
Spanish Legal Update

Review

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Protection of celebrities' right to personal and family privacy, honour and self image.

The limits between freedom of expression and the right to honour, personal privacy and self image - regulated in Spain by Law 1/1982 regarding the protection of honour, personal privacy and self image - are a constant source of debate and controversy. Recently, the Spanish Supreme Court has rendered a decision regarding this matter and responding to the heterogeneous requests made by the claimant, a famous Spanish bullfighter.

The claim filed by the bullfighter's representatives before the Court of First Instance of Seville requested this Court to declare the existence of an unlawful interference with his right to honour, personal privacy and self image on behalf of two well-known magazines of the Spanish yellow press. Firstly, the claimant argued that these magazines had infringed his right to privacy when publishing an article about his broken marriage and his new partner. Secondly, he alleged that this article had violated the honour and dignity of his deceased mother. And thirdly, the snapshots appearing in the article made him request for formal protection of his image.

The Court of First Instance dismissed the bullfighter's claim, but his representatives lodged an appeal, first before the Provincial Court of Madrid – who also dismissed the appeal -, and finally before the Supreme Court.

In this and other similar cases, the competent Court must consider the rights claimed and the freedom of information, considering the particular circumstances of the claimant and the treatment given by the media to the news.

Being a celebrity does not entail that his constitutional rights can be violated, but it is nonetheless important to stress that the claimant is one of the most famous characters in the Spanish public and social life, not only because of his career and of the fact that he comes from a family of famous bullfighters and was married to a duchess, but also because he authorised the use of his image to gossip magazines in several occasions in the past, therefore turning events that belonged, in principle, to his private sphere, such as his wedding party, into public events. His image also has a great public impact as it has been used in several advertising campaigns. Lastly, the controversial circumstances surrounding the death of his mother also had a great impact, since she was even more famous than her son for the Spanish yellow press journalists. All of the above, that is, the proof of the claimant and his mother's fame, as well as the cases in which the bullfighter decided to expose his private life in the past, were deemed relevant by the Supreme Court when assessing the Provincial Court's decision.

The Supreme Court dismissed the appeal on the grounds that the private spheres in which the bullfighter was claiming for an infringement had turned into public spheres due to his own acts –thus reducing his privacy sphere - and considered that the magazines had not performed an inadequate treatment of the news - and therefore did not violate his right to honour - since they had fulfilled several indispensable requirements to make the freedom of information prevail over the abovementioned rights: first, the information disclosed must be accurate; second, the information must involve a general interest or have public relevance; and third, the information must be presented avoiding insulting, slanderous or offensive language.

Héctor Romero

Setback for internet betting and gambling.

In its Judgment of 8 September 2009, the European Court of Justice ruled that the restrictions imposed by some Member States to private Internet betting and gambling operators, together with their prohibition, does not infringe European regulations because they can be justified on the grounds of the fight against fraud and criminality.

The Judgment overrules the appeals filed by the online gambling operator Bwin, as well as the appeal filed by the Portuguese Professional Football League. Both were fined by the Portuguese authorities with 74,500 and 75,000 € respectively for Internet betting and gambling activities, together with advertising activities, against the provisions set forth in Portuguese regulations.

The issue referred to the Court was whether the exclusive rights granted to the Portuguese gambling institution, when relying on Bwin, i.e. a service provider that is established in another Member State where it lawfully provides similar services and that has no physical establishment in Portugal, constitute an impediment to the free provision of services, in breach of the principles of freedom to provide services, freedom of establishment and the free movement of payments.

The Court deemed that restrictions can be justified on the grounds of public policy. In addition, a certain number of overriding reasons in the public interest have been recognised by case-law, such as the prevention of fraud and the general need to preserve public order. The Court also considers that the legislation on games of chance is one of the areas in which there are significant moral, religious and cultural differences among Member States. Due to the lack of Community harmonisation in the field, each Member State is responsible for determining, in accordance with its value system, what is required in order to ensure that the interests in question are protected, the Court concluded.

The fact that a Member State has opted for a protection system that differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. The Court considered that said provisions must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the degree of protection that these authorities seek to ensure.

The Member States are therefore free to set the objectives of their policy on betting and gambling and, where appropriate, to define in detail the level of protection sought.

Therefore, the Court's conclusion was that the fight against crime may constitute an overriding reason in the public interest capable of justifying restrictions regarding operators authorised to offer services in the games-of-chance sector. The Court deemed that games of chance involve a high risk of crime or fraud, given the scale of the earnings and the potential winnings for gamblers.

Due to the fact that the online gambling sector has not been subject to Community harmonisation, a Member State is entitled to consider that the mere fact of having an operator such as Bwin lawfully offering services online in another Member State, where it is established and, in principle, already subject to statutory conditions and controls on behalf of the competent authorities in said State, does not fully guarantee the protection of national consumers against the risks of fraud and crime, in the light of the difficulties that the authorities of the Member State of establishment are likely to encounter in assessing the professional qualities and integrity of the operators.

The decision of the Court was that Article 49 EC does not preclude legislation of a Member State, such as that at issue in the main proceedings, which prohibits operators such as Bwin International Ltd, which are established in other Member States in which they lawfully provide similar services, from offering games of chance via the internet within the territory of that Member State.

The Judgment constitutes a major setback for the European Commission, which has promoted the liberalisation of Internet betting and gambling activities and has initiated disciplinary proceedings against Member States imposing restrictions.

Fernando González

Video surveillance and the personal right to privacy and self-image.

The installation of cameras and video cameras for video surveillance continues raising doubts regarding their legality and possible infringement of the fundamental personal right to privacy and self-image. Although Instruction No. 1/2006 of the Spanish Data Protection Agency has clarified this issue by including the doctrine elaborated by the Spanish Constitutional Court, a number of video surveillance system agreements of Homeowner Associations have been submitted in Court to request their revocation.

The sentences issued by the Asturias High Court (December 5, 2008) and the A Coruña High Court (March 25, 2009), dismissed the appeals filed against the first instance judgments and declared the full legality of the two Homeowner Associations' agreements for the installation of video surveillance cameras in public areas, thus stating that these video surveillance systems do not violate the fundamental right to self-image.

The personal right to self-image is protected by Article 18.1 of the Spanish Constitution and Organic Law 1 / 1982. The Constitutional Court has defined the power conferred by this fundamental right through multiple rulings or sentences, describing this power as the right to prevent unauthorized third parties from obtaining, reproducing or publishing self images, regardless of the informative, commercial, scientific, cultural, etc. purposes pursued by those taking or disseminating the image. Nonetheless, the personal right to self-image is not to be understood as an absolute right, which means that it can be limited or restricted due to public interest grounds.

In Instruction No. 1/2006, the Spanish Data Protection Agency acknowledged the compatibility of video surveillance systems with the fundamental right to self-image as personal information. However, the Agency specifies that the legal rights protected shall be considered before approving the installation of video surveillance systems, a common and ongoing requirement aimed at safeguarding the constitutionality of all measures restricting fundamental rights.

The Asturias and A Coruña High Courts reached similar conclusions regarding the legality of the agreements adopted by the Homeowner Associations after undertaking a proportionality review on the appropriateness of the measure agreed, its need and the balance between pros (benefits) and cons (damages):

- Cameras would be placed on common elements not intended for the development of personal privacy. This means that no privacy or self-image right could be violated.
- The video cameras would enhance the security of both the property – which had suffered repeated damages in common elements - and the neighbours.

The Courts have concluded that it is possible to install video cameras for security purposes because these systems do not violate the fundamental rights to privacy and self-image. However, the measure must be analyzed on a case-to-case basis in order to determine that it does not violate the principle of proportionality and the Homeowner Associations shall comply with the

requirements set forth under Law 15/1999 of Personal Data Protection, namely:

- The need to notify the creation of video surveillance files to the Spanish Data Protection Agency so that the latter can proceed to the registration thereof.
- The implementation of technical and organizational measures to ensure the safety of personal data.
- The need to install a sign warning on the existence of video cameras.

Sara Antolín

Scope of regulation no.1393/2007 of the european parliament of 13 november 2007 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters: judicial service of documents beyond judicial proceedings.

Given the refusal of the Clerk of Court of First Instance No. 5 of San Javier to take action on the request to notify an affidavit aimed at informing the contracting parties located in the UK, and in Irland, on the unilateral termination of a series of sales contracts concluded with them by the seller an appeal was presented in the Court where the Clerk belonged. This notification does not fall under the legal proceeding.

In order to solve the aforementioned action, the Court presents a preliminary ruling to the ECJ in relation to the scope of EC Council Regulation 1348/2000, which refers to notification and transfer of judicial and extrajudicial documents dealing with civil or commercial matters. This is relevant because to determine if the scope would cover notification of court documents outside court proceedings made between individuals, or of on the contrary it should be exclusively limited to the framework of judicial proceedings.

Based on this and on the essential purpose of the regulation to establish a intra-community notification and transfer system to ensure proper operation of the internal market, the ECJ declares the extent of its scope indicating that judicial cooperation can not be only limited to judicial proceedings, thus opening the possibility of existence outside legal proceedings.

The ECJ positioned itself in accordance with the general opinion of most EU countries. This position goes against the view of the Spanish and Polish governments, which saw the extension as possible saturation of judicial functions by understanding that that function of service should not necessarily be fulfilled by them since the regulation considers the creation of specific transmitting and receiving bodies.

Therefore the ECJ, by virtue of a sentence dated June 25, 2009, proceeded to respond positively to the notification request related to the disputed affidavit. This fell outside the legal proceedings.

Paula Casado

Third party appeals under EU Regulation 44/2001.

Last April 23, 2009, the Court of Justice rendered its decision on Case C-167/2008 regarding a preliminary ruling on the interpretation of Article 43(1) of Council Regulation (EC) No 44/2001, which rules that a creditor of a debtor cannot lodge an appeal against a decision on a request for a declaration of enforceability if he has not formally appeared as a party in the proceedings in which another creditor of that debtor applied for that declaration of enforceability.

The reference has been made in the course of proceedings brought by certain creditors (hereinafter, the applicants) of the Central Bank of Iraq ('CBI') against another CBI creditor, Ompol Ltd, established in the Czech Republic ('Ompol'), in relation to an enforcement order of the Court of First Instance of Brussels authorising the enforcement of a judgment of the Court of Appeal of Amsterdam concerning Ompol's claims against CBI.

The issue was raised with reference to Article 43(1) of Regulation No 44/2001, which provides as follows:

'The decision on the application for a declaration of enforceability may be appealed against by either party.'

On the other hand, the Belgian Civil Code states:

'However, creditors may exercise all the rights and claims of the debtor, with the exception of those that are exclusively connected to the person.'

The proceedings have as question of law the pro rata distribution of monies belonging to CBI. Ompol's title amounts to half of the total amount of the claims against CBI. Ompol bases its title on a judgment delivered by the Court of Amsterdam. The First Instance Court of Brussels authorised enforcement of said judgment on the basis of Article 38 et seq. of Regulation No 44/2001.

The applicants brought a joint appeal against that authorisation of enforcement by means of an 'indirect claim' under the Belgian Civil Code, in conjunction with Article 43(1) of Regulation No 44/2001, with a view to preventing enforcement of the judgment of the Court of Amsterdam.

The First Court of Brussels declared the appeal inadmissible on the grounds that, although Article 1166 of the Belgian Civil Code grants creditors the right to exercise all rights and claims of their debtor, a creditor cannot be regarded as a 'party' within the meaning of Article 43(1) of Regulation No 44/2001.

The applicants brought an appeal in cassation against that decision and the cassation Court decided to suspend the proceedings and refer the issue to the Court for a preliminary ruling.

The Court of Justice, based on the principle of legal certainty of the Community legal system and considering that this procedure constitutes an autonomous and complete system, independent of the national legal systems, states that Regulation No 44/2001 excludes procedures whereby any interested third party may challenge an enforcement order under domestic law.

Therefore, a creditor of a debtor cannot lodge an appeal against a decision on a request for a declaration of enforceability if he has not formally appeared as a party in the proceedings.

Jesús Carrasco.

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