Spanish Judicial Decisions in Private International Law, 1997

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I. SOURCES OF PRIVATE INTERNATIONAL LAW

1. Community Law

– *STS* 28 November 1997, *Ar. Rep. J.*, n. 8435.

Directive 93/13/EEC, 5 April 1993, on abusive clauses in contracts signed by consumers. Not transposed in due time. Vertical direct effect: yes.

"Legal Grounds:

First.– 'Home English', a company domiciled in Barcelona, v. Mateo G. T., domiciled in Villena. The issue was a contract, styled 'matriculation', an atypical and complex contract of sale and services whereunder the latter undertook to pay a price, which payment was not in the event made. Dated 5 April 1995, printed on both sides and completed with specific details on the front, where the parties signed, the back of the contract included a printed clause specifying submission to the jurisdiction of the Courts of Barcelona; the back was not signed by the parties; on the front, where they did sign, there is a declaration of acceptance of the specific conditions (meaning clauses) of this contract in accordance with the clauses appearing on the back.

This kind of contract is known as a standard-form contract, meaning a contract whose essence and whose clauses are drawn up by one party and imposed on the other, who is unable to negotiate the terms, make a counter-offer or amend them, but can only accept or reject them; the freedom to contract is preserved (freedom to sign the contract or not), but not so the contractual freedom (freedom of both sides, not just one, to draw up mutually acceptable clauses). There is no question as to the validity of the standard-form contract, which is a part of modern life, but there is a clear need for legal and judicial control to protect one of the parties from injuries intolerable in Law. This relates directly to the question of general conditions in contracts, as

Spanish Yearbook of International Law, Volume V, 1997

parts of standard-form contracts, which are not genuine conditions but covenants or clauses included in all the contracts drawn up by one party and imposed on any party wishing to deal with the former. Inasmuch as these constitute a serious restriction on the principle of free will, a considerable body of legislation has been enacted throughout Europe, not to restrict such clauses but to control them and thus prevent their abusive use.

Second.– The party 'Home English' filed suit against Mateo G.T. for the unpaid amount with the court then corresponding in the rota of Barcelona courts. Mateo G.T. filed a challenge of competence through the Court of First Instance in Villena, while the former disputed the challenge. The parties based their positions respectively on the general rules of competence and on the jurisdiction clause, and each side obtained a report favourable to its cause from the Public Prosecutor.

According to the general rules (article 62, rule one, of the Civil Procedure Act), the Court of First Instance in Villena has jurisdiction. According to the jurisdiction clause, article 56, the Barcelona court has jurisdiction.

Third.– Article 10 of the Defence of Consumers and Users (General) Act 26/1984, 19 July (*RCL* 1984/1906 and *ApNDL* 2943) sets forth the rules for general conditions of contracts, which equally apply in this case. From the foregoing, it is apparent that the jurisdiction clause in the contract at issue comes within the meaning of general conditions as defined by article 10.2 of the Act: for the purposes of this Act, clauses, conditions and stipulations of a general nature (the requirements are laid down in article 10.1) refer to a set of conditions, clauses or stipulations previously drawn up unilaterally by a company or group of companies for inclusion in all contracts entered into by that company or group of companies and whose inclusion cannot be challenged by a consumer or user (*i.e.*, the purchaser or end user of the product as provided in article 1.2) wishing to acquire the good or service concerned. Furthermore, article 10.1, c) requires that the return for services rendered be established in good faith and be fairly balanced; subsection 3 of this article excludes abusive clauses, which are defined as clauses which are disproportionately or inequitably prejudicial to the consumer or which entail an imbalance between the rights and obligations of the parties to the detriment of the consumer or user. The jurisdiction clause in the present case is deemed abusive in that there is an imbalance of rights and obligations and disproportionate and unfair prejudice to the purchaser in the fact of having to litigate far from home with all that this entails, while the plaintiff is far more powerful financially. And the jurisprudence of this Court so confirms: Decision of 23 July 1993 (*RJ* 1993/6476), 20 July 1994 (*RJ* 1994/6518), 12 July 1996 (*RJ* 1996/5580), 14 September 1996 (*RJ* 1996/6715), 8 November 1996 (*RJ* 1996/7954), 30 November 1996 (*RJ* 1996/8457) and 5 July 1997 (*RJ* 1997/6151).

Also relevant in addition to these regulations is Directive 93/13/EEC, 5 April 1993 (*LCEur* 1993/1071), on abusive clauses in contracts concluded with

consumers. Article 3 of this Directive defines abusive clauses in the following way: Contractual clauses which have not been individually negotiated shall be deemed abusive if despite the good faith requirement, they entail a considerable imbalance, unfavourable to the consumer, between the rights and obligations of the parties under the contract. A clause shall be considered not to have been individually negotiated where it has been drawn up beforehand and the consumer has had no say in its content, particularly in the case of standard-form contracts. The burden of proof that a standard clause has been individually negotiated lies with the professional so stating. The Annex to the Directive here referred to contains a list, for guidance purposes and not exhaustive, of clauses that may be declared abusive ... Which negates or hinders the institution of court proceedings or appeals by the consumer, especially where it obliges the consumer to address only one jurisdiction or channel of arbitration not established by law, thus unduly restricting the means of proof at his disposal ... Article 6. The member states shall establish that consumers are not bound, in the conditions laid down by the relevant national law, by abusive clauses in a contract entered into between the consumer and a professional ... *etc.* Under article 10, the cited Directive was to have been incorporated in Spanish law by 31 December 1994 at the latest, but this was not the case. The jurisprudence, as set forth in a Decision of 18 March 1995 (*RJ* 1995/1964), notes the problems relating to the direct effect of Directives not transposed in due time: according to the doctrine of the European Communities Court of Justice, these are not automatically incorporated in the statutes of the states of the European Union but have a vertical effect on states and when individuals act against states because the Directive has not been incorporated in internal law in due time, and a horizontal effect in disputes between private individuals where the Directive has not been incorporated in due time and contains precise regulations that are clearly susceptible of immediate implementation. For the purposes of judging the submission clause, this was the view taken by this Court's Decisions of 8 November 1996, 30 November 1996 and 5 July 1997.

Fourth.– In conclusion, under the provisions of the Defence of Consumers and Users (General) Act and the EC Directive, the jurisdiction clause in the contract at issue is deemed abusive and is therefore void (article 10.4 of the cited Act) and unenforceable (article 6 of the Directive).

In the absence of submission, the applicable provision is article 62, rule 1 of the Civil Procedure Act, and hence this Court finds that competent jurisdiction lies with the Court of First Instance of Villena".

II. INTERNATIONAL JURISDICTION

1. Contracts

– *SAP* Pontevedra, 25 March 1997, *RECA*, 1997, p. 275.
Tacit submission.
Note: See V. International Commercial Arbitration.

– *SAP* Castellón, 26 May 1997, *Ar. C.*, 1997, n. 1343
International maritime transport. Subrogation of the insurer to the rights of the insured. Plurality of defendants. Declinatory exception. Scope of the submission clause in the bill of lading

"Legal Grounds:

The legal grounds of the challenged decision are not disputed.

First.– The plaintiff 'Plus Ultra, SA', being subrogated to the rights of the maritime goods transport agent that it compensated for deterioration of the goods shipped and having sued the shipowners 'Egyptian European Maritime Co.' and the shipping agents 'Viuda de Enrique Gimeno, SA', appealed from the decision which upheld the defendants' plea for a declinatory exception and found that the competent jurisdiction for this suit lay with the Courts of Alexandria by virtue of the submission clause included in the bill of lading, and not the Courts of Castellón as sustained by the appellant.

We should point out firstly that neither in the first instance nor in this appeal did either party raise the issue of the judicial channel through which lack of territorial jurisdiction is to be sustained since the Procedural Reform Act of 1984 (*RCL* 1984/2040; *RCL* 1985/39 and *ApNDL* 4257). In this respect we have said (Decisions, *inter alia*, of 20 December 1990, 12 March 1991, 23 July 1991, 10 November 1994 and 5 December 1994) that: a) The new wording following the reform of article 533.1 of the Civil Procedure Act instituted by the Act of 6 August 1984 restricts the dilatory exceptions of reference to the lack of jurisdiction (since hearing of the challenge lies with a different order of jurisdiction or with administrative instances), the lack of objective competence *rationae materiae* and the lack of functional competence (where the matter has to be judged by a different level of jurisdiction), but territorial jurisdiction is no longer included owing to the substitution of the generic expression 'lack of jurisdiction' by the more precise expression 'lack of objective or functional jurisdiction or competence'. Thus, if lack of territorial competence is no longer one of the accepted dilatory exceptions, it can no longer be invoked in the writ of reply to the complaint. b) The invoking of lack of territorial competence can only be sustained either as a declinatory issue to be substantiated by processing of motions in pursuance of article 79 of the Civil Procedure Act (*LECiv*) or else only in proceedings for small claims, as absence of procedural rules subject to examination in the

appearance regulated by articles 691 *et seq.* of the Civil Procedure Act. The criterion here cited is also maintained by consolidated doctrine of the Supreme Court (Decisions of 17 June 1991 [*RJ* 1991/4470], 5 February 1992 [*RJ* 1992/830], 30 December 1992 [*RJ* 1992/10561 and *RJ* 1992/10564], 23 February 1993 [*RJ* 1993/1228] and 4 December 1993 [*RJ* 1993/9832]), which considers that the defendant's proposal in its reply to the lack of territorial competence exception and in the event of denial his acquittal in respect of the substance of the issue, is exactly the procedural action described in article 58.2 of the Civil Procedure Act as determining tacit submission.

In the case at issue, while the shipowners did no more than raise the issue of competence, the shipping agent did the same but then immediately entered a precautionary reply to the complaint, which could have raised the problem described with respect to this party. However, besides the fact that this would not have affected the correctness of the procedural issue raised by the shipowners, it is a question that has not even been raised, and therefore, having mentioned it to place our criterion on record, it remains only to address the problem that prompted the lodging of an appeal, and that is the issue of whether or not jurisdiction lies with the Courts of Castellón as sustained by the appellant, or with the Courts of Alexandria as the defendants successfully maintained in the original instance.

Second.– The basis of the appealed decision declaring for the jurisdiction of the Courts of Alexandria was clause 3 of the bills of lading for the allegedly damaged goods (folios 17 verso and 19 verso), whereby all disputes arising in connection with the shipping contract manifested in the bills of lading should be settled in the place where the shipowners have their principal place of business, namely Alexandria as stated in the cited documents. It is true that the court of instance in principle considered the jurisdiction clause valid in only one of the bills of lading, the one appearing on folio 17, as this was the only one bearing the signature of the consigner, whereas the second bill bore no such signature. Despite that, the court concluded that the Courts of Alexandria also had jurisdiction over issues arising in connection with the second bill, based on the jurisprudential principle of prevailing interest and the fact that the shipment recorded in the bill of lading that does bear a signature in acceptance of the clause relating to jurisdiction of foreign courts was the more valuable. The appellant does not deny the virtue of this doctrine but does deny its applicability in this case, sustaining that since the shipment referred to in the signed document was more valuable, it must be understood that the larger amount of compensation is being claimed for the document in which the jurisdiction clause was not signed. If this were the case, the doctrine referred to must necessarily lead to the opposite conclusion to that which was reached. However, such is not the opinion of this Court. The criterion applied by the doctrine of prevalent interest, reflected in Decisions of 3 January and 4 November 1983 (*RJ* 1983/156 and *RJ* 1983/5954) is which of the contracts or legal relationships that have given rise to the merger of causes is the more

valuable. This means that the deciding factor must be not the amount of the actual claim but the content of the contract of greater value; ultimately, it is this contract that must constitute the crux of the issue in the case, regardless of the amount involved in whatever judicial decision may issue in that respect.

In the instant case, the bill of lading in which the jurisdiction clause is expressly accepted is representative and reflects the greater value, and therefore the doctrine of prevalent interest as cited has been correctly applied to express the greater weight, in regard to territorial jurisdiction, of the contract in which the consigner by signing accepted the jurisdiction of the courts of the shipowners' principal place of business over the contract in which such jurisdiction was not in principle accepted.

Third.– Of less weight is the argnment alleging the abusive nature of the clause of reference and invoking the EC Directive on such clauses. Setting aside the dubiety of whether that directive can be invoked in contractual relations where one of the parties is not a national of an EC country, it clearly cannot be invoked either by the appellant or by the consigner to whose rights the applicant was subrogated after paying compensation for the damage sustained by the goods shipped. Council Directive 93/13/EEC, 5 April 1993 (*LCEur* 1993/1071) on abusive clauses in contracts entered into with consumers restricts the subjective applicability of this rule to persons meriting the consideration of consumers, which the same rule defines as natural persons acting for purposes unrelated to their professional activity, and that is obviously not the case of the appellant or the consigner to whose right it has succeeded. Again, the specific national consumer protection legislation enshrined in Act 26/1984, 19 July (*RCL* 1984/1906 and *ApNDL* 2943) does not favour the appellant, given the well-known fact that article 1.2 thereof restricts the definition of consumers to end users of goods and services, which clearly does not apply to the appellant.

Fourth.– Turning to the question of the possible effects of a clause accepting the jurisdiction of foreign courts, as in the instant case, the Court is well aware of the reservations in the Supreme Court's jurisprudence in that respect inasmuch as the jurisdiction of Spanish courts is associated with the exercise of national sovereignty (*STS* 10 November 1993 – number 1040/1993– [*RJ* 1993/8980]). However, such reservations have arisen in cases lacking the clarity of the one here at issue, where we have goods shipped from Castellón (Spain) to Alexandria (Egypt), as recorded in two bills of lading, a bill of lading being a mercantile document whose formalisation and effects are governed by articles 709 *et seq.* of the Code of Commerce and which serves a threefold purpose in that it is a document accrediting the cargo and also serves as a credit certificate and a certificate of conveyance (*STS* 26 April 1995 – number 385/1995– [*RJ* 1995/3550]). We have then a shipment substantiated by a certificate of security, the bill of lading, which is functionally a negotiable security, and therefore the scientific doctrine holds that in light of this characterisation the force of the document is predicated on

a literal reading, so that the holder's right and position are substantially demarcated by the text of the bill of lading.

It must be borne in mind that in the instant case the appellant is subrogated to the receivers of the damaged goods, whom the former indemnified as the insurer of the shipment, so that the appellant enjoys the same rights and can claim the same exceptions, given that under article 780 of the Code of Commerce, once the insurer has paid the insured amount, 'it shall be subrogated to all the rights and obligations of the insured'. For that reason the jurisdiction clause applies equally to the appellant, for the law does not confer a simple right of repetition but uses subrogation as a means of rejoinder, as set forth in Supreme Court Decision number 942/1993 of 13 October 1993 (*RJ* 1993/7514).

This last decision, rightly invoked by the mover of the declinatory exception, rules that since article 22.2 of the Organic Judiciary Act (*RCL* 1985/1578, 2635 and *ApNDL* 8375) freely admits the jurisdiction clause where this refers to Spanish courts, it would be absurd and prejudicial to exterior judicial traffic were it not to be admitted in the case of foreign courts. There can therefore be no objection to the validity of the jurisdiction clause, for we cannot ignore the evident fact that the growing globalisation of international trade, that is the internationalisation of mercantile traffic, is not compatible with postures radically opposed to Spanish nationals litigating in foreign courts where the relevant contract so stipulates.

Five.– Furthermore, the outcome would be the same even if the jurisdiction clause did not apply. Setting aside the jurisdiction clause, the applicable statute is rule 1 as set forth in article 62 of the Civil Procedure Act, which provides that in actions *in personam*, the jurisdiction lies *prima facie* with the court in the place where the obligation was to be discharged. In the instant case involving maritime transport, the place of performance in light of the terms of the bills of lading ('clean on board, freight prepaid') is not the place where the goods were embarked or the place where the charter price was paid – that is, Castellón – but the place of destination or delivery of the goods as the jurisprudence finds (*SSTS* 10 March 1993 [*RJ* 1993/1834] and 13 October 1993), including decisions upholding the jurisdiction of foreign courts such as that of 10 November 1993.

Following this criterion, even were submission to the courts of Alexandria to be denied, which is not the case, strict application of article 62.1 of the Civil Procedure Act (*LECiv*) would lead to the same conclusion, that is dismissal of the appeal.

Sixth.– In light of the foregoing considerations, the appeal is dismissed and the appellant is ordered to pay the costs of the appeal (article 710 *LECiv*)".

– *S.* Court of First Instance No. 1 of Tolosa, 13 January 1997, *RECA*, 1997, p. 244.

Brussels Convention of 27/9/1968. Place of discharge of the obligation giving rise

to the claim. Declaration of *lege causae*. Competence of Spanish courts. Tacit submission: no. Contract entered into prior to the coming into force of the Rome Convention of 19/6/1980. Applicability of art. 10.5 of the Civil Code: Scots Law. Insufficient accreditation. Subsidiary applicability of Spanish Law

"Legal Grounds:

First.– The defendant William Grant & Sons Limited, without replying to the suit brought against it, enters a plea under international law for stay of judgment on the ground that the Spanish courts are not competent to try the claim brought against it, the competent forum being the courts of Scotland in pursuance of art. 2 of the Brussels Convention of 27 September 1968 regarding jurisdiction and the enforcement of judicial decisions on matters of civil and mercantile law (referred to hereinafter as the Brussels Convention), whereby jurisdiction lies with the courts of the place of domicile of the defendant, the argument in brief being non-applicability of the special jurisdiction laid down in art. 5.1 of the Brussels Convention. Under that convention the competent court in contractual matters is that of the place where the obligation giving rise to the cause was or ought to have been discharged. In the present case discharge of the obligation is without any physical location, so that although contract law refers to a place of discharge, this place is necessarily notional and hence such a stipulation cannot be considered for the purposes of art. 5.1 of the Brussels Convention. The same conclusion (jurisdiction of the courts where the defendant is domiciled) ensues from the defendant's interpretation of our internal statutes – under art. 22.3 *LOPJ*, 1 July 1985 as it relates to art. 1262.2 *CC*, whereunder in cases like the present one where the contract is concluded by letter, the contract is presumed to take place where the offer was made, and as it relates to art. 1171.3 *CC* – because if what is claimed is payment of a sum of money, in the absence of a designated place of discharge of the obligation, payment in discharge of that obligation must be the domicile of the debtor, in this case Scotland.

A subsidiary issue arises in connection with decline of jurisdiction between Spanish courts, to wit that if Spanish internal law, specifically art. 1171.1 *CC*, is applicable and if for the sake of argument the plaintiff's case is accepted and consequently the obligation to pay was situated in San Sebastian, the case is justiciable by the court of San Sebastian and not by this court of Tolosa.

The plaintiff entered a reply opposing the stay on judgment summarised earlier, invoking art. 5.1 Brussels Convention, under which, Spain being the country of discharge of the defendant's payment obligations, the jurisdiction generally lies with the Spanish courts; and once the country whose courts have the jurisdiction is determined, in the present case the competent court to try the case is that of Tolosa pursuant to the Additional Provision of the Agency Contracts Act, whereunder the competent court is the court of domicile of the agent and any agreement to the contrary is to be considered void. The plaintiff further alleges that the defendant has tacitly accepted this court in the terms of art. 58.2 Civil Procedure Act (*LECiv*) in that the defendant requested

official translations of several documents accompanying the writ, which tacit acceptance the defendant denies in the plea for a stay, invoking the flexible interpretation that the European Court of Justice has been giving to art. 18 Brussels Convention. This article establishes *prorogatio fori* (like our tacit acceptance of the court in a Contracting State when the defendant appears before it), unless the purpose of such appearance is to impugn the jurisdiction.

Undoubtedly a variety of issues arise here which need to be analysed in logical sequence as the premises for a conclusion or finding.

Second.– In the first place it will be useful to define and categorise the legal business existing between the two opposing parties, which will be taken into account in examination of the question of jurisdiction. The plaintiff alleges that the contract at issue is a contract of agency containing an exclusivity clause, formalised in two letters drafted by the defendant and sent to the plaintiff on 11 November 1976 and 27 January 1983; each is identical in substance except as regards the territorial scope, the first letter referring to Peninsular Spain and the Balearic Islands and the second to the Canary Islands, letters which the plaintiff describes as 'contracts'. One of the arguments enlisted in favour of thus considering the contractual relationship of the parties is based on the terms of the said contracts, in that they make reference to the plaintiff as 'exclusive agent' for the sale in the territories indicated, on an exclusive basis, of Grant's Royal Scotch Whisky and Glenfiddich Pure Malt Whisky. However, from the plaintiff's own description of the contractual relationship existing between the parties, set forth under Fact Three in the plaintiff's writ, we must conclude that this is not an agency contract but a contract of concession or distribution on an exclusive basis, which indeed the plaintiff tacitly acknowledges in citing examples of jurisprudence relating to these kinds of contract, going on to argue for the applicability of the rules of agency contracts to distribution or concession contracts.

Third.– Turning now to a detailed examination of international declinatory exceptions, we must look first at the rules on jurisdiction laid down by the Brussels Convention of 1968, which is applicable in Spanish Law in pursuance of arts. 1.5 *Cc* and 96.1 *CE et cetera*, which was addressed in the San Sebastian Convention of 26 May 1989 regarding accession by the Kingdom of Spain and the Republic of Portugal to the Brussels Convention for the purpose of implementing the provisions of art. 220 EECT, published in the *BOE* of 28 January 1991 and thus accepted as conventional Community law. The catalogue of jurisdiction rules proposed by the Brussels Convention basically distinguishes between defendants domiciled (art. 3) and not domiciled (art. 4) in a Contracting State. The only rules that can be invoked against those in the first category are the regulations painstakingly set forth in Title Two Sections 2 to 6 of the Brussels Convention, which are ordered as follows: a) general criterion, to the effect that the jurisdiction lies with the Courts of the State of domicile of the defendant (art. 2); b) special

jurisdictions overriding the general rule (arts. 5 and 6); c) particular jurisdictions in relation to insurance (arts. 7 to 12) and to contracts entered into with consumers (arts. 13 to 15); d) exclusive jurisdictions (art. 16); and e) express (art. 17) and tacit (art. 18) *prorogatio fori.* One of these rules stands out from the rest, and that is the *forum executionis* in contractual matters – that is, the jurisdiction of the court of the place where the obligation originating the suit was or ought to have been discharged (art. 5.1), the rule of special jurisdiction whose applicability to the instant case is at issue.

From a reading of the writ of process, we may conclude that the plaintiff is bringing two actions, both monetary claims, consisting in indemnification for damages and loss of profit, and indemnification for clientele built up by the plaintiff, from which the defendant will continue to derive benefit after termination of the contract of exclusive concession or distribution. This conclusion will affect jurisdiction, albeit the plaintiff in replying to the exception maintains that it is bringing one single claim for indemnification – that is, for unilateral rescission of the mentioned contract. The issue here is clearly one of 'contractual matters' within the meaning of art. 5.1, a point not even broached in this case. The jurisprudence of the ECCJ has now been consolidated and considers such matters an autonomous Community notion proper to the Brussels Convention, *viz.* decision of 22 March 1983, case 34/82, *Peters/Zuid Nederlandse* and decision of 8 March 1988, case 9/87, *Arcado/Haviland*; the latter refers to an instance of undue unilateral rescission of an autonomous commercial agency contract and the payment of commissions, similar to the supposition of fact in a decision of 6 October 1976, case 14/76, *De Bloos/Bouyer*, referring, as in the instant case, to unilateral rescission of an exclusive distribution contract without giving reasonable notice and claims for damages, all instances which according to the ECCJ come within the meaning of contractual matters. Having said this, we must determine what Law is applicable to establish the place where the obligation originating the suit was or ought to have been discharged – which in the instant case will help to determine the specific obligations underlying the case of the defendant – and under which Law the applicable jurisdiction should be determined on the basis of the place of discharge. Absent any express agreement by the parties as to the place of discharge of the obligations originating the suit, this must be determined in accordance with contract law. Such was the verdict of the ECCJ in the first decision issuing in interpretation of the Brussels Convention, case 12/76, 6 December 1976, *Tessili/Dunlop*, which found that determination of the place of discharge as the nexus for determination of jurisdiction, under contract law is that which corresponds most closely with the jurisdiction criteria of art. 5, namely the existence of a close connection between the dispute and the court. This criterion has since been further sustained in later decisions, for instance that of 15 January 1987, case 266/85, *Shenavai/Kreischer*. The ECCJ rejected both the invocation of *lex fori* and a Community solution and opted for a solution by conflict of law rules. Under

Spanish Law, given that the Rome Convention of 19 June 1980 on law applicable to contractual obligations is not applicable in the present case inasmuch as it does not apply to contracts entered into prior to the coming into force of that Convention (art. 17) and the Convention came into force for Spain on 1 September 1993 according to art. 5.1 of the said Convention, we must turn to the rules of conflict at Private International Law, specifically art. 10.5 *Cc*. Following a list of events not germane to the present case, this rule states that the *lex contractus* is the law of the place where the contract was entered into. There is no difficulty in determining such place where the contract is *inter praesentes*. Between remote parties, this is determined with the help of art. 1262.2 *Cc*, last point, which serves as an auxiliary rule for determining the law applicable to a contract. Art. 1262.2 *Cc* provides that in the case of contracts *inter absentiae*, with specific reference to contracts concluded by letter as in the present instance, 'acceptance by letter only obliges the offeror from the time at which he had cognisance thereof. In such case the contract is presumed to have been concluded at the place where the offer was made'. A fictitious locus of conclusion is therefore established, so that this locus is 'presumed' and has the purpose of identifying a place that can be considered the locus of conclusion of the contract regardless of the time of conclusion. This solution is valid for both civil and mercantile contracts. Art. 54 *CC* is not applicable as it refers only to the separate problem of time. In the instant case, the offer having been made in Scotland as evidenced by the plaintiff's documents 1 and 2, English *[sic]* Law is the contract law for determining the place of fulfilment of the obligation originating the complaint and also for determining international juridical competence, and more specifically what court has territorial jurisdiction. However, the fact that the applicable contract law is English *[sic]* law raises the problem of accrediting not only the validity and content of that law, but also its applicability to the present case.

Fourth.– Art. 12.6 *Cc* provides that anyone invoking foreign law must prove its content and validity by means accepted by the Spanish rules of evidence. However, in applying it the Spanish court may further avail itself of whatever means of verification that it deems necessary and shall issue the requisite orders for this purpose. Leaving aside the doctrinal issue of whether for procedural purposes foreign law is to be considered as a fact or as normative and hence subject to the principle *jura novit curia*, the fact is that our jurisprudence has repeatedly and almost unanimously viewed it as a fact subject to normal procedural rules of evidence: 'Foreign law, as a matter of fact, has to be alleged and proven by the party invoking it' (*cf. TS SS* 1 February 1934, 4 December 1935, and 9 January 1936) according to *STS 6ª S* 15 March 1984 (Presiding Mr. Jiménez Asenjo), and: 'The application of foreign law means that such law may be alleged as a means of proof in Spanish courts, and the mere citation of articles of foreign law codes is not in itself sufficient to prove the obligation therein determined; the existence and

the force of the law invoked must be accredited by the opinion of two experts in jurisprudence' (*TS 1ª S* 19 November 1992 – Presiding Mr. Martínez Calcerrada). Therefore, in the absence of proof, which is absolute in the instant case inasmuch as the defendant claims Scots Law as the *lex contractus* but provides no evidence as to validity or content, the subsidiary contract law must be Spanish law. In this connection *STS 1ª*, 7 September 1990 (Presiding: Mr. Burgos Pérez de Andrade) established that 'the applicability of foreign law is a matter of fact and as such must be alleged and proven by the invoking party, who must accredit the precise nature of the current law, its scope and its accepted interpretation in such a way as to dispel any reasonable doubt of the Spanish courts as to its applicability, all subject to reliable documentary evidence. The common practice in Spanish courts is that where they cannot be absolutely sure of the applicability of foreign law, they must judge and decide in accordance with Spanish law (*cf. TS SS* 28 October 1968, 4 October 1982, 15 March 1984 and 12 January and 11 May 1989).

There can be no doubt that in the absence of any evidence from the party invoking the foreign law that it considers applicable, the court is unable to cooperate in ascertaining the content of that law as provided in the last point of art. 12.6 *Cc*; therefore in procedural terms, an order to postpone final judgment pending further or better evidence as provided in art. 340 *LECiv* is complementary only according to long-standing jurisprudence and hence cannot ever substitute for the inactivity of the parties.

Five.– Having determined as aforementioned the *lex contractus* whereby the place in which the obligation originating the suit was or ought have been determined is to be established, given that in the instant case there are two obligations, it must be determined which is relevant to the stated purposes for application of art. 5.1 Brussels Convention. This question has been raised in the ECCJ in relation to several matters, the first being case 14/76 *De Bloss/ Bouyer* in connection with the unilateral rescission of an exclusive distribution contract without notice and a claim for rescission of contract plus compensation for damages. This decision establishes the need to individualise the specific obligation constituting the basis of the claim, distinguishing between an original obligation, an obligation substituting the original obligation that was not fulfilled and hence accessory to the original obligation, and an autonomous obligation. In subsequent cases the court mitigated the doctrine that this decision seemed likely to lay down, admitting that in the specific case of litigation where the action brought by the plaintiff involves several obligations arising out of one and the same contract, the court concerned, in order to determine whether it is competent, must be guided by the principle whereby the accessory follows the principal – in other words, it is the principal of more than one obligation at issue that determines the court's competence (decision *Shenavai/Kreischer*).

As noted, in the instant case it is understood that the complaint refers to two obligations, which according to the doctrine cited are classified as

follows. An obligation to compensate for damages, including loss of profits, arising in part from failure to give adequate notice, a breach which is linked to the place of discharge of the allegedly unfulfilled obligation, which is non-originating and is accessory, but to the primary originating obligation, and to compensate for the benefits and profits that will accrue to the defendant after termination of the contract through the clientele enlisted by the plaintiff as exclusive distributor for the defendant. The latter comes under the heading of compensatory or autonomous damages since they do not originate in the breach of a specific obligation under the contract and are intended to palliate the inequitable effects of rescission of the contract. The classification of the obligation as autonomous is derived from the law applicable to the contract, which as we have noted is Spanish law. Under that law there is no express and concrete regulation of exclusive concession or distribution contracts as distinct from agency contracts, which have been regulated since 1992, and hence what we have is a non-typified and undenominated contract the notes on which have been built up by the Jurisprudence on the basis of contractual autonomy (art. 1255 *Cc*), the general provisions governing obligations and contracts (arts. 1088 *et seq. Cc*) and the realities of the market. It is the position of our Jurisprudence that the essence of the obligation to compensate for the profits that the grantor will derive from the clientele built up by the concessionaire after opting to rescind the contract lies not in the contract *per se* but in the unfair enrichment of one of the parties. In this connection, Supreme Court Decision *STS 1ª* 18 December 1995 (Presiding: Mr. Villagómez Rodil) rules that 'in cases where a commercial distribution contract is exclusive and unlimited in duration, either party may terminate, but it may not do so on terms which are abusive or transgress the established bounds of good faith; the rights of the concessionaire arising from the commercial facility provided, infrastructures, clientele, and also storage and accumulation of goods, are not to be set aside, still less trampled upon, so that there is a requirement of necessary prior notice and liquidation of the commercial relations sustained, with a view to settling whatever monetary credits and debits are appropriate (*Cf. TS 1ª SS* 24 March 1993 and 17 October 1995)'. And among others, *S AP Tarragona Secc. 1ª*, 5 February 1993 (Presiding: Ms. Espejel Jorquera) ruled that 'an exclusive distribution contract allows for unilateral withdrawal, without prejudice to appropriate compensation by a party abusively rescinding (*Cf. TS S* 3 July 1986). Evidently, any compensation does not originate in the termination of the commercial relationship as such but in failure to give notice if such is stipulated, or in the breach of one of the conditions in the contract. It is only possible to recover any proven damages consequent upon the cessation of distribution if such cessation has taken place in an abusive manner and in breach of the requirements of good faith, so that where there has been no breach of a contractual duty, the distributor may only be entitled to compensation in respect of the benefit accruing to the grantor of the exclusive

concession from the clientele enlisted by the distributor in order to avoid undue enrichment of one of the parties'.

Now, of the two obligations at issue, the principal one for the purpose of determining the locus of discharge and hence applying the rule provided in art. 51 Brussels Convention must be the obligation to compensate for damages arising from insufficient notice of termination and from unilateral, groundless, untimely and unexpected termination as alleged by the plaintiff, although this is obviously not the time to undertake an examination of the grounds. The obligation at issue here is one which stands in place of an unperformed principal obligation, the first being the locus of discharge of the second, whereas the other obligation referred to is accessory to the principal obligations in the contract at issue. On the basis of the obligation to compensate for damages arising from insufficient notice, which in turn eonstitutes unilateral, groundless, untimely and unexpected termination of the contract by the defendant, the relevant obligation in light of the *De Boos/ Bouyer* decision would be the one regarding which the default is invoked in support of a claim for damages – in the instant case the grantor's obligation to give reasonable notice, as noted in the written remarks presented to the ECCJ in case 9/78 *Arcado/Haviland.* It is the court's understanding that this obligation to give reasonable notice and to refrain from untimely unilateral termination must be discharged not in Scotland but in Spain, more specifically at the place where the plaintiff has its principal place of business – that is Zizurkil, situate in this Judicial District of Tolosa. This court is therefore competent to try the matter.

Sixth.– In rebuttal of the declinatory plea, the plaintiff further alleges tacit acceptance of this jurisdiction by the defendant, pursuant to art. 58.2 *LECiv* in that the request for translation of several documents accompanying the writ implies a procedural act. However, such tacit acceptance is rebuttable under the provisions of art. 18 Brussels Convention, which allows *prorogatio fori* against the court before which the defendant appears; but 'this rule shall not be applicable where the object of the appearance is to challenge the court's competence... As the defendant says, this rule has been interpreted flexibly by the ECCJ, so that wherever such intention to challenge jurisdiction is deducible, the rule must apply. The Brussels Convention contains no rule similar to art. 58.2 *LECiv*, whereby any 'representation' made to a court by the defendant other than a formal declinatory plea constitutes the defendant's tacit submission to the court to which that representation is made. Our Supreme Court has defined representations in the above sense as entering a plea for the suspension of proceedings (*STS* 3 January 1963), lodging of an appeal (*SSTS* 7 February 1984 and 11 February 1981) or requesting a postponement to reply to the complaint (*SSTS* 11 February 1981 and 27 July 1992). On the other hand, the mere fact of appearing or the appearing of the defendant to make over a sum of money, for example, cannot be considered representations in the sense referred to. The difference in interpretation is

illustrated by the fact that our Supreme Court is categorical in this respect: *viz. STS* 22 May 1995 (Presiding: Mr. Morales Morales), which rules that 'since it was removed from the list of dilatory exceptions in art. 533 *LECiv*, lack of territorial competence can only be alleged in the form of a plea for waiver or declination of jurisdiction. And in the latter case, which must be substantiated and settled in the pleading stage (given that art. 687 *LECiv* is not applicable), such allegation must be single and prior to and separate from any other issue, given that if it is included in the same writ of reply to the complaint for resolution in the final decision issuing from the trial, this implies true tacit submission to the court in which it was filed (*Cf. TS 1ª SS* 30 December 1992, 4 December 1993 and 5 February 1994)'. In other words, barring exceptional cases like that of *STS* 22 March 1991, the declinatory plea presented in the writ of reply to the complaint cannot be accepted inasmuch as it entails tacit submission to the jurisdiction of the court as provided in art. 58.2 *LECiv*. However, as the plaintiff has pointed out, the ECCJ has regularly accepted the grounds of the declinatory pleas, and in the same writ claims subsidiarily that the basis of the complaint is dealt with in the same light by the decision in case 27/81 *Rohrossberger* of 22 October 1981. In any event, given the shortness of the time (three days) allowed under art. 601 *LECiv* for submission of the declinatory plea, the fact that the request for translation of the documents submitted with the writ was submitted well within the allowed term cannot be construed as tacit acceptance of *prorogatio fori* within the meaning of art. 18 Brussels Convention. According to the best doctrine (*e.g.*, A.L. Calvo Caravaca in his comment on art. 18 BC), acknowledging the primacy of Community Law, as for example the Brussels Convention, and the necessary influence of art. 18 on the internal law of member states, particularly as regards procedural law, a court is only competent to exercise a procedural act under the *lex fori* where the allegation is a substantial one intended to secure the acquittal of the defendant and does not at the same time challenge the competence of the court".

III. PROCEDURE AND JUDICIAL ASSISTANCE

– *SAP* Alicante, 8 October 1997, *A. C.*, 4/1998, 76.

Hague Convention of 15/11/65 on notification or remittal abroad of judicial or extra-judicial documents in civil and commercial matters. Letters rogatory. Untranslated notification, Incompatibility with the form provided in the law of the receiving country.

"Legal Grounds:

First.– The appellant reiterates the plea for annulment of proceedings on the grounds of defencelessness of Mrs. C. pursuant to article 238 of the Organic Judiciary Act (*RCL* 1985/1578, 2635 and *ApNDL* 8375), given that the complaint giving rise to these proceedings and the related documents were

delivered to her untranslated by means of letters rogatory sent by the Court of First Instance to France, the country of residence and nationality of the appellant, who upon receiving summons rejected the notification on the grounds that it has not been translated into French as required under article 688.6 of the new French Code of Procedure; this fact was also stated in the note of remittance of the letters rogatory, the appellant arguing non-compliance with the provisions of the Hague Convention (number XIV) regarding notification or remittal abroad of judicial and extra-judicial documents in civil and commercial matters, dated 15 November 1965 (*RCL* 1987/1963 and *RCL* 1989/817). In this connection it must be pointed out that article 5 of the cited Convention does not establish any requirement for translation of the documents to be remitted; paragraph 3 provides that 'if the document is to be communicated or conveyed in the terms of paragraph 1, the central authority may request that the document be drafted in or translated into the official language or one of the official languages of the recipient's country', but it is also the case that paragraph 1 of the cited article 5 contemplates two forms of notification: a) in the forms provided by the laws of the receiving state, or b) in the particular form requested by the issuer, provided that this is not incompatible with the law of the receiving state. It is this latter situation that the appellant alleges on the grounds that French law requires translation, as has been accredited pending contrary evidence, inasmuch as it permits the rejection of any untranslated documentation. The Court therefore finds that the summons is invalid in that Mrs. C. acted lawfully under the law of her country (article 688.6 of the New Code of Civil Procedure) in rejecting the documentation in Spanish, and so it is the court's duty to accept the plea of annulment in pursuance of article 238 of the Organic Judiciary Act, and thus to order the plaintiff to supply the appropriate French translation of the writ and the annexed documentation in order to serve the appellant with the summons.

Second.– The instant actions having been annulled, the court rests silent on the question of costs in both instances".

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND DECISIONS

– *ATS* 15 July 1997, *Ar. Rep. J.*, 1997, n. 9147.

Brussels Convention 27/9/68. *Exequatur*. Proceedings for homologation purposes only; exceptions. The right to due process.

"Legal Grounds:

First.– In order to arrive at a satisfactory ruling on the admissibility of the grounds of the instant appeal, it will be well first of all to establish, on the question of principles, that the regime whereby our legal system recognises and declares the enforceability of foreign decisions is a purely procedural one

whose purpose is to determine whether the conditions established by conventional norms or by the general rules laid down in the Civil Procedure Act (arts. 951 *et seq.*), whichever is the case, for the granting of an *exequatur* exist, but without undertaking a review of the materially applicable law as regards either the law applicable for resolution of the dispute in accordance with the appropriate resolutory system or whether or not the materially applicable law has been correctly applied and interpreted, as this lies outwith the system's homologating function (*SSTC* 54/1989 [*RTC* 1989/54] and 132/1991 [*RTC* 1991/132]; *AATS* 3 December 1996 and 24 December 1996); secondly, that the interdiction preventing courts called on to decide on the plea for *exequatur* from reviewing the grounds of the matter applies equally to examination of the propriety of the conduct of original proceedings in accordance with the *lex fori* and in due observance of the secondary rules that regulate it, the only exception to this prohibition being due respect for the guarantees set forth in article 24 of the Spanish Constitution (*RCL* 1978/2836 and *ApNDL* 2875), whose supervising role demands that the decision conform to it, recognising as it does the public nature of the forum which, as a limit on the recognition and enforcement of foreign judicial decisions, has acquired a new dimension since the institution of the Spanish Constitution, assigning it a clearly constitutional role (*SSTC* 43/1986 [*RTC* 1986/43] and 132/1991 and *AATC* 276/1983 and 795/1988; *AATS* 23 July 1996, 24 September 1996, 1 October 1996, 10 December 1996 and 25 February 1997, among the most recent); thirdly, and flowing from the foregoing, that where admissible, an appeal to the Supreme Court against decisions handed down by *Audiencias* in *exequatur* proceedings must be for the sole purpose of reviewing the application of the rules of recognition by the lower courts, and therefore in the instance of the enforcement of decisions coming within the scope of application of the Brussels Convention of 27 September 1968 (*RCL* 1991/217, 1151 and *LCEur* 1989/1327) in respect of jurisdiction and the enforcement of judicial decisions in civil and mercantile cases, the focus of the examination must be the rules contained in Title III; it therefore falls outside the scope of such judicial review, as marginal to the homologation procedure, to verify the forums determining international judicial competence, even by indirect reference for purposes of recognition for the control of fraudulent conduct, by express proviso of art. 28 paragraph three of the Convention – except in cases where such control is permitted as coming within the meaning of sections 3, 4 and 5 of Title II or of art. 59 of the Convention – which indeed prohibits their supervision to determine agreement with the internal system; and it is likewise beyond the bounds of this appeal to verify the applicable law and the observance of the substantive norms that are materially applicable and the norms governing the procedure at origin (art. 29 of the Convention) unless this is necessitated by the requirements of recognition (*v. gr.* art. 27.2) or is required for adjustment of the effects of the decision in recognition of the Spanish public order; and fourth and lastly, we are bound to give notice that

the Constitutional Court has entrusted the Supreme Court with the task of examining the requirements emanating from the public nature of the forum, homologation of compliance with such requirements, and the interpretation of the rules establishing these – all moreover matters of ordinary law that lie outside the province of the Constitutional Court except in the event of infringement of a fundamental right protected by it (*SSTC* 89/1984 [*RTC* 1984/89], 43/1986, 54/1989 and 132/1991; *AATC* 276/1983 [*sic*] and 795/1988).

Second.– In application of the foregoing criteria to the case at issue, we are bound to conclude that the first two of the three grounds alleged are inadmissible. The first of these, which invokes numbers 1 and 4 of article 1692 *LECiv*, alleges the inapplicability of article 20 paragraphs 2 and 3 of the Brussels Convention (in the Consolidated Text drafted after the Accession of Spain and Portugal) as it relates to article 15 of the Fourteenth Hague Convention of 15 November 1965 (*RCL* 1987/1963 and *RCL* 1989/817), having regard to notification or conveyance abroad of judicial and extra-judicial documents in civil and mercantile cases. The ground thus stated is inadmissible in that – leaving aside the fact that it rests upon two ordinals of art. 1692, which for purposes of judicial review is technically quite wrong in light of the formal strictures imposed by art. 1707 of the same Law – what the appellant is really denouncing is an alleged abuse or excess of jurisdiction on the part of the Portuguese court in that it failed to implement the provisions of the above-mentioned art. 20 paragraphs 2 and 3 Brussels Convention, the second of which refers to art. 15 of the Fourteenth Hague Convention for the event that, as in the instant case, the writ of summons in the original proceedings have to be served abroad. This is therefore an appeal intended to draw attention to what in the appellant's opinion is improper procedure by the original court in not having suspended the proceedings for lack of evidence that the defendant was summonsed in due form and with sufficient time to present a defence or, absent evidence of reception of the writ, until the lapse of the six month period referred to in art. 15 paragraph two point b) of the Fourteenth Hague Convention. As it stands, such a challenge cannot be entertained in this forum in that it exceeds the bounds placed upon the judge of the *exequatur*, who cannot consider it without pronouncing upon the propriety of the court's action in original proceedings; we would further add, *incidenter*, that according to the records the Clerk of Court of Viana do Castelo certifies that the defendant was served by certified mail with prepaid acknowledgement, issued on 26 October 1992 and received by the addressee on 2 November of the same year, so that in any case the second paragraph of article 15 of the Fourteenth Hague Convention would not apply. It is quite a different matter if the appellant calls into question whether the act of notification was regular and whether the defendant's rights of defence in the original proceedings were fully protected by due compliance with the formalities established in the law applicable to procedural events of this kind and sufficiently well in advance to allow the presentation of a defence, which

is properly invoked by reference to the relevant provisions of the Brussels Convention regulating the grounds of recognition. The third ground of the appeal does in fact raise the issue in due form and hence can be entertained. The first ground for the appeal, then, is inadmissible under rule 2 subparagraph one of art. 1710.1 *LECiv* as it relates to art. 1707, and under rule three case one of the same art. 1710.1 of the *LECiv* (Civil Procedure Act).

Third.– The arguments supporting the inadmissibility of the first ground apply equally to the second in that, on the basis of art. 1692 point 4 *LECiv* it alleges breach of art. 10.1, a) and b) of the Rome Convention of 1 June 1980, which regulates International Trade in Goods, and art. 20 paragraph 1 of the Brussels Convention. The appellant's intention is to challenge the competence of the court in the state of origin for failing to declare itself incompetent *ex officio*. This raises two issues: firstly, a review of the action of the deciding court in those proceedings, which lies outwith the scope of homologation proceedings and hence of a judicial review thereof as already noted; and secondly, it indicates a desire to make control of the competence of the original court a criterion for recognition. This is not admissible inasmuch as the point at issue is not one of those contemplated in art. 28 Brussels Convention which would render it susceptible of indirect control in the *exequatur* procedure. We should add that in such a case, it is infringement of this rule that would have to be alleged, and it is therefore this rule that would have to be cited in a plea for judicial review rather than art. 20 paragraph one of the Convention, which contains a mandate addressed to the original court requiring *ex officio* examination of its own competence in the events there defined. The ground must be rejected as coming under the cause provided in rule 3 case one of art. 1710.1 *LECiv*, admission whereof does not require prior communication by the court to the interested party, as repeatedly stated in the doctrine of this Court and the Constitutional Court (*SSTC* 37/1995 [*RTC* 1995/37], 46/1995 [*RTC* 1995/46], 98/1995 [*RTC* 1995/98] and *ATC* 24 April 1996 [*RTC* 1996/100 *Auto*]).

Fourth.– Having regard to the third ground of the appeal, we find no legal obstacle to admission, as above noted".

V. INTERNATIONAL COMMERCIAL ARBITRATION

– *SAP* Pontevedra 25 March 1997, *RECA*, 1997, p. 275.
International maritime transport. Scope of the arbitration clause. Judicial channel for upholding

"Legal Grounds:

First.– The appellant sustains all the grounds of opposition to the complaint, both formal and substantial, and hence the court must review then all.

Second.– Beginning with the secondary or procedural grounds, the first is

the question of the parties' being allegedly bound by an international arbitration clause.

Indeed, the defendant claims that the shipping contracts (*Notas de Cierre*) contained a clause expressly stipulating submission of disputes to arbitration in London. However, the existence of this clause is in doubt given that neither plaintiff nor defendant supplied the originals of these contracts with their respective writs of process and reply.

Nevertheless, in the evidence stage, at the instance of the defendant the original court petitioned this Chamber, where appeal number 1063/1995 issuing from preventive attachment proceedings 181/1991 in the same court was pending, requesting attestation of documents (classified as original) numbers 2 to 7 and 10 to 16. The Secretary issued attestation of documents requested, including a *Nota de Cierre* (shipping contract) between the shipper and the consigner 'Barconoya, SA' bearing the signatures of both parties. Attestation was also issued in respect of a bill of lading, issued to order, in which the consigner is named as the master of the fishing vessel 'Comboroya III', property of the consigner 'Barconoya, SA'; however, this document is unsigned. The plaintiff also presented with its proposal of evidence the *Notas de Cierre* or contracts concluded by 'Barconoya, SA' and 'Congeladores Cies' with the shipper (which appear to be original); however, these contracts are not signed by the consigners.

Although the *Nota de Cierre* thus attested appeared to have been signed by both contracting parties, in the original proceedings it was not proven that the attested documents were really the originals and that the signatures were authentic, both suppositions that the plaintiff categorically denies.

But even were the clause of submission to arbitration in London considered valid, as it undoubtedly is at law, in view of the restrictive approach generally adopted by the jurisprudence of the Supreme Court as regards clauses of submission to a given forum, which are binding only on the parties that signed them, the defending shipper 'Lavinia Corporation' cannot argue the clause allegedly agreed with 'Barconoya, SA' against the plaintiff, the cargo's insurer, as is clear from the Decisions of 18 June 1990 (*RJ* 1990/4764) and 30 April of the same year (*RJ* 1990/2807).

The original court declared the submission clause invalid on purely formal grounds in a decision of 3 November 1996 (folio 303), issued in a hearing as provided in articles 691 to 693 *LECiv*.

In the opinion of this Chamber it was an opportune moment to resolve the question in that it raised the issue of a requirement affecting the validity of proceedings which was not susceptible of remedy without the agreement of both parties (rule 4. article 693); however, the arguments used are at the very least debatable.

A clause stipulating submission of disputes to arbitration is classified as a true dilatory exception in article 533 point 8 *LECiv* and in ordinary large claims proceedings is subject to the same treatment as the other exceptions

listed in the said article – namely that it must be examined and resolved prior to the plea in defence (article 532). But in small claims proceedings the applicable provision is article 687, whereunder dilatory exceptions are entered in the plea in defence, although it is the case that the pre-continuation hearing comes within the literal meaning of the said article 687 as it relates to the possibility of remedy of defects (rule three) or dismissal of the case (rule four); such dismissal is appealable (article 382) but in small claims is subject to article 703 whereby the court – if it decides to continue the proceedings – can simply accept announcement in due time without suspension of proceedings for that reason, and the appellant must claim such exception again in its appeal from the final decision, so that it will be admitted for both purposes. We should note that in the instant case, the defendant in its writ of appeal complied with the requirement to reproduce the appeal originally lodged against the Decision of 3 November 1995. And in the event of the court deciding to stay the proceedings, the appeal would be valid on both counts (article 384.2.).

This court definitely rejects the opinion of the original court, as set forth in the above-mentioned decision, that the procedure of declinatory exception is included in the procedure mentioned in the said clause, the latter being peremptory pleas (article 79), for both doctrine and jurisprudence are agreed that since the procedural reform of 1984 (*RCL* 1984/2040; *RCL* 1985/39 and *ApNDL* 4257), declinatory exceptions cannot be included in the exceptions listed in article 533.

The provisions of article 11 of the Arbitration Act 36/1988 (*RCL* 1988/2430 and *RCL* 1989/1783) cannot apply to the proposed solution, given that the procedure for sustaining the exception is naturally the one authorised by the rules regulating the proceedings concerned; it is after all difficult to admit conceptually that a person claiming the exception of submission to arbitration in the first place can be judged to have accepted the court's jurisdiction by dint of having also raised questions of substance.

Three.– The second ground of the appeal, namely the exception of *litis pendentia*, is likewise unsustainable for the same reasons as were properly and correctly stated by the original court. These reasons require no qualification other than possibly to add that the alternative option of requesting joinder of the cases pending (to preserve the unity of proceedings) was open to both the plaintiff and the defendant, and the defendant did nothing in this respect.

Fourth.– Finally, as regards the exceptions of lack of action and legitimacy, which the defendant classifies as subsidiary to the claim for damages sustained by the goods consigned by 'Barconoya, SA', suffice it to say that the plaintiff insurer is in exercise of a right to which it is entitled by legal subrogation against payment (articles 780 Code of Commerce and 43 Insurance Contracts Act [*RCL* 1980/2295 and *ApNDL* 12928]) and therefore obviously has no need to seek the consent of the insured, nor is it bound by any actions that the insured may institute on its own account. Subrogation

comes into operation at the time of payment and its validity is not dependent on any notification to the debtor. This is obviously notwithstanding any exceptions that the debtor may raise against the plaintiffs, for example payment to the initial creditor (the insured who sustained the damages), given that payment may be alleged by the debtor against the creditor who has been paid, whoever actually made the payment, since payment can lawfully be made by any capable person, irrespective of whether that person has an interest in the discharge of the obligation, whether that person is aware of or approves such discharge or whether or not the debtor is aware of the discharge (articles 1158 and 1160 Civil Code).

Five.– Turning now to the merits of the case, the argument of the judge *a quo* must be accepted in its entirety.

The two average certificates from 'Comismar' were issued subject to guarantees in that the cargo had been examined in the presence of the master of the carrier vessel as the cargo was unloaded (goods belonging to 'Congeladores Cíes' from 16 to 22 May and goods belonging to 'Barconoya' from 23 to 27 May). From these certificates and the report issued by the appraiser Mr. T. P. at the behest of 'Comismar' it is concluded that the damage found to the goods was due mainly to loss of low temperature caused not by defects of installations or machinery belonging to the vessel's refrigeration system but to improper stowage by the master preventing normal circulation of cold air among the batches, which made it impossible to maintain the normal temperature required for optimum preservation, and originating an attendant obligation to indemnify. The appeal is therefore dismissed and the original decision upheld.

Sixth.– The costs of the appeal proceedings must be charged to the appellant in pursuance of article 710 *LECiv*".

VI. CHOICE OF LAW: SOME GENERAL PROBLEMS

1. Proof of Foreign Law

– *STS* 3 March 1997, *Ar. Rep. J.*, 1997, n. 1638.

Establishment of foreign Law as being collaboration between the court or tribunal and the parties. *Ex officio* investigation of applicable law carried out by the judge.

"Legal Grounds:

First.– The first ground for the appeal, presented by the company 'Mercantil Tana, SA', resting on article 1692.4 of the Civil Procedure Law, denounces the infringement consisting of violation for non application of articles 1, 2, 7, 19 and 20 of the Law dated 22 December 1949 (*RCL* 1949/1500 and *NDL* 13278) concerning Transport of Merchandise by Sea on the basis of bill of lading, and articles 275, 379, 625, 706, 708, 711, 713, 715, 716 and 718

of the Trading Code in which, taken as a whole and separately, it is established that named bills of lading are securities which must necessarily be presented to the carrier in order for merchandise to be removed, the ruling being appealed infringing such precepts by considering that the non negotiable bill of lading resembles the maritime consignment note and therefore does not have the legal nature of bill of lading, and since it does not include the right to title, the merchandise carried can be delivered to the consignee without prior return of the bill of lading. Making request for principle, the case put forward as a consideration for appeal raises important question which has been a 'central issue' during the lawsuit, in other words, the legal nature of the documents certifying the consignee of the cargo carried by sea, taking for granted that such documents comprise 'bills of lading' and so skilfully attempting to side-step the problem of contractual interpretation which the court has had to resolve *a quo* in advance. In fact, after consideration of the reports issued by American and Spanish lawyers in respect of the sea transport of merchandise document called 'Sea waybill' (also known as 'straight bill of lading', 'non negotiable bill of lading, non negotiable receipt'), the ruling appealed against considers that it is analogous to a sea way bill, and regarding the most disputed point of this legal *diferendo*, in other words, its value as title which includes the right to delivery or simply a probative document, that the carrier is released by means of delivery of the merchandise to whomsoever identifies himself as being the individual who is consignee of same, without counterdelivery of the original of the said document being necessary at the same time. Doctrine establishes that these documents prove the obligation of the carrier against the consignee, but the latter does not need to present the document in order to claim delivery of the merchandise and so it is sufficient for him to identify himself as the individual initially appointed as beneficiary of the right to delivery. These documents lack the properties that define securities and are issued when transfer of the merchandise is not envisaged and consequently it is not destined for circulation. The foregoing reasoning is sufficient to reject the case in the light of the biased displacement of the real issue which is raised and has not been contested – no doubt due to the logical consistency of the grounds of the appeal Court – through the appropriate channel of interpretation contrary to Law. In place of this, a large number of regulations which are said to be infringed are grouped together in the case, without taking into account the appropriate and necessary separation for establishing the relevance and grounds of the case, which is the inescapable duty of the appellant, as stated in article 1707, paragraph 3, of the Civil Procedure Law (Decision of the Supreme Court dated 22 January 1993 [*RJ* 1993/482]). At the same time the appellant ignores the statement made by the appeal ruling in the following terms: '... it follows from the examination of the 132 bills of lading furnished by the plaintiff with its lawsuit (Documents nos. 21 to 174), which reflect the content of the rights and obligations of the sea transport contracts freely

entered into by the parties, that, in accordance with the first clause, the said bills of lading shall be subject to all the provisions for transport of merchandise through the Maritime Act of the United States of America, passed on 16 April 1936 ...', which means a clear acknowledgement of the applicability of American Law to relationships arising out of the said documents. The case succumbs for all the reasons stated.

Second.– The appellant denounces (article 1692.4. of the Civil Procedure Law) infringement for reasons of erroneous interpretation of articles 338 and 339 of the Trading Code in relation to the Vienna Convention which Spain joined by means of the Instrument published in the 'Official State Gazette' (*BOE*) dated 30 January (*RCL* 1991/229) and the international rules for interpretation of commercial terms drawn up by the International Chamber of Commerce, known as 'Incoterms' 1953, drawn up afresh in 1978, whose precepts regulate forms of the international contract of sale which are not applicable to the sea transport contract which is the subject for elucidation in the lawsuit concerning us here, and so the reference to the FOB clause as argument of the ruling being appealed against is inadmissible. In fact and as established by the ruling under appeal, according to the evidence furnished by the adversary the sales operations between 'Tana, S.A.' and 'Affiliated Food Corporation' were made under FOB conditions. This form of maritime sale is characterised by being completed with the loading of the merchandise, at which moment ownership and responsibility for the merchandise pass to the purchaser, the obligation to pay the price starting from that time onwards and the vendor being empowered to demand payment of the price from the purchaser as from the moment in which the lemons were loaded, without having to wait until the merchandise reaches its destination. But the alleged infringements that are argued cannot be honoured, since after excluding the Vienna Convention called on, which was not included in the Spanish legal system (article 1.5 of the Civil Code) until 30 January 1991, in other words, subsequent to the birth of the litigious legal relationship, articles 1465 of the Civil Code and 338 and 339 of the Trading Code have a regulatory content so that agreements to the contrary or those of a modifying nature maintain their potential as *a sensu contrario* as acknowledged by Supreme Court Judgment dated 20 June 1986 (*RJ* 1986/3781). Undoubtedly, the use by the contracting parties of clauses provided for in the 'Incoterms' is of significant importance in respect of the moment of delivery of the merchandise and subsequent transfer of its ownership to the purchaser, which may carry with it, as in fact occurs, important consequences regarding the transportation relationship, such as, for example, with regard to deciding active legitimisation in respect of claims concerning the cargo. In this respect, this Court has ruled in Ruling dated 17 October 1984 (*RJ* 1984/4969) that 'sale carried out by means of the FOB clause must be understood to be in agreement with articles 1462 and 1465 of the Civil Code, regulations which, even within their regulatory nature, are not excluded by the said clause, and so the latter must be interpreted as

being in agreement with its aim to place the merchandise on board so that the fundamental obligation of delivery to the purchaser is complied with. For this reason, the argument contained in the fourth elementary principle of the ruling under appeal is faultless in the sense that once the sale of lemons had been completed between 'Tana, S.A.' and 'Affiliated Food Corporation' under FOB conditions, the vendor could demand from the purchaser payment of the price from the moment in which the lemons were loaded on board, without having to wait until they reached their destination. Obviously, the transportation and delivery were not the cause of the alleged failure to settle payment and it cannot be alleged that a carrier is guarantor of the obligations deriving from the contract of sale and even less so when these are documented in non negotiable instruments and when the obligation of the purchaser to pay the price arises when the merchandise is loaded on board and not when it reaches its destination. As some failure to pay has occurred, this was exclusively due to the relationship existing between the vendor and the purchaser, and it is the purchaser, as indicated in the ruling, against whom 'Tana, S.A.' may address action for the alleged failure to pay, 'Sea-Land Service Inc.', as mere carrier, being alien to same. In short, the case cannot prosper.'

Third.– The appellant denounces (article 1692.4. of the Civil Procedure Law) the infringement of articles 3, 7, 11 and 12 of the Civil Code inasmuch as the Law applicable to the case concerning us here, in respect of the said precepts, is the Spanish law established in the 1949 Sea Transport Law, such precepts being infringed in the ruling since it considers that the system applicable to the non negotiable bill of lading is that of the United States regulations for the port of New York, as stated in the same elementary principle IV of the ruling. But, as has already been sufficiently explained in the first elementary principle hereto, the ruling under appeal neither considers that the justificatory documents of delivery of the merchandise are authentic or true bills of lading, but documents of another kind, similar to the sea-way bill, nor limits itself to acting in accordance with the normal trading practice of usage of the port of New York, but takes into account the applicable maritime legislation and none other, in accordance with the first clause of the documents in question, than the transport regulations for merchandise established by the Maritime Act of the United States of America, dated 16 April 1936, which was only natural if one considers that the sea carrier, its vessels and crew all held American nationality and the transport by sea had to be carried out from one Spanish port to a port in the USA and in accordance with the nature of the said documents, in which their non negotiable nature must be pointed out and in which the consignee of the merchandise is recorded precisely as being the purchaser of same, the 'Affiliated Food Corporation' company. In compliance with the provisions of article 12.6 of the Civil Code, the party responsible has, in addition, proved application to the case of the foreign regulations already stated, in accordance with the

consolidated doctrine of this Court which understands that the application of foreign Law is a matter of fact, and as such must be alleged and proved by the party invoking it (Rulings dated 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] and 7 September 1990 [*RJ* 1990/6855], among others). In short, the Court took *a quo* consideration, besides the express submission to the Law of the United States, contained in each and every one of the 132 litigious contracts, of the fact that the agreements were absolutely valid in accordance with article 10.5 of the Civil Code, as the stated American regulations possess numerous points of connection with the said 132 contracts since the carrier, 'Sea-Land Service Inc.' holds American nationality, the carrier vessels also sailed under the American flag, the captains held American nationality and the transportations were made to the United States of America. It also took into consideration the decision of the legal consultants or specialists in American maritime Law, drawn up before the Spanish Consul in New York, in respect of the legislation applicable to the question under debate. It has been established that under United States Law, the carrier is under no obligation whatsoever to demand non negotiable bills of lading from the person identifying himself as being the same person appearing on such bill of lading as receiver of the merchandise. This is not for reasons of one use of the port of New York, as stated by the appellant, but for reasons of the content, text and validity of the American Law applicable to the matter in dispute. The case therefore fails.

Fourth.– Using the fourth ground (article 1692.4 of the Civil Procedure Law) infringement is denounced for reasons of non application of articles 2 and 57 of the Trading Code and 1.258 of the Civil Code, in all of which there is an obligation to execute the contracts, fulfilling them in good faith, which the defendants in this lawsuit have obviously not done, the ruling not having taken account of the content of such precepts. Generic invocations of the good or bad faith exercised by of one of the parties is not relevant, not only because good faith is presumed and anything to the contrary must be proved, but there is no minimum actual support to permit the establishment of an accusation such as that being attempted. As a result, the case fails.

Fifth.– The fifth ground (article 1692.4 of the Civil Procedure Law) brings a charge of infringement for wrongful application of articles 578, 610, 628 and 632 of the Civil Procedure Law, and also articles 1214, 1215, 1241 and 1243 of the Civil Code, whose precepts establish the licit means of proof in our legal system and its requirements, these being infringed since the ruling is based on reports furnished in the lawsuit and which are not in the nature of expert proof, or the very nature of such reports. Once again, the ruling under appeal commits the defect of abrogational technique which the crowding, without due and relevant separation, of precepts cited as having been infringed implies, together with the citation of an erroneous ordinal for *in iudicando* presentation of errors which, under ordinal no. 3 according to the procedural

nature of the rules, would be *in procedendo* errors that would exact the fulfilment of prior requirements which, naturally, have not been observed in this case. But turning to the subject proposed by the appellant, which is limited to whether the same rules are exactly applicable to the evidence in the broad sense of foreign Law as to the evidence of the facts, some matters must be defined more closely. Although the proof of foreign Law is, in fact, spoken of in a generic sense, this criterion, which in Spain responds to a legal tradition originating in Law 18, Heading 14 of Item 3, doctrinal and jurisprudential evolution never placed the proof of foreign Law on a par with proof of the facts, since it has been understood that the justification or proving of the foreign regulation and proof of the facts are not identical contingencies. In this respect, it has been pointed out that *iura novit curia*, although mitigated in respect of foreign Law, is not excluded as a principle with respect to knowledge of non national regulations, although the parties must cooperate with the judge in seeking out the foreign rule, furnishing him with the means of acquiring knowledge of same, in such a way that rather than one probatory activity in the strict sense of the word it is a matter of collaboration between the parties and the authority. In our current procedural system, after the wording given to the preliminary Heading of the Civil Code by Decree 1836/1974 dated 31 May (*RCL* 1974/1385 and *NDL* 18760), article 12.6 makes it quite clear that: a) the foreign regulation is 'accredited'; b) in his function as enforcer of the law, the Judge may use whatever verification instruments he considers appropriate. The term 'accredit' is not used in an ordinary but in a technical sense, which means that it is unnecessary for the verification or proving of the content and validity of the foreign regnlation to conform to the rules governing strict proof, but to respond to the most open of requests for the proof doctrinally known as 'liberal' or, in other words, proof that presupposes the liberty of probatory means (on the condition that these are lawful and are obtained through means not prohibited by law), and freedom of evaluation and appraisal. If the Judge, using the documentation and assistance furnished by the parties, does not consider he has been sufficiently well informed, he should and may act on his own initiative and investigate the applicable regulation. As a result and in practice, the expert reports (besides possible information provided by witnesses) serving this purpose do not necessarily have to conform to the rules of procedure of these methods of proof, which also emerges from atypical expert ruling as regulated by the European Convention concerning foreign Law, dated 7 June 1968 (*RCL* 1974/2050 and *NDL* 6679), which Spain joined on 19 November 1973. Therefore, it is not possible to adduce probatory infringements in respect of the free acceptance and assessment carried out *a quo* by the authority in the case concerning us here, in respect of the ruling issued by the legal consultants over American Maritime Law, whose specialisation in the matter was established by certificate issued by the American Maritime Law Association and legalised before the Spanish Consul in New York in respect of applicable

American regulations concerning the matter under debate and accompanied by legal texts, doctrine and jurisprudence, and in particular the legislation concerning the straight bill of lading, the non negotiable bill of lading and the non negotiable sea-waybill, which ruling also coincides with that of the Spanish legal teachers/experts as also recorded in legal document. For all the foregoing reasons, the case is unsuccessful.

Sixth.– Lastly, the sixth and final case with reference to several rulings issued by this Court denounces the failure to apply the doctrine of the case to the case itself. But the rulings already cited are used with arguments that make an assumption of the question since they take into consideration the classical 'bills of lading' that include the right to delivery of the merchandise, with omission of the litigious bond, centred on the differentiated nature, also according to applicable American Law, of the documents issued for justifying the loading, placing on board and the consignee of the merchandise. As a result, the case fails.

Seventh.– Rejection of the grounds comprising the appeal is the underlying condition for stating that there is no cause for same, with imposition of the costs incurred and loss of the deposit established (article 1715 of the Civil Procedure Law)".

– *SAP* Málaga 20 February 1997, *REDI*, 1997-38-Pr.

Law applicable to separation. *Ex officio* investigation into foreign Law.

"Legal grounds:

First.– The appellant requests revocation of the judgment being appealed against and, without entering into the question of the existence or otherwise of the cause giving rise to marital separation or the appropriateness of the complementary measures adopted, concerns the rejection of the lawsuit for a merely formal reason, which is that the inappropriately established claim cannot succeed since the prevailing Belgian Law should have been called upon in same and proof of such Law attached thereto, or, alternatively, for partial nullity of the procedure to be declared, taking same back to the moment in which appropriate grounds are established by the plaintiff.

Second.– The congruity of the rulings, according to article 359 of the Civil Procedure Law, is closely linked to the regulatory principle of the parties as upheld in the civil procedure, so that the ruling cannot grant more than what the plaintiff requests, or concede anything other than what the latter requests, or concede it by any title whatsoever other than that on which the ruling is based, which is the necessary absolute agreement existing between the ruling and the petition in respect of persons, things, the matter requested and the action exercised. The plaintiff exercises against his wife a lawsuit for separation in respect of their marriage, citing harmful or offensive conduct and serious or repeated violation of conjugal duties as the cause; it is true that he calls on article 82 of the Spanish Civil Code, when the applicable legislation is Belgian law, this latter being the common national law of both spouses,

according to article 107 of the said Legal Text, and so the congruity would be affected and the claim could not be upheld if that reason for separation did not exist in Belgian law, but as it was established during the period for consideration of evidence that article 231 of the Belgian Civil Code also contains as cause for separation the violence and serious abuse exercised by one spouse towards the other, which is borne out by the ruling of the two Belgian legal consultants that is present in the evidence put forward by the plaintiff, congruency suffers no detriment and the only obstacle lies in the untimely nature of the documentary certification of the applicable law since on this occasion the *iura novit curia* principle did not prevail exceptionally.

Third.– The Court supports the arguments contained in the second and third grounds of the ruling appealed against in respect of the possibility of furnishing documents in cases not provided for in article 506 of the Civil Procedure Law, taking them to be reproduced here without the need for useless repetition, and being empowered to add to the correct arguments contained therein for justifying the general nature of their contribution to a lawsuit, that this possibility is increased in the separation process since, given the public nature of marriage whose regulation is established by Law aside from the possibility of pact limited to the parties only in respect of the decision or otherwise to enter into marriage contract and the choice of marital economy system, the regulatory principle of the parties involved in the procedure is equally limited, the Judge being empowered in ruling i) of the fifth additional provision of Law 30/1981 (*RCL* 1981/1700 and *ApNDL* 2355) to agree any type of evidence for pronouncing separation when faced with doubts concerning the convergence of circumstances as each case may require, without this violating the principle of acceptance of party contribution since he is allowed *ex officio* investigation into the objective truth in respect of the existence of cause for separation, without this placing either party in a situation where proper defence is lacking, which at all events is an essential requirement according to 238.3 and 240.1 of the Organic Law on the Judiciary (*RCL* 1985/1578, 2635 and *ApNDL* 8375), so that nullity of action may be declared, which is an alternative request carried out by the appellant who could make the allegations he may consider pertinent in respect of the merits of the case, the facts comprising the case called on and the law to be applied, without taking consideration of the hearing held on first application or in the appeal carried out, perhaps for reasons of the evidence provided which was not denied by the defendant and was established by testimony of the penal lawsuit which found her guilty of having inflicted verbal and physical abuse on the defendant, with total rupture of marital duties and those concerning any other elementary civil right of cohabitation.

Fourth.– Article 896 of the Civil Procedure Law states that the confirmatory rnling of the decision appealed against means that all costs are for the account of the appellant.

VII. NATIONALITY

VIII. ALIENS, REFUGEES AND CITIZENS OF THE EUROPEAN COMMUNITY

IX. NATURAL PERSONS: LEGAL INDIVIDUALITY, CAPACITY AND NAME

X. FAMILY LAW

1. Marriage

– *DGRN* Resolution 8 January 1997, *Ar. Rep. J.*, 1997, n. 9199
Consular marriage. Vienna Convention on Consular Relations dated 24.4.1963. Simulation of consent.

"Legal Grounds:

First.– The following articles were considered: 5 of the Vienna Convention on Consular Relations dated 24 April 1963 (*RCL* 1970/395 and *NDL* 26104); 16 of the Universal Declaration of Human Rights (*ApNDL* 3626); 12 of the Rome Convention dated 4 November 1950 (*RCL* 1979/2421 and *ApNDL* 3627), concerning the protection of human rights and fundamental freedoms; 23 of the New York International Covenant dated 19 December 1966 (*RCL* 1977/893 and *ApNDL* 3630) concerning Civil and Political Rights; 10, 14 and 32 of the Constitution (*RCL* 1978/2836 and *ApNDL* 2875); 3, 6, 7, 12, 44, 45, 49, 51, 55, 56, 73 and 1253 of the Civil Code; 73 of the Registry Office Act (*RCL* 1957/777 and *NDL* 25893); 245, 246, 247 and 252 of the Registry Office Regulations (*RCL* 1958/1957, 2122; *RCL* 1959/104 and *NDL* 25895); Directive dated 9 January 1995 (*RCL* 1995/210), and the Resolutions dated 9 (2nd) October and 3 and 17 December 1993 (*RJ* 1993/7969, *RJ* 1993/10175 and *RJ* 1994/564), 20 (2nd) January, 30 May, 25 September and 22 (1st) November 1995 (*RJ* 1995/1606, *RJ* 1995/4415, *RJ* 1995/8284 and *RJ* 1996/608) and 8 January, 23 March, 27 (3rd) April, 26 (1st) June, 18 (3rd) July, 20 (3rd and 5th) September, 18 (1st, 2nd, 3rd and 4th) and 23 (1st, 2nd and 3rd) October and 11 December 1996 (*RJ* 1996/2289, *RJ* 1996/4254, *RJ* 1996/4859, *RJ* 1996/6734 , *RJ* 1996/9795 and *RJ* 1997/716, *RJ* 1997/826, *RJ* 1997/3520, *RJ* 1997/3521, *RJ* 1997/3566, *RJ* 1997/3567, *RJ* 1997/4483 , *RJ* 1997/4485, *RJ* 1997/4485 and *RJ* 1997/7377).

Second.– In this file, prepared prior to the celebration of a civil marriage between a Spaniard and a Moroccan woman, a formal defect is observed insofar as a request has been presented for authorisation of the marriage by

the Officer-in-Charge of the Consular Registry Office in Casablanca, when such person, despite being a civil servant with authority to do so according to the Civil Code (*cf.* Art. 51), does not possess this authority on an international level. In fact, according to article 5, letter f), of the Vienna Convention on Consular Relations, ratified by Spain and Morocco alike, consular functions on this point are subject to 'the laws and regulations of the receiver State not arguing against' same, when, according to what is known of Moroccan legislation, it is not possible for the Spanish or any other foreign Consul to authorise the marriage of one of its nationals to a person holding Moroccan nationality. However, it is always possible that the prior Spanish file would conclude with the issue of the matrimonial capacity certificate (*cf.* art. 252 *RRC* [Civil Registry Regulations]) and that authorisation for the marriage in Morocco would then be granted in accordance with the form established by *lex loci*, and it is also possible that, on completion of that file with a favourable final ruling, the marriage would be authorised in Spain before the appropriate body, even by means of special power of attorney granted by the female contracting party domiciled abroad (*cf.* art. 55 *Cc*).

Third.– At all events, as the formal defect noted would not prevent authorisation of the marriage, the basic question to be decided is whether or not the existence of real matrimonial consent of the partners can be deduced from the file.

Fourth.– The problem of so-called marriages of convenience – the French call them 'white' marriages – is a very common phenomenon in countries subjected to heavy immigration and which has given rise to diverse measures in comparative Law and also, within the scope of its jurisdiction, to a recent directive of a general nature issued by this State Centre (Directive 9 January 1995). The celebration of marriage between a national and a foreigner is not, in fact, what is really being sought through such marriages, the real aim, under the guise of this institution and generally in return for payment of a price, being for a foreigner to take advantage of the appearance of marriage, especially for the purpose of gaining entry to national territory or regularising that person's residence therein, or to make it easier to obtain the nationality of the apparent spouse.

Fifth.– There is no doubt that a marriage of this kind would have to be considered null and void in our Law for reasons of lack of real matrimonial consent (*cf.* arts. 45 and 73.1. *Cc*). Now, we are faced with the question of how to verify this lack of consent, since, as is usually the case in all hypotheses of simulation, direct evidence of simulated intention rarely exists, and so the discovery of the real disguised intention of the parties is a difficult task in which the proving of judicial presumption plays an important role, and for this to be successful 'it is essential for a precise and direct link to exist between the demonstrated fact and that whose deduction is attempted in accordance with the rules of human criterion' (art. 1253 *Cc*). On the other hand, it must be borne in mind that a general presumption of good faith exists and that *ius*

nubendi is a fundamental right of the individual that is recognised at a constitutional and international level, and so the conviction of simulation and the resulting fraud must come to be formed to a degree of moral certainty in the opinion of the person who must decide the nullity of the marriage under discussion.

Sixth.– There is no doubt that it is possible to appreciate lack of matrimonial consent, as well as any other obstacle or impediment for the marriage, in the file drawn up prior to the marriage (*cf.* arts. 56.I *Cc* and 245 and 246 *RRC*), and the result of the interrogation of each contracting party that is carried out by the Officer-in-Charge, assisted by the Registrar, within the personal, private and separate audience process, as provided for in article 246 of the Regulations (*cf.* Directive 9 January 1995, regulation 4), is of special importance for deducing simulation.

Seventh.– In this case, the first statements made by the female contracting party before the Consul within the processing of such audience revealed that she did not know the age of the male contracting party; that they communicate with one another through a third party since they have no language in common, and that their relationship started as a result of one visit he made to Morocco at Christmas 1995. In accordance with the rules of human criterion, it is lawful to deduce from these proven facts (*cf.* art. 1253 *Cc*) that the marriage is null and void for reasons of simulation. This is the conclusion, in no way an arbitrary one, reached by the Officer-in-Charge who, being so close to the facts, is the person who can most easily appreciate them and form his conviction in relation to them".

– *DGRN* Resolution 4 April 1997, *A.C.*, 1998-4, R335.

Marriage entered into in accordance with *lex loci*. Relevant moment for determining whether consent was simulated.

"Legal Grounds:

First.– The following articles were considered: 16 of the Universal Declaration of Human Rights; 12 of the Rome Convention dated 4 November 1950 for the protection of human rights and fundamental freedoms; 23 of the New York International Pact concerning civil and political rights dated 19 December 1966; 10, 14 and 32 of the Constitution; 3, 6, 7, 44, 45, 49, 56, 65, 73 and 1253 of the Civil Code; 23 and 73 of the Registry Office Act; 54, 85, 245, 246, 247, 256, 257 and 354 of the Registry Office Regulations; Directive dated 9 January 1995, and Resolutions dated 9 (2nd) October and 3 and 17 December 1993; 20 (2nd) January, 30 May, 25 September and 22 (1st) November 1995; 8 January, 22 March, 27 (3rd) April, 26 (1st) June, 18 (3rd) July, 20 (3rd and 5th) September, 18 (1st, 2nd, 3rd, 4th) and 23 (2nd and 3rd) October and 11 December 1996, and 8 January and 8 February 1997.

Second.– The fight against fraud at the Registry Office is raised with special incidence in the matter of the authorisation or registration of so-called 'white' or convenience marriages. One of their most typical manifestations

occurs when a national and a foreigner simulate a marriage, but the only thing really being sought under the guise of this institution and generally in return for payment of a price, is for a foreigner to take advantage of the appearance of marriage, especially with the aim of providing ease of entry into national territory, regularising residence therein or making it easier to obtain the nationality of the apparent spouse.

Third.– Simulated marriage is null and void in our law for reasons of lack of real matrimonial consent (*cf.* arts. 45 and 73.1 *Cc*), so the principle of legality must prevent the appropriate Spanish bodies from authorising null and void marriages and also from registering marriages already authorised by foreign bodies. However, on the one hand the practical difficulties of proving simulation must be acknowledged, since direct proof of simulated intention does not normally exist and in the majority of cases it is necessary for sufficient proven facts to be present in order to deduce from them the real disgnised intention of the parties, by means of proof of presumptions in 'a precise and direct link in accordance with the rules of human criterion' (art. 1253 *Cc*). On the other hand, it must be borne in mind that a general presumption of good faith exists and that *ius nubendi* is a fundamental right of the individual that is recognised at an international and constitutional level, and so the conviction of simulation and the resulting fraud must come to be formed to a degree of moral certainty in the opinion of the person who must decide the nullity of the marriage under discussion.

Fourth.– In accordance with the most recent doctrine of this State Centre, particularly as from the issue of Directive dated 9 January 1995 and the Resolution dated 20 May 1995, the appropriate moment for attempting to discover the fraud is, within the prior file, the process of personal, private and separate audience with each contracting party (*cf.* art. 246 *RRC* and rule 3 of the Directive dated 9 January 1995), while that moment, in the case of a marriage already performed abroad in the local manner, must centre on 'the appropriate complementary statements' which, together with 'the certificate issued by the authority or civil servant of the country where such marriage was performed', comprise the registrable title, through application of art. 256 of the Registry Office Regulations.

Fifth.– On the basis of these considerations, it must be decided whether sufficient objective facts exist for deducing simulation in this case which deals with a marriage celebrated on 22 October 1996 in Honduras between a Spaniard and a Honduran woman, whose registration has been rejected by the Officer-in-Charge of the Consular Registry Office.

Sixth.– There are firm bases in the appropriate complementary statements for considering that the marriage was only performed in order to provide the Honduran woman with entry into Spain. The latter has never been to Spain and the male contracting party has only been to Honduras once, arriving two days before the wedding; they had not met person to person before this and their means of contact was through an individual whose identity was

described differently by each of the parties; he has no economic resources and is ignorant of elementary facts concerning her, and she does not know which region of Spain they are going to live in.

Seventh.– If the Honduran marriage certificate is not registrable for these reasons, it is useless to resort to the other possible channel of registration which is the file provided for in art. 257 of the Regulations, since the procedures carried out now, inasmuch as they are closest to the facts, are the only ones that can assist in discovering more spontaneous answers that are closer to the truth.

In accordance with the regulatory proposal, this State Office has decided to reject the appeal".

2. Marriage. Capacity

– *DGRN* Resolution 4 April 1997, *A.C.*, 1998–4, R 334.
Applicable law.

"Legal Grounds:

First.– The following articles were considered: 9, 12, 46, 48, 49, 65 and 75 *Cc*; 23 and 73 *LRC* (Registry Office Act); 85, 128, 256 and 257 of the *RRC*; Directive dated 22 March 1974; *TS* (Supreme Court) rulings dated 10 June 1916 and 12 March 1942, and Resolutions dated 25 March 1950, 27 June 1969, 10 November 1976, 10 July 1989, 4 December 1991, 17 March 1992, 5 July 1993 and 27 (3rd) May 1994.

Second.– This appeal discusses whether, by means of presentation of the corresponding foreign certificate (*cf.* Arts. 65 *Cc*; 23 *LRC* and 85 and 256 *RRC*), a marriage performed in accordance with *lex loci* in the Dominican Republic between a divorced Spaniard and a Dominican woman aged fourteen, who has obtained the prior consent of her parents, is registrable.

Third.– The marriage conforms to one of the forms provided for in the Spanish legal system (*cf.* art. 49 *Cc*) and the only obstacle opposed by the ruling being appealed – and the only one, therefore, which may now be examined – lies in the age of the female contracting party, because it is argued that non-emancipated minors may not enter into marriage (*cf.* art. 46 *Cc*), unless when, being over the age of fourteen, they have obtained the age dispensation which the examining magistrate is responsible for granting (*cf.* art. 48 *Cc*).

Fourth.– Now, this reasoning starts from a false basis which is that of considering that the rules which, in accordance with our controversial system, are, in principle, exclusively applicable to Spaniards, are applicable to a foreigner. In fact, there is no doubt that the capacity for entering into marriage forms part of the personal statute decided by national law (*cf.* art. 9.1 *Cc*), or that, in accordance with Dominican legislation (*cf.* art. 12.6 *Cc*), the woman may enter into marriage once she has reached the age of fourteen,

subject to the consent of her parents. Therefore, the only possibility of excluding application of the foreign law will be to consider that the latter is contrary to Spanish public order (*cf.* art. 12.3 *Cc*), but this possibility must be rejected outright, not only because the exception of international public order is obviously applicable in a limited way, but basically because by no means is it observed that permitting a woman who has reached the age of fourteen to enter into marriage, without legal dispensation, but with the consent of her parents, is a precept which is incompatible with Spanish public order. Therefore, it is deduced that the dispensation provided for by the *Cc* for Spaniards is justified because the legislator starts from the assumption that as from the age of fourteen there is a natural capacity for entering into marriage, and this deduction is also supported by the existence of dispensations subsequent to the marriage (*cf.* art. 48, III, *Cc*) and by the possible *ex lege* validation of the marriage of a minor (*cf.* art. 75 *Cc*).

Fifth.– As pointed out earlier, we cannot decide at this moment whether or not there are other defects preventing registration. If he deems fit, and adhering to the consequences stated in art. 128 of the *RRC*, the Consul as Officer-in-Charge may, where appropriate, indicate such defects.

This State Office has decided, in accordance with the regulatory proposal, to allow the appeal and state that the age of the Dominican contracting party is not an obstacle preventing registration of the marriage".

3. Marriage. Separation

– *SAP* Malaga 20 February 1997, *REDI*, 1997-38-Pr.
Law applicable to separation.
Note: See VI. 1.

4. Marriage. Divorce

– *TS* Judgment 18 March 1997, *Ar. Rep. J.*, 1998, n. 4447.
Agreement between Spain and France dated 28.5.1998. Civil marriage entered into in France and subsequent canonical marriage performed in Spain. *Exequatur* of the French divorce decree. Theories of the extent and harmonisation of the effects.

"Legal grounds:

First.– The Agreement between Spain and France concerning the recognition and enforcement of judicial and discretionary decisions and *bona fide* proceedings in civil and mercantile matters, dated 28 May 1969, ratified on 15 January 1970 and published in the *BOE* (Official Gazette of the Spanish State) on 14 March 1970 (*RCL* 1970/451 and *NDL* 18576), in accordance with its 1st article, must be applied for reasons of the nature and matter of the act whose *exequatur* has been requested.

Second.– According to the said Agreement, the following must be controlled: international legal jurisdiction (article 3.1), the firmness of the decision (article 3.2), the law applied to the merits of the case (article 5, which confirms the principle of equivalence of results), compliance with the public order of the State called upon (article 4.2), the guarantees of hearing and defence in the source proceedings (articles 4.3 and 15); the *lis pendens* or rulings that devolve on the State called upon or any other (article 4.4) and the minimum formal requirements (article 15); all the requirements established by the bilateral treaty are reasonably complied with.

Third.– However, the fact that Maria Jesus G. R. and Jose Manuel C.S., husband and wife, were married twice, in civil and canonical forms, in France and in Spain in 1985 and 1987, cannot be ignored. For reasons of the difference of form, the place in which each was held and their respective dates, it is not possible to conclude unequivocally that this is a matter of one same transaction verified in two ways or according to different formalities, such as commonly occurs in the canonical marriages entered into in France which are preceded by civil nuptials, as required by French law; on the other hand, it seems that we are necessarily faced with two different legal transactions. The first of these is the civil marriage, recognition of whose divorce through French ruling is requested from Spanish jurisdiction and Law and, for the reasons stated above, there is no obstacle in the way of such procedural recognition. However, the canonical marriage held two years after the civil marriage and in Spain produces civil effects in the Spanish legal system, in accordance with article VI, 1 of the Agreement concerning Spanish legal matters and the Holy See, dated 3 January 1979 (*RCL* 1979/2963 and *ApNDL* 7132), and article 60 of the Civil Code, and endures with as much civil effectiveness as otherwise, once the civil marriage held in France has been dissolved, without the French ruling dissolving it being able to have the same effectiveness as a Spanish ruling for divorce of a canonically celebrated marriage which presumes the cessation of its civil effects, since neither the theory of the extent of the effects - which means recognising the same effects in the Spanish legal system as those produced abroad by the foreign ruling (in this case, divorce of civil marriage) - nor the harmonisation of the effects through which the foreign ruling, in the legal code of the law court, would be attributed with the same effects as a similar ruling devolving on the latter would have (in this case, the foreign ruling is for divorce of civil marriage and once recognised would have to produce the same effects as a Spanish ruling for divorce of civil marriage, and not a marriage governed by concordat; for the rest, and according to the best scientific doctrine, this latter theory is not the one which should be applied to such recognition) allow such a conclusion to be reached.

The Court resolves: We grant *exequatur* to the judgement passed by the Great Court of Appeal in Foix, France, in its Court Proceedings num. 311/1993, dated 25 November 1993, which decided the divorce of José Manuel C.

y S. and María Jesús G. R., and, therefore, only dissolved the marriage that they had entered into in Saint Jean de Verges, France, on 13 July 1985.

The Honourable Magistrates indicated in the margin thus decide, order and sign thereto, and I, as Secretary, certify as to same".

5. Adoption

– *DGRN* Resolution 6 March 1997, *A.C.*, 1998-4, R 296.

Hague Convention dated 29.5.1993. Law 1/1996, dated 15 January concerning Legal Protection of Minors. Adoption established abroad is not recognised without statement of suitability of the adoptive Spaniard domiciled in Spain. Applicable law.

"Legal Grounds:

First.– The following articles were considered: arts. 6, 9, 11, 12 and 180 *CC*; 15, 16, 23, 24, 26, 38 and 46 *LRC*; 66, 68, 85, 94, 95, 124, 128, 154 and 354 *RRC*; 25 of the *LO* 1/1996, dated 15 January, concerning Legal Protection of Minors; the 2nd additional provision and sole transitional provision of this Law; the Convention on the Protection of Children and Cooperation in respect of Intercountry Adoption, done at The Hague on 29 May 1993 (*BOE* dated 1 August 1995), and the Resolutions dated 1 and 29 February, 1 and 22 April, 12 July, 16 September and 29 November 1996 and 12 and 24 January and 14 (5th) February 1997.

Second.– Using these procedures, an attempt has been made to register in the Central Registry Office a birth that occurred in China on 17 December 1977, together with an adoption, which is said to have been established in China on 10 July 1995, through which the adoptive parents, formerly Vietnamese and now holders of Spanish nationality and resident in Spain, receive the said minor in adoption.

Third.– The decision under appeal has rejected registration of the adoption for one sole reason, which is the revocability of the adoption according to applicable Chinese legislation. However, before examining this defect it is appropriate for this State Office to extend the study to other defects detectable in the case. The principle of legality (*cf.* arts. 24 and 26 *LRC* and 94 and 95 *RRC*) demands that situations that do not conform to the law (*cf.* art. 6 *Cc*) shall not be registered and it is appropriate, for reasons of procedural economy (*cf.* art. 354 *RRC*) for the State Office to anticipate a solution to an incomplete classification which, if not completed now, would not have prevented the Officer-in-Charge from indicating new defects that would hinder registration (*cf.* arts. 124 and 128 *RRC*).

Fourth.– Above all, in this work of integration of the classification, it must be observed that the request for registration of the adoption took place on 18 September 1996, in other words, when the Law on Minors dated 15 January 1996 and the rewording of art. 9.5 *Cc* were already in force, the latter of which

does not recognise the adoption established abroad as an adoption 'until the authorised public body has declared suitability of the adoptive parent, if the latter were Spanish and were domiciled in Spain at the time of the adoption'. The absence of this statement of suitability must be observed by the Officer-in-Charge of the Registry Office in his assessment (*cf.* 2nd additional provision of the same Law) and has been noted down by the prime movers themselves in their initial document, and so this defect prevents registration for the time being.

Fifth.– In the second place it must be observed that, in accordance with what is known of Chinese legislation regarding the matter (*cf.* art. 12.6 *Cc* and the Chinese Law dated 29 December 1991) the adoption called into question does not conform to Chinese law governing the adoptive parent, which must apply with regard to the appropriate authority for establishment of the adoption and with regard to the necessary capacity and consents (*cf.* art. 9.5 *Cc*) and even with regard to the form of establishment (*cf.* art. 11 *Cc*). In fact, in spite of the certificate of kinship issued by the Embassy of the People's Republic of China in Madrid and the incomplete transcription of art. 20 of the said 1991 Chinese Law, the fact is that according to art. 4 of this Law, only the adoption of minors aged fourteen is provided for and that, according to its art. 20, adoption carried out by foreigners necessarily requires this to be registered in the Chinese Registry Office, which is not stated here, and its subsequent conversion to public document before a Notary, and this is not stated either. It therefore follows that the statement made by the biological parents in affidavit dated 10 July 1995 is insufficient, according to Chinese legislation, for considering the adoption to be established.

Sixth.– The existence of the defects noted down makes it unnecessary to examine the obstacle observed in the assessment made by the Officer-in-Charge concerning the revocability of the Chinese adoption, all the more so when the application of this principle, if the adopted child is outside the People's Republic territory, has been called into question by the Chinese authorities themselves, which is why a question, which this is not the right time to decide, is raised regarding the content and validity of foreign law (*cf.* art. 12.6 *Cc*).

Seventh.– Furthermore, as the adoption is not registrable, then neither is the birth that occurred abroad which, according to Spanish laws, does not affect any Spanish citizen (*cf.* arts. 15 *LRC* and 66 *RRC*). On the other hand and in accordance with the foregoing reasoning, since according to Chinese law the marital status of the Spanish adoptive parents is not affected either, the adoption sought cannot be noted down in the Registry Office (*cf.* art. 38.3 *LRC*), not even as a situation of adoption or fostering (*cf.* arts. 81 and 154.3 *RRC*) which is invalid for Chinese legislation.

This State Office has decided, in accordance with the regulatory proposal, to reject the appeal".

– *DGRN* Resolution 11 March 1997, *A.C.*, 1998-4, R 301.
Harmonisation of full Venezuelan adoption to that of the Spanish Civil Code.

"Legal Grounds:

First.– The following articles were considered: 9 *Cc*; 15 and 46 *LRC*; 66, 68, 197 and 213 *RRC*; 25 of *LO* 1/1996, dated 15 January, concerning Legal Protection of Minors; the Convention on the Protection of Children and Cooperation in respect of Intercountry Adoption dated 29 May 1993, ratified by Spain (*BOE* dated 1 August 1995), and the resolution dated 28 June 1996.

Second.– This appeal discusses whether an adoption formalised in 1996 before the Venezuelan authorities by a Spanish married couple in favour of a Venezuelan child, born on 23 November 1993, is registrable.

Third.– According to the documentation furnished in respect of Venezuelan legislation concerning full adoption, this is comparable to the sole adoption regulated in the Spanish *Cc*, its effects corresponding to those provided for by Spanish law (*cf.* art. 9.5 *Cc*). The fact that it could be revocable (according to the documentation initially furnished) or be annulled (in accordance with the subsequent accompanying documentation) by virtue of firm legal ruling in no way invalidates that assimilation, and registration must only be refused in those cases in which the adoption does not sever the bonds tied to the natural relationship or may be revoked at any subsequent moment at the wishes of the adoptive parent or the adopted child; therefore, the circumstance to be borne in mind, amongst others, when assessing whether a foreign adoption may be registered in the Spanish Registry Office, is the voluntary revocation and not that resulting from a legal ruling. We must not forget that in our legislation it is possible for the Judge to decide the annulment of the adoption (*cf.* art. 180.2 *Cc*), thereby producing effects that are similar to those envisaged in the foreign legislation called on. Therefore, the adoptive parents having been declared suitable by the corresponding public body and all other requirements demanded by Spanish legislation having been complied with, there is no legal obstacle whatsoever for agreeing to what is requested.

This State Office has decided, in accordance with the regulatory proposal:

1. To allow the appeal and revoke the resolution appealed against
2. To order the registration of the birth of F.H., born in C. (Venezuela) on 23 November 1993, placing the adoption established on record by means of marginal annotation, as well as the resulting order of surnames and the proper name Carlos habitually used by the adopted child (*cf.* arts. 197 and 213.1.ª *RRC*)".

– *DGRN* Resolution 5 April 1997, *A. C.*, 1998-4, R 337.
Hague Convention dated 29.3.1993 and Law 1/1996, concerning Protection of Minors. Scope of temporary application.

"Legal Grounds:

First.– The following were considered: The Convention on the Protection of Children and Cooperation in respect of Intercountry Adoption, done at The Hague on 29 March 1993 (*BOE* dated 1 August 1995); art. 9.5 of the Civil Code, drafted by public general act of Parliament 1/1996, dated 15 January; the sole transitional provision of this Act; arts. 15.23 and 46 of the Registry Office Act, and Resolutions dated 29 November 1996 and 17 January, 14 (5th) February and 6 and 11 (1st) March 1997.

Second.– This appeal discusses whether the birth of a female minor that occurred in Romania, as well as the adoption formalised legally in this country and by which that minor, of Romanian nationality, has been adopted by a Spanish married couple domiciled in Spain, is registrable in the Central Registry Office. The request for registration was presented on 25 January 1996, and the petition for adoption was presented before the Romanian Court on 9 May 1995 and was approved by the Court on 10 November 1995.

Third.– In this situation, the decision of the Officer-in-Charge of the Central Registry Office was unfavourable, adducing two rectifiable defects which prevent the registrations that are sought, which are the lack of intervention on the part of the competent Romanian central authorities and the absence of the relevant statement of suitability of the adoptive parents obtained from the corresponding Spanish public body.

Both requirements are considered necessary by application of the Hague Convention, cited in the documents considered, and which has already come into force both for Romania and for Spain.

Fourth.– Now, as clearly emerges from art. 41 of the said Convention, the necessary intervention of the central authorities of the States of origin and reception, as well as the application of the Convention itself, are only compulsory when the adoption request addressed to the central authority of the State of the usual place of residence of the future adoptive parents (*cf.* its art. 14) has been received after the coming into force of the Convention in the source State and in the receiving State. This last condition is not present in this case, since the Convention came into force for Romania on 1 May 1995 and for Spain on 1 November 1995, and as stated earlier, the petition for adoption was presented before the Romanian Court on 9 May 1995 and therefore at a time when the Spanish central authorities were not yet under the obligation to intervene in international adoption.

Fifth.– It must also be observed that it is necessary, independently of the stipulations of the Convention, for the competent Spanish public authorities in matters regarding the protection of minors in the respective territories to state, prior to registration, the suitability of the adoptive parents who are Spanish and domiciled in Spain, so that the foreign adoption may be recognised in Spain; this has been established in the national plan by art. 9.5 of the Civil Code, drafted by Organic Law 1/1996, dated 15 January. Now, this Law, published in the 'Official Gazette of the Spanish State' dated 17 January 1996, came into force thirty days after its publication (*cf.* final

provision twenty-four), for which reason, having requested registration from the Central Registry Office on 25 January 1996, the said Act had not yet come into force and compliance with a requirement not demanded by the earlier legislation then in force cannot be imposed, as acknowledged by the sole transitional provision of the said public general act of Parliament.

This State Office has decided, in accordance with the regulatory proposal:

To allow the appeals and revoke the resolution appealed against.

In the light of the accompanying documentation, to order registration in the Central Registry Office of the birth that occurred in B. on 19 July 1994, together with the adoption formalised in Romania on 10 November 1995".

6. Maintenance

– *SAP* Balearic Islands, 13 March 1997, *A.C.*, 20/1997, @1494.

United Nations Agreement dated 20.6.1956. Claim for provisional maintenance, instead of requesting *exequatur* of the foreign divorce decree. Legal Kidnapping.

"Legal Grounds:

The legal grounds of the decision of the original court are not accepted.

One.– In order to provide urgent solutions to the humanitarian problem of persons having no means of support who are entitled to receive maintenance from others living abroad and given the serious legal and practical difficulties involved, a convention was signed at the United Nations headquarters in New York on 20 June 1955 with a view to devising measures to resolve this problem and deal with the difficulties. Spain acceded to the convention and ratified it on 6 October 1966 (published in the Official State Gazette, 282, 24.11.66).

The said international convention having been published in full in the gazette cited above, the legal regulations contained therein constitute part of the legal system of this nation, as generally provided by art. 1.5 *Cc.*

Of paramount interest among the said legal regulations for the purposes of this case is that contained art. 5.3 of the convention, whereby 'the procedure provided in art. 6 may, if the law of the defendant's State so allows, include *exequatur* or registration or a new action based on the decision issued pursuant to the provisions of paragraph 1'.

This convention therefore establishes two procedures in addition to those already available under internal or international law for the securing of maintenance in contracting states, namely enforcement in the defendant's country of a decision issued in another contracting state, including *exequatur* or registration; or alternatively institution of new proceedings in the defendant's country based on documents remitted by the authorities of the country of the person or persons claiming maintenance.

In the instant case the Public Prosecutor's Office has not asked for enforcement of the divorce decree of 22 June 1990 issued by Section 2 of the

Zurich District Court in case 01-7011990 but has initiated proceedings for maintenance under arts. 142, 143, 146 and 148 *Cc* and 1609 *LECiv* and the provision of the international convention referred to. The court of instance is therefore in error in having accepted the exception of inappropriate procedure and having opted for provisional maintenance procedures rather than *exequatur* or registration; or alternatively institution of new proceedings in the defendant's country based on documents remitted by the authoritiess of the country of the person or persons claiming maintenance.

Two.– It is recorded in the proceedings that the union of Yvony M. and Juan Manuel F. gave issue to two children, Daniela and Alejandro, the first on 22 May 1984 and the second on 27 March 1988, both children remaining in the custody of the mother after the separation; the obligation of the defendant F. H. to pay maintenance for his minor offspring is established in our own legal system (art. 143 *Cc*) and was ordered in Switzerland by the firm decision of a Zurich court.

Three.– The legal obligation to provide maintenance stems from the existence of a blood tie between the person requiring it through lack of means of support and the person possessing sufficient means and hence the obligation to provide such maintenance. In the instant case, as already noted, it has been demonstrated that a blood tie exists between the minors for whom maintenance is claimed and the defendant, and therefore Mr. F. H. is obligated to contribute along with his wife to the maintenance and pubringing of the children.

Determination of the amount of maintenance must take into account the needs of those maintained and the ability of the person under that obligation to pay. In the instant case the court has no evidence that the defendant lacks the temporary occupations that he says he discharges in fact two of his writ of reply or the income that he earns therefrom, and therefore we cannot accept the alleged disproportion between his income and the amount claimed by the plaintiff for maintenance of the children, which amount is deemed to be adequate in light of the circumstances, age and needs of the children.

Four.– In pursuance of arts. 523 and 896 *LECiv*, the defendant is ordered to pay the costs of the original proceedings. There is no express provision as to the costs of this appeal".

XI. SUCCESSION

XII. CONTRACTS

– *S.* Court of First Instance No. 1 Tolosa, 13 January 1997, *RECA*, 1997, p. 244.
Note: See II.2

XIII. TORTS

XIV. PROPERTY

XV. COMPETITION LAW

XVI. INVESTMENTS AND FOREIGN EXCHANGE

XVII. FOREIGN TRADE LAW

XVIII. BUSINESS ASSOCIATION/CORPORATION

XIX. BANKRUPTCY

XX. TRANSPORT LAW

1. International Maritime Transport

– *STS* 3 March 1997, *Ar. Rep. J.*, n. 1638
Note: See VI.1
– *SAP* Pontevedra, 25 March 1997, *RECA*, 1997, p. 275.
Note: See V. International Commercial Arbitration.
– *SAP* Castellón, 26 May 1997, *Ar. Rep. J.*, n. 1343.
Note: See II.2.

XXI. LABOUR LAW AND SOCIAL SECURITY

XXII. CRIMINAL LAW

XXIII. TAX LAW

XXIV. INTERLOCAL CONFLICT OF LAWS