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Practice of Spanish Authorities

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PROCEDURAL TREATMENT OF RECOGNITION OF FOREIGN JUDGMENTS IN THE PRACTICE OF SPANISH AUTHORITIES*

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I. INTRODUCTION

1. Complexity is perhaps the most striking feature of the area of recognition and ‘enforcement’¹ of foreign judgments in Spain. Hence, it may seem paradoxical that this complication stems largely from the proliferation of international and Community instruments whose essential purpose is to simplify (recognition). But the fact is that each convention or regulation, in striving to make things easier, lays down different conditions and/or introduces a specific type of recognition and/or proceeding. Indeed, the whole area is plagued by special cases as a direct consequence of both the ‘internationalist euphoria’ experienced by the Spanish system in the last quarter of XXth Century², and the encouragement of the ‘fifth Community freedom’ or promotion of the principle of mutual recognition of judicial decisions by Community authorities³.

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¹ When the term ‘enforcement’ is used to refer to one the mentioned area of Private International Law (PIL), i.e., the area of ‘recognition and enforcement’, it actually means *recognition of the enforceability* of a foreign decision. It does not refer to the enforcement of a decision itself. Hence the inverted commas, which are intended to warn that the term is imprecise in this context. On inaccurate use of the term ‘enforcement’ and its consequences, see §4 below.

² Cf. FERNÁNDEZ ROZAS, J.C., “Problemas de asimilación de los tratados internacionales de Derecho internacional privado en un sistema de base estatal: la experiencia española”, *Mélanges Fritz Sturm*, vol. II, Éditions Juridiques de l’Université de Liège, Liège, 1999, pp. 1447-1468, esp. p. 1447.

³ In its initial stages, the back-up of such freedom gave rise to the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, done at Brussels on 27 September 1968 (*OJEC* C 189, 28 July 1990), hereafter BC; to Council Regulation (EC) no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*OJEC* L12, January 2000), hereafter Reg. 44/2001; and Council Regulation (EC) no. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of

However, the complicatedness cannot be attributed solely to the internationalisation of sources. Much of the responsibility lies with a national legislator incapable of ameliorating the difficulties entailed in the handling of such a multiplicity of regulations, when it comes either to negotiating conventions or to devising a more appropriate internal regulation. Two evidences of this fact are (1) that the reform of the rules of civil proceedings that took place in 2000 did not cover the recognition and ‘enforcement’ of foreign judgments⁴; and (2) that the subsequent amendment⁵ of the rules maintained in force resulted in a formally dubious ‘stopgap’ which further presented defects in a number of aspects⁶. The outcome is that the Spanish system is composed of many instruments that envisage many different proceedings⁷ and types of

judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (*OJEC* L338, 23 December 2003), hereafter Reg. 2201/2003. Strictly speaking, the regulations culminating the process can not be considered instruments for the recognition of *foreign* judgments, as we argue later on (§4).

⁴ The sole Repeal Provision of the *Ley de Enjuiciamiento Civil* (Civil Proceeding Act, Law 1/2000 of 7 January, *BOE*, no. 7, 8-I-2000, corr. err. *ibid.*, no. 90, 14-IV-2000, and *ibid.*, no. 180, 28-VII-2000, hereafter LEC 2000), retains arts. 954 to 958 of the Civil Proceeding Act of 3 February 1881, *Gaceta de Madrid*, 5 to 22-II-1881, corr. err. *ibid.*, 5-III-1881 (hereafter, LEC 1881) until the entry into force of the upcoming International Legal Cooperation Act (twentieth final provision, LEC 2000). This Act was supposed to be presented by the Government not more than 6 months after the entry into force of the new civil procedure act.

⁵ See Organic Law 19/2003 of 23 December amending the Judiciary Act, Organic Law 6/85, *BOE*, no. 309, 26-XII-2003, and the Fiscal, Administrative and Social Measures Act, Law 62/2003 of 30 December, *ibid.*, no. 313, 31-XII-2003.

⁶ See my article “Competencia de los juzgados de primera instancia para conocer del procedimiento de *exequátur*. (Reflexiones a raíz de la modificación de las normas de la LEC de 1881, por la LO 19/2003 y por la Ley 62/2003)”, *Diario La Ley*, no. 6039, 14 June 2004, pp. 1-5. Other criticisms of the reform have come from, *inter alia*, ÁLVAREZ RODRÍGUEZ, A., “La Sala 1ª del Tribunal Supremo ya no es competente para conocer del reconocimiento de las soluciones judiciales y arbitrales extranjeras”, in *Derecho Migratorio y Extranjería*, no. 5, March 2004, pp. 39-68; and OÑA LÓPEZ, M.M., “La modificación del artículo 955 de la Ley de Enjuiciamiento Civil de 1881: la atribución de competencia para conocer del procedimiento de *exequátur* a los Juzgados de primera instancia”, *REEI*, 2004 (http://www.reei.org/reei8/OnaLopez_reei8_.pdf, last visited on 31 March 2008).

⁷ Indeed, there are mainly four: (1) The proceeding regulated in arts. 955 to 958 LEC 1881, usually known as the *internal exequatur proceeding*; (2) The proceeding laid down in the BC, which is identical to the one subsequently regulated in the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988 (*BOE*, no. 251, 20-X-1994, corr. err. *ibid.*, no. 8, 10-I-1995 (referred to hereafter as LC and the *LC proceeding*); (3) The *proceeding under Reg. 44/2001*, that differs from the CB proceeding in a good number of respects. The same changes likewise affect the new Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters done at Lugano on 30 October 2007 (*OJEU* L337 of 21 December 2007, hereafter LC2): where the LC2 is applicable the proceeding to be followed will be substantially similar to that envisaged in Reg. 44/2001: for that reason this new instrument is not dealt with separately in the rest of this article; (4) The *proceeding under Reg. 2201/2003*, that remains in many respects closer to the one originally regulated by the BC, although it also shares features in common with that of the other Regulation. We would note that there may be other proceedings, albeit confined to the recognition of judgments on specific matters, like the one provided for judgments relating to the costs and expenses of proceedings in the Hague Convention on civil procedure of 1 March 1954 (*BOE* no. 297, 13/12/1961). This proceeding is set in motion by a request through diplomatic channels (unless there is a convention between the State of origin and the requested State where under a

recognition. This diversity considerably complicates the application of the rules by the authorities.

The specific purpose of this article is to analyse Spanish practice as it relates to the procedural aspects of recognition. To that end, given that courts can only act at the instance of the parties (*nemo iudex sine actore*), it will be best to begin by examining the scope of party autonomy for purposes of pursuing recognition proceedings (II). Next a parallel analysis of the norms regulating the various procedures and the practice of Spanish authorities in applying these norms will be conducted, largely on the basis of timing. The analysis begins with the different proceedings, from the standpoints of the competent authorities (III.1), the intervening parties (III.2) and the documents to be submitted (III.3). Next a special attention will be paid to the fundamental issues relating to the course of the successive stages of the proceedings, namely first instance (IV.I), with special reference to the adoption of provisional measures (IV.II) and the rules governing appeals (IV.III). The study concludes with a summary of the main conclusions (V).

II. SCOPE OF PARTY AUTONOMY

1. Choosing the type of recognition or/and the proceeding

2. The instrument applicable to the recognition of a foreign judgment specifies the type of recognition that is available and the appropriate proceeding, if needed. For instance, where automatic recognition is provided —i.e. the regulation or convention either expressly contemplates the possibility of recognition without any prior proceedings⁸, or it differentiates between recognition and a declaration of enforceability

request may be processed directly by the interested party (see art. 18) and there is no conflict. See *Auto del Tribunal Supremo* (hereafter, ATS) (Civil Chamber) of 17 September 1996 (*Westlaw*, RJ 1998/3556) and ATS (Civil Chamber) 12 May 1998 (*ibid.*, 1998/448).

⁸ Under the Spanish system, the instruments that expressly provide automatic recognition are: the Community regulations mentioned above (see arts. 33.1 Reg. 44/2001 and 21.1 Reg. 2201/2003); the LC (see art. 26.1); the LC2 (see art. 33.1); the Convention on recognition and enforcement of court judgments and transactions and enforceable public documents in civil and commercial matters, between Spain and the Federal Republic of Germany done at Bonn on 14 November 1983 (*BOE*, no. 230, 24-IX-1992: see art. 10.1); the Convention on recognition and enforcement of court judgments and transactions and enforceable public documents in civil and commercial matters, between Spain and Austria done at Vienna on 17 February 1984 (*ibid.*, no. 270, 29-VIII-1985: see art. 12); with certain restrictions, the Convention on legal cooperation in civil matters between the Kingdom of Spain and the Government of the Federal Republic of Brazil done at Madrid on 13 April 1989 (*ibid.*, no. 164, 10-VII-1991, corr. err. in *ibid.*, no. 193, 13-VIII-1991: see art. 18.1); the Treaty between the Kingdom of Spain and the Republic of El Salvador on jurisdiction and the enforcement of judgments in civil and commercial matters done at Madrid on 7 November 2000 (*ibid.*, no. 256, 25-X-2001: see art. 10); the Convention on recognition and enforcement of judgments and arbitral decisions in civil and commercial matters between the United States of Mexico and the Kingdom of Spain done at Madrid on 17 April 1989 (*BOE*, no. 85, 9-IV-1991, corr. err. in *ibid.*, nos. 108, 6-VI-1991 and 226, 20-VIII-1991: see art. 8); the Convention between Spain and Romania on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters done *ad referendum* at Bucharest on 17 November 1997 (*ibid.*, no. 134, 5-VI-1999: see art. 11.1); and the Convention between the Kingdom of Spain and the Union of Soviet Socialist Republics–Russian Federation on legal assistance in civil matters done at Madrid on 26 October 1990 (*ibid.*, no. 151, 25-VI-1997: see art. 24.1). Moreover, conventions which use the term *recognition* (or ‘enforcement’) by *operation of the law* or *ipso iure* (“de pleno derecho” in Spanish; “de plein droit” in French) do so as a synonym of automatic recognition. For instance, the Hague Convention on Protection of Children and

(or ‘enforcement’), restricting the conduct of a proceeding to “enforcement”⁹ and not awarding competence to any particular authority¹⁰ —such automatic recognition is presented as alternative to a principal action for recognition. Therefore, the parties are entitled not only to choose whether or not to apply for recognition, but also to select the way in which the decision will be recognized. As a result an authority competent to conduct a principal request for recognition cannot reject it simply because the judgment may be subject to automatic recognition¹¹.

On the other hand, when recognition must necessarily be by way of a proceeding, as is the case whenever the Spanish autonomous regime is applicable¹²—other than in the

Co-operation in Respect of Intercountry Adoption of 29 May 1993 (*ibid.*, no. 182, 2-VIII-1995: see art. 23); and the Convention on changes of surnames and forenames signed at Istanbul on 4 September 1958 (*ibid.*, no. 15, 8-I-1977: see art. 3).

⁹ Hague Convention concerning the powers of authorities and the law applicable in respect of the protection of infants of 5 October 1961 (*ibid.*, no. 199, 20-VIII-1987: vide art. 7); the Convention between Spain and France on recognition of judicial and arbitral decisions and authentic acts in civil and commercial matters of 28 May 1969 (*ibid.*, no. 63, 14-III-1970: see art. 13); the Convention between Spain and Italy on legal assistance and recognition and enforcement of judgments in civil and commercial matters done at Madrid on 22 May 1973 (*ibid.*, no. 273, 15-XI-1977: see art. 21); and the Convention on judicial cooperation in civil, commercial and administrative matters between the Kingdom of Spain and the Kingdom of Morocco done at Madrid on 30 May 1977 (*ibid.*, no. 151, 25-VI-1997: see art. 25). The proposal to identify conventions which provide for automatic recognition with the two abovementioned criteria comes from ARENAS GARCÍA, R., in “Frontera entre el reconocimiento y la ejecución de una sentencia extranjera en materia de pensión compensatoria”, *AEDIPr*, 2004, pp. 944-959, esp. p. 949. I accept his criticism of a former opinion of mine in which I denied the existence of automatic recognition in the Franco-Spanish convention. However, I disagree that the internal laws must enable such recognition in order to understand that this convention, like the other conventions cited above, enables automatic recognition. If we differentiate strictly between the types of recognition that the internal laws may admit and the proceedings provided for its implementation, we must admit that the referral made by each of the above-cited bilateral conventions to such internal laws is confined to the proceeding for declaration of enforceability. Hence automatic recognition may be admitted even if it is not provided for in LEC 1881. The *Auto de la Audiencia Provincial de* (hereafter, AAP) Barcelona (Section 1) of 28 February 2002 (*Westlaw*, JUR 2002/136809) arguably bears out the interpretation that the Franco-Spanish Convention provides for automatic recognition, if not without eliciting criticisms on the part of the Spanish doctrine: see the remarks on this subject by OROZCO HERMOSO, M., in *AEDIPr*, 2004, pp. 851-853.

¹⁰ The Convention on judicial assistance between the Kingdom of Spain and the Republic of Bulgaria done at Sofia on 23 May 1993 (*BOE*, no. 155, 30-VI-1994) cannot therefore be said to provide for automatic recognition: although it differentiates between recognition and ‘enforcement’ and when alluding to the latter refers only to the need for a proceeding (see art. 20(1)), it attributes jurisdiction for both *recognition* and enforcement to certain specific authorities (in Spain, the *Juez de Primera Instancia* - Judge of First Instance: hereafter, JPI-: see art. 20.4), and hence it must be construed that such recognition has to be effected through a procedure before those authorities.

¹¹ Thus, AAP Barcelona (Section 1) of 28 February 2002 (*cit.*) was presumably inexact in correcting the JPI who refused jurisdiction to recognize a French divorce judgment and noted that the competent body was the Supreme Court (which was the case at that time). Where the AP erred was in stating that the party interested in securing recognition could not appeal to the TS but had to file with the Judge in charge of the Registry where the divorce would have to be registered. Having stated—as it had—that the Franco-Spanish bilateral convention allows for automatic recognition, the AP should have asserted that both options were available. If the parties wished to secure a definitive ruling on recognition, there would have been nothing to prevent them applying to the TS. A similar error was committed by the JPI in an issue which the AP Seville (Section 5) subsequently resolved on appeal by *Auto* of 21 October 2005 (*ibid.*, JUR 2006/173255), when the JPI refused an application for recognition of a Swedish divorce decree on the ground that the specific recognition procedure could not be pursued because automatic recognition was available.

¹² Following the criteria noted above for identifying when automatic recognition is available (see *supra*, note 9), it was argued that the LEC 1881 admitted such recognition, given that art. 955 referred only to the ‘enforcement’ of foreign judgments (cf. ARENAS GARCÍA, R., in “Frontera entre el

case of judgments delivered in voluntary jurisdiction proceedings or of the regulation contained in article 84.1 RRC¹³— the margin for decision is reduced to the actual opening of the proceedings. Rules governing the corresponding proceeding, as procedural rules, are non-discretionary, and so entitled parties may decide whether or not to request recognition of the judgment, but they may not choose the proceedings whereby this is to be done¹⁴. Hence it will be necessary to follow the internal (Spanish) exequatur procedure not only when there is no applicable convention but also when the applicable instrument remits to “the internal procedure of the requested State”¹⁵, even if

reconocimiento y la ejecución...”, *loc. cit.*, p. 948; see also VIRGÓS SORIANO, M. and GARCIMARTÍN ALFÉREZ, J.F., *Derecho procesal civil internacional*, 2ª ed., Civitas, Madrid, 2007, p. 580). However, the reform of art. 955 LEC 1881 introduced by Law 62/2003 (*cit.*), as the author himself notes, removed that possibility, by attributing the competence to ‘examine applications for *recognition and enforcement of judgments and other foreign judicial and arbitral decisions*’ (my italics) to the JPI. There can therefore be no question of automatic recognition of decisions coming under the LEC 1881 despite the fact that Spanish courts have sometimes done so. Concerning a Bolivian divorce, see *ad ex* AAP Barcelona (Section 12) no. 20/2007 of 23 January (*Westlaw*, JUR 2007/177622) and my own “Note” to this decision in *REDI*, 2007, in press.

¹³ For an analysis of the current treatment of foreign judgments in matters of voluntary jurisdiction and an alternative proposal—subjection to exequatur—see DE MIGUEL ASENSIO, P., *Eficacia de las resoluciones extranjeras de jurisdicción voluntaria*, Eurolex, Madrid, 1997, *passim*. Regarding the recognition of adoptions formalised before foreign authorities, see art. 27 of the International Adoption Act, Law 54/2007 of 28 December, *BOE* no 312, 29/12/2007. For its part, art. 84.1 RRC allows the Civil Registrar to give effects to a foreign decision (of divorce or annulment of marriage) that is presented merely in support of the capacity for a registrable act (marriage), as long as the decision does not conflict with public policy. Hence, it gives the possibility to recognize automatically foreign decisions that are not susceptible of registration, i.e. that do not affect any Spanish national nor refer to acts (marriage or the decision itself) which have taken place in Spanish territory. On this practice and the risks that it entails, see both the “Note on AAP Barcelona (Section 12) no 20/2007 of 23 January”, cited above and my “Note on Res. DGRN (1ª) of 6 November 2000”, *REDI*, 2001, pp. 537-541.

¹⁴ Under the current rules it is not possible to secure a ruling from the Spanish courts which accepted the substance of a foreign decision other than by way of the appropriate recognition proceeding. It would therefore be improper to order maintenance payments decreed in a foreign judgment if the creditor has filed suit to obtain a conviction by means of any other type of procedure. This was the ruling in AAP La Rioja (Sole Section) no. 43/2003 of 25 April (*Westlaw*, JUR 2003/150981). Nonetheless, for the opposite view see SAP Santa Cruz de Tenerife (Section 1) no. 89/1999 of 6 February (*ibid.*, AC 1999/4117) and SAP Málaga (Section 5) no. 1059/2004 of 27 September (*ibid.*, JUR 2004/292433). The options left to the parties in the foreign procedure are limited to three: (1) application for recognition of the decision (and enforceability where applicable); (2) inaction; and (3) opening of fresh proceedings, within the framework of which the foreign decision may only be introduced as an element of proof or to oppose *res judicata*.

¹⁵ See Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children (*BOE*, no. 271, 12-IX-1973: see art. 6); the Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations (*ibid.*, no. 192, 12-VIII-1987, corr. err. *ibid* no. 282, 25-XI-1987: see art. 13); the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children and Restoration of Custody, done at Luxembourg on 20 May 1980 (*ibid.*, no. 210, 1-IX-1984: see art. 14); the Convention on judicial assistance in civil and commercial matters between the Democratic and Popular Republic of Algeria and the Kingdom of Spain, done at Madrid on 24 February 2005 (*ibid.*, no. 103, 1-V-2006: see art. 20); the Convention on legal assistance, recognition and enforcement of judgments in civil matters between Spain and the Socialist Republic of Czechoslovakia—now the Czech Republic and Slovakia—done at Madrid on 4 May 1987 (*ibid.*, no. 290, 3-XII-1988, corr. err. *ibid.*, no. 22, 26-I-1989: see art. 25.3); the Treaty between the

that procedure has to be ‘straightforward (or simple) and swift’¹⁶ and although such internal procedure may well be neither of these things¹⁷. It is worth noting in this connection that the procedures provided in the LC, Reg. 44/2001 and Reg. 2201/2003 can—and should¹⁸—be used only for purposes of recognition of foreign decisions falling within their respective scope.

The foregoing, however, requires two qualifications. The first is that the parties have the possibility of obviating the effects of the foreign judgment by the means of bringing up fresh proceedings on the same cause of action in Spain¹⁹. Spanish jurisprudence let conclude that the interested parties may decide both when²⁰ to request their cooperation so as to confer on the judgment the authority accorded to it in the foreign State and whether they wish such recognition or prefer to seek a new ruling from the Spanish courts and ignore the foreign judgment²¹. But the fact is that such a possibility will depend not only on the action of any other legitimate party but also on whether the judgment is susceptible of automatic recognition. Hence, when one of the parties affected by a foreign judgment (unrecognised) brings a new proceeding with the same cause of action against the other, the success that he or she may hope to achieve by securing a ruling from the Spanish court that renders the foreign judgment without effect in Spain²² will depend first and foremost on the other legitimate party not

Kingdom of Spain and the Chinese People's Republic on judicial assistance in civil and commercial matters, done at Beijing on 2 May 1993 (*ibid.*, no. 26, 31-I-1994, corr. err. *ibid.* no. 60, 11-III-1994: see art. 18); the Convention between Spain and Israel for mutual recognition and enforcement of judgments in civil and commercial matters, done at Jerusalem on 30 May 1989 (*ibid.* no. 3, 3-I-1991, corr. err. *ibid.*, no. 20, 23-I-1991: see art. 5); the Convention on judicial assistance in civil and commercial matters between the Kingdom of Spain and the Islamic Republic of Mauritania, done on 12 September 2006 (*ibid.*, no. 267, 8-XI-2006; see art. 20); the Convention on legal cooperation between the Kingdom of Spain and the Oriental Republic of Uruguay, done at Montevideo on 4 November 1987 (*ibid.*, no. 103, 30-IV-1998: see art. 10); and art. 20 of the Spanish-Bulgarian Convention (*cit.*).

¹⁶ See art. 14 of the Convention between the Kingdom of Spain and the Kingdom of Morocco on judicial assistance, recognition and enforcement of judicial decisions in matters of the right of custody and the right of visits and return of children, done at Madrid on 30 May 1997 (*BOE* no. 150, 24-VI-1997); art. 14 of the 1980 Luxembourg Convention, *cit.*; art. 11 of the Spanish-German Convention, *cit.*; and art. 13 of the Convention between Spain and Austria, *cit.*

¹⁷ Nonetheless, in the context of the recognition of a German decision coming under the bilateral convention, the TS (Civil Chamber), which had jurisdiction then, asserted in an Auto of 10 September 1996 (*Westlaw*, RJ 1998/3555) that the exequatur procedure was ‘a manifestation of the criteria of rapidity and simplicity’ required by that convention.

¹⁸ In this connection see the critical comments relating to the praxis of courts which apply the exequatur procedure of the 1881 LEC, instead of following the provisions of these instruments by LÓPEZ-TARRUELLA MARTÍNEZ, A. in “Reconocimiento y ejecución de sentencias en el marco del espacio judicial europeo”, *AEDIPr*, 2003, pp. 821-824, esp. pp. 822 and 823.

¹⁹ This possibility is to be denied in the frame of Reg. 44/2001, as a result of the *De Wolf* Case: see WAUTELET, P., “Art. 33”, MAGNUS, U. and MANKOWSKI, P. (Eds.), *Brussels I Regulation*, Munchen, Sellier, 2007, pp. 547-555, esp. p. 551.

²⁰ The act of recognition would have no period of limitation: the independence and autonomy of the procedure are such that if the rights recognised therein should have lapsed, such an objection must be entered in the enforcement proceedings subsequent to the award of exequatur: see ATS (Civil Chamber) of 23 May 2000 (*Westlaw*, RJ 2000/4382).

²¹ In the event that there is a foreign judgment ordering maintenance and the cooperation machinery provided in the New York Convention on recovery of maintenance abroad of 26 June 1956 (*BOE*, 24-XI-1966) is invoked, the mediating Spanish authority—i.e. the State Attorney—must opt for recognition rather than filing a new complaint since the former is the faster and simpler way, as stressed by SOTO MOYA, M., in his comments on the *Sentencia* (hereafter, S) AP Tarragona (Section 3) of 24 November 2002, in *AEDIPr*, 2004, pp. 912-914.

²² In such a situation ‘recognition of the foreign judgment in Spain (...) collides ineluctably with the effects of the domestic judgment, and most particularly with *res judicata* (...), which bars any other ruling between the same parties on the same subject that might be different, risking of undermining the

claiming *res judicata*. In this context, the mere presentation of the foreign judgment in the proceedings is not enough, as it would be assumed that is simply being cited as evidence²³. The proceeding, then, may conclude with the delivery of a new decision by the Spanish court. Party autonomy will have prevented recognition of the foreign judgment, which the court is powerless to impose²⁴. If on the other hand the defendant files a plea of *res judicata*, its fate will depend on the type of recognition that is applicable. Should the foreign decision be susceptible of automatic—and incidental as the case may be—recognition, *res judicata* exception would be admitted²⁵. But when it is not possible for the Spanish court itself to rule on recognition, the plea will normally be denied and the procedure initiated in Spain be pursued in order to secure a new decision on the merits of the case²⁶. Aiming at preventing opportunistic behaviour, duplication of procedures and conflicting judgments, it would arguably be preferable to apply for and grant a stay of the (new) proceeding (*ex art. 43 of LEC 2000*). If the

harmony that must necessarily prevail among the judicial decisions that form part of the internal order of States in order to avoid irreparable harm to legal security (...): cf. ATS (Civil Chamber, Sole Section) of 11 March 2003 (*Westlaw*, JUR 2003/87983) and references therein.

²³ See SAP Pontevedra (Section 1) 158/2000 of 20 March (*Westlaw*, JUR 2006/126785) and AAP Barcelona (Section 12) no. 211/2006 of 20 September (*ibid.*, AC 2007/784). When a foreign judgment is exhibited or submitted with the intention of accrediting some fact that is deemed proven therein, the findings of the judgment need not be recognised. In such a case, what is submitted is a public document containing the judgment, which as a foreign document must meet the requirements set out in arts. 323.2 and 144 LEC 2000 to have the same force in Spain as Spanish public documents (full force of the facts contained therein, *ex art. 319 LEC 2000*). Having regard to these, see JIMÉNEZ BLANCO, P., “La eficacia probatoria de los documentos públicos extranjeros”, *AEDIPr*, 2000, pp. 365-404. An express provision on the extension of probatory force without recognition can be found in art. 8 of the Hispano-Mexican Convention (*cit.*).

²⁴ In this connection, in AAP Gerona (Section 2) no. 117/2002 of 8 July (*Westlaw*, 2002/243696) an appeal is upheld against a decision (AJPI no. 3 of Blanes of 26 November 2001) refusing to admit an application for divorce based on the existence of an English divorce decree which the appellant presented in evidence of the absence of cohabitation and which the JPI considered had to go through the recognition proceeding. For a similar case see SAP La Coruña (Section 4) no. 12/2006 of 25 January (*ibid.*, JUR 2006/78910).

²⁵ See AAP Valladolid (Section 1) no. 75/2006 of 12 June (*Westlaw*, AC 2007/66) in connection with a Bulgarian divorce decree. Given that automatic recognition is available under arts. 23 and 25 of the Hispano-Moroccan Convention (*cit.*) according to the interpretation noted earlier (see note 9 above), the *res judicata* exception should not properly be rejected on the ground of absence of a principal action for recognition of Moroccan divorce decrees; but see, in this sense, SAP Murcia (Section 1) no. 166/2003 of 12 May (*Westlaw.*, AC 2003/1676) and AP Málaga (Section 5) no. 384/2004 of 31 March (*ibid.*, JUR 2004/128865). Note to the contrary how in SAP Barcelona (Section 12) of 23 April 2003 (*ibid.*, JUR 2003/254214) the Court used the arguments presented here to affirm the possibility of automatic recognition of a Moroccan judgment, even although it eventually rejected the *res judicata* exception on the ground that the judgment did not meet the conditions of enforceability laid down in the Convention. Again, the possibility of automatic recognition of a French judgment is implied in SAP Orense (Section 1) no. 213/2004 of 4 June (*ibid.*, JUR 2001/236463). In this decision, the judgment of the JPI that granted the divorce was set aside given that the institutional instrument then in force (Reg. 1347/2000) was not applicable for reasons of timing. The French divorce decree concerned could nonetheless possibly be automatically recognized through the bilateral convention between France and Spain (*cit.*: see note 9 above), but this possibility is not mentioned in the Galician court’s judgment. See comments on this judgment by JIMÉNEZ SÁNCHEZ, M.Á., in *AEDIPr*, 2003, pp. 888-893. In the case of an Italian judgment, SAP Álava (Section 1) no. 443/1995 of 20 September (*Westlaw*, AC 1995/2217) denied the force of the objection raised by the party against whom recognition was sought, but not without reason given that the latter invoked *litis pendens* rather than *res judicata*.

²⁶ See SAP Alicante of 5 May 2000 and SAP Guipúzcoa (Section 3) of 11 December 2000 and comments by MARÍN PEIDRO, L., in *AEDIPr*, 2002, pp. 682-686. Regarding two Romanian judgments presented in different procedures on matrimonial disputes, see AAP Tarragona (Section 3) of 29 November 2006 (*Westlaw*, JUR 2007/223323) and SAP Asturias (Section 4) no. 321/2006 of 29 September 2006 (*ibid.*, AC 2006/1814).

foreign judgment was delivered before the initiation of the proceeding, its deferral would allow the party opposing *res judicata* to secure a ruling on recognition of the foreign judgment from the competent authority through the appropriate procedure²⁷.

3. A second point regarding the exercise of party autonomy is that it is possible in particular cases to choose the procedure to be followed for recognition with respect to a principal issue. This occurs when the foreign judgment is subject to more than one instrument and the rules of compatibility provide a choice in the application of rules of procedure. For example, such a situation arises with the application of the LC or Reg. 44/2001 and of a convention relating to a specific subject²⁸, i.e. when the foreign judgment requiring recognition is a maintenance decree given in another State party to the LC or in another Member State which is at the same time a party to the Hague Convention of 1973²⁹ or the Hague Convention of 1958³⁰. In that case under the LC and Reg. 44/2001 *it is compulsory* to apply the conditions for recognition provided in the specific convention (Hague Convention 1973 or Hague Convention 1958)³¹, and to *allow* the provisions of the LC or the Regulation to be applied in respect of the proceedings provided for therein. It is therefore up to the party applying for a declaration of enforceability whether the BC or the Reg. 44/2001 proceeding is to be followed if the party so requests, or the internal exequatur procedure referred to in the cited Hague Conventions³².

2. Opting for non-recognition

4. There is another way in which the parties may exercise their free will as regards the extra-territorial effects of *non-Spanish* decisions, rooted in the possibility of certain decisions given by courts in other Member States (except Denmark), i.e., decisions carrying the ‘European order’ certification, being enforced regardless of any

²⁷ Cf. VIRGÓS SORIANO, M. and GARCIMARTÍN ALFÉREZ, F.J., *op. cit.*, pp. 561-567, p. 659.

²⁸ In the LC, the special convention may be prior or subsequent to the former’s entry into force (see arts 57 LC and 67.5 LC2); in Reg. 44/2001, thanks to the ‘AETR effect’, provision is made for such compatibility only in respect of prior conventions (art 71).

²⁹ *Cit.* In this respect it is worth noting that this Convention does not bar the application of any other instrument that links the requested State with the State of origin (art. 23) and is applicable regardless of when the judgment was given; and it will only be affected by this date for purposes of declaring the enforceability of payments still outstanding prior to the entry into force of the Convention: see art. 24.

³⁰ *Cit.* Note that the Hague Convention 1973 would only replace the latter in the case of relations between States which are not parties to both, *ex art.* 29 Hague Convention 1973.

³¹ Such an application is far from usual. In all the cases we have analysed in connection with the recognition of Swiss maintenance decrees, the LC has also been applied in respect of the conditions of recognition: see, for instance, AAP Málaga (Section 5) no. 31/2001 of 31 January (*Westlaw*, AC 2001/1836) and SAP Orense (Section 1) of 7 March 2006 (*ibid.*, AC 2006/1548). HC 1973 has also not been applied to conditions of recognition in some cases where this has come under the BC or Reg. 44/2001; for example, German maintenance decrees coming under the BC in AAP Castellón (Section 3) no. 478/2000 of 8 September (*ibid.*, AC 2000/5116); and with regard to Reg. 44/2001 (without even a mention of HC 73) in AAP Murcia (Section 5) no. 27/2007 of 16 March (*ibid.*, JUR 2007/272936). In connection with a Netherlands judgment to which only the BC was applied, see ATS (Civil Chamber) no. 742/1995 of 21 July 2000 (*ibid.*, RJ 2000/5501). The closest we have found to a correct interpretation of the compatibility between these instruments is in AAP Gerona (Section 2) no. 190/2000 of 22 November (*ibid.*, JUR 2001/62793), in which the conditions of the BC and HC 1973 were applied cumulatively.

³² For an example of application of the internal exequatur procedure omitting any mention of the BC (which was applicable at the time) in a case of recognition of the enforceability of two German maintenance decrees, see ATS (Civil Chamber, Section 1) of 17 May 2005 (*ibid.*, JUR 2005/150613).

recognition³³. Be it said that the granting of the certification that the Member State's decision needs from the authority of the State of origin in order to receive such an order, and likewise the invocation thereof in the requested State, depends not only on compliance with the conditions set forth in the relevant instrument but also on the will of the parties in the foreign procedure.

To understand the scope of this option, it is important to remember that generally speaking, where the intention is to call for the enforcement of a decision, if it is a foreign one, then between the proceedings in which it was delivered and the enforcement procedure in Spain there must be another distinct and independent stage, namely the procedure for declaration of enforceability³⁴. According to the principle *nulla executio sine titulo*, an enabling instrument will have to be obtained from the competent authority of the forum, by means of a specific procedure³⁵. Hence, the enforceability of a foreign judgment also needs to be recognised, and therefore we should stress that the term 'enforcement' ought not to be used in conjunction with the term 'recognition' in the context discussed here³⁶. The possibility we noted of initiating enforcement proceedings without prior proceedings for a declaration of enforceability would therefore be an exception; but not, strictly speaking, to the said principle of *nulla executio*.... The apparent contradiction is resolved by a relatively recent development, namely the emergence and gradual spread of a Community *lex fori* as distinct from the *lex fori* of States. Its implantation, stimulated by the extension of the mutual recognition principle to judgments of Member States, has arguably led in its latter stages³⁷ to the introduction of a new concept to European legal systems—namely that of a 'European judgment' whose enforceability, regulated by the Community *lex fori*, is not contingent on recognition.

II. INITIATING THE PROCEEDINGS

1. Jurisdiction

A. 'Objective' and 'functional' jurisdiction

³³ Under arts. 41 and 42 of Reg. 2201/2003; in Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, *OJEC* L 143 of 30 April 2004; in Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December creating a European order for payment procedure, *OJEU* L 399 of 30 December 2006; and in Regulation (EC) No 861/2007 of the European Parliament and of the Council establishing a European Small Claims Procedure, *ibid.*, L 199 of 31 July 2007.

³⁴ See AAP Madrid (Section 13) of 12 February 2002 (*Westlaw*, JUR 2002/132026) and AAP Tarragona (Section 1) of 10 May 2001 (*ibid.*, JUR 2001/197938).

³⁵ Recognition of the enforceability of the foreign judgment cannot be automatic, despite the abundance of practical examples where such recognition has been given, erroneously, for purposes of a declaration of enforceability. See ARENAS GARCÍA, R., "Reconocimiento y ejecución de sentencias al amparo del Convenio de Bruselas de 1968", *AEDIPr*, 2002, pp. 550-558, esp. p. 556 and 557).

³⁶ As noted above in note 1. This confusion affects the practice of the authorities. It is quite common for the party requesting exequatur to ask for enforcement—in the strict sense of the word—of the judgment from the body that actually decides on recognition, and it is also quite normal for the latter to grant it and order non-provisional enforcement measures. In this connection see §13 below.

³⁷ See OREJUDO PRIETO DE LOS MOZOS, P., "Repercusiones del reconocimiento mutuo de las resoluciones judiciales en los sistemas autónomos: excesos y carencias", *AEDIPr*, 2006, pp. 481-502.

5. Through the reforms introduced by Organic Law 19/2003 and Law 62/2003³⁸ the Spanish legislator addressed a long-reiterated demand³⁹ that jurisdiction for the conduct of internal exequatur proceedings, which (formerly) lay with the TS (*Tribunal Supremo*: Supreme Court), be transferred to the JPIs (*Juzgados de Primera Instancia*: Courts of First Instance)⁴⁰. This meant that competence to deal with any recognition procedure at first instance fell to the said courts regardless of which instrument was applicable: article 955 LEC 1881 as it currently stands would assign competence to the courts of first instance, coinciding not only with the LC (art 32), Reg. 44/2001 (art 39.1 and annex II) and Reg. 2201/2003 (art 29.2 and corresponding ‘list’⁴¹), but also with several bilateral conventions which remit to internal exequatur procedures for all other purposes⁴²; thus, before the reform, the internal exequatur procedure had to be pursued through bodies other than the one that normally possessed jurisdiction (i.e., the TS)⁴³.

However, the simplicity that such uniformity would have brought has been considerably compromised with the latest reform of the Judiciary Act [LOPJ] introduced by Organic Law 13/2007 of 19 November⁴⁴. This statute adds a new section to article 86 *ter* whereby the *Juzgados de lo Mercantil* (Juvenile Courts: hereafter, JMs) have jurisdiction ‘for the recognition and enforcement of foreign judgments and other judicial and arbitral decisions where these concern matters within their competence, unless they have to be dealt with by another court or tribunal under treaties or other international norms’. In so doing the new section presents two problems. The first is that it reintroduces differentiated treatment of the competence to recognise decisions dealing with matters for which jurisdiction is attributed to the JM (“*unless they have to be dealt with by another court or tribunal...*”). Thus, notwithstanding if a foreign decision deals with any of the matters listed as ‘commercial’ in art. 86.2 *ter* LOPJ (matters which are attributed to the JM), jurisdiction will be endorsed to the JPIs if such decision comes under the LC, Reg. 44/2001 or a bilateral convention remitting to the internal procedure of the requested State and assigning competence expressly to the

³⁸ Cit.

³⁹ See REMIRO BROTONS, A., *Ejecución de sentencias extranjeras en España. La jurisprudencia del Tribunal Supremo*, Tecnos, Madrid, 1974, pp. 282-283; and in connection with recognition of the enforceability of arbitral decisions, ÁLVAREZ GONZÁLEZ, S., “Los Juzgados de Primera Instancia ante el exequátur de laudos arbitrales extranjeros”, RCEA, 1986, pp. 53-65.

⁴⁰ On the reform, see the reference in note 6 *supra*.

⁴¹ List 1 of the “Information relating to courts and redress procedures pursuant to Article 68 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000”, *OJEC*, C40, 17 February 2005.

⁴² For instance, in the conventions signed by Spain with the following States (all cited earlier): Brazil (art. 22), Bulgaria (art. 20), China (art. 18); Israel (art. 5.2); El Salvador (art. 13); Morocco (art. 25); Mexico (art. 19); Romania (art. 14); Tunisia (art. 21); Uruguay (art. 9); the USSR (i.e. Russian Federation: art. 24). Competence under the Spanish-Swiss Convention is controversial: whereas it is not expressly attributed to the courts of first instance according to VULLIEMIN, J.-M., “El Tratado entre España y Suiza sobre la ejecución recíproca de sentencias o fallos en materia civil o comercial de 19 de noviembre de 1896: la autoridad española competente en materia de *exequátur*”, *RGD*, 1988, pp. 1219-1231, it is so attributed according to REMIRO BROTONS, A., *op cit.*, pp. 281-283 y GARAU SOBRINO, F.F., “El reconocimiento en España de las resoluciones judiciales extranjeras en materia matrimonial”, *Puntos capitales de Derecho de familia en su dimensión internacional*, Dykinson, Madrid, 1999, pp. 303-331, *esp.* p. 317. See also ÁLVAREZ GONZÁLEZ, S., *loc. cit.*, pp. 54-56.

⁴³ With all the drawbacks that this could entail. For example as regards the possibility of appealing decisions of JPI conducting internal exequatur proceedings, bearing in mind that the bilateral conventions make no provision in this respect and that in this procedure the decisions of the TS were not susceptible of appeal. On this problem at the present time, see §15 below.

⁴⁴ LO 13/2007 of 19 November for extraterritorial prosecution of illegal trafficking or clandestine immigration of persons, *BOE*, no. 278, 20/11/2007.

JPIs. In other words, for the conduct of any of the proceedings provided in the instruments concerned (LC, Reg. 44/2001 or Reg. 2201/2003) only the JPIs will be competent, even if the matter is ‘commercial’; and in the conduct of the internal exequatur procedure the JMs will be competent only insofar as the bilateral convention applicable to the recognition does not attribute jurisdiction to the JPIs. The second problem relates to the attribution of competence to the JMs “for recognition and enforcement of judgments and other judicial and arbitral decisions *where these deal with matters for which it is competent*”⁴⁵. It will bring about a considerable complexity in demarcating the competence of the two types of body (JPI and JM) in non-bankruptcy proceedings, and particularly in connected matters⁴⁶.

B. Local jurisdiction

6. The determination of the body with territorial or local jurisdiction for the recognition proceedings differs largely according to the applicable instrument. For in fact not only is there a specific rule for each procedure—i.e. the ones provided in the LC (art 32.2), in Reg. 44/2001 (art 39.2), in Reg. 2201/2003 (art 29.2) and the internal exequatur procedure (art 955 LCE 1881)—but also some bilateral conventions provide rules on territorial jurisdiction of courts of first instance where these are assigned competence.

Insofar as the criteria governing local jurisdiction are determined specifically for each recognition proceeding, the special (institutional or conventional) norms displace the provisions that regulate local jurisdiction in a general way (i.e., arts. 50-60 LEC 2000)⁴⁷. These rules cannot therefore be construed as being dispositive⁴⁸: the party applying for recognition must demonstrate fulfilment of the criteria laid down for the proceeding to continue⁴⁹, and the requested court must verify its jurisdiction *ex officio*⁵⁰.

⁴⁵ As postulated by OÑA LÓPEZ, M.M., *loc. cit.*, p. 4.

⁴⁶ This complexity was already noted in the first criticisms that were raised to the creation of Juvenile Courts in Spanish system: see inter alia EIZAGUIRRE BERMEJO, J.M., “Los Juzgados de lo mercantil: un atentado contra la seguridad jurídica”, *Diario La Ley*, no. 5648, 2002, pp. 1-6. For a later confirmation of the insecurity caused by this creation, see inter alia HERRERA CUEVAS, E.J., “De la competencia objetiva de los Juzgados de lo mercantil”, *ibid.*, no. 619 of 17 February 2005 (www.laley.net).

⁴⁷ Before the cited reform of the 1881 LEC recourse to these rules was necessary when under a bilateral convention the internal exequatur procedure had to be pursued through a JPI rather than the TS. Note, however, some cases of erroneous application of the rules of local jurisdiction in AAP Baleares (Section 5) no. 72/2004 of 22 June (*Westlaw*, JUR 2004/258132)—application of art. 50 LEC in the context of a procedure under Reg. 44/2001; AAP Asturias (Section 1) no. 113/2006 of 3 November (*ibid.*, AC 2006/2015)—application of art. 855 LEC 1881 in the context of an internal exequatur procedure; and AAP Madrid (Section 10) of 1 October 2001 (*ibid.*, JUR 2004/157864)—application of art. 62 LEC 1881 in the context of proceedings under the BC.

⁴⁸ However, in AAP Granada (Section 3) no. 34/2003 of 12 April (*Westlaw*, JUR 2003/200924) local jurisdiction is determined in application of LEC 2000, in a case when the (Spanish-Moroccan) bilateral convention assigns competence to the court of first instance without establishing particular criteria.

⁴⁹ Thus, AAP Madrid (Section 13) no. 231/2004 of 22 December declined jurisdiction, noting the impossibility of ‘recourse to the procedure for enforcement of a foreign judgment in the absence of a prior enquiry by the party interested in its enforcement to provide at least some indication as to the existence of a some property of the enforcee in the State that is being asked to enforce the said Judgment’ (*Westlaw*, JUR 2005/38527).

⁵⁰ See ATS (1st Chamber) of 26 June 2001 (*Westlaw*, RJ 2001/6586); and AAP Madrid (Section 12) no.221/2000 of 28 March (*cit.*). For other cases affirming territorial incompetence of the Spanish authorities, see AAP Málaga (Section 4) no. 302/2002 of 5 November (*ibid.*, JUR 2004/139881) and AAP

Nevertheless, there are some rules of territorial jurisdiction that grant the party requesting recognition a possibility, if a limited one, of choosing the territorially competent court. Indeed, the virtual uniformity of the Spanish system as a whole in taking the place of domicile⁵¹ (or habitual residence) of the party against whom recognition is sought⁵² as the prime criterion for determining local competence⁵³ is compromised as regards the possibilities of choice. In some instances the applicant may choose between the former forum and that of the place of enforcement⁵⁴; in others, however, the forum of the place of enforcement, or of the place where the judgment is to take effect or place of ‘*ejecución impropia*’⁵⁵, can only be used in cases where the party against whom recognition is sought does not have his place of domicile⁵⁶ (or habitual residence)⁵⁷ in Spain. It need hardly be said that the particular features of each proceeding as regards determining the criteria governing local jurisdiction does not help to make the recognition system as a whole easier for the Spanish authorities to manage.

2. Intervening parties

Madrid (Section 12) no. 221/2000 of 28 March (*ibid.*, JUR 2000/198260). See comments on this last decision by ARENAS GARCÍA, R., “Reconocimiento y ejecución de sentencias al amparo del Convenio de Bruselas de 1968”, *AEDIPr*, 2002, pp. 550-558, esp. pp. 557-558.

⁵¹ This criterion is determined in a uniform manner for natural persons in accordance with internal rules (art. 40 Cc), in application of any instrument (see the reference to Spanish law in arts 52 LC and 59.1 Reg. 44/2001): see ATS (1st Chamber) of 26 June 2001, *cit.*, and AAP Santa Cruz de Tenerife (Section 3) no. 95/2000 of 25 May (*Westlaw*, AC 2000/3817). In the case of legal persons, uniform application may vary when Reg. 44/2001 is applied given the breadth of the domicile criterion in art. 60.

⁵² Art. 955 LEC 1881 allows not only the award of jurisdiction to the JPI of the domicile or place of residence of the party against whom recognition or enforcement is sought, but also to the JPI of the domicile or place of residence of the person affected by such recognition or enforcement.

⁵³ Only art. 2 of the Spanish-Swiss Convention determines that enforcement is to be implemented ‘by the court or authority of the place where enforcement is to take place, and who is competent to grant exequatur’.

⁵⁴ For instance, in the procedure under Reg. 44/2001 (art. 39.2): see AAP Gerona (Section 2) no. 169/2004 of 2 November (*Westlaw*, AC 2004/2251); and in the internal exequatur procedure, when the Spanish-Salvadoran Convention (art. 13) or the Spanish-Romanian Convention (art. 14.2) is applicable.

⁵⁵ The ‘place where enforcement of the judgment is to take effect’ is the last forum under art. 955 LEC 1881. It avoids the lacuna that once existed in connection with the determination of territorial jurisdiction for the recognition of decisions in cases of marital breakdown, and which had hitherto been compensated for, in the absence of any other criterion, by awarding jurisdiction to the JPI of the place where the marriage was registered. See ATS (Civil Chamber) of 2 March 1999 (*RJA* 1999/1900) and 9 February 1999 (*ibid.*, 1999/1001). Note that this forum does not establish an open criterion susceptible of interpretation, such as that of the place that ‘was the domicile where the applicant was born, to which he occasionally travels and in which he has relatives and friends’, as noted in AAP Asturias (Section 1) no. 113/2006 of 2 November, *cit.*

⁵⁶ That is the case of the procedure under the LC (art. 32.2). The expectation would be similar with regard to the internal exequatur procedure where recognition is governed by the Spanish-Mexican Convention, art. 19 of which provides that the forum shall be the domicile or place of residence of the convicted party, or failing that of the place where his goods are situated in the territory of the requested State.

⁵⁷ For instance, in the conduct of the procedure for declaration of enforceability of decisions in matters of parental responsibility, as it relates both to the habitual residence of the party against whom recognition is sought and to the habitual residence of the child or children referred to in the application, in Reg. 2201/2003 (art. 29.2).

A. Right to intervene as a party in the recognition proceedings

7. Articles 25 and 31 LC, 33 and 38 Reg. 44/2001 and 21 and 28 Reg. 2201/2003 all provide that *any interested party* may apply for recognition of a judgment on a principal issue or seek a declaration of enforceability. This presents a degree of uncertainty (what is an *interested party*?), which is however inevitable. As in the case of the internal Spanish system, which lacks any rule regulating the particular capacity that parties have to possess in order to intervene in the exequatur proceedings, it must be assumed that this capacity is not confined to those who were parties in the proceedings concluded by the decision for which recognition is sought and the assignees and representatives of those parties⁵⁸. It also applies to any other person who can demonstrate a legitimate interest⁵⁹, an issue that can only be determined in each particular case⁶⁰.

While the interests of the parties affected by the foreign decision could coincide, in most cases recognition is sought because the party on the losing end in the foreign suit does not comply with the terms of the decision and hence the applicant seeks to have these enforced⁶¹. This means that for purposes of passive legitimation the recognition procedure must be initiated against whoever was a party in the foreign proceedings or their assigns. Where such a party is a legal person, any lifting of the veil that may be in order to justify the application for enforcement against another person connected with the person convicted in the foreign judgment must be done within the framework of the enforcement procedure⁶².

B. Role of the Public Prosecution Service

⁵⁸ However, see STS (Civil Chamber) of 12 February 2000 (*RAJ* 2000, 759) and my ‘Note’ in *REDI*, 2001, pp 481-486. This was the position traditionally adopted by the Spanish doctrine, albeit before the Spanish Constitution came into force: for all purposes see REMIRO BROTONS, A., *o. cit.*, p 286.

⁵⁹ As postulated by ARAGONES ALONSO, P., in “Procedimiento para el exequatur de sentencias civiles extranjeras en España”, *RDPPr*, 1952, pp 551-569, esp. p 557. Recent Spanish doctrine concurs on this point: see FERNÁNDEZ ROZAS, J.C. and SÁNCHEZ LORENZO, S., *Derecho internacional privado*, 4^a ed., Madrid, Civitas, 2007, p 207; VIRGÓS SORIANO, M. and GARCIMARTÍN ALFÉREZ, F.J., *op. cit.*, pp 679-680; CALVO CARAVACA A.L. and CARRASCOSA GONZÁLEZ, J., *Derecho internacional privado*, vol. I, 8^a ed., Granada, Comares, 2007, p 355; ABARCA JUNCO, P. and PÉREZ VERA, E. (Dir.), *Derecho internacional privado*, Vol. I, 3rd ed., Madrid, UNED, 2001, p 446.

⁶⁰ See my “Nota a Auto TS (Sala de lo Civil) de 12 de febrero de 2000” *passim, cit.*

⁶¹ Therefore recognition procedures offer the party against which recognition is sought the means of opposing it as a guarantee of the right of defence, for all that their purpose is a harmonising rather than a contentious one: see STC 54/1989 of 23 February, *BOE* no. 62, 14-III-1989 and Note by DESANTES REAL, M. en *REDI*, 1989, pp 627-639; see also GONZÁLEZ CAMPOS, J.D., “The Spanish Constitution and Private International Law in constitutional jurisprudence”, *SYIL*, 2003, pp 1-59, esp. pp 21 and 22.

⁶² As noted by ARENAS GARCÍA, R. in his comments on AAP Málaga of 9 February 2000, in “Reconocimiento y ejecución...”, *loc. cit.*, p 557. In the case settled in those proceedings recognition and ‘enforcement’ was requested against “*La Costa SL*” when in fact the company convicted in the German decision was “*La Costa Ltd.*”. For identical examples (admission of an appeal against decisions by different JPI of Málaga recognising and—erroneously—ordering enforcement of German decisions against *La Costa SL*, see AAP of Málaga (Section 6) nos 140/1999 of 28 June (*Westlaw*, AC 1999/1599); 173/2000 of 20 June (*ibid.*, JUR 2000/283925); 271/2000 of 26 October (*ibid.*, JUR 2001/45299); 260/2000 of 18 October (*ibid.*, JUR 2001/44012); 270/2000 of 18 October (*ibid.*, JUR 2001/106836); 237/2000 of 20 September (*ibid.*, JUR 2001/75705); 48/2001 of 19 February (*ibid.*, AC 2001/1424). See also a case of admission to appeal for the (improper) ordering of enforcement measures in proceedings for recognition of a German decision against the representative of the company convicted in SAP Baleares (Section 4) no. 738/2001 of 16 November (*ibid.*, JUR 2002/42058).

8. Another bone of contention in the praxis of the Spanish authorities is the role played by the Public Prosecution Service (*Ministerio Fiscal*) in proceedings regulated by the LC, Reg. 44/2001 or Reg. 2201/2003 where such intervention occurs in application of article 956 LEC⁶³ (which so ordains for the internal exequatur proceedings) in cases where the cited instruments make no provision for the point at issue⁶⁴. It seems from the practice of most Spanish authorities that the fact that the proceedings conducted through the JPIs in application of these instruments are not adversarial (see §13 below) is felt to justify this formality being eschewed⁶⁵. Nonetheless, there is no lack of courts which have taken the view that given the silence of these instruments on this point, such intervention is mandatory in view of the subsidiary role of the *lex fori*, i.e. in application of article 956 LEC 1881⁶⁶.

The argument proffered against mandatory intervention is a powerful one. If the party against whom recognition is sought is not given a hearing at first instance⁶⁷, it would hardly seem to be indispensable for the Public Prosecution Service to have it—especially if the proceeding is the one provided in Reg. 44/2001, which further excludes the option for the JPI to examine any grounds for refusal of recognition. If in this procedure the court itself cannot oppose enforcement of a judgment from another Member State unless the requisite documents are not produced (see §§11 and 13 below), it makes no sense for the Public Prosecution Service to be required to issue a report. Therefore, if upheld, intervention would only be mandatory at first instance in the other two proceedings or at second instance⁶⁸ in any of the three. Hence, given that any differentiation between these procedures or the stages thereof would be artificial, it might be more appropriate to assume that article 956 LEC 1881 is not applicable. The fact is that in such cases the Public Prosecution Service could play the role assigned it in the internal rules, which is to assure that the law is adhered to. But this line of argument

⁶³ That is, other than in cases where the PPS must mandatorily intervene as representative or defender of those lacking capacity to act or legal representation. Thus, the need for such a hearing would be absolute, for instance within the framework of the LC or Reg. 44/2001, in an application for recognition of a decision on maintenance in representation or defence of a child; or in Reg. 2201/2003, when recognition affects a decision on parental responsibility.

⁶⁴ It seems clear that art. 956 LEC 1881 is not applicable as the provision referred to by the LC (art 33.1), Reg. 44/2001 (art 40.1) or Reg. 2201/2003 (art 30.1) where they establish that the internal rules govern ‘the procedure for making the application’. The issue of a report by the Public Prosecution Service is not strictly speaking relevant to the ‘procedure for making the application’. Nevertheless, for an instance of this argument being used as one of the underpinnings of an appeal by a party opposing recognition and the court failing to rebut it in the terms cited here, see AAP Madrid (Section 13) of 2 July 2002 (*Westlaw*, JUR 2003/48664).

⁶⁵ For examples in application of the BC proceeding, see STS (Civil Chamber, Section 1) no. 387/2004 of 4 April, (*Westlaw*, RJ 2006/1917); AAP Madrid (Section 13) of 2 July 2002 (*cit.*); AAP Castellón (Section 3) no. 478/2000 of 8 September (*ibid.*, AC 2002/5116); and AAP La Rioja (Sole Section) nos 135/2001 of 19 October (*ibid.*, AC 2002/306) and 60/2003 of 21 May (*ibid.*, JUR 2003/167469).

⁶⁶ For instance, in a ruling of 8 February 2000 (*Westlaw*, AC 2000/107), the AP Guipúzcoa (Section 2) asserted that the requirement set out in art. 956 LEC is indispensable albeit remediable: it considered the requirement satisfied by the Public Prosecution Service’s intervention in the appeal proceedings.

⁶⁷ In some decisions the courts note that the Public Prosecution Service has been granted a hearing at first instance; but in some cases notice of the application for recognition had also, erroneously, been sent to party against whom recognition was being sought: see for example AAP Alicante (Section 4) no. 55/2001 of 22 March (*Westlaw*, JUR 2001/194928).

⁶⁸ In this connection, in AAP Baleares (Section 4) no. 307/2000 of 29 December (*Westlaw*, JUR 2001/96111) it appears that the Public Prosecution Service would only act before the AP in proceedings conducted in accordance with the BC.

perhaps only has real force in the denial of mandatory intervention. In a context like that of ‘Private Law’ in which the only State interests that might be affected are those relating to the possible collision of the effects of the foreign decision and Spanish public policy, the need to assure adherence to the law is very relative inasmuch as these proceedings are only conducted when the decisions are from Member States, or at most other States parties to the LC. As we know, application of the public policy clause is most exceptional when it comes to enforcing decisions from these States. In short, if the intention of the conventional or institutional legislator is to simplify these procedures as much as possible, the most appropriate interpretation is that the lack of any express provision bars Member States or States parties from imposing this formality. It therefore follows that subsidiary application of the *lex fori* is not appropriate on this point in view of the possible harm that adherence thereto may cause to the ‘effectiveness’ of the LC or the Community regulations⁶⁹.

3. Documentation required

9. The documents that are demanded and the requirements that these have to meet under the internal exequatur procedure are perfectly valid in any other procedure. In order to simplify the proceedings as much as possible, both LC, Reg. 44/2001 and Reg. 2201/2003 refer to the relevant sections of the ‘common provisions’ (arts 33.3 LC, 40.3 Reg. 44/2001 and 30.3 Reg. 2201/2003) where *specific* certificates are introduced, in order to lessen the number and the formalities of the usual documents. However, despite such reference there still remains the possibility of presenting any other documents (where appropriate carrying more formalities), since these provisions expressly so ordain. To put it in another way, according to the *argumentum a maiori ad minus*, the documents that will secure a favourable decision on recognition in the course of the internal exequatur procedure can also be valid under the LC, Reg. 44/2001 or Reg. 2201/2003 proceedings. We shall therefore do well to start by looking at the requirements generally stipulated by the internal rules before looking more closely at the facilities provided by the conventional and institutional rules.

All proceedings must be initiated with the submission of a writ, signed by a solicitor and accompanied by a power of attorney *ad litem*⁷⁰, and the original or an authenticated copy of the decision⁷¹. The rest of the documents that are submitted aim at providing evidence supporting compliance with the conditions laid down for recognition or (as far as possible) the absence of grounds for refusal; thus, generally speaking the only essential thing is to append, in addition to the documents referred to, documentary evidence showing that the decision is final and where appropriate enforceable, and that

⁶⁹ VIRGÓS SORIANO, M. and GARCIMARTÍN ALFÉREZ, F.J., *op. cit.*, p 675, take the view that ‘there are no reasons to justify the intervention of the Public Prosecution Service’.

⁷⁰ As the parties must be defended by a technical director (*abogado*) and represented by an attorney (*procurador*). The attorney is always an attorney of the court to which the application is addressed. Therefore, the power of attorney is enough to satisfy the applicant’s obligation to give ‘an address for service of process within the area of jurisdiction of the court applied to’, as provided in LC, Reg. 44/2001 and Reg. 2201/2003. Note that if such choice of address is not feasible under the rules of the requested State, it must be made by appointing a representative *ad litem* (arts 33.2 LC, 40.2 Reg. 44/2001 and 30.2 Reg. 2201/2003).

⁷¹ See arts 46.1 LC, 53.1 Reg. 44/2001 and 37.1a) Reg. 2201/2003. Art. 956 LEC 1881 only refers to ‘enforcement’, but there is nothing to prevent—indeed it is quite normal—the submission of an authenticated copy of the decision instead of the original: see, *ad ex.*, ATs (Civil Chamber) of 11 March 2003, *cit.*; of 17 May 2005, *cit.*

the document instituting the proceedings or other similar document was served in the proceedings of origin if the defendant was declared in default. All the documents must be accompanied by the appropriate legalisation, or by the ‘apostille’ as the case may be⁷², and a translation⁷³, unless either or both of these formalities is unnecessary according to the applicable institutional or conventional instrument.

10. Where documentary requirements are most simplified is in the conduct of proceedings regulated in Community regulations. In Reg. 44/2001 such a reduction is achieved through the adoption of a standard certificate, provided in Annex V, which must be sent along with the copy of the decision as noted (and in Spain also the power of attorney *ad litem*). From a formal standpoint this document, which must be issued by the competent authority of the State of origin, provides a means of grouping together all the essential information on issues that would otherwise have to be individually proven and on the granting of legal aid in the proceedings at origin, which in some cases may be of importance for the recognition procedure. But more importantly still, from a substantive point of view it further provides the basis for a presumption of lack of grounds for the refusal of recognition⁷⁴. The burden of proof will be reversed: the party seeking to prevent the transfer will have to demonstrate the irregularity of the original decision⁷⁵ by appealing through the appropriate channels. It should be stressed at the same time that in the event that it should be impossible to produce such a certificate, any of the issues may be proven by the submission of some other documentary evidence (art. 55.1)⁷⁶. Furthermore, the requirements for these documents are relaxed, so that none will require legalisation or other such formality (nor power of attorney *ad litem*: see art. 56), and an—official—translation will be necessary only if the competent JPI so requires in order to conduct the proceedings (art. 55.2).

For its part, Reg. 2201/2003 provides standard forms in the relevant annexes (I for judgments on matrimonial matters, II for judgments on parental responsibility: see art. 39) which also provide information on the chief aspects: e.g. on the type of judgment, and on the type and enforceability of the judgment respectively, and whether legal aid was granted in both cases. Thus, it dispenses with the need for submission of any other specific documents. But the two forms differ from the one provided in Reg. 44/2001 in that they contain no mention of the service of the document instituting the proceedings or equivalent document, so that if the proceedings in the State of origin were conducted

⁷² If they come under the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, *BOE*, no. 229, 25/09/1978.

⁷³ Which must be official, assuming that is what is meant by the phrase ‘done in accordance with the law’ in art. 956 LEC 1881. Note in this connection that LEC 2000 only requires the presentation of an official translation of foreign public documents not drafted in Spanish, or where applicable in the official language of the Autonomous Community concerned, if a private translation presented originally is challenged (art. 144 LEC 2000).

⁷⁴ With regard to the issues there accredited. For instance, if the service of notice on the defendant in the original proceedings or an equivalent document is certified by the authority of the State of origin, the burden of proof that the defendant has nonetheless been rendered defenceless—i.e. that he did not receive it ‘in adequate time and manner’ to enable him to prepare a defence—and was unable to appeal the decision lies with the party (in default) against whom recognition is sought. If there is no record of that party having appealed or offered a challenge or other representation against the decision, there can be no grounds for not accepting such certification: see AAP Madrid (Section 21) no. 262/2006 of 28 April (*Westlaw*, AC 2006/1028) and AAP Madrid (Section 13) no. 68/2006 of 30 March (*ibid.*, JUR 2006/193593).

⁷⁵ Cf. GUZMÁN ZAPATER, M., “Un elemento federalizador para Europa: el reconocimiento mutuo en el ámbito del reconocimiento de decisiones judiciales”, *RDCE*, 2001, pp. 405-438, esp. p. 436.

⁷⁶ See AAP Gerona (Section 2) no. 169/2004 of 2 November (*Westlaw*, AC 2004/2251); AAP Lugo (Section 1) no. 267/2003 of 2 July (*ibid.*, AC 2003/1809).

in default of appearance, that fact must necessarily be certified (see arts 37-39). For the rest, this Regulation also exempts all documents from the requirement of legalisation or other similar formality (art. 52), and it allows a translation to be dispensed with unless the court requires one (art. 38.2).

Finally, it should further be noted that within the framework of conduct of the LC procedure (see arts. 46-49), the main advantages for the person applying for recognition are the absence of a requirement for legalisation or other similar formality for all documents and the possibility of dispensing with a translation unless the JPI requires one.

III. CONDUCT OF THE PROCEEDINGS

1. Proceedings at first instance

A. Non-adversarial proceedings

11. The most remarkable feature of the proceedings contemplated in the LC, Reg. 44/2001 and Reg. 2201/2003—and the chief advantage that they afford the applicant for recognition—is the absence of an adversarial procedure at first instance. One point that the three instruments have in common is that they lay down proceedings which make no allowance for service of notice of institution on the party against whom such recognition is sought, as the latter is not permitted to make any submissions at this point (arts 34 CL, 41 Reg. 44/2001 and art. 31 Reg. 2201/2003). The court applied to must render its decision ‘without delay’ and *inaudita alteram parte*, a fact that is not prejudicial to this other party’s rights of defence since he may present grounds for the refusal of recognition through the appropriate appeal proceedings⁷⁷. Such decision must take the form of an ‘auto’, in subsidiary application of the rules on internal exequatur procedure (art. 956 LEC 1881). Notice of that ‘auto’ must immediately be served on the applicant by the ‘secretario judicial’ (a given clerk of court)⁷⁸, in the manner prescribed by Spanish law (arts 35 CL, 42 Reg. 44/2001 and 32 Reg. 2201/2003). Thus, given the applicant’s obligation to provide an address for service within the court’s area of jurisdiction, the rules applicable to notification will be articles 149 to 168 LEC 2000. Moreover, the decision of the JPI must also be brought to the notice of the other party⁷⁹: under the cited articles if the party is domiciled in Spain, and if the party is domiciled abroad, either following the provisions of Regulation 1/2005 of the *Consejo General del*

⁷⁷ In application of the procedure provided in the BC, see the dismissal of appeals brought on the grounds—inter alia—of failure to allow a hearing to the party against whom recognition was sought, in AAP Gerona (Section 2) no. 190/2000 of 22 November (*cit.*); AAP Castellón (Section 3) no. 478/2000 of 8 September (*cit.*); SAP Cádiz (Section 8) no. 318/2001 of 21 November (*Westlaw*, JUR 2002/42671); AAP Gerona (Section 2) no. 58/2002 of 4 April (*ibid.*, JUR 2002/183266); AAP Valencia (Section 6) no. 123/2002 of 13 June (*ibid.*, AC 2002/1371); and AAP La Rioja (Sole Section) no. 60/2003 of 21 May (*ibid.*, JUR 2003/167469).

⁷⁸ Only the LC (Spanish version) makes express reference to the ‘secretario judicial’. This clerk will nevertheless also be responsible for notifying in application of Reg. 44/2001 and Reg. 2201/2003, in application of art. 152 LEC 2000.

⁷⁹ This must apply to all proceedings despite the fact that neither the LC nor Reg. 2201/2001 makes express mention of such service, unlike art. 42.2 Reg. 44/2001. Moreover, the reference in the latter to the decision on the application for a ‘declaration of enforceability’ should not be taken literally. Notice of the decision must be served, whether or not the applicant’s request is granted.

*Poder Judicial*⁸⁰ in implementation of articles 276-278 LOPJ and 177 LEC 2000, or the provisions of whatever regulation or convention is applicable⁸¹.

The feature that differentiates the recognition or declaration of enforceability procedure provided in Reg. 44/2001 from the other two⁸² concerns the object of the decision that has to be taken by the JPI rather than strictly procedural issues: whereas in application of the LC (art. 34.2) and Reg. 2201/2003 (art. 31.2) the court may refuse an application only for reasons specified in certain articles (arts 27 or 28 CL and 22, 23 or 24 Reg. 2201/2003), the only grounds for which the court may refuse recognition under Reg. 44/2001 is failure to submit the documents discussed above⁸³. The grounds for refusal provided in articles 34 and 35 Reg. 44/2001 will be checked only if the party against whom the declaration of enforceability is sought lodges an appeal (art. 45.1). In any case none of the instruments allow a decision to be reviewed as to its substance at any stage (arts 29 CL, 24 Reg. 2201/2003 and 36 Reg. 44/2001).

What all this amounts to is that recognition, in the sense of a ruling on recognisability may be the specific object of the procedure regulated in Reg. 44/2001 only if contested by way of appeal, but not at first instance⁸⁴. But despite that, for the same reason it is possible to derive conclusions of a procedural nature from this 'novel aspect' of Reg. 44/2001. If the JPI is only able to verify formal correctness⁸⁵, the faculties of such requested authority will be similar to those of some systems which merely 'record' the foreign decision⁸⁶, so that such a formal check could actually be performed by an accessory of the court or tribunal to which conduct of the proceedings falls⁸⁷. For that purpose it would suffice to include the assignment of this task in an annex; but in fact Spanish law does not designate

⁸⁰ Resolution of the Plenum of the *Consejo General del Poder Judicial* of 15 September 2005 approving Regulation 1/2005 on accessory aspects of judicial actions, *BOE*, no. 231, 27-IX-05): see Title IV Chapter II.

⁸¹ For fuller coverage see FERNÁNDEZ ROZAS, J.C. and SÁNCHEZ LORENZO, S., *op. cit.*, pp 265-272 and VIRGÓS SORIANO, M. and GARCIMARTÍN ALFÉREZ, F.J., *op. cit.*, pp 407-420.

⁸² Which indeed is the most outstanding of all the reforms made to the BC in its transition to Reg. 44/2001, as noted by SÁNCHEZ LORENZO, S. in "Competencia judicial, reconocimiento y ejecución de resoluciones judiciales en materia civil y mercantil: el Reglamento 44/2001", SÁNCHEZ LORENZO, S. & MOYA ESCUDERO, M. (Eds.), *La cooperación judicial en materia civil y la unificación del Derecho privado en Europa*, Dykinson, Madrid, 2003, pp. 39-67, esp. p. 62. On the drawbacks not addressed by the reform, see my own "El reconocimiento de decisiones...", *loc. cit.*, *passim*.

⁸³ Hence the possibilities of partially recognising a decision, for which all three instruments expressly provide (arts 42 CL, 48 Reg. 44/2001 and 36 Reg. 2201/2003), are limited in the first instance of the procedure regulated in Reg. 44/2001 to two events: that such partial recognition be requested by the party, and that the Regulation itself be materially inapplicable to one or more parts of the foreign judgment. In the other two instruments the possibility of partial recognition is not reserved to a second instance where there are grounds for refusal based on rulings separable from the foreign decision, for example conflict with the international public policy of the requested State.

⁸⁴ MERLIN, E., "Riconoscimento ed esecutività della decisione straniera nel regolamento "Bruxelles I"", *Riv. dir. proc.*, 2001, pp. 433-461, esp. p. 450.

⁸⁵ See MOSCONI, F., "Un confronto tra la disciplina del riconoscimento de dell'esecuzione delle decisioni straniere nei recenti regolamenti comunitari", *Riv. int. dir. int. proc.*, 2001, pp. 545-556, esp. p. 550. The bar on considering the reasons for refusal applies equally to public policy: cf. WAGNER, R., "Von Brüsseler Übereinkommen über die Brussel-I Verordnung zum Europäischen Vollstreckungstitel", *IPrax*, 2002, pp. 75-95, esp. p. 83.

⁸⁶ Cf. PATAUT, E., "L'exécution des jugements nationaux et la Convention de Bruxelles", *Les effets des jugements nationaux dans les autres États membres de l'Union Européenne*, Bruylant, Brussels, 2001, pp. 31-53, esp. p. 35.

⁸⁷ Cf., for an explanation of the assignment of competence in France, the *greffe du tribunal*, DROZ, G.A.L. y GAUDEMET-TALLON, H., "La transformation de la Convention de Bruxelles du 27 septembre 1968 en Règlement du Conseil concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale", *Rev. crit. dr. int. pr.*, 2001, pp. 601-652, esp. pp. 644 and 645.

another officer such as the ‘secretario judicial’. It is the actual judge who has to conduct the checks.

B. Adversarial proceedings

12. The Spanish internal exequatur procedure, unlike the ones discussed heretofore, is adversarial from the first instance on. According to article 957 LEC 1881 the party ‘against’ whom recognition of the foreign decision is sought must be given a summons to appear within 30 days⁸⁸. This provision applies only to cases where such party is domiciled in Spanish territory, since it adds that to effect such summons the competent body must remit a certificate to the AP (*Audiencia Provincial*: Provincial High Court) of the place where the party is domiciled. Hence, other rules must apply if the party against whom recognition is sought is domiciled abroad. In such an event, the competent JPI or JM must provide a longer deadline for the appearance if circumstances so dictate, and the summons must be executed in accordance with the rules cited above, namely the applicable institutional or conventional instrument, or failing that, articles 276-278 LOPJ and 177 LEC 2000 and, in implementation thereof, Regulation 1/2005 of the *Consejo General del Poder Judicial*.

Starting on the day of his appearance, the ‘defendant’ still has a ‘period of nine days’ in which to respond (art. 956 LEC 1881). If the appearance does not materialise, the proceedings continues upon the elapse of the time specified to that effect. In either case, as noted earlier, the application is passed on to the Public Prosecution Service, which will issue a non-binding report. In light of this report and the submissions of the parties, the competent body⁸⁹ will issue a decision in the form of an ‘auto’ (art. 956 LEC 1881) as to whether the foreign decision meets the conditions stipulated in the applicable bilateral convention or in article 954 LEC 1881, along with any conditions that Spanish jurisprudence may have imposed in the autonomous system⁹⁰. A notice of such decision must also be served on the parties in accordance with the cited rules governing the service of judicial documents. In any case exequatur, as a mere homologation procedure, does not allow for any review of the substance of the foreign decision.

2. Adoption of provisional measures

13. A declaration of enforceability issued under the proceedings regulated in the LC, Reg. 44/2001 and Reg. 2201/2003 does not cause the immediate opening of the relevant enforcement proceedings. These proceedings can only be initiated upon expiry of the

⁸⁸ Obviously, if the application for exequatur is made jointly, such an appearance will be unnecessary: cf. IGLESIAS BUHIGUES, J.L., “Reconocimiento y ejecución de sentencias extranjeras de divorcio”, *Cursos de Derecho internacional de Vitoria-Gasteiz* 1984, Servicio Editorial del Universidad del País Vasco, Bilbao, 1985, pp. 241-279, esp. p. 273.

⁸⁹ Art. 956 LEC 1881 uses the term *Tribunal* (court) and not *Juez* (judge), what let us suppose that the legislator probably omitted to update this provision in line with the reform introduced by Law 62/2003. This omission is especially relevant as regards the rest of the article, in particular the possibility of lodging an appeal against a decree of the JPI (*infra*, §15).

⁹⁰ For fuller coverage see FERNÁNDEZ ROZAS, J.C. and SÁNCHEZ LORENZO, S., *op. cit.*, pp. 214-233 and VIRGÓS SORIANO, M. and GARCIMARTÍN ALFÉREZ, F.J., *op. cit.*, pp. 599-661.

deadline for the presentation of an appeal⁹¹, albeit many Spanish JPIs order the enforcement of a foreign decision at the same time as they grant recognition⁹². During this period the LC and Reg. 44/2001 provide that the JPI may order⁹³ provisional measures if so requested: under the LC (art. 39) once recognition has been granted; and in proceedings under Reg. 44/2001 (art. 47.1) even before such a ruling. In both cases the measures will be those established by Spanish law (arts 39 CL and 47 Reg. 44/2001), albeit the requirements specified there, such as *periculum in mora*, *fumus boni juris* or security are unnecessary for their adoption⁹⁴.

⁹¹ One month as from the service of notice if the party against whom enforcement is sought is domiciled in Spain, and two months if the party is domiciled in another State: see arts 36 CL, 43.5 Reg. 44/2001 and 33.5 Reg. 2201/2003.

⁹² See, *ad ex.*, SAP Baleares (Section 4) no. 85/2002 of 7 February (*Westlaw*, JUR 2002/124680); AAP Baleares (Section 3) nos 136/2001 of 29 May (*ibid.*, JUR 2001/245744), 140/2001 of 1 June (*ibid.*, JUR 2001/246142), 40/2005 of 15 March (*ibid.*, AC 2005/291) and 122/2006 of 20 June (*ibid.*, JUR 2006/225932); AAP Baleares (Section 4) nos 307/2000 of 29 December (*ibid.*, JUR 2001/9611) and 198/2002 of 31 December (*ibid.*, JUR 2003/75167); AAP Baleares (Section 5) of 22 September 2003 (*ibid.*, JUR 2004/86726); AAP (Section 15) Barcelona no. 277/1999 of 10 September (*ibid.*, AC 1999/6817); AAP Castellón (Section 2) no. 202/2002 of 12 June (*ibid.*, AC 2002/1966); AAP Madrid (Section 14) no. 114/2003 of 9 June (*ibid.*, JUR 2003/247093); AAP Madrid (Section 18) nos 300/2006 of 22 December (*ibid.*, JUR 2007/161935) and 161/2004 of 11 October (*ibid.*, JUR 2004/300084); AAP Madrid (Section 20) no. 197/2004 of 5 October (*ibid.*, JUR 2005/41464); and AAP Las Palmas (Section 3) nos 66/2004 of 26 April (*ibid.*, JUR 2004/150691). In some cases the mistake has been made by the AP itself. For instance, ordering seizure on appeal after admitting the appeal against refusal of recognition, as in AAP Alicante (Section 4) no. 251/1999 of 23 April (*ibid.*, AC 1999/799). In other cases the confusion between a declaration of enforceability and enforcement has led to Spanish authorities being declared competent in respect of the former on the basis of rules regulating the latter, for instance in AAP Madrid (Section 11) no. 56/2005 of 21 March (*ibid.*, AC 2005/882): see “Note” to this decision by FELIU ÁLVAREZ DE SOTOMAYOR, S., in *REDI*, 2006, pp. 459-462. The recurrence—and error—of this approach on the part of Spanish authorities, essentially in application of the BC, has come in for a great deal of criticism from the doctrine: see inter alia ESTEBAN DE LA ROSA, G., in “Nota a AAP de Vizcaya (Sección 4ª) de 19 de junio de 1996”, *REDI*, 1996, pp. 282-286; ARENAS GARCÍA, R., “Problemas derivados del sistema de recursos previsto en el Convenio de Bruselas”, *AEDIPr*, 2001, pp. 868-871, esp. pp. 869 and 870; *id.*, “Reconocimiento y ejecución ...”, *loc. cit.*, pp. 555-557; TORRES YANES, F., in his comments on AJPI Bilbao no. 10 of 15 October 2001, *AEDIPr*, 2003, pp. 910-913.

⁹³ The JPI is also competent when recognition is granted by decision of the AP upholding an appeal by the applicant against refusal of recognition by the former: see AAP Baleares (Section 4) no. 37/2000 of 15 February (*Westlaw*, AC 2001/2423).

⁹⁴ As laid down by CJEC’s Judgment of 3 October 1986 in Case C-119/84, *Capelloni et Aquilini v Pelkmans*, *Recueil*, 1985, pp. 3147 et seq. With specific reference to the doctrine of the CJEC, see AAP Barcelona (Section 15) of 4 March 2004 (*Westlaw*, AC 2004/1550) and the comments on this decision by HERNÁNDEZ RODRÍGUEZ, A., in *AEDIPr*, 2005, pp. 1046-1048. In a similar vein see also AAP Burgos (Section 3) no. 178/2005 of 15 April (*Westlaw*, JUR 2005/101793) and Note on that ruling by GARAU SOBRINO F.F. in *REDI*, 2005, pp. 976-980, and AAP Madrid (Section 10) no. 167/2007 of 11 July (*ibid.*, JUR 2007/336746). On the other hand, see a different interpretation by the Public Prosecution Service, admitted by the TS, according to which the literal reading of the provision allowing the adoption of provisional measures (*in casu*, art. 39 BC) ‘means that the competent court has the option of ordering them or not in accordance with the national law, for any other interpretation would collide with that article and with article 24 of the Constitution, and moreover article 1400 LECiv/1881 may not be applied in such a way as to infringe article 39 of the Brussels Convention since its role is not merely supplementary but rather the cited provisions are complementary, and the party seeking the measures has furnished no

Unlike the instruments discussed above, the Spanish internal exequatur procedure makes no express provision for the adoption of provisional measures. Nonetheless, such measures must certainly be allowable⁹⁵, always provided that the general requirements laid down in the rules governing civil procedure are met (arts. 721 et seq. LEC 2000). Hence, if the party favoured by the foreign decision considers it necessary to assure the enforcement of the guardianship awarded by that decision, he or she may ask the JPI ‘of the place where the decision is to be enforced or is to take effect’ (art. 724 LEC 2000)—i.e., the JPI that conducted the exequatur procedure⁹⁶—to order one of the measures provided for in Spanish law (art. 727 LEC 2000).

3. Appeal regime

A. Available appeals

14. Because the proceedings regulated in the LC, Reg. 44/2001 and Reg. 2201/2003 are non-adversarial, it is only at the appeal stage that the party against whom recognition is sought can present grounds for contesting such recognition. As noted, in the event of an appeal these grounds will be examined for the first time within the framework of the procedure regulated in Reg. 44/2001. Once notice of the JPI’s decision is served, the party against whom recognition is sought—but also the applicant (art. 40.1 LC, art. 43.1 Reg. 44/2001 and art. 33.1 Reg. 2201/2003) in the event that the decision is wholly or partially negative⁹⁷—may appeal to the AP (arts 37.1 and 40.1 LC, art. 43.2 and Annex III Reg. 44/2001 and art. 33 Reg. 2201/2003 and list 2 of the Information⁹⁸). To that end the party has one month if resident in Spain, and two months, non-extendible, if resident abroad, in which to lodge an appeal (arts 36 LC, 43.5 Reg. 44/2001 and 33.5 Reg. 2201/2003). An appeal in cassation may also be brought against the AP’s judgment before the TS (art. 41

evidence that the defendant has concealed or undervalued his assets’ in STS (Civil Chamber, Section 1) no. 845/2006 of 5 September (*Westlaw*, RJ 2006/6375).

⁹⁵ As the TS ruled when it considered the exequatur proceedings, although it declined jurisdiction in favour of the JPI competent for purposes of enforcement: see ATS (Civil Chamber) of 29 January 2002 (*Westlaw*, JUR 2002/48100) and ATS (Civil Chamber) of 16 April 2002 (*ibid.*, JUR 2002/120052).

⁹⁶ Thus reinterpreting the above-cited art. 724 LEC 2000 in the light of art. 955 LEC 1881: cf. VIRGÓS SORIANO, M. and GARCIMARTÍN ALFÉREZ, F.J., *op. cit.*, p. 681. This ‘reinterpretation’ is appropriate in view of the drawbacks resulting from the dissociation between the bodies competent to adopt measures and to rule on recognition, given that approval must meet the criterion of *fumus boni juris*. In fact this argument was accepted by the TS in its Auto of 29 January 2002 (*cit.*), even although it finally denied its own competence to order provisional measures in the light of other factors. Since the transfer of competence from the TS to the JPIs or JMs, such factors (lack of means of appeal from the Supreme Court’s decision, the fact that the latter is not a court of instance, procedural efficacy and economy...) are no longer relevant. The possibility of applying the territorial criteria enshrined in the rules of recognition (LEC 1881), even before the latest reform, is also defended by GRÀCIA I CASAMITJANA, J. in comments on the TS rulings cited above: “Medidas cautelares en procedimientos de exequátur”, *AEDIPr*, 2004, pp. 782-784, esp. p. 783.

⁹⁷ Along the same lines see GARAU SOBRINO, F.F., “Nota a Auto Audiencia Provincial de Vizcaya núm 218/2005 (Sección 3ª), de 22 de marzo de 2005”, *REDI*, 2006, pp. 462-465, esp. p. 465. In such cases security is required to guarantee the other party’s right to a defence. In this connection see § 16 *infra*.

⁹⁸ See “Información relativa a los órganos jurisdiccionales y las vías de recurso de conformidad con el artículo 68 del Reglamento 2201/2003...”, *cit.*

LC, art. 44 and annex IV Reg. 44/2001 and art. 38 Reg. 2201/2003 and list 3 of the Information⁹⁹).

The provision made in the conventional and institutional regulations regarding appeals is so scanty that these have to be based almost entirely on internal rules of procedure¹⁰⁰. It is these that determine the conditions and causes of admissibility¹⁰¹, and likewise, as we shall see further below, all the formalities that have to be followed. The only limitation on the application of such internal provisions is that they must not detract from the effectiveness of the conventional or institutional instrument. For instance, in the case of appellable decisions, it is *de rigueur* to adopt the restrictive interpretation that the CJEC has been accepting in view of the purpose of the recognition proceedings: only the above-cited appeal and appeal in cassation may be brought¹⁰², and only against decisions granting or refusing recognition, and appeal therefrom respectively¹⁰³. However, another equally restrictive interpretation, this time regarding the grounds of appeal in cassation, could derogate from that purpose: i.e. that sustained by the TS in ruling that cassation is only available for the cases listed in article 477.2.3 LEC 2000¹⁰⁴, that is only when the decision ‘has cassational interest’¹⁰⁵.

15. As regards the Spanish internal exequatur procedure, article 956.2 LEC 1881 provides that there can be no appeal against the decision to grant or refuse recognition. This restriction of instances is probably due to an oversight on the part of the legislator¹⁰⁶, who in the last reform of the exequatur procedure presumably failed to realise that in transferring jurisdiction to the JPIs, some avenue of appeal would be

⁹⁹ Ibid.

¹⁰⁰ See FUENTES CAMACHO, V., “El recurso de casación en la ejecución de resoluciones judiciales extranjeras y el sistema institucional de Bruselas y Lugano”, *Tribunales de Justicia*, 1998, no. 5, pp. 505-519, esp. p. 510; *id.*, “Ámbito del recurso de casación en el marco del Convenio de Bruselas/Lugano”, *AEDIPr*, 2002, pp. 602-604, esp. p. 695.

¹⁰¹ See STS (Civil Chamber) of 23 March 1999 (*Westlaw*, RJ 1999/1666) and comments on this decision by ARENAS GARCÍA, R., in “Problemas derivados del sistema de recursos...”, *loc. cit.*, p. 869. See also STS (Civil Chamber) of 7 February 2002 (*Westlaw*, RJ 2002/1113).

¹⁰² For a critical view of the restriction of access to extraordinary appeals for infringement of procedure, see the comments on STS (Civil Chamber) of 7 February 2002 (*cit.*) by CARBALLO PIÑEIRO, L., “Ámbito del recurso de casación en el marco del Convenio Bruselas/Lugano”, *AEDIPr*, 2004, pp. 807-811

¹⁰³ None of these appeals is therefore allowable against interim judgments, as noted by GARAU SOBRINO, F.F., in “Ámbito del recurso de casación en el marco del Convenio Bruselas/Lugano”, *AEDIPr*, 2005, pp. 1011-1014, esp. p. 1011. Note that CJEC’s Judgment (Sixth Chamber) of 4 October 1991, Case 183/90, *Berend Jan Van Daltsen and others v Bernard Van Loon and others*, *Recueil*, 1991-I, pp. 4743 et seq., affirms the inappellability of the decision refusing a stay of proceedings, and CJEC’s Judgment of 11 August 1995, Case C-432/93, *Sisro v Ampersand*, *Recueil*, 1995-I, pp. 2269 et seq., stresses the impossibility of invoking internal law to extend the powers vouchsafed in the instrument itself. However, on decisions on the admission of appeals as such, see note 109 below.

¹⁰⁴ See the “Criterios sobre recurribilidad, admisión y régimen transitorio en relación con los recursos de casación y extraordinario por infracción procesal, regulados en la LEC”, adopted on 12 December 2000 by decision of the TS’ General Meeting (available in <http://www.poderjudicial.es/eversuite/GetRecords?Template=cgpij/ts/principal.htm>, last visited on 14 April 2008).

¹⁰⁵ The threat to the effectiveness of Reg. 44/2001 and Reg. 2201/2003 lies in the fact that only the TS can put pre-judicial questions to the CJEC on the interpretation of the two instruments: cf. FERNÁNDEZ ROZAS, J.C. and SÁNCHEZ LORENZO, S., *op. cit.*, pp. 211. Similarly, see VIRGÓS SORIANO, M. and GARCIMARTÍN ALFÉREZ, F.J., *op. cit.*, p. 677. This restriction is also criticised by CARBALLO PIÑEIRO, L., *loc. cit.*, p. 809.

¹⁰⁶ See also note 89 *supra*.

desirable—in other words this point in the article should have been struck out¹⁰⁷. The refusal of appeal was (more or less) understandable when the TS was the only body competent to handle this procedure; but if it was conducted by a JPI under a bilateral convention, the bar on appeals was understood not to apply, since it was a general rule which did not fit the case in point¹⁰⁸. Hence, today there is no possible justification for maintaining the bar on appeals. Although there is no right to a second instance in civil proceedings, it is desirable that the decisions of JPIs and JMs be appellable, if only because certain conditions of recognition—in particular that the foreign decision be compatible with Spanish public policy—need interpretation, which should entail the possibility of unifying doctrine. It is more than desirable that appeals be brought against the decisions of these local bodies and that if necessary they reach the TS by way of cassation.

However, the possibility of appeal is not only an aspiration; it is in fact a reality to judge by Spanish practice. In examining decisions, the JPIs, as the bodies competent to examine the appellability of these¹⁰⁹, and the APs themselves, are presumably ignoring the terms of article 956 LEC 1881. In some cases the admission of the appeal is justified on the ground that the JPI has simply refused to admit the application for recognition for consideration, without making any ruling on the actual recognition¹¹⁰. But in other cases the prohibiting article is simply ignored¹¹¹. This practice of Spanish jurisprudence on the issue could be welcomed; however, since it is *contra legem* it ought to be accompanied by arguments to justify refraining from applying the letter of the law.

B. Course of the procedure upon appeal and in cassation

¹⁰⁷ It would have sufficed simply to remove it: appeals would then be regulated in accordance with the general rules laid down in arts 455 to 467 LEC 2000.

¹⁰⁸ See AAP Madrid (Section 24) of 13 February (*Westlaw*, JUR 2002/148661) and AAP León of December 1992 (*ibid.*, AC 1994/2214).

¹⁰⁹ Within five days starting on the day following service of the decision, the appellant must submit a preparatory writ to the court that issued the decision (art. 457 LEC 2000), that is the JPI. This authority must check that the decision is appellable and the appeal has been lodged in due time; if so, it must issue an order admitting the preparatory writ and direct the appellant to submit it to the AP as provided in art. 458 LEC 2000. It is important to note that these rules also apply in the substantiation of an appeal under the procedures regulated by the LC, Reg. 44/2001 and Reg. 2201/2003. The fact that these instruments provide that the appeal be made to the AP makes no difference, since preparation and submission are separate processes: see AAP Madrid (Section 18) of 9 March 2001 (*Westlaw* AC 2001/1024) and AAP Málaga (Section 5) no. 163/2003 of 10 June (*ibid.*, JUR 2004/34954). Similarly, the regulation governing what appeals are available against the decisions of the JPI regarding the preparation of an appeal ought to be extended to cover procedures conducted under the LC, Reg. 2201/2003 and Reg. 44/2001. For instance, the fact that art. 44 Reg. 44/2001 provides that ‘the judgment *given on the appeal* may be contested *only* by the appeal referred to in Annex IV’ (my italics) should not prevent the admission of appeals that are allowable under Spanish rules of civil procedure against decisions given at the preparatory stage of appeals. See for example the admission of an appeal of complaint against the decision of a JPI not to admit an appeal, in AAP Madrid (Section 20) no. 219/2004 of 19 October (*ibid.*, JUR 2005/41365).

¹¹⁰ For an analysis (concluding denial) of the applicability of art. 956.2 LEC 1881, see AAP Madrid (Section 22) no.217/2007 of 28 September (*Westlaw*, JUR 2007/353517). An appeal was also admitted, although without any mention of the article, by AAP Barcelona (Section 12) no.10/2005 of 27 January (*ibid.*, JUR 2005/54570).

¹¹¹ The appeal was settled without addressing the issue by, among others, AAAP Barcelona (Section 12) nos. 153/2005 of 28 July (*Westlaw*, AC 2006/1554), 37/2006 of 28 February (*ibid.*, JUR 2006/232193) and 129/2006 of 19 May (*ibid.*, JUR 2006/271096); AAAP Madrid (Section 22) nos. 160/2005 of 16 June (*ibid.*, JUR 2005/221416) and 214/2007 of 25 September (*ibid.*, JUR 2007/329633); and AAP Lérida (Section 2) no. 38/2007 of 20 February (*ibid.*, JUR 2007/249888).

16. As noted earlier, the LC, Reg. 44/2001 and Reg. 2201/2003 only regulate appeal proceedings to a very limited extent. Aside from laying down deadlines (discussed above), they do no more than require that appeals be dealt with according to the procedure governing contradictory matters (arts 37.1 LC, 43.3 Reg. 44/2001 and 33.3 Reg. 2201/2003), regarding which Reg. 44/2001 stresses that the authority must give a decision without delay and may not refuse an application for recognition on any grounds other than those specified in the same Regulation. It also reiterates the bar on reviewing the decision as to its substance (art. 45)¹¹². All three instruments further provide that the decision bringing an end to this procedure must be susceptible of no more than one appeal. The nature of that appeal (normally the kind brought against decisions at first instance) and which courts are competent to deal with it are matters for each Contracting (for CL) or Member State (for both Regulations) (see §14 *supra*). And lastly, they contemplate the possibility of a stay of the proceedings in two cases.

In the first case, a stay must be ordered if the party seeking recognition is the appellant and the party against whom it is sought fails to enter an appearance. In that case articles 40.1 LC, 43.4 Reg. 44/2001 and 33.4 Reg. 2201/2003 provide for application of the procedural guarantees specified in articles 20 LC, 26 Reg. 44/2001 and 18 Reg. 2201/2003 respectively, including where such party is not domiciled in a Contracting or Member State. Hence, whether on first appeal or in cassation, the proceedings must be stayed until it is verified that the party against whom recognition is sought has received notice in sufficient time for him to arrange a defence, or that all proper steps have been taken to that end. The second case again entails a security, stemming from the fact that all three instruments allow the recognition of decisions which are not yet firm. In this case the court must stay the proceedings (arts 38.1 LC, 46.1 Reg. 44/2001 and 35 Reg. 2201/2003)¹¹³ or, under the LC and Reg. 44/2001, make continuation of the proceedings conditional upon the provision of security (arts 38.3 and 46.3 respectively), if the party against whom recognition is sought furnishes evidence¹¹⁴ that an appeal has been lodged against the decision in the State of origin¹¹⁵ or any other

¹¹² While arguably superfluous as reiteration, this provision could have some pedagogical value. However, in the Spanish case that hardly seems necessary: in most of the decisions given on appeal the courts have upheld appeals lodged against decisions of JPIs which reviewed the merits [e.g. AAP Cádiz (Section 8) no. 22/2002 of 7 March (*Westlaw JUR 2002/138099*)] and dismissed any grounds of opposition entailing a review of the merits or objections to enforcement founded on exceptions such as compensation or payment -which can nonetheless be invoked in the enforcement procedure: see, *ad ex.*, AAP Baleares (Section 5) no. 193/2006 of 13 November (*ibid.*, JUR 2007/46062); AAAP Baleares (Section 3) nos 95/2002 of 11 July (*ibid.* JUR 2002/244565), 128/2004 of 14 October (*ibid.*, JUR 2004/285896) and 177/2005 of 24 November (*ibid.*, AC 2005/2192); AAP Barcelona (Section 14) no. 159/2004 of 5 November (*ibid.*, JUR 2005/16445); and AAP La Rioja (Sole Section) no. 135/2001 of 19 October (*ibid.*, AC 2002/306).

¹¹³ Although these provisions would appear to define an option open to the court dealing with the appeal, the fact that the decision could be declared unenforceable suggests that it is an obligation: cf. VIRGÓS SORIANO, M. and GARCIMARTÍN ALFÉREZ, F.J., *op. cit.*, pp. 678-679.

¹¹⁴ The burden of proof lies precisely with that party, so that a stay is not allowable in the absence of such evidence: see AAP Navarra (Section 2) no. 1/2002 of 15 January (*Westlaw*, AC 2002/1038).

¹¹⁵ According to Judgment of the CJEC of 22 November 1997, Case 43/77, *Industrial Diamond Supplies v Riva*, *Recueil*, 1997, pp. 2175 et seq., an appeal that may result in the annulment or amendment of judgment which is the subject matter of exequatur constitutes an 'ordinary appeal'. One must therefore take exception to the reasons cited on AAP Baleares (Section 5) no. 65/2002 of 14 June (*Westlaw*, JUR 2002/211428) refusing a stay on the proceedings on the ground that continuation did not entail enforcement of the decision 'but the court has confined itself to declaring it enforceable in Spain and ordering a provisional measure, and hence there is no reason whatsoever to stay the proceedings' (see

form of appeal has been lodged if the judgment was given in the United Kingdom or Ireland (arts 38.2 LC, 46.2 Reg. 44/2001, 35.2 Reg. 2201/2003), or if the time for such appeal has not yet expired.

17. The absence of express provision for appeals against the judgment of a JPI in internal exequatur procedure (which makes no direct reference to non-appellability *de lege lata*, see §14 *supra*) is sufficient to account for the lack of any express provision in Spanish law as regards a first appeal and an appeal in cassation linked to that procedure. Spanish judicial authorities follow the general rules provided for appeal and cassation when, ignoring the terms of article 957.2 LEC 1881, they settle an appeal lodged against a decision by a JPI, and where applicable against a decision by an AP.

In this procedure a stay is only possible in the first of the cases mentioned, since the decision must be firm (art. 951 LEC 1881)¹¹⁶ and hence there is no need for the other security discussed above. The proceedings may be stayed where appropriate under the terms of the instrument applicable to service of notice to the party against whom recognition is sought of the appeal against the refusal of recognition if this party fails to enter an appearance in the manner specified in the applicable norm¹¹⁷.

IV. CONCLUSIONS

A comparison of the norms regulating the procedural aspects of recognition of foreign judgments ('the theory') with the practice of Spanish authorities in the matter like the present one is positive on balance despite the difficulties posed by the excessive number of special cases in the normative solutions arrived at and the shortcomings of internal regulation, both in the implementation of international instruments and in the country's own internal system. With regard to these shortcomings, the jurisprudence is notably integrative on issues like the intervention of the Public Prosecution Service in procedures under the LC and Reg. 44/2001 (which it denies) or the admission of appeals against decisions by the courts dealing with exequatur (which it allows).

Nevertheless, there are still some relatively frequent errors that are solely attributable to the judicial authorities themselves, such as failure to distinguish properly between the proceedings for a declaration of enforceability and enforcement within the framework of the LC or Reg. 44/2001. But the Spanish legislator should help to palliate the complexity inherent in an excessive diversity of solutions. The difficulties encountered in the application of the rules of recognition would be reduced through a modernisation of the internal system, and, in particular, by way of incorporating some solutions similar to those contained in conventions and EU regulations as, for example,

Fifth Ground). At all events, in the case in point the court would have been justified in dismissing the application for a stay on the ground that the appeal lodged in the Member State of origin (a review) was not an ordinary one, unless a review can be considered an 'ordinary appeal' in this particular sense.

¹¹⁶ Note that the requirement that the decision be firm also arises in conventions signed by Spain under which the internal exequatur procedure is also followed, as pointed out by VIRGÓS SORIANO, M. and GARCIMARTÍN ALFÉREZ, F.J., *op. cit.*, p. 605.

¹¹⁷ Arts 15 and 16 of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 15 November 1965 (*BOE* no. 203, 25-VIII-1987, corr. err. *ibid.*, no. 88, 13-IV-1989) and art. 19 of Regulation (EC) no. 1397/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) no. 1348/2000 (fully applicable as from 13 November 2008 according to art. 26 of same).

automatic and incidental recognition and a more rapid non-adversarial (in the first instance) procedure.

ABSTRACT: The present article aims at giving a complete view on the practice of Spanish authorities regarding the procedural aspects of recognition and 'enforcement' of foreign decisions. Subsequent to a brief introduction, the opening section of the work focuses on the scope of party autonomy, i.e., the possibilities that the interested parties may have in choosing among the several types of recognition and/or proceedings existing in the Spanish system, and also in opting for non-recognition. The following sections consider the main problems that arise in the development of recognition (or declaration of enforcement) proceedings, starting from their initiation. Therefore, it first studies the treatment given by judicial authorities to the determination of their competence, then to the right to intervene and the role of the Public Prosecution Service and finally the documentation required. Secondly, the course of the proceedings is examined in its various stages. In the first instance, a difference is laid down between non-adversarial and adversarial proceedings. Then, a special consideration is given to the adoption of provisional measures before ending with an analysis of the main aspects of the appeal regime.

RESUMEN: El presente trabajo analiza el reconocimiento en España de resoluciones extranjeras en lo que respecta a cuestiones de índole meramente procedimental y fundamentalmente a la luz de la práctica. Aborda, por tanto, las dificultades que plantea la existencia de diversos tipos de reconocimiento y de diferentes procedimientos para obtenerlo, y da cuenta de la aplicación que del sistema realizan los órganos jurisdiccionales españoles.

KEYWORDS: SPANISH PRIVATE INTERNATIONAL LAW- RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENTS- PROCEDURAL MATTERS- PRACTICE OF SPANISH AUTHORITIES

PALABRAS CLAVE: DERECHO INTERNACIONAL PRIVADO ESPAÑOL- RECONOCIMIENTO DE RESOLUCIONES EXTRANJERAS- CUESTIONES PROCESALES- PRÁCTICA DE LAS AUTORIDADES ESPAÑOLAS