REFLECTIONS ON A NEW INTERPRETATION OF ARTICLE 12 OF THE *CÓDIGO CIVIL*

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I. INTRODUCTION. ARTICLE 12 OF THE *CÓDIGO CIVIL:* FROM A GENERAL RULE TO A RESIDUAL RULE

Article 12 of the *Cc,* in the wording provided by Decree 1836/1974 which reformed the Code's preliminary chapter, was a novelty in the Spanish system of private international law (PIL) which up until that time had lacked guidelines for the application of the rule of conflict [1]. It is quite clear that the intention of lawmakers in 1974 was only to confirm article 12 of the *Cc* as the *general rule of application* in the area of the law applicable to the Spanish system of PIL. As Spanish doctrine has repeatedly shown, the lawmakers focused on this system from the general perspective of conflicts of law, and therefore article 12 of the *Cc* was theoretically called upon to solve the problems related to the application of the rules found in articles 8 through 11 of that code.

Nevertheless, ever since article 12 of the *Cc* entered into force, its general

1. Art. 12 of the Spanish *Código Civil* (Royal Decree 1836/1974, 31 May) states: "1. The qualification used to determine the rule of conflict applicable will always be done in accordance with Spanish law. 2. The remission to foreign law will be understood to be to its material law, without taking into account the renvoi that its rules of conflict can make to laws other than Spanish law. 3. In no case will foreign law be applicable when it is contrary to public policy. 4. Fraudulent evasion of the law is considered to be the use of a rule of conflict in order to avoid a mandatory Spanish law. 5. When a rule of conflict remits to tbe law of a State in which there coexist different legislative systems, the determination of which one is applicable will be done in accordance with the legislation of that State. 6. Courts and authorities will *ex officio* apply the rules of conflict of Spanish law. Any individual who invokes foreign law must prove its content and effectiveness by the means of evidence accepted under Spanish law. However, in order to apply foreign law, the judge can use any instrument for gathering information that he considers necessary, and can issue any court he considers appropriate for that purpose."

Spanish Yearbook of International Law, Volume II 1992, 3-31.

nature has been affected by different factors which have increased in importance with the passage of time. The result has been the limitation of the hoped for "general effectiveness" of article 12. Social, legal and political changes have taken place. As regards the first type of change, social matters that today are considered issues of PIL have undergone both qualitative and quantitative changes and are not anything like those contemplated by lawmakers in 1974. From this perspective, article 12 of the *Cc* seems to be out of date and unable to meet the demands of today's foreign private affairs. More important yet are the legal and political changes that have taken place which culminated in the enactment of the Spanish Constitution in 1978. These changes are linked to a series of different elements.

1. The Impact of the Spanish Constitution

The general impact of the Constitution on the Spanish system of PIL has already been amply seen in doctrine [2]. As regards how the adaptation of this system to the Constitution has affected article 12 of the *Cc* we must state that:

a) The system of material sources for the law established by the Constitution (especially articles 9 and 96.1) relegates article 12 of the *Cc* to a secondary position and gives it a limited role — a residual role — with conventional solutions winning out as we will see below. This becomes even more evident after Spain begins to participate more frequently in international PIL treaties.

b) The interpretation and application of the mechanisms stipulated in article 12 of the *Cc* are in strict accordance with constitutional principles (art. 5 *LOPJ*) [3]. Constitutional values dictate that in certain situations the mechanisms

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2. See J.D. González Campos and J.C. Fernández Rozas, *Derecho internacional privado, materiales de prácticas (Derecho judicial internacional)*, vol. I, p. 40—5 and the bibliography it cites. *Inter alia*, R. Arroyo Montero, "Derecho internacional privado y Constitución. Proyección en la jurisprudencia española de la doctrina del Tribunal Constitucional Federal de Alemania", *REDI*, vol. XL, (1988), p. 89—104 (especially footnote 4). J. D. González Campos, *Derecho internacional privado. Introducción*, UAM, 1984, p. 58 et seq. The same in E. Pérez Vera et. al., UNED, *Derecho internacional privado*, 4th ed., 1993, p. 35—55; J. M. Espinar Vicente, "Constitución desarrollo, legislatura y Derecho internacional privado", *REDI*, vol. XXXVIII, 1986, n. 1, p. 109—134.

3. On the other hand, it is worthy of note that article 12 of the *Cc* is not affected by "unexpected unconstitutionality" nor by the limits on the principle of the impossibility of retroactivity of rules in the sense given this principle by the *STC* (Division 2), n. 80, 20 December 1982. In this regards see *STS* (Division 1), 6 October 1986, *RAJ*, 1986, n. 5327, with a note by M. A. Amores Conradí in *REDI*, 1987, p. 239—248 and the *STS* (Division 1) dated 9 Decemher 1986, *RAJ*, 1986, n. 7224, with a note by P. Rodríguez Mateos, *REDI*, 1988-I, p. 240—246. The immediate

of application stipulated in article 12 of the *Cc* cannot be used, even when a literal reading of the principle indicates that they should be. Constitutional interpretation as a "metacriterion for interpretation"[4] takes precedence over an *ad pedem literae* reading of article 12 of the *Cc*. An attempt is thus made to examine the material result of the interpretation of article 12 in relation to a specific rule of conflict in order to correctly satisfy and optimize[5] the values and provisions of the Constitution. In addition to the substantive values found in the *CE (ad exemplum, favor minoris, favor familiae,* consumer protection), we must also respect the values that it provides as regards the legal system as a system including legal certainty and the system's legal foundation (art. 9 *CE*). These can shrink the effects that can be derived from the "mechanisms of correction" related to the functioning of the rule of conflict found in article 12 of the *Cc*.

In keeping with this line of constitutional interpretation of article 12 of the *Cc*, case law clearly shows the "constitutionalization" of article 12.3 of the *Cc* (the exception of public policy)[6], perhaps because it is the "functional correction mechanism" which is most frequently used in court. Of course, the other rules of application found in article 12 of the *Cc* have not escaped this process of "constitutionalization" either. *Plus ultra* can also suggest, *de lege ferenda*, the possibility of reforming the mechanisms of correction stipulated by article 12 of the *Cc* in order to better achieve the higher legal principle of "equality" (art. 1.1 and Preamble to the *CE*) and of the *desiderata* found in the

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repeal effect of the *CE* (third derogatory disposition) projected on the entire PIL system in effect at the time of the entry into force of the *lex suprema* did not bring about the total or partial repeal of art. 12 of the *Cc*.

4. In the words of F. Balaguer Callejón, *Fuentes del Derecho I (Principios del ordenamiento constitucional)*, Tecnos, (1991), Madrid, p. 159—160. Art. 5 of the *LOPJ* conditions the general rules of interpretation provided for in arts. 3 and 4 of the *Código Civil* and also in PIL. For J. D. González Campos (in the UNED collection, *op. cit.*, p. 48) "the essential content of the laws and freedoms recognized by the *CE*" should form the basis for "the process of application of the en-tire system."

5. Along these lines, and in relation to the determination of affiliation in Spanish PIL (art. 9.4 of the *Cc*), J. D. González Campos proposes "to achieve an optimization of the values found in art. 39.2 *CE*" (*"favor filii"*) and confirms that the expression "personal law" used in art. 9.4 of the *Cc* can be understood either as the child's national law or habitual residence law, which is combined with a "flexibilization" of arts. 9.1 and 9 *Cc*. J.D. González Campos et. al., *Derecho international privado*, 5th revised ed., (1993), Madrid, p. 504.

6. An example of this is the decision of the Court of First Instance in Mieres on 28 December 1981 ("V. Fernández Coma *v.* F. Mallo Beltrán") and the decision of the *Audiencia Territorial* of Oviedo (Civil Division) 20 October 1982, with a note by M. Fernández Fernández in *REDI*, (1983), p. 522—528.

Preamble to the Constitution in an attempt to introduce the principle of equality among the *lex causae* and *lex fori*[7].

2. The Modernization of Spanish PIL by Convention

Spanish lawmakers have opted to modernize the PIL system by using the conventional method of ratifying an important number of agreements related to PIL, especially in the years since 1987. This has brought about the adoption of different solutions for questions addressed by article 12 of the *Cc* without the article itself being modified or formally affected and without "formally incorporating" the conventional solutions by virtue of the so-called "Hinweis Method" (incorporation by reference). This process of "conventional modernization of the system" [8] does not prevent us from noting that conventional Spanish policy has opted for *ad hoc* solutions rather than structural ones on more occasions than one would like, and this has given way to instruments which instead of modernizing the system or facilitating international cooperation and harmonious solutions, create unjustified specific regimes which disrupt the harmony of the entire system[9]. In any case, the result is that conventional solutions to questions such as exceptions of public policy, renvoi and remissions to plurilegislative or qualifying systems displace the solutions offered by article 12 of the *Cc*.

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7. Specifically, collaboration "on the strengthening of pacific relations and effective cooperation among all the peoples of the Earth." In this sense, the proposal made by J.C. Fernández Rozas and S. Sánchez Lorenzo, *Curso de derecho international privado*, Civitas, 2nd ed., (1993), Madrid, p. 140. J.D. González Campos suggests that the three most urgent objectives of a reform of Spanish PIL (among which we find the "optimization of the values of the *CE*") cannot be met unless there is a "special law on PIL". J. D. González Campos in E. Pérez Vera *et al.*, *op. cit.* p. 41.

8. This expression is by J.D. González Campos: "La recepción del Derecho internacional privado convencional en el ordenamiento español," I Jornadas de profesores de DIP., (León, 19/30 May 1989), unedited. See A. Alvarez Rodríguez. "Jornadas sobre el DIPr convencional en el sistema español: problemas de incorporación y aplicación", *REDI*, vol. XLI, (1989), n. 2, p. 685—688.

9. For all of these see J.C. Fernández Rozas, "Comentario al art. 9.7 C.c." in *Comentario del Código Civil*, (1991), Ministry of Justice, p. 92—94, related to the agreement between Spain and the Republic of Uruguay on the conflicts of law in matters related to the support of minor children and the recognition and enforcement of decisions and legal transactions related to child support, done in Montevideo, 4 November 1987 (*BOE* n. 31, 5.2.1992). The lack of coordination can be perceived in other sectors of PIL, especially in the recognition and enforcement of decisions. In this regard see J.C. Fernández Rozas and S. Sánchez Lorenzo, *op. cit.*, p. 616.

3. The Process of Forming Different "Legal Circles"

The Spanish PIL system has responded to the increased complexity of the social matters with which it must deal by forming a system of "legal circles" which in turn was facilitated by the formation of the system through different legislative procedures. Each "circle" has some "criteria for application" and when these concur, the search for the PIL rule applicable to a situation must be carried out in that context. The rules of functioning of Community law related to private international situations (Community PIL) and autonomous PIL (State based) can be built on this foundation. If the situation is of interest or is connected to the "Community market" the rules of Community PIL will be applied, and if not, the provisions of autonomous PIL will be. The doctrine speaks of a new "economic make-up" for PIL which includes the "principles and other basic rules of the constituting treaty of the European Community" [10]. The application of Community law in the sense just mentioned, produces a displacement of autonomous PIL and consequently of article 12 of the *Cc* [11]. A similar phenomenon can be proven in relation to the criteria that determine the scope of application of international agreements[12].

4. The Specialization of Autonomous PIL

The general process of specialization that is affecting private law is also affecting private international law. In this sense, autonomous PIL is undergoing a process of "specialization" not only in matters of regulation but also as

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10. A. Borrás Rodríguez, N. Bouza Vidal, J.D. González Campos and M. Virgós Soriano, Prólogo a la *Legislación básica de Derecho internacional privado*, Tecnos , 3d ed., (1993), Madrid, p. 19.

11. As P. Rodríguez Mateos says on the occasion of the regulation of the market, the autonomous legal systems begin to work when the market that is affected is the domestic market. If it is the Community market, Community law is applied. If there are no Community rules yet, the autonomous rules can be applied *per excepcionem*. P. Rodríguez Mateos, *Sistema de mercado y tráfico international de mercancías*, Ed. La Ley, (1992), Madrid, p. 14.

12. F. Rigaux has highlighted the circumstances that serve as "detonators for the application of conventional law" and has traced a parallelism between these circumstances and the point of connection of the rule of conflict. See F. Rigaux, *Derecho internacional privado*, (translation by A. Borrás Rodríguez), Civitas, (1985), Madrid, p. 219—221 and 224. This is connected to the author's attempt to make specific PIL from PIL. See F. Rigaux "La méthode des conflits de lois dans les codifications et projets de cedifications de la dernière décennie" *RCDIP*, 1985, p. 26. *Id.*, "L'espace et le temps en droit international privé", *Droit international et droit communautaire, (Actes du colloque, Paris, 5—6 April 1990)*, (1991), Paris, p. 227—236.

regards the solution adopted and the method of regulation chosen. This leads us to believe that there will be scarce use of the mechanisms stipulated in article 12 of the *Cc* which were designed to be used in relation to general rules of conflict related to generic institutions and which contribute global solutions that tend to disregard the actual content of the law which is finally applied.

5. The End of the *Código Civil* as the Only Legislative Corpus of Private Law

The mythical nature of both the international and national codifications of PIL has a great impact on the characteristics of current Spanish PIL. A general rule of application for a civil code whose life cycle seems to have come to an end no longer makes as much sense as it may once have. This is so because even if the *Cc* at one point included all of the rules related to the part of the law applicable in PIL, this is certainly not the case now[13].

Furthermore, the rules of autonomous PIL found in the Preliminary Title of the *Cc* which were reformed in 1987 and 1990 seem to have been modified withhout taking into account any possible effect that the mechanisms provided in article 12 of the *CC* might have on them. Therefore it seems that lawmakers forgot the "general nature" that was attributed to article 12 of the *Cc* when they enacted the new rules for PIL, whether they were extra-codicial or new rules found in the Preliminary Title of the *Cc*. This is even more true in relation to the special laws which include PIL rules that are truly PIL "microsystems" and therefore quite removed from the provisions of a general rule such as article 12 of the *Cc*[14].

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13. The foundations for the rules of autonomous PIL that are not found in the *Cc* increase exponentially. In this sense it is possible to detect a process of "formal decodification of PIL" as M. Virgós Soriano warned in E. Pérez Vera *et al., op. cit.* p. 85. We can also find on this topic the recent article by D. P. Fernández Arroyo, "L'influence des conventions internationales sur l'actualisation du droit international: le cas latinoaméricain" in *Permeabilité des ordres juridiques, (Rapports présentés a l'occasion du colloque-anniversaire de l'Institut Suisse de Droit Comparé)*, (1992), p. 217—234 (especially pp. 232 *et seq.*). For this author, the new special laws that affect PIL are not exceptions or developments of the *Cc* but rather enforcement (direct) of constitutional mandates: *ad ex.* Law 16/1989, 17 July on the defense of competition (*BOE*, n.170, 18.7.1989), Law 3/1991, 10 January on unfair competition (*BOE*, n.10, 11.1.1991), Law 26/1984, 19 July (*BOE*, n.191, 25.7.1984), Law 22/87 on copyrights (*BOE* n.275, 17.11.1987), to name a few). This contributes to the "erosion" of codicial PIL which, nevertheless, has not caused the total abandonment of this formal base of PIL.

14. D.P. Fernández Arroyo, "L'influence..." *op. cit.*, p. 217—234.

6. The End of the General Section of the PIL

Unlike the doctrinal desires of other periods of time, today the majority of Spanish doctrine grants partial effectiveness to article 12 of the *Cc* within the sector of applicable law. Therefore there is no general section that includes "common problems of application" related to the entire system[15]. This has brought about a restriction of the scope of application of article 12 of the *Cc,* which in years past was invoked to solve problems related to "qualification", "fraudulent evasion of applicable law" and "public policy" in other legal sectors such as international judicial competence or even issues of nationality or lack thereof[16].

7. The Use of Other Rules

Special material rules, imperative material rules and self-limiting rules solve the problems of applicable law without using a conflict technique. This brings about a restriction of the use of article 12 of the *Cc* which is contemplated exclusively for rules of conflict[17]. The increasingly frequent resort on the lawmaker's part to rules that use non-attributory regulating techniques has given rise to a system which has produced sectors which are almost completely free of conflict (for example, those related to non-contractual responsibility in relation to matters such as damages caused by aircraft, the rights of

15. J.C. Fernández Rozas and S. Sánchez Lorenzo: *op. cit*, p. 29—33. The doctrine limits the application of certain rules of functioning to the sector of applicable law. An example is the position taken by M. Virgós Soriano in relation to art. 9.9 of the *Cc.* M. Virgós Soriano. "Comentario al art. 9.9 Cc" *Comentario del Código Civil, op. cit.*, p. 101.

16. An example is given in A. Marín. *Derecho internacional privado* (Private international law) General section, 8th ed. (1993) Granada, p. 338. In another context, the doctrine tried to reproduce the schema found in article 12 of the *Cc* on the application of the law in other sectors of private international law. *Cfr.* P. Abarca Junco in E. Pérez Vera *et al., op. cit.* p. 124—128 in relation to the "fraudulent evasion of applicable law".

17. See the opinions of M. A. Amores Conradí in J. D. González Campos *et al., op. cit.*, p. 301—303, in relation to the right to compete and antitrust rights (Law 16/1989, 17 July on the defense of competition, arts. 1 and 6, *BOE*, n.170, 18.7.1989) and those of M. Virgós Soriano, *El comercio internacional en el nuevo derecho español de la competencia desleal*, (1993), Madrid, p. 127—135 as regards art. 4 of Law 3/1991, 10 January, on unfair competition. In the authors' opinion and as regards the cases cited, this is a case of "implicit or explicit rules on the spatial scope of the effect of both rules, using a unilateral technique in which, once again, ouly the situations that affect Spanish markets are regulated" without this being a barrier to timely bilateralizations of those rules.

competitors, maritime pollution due to hydrocarbons). In these areas, for obvious reasons, article 12 of the *Cc* has little to contribute[18].

II.CONVENTIONAL PIL'S EXCLUSION OF ARTICLE 12 OF THE CÓDIGO CIVIL

1. The Rules of Application According to Conventional PIL

Spanish doctrine on PIL has shown how conventional PIL has "displaced" or "substituted" the autonomous dimensions of the system by virtue of hierarchical criteria[19] to which is added *ad abundantiam* the criterion of *auctoritas specialis ratione materiae*[20]. These agreements incorporate not only

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18. The existence in some sectors of rules that use different regulating techniques requires the interpreter to come up with a "functional reordering" of the system (J.C. Fernández Rozas and S. Sánchez Lorenzo, *op cit.*, p. 441—442), an operation in which the rule of conflict ends up being the general or residual rule or the rule of closure if it in reality is not eliminated completely. As M. Virgós Soriano states in *El comercio...*, *op. cit.*, p. 129, in our PIL we can find a broad group of related matters that are governed hy unilateral criteria (antitrust law, law on competition and law on non-material goods). This is not, obviously, the only one (*cfr.* art. 3 of Law 24/1988, 28 July on the stock market, *BOE* n.181, 29.7.88).

19. According to the thesis that is defended by tbe majority of authors, especially J.D. González Campos, L.I. Sánchez Rodríguez, M.P. Andrés Sáenz de Santa María, *Curso de Derecho international público*, vol. 1, 4th ed., (1990), Madrid, p. 235—241, which also include the divergent opinions of E. García de Enterría and T.R. Fernández, I. de Otto y Pardo, and A. Remiro Brotóns.

20. As a simple example it is worth remembering that the Hague Convention of 2 October 1973 on the Law Applicable to Product Liability (*BOE* n.21, 25.1.1989), overrides the more general art. 10.9 of the *Cc*; the Hague Convention of 5 October 1961 on Jurisdiction and Applicable Law on Minors Protection (*BOE*, n.199, 20.8.1987), overrides the more general art. 9.6 of the *Cc*; the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (*BOE*, n.197, 17.8.1988), displaces the more general art. 11 of the *Cc* even thougb doctrine is not unanimous on tbe degree to which this convention displaces the autonomous rules (*cfr.* J. D. González Campos, "Comentario al art. 732 and 733 of the *Código Civil*", *Comentario . . ., op. cit.* (1991), Madrid, p. 1822—1828 and A. L. Calvo Caravaca in J. D. González Campos *et al., op. cit.* p. 551—553). The *auctoritas specialis* derived from the fact tbat internatio-nal agreements only regulate the cases related to the parties to the agreemcnts disappears in the case of "open conventions" (also called *erga omnes*) which produce an effect of total "substitution" or "displacement" of the autonomous rule or regulation and a partial substitution or displacement of rules of application (this exists in relation to the rest of the matters which are not affected by conventional rules). This, however, does not imply that conventional rnles cannot include an *auctoritas specialis ratione materiae* related to the autonomous rules.

regulation solutions but also "application solutions" which displace the contents of article 12 of the *Cc*[21]. When the weight of the conventional rules in our system was not very great, there was less "displacement" of article 12 of the *Cc*. Today, the Spanish PIL system presents a considerable conventional *quantum* and the phenomenon of "displacement" is growing in importance.

Spanish doctrine on PIL signaled the displacement of article 12 of the *Cc* and this has been verified by the rules of application related to the rules of conflict found in international agreements. Therefore we will limit ourselves to defining this phenomenon in relation to certain extremes.

A) Qualification (Article 12.1 of the *Cc*)

The rule of *lege fori* qualification referring to the "qualification-subsummission" included in article 12.1 of the *Cc* is heavily conditioned, first of all, by the specific interpretation of conventional rules which dictates the socalled "subsummission" of the factual case to the rule of conflict[22]. In the second place, this rule is conditioned by the existence of the so-called "autonomous qualifications" found in international PIL agreements. In this respect, numerous agreements include definitions of the institution being regulated and concepts be-longing to conventional PIL which in most cases, simplify or avoid the problem of qualification[23]. It is clear that tbe more "conflictive" the concept is, the more useful the "autonomous qualification"

21. As regards the agreements known as *erga omnes* which "displace" or "substitute" autonomous PIL, see the thoughts of P. Domínguez Lozano, "La ley aplicable a las obligaciones de alimentos en DIPr español", *REDI*, (1989), p. 433—486. The "displacement" of art. 12 of the *Cc* that the conventional solutions provide do not depend on whether or not they are *erga omnes* agreements. Each agreement is to be applied within its own scope of application and in accordance with its own "terms of applicability" (F. Rigaux) and in these cases the so-called "displacement" will occur.

22. J.D. González Campos in E. Pérez Vera *et al., op. cit.* p. 57. See The Vienna Convention on Treaty Law, 23 May 1969, instrument of accession 2 May 1972 (*BOE*, n.142, 13.6.1980).

23. Some of these are art. 5 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction in relation to the concepts of "rights of custody" and "rights of access"; of art. 1.2 of the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents, in relation to the concept of "traffic accident"; art. 5 of the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations, in relation to "contracts entered into by consumers". Among the agreements that are not in force in Spain, *ad ex.*, art. 8 of the Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons, in relation to the concept of "agreement as to succession" and art. 2 of the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition, in relation to the concept of this institution.

found in the conventional text is, since a divergent "national" interpretation can endanger the idea of uniformity that shapes the agreement. Third, giving certain jurisdictions the responsibility of interpreting the rules of an agreement is a good way to avoid these problems, as article 12.1 of the *Cc*[24] is displaced. Finally, some agreements make use of the so-called "application of accumulated State concepts" which also displaces the solution offered by article 12 of the *Cc*[25]. The fact that there are international PIL agreements which ignore certain questions does not mean that qualification as a topic is free from controversy[26].

B) Renvoi (Article 12.2 of the *Cc*)

In addition to the (in)appropriateness of this institution in contemporary PIL, it seems clear that the conventional dimension of the system rejects renvoi in two basic ways[27]: through international agreements that establish that the competent authority will directly apply "domestic law",[28] and through others which more radically prohibit renvoi and establish that "domestic law as designated in this agreement will be applied"[29].

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24. *Cfr.* the role of the European Court of Justice as regards the Rome Convention on the Law Applicable to Contractual Obligations dated 19 June 1980 (*JOCE*, n.L 266, 9.10.1980 and *BOE* n.171, 19.8.1993 and n.189, 9.8.1993), related to the two Protocols on the interpretation of this concept by that Court, done in Brussels, 19 December 1988 (*DOCE*, n.L 48, 20.2.1989). In a different sector, see the role of the same Court in relation to the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters by means of the protocol related to its interpretation by the Court of Justice, done in Luxembourg, 3 June 1971 (*DOCE* C 189/25, 28.7.1990, *BOE* n.24, 28.1.1991 and *BOE* 30.4.1991).

25. Thus, art. 12 of the Hague Convention of 5 October 1961 on Jurisdiction and Applicable Law on Minors Protection, as regards tbe concept of "minor".

26. *Cfr.* the concept of "contract" in the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations previously cited.

27. A. Borrás Rodríguez, "Comentario al art. 12.2 of tbe *Cc*", *Comentario del Código civil*, (1991), Madrid, p. 140—42.

28. *Ad ex.* art. 2.1 of the Hague Convention of 5 October 1961 on the Jurisdiction and Applicable Law on Minors Protection.

29. As an example we can use the cases of the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations (art. 4); the Hague Convention of 2 October 1973 on the Law Applicable to Product Liability (arts. 4 and 5); the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (art. 1); of the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents (art. 3).

C) Public policy (Article 12.3 of the *Cc*)

Conventional PIL today tends to restrict its functioning. This is reflected in the way it is stated in these texts which usually require that the law claimed by virtue of the agreement be "manifestly incompatible with the public policy of the forum"[30]. International cooperation and the "principle of trust" that form the basis of all of the rules of conventional PIL justify an exceptional and restric-tive conceptualization of the clause on "public policy".

D) Remission to Plurilegislative Systems (Article 12.5 of the *C*)

Numerous international agreements establish an *ad hoc* approach to this particular point which displaces the solution found in article 12.5 of the *Cc*. These conventional formulae take on different forms: "fragmentation clauses"[31], "remission clauses"[32] "direct localization clauses"[33] and "federal clauses"[34].

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30. Once again we can use as an example art. 4 of the Munich Convention of 5 September 1980 on the Law Applicable to Names (*BOE* n.303, 19.12.1980); art. 11.1 of the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations; art. 7 of the Hague Convention of 5 October 1961 on Conflicts of Laws Relating to the Form of Testamentary Dispositions; art. 10 of the Hague Convention of 4 May 1971 on tbe Law Applicable to Traffic Accidents. We can even see that the conventional wording has been adopted in certain sectors of autonomous PIL, specifically by tbe rules related to the "common regime" of interuational legal assistance (art. 278.4 *LOPJ*). A criticism of the unjustified lack of coordination that is the result of maintaining different definitions of "public policy", one for autonomous PIL and another for conventional PIL, is offered by J.C. Fernández Rozas and S. Sánchez Lorenzo, *Curso..., op.cit.* p. 485.

31. *Ad ex.* art. 19 of the Rome Conveution of 19 June 1980 on the Law Applicable to Contractual Obligations, and art. 12 of tbe Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents.

32. Art. 1.2 of the Hague Convention of 5 October 1961 ou the Conflict of Laws Relating to the Form of Testamentary Dispositions, and art. 14 of the Hague Convention of 5 October 1961 on Jurisdiction and Applicable Law on Minors Protection. This has to do with the technical formula that is used by art. 12.5 of the *Cc*.

33. This is the case of art. 16 of the Hague Convention of 14 March 1978 on tbe Law Applicable to Matrimonial Property Regimes (not in effect in Spain): "in absence of these rules, the spouse will be considered a national of the State in which he/she last habitually resided, and the common nationality of the couple will be that of their last habitual residence."

34. Similar to the ones found in arts. 13, 14 and 16 of the Hague Convention of 2 October 1973 on the Law Applicable to Product Liability, and art. 23 of the Hague Convention of 2 Octoher 1973 on tbe Law Applicable to Maintenance Obligatious. Iu essence, this gives the States the right to limit the scope of the Convention to ccrtain parts of its territory and/or the right to formulate a reservation to the Convention with effects limited to a certain part of its territory.

E) The Conventional Rules

The conventional rules of the system, however, are not limited to fraudulent evasion of applicable law or to problems related to the application of foreign law. The first is justified by the limited effectiveness of the institution, whose content today has been swallowed up by the exception of "public policy of the forum"[35]. The second is justified because the procedural nature of the application of foreign law makes it a question that must be decided by the *lex fori (lex fori regit processum*, art. 8.2 of the *Cc*) and because conventional efforts in this area have been global and not sectorial[36]. All of this, subject to the idea of cooperation that shapes the conventional rules of PIL, assumes that the party States will not adopt postures that will obstruct the real effectiveness of the international agreement based on the "procedural treatment of foreign law".

2. Gaps in Conventional PIL and Recourse to Article 12 of the *Código Civil*

There exist situations, however, in which an international agreement is applicable but does not include rules of application for the resolution of specific
problems related to how the conventional rules of conflict work. Most cases have to do with qualification, the application of foreign law and the problems that arise from some particularly flexible connections, such as nationality.

As regards qualification, the agreements of the The Hague Conference are

35. J.C. Fernández Rozas and S. Sánchez Lorenzo, *Curso..., op.cit.* p. 460.

36. Note the impact of the Conventions on information on foreign laws, especially the European Convention done in London on 7 June 1968, on Information on Foreign Law and the Additional Protocol dated 15 March 1978, also ratified by Spain (*BOE* n.240, 7.10.1974). *Cfr.* the Inter-American Convention on Proof and Information on Foreign Law, done in Montevideo on 8 May 1979 (*BOE* 13.1.1988). Some bilateral international agreements include their own rules on information about foreign law which have different rules of functioning and a different scope. For example, the Convention with Mexico of 1 December 1984, regarding the Exchange of Information on Legal Systems (*BOE* n.137, 8.6.1985); art. 10 of the Convention on Legal Assistance, Recognition and Enforcement of Judgments in Civil Matters between the Kingdom of Spain and the Socialist Republic of Czechoslovakia, done in Madrid, 4 May 1987 (BOE, n.290, 3.12.1988 and 26.1.1989). In Spanish doctrine see J.A. Tomás Ortíz de la Torre, "El conocimiento del derecho extranjero y la adhesión de España al Convenio de Londres de 7 de junio de 1968" *Revista General de Legislación y Jurisprudencia*, vol. LXIV, n. 232, (1972), p. 721—738; A. Pérez Voituriez, *La información de la ley extranjera en el Derecho internacional privado*, (1988), Madrid.

well known. In addition to any possible "autonomous qualifications" they might have, they do not indicate which criteria should be used for qualification/subsummission[37]. Addressing the topic of German case law, M.A. Amores Conradí recently pointed out the doubts that arise when trying to qualify a situation such as "extracontractual civil responsibility" in relation to art. 1 of the Convention of The Hague, 4 May 1971, on the law applicable to traffic accidents[38]. As regards the application of foreign law, due to the reasons given above, a general lacuna exists in conventional law. Other agreements also have gaps related to renvoi (The Munich Convention, 5 September 1980, on the law applicable to names and surnames), or lack precise definitions of public policy (art. 20 of the Convention of The Hague, 25 October 1980 on civil aspects of the international kidnapping of minors[39]) or have problems applying the nationality connection such as the Munich Convention cited above as regards the legal treatment of dual nationality when specifying the connection.

Two solutions can be offered in relation to the gaps created by the absence of conventional rules of application.

The first is to proceed with an integration of the rule by means of the general principles that inspired the agreement[40]. However, the scarce number of rules in some agreements (*cfr.* the Munich Convention previously cited) sometimes makes it difficult to formulate solutions in this way.

Therefore, as regards qualification, the interpreter should look for the concept dealt with in the "conventional context" and take it from the spirit of the conventional rules. It isn't wise to make use of an unjustified and automatic recourse to the *lege fori* qualification (art. 12.1 of the *Cc*). International cooperation and the principles of legislative politics that inspire conventional prac-tices require us to find "autonomous qualifications" implicit in the conventional texts based mostly on the systematic and teleological interpetation of the conventional articles. The *lege fori* qualification definitely

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37. For example, consider the case of art. 1 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (*BOE* n. 203, 25.8.1987). The convention does not include any rules on the law which should be used to classify matters as *civil* or *commercial* for purposes of notification. See the comments in this regard of *Rapport explicatif* by M. V. Taborda Ferreira *Actes et documents de la dixième session de la Conférence de La Haye*, vol. III, (1965) p. 365—366.

38. M.A. Amores Conradí, "Obligaciones no contractuales (estatuto delictual)" in J.D. González Campos *et al., Derecho international privado. Parte especial*, 5th rev. ed., (1993), Madrid, p. 307—308.

39. *BOE* n. 202, 24.8.1987 and *BOE* n. 155, 30.6.1989.

40. Indirectly M. Virgós Soriano, "Comentario al art. 9.9 del Código Civil", in *Comentario del Código Civil, op. cit.* (1991), Madrid, p. 101.

seems less than adequate now that the unification of PIL has begun to take place at the conventional level. One example of this posture is the one adopted in German case law and defined in Spanish doctrine by M. A. Amores Conradí in relation to the aforementioned problem of qualification (qualification of a situation like "extracontractual civil responsibility" pursuant to art. 1 of the Convention of The Hague, 4 May 1971, on the law applicable to traffic accidents.) The author offers an *ad hoc* solution (the "qualification option" in favor of the plaintiff) derived from the theory of accumulation of pretensions that the Convention maintains[41]. This way, any possible *tout court* appeal to article 12.1 of the *Cc* would be avoided or heavily conditioned.

As regards renvoi, the attempt not to frustrate conventional unification brings about its exclusion. In agreements that do not include a specific solution (*cfr.* the Munich Convention, 8 September 1980 previously cited), the objectives of suprastate unification and legal certainty virtually dictate the exclusion of renvoi and consequently the inapplicability of article 12.2 of the *Cc*.

In terms of the procedural treatment of foreign law, the opening of legal values to other legal systems as a consequence of the conclusion of a PIL agreement, and especially the commitment that States make at the international level to adopt the legal rules of the agreement, are concepts that would be compromised if the line that the *Tribunal Supremo* has mandated regarding the treatment of foreign law and in relation to article 12.5 II of the *Cc* were to be strictly followed. A consideration of such an interpretation in relation to conventional rules, that is, the adoption of obstructionist attitudes as regards the application of foreign law derived from "procedural specialities", could convert the agreement into a useless instrument in addition to making it possible to bring about a similar reciprocal reaction in other forums. The fact that PIL agreements do not accept the use of foreign law as a solution does not generate a *lacuna legis* because it is based on the idea that the State is obligated to apply the law designated by the conventional rule of conflict without alluding to "procedural specialities" of foreign law meant to make application more difficult. This is supported not only by the principal of international cooperation as a global premise of PIL[42], but also by the fact that the application of rules of a procedural nature should be submitted to the rules of PIL on applicable law so that the first do not

41. M.A. Amores Conradí, "Obligaciones no contractuales (estatuto delictual)" in J. D. González Campos *et al., op. cit.*, p. 307—308.

42. J.D. González Campos and J. C. Fernández Rozas, *Derecho internacional privado español (textos y materiales, vol. I, Derecho judicial international)*, 2nd ed., (1992), Madrid, p. 265.

frustrate the objectives that the lawmaker had envisioned by means of the second[43]. There is no place, then, for any future use of article 12.6.II of the *Cc* in this area as its use could ruin the results achieved through international cooperation and set forth in an international treaty that includes rules of conflict.

Finally, as regards the exception of "puhlic policy", the fact that in the future there may very well be no specific conventional means of dealing with this issue might bring about solutions based on the use of specialized formulae on public policy taken from international human rights agreements (*cfr.* the Covenant for the Protection of Human Rights and Basic Freedoms done in Rome in 1950[44]). It is also possible in some cases to recur to the conventional principles themselves.

The second is to recur "by analogy" to the rules of application of autonomous PIL[45]. However, the recourse to analogy should not take place automatically. The analogous application of rules of application of autonomous PIL in order to solve problems of application of the conventional rules of conflict should be governed by a respect for the "principles which inspired the agreement", in other words, the philosophy and the spirit of the agreement. This will ensure that the analogous solution is very similar to the self-integrating one.

III. THE INAPPLICABILITY OF ARTICLE 12 OF THE *CÓDIGO CIVIL* IN CERTAIN SECTORS OF AUTONOMOUS PIL

1. Article 12 of the *Código Civil* and the Contradiction of Rules in PIL

The generic formulation of article 12 of the *Cc*, the wording of the precept, and the global nature of the reform of the Preliminary Title of the *Cc* put into effect by virtue of Decree 1836/1974, 31 May, might lead the interpreter to think that

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43. See F.J. Garcimartín Alférez, *Sobre la norma de conflicto y su aplicación judicial (cinco cuestiones clásicas)*, (1993), Madrid, p. 14.

44. See P. Mayer, "La convention européenne des droits de l'homme et l'aplication des normes étrangères", *RCDIP*, (1991), p. 651—665.

45. This is the position that is defended indirectly by J.D. González Campos. In relation to art. 1 of the Hague Convention of 5 October 1961 on Conflicts of Laws Relating to the Form of Testamentary Dispositions, the author postulates that the analogous application of art. 9.9 of the *Cc* should be used to solve problems of dual citizenship that can be generated by art. 1 of the cited Convention. J. D. González Campos, "Comentario al art. 732, par. I y II", *Comentario del Código civil, op. cit.*, p. 1823.

article 12 of the *Cc* can be applied to all rules of conflict in Spanish autonomous PIL. However, we have already stated that this is not so.

First of all, because we can see that specific rules of conflict or functioning have been introduced into the system; for example, article 98.I *in fine* of the law of negotiable instruments and checks[46] (second grade renvoi in relation to the obligatory force of a bill of exchange or a promissory note) and 162.I *in fine* of the same law (the same question as regards a check). However, a second aspect is much more interesting given the sectorial impact of the previous rules. Along these lines, article 12 of the *Cc* includes, on the one hand, "rules of exception" or "functional corrective rules" and on the other, true "rules of application" *stricto sensu*.

The "rules of exception" "correct" the literal wording of the rule of conflict in the sense that they make the law which was originally designated by the rule inapplicable (art. 12.2 of the *Cc* on renvoi; art. 12.3 of the *Cc* on public policy; art. 12.4 of the *Cc* on fraudulent evasion of applicable law; and art. 12.6.II of the *Cc* on the impossibility of proof of foreign law.)

And the "rules of application" *stricto sensu* define or help to define the law designated by the rule of conflict (art. 12.1 of the *Cc* on qualification in order to determine the rule of conflict; art. 12.6.I of the *Cc* on the imperative nature of the rule of conflict, and art. 12.5 of the *Cc* which provides for remission to plurilegislative systems) or they establish the conditions under which the designated law can be considered (art. 12.6.II of the *Cc* as regards the procedural treatment of foreign law).

The *rules of exception* in art. 12 of the *Cc* give rise to an exception to the normal functioning of the rule of conflict, which makes the normative mandate of the rule of conflict (application of the designated law) inapplicable. In this sense, they are rules that generate a *normative antinomy* with the rules of conflict. The antinomy is produced because the rule of conflict (to apply the law designated) and the rule of exception (not to apply the law designated under certain conditions, for example, if it is contrary to public policy or if the rules of PIL of the *lex causae* remit to the law of the forum)[47] cannot be respected at the same time. The rules of application *stricto sensu* of article 12 of the *Cc* do not provoke an exception to the normal functioning of the rule of

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46. Law 19/1985, 16 July, on negotiable instruments and checks, *BOE*, n. 172, 19.7.1985.

47. Normative antinomies or "conflicts of rules" are quite frequent in PIL. For example, the operation of "delimitation" in its different fields of application, which is to be applied to the "rules of regulation" is nothing more than resolution of a "conflict of rules" applicable *icto oculi to* the same foreign situation. See in this respect, J.C. Fernández Rozas and S. Sánchez Lorenzo, *Curso...*, *op.cit.* p. 439—444. In a very similar sense, M. Virgós Soriano in E. Pérez Vera et. al., *op. cit.* p. 85. In this way, the interest, *melius*, tbe *ratio legis* that shapes the rules can impose its prevalence over

conflict, but this does not mean that there are not normative contradictions between these rules. Consider the interpretation that the *TS* has given of article 12.6.II of the *Cc* as regards how it affects *onus probandi* and the role of the judge in the examination of foreign law, which is clearly in conflict with the rules (*ad. ex* art. 9.5 of the *Cc*), the wording of which requires that the interpretation given by the *TS* be ignored and advocates a decidedly active role for the judge in the proof of foreign law[48]. On the other hand, the wording of the rules of conflict of autonomous PIL can make the auxiliary mandates of these rules of application *stricto sensu* quite useless. This happens, for example, with the criterion that is found in article 12.1 of the *Cc* as regards qualification, which cannot be used in certain cases since in the description of the possible

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another rule with the opposite content. On the other hand, the aforementioned formal decodification which is affecting Spanish PIL can produce the effect of an "accumulation of regulating rules" (M. Virgós Soriano), in other words, a "conflict of rules" in PIL. Doctrine offers repeated exam-ples of "conflicts of rules" in PIL, generally as regards rules of regulation. In this sense see, M. A. Amores Conradí, "Comentario al art. 9.1 del Código Civil", *Comentario del Código Civil, op. cit.*, p. 77 in relation to art. 9.1 of the Cc. and "other specific rules" in matters of personal law; M. Moya Escudero in A. Marín López et. al, *Derecho international privado español. II. Parte especial. Derecho civil internacional*, 8th ed., 1994, Granada, p. 151 in relation to art. 9.2 and art. 9.10 of the *Cc.*

48. The position traditionally held in the case law of the Spanish *TS* as regards foreign law is clearly reflected in the judgment issued by the *TS* (Division 1) on 11 May 1989 (*RAJ* (1989), n. 3758). This doctrine can be summed up very quickly in the following points: a) the application of foreign law is a *de facto* question and as such must be alleged and proven by the party that invokes it; b) the exact law in force and its scope and authorized interpretation must be proven so tbat tbere is not even the smallest of reasonable doubts in the Spanish court as to its interpretation; c) proving this should be done by means of the pertinent documentation including a statement by two foreign law consultants and the corresponding certification issued by the consular authorities of the country in question; d) the application of foreign law requires the person invoking it to allege and prove its application and this means tbat not only must the law be cited, but its applicability must also be fully demonstrated; e) when Spanish courts cannot find absolute and certain grounds for the application of foreign law, tbey must judge and rule according to Spanish law. See among others, the following *TS* decisions (Division 1): 9 July 1895, 19 November 1904, 30 January 1930, 1 February 1934, 4 December 1935, 9 January 1936, 19 December 1935, 19 December 1939, 8 March 1949, 30 June 1962, 28 October 1968, 5 November 1971, 12 March 1973, 3 February 1975, 4 October 1982, 15 March 1984, 26 May 1987, 12 January 1989, 7 November 1989, 7 September 1990 (Division 4), 10 December 1990, 19 June 1991, 16 July 1991, 17 December 1991. Among others, the *TS* judgment (Division 1) of 17 March 1992 (*RAJ*, 1992, n. 2196) states: "tbe proof of foreign law, which, in spite of the benefits of practising it for the eulightenment of tbe judicial organ, can be recognized and applied *de oficio* by the jurisdictional organ or simply accredited by means of a photocopy of the *Gazetta officiale* — which is what has happened in this case —which indicates tbe law to he applied."

cases contemplated in the rule of conflict, very generic terms are used which do away with the need to qualify social issues *ex lege fori* (see art. 9.3 of the *Cc*).

It should not be difficult to reestablish the coherence of the system if the mandates of the rule of exception are imposed when they really constitute an exception ("rules of exception") or a clarification ("rules of application *stricto sensu*") which is what makes up a specific type of normative specialty. The starting point sbould be the "combined interpretation" of the rules of application of functioning and the rules of regulation[49], a posture which would allow for a decision to be made as to the primacy of the *ratio* of the regulating rule or the rule of application. Now then, in light of the generic wording of article 12 of the *Cc* (which does not distinguish tbe rules or matters which it covers), this *modus operandi* of the functional correction mechanisms should theoretically be susceptible to application as regards all rules of conflict in the Spanish system. Thus, all autonomous PIL rules of conflict would be corrected, for example, through renvoi to the first instance as established by article 12.2 of the *Cc,* and every "qualification that determines which rule of conflict to apply" would be made *ex lege fori.* However, this is not the case.

An example might help us understand the problem. Spanish authors have stated unanimously that first degree renvoi (art. 12.2 of the *Cc*) is not operative in relation to article 10.5 of the *Cc* (the law which governs contractual obligations)[50]. However, this is not so because article 12 and article 10.5 of the *Cc* do so establish, because niether of tbem address this subject, but rather because it was deduced from the *ratio* of article 10.5 of the *Cc* that the will of the state legislator was to grant the parties, within certain limits, direct *electio juris,*

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49. A.L. Calvo Caravaca states this clearly when dealing with the relation between art. 9.8 of the *Cc* and art. 12.2 of thc *Cc:* "the rules of application or of functioning — and art. 12. 2 of the *Cc* is one of them — cannot be understood in an isolated fashion, but rather they should be interpreted together with the regulating rules". A.L. Calvo Caravaca in J.D. González Campos et. al., *op. cit.*, p. 544—545. From a theoretical point of view, we are dealing with something other than the "integrated interpretation" to which M. Virgós Soriano makes reference as regards the rules that establish fora of international judicial competence in keeping with the guarantees established in art. 24 of the *CE. Cfr.* the reference made by J.C. Fernández Rozas and S. Sánchez Lorenzo, *Cursos..., op.cit.* p. 273. Traditional Spanish doctrine (M. Aguilar Navarro, J.A. Carrillo Salcedo), had already shown the necessity of a "dynamic interpretation" of the rule of conflict, instead of a "static and formalistic" approach which produces poor results. *Cfr.* J.A. Carrillo Salcedo, *Derecho internacional privado,* UNED, (1979), Madrid, p. 182.

50. Note that this precept (art. 10.5 of the *Cc.*) is displaced and therefore inapplicable after the entry into force in Spain of the Convention of Rome on the Law Applicable to Contractual Obligations dated 19 June 1980 (*BOE* n.171, 19.7.1993 and n.189, 9.8.1993), produced on 1 September 1993.

excluding the renvoi which the rules of *lex causae* could provoke. Due to *ratione materiae,* the *ratio legis* of article 10.5 of the *Cc* overrides the *ratio* that backs up the renvoi (art. 12.2 of the *Cc*)[51]. We are, therefore, *rectius,* faced with a case of "normative contradiction" between articles 12.2 and 10.5 of the *Cc,* which is resolved in favor of the latter by virtue of its *auctoritas specialis* as compared to the general nature of the former which does not define the matters to which it applies.

The possibility of *normative contradiction* within autonomous PIL was very low in 1974. In fact, the rules of conflict enacted at that time were mainly the result of formal cases and they seemed to be shaped mainly around the principles of proximity and sovereignty. The functional correction mechanism was generally used to reenforce the principle of sovereignty (especially the first degree renvoi and the exception of public publicy) which made it quite difficult for there to be a confrontation of the different *rationes legum.* That is why it seems clear that the will of the Spanish lawmaker in 1974 was to enact "general rules" that would deal with the problems of application of the rules of conflict, and would leave the resolution of possible normative contradictions to the interpreter of the law. The lawmaker in 1974 chose not to "specialize the rules of application", especially those that were "functional correctives".

The situation changed drastically after the *CE* which brought about a reinterpretation of the entire PIL system and also the incorporation of the rules of conflict of autonomous PIL into the Spanish PIL system during the 80s. In the first place, an interpetation of article 12 of the *Cc* and of the rules of regulation in accordance with the *CE* required that certain material objectives (*favor minoris,* protection of the weaker party in a legal relationship, etc.) be met. These objectives were to be part of the system's rules of conflict regardless of the point of time at which the rules were created. In the second place, the post-*CE* wording of the rules of conflict largely reflects the principle of material inspiration (*rules that are materially oriented,* arts. 9.3, 4, and 5 of the *Cc*) and/or the principle of autonomy of will (*ad exemplum,* with nuances, art. 9.2 of the *Cc*). All of this was part of the process of specialization in the

51. This criterion of speciality should be deduced from the PIL system by means of *legal argumentation* based fundamentally on the consideration of the *voluntas legislatoris* found in each rule of PIL; speciality is tbe fruit of a *systematic interpretation* (art. 3.1 of the Cc) as has been pointed out by F. K. von Savigny, and in order to do this, a special object must be assigned to each contradictory text and the reciprocal limits of its application should be set. F. K. von Savigny, *Sistema del Derecho romano actual* (translated from French by J. Mesía and M. Poley), Madrid, 1879, vol. I, ss. 42 to 45.

regulation of private foreign affairs found in current Spanish PIL and to which we have made brief reference[52].

In response to these phenomena, there is a *lege lata* maintenance of the supposedly general effect of article 12 of the *Cc*. This situation generates the emergence of multiple normative contradictions in different sectors. One general rule of application (in the sense that it would supposedly be applicable to all types of matters) which acts as if all of the rules of conflict were either an expression of the principle of sovereignty or merely localizers, would be in direct conflict not only with the specialized purposes (*rationes legum*) that the lawmaker is seeking in the new rules of conflict, but also with a Constitutional interpretation of the entire system.

2. The Reduction of the Scope of Application of the Rules of Exception

An analysis of the rules of conflict of autonomous PIL reveals that the *ratio legis* of these norms overrides the functional correctives still set forth by article 12 of the *Cc* and makes them inoperative.

A) Renvoi (Article 12.2 of the *Cc*)

a) When the rule of conflict is inspired in the principle of autonomy of will, the *ratio* of the rule excludes renvoi, even in cases in which this autonomy of will seems to be subject to certain limits (art. 9.2 of the *Cc* on the effects of matrimony; art. 10.5 of the *Cc* on contractual obligations, general rule; art. 10.11 of the *Cc* on agency; and art. 10.1.III of the *Cc* 8 *in fine* on the creation or abolition of taxes on goods in transit) as has been pointed out in comparative case law and in doctrine in general[53].

b) When the rule of conflict is a *materially oriented rule* the admission of renvoi would be contrary to the *ratio* that inspires the rule of conflict in question. In the case of rules of conflict with alternatively structured connections (arts. 11.1 and 9.3 of the *Cc*), the wording of the precept requires that the material law of different legal systems be consulted, thereby impeding

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52. P. Lagarde, "Le principie de proximité dans le droit international privé contemporain (Course général de droit international privé)", *Recueil des Cours*, (1986-I), vol. 196, p. 9—238. This text provides the criteria that are used as *ratio* for the modern rules of PIL in the area of applicable law.

53. Implicitly, M. Virgós Soriano in J.D. González Campos *et al.*, *op. cit.*, p. 198. The more modern systems of PIL expressly exclude renvoi, thereby eliminating *in primis* normative contradictions.

the consideration of the rules of conflict of any of them. When we are dealing with rules of conflict with subsidiarily structured connections (the case of art. 9.2 of the *Cc*), allowing renvoi would also violate the *ratio* of the precept, which was the *favor* sought by the lawmaker. On the other hand, accepting the renvoi could violate the legal certainty that is provided *prima facie* by the rule of regulation with points of subsidiarily structured connection (for example, art. 9.2 of the *Cc*).

c) It is also impossible to accept renvoi in certain situations in which the rule of conflict seems to be formed by one or several basic principles which are the "core of the regulation" of a specific sector of private foreign affairs. This is the case of the principles of "unity and universality of inheritance" found in article 9.8 of the *Cc* and the principle of "unity of regulation" found in art. 9.11 of the *Cc*. In these cases it would not be possible to accept renvoi if it would bring about a legislative fractioning of the legal system of inheritance[54] or of the "personal statute" of the juridical person[55]. In these situations, the *ratio* of the rule, based on the principle in question, would demand that the possibility of renvoi be discarded.

d) It is possible to think that renvoi in our PIL system is limited to the rules of conflict with single connections, but this is not true in all cases. The principle that is the basis for regulation should be respected even in cases in which it is detrimental to renvoi. Therefore, apart from cases in which the rule seems to be shaped by a core principle of the general regulations on that topic, the rules are generally inspired by constitutional principles that should be strictly safeguarded. Along these lines, for example, and apart from the direct impact of imperative rules of conventional PIL (especially in matters of human rights, such as the United Nations Convention on the Rights of Children, done in New York, 20 November 1989[56]), the mechanism for renvoi in art. 9.6 of the *Cc* does not allow renvoi to Spanish law in a case in which the protection of a minor is greater under his national law than under Spanish law, no matter how much the

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54. To the contrary we find the judgment of the *Audiencia Territorial* of Granada dated 22 December 1988 (Lowentahl case) which reflects the Court's concern with finding a case that would justify the application of Spanish law (return renvoi) rather than in finding the most correct solution to the normative contradiction. See the commentary on the consequence of this posture by A.L. Calvo Caravaca in J.D. González Campos *et al., op. cit*, p. 544—545 and the note by M. Moya Escudero in "Jurisprudencia española de Derecho international privado", *REDI*, vol. XLII, (1990), no. 2, p. 635—637 and the text in M. Moya Escudero y J. Carrascosa González, *Supuestos prácticos de Derecho internacional privado español*, Comares, 1993, Granada, p. 111—115.

55. A.L. Calvo Caravaca, *"Comentario al art. 9.II del C.c." in Comentario del Código civil, op. cit.*, p. 103—105.

56. Ratified by Spain, 30 November 1990, *BOE*, n. 313, 31.12.1990.

rules of conflict of the national law remand the case to Spanish law. The *ratio* of the rule, interpreted in accordance with the Constitution, requires that the law that is most favorable to the minor child be applied.

e) Therefore, renvoi is limited to being used as a residual action in relation to some rules of conflict that have a single point of connection and then only under fairly strict conditions such as respect for the "core principles of the regulations" (see art. 9.8 of the *Cc,* section on inheritance). Nevertheless, and from another point of view, we think that a "functional use" of renvoi is possible when the Spanish legal system establishes a more favorable doctrine than the one provided for in *lex causae* for a more perfect achievement of constitutional values (*favor minoris, favor familiae*).

B) Public Policy of the Forum (Article 12.3 of the *Cc*)

There are no fundamental contradictions between the *ratio legis* of the rules of regulation and the basis of article 12.3 of the *Cc* as to the primacy of the exception, keeping in mind that the exception must be interpreted according to "current" constitutional values and principles. As regards the gap created by article 12.3 of the *Cc* in relation to the positive effect of the exception on public policy, the integration of the exception should be guided by these principles and values so that:

a) In the case of rules of conflict with subsidiarily structured points of connection, if the legal system elaimed by the first connection is rejected because it is contrary to the public policy of the forum, the *ratio* of the precept requires that the legal systems claimed by the subsidiary connections be successively consulted (*ad ex.* arts. 9.2 and 107 of the *Cc*). Only in the case that all of the systems claimed are contrary to the public policy of the forum can *lex fori* be applied.

b) In the case of rules of conflict with alternative connections, if there is a conflict between one of the laws claimed and public policy, the interpreter must consult the other alternative systems claimed (*ad ex* arts. 9.3 and 11 of the *Cc*). As was true in the previous case, *lex fori* can only be applied if all of the systems claimed are contrary to the public policy of the forum.

C) Fraudulent Evasion of Applicable Law (Article 12.4 of the *Cc*)

The limits of article 12.4 of the *Cc* have been amply defined by Spanish doctrine. The mandate of article 12.4 of the *Cc,* which would impede the application of the law claimed by the rule of conflict concerned, cannot function in relation to rules of conflict that utilize connections that are either non-changeable or changeable but fixed in time by the lawmaker (arts. 107, 9.2

and 9.8 of the *Cc*). *Ad adjuvandum,* the contents of "fraudulent evasion of applicable law" have been absorbed by the exception of "public policy" (art. 12.3 of the *Cc*) thereby limiting article 12.4 of the *Cc* to being a mere "stylistic clause" of case law.

3. Reduction of the Functional Scope of the Rules of Application *Stricto Sensu*

A) Qualification

As Professor A. Borrás Rodríguez[57] has pointed out, autonomous qualifications, even when found in rules of State PIL (*ad ex.* in the author's opinion, art. 9.8 of the *Cc*)[58] make "the use of the provisions of article 12.1 of the *Cc* unnecessary". When the hypothesis of the rule of conflict is worded in a broad manner, (see *ad ex.* art. 9.6 of the *Cc* "guardianship and other types of protection for those lacking capacity" and art. 10.9 of the *Cc* "non-contractual obligations") the social fact being dealt with in the rule can be more easily subsumed according to its function. Thus, the hypothesis of article 9.3 of the *Cc* related to "marital settlements or pacts" makes it possible to focus on the regulating function of the agreement between a married couple as regards their economic life, independent of its nature and *nomen juris*[59]. On other occasions, the PIL rule includes several categories which in other historical periods were subject to a variety of different rules of conflict, and therefore the problems of qualification disappear. This is the case of article 10.1 of the *Cc* which refers to rights to moveable and immoveable goods and article 9.2 of the *Cc* which refers to personal effects and the estate of a married couple. Finally, the formulation

57. A. Borrás Rodríguez, *"Comentario al art. 9.8 Cc. in Comentario del Código civil, op. cit.*, p. 95—98.

58. On the function of "autonomous qualification", A. Borrás Rodríguez, "Comentario al art. 12.1 Cc." in *Comentario del Código civil, op. cit.* p. 139—140. *Id.* "Comentario al art. 9.8 Cc.", *loc. cit.*, p. 95—98. For A.L. Calvo Caravaca, however, art. 9.8 of the *Cc* does not include an autonomous qualification but rather uses "a generic expression to describe the real fact that is governed by the rule". This interpretation seems to be supported by the genesis of art. 9.8 of the *Cc* (cfr. art. 23 of the Italian *Cc* of 1938/1942); A.L. Calvo Caravaca in J.D. González Campos *et. al., op. cit.*, p. 542). As J.A. Carrillo Salcedo once said, "one thing is the scope of the concepts and another very different matter is the use of autonomous concepts that belong to PIL". J.A. Carrillo Salcedo, *op. cit.*, p. 188.

59. M. Moya Escudero in A. Marín López *et al., op. cit.*, p. 152—153, speaks of an "extensive nature of the real fact that is being governed by the law".

of PIL rules that only contemplate the possibility of applying Spanish law (art. 9.5.I of the *Cc* establishes the application of Spanish law as a general rule) makes recourse to article 12. 1 of the *Cc* "not only useless, but technically incorrect"[60]. All of these circumstances reduce the scope of article 12. 1 of the *Cc* in relation to the rules of conflict of autonomous PIL.

B) Remission to Plurilegislative Systems

Contrary to what takes place in relation to article 12. 1 of the *Cc,* the scope of application of article 12.5 of the *Cc* is not reduced by circumstances external to the precept itself. Article 12.5 of the *Cc* only deals with the need to integrate the lacuna that is caused in situations in which the *lex causae* lacks rules which establish the applicability of one of the legal systems that coexist within it and of the ones that may exist in cases of "*ad intra* remission". Therefore, no restriction on the scope of application of article 12.5 of the *Cc* exists.

C) Treatment of Foreign Law

As was said earlier, it is not possible to interpret the rules of application or functioning in an isolated fashion. They should be interpreted in close relation to the rules of regulation. The interpreting function is always, then, a "combined interpretation".

The rules of conflict introduced in the autonomous dimension of the system after the enactment of the *CE* try to regulate issues related to foreign affairs with a high degree of legal certainty. It is totally contrary to the *ratio legis* of precepts such as article 9.4 of the *Cc* (parent-child relationships), article 9.5 of the *Cc* (adoption) or article 9.2 of the *Cc* (effects of matrimony) to leave the "final application" of foreign laws up to the parties or to *judicial power.* The lawmaker has expressed his will as to which law should be applied, and this cannot be ignored by a passive attitude on the part of the parties in the trial or because the judge, having the right to examine the contents of foreign law (art. 12.6.II of the *Cc* permits this), chooses not to. The *ratio legis* of rules of regulation such as the ones previously cited, take precedence over the interpetation of article 12.6.II of the *Cc* which the *TS* has traditionally sustained.

An example would help us to understand the negative consequences of this interpretation of article 12.6.II of the *Cc* in this realm. If the material content of the State law of the country of which the minor child is a citizen, lends to a

60. M. Moya Escudero in A. Marín *et al., op. cit.*, p. 197.

correct realization of *favor minoris,* how can we leave the application of a legal system which benefits the legal status of the minor up to the will of the parties or that of the judge? How can we reconcile such a posture with the *favor minoris* that inspires the application and interpretation of article 9.6 of the *Cc,* a principle which is embraced by the Constitution itself?

Other examples might be even clearer since the mandate of the lawmaker to the legal operator is even more categorical. Article 9.5.I of the *Cc* states that under certain circumstances Spanish judges must apply the national law of the adoptee in order to prevent unstable adoptions from being granted. This type of material orientation cannot be obstructed by a restrictive interpretation of article 12.6.II of the *Cc* which, as has been said previously, seeks to impede the constitution of unstable adoptions. It would be contrary to the *ratio* to leave the application of the national law of the adoptee up to the parties or to the will of the judicial organ. This argument can be restated in relation to article 9.5.II of the *Cc* and the so-called "second step" of PIL[61] (optional application of the national law or the habitual residence law of the adopting parents or of the adoptee as regards the consents, hearings and authorizations required by those laws). If a petition is presented by the party adopting the child or the State attorney and the judge accepts it, should the proof of foreign law be left exclusively in the hands of the parties? Doesn't it seem more in keeping with the *ratio* of article 9.5.I of the *Cc* and with the public good found in the rule, that in order for the judge to grant a polivalent adoption, he must examine foreign law as this is permitted by article 12.6.II of the *Cc?*[62]

Recent Spanish case law interprets article 12.6.II of the *Cc* in this way, thereby strengthening the *real imperativeness* of the rule of conflict and negating its *formal imperativeness* which the has been maintained by the *TS* in its well-known doctrine on article 12.6 of the *Cc.* In this regard, the very interesting decision issued by the *Audiencia Provincial* in Oviedo, 13 March 1990[63] is worthy of mention. It must be accepted that certain rules of conflict implicitely include a mandate requiring the jurisidictional organ to examine the

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61. J.D. González Campos in J.D. González Campos *et al., op. cit.* p. 509.

62. Implicitly in P. Rodríguez Mateos, *La adopción internacional,* (1988), Oviedo, p. 93—104 and 110—124.

63. In *REDI,* vol. XLII (1991), n. 2, p. 532—535, and the suggestive note by P. Rodríguez Mateos. The judgment delves into the position that was timidly set forth in the judgment of the *Audiencia Territorial* of Valencia (Civil Division) of 3 April 1982, *RGD,* (1982), p. 1137 *et seq.* which brings about the exile of the factual quality of foreign law and takes us to the final consequences of the remissive mechanism of the rule of conflict by virtue of its obligatory nature. In a similar sense, the judgment of the *Audiencia Provincial* of Granada on 12 February 1992, *REDI,* (1992), with a note by M. Moya Escudero, and the judgment of the jurisdictional organ on

contents of foreign law. This derives from the rule's *ratio legis,* which would not be respected if this were not so. The position which we defend, which is a bit risky given the wording of article 12.6.II of the *Cc,* can theoretically be connected to the abandonment of "*Bisbal*" case law in France (decisions issued by the *Cour de Cassation* 11 and 18 October 1988[64]). In any case, our position only affects the treatment of foreign law (*onus probandi,* the role of the judge in examining it) and not the imperative nature of the rule of conflict or the possibility of omitting it due to an agreement between the parties, which is a totally different issue[65].

Accepting an interpretation of art. 12.6.II of the *Cc,* conditioned or forced by the *ratio legis* of rules such as art. 9.5.II of the *CC,* has paradoxically negative collateral effects. This is due, on the one hand, to a lack of efficient mechanisms in our legal system which can be used by a judge to ascertain the content of foreign law, and on the other, by the scarce practical results of the Covenant of London 7 (June 1968[66]) on information about foreign law and authorities' minimal recourse to this law. With M. Lequette and B. Ancel[67], it is

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22 October 1992, also with a note by M. Moya Escudero, in *Revista de Derecho Bancario y Bursátil,* n. 51, July/September 1993, p. 831—845, under the title of "The Free Circulation of Bills of Exchange in Spanish Private International Law." The Resolution of tbe Institute of International Law also made a pronouncement of this type in its 64th session held in Santiago de Compostela (1989). In Spanish doctrine, see the recent contribution made by F. J. Garcimartín Alferez based on concepts of economic liberalism and the economic analysis of the law, *Sobre la norma de conflicto..., op. cit., passim.*

64. *RCDIP,* 1989, p. 368 *et seq.* This abandonment seems to be generally accepted and not only limited to matters concerning the status and capacity of individuals. In this sense see the judgment of the French *Cour de Cassation* (Civ. 1st) 4 October 1989, *RCDIP,* 1990, pp. 316 *et seq.* and the note by P. Lagarde. On the other hand, the problem presented in light of the recent French case law which allows the mandate of the rule of conflict to be ignored is quite different, and it makes the law designated by the rule inapplicable and the one agreed to by the parties applicable. This possibility is restricted to matters in which the parties can freely make use of their rights. *Cfr.* judgment by the *Coar de Cassation* (Civ. 1st) 19 April 1988, *RCDIP,* 1988, p. 68 *et seq.* and the note by H. Batiffol. On this particular item, see the interesting thoughts of A. Ponsard, "L'office du juge et l'application du droit étranger", *RCDIP,* 1990, p. 607—619.

65. Y. Lequette, "L'abandon de la Jurisprudence Bisbal (à propos des arrêts de la Première chambre civile des 11 et 18 octobre 1988)", *RCDIP,* 1989, p. 277—330. Specifically on tbe possibility of a *practical repeal* of the rule of conflict, on pp. 287 and 330—315. Also on this aspect, A. Flessner, "Fakultatives Kollisionrecht", *RabelsZ,* 1970, p. 547 *et seq.* and P. Mayer, *Droit international privé,* Ed. Montchrestien, (1991), 4th ed., Paris, p. 104—108.

66. *BOE* n. 240, 7.10.1974.

67. Y. Lequette, "L'abandon...", *op. cit.* p. 277—330. B. Ancel: "La connaissance de la loi étrangère applicable", *Droit international et droit communautaire, (Actes du colloque, Paris, 5—6 avril 1990),* (1991), Paris, p. 87—96.

worthwhile to consider the idea put forward by R. David of using conventional channels to create an "information network on foreign laws" among the contracting States which their judicial organs could use to obtain information about the foreign law claimed in rules of conflict. This network would make use of computerized channels of transmission and of data banks that would be continually updated as regards foreign legal systems. This would facilitate the currently burdensome task of gaining access to the content of foreign law in order to *ex officio judicis* apply this law.

In conclusion, the configuration of the new rules of conflict of autonomous PIL and the interpretation of the entire system according to the *CE* generates two types of consequences in relation to article 12.6.II of the *Cc*.

In the first place, in cases in which the parties have alleged a foreign law designated by the rule of conflict, or in which this foreign law has been insufficiently proven, the *ratio legis* of the rules of conflict — the application of which should be facilitated by article 12.6.II of the *Cc* — requires judicial organs or authorities to utilize any instruments available to them to fully prove the foreign laws. In this sense, normative antinomy generates a consequence that is interpretative in nature as the wording of article 12.6.II of the *Cc* allows its interpretation to be forced to this point.

In the second place, when the parties have not alleged or proven the applicable foreign law in cases involving private foreign affairs, normative antinomy requires the wording of article 12.6.II of the *Cc* ("Nevertheless, in order to apply it, the judge *can* also make use of...") to be rejected given that the *ratio* of the rule of application requires the allegation and proof of foreign law *ex officio judicis* (see *ad ex.* art. 9.5.II of the *Cc* which refers to the application of the national or habitual residence law of the adopting parent or of the adoptee).

IV. CONCLUSIONS

1. Article 12 of the *Cc* cannot currently be considered the general rule of application related to the rules of conflict of autonomous PIL. Different factors come together to make this statement true: the emergence of new rules that employ unilateral techniques; the correct and radical distinction that current doctrine makes between the three sectors of PIL content (international judicial competence, the law applicable to situations of private foreign affairs, and the extraterritorial effectiveness of acts and decisions) whicb impedes the existence of a general section for all parts of PIL; the specialization of Spanish PIL and the exclusion of conventional and eventually institutional PIL.

2. From this perspective, conventional PIL usually includes provisions that displace or substitute those established in article 12 of the *Cc* on topics such as renvoi, remission to plurilegislative systems, qualification and public policy. To this we should add that the intepretation of the entire system according to the *Constitución española* and the orientation of the new rules of conflict of autonomous PIL provoke a complex series of normative antinomies that translate into a reduced scope of applicability for article 12 of the *Cc*. This phenomenon is also evident in relation to the extra-codicial rules of autonomous PIL which are distributed in a set of PIL "microsystems" that directly develop constitutional mandates.

3. This reduction in the scope of application of article 12 of the *Cc* can be perceived in terms of both "functional correction mechanisms" and in rules of application *stricto sensu* which are found in article 12 of the *Cc*. Therefore, the *ratio legis* of the rules of conflict of autonomous PIL dictate a certain interpretation of the different mandates of art. 12 of the *Cc* or even the rejection of the literal wording of the precept. As a result, it is possible, for example, to maintain that art. 9.5.II of the *Cc* can require a judge to make an *ex officio* application of the foreign law which corresponds to the nationality or habitual residence of the adoptee or the adopting parent in order to prevent an unstable adoption from being granted by ignoring the literal indications of article 12.6.II of the *Cc* and the intepretation of this article that has been given by the *TS*. At the heart of the matter is an issue of *normative antinomy* whose resolution from the perspective of PIL does not mean that there are not aspects of legal philosophy which we have not addressed. Therefore, the solutions offered by article 12 of the *Cc* are left with a residual role centered principally on the rules whose *ratio* is not in conflict with the *ratio* of the different mandates of article 12 of the *Cc*.

4. Therefore, Spanish PIL appears to be a legal system in which a high number of normative contradictions can be found and as such, it seems to be somewhat incoherent. It can, then, be considered a "quandary" system (C. L. Hamlin), a system that generates perplexity[68]. From this perspective, new channels for reflection on other points of interest emerge although it is not possible to cover each and every one completely in this paper. These include the return to a decodified PIL; the central role of the determination of applicable rules[69], which makes the resolution of conflicts of interest and the

68. C.L. Hamlin, "Quandaries and the Logic of Rules" *Journal of Philosophical Logic*, 1972-I, p. 74—85. Also, C.E. Alchourron, "Conflictos de normas y revisión de sistemas normativos" in C.E. Alchourron and E. Bulygin, *Análisis lógico y Derecho*, (1991), Madrid, p. 291—300.

69. On this topic, F. Rigaux, *Derecho internacional privado, op. cit.*, p. 270—290.

determination of the criteria that govern private international situations quite difficult; the task of the interpreter to resolve the majority of the normative conflicts in PIL and proceed to a "functional reordering" of the system[70]; the State lawmaker's obligation to provide a PIL system which is inspired by and shaped according to the principle of legal certainty found in article 9.3 of the *CE*. This would require a PIL system free of ohscure texts and serious intepretative conflicts in case law which would distinguish "ambiguity in the rules" (which is not contradictory to the principle of legal certainty[71]) from "situations which are objectively con-fusing (...) which provoke games and relationships among rules thereby creating perplexities which are difficult to resolve as regards which law is applicable." Legal certainty should be the *central criterion* on which the principles of resolution of normative conflicts are based[72].

SUMMARY

Since article 12 of the *Cc* entered into force, its general nature has been affected by different factors which have increased in importance with the passage of time. The result has been the limitation of the hoped for "general effectiveness" of article 12. Social, legal and political changes have taken place. As regards the first type of change, social matters that today are considered issues of PIL have undergone both qualitative and quantitative changes and are not anything like those contemplated by lawmakers in 1974. From this perspective, article 12 of the *Cc* seems to be out of date and unable to meet the demands of today's foreign private affairs. More important yet are the legal and political changes that have taken place which culminated in the enactment of the spanish Constitution in 1978.

70. On this topic, J.C. Fernández Rozas and S. Sánchez Lorenzo, *Curso..., op. cit.*, p. 441.

71. *TC* judgments n. 77/82, 20 December, 16/1990, 26 April. On the need for legal certainty in the area of the interpretation of the law, see *TC* judgment n. 200/1989, 30 November and 144/1988, 12 July.

72. *STC* n. 27/81, 20 July.