SPANISH JUDICIAL DECISIONS IN PRIVATE INTERNATIONAL LAW 1993–1994

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A complete listing of all Spanish decisions in Private International Law is published each year in the *REDI*. This publication can be consulted for any further information required. We wish to thank the *REDI* for the use of their resources in the preparation of this text.

I. SOURCES OF PRIVATE INTERNATIONAL LAW

— STC 88/1993, 12 March. *BOE* 15.4.93.
Note: See XXIV.1

II. INTERNATIONAL JURISDICTION

1. Lis pendens

— SAP Bilbao, 23 June 1993. *REDI*, 1994—60–Pr.
Requirements for international *lis pendens*. The 1968 Brussels Convention. Protective measures and material proceedings.
Lis pendens no:

"The judge, when faced with the allegation of the exception, should examine not so much whether or not the foreign court is competent to hear the case but rather if the requirements found in case law for the viability of the exception in question have been met. These requirements are that the persons, things and actions (art. 1.252 *Cc*) in question are identical in nature in order to avoid not only duplication of actions, but also the possibility of contradictory judgments being issued and of a challenge being made to the exception of the *res judicata* in another trial. (Ss.TS June 8 1990, September 28, 1989)...

It is also important to note that *lis pendens* only exists if a case is

Spanish Yearbook of International Law, Volume III 1993–1994, 427–469.

pending on the same legal issue, and the resolution of that case must produce *res judicata*. ... the enforcement and small claims proceedings being challenged here are different in nature ....

In spite of the fact that the previous rationale provides sufficient grounds for the rejection of the *lis pendens* exception, the Court has examined and analyzed the international scope of this exception and whether or not the Brussels Convention should be applied once Spain ratifies it. In any case, what definitely must be examined here is if the proceedings carried out in Spain and those brought before the French foreign court are identical in nature, that is, if the same action is debated and enforced and if the objective of both suits is similar. ... the Court finds that the objective of the suit brought before the French court is not the same as the one being examined here; while there the embargo of a loan is being sought (which is in the nature of a protective measure), in this case, the objective is to have the decision enforced by means of collection procedures (auction and sale of assets to cover debts) for the purpose of obtaining a loan that is backed by a deed which according to legal dispositions, has executive force (art. 1.494.4 *LECiv*). This application gives rise to a situation in which neither the things nor the action of the two suits are identical, and therefore the petition for a *lis pendens* exception is accepted".

2. Prorogation of Jurisdiction

— STS 13 October 1993, *Ar. Rep.* J., 1993, n. 7514.
Insurance contract. Subrogation of the insurer to the position of the insured and the insurer's right to oppose the choice of jurisdiction included in the bill of lading.

"This ground is accepted because the Court of Appeal based its decision on an incorrect understanding of the legal position of the insurer who paid compensation to an insured party. In the area of maritime insurance to which the *Código de Comercio* is applicable, this Court has repeatedly ruled that, as article 780 clearly specifies, once the quantity stipulated in the insurance policy is paid by the insurer 'the insurer is subrogated to the position of the insured for all rights and obligations that correspond to him.' Therefore, it cannot be claimed that a suit based on the choice of jurisdiction clause cannot be brought against the insurer because he was not a party to that clause, although this is exactly what the judgment being challenged does by giving this

reason the status of *ratio decidendi* in its ruling. This ignores the fact that F., S.A., the insured, did indeed accept the choice of jurisdiction clause along with the entire bill of lading that covered the merchandise that CML was to transport. Thus, the insurer, acting on this bill of lading, must accept this clause as well. If this were not so, the result would be that the rights of the other parties to the contract would be unfairly affected by his subrogating to a third party in application of article 1.209.2 *Código de Comercio*, if this third party could allege that as regards that which adversely affects him, the agreement is *res inter alios acta.*

It would be different if, in order to recover the money he had already paid out, the insurer could simply file for recovery against his debtors. In that case, because his case would be independent of the insured party's case, he would not be bound by the agreement entered into by the latter. But the law uses subrogation for purposes of recovery of monies already paid out, and the result is the 'transfer to the subrogated party of the loan with all rights thereof, be they against the debtor or against third parties whether these be guarantors or mortgage holders' (art. 1.210 *Código de Comercio*). This is the interpretation given in the judgment of November 11, 1991 as regards maritime insurance.

In order to conclude that there is no choice of jurisdiction, the judgment being appealed invokes articles 10 *Cc* and 21.1 and 22 *LOPJ* in addition to the arguments explained above, but does not provide even a minimal explanation of the reasoning employed. These articles cannot be invoked because article 10, which refers to conflicts of law, has nothing to do with jurisdictional conflict. Nor does article 21.1 *LOPJ* negate the validity and efficacy of the choice of jurisdiction, because if article 22.2 of the *LOPJ* recognizes the choice of the jurisdiction of Spanish courts, it would be absurd for it not to recognize the choice of foreign courts. Finally, article 22 makes it even more difficult to arrive at the Appeal Court's conclusions given that this legal action does not fall with the scope of matters that can be heard exclusively by Spanish courts (n. 1).

The acceptance of this ground makes the examination of the other grounds unnecessary because as a result of its acceptance, the appealed sentence must be set aside and the court of first instance's rejection of the suit is reconfirmed".

— STS 10 November 1993, *Ar. Rep. J.*, 1993, n. 8980.
International maritime transport. Scope of the choice of jurisdiction clause of the bill of lading. Several defendants.

"The plaintiff, 'E., S.A.' has filed five grounds for appeal in cassation against the judgment which will be analyzed here. However, before beginning the analysis, it is important to remember that jurisdiction, defined as the scope of judicial power and the physical and material sphere of the authority to issue judgments and enforce them, has limits which sometimes prohibit a specific judicial organ from hearing a case. This is a prior issue and under the law, a court is allowed and even sometimes required to *ex officio* analyze whether or not it has jurisdiction. Issues of jurisdiction can also be introduced or rejected by the parties to a suit as explained in article 533 *LECiv,* and can be demanded in cassation in the appropriate ground.

Before the publication of the *LOPJ*, the limits were somewhat unclear given that the literal tenor of article 51 *LECiv* had produced judgments that allowed national jurisdiction to cover all types of matters. This was surely due the fact that not taking into account the true sense and scope of this precept which at one time was a timid manifestation of the principle of jurisdictional unity, [art. 51 *LECiv*] abolished the 1852 Decree, called the *Decreto de Extranjería* (Decree on Aliens), and gave civil courts jurisdictional authority to hear all civil cases provided that there was a rule of attribution. This is the only interpretation that should be allowed as regards this article in relation to article 62 *Código de Comercio* and the treaties to which Spain is a party. The result is that aliens can sue or be sued, and their cases can be heard by Spanish courts in accordance with the laws of the Kingdom and treaties with other powers. This is specifically stipulated in article 70 *LECiv*.

The *LOPJ* more clearly defined the scope of the powers attributed to our Courts. As regards civil matters, article 22 defines those in which jurisdiction is exclusive and those in which choice of jurisdiction is allowed if the parties so desire, and finally, those that are generally submitted to Spanish courts in cases in which no choice of jurisdiction is stipulated.

When a choice of jurisdiction is stipulated, as is the case in this suit, the interpretation and validity of choice of jurisdiction clause must be discussed, and the acts that generate tacit submission and the case's points of connection with the law that determines general authority must be evaluated.

Paragraph 2 of article 22 *LOPJ* establishes that Spanish courts have general jurisdiction 'when the parties [to a suit] have expressly or tacitly submitted to Spanish courts, and when the defendant (not the plaintiff, as is so blatantly and erroneously stated in some of the official

editions of the law) is domiciled in Spain'. Therefore, it is possible to admit agreements conferring jurisdiction, and reciprocally, we must admit the possible choice of foreign jurisdiction made by Spaniards as long as two conditions are met: 1) the matter involved does not affect sovereignty as it is interpreted by our own procedural rules, and 2) the issue is brought before our courts for a ruling based on the legal rules on territorial competence. Lack of jurisdiction is examined using the procedures established for declinatory pleas given that it is difficult to imagine that a foreign court would issue an injunction against a Spanish court to prevent it from hearing a case, as that would constitute a challenge to sovereignty. The declinatory plea would conclude, when appropriate, not with the remission of the case to the competent court, but rather with an indication made to the parties involved of the country in which the Spanish judge believes the case should be heard.

This being so established, in the case at hand the defendants presented a declinatory plea related to jurisdiction based on the choice of jurisdiction clause, and therefore, we must determine if in the trial a solution was found that is in keeping with Spanish procedural rules.

The fourth ground of the appeal charges that judgment is contrary to the case law that has interpreted articles 56 and 57 *LECiv*, and cites article 1.692.5 as support. For reasons of method, this ground will be analyzed first.

The ground itself cites the judgment of May 31, 1984, which finds that choice of jurisdiction is an exception to the general rules of competence, and therefore it must be clearly and explicitly stated (this criteria is corroborated by judgments dated October 4, 1965, November 5, 1966 and others). Furthermore, it establishes that a choice of jurisdiction clause is not valid if it is not signed by all of the parties involved (judgment of June 26, 1967), and that the signatures must correspond to the interested party, not to the captain, as stated in a judgment dated May 21, 1982.

This Court accepts these criteria, and by applying them to the case at hand, it finds no lack of jurisdictional competence, because no submission by the plaintiff to foreign courts can be derived from the contract for the maritime transport of merchandise to Barcelona between the plaintiff and the two companies that maintain that they are defendants by virtue of these transport contracts.

Furthermore, the two defendants do not even agree on which foreign country should hear the case, France or Korea. By filing a suit before the Spanish courts, the plaintiff tacitly accepts submission to them. This coincides with the general rule applicable to contracts which states that

the judge of the place where the obligation is to be fulfilled is competent to hear the case. In this case, this would be Barcelona. Even if we accept that there was a choice of foreign jurisdiction, the defendant, 'Maritime D.E., S.A.', was summoned before the courts of its place of domicile, and was able to present a defense in the venue most convenient to it, and therefore cannot allege lack of jurisdictional competence without risking that this procedural conduct be classified as bordering on fraud with intent to delay the resolution of the case.

This decision is supported by the bill of lading itself, identified as document number 4 of those presented with the suit, given that it is not signed by the interested party or by anyone on his behalf, as is claimed in the first ground which is formulated under article 1.692.4 *LECiv* and which should be accepted. There is no reason to analyze the content of the second ground because it is formulated against an argument used by the court of first instance which was not accepted in the first appeal, which is the judgment that is being appealed in cassation here".

— SAP Málaga, November 2, 1993. *REDI*, 1995—32–Pr.
Submission to Spanish courts. Filing an international declinatory plea.

"Prior to the analysis of the merits of the case, the appellant presents a dilatory plea based on the Spanish courts' lack of competence to hear the case pursuant to the provisions of the first part of art. 533 *LECiv*. The *LOPJ* profoundly modified the jurisdiction of Spanish courts. Art. 22 of said law lists a series of connecting factors between the facts of a case or the parties involved and Spanish jurisdiction which would give jurisdiction to Spanish judges. This, of course, means that if none of the connecting factors, or if the application of these factors indicates jurisdiction for a foreign court, Spanish judges should not hear the case. If this were not so, art. 22 *LOPJ* itself would not be necessary. Now then, n. 2 of this precept states that in civil cases, Spanish courts are generally competent when the parties to a case involving foreign affairs enter an appearance before them. Other than this phrase, there is no rule in the *LOPJ* that regulates submission, so that from a Private International Law point of view, the rules established in the laws governing international territorial competence must be applied. These rules are found in arts. 56, 57, 74 and other similar articles of the *LECiv*. This is why foreign legal matters present procedural problems in relation to tacit submission. The solution is found in n. 2 of art. 58 *LECiv*, which states that once the defendant enters an appearance, the only action that he may take is to file a declinatory plea (which

according to the doctrine of the *TS* corresponds to the defendant), because in order to prevent submission to the Spanish court, he must file the so–called international declinatory plea, which should not be confused with the dilatory plea found in art. 533.1 *LECiv*. If he does not do so in the manner stipulated by law, the defendant's reply and appearance in court will inevitably produce tacit submission to Spanish courts".

— SAP Barcelona, February 15,1994. *REDI*, 1995—2–Pr.
International maritime transport. Choice of jurisdiction found in the bill of lading: the question of competence. Tacit submission.

"First of all, we must state that art. 22 of the Organic Law 6/1985, dated July 1, recognizes 'the jurisdiction of Spanish courts ... 3. ... as regards contracts, when these originate or are to be fulfilled in Spain'. This case can be heard by Spanish courts because there are connecting factors that allow for this. However, this case has nothing to do with any of the issues that are listed in section 1 of this precept as being of exclusive competence, which means that it could also be heard by a foreign court. This is why, in spite of the fact that pursuant to the provisions of art. 2 of the 1968 Brussels Convention that states that individuals domiciled in a contracting State are subject to the jurisdictional organs of that State, regardless of their nationality, the prorogation of jurisdiction to courts that normally are not competent to hear a case is allowed. (ECCJ, June 24, 1986). Article 18 of the Convention warns that 'apart from jurisdiction derived from other provisions of this Convention a court of a contracting State before whom a defendant enters an appearance shall have jurisdiction. This rule does not apply where the appearance was entered solely to contest jurisdiction'. This has been understood to mean that the substantive defense of the motion for a ruling on the case is compatible with the challenge, provided that the challenge, if not presented first, is not presented after the judge takes a position, which according to Spanish procedural law is considered to be when the first allegation is presented before a competent judge (ECCJ, June 24, 1981). In the case at hand ..., the clarity of the petition in the response allows the acceptance of the prior question of competence.

Therefore, the restrictive criteria of the declinatory plea on jurisdiction in favor of foreign courts previously accepted in case law ... and based on art. 51 *LECiv* ... is not applicable. As this Court has pointed out on other occasions, this previous position should be

explained, especially given the entry into force on February 1, 1991, of the Brussels Convention dated September 27, 1968.

... Therefore, it cannot be declared that the litigious choice of jurisdiction clause cannot be challenged by the insurer as he did not sign it, because the insurance company, which bases its action on the bill of lading, must also accept it.

Now then, our law does not regulate the manner in which lack of jurisdiction based on territory should be claimed. Although doctrine and case law show that the regulations on territorial jurisdiction ... are not directly applicable when there is a case like this one, in which a State is not exclusively competent, making it necessary to file an international declinatory plea. The appellant in this case did not do this, thereby eliminating the plaintiff's right to question the formal correctness regularity of the choice of jurisdiction found in a clause printed on the bill of lading.

But in addition to this, jurisdiction rules must be interpreted in light of art. 24 *CE*, and therefore in the manner that most protects the legitimate interests of the litigants and rejects the abuse of rights or legal fraud. In this case, which has to do with a transport contract in which: a) both litigants are domiciled in Barcelona; b) the loading port is Bangkok; and c) the final port and place of delivery is Barcelona ..., the shipping agent cannot take advantage of the extraterritoriality clause that was agreed to by the French company ... because a) there was no connection whatsoever with the city of Marseille, b) this was not its original purpose and ... c) the defendant does not have any legitimate interest. The challenge based on lack of jurisdiction can only be understood as a delaying tactic which is contrary to the concept of procedural economy found in art. 7 Cc.

— SAP Barcelona, April 12 1994, *RGD*, 1994, pp. 11447—11450.
Choice of jurisdiction: invocation by a defendant residing in Spain. Recognition of the powers of a foreign trustee.

"Second.– In this suit, the trustee in bankruptcy of Video–p. GmbH demands that U., S.A., pay him the sum of 1,009,968.72 German marks, or the equivalent in pesetas of (62,416,053), which corresponds to the value of the material which had been delivered to the former. In response to the judgment, which rules completely in favor of the plaintiff, the defendant files an appeal based on the following four grounds: 1. The courts of Oberndorf (Germany) are competent and not those of San Feliu de Llobregat (Spain). The court incurred in an error

by stating there was submission when in the writ of response the type of dilatory plea contemplated in art. 533 *LECiv* had been formulated. 2. The plaintiff is not the representative of the creditors given that the exequatur of the resolution so determining was not obtained. 3. The loan on which the suit is based was granted to a third party. 4. Prescription.

Third.– The ECCJ judgment of June 24, 1981, permitted European judges to clarify a series of controversial questions as part of their task of interpreting the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed at Brussels on September 27, 1968 and the Protocol concerning its interpretation. Specifically, these questions included, on the one hand, the primacy of article 18 — tacit agreement — over article 7 — express agreement — when both concur in the same matter (years later the ECCJ decision dated March 7, 1985, extended the effects of this primacy to a case in which the plaintiff presented allegations on the merits of the case without opposing the existence of a choice of jurisdiction clause, and a loan was claimed by the defendant as compensation), and on the other hand, the possible appearance of the defendant to both challenge jurisdiction and, subsidiarily, present a defense on the merits of the case (in the same sense as the TJCE judgment of October 22, 1981). Finally, the last question is the timing of both actions, with the condition that in order for the challenge on the merits of the case not to be susceptible to the automatic application of article 18, if the challenge of jurisdiction is not filed prior to the defense of the merits of the case, it must at least be filed prior to what according to *lex fori* is considered to be the first defense brought before the judge who is hearing the case (ECCJ, June 24, 1981).

Fourth.– Whether or not the opinion issued concurs with the declarations of the ECCJ, it should be pointed out that the company being sued is domiciled in M. de R. (Barcelona) and therefore it has no legitimate interest as it is not procedurally harmed or prejudiced by the rejection of the submission, but rather just the opposite, and therefore the alleged lack of jurisdiction can only be considered a purely dilatory tactic which is contrary to the concept of procedural economy under art. 7 *Cc* (*ad exemplum, STS* December 1, 1987). Given that the fact that the suit was filed in Spain, the defendant benefits from not having to travel, in spite of the fact that the choice of jurisdiction clause was established for the plaintiff's benefit. The right to invoke the submission clause was forfeited when a suit was brought before a judge corresponding to the place of residence of the defendant. The fact that

the appellant claims that if the case had been heard in Germany, the ruling would have been in its favor because the *lex fori* of Germany would have been applied, is of no importance. Facts that could have been considered in a different light if a different law were applied were not proven, specifically the rule that establishes longer periods of time than does our legal system for the prescription of actions that benefit the purchaser in matters of latent defects, which is what the appellant alleges once the deliveries were proven and recognized. However, the defendant, who has the *onus probendi* as regards the facts being alleged, has not proven this, and in any case, the application of foreign law is a *de facto* question and as such must be alleged and proven by the party that invokes it. The exact law, its scope and authorized intepretation must be accredited so that its application cannot produce the slightest reasonable doubt in the Spanish courts. All of this must be proven by means of authentic and offical documentation. lt is common practice for Spanish courts to judge and rule according to domestic law (judgments of October 28, 1968, October 4, 1982, March 15, 1984, January 12 and May 11, 1989, which is cited in the most recent judgment dated September 7, 1990) when they are not absolutely certain of the grounds for the application of foreign law. Furthermore, in this case, the choice of jurisdiction clause invoked by the defendant was simply one of the general conditions of the contract which were printed on the back of the invoices, and there was not even a declaration of acceptance by the individual who alleges that he renounced his own law, a fact which he invokes here and which must be rejected for the reasons given above.

Fifth.– The defendant argues that there is no legitimate plaintiff in this case. If this position were to prosper, no claims could be made against the defendant by the plaintiff. Fact five of the response states: 'If the corporation was dissolved and the break–up registered *ex officio,* it follows that no one can claim anything on its behalf'. As a result, 'defense counsel does not know if perhaps Mr. K. E. represents the entire group of creditors rather than the corporation itself. The facts in this regard, should be clearly stated in both the power of attorney and the documents that accompany it as well as in the suit itself' (page 313 and back). However, the initial writ reads: 'acting as the bankruptcy trustee' (page 1) and remits to the power of attorney, which is translated as: 'as regards the bankruptcy of the assets of the company' he has 'exclusive representation in the bankruptcy proceedings and acccording to German law this representation includes the power to grant powers–of–attorney abroad'. (This is indicated as the content of

the Certificate given that it is included as one of the stipulations of the power–of–attorney and appears after the expression 'I, the Notary Public, do hereby certify'.

Therefore this is a clear representation, not blurred by the seventh fact of the response in which is found the allegation that 'in order for this order to be valid in Spain the *exequatur* should have been obtained from the Spanish *TS* for its enforcement in Spain in accordance with the provisions of arts. 95*1et seq. LECiv* and the Convention on the recognition and enforcement of judicial decisions and transactions or public documents with executive force between the Federal Republic of Germany and Spain, January 18, 1988. For these reasons, neither the bankruptcy order nor the appointment of Mr. K. H. as the trustee or administrator of the bankruptcy is valid in Spain given that the order in question did not obtain the necessary *exequatur*. The foundation for this is in art. 955 *LECiv* and has nothing to do with the fact that thc law speaks of 'judgments' because this requirement is equally applicable to 'orders', but rather is because the law refers to 'enforcement actions' (art 954) and 'enforcement' (art. 955) and, according to what has been presented, this is not the case here. The first jurisdictional order was correct in qualifying the recognition of the declaration of bankruptcy itself or the agreement betwcen creditors and the bankrupt company as an effect derived from both the judicial decision and the appointment in the foreign country of the representative of a corporation and his acts in Spain to conserve or recover the active assets of the bankruptcy given that effectiveness in this forum of a retroaction agreed to outside of its borders was not being sought. These precautionary measures benefit the creditors and do not require an *exequatur.* By interpreting art. 955 *LECiv* so broadly, the defendant must accept the consequences of the arguments presented in defense of the position that the suit should have been brought in Germany, because in that context, the 'Convention between Spain and the Federal Republic of Germany on the recognition and enforcement of judicial decisions and transactions and public documents with executive force in civil and commercial matters dated November 14, 1983' would be applicable. This convention states: 'the enforcement of a German judgment in Spain is really not more than an issue of processing.' Finally, if the defendant recognizes the extrinsic force of the photocopied documents presented by the actor to prove representation, taking into account the way in which this represcntation has been attacked by the defendant, it seems relevant to point out that the power of attorney meets all domestic requirements by having the apostille (The Hague Convention, October 5, 1961) and the required

stamp and seal of the Provincial Court of Rottweil. For these reasons, the second ground cannot be accepted.

Sixth.– The defendant offers documents 4—6 which she attaches to her response as proof of the assignment. As regards the first, it has to do with the assignee's notification of T.M., S.A.. There is no recognition by the assigner, nor is the notification made to the debtor, but rather to a different company altogether.

Document n. 5 is purported to be written by the plaintiff, although the plaintiff has not admitted this to be so. In any case, the document is also addressed to T.M., S.A., as debtor ('we have assigned against you'— page 337). Finally, document n. 6 is a notification from the assignor to the defendant, and like the other, it includes no mention of the will of the creditor. Therefore, even though the lack of recognition of these private documents does not totally strip them of their value, they can only be considered by determining their credibility in light of the circumstances. First of all, they are not sufficiently literal. Second, the fact that the party who could be harmed by them denies their authenticity does not prove that the party who invoked them made an attempt to show their authenticity, and therefore the alleged rights of the assignor cannot be accepted as no proof has been offered to verify the assignment. For these reasons, ground three must also fail.

Seventh.– The fourth and final ground is also rejected due to the fact that invoking prescription in the appeal is not procedurally correct because a motion for prescription was not formulated at the appropriate time in the response or during the first trial. Once the terms of the trial were determined without prescription being contemplated, the plaintiff could not allege or present evidence to disprove the alleged abandonment of her right or the passage of time that could determine that this right had been overlooked. The acceptance of this ground would give rise to a possible new claim based on lack of due process for the other party as this is a peremptory plea which can clearly be renounced and therefore is not acceptable *ex officio* (*STS* dated May 27, 1991). This is in addition to the fact that the doctrine of this Court states that if there is not a foundation of intrinsic justice, but rather one of legal certainty, the precepts that regulate this issue must be interpreted in a restrictive manner. It is not appropriate for a plea that was not included in the first trial to be presented in this appeal. We must not forget that the principle of congruence dictates that judgments and appeal limits must be respected. This principle is frequently found in case law and is accepted doctrine (*ad exemplum, Ss.TC* of November 28, 1983, May 20 and July 7, 1986, July 19, 1989 and April 21, 1992).

What cannot be taken into or ruled on are pretensions formulated during hearings on the appeal as this is not procedurally correct. Although an appeals court is allowed to review the entire first trial, this review is not considered a new trial nor is the appeals court authorized to resolve problems other than those presented in the first trial as this would contravene the principle of *pendente apellatione, nihil innovetur.* In any case, there does not seem to be any factual base that supports such a pretension given that this is a personal action derived from a contract and as such has no special prescription limit. Its *dies a quo* was the year 1988, and the case was heard in the year 1991, after extra–judicial claims were made which were proven through documents and recognized by the defendant. This is mentioned here for purely dialectic reasons because the legally established limits for prescription, which would have to be interrupted in order to keep the action alive, have not yet passed".

3. Contracts

— AAP Barcelona, 2 June 1994. *REDI*, 1995—35–Pr.
Unilateral resolution of a contract for exclusive distribution rights in Spain: The international jurisdiction of Spanish courts. Determination of the domicile of corporations.

"This Court believes that it must consult national legislation in order to determine whether or not to apply the 1968 Brussels Convention to this case. According to this legislation, B.F. Ltd. cannot be considered domiciled in London because it only has a delegation or agency there and not its legal domicile (art. 38 *RRM*) nor its real operational headquarters (art. 6 *LSA*). The plaintiff's claim — for the purpose of serving notice on the defendant — that the corporation is domiciled in London does not in any way affect the real or legal domicile of the company, which is located in the United States. Therefore, the only possible conclusion is that the 1968 Brussels Convention is not applicable to this case.

If prior to the passage of the *LOPJ*, an erroneous interpretation of art. 51 *LECiv* extended national jurisdiction to all types of matters, art. 22 *LOPJ* limits the exercise of the jurisidictional function. This is a type of self–limitation that the State practises in the exercise of its sovereignty due to its lack of interest in hearing certain matters that do not have the necessary connecting factors with national territory, which

implies the exclusion of State jurisdictional protection. Art. 22 *LOPJ* distinguishes between matters in which jurisdiction is exclusive (n. 1), others that allow for submission, and finally those that attribute the right to hear a case to Spanish courts in a general sense. Thus in cases in which the defendant is domiciled in Spain (n. 2), or when the rule of attribution for certain matters is given (nn. 3—5), the jurisdiction should be understood to be that of the domicile of the defendant. Of course, this limitation does not prevent the courts of several different States from being competent given the coexistence of several different State laws.

This Court does not agree with the appellant that the unjust enrichment action brought by the plaintiff should be considered a quasi–contract because unjust enrichment was the result of unilateral and unjustified termination of the contract. Therefore, compensation cannot be separated from the contract itself or from the reasons or grounds for its termination. In the new legislation on a similar type of agency contract, which, by the way, establishes the domicile of the agent as the only recognized territorial jurisdiction, the rule itself requires what is called 'clientele compensation' to be added to compensation for damages, when a business unilaterally gives notification of the termination of the contract. This is why it is impossible to claim that the obligation does not originate in the contract itself, as most of the characteristic obligations of an exclusive distribution contract in Spain are to be carried out or fulfilled within Spanish territory.

Even if we consider the ruling being sought in the suit to be autonomous and quasi–contractual in nature, we must recognize that this type of ruling is contemplated in art. 22 *LOPJ* because: 1. The limits of State jurisdiction should be interpreted in a restrictive manner when they imply a renunciation of sovereignty or impede access to jurisdiction; 2. An integrative interpretation of art. 62 *LECiv* which uses the broader term 'personal actions' encompasses both contractual and extracontractual obligations, even if they are not expressly listed in the article, because case law has determined that jurisdiction in these cases is the place where the harm was produced and not the domicile of the defendant. Therefore, there is nothing to prevent the analogous application found in the decision that is being appealed provided that a national is involved in the litigation, the necessary territorial connection exists and the change in patrimony that is to be compensated takes place in Spain, without forgetting that, according to the *TS* in its judgment of June 8, 1986, compensation for damages must

be paid in the place where they are produced or discovered.

Finally, by taking into account that the wording of art. 22 *LOPJ* was inspired by the 1968 Brussels Convention, for purposes of the interpretation of article 5, nos. 1 and 3, we can also consult the guidelines given by the ECCJ. In the judgment of March 8, 1988, (Case 9/1987, *A. v. H.*) the Court confirmed the contractual nature of a claim for compensation due to the improper termination of an agency contract. In a judgment dated September 27, 1988 (Case 189/1987, *A. K. v. Banco S., M. H. T. and C.*), it is given to understand that obligations that do not derive directly from a contract are included in the concept of extracontractuality contemplated in art. 22 ° *LOPJ*. Consequently, and in accordance with the ruling in the *Bier v. Mines de Potasse D'Alsace* case dated November 30, 1976, when there is a geographic disassociation between the actor who causes the harm and the harm itself, both places are closely tied to the jurisdictions in which the case can be heard, and as there seems to be no reason to choose one point of connection over another, both courts are competent".

4. Torts

— SAP Madrid, 4 January 1994. *REDI*, 1995—17–Pr.
Traffic accidents.
Note: See XIII. Torts

5. Exclusive Jurisdiction

— STS, 28 January 1994, *Ar. Rep. J.*, 1994, n. 572.
Patents. Validity of a patent inscribed in the Spanish Industrial Property Register. Exclusive jurisdiction of Spanish courts. The relationship between international jurisdiction and territorial jurisdiction.

"As regards foreign corporations in Spain, it is common for them to have a domicile in this country and when they do not, as is the case here, there is a gap in the procedural rules that determine territorial jurisdiction. This issue has been contemplated by this Court in judgments dated October 27, 1976 and December 2, 1989. Taking as a starting point the fact that the judgment being appealed accepts as proven fact that P.I. does not have a domicile in Madrid, or even a delegation, and it does not have any other domicile in Spanish territory,

the Court in Barcelona must be recognized as competent to hear this case as [the case] falls under the jurisdiction of Spanish civil courts.

Article 4 of the Friendship Treaty between Spain and the United States dated July 3, 1902 (ratified April 14, 1903), which has been invoked here, does not affect this jurisdiction or the rejection of the declinatory plea. This bilateral Convention recognizes the reciprocity of rights for the nationals of both States, their free access to the Courts in accordance with the Convention and the possibility that the rules are applicable in each country. This is also so established in article 27 of the *Cc*, art. 13 *CE* and Law 7/1985. Thus, the foreign rules in question — namely article 293 of the North American Patent Act — cannot be used to determine the competence of Spanish courts because this is a matter of compulsory law and is not subject to the will of the parties involved, except in the few cases in which submission is effective.

The North American company's access to the courts was admissible in the trial because the company appeared in court within established time limits, filed a response to the suit, and had at its disposal all of the means of proof and procedural tools that our system makes available to Spanish citizens. Therefore, the Treaty was observed and there was no lack of due process or reciprocal judicial attention during the case ...

... An attempt is being made here to give priority to North American law without duly demonstrating its content and effect in a manner allowed under Spanish law, such as by means of official documentation (judgments May 11, 1989, July 16, 1991, January 17 and November 19, 1992).

As regards the validity of patents, according to article 22.1 *LOPJ*, Spanish courts are competent. This is a consequence of the natural and political attribution of jurisdictional activity inherent in the sovereignty of the State (arts. 1 and 4 *LOPJ* in relation to 117 *CE*). Also, in keeping with article 104 *Cc*, industrial property rights are protected within Spanish territory by Spanish law, independent of the application of international treaties and conventions signed by Spain when appropriate, which is not the situation in this case".

III. PROCEDURE AND JUDICIAL ASSISTANCE

1. Notice

— STS 22 October 1993. *REDI*, 1994—61–Pr.
Notice served in France by mail. Application of the Hague Convention of November 15, 1995.

"The appeal, in addition to the *de facto* claims it makes, argues that the subpoenas were irregular because the authorization to serve notice by certified mail contemplated in article 56 *LPL* should be understood to mean service of notice within national territory. As regards subpoenas abroad, the provisions of article 300 *LECiv* should be applied. These stipulate that judicial proceedings that are to be carried out abroad will be processed through diplomatic channels. Having thus presented the legal considerations, we must keep in mind that the international treaty that establishes the notification or transfer abroad of judicial documents is the 1965 Hague Convention, n. XIV, dated November 15, 1965, sigued by Spain and France and ratified on June 4, 1987 and July 3, 1972 respectively. Article 10 of this convention specifically establishes that the convention itself does not prevent documents from being mailed to individuals who are abroad, provided that the State in qucstion agrees. According to the attached declarations, only Norway, Luxembourg, and the Federal Republic of Germany have opposed this method. ln its instrument of ratification, Spain declared 'that its judges, regardless of the provisions of article 15, can proceed in spite of not having received any notification attesting to service being made or to the remission of documents if the requirements found in article 15.2 are satisfied'. In paragraph 2 of this article, the first situation that is contemplated is that 'the document was sent in one of the manners stipulated in this Convention'. It suffices to mention these precepts to conclude that service by certified mail with written acknowledgement of receipt as stipulated in article 56 *LPL* is completely regular in France because Convention n. 14 of The Hague to which article 300 *LECiv* remits, does so permit. Therefore, given that the signatures of the receiver and of the postal worker are both found on the acknowledgement of receipt slip as is required by article 56, the judge can proceed as he is authorized to do in the declaration that is included in the instrument of ratification that was cited above".

2. Legal Kidnapping

— AAP Granada, 9 December 1993. *REDI*, 1994—22–Pr.
Refusal to return custody of a minor to her German mother. The minor's opposition to being returned. Application of the Hague Convention of 25 October 1980.

"The case heard by the Court of First Instance n. 3 in this city at the request of the *Secretaría General Técnica* (General Technical Secretariat) of the Ministry of Justice asks that in keeping with the Hague Convention dated October 25, 1980, the necessary provisions be adopted for the immediate return of the minor children Cristina and Isabel A. G. to their mother, Ms. Beatte H. A. G., who resides in Germany. The court issued a ruling on April 19 of this year, the *de facto* antecedents of which are accepted as stated and therefore will not be reproduced in this appeal, and which contains the following decision: 'The immediate and forced return of the minor child Cristina A. G., daughter of Carlos A. G. and Beatte H., in application of the previously cited precepts 12 and 13 of the Hague Convention of 25 October 1980, and the others cited in the first legal ground of this resolution which rejects the petition for return of the aforementioned minor child to her mother, is not admissible because it was brought under the international convention cited above. However, all civil recourses available to the parents as regards custody of the two minor children in accordance with article 19 of the Convention are reserved. These include preference for keeping the two together, modification of the custody agreement, visitation requirements or any other type of judicial action'.

The *Secretaría General Técnica* of the Ministry of Justice filed an appeal against this ruling which was admitted on both grounds, and after notifying the parties involved, the case was sent to this Court.

If the last paragraph of article 13 of the Convention of The Hague of October 25, 1980, does indeed allude to the 'information on the social situation of the minor child provided by the Central Authority or other competent authorities of the child's habitual residence', this is only to give notice that the judicial or administrative authorities 'will take [this information] into account', if it is included in the proceedings. Thus, the trial judge did take into account, as will this Court, all of the documentation presented by the *Secretaría General Técnica* of the Ministry of Justice. However, this stipulation cannot in any way be construed as an obligation on the part of the judge to take into account other reports, regardless of the fact that within the sovereign powers

that correspond to him according to article 340 *LECiv*, he can request any information he deems necessary to come to a correct resolution of the case. The fact that the judge did not make use of these powers does not mean that there has been a procedural error of any kind that would warrant the annulment of the proceedings that the appellant is seeking.

In cases dealing with separation, divorce or other family matters, both national law and international conventions are inspired by the principle of the protection of minor children who are the main victims of the problems between their parents. Having none of the blame, these children are deprived of their sacred right to live with a father and a mother in a peaceful household. This principle also influences the aforementioned Hague Convention of October 25, 1980, as is reflected in its preamble and more specifically in article 13, given that, in spite of the fact that the main purpose of the Convention is to remedy or block the effects of the illegal transfer of minor children by putting into play international assistance in returning these children to the parent who has legal custody, it contains some provisions which relieve State administrative or judicial authorities of the obligation to order the return of the minor child not only when it is shown that there exists one of the circumstances found in sections a) and b) of the article, but also in cases in which the judicial or administrative authorities of the State being petitioned learn that 'the minor child himself is opposed to being returned, and the child has reached an age and level of maturity at which it is appropriate for his opinion to be taken into account'. In this way, the overriding good of the minor child prevails and an affront to his liberty is avoided. Given his maturity and intellect, he merits respect and protection.

Leaving aside the case of the minor child Isabel A. G., who is reported to already be in Germany under her mother's custody, and addressing only the case of her older sister, Cristina, which is definitely the issue of this appeal, we must state that this minor, born July 30, 1981, is now 12 years old. According to article 92 *Cc*, she is old enough to be heard as regards resolutions that affect her directly, which shows that Spanish law considers her to able to make sound judgments. Furthermore, the social worker and the psychologist who have studied her personality agree on her capacity and level of maturity and her adaptation and integration in the family structure, as well as in social circles, school and other arenas in which she functions. When the court questioned Cristina in the terms found on page 107 of the record, her desire to stay in Spain with her father and other relatives was clearly manifested, and the idea of returning to Germany with her mother,

other than for short visits or during vacations, was rejected. One of the reasons she gave for not wanting to return to Germany was that her mother now lives with another man, and she prefers to be with her natural and legitimate father. All of these statements, although made shortly before turning the age stated above, seem very reasonable and confirm her good sense and judgment. Therefore it would be cruel and unjust to rule against the express and rational will of Cristina and use coercive measures to separate her from those people with whom she desires to live and from an environment in which she is fully integrated and which guarantees proper education and training and put her into an environment which she clearly rejects.

Given these circumstances, it is appropriate to make use of the authorization that article 13 of the Convention of The Hague of October 25, 1980, provides and deny the return of this minor child to her mother, thereby confirming the decision being appealed. There is no reason to consider a new legal regulation related to communication and visitation rights as brought by the appellant in the hearing because this is within the purview of the court that hears the principal case.

We must confirm and do confirm the decision issued by the Honourable Judge of the Court of First Instance...".

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND DECISIONS

1. Enforcement of Foreign Jndgments

— STC 199/1994, 4 July. *BOE* 4.8.94.
Actual enforcement after obtaining the *exequatur* of a foreign decision. The possibility of filing the appeals allowed against the enforcement of Spanish decisions.

"In the first place, we must keep in mind that the resolution being challenged has to do with a procedure related to the enforcement of a judgment issued by a foreign court in which the entity seeking protection was convicted and sentenced to pay a certain amount of money. Therefore, when under the protection of the principle of cooperation, an attempt is made to have a judicial decision issued in another State recognized in Spain so that it produces legal effects here,

it is necessary to satisfy the requirements or conditions generally stipulated by Spanish law (arts. 951 to 954 *LEC*) or those specifically stipulated in an international treaty to which the legislator, in the exercise of his sovereignty, subordinates the concession of the *exequatur* (Ss.TC 98/1984, 54/1988 — *sic.* — and 132/1991). However, once the *exequatur* is granted, as is the case here, the subsequent enforcement of the foreign judgment by Spanish judicial organs must be carried out through the procedural channels established in our law (art. 958.2 *LECiv*), including the means of enforcement and the system for appeals.

Having stated this, we must next point out that the decision being challenged in this constitutional proceeding, which is the decision of the First Division of the *TS* dated April 27, 1992, based the inadmissibility of the appeal in cassation on article 1.687, n. 2 in relation with n. 1 *LECiv*, and stated that this precept only allows for an appeal in cassation to be filed against decisions issued on appeal when they have to do with the enforcement of judgments issued in ordinary declarative trials. In the Court's opinion, this makes a broad interpretation of the aforementioned precept impossible, given that in accordance with the provisions found in n. 2, no judgments other than those issued in the declarative trials mentioned above fall under the scope of appeals in cassation nor do decisions produced in proceedings on the enforcement of foreign judgments that take place in Spain.

Now then, given this interpretation of article 1.687, n. 2, *LECiv*, the petitioner for protection knows that he is not being reasonable given that the petition is based on an unjustified discrimination between trials carried out in Spain and those held abroad, which leads to a clear limitation of the full effectiveness of the right to due process recognized in article 24.1 *CE*, as regards access to appeal procedures. ...

This clearly shows that the jurisdictional body has applied a legally stipulated ground for inadmissibility and has modified its decision based both on a literal interpretation of the precept applied and on the purpose of the appeal in cassation itself. The appellant attempts to base his petition for protection on a teleological interpretation of the same precept supported by the fact that a previous trial was held in the other State and in accordance with the provisions of foreign law. In the majority of cases related to the enforcement of a foreign judgment, the trial does not have the same name or the same content as the procedural channels stipulated by Spanish lawmakers.

In light of the doctrine that has been presented here, it is clear that this Court cannot rule on whether or not the interpretation given by the

judicial organ is correct as this undoubtedly falls within the sphere of ordinary legality. Nor can it rule, as the appellant wishes, that the interpretation of legality that she proposes is more favorable to the fundamental law that she invokes, because the judicial resolution being challenged here is not manifestly unreasonable or arbitrary given that the judicial organ had grounds to apply the legally stipulated reasons for inadmissibility of the appeal in cassation. Therefore, the complaint made by the plaintiff is not a constitutional matter according to article 24.1 *CE*.

2. Recognition and Enforcement. Natural Persons. Capacity

— ATS 22 December 1993. *REDI*, 1994—12–Pr.
Natural persons. Capacity. Recognition of a French declaration of incapacity and the appointment of an administrator of assets. The application of the Spanish–French Convention of 28 May 1969: control of jurisdiction. Public policy. *Exequatur*: yes.

"It seems that according to the judgment to be enforced, there are two types of declarations: the fundamental type, which is constitutive in nature given that it can convert what from a legal point of view is the basic status of a human being — his personality — into just the opposite: incapacity, and the complementary type, represented by submission of the incapable individual to guardianship and the appointment of an administrator of his assets in Spain (until a guardian is appointed).

It is clear that as a consequence of this, the solution of this *exequatur* presents various problems, the first being the distinction between recognition and enforcement of foreign resolutions. This question has been the subject of doctrinal debates in Spanish and even international case law.

The question lies in whether prior to the request for the *exequatur* a judicial organ charged with ruling on recognition can address the merits of the decision whose enforcement is being sought, in other words, if this organ can revise a decision, or if it must limit its actions in granting or denying recognition to ascertain if the decision was issued by the appropriate judge, if it has any formal defect, or if it is contrary to public policy (see *STS* 132/1991, June 17, and those cited therein). For those purposes, the criteria that currently prevail on this issue are those most recently issued (see *STS* March 19, 1986 and *STC* 132/1991, cited

above) which state that this Court must only rule on recognition within the limits that have been indicated and therefore cannot enter into an evaluation of the questions of fact established by the original court or the merits of the case. This function corresponds to the judge responsible for the enforcement in Spain of the decision, who can decide as to whether or not it is enforceable, which is the criterion which must be followed in this *exequatur.*

Given the above, and proceeding in a systematic manner, the first question to be examined as regards the granting or denial of recognition is the issue of the jurisdiction or lack of jurisdiction of the court that issued the judgment which is the object of this *exequatur.* It must be pointed out that the Convention with France dated May 28, 1969, ratified by an instrument dated January 15, 1970, first indicates in article 3.1 that decisions issued by the courts of both parties will be recognized, but then states in n. 1 that recognition will granted only if the original court is competent according to the provisions of article 7 of the Convention, which determines the cases in which both courts are considered competent. In its point n. 1, it states 'when at the time of the filing of the suit, the defendant is domiciled or habitually resides in the State of origin'.

On the other hand, article 9.1 of the *Cc*, establishes that personal law is determined by nationality. Number 6 stipulates that the law applicable as regards guardianship and other protective institutions for individuals lacking capacity (a situation also resolved by the judgment in question) is the domestic law of the incapacitated individual.

Article 22.3 of the *LOPJ* contemplates the jurisdiction of Spanish judges and courts: 'in the absence of the preceding criteria and ... in matters of incapacity and protection measures for a person or for the assets of minors or the incapacitated, when they habitually reside in Spain ...'.

Given the rules indicated above and regardless of the existence of a certain discrepancy between the *Cc* and the treaty with France, the competence of the French court in this case should be accepted for the following reasons: 1) The evidence presented proves that the incapacitated individual has habitually resided in France since at least 1988; 2) that consequently, and for the same reason that article 22.3 of the *LOPJ* attributes jurisdiction to Spanish courts when the incapacitated individual habitually resides in Spain, the same rule is applicable in the cases in which this residence is in France, in accordance with the provisions of article 7.1, in relation with article 1.1 of the Convention with this country; 3) even though this seems to lead

to another interesting point — which of the applicable rules prevails — it is not an obstacle for the recognition of the competence of the French court's jurisdiction in this case given that a) it is article 1.5 Cc itself that establishes that international treaties that meet the requirements listed in the Cc are equal to the laws listed in the first section of the article; b) this declaration is supported by article 95.1 *CE*; c) likewise, the Vienna Convention of May 23, 1969, with instrument of adhesion dated May 2, 1972, on the Law of Treaties, sanctions the 'superlegality' of treaties as regards positive domestic law in article 26 and 27; d) finally, the doctrine regarding the prevalence of these treaties was established by the then division 4 (today division 3) of the *TS, Ss.TS* February 22, 1970, March 17, 1971 and September 30, 1982.

Having resolved the issue of legislative priority as regards the competence of the French court to rule on the case brought before it, we must now enter into an examination of whether or not the judgment whose enforcement is being sought is contrary to Spanish public policy.

For these purposes, and taking as our point of departure that this decision on a declaration of incapacity pertains to the category of constitutive declarations, mentioned in the second section, we must examine its relation with the declarations on which the 'complementary effects' represented by the designation of Ms. ... as administrator in Spain of the assets of the incapacitated individual are based, and the fact that a report on the administration of these goods must be given to the Judge who issued the decision which is the object of this *exequatur*.

As regards these declarations, this court finds that there is no affront to Spanish public policy: 1) because the fact that the judgment did not determine the degree of incapacity (art. 210 *Cc* does not imply an attack on said public policy given that this is contemplated in the *Cc* itself under the provisions of article 171.1, final section. 2) This court also feels that the declaration found in the French judgment on the appointment of Ms. ... as the administrator in Spain of the assets belonging to her sister who was declared incompetent, does not constitute an attack on public policy because even though the figure of the administrator does not appear in the *Cc* given that it is the guardian who is charged with this function, an administrator is allowed to administer the assets of children in situations contemplated in article 167 *Cc*. It must also be remembered that, according to the judgment being studied, this seems to be a provisional measure until a guardian is named (art. 9.6 *Cc*; 3) As regards the keeping of the accounts by the administrator designated in the decision issued by the French judge, this also does not affect public policy for the reasons given in numbers

1 and 2; 4) Finally, it is also important to point out that even though refusal to recognize and enforce judgments that are contrary to public policy is contemplated in most international treaties (art. 4.2 of the French convention), it is true that recently a certain flexibility has been evident in international case law and doctrine that has stopped considering public policy to be an insurmountable barrier and has converted it into what is called a 'mitigating effect', the application of which is closely related to international treaties in questions of the admission or rejection of the recognition of the *exequatur* (art. 1.5 *Cc*).

3. Recognition and Enforcement. Money Jndgments

— SAP Lugo, 31 October 1994. *REDI*, 1995—50–Pr.
Declaration of the enforceability of a foreign judgment in accordance with the 1968 Brussels Convention. Requirements. Regular and timely notice. Scope of enforcement.

"Spanish procedural laws are the only laws applicable to proceedings that are carried out in Spanish territory (art. 8 *Cc*). The procedural rules of the country where judicial proceedings are held are the ones which according to the principle of the territoriality of formal laws, must be applied. The rules on summons or subpoenas of the defendant in our procedural law cannot be considered in opposition to public policy because, in the sphere of action which concerns us here, this concept must be interpreted in a restrictive manner in accordance with the prevailing international concepts. Therefore, it follows that given that the Court admitted what might be called the suitability of the summons to trial of the *Comunidad Cetarea de Burela CB*, it should also be considered so by the court required to carry out enforcement, not only when both the original and an authentic copy of the document attesting the notice of the suit to the party accused of nonappearance (which is the case at hand here) have been presented, but also when the summons is proven by means of equivalent documents or when the Court of enforcement is considered duly informed. Having examined the documents and their translations presented by the plaintiff, the Court finds that the judgment issued by the Court of the District of Dornoch against *Cetarea Burela CB* has been duly accredited, and that notice of the initial action brought by the plaintiff, in other words, the suit itself, was indeed served on the defendant by means of certified mail, who then made no attempt to defend herself against the suit in the

stipulated period of time of 42 days (which we believe to be sufficient). In other words, the judgment was delivered to the defendant and no appeal was filed within the time stipulated for this purpose. All of these conclusions are presented in light of arts. 25 s. of the Brussels Convention to which the Kingdom of Spain is a party.

In spite of the above, the petition will be admitted only as regards the amounts corresponding to the principal, interest and costs as dictated in the ruling and the amounts budgeted for interests and expenses, according to the provisions of arts. 919 *et seq. LECiv* which refer to the process of enforcing judgments. This decision only affects *Cetarea Burela CB*, as this Court does not consider it appropriate to extend enforcement to the individuals listed in the writ of the executor because this would surpass the procedural sphere of action attributed to the enforcement being requested and affect questions of material law. This is not within the purview of enforcement given the terms of the petition and the fact that the petition is not accompanied by proof of any kind of community components or their participation in the petition.

V. INTERNATIONAL COMMERCIAL ARBITRATION

— ATS, 22 September 1994. *RECA*, 1995, pp. 311—314.
Conditions for the *exequatur* of a foreign arbitral award. Accreditation of the identity of the petitioner of the *exequatur* and the plaintiff in the arbitration. Power of attorney. Jurisdiction and constitution of an arbitration board.

"First .– The opposition of the legal representatives of 'José Esteban Alenda, S.A.' claiming that it has not been proven that 'Stiftelsen Svenska Film Institutet', the petitioner for the *exequatur*, and 'Svadish Film Institute', the plaintiff in the arbitration and the so–called grantor in the translation of the licence granting contract, are one in the same, lacks reasonable grounds given that the document presented as I *bis* by the petitioner does sufficiently accredit that these two institutions are the same. The fact that the sworn interpreters who signed the document called it a certificate, as opposed to a translation, is of absolutely no relevance whatsoever.

Second .– The same lack of grounds exists for the objection based on the defects of the power of attorney which, in the opinion of this party are, briefly: 1.– The absence of data identifying the grantor of the

power, such as marital status, profession, address or national identity card number, and 2.– Failure to present the authorization on which representation is based and the powers held by the grantor in this regard, as well as failure to present a document accrediting the power of attorney. In spite of the fact that it is quite debatable that the granting of the power of attorney is subject to the procedural rules in effect in the territory where the judgment is being invoked (art. 3 of the New York Convention, June 10, 1958), it is true that this very common power does substantively include the identifying information required by notarial regulations and that the signature of the notary attesting to its veracity covers and satisfies the formalities required to accredit the authority that brought about representation of the grantor and the powers involved.

Third .– The third ground of opposition, which was the last to be formulated, refers to section d) of number 1 of art. 5 of the aforementioned New York Convention because it alleges that recoguition and enforcement of the award can be denied, as requested by the affected party, if this party can prove that in the constitution of the arbitration board, either the agreement between the two parties or the legislation of the country where the arbitration took place was not respected. To prove this, the opposing party presented a letter sent to his attorney from a Swedish legal firm notifying him that the other party would not accept the appointment of a Spanish attorney as arbiter. Now then, independent of the fact that the company requesting the *exaquatur* did not recognize this letter, we must keep in mind that the contents of the letter could only attest to the intention of naming a Spanish arbitrator in rcsponse to the resignation of Mr. Galvarrieto Tintore, who had already been appointed. The company's opposition has absolutely no relevance as regards a defective constitution of the arbitration board, especially given that the award issued by the board explains the problems that arose as a result of 1) Mr. Galvarrieto's resiguation and the proposal of Mr. Suárez Lozano, a Spaniard, as his replacement, 2) the opposition of the plaintiff 'Sfl', and 3) the appointment of a new arbitrator for the board. Thus, no further reasoning is needed to reject the last ground of the challenge as here formulated.

Fourth.– The jurisdiction of the court that issued the judgment and whose recognition is being questioned here seems undeniable since Spanish jurisdictional organs are competent to hear, among others, matters having to do with contracts (art. 22.3 *LOPJ*). Therefore, in keeping with the report presented by the State Attorney and the

contents of arts. 951*et seq*. *LECiv*, and given that in the final judgment, the circumstances stipulated in art. 954 *LECiv* do exist, and the requirements for authenticity are met in the country in which the decision was issued, as are those required by Spanish law, compliance with the foreign judgment can be granted in Spain in accordance with the provisions of the second paragraph of art. 958.

The Court: Rules to grant compliance in Spain with the final judgment and to issue the appropriate certification to put the agreement into effect as requested by the interested party, as this is admissible".

VI. CHOICE OF LAW: SOME GENERAL PROBLEMS

— SAP Málaga, 7 February 1994. *REDI*, 1995—10–Pr.
Renvoi.
Note: See X.4

VII. NATIONALITY

VIII. ALIENS, REFUGEES AND CITIZENS OF THE EUROPEAN COMMUNITY

IX. NATURAL PERSONS: LEGAL INDIVIDUALITY, CAPACITY AND NAME

— RDGRN, 21 June 1994, *Ar. Rep. J.*, 1994, n. 6563.
Proof of capacity to marry.
Note: See X.3

X. FAMILY LAW

1. Adoption

— STC 88/1993, 12 March. *BOE* 15.4.93.
Adoption. Interlocal conflict of laws.
Note: See XXIV.1

— RDGRN 18 October 1993. *REDI*, 1994—37–Pr.
Adoption granted in Morocco. Recognition. Lack of institutional equivalence. Effects that differ from those typically attributed under Spanish Law. Access to the Spanish Register.

"The main problem that arises in this appeal is whether or not an adoption granted in Morocco on May 28, 1991, can be recorded in the Spanish Civil Registry. In this case, a single Spanish woman adopted a Moroccan national born in Morocco on September 28, 1963. According to the reports obtained on Moroccan law, we must agree with the decision issued May 14, 1992, that the 'adoption' granted by competent Moroccan authorities and public officials does not in any way correspond to adoption as recognized by Spanish law. There is no filial or familiar bond between the two parties, there is no alteration in the civil status of either of the parties, and the only obligation established is a personal one by which the 'adopting parent' takes responsibility for the 'adoptee' and must cover [his] needs and support... Also, in order for this 'adoption' to be recorded, it is not sufficient that the consents required are subsequently given before the competent authorities (see art. 9.5, last paragraph *Cc*). An adoption as stipulated by Spanish law, must be granted *ex novo* by a competent Judge".

2. Legal Kidnapping

— AAP Granada, 9 December 1993. *REDI*, 1994—22–Pr.
Note: See III.2

— AAP Zaragoza, 28 March 1994. *REDI*, 1995—9–Pr.
The concept of illegal transfer. Action to deny return: grave risk that the return of the minor child might expose [him] to physical or mental harm.

"Art. 3, a) of the Convention stipulates that the transfer or retention of a minor is considered illegal 'when it is done in a way that violates a right to custody granted separately or jointly to an individual, an institution or any other organization, in accordance with the law in effect in the State in which the minor habitually resided immediately prior to the transfer or retention'. This means that the transfer of the minor child by [his] mother from the state of California (United States) to Spain cannot be considered illegal if, as stated in the record, this transfer took place prior to the decision issued by the California court, dated March 8, 1993 ....

The psycho–social report issued by the Court states that the minor child, aged 23 months, has lived since birth with his mother and his sister, and he should not be exposed to a new and unknown situation with unpredictable consequences for his psycho–developmental evolution".

3. Celebration of Matrimony

— RDGRN, 21 June 1994, *Ar. Rep. J.*, 1994, n. 6563.
Capacity to marry an alien. The existence of a prior bond: proof.

Authorization for a civil marriage between a Spanish national and a Ghanaian national was denied on the grounds that sufficient proof had not been provided by the Ghanaian national that he was unmarried.

This rigorous interpretation should not prevail in this case because it produces an unjustifiable delay in the exercise of an individual's basic rights. As was pointed out in the preliminary examination of the case, proof of single marital status can be given by means of a sworn declaration made by the subject himself (today also by giving his solemn word: see art. 363 *RRC*) and if it is advisable to require complementary measures to guarantee the veracity of such a declaration (art. 246 *RRC*), the statement made by the interested party can be corroborated by statements made by witnesses or by documents from Ghana, even though they are not legalized.

In this type of matter, as the preamble to the Preliminary Examination cited above states 'the fear of criminal activity and reasonable prudence in preventing illegal marriages should not translate into an excess of precautions which do not correspond to a general assumption of good faith'".

4. The Economic Regime of a Marriage

— SAP Málaga, 7 February 1994. *REDI*, 1995—10–Pr.
The economic regime of a marriage: applicable law. Renvoi to Spanish law.

"The appellant requests the reversal of the judgment and a new ruling rejecting the pretensions of the plaintiff. She bases her petition on the principle of the immutability of the economic regime of marriage, invoking the *TS* judgment of October 6, 1986, and on the non– application of double renvoi in matrimonial law. The doctrine established by the judgment of October 6, 1986, does not constitute a precedent here since it cannot be applied to the resolution of an appeal, is not applicable in the case at hand because this resolution has to do with a situation in which a couple have different legal residence, and, according to the literal nature of the texts in effect, the residence of the husband prevails. This is in conflict with the concept of sexual equality as proclaimed in article 14 *CE*. In this case, there is no conflict between the law of the two spouses as both of them had the same nationality at the time of marriage and continued to have the same nationality afterwards. The appeal only addresses applicable law, not because there was a change in residency of one or the other parties, but rather because there was a mutual and simultaneous change in residence of both parties when they came to live in Spain in 1968, the year they got married. Therefore, during their entire married life, they both resided in Spain.

Section 2 of art. 9 *Cc* establishes that the effects of marriage are governed by the personal law common to the spouses at the time of marriage. This rule is applicable to the case at hand as there was no marriage pact between them as regards their matrimonial regime. However, by remitting to their common personal law, in accordance with art. 12 of the above cited legal text, this gives rise to a renvoi to Spanish law as is shown by two reports presented by attorneys of the high courts of that country, which as the British consulate certifies, is how opinions on English Law are generally issued. These reports state that if the two spouses acquired a home in Spain of their own free will, as is undoubtedly the case here, Spanish law is applicable to the assets of the spouses from the time they acquired that home in this country, and given that this is Common Law territory, they are subject from that time to a community property regime as there is no pact between them on the economic regime of their marriage".

XI. SUCCESSION

XII. CONTRACTS

— STS 13 October 1993, *Ar. Rep. J.*, 1993, n. 7514.
Note: See II.2

— STS 10 November 1993, *Ar. Rep. J.*, 1993, n. 8980.
Note: See II.2

— STSJ Cataluña 1 June 1993. *REDI*, 1994, p. 412.
Note: See XXIV.2

— SAP Barcelona, 20 May 1993. *REDI*, 1995—20–Pr.
Bill of exchange. Law applicable to the form of the instrument. Draft clause: Foreign language.

"In accordance with art. 1.1 of Law 19/1985 dated July 16, the bill should include the wording 'bill of exchange' in the text of the instrument itself and in the language used in its preparation. The instruments presented, which have a clear draft–type formal structure (desiguation of issuer, receiver and drawee, valuation clause and rate of commission) are written in English. Therefore, the remission our Law makes to the expression of the bond as a bill of exchange should be interpreted in accordance with the English language, and it seems clear that the grammatical modification (First of Exchange instead of First Bill of Exchange) cannot in any way affect the clear sense that the parties wished to give to the exchange notes as an instrument of payment. Therefore, the *a quo* judge's deduction is not correct nor is the remission to art. 601 *LECiv*. It is true that our law has been adapted to the Geneva Conventions of June 7, 1930 and May 19, 1931 (Statement of Purpose)and that there is a clear tendency to consider the wording in a foreign language as a pure and simple mandate for payment which is interpreted, as regards form, according to the law of the country in which the drafts are issued (art. 11.1 *Cc*. In fact, and as regards bills of exchange, art. 11.2 *Cc* implies that because of art. 1 of the Law of Monetary Exchange and the above cited Conventions, there is remission to the grammatical rules and the commercial uses of banking

law in English, which are clearly stated".

— RDGRN 4 January 1993. *REDI*, 1994, p. 842.
Note: XIV.1

XIII. TORTS

— SAP Madrid, 4 January 1994. *REDI*, 1995—17–Pr.
Traffic accidents. The jurisdiction of Spanish courts. Applicable law according to the Convention of The Hague dated May 4, 1971.

Dilatory plea 1 of art. 533 *LECiv* (the only elements that will be admissible as dilatory pleas: lack of jurisdiction) must be rejected. We have before us a claim for compensation based on a tort that was brought by victims who habitually reside in Spain. The action is brought against the author of the harm, who also resides in Spain. Numbers 2 and 3 of art. 22 Organic Law 6/1985 dated July 1, on Judicial Power, state that: In civil matters, Spanish courts will generally be competent when the plaintiff resides in Spain, and specifically in matters of torts, when the author of the harm and the victim both habitually reside in Spain. Therefore, there is no doubt that Spanish judges and courts are indeed competent to hear the case in question.

... giving rise to a problem of territorial jurisdiction, which assumes the jurisdiction of Spanish courts and judges, it is then inadmissible and absurd, to think that after confirming this jurisdiction, a ruling is made that no judge or court in Spain is territorially competent. The First Additional Disposition of Organic Law 3/1989 dated June 21, which updates the *CP*, states in point n. 1 that civil trials, no matter what the monetary amount involved, will be decided in an oral hearing if they are related to compensation for damages caused by a traffic accident. N. 2 of the Disposition is a specific rule on territorial jurisdiction and states: 'In any case, the Court of First Instance of the place in which the harm was done will be competent to hear the case and will *ex officio* examine its own competence.' However, this is not applicable to traffic accidents which occur outside of national borders. The general rules on territorial jurisdiction as outlined in arts. 56—71 *LECiv* should be applied in these cases.

... A specific rule relative to the law applicable as regards liability

resulting from traffic accidents, is stipulated in the convention on the law applicable in matters of traffic accidents, done in The Hague on May 4, 1971 ... In this case, a traffic accident occurred in Turkey which involved only one vehicle with a Spanish licence plate, and all of the victims travelling in that vehicle habitually reside in Spain. Therefore the applicable law is Spanish domestic law... It is true that Turkey has neither ratified nor signed the Convention, but it is also true that in art. 11 of the Convention it states that 'the application of arts. I to 10 of this Convention do not depend on the concept of reciprocity'... Even though the rule of conflict found in Spanish law remits to Turkish law as regards the regulation of civil liability derived from traffic accidents, Spanish law would ultimately have to be applied.... It would be impossible for the Court to remit to foreign law if none of the litigants alleged its applicability. In this case, the dispute must be resolved by applying Spanish law.

The Spanish law on civil liability resulting from traffic accidents must be applied in its totality given the events as they actually occurred and the location in which they occurred. This does not mean that Spanish law will be applied as if the events occurred within Spain, but rather Spanish law will be applied to a traffic accident that occurred abroad, in this case in Turkey. Nothing prevents Turkish law from being applied to a specific question (for example as regards the so–called green card) within the overall Spanish regulation of the matter. This does not imply the use of one of the most notable legal figures found in Private International Law — the renvoi – which is regulated in n. 2 of art. 12 *Cc*.

XIV. PROPERTY

1. Property. The Transfer of Real Estate. Foreign Investment

— RDGRN 4 January 1993. *REDI*, 1994, p. 842.
The transfer of real estate located in Spain from one alien to another. The validity of the transfer and the monitoring of investment.

Under our current legal system, the validity of the transfer of an asset located in Spain from one non–resident to another, if effected abroad, is not subject to the formalities found in article 17.3 of the new

Foreign Investment Regulations. This solution should be applicable to the transaction in question given that it was carried out when the prior law was in effect, because as our *TS* has declared (see *STS* 3 January 1991), the legislation on foreign investment and on exchange control is unique and exceptional and based on the economic, political and social circumstances of a specific point in time. The dictates of such law require civil business transactions to meet some complementary requirements once they meet the substantive requirements stipulated in articles 1.251, 1.235 and 1.274 of the *Cc* The omission of the first requirement due to administrative non–compliance cannot affect the effectiveness of the contract which created the link between the two parties.

Now then, this does not mean that these transactions should be automatically recorded in the Property Registry because the presentation of authentic documentation is not the only requirement for recordal to take place (arts. 3 *LH* and 36 *RH*). The law on foreign investment extends the sphere of registrational qualification in cases of foreign investment and establishes that the requirements found within this law must be met including those, like the one being debated here, that are not *ad solemnitatem* in nature. Article 17.1 del *Reglamento de Inversiones Extranjeras* (Foreign Investment Regulations) does so establish, as did the rules that were in effect at the time the transaction took place, which was the first final disposition of the law and of the 1986 *Reglamento de Inversiones Extranjeras* in relation to article 18 *LH*".

2. Patents. International Jurisdiction

— STS 28 January 1994, *Ar. Rep. J.*, 1994, n. 572.
Note: See II.5

XV. COMPETITION LAW

XVI. INVESTMENTS AND FOREIGN EXCHANGE

XVII. FOREIGN TRADE LAW

XVIII. BUSINESS ASSOCIATION/CORPORATION

XIX. BANKRUPTCY

— SAP Barcelona, 12 April 1994, *RGD*, 1994, pp. 11447—11450.
Note: See II.2

XX. TRANSPORT LAW

XXI. LABOUR LAW AND SOCIAL SECURITY

XXII. CRIMINAL LAW

XXIII. TAX LAW

XXIV. INTERLOCAL CONFLICT OF LAWS

1. Competence of 'Comnnidades Autónomas' as regards the Development of their Foral Civil Law

— STC 88/1993, 12 March. *BOE* 15.4.93.
The limited jurisdiction of *Comunidades Autónomas* according to *ratione materiae*. The constitutionality of Law 3/1988 of the Cortes de

Aragón on adopted children.

"The appeal invokes exclusive state competence as regards 'civil legislation' in accordance with the provisions of art. 149.1.8 *CE*. This is the rule which, according to the State Attorney, would have been infringed by the law that is being challenged, whose regulation cannot be recognized as the valid exercise of the correlative competence of the *Comunidad Autónoma* which, according to art. 149.1.8, gives the Statutes of Autonomy of Aragon (*EAA* hereinafter) the power to 'conserve, modify and develop the civil law of Aragon' (art. 35.1.4). Both constitutional and statutory rules must serve as canons of validity for the rules being challenged, although for these purposes, contrary to the arguments presented by the *Diputación General de Aragón*, the provisions of the first additional dispostion of the Constitution on the disposition protection of and respect for the 'historical rights of foral territories' and the general updating of this regime 'within the framework of the Constitution and of the Estatutos de Autonomia (Statutes of Autonomy)' cannot be considered pertinent. Neither this provision nor the one found in the fifth additional disposition of the *EAA* should be taken into consideration here, not only because the historical rights of the Communities and foral territory cannot be considered autonomous titles, from which specific competencies that are not incorporated into the Statutes can be derived, ... but also, and more importantly, because the purpose of the first additional disposition of the *CE* is not to guarantee or regulate the constitutional regime of the regional civil laws, (only contemplated in art. 149.1.8 and in the second additional disposition of the *CE*), but rather to allow for the integration and updating of some of the peculiarities of public law that in the past were unique to certain parts of the nation and their integration into the post–Constitutional legal regime.

After attributing exclusive competence on 'civil legislation' to the State, the aforementioned constitutional precept guarantees civil regional law through political autonomy. This guarantee is not based on the intangible or supralegal nature of special or regional civil law, but rather on a provision that the *EAA* of the *Comunidades Autónomas* (Autonomous Communities) in which foral civil laws were in effect at the time the Constitution entered into force, could attribute to those Communities the competence to 'conserve, modify and develop' those laws. These concepts define and limit both the competencies which can be attributed or exercised and those which must be used to evaluate the constitutionality or inconstitutionality of the rules issued by the

lawmaker in the *Comunidad Autónoma*. In keeping with this, the provision found in the same article (n. 149.1.8) reserves certain regulations for the State which 'in any case' are taken from the rules of the *Comunidades Autónomas*. This cannot be considered a first degree rule on competence which defines the spheres of action that correspond to the State or to certain *Comunidades Autónomas* ... It is more a second degree reservation of competence in favor of the State lawmaker with the purpose of identifying and delimiting a sphere within which special civil or regional law is not susceptible or subject to conservation, modification or development ...

The constitutional concept of 'conservation ... of special or regional civil laws' allows for the integration into the Autonomous legal order of the *Compilaciones* and other rules derived from sources related to their legal system and can also make the legislative formalization of customs that are in effect in the region viable ... However, none of these operations can be recognized here. The Constitution allows for 'conservation', in other words, the maintenance of regional civil law. The mere invocation of historical precedents, no matter how much they reflect long–formed traditions, cannot be decisive in and of itself for the purposes of the provisions of art. 149.1.8 *CE*.

Furthermore, the law being challenged cannot be considered to 'modify' special preexisting Aragonese law given that there was no rule of any type in that law, either direct or express, on adoption and its effects, and this in spite of the fact that the Law presents itself as a rule which 'modifies art. 19.1 of the *Compilación*', which itself was void of any content until the present legal text was adopted. However, a determination must be made as to whether or not this Law can be considered to 'develop' regional law.

The constitutional (art. 149.1.8) and statutory (art. 35.1.4 *EAA*) concept of 'development' of special or regional civil law, can be identified according to the *ratio* of the guarantee of the competence on their foral law, which establishes that precept as a fundamental rule. The Constitution thus allows preexisting special or regional civil laws to be the object of not only 'conservation' and 'modification', but also of legislative action, which makes organic growth possible and recognizes not only the historical nature and current effect of this law, but also the future vitality of these pre–Constitutional legal systems. This growth cannot be fomented in any direction or as regards any specific object, because as we saw earlier, legislation in the *Comunidades Autónomas* on civil matters was recognized by the Constitution, not as a general or abstract assessment of what the

different interests of the Comunidades Autónomas might be (art. 137 *CE*), but rather in order to ensure certain regional or special laws in effect in certain regions. The term 'wherever they exist' used in art. 149.1.8 *CE* to delimit the competence of *Comunidades Autónomas* in these matters, must be understood more in terms of total regional law than in terms of specific regional institutions.

There is no doubt that the constitutional notion of 'development' allows for the legislative ordering of spheres that had previously not been regulated by that Law. The contrary would lead to an unacceptable identification of this concept with the more restricted concept of 'modification'. The 'development' of special or regional civil laws stipulates autonomous competence in these matters that should not be linked to the contents of the current *Compilación* or other rules of this type. It is possible, then, for *Comunidades Autónomas* that have special or regional civil law to regulate institutions linked in some way to those that are already regulated by the *Compilación* through a process of updating or innovation of the contents or principles that make up that law.

This clearly does not mean that the *Comunidades autónomas* have unlimited civil legislative competence based on *ratione materiae*. This would contradict the provisions of art. 149.1.8 *CE*. For the same reason, we cannot recognize the grounds of civil singularity which the Constitution wanted to guarantee through competence.

There is a relation between adoption and the law of Aragon which gives constitutional legitimacy to the regulation found in the law being challenged and which should not be considered disconnected from regional civil law but rather a rule that is founded on family and inheritance law in Aragon. This law can be considered complemented or integrated (that is, developed) by the law we are judging today. This law, therefore, cannot be considered unconnected from the law that it is meant to partially innovate.

A different solution would be possible if the object itself, and not the content of the rule, were unequivocal and radically distanced from the competencies here considered to pertain to the *Comunidad Autónoma*. But this is not the case. We just showed, in effect, that the Aragonese lawmaker can, in connection with the content of its own regional civil law, regulate certain aspects of the status of adopted children. It suffices to state that this is so, and it is not necessary to enter into premature judgments at this time in order to reject this challenge.

2. Contracts

— STSJ Cataluña, 1 June 1993. *REDI*, 1994, p. 412.
A contract for the transmission of real estate located in Aragon. The applicable law. Contractual qualification of annulment due to an *ultradimidium* infringement of Catalonian civil law.

"On May 28, 1992, Section 4 of the *Audiencia Provincial* of Barcelona issued a ruling on an appeal which confirmed the ruling of trial court number 4 in Badalona on September 2, 1991, in small–claims case number 101/90 which Joan brought against 'PSA'.

This ruling does not allow for the exercise of the *ultradimidium* action that is being requested, which is regulated by articles 321—325 of Catalonian civil law, because the real estate that was the object of the contract which is, in turn, the object of this litigation, is located in Castellseràs, in Aragon. In other words, it is not located in Catalonia. According to the judgment being challenged, if there is no express submission by the parties to another law, even though these parties have Catalonian civil condition (*vecindad civil*), the law of the place where the real estate is located is the applicable law, and in this case that law is the law of Aragon. This legal entity is not contemplated under the law in effect in Aragon and that is why this action was rejected.

The first ground for cassation alleges an infraction based on the incorrect application of the second paragraph of section 5 of article 10 *Cc* in relation to and integrated into the first section of article 16 *Cc*. In the second ground, section 9 of article 10 of the *Cc* is invoked as the rule of the law that is infringed by not being applied. The two grounds for cassation, which we will examine together, are used by the plaintiff to formulate the present conflict of laws in order to sustain his thesis. He hopes to have the *ultradimidium* action declared admissible in spite of the fact that the real estate which is the object of the litigation is located outside of Catalonia by sustaining that there is a legal and not a contractual obligation, that the parties to the action are linked to Catalonia, and that the event on which the action is based took place in Catalonia.

Interregional conflicts of law can arise when several legal systems coexist within a State given the connections that they can have to a specific event. These conflicts must be resolved taking the following considerations into account:

Competence to define the rules that must be applied to conflicts of law and the determination of sources of law in accordance, in this case,

with the rules of special or regional law (*Derecho foral*), correspond to the State which has exclusive authority in this area according to article 149.1.8 *CE*.

Current State rules on this subject are derived from article 13.1 *Cc* which states that the dispositions of the Preliminary Title of the *Cc* have general and direct application throughout Spain, (given that they determine the effects of laws and the general rules for their application and that article 16.1 of this substantive code includes a remission clause to the rules of Private International Law found in chapter IV of the aforementioned preliminary title with the exceptions that this article contemplates). This leads us preceptively to the application of the rules that are found in article 10 Cc and to the different situations that that article lists. The discrepancy between the plaintiff and the ruling of the Barcelona court lies in the selection that was made in the case being analyzed.

The appellant maintains that the *ultradimidium* action derives from a legal and not a contractual obligation, and therefore the conflict of laws which came about because of the connection between the civil status of the grantors, the place where the contract was signed and the location of the real estate that was the object of the sale requires that the case be resolved in favor of the application of Catalonian civil law, which is what would happen if the case found in section nine of article 10 *Cc* were to prevail and not the provisions of section 5, as the judgment ruled. Therefore, this appeal in cassation has to do specifically with determining if the sale in Badalona of real estate located in Aragon (Castellseràs, Teruel) between parties with Catalonian civil status can be annulled if it was sold for less than half of its fair price by applying Catalonian civil law, which contemplates this possibility by means of the exercise of an *ultradimidium* action or if this is not possible because the civil laws of Aragon should be applied, and in Aragon this type of action does not exist because the principle of *tamtun valet res quantum vendi potest* rules, as the court in Barcelona has found. Annulment based on *ultradimidium* harm in cases such as this, which give rise to conflicts of law based on the territorial dispersion of the terms of the contract, must depend on whether or not this action is derived from a contract. In this case, the answer to this question is undoubtedly yes, and therefore, the plaintiff's pretension that there is a conflict of law must be resolved by applying paragraph 1, point 9, article 10 of the Cc because this is a non–contractual obligation, and therefore the plaintiff's pretension is completely inadmissible.

In the first place, the concept of annulment refers to contracts that

are entered into in a valid and effective manner, but that when some type of prejudice results in harm to one of the parties, the law allows the prejudiced party to petition for a declaration of inefficacy. In the second place, an *ultradimidium* action is not a legal obligation nor is it compulsory in nature. Rather it is a right derived from sales/real estate contracts that allows the party who has been harmed in an amount equal to half of the fair price of the property to annul the contract even though all of the requirements for its validity were met. Finally, the fact that this action is specifically regulated by law makes it impossible to maintain that it is a legal obligation independent of the contract, since there is no incompatibility between the fact that it was created by law and is considered a contract, since contractual obligations can also be legal. The only contracts that have this autonomous legal nature are those that have nothing to do with the legal link or those which fall outside what could be considered the normal clauses of a contract, neither of which is true in the case at hand.

The *TS*, in a ruling dated July 16, 1991, confirms this theory when it states 'according to the common sense found in notarial doctrine and case law, the law in and of itself is never a source of obligation, but rather a generator of sources. Therefore when article 1.089 of the Code states that obligations originate in the law, apart from the fact that all obligations originate in the law that establishes them, it must be understood to mean that in addition to those specifically mentioned in the precept itself, it includes any other fact that the law considers a source of obligation.'

The possibility of annulling a sales contract due to harm caused by the selling price, constitutes grounds for annulment that must be stipulated in the law. This can be seen in article 371*et seq.* of the *Compilación* of Catalonian Civil Law which are included in the first title of Book IV that deals with obligations and contracts. But the fact that this is stipulated in the law does not mean that this provision cannot form part of the normal regime of the contract. The seller has a discretionary right which he can exercise against the buyer which affects the price even to the point that it produces an economic disfunction or anomaly because price is an essential element of the contract and can affect the legal link.

The *TS*, in a judgment dated November 9, 1904, mentioned two other judgments on cases very similar to this one, dated June 8, 1874 and July 7, 1879. It affirmed that the only criterion to be applied in interregional conflicts of law was the principle that real estate is governed by the law of the territory, regardless of where the obligation

was created or where the parties to the contract reside. This division of the *TSJ* of Catalonia ruled in a similar fashion in a judgment issued on October 7, 1991: 'the corresponding rules (articles 321*et seq.* of the *Compilación* of Catalonia) will be applied when, as in this case, the real estate that was sold is located in Catalonia, and this regardless of the *vecindad civil* of the buyer. This is deduced from section 1, article 16 *Cc* according to which the conflicts of law that can arise due to the coexistence of several laws within Spanish territory will be resolved according to the rules found in chapter IV (rules of Private International Law) and section 5, article 10, which establishes that, with regard to contracts on real estate, if there is no express submission, the law of the place where the real estate is located is applicable' ... 'and the *STS* dated March 12, 1984 will not be an obstacle to this declaration, although a reference is made to it in n. 7 of the whereas clauses stating that those clauses that give rise to a different solution are more of an *obiter dictum* in nature'."

LITERATURE

SPANISH LITERATURE IN THE FIELD OF PUBLIC AND PRIVATE INTERNATIONAL LAW AND RELATED MATTERS 1993 AND 1994

This survey, prepared by I. García Rodríguez (Associate Professor in Private International Law at the University of Alcalá de Henares), is designed to provide information for international lawyers and law students on matters concerning Public and Private International Law published in Spain or by Spanish authors. International Law has been widely interpreted to include related matters if the work in question deals with considerations of International Law.

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