Chapter I

Good legal practices in Spanish law? Clauses governing residence and the export of Spanish Social Security Benefits

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I. INTRODUCTION

In order to prevent the coexistence of many different social protection regimes from becoming an insurmountable obstacle to the exercise of the right of free movement of persons, the current Article 48 of the Treaty on the Functioning of the European Union proclaims that the European Parliament and the Council shall adopt such measures in the field of Social Security as are necessary to provide freedom of movement for workers.

This precept has been developed in Regulation 883/2004, whose scope of personal application is delimited in Article 2, from which it can be inferred that it is applicable to the nationals of States in which European Union Law is applied and who are or have been subject to the legislation of one or several Member States, as well as their family members and survivors.

Article 7 of Regulation 883/2004 carries the heading “Waiving of residence rules” and provides that “Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account

1. This report has been published in the framework of the R & D project “Good Legal Practices in the Field of Labour and European Law to Reduce Labour Litigation Expenditure at Zero Cost (I+D DER 2012-32111).
of the fact that the beneficiary or the members of his/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated”.

The principle of the waiving of residence rules is better known as the principle of export of benefits.

Regulation 1231/2010 widens the application of Regulation 883/2004 to the nationals of third countries legally residing in EU territory, and so this group also comes under community provisions on the export of Social Security benefits coordinated in the territory in which EU Law is applicable.

II. THE REFORM OF RESIDENCE RULES IN SPANISH LAW


Although the Preamble to Law 22/2013 makes no mention of the purpose of this reform, it can be deduced that it is none other than to prevent the export of non-contributory Social Security benefits and to avoid payment of the healthcare costs generated by those persons who spend over 90 days outside Spain in each calendar year. And, at the same time, it introduces into our Social Security legislation the concept of “habitual” residence, which is mentioned in the articles of Regulation 883/2004 on the coordination of Social Security systems.

III. MATERIAL SCOPE OF THE REFORM

It should first be noted that, pursuant to Article 7 of the Revised Text of the General Social Security Law, residence in Spanish territory is a general requirement of Spanish citizens for their inclusion in the contributory or non-contributory level of the Social Security system. With respect to foreigners, Article 14.1 of Basic Law 4/2000 requires that they reside legally or are legally in Spain.

But it is one thing that, as a translation of the principle of territoriality, one of the requirements for Spanish Social Security legislation to be applicable is to work, reside (or be) in Spain, and another very different thing for residence in Spain, or proven periods of residence in Spain, to be

2. After the new Revised Text of the General Social Law of 2015 came in force, the references to the former Sixty-Fifth Additional Provision should be made to the new article 51.
specifically required for the recognition and maintenance of certain Social Security benefits. Article 51 of the Revised Text of the General Social Security Law would only be applicable to the latter.

From the drafting of the article 51, it can be inferred that it affects two types of benefits: the second section is devoted to monetary Social Security benefits which require residence in Spanish territory:

“For the purposes of the maintenance of the right to monetary Social Security benefits for which residence in Spanish territory is a requirement, it shall be understood that the beneficiary of said benefits, including supplementary benefits, has his/her habitual residence in Spain, even though he/she has spent periods abroad, provided these do not exceed 90 days in each calendar year, or when the absence from Spanish territory is caused by duly certified illness. Notwithstanding the provisions of the preceding paragraph, for the purposes of unemployment payments and benefits, the specific regulations governing said benefits shall be applicable”.

The third section affects healthcare benefits for which residence in Spanish territory is required:

“For the purposes of the maintenance of the right to healthcare benefits for which residence in Spanish territory is required, it shall be understood that the beneficiary of said healthcare benefits has his/her habitual residence in Spain even though he/she has spent periods abroad, provided that these do not exceed 90 days in each calendar year”.

To make the acquisition and maintenance of the right to a Social Security benefit conditional upon residence in Spain is a requirement that has traditionally been one of the typical features that configure the non-contributory benefits of the Social Security system (and Social Assistance benefits provided by Regional Governments), and this is also required of Spanish citizens.

A. HAS LAW 22/2013 REPEALED THE PREVIOUS EXCEPTIONS RELATING TO THE RESIDENCE REQUIREMENT?

Absence from Spanish territory for reasons of illness, which must be duly certified, is the only cause contemplated under article 51 of the Revised Text of the General Social Security Law that would not be counted to determine whether or not the absences exceed 90 days in each calendar year.

But, scattered throughout the regulations governing Foreign Residents and the Social Security system, there are other cases in which absence
from Spain does not affect the maintenance of the right to the benefit in question.

It is therefore necessary to ask whether the exceptions to the requirement to maintain residence in Spain that is found in our legislation have been tacitly or expressly repealed after the entry into force of Law 22/2013. The answer to this question, in the absence of a better opinion, must be negative.

Firstly, because Law 22/2013 does not revise the text of each and every one of the national regulations which contemplate exceptions to the requirement to reside in Spain as a condition for the maintenance of the right to benefits, whether it be a non-contributory retirement pension, invalidity, family benefits, employment benefits and payments, benefits for the termination of activity or supplementary benefits.

Neither can a tacit repeal be alleged, since the pre-existing regulations are not contrary to or incompatible with the new article 51 of the Revised Text of the General Social Security Law, and this is so because what the latter regulation governs is the moment at which a person is considered to have ceased to have his/her “habitual” residence in Spain for the purposes of the maintenance of his/her right to a benefit of the Spanish Social Security system which requires residence in the country.

But the “habitual” residence, today, is not a general requirement under Spanish Social Security legislation, and so the pre-existing regulations remain in force.

What we believe the Spanish legislators really intended with this new article 51 was to solve the problems arising when European Union Law comes into play (and more specifically, Regulation 883/2004) which, to determine which State is responsible for paying Social Security benefits, uses the concepts of the “habitual residence” and the “stay” of the beneficiary.

IV. THE POLYSEMIC CONCEPT OF “HABITUAL” RESIDENCE

Differentiating between residence and “habitual” residence is far from easy or trouble-free, especially when, depending on the area of legal regulation involved, the expression can have different meanings.

As the Contentious-Administrative Division of the Spanish Supreme Court declared in its sentence of 16.6.2011: “residence requires, on the one hand, a spiritual element, the intention to reside in a certain place. On the other hand, it is necessary for there to be a material element, effective residence. The doctrine of this Chamber with regard to this problem has varied between giving relevance to the subjective or the objective
element. For tax purposes... there is no doubt that the relevant element is the objective element. There is no question that one does not cease to be resident in Spain by the mere fact of declaring that one has applied for residence in another place if this is not accompanied by effective residence in the chosen place”.

For its part, the Employment Division of the Supreme Court, in its sentence of 18.10.2012, highlighted that the concept of residence is one that can be graduated and is to some extent “elastic” insofar that the different branches of legal regulation use different parameters to define it. But “something in common can be detected among the different interpretations of the concept: residence implies physical settlement in a single place and for a minimum period of time, in all events greater than 15 days”.

The Supreme Court has also indicated that “the legal concept of residence belongs to a family in which it is related to the concepts of domicile and stay. On the other hand, substantive residence is often accompanied, in the different branches of law that use it, by different adjectives: habitual residence, temporary residence, permanent residence or long-term residence. Residence for the purposes of income tax is not exactly the same as residence for the purposes of the right/duty to register as a resident of a municipality, or residence for the purposes of legislation governing foreigners, or residence for the purposes of the geographic mobility of workers, or residence for the purposes of the active and passive suffrage rights” (Sentence of the Supreme Court of 3.6.2014 [JUR.188834] and the sentences cited therein).

A. “HABITUAL” RESIDENCE IN THE REVISED TEXT OF THE GENERAL SOCIAL SECURITY LAW

It should first be noted that when the beginning and the conservation of the right to a non-contributory Social Security benefit is subordinated to a residence requirement, the terminology that has traditionally been used in the Revised Text of the General Social Security Law is not “habitual residence” but “legal residence” or “residence”, with no adjectives.

The use, then, of the term “habitual residence” in the new article 51 of the Revised Text of the General Social Security Law is apparently a novelty.

B. “HABITUAL” RESIDENCE IN THE LAW ON PERSONAL INCOME TAX

If the legislative panorama were not already sufficiently complex, it
must also be taken into account that, in the sphere of Spanish Tax Law, Personal Income Tax classifies taxpayers as “physical persons who have their habitual residence in Spanish territory”

But, and this is what is most notable, a “habitual” resident is not just someone who “remains for over 183 days during the calendar year in Spanish territory” but it must also be understood that the taxpayer has his/her habitual residence in Spanish territory “when the principal core for the basis of his/her economic activities or interests are directly or indirectly located in Spain”. These are, then, alternative requirements which are not necessarily cumulative.

It is legally possible, therefore, to be a “habitual” resident in Spain for tax purposes, regardless of the time which a person spends abroad.

1. Tax status of Social Security contributions

Depending on the different means of funding, there is a classic dichotomy between contributory benefits (those which are paid for and which are accessed on the basis of direct contributions by beneficiaries or the insured or indirect contributions of employers), and non-contributory benefits (funded by public funds from the budget and receipt of which is not conditional on prior requirements of Social Security registration or contributions).

However, it must be acknowledged that this classification is not definitive and that the “contributory” benefits also have “non-contributory” features, since the State intervenes, through the budget, in the funding of Social Security costs. Typical cases are the non-contributory unemployment benefits regulated under Article 274.1, section 1, letter c) and Article 274, section 2, of the Revised Text of the General Social Security Law, and “contributory” family benefits (Article 237 of the same law). In neither of the examples mentioned is it necessary to demonstrate any minimum period of contributions for the “contributory” benefit to be granted.

4. Article 9.1.a) of Law 35/2006, of 28 November, on Personal Income Tax: “it shall be understood that the taxpayer has his/her habitual residence in Spanish territory when any of the following circumstances applies: a) that he/she remains for more than 183 days per calendar year in Spanish territory. To determine this period of presence in Spanish territory, sporadic absences shall be counted, unless the taxpayer demonstrates that he/she is resident for tax purposes in another country. In the case of countries or territories considered to be tax havens, the Tax Authorities may require proof that the taxpayer has spent 183 days of the calendar year in that place”.
6. In accordance with Article 109.3 RTGSSL, all unemployment benefits, including welfare assistance benefits, must be classified as contributory.
I. GOOD LEGAL PRACTICES IN SPANISH LAW? CLAUSES GOVERNING RESIDENCE...

As can be seen from sentence no 39/1992 of the Constitutional Court, the controversy regarding the legal nature of Social Security contributions is not new. Spanish legal doctrine agrees that its nature is that of a tax, a thesis backed by the Constitutional Court7. But there is no unanimity with respect to its specific place among the diversity of figures that the term tax can cover. For some authors, Social Security contributions are in nature a special tax, whereas others believe that it is a charge, “since the worker, as well as being the payer, is also the beneficiary of the service financed with those payments”.

In view of the apparently fictitious nature of the contribution-tax dichotomy, we may ask why the legislature does not use better legislative technique and replace the current nomenclature with another.

Among the possible motives that advise against initiatives of this type, the sociological factor is not the least important, given the generalised public rejection of the tax system. In this regard, nobody has spoken with greater clarity than SCHULTE8, when he declared that the use of the term contribution rather than tax is due to the fact that “it is expected that contributions will be more easily accepted by the citizens, since people have the sensation that they receive something in exchange for their payments”.

For the purposes of this paper, and if the thesis that contributions have the nature of a tax is accepted, it is paradoxical that the concept of residence for tax purposes contained in the Law on Personal Income Tax is not applicable for the recognition and conservation of “contributory” and “non-contributory” Social Security benefits.

C. “HABITUAL” RESIDENCE IN REGULATION 883/2004

Given that the principle of unity of the applicable legislation is an essential pillar of the coordination of Social Security systems, a person can only have one “habitual” residence. This is a key concept in the determination of the Social Security legislation that is applicable and which State is competent for the payment of Social Security benefits.

Article 1, letter j) of Regulation 883/2004 contains the definition of

7. Sentence of the Constitutional Court no 39/1992, of 30 March: “it is undeniable that the social protection system has progressively become separated from the contributory scheme and has become ever closer to the concept of a tax”.
residence: "the place in which a person habitually resides", in contrast to "stay": "the temporary residence" (Article 1, letter k).

Given the opacity of this definition, it is no surprise that the concept of residence for the purposes of the coordination of Social Security systems has had to be addressed in Regulation 987/2009, whose Article 11 carries the title "Elements for determining residence".

This Regulation enumerates a wide range of criteria for the determination of the "habitual" residence of a person, which include "the duration and continuity of presence on the territory of the Member States concerned" and "the person’s situation" (including, in the latter case, the Member State in which the person is deemed to reside for taxation purposes). In those cases in which not even these criteria are sufficient to offer a conclusive result, Article 11.2 of said Regulation 987/2009 establishes that "the person’s intention, as it appears from such facts and circumstances, especially the reasons that led the person to move, shall be considered to be decisive for establishing that person’s actual place of residence".

The keystone upon which the concept of "habitual" residence depends for the purposes of the coordination Regulations is the "centre of interests" of the person, as seen in the Brey case.9 In accordance with Article 1, letter j), of Regulation 883/2004, the residence of a person is that place in which he/she habitually resides, an expression which refers to the Member State in which the persons affected habitually reside and in which the principal focus of his/her interests are located.

At all events—and it is important to highlight this—the concept of residence for the purposes of the coordination Regulations of Social Security systems is not affected or conditioned by the definitions contained in national regulations, and not even by the definitions contained in other Community texts, such as Directive 2004/38.10

Furthermore, "a nationally defined residence concept could lead to a situation where a person, despite living all his/her life in the EU, is not considered to be resident by the legislation of any Member State".11

At all events, it must be recognised that the community concept

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   http://www.tress-network.org/EUROPEAN%20RESOURCES/EUROPEANREPORT/
   ThinkTank_HealthcareUninsuredCitizens_Final_140111.pdf

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of “habitual” residence is subject to controversy and this has led the European Commission to publish in 2014 an Application Guide for the “Habitual Residence Test” for Social Security purposes, “to help Member States apply EU rules on the coordination of social security for EU citizens that have moved to another Member State”.

V. NON-APPLICATION OF SPANISH RESIDENCE CLAUSES WHEN EUROPEAN UNION LAW OR INTERNATIONAL SOCIAL SECURITY CONVENTIONS ARE APPLICABLE

Without questioning the competence of the States to introduce legislative reforms in their Social Security systems, the principle of the primacy of European Union Law must be kept very much in mind.

Specifically, as regards Social Security, it is necessary to bring up Regulation 883/2004 (further developed under Regulation 987/2009) which does not institute a common Social Security regime, but allows different national regimes to continue to exist; its sole objective is to guarantee a certain level of coordination between them.

Regulation 883/2004 contains different regulations regarding the export of benefits, depending on whether they are contributory or non-contributory Social Security benefits, and special non-contributory cash benefits or benefits in kind (healthcare).

Said provisions must be applied as a priority in the case of subjects included within the scope of personal application of Regulation 883/2004 who claim Social Security benefits coordinated under the Regulation.

With respect to the application of coordination rules to nationals of third countries, the provisions of Regulation 1231/2010 are applicable, which widen the application of Regulation 883/2004 and Regulation 987/2009 to nationals of third countries who, due only to their nationality, are not covered by said Regulations.

A. THE EXTINCTION OF THE RIGHT TO NON-CONTRIBUTORY SOCIAL SECURITY RETIREMENT AND INVALIDITY PENSIONS DUE TO THE LOSS OF RESIDENCY

According to Spanish legislation, the right to a non-contributory Social Security pension is extinguished if the requirement of legal residence in Spain is not fulfilled.

In contrast to what happens with other benefits coordinated under Regulation 883/2004, which, according to Spanish legislation, are not exportable, but which are exportable under Union law (contributory and
non-contributory unemployment benefits), non-contributory retirement and invalidity pensions ceased to be exportable to other States in which European Union law is applicable, from the moment in which they were notified by the Spanish Government as special non-contributory benefits\(^\text{12}\) (currently included in Annex X of Regulation 883/2004\(^\text{13}\)). It must be taken into account that, for the purposes of Annex X of Regulation 883/2004, Social Assistance benefits provided by Spanish regional governments to complement non-contributory state Social Security pensions are also classified as special non-exportable cash benefits.

With respect to non-contributory Social Security invalidity and retirement pensions, it must be noted that the wording of Article 51.2 of the Revised Text of the General Social Security Law substantially coincides with Article 10.2 of Royal Decree 357/1991: “residence subsequent to the recognition of the right shall not be considered interrupted by absence from Spanish territory of less than 90 days in each calendar year, or when the absence is due to duly certified illness”.

The new Article 51 of the Revised Text of the General Social Security Law contains no novelties, then, with respect to the legal regime governing non-contributory Social Security invalidity and retirement pensions.

**B. LOSS OF RESIDENCE AND SUPPLEMENTARY BENEFITS**

1. The non-extinction of the right to supplementary benefits due to the loss of “habitual” residence in Spain when Regulation 883/2004 is applicable

Article 59 of the Revised Text of the General Social Security Law regulates supplements to contributory pensions which are lower than the minimum. The recognition of the right to these benefits is conditioned by the residence requirement, though only with respect to pensions originating from events occurring since 1 January 2013.

The thesis proposed here is that the residence requirement is not applicable to subjects protected by Regulation 883/2004 who exercise their right of freedom of movement.

This is justified by the fact that although these supplementary benefits

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12. Article 70.3 of Regulation 883/2004 expressly excludes the application of Article 7 (suppression of residence clauses) to special non-contributory cash benefits.
13. Article 3.3 of Regulation 883/2004 provides that said Regulation shall also be applied to the special non-contributory cash benefits contemplated in Article 70. From the reading of the latter Article, it can be inferred that the term “special non-contributory benefit” is reserved for benefits which the States notify in Annex X.
are non-contributory according to Article 109.3.b) of the Revised Text of
the General Social Security Law, they have not been notified as special

And it must be taken into account that only non-contributory benefits
included in said Annex are non-exportable according to European Union
Law, all of which is without prejudice to the fact that the Court of Justice
in Luxembourg can pronounce on whether or not the governmental
notification complies with European Union Law.

Since, for the purposes of Regulation 883/2004, contributory pensions
are exportable, the supplements to those pensions must also be exported
when Regulation 883/2004 can be invoked by pensioners benefiting from
said supplements.

Therefore, the new Article 51 of the Revised Text of the General Social
Security Law does not modify, and much less repeal, the right to the
exportation of benefits enshrined in the Treaty on the Functioning of
the European Union, further developed by Regulation 883/2004.

In conclusion, pensioners with a recognised right to supplementary
benefits and who are included in the scope of personal application of
Regulation 883/2004 have a recognised right to export not only their
contributory pensions but also the supplementary benefits provided that
they are resident in one of the States in which the coordination Regulations
are applied.

*Mutatis mutandī*, nationals of third countries also have the right to export
the supplementary benefits when Regulation 1231/2010 is applicable.

2. Other cases of the non-extinction of the right to supplementary
benefits for absences of more than 90 days in the calendar year

Firstly, absences from Spanish territory which are due to duly certified
illness are not counted for the purposes of the loss of the right to receive
supplementary benefits, as this is expressly established under Article 51.2

Secondly, it must be borne in mind that Spanish legislators have
explicitly laid down that, even in the case of stays of more than 90 over
the calendar year, the interested party can “certify by other means that
his/her habitual residence is in Spain. For these purposes, the family
situation, the existence of professional reasons which oblige him/her
to travel frequently, the fact of holding a stable job in Spain or his/her
intention of holding such a job may be taken into account” (Article 10.3 of
Royal Decree 1716/2012, of 28 December).

That is, there is a rebuttable presumption of the loss of habitual
C. UNEMPLOYMENT BENEFITS

Article 51.2 of the Revised Text of the General Social Security Law establishes that “for the purposes of unemployment payments and benefits, the provisions established in the regulations shall be applicable”.

This is, then, a block referral to Title III of the Revised Text of the General Social Security Law, which regulates contributory and non-contributory unemployment benefits and, specifically, the causes of the extinction and suspension of the right to said benefits, among which are “the transfer of residence or stay to a foreign country” (Articles 271 and 272 of said law) and which were reformed prior to the inclusion of the new Article 51.

Today, therefore, in accordance with points f) and g) of Article 271.1 of the Revised Text of the General Social Security Law, the payment of the benefit is suspended “in cases of the transfer of residence to a foreign country in which the beneficiary declares that the purpose is to seek or perform work, professional training or international cooperation, for a continuous period of less than 12 months, provided that the departure to the foreign country is previously communicated to and authorised by the managing body, without prejudice to the application of the provisions regarding the export of benefits under European Union rules. In cases of a stay abroad for a maximum period, whether continuous or not, of up to 90 days in each calendar year, provided that the departure to the foreign country is previously communicated to and authorised by the managing body”. Departure to a foreign country for a period of not more than fifteen calendar days once per year shall not be considered a stay abroad or a transfer of residence, without prejudice to the fulfilment of the obligations established in Article 299”.

In the final analysis, the non-application of Article 51 to unemployment payments and benefits is an expression of the will of the legislators to maintain the recent reform of these benefits under Royal Decree-Law

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14. Given that competence for passive employment policies has not been transferred to the Regional Governments, the competent Managing Body is the State Public Employment Service.
I. GOOD LEGAL PRACTICES IN SPANISH LAW? CLAUSES GOVERNING RESIDENCE...

11/2013 (later, Law 1/2014, of 28 February) under which legislators adopted the new case law of the Supreme Court regarding the effects of temporary absence from Spain on unemployment payments and benefits.

This case law, which is found, among others, in the sentences of the Supreme Court of 18.10.2012, 30.10.2012, and 3.6.2014, addresses the question of where to draw the “dividing line between a stay and residence, something which the Social Security legislature or the holder of regulatory powers in this field could have established, but which neither have done”... “the aforementioned regulatory vacuum could be filled by... systematic interpretation, bearing in mind that legislation governing foreign residents offers a delimitation which is quite strictly adjusted to the requirements of social order. Under Article 31.1 of the Basic Law on Foreign Residents, temporary residence is distinguished from a stay, beginning as from 90 days of presence. And, as has already been stated, this threshold is practically the same as that of the three months’ stay outside the territory of the member state which pays the benefit used in Regulation 883/2004”.

Although this legal reasoning may be correct with respect to the specific cases presented to the Supreme Court, to generalise and extrapolate them to all of the benefits subject to the residence requirement, as does Article 51 of the Revised Text of the General Social Security Law, is much more questionable.

Firstly, because it is not true that Basic Law 4/2000 sets the threshold between a stay and residence in all cases as over 90 days’ presence in Spain; there are exceptions. Specifically, Article 30.1 of Basic Law 4/2000 provides that: “a stay is presence in Spanish territory for a period of not more than 90 days, without prejudice to the provisions of Article 33 for admission for the purposes of study, student exchange, non-work practice or volunteer services”.

Likewise, Basic Law 4/2000, for example, does not consider the absence of foreigners from Spanish territory to be cause for the extinction of long-term residence if the absence is “of up to six months continuously, providing that the sum of these [absences] does not exceed a total of ten months within the five years referred to in section 1, unless the corresponding departures were irregular. In the case of absence for professional reasons, the continuation of residence shall not be affected by absences from Spanish territory of up to six months continuously, provided that sum of these does not exceed a total of one year within the five years required” (Article 148.2 of Royal Decree 557/2011). More exceptions can be found in Article 152 of Royal Decree 557/2011.

Secondly, since the Supreme Court correctly invokes Regulation
883/2004 with respect to the export of unemployment benefits, it should have taken into account that the most remarkable difference between the new coordination Regulation and its predecessor (Regulation 1408/71) in the field of the coordination of unemployment benefits lies precisely in the fact that, currently, unemployment payments and benefits are exportable in the territory in which European Union Law is applicable for a period of up to 6 months (Article 64.1.c) of Regulation 883/2004).

This article is equally applicable to the Active Integration Income (regulated under Royal Decree 1369/2006) for unemployed persons with special economic needs and who face difficulty in finding employment.

Regarding its legal nature, it has been said that it forms part of the public Social Security regime’s duty to protect against unemployment, though it has a specific nature differentiated from the contributory and non-contributory level. It is a “tertium genus”.

In accordance with Spanish legislation, it is a non-exportable benefit, since departure to another country to seek or perform work or for professional training or international cooperation for a period of less than six months are grounds for temporary cancellation (Article 9.3 d) RD 1369/2006).

Given, though, that all Spanish unemployment benefits are coordinated by Regulation 883/2004 and given that the Active Integration Income has not been notified in Annex X of said Regulation as a non-exportable, non-contributory special benefit, the only solution that can be reached is that it may be exported for up to a maximum of six months to the territory in which European Union Law is applicable (Article 64.1.c) Regulation 883/2004).

D. BENEFIT FOR THE TERMINATION OF ACTIVITY AND
ARTICLE 51 OF THE REVISED TEXT OF THE GENERAL SOCIAL SECURITY LAW

Article 15.1.b) of Royal Decree 1541/2011, which develops Law 32/2010, establishes that by virtue of the provisions of Article 11.1.f) of Law 32/2010, of 5 August —currently Article 340 of the Revised Text of the General Social Security Law— the right to protection for the termination of activity shall be suspended in cases of the transfer of residence to a foreign country when the beneficiary declares that it is for the purpose of seeking or performing work, for professional training or for international cooperation, for a continuous period of less than twelve months, without prejudice to the application of the provisions on the export of benefits contained in European Union rules. In other cases, the transfer of residence to a foreign country which does not comply with the
above requirements will suppose the extinction of the right. Occasional departure to a foreign country for a period of not more than 30 calendar days once a year, provided that this departure is previously communicated to and authorised by the managing body, will also suspend this right.

If we compare the transcribed text with the wording of the new sections f) and g) of Article 271.1 of the Revised Text of the General Social Security Law, we see that they are very similar, but not identical.

The fact that, furthermore, Article 51 of the Revised Text of the General Social Security Law does not establish any specific provision for this benefit (unlike the case of unemployment payments and benefits) raises important questions.

We should not forget the fact that, for the purposes of Regulation 883/2004, the regime for the export of unemployment benefits is applied equally to benefits for the termination of activity, and so these will be exportable for a period of up to six months.

E. NON-CONTRIBUTORY FAMILY BENEFITS AND RESIDENCE ABROAD

Non-contributory family benefits are regulated by Chapter I of Title VI of the Revised Text of the General Social Security Law. The beginning and maintenance of the right to these benefits is subordinate to the requirement of legal residence in Spain which is demanded of both the beneficiaries and of the person who gives rise to the right to the benefit.

Before Law 52/2003 reformed the regulations on family benefits, the Spanish courts had been giving a flexible interpretation to the requirements for residence and cohabitation between the person giving rise to the right to the benefits and the beneficiary, in application of Convention 157 of the ILO, requiring residence only of the beneficiary.

Currently, the general rule is the exclusion of children who do not reside in Spain (or in the territory of the European Union when the coordination regulations are applicable). This rule also has other exceptions based on bilateral Social Security conventions.

With respect to internal legislation, the only exceptions to the requirement for cohabitation contained in Royal Decree 1335/2005, of 11 November, which regulates family Social Security benefits, are the following:

Pursuant to Article 9.1.2: “temporary separation for reasons of study, work of parents or foster parents, medical treatment, rehabilitation or other similar causes does not interrupt the cohabitation”.

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The concept of “temporary” separation is a vague legal concept which depends on the duration, which may be longer or shorter, of the studies or of the medical treatment and rehabilitation, concluding with a final clause which is a catch-all: “other similar causes”.

The sloppy drafting of this clause raises the question of whether or not these justified causes of temporary separation which do not interrupt cohabitation absolve both the beneficiaries and the persons giving rise to the right to the benefit from the requirement to maintain their legal residence in Spain.

At all events, and in accordance with the provisions of Article 10.1.a) of Royal Decree 1335/2005, the residence requirement in Spain is considered to be fulfilled even when there is an interruption of cohabitation for reasons of the work of the beneficiaries “in the case of workers transferred by their company outside Spanish territory, who are in a situation similar to that of being registered and contributing under the corresponding Spanish Social Security regime”.

As regards European Union Law, it should be recalled that provisions on the coordination of family benefits are contained in Chapter 8 of Regulation 883/2004. The purpose of the chapter is, fundamentally, to prevent a Member State from making the concession or amount of family benefits depend on a residence requirement placed on members of the family of the worker in the State which grants said benefits, thereby guaranteeing the exercise of the right of freedom of movement.

For the purposes of Regulation 883/2004, co-ordinated Spanish family benefits (those regulated under Article 351 of the Revised Text of the General Social Security Law) are classified as non-contributory Social Security benefits and are not included in Annex X of Regulation 883/2004 (and they are not, therefore, special non-contributory benefits for the purposes of Regulation 883/2004, unlike non-contributory Spanish Social Security retirement and invalidity benefits).

The principle of the export of benefits enshrined in Regulation 833/2004 has never been applicable to family benefits. The explanation is very simple: in the case of the payment of family benefits for children who do not reside in the State competent for their payment, the beneficiary does reside in the territory of the competent State; and so this is a case of the equal treatment of the residence of family members.

This is the reason why Article 67 of Regulation 883/2004 states that “a person shall be entitled to family benefits in accordance with the legislation of the competent Member State, including for his family members residing in another Member State, as if they were residing in the former Member State”.
Although there may be entitlement to family benefits for family members who do not reside in the territory of the Member State which pays the benefit, it must be underlined that, at all events, the residence must be in one of the States where European Union Law is applicable, as has already been established by the Court of Justice in the Fahmi case.\footnote{Judgement of the CJEC of 20.3.2001, -33/99, (Fama y Esorris Cerdeara-Pinedo Amado) Rec; p.l-2452: “if the children of a Moroccan worker do not reside in the Community, neither the Moroccan worker concerned nor his children can rely, in regard to benefits such as those which constitute the object of the main procedure, on the principle of the prohibition of discrimination established in Article 41, sections 1 and 3 of the Cooperation Agreement”.

To conclude, it should be noted that the National Social Security Institute published its Circular 4/2006, of 11 October, on the application of rules on Social Security family protection, “which has not been modified since the entry into force of Community Regulations 883/2004 and 987/2009, however they continue to be applied, though the references to Regulations 1408/71 and 574/72, are understood to be made to the new Regulations”.}

\section*{F. INTERNATIONAL SOCIAL SECURITY CONVENTIONS AND SPANISH FAMILY BENEFITS: EXCEPTIONS TO THE REQUIREMENT OF THE RESIDENCE OF FAMILY MEMBERS IN SPAIN OR IN THE EUROPEAN UNION}

To resolve the question of whether it is possible to receive family benefits without meeting the requirement laid down in internal regulations regarding residence in the national territory of the persons giving rise to the right to the benefit, National Social Security Institute Circular 4/2006, 11 October, is a key text.

This Circular is headed “Instructions for the application of the rules on family protection under the Social Security system” and it contains specific provisions with respect to family members resident in other countries by which Spain is bound by international rules, with two cases being contemplated: Community Regulations (already analysed in the previous section) and bilateral conventions.

It is with respect to the latter, developed in section 14 of the Circular, where the surprises arise and, specifically, section 14.2 not only lists the bilateral conventions signed by Spain which include family benefits within their scope of application, but on page 43 of Circular 4/2006, it is explicitly stated that “in the application of these Conventions, except that with Australia, the residence of the child or, if applicable, the foster child, in the other signatory State of the bilateral regulation shall be considered
residence in national territory”, and it adds “it is important to highlight that these international rules only refer to the residence of the person giving rise to the right to the benefits, not to the beneficiaries...”.

In other words, failing to meet the residence requirement in Spain of the children or foster children contained in Article 182.1.b) of the Revised Text of the General Social Security Law, the workers covered by the scope of application of the international conventions which so provide, may be beneficiaries of the monetary benefits with respect to the children or foster children in their care, even though these may reside in Brazil, Canada, Chile, the Dominican Republic, Morocco, Paraguay, Peru, Russia, Tunisia, the Ukraine or Uruguay.

And the new Article 51 of the Revised Text of the General Social Security Law cannot, in any way, repeal or even modify an international convention which is in force.

G. HEALTHCARE

Article 51.3 of the Revised Text of the General Social Security Law provides that: “for the purposes of the maintenance of the right to health benefits for which residence in Spanish territory is required, it shall be understood that the beneficiary of said benefits has his/her habitual residence in Spain even though he/she has spent periods abroad, provided that these do not exceed 90 days in the calendar year”.

The first criticism that this clause attracts is its confusing wording, since it uses the term “beneficiary” without taking into account that Article 3 of Law 16/2003, on the Cohesion and Quality of the National Health Service, when describing its scope of application, differentiates between the “insured” and the “beneficiary of an insured”. And so, interpreting this third section of Article 51 of the Revised Text of the General Social Security Law strictly, the group of persons to whom the reform is applicable is substantially restricted, even though that was certainly not the intention of the legislators.

Secondly, it is evident that Article 51.3 of the Revised Text of the General Social Security Law cannot be applied literally, since the Informative Note of the Sub-Directorate General for Legal Assistance and Organisation of the National Social Security Institute of 30.1.2014 “On the Regulatory Changes Contained in Law 22/2013” recalls the existence of an important exception: “however, in application of Article 7.2a of Royal Decree 1192/2012 and of Regulation 883/2004, it shall be understood that the beneficiaries of an insured meet the residence requirement when they reside in the territory of any Member State of the European Union, the European Economic Area or in Switzerland”.

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Given that Article 7.2 of Royal Decree 1192/2004 lays down that the fact of ceasing to reside in the territory does not carry with it the loss of status as a beneficiary when this is established under applicable “international rules”, together with the fact that the Informative Note of the National Social Security Institute states that, in these cases, residence has to be in territories in which European Union Law is applicable, we are obliged to conclude that the legislators have erroneously classified European Union Law as International Law, which it is not.

1. Health benefits which require residence in Spanish territory

Article 51.3 of the Revised Text of the General Social Security Law is not intended to apply to all of the insureds and beneficiaries of health benefits in Spain, as its scope of application is much more restricted: the “health benefits for which residence in Spanish territory is required”.

In other words, the 65th Additional Provision of the Revised Text of the General Social Security Law is not applicable to the insureds and the beneficiaries listed in Article 3.2 of Law 16/2003, on the Cohesion and Quality of the National Health System, whose right to health benefits is not dependent on residence, which is the case of “employed or self-employed workers affiliated with the Social Security system and who are registered as active or in a similar situation; Social Security pensioners; and recipients of any other periodical Social Security benefit, including unemployment payments and benefits”.

With regard to the situations which are similar to being registered as active for the purposes of the right to healthcare, we must consider the Ministerial Order of 27.1.1982, on the scope of situations similar to registration as active in the case of workers employed by Spanish companies—and their family members—who are transferred abroad. With regard to this particular case we must cite Article 3.3.b) of Royal Decree 1192/2012, which waives the requirement to have authorised, effective residence in Spain for “those persons who temporarily come to Spain and are in the charge of workers transferred by their company outside Spanish territory, provided that they are in a situation similar to being registered as active, and are contributing under the corresponding Spanish Social Security regime”.

In another line of thinking, and as a hypothesis, the possibility is put forward that the legislators’ objective was to apply the new Article 51.3 of the Revised Text of the General Social Security Law to a single case: the unemployed who have exhausted their unemployment payments or benefits and other similar benefits.

This conclusion is reached on the basis that it is Law 22/2013, the
General State Budget, which incorporates the 65th Additional Provision of the Revised Text of the General Social Security Law—a currently Article 51—and also gives the new text to Article 3.2.d) of Law 16/2003, expressly requiring, since 1.1.2014, the new requirement of residence in order to recognise the right to healthcare for unemployed persons who have exhausted unemployment payments or benefits or other similar benefits.

But the new Article 51.3 of the Revised Text of the General Social Security Law has a wider potential scope of material and personal application, since sections 3 and 4 of Article 3 of Law 16/2003 contain other cases in which the recognition of this status as an insured or beneficiary of healthcare is expressly and explicitly subordinated to residence in Spain:

Article 3.3 of Law 16/2003: “... Persons of Spanish nationality or of a Member State of the European Union, European Economic Area or Switzerland who reside in Spain and foreigners who hold an authorisation to reside in Spanish territory may enjoy the status of insured provided that they demonstrate that they do not exceed the income limit laid down in the regulations”.

Article 3.4 of Law 16/2003: “... the spouse, or person with a similar personal relationship, who demonstrates the corresponding official registration, the ex-spouse for whom the insured is responsible, as well as the descendants and similar persons for whom the insured is responsible and who are under 26 years of age or who have a disability of 65% or more, shall have the status of beneficiaries of an insured, provided that they reside in Spain”.

With respect to descendants and similar persons, it is important to recall that cohabitation is not considered to have been interrupted for reasons of work, study or similar circumstances and that it is understood that the beneficiaries of an insured fulfil the residence requirement when they reside in the territory of any Member State of the European Union, the European Economic Area or Switzerland (Articles 3.2.b) and 7.2a of Royal Decree 1192/2012).

It should be highlighted that neither Section 3 nor 4 of Article 3 of Law 16/2003 were introduced or modified by Law 22/2013. It must, therefore, be admitted that prior to the General Budget Law of 2014, our laws already regulated cases in which the loss of the status as a resident in Spain (or as a person authorised to reside) carried with it the extinction of the right to healthcare.

Likewise, residence in Spain is an essential requirement in order to subscribe to the special convention on the provision of healthcare by means of the payment of the corresponding benefits contemplated under
Article 3.5 of Law 16/2003, further developed by Royal Decree 576/2013, of 26 July.

In all events, the return of the insured to Spain would mean that he/she would have access to healthcare benefits in accordance with the different means of recognition foreseen under current legislation. This is without prejudice to the fact that, during their temporary visits to Spain, Spanish citizens resident abroad may invoke the specific provisions contained in Royal Decree 8/2008.

With respect to insured foreigners who are citizens of third countries, it should be noted, firstly, that in accordance with the Second Additional Provision of Royal Decree 1192/2012, "persons with the right to healthcare under bilateral conventions which cover the provision of healthcare, shall have access to same, provided that they reside in Spanish territory, or during their temporary presence in Spain, in the way, to the extent and under the conditions established under said bilateral provisions".

Secondly, the absences of foreigners from Spanish territory which exceed 90 days are not an automatic cause of the extinction of the authorisation to reside in Spain, since temporary authorisations are extinguished, among other causes, by absences from Spain of over six months in one year.

And, in all events, this six-month limit is not applicable "to the holders of a temporary residence and employment authorisation who have a labour relationship with non-governmental organisations, foundations or associations which are registered in the corresponding general registry and which are officially recognised as being in the public interest, such as aid workers, and those who perform research projects, development cooperation work or humanitarian aid, undertaken abroad, for said organisations. Neither shall it be applicable to the holders of a residence authorisation who remain in the territory of another Member State of the European Union for the purpose of temporary study programmes promoted by the European Union" (Article 162.1.e) of Royal Decree 557/2011).


It is paradoxical that, unlike the case of the second paragraph of Article 51 of the Revised Text of the General Social Security Law, the third paragraph does not include the "tag" that "absences from Spanish territory due to duly certified illness" are not counted.

And this is despite the fact that Article 19 of Regulation 883/2004 not only regulates the right of beneficiaries and insureds to receive the necessary healthcare paid for by the competent State during temporary stays in other countries in which European Union Law is applicable,
but Article 20 of Regulation 883/2003 also regulates travel to receive programmed medical assistance in a State other than the competent State.

And this is why, despite the silence of the legislator, absence from Spanish territory to receive medical attention under Regulation 883/2004, whatever its duration, should not be counted for the purposes of Article 53.1 of the Revised Text of the General Social Security Law, since the patients are exercising a right which is recognised in a regulation which has primacy and a direct effect on national legislation.

Likewise, it must be ruled out that Article 51.3 of the Revised Text of the General Social Security Law repeals or modifies the regulation applicable to the European Health Insurance Card, which is "the personal, non-transferable document which demonstrates the right to receive the necessary healthcare, from a medical point of view, during a temporary stay for reasons of work, study or tourism, in the territory of the European Union, the European Economic Area and Switzerland".

Neither can it be interpreted that Article 51.3 of the Revised Text of the General Social Security Law has tacitly repealed the Second Additional Provision of Royal Decree 1192/2012, which clearly indicates that "persons with the right to healthcare under community regulations for the coordination of Social Security systems ... shall have access to same, provided they reside in Spanish territory or during their temporary presence in Spain, in the way, to the extent and under the conditions established in said community provisions".

In all events, it must also be taken into account that, in the cases in which a beneficiary or insured leaves Spain for a period greater than 90 days in a calendar year, this does not automatically mean that he/she acquires the rights to healthcare in another country.

From the above, the conclusion that can be drawn is that, given the primacy of European Union Law over national legislation (together with the large number of international Social Security conventions subscribed to by Spain) the practical efficacy of Article 51.3 of the Revised Text of the General Social Security Law is significantly lessened.

And to this already complicated legal panorama is added the entry into force of Royal Decree 81/2014, of 7 February, which establishes rules to guarantee cross-border healthcare.

By means of this Royal Decree, Spain has transposed Directive 2011/24, on the application of patients’ rights in cross-border healthcare, and Implementing Directive 2012/52 to its national legislation.

With respect to the question of the delimitation between Royal Decree 81/2014 and the Regulations on the coordination of Social
Security systems, the Explanatory Memorandum of Royal Decree 81/2014 indicates that “the most notable practical difference is that, in accordance with the Directive, patients must pay in advance the cost of the healthcare received, which will later be reimbursed, according to each case; while in the Regulations, this is not a general obligation. Another significant difference is that the Directive is applicable to all healthcare providers, public and private, whereas the Regulations coordinate only Social Security systems”.

As indicated in the website of the Ministry of Health, Social Services and Equality, “the option of this new rule could benefit patients requiring specialised treatment or who seek a diagnosis or treatment for a rare disease, as well as persons who live in cross-border zones and those who work or reside in Spain but who wish to be treated close to their families in another Member State”.

3. Instructions of The National Social Security Institute

On 18.2.2014, the National Social Security Institute issued an Instruction to clarify the application of Regulations 883/2004 and 987/2009 after the modifications made under Law 22/2013, the General State Budget, under Article 3.2.d) of Law 16/2003 and the incorporation of the new 65th Additional Provision al Revised Text of the General Social Security Law.

The starting point, as it had to be, was the recognition by the National Social Security Institute that “the provisions of community Regulations take precedence with respect to the provisions established under the internal legislation of a State”.

Consequently, “the insureds whose right to healthcare is recognised under Article 2.1.a) and 2.1.b) of Royal Decree 1192/2012, can obtain a Provisional Replacement Certificate with a maximum validity of 90 days per year for health coverage during a temporary stay in another Member State”.

In accordance with Article 7.2.a) of Royal Decree 1192/2012, “ceasing to reside in Spanish territory does not carry with it the loss of that status when it is so established under applicable international Social Security rules” (Regulations 883/2004 and 987/2009). Consequently, “in their temporary travels they may obtain a Provisional Replacement Certificate which is valid for 90 days and which may be renewed as long as the right holder maintains that right in Spain”.

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