UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

ANWAR, *et al* *Plaintiffs,* -against- FAIRFIELD GREENWICH LIMITED, *et al* *Defendants.* This document related to all actions	Master File No. 09-CV-0118 (VM)

EXPERT DECLARATION OF PROF. DR. FERNANDO GASCÓN ON SPANISH LAW

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I, DR. FERNANDO GASCÓN, hereby declare:

1. I am a professor of law at Complutense University, Madrid. I have been asked as an independent expert to provide an opinion whether it is more likely than not that a Spanish court would recognize the preclusive effect of the decision or settlement in a U.S. class action on members of the class who have not directly participated in the process and have not opted-out when offered the opportunity (absent class members). A response in the affirmative, in favor of recognition, involves maintaining, as the most likely event, that the courts of Spain would deny subsequent exercise of individual actions in Spain by any of these absent class members vis-à-vis any of the defendants. I am also aware that the court's assessment of this matter constitutes a condition of class certification in this process and, consequently, inclusion or not in the class of aggrieved investors who are residents of Spain.

1. PRELIMINARY CONSIDERATIONS

2. Let me state now that my opinion on this matter is positive, for the reasons that I shall lay out in the pages that follow; I believe that, in general terms, a judgment or a court-approved settlement in the framework of a judicial action in the courts of the United States will be recognized and enforced in Spain; and, in more specific terms, I also believe that, given the manner in which the class action in *Anwar v. Fairfield Greenwich Ltd.* is being conducted, it is more likely than not that Spain would recognize a final judgment or court-approved settlement in the case.

3. I issue this declaration in my capacity as Professor of Procedural Law at the Complutense University of Madrid, the largest public university in Spain and one of her chief academic models. Since February 2009, I have held accreditation in Spain as a *Catedrático* [Tenured Professor] of the University and I have since November 2008 held the position of Director of the Procedural Law Department of that University. My principal activity is teaching at the university level and conducting legal research; I also

occasionally work with those practicing the profession, by the preparation, with a certain frequency, of legal reports in disputes with cross-border aspects.

4. The ambit of my academic specialization embraces international and comparative civil procedural Law and the tools for collective safeguarding of rights and interests, which are subjects that come together in the matter that is now to be examined. Since I wrote my doctoral dissertation, which I defended in 1997 and which dealt with cross-border provisional measures, I have published several writings on aspects of international civil procedure, among which is one concerning recognition in Spain of decisions by foreign courts. I have also produced a variety of writings on collective actions; the most recent of these, published in Spain in 2010, concerns collective settlements, contains a comparison between the Spanish and the United States systems, and analyzes – among other matters – the possibility of recognition in Spain of United States collective settlements; side by side with this are other writings on the subject of collective relief in the Spanish system that have been published in Spain, in France, in Germany and in Italy. I ought to add that the civil justice system of the United States is very familiar to me; I was a Visiting Scholar at the University of California-Berkeley in the summer of 2009 (precisely in order to prepare the work on class settlement to which I have referred above); I have translated into Spanish *American Civil Procedure: an Introduction* by G. Hazard and M. Taruffo; and in March 2010 I supervised the defense of a doctoral dissertation on provisional measures in United States civil process. [My Curriculum Vitae is enclosed as Exhibit 1 to this declaration]

5. I ought at all events to point out that this *expert declaration* centers on the functioning of the Spanish civil procedural system and on the possible admission under it of a decision or of a settlement approved by a court in the framework of a process in which a securities class action is brought before a court of the United States.

6. As the final initial element, I ought to point out that my knowledge of the salient facts for the production of this declaration is based upon the allegations set forth in the *Second Consolidated Amended*

Complaint filed against *Fairfield Greenwich Ltd. et al.* on September 29, 2009, and the decision of Judge Victor Marrero of the *United States District Court for the Southern District of New York* dated August 18, 2010, deciding the defendants' motions to dismiss.

2. SALIENT FACTS

7. It is not, to be sure, my purpose now to enlighten the court and the other parties about facts and allegations with which they are entirely familiar. I think it advisable, however, to identify which are the most salient facts in this dispute from the perspective of a Spanish court that may at some future time find itself called upon to make a determination about recognizing in Spain the preclusive effects of the decision or of the settlement that brought it to a close.

8. In general, the action originates from the existence of a wide network of investor attraction, through certain feeder funds under the auspices of the *Fairfield Greenwich Group*, which later introduced the sums in the *Ponzi system* promoted by Bernard Madoff. Investors were induced to invest in the Funds in reliance upon defendants' misrepresentations concerning, inter alia, the extend of their due diligence and oversight of Mr. Madoff's investment strategy.

9. Among the feeder funds offered by the *Fairfield Greenwich Group*, two were created that were specially designed to attract investors not resident in the U.S.: the *Fairfield Sentry Ltd.* fund and the *Fairfield Sigma Ltd.* fund. Although both funds were formally incorporated in the British Virgin Islands, their management and investment activities were carried on chiefly in the United States and, in particular, in New York City. According to the books and records of the offshore funds, 16 Spanish investors constituted 2.31% of the registered subscribers in *Fairfield Sentry*, and 38 Spanish registered subscribers constituted 18% of the investors in *Fairfield Sigma*. When the fraud committed by Mr. Madoff came to light, the losses sustained by the Spanish members of the class in *Fairfield Sentry* amounted to

approximately $270 million (approximately 6% of the total losses of the class in the fund) and the losses sustained by the Spanish members of the class in *Fairfield Sigma* were $28 million (4% of the total losses sustained by the class in the fund).

10. This action was filed, individually and in their own names, by various natural and legal persons who had invested in some of the *Fairfield Greenwich Group*'s feeder funds and who were harmed by the way in which their investments were managed; moreover – and this is the most salient point for the purposes of this declaration – the action that initiated the process also embraces the exercise of a class action, for the benefit and in the interest of all the investors – some known and others still unknown – who were harmed and who do not appear in their own names and individually as plaintiffs in the process. The defendants are those persons and entities alleged to be responsible for causing the damages to the class as described in detail in the Second Consolidated Amended Complaint. The legal foundations on which the claims are based vary from defendant to defendant; sometimes recourse is had to the U.S. federal securities laws and in other cases recourse is had to the common law on the matter of damages. And the relief claimed is aimed, in general terms, at indemnification for the damage sustained, at the return of the sums wrongly received as *fees*, and at obtaining punitive damages.

3. GENERAL MATTERS

3.1 *General focus of the declaration*

11. The declaration requested concerns whether it is more likely than not that a Spanish court would recognize, vis-à-vis the absent class members, the preclusive effectiveness of the decision or of the settlement that might be reached in this process, if the court consents to class certification.

12. For several decades the Spanish courts have routinely recognized judgments rendered by courts of the United States, provided that the conditions for recognition under Spanish law are met. There is not,

then, a line of decided cases hostile to court decisions coming from the United States despite the differences between our separate civil justice systems.

13. As far as it is possible to learn from data bases and publications, recognition of a decision or of a settlement reached as the result of the bringing of a class action before a court of the United States has never to date been attempted in Spain; thus, there is no known legal precedent in this matter. Moreover, the question has been treated from an academic point of view only and in a very limited way [in my book *Tutela judicial de los consumidores y transacciones colectivas*, Ed. Civitas, Madrid, 2010, pp. 217-229 (Exhibit 2); and in the handbook of Prof. M. Virgós Soriano and Prof. F.J. Garcimartín Alférez entitled *Derecho Procesal Civil Internacional. Litigación internacional*, Ed. Civitas, 2ª ed., Madrid, 2007, pp. 427 and 644 (Exhibit 3)].

14. In the following pages, I shall explain the requirements and conditions on which recognition in Spain of decisions rendered abroad depends and, in connection with each of them, I shall examine whether they can be satisfied in the case *Anwar v. Fairfield Greenwich Ltd.* More specifically, it is necessary to identify those aspects of the decision or of the settlement that might be problematic pursuant to the usual patterns of recognition of foreign court decisions to which the courts of Spain are accustomed; my examination will center principally on determining whether they form obstacles to recognition and to what extent; at the end of my examination, a general conclusion can then be arrived at.

3.2 *Applicability of the "system of conditions" of the Law of Civil Procedure of 1881 to decisions coming from the United States*

15. The Spanish legal system contains no fixed regime for approval of foreign judgments, because of the co-existence of legal provisions of supranational origin, specifically European Community Union statutes, rules and regulations, with legal provisions of domestic origin, and also because of the primacy of the former over the latter.

16. In the event that the decision comes from a State with which Spain has executed an applicable treaty, that treaty will determine approval. On this point, the European Community rules in particular are conspicuous as applicable to decisions issued in Member States of the European Union; currently, this is Regulation 44/2001, of December 20, 2000, which has its roots in the Brussels Convention of 1968. This provision is of special importance, first of all, because it is frequently applied, but its importance is more than anything else qualitative: Through the so-called "Community procedure for preliminary questions" the Community standards form the object of uniform interpretation by the European Court of Justice; in this way, the Court has created a *corpus* of jurisprudence which is constantly being added to and of which the courts of each country – including those of Spain – take great account. And, through this mechanism, the concept of recognition and exequatur that underlies Community provisions has generally spread its mantle over the entire system, that is to say, even over cases beyond the purview of the European Community Rules.

17. If the decision sought to be recognized in Spain is not subject to a supranational provision, the domestic legal system will then have to be turned to. This is what occurs in the case of court decisions coming from courts of the United States, because of the lack of a bilateral treaty between Spain and the United States on the recognition of judgments.

18. The domestic legal system is defined in Articles 951 to 958 of the 1881 Law of Civil Procedure [*Ley de Enjuiciamiento Civil de 1881*, hereinafter LEC/1881 (Exhibit 4)]. This peculiar legal provision deserves to be explained. At the present time, the regulations on civil process in Spain are set out in the Law of Civil Procedure that was passed on January 7, 2000, and took effect on January 7, 2001 [*Ley de Enjuiciamiento Civil de 2000*, hereinafter LEC/2000]. The 2000 Law of Civil Procedure made a fundamental change in the design of civil processes in Spain, and it superseded the 1881 Law of Civil Procedure. It happens, however, that the scope of matters under LEC/1881 is much broader than under LEC/2000; certain matters covered in LEC/1881 were not covered by LEC/2000, which, rather, provided for the drafting in the future of special laws for those matters. This is precisely the case with recognition

and enforcement of foreign judgments; Final Provision 20 of LEC/2000 provided that a Bill for International Co-operation in Civil Matters would have to be submitted within a period of six months and that, for so long as such special law was not enacted, the LEC/1881 provisions on exequatur were to be applicable [Exhibit 5]. As happens with some frequency, it would appear that the terms of Final Provision 20 of LEC/2000 have fallen into oblivion, with the result that, this far into the 21st century certain provisions passed in the 19th century have continued in force. Fortunately, despite the fact that the provisions of LEC/1881 on this point are archaic in both language and concept, they have undergone great jurisprudential re-interpretation so that the present system of recognition has been modernized to reflect developments in the area of recognition of foreign judgments in the European Community and in other, advanced legal systems.

19. Under the system contemplated in LEC/1881, in the absence of an international treaty, the basic criterion for determining whether a foreign decision can or cannot be recognized in Spain is reciprocity, which can take place in two ways: i) positive reciprocity, such that the foreign decision can be certified in Spain if Spanish decisions are granted exequatur in the State of origin; ii) negative reciprocity, which excludes the granting of exequatur if Spanish decisions are not certified in the country of origin. Where, as here, reciprocity – whether positive or negative – is absent, obtaining certification will depend on the presence of a number of requirements, enumerated in Article 954 of LEC/1881, which I shall mention briefly.

20. In theory, then, it might be thought that, if a Spanish court determines that positive reciprocity exists, recognition of a decision or of a settlement such as those that could be arrived at in *Anwar v. Fairfield Greenwich Ltd.* would be justified without the need to verify the presence of any other requirement.

21. In practice, however, Spanish jurisprudence ignores reciprocity; in the opinion of the Spanish courts, in order to find that positive reciprocity is present, the party seeking recognition must prove that in

a similar case an equivalent decision issued in Spain has already been recognized in the country of origin [cf. Decision of the Supreme Court of April 7, 1998 (RJ 3559) (Exhibit 6) and Decision of the Supreme Court of November 13, 2001 (JUR 2002\608) (Exhibit 7)]; in other words, it would have to be shown that a court in the United States had previously recognized a class action judgment or a class settlement approved by a Spanish court, but it would not suffice, on the other hand, to argue that a decision rendered in a collective process in Spain would probably be recognized in the United States. Given the impossibility of satisfying this requirement, in practice the Spanish courts in all cases declare that neither positive nor negative reciprocity has been evidenced and, consequently, they look directly at the presence of the requirements enumerated in Article 954 LEC/1881 [cf. Decision of the Supreme Court of December 24, 1996 (RJ 1997\8394) (Exhibit 8); Decision of the Supreme Court of June 9, 1998 (RJ 5322) (Exhibit 9); Decision of the Supreme Court of October 27, 1998 (RJ 9009) (Exhibit 10); Decision of the Supreme Court of July 20, 1999 (RJ 5237) (Exhibit 11); Decision of the Supreme Court of November 13, 2001 (JUR 2002\608) (Exhibit 7); Decision of the Supreme Court of May 28, 2002 (JUR 2002\159025) (Exhibit 12); Decision of the Supreme Court of July 8, 2003 (JUR 2003\206114) (Exhibit 13); Decision of the Supreme Court of January 20, 2004 (JUR 2004\54318) (Exhibit 14)].

3.3 The Spanish courts with jurisdiction to recognize a decision or a settlement coming from a court in the United States

22. Until January 15, 2004, the Civil Division of the Supreme Court was the only court with jurisdiction to decide applications for the recognition of foreign judgments in situations where the domestic legal system under LEC/1881 was applicable; consequently, it fell to it alone to pronounce on recognition of the decisions coming from courts of the United States.

23. The Supreme Court is the superior organ of the Spanish court system and its jurisdiction of this matter was justified by the rigid concept of exequatur that existed in the 19th century: Permitting a foreign judgment to have effect in Spain presupposed a surrender of sovereignty, which can be authorized only by

the Supreme Court. With the passage of time, this sovereignty-related concept was gradually modified through a view that made international judicial co-operation the principal consideration. As a matter of fact, in accordance with the treaties on this matter that were signed in the second half of the 20th century, and in particular when it comes to applying Community provisions, jurisdiction to recognize and to grant exequatur has been transferred to the courts that occupy the first level in the organization of the Spanish courts.

24. Concentration of this function for so long in the Civil Division of the Supreme Court had two effects of great utility in practice: 1) a consistent and easily identifiable jurisprudential doctrine was created that the other courts rely on heavily; 2) the Supreme Court found the ability to re-interpret archaic provisions and to adapt them to the new circumstances resulting from Spain's more open acceptance of international legal relations from the second half of the 20th century on.

25. In 2003, the law in this matter was amended and took effect on January 15, 2004, shifting jurisdiction to recognize foreign decisions under Spanish domestic law; at the present time, it lies with either the Courts of First Instance [*Juzgados de Primera Instancia*] or the Courts for Mercantile Matters [*Juzgados de lo Mercantil*], depending on the subject. In both cases, they are single-person judicial organs that are the first level of the Spanish court system in matters of private Law. In *Anwar v. Fairfield Greenwich Ltd.*, taking due account of the internal distribution of cases between them (Article 86-*ter* 2, Organic Law of the Judiciary) (Exhibit 15), jurisdiction would fall to a Court of First Instance. Its decisions can be appealed to the Provincial Courts [*Audiencias Provinciales*], where judgments are rendered by panels of three judges.

26. On occasion, the decisions of Spanish courts in matters of recognition and exequatur are appealed to the Constitutional Court if it is concluded that any of the fundamental rights and freedoms recognized in the Spanish Constitution has been violated; this means that Constitutional Court jurisprudence also exists in this area.

27. If the Spanish legal system is to be classified into one of the two great Western legal families, it is clear that it is a system of *civil law*, not of *common law*. However, although there is no formal connection to judicial precedent, the fact is that, in practice, previous decisions on similar issues are given great weight, especially when they reflect consolidated criteria; courts of lower rank tend in every case to support their decisions by citing decisions of the higher courts and, in particular, those of the Supreme Court and of the Constitutional Court.

28. Thus, it is important to bear in mind that the Spanish court will have to decide on recognition on the basis of the provisions of Articles 951 to 958 of LEC/1881, but will do so in light of the jurisprudence of the Supreme Court and of the Constitutional Court.

3.4 Recognition of a foreign judgment in Spain entails an extension of its effects

29. In the abstract, the systems for recognition of foreign decisions admit two varieties: Equivalency of effects and extension of effects.

30. - Equivalency of effects means that, once a foreign decision has been recognized, it has in the State of which recognition is sought the same effects as an analogous domestic decision in that jurisdiction..

31. - Extension of effects, on the other hand, means that a recognized foreign judgment will have the same effects in the State granting recognition as it would have in the jurisdiction where the judgment was originally entered, unless recognition is made subject to some restriction.

32. Although it is not expressly laid down in the language of any provision, the Spanish system for recognition of court decisions under the domestic legal system of LEC/1881 is based on extension of effects; this has been a consistent theme in the jurisprudence of the Constitutional Court [Judgment 132/1991, of June 17th (Exhibit 16)] and of the Supreme Court [Decision of December 24, 1996 (RJ 1997\8394) (Exhibit 8); Decision of July 20, 1999 (RJ 5237) (Exhibit 11); Decision of February 6, 2001

(RJ 1511) (Exhibit 17)]; this is a line of interpretation that is also coherent with the concept of recognition that inspires European Community provisions (cf. Judgment of the *European Court of Justice* of February 4, 1988, Case 145/86, *Hoffmann v. Krieg*) (Exhibit 18). Spanish doctrine without exception also supports this option [cf., for all cases, M. Virgós Soriano/F.J. Garcimartín Alférez, *Derecho Procesal Civil Internacional. Litigación internacional*, Ed. Civitas, 2ª ed., Madrid, 2007, p. 564 (Exhibit 19); J.C. Fernández Rozas/S. Sánchez Lorenzo, *Derecho Internacional Privado*, ed. Civitas, 3ª ed., Madrid, 2004, p. 188 (Exhibit 20); A.L. Calvo Caravaca/J. Carrascosa González, *Derecho Internacional Privado*, Volumen I, Ed. Comares, 5ª ed., Granada, 2004, pp. 321-322 and 377 (Exhibit 21)].

33. Consequently, if a judgment or a settlement obtained in the United States following the bringing of a class action is recognized in Spain, it will have in this country the same effects as it has in the United States, which includes, of course, the preclusive effect that would prevent any absent class member from bringing new actions against the same defendants on the basis of the same facts on which the action in the United States was based.

34. It should be noted, in any event, that this preclusive effect is not unknown in the civil procedural system of Spain. Decisions that are final have the effect of *res judicata* and, according to Article 222.1 LEC/2000, "final judgments' *res judicata*, whether they find in favor of or against the plaintiff, exclude, in accordance with the law, any further action having an object identical to the action in which that judgment was rendered." (Exhibit 22) In the case of settlements, the result is the same, although the doctrine debates whether *res judicata* in the strict sense is concerned or simply the preclusive effectiveness of the settlement (*exceptio pacti*). Moreover, as we shall see below in more detail, the civil procedural system of Spain contemplates preclusive effectiveness, vis-à-vis absent class members, of judgments rendered in collective processes, on the terms set out in Article 222.3 LEC/2000.

35. In addition, it is important to note that the system of recognition contemplated in Spanish procedural legislation does not, as is usual in all systems, permit the Spanish courts to scrutinize the

merits of the foreign decision; their function is confined to approval of the foreign decision, but it is not permitted to inquire whether the decision is correct or not, or whether the courts of Spain would have arrived at the same result or at an equivalent result [Decision of the Supreme Court of November 13, 2001 (JUR 2002\608) (Exhibit 7)].

3.5 *Restatement by the Supreme Court of the requirements set out in Article 954 of the LEC/1881*

36. If a class action judgment or a class settlement arising out of a judicial action in the United States is recognized in Spain, it will have preclusive effects. In order for this to occur, the requirements set out in Article 954 LEC/1881 must be satisfied. These are, verbatim, as enunciated and stated in 1881, as follows:

1. "That the enforcement order has been rendered as the result of the bringing of an action *in personam*.

2. That it has not been rendered in the absence of the defendant.

3. That the obligation for which compliance is sought is lawful in Spain.

4. That the document that contains the decision satisfies the conditions necessary in the nation in which it has been issued in order to be considered authentic and those that the laws of Spain require in order that it is worthy of faith and credit in Spain."

37. This provision, however, has been re-interpreted by the Supreme Court in the course of the last decades, in order to conform the Spanish system of recognition to the demands of the equivalent supranational provisions. The result is that, for a foreign decision to be recognized in Spain, seven elements must be satisfied; the greater part of them can to a greater or lesser extent be deduced from the language of Article 954 LEC; however, it is the jurisprudence of the Supreme Court that systematized them (cf. Prof. P. Juárez Pérez's *Reconocimiento de sentencias extranjeras y eclesiásticas por el régimen*

autónomo español, Ed. Colex, 2ª ed., Madrid, 2008 (Exhibit 23)] and at the present time, with the jurisdiction of the Supreme Court in this area excluded, this structure continues to be applied in consistent and homogeneous fashion by the lower courts (Courts of First Instance and Provincial Courts).

38. These seven elements are as follows:

1. The decision is final.

2. The court from which it comes has jurisdiction.

3. The decision has been rendered on an action *in personam*.

4. The decision has not been rendered with the (involuntary) non-appearance of the defendant.

5. The decision does not violate Spanish public policy.

6. The document including the decision is authentic.

7. The decision is not in conflict with another judgment already given effect in Spain.

39. Recognition in Spain of a judgment or of a settlement in *Anwar v. Fairfield Greenwhich Ltd*., therefore, will depend on meetings these seven conditions.

4. REQUIREMENTS FOR RECOGNITION (I): THE FINALITY OF THE DECISION

40. In order for a foreign court decision to be recognized in Spain pursuant to LEC/1881, it must be final (Article 951 LEC/1881), which is to say, no appeal from it is possible. Where a United States class action is concerned, our attention must focus on two areas:

4.1 *Recognition of settlements is possible*

41. At the present time, it is to be understood that not only is recognition of judgments rendered by a court possible, but recognition of settlements approved by the court is, too. As a matter of fact, although the original language of the Spanish legal system took account only of judgments, at present, in the wake of the reforms made by Law 62/2003 and by Law 13/2009, Article 955 LEC/1881 makes express reference to "judgments and *other court decisions."* Court decisions that approve a collective settlement come within the meaning of "other court decisions," and, according to *Rule* 23(e) of the *Federal Rules of Civil Procedure*, there is no class settlement without court approval, that is to say, if there is a decision by a court that endows the settlement with binding effect: if a class settlement is approved by the court after holding a fairness hearing, a final judgment will be entered; among other things, the judgment will include a bar order prohibiting class members from suing the defendants and releasing all claims that the class has against the defendants.

42. Thus, any hypothetical class settlement that might be approved in *Anwar v. Fairfield Greenwich Ltd.* could have effect in Spain, subject to recognition of the court decision that approves it, whether it takes the form of a judgment or whether it is another kind of judicial decision. More precisely, it is in respect of that judicial decision approving the class settlement that recognition must be obtained [cf., in a similar connection, J.C. Fernández Rozas/S. Sánchez Lorenzo, *Derecho Internacional Privado*, ed. Civitas, 3ª ed., Madrid, 2005, p.198 (Exhibit 24)]. The court decision approving the settlement must in any event be final.

43. As a matter of fact, in Spain's domestic system, the binding effect of any type of settlement also depends on the existence of approval by the court (Article 19 LEC/2000) (Exhibit 58); moreover, if mandatory enforcement of a court-approved settlement is sought, as far as the Law is concerned, the instrument upon which enforcement is based is not the settlement itself, but the court decision that approves it (Article 517.1.3 LEC/2000).

4.2 *When is a United States decision or collective settlement understood to be final?*

44. When Spanish law requires that a court decision be final, it means that an ordinary appeal from the decision is no longer possible; in other words, recognition is not warranted if any of the parties has appealed the decision and an appeal or cassation proceeding of the decision is currently pending or the time period for filing an appeal has not yet run.

45. As far as Spanish law is concerned – and this is the important point – it is not necessary that the judgment cannot in any case be revoked or amended; in addition to ordinary challenges, most legal systems – Spain's included – make room for appeals or extraordinary and special relief that make it possible in very singular circumstances to annul or rescind a final court decision. It happens that these mechanisms are not intended to be ordinary and are not to be anticipated as possibilities within the reasonably brief term to appeal that commences to run when the decision is served on the parties and, therefore, the possibility that they might be raised at some time is not an obstacle to the court decision's being considered final. In other words, for purposes of recognition, a foreign decision is understood to be final despite the fact that, in the abstract, some extraordinary relief in respect of it may still be possible [see also in this connection M. Virgós Soriano/F.J. Garcimartín Alférez, *Derecho Procesal Civil Internacional. Litigación internacional*, Ed. Civitas, 2ª ed., Madrid, 2007, p. 604-605 (Exhibit 25)].

46. To sum up, the judgment that is rendered or the court decision that approves a settlement in *Anwar v. Fairfield Greenwich Ltd.* cannot be taken as final for purposes of recognition in Spain if one of the parties or some class member has appealed it or can still do so – I am thinking in particular of the possibility that some class member has filed objections to the proposed settlement at a fairness hearing, but the court overruled the objection and approved the settlement. On the other hand, it definitely can be taken as final if it has not been and cannot be appealed, or if the appeal has been dismissed. But it is to be taken as final in any case even if some kind of collateral attack can be made at some future time by a class member.

5. REQUIREMENTS FOR RECOGNITION (II): COURT OF ORIGIN HAS JURISDICTION

47. A Spanish court can recognize a foreign judgment only if it finds that the court that issued the judgment had proper jurisdiction determined in accordance with international standards. This review operates on two levels:

48. - In the first place, any possible infringement of the exclusive jurisdiction of the courts of Spain as currently defined in Article 22.1 of the Organic Law of the Judiciary [Exhibit 26] is prohibited; decisions rendered in processes initiated in respect of matters that, as far as the laws of Spain are concerned, can be decided only by the courts of Spain will not be recognized as effective in Spain.

49. - More generally, the Spanish court verifies that the dispute has a sufficient and reasonable connection to the courts of the jurisdiction where the action was brought and the judgment sought to be recognized was entered. When it comes to weighing the presence of this connection, the Supreme Court's jurisprudence tends to operate in two ways: 1) on the one hand, it usually enunciates the links that the case has to the foreign court and it evaluates whether it considers them to be reasonable; 2) on the other hand, it tends to bilateralize the areas of international jurisdiction contemplated in Spanish domestic law, which is to say it makes a sort of "comparison" to verify whether, in an analogous, converse situation, a Spanish court might have declared itself to have jurisdiction to take cognizance of the dispute. Thus, the courts of Spain seek to prevent plaintiffs from fraudulently seeking a "court of convenience" abroad; that is to say, the plaintiff has engaged in forum-shopping. And the chief concern of the Spanish courts is whether the plaintiff has sought out a jurisdiction whose choice of law standards can be manipulated to give the plaintiff an advantage on the merits of the case that otherwise would not be available to it. [*cf.*, Decision of the Supreme Court of December 24, 1996 (RJ 1997\8394) (Exhibit 8); Decision of the Supreme Court of October 27, 1998 (RJ 1998\9009) (Exhibit 10); Decision of the Supreme Court of July 20, 1999 (RJ 5237) (Exhibit 11); Decision of the Supreme Court of November 13, 2001 (JUR 2002\608) (Exhibit 7); Decision of the Supreme Court of May 28, 2002 (JUR 2002\159025) (Exhibit 12); Decision of the Supreme Court of January 20, 2004 (JUR 2004\54318) (Exhibit 14)].

50. In *Anwar v. Fairfield Greenwich Ltd.*, it seems to me that this check of jurisdiction would be overcome without any difficulty, since no exclusive jurisdiction of the courts of Spain is infringed and the dispute exhibits a very pronounced connection with the United States and, more specifically, with New York State.

5.1 *No exclusive jurisdiction of the courts of Spain is infringed*

51. Where an international treaty is lacking, Article 22.1 of the Organic Law of the Judiciary provides that the courts of Spain have exclusive jurisdiction in the following areas:

1) rights *in rem* and leases on real properties located in Spain;

2) incorporation, validity, annulment, or dissolution of companies or legal persons who have their domicile on the territory of Spain, and also with respect to the resolutions and decisions of their organs;

3) validity or invalidity of the registrations entered on a Spanish register;

4) registrations or validity of patent and other rights subject to filing or registration, where the filing or registration has been applied for or carried out in Spain;

5) recognition and enforcement on the territory of Spain of court decisions and arbitration awards issued abroad.

52. As can be noted, the dispute in *Anwar v. Fairfield Greenwich Ltd.* does not revolve around any of these matters, and so no exclusive jurisdiction of the courts of Spain is infringed.

5.2 *The dispute exhibits a very pronounced connection with the courts of the United States and, more specifically, with the courts of New York*

53. In very general terms, the important particulars for weighing the connection of a dispute with a jurisdiction are usually the domiciles of the parties – but especially the defendant's domicile – and the

content of the action brought. In this case, of the four defendant funds, two were incorporated in the British Virgin Islands (*Fairfield Sentry Ltd.* and *Fairfield Sigma Ltd.*) and the other two in Delaware (*Greenwich Sentry L.P.* and *Greenwich Sentry Partners L.P.*). Now, then, at the present time the first two do not even have a domicile properly so called, because they are being liquidated. But many other defendants are indeed domiciled in the United States. I believe, moreover, that the criterion of defendant's domicile in a case such as this is not the only salient one but, rather, attention must be paid, on the contrary, to the cause of action and the locality where the facts of importance for this process have taken place.

54. It goes without saying that the present litigation is based on the filing of tort, contract and, quasi-contract claims and relief is sought for the losses sustained. Furthermore, as the court itself made plain in its decision on the defendants' motions to dismiss, the greater part of the events and of the acts of the defendants that gave rise to this claim took place in New York. Indubitably, many transactions and activities took place in very different countries, but in the end all these transactions ultimately produced their effects at the defendants' New York offices. Above all it is important to bear in mind that the core of the actions brought centers on the interconnection between the defendant feeder funds and Mr. Madoff's business system, which was in New York at all times. As indicated in the decision on the motion to dismiss, itself, "*The forum with the greatest contact and interest in this action is New York, the jurisdiction where the fraud and other breaches of duty were masterminded.*"

55. In short, the plaintiffs in *Anwar* are seeking to hold the defendants liable for the damages sustained by the class, and the relevant acts that were determinative of the production of such damages took place in the United States, and, in particular, in New York. This conclusion underlies the decision of the *District Court for the Southern District of New York* to take jurisdiction of this claim. And in my opinion, it would also be shared by any Spanish court that had to examine, when the time came to decide on recognition, whether the matter exhibited a sufficient connection with the courts of the United States.

56. Before all else, I must stress this notion: In order for a reasonable and sufficient connection to be understood to exist between a dispute and the courts of a State, it is not necessary that the case exhibit connections solely with that State – that is to say, it cannot be required that it not exhibit connections with other States, for this would be impossible in most cross-border disputes; what is more, it can be concluded that there is a reasonable connection with a foreign court, despite the fact that the case may also exhibit a reasonable connection with the courts of Spain – provided, of course, that exclusive jurisdictions are respected. As a matter of fact, the Supreme Court of Spain on one occasion stated its express reliance on the points of connection found by the United States court of origin when it affirmed its own jurisdiction and it defined sufficient connection as the existence of the court's proximity to the object of and parties to the dispute that is reasonable and that makes it possible for the defendant to have access to the process on a footing of equality so that it may duly exercise its right to a defense [Decision of the Supreme Court of April 7, 1998 (RJ 1998\3559) (Exhibit 6)].

57. That said, account must be taken of the fact that the forum of the locality where the harmful facts took place is recognized in general as a valid forum in the legal system of Spain, pursuant to Article 22.3 of the Organic Law of the Judiciary (Exhibit 26), which attributes international jurisdiction to the courts of Spain "in the matter of extra contractual obligations (i.e., damages) if the fact from which they result took place on the territory of Spain". Therefore, when it comes to the matter of recognition, a Spanish court could not fault a court of the United States for having declared itself to have jurisdiction on the basis of a criterion that, in the reciprocal case, would have permitted it to declare itself to have jurisdiction.

58. Furthermore, when the courts of Spain have had to look into a sufficient connection for recognition of foreign decisions, they have on various occasions held that where an action aimed at recovering damages is concerned – and this is such a case – the most reasonable point of connection is the place where the damage took place [Decision of the Supreme Court of December 24, 1996 (RJ 1997\8394) (Exhibit 8); Decision of the Supreme Court of November 13, 2001 (JUR 2002\608) (Exhibit 7); Decision of the Supreme Court of January 20, 2004 (JUR 2004\54318) (Exhibit 14)].

59. In a case analogous to this one, a Spanish court would have to admit that the *District Court for the Southern District of New York* claimed jurisdiction for the right reason, because it understood that it was in that jurisdiction that the most salient facts to be adjudged took place and that the United States is the country that has the greatest connection with the case. This criterion means a sufficient and reasonable connection between the court of origin and the process, ensures that the defendant has access to a court before which he can fully defend himself, thus excluding any suspicion of fraud, and makes it possible to have the certainty that the requirement to verify the jurisdiction of the court of origin would be satisfied.

60. In addition, it is important to retain that prorogation of jurisdiction is also a valid way to attribute jurisdiction to the courts of a state. According to the Spanish domestic law (art. 22 of the Organic Law of the Judiciary, Exhibit 26), submission to the Spanish jurisdiction can occur by litigating a controversy on the merits or by not contesting the jurisdiction of the courts. Thus, if most of the defendants in *Anwar* did not challenge the personal jurisdiction of the New York courts in their motions to dismiss, a Spanish court should also admit that the New York court had jurisdiction based in the fact that defendants have entered an appearance before that court without contesting its jurisdiction.

6. REQUIREMENT FOR RECOGNITION (III): THAT THE DECISION WAS RENDERED ON THE BRINGING OF AN ACTION *IN PERSONAM*

61. Article 954.1 LEC/1881 requires that the decision whose recognition is sought "have been rendered as the consequence of the exercise of an action *in personam*."

62. According to the traditional schema inherited from Roman Law, legal actions can be classified into actions *in rem*, actions *in personam*, and mixed actions. Actions *in rem* are those that are founded on the holding of some real right (*e.g.*, a property owner's claim for recovery). Actions *in personam* are those that are founded on a debt or obligation right (*e.g.*, an action to claim the price of the thing sold, or an action for compensation for damages arising out of negligent conduct). And mixed actions are those

for division of a thing held in common (*actio communi dividendo*), an action to settle property bounds (*actio finium regundorum*), and an action for distribution of an inheritance (*actio familiae ercisundae*). Now, then, according to the initial concept of LEC/1881, exequatur was granted only to judgments that resulted from the bringing of actions *in personam* for a specific purpose, namely to prevent the effectiveness in Spain of judgments issued abroad with respect to property – personal or, more especially, real – situated in Spain. It was an indirect way to preserve respect for the exclusive jurisdictions of the courts of Spain.

63. At the present time, the function of this condition has been taken over by the previous requirement (checking the jurisdiction of the court of origin) and the courts scarcely give it practical importance.

64. In any case, in the process with which we are now concerned, all the actions brought are to be classified as actions *in personam*, so that in no way could this requirement preclude recognition of such judgment as is issued or such court decision as approves a class settlement in *Anwar v. Fairfield Greenwich Ltd.*

7. REQUIREMENTS FOR RECOGNITION (IV): THAT THE DECISION HAS NOT BEEN RENDERED IN THE (INVOLUNTARY) ABSENCE OF THE DEFENDANT

65. Article 954.2 LEC/1881 requires that a decision for which recognition is sought has not been rendered on the basis of an absence that took place abroad.

66. For some time, the Supreme Court construed this requirement literally, but for quite a number of years now it has been assigned a more limited scope: Respect for the rights of the defendant during the course of the process, making sure that he knew of the existence of the claim against him at a time when it was reasonably possible for him to do whatever necessary to mount an adequate defense of his rights in

the process. For this reason, at the present time, the mere fact of absence of the defendant has become insufficient in and of itself to determine whether recognition is warranted: an absence of the defendant abroad will be relevant only if it constitutes the proof that his right of defense was violated because of lack of knowledge of the existence of a process brought against him.

67. For this purpose, the Supreme Court and the lower courts distinguish between two kinds of absence in recognition proceedings: (1) voluntary absence or absence of convenience; (2) involuntary or unavoidable absence. The effects produced by each one of them will be quite different.

68. (1) An absence is voluntary or is one of convenience if the defendant is aware of the existence of a process brought against him and freely decides to adopt a passive attitude in respect of it. When this is shown in an exequatur proceeding, the conclusion is that there is nothing to prevent granting exequatur, the literal meaning of Article 954.2 LEC/1881 notwithstanding [Decision of the Supreme Court of June 23, 1998 (RAJ 6080) (Exhibit 27); Decision of the Supreme Court of February 17, 1998 (RAJ 2674) (Exhibit 28)].

69. (2) Involuntary or unavoidable absence is used to designate that situation of a defendant who has not appeared in the process because he was unaware of its existence. In most cases, this is because the notice informing him of the existence of the process and summoning him to enter a defense did not have the desired result. When the court is aware that this was the reason for the absence, it must deny exequatur [Decision of the Supreme Court of September 8, 1998 (RJ 6846) (Exhibit 29); Decision of the Supreme Court of June 2, 1998 (RJ 7195) (Exhibit 30); Decision of the Supreme Court of May 26, 1998 (RJ 5345) (Exhibit 31)].

70. It lies exclusively with the Spanish court deciding on recognition to form a judgment as to the voluntary or involuntary nature of the defendant's absence. And it is the laws of Spain – and the constitutional doctrine that interprets them – that provides the court with the parameters by which to measure how much of a real opportunity the defendant had to defend his rights in the process before the

foreign court, taking into consideration, in particular, the manner in which the defendant was informed of the existence of the process and summoned to appear [Constitutional Court Judgment 98/1984, of October 24th (Exhibit 32); Constitutional Court Judgment 43/1986, of April 15th (Exhibit 33); Constitutional Court Judgment 54/1989, of February 23rd (Exhibit 34); Constitutional Court Judgment 132/1991, of June 17th (Exhibit 16); Decision of the Supreme Court of February 2, 1999 (RJ 788) (Exhibit 35); Decision of the Supreme Court of January 26, 1999 (RJ 194) (Exhibit 36); Decision of the Supreme Court of September 8, 1998 (RJ 6846) (Exhibit 29); Decision of the Supreme Court of October 8, 1996 (RJ 1998\5339 and 5340) (Exhibit 37); Decision of the Supreme Court of April 28, 1998 (RJ 3593) (Exhibit 38)]. The most usual cases where a check takes place are those in which court orders (or the like) was the method used to summon a defendant abroad; in these cases, it is usual to apply the Constitutional Court's doctrine on the residual nature that is to be ascribed to summons by court order, and it is ascertained that this was a final instrument actually employed after actual and unfruitful attempts to carry out some type of notification in person or with more of the aspect of being known to its addressee [Decision of the Supreme Court of February 2, 1999 (RJ 788) (Exhibit 35); Decision of the Supreme Court of September 8, 1998 (RJ 6846) (Exhibit 29); Decision of the Supreme Court of May 19, 1998 (RJ 4451) (Exhibit 39); Decision of the Supreme Court of April 7, 1998 (RJ 3560) (Exhibit 40)]. On the other hand, in several of its decisions the Supreme Court has displayed an attitude clearly favorable to "presuming" that the non-appearance was involuntary, thus shifting to the petitioner for exequatur the burden of showing – often, over and above the level of requirement that would be demanded in domestic cases – that the defendant had knowledge of the process and was able to defend himself in it [Decision of the Supreme Court of June 15, 1999 (RJ 4348) (Exhibit 41); Decision of the Supreme Court of January 26, 1999 (RJ 194) (Exhibit 36); Decision of the Supreme Court of September 8, 1998 (RJ 7263) (Exhibit 29); Decisions of the Supreme Court of May 26, 1998 (RJ 5345 and 4534) (Exhibits 31 and 42); Decision of the Supreme Court of June 9, 1998 (RJ 5322) (Exhibit 9); Decision of the Supreme Court of April 28, 1998 (RJ 3595) (Exhibit 43)].

71. In a case such as that which has our attention here, there is no reason that an absence should be an obstacle to subsequent recognition of the judgment, given that the defendants are not in an absence situation, and if any of them were, there also would be no obstacles to recognition if it is shown that their absence from the process was voluntary. It is important to be clear that it is the absence of the defendant that is checked through this requirement; what effect on recognition the absence of the absent class members may have is something that will be seen in connection with the next condition.

72. In addition, it must be borne in mind that if at some future time it were necessary to obtain recognition in Spain of the judgment in *Anwar v. Fairfield Greenwich Ltd.*, it would be at the initiative of one of the current defendants. And, of course, if the subject who subsequently seeks recognition in Spain of the judgment is a subject who was a defendant abroad, that act will cure any possible defect that might have affected him in the defense of his rights in the process brought before the foreign court [Decision of the Supreme Court of April 18, 1998 (RAJ 3594) (Exhibit 44)].

8. REQUIREMENTS FOR RECOGNITION (V): THAT THE DECISION IS NOT CONTRARY TO THE PUBLIC POLICY OF SPAIN

73. Article 954.3 of LEC/1881 lays down as a requirement for the granting of exequatur: "That the obligation the satisfaction of which is being sought is lawful in Spain"; the Supreme Court tradition has construed the lawfulness of the obligation – which of itself alone would have a very constricted radius of action – with the more general requirement that it does not violate the public policy of Spain.

74. The concept of "public policy" in the context of recognition of foreign court decisions has undergone a clear line of development following the coming into effect of the Spanish Constitution of 1978; it is to be understood as respect for the constitutional principles and fundamental rights set out in the Great Charter, especially those rights enshrined in Article 24 (Exhibit 45), which recognizes the

guarantees of due process and fair trial [Constitutional Court Decision 276/1983, of June 8th (Exhibit 46); Constitutional Court Decision 54/1989, of February 23rd (Exhibit 34); Constitutional Court Judgment 132/1991, of June 17th (Exhibit 16); Decision of the Supreme Court of September 10, 1996 (RJ 1998\4446) (Exhibit 47)]. In this connection, Constitutional Court Judgment 43/1986, of April 15th (Exhibit 33) states as follows: "Although the fundamental rights and public freedoms that the Constitution guarantees achieve full effectiveness only where the exercise of Spanish sovereignty holds sway, our public authorities, including the Courts and Tribunals, cannot recognize or accept decisions delivered by foreign authorities if they comport an infringement of the fundamental rights and public freedoms constitutionally guaranteed to Spaniards or, as the case may be, to Spaniards and foreigners. Thus, the public policy of the forum has in Spain acquired a different context, one that is steeped in particular in the requirements of Article 24 of the Constitution." Declarations of this type appear repeatedly in the decisions of the Supreme Court and of the other courts of Spain called on to pronounce on recognition and enforcement of foreign decisions (*cf., inter alia,* Decision of the Supreme Court of December 24, 1996 (RJ 1997/8394) (Exhibit 8); Decision of the Supreme Court of March 4, 2003 (JUR 2003\87951) (Exhibit 48); Decision of the Supreme Court of March 14, 2007 (No. 294/2007) (Exhibit 49)].

75. A foreign court decision violates Spanish public policy, then, if it runs counter to any of the essential Constitutional values in effect in Spain. Based on this premise, the jurisprudence of the Supreme Court – which the lower courts abide by – distinguishes between procedural public policy and material public policy.

76. - A violation of procedural public policy takes place if the judgment abroad has been delivered in infringement of any of the essential guarantees of right to a fair trial (since these guarantees have constitutional standing). A check on procedural public order was initially applied in the context of recognition proceedings for foreign judgments delivered *in absentia*, but the jurisprudence has generalized this and has extended it to all aspects of the fundamental right to a fair trial (*cf.*, for all this, Supreme Court Ruling of June 9, 1998 (RJ 5322) (Exhibit 9)].

77. - And a violation of material public policy takes place if the content itself of the foreign court decision runs counter to Constitutional values. One example comes from the case resolved by the Decision of the Provincial Court of Barcelona, Section 15, on March 15, 2010 (AC 2010\1203) (Exhibit 50), where it was sought to obtain recognition of a judgment that ordered the arrest of a subject for breach of civil obligations. Now, then, this safeguard – material public order – is subject to an important limit: The recognition procedure does not as a rule permit a new hearing on the merits of the matter in dispute, as it is not necessary, for the purpose of granting recognition, to verify whether the courts of Spain would have arrived at the same solution as the foreign court or whether they consider such a solution to be acceptable. The Constitutional Court of Spain has firmly insisted on this limit [Constitutional Court Judgment 54/1989 of Feb. 23rd (Exhibit 34); Constitutional Court Judgment 132/1991 of June 17th (Exhibit 16); also, Decision of the Supreme Court of June 9, 1998 (RJ 1998\5323) (Exhibit 9)].

78. As we shall see below, there is no reason why any of these aspects of the public policy of Spain would be violated in the event of recognition of the judgment or of the decision approving a settlement in *Anwar v. Fairfield Greenwich Ltd.*

8.1 *Recognition of the judgment or of the decision approving a settlement in Anwar v. Fairfield Greenwich Ltd. does not violate the public order of Spain as regards procedural public policy*

79. To ensure procedural due process, the Spanish court that is called upon to decide whether a foreign judgment should be recognized will verify how the process was conducted at origin, and will deny recognition if it finds that there was a significant violation of the right to a fair trial, as this right is understood by the courts of Spain, which is to say in the light of Article 24 of the Spanish Constitution.

80. As regards recognition of the judgment or of the decision approving a settlement in *Anwar v. Fairfield Greenwich Ltd.*, it seems to me that there are two main matters that may arise in connection with

Spanish public policy: i) Decisions are involved that have been arrived at after the bringing of a class action in the United States; ii) the judgment, if there is a judgment, has been arrived at on the basis of a jury verdict. Neither of these, in my opinion, is of sufficient force to prevent recognition, as we shall see below.

8.1.1 *Class actions in the procedural system of the United States are not incompatible with the public policy of Spain*

81. Class actions in the United States involve, from a purely procedural perspective, a named plaintiff(s) asserting in court the rights and interests of members of a class that share common issues of fact and law. This, then, is an exception to a fundamental tenet of Spanish law, that every person is authorized to seek vindication of his own rights in court, but not the rights of others. From this perspective, an absent class member could attempt to challenge in Spain the recognition of a judgment or of a class settlement in the United States by alleging that he was not himself a party to the legal process in which a decision was arrived at that directly affected him, and this would run counter to Spanish public policy. The argument, however, does not stand, since the civil procedural system of Spain also provides tools very similar to class actions to obtain legal protection of the rights and interests of a class of plaintiffs, the most significant of which are the collective actions governed by the 2000 Law of Civil Procedure.

A) Rejection of a general objection: The system of collective actions under Spanish Law

82. Since LEC/2000 took effect, it is possible in Spain to bring a legal action at the instance of a given entity, but in defense of the rights and interests of a identified group of persons, who may or may not be identified and who need not take part in the process and need not have authorized the plaintiff entity to act in the process to defend their rights.

83. The system of collective actions currently governed by the Spanish LEC is characterized by the following features:

84. **a)** Its material scope is restricted to the scope of consumer Law; according to Article 11 LEC/2000 (Exhibit 51), collective actions take place as a reaction to an event harmful to public, includings of consumers and users. However, the notion of "consumers and users" is fairly broad; according to Article 3 of the General Law on Consumer and User Protection (Exhibit 52), as revised, "natural or legal persons who operate in an area other than that of business or professional activity" possess that character.

85. On this point, then, the system of class actions prevalent in the United States is broader than the Spanish one, for it is applicable in areas where, for the time being, collective actions are not yet possible in Spain.

86. **b)** Standing to bring collective actions in Spain is not bestowed on any of the subjects injured by the harmful fact. The lawmakers of Spain preferred to restrict standing to bring collective actions to certain entities, as follows:

87. - In the case of harmful facts that have adversely affected an identifiable group the Law speaks of "collective interests" and collective actions on their behalf may be brought by three types of entities: a) consumer and user associations; b) entities lawfully organized for consumer protection (*e.g.*, certain public agencies and administrations, such as the National Consumers Institute); c) groups of consumers adversely affected, provided that the group is made up of more than one half of those harmed (Articles 11.2 and 6.1.7 LEC/2000) (Exhibit 51).

88. - In the case of harmful facts that have adversely affected a group who have not been specified and who cannot be specified, the collective action law speaks of "diffuse interests," and the bringing of collective actions is more restricted; only "representative" associations of consumers have standing, which are those that, by reason of the large numbers of their members and their generalized presence, form part of a nationwide administrative organ, namely the National Consumers Council (Article 11.3

LEC/2000, read in conjunction with Article 24.2 of the General Law on Consumer and User Protection, as revised) (Exhibits 51 and 52).

89. The difference from the system in the United States is also discernible in this regard: It is not a class member who brings the action but a different entity or, at most, a numerous group of class members. Contrariwise, there is no judicial oversight in Spain as to whether the entity that decides to bring the action will adequately protect the rights of all the subjects. And, in particular, in Spanish collective processes there also is no proceeding equivalent to the class certification in the United States system; the courts of Spain do not ascertain at the commencement of the process if the right conditions for bringing a collective action have been satisfied, but, rather, they must allow it to proceed if they find (i) that facts harmful to consumers are concerned, and (ii) that the entity that has brought the action has the standing to do so.

90. **c)** The specific persons whose rights and interests are being asserted in a collective action do not have to take part in the process in order to enjoy the benefits of a possible favorable judgment or of a settlement; it is understood that their rights and interests form the scope of the process, and express participation in the action on their part is not necessary. LEC/2000, however, offers them the opportunity of taking part in the process, if they wish, in order to participate individually in the prosecution of their claims.

91. It is therefore necessary that persons who may be adversely-affected by the proceedings have notice of the existence of the process itself and their right to participate. Since individualized notification of all consumers adversely affected is not always possible or reasonable, it is considered sufficient to issue a collective citation “to those who have been harmed by reason of their being consumers of the product or users of the service that gave rise to the process.” Notice will be given by publication in the social communication media in the area where the harm to the rights and interests of the consumers and users occurred (Article 15.1 LEC/2000) (Exhibit 51). A number of special features or additional requirements are, however, laid down, and are based on the type of interest in play in the process.

92. - Where the bringing of an action in defense of the collective interests of consumers (reminder: Those injured by the harmful fact have been specified or are easily specifiable), Article 15.2 LEC/2000 requires that beforehand the plaintiff have notified all interested parties of the filing of the action (Exhibit 51). In practice, this requirement is to be understood in a somewhat different way: What it demands is notification of intent to file the action, with a sufficient degree of specificity as to content.

93. - On the other hand, if diffuse interests are in play (where the harmful fact injures a innumerable unknown persons or persons whom it is difficult to identify), no prior notice of the filing of the action is required, so that publication of the existence of the process occurs only by publication of the decision of the court acknowledging that the claim can be pursued.

94. These mechanisms for giving notice are designed to make it possible for those consumers who so desire to take part as individual plaintiffs. It is not, in any case, that the Law considers such participation necessary; on the contrary, consumers who have been adversely affected can reap the benefits, if any, of the bringing of the collective action by the entity that has standing to do so, even if they stay at the margins of the dispute. Given the fact that it is their rights and interests that are in play, however, the Spanish lawmakers exerted themselves to offer them the possibility of also being active protagonists in the process, in which case they have the right in the judgment to an individualized pronouncement on their legal positions (Article 221.1.3 LEC/2000) (Exhibit 22). Such participation in principle places them in an active position, which means that they are also plaintiffs, together with the entity that brought the collective action. An individual consumer does not enter the process solely to support the bringing of the collective action, but to assert “his individual right and interest.”

95. However, what LEC/2000 at no time provides for is the possibility that a consumer might decide to exclude or separate himself from the collective action and reserve for himself the bringing of his individual action for a separate process; thus, the opt-out characteristic of the United States system of class actions is not contemplated. Nevertheless, one doctrinal camp – to which I belong – is of the opinion that this can also be the goal of participation by consumers in the collective process. It must be

acknowledged that, in the short time that collective actions in Spain have been allowed, there is no record of consumers asserting their right to participate as individuals in such an action.

96. **d)** Once final, the judgment delivered at the conclusion of a collective process has the effect of *res judicata* with respect to all the subjects adversely affected by the wrongful act or omission that prompted the bringing of the action.

97. LEC/2000 requires the court to make a number of pronouncements in its judgment bringing a collective process to a close. According to Article 221.1.1 LEC/2000 (Exhibit 22), any favorable judgment rendered at the end of the process must individually identify those consumers and users who are deemed to benefit from its ruling. If such individual identification is not possible, the judgment must set out the data, characteristics, and requirements necessary to demand payment and, as the case may be, file for enforcement proceedings or take part in them if they are filed by the plaintiff consumer association. Furthermore, pursuant to Article 221.1.3 LEC/2000, if specified consumers or users have entered an appearance, the judgment must make an express ruling on their claims.

98. The most important rule of all, however, is that set out in Article 222.3 LEC/2000 (Exhibit 22), according to which "*Res judicata* shall have effect in respect of the parties to the process on which it is decided and on their heirs and assigns, *as well as on non-litigant subjects who hold the rights which underpin the standing of the parties as contemplated in Article 11 of this Law*." The subject to which the final portion of this provision has reference are precisely consumers and users who hold the rights and interests defended through the collective process.

99. The provision is categorical: The effect of *res judicata* extends to all consumers, even those who have not taken part in the process and irrespective of whether the outcome of the process has been positive or negative for them. The doctrine on this matter is unanimous in recognizing this, for it says that in Spain the rule is that *res judicata* does not depend on the outcome of the process (*res judicata non secundum eventum litis*), as stated in Article 222.1 LEC/2000. [Some of the most authoritative doctrine is

to be found, in A. de la Oliva Santos, *Objeto del proceso y cosa juzgada en el proceso civil*, Ed. Civitas, Madrid, 2005, pp. 187-188 (Exhibit 53); I. Tapia Fernández, *El objeto del proceso. Alegaciones. Sentencia. Cosa Juzgada*, Ed. La Ley, Madrid, 2000, p. 224 (Exhibit 54); Mª P. Calderón Cuadrado, *Tutela civil declarativa*, Ed. Tirant lo Blanch, Valencia, 2008, pp. 480-487 (Exhibit 55); J. Montero Aroca, *Derecho Jurisdiccional. II. Proceso civil*, Ed. Tirant lo Blanch, 18ª ed., Valencia, 2010, p. 488 (Exhibit 56)].

100. The *res judicata* effect of a final judgment takes, in the Spanish legal system, two different forms:

101. - Negative or exclusionary (*non bis in idem*) effectiveness, which prevents the institution of a new process that has the same object: "The *res judicata* aspect of final judgments, whether they find in favor of or against the action, exclude, in accordance with the law, any further process having an object identical to the process on which that judgment was rendered" (Article 222.1 LEC/2000). This effectiveness is also known as preclusive effectiveness of *res judicata*.

102. - Positive or pre-trial effectiveness, where, if the second process is not identical to the first, but there is some connection between the two, the court in the second process is bound by the judgment in the first process when it comes to resolving matters in common: "That which is decided with the force of *res judicata* in the final judgment that brings a process to a close shall be binding on the court in a later process when that former process appears as the logical antecedent of what its object is, provided that the litigants in both processes are the same or that *res judicata* extends to them by law" (Article 222.4 LEC/2000) (Exhibit 22).

103. Combined application of the three rules cited give the following result: If a consumer brings an action as an individual against a business for a harmful fact that previously gave rise to a collective process decided by final judgment, the defendant can assert the force of *res judicata* and the court will have to dismiss the second process, even though the plaintiff consumer has not participated in the first process and even though he avers that he was unaware of its existence.

104. Bearing in mind the equivalency that Spanish law makes between legal judgments and settlements (Article 1816 of the Civil Code: "As far as the parties are concerned, a settlement has the authority of *res judicata*", – Exhibit 57 –), the foregoing conclusion can validly be transferred to collective settlements arrived at in the context of a collective process, if it is approved by a court (Article 19 LEC/2000) (Exhibit 58). Both the doctrine and the line of decided cases in Spain occasionally differ as to whether a settlement produces, in the strict sense, the effects of *res judicata*, as the court has made no judgment on the merits of the dispute. This, however, is a merely terminological discussion, because the jurisprudence has invariably clothed settlements with a preclusive effectiveness equivalent to the negative effectiveness of *res judicata*, which prevents the subjects bound by the settlement to commence a new process that would deal with what was resolved in the settlement (*exceptio pacti*). The Supreme Court Judgment of April 5, 2010 (RJ 2010\2541) (Exhibit 59), synthesizes the jurisprudence of the Supreme Court of Spain on this point, as follows:

> "In accordance with the jurisprudence, a settlement, whether in court or elsewhere, produces the effect of replacing a controverted legal relationship with another one, certain and not controverted, by extinguishing the rights and causes of action on which it is based and by creating new relationships and obligations (SSTS July 8 and 17, 2008, RC No. 3182/2001 and RC No. 211/2002). That is why the possibility has been denied of raising questions that have to do with situations predating the settlement, which have forfeited legal protection upon being settled (SSTS of October 20, 2004, RC No. 2563/1998, and July 7, 2006, RC No. 4131/1999). The "*exceptio pacti*" [exception of settlement], whose meaning is similar to that of the material *res judicata*, can be asserted in any process, even though the LEC mentions it only as an exception to enforcement action (Article 557.1.6ª LEC).
>
> If the settlement has the effect of *res judicata* for the parties, according to Article 1816 CC, it is binding on the court in a subsequent process if the subjective and objective elements are identical (SSTS of January 30, 1999, RC No. 2281/1994). However, the jurisprudence maintains that a

settlement cannot be completely identified with the effects of *res judicata* characteristic of final judgments (SSTS of September 28, 1984, April 10, 1985, and December 14, 1988) and that the impossibility of raising anew settled matters does not mean that the settlement is invulnerable, for its validity and effectiveness can be challenged, stripping it of effect and resuscitating the earlier legal situation." For doctrine, *cf.* De la Oliva Santos, *Derecho Procesal Civil. El proceso de declaración*, Ed. Cera, 3ª ed., Madrid, 2004, p. 482 (Exhibit 60); I. Tapia Fernández, *El objeto del proceso. Alegaciones. Sentencia. Cosa juzgada*, Ed. La Ley, Madrid, 2000, p. 224 (Exhibit 54).

105. I must point out, however, that the possibility that is being looked at here is very difficult to imagine in reality. In case of settlement, a Spanish investor who benefits from a settlement would, undoubtedly, prefer to collect the sum allocated to him, rather than devote his time and his money to bringing before a Spanish court a process of uncertain outcome. The same applies if there were a favorable judgment: it would be easier to participate of its effects. If the defendants won, the Spanish absent class member might have an initial temptation to try to introduce a new claim in Spain, but: i) even if the Spanish court did not recognize the preclusive effect of the New York decision, it is very likely that the findings of the New York court in favor of the defendant would be given important weight (the so-called evidentiary effect of foreign judgments, that in Spain does not need their previous recognition); ii) the absent class member would have to pay his costs and compensate the defendants if he lost this second process.

106. On this point, then, it can be seen that the solution under Spanish law is similar to that prevailing for class actions in the United States. The Spanish system of collective actions is not based on voluntary participation of individuals in the action, but all subjects adversely affected must, whether they like it or not and whether they know it or not, accept the fact that another subject can exercise his rights in an action in collective fashion, together with those of many others. It is, thus, very important to point up the fact that the Spanish system accepts as normal a manner of litigating in which some subjects assert in court the rights of others, so that these are bound *pro futuro* and, as we have seen, it does so without even

requiring that the court have full certainty that the subjects adversely affected know of the existence of the process, by, in many cases, contenting itself with a collective citation made through the social communication media.

107. It seems to me, therefore, that the Spanish collective action system in its essential respects offers fewer guarantees to the class members than the United States system of class actions; on the one hand, because judicial monitoring of the commencement and evolution of the process is less, and that monitoring is at all times justified in the interest of the class members; and, on the other hand, because it is harder on the class members, who are not clearly granted the right to exclude themselves from the process, despite the fact that they will be bound by its outcome, even if unfavorable to them.

108. **e)** As a matter of fact, collective actions as contemplated in LEC/2000 are not the only example of a collective process allowable in the Spanish system. In the area of labor processes there is also a special procedure, that of collective conflict (Articles 151 to 160 of the Law of Labor Procedure) (Exhibit 61), which has some similar features. The procedure is employed to process the actions that affect the general interests of a general group of workers and that deal with the application and interpretation of a state standard, collective agreement, whatever its effectiveness, or of a company decision or practice (Article 151.1 Law of Labor Procedure). Just as occurs in the area of civil process, in the area of labor process standing to bring a collective process does not vest in the workers affected, but in other subjects: the unions, the employers' associations, and, by way of exception, employers or the organs representing workers (Article 152 Law of Labor Procedure). In no event will the participation of individual workers affected be permitted, even though the effects of the process will extend to them:

109. - If an agreement or settlement is reached, it will have binding effects for all the workers, as if it were a collective agreement (Article 154.2 Law of Labor Procedure).

110. - If a judgment is rendered and becomes final, it will have the effect of *res judicata* on the individual processes that are pending or that may be brought and that deal with the same matter (Article 158.3 Law of Labor Procedure).

111. Once again, then, we have a manifestation that the form of litigation characteristic of United States class actions is accepted as possible by the Spanish procedural system.

112. **f)** To summarize what has been set out so far, it cannot be said that recognition in Spain of a judgment or a settlement arrived at through a form of litigation that also exists in Spain violates Spanish public policy, all the less so when it appears that this form of litigation is, in Spain, subject to lesser guarantees for absent class members.

B) Rejection of other possible objections

113. Having established the concept that, in general terms, collective litigation is not in conflict with Spanish public policy, there might still be an attempt by an absent class member to challenge recognition so as to prove that certain specific aspects of collective litigation in the United States or in *Anwar v. Fairfield Greenwich Ltd.* violate his basic procedural guarantees. The following three possible objections can be conceived of:

114. **a)** The Spanish procedural system permits collective litigation only in the area of consumers or collective labor conflicts, and this is not the case with the *Anwar v. Fairfield Greenwich Ltd*. class action.

115. In general terms, this clash of subject-matter areas cannot be considered to be in conflict with domestic public policy: Collective actions in Spain are restricted to specified sectors because of a simple legal option that is not dependent on Constitutional imperatives; therefore, there is nothing that would prevent Spanish law from extending the scope of action of collective actions beyond consumer Law and collective labor conflicts. The only thing of significance for public policy is, precisely, acceptance of

collective litigation as an exception to the rule that each subject defends in court only his own rights and not the rights of others, and this is something that has already been accepted in the Spanish system.

116. Moreover, in the case under consideration here, it can be held, pursuant to the categories characteristic of Spanish Law, that it is a case of harm caused to consumers and users, at least as respects the class members residing in Spain. As we saw above, Article 3 of the General Law of Consumer and User Protection, as revised, ascribes that character to "those natural or legal persons who operate in an area other than that of business or professional activity." On the basis of the allegations set out in the *Second Consolidated Amended Complaint*, the residents in Spain are either natural persons or else entities the majority of which take the form of a *Sociedad de Inversión de Capital Variable* [Variable Capital Investment Company] (known as *Sicav*), that is frequently used by natural persons with large fortunes as the formula for making investments with lower tax costs. In all cases, the injured parties in this process are persons who invested their savings in order to make a return, but they are not financial investment professionals whose productive processes include these activities.

117. Therefore, this hypothetical objection lacks foundation, and the argument would likely fail as a ground for denying recognition of a judgment or settlement arising out of *Anwar v. Fairfield Greenwich Ltd*.

118. **b)** An absent class member residing in Spain who intends to bring an individual action before a Spanish court claims that he was not duly informed of the existence of the process in the United States, so that he was unable to decide whether to join the action or to opt-out.

119. As stated previously, if the collective process had taken place in Spain, this statement would not always have sufficient potentiality to exclude the preclusive effectiveness of a collective judgment, at least not in cases in which an action was brought to defend the rights of a plurality of unspecified subjects or subjects difficult to specify – and, in this case, the members of the class seem to be identifiable. On the other hand, in cross-border cases such as this, the risk that a Spanish court might admit this argument,

precisely due to the cross-border situation, cannot be ignored. Nevertheless, it is relatively simple to neutralize it.

120. In fact, the laws of the United States require that the class members be duly notified of the bringing of a collective action so that they can exercise their right to opt out of the process. In principle, this notice to the class members has to be given in accordance with the requirements of United States law [*cf*., the reasoning in the Decision of the Supreme Court of January 20, 2004 (JUR 2004\54318) (Exhibit 14)]. However, if it is desired to have a foreign decision recognized in Spain and the correctness of the notification is called into question, Spanish jurisprudence concludes that it should be checked by taking due account also of the parameters or rules of the laws of Spain [*cf*., Constitutional Court Decision 795/1988, of June 20th (Exhibit 62); Decision of the Provincial Court of Barcelona, Section 15, of October 14, 2003 (AC 2003\1896) (Exhibit 63); Decision of the Provincial Court of Alicante, Section 4, of April 23, 1999 (AC 1999\799) (Exhibit 64)]; this jurisprudential interpretation was formulated in particular to assess whether a defendant's absence was voluntary or involuntary, but it could also be applied to cases of notification of collective process to class members.

121. Consequently, the salient point is that the class members residing in Spain will be notified of the existence of the process through procedures and with guarantees comparable to those established for similar cases under Spanish law. Since the class is comprised of registered subscribers or their principals, absent members of the class will receive individualized notices based on the addresses of record in the share registry. In addition, the Court may order notice to be given by publication, and by postings on a website dedicated to the litigation. If so, any possible objection to recognition on the part of the absent class member who alleged ignorance of the existence of the process must be denied [in this connection, see also M. Virgós Soriano/F.J. Garcimartín Alférez, *Derecho Procesal Civil Internacional. Litigación internacional*, Ed. Civitas, 2ª ed., Madrid, 2007, pp. 644-645 (Exhibit 3)]. As we have already seen, Spanish law contemplates two possibilities:

122. - That the potential class members are identified or are easily identifiable; in this case, an initial personal notice of the bringing of the action is necessary, followed by publication of the acceptance of the action in the social communication media that reach the locality where the harmful facts have occurred.

123. - That the potential class members have not been identified or are not easily identifiable; the collective citation through the social communication media must suffice, then.

124. It seems to me evident that the ordinary standards of notice to the class members in the United States system of class actions more than satisfy these requirements; direct, personal notice to the class members identified is also required in the United States, and notification by means of the social communication media is reserved for those cases in which the class members are far flung (*rule* 23 (c)(2)(B) FRCP]. Furthermore, according to United States law, in cases where a settlement is to be reached, an additional notice of the proposal to the class members is necessary, so that they can file objections and, if the court sees fit, request exclusion [r*ule* 23 (e)(1) FRCP]; such a notice, which strengthens the class members' guarantees, is not even contemplated in Spanish Law.

125. Consequently, there should be no obstacle to recognition in Spain of a judgment or a decision approving a settlement as the result of a class action in the United States if the following can be shown: 1) That reasonable steps were taken to assure that all the class members who were identified were notified directly and comprehensibly of the existence of the process; and 2) that a notice was published in the press to inform unidentified potential members of the class living in Spain of their rights.

126. Direct notice to the class members identified can be given privately to those concerned, provided that an authentic record of the fact that this has been done is made; Spanish law allows this type of private notice to parties injured by the harmful fact (Article 15.2 LEC/2000) in purely domestic cases, so there is no reason to alter this requirement in cross-border cases. Therefore, it is not necessary that it be a Spanish court that issues notice to the class members residing in Spain of the existence of a collective process, for example, through an international judicial co-operation instrument under the Hague Convention of 1965

on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters [cf., Decision of the Provincial Court of Barcelona, Section 15, of October 14, 2003 (AC 2003\1896) (Exhibit 63)].

127. On the other hand, it is certainly necessary to require that the notice be served in a language that its recipient knows, for it has to be comprehensible to him. For that reason, in case of doubt, it will have to be in Spanish.

128. As for the content of such notice, what is set out in *rule* 23 (c)(2)(B) FRCP more than satisfies the requirements that would be mandatory in domestic cases.

129. In the case of notice that comprises a collective citation of possible class members residing in Spain but not identified, it will be advisable: 1) to select a medium of communication of general dissemination throughout the territory of the nation; 2) to provide the information in the Spanish language; 3) to include the content set out in *rule* 23 (c)(2)(B) FRCP.

130. The same will have to be done, *mutatis mutandis*, with respect to notice to the class members of the existence of a proposed settlement.

131. In all cases, it is important to bear in mind that Spanish jurisprudence puts the burden of proving correct notification on the party who requests recognition [Decision of the Supreme Court of June 9, 1998 (RJ 5322) (Exhibit 9); Decision of the Supreme Court of October 3, 2000 (RJ 7980) (Exhibit 65)]. In our case here, the burden would be on the plaintiffs if they seek to enforce the judgment in Spain in order to levy on assets belonging to the defendants or the defendants if they should seek to use a decision in the New York class action as a shield against cases brought by absent class members. Correct notice of the existence of the process to the absent class members will prevent them from later challenging recognition of the judgment or of the settlement by alleging that it was impossible for them to mount a defense. Something like this came up in a case decided by Decision of the Provincial Court of Madrid, Section 14, on June 9, 2003 (JUR 2003\247093) (Exhibit 66), though it was in connection with the so-called

"standard process" of English law, under which, if one and the same plaintiff brings different actions against several defendants who are similarly situated, the court can single out one action as a test case, and extend the decision entered in the test case to the other related actions. A defendant, against whom exequatur of a judgment delivered by an English judge in these conditions was attempted, objected, alleging his absence at the process and violation of his fundamental rights to a hearing and a defense. The court, however, and rightly so, dismissed his claim, noting that, by agreeing to the standard process, he himself excluded the possibility of an individualized, personal defense and that it would have sufficed for him not to have agreed to the standard process – which he could freely have done – in order to avoid the result that he was challenging on the ground of objection to recognition.

132. In *Anwar v. Fairfield Greenwich Ltd*., moreover, notice of the existence of the process to the class members ought not in principle to constitute an obstacle to recognition of any judgment or settlement that brings the process to a close. As a matter of fact, the number of investors with residence in Spain is small, and the possibility exists that all of them can be notified directly and personally of the existence of the process. In addition, if it were not certain that all potential injured parties could be contacted directly, publication of notice in a medium with a nationwide presence would do to satisfy domestic standards. If it can be shown that such notices were given, it will ultimately be untenable that public policy has been violated in its procedural aspect, and recognition of the United States court's decision in Spain will be unavoidable.

133. **c)** An absent class member could also try to claim that defending his right before a court of the United States would have been very onerous for him and that, therefore, he had no real possibility of defending his legal position in the original process.

134. If this statement were true, the Spanish court that had to decide on recognition could conclude that he was undefended and, therefore, that public policy was violated. But this would be an inadmissible argument, for two basic reasons:

135. - In the first place, because it is not necessary that he be an active participant in the process, given the structure of collective processes; he can benefit from the result of the process even though he does not take part in it. Moreover, the named plaintiff is responsible for protecting the common interests of all class members. The Court selects the named plaintiff after it satisfies itself that the named plaintiff in question is sufficiently qualified and experienced to serve as a representative for the class and to protect the interests of the class members.

136. - In the second place, because an absent plaintiff would have the option of excluding himself from the class action process; the requirements for doing so are, under the laws and practice of the United States, simple and are available to a class member residing outside the United States [also applicable here would be the line of reasoning in the Decision of the Provincial Court of Madrid, Section 14, of June 9, 2003 (JUR 2003\247093) (Exhibit 66) to which reference has been had just above].

137. As a matter of fact, Constitutional Court Judgment 43/1986, of April 15th (Exhibit 33) held that, with respect to a denial of recognition, the statements of the challenger concerning the greater onerousness of defending himself abroad (specifically, in the United States) and his lack of confidence in the court that took cognizance of the dispute were absolutely irrelevant.

C) Partial conclusion

138. The content of the foregoing pages makes it possible to maintain with certainty that the fact that the judgment or the decision approving a settlement in *Anwar v. Fairfield Greenwich Ltd*. were achieved as a consequence of the bringing of a class action does not violate Spanish public policy in its procedural public policy aspect.

8.1.2 *Recognition of a decision rendered on the basis of the verdict reached by a jury is not contrary to the public policy of Spain*

139. Checking public policy means, as previously stated, that when it comes time to decide on recognition and enforcement in Spain of a foreign court decision, the Spanish court must take account of the procedural guarantees laid down in Article 24 of the Spanish Constitution and must check whether, when the decision whose recognition is sought was delivered, those guarantees were respected. Among the guarantees that make up the fundamental right to protection of the courts is the requirement that court decisions be reasoned (Article 120, read in conjunction with Article 24 of the Constitution), so that those who come before it may learn why the courts decide as they do.

140. As regards deciding on recognition of foreign decisions, Spanish jurisprudence finds that it is to be denied if those decisions are not reasoned, as then they would be in conflict with Spanish public policy in its procedural aspect [Constitutional Court Judgment 54/1989, of February 23rd (Exhibit 34); Constitutional Court Judgment 132/1991, of June 17th (Exhibit 16); Decision of the Supreme Court of December 24, 1996 (RJ\1997\8394) (Exhibit 8); Decision of the Supreme Court of January 20, 2004 (JUR 2004\54318) (Exhibit 14); Decision of the Provincial Court of Barcelona, Section 15, of October 20, 2006 (JUR 2009\203309) (Exhibit 67)].

141. Therefore, it is necessary to consider whether a judgment pronounced by a court of the United States on the basis of the verdict arrived at by a jury would or would not be sufficiently reasoned, taking account of the fact that, according to the United States procedural system, juries are not in all cases obliged to provide the reasons for their verdicts on the disputed issues of fact (r*ule* 49 FRCP).

142. Spanish jurisprudence repeatedly emphasizes the fact that it is a purpose of court decisions to let the parties know the facts that the courts consider proven and the legal arguments from which they decide to extrapolate legal consequences from those facts; this is a guarantee against the judicial arbitrariness that at the same time makes it possible to challenge the courts' decisions [for all this, *cf.* Constitutional Court Judgment 302/2005, of November 21st].

143. Thus, when it comes to analyzing the reasons for foreign court decisions with a view to recognition of them, the courts of Spain have found as follows:

144. - It cannot be attempted to cover over, as a lack of reasoning, what actually is a check of the merits of the decision. In this connection, Constitutional Court Judgment 132/1991, of June 17th (Exhibit 16), states as follows: "The fact that the Spanish court verifies whether the foreign decision satisfies the said requirement or not means, however, a review of the merits of the decision, which is to say a review of the Law applied or of the reasoning as a whole that led to the decision taken, for the court on exequatur does not, as we have previously found, operate as a court of review of the foreign court decision, but merely as a court of approval of it. A check of the grounds and reasoning in Law of the foreign decision must, then, be uncoupled from verification of the appropriateness or local correctness from the juridical viewpoint of the grounds for the Judgment, as this would make the Court on exequatur a court of cassation, which as is very well known goes beyond its approval function, and it must confine itself, as far as that requirement is concerned, to confirming that the foreign decision sets out the arguments on which it is based and makes it possible to understand the answers given to the matters raised, and that the resolution of the case is the consequence of rational exegesis of the law applied and not the fruit of judicial arbitrariness" [along the same lines, see also Decision of the Supreme Court of December 24, 1996 (RJ 1997/8394) (Exhibit 8)].

145. - The reasons for foreign judgments cannot be evaluated according to the reasoning criteria of the Spanish legal system; rather, the fact that parties to the process were able to learn the reasons that justify the court's decision must simply be verified [again in this connection, Constitutional Court Judgment 132/1991, of June 17th (Exhibit 16)].

146. - The Spanish courts admit of the possibility that the reasoning or grounds for the judgment can be integrated with other documents or decisions in the process, or even with the proceedings during the process; the Decision of the Supreme Court of January 20, 2004 (JUR 2004\54318) (Exhibit 14) finds it acceptable to deduce the factual basis for a judgment on the basis of testimony given during the oral

proceeding, and the Decision of the Provincial Court of Barcelona of October 20, 2006 (JUR 2009\203309) (Exhibit 67), accepts reference to a prior court decision as the legal foundation of a judgment.

147. - In its Decision of December 24, 1996 (RJ 1997\8394) (Exhibit 8), the Supreme Court did not find contrary to Spanish public policy the fact that a judgment was based on a jury verdict in a case in which the party objecting to exequatur alleged irregularities on the part of the jury, the presence of pressure, and its irrational fixation on the amount of compensation.

148. With due consideration of the foregoing, it seems to me that in *Anwar v. Fairfield Greenwich Ltd*. whatever judgment may be issued on the basis of a jury verdict could not be considered lacking in foundation, from the perspective of Spanish public policy, since all the parties will have been able to learn the reasons by which such a result was arrived at, by combining the following elements: On the one hand, the *Second Consolidated Amended Complaint*, which sets out all the counts against the defendants and the facts on which they are based; on the other hand, the court's decision on the motions to dismiss filed by the defendants, because in it the court identified what legal foundation is admissible for each one of the claims made by the plaintiffs.

149. Consequently, any verdict in favor of the plaintiffs on one or more counts in the complaint means that the jury found the facts to be as alleged in those counts in the complaint, that it based its conclusion on the evidence admitted at the trial and that it deemed applicable to each count the legal grounds which were proposed by the plaintiffs and which were admitted by the court in deciding on the motion to dismiss.

150. Of course, assessing the presence of reasoning would be made simpler if one of the special verdicts contemplated in *rule* 49 Federal Rules of Civil Proedure were delivered. Even though it were not so, however, the judgment rendered on the terms described ought to be considered sufficiently reasoned by a Spanish court for the purpose of passing the domestic public policy test.

8.2 *Recognition of the decision or of the order approving a settlement in Anwar v. Fairfield Greenwich Ltd. does not violate the public policy of Spain as regards material public policy.*

151. Having seen that the judgment or the decision approving a settlement in *Anwar v. Fairfield Greenwich Ltd*. is not contrary to the procedural aspect of Spanish public policy, we must now determine whether a judgment or settlement would be contrary to the material aspect of Spanish public policy. In other words, to verify whether there is anything in the scope of the process and in the remedies sought that would conflict with the basic Constitutional values prevalent in Spain.

8.2.1 *Punitive damages* under *the United States system are not contrary to the public policy of Spain*

152. The *Prayer for Relief* that concludes the *Second Consolidated Amended Complaint* seeks, among other reliefs, "*punitive damages for each claim to the maximum extent available under the law on account of the outrageous nature of Defendants' willful and wanton disregard of Plaintiffs' rights.*"

153. Punitive damages is not a concept that exists in Spanish Law on damages – whether contractual or extra contractual. The Spanish system in the area of damages as a rule hews strictly to compensation for the harm sustained; this has been stated, for example, in the Supreme Court Judgment of December 19, 2005 (RJ 2006\295) (Exhibit 68), "indemnification for damages must cover consequential damages and *lucrum cessans*, but with indemnification of the injured party forming the limit of compensation, for it is the purpose of compensation to restore the adversely-affected asset to the condition it would have been in had the violation not taken place, but not to provide the injured party with a profit or enrichment; so that the damages actually sustained are restored, since our Law does not recognize the so-called "punitive damages" nor does the notion of "private pain" currently have a function."

154. On occasion, when it has been attempted to have a United States judgment that ordered the payment of punitive damages recognized in Spain, the defendant has challenged it, claiming that it would

run counter to domestic public policy in its material or substantive aspect to impart validity to a concept contrary to the general rules of the Law on damages in Spain. The response, however, has at all times been negative:

155. - In general terms, because Spanish jurisprudence concludes that the fact that a legal concept does not exist in our system is no obstacle in itself to granting recognition of the judgment. In addition to the decisions that will be cited below with respect to punitive damages, see the Decision of the Provincial Court of Navarre of January 15, 2002 (AC 2002\1038) (Exhibit 69) concerning the *astreintes* of French Law, which are coercive fines payable to a creditor in the event of violation by a debtor of certain judicial obligations and which in the view of Spanish Law could generate unlawful enrichment; the fact that Spanish Law ignores this concept is no obstacle to the enforcement in Spain of a French decision that levies them on a defendant.

156. - In particular, with respect to punitive damages, it has been held that denial of recognition on this ground would mean reviewing the merits of the foreign judgment, for punitive damages cannot be considered contrary to Spanish public policy; the ordinary system for reparation of damages cannot be understood to be linked to essential Constitutional values.

157. Specifically, the Decision of the Supreme Court of December 24, 1996 (RJ 1997\8394) (Exhibit 8), dismissed a challenge to recognition with the argument that the Spanish court would be improperly meddling in the concepts and indemnification basis for the damages and in the ambit of discretion for determining them accepted under the legal system of origin (that of the United States). And the subject is dealt with somewhat more thoroughly in the Decision of the Supreme Court of November 13, 2001 (JUR 2002\608) (Exhibit 7), in a case in which the defendant objected to recognition of a judgment of the Federal Court District Court for the Southern District of Texas that ordered defendant to pay punitive damages, alleging that it was contrary to the material or substantive aspect of public policy. The Supreme Court firmly rejected this argument in the following terms:

"When the matter is duly focused on (…) it is limited to verifying that the order delivered in the judgment to be recognized – more properly, the effects that flow from it – is in line with the substantive aspect of public policy, identified here with presence in the domestic legal system of a given legal concept or institution, and with the possibility of pacifically abiding by those that it contemplates and provides for. In the judgment to be recognized, it is easy to find, in fact, economic pronouncements that answer a purpose that is not strictly speaking one of compensation of the damages sustained as a result of the acts of the defendant, but, rather, punitive and sanctioning, and also preventive of future damages. When it comes to specifying the essential legal principles and values with which it is possible to identify the concept of international public policy, it cannot be ignored that those under which the mechanism for indemnification of damages operates are not entirely alien to the idea of prevention, and nor are coercive sanctioning tools foreign to them, whether in the material aspect – contractual, specifically – or in the procedural sphere. It is not always easy, moreover, to differentiate indemnification concepts and to define the quantum that is relevant to that coercive sanction and that constitutes reparation for pain and suffering. In any case, when it comes to confronting the dilemma of reconciling it with public policy for the purpose of recognition of foreign judgments, we cannot lose sight of either the connection that the matter has to the forum or, in particular, the principle of proportionality that has imbued the decisions of the courts of the States of our milieu in similar situations. Furthermore, in another connection, it must be borne in mind that the said "punitive damages" have made use of civil liability as an institution of private law to the detriment of punitive law, which is completely in accord with the doctrine of minimal intervention in the said penal sphere, and therefore, on the basis of the said absolutely generalized doctrine, punitive damages cannot be spoken of as an institution that offends public policy."

158. To sum up, it must be clear that punitive damages under United States law are not necessarily in conflict with Spanish public policy [for the doctrine, see also M. Virgós Soriano/F.J. Garcimartín Alférez, *Derecho Procesal Civil Internacional. Litigación internacional*, Ed. Civitas, 2ª ed., Madrid, 2007, pp.

647-650 (Exhibit 70); A.L. Calvo Caravaca/J. Carrascosa González, *Derecho Internacional Privado*, Vol. I, Ed. Comares, 5ª ed., Granada, 2004, p. 392 (Exhibit 71)]. Consequently, on the basis of this reason recognition cannot be denied to the judgment that is eventually delivered in *Anwar v. Fairfield Greenwich Ltd*. and that includes an order to pay a sum of money by way of punitive damages.

8.2.2 *Securities class actions are not contrary to the public policy of Spain*

159. The *Anwar v. Fairfield Greenwich Ltd*. case constitutes the bringing of a securities class action. It has been concluded above (8.1.2) that, as class actions, this type of process is not in itself contrary to Spanish public policy. And it must now be made clear, too, that, as regards their statutory securities law claims, they also cannot be considered contrary to the material public policy of Spain, irrespective of the fact that they have not to date been brought as such before our courts.

160. In the first place, it must be made clear that material public policy is not to be confused with the legal provisions of *hard law*, which is to say imperative legal provisions that cannot be dispensed with by the parties. It is true that in both Spain and the United States the provisions concerning the securities market possess in many regards a clearly imperative character; however, that does not make it possible to conclude that they form part of the notion of Constitutional public policy, in the sense that this is understood in the area of recognition of foreign court decisions; this is expressly stated in the Decision of the Provincial Court of Madrid of June 9, 2003 (JUR 2003\247093) (Exhibit 66).

161. In particular, actions aimed at reparation for damages sustained by investors as the result of the improper acts of the various operators in marketing securities also cannot be considered contrary to Spanish public order. There are by now a number of cases in which the courts of Spain have on this basis found against financial entities; thus, the Judgment of Madrid's Court of First Instance 87 of March 2, 2010 (AC 2010\107) (Exhibit 72) ordered the financial entity known as Bankinter SA to indemnify several tens of investors whom it had induced to acquire securities from Lehman Brothers and from certain Icelandic banks (Landsbanki and Kaupthing), and the Judgment of Valencia's Court of First

Instance 23 of July 30, 2010 (AC 2010\1696) (Exhibit 73) ordered the financial entity known as Banif SA to indemnify certain customers for incorrect advice on the purchase of shares of a foreign entity and for defective information in connection with a drop in their quoted value.

162. Taking due account of the purpose of the claims made in *Anwar v. Fairfield Greenwich Ltd*., no infringement of any essential constitutional value is found that could be determinative of a violation of the substantive or material aspect of the public order of Spain.

9. REQUIREMENTS FOR RECOGNITION (VI): THAT THE DOCUMENT CONTAINING THE DECISION IS AUTHTENTIC

163. Article 954.4 of LEC/1881 expressly requires "that in order to be considered authentic the document containing the final judgment must satisfy the requirements called for in the nation in which it was delivered and the requirements that the laws of Spain call for in order for it to be worthy of faith and credit in Spain." This is a requirement that has never created any difficulty in practice; petitioners for recognition and exequatur usually have recourse to the "apostille" or, if not, to certifications and authentications that the Supreme Court and the lower courts have at all times found sufficient [*cf.*, for all this, Decision of the Supreme Court of July 20, 1999 (RJ 5237) (Exhibit 11); Decision of the Supreme Court of June 15, 1999 (RJ 4348) (Exhibit 41); Decision of the Supreme Court of June 8, 1999 (RJ 4347) (Exhibit 74); Decision of the Supreme Court of October 13, 1998 (RJ 7668) (Exhibit 75); Decision of the Supreme Court of February 10, 1998 (RJ 2666) (Exhibit 76)].

164. Consequently, this is also a requirement that should not create difficulties for recognition in Spain of whatever judgment or settlement is arrived at in *Anwar v. Fairfield Greenwich Ltd.*

10. REQUIREMENTS FOR RECOGNITION (VII): THAT THE DECISION IS NOT IN CONFLICT WITH ANOTHER JUDGMENT PREVIOUSLY GIVEN EFFECT IN SPAIN

165. Despite the fact that LEC/1881 does not expressly so provide, the line of decided cases has found that, for the granting of recognition or exequatur to a foreign court decision, it is necessary to check that the decision in question is not in conflict with another that previously had effect in Spain.

166. Initially, the Supreme Court, and now the lower courts that have to decide on prayers for recognition, find that a foreign decision cannot be permitted to have effect in Spain if its content clashes with that of another decision already given effect within our borders previously. The force of *res judicata* is thereby being ascribed to a decision that previously had effect in Spain, with a negative or exclusionary effectiveness that prevents the granting of recognition or exequatur to the foreign decision. This effectiveness is primarily assigned to Spanish decisions [Decision of the Constitutional Court 703/1986, of September 17th (Exhibit 77); Decision of the Supreme Court of December 24, 1996 (RJ 1997\8394) (Exhibit 8); Decision of the Supreme Court of April 7, 1998 (RJ 3560) (Exhibit 40); Decision of the Supreme Court of October 6, 1998 (RJ 7329) (Exhibit 78); Decision of the Supreme Court of December 1, 1998 (RJ 10543) (Exhibit 79); Decision of the Supreme Court of July 20, 1999 (RJ 5237) (Exhibit 11); Decision of the Supreme Court of May 28, 2002 (JUR 2002\159025) (Exhibit 12); Decision of the Supreme Court of March 11, 2003 (JUR 2003\87983) (Exhibit 80); Decision of the Supreme Court of July 8, 2003 (JUR 2003\206114) (Exhibit 13)], and also to other foreign decisions provided that they had already taken effect in Spain at the time when the request for recognition or exequatur of the other foreign decision was made; and that they were previously effective means that they had theretofore been recognized [Decision of the Supreme Court of May 12, 1998 (RAJ 4448) (Exhibit 81); Decision of the Supreme Court of April 28, 1998 (RAJ 3595) (Exhibit 43)].

167. Spanish jurisprudence has also on occasion found that exequatur is not to be granted to a foreign decision in the event of *lis pendens*, which is to say when that which was the object of the determination

arrived at on it forms part of the object of a process currently pending before the courts of Spain [Decision of the Supreme Court of January 19, 1999 (RJ 186), in connection with a foreign arbitration award (Exhibit 82); Decision of the Supreme Court of December 22, 1998 (RJ 10803), under the bilateral convention with France (Exhibit 83); Decision of the Supreme Court of April 28, 1998 (RJ 3595) (Exhibit 43); Decision of the Supreme Court of June 20, 2000 (RJ 4656) (Exhibit 84)]. Preference is thereby given to any decision that is final in our State vis-à-vis a foreign decision, even though the latter may by definition antedate the former. Well, then, in order to prevent abuse and fraud, this has been refined so that *lis pendens* can form an obstacle to recognition only if the judicial process in Spain started before the judicial process abroad that led to the decision whose recognition is sought, as otherwise actions might be brought domestically for the sole purpose of preventing the future effectiveness of such judgment as might be delivered in a foreign process [*cf.* Decision of the Supreme Court of March 20, 2001 (RJ 5520) (Exhibit 85); Decision of the Supreme Court of October 14, 2003 (JUR 2003\261670) (Exhibit 86); for the doctrine, J. Maseda Rodríguez, "*Exequátur* y carrera de procedimientos: la ineficacia de los medios procesales," *Tribunales de Justicia*, 1998-3, pp. 297-304 (Exhibit 87)].

168. Consequently, it would be conceivable to deny recognition to such judgment or settlement as is arrived at in *Anwar v. Fairfield Greenwich Ltd*. only if a process had been commenced in Spain for the same object prior to the time at which the litigation commenced before the Court of New York; and denial would also be imposed if in Spain a final judgment had already been rendered in a process that concerned the same object at the time when recognition of the United States decision was sought.

169. To specify when it is deemed that the objects of the two processes are identical, it is necessary to take account of the identity or partial coincidence that exists between a collective process and an individual process in which a party injured by the harmful fact has directed his action solely to the defense of his rights. Therefore, it would also be warranted to partially deny recognition if some investor, on an individual basis, had already obtained a final judgment in Spain for the same facts or if he had, previous to the commencement of litigation in the United States, brought process to claim protection on

the basis of the same facts. However, it must be reiterated that in such cases denial would be partial and limited to the specific individual who was a litigant in Spain on an individual basis.

170. With respect to all the others, the judgment or settlement would be recognized and would produce in all normality the preclusive effect that it also had at its origin. Therefore, the matter is much more theoretical than practical:

171. - If an injured investor has filed a claim in Spain on the basis of the same facts before the *Anwar v. Fairfield Greenwich Ltd*. process started in the United States, the defendants will have the burden of defending themselves before the relevant Spanish court and, obviously, will not be able to raise before the Spanish court the preclusive effect of the judgment or of the settlement arrived at in the United States, for the simple reason that there has been no judgment or settlement yet.

172. - If an injured investor files his individual claim in Spain when a judgment has already been rendered or a settlement approved in *Anwar v. Fairfield Greenwich Ltd*., then any party sued in Spain could successfully request recognition of the judgment or of the settlement, so that its preclusive force would prevent the evolution of the individual process in Spain.

173. - Finally, if an injured investor files his individual claim in Spain after the *Anwar v. Fairfield Greenwich Ltd*. litigation commenced in the United States, but before any judgment is issued or settlement is approved in it, the party sued in Spain could asset the exception of international *lis pendens* because of the identity between the object of the Spanish process and the object of the process of the United States, which would lead to termination of the process in Spain. Of course, in this case, as in the earlier ones, the point of departure must be that the subject has not opted to be excluded from the collective process in the United States, for it is then evident that he would preserve his right to file an individual claim.

GENERAL CONCLUSION

I have been asked for my opinion as to whether it is more or less likely that recognition would be granted in Spain to the judgment or the court decision approving a settlement in the *Anwar v. Fairfield Greenwich Ltd*. case currently before the *United States District Court for the Southern District of New York*.

Having examined all the elements that a Spanish court sitting on the matter would have to verify, the conclusion must be reached that, in this case, obstacles that would prevent recognition are not, *a priori*, present. In singular fashion, the following can be highlighted:

1) There is a strong connection between the process and the court that is sitting on it.

2) Recognition of judgments or settlements arrived at as a consequence of the bringing of class actions does not violate the public policy of Spain in either its procedural aspect or its material aspect, nor does the fact that absent class members residing in Spain may be involved.

If the proceedings in the *Anwar v. Fairfield Greenwich Ltd*. case unfold in accordance with the rules characteristic of the laws of the United States in the area of collective actions and the absent class members are given the notifications contemplated in those laws, it can be presumed to be highly likely that such judgment as is rendered or such transaction as is approved by the court will have preclusive effects in Spain vis-à-vis any absent class member who might attempt to commence an individual process in relation to the same facts. Recognition of the judgment or of the decision approving the settlement will thus be capable of preventing the commencement and subsequent carrying on of individual processes by absent class members vis-à-vis those already sued in the United States for claims already adjudicated or which could have been adjudicated in the U.S. proceeding based on the same core set of facts. .

Any possible denial of recognition, then, would take place only in the event that in some regard the proceeding did not evolve in accordance with the ordinary rules, to the prejudice of the absent class members' possibilities of defense, participation, or exclusion. However, if regular evolution is assumed,

then my opinion is that recognition in Spain of the judgment or of the decision that approves the settlement is much more likely than not.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: February 28th, 2011

Madrid, Spain

Dr. Fernando Gascón