EFFECTS OF FOREIGN DECISIONS IN SPAIN

➢ INTRODUCTION

This presentation will try to give a general outlook on the effects that the orders, titles and other procedures and legal situations from foreign countries can have in Spain. We are going to stick to the titles, decisions, orders, warrants and other documents of commercial contents or nature, putting aside those which are penal in nature or which have, say, family or marriage content.

Having said this, we must also take into account that we will find big differences in the recognition and enforcement of orders or titles from the single European area, that is, from a **Member State of the European Union**, compared to those obtained or pronounced in states outside that European area.

First, and before starting to explain the procedure, it must be highlighted the fact that the internal Spanish Law fights between two fronts: cooperate with the different countries to avoid obstacles for the enforceability in Spain of resolutions coming from abroad (this is achieved through international treaties and the transpositions of European Union laws) and the exercise of its own jurisdiction and sovereignty (which is achieved with rules, mainly of internal procedure, and by requiring the respect of Spanish public policy).

➢ RECOGNITION AND ENFORCEMENT OF JUDICIAL DECISIONS

We start from the legal fact that in Spain an exequatur, a procedure of recognition of a foreign decision, is not (or must not be) a new procedure where the merits of the case are resolved again, **it is not a revision of the order** pronounced abroad. It is a procedure where simply **it is verified that the foreign decision fulfils all the requirements to be valid and**, therefore, **be recognized and enforced in Spain**.

As it has been said before, we must distinguish between decisions or titles from the European Union and those coming from countries not members of the European Union.

In Spain, for those foreign decisions adopted in the European area, Council Regulation (EC) No 44/2001 applies (commonly known as "Brussels I"). The aim of this Regulation was to create a single European area where judicial decisions could move freely, with the only limit of the public policy of each Member State.

Nevertheless, not every foreign decision enforceable as a sovereignty act of other State is a title actually enforceable in Spain, unless the Spanish judicial authority grants to it, in a specific and certain way, that nature or enforceability, through the relevant "exequatur". Therefore, it must be born in mind that the power to recognize and enforce in Spanish territory judicial resolutions and orders pronounced abroad, corresponds to Spanish judges and courts (article 22.1st LOPJ (Framework Law on the Judiciary) **and article 36 of LEC** (Code of Civil Procedure), in as much as defines the range and boundaries of the jurisdiction of the Spanish civil courts), but with the limit of the article 36 of said Regulation 44/2001 which states that "Under no circumstances may a foreign judgment be reviewed as to its substance."

Thus, even though we are within the European frame, we have some particular rules that will apply in Spain.

Two essential articles of the Code of Civil Procedure:

ON THE FOREIGN ENFORCEABLE TITLES.

Section 523. Enforceability in Spain. Law that applies to the procedure.

"1. In order that the final judgments and other foreign enforceable titles bring with them the enforcement in Spain, international Treaties and legal regulations on international legal cooperation shall apply.

2. In any case, enforcement of foreign judgements and enforceable titles will be carried out in Spain according to the provisions of this Code, unless the international Treaties currently in force in Spain provide otherwise."

ON THE PROVISIONAL ENFORCEMENT AND OPPOSITION TO IT.

Section 525. Judgements not provisionally enforceable.

"2. The foreign judgements that are not final cannot be provisionally enforced, unless the international Treaties currently in force in Spain provide expressly otherwise."

With this limitations, some internal procedure rules do exist, and these are, briefly, the following: the applicant shall produce before the appropriate court the relevant application or request for recognition and enforcement, together with certified copy of the enforceable title; it can be a judgement or other court order, a non-judicial title (eg, a notarial document), or a document of court settlement, a certification using the standard form of the Annex V to the Regulation for court titles or of the Annex VI for non-judicial titles, a power of attorney, since Spanish laws so require. In Spain, it is compulsory that a lawyer and a solicitor take part in the procedure. We lawyers and solicitors can only act before the courts when we have a power granted by our client. Spanish law requires also the certified translation of files written in a foreign language.

The Sect. 56 LOPJ as amended by LO (organic law) 19/2003, of 23rd of December, confers on the Courts of First Instance the power to hear applications for **recognizing** and **enforcing** foreign judgments and the **Article 955 LEC 1881 (as amended by the Act 62/2003, of 30th**

December) that confers on the Courts of First Instance the power to *"hear the applications for the recognition and enforcement of foreign judgments and other court orders and arbitrator's awards."* Pursuant to article 33.1 of the Regulation, the decisions pronounced in one of the Member States will be recognized in the other Member States.

"A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required."

The procedure would then be that provided for in the same Regulation (with the special characteristics above mentioned of the Spanish internal procedure Law), which only sets out that the recognition should be immediately granted, without hearing any party, and without reviewing the merits of the case, provided none of the impediments set forth in the article 34 of the Council Regulation (EEC) 44/2001 for the granting of an exequatur exists.

This recognition is characterized by four essential features.

First, in general it operates automatically, and covers all the typical effects of the judgment (basically the res judicata) (art. 25), including judgments, court orders, writs, and acts of payment of expenses.

Second, it is only required that decisions are enforceable in their State of origin, not that they are final decisions (except for the provisional enforcement).

Third, it is possible that the debtor opposes with some basis the recognition (art. 26).

And fourth, likewise, the art. 50 includes the recognition of public documents which are enforceable and court settlements.

Under the provisions of the Council Regulation (EC) 44/2001, 22nd December 2000, as well as the article 955 of the Code of Civil Procedure of 1881 the **Courts of First Instance are the only one competent to hear the applications for the recognition and enforcement of foreign judgments** and other court orders and arbitrator's awards as regards the subject-matter

competence. The Court of First Instance of the domicile or place of residence of the party against which the recognition or enforcement is sought, or of the domicile or place of residence of the person to which the effects of recognition or enforcement refer, will be competent. However, subsidiarily the jurisdiction ratione loci will be determined by the **place of enforcement or where those judgments and decisions must have effect, which is important for the protective measures**.

Nevertheless, when the application for recognition and enforcement of the judgment or court order deals with **commercial matters, Commercial Courts will be competent**, and not the Courts of First Instance.

If it is a court order or decision pronounced in a country not member of the EU, then the first thing to check is if there exists any bilateral agreement of recognition and enforcement of resolutions and of international aid and cooperation, because that will make things much easier and the client will be much happier. The exequatur would be dealt with according to Spanish procedure rules (Code of Civil Procedure), giving priority to criteria of public policy and reciprocity with the State of origin, that is, the country where the order to be recognized and enforced had been issued.

That is what states the Code of Civil Procedure, 1881, in the articles 951 to 954. **For a foreign judgment to be enforceable in Spain, it is required**:

1.- That it is so determined by the **International Treaties**.

2.- If there is no International Treaty, the **principle of reciprocity between both countries** will be observed, that is, if the State from which the Judgment derives regards valid the Judgments pronounced in Spain. So, if the judgment comes from a State that carries out judgments pronounced by Spanish Courts, it will be enforceable in Spain, if, on the contrary, the Judgment comes from a State that does not carry out Spanish court orders, it will not be enforceable in Spain.

3.- Finally, when there is no International Treaty or reciprocity principle applicable, the judgment must fulfil the following conditions: **a)** that it has been pronounced as a result of the exercise of an action *in personam*, **b)** that it has not been given in default of appearance, **c)** that the duty whose fulfilment is sought is lawful in Spain, **d)** that, in the country where it has been given, fulfils the necessary requirements to be considered authentic, and those that Spanish laws require to be authentic and reliable in Spain.

- **RECOGNITION IN SPAIN OF FOREIGN AWARDS**

Since arbitration is excluded in European legislation, the Convention of New York of 10th June 1958, the Spanish Arbitration Act and the Code of Civil Procedure of 1881 (as recently amended by the Act 13/2009, of 3rd November), specifically the articles 951 and following that will still be in force, will apply to the recognition of foreign awards, governing the efficacy in Spain of awards issued by foreign courts, until the coming in force of the Act on international legal cooperation in civil matters.

The Spanish Arbitration Act (Act 60/2003) deals with the definition and proceedings of foreign awards (relative to their recognition and enforcement in Spain). In particular the ARTICLE 46 OF THE ARBITRATION ACT 60/2003 OF 23D DECEMBER provides:

"Foreign nature of the award. Governing rules:

1. Foreign award is the award issued out of the Spanish territory.

*2. The **exequatur** of foreign awards will be governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, made in New York, the 10th of June 1958, subject to the provisions of other international conventions that are more favourable to their granting, and will be carried out according to the procedure set forth by the civil procedure rules for judgments given by foreign courts."*

The requirements for the exequator of a foreign arbitration award will therefore be those set forth in the **CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, MADE IN NEW YORK, THE 10TH OF JUNE 1958.**

However, in Spanish courts some argue that for the recognition and enforcement of awards issued within the EU area the EEC Regulation 44/2001 would apply, even though the article 1 of said Regulation excludes expressly the arbitration in its letter d).

Taking into account that the article 46.2 of the Arbitration Act 60/2003, in relation to the issue of recognition and enforcement of foreign awards refers to the rules that govern the exequatur for foreign judgments, if we come across a Court order pronounced in a Member State of the European Union, it cannot be ruled out that the proceedings are governed by the **Council Regulation EEC 44/2001 of 22 December, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters**.

Therefore, potential differences in the proceedings of an exequatur will be dependent on the "court order nationality", i.e., on the fact that it has been given in a country of the European Union, since awards are put on a level with judgments so that, with a plausible unifying intention, there are no differences due to their arbitral or judicial nature in terms of the internal proceeding to be followed for their recognition and enforcement in Spain.

Thus, the Regulation 44/2001 (by virtue of that equivalence made by the Arbitration Act) shall govern the procedural aspects of the exequatur proceedings, while in the other aspects we shall follow the provisions of the Convention of New York. (among others, the Order issued on 25th February, 2010, by the Commercial Court No 8 of Madrid, that carries out the enforcement of an arbitration award without notification to the defendant and following the procedure of Regulation 44/2001).

- **INSOLVENCY PROCEEDINGS - the Regulation (EC) No 1346/2000**

Bankruptcies, compositions and other similar proceedings are excluded from the scope of the Brussels Convention of 1968. Since 1963 several works have been done with the aim of create a Community instrument in this regard. The Amsterdam Treaty, made on 2 October, 1997, sets out new provisions on civil judicial cooperation and, on this basis, the Regulation (EC) No 1346/2000 on insolvency proceedings was passed.

The Regulation does not apply to Denmark and the United Kingdom, inasmuch as there could be incompatibility with agreements previously reached within the framework of the Commonwealth. In no case can the Regulation apply to the insolvency proceedings filed by or affecting insurance companies, credit institutions, and investment firms whose services involve the holding of funds or third party transferable securities nor collective investment undertakings.

The Regulation applies to the insolvency proceedings filed after it came in force on May 31st, 2002. It substitutes bilateral and multilateral conventions existing between two or more UE countries.

This Regulation sets out a common framework for the insolvency proceedings in the European Union (EU). The purpose of the harmonized provisions relative to insolvency proceedings is to avoid the transfer of assets or judicial processes from one EU country to other in order to benefit from the best situation from the legal point of view to the detriment of the creditors (*«forum shopping»).* With the aim of guaranteeing procedures that are more uniform and dissuade parties from moving assets or judicial processes from one EU country to other to improve their legal situation, solutions put forward are based in the principle of universality of proceedings.

The Regulation defines the concept of «court» as a legal person or other competent body empowered by its domestic law to file proceedings. The jurisdictional organisms competent to file the **primary proceedings** are the courts of the EU country where creditor's main interests are located. Later, **secondary proceedings** can be filed in other EU country if the creditor does have a premise in that territory let's say secondary.

The court orders issued by the competent court of the principal proceedings will be immediately recognized by all countries of the EU, without further formalities, unless:

- said recognition could have negative repercussions in the public police of that country;
- the decisions limit the mail confidentiality or the individual freedom.

In its turn, the Spanish Bankruptcy Act (Act 22/2003 of 9th July), echoing the spirit of the European Regulation, even though this applies to the bankruptcy proceedings and insolvencies conducted in any country, not only those under the umbrella of the European Union, devotes its

Title IX to the rules of private international law (more than 30 articles) that deals specifically with the relationship between the different legal systems that can be involved in a situation of bankruptcy or insolvency.

It must be first said that the article 199 of this Bankruptcy Act (Act 22/2003) establishes the preference of the rules of this internal law over the Regulation 1346/2000 and over other international laws (international conventions…) regulating the subject.

As it has been said, these rules of private international law regulate the law applicable to each case, right or asset that can be affected by the bankruptcy situation. For example, they refer to the rules of each domestic official registry for issues related to property and vessels or airplanes.

As for the exequatur proceedings, the Act 22/2003 has some rules mainly of practical nature, with a concise and direct content, that, once a main foreign insolvency proceedings is recognized in Spain, makes it easier to start in Spain local bankruptcy proceedings and forces to give all sort of information to the creditors that are abroad. Those creditors will be treated as if they were creditors of the Spanish bankruptcy proceedings, they do not need any special procedure whatsoever for the recognition of their credit.

It is particularly interesting for the issue we are looking at the article 220 of the Act 22/2003, which sets out that the foreign court orders that declares the opening of an insolvency proceeding will be recognized in Spain through an exequatur regulated by the Code of Civil Procedure, as was noted before. It is possible that that foreign procedure is recognized as a “principal” proceeding, if it is being dealt with in the State where the debtor has his principal place of business, or as territorial foreign proceeding, in case there is some connexion with that country, for example, because there are debtor’s assets located in that country. The enforcement of any execution decision issued in a foreign insolvency proceeding requires a previous exequatur.

Other important rule established in this Act is the full cooperation between the States where the bankruptcy proceedings are being conducted and the criterion of single payment, regardless of the jurisdiction where it is received, with the obligation for the debtor of reimbourse whatever payment he had received in excess in other jurisdiction.

- **CONSIDERATION OF FOREIGN MORTGAGES AND OTHER FORMS OF CREDIT RECORDED IN PUBLIC DOCUMENTS UNDER SPANISH LAW**

We should look, even if it is only briefly, into how foreign mortgages are considered in Spanish Law. Given our context, it makes sense to make an even more particular reference to maritime liens.

Now, also in this case we should distinguish mortgages given in Europe and mortgages given in countries outside Europe.

It is widely known that Europe is struggling to achieve a transfrontier mortgage credit, however, the truth is that so far Europe has not been able to find out how. Even though it was once thought that even a legal unification was possible, this idea was soon to be ruled out for being too utopian given the vast differences amongst the legal systems. It was later thought that the mutual recognition technique could be used. Recently, an effort has been made to open a third way, such as the creation of a special type of mortgage that would be uniformly regulated by all Member States of the EEC, so it could be used in the same way for any of them. This "Euromortgage" seems more like a Utopia not in accord with the current financial situation.

Focussing on our present reality, we understand that Regulation (EC) No 805/2004 issued by the European Parliament on 21st April 2004 establishing an enforceable title for uncontested claims could be used for the execution of credit recorded in foreign public deed, European deeds or European Public Documents. Regulation (EC) No 805/2004 "should apply to judgments, court settlements and authentic instruments on uncontested claims and to decisions delivered following challenges to judgments, court settlements and authentic instruments certified as European Enforcement Orders." As it is clearly stated in Recital (9) of such Regulation, this is a step forward, a breakthrough towards the longed-for single European legal space, since "such a procedure should offer significant advantages as compared with the exequatur procedure provided for in Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (6), in that there is no

need for approval by the judiciary in a second Member State with the delays and expenses that this entails.""

The aim of the aforementioned Regulation is to create a European enforceable title for uncontested claims, which will allow through minimum regulation, the free circulation of judgments, court settlements and enforceable public documents, without the need for any intermediate step for its validation and execution in the enforcing Member State.

The creation of a European court title entails the **abolition of the** Exequatur, hence the breakthrough from Regulation (EC) No 44/2001. This entails that a resolution certified as a European enforceable title by a Member State shall be valid and executable in the rest of the Member States without the need for any declaration of enforceability and without any possibility of opposing its recognition.

In order to guarantee the necessary information on the debtor in relation to the credit, the document instituting the proceedings or an equivalent document shall contain, in accordance to Article 16 of the Regulation, the following information:

a) name and address of each party;
b) the value of the credit;
c) if interest is claimed on the credit, the interest rate and the period for which such interest is claimed, unless the law of a Member State requires that an interest should be added to the principal automatically; and
d) a reason for the action.

Article 20, refers in turn to the internal procedure rules of each State for the execution procedure, warning that certified judgments such as European enforceable titles will be executed under the same conditions as the judgments issued in the enforcing Member State and stating that it will not be required that a party in a Member State request the execution of a certified judgment as a European enforceable title issued in another Member State, a caution or deposit whatsoever, regardless of its denomination, nationality, of being domiciled or not, of being resident or not in the enforcing Member State.

Given that **Regulation (EC) No 805/2004 of the European Parliament and the Council of 21st April 2004**, which establishes a European enforceable title for uncontested claims, states in **Article 20** that the enforcement proceedings **"shall be regulated by the law of the Member State of enforcement"**, the steps to follow are described from **Articles 517 onwards of the Code of Civil Procedure ("On Compulsory Enforcement and Preventive Measures").**

By virtue of Article 517.9º of the LEC (Code of Civil Procedure), a European court title falls under the category of "enforceable title" and entails its enforcement, i.e., it shall start at the Court of First Instance or competent Commercial Court an enforcement procedure in which specific preventive measures are requested to be implemented regardless of the fact that later on, once any such measures have been taken, the debtor opposes the enforcement based on a restricted set of grounds.

We should remember that the order of priority refers, first to the regulation on Maritime Claims, secondly, to the Community Law, and, exclusively in default of those, to National Law (Art. 71 of Regulation 44/2001, Art. 57 of Brussels and of Lugano, and Art. 21.1 of the Spanish Law on the Judicial System).

With respect to maritime liens, we must contemplate the corresponding act with preference in its application — the widely-known INTERNATIONAL CONVENTION ON MARITIME LIENS AND MORTGAGES, SIGNED IN GENEVA ON 6TH OF MAY 1993, which Spain entered on 31ST of May 2002.

In order for a maritime lien to be enforceable in a signing country of said Convention, it is required that: (a) it was given and recorded in a registry, in compliance with the law of the country in which the vessel is registered; (b) the registry and the documents that must be presented to the Registrar be freely accessible to the public and entries and copies of any such documents be available upon request to the Registry; and c) the Registry or any such documents mention, at least, the name and address of the person who has been given the mortgage or the bearer thereof, the maximum allowance and the date, as well as other defining particulars that may be required by the issuing State.

It should be noted that, without prejudice to the Convention, **primacy and effect on a third party** depend on the law of the country in which it is recorded. With regard to the **enforcement procedure**, the Convention of 1993 refers you to the law of the country in which the enforcement takes place, which in our case is the Spanish Maritime Lien Act 1893, which contains a scrupulous regulation of the particulars of maritime liens, which is completed by the Regulation of the Registry of Companies (Royal Decree 1784/1996 of 19th July).

Despite the time constriction, we should also point out the matter relating to the influence exercised by maritime liens following the Geneva Convention of 1993, with respect to an eventual creditors' meeting or any other situation of insolvency on the part of the vessel's owner. We understand that the ranking of credit as privileged (crew's salary, prize for rescue) would enable the creditor to execute said "privileged credit" against the vessel, especially with effect on the credit, which would entail under Spanish law the isolated enforcement of the vessel and even (Article 155 of the Consular Act) the court-ordered payment of the vessel directly to the creditor.

- **PREVENTIVE MEASURES**

As regards the preventive measures, we must say that the regulation of these is contemplated in the Spanish Code of Civil Procedure (Act 1/2000, of 7th January). We start saying that preventive measures should be expressly requested; they will never be taken by operation of law, but will be subject to the principle of the initiative of the parties.

The article 726 of the LEC mentions the features of the preventive measures, in a brief outline the following can be highlighted:

a. **Instrumentality**, since the same depend on the main process to which they refer, and, as the art. 726-1-1ª States: "*They lead exclusively to make possible the effectiveness of the protection that the court could grant in a potential judgment against the defendant…"*

b. **Provisional nature**, these measures intend not to be for an unlimited period, they last only until the guaranteeing function is achieved.

c. **Transient nature**, is a feature related to the latter, preventive measures are not indefinite but temporary.

d. **Variability**, since preventive measures can vary if the factual situation to which they refer changes.

e. **Proportionality** is another feature, disproportionate preventive measures cannot be taken to achieve the goal sought for, which is guaranteeing the effectiveness of the judgment.

f. **Procedural nature**, since they are taken in a process, with all its guarantees, hearing the parties, right to a fair hearing, equality of arms, etc.

The Law, based on consolidated doctrine and case-law, goes for a *numerus apertus* of preventive measures. Thus, in its Explanatory Statement it is said that "*…the present regulation is done so as to have an open system of preventive measures, not a* numerus clausus *or restricted system."* Therefore, the article 726 of the LEC is "just a expository catalogue" of measures that can have preventive nature, clearly statement that it is a *numerus apertus*, so other preventive measures can be taken, different than those expressly mentioned in said article. The grounds for taking the preventive measures are contemplated in the art. 728 of the Act 1/200, and are these: "danger due to procedural delay, prima facie case and bail", and the Explanatory Statement considers them as "*essential factors indispensable for taking preventive measures."* They are these.

1. **Periculum in mora.** The art. 728-1 requests for their adoption that it is justified "that, in the particular situation, during the pendency of the process, if the requested measures are not taken, situations could occur that prevent or hinder the effectiveness of the protection granted in a potential judgment against the defendant", that is, that the lack of adoption would prevent or hinder the effectiveness of the judgment, because the time causes the circumstances to change or the defendant will try to prevent the enforcement of the judgment.

2. **Prima facie case,** or probability of the alleged claim. It is another requirement set out by art. 782-2, according to which *"The applicant for preventive measures must also show data, grounds and documentary proofs which lead the court to form , without prejudging the merits of the case, a provisional and circumstantial opinion*

favourable to the grounds of his claim…", and assumes that the adoption of preventive measures is justified on the basis of the probability of the alleged claim.

3. **Bail.** And last, the mentioned art. 728-3 sets out that *"Unless otherwise decided, the applicant for a preventive measure shall give enough bail to pay, in a fast and effective way, for the consequential damages that the adoption of the preventive measure can cause to the assets of the defendant."* The bail takes then the form of a guarantee for the defendant in case there is a judgment for the defendant, which guarantee covers the liability for the damages that the adoption of the preventive measure can have caused to him. The Law does not regulate how to determine this security, its determination will depend on the discretion of the Judge.

Moment to request preventive measures

The article 730 of the LEC sets out the moments to request preventive measures, in the following manner:

1. ***"Normally preventive measures shall be requested together with the main claim".***

2. *"Preventive measures can be requested before the claim if the applicant in that moment provides and proves urgency or necessity reasons."*

In this case, the measures agreed will be ineffectual if the claim is not filed before the same court that dealt with the request for the measures within twenty days of their adoption. The court, on its own motion, will decide through an order to raise or revoke the fulfilling acts already carried out, award costs against the applicant and declare that he is responsible for the damages caused to the person concerned by the measures.

Submission

Preventive measures shall be always requested in writing, either separately or by means of "further claim" (otrosí) in the main claim, and, as art. 732 of the new LEC indicates, justifying the occurrence of the requirements required by law and enclosing the documents that support it or offering the leading of other evidence that proves it.

Once the request for preventive measures is submitted, two things can occur, depending on the fact that there is or there is not a **previous hearing of the defendant:**

a. That the defendant is notified of the same, being then summoned both parties.

b. That the defendant is not notified, and the measure is then taken without hearing the defendant. This will only occur when the applicant requests it expressly and it is proved that there are urgency reasons, or that the previous hearing of the defendant could compromise the successful conclusion of the preventive measure.

Finally, it must be said that, according to the articles 735 and 736, the admission or rejection of the measures is done by means of an Order (Auto), which shall be issued within the maximum term of five days. If the Judge considers that all requirements are met, he or she will grant the requested preventive measure, fixing the form, value and time when the bail should be granted by the applicant of the measure. This Order could only be appealed without suspensory effects.

This procedure is the one to be applied when any of you want to secure a potential credit or a judgment or court orders with assets or rights that are in Spain.

If the creditor requesting preventive measures is within the European judicial area, that is, under the umbrella of the Regulation (EC) No 44/2001, then he will resort to its article 31, that allows to request preventive measures to the courts of a Member State even though other Member State is competent to judge on the merits of the case. From a practical point of view, each State will apply the internal procedure rules for the adoption of the particular preventive measure.

In the arbitral field (we know it is excluded from the scope of the Regulation (EC) No 44/2001, the claimant in an arbitral procedure is subject to the same unsuccessfulness risks than the claimant in an ordinary judicial process, that is why both the Regulations of the International Arbitration Court and the same International Conventions contemplate the possibility of taking preventive measures. (Article II.3 of the Convention of New York)

The same Court of Justice of the European Communities, in its well known Judgment of 17th November, 1998, when analysing if it is possible to take preventive measures in order to secure the effectiveness of an arbitration award, has confirmed such possibility. However, it cannot be concealed that it has been tried to deny the possibility of taking preventive measures in an arbitration procedure, on the basis of the idea that an arbitrator cannot enforce said preventive measures (since arbitrators have not enforcement power). Nevertheless, once admitted and verified that it is necessary and possible to take preventive measures in order to enforce an arbitration award, it is right to analyse who has competence to grant said measure -that is, if it must be awarded by the same arbitrator or Arbitration Court dealing with the merits of the case, or by a State judge. The regulations of the most important arbitration institutions admit that the arbitrators are competent to grant preventive measures. The Regulation of the Spanish Arbitration Court (in its article 15) grants also that possibility, since it declares that arbitrators can, unless the parties agree otherwise, take the preventive or provisional measures they consider necessary, and that they can subject the adoptions of such measures to the previous granting of enough bail or security, which will be requested to the applicant party.

Since the coming in force of the Spanish Arbitration Act (Act 60/2003), the possibility for the arbitrators to take preventive measures is clear and open. The article 23 of said Act 60/2003 grants **power to the arbitrators to grant preventive measures, when states that "Unless the parties agree otherwise, the arbitrators will be able, at the request of any of the parties, to take the preventive measures they consider necessary in relation to the subject-matter of the litigation. The arbitrators can request enough bail to the requesting party.**

Finally, just a short reference to those preventive measures regulated by specific International Conventions on maritime matters, such as the arrest of ships regulated by the Geneva Convention on Arrest of Ships, 12th March, 1999, in force in Spain for one year now.