

Bulletin

A word from the Chairman

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Welcome to our third Bulletin which contains exciting news about our Annual General Meeting and Seminar at the Law Society, Chancery Lane on 31 January.

This event will provide an excellent opportunity to meet fellow BSLA members as well as colleagues from other bilateral associations who will also be attending.

Our AGM will take place in the morning and will be followed by lunch at Lincoln's Inn. If you would like to attend the lunch please complete the booking form below or e-mail cedillo@fscornik.co.uk.

Lunch will be followed by a tour around these beautiful chambers, returning to the Law Society in time to attend the stimulating sessions presented by an impressive list of high profile speakers covering a wide range of current legal issues, full details of which you will find below.

The sessions are scheduled to finish at 6.00pm and at 6.30pm we will hold a

Spanish Wine Reception.

BSLA members may attend both the Seminar and Reception free of charge.

The BSLA's first year has been a highly successful one with a membership nearing 200. I hope that we have managed to fulfil your expectations and that we will continue to be of service to you.

Please find enclosed herewith a direct debit form so that you can renew your membership subscription, which will expire after the Annual General Meeting.

I look forward to seeing you on 31 January.

Alberto Pérez Cedillo
Fernando Scornik Gerstein
Spanish Lawyers



BSLA ANNUAL GENERAL MEETING & SEMINAR

The Law Society, 113 Chancery Lane, London, WC2A 1PL 31 January 2003

PROGRAMME

1115-1200	Registration and Refreshments
1200-1210	Alberto Pérez Cedillo, Chairman – Welcome and Introduction
1210-1300	Annual General Meeting
1300-1445	Lunch at Lincoln's Inn followed by optional tour of the Inn
1445-1530	Gorka Espiau, journalist and spokesman of Elkarri "The social movement dialogue and accord in the Basque Country"
1530-1615	Paul Stookes, Chief Executive, Environmental Law Foundation "Costing the earth in the light of the <i>Prestige</i> "
1615-1630	Refreshments
1630-1715	Christopher Hutchings, Legal Adviser, <i>Hello</i> "Rights of privacy in Britain and Spain – The Michael Douglas/Catherine Zeta-Jones action"
1715-1800	Peter Caruana QC, Chief Minister of Gibraltar "Gibraltar today"
1800-	Spanish Wine Reception

CPD CREDITED

We wish to inform you that on

13 JANUARY 2003

the BSLA will be moving to

HOLBORN HALL
193-197 HIGH HOLBORN
LONDON WC1V 7BD

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BSLA ANNUAL GENERAL MEETING – LUNCH AT LINCOLN'S INN

I wish to attend the Lunch at Lincoln's Inn, followed by a guided tour of the Inn, on 31 January 2003 at 1.00pm

Name Telephone

Bilateral Fax

Address

E-mail

Please return together with a cheque for £40, payable to the British Spanish Law Association, to BSLA, Holborn Hall, 193-197 High Holborn, London, WC1V 7BD. Upon receipt of your cheque we will send you an invitation to the Lunch. For more details please contact the BSLA at 0207 7404 8400 or cedillo@fscornik.co.uk.

In the wake of Enron

Javier Sans Roig discusses the implications of recent high profile corporate scandals



There is no doubt that recent events in the financial world have had a deep effect on the services some professionals provide to public corporations, as well as on the way the professions themselves should be organised.

One of the major accounting firms has disappeared – doubtless through its own wrongdoings, but carrying many innocent victims with it – the ethical rules governing lawyers active in securities law in the US have changed dramatically, and the pressure towards new regulations, especially for large, “global” law firms, has increased tenfold.

There is little sympathy for arrogance, in particular when this attitude masks either plain dishonesty, or, at best, blind acceptance of an unacceptable services philosophy. There should, nonetheless, be some concern about whether the factors behind the demise of Arthur Andersen are an exception or represent a deeper trend.

As the Preliminary Report of the American Bar Association Task Force on Corporate Responsibility (15 July 2002) sums up, the 1990s can be seen as times when a mixture of elements created an atmosphere beneficial for – if not directly related to – a number of outstanding cases of corporate responsibility arising from three main factors:

- Continuous and spectacular rises in the Stock Exchange, leading investors to expect double digit annual returns as a matter of course, thus compelling corporate executives to meet unrealistic growth patterns.
- Stock-based executives’ compensation creating powerful incentives to meet these expectations, facing directors with increased pressure to offer attractive benefit packages in an ever-more competitive marketplace.
- Outside professionals hired by the corporations – in particular, lawyers and accountants – facing increased pressure from consolidation and global competition in their own fields, forcing them to seek new ways to meet clients’ demands.

This latter factor only deepened the already well-established trend in the US and the UK (less so in continental Europe) towards large, professionally-managed law and accounting firms, in which profit considerations have very quickly overcome other aims which, increasingly, have been seen as traditional or even “outdated”.

In particular, rising costs have led auditing firms to use low-margin activities (such as mere auditing) as a mere basis to introduce to the client new, high-margin services under the pretext of the “one-stop shop”. The proportion of audit-based *versus* consulting-based income for Andersen from Enron (markedly in favour of consulting) is a clear example. The fact that, in Spain, Price Waterhouse is the biggest law firm may be another.

There is no doubt that the legal profession has undergone deep changes and more will come, affecting everyone from the single practitioner or small law firm where budgets are unimportant and clients pay, ultimately, what they are asked to pay and where waste of resources is largely irrelevant, to the highly streamlined office where secretarial work has all but disappeared, information is immediately available at the fingertips and a definite budget for each particular job is a matter of course.

Highly sophisticated technologies for the dissemination and retrieval of information, quality control, unification and streamlining of working practices, to say nothing of billing procedures, unified marketing and advertising, have allowed law firms to grow beyond what was thought healthy or even possible a few years ago.

To manage, in an efficient manner, all the available resources much needed in the present environment, lawyers, and certainly law firms, have to bear in mind questions of efficiency, margins and returns which were formerly the currency of industry and commerce. In other words, disciplines and habits seen in the past as exclusive to businessmen have perforce been adopted by practitioners to succeed in this change. These were necessary improvements, and waste and inefficiency (the inseparable companions of complacency) have largely been eradicated, though at the cost, perhaps, of a more stressful life.

But is this the only cost?

Concerns about profitability are very reasonable, but the serious mistake is to convert a service-oriented organisation into a profit-oriented one.

There is considerable risk for the profession – and for society at large – when profit considerations override “traditional” values such as respect for the Law and placing the client’s best interests above one’s own. Society, quite understandably, reacts.

An example is the Sarbanes-Oxley Act in the US, enacted on 30 July 2002, which requires lawyers advising publicly quoted companies to report credible evidence of material violation of the securities laws or of the breach of fiduciary duties by corporate officers, to a higher authority in the corporate ladder up to, if necessary, Board level, if the relevant officers have failed to take appropriate action. As Roger C. Cramton put it in an article in the November issue of *The Business Lawyer*, the practical problem here is that of annoying the person within the organisation who has the power to hire and fire the lawyer, since that individual may be part of the problem.

Symptomatically enough, Cramton’s otherwise well-Continued on following page

Child Abduction Guide Launched

Anne-Marie Hutchinson reports on a new initiative to halt child abduction



On 10 September 2002 the Reunite Child Abduction Prevention Guide for Spain was launched at the European Parliament in Brussels.

The guide, which is available in Spanish and English, follows the format and previous initiatives of Reunite in the production of prevention packs for England and Wales, Scotland and Northern Ireland. Prevention packs for other European jurisdictions are in the pipeline.

The packs outline the Spanish Domestic law relating to children and families and, in particular, gives practical advice on the steps that a parent or carer should take in order to prevent the wrongful removal of children from the Spanish jurisdiction.

The pack is aimed at parents, lawyers and other professionals working in the field of parental child abduction.

The guide was prepared by Christopher Lee, a founder member of the BSLA, and a long-time supporter of Reunite and its work.

The launch took place at the European Forum on International Parental Child Abduction, which serves the European Parliamentary All-Party Group on child abduction and related issues. The gathering was chaired by Ms Mary

Banotti MEP, the European Parliament's mediator for trans-nationally abducted children.

Reunite will be working with Christopher Lee to ensure distribution of the prevention pack within Spain. Denise Carter OBE, Director of the Reunite International Child Abduction Centre, welcomed the initiative which has come to fruition after many months' work. Prevention of child abduction is essential if the alarming increase in cases is to be halted. Children are wrongly removed from Spain to all parts of the world and there is significant traffic between the United Kingdom and Spain.

The European Legal Working Group has been formed to support the work of the European Network on Child Abduction. The group, chaired by myself, is served by Reunite and provides legal expertise and research support to the MEP Group. Christopher Lee is Spain's representative on the group.

Further information about the guides can be obtained from Reunite International Child Abduction Centre, 6 De Montfort Street, Leicester, LE1 7GA. Tel: 0116 255 5345, fax: 0116 255 6370, e-mail: reunite@dircon.co.uk, website: www.reunite.org.

Enron

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documented and extremely interesting article does not seem to react strongly over the problem of breaching the duty of lawyers' confidentiality, perhaps because it takes for granted that the implicit consideration behind the Sarbanes-Oxley Act lies in the distinction between "client" and "fee paying person".

In effect, if the ultimate beneficiaries ("clients") of the corporate lawyer's services are the investors in the Stock Exchange, it follows that the corporation is not his client in certain areas, and the lawyer's duty is towards the public at large who may (or may not!) invest in the stock of the corporation. In other words, the lawyer's duty is towards the abstract concept of fairness in capital markets. Not for the first, or, one may venture, the last time, the legal profession is seen as warranting some fundamental piece of the social fabric.

As Cramton quite properly mentions, this particular duty entails some element of personal and financial risk for the corporate lawyer, and here again the Law expects lawyers or law firms to be above individual or collective profit considerations. One cannot but applaud such an attitude, even though it does not efface the antagonism in social

trends: on one hand the lawyer is encouraged, even implicitly expected, to behave as a businessman, and on the other he is required to place his particularly remote client's interests (ie eventual investors in the corporate stock) before his own (ie continuing good relations with the person who appoints him). This is somewhat akin to asking a company to publicise the fact that one of its customers is increasing its profits by diluting the raw material it supplies.

Perhaps the contradiction lies in the diverse origin of what were initially two different ways of life: the merchant (a distinct, minority class until the Industrial Revolution) and the professional. The former was, and still is, expected to pursue greater profit, with the Law being the only restraint, while the latter is required to abide by ethical standards which can be summarised as putting his client's interests above his own.

An interesting challenge is to find out the historical origin of this dual standard, but this would by far exceed the purpose of this article. For the sake of controversy, let me say that some see the origin of the professional attitude in what is today the Arab world, whilst the "merchant" attitude would be attributed to what is today the Anglo-Saxon one.

Fly to the Canaries

Pablo Boyer Bergese outlines the tax advantages available in the Canary Islands Special Zone



Spain offers one of the best tax jurisdictions in the world under the terms of the Canary Islands Special Zone (*La Zona Especial Canaria – ZEC*).

The ZEC is a low taxation plan created within the framework of the Canary Islands Economic and Fiscal Regime (REF) with the intention of encouraging the economic and social development of the Islands. The ZEC regime was authorised by the European Commission in January 2000 and introduced into the Spanish regulations by the Spanish Government.

At present, many national and foreign companies have developed their business ideas in ZEC territory. However, many entrepreneurs are still not aware of the many benefits afforded by the ZEC: low taxation, excellent facilities, large infrastructures, etc.

We should not forget that the Canary Islands offer year-round mild temperatures and an incomparable atmosphere to set up a company. Excellent beaches, food, people and much else besides, makes them an attractive location.

However, the information provided below cannot be taken alone as a sufficient basis upon which to make any specific decision regarding business operations in the ZEC. A particular study will be necessary for each case.

The main aspects of the rules governing the setting-up a ZEC entity are as follows:

Initially, the ZEC will be in force until 31 December 2008, although an extension could be approved subject to the approval of the European Commission. The authorisation to register a company in the official ZEC Register (ROEZEC) will currently end in December 2006.

Those companies wishing to carry out industrial activities, or render services (as listed in the index of permitted activities) may set up a ZEC entity. A company may be established over the whole Canary Islands territory within the following conditions:

- companies whose corporate purpose consists of rendering services may be established anywhere within the Canary Islands territory;

- companies whose corporate purpose is the production, transformation, handling or commercialisation of goods should be established only within certain areas.

Generally, a Spanish company could be authorised as a ZEC entity if it fulfils the following requirements:

- It must be a newly incorporated company with domicile and effective office within the ZEC territory;
- One of the directors must be resident in the Canary Islands;

- It must make an investment of at least €100,000 in fixed assets within the first two years of its authorisation;

- It must create five jobs within six months of the date it receives the authorisation to establish itself as a ZEC entity and maintain an average of this number of workers during the time it is registered as a ZEC company.

Depending on the above, ZEC entities will be subject to Corporation Tax at reduced rates ranging from 1% to 5% according to:

- Net job creation;

- Date of registration in the official ZEC Register;

- Whether the activity is new or pre-existing;

- Whether the activity is widely established in the Canary Islands territory.

Considering that the normal applicable Corporation Tax rate in Spain is 35%, with a reduced tax rate of 30% on small and medium companies, and with similar taxation in most European countries, the Canary Islands Special Zone is one of the lowest tax systems available in Europe. Only a few jurisdictions (Switzerland and Holland, for example) are comparable.

In addition, the applicable law states that dividends and capital gains will not be subject to withholding tax provided the parent company is not resident in a tax haven country and there is a minimum participation of 25% in the Spanish subsidiary (ZEC entity), and such participation is held for a minimum period of one year, irrespective of the terms of the Double Tax Treaty between Spain and the country where the parent company is located.

This might apply in the case of an international company which wishes to invest directly in the Canary Islands and/or perform an activity in both Spain and another country. In addition to this, the Parent-Subsidiary European Directive also applies to investments which come from Europe.

Consequently, in my opinion it is well worth considering this opportunity to invest with low tax costs and I would encourage all entrepreneurs to do so. I will be pleased to provide any further information or deal with enquiries by e-mail at levygee2@infonegocio.com by phone on + 34 91 395 28 40.

Pablo Boyer Bergese MBA
Solicitor of England and Wales
Associated Lawyer, International Tax Department (Spain)
Levy Gee España/Numerica Group Plc

Accident at Work

Agustín Tornos reviews the criminal procedure following an industrial accident in Spain



An industrial accident in a place of work is defined as any bodily injury suffered by a worker on the occasion of, or as a consequence of, tasks effected under an employment contract, including all diseases, injuries and even death suffered because of, or on account of, work.

Regardless of the legal proceedings commenced in the event of an accident at work under labour or administrative jurisdiction, particular importance has recently been placed on the investigation and prosecution of such events under criminal jurisdiction, which has the initial effect of suspending any other proceedings until a final decision has been ruled.

In broad terms, it can be said that the 1995 Spanish Criminal Code allows the prosecution of accidents at work under different options:

- In the event of the worker's death, it could be a case of negligent homicide (Article 142, punishable by one to six years' imprisonment), or a negligent fault resulting in death (Article 621.2, punishable by a fine);
- In the event of the worker sustaining an injury, it could be a case of an injury crime (Article 152 and concordant articles, punishable by up to three years' imprisonment) or an injury fault (Article 621.1 and 3, punishable by a fine);
- In the event of an accident that only creates a situation of risk, this would be a case of a crime against the workers' safety (Articles 316 and 317, with penalties of up to three years' imprisonment).

Thus it is the final outcome of the accident that determines the criminal classification of the case in question. It should be stressed that the lower Spanish courts follow very different criteria in order to distinguish between a crime and a fault, and also, interestingly, in the accusation of guilty parties.

In this respect it should be noted that there is a clear tendency towards disproportionately extending the list of accused parties and civil liabilities in such a way that a normal case may include, as accused parties, the immediate superior or supervisor of the injured worker, the Human Resources Director, Head of Personnel or Safety & Hygiene responsible (where applicable), the General Manager, and, in some extreme cases, the Directors themselves.

A subsidiary liability may also be found against the companies and their respective insurance companies.

Finally, action might also be taken against the

companies with an indirect or peripheral participation (equipment manufacturers, temping agencies, contractors, sub-contractors, etc.)

Experience shows that the employer is accused almost automatically of criminal liability in all industrial accidents no matter how trivial or unforeseeable the accident may have been. In fact, in recent years the employer's position has changed from impunity to presumption of guilt.

This criminalising tendency has been fundamentally encouraged from two different angles. On one hand, by the media, stressing the idea that the weakest party (ie the worker) should be protected to the maximum, and on the other, by trade unions, who have made the issue of health and safety their day-to-day main concern.

This scenario obviously favours the arrangement of economic out-of-court agreements between the employer and the injured party's lawyer as soon as possible, particularly if there is adequate insurance cover. In this respect, it is essential to take at least the following points into consideration:

From the employer's point of view, the compensatory agreement must be necessarily bound to the withdrawal of any further action by the injured party, including the signature of specific statements declaring the innocence of the accused parties. If the agreement is made at an early point in the proceedings, the Attorney General's Office will almost always consent to the same, waiving any further action (although it does not actually have jurisdiction itself in the case of faults); and if it does not grant its consent or approval, the accusation is considerably weakened and normally bound to fail.

It is also essential to involve the insurance company in negotiations in order to obtain its consent and, therefore, its undertaking to pay. It should be noted that in Spain we have a fixed list of payments applicable to almost every injury (commonly known as *El Baremo*), so there is little room to discuss economic matters regarding this issues.

Finally, it should be mentioned that if negotiations fail, judicial resolutions tend to be relatively lenient and, under normal circumstances, never lead to the actual imprisonment of the convicted party, except in exceptional cases or if there is a previous criminal record.

Agustín Tornos
Senior Partner, Bufete Tornos

Going on the Defensive

Antonio Bravo explains how to prepare a defence in a Spanish court



When instituting proceedings or preparing a Defence it is necessary to take into consideration not only the pertinent legal arguments but also all the necessary formal requirements required by the procedures before the Courts.

One of the most important of these is, undoubtedly, the presenting of those documents that the parties consider necessary to obtain a favourable Judgment. It is important to point out that in Spain the parties are not free to present documentation at any phase during the proceedings but only at certain points.

The general rule is that all documents should be presented with the Writ or the Defence so that both parties have knowledge from the outset of all documents on which the counterpart will be basing its arguments. It is only in very exceptional cases that documents are accepted after that initial phase.

The object of this article is to clarify, which documents must be presented with the Writ and the Defence and which documents may be presented at a later date.

DOCUMENTS TO ADJOIN THE WRIT AND THE DEFENCE

These documents are the following:

1 Power of Attorney. In Spain, unlike many other European countries, the Lawyer is not the legal representative of the client before the Court. Such representation is entrusted to the Court Agents (*Procurador*), whose most important functions are:

- Formally representing the client.
- Receipt of judicial notices.
- Presentation of Writs prepared by the Lawyer.
- Attendance, in representation of the client, to all the steps of the procedure.

This coexistence of Lawyers and Court Agents involves a system where both professionals must act in unison in judicial procedures with the Lawyer as the director of the case, and the Court Agent as the legal representative of the client before the Court.

In order to allow the Court Agent to act on behalf of his client, it is imperative that he be empowered. This may be completed in two forms:

■ Public Deed issued before a Notary Public, in which the client allows one or more Court Agents to act on his behalf in a specific case or in various cases that may arise before a Spanish Court. The power must be as broad as possible in order to allow the Court Agent the freedom to act. It is essential to mention the right of

remedy such as appeal or *casacion* before the Supreme Court; in general the power includes all actions that may arise during the procedures.

In addition, the new Law on Civil Procedure (LEC), requires that a Public Deed must specifically empower the Court Agent to abandon an action, accept the claim of the other party or to renounce the procedure in the case of extra-judicial settlement (Article 414).

This Public Deed granted to the Court Agent must be adjoined to the Writ or the Defence. If not, the Court will grant the party a short period of time to produce it. The failure to remedy this omission will lead to the rejection of the Writ or Defence.

■ Representation conferred *apud acta*. This consists of the appearance of both client and Court Agent before the Secretary of the Court in order to confirm that the client entrusts the Court Agent with the right to represent him in all judicial procedures, including the special faculties mentioned in Article 414.

Representation *apud acta* must be conferred at the same time as the presentation of the first document to the Court or before the first procedure.

2 Documents on which the case will be based. All documents judged pertinent and beneficial for the rendering of the final judgement, must be adjoined to the Writ or Defence. This category, includes the following:

- Diskettes, CDs, or any other items enabling the reproduction of speech, sound, pictures or other relevant information in whatever form.
- Certificates or any other documents derived from a public registrar (Commercial Registry, Property Registry, etc.). Before the adoption of the LEC it was not necessary to present these documents with the Writ or Defence since it was within the scope of the Court to obtain these documents when requested by one of the parties to do so. However, in accordance with the LEC, the party is now responsible for presenting all public documents to the Court with the Writ or Defence, since the registries are public and consequently of public knowledge.
- Legal opinions prepared by experts.
- Reports established by authorised private investigators.

Any documents falling within this category will not be accepted if presented later, unless they fall within the exceptions stated below.

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Keeping Data Safe

Jordi Quintana sets out the rules governing data transfers from Spain



The European Parliament passed the Communications Data Protection Directive on 30 May 2002.

As a result, the authorities of the 15 European Union member countries will be able to direct telecommunications companies to store transmission data for e-mails, phone-calls, Internet use and further data for a fixed period of time. According to the information published in the media, the Spanish Government intends to impose a data storage period of one year.

Obviously, this decision involves not only EU citizens, but also non-EU residents who may wish to make contact with EU residents. The fulfilment of the applicable laws to be created in the countries of the Union, under the scope of the new Directive, will probably involve new responsibilities for those companies which collect personal data when trading.

However, companies should already be observing and fulfilling the contents of Data Protections Directives 1995/46/EC and 1997/66/EC as well as the European Commission Decisions Nos. 2000/518/EC, 2000/519/EC and 2000/520/EC, among others, when performing international data transfers.

Specifically, the applicable law in Spain is the Organic Act for the Protection of Personal Data 15/1999 (LOPD 15/99) and its development rules. The LOPD 15/99 regulates the international transfers of data collected in Spain, even when the collecting company is a non-resident company. In accordance with this Act, and as general criteria, prior approval from the Director of the Data Protection Agency is required in all international transfers of data.

However, Section 34 of the LOPD 15/99 exempts from the general rule of authorisation any situation where the recipient of the transfer is located in a European Union member state, or in a country in which the European Commission has declared that an adequate level of protection is guaranteed. These countries, according to the European Commission Decisions 2000/518/EC, 2000/519/EC and 2000/520/EC, are Switzerland, Hungary and those provided by the "safe harbour privacy principles".

In addition, the prior authorisation of the Director of the Agency will not be required in the following summarised cases:

- When the transfer is based on an international treaty of which Spain is one of the signatories.
- When the transfer is based on a request by a jurisdictional co-operation (eg Courts and Tribunals).
- When the transfer is requested for medical treatment, preventative care or other health services.
- When the transfers consist of bank transfers in accordance with the legislation of the recipient country.

- When the owner of the data gives express consent to the transfer.
- When the transfer is required to perform a contract or a pre-contract between the owner of the data and the recipient (as a general rule).
- When the transfer is required in order to protect the general interest, especially when the data is requested by a tax authority in the recipient country.
- When the transfer is required in order to enforce a Court decision, or when it is required to guarantee the right of the person(s) to be defended before a Court or Tribunal.
- When the transfer is requested by a public registry in the recipient country (eg the Land Registry or the Commercial Registry) in pursuance of the performance of its duties.

In my view, companies which intend to transfer personal data abroad from Spain, should take into account at least the following points:

Any person or entity who is responsible for the transfer or process of a file out of Spain, must declare the transfer to the Data Protection Agency when the file is declared or when the transfer is intended.

The declaration should include the country of destination, the person or the entity of the destination, the reason for the transfer and use of the data.

If the transfer of data does not need the prior approval of the Director of the Data Protection Agency, it should be accredited when the communication to the Agency intending the transfer is entered.

The level of protection of the country of destination concerning the personal data, should be established before the Agency under its requirement to the transferor, when the recipient of the transfer is placed in a non-EU country or a country not included within the European Commission Decisions as a safe country, or when the reasons of the transfer would be different from those expressed in Section 34 LOPD 15/99, summarised above.

The transferor (in such cases as those referred to above) must also present a copy of a trade contract between the transferor and the recipient that should contain:

- The identity of the transferor and the recipient of data.
- The purpose of the international transfer and the data to be transferred.
- An undertaking by the transferor that the collection and processing of the data on Spanish territory complies fully with the rules contained in LOPD 15/99 and that the file in which the data for transfer is recorded is entered in the General Data Protection Register.

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Data Transfer

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- An undertaking by the recipient that it will process these exclusively for the purpose given as the reason for the transfer and in accordance with the data protection standards of Spanish law and will not communicate the data to any third party without having obtained the consent of the owners of the data.
- An undertaking that the recipient will adopt the security measures required by the laws on personal data protection in force in Spain.
- An undertaking that the transferor and recipient shall be jointly and severally liable vis-à-vis private individuals, the Data Protection Agency and the Spanish legal authorities for any breach of the contract by the recipient which breaches LOPD 15/99 or causes injury to the owners of the data.
- An undertaking that any owner of the data injured as a result of the processing by the recipient shall be compensated in accordance with the liability system referred to in the previous paragraph.
- A guarantee that the injured party may exercise his rights of access, correction, cancellation or opposition vis-à-vis the data transferor and recipient of the data. It must also be stated that an owner of the data whose rights are infringed may ask the Data Protection Agency to intervene in the terms provided in LOPD 15/99.
- An undertaking from the data recipient to grant access to the establishment where these are being processed, to documentation, hardware and software, to representatives of the Data Protection Agency or an independent entity appointed by the former when required for the purposes of verifying compliance with the obligations arising from the contract.
- An undertaking that, once the contractual relationship has ended, personal data will be destroyed or returned to the

transferor along with any medium or document in which any personal data on the subject is contained.

- An undertaking that owners of the data may require compliance with the provisions of the contract in all matters in where it is to their benefit.

The Agency may request amendments to the contract, in order to guarantee the rights of the owners of the data.

When the transfer of data is intended for the processing of the data outside Spain, these same rules must be observed.

In a case where a contract needs to be provided, the said contract must state that, once the contractual service has been provided, the personal data must be destroyed or returned to the transferor, along with any medium or document containing any personal data for processing.

We must also point out that the Director of the Agency may decide to refuse the transfer of the data. In that case, the transferor can appeal to the Administrative Appeals Division of the National High Court (*Audiencia Nacional*).

It should be pointed out that most companies currently do not comply with the legal obligations concerning the Personal Data Protection regulation in Spain. Also, the international transfer of data is usually performed without following the applicable rules. For example, during the calendar year of 2001, the Data Protection Agency imposed fines totalling more than €12m and detected 500 infringements. The fines for these infringements have varied from €601 to over €600,000.

Until now the focus of the Data Protection Agency has been on the companies in the TMT sector or major companies acting in the various fields of activity with international trade and interchange.

Jordi Quintana
Lawyer. I.T. Department
Pedro Brosa & Asociados

Defence

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3 Translations of Documents. All documents presented to the Court and not drafted in Spanish or in any other official language must be presented with a translation. Failure to comply with this requirement will lead to the rejection of the document as evidence.

Translation of the documents may be completed by the party who presents the documents or by an official translator. A sworn translation certifies that it is exact and corresponds to the original text, and consequently cannot be contested by the other party.

It is feasible that the other party might argue lack of precision in respect of the original text and therefore reject all the documents which have not been completed by a sworn translator. In this case it will be necessary to submit a sworn translation or one issued by the Department of Foreign Languages of the Ministry of Justice.

Therefore, in general terms, it is advisable to present

sworn translations when the documents are essential to the case.

DOCUMENTS THAT MAY BE FORWARDED AFTER THE WRIT AND THE DEFENCE

As stated above, the general rule is to present all documents with the Writ or the Defence. Nevertheless, this rule has the following exceptions:

- Documents drafted after the date of the Writ or the Defence. This applies only in those cases where they could not have been provided or obtained before said date.
- Documents drafted before the Writ or the Defence when the party that presents them gives a sworn statement of his lack of knowledge of them when the Writ or the Defence was issued.
- Documents drafted before the Writ or the Defence that

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Passing on Property

In the first of a series of articles,
Nielson Sanchez Stewart explains “Matilde’s Will”
and other aspects of Spanish Inheritance Law



As everyone knows, according to Spanish Law the inheritance of a person can be of two kinds depending on whether the deceased left a Will or not. The issuance of a Will is completely voluntary and the lack of one does not normally have fundamental consequences.

It has been said – I have heard it innumerable times – that as a foreigner in Spain, if you die without a Will, your assets will go to the State. This is true, but only if you have no children, no wife or parents and no relatives of any kind up to the sixth grade, namely the children of cousins of your parents. The average human being is either married, has children or parents or brothers etc. So, if no Will is made, the only consequence is that the Law provides where the deceased’s assets will go, and most legal systems are meticulous in this respect.

One of the main differences between English and Spanish Law in respect of inheritance is that while there are limitations in Spain regarding the freedom that a Spanish subject has in making a Will, a British subject can leave his assets to whoever he chooses. In Spain, there are compulsory portions of the estate which must go to children, parents and wife. Obviously, the compulsory portions that Spanish Law provides depend on whether one has children, is married or has parents. The proportions vary according to the different possibilities and the freedom to deal with one’s assets after death varies from only one third of them (in cases where there are children, grandchildren or great-grandchildren) to the whole (where there is no issue, no parents and no spouse).

In Spain there are various types of Wills, from the Holographic Testament to the Open Will.

According to the Spanish Civil Code, the Holographic Testament is a document that has to be entirely handwritten by the testator or testatrix and which should state the year, month and day when it is written. It then has to

be signed. Though it is not subject to any other specific formality, these basics are essential.

In 1918 the Spanish Supreme Court referred, in a famous decision, to what is known as “Matilde’s Will”. Matilde was a young girl from a town in the province of Valladolid who was married to Don Jose Pacios, a gentleman of her neighbourhood. In 1915, when they were already married, she found a love letter that she wrote to him when they were only engaged. It was written in two pages and the back of the first page was blank. In the same letter she wrote “In Peñafiel on 15 March, 1915. Pacitos de mi vida, en ésta, mi primera carta quiero decirte que para ti todo, todo lo mío es para ti, para que me quieras siempre. Matilde.” She then signed it.

The translation is: “My darling Pacitos (Pacitos being a familiar abbreviation of her husband’s surname) in my first letter I want you to know that I want to tell you that everything I have is for you, so that you will love me forever. Yours, Matilde.”

It could not be simpler. The Court considered that this document was perfectly valid as her last Will and testament and “Pacitos” was declared as her sole heir, against her brothers and sisters.

Spanish Law specifically allows a foreigner to write a Holographic Testament in his own language; a wise norm considering that this was adopted in 1904.

However, Holographic Testaments are unusual since they present problems of authenticity, and often, since no professional intervenes in their drafting, lack clarity.

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Defence

Continued from previous page

could not be presented since the party did not have access to them. It is necessary that the party make special reference in its allegations to these documents.

- Documents or expert reports which are necessary due to the allegations stated in the Defence.
- Judgements or resolutions from any Court, rendered at any time after the Writ or the Defence, that may have a decisive influence on the final judgment.

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Building up Valencia

Andres Crespo explains the recently publicised Valencian Urbanistic Law

A recent article in the *Sunday Times* has unnecessarily worried property owners in the Valencia region. This article will analyse the legal position of a property owner in the light of the urbanisation of lands.

Spain is composed of regions. Every region or autonomous community (self-governed entity) has its own government and parliament and is responsible for its own planning law.

Although the Law of Urbanistic Activity was passed in 1994 it is already obsolete as it has been superseded by subsequent legislation in other regions, judicial decisions and practical difficulties arising from the unforeseen surge in demand from property in area.

The problem in the Valencia region was that when this law came into effect, owners of rural land did not want to urbanise it because of the high costs involved. So they built on countryside land where, in general, it was permitted to build on 5,000 square metres plots (in 1992 the government raised this to 10,000 square metres). This led to the present situation – large areas of rural land, full of houses but without any urban infrastructure; no streets, pavements, street lighting etc.

Another problem was the scarcity of houses. Up to this date only landowners or local Town Halls could urbanise land. Since both were reluctant to do so it was difficult to increase the housing stock and so prices became inflated making it impossible to guarantee the right of every family to own a decent home.

The Valencian Urbanistic law (LRAU) introduced a new player: the urban developer. This is a company dedicated to urbanising an area which was previously given borders by the Town Hall. This urbanising company need not necessarily be the owner of the land.

For the purposes of planning law there are three classes of land:

- **Urban land.** A person who buys a plot of land or a house on this type of ground need not pay urbanisation costs. The fundamental obligation lies in conserving the property.
- **Rural land.** Dedicated to agriculture or forestry. It is not permitted to construct a house but if the owner owns a plot of 10,000 square metres or more, he may obtain permission to do so. Rural land may become urbanisable land in the future.
- **Urbanisable land.** Land which the local Town Hall wishes to be urbanised and built on. The Town Hall decides which units of land will be so designated and establishes detailed borders. This is usually set out in the general plan of the Town Hall. The urban developer is charged with transforming this land from rural to urban by installing appropriate infrastructure.

Anyone can be an urban developer, including local Town Halls and groups of rural landowners. These would normally

be given preference.

When an urban developer expresses his wish to urbanise a unit of rural land, the Town Hall publicises this to allow for competition and will then decide which is the most suitable offer in the light of the programmes submitted.

The programme explains the type of urbanisation, foreseen costs and the method intended to finance it. The urban developer must guarantee a specific percentage to be paid to the Town Hall and pay all urbanisation costs in advance.

Ultimately, though, it is the local landowners who will bear the costs since they will be the main beneficiaries of the urbanisation process. The urban developer is additionally entitled to a fee or benefit (normally set by the Town Hall) which is also paid by the landowners.

The Town hall will supervise and direct all the activities, choose the urban developer and have control over him, approve the contents of the programme and the urbanisation project as well as the new division of plots and the various costs the landowners must pay.

Landowners may pay their share of urbanisation costs in cash or with land.

What can an affected owner do?

Or course, he could become an urban developer himself, in association with other owners, although this is not easy because urbanisation is a very complicated process.

He can refuse to co-operate with the programme and ask the urban developer to buy out his property. In this case the law provides that he must receive the market price.

He can object to the costs of the urbanisation on the grounds that they are too high. He can also contest the value that the programme estimates for his plot. All such objections are dealt with by the local Town Hall.

Once the urbanisation is complete the total area of private property will be less than it was at the beginning since part of it will have become streets, green zones, etc. The new plots (assessed according to objective values) will be proportionally divided between the owners according to the land they had at the beginning within the unit of execution.

Who gains?

Local landowners stand to benefit from urbanisation of their land because most building restrictions are then removed and, of course, an appropriate infrastructure is now in place.

Who loses?

Where electricity and water supplies already exist landowners are generally not interested in urbanisation since they must pay their share of the urbanisation costs even though they are unlikely to see any financial benefit. In the case of a large piece of land, however, there is now the option of building more houses – one of these plots will be allocated to the existing house.

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Private Property and Limited Companies

Arno W. Meuser proposes the Spanish Limited Company as a vehicle for acquiring property



When buying property in Spain it is necessary to undertake the economic exercise of weighing up the benefits and advantages against costs that may be incurred during the period of ownership.

Until the late 1980s, purchasing Spanish property using a corporate structure based in an off-shore jurisdiction offered a number of rewards regarding taxes payable on such acquisitions. Sadly, many of these companies were also involved in money laundering on a wide scale. Spain reacted swiftly by introducing a 3% tax payable on the rateable value of property held in an off-shore company, causing a significant reduction in the use of off-shore structures to acquire Spanish property.

However, for owners of high-value property, the Spanish limited company provides widely unacknowledged advantages regarding the purchase and administration of assets.

The constitution of a Spanish limited company (*Sociedad Limitada* or SL) requires, along with the drafting of the Articles of Association, the selection of a unique company name, the selection of shareholders and the election of company director(s). The company must have a minimum share capital of €3,006 and can normally be set up within 20 days.

There is a requirement to prepare and audit annual accounts, a copy of which has to be lodged with the Company Registration Office. Agents, who take care of all necessary annual tasks, charge an administration fee which has to be considered in the total costs of running a limited company.

The liability for taxes of such a property-owning business is based on the normal tax rate applicable for legal persons (currently 35%) and depends on the annual turnover generated. In the described circumstances this

would be an estimated amount equal to the rent paid for the property. However, this tax liability can be written against maintenance and management costs. Personal taxes, such as Wealth Tax, are not applicable to a limited company.

The SL is also liable for Capital Gains Tax on gains accruing from the sale of company assets. However, such transactions hardly take place as the sale of the property itself will not occur since, in this event, the shares of the company will simply be passed on and, with them, the rights over the company assets. The tax liability for such a transfer can be reduced to zero with advance planning.

Furthermore, selling company shares does not attract such high costs as a property transfer. There is no tax liability on the purchase of shares, compared to 7% (Balearic Islands) on the purchase of property. In addition, notarial costs are lower than for a property purchase.

As far as inheritance taxes are concerned, the Spanish system of taxes does not allow for ample inheritance tax exemptions for spouses or children as in United Kingdom. Conveying the shares of a limited company may avoid or mitigate any liability to tax.

Apart from the ownership of property, the SL could also be used as a holding company participating in foreign enterprises. The tax exemption regarding both dividends and capital gains arising from the sale of participating affiliates offers a bonus for investors that should be considered when planning an investment in property in Spain. (See further: "Spanish Holding Companies", Armando Tomas Vidal, BSLA Bulletin No 2, May 2002)

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The cost of urbanisation varies from about €20 to €36 per sqm and anyone who buys rural land must consider the possibility of future urbanisation. However, the value of urbanised land is often ten times higher than rural land.

In the eight years since the LRAU came into effect the number of houses on the market has increased significantly more than in other regions of Spain, although local house prices have not fallen.

Who can speculate with this system?

In general, only the rural landowner who sees his land being transformed into urbanised plots. Nevertheless, the LRAU has brought wealth to everyone and has been copied in several other regions of Spain.

The *Sunday Times* reported that the LRAU has been challenged in the Spanish Constitutional Court. This is true, although the challenge concerns a specific question regarding the legal position of the urban developer and has nothing to do with the rights of landowners.

The Court of Luxembourg has proclaimed that the role of urban developers should be open to every company in Europe.

In short, I think that the LRAU offers a workable solution to the problem of urbanisation activities. The few who may feel they are adversely affected cannot deny what is true: no one who has invested in property in the Valencian region has ever lost his money.

Bilaterals Reception 2002

More than a hundred legal practitioners from over 35 countries enjoyed a glorious Summer evening last June at the annual Reception for Bilateral Associations.

The event, organised by the BSLA, was held in the magnificent



grounds of the Honourable Society of the Inner Temple.

The reception was given a particularly latin flavour by the presence of a Spanish guitarist.

■ The BSLA does not assume legal responsibility for any errors or omissions contained in this Bulletin.

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