, entailing the incorporation of the minor in the adoptive family in the same terms as a biological child and the severing – save in very exceptional cases – of ties with the adoptee's biological family where known. Where the two appear to differ is in the revocation of an adoption; in Spain judicial annulment is only possible in the extreme case provided in art. 180 *Cc*, whereas in Vietnam the provision for annulment of the adoptive relationship under art. 39 of the Act of 29 Dec. 1986 is more permissive.

Sixth: Specifically, art. 39 of the Vietnamese Act provides that 'the adoption may be terminated if the adopter or the adoptee or both commit serious acts of physical or moral violence or other acts that extinguish the ties of affection between them'. It must be remembered, however, that the decision to terminate an adoption lies in all cases with the Courts, and that only the option of voluntary termination conflicts with the Spanish concept of adoption. Moreover, revocation by the biological parents is hardly an option in the case of an abandoned child. Also, given the virtual impossibility that a Spanish and a foreign adoption have absolutely identical effects, it must evidently suffice that they be mutually assimilable; hence, identity of effects must be interpreted in the basic sense that adoption entails the full integration of the adoptee in the adopting family for the duration of his or her minority, without interference from the family of origin, and that the adoptee is treated in all respects as the biological child of the adopter or adopters.

Seventh: It only remains to note that the certification of suitability of the adopters, a requirement for all those domiciled in Spain, has been duly submitted and hence all the requirements of Spanish law (*cf.* art. 9.5 *Cc*) have been complied with"

– RDGRN 23 February 1999 (*BIMJ*,1855)
Rumanian adoption. 1993 Hague Convention

"Legal Grounds:

...

Third: It is central to this appeal that the adoption application to the Rumanian authorities was made at a time when the Hague Convention referred to in the proceedings was already in force, and hence binding, in both countries. It must therefore be determined whether the conditions for international adoption set forth in the Convention – which are part of Spanish domestic law (*cf.* arts. 1.5 *Cc* and 96 *CE*) since publication in the *BOE* (1 Aug. 1995) and hence compulsory – have been met.

...

Sixth: The facts in the present case are as follows: a certificate of suitability was issued by the Government of Aragon specifically for the adoption of a Rumanian child; the Rumanian adoption order specifies that the Spanish law on adoptions has been fully complied with, which is an absolute requirement for the Rumanian Adoptions Committee to process the application; all of

which is in compliance with art. 15 of the Hague Convention. The judgment also recognizes compliance with the requirements of Rumanian law as adapted to international law following ratification of the Convention of 1 May 1995. However, the mandatory intervention of the Spanish central authority is absent, for as stated in the certificate of suitability presented itself, it is not valid for adoption procedures nor does it substitute the certificate of suitability that must be presented. Given this fact, the adoption here at issue clearly cannot be registered in that it is plainly in breach of the Hague Convention.

Seventh: Nevertheless, there can be no objection, if application is made, to recording the foreign document of adoption, as affecting Spanish citizens, in the Spanish Civil Registry, given that such a record reflects a personal adoptive or foster relationship (*cf.* art. 154.3 *RRC*) which, having been formalized abroad, may be entered upon presentation of an authentic foreign document (*cf.* art. 81 *RRC*). The entry, which is of limited legal effect (*cf.* arts. 38 *LRC* and 145 *RRC*), is to be placed in the margin of the entry of birth, or the supporting entry provided in art. 154.1 of the Regulations as the case may be, and must expressly state that the Spanish nationality of the child has not been accredited in accordance with Spanish law (*cf.* art. 66 *in fine RRC*)".

- RDGRN 11 May 1999 (*RJA* 1999\10154)

Recognition of absolute French adoption of a Guatemalan child previously adopted in Guatemala (simple adoption). Hispano-French Convention.

"Legal Grounds:

...

Second: A married couple, the husband French and the wife Spanish, adopted a girl child of Guatemalan nationality, in Guatemala and in accordanee with Guatemalan law. When they attempted to register the adoption with the Spanish Consular Registry in Guatemala, the registrar refused on the grounds that a Guatemalan adoption is a simple adoption and hence its effects are not equivalent to those established by Spanish law (*cf.* art. 9.5 *Cc* and Judgment of 13 November 1998).

Third: In view of this situation, the adopting couple obtained a judgment from a French court ruling that the adoption of the said Guatemalan child was absolute. Upon denial of registration by the Consular Registrar in Guatemala, the adopters appealed to this Department.

Fourth: According to scientific doctrine and past decisions of this Department, foreign judgments constituting an adoption can indeed be recognized in Spain without the need of *exequatur*. However, the Convention between Spain and France eited in the proceedings contains an exception, namely that given the wide scope of the Convention (*cf.* article 2.1), this undoubtedly includes voluntary jurisprudence procedures, and therefore recognition of such procedures in Spain requires an *exequatur* from the Supreme Court concerned (*cf.* arts. 2.4, 6 and 13 of the Convention) in

accordance with the procedure laid down by Spanish law, which at this time requires the intervention of the Civil Division of the Supreme Court (*cf.* arts. 951 *et seq. LECiv.* and 22.1 and 56.4 of the Judiciary (Organic) Act 6/1985 of 1 July)"

3. Legal Kidnapping

– SAP Zaragoza, 3 April 2000 (*RJA* 2000\830)

International kidnapping of minors. Unlawful removal to Spain. Obligation of return of the minor to the United States

"Legal Grounds:

...

Second: The appellant alleges ... that the removal of her son from the United States of America to Spain to live with her and her family in the city of Zaragoza, which took place on 4 March 1995, cannot be deemed unlawful for the purposes of the Hague Convention of 25 Oct. 1980 in that she was unaware of any decision by a US court barring her from travelling to Spain with her son, and furthermore that she was in exercise of parental authority in respect of her son, who possesses Spanish nationality as stated in his passport.

This ground cannot be entertained, firstly because it raises a new issue which was not addressed or debated at first instance and hence cannot be raised *ex novo* in this appeal, and secondly it transpires from the records submitted in these proceedings, consisting in private testimony to the voluntary jurisdiction procedures referred to, that the removal of the appellant's child from the United States of America to Spain took place after the Tulane County Court in the State of California had issued a judgment forbidding the minor to leave US territory; therefore, under art. 3 of the said International Convention such removal must be deemed unlawful regardless of the arguments of the appellant to the contrary. ...

Third: Another ground adduced in appeal is that to return to the United States would entail seriously prejudicial effects for the development of the minor through definitive deprivation of the mother-son relationship in that he would no longer be able to live with his mother in the family environment in which he has grown in these last years.

This ground of appeal is also rejected since such issues can only be addressed in the terms of art. 13 of the said Convention and ought to have been raised for those purposes in the prior voluntary jurisdiction proceedings. This Court cannot therefore see how they could be adduced in annulment of the two judgments referred to.

Fourth. A further ground adduced in appeal is an alleged lack of defence of the appellant and her son, firstly in that the court of instance was confused by the submission of documents from a foreign court which were incomprehensible to it, and secondly in that delivery of the minor entails a serious risk to him which could not be properly assessed in the judgments here appealed.

A reading of these two judgments is sufficient to show that the allegations of the appellant in this case were in fact duly examined and the evidence was duly considered. In conclusion, the decision to grant the request of the central authority of the applicant State and to order the return there of the minor Brian Luis J. Escudero was correct, and there is no evidence of procedural defects requiring annulment of the prior actions as defined in art. 238.3 *LOPJ*. The appeal is therefore dismissed".

– SAP Huesca, 16 November 2000 *(Colex-Data)*

Unlawful removal. Denial of application for return because more than one year has passed and the minor is certifiably integrated.

"Legal Grounds:

...

Second: The appellant's sole ground of appeal is infringement of arts. 3, 5 and 12 of the Hague Convention of 25 Oct. 1980 on civil aspects of international kidnapping of minors.

As regards the first two articles, the court *a quo* rightly ruled that the removal of the child from Venezuela to Spain at the instance of her father was unlawful, and there is therefore no more to be said on this point. It was unlawful in that the mother had legal custody of the child and hence the right to decide where she should live, as decided in divorce proceedings in court of first instance number three of the State of Carabobo. ...

Para. 1 of art. 12 of the Convention provides that 'when a minor is removed or held unlawfully within the meaning of art. 3 and at the time of commencement of procedures through the judicial or administrative authority of the Contracting State where the minor is, less than one year has elapsed since the time that the unlawful removal or holding took place, the competent authority shall order the immediate return of the minor'. This does not apply in the present case since the kidnapping took place on 16 June 1996 as stated in the complaint and confirmed by the evidence, particularly the documentary evidence (folios 13, 55, 56, 90 and 98 *et seq.*), and the matter first came to the knowledge of a Spanish authority (the Ministry of Justice) in July or August of the year 2000 (folios 95 and 96). Moreover, the complaint giving rise to the procedure here considered was lodged on 1 Sep. 2000. It is true that the mother immediately reported the facts to the Venezuelan authorities and that the second minors' court of the State of Aragua issued a request for international assistance dated 25 June 1996 and addressed to the Venezuelan Consul in Madrid; however, the request was never acted upon and was certainly not submitted to any Spanish authority, as recognized in the document initiating the procedure and corroborated in a copy of the official note appended to folio 107 of the record of proceedings, dated 29 Feb. 1999, whereby the Ministry of Justice of Venezuela returned the letters rogatory for return of the minor to the judge of the second minors' court of the State of Aragua and advised that through error or omission the letters had not been

acted upon. As the Public Prosecution rightly argues, the blame attaching to whoever was responsible for failure to pass on the request for international assistance cannot alter the facts as stated heretofore.

After the elapse of a year, then, there is no requirement to return the minor when 'it is demonstrated that [she] has become integrated in his new environment', as provided in the second paragraph of art. 12. That this is the case here is plain from the abundant evidence taken, including statements by the minor herself. In short, it is the intention of the international legislator that, in the specific circumstances given here (that is, the elapse of more than one year since the kidnapping), the overriding consideration be the good of the minor, as more deserving of protection than the interests of any others involved, in this case the mother.

Be it said moreover that the child has stated that she does not wish to return to Venezuela and does not wish to be with her mother, although she did admit that she did not wish to lose her mother and that she got on well with her 16-year-old brother, all for reasons set forth in two declarations of varying prolixity and coherence. Given this circumstance, art. 13, para. 2 of the Convention allows the requested authority to deny return 'when the minor has attained a sufficient age and degree of maturity for his opinions to be taken into account'. That is the case here, given that Natalia will be 12 years old on the 19th of this month and has demonstrated sufficient maturity according to the psychological reports included in the record of proceedings, quite irrespective of whether or not progressive contacts with her mother may be essential to her normal development and psychological growth. There is, then, a second ground for dismissing the complaint.

However, the other grounds adduced by the father against the original request for return of the child do not stand. In the first place, the mother at no time has accepted the child's removal either explicitly or tacitly, as argued by the court of instance [sec. a) of the said art. 13]. In particular, there is nothing on record to suggest that Mrs. A. previously had the opportunity or the means to come to Spain and apply directly for the return of the child as she has now done, despite having sold a flat. Again, it has not been shown that she knew the exact whereabouts of her former husband. Finally, return to the mother would not put the child at physical or mental risk or place her in an intolerable situation [sec. b) art. 13]. There is no reason to believe that there might be a repetition of the sexual abuses suffered on one occasion or that the personal habits of the mother or the customs of the country would be prejudicial to Natalia's development".

4. Marriage

a) Celebration and registration

– RDGRN 6 November 2000 (*BIMJ*,1887)

Application for authorization of marriage between a Spanish and a Cuban national, both divorced. Law applicable to capacity for marriage. Personal law.

"Legal Grounds:

...

Second: The capacity of a foreigner to enter into matrimony is governed by personal statute as determined by the law of that person's country (art. 9.1 *Cc*). In this case the documents submitted by the applicant, a Cuban national, demonstrate that she is divorced by virtue of a definitive decree issued in Cuba, and therefore there is in principle no obstacle to her contracting civil matrimony with a Spanish national.

Third: One must not be misled by the terms of art. 107.11 of the Civil Code to the effect that divorce decrees issued by foreign courts are to be effective in Spanish law only once they are recognized under the provisions of *LECiv.*; the requirement for *exequatur* of the foreign divorce decree must be understood as confined to foreign judgments affecting Spanish citizens or marriages previously registered with the Spanish Civil Registry, which is not the case here. As art. 84.1. of the Regulations states, foreign judgments determining or completing capacity for a registrable act do not have to be directly enforceable in Spain. The Cuban divorce decree is perfectly acceptable as evidence of the Cuban citizen's capacity to marry".

– RDGRN 4 January 1999 (*BIMJ,1854*)
Islamic marriage contracted by foreigners in Spain. Registry of religious entities.

"Legal Grounds:

...

Second: As this Department has repeatedly declared, two foreigners may marry in Spain 'in the manner provided for Spanish citizens' (art. 50 *Cc*) and hence today by religious ceremony in accordance with Islamic Law, the latter to be accredited by certification of the representative of the Islamic Community in which the marriage takes place (*cf.* secs. 1 and 3 of art. 7 Law 26/1992 of 10 Nov., and section III of the Instruction of 10 Feb. 1993).

Third: That said, the doctrine in this respect demands compliance with all the qualifications for applicability of the said Law 26/1992 of 10 Nov. as defined in art. 1 thereof, whereby the rights and obligations under that Law are to apply to 'Islamic Communities registered with the Registry of Religious Entities and then or later belonging to the 'Islamic Commission of Spain' or to any of the registered Islamic Federations belonging to that Commission, as long as these are registered with the said Registry'. Therefore, for the rights under the said Law 26/1992 to be recognized, the Islamic Communities concerned must be registered with the Registry of Religious Entities at the Ministry of Justice and must be on record in the same Registry as belonging to the Islamic Commission of Spain or one of the Islamic Federations there registered, as long as such registrations are not cancelled.

Fourth: In the present case, however, the marriage was conducted in Barcelona by a representative of the 'Annour' Islamic Community on 18 Sept. 1997, that is before the said Community was registered with the Registry of Religious Entities as belonging to the Spanish Federation of Islamic Religious Entities. The said registry certifies that such registration took place on 17 Mar. 1998, and therefore this marriage does not come under the provisions of Law 26/1992 of 10 Nov".

– RDGRN 12 May 1999 (*BIMJ*, 1857)

Marriage in the Islamic rite between Spanish and Moroccan citizens at the Moroccan Consulate in Madrid. Law applicable to form of marriage. Denial of registration.

"Legal Grounds:

...

Second: Art. 49 *Cc* clearly establishes that a Spaniard marrying in Spain must be married by a judge, a mayor or a functionary designated for that purpose by the Civil Code, or else by religious ceremony as provided by law. A consular marriage validly entered into by two foreigners in Spain, if sanctioned by the personal jurisdiction of either party (*cf.* art. 50 *Cc*), is nevertheless invalid if one of the partners is a Spanish citizen, so that in the latter case the marriage is void under art. 73.3. *Cc*.

Third: The principle of basic legality governing the Civil Registry (*cf.* arts. 23 *LRC* and 85 *RRC*) therefore compels denial of registration in respect of the marriage between a Spanish and a Moroccan citizen held on 18 Sep. 1997 at the Consulate General of the Kingdom of Morocco in Madrid. The certification of the Chargé d'Affaires is undoubtedly sufficient to warrant the legal validity of the marriage ceremony (*cf.* arts. 65 *Cc* and 256 *RRC*).

Fourth: The privilege of extraterritoriality vouchsafed to foreign Embassies and Consulates in Spain is no argument against this conclusion. Foreign Embassies and Consulates are now Spanish territory since the old fiction of extraterritoriality was replaced in Public International Law by the concepts of inviolability and immunity.

Fifth: In conclusion, although the marriage in question was celebrated in accordance with Islamic rites, it was not conducted by a clergyman from an Islamic Community registered as belonging to an Islamic Commission of Spain or to one of the Islamic Federations represented on the said Commission. Only given that condition can an Islamic marriage in Spain be effective for the purposes of the civil law (*cf.* arts. 1, 3 and 7 Law 26/1992, of Nov.)".

– RDGRN 24 July 2000 (*BIMJ*, 1879)

Marriage abroad between a Spanish and a Dominican citizen. Marriage of convenience. Denial of registration.

"Legal Grounds:

...

Second: What is known as marriage of convenience is definitively void in Spanish law, as there is no true matrimonial consent (*cf.* arts. 45 and 73-11 *Cc*). In order as far as possible to stop the contracting of such marriages and their registration with the Civil Registry, on 9 Jan. 1995 this Department issued an Instruction intended to prevent foreigners from obtaining entry to Spain or regularizing their presence here through simulated marriage with Spanish citizens.

Third: The said Instruction seeks to prevent the contracting of fraudulent marriages in Spanish territory; it stresses the importance in the pre-marital formalities of a private, personal and separate hearing of each party (*cf.* art. 246 *RRC*) as a means of detecting any obstacle or impediment to the marriage (*cf.* arts. 56, 1, *Cc* and 245 and 247 *RRC*), including the absence of consent to matrimony. Similar measures ought to be adopted when it comes to registering a marriage contracted abroad in the form permitted by the *lex loci* in the Consular Registry or the Central Registry. The Registrar must verify that the legal requirements – without exception – for the marriage are complied with (*cf.* art. 65 *Cc*). If the marriage is accredited by 'certification issued by an authority or functionary of the country where it took place' (art. 256.31 *RRC*), then that document and 'the appropriate supplementary declarations' must be assessed to dispel any doubts as to 'the reality of the marriage and its legality in terms of Spanish law'. That is how the issue is addressed in art. 256 of the Regulations, obeying the same criterion as established by art. 23, II of the Law and art. 85 of its implementing Regulation for admission of other entries without full records by virtue of certification by a foreign Registry.

Fourth: This extension of the measures intended to prevent registration of simulated marriages even where held abroad, has been espoused by this Department since the Decision of 30 May 1995. This means that registration is to be denied where a number of objectives facts are given, corroborated by the declarations of the interested parties and by other evidence, from which it is reasonable to deduce, in accordance with the rules of human behaviour (*cf.* art. 1253 *Cc*), that the marriage is simulated and hence invalid.

Fifth: The issue in this particular case is the registration of a marriage held in the Dominican Republic on 28 Dec. 1998 between a Dominican and a Spanish citizen. The following objective facts are proven: there is absolute disagreement between the declarations of the two parties as to whether they had resolved to marry before or after having first met; they married a few days after his arrival in the Dominican Republic, the two having become acquainted through a friend of the bride resident in Spain; however, the decisive fact is that the bride lied about her previous marital status, stating before a local Notary that she had never been married, either by civil or religious procedure, when in fact she had been married before. She also stated that she had no children when in fact she had two.

Sixth: From these proven facts it is a reasonable and by no means arbitrary deduction that the marriage is simulated and hence void. This was the view of the Chancellor of the Consulate as acting Prosecutor (art. 54 *RRC*) and the Consular Registrar, whose proximity to the facts best suits them to judge and form an opinion on them. This conclusion, which was reached nearer the time of the marriage, would be unaffected by a subsequent procedure under art. 257 of the *RRC*, which should be dispensed with in the interests of procedural economy (*cf.* art. 354 *RRC*) were it to be judged that in addition to the courts, this avenue was also open to contest the denial resulting from assessment under art. 256 of the Regulations".

– RDGRN 10 March 2000 (*BIMJ*, 1869)

Authorization for marriage between a Colombian and a Spanish citizen. *Ius nubendi* and *bona fides.*

"Legal Grounds:

...

Second: The procedure preliminary to a civil marriage includes an essential and indispensable step (*cf.* Instruction of 9 Jan. 1995, rule 3.), namely a private personal interview with each party separately; this is conducted by the instructor, with the assistance of the secretary, to ensure that there is no prior impediment or other legal obstacle to the marriage (*cf.* art. 246 *RRC*).

Third: This formality has become increasingly important in recent times – especially in marriages between Spanish citizens and foreigners – in that it can occasionally serve to reveal ulterior motives on the part of parties who do not actually wish to be bound in wedlock but only to gain the advantages to the foreigner deriving from the appearance of marriage. If through this formality or by any other means the Registrar becomes persuaded that there is fraudulent intent, then he must not authorize a marriage which is void in the absence of true matrimonial consent (*cf.* arts. 45 and 73-1. *Cc*).

Fourth: However, the practical difficulties of detecting simulation are well known. There is not normally any direct evidence of this, and therefore it is almost always necessary to fall back on a test of presumptions, that is, to show the absence of consent by deduction from one or more proven facts in a direct line of reasoning according to the rules of human behaviour (*cf.* art. 1253 *Cc*).

Fifth: In the present case, the proven facts emerging from the interview of the parties are insufficient to indicate beyond a shadow of doubt that there is simulation. The parties' statements as to the manner and time of their meeting coincide; they evince a satisfactory knowledge of their respective personal and family circumstances; the relations between the Spaniard and the Colombian date back to May or June 1999, and lately they have been living together. Given these circumstances, the fact that the husband registered as living in the same municipality and place of domicile after she did – the only objective fact from which to deduce fraud – does not constitute grounds for denial. To

establish the existence of fraud, additional objective facts of this kind are required; the private reasons of the parties for forming a family must be left aside, since inquiry in to these would constitute an invasion of privacy as protected by the Constitution.

Sixth: Given the general presumption of *bona fides* and that *ius nubendi* as a fundamental right of the person is not to be circumscribed, passed over or denied save where there is well-founded and absolute certainty regarding the legal obstacle barring the intent to marry, it is preferable, even in case of doubt, not to place hurdles in the way of the union. As Decision 9-2. of October 1993 concluded in a similar case, 'given the choice of authorizing a marriage that might in the event be declared void or of circumscribing the *ius connubii*, this Department must always take the first option'. 'There is always the possibility that the Public Prosecution Service will seek judicial annulment of the marriage (*cf.* art. 74 *Cc*) in an ordinary declarative action where the full circumstances of the specific case can be duly considered".

– RDGRN 22 February 1999 (*RJA* 1999\10107)

Request for authorization of marriage between a Spanish and a Rumanian citizen. *Ius nubendi.* Presumed absence of consent.

"Legal Grounds:

...

Second: So-called marriages of convenience – *mariages blancs* in the French terminology – are a common problem in countries with high levels of immigration. They have given rise to various measures in Comparative Law, and also to a recent Instruction by this Department within its designated sphere (Instruction of 9 Jan. 1995). The purpose of such unions is not matrimony between a national and a foreign citizen but under the guise of marriage – and normally at a price – to facilitate the entry of a foreigner to Spain, to regularize his or her presence in the national territory, or to facilitate his or her acquisition of the nationality of the supposed spouse.

Third: A union of this kind is clearly void in Spanish law, given the absence of true consent to matrimony (*cf.* arts. 45 and 73.1. *Cc*). However, the question remains how to prove such absence of consent, since in any supposition of simulation there is very rarely direct evidence proving intent to defraud, and it is no easy task to discover the ulterior motives of the parties. In this task, the verdict of a court is very important, but to achieve this, 'between the proven fact and the fact deducible therefrom there must be a clear and direct link based on the rules of human behaviour' (art. 1253 *Cc*). At the same time, it must be remembered that there is a general presumption of *bona fides*, and that the *ius nubendi* is an internationally and constitutionally recognized fundamental right of persons, so that any decision on the annulment of the disputed marriage must be founded on the moral certainty that the marriage is simulated and hence fraudulent.

...

Sixth: That is the basis on which this Court must judge the present case regarding the proposed marriage of a Spanish and a Rumanian citizen, which has been barred by the Civil Registrar on the grounds that the true object is not matrimony but a Spanish resident's permit for the foreign party.

Seventh: In this case there are a number of factors supporting the opinion of the Registrar, namely the groom's ignorance of the bride's surnames; total mutual ignorance of family circumstances; discrepancies between the appellant's account of his place of residence in the last two years and that given by his country's Embassy; discrepancies in the accounts of the place and the town in which they first met; and finally, the significant fact that the groom is in Spain illegally without a resident's permit. We should stress that the judge may form an opinion with a degree of moral certainty on the basis of the attitude of the parties, their behaviour and the manner in which they answer certain questions, and that this opinion has weight, given that, as we have already noted, it is very difficult to prove simulation other than through the declarations and personal attitudes of the simulators.

Eighth: In short, while it is true that the *ius nubendi* as a constitutionally and internationally sanctioned fundamental right may not be circumscribed on the basis of facts insufficient in themselves to warrant the presumption that there is no real intention to enter into matrimony, that right may not be invoked when there are not only pointers but objective facts to support the belief that there is no real intent. As Instruction 9 of Jan. 1995 stressed, Registrars must 'assure themselves, without prejudice to the general presumption of *bona fides*, of the veracity of consent insofar as this is possible under the current regulation regarding preliminary reports"

– STS, 25 November 1999 *(RJA* 1999\8434)

Marriage between Spanish citizens in a foreign country in 1924 sanctioned by a foreign civil authority. Nullity. Consequences in respect of rights arising out of a matrimonial relationship and inheritance.

"Legal Grounds:

...

First: Given the said facts, which are unassailable in cassation as the product of a logical and rational interpretation, it must be said in principle that the marriage entered into by Elías L. L. and Luisa S. R. was a union that might have been void but was certainly not non-existent, at least as far as the Spanish legal system is concerned.

Indeed, setting aside the harmful distinction existing between non-existent and void legal acts, modern scientific doctrine compels us to affirm that the marriage at issue – which must at all events be considered a civil marriage for obvious reasons – is absolutely void, since it was formalized solely with the Uruguayan civil authorities, thus clearly coming into conflict with arts. 100 and 101.4 *Cc*, current at the time, and with the present arts. 49.1 and 51 of the

same Code, which require the intervention of a diplomatic or consular functionary responsible for the Civil Registry abroad, who will act in the capacity of municipal judge under the previous regulations, or as the designated functionary.

Nonetheless, the said marriage was entered into entirely in good faith – so we must presume, there being no indications in this case to the contrary – and thus complies with the former art. 69 *Cc.* It follows from the foregoing considerations and from the statute referred to, which is still in force for de facto marriages, that this marriage, while void for the purposes of Spanish law, was entered into in good faith and hence must be effective for civil purposes, and certainly as regards the offspring.

Second: However, given the acknowledged *bona fides* of the spouses, this will necessarily have an effect on the marriage settlement when it comes to liquidation. And in complete accord with the contested judgment, we find that the basis of marriage settlement in the event of a de facto union – legally void marriage between Elías L. L. and Luisa S. R. – must be the holding of goods in common, as provided in art. 9 as it relates to art. 1315 *Cc* of the time and as confirmed by arts. 72 and 1417 of the said Civil Code; that is, that insofar as the matrimonial estate is concerned, the pronouncement of nullity of a marriage has the same effect as its termination by death ...".

– RDGRN 24 July 2000 (*BIMJ,* 1879)

Request for registration of marriage held in Morocco. Denial on grounds that the Moroccan certificate does not meet the required conditions.

"Legal Grounds:

...

Third: The decision to register or not lies with the Central Registry as the applicants are domiciled in Spain (*cf.* art. 68, II, *RRC*), and the requirement for registration is either a certificate from the foreign Registry, issued by the appropriate authority or functionary of the country concerned (*cf.* arts 23 *LRC* and 85 and 256-3. *RRC*), or by an affidavit as provided in art. 257 of the Regulations 'duly accrediting that the marriage took place in due form and that there are no impediments.'

Fourth: The accompanying Moroccan certificate does not meet the requirements of art. 256.3 of the Regulations in that it is not a certified extract from the Registry but a series of testimonies as to the reality of the marriage in the form of a notarized document. As to the affidavit, we conclude that the evidence submitted is insufficient to accredit that 'marriage took place in due form'. There are no attesting witnesses, nor is there explicit mention of the place, the exact date or the authorization of the wedding. All that the accompanying evidence imports is that the appellants are deemed by the Moroccan authorities to be joined in wedlock; however, without more detail as to the act of matrimony, it cannot be registered and cannot be entered as provided in art. 271 of the Regulations or by means of an affidavit

warranting presumption (*cf.* art. 38.2. *LRC*) as regulated in arts. 335, 339 and 340 of the said regulations.

Fifth: Notwithstanding the foregoing, should further evidence be furnished, it may be possible to submit a new affidavit and thus secure the registration or annotation of the marriage. There is likewise nothing to prevent the acceptance of the evidence here appended from being accepted by any body as sufficient evidence of matrimony given that there has been an application for registration and that is the essential requirement for admission of other evidence unrelated to the Registry in cases of non-registration under art. 2 of the Law".

– RDGRN 27 April 1999 (*RJA.* 1999\10147)

Request for registration of marriage held in Morocco by a Spanish citizen of Moroccan origin. Previous marriage. Repudiation

"Legal Grounds:

...

Second: The issue is the registration with the Spanish Civil Registry of a marriage entered into in 1997, in Morocco and in the local form (*cf.* art. 256.3 *RRC*) by a man, Moroccan by birth, who acquired Spanish nationality in 1990.

Third: The procedure for registration of this marriage requires proof, by the appropriate Moroccan certificates (*cf.* arts. 65 *Cc*; 23 *LRC* and 85 *RRC*) and other means, that the Spanish party was legally entitled to enter into matrimony according to the applicable Spanish law (*cf.* art. 9.1 *Cc*). This basic requirement is not met in that the records show this man to have a previous marriage, as yet not dissolved. The certificate accompanying the original application records a divorce – or rather a repudiation – which was pronounced only the one time and is hence revocable in absence of the two subsequent repudiations required under Muslim law for the act to be irrevocable and the marriage tie sundered. This certificate cannot be superseded by the new certificate accompanying the appeal, since the translation of the latter, although based on the same Arabic original, omits certain of the terms of the first translation. Again, the consular certificate accompanying the appeal does not prove the sundering of the previous union, for the fact that this certificate accredits the party's capacity to marry anew does not warrant that the original marriage has been duly dissolved, especially in view of the fact that a Moroccan male is entitled to marry polygamously.

Fourth: In short, the dissolution of the previous union is not duly proven, and therefore the subsequent marriage of the Spanish citizen cannot be registered on the grounds of previous marital ties (*cf.* arts. 46 and 73.2. *Cc*)".

b) Divorce

– SAP Barcelona 6 April 2000.

Note: See Section VI, 2

c) Matrimonial property

– RDGRN 4 February 1999 (*La Ley*)

Acquisition of dwelling by one of the spouses. Matrimonial property. Registration of sale.

"Legal Grounds:

First: The facts to be considered in this appeal are as follows: a) On 2 Nov. 1968, Pilar R.A. acquired the dwelling at issue by virtue of a private contract of sale in which the purchaser's marital status was not mentioned; b) The said purchaser had married Sergio K., an Italian citizen, in Spain on 26 May 1962; c) By public deed signed by the seller and the said Sergio K., on 5 May 1981 the latter incorporated the said contract of sale in a public document in which it was stated that Pilar R.A. purchased the dwelling 'as matrimonial property'; d) On 1 Oct. 1981, Pilar R.A. ratified her husband's action in a deed stating that the dwelling was subject to 'common ownership under Italian law by virtue of a matrimonial relationship' and requested that the property be registered 'in the names of the spouses and as matrimonial property'; e) The property was registered as 'matrimonial property'; f) The husband being now deceased, the appellant seeks to register sale of the property by the wife alone, it being stated in the deed of sale that the dwelling was the sole property of the wife, that at the time of acquisition the spouses maintained separate estates and therefore there is an error in the registration;

Second: Given that the property is registered as 'matrimonial property' by virtue of a public document requesting that it be registered 'in the names of the spouses and as matrimonial property', rectification of the entry requires the consent of the registered holders of title. Pilar R.A. states that she is her husband's sole heir, but this statement must be accredited since there is no evidence that the 'declaration in lieu of the act of notoriety' made by the lady in question to the Italian Vice Consul, which simply records her own statement, is sufficient in Italian law, as applicable in accordance with art. 9.8 *Cc* and as required by art. 36 *RH* to demonstrate such sufficiency.

Third: In addition to the foregoing, it is by no means clear that there was an error as the appellant claims, for although it appears that the spouses held separate estates under Italian law (if there was no marriage contract), it remains to determine how binding were the declarations made by husband and wife in incorporating the private contract of sale in a public deed. The appellant claims that these declarations are not binding, since at the time the deed was drawn up (5 Mar. 1981) donations between spouses were prohibited in Spanish law and were only permitted by the Law of 13 Mar. 1981. However, this argument lacks conviction given that: a) The wife ratified the deed after the promulgation of the said Law; b) If, as appears to be the case, the applicable law is Italian law, the prohibition of donations between spouses in art. 781 of the Italian Civil Code was declared unconstitutional by Decision of the Italian Constitutional Court on 27 June 1973; c) Also under Italian law,

spouses may unilaterally declare goods to be part of the 'family assets' (a category comparable to goods in common), as provided in art. 167 of the Italian Civil Code following the reform of 1975".

5. Maintenance

– SAP Santa Cruz de Tenerife 6 February 1999 (*RJA*, 1999\4117)

Claim for payment of monies owed in maintenance under a foreign decree. Applicable Convention.

"Legal Grounds:

First: The contested judgment entirely upholds the complaint lodged by the Public Prosecutor asking that the defendant be ordered to pay the monies claimed as required in a judgment delivered on 28 Mar. 1990 by the Civil Court of the District of Locle in the Republic and Canton of Neuchatel, and as approved in the Agreement of 22 Jan. 1990 regulating the terms of dissolution of marriage and the obligation to provide maintenance for the offspring. This is contested by the defendant in the present appeal, who having admitted the facts of the suit and the existence of the Agreement contests the said judgment on three grounds: firstly, that the contested judgment accepts as proven the facts as set forth in the suit on the basis of the documents accompanying the writ, which documents it accepts as valid evidence by virtue of a Convention on legalization of documents to which Switzerland is not a party; secondly, that the applicable instrument in the case at issue is not the United Nations Convention on the enforcement of maintenance abroad, done at New York on 20 June 1956, but the Hague Convention of 2 Oct. 1973 on the Law Applicable to Maintenance Obligations, according to which, in the case at issue the applicable law is that of Switzerland as the habitual country of residence of the maintenance creditor; and thirdly, that the defendant's financial situation has changed, while his income in Spain, which is considerably less than when he signed the Agreement, is insufficient to meet the obligation there accepted.

Second: Turning to the appeal and the first ground of contestation, suffice it to say that it is inadmissible, firstly because the Hague Convention of Oct. 1961, to which Switzerland was a party from its inception and which was ratified by Spain on 21 Oct. 1976, abolishes the requirement of legalization of foreign public documents including judicial decisions, and more specifically verdicts, so that these may be held valid and enforceable without the need of legalization; and secondly, because the appellant contradicts his own acts in seeking to affirm that the facts of the suit are not proven because the said documents cannot be accepted as valid for the reason indicated above, when both in his writ of response (folio 48 of the record of proceedings), where he acknowledged the existence and authenticity both of the Agreement and the judgment, and at the hearing, where he denied the facts, he had already accepted the documents as valid.

Third: Likewise inadmissible is the second of the grounds, given that in the case at issue the object is not to obtain a maintenance order, which was legally established prior to the claim and hence does not come under either the New York Convention of 1956, which deals with maintenance in general between any persons, or the Hague Convention of 15 Apr. 1958, ratified by Spain on 2 Jul. 1973 (*BOE* of 12 Nov. 1973), on recognition and enforcement of judgments on matters of maintenance obligations, but rather to obtain a declarative decree on the amounts that the defendant/appellant must pay to the plaintiff by virtue of maintenance obligations already established under Swiss law, and therefore it is possible either to proceed under the second of the two Conventions mentioned by way of letters rogatory or by way of *exequatur*, or else to lodge a claim for payment based on the said maintenance obligation as in the present case. The crux of the matter at issue is therefore whether these obligations have been met or any of the causes of extinction are given, and yet the question of payment or of extinction of the obligations has been neither proven nor even addressed".

XI. SUCCESSION

– STS 21 May 1999

Note: See Sec. VI.3 (referral)

– RDGRN 27 April 1999 (*RJA* 1999\2761)

Registration of inheritance. Law applicable to the succession of the heir and her rights in property arising out of a matrimonial relationship.

"Legal Grounds:

First: The material basis giving rise to this appeal is the registration, in the name of an heir of Bulgarian nationality, of a property inherited from a deceased person of the same nationality, by virtue of a will made by the latter in Spain whereunder the former is partially named as sole heir. What is unusual is that the cause of denial of registration should be not the validity of succession but the absence of reference to the legal rights in property of the heir arising out of a matrimonial relationship and the absence of evidence as to the legal rights in property arising out of a matrimonial relationship and the system of succession in Bulgarian law. Therefore, as the State's appeal is restricted to those issues directly and immediately relating to registration (*cf.* art. 117 of the *RH*), it is these that we must address.

...

Third: The second ground for denial is absence of accreditation on two counts: Firstly the legal rights in property arising out of a matrimonial relationship, and secondly the rules of succession, both as determined by Bulgarian law.

The first of these objections is meaningless, firstly because, as we said,

accreditation of the legatee's rights in property arising out of a matrimonial relationship is not an essential requirement for registration of inherited goods or rights in her name, and secondly because the mere accreditation of the legal situation under Bulgarian law is of no consequence. As also noted, there is no legal basis for the assumption that a married person's nationality necessarily determines the law governing their rights in property; it could well be that the rights of the heir are subject to laws other than those of Bulgaria or are protected by a an agreement freely entered into by her, so that the accreditation required is in itself pointless.

Fourth: Of the other requirements for which accreditation is demanded in the same objection, only the second of those in the contested note is warranted, although the force of the objection is much less if we accept as valid title in succession the will made in Spain by the deceased, in which the appellant is named as sole heir to property situate in this country. Given that succession is subject to the national law of the deceased at the time of death (*cf.* art. 9.8 *Cc*), that there are limitations on referral to Spanish law (article. 12.2 *Cc*), and that the application of foreign law constitutes an exception to the maxim *iurat novit curia*, there is certainly a need to demonstrate that legal provision underlying the transfer of ownership of the property whose registration is sought is feasible under the material law governing succession; however, this does not necessarily mean, as the note claims, that the requirement of accreditation extends to the entire system of succession in Bulgarian law or that such accreditation may only be by means of certification – which is not in fact certification – as provided in art. 36 of the *RH*, but that accreditation is served, undoubtedly more effectively, by statements or reports as referred to in the regulations, and by any other means of proof admitted in law and particularly in International Conventions".

XII. CONTRACTS

Note. See Sections XX and XXI

1. Formal validity

– RDGRN 11 June 1999 *(La Ley)*

Foreign power of attorney. Classification. Requirements for registration in Spain of foreign public documents.

"Legal Grounds:

First: The object of this appeal is the entry in the Registry of Property of the sale of a property, given that the seller's wife acted on his behalf, presenting as evidence of her power of attorney a typed document, dated 22 Oct. 1993 and signed by the registered holder of title, in which the latter grants power of attorney to his wife for the purpose of selling a certain property there identified. This document contains a note reading as follows: 'Number

390 of the roll of public documents for 1973, I hereby legalize the above signature, made before me on the instant date by the hand of Mr. ... (the registered holder of title), born on 5 Feb. 1935, domiciled ..., identified by his identity card number..., 60323, Frankfurt/Main, 22 Oct. 1993, Friedrich Hauptvogel, Notary'. This is followed by his stamp and signature and bears the requisite apostille...

...

Third: Although there is no difficulty in determining when a Spanish document meets the conditions required to qualify as public or authentic as defined in art. 1.216 *Cc*, the question becomes extraordinarily complex in the case of a foreign document. This document will of course have force under Spanish law (*cf.* arts. 4 of the *LH* and 36 of the *RH*) if it was issued in due form in the country of origin (*cf.* articles. 600.3 and 954.4 of the *LECiv.*); however, this initial appreciation does not wholly resolve the problem, as the issue here is to determine, in light of the requirement of public documents for entry in the Spanish Registry of Property, when a foreign document may be classified as a public instrument and thus be admitted by the Registry of Property.

Fourth: ... To the contrary, it is on art. 12.1 *Cc* that an approach to the question must be based: that is, if a Spanish public document requires certain special characteristics to qualify for entry in the Registry of Property – which is generally the case with private documents – then a preliminary process of classification is required, that is, a comparison of the basic requirements demanded of the foreign document for it to have the equivalent public status in the legal system of origin. Only where the foreign document meets the requirements or minimum conditions demanded of a Spanish public document can it be deemed to qualify for entry in the Spanish Registry of Property.

Fifth: It must be said in this connection that a Spanish public document qualifies as such if it meets the following basic requirements: a) that it has been authorized 'by a Notary or a competent public employee' (art. 1.216 *Cc*), that is that the authorizing functionary be qualified to exercise the public function of attestation, or else in the extrajudicial sphere; b) that 'the formalities required by law' have been observed (art. 1.216 *Cc*), meaning compliance with the formalities required for each category of public document, which for the purposes of public documentary substantiation of an extrajudicial act are essentially adequate identification of the signatory of the act or contract (attestation of knowledge or judgement of identity and satisfaction of the authorizing person as to the capacity of the signatory.

Sixth: Thus, if we consider the basic requirements as indicated for the classification of the foreign document, we find that it cannot be rejected as the Registrar seeks to do, on the grounds that it is 'a simple authorization with the signature legalized', for absent an assurance from the Registrar that to the effect that she is sufficiently acquainted with the foreign law, it could be –

although we do not prejudge the issue here – that given due identification of the signatory and the possibility that recognition of capacity is implicit, the notarization of the document would cover the formalities required under German law for the power of attorney to qualify as a public document".

XIII. TORTS

– SAP Guipúzcoa 31 December 1999 (*RJA* 1999\2481)

Liability arising out of collision with a bicycle. Applicable law and international competence. Proof of foreign law and similarity between applicable French law and Spanish law

"Legal Grounds:

...

Second: As to the objection of lack of jurisdiction, the fundamental provision is art. 22.3 of the *LOPJ*, whereunder at civil law the Spanish courts have competence in matters of extra-contractual obligations when the causal event took place in Spanish territory or the causer of the damage and the victim are both habitually resident in Spain ...

The evidence submitted shows that the defendants are registered in the town of Irún (folio 237) and that from the documents it can be inferred only that taxes similar to the Spanish Municipal Property Tax are paid in French territory in respect of a dwelling owned by them in the town of Hendaye, but this is insufficient to certify that the defendants are resident in the said town

...

Art. 10.9 of the *Cc* provides that non-contractual obligations are to be governed by the law of the place where the causal event occurred. In other words, the applicable law in this case is the *lex loci*, and given that the accident took place in Hendaye, French law would be applicable.

Having established the foregoing, it should be said that a foreign law as fact must be accredited by the party proposing its application. In the present case, we would note that even although that law has not been accredited in due form, there is no ignoring the fact that the law as regulated in the French Civil Code is similar to the law as regulated in the Spanish Civil Code, both of which are based on the Napoleonic code, and therefore the applicable statute should be the Code Civil...

...

Fourth. ... We turn now to the second ground of contestation, regarding interest. The contested judgment applies the rate of interest stipulated in art. 20 of the Insurance (Contracts) Act in the wording prior to Act 30/1995.

On this point we would note that since the law applicable to the specific case at issue here is French law, then the applicable interest rate should be the legal rate provided in that law and set on execution of judgment, with the proviso that under the principle of *reformatio in peius* such interest may not exceed 20% as set in the contested judgment".

XIV. PROPERTY

– STS 21 July 2000 (*RJA* 2000\6470)

Well-known foreign trade mark. International protection. *Lex loci protectionis.*

"Legal Grounds:

...

Second: The proven 'facta' are as follows: 1. The FANATIC trade mark has been registered with the Federal Patent Office of the German Federal Republic since 21 Nov. 1982, in the name of the German plaintiff SCHURZ-WERKE GmbH Co. KG.

2. The defendant later registered the same trade mark with the Spanish Registry of Industrial Property (granted in 1984), despite the fact that the German trade mark had been registered earlier and that the defendant knew of that trade mark...

Third: ... we share the view of the original court, LG 1: that in registering for its own use a trade mark widely known in the Continent of Europe and ignoring the priority of the latter, the defendant was in breach of art. 3.2 and 12 of the Trade Mark Act and the Paris Union Convention; furthermore, it is evident from the proven facts that the defendant acted in clear and witting bad faith with the intention of profiting from a reputable trade mark by establishing a registration. In view of such bad faith, under art. 3.2 of the Trade Mark Act, annulment of the registration is clearly the only course;

... in connection with the foregoing we would cite art. 6 bis of the Paris Union Convention of 1883 (also relevant in this matter is the Madrid Arrangement of 14 Apr. 1891, the Text approved in Stockholm on 14 Jul. 1967 and the Nice Arrangement for International Classification of Products and Services of 15 Jun. 1977), which upholds the extra-territoriality of a well-known unregistered trade mark against a registered holder of title (contrary to the principle of territoriality of trade marks). In short, given the reputation of the trade mark, and most importantly the bad faith referred to, there is clearly no call to halt the action challenging prescription ...

Fourth: Furthermore, as indicated earlier, we fully concur with the reasoning of the first judgment, as confirmed by the judgment here contested, in LG 3 where it states: '... protection of a trade mark does not extend only to those registered with the Spanish Registry, but also to foreign trade marks registered with the International Office for the Protection of Industrial Property in Bern, in accordance with the Madrid Arrangement of 14 Apr. 1891 as revised in London on 2 Jun. 1934 and the Paris Union Convention of 20 Mar. 1883 as amended by the Stockholm Act of 14 Jul. 1967 for the Protection of Industrial Property...'; this is confirmed by a recent judgment of this Court (29 Feb. 2000) to the effect that '... for the purposes of protection in Spain the applicable instrument is the Paris Union Convention (Stockholm Act of 14 Jul. 1967), art. 8 of which established such protection by

relating it to art. 2 of the same Treaty so that nationals of all countries of the Union might enjoy the same advantages as nationals in all other countries of the Union as regards protection of industrial property and will hence be entitled to the same protection and the same legal remedy against any attack on their rights, always provided that they meet the same requirements and complete the same formalities as are required of nationals. What this means, to judge by the Supreme Court Decision of 3 Feb. 1987, is that 'to afford legal protection to a trade name – and by extension also a trade mark – as regulated by Spanish law, the Union rules require no formality of any kind when the former is the actual business name in accordance with the regulations of the country of origin; the name need not be in use in Spain, and it is sufficient to demonstrate its prior use in a country of origin that is a signatory of the Paris Convention'. Under art. 8 of the said Convention, therefore, registration of trade names being optional, foreign and Spanish entities having so registered possess equal rights, since these rights are protected as if they had been actually registered, in accordance with the regulations of the Union...'. Therefore, the ground of contestation is dismissed, and likewise the appeal with all its attendant consequences".

XV. LAW OF COMPETITION

XVI. INVESTMENT AND FOREIGN EXCHANGE

– STS 17 February (*La Ley*, 2000, 4581)
Mortgage loan to non-resident foreigner.

"Legal Grounds:

...

Third: The third ground of appeal, citing section four of art. 1692 *LECiv.*, alleges a general breach of the regulations governing mortgage loans to non-resident foreigners in force at the time of the contract, specifically RD 2077/1986 of 25 Sep. regulating foreign transactions, art. 12.3 whereof provides that holders of title in investments coming under the provisions of that Chapter may, subject to prior authorization by the DGTE (Department of Exterior Transactions), receive mortgage loans from Spanish credit institutions for the acquisition of real estate, in that the loan granted to Mr. P. was based on a convertible peseta account in his name and that payments may not be made by residents to non-residents without the authorization of the DGTE as provided in art. 2 of the Order of the Ministry of Economy and Finance, for which reason this authorization was required, to subrogate the resident purchasers to the title in a mortgage granted to a non-resident who sells the mortgaged property.

The issue in this ground, which like grounds six and seven may have some foundation, is the claim that the contract of sale is void, given that the price

was set at 11,094,287 pesetas and made payable by subrogation of the purchasers to the mortgage taken out by the seller on the property being sold, and such subrogation is not possible since the mortgage payments had hitherto been made in convertible pesetas and therefore the purchasers cannot make subsequent payments in ordinary pesetas without the authorization of the DGTE. This line of argument is inadmissible in the present ground because only administrative regulations not ranking as law are alleged to have been breached, and as the jurisprudence of this Bench No. 1 has it (including Decisions of 25 Oct. 1990, 11 Feb. 1991 and 30 Sep. 1991), such breaches cannot be raised in cassation because the provisions allegedly breached do not possess the rank of law. Furthermore, a simple reading of the precepts allegedly breached shows that none of those invoked refer to subrogation to mortgage loans and it can therefore hardly be deduced from there that residents may not be subrogated to mortgage loans granted to a non-resident; what is more, the record of proceedings (folio 128) shows a report by the Ministry of Economy and Finance stating that the authorization of the DGTE is not required for such subrogation.

Fourth: The fourth ground cites section 4 of art. 1692 *LECiv.*, alleging breach of art. 1281 *Cc* as it relates to the interpretation of clause nine of the deed of mortgage of the property being sold, where the borrower, as a non-resident, authorizes the Bank to debit his foreign currency account for the sundry expenses arising from the constitution of the mortgage and formally undertakes to maintain a sufficient balance to cover the amounts to be debited on given dates by the Bank; but at the same time, the following paragraph of that clause provides that payments may be made in pesetas in the event that the borrower ceases to be non-resident, which provision is rightly noted in the contested judgment, and therefore the said precept cannot be said to have been breached".

XVIII. BUSINESS ASSOCIATION/CORPORATION

– SAP Barcelona 29 April 1999 (*Colex Data)*

Capacity to act. Law applicable to representation of organizations. Bankruptcy.

"Legal Grounds:

First: The original case from which this appeal is derived was an action for declaratory judgment brought by a Danish bank Varde Bank A/S in a claim for 2,026,145.83 Deutschmarks in respect of a loan of 2,000,000 Deutschmarks granted to a Danish subject, Sten H. H. S. on 17 Oct. 1990, the balance being the agreed interest. The action was brought against Mr. S. as the principal debtor and against his wife, Angeles S. F., as debtor *in solido* by virtue of a guarantee agreement. ... A matter of days before the hearing, Mr. S.'s counsel requested a preliminary ruling in light of the fact that the plaintiff's successor in the debt, VB Finans A/S, had been declared bankrupt;

the request was denied and at the hearing itself Mr. S.'s counsel raised a prior issue, claiming an exception in that the plaintiff and its counsel were not qualified to act since the plaintiff's successor was declared bankrupt on 22 Jan. 1996 by the Bankruptcy and Successions Tribunal of Denmark constituted in the court of Esbjerg...

Second: The exceptions regarding the qualification of the plaintiff Varde B. A/S and its counsel to act, based on the bankruptcy of the former's successor VB Finans A/S, were tabled by the appellant under Spanish law in disregard of art. 9.11 *Cc*, which provides that 'personal law as regards legal persons is determined by their nationality and shall be applicable in all matters pertaining to capacity, incorporation, functioning, transformation, dissolution and extinction'. In the present case that would be Danish law, which has not been invoked and with which this Bench is unacquainted as it has not been accredited by the appellant, who has simply appended to the roll, with the writ of motion for the new preliminary special ruling, a copy of the judgment of 22 Jan. 1996 delivered by the Bankruptcy and Successions Tribunal of Denmark, in which it declares the assets of VB Finans A/S to be in a state of legal bankruptcy and that the company formerly called A/S Varde Bank had previously been wound up, but it does not state the consequences of that declaration; and given that this Court is ignorant of the consequences inherent in such a declaration in Danish law – among other things whether a bankrupt is disqualified from action – and of whether, in view of the time elapsed, the bankruptcy still stands or the bankrupt has been rehabilitated, in light of the Decision of 30 June 1978 a declaration of bankruptcy does not bar the bankrupt from acting in law in exercise of those rights not affected by the restraints on its assets, and given that the judgment declaring bankruptcy states that 'the assets consisted solely of shares and title in a debt to a subsidiary company in favour of the latter, to which all the assets had been transferred' – that is, that the bankrupt company's assets did not include any loans that it may have held against the defendants/appellants – we dismiss the exceptions moved and deny the annulment of actions brought on the basis of that same fact".

– RDGRN 4 February 2000 (*RJA* 2000\488)

Transfer of registered place of business to Spain. Change of nationality. Change of applicable law.

"Legal Grounds:

First: The factual basis of this appeal is that the General Meeting of Shareholders of a company domiciled in the Principality of Liechtenstein resolved to transfer its registered place of business to Spain, acquire Spanish nationality and adapt its company bylaws to the Limited Companies Act 2/1995 of 23 March.

Second: According to article 309.1 of the Companies Registry Regulations (*RRM*), when a foreign company transfers domicile to Spanish territory, 'the

first entry must include all acts and circumstances whose recording is mandatory under the Spanish regulations and are extant in the foreign Registry'. This rule regulates only the mechanics of registration as regards due announcement and attendant mercantile publication of such transfer, regardless of the requirements or the material effects of such act. There is no prior judgment as to whether or not the transfer of domicile to Spain entails acquisition of Spanish nationality or, where there is a change of nationality, whether this is feasible without a change of legal personality or it is necessary under Spanish law to incorporate a new legal person subject to prior extinction of the former person (we must bear in mind firstly that this rule applies to 'foreign entrepreneurs or entities qualifying for registration under Spanish law' and hence to both legal persons and individual entrepreneurs, and secondly the possibility (to be desired) that such issues are covered by international conventions – compare article 149.2 of the *LSA*; article 72.2 of the *LSRL* and article 20 of the *RRM* on the transfer of domicile of Spanish companies to other countries, and articles 48 and 293 of the EEC Treaty, consolidated version). Hence, although the rule provides that registration 'shall be effected on the basis of literal certification or transcription of the page or record from the foreign Registry', that rule must be checked against the corresponding material rules applying to the act to be registered, compliance with which must be certified by the registrar (compare article 18.2 of the Code of Commerce). These include rules governing the feasibility of and the requirements for adoption of resolutions on the transfer of domicile, change of nationality or legal personality if applicable, and adaptation of company bylaws to Spanish law, as determined by the nationality of the company – which in this case is that of the Principality of Liechtenstein (article 9.11 of the Spanish Civil Code). Furthermore, it is not the company's original personal law but Spanish law that must regulate the details of incorporation or configuration of the company as a Spanish entity, including registration with the Mercantile Registry. However, this does not necessarily mean that the Registrar can require presentation of all the titles on which the entries in the registry of origin are based, since – apart from adaptation of the resolutions adopted, as mentioned, to the foreign law – it will only be necessary to judge those details whose inclusion is mandatory in the first registration of the company under Spanish law . . . .

In this case, as regards the details which, as noted, must be governed by the personal law of the company at the time the resolutions were adopted, it must be remembered that absent a statement from the Registrar confirming sufficient familiarity with the foreign law – and there is no such reference in the document considered – (compare article 36 of the *RH* with article 80 of the *RRM*, and article 168 of the *RN*), it is conceivable, although the question is not prejudged here, that under the foreign law in question the content of the certificate presented is sufficient, without the need to present Bylaws or other supporting documentation, for due pronouncement on whether the adoption

of the resolutions concerned conforms in the pertinent aspects to the said foreign law (indeed there is always the possibility that such law is imperative and does not allow bylaw provisions on resolutions for transfer of domicile to a another country). On the other hand, as regards the other details whose examination is mandatory for purposes of entry in the Spanish registry, the very little information provided by the certificate from the Registry of origin is clearly insufficient".

XIX. BANKRUPTCY

– SAP Albacete 27 May 1999 (*La Ley)*
Recognition of power of an unofficial receiver in a foreign bankruptcy.

"Legal Grounds:

First: A. E. Y. AG., acting as administrators of the assets in the bankruptcy of Jürg H., initiated action for a declaratory judgment, the origin of the decisions here contested, against Fredy L. and F. L. P. I. S., S.A., seeking a declaration of joint and several liability of the defendants and an order for them to pay the plaintiff the amount of 2,769,210 pesetas.

Second: ... In the present case A. E. Y. A.G. state in their complaint that they act as administrators of the assets in bankruptcy of Jürg H., having been appointed to the equivalent in Swiss law of what would be Mr. H.'s referee in Spain; and while it is true, as stated by counsel for the appellant, that the plaintiff has been at no great pains to demonstrate this, it is equally true that the certificate issued by the Zürich district court, which is appended to folios 88 *et seq.* of the record, is deemed sufficient evidence of the appointment of the plaintiffs as unofficial receivers in the bankruptcy proceedings of Jürg H., and that in the exercise of that function they possess all the legal powers and duties of a receiver, in particular that of undertaking all the business of maintenance and utilization of the bankrupt's assets and of representing them in court".

– SAP Barcelona 29 April 1999 (*Colex Data)*

See XVIII Business Association/Corporation

XX. TRANSPORT LAW

– *STS* 9 February 1999 (*RJA* 1999\1054)
International transport of goods by road. Interpretation of the Geneva Convention. Proof of foreign law.

"Legal Grounds:

...

Second: The second ground, which cites section four of article 1692 of the *LECiv.*, claims erroneous application of article 29.1 of the Geneva

Convention on the international transport of goods by road as it relates to article 23.3 of the Convention ... This ground cannot be entertained in that wilful misconduct is the only possible classification where a person at the wheel of a large goods vehicle departs from the stipulated route, crosses a level crossing at a point so inadequate for the passage of vehicles that the vehicle becomes stuck and comes into contact with railway cables. The judgments in the prior instances classified such conduct as wilful misconduct, and the ground alleged offers no valid reason to doubt that classification. The defendants have given no reason to justify or mitigate the reckless behaviour of their employee, and there can therefore be no limitation on their liability for the damages caused.

Third: The third ground, citing section four of article 1692 of the *LECiv.*, claims breach of article 32 of the Geneva Convention as regards the period of limitation. This ground again cannot be entertained in that, as argued in the judgments of instance, lapse is caused by abandonment of the action by whoever initiated it; in the present case there is no presumption of abandonment since there have been repeated claims within the three years established in the Convention for cases of this kind.

Fourth: The fourth ground calls for a reversal of judgment, alleging breach of article 3 of the Geneva Convention in that since the driver changed route in contravention of his company's instructions, he was not 'acting within the scope of his employment', which is the condition for liability of the employer for the acts or omissions of its employees under article 3. This argument will not stand: the driver was carrying by order and on behalf of his employers, and that constitutes 'acting within the scope of his employment'. The fact that therein he acted recklessly and caused damage does not remove him from the scope of his employment nor excuse his employers from liability for the acts or omissions of their employees.

Fifth: The fifth ground, again citing article 1692, claims breach of article 12.6 of the Civil Code as it relates to article 10.5 of the same Code. The appellant argues that the Spanish court is competent to judge the claim but that it ought *ex officio* to have applied the rule of conflict, and therefore Italian law should be the applicable law by remittal under article 10.5 of the Civil Code.

This ground cannot be entertained; moreover, we do not see what relevance this can have to the dismissal of an action based on the Geneva Convention, to which Italy is also a signatory, as stated in article 51 of the text published in Spain on 7 May 1974. The applicable foreign law must be specified. It must be explained to the court (see *inter alia* Decision of 31 December 1994) since *iura novit curia* does not apply, and it must comply with article 12.6 of the Civil Code, whereby anyone invoking foreign law must demonstrate the substance and the currency of such law by means of proof accepted in Spanish law, without prejudice to the right of the court to call on whatever means of proof it may deem necessary".

XXI. LABOUR LAW AND SOCIAL SECURITY

– STSJ Madrid 4 March 1999 (*RJA* 1999\755)
Law applying to contracts of employment. Art. 10.6 *Cc*.

"Legal Grounds:

...

Third: The appellant cites sec. c) of art. 191 *LPL* as a cause of breach of art. 12.6 *Cc*, in that the defendant has proffered insufficient proof of Moroccan law and therefore Spanish law must apply.

This ground does not stand, given that in the sixth of the proven facts in the contested judgment it is demonstrated that art. 6 of the Arrete Residentiel of 23 Oct. 1948, here transcribed, is applicable to the case *in litis*. As noted in the first legal ground, this is the substance of the legal text and its translation extant in folios 219 to 228, a proven fact that has not been contested by the appellant or gainsaid by any other document or examination.

Fourth: We must likewise dismiss grounds 6, 7 and 8 of the appeal, which claim breach of arts. 55.1 and 5 *ET* citing the same provision as the foregoing, in that Spanish law is not applicable to the dismissal at issue. The unchanged factual account in the contested judgment shows that the plaintiff was engaged at the Spanish Embassy in Rabat to render services at the Depository in El Aiun, and it is the established doctrine of this Bench that the general principle laid down in art. 10.6 *Cc* regarding the place where services are rendered must be respected in determining the law applicable to a contract of employment, especially where such services are rendered on a permanent basis in the place where the contract of employment was made – that is abroad – undoubtedly because that is where the employee is habitually resident; for this reason art. 1.4 *ET*, which implements the said art. 10.6, establishes that for Spanish labour law to be applicable to services rendered by employees abroad, such employees must be Spanish, they must work for Spanish companies abroad and must have been engaged in Spain. This last condition is clearly not met in this case, and therefore the Spanish labour regulations do not apply to the plaintiff, whose contract is subject to Moroccan law, as the plaintiff recognizes in the fifth ground, seeking the application of Spanish law solely on the grounds that the Moroccan law is not proven, which as we have seen is not the case since the foreign law has been fully accredited".

– STSJ Madrid 7 October 1999 (*RJA* 1999\3338)
Contract of employment. Applicable law. Universality of the 1980 Rome Convention.

"Legal Grounds:

First: According to the uncontested proven facts, the plaintiff worked as a clerk in the Spanish Embassy at Abidjan (Ivory Coast) under verbal contract from 1 Apr. 1995 until, having successfully completed an entrance examination organized by the Ministry of Foreign Affairs, his engagement

was approved subject to a three-month trial period commencing on 1 Jan. 1998. According to clause 6 of the contract, the employee was to be subject to the labour laws of Ivory Coast. On 16 Mar. 1998 the Spanish Embassy advised the plaintiff that he had not performed successfully during the trial period, and on 31 Mar. 1998 he received further advice to the effect that his services were being dispensed with as of said date.

... The appellant alleges that the terms of the Rome Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 Jan. 1980 and ratified by Spain on 7 may 1993, should also be taken into account on the grounds that the said Convention does not apply only in the event of conflict between Spanish law and the law of another Member State of the European Union, but that it is sufficient for a Member State to acknowledge a conflict between its own laws and those of any other country. The argument is based on art. 2 of the Convention, which reads: 'Any law specified by this Convention shall be applied whether or not it is the law of a Contracting State'.

However, this does not necessarily imply that the Convention is applicable to conflicts not involving at least two Member States of the European Union. International conventions apply to those States that have expressed their consent to them in the manner prescribed in international law, not to States which are not parties to such conventions. The Rome Convention is applicable in cases where the contract in question remits to the laws of more than one Member State of the European Union as regards nationality, the place the contract was made, the place of performance or other elements contemplated in the Convention. On that basis, what the said art. 2 provides is that if the law chosen under the rules of the Convention is that of a non-Member State (which may happen, for instance, if the parties have expressly agreed to be bound by that law), this does not bar application of the Convention.

Therefore, in the present case, where the elements to be considered do not relate to more than one Member State of the European Union, the applicable law is not the Rome Convention but the rules of conflict of Spanish law, which have not been entirely repealed and are still applicable to conflicts not involving more than one State of the European Union.

In any event, the foreign law would still be applicable under the Rome Convention as it is under arts. 10.6 *Cc* and 1.4 *ET*.

...

Third: On the basis of the premise established above that under the rules of conflict the law applicable to the plaintiff's contract is that of Ivory Coast, and also that in this process the substance of that law was not accredited in the original proceedings ... Therefore, in accordance with the jurisprudence cited, it was up to the defendant to accredit the foreign law – and this being the Ministry of Foreign Affairs, the defendant was best placed to do so – and the lack of proof does not warrant dismissal of the action but application of Spanish law".

XXII.CRIMINAL LAW

XXIII. TAX LAW

XXIV. INTERLOCAL CONFLICTS OF LAWS

– STC 16 October 2000 (*RATC* 2000\236)

Declaration of paternity. Application of the Law of Navarra. Application of the law corresponding to the son's regional citizenship does not infringe the principle of equality before the law.

"Legal Grounds:

First: ... The action alleges infringement of art. 14 of the Spanish Constitution in that the said judgment constitutes a violation of the appellant's right to equality and non-discrimination, given that if the provisions of the Civil Code regulating actions to establish descent outside wedlock were applied to his claim for a declaration of paternity, the plaintiff would be entitled to make such a claim, whereas this is denied him under the regional civil law of Navarra. The appellant argues that while there is no question as to the constitutionality of Law 71 of the New Law Code of Navarra which bars him from seeking legitimization, the court whose judgment is here contested ought to have interpreted and applied this precept with due regard for the provisions of the Constitution ...

Second: Regarding the question raised by this appeal, it must be remembered that art. 149.1.8 *CE*, in setting out a 'guarantee of regional civil statutes through the political autonomy' of those Autonomous Communities where there is a regional or special civil law (STC 88/1993 of 12 March) and recognizing the competence of the Autonomous Communities to preserve, modify and develop such law, admits that conflicts or contradictions may arise among the different civil laws coexisting in Spain with regard to a given matter, since the same article reserves for the State exclusive competence to lay down 'rules to settle conflicts of laws'. From the breadth of the expression it must be taken to apply both to conflicts with the civil laws of other States and to what are termed 'internal conflicts' – that is, conflicts that may arise among the different civil laws in force in Spanish territory. These regulations are contained in Chapters IV and V of the Preliminary Title of the Civil Code, and there are two points which deserve mention for the purposes of the present case. Firstly, in connection with internal conflicts, art. 14.1 of the *Cc* provides that 'subjection to the common civil law or to a special or regional civil law shall be determined by regional citizenship'. Secondly, art. 16.1 provides that any conflicts of laws that may arise out of the coexistence of different laws in Spanish territory are to be settled, subject to certain special aspects, 'according to the rules set forth in Chapter IV'. The rule applying to descent is art. 9.4, which establishes that such matters are to be governed 'by

the personal law of the son, and if this cannot be determined, then by the law of the son's habitual place of residence'.

Third: Having established this, we note that the appellant's argument is based on the premise that there is a conflict or contradiction of rules between the provisions of the common civil law and the civil law of Navarra as regards the active right of children born out of wedlock to claim descent; and while there is an implicit admission of the applicability of the latter in light of the Navarrese citizenship of the son, his action for alleged infringement of his right to equality and non-discrimination in fact derives from the fact that the Regional Civil Law of Navarra is more restrictive than the applicable civil law. The appellant thus ignores the fact that the application of the regional civil law of Navarra is the consequence of a provision made by the legislator in exercise of the competence vouchsafed by the said art. 149.1.8 *CE*, whereunder it enjoys considerable freedom of legal configuration – indeed, more than is allowed by the Constitution in such matters, according to STC 226/1993 of 8 July. However, in the present case there is clearly no questioning of the equality of the civil laws coexisting in Spanish territory or of certainty as to the applicable law; all that is questioned is the fact that the civil law of Navarra is more restrictive than the common civil law as regards the plaintiff's object in the proceedings *a quo* – that is, the conflict of rules as resolved by the legislator.

Fourth: ... The crux of the issue, as also noted, is the principle of equality in the application of the law. The appeal is based on the judgment, but such application is based on Law 71 of the Compilation of Civil Law of Navarra, section b) of which provides that 'children born out of wedlock may bring an action for recognition of paternity or maternity in the following cases: 1. Where it is public knowledge that the alleged mother and father cohabited at the time of conception. 2. Where the status of the child with respect to the defendant is established. 3. Where there is a declaration by the alleged progenitor. 4. Where there is biological evidence of the parent-child relationship. 5. In the case of maternity, where there is evidence of the birth. Action may also be brought by the descendants of a child born out of wedlock who died while a minor or legally incapacitated'. The appeal also claims infringement of art. 39 *CE*, which clearly lies outside the province of this Court as it does not entail one of the specially protected fundamental rights as referred to in art. 53.2 *CE*. Our judgment must therefore be confined to determining whether the Decision of the Civil Bench of the High Court of Justice of Navarra was discriminatory in applying Law 71 of the Compilation of Civil Law of Navarra by reason of the regional citizenship of the son claiming recognition of descent.

Fifth: In this connection the Decision of the High Court of Justice of Navarra dismissing the appellant's claim could not in fact have violated the principle of equality invoked. Moreover, that Decision seems reasonable, is duly grounded, is neither arbitrary nor erroneous and can be seen to be

founded in law in the application of Law 71, which beyond the points regulated therein does not recognize any subjects as legitimately entitled to bring an action for recognition of paternity or maternity other than the children, who are thus entitled to bring such an action. And if that were not enough, the entitlement to bring an action for recognition of descent out of wedlock is significantly extended in section three of the said Law 71, where it provides that 'Action may also be brought by the descendants of a child born out of wedlock who died while a minor or legally incapacitated'. Hence, the Decision of the Civil Bench of the High Court of Justice of Navarra applies that law on the basis of the 'personal law of the son', who in this case possesses Navarrese regional citizenship through his mother (art. 9.4 *Cc*). Furthermore, the Decision precisely explains the consequences of this, stating that 'as this – the 'new Law Code' of Navarra – is a complete, closed system that regulates such matters in the manner indicated, it cannot be substituted by the common Law, since this would be tantamount to refraining from applying the norms provided for these matters in Navarra'. The decision as to who is entitled to take action must therefore be governed by the personal law of the son – that is, the regional law of Navarra. Moreover, in Navarra the first additional provision of the Constitution has been implemented in the form of an update of the traditional regional laws embodied in the Organic Law on the restitution and improvement of the regional legal system of 10 August 1982, whereby Navarra became a regional entity (*Comunidad Foral*) with its own system, autonomy and institutions in a similar way to all other Autonomous Communities.

This in itself is sufficient to invalidate the appellant's comparison of common civil law and regional law on which his claim of discrimination is based. The comparison with the civil jurisprudence of the Supreme Court cannot be accepted for the purposes of the appellant; this jurisprudence interprets other statutes (arts. 133 *et seq.* of the *Cc*). More importantly, the issue here is not one of substantially identical cases but, as we have said, manifold and differentiated historical and legislative processes which are acknowledged in the present Constitution. This means that there may be a specific approach to these matters, possibly more restrictive as in the present case, in the regional implementing legislation, and that the variety of statutes embodying this implies that each system operates in its own terms, for while there are of course relations between systems, these are based on their differentiation from others: this differentiation is manifested in a particular system of sources of Law which arise in the specific ambit of the organization giving rise to the Legal System.

In the case of Navarrese regional law, the legislator has exercised its freedom to regulate within its acknowledged area of competence in determining who can act legitimately and what persons, within the specific sphere of application of Navarrese Special Law, are empowered to bring an action for recognition of descent out of wedlock. Finally, it is neither

necessary nor indeed the mission of this Court to enter into the reasons that may have prompted the regional legislator to make one or the other choice. What is important is that the court delivered a reasonable judgment in which the solution arrived at cannot be said to have been arbitrary, based as it is on a rational interpretation of the Law. The appellant's claim of unequal treatment is unfounded; the points on which Navarrese regional law differs from the common law do not, in short, produce inequality before the law. Otherwise, as already explained, the very existence of the [regional legal systems] would be meaningless".

– STSJ Aragon 10 March 1999(*RJA* 1999\1137)

Law applicable to dissolution of marital financial arrangements. Rules of conflict. Regional citizenship of spouses at the time of marriage. Navarrese Law not applicable in cassation.

"Legal Grounds:

...

Fifth: The third ground of the appeal is the only one based on infringement of a rule of civil law specific to Aragon and hence the one that warrants the competence of this Court

...

In examining this ground we must determine the applicability to the present case of the rules in the Aragonese Code that regulate the law of property in Aragon, and within that law the rule governing relations between estates. ...

c) The judgment at first instance cited arts. 37 *et seq.* of the Aragonese Code in its first legal ground, without then explaining why they were applicable, while the second ground, s. F), addressed the question of whether the spouses possessed Aragonese or Navarrese regional citizenship. The court determined the former on the grounds that the spouses were married in 1969 and have since lived in Zaragoza and may therefore be presumed to be Aragonese in absence of any declaration to the contrary as provided in art. 14.5.2 *Cc.* The court therefore deemed that the statutes applicable to the case were arts. 57 and 58 of the Aragonese Code.

d) In examining the appeal against the initial judgment, the Provincial Court (AP) did not explicitly address the applicability of the Aragonese Code, judging solely on the factual and legal issues raised and deciding in accordance with Aragonese law.

e) However, the reasons adduced in the original judgment are inadmissible. The point is not whether the spouses were Aragonese at the time of litigation, having acquired regional citizenship by dint of over 10 years' residence in Aragon, but what their citizenship was at the time of marrying. The applicable civil law system has to be determined under the rules set forth in Ch. IV of the preliminary title of the Civil Code arts. 8 to 12, to which art. 16.1 of the same Code refers, according to which personal law is determined by regional citizenship.

f) The effects of marriage are regulated by the personal law of the spouses at the time of marrying, this being the prevailing point of connection established in art. 9.2 of the Civil Code. The rules of conjugal property are therefore unaffected by a change in regional citizenship arising from continuous residence in another region. These rules remain unchanged unless the spouses agree to change them, in accordance with arts. 1325 and 1326 *Cc* and, as regards Aragon, by virtue of the civil liberty acknowledged in art. 3 of the Aragonese Code and expounded in arts. 24 and 26.

Sixth: As regards the regional citizenship of the spouses when they married on 9 Oct. 1969 in Javier (Navarra), the following facts are on record: 1. José Luis S. M. is registered as the son of Navarrese parents, Ramón S. S. and Carmen M. S., both born in and citizens of Cascante in Navarra, as declared by them in a will (*testamento de hermandad*) made before the notary of the said town on 20 Mar. 1973; 2. When he appeared before the Notary of Cascante on 20 May 1982 to formalize a contract of sale, the plaintiff declared that he possessed Navarrese regional citizenship and was married under the Navarrese system of *conquistas*, and there is nothing in the record of proceedings to show that his regional citizenship was other than Navarrese at the time he married; 3. Celia A. M. is the daughter of Navarrese parents, being the issue of a marriage between Marceliano A. C. and Milagros (known as Milagrosa) M. I., both citizens of Cascante, who on 3 Mar. 1989 formalized a notarized deed of donation in favour of their children, the second provision of which stated that 'to avoid the need for judicial intervention, the donors declare under oath that this donation is made freely after due deliberation, and that the goods remaining to them are sufficient for them to live in accordance with their position and circumstances' – a clause which is meaningful only if Navarrese law was applicable to the act, as provided in Law 159 of the New Law Code; 4. There is nothing in the record to show that in 1969 the wife, the appellant in this case, had acquired a regional citizenship other than Navarrese.

Seven: From the foregoing facts this Court concludes that the marital economic arrangement of the parties was that of *conquistas* as regulated by Law 82 *et seq.* of the New Law Code of Navarra. These rules could have been applied by the Judge and Court at first and second instance respectively in accordance with the principle of *da mihi factum dabo tibi ius.*

The same is not true, however, in an appeal in cassation, where the Court must address the grounds cited by the appellant and determine whether or not the law has been infringed as claimed.

In the ground here examined the appellant claims infringement of arts. 1327 *Cc* and 47.1 of the Aragonese Code; however, the argument is not that the said statutes were wrongly applied but that in her judgement the consequences of their application as regards the accounts with Banco Central Hispano and Banco Bilbao Vizcaya, as specified in section 3 of the

first legal ground and the fifth ground of the appeal, are erroneous. Clearly, then, if the marriage is not subject to the civil law of Aragon, the statutes allegedly infringed are not applicable and the ground of appeal is not admissible".