# SPANISH JUDICIAL DECISIONS IN PRIVATE INTERNATIONAL LAW, 1991.

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A complete annotated listing of all Spanish judicial decisions in Private International Law is published each year in the *Revista Española de Derecho Internacional* (Spanish Journal of International Law). This publication can be consulted for any further information required. See *REDI* 1991, pages 183--258 and 469--577. We wish to thank the *REDI* for the use of their resources in the preparation of this text.

## I. SOURCES OF PRIVATE INTERNATIONAL LAW

**— STC 209/1991, 7 November 1991.**
**Note: See IV.2**

## II. INTERNATIONAL JURISDICTION

### 1. Family Law. Community property in marriage. Contract of sale

**— STS, 4 November 1991 (civil), *Ar.Rep.J.*, 1991, n. 7931.**
**Action to invalidate a sales contract for real estate located in Spain and covenants governing proprietorship between foreign spouses: community property in German law. Residency of tbe defendant in a foreign country. Court's lack of jurisdiction.**

"*Legal Grounds:*

Second. The first ground, pursuant to article 1692, 4th *LECiv*, alleges an error in the evaluation of the evidence, and cites the documents entered into the record from which said error arises. With this allegation, an attempt is made to contest the statement made in the decision being appealed that the

married couple (the appellant and the appellee, Mr. J.P.W.) did not maintain their principal residence in Spain at the time of the suit, and therefore due to the fact that the suit dealt with a dispute over community property between the two, in accordance with the provisions of article 22.3 of the *Ley Orgánica de Poder Judicial* (*LOPJ* — Organic Law on Judicial Power), Spanish courts would not have jurisdiction.

This ground is inadmissible as clearly shown by the statement made by the appellant herself in the suit that gave rise to this proceeding. In her second allegation of fact she declared that her marriage had virtually ended quite a bit earlier, "the defendant having gone to live in the Dominican Republic more than a year ago, as far as can be told, and with no known address available, having come back to Spain on two occasions for reasons that will be specified later on". She also corroborates in an interrogatory that her husband does not reside in Spain (answer to question 15 [page 251 overleaf and 252 overleaf]).

Third. In the second ground, pursuant to article 1692.5, *LECiv*, she alleges an infringement of articles 1303 and 1895 in relation to article 1275, all of the *Código Civil Español* (*C.c.* — Spanish Civil Code), and article 37 of *La Ley Hipotecaria* (*LH* — Hypothecary Law) (R. 1946, 342, 886 and N. Dicc. 18732). This infringement consists of a failure to apply. According to the appellant, she exercised a real action in her suit, not a personal one (as the judgement being appealed states), and therefore claims that the Spanish judiciary does have jurisdiction under the provisions of article 22.1 of the *LOPJ*.

This ground cannot be allowed. In addition to the procedural defect that the ground does not explain exactly what the infraction of each of the articles cited is, but rather is limited to expounding the appellants' own theory on the nature of the action without connecting it to said articles, she also tries in any way she can to adapt the supposed facts that she presents in her suit to any of the sections of article 22 without taking into account the criteria of the *a quo* chamber, which she does not rebut, thereby demonstrating how absurd, illogical and contrary it is to the rules of legal interpretation of article 3.1 of the *Código Civil* (*C.c.* — Spanish Civil Code).

Moreover, the theory itself is faulty as she has brought suit against her spouse and the purchasers of his estate to invalidate a contract based on the precepts of the German Civil Code which regulate the economic aspects of marriage, an action which can affect third parties who do not operate in good faith. Even in an independent evaluation of the action according to Spanish civil rules, it can in no way be considered a real action, because if the contract is declared null and void, a compensatory effect would be produced, and this is not the same as an action for recovery because, among

other reasons, in a system in which there is a separation of property at the outset and a system of community property at dissolution — which is the system that applies to the W's — each spouse is the legal owner of his/her property as if they were under a system of complete separation, and if either of them questions how the other disposes of "all of his estate" without the other's consent, this cannot be interpreted as giving the other party the right to try to recover as a dispossessed owner. If such an action were to succeed, the goods that make up the estate would continue to be the property of the spouse who unduly disposed of them (par. 1366 and 1368 of the German Civil Code or BGB.) In general terms, the same holds for the annulment of contracts. If the parties to the contract must be repaid for their contributions once the contract is annulled (art. 1303 of the *C.c.*), this is not because the judgement recognizes that they own them, but rather because the instrument used to exchange them was inefficient and did not take into consideration the actual right they may have had to the property conveyed.

Fifth. The fourth ground, pursuant to article 1692.5 of the *LECiv* denounces an infraction of the doctrine of jurisprudence included in S. 20-3-1973 (R. 1973, 3775) "and other judgements handed down by this High Court similar to this one" (*sic*). In this ground, the appellant insists that because a real action was involved, Spanish judicial bodies did have jurisdiction and the ground should be rejected for the reasons previously stated on the nature of the action, which is not real. Moreover, the ground is incorrectly formulated as it does not cite more than one specific case and this certainly would not constitute jurisprudential doctrine. Furthermore, it is important to point out that said case and judgement predate the *LOPJ* that is currently in effect. Article 22 of this Law regulates international civil jurisdiction with other criteria that are more open to the admission of the jurisdictional authority of foreign judges and courts."

## 2. Succession. Assignment of inheritance rights. *Cautio indicatum solvi*

**— STS 4 April 1991 (civil), *Ar.Rep.J.* 1991, n. 2636.**
**Petition to annul the deed assigning the right to inherit real property in Spain**

*"Legal grounds:*

Fourth. As regards the first ground, and citing paragraph 4 of article 1692 of the *LECiv* as the procedural foundation for it, it seems that the appellants claim that the judgement being appealed contains two evidentiary errors in fact, even though they do not offer any support for this claim that is appropriate or sufficiently precise. These two errors are: one, accepting as

fact that the plaintiff, here the appellee, Ms. A.S.N., did not grant power of attorney to Ms. T.R., and the other, also accepting as fact that the aforementioned plaintiff (Mrs. S.N.) is a Spanish citizen. As proof of these two alleged evidentiary errors, which they seem to want to challenge, the appellants cite, as documents entered into the record as evidence, the public recording of the substitution of the power of attorney (dated 28 June 1978) which was authorized by the Notary Public of Lanus (Argentina) Mr. M.N. and was granted by Ms. T.R.C. in favor of Mr. T.M. which, according to the appellants, included the power of attorney previously (21 September 1973) granted to Ms. T.R.C. by Ms. A.S.N. (in the presence of the notary public of Moron, Argentina, Mr. E.R.A., with the master copy recorded on page 172 of Register n. 50), and which states, according to the appellants, that Mrs. A.S.N. is Argentinian and holds identity card n. 5.410.593. As regards the first of the alleged evidentiary errors (whether Mrs. A. S. N. really granted power of attorney to Ms. T. R. C.), this ground must be rejected because in order for a document entered into the record to serve as evidence of an alleged evidentiary error in fact, it must not be contradicted by other probatory items (art. 1692.4 of the *LECiv*). In this case, this contradiction does clearly and unequivocally exist, since in response to the statement that in the aforementioned assignment of power of attorney witnessed by the Notary Public of Landa (Arg.) Mr. J.M.N., it is stated that Mrs. A.S.N. had previously (21 September 1973) granted power of attorney to Ms. T.R.C.(as witnessed by the Notary of Moron, Argentina, Mr. E.R.A., with master copy recorded on page 172 of Registry n. 50) and the record of the judgement under appeal seems to clearly show that in the protocol which corresponds to Register 50 in Moron (Argentina) which belongs to the Notary Pubic Mr. E.A. "on page 172, in the year 1973 of said protocol, the public deed of sale was recorded by E.L. and another party representing J.F.A. in favor of R.H.B. ..., and that as of 21-9-1973 there is no master copy recorded regarding Mrs. A.S.N.'s power of attorney" and this according to a certificate issued by the Notary holding the aforementioned protocol, according to the letters rogatory duly sent for that purpose (pages 153 and 162 of the records of the *Juzgado de Primera Instancia* (Court of First Instance). Furthermore, there exists in these same records another certificate issued by the aforementioned Notary and entered into evidence by the then plaintiff, here appellee, from which the following is quoted: "H.T.M., Notary Public in possession of the protocols pertaining to the Notary Public E.R.A., certifies that, having carried out the search and having made an official copy of the protocol corresponding to the year 1973, page 172, there exists in it no deed of power of attorney (underlining as it appears in the certificate) granted by A.S.N. to T.R.C. (*sic*). In response to the request

made by the Spanish Consulate in the city of Rosario (General Consulate), I issue this document in the city of Moron, on the 18th of March 1982 (page 109 of the record)". As regards the second of the alleged errors of evidentiary facts that the appellants are challenging (regarding the nationality of the plaintiff, here the appellee, A.S.N.), apart from the fact that this issue is irrelevant to the case under consideration, as will later be shown, this ground must also be rejected since the corresponding birth certificate (page 188 of the record) proves that the aforementioned Ms. A.S.N. was born in Spain and is the daughter of a Spanish father, and therefore is entitled to Spanish citizenship by birth (art. 17.1 of the *C.c.*), and the defendants, here appellants, have not fulfilled their burden of proof, as dictated by the judgement being appealed, to show that the aforementioned Mrs. A.S.N. has lost her Spanish citizenship by acquiring Argentinian citizenship, or for any other reason, and no evidentiary value can be attributed in this respect or in any other to the power of attorney (the only means of proof that the appellants invoke) that Ms. S.N. is said to have granted to Ms. T.R.C. on 21 September 1973, as said power of attorney, as was stated previously, does not exist and was never legally granted.

Fifth. As regards the second ground, based on article 1792.1 of the *LECiv*, which alleges "an infraction of the first exception of article 533 of the *LECiv*, of article 51 of the same, and also of articles 21, 22, and 23.1 of the *LOPJ* (R. 1985, 1578, 2635 and Sects. 1975-85, 8375)" the appellants maintain that Spanish judges and courts do not have jurisdiction in the case on which this appeal is based, and they offer as proof that Ms. A.S.N. holds Argentinian citizenship and granted a power of attorney on 21 September 1973, before the Notary Public of Moron (Argentina) Mr. E.R.A. in favor of Ms. T.R.C., and therefore the legal question being debated here (the annulment of the deed of assignment of inheritance rights, dated 25 October 1979, which is referred to in Section 3 of the first Legal Ground of this resolution, together with the legal consequences arising in the Official Register as a result of said annulment) substantially rests on the validity or nullity of the aforementioned power of attorney or mandate, and this, the appellants claim, can only be declared by Argentinian courts. Moreover, they argue that even if Ms. S.N. is considered a Spanish citizen, and even if no other power of attorney had been granted by her to Ms. T.R.C., there does exist the substitution of power of attorney granted by the latter party, who is Argentinian, to Mr. T. M. as witnessed by an Argentinian Notary Public whose declaration of annulment, which they claim is a previous pretext of the legal question being debated here, would also be a matter solely for Argentinian courts. After being reminded that, as has been stated upon examination of the first ground, Mrs. S.N. is a Spanish citizen and that

she had not granted any power of attorney to Ms. T.R.C., the second ground, which we are dealing with here, must be rejected on the basis of the following considerations:"

1. Because in spite of what the nationality of the parties to the litigation might be, and because Spanish courts are competent to hear cases that arise between foreigners (art. 51 of the *LECiv* and 21 of the *LOPJ*) when the object of the litigation is a question over which the Courts of the country would have jurisdiction (this is the source of the irrelevance that we insinuated earlier regarding the issue brought up by the defendants, here appellants, as to the nationality of the plaintiff, here the appellee Mrs. S.N., who, moreover, is a Spanish citizen, as has already been stated), and as the litigation at hand has to do with the annulment of a public deed granted here in Spain (the assignment of inheritance rights to which we referred in Section 3 of the first legal ground of this resolution), which affects real estate located within Spanish territory, and recorded in the *Registro de la Propiedad* (Spanish Real State Registry) and the inscriptions of which are also to be cancelled or annuled as a consequence of the nullification being sought of the aforementioned public deed of assignment of inheritance rights, and furthermore, as the defendants who are truly interested in the question being debated (the siblings S.P. and the spouses of those siblings who are married) are Spanish citizens and reside in Spain, there exists no doubt that the jurisdictional right to hear this case pertains exclusively to Spanish Courts, in accordance with the precepts of numbers 1 ("in matters of validity or nullity of inscriptions — deeds registered in a Spanish registry"), 2 ("when the defendant resides in Spain"), and 3 ("in matters of contractual obligations when these originated or must be carried out in Spain") of article 22 of the *LOPJ*. 2nd. Because the solution to the question being debated in the litigation from which this appeal arises does not rest on the validity or nullity of a power of attorney or mandate granted in a foreign country (the one which the defendants, today appellants, claim that Mrs. S.N. granted to Ms. T.R.C.), the annulment of which undoubtedly would not fall within Spanish jurisdiction, but simply on the real and physical existence or non-existence of the granting of said mandate or power of attorney, which, as far as the merely factual, not legal question is concerned, can be considered by the Spanish courts as it indeed was when the judgement being appealed using the certificate issued by the competent Argentinian Notary (pages 109 and 153 to 162 of the Magistrate's records) declared that the granting of the aforementioned power of attorney or mandate did not take place in physical or real life as there is no proof of it in the corresponding protocol. Therefore there is no need to make a ruling on the validity or nullity of the two subsequent writs of substitution of power of

attorney (the one T.R.C. granted to Mr. T.M. and the one he then granted to Mr. E. and Mr. J.R.T.) in spite of the fact that these were indeed granted (the first in Argentina and the second in Spain), because the non-existence in physical reality of the original mandate or power of attorney (given by Mrs. A.S.N. to Ms. T.R.C.) must inexorably carry with it the non-existence of the later substitutions, as no one can replace a mandate or power of attorney which has never been conferred (*nemo dat quod non habet*).

Sixth. The third ground of the appeal is aimed at challenging the Court of Appeal's decision — which was in complete concurrence with the lower court's decision — to grant an exemption from security for costs. The appellants claim "an infringement by failure to apply article 534 of the *LECiv*, articles 17 and 33 of The Hague Convention on Civil Procedures, 15 April 1958, ratified by Spain in an Instrument dated 28 June 1961 (R. 1775 and N. Dicc. 24699), article 9 of the *C.c.* articulated on 31 May 1974, and articles 1 and 2 of the Convention on Double- Nationality with Argentina, dated 14 April 1964, and ratified in and instrument dated 2 February 1970, (R. 1971, 1799 and N. Dicc. 22159)", and maintain that because the plaintiff, here the appellee, holds foreign citizenship (Argentinian and the Republic of Argentina is not a signatory of The Hague Convention), the aforementioned plaintiff should have been required to post security for costs. After establishing that the procedural channel used in the articulation of the ground at hand (art. 1693.5 of the *LOPJ*) was inappropriate, as it only allows a complaint based on an infraction of the substantive rules (in addition to case law) that are applicable to the resolution of the merits of the case that are the object of this suit, and not the infraction of procedural or adjectival rules, as these can never constitute a *vicio in indicando*, the cause must be rejected for the following reasons:

1. Because as stated in the fourth legal ground of this resolution, Ms. A.S.N.'s claim to Spanish citizenship must be accepted because it is accredited by her birth certificate in Spain and as a daughter of a Spanish father (page 188 of the record) and because the defendants have not proven that she has lost said citizenship by acquiring Argentinian citizenship, or for any other reason. 2. Because even if, for purely dialectic reasons, the plaintiff, Ms. S.N., were considered to have foreign citizenship, the fact that in Spain the so-called *cautio indicatum solvi* requirement of foreign plaintiffs is not automatic or immediate — as this Court has already declared in a ruling on 31 October 1989 (R. 7037) — simply because the country of which they are citizens is not a party to or has not ratified the Hague Convention dated 1 March 1954, currently replaced by the Treaty to Facilitate International Access to Justice completed in The Hague on 25 October 1980, and ratified by Spain on 20 January 1988 (R. 1988, 684) —

as the appellants appear to maintain, but rather that, in said pretext, by virtue of the principal of reciprocity under which this matter, in a supplementary way , is governed, a security for costs will only be required of foreign plaintiffs in Spain when it is proven that their country requires the same of Spanish plaintiffs, and it is the responsibility of the defendant not only to invoke this exemption, which is not automatically adjudgeable, but also to provide proof, as they would have to for any other foreign right that can be invoked, (art. 12.6 of the *C.c.*) that in the plaintiff's country said bond would be required of Spanish citizens; said proof was not presented in the case at hand, as was declared in the ruling of the lower court (second legal ground), the reasoning of which is accepted here in the Court of Appeals."

## 3. Quasi-contracts. Unjustifiable Enrichment

**— STS 29 November 1991 (civil), *Ar.Rep.J.* 1991, n. 8578. Unjustified enrichment. Jurisdiction of Spanish courts: residency in Spain of both parties, submission by the defendant.**

*"Legal Grounds:*

Third. The first ground claims an infraction due to erroneous interpretation of articles 21 and 22.3 of the *LOPJ* (R. 1985, 1578, 2635 and Sections 1975--85, 8375) based on the fact that the *a quo* court accepted jurisdiction over the litigation because general jurisdiction in civil law is the place of residence of the defendant and because the tort feasor and the victim considered Spain as their common habitual place of residence, and moreover argued that it was never specified if the requirement made of the defendant-appellee, was contractual or extra contractual. The argumentation of the ground shows it should have been formulated under article 1692.1 of the procedural rules; nevertheless, it can be examined as presented due to the flexibility introduced by Law 34/1984 dated August 6 (R. 1984, 2040; R. 1985, 39 and Sections 1975-85, 4257). As regards the kind of obligation stipulated in the record, even though the *a quo* court does not define it as contractual or extra-contractual, this does not mean that it was not classified as allusions were made on several occasions to an "unjustified payment" (second and third grounds for the ruling), thereby placing it within the scope of "obligations that are incurred without an agreement" as is shown by the references made to articles 1895 and following of the *C.c.*. There is no doubt that the appellant resides in Alcobendas (Madrid), and as regards place of residence and residency status, it must be remembered that the appellant, in the aforementioned court order issued at his request, declared that the appellee entity had "a representative in Spain" and gave a specific address in

Madrid and that said court order was answered by a representative of the entity who had a power of attorney that was registered with the Registro Mercantil (Mercantile Registry), and therefore it is reasonable to assume from all this that Mr. M. de A. accepted this obligation in Madrid, which, together with his appearance in the proceedings to respond to the complaint, his allegations of certain objections and his opposition to the plaintiff's pretensions, can be interpreted as his willingness to submit to Spanish jurisdiction. Therefore, by combining the data and circumstances presented here and analyzing them according to the jurisdictional rules included in articles 21 and 22.3 of *LOPJ* 6/1985, dated July 1, and the text of article 41 of the *C.c.*, it can be concluded that the *a quo* court did not erroneously interpret the aforementioned organic provisions when it deemed the Spanish courts competent to hear the claim presented by "Manufacturers Hanover Trust Company". Therefore the ground is rejected."

## IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENTS AND DECISIONS

### 1. Contracts. Money Judgement. Due process

**— STC 132/1991, 17 June 1991 (Division 2), *BOE*, 8.7.91.**
**Article 24 of the Constitución Española (*CE* — Spanish Constitution): The right to due process as regards the recognition of foreign judgements.**

*"Legal Grounds:*

3. The appellant alleges that the decision issued by Division 1 of the Supreme Court violates her right to due process, but in no way denies her access to legal defense (art. 24.1 *CE*). The alleged infraction of this fundamental right is based first on the Supreme Court's failure to verify whether or not the Algerian resolution violated the right to due process — which includes the right to obtain a judicial resolution that is based on sound legal grounds — and the right to a public trial with full guarantees — which includes the right to an impartial judge; and second on the Court's authorization of the *exequatur* of a foreign decision, which, in the opinion of the appellant, violates her right to a judicial decision based on sound legal grounds and the right to an impartial judge, all of which is contrary to Spanish public law. Furthermore, the Supreme Court did not find any unlawfulness in the obligation to be enforced as it was defined in the Algerian decision, nor any failure to determine in said decision the way in

which interest accrued on the amount fixed as compensation should be calculated.

Before beginning the analysis of the problems that the appeal presents under article 24 of the *CE*, the alleged violation of due process by the Supreme Court should be cleared. This violation allegedly arose from the Court not having verified if the foreign decision was issued by an impartial judge; however, the plaintiff did not specify in the appeal or in the procedure for *exequatur* opposition, any proof of the alleged partiality of the Algerian judge which would indicate that this was anything more than an added consequence of the foreign judgement's lack of grounds, and it is really this lack that causes the appellant to question the guarantee of impartiality. For this reason this allegation can only be dealt with as part of the examination of the alleged violation of her right to due process by the foreign judgement based on the allegation that the Algerian ruling did not have adequate legal grounds.

4. When examining the question as defined above, it is wise to remember this Court's doctrine on the recognition and enforcement in Spain of judicial decisions issued by foreign courts. It has already been declared in SSTC 98/1984 and 43/1986 and later again in STC 54/1989, that examining the requirements established by the legal system and court rules for the enforcement of a foreign judicial decision, the harmonization of compliance with said requirement, or the interpretation of the rules that establish these things, is strictly a question of ordinary legality and jurisdictional function in which this Tribunal Constitucional (Constitutional Court) cannot and should not enter, except, obviously, in cases in which a fundamental right protected by the Constitution has been violated. This court has also had the occasion to point out in several rulings that the concept of court rules as a limit on the recognition and enforcement of foreign judicial decisions has acquired a new dimension since the adoption of the 1978 Constitution which, without a doubt, is strongly colored by the set of principles that inspired our constitutional law, among them in a very special sense, fundamental rights and public liberties. Therefore, even though these fundamental rights and public liberties that the Constitution guarantees are only truly effective in areas of Spanish sovereignty, our public authorities, including judges and courts cannot recognize or receive judgements issued by foreign authorities that violate the fundamental rights and public liberties constitutionally guaranteed to the Spanish people, or in certain cases, to the Spanish people and foreigners. Court rules have thus come to be greatly influenced by the demands of the Constitution, and, specifically as regards the situation which concerns us here, by the requirements established in article 24 *CE* (SSTC

43/1986, legal ground #4, 54/1989, legal ground #4, AATC 276/1983 and 795/1988.)

These stipulations require the Spanish court to take the guarantees included in article 24 *CE* into account when deciding on the enforcement of a foreign judicial judgement in Spain and to check to see if these guarantees were respected at the time the judgement to be enforced was handed down. However, limiting ourselves to the appeal for protection at hand, which is based on the foreign judgement's lack of firm legal grounds, and without considering the possibility that a foreign decision could conceivably infringe some fundamental right other than those included in article 24 *CE* — as this possibility is not pertinent to this case — the verification of those guarantees by the judge of the *exequatur* could not include a review of the merits of the case as this would surpass the limits of the harmonization function that he is entitled to. In fact, the Spanish approach to the *exequatur* is based as much on the rules that define it as on doctrine and case law, with the exceptions that in a limited fashion arise from the ordinary legal system and from specific reciprocity, and it is considered to be an autonomous procedure for purposes of harmonization to ensure reciprocity. Therefore a full review of the merits of the case would be, in principle, antithetical to those purposes, and they would consequently be stripped of their strength and the review would become more a process of internalization or "domestification" than of recognition.

Therefore, among the guarantees that article 24.1 *CE* establishes, and according to this Court's extensive case law in this area, there is no doubt that in order to insure due process, jurisdictional decisions must be based on the Law. As long as this requirement is included in article 24.1 *CE*, as the Attorney General has pointed out, foreign legal decisions to be recognized and enforced in Spain cannot be exempt. However, when the Spanish court verifies the foreign decision's compliance with this requirement it cannot carry out a full review of the decision, that is, a review of the Law which is applied or the set of reasonings that led to the decision, because, as we just said, the *exequatur* judge does not function as a part of the review process for a foreign judicial decision but rather only as a part of the harmonization process for the decision. Verification of the purpose and legal grounds of a foreign judgement must therefore be disassociated from the verification of the internal correctness, from a legal point of view, of the legal grounds of the judgement, because if not, the *exequatur* judge would become part of the appeal process, something which is clearly outside of the harmonization function. The *exequatur* judge must be restricted to verifying if the foreign decision includes the arguments it is based on. This would allow us to understand the responses given to the questions presented in the suit and to

see that the solution given in the case was the result of a rational explanation of applied law and not of the arbitrariness of the judicial body. It is clear that, in accordance with the doctrine of this Court, which is presented at the beginning of this section, it is the *exequatur* judge who must verify if the foreign judgement complies with the requirement that it have sound legal grounds and when necessary, insure the harmonization of that compliance, but the criteria which would establish sound legal grounds according to Spanish law are not necessarily those found in foreign law.

5. The appellant complains first and foremost of the violation of her right to due process because Division 1 of the Tribunal Supremo (Supreme Court) did not verify if the Algerian judicial resolution, whose *exequatur* was requested, had sufficient legal grounds, and as a consequence, it granted recognition of a foreign judgement which, in the opinion of the appellant, did not have sufficient legal grounds, as it was not based on any jurisprudential rule or principle whatsoever, and its arguments seemed arbitrary. After verifying that the judgement handed down by the Algerian Court of Appeals did comply with the requirements and pretexts of the *LOPJ* for the recognition of decisions issued by foreign judicial bodies, Division 1 of the Supreme Court found that the procedural guarantees included in article 24 *CE* had been respected during the trial and that in terms of the allegation related to the substantive law applied that the petitioner for protection made to the *exequatur*, (the Court, *sic*) found that — as stated in the Record — the petitioner "was afforded the due process which she claimed she had been denied as established in the law that governs the foreign court, which the party here in extemporaneous opposition to its fulfillment, should logically be aware of," and furthermore believes that what the appellant here was really attacking was "the content and foundation of the judgement, which is not contemplated in the function assigned by the *LOPJ* in articles 951 and 958."

Therefore, in response to the complaint filed by the appellant, it seems that in the decision being challenged, the Supreme Court made an implicit but clear pronouncement on the foreign judgement's lack of legal grounds finding that it did indeed have sufficient legal grounds according to the Law which governed the foreign court, and thereby rejected the cause for opposition to the *exequatur* based on the Law applied, because the only reason for applying the law was to review the content and grounds of the foreign judgement, which is not in line with the nature of the *exequatur* procedure according to the *LOPJ* and definitely surpasses the harmonization function of the judge of the *exequatur*. The Supreme Court arrived at this conclusion in a decision that, although brief, was clearly based on the Law, and therefore, it could not be concluded that the decision being challenged

had violated the appellant's right to due process as its purpose was not found to be either arbitrary or unreasonable. This can clearly be seen by reading the Algerian sentence, which is the object of the *exequatur*, in which the reasons for the compensation that was awarded were given, thereby dismissing the petitioner's claims and in which, whether rightly or wrongly, commercial practices were expressly cited in support of the decision. In reality, as pointed out by the Attorney General's office, what the plaintiff was stating in the complaint was not the lack of legal grounds for the foreign judgement, but rather her disagreement with the judgement and the evaluation of the facts carried out by the foreign judicial body with the hope that this Constitutional Court would revise and examine its grounds thereby assuming a function that does not pertain to it and which surpasses the limits of an appeal for a constitutional remedy.

6. Finally, it is not possible to accept the other two challenges that the appellant brings against the judgement, which, basically claim, as was pointed out at the outset, that the Supreme Court did not evaluate the unlawfulness of the obligation plaintiff is seeking to have enforced, as stated in the foreign decision, and in the failure to specify the interest accrued on the amount set as compensation in the Algerian judgement. Under article 24 (*CE*), both challenges lack constitutional meaning. Thus, as regards the unlawfulness of the obligation, apart from the fact that in the judgement being challenged the Supreme Court expressly qualified the "object of litigation" as "licit in Spain" the plaintiff only establishes a question of ordinary legality, which is not within the purview of the Court, this being the infringement of certain Decrees on cereal production, the exportation of goods, and the control of exchange rates as a cause for the unlawfulness of the obligation, and it falls to the organs of ordinary jurisdiction and not to this Court to determine the lawfulness or unlawfulness of such an obligation in terms of legality, which, as such, is outside the purview of this constitutional body. Likewise, the alleged violation of article 24 of the *CE* also suffers from constitutional inconsistency as regards the matter of lack of specificity as to the way in which the interest accrued on the compensation should be calculated according to the foreign judgement. The appellant once again simply disagrees with the judgement and this does not transcend the scope of ordinary legality. The judgement being challenged expressly responds to this charge of lack of specificity in its third legal ground. The Supreme Court states that "the lack of methods of determination (of interest) cannot be objected to once a legal interest in the same is shown to exist (in the country where the original Court is located) through the presentation of legalized documentation required by the specific regulations that correspond to the Spanish judicial organ charged with the

actual enforcement of the judgement". The appellants disagreement with this point lacks constitutional relevance and revolves around a statement of the consequences that could be derived from the remittance to an Algerian rule for the determination of interest, as this court has repeatedly stated that due process as guaranteed by article 24.1 *CE* does not mean the interested party will obtain a judicial ruling to his/her liking, nor does it require an error-free interpretation or application of ordinary law. It also stated that any errors, mistakes or interpretations that either party considered incorrect, fall outside of the purview of the Constitutional Court."

## 2. Family Law. Canonic judgement

**— STC 209/1991, 7 November 1991, *BOE* 27.11.91.**

**Sources of private international law. Convention with the Holy See. Art. 24 of the *CE*: right to due process of law as regards the enforcement of canonic judgements.**

*"Legal Grounds:*

1. The appellant has come to this Court to ask that the judicial actions that denied her effectiveness of the civil order issued in the judgement handed down by an Ecclesiastic Court regarding the canonical marriage ceremony that took place between herself and Mr. J. E. C, La. be annulled. She bases her request on the fact that the civil judge followed the provisions of the Second Additional Provision of Law 30/1981 dated July 7, which modifies the *C.C.* articles on marriage and divorce instead of applying the rules included in the Second Transitory Provision of the Convention on Legal Matters between the Kingdom of Spain and the Holy See made on 3 January 1979, which alludes to cases that are pending in Ecclesiastic courts at the time the Convention went into effect. The appellant claims that this judgement constitutes a violation of her right to due process as the judgement for denial issued by the judicial body blocks the enforcement of a judicial verdict, and thereby violates the fundamental rights guaranteed in article 24.1 *CE*.

2. A simple reading of the factual antecedents on which the petition formulated in this case is based suffices to determine that the question presented here is similar in all aspects to the one which motivated this Court's position as stated in STC 65/1985, which also falls along the lines of STC 66/1982. Both judgements annulled a similar judicial decision that declared that certain judgements of ecclesiastic courts in matters of the annulment of marriages contracted canonically, in accordance with the legislation in effect at a given point in time, and whose validity was

challenged before Ecclesiastic authorities prior to the point at which the aforementioned Legal Convention with the Holy See went into effect, had no civil effects.

It is therefore obligatory to use the previously established doctrine in the resolution of the matter in question here and the grounds on which the decision is based can be no other than those which served as grounds in the appeal resolved by STC 65/1985.

In effect, on that occasion we stated that:

"a) The determination of the applicable rules and their interpretation according to ordinary jurisdiction as a question of mere legality becomes a constitutional matter if a violation of fundamental rights can be derived from it.

b) The right to due process is not limited to guaranteeing that the interested party has access to the courts of law and is able to defend his/her legal claims equally with the other parties, or to guaranteeing that the party will obtain a resolution based on legal grounds. It also requires that the verdict be enforced, because otherwise judicial decisions and the recognition of the rights that they guarantee to one of the parties to a suit would be no more than mere declarations of intentions.

d) Therefore, in the case at hand, in which there is no question that the circumstances established in the aforementioned transitory Provision do exist, the civil Judge's refusal to proceed with said recognition in the terms legally stipulated does constitute a violation of the aforementioned constitutional principles and therefore, the granting of the remedy requested by the appellant is approved".

3. To this must be added a consideration that highlights the defenselessness claimed by the appellant because the judicial decision being questioned here requires the interested party to resort to a second legal process in order to obtain due process. This remittance does constitute a situation of defenselessness because no one can be forced to file a new action in order to remedy a violation of a fundamental right which occurred in a trial that has already concluded. (STC 265/1988).

This *dissenting opinion* was written by the Honorable Magistrate Eugenio Diaz Eimil on the Full Court's ruling on appeal n. 2062/1988. Agreeing with that opinion were the Honorable Francisco Rubio Llorente, Magistrate and President of Division 2, and the Honorable Jesus Leguina Villa, Luis López Guerra and Alvaro Rodríguez Bereijo, all Magistrates.

The judgement, which was approved by the majority, upholds the doctrine established by SSTC 66/1982 and 65/1985 which in my opinion is faulty because it is separated, without sufficiently clear reasons, from the theoretical considerations formulated in STC 1/1981. Additionally an

inadequate interpretation of the concept of due process is applied which is not in keeping with the intent, content and scope attributable to it in the numerous judgements issued by this Constitutional Court which form a solid and unanimous corpus of doctrine which has only been questioned in very isolated cases — and then only implicitly — among which are those resolved by SSTC 66/1982 and 65/1985.

According to this established doctrine, due process guarantees litigants that their claims will be judged on their merits as long as they work within the procedures established by the Law and comply with all of the formal requirements for the valid filing of a case.

As a result, judicial decisions which indicate legally established procedures to the plaintiff and remit him to them cannot violate, in and of themselves, the right to due process as there exists no valid legal grounds on which to base a constitutional reproach to this type of judgement without prejudicing the violation that may have originated not in the application of the rule, but rather in the rule itself, in which case its unconstitutionality stems from its incompatibility with that right.

In the case in question, the ruling being appealed does not reject a resolution of the basis of the case as sought by the plaintiff — the recognition of civil effectiveness of a canonic judgement that annuls a marriage — but instead, the civil judge, in perfect fulfillment of his duty to safeguard the purity of procedural law, demands compliance with a procedural rule — the Second Additional Provision of Law 30/1981 — in accordance with the only possible interpretation of that rule. This provision states that if "opposition exists, both the parties and the prosecutor maintain their right to file a claim in the appropriate court." According to this legal prescription, this is the procedural process by which the civil judge would have to decide on the civil effectiveness of the canonic ruling, a matter which would thereby not be prejudged.

For these reasons, the ruling in the case being appealed does completely and fully satisfy the executant's right to due process, which only guarantees her the right to have her claim resolved in the appropriate proceedings, and which at the same time, respects the right also conferred by article 24 of the *CE* to the opposing party of having access to the procedures that the law provides, a right which could be violated if this party were not allowed to contradict the executor's claims in the "appropriate court."

This judgement, with which I disagree, and SSTC 66/1982 and 65/1985 do not understand this matter in the way that I do, and their error undoubtedly lies in attributing procedural effects to the second transitory provision of the Convention on Legal Matters between the Kingdom of Spain and the Holy See dated 3 January 1979, and article XXIV of the 1953

Concordat, which they do not have. This leads them to support a doctrine which essentially says that the civil judge, when presented with the plaintiff's appeal, is obliged to mechanically recognize in an immediate and irreversible manner, the civil effectiveness of the canonic judgement, with no further proceedings and absolutely independent of what the other party might allege.

I do not believe that such a doctrine is acceptable as it, in essence, denies the civil judge the possibility of exercising his full jurisdiction which is recognized by STC 1/1981 and even by some Supreme Court decisions prior to the Constitution. It does this with no legal grounds because the second transitory Provision of the Convention does not provide for any kind of procedure or have as its purpose the determination of which is the appropriate procedure with which to get the judge to recognize the civil effectiveness of canonic rulings, without adapting the substantive aspects of the 1953 Concordat to the new postulates and material values approved by the Spanish Constitution (*CE*).

In this sense, and as further proof that this judgement is in error, I have no problem admitting, for hypothetical purposes, that the 1979 Convention establishes a new configuration as regards the legal relationship between the State and the Catholic Church, in which civil judges are given the authority to utilize the full scope of their jurisdiction in cases dealing with the recognition of the civil effectiveness of canonic judgements in the sense that they can review the material content of those decisions in order to decide if that recognition does or does not comply with State Law. They can also establish a transitory rule stating that "the cases that are pending before Ecclesiastic Courts at the time this Convention enters into force, will proceed in said Courts, and the rulings will have civil effectiveness as stipulated in article XXIV of the 1953 Concordat," which according to the hypothetical thesis we've presented, would prohibit the civil judge form carrying out this control and oblige him to automatically recognize the judgement.

This thesis, related to article XXIV of the Convention, was not unanimously accepted in jurisprudence even before the Constitution was approved and clearly shows that this principle and the Second Transitory Provision of the Agreement do not stipulate when the judge should exercise his jurisdiction, whatever its scope may be, and therefore, they do not replace the Second Additional Provision of Law 30/1981, nor cause it to be in direct conflict with the executant's right to a specific judicial procedure other than the ones established by that Law as guaranteed by his right to due process.

The inevitable conclusion, therefore, is that the judge's decision to remit the plaintiff to the "appropriate court proceedings" by applying the additional Provision, does not violate the fundamental right invoked by the plaintiff, nor can it, subsequently, grant the protection sought unless an explanation with satisfactory reasoning is given to show that this violation did not arise from the irreproachable judicial decision, but rather from the legal rule applied in the decision. However, in order to do that, the additional Provision would have to be considered unconstitutional because it would prohibit the judge from automatically recognizing the civil effectiveness of a judgement without any consideration whatsoever of the other party's opposition. This would seriously limit the executant's right to automatic recognition and that would consequently constitute a violation of the right to due process. This would be paramount to declaring that those individuals who seek to enforce a canonic judgement have the right, based directly on article 24 of the *CE*, to be exempt from all proceedings and to have civil effectiveness recognized immediately and without further questioning. In my opinion, this doctrine is one that undoubtedly has doctrinal difficulties that are not easy to overcome.

Finally, we should add that in reality, the problem presented by the appellant is a question of ordinary legality with no constitutional relevance and what has happened is simply that the judge, who was legitimately exercising the exclusive jurisdictional authority that is conferred on him by article 117.3 of the *CE*, applied procedural rules in a reasonable manner when he identified the rule to be applied without employing a selection procedure, because there was no concurrence of procedural rules from which to choose. In this application of ordinary law there also does not exist an interpretive *res dubia* that would allow a choice to be made as to which of the possible interpretations is the most favorable in terms of the effectiveness of the right to due process. Therefore, from a constitutional point of view, no discussion can take place as to an incorrect application of the Law and no challenge to the ruling can be made based on a supposed retroactive application of Law 30/1981, because due to the fact that Law 30/1981 predated the filing of the claim for enforcement of the canonic judgement, dated 1987, this is totally impossible.

I offer all of the aforementioned reasons in support of my position that protection should be denied and that the doctrine of SSTC 66/1982 and 65/1985 should be rectified. I sincerely believe that the Constitutional Court should maintain an attitude of constant theoretical refinement, especially when it is clear that the doctrine that needs to be rectified leads us to persist in a highly questionable denaturalization of the limits of constitutional jurisprudence in the area of the protection of rights, as is the case when what

is no more than a simple question of ordinary law is converted into a constitutional problem. This type of action even leads us to annul decisions in which there has been an impeccable application of a law currently in effect without questioning or expressing any doubt whatsoever about the constitutionality of doing so.

My discrepancy with the judgement in question is expressed with the maximum respect for and the unconditional acceptance of the decision taken by the majority whose right to define and apply constitutional law I clearly recognize."

## 3. Family Law. Custody of minors

**— ATS 19 February 1991 in *REDI*, 1991, p. 80.**
**Judgement issued in France regarding the custody of minors. Ordinary Law: application of the Spanisb-French Accord of 1969. *Exequatur*: yes.**

"Even though the decision in question is not purely and simply whether or not to recognize a foreign judgement, but rather whether to recognize a judgement regarding the custody of minors, which at the international level is regulated by Council of Europe Convention number 105, this Convention cannot be applied in this case because said custody was recognized in Luxembourg on 20 May 1980, and the Convention did not take effect in Spain until 1 September 1984, clearly after the judgement whose recognition is being sought was issued.

For the same reason, the convention on competence and the law applicable in matters regarding the protection of minors — number 10 of the Conference of The Hague, 5 October 1961 — cannot be applied because it went into effect in Spain on 21 July 1987.

The question should therefore be redirected towards the Convention between the Kingdom of Spain and France of 28 March 1969, and specifically to articles 951 *et seq.* of the *LECiv.* Consistent with these rules and taking *LOPJ* article 22.3 into account, it is not customary for objections to be made as to the jurisdictional authority of the French courts nor the type of action being filed.

Before continuing, the exact nature of the problem should be clarified. This is not a problem related to the enforcement of a decision awarding the custody of minors, nor a change in a decision of that nature, nor the restitution of a minor who has been unduly detained against the wishes of his guardian, but rather one related to the recognition — different from enforcement — of a harmonized judicial decision mutually agreed to by the parents on the subject of visitation rights with their daughter. This

recognition, according to the French judgement, functions both as a fact which requires the French courts to remove any obstacles imposed on a Spanish citizen as regards the exercise of his visitation rights, and as a legal right which allows authorities, courts and civil servants to make any decision they deem necessary in cases of non-compliance by either the Spanish or French citizen.

Therefore, the recognition of the French judgement gives the interested parties valid and effective legal rights in their custodial relations, without overstepping jurisdictions or producing acts of judicial or administrative enforcement. According to the Conventions cited in the first two sections of this decision, if these acts were to occur at some later point in time, jurisdiction would pertain to the authorities designated in them or to ordinary judges.

In the aforementioned, nothing is found from a legal or public law point of view that would warrant the rejection of the *exequatur*, but rather compliance with the terms of a specific Convention which cannot be applied retroactively, by means of a more generic one. This Convention establishes less bureaucratic procedures for the recognition and subsequent enforcement of the decision by non-judicial authorities alone or in collaboration with their judicial counterparts."

## 4. Family Law. Divorce

**— ATS 24 May 1991, in *REDI* 1991 p. 90.**
**Divorce declared in the U.S. Type of Conditions: control of the international judicial jurisdiction of the original court. *Exequatur*: yes.**

"Perhaps the most complex aspect here is the adjudication of property as it is possible that according to article 22.1 *LOPJ*, different competencies exclusive to Spanish courts may be at issue. In this particular case, the real estate held exclusively by the husband presents no complications as there is no question as to the type of property ownership involved. As regards real estate located in the United States, there are also no objections to make as Spanish courts cannot claim any jurisdictional authority over them. The only case in which there could be any obstacle is regarding a piece of Spanish real estate located in the Manga del Mar Menor area that was sold jointly. However, as this is not a purely real action, and as it is the consequence of a complex divorce action, a rule of exclusive jurisdiction which would impede the *exequatur* cannot be invoked, and therefore only recognition is granted."

## 5. Arbitration Agreement and International Jurisdiction

**— ATS 1 March 1991, in *REDI* 1991 p. 95.**
**French judgement imposing a fine. Ordinary system: 1969 Convention hetween Spain and France. Control of international judicial jurisdiction of the original court. *Exequatur*: yes.**

"Clause 31.1 of the contract must be considered in order to resolve the dispute presented here. This clause regulates the proceedings which in our law and jurisprudence is called arbitration. This clause, which allows for the submittal of technical differences to a highly qualified third party, produces serious legal consequences of two types: those related to the terms and conditions of the contract itself and those having to do with jurisdictional authority.

As regards the clauses of the contract, these technical differences have an effect on the legal compliance and responsibility inherent in the contract, these being questions and responsibilities that are completely different from any other that could come up within the contract. This said, it must be kept in mind that when Gueria Industries demands the use of an arbitrator, it does so on behalf of a French firm based in that country, and then, in the protocol which formalizes the arbitration, accepts the residency of the arbitrator, the place where his/her work will be carried out and the fact that the decision issued can not be appealed. The legal translation of this, for our purposes, is that the arbitrator's decision creates an obligation in the foreign county between a Spaniard and a foreigner, and that that decision should be complied with in the foreign country because that is where critical judgements as to its proper fulfillment can be made. It does not really matter where the technical operations that produce compliance with the decision are carried out.

From a procedural perspective, this specific, voluntary and unrestricted submittal means there will be a displacement of the point of connection to an area other than the original one, thereby creating a different point of jurisdictional authority — the French one. Based on these antecedents, article 9 of the Convention between Spain and France should be applied. (...) Therefore, in this case the French Courts' rejection of the exception to real lack of jurisdiction as presented by Guría Industries is of utmost importance from the point at which the grounds for the exception implicate Spanish jurisdiction.

From a territorial perspective, the lack of jurisdiction that Guría Industry alleges could present problems related to the original contract, but not related to the legal consequences of the arbitrator's decision establishing the

French court's jurisdictional authority. For these effects and purposes, the judgement on jurisdiction is correct according to article 7.7 of the Spanish-French Convention on the recognition and enforcement of resolutions in civil and mercantile matters.

Furthermore, article 8 of the cited Convention gives the Courts being challenged the right to refuse to recognize the foreign decision when, due to the type of case involved, jurisdiction pertains completely and exclusively to the State itself, because according to article 22.1 *LOPJ*, this question does not pertain exclusively to Spanish judges and courts.

There remain two aspects to deal with: Guría Industries alludes to a second arbitration done behind its back which caused defenselessness. This second arbitration never took place. At the time the arbitrator's task was formally given to him, he was asked to quantify damages, and in his decision he declined to act on this issue stating that once the damages, their causes and the way in which to remedy them were determined, the quantification could be done during the guaranteed visit the ship was to make in the immediate future, and this is exactly what was done.

The failure of these operations was the motive for the expert report made by the arbitrator himself, but not as the arbitrator but rather as an expert speaking to the question of the amount of the damages. In this context, the report is simply one of many that are commissioned and used in the preparation of a lawsuit. From this point of view, there is no defenselessness but rather the use, by the plaintiff, with notification given to Guría Industries, of his freedom to seek out expert reports that would support a later complaint (document n. 18 *bis*).

And finally, the possibly faulty citation merits special treatment. Article 4 of the Spanish-French Convention provides for the refusal of recognition when the notice of the initiation of a trial is not given to the defendant so as to assure him/her sufficient time in which to prepare a defense. A first look would lead us to deny recognition, and, consequently, the enforcement of the decision, as the citation did not reach the Spanish defendant until 26 July 1978. However, upon reading the judgement issued by the Burdeos Court, we see that the same day the citation was delivered, a certified letter was sent informing him that hearings in the La Rochelle Commerce Court (1st judgement) would begin on 22 September 1978; this would allow the defendant to appear before the court, which he did not do. Moreover, he appealed to the Poitiers Court, where it is recorded that he defended himself and moved for cassation invoking all possible legal remedies. He appeared once again in the Burdeos Court and waived his motion for cassation against this last judgement, and therefore, as the Burdeos Court stated, there is no

defenselessness, but rather a negligence on the defense's part to protect his own interests."

## V. INTERNATIONAL COMMERCIAL ARBITRATION

### 1. Relations between the 1958 New York Convention and the 1961 European Convention on International Arbitration

**— ATS 27 February 1991, *REDI* 1991 p. 97.**
**Recognition of foreign arbitration awards. Applicable International Convention. The nature of the exequatur proceeding.**

"In response to the question presented here, which attempts to introduce an incident which would normally be the object of an ordinary declarative trial into a proceeding on the recognition and enforcement of arbitration, we should submit to the June 10, 1958, Conventions on the recognition and enforcement of foreign arbitration awards (*BOE*, 11.7.77) which are also known as the New York Convention and the 21 April 1911, European Convention on International Arbitration (*BOE*, 4.10.75).

Using the language of the Conventions, we could say that the European Convention deals with questions of which law to apply and the jurisdiction of legal authorities and arbitrators, and the New York Convention deals with the recognition and enforcement of arbitration awards and rulings. In this sense, even though the chronology is different, the legal-logical order of interpretation and application indicates that the European Convention should be contemplated first as it defines applicable law, the competency of the parties, the conditions of the objects, the effectiveness and validity of arbitration pacts — considered in and of themselves or as part of a contract — and the means by which to oppose arbitration on the grounds of jurisdictional incompetency or the ineffectiveness or validity of the arbitrational clause or the arbitration award. In any case, discussion on the 1961 European Convention is a legal and logical first step as the creation of arbitration, judicial competency and the upholding of an arbitration award depend on it. This is the state of the issue and from this legal-logical point of view, the opponent's petition for recognition is not possible.

From another perspective, it is an incontrovertible rule in all international treaties on the recognition and enforcement of judicial decisions and arbitraments that in order to grant recognition and enforcement the merits of the case cannot be questioned or, at most, that questioning must be very

limited and strictly related to issues regarding the recognition or enforcement being sought. This issue is addressed in articles 951 to 958 *LECiv* which state that the only permissible control in this regard is the one related to the legality of the obligation and its conformity to domestic public law.

From the perspective of domestic procedural law, the articulation desired here cannot be achieved. The *exequatur* is not really a trial and the provisions of article 741 *et seq.* of the *LECiv*, maxime, are not included in the *exequatur*, when, as defined in article 951 to 958 of the *LECiv*, especially article 954 of the *LECiv*, the claim would have to limit itself to the negative aspects of the cited article and not to any others, unless what was really hoped for was an atypical and unconnected countercharge against which the opposing party would have no real possibility of defending himself. Incidental recognition, in cases where it is allowed, is part of a hypothesis that is exactly the opposite of what is being proposed here; in these cases [recognition] would be a decisive factor related to the merits of another issue that is necessary for the appropriate resolution of that matter. What is attempted here — against all logical order — is to turn this issue and its merits into an element that affects whether the formal element succeeds or not. And even from the perspective of the procedural defense of the opposing party, proceeding in this way would lead this Court to render a decision that could not be appealed on whether the arbitration clause of an international contract is valid or not (art. 759 and 761 *LECiv*). This violates the fundamental principle of the right to appeal.

In related issues, article VI of the European Convention on Arbitration includes two sections: the first regulates the procedural exception from obligation when faced with the initial jurisdictional proceedings, and the second regulates court actions on the validity of the arbitration clause, a proceeding which must take place before the beginning of arbitration (art. VI.3). If the opponent's theory were to be accepted, we would have a case in which, by reviewing the existence of an arbitration clause, the *exequatur* would be used to annul an arbitration award outside of the normal channels established in article IX of the Convention.

Furthermore, article V of this rule foresees exactly the position that the opposing party is attempting to take here. In fact, article V.1 states that the arbitrator's lack of jurisdictional authority due to the inexistence of an (arbitration) clause should be stated at the time allegations are presented in the arbitrational proceedings. In article 3, the arbitrator is given the right to recognize both his own jurisdictional authority and the validity of the arbitration clause or the contract of which it forms part, without fear of appeal. So the correct time for presenting this claim was then, not now.

Therefore, the consequences of what has occurred here can only be attributed to the individual who, having the right to, did not act in a legally useful manner. It is also important to add at this point that the document presented now at the incorrect time, in an attempt to try to invalidate submission to international arbitration, is a photocopy with no guarantee of authenticity.

Having clarified the previous issues, the problem that remains centers on investigating if the arbitration award complies with the conditions established in the 1958 New York Convention. According to articles IV and V of this Convention, we should proceed to recognize and order enforcement, given that all of the requirements of said articles have been met: the appellant did not make use of the means of defense available to him and the rules of procedure used are the appropriate ones according to art. III of the Convention."

## VI. CHOICE OF LAW. SOME GENERAL PROBLEMS

### 1. Proof of foreign law

**— STS 16 July 1991, *Ar.Rep.J.* 1991, n. 5389**
**Foreign law as a fact.**

*"Legal Grounds:*

Second. — The set of grounds related to the alleged error in the evaluation of the evidence is headed up by the already resolved question of the legal personality of the plaintiff. This is, in principle, a new question, presented for the first time in the defendant's written conclusions — completely outside of the legal-evidentiary phase of the case — and therefore an appeal on this ground is impossible. However, in addition to this, the rejection of this ground is correctly reasoned in the judgement being appealed, and takes into account, without including a formal reference to it, this court's doctrine regarding the application of foreign law. Foreign law is considered a de facto question, and as such must be alleged and proven by the party who invokes it, who is required to accredit the exact entity of the law in effect as well as its scope and its authorized interpretation in such a way that its application does not give rise to the slightest reasonable doubt in Spanish Courts, and all of this must be accompanied by the pertinent certified documentation. Decisions 1-2-1934 (R. 227); 9-1-1936 (R. 49); 30-6-1962 (R. 3322); 28-10-1968 (R. 4850); 4-10-1982 (R. 5537); 12-1-1989

(R. 100); 11-5-1989 (R. 3758), etc. This doctrine must be taken into account (given the contents of articles 9 to 11 of the *Código Civil*) in order to determine and judge the lack of legal personality which the plaintiff is charged with. The foreign provisions of this doctrine are absent in this litigation".

### 2. Proof of foreign law

**— STS 17 December 1991, *Ar.Rep.J.* 1991, n. 9717.**
**Note: See XI. Succession.**

### 3. Burden of proof of foreign law

**— STS 19 June 1991, *Ar.Rep.J.* 1991, n. 4637.**
**Note: See XII. Contracts.**

## IX. NATURAL PERSONS: LEGAL INDIVIDUALITY, CAPACITY AND NAME

### 1. Custody of minors

**— STS 21 June 1991, *Ar.Rep.J.* 1991, n. 4570.**
**Attempt to institute temporary custody of a foreign minor in Spain, applicable law and procedural channels.**

*"Legal grounds:*

First. Mr. J.W.V.S. and the married couple formed by Mr. T.M.F. and Mrs. E.Ll.S., filed a small claims suit (*juicio declarativo de menor cuantía*) against the Public Ministry and any individual who might object to the establishment of temporary custody of the child K.I.V.S. with the aforementioned couple, as Mr. V.S. is currently in prison. The suit is based on the following allegations as to the facts which are here summarized: 1) Mr. J.W.V.S. and Ms. L.L.J. de M., deceased, both citizens of the Netherlands, met in February, 1977, and married in Noordwijk (Holland) on 23 September of the same year, and on 7 January 1980, a daughter, named K. was born to them in Seria, state of Brunei (Malaysia). 2) In April 1977, Mr. V.S. bought a piece of land within the city limits of Alfaz de Pi, upon which he built a house which would serve as the family home from the middle of 1984 on, the time at which he, his wife and his daughter

established permanent residency in Spain after his retirement as an Electro-Technical Engineer for Shell Corporation. 3) Mr. V.S. and Ms. de M's marital life suffered from a continual lack of mutual respect which on several occasions degenerated into aggressive behavior and destruction of property, and for this reason, the daughter, Kathy, spent most of her days at the home of Mr. and Mrs. M., neighbors and friends of her parents. After several periods of separation, the situation was deemed impossible, and the parents came to the mutual agreement to end their relationship, and so on 15 April 1985, the Court of The Hague granted the divorce and stipulated that given the age of the child, she should remain in the custody of her mother with secondary custody granted to the father. The mother was also awarded the house that was the family home in Spain although it was agreed that the garage or basement of the house would be reserved for the father so that he could be close to his daughter. 4) On 6 March 1986, after a very serious family argument between the child's parents which included mutual aggressions and attacks, Mrs. de M. died and Mr. V.S. was taken to the Foncalent Penitentiary where he remains at the present time. The mother's death, according to the Medical Examiner's report, was violent and the result of homicide perpetrated by Mr. V.S., who claimed the death was accidental and the result of the tumultuous argument previously mentioned in which she received a blow to the head after being pushed. 5) Before the death of Mrs. de M., their daughter spent longer and longer periods of time with Mr. and Mrs. M. and their three minor children, attended school with them at the Colegio de la Nuncia School, and ate in their home. After the incident, she was cared for by Mr. and Mrs. M. as if she were their own daughter, and her integration into their family and their habits was total and untraumatic, and furthermore, the child, more Spanish than Dutch, maintains a very good father-daughter relationship with her father. 6) Word was received that a sister of Mrs. de M. was willing to take K. to Holland, it is believed due to the fact that she is the universal heir to her mother's estate. It should be pointed out that K. scarcely knew her mother's sister, which would make it extremely prejudicial for her to be sent to Holland when with the M. family she has finally found the stability she never had. At the proceedings, which were held in the *Tribunal de Primera Instancia* n.2 (Court of First Instance number 2) in Benidorm, the parties present were the District Attorney, who moved that a judgement based on the evidence and the applicable legal grounds be issued, and Ms. L.B.V. de M. appointed by Dutch Courts as the testamentary guardian of the minor child, K.V.S., and counsel for the defense also appointed by the Court as shown on the record of 15 January 1987, and clarified on the February 15 record, by which the *exequatur* of the divorce ruling issued by the Dutch Courts and currently

before the First Division of the Supreme Court was obtained. The appearance of said individual was to oppose the claim and request that the exceptions based on the inappropriateness of the proceedings and of the *litis pendens* be accepted, without entering into the merits of the case, and if this could not be, that the plaintiff's action be rejected. On January 26, 1988, the Court issued a decision dismissing the case and absolving the defendants of the claims made in said suit due to the inappropriateness of the proceedings, with no attempt to evaluate the merits of the case. This decision was confirmed by the ruling issued on 11 April 1989, by the Sixth Section of the *Audiencia Provincial de Valencia* (Provincial Courts — Valencia). It is this second judgement which is being appealed by Mr. J.W.V.S.

Second. The appeal is based on four grounds protected article 1692.5 of the *LECiv*, except for the first one, which is covered by number 3 of said article. The first two grounds were declared inadmissible by a decision issued by the Court on 21 December 1989. This then reduces the appeals to be studied to the last two, numbers 3 and 4. The infringement alleged in the third ground — incorrect application — refers to the Additional Provision of Law 13/1983, dated October 24 (R. 1151 and Appendix 1975--85, 207) that modifies the *C.c.* on matters of custody, which, the appellant claims, is not applicable in the case of proceedings, "in cases in which it was prohibited by: a) the requested establishment of "temporary custody", an institution unknown to our legislature and which was sought under Dutch law and in accordance with it, which is why the claim was not admissible under Title IX, nor X of Book I of the *C.c.*; b) article 482.2 of the *LECiv*, which, consistent with the wording of Law 34/84 specifies exactly which proceedings are to be used when suing, and c) the provision in article 9.6 of the Preliminary Title of the *C.c.*, which excluded the hope for protection under the already mentioned Titles IX and X of Book 1 of the Civil Code by demanding submission to Dutch law." The appellant also argues that the judgement being appealed confuses the "formalities" of the assignment of the custodianship with the "nature and scope" of the institution; the first must comply with Spanish law (art. 9.6,II of the *C.c.*) and the second, on the other hand, is subject to Dutch law (number 6) of art. 9 of the Code). The inclusion of the ground in number 5 remains doubtful because although it invokes a possible violation of a legal rule due to incorrect application, the fact that the rule is procedural leads to the conclusion that this ground should have been reintroduced under article 1692.3.

Third. It is true that the concept of "temporary" custody is not found in our law although some similarities could be found with the concept of the *de facto* guardianship that is regulated by articles 303 and the next few articles in our *C.c.* and in the "acceptance" which is mentioned in articles 172 and

173 of that legal text, which as a consequence causes the substantive aspects of this institution to be regulated by Dutch Law given the nationality of the minor child in question and the contents of the rules of private international law found in our Legal Code in Chapter IV of the Preliminary Title, and especially those listed in numbers 1 and 6 of article 9, a rule alluded to in the ground by number 8, which, without a doubt, was an involuntary error. Nevertheless, the procedural aspects, understood to be those having to do with the requirements and formalities that must be observed when drawing up and instituting this custody, remain subject to Spanish law as stipulated in articles 8.2 and 9.6, second paragraph of the *C.c.*, a fact which is understood and recognized by the appellant. Therefore, by keeping the distinction just made in mind, it seems quite clear that the procedural processing that could be applied to the claim in this case would be the one corresponding to Spanish law, and it is here that the Additional Provision of Law 13/1983 comes into play establishing that the correct procedure would be the one pertaining to voluntary jurisdiction, as this provision, due to is specific and special nature, would override those found in articles 482.2 and 484.2 of the *LECiv.* Moreover, this Additional Provision does not lose its legal effect simply because the Government has not yet complied with the mandate of the final provision. All of the preceding leads to the conclusion that the *a quo* Court did not incorrectly apply the additional Provision, which clearly determines that the ground must be rejected."

## X. FAMILY LAW

### 1. Marriage

**— RDGRN 20 August 1991, *BIMJ* 1991, p. 5199.**
**Civil marriage ceremony performed in Melilla (Spain), possible obstacle based on the prior celebration of an Islamic marriage ceremony in Melilla.**

"*Legal grounds:*

II. The first obstacle outlined in the appeal to block authorization of the proposed civil wedding ceremony is the fact that none of the petitioners resides in Melilla, but this reading is clearly a material error due to the faulty composition of the form used, because it has been fully proven that one of the parties does indeed reside in that city and is registered with the Census Bureau there.

III. The second of the obstacles cited is that the parties to the marriage have already been married in an Islamic ceremony in the city of Melilla, the interested party possessing Spanish citizenship since 1975. Now, this fact has not been sufficiently proven and is contradicted by the attached certificate of marital status and the certificate declaring single status, and by the results of the personal hearing carried out by the district attorney in a reserved and individual manner (*cfr.* art. 246 *RRC* — Civil Registry Regulation). But even if this marriage according to Muslim rites had taken place within Spanish territory, and given that the interested party is a Spanish citizen, this ceremony is not currently recognized nor can it have civil effect (*cfr.* art. 60 *C.c.* and the 17 June 1991 decision) as there still does not exist any agreement with the State nor with the State law alluded to in article 59 of the *C.c.*, so there is no reason why two people who have celebrated an exclusively religious ceremony with no civil effectiveness, should not solemnize their union through the civil ceremony provided for in Spanish legislation.

In accordance with regulations, this administration has agreed to accept the appeal and declare that there is no reason why the presiding judge should not authorize the ceremony."

## 2. Adoption

**— RDGRN 22 June 1991, *BIMJ* 1991, p. 4429.**

**A request to enter into the record of the Spanish Civil Registry, the adoption in Switzerland of a Spanish minor by his grandparents due to the incompetency of bis mother.**

"*Legal grounds:*

II. Given that there is no dispute regarding the fact that the adoption authorized by a Swiss Court is not valid as it affects Spanish citizens and dictates the adoption of a child by his maternal grandparents, in direct conflict with the express prohibition of such in article 175.3,1 of the *C.c.*, the question being studied here is if said adoption, even though it can not be duly inscribed, can be noted in the *Registro Civil Español* (Spanish Civil Registry) under the provisions of article 38.3 of the *LRC* (Civil Registry Act) which does allow the annotation of a fact relating to Spanish citizens which affects their civil status according to the foreign law, for purely informational purposes and without the entry ever being able to constitute the proof needed for inscription (*cfr.* art. 145, *RRC*).

III. In principle, there is no doubt that according to the text of article 38.3 of the *LRC* (*cfr.* also art. 152 *RRC*) this adoption, which took place in

Switzerland, affects the civil status of Spanish nationals according to Swiss law, and so there seems to be no reason to deny the desired annotation. However, the agreement being appealed prohibits the annotation because it feels that the fact that this annotation would reflect is completely null and void under Spanish law (*cfr.* art. 6.3 *C.c.*) and because "an annotation cannot be made if it is clear that it would be absolutely and unrepairably ineffective" as cited in article 151 of the *RRC*.

IV. These arguments cannot be accepted. Article 151 of the Regulation, if taken somewhat less literally, does not support article 38.3 of the *LRC*, but rather number 2 of article 38, in which, without making reference to any foreign Law, it is stated that the annotation of a "fact whose inscription cannot be admitted because some of its specific details cannot be legally accredited" can be admitted. While number 2 regulates the annotation of a fact which is not totally accredited, number 3 states that the elements related to civil status are fully justified and that those elements, while not valid under Spanish law, do influence the civil status of a Spanish citizen, due to the exclusive application of a foreign law.

V. The allegation that "acts contrary to compulsory or prohibitory rules are null according to the law" (art. 6.4 *C.c.*) is also not sufficient reason to deny annotation. Article 6 of the *C.c.* stipulates that the rules should establish different effects in case of infringement. Something very similar occurs in this case. There is a legal principle which, without denying the absolute nullity of the adoption, allows an annotation to be added to the *Registro Civil* (Civil Registry) which states a simple fact, and the entry, as was indicated earlier, is considered to be simply informative and in no way constitutes proof for purposes of inscription. This stipulation should be clearly highlighted in the entry itself and in any certification based on the Registry that is issued (*cfr.* art. 145, *RRC*). After all, we find here the same reasons that justify the annotations in cases of diverse surnames (O.M. 31 August 1988) or diverse first names (*cfr.* RDGRN dated 5 February 1990 and others cited in the prosecutor's legal opinions) in spite of the fact that the surnames or first names which affect a Spanish citizen under foreign law, directly infringe Spanish laws.

In accordance with the proposed regulation, this Department has agreed to accept the appeal and order that the adoption granted in a foreign country based on the attached public decree, be annotated along side the inscription of birth, with a clear indication that said adoption does not produce effects under Spanish law.

## XI. SUCCESSION

### 1. Last will and testament. Applicable Law. Proof of foreign law

**— STS 17 December 1991 (civil), *Ar.RepJ.* 1991, n. 9717.**
**Last will and testament authorized by a Moroccan subject according to Spanish Law: Nullity according to Koranic Law. Lack of proof of foreign law by the party who invoked it.**

*"Legal grounds:*

First. In the first ground, pursuant to article 1692.4 *LECiv*, an error on the judges' part is denounced, and the declaration of heirs of the principal, Mr. O.M.A., before the Notary Public in Villa-Nadrod is offered as documentary proof along with the expert report done by the erudite Mr. G. which shows, according to the appellants, that the aforementioned declaration of heirs, accepted by the Moroccan courts as shown in the suit, is the only valid document according to the law and the personal statutes applicable to the decedent.

In this ground an attempt is made to have the notarized will declared null and void in accordance with Spanish Law, and it is clear that the ground can not be accepted because it presents a question of legal interpretation, not of faulty evaluation of a fact which is what article 1962.4 of the *LECiv* authorizes. The rules that have been violated haven't even been cited, which does not fulfill the requirements for the filing of an appeal. It is not possible to remit to "applicable law" in general, this being contrary to the express provisions of article 1707.1 of the *LECiv*.

Second. In the second ground, pursuant to article 1692.5 of the *LECiv*, there is an alleged infraction due to the failure to apply the rules found in Book V "On Wills" by Daker 1-58-073 dated 20 November 1958 (20 by Reyeb, 1377) and Book VI "On the Order of Succession" by Daker, 22 November 1957 — 28 of Deber 11 of 1377 — in relation to articles 9 and 10 of the *C.c.*. In the pleadings of the case, the appellants cite articles 173 to 176, 188 to 190 and 191 to 194 as the infringed articles of certain "blocks" of legislation related to the *Código de Estatuto* (Special Code of Personal Statutes) applicable to Moroccan citizens — which was the citizenship held by the principal in this case. Pursuant to these articles, neither the content of the principal's will nor the way in which it was executed conformed to the special law applicable to the principal.

This ground must be dismissed because the appellants have not proven that Moroccan Law prohibits its citizens from executing a will in a foreign

country (in this case Spain) according to the legal stipulations of that country as regards content. They have also failed to prove that this special law prohibited disinheritance in a will (which is what the decedent did to the children of his previous marriage and to the woman who was his wife and is now the appellant, Ms. M.B.A.L.) nor that the decedent is limited to leaving to his wife and the children he had with her that which corresponds to them by Law (which he also did). The appellants had the burden of proof according to article 12.6 of the *C.c.*

Fourth. In the fourth ground, pursuant to article 1692.5 *LECiv*, the judgement being appealed is alleged to have violated the rules that regulate the reasons for disinheritance under Muslim Law.

The ground must be rejected not only because it once again has the same defect of remitting to groups or "blocks" of rules but also because the judgement being appealed accepts as proven the actions of the appellants which form part of a motion for disinheritance. Furthermore, instead of questioning the evidentiary results in this appeal through the right channels, the appellants simply state the opposite of that which has been accepted as proven".

## XII. CONTRACTS

### 1. Express choice of applicable law. Proof of foreign law

**— STS 19 June 1991, *Ar.Rep.J.* 1991, n. 4637**

**Action to annul a contract for the transport of water to the city of Ceuta (Spain) by a foreign company, clause granting the option of applying English Law.**

*"Legal Grounds:*

Second. The charge of inconsistency that is made in the ground that initiates the appeal is based on the claim that the Court did not examine this action to annul a contract, alleging that the English law applicable to this case "given that neither of the parties — as stated in the ground — alleged or questioned this specific point in the merits of the claim" was not established. Despite the fact that this charge was ruled inadmissible, it merits reconsideration because it claims that the inconsistency lies in the reasoning the judge used to arrive at the generic conclusion to dismiss the case which is expressly established in the judgement. However, it cannot be said that, in light of the mandate in article 359 of *LECiv*, the judgement

failed to address, or in other words, in its provisions it omitted the issue of the plaintiff's request for an action to annul the contract which she had made with the defendant, Scandorp Shipping, to transport potable water to Ceuta even though the arguments supporting dismissal were considered inadmissible because they were not alleged in the expository phase. It is the appellant's opinion that this circumstance converts a *ratio dicendi* into something other than a *causa petendi* according to the obscure text of the first ground which does not explain exactly what the alteration of the *causa petendi* is on which the inadmissible claim of inconsistency is based. As for the second ground, it is also bound to fail, especially taking into account the contents of the decision to reject the first ground and the unabashed alteration of the *causa petendi* being claimed. It should be noted that, not only in the appellant's use of delaying tactics such as the presentation of an exception based on lack of jurisdictional authority and a writ of opposition, but also in the answer to the suit that followed the denial of that exception, we find time and again the issue of the applicability in "Spanish law" — precisely in Spanish law — of English legislation in matters having to do with submission to the courts of the country in which the contract was drawn up and signed as well as in issues concerned with the validity, interpretation and enforcement of the contract whose annulment was being sought. Therefore it is quite clear that, as has been stated, the Court did nothing more than respond to the facts as presented and defended by the parties to the extent that it could according to the terms of the Agreement, and that the judge's decision not to rule on the annulment of the contract cannot be considered an infringement of article 1.7 of the *C.c.* once it was shown that the action to annul was denied because English law, which was applicable to this case pursuant to article 10.5 of the *C.c.*, and the use of which is also recognized in the *C.c.* (art. 1.255), had not been established as regards its contents or scope. According to the rules in our legal code which govern matters of this type, this responsibility pertained to the party who sought to subject the action to annul the contract to English law.

Third. No better luck is in store for the third ground in which the appellant challenges the incorrect application of no. 5 of article 10.5 of the *C.c.*. The double limitation on the applicability of a foreign law that affects the principle of freedom of autonomy in our civil law — that is, the exact nature of the submission and connection of the parties to the law freely chosen by them — which the appellant claims is lacking in this case, is unequivocally present in it. This is clearly seen in Clause 40 of the Policy — presented by the plaintiff herself (pages 7 to 24) — in which apart from establishing submission of the case to English jurisdiction — a question which procedurally we cannot enter into here — the interpretation of the

terms and conditions of the contract is also established as is the relationship between the two parties to the contract, one of whom is an English citizen and resides in England. These terms and conditions are to be implemented "according to the law of England," as the appealed judgement points out. The judgement also defends the application of foreign law, "because, in any case (in addition to the submission) — it states — English law should be applied pursuant to the last section of the paragraph, number and article cited, (place contract was signed)" and there is no effective challenge made to this position in this case. This is what determines the failure of not only this ground, but also the following one (and with no less justification) in which, pursuant article 2.6,11 of the *C.c.*, an attempt is made to declare the defendant responsible for establishing the existence and scope of English law. It having been proven that English law was applicable in this case, the judgement charged the plaintiff, as she has correctly claimed here, and not her opponent with the responsibility of establishing the origins of the action to annul according to the civil rules in effect at the time in the country whose laws governed the contract."

## XIII. TORTS

## XIV. PROPERTY

### 1. Trade marks. Unfair competition. Applicable law

**— STS 23 April 1991, *Ar.Rep.J.* 1991, n. 3019.**
**Claim made by foreign companies against a Spanish firm for copying distinctive signs for use on products sold in Spain, article 10 *bis* of the Paris Convention on the protection of copyrights, 1883.**

*"Legal grounds:*

Fourth. In the second ground, due to an error in interpretation, the alleged infringement is also an infringement of article 12 of the Statute, but in this case, in relation to number 13 of said Statute and of article 10 *bis* of the Paris Convention on the Protection of Copyrights, dated 20 March 1883, (R. 1956, 663, 1006 and N. Dicc. 24994), the Stockholm Act of 14 July 1967 (R. 1974, 254 and N. Dicc. 25042) and the related case law, citing also article 112.4 of Law 25/1970, dated December 2 (R. 2090 and N. Dicc

30581) by which the Statute on Wine, Vineyards and Alcohol was approved. The grounds for this appeal are basically that even though the label on the bottle of the product being sold by the defendant does not include the word "whisky", the other elements, such as the legends and the figure of a Scottish bagpipe player, would lead the public to believe that the product was Scotch whisky and not *aguardiente*. The fact that a Scottish bagpipe player is stamped on the label is not in any way related to the prohibitions included in articles 124.13 of the Statute or 10 *bis*.3,3 of the Paris Convention: "the insignias in which there are legends that might constitute a false indication of origin, credit or industrial reputation" and "the use of indications or declarations in the exercise of commerce which could create a misconception in the public's mind as to the nature, mode of manufacturing, characteristics, possible uses or quantity of the products." This is because no matter how much breadth of meaning can be given to an industrial drawing of a Scottish bagpipe player, it could never be considered to be a "legend, indication or declaration". As for the legends and indications on the label in question, we must keep in mind the assumptions of fact established in the first trial, in particular the following: "as regards the exact wording on the bottle, it leads us to believe that this is a product that is made and bottled in Spain by *Destilerias Campeny* (Campeny Distilleries) and there is no indication that it is any type of whisky" and "as regards everything that is missing on the defendant's label, which on the other hand, refers to the manufacturer — Campeny Distilleries — as well as its manufacturing, mixing and bottling in Spain". Therefore the facts presented show that the error or the confusion does not exist and therefore the prohibitions included in the principles that have supposedly been infringed are not applicable, and these facts likewise invalidate the provisions included in article 112.4 of Law 25/1970: "The labels on products made in Spain and destined for sale on the domestic market, which are totally or partially written in a foreign language, must include the statement "Made in Spain" in a clear and visible spot." It is also highly debatable whether the rules established in this law can be applied to questions of copyright or not, even though said law dedicates an entire chapter — articles 119 to 132 — to the issue of infringements of its own provisions and to the procedures for redress." All of the preceding shows that the *a quo* court did not violate the laws cited or the jurisprudential doctrine of the decisions being reviewed in relation to article 124.13 of the Statute, and therefore this ground is rejected.

Fifth. In the third ground, an infringement is alleged due to the incorrect interpretation of article (n. 10) of the aforementioned Paris Convention and related case law. The truth is that the inviability of this ground is a consequence of the failure of the previous one, not because the reasoning for

the two is similar, but because the "factum" prepared for the second — which is not reproduced here in order to avoid unnecessary repetition — is sufficient in and of itself to invalidate the supposed infringement of the aforementioned article 10.1, establishes that "the provisions of the preceding article will be applied when there is a direct or indirect use of a false indication concerning the origin or a product or its producer, manufacturer or dealer," given that according to this "factum" none of the allegedly false indications described in the section that was just transcribed could be found on the label. As regards article 10.2 which is also transcribed in the ground, a simple reading of it shows the lack of legitimate interest of the appellant as regards his invocation of the rights protected by this article, because section 2 recognizes "all producers, manufacturers, or dealers dedicated to the production, manufacturing or sale of this product as an interested party" and it is clear that these qualities can not be attributed to "the Scotch Whisky Association" because in its fundamental objectives, outlined in the suit's first statement of fact, there is nothing on production, manufacturing or commercialization. Therefore, as the *a quo* court does not find any infringement of article 10 or of any concepts related to the doctrine set out in the judgement reviewed in the last ground of this appeal, the inviability of the ground is reconfirmed."

## XV. COMPETITION LAW

### 1. Unfair competition

**— STS 23 April 1991, *Ar.RepJ.* 1991, n. 3019.**
**Note: See XIV. Property.**

## XVI. INVESTMENT AND FOREIGN EXCHANGE

### 1. Contracts

**— STS 11 October 1991 (civil), *Ar.RepJ.* 1991, n. 6914.**
**Contract for a loan in foreign currency. Enforcement of a judgement that requires the fulfillment of a monetary obligation in foreign currency. Kind of currency which should be used as payment.**

*"Legal Grounds:*

Fourth. In the third and final ground, with procedural support found in article 1692.5 of the *LECiv* and by invoking article 1170 of the *C.c.*, the *Ley de Control de Cambios* (Law on the Control of Currency Exchange) dated 12 October 1979 (R. 2939 and Sections 1975--85, 9830) and Organic Law 10/83, dated 16 August 1983, (R. 1800, 2664 and Section 1975-85, 9830) which modifies Chapter 11 of the cited 1979 *Ley de Delitos Monetarios* (Law on Monetary Crimes), it seems that the appellant maintains that because she is a resident of Spain she could not pay a debt in Belgian francs to the plaintiff without committing a monetary crime because the plaintiff is not a resident, and this is, she claims, exactly what the judgement requires her to do. By moving away from the allegations in the ground, which all have to do with what was previously summarized, the appellant is trying to mix or confuse the only question debated in the trial, which was a strictly civil matter. This question had to do with the deadline for payment of a loan and the borrower's subsequent obligation to return the amount received and the interest that accrued on said amount. The appellant is attempting to confuse this with an issue related to the type of currency which should be used to effect the repayment and the administrative requirements that must be met in order to make the payment, a question which pertains strictly to the area of rules on the control of currency exchange and which will have to be specified in the enforcement phase of the decision. Accepting the unquestionable premise that it is legal to pay a monetary debt in foreign currency (art. 921.3, and 1435.2, both from the *LECiv*), by ordering the defendant, here the appellant, to return the amount of the loan in Belgian francs, the decision being appealed has complied with article 1170 of the *C.c.* according to which the payment of monetary debts should be made in the currency agreed upon. In this case the kind of currency was clearly indicated (as this was the type of currency received by the borrower) and there is nothing to prevent the payment from subsequently being made in the same currency if it is convertible foreign currency with an official rate of exchange and the obligation to pay in the same currency is authorized or legally permitted — articles 1435.2 of the *LECiv* and 47 of the *Ley Cambiaria y del Cheque* (Law on Exchange and Checks) (R. 1776, 2483 and Section 1975-1985, 3499 and 8431). Otherwise its equivalent in pesetas must be paid and all of the requirements related to the legal control of the exchange of currency must be met, something which the sentence being appealed here has clearly taken into account, albeit in a somewhat laconic way, when it states (legal ground 4) that in response to the plaintiff's petition "the invocation that the appellant makes of monetary rules is not an obstacle because in the appeal the plaintiff, when she asks for the return of

principal and interest in Belgian francs, is careful to point out that she followed "the principles of article 1170 of the *C.c.* and the current related set of rules" and took them into account at the time of liquidation, thereby avoiding the difficulties alleged by the appellant." And furthermore, when the verdict of the first court trial (confirmed in its entirety by the judgement being challenged here), after ordering the debt to be paid in Belgian francs, adds "protected from the provisions of article 1170 of the *C.c.* and the concordant and current rules," it implies, as was stated previously, that the determination of which currency should be used to effect the payment should be made in the enforcement phase of the decision according to the legislation on the control of currency exchange in matters of monetary obligations in foreign currency, but in no way does it imply that the debtor, here the appellant, would not have to pay off the debt, which is precisely what she seems to be hoping to achieve with this ground, which, based on all of the above, should be rejected".

## XVII. FOREIGN TRADE LAW

## XVIII. BUSINESS ASSOCIATION/CORPORATION

## XIX. BANKRUPTCY

## XX. TRANSPORT LAW

## XXI. LABOUR LAW AND SOCIAL SECURITY

### 1. Employment contract. International jurisdiction. Applicable Law

**— STS 15 March 1991, *Ar.Rep.J.* 1991, n. 1858.**
**Note: See above II. International Jurisdiction**

XXII. CRIMINAL LAW

XXIII. TAX LAW

XXIV. INTERLOCAL CONFLICT OF LAWS

## 1. Family Law. Matrimonial Property. Applicable Law

**— STS 15 November 1991 (civil), *Ar.Rep.J.* 1991, n. 8817.**
**Matrimonial economic regime: Determination of legal residence of the husband." Legal Residence" as a connecting factor.**

*"Legal Grounds:*

Second. In the first ground of the appeal there is an allegation of "an infringement of article 15.3 of the *C.c.*., in its previous version, which recognizes the acquisition of legal residency by means other than continued residence." In this ground it is argued that legal residence determines if an individual is subject to common civil law, special law or statutory law, with article 15.3 (in the version prior to *Decreto* (Decree) 1836/1974, dated 31 May 1974 [R. 1974, 1385 and N. Dicc 18760 note]) establishing that common legal residency is based on "uninterrupted residency" for two years when the interested party states that he wishes to claim that residency, or on "residency" for a period of ten years when an individual has made no declaration during that period rejecting legal residency, and that "the provisions of this article are applicable by reciprocity in Spanish provinces and territories that have different civil legislation." Therefore, the determining element in the acquisition of legal residency is none other than "residence" with the following judgements, among others, making pronouncements to this effect: 30-10-1901, 18-5-1932 (R. 1932, 1055), 3-6-1934 (R. 1934, 1087 and 1087 *bis*), 5-6-1935, 11-10-1960, (R. 1960, 3083) and 10-11-1961. The "habitual residence" is identified as the "place of residence" according to article 40 of the *C.c.*, regardless of administrative residence or registration with the municipal census bureau as is stated in the case law of the Supreme Court. S. 2-7-1926 distinguishes these types of residence from civil, administrative, procedural, statutory (foral) and international residence, and argues that the decision being appealed stated in its fifth legal ground, and considered it a proven fact, that Mr. M. resided in

Bata (Republic of Guinea) and therefore infringed article 15.3 of the *C.c.*, based on the fact that in spite of all this, in spite of recognizing that the deceased had resided in Bata and not within statutory territory, a change of residence took place.

Third. It is true according to the unchanging jurisprudential doctrine coming from the Court, that place of residence should not be confused with legal residency, according to municipal law, and that only certificates from the census bureau, voting census or civil registry should be considered as proof of such, and that the concept of habitual residency is a question of fact that must be decided by the court hearing the case. So, in this factual aspect, it is important to point out firstly that the statements attributed to the *a quo* court in the fifth ground of the decision being appealed, were made with the following literal content: "and it is also true that there is abundant demonstrative proof to show that Mr. M. resided in Bata; however, his real place of residence for civil purposes was considered to be Barcelona, where he maintained a home, even before he recognized that he had an illegitimate son (which he did in his last will and testament dated 18 January 1950) and before he married for the first time, so that even though his stay in Bata was lengthy (although from Mr. V's testimony it seems Mr. M. spent long periods of time in Spain, which were not merely vacations as indicated in the document on page 110), which is quite understandable given the geographic circumstances (distance and difficulties in transport), this residence was only business motivated as part of the activities of the company of which he was part owner were carried out there, with obvious predominance in both objective and subjective terms, of the family home over the business home." Therefore, the statement regarding residence in Bata cannot be accepted in and of itself as absolute or even demonstrative proof of a clear infringement of article 15.3 of the *C.c.* for the purposes stated in the appeal.

Fourth. In terms of the factual aspects alluded to earlier, what is truly transcendental is the conclusion arrived at by the *a quo* court in the aforementioned fifth ground: "This court, after weighing each and every piece of evidence, is fully convinced that Mr. M.M.A., had been residing in Barcelona for more than 10 years at the time he married Ms. M.M. de la F. on 12 May 1956". The facts on which this statement was made have not changed and they have not been challenged through the appropriate channels of appeal; therefore they are undoubtedly and correctly established by the aforementioned Court: "and therefore because he had acquired legal residency in Catalonia, said union is subject to the economic status of separation of property" and all of the above, with no need for further reasoning, is just cause for the rejection of the appeal because it is

impossible to find any infringement in the decision related to article 15.3 of the Code in its previous version. The inviability of the first ground for appeal produced the inviability of the next one, the second one, in which a claim is made of an "infringement of article 14.3 of the *C.c.* in its current version" *ad cautelum* and secondary to the case due to the fact that the legislation in effect at the time of death was considered applicable instead of the legislation in effect at the time of marriage, and this inviability is automatic as long as the principle, in its current version, regulates the means of acquisition of a change in legal residence in the same way the old one did".