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A Word from the Chairman

Just before sending this seventh issue of the Bulletin to the printer, the Valencia Law Society confirmed that they would be delighted to host our BSLA annual conference. Since then we have been putting together a program which tackles local and private international issues.

The dates for your diary are 19 and 20 of May. There is still time for special requests so please contact me or any members of the committee if there are any particular matters which you will like us to consider for a session.

Valencia is Spain's third largest city and among the liveliest. To many UK lawyers it is likely to be known because of the Valencia Urban "grab law" which enabled property developers to apply for land to be reclassified from rural to urban without seeking the owners' permission and which was – after much debate – recently modified.

For most people Valencia is the capital of the region which is home to "paella", Spain's most famous dish and "las fallas", a local week-long festival with fireworks and massive bonfires every night. In reality Valencia is today the most upcoming city of "the New Spain", currently undergoing a

facelift in preparation for the 2007 America's Cup, and boasting a magnificent

City of Arts and Sciences. Developed by Santiago Calatrava, this new part of the city is a large-scale urban recreation centre for culture and science which also incorporates *L'Oceanogràfic*, an underwater city designed by the late Felix Candela. I look forward to seeing you there.

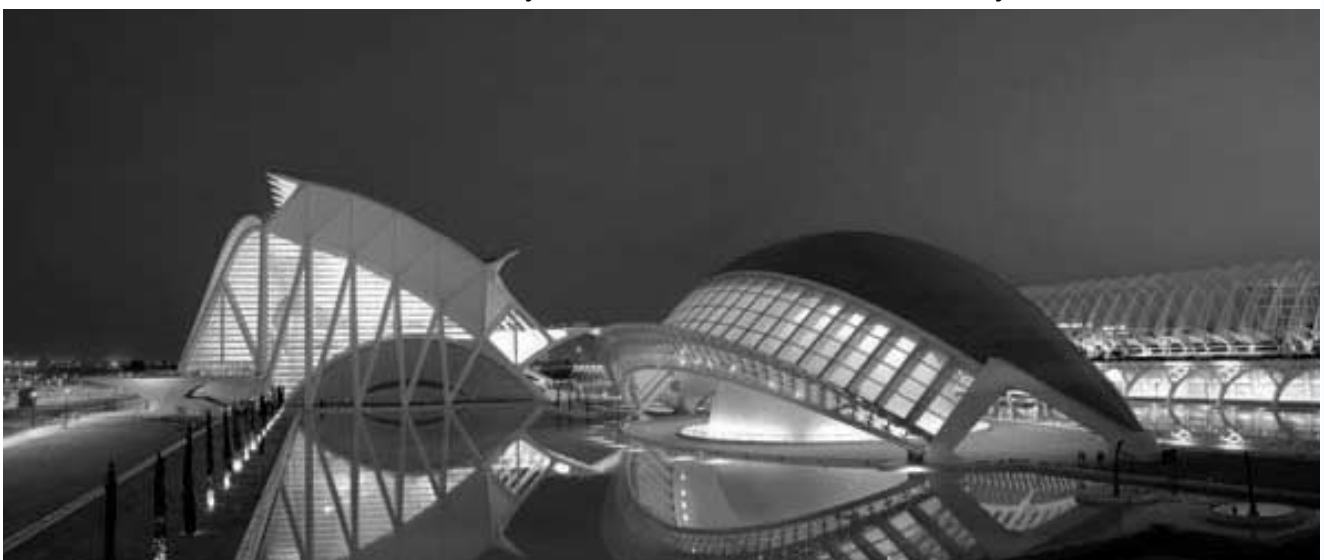
The members of the German bilateral have asked me to tell all of you how much they did enjoy our joint event at the House of Lords and they look forward to organising more joint events.

Finally I would like to thank all the committee who have been working hard in the preparation of our new series of Lectures, dates and details of which appear on the back page, and which I am sure will prove as popular as ever so please book in advance not to be disappointed!



Alberto Pérez Cedillo
Chairman, BSLA

BSLA ANNUAL CONFERENCE IN VALENCIA – 19-20 May 2006. More details to be announced. Below: City of Arts and Sciences, Valencia



Harmonious Wills

Charlotte Simm examines a recent case involving multiple wills and cross border estates



An application made by the executors of Edward William Baldry deceased was heard by Charles J in the High Court of Justice (Family Division) on 27 November 2004.

The case may be of interest to private client practitioners for its relevance to the modern day testator who wishes to achieve the harmonious devolution of assets in more than one jurisdiction.

Baldry – the facts

Edward William Baldry (“the Testator”) executed an English Will on 12 July 1982 which stated “I hereby revoke all testamentary dispositions made by me (other than any will made by me in a Spanish form relating only to my property situated in Spain) and declare that this will and my said Spanish will shall together constitute my last will. This will shall not affect my said property situated in Spain, disposed of by my said Spanish will and all references herein to my estate shall be construed as excluding my said Spanish property.”

The Testator subsequently executed a will in Spain on 3 March 1983, the translation of which provided that he revoked “any testamentary dispositions purporting to be his and bearing a date prior to the date of this will, in relation to his property in Spain; as regards his property abroad he has made a will making provision in a separate document”.

The Testator died in June 2000, domiciled in Spain.

The executors of the English will sought a direction from the court that only the English will should be admitted to probate on the basis that the Spanish will, not having existed at the time of the execution of the English will, had not been incorporated into the English will.

It may be helpful to summarise some of the relevant points of law and practical issues arising, in particular as to the operation of multiple wills, the principles of revocation and the doctrine of incorporation.

Multiple wills

As we know, it is not uncommon for a testator to make more than one will. Indeed this is often the case where, as in *Re Baldry*, a testator owns property in England and also abroad.

Where such a situation arises, it is necessary to consider with the testator whether it is appropriate to his

circumstances to have a single will dealing with his worldwide estate or to have more than one will, taking separate effect, covering the jurisdictions concerned. The succession and taxation implications of the various options will need to be looked at, from the point of view of the UK and from the point of view of the other jurisdiction(s) involved. The issues arising can be complex and, if appropriate, local advice should be sought. Each case should be considered on an individual basis.

Careful consideration should always be given as to the scope of revocation to be effected by any proposed will, so as not unintentionally to undo, or leave in place, any previous testamentary dispositions. This should then be clearly reflected in the will, for example by expressly limiting the revocation of previous wills and codicils to a particular territory.

Circumstances in which wills are revoked

It may be helpful to remind ourselves of some general principles of UK law whereby wills may be revoked or not revoked, whether automatically, expressly or by implication.

- (a) Under the Wills Act 1837 a will is automatically revoked by
- the subsequent marriage of the testator (unless the will is made in expectation of marriage); or
 - by another will or codicil declaring an intention to revoke; or
 - by being burnt, torn or otherwise destroyed by the testator or some other person in his presence and by his direction with the intention of revoking.
- (b) If a will deals with the testator’s whole estate it will revoke any earlier will or other testamentary disposition.
- (c) If a will fails to deal completely with the estate, it may nonetheless revoke an earlier will if it shows an intention to do so.
- (d) The expression “This is the last will and testament” is not in itself necessarily sufficient to revoke an earlier will.
- (e) A revocation clause is not strictly necessary but it helps to make crystal clear an existing intention to revoke.

The doctrine of incorporation by reference

The doctrine of incorporation operates with the effect that another testamentary instrument may be entitled to probate by reason of its being incorporated by reference. This can

work in such a way as to incorporate an unexecuted document into a duly executed one.

The principle is that where a testator expressly refers in a will or codicil to another existing document as carrying out or containing his own dispositions, that other document is considered to be incorporated in, and to form part of, the will and is included in the probate.

For the doctrine of incorporation to arise the necessary elements are as follows:

- (a) the document to be incorporated must be in existence at time of execution;
- (b) the document to be incorporated must be described as then existing; and
- (c) the will must not state that the document is not to form part of it.

Thus, for example, the question of incorporation does not arise if a will or codicil refers to another document as a future document or if a will or codicil refers to another document in such manner as to indicate a future intention to make such a document. However the doctrine does arise where a will or codicil refers to a document as existing which is then existing.

Practitioners may be familiar with the device whereby the testator in his will requests the executors to have regard to any letter of wishes of his which may come to the attention of the executors within, say, three months of the testator's death.

It will be appreciated that under the above principles such a letter of wishes is not thereby incorporated with the will since it satisfies none of the required elements of the doctrine of incorporation. However, a useful practical effect is that the testator thereby has the flexibility to make and/or alter such a letter of wishes without having to revise his underlying will.

The decision in *Re Baldry*

Charles J summarised the test he had to apply as follows: were the English and Spanish wills executed by the testator two independent wills or were they interdependent, one being incorporated into the other by reference?

Charles J conceded that he could see the basis of the argument that in this case the two wills were interdependent from the words in the initial recital to the English will that "this will and my said Spanish will shall together constitute my last will". However, in his judgment, when that passage was read as part of the entirety of the introduction to the English will and with the Spanish will it was clear that on the true construction of the documents they were not interdependent but independent as intended by the testator. Therefore the Spanish will was not incorporated into the English will or *vice versa*.

Some practical points arising

In the "global village" of today, multi-jurisdictional estates and the operation of multiple wills are on the increase.

Will drafting practitioners need to be alert to the delicate balance where both English and foreign property is involved and approach the challenge of drafting will documentation in such circumstances with particular caution.

Some points which it may be helpful to bear in mind are as follows.

- (a) When taking will instructions, it is advisable to ask specifically whether there is any foreign property, rather than rely on the testator mentioning it. Likewise the position with regard to any powers of appointment should be specifically checked.
- (b) The testator's wishes with regard to his worldwide assets should be clearly identified.
- (c) The scope and terms of all existing testamentary dispositions which are not intended to be revoked should be ascertained. This may involve obtaining an official translation of a foreign will.
- (d) It may be appropriate for the testator to seek local advice as to the succession and taxation implications arising in another jurisdiction. For instance 'forced heirship' provisions operating in that jurisdiction may have the effect of overriding the testator's wishes.
- (e) Domicile will be relevant to the validity of the will, the entitlement to the grant and succession to the estate.
- (f) The location of assets and whether such assets are moveable or immoveable may also be relevant to their succession.
- (g) The appropriate scope of a revocation clause and of the will provisions should be carefully considered and reflected in the will by unambiguous and consistent language.
- (h) In some cases an English will incorporating discretionary trusts may give helpful flexibility to accommodate, at the relevant time, the succession laws and taxation regimes of other jurisdictions.
- (i) Some jurisdictions do not recognise the concept of trusts.
- (j) Even if a separate will dealing with the assets in another jurisdiction is not strictly necessary, it may be worth making one in order to avoid delays or difficulties arising later.

Edward William Baldry deceased [2004] WTLR 609

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Maternity Rights

Liza Zucconi sets out the statutory rights of working mothers in Britain ...

There are many rights that currently exist in the UK specifically to protect pregnant women, to provide a period of leave for the mother immediately before and after the birth of her child and to allow her to return to her place of work.

At present, women employees who can satisfy the relevant qualifying conditions enjoy the following statutory rights:

- Paid time off to receive ante-natal care;
- 26 weeks' maternity leave;
- Protection for dismissal by reason of pregnancy or childbirth;
- Protection from detriment by reason of pregnancy, childbirth or maternity;
- Maternity pay;
- Return to work after ordinary maternity leave or additional maternity leave (a further 26 weeks);
- Offer of alternative work before being suspended on maternity grounds;
- Remuneration on suspension on maternity grounds.

An employee must tell her employer at least 28 days before she intends to stop work to have her baby and the employer can request that this be confirmed in writing. An employee may change her mind about the date she wishes her statutory maternity pay (SMP) to start but she must still give her employer at least 28 days notice of the new date.

She must also provide her employer with evidence of when her baby is due. This is normally on maternity certificate MATB1. The earliest that this certificate may be issued by a doctor or midwife is

20 weeks before the week in which her baby is due.

SMP provides employees with some money to help them take time off at and around the birth of their baby. SMP is paid by the employer, up to a maximum of 26 weeks, and is considered to be earnings so the employer will deduct tax and National Insurance.

■ An employee must normally satisfy four conditions before she can qualify for SMP:

- (a) She must have been continuously employed by her employer for at least 26 weeks ending with the week immediately preceding the 14th week before the EWC (expected week of confinement); i.e. the 15th week before the baby is due.
- (b) She must have ceased to work for the employer wholly or partly because of pregnancy or confinement;
- (c) Her normal weekly earnings, for a period of eight weeks ending with the week preceding the 14th week before the EWC, must not be less than the lower limit for the payment of National Insurance contributions (currently £82.00).

■ The amount of payment due to an eligible employee on maternity leave is:

- (a) For the first six weeks – 90% of normal weekly income (calculated for a period of eight weeks immediately preceding the 14th week before EWC). There is no minimum rate of pay.
- (b) £106.00 or 90% of average weekly earnings if this 90% rate is less than £106.00.

It does not exclude any contractual benefits to which the

employee may be entitled, but the employer is entitled to set off SMP against contractual remuneration in respect of the same period and *vice versa*, i.e. the employer has to meet the more onerous of the contractual and statutory burdens, but not both of them. Similarly, tax, National Insurance contributions and any other regular deductions fall to be deducted from SMP.

In certain circumstances employers can obtain

advance recovery of SMP from the Board of the Inland Revenue, but generally relevant monies are deducted by the employer from NICs, which would otherwise fall to be remitted by him. Apart from small employers (ie those whose contribution payments for the qualifying tax year do

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From 15 December 1999, a new right of parental leave, introduced in order to comply with the EU Parental Leave Directive, entitles an employee to be absent from work to care for a natural or adopted child.

in Britain & Spain

... while **Carmen Ortuzar** lists those available to working mothers in Spain



Spain is one of the EU countries with both the lowest birth rate (1.07 children per woman of childbearing age) and the lowest female employment rate (67% of women aged 20 to 44 years without children and 40% of women with children under the age of six in 1998).

This situation has triggered many changes in Spanish law with respect to maternity leave and parental rights.

Spanish working mothers currently enjoy the following statutory rights:

- 16 weeks maternity leave;
- Maternity pay of 100 per cent for 16 weeks;
- Paid time off to receive ante-natal care;
- Return to work after maternity leave;
- Once the maternity leave is over, women can enjoy two breaks for breast-feeding of half an hour or one of one hour until the child reaches nine months of age. Often companies agree to exchange the remunerated breaks for a one hour reduction which allows the mother to leave an hour earlier, equally remunerated.
- Women also have right to reduce their working hours until their child is six years old. In this case the payment is reduced proportionally.

Maternity leave is a 16-week paid leave for working mothers. At least six weeks must be taken after the child's birth, while the remaining 10 weeks can be taken before or

after the birth. The mother receives earnings-related cash benefit directly from social security at a high level of earnings replacement. To qualified for this benefit, she needs to have contributed to social security at least 180 days in the previous five years and be contributing at the beginning of the leave. During this period the employer has to pay the employer's contribution to social security.

The parental leave period can be enjoyed full time unless the employer has expressly agreed to enter into a part-time agreement or in cases where the employee belongs to a sector which has specific government regulation in this respect.

The Government's willingness to reconcile family and working life was made evident with one of the most popular measures ever adopted

whereby every Spanish working woman obtains a monthly payment of 100 for each of her children who are younger than three.

*The low birth-
and female
employment rates
have triggered
many changes in
Spanish law.*

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British Maternity Rights

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not exceed £45,000), employers will be able to recover only 92% of each payment of SMP, which is intended to recoup the NICs payable on such payments.

The employee is entitled to return to the same job as she was employed for before her maternity leave began. If during her absence from work there have been any general improvements to her terms and conditions of work she is entitled to benefit as if she had been at work.

If the employer allows a request to return to work part-time, there is no problem in law and no break in service. There is a right to return to the same job and the same hours, and if an employer does not consider or

accommodate an employee's request in this regard without a sound business reason, the employer may be considered to be acting in a discriminatory fashion.

From 15 December 1999, there is a new right of parental leave, introduced in order to comply with the EU Parental Leave Directive. The law entitles an employee to be absent from work on parental leave to care for a natural or adopted child.

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No Substitute for a Lawyer

Nielson Sanchez Stewart *is sceptical
about the increasing use of mediation*



In England and Spain, as well as in the whole of Europe, there is plenty of hope in mediation. It is said that it will contribute significantly to alleviating the burden of work at the Courts of Justice.

The problem of delay is undermining the sense of justice. It is said that belated justice is no justice at all. In fact, the clever definition of the Roman jurist Ulpiano at the beginning of our era, "justice is to give what is due to each one", has to be complemented with "to give what is due to each one in due time".

For a number of reasons, I personally have my doubts that mediation will be the magical recipe.

First, because mediation is nothing new, in spite of what the European Union is trying to present us with. It is fact that the Green Paper of the last two decades, the ADR (Alternative Dispute Resolutions) corresponds to new terminology, and that there is a project of a European directive that will be imposed soon, as well a number of regulations in each country, but I insist that there have been mediators since the very beginnings of the legal profession.

According to the Official Dictionary of the Spanish Royal Academy, "mediator" is equivalent to "advocate", and "advocate" is by definition a "mediator".

Besides, mediation solves one sort of problem and litigation solves another. It is true that in some cases litigators are ill-advised, sometimes by their friends and relatives who encourage them to go to Court and, with the help of mediators, they can solve their difficulties without having to submit the matter to a Tribunal. But nowadays everyone knows how difficult and risky it is to go to Court, so when you start litigation, it is because – and this happens especially in family matters – you want war and not peace.

In most regions of Spain, laws have been implemented in respect of mediation on family matters. Because of this, universities and other educational entities have started to give courses on mediation, some of as much as 800 hours. Even though, at this stage, these courses would appear to be postgraduate studies, this is changing and every person with a university degree – i.e. an engineer, an architect – may become an expert on mediation just by attending some of these courses.

The idea, even though unadmitted, is to create a new profession which will take over a significant part of the activities of advocates. It is said that this will not be so, and that advocates will be needed to draft the documents of mediation, but they will without any doubt lose the position of being in the driving seat. They will no longer monitor the

case. The mediator will, and the advocate will be called just to put in legal terms what has been agreed without his intervention and sometimes against his advice.

The Spanish legal profession should be very much aware of how important parts of their scope of activities have been taken over by lay people or other professionals, especially giving advice in labour, tax and planning matters.

If we do not take good care, it will be said very soon that "lawyers will be no longer qualified as mediators unless they take these courses" and "an advocate should defend and the mediator should mediate".

In most laws approved in Spain, the advocate of one party cannot mediate. In fact, the mediator is conceived as an independent person who is in touch with both parties and cannot defend one against the other. This is correct as there are obviously in the process of mediation a number of matters that are disclosed to the mediator by all the people involved, which the mediator cannot use for one party against the other. But this is not the problem.

Mediation has always been in charge of the legal advisors of both parties. When a conflict arises the client will seek his lawyer's advice who, before proceeding against the other party, will normally make contact with the colleague acting on behalf of the other party and arrange to sit down and try, with or without the presence of their respective clients, to find an amicable solution.

An experienced lawyer will have surely gone through this procedure and will be in agreement with me that it is far from being a simple task. In fact, I am sure that there are hundreds of matters that have been solved without the intervention of the Courts through agreements like this, which normally take dozens of hours.

What I am afraid is that if mediation becomes fashionable the client, instead of going to see a lawyer in the first place when a problem arises, will go to a professional mediator who will undertake the job of solving the problem by himself. He is neither a judge nor an arbiter, and he is supposed only to conduct negotiations and push both parties who are in conflict to find a solution. It should be noted that the conflict that this mediator is trying to solve is a legal problem, or at least a problem that has important legal ramifications. The lawyer will come, as usual, too late.

That is why I feel that the matter should be dealt by a legal professional, who is the only one who can advise about the consequences of any solution that the parties find.

This is the root that has been followed in Germany

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Paying up on Time

Mercedes Clavell discusses a new Spanish law to combat late payment



"We pay at 180 days. However, if you need the money before, we will be pleased to make an advanced payment with 3% interest". This notice, hung up in the purchase room of one of the largest distribution companies in Spain, summarizes the payment regime imposed in Spain by large companies, especially in the distribution sector.

The average payment delay in Spain is 80 days, the third longest in Europe. In the construction sector it is 193 days and for subcontractors it is 210 days. This delay causes financial problems to medium-sized and small companies, and 25% of bankruptcies are related to lack of cash due to late payments. Large companies, taking advantage of such long payment practices, have even assumed this payment policy in order to obtain additional cash.

On 29 December 2004 Law 3/2004 on Combating Late Payment in Commercial Transactions was approved, two years after the deadline established by Directive 2000/35/EC. This law had been anticipated with concern by many companies, but its wording has been considered by many experts as deceptive. That is, after one year of this Law being in force, we cannot say that it has had a dramatic effect in speeding up payments, but at least it provides lawyers with a tool when we are asked by our clients for remedies when debtors use endless excuses for not paying on time.

The law establishes as a general rule that payments due from commercial transactions should take place 30 days after issuance of the invoice or the delivery of the goods or services, although the parties can agree a different term. This is one of the weak points of the law, as the stronger party will always have a better negotiation position to impose the most convenient terms. However, the creditor can ask before the Court for the nullification of the clauses considered abusive. The Court will decide based on all the circumstances of the case, such as the nature of the good or service, the granting of additional guarantees by the debtor and the normal "uses of trade". The law says that repeatedly

imposing abusive payment terms cannot be considered as a normal "use of trade". In our opinion, the main problem with these clauses is that the initiative for asking for the nullification of any clause corresponds to the creditor. It would have been more practical to establish that any payment term longer than those established by the law would be null and void except where the debtor proves its validity according to all circumstances involved in the transaction.

Once the invoice is due, any delay implies the obligation of paying interest at the rate agreed in the contract. If the contract contains no agreement on this point, the rate will be the one used by the Central European Bank in its most recent main financing operation plus seven points. For example, this rate has been 9.09% during the first semester of 2005 and 9.05% during the second semester.

The creditor can claim compensation for the costs incurred in claiming the outstanding invoices. The compensation should be calculated according to the principles of transparency and proportionality and it cannot exceed 15% of the debt. If the debt does not exceed 30,000, the maximum limit for the compensation is such amount. If the judgment obtained by the creditor includes the debtor's obligation to pay the legal costs, the above compensation is not applicable.

The Law is applied to payments made among companies and between companies and Public Administrations, but payments to or from consumers are excluded. Interest derived from cheques, promissory notes and bills of exchange, and payments from insurance companies are excluded from this Law, as well as payments within a bankruptcy procedure.

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Mediation

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(*Rechtsberatungsgesetz*) for example, where mediators necessarily have to be advocates.

Bar Associations and Law Societies should do their utmost to create centres of mediation whereby people who really want to find a solution to their problem and not necessarily get involved in legal disputes, could go to be advised about alternative solutions.

The Malaga Bar Association is working in this matter and a Centre of Mediation has been created some time ago. So far, without very many clients.

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A New Domain

Jonathan Cornthwaite & Gina Schwartz
*summarise the steps needed to secure
registration of an .eu domain name*



The long-awaited .eu domain name was launched on 7 December 2005. The .eu domain name will be of particular interest to businesses operating within the EU and those seeking to expand their defensive portfolios to prevent others from registering a particular domain name.

Timetable for Launch

The .eu domain name is being launched in three distinct phases:

1. Sunrise Period Phase I: 7 Dec 2005 to 7 Feb 2006

During the Sunrise Period Phase I, only domain names which correspond exactly to registered Community or national trade marks, geographical indications or designations of origin may be applied for.

It is expected that, by the date of publication, the Sunrise Period Phase I will have passed. However, brand owners will not necessarily have missed the boat, having the option to apply in Phase II.

2. Sunrise Period Phase II: 7 Feb 2006 to 7 April 2006

During the Sunrise Period Phase II, only domain names that correspond exactly to the rights referred to in the previous paragraph and other prior rights protected under national and/or EU law may be applied for.

In the UK, such prior rights are unregistered trade marks that are protected by the law of passing off.

Broadly, passing off is the common law right to prevent others from using your name or brand to suggest that their products emanate from you, where you have built up goodwill or reputation in that name or brand. This right applies regardless of whether formal steps have been taken to register a trade mark.

It is important to note that, in the UK, trade mark applications will *not* be treated as prior rights for the purpose of Phases I or II of the Sunrise Period.

Other prior rights may form the basis of a Phase II application in other jurisdictions. In Spain, for example, such prior rights include unregistered trade marks, trade names, business identifiers, company names and distinctive titles of protected literary and artistic works.

3. Land Rush: 7 April 2006 onwards

In the so-called "land rush" period, applications will be opened up to all on a "first come first served" basis.

Hypothetical Example

Chocoholics Limited is a well-known English chocolate manufacturer with European aspirations. The company

owns a UK trade mark registration for VENUS, and a Community trade mark registration for SATURN.

It has produced its popular PLUTO bar for the UK market since 1985, but has never applied for a trade mark for this brand. However, Chocoholics Limited does have a pending UK trade mark application for MERCURY, a new brand that it has not yet used.

Chocoholics Limited would be able to apply for the following .eu domain names:

- In Sunrise Period Phase I: venus.eu and saturn.eu
- In Sunrise Period Phase II: both of the above, *plus* chocoholics.eu and pluto.eu
- In the Land Rush Period: all of the above, *plus* mercury.eu

Who may Apply

Applicants must be:

- an undertaking having its registered office, central administration or principal place of business within the EU;
- an organisation established within the EU; or
- a person resident within the EU.

Application Procedure and Documentation

.eu domain names must be registered through an accredited Registrar, who acts on behalf of the applicant. A list of accredited Registrars is available at www.eurid.eu.

In Phase I of the Sunrise Period, a copy of the certificate of registration, a renewal certificate or an extract from an official on-line database operated by the relevant national trade mark office, the OHIM or the WIPO will be required as evidence of a registered trade mark.

In Phase II of the Sunrise Period, applicants relying on prior rights in the UK will be required to submit an affidavit, signed by a legal practitioner (or other professional representative) and accompanied by supporting documentation, stating that the name meets the conditions for protection by the law of passing off.

Costs

The official cost of registering an .eu domain name in the first year of operation will be 10 euros. Registrars add an administration fee for their services, so the cost to applicants is higher.

Registration and Maintenance

Once registered, the registrant will obtain a transferable, renewable and exclusive right to use the .eu domain name.

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Illegal Monopoly

Manuel J. D. Martin reports on
EU rules governing provision of services



As a result of investigating complaint no. 2005/5006 to the European Commission (lodged by the subscriber and endorsed by the English Notaries Society), the European Commission believes that Spain is in breach of Article 49 EC on freedom of providing services. On 14 November 2005 the European Commission wrote to the Spanish Permanent Representation recalling the previous position of the Spanish authorities which accepted the registration of acts from non-Spanish notaries and expressing concerns about the present practice of refusal, which is in breach of Article 49 EC on freedom of providing services.

Spanish notaries have recently strengthened their monopoly. After more than 100 years of the current land registry laws and practice enabling registration of foreign notarial documents in Spain (whether or not they involved the transfer of property in Spain), the regulatory body for the registries and the notarial profession in Spain (DGRN) now claims that only documents signed in the presence of a Spanish notary can be registered in Spain whenever the transaction involves property in Spain. This is a serious blow to the basic principles of the EU and to consumer rights in Europe.

As a result of resolutions from the DGRN dated 7 February 2005 and 20 May 2005, Spanish land registrars are being forced to refuse registration of documents authorised by non-Spanish notaries when those documents refer to purchase of property or rights affecting property, inheritance of property or any other transaction affecting property situated in Spain, even if those documents authorised by non-Spanish notaries comply with *all* the necessary

formalities and guarantees for the document to be registered in Spain. Registration must be refused by land registrars (often against their better judgment) simply because the document has been authorised by a non-Spanish notary, as opposed to a Spanish notary or a Spanish consul.

Most amazingly, the above changes have been carried out by the DGRN completely arbitrarily and without any recent changes in Spanish law supporting these resolutions. The above is in clear breach of the basic principles of the European Union and amounts to a ruthless and unprecedented attempt to strengthen primarily (but not only) the monopoly of Spanish notaries by preventing competition, not just from freedom of movements of notaries within Europe which would allow other notaries (e.g. English notaries) to practise in Spain, but even from documents signed before English notaries in our own jurisdiction (England and Wales).

This matter has been investigated by the European Commission (Internal Market Directorate) which is of the opinion that the above resolutions are in breach of Article 49 of the EC on freedom of providing services and wrote to the Spanish Permanent Representation on this matter on 14 November 2005. Spain has yet to reply and it seems that if the resolutions are not set aside, the European Commission may be forced to commence infringement proceedings against Spain.

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.eu Domain

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The domain name will be registered for one year, but will be automatically renewed annually (for a fee) unless the registrant asks the Registry, through its Registrar, not to renew the domain name.

Comment

The phased registration system is a welcome means of preventing brand owners from being held to ransom by cybersquatters who snap up domain names corresponding to their brands. However, brand owners should not assume that they will automatically be granted a particular domain name.

Even within the Sunrise Period, .eu domain names will be allocated on a first come, first served basis. Owners of national or Community trade mark registrations may be pipped to the post by other trade mark owners with registrations for the same mark in a different country, or for

the same mark registered for different goods or services. Those eligible to apply should therefore ensure that they are ready to apply at the earliest opportunity.

Applicants are also advised to follow the registration procedure to the letter, or risk losing their place in the queue. Whilst applications for those with registered trade marks are likely to be relatively straightforward, more preparation will be required by applicants with other prior rights who will, in the UK at least, need to prepare supporting affidavit evidence.

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Legal Babel

Greg Lascelles *looks at some of the potential perils for English solicitors and businesses in advising and doing business with non-English-speaking clients*



Solicitors owe a duty of care in tort (the civil law of responsibility) to clients to exercise reasonable care and skill in the conduct of their business. This duty runs alongside the duties outlined in the retainer agreement with the client. Solicitors can thereby be held liable in tort to their clients for economic loss caused by negligence.

One area in which a solicitor may be found to have been negligent concerns advice that is not sufficiently tailored to the nature of the individual clients concerned. Cases on this subject usually concern the experience of the client such that there seems to be a different degree of duty owed, in a business transaction, to an experienced businessman than a client with poor commercial knowledge. This duty responds to the concern of ensuring that a client has understood the advice given. Solicitors have been found negligent in cases where they have not explained the meaning of clauses which they knew or ought to have realised that the client did not fully understand (*Sykes v Midland Bank Executor and Trustee Co Ltd [1969] 2 QB 518*) and where they have not explained the documents which their client was being asked to execute and the consequences to their client of so executing them (*Stannard v Ulithorne [1834] 10 Bing. 491*).

There would therefore seem to be clear scope for a negligence action against a solicitor where the solicitor is not sufficiently attuned to the needs of a client who has a poor grasp of English.

In *Siasati v Bottoms & Webb [1997] EGCS 22*, the claimant was an Iranian who did not speak English (and had to use an interpreter) and who took on a commercial lease on an old property. The lease included a full repairing covenant and, as security for performance of his covenants, he was required to execute a legal charge on his home. The commercial property was found to be in bad condition (there was no prior structural survey) and needed substantial repairs. The claimant could not afford the repairs and was unable to raise capital via a mortgage due to the legal charge on his home. The High Court found that the solicitors should have taken "all steps to explain the nature and scope of the obligations and ensure that the plaintiff had understood the advice he received. Such advice ought to have been put in writing..." The Court found that if the claimant had appreciated the consequences (particularly of the legal charge) he would not have entered into the transaction. The solicitors were liable for the loss suffered.

In *Peyman v Lanjani [1985] Ch 457, 420 (B)*, the Court of Appeal found that a solicitor was negligent in that he had

failed to advise a non English speaker (also Iranian) not to proceed so quickly with buying the lease on highly-priced restaurant premises (which were subsequently found to have a defect in the title). This was despite the fact that the man was a businessman with several years of running a restaurant in Iran. The decision could be criticised as it may appear to impose upon a solicitor a duty to advise on the wisdom of entering into a transaction which runs contrary to cases that state that a solicitor does not have such a duty (see, e.g. *Clarke Boyce v Mouat [1994] 1 AC 428*). However, here the solicitor had actually reassured the non English speaking claimant and had told him that he was getting a good bargain, which was not the case.

Although the *Peyman* case has its own particularities, the idea of a higher-level duty of care being owed by solicitors to non English speaking clients cannot be ignored, particularly in the light of the House of Lords decision in *National Westminster Bank plc v Amin and another [2002] UKHL 9* (although the case concerned a bank rather than a solicitor), which is discussed further below and which suggests just that.

An action in negligence against a solicitor might also conceivably arise where a solicitor who is only partially fluent in a language attempts to communicate advice in that language. If the advice is misunderstood due to the lack of fluency of a solicitor, that could constitute a valid ground for a claim of negligence. In the case of a French client (and I hope that readers will bear with the relatively far-fetched example), a phrase as banal as "this document is very sensible" if carelessly translated into French by a native English solicitor could be interpreted by the French client as being "this document is highly sensitive". The result may be that a document which was to be used as part of a tender submission would not be included for confidentiality reasons and the bid lost due to the dossier being incomplete.

The general advice must be that in such circumstances the solicitor must be very careful to ensure that any advice and any documents are understood by non English clients even if those clients appear to understand and appear to be aware of what they are doing (e.g. even if they are nodding as you try to explain the concepts of legal and equitable ownership). The general client care requirements in Chapter 13 of the Guide to the Professional Conduct of Solicitors may be of assistance here, in particular the suggestion (at section 6(6)) of providing a written note of the advice (that can be translated and explained), however tactless that might appear.

Clients' duties

In some instances, clients should also be advised to take care when dealing with their non-English speaking clients. Two random examples are given below that illustrate the potential issues clients may face and of which their legal advisers should be aware.

Mortgages/security

In *National Westminster v Amin*, the House of Lords considered a case where a charge had been granted by a mother and father (Ugandans who could not speak English) on their property as security for a bank loan to their son (who was fluent in English). The bank attempted to enforce the charge and the mother (the father having died) put forward a defence of undue influence upon her by her son (who had been with his parents when they signed the security document).

In order to show that it did not have constructive notice of the undue influence of the son, and therefore of the lack of effective consent by his parents to the transaction, the bank needed to show that it had taken reasonable steps to satisfy itself that the parents understood the nature and effect of the transaction and knew what they were doing when they entered into it. In support, the bank showed a solicitor's letter that appeared to confirm that the defendants had had everything explained to them.

There was some argument as to whether the solicitor was acting as agent for the bank or for the parents. The mother argued, in support of the undue influence defence, that she did not speak, read or write English. The bank attempted to strike out the defence. The strike out application went from the County Court, through to the House of Lords. The strike out was dismissed because their Lordships felt that there was merit in the defence. In support of this (and the remittance of the case to the County Court for trial), Scott LJ suggested that something more (in the way of a higher degree of care and caution) might be required of the bank because, among other things, the bank allegedly knew that the defendants "could not speak English and knew of their cultural, ethnic minority background. The bank knew, therefore, that they might be specially vulnerable to exploitation in relation to transactions such as that which was being proposed." Further, the bank "gave no indication of the special care that might need to be taken in advising" the defendants (see 24(i) and (ii) of the judgment). I do not know what happened at the subsequent County Court hearing but the case certainly demonstrates that the House of Lords believes that special care may need to be taken by banks when loans are secured on the assets of people who do not speak English - in the case of a solicitor this probably amounts to a higher duty of care.

Product liability

Article 7 of the General Product Safety Regulations 2005 (implementing Directive 2001/95/EC), which came into force on 1 October 2005, states:

"(1) within the limits of his activities, a producer shall provide consumers with the relevant information to enable them:

(a) to assess the risks inherent in a product throughout the

normal or reasonably foreseeable period of its use, where such risks are not immediately obvious without adequate warnings, and

(b) to take precautions against those risks."

It may be that this duty to provide relevant information could be invoked in England to allege negligence against a manufacturer for failing to properly communicate safety information where the manufacturer knows that the user of the product is likely to be a non-English speaker and/or reader (a duty to warn in such circumstances has been the object of proceedings in the US)*.

Indeed, some legislation specifically provides that manufacturers/suppliers should ensure that product instructions contain translations into the language or languages of the country in which the product is to be used (see, for example, Schedule 3, Section 1(1.0.6) of the Equipment and Protective Systems Intended for Use in Potentially Explosive Atmospheres Regulations 1996 (SI 1996/62, as amended)).

Even where a client complies with a duty to provide adequate safety information in the language of the country where the product is distributed, a client may still need to consider who the actual users of the product might be (e.g. if they are likely not to speak the language of the country where the product is distributed: another possibly far-fetched example might be where an Italian product specifically targeted at Miami's Cuban community only contains safety information in Italian and English). This is because defences to offences under product liability legislation could provide that a person must show that they took "all reasonable steps and exercised all due diligence" to avoid committing an offence (see, for example, article 18 of SI 1996/62, as amended). In such instances, it does not take a great leap of faith to imagine that the defence of "all reasonable precautions" would not be available to a manufacturer who does not adequately convey safety information where the manufacturer could reasonably foresee that the users were unlikely to understand the language of the safety information.

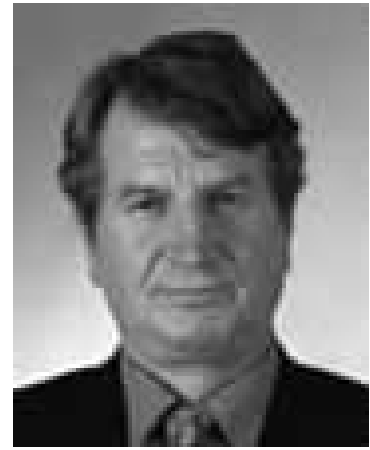
The prudent way around this issue, admittedly rare (for the moment), would be for such clients to be advised to consider, if possible, at least pictorial warnings or symbols on top of a word message in the language of the foreseeable user.

* Occasionally, room may also have to be made where the user of the product is an English speaker. Many internet sites describe the case of a Mr Grazinski of Oklahoma who in 2000 "purchased a brand new 32 foot Winnebago motor home. On his first trip home, having joined the freeway, he set the cruise control at 70 mph and calmly left the driver's seat to go into the back and make himself a cup of coffee. Not surprisingly the Winnie left the freeway, crashed and overturned. Mr. Grazinski sued Winnebago for not advising him in the handbook that he couldn't actually do this. He was awarded \$1,750,000 plus a new Winnie." Winnebago supposedly changed their handbooks after this case.

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Legal Needs in Spain

Charles Pugh summarises the findings of a recent survey



For the sake of simplicity, this report will generally follow the format of the original questionnaire which was sent out to selected firms in November 2004, and with additional material generated during interviews carried out in June 2005.

Question 1. Please indicate how much work you do on behalf of British clients in the following areas (on a scale of 1 to 10);

This question asked respondents to consider eight different areas of law, and to rank them in order of importance. Below I have taken the opportunity to highlight some points that might be of particular interest:

Criminal law

Where British citizens are concerned this seems to fall into three broad categories:

- Traffic offences (such as drink-driving)
- Weekend drunken violence
- Fraud (for example receiving payment for installing security doors, and then disappearing with the money, but without having done the work)

In these second two instances very often both the perpetrator and the victim are British.

Employment law, Contract law

Only one firm that responded to the questionnaire described themselves as having a "specialist" employment department. On the whole people do not regard this as particularly a growth area with regard to British clients. Those British who come to live and work in Spain seem to want to set up their own businesses (rather than work as employees for others). Their businesses tend to be small (often associated with the building trade) and therefore not significant employers. The majority of contract work carried out on behalf of British clients seems to involve recovery of debt, most commonly within the building trade.

Inheritance, Wills, Probate

These areas of law are dealt with more fully later in this report (see especially questions 6 and 7). They are of particular interest because they nearly always require some form of collaboration with an English lawyer.

Personal Injury

Slippers and trippers – it is unusual in Spain for citizens

to take a public authority or shop to court for compensation. British clients will often ask their Spanish lawyers to do this kind of work (it seems it is far more common in the UK), but it is a long, expensive and generally fruitless process, which in any case has a fairly prohibitive limitation period of six months (particularly a problem where the client is a tourist rather than a resident).

Residency, Buying and Selling Property, Building and Planning (including LRAU)

This is generally dealt with below in question 2, but I want to list some comments here that were made on the subject of planning, not the least of which is that there are an estimated 42,000 illegally built homes on the Spanish costas. A large number of problems are being generated by the controversial LRAU, which is currently before the Valencia Parliament, although few respondents seem to expect that any changes to the law will actually occur. A number of law firms are also dealing with a significant quantity of cases involving unscrupulous developers who have built and sold properties for which no planning permission exists. In one recent case the Mayor of Elche demolished 14 new houses that had been built illegally on "rustic" zoned land.

Question 2. With reference to the above fields, does the foreign citizenship of your clients complicate their cases?

A number of respondents mentioned that they felt this question had not been well phrased. There are rarely any problems associated directly with nationality because everything is covered by European citizenship. The general consensus seemed to be that it was not the foreign citizenship of clients that caused problems, so much as their lack of knowledge regarding the differences between Spanish law and British law, and between Spanish culture and British culture.

Often British citizens only come to Spanish lawyers after a problem has already arisen. Estimates vary but it seems fair to suggest that up to 50% of British citizens on the Costa Blanca buy property without seeking any independent legal advice.

Typical mistakes that British citizens make, which can lead to serious consequences for the sale or purchase of property, include:

- Neglecting to apply for an NIE number.
- Neglecting to apply for "resident" status.
- Incompetently drawn up contracts for the purchase of property.
- Failing to make a Spanish will to cover any property, and ensuring that this new will does not override any will(s) already existing in England.
- Not checking through independent lawyers that a property has the correct planning permission and building licences. A number of respondents stressed the importance of getting an independent lawyer to do this work. This is not always obvious to British buyers of Spanish property because so many other people are willing to do the work, often at cheaper rates, including the promoter, the agent, the "gestor", the assessor, none of whom are legally qualified or even necessarily independent. Indeed, promoters and estate agents often discourage buyers from going to lawyers when buying properties, even though neither has any obligation to defend the purchaser's interests.
- *Dinero B* – the (strictly-speaking illegal) custom where the seller of a property asks the buyer to pay something like 15-25% of the asking price in cash. Something that can cause British buyers problems. One solution is for a Spanish lawyer to draw up a private contract ensuring that the seller cannot withdraw from the sale if the British buyer refuses to pay the *dinero B*.

A number of respondents wanted to make clear that all these problems can be easily avoided if purchasers take independent legal advice. Indeed, many respondents were exasperated by the number of occasions on which British citizens had come to them after it was already too late; that is to say, at the point at which a legal formality becomes a legal nightmare.

Also, a number of British expatriates do not seem to realise either that their English accountants are not necessarily ideally positioned to look after their interests in Spain, nor that – unlike in Britain – Spanish lawyers can do this work on behalf of their clients. In fact, in this instance Spanish firms have an advantage over British firms in that they can offer a more fully integrated service to customers because they are able to offer financial services, including business accounts, tax advice and investment advice, which in Britain are all services provided by accountants. There are a number of Spanish tax laws applicable to non-resident persons, companies, and British residents.

Perhaps strangely, no one really felt that language or translation was a problem. As one respondent put it, "translation involves no problems. It is much cheaper here than in the UK and we have a list of specialist interpreters who are relatively cheap."

Question 3. How do British clients find you (please tick one or more): a) Through expatriate community groups, b) Advertising, c) British Consulate, d) Walk in, e) Other (please specify).

There were a number of different responses to this question. The most commonly mentioned are listed below:

- Word of mouth was easily the most common response. "The English bush telegraph" (as one respondent described it) seems to operate very effectively.
- Recommendations from estate agents, building companies and developers.
- Recommendations from other lawyers, both in Spain and in Britain. It is something that will be discussed in more detail later, but a common reason cited for wanting to develop relationships with British law firms is the opportunity this represents for developing new business.
- The British Consulate list of recommended law firms.
- As a result of advertising (discussed in more detail in Question 4).

Question 4. Do you market your services to the UK population? If so, how?

Nearly all respondents agreed that being on the British Consulate list of recommended firms was very important in attracting British clients. Above and beyond this there was a very wide variety of responses. A number of respondents do not actively market their services at all to the UK population. This quote is perhaps typical of this attitude:

"We do not do any kind of advertising. We rely solely on word of mouth recommendation, together with being on the list of British Consulate recommended firms."

At the other end of the scale, there are a number of firms which are very active in their marketing efforts. Again, the following quote is typical of this approach:

"We advertise at exhibitions, including property exhibitions in the UK. We are also members of the Spanish Chamber of Commerce in the UK, and we advertise in a variety of magazines, such as *Homeoverseas*."

The *Costa Blanca News* (an English language newspaper) also plays a large part in the marketing strategy of many firms, with a number of firms contributing editorials and articles as well as simply placing advertisements. English language websites and brochures were also mentioned as part of marketing strategies specifically tailored towards a British audience.

Question 5. Do you have any measures in place to deal with future growth in demand?

Of everyone who responded to the questionnaire, roughly half said that they did not feel any need to put measures in place to deal with any future growth in demand, while the other half have obviously put in place clearly thought out strategies to deal with future growth. Interestingly, these answers correspond to those given for the above question; that is to say the same firms who do not advertise have no measures in place to deal with future demand, and *vice versa*. Unfortunately it is impossible to know (based on the questions we asked in the questionnaire), but it is tempting to assume that the difference here may be between firms who do some work for British clients, but do not rely on it, and firms who do a significant proportion, or even the bulk of their work on behalf of British clients.

Certainly, given the number of British expatriates living in the region, (the official estimate is 170,000, which one respondent at least regards as a huge underestimate) it seems entirely possible for a law firm to exist working exclusively on behalf of foreign clients. Indeed one firm does so, explaining that as much as 95% of its total work is carried out on behalf of English clients. It seems likely that this trend is going to continue and, indeed, expand out of the coastal towns with which the British are traditionally associated. One firm explained that they have recently begun receiving regular enquiries from Valencia city, Castellion and even inland Spain.

Of the firms that do have measures in place to deal with future growth in demand, the following is a list of strategies that have already been initiated, or are planned for the near future:

- Increasing the number of offices in the region.
- Increasing the number of fields of law practiced (with a particular consideration given to the needs of British clients).
- Further developing relationships with British lawyers and law firms.
- Developing the use of information technology.
- Creating websites and marketing material in English.
- Recruiting staff with the development of a service more relevant and useful to British clients specifically in mind.
- Staying informed of changes in the law (both in England and in Spain), which are likely to affect the legal position of British clients. One such is the new law on homosexual marriage which is about to come into force in Spain, and will affect not just marriage, but also adoption, inheritance, tax etc.

Question 6. Would it be useful for you to form closer working relationships with British Lawyers? Why?

The responses to the questionnaire make clear that there are certain legal areas where generically there is likely to be an overlap between Spanish and English law. This happens most regularly when dealing with issues such as divorce, wills and probate, and taxation. If a British client has interests in both Spain and Britain then in these instances it would be almost impossible for either a Spanish lawyer or an English lawyer to deal with the work alone. Certainly, all respondents who do legal work on behalf of British clients in these areas already have in place some form of collaborative relationship with a British lawyer or lawyers. As one respondent makes clear:

“Above all, collaboration helps me in matters concerning wills and inheritance; and in procedural matters in relation to Powers of Attorney and the obtaining of necessary documentation for an English person to use in Spain.”

A number of respondents, therefore, already have informal contacts with British lawyers. There seems to be some desire, however, to strengthen these ties and perhaps develop more formal relationships in the future. Certainly, there does seem to be some difference of opinion as to exactly what form of

collaboration would be most beneficial as the following makes clear.

- Different approaches to the notion of collaboration:
- Collaboration in which an English lawyer would spend at least some time in-house with the Spanish firm.
 - An agreement to give mutual recommendation and an agreement to exchange information.
 - Collaboration where and when necessary; one opinion is that straightforward transactions in Spain do not require the involvement of English lawyers, but where niche clients are concerned a collaboration is often necessary (distribution agreements for example, or franchising). In these instances the collaboration would most likely be between the client’s existing British lawyer and a newly appointed Spanish lawyer (ie a collaboration that does not make use of any pre-existing arrangement).

The following quote makes clear how one collaboration works in practice:

“We already collaborate and the benefits are manifest in that the firms in England are responsible for receiving the client, explaining procedures, obtaining relevant documentation, giving information about legal expenses and also preparing and getting signed in the presence of a British Notary Public, necessary documents such as Powers of Attorney. We then receive the instructions from the English lawyers with a significant amount of the necessary work done. This does not result in anything cheaper for the client but probably gives more satisfaction because the client has the reassurance of dealing with an English lawyer, yet the security that his or her Spanish affairs are being dealt with by a Spanish lawyer.”

The questionnaire responses revealed a wide variety of benefits already resulting from existing collaborations with English law firms. These are listed below.

- Collaboration helps us to:
- Improve our knowledge of English law.
 - Better evaluate certain client problems.
 - Offer a more integrated service.
 - Obtain necessary documents from the UK (Certificates of Applicable Law, Powers of Attorney etc.).
 - Assist clients (Spanish as well as British) who have legal needs in the UK.
 - Keep up to date with changes and developments in British law.
 - Provide a complete service, particularly in matters concerning wills and inheritance (many respondents felt that, in these two instances, collaboration was not just desirable but actually necessary).

There were also some less tangible benefits suggested. Most respondents agreed, for example, that competition for British clients was increasing and that a recommendation from, or working relationship with, a reputable English law firm was a good way of ensuring that, while the quantity of work done increases, the quality remains high or improves where possible.

The advantages mentioned also included a number that were not directly concerned with providing an improved service to British clients. Collaboration, for example, was acknowledged as a good way of

generating new business, as well as simply being a “professionally enriching” experience (in the words of one respondent).

NB – The Right of Establishment

It seems that no English firm in the region has exercised its Right of Establishment, although a number of German firms have. Foreign firms who have attempted to exercise a Right to Establishment do not seem to enjoy a particularly good reputation and, occasionally, are assumed to be law firms that have failed in their own countries. The general consensus seems to be that the only practical way to approach a legal problem in Spain on behalf of a foreign national is by way of an association with a Spanish firm; any other approach is bound to flounder for lack of local knowledge.

Question 7. Would it be useful for you to have greater knowledge of British law? If yes; Which areas of law would you like to know more about? Would you be interested in attending seminars on these subjects?

The responses to this question were overwhelmingly positive. As one respondent wrote: “We would like to increase our understanding in the areas in which English law is in conflict with Spanish law, such as nationality, ancillary relief in divorce matters and inheritance law.”

The following four areas of law were cited by nearly every respondent as areas in which people would like to improve their knowledge of British law:

- Property law.
- Inheritance and wills.
- Tax law.
- Divorce law.

The following two areas of law were mentioned at least once as areas in which people would like to improve their knowledge of British law:

- Mercantile law.
- Town and country planning.

Question 8. Is the nature of the work you do on behalf of UK clients changing? If so, how?

Perhaps half of all respondents answered “no” or “no change” to this question and, judging from the responses as a whole, it would probably be correct to say that the bulk of legal work done on behalf of UK clients is still the same as ever it was – the purchase and sale of property. As one respondent put it:

“In one sense there is no change. The typical British client wishes us to do his property purchase and to ensure that his title (*escritura*) is properly registered (in the *Registro de la Propiedad*) and that there is payment of the proper taxes in respect of the purchase.”

All respondents, however, agree that the volume of work being done on behalf of UK clients has risen, which has brought about its own changes. The increase in clients has led to a larger number of law firms eager to do the work (the evidence is anecdotal but it certainly seems that more and more law firms are targeting the British community as a significant source of work) and there are, of course, a number of consequences generated by these higher levels of competition:

“The increase in clients has called for more specialisation, and demands more efficiency from all the intermediaries such as lawyers, notaries public, registrars, public officials and so on.”

That there has been a rise in the number of UK clients is, of course, mostly because there are simply more British citizens living in the region now. It seems, however, that part of the increase, at least, is the result of a shift in attitude. As one respondent noted: “previously the British relied on estate agents and friends with the result that they ran into serious problems. Now the British citizen in Spain goes to an independent lawyer more frequently, which is an important step forward.”

Perhaps half of all respondents felt that there had been a change in the work being done on behalf of British clients. This seems to be due principally to the fact that the expatriates settling into the area no longer fall into just one category. Whereas 15 years ago British expatriates were almost exclusively retirees, now there seem to be a large number of younger immigrants who can be divided into a number of different categories and who require a wider variety of legal services.

Total Transfer

This category includes British citizens who have sold up everything in England and have moved to Spain, often with young families, with the intention of either seeking employment, starting their own businesses or opening a branch of an existing English office. The legal needs of British citizens who fall into this category might include social security, employment law, family law, tax law criminal law and insurance. This trend seems to have been growing more and more noticeable since about 2001 and it seems (on anecdotal evidence) that clients of this type tend to be better informed and more demanding.

Second Generation – Living in Britain

Older expatriates who retired to Spain in the 70s and 80s are now giving way to the next generation who are inheriting the properties leading to a large increase in the amount of inheritance and tax work being done.

Second Generation – Living in Spain

There also appears to be a second generation of British citizens resident in Spain; the children of those who came to Spain in the late 1970s. They live and work in Spain and often marry other expatriate British, creating problems of private international law if they separate and divorce with consequences for issues such as custody and the distribution of matrimonial assets.

Knowledge Workers

So-called because they work mostly from home and return intermittently to the UK. Developments in technology have meant that they are able to live in Spain though essentially their jobs still remain in England.

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Saying it Right

Dr Frank G Dawson & Stella Styllis

*advocate clear and concise drafting of
legal documents*



Spanish and other Civil Law lawyers are increasingly required to draft commercial agreements and other documents in English for various reasons:

- The client is English,
- Even if neither party is English, their parent companies may insist as a matter of policy that contracts to which their foreign subsidiaries are parties be in English,
- English is the only language that the parties have in common,
- English is called for by the nature of the transaction, as in loan agreements syndicated among several international banks, or
- In the case of a financing arrangement potential investors may be English.

Whatever the reason - either one of the above or others - perhaps the first step a Civil Law trained lawyer would take would be to locate an English language precedent or model for the agreement or document to be drafted. Two problems then arise. First, the precedent must usually be modified to reflect the new fact situation. Second, the Civil Law lawyer would be foolhardy to assume that a document prepared by an English or US lawyer is well-drafted. This article addresses the latter point.

For centuries English as utilised by lawyers in contracts and other documents has been justly described as obscure, pompous, pedantic, unrelated to everyday usage of the language and confusing to both clients and judges. Early critics include Jonathan Swift, Jeremy Bentham, Thomas Jefferson and Charles Dickens. They have been joined by more recent commentators such as the late Lord Denning who famously remarked that in their writing "*lawyers try to cover every contingency but in so doing they get lost in obscurity*".¹

A few of the frequently encountered basic shortcomings in documents produced by Common Law lawyers and of which their Civil Law colleagues should be aware are:

- Excessively long sentences and paragraphs which cannot but confound readers. Monster sentences the authors have seen contained at least 257 words! A good rule of thumb would be to try to keep sentences to an average of 25-30 words and never let paragraphs occupy more than a third of a page.
- An abundance of archaic words and expressions some of which are long past their sell-by dates. The usual suspects include *witnesseth, whereas, aforesaid, party of*

the first part, said, hereinafter, hereby aforementioned, hereinafter referred to. The list is vast.

- Needless definitions which add nothing but clutter to an agreement such as "*Contract*" means agreement, "*Purchaser's solicitors*" means ABC law firm.
- Misuse of verbs of obligation, such as using shall to express futurity or a condition instead of to create an obligation: *This contract shall be governed by the law of England should be This contract is governed by the law of England.* (or, better still - and shorter - *is governed by English law*).
- Strings of synonyms where one word will do, as in *This contract is not to be varied, modified or amended without the written consent of both parties.* Surely amended will suffice. Other common phrases that can be reduced to one word include *due and payable*, and *null and void*.
- Reliance upon the passive voice - almost instinctive among lawyers - so that sentences are longer than they would have been had the active voice been used. For example, *The legal opinions shall be delivered by the parties at the closing* is longer by two words than *The parties shall deliver the legal opinions at the closing.* Even minor word reductions add up quickly in a lengthy contract. Also, one doesn't have to wait until the end of the sentence to discover the identity of the actors - that is, *the parties*. The use of the active voice produces a trimmer document more likely to appeal to (and be read by!) the intended audience.
- The use of vague, often subjective terms without attempting to give them substantive content or definition, as in *best efforts, reasonable efforts, material adverse change, without limiting the generality of the foregoing* or the oft-used *forthwith*.
- Loading a document with bloated, pompous phrases such as *prior to, in the event that, pursuant to the terms of this contract* instead of *before, if and under this contract*.

There are many other linguistic pitfalls which Common Law drafters often fail to avoid, such as structural defects, ambiguity, incorrect punctuation, buried verbs, legalese, jargon and, of course, grammatical mistakes arising from failure to observe basic rules - e.g. a complete sentence must have a subject and a verb.

The abundance of books and articles published in the UK and abroad on correct legal drafting demonstrate the concern

of some members of the legal profession in Common Law countries over the generally low standards of written legal English in their own nations. Unfortunately, many Common Law lawyers do not believe their written efforts could be improved or that it is worth the time to try to do so. Their complacency is misplaced. As the author of one commentary observed, *Lawyers have two common failings. One is that they do not write well, and the other is that think they do.*²

Our concerns are not simply over style. Poorly drafted documents are accidents waiting to happen because they:

- irritate clients, other lawyers, judges and arbitrators who must read and reread lengthy documents in an attempt to ascertain their meaning;
- create misunderstandings between parties which may escalate into litigation;
- can lose cases if one's opponents pleadings and documents are clearer and more understandable;
- cost law firms - and clients - money when badly drafted documents need to be revised; and
- foster disrespect for or indifference to the law.

Most importantly, poor communication skills are bad for business. Arthur Hoole, president of the Law Society of England and Wales, warned twenty years ago that if *men and women are to turn to us first for advice, we shall have to learn to give them that advice in language they can understand. Few things have done more to drive people from our doors than our inability both in documents and in letters and speech to express ourselves in clear simple English.*³ President Hoole's sensible admonition clearly still has not produced the desired effect and so the Law Society in early 2003 launched a Client Care Charter advising solicitors

against the use of complex legal jargon when communicating with clients.⁴

With the increasing worldwide use of English in legal documents, Common Law lawyers risk exporting their bad drafting habits abroad. Generally no harm is done unless a dispute over interpretation or performance arises. Nevertheless, Civil Law lawyers should be aware of the drafting errors to which their Common Law colleagues are all too prone, and therefore not adopt precedents uncritically even where they originate from prominent London or New York law firms.

Notes

- 1 Quoted in Peter Butt and Richard Castle, *Modern Legal Drafting* (Cambridge: Cambridge University Press, 2001) p.64.
- 2 Carl Felsenfeld, 'The Plain English Movement in the United States' *Canadian Business Law Journal* p. 413 (1981-82).
- 3 Arthur Hoole, 'Meeting the Challenge', 81(4) *Law Society's Gazette* 2814, 2817, (18 Oct 1984).
- 4 'Firms told to Ditch the Jargon' 100(1), *Law Society's Gazette* 3 (20 March 2003).

The authors, who have extensive experience in practice, provide courses in legal English skills and language for Common and Civil Law lawyers in this country and abroad through AXIA TRAINING LIMITED, 27 Old Gloucester Street, London WC1N 3XX, Tel: +44(0)207 681 0043 Fax: +44(0)207 419 1952 (www.axiatraining.com), e-mail: sts@axiatraining.com



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Please return, together with a cheque made payable to the British Spanish Law Association, to
BSLA, 1 New Square, Lincoln's Inn, London WC2A 3SA.

House of Lords Reception



The splendid River Room at the House of Lords was the venue for a joint event with our German colleagues.

Good food and wine and spectacular views made a very pleasant evening, according to the "thank-you" e-mails received by the association from its members and their guests.





BSLA LECTURES 2006

Spanish Matrimonial Law

Thursday 6 April from 6pm to 7.30pm followed by wine and tapas

Chairs: Lady Helen Ward of "Manches LLP" and

Alberto Perez Cedillo of "Alberto Perez Cedillo Spanish Lawyers and Solicitors"

Speakers: **Elena Zarraluqui**, Spanish lawyer of "Zarraluqui Abogados", Madrid

James Stewart and **Richard Sax**, solicitors of "Manches LLP", London.

Venue: Manches LLP, Aldwych House, 81 Aldwych, London WC2B 4RP

For tickets please contact C. Louca (James Stewart's PA)

at 0207 753 7741 E-mail: chryssie.louca@manches.com

Spanish Criminal Law: Rozinante or Red Rum? Would Bill Sykes prefer to be tried in Spain?

Thursday 6 April from 6pm to 7pm

Speaker: John D.S.A. Traversi, barrister at Chambers of Anthony Berry Q.C, London

Venue: Irwin Mitchell Solicitors, 150 Holborn, London EC1N 2NS

For tickets please contact Carmen Calvo-Couto at 0207 421 4703

E-mail: Carmen.Calvo-Couto@IrwinMitchell.com

The Enforcements of Judgments and Recoverability of Costs in Spain – A Practical Overview

Thursday 4 May from 6pm to 7 pm

Speaker: **Casilda Cortes-Puya**, solicitor and Spanish lawyer

of 'Valentin Cortes Abogados', Madrid

Venue: Irwin Mitchell Solicitors, 150 Holborn, London EC1N 2NS

For tickets please contact Carmen Calvo-Couto at 0207 421 4703

E-mail: Carmen.Calvo-Couto@IrwinMitchell.com

Spanish Probate

Thursday 11 May from 6pm to 7pm

Speaker: **Lorenzo Ruiz Barrero**, solicitor and Spanish lawyer

of "Alberto Perez Cedillo Spanish lawyers and Solicitors", London.

Venue: Thomas More Chambers, 7 Lincoln's Inn Fields, WC2A 3BP

For tickets please contact Macarena Canada at 020 3077 0000 E-mail: cedillo@apcedillo.com

Tickets are priced at £10 [members] and £15 [non-members].

All lectures are CPD accredited both by the Law Society and the Bar Council.

Please make all cheques out to "BSLA"

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