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**N.I.G.** 07040 42 1 2019 0015446

**ROLL: RPL APPEAL (LECN) 0000709 /2019**

**Court of origin:** JDO. FIRST INSTANCE No. 24 of PALMA DE MALLORCA

**Source Procedure:** ORD ORDINARY PROCEDURE 0000542 /2019

Recurring: CENTRAL SANTA LUCIA L.C Procurator: CRISTINA SAMPOL SCHENK Lawyer: RAFAEL GIMENO-BAYON COBOS

Recurred: FISCAL MINISTERY, MELIA HOTELS INTERNATIONAL SA Procurator: , RUTH MARIA JIMENEZ VARELA

Lawyer:, DAVID VICH COMAS

# AUTO NO. 66/20

THEMOS. SRES. PRESIDENT:

Mr Miguel-Alvaro Artola Fernández

Judges:

Mr Jaime Gibert Ferragut

Ms. María Encarnación González López

In Palma de Mallorca at eighteen March of two thousand twenty.

**ASRS** BY the Third Section of this Provincial Hearing, to the degree of appeal, this Ordinary Judgment, followed before the Court of 1st Instance No. 24 of Palma, under number 542/2019, Rollo de Sala **no. 709/2019,**  with the intervention, as plaintiff- appellant, CENTRAL SANTA LUCIA L.C, represented

Signed by: M. ENCARNACION GONZALEZ LOPEZ



20/03/2020 09:17

Minerva

Signed by: MIGUEL ALVARO ARTOLA FERNANDEZ

20/03/2020 12:17

Minerva

Signed by: JAIME GIBERT FERRAGUT 24/03/2020 12:14

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by the Procurator of the Courts Of Ms. Cristina Sampol Schenk and assisted by the Lawyer D. Rafael Gimeno Bayón Cobos, and as a defendant-appealed, MELIA HOTELS INTERNATIONAL S.A, represented by the Prosecutor of the Courts Dña. Ruth Jiménez Varela and assisted by the Lawyer D. David Vich Comas, with the intervention of the Public Prosecutor's Office.

IS PONENT the Ilma. Ms. Magistrate Maria Encarnación González López

# FACT BACKGROUND

**FIRST.-** By the Ilma Ms. Judge of the Court of 1st Instance No. 24 of Palma, Auto was issued on 2 September 2019, the operative part of which is as follows:

*"I* ***have*** to ***estimate***  *the*  *decline*  *raised*  *by*  *the*   *Procedural*  *representation of*  *MELIA HOTEL*  *INTERNATIONAL*  *S.A.* *and,*   *Consequently,*  *I have*  *to*  *declare*  *the*  *lack*  *of*  *jurisdiction*  *and*  *competència*  *International Competence of the*  *Tribunals*  *Spanish* courts *to*  *know*  *the*  *prsent*  *lawsuit*  *and to decreed the*  *dismissal*  *of the*  *prersents*  *actions.*

*All this*   *expressly*  *condemns*  *the*  *actora*   *Party*  *to the*  *payment*  *of*  *the*  *coasts*  *that*  *this*  *incident*  *has*  *generated. "*

**SECOND.-** Against the said resolution, and by the representation of the acting party, an appeal was brought, which was admitted, and followed by its formalities was noted for a vote and judgment on 3 March 2020, followed by the pending actions pending the appropriate resolution.

# JURIDIC FUNDAMENTALS

Those of the judgment given to the previous degree of jurisdiction are not accepted as long as they oppose those who follow.

**FIRST.-** The instant part of the proceedings challenges the decision by which the Court of First Instance declares the lack of jurisdiction and international jurisdiction of the Spanish Courts to hear the proceedings and agrees to the file de theproceedings. The Order is issued in application of article 65 of the Law on Civil Procedure in resolving the decline promoted by the defendant. By appeal, the acting party seeks to call into question the reasoning of the contest under appeal.

As is well stated in it, resolving on the obstacles set out by the responding party in promoting the declinator, requires determining what the actor's claim is. At this point, the present can only start from the descriptioncontained in the decision appealed by the right and exhaustive. In the application, THE acting party, CENTRAL SANTA LUCIA L.C, of American nationality, states that she is successor to SANTA LUCIA COMPANY S.A. and SOCIEDAD CIVIL HERMANOSS.B.B., who held ownership of the so-called "Ingenio Santa Lucia", dedicated to the exploitation of sugar cane. The Cuban government born after the revolution established a Marxist-Leninist regime in January 1959. On October 15, 1960,Law 890 was published, which agreed to nationalize all assets and companies of natural or legal persons of Cuban nationality or constituted under Cuban law. By application of the aforementioned Law the State confiscated the land owned by SANTA LUCÍA COMPANY S.A. and SOCIEDAD CIVIL HERMANOS SÁNCHEZ, which became its property with violation of international law. On the confiscated land is Playa Esmeralda in which two hotels owned by GAVIOTA S.A, sociedad owned state-owned. Hotels are operated by the now-sued hotel with illegal confiscation by obtaining enrichment with unlawful cause, deriving the benefits obtained from bad faith possession for the purposes of article 455 of the Civil Code.

On the basis of the above claim, the appealed resolution finds a lack of jurisdiction and international jurisdiction. Jurisdiction is excluded in a dual aspect: (a) because the actionable claim requires the analysis and valuation of the nationalization of assets by the Cuban Government, the examination ofvalidity and legitimacy and, b) because the claims relating to a property owned by a State are exercised in the application. International competition is excluded by (a) to bring an action of a real nature in respect of real estate located in Cub a;and (b) because the unjust enrichment underlying the claim rests on an action of a real nature on the basis of the liquidation rules of the possessive state (Article 455 of the Civil Code).

**SECOND.-** In appealing the decision on lack of jurisdiction, the acting party submits that it violates the right to effective judicial protection recognized in article 24 of the Constitution and the provisions of article 117.3 there, arguing that it has not directed the claim against the Cuban State.

First, it is appropriate to specify the extent of the constitutional right which the party considers to have infringed. Judgment of the Constitutional Court 45/2002 of 25 February concerns the right to obtain from judges and courts a reasoned and legally based decision on the merits of the claims which are appropriately inferred by the parties, stands in an essential element of the content of the fundamental right recognised in Article 24.1 EC; since the right to judicial protection isan essential right of legalconfiguration, its exercise and provision are contingent on the concurrence of the budgets and requirements that, in each case, has been established by the legislature, which cannot, however, establish obstacles or obstacles or capricious obstaclesor obstacles that prevent access to the process, in breach of constitutionally guaranteed judicial protection ( STC 185/1987 , out of 18 November), which is why the right to judicial protection is also satisfied byobtaining a decision of inadmission, which prevents the substance of the question referred from entering into the substance, if that decision is based on the existence of a legal cause justifying it, applied reasonably by the judicial body (SSTC 19/1981, 8 June; 69/1984, 11 June; 6/1986, 21 January; 118/1987, 8 July; 57/1988, 5 April; 124/1988 of 23 June; 216/1989, 21 December; 154/1992, 19 October; 55/1989, 21 December; 154/1992, 19 October; 1995, 6 March; 104/1997, 2 June; 108/2000, 5 May; 201/2001 October 15, among many others). On the basis of these parameters, the grounds of appeal must be examined.

Article 21.2 of the Organic Law of the Judiciary excludes from the jurisdiction of the Spanish Civil Courts the claims for enforced in respect of subjects or property that enjoy immunity from jurisdiction and enforcement in accordance with Spanish law and the rules of public international law. The provision is developed by Organic Law 16/2015, of October 27, on privileges and immunities of foreign States, International Organizations with headquarters or offices in Spain and international conferences and meetings held in Spain. Article 2 of that article distinguishes between immunity from jurisdiction and immunity from enforcement. It defines the former as the *"prerogative of a State, organization or person*  *not*  *to*  *be*  *sued*  *or*  *prosecuted*  *by*  *the*   *courts*  *of*  *another State",*  and immunity from enforcement as the *"prerogative by which a State,organization*  *or*  *person*  *and*  *its*  *property*  *may*  *not*  *be*  *subject to*   *coercive*  *measures* or  *enforcement*   *of*  *decisions*  *given*  *by*  *the*  *courts*  *of*  *another*  *State".* Article 4 of that state recognizes immunity from jurisdiction and enforcement to any foreign State and its property.

The decision at first instance assesses the immunity of jurisdiction with respect to the State of Cuba and its assets, in the aspect of being excludedfrom the proceedings of the knowledge of the Spanish Courts because it requires the prosecution of an action of the foreign State and because it affects a good owned by it, without in any case confusing between the two types of immunity recognized by legal.te.

It is argued by the appellant that the claim is not directed against the Cuban State, the only one to which immunity can be recognized, but against a Spanish entity domiciled in Palma de Mallorca. In that regard, as highlighted in the decision, it cannot be overlooked that the analysis of the claim inexcusably and as a matter of substance requires the examination of the decision to nationalize property – "confiscation" in terms used in the lawsuit - and its lawfulness by application of theinternational Derecho. No pronouncement can be made of the conduct of the defendant generating according to the actor of her right without examining that act which the foreign State once carried out, although this should not lead to asserting the defect of jurisdiction. The original lawsuit against the proceedings is not directed against the Cuban state. The responding party interprets the prerogative defined in Article 2(a) of Organic Law 16/2015, already transcribed, as regulated by the United Nations Convention of 2 December 2004, according to which it is not necessary for the claim to be directed against a foreign State, and it is sufficient for the process to undermine the property, rights, interests or activities of that other State. That interpretation cannot displace Article 51 of Organic Law 16/2015 which, in Title VII, concerning procedural matters, states that *"For the purposes of this Organic Law, it shall be understood that proceedings have been brought before the*Spanish isditional jur*bodies against any of the bodies or persons who, in accordance*  *with*   *this*  Organic  *Law,*   *enjoy*  *immunity,*  *if*  *any*  *of*  *them*  *is mentioned*  *as*  *a party*  *against*  *which*  it *is directed".*    *a*  That demand is       reflected, similarly, in Article 49 thereof, which requires the Spanish courts to assess of its own motion the questions relating to immunity referred to in the Law, by refraining from hearing them of the cases before them *"where*an action has been*expressed,*   *complaint*  *or*   *otherwise* initiated *proceedings or where an enforceable measure is sought in respect of any of the bodies, persons*  *or*  *property*  *which*  *enjoys*  *immunity*  *under*  *this*  *Organic Law".*

As has already been stated, no claim or claim is directed against the foreign State or its assets, the appeal to assert the jurisdiction of the Spanish courts must succeed.

This is not contradicted by the rulingscited by the appellant. The Judgment of the Third Chamber of the Supreme Court of 10 December 2003 analyses the claim of the appellants there in relation to the responsibility of the Government of Spain in the implementation of the Agreementwith the Cuban Government on16 November 1986. On its sixth legal basis, the decision leaves safe the rights of those affected by expropriation outside that Convention,*"since*   *its*  *conclusion* does *not*  *extinguish*  *the*  *exercise*  *of*  *that*  *hipotical*  *right*  *of*  *individuals to recover the confiscated property or to obtain fair compensation, raising, to that effect, the corresponding claim before the current or subsequent Cuban Government".* In the STS (Room 1a) of 30 December 2010 which is cited by the appellant, it is specified that *"the registration seat* carried out *in* Spain is *challenged,*   *not* the *act* that *caused*  *it*  *– the*  *validity of which,*  *on* the *other* hand, was subject to the right and control of the Cuban Courts", adding that *"As stated above the aforementioned judgment of 25 September 1.992, it is not for us to review the legitimacy of the acts executed in Cuba as a result of the*application of Law  *890. However, given the significance that in our*  *system* of    *attribution of assets*  *have*  *the*  *existence*  *and*   *lawfulness*  *of*  *the*  *case, assess them*  to *the*     *extent*  *necessary*  *to*  *determine*  *the*  *validity*  *of*  *the* new *ownership*  *caused*  *by*  *the*  *expropriation*  *of*  *the*  *mark*  *number*  *99.789,*  *and*  *published* by *the*  *registration*  *of* industrial *property.*  *To*  *this*  *indirect*  *control* the plaintiffs *have*  *full*  *right,*  *in accordance with our legal order."* In the case of the case in the case of the case, the acting party does not claim to be resarmed by the Cuban State, nor through the knowledge of the effects of the application of its rules, a review that could be classified as direct is exercised over it.

**THIRD.- Affirmed by** the Jurisdiction, the international jurisdiction also denied in the appealed decision must be analysed. As anticipated, the appealed decision excludes the jurisdiction of the Spanish judicial bodies for bringingan action of a real nature in sent that affects a good located in Cuba and for having a real character the claim for the liquidation of a possessory state. On the basis of those considerations, it applies Article 24 of Regulation 1215/2012 in which, withthe exception of the general jurisdiction of international jurisdiction based on the defendant's domicile, exclusive jurisdiction in matters relating to property rights is conferred on the courts of the Member State where the immovable property is located.

In order to determine the rules applicable to the actionable claim, it is necessary to classify the action brought. This must be done on the basis of the rules applicable to an object that transcends the national level inso matter wheres the damages claimed in the claim originate from the operation of hotels in Cuba. Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement ofjudgments in civil and commercial matters lays down in Article 4 as a general jurisdiction that of the defendant's domicile. That general rule is justified in its recital (15) by noting that*"The rules of jurisdiction must be* of a high degree of *predictability and must be based on*   *the*  *principle*   *that*    *jurisdiction* is *generally*  *based on*  *the*  *defendant's*   *domicile.*   *La*  *Jurisdiction*  must   *always*  *be*  *governed*  *by*  *this principle,*  *except*  *in*  *some*  *very* specific *cases*  *where*  *the*  *subject-matter* of *the*  *dispute*  *or* the autonomy of the parties *justifies* another connecting *criterion. With regard to* legal*r*   *persons,*    *domicile*  *should*  *be defined*  *autonomously*   *to*  *increase the*  *transparency*  *of*  *common*  *rules*   *and*  *avoid conflicts*  *of*  *jurisdiction."* By way of derogation from that principle, Article 24 contains the exclusive jurisdiction which has been applied in the appealed decision. The application of the supranational rule requires that its interpretation be in accordance with the ogansof the same area, in particular the decisions of the Court of Justice of the European Union which is responsible for ensuring compliance with the law in the interpretation and application of the Treaties as provided for in Article 19 of the Treaty on European Union. The Court interprets restrictively, the specific competition rules deviated from the general jurisdiction, and in particular in the field of rights in rem, has repeatedly held that the exclusive jurisdiction provided for in Article 24.1 of Regulation 1215/2012 does not cover all actions relating to real estate rights, but only those falling within the scope of that regulation. The action needs to be found, on the one hand, among which they tend to determine the scope, consistency, ownership, possession of immovable property or the existence of other real rights in those goods and, on the other, to ensure to the holders of such rights the protection of the prerogatives conferred on them by their title (judgments of 3 April 2014, Weber, C- 438/12, EU:C:2014:212, paragraph 42 of 17 December 2015, Komu and Others, C- 605/14, EU:C:2015:833, paragraph 26, and of 16 November 2016, Schmidt, C- 417/15, EU:C:2016:881, paragraph 30). It's not enough, consequently, that the action affects a right in rem or relates to immovable property in order to determine the jurisdiction of the court of the Member State where the immableissituated, but it is necessary that the action be based on a right in rem and not a personal right (judgment of 16 November 2016, Schmidt, C-417/15, EU:C:2016:881, paragraph 34).

On the basis of those considerations, the actor's claim cannot be attributed to a real character. It does not affect any of the rights which determine the application of the exclusive jurisdiction as interpreted by the Court, but is based on any unlawful enrichment which is attributed to the pairdemanded for the operation of certain establishments located on the land which was "confiscated". The nature of that action determines that the Spanish bodies must be given jurisdiction to hear it. Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ('Rome II'), in Article 2 thereto, means 'damage' the consequences resulting, inter alia, from unjust enrichment. This israta in matters falling within the scope of Regulation 1215/2012 by not being among those that relate as excluded in Article 2. Unjust enrichment is part of what Article 7 is. (2) of the Ruleingus calls "delict or quasi-delictmatter", it is a repeated doctrine of the Court that the concept encompasses any claim requiring liability of a defendant and not related to 'contractual matters' (judgments of 27 September 1988, Kalfelis, (189/87, EU:C:1988:459, paragraphs 17 and 18; March 13, 2014, Brogsitter,C-548/12, EU:C:2014:148, paragraph 20 of 21 April 2016, Austro-MechanaMechana, C-572/14, EU:C:2016:286, paragraph 32, and of 16 June 2016, Universal Music International Holding, C-12/15, EU:C:2016:449, paragraph 24). Accordingly, the general jurisdiction represented by the defendant's domicile (Article 4 of Regulation 1215/2012) and the alternative jurisdiction represented by theplace where the harmful eventoccurred or may occur (Article 7.2) applies.

The same international competence would result from the application of Articles 22 and following of the Organic Law of the Judiciary, since Article 22b, leaving the mandatory jurisdictions safe, confers jurisdiction on the Spanish courts whenthe defendant is domiciled in Spain or is thus determined by any of the forums established in Articles 22 quáter and 22d. In the latter, jurisdiction is conferred on the Spanish Courts in respect of extracontractual obligations, in the event of express or tacit submission, and even if the defendant was not domiciled in Spain, where the harmful event occurred in Spanish territory.

Consequently, having chosen the acting party from among the possible jurisdictions is the one corresponding to the domicile of the defendant, the jurisdiction of the Spanish judicial bodies must be declared.

**FOURTH.-** With regard to procedural costs, the objective criterion of maturity requires the imposition ofthedeclinator on the decline of the payment of those caused by the incident in the first instance.

As regards those caused in this elevation, pursuant to Article 398 of the Law on Civil Procedure, the estimation of the action precludes an express pronouncement.

Pursuant to the provisions of Additional Provision 15a of the Organic Law of the Judiciary, introduced by the nineteenth issue of the first article of Organic Law 1/2009, of November 3, complementary to the Law on the reform of procedural legislation for the implementation of the new Judicial Office, it is agreed to refund the deposited to appeal.

Having regard to the articles cited and others of general and relevant application,

# Operative

1. The appeal lodged by the Procurator Ms Sampol Schenk, on behalf of central SANTA LUCIA, S.L, against the order issued on 2 September 2019 by the Ilma Ms. Magistrado Judge of the Juzgado de PrimertoInstance No24 de Palma, is up to be brought against the order of ordinary trial from which the present scroll ates.
2. Accordingly, the express decision is revoked by declaring the international jurisdiction and jurisdiction of the Court of First Instance to hear the proceeding.miento.
3. The party that promoted the declinatory is imposed on the payment of the costs caused by the incident in the first instance.
4. There is no express statement regarding the payment of the costs incurred in this elevation.
5. The refund of the deposit constituted for the filing of the appeal is agreed.

Thus, by this car, against which there is no recourse, we agreed.

The dissemination of the text of this decision to parties not interested in the process in the processthat has been issued may only be carried out after dissociation of the personal data contained therein and with full respect for the right to privacy, the rights of persons who require a special duty to protect or to guarantee the anonymity of the victims or injured, where appropriate.

The personal data included in this resolution may not be transferred, nor communicated for purposes contrary to the laws.