Spanish Judicial Decisions in Private International Law, 1998

This section was prepared by Dr. I. García Rodríguez, Lecturer in Private International Law at the University of Alcalá (Madrid). We include full text, or the most important legal grounds, of the decisions and sentences of different courts with preference being given to both, the Spanish Constitutional Court and the Spanish Supreme Court.

A complete listing and commentaries of all Spanish decisions in Private International Law is published each year in the *Revista Española de Derecho Internacional* (*REDI*), but the full text can be consulted in Aranzadi compilation (book or CD).

I. SOURCES OF PRIVATE INTERNATIONAL LAW

II. INTERNATIONAL JURISDICTION

1. Prorogatio fori

– SAP Barcelona, 5 October 1998 (1998/8973)
Jurisdiction of Spanish Courts; limits of the Spanish Courts before and after the *LOPJ*. Non-applicability of the exemption agreed to in the contract.

"Legal Grounds:

First: In the appealed sentence, the judge ruled 'a quo' the Spanish court's lack of jurisdiction to hear this case and that the courts of the State of California had jurisdiction in compliance with Clause 18.5 of the distribution contract between the complainant and the defendant (see attached documents pp. 35-82). Against that judgement, 'Seagate Technology International' filed an appeal alleging that by responding to the complaint, even in a subsidiary way, the defendant, 'Sistemas y Componentes, SA' (here forward known as 'Siscomp, SA'), tacitly submitted to the jurisdiction of the court before which the complaint was filed.

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The truth of the matter is, however, that this argument cannot be admitted for two reasons:

1. First of all because, in consonance with the Supreme Court judgement of 10 November 1993 (RJ 1993\8980), without prejudice to the right that the parties have to denounce the defect, 'jurisdiction, as a scope of the Judiciary (...) is (...) a '*prius*' that should concur for a court to take action, mandatory under law, that permits or, on occasions, even obliges the court to analyse (...)' (the concurrence of that supposition).

2. Second of all, because the issue of in what court the case is heard is of the utmost importance and the lack of jurisdiction of the Spanish courts must be recognised in this case. In this respect it should be remembered that a literal interpretation of Art. 51 of the Civil Procedure Law (*LECiv.*) gave rise to case law which affirmed the importance of jurisdiction in that it is an issue closely linked to national sovereignty, therefore accepting the '*prorrogatio fori*' and rejecting the '*derogatio fori.*' Before its publication in the *LOPJ* (RCL 1985\1578, 2635 and *ApNDL* 8375), the problem of lack of legal jurisdiction had not even been directly considered to contest the lack of territorial jurisdiction (international) and had been limited to resolve jurisdictional issues based on background circumstances giving absolute authority to that precept of the *LECiv.*

Today, what is known as the declinatory plea for reasons of jurisdiction, is accepted without reservation in the challenging of international judicial jurisdiction. Therefore, the 10 November 1993 Supreme Court decision reasoned that 'since the *LOPJ* the scope of jurisdiction of our courts is more clearly defined and, in the case of civil order, Art. 22 defines certain issues for which the exception does not apply and others for which it does and hence the extension of the scope upon request by the parties. The precept also highlights a series of issues that are generally attributable to Spanish courts in the event that jurisdiction is not deduced by other means.' Based on this judgement it was concluded that 'possible submission of Spanish subjects to the jurisdiction of other countries' courts will have to be admitted as long as the issue does not affect national sovereignty in light of the interpretation of this sovereignty by our own legal regulations heard in our courts.' The decision will be based on the application of legal regulations on territorial jurisdiction.

In this same sense, the 13 October 1993 Judgement (RJ 1993\7514) affirmed that the validity and enforceability of expressed submission must be recognised. If Art. 22.2 *LOPJ* freely allows it when it affects Spanish courts and tribunals, it would be absurd and destabilising for the external legal balance not to recognise it with respect to foreign legal institutions.

However, as was alluded to above, the procedural regime to be followed in the case of a declinatory plea for reasons of jurisdiction is quite controversial because although Arts. 21 through 25 of the *LOPJ* deal with cases in which the Spanish courts have jurisdiction to deal with litigation that has some

foreign component, they do not determine the procedural means by which this jurisdictional issue may be brought to the attention of the court.

Therefore, although in the doctrine some authors admit the possibility of appeal by means of Art. 533 of the *LECiv.* exception one (S. D., R. M.), others insist on the need to file a declinatory plea.

In general the courts tend to resolve this issue during the preliminary phase of the process but do not openly reject (although it is not the most desirable formula as will be seen shortly) appeals through the exception to Art. 533.1 – as is the case here – which does not determine expressed or tacit submission.

Undoubtedly the Court of Justice of the European Economic Community had an influence on that conclusion through a number of its interpretative judgements of Art. 18 of the Brussels Convention and in light of the need to protect the right to defence of the accused, refusing tacit submission by virtue of lack of jurisdiction while at the same time formulating background allegations in a subsidiary fashion – *SSTJCE* of 22 October 1981 (case 27/1981), of 31 March 1982 (case 25/1981) and 14 July 1983 (case 201/1982).

Despite all of this, it is true that if the issue is proposed and decided as a dilatory exception, one runs the risk of violating Art. 24.1 of the Spanish Constitution (RCL 1978\2836 and *ApNDL* 2875) (granting the right to receive a decision from a legal institution on the merits of the pretensions formulated) given that the issue would not be resolved until the final sentence is delivered; a decision that, in principle, does not correspond with Constitutional Court doctrine (SSTC 22/1985 [RTC 1985\22], 39/1985 [RTC 1985\39] and 55/1986 [RTC 1986\55]). In this same sense and as an illustrative example, in the 11 March 1985 Judgement number 39/1985 (in relation to an administrative law appeal) it was stated that 'the method of declaring lack of jurisdiction in the final judgement, regardless of the manner of arbitration, other mechanisms contained in that law (alluding to the LJCA) (RCL 1956\1890 and NDL 18435) to resolve the jurisdictional issue, are not compatible with the right to effective judicial protection.'

Applying this constitutional doctrine, it would always be preferable, when alleging international lack of jurisdiction by virtue of the *LECiv.* (Art. 533 number 1), that the issue be resolved during the preliminary stage of the proceedings, even if this is by use of the appearance provided for in Art. 691 during the course of the declaratory judgement.

This procedure was not employed in the case at hand and therefore, given the reasons explained above, we cannot resort to the mechanism of tacit submission based on Art. 58 of the *LECiv.*

Second: The complainant filing appeal also argued that, given that the accused's legal domicile was in Barcelona, no effective damage that would have resulted from 'Seagate Technology International's' waiving of the exemption agreed to in the contract – undoubtedly to its benefit (no argument

to the contrary being made since 'Siscomp, SA' made repeated references to the fact that this was a standard form contract) – basing the suit on the exemption of the accused entity.

This argument is based on sound reasoning that certainly cannot be overlooked. That was the spirit of the 10 November 1993 Supreme Court judgement when it affirmed that, since the complainant proved tacit submission by virtue of filing the case before the Spanish courts 'it could be supported that the accused (...), who was subpoenaed to appear before the court of its legal domicile, be given the right to defence and be granted the most advantageous exemption (...)', the consequence of which would be that 'it would be unable to oppose lack of jurisdiction without risking legal conduct that would be bordering on fraud and would slow down a judgement in the case.'

The judgement handed down on 10 March 1993 (RJ 1993\1834) was similar in recognising the legitimacy of the selection made by the complainant in benefit of the defendant affirming that in essence it was 'the intention of one of the litigants to avoid the quickest and most precise resolution of the conflict resorting to the legal but complicated issue of conflicting laws (...).'

Third: Furthermore, the appellant is correct in claiming that (undoubtedly motivated by the defence proposed by the accused) the court was mixing the merits of the case with the subject of the lack of jurisdiction. The result was that it accepted the exemption in light of the allegations made in the rebuttal with respect to the actions that it reserved to exercise against the complainant before the courts of the State of California based on the multiple damages that would supposedly have been produced – lack of adequate defence for Siscomp, SA if the jurisdiction of the Spanish courts were recognised. What is certainly true is that that company was able to manipulate concepts in an ingenious way. In order to detour the case from what in our opinion is the central issue (no damage whatsoever resulting from filing the suit before the courts corresponding to the place of legal domicile), its argument is based on a hypothetical reaction devoid of any real validity using the following reasoning: given that Siscomp was going to take legal action before the courts of California – in strict respect of the submission clause written into the contract (and, in other circumstances, surely would be claimed null and void given that it was invoked by the other party) – to make claim for the multiple damages derived from Seagate's breaking of the contract (which to date it has not done despite the five years that have transpired since the date that this case was filed). The proper course to take is to resolve this suit together with the other so as to not separate the joinder of issue.

Although the above line of reasoning is correct from a formal point of view, we cannot accept part of its premise. The fact is that there was nothing precluding the accused in this case from filing a counterclaim as part of this suit thus invalidating all of its objections. Furthermore, it cannot be claimed

that the counterclaim was unviable because the amount would surpass the maximum limit established by the Civil Procedure Law for the declaratory judgement on an action for a minor claim. Not only would this claim be nothing more than the opinion of the interested party (no objective proof was presented attesting to the innumerable damages supposedly suffered), but there is no doubt that an action for a major claim could have been filed and a request could be made at a later date for the accumulated sum of the two proceedings having met the requirements established in Arts. 160 and subsequent of the Civil Procedure Law. It is also plain to see that the call for jurisdiction of foreign courts constantly referred to in this case would make no sense if the exemption were opposed which was repeatedly refused by the accused with the logical argument that its exemption was clearly renounced for all issues stemming from the distribution contract signed by the two parties.

Fourth: With regard to the rest, it is true that the contract called not only for the filing of suits before the courts of California but also to their being subject to conflict resolution in accordance with the laws of that state. This circumstance, however, is not in and of itself sufficient to consider the exemption formulated because 'Siscomp, SA' certainly did not prove that the application of that right favoured it in any way and, at any rate, it could have filed an appeal because even if it was within the jurisdiction of this country, the conflict could have been resolved by applying the law to which the two parties expressly subjected themselves.

In short, we are of the opinion that the circumstance mentioned does not preclude in any way a resolution of the suit filed in this case. Allegations were not even made (the suit was strictly limited to procedural issues regarding the lack of jurisdiction of Spanish courts) that substantial differences actually exist between Californian and Spanish law concerning this issue (Civil Code, Art. 12).

For these reasons the appealed sentence was overturned.

Fifth: In delving into the resolution of the merits of the case, the accused party insisted that the complainant failed to meet its obligations stipulated in the distribution contract signed by the two entities and that this failure consisted in failure to supply a certain model (between November 1991 and May 1992). The required model was substituted by another and this failure to supply supposedly gave rise to serious loses while extraordinary profits were obtained by the supplier.

(...)".

– SAP Valencia, 21 May 1998 (AC 1998\1093)

Jurisdiction of Spanish courts: Fuel supply contract agreed to by means of facsimile; supplier with legal domicile in Spain; accused companies with legal domicile abroad; application of Art. 22.3 *LOPJ*; clause subjecting eventual disputes regarding affreightment arrangements agreed to by the accused companies – owner of the ship and carrier – to arbitration in London-.

"Legal Grounds:

The legal grounds of the challenged judgement are accepted on the condition that they are not in conflict with the following:

First: A suit was filed by the company 'Repsol Petróleo, SA' against the companies 'Companhía de Navegaçao Lloyd Brasileiro' and 'Can American Line Inc.' The former filed a declinatory plea for jurisdiction based on the following arguments:

1. The complainant's aim was to novate the obligation of 'Can American Line Inc.' that contracted the supply of fuel and called for payment through the subrogation of the 'Companhía de Navegaçao Lloyd Brasileiro,' owner of the ship through an affreightment arrangement with 'Can American Line Inc.' based on Art. 2, point 5 of the 1926 Brussels Convention (RCL 1930\1104 and NDL 15463) on maritime privileges and mortgages.

The complainant therefore claims the contractual relationship entered into through the affreightment policy ('time charter' modality) between 'Can American Line Inc.' and the 'Companhía de Navegaçao Lloyd Brasileiro' on 28 May 1992.

Clause 55 states that: 'Any dispute that arises with respect to this affreightment policy will be referred to London for arbitration; one arbitrator will be named by the ship owners and another by the charterers. In the event that the arbitrators do not reach an agreement, the issue will be transferred to a third arbitrator named by the two original ones. The decision taken by the arbitrators or by the third arbitrator will be final and binding for both parties. The arbitrators should be members of the Baltic or of the London Association of Maritime Arbitrators. This policy is under English law.'

A standard model of the time charter was used the clauses of which have the category of 'trade purposes.'

The complainant cannot overlook this purpose and is not a third party to this policy given that it applies with respect to a change of debtor.

2. Assuming for a moment that the relationship between the complainant and the 'Companhía de Navegaçao Lloyd Brasileiro' was not based on the affreightment policy but rather on the fuel supply contract to which it was not party, the complainant turns to Art. 22.3 of the *LOPJ* (RCL 1985\1578, 2635 and *ApNDL* 8375) 'in contractual obligation issues when they come about or should be carried out in Spain.'

The complainant presented a fuel delivery invoice in Gibraltar and another for a lesser amount in Tarragona, both upon request by the 'Can American Line Inc.' with legal domicile in Houston (Texas, United States). Therefore, since the obligation originated in Gibraltar and the place of fulfilment is the legal domicile of the company placing the order, the Valencia court does not have jurisdiction.

The fact that the accused posted bond to lift the seizure of the ship does not imply recognition of the jurisdiction of the court.

Second: Repsol Petróleo SA opposed the declinatory plea (page 259). It

reasoned that it did not invoke the existing contractual relationship between the accused parties but simply indicated that the 'Companhía de Navegaçao Lloyd Brasileiro' is the owner of the ship which was apparently being used by 'Can American Line Inc.' through an affreightment arrangement.

The fact that the accused parties agreed to submit to arbitration is not binding with regard to the complainant which was not party to the affreightment policy.

It requested the delivery invoice for 75 t of fuel in Gibraltar (page 11), another for 400 t delivered to Algeciras and another for a lesser amount in Tarragona (page 12).

The suit makes no reference to subrogation but rather to the joint conviction of the two accused parties.

Third: In response to the decision to reject the declinatory plea, the appeal filed by the 'Companhía de Navegaçao Lloyd Brasileiro' reiterated the supporting arguments of its accessory suit. With regard to the jurisdictional scope of the Spanish Judiciary in civil jurisdiction, Art. 22.2 *LOPJ* states that Spanish courts and tribunals have general jurisdiction 'when the parties expressly or tacitly submit to Spanish courts or tribunals as well as when the accused (not the complainant despite the evident and flagrant error in some editions of the law) has its legal domicile in Spain.'

Submission to the Spanish courts may therefore be permitted and, by virtue of reciprocity, possible submission of Spanish subjects to the jurisdiction of foreign courts must also be recognised as long as the issue does not affect national sovereignty as defined by our own procedural regulations and is brought before our courts the decision of which must be based on the legal regulations controlling territorial jurisdiction. Furthermore, the procedural treatment of lack of jurisdiction is carried out through declinatory plea channels given that it would be inadmissible for a foreign court to emit a writ of waiver to a Spanish court to halt court proceedings because they affect its national sovereignty. When applicable, the declinatory plea will give rise not to the remittance of proceedings to the competent court but rather with a communication to the parties as to which country, in the view of the Spanish judge, should hear the case (S. 10 November 1993, n. 1040/1993 [RJ 1993\8980]).

Fourth: In the case of this suit, the clause regarding the submission to arbitration in London agreed to in the afreightment contract is applicable exclusively within the subjective scope to those who were party to that contract and accepted it freely, expressly and voluntarily and not to those who, like the complainant, were third parties to that legal situation and made no statement with regard to their intention to abide by it. Their rights to claim the effective legal title ship of the Spanish courts may therefore not be limited by an agreement to which it is not party. Furthermore, on a more objective plain, the validity of this clause is applicable exclusively to '*Any dispute arising from this afreightment policy ...*', not to other disputes arising as a result of

different legal relationships such as the supply contract for fuel applying to the ship. The situation would be no different even if this ship had been party to the afreightment contract or if the fuel supplier had mentioned the existence of this contract in its lawsuit; the debate was lodged by a person who had nothing to do with the afreightment and with respect to an issue unrelated to this legal relationship. The submission clause is therefore not applicable and since the accused companies do not have legal domicile in Spain, general *forum* of Art. 22.2 *LOPJ* is not applicable either, and Art. 22.3 *LOPJ* should prevail.

Fifth: In accordance with the aforementioned number 3 of Art. 22 *LOPJ*, the Spanish courts and tribunals have jurisdiction '... in subjects related to contractual obligations when the latter are devised or to be carried out in Spain...' In the case at hand, the supply contract was entered into by facsimile. The offer was sent on two occasions from Gibraltar and was accepted in Madrid (pages 183, 186 and 195) and the place of signing should be considered Madrid because it was in this location that the offer and the acceptance concurred. Furthermore, given that this was a supply contract, the place of fulfilment of the contract is any location at which goods are delivered regardless of the size of the delivery. Therefore, since the third fuel delivery took place in the port of Tarragona, it is clearly the responsibility of the Spanish courts to admit the lawsuit filed by the supply company that is claiming payment.

Sixth: In compliance with Art. 896 of the *LECiv*, court costs related to this appeal should be paid by the appellant."

2. Derogatio fori

– SAP Tarragona of 20 May 1998 (AC 1998\5711)

International maritime transport: judicial jurisdiction; expressed submission to the Palermo court included in the bill of lading.

"Legal Grounds

First: The first issue that must be deal with in this appeal is the validity of the expressed submission clause to the Palermo courts according to the bill of lading issued justifying the transport contract which is at the centre of this suit.

This Court has had the opportunity to point out in its judgement of 30 November 1996, following the jurisprudence laid down by the Supreme Court with respect to this subject on 13 October 1993 (RJ 1993\7514), that Art. 21.1 of the *LOPJ* (RCL 1985\1578, 2635 and *ApNDL* 8375) provides no justification that would negate the validity and efficacy of expressed submission. Art. 22.2 of the same law openly recognises that if jurisdiction may be granted to Spanish courts and tribunals, it would be both absurd and disturbing for external legal traffic if it did not recognise the jurisdiction of

foreign legal institutions. It goes on to add that, in compliance with Art. 780 of the Commercial Code (*CC*), once the insurance company makes payment in the amount insured, all of the rights and obligations will be subrogated thus allowing the insurer to oppose the expressed submission clause. The same reasoning was followed in the judgements delivered on 20 July 1992 (RJ 1992\6440) and 10 November 1993 (RJ 1993\8980), the latter indicating that Spanish nationals may be subject to the jurisdiction of another state if the issue does not affect national sovereignty, the declinatory plea being the channel through which a Spanish judge's lack of jurisdiction may be brought to the foreground.

Notwithstanding the above, this doctrine highlights the strictly exceptional nature of the submission pact (S. 10 July 1990 [RJ 1990\5792]), and the fact that it must be clear and subscribed to by all of the contracting parties (SS. 21 January 1986 [RJ 1986\108]; 25 June 1994 [RJ 1994\6501] and 23 May 1995 [RJ 1995\4255]). STS of 30 December 1992 (RJ 1992\10566) concludes that the submission to an arbitral clause forming part of the affreightment contract is not binding for those that were not party to it since it is designed to resolve controversies between the affreighter and ship owner and is not aimed at the receiver of the goods. Therefore, the complainant cannot oppose the submission clause as a subrogated insurer in actions initiated by the insured, but rather as the result of the fact that the insured (receivers – buyers of the merchandise) are not bound by this clause because they did not intervene in the bill of lading in which said clause was introduced. The signatures of the insured appearing on the back of the document do not change this situation because they were made exclusively to subscribe to the note denouncing the loss of several litres of wine in the unloading operations (pages 53 and 54)."

– SAP Malaga, 9 January 1998 (AC 1998\8880)

Plea of lack of jurisdiction; lack of relevancy; time sharing contract; clause of submission to the Geneva courts and tribunals; action taken not stemming from the contract.

"First: The appellant alleged that it was understood that the pleas formulated were reproduced, at least the plea for joint litigation, and that the time sharing week was not sold, pointing out that the commitment was for management of the sale but was not a guarantee of success.

Second: The appellant opposed first of all the plea of lack of jurisdiction since, in compliance with the time sharing contract, the suit was subject to the courts and tribunals of Geneva (Switzerland).

With respect to this issue, confirmation is due to the reasoning adopted in the judgement because the lawsuit does not stem from the contract but rather from the commitment in writing made by the accused for the purchase of the week offered in sale by the complainants who found themselves in a situation non-liquidity.

It should be added that the submission clause is clearly abusive (Art. 10 of the *Consumer Law* [RCL 1984\1906 and *ApNDL* 2943], *in the wording formerly in force, made even more serious following the Community directive on abusive clauses)* and not accepted since it was printed on the back side of a document which was not subscribed to by the complainants.

For the same reason the pleas for lack of passive legitimation and joint litigation, the purpose of which was to make it necessary to file suit against the Gibraltar based companies operating the apartments, should be rejected. The accused company alleged that it was only the owner of the apartments and that the complainants were using them as members of the corresponding 'club.'

Nothing would be accomplished by admitting the pleas because the commitment to sell was acquired directly by the accused as can be deduced by the correspondence exchanged with the complainants".

3. Exclusive forum

– AAP Barcelona, 26 October 1998 (AC 1998\8948)

Jurisdiction of the Spanish courts: appropriateness; if admitted, pretensions presented in the case would necessarily affect real estate situated in Spain which, according to the contested contract, are recognised as being the property of the accused with legal domicile in Spain.

"First: The Court of Instance, in its judgement of this remedy of appeal, rejected the issue of jurisdiction by international declinatory plea filed by Sara Tourhotel AB currently known as Transpool AB, a Swedish company that claims the jurisdiction of the courts of its legal domicile and the lack of territorial jurisdiction proposed by the rest of the co-defendant companies which claim that jurisdiction corresponds to the court located in the *situs* of the real estate – in San Bartolomé de Tirajana.

Second: It should first of all be pointed out that when the complainant (the appellant in this case), filed its complaint it referred to the upholding of the sales contract signed on 29 December 1992 with the Swedish company (known as the letter of intentions) affirming that that company, through a number of branch companies (the rest of the co-accused companies), controlled a vast agglomeration of hotel and tourist facilities mostly in the Balearic and Canary Islands. As part of that same contract with Nordotel, an industrial lease was arranged. According to this letter of intentions (pp. 95-102) the co-defendant Spanish companies with the exception of Nordotel are the owners of the apartments and businesses all located in Spain and which were to be acquired by the complainant and rented in compliance with pre-determined conditions and time frames to the other co-defendant Nordotel.

Third: With respect to international jurisdiction, both parties coincide in the application of the Lugano Convention of 16 September 1988 (RCL

1994\2918 and RCL 1995\64), which entered into force in Spain on 1 November 1994 and in Sweden on 1 January 1993 and, in line with the judgement delivered by the court of instance, it should be affirmed that section five of that convention entitled exclusive jurisdictions states exclusively and regardless of legal domicile that 'with respect to real asset rights and property leasing contracts, the courts of the contracting state in which the real property is found' [Art. 16, A]. In the case at hand it is undeniable that if admitted, pretensions presented in the case would necessarily affect real estate situated in Spain which, according to the contract itself, is recognised as being the property of the accused with legal domicile in Spain and for that reason the jurisdiction assigned in the appealed proceedings should be upheld. This is especially true considering that in the Lugano Convention itself a reference is made to real 'rights' and not to 'actions' of a certain nature and that the Supreme Court in its 13 October 1993 judgement (RJ 1993\7514) stated that there was no case for 'derogatio fori' in issues pertaining to Art. 22.1 *LOPJ* (RCL 1985\1578, 2635 and *ApNDL* 8375) thus giving Spanish courts and tribunals exclusive jurisdiction. Although it is true that the same Supreme Court in its judgements of 14 December 1977 (RJ 1977\4741) or 16 February 1992 excluded the concept of real estate leasing and as a consequence exclusive jurisdiction from contracts related to the exploitation of a business or industrial rental, the link that exists between the petition concerning the real estate property and the rental of industry, in compliance with Art. 22.3 of the Convention, calls for the upholding of the declared jurisdiction with a view to avoiding a situation resulting in resolutions which are incompatible.

Fourth: Given that the rest of the co-defendants did not raise other issues at the time of the hearing, the jurisdiction of the Barcelona court which was determined in the appealed judgement should be upheld, especially considering that four of those co-defendants have their legal domicile in this city. With regard to the subsidiary request filed by the appellant at the time of the hearing, the fact that the appellee could not request the transfer of proceedings suffices to indicate its complete inappropriateness at this stage given that it would affect the base of the issue being debated".

4. Special forum

– SAP Guipúzcoa of 28 April 1998 (AC 1998\7945)

Lack of jurisdiction of Spanish courts with respect to transport outside of Spain.

"Legal Grounds

The 19 May 1956 Convention (RCL 1974\980 and NDL 29284) should be applied in this case. This Convention regulates the international transport of goods by road with respect to that which the parties agree to. The controversy stems from whether Art. 31 of that Convention is applicable. The

complainant transport entity took responsibility for the goods outside of Spain and delivery of those goods was made outside of Spain on seven different occasions and on two other occasions delivery was made within Spain. Given that no circumstances were identified that would invalidate the application of the Convention's Art. 31, it is clear that Spanish courts and tribunals have jurisdiction to hear the two transport claims that are part of a suit concerning transport to Spain and not related to the other seven cases. The remedy of appeal was thus rejected and the judgement delivered on 30 January 1997 was upheld".

III. PROCEDURE AND JUDICIAL ASSISTANCE

– STS (Civil Court) (RJ 1998\3752)

Authority granted to solicitors abroad; non-existence of lack of authority; conference by notary public of the country of origin; irrelevancy of the failure to meet the requirements set out in notary regulations; Supreme Court appeal; procedural defects; dismissal; failure to examine evidence; in second instance; confession of the foreign company and complainant with respect to the certified summary of commerce and accounting records; assistance from the United States Judicial Authority; return of the letter of request for failure to carry out the required translation into English.

"Legal Grounds

First: The suit filed by 'Children's Television Workshop' was accepted in both instances. The case was against the accused 'Romagosa Internacional Merchandising, SA' for payment of the sum requested plus legal interest. A Supreme Court appeal was then filed the first motive of which was based on subsection one, number 3 of Art 1692 of the Civil Procedure Law in relation with Art. 8.2 of the Civil Code, Arts. 1 and 3 of the Civil Procedure Law and Arts. 164, 165 and especially 166 of the Notary Regulation (RCL 1945\57 and NDL 22309); violation for having admitted as valid the power of attorney for lawsuits presented by the complainant with his claim. In the grounds for the motive it was alleged that the insufficiency and illegality of the power of attorney, already denounced in the response to the claim, is rooted 'first of all in the lack of precision regarding the nature of the complainant's legal representatives for lawsuits designated in that power of attorney which confused the term lawyer with that of 'solicitor.' Moreover, given that it was a legal entity being dealt with, the background information necessary to accredit that the courtroom representation granted was delegated by the authorities of the complainant with power to take such decisions was not transcribed in that power of attorney.' With respect to the first allegation, in addition to having been remedied during the course of the proceedings as the appellant admitted in the summary of evidence, the fact is that the professionals to whom power of attorney was granted were indeed Court

Solicitors and that the authority bestowed on them was appropriate and in accordance with their professional function within that legal procedure. They were, however, designated as 'lawyers' in the power of attorney but this error is not sufficiently serious so as to support a challenge of this nature especially considering that the error was the result of a faulty translation from the original.

The second allegation cannot be accepted either. Jurisprudence was established in the power of attorney granted in compliance with Italian legislation through the judgement delivered by this court on 23 June 1977 (RJ 1977\3011) stating that its validity before Spanish courts could not be rejected in compliance with Art. 11 of our substantive law. This is not affected by number two of that precept which sets up a regulation to deal with acts and contracts granted abroad when the law regulating their content requires a certain format or solemnity given that in our legal system a specified legal format is only imposed for public documents (Art. 1280, number 5 cited above) or the acts of the Solicitor 'with sufficient authority granted by a legal representative (Art. 3 of the Civil Procedural Law) but not with regard to the requirements established in Arts. 161, 164, paragraph one, 165 and 166 of the 2 June 1944 Regulation that, although must be strictly met in Spanish territory if they are to be considered valid (S. 26 May 1975 [RJ 1975\2444]), they cannot be required with respect to powers of attorney granted abroad because they are precepts of a lower rank than those stipulated in number two of that Art. 11.'

The power of attorney granted before a Notary Public in the country of origin was presented when the suit was filed and the accused party filing this appeal did not present any evidence whatsoever showing that that power of attorney was not in compliance with the laws of the country in which it was granted. For that reason its validity must be recognized in accordance with the doctrine contained in the judgement and the motive is therefore rejected.

Second: The same procedural channels were used in the formulation of the second motive for infraction of the constitutional right to proper legal defence in accordance with Art. 24 of the Constitution (RCL 1978\2836 and *ApNDL* 2875), in relation with Arts. 867 and 869 of the Civil Procedure Law and others related with these legal precepts.

In order to resolve this motive it is necessary to review the following procedural information: a request was filed by the accused appellant for the discovery of evidence in second instance; evidence presented was a confession made by the complainant's legal representative and certified summary of commerce and accounting records. This was agreed by legal judgement on 8 April 1992 and given that presentation of this evidence required the collaboration of the United States' judicial authorities, a time frame of four months was granted for its collection. The letter of request was sent to the United States but was returned by the Justice Ministry for translation into English without which the requested collaboration could not be given. This

information was passed on to the appellant who did the translation which was returned by the court for the 'certification of conformity' issued by the diplomatic or consular officer or a sworn translator of the requested state in compliance with the agreement between Spain and the United States. This certification was never presented and by court order of 19 October 1992, having used up the time granted for the collection of evidence, the case was passed on to the judge rapporteur for commencement of the pre-trial enquiry.

All of this goes to show that the responsibility for not presenting the proposed and accepted evidence lies exclusively with the party which is now the appellant for not having met established requirements and for having used up the time allotted without presenting the translation in the legally required format. The possible lack of defence that this may have caused to that party is attributable to that party alone therefore discounting any allegation of procedural defect. It should also be pointed out that the 'a quo' court, in granting the discovery of evidence based on Art. 862.2 of the Civil Procedural Law, acted benevolently because the evidence proposed and admitted by the court in first instance was not presented; this same evidence was proposed in second instance exclusively by the accused party and in addition to the errors contained in the proposition brief, it did not request a deadline extension for the collection of that evidence in compliance with Arts. 698, 556 and subsequent of the Civil Procedural Law; given that the evidence was to be collected abroad, an extension of the standard deadline for a minor claim was clearly necessary. The motive was therefore dismissed.

Third: The mere annunciation of the third motive which was formulated in accordance with number 3 of Art. 1692 of the Civil Procedure Law 'for an error of fact in the evaluation of the documentary evidence,' gives rise to its dismissal due to the eradication of the procedural regulation to the degree of a Supreme Court challenge by virtue of Law 10/1992 of 30 April (RCL 1992\1027) and it therefore should not have been admitted in court as a motive.

With respect to the fourth motive, presented through the procedural channels set out by Roman numeral 4 of Art. 1692 of the Civil Procedure Law, claim was made of an infraction of Art. 1281 and 1253 of the Civil Code. The motive reads as follows: 'The Provincial Court, through its interpretation of accusation document number 6 established the sum of the debt attributable to 'Romagosa', the accused, in the same manner followed by the Court of Instance;' 'and far from limiting itself to a literal interpretation of the terms of this provisional state of accounts pending additional liquidations not yet made as we have already mentioned in a previous motive, following a through reading of document number six, an extensive interpretation was made arriving at a certain and requirable sum to be paid to the complainant;' in this process it uses a presumptive argument expressed in the terms of the final subsection of legal ground three of the appealed sentence.

Apart from using the same Supreme Court appeal for two infractions

concerning heterogeneous precepts that have nothing to do with one another as is the case with 1281 and 1253 of the Civil Code mentioned above, this motive cannot be upheld.

In its legal ground three, the appealed judgement states that 'the nucleus of the appeal, an issue that dates back to the first instance, is based on clarifying whether the self-proclaimed commissions, based on contracts and deadlines specified in document number six and attached with the counterclaim (note of clarification: this is the same document with the same number that was attached with the accusation referred to in the motive), owed to the appellant are actually payable or not by the other litigant, or whether the amount proposed in the accusation can be considered as payable.' From that perspective, the 'a quo' court, following a detailed and careful examination of the evidence presented, concludes that the amount requested is payable but does not recognise the existence of pending commissions between the two parties. The Instance Court arrived at this conclusion after studying and assessing the evidence without, at any time, resorting to probable cause but rather based its assessment exclusively on positive evidence presented in court. The 'a quo' court did not fail to recognise the literal sense of this document but rather made a careful examination of the certainty or not of the statements made therein by the author, the accused appellant.

Fourth: Allegation was made in motive five, in accordance with ordinal number 4 of Art. 1692 of the Civil Procedure Law, of an infraction of Art. 12.6 of the Civil Code. The claim is that the appealed judgement does not consider in the slightest the foreign law to which the two parties had subjected. It would therefore seem that the appellant is limiting his challenge to an infraction of paragraph 1 of that Art. 12.6 especially considering that in his counterclaim he accepted the comprehensive judicial resolutions attached with the accusation that were delivered under New York law which governs the contract.

Considering the terms on which the appeal is based which are reflected in the above legal grounds of this resolution, it was not necessary to make specific mention of the foreign law applicable in the resolution of the issue. Furthermore, it should not be forgotten that the appealed judgement specifically accepts the grounds of the appealed decision whose legal ground number three examines the law invoked by the two parties in defence of their pretensions. This supports the explicit acceptance of that law which is incorporated into the judgement that resolves the appeal. Furthermore, since the motive is based upon an alleged infraction of the law, what is being called into question is the examination of evidence in the petition alleging the complainant's failure to meet contractual obligations in contrary to that which is stated in the appealed sentence concerning the non-payable nature of the commissions derived from the original contractual relationship of the parties to this lawsuit. This motive is therefore rejected.

Fifth: The rejection of each and every one of the motives of the appeal is

indicative of the rejection of the entire appeal itself with the lawful consequences concerning court costs and the designation of the deposit in accordance with Art. 1715 of the Civil Procedure Law.

(...)".

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENTS AND DECISIONS

1. Arbitration

– ATS of 24 November 1998 (Civil Court) (RJ 1998\9228)

"Exequatur": mechanism designed specifically to homologate the effects of foreign judgements, principally those of a procedural nature; arbitral decision delivered in London; non-existence of a lack of passive legitimation; lifting of the veil sheltering public limited companies in order to delve into the "substratum."

"Background Information

First: Mr. Venturini Medina, Court Solicitor representing the company 'Sindicato Pesquero del Perú, SA' (hereafter known as SIPESA) filed an arbitral decision 'exequatur' suit which was delivered in London on 2 August 1995 by the Grains and Feed Trade Association (GAFTA) in the arbitral proceedings between its representative and the Spanish company 'Internacional de Productos Químicos, SA' (INPROQUISA). This latter company was sentenced to pay the former the amounts reflected in the above mentioned decision.

Second: The petitioner, the complainant in this arbitral proceeding, had its headquarters in Lima, Peru while the accused had legal domicile in Madrid, Spain.

Legal Grounds

(...)

Second: Upon examination of the key issues of the case it was learned that, in accordance with the regulations of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, of 10 June 1958 (RCL 1977\1575 and *ApNDL* 2760) to which Spain became party on 12 May 1977 and which entered into force on 10 August of the same year, this Agreement was applicable to the case at hand. The resolution under scrutiny is among those included in Art. I of the Convention and the document making reference to Art. IV.1, a) was attached by the petitioner duly translated into Spanish and affirming that the arbitral decision was final.

Third: The object which gave rise to the arbitral proceeding is susceptible to an arbitration hearing in Spain (Art. V.2).

Fourth: The opposition raised by the company 'Internacional de Productos Químicos, SA' to the recognition and execution of the decision is based first of all on the fulfilment of the requirement found in Art. IV.1, b) of the Convention. The second cause for opposition was the accused's lack of passive legitimacy due to the existence of two different companies – 'Inproquisa Comercial, SA' and 'Internacional de Productos Químicos, SA' (INPROQUISA) – and due to the fact that the accused party in this proceeding is the second of the two companies while it was exclusively the first that had trade relations with the complainant. Given the procedural nature of this second cause for opposition, it will be looked at first. An examination shows, as was indicated above, that it was a different company by the name of 'Improquisa Comercial, SA' that was involved in the material legal relationship and not the company that appears in this proceeding as the opponent to the decision. It must first of all be kept in mind that in our legal system the 'exequatur' is designed – based on Art. III of the New York Convention – as a mechanism the purpose of which is to simply homologate the effects of foreign resolutions, principally from a procedural perspective. This purpose is supported even by the Constitutional Court (*cfr.* STC number 132/1991 [RTC 1991\132]) and any attempt to alter the essence of the issue is thereby vetoed including the 'ad causam' legitimacy in the proceeding initiated in the terms in which the material relationship was constituted, the only exceptions being those imposed by the necessary respect and accommodation to the effects of a resolution with respect to public order imperatives which, in an international sense, stem from the same essential principles of our constitutionally based legal system. This homologating character therefore keeps the 'ab initio' court from examining the form in which the legal-material relationship was originally arranged, especially with regard to the intervening parties' role in that relationship. There is no doubt, however, that this examination would be appropriate in our legal system in light of consolidated case law on lifting the veil under which information could be concealed. The only thing that the court can do, therefore, is to analyse the real composition of the material relationship through its personal elements with a view to avoid damaging the right to defence of an entity involved in a legal proceeding without having been party to that legal relationship giving rise to a judicial sentence. It must also be considered that the court delivering judgement did not take this circumstance into consideration which was brought to its attention through proper legal channels and within established deadlines given that proscription for lack of defence should also be applied to the execution of the arbitral decision. From this perspective the fact must be recognised that the company which is the complainant in this case was able to argue in the arbitral proceeding its lack of causal legitimacy without running the risk that the court would rule that it had accepted the jurisdiction of the court and its proceedings and this lack of submission to arbitration would therefore be justified by its non-intervention in the business transaction under scrutiny. It

did not proceed in this manner, however, and simply refused to submit to arbitration and not always in the most appropriate manner. Together with the unequivocal affirmation that 'at no time had it submitted to GAFTA arbitration' (letter of 26 November 1993 from Mr. José Ignacio Z. B. of 'Legal Consult, SA' in representation of 'Inproquisa, SA' to Ms. Pamela K. J., Director of GAFTA), there are others like those contained in the letters of 21 July and 9 August 1993, in which INPROQUISA's refusal to submit to arbitration is justified by the fact that at no time and in no way had it caused damage to the 'Sindicato Pesquero del Perú, SA', an affirmation that hints at a certain level of recognition of the commercial relationship linking the parties and giving rise to the controversy in the first place.

Furthermore however, in the event that the lack of legitimacy in this proceeding and its eventual effect on the procedural principles providing structure to public order, the court must consider that according to the case file the two companies in question – 'Inproquisa, SA' and 'Inproquisa Comercial, SA' – shared the same administrator, the same legal domicile and even commercial objectives that were quite similar. These circumstances lead one to the conclusion that one of the companies undoubtedly acted on behalf of the other, being its instrumental entity in commercial operations as is common practice in business trade. Given these circumstances, a sense of fairness indicates the need to penetrate into the 'substratum' of these companies in order to avoid, as was stated in the SSTS of 28 May 1984 (RJ 1984\2800), 1 December 1995 (RJ 1995\9155), 10 February 1997 (RJ 1997\936) and 24 March 1997 (RJ 1997\1991), among others, under the protection of its legal form and its own legal personality, doing damage to public or private interests or being used in a fraudulent manner (Art. 6.4 Civil Code) in such a way as to damage or infringe upon the rights of others (Art. 10 Spanish Constitution [RCL 1978\2836 and *ApNDL* 2875]). It is from this broad perspective that an analysis should be made of the alleged lack of legitimacy and its eventual effect upon procedural public order. From this point of view, all of the circumstances highlighted necessarily point to the dismissal of the case for opposition filed given that the very nature of the proceeding precludes its consideration. However, even if this stumbling block were overcome by applying the mandatory control of respect for public order, the case should be dismissed because it is unacceptable to overlook the procedural rights and guarantees of one who failed to bring up the issue in the proper terms before the initial court and, finally, because of the proscription of the abuse of law (Art. 7.1 Civil Code) unveiled once a close look was taken of the personal underpinnings of the companies.

Fifth: Which brings us finally to an examination of the cause for opposition based on the failure to meet the procedural obligation on the part of the petitioner to attach, together with the complaint, the original copy of the agreement referred to in Art. II or a copy that meets requirements with regard to its authenticity, a supposition that should be understood in relation

with the original definition expressed in that article of the conventional regulation which should also bear in mind the precepts of the European Convention on International Commercial Arbitration, done in Geneva on 21 April 1961 (RCL 1975\1941 and *ApNDL* 2761), applicable to those states which are party to it. In applying those precepts and with a view to verifying fulfilment of the stipulated requisite, the court has channelled its hermeneutic energy towards a search for the will of the parties to include in the content of the contract the clause of commitment referred to or, in a more general sense, the will to submit the litigious issue to arbitration through examination of the whole body of communication and actions taken by the parties to the business relationship (*cfr. AATS* 17 February 1998 [RJ 1998\760 and RJ 1998\972], in 'Exequatur' number 3587/1996 and 2977/1996; SSTS of 7 July 1998, in 'Exequatur' number 1678/1997, and the SSTS of 6 October 1998, in 'Exequatur' number 2378/1997). From this perspective, this cause for opposition must also be dismissed. In addition to the fact that the case file shows the unclear and ambiguous position of the accused company with regard to arbitration (as was mentioned above, at times basing its rejection on not having caused harm to the complainant company and not on the unequivocal affirmation of not having subscribed to any arbitral clause whatsoever), it has also been proven that the company 'Hispatrade, SA' acted, in collaboration with the company 'Perú Broker, SA', as an intermediary, mediator or broker in the business operation and in fulfilling that role, taking orders from the accused company, made a bid to purchase SIPESA. The conditions of this purchase bid included the rest of those found in the standard Peruvian contract which includes the clause regarding submission to GAFTA arbitration. It was in these terms that a facsimile message was sent to the complainant company on 5 February 1993 that listed, as a sort of summary, the stipulations of the contract with reference to the standard Peruvian contract. This is common practice in conformance with mercantile tradition regarding international contracts. This was further highlighted by the above mentioned mediation companies in the reports ratified by their respective board of directors. The court is therefore of the opinion that, after having studied that documentation and considering the fact that contracts were drafted in the terms provided for in those communications, it can reasonably be affirmed that the parties showed the will to submit their disputes to arbitration and, as a consequence, the complainant has therefore met the requirement set out in Art. IV of the Convention the interpretation of which is in accordance with its Art. II. With regard to the rest, nothing needs to be said with respect to the validity and efficacy of the arbitral clause in terms of the technique used in the negotiating process because no allegations were made by the opposing party in accordance with Art. V of that same International Convention.

(...)".

– ATS of 8 September 1998 (Civil Court) (RJ 1998/6840)
"Exequatur": the object of the proceeding is to determine the fulfilment of requirements set out in the regulations – generally of a procedural nature – without being able to carry out an in-depth study of the issue beyond the bounds set by public order or, in the case of decisions taken abroad, beyond limits set out in Art. V of the New York Convention.

"Legal Grounds

First: In accordance with the regulations contained in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 to which Spain became party on 12 May 1977 (RCL 1977\1575 and *ApNDL* 2760) and which entered into force in Spain on 10 August of that same year, applicable to the case because the resolution whose recognition is sought is among those listed in Art. I of the Convention, the petitioner presented to the court the document referred to in Art. IV.1, a), duly translated into Spanish and accrediting the definitive nature of the arbitral decision under scrutiny.

Second: The situation which gave rise to the arbitral proceeding is susceptible to an arbitration hearing in Spain and a repeated arbitral award is not contrary to Spanish public order (Art. V.2).

Third: The opposition expressed by the accused entity, and focusing on the purely declarative nature of the arbitral resolution, should not be considered sufficient cause to block the granting of the requested 'exequatur.' It is true that the nature of this 'exequatur' proceeding necessarily entails the rejection of the opposition formulated and provides for the granting of the sought recognition once verification has been made of the suppositions to which Art. IV of the Convention conditions it in light of the absence of any other allegation concerning its appropriateness, the accreditation of which is imposed by Art. V upon the party which expresses opposition. This court, in accordance with case law established by the Constitutional Court (*cfr.* STC 132/1991 [RTC 1991\132] and AATS 3 December 1996 and 21 April 1998 [RJ 1998\3562], among others, which has stated time and again that a proceeding leading to the granting of the 'exequatur' of a foreign judgement is merely for homologation purposes and its object is to verify fulfilment of the requirements set out by the regulations which are generally of a procedural nature. The jurisdictional institution carrying out this function may not delve into the grounds of the case decided by the resolution. It may not investigate beyond the control limits imposed by respect for public order or, in the case of judgements delivered abroad, beyond the limits established by Art. V of the 1958 New York Convention when applicable. Given this state of events, one should not confuse this procedural channel, truncated by virtue of a purely declarative resolution recognising the effects of the award and its enforceability in Spain, as the case may be, with the actual enforcement which is incumbent, once the sentence is received, upon the Judge of First Instance of the community in which the convict has legal domicile or of the community in

which the sentence should be carried out (Art. 958 LECiv.). It is incumbent upon this Court to homologate the effects produced by the foreign arbitral resolution, in function with its own pronouncements whether these be purely declarative or condemnatory, in such a way that these will be the effects that will pass on to the internal order with the content and extension in accordance with the rules governing the resolution, with no more limitations than those imposed by conformance to public order. It is incumbent upon the institutions of first instance to enforce the provisions of the arbitral sentence in these strict terms if it indeed contains some pronouncement susceptible to enforcement. However the fact that its effects, in the material sense, turn out to be merely declarative in nature should not be an obstacle to the 'exequatur' because in that case it would be these pronouncements which, once recognised by this Court, will work to the advantage of the party filing suit in the manner most in tune with its interests, in conjunction with strictly procedural effects – principally related to that which is judged – which is derived from the latter and projected upon the former".

– ATS of 9 June 1998 (Civil Court) RJ 1998/5323)
"Exequatur": limits; public order; concept and reach; inclusion of constitutional principles; respect for the demands imposed by the right to effective legal protection; appropriateness; non-violation of public order.

"Background Information

First: The solicitor..., in representation of the company 'Breakbulk Marine Services Limited,' filed a request for the 'exequatur' of three decisions to a single arbitral proceeding. The three decision were: the Final Partial Judgement of 28 March 1996, the Final Partial Judgement of 21 November 1996 and the Final Judgement of 5 March 1997. The first two were delivered by the arbitrators Mr. Nicholas Legh-Jones, Mr. Mark Hamsher and Mr. Michale Mabbs while the third was delivered by the arbitrator Mr. Michale Mabbs, all from England. The judgements sentenced the Spanish company 'Nervacero, SA' to pay the sum of 1,030,776.65 US Dollars plus 213.90 US Dollars per day as of 15 March 1997 to cover interest payments.

Second: The party requesting the exequatur had legal domicile in the Anglo-normand islands while the accused party was established in Spain.

(...)

Legal Grounds

First: In accordance with the regulations contained in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (RCL 1977\1575 and *ApNDL* 2760) to which Spain became party on 12 May 1977 and which entered into force in Spain on 10 August of that same year, applicable to the case because the resolution whose recognition is sought is among those listed in Art. I of the Convention, the petitioner presented to the court the document referred to in Art. IV.1, a),

duly translated into Spanish and accrediting the definitive nature of the arbitral decision under scrutiny.

Second: The situation which gave rise to the arbitral proceeding is susceptible to an arbitral hearing in Spain and a repeated arbitral judgement is not contrary to Spanish public order (Art. V.2).

Third: The company 'Nervacero, SA' first of all opposes the exception to public order since it was not party to the judicial or arbitral proceedings that took place between the purchasing company to which the merchandise was sent – 'Sangyong Corporation' – and the ship owner – 'Quadrant Shipping Limited,' – and between the latter and its affreighter – 'Breakbulk Marine Services Limited,' – respectively, thus violating the legal doctrine regarding necessary passive joint litigation; also giving rise to the issue of mandatory respect for the hearing guarantees provided for in Art. 24 of the Spanish Constitution (RCL 1978\2836 and *ApNDL* 2875). With respect to the argument presented it must not be forgotten, first of all, that this proceeding deals strictly with legal process and focuses exclusively on standardising the effects of the judgement to be recognised, disallowing further revision of the essence of the issue than that which is strictly necessary to guarantee respect for the essential principles of our legal regulations conforming the concept of public order in the international sense. This criteria has been upheld by the Constitutional Court (SSTC 54/1989 [RTC 1989\54] and 132/1991 [RTC 1991\132]) – superfluous citation if the opposing party is privy to this information. The High Court has also stated that the concept of public order in a court of law, as a limiting factor in the recognition and enforcement of judicial decisions taken abroad, has taken on a new dimension since the entry into force of the 1978 Constitution. It goes without saying that the body of principles that gave rise to our constitutional legal system must be taken into consideration, special attention being given to fundamental rights and public freedoms, thus acquiring a singular content impregnated by the demands of the Constitution and especially by those of its Art. 24 (SSTC 43/1986 [RTC 1986\43], 54/1989 and 132/1991; AATC 276/1983 [RTC 1983\276 AUTO] and 795/1988 [RTC 1988\795 AUTO]). And finally, the same constitutional doctrine adds that an examination of the requirements acquired by the court of law's legal system for the declaration of the enforceability of foreign resolutions, the homologation of the fulfilment of these requirements and the interpretation of the regulations by virtue of which they are established are an issue of ordinary legality and strict jurisdictional functioning that are incumbent upon this Court and specifically upon this Courtroom number 1 (*cfr.* SSTC 98/1984 [RTC 1984\98] and 132/1991).

It is therefore within this framework that an analysis should be carried out regarding the violation of the court of law's public order as requested by the opposing company. In this particular case of the lack of necessary passive joint litigation, an analysis should be done of the plea presented from the perspective of the violation of the procedural guarantees involved, specifically

the situation of defencelessness suffered by one who was not called to court but who should have been as required by the applicable regulation or due to the very nature of the legal relationship in question thus avoiding the possibility that someone could be sentenced without being heard in a court of law and the possibility of two irreconcilable contradictory sentences.

The cause of the opposition presented before the Court cannot be upheld. The cause of the two different foreign proceedings – judicial and arbitral – in which the opponent feels it should have participated is rooted in the maritime transport contract forming part of the 'clean' bill of lading issued in the name of the purchasing company receiving the merchandise. The purchasing company filed a lawsuit which was based precisely on the 'clean' nature of the lading of the goods transported, first of all, against the party who appears and is recognised as the carrier – the company 'Quadrant Shipping Limited,' owner of the chartered ship – and on the principal chartering contract ('time charter') held between 'Quadrant' and the charter company 'Breakbulk Marine Services Limited (BMS)' and second of all against this latter company given the responsibility it undertook in its relations with the receiver of the merchandise, based here on the obligations assumed through the time charter contract. The opponent company is not party to either of the legal relationships, both substantive and procedural. The opponent's responsibility to the petitioner of the exequatur is required by virtue of the letter of indemnity (LOI) which was issued to this charter company as part of the charter contract – GENCON policy – agreed to with the opponent. This purpose of this letter of indemnity was to cover the reservations registered by the cargo inspectors and observed by the captain of the ship as well, on the state of the merchandise. These reservations appeared on the cargo receipts and on the bills of lading which, for that reason, were not 'clean' as had been agreed to in the charter contract. Given this state of events, it is difficult to justify the necessity of the opponent's intervention in those suits whether to avoid a situation of defencelessness or the possibility of contradictory pronouncements. Even if it is the opponent's desire to base its allegation of defencelessness on the fact that if it had been up to the participants in those legal processes they would have reached trans-national agreements that would have renounced the proceedings under way and the surrender of their rights, concluding that the compensatory amount agreed to therein and required of the opponent in the arbitral proceeding was established without its participation (excessive and irrational as it may be), it cannot deny the fact that, in line with this reasoning, on the one hand the settlement was reached by those that were involved in the litigation within the framework of the respective relationships that linked them and, on the other hand, the original arbitral proceeding was based, as has already been established, on the letter of indemnity that protected the petitioner of the exequatur. Furthermore, the opponent had the opportunity to table the arguments that it is now using and to receive an answer from the arbitral institution both on the answerability of

those that took on that responsibility by virtue of those agreements as well as the consequential rationality of the solution reached, its appropriateness and the amount of compensation, interests and legal costs that were borne by the petitioner of the exequatur.

Fourth: The second cause of opposition should also be examined under the same public order limiting parameters from an international perspective. The issue is now one of violation of the right to effective legal protection that, in the view of the accused, was caused by the inappropriate rejection of its remedy of appeal against the judgement. It will therefore be the content of this right, with respect to the content of the right to a resolution based on law, in the configuration provided by the Constitutional Court, which will determined whether a transgression has taken place in the public order of the court of law with respect to the extremely scanty – this fact should be recognised – decision delivered by the British court. In this respect, one should not lose sight of the fact that the case law coming from the Constitutional Court (SSTC 37, 58 and 135 of 1995 [RTC 1995\37, RTC 1995\58 and RTC 1995\135] and 101 and 179 of 1997 [RTC 1997\101 and RTC 1997\179]) has highlighted the heterogeneous constitutional relevance put on the right to access to jurisdiction and the right to legally established resources, the latter a mere corollary of the former when considering that the right to gain access to the justice system is not granted by a law but rather by the Constitution itself. It is here that we find the differing importance which, from a constitutional perspective, may be granted to one or the other because the way the regulations are dealt with may be different depending upon whether they function as an impediment or obstacle blocking access to jurisdiction or whether they simply have a limiting effect upon appeals against a sentence delivered during the course of a hearing with all of the guarantees (SSTC 3/1983 [RTC 1983\3] y 294/1994 [RTC 1994\294]). The application of regulations acting as an obstacle may eliminate the right to submit the case to a judge while those having a limiting effect would only put a halt to the revision of the judicial sentence already delivered in the sentence of instance by virtue of which the fundamental nucleus of the right protected in Art. 24.1 of the Spanish Constitution would be satisfied regarding the right to effective legal protection from a judge.

The Constitutional Court also states that (SSTC 37 y 58/1995) 'The appeal system is incorporated into the concept of legal protection with the particular configuration it is afforded by each one of the procedural laws regulating the different jurisdictional regulations. There is no constitutional right supporting these means of appeal and the possibility is imaginable, possible and real that these means do not exist except in penal cases (SSTC 140/1985 [RTC 1985\140], 37/1988 [RTC 1988\37] and 106/1998 [RTC 1998\106]). The Constitution does not contain any regulation or principle that dictates the need for double instance or for certain appeals and, in an abstract sense, their inexistence or their admissibility contingent upon the meeting of certain

prerequisites is possible. Development and regulation of this material is part of the legislator's prerogative (STC 3/1983).' As a result, 'the hermeneutic principle 'pro actione' does not operate with the same intensity at the initial stages of the process when it comes to gaining access to the judicial system as it does in subsequent stages because an initial judicial response has been obtained regarding the pretensions of the parties concerning due process and its essential content regardless of whether that due process is singular or multiple in accordance with the appeals system established in the procedural regulations.

In light of the criteria presented and as long as the constitutional mandate regarding the obligation to provide justification – essential in sentences and decisions regarding substantial points in the case – is rooted in informing the litigant of the most important reasons behind the decision taken, the conclusion should be reached that in this particular case that obligation was not overlooked and therefore the right to legal protection was not violated when the 'ratio' of the decision is found in the very faculties that the applicable procedural regulations confer upon the jurisdictional institution. In this case the jurisdictional institution decided to reject, on the one hand, the request for authorisation of the High Court of Justice in London to file an appeal and, on the other hand, the request to extend the deadline set to procure agreement from the other litigant party to file appeal. These concurring circumstances are supported by Section 1 (2) of the English Arbitration Act of 1979 on the appeal admission procedure in such a way that the resolution delivered by that High Court is based on the exercise of those legal rights. Furthermore, in accordance with these same rights, a different and more favourable decision regarding legal protection may be required of the High Court and could be obtained in compliance with the constitutional criteria cited when the intensity of the judicial protection is decreased when an appeal is filed as has happened in this case".

– ATS of 27 January 1998 (Civil Court) (RJ 1998\2931)

"Exequatur:" origin: fulfilment of requirements imposed by virtue of the New York Convention of 10 June 1958; legal capacity and representation of those that formalised the arbitral convention; existence and validity of the arbitral convention; purely standardising nature of the "exequatur" proceeding.

"Background Information

First: The solicitor, in representation of the company 'Unión de Cooperativas Agrícolas Epis-Centre,' filed a suit of exequatur in relation to the arbitral decision delivered by the arbitrators Mr. Michel Koch, Mr. Jean Cazard and Mr. Jean-Pierre Denis on 6 April 1995 as part of the arbitral proceedings between his client and the Spanish company 'La Palentina, SA,' by virtue of which the latter was sentenced to pay the former the sums appearing in that sentence.

Second: The requesting party, the complainant in the arbitral proceeding,

had its headquarters in Bourges, France while the defendant had legal domicile in Palencia, Spain.

(...)

Legal Grounds

First: Resolution of this exequatur must be in conformance with the New York Convention concerning the recognition and enforcement of arbitral awards of 10 June 1958. This Convention is applicable by virtue of the substance of the case and of the date of the resolution. It has a universal nature in Spain given that no reservation was raised regarding its Art. I and was ratified on 12 May 1977 (*BOE* of 12 July of the same year [RCL 1977\1575 and *ApNDL* 2760]). This Convention is preferable to the one concluded between Spain and France on the recognition and enforcement of arbitral awards and authentic acts in civil and commercial matters, of 28 May 1969 (RCL 1970\451 and NDL 18756), that would also be applicable in accordance with its Arts. I, II and XVII. Although the date of this latter agreement is more recent than the New York Convention, its Art. XIX states that it will not affect other agreements dealing with specially endorsed matters or matters which the parties may endorse regulating the recognition and enforcement of awards. This regulatory provision must be complemented by the principle of maximum efficacy inherent in this type of conventional regulation and that, in cases such as this one, gives rise to the preference of the New York Convention as this Court has pronounced on earlier occasions (see ATS 16 April 1996, Exequatur 3868/1992).

Second: The above mentioned Convention conditions the granting of the exequatur to verification of having met the following requirements: first of all, the meeting of certain formalities consisting in the attachment, together with the complaint, of the original or authenticated copy – notarised and officially sealed – of the arbitral resolution as well as the original or authenticated copy – also legalised and officially sealed – of the submission agreement described in Art. II, in both cases accompanied by the corresponding sworn or certified translation into the official language of the country in which the sentence is appealed (Art. IV). Second of all, verification of having fulfilled other basic requirements must be made. These are mostly related to determining whether, according to the laws of the State in which homologation is attempted, the object of the difference resolved through arbitration is susceptible to arbitration in that country [art. V.2, a)], and making sure that the recognition or enforcement of the sentence is not contrary to the public order of that country. In this case these requirements were met, highlighting Art. IV, point 1., letter a), and paragraph 2., and Art. V, point 2., letter a) and letter b) with respect to the substantive side of the concept of public order. Its procedural aspect will be the object of a subsequent legal ground resolving the motives behind opposition to the exequatur formulated by the company 'La Palentina, SA' as will the existence or lack thereof of the arbitral agreement descriptively defined in

Art. II, point 2 of the Convention and which also constitutes a specific cause for opposition to the exequatur.

Third: The Spanish company 'La Palentina, SA' opposes the proposed homologation by alleging a number of motives which, if they are to be properly resolved, should be analysed in the following order. First of all the nullity of the power of attorney of the solicitor filing the complaint was claimed based on insufficiencies and defects related to the fact that the authorising Notary Public did not testify as to the existence any documentation attesting to the competency and nature of those granting the power of attorney given that the petitioner is a corporate person. Despite the fact that a ground for opposition of this nature could lead to the dismissal of the case due to its procedural effect on the exequatur, it does not affect the appropriateness or lack thereof of the homologation with respect to the essence of the issue. The fact is that this motive cannot be accepted because, as the Public Prosecutor rightfully stated, the power of attorney was granted before a French Notary Public subject to the 'lex auctoris' and in that document it is clearly indicated that the grantor appeared and acted as the Director of the company (petitioner of the exequatur) and, as such, has the necessary legal capacity to grant the power of attorney. This legal capacity was determined through certification of this and other details by the Notary Public. The literal transcription of the power of attorney document and corrections made thereto should be maintained as long as it is not proven that the document was granted in violation of the regulatory norms applicable to the functions of the Notary Public.

Fourth: The party opposing the exequatur claims, under the heading 'inexistence and/or nullity of the arbitral convention,' a number of different issues which, for reasons of methodological correctness, should be studied in the proper order. First of all, an examination should be made of the alleged lack of capacity and representative authority of the persons who subscribed to the arbitral Convention. Although presented jointly, these are two distinct motives for opposition which should be differentiated because the capacity of those who intervened in the agreement must be granted in accordance with Art. 60 of Law 36/1988, of 5 December (RCL 1988\2430 and RCL 1989\1783) and this coincides with the general provision found in Art. 9.11 of the Civil Code in accordance with its corresponding personal law determined by nationality. Representation, therefore, comprises an issue that must be analysed within the realm of the national law of the corporate person if the situation involves the action of this person through its institutions and, in the event that the action is carried out by persons outside of those institutions by virtue of power of attorney granted by those that are part of the institution, the applicable legislation is found in Art. 10.11, subsection two of the Civil Code. Regardless of this situation, what should be made clear is that the New York Convention puts the burden of proof of these issues on the party opposing the exequatur; the one tabling these issues as a cause for rejection.

This is to the contrary of what the Spanish company is attempting in attributing the burden of proof to the petitioning party. Furthermore, we have a situation in which the opposing company has not proven that, in accordance with the applicable legislation – which, as was mentioned above, in accordance with our system of conflict resolution, should be French law – the petitioning company lacks the necessary capacity to grant the commitment. Nor did it prove that those that intervened in the legal proceedings lacked this capacity as natural persons or that they lacked sufficient representative capacity to link the corporate person, acting within its institutions or acting with power of attorney. For these reasons, this cause for opposition should not be accepted.

Fifth: The central nucleus of the ground for opposition under scrutiny here maintains the inexistence of the arbitral agreement and therefore its nullity – causes for rejection of the exequatur in accordance with Art. V.1, a) of the New York Convention. The allegation that no arbitral contract existed – giving rise to the examination of the supposition described in Art. IV.1, b) concurrently with the ground for opposition described in Art. V.1, a) – is further supported by the allegation that the sales contract should reflect the arbitral commitment. The opposing company points to the verbal nature of the legal proceedings concluded with the petitioner of the exequatur in which no mention whatsoever was made of submission to arbitration. The argument used, however, cannot be admitted for the following reasons: a) The case file shows a confirmation of sale dated 24 September 1993 issued by the Mediation Company 'Sim-Dag' with the number 12298. The company figuring as the seller in the transaction is the Cooperative Company 'Espis Centre' while the buyer is 'La Palentina, SA.' The conditions of that sales document indicate that any controversy regarding the contract will be heard in arbitration by the Paris Arbitration Board that will rule in last instance regarding conformity with its regulations of which the parties to the contract stated to be cognoscente and accept; b) The case record also shows that the same Cooperative Company 'Epis Centre' sent the opposing company confirmation number B-93190 which reads as follows: 'We confirm the sale made to you in accordance with the conditions listed below through the intervention of 'Sim-Dag' on 24 September 1993.' The following text appears in this confirmation under the section entitled 'observations': 'Contract 21 of Paris-Peso and quality upon exit. Laboratories: first analysis Ensmic. – Second Laboratory Aria (GDS MLINS Paris). The measures acquired in the two analyses will be considered definitive.' That confirmation was followed by a facsimile message sent by 'La Palentina, SA,' dated 20 October 1993 to 'Epis Centre.' Section six of that message read as follows: 'These are our complementary regulations that we want to include in your contract number B-93190 awaiting your acceptance. We are in agreement with the rest of the points in the contract'; c) Irrespective of the rest of the communication between the companies also included in the arbitral decision case file, the

correspondence that transpired through the documents referred to above allows us to conclude, without any doubt whatsoever, that the requirement imposed by Art. IV.1, b) of the New York Convention was satisfied. Sufficient proof exists regarding the will of the parties to incorporate into the contract a clause regarding arbitration and claim of unawareness of that clause is not justifiable because this clause is included in standard contracts (Paris Contract number 21) used in the contract between the two parties. Furthermore, the admitted reception by the opponent of confirmation number B-93190 issued by the seller, together with the response sent by the buyer to the seller allows us to conclude without any ambiguity that the buyer was well aware that the arbitral clause formed part of the contract and raised no objection and even expressly stated its conformity with the clauses which it chose not to modify.

Assuming that the information presented above proves fulfilment of the requirement imposed by the above mentioned Art. IV.1, b) of the multilateral Convention, the conclusion should also be reached that the petitioner of the exequatur attached to the complaint filed, in addition to other documents, those which express commitment to arbitration as called for in Art. II.2 of the Agreement interpreted in conjunction with Art. I.2 of the 21 April 1964 Geneva Convention (RCL 1975\1941 and *ApNDL* 2761) on International Commercial Arbitration. This later agreement, undoubtedly complementary to the former, also sheds light on the ground for opposition presented by the Spanish company and from this perspective as well no obstacle can be found to the recognition sought. If the opposing party bases its argument on the inexistence of a written contract which includes the arbitral clause, the truth is that it did not succeed in proving its claim, as is its responsibility, that that contract was not successfully concluded and that that which was presented as a contract was actually nothing more than an offer which was not accepted by the buyer. This particular issue should be analysed in light of the applicable law which in this case is the United Nations Convention on the International Sale of Goods, Vienna 11 April 1980 (RCL 1991\229 and RCL 1996\2896), in force in those States of which the parties to the legal transaction are nationals. Application of this Convention leads to an interpretation of the will of the buyer expressed in the facsimile message of 20 October 1993 as an acceptance of the terms of the offer if they are considered to not be substantially altered (Art. XIX.2 and 3 of the Vienna Convention), whether a counter-offer is requested that implies another contract (Art. XIX.1), brought to a close by conclusive or typical acts of enforcement carried out by the French company (Art. XVIII.1 and 3). The truth of the matter is that in either of these circumstances, the legal transaction would have been finalised (especially considering that Art. XI refers to the principle of freedom of form) and would have included the pact of submission without which, irrespective of the conclusion of the contract, questions would be raised regarding its validity which would have to be studied in light of the law emanating from the Rome

Convention on the Law Applicable to Contractual Obligations, of 19 June 1980, also in force between the two parties. And if the intention of the opponent is to negate the validity of the arbitral convention, whether for reasons of form 'ad solemnitat' or for reason of error or omission in its essential elements, it was not successful in proving that, in accordance with law referred to in Art. V.1, a) of the New York Convention – transformed here into a veritable norm of conflict – the arbitral contract was invalid. Here it should be made clear that under no circumstances are these aspects regulated by the Spanish Arbitration Law, specifically aspects related to the formalisation of the arbitral convention. As a result, it is not incumbent upon the Spanish Arbitration Law to verify the controls of this homologating procedure in accordance with the conflict resolution regulation forming part of the cited article of the Convention. The ground for opposition is therefore rejected and this dismissal also affects the ground listed under letter B bis) of the document of opposition which refers to the missing documents that should have been attached to the complaint, focusing specifically on the missing original or authenticated copy of the agreement referred to in the arbitral clause.

Sixth: Let us turn our attention now to the grounds related to the violation of the basic principles governing procedural public order, especially the right to defence and the corresponding proscription of defencelessness and those referring to the lack of jurisdiction of the Arbitration Tribunal to rule on its own competency, to the extemporaneous nature of the decision, to the incongruence in the 'petitum' of the request for exequatur and to the lack of reciprocity on the part of French jurisprudence. None of these grounds should be recognised as valid. First of all, with respect to the transgression of procedural public policy – based on Art. V.1, b) of the New York Convention – it must be recognised that the opponent was duly informed of the initiation of the arbitration proceeding by receiving a copy of the complaint accompanied by a form by which to make initial observations (document 3 bis attached to the opposition brief). The opponent was also informed that the arbitration proceeding was to take place before the International Chamber of Commerce in Paris, in accordance with its own regulations. As has been already stated in the preceding ground, the point must once again be made that the opposing party appeared before that arbitration organisation to object to its jurisdiction based on the inexistence of an arbitral convention. In light of this situation it is impossible to claim, as the opponent has done, that it did not have the possibility to designate an arbitrator or to formulate allegations regarding the merits of the case or, in general, that it did not have information on the proceeding. The different procedural stages, including the process of arbitrator designation, found in the Rules of the International Chamber of Commerce in Paris that applied to this arbitration proceeding. It is once again reiterated that the opponent had or could have had knowledge of this fact and it is precisely in light of these Rules that an examination

should be made of the alleged extemporaneous nature of the decision and not with respect to the internal law as claimed by the opponent party. The Rules also apply to the alleged defencelessness caused by the rejection of the appeal for second arbitration or for and examination of the case in second instance (Arts. 17 and 18 of the Rules). With respect to this a warning should be made, on the one hand, that on this point the arbitral tribunal followed the provisions contained in the cited Rules as the guiding procedural regulation provided for in the arbitral agreement; and on the other hand – as far as verification of adherence to public order norms is concerned – an examination not only of the regularity with which the regulation was applied by the arbitral institution as a safeguard of procedural guarantees, but especially of the adaptation of the result produced by its application to internal order, must be done in accordance with criteria established by the Constitutional Court, maximum interpretative authority of the Fundamental Norm (RCL 1978\2836 and *ApNDL* 2875), the principles, rights and freedoms of which are recognised thus identifying the international concept of public order. It must also be borne in mind that the Constitutional Court has insisted on the purely homologating nature of the exequatur proceeding which vetoes any examination of the merits of the case with no exceptions aside from those imposed by the necessary respect for internal public order. With respect to this public order and especially with respect to the right to gain access to jurisdictional resources, the Constitutional Court has stated that the appeal system through which judicial protection is granted in the configuration provided by each one of the laws of court procedure is not a constitutional right accessible through this type of challenge and the possibility is imaginable, possible and real that this right does not exist except in penal cases (SSTC 140/1985 [RTC 1985\140], 37/1988 [RTC 1988\37], 106/1988 [RTC 1988\106], 37/1995 [RTC 1995\37] and 58/1995 [RTC 1995\58]), adding the corollary statement 'the hermeneutic principle 'pro actione' does not operate with the same intensity at the initial stage of the process as in successive ones and once an initial judicial response is acquired it is unimportant whether it is final or multiple in accordance with the procedural regulations of the appeals system,' the interpretation of which is incumbent upon the ordinary courts and thus outside of constitutional control unless that interpretation is clearly arbitrary or erroneous affecting fundamental rights (SSTC 192/1992 [RTC 1992\192], 101/1993 [RTC 1993\101], 274/1993 [RTC 1993\274] and 58/1995, among others). In summary, the criteria presented above do not point to a violation of our public order in the form and content indicated when the arbitration tribunal acted in the determination of the deadline for the filing of appeal against the arbitral decision and the format and place where the appeal document was to be presented, in accordance with the regulations applicable to arbitral proceedings the interpretation and application of which, given that they are not arbitrarily or clearly erroneous, cannot be considered as a violation of a fundamental

right that would justify the refusal, for transgression of public order, of the exequatur sought. And finally, with respect to the lack of jurisdiction of the arbitration tribunal, it suffices to say that that ground is based on the inexistence of an arbitral agreement and ignorance of the applicable arbitration procedure. With regard to the incongruence and negative reciprocity it should be pointed out that what the opponent calls incongruence concerning the petition for exequatur is completely unfounded not only because the term incongruence refers to a characteristic that should refer to sentences or to judicial resolutions in general but also because what the opponent inappropriately calls incongruence is nothing more than a simple lack of semantic precision that should be remedied in accordance with the nature of the action being taken. With respect to the alleged negative reciprocity, the opponent has provided no proof nor has he even provided a judicial decision delivered by the French courts on which to base his assertion. At any rate, the reciprocity in question would be subsidiary to the conventional applicable regime contained in the New York Convention in accordance with which this exequatur was resolved".

2. Divorce

– ATS of 27 October 1998 (Civil Court) ((RJ 1998\9009)
"Exequatur" allowed: Divorce sentence delivered by the courts of the United States.

"Background Information

First: The Solicitor... of Ms. María C. S. filed a petition for 'exequatur' of the 3 December 1986 sentence delivered by the Eleventh Section of the Judicial Division in Dade County (State of Florida), the United States of America by virtue of which divorce was granted to the client (the accused in the original hearing) and Mr. Mario Alejandro A. F.

The matrimony had taken place in San Vicente (Santiago de Chile), Chile on 17 February 1975 and was recorded in the Spanish Civil Registry.

Second: The spouses were Spanish (the bride) and Chilean (the groom), both residents in Chile. At the time of the divorce proceedings within the jurisdiction of the United States the husband was a resident of the United States of America; when the petition for justice was filed before this Court, the petitioner was Spanish and resided in Spain.

Legal Grounds

First: Since no treaty has been signed with the United States of America regarding the recognition and enforcement of sentences, the general regime found in Art. 954 of the *LECiv.* should be applied because negative reciprocity was not proven (Art. 953 of the *LECiv.*).

Second: The sentence is proven to be effective in accordance with the law of the State of origin. The effective nature of the sentence, the 'exequatur' of

which is being sought, is called for, regardless of the recognition regime applied, by Art. 951 of the *LECiv.* (with regard to this issue the conventional regime is not the only one relevant if read together with the following precepts) and reiterated doctrine handed down by this Court.

Third: Requisite number 1 of Art. 954 *LECiv.* should be considered fulfilled by virtue of the personal nature of the divorce proceeding.

Fourth: With respect to requirement number 2 of that same Art. 954 *LECiv.*, it is assumed as proven that the petitioner of the 'exequatur' was the accused party in the original hearing by virtue of which, and in accordance with reiterated criteria handed down by this Court, all of the guarantees granted by the right to defence and the proscription of defencelessness are considered as satisfied (AATS 24 March 1998, 31 March 1998 and 7 April 1998 among others).

Fifth: With regard to requirement number 3 of the above mentioned Art. 954 of the *LECiv.*, conformity with Spanish public order (from an international perspective) is complete: Art. 85 of the Civil Code recognises the possibility of divorce regardless of the form or the time when that marriage was undertaken.

Sixth: The authenticity of the resolution, proof of which is required by Art. 954.4 of the *LECiv.*, is guaranteed by the legal nature under which the proceedings took place as verified by court files.

Seventh: There is no reason to believe that the international judicial jurisdiction of the United States of America was the result of the parties' fraudulent search for a court that would meet their particular needs (Arts. 6.1.4 of the Civil Code and 11.2 *LOPJ* [RCL 1985\1578, 2635 and ApNDL 8375]); Art. 22.2 and 3 *LOPJ* does not make any provision for courts of exclusive jurisdiction as does Art. 22.1 of the same Organic Law but the case at hand does not include the determining factors in favour of the Spanish courts. Quite to the contrary, there are connections that must be recognised such as the husband's legal domicile in the United States of America at the time that divorce proceedings were initiated before the US courts and the wife's acceptance of the jurisdiction of the courts of the United States of America. These reasons support the jurisdiction of the courts of origin and therefore exclude the possibility of fraud with respect to the law applied to the merits of the case, an issue related to the above.

Eighth: There is no evidence of contradiction or material incompatibility with a judicial decision or pending lawsuit in Spain".

– ATS of 6 October 1998 (Civil Court) (RJ 1998/7329)
Recognition and enforcement of sentences: Spanish–French Convention of 28 May 1969. Denial of exequatur: sentence irreconcilable with a court of law.

"Background Information

The Solicitor..., in representation of Ms. A. G., filed a plea for 'exequatur' of the 31 May 1972 sentence delivered by the Court of Great Instance of Paris,

France by virtue of which divorce was granted to the client (the accused in the original suit) and Mr. Juan José M. G.

The marriage was celebrated in Orce (Granada), Spain, on 17 December 1959 and registered in the Spanish Civil Registry.

Second: The spouses were both Spanish nationals and residents in Spain. At the time that divorce proceedings were initiated before the French courts, they were residents in France; when the plea for justice was presented before this Court, the petitioner was Spanish and resided in France.

Legal Grounds

The Convention concluded between Spain and France on the recognition and enforcement of judicial and arbitral decisions and authenticated acts in civil and trade matters of 28 May 1969 must be applied. This agreement was ratified on 15 January 1970 and published in the *BOE* on 14 March 1970 (RCL 1970\451 and NDL 18576) and is applicable in accordance with its Art. 1 given the nature and material of the act the 'exequatur' of which has been requested.

Second: In accordance with this Convention, attention must be given to international judicial jurisdiction (Art. 3.1), the effectiveness of the resolution (Art. 3.2), the law applicable to the merits of the case (Art. 5 which promotes the principle of equivalency of results), conformity with the public order of the requested State (Art. 4.2), guarantees of an appearance in court and defence in the original hearing (Arts. 4.3 and 15), minimum formal requirements (Art. 15) and the litispendency or decisions affecting the requested or other State (Art. 4.4). It is upon examination of this latter requirement, and without prejudice to the verification of fulfilment of the other requirements imposed by the bilateral regulations, that an insurmountable stumbling block is encountered regarding the homologation being sought because the Court of First Instance number 3 in A Coruña delivered a judgement on 11 February 1984 granting a divorce to the petitioner of the 'exequatur' and Mr. Juan José M. G. Given this state of events, the attribution of validity in Spain to the foreign sentence, in such a way that its effects, in conformance with the legal system at origin, are valid in our country, necessarily clashes with the very validity of the national resolution and especially with the effect that the case judged produces. It impedes the possibility of another pronouncement on the same object and between the same parties which could possibly be different with the consequent risk of subverting the harmonious relationship that should necessarily characterise the judicial decisions that form part of the internal order of the States possibly causing irreparable damage the legal security of 'inter partes' relations."

– ATS of 8 September 1998 (Civil Court) (1998/7263)

"Exequatur": lack of relevancy; divorce sentence delivered by a Uruguayan court, delivered in default, lack of proof of hearing citation and notification of the sentence.

"Background Information

First: The Solicitor..., in representation of Mr. P. O., filed a plea for 'exequatur' of the 30 June 1982 sentence delivered by First Instance Civil Court number 16, Office 2 of Montevideo, Republic of Uruguay granting a divorce between the client, complainant in the original hearing and Ms. Isabel C. S.

The marriage took place in Bueu (Galicia), Spain, on 4 June 1955 and was entered in the Spanish Civil Registry.

Second: The spouses were both Spanish nationals and residents of Spain. At the time that divorce proceedings were initiated in the jurisdiction of Uruguay, the husband was residing in the Republic of Uruguay while no legal domicile or place of residence is on record for the wife who was declared in contempt of court in the original hearing. When a plea for justice was file with this Court, the petitioner was Spanish and a resident of Spain.

Legal Grounds

First: The convention concluded between the Republic of Uruguay and the Kingdom of Spain done in Montevideo on 4 November 1987, ratified on 16 October 1997 and published in the *BOE* on 30 April 1998 (RCL 1998\1089), is not applicable because Art. 1, section a) of that convention expressly excludes the state and capacity of natural persons and family law from its material scope of application with respect to constituent or declarative sentences of such states or rights. The general regime established by Art. 954 of the *LECiv.* should be applied given that negative reciprocity is not accredited (Art. 953 *LECiv.*).

Second: With respect to requirement number two of that same Art. 954 of the *LECiv.*, it would be appropriate to highlight the reiterated doctrine handed down by this Court and note that there are a number of different categories of default into which the accused's absence could be placed and the corresponding effects that one or the other would have on the 'exequatur' proceeding would be different as well. The ruling made by this Court on 28 May 1985 reflects that diversity distinguishing between default for reason of conviction (non-appearance due to refusal to recognise the jurisdiction of the court), forced default (due to not have received a citation) and personal default (non-appearance by a person who has been issued a proper summons and is cognoscente of the existence of the proceeding) (along these same lines AATS 13 June 1988 and 1 June 1993, and STC 43/1986, of 15 April [RTC 1986\43]). Having established the above facts, it should be stated that, as was accredited during this proceeding by the Uruguayan Central Communications Office, on 10 September 1981 an unsuccessful attempt was made to issue a summons to the accused party and this resulted in a declaration of contempt of court delivered on 17 October 1981. An unsuccessful attempt was also made to provide notification of this resolution on the 22nd of the same month and year. This same situation was once again repeated on 13 August 1982 with respect to notification of the sentence, the recognition of which is now

being requested. This information does not, however, allow for absolute confirmation that the accused had full and proper knowledge of the existence of litigation and therefore the classification of the accused's default as personal, the only category of default that would not be an obstacle to the granting of recognition and enforcement of the sentence delivered by the Uruguayan courts, is the reason why the plea of 'exequatur' should not be upheld because the petitioner of the 'exequatur' failed to meet his obligation of proving that the accused was properly and in a timely fashion informed of the suit file against her".

– ATS of 7 July 1998 (Civil Court) (RJ 1998\6087)

"Exequatur": Lawful; notarial act of divorce by mutual accord between a Spaniard and a Cuban; granted before the Notary Public of the International Legal Office of the Republic of Cuba; inexistence of a treaty between the two countries; no accreditation of negative reciprocity.

"(...)

Fifth: With respect to requisite number 3 of Art. 954 of the *LECiv.*, there is full conformity with Spanish public order (in an international sense). Art. 85 of the Civil Code envisions the possibility of divorce regardless of the form and date that the marriage was celebrated. Having reached this point, however, it is important to point out that a divorce by mutual accord authorised before a Notary Public could lead to a violation of public order. In decisions delivered on 1 October and 19 November 1996 by this Court (analogous to RJ 1998\2667), all doubts were removed regarding whether this type of divorce could be upheld. In accordance with Cuban law it seems that the role played by the Notary Public is not limited to emitting certifications or to authorising mutual dissent regarding matrimonial ties. His competencies include the verification of certain conditions which must be met in order to obtain a divorce. This is all within a defined proceeding to which, from a precept point of view, requests for divorce by mutual accord must adapt. It should be indicated, however, that this notarial intervention implies a certain degree of homologation of the will of the parties extracted from the original legal system that grants Notary Publics what appears to be exclusive authority in this area. It therefore cannot be argued that a divorce obtained in this manner is contrary to internal public order. This concept has been developing and has finally attained constitutional recognition, comprehensive of legal principles and constitutionally protected rights (SSTC 54/1989 [RTC 1989\54] and 132/1991 [RTC 1991\132], among others), which allows for the recognition of the notarial document granting divorce in line with the position maintained by this court in cases in which, like this one, no jurisdictional institution intervenes but rather the decision is taken by a different ranking authority or civil servant with jurisdiction in accordance with the legal system at origin (vid. AATS 2 July 1996, 16 July 1996, 19 November 1996, 4 February 1997 and 24 June 1997).

Sixth: The authenticity of the resolution as required by Art. 954.4 of the *LECiv.*, is guaranteed by virtue of the legal nature of the process attested to by the record of proceedings.

Seventh: There is no reason to believe that there was a fraudulent search by the parties for a court system that would meet their particular needs considering the nationality of the wife as well as the place where the marriage took place. These circumstances preclude the declaration of fraud with regard to international judicial jurisdiction and therefore with respect to the material law applicable to the merits of the case, an issue linked to the above.

Eighth: There is no evidence of contradiction or material incompatibility with a judicial decision delivered or pending proceeding in Spain".

– ATS of 23 July 1998 (Civil Court) (RJ 1998/5337)

"Exequatur": lack of relevancy; divorce; granted by the Moroccan Notaries assigned to the Notarial Section of the First Instance Court of Tangiers, Morocco, legalised by the Mohammedan magistrate of Tangiers.

"Background Information

First: The Solicitor... C. M., in representation of Ms. Fatima el H., filed a plea for the exequatur of the divorce of 9 February 1995 delivered before the Moroccan Notaries assigned to the Notarial Section of the First Instance Court of Tangiers, Kingdom of Morocco, legalised by the Mohammedan magistrate (documentation judge) of Tangiers, Morocco, by virtue of which divorce was granted to the client and Mr. Mohamed Larbi José Joaquín R. G.

The marriage was by Koran civil ceremony and was celebrated in Tangiers, Morocco before the Court of First Instance on 25 February 1992 and was entered into the civil registry of the Spanish General Consulate in Tangiers, Morocco.

Second: The groom was a Spanish national while the bride was Moroccan, residents of Spain and Morocco respectively. At the time when divorce proceedings were filed before the Moroccan authorities, they were Spanish and Moroccan and resided in Tangiers and Ksar el Kebir, Morocco, respectively. When the plea for justice was filed before this Court the wife was Moroccan and resided in Madrid, Spain, and stated that her ex-husband resided in Tangiers, Morocco.

Third: The following documents were presented to the Court: a duly authenticated and translated copy of the document the recognition of which is being sought but lacking the legalisation of the signature of the Moroccan authorities which should have been acquired by the diplomatic agent or the Spanish Consul of the Spanish Foreign Affairs Ministry; and certification of the inscription of the marriage in the Spanish Civil Registry.

Fifth: By court ruling delivered on 26 September 1995 the petitioner was summoned to provide the Court with an authenticated, legalised and translated copy of the resolution in order that it be recognised as a document attesting to the effectiveness of the resolution. At a later date, by court ruling

delivered on 7 November 1995, the petitioner was once again summoned to provide the Court with the judgement of two legal consultants of the Kingdom of Morocco, declared to conform to Moroccan law by the Moroccan diplomatic or consular authorities accredited in Spain, on the following points: 1) if the Moroccan Notaries who authorised the divorce document carry out jurisdictional functions or act strictly as Notaries; 2) If the divorce means the definitive end to matrimonial ties; 3) whether both the husband and the wife are free to remarry.

(...)

Legal Grounds

First: Since no treaty has been signed with the Kingdom of Morocco regarding the recognition and enforcement of sentences, the general regime found in Art. 954 of the *LECiv.* should be applied because negative reciprocity was not proven (Art. 953 *LECiv.*).

Second: The petitioner failed to present the documentation required by this Court as a prerequisite to resolve the exequatur plea under examination. Although the summons of the first court ruling of 26 September 1995 was answered by presenting the Court with an authenticated copy of the divorce document – thus correcting the initial lack of legitimisation by a diplomatic or consular agent or by the Deputy Secretariat of the Spanish Foreign Affairs Ministry – as well as with certification issued by the Moroccan Consul General in Spain on 10 October 1995 indicative of the effectiveness of the divorce resolution and the freedom of the divorced woman to remarry, it is also true that the report on the nature of the functions of the authorising Moroccan Notaries and on whether the divorce thus declared means the definitive end to marital ties, issues that in no way are revealed in the terms of the divorce document whose recognition is being sought, was not presented to the Court. The result is that the following issues have not been proven: on the one hand, the condition of judicial authority or civil service providing the Moroccan Notaries with 'imperium' with regard to the divorce document which gives the impression of being a private agreement between the spouses in which the notarial intervention appears to be nothing more than a formal requisite mandated under law and applicable to the merits of the case to homologate, authorise or lend some sort of authenticity to the act but without their decision (if there indeed ever was one) having any sort of constitutive effect on the marital status of the spouses. Second of all, the definitive and irrevocable character of the end to the matrimonial ties, an essential requirement in accordance with our legal system was not proven. This is especially serious due to the definitive character that must be attributed to situations that conform to the marital status of individuals and the legal security that they must provide. For all of the above expressed reasons and in line with the criteria established by this Court in similar cases (vid. ATS of 6 February 1996), the plea for exequatur cannot be upheld".

– ATS of 21 April 1998 (Civil Court) (RJ 1998\3563)
"Exequatur": Lawful: Reversible act of divorce celebrated in Cairo, granted before Notaries Public of the Personal Statutes Notarial Office located in Cairo, Egypt; revocability challenged with a demand for effectiveness of the sentence.

"Background Information

First: The solicitor..., in representation of Ms. A. R., filed a petition for the exequatur of the reversible act of divorce of 16 January 1996 delivered by the Notarial Office of Notarial Affairs in Cairo, Egypt, by virtue of which reversible divorce was granted to the client and Mr. Nader Abdel-Fatah A. El-G.

The marriage originally took place in Cairo, Egypt on 24 November 1994.

Second: The spouses were Egyptian (the husband) and Spanish (the wife) and were residents in Egypt and Spain respectively; when the plea for justice was filed before this Court the wife was Spanish and resided in Spain.

Legal Grounds

First: Since no treaty has been signed with Egypt regarding recognition and enforcement of judicial sentences, the general regime found in Art. 954 of the *LECiv.* should be applied given that negative reciprocity is not accredited (Art. 953 of the *LECiv.*).

Second: The petitioner of the exequatur presented this Court with the reversible declaration of divorce delivered by the Notarial Office of the Notarial Statutes in Cairo. Attention should be drawn to the uniform criteria followed by this Court in former cases requesting the recognition of resolutions of this nature and in AATS of 16 and 23 July 1996, 24 September 1996 and 28 January 1997 which stated that 'it is true that a literal interpretation of the document presented indicates that it is impossible to grant recognition of this foreign judgement as requested. It is important to highlight the reversible nature of the divorce granted by the authorising notaries which lends the dissolution of the marital link, as was stated in the ATS of 16 July 1996 (resolution of a similar case), a certain degree of conditionality which, in the case of the cited judgement, on the one hand conflicted with the required effectiveness of the resolution whose recognition is sought – a requisite imposed, regardless of the channels of recognition followed, by Art. 951 of the *LECiv.* and, on the other, became an added element to the dissolution of the link desired which is contrary to the principles that inspire and comprise the concept of public order which, with respect to this sort of issue, is undoubtedly in intimate connection with constitutional principles and rights. As was indicated in the above mentioned decision of 16 July 1996, 'the dissolution of the marital relationship through divorce in our legal system is necessarily invariable in nature; i.e. it is definitive and irreversible. This does not mean to say that the divorced spouses cannot remarry but, under no circumstances, may the subsistence of the marital link be subject to the free disposition of the spouses giving rise to a

situation in which, by a mere exercise of their will, they can return to the former marital status – even when an evaluation of the circumstances determining the reversal of the divorce is left to the Authorities -, because this is in conflict with the stability and certainty that must be lent to situations that involve marital status and, therefore, equal rights and responsibilities for husbands and wives provided for under Art. 14 of the Spanish Constitution (RCL 1978\2836 and ApNDL 2875), establishing the principle of equality and provided for in a general sense in our civil legal system in Art. 66 of the Civil Code.

Third: Application of the above criteria to the case under examination here must necessarily result in refusal to grant the recognition sought because the object of the divorce decision was the granting of a reversible divorce to the petitioner and her husband Mr. Nader Abdel-Fatah A. El-G. This Court must, however, recognise the particular circumstances surrounding this case which point to the granting of the homologation requested focusing both on the principles governing recognition of foreign resolutions in Spain and on an elementary principle of material justice. From this perspective, the fact that it is the wife who has requested the exequatur, taken together with the fact that the period of time assigned by the legislation at origin to the exercise of the husbands right to demand reversal was surpassed by a more than ample margin must be taken into consideration especially in light, as indicated by the case file, of the remarriage of the husband. Given these circumstances, it is not possible to lift the public order barrier in its international sense – and with a restrictive interpretation – and it thus becomes insurmountable. This barrier should be lifted when the person suffering damages from unequal treatment under law is lacking the protection she is entitled to. In this way it is not consolidated in our internal rules when it is preferable that this protection is not automatically included in the court of law. In this case it should not be forgotten the all important fact that the situation of imbalance had disappeared when the request for the exequatur of the foreign resolution was made because the husband no longer had the right to re-establish his former marital status and it should not be forgotten that it is within this particular context that the case is introduced into internal order with the declaration of exequatur. The result is that, on the one hand, there is no longer a note of instability and uncertainty regarding the marital status that is contrary to the basic underlying principles of our legal system and, on the other, a resolution that materially produces an unjustified imbalance between the two spouses is remedied even though this imbalance is rooted in the foreign regulation applied its validity cannot be upheld at the time that the case was studied. To insist on the opposite point of view would be to raise the formalism of the egalitarian principle to a plain above the material result produced in this specific case, turning into harm what should be offered as protection for the woman suffering discrimination, obliging her to go through a divorce in Spain to obtain a definitive dissolution of the marital tie which

was already dissolved in the country of origin, when through the exequatur the sentence with this same content would be received.

Fourth: The finality and applicability of the resolution is further supported by the subsequent marriage of the husband. Furthermore, the personal nature of the legal action taken calling for the dissolution of the marital ties through divorce is accredited. With respect to the procedural guarantees in the original lawsuit (requirements 2 and 3 of Art. 954 of the *LECiv.*), it should be stated that the petitioner of the exequatur was the accused in the original lawsuit and this circumstance conforms with reiterated criteria emitted by this Court indicating that those guarantees are satisfied, especially the right to the defence to which she is entitled (vid. ATS 26 March 1996).

Fifth: There is no reason to believe that the international judicial jurisdiction of the Egyptian Court was the result of the parties fraudulent search for a court that would meet their particular needs (Arts. 6.1.4 of the Civil Code and 11.2 LOPJ [RCL 1985\1578, 2635 and ApNDL 8375]); Art. 22.2 and 3 LOPJ does not make any provision for courts of exclusive jurisdiction as does Art. 22.1 of the same Organic Law but the case at hand does not include the determining factors in favour of the Spanish courts. Quite to the contrary, there are connections that must be recognised such as the husband's Egyptian nationality, the legal domicile of the married couple in Egypt at the time that divorce proceedings were initiated before the Egyptian courts and the place where the wedding was celebrated. These reasons exclude the possibility of fraud with respect to the law applied to the merits of the case, an issue related to the above"

– ATS of 18 April 1998 (Civil Court) (RJ 1998\3561)
"Exequatur": Lack of relevancy: sentence declaring the annulment of the religious marriage celebrated in Spain, delivered by Court number 13 in Santiago de Chile.

"Legal Grounds

First: Since no treaty has been signed with Chile regarding recognition and enforcement of judicial sentences, the general regime found in Art. 954 of the *LECiv.* should be applied given that negative reciprocity is not accredited (Art. 953 of the *LECiv.*).

Second: The definitiveness of the sentence was proven in accordance with the law of the State of origin. The definitiveness of the sentence, the exequatur of which is sought, is required, regardless of the recognition regime, by Art. 951 of the *LECiv.* – not only applicable to the conventional regime if read jointly with the subsequent precepts – y reiterated doctrine issued by this Court.

Third: Requisite number 1 of Art. 954 of the *LECiv.* should be taken as fulfilled considering the personal nature of the divorce proceedings.

Fourth: With regard to requisite number 2 of the same Art. 954 of the *LECiv.*, it is understood that the original hearing took place with the cognizance of both spouses.

Fifth: With regard to requisite number 3 of Art. 954 of the *LECiv.*, it should be stated that this Court, in the resolution of previous cases of request for exequatur of marriage annulment sentences delivered by the Chilean Courts, has adhered to the criteria that 'the lack of territorial jurisdiction of the authorising civil servant resulting in the formal defect which, under Chilean law, invalidates and gives rise to the annulment of the matrimony the recognition of which is being sought in Spain, cannot be considered contrary to Spanish public order – in an international sense – even though it is not a cause for annulment admitted in the requested country. Although Art. 53 of the Civil Code makes an exception regarding the lack of jurisdiction of the authorising judge or civil servant as a cause for annulment according to Art. 78 in fine – which contains an exception regarding its own application in favour of Art. 73.3 – so that a legislative interpretation of that nature cannot be formulated as a principle of public order with respect to a marital issue blocking the exequatur of a foreign annulment sentence because that consideration cannot be deduced from the body of our constitutional and civil regulations' (AATS of 11 July, 10 and 17 October 1995 and 27 February 1996). The criteria expressed cannot, however, be applied to cases such as this one in which the authorising civil servant's alleged lack of territorial jurisdiction is rooted in the officiating entity at the religious wedding ceremony celebrated in Spain. In this case the marriage had civil implications from the very beginning in accordance with Arts. 49 and 60 of the Civil Code and Art. VI.1 of the Legal Affairs Agreement between Spain and the Hole See of 3 January 1979 [RCL 1979\2963 and ApNDL 7132]). As has already been expressed above, considering that the lack of territorial jurisdiction of the authorising civil servant is inoperative with respect to full efficacy, recognition of the marriage annulment declared in the judgement, the exequatur of which is being sought, based precisely on an effect that would not have been produced within the Spanish legal system, essentially means the upsetting of internal order and eluding the very consequences of the regulations being applied (in this case more the lack of consequences) attributing to them other consequences in line with the legal system of the State of origin. And finally, to seek to homologate these effects in Spain would produce results that are not unknown to our legal system but which are in radical opposition to it. This is despite the fact that it is upon this very legal system, and upon the ecclesiastic regulation as the governing law of the act and that gave rise to the civil effects of the marriage in accordance with Arts. 49 and 60 of the Civil Code and the above mentioned 1979 Agreement on Civil Matters, that the decision rests (see whereas clause 6, 'in fine' of the sentence whose recognition is sought). All of this justifies the control carried out by this Court of the law applied in the form outlined above with a view to adapting the effects derived from the application of the regulation to those protected by the basic principles of public order. The conclusion that must be reached is that these principles dictate refusal of the homologation sought".

– ATS of 7 April 1998 (Civil Court) (RJ 1998\3560)
"Exequatur": Lack of relevancy: divorce sentence of a marriage celebrated in Spain delivered by Superior Court number one for Civil Matters in the Republic of Venezuela; sentence delivered in default; no accreditation of summons issued for the hearing at origin nor of notification of the sentence the recognition of which is sought; existence of a divorce sentence delivered in Spain; defence of *res judicata*.

"Legal Grounds

First: Since no treaty has been signed with the Republic of Venezuela regarding recognition and enforcement of judicial sentences, the general regime found in Art. 954 of the *LECiv.* should be applied given that negative reciprocity is not accredited (Art. 953 of the *LECiv.*).

Second: With regard to requirement number 2 of the same Art. 954 of the *LECiv.*, it would be appropriate to highlight the reiterated doctrine handed down by this Court regarding the requisite established under ordinal number 2 of Art. 954 of the *LECiv.* and note that there are a number of different categories of default into which the accused's absence could be placed and the corresponding effects that one or the other would have on the 'exequatur' proceeding would be different as well. The ruling made by this Court on 28 May 1985 reflects that diversity distinguishing between default for reason of conviction (non-appearance due to refusal to recognise the jurisdiction of the court), forced default (due to not have received a citation) and personal default (non-appearance by a person who has been issued a proper summons and is cognoscente of the existence of the proceeding) (along these same lines AATS 13 June 1988 and 1 June 1993, and STC 43/1986, of 15 April [RTC 1986\43]). Having established the above facts, it should be stated that the accused, at the time that the divorce proceedings were brought before the Venezuelan Courts, was summoned by means of 'placards' naming the court and the defender (a praetising lawyer) who did not appear in court and was declared in contempt without having been accredited or having received a summons regarding the proceedings at origin nor did she receive notification of the sentence, recognition of which is being sought. This circumstance precludes qualifying her default as personal, the only category of default that would not be an obstacle to the granting of recognition and enforcement of the sentence delivered by the Venezuelan courts. For this reason, the request for exequatur should not be upheld because of failure to meet the requisite of accrediting that the sentence, the recognition of which is sought, was not delivered in default.

Third: In addition to the above cause for refusal, there is another obstacle equally insurmountable with respect to the homologation pursued. The fact is that First Instance Court number five in Pontevedra delivered a sentence on 23 July 1990 granting the divorce of the marriage between the person who is now the petitioner of the exequatur and Ms. María Hortensia M. P. in a mutual accord proceeding. Given these circumstances, the recognition in

Spain of the validity of the foreign judgement and the recognition in our country of its effects in accordance with the legal system in place in the country of origin, is in clear conflict with the very validity of the national resolution. Furthermore, special attention should be drawn to the fact that it is also in conflict with the effect of *res judicata* that is produced and which precludes the possibility of another judgement on the same matter and between the same parties which could possibly be different and would thus risk subverting the harmonious atmosphere that should necessarily be the norm when it comes to judicial decisions that form part of the internal order of states and failure to respect this could do irreparable damage to the legal security of inter-party relations".

– ATS of 27 January 1998 (Civil Court) (RJ 1998/2924)
"Exequatur": Divorce sentence delivered by a Moroccan Court; fulfilment of requirements contained in Art. 954 of the *LECiv.*.

"Legal Grounds:

(...)

Second: The requirements imposed by Art. 954 of the *LECiv.* on recognition are reasonable met. The effectiveness of the resolution has been sufficiently accredited and was homologated by the Notary Judge before the Casablanca Court of First Instance in compliance with the legislation of the original country. The personal nature of the suit, the purpose of which was to end a marriage, has also been established as was respect for procedural guarantees in this foreign proceeding in which the two spouses participated. It should also be stated that a correction was issued regarding the pronouncement contained in the resolution presented along with the Spanish internal law, contrary to the opinion of the Public Prosecutor's Office. Adaptation to public order – which from an international perspective is fundamentally constitutional in nature and is linked to fundamental rights and public freedoms that are constitutionally defined and guaranteed – is contingent upon the type of divorce pronounced by the Moroccan judicial authorities. In order to make this determination, a summons was issued by this Court and was satisfied by a report filed by the Moroccan Consulate General in Madrid and part of the case file. This report takes a look at the legislation applicable to the legal business at hand contained in the Dahir, number 1-57-343 of 22 November 1957, regulating the Personal Statute and Succession Code in force in the Kingdom of Morocco. Regardless of whether the legal process is called divorce or whether it is called repudiation, the legal act that dissolved the matrimonial ties between the two spouses – and it should not be forgotten that in both the sworn translation filed before this Court and in the above-mentioned report by the Consulate General of Morocco the term used is divorce – can be initiated by the husband or the wife in accordance with regulating legislation (see Arts. 44, 61 and subsequent and 66 and subsequent of the Code referred to above). This fact is perfectly clear in this case in which

it is the wife who 'filed for divorce from her husband.' Furthermore, this type of divorce or repudiation is called 'khole' in Moroccan legislation and is regulated under Chapter III of the above-mentioned Code under the title 'Repudiation (or divorce depending on the translation referred to) with compensation.' It opens with Art. 61 that states: 'The spouses may agree on the repudiation (or divorce) through a compensatory arrangement.' Art. 67 of this same regulation highlights the irrevocable nature of this type of divorce or repudiation as indicated in the report issued by the Moroccan authorities. It can therefore be concluded that in this case no constitutional right or guiding principle of our legal system that helps to define the concept of public order has been violated and recognition is therefore given to the resolution, the effects of which are sought to be applied in Spain with respect to both their procedural as well as their substantive aspect. And finally, the authenticity of the resolution was determined by the legality with which the process took place, i.e. the jurisdiction of the Moroccan courts based on the residence of the two spouses in that Country. Art. 22.1 of the LOPJ (RCL 1985\1578, 2635 and ApNDL 8375) does not imply the exclusive jurisdiction of the Spanish courts and the possibility of making fraudulent use of the law pertaining to this issue and that applicable to the background of this case was excluded, an issue related to the former. There is no evidence of the existence of a pronouncement or a case pending in Spain on this same issue involving the same parties".

– ATS of 24 February 1998 (Civil Court) (RJ 1998\2909)
Recognition; Judgement delivered by a Mexican court annulling a birth certificate and recognition of paternity; exclusive jurisdiction of the Spanish courts in matters of validity or nullity of inscriptions in the Spanish civil registry; includes the hearing of the proceedings derived from the rectification.

"Legal Grounds

First: This procedure seeks to procure the homologation of a judgement delivered by a court in the United States of Mexico which, among other pronouncements, declares 'the absolute nullity of a birth certificate and recognition number 3,099 inscribed in birth registry volume number one of 1975; birth registration of the minor Migel Angel B. M. in which the name of the father of said minor, Mr. José Julio R. J., appears independently in that same document. In the 'petitum' of the claim, the complainant requests that, prior to the established proceeding, the sentence delivered on 8 February 1983 be enforced and that a letter of request be sent to the Central Civil Registry calling for the rectification of the filiation inscription in Book 031, page 303, number 151 with the understanding that the law, the validity of which is sought, is applicable in Spain because it is a general principal of law that the registration should coincide with the material reality of the situation.

Second: In this case an examination should be made of the request commencing with the determination of the judicial regime (conventional or

legal) under which it should be resolved. It is at this point that it becomes clear that, regardless of the fact that the ad hoc conventional regulation is in force to regulate the recognition and enforcement of sentences and arbitration decisions between Spain and the United States of Mexico in civil and trade matters, the convention subscribed to by the two nations on 17 April 1989 (RCL 1991\919, 1190 and 2283) in its Title II and especially in Art. 3, a), excludes from the material scope of application issues related to marital status and the capacity of natural persons. In this sense, the decision regarding the lawfulness of the homologation that is sought through this proceeding should be based on deliberation independent of the above mentioned conventional regulation and in accordance with the regulations contained in our *LECiv.* and in line with the procedural principles of our internal order. It is here that an insurmountable obstacle to the granting of the 'exequatur' presents itself, an obstacle that is rooted in Art. 22.1 of the Organic Law of the Judiciary (RCL 1985\1578, 2635 and ApNDL 8375) which explicitly reinforces the exclusive jurisdiction in civil matters of the Spanish courts and tribunals in matters concerning the validity or nullity of inscriptions made in a Spanish registry, a precept which makes it impossible to grant the requested 'exequatur.' The undeniable consequence of granting the exequatur, with respect to acts of enforcement after the recognition, would be the rectification of a Spanish registry inscription, specifically the one in which Mr. José Julio R. J. figures as the father of the minor Miguel Angel B. M., which would infringe upon the mentioned precept. It should be made clear that the only possible channels through which rectification of a Spanish registry inscription may be obtained is by initiating proceedings foreseen in our legislation before the competent authorities".

Note: See also X. 1, 2 and 3.

3. Successiou

– ATS of 29 September 1998 (RJ 1998\9004)
"Exequatur": dismissal; acts of voluntary jurisdiction; ruling on declaration of heirs and resolutions on the awarding of legacy delivered by the courts of Argentina.

"Legal Grounds:

(...)

First: There are no conventional regulations applicable to these resolutions the recognition of which is sought.

Second: Given that the resolutions whose recognition is being sought include a statement made by the heir in favour of the ancestor and the formal delivery and acceptance of the legacy appearing in the will made by the constituent which, in accordance with the internal legal system, would give rise to a proceeding to set a date for the acceptance of the inheritance

('interrogatio in iure'), these resolutions are acts of voluntary jurisdiction in which the intervention of the jurisdictional authority is not the result of a lawsuit or controversy between the parties in conflict but rather are the result of applying the corresponding regulation the object of which is to receive the corresponding private statements which comprise the formal requisite for the enforceability of the act and to interpret and apply the law to the case at hand thus giving it formal effects attributing rights to the interveners or simply homologating the pre-existing rights. According to the Spanish procedural system, acts of voluntary jurisdiction do not have an executory effect (at least not in a literal sense) nor do they produce material *res judicata* and the issue may therefore come under the authority of the judges and courts through the initiating the corresponding legal action.

Third: In application of the above, this Court has been denying recognition of acts of this nature through the 'exequatur' proceeding regulated by Arts. 951 and subsequent of the *LECiv.* For many years now (cfr. ATS 7 February 1955), attention has been drawn to the unique differences that exist between resolutions delivered in cases of voluntary jurisdiction and sentences handed down in lawsuit hearings (see AATS of 16 July 1996, 16 September 1997, 21 October 1997 and 10 March 1998). These differences are evident both in the lawsuit and the way in which the jurisdictional action is taken as well as in the function that the law attributes to the intervention of the jurisdictional institution and in the effects that one or the other type of decisions actually have. These differences out rule any intent (even analogical) to apply the proceeding foreseen in Arts. 951 and subsequent of the *LECiv.* and transfer the issue of the homologation of voluntary jurisdictional acts to recognition through incidental channels by the institution or authority before which recognition is sought of the effects of that act. This authority, in addition to verifying the requisites set out in Arts. 600 and 601 of the *LECiv.*, must also take into consideration those established by the corresponding material regulation determined by the Spanish conflict regulation (Art. 9.8 Civil Code) including, as the case may be, those articles applicable by virtue of the material".

Note: See also XI.

4. Custody and child protection

– ATS of 13 October 1998 (Civil Court) (RJ 1998/7670)
Foreign judgement: recognition; lack of relevancy; lack of jurisdiction on the part of the Supreme Court to grant the "exequatur"; judgement delivered by a Moroccan Court granting custody of a minor; Convention of 30 May 1997; jurisdiction for issuing belongs to First Instance Courts.

"Legal Grounds

First: Art. 25 of the Convention on Judicial Cooperation on civil, trade and

administrative matters done in Madrid on 30 May 1997 (*BOE* n. 151 of 25 June [RCL 1997\1606]), which provisionally came into force on 30 May 1997, the date of its signing, and came definitively into force on 'the first day of the second month following the last notification of having met constitutional formalities in each of the two countries (Art. 45), stipulates as the competent authority 'the Court of First Instance – sic – of each of the contracting States. This grants the right to enforce the resolution, upon request by the interested party, in accordance with the legislation of the State requesting that enforcement. Given that the request for the 'exequatur' of the sentence the recognition of which is sought was presented before this Court on 17 November 1997 at which time the Convention was in force, this Court does not have jurisdiction to process the requested exequatur.

Second: Art. 74 of the *LECiv.* states that the jurisdictional institution that is believed incompetent due to nature of the case may abstain from hearing such case once informing the Public Prosecutor and will advise the parties to exercise their right before proper authorities".

Note: See also VII and X.2 and 4.

5. Alimony

– ATS of 23 June 1998 (Civil Court) (RJ 1998/6080)
"Exequatur": In default in the original proceeding: classes and effects; lawful: sentence delivered by a court in the district of Austria: recognition of paternity and sentence for the payment of alimony: application of the Convention between Austria and Spain of 17 February 1984 and of The Hague Convention number IX of 15 April 1958: in default for reasons of personal convenience: no grounds for defencelessness.

"Background Information

First: The Solicitor... S. F. in name and representation of the minor Nina W., filed a request for the exequatur of the 25 March 1994 sentence delivered by the District Court of Floridsdorf-Viena, Austria, which declared the paternity of Mr. Juan R. C. with respect to the naturally born daughter of Ms. Elizabeth M. W., the minor Nina W., sentencing him to pay the amounts requested by the mother of the minor as alimony.

Second: The party against whom the exequatur is directed was summoned to appear in court and did so to oppose recognition of the sentence for the reasons which are briefly outlined below: 1) lack of jurisdiction of the court which delivered the sentence which is the object of the recognition; 2) defencelessness caused by the extemporaneous summons issued at the original hearing; 3) irregularities in the evidence presented at the original hearing.

(...)

Legal Grounds

First: Due to the diversity of pronouncements contained in the resolution the recognition of which is being sought, attention must be directed towards the Convention between Spain and Austria on the Recognition and Enforcement of Resolutions, Judicial Transactions and Public Documents with enforcement authority in civil and commercial matters of 17 February 1984, ratified on 1 July 1985 and published in the *BOE* on 29 August 1985 (RCL 1985\2112 and ApNDL 13572), and towards The IX Hague Convention of 15 April 1958 (RCL 1973\2051 and NDL 23154 bis), concerning the recognition and enforcement of decision relating to maintenance obligations towards children which entered into force in the Republic of Austria on 4 November 1960 and in the Kingdom of Spain on 10 November 1973, both agreements applicable 'ratio materiae et tempore' in accordance with Arts. 1.1 and 3 and 1 and 16 respectively.

Second: With regard to the controls that should be implemented by the requested State for recognition, the Spanish – Austrian Convention makes reference to international judicial jurisdiction (Arts. 4.2 and 7 through 10), the enforceability of the resolution (Art. 4.1), the law applied to the background issues (Art. 6.2 that marks the principle of equivalency of results), conformity with the public order of the requested State [Art. 5.1, a)], guarantee of a hearing and defence in the original proceeding (Art. 5.2), litispendency or the existence of resolutions delivered in the requested or requesting State [Arts. 5.1, b) and c) and 18] and formal requirements (Art. 16). With regard to the IX Hague Convention, it makes reference to international judicial jurisdiction (Arts. 2.1 and 3), the enforceability of the resolution (Art. 2.3 except in the case provisionally enforced resolutions), conformance with the public order of the required State (Art. 2.5), litispendency or decisions delivered in the required State (Art. 2.4), minimum formal requirements (Art. 4) and guarantee of defence and hearing in the original proceeding (Art. 2.2).

Third: With respect to international judicial jurisdiction, it suffices to say that the Austrian courts were competent according to Art. 7.1.11 of the Spanish – Austrian Convention and Art. 3.2 of the IX Hague Convention (habitual residence in the state of origin of the person to whom alimony is owed).

Fourth: Due to the imprecision of the Spanish – Austrian Convention's Art. 13 and in accordance with the IX Hague Convention's Art. 6, the steps to be followed in the recognition process are those established by the internal law of the requested State, i.e. Arts. 995 and subsequent of the *LECiv.*, and this was the procedure followed in this proceeding.

Fifth: On the issue of controlling legislative jurisdiction imposed by Art. 6.2 of the Spanish – Austrian Convention, it has been accredited that the law which was materially applied by the court of origin is the one indicated by the Spanish conflict regulation (Art. 9.7 Civil Code) considering the differing nationalities of the payer and receiver of alimony.

The IX Hague Convention does not have this control mechanism but it should not be forgotten that the VIII Hague Convention (RCL 1974\972 y NDL 19678) on the applicable law in the case of minors that entered into force for the Republic of Austria on 23 August 1959 and for the Kingdom of Spain on 26 May 1974 states that the law applicable to the background of the issue is that of the resident country of the creditor of the alimony (Art. 1). The only cases under which this law is not applicable are those in which there is clear evidence of incompatibility with the public order of the state possessing the authority to hear this judicial claim (Art. 4).

Sixth: It is in fulfilment of the guarantees of a hearing and proper defence in the proceedings at origin that the Court must turn its attention to accrediting whether these rights were violated or not. Given this requirement, attention should be drawn to the repeated doctrine of the Constitutional Court that attributes to this Court the jurisdiction to assess those factors indicating whether the foreign sentence should be recognised and enforced or not, the homologation of the fulfilment of those requirements and the interpretation of the regulations that put these in place given that these are issues of ordinary legality and jurisdictional functioning in the strict sense (SSTC 43/1986 [RTC 1986\43] and 132/1991). Based on these indications, it is common practice for this Court to situate the requirement for the absence of default in the case of the accused in the lawsuit at origin within the framework of the constitutional rights to a hearing and defence and the related proscription of defencelessness called for by procedural public order. In doing so it singled out the so called default for reasons of personal convenience, strategic or voluntary, which characterises those who, despite having been legally summoned and cognoscente of the proceeding under way, do not answer the call of the foreign court (cfr. ATS 25 February 1985 and STC 43/1986). This sort of default should generally not be an obstacle to the recognition of the resolution. Forced or involuntary default, however, is that which covers cases in which the cause is not the fault of the person in default or is not caused by him or in which he did not receive notice of the proceeding in proper fashion and was therefore unable to defend himself adequately. In this case the foreign resolution would not be homologated. In short, it is a matter of guaranteeing the necessary adaptation of the resolution to be recognised to internal public order from a procedural perspective which, in turn, gives rise to an examination of whether the foreign judicial resolution satisfies the guarantees contained in Art. 24 of the Constitution (RCL 1978\2836 y ApNDL 2875) (cfr. STC 132/1991 [RTC 1991\132]).

Although the documentation on file could lead one to believe that the person against whom these proceedings are directed was summoned extemporaneously to appear in court at the original hearing, attention must be paid to the important information contained in the letter sent by his wife to the sentencing court dated eight days subsequent to the date that the summons was served. This letter revealed that he was cognoscente or could

have been cognoscente of the proceeding and had a reasonable opportunity to develop a stance and put together a defence by use of the means that the original order made available. The conclusion must therefore be reached that it was the omissive attitude of the accused that gave rise to a hearing without his presence and led to the eventual retroaction of the proceedings at the time at which the alleged procedural flaw (if there, in fact, was one) was committed. Furthermore, it should be stated that being cognoscente of the sentence, he accepted it without filing legal appeal and his simple statement that he lacked economic means to continue with the proceedings, considering the legal instruments available to facilitate international access to justice, should not be used as an obstacle to recognition.

At this point it would be helpful to mention Constitutional Court doctrine on defencelessness which states that, in order to be considered constitutionally relevant, defencelessness must be material, real and effective and not merely formal. It must deprive the accused of one of the instruments that the legal system makes available for the defence of his rights or it must impede the effective application of the principle of contradiction. Defencelessness may not be alleged by those who find themselves in that situation due to passiveness, disinterest, inexperience or negligence (SSTC 112/1993 [RTC 1993\112], 364/1993 [RTC 1993\364], 158/1994 [RTC 1994\158], 262/1994 [RTC 1994\262], 18/1996 [RTC 1996\18], 137/1996 [RTC 1996\137], 99/1997 [RTC 1997\99] and 140/1997 [RTC 1997\140]), as is the case here. The disinterest of the accused in the proceedings as judged by his lack of effective intervention in the process despite being provided with the means to exercise his rights, makes it impossible for him to use material defencelessness as an argument".

Note: See also X.3

6. Payments

– ATS of 9 June 1998 (Civil Court) (RJ 2998/5324)

Lack of jurisdiction of the Supreme Court to grant an 'exequatur': sentence delivered by the Supreme Court of Gibraltar for payment of a stipulated amount: Gibraltar: application of the 27 September 1968 Brussels Convention: jurisdiction of the first instance courts. Objective jurisdiction: public order regulations.

"Background Information

First: The Solicitor ... in representation of 'ABN Amro Bank Limited', filed a request for the exequatur of the sentence delivered by the Supreme Court of Gibraltar, United Kingdom, on 26 June 1992 by virtue of which Mr. Michael Charles M. C. was sentenced to pay a stipulated amount in Swiss Francs.

(...)

Legal Grounds

First: Attention must be turned to the regulation contained in the 27 September 1968 Brussels Convention (RCL 1991\217 y 1151), on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The United Kingdom and the Kingdom of Spain became party to this Convention on 9 October 1978 and 26 May 1989 respectively. The resolution, the recognition of which is sought, is not found amongst those excluded for reasons of subject material and listed in Art. 1 of the Convention.

Second: Attention must be turned to Art. 32.1 of the Brussels Convention of which Art. 10 of the 1989 Adhesion Agreement forms a part in the event that procedural recognition were appropriate in light of Art. 26 which considers it to be exceptional because the dominating principle is that it is automatic. Having established this, the above mentioned Art. 32.1 states that requests for enforcement will be filed 'in Spain before the Court of First Instance' thus indicating that this Court is not authorised to grant the exequatur. It does not have jurisdiction to make a pronouncement on this issue and may inform the requesting party of his right to file the request before the pertinent jurisdictional institution.

The nature of the *ius cogens* regulations controlling objective jurisdiction require an examination of that jurisdiction by the legal institution that is hearing the case and in accordance with Art. 74 of the *LECiv.*, the institution in question should not hear the case if it is considered that it does not have jurisdiction due to the material being treated; notifying the Public Prosecutor's office and the parties involved.

Third: With regard to territorial jurisdiction, Art. 32.2 of the Brussels Convention states that 'territorial jurisdiction will be determined by the legal domicile of the party against whom the enforcement is requested. If that party does not have legal domicile in the requested State, jurisdiction will be determined by the place of enforcement.'

The Court delivers the following judgement: 1. We declare this Court's lack of jurisdiction to grant an exequatur of the sentence delivered by the Supreme Court of Gibraltar, United Kingdom, on 26 June 1992 sentencing Mr. Michael Charles M. C. to pay a stipulated amount in Swiss Francs. 2. The interested parties may exercise their right before the Court of First Instance in the location corresponding to the legal domicile of the accused or in the place of enforcement".

– ATS of 7 April 1998 (Civil Court) (RJ 1998\3559)

"Exequatur": Reciprocity regime and subsidiary regime of the *LECiv.*: requirements; sentence calling for the payment of a stipulated amount delivered in the State of Minnesota, United States: no bilateral treaty: reciprocity: lack of relevancy: defencelessness of the accused in default not recognised.

"Background Information

First: The Solicitor..., in representation of the company 'Northrup King

Corporation,' filed a request for exequatur of the 13 April 1995 judgement delivered by the Eighth Circuit of the United States Appeals Court which confirmed the 4 March 1994 judgement delivered by the District of Minnesota Court sentencing the Seville based company 'Compañía Productora de Semillas Algodoneras' to make compensatory payment in the amount of 1,922,295.40 US Dollars or the equivalent in Spanish Pesetas plus the interest accrued on the sum in Pesetas as of the date of the accusation.

Second: The party requesting the exequatur and complainant in the original hearing had its headquarters in Golden Valley (Minnesota), United States of America at the time the request was filed while the accused company had its headquarters in Seville, Spain.

Legal Grounds

First: Since there is not treaty between the United States of America on the recognition and enforcement of sentences, it must be determined whether the reciprocity regime should be applied in its positive aspect as provided for in the *LECiv.* and as requested by the complainant. Art. 952 of the *LECiv.* states that 'in the event that no special treaties exist with the nation which delivered the sentence, that sentence will be enforced to the same degree that sentences delivered in Spain are enforced.' This reciprocity regime interpreted from a positive angle should be, on the one hand, bilateral and relative, i.e. specifically based on the solutions foreseen or provided by a specific order coming from a foreign country, in this case from the United States, to Spanish sentences; and, on the other hand, it should be limited in time to the moment at which recognition of the foreign decision is requested. Having studied the documentation provided by the petitioning party in justification of the reciprocity invoked and which is comprised of a legal memorandum or report issued by two practicing lawyers in the state of origin on the enforceability of the sentence in question and on the reciprocity regime to recognise a Spanish sentence delivered in default, the conclusion must be reached that the recognition and statement of enforceability of the foreign sentence in question should not be subject to the above mentioned subsidiary regime but should rather be subject to the regime that is also subsidiary of reciprocity provided for in Arts. 954 and subsequent of the *LECiv.* This solution is based upon the fact that the report looks at the jurisprudential criteria related to the law applicable to the recognition of foreign sentences in the State of origin (in this case comprised of the Uniform Law of the State of Minnesota) and was extracted from cases in which a decision was not taken on the homologation of a Spanish sentence. Among others the Hilton *vs.* Guyot, the Nicol *vs.* Tanner, the Hansen *vs.* American National Bank and the Somportex Ltd. *vs.* Philadelphia Chewing Gum Corp. cases are cited so that the required relativity referred to above disallows accreditation of the reciprocity being used as an argument. Furthermore, it should not be forgotten that reciprocity does not free one from meeting certain conditions set by the Spanish legal system for recognition regardless of the regime applied and these are the

enforceability of the resolution and its compulsory compliance with the internal public order both from a procedural as well as a substantive perspective. This means that the application of the reciprocity regime in the homologation of the foreign sentences will usually imply an added set of requirements to be fulfilled thus placing a heavier burden of proof on the requesting party, something that would be unnecessary if the general regime of conditions established by the *LECiv.* were applied. As a result and as long as negative reciprocity is not confirmed, it is appropriate to examine this exequatur request in accordance with the above mentioned Procedural Law regime.

Second: Proof was provided regarding the enforceability of the sentence in accordance with the law of the State of origin. The enforceability of the sentence for which the exequatur is sought is a requirement established, regardless of the recognition regime, by Art. 951 of the *LECiv.* – which is not strictly limited to the conventional regime if read jointly with the following precepts – and by reiterated doctrine delivered by this Court.

Third: Requirement number one of Art. 954 of the *LECiv.* should be taken as fulfilled in light of the personal nature of the suit claiming payment of a sum of money.

Fourth: With regard to requirement number 2 of the same Art. 954 of the *LECiv.*, it should be pointed out that in accordance with the terms of the enforceable judgement, with those of the resolution handed down by the appeals court for which recognition is sought and with those of the rest of the documentation accompanying the suit, the accused company appeared in court at the original proceeding in order to voice its opposition relative to the court's lack of jurisdiction and the improper summons which it was issued calling for its appearance at the hearing. Both of these exceptions, having been dismissed by the District Court, were again alleged before the Appeals Court and were again dismissed. Given the absence of response relative to the merits of the case, the Instance Court declared the accused in default and handed down a sentence for payment of the sums claimed in the suit. The default should therefore be categorised as one of conviction arising from the lack of jurisdiction that the accused attributed to the foreign court to hear the case as well as from the defects in the summons to appear in court; both obstacles to the exercise of the accused's right to defence. A careful examination should now be made of whether the requirement to inform the defendant of the impending suit was met in accordance with the provisions that regulate these procedural acts as well as whether the accused had the possibility of exercising to the fullest extent its right to defence. Judging from the facts gathered from the first instance sentence and from the appeals sentence – that this Court must respect given that it would be impossible to carry out a general revision of these and the documents admitted as evidence in the original hearing and since it would be completely inappropriate given the purely homologating nature of this procedure – it was determined that the accused was summoned

to appear at the hearing in accordance with the formula outlined in the XIV Hague Convention Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 15 November 1965 (RCL 1987\1963 and RCL 1989\817), carried out through the Central Authority in Spain – the Sub directorate General for International Legal Cooperation of the Justice Ministry – which certified having delivered the communication to Ms. Rosalía R., 'rep.legal' of COPSA who received all of the documentation attached to the letter of request. Attention should be placed on the correctness of this act of communication in accordance with Spanish procedural law both in the manner in which the communication was made as well as in the documentation made available to the accused and it must be stated that the summons delivered to the person claiming to be the legal representative of the accused company – it is assumed that the expression 'rep.legal' taken from the sentence refers to the legal representative – was carried out in accordance with internal procedural law. The documents delivered providing notice of the filing of the lawsuit and inviting the accused to defend itself properly should also be considered as sufficient. It is also significant, although in and of itself it is not a determining factor, that the Central Authority in Spain carried out the letter of request by delivering the documentation to the accused and not returning it to the State of origin for reasons of incorrectness or insufficiency as is its prerogative in accordance with Art IV of the Hague Convention. All of this leads to the conclusion that the summons issued to the accused in the original hearing was done in compliance with applicable regulations and was proper and useful for the exercise of the accused's right to defence. To state it in a different way, linking the requisite of absence of default with that of respect for internal public order from a procedural perspective as far as the safeguard of these types of guarantees is concerned, it can be stated that the act of communication was not damaging to the accused's right to defence and therefore cannot be used in the argument for defencelessness. One more detail in support of this conclusion is the fact that the afternoon prior to the hearing, the accused presented the First Instance Court with an additional 17-page memorandum expressing its opposition. With respect to the accused's claim that the Court did not have jurisdiction to hear the case giving rise to the accused's absence at the hearing for reasons of conviction, it should not be forgotten that the accused initially opposed that exception requesting a stay of proceedings which was subsequently denied by the American District Court. The accused then allowed the proceeding to run its course without formulating a rebuttal regarding the merits of the case and, as the Appeals Court sentence points out, the accused could have refuted the reasonable jurisdictional presumptions on which the first instance court based its jurisdictional decision. The result is that from this perspective the absence of the accused at the hearing is not an insurmountable obstacle to recognition of the sentence either and the requirement imposed by number 2 of Art. 954 of the *LECiv.*, in line with reiterated criteria from this Court on subjects such as

these (AATS 22 April 1997, 23 September 1997, 20 January 1998 and 17 February 1998, among others) should be understood as having been met.

(...)

Seventh: There is no reason to believe that the international judicial jurisdiction of the Courts of the United States of America was the result of a fraudulent search for a forum of convenience by the parties to the suit (Arts. 6.4 of the Civil Code and 11.2 LOPJ [RCL 1985\1578, 2635 and ApNDL 8375]); Arts. 22.3 and 3 LOPJ do not establish exclusive forums of jurisdiction as does Art. 22.1 of that same Organic Law but this case does not contain any of the determining factors warranting jurisdiction of the Spanish courts. Quite to the contrary, the jurisdiction of the American court appears to be reasonably well justified in light of the 'minimum contact with the forum' needed to establish its jurisdiction which this Court considers sufficient and proper to guarantee the proximity of the jurisdictional institution to the object and the parties to the suit while, of course, always bearing in mind reasonability and aid, especially the accused, in gaining access to the process on an equal footing from which it can properly exercise its right to defence, excluding any possibility of fraud either in the attributive regulations regarding jurisdiction of the national courts or those that would regulate the merits of the case, an issue linked to the above".

V. INTERNATIONAL COMMERCIAL ARBITRATION

– SAP Valencia 21 May 1998 (AC 1998\1093)

Jurisdiction of the Spanish courts: fuel supply contract concluded by fax: supplier with legal domicile in Spain: accused companies do not have legal domicile in Spain: application of Art. 22.3 LOPJ: existence of a clause calling for submission to arbitration in London in the event of disputes arising concerning freightment policy agreed to between the accused companies – owner of the ship and the transporter.

Note: See II.1

– ATS of 24 November 1998 (Civil Court) (RJ 1998\9228)

"Exequatur": a purely homologating mechanism the purpose of which is to standardise the effects of foreign resolutions, principally those of a procedural nature; arbitral decision delivered in London: no evidence of lack of passive legitimation: call for transparency in the case of joint-stock companies in order to delve into the 'substratum.'

Note: See also IV.1

– ATS of 8 September 1998 (Civil Court) (RJ 1998/6840)

"Exequatur": proceeding; the object is to verify fulfilment requirements set up by the regulations (generally of a procedural nature) without being able to look into the merits of the case past the point established by public order or, in the

case of foreign judgements, past that established by Art. V of the New York Convention.
Note: See IV.1

– ATS of 9 June 1998 (Civil Court) (RJ 1998/5323)
"Exequatur": limits: public order: concept and reach: inclusion of constitutional principles: respect for the requirements of the right to effective judicial protection; in accordance with the law: no violation of public order.
Note: See IV.1

– ATS of 27 January 1998 (Civil Court) (RJ 1998\2931)
"Exequatur": In accordance with the law: requirements stemming form the 10 June 1958 New York Convention met; legal capacity and representation of those that closed the arbitration agreement; existence and validity of the arbitration agreement; the purely homologating nature of the exequatur proceeding.
Note: See IV.1

VI. CHOICE OF LAW: SOME GENERAL PROBLEMS

– SAP Alicante 27 November 1998 (AC 1998\2245)
Marriage separation: applicable legislation: both spouses of German nationality: application of German law: failure to obtain their accreditation: error made by the instance judge who should have nullified the claim without having changed the personal law of the litigants.

"Legal Grounds

First: Based on allegations made by the appealing and appealed parties and in relation to the acts leading up to the resolution being challenged in this case, the appeal should be admitted and consequently the judgement delivered by the 'a quo' judge should be revoked because the judgment in question is in violation with Art. 107 in relation with Arts. 9.2 and 12 of the Civil Code. This affirmation is based on the following considerations.

Upon examination of the actions undertaken in first instance it was determined that the object of the proceeding was the separation of the marriage celebrated on 21 December 1987 in the town of Nidda (Germany). The two spouses are of German nationality and at the time that separation proceedings were initiated they both had legal domicile in Spain. Furthermore, they requested the adoption of complementary measures affecting the subsistence and possibly the conclusion of the matrimonial economic regime that existed between them as well as the use and administration of common assets, etc.

In light of what was said in the above paragraph and in the case of conflict of laws regulated by our legal system as can be detected upon analysis of Arts. 9, 12 and 107 of the Civil Code, this separation proceeding should have been regulated and resolved by applying the national law common to the spouses at the time that the suit was filed which in this case is German law and in no case

has a foreign law been construed as a personal statute to be applied as a conflict regulation. Having stated the above and having established that it is substantive German legislation that should be applied in order to determine the lawfulness of the separation and the complementary measures requested, the law of that nation should be accredited by anyone who intends to implement it through application of notable conflict regulations even at the government's initiative because the application of foreign law is a question of fact and as such must be affirmed and proven by the party that, with the filing of the request for separation, should have applied it. This accreditation should be applied not only to the precise entity of applicable law but also to its reach and authorised interpretation so that its application does not give rise to even the smallest reasonable doubt within the Spanish courts.

Not having resolved the issue in this manner the 'a quo' judge, assigned to this case in accordance with Art. 12.6 in relation with Arts. 9 and 107 of the Civil Code, should have dismissed the suit absolving the accused of having to respond to the demands made by the complainant without incurring in an alteration of the personal law of the litigants. The conclusion can therefore be reached that the 'a quo' judge committed an error that supports the case of the appealing party and which was not refuted by the appellee (who reported on page 35 of the case filed in trial court that a motion for separation had been filed in Germany prior to the objection to interposition that gave rise to this present case).

Based on all of the above, this remedy of appeal filed by the representative of Mr. Peter B. is allowed and in accordance with the law the sentence delivered by the court of instance is thereby revoked due to an error in the determination and application of the personal law applicable based on the object of the proceeding. A new resolution has therefore been issued which dismisses in its entirety the suit filed by Ms. Helma B. against Mr. Peter B., the latter being absolved of claims formulated against him. No pronouncement is made regarding court costs related to first instance in line with reiterated doctrine delivered by this Court and in consideration of the special nature of the process enveloping the resolution of this case".

Note: See also XX.

VII. NATIONALITY

– STSJ Catalonia 22 June 1998 (RJ 1998\6136)

Paternity claim filed by the son: necessary to file suit against the mother also. Spanish nationality: existence: born in Spain, son of a British mother and unidentified father. Supreme Court appeal: dismissal and allowance under law.

"Legal Grounds

First: In order to be properly studied, this Supreme Court appeal filed against the 14 October 1996 judgment delivered by Section 14 of the

Barcelona Provincial Court requires a look at the following background information: on 27 November 1971 Ms. Teresa P. of T. and S. filed suit for the compulsory recognition of her natural son Sergio, a minor, based on Art. 135.2 of the Civil Code against Mr. Francisco Javier of F. S. The case was accepted by First Instance Court number 8 of Barcelona in a judgement delivered on 7 October 1972, subsequently upheld by Section Two of the Territorial Court and finally dismissed by the Supreme Court through a judgement delivered on 17 May 1974 (RJ 1974\2090) which overturned the previous decision. On 3 July 1974 Ms. Teresa P. of T. filed a new suit, once again in representation of her young son against the same accused party and with the same intention although this time it was based on Art. 4 of the *Compilació de Dret Civil de Catalunya* (Compendium of Catalonian Civil Law) (RCL 1984\2994; ApNDL 2001 and LCAT 1984\1888). The Court of First Instance number 8 of Barcelona, in its resolution handed down on 13 March 1975 dismissed the case on the basis of *res judicata*. Finally, on 10 March 1992, Mr. Sergio P. of T. and S., now of legal age (born 24 August 1970) filed suit for extra-matrimonial filiation based on Art. 127 of the Civil Code. The case was positively received by First Instance Court number 17 of Barcelona in its judgement delivered on 11 July 1995 and upheld by the sentence that is now the object of this Supreme Court appeal. This appeal is comprised of eleven motives the first two of which are based on constitutional precepts: the first on Arts. 24 and 120.3 of our Fundamental Regulation (RCL 1978\2836 and ApNDL 2875) and the second on Arts. 9.3 and 24 of the same text. The appeal was filed before courtroom number one of the Supreme Court and both of these motives were dismissed in the 14 October 1997 sentence and the case was received by this Court on 5 March.

Second: Along with the above analysis it is also necessary to take a careful look at the underlying *objective* of this appeal focusing on the previous issue brought forth by the appellee. The appellee does in fact invoke the inadmissibility of the this appeal or its integral dismissal without allowing the Court – according to his criteria – to examine the merits of the case because new issues were brought to the forefront that were not part of the appeal controversy thus disallowing the focus of the dismissal that resulted from the first instance sentences of 26 September and 14 October 1994 (RJ 1994\6989 and RJ 1994\7551), for example.

In the background information to his appeal the appellant argued that the Barcelona Court 'delivered its sentence on 14 October 1996 and, without carrying out a detailed examination of each one of the motives for appeal – coinciding with the allegated exceptions – dismissed the appeal ... and then goes on to argue that the Barcelona Court 'failed to provide a well grounded response based on law to all of the issues presented 'in voce during the course of the appeal hearing with the exception of the *res judicata* ...'

It is true that the Barcelona Court did state the following in its first legal ground: 'The accused and appellant has, for all intensive purposes, based its

appeal allegations against the sentence delivered by First Instance Court number one by virtue of which ... in light of the issue of *res judicata* ...'

Furthermore, the record of proceedings filed by the secretary of the appeals hearing is brief and stereotyped and limits its explanations to the fact that the appellant, in his report, requested '*the revocation*', the appellee requested '*the confirmation*' and the Public Prosecutor '*the confirmation*'.

Despite all of this, the appellant's argument cannot be accepted. On the one hand, in its enunciation prior to its numbered listing of the legal grounds, the Barcelona Court clearly expresses its acceptance of the grounds of the instance judgement and states: 'the legal grounds of the appealed judgement are by and large accepted. Secondly, the sentence which is the object of this appeal case does not state that the revision debate will focus exclusively on *res judicata* but rather uses the adverb *practically* which, according to the dictionary, is the same as '*almost* or '*nearly* which means that that may have been the principal issue of controversy but not the only one. And finally, as has been highlighted by our very best procedural doctrine, it could be that the object of the Supreme Court appeal is based on the Legal Grounds (predeterminers of the judgement) that appear in the first instance resolution and the same is true of the cases remitted to that resolution in second instance. This remission can be expressed or tacit and example formulas can be found which are similar to the one used in the judgement that is now under appeal. Along these same lines we have the Supreme Court sentences of 25 November and 23 December 1991 (RJ 1991\9476), 27 May and 5 November 1992 (RJ 1992\9221), among others. The fact is that the judgement delivered by the Barcelona Court does not focus exclusively on the *res judicata* issue but also, as will soon be plain to see, it goes into the civil community affiliation of the parties describing it as 'Catalan and arguing 'this conclusion is the result of evidence studied in the Court's exhaustive analysis of all relating to the appealed sentence'.

As a consequence of the above, the background issue used by the appellee – repeated throughout the challenge of the specific motives for the repeal – should be rejected in order to allow for their study.

Third: In its report the appellant party was careful to explain that the third, fourth and fifth motives (as was mentioned above the first and second deal with constitutional issues) are really precursors or pre-determiners of the sixth which covers them all. The fact is that the third motive for dismissal is based on Art. 1692.3 of the *LECiv* and is founded on the infraction of Arts. 17 and 1218 of the Civil Code, refuting the statement made in the Barcelona Court's judgement calling for remittal to the first instance with respect to which the complainant claims Spanish nationality. The fourth motive, based on the same precept of the procedural law, considers that Art. 14 of the Civil Code was violated in relation with Arts. 1218 and 1232 of that same legal text, attempting to annul the affirmation of the sentence, alluded to above, with respect to the fact that the parties – including the complainant – claim to be

members of the Catalan community. The fifth motive, founded on the same procedural precept, points to infringement of Art. 9.4 of the Civil Code and focuses on fighting the Barcelona Court's opinion – by virtue of its remittance to the instance court – that that article cannot be applied to actions involving filiation which are regulated by Art. 127 of the Code and through Law 7/1991 of 27 April (RCL 1991\1405 and LCAT 1991\176), of the *Generalitat de Catalunya* (regional government of Catalonia), jurisdiction being determined by Art. 63.1 of that Code. These three motives do, therefore, set the stage for the sixth that, based on number 1 of Art. 1692 of the *LECiv*, proclaims the abuse or excess of jurisdiction in relation with Arts. 21 and 22.3 of the *LOPJ* (RCL 1985\1578, 2635 y ApNDL 8375).

In summary, the appellant argues that the complainant, Mr. Sergio P. of T. S., is not a citizen of Spain and, due to the fact that the judgements delivered take the opposite view, these latter infringe upon the limits of Spanish jurisdiction in so far as, in accordance with Art. 22.3 of the LOPJ, the Spanish Courts and Tribunals will only have jurisdiction in *issues involving filiation and paternal-filial relationships when the son or daughter has habitual residence in Spain at the time the suit is filed or when the complainant is Spanish or resides habitually in Spain.* This means that a new analysis must be made of the nationality of the complainant because the dismissal or acceptance of the four motives described above will depend on this.

According to the birth certificate appearing as page 479 of the case file, Mr. Sergio P. of T. was born on 24 August 1970 in the Dexeus Clinic in Barcelona and is the son of Teresita S. and P. of T., born in London and of British nationality. According to the Filiation Register, page 334, he is duly registered in the Barcelona Civil Registry in volume 587 page 491. Case file page 349 shows that Mr. P. of T. does not figure in the Registries of the British Consulate General as a British citizen residing in the British consular jurisdiction of Barcelona. The file also shows on pp. 350 and 470 that Mr. P. of T. has never filed for Spanish nationality according to certification received from the Spanish Consulate General in London and the Directorate General for Registries and Notarised Documents of the Spanish Justice Ministry. Pages 364 to 369 of the file show Spanish passports belonging to the complainant.

In short, this is a case of a person born in Spain of an unidentified father and British mother. There is no evidence of his acquiring the mother's nationality; evidence that would have been easy to attain by the party who would stand to benefit from that information. The situation being as it is, there is no other alternative than the application of Civil Code Art. 17.1, according to which *those born in Spain whose filiation is not determined are considered Spanish nationals from birth.* He could have also claimed Spanish nationality from birth in accordance with the legislation in force prior to the drafting of Law 18/1990 of 17 December (RCL 1990\2598) and would not have lost it as a result of the later modification in accordance with the first

transitory provision of the 1990 law which reads as follows: '*The acquisition or loss of Spanish nationality in compliance with the former legislation remains in effect even if the cause of that acquisition or loss is not contemplated in the current law*'. The 13 July Law 51/1982 (RCL 1982\2030 and ApNDL 10151), states in its Art. 17, paragraph 4 that *those born in Spain whose filiation is unknown or if the nationality of one of the parents is known but the legislation of that parent's home country does not attribute nationality to the child,* he or she will be considered Spanish from birth. Our most dependable doctrine has interpreted the effects of this precept to be retroactive with respect to the regulation of the 15 July 1954 Law (RCL 1954\1084 and NDL 22144) that was in force at the time of the complainant's birth because it is a right declared for the first time by law; the subjective right to Spanish nationality based on circumstances that were not contemplated in the earlier legislation.

The appellate judgement grants the complainant his place in the Catalan Community – therefore Spanish nationality – and the sentence delivered by the instance court states: '*regarding the mere effects of this litis, it is duly accredited, judging from the documentation on file, that the complainant is in possession of Spanish nationality*' and there can be no doubt that of all the evidence presented during the course of this voluminous proceeding none has succeeded in showing that the complainant had a nationality different – British, for example – from the Spanish nationality that he was born with. Furthermore, the civil Community Membership is granted unto him by virtue of Art. 14.6 of the Code.

Therefore, the sixth motive of the appeal challenging the complainant's Spanish nationality should be rejected and, as a result, the third, fourth and fifth motives as well due to the fact that, as was stated above, they are mere precursors of the sixth.

(...)".

– SAP Guipuzcoa of 22 June 1998 (AC 1998\1212)

Acquisition of nationality: lack of relevancy: proof of petitioner's identity not provided.

"Legal Grounds

(...)

During the course of the oral proceedings, the appellant requested that the Instance Court's judgement be revoked and that another be delivered fully allowing the request. The appellant based his appeal on the following motives:

1. The political situation in Argentina at the time of the hearing justified his leaving that country under the guise of a different identity and subsequent maintenance of that identity.

2. The resolution being challenged makes an erroneous assessment of those circumstances:

- It puts little value on the evidence of witnesses despite the fact that this is an ideal way to accredit one's identity.

- It does not take into consideration the statements made by the sister and cousin of the appellant before the Consul of Spain in Buenos Aires.
- It completely ignores documentary evidence on file despite the fact that it accredits both the birth and identity of the appellant.

At the hearing the Public Prosecutor adhered to the appellant's pretensions concluding that the documentation filed along with the request were sufficient evidence of their viability.

Second: The issue that must be dealt with by this Court is whether, as has been affirmed by the appellant in citing the resolution delivered by the Directorate General of Registries, it has been accredited or not that the appellant has the identity that he claims, i.e. he is who he says he is.

Having established that, it should be pointed out that the complainant/appellant presented the following evidence in court to support his allegation:

- A birth certificate from the Buenos Aires Civil Registry in the name of Guillermo Victor L.
- A birth certificate from the Central Civil Registry in the name of Raul Alberto N. F.
- An Argentinean identity card in the name of Guillermo Victor L.
- An Argentinean enlistment card also in the name of Guillermo Victor L.
- A summons and a certification issued by Federal Criminal and Correctional Court number 6 of Buenos Aires on the dismissal due to prescription of a criminal suit filed against Mr. Guillermo Victor L.
- A document issued by the Spanish Consulate in Buenos Aires with statements made by the Argentinean nationals Ms. Susana Elba L. and Ms. Margarita R.
- A copy of Mr. Raul N. F.'s appearance before the official in charge of the Rentería Civil Registry with regard to Art. 23 of the Civil Code.
- A note regarding the work experience and status as one searching for employment in the name of Mr. N.
- A certification issued by the Land Registry on the ownership of a dwelling that the complainant shares with Ms. B. M.
- A birth certificate in the name of Ms. Christianne Olaia N. B., daughter of the complainant, issued by the San Sebastián Civil Registry.
- A birth certificate in the name of Ms. Jean Christianne B. M., issued by the San Sebastián Civil Registry.
- A certificate and a copy of file number 226/1996 compiled in the San Sebastián Civil Registry by virtue of which the Directorate General for Registries and Notarised Documents, for the favourable report by the official at the Public Prosecutor's Office, denied the complainant's request to rectify the Registry in the same sense as the judgement giving rise to this proceeding.
- Three witnesses of Spanish nationality that claim to have known the complainant for approximately 17 or 18 years and attest to his identity as Mr. Guillermo Victor L.

Upon request by the Public Prosecutor's Office, sealed copies of documents from the complainant's nationality acquisition file including his certificate of registration with the Argentine Consulate in Bilbao in his name were attached to the case file.

Third: Following a new assessment of the evidence and in light of the fact that the foreign documents are not legalised, the Court is of the opinion that the appeal is not viable:

1. The statements made by the witnesses in court are intranscendent because, as the *a quo* judge pointed out, they are reference witnesses and their only 'reference' is the complainant himself. The result is that their statements are nothing more than manifestations of the interested party.

2. The act before the Spanish Consulate in Buenos Aires is useless as evidence as well because it alone cannot accredit the alleged family ties between the witnesses and Mr. L.

3. No objective proof exists showing that case documents 3 and 4 belong to the complainant and correspond to his real identity, nor do they prove that another person exists by the name of Raul Alberto N. F.

The lack of proof in both cases, that could have been accredited in a documentary manner (appearance in court of the 'other' Mr. N.) and by an expert (lophoscopic report), is the responsibility of the appellant in accordance with Art. 1214 of the Civil Code because they affect constituent elements of his argument.

Fourth: The exceptional circumstances both in the material as well as the procedural arena make it unnecessary to make any type of pronouncement regarding court costs in this second instance".

VIII. ALIENS, REFUGEES AND CITIZENS OF THE EUROPEAN UNION

– STSJ Galicia 17 September 1998 (RJCA 1998\3308)

Residence visa exemption: exceptional reasons: concept: existence: family regrouping and humanitarian reasons: father of Spanish nationality and a senior citizen: exemption approved.

"The Civil Government of Lugo delivered its resolution on 29 December 1995 denying a request for a residence visa exemption formulated by Ms. María Teresa F. G., accompanied by a warning that she had fifteen days to leave the country.

The Supreme Court allowed this administrative law appeal thus nullifying the challenged resolution and instructing the accused government institution to grant the exemption originally denied.

Legal Grounds

First: The object of this administrative law appeal is the 29 December 1995

Lugo Civil Government resolution that denied Ms. María Teresa F. G. her request for a residence visa exemption.

Second: Reiterated case law doctrine has established that the exceptional reasons referred to in Arts. 5.4 and 22.3 of Royal Decree 1119/1986 (RCL 1986\1899 and 2401) do not have a merely temporary, infrequent or ordinary meaning but rather possess qualitative, important and transcendental values regardless of the frequency or reiteration with which they are produced. A number of different resolutions delivered by the Supreme Court consider that exceptional circumstances should include situations like regrouping and family integration (Supreme Court sentences of 17 October 1997 [RJ 1997\7645], 14 October 1997 [RJ 1997\7454] and those cited in the latter).

Third: In the visa exemption request formulated through administrative channels, the appellant based her petition on the fact that her father was Spanish and had taken up residence in national territory and that she had to take care of him in his old age. The police report that figures as page five of the case file was sent to the authority in charge of resolving the case and indicated that the appellant's father was born in Trabada (Lugo), was 93 years of age and had returned to Spain after having resided for a long period of time in Cuba. The Administration never once doubted that the father of the appellant was of Spanish nationality and recognises the truth of the facts that she presented to the Court. The family situation, the father being of Spanish nationality and the fact that he was old all point to the need to focus on family regrouping and humanitarian considerations. For these reasons the above described circumstances will be considered exceptional and the appeal request granted".

– STSJ Galicia 28 May 1998 (RJCA 1998/1998)

Residence visa: exemption: denied lack of relevancy: concurring exceptional circumstances: roots established during former legal residency, ongoing studies and family integration: development of family business.

"The Civil Governor of A Coruña, in his 31 January 1996 resolution, refused a request for residency visa exemption made by Eduardo Silveira T. J.

The High Court of Galicia allows the Administrative Law Appeal, annuls the challenged resolution and orders the accused Administration to grant the appellant the visa exemption requested.

"Legal Grounds

First: The object of this Administrative Law Appeal is the 3 January 1996 resolution delivered by the A Coruña Civil Government which denied a request for a residence visa exemption filed by the appellant Mr. Eduardo S. T. J.

Second: Reiterated case law doctrine has established that the exceptional reasons referred to in Arts. 5.4 and 22.3 of Royal Decree 1119/1986 (RCL 1986\1899 and 2401) do not have a merely temporary, infrequent or ordinary

meaning but rather possess qualitative, important and transcendental values regardless of the frequency or reiteration with which they are produced.

Case law has also affirmed, in the case of foreigners married or living in a stable relationship (situation which, for these purposes, should be considered on a par with marriage) with Spanish nationals, the need to protect the family, keep the family unit intact and avoid the compulsory abandoning of national territory in order to procure a consular visa (which could take an inordinate amount of time or could also be denied). These are motives that are over and above those that commonly affect foreigners entering our country and therefore should be considered exceptional reasons that justify the exemption of the obligation to obtain a resident visa (Sentences of 4 and 10 October 1994 [RJ 1994\7411 and RJ 1994\7412] and 22 December 1995 [RJ 1995\9516]). Furthermore, the fact that the petitioner is residing illegally in Spain is not an impediment to the application of the criteria described above given that the object of the visa exemption is precisely that of legalising that situation of illegality (STS of 4 February 1997).

A number of Supreme Court decisions indicate that exceptional circumstances should include those related to having established roots in Spanish territory demonstrated by such circumstances as carrying out academic studies with a sufficient degree of determination and personal profit, family regrouping and integration and having been the holder of a residency permit in the past (SSTS 17 October 1997 [RJ 1997\7645], 14 October 1997 [RJ 1997\7454] and those cited in the latter). It should be pointed out that with regard to family regrouping, being the spouse of a Spaniard and being the spouse of a foreigner who is a resident in Spain are on the same plain (Art. 7.2 of Royal Decree 1119/1986).

Third: A study of case file documents supports the reality of the facts alleged in the lawsuit; i.e. that the appellant, a Brazilian national, entered Spain in 1993 with a tourist visa and subsequently legalised his residency by procuring a two-year study visa in 1994 for studies in a hair dressing academy; that he maintains a sentimental, stable relationship with a Brazilian national who is a legal resident in Spain and that the couple had a child who was born on 2 September 1995; that he has established a business along with a Spanish national and his sentimental partner, a bar-cafeteria located on Avenida de Chile in the city of A Coruña. Application of the case law doctrine referred to above leads to the conclusion that in this case we find the exceptional reasons required by the regulation cited above for the requested visa exemption because it has been proven that the appellant has established roots here (former legal residence, ongoing studies, family integration). To all of this we must add that he is involved in a business activity that indicates that he has sufficient economic means and all that that denotes and is fully integrated into Spanish society. For all of the above this appeal must be allowed".

IX. NATURAL PERSONS: LEGAL INDIVIDUALITY, CAPACITY AND NAME

X. FAMILY LAW

1. Marriage, separation and divorce

– ATS of 13 October 1998 (RJ 1998\7669)
Recognition of judicial sentence: lawful: resolution granting license for common accord divorce granted by the Ministry of Justice and Ecclesiastical Affairs of Iceland: resolution delivered in the exercise of public functions by authorities granted 'imperium': spouses with legal residence in Iceland at the time the petition for license was filed.

"Background Information

First: The Solicitor..., in representation of Mr. L. R., filed a petition for the 'exequatur' of the 28 April 1987 Resolution delivered by the Ministry of Justice and Ecclesiastical Affairs of Iceland by virtue of which a license was granted for the common aceord divorce between her client and Ms. Dianna B. The divorced couple had contracted matrimony in Granada, Spain, on 20 December 1983 and the act was registered in the Spanish Civil Registry.

Second: The two spouses were both Spanish and residents in Spain. At the time that the request for the divorce license was filed before the authorities of Iceland, they were both residents in that country; at the time that justice was requested from this Court, the petitioner was Spanish and resided in Spain.

(...)

Legal Grounds

First: Given that no treaty exists with Iceland regarding the recognition and enforcement of sentences, The general regime of Art. 954 *LECiv* should be applied since there is no evidence of negative reciprocity (Art. 953 *LECiv*).

Second: The sentence is proven to be enforceable in accordance with the law of the State of origin. The effective nature of the sentence, the 'exequatur' of which is being sought, is called for, regardless of the recognition regime applied, by Art. 951 of the *LECiv* – with regard to this issue the conventional regime is not the only one relevant if read together with the following precepts – and reiterated doctrine handed down by this Court.

Third: Requisite number 1 of Art. 954 *LECiv* should be considered fulfilled by virtue of the personal nature of the divorce proceeding.

Fourth: With respect to requirement number 2 of that same Art. 954 *LECiv*, it has been proven that the request for the divorce license was made by common accord by the two spouses.

Fifth: With regard to requirement number 3 of the above mentioned Art. 954 of the *LECiv*, conformity with Spanish public order (from an international

perspective) is complete: Art. 85 of the Civil Code recognises the possibility of divorce regardless of the form or the time when that marriage was contracted. Furthermore, the fact that the resolution the exequatur of which is being sought was delivered by the Ministry of Justice and Ecclesiastical Affairs of Iceland should not be considered an obstacle to recognition in light of the nature of the decision delivered in the course of public functions and therefore by 'imperium' authority in accordance with the regulations of that country, just as this Court has had the opportunity to state in the resolution of similar cases (see AATS of 18 April 1998, Case 3525/1997).

Sixth: The authenticity of the resolution, proof of which is required by Art. 954.4 of the *LECiv*, is guaranteed by the legal nature under which the proceedings took place as verified by court files.

Seventh: There is no reason to believe that the international judicial jurisdiction of the Courts of Iceland was the result of the parties' fraudulent search for a forum that would meet their particular needs (Arts. 6.1.4 of the Civil Code and 11.2 LOPJ [RCL 1985\1578, 2635 and ApNDL 8375]); Art. 22.2 and 3 LOPJ does not make any provision for courts of exclusive jurisdiction as does Art. 22.1 of the same Organic Law but the case at hand does not include the determining factors in favour of the Spanish courts. Quite to the contrary, there are connections that must be recognised such as the couple's legal domicile in Iceland at the time that divorce proceedings were initiated before the authorities of that country. These reasons support the jurisdiction of the courts of origin and therefore exclude the possibility of fraud with respect to the law applied to the merits of the case, an issue related to the above.

Eighth: There is no evidence of contradiction or material incompatibility with a judicial decision or pending lawsuit in Spain".

– ATS of 20 January 1998 (Civil Court) (RJ 1998\2667)
Divorce granted by Cuban Notary Public: mutual accord of the spouses authorised in the presence of a Notary Public: no evidence of violation of Spanish public order.

"Background Information

First: The Solicitor..., in representation of Mr. H. M. and Ms. P. P., filed a request for the exequatur of the 1 September 1997 document sealed by the Notary Public in the city of La Havana, Cuba, Ms. Olga Lidia Pérez Díaz, by virtue of which a mutual accord divorce was granted to the two spouses. The original marriage ceremony was celebrated in La Havana, Cuba, on 3 July 1996 and was entered into the Spanish Civil Registry.

Second: At the time of the marriage the husband was Spanish while his wife was Cuban and they were residents in Spain and Cuba respectively. At the time that divorce proceedings were filed in Cuba they were Spanish and Cuban nationals; when they requested justice before this Court the spouses were Spanish and Cuban and both resided in Spain.

(...)

Legal Grounds

First: Given that no treaty exists with the Republic of Cuba regarding the recognition and enforcement of sentences, The general regime of Art. 954 *LECiv* should be applied since there is no evidence of negative reciprocity (Art. 953 *LECiv*).

Second: The sentence is proven to be enforceable in accordance with the law of the State of origin. The effective nature of the sentence, the 'exequatur' of which is being sought, is called for, regardless of the recognition regime applied, by Art. 951 of the *LECiv* – with regard to this issue the conventional regime is not the only one relevant if read together with the following precepts – and reiterated doctrine handed down by this Court.

Third: Requisite number 1 of Art. 954 *LECiv* should be considered fulfilled by virtue of the personal nature of the divorce proceeding.

Fourth: With respect to requirement number 2 of that same Art. 954 *LECiv*, it has been proven that the request for divorce was made by common accord by the two spouses.

Fifth: With regard to requirement number 3 of the above mentioned Art. 954 of the *LECiv*, conformity with Spanish public order (from an international perspective) is complete: Art. 85 of the Civil Code recognises the possibility of divorce regardless of the form or the time when that marriage was contracted. Having reached this point, however, it is important to point out that a divorce by mutual accord authorised before a Notary Public could lead to a violation of public order. In decisions delivered on 1 October and 19 November 1996 by this Court, all doubts were removed regarding whether this type of divorce could be upheld. In accordance with Cuban law it seems that the role played by the Notary Public is not limited to emitting certifications or to authorising mutual dissent regarding matrimonial ties. His competencies include the verification of certain conditions which must be met in order to obtain a divorce and issues related to minor children born of the couple. This is all within a defined proceeding to which, from a preceptive point of view, requests for divorce by mutual accord must adapt. It should be indicated, however, that this notarial intervention implies a certain degree of homologation of the will of the parties extracted from the original legal system that grants Notary Publics what appears to be exclusive authority in this area. It therefore cannot be argued that a divorce obtained in this manner is contrary to internal public order. This concept has been developing and has finally attained constitutional recognition, comprehensive of legal principles and constitutionally protected rights (SSTC 54/1989 [RTC 1989\54] and 132/1991 [RTC 1991\132], among others), which allows for the recognition of the notarial document granting divorce in line with the position maintained by this court in cases in which, like this one, no jurisdictional institution intervenes but rather the decision is taken by a different ranking authority or civil servant with jurisdiction in accordance with the legal system at origin (see AATS 2 July 1996, 16 July 1996, 19

November 1996, 4 February 1997 and 24 June 1997).

Sixth: The authenticity of the resolution, proof of which is required by Art. 954.4 of the *LECiv*, is guaranteed by the legal nature under which the proceedings took place as verified by court files.

Seventh: There is no reason to believe that the parties engaged in a fraudulent search for a forum that would meet their particular needs in light of the wife's nationality and the place where the wedding was held. These reasons exclude the possibility of fraud with respect to the law applied to the merits of the case, an issue related to the above.

(...)".

– SAP Alicante 27 November 1998 (AC 1998\2245)

Applicable legislation: separation: both spouses of German nationality: application of German law: lack of accreditation: error on the part of the instance judge who should have dismissed the case without altering the personal law of the litigants.

Note: See VI

– SAP Barcelona 15 September 1998 (AC 1998\1948)

Applicable legislation: divorce: both spouses of Chinese nationality: need for allegations and proof provided by the complainant of the law in force in the Republic of China regarding these issues: impossible for the parties to renounce their nationality and inability of the Spanish court to remedy the lack of allegation through application of Spanish law: public order issue: *ex officio* assessment of the violation of the legal principles in play.

"Legal Grounds:

First: The judgement delivered by the Instance Court granting the divorce of the litigants is now the object of an appeal filed by the complainant who has requested the revocation of that sentence with regard to the measures regulating the complementary effects of that marital crisis. The representative of the accused as well as the Public Prosecutor requested confirmation of the Instance Court's ruling.

Second: Prior to issuing an opinion on the pretensions contained in the appeal filed by the complainant, the Court feels that it is necessary to take a stand on the essential issue of public order and analyse and identify the legislation applicable to the object of the litigation in light of the fact that the Spanish legislation on marital status was invoked by the complainant and applied by the Instance Judge but the circumstances show that both litigants are of Chinese nationality.

Although it is true that in the assignation of jurisdiction the conflict regulation applicable is that of Spain in accordance with Art. 12.1 of the Judiciary's Organic Law (RCL 1985\1578, 2635 and ApNDL 8375) in relation with Additional Provision 3 of Law 30/1981 of 7 July (RCL 1981\1700 and ApNDL 2355) attributing jurisdiction in the case of separation and divorce

litigation to the Spanish courts as long as the habitual residence of the litigants is in our country as is the case here, in the case of litigation on marital status, both with regard to separation as well as divorce and their effects, when the spouses share the same nationality it is their national legislation that prevails in accordance with Art. 107 of the Civil Code.

As a consequence of the above, the invocation made by the complainant of Spanish law and its application by the Instance Judge is in violation of the principles and regulations of private international law in force in Spain. It is incumbent upon the complainant to present allegations and show evidence of the applicable Chinese law in the absence of which it is impossible to deliver a judgement because the identification of the applicable law is an issue of public order which cannot be renounced by the parties nor is it within the power of the Spanish Court to remedy this lack of allegation by applying the Spanish law and in the event that a judgement were issued, it would lack judicial enforcement in the country where the litigants' marriage is registered.

According to Civil Code Art. 12, it is incumbent upon the party filing suit to accredit both the content and period of legal enforcement of the foreign law by making use of evidence permitted under Spanish law and although the Judge could make use of all the fact-finding instruments deemed necessary, that nature of activity must be done during the instance stage both with respect to the identification of the specific regulation applicable and its period of enforcement as well as to the hearing to determine the equivalency of the institutions in that country with those provided for under the Spanish legal system or the weighing of the subjection to the foreign regulation to public order, granting the parties the possibility of making allegations and providing proof regarding the issues outlined above.

Given that the complainant failed to take action in compliance with the regulations governing private international law referred to in this legal ground; and given that the Instance Court Judge also failed to take any initiative whatsoever to remedy that defect in the suit filed, it is lawful to proclaim the ex officio violation of the public order principles listed above and reject the pretension contained in the complaint without prejudice to the right of the parties to take legal action with regard to alimony payments or the resolution of parental custody conflicts as deemed necessary or to take up the suit on marital status invoking and providing proof of the applicable material law.

The rejection of the divorce suit makes it unnecessary to pass judgement on the motives of the appeal presented by the appellant.

(...)".

Note: See also IV.2

2. Natural and adopted filiation

Note: See VII.

3. Alimony

– ATS of 21 July 1998 (Civil Court) (RJ 1998\6249)
Sentence delivered by the Court of the District of Eferding, Austria, on paternity and the obligation to make alimony payments: request cannot be made by exequatur; losing sight of the fundamental issue which is the statement of paternity; accused with legal domicile in Spain.

"Background Information

First: On 24 May 1996, the Technical Secretariat General of the Ministry of Justice, acting as the mediating institution within the framework of the United Nations Convention on the payment of alimony abroad, done in New York on 20 June 1956, presented the Court with documentation from Austria issued by the Federal Justice Ministry of that country acting as the Remitting Authority through which requests are filed, in compliance with the above-mentioned United Nations Convention as well as the Convention between Spain and the Republic of Austria on the recognition and enforcement of resolutions, judicial transactions and public documents with executive authority on civil and trade matters of 17 February 1984, ratified on 1 July 1985 and published in the *BOE* on 29 August 1985, in recognition and enforcement (limited to the part dealing alimony payments) of the 27 May 1991 resolution delivered by the District Court of Eferding, Austria by virtue of which the paternity of Andrés V. H. was declared with respect to the minor Julia P. ordering the father to make 'monthly sustenance payments of S. 1500 as of 19 February 1987 until 28 February 1991 and monthly sustenance payments of S 2630 from 1 March 1991 until which time the complainant is self sufficient.'

Second: The case file includes two reports dated 31 October 1994 and 20 January 1995 issued by the State Public Prosecutor's Office and that are in line with an earlier report issued by that institution on 22 April 1991 – issued in response to two notes of protest received from the Foreign Affairs Ministry of France and the authorities of the Kingdom of Sweden within the framework of the New York Convention on the payment of alimony abroad. The 31 October 1994 report points to 'the difficulties encountered in taking judicial action because, given that paternity is based on a foreign resolution which the accused does not accept, it is first necessary to obtain the exequatur of the sentence which also gives rise to obstacles that are difficult to surmount in light of the fact that the accused was not present (in default) at the hearing at which the judgement was delivered. And subsequently, the 20 January 1995 report indicates that 'in order to judicially deal with the petition for alimony payments it is first necessary to obtain the exequatur of the foreign resolution

on which paternity is based and which the accused does not accept. It should also be pointed out that the Public Prosecutor is not authorised to procure that exequatur without prejudice to the fact that all of the difficulties arising from the procedural situation of default in which the resolution was delivered could be solved by arguing that default was voluntary.'

Third: In a brief dated 6 October 1996 the Austrian Federal Justice Ministry expressed its disagreement with the State Public Prosecutor's Office that maintained that the prior recognition and enforcement of the resolution determining paternity was an indispensable prerequisite in order to issue the recognition and enforcement of the alimony resolution. It affirmed that that conclusion was not drawn from the 15 April 1958 Hague Convention on the recognition and enforcement of decisions on sustenance issues involving minors (Hague Convention number IX) nor was it drawn from the 17 February 1984 Convention between the Republic of Austria and Spain.

Fourth: In a report dated 2 July 1996, the Public Prosecutor's Office expressed the fact that it was impossible, in accordance with our procedural laws, for the Public Prosecutor to seek recognition and enforcement of a foreign sentence because its participation is not foreseen in this domain. Its role is to oversee the request for exequatur formulated by others which means that the proper request is to be made to the court through the intervention of the lawyer and the solicitor (Arts. 3 and 10 of the *LECiv*) and not through a simple announcement sent by the Technical Secretariat General of the Ministry of Justice as has been the case up to now because in Spain it is not legal procedure to initiate judicial activity and there is no reason that the procedural regulations in force should not be upheld (Art. 1 *LECiv*).

Fifth: On 21 October 1996, Court Solicitor Mr. Gandarillas Carmona, in name and representation of Mr. Andrés V. H., appeared in court to initiate these proceedings and filed a suit on 11 November 1996 opposing the exequatur that had been requested allegating, first of all, the lack of competency of the original Court in accordance with Arts. 7 to 10 in relation with Art. 4.2 of the Spanish-Austrian Convention because that Convention was in force at the time that the paternity and alimony suit was filed and it stipulates that the institution authorised to hear the case is the one corresponding to the legal domicile of the accused which at that time was Tossa de Mar, Costa Brava, Spain. Second of all, he claimed defencelessness because he was not summoned or notified in a way guaranteeing that the summons and notification were received by the accused.

Sixth: On 20 January 1997 the Public Prosecutor issued a report against the granting of the exequatur requested in compliance with Art. 5.2 of the Spanish – Austrian Convention on the grounds that the accused did not participate in the original proceedings.

Seventh: By the decision of this Court delivered on 18 March 1997, these case proceedings were sent to the Technical Secretariat General of the

Ministry of Justice in order that the latter address the State's Legal Services in order to request their procedural representation in this case.

Eighth: On 4 May of this year and through proper channels the Treasury Council, duly authorised by the State's Directorate General for Legal Services and upon request by the Justice Ministry's Technical Secretariat General, filed a request with this Court to deliver a judgement declaring the lawfulness of the enforcement of the sentence delivered by the Court of Eferding (Austria) and the subsequent effectiveness of the sustenance payments set forth in that sentence to be paid by the Spanish subject Andrés V. H.

Ninth: On 15 June of this year the Public Prosecutor filed a report that can be summarised as follows: 'Page 28 of these proceedings indicates that prior to the accused's conviction he was personally given a copy of the original suit brought against him that gave rise to the sentence the enforcement of which is now sought. This means that the arguments now being presented through the Solicitor Mr. Gandarillas Carmona could have been made at the proceedings that took place at the Austrian Court and therefore Mr. V. H.'s objections should not be taken into consideration'.

Tenth: The petitioner of the exequatur and complainant in the original lawsuit – in which she was represented by the Local Government Office of Protection for Minors in Eferding – was of Austrian nationality and resided in Eferding, Austria, while the accused, Mr. Andrés V. H., was Spanish and resided in Spain. At the time that the request for justice was filed with this Court, both parties conserved their nationality and residence.

Eleventh: The following documents figure in the case file: duly translated and certified copy of the Austrian Court's resolution. The certification was issued directly by the Court of origin making specific mention that the summons for the original hearing was delivered personally to the accused although notification of the sentence was done by deposit in Court; other documents.

Legal Grounds

First: This proceeding was initiated through a request for exequatur of the resolution of 27 May 1991 delivered by the District Court of Eferding, Austria, which declared the paternity of Mr. Andrés V. H. with respect to the minor Julia P. and obliged the former to make the sustenance payments to his daughter stipulated in that sentence. From the very outset it should be made clear that although the Austrian resolution delivered by the Eferding Court makes a statement of paternity as well as compulsory sustenance payments, it is only with reference to the payments that the Remitting Authority – and therefore the Treasury Council in filing the request for exequatur – requested the recognition and enforcement of the sentence.

Second: An examination of the circumstances surrounding this request for exequatur should, in principle, be done in light of the IX Hague Convention concerning the recognition and enforcement of decisions relating to maintenance obligations towards children of 15 April 1958 (RCL

1973\2051 and NDL 23154 bis), in force in Spain and Austria and not in accordance with the subsequent XXIII Hague Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations, of 2 October 1973 (RCL 1986\2857), on the grounds that it was not ratified by Austria. When it comes to the claiming of sustenance payments, the regulations contained in that conventional text should take precedence over the Spanish – Austrian Convention on the recognition and enforcement of resolutions, judicial transactions and pubic documents with executive authority in civil and trade matters of 17 February 1984, ratified on 1 July 1985 and published in the *BOE* on 29 August 1985 (RCL 1985\2112 y ApNDL 13572) which is also materially and temporally applicable (Arts. 3 and 20) given the specific nature of those regulations and by virtue of the safeguard clause contained in this latter document in favour of other agreements that regulate the recognition and enforcement of judicial resolutions in certain sectors in force between the two parties (Art. 19).

Third: The IX Hague Convention makes recognition subject to the following conditions: control of international legal jurisdiction (Art. 2.1 with respect to Art. 3); safeguard of procedural guarantees in the original hearing (Art. 2.2); the enforceability of the resolution (Art. 2.3); the inexistence of litispendency or resolutions delivered to the same parties on the same subject whether in the requested state or the requesting state (Art. 2.4); respect for public order in the requested state (Art. 2.5); and, finally, the meeting of required formalities (Art. 4). The control of conditions for recognition, however, should not encompass the law materially applied to the merits of the case because this is prohibited by Art. 5 of the XXIII Convention and because this would be determined in this case by the VIII Hague Convention on the Law Applicable to Maintenance Obligations towards Children, of 24 October 1956 (RCL 1974\972 and NDL 19678), in force in both States.

Fourth: An examination of the documentation provided by the petitioner shows that the requirements for recognition, when it comes to a pronouncement on the exequatur request, would be reasonable well met. First of all, along with the request the complainant attached all of the documentation listed in Art. 4 of the IX Hague Convention. The enforceability of the sentence the homologation of which is sought is supported by the documentation on file and the jurisdiction of the original court in cases strictly related to sustenance by virtue of recognition is perfectly clear on the grounds of the Austrian nationality of the minor recipient of the sustenance and her residence in the State of origin and in light of the forum of jurisdiction found in Art. 3.1 of the IX Hague Convention. The applicable requirement in the Spanish – Austrian Convention should also be considered as fulfilled as well in light of its Art. 7, 1, 11 which allows for a special jurisdictional forum when the suit is related to the payment sustenance.

Despite the fact that to this point it seems that the Court of origin does

indeed have jurisdiction, it is in this study of international judicial jurisdiction that the difficulty to the recognition requested is rooted. As was outlined above, in principle there does not seem to be any question regarding the jurisdiction of the District Court of Eferding in the sentencing of Mr. Andrés V. H. to the payment of a stipulated amount for sustenance in the recognition of that pronouncement. Given that the request formulated by the Remitting Authority is a request for partial recognition relative solely to the part of the sentence referring to sustenance, in principle the requested exequatur should be granted. However, in addition to the pronouncement on the payment of sustenance the original resolution contains a statement of paternity that cannot be ignored by the Court especially in light of the dominating nature of that statement and the secondary nature of the obligation to make sustenance payments that is the natural consequence of the determination of the filial relationship, the recognition of which gives rise to an examination of the requirements of international judicial jurisdiction focusing on the main objective of the suit irrespective of the fact that the request for recognition and enforcement made not mention of that statement of paternity but rather exclusively of the sentence to make sustenance payments. This is necessary because there is an expressed accessory relationship between the two pronouncements made by the original Court. This examination should verify jurisdiction in accordance with the internal law in function with the principal action of filiation and not the subordinated action of sustenance and consider that the accused raised an objection in the original proceeding with regard to the assignation of jurisdiction adopting a position of default for reasons of conviction because he was of the opinion that the Austrian Courts lacked jurisdiction to hear a case of filiation. That being the case, the Austrian Court would not be in a position to rule on the payment of sustenance which was a consequence of the prior determination of paternity. To state it in a different manner, for purposes of verifying the conditions for international legal jurisdiction with regard to these proceedings, it is impossible to separate the pronouncement made on sustenance from the principle ruling on filiation because certainly with this requirement the result would be to block access to the resolutions delivered following a fraudulent search for a favourable forum. This Court has also highlighted the link of control that public order from a procedural perspective has in these circumstances because it could permit negating access to court decisions that situate the accused in a position of defencelessness (AATS of 10 December 1996, 16 September 1997, 23 September 1997 and 7 April 1998) or, as is the case here, when defencelessness is the result of dividing the court's pronouncements and presenting them for exequatur in an isolated fashion when the stance taken by the accused in the original suit, when he refused to recognise the jurisdiction of the court, was the result not only of the joint exercise – emphasizing the subordination or accessory relationship – of the filiation and sustenance issues but also and especially of the principal issue in that original hearing. As a result of all of the

above, in accordance with Arts. 7.1.1 and 8.1 of the Spanish – Austrian Convention that is applicable to the examination of the requirements for the recognition of the sentence where paternity is concerned it must be stated that – in light of Art. 1 of the IX Hague Convention – none of the indirect jurisdictional forums envisioned are applicable, either in a general or specific sense, on the grounds of the nationality of the accused at the outset of the lawsuit and his legal and habitual residence in Spain which, in accordance with Art. 2.5 of the IX Hague Convention, now in relation with the Bilateral Convention, means the recognition sought must be denied.

(...)".

– ATS of 30 January 1998 (Civil Court) (RJ 1998\5336)

Foreign sentence: "exequatur": lawful: alimony: judgement delivered in the United Kingdom.

"Legal Grounds

First: The United Kingdom is not party to Hague Conventions numbers VIII and XXIV, both dealing with the law applicable to alimony obligations. It is party, however, as is Spain, to Hague Convention number XXIII referring to the Recognition and Enforcement of Decisions relating to Maintenance Obligations, of 2 October 1973 (RCL 1986\2857) and to the United Nations Convention relating on maintenance obligations of 20 June 1956 (RCL 1966\2107; RCL 1971\2055 and NDL 24802). It is only these two multilateral treaties, therefore, that should be considered in the resolution of this exequatur request.

Second: The object of the above mentioned United Nations Convention, in accordance with its Art. 1, is to provide a person, hereafter referred to as the complainant, residing in the territory of one of the Contracting Parties, with the sustenance that he/she has the right to receive from another person, hereafter referred to as the accused, who is subject to the jurisdiction of the other Contracting Party. This objective will be achieved through the services of institutions referred to hereafter as Remitting Authorities and Intermediary Institutions. As part of this effort to provide alimony sustenance abroad, Art. 6.1 states that the Intermediary Institution, 'within the jurisdictional parameters conferred upon it by the complainant', will implement all of the appropriate measures to obtain alimony payments, even by means of transaction and, if necessary, it is authorised to initiate and follow up on alimony litigation and call for the enforcement of any sentence, decision or other judicial act and to include Art. 5.3 in such initiatives 'in accordance with the law of the State of the accused,' the exequatur among others. Art. 6.3 states that 'despite any provision contained in this Convention, the law applicable to the resolution of alimony suits and to any issue that arises in relation with it, will be the law of the State of the accused, even the Private International Law of that State.' From this it seems that the Convention designates the law applicable to the merits of the case in accordance with the

support given within the very Convention to gain access to the justice system. Even more so when, as is the case here, a petition is filed for the recognition by one State of a sentence delivered by another State and the interpretation is imposed that the reference to the law of the State of the accused is not the law applicable to the merits of the case but rather to the recognition regime set up by the law system of the accused's State with regard to the resolution or sentence in question. In the Spanish legal system, that regime is the one provided for in the above mentioned Hague Convention number XXIII because of the object of the sentence the recognition of which is sought and because it is a sentence delivered in the United Kingdom, a State which is party to that Treaty as is Spain.

Third: With respect to the controls that should be implemented by the requested State for the recognition, the XXIII Hague Convention makes reference to international judicial jurisdiction (Arts. 4.1, 7 and 8), the enforceability of the resolution (Art. 4.2 unless regarding provisionally enforceable resolutions), the absence of procedural fraud in the original proceedings (Arts. 5.2 and 6), the litispendency or resolution already delivered (Art. 5.3 and 4) and formal requirements (Art. 17). There is no impediment whatsoever in this case.

Fourth: With respect to international judicial jurisdiction, it suffices to say – as was stated by the Public Prosecutor – that the British courts have jurisdiction in accordance with Art. 7.1 and 3 (habitual residence in the State of origin of the debtor or the creditor of alimony; expressed or tacit submission) of the applicable Convention.

Fifth: With respect to the law applicable to the merits of the case it should be pointed out that the applicable Convention has no control over this. Art. 12 states that no examination will be made of the merits of the case. It should also be pointed out that the XXIV Hague Convention (in consonance with number VIII) deals with this issue and states that the law applicable to the merits of the case is that of the residence of the creditor of alimony. This reality, if it were not for the above-mentioned fact that this case is not bound by the XXIV Hague Convention, would lead directly to the dismissal of the allegation made by the accused. There is no sign of a fraudulent search for a forum of convenience on the part of the complainant in the original proceeding (Art. 6.4 of the Civil Code) and therefore no claim can be made of fraud with respect to the law applied to the merits of the case (Art. 12.4 of the Civil Code) in so much as this issue is linked to and dependent upon the former. In order to determine the material regulation, the conflict regulation found in Art. 9.7 of the Civil Code is the one which should be applied (which could actually be the British regulation if we had adhered to the precept under examination because the nationality of the minors is not sufficiently proven) by Spanish courts and not foreign ones.

Sixth: With regard to the claim of defencelessness in the original hearing and invoked by the accused in this exequatur hearing, the following

affirmations should be made: a) the resolution asserts that the accused, the complainants and the Public Prosecutor acting as 'curator ad litem' for the minors were all heard during the course of the hearing; b) it appears that the accused recognises that he was aware of the suit filed against him or he at least decided not to appeal the resolution and was cognoscente of the 23 October 1987 judgement (that established the protection of the minors by the British authorities and granted custody to the H. family) the exequatur of which is sought through this proceeding.

Seventh: The proceedings by which recognition should take place, in accordance with Art. 13 of the XXIII Hague Convention, are those set up in accordance with the internal law of the requested State, i.e. Arts. 955 and subsequent of the *LECiv*, the proceeding being thus verified.

Eighth: Art. 14 of the XII Hague Convention allows for partial recognition.

The Court rules as follows: 1.) The exequatur of Resolution number 87 WG 2023 delivered by the Court of the District of Sheffield, United Kingdom on 27 April 1989 sentencing Mr. José C. to make sustenance alimony payments to his children Claire Josie and Jordi C. in the amount of twenty sterling pounds per month for each one of them in accordance with British law is hereby granted. Payments should be made to Mr. George H. and to Ms. Marjorie J.

(...)".

4. Legal kidnapping

– STS of 22 June 1998 (Civil Court) (RJ 1998\4743)

Legal minors: return to a foreign country: lawful: return to Switzerland with their mother who had been granted custody through a separation sentence delivered in that country; contradictory resolutions adopted by the same jurisdictional authority in Spain; Hague Convention: Art. 16.

"Legal Grounds:

(...)

Fifth: This lawsuit deals with the judicial application of the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (RCL 1987\1960; RCL 1989\1442 and RCL 1996\231), with the support of the following background information provided by the Public Prosecutor: The mixed marriage between a Spanish national Mr. José M. R. and a Swiss national Ms. Therese G. after a number of ups and downs ended in the effective break-up with the wife leaving with the two minor children born in May of 1984 and August of 1985. The wife initiated divorce proceedings before the Swiss courts and the case was filed on 19 September 1990 and the husband appeared before the court. The spouses agreed to grant custody of the children to the mother in Switzerland without prejudice to the right to visit the father in Spain. The Civil Court of the Region of Laupen

delivered its sentence on 13 March 1991 homologating the 'agreement' (earlier that very same day the husband appeared before the Spanish Consulate allegating that the Swiss courts did not have jurisdiction and that the Court in question was going to ratify the 'agreement' under coercion). While the divorce proceedings were under way in Switzerland the husband filed a request with the First Instance and Trial Court number 6 in Almeria (the last legal domicile that the couple shared) for very provisional measures prior to filing for separation based on Art. 104 of the Civil Code. The request was rejected by the First Instance Court and this resolution was later upheld by a higher court on 25 May 1991. The children were in Spain visiting their father in accordance with the visiting rights granted him by the Swiss sentence when he retained them there longer than the time allotted to him while he filed a request for separation with Court number 6 in Almeria (31 July 1991) at which time he also requested the custody of the children. On 6 August 1991 the mother requested the immediate return of the children based on the Hague Convention. By virtue of a rota system, First Instance and Trial Court number one of Almería was assigned to the case on 14 August 1991 and on 25 October 1991 this same court delivered a judgement ordering the return of the children. This resolution was appealed and upheld by the Provincial Court in its decision of 24 March 1992. The Public Prosecutor highlighted the fact that the judicial authorities took more than thirty weeks to resolve a request for return based on a Convention that obliges them to act with urgency in these proceedings and furthermore requires that in the event that a decision is not reached within a period of six weeks from the date that proceedings were initiated, the complainant or the central authority of the requested State has the right to request a statement explaining the reasons for the delay (Art. 11 of the 25 October Hague Convention). Although the court decision was made enforceable by the verdict of 21 April 1992, they were not able to adopt the measures necessary to carry it out. In a small provincial capital where the accused has his clinic there were difficulties in serving the summons; one of the minors was not found; the other was taken by the police to Courtroom number one in December of 1992 to be turned over to the Swiss Consul General in Malaga. He was in a psychological state to be expected of five and six year olds who had spent over a year living in this situation. Serious damage was done due to the clearly unnecessary delay in their return. In tandem with the return proceedings, a separate hearing was held in Courtroom number six on provisional measures and a judgement was delivered on 7 July 1992 which granted custody of the children to the father. This judgement was later declared null and void because the Public Prosecutor was not duly informed of the proceedings as called for by Arts. 1897 and subsequent of the *LECiv*. On 11 September 1992 a sentence was delivered by the same Court number six on the separation suit and the petition filed by the father was allowed meaning that the children were to remain in the father's custody. Thirteen months later, on 27 October 1993, a

sentence was delivered by the Almeria Provincial Court upholding the lower court's judgement and making it impossible to enforce the order issued by this same court which allowed the request for return. In Trial Court number three in Almería a preliminary judicial investigation got under way in response to an inference made regarding testimony heard in the First Instance Court of the same capital city in the case dealing with the request for return, for an alleged crime of disobedience with a specification of charges drafted by the Public Prosecutor and dated 2 November 1992. An attempt was also made by the mother of the children to press penal charged against the father for kidnapping but these were dismissed by the Public Prosecutor.

Sixth: Motive number one of the appeal denounces the violation of Art. 16 of the above-mentioned Convention (and therefore infraction of Art. 3 of the Civil Code and Arts. 31 and 32 of the Vienna Convention on the Law of Treaties, of 23 May 1969 (RCL 1980\1295 and ApNDL 13520) and also Art. 1 of the Hague Convention in so far as its final objective is ignored). Art. 16 states that '...the judicial authorities... where the minor has been take or where he or she is illegally being held, will not rule on the merits of the case related to custodial rights until which time it has been determined that the minor must be returned in accordance with this Convention...' The sentence under challenge considers that this precept has been met when it affirms that '... this is what has happened in this case because the fact that this Court has decided on the return of the minors does not preclude the deliverance of a resolution resolving the personal suit filed by a Spanish national residing in Spain with reference to the measures outlined in Arts. 102 and 103 of the Civil Code because given that the Spanish Courts have jurisdiction to hear the marital separation case of a marriage that took place in Spain, Spanish law should be applied in compliance with Art. 107 of the Civil Code, Art. 22 of the Judiciary's Organic Law and Additional Provision One of Law 30/1981 of 7 July. According to this legislation it is incumbent upon the appropriate First Instance Judge to adopt the measures that are outlined in Art. 91. This obligation placed upon the judge, arising from the generic mandate contained in Art. 1.7 of the Civil Code, includes the adoption of measures related to the patria potestas and custody of the children and the visiting schedule of the parents with a view to 'favor filii.' For this reason we can affirm that it is one thing to request the regulation of the spouses and their children's personal relations derived from the marital separation and it is quite another to request the return of minors who had been abducted based on that Convention; a petition that does not require the exequatur of the original sentence granting custody of the minor whose return is sought and of which this Court had knowledge when it ruled in favour of that petition filed by the Swiss authorities on 24 March 1992. This ruling upheld the Court resolution of 25 October 1991 and resulted in the immediate return of the minors David and M.0 R. carried out through the Justice Ministry's Technical Secretary General on 8 August 1991.'

Seventh: The Public Prosecutor is of the opinion that the steps taken by the Court to establish the reach of the precept violate the spirit of the legal regulations set out in Art. 3 of the Civil Code in providing details on the different elements that comprise the hermeneutic operation revealing their 'spirit and final objective' in consonance also with Arts. 31 and 33 of the Vienna Convention on the Law of Treaties that demands good faith and considers the 'objectives and purposes of the Treaty' which could be referred to for complementary interpretation independent of the 'preparatory work' and the 'circumstances of the lawsuit.' The final purpose of the Convention is the 'return of minors' and therefore an interpretation of Art. 16 that, without having returned the minor, despite having agreed to that return and at the same time delving into the merits of the case, implies an obstacle to that final purpose by effectively impeding the return, is in conflict with the above-mentioned hermeneutic criteria all of which support the priority of return regardless of what happens later.

Eighth: The Public Prosecutor goes on to affirm that the Convention's Art. 16 should be interpreted in light of Art. 1 that outlines the Convention's objectives: a) to guarantee the immediate return of the minors who have been illegally moved or retained in any of the contracting States; b) to make certain that visitation and custody rights in force in one of the contracting States is respected in the rest of the contracting States. For that very reason the sentence under challenge is 'off the mark': on the one hand, the Almeria Court accepted the demand for the return of the children filed by the mother because it was determined in the resolution delivered in this proceeding that 'this case comes under Art. 3 of the Hague Convention because the mother was granted custody of her two children in accordance with the divorce sentence delivered by the Swiss Court and the Spanish father's refusal to return the children constituted illegal retention. ...The above mentioned Convention allows the judicial authorities of the requested state to directly apply the legislation and the judicial or administrative decisions of the requesting state regardless of whether they are formally recognised or not in the minor's habitual state of residence without having to resort to specific procedures for the recognition of foreign judicial decisions (Convention Art. 14). Furthermore, the court record shows that the father of the children consented to the agreement which determined the judicial resolution on the divorce and which granted the mother custody of the children. And to conclude, the resolution under appeal (that called for the return of the children to Switzerland) was upheld because it met the requirements set out in the Convention... and none of the causes for denial outlined in Arts. 12 and 13 were present (ruling of 24 March 1992). In addition, the same jurisdictional institution ruled on the request for marital separation filed by the father of the children and one of the accessory pretensions of that suit was the custody of the children in the sense indicated above and for the reasons already stipulated in the sentence under challenge. In summary and in plain words, the same jurisdictional institution rules in one

proceeding that the children must return to Switzerland to be with their mother because she is the spouse who was granted custody in accordance with the Swiss sentence and then turns around and rules in another proceeding that the children should remain in Spain with their father because he should be granted custody. The interpretation of Art. 16 of the sentence under challenge is in conflict with the hermeneutic regulations expressed and with the real purpose of the Hague Convention which is very clearly expressed in its Art. 1.

Ninth: Undoubtedly the Court's interpretation, regardless of its efforts to justify its ruling, has fallen into a literal and isolated examination of Art. 16 of the XXVIII Hague Convention and this has given rise to impediments in applying the spirit of the Convention which is first and foremost the return of the minor illegally taken from the parent who had been granted legal custody in this case by the judicial authorities of the State in which the minor was residing at the time of the illegal retention; and this is without prejudice to the later decisions that could be adopted on the merits of the case and which would be enforced, if need be, in accordance with the applicable rules of international judicial cooperation. These criteria lead us to allow the motive.

Tenth: In line with this same reasoning, it is also in accordance with the law to allow the third motive of the articles that invoke infraction of Art. 24.1 of the Spanish Constitution (RCL 1978\2836 and ApNDL 2875) and Art. 13.1 of this same text because the sentence under challenge does indeed violate the principle of effective protection with regard to the mother of the children, petitioner for their return, because that sentence effectively blocks the enforcement of the earlier enforceable sentence delivered in that proceeding in her favour, enforcement of which makes the sentence under appeal impossible. We therefore find ourselves before an enforceable resolution handed down by a Spanish judicial institution in an appeal proceeding and which has not been enforced nor can it be enforced due to the sentence delivered by the same jurisdictional institution at the separation proceeding. It should not be forgotten that the principle of effective protection not only implies the right to a sentence based on legal grounds buy also the enforcement of that sentence when it is indeed enforceable. The Constitutional Court has stated time and again that the right to the enforcement of sentences in their own terms is part of Art. 24.1 of the Spanish Constitution (Sentence 148/1989 [RCT 1989, 148]). If this were not the case, the judicial decisions and the rights acknowledged by those sentences would be nothing more than mere statements of intention with no practical or effective applicability whatsoever (Sentence 167/1987 [RTC 1987\167]). Along these same lines we have Sentences 152/1990 (RTC 1990\152), 35/1994 (RTC 1994\35) and many more.

Eleventh: As a consequence of all of the above and allowing the Supreme Court appeal in interest of the law, in conformance with the motives upheld, the following doctrine applicable to similar situations should be adopted: a) The interpretation of the frequently cited Art. 16 by the appealed sentence is

erroneous because of its absurd nature and the fact that it is in direct conflict with the intended purpose, the historical and legislative background and the preparatory work of the Hague Convention (Art. 1), the Vienna Convention (Arts. 31 and 32) and the Civil Code (Art. 3). b) The correct interpretation of that precept, in compliance with these hermeneutic regulations, means that the judicial authorities of the requested contracting State cannot take decisions on the merits of the case, minor protection law, until which time it has been determined that the conditions set out in the Convention for the return of the minors do not exist. c) That sentence was an impediment to effective protection of the mother (Art. 24.1 of the Spanish Constitution), to the fundamental right that the Constitution's Art. 13 guarantees to foreigners 'in the terms established in treaties and laws', making it impossible to carry out an enforceable sentence in her favour upon confirmation of the first instance sentence delivered in the separation proceeding. The interpretation of the appealed sentence leads to a result which is fraudulent under law and intolerable in light of Civil Code Art. 6.4 and especially Art. 11.2 of the *LOPJ*. The suit filed for separation by the father and his overall procedural conduct indicates bad faith, an unfair ploy the intention of which is to breach the regulation and gives rise to a failing to meet the legal responsibility to remain obedient to the regulations and the appealed sentence has achieved its objectives.

Twelfth: The fact that res judicata does not allow modifications does not mean that those who have suffered damages as a result of this case cannot take the corresponding legal action to obtain compensation in accordance to the responsibilities that are determined.

For all of the above and in the name of the King and by virtue of the authority invested in me by the Spanish people and their Constitution:

Verdict

The Constitutional Court Appeal filed by the Public Prosecutor against the sentence of 27 October 1993 delivered by the Provincial Court of Almeria case number 177/1993 heard in First Instance Court number 6 of Almeria filed by Mr. José M.0 R. A. against Ms. Therese G. and the Public Prosecutor is hereby admitted. As a result, we hereby state that the appealed sentence should have interpreted Art. 16 of the Hague Convention on the abduction of minors in harmony with legal ground eleven; court costs not designated. The corresponding certification should be forwarded to the above mentioned Court along with the appeal file".

XI. SUCCESSION

– SAP Lugo, 29 April 1998 (AC 1998\4708)

"Declaratory Act of multiple heirs" authorised in Cuba; the person who died was a Spanish national: valid: there is no impediment to carrying out personal

law regardless of the fact that the declaration was made in another country and in conformance with that country's procedural regulations.

"Legal Grounds

First: The lack of active legitimation, already rejected in the First Instance Sentence, is the fundamental issue of the appeal to such a degree that during the course of the visit this was the only issue dealt with by the petitioner. His argument was not as effective as he would have liked, however, because a solid base on which to support the exception was not established. This exception is based on the allegation that the 'declaratory act of multiple heirs authorised in Cuba on 27 March 1995 lacks validity in light of the fact that since the decedent was a Spanish subject, his declaration of heirs should have been done, in accordance with Art. 979 of the *LECiv.*, i.e. at the last legal domicile that he had in Spain. This interpretation cannot be accepted, however, because this precept exclusively applies to cases in which, through a notarised act, the declaration of heirs is done here instead of at any number of possible places. This regulation, however, does not imply that having died in a foreign country, he is not free to make that statement in that country. This is therefore not an infraction of Civil Code Art. 9 where it states that personal law applicable to natural persons is determined by one's nationality and that this law controls, among other things, succession following death. A different procedure from the one used in Spain was employed in drawing up the statement of heirs and logically it was the Cuban procedure through which the spouse and children are declared heirs. Spanish legislation provides for this same condition so the result would have been exactly the same had he made the declaration is Spain. For this reason the declaration made in Cuba, an authenticated copy of which appears in the court file, should be considered perfectly valid and enforceable. This document meets all of the applicable requirements made by our legislation for foreign documents (Art. 600 of the *LECiv.*) and since those that filed the suit in the name of the whole group are the heirs, there can be no doubt as to its active legitimation and the exception should therefore be rejected."

XII. CONTRACTS

Note: See IV.1

XIII. TORTS

XIV. PROPERTY

XV. COMPETITION LAW

XVI. FOREIGN TRADE LAW

– RDGRN of 25 August 1998 (1998\6586)

Foreign investment: Requirements: investor not a resident of Spain: accreditation through certification of non-residence issued by the Ministry of the Interior: exceptions. Property register: inscription: sale: Propriety: carried out by a non-resident: statement of his status as a non-resident and documentary accreditation of his status as a foreign subject.

"Facts

First: By virtue of a public document authorised on 22 June 1994 by the Notary Public of Carboneras Mr. José María C. C., Ms. Francisca J. F. sold an undividable half of a lot in Mojácar to Ms. Ginesa N. J. The public document shows that the buyer is of French nationality, resides in Mojácar, Cañada Aguilar and has French I.D. number ... She later stated that she was not a resident and accredited her nationality with the above mentioned documentation and also stated that there was an urgent need to carry out this transaction. Form MC-3A (statement of foreign investment in real estate) was attached to this public document.

Second: After a copy of the public document was filed in the Vera Property Registry, it was sent back with the following note: 'This document cannot be registered due to the following repairable errors: First: The deed was granted without having accredited the residency of the buyer who is of French nationality. Due to reasons of urgency, the deed was not accompanied by justification of her non-residence in order to be entered into the ledger of the property registry which is required in accordance with Art. 17.1 of Royal Decree 671/1992, of 2 July (RCL 1992\1510), on foreign investment in Spain. In the event that she is a resident as she stated at her appearance and on form M-C-3-A, that status has not been accredited either - Art. 2 of Royal Decree 1816/1991, of 20 December (RCL 1991\3013); Art. 17 Royal Decree 671/1992 of 2 July and the Instruction of the 26 October 1992 Resolution delivered by the Directorate General for Foreign Transactions. Second: On thc third line of section one a section of text that could affect the description of the lot is scratched out and must be remedied - Art. 26 of the Notary Law (NDL 22306) and 152 and 243 of the Notary Regulation (RCL 1945\57 and NDL 22309). Third: The legal domicile of the buyer is not expressed with sufficient clarity to justify the registry change with respect to her former domicile, indicating legal domicile in France but in the former deed it seems that she resided in Mojácar and in her appearance and on form M-C-3-A the buyer stated that she was not a resident. On the letter of delegation it states that she is temporarily residing in Mojacar - Articles 9 and 18 of the Mortgage Law (RCL 1946\342, 886 and NDL 18732), rule 9 of Art. 51 and Art. 98 of the Mortgage Regulation (RCL 1947\476, 642 y NDL 18733). A preventive note of suspension was not taken because it was not requested. Vera, 28 July 1994 – The Registrar. (illegible signature)

Third: Mr. José María C. C., the Notary Public who authorised the deed, filed a governmental appeal in response to this note of rejection and based it on the following: The deed clearly shows that the buyer is not a resident; with regard to the need to accredit this non-residency status in accordance with Art. 17.1 of Royal Decree 671/1992 of 2 July, there are exceptions. The 26 October 1992 resolution admitted that for reasons of urgency the transaction could be formalised even though at the time of registration there was no certification of non-residence as long as the investor makes a statement of his status as a non-resident and provides accreditation of his nationality with proper documentation. These circumstances will be taken down by the Notary Public and will figure on the public document and will also be reflected in the statement to be sent to the Foreign Investment Register. This is independent of the obligation that the investor has to obtain that certification and send it to the Directorate General for Foreign Transactions. The final part of the first note does not merit any consideration but mention should be made of the fact that non-residency status for investment purposes is not accredited by a simple statement made by the issuer of the credential; the requirements set out by the Registrar must be met. With respect to the note's second point there is an undeniable scratch out in the copy which was a result of the urgent nature of the transaction however, in accordance with Art. 243 of the Notary Regulation, this error should be ignored and the lot would then remain with the description contained in the former deed. The description of the lot would not be affected in the least and in fact the former deed was registered without even containing the municipality where the lot was located. With regard to point number three, the Mortgage Law makes no mention in the precepts cited of legal domicile and Rule number nine of the Regulation's Art. 51 states that it must be stipulated if it indeed appears on the deed but it does not say that in the case of a change of domicile inscription will be refused. In reference to the alleged lack of clarity regarding this legal domicile, our attention must be turned to Art. 2 of the above-mentioned Royal Decree 671/1992 from which it can be deduced that investors may have their main residence established abroad and another domicile in Spain; a right that seems to be supported by Art. 13.1 of the Constitution (RCL 1978\2836 and ApNDL 2875).

Fourth: In his report the Registrar assumes that the defects highlighted in his note are the result of contradictions contained in the document to be registered, of additional notes and entries in the register and doubts about whether the buyer is or is not a resident, a situation that does require justification. The documents indicate that in the letter of delegation she figures as a temporary resident of Mojácar and in the deed, having stated that she was lived in that town, affirmed that she was not a resident. This alleged contradiction obliged the Registrar, in compliance with Art. 17 of Royal Decree 671/1992 of 2 July to ask for justification of this situation. In the statement form filled out and filed at the Foreign Investment Register,

although this is not a registrable deed nor can it be presented as evidence, does contain relative information and in this case Spain figures as the legal domicile which is contrary to what was stated. Section 3 of Instruction 7 of the 6 July 1992 Resolution of the Directorate General for Foreign Transactions stipulates that the circumstances surrounding a declaration of non-residency must figure in the statement and this is what is lacking in this case thus giving rise to doubts regarding residency. This same resolution authorises execution of the public document without accrediting non-residency status exclusively in the case of urgency but says nothing of the inscription of that document and it should therefore be assumed that justification is needed for that inscription. With regard to the second effect of the note it should be kept in mind that what has been judged is the copy of the deed and not the original and the scratch-out is on the copy. The fact that the property is identified in identical terms and assuming that the scratched out words do not exist and considering that the original deed was inscribed without this information, does not eliminate the existence of a defect in the document which, in accordance with notary legislation, is a breach of formality. With regard to the last defect, Art. 51.9 of the Mortgage Regulation states that the domicile should appear on the document 'along with the circumstances supporting it' and in this case the Registrar, in light of the letter of delegation that was issued just five days prior to the deed and which indicates that the buyer is a 'temporary' resident of Mojácar, the former inscription indicating domicile in France and finally the domicile that figures on the deed itself, all leads to confusion that requires proper clarification. While recognising the fact that a non-resident may establish a second residency in Spain thus constituting both domiciles, legal domicile implies habit or permanence that is not attributable to a person who resides 'temporarily' in a given place. According to Civil Code Art. 40, legal domicile implies habitual residence and although this residency may be established through a simple statement, this case presents doubts as to whether the alleged domicile is actually a habitual residence or whether it is merely temporary; whether foreign residency is maintained and Spanish residency solely for the purpose of receiving notifications.

Fifth: The President of the Superior Court of Justice of Andalusia delivered a judgement dismissing the appeal but based his decision exclusively on the first of the defects: the buyer's failure to accredit non-residency status.

Sixth: The petitioner appealed this judgement focusing particular attention on having met the requirements set out in Art. 17 of the 2 July Royal Decree 671/1992 with regard to the Directorate General for Foreign Transactions Resolution of 26 October of the same year.

Legal Grounds

In light of Arts. 2 and 17 of the 2 July Royal Decree 671/1992 on Foreign Investment in Spain; Rule 7.3 of the 6 July 1992 Instructions from the Directorate General for Foreign Transactions and the 18 January 1995 Resolution (RCL 1995\189):

First: Although the Registrar's note indicated three defects all of which are under appeal, this particular appeal applies to the ruling which dealt exclusively with the first and made no mention of the other two. Since the petitioner filed an appeal against that judicial decision and failed to reiterate her opposition to the other defects which were left unresolved and were not even alluded to in that pronouncement, focus will be placed exclusively on the issue to which the appeal refers.

Second: The defect on which this debate focuses is similar to an issue resolved by a Resolution delivered on 18 January 1995. That resolution stated that the qualification of an investment as foreign is based on the residence of the investor and not his nationality. This fact led to Art. 17 of the 2 July Royal Decree 671/1992 on Foreign Investment in Spain which made it compulsory for both Notary Publics, responsible for the execution of the investment transaction, and Property and Business Registrars to control the legality of these transactions by requiring the non-residency status of the investor in Spain. In compliance with Art. 2 of the above-mentioned Royal Decree, this control is carried out in accordance with Art. 2.4 of Royal Decree 1816/1991 that, as far as natural persons are concerned, states that non-residency is justified through a negative certification issued by the Ministry of the Interior no more than two months prior to the transaction.

The problem with this system is the amount of time that it normally takes for this certification to be issued, on occasion incompatible with the urgency of the situation. This led the Directorate General for Foreign Transactions to modify the process in its Resolution of 26 October 1992, Rule 7.3 of the 6 July Instructions permitting execution of the foreign investment transaction for reasons of urgency on the condition that the investor make a statement of his condition as a non-resident and acquired his foreign nationality by presenting appropriate documentation. Formal accreditation would remain compulsory but could be presented at a later date to the Directorate General for Foreign Transactions.

From all of the above it can be deduced that under such circumstances the authorisation of the document as well as its inscription in the Registry is justified because the dispensation from the non-residency justification should be all inclusive. This justification which became the responsibility of that Directorate General and in light of the fact that sanctions for infractions of the applicable regulations regarding foreign investment are found in Law 40/1979 of 10 December (RCL 1979\2939 and ApNDL 9830), on the legal regime for change control no longer has the validity and enforceability of acquisition business. Furthermore, there is no regulation authorising Registrars to qualify the level of efficiency of the Notary Publics in carrying out their duty to channel information to the Foreign Investment Register regarding the investment made or its content.

XVII. BUSINESS ASSOCIATION AND CORPORATION

XVIII. BANKRUPTCY

XIX. TRANSPORT LAW

XX. LABOUR AND SOCIAL SECURITY LAW

– STSJ Andalusia, 4 December 1998 (AS 1998\7685)
Applicable legislation: A worker was hired and worked in the country of his nationality. Labour jurisdiction: incompetence.

"Background Information

First: According to the court record, a suit was filed by Mr. Mohammadi B. M. for disability against the National Social Security Institute, 'Vascongadas de Seguros y Reaseguros', the General Social Security Treasury, the Public Prosecutor's Office and 'Union y el Fenix.' A judgement was delivered by the Court of reference on 5 March 1998 in the terms found in the enacting terms.

Second: The above-mentioned sentence lists the following proven facts:

I. According to a statement made by the complainant, he worked for the period of time indicated in the suit for the mining company 'Compañía Española de Minas del Rif, SA' in the exploitation of iron ore mines that this company has in the town of Uizan in the Kingdom of Morocco, situated in the area assigned by the Algeciras Conference to the Spanish Protectorate.

II. The 'Compañía Española Minas del Rif, SA' carried out its economic activity until 1961 when the Moroccan company 'Seferif' took over operations.

III. The Spanish Protectorate in the Kingdom of Morocco came to a conclusion by virtue of the Joint Spanish-Moroccan Declaration of 7 April 1956.

IV. The complainant filed for permanent disability resulting from an illness related to his profession. This request was denied by a resolution delivered by the Provincial Directorate of the National Social Security Institute.

V. Prior claim was also denied.

VI. The complainant is a Moroccan national and resides in the Kingdom of Morocco.

Third: An appeal for reversal was filed by the complainant against that sentence. The case file was received in this Court which arranged for a study and subsequent resolution.

Legal Grounds

The complainant filed suit for permanent total disability compensation applicable to all professions or trades or, collaterally, total disability with regard to the habitual profession resulting from an illness related to his profession against the Managing Entity of the INSS (National Social Security Institute), the TGSS (General Social Security Treasury), the 'Compañía Vascongada de Seguros y Reaseguros, SA', the 'Union y el Fenix Español, SA and the Public Prosecutor's Office.

The Social Court delivered a judgement allowing the exception of lack of jurisdiction invoked by the eo-defendants and rejecting the lawsuit and advising the complainant of the possibility of exercising his rights within the legal jurisdiction of the Kingdom of Morocco.

The complainant filed an appeal for reversal against that judicial resolution based on one single motive in accordance with section a) of Art. 191 of the Labour Procedure Law (LPL) (RCL 1995\1144 and 1563), with a view to situating court proceedings to a former point in time when the alleged violation of procedural regulations or guarantees leading to a condition of defencelessness were committed, denouncing the infraction for failure to apply number 3 of Art. 25 of the LOPJ (RCL 1985\1578, 2635 and ApNDL 8375), in harmony with number 2, a) of Art. 10 of the LPL and Art. 24 of the Spanish Constitution (RCL 1978\2836 and ApNDL 2875), requesting recognition of Spanish jurisdiction and pronouncement on the merits of the case raised during the course of the lawsuit.

Given that the judgement delivered by the Instance Court declared a lack of jurisdiction, an exception provided for under Art. 533.1 of the *LECiv.* (which has a supplementary application), and considering the nature of the necessary law and the character of public order required by the subject of jurisdictional competency for the study and judgement of specific litigation, the Court should proceed to carry out a prior and preferential study and with this end in mind it is authorised to analyse the entire array of allegations and evidence without having to address the specific motives, arguments and reasoning that appear in the appeal for reversal; nor does it have to address the factual premise verified by the 'a quo' judge although it does accept the integral judicial version of the facts given that it complies with the evidence heard during the course of the hearing and represents a joint, reasoned and sound estimation of those facts.

It should be considered that in the Spanish Social Security legal system the general regulation dealing with conflicts regarding social benefits is set out in Art. 2, b) of the Consolidation of the Labour Procedure Law ratified by legislative Royal Decree 2/1995 of 7 April, proclaiming the competency of the jurisdictional institutions of the Social Order in Social Security matters including unemployment benefits. This is closely linked to Art. 25.3 of the 1 July Organic Law 6/1985 of the Judiciary which states that in Social Order, the Spanish courts and tribunals have jurisdiction in Social Security issues

related to Spanish entities, institutions, or those that have their legal domicile, agency, delegation or any other type of representation in Spain.

In principal therefore, the hearing of and resolution of a case regarding a Social Security benefit regulated by the Spanish system and under the auspices of a Spanish Social Security Agency is attributable to Spanish tribunals; a fact which negates any pronouncement regarding lack of jurisdiction. This does not necessarily mean the allowance of the request because the pretension could be acceptable or unacceptable in a court of law. Therefore the social benefit may or may not payable by the Managing Institution or the entity legally responsible.

This, however, is not the essence of the problem because the claim that the complainant filed with the National Social Security Institute (*Instituto Nacional de Seguridad Social* – INSS) requesting permanent and total disability resulting from an illness related to his profession cannot be either granted or rejected through administrative channels due to reasons of formality. The agreement with the Spanish Social Security Agency is based exclusively on the fact that: 'Since there are no antecedents in the Spanish social security system, the CEI does not get involved in the assessment of possible disability.' Therefore, the total absence of data or information in Spanish Social Security Agencies that could support the existence of a legal relationship involving the social security system justifies the INSS's decision that implicitly presupposes its abstention or refusal to respond because it does not participate in the assessment of an alleged disability. This fact makes it necessary to go back to the legal labour relationship and the ensuing application of the regulation found in number 1 of Art. 25 of the LOPJ which states that the Spanish social order courts and tribunals have jurisdiction regarding issues on the rights and obligations derived from a work contract when the services are rendered in Spain or the contract was concluded in Spanish territory, when the accused has legal domicile in Spanish territory or an agency, branch office, delegation or any other representative office in Spain and when the worker and the entrepreneur are of Spanish nationality regardless of where the services were rendered or the contract concluded. What this means is that the LOPJ makes business arrangements between Spaniards, between foreigners and between Spaniards and foreigners subject to the territorial jurisdiction of Spanish laws as regards acts or contracts concluded or developed in Spain. This therefore also means that the Spanish courts and tribunals do not have jurisdiction to hear and deliver judgements in those cases in which services are rendered by a foreign worker in a foreign country. This summary covers in a logical and coherent manner all of the implications and obligatory derivations of a work contract including those relative to the Social Security Regime.

Having established the above parameters, in order to gain a clearer perspective and to better judge and solve the issues of this case, it should be pointed out that jurisdiction is the discretionary authority emanating from

state sovereignty and exercised exclusively by independent courts and tribunals predetermined by law to carry out that law in each specific case, delivering judgements and enforcing them. Both Art. 117.3 of the Spanish Constitution as well as Art. 2.1 of the LOPJ both basically state that the exercise of jurisdictional authority through the deliverance and enforcement of judgements is the exclusive domain of courts and tribunals established by laws and in international treaties in accordance with the regulations concerning jurisdiction and procedure set up under the laws.

Given, therefore, that jurisdiction is a derivation of State sovereignty, the judicial institutions by means of which each State organises its legal system cannot, due to lack of delegated sovereignty, invade the jurisdictional territory of the institutions of another State in the same way that they are obliged to hear all cases within their jurisdiction by legal mandate of national laws or applicable Community or international regulations. In the event that they did encroach upon another state's jurisdictional area it would be considered an abusive or excessive exercise of jurisdictional authority when the case is assigned by another legal system by legitimate authority and means.

By virtue of the above, the application of Moroccan law should be considered proper and Spanish jurisdiction should be excluded given that the worker is a foreign national (Moroccan) and that he was hired and worked in a foreign country of his nationality and residency (Morocco). The laws of the Kingdom of Morocco should therefore prevail with regard to all of the rights, obligations and consequences of those laws regarding labour issues as described in the work contract and regarding social security benefits available to all employed workers. The present controversy, however, is expressly excluded from the jurisdiction of the Spanish courts and tribunals and it really makes not difference whatsoever the jurisdiction under which a benefit regulated by the Spanish social security system or the Spanish Social Security Agency falls because these are two theoretical elements that do not go beyond 'nomen iuris', because the circumstances of this case do not warrant the authority of the Spanish social order legal institutions.

It is also completely irrelevant to base the application of Spanish law over Moroccan law (with the corresponding legal jurisdiction) on the affirmation made in the lawsuit that during a certain period of time the complainant worked for a Spanish company. The truth of the matter is that the Spanish Protectorate in the Kingdom of Morocco ended with the Joint Spanish-Moroccan Statement of 7 April 1956 (RCL 1957\299 and NDL 19483), meaning that the complainant only worked for the Spanish company until 1961 at which time the activity was taken over by a Moroccan company. Furthermore, the social as well as the penal laws are governed by the principle of territoriality and are in force in national territory in accordance with Art. 7 of the General Social Security Law (LGSS) (RCL 1994\1825).

And finally, it should also be pointed out that: 1) In accordance with

former Art. 1 of the Civil Code in force from the year 1889 until the reform of the Preliminary Title of 31 May 1974, 'the laws will be applied in Mainland Spain, adjacent islands, Canary Islands and territories subject to Peninsular legislation, etc.' The Spanish Protectorate Zone in Morocco was never subject to Mainland legislation but rather had autochthonous legislation which the Caliph of Tetuán derived from the SAR authority promulgated in Dahires with its own regulations. 2) The Spanish-Moroccan Convention on Social Security of 8 November 1979 (RCL 1982\2695 and ApNDL 12808) and the Additional Protocol of 1984 (RCL 1985\1366 and ApNDL 12809), in force as of 1 October 1982, in accordance with Art. 47 of the first of the two texts states in the preamble that its objective is to 'assure that the workers of each of the two countries who carry out or have carried out a professional activity in the other country are offered a better guarantee of their acquired rights.' This covers the situation of Spanish nationals who work or have worked in Morocco and of Moroccan nationals who work or have worked in Spain. The complainant, however, is not found within either of these two categories.

All of the above, therefore, gives rise to the confirmation of the sentence delivered in first instance which admits the existence of the exception of lack of jurisdiction once having dismissed the appeal without ruling on the alleged legal infractions committed".

– STSJ Madrid of 10 December 1998 (AS 1998\4386)

Assessment: by the Spanish courts and tribunals: domicile of the accused in Spain and Spanish nationality of the parties to the case: nullity of the expressed clause of submission to the jurisdiction of a foreign state.

"Legal Grounds

First: The sentence delivered by the Instance Court allowed the exception of lack of jurisdiction of the Spanish courts and tribunals alleged by the Treasury Council in representation of the Foreign Affairs Ministry with relation to a lawsuit regarding dismissal filed against the Ministry by the complainant. The sentence under appeal declared that jurisdiction belonged to the courts and tribunals of Ivory Coast. The complainant proceeded to file an appeal for reversal in which he made only one argument in accordance with Art. 191 a) of the LPL (RCL 1995\1144 and 1563), to request the annulment of the sentence and a statement declaring the competency of the Spanish judicial institutions to hear the case and send the case file to the Instance Court in order that a sentence related to the merits of the case be delivered.

The Court arranged for the transfer of the case file to the Public Prosecutor in order that a report be issued. This report was delivered in the form of a ruling on 23 November 1998 stating that the Spanish courts and tribunals do not have jurisdiction and that it was incumbent upon the Ivory Cost Courts to hear the case in light of a contractual clause granting expressed submission to the courts of that State which is perfectly valid. The parties made their

allegations, the appellant defending the jurisdiction of the Spanish courts and the appellee defending the opposite view.

In accordance with the proven facts of the sentence under appeal that were not challenged, facts that are not in any way controversial and that this Court upholds, the complainant was working for the Spanish Embassy in Abidjan (Ivory Coast) ever since 1 April 1995 as an administrative official. He had no written contract until 23 December 1997 when, having been chosen through a personnel selection process, a three-month trial contract was authorised in accordance with local legislation, becoming effective on 1 January 1998. Clause number 10 of the contract signed in Abidjan stipulates that 'in order to settle any conflict that could arise in the interpretation of this contract, both parties shall submit by mutual accord to the jurisdiction of the courts and tribunals of the Ivory Coast.' The contract was signed by the Spanish Ambassador to the Ivory Coast and the worker.

The issue brought to the forefront by this appeal is whether the Spanish judges and courts are competent to hear the original suit that gave rise to this appeal and this means dealing with the problem of international legal jurisdiction. In order to properly judge this case it is necessary to, first of all, select the applicable regulation or regulations and exclude some that, despite their being cited in the sentence and in the appeal brief, are not applicable for the reasons that will be explained below.

Second: The extension and limits of Spanish jurisdiction are regulated in Arts. 21 to 25 of the *LOPJ* (RCL 1985\1578, 2635 and ApNDL 8375). Section 1 of Art. 21, the only one that is of interest at the moment, states that 'the Spanish courts and tribunals will hear cases that originate on Spanish territory between Spanish subjects, between foreign subjects and between Spaniards and foreigners in accordance with this law and the international treaties and conventions to which Spain is party.' Art. 25 is the one that determines under what circumstances the Spanish courts and tribunals are competent within the social order.

The conflict to be resolved in this case affects the judicial competence of the judges and courts in Spain and the Ivory Coast. This circumstance spells the inapplicability of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, of 27 September 1978 (LCEur 1972\178), because its subjective context only includes European Union Member States and is not applicable when the conflict involves a state that is not party to the convention. This convention was initially signed by the six original Member States of the European Economic Community and was broadened and modified on three different occasions (1978, 1982 and 1989) on the dates of accession of new Member States the last of which corresponds to the accession of Spain and Portugal through the San Sebastian Convention of 26 May 1989 (RCL 1991\217 and 1151) (*BOE* of 28 January 1991).

For the same reason the Lugano Convention of 16 September 1988 dealing with these same issues should also be overlooked because it applies to

European Union Member States and to members of the European Free Trade Association.

With regard to the 19 June 1980 Rome Convention to which Spain and Portugal became party by virtue of the Funchal Convention of 18 May 1992 (RCL 1993\2205 and 2400) (*BOE* of 19 July 1993), the subjective context of which coincides with the European Union, is not applicable due to the matters to which it applies. It deals with the determination of the applicable law to contractual obligations, an aspect that is clearly different and logically posterior to the problems of deciding which national jurisdiction is competent to hear the case. The national judge dealing with this case will have to base his resolution on his country's national law or on applicable foreign legislation in compliance with the regulations governing Private International Law.

As was pointed out in the sentence delivered by Supreme Court Courtroom number 4 on 29 September 1998 (RJ 1998\8554), 'the content and objective of the Convention (Rome Convention) is to determine, in a compulsory juridical relationship the elements of which are spread out over space, where the centre of gravity of the relation and the law that should be applied is, an issue which has nothing to do with the jurisdiction that should hear the case and apply the law thus chosen.' Another sentence of the Supreme Court of 17 July 1998 (RJ 1998\6263) rejects the confusion between the issue of the court which is competent to hear the case and the selection of material law which should be used as the basis for pretension deduced.

On this respect, it should be pointed out – diverging from the criteria held by sentences delivered by this Social Court of Madrid in its Section 2 of 11 November 1997 and 10 March 1998 (AS 1998\1115), cited in the sentence now under appeal – that Arts. 3.3 (erroneously cited as Art. 4.3 of these sentences) and 6.2 of the Rome Convention do not annul the *LOPJ* because they refer to different things; Arts. 21 and subsequent of the *LOPJ* regulate the competency of the Spanish judges and tribunals while the Rome Convention focuses on the determination of the material law applicable. The allusion made in Art. 3.3 of the Rome Convention to the parties' selection of a foreigu court cannot give rise to a different conclusion: 'The parties' selection of a foreign law, accompanied or not by the selection of a foreign court...'. This reference is nothing more than the mere mention of a possibility, that of submitting to a foreign court, that is not by any means regulated by this international instrument with the exception of that provided for in that precept which states that submission to a foreign law, regardless of whether this was in tandem with submission to a foreign court, cannot affect the imperative provisions of the country in which all of the other elements of the situation are located. Apart from that provision, the Rome Convention does not regulate, and this point must be stressed, in which cases and under what circumstances one can agree to a clause that subjects a legal matter to a foreign court given that this problem is the object of the Brussels and Lugano Conventions (RCL 1994\2918 and RCL 1995\64), cited above. It cannot be maintained, therefore, that Arts. 3.3 and 6.2

of the Rome Convention annul Arts. 21 and 25 of the *LOPJ* and allow the clause of expressed submission to foreign courts.

Third: Furthermore, it is necessary to draw a line between international legal competency and the territorial competency of the State judicial institutions. In this way the determination of whether the Spanish or foreign judges should hear a particular case is an issue concerning the extension and limits of Spanish jurisdiction that is regulated exclusively by the *LOPJ* in this case given the fact that no international convention is applicable as has been discussed above.

In accordance with Art. 25.1 of the *LOPJ*, two criteria are found that attribute competency to Spanish jurisdiction in the case at hand: the accused, the Foreign Affairs Ministry, has legal domicile in Spanish territory and both the complainant as well as the accused are Spanish nationals. In this case and in accordance with the article cited above, the place where the services were rendered and the contract signed is of no particular significance.

The real essence of the issue, therefore, is in deciding whether, in light of this information, preference should be given to the conventional jurisdiction or whether validity can be attributed or not to an expressed clause of submission to foreign Judges and Tribunals against the legal criteria of attribution of competency to Spanish jurisdiction (*derogatio fori*).

First of all, one should reject the argument that the expressed clause of submission, in this case, to the jurisdiction of the Ivory Coast is valid in accordance with Art. 56 of the *LECiv.* which could also be applied in labour proceedings in replacement of the LPL on account of the fact that, since the drafting of this last law in 1990 (RCL 1990\922 and 1049), the regulation of Art. 2.3 of the 1980 LPL (RCL 1980\1719 and ApNDL 8311) that prohibited stipulations contrary to the legal criteria establishing territorial competency were struck from the books. This last step of the reasoning is not without challenge because there are also arguments that support that the legal criteria of territorial competency attribution are not at the will of the parties in the labour suit. It is not necessary to resolve this issue right now, however, because this is not a problem of determining territorial competency between social court judges in Spain and therefore Art. 56 of the *LECiv.* is not applicable because this article, together with the rest of the articles of the same section 2 of Title II, Book 1 exclusively regulate the determination of the judge who is territorially competent within Spanish jurisdiction. In the *LECiv.* it was Art. 51, today substituted by Art. 21 *LOPJ*, which determines when Spanish civil jurisdiction has competency over other countries while Art. 56 and subsequent of the *LECiv.* regulate internal territorial competency. This distinction between the competency of Spanish jurisdiction and the posterior territorial distribution among Spanish Judges and Tribunals is clearly laid out in Art. 70 of the Civil Procedure Law.

Art 56 of the Civil Procedure Law may not be applied analogically or even to gain general orientation either. It is understandable that a wide margin of

autonomy is provided in the determination of the competent judicial institution from a territorial perspective within national jurisdiction but this same criteria cannot be applied to the determination that a foreign jurisdiction is competent to hear a case when the Spanish law stipulates that the issue in question should be heard by the Spanish legal institutions. On the contrary, the resolutions delivered by Spanish courts have rejected this possibility and international treaties only recognise the validity of expressed submission which goes against the legal jurisdiction under certain conditions and tend to protect the weakest party to the contract or in the legal relationship.

Under civil jurisdiction, Art. 22.2 of the *LOPJ* attributes general competency to Spanish Judges and Tribunals when the parties subject themselves, either expressly or tacitly, to the Spanish Courts but Courtroom n. 1 of the Supreme Court rejected the interpretation 'a sensu contrario' of this precept blocking the application of clauses of expressed submission to foreign courts arguing that '... an extensive criteria limiting legal expression cannot be applied because if this were not the case it could give rise to a situation in which the alleged submission of the interested parties could lead to an evasion of the litigation hearing that, in general, is attributable to Spanish courts or tribunals with the consequential removal of the imperatives that link jurisdiction to national sovereignty in the sense expressed by the 31 October 1988 sentence (RJ 1988\7779)...' (Supreme Court Sentence of 30 April 1990 [RJ 1990\2807] reiterated by the 18 June 1990 sentence [RJ 1990\4764]).

Within the scope of social order, the sentence delivered by this Social Court (Section 2) of 17 March 1997 failed to enforce an expressed clause of submission to the courts of the Ivory Coast (the same country involved in this particular case) stating that '... the Court cannot abide by the effects and consequences of that clause because that would in effect give preference to conventional rather than legal jurisdiction. Judicial doctrine has been established in the social order determining that expressed submission clauses that alter regulations established under law regarding judicial competency are null and void (see also the sentence delivered by this Court on 9 March 1995 [AS 1995\1271]).'

In a case such as this, the exclusive applicability of the *LOPJ* in light of the inexistence of international regulations that could possibly come into play, should conclude by maintaining the nullity of the clause of expressed submission to foreign courts when, in accordance with Art. 25 *LOPJ*, the competence of Spanish courts is clearly deduced because this is an imperative regulation and, given that this sort of clause is not contemplated, the conclusion must be reached that the attribution of competency to Spanish jurisdiction is not an issue that can be decided by the parties to the contract in question.

This solution is further supported if one considers the restrictive criteria

applied to the admission and regulation of the repeated clauses in the Brussels Convention. These restrictive criteria establish limits regarding the enforceability of the expressed will of the parties in certain sectors in which protection of the weakest party to the contract is deemed necessary. This is the case with insurance contracts and contracts concluded with consumers (Art. 17 in relation to Arts. 12 and 15). With regard to labour contracts, the last paragraph of Art. 17 (wording introduced as a consequence of the San Sebastian Convention marking the accession of Spain and Portugal) states that in the case of individual labour contracts, the conventions or agreements attributing competency will only be effective if they are posterior to the commencement of the litigation or if it is the worker who files the complaint before other courts different from the one corresponding to the domicile of the accused or the one indicated in Art. 5.1 which, for all intensive purposes, is the one corresponding to the place where the services are rendered.

If these limitations and precautionary measures are established and applied to neighbouring countries which share cultural, social, political, economic, etc. similarities, it does not seem logical to lay them by the wayside and admit the absolute validity of expressed submission of the parties to the jurisdiction of other states that are quite different from our own. Furthermore, the Spanish State's practice of voluntarily subjecting itself, through labour contracts signed by its Ambassadors as seems to be common practice given the number of these cases, to the jurisdiction of foreign courts is surprising and difficult to explain.

In summary, by virtue of two concurring laws attributing competency to Spanish jurisdiction in accordance with Art. 25.1 *LOPJ* – legal domicile of the accused and Spanish nationality of the complainant and the accused – and considering the nullity of the clause of expressed submission to the jurisdiction of the Ivory Coast given that it is contrary to the imperative law (Art. 6.3 of the Civil Code), the appeal for reversal filed against the Instance Court's sentence should be allowed thus declaring the competency of the social order institutions of the Spanish jurisdiction to hear the case that gave rise to these proceedings. Therefore, the sentence delivered by the Social Court should be declared null and void and the proceedings should be sent back to that Court in order that a new sentence be delivered on the merits of the case".

– STSJ Galicia of 27 April 1998 (AS 1998\960)

Competency of the Spanish Courts: extension and limits: claim filed for Social Security benefits: claim filed against both national and foreign entities and companies.

"Legal Grounds

First: The original suit was filed against the Social Marine Institute (Instituto Social de la Marina – ISM), The National Social Security Institute (INSS), 'Pescanova, SA' and 'Argenova, SA' and requests '... a sentence declaring that my husband died as the result of a work-related accident on 29

January 1997 and a verdict against the accused in consonance with their responsibility and in light of the above-requested declaration to provide the following benefits: death benefit, life-long widows benefit equivalent to 45% of the regulatory base, orphans benefit for my son equivalent to 20% of the regulatory base. To all of these benefits a surcharge of 50% should be added given that he died in a work accident and lump-sum compensation for work accidents equivalent to 6 monthly salaries and a further month's salary for my son the amounts of which will be stipulated at the time of the hearing in accordance with the documentation presented.'

The Instance Court delivered a sentence that admitted the exception of lack of jurisdiction of the Spanish Courts and consequently declared itself incompetent and failed to study the merits of the case. An appeal for reversal was filed against this sentence by the complainant who denounced an error of fact in the assessment of evidence as well as certain regulatory infractions and requested '... a resolution that overturns the Instance Court's decision and that sentences the accused to make payment on the requested benefits in the amount and with the increases stipulated in this appeal.'

Second: Independent of the material issues brought out by the original litigation and the appeal, it should be indicated that the principle of double instance applicable to this case [Art. 189.1, c) of the Labour Procedure Law (RCL 1995\1144 and 1563) –LPL–] limits this appeal to the determination of whether the Spanish courts are competent or not to hear the case and deliver a judgement. Even if the Court did, in fact, deliver a judgement different from the one handed down by the Instance Court, it would not have the authority to rule on the merits of the case because, in accordance with the above-mentioned principle and in line with procedural logic, the case file must be returned to the Court of origin for an enforceable ruling (subject to an eventual appeal process) on the statement and recognition of rights presented by the complainant who here makes a reference to the limits of this appeal but does not, however, make use of the proper appeal channels. The term 'error of fact' indicates infringement of Art. 25.1 of the *LOPJ* (RCL 1985\1578, 2635 and ApNDL 8375) that is based on having signed the labour contract between the deceased and 'Argenova, SA' in national territory.

The appealed sentence argues, invoking the above-cited Art. 25.1 *LOPJ*, the exception of incompetence in circumstances inherent to the scope of the relationship between the deceased husband of the complainant and 'Argenova, SA' (thus, place at which the contract was concluded and services rendered, subject to the legislation and affiliation to Social Security for foreign subjects). We do not share this argument, however, because prior to focusing upon concrete issues like the ones referred to above and also prior to invoking the precept in question, attention should be placed on Art. 21.1 LOPJ ('The Spanish courts and tribunals shall hear those cases that arise in Spanish territory between Spanish subjects, between foreign subjects and between Spaniards and foreigners in accordance with this Law and with

international treaties and conventions to which Spain is party'). It can thus generally be deduced that there is no material that may objectively remain beyond the reach of Spanish jurisdiction. Together with this principle, the Spanish nationality of the Social Security Agency and of one of the co-defendant companies ('Pescanova, SA') points to the unavoidable need for a pronouncement and at the same time precludes the application of self-limitations (Art. 25 *LOPJ*) that, as exceptions to this general rule, are established by the State itself in the exercise of its jurisdictional function without prejudice to the decision that, as stated by the Public Prosecutor, could be adopted with regard to the other employer ('Argenova, SA') the nationality of which was the object of discussion throughout the instance hearing and solely to which the procedural exception that is the object of this appeal could be applied".

– STSJ Madrid 19 February 1998 (AS 1998\597)

Application of the 27 September 1968 Brussels Convention: determination: services rendered abroad for the Spanish Government: applicable legislation: determination: services rendered abroad: need to accredit foreign legislation. Personnel that renders services abroad: non-application of the Collective Convention; forced retirement: inappropriate dismissal.

"Legal Grounds

First: In the Instance hearing an argument was made for the exception of jurisdictional incompetence and this Court has seen fit to request the opinion of the Public Prosecutor who came out in favour of Spanish jurisdictional competence. The Court shares this view because within the scope of the EEC countries, the 27 September 1968 Brussels Convention should be applied (*BOE* of 28 January 1991 [RCL 1991\217 and 1151]), that established regulations concerning judicial competence in civil and trade matters. It is the Brussels Convention and not the Lugano Convention of 16 September 1988 (*BOE* of 20 October 1994 [RCL 1994\2918 and RCL 1995\64]) – as was argued by the Treasury Council – that should be applied because the Brussels Convention only affects EEC Member States and therefore, if the foreign component of the case is located in one of the Member States, that is the applicable Convention. On the other hand, the Lugano Convention will be applied in the event that there is a foreign component to the case centred in a country that is not a member of the European Union because this Convention covers a broader range of countries. At any rate, the regulations are similar but one important point should not be overlooked: Art. 25 of the *LOPJ* (RCL 1985\1578, 2635 and ApNDL 8375) should be given priority.

The rules regarding territorial competence or jurisdiction are as follows: a) first of all, general jurisdiction is that of the legal domicile of the accused – Art. 2 of the Convention – ('forum rei'). b) Second of all and considered special jurisdiction is that corresponding to the 'place where the service or work is habitually rendered' ('forum locus laboris') – Art. 5.1 -; this is an

alternative or concurrent jurisdiction that is decided upon by the complainant. It is therefore self evident that, given that the Spanish Government is the employer in this case, jurisdiction lies with the legal institutions of the Kingdom of Spain.

Second: In accordance with Art. 191, b) of the LPL (RCL 1995\1144 and 1563), the appellant requested the addition of a series of proven facts the appropriateness of which should be analysed separately.

First of all, and based on document pages 63 and 95 (this must be a mistake, the appellant actually referring to pages 64 and 94), and attempt is made to add to the case file that the complainant did not reside in France until 2 April 1976. This revision should not be admitted for two reasons: first of all because, as will be analysed below, this information is irrelevant to the case at hand because the important issue is where the contract was concluded and not where the complainant was residing and therefore the requested revision should be rejected -SSTS (Social) of 20 February 1979 and 28 February 1985 (RJ 1985\715) -; second of all, because from page 64 that the complainant refers to specifically for a review of the facts, it can be inferred that the certificate appearing on page 94, registration of the complainant in the Consular Office as a resident, takes place only after having resided in the consular demarcation for a period of a year; meaning that these documents are insufficient to gain access to the revision requested.

Based on the documents contained in the case file pages 74 to 78, a revision of the facts is also sought with the intention of indicating that in 1989 the complainant participated in a job application process to formalise his job post and was named to that post by the Ministry. That information which is inferred by the administrative file is not relevant either as will be indicated below and therefore the revision requested was turned down. At any rate, the application was for a job post offered through the Spanish representation in Strasbourg, the only applicant being the complainant who was named to the post by the Foreign Affairs Minister.

It was requested that it appear on record that the decision to grant the complainant retirement was delivered by the Foreign Affairs Ministry which can be inferred from page 82. This addition is considered unnecessary because no one is questioning the fact that the employer is the above mentioned Ministry.

Third: The second motive is based on Art. 191, c) of the LPL in relation with Art. 1.4 of the Workers Statute (Estatuto de los Trabajadores – ET; RCL 1995\997) although in the development of the appeal a number of other legal regulations and arguments are cited.

First of all, the appellant argues that the point of connection is incorrect because it should be considered that the complainant resided in Spain and moved to Strasbourg in order to be employed there. The contract was then approved by the Ministry. He then participated in a formal job application procedure and was dismissed by the Ministry considering that it was not fair

to give special consideration to an alleged verbal contract while ignoring the indicated facts. Second of all and based on the above, it was argued that the point of connection used is incorrect because, in the opinion of the appellant, given that there was not written contract but rather a verbal one, residence criteria should be applied in a complementary way as inferred by Art. 4 of the Treaty of Rome (LCEur 1986\8). Based on this legislation the fact that the complainant resided in Spain until 2 July implies that Spanish law should be applied. Third of all, it was stated that the Ministry approved the contract in Spain and it should therefore be considered that the contract was concluded in Spain. Fourth of all, it is argued that the interpretation of the judge could make it easier for the Ministry to manipulate the facts which could give rise to a situation of fraud.

One fact that the appellant did not try to revise should be made perfectly clear: as was indicated in legal ground three of the sentence, the complainant was hired in Strasbourg on a verbal basis and there is no evidence of a job offer in Spain prior to the verbal formalisation of that contract. This bit of information is essential in order to resolve the case.

The appellant argues in favour of an infraction of Art. 1.4 of the Workers Statute (Estatuto de los Trabajadores – ET; RCL 1995\997), the fact being, however, that that regulation is not applicable. From Art. 1.4 of the ET it can be inferred that in order that the indicated article be applied, the following must concur: a) first of all a subjective requirement; the employee as well as the employer have Spanish nationality; and b) second of all two objective requirements; that the services be rendered outside of Spain and that the contract be concluded in Spain -STS (Social) 19 February 1990 (RJ 1990\1116)-. This latter requirement is not met because the contract was concluded verbally abroad. Following this line of reasoning the STS (Social-RCUD) 10 December 1996 (RJ 1996\9140), based on the fact that the contracts were signed abroad by those represented and by the Spanish diplomatic representation, holds that '...there is no sign that the contract was formalised in Spain and, although attention was paid to the reasoning of the appeal that proposed to negate that the respective diplomatic representations of Spain abroad lacked the authority to formalise the contracts, this circumstance could affect its documentation but not the existence of the contract that, in accordance with Art. 8 of the ET, can be verbal. The result is that it has been the workers and the diplomatic representation of each one of the respective States that, in written or verbal form, have concluded each one of their contracts in the city that hosts each representation. Therefore, the conclusion reached in the Instance judgement that denies the application of Spanish legislation without infringing, but rather respecting the cited number 4 of Art. 1 of the above-mentioned ET is correct. The argument that the offer of employment was made in Spain is irrelevant because there is no evidence of that offer...' Furthermore, this is the very doctrine that this Supreme Court of Justice has been applying in its Sentences of 8 October 1992 (AS 1992\4888) –

that also rejected the idea that Spanish diplomatic offices or headquarters abroad, in so far as court proceedings are concerned, are to be considered as Spanish territory -; 14 February 1994 (AS 1994\852) – where in a case quite similar to this one it was stated '... it is plain to see that the agreement reached between the parties took place abroad, without prejudice to the conditioning of the latest ratification of the post by the head of the diplomatic or consular mission by the corresponding government authority...'; 8 March 1994; 16 March 1994; 4 November 1994 (AS 1994\4583); 3 February 1995 (AS 1995\786); 10 March 1995; 12 June 1995; 19 June 1995 (AS 1995\2669) and 14 July 1995.

Once it has been established that Art. 1.4 of the ET is not applicable to this case – thus avoiding the complex problem of its relation with the Treaty of Rome (the SAN of 28 February 1996, was of the opinion that Art. 1.4 of the ET could not be applied once the Treaty came into force) – the Convention on the Law Applicable to Contractual Obligations is applicable. This regulation, signed in Rome on 19 June 1980 (*BOE* of 19 July 1993 [RCL 1993\2205 and 2400]), implies the non applicability of Arts. 10.5 and 10.6 of the Civil Code because the object of this regulation is to establish certain uniform conditions or norms with respect to conflict resolution regarding international contracts. In contrast with what the appellant erroneously argues, it is not Art. 4 but rather Art. 6 of that Convention that is applicable in light of the fact that no stipulation was made in the labour contract regarding the applicable regulation (Art. 3). This regulation holds, as far as this case is concerned, that the labour contract will be governed '... by the law of the country in which the worker, in fulfilment of his contract, habitually renders his services even though he may be sent abroad for a temporary period of time...' The so called 'lex loci laboris' is therefore applies here. This criteria is in consonance with the reasoning of the Instance Court's judgement that argues that Spanish Law is not applicable.

Fourth: Now that it has been established that French Law and not Spanish Law is applicable, this Court does not share the solution offered by the Instance Judge. In this case the position of the State Administration was that French Law should prevail but its content was not considered sufficiently established. As a result, the Instance judge reasoned that since this law was applicable but in light of the fact that its content lacked approval he decided to reject the request, an opinion that this Court does not share. This manner of proceeding seems to be contrary to Art. 12.6 of the Civil Code that states '... The person who invokes foreign law should accredit its content and applicability through those means allowed under Spanish Law. However, in application of this law, the judge is also free to make use of any investigative instruments deemed necessary, delivering the necessary court decisions.'

In interpretation of this precept, case law has established the following rules in so far as this case is concerned:

1. The person who invokes foreign law should 'accredit in a court of law the existence of legislation that supports its enforceability and its application to the case at hand.' -SSTS (Civil) 3 February 1975 (RJ 1975\327) and 31 December 1994 (RJ 1994\10245)-. It is argued that 'the application of foreign law is a matter of fact and as such must be alleged and proven by the party invoking it' -SSTS (Civil) 28 October 1968 (RJ 1968\4850), 4 October 1982 (RJ 1982\5537), 15 March 1984 (RJ 1984\1574), 12 January and 11 May 1989 (RJ 1989\100 and RJ 1989\3758), 7 September 1990 (RJ 1990\6855) and 3 March 1997 (RJ 1997\1638)-.

2. When it comes to determining the foreign law applicable, the Instance Judge has broad investigative powers based on legality as well as case law and is not bound by the contributions of the parties. Along these lines the STS (*Civil*) of 3 March 1997 is relevant in its argument that: 'Although in a general sense one does in effect speak of the verification of foreign law, a criteria in Spain that goes back to a tradition based on Law 18, Title 4 of Section 3, the evolution of doctrine and case law shall never place the verification of foreign law on the same level, in a strict sense, with verification of the facts because it is believed that justification or accreditation of the foreign regulation and verification of the facts are not the same thing. In this sense it has been made evident that the '*iura novit curia*,' although attenuated with respect to foreign law, is not excluded as a principle when it comes to recognition of extra-national regulations, although the parties should cooperate with the Judge in his search for the foreign regulation so that instead of an evidence collecting activity in a strict sense it is more like a collaborative effort between the parties and the institution. In our procedural systems currently in force, subsequent to the drafting of the Preliminary Title of the Civil Code, Art. 12.6 made it very clear that: a) the foreign regulation must be 'accredited'; b) in his function as the one applying the regulation, the judge can make use of all and any investigative instruments that are deemed necessary. The term 'accredit' is not used here in a general but rather a technical sense which means that it is not necessary that the verification and the enforceability of the foreign regulation be in harmony with the evidence in the strict sense. The term is used in reference to a more open concept of evidence referred to in doctrine as 'free' or, to put it in a different way, evidence or verification that presupposes the free use of investigative measures (as long as they are legal), and freedom of assessment or appraisal. If the judge together with the help of the parties, does not feel that sufficient light has been shed on the case, he should and may investigate the applicable norm...'

3. The Court wants to make mention, as an investigative measure, of the atypical expert opinion regulating the European Convention with regard to Information on Foreign Law of 7 June 1968 (RCL 1974\2050 and NDL 6679), to which the Kingdom of Spain became party on 19 November 1973.

4. It is possible to resort to judicial enquiry with a view to arriving at a deeper understanding of the applicable foreign law, especially when foreign

regulations are allegated and are then accredited in a faulty fashion or are found to be contradictory -STS (Civil) 15 November 1996 (RJ 1996\8212)-.

5. In the event that foreign law has not been verified at all or lacks sufficient clarity or security, the appropriate response is not to dismiss the lawsuit but rather to apply Spanish legislation -SSTS (Civil) 11 May and 21 June 1989 (RJ 1989\3758 and RJ 1989\4771) and 23 March 1994 (RJ 1994\2167)-. Along these lines and given its usefulness to this particular case, attention should be given to the doctrine laid down by the STS (Civil) 4 May 1995 (RJ 1995\3893) that states '... in order to accredit the foreign regulation, it is not enough, according to STS 23 October 1992 (RJ 1992\8280) and others, to draft a report upon petition by the appellants expressly related to the litigation at hand and that does not reproduce the literal text of the precepts referred to nor accredits, as is compulsory, the enforceability of the applicable law...'

If one applies this doctrine to the case under analysis here, it becomes clear that it is incumbent upon the State Administration to accurately verify the applicable legislation. It is true that on page 110 of the administrative file there is an internal report but it is also true that the Instance Judge, rightfully applying the doctrine contained in STS (Civil) of 23 October 1992, did not consider it sufficient for the purpose proposed.

Fifth: Having made the above arguments and in light of the absence of sufficient proof of the applicable French law, Spanish law should prevail in this case. This means, as was rightfully stated in the appeal, that the sentence infringed upon Art. 154 of the LGSS in relation with the SSTC 22/1981 (RTC 1981\22) and 58/1985 (RTC 1985\58). It may also be inferred from the doctrine laid down by the STS (Social) 17 March 1995 (RJ 1995\2023) that the Collective Convention of the Ministry of Foreign Affairs is not applicable to the personnel rendering services abroad and therefore compulsory retirement based on the application of a Convention that is not applicable gives rise to a situation of unlawful dismissal. Furthermore, this doctrine has been reiterated by STS (Social) 17 June 1994 (RJ 1994\5448). With regard to the rest of the suit, in proven fact number two it was stipulated that the 3,000 Francs that the complainant received were to defray expenditures related to the performance of his job and therefore should not be considered as salary payment. The appeal should therefore be allowed and the dismissal declared inapplicable."

XXI. CRIMINAL LAW

– SAP Alicante of 3 July 1998 (ARP 1998\4237)

Receiving of stolen goods with reference to an automobile stolen in France: the subsequent mobilisation of the vehicle to be resold in Spain does not imply the competence of Spanish courts in the hearing.

"Background Information

First: The verdict of the sentence under appeal literally states: 'It is my obligation to sentence and I hereby sentence Ali B. as the author of the crime of receiving stolen property and a further crime of the use of falsified documents. Being that there are no concurring circumstances that altering criminal responsibility, the sentence is 6 months imprisonment for the first crime and 3 months imprisonment and a fine of 3 months with a daily quota of one thousand pesetas for the second crime in addition to court costs.'

Once this resolution becomes enforceable, the vehicle license number RP 89 is to be turned over to the entity 'Cofica.'

Second: A remedy of appeal was filed by the representative of the accused against this sentence and was principally based on: an error in the assessment of the evidence, infraction of the principle of presumed innocence and a violation of Arts. 298 and 393 of the Penal Code (CP).

Third: The remedy of appeal request was distributed to the rest of the interested parties and then the original case file and the appeal were transferred to this Appeals Court on 29 May 1998. Subsequent to examination of all of the material contained therein, deliberation and decision were set for 30 June 1998.

Fourth: Examination of the proceedings related to this case shows that all applicable legal prescriptions have been observed.

Having heard the case, the rapporteur is the Honourable Alberto Facorro Alonso.

The proven background information corresponding to the sentence under appeal is not admitted in Court.

Legal Grounds

First: In order to resolve this appeal and due to the weak nature of the documentary evidence on which it is based, the only evidence on which the hearing was based, a distinction must be made between the two types of crimes that gave rise to the sentence: receiving of stolen goods and the use of falsified documents, punishable under Arts. 298.1 and 393 of the Penal Code (RCL 1995\3170 and RCL\1996\777).

With regard to the first crime, even if the objective base of the crime is admitted by forcing the evidential value of the facsimiles issued by the French police and the documentation furnished by the financial entity of the same nationality, and considering that the automobile was the result of a crime against patrimony, an affirmation that is very debatable considering that the alleged defrauding was against the lending entity and not the seller of the automobile, it is certainly beyond question that the stolen vehicle was used in France where the appellant had in his possession the objects that were illicitly procured at the moment at which the crime was committed in accordance with reiterated and accepted case law criteria. Although subsequently the stolen property was moved for resale or to obtain some monetary profit, this second operation forms part of what could be considered the final stages of the crime

and for that reason, and in accordance with Art. 23 of the LOPJ (RCL 1985\1578, 2635 and ApNDL 8375), and due to the inexistence (contrary to the criminal tipification contained in Penal Code Art. 300.4) of any specific regulation on extra-territoriality, the judgement of this crime does not correspond to the Spanish courts proceeding therefore to its dismissal.

Second: The principle 'in dubio pro reo' and the interpretative case law of the indicatory evidence, requiring that the conclusion accepted by the judge be the only possible inference that can be deduced from the elements proven through direct evidence, also lead to the dismissal of charges for the second crime. In light of the formal validity of the documentation exhibited by the appellant and given that there is not other evidence against his person, it cannot be concluded that he was cognoscente, the psychological element of the wrongdoing, of the alleged false identity of the owner of the vehicle and this second appeal motive must therefore also be admitted.

Third: The guilty sentence must therefore be revoked but, in light of the documentation furnished by the entity 'Cofica,' the civil pronouncement regarding the return of the vehicle is upheld".

XXII. TAX LAW

–SAN of 31 March 1998 (Division for suits under administrative law, JT 1998\893)

Obligation to make tax payments (non residents): ship rental in 'bare boat charter' regime by a resident company to be used in international maritime transport: payments made to the non-resident leaseholder subject to taxation in Spain: lack of relevancy.

The interpretation of Art. 334.1, b) RIS indicates that profits obtained in the following circumstances are excluded from Business Tax: the contract is concluded with non-resident entities that have no permanent offices in Spanish territory; the patrimonial elements under contract are used mostly (even though they may occasionally come into contact with national territory whether this be in customs or unloading at the port or warehouse) outside of national territory; under no circumstances are the ships to be used for national transport. These requirements were already on the books of the Tax Administration by Ministerial Order of 17 June 1981 and for that reason should be used to interpret Art. 334.1, b) RIS, although no mention of this Ministerial Order was made in the Second Final Provision of the cited Regulation in the list of enforceable provisions.

The Court for Suits under Administrative Law allows the Administrative Law Appeal filed against the TEAC agreement of 23 February 1994 with regard to Business Tax (...).

"Legal Grounds

First: This Administrative Law Appeal was filed against the 23 February

1994 decision (JT 1994\346) delivered by the (*Tribunal Económico-Administrativo Central – TEAC)*Central Economic-Administrative Court (File number RG 2422/1990; RS 7/1991), that partially upheld the appeal to a higher court filed by the entity 'Ybarra y Compañía, SA', the appellant in this case, against the decision delivered by the Regional Economic-Administrative Court of Andalusia (*Tribunal Económico Adminisgtrativo Regional –TEAR*) on 18 January 1990 that, in turn, had disallowed the economic-administrative claim filed by the same appellant against the decision taken by the Provincial Inspection Office to levy a business tax (non-resident entities) for fiscal year 1985 totalling 20,310,476 Pesetas.

That settlement dates back to the act of non-conformity initiated by the appellant in this case on 18 December 1985 acting as the party responsible for the entity 'Hans América, SA' with legal domicile in Panama. In this act of non-conformity it was stated, among other things, that 'Hans América, SA' was a passive, non-resident subject; that 'Ybarra y Compañía, SA' had made payments for the chartering of two ships during the months of October and November 1985 and had filed forms 210 under the assumption that these operations were not subject to taxation; that the Inspection was of the opinion that, in accordance with Law 5/1983 (RCL 1983\1369 and 1590), the passive subject should pay taxes through its designated representative or, in his absence, the account payer, and given that net profits totalled 92,525,510 pesetas and by application of the coefficient for 1985 of 18% the integral total came to 112,835,986 pesetas. Given that there is no agreement on double taxation with Panama and by applying the 18% tax rate to the integral total above, a tax bill of 20, 310,476 pesetas was calculated.

The administrative settlement procedure, followed by the Regional Economic-Administrative Court (that dismissed the initial claim filed) upheld the Inspector's proposal. The Central Economic-Administrative Court partially allowed the claim but only with regard to the specific determination of the integral sum and thus nullified the calculation and ordered a new computation of the sum without raising it to the integrated amount.

Second: The only issue being raised here is whether the operation carried out during the months of October and November of 1985 between the Panamanian entity and the complainant in this case was subject to the business tax – as claimed by the Administration, the accused in this case – or not as claimed by the appellant. This issue is identical the one resolved by this same Court and Section in the 5 March 1998 Sentence delivered in Appeal Case 472/1994 and the grounds of which, for reasons of legal security and with a view to maintaining the unification of doctrine, we reproduce below:

'Second: The only issue under debate is focused, as both parties agree, on determining whether the payments made by the ship leasing company under a 'bare boat charter' regime to non-resident companies and used by the appealing entity for international maritime transport are subject or not to the payment of business taxes.

As the parties affirm, the leasing of a ship in 'bare boat charter' conditions is characterised by the fact that the owner grants temporary use for an agreed price to another entity of a ship without fitting it out, equipping or rigging it (these contracts are known as 'flete casco desnudo' in Spanish and 'affrétement coque nue' in French); in other words, the lessee takes possession of the ship and normally becomes a ship owner by operating, equipping and fitting the vessel and even gaining the right of abandonment foreseen in the Trade Code.

In this sense, case law has denominated this as the 'simple chartering of an object in which the essential element is the transfer of the possession to the lessee who is free to name a captain, give him orders and freely use the ship within the confines of the agreement' (SSTS 24 March 1911, 10 December 1951, 12 June 1961 [RJ 1961\2362]; among others).

From a tax perspective, the sum paid for the rental, resulting from the owner doing business with a non-resident foreign company, is regulated by Art. 4.1, b), of Law 61/1978, of 27 December (RCL 1978\2837 and ApNDL 7226), of the Business Tax that states: "Passive subjects who are not residents in Spanish territory are subject to make tax payments when they make a financial profit or increase their patrimony in that territory or draw profits through payments made by a person or public or private entity that does reside in that territory.' It is this 'obligation to make tax payments' that is developed by Art. 15 of the Tax Regulation, ratified through Royal Decree 2631/1982, of 15 October (RCL 1982\2783, 2941 and ApNDL 7240).

In principle these rentals, in accordance with Arts. 32.2 of the Law and 341 of the Regulation, are subject to withholding tax given that they are income or profit obtained in Spain in accordance with Art. 7 of the Tax Law.

Third: In this case therefore, the price of the rental paid by the complainant to the non-resident foreign company and owner of the ships fits into the second case of 'mandatory payment' in line with the criteria of payment made by a resident company to another that is not a resident.

From a trade perspective, this is an 'international traffic operation' the objective of which is the conclusion of a rental contract subscribed to by companies that are not personally subject to the same legal system.

In this sense, the complainant's request for application of Art. 334.1, b) of the Business Tax Regulation, ratified by Royal Decree 2631/1982, of 15 October, and which does not consider income earned in Spain: 'that which is earned with regard to international mercantile traffic operations of the paying resident entity carried out abroad by entities not residing in Spanish territory,' does, in principle, make sense in relation with the object of the 'international traffic operation' concluded between the two companies, resident and non-resident.

The most significant thing about the fiscal treatment of the financial transactions resulting from this specific bare boat charter contract concluded between non-resident companies were the legislative improvements introduced as a result. Law 31/1990, of 27 December (RCL 1990\2687 and RCL

1991\408), on the General State Budget for 1991 through its Art. 62 provided new drafting for Art. 23 of the Business Tax Law and has established in its Section 3, point 5: 'Profits or increases in patrimony resulting from the rental or transfer of containers or of bear hull ships or aircraft used in international maritime or air travel will not be considered as earned in Spain.'

Along these same lines we also have Art. 46.1, e), of the applicable Law 43/1995, of 27 December (RCL 1995\3496 and RCL 1996\2164), of the Business Tax Law.

Judging from the precepts cited above it can be assumed that the purpose of the bare boat charter ships is that of 'international maritime navigation'; if that were not the case, the tax exemption would not be applicable.

This regulation is subsequent to the regulatory norm on the taxable activity that, even if not applicable, can serve as an interpretive criteria.'

Third: In summary, the issue is whether the payments made by entities residing in Spain for the charter of ships to non-resident companies without any permanent establishment in Spain for use in international maritime traffic operations are or are not subject to the Business Tax in Spain. While admitting the point of connection for subjection to the Business Tax, in addition to the unquestionable fact that the income was generated in Spanish territory, the fact that the payment was made by a resident to a non-resident, it should be kept in mind that the latter should be used with special caution in order to avoid unwarranted pervasiveness in the application of the Spanish Business Tax. This explains why Art. 34 of the then in force Business Tax Regulation ratified by Royal Decree 2631/1982 on 15 October excluded from taxation certain operations that, upon strict application of the payment criteria, could be subject to the Spanish tax.

As far as the case at hand is concerned, Art. 334.1, b) of the above-cited Regulation stated that 'Income generated through international trade traffic operations by the paying entity residing in Spain carried out abroad by entities that have no residency established in Spain will not be considered as income earned in Spain.'

Interpretation of this precept leads us to the conclusion that profits earned under the following circumstances are exempt from the Business Tax: the contract is concluded with non-resident entities that have no permanent offices in Spanish territory; the patrimonial elements under contract are used mostly (even though they may occasionally come into contact with national territory whether this be in customs or unloading at the port or warehouse) outside of national territory; under no circumstances are the ships to be used for national transport. These requirements were already on the books of the Tax Administration by Ministerial Order of 17 June 1981 (RCL 1981\1693 and ApNDL 7236) and for that reason should be used to interpret Art. 334.1, b) of the Business Tax Regulation, although no mention of this Ministerial Order was made in the Second Final Provision of the cited Regulation in the list of enforceable provisions.

These three requirements are all met in this case. The entity 'Hansamérica, SA' was not a resident in Spanish territory nor did it have any permanent establishment in Spain and the chartered ships were used for international mercantile traffic and were not used for national traffic as could erroneously be deduced from the certificate issued on 28 January 1987 by the Directorate General of the Merchant Marine under the auspices of the then Ministry of Transport, Tourism and Communications. This certificate can be found in the administrative file attached to the proceedings.

Fourth: By virtue of all of the above, this appeal is admitted along with the corresponding annulment of the resolution under appeal as well as the tax fee due in accordance with that resolution in light of the fact that it does not conform with Law.

No circumstances were detected that determine any special consideration with regard to court costs in accordance with Art. 131.1 of the Law on Contentious-Administrative Jurisdiction (LJCA) (RCL 1956\1890 and NDL 18435)."

– SAN of 5 March 1998 (Division for suits under administrative law, JT 1998\670)

Business tax: Obligation to pay taxes (non-residents): rental of ships under 'bear boat charter' regime by the resident company for use in international maritime transport operations: payments made to the non-resident leaseholder subject to taxation in Spain: lack of relevancy.

"The complainant company holds the view that in accordance with the precept (Art. 7 OM of 25 January 1979), chartered foreign ships that are provisional Spanish flagships are not able to perform national cabotage operations but unquestionably must operate exclusively within the domain of 'international maritime transport,' a fact that is not impaired by the fact that the ship sails into Spanish ports.

This Court shares this opinion but it should also be pointed out that as far as taxes are concerned, the use of the ship in that maritime traffic must be real; i.e. this label must be based on the objective and proven fact that the lease holding company has actually used the ships for that purpose. If this is not the case, the price paid for the chartering of the ships would be treated as ordinary income as would the profits earned from capital assets of the leasing company through this type of chartering.

This Court for Administrative Lawsuits under the auspices of the National Court rejects the administrative law appeal filed against the TEAC Agreement of 29 June 1994 regarding the Business Tax (...).

"Legal Grounds

First: This appeal was filed in opposition to the Resolutions both of which were delivered on 29 June 1994 by the Central Economic-Administrative Court (TEAC) that partially allowed the appeals filed against the decisions, both dated 31 July 1990 delivered by the TEAR of Madrid and cancelled the

obligation to pay interest and late payment sanctions in relation with the Business Tax payment due for fiscal years 1980 to 1983 (for a total of 246,233,891 pesetas) and fiscal years 1979 and 1980 (for a total of 20,793,785 pesetas) in accordance with the Acts of non-conformity of 22 and 9 June 1983 that proposed payment of taxes corresponding to bare boat charter payments in the form of withholding applied to these earnings given that the company has no permanently established entities in Spain.

The appellant company bases its argument on one issue coinciding with the TEAC resolution and this is whether payments made for the rental of ships under a bare boat charter regime to non-resident companies and used by the appellant company for international maritime transport are subject or not to the Business Tax. Basing judgement on Arts. 4.10, b), 6.2 and 7, of Law 61/1978 (RCL 1978\2837 and ApNDL 7226), on the Business Tax, and on Arts. 18, 19, 333 and 334, of the Tax Regulation (RCL 1982\2783, 2941 and ApNDL 7240), as well as on the TEAC doctrine (Resolution of 15 December 1989) with regard to the rental of containers and on case law (SS. of 18 and 27 September 1991 [RJ 1991\7773 and RJ 1991\7778]), it seems that the payment of those rental fees is exempt from tax withholding based on the criteria of the nationality or residence of the receiving entity and the place where the service was rendered and ignoring the nature or residence of the paying entity. It was stated that those ships were not used in Spanish territory in accordance with the prohibition found in Art. 7 of the 25 January 1979 Ministerial Order (RCL 1979\345 and ApNDL 2), that sets out the regulations concerning the provisional flying of the national flag by foreign ships and the flying of foreigu flags by Spanish ships and that also partially subjects foreign ships flying the Spanish flag to Spanish legislation without necessarily 'using' Spanish territory. The appellant alleged that its position was in line with the criteria established by the 17 June 1981 Ministerial Order (RCL 1981\1693 and ApNDL 7236), that includes a response to consultation number 15 although this refers to containers rather than ships. Art. 334.1, b) of the Tax Regulation is invoked for the application of the tax exemption status as is the TEAC Resolution of 15 December 1989.

The Treasury Council upholds the arguments set out in the resolution under appeal. He states that in accordance with Art. 4.1, b), of Law 61/1978 there can be no doubt that fees paid for the chartering of ships under that contractual regime are subject to tax payment and that the case being debated here is not among the exceptions set out in Art. 15 of the Regulation. And finally he is of the opinion that administrative doctrine and case law on containers is not applicable to this case.

Second: The only issue under debate is focused, as both parties agree, on determining whether the payments made by the ship leasing company under a 'bare boat charter' regime to non-resident companies and used by the appealing entity for international maritime transport are subject or not to the payment of business taxes.

As the parties affirm, the leasing of a ship in 'bare boat charter' conditions is characterised by the fact that the owner grants temporary use for an agreed price to another entity of a ship without fitting it out, equipping or rigging it (these contracts are known as 'flete casco desnudo' in Spanish and 'affrétement coque nue' in French); in other words, the lessee takes possession of the ship and normally becomes a ship owner by operating, equipping and fitting the vessel and even gaining the right of abandonment foreseen in the Commercial Code.

In this sense, case law has denominated this as the 'simple chartering of an object in which the essential element is the transfer of the possession to the lessee who is free to name a captain, give him orders and freely use the ship within the confines of the agreement' (SSTS 24 March 1911, 10 December 1951, 12 June 1961 [RJ 1961\2362]; among others).

From a tax perspective, the sum paid for the rental, resulting from the owner doing business with a non-resident foreign company, is regulated by Art. 4.1, b), of Law 61/1978, of 27 December of the Business Tax that states: "Passive subjects who are not residents in Spanish territory are subject to make tax payments when they make a financial profit or increase their patrimony in that territory or draw profits through payments made by a person or public or private entity that does reside in that territory.' It is this 'obligation to make tax payments' that is developed by Art. 15 of the Tax Regulation, ratified through Royal Decree 2631/1982, of 15 October.

In principle these rentals, in accordance with Arts. 32.2 of the Law and 341 of the Regulation, are subject to withholding tax given that they are income or profit obtained in Spain in accordance with Art. 7 of the Tax Law.

Third: In this case therefore, the price of the rental paid by the complainant to the non-resident foreign company and owner of the ships fits into the second case of 'mandatory payment' in line with the criteria of payment made by a resident company to another that is not a resident.

From a trade perspective, this is an 'international traffic operation' the objective of which is the conclusion of a rental contract subscribed to by companies that are not personally subject to the same legal system.

In this sense, the complainant's request for application of Art. 334.1, b) of the Business Tax Regulation, ratified by Royal Decree 2631/1982, of 15 October, and which does not consider income earned in Spain: 'that which is earned with regard to international mercantile traffic operations of the paying resident entity carried out abroad by entities not residing in Spanish territory,' does, in principle, make sense in relation with the object of the 'international traffic operation' concluded between the two companies, resident and non-resident.

The most significant thing about the fiscal treatment of the financial transactions resulting from this specific bare boat charter contract concluded between non-resident companies were the legislative improvements introduced as a result. Law 31/1990, of 27 December (RCL 1990\2687 and RCL

1991\408), on the General State Budget for 1991 through its Art. 62 provided new drafting for Art. 23 of the Business Tax Law and has established in its Section 3, point 5: 'Profits or increases in patrimony resulting from the rental or transfer of containers or of bear hull ships or aircraft used in international maritime or air travel will not be considered as earned in Spain.'

Along these same lines we also have Art. 46.1, e), of the applicable Law 43/1995, of 27 December (RCL 1995\3496 and RCL 1996\2164), of the Business Tax Law.

Judging from the precepts cited above it can be assumed that the purpose of the bare boat charter ships is that of 'international maritime navigation'; if that were not the case, the tax exemption would not be applicable.

This regulation is subsequent to the regulatory norm on the taxable activity that, even if not applicable, can serve as an interpretive criteria.

Fourth: The question that arises is whether Art. 334.1, b) of the Business Tax Regulation, even in cases where there are indications that they may be exempt from paying tax on income from charter contracts, is applicable to the case under debate here in which the complainant affirms that the chartered ships were used for international maritime traffic.

In support of this allegation, the complainant bases his argument on Decree 3327/1977, of 9 December (RCL 1977\2741; RCL 1978\168 and ApNDL 1), on the provisional use of the Spanish flag by foreign ships or the use of a foreign flag by national ships in relation with the Ministerial Order of 25 January 1979 (Ministry of Transport and Communications) regarding complementary regulations pertaining to the provisional use of the Spanish flag by foreign ships or the use of a foreign flag by national ships.

Art. 7 of the above-mentioned Order states that: 'Foreign ships provisionally flying the Spanish flag shall not be permitted to engage in national cabotage, fishing, State commerce, port traffic nor in any other activity reserved by the applicable legislation to national flagships.'

The complainant company is of the opinion that, given the content of the precept, foreign ships that are chartered and that provisionally use the Spanish flag are not able to engage in 'national cabotage' and it goes without question that they must engage in 'international maritime traffic.' This is not nullified by sailing into Spanish ports.

This Court shares this opinion but it should also be pointed out that as far as taxes are concerned, the use of the ship in that maritime traffic must be real; i.e. this label must be based on the objective and proven fact that the lease holding company has actually used the ships for that purpose. If this is not the case, the price paid for the chartering of the ships would be treated as ordinary income as would the profits earned from capital assets of the leasing company through this type of chartering.

It would, therefore, not be sufficient to simply invoke a regulation to prove that the ships in question are being used for international maritime traffic. First of all, the applicable legal requirements (Art. 10 of the Ministerial Order

stating: 'Record that circumstance on the application form) must be met; and second of all, that traffic must move 'between foreign ports although occasionally cargo could be loaded or unloaded in a Spanish port' (as stipulated in the precept itself).

In this case, the complainant has proven that the ships were used for international transport, for trips between Spain and the United States and between other countries and the bill of lading was presented as evidence.

The fact that the ships fly the national flag and are therefore subject to Spanish legislation in accordance with Art. 12 of Decree 3327/1977 of 9 December is not indicative of any type of change or modification in the applicable tax regulation which is independent of trade legislation relative to ships as vehicles of trade.

This same interpretation was adopted by the Administration with regard to the application of the 17 June 1981 Order (Internal Revenue Ministry) that points to the doctrine used in binding answers to consultations formulated by taxpayers about the business tax. It was with reference to consultation number 15 on Art. 7, b) of Business Law and focused on the rental of containers that were leased to foreign companies and the Administration ruled in favour of exempting the income generated by those rental payments as along as a series of conditions were met including: 'under no conditions shall the container be used for national transport purposes.' This same criteria was followed by the TEAC and in case law cited by the complainant.

It can therefore be determined that the complainant was not under obligation to withhold the tax in accordance with Arts. 1 and 2, c) of Royal Decree 357/1979 (RCL 1979\598), and Art. 341.2, of the Tax Regulation, corresponding to the income earned from capital assets of a non-resident company.

Fifth: In application of Art. 131.1 of the LJCA (RCL 1956\1890 and NDL 18435), no special mention is made with regard to court costs".

XXIII. INTERLOCAL CONFLICTS OF LAW