SPANISH JUDICIAL DECISIONS IN PRIVATE INTERNATIONAL LAW 1992

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A complete annotated listing of all Spanish judicial 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

II. INTERNATIONAL JURISDICTION

1. Consumer Contract: Choice of Spanish Jurisdiction. Brussels Convention

— SAP Madrid, 21 January 1992. *REDI*, 1992-64-PR.
Contract drawn up between a provider of services and a consumer domiciled in or whose principal place of residence is Spain. Clause accepting the jurisdiction of Madrid courts.

"Legal Grounds:
(...)

The so-called international 'forum of protection' that is included in the 1968 Brussels Convention on international judicial jurisdiction and on the enforcement of resolutions related to civil and mercantile issues has been fully integrated into our set of laws and accepted as having primacy over our domestic law (the ratification instrument and text of the Convention was published in the *BOE* on 28 January 1991 and the list of treaties in the *BIMJ*, number 1591 on 25 February 1991). Even though articles 13 and 15 of said text (introduced into the Convention after the accession of Denmark, Ireland and the United Kingdom to the European Common Market in 1978), accept that protection depends on the residence of the consumer, they include provisions

for cases in which this Community rule on international jurisdiction can be by-passed. One of the several cases in which this could happen is in the case of a contract between a provider of services and a consumer who both either are domiciled or habitually reside in the contracting State at the time the contract is drawn up providing that the parties to the contract accept the jurisdiction of the courts of that State and that there is no law in that State prohibiting this type of agreement. In Community law, the general interpretation of the Brussels Convention advocates the protection of the weakest party in this type of legal negotiation (decision of the ECCJ on 21 June 1978, as. 150/1977) but does not prohibit Member States from passing legislation allowing for the inclusion of a clause or agreement on submission to certain domestic courts. Consequently, as there is no opposing principle of Community law and as there does not exist any defenselessness which would be prohibited by article 2 of the Spanish Law of 19 July 1984, the question here is really limited to whether or not the clause of submission to the judges and courts of Madrid can be considered an abusive clause according to the spirit of article 10 of said Law. The Court feels that, as no general prohibition of express procedural submission is included in consumer contracts — like the one that is found in article 24 of the Law on Insurance Policies — it must proceed with a careful evaluation of the possible abusive character of the general conditions of a contract on a case by case basis. In the specific case being debated here, we find no evidence of the required level of inequality, disproportionate prejudice or unfair treatment of the consumer, and therefore, in keeping with the provisions of articles 56 and 57 *LECiv*, the appeal is accepted and the previous ruling revoked as the appellee has not proven that the debt being claimed here has been paid as is required (art. 1.214 Cc) and no credible refutation of the evidence as to the facts of the case as presented by the appellant has been provided".

2. Contracts. Agreement to Submit to Foreign Courts. Choice of Law: Clause on Choice of Foreign Law.

— STS, 20 July 1992, *Ar. Rep. J.* 1992, n. 6440.
Distribution contract between a firm domiciled in Belgium and another firm domiciled in Spain. Services stipulated in contract to be carried out in Spain. Clause submitting the contract to the jurisdiction of German law and German courts.

"Legal Grounds:
First.- The mercantile firm 'Marine Power Europ Inc.', domiciled in Parc

Industriel de Petit Rechair B-4822, Verviers, Belgium, entered into a contract (which was to take effect on 1 September 1986), as a 'seller' with the Spanish mercantile firm 'Marina Internacional SA' domiciled at Narváez n. 86, Madrid, as the 'distributor'. The contract stipulated that the second party would purchase products from the first and resell them in Spain to retailers and other clients, and as the holder of the exclusive rights of distribution of these products, would control and direct the sale of the first party's products to the final consumers, these products being outboard and inboard motors and accessories. The actual place where the contract was signed is not stated in the contract. Clause (16) of this contract states literally that: 'This contract will be subject to the laws of Germany and the jurisdiction of the Frankfurt am Main courts'. As the result of the failure to pay for a certain quantity of merchandise or 'product' at the end of the contract in the amount of 4,546,624 Belgian francs, a claim was filed for said amount not only against the firm but also against the general manager, Mr. Abelardo G.L., because it was suspected that the amount corresponding to the motors or products sold during the liquidation phase of the expired contract had been appropriated by the aforementioned general manager instead of being deposited in the firm's account. Therefore in addition to the personal claim for the amount in question, there is a subrogatory action based on article 1111 of the Civil Code. In response to the mercantile firm's opposition to the delay motions (art. 533.1 and .3 of the *LECiv*), and due to the lack of liquidity of the debt and Mr. G.L.'s lack of personal liability, a judgment was issued in both instances absolving Mr. G. L. and declaring the corporation entirely responsible. It was further stipulated that the exchange rate used to calculate the amount due in pesetas would be the official rate of exchange for Belgian francs on the day the payment was actually made.

Second.- As no motions were channeled through number 4 of article 1692 of the *LECiv*, the factual declarations that are included in the contested sentence remain unaffected, and therefore must be considered an obligatory premise in the correct application of the law.

Third.- The first ground, under the provisions of number 1 of article 1692 of the *LECiv*, claims that excessive exercise of jurisdictional authority constitutes an infringement of articles 56 and 51 of said Law and articles 9, 21 and 22 of the *LOPJ* (*RCL* 1985, 1578, 2635 and *ApNDL* 8375). This question goes to the heart of the expressed submission that is contained in clause 16 of the contract that was transcribed in the first legal ground of this resolution, and in this regard it should be clearly understood that: A) both article 51 and article 56 of the *LECiv* explicitly refer to Spanish courts, to ordinary jurisdiction and to cases related to civil business transactions, and therefore, according to these principles express submission cannot be applied to business transactions that

are other than civil or mercantile (this assuming a broad interpretation of civil) nor to courts in which express submission is not part of their ordinary jurisdiction given the authority granted them by Law to hear certain types of cases, nor to foreign courts. Therefore, considering that the dispute arose within Spanish territory and this is where the terms of the contract in their entirety were to be complied with, the submission is not applicable; B) By reading articles 9, 21-I and 22 of the *LOPJ* it is clear that jurisdiction in this case pertains to Spanish courts since no details are given as to the first two sections of this last principle on which court should hear matters related to contractual obligations when these are created and are to be carried out in Spain — which is true in this case — and when these articles coincide with the general rules established by article 61.1 of the *LECiv* as the place of enforcement of or compliance with the contract is clearly identified as is the residence of the party being sued; C) As regards international treaties, considering that Spain belongs to the community of nations, especially to the European Community, it seems that according to articles 2, 3 and 5 of the Lugano Convention of 16.9.1988, which does not yet seem to have been ratified in our country, individuals residing in a contracting State, regardless of their nationality, are subject to the jurisdictional organs of that State. Suit can be brought against them in the courts of another contracting State but only in accordance with the specific rules regarding contractual obligations which state that cases should be heard in the jurisdiction in which the obligation must be fulfilled, which in this case is Spain. Article 17 of this Convention contemplates the possibility of the parties' submission when at least one of them resides in a contracting State and defers the authority to hear disputes that arise to the courts of another contracting State. This same rule is found in the Convention dated 26.5.1989 (*RCL* 1991, 217 and 1151) regarding the accession of Spain and Portugal to the Brussels Convention of 27.9.1968 on judicial competence which was ratified on 29.10.1990; D) As can be seen in what has been stated above, the possibility of express submission to the courts of a third State — known as a deferment of competence in the international treaties we are using as a reference — is, in principle, pertinent to this case, but this deferral can only take place if one of the parties to the litigation resides in a State that is a party to the Convention and if the court selected is in a State that is also party to the same Convention. However, in this case, clause 16 of the contract stipulates submission first to German law and second to the courts of Frankfurt am Main, and submission to that law obviously conditions the submission or deferment of judicial competence, especially if we keep in mind that the application by a court of foreign law is an anomaly and as such is an exception to normal trial procedures and to the application of substantive law or the merits of the real legal relationship that is at the core of the dispute. This means that if it is not

expressly or unequivocally stated otherwise, submission to a certain court must be based without exception on that court's ability to apply specific law. Therefore, as international agreements do not address the possibility of applying the domestic law of one country in another, and as they only contemplate the issue of judicial competence and the enforcement of judgments, this must be understood to mean that in the present case, the 'deferment of competence' included in clause 16 of the contract, conditioned by the application of German law, is not valid according to article 10.5 of the *Cc* which requires that there be a link with the business transaction that is being considered and this link does not exist here given that neither the object or substance of the contract nor the parties to it have even a minimal direct or indirect relation with German law; E) The *vis atractiva* that ordinary jurisdiction has is proof of its procedural potential to assume jurisdiction when one of the parties to a suit had not agreed to the submission or deferment of competence which in principle, and for the reasons stated in the suit, while not admissable, could have been viable if there had been fortuitous collusion, complicity or appropriation of the estate pertaining to the firm being sued; and F) The doctrine of this Court (S. 1.12.1987 [*RJ* 1987, 9172]) admits the appropriateness of omitting the clause on submission when by complying with the legal principles on competence, the suit is brought before the judge who would normally hear a case brought against the defendant. This does not affect the legal attempt to respect the clause of submission which was obviously established in favor of the plaintiff if the plaintiff is willing to renounce the clause in favor of the defendant in order to eliminate travel and other types of inconveniences.

Fourth.- The second ground, pursuant to number 5 of article 1692 of the *LECiv* denounces the infringement of articles 1280-5, 11-2, 8-2 and 1216 of the *Cc* in relation to article 147 of the *Reglamento Notarial* (*RCL* 1944, 994; *RCL* 1945, 57 and *NDL* 22309) and article 503 of the *LECiv.* This ground cannot be accepted because since the appellant did not prove, as was required, that Belgian law requires certain formalities that were not complied with before the authorities of that nation, and given that the signatures on the power of attorney were legalized, stamped and presented during the mandatory hearing as required by article 693 of the *LECiv,* this power of attorney seems to meet the requirements set by Private International Law (art. 11-1 of the *Cc*). This article establishes the application of the principle of *locus regit actum,* and prohibits requiring that a foreign document comply with the formalities of our legal system, which is purely routine if no proof is offered of any other type of defect in the power of attorney. Even article 1280 is subordinate to the provisions of article 11-1 which specifically refers to the rules of international law. It is sufficient then, as is the case here, that there be no reasonable doubt as

to the delegation of power of attorney. As regards petitions, this can be done *apud acta* by simply going to the administrative office of the court (art. 281-3 of the *LOPJ*). The power of attorney can be rectified at any time during the trial prior to the judgment being handed down, especially during the mandatory appearance. This provision was inspired by the concept of procedural economy, the preservation of the procedures stipulated in articles 241 and 243 of the *LOPJ* and by the well-established doctrine of this Court. For these reasons, this ground is rejected."

III. PROCEDURE AND JUDICIAL ASSISTANCE

— STS 17 March 1992. *Ar.Rep.J.* 1992, n. 2195.
Proof of foreign law. Accreditation of the legal representative of a foreign firm. *Ex officio* notice by the court of foreign law.

"Legal Grounds:

First.- The first ground as stated by the appellant, Ecari S.A., pursuant to number 3 of article 1692 of the *LECiv* is admissable. Using articles 533.2, section 2 of article 503, and rule 3 of article 693 of the *LECiv* as a foundation, the ground claims a lack of legal personality due to the insufficient accreditation of the legal representative of the plaintiff, 'Cartiere Reunite Donzalli e Meridionali S-P-A (CRDM)'. The representative, Mr. L., appeared by virtue of a power of attorney that had been legitimately granted in the plaintiff's country of origen and which complied with all of the requirements needed to justify its validity including a translation of said document done by a 'sworn translator-interpreter'. Neither the document nor the translation were contested. The alleged lack of sufficiency of evidence related to the legal faculties or powers, which according to Italian Law correspond to the *comisario* of an *administración extraordinaria* of the firm, has no cassational relevance because the question as it has been presented here does not really have anything to do with a problem of legal personality which should have been rectified, but rather with proof of foreign law which, in spite of the fact it might enlighten the court to present such proof, is not necessary as foreign law can be known and applied *ex officio* by the judicial organ or simply accredited by means of a photocopy of the *gazetta officiale,* as was done in this case to indicate the applicable *legge,* which remits the case to the jurisdiction of the previously cited *comisario.* Therefore, the ground fails."

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND DECISIONS

— ATS 7 January 1992. *REDI* 1992-26-PR.
Spanish-German Agreement of 1983. Public policy.

"(...)

The Spanish-German agreement to mutually recognize and enforce judicial resolution, dated 14 November 1983, which was ratified on 18 January 1988, should be applied because even though the date of the order for enforcement — 22 February 1988 — is prior to the date the agreement was to take effect — 18 April 1988 — the final effect of the sentence, which takes place after notification and the expiration of the period in which the decision could be contested, took place long after the date mentioned above of 18 April 1988.

The nature of original resolutions is sometimes perplexing. However, the system described in art. 2 of the Agreement related to the final record of the resolution puts everything in its proper place in the sense that these resolutions are acceptable because they fall within the range of definitions and categories of decisions covered by the Agreement and also within the jurisdiction of the individual who issued the order.

Problems of public policy, whether material or procedural, should be dealt with using the same criteria. Furthermore, under our Law, some types of legal proceedings for collection such as cases involving sworn accounts, court orders in trade or the procedure found in article 131 *LH* have certain traits in common with the procedures followed in the originating country. And finally, the fact that this case deals with a suit between two German citizens on obligations contracted for in Germany and heard there by German judges according to German procedural and material law, make it clear that the control of the most sensitive requirements of the judgment should be carried out according to the rules of the country of origen and not those of the country of appeal.

As regards the problem of competence, no objection can be made as jurisdiction is mandated by art. 7 of the Agreement and based on residence, and arts. 22.2 and 3 *LOPJ* do not confer any type of exclusive jurisdiction in this case."

— ATS 7 January 1992. *REDI*, 1992-16-PR.
British divorce decree.

"(...)

As there is no agreement in place with the country of origen as regards the

recognition and enforcement of judgments, the general system found in art. 954 *LECiv* should be applied as there is no evidence to show that Spanish judgments are not enforced in the United Kingdom.

In order to adequately judge compliance with the guarantees of the right to a hearing and defense included in n. 2 of art. 954 *LECiv,* a complete and literal copy of the text of the judgment proving the presence of the interested parties at the trial or copies of travel documents should have been submitted. As this was not done, the *exequatur* could have been denied. However, because the defendant in the original trial is the plaintiff in this action, this fact can be overlooked. The positive and unequivocal action of the plaintiff, who prefers this action to an action on his right to contest, resolved the situation. For this reason, it will not be ruled inadmissable.

The problem of public policy can be ruled out due to the existence of divorce in our country, and in spite of the lack of a concrete statement of the grounds for dissolution used by the British courts (very general grounds are given), the principle of equivalency of outcomes allows us to overcome the problems we encounter.

As regards the judicial competence of the courts, the fact that in this case art. 22.1 *LOPJ* does not consider competence to be exclusive, the court of origin is considered to have jurisdiction.

Finally, the judgment's validity was proven and the documents presented were translated and stamped.

— ATS 22 January 1992. *REDI*, 1992-17-PR
Evidentiary effect of a divorce decreed in Morocco.

"(...)

In principle, the Spanish legal system is not affected by the state and condition of foreigners who are subject to their own laws and any possible modification of them (art. 9.1 *Cc*). Therefore, as the original judgment does not change the marital status of a Spanish citizen, it falls outside of the scope of domestic law and does not, therefore, need an *exequatur.* It would be impossible to continually require foreigners to produce a string of *exequaturs* in order to prove their legal capacity and marital status which, as has already been stated, are governed in terms of extension, limits and efficacy by their own legal code.

The plaintiff maintains that the *exequatur* is needed for the paperwork required for a civil marriage to a Spanish citizen. In other words, she needs it as reliable proof that she is free to marry. Our best doctrine accepts that this foreign judgment on civil status, even without *exequatur,* is valid for certain purposes beyond the borders of the country where it was decreed. Among

these purposes is that of serving as proof — according to the documents — of the marital status of two foreigners. This proof is found in the decree itself and no other type of proof is needed as the only purpose intended is to prove the party is free to marry. Therefore the *exequatur* would not in any way affect the foreign subject's marital status as determined by his/her own law.

This Court has had occasion to make pronouncements on similar cases in judgments handed down on the 9th and 24th of April, 1991. The same criterion was followed on those occasions as was used in this case and this was basically to allude to the difference between recognition and enforcement of a foreign judgment. Only the first was needed to give the decree complete probatory force, and in spite of the fact that the *exequatur* was not necessary, all this was done because of the proceedings which took place prior to the civil marriage on May 22, 1974. The fifth conclusion of these proceedings states that based on similar cases, proof of being free to marry can consist of a certificate taken from a regular but authentic register, and in some cases, other types of proof would also be allowed. Furthermore, all of the above does not take into account the Agreement on the Issuance of Certification of Legal Capacity to Marry of 5 September 1980, ratified 10 February 1988, which, while not signed by Morocco, does conform to art. 1 *Cc* of our domestic law, and therefore its criteria can be used as interpretive tools to establish the type of proof that can be accepted in cases related to an individual's legal capacity to contract matrimony."

— RDGRN 17 March 1992. *Ar.Rep.J.*, 1992, 2571.
Foreign divorce decree: proof of legal capacity to contract matrimony.

"Legal Grounds:

First.- The question presented in this appeal is if in order to contract matrimony with a Spanish citizen it is enough for a foreign citizen to prove his/her legal freedom to marry by means of a foreign divorce decree which is properly translated and legalized, or if an *exequatur* of that decree must be obtained in order for it to be effective according to the Spanish legal system.

Second.- We must first recognize that a foreigner's legal capacity to marry in Spain must be determined by referring to the specific law applicable to that individual according to his/her citizenship (art. 9-1 *Cc*) and that, divorce is regulated in our private international law by the Law found in paragraph 1 of art. 107 of the Code (cfr. art. 9-2 *Cc*). If a foreign subject meets the requirements stipulated above, he/she is free to enter into a new marriage in Spain without obtaining an *exequatur* which is required for other types of cases according to art. 107, paragraph 2. This is so because in this situation there is no request to enforce a foreign judgment in Spain and, as the judgment was issued

in a foreign country and does not affect any Spanish citizen, it is not subject to inscription in the Spanish Registry (cfr. arts. 15 *LRC* [*RCL* 1957, 777 and *NDL* 258931] and 66 *RRC* [*RCL* 1958, 1957, 2122; *RCL* 1959, 104 and *NDL* 25895]). It remains to be determined if, by virtue of this decree, legal capacity to enter into a recordable act is justifiable. If this is determined to be so, it is not necessary for the decree to have direct force in Spain (cfr. art. 84-1 *RRC*).

Third.- According to the provisions of the *LECiv,* to which art. 107, II, *Cc* alludes, the recognition of the foreign decree is only required in order for an individual to be able to enter into matrimony in Spain when one of the divorced parties was a Spanish citizen at the time the divorce was decreed, or if the marriage dissolved by the foreign decree is registered in the Spanish Civil Registry (cfr. Res. 28-1-1981 [*RJ* 1981, 1186]). In all other cases, the foreign decree is no more than a fact which determines the legal capacity to marry of divorced foreigners and therefore, unless the collaboration of Spanish judicial organs were required to enforce one of the stipulations of the foreign decree, requiring an *exequatur* would be totally unnecessary.

— RDGRN 28 August 1992. *Ar.Rep.J.* 1992, 7222.
Pontifical dispensation of an unconsummated marriage.
Note: See X. Family Law

— STS 25 September 1992. *Ar.Rep.J.* 1992, n. 7325.
Foreign expropriations.
Note: See XIV. Property

V. INTERNATIONAL COMMERCIAL ARBITRATION

— STS 30 December 1992. (*Actualidad Civil*) 1993, n. 493.
Clause of submission to arbitration in a shipping contract, non-applicability to the purchaser and recipient of the goods. Scope of the clause of submission to arbitration in a foreign country

"Legal Grounds:

Second.- The first ground, pursuant to art. 1692.1 *LECiv,* alleges 'lack of jurisdictional competence' (sic) based on an infringement of arts. 51 and 53 of the *LECiv* in connection with art. 57 of the same Law and the Agreement dated 10 July 1958 and ratified by Spain on 29 April 1977 regarding the recognition and enforcement of foreign arbitral settlements, and also with the Agreement dated 21 April 1961 and ratified by Spain on 5 March 1975

regarding international commercial arbitration. This ground questions the judgment handed down by the court rejecting the challenge based on lack of jurisdictional authority to hear the case, which was opposed by the appellant in the answer to the original suit, in spite of the fact he had signed a shipping contract which stipulated submission to arbitration in London. This ground challenges the reasoning given in the judgment in the following way (leaving another approach for the next ground of the appeal). A) According to the Court, the challenge is not admissible because neither the defendant nor the plaintiff signed the contract. In the appellant's opinion, D. de H., S.A., who through subrogation was replaced by the insurance company, A., S.A., as purchaser and recipient of the merchandise, was not exempt from the terms and conditions of the shipping contract or bill of lading. The conditions of transport were accepted including the clause stipulating submission to arbitration in London in case of any claim stemming from shipping. B) The Court also rejects the challenge because the authority to designate arbiters was given to the shipowners and the shipping companies which, according to the Court, made the efficacy of arbitration quite difficult in practical terms. In response, the appellant alleges that, even though this difficulty might indeed exist (which she denied), the applicability of the procedure agreed to in the contract should be respected. C) The Court also declared yet another reason for rejecting the challenge: according to a letter sent to A., S. L. on 16 October 1986, the representative of the interests of the appellant in Spain referred to the possibility of judicial intervention. At no time was reference made to the clause stipulating arbitration in London but rather to recurring to the judicial system. The appellant counterclaims that this entity was not empowered to legally represent her, and much less to create legal obligations through its acts and manifestations, as the entity was only charged with supervising, informing and transferring the specific commercial event.

This ground is incorrectly formulated as number 1 of art. 1692 does not include any allusion whatsoever to the 'lack of jurisdictional competence'; however, given the rampant antiformalism that exists today, and in light of the reasoning presented, it could be understood to allude to an abuse or excess of jurisdiction based on the fact that the Court issued a ruling on a question that should be subject to arbitration. The ground is also technically faulty because it does not state the principles of the agreements which are claimed to be infringed but rather expects that information to be culled from the contents of the argumentation in which arts. 2 of the 1958 Agreement and 6 of the 1961 Agreement are mentioned.

As for the merits of the ground, the request for cassation of the judgment cannot be accepted even though parts of the argumentation are valid. The principal obstacle to the acceptance of the challenge to submission to

arbitration from an objective point of view — and one which was not emphasized in the judgment being appealed — is that neither the plaintiff in the original case nor the defendant who is here the appellant, were parties to the shipping contract. The appellant states that the recipient of the merchandise is A., S.A., who through subrogation, accepted the conditions of the shipping contract, and this is not documented anywhere in the bill of lading (stipulation 19). If indeed it was agreed that any claim based on the shipping contract would be subject to arbitration in London, this stipulation referred to disputes between the owner and the shipper (B.S.C.), and D. de H., S.A. was only the recipient of the merchandise. To support her claim, the appellant cites judgments issued by this Court on 28 June 1933 and 5 March 1980. Neither has anything to do with the question at hand because in the bill of lading it is stipulated that the carrier and consignee of the merchandise were subject to certain organs of civil jurisdiction, a fact which was not admitted by the consignee, and the Court declared that the fact that the recipient had not agreed to the conditions of maritime transport did not affect the efficacy of the bill of lading, which upon being accepted by the consignator as the proper document for unloading and accepting the merchandise, implies acceptance of all of the conditions stipulated therein. As for this case, there is not a shred of proof of that acceptance because the bill of lading included the clauses of the shipping agreement and we have already seen that the recipient of the merchandise is not even mentioned in this contract. Therefore, the judgment being appealed here must be reconfirmed as D. de H., S.A. was not a party to the shipping contract.

As regards points B) and C), the appellant is right on these points but this does not constitute grounds for cassation of the judgment in light of the considerations outlined above.

Third.- The second ground, pursuant to art. 1692.2 *LECiv* alleges 'lack of territorial jurisdictional authority' and claims that the judgment infringes arts. 56 and 57 of the previously cited Law in connection with art. 1 of the *Ley de Arbitraje* of 22 December 1953 and alleges that 'the law in effect on 5 December 1988 should serve as a legislative reference even though it postdates the other law cited'. The express submission to arbitration in London included in this contract makes it quite clear that the Cartagena courts do not have jurisdictional authority in this case.

The ground must be rejected based on the findings on the first ground with no need for any further analysis of the errors in content, among which can be found treating the challenge to submission to arbitration as territorial incompetence, an error which the Court of Appeals also committed. The question being debated here falls outside of the scope of civil jurisdiction and therefore cannot be heard by any civil court.

Fourth.- The fifth ground (number three of those that were admitted), pursuant to art. 1692.5 *LECiv,* accuses the judgment being appealed of making the error of incorporating territorial incompetence into jurisdictional incompetence and consequently the challenge to submission to arbitration opposed by the appellant in his answer to the suit was rejected because, according to the criteria of the Court of Appeals, this should have been objected to as a prior incident. Therefore art. 687 and arts. 533.1 and 58 of the *LECiv* were not even applied. The appellant also claims that art. 2 of the Agreement of 10 July 1958 and art. 6 of the Agreement of 21 April 1961 were infringed.

This ground must be rejected along with the others for similar reasons. D. de H. S.A. and the entity being sued here in subrogation, were not bound by the clause for submission to arbitration found in the shipping contract. Only if the situation had been exactly the opposite could this ground have been accepted."

VI. CHOICE OF LAW: SOME GENERAL PROBLEMS

1. Proof of Foreign Law

— STS 17 March 1992, *Ar.Rep.J.* 1992, n. 2195.
Note: See III. Procedure and Judicial Assistance

— STS 23 October 1992, *Ar.Rep.J.* 1992, n. 8280.
Note: See XI. Succession

— STS 19 November 1992, *Ar.Rep.J.* 1992, n. 9240.
Note: See XII. Contracts

— STS 13 April 1992, *Ar.Rep.J.* 1992, n. 3101.
Note: See XII. Contracts

— SAP Granada, 12 February 1992. *REDI,* 1992-38-PR.
Note: See XII. Contracts

— SAP Madrid, 24 September 1992. *REDI* 1992-87-PR.
Note: See XII. Contracts

2. Public Policy

— STS 25 September 1992, *Ar.Rep.J.* 1992, n. 7325.
Note: See XIV. Property

— STS 23 October 1992, *Ar.Rep.J.* 1992, n. 8280.
Note: See XI. Succession

— ATS 7 January 1992, *REDI* 1992-26-PR.
Note: See IV. Recognition and Enforcement of Foreign Judgements and Decisions

3. Foreign Legal Institution Unknown in Spanish Law

— RDGRN 12 May 1992. *Ar.Rep.J.,* 1992, n. 4847.
Note: See XIV. Property

4. Equivalence of Legal Institutions

— RDGRN 14 May 1992. *REDI,* 1992-81-PR.
Note: See X. Family Law

5. Proof of the Celebration of a Marriage Contracted in a Foreign Country

— RDGRN 13 July 1992. *Ar.Rep.J.,* 1992, 6532.
Note: See X. Family Law

X. FAMILY LAW

1. Adoption Granted in a Foreign Country: Recognition in Spain

— RDGRN 14 May 1992. *REDI,* 1992-81-PR.
Registration in Spain of an adoption granted in Morocco between two Moroccan nationals when the adoptive parents subsequently acquire Spanish nationality. Equivalence of legal institutions.

"(...)

The main problem presented in this appeal is if it is permissible to record an adoption in the Spanish Register that was granted in Morocco in 1984 concerning Moroccan nationals considering that the adoptive parents became citizens of Spain in 1990. If permission is granted, then the birth of the child would also have to be recorded — or at least an annotation would have to be made pursuant to art. 154.1 *RRC* — so that the recording of the adoption could be annotated in the margin (art. 46 *LRC*).

After studying the reports we have obtained on Moroccan legislation, we must conclude that the 'adoption' granted by competent Moroccan authorities has nothing in common with adoption as it is recognized in Spanish law: it does not require any filial or familial ties between the parties, it does not alter the marital status of the parties in any way, and it only establishes a personal obligation on the part of the married couple that takes charge of a minor to attend to his/her necessities and care. It is quite clear therefore, that this figure cannot be considered as one of the recordable acts listed in art. 1 *LRC*. Moreover, in order for this 'adoption' to be recorded it does not suffice that the consent required to adopt a child in Spain be subsequently given before a competent authority (art. 9.5, last paragraph, *Cc*); an adoption as defined under Spanish law must be granted *ex novo* by a competent Spanish judge.

There is no reason, however, why the record granting the Moroccan adoption, which affects Spanish nationals, should not be annotated in the Spanish Registry if MF or any other interested party should so request as this figure involves a personal type of adoption or commitment to care for a child that, if granted in Spain, would be recordable according to art. 154.3 *RRC*, and if granted in a foreign country, would be recordable upon presentation of the actual foreign document (art. 81 *RRC*). The annotation and the limits of its effects (arts. 38 *LRC* and 145 *RRC*), would be written in the margin next to the record of birth, or, in certain cases, next to the annotation provided for in art. 154.1 of the same Law. In such cases it would be necessary to clearly state that nationality is not accredited in accordance with the law on Spanish nationality based on birth (art. 66 *fine RRC*)."

2. Marriage Ceremony Performed in a Foreign Country Between Foreigners. Proof of a Marriage Being Celebrated

— RDGRN 13 July 1992. *Ar.Rep.J.*, 1992, n. 6532.

Marriage ceremony performed in Morocco between Moroccan nationals who subsequently obtained Spanish citizenship. Recording of the marriage in the Spanish Civil Register. Proof of a marriage being celebrated.

"Legal Grounds:

First.- The events that affect Spanish citizens, even if they occur prior to obtaining Spanish citizenship, are recordable in the appropriate Spanish Register (cfr. arts. 15 *LRC* [*RCL* 1957, 777 and *NDL* 25893] and 66 *RRC* [*RCL* 1958, 1957, 2122; *RCL* 1958, 104 and *NDL* 25895]) provided that they comply with the requirements applicable to each particular case. Therefore, the question here is whether these requirements were met in the case of this couple who allege to have been married in Morocco in 1951.

Second. — The competency to decide this issue corresponds to the Central Register given that the petitioners reside in Spain (cfr. art. 68, II, *RRC*). Since no certificate or license issued by the authorities or civil servants of the country in which the marriage purportedly took place has been presented, the correct method by which to obtain approval for the recording of the marriage is the presentation of the documents outlined in art. 257 of the *RRC* 'in which the marriage ceremony itself and the inexistence of any impediments to the marriage will be duly accredited'.

Third.- After studying the evidence presented in these documents we must conclude that the 'celebration of a marriage ceremony' was not adequately proven. The Moroccan document offered as evidence is no more than a notarized copy of a deposition which does not even include the circumstances of the ceremony: not the place, nor the time, day or month of the wedding. The witnesses, in spite of having been called to give exactly this information, also fail to do so, so it is not possible to ascertain if the marriage ceremony met the requirements stipulated by Moroccan law.

Fourth.- The truth is that the evidence presented does allow an assumption to be made that the parties here are considered to be a married couple, but, if no more details are provided as to the celebration of the wedding, it cannot be recorded or even annotated pursuant to art. 271 of the *RRC* or proven by means of a document that could be accepted as evidence (cfr. art. 38.2 *LRC*) pursuant to arts. 335, 339 and 340 of the same *RRC.*

Fifth.- The aforementioned should not prevent the parties from obtaining the inscription or the annotation of the marriage in the Register if they can provide further evidence. Furthermore, there is nothing to impede the evidence presented here from being accepted by other organisms as sufficient proof of this couple's marriage, because an attempt was made to obtain the inscription and, according to the provisions of art. 2 of the *LRC,* this is the one requirement that must be met in order to be able to present as proof something other than inscription in the Civil Register if this inscription does not exist."

3. Religious Marriage: Pontifical Dispensation

— RDGRN 28 August 1992. *Ar.Rep.J.*, 1992, 7222.
Inscription of a religious marriage; previous marriage also celebrated canonically, dissolved by divorce decree and by pontifical dispensation of an unconsummated marriage.

"Legal Grounds:

First.- This appeal concerns an individual whose first religious marriage was inscribed in the municipal Register in 1983 as was the Spanish divorce decree that she was granted in 1987. Pontifical dispensation for an unconsummated marriage was granted in 1988 and the interested party entered into another religious marriage in Spain in 1991. It is the inscription of this second marriage that is in question here.

Second.- It is not necessary to examine the exact details of the Spanish marital system to solve this case. It suffices to adhere to the provisions of art. 63 of the *Cc* which state that: 'the inscription of a religious wedding ceremony performed in Spain can be done by simply presenting the church documentation which must include the information required by the *LRC*. Registration will be denied when the documents presented or any registry entries show that the marriage does not meet the requirements for validity set out in this section'. It is true that the ecclesiastic certification presented shows that the bride is single and that in the section entitled 'comments' a reference is made to the pontifical dispensation. However, this does not mean that the inscription of this new marriage gives civil efficacy to that dispensation, which, of course, can only be granted through judicial channels (cfr. art. VI, 2 of the Agreements [*RCL* 1979, 2963 and *ApNDL* 7132] and art. 80 *Cc.*). It should be noted that the evaluation of the ecclesiastic certification of the religious marriage must take into account not only the documents presented but also any entries in the Register. The denial of inscription must be based on these elements if it is found that the marriage does not meet the requirements for validity according to the *Cc.* In this case in particular, it is precisely this entry in the Register — the inscription in the margin of the divorce decree — that gives the divorced party the right to remarry. Therefore proof of the validity of this new marriage is found in the Civil Register itself, regardless of what the ecclesiastic documents show in this regard.

Third.- It would make no sense to require the interested party to have a civil wedding ceremony, which, as a divorced woman she could indeed do with no difficulty whatsoever, and it would also make no sense to make the inscription of her new religious marriage dependent upon the civil enforcement of the dispensation of an unconsummated marriage. This enforcement is not possible

because the marriage bad already been dissolved in the eyes of the State prior to the dispensation and it would be totally contradictory to the divorce decree to admit a subsequent and different cause for dissolution.

Fourth.- There are, therefore, no obstacles to the inscription of a marriage celebrated according to the rules of Canon Law if that marriage also meets the requirements for validity set out by civil legislation. The only warning that must be made here is that the party about to contract marriage must be classified as divorced because that is what she is considered to be under Civil law until she remarries. It does not matter that the ecclesiastic documents classify her as single as this is not a valid civil classification, nor is it really true according to Canon Law if we consider that pontifical dispensation of an unconsummated marriage is the dissolution of a validly celebrated marriage (cfr. Canon 1142 of *Codex* [*ApNDL 2357*]).

Fifth.- Finally, we cannot accept that the annotation of the existence of a pontifical dispensation in the inscription of the first marriage be considered simply informative. In spite of the fact that the annotation could be based on art. 38.5 of the *LRC* (*RCL* 1957, 777 and *NDL* 25893), in this case this article cannot be applied as it would imply that a marriage that was already dissolved civilly by a divorce decree could be redissolved at a later date. This, as was stated before, would constitute an untenable contradiction of the entry in the registry which was based on a final judicial decision."

4. Marital Property

— STS 23 December 1992. *Ar.Rep.J.* n. 10653.
Note: See XXI. Labour Law and Social Security

— STS 23 March 1992. *Ar.Rep.J.* 1992, n. 2224.
Note: See XXIV. Interlocal Conflicts of Laws

— STS 19 November 1992. *Ar.Rep.J.* 1992, n. 9240.
Note: See XII. Contracts

5. Marriage in Spain of a Spanish Citizen With a Foreigner: Freedom to Marry

— RDGRN 17 March 1992.*Ar.Rep.J.*, 1992, n. 2571.
Note: See IV. Recognition and Enforcement of Foreign Judgments

XI. SUCCESSION

— STS 23 October 1992. *Ar.Rep.J.* 1992, n. 8280.
The inheritance of a Belgian citizen; action to nullify gifts of real estate located in Spain. Payment of inheritance taxes. Choice of law: distinguishing between the merits of a case and procedural issues. Proof of foreign law. Public policy.

"Legal Grounds:

First.- In the original suit brought in small claims court from which this appeal for cassation derives, Mr. Jean Marie Martin P. D. and Mr. Martin Jean Marie P. D. requested in opposition to the defendant, all Belgian citizens, that the property deeds dated 29.5.1974, 10.8.1980 and 12.2.1982 be declared null and void to the extent that they affected the land and structure known as chalet number 29 in the development called El Tosal in the town of Nucia, and bungalow number 34 of the same development and municipality (Villajoyosa district) and only to the extent that the respective gifts authorized in said deeds surpass the amount that through inheritance would correspond to both the plaintiffs and the defendant, Ms. Claire Rafaelle M. Moreover, they also request that the gifts corresponding to both of the aforementioned properties be reduced to the limits that the defendant is required to pay given that she is a widow. The judgment that is now being appealed in cassation, which confirmed the original decision, partially accepted the suit and stated that there was no legal basis for declaring the 1974 and 1980 deeds null and void because they did not correspond to any kind of provision authorized by Mr. Henri Nicolás D. and Ms. Claire Rafaelle M.. Furthermore, there was no legal basis for declaring the deeds dated 29.5.1979 and 10.8.1979 null and void because they did not correspond to any gift between the two parties. On the other hand, a reduction in the gift included in the deed dated 12.2.1982 was approved and finally, the legitimate heirs of Mr. Henri Nicolás D. were ordered to pay the debt that existed between the deceased and the company called 'Cabipco SL' at his time of death. This final ruling, which was not included in the suit but was added to the written response to the counterclaim, was not challenged in the appeal in terms of its procedural correctness but rather only as regards the fact that according to the plaintiff/appellant Mr. Jean Martin Paul D., Belgian law should have been applied and not the Spanish *Cc,* as was done by the *a quo* Court. The appeal is really limited to determining if the rules of conflict that are found in the Spanish *Cc* (especially art. 9, rule 8) have been correctly applied by the Court of First Instance, without considering if the facts on which the judgment here being appealed in cassation are challenged or if the national law of the plaintiff's country has been applied to this inheritance.

Second.- The first ground is formulated pursuant to number 5 of art. 1692 of the *LECiv*, and claims an 'infringement due to partial application of art. 9, section 8 of the *Cc*'. This ground maintains that 'Belgian law should be applied in its totality' evidently because the case was remitted according to the provisions of the Spanish rules which are here being challenged because of their incomplete application. This is the basis of the legal question being debated in the appeal. By claiming this total 'remission' to Belgian law, the appellant hopes to gain approval for his petition to have an inventory of all of the goods that make up the deceased Mr. D's estate drawn up. This petition was not included in the original action but rather was added at the second stage of the process by the appellant. The Court of Appeals rejected this petition on the legal grounds that this degree of precision 'was not a part of the original suit and therefore for this Court to make a decision on the matter would be incongruent'. The ground being studied should be resolved together with number four, which, by being brought incorrectly under number 5 of art. 1692, alleges the infringement of the law due to the incorrect application of art. 359 of the *LECiv*. This Court has stated on several occasions that the correct procedural basis for this ground is found in number three of art. 1692. In spite of this defect, the ground must be rejected along with the first ground, for the following reasons: a) In his pleadings, the appellant confuses rules of substantive law such as art. 9 of the *Cc* and procedural rules such as art. 359 of the *LECiv*. Furthermore he forgets that while the first remits cases related to inheritance *mortis causa* to the national law of the deceased (rule eight), procedural rules are governed by art. 8, paragraph 2 which state that 'Spanish procedural laws will be the only laws applicable to actions that occur in Spanish territory and this does not affect the remissions to foreign law that these laws may stipulate as regards procedures that must be carried out outside of Spain'. This principle undoubtedly dictates the application of Spanish procedural rules in cases in which the substantive law which governs the merits of the case is foreign. Therefore, art. 359 of the *Ley Procesal Civil* is fully applicable to the matter being debated. b) All of the above is in accordance with scientific and legislative doctrine on the territoriality of procedural laws which can also be found in art. 51 of the *LECiv* and arts. 4, 21.1 and 23 of the *LOPJ* (*RCL* 1985, 1578, 2635 and *ApNDL* 8375). c) As the drawing up of an inventory was not requested in writing in the original pleadings of the case nor during the trial itself or during its enforcement, it is fully admissable for the Court of Appeals to refuse to make a ruling on this question. By agreeing to make a ruling the Court would be entering into a clear incongruency which would constitute an infraction of the Spanish procedural rules found in the previously cited art. 359. Both grounds should be firmly rejected. Moreover, as regards number four, what is stated in the following section on the application of art. 818 of the *Cc* as

ordered by the judgment of the Court of First Instance should be taken into account. However, its legal grounds should be based on the appealed question, an issue which ground three of the appeal addresses.

Third.- This third ground (the second was not formulated) is also pursuant to number 5 of article 1692 of the *LECiv.* The ground claims an infringement based on 'incorrect application of art. 818 of the *Cc*'. In the first paragraph of this principle, it states that 'the value of the goods that belonged to the deceased at the time of death minus debts and liens will be used to determine the amount of the inheritance to be passed by law to the family and this without taking into account the terms of the will'. This rule sanctions the traditional principle of public policy which says 'you must pay before you can inherit'. The appeal, which does not state which rule of Belgian law should be applied instead of this one and forgets — as the *a quo* Court pointed out — that this issue was not brought up when the counterclaim was accepted, maintains that art. 818 should not have been applied by the *a quo* Court, and therefore that this Court should not have ordered the descendents of the deceased to pay the debt that was incurred by the deceased because it should be paid in equal shares by the widow and the children of the deceased; however, this is claimed, once again, without citing any legal rule. This ground is also rejected: a) First of all because in Spain a foreign law cannot be applied *ex officio* when — as in this case — it is not sufficiently pleaded and when no one claims his right to it — as is also the case here — in relation to assets located in Spain. This criterion is stipulated by judgment 16-121960 (*RJ* 1960, 4097) and others. b) According to art. 12 of the *Cc,* the certificate that was presented did not suffice to 'prove the contents' of Belgian law, as it was no more than a report requested by the appellants themselves on this specific piece of litigation. It does not include any quotes of the principles that are included in the appeal nor does it specify what the contents of each of the ten articles it cites are. Apart from this, 'the legal effectiveness of the foreign law' was also not proven as is required by art. 12 (of the Spanish *Cc*) in paragraphs 3 and 6. Therefore, there is no doubt that the Spanish Court lacked autonomy to interpret the applicable foreign law, and, if it had accepted the document that was presented, it would have been transferring its jurisdictional function to the foreign jurists who authored it, and then only upon the request of one of the interested parties and with no proof of its being official or anything more than a personal favor. c) In the third place, the rule applied in the appealed judgment, which accepted the reasoning of the judge of the Court of First Instance on this matter, refers to an established practice related to inheritance, which is the *legítima,* (the part of an inheritance passed on to family members by law), and to the consequences of the determination of its contents which could very well be considered an issue of public policy in our law. This would impede the application of foreign law (art.

12, section 3 of the *Cc.*) which, as we said earlier, was not correctly invoked in this point. Therefore, it is also impossible to determine if it is contrary to the provisions of Spanish law or whether art. 12.3 of the *Cc* should be applied to this case. Article 12.3 sanctions the principle that 'in no case shall foreign law be applied when it is contrary to public policy'. This could happen if an inheritance were agreed to — no matter what kind it is — without making sure that before the transferral of the inheritance, the debts that the principal had contracted directly were deducted. All of this has to do with the principal of territoriality and of *lex fori* and of course, with the application of this last law to the problem of qualifying just what should be considered *mortis causa* inheritance, forced inheritance and inheritance of the debts of the deceased, all points of litigation that were questioned and resolved by the judgment being appealed. This is assuming, of course, that it falls to the Spanish courts to define and determine in each case just what constitutes the public policy of the forum which should be protected at all times from the possible application of an antagonistic or incompatible foreign law. Consequently, this ground should also be rejected as should the entire appeal.

Fourth.- The rejection of the appeal mandates the imposition of legal costs on the appellant as well as the loss of the deposit made for purposes of the appeal which will be disposed of as stipulated by law (art. 1715, last paragraph of the *LECiv*)."

— STS 23 December 1992. *Ar.Rep.J.* n. 10653.
Note: See XXIV. Interlocal Conflict of Laws

XII. CONTRACTS

1. Choice of Law. Proof of Foreign Law

— SAP Granada, 12 February 1992. *REDI,* 1992-38-PR.
Revocation of a gift of real estate located in Spain. Application of German law. Proof of foreign law.

"(...)

Given the jurisdictional competence of Spanish judicial organs to hear this case pursuant to the provisions of art. 22.2 *LOPJ,* and given that in accordance with art. 10.7 *Cc,* the plaintiff is considered a German citizen, the application in this specific case of German law and especially of the principles found in articles 516 and 530 of the *Cc* seems unavoidable. The first principle must be

applied because, without requiring the contract to include any specific formalities, it defines gift as 'the manner by which one person contributes to the wealth of another person to the detriment of his own estate, if both parties agree that the contribution is made free of charge', and the second because it authorizes the revocation of the gift 'if the recipient is guilty of severe ingratitude resulting from a serious offense against the donor or against one of his close relatives'. The existence of these norms and the lack of any others that contradict them or offer a logical explanation of their nuances arise not only from the evidence presented by the plaintiff regarding their content and legal effectiveness (pages 13 to 16 of the record) but also from the attitude displayed by the defendant during the trial which was basically to wait to object to what she considered to be insufficient proof of German law as presented by the plaintiff until the summarization of evidence that is regulated by art. 701 *LECiv.* She ignored the fact that art. 690 stipulates that 'litigants will manifest in writing if they do or do not agree with the facts as stated in the suit' and that 'silence or evasive answers can be construed in the judgment as acceptance of the facts if they are not sufficiently clarified in the hearing which is regulated by the following articles'. She also ignored the fact that art. 693.2 grants the defendant the right to specify, clarify and rectify 'anything s/he feels is necessary to set the limits for the debate'. While these rules do not allow foreign law to be considered a debatable issue, not even in relation to art. 12.6.2 *Cc.*, they do place the responsibility of challenging what the plaintiff presented as to the content and effectiveness of said law squarely on the defendant. If the defendant accepts the law as presented by the plaintiff at the outset, she cannot at a later stage try to contradict the efforts made by the Court to establish the contents and effectiveness of the foreign law invoked. In such a case, the defendant, — who would not be allowed to add to the evidence as is, in principle, her right — would have to be satisfied with the attempts made by the Court to gather the appropriate information on the question even if she had reason to doubt the adequacy of the proof presented by the plaintiff. No doubts of this kind are held by this Court at this time and especially given the details on family law provided by professors Kipp and Wolff in a report that was presented by the defendant herself.

There is no doubt that the two parties were formally engaged to be married as is evidenced by the fact that in July of 1985 they initiated the necessary pre-nuptial paperwork by requesting the Civil Register of North Hamburg to publish the wedding banns. It is also reasonably proven that as a result of that engagement, a house located on parcel 172 of the *Rocío de Nagüelez* development in Marbella was purchased in October 1984 and duly registered with the *Registro de la Propiedad* of that community in the name of the defendant. In addition to all of this, it has also been proven to our satisfaction

that this house was a gift from Mr. Bergman to Ms. Magálhaes resulting from his intention to marry her in the very near future."

— STS 13 April 1992. *Ar.Rep.J.* 1992, n. 3101.
Bills of exchange emitted in Mexico. The requirement to protest.

"Legal Grounds:

Second.- In the first ground pursuant to art. 1692.5 *LECiv,* an infringement of the provisions of art. 10.3 *Cc* is claimed based on an incorrect interpretation of its contents in relation to art. 12.6 and art. 12.4 which both have the same legal text. The claim states that the 'judgment issued in the Court of First Instance ruled that provisions of the Spanish legal system were applicable to the facts being debated at the time these events took place because the content and legal force of the Mexican law which the defendant makes reference to have not been proven for the record'. On this point the reasoning is that the judgment being appealed had already accepted the opposite thesis which was proposed by the defendant-appellant in accordance with art. 10.3 while at the same time assigning her the responsibility of proving the characteristics, requirements and efficacy of the rules of the Mexican legal system. According to the judgment being appealed, the defendant had to specifically prove that according to Mexican law, it is not necessary to protest bills of exchange — as would occur under Spanish law — in order to prevent these bills from being harmed. It undoubtedly fell to the plaintiff/here appellee to invoke foreign law as a simple analysis of the documents and Spanish law indicate. The penultimate paragraph of the ground shows that the defendant/here appellant did not invoke foreign law and only stated that a document is subject to the law of the place in which it was produced and that in this case, the document in question does not fall within the scope of Spanish law. Likewise, in the following ground pursuant to art. 1692.5 *LECiv,* an infringement of the provisions of art. 1214 *Cc* is claimed based on the failure to apply the basic principle of this article to the judgment at hand. This principle states that the burden of proof of an obligation falls to the party who demands its fulfillment, and it specifies that this article is not being cited as regards the evaluation of the evidence — which would not be acceptable for the appeal in cassation — but rather as regards the Court's incorrect application of the principle as in no case should the defendant have the burden of proof of the facts alleged in the suit. Proof of Mexican law is an essential part of the evidence related to the facts, and since the bills of exchange were emitted in Mexico, according to the provisions of the article previously cited, their existence would unavoidably be regulated by Mexican law which is considered *de facto* as regards probatory effects. Therefore, the judgment does infringe the provisions of art 1214 *Cc.*

Both grounds, then, hope to demonstrate not only that the burden of proof as regards Mexican law falls to the plaintiff given that it is the plaintiff who is demanding fulfillment of the obligation, but also that the acceptance of Mexican legislation would invalidate the main thesis of the judgment in the sense that this legislation does not require a protest due to lack of payment of the corresponding bill of exchange. As regards this problem and after examining both grounds, the Court has no choice but to state that it is undeniably true that the operations that produced the dispute at hand refer to the *pro solvendo* or *en cobro* (subject to collection) and not the *pro soluto* or en pago (subject to payment) surrender of the bills of exchange so that as part of the process of collection of these amounts the defendant would verify that there exist funds to cover the debt to be paid to the receiver whose residence and place of payment was Mexico. It is also true that the failure to pay these bills of exchange and failure to file the appropriate protest would constitute 'harm' to the bills of exchange under Spanish law and this provoked the initiation of the process to cancel the collection thereby producing prejudicial economic effects for the plaintiff. It is therefore necessary to analyze if in reality filing a protest is required under both Spanish law (as is the requirement to follow the rules included in our *Código de Comercio* before the reform of the *Ley Cambiaria y del Cheque* which according to the provisions of arts. 502 and ss. of the *Código de Comercio* then in force did indeed stipulate) and under Mexican law, and then to predetermine which of the two parties would have the burden of proof if Mexican law were applicable. In order to do this, as we said previously, we must remember first that the bills of exchange in question — fs. 11 and ss. — were accepted by the Mexican debtor and that the place of emission and payment of these was Mexico. Second, the provisions of art. 10.3, which is applicable in this case, stipulate that the emission of bank paper or shares is subject to the law of the land in which these are emitted which is also considered the site of payment. Third, assuming — as the Court states in its legal ground 4 — that Mexican law is applicable, it is then necessary to determine which of the parties has the responsibility of alleging the existence of this law according to the provisions of the last paragraph of art. 12 of the *Cc*, which establishes that the party who invokes foreign law should accredit its content and effectiveness by means of evidence that is admissable according to Spanish law even though the 'Court can make use of any additional tools of inquiry that it considers necessary by issuing the appropriate court orders'. In spite of the fact that it is the plaintiff who demands compliance with the *Banco de Bilbao's* obligation to pay because the bills of exchange were delivered to that bank for payment — as is evidenced by the commissions charged for this purpose —, it is clear that due to the fact that the plaintiff brought this claim, it must be channeled through the protection provided by Spanish law and it was

the defendant, in her response to the suit and particularly in her second legal ground, who stated that such effects or bills of exchange were not harmed in spite of the fact a protest was not filed given that Art. 165 of the *Ley Federal de Títulos y Operaciones de Crédito* which sets Mexican doctrine and jurisprudence in this regard states that in that country the holder of a bill of exchange has an indirect exchange action against the receiver even if no protest is filed. From this it seems clear that it was the defendant who raised the issue of foreign law and therefore the burden of proof should fall to her. Thus not only should the first ground be rejected, but also the second one in which an attempt is made to mix the specific rules previously cited from the last paragraph of art. 12 and the general rule of *onus probandi* found in art. 1214 *Cc.* It is evident that if the *lex especialis derogat generalis* comes into play, as is claimed, the rules in 1214, due to their universal application, impose the burden of proof on the party that demands the fulfillment of an obligation, which in this case is the plaintiff. Therefore, when there is a specific rule related to the case to be proven or one in which proof is disputed, such as the last paragraph of art. 12 for example, and regardless of what the procedural positions of the interested parties might be, it is specifically prescribed that the party who invokes compliance with a foreign law should accredit its content. Furthermore, this fact not only justifies the rejection of the ground but also the complete reconfirmation of the judgment being appealed as even Mexican law in the provisions of art. 139 as cited in the document requires compliance with the obligation to protest bills of exchange in case of a total or partial failure to pay. This was not done by the defendant and was a key element in the judicial decision and sentence. (This principle is also found in a previous decision of the Court in *STS* 14.4.1980 [*RJ* 1980, 1415] on an analogous case, *mutatis mutandi,* which established the Court's position that the bank is required to obtain the protest for lack of payment in favor of the receiver who is not responsible for doing this, and that this must be done in a reasonable amount of time in accordance with the law of the land and the law of foreign currency exchange applicable pursuant to art. 475 *Código de Comercio* as to the country in which the proceedings should be carried out. As in this case the bills were drawn in Spanish territory to be paid in a foreign country, is it compulsory to follow the doctrine initially stated that if the bank which is required to honor the bills fails to secure them through the proper procedures, it must thereby suffer the extreme consequences set out in art. 1170 of the Cc. The bank, having accepted the bill and through its own error having 'harmed' it, must pay in spite of the fact the bill was not paid when it was due). For these reasons the appeal and any effects that may be derived from it are rejected."

— STS 20 July 1992 *Ar.Rep.J.* n. 6440.
Note: See II. International Jurisdiction

— SAP Madrid, 24 September 1992. *REDI,* 1992-87-PR.
Law applicable to the validity of a bill of exchange issued in Lugano by a British corporation. Allegation and proof of foreign law.

"(...)

It must not be forgotten that the determination of the applicable rule of conflict will always be made in accordance with Spanish law and that, subject to the *ex officio* application of the Spanish rules of conflict and any other relevant points contained in them, any foreign law that is invoked must be presented and proven to the judge that hears the case in accordance with the corresponding decrees or the information agreed to be presented (arts. 12.1 and 6 *Cc*). The statement made by the drawees of the bill of exchange in question indicates that the drawer of the bill is the British firm F.T. Ltd., and Lugano is mentioned, which as was stated, is located in Switzerland. Therefore, in accordance with the provisions of arts. 10.3 and 1.1 Cc and art. 99.1 *Ley Cambiaria y del Cheque* — and in relation to art. 2.c) of this same law — Swiss law, not North American law as is stated in the resolution being appealed, is applicable to the formalities of the bill in question because said bill was drawn in Lugano. Both the Geneva Convention of July 7, 1930 (signed by Spain and published only for informative purposes in the *Gaceta de Madrid* on October 20, 1932, although it was not ratified) on legal disputes regarding matters of bills of exchange and negotiable notes — art. 3 — and the Swiss Code of Obligations (arts. 991.7 and 992), the current effectiveness and text of which have not be adequately proven here — provide that, on the one hand, the manner in which obligations related to bills of exchange are acquired is governed by the laws of the country in which these obligations are created and on the other, that the bill of exchange must include an indication of the place in which the bill is drawn up to be considered a valid bill. If the location is not indicated it will be assumed to have been drawn in the place designated next to the name of the drawees. Article 1.000 of the Swiss Code expressly contemplates that a blank bill of exchange cannot be demanded of the bearer unless the bill was acquired in bad faith or a serious fault was committed in the acquisition of the bill.

But in the case at hand, this scientific and specific Court recognition cannot be applied because as is stated in the case law of the TS and as we have already indicated (judgments dated 15.3.1984, 12.1.1989, 11.5.1989 and 7.9.1990) when we cited the provisions of article 12.6 *Cc,* 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 entity of the law in force must be proven as must its scope and authorized interpretation so that its application does not raise the slightest reasonable doubt in the Spanish Courts. All this should be accomplished by presenting the pertinent certified documentation. It is a long held practice that when it is not possible for a Court to confirm the application of foreign law with absolute certainty, it has to judge and rule on the case according to Spanish law. We must note that the result of this second option which must be followed in the cases noted above, is the same as in Swiss law given the identical rules found in that law that were presented as proof in this case pursuant to the provisions of arts. 1.7 2.c and 12 *Ley Cambiaria y del Cheque,* and therefore the challenge based on formal defects in the letter of exchange that was drawn up and issued in Lugano is rejected."

— STS 19 November 1992. *Ar.Rep.J.* 1992, n. 9240.
Simulated sales contract for real estate, masking a gift of said property. Validity of the disposition of property without spousal consent according to German law. The effects of marriage on the validity of the disposition of an estate. Proof of foreign law.

"Legal Grounds:

First.- The decision issued by the Court of First Instance in Motril on 30.6.1988, regarding the action brought by the married couple, here the plaintiffs, against the defendant, partially accepted the action stipulating that in addition to other pronouncements, the sale of the registered property in question in this litigation was ruled null and void as all of the above — Legal Ground 1 — was the result of the petition to nullify the deed of sale authorized on 15.6.1984 and the later rectified version of it dated 16.10.1984, as it can only be considered a simulated sale. Therefore — Legal Ground 4 — the price paid for the property was found to be totally fictitious based on the evidence presented during the course of the trial, and it is quite possible to believe that this simulation masked the real business transaction that was taking place here which was the alleged donation of the real estate in question which was freely given to the defendant. However, as there is no record that the recipient expressly accepted this gift — Legal Ground 6 —, we must conclude that pursuant to art. 633 *Cc* this sale is really a simulation and is subject to the consequences that may be derived from it as regards the nullity of the purchase. This decision was appealed by the defendant (and not by the plaintiff, as was erroneously stated in the second whereas clause of the decision of the Court dated 3.2.1990) and the decision made regarding this appeal, as cited above, was handed down by the Third Division which, although for different legal reasons, rejected the appeal. Their line of reasoning was as follows: In the first

place, no flaw was found in this act of transmission that would justify declaring it null and void even taking into account the alleged psychological effects this had on the plaintiff, which in reality never affected his competence to act. As regards the lack of consideration of the contract, this is argued in number 2 which states that due to the reasons that are given in the action itself, the only possible conclusion is that what was really transpiring between the two parties when the transaction whose nullity is being sought was carried out was a donation. However, the contract cannot be deemed non-existent based on absolute simulation but rather is annullable due to relative simulation, because according to the legal reasoning given in number 3, this donation was hidden in a sales contract, and therefore the resolution given by the Court of First Instance cannot be honored as it is based on the grounds that the lack of effectiveness is the result of no record existing of the acceptance by the recipient of the gift in spite of this donation being real estate. The defendant herself freely recognized during her testimony that the transaction that took place was indeed a gift and by this testimony we can assume that acceptance was given. In addition, regardless of this implicit acceptance, we should also take into account that the validity or effectiveness of this transaction of a donation, in accordance with German legislation, and pursuant to art. 10.7 of the *Cc,* does not require an express acceptance on the part of the recipient. The thesis that is being put forth as *ratio decidendi* is based on the following arguments: First, that according to the provisions of art. 516 of the German Civil Code, a donation by which one party assigns part of his estate to another requires both parties to agree to the fact that this assignment is made without any type of monetary transaction. That this is true in this case is reflected in the record as the defendant confessed that no price was set for the transaction and that likewise, both parties agreed that the marital property regime of the plaintiffs was community property as established in arts. 1363 and following. In the second place, in accordance with this legislation, in addition to art. 9.2 and 3 of the *Cc,* assets acquired by either spouse, even those purchased after the wedding is celebrated, do not become community property. Each spouse administers his/her own estate according to art. 1364. Without a doubt, the property that was transferred to the defendant could not in any way be considered the principal part of the plaintiff's estate. According to art. 1365 one spouse cannot dispose of his or her entire estate or the major part of it without the consent of the other spouse. In the third place, according to art. 1367, a unilateral legal business transaction — such as a gift or donation — lacks validity if it is carried out without the required consent. This required consent must by viewed in relation to art. 1368 by virtue of which if one spouse disposes of his/her estate without the other spouse's consent, the latter will have the right to challenge that action, and as this is exactly the case here, the donation

in question must be ruled null and void as it was made by the plaintiff without the required consent of his spouse and therefore, while based on different grounds, the decision must be reconfirmed and the appeal rejected. The appeal in cassation is filed against this decision by the defendant and is based on the following two grounds which have been introduced into the case documentation and are the object of this Court's examination.

Second.- In the second ground of the appeal, an error in the evaluation of evidence is alleged pursuant to the previous version of art. 1692.4. This error is alleged to be related to the application that the judgment being appealed made of the provisions of art. 1367 of the German Civil Code when it stated that unilateral legal business transactions, such as gifts or donations, lack validity if the required consent is not obtained. The Court is alleged to incur an error when it accepts the evidence based on the translation of this rule, because there definitely must be a correct understanding of the sanctions contained in this precept regarding allusions to required consent, which in any case, refers to the cases in which spousal consent is required as stipulated by art. 1365 *BGB*. It is evident that this ground, as it is presented here, cannot be accepted as, regardless of the legal references that are made to a correct interpretation of art. 1367 of the German code, which, at the same time is the object of consideration for the examination of the previous ground, an accusation that the Court made an error cannot be considered admissable simply because it is stated in the ground. This error lies in how the Court evaluated the evidence based on a translation of the rule and that when comparing the different translated versions of foreign law, the fact that the Court chooses one version in particular cannot be considered an error simply because the version chosen is not the best one according to the appellant. This, however, does not preclude the possibility of making a legal claim based on this disagreement with the text used which would prevail only when there is an accurate interpretation of the precept in question. For the reasons stated above, this ground fails. In the first ground of the appeal and pursuant to the previous version of no. 5 of art. 1692 *LECiv*, a claim is made that there was an infringement of the provisions of the last paragraph of art. 12 of the *Cc* as regards the arguments as stated in the fourth whereas clause of the judgment regarding the sanction established in the cited precept of art. 1367. This claim states that the Court interpreted the content and effectiveness of this precept in a way that has not been proven by any means recognized under Spanish law. We repeat, in no way has it been proven that the criteria that the Court uses correspond to the content of the German rule because this is not at all what it means. According to the requirements of case law, the application of foreign law assumes that its laws can be alleged as a means of proof in Spanish Courts, and that the isolated citation of articles of foreign codes is not sufficient to justify the obligations

found in them. The existence of the law and the interpretation of the law being invoked must be proven by means of a decree issued by two legal consultants. Specifically, according to what has been shown by this party — which was recognized by the Court on the record — this is not a case of the disposal of all or the majority of an estate but rather the giving as a gift of a specific asset. As far as we can tell, the *a quo* Court does not use an authentic interpretation of art. 1367 of the German Civil Code because as we all know, according to art. 516, in German law a donation is considered a consensual and bilateral contract as long as it is a free assignment of assets agreed to by both parties and by virtue of which one party contributes to the estate of another party. Therefore this assignment of assets must be accepted by the recipient without the sanction in art. 1367 being applied twice. This article established that a unilateral business transaction is not valid if it is carried out without the required consent, which consequently prohibits the application of the provisions of art. 1368 in the sense that if one spouse disposes of his/her estate without the consent of the other, the latter is also entitled to make a legal claim against third parties based on the provision's lack of validity.

Third.- An examination of this ground leads us to point out that, subject to the rules included in the last paragraph of art. 12 of the *Cc* which state that anyone who invokes foreign law must accredit the contents and effectiveness of that law by means of proof that is admissible according to Spanish law, and that when applying foreign law, a judge can make use of any information gathering methods that he considers necessary, it is evident that, according to the provisions of art. 10.7 *Cc* (making donations is governed in any case by the *Ley Nacional del Donante*) in order to avoid litigious discrepancies and after the legal pronouncement (which was not questioned in the appeal) that although this seems to be a simulation, what we really have is a contract for a donation being given by the co-plaintiff to the defendant and therefore an evaluation of the effectiveness or nullity of the donation must be done according to German law and that by virtue of the texts used from German Civil Law in the appeal, the following conclusions must be made: In the first place, in Legal Ground 3 and specifically as regards German law, the Court recognizes the existence of a contract for the making of a donation which was the true intent of the two parties involved and that the donation was accepted by the donee. Article 566 of the German Civil Code establishes that 'a donation is the assignment or attribution of assets by which one party contributes to the value of the estate of another party if both parties agree that this assignment of assets is made with no monetary transaction involved'. This then is indeed a consensual unilateral contract independent of the fact that no money is involved. In the second place, according to Legal Ground 4, there is no question that the actors in this case are subject to community property laws. In the third place, in art. 1.36 of the

German Code, it states that the assets acquired by either spouse even after the wedding do not become part of the mutually held estate, and each spouse continues to administer his/her own assets independently — art. 1364 — with the expectations established in the subsequent articles. In the fourth place, and in keeping with the above, according to the precedents that exist which are reproduced in the decision handed down by the judge of the Court of First Instance and which are not questioned in the litigation ('... The facts on which the parties are in agreement should be stated. They are the following: a) that by means of a public deed of sale the principal, Doctor Albers [married to the principal Ms. Britta], acquired from Ms. Concepción L.L. on 29.4.1964, two plots of land measuring 1000 square meters each, which are described in the first fact of the suit; b) that on the second plot of land a single family home was built and was given the name 'La Madita'; c) that this structure was registered by Doctor A. by means of a construction permit granted 4.8.1971; d) that Doctor A. and the defendant were involved in an intimate relationship and even lived together for long periods of time which they usually spent in the villa called 'La Madita' in Almuñécar; e) that on 15.6.1984 Doctor A. and the defendant signed a sales contract by which the first sold the second the two 1000-meter plots of land referred to earlier for a total price of 300.000 *pesetas* which the seller claimed to have received at a prior date; and f) that on 16.10.1984, both parties appeared again before the notary public in Motril and granted a revised deed to the property which stated that the property included not only the two lots but also the structure built ...'), we must conclude that by virtue of these facts, the assets that are the object of the nullification were the private property of the actor and were acquired after he was married in accordance with the provisions of this rule. Likewise, according to art. 1365, the disposal of the entire estate or the majority of it without the consent of his spouse is prohibited, but there was no doubt whatsoever, says the Court in Legal Ground 4, that the property transferred to the defendant 'did not in any way constitute the majority of the actor's estate'. In the fifth place, the disputed art. 1367 of the German Civil Code (*BGB*) establishes that a unilateral business transaction — such as a donation — lacks validity if it is carried out without the required consents according to the version of the article accepted by the Court. According to the appeal this article should read: '... A unilateral business transaction — which does not include a donation — lacks validity if it is carried out without the required consents...'. And finally, in the sixth place, art. 1368 establishes that if one spouse disposes of his/her estate without the required consent of the other spouse, the latter is also entitled to make a judicial claim against the third party based on the lack of validity of the disposal of the property.

Fourth.- In light of the preceding considerations, the first ground of the

appeal must be accepted in terms of its substance — although not all of the argumentation presented can be accepted on legal grounds — because by accepting the *facta* that are not questioned in the appealed judgment, it turns out that on the one hand, in spite of the existence of a subsidiary system of community property in the actor's marriage, the provisions of art. 1363 of the *BGB* state that assets acquired by one spouse do not become part of the shared property of both. Therefore, since the assets given as a donation — the lots and the house which were the object of the public deeds dated 15.6.1984 and 16.10.1984 — belonged to the donor, and keeping in mind that this *donatum* did not make up all of the estate of the donor, or even a large part of it, he could dispose of these assets as he saw fit without the intervention of his spouse (art. 1365). This leaves us with the issue of whether according to German law — and specifically art. 516 BGB — a donation is considered to be bilateral or unilateral, even though it can be derived from the context itself that a donation only creates obligations for the donor and is subject to the donee accepting or concurring in the action. Therefore it is reasonable to classify this as a bilateral act in process, but one that is unilateral in nature as regards its contractual dimension (and this without it being necessary to apply to this foreign law the problematic fact that in Spain, due to its systematic placement in the *Cc*, Book III, Title II, arts, 618 and following., this is an act by which ownership of property is transferred or a way in which property can be acquired without this affecting its being a contract or its being free, or the donor's obligation to deliver the donation to the donee once the donee has accepted it). Therefore the sanctions found in art. 1367 should be applied if we confirm that a unilateral business transaction lacks validity if it is carried out without the required consent. Consequently, this concept of a unilateral business transaction is not applicable to the present donation regardless of the fact that an elementary interpretation of this required consent would rightly refer to the consent given by the person who acted as the unilateral contractor or, in some cases, it would include the spouse when the case in fact is subject to the repeatedly cited art. 1365 if the property being disposed of is the entire estate or the majority of the estate of the donor, which — as has been stated repeatedly — is not the case here as the property does not make up the entire estate or the majority of it — Legal Ground 4. This is not disputed in the litigation and therefore, in summary we can say that if the idea that a donation is a unilateral contract as it only creates an obligation for the donor can be derived from art. 1516, if the assets that are donated are part of the actor's estate according to art. 1363 and the declarations of the Court, if he can give them away without spousal consent (art. 1635) and if art. 1367 doesn't have to be applied since this donation did not include all or the majority of the estate, we must therefore conclude that the judgment being appealed was based on an inexact interpretation and

application of German legislation as was stated in the dispute, and that therefore in accordance with this reasoning, the ground should be accepted as should the appeal and any derived consequences that may occur according to art. 1717 of the *LECiv.*"

XIII. TORTS

XIV. PROPERTY

— RDGRN 12 May 1992. *Ar.Rep.J.*, 1992, n. 4847.
Inscription in the Spanish *Registro de la Propiedad* of a provisional judicial mortgage ordered by a French court. Institution of foreign law.

"Legal Grounds:

First.- In this appeal an attempt is made to obtain the entry of a caveat in the *Registro de la Propiedad* of a pending attachment based on a court order issued by the Spanish judge in which said judge orders compliance with a court order that states that 'recognition is granted of the petition for the enforcement of the ordinance dated 23.2.1989 which was issued by the Court of Commerce of Lavalen and authorized the Banco de Bretaña to accept an inscription in the *Registro de la Propiedad* in Almuñecar of a provisional judicial mortgage on certain assets belonging to the debtor and his guarantee of certain quantities, so that, by virtue of the Covenant of 28.5.1969, ratified in an instrument dated 15.2.1970 (*RCL* 1970,451 and *NDL* 18576), an order is given to enter the provisional judicial mortgage regarding the property described above in the Almuñecar *Registro de la Propiedad...*'. The Registrar refuses to make the entry because this type of inscription is not contemplated in the LH.

Second.- The Spanish judge, as part of his duties related to cooperating with foreign judicial bodies, can order measures that will guarantee real estate holdings located in Spain. However, when an attempt is made to use these measures to obtain special concrete legal or registrational effects, or special enforcement effectiveness, the judge is required to abide by the exigencies of Spanish law as stipulated in arts. 8.11, 10.1 and 10.10 of the *Cc.* According to Spanish law, and the principle of specialty, the expression 'inscription of a provisional judicial mortgage' is not in and of itself precise enough to warrant the desired entry or the application of the right being claimed. If what is sought is a caveat in the registry of pending attachment, the documentation presented should show that fact clearly as the Registrar is required to note the nature of

the right that must be recorded in the *Registro* using 'the name that is given on the documentation' (cfr. arts. 9.1 and 72 of the *LH* [RCL 1946, 342, 886 and *NDL* 18732] and 51.5 and 166 of the *Reglamento Hipotecario* [*RCL* 1947, 476, 642 and *NDL* 18733]).

Third.- It is not the responsibility of the Registrar to determine what the closest equivalent in our legal system is to an institution of foreign law which he is not expected to know (*vid.* art. 6 and 12 of the *Cc* and 36 of the *Reglamento Hipotecario*). The Registrar can only evaluate the validity and effectiveness of the item to be inscribed in order to make the requested entry in the Register, and to do this he must abide by the terms of the documents presented to him and to the legal classifications that are included in them (9.1 and 2 and 18 of the *LH* and 51.5 and 6 of the *Reglamento Hipotecario*). He may not in any way adapt, convert, integrate or change the form of that which makes the inscription possible. He must point out any defects he finds, but he may not correct them (see arts. 19 and 66 of the *LH*).

Fourth.- Therefore, the 'provisional judicial mortgage inscription' that had been ordered having been rejected, we cannot expect the Registrar to extend a caveat of pending attachment based on that document. This would lead to a disavowal of not only the exclusive competence of the Courts to dictate the attachment itself (see arts. 919 and 927, 1403 and 1440 of the *LECiv*) but also, and more importantly, of the repercussions that the different scope of each of the measures would have (in spite of the points they have in common — consider if you will the repercussions on the order of priority of creditors in solvency proceedings which each has) according to the requirements and demands that each one presupposes. This could lead to the elimination of any of these measures (see attachment order 1447 of the *LECiv*) which are basic features of our procedural law.

Fifth.- On one point, however, this classification for registration purposes cannot be maintained, and this is if the defect in accuracy in the type of judicial guarantee being sought to be recorded in the registrar is in itself judged to be sufficient reason for refusal (because this implies that it is an uncorrectable defect). In the case at hand, sufficient proof is provided in the documentation presented of the fact that the property has already been the subject of judicial proceedings and the lack of accuracy of the circumstances required for a correct determination of issues related to registration is not sufficient reason — in this or other similar cases — to keep its effects from being applied retroactively from the date of the original entry if this entry was not considered valid pending the results of this appeal."

— STS 22 June 1992, *Ar.Rep.J.* 1992, n. 5459.

Sale of a bus with a reserved right to ownership by a corporation located in

Germany to a German citizen. Third party exceptions in Spain. Choice of law: sale with reserved right to ownership.

"Legal Grounds:

First.- The German corporation 'Gottlob Auwaerter Gmbh & Co.', here the appellant, claimed a third party right to ownership of the bus registered with license plate number LO-MH-37 and requested the lifting of impoundment ordered in case number 173/1985 heard by the Court of First Instance in Santa Coloma de Farners based on his understanding that said bus was his property because the sale of the bus to Max H., the debtor and a third party defendant in the aforementioned case, included a reservation of ownership clause. 'Viajes Etusa S.A.', the plaintiff in the aforementioned case 173/1985, is opposed to the third party ownership and alleges that the vehicle that was impounded was the property of Mr. H. because the agreement on the reservation of the right to legal ownership was not proven. The petition presented by 'Gottlob Auwaerter' was rejected by the Court and this decision was reconfirmed at the appeal level. The plaintiff, here appellant, has now filed an appeal in cassation based on two grounds, both pursuant to art. 1692.5 of the *LECiv.*

Second.- The first ground claims an 'infringement of the rules of law due to an incorrect application of art. 23 of Law 17-7-1965 (*RCL* 1965, 1313 and *NDL* 30354)'. Basically what the ground alleges is that 'the precept cited was incorrectly applied by the *a quo* court because the application of said precept was done without taking into consideration other principles of Law 17.7.1965, specifically art. 4, section 5 of said law which expressly limits the scope of application of the law and excludes its application to matters of foreign trade'. It is true that the seller of the bus, 'Gottlob Auwaerter' is a corporation located in Stuttgart and is registered with the Mercantile Registry of that city, and that the buyer, Mr. H., is a German citizen. It is also true that the sale was made in Germany and this lends credence to the appellant's claim that this transaction — in which the seller alleges that she had reserved the right to legal ownership — should be considered a matter of 'foreign trade' and therefore not subject to the *Ley sobre Ventas de Bienes Muebles a Plazos* (Law on the Hire Purchase of Goods and Chattels) of 17.7.1965, according to art. 4.5 of that law. Furthermore, given the concurrent circumstances, the contract would not in any way be subject to Spanish law. All of the above could lead to an acceptance of the ground being examined, but not to the acceptance of the appeal itself, for reasons that will be explained below.

Third.- The second ground is based on an alleged infringement 'because art. 11.1 of the *Cc* as it is related to arts. 600 and 601 of the *LECiv* and art. 1218 of the *Cc* were not applied'. It is claimed that the trial court committed an error of law in its evaluation of the documentary evidence as regards the public

document that was authorized before Mr. Rolf F., a notary public in Stuttgart-Mohringen on 19.7.1985. In this document, Mr. H. admits that he did not pay the agreed purchase price for the bus he bought from 'Gottlob Auwaerter' and that the vehicle had been sold with a reservation of the right to legal ownership clause in the contract.

First of all, we must point out that the trial court does not refute the validity of the legal business transaction attested to in the document in question or find any formal error or failure to comply with required formalities, nor does it doubt that these formal aspects and formalities should be those set by German law. Consequently, no infringement of art. 11.1 is found. Furthermore, the contested decision deems that the transaction is ineffective against 'Viajes Etusa' because this agency cannot be blamed for the lack of publicity and makes an inadmissable reference to art. 23 of Law 17.7.1965. This, however, in no way implies that the requirements stipulated in arts. 600 and 601 of the *LECiv* as regards the recognition of documents authorized in another country as having the same legal validity as those authorized in Spain were not fulfilled. As regards art. 1218, also cited in this ground, we must remember that in accordance with this article 'public documents are considered proof, even against a third party, of the fact or event that motivated their authorization and of the date of issuance of the document' but not of the intrinsic truth of the claims made by those who granted the documents (*SS.* 24.10.1983 [*RJ* 1983, 5339], 5.3.1986 [*RJ* 1986, 1099] and 7.7.1989 [*RJ* 1989, 5414] among others). Furthermore, Mr. H's recognition that the bus in question had been delivered to him with a reservation of the right to legal ownership only has testimonial value against his creditor, 'Viajes Etusa'.

Fourth.- Therefore, the ground being studied is rejected but not without pointing out that even though Law 17.7.1965 was considered to be inapplicable to this case, we must reaffirm that the judgment handed down by the Court of First Instance was correct in stating that the documentation on the sale of the bus should clearly state that payment was made in one lump sum and that no allusion was made to any kind of subsequent payment. Moreover, according to art. 1225 of the *Cc*, the selling price of the bus should also be on the document, and as it isn't, the invoked reservation of the right to legal ownership does not have evidentiary weight against third parties. Additionally, Mr. H. is listed as the owner of the vehicle on the permit to circulate and all of these things together contradict the possible existence of a reservation of the right to legal ownership clause even though this clause is referred to on a printed order form. We should also note that in Annex 2, the price of the vehicle to be delivered is listed as DM 602,500 plus extras and value added tax, but once again there is no mention made of any deferred payment. This leads us to the conclusions that given the facts as they have been presented, the statements made by Mr. H. in a

document dated 29.7.1985, more than two years after the date of the sale of the impounded bus, should not prevail over the other documentation.

Fifth.- According to the provisions of art. 1715, *in fine* of the *LECiv*, as the appeal was rejected, court costs are to be paid by the appellant who will also lose the deposit that had been made."

— STS 25 September 1992, *Ar.Rep.J.* 1992, n. 7325.

Recognition of foreign expropriations. Public policy. Sale of the rights to a trademark inscribed in the Spanish Registry by the previous owners. Claims of nullity brought by the comptroller of the Cuban firm named by the Cuban government after the Cuban Revolution to take over the firm from the owners and administrators. Lack of applicability of the Spanish-Cuban Treaty of 1988. Conflict with Spanish constitutional public policy.

"Legal Grounds:

First.- The Cuban company *'Cifuentes y Compañía'*, represented by a comptroller appointed by the Cuban government, brings suit against the C.T. brothers and the mercantile firm *'Internacional Cifuentes S.A.'*, founded and registered in Spain, to have the sales contract authorized by the public deed registered on 8.2.1982 and clarified in another public deed dated 22 March of the same year declared totally null and void. These contracts transferred the right to the trademarks identified in the Spanish *Registro de la Propiedad Industrial* under the numbers listed in the suit to *Internacional Cifuentes.* This would also bring about the cancellation of the inscriptions of these trademarks in the Register thereby declaring that *Cifuentes y Compania* retain the trademarks in question and that the only legal representative of this mercantile company is the State comptroller, Mr. S. P.. They also ask that an award of damages be made. The defendants oppose and request the dismissal of the case. The action is rejected by both the trial and the appeal court.

Second.- The third ground must be analyzed first for methodological reasons. Since the ground was brought pursuant to art. 1692.4 of the *LECiv*, and the judgment was challenged due to an alleged error of fact in the evaluation of the evidence, and as this ground integrates the *factum*, it is most likely a necessary premise for the correct application of the law. In this trial it must be duly recorded that the document presented as proof of the alleged error is not valid for the purposes of this appeal, and this not only because it has already been analyzed by the Court of First Instance, but also because in this ground, it is the Court's interpretation of the document that is being challenged. We must not forget that as in this case we are dealing with a document which creates or stipulates State intervention, and this in turn substantially influences the Spanish legal system through so-called public

policy, it clearly has some unmistakable areas of legal evaluation that surpass the limits of the scope of the rule chosen to challenge the judgment, namely art. 1692 of the *LECiv.* As regards the 1988 Covenant (*RCL* 1988, 596 and 811), although an attempt is made in this appeal to claim the effectiveness of this Covenant — which is notoriously out of place in this appeal — and use it to prove the factual error that is being alleged, it suffices to say that the action — which is dated 4.2.1986 — predates the Spanish-Cuban Covenant cited here, and it is useless to try to obtain a retroactive effect, not in terms of its application but rather as a tool for interpreting the problem presented here which has to do with the validity or nullity of the onerous transmission of some trademarks obtained in 1982, an act which predates both the international treaty referred to and the willingness of the State to intervene which dates to 1959. This, however, should not tempt us to forget that by naming the Covenant in this ground, two transcendental facts are brought to the foreground. First, the Covenant only applies to Spanish citizens, and even though the C.T. brothers are Spanish citizens now, they were not when they were prohibited from participating in economic and legal contacts and when their property was taken from them by means of a governmental order. Consequently, the application of this Covenant to the defendants could very well be the object of broad and thorough deliberations that do not fall within the purview of this Court. Second, the Covenant is a clear, official and unmistakable declaration of the fact that the suppression of private property was a general practice and there was no prior — as a matter of fact just the opposite, quite delayed — economic compensation. This obviously does not prevent or neutralize other intangible but significant types of harm from being done. As for other issues, as the documentation presented in the second instance not only has already been evaluated by the Court of Appeals and adds absolutely nothing new of any substance to the documentation presented during the original trial, because the ground does not mention in which of the documents and to what extent or manner the Court's error is found as is required, and because seeking renewed evaluation and interpretation of the evidence admitted onto the record would convert the case into a third instance matter which is inadmissable in cassation cases, this ground is rejected.

Third.- The first ground, pursuant to number 5 of art. 1692 of the *LECiv,* alleges an infringement of art. 128.2 of the Constitution. The following rules of the Constitution are also claimed to be affected by the judgment: arts. 33 and 38 (*RCL* 1978, 2836 and *ApNDL* 2875). In response, we must say that the crux of the question presented here is found in two fundamental points which are: A) The fact that the C.T. brothers, here defendants, were indeed the owners and managers of the complainant corporation 'Cifuentes y Cía' which at the outset was known as 'Cifuentes, Pego y Compañía'. This company was formed

on 19.2.1916 as a general partnership and has remained as such to the present time. The company's circumstances, especially as regards ownership and management, are recognized by the appellant. These facts are accepted as proven by the judgment being challenged and have not been disqualified. B) The fact that as soon as the political situation changed in Cuba in 1960, a general and absolute separation of the owners and management personnel of corporations was carried out, especially as regards the tobacco industry — with no exception noted in the court records as being proven by the plaintiff — and a comptroller with far-reaching powers was appointed by the government. This appointment in principle — see the abundant documentation presented by the plaintiff himself as well as the appellant — was for a period of six months, but was then renewed a number of times and finally proclaimed *sine die.* The expulsion of the owners and managers of these companies, and specifically those of the company known as 'Cifuentes y Cía', was carried out with no documentation as to the existence of criminal or disciplinary action against these individuals which might explain the reasons given for the expulsions which are listed in a general sense as being pursuant to laws 647 of 1959 and 843 of 1960 or resolutions of the Ministry of Labour number 20260 dated 15.9.1960, number 123 dated 21.9.1966 and 13 dated 18.1.1967 among others. These are related to the alleged obstruction of work and productivity which must be legally proven as absolutely true according to the Constitution under its guarantees of legal certainty and the presumption of innocence (art. 9, 2, and 25 of the *Spanish Constitution*) and those related to the principles of legality and sanctions by virtue of the legal process prior to the alleged commission or omission of the facts that justify a sanction as serious as the denial of any kind of right: ownership, management, administration, etc. And this and nothing else is the crux of the question because our ordinary civil law courts cannot nor should they become involved in topics such as the ones presented here related to their legality in the country of origin. They must, however, be cautious because the acts enforced in Spain by those who according to the Law of origin — the Cuban *Código de Comercio* and *Código civil* — are empowered to do so, cannot be disqualified or annulled by virtue of legal rules which do indeed come from a sovereign State, but whose purpose, structure and underlying philosophy directly conflict with the *Spanish Constitution.* Indeed it is known and accepted that in general, and with few exceptions, traditional agreements on extradition have a reservation related to their possible enforcement, and this is that facts or events of a political nature cannot be judged because the rules of territoriality protect them from the demands of a complainant country. Here I have *mutatis mutandi* a parallel situation that does not affect individuals themselves, but does affect their assets and rights. Therefore the trial judges have correctly assumed that as no reference is made to economic

compensation, this action — brought by a governmental comptroller by virtue of rules and resolutions that do not specify concrete and real causes which can be individually contested and in which the two parties appear and are heard — hides the real and effective sequestering of belongings located in Spain. Due to this fact, these assets are protected by the constitutional statutes that proclaim liberty, justice, equality and political pluralism as the supreme values of the legal system and recognize private property, the free market and in exceptional cases, the intervention or expropriation of assets by means of a hearing in which both parties are heard — especially the alleged guilty party. These requirements are not met when someone is appointed to represent a private company by means of unjustified governmental designation. Therefore, the international covenant, in addition to being untimely, cannot be applied to the case in question and therefore the ground is rejected.

Fourth.- The second motive, which is covered by the same procedural rules as the previous one, alleges an infraction of art. 24 of the *Constitution* which is no more than a corollary of the prior ground as is indicated in the ground itself. Therefore, we must reiterate here that the reasoning of the previous legal ground invariably and unquestionably prevents us from granting active legitimacy to anyone who in an absolutely irregular manner exercises an action to nullify a contract drawn up by the legitimate owners of the industrial right being transmitted and who are located in Spain, because this not only disregards our national statutes, but also shows a total lack of consideration for the provisions of art. 10, paragraphs 4, 5 and 8 of the *Cc,* all of which leads to the rejection of this motive.

Fifth.- The fourth motive, pursuant to the procedural aegis of number 5 of art. 1692 of the *LECiv,* claims a violation of art. 1261 of the *Cc* and the case law which has been invoked, and in the allegations questions the validity and effectiveness of the contract that transmits the ownership of the trademarks belonging to the general partnership 'Cifuentes y Cía' dated 8.2.1982 and clarified in another document dated 22 March of the same year, and ratified on 22.4.1983 and 7 November of the same year. This ground must be rejected as regards consent because the appellant assumes that only the governmental comptroller is legitimately able to carry out this business transaction in Spain and not the individuals who make up the mercantile partnership. This clearly contradicts the terms of the judgment being appealed and has not been counteracted or nullified in cassation. As regards the object, if the trademarks do not constitute the social object but rather form an integral part of the estate of the company, which includes other types of assets as well, its total or partial expropriation — as would be the case with the acquisition or invention of new assets — falls within statuary powers given that the vacancy caused by the death of one of the partners was correctly filled by one of his successors

according to the stipulations of the law. Therefore the list of owners of this personal partnership is complete (Statutes, art. 21, sections D and P; pages 403 and 471). As regards the action itself, which is projected as being a simulation of a sale since the selling price is lower than the real value of the trademark, it is true that the economic situation of the company, given the political environment that surrounds the central headquarters, makes this sale a high risk venture which affects the prospects for exploitation of the business and has serious consequences as regards the monetary returns on the investment in the trademark. As for the allegation of fraud, as nothing of this nature was mentioned in the judgments issued by the trial or first appeal court, it is clear that an evaluation of intentions cannot be used as a factual base by which to obtain a careful application of art. 6 of the *Cc* especially by someone who, according to both the ordinary and constitutional law related to this contract, lacks legitimacy because he lacks recognizable powers or legal faculties. For all of these reasons, the ground is rejected.

Sixth.- The fifth ground, also pursuant to art. 1692.5 of the *LECiv,* claims a violation of art. 1281, paragraph 1 of the *Cc* and the pertinent case law related to the erroneous interpretation that the judgments being challenged made of the by-laws of the business corporation as regards the right of the managing partners to buy and sell assets of all types and therefore, to buy and sell the factory's trademarks. This ground must also be rejected because as was stated previously, the interpretation of the by-laws was clear and all of the partners respected the rules as set out in these by-laws (including the successors of the deceased Mr. Manuel C.). Both the judge of the Court of First Instance and the judge of this Court find this interpretation to be logical and true and free from the type of circumstances or defects that would be needed for a challenge to prosper in the highest courts. Moreover, the group that has authorized the transmission is made up of the totality of the owners of this personal partnership and their rights cannot be ignored or overridden, especially by someone such as the comptroller, who is completely unrelated to the company in terms of the issues related to its actions in Spain. The legal principle of *res interalios acta nobis, nee nocet, nee prodest* must he applied as regards compliance with the obligations of partners derived from it which includes *ad intra* the possibility of the owners bringing suit but does not extend this right to third parties who are *ad extra* to the corporation. Therefore, the appellant is prohibited from verifying the liquidation in time and form according to the bylaws of the partnership because he does not meet the ownership requirements. Thus his pretension fails and furthermore he has no proven legitimate legal interest in the corporation according to Spanish law.

Seventh.- Having rejected all five grounds, the appeal must fail and therefore all costs must be paid by the appellant who also loses the amount on deposit."

XV. COMPETITION LAW

XVI. INVESTMENT AND FOREIGN EXCHANGE

XVII. FOREIGN TRADE LAW

XVIII. BUSINESS ASSOCIATIONS/CORPORATIONS

— RDGRN, 29 February 1992. *REDI,* 1992-85-PR.
Inscription in the Mercantile Register of a branch of a British corporation located in Spain. Recognition of foreign corporations that are not equivalent to the types of corporations contemplated by Spanish lawmakers.

"(...)

After the changes brought about by Law 19/1989 dated 25 July, which partially reformed and adapted our mercantile law to the directives of the European Union and the *RRM* approved by Royal Decree 15971/1989 of 29 December, our Law stipulates that 'branches of foreign corporations' are required to be recorded in the Mercantile Register [art. 81 k) *RRM*]. The confusion created by the original wording of the text (arts. 84.2 and 88 *RRM* of 1956) as regards whether the branch itself or the foreign corporation should be recorded was clarified. Today, article 264 *RRM* (1989) clearly states that 'foreign corporations that establish a branch office in Spanish territory must be recorded in the Mercantile Register corresponding to the area in which they are located'. Therefore it is clear that it is the branch, not the corporation, which must be registered.

Thus the inscription of a branch should not be denied based on the argument that the foreign corporation that establishes a branch in Spain — in this case a higher education corporation — has no right to be registered in the Spanish Mercantile Register because it is not contemplated in any of the sections of art. 81 *RRM,* which lists the businesses which are subject to compulsory inscription in the Mercantile Register. The Registrar blames the defect claimed in the note on the wording of sections k) and j) of art. 81. Section k) requires the inscription of branches of foreign corporations and section j) makes this obligatory for the branches 'of any of the subjects previously listed'. We can conclude from this interpretation that the expression 'foreign corporations' in section k) would be equivalent to 'subjects with a right

to be inscribed' according to Spanish law. This criterion, in addition to contradicting art. 264 *RRM,* doesn't take into account the clearly different treatment that the new *RRM* affords the inscription of branches of Spanish entities and the inscription of foreign branches, nor does it consider the conclusion that can be drawn from arts. 269 and 277 *RRM* which imply that it is not necessary for the branch offices of foreign firms to be inscribed or to have the right to be inscribed in the Spanish Mercantile Register.

The foreign corporations to which Section 4 of art. 81 refers do not, therefore, have to correspond to any of the types of partnerships or corporations recognized by Spanish law. A broad definition or conception of trade corporation which can be used to orient us — especially in this case as we are dealing with a British firm — is the concept of corporation as established in art. 58 *TCEE,* approved in Rome in March of 1957. This precept, which within the framework of Chapter II which is dedicated to the right to establish a firm or corporation, states that the word corporation should be interpreted as 'civil or mercantile corporations including cooperatives, and other legal persons under public or private law, except those that are non-profit in nature'. The Mercantile Registrar is limited to checking to make sure that the foreign corporation is indeed considered as such under the laws of its home country and that it is correctly incorporated according to those laws. The *DGRN* in R. of 11 September 1990, states that the function of the registrar as regards foreign corporations that set up branches in Spain is limited to verifying if the corporation in question is validly incorporated under its national law and to controlling the legality of the creation or establishment of the branch by the corporation.

Therefore we must determine whether or not this higher education corporation has legal personality according to British law and just what its purpose is. This firm, which is regulated by the Education Reform Act of 1983, is indeed a legal person (art. 124 of said act) and its purpose is to promote and offer advanced courses in art and design and develop ties with European industries, professions and educational institutions in order to teach Art and Design. More specifically, the branch for which the inscription is being sought proposes to establish a school in Barcelona which would offer the first Master of Arts program in Art and Design in Europe. To accomplish this, capital has been provided and income is expected from academic tuition fees. This purpose, which assumes that services will be offered to the public, reveals the mercantile nature of the enterprise, which is even clearer if we take into account the profit earning goals of the company in question."

XIX. BANKRUPTCY

XX. TRANSPORT LAW

XXI. LABOUR LAW AND SOCIAL SECURITY

XXII. CRIMINAL LAW

XXIII. TAX LAW

XXIV. INTERLOCAL CONFLICT OF LAWS

— STC 36/1992, 23 March. Plenary session. *BOE* 10.4.1992.
State competence in matters related to rules for resolving conflicts of law.

"Legal Grounds:

First.- The object of this dispute is the Order issued by the Council of the Department of the Economy and the Treasury of the Basque Country on 17 July 1985 concerning stocks which can be used to cover the technical reserves of insurance companies, capitalization and savings corporations, and voluntary retirement fund programs whose central offices are located in the Basque Country. The State attorney reminds the Council that first of all, the Order limits the scope of its own applicability by stipulating that only one criterion — that the business office of the companies in question must be located in the Basque Country — must be met instead of the three — business address, area of operations and location of risks in the autonomous communities — which are stipulated in art. 39.2 and 3 of Law 33/1984 dated 2 August which forms part of the *Ordenación del Seguro Privado (Ley de Ordenación del Seguro Privado)* which limits the competence of the autonomous communities in relation to direct insurance companies and mutual benefit societies for social security purposes that are not part of the State social security system. In the second place, the State Attorney challenges this Order on the grounds that it limits the moveable assets that can be used to invest in the technical provisions of the insurance companies and voluntary retirement funds to those found in the annex it provides while according to basic state regulations ([art. 64.2 b)

and the third Final Disposition of the *Reglamento de Ordenación del Seguro Privado — ROSP —*, approved by Royal Decree 1348/1985 on 1 August] all types of bearer securities whether they are fixed interest securities or equities are acceptable if they are quoted on the Stock Exchange.

(...)

Third.- As regards the way in which the Order limits its scope of application, distancing itself from the provisions of art. 39.2 and 3 of the *LOSP*, it suffices to keep in mind that, on the one hand, according to *STC* 86/1989 (legal ground 9) and art. 39.2 and 3 of the *LOSP*, the State has exercised the competence reserved for it by art. 149.1.8 of the *CE* in matters of 'rules for resolving conflicts of law' and on the other hand, the triple point of connection that this legal precept establishes cannot serve to prove that something is unconstitutional based on the reasons given and the way they are developed in *STC* 86/1989 (legal grounds 10 and 11) which should be here applied. Therefore it is quite clear that to the extent that the Order that has given rise to the dispute in question limits its scope of application by means of establishing a point of connection different from the one that has been set by the State's legislators, as is their right and duty, it is invading the State's sphere of competence.

However, as regards voluntary retirement fund organizations, there is no reason why the Order being challenged cannot reproduce, as the representatives of the Basque Government argue, the criteria set by Royal Decree 3228/1982 of October 15 related to the transfer of functions and services to the Basque Country in matters of mutual benefit societies that are not part of the State Social Security system (annex B.1). As was already stated in *STC* 86/1989, legal ground 9, in response to a similar objection, 'if indeed the state legislator cannot unilaterally modify the content of the alleged Decree on transfers, there is nothing to prevent the Law that incorporates the bases of regulation of a matter from applying criteria that limit the scope of application of the autonomous communities' competence differently than was done in a prior decree on transfers and, it is appropriate to mention here that the communities would have to abide by those criteria.

Ruling

As a consequence of all of the aforesaid, the Constitutional Court, by the authority vested in it by the Constitution of Spain, has decided

1. to declare that the disputed competence pertains to the State,

2. to annul the Order dated 17 July 1985 issued by the Council of the Department of the Economy and the Treasury related to the types of securities that can be used to cover the technical reserves of insurance companies, of capitalization and savings corporations and of voluntary retirement fund organizations located in the Basque Country."

— STS 23 March 1992, *Ar.Rep.J.* 1992, n. 2224.
Marriage entered into in Palma de Mallorca with no pre-nuptial agreement. Determination of domicile of the spouses and the law applicable to the marriage's economic regime given it is not community property. Choice of law. Marital property. Domicile as a connecting factor.

"Legal Grounds:

First.- The trial on which this appeal is based was brought by Ms. Rosa-María M.C. against her husband Mr. Jesús-Fernando M.L. (whom she had married on 24.9.1983 in Palma de Mallorca and from whom she is legally separated as decreed on 6.3.1986). The plaintiff hoped for a judgment stipulating that the economic regime applicable to the marriage was the community property regime and that the apartment (described in the suit) which was bought by both spouses prior to their marriage and the savings accounts held in both their names would also be considered community property and that an agreement would be drawn up for the liquidation of the assets held in common. The Third Division of the Provincial Court of Palma de Mallorca overturned the ruling issued in the first trial (which had completely accepted the suit) rejecting it and ruling that the economic regime that was applicable to this couple was separation of estates. The plaintiff, Ms. Rosa-María M.C. has filed this appeal in cassation against the ruling of the aforementioned court.

Second.- The ruling being appealed is based on the following facts which are not disputed by either party: 1º Mr. Jesús Fernando M.L. was born on 30.5.1954 in Moratalla (Murcia) where his parents lived until 1966 when they moved their principal residence to Barcelona. Mr. M. L. was twelve years old at the time and moved with the family to Barcelona. 2º. Mr. Jesús-Fernando M.L. was registered in the Barcelona census in 1970, 1975 and 1981 and removed himself from the census on 8.3.1983. 3º. In 1981, Mr. Jesús-Fernando M.L. moved his principal residence to Palma de Mallorca, and on 24.9.1983 he married the plaintiff, Ms. Rosa-María M.C.. There was no pre-nuptial agreement. Based exclusively on these facts, the judgment being appealed concludes that Mr. Jesús-Fernando M. L. had acquired legal residency in Catalonia due to his continued residence in Barcelona for ten years and to the fact that there did not exist any declaration to the contrary. The judgment being appealed further states that according to art. 14.3 of the *Cc* as there was no pre-marital agreement made it must be understood that the marriage that he entered into in 1983 in Palma de Mallorca with Ms. Rosa-María M.C. was subject to the regime of separation of estates as this is the legal suppletory according to the Laws of Catalonia (*ApNDL* 2001 and *LCAT* 1984, 1888) (art. 7). The three grounds of the appeal which are used to dispute the conclusions of the

judgment being challenged have to do with the legal residency in Catalonia of the defendant, Mr. M. L.. We will begin for reasons of legal methodology, by examining the second ground.

Third.- The second ground, pursuant to art. 1692.5 of the *LECiv*, claims that the Court committed — and I quote — 'an infringement of the law due to the incorrect interpretation of art. 14.3-2 of the *Cc* in relation to art. 225 of the *RRC* (*RCL* 1958, 1957, 2122: RCL 1959, 104 and *NDL* 25895) by counting as part of the ten years set by the *Cc*, time which should not have been counted because the individual in question was a minor and was not legally responsible for himself'. Using as our base the facts that were related in the previous ground and are accepted as true, and which are the only ones on the record, the ground must be accepted for the following reasons. Since the judgment being appealed, using simplistic arguments, limits itself to considering the fact that the defendant, Mr. Jesús-Fernando M.L. acquired legal residency in Catalonia as a consequence of his uninterrupted residence during ten years in Barcelona with no declaration being made to the contrary during this time, this obviously means, although no reasoning is given on this matter, that it accepts the idea that when in 1966 the defendant arrived in Barcelona at the age of 12, together with and under the custody of his parents, they — his parents — did not have legal residency there. If they had had, the son would have automatically had it as well without having to wait the ten years (minor children have the same legal residence as the parents whose custody they are in according to the wording of art. 14.4 of the *Cc* at the time this case refers to) and therefore we must assume, even though the judgment being appealed says nothing in this regard, that the parents had the same legal residency since they were both from Moratalla (Murcia), an area governed by civil, not statutory law, when they emigrated to Barcelona in 1966. Furthermore, the parents did not acquire Catalonian residency while their child was a minor. It has not been proven that they acquired it as they did not go before the Civil Registrar and declare two years of residence (art. 14.3.1 of the *Cc*) nor had the required ten years passed before the child came of legal age (1975) so that residency could be granted to the child through this second means of acquisition. Therefore, it is clear that when Mr. Jesús-Fernando M.L. came of legal age on 30.5.1975 when he turned 21 (art. 320 of the *Cc* in the wording that was in effect at the time), he had common legal residency and therefore since from this date until he transferred his residence to Palma de Mallorca (1981) ten years had not passed, he was not eligible for Catalonian legal residency. This was due to the fact that the years from 1966 on that he, still a minor, lived in Barcelona with his parents and was under their custody could not be counted (which the appealed judgment did incorrectly without even considering this issue) because art. 225 of the *RRC*, after establishing in paragraph 1 in full agreement with art. 14.3.2 of the *Cc* that

'a change in legal residence occurs *ipso iure* as a result of ten years of uninterrupted residence in a province or territory that has a different civil legal system, unless before that time is up, the interested party formulates a declaration to the contrary', adds in paragraph 2 that 'in the computation of this ten year period, the time during which a person is not considered legally responsible for himself cannot be counted'. This is the situation in which Mr. Jesús-Fernando M.L. found himself during the time he was a minor (1966-1975) and this period of time cannot be counted towards the ten year period. As Mr. M.L. had common legal residence, as was just shown, when he married the plaintiff, here appellant, Ms. Rosa-María M.C. in 1983 in Palma de Mallorca and as there was no pre-marital agreement, we must conclude that this marriage is subject to a community property regime (art. 1316 of the *Cc* in relation to sections 2 and 3 of art. 9 of the same code, in the wording that was in effect at the time of the wedding, and in relation to art. 16 of said legal code). Moreover, except for the position that he has taken in this suit (which contradicts his own actions) the defendant, Mr. M.L. has expressly recognized in a written document dated 3.3.1987 which was presented to the Family Court in Palma de Mallorca (case n. 342/1985) as part of the enforcement stage of the judgment for separation of estates, that his marriage was a community property marriage (page 44 of the record) which he then ratifies in testimony before this Court when, on absolving the first position, he answers that he is not married under a regime of separation of estates (pages 83 and 84). This is also clearly shown on his income tax forms that he filed jointly with his wife in 1983 and 1984 which expressly states that the economic regime of this marriage was community property (pages 115 and 124). The acceptance of the second ground which was just examined, makes it unnecessary to study the other two (the first and the third) because they have the same basis as this one, even though they are presented from different legal perspectives."

— STSJ - Cataluña 7 October 1991. *Ar. Rep. J.*, 1992, n. 3909.
Sale of real estate located in Catalonia. Application of Catalonian law — rescission due to *ultra dimidium* damage — regardless of the legal residency of the parties to the contract.

"Legal Groands:

First.- The first ground of the appeal in cassation that is the object of this legal case claims an error was made in the evaluation of the evidence based on the documents entered onto the record. This would constitute an infringement of art. 14 of the *Cc*, pursuant to art. 1692.4 of the *LECiv.* Two important facts are offered as proof: one, that Mr. F. is not Catalonian and for many years prior to the suit he had maintained his residence in the place of his birth (he was born

in Menorca), and two, no proof has been offered that the seller is Catalonian. This ground should be rejected because, regardless of the incorrect manner in which it was brought before the Court (claiming an infringement of a principle of substantive law to be an error in fact in the evaluation of the evidence) and regardless of the fact that in order to invoke art. 1692.4 of the *LECiv* one must meet some specific requirements — one of which is to have a *strictu sensu* document which has not been evaluated by the trial judge because erroneous evaluation of evidence should be brought under number 5 of this article — the legal residence of Mr. F.C. (buyer, defendant in the rescissionary action and here appellant) at the time at which the contract was drawn up is totally irrelevant as is the legal residence of Mr. C.B. (seller and here appellee) even though there is no doubt whatsoever that this last party was indeed a legal resident of Catalonia. This is so because the object of this litigation deals with the rescission of a sales contract due to *ultradimidium* harm, and therefore the point of connection in this matter is the item itself, that is, the appropriate rules (art. 321 and the following few) of the Catalonian legal code (*ApNDL* 2001 and *LCAT* 1984, 1888) are applicable when, as is true in this case, the real estate which is the object of the onerous transfer of ownership is located within Catalonia, and this regardless of the legal residency of the buyer. This can be deduced from section 1, paragraph 1 of art. 16 of the *Cc*, which stipulates that the conflict of laws that might arise from the coexistence of different legal codes within Spanish territory will be resolved according to the rules found in Chapter IV (*Normas de Derecho Internacional Privado*) and 10, section 5, which establishes that if there is no expressed submission, in cases having to do with contracts on real estate, the law of the area in which the real estate is located will be the one applied to the contract. This is not the proper forum in which to ponder whether the system is correct or appropriate as it is undeniable that this is the only legal system that can be applied. *STS* 12-3-1984 (RJ 1984, 1216) presents no obstacles in spite of the fact that in the seventh whereas clause a different solution is proposed, which here should be considered as no more than an *obiter dicta*. It should also be pointed out that the criterion used was also cited in the judgment handed down by the Court of First Instance and was not excluded at the next level and for the appeal to have succeeded this conclusion would have had to be challenged. And although it is true that at both levels of this case so far (first instance and appeal) the judgments address the issue of the legal residency of both parties to the contract, this is almost *ex abundantia* or the result of exhausting all other arguments. It is absolutely unnecessary for the resolution of the case and has no relevance whatsoever for the appeal in cassation. And it is for precisely these reasons that this Court did not accept the suspension of the civil case in favor of the criminal case, because the hypothetical falsity of the document in question has no relevance

whatsoever for the outcome of the litigation according to art. 10, section 2 of the *LOPJ* (*RCL* 1985, 1578, 2635 and *ApNDL* 8375) when it speaks 'of a prejudicial criminal question which cannot be ignored when deciding the case if it has a direct impact on the contents of the decision'".

— STS 23 December 1992. *Ar.Rep.J.* n. 10653.
Deceased having legal residency in Catalonia, inheritance rights of the spouse. Economic regime of the marriage, marriage entered into in Palma de Mallorca with legal residency under common civil law. Succession. Choice of law. Marital Property: Choice of law.

"Legal Grounds:

First.- The first ground of the appeal is pursuant to the version of art. 1692.4 of the *LECiv* prior to the reform dated 30.4.1992 (*RCL* 1992, 1027). It alleges 'that the judgement handed down by the Territorial Court in Barcelona is not in compliance with the law because it accepted the existence of the regime of community property and assigned 50% of the assets that resulted from the dissolution of this partnership to the widow' and that 'the judgment is based on the fact that one of the parties — and we understand here one of the spouses — was born in Lorca (Murcia) and the other in Santiago de Arboleas (Almería)' and it concludes by maintaining that 'when Isabel-Policarpa O. D. and Juan C. S. married, they were both residents of Palma de Mallorca, and therefore we must presume that the regime of the marriage was the one stipulated by Balear law and not a community property regime and this is all the more evident due to the fact that the plaintiff did not present any proof to the contrary'. The documents that were presented as proof of the error made in the evaluation of the evidence which the trial court was accused of making are the certificates of inscription of the marriage between Mr. C and Ms. O issued by the Civil Registrar of Palma de Mallorca.

It is quite obvious that this ground is inadmissable. In fact, the facts on which the judgment is based — the determination of the place of birth of the two spouses — are not really questioned, but rather by referring to a different fact — that when the two parties were married, they were both residents of Palma de Mallorca — it is hoped that the economic regime of the marriage dictated by Balear law, and not a community property regime, will be declared valid. This is clearly not a question related to the evaluation of the evidence and it falls outside of the scope of the ground itself which is based on art. 1692.4. It is also important to note that the judgment being challenged does not deny that the parties resided in Palma, but rather questions the claim that the spouses had established legal residency in the Baleares prior to their wedding, and this is a very different question indeed.

Second.- The second ground is also formulated pursuant to art. 1692.4 and it refers to the trial court's omission of the fact that the appellant feels that it had been proven that 'at the time of death, [the deceased, Mr. Juan C.S.] had acquired legal residency in Catalonia'. This claim is based on the last wills and testaments authorized by Mr. C. on 18 January and 15 June 1973 and on 21 February 1983 in which he states that he is 'Catalonian due to his residence' in the first two documents, and that he holds 'legal residency in Catalonia based on residence' in the third document. This being so, Mrs. C.C.'s claim must be accepted as no attempt whatsoever has been made to prove that what was stated in these last wills and testaments was not true. Therefore, the ground must be accepted with all of the consequences thereof which will be examined in the fifth ground which deals with the inheritance rights of Mrs. P. O., the widow of Mr. C. S.

Third.- The third ground is pursuant to the previous number 5 of art. 1692, as are the following grounds, and alleges an infringement of art. 14.3.4 of the version of the *Cc* prior to the Reform of 14.10.1990 (*RCL* 1990, 2139). The arguments presented in this ground are limited to a reference to the reasoning given in the judgment handed down by the trial court (Legal ground 8) and do not refute the foundation itself of the affirmations in the appealed judgment in the sense that 'the fact that the marriage was celebrated in Palma de Mallorca, and that no proof is offered that (the spouses) had acquired residency in the Baleares prior to the marriage, does not affect their being subject to common law, which in this matter is a regime of community property, if there is no stipulation to the contrary in a pre-marital agreement'. Therefore, this ground must fail.

Fourth.- The fourth ground of the appeal claims an infringement of arts. 3, 1344, 1347 and 1354 of the *Cc* and alleges, in summary, that 'Isabel-Policarpa O. D. is not entitled to 50% of the assets upon the dissolution of the partnership' because 'the couple had in reality been separated for more than 40 years' and 'benefits from community property are only justified when a life is shared'.

The judgment being challenged recognizes that the spouses, Mr. Juan C. and Mrs. Isabel P. O. had indeed been 'separated in reality for many years' but it maintains that this fact 'does not affect the right of the wife to half of the estate because art. 1392.3 of the *Código* requires the separation to be decreed legally, which is not the case here, nor was there any judicial ruling that annulled the community property arrangement based on the existing *de facto* separation'. The judgment's inaccuracy regarding the years of separation is offset by stating that the absolution of the respective positions first taken from the testimony of the plaintiffs, Juan C. O. and Mrs. Isabel P. O., allows us to conclude that the separation lasted for more than forty years during which time these individuals lived separate lives and the husband formed a new extra-

marital family which produced two children who are the defendants in this case. Accepting these facts, we must remember the doctrine set forth by case law (*SS* 13.6.1986 [*RJ* 1986, 3549], 26.11.1987 [*RJ* 1987, 8689] and 17.6.1988 [*RJ* 1988, 5113] which shows that *de facto* separation excludes the concept on which community property is based, which is the concept of living together until the time of death of one of the spouses. To understand this any other way would be contrary to good faith and would constitute an abuse of law and an interpretation of the law that was not in accordance with social reality (art. 3.1 of the *Cc*) and this could not be accepted by the courts. Therefore, the ground being examined here is accepted.

Fifth.- The final ground of the appeal alleges an infringement of arts. 9-8 and 834 of the *Cc* and 148 of the *Compilación de Derecho Civil de Cataluña* (*ApNDL* 2001 and *LCAT* 1984, 1888).

Having established the legal residence of the deceased at the time of his death (12.11.1983), it follows that inheritance must be governed by the special civil law of Catalonia which was invoked in the original suit with reference to preterition and intestated inheritance citing arts. 141-3 and 248 of the *Compilación* and therefore the attempt made by the plaintiffs (C. O. and Mrs. O. D.) to obtain a declaration of the widow's right to use and enjoy a share of the inheritance — which would be based on art. 834 of the *Cc* — cannot be accepted given that this quota would have to be based on the provisions of arts. 147 and ss of the *Compilación* dated 21.7.1960 (*RCL* 1960, 1034, and *NDL* 4575) on the marital share (one quarter of the inheritance), and the plaintiffs have not alleged anything as regards the admissability or requirements of this share. In conclusion, as the *a quo* court incorrectly declared the widow Isabel P.O.'s right to third for betterment usufruct (art. 834 *Cc*), this ground must also be accepted."